

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000569

Case No. 2019-CP-26-07075

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SC Court of Appeals

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
Joe Doe Lifeguard, Defendants,

Of which Lack's Beach Service, Inc. is the.....

Appellant,

**RECORD ON APPEAL
VOLUME III**

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P R O C E E D I N G S

(Whereupon, the following proceedings started at 9:13 a.m.:

CHARGE CONFERENCE

THE COURT: Okay. Let's talk about jury charges first. Have y'all seen mine that I emailed to you very late last night.

MR. THOMPSON: I was impressed. It was late.

THE COURT: It was very late.

MR. McLEOD: Your Honor, I'm not sure which copy I have got, but the copy I have, I don't think, has a charge on the survival action, conscious pain and suffering, and what that damage is. We would need to add that, Your Honor.

THE COURT: So I don't have a specific survival charge and haven't been able to find one. It's not in our bench book, it's not in Anderson's. My understanding is there's a charge on conscious pain and suffering but not, like, a separate one on the survival action.

MR. McLEOD: Well, if you just -- I think the way you would do it is that you would just charge on that element of damage, conscious pain and suffering, of the decedent. Because the jury just needs to know that that is a compensable damage in addition to the damages for the statutory beneficiaries, the children.

THE COURT: How about do y'all have a life expectancy?

MR. McLEOD: We do, Your Honor.

1 MR. WILSON: You just need the number, Your Honor.

2 THE COURT: Correct.

3 MR. WILSON: Oh, I'm sorry. We've got it as, for
4 Mr. Zurihan, 37.39 years.

5 MR. THOMPSON: It was 41 at the time of death.

6 THE COURT: I'm sorry. 37?

7 MR. WILSON: 37.39. Yes, ma'am. May I approach?

8 THE COURT: Mm-hmm.

9 MR. THOMPSON: Your Honor, we agree with that.

10 THE COURT: Okay. So I have just got a general charge on
11 pain and suffering that says, "Pain and suffering compensates
12 the plaintiff for physical discomfort and emotional response
13 due to the sensation of pain caused by the injury itself.
14 There is no definite standard by which to compensate the
15 plaintiff for pain and suffering. You have the authority to
16 determine the amount, if any, to be allowed for pain and
17 suffering using calm and reasonable judgment to ensure that
18 the damages are just and reasonable in light of the testimony
19 and evidence presented in this case." But I feel like we need
20 an additional, "if you find that"...

21 MR. McLEOD: Your Honor, I just found -- this is
22 *Singletary vs. Shuler*, which is S.E.2d -- 861 S.E.2d, 591.
23 It's a Court of Appeals case. It actually cited the *Croft*
24 case that I cited to the Court yesterday.

25 In here, the Court says, "In South Carolina, the cause of

1 action for injuries to an individual survived that
2 individual's death, and damages are recoverable by the legal
3 representative of the decedent's estate." And they cite
4 15-5-90.

5 "Under the statute, a decedent's personal representative
6 can recover for the decedent's conscious pain and suffering,
7 but there must be sufficient proof that the decedent was
8 conscious and simultaneously suffering prior to his death." I
9 submit, Your Honor, that would be an appropriate charge.

10 MR. THOMPSON: I agree with that, Your Honor.

11 MR. McLEOD: It's at footnote 17. I mean, it's at
12 headnote 17.

13 THE COURT: And if you can just give me the cite one more
14 time.

15 MR. McLEOD: Yep. *Singletary vs. Shuler*. 861 S.E.2d
16 591. And it's a Court of Appeals, 2021.

17 THE COURT: Got it.

18 MR. THOMPSON: And, Your Honor, if I may, we had talked
19 yesterday about the pre-impact fear. I have a charge --
20 proposed charge for that. It might dovetail nicely behind the
21 charge that they just suggested. So if I could...

22 And it's just -- I mean, you can probably change it up a
23 little bit to add onto the bottom of the charge that they just
24 suggested.

25 MR. McLEOD: And that's fine, Your Honor. I guess you

1 can read ours, then his --

2 MR. THOMPSON: Yes.

3 MR. McLEOD: -- in that order. That way, it makes sense.

4 THE COURT: Okay. What else with respect to charges?

5 Anything else?

6 All right. Let's move on to the verdict form.

7 MR. McLEOD: Are you going to charge 15-7-145?

8 THE COURT: Yes.

9 MR. McLEOD: Just for the record, Your Honor -- I respect
10 the Court's ruling, but just for the record, we object to that
11 charge just because our case is not based upon that statute.
12 The duty doesn't arise from the statute, and their defense
13 doesn't arise from the statute either. The statute was
14 passed, and it is specific to municipalities. It is not
15 specific to and was not passed to dictate what this private
16 company may or may not do, and so I think it would be
17 misleading, but I understand and respect the Court's ruling.

18 THE COURT: Anything else with respect to charges?

19 MR. McLEOD: Your Honor, I'm sorry; the one last one was,
20 I looked at -- yesterday afternoon, I asked you about the safe
21 alternative charge.

22 THE COURT: Yes.

23 MR. McLEOD: And I looked at those cites, and, as I
24 suspected, those were -- it's a warranty in a strict liability
25 case where, obviously, the plaintiff's burden is to prove

1 alternative feasible design, and so that is not our burden in
2 a simple negligence case, and so we would object to that
3 charge, Your Honor.

4 MR. THOMPSON: Your Honor, it's not part of the burden.
5 It's part of the defense. I mean, this is exactly what they
6 have put into evidence over the course of the last four days,
7 that you should have done something differently, you should
8 have done something safer, and then the entire -- I mean, the
9 law is what you don't -- the question is was it safe at the
10 time -- it doesn't matter if it was safer -- or alternatives
11 were safer. That's a universal concept.

12 MR. McLEOD: Your Honor -- and if the Court is inclined
13 to charge it, I would ask that you charge all of that charge.
14 And, here, this is at -- in the CGS section 26, when it
15 discussed the possibility of a safer method, in addition to
16 what Mr. Thompson has asked, the charge should read, "In the
17 absence of" -- "however, according to authority, the one who
18 chooses the more dangerous course may be deemed negligent in
19 the absence of an emergency, sudden peril, or other
20 circumstances justifying such choice. Moreover, where a
21 defendant has actual or constructive knowledge of the position
22 and situation of the plaintiff and thereafter, instead of
23 exercising the required degree of care to avoid injuring the
24 plaintiff, takes the action which immediately and instantly
25 inflicts injury. The action which occasions the injury is an

1 act of negligence."

2 THE COURT: Okay. That's terribly written, wordy, and
3 hard to understand, but I'm happy to charge that additional
4 language.

5 MR. McLEOD: Let me -- do you have yours, Trey?

6 MR. THOMPSON: Your Honor, obviously, we would object to
7 the additional amount of the language. It's succinctly
8 stated, and I don't believe that any of what Mr. Mullins --
9 Mr. McLeod has cited is applicable to the facts of the case,
10 so I understand if you charge it.

11 THE COURT: I'm going to see if I can't make it a little
12 more succinct.

13 MR. WILSON: May I approach, Your Honor?

14 THE COURT: Sure.

15 MR. WILSON: This is what he was reading from. It was
16 cited in the defendant's footnote to support their charge.
17 That was what Mr. McLeod was reading from, if you've got that.

18 THE COURT: Again, that's the 65 CGS --

19 MR. WILSON: Yes, ma'am.

20 THE COURT: Okay. Did y'all take a look at the charge on
21 reckless, willful, and wanton? Can y'all turn to that and
22 let's look at that?

23 MR. WILSON: Your Honor, I apologize. What page was that
24 on?

25 THE COURT: It is -- looks like page 8. It's right after

1 the Safer Alternatives section. So I guess here's the issue:
2 I feel like we have to include the language on clear and
3 convincing evidence there, but I have deleted any reference to
4 punitive damages so that, on the verdict form, we can include
5 some language to the effect that, "Did the plaintiff prove by
6 clear and convincing that the conduct of the defendant was
7 reckless, willful, and wanton?" Do y'all have a proposed
8 verdict form?

9 MR. WILSON: Your Honor, we saw the one that you sent.
10 We made some minor changes. I think Mr. Thompson pointed
11 out -- and I don't disagree -- that the caption reads "and as
12 natural parent for the children." Under your rules, they're
13 no longer parties, so he wants that off the caption.

14 MR. THOMPSON: Which one? I've got a couple.

15 MR. WILSON: The last one I handed you as well.

16 MR. THOMPSON: Your Honor, the verdict form that they
17 have handed, I have got a couple of issues with. Obviously,
18 the caption needs to be clean, but if we work from the back,
19 there is a question about the punitive damages or the punitive
20 conduct. I think there needs to be a note after paragraph 7
21 that, if you find yes, there will be further -- further
22 proceedings or something like that. You will be asked to
23 provide additional deliberations or something to that effect.
24 Because just saying yes or no doesn't give them any
25 information about what happens next, and I think they need to

1 know, if it's yes, then they're going to have additional
2 deliberations about punitive -- about damages.

3 MR. McLEOD: Your Honor, I would just say that Your Honor
4 doesn't need to include that. What Mr. Thompson hopes is that
5 they check no because they want to go home when, in reality,
6 the only decision for them to make in a bifurcated trial at
7 this stage is whether or not there's evidence, and if they
8 check yes, then they're required to go to the second phase.

9 And, so, Your Honor, as Your Honor has it now, Question 7
10 with yes or no is appropriate, and that's the way the verdict
11 form should read as to that issue.

12 MR. THOMPSON: I think it's incomplete and it doesn't
13 explain what is supposed to happen. It's just a question
14 without --

15 MR. McLEOD: It's not about notice or educating the jury.

16 MR. THOMPSON: -- explanation.

17 MR. McLEOD: It serves no purpose.

18 THE COURT: So y'all are looking at the last version that
19 I sent you yesterday that just has actual and punitive
20 damages?

21 MR. McLEOD: This is the one that we were looking at,
22 where Question 7 asks whether clear and convincing,
23 reckless --

24 THE COURT: Okay. That's not the one I have got in front
25 of me.

1 MR. McLEOD: Well, that may be my mistake.

2 MR. WILSON: We took the verdict form and we just simply
3 added that punitive charge.

4 THE COURT: Okay. I haven't seen that.

5 MR. McLEOD: Can you email that to them?

6 MR. WILSON: Sure.

7 MR. McLEOD: So what we're proposing, Your Honor, is to
8 go through the negligence cause of action, comparative, then
9 -- percentages, and then the actual damages. And then the
10 last question is just asking whether or not, clear and
11 convincing and reckless, and if they check yes, then you would
12 bring them back in, and we would do the second phase. If they
13 check no, then they go home.

14 THE COURT: Let me read that paragraph 7. Because I have
15 not used the word "punitive damages" in my jury charges at
16 all.

17 MR. THOMPSON: Correct.

18 THE COURT: And this doesn't appear to either.

19 MR. McLEOD: Correct.

20 THE COURT: That was what I was envisioning.

21 You have got a copy of their proposed verdict form?

22 MR. THOMPSON: Yes. We have a couple more issues that we
23 need to discuss with their form.

24 THE COURT: Sure.

25 MR. WILSON: Your Honor, I just emailed you a copy.

1 MR. THOMPSON: Your Honor, looking at the verdict form
2 it asks, "Was the plaintiff negligent?" It's really the
3 decedent in this case, not the plaintiff as Ms. Abel. And
4 that would apply to whether the decedent was negligent and
5 whether the decedent's negligence proximately caused the
6 decedent's injuries. Or if you want to put "Mr. Wolde"
7 instead of "the decedent."

8 And also in paragraph 5. Whatever the nomenclature would
9 be at that point, whether it's "decedent" or "Wolde" or
10 whatever it is, switching it out for "plaintiff."

11 And that gets us to paragraph 6, Your Honor.

12 THE COURT: Mm-hmm.

13 MR. THOMPSON: So wrongful death claim, survival action
14 is for the benefit of the estate, and the money goes to the
15 estate, and then the money is distributed pursuant to statute.
16 Right?

17 Same with the wrongful death. Wrongful death claim is
18 brought by the personal representative on behalf of the heirs.
19 The money that the personal representative collects goes into
20 the estate to then be distributed in accordance with the
21 statute.

22 So, Your Honor, it doesn't allow for individual
23 assessment of damages for each heir. It is a gross for the
24 estate, for the beneficiaries, that will take thereunder, and
25 then it's up to the probate court to decide how that money is

1 distributed amongst the heirs. That's not a decision for the
2 jury.

3 MR. McLEOD: Your Honor, under 15-51-40, the statute
4 specifically says the jury may award damages respective to
5 those who benefit the case is brought on behalf of. And, so,
6 the damages, per the statute, are respective to each statutory
7 beneficiaries, which are each of the children.

8 And if you put just one damages line, then you run into
9 the problem that I ran into in front of Judge Norton, is that,
10 after the verdict, their first motion is excessive, and they
11 say, we can't tell who the damages were awarded to, and,
12 therefore, it's reversible error. Whereas, if you do it this
13 way, Your Honor, just as the statute is contemplated, then
14 it's appropriate.

15 MR. THOMPSON: Judge, it absolutely causes potential
16 problems, because if the jury decides that each child should
17 get something different, then that is not what the statute
18 allows with regard to the recovery made by the personal
19 representative.

20 The personal representative in this case brings this
21 case. If there's a recovery, the four children will share
22 equally. So for the jury to then distribute it differently is
23 absolutely, 100 percent against the statute and the laws of
24 the State of South Carolina.

25 MR. McLEOD: Your Honor, if I could just read for the

1 record. This is 15-51-40. "In every such action, the jury
2 may give damages, including exemplary damages, when a wrongful
3 act, neglect, or default, which was the result of
4 recklessness, willfulness, or malice, as they may think
5 proportional to the injury resulting from the death to the
6 parties respectively for whom and for whose benefit such
7 action shall be brought."

8 Now, the next sentence is, "The amount so recovered shall
9 be divided among the aforementioned parties."

10 How the statute says that the funds should be distributed
11 has nothing to do with the fact that the statute requires that
12 damages be allocated for each individual injury. And the
13 reason why I believe the legislature put it in there -- and I
14 have had this issue in other cases -- some statutory
15 beneficiaries don't have the same damages as others. For
16 example, if a parent loses a child and one of those parents is
17 a deadbeat dad and really had no relationship with the child;
18 whereas, the mother raised the child, cared for the child, and
19 nurtured the child, those damages are, by no means, equal. And
20 I believe that's why the statute does it that way, Your Honor.

21 MR. THOMPSON: Your Honor, I have never seen it done this
22 way. The statute doesn't say that it's done this way. The
23 statute specifically states -- the wrongful death statute
24 states the action is brought by the personal representative
25 for the beneficiaries, and then the result, whatever that is,

1 is then distributed in accordance with the probate code.

2 The wrongful death statute does not discuss distribution.
3 The probate does.

4 THE COURT: What I'm going to do is I'm going to just put
5 "actual damages to the Estate of Zerihun Wolde, for the
6 benefit of his beneficiaries." And I think that you can argue
7 to the jury what the damages are for each of the children, but
8 I feel very uneasy putting a separate amount because of the
9 reason exactly that this is not going to go to each child
10 according to what they put. It's going to go to the estate
11 and be divided according to the statute.

12 MR. McLEOD: Well, the only thing I would add, Your
13 Honor, is, you know, there are two different damages
14 compensable here. One is, their survival actual damages, his
15 conscious pain and suffering, and the second is, under our
16 wrongful death statute, they are the statutory beneficiaries
17 on whose behalf the action is brought, and the statute
18 specifically says that a jury may make proportion to the
19 injury resulting from the death to the parties respectively
20 for whom and for whose benefit such action is brought.

21 The mother brings the case on behalf of the children and
22 for their benefit and the jury awards damages portioned to the
23 injury respective to each one of them. And that's the only
24 reason --

25 THE COURT: I don't think that there's anything wrong

1 with you arguing that to the jury. I just don't -- I think
2 that that's misleading on the jury form that that's what each
3 child is going to get, and that's not what the statute allows
4 for. I was just going to put "actual damages to the Estate of
5 Zerihun Wolde, for the benefit of his beneficiaries."

6 MR. THOMPSON: And so, Your Honor, the first one would be
7 actual damages to the Estate of Zerihun Wolde for the survival
8 action, and then the second would be actual damages to the
9 Estate of Zerihun Wolde on behalf of the beneficiaries, and
10 you can list them. I don't think they should be but for the
11 benefit of beneficiaries.

12 THE COURT: Yeah, we just haven't really told them what
13 the survival action is, and I haven't seen a verdict form or a
14 jury charge on the survival action.

15 MR. PRACHT: We had one that we submitted up, Your Honor.

16 MR. THOMPSON: Yeah, he submitted one earlier that we
17 had.

18 THE COURT: Okay. I haven't seen it. Did you email it?

19 MR. McLEOD: Maybe you could do the Estate of Zerihun
20 Wolde for conscious pain and suffering, and then do a second
21 line that says, "To the Estate," and then list the children
22 because they're the sole, statutory beneficiaries.

23 MR. THOMPSON: Beneficiaries, yeah.

24 MR. McLEOD: And if -- that will probably cover it. And
25 then I'll just discuss each of the children and the proof

1 offered for each of their damages.

2 THE COURT: All right. I'm going to make these changes
3 to the verdict form, and then we're going to print it out so
4 you guys can look at it in black and white before we send this
5 back to the jury.

6 MR. THOMPSON: And I think the caption --

7 (Pause in the proceedings while the Court reviews
8 documents.)

9 (Court's Exhibit No. 6, Defendant's Objections, was
10 marked for identification.)

11 MR. WILSON: Your Honor, just one thing, if I may. On
12 No. 4, "Was Mr. Wolde's negligence a proximate cause of his
13 death?" If the answer is no, I think it should go to Question
14 7 for the damages.

15 THE COURT: Yeah, we don't have a Question 8 so I need to
16 look at --

17 MR. WILSON: Well, you have two sevens. Eight is the
18 punitive damage question, I believe.

19 THE COURT: So, in Question No. 3, I'm going to change,
20 next to "no," instead of "go to Question 8," I've got "go to
21 Question 7."

22 Then, in Question 4, again next to "no," instead of "go
23 to Question 8," I've got "go to Question 7."

24 And then I have got two No. 7s. So it should be No. 7 is
25 the damages, and No. 8 is the question about reckless,

1 willful, or wanton.

2 MR. WILSON: Yes, ma'am.

3 MR. THOMPSON: Yes, Your Honor.

4 THE COURT: Anything else that you see on the verdict
5 form that we need to adjust?

6 MR. WILSON: The only thing I would add is, in No. 5,
7 "Percentage must add up to 100. It's not necessary for each
8 defendant." It should be "the defendant." Or, simply, is not
9 necessary for either party to be assigned a percentage of
10 negligence.

11 MR. THOMPSON: Yeah, that whole -- the second two
12 sentences probably removed. Just says, "The percentage must
13 add up to 100 percent," and that could be it.

14 THE COURT: I think those next two sentences would be if
15 you have multiple defendants.

16 MR. THOMPSON: Yes, Your Honor.

17 MR. WILSON: Multiple defendants. You could add in,
18 "it's perfectly acceptable for a party to be assigned zero
19 percentage," to clarify, so that they know that neither party
20 has to be assigned a percentage. That would be the last
21 sentence, that's "it's perfectly acceptable for each party to
22 be assigned a percentage."

23 THE COURT: Any problem with that, Mr. Thompson?

24 MR. THOMPSON: Yeah, I --

25 THE COURT: Or for either party?

1 MR. THOMPSON: I think the problem is that, if they
2 answered the questions that each party is negligent and the
3 proximate cause contributed to it, so there has to be
4 something more than zero. I think that the response there is
5 you can have one defendant that actually does have a zero, and
6 that's why it doesn't list a party can be listed as zero.
7 Because the questions before have clearly set forth that
8 everybody is negligent, and now, we're just determining how
9 you divide that negligence up. If it's zero, then it's
10 incompatible, and it is contrary to what the answers were to
11 the questions prior.

12 THE COURT: I see your point. I'm just going to stop it
13 with the percentages, with "the percentages must add up to 100
14 percent."

15 MR. WILSON: And that's it. Yes, ma'am.

16 (Pause in the proceedings while the Court reviews
17 documents.)

18 THE COURT: Let's talk about the closing. So the only
19 thing I really have to say about closing is just that the
20 reply should be a true reply and not go into new material,
21 should only be replying to what the defendant has raised in
22 his closing.

23 MR. McLEOD: Fair enough, Your Honor.

24 THE COURT: Anything else before we bring the jury in?

25 MR. McLEOD: Nothing from the plaintiff, Your Honor.

1 MR. THOMPSON: Your Honor, we have a couple of loose ends
2 to tie up.

3 THE COURT: Okay.

4 MR. THOMPSON: I have made as Court's Exhibit 6, it was
5 the deposition designations for Mr. Chandler, who was
6 presented by video at the time that we argued the various
7 sections did not have that. And so I didn't have them in
8 print; I was using them off the computer. I presented that as
9 Court's Exhibit 6.

10 Your Honor, the second matter would be, as a matter of
11 law, I have to raise again my directed verdict motions at the
12 close of the plaintiff's case and the conclusion of the
13 evidence, obviously, for all the same reasons, for the same
14 arguments that have been advanced before. We would make those
15 same arguments. I understand where we are at this point and
16 we're going to go forward, but I need to protect my record.

17 THE COURT: Absolutely, and I'm going to respectfully
18 deny the motions, again, for the same reasons that we
19 discussed previously.

20 MR. THOMPSON: Yes, Your Honor. And then, finally, Your
21 Honor, the only other issue that I would ask that the Court
22 consider is, in closing argument, I have concerns about the
23 reptile theory. I have concerns about arguments being made
24 that somehow this jury needs to fix to protect the public at
25 large, to make things safe for everybody, that somehow their

1 verdict is going to send a message that they need to protect
2 this city or this locality or the tourists that come in.

3 Your Honor, those are not appropriate arguments to make.
4 It's the classic reptile, doesn't have anything to do with
5 this particular plaintiff, this particular defendant, and what
6 the injuries and damages were sustained by them. It's going
7 outside and beyond the evidence of the case, and I'd ask Your
8 Honor -- I really don't want to get up and have to object in
9 closing, but anticipating that, I heard a lot of
10 cross-examination that started to suggest that, the citizens
11 of Myrtle Beach, the tourists that are coming in, that this --
12 somehow this verdict is going to change that for the benefit
13 or for the benefit of the public and the safety of the public.

14 THE COURT: Mr. McLeod?

15 MR. McLEOD: Yeah, I don't plan on arguing that they need
16 to give a verdict to protect the public, Your Honor. Their
17 verdict is supposed to compensate the injured party for the
18 harm caused by virtue of the violations of the standard of
19 care, Your Honor. Obviously, privilege or responsibility, you
20 can't take that out of the case, because the citizens gave
21 that privilege to make money on the beach, and in exchange,
22 that responsibility, providing lifeguard services, that's in
23 the case and it's in the franchise agreement. I'll absolutely
24 talk about that, Your Honor.

25 MR. THOMPSON: I don't have any problem with that. I

1 mean, that's -- it's just when it starts to expand into
2 somehow protecting the public at large.

3 THE COURT: Okay. Anything else?

4 MR. McLEOD: Nothing from the plaintiff, Your Honor.

5 MR. THOMPSON: Nothing from the defendant, Your Honor.

6 MR. PRACHT: Your Honor, are we going to jury now? I was
7 going to bring in the children.

8 MR. THOMPSON: Your Honor, with regard to the children, I
9 know that they were upfront when opening. I don't think it's
10 appropriate for them to sit on this side of the bar. I think
11 they should be -- they're still witnesses and not parties, and
12 I'd ask that they be seated or sitting in the --

13 MR. PRACHT: We'll put them in the front row, Your Honor.

14 THE COURT: That's fine.

15 MR. McLEOD: We'll put them right there.

16 MR. THOMPSON: That's fine. The front of the pews.

17 MR. McLEOD: No, put them right there in those chairs.

18 This is the part where I say, "You've got to be kidding me,

19 Trey." We're going to put them right there in the chairs.

20 This is a public courtroom. Their dad is dead.

21 MR. THOMPSON: There's a reason why there's a bar here,
22 and the lawyers and parties are on this side, and the public
23 is on the other side, and the party in this case is Ms. Abel.

24 MR. McLEOD: We'll just seat them right here behind their
25 mother, Your Honor. There's nothing inappropriate or

1 prejudicial.

2 THE COURT: I think that's fine.

3 MR. THOMPSON: Your Honor, are we going to go straight
4 through plaintiff's and defendant's closings?

5 THE COURT: I guess we'll see what the timing looks like.

6 MR. THOMPSON: I'm not going to make it through mine,
7 Judge. So if I can go now or if we can take a break.

8 THE COURT: Yeah, I'm fine if you want to take a break
9 right now, if you want to.

10 MR. THOMPSON: Yeah, could I just...

11 THE COURT: Yeah, sure.

12 MR. THOMPSON: Thank you.

13 (A brief recess was taken from 10:04 a.m. to 10:11 a.m.)

14 THE COURT: Okay. Are we ready for the jury?

15 MR. McLEOD: We are ready, Your Honor.

16 MR. THOMPSON: Yes, Your Honor.

17 (The jury entered the courtroom at 10:12 a.m.)

18 THE COURT: Good morning, ladies and gentlemen. Thank
19 you for your patience with us this morning. We had a number
20 of legal issues we had to address before we move into the
21 closing arguments, so, again, I don't want you to think that
22 we have been wasting your time. We have been hard at work
23 this morning.

24 We're going to go right now into closing arguments, and
25 then, after closing argument, I'll give you the instruction on

1 the law, and then you will begin your deliberations. We may
2 take a break before that happens, but just to give you an idea
3 of what our day will look like.

4 Okay. Mr. McLeod?

5 MR. McLEOD: May it please the Court, Your Honor.

6 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

7 MR. McLEOD: Good morning. I want to first thank you.
8 I'm not thanking you for being here because you kind of didn't
9 have a choice; you had to be here. But you know you didn't
10 have to pay attention, and each of you have carefully paid
11 attention this week, and on behalf of the children and their
12 mother, I thank you.

13 When I first visited with you, I told you that we would
14 prove that there were life safety hazards in the water that
15 day. I shared with you that we would prove that the defendant
16 for-profit knew those life safety hazards were present that
17 day. I also shared with you we would prove that they failed
18 to close the beach, they failed to warn, they failed to
19 provide any rescue efforts.

20 And the judge is going to charge you with what our burden
21 is in this case, and our burden is only to prove that they
22 failed to act reasonably and prudent in one way, and the
23 scales of justice, as Your Honor will share with you, is that
24 our burden is about preponderance of the evidence. This is
25 not a criminal trial.

1 So if the scales tip ever so slightly in our favor, our
2 evidence, then the defendant is legally responsible for the
3 harm that it has caused. I would submit to you, ladies and
4 gentlemen, that we have done much more, and we have done more
5 because you deserve to know not just what happened but why it
6 happened.

7 The evidence in this case is overwhelming. I would
8 submit to you that the scales of justice are tipped to the
9 floor. The question then becomes have the defendants offered
10 you any evidence to move those scales at all.

11 George Lack, he admitted that, when there are rip
12 currents, there should be no swimming. Their training manual
13 says that the lifeguards' purpose is to detect the rip current
14 when it opens and get swimmers out of that hazard. That
15 didn't happen. And that wasn't an accident.

16 Do you remember, with Mr. Oliver, when I went over the
17 training manual and I showed him the first signal in the
18 training manual? The first signal or code, I'm sorry, was no
19 swimming. And it was the only one in the manual -- and you'll
20 have the evidence -- where there was no procedure for how to
21 have no swimming. That's not an accident, ladies and
22 gentlemen. That is by design.

23 These kids that this defendant placed in a position of
24 public trust didn't have the training, and, even if they did,
25 they weren't allowed to take the safe course like no swimming.

1 Do you remember when I asked Mr. Lack -- I went over and
2 I got that big flag -- the big red flag, and I said, "Sir, do
3 you have a flag that looks like this but it has the words "no
4 swimming" on it?" He said, "No."

5 Why? Well, if nobody is able to get in the water, they
6 might not stay on the beach. And if they don't stay on the
7 beach, they might not need his chairs and his umbrellas.

8 This case involves some of the most deliberate and
9 conscious failures I have seen in my almost 25 years. Have
10 they offered a single piece of evidence from a single witness
11 that says we did not violate the standard of care? It was
12 okay to leave the waters open? It was okay not to train these
13 kids?

14 Did you notice when Mr. Thompson yesterday offered the
15 evidence with Ms. Chickering from the employee files? The
16 State Department believed these kids were coming to be beach
17 attendants, and they are coming here under the J-1 program,
18 which is designed so we can share our values. I mean, my
19 family is originally from Scotland, going all the way back.
20 At the end of the day, we're all a nation -- this is a nation
21 of immigrants. We welcome all. That's what the program is
22 about.

23 But the kids get here, and instead of being a camp
24 counselor or a beach attendant, they literally are put on a
25 lifeguard tower that the citizens of Myrtle Beach, through

1 their elected officials, believed was so important for the
2 safety, and the kids had no idea what to do. Their defense in
3 this case, I guess, is that there was a red flag, and somehow
4 that was supposed to notify Mr. Wolde that there was a rip
5 current or that the swimming conditions were hazardous.

6 Do you remember when Mr. Thompson in his opening -- and I
7 asked the court reporter to print me a copy because I didn't
8 want to get it wrong. He told you, "The evidence will show
9 that those red flags were up and down the beach at every
10 lifeguard tower." Did that prove to be true?

11 Do you see the lifeguard tower? Do you see a red flag?

12 So then they say, Well, he was at lunch. That's why
13 there was no red flag there. And for the life of me, I have
14 been trying to figure out how is that a defense? In my mind,
15 that creates additional legal responsibility. Because when
16 you have a life safety hazard that you know about that
17 morning, you don't abandon the tower. You make sure, just as
18 the City required, that there is a professional lifeguard, but
19 they didn't.

20 Now, do you remember when I asked Mr. Lack -- I showed
21 him the lineup from that day. I said, "Mr. Lack, would you
22 agree with me that you were understaffed that day?" He
23 reluctantly agreed. There isn't a single witness or a single
24 piece of evidence that says that they were not understaffed on
25 that day. And not only were they understaffed, they were

1 understaffed where it mattered: For this man's life.

2 And to add insult to injury, do you remember when the
3 lady testified yesterday, she said they were understaffed that
4 day, they were short, so they had to move people around.
5 Again, this is no accident, ladies and gentlemen. This is no
6 accident.

7 Isn't it odd that all the money-making towers were
8 staffed fully? Do you think that's a coincidence, or do you
9 think that's by design?

10 The facts, they are a stubborn thing.

11 The franchise agreement required eight towers. Now, they
12 say they were down to 50 percent complement. I got the
13 calculator, and I went over there and said, "Mr. Lack, would
14 you please multiple .75 percent times 8 or divide it in half?
15 Divide it any way you want to. There's no way to do the math
16 and arrived at a conclusion that they had enough personnel
17 that day, even if they were properly trained.

18 But the problem in this case, I handed Ms. Chickering --
19 and it ain't her fault. They're innocent pawns here, folks.
20 They're innocent pawns here. It ain't her fault. It's the
21 company's fault.

22 I said, Please show this jury any training record -- I
23 mean anything, a sticky note -- that shows that these kids
24 were properly trained to perform this public safety job. And
25 what did she share with us? There are none.

1 The only evidence was there was a lady who went to Poland
2 and did some training, and that lady didn't testify. Then
3 they talk about a fellow named Mike Brown. Mike Brown, did he
4 testify? Not a single witness that has an ounce of personal
5 knowledge of training any of these guards, much less the
6 guards at issue in this case, the guards that did not respond,
7 that did not warn, that did not close the beach.

8 But, as I said, facts are a stubborn thing. This is also
9 in evidence, and these are the stand totals for 2018. How
10 many LGO stands -- it's hard to be consistent in a half truth.
11 How many stands did they tell the City they had for all of
12 2018? Four. They never intended to provide the level of
13 protection the citizens of Myrtle Beach demanded in exchange
14 for a privilege unlike anything I'm familiar with.

15 He has a monopoly on the beach to provide the very thing
16 people need on the beach. That's a pretty good gig. That's a
17 pretty good gig. But with that privilege comes real
18 responsibility.

19 Mr. Thompson said in his opening that sometimes it's not
20 the evidence that you hear at trial, sometimes it's the
21 evidence you don't hear. I could not agree more. We brought
22 you Dr. Thomas Griffiths. He is one of the foremost experts
23 in the country in aquatic safety. He shared with you they
24 violated the professional standards of care by not closing the
25 beach. It starts and stops there. It starts and stops there.

1 They violated the standard of care by failing to take any
2 preventative measures, and they violated the standard of care
3 for failing to provide any rescue efforts, because, see, the
4 hazards on that day weren't just the rip current. They were
5 the rip current and the longshore current. And what makes
6 that hazardous condition particularly life-threatening is most
7 people, if they are knowledgeable about a rip current, they
8 are taught to swim out of the rip current. Well, when you
9 have a -- I'm sorry, when you have the rip current.

10 But when you have a longshore current coming down the
11 beach, it's because you're young, it's because your heart
12 starts racing out of fear and you swim out but you're actually
13 swimming into another current, you went from hazard to ultra
14 hazard.

15 Did they bring you any expert to say that they complied
16 with any safety rules? The answer is no. Again, that's not
17 an accident. It's not because Mr. Thompson is not a good
18 lawyer. He is. But that's not an accident.

19 The first thing that you will get in your jury room will
20 be the verdict form. And the first question that you'll be
21 asked is whether or not Lack's Beach Service is negligent.
22 And Her Honor is going to charge you what negligence means and
23 what proximate cause is. And you'll have a choice. You'll
24 have a choice to find that they were negligent, or you'll have
25 a choice to find that they weren't.

1 And this is the hardest part of this for me. This
2 responsibility that I feel for those kids and that mother is a
3 privilege in and of itself. And when I'm done, I don't have
4 anymore control. You have that choice, and we will respect
5 whatever your verdict is. Just know that whatever your
6 verdict is, there's nothing we can do to change it. It will
7 stand the test of time.

8 The second question you'll ask is -- or the third
9 question is: Was Mr. Wolde negligent? Consider this:
10 Negligence, okay, somebody can do something wrong, something
11 you may disagree with, but that still does not rise to the
12 level of negligence in a legal standard because his negligence
13 has to be a proximate cause of his death.

14 Now, what does that mean? What the judge will charge you
15 is proximate cause is about foreseeability. Does anybody
16 believe Mr. Wolde foresaw or should have foreseen that he
17 would lose his life that day?

18 On that day, it was sunny. Do you remember the night
19 before, the family came to the beach, and the kids were not
20 allowed to get in the water because there were no lifeguards
21 present. The kids weren't allowed to swim if they just had
22 just eaten. The kids were only allowed to swim with adults.

23 Mr. Wolde did not drown because he went swimming in the
24 Atlantic Ocean, ladies and gentlemen of the jury. If you're
25 like me and my family, my kids want to play in the surf, and I

1 want to get in the water. People don't go swimming in the
2 ocean. You don't see people swimming laps in the ocean. And
3 that's not what Mr. Wolde and his children did. They went to
4 do what me and my family do. I go to cool off, and my
5 daughters and my two sons go to play in the surf.

6 So let's look at -- I hope that's clear enough. It's a
7 sunny day. This is not -- there are not clouds in the sky.
8 It's not raining, there's no storm, there's no cold front.
9 It's a pretty, sunny day. You see the waves. Does anything
10 look abnormal or unsafe to you?

11 All the testimony has been Major Sergeant Chandler:
12 There was nothing that I saw that would lead me to believe
13 that there were any life safety hazards with regard to
14 swimming conditions that day.

15 Mr. Bender, he testified to the exact same thing.
16 Ms. Abel testified to the exact same thing.

17 How ironic is it that the people who knew of the hazard
18 never told. I mean, do you see how backwards that is? We
19 blame you because you got in the water when it was their
20 responsibility, because of what they knew, to keep us from
21 getting in the water.

22 The testimony in this case has been, you heard Wubit
23 testify they were waist deep. She was five feet tall. She
24 was five feet tall. Same with Adam. Here's another picture.
25 This is in Exhibit No. 9. And do you see kids playing in the

1 surf, adults with their children? That's the only thing that
2 Mr. Wolde did.

3 And for this particular defendant to stand before you and
4 argue it was Wubit's fault because, according to them, she's
5 not a strong swimmer, it was Adam's fault, it was their
6 father's fault. It takes a unique for-profit on these facts
7 to argue that to you.

8 It is equally painful, when you heard Wubit's testimony
9 and her mother that she thinks, "Well, if I had just not gone
10 swimming, maybe it wouldn't have happened." That wound and
11 that injury will last a lifetime. What do they do? They pour
12 salt on that wound in a failed attempt to escape the legal
13 responsibility that we have proven beyond a shadow of a doubt,
14 if this was a criminal case.

15 Now, when they went in the water, they first had their
16 boogie boards. Okay? And boogie boards have leashes. You
17 know, you put them around your wrist. Well, a boogie board is
18 a flotation device too. And their testimony was that they
19 went and played in the surf, and both Wubit and Adam had a
20 boogie board. And then they came back on the beach and put
21 their boogie boards up. Why is that important? That's
22 important because, obviously, when they went down to play in
23 the surf the first time, they didn't notice anything wrong,
24 and neither did Dad.

25 But just as the defendants have testified, rip currents

1 move up and down the beach. When they went back in the water,
2 they got pulled by the rip current. They got pulled out.
3 There is no testimony that any of them were swimming in deep
4 water. The testimony is they were playing in the surf.

5 Once they were in gravity's grasp of that rip current,
6 Adam was able, with help of bystander directing him, to get
7 out of the rip current. Wubit and her father were not.

8 Once they got into the longshore current, it pulled them
9 down the beach. It pulled them down the beach almost in front
10 of the other stand. And so the way these towers work is this
11 tower has responsibility for half a city block that way, this
12 tower has responsibility for half a city block this way. This
13 tower has responsibility this way, and this tower has
14 responsibility for half a city block that way.

15 From the point they started yelling for help, screaming,
16 all the way through the drift to when they were pulled out by
17 bystanders, not a single person provided any assistance. Not
18 a single person closed the water like they were required to
19 do.

20 It is fundamental that -- I believe, that when you accept
21 an enormous privilege like this for-profit was given, you have
22 to fulfill your responsibility. The law requires it. Common
23 sense requires it. Common sense requires it.

24 But what did this particular defendant do? Remember we
25 talked about blue shirts and yellow shirts? It's not a

1 coincidence because the State Department thought they were
2 coming here to be beach attendants. That's the blue shirt.
3 Okay? And I know I fumbled with the math, and I'm sorry, when
4 I was right here with Mr. Lack, but I have calculated the math
5 and I have got it together here. This is what I wanted to
6 show through him. Because, again, this was not a simple
7 mistake. This was foreseeable, and this was by design,
8 because when you put these kids on these towers who are not
9 trained and you give them conflicting responsibilities, there
10 ain't no way to follow the safety rules. They can't. They're
11 putting these kids in a position to fail.

12 If Mr. -- or if the company, for their 27 stands, with
13 the eight-hour day, that would give you 216 hours per day of
14 beach attendant labor. If you take the 216 hours a day times
15 30 days in a month, you get 64,800 hours. If you take those
16 hours and multiply them times ten, you get 64,800. See, I
17 messed the math up. This number right here is supposed to be
18 6,480. Okay? The final numbers are correct.

19 The 489 gross revenues comes from what's in evidence
20 right here. Do you see that?

21 So had he just provided the blue shirts, he still would
22 have grossed \$424,700 in 30 days. 30 days. But he made a
23 choice, you see. This company made a choice. And as I
24 listened to the testimony, I couldn't help but think -- it's
25 like they say every moon has both a dark and a light side.

1 On the one side, you have Mr. Chandler, who had no legal
2 responsibility to go help. He had been given no privilege by
3 anybody. He took his child, put it in his mother's arms, and
4 he went. That's what humanity does. That's what you do.
5 It's instinct.

6 The same thing for Mr. Bender. And I got goosebumps when
7 I heard Mr. Chandler's testimony after Mr. Bender's because I
8 don't know if you recognized, but Mr. Chandler said, "And then
9 another gentleman ran out to assist." They never met. They
10 don't know each other's names. Mr. Chandler was talking about
11 Mr. Bender.

12 You had two bystanders in the ocean trying to pull them
13 ashore, and that is when Mr. Bender went to further assist.

14 The question becomes, in this case, is there any excuse?
15 Is there any excuse? Have they offered any evidence that what
16 they did was proper, that what they did was safe?

17 Now, they told you in the opening that the franchise
18 agreement -- I believe his exact words were "it starts and
19 ends there." Do you remember that? And do you remember I
20 asked you please listen carefully to what they prove or offer
21 that they were allowed to do that which they were doing?

22 I asked George Lack, Here's the franchise agreement.
23 Please find any language in that contract with the citizens of
24 Myrtle Beach that authorizes lifeguards to be involved in
25 commerce, commercial sales. It doesn't exist.

1 "Find me a sentence that can either reasonably be
2 construed where the citizens of Myrtle Beach authorized this
3 dangerous and unsafe manner of operation. Not there.

4 Do you remember the City manager, Mr. Pedersen? He
5 testified yesterday. I asked him too: Please show these
6 ladies and gentlemen of the jury where on the four corners of
7 this document -- the only thing that the City has approved --
8 it says what they say it says. And he took us to Section 4.
9 Do you remember that? Section 4 specifically says that beach
10 equipment can only be rented as authorized herein, Section 4.
11 Guess what is conspicuously absent from Section 4. The word
12 "lifeguard." I can tell you that ain't a mistake.

13 Do you remember Mr. Lack told you the City's lawyer
14 drafted this. Well, did you hear testimony from the City
15 lawyer that, you know, I got on my typewriter, I typed this
16 up, and this is what it was intended to mean? You didn't hear
17 that evidence.

18 Did you hear from a member of City Council, anybody
19 authorized to speak on behalf of the citizens of Myrtle Beach
20 in this witness stand to say, yes, it's okay? This document
21 contemplates it. You didn't hear that evidence.

22 So how did it happen? Well, that story begins all the
23 way back in 1996. And I don't know if you remember,
24 Mr. Brewster. Now, Mr. Brewster has been the president and
25 the chairman of the preeminent lifeguard agency in this

1 country. They are the standard of care.

2 And he told us that, in 1996, this company submitted an
3 application to be certified to be ocean lifeguards. And,
4 before then, there was no guideline that said the obvious:
5 Lifeguards can only be assigned the task of public safety.
6 Because it's understood.

7 I mean, when teachers are certified to teach by the
8 State, their certificate doesn't say you can only teach. It's
9 understood. You see, when people's objectives are the same,
10 it ease so easy to communicate, but when they're not, it is so
11 hard.

12 Well, ultimately, this for-profit, back in January of
13 1996, stated as follows. See, because he knew that the USLA
14 logo was good for him. He knew that that would make him look
15 legit. He knew that that would make him look like a lifeguard
16 company. The problem is, he knew they weren't lifeguards.

17 "Effective immediately Lack's of North Beach Service"
18 that's the another company that he owns -- "will employ a
19 corps of open-water lifeguards whose sole responsibility will
20 be to provide a lifeguard service in designated areas of
21 Myrtle Beach in Horry County. It should be noted that
22 lifeguards assigned to this new service will not be subject to
23 any duties that would distract or intrude their attention from
24 the observation of persons in the waterfront area. Lack's of
25 North Beach Service, Inc., agrees to continue to comply with

1 USLA guidelines for agency certification."

2 That was his representation to this organization. That
3 was his commitment to safety. As it turns out, that ain't
4 what he intended all along.

5 Mr. Brewster visited Myrtle Beach -- I believe it was in
6 two-thousand -- well, so the certification -- this is a letter
7 that followed this company's representation to the USLA. This
8 is January 27th, the day after that letter. "In particular,
9 you have agreed to modify your operation in such a way so as
10 to ensure that lifeguards assigned to supervise the aquatic
11 area shall not be subject to duties that would distract or
12 intrude their attention from proper observation of persons in
13 the waterfront area. Specifically, your lifeguards assigned
14 to water surveillance will not be assigned to any duties other
15 than public safety."

16 Because there is inherent risk in these conflicting
17 responsibilities, that is when the USLA then passed the
18 guideline that Mr. Brewster talked about. In essence, they
19 said, okay, some lifeguards can sell the chairs, but you have
20 to have a lifeguard trained and certified on that tower, and
21 his or her sole responsibility is water observation.

22 Well, ten years rock along and what happens?
23 Mr. Brewster comes to Myrtle Beach. I believe he testified he
24 had heard some rumblings or some complaints. So he comes to
25 the beach, and what does he see? His exact words were, "We

1 were bamboozled."

2 You see, when people's objectives are the same, it ain't
3 difficult. Nobody gets bamboozled. But when somebody's
4 objective are very different, when they live on the dark side
5 of the moon, it's just a different animal altogether.

6 And so when Mr. Brewster was on the beach, do you
7 remember, Mr. Lack came out on the beach, and I don't think he
8 was very cordial to Mr. Brewster. And so then what followed
9 was an investigation that was done by the USLA into the fact
10 that they had been bamboozled by this for-profit on something
11 as important as public safety. And what was the result of
12 that was Mr. Lack got a letter -- Mr. Lack received a letter.
13 And then he gave his position as to why his certification
14 should not be yanked.

15 Now, watch this. This is the USLA letter dated October
16 24, 2007, to this for-profit company. And what was his
17 defense? "There is an existing agreement between the USLA and
18 Lack's Beach Service that was worked out between George Lack,
19 Chris Brewster, Mike Hensler, and Ron Watson." That was his
20 first argument.

21 Now, isn't that odd? Because when I asked him about the
22 franchise agreement, do you remember? Because facts are a
23 stubborn thing. He said, "Well, Mr. Pedersen and I had an
24 agreement." Do you remember that? The exact same thing he
25 was doing in 2007, he was doing in 2018 when his franchise

1 agreement was amended to give him the sole ability, the sole
2 exclusive privilege to make money on the public's beach.

3 Well, look what else he told. "After interviewing all
4 supervisors and contacts of the City and County, no one has
5 observed a lifeguard only engaged in any other activity other
6 than water surveillance."

7 It is almost -- if it weren't so demonstrably false, it
8 would be funny. But that is what he's saying.

9 Now, we have shown you the sales records from this day.
10 They're in evidence. That is their responsibility. They sell
11 every day. Does he expect anybody to believe that a
12 non-profit -- America's premiere non-profit when it comes to
13 ocean lifeguards, "Oh, nobody said anything, nobody said
14 anybody's doing it"?

15 Now, what did the USLA say in response? They made
16 findings after their investigation, there was no such side
17 deal or agreement. That's No. 1. There is no agreement
18 between Lack's and USLA. And what did they do? They revoke
19 his certification.

20 And did you note, when I cross-examined him, I said,
21 "Isn't it true, sir, that every two years you have to get
22 recertified? And what did you tell them around that time in
23 your application?" He certified to them that his lifeguards
24 on the tower were only responsible for water observation.

25 You see, the dark side of the moon is just different.

1 It's different. And there's such a contrast between the light
2 side of the moon.

3 Did you hear how the kids and their family came to Myrtle
4 Beach to begin with? It's because they chose family time over
5 a damn iPad. If I gave my two daughters and my two son a
6 choice between an iPad and family time, they're going to pick
7 the iPad. But not with this family.

8 Think about everything this mother has gone through to
9 get to the place where she can go on the vacation. Think of
10 what it took to become a registered nurse in this country to
11 earn the living to bring her family on vacation. And that is
12 what led to this.

13 You heard Adam testify. What does he like to do with his
14 father? Remember he talked about spring break? He likes to
15 go see the cherry blossoms in D.C. He likes to go see the
16 monuments.

17 This family, I believe, represents the best in who we
18 are. I believe that to the bottom of my heart. And the
19 responsibility of representing them is something that I will
20 cherish the rest of my life, regardless of what the outcome of
21 this case is. This has been a tremendous privilege for
22 Cooper, for Chris, for Brooke, for Caroline.

23 Now, we get to a point where, on the verdict form, you'll
24 be asked to consider damages. And, at this juncture, the
25 damages you'll be asked to consider are the actual damages for

1 two things. One is what's called conscious pain and
2 suffering, and the law, if the defendant is legally
3 responsibility for the harm that they have caused, causes
4 conscious pain and suffering, that is the suffering Mr. Wolde
5 experienced during this drowning process, then, that is an
6 award of damages.

7 And the amount of those damages are entirely up to you.
8 You get to use your own common sense, your everyday, ordinary
9 experience. Because, you see, the jury system, that is the
10 power. All 12 of you together, with your combined everyday
11 experience. You don't have to be an expert. You don't have
12 to go to law school.

13 And the evidence in the case is that he was foaming at
14 the mouth, that he was bobbing up and down, gasping for air.
15 He struggled mightily, and he did save his daughter's life.
16 The problem is, they didn't even have a "no swimming" sign and
17 nobody came for him.

18 The coroner's report is in evidence, and these records
19 are required to be kept by statute. And what is in that
20 report? "I later learned from police that the two children
21 were also pulled from the ocean by bystanders after being
22 caught in a rip current. It is believed that the patient was
23 attempting to rescue the children when he went under."

24 If you-all assign comparative negligence to Mr. Wolde, we
25 will respect that. Okay? I can tell you, as father of four,

1 I mean, you got to be kidding me. You got to be kidding me.
2 He did what he had to do, and because of it, that beautiful
3 girl is sitting in this courtroom with y'all.

4 And so, when you get to damages, the other bucket of
5 damages, if you will, are the damages that each of the
6 children -- the twins and Adam and Wubit -- have because their
7 father is no longer here. And as the judge will charge, those
8 damages are for each of their injuries.

9 And we showed you evidence how, although they share a
10 common loss, they experience that pain differently. Eden, her
11 joy was pleasing her father. That was one of her favorite
12 joys. That joy is gone. For Edom, her mother testified she
13 still hasn't fully grasped that Daddy is not coming back.

14 And I don't know if you caught this in Wubit's testimony,
15 but when they got back to Maryland, I think she said it was a
16 few days before they found out that their father was no longer
17 with them. She didn't know how to tell them because she knew
18 the pain. She knew the look on their faces that she was going
19 to see. And so she got a priest and had the children go to
20 their uncle's house, and she had the priest tell them with
21 her.

22 You know, on the light side of the moon, when Adam runs
23 to the water's edge where he sees a crowd, and Mr. Chandler
24 says, "Adam" -- or he doesn't know his name -- but he says,
25 "You have got to be strong for your siblings." What happens

1 on the light side of the moon? He grabbed his sisters' hands
2 and they kneeled and prayed.

3 Now, the owner of this for-profit company, did you notice
4 when I asked him, "Did you go to the hospital that day? Had
5 you ever met the mother before?" He said, "I wasn't in Myrtle
6 Beach that day." But it is hard to be consistent, because
7 Randy Smith, they read his testimony in yesterday, he said,
8 "Every morning, Mr. Lack and I ride the beach and look at the
9 water conditions." You see, that's the dark side of that same
10 moon.

11 And so when deciding the damages, Adam has lost his best
12 friend. There is a note that is in evidence, and the note
13 that Adam wrote, he says -- he wrote this for school: "If I
14 was given one wish to go on a trip, I would send my mother and
15 my siblings on a trip so Dad and I could spend quality time
16 together."

17 You see, this dad was so important in their lives because
18 the mother, the nurse, the whole family relied on Dad. He was
19 the cook. He did the homework. You notice how the mother
20 talked about the kids are good in math? It's because the dad
21 was good in math.

22 The morning that they went on the beach, it was dad that
23 put the sunscreen on them. I don't put the sunscreen on my
24 kids. Okay? I mean, he was a nurturer in this family, and he
25 made her career possible. You know what that is? That's

1 love. There ain't no ego in that. That is nothing but
2 selflessness and love.

3 Wubit. She testified -- and I -- I don't know if I
4 have -- in my almost 25 years, if I have heard anything that
5 moved me more than this. She said that she has a recurring
6 dream that she and her father are struggling in the water,
7 they're yelling for help, and in the dream, help arrives.
8 And, for her, she wakes up and realizes the nightmare is
9 waking up, that it didn't happen.

10 For most people, you have a nightmare that seems so vivid
11 and so real you weak up and you go, "Whew, it was just a
12 dream." And these children will carry this loss for the rest
13 of their life.

14 As their mother testified, there's darkness. There's
15 pain. And so one way -- and, again, you-all have the sole
16 responsibility to decide whether or not to award damages and,
17 if so, how much.

18 One way to think about it is, is the judge will charge
19 you that their father, according to the life expectancy table,
20 which is just an actuary comes up with it, our legislature
21 passes it, what everybody's reasonable life expectancy is, is
22 approximately 37 years.

23 And, so, if you take every hour of every day and you
24 factor in sleep. So you take 15 hours of every day, for the
25 rest of their lives, for every hour, if this for-profit was

1 required to put \$10 in a bucket -- think about the sales --
2 just \$10 for every hour in a bucket, and that \$10 would take
3 away the emptiness, would take away the pain. Well, if you do
4 that math, that would come out to approximately \$8.1 million
5 in total actual damages.

6 In considering whether or not the \$10 an hour put in that
7 bucket is reasonable, the evidence in the case is that the
8 base pay that this company paid the kids was only \$8 an hour.
9 But if their commissions were higher, then they got the higher
10 piece.

11 It is entirely up to each of you. And I will say this:
12 Your verdict will stand. These children will never have
13 another opportunity.

14 I thank you for your attention this week. Thank you.

15 MR. THOMPSON: May it please the Court, Your Honor?

16 THE COURT: Yes, sir, Mr. Thompson.

17 MR. THOMPSON: Thank you.

18 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

19 MR. THOMPSON: Good morning. You know, lawyers do a lot
20 of preparing. We do a lot of writing and note-taking and
21 outlining, and we prepare for things like closing, we prepare
22 for things like opening, and one of the things that I try to
23 do is anticipate the other side's argument, anticipate the
24 other side's closing, if you will. And I prepare for what I
25 think I need to tell you, and I prepare for what I want to

1 tell you. But then there's some things that are said in
2 closing that jump off the page at me, and some things that I
3 have to address right upfront.

4 Mr. McLeod quoted me in my opening several times. Well,
5 the one thing that he said in closing was this -- and it
6 jumped off the page for me: Nobody was allowed to swim if no
7 lifeguards were present. That was the rule. That was the
8 rule. No lifeguards present.

9 Every family member that testified said they never saw a
10 lifeguard. Every one of them. Not one said they saw a
11 lifeguard, yet Mr. McLeod said you're not allowed to swim if
12 no lifeguards are present. That's the rule.

13 Now, interestingly enough, there was a lifeguard present.
14 You might have found it a little bit odd when I admitted into
15 evidence two photographs from Ms. Abel's phone. And you will
16 have them in the back when you deliberate. But what's
17 important is -- we can probably use this -- this is not a
18 really good representation; it's hard to see. But there's a
19 little yellow sign there, and the sign says: "For rent, go
20 this way."

21 Now, this is also the same photograph that they pulled
22 out and said here's the empty lifeguard chair down in the
23 distance. Right? But this yellow sign doesn't say go that
24 direction to that lifeguard to rent chairs. It says go this
25 direction.

1 And there was a lifeguard. That was L-22. It was near
2 the Sea Crest Resort. The lineup you have seen multiple
3 times. L-22 was on duty. He had a red flag posted. It was
4 no more than several chairs down from where they set up. The
5 photograph shows you that. The photographic evidence shows
6 you they were right near L-22. They were right near that
7 flag. That flag was posted in front of L-22.

8 And, you know, I can't even put it together because the
9 bottom half of that sends this up through the ceiling. That's
10 how tall. It stands above everything. It is a red flag. It
11 means something. What does red mean? What does red mean to
12 anybody? It means stop. It means warning. Does red ever
13 mean go? Does it? It doesn't.

14 So there was a lifeguard -- there was a red flag posted
15 very near where they set up, by their own photographic
16 evidence. But they said there wasn't a lifeguard. You can't
17 have it both ways. There either was -- the information was
18 posted, the warning was there, the red flag was there, the
19 lifeguard was only several chairs down. Go ask. If you have
20 a question: Wow, you know what? I have never been to South
21 Carolina before. I have never been to Myrtle Beach before.
22 What is that red flag? What does that mean? I think I ought
23 to go check that out.

24 They didn't. They didn't. They said there were no
25 lifeguards present. There was no flags. That's what they

1 said. The evidence is showing you that that's not true.

2 Weslyn, as she was coming to the scene, she rides by
3 L-23, which is even further up the beach. She rides by L-22,
4 which is right there at the Sea Crest, and then she ends up
5 down where the event occurred at L-21. Red flags flying at
6 L-23. Red flags flying at L-22. And the lineup shows up L-22
7 was not at lunch. It shows you that flag was flying.

8 Now, didn't mean to get sideways on some of the things I
9 want to talk about. And so I started thinking about, you
10 know, there are two things that I would suggest to you that
11 make us humans different than anything else on the planet.
12 It's a heart and a brain.

13 Now, a lot of things -- a lot of animals have hearts and
14 brains, so what am I talking about? A heart, what is that a
15 symbol for? Love, caring, emotion, sorrow, sadness, despair.
16 All of the range. Right? And there's nobody in this
17 courtroom -- nobody -- that doesn't feel for this family.
18 It's human. It's the heart. That's what we feel.

19 What's the brain? The brain is rational thought. It's
20 "This is what the facts are. This is what is in front of me.
21 This is what makes sense. This is what doesn't make sense."
22 It is guided by evidence, not emotion.

23 And so when you are charged -- and it sounds crazy to say
24 that you're being charged, but the judge provides instruction
25 because you find the facts. Right? What do I mean "you find

1 the facts"? You decide what the facts are. You have heard
2 evidence from a whole source of different places and people,
3 information. And you decide those facts. You take them and
4 then you say, "Okay. What do I believe? What makes sense?"
5 That's your job. That's your prerogative. You look at the
6 facts and you decide. That's your brain. That's rational
7 thought. Look and see.

8 And so you're charged that emotion, sympathy, passion,
9 prejudice, those have no place in this courtroom. It doesn't
10 drive a decision in this case. What are the facts?

11 So Mr. McLeod liked to quote me in my opening, and I'm
12 going to begin the rest of my closing here with what I ended
13 with: If you can't change the outcome, there can't be any
14 liability. Right? Let's talk about that.

15 You know, there was a lot in the case. Mr. McLeod, in
16 the plaintiff's case, he spent a lot of time talking about
17 things that happened 10, 12 years ago, that sort of thing.
18 And, you know, I'm glad that whatever I did 12 years ago is
19 not in front of a group of 12. I really am. But you know
20 what? At the end of the day, it's all about what happened on
21 the 18th or in 2018, August.

22 So I told you in the opening we really are going to focus
23 on the facts. You know, what happened on the beach? What
24 happened on the beach on August 24th, 2018? And it's not for
25 conjecture, it's not speculation. What have the plaintiffs

1 brought to you to say this is what happened? Right?

2 My best tally on that is four witnesses: Jeff Bender,
3 Julian Chandler, Adam, and Wubit. Those are the only four.
4 Only four that they brought you. Okay? So let's talk about
5 each of those. And I'm going to try and deal with them in the
6 order in which they were presented.

7 Jeff Bender appeared; right? Jeff Bender was the first,
8 sounded like, to go to the family's assistance. Right? What
9 did he hear? He heard a lady yelling. Did he hear the family
10 yelling? Did he hear Mr. Wolde yelling? No. He heard a
11 woman yelling. And what did he see? The woman was helping
12 Wubit. That's what he heard. He didn't hear any other
13 yelling at all. He didn't testify to that.

14 So the first thing he hears is a woman who is assisting.
15 And the first thing that Mr. Bender sees is Mr. Wolde,
16 unfortunately, bobbing in the water. He's unconscious. He
17 never sees him struggling. Never. That's his testimony.

18 There's no evidence from Mr. Bender about what happened
19 to Mr. Wolde. None. The only thing Mr. Bender tells you is,
20 I hear a yell from a lady, I go into the water, and I assist,
21 and I help bring Mr. Wolde to the beach.

22 That was followed by -- and let me make sure --
23 Mr. Bender, of course, was only contacted a month ago to
24 provide testimony in this case. He wasn't contacted in '18,
25 he wasn't contacted in '19, he wasn't contacted in '20, and he

1 wasn't contacted in '21. He was contacted about a month ago
2 for the first time.

3 So then we follow up with Julian Chandler. He had a
4 similar story to tell in the sense that he was only recently
5 contacted really literally a couple of weeks ago. His
6 testimony was presented by video.

7 And Mr. Chandler had an interesting story. So
8 Mr. Chandler was staying off-beach, and he came through a
9 public access point, and he saw what he says was an empty
10 chair. It was at the bulk chairs and umbrella. Bulk, not a
11 lineup as in everything is stacked at the back of the dunes.
12 That's not an active chair. It's not.

13 But, most importantly, what did Mr. Chandler tell you
14 about the lifeguard that he saw? He was wearing red shorts
15 and no shirt. Well, it wasn't a lifeguard. Couldn't have
16 been. This is the uniform.

17 And, just to make sure, the letter from 2018 shows you,
18 blue shorts, yellow shirt. Julian Chandler did not see a
19 lifeguard in red shorts with no shirt. He didn't. It may
20 have been somebody hanging out talking to some friends of his
21 in the back or in the dunes in an empty chair. I don't know
22 what it was. It wasn't a lifeguard.

23 But doesn't that make a lot of sense, when Mr. Chandler
24 testifies that he sees this guy in the red shorts and no shirt
25 down at -- when this thing is going on and he's like a deer in

1 the headlights? Of course he is. He's not a lifeguard. It
2 makes a lot of sense.

3 But he says, "That must have been a lifeguard, he's
4 wearing red shorts, he looked like a deer in the headlights."
5 No, he wasn't. He was another bystander. And he probably
6 really did have the deer-in-the-headlights look.

7 Mr. Chandler's story is just like Mr. Bender's except
8 Mr. Chandler's story is a little bit down the line, if you
9 would. Mr. Bender was first, it sounded like. He heard the
10 yell of the lady and went out first. Mr. Chandler heard the
11 yell of the lady. Went out. It sounded like Mr. Bender was
12 already helping.

13 Mr. Chandler didn't provide you any evidence of any
14 yelling from the family at all. Mr. Chandler didn't provide
15 you any evidence of what happened to Mr. Wolde at all. None.

16 Both of them admitted very openly, very readily, "I don't
17 know what happened. By the time I got to him, he was
18 unconscious."

19 So there's some other things from Mr. Chandler I just
20 don't understand. I mean, he said the boy came to the scene,
21 came to the area where there was the group. Well, Adam took
22 the stand and said, I went and got the mom, and when she left,
23 I stayed with my twin sisters. I stayed away. I didn't go
24 over there. That's what he testified to. But Mr. Chandler
25 said the boy came to the scene, his mother was hysterical, the

1 twins were there, and all of this was happening in the same
2 area. That's not what Adam said.

3 He also said -- talked about the statement that he gave,
4 and I cross-examined him on that statement, because his
5 statement said things like the girl was in the water and was
6 in trouble, and the father went running into the water to get
7 her. Nobody's testified to that at all.

8 Mr. Chandler said, when asked about that, the statement
9 that he signed, for the police, he said, "Well, that's not my
10 statement, but that's what the boy told me." That's not what
11 Adam testified to.

12 So then we turn to Adam and Wubit. What happened? So
13 understanding that Adam was just 12, and he had just had a
14 birthday. He was just 12 in 2018 and Wubit was nine. And I
15 found it interesting that, over the course of time, I mean,
16 both of them took the stand and testified, when they were done
17 with the boogie boards, they were in the water, playing, and
18 they unintentionally went deeper. They both said that.
19 That's an interesting word: Unintentionally.

20 Why would they both say that? Because Adam had already
21 testified a year ago that they intentionally went deeper.
22 They intentionally -- as he said, it's no fun in the shallow;
23 I want to play in the deeper water.

24 And the father, Mr. Wolde, then took the children deeper
25 to a point where Wubit couldn't touch, and she was holding

1 onto her father. And she was afraid. That's not the water
2 that she is comfortable in. She testified to that very
3 clearly. "I don't like deep water. I'm not comfortable. I
4 felt unsafe," before the trouble happened. That's very
5 important. Before the trouble happened.

6 And then the trouble happened. There was yelling.
7 Nobody knows how long that was. Nobody. They can't, neither
8 one of them. Maybe one heard the other and testified there
9 was some time, but the cross-examination, I had to go back to
10 their testimony from a year ago and say, you know, sometimes
11 people don't remember things very well, and sometimes you say
12 things and then maybe time passes and your memory gets a
13 little different, but this is what you said a year ago. And
14 isn't this true? And they both said yes, when I had to
15 cross-examine them, when I had to ask them questions about why
16 their testimony was different today than it was last summer.

17 And when I crossed them every time, they said, Yeah, you
18 know, what I said back in December of last year, that is
19 actually correct.

20 And so we have evidence, and their testimony, then, is
21 they can't tell you how long this happened. They can't.
22 Neither one of them can. That's what they testified to.

23 Those are your four witnesses. Those are your four
24 witnesses. What happened? What happened on the beach that
25 day? What happened in the water? How was that outcome

1 changed? How can you change that outcome? There's nobody --
2 nobody has told you that they struggled for any period of
3 time. Nobody has told you that you can see it. Nobody has
4 told you that you can hear it. Nobody.

5 The only people or the only persons that have come in
6 here and said they heard anything was Mr. Chandler,
7 Mr. Bender, and they heard a woman who was already assisting
8 Wubit. That's the evidence.

9 But they want you to award \$8.1 million against Lack's
10 Beach Service, and they haven't brought you any evidence that
11 Lack's Beach Service could have done anything -- anything to
12 stop this, to assist this in any way, shape, or form.

13 So there are a couple of things that I'd like to you to
14 think about, and they sort of go back through some of the
15 things that Mr. McLeod talked about and some of the things to
16 think about.

17 Dr. Griffiths testified. Well, they paid Dr. Griffiths
18 to testify. He was paid \$500 an hour. Is there any surprise
19 what Dr. Griffiths said? Right? Dr. Griffiths said the water
20 should have been closed at 10 a.m. Okay. Well, that's great.
21 This event happened at 12:45. How many rescues happened at
22 10:00? How many rescues happened at 11:00? How many rescues
23 happened at 12:00? 12:30?

24 If the water should have been closed and it was so
25 dangerous, shouldn't we be talking about a lot of people that

1 got into trouble that day? Where's the evidence? It's not.
2 No evidence.

3 He says close the water, but every witness said there
4 were all people in the water. Children, adults. Everybody
5 was in the water. No evidence of any trouble with anybody at
6 all. How is that? Dr. Griffiths, of course, he says close
7 the water, but he's never even been to South Carolina -- well,
8 to the beach. He's never been to Myrtle Beach. He's never
9 been to any beach in the state of South Carolina. Never.
10 Close the water at 10:00.

11 Well, the proof is there was no reason to close the
12 water. Nobody got in trouble. Nobody.

13 So then Dr. Griffiths is testifying, Well, you know, the
14 weather was such that day, it should have been closed. Rips
15 were everywhere. Again, where is that evidence?

16 One thing about rips that we know, of course, is they are
17 temporary, they move, they show, they disappear. They are
18 unpredictable. Where was the rip in this situation that was
19 identifiable by a lifeguard prior to the Wolde family getting
20 in trouble? You haven't heard any testimony about that.
21 Change the outcome.

22 And then think about, while there's nobody that,
23 apparently, got in any trouble, there's no evidence of that
24 all morning until 12:45, right? Think about there's a rip,
25 and all these people are there. How is it the Wolde family

1 were the only ones to get in trouble? All of these people.

2 The rip was always described as a current that is rushing
3 out from the beach out to the ocean. Again, all these people.
4 Wouldn't they get involved in, be subject to, have problems
5 with the same rip? There's no evidence of that. There's no
6 evidence of anything to warn of. There's no evidence of
7 anything --

8 You know, Tony Flaherty, he took the stand and he told
9 you, you know, If we see a rip, we'll throw down flags and
10 we'll get people out of it. There's no evidence. There's no
11 evidence that anything was happening prior to them getting in
12 trouble. There's no evidence to suggest that the lifeguards
13 or Lack's Beach Service had anything to warn the beach of at
14 that time.

15 That red flag is out, generally, be careful. Red flag.
16 Warning. Be careful. There are conditions out there. We're
17 doing our best, but rips cannot be predicted. We're not just
18 going to empty the beach just because they are rip currents or
19 may be rip currents. Not going to happen. Again, no evidence
20 of any issue with anybody before 12:45.

21 Dr. Griffiths and Mr. McLeod have spent a lot of time
22 talking about the training. There's no training, there's no
23 evidence of training. He's very good about saying there's no
24 evidence of training because we don't have the check sheets,
25 don't have the sign-in sheets. It's all paper. We just don't

1 have it. But the testimony was very clear that training
2 occurred. The training happened. Right?

3 Duke Brown. How many of you saw, when Chris Brewster of
4 the USLA sat here and Julius Duke Brown's name was -- "Who is
5 Julius Duke Brown?" He lit up. He smiled. And he told you
6 who he was, and then he said, "He's a friend."

7 Well, Julius Duke Brown is the one that provides the
8 program, the agenda, if you will, for training Lack's Beach
9 Service guards. In fact, Dr. Griffiths -- I don't know that
10 he knew that at the time but he, eventually, after an amount
11 of cross-examination, agreed that the training regimen, the
12 program that Lack's Beach Service employed was adequate, it
13 met the standard. He just didn't have any evidence that they
14 followed it. He didn't have any evidence that there was a
15 check sheet. He didn't have any evidence that somebody signed
16 and that, therefore, they must have done it.

17 Weslyn told you who did that training that year. Duke
18 Brown did the classroom training, and then Libor did the beach
19 training. The training happened; we just don't have any
20 records of it, and it's unfortunate. We wish it could be
21 different.

22 Duke Brown. He's an important piece of the puzzle here
23 because Duke Brown, of course, is a member of the USLA
24 certification committee. He's on the committee -- the process
25 that then observes, looks at, considers applications of

1 people, organizations to be members of USLA, to be certified
2 by USLA. He has that responsibility. He has that commitment
3 to USLA. What does Duke Brown do for a living? He works for
4 Horry County Police Department. He is Horry County Beach
5 Patrol. He sees Lack's Beach Service, which has a contract, a
6 franchise with the County, he sees them every day doing what?
7 Renting equipment on the County's beaches. Duke Brown of USLA
8 knows exactly what Lack's Beach Service is doing every day.
9 It's on his beach.

10 Duke Brown trains Lack's Beach Service -- assisted in
11 training Lack's Beach Service lifeguards. He knows exactly
12 what they're doing. No question about it. He's USLA
13 certified, he's a USLA certification process committee member,
14 and he knows exactly what Lack's Beach Service is doing.

15 So we get to the dual role, and the dual role is very
16 straightforward. I'm not going to spend a lot of time on it,
17 because the franchise agreement is -- the franchise agreement
18 provides Lack's Beach Service with the opportunity to do
19 exactly what has been described, and that is the lifeguards
20 can rent beach equipment.

21 Mr. McLeod talks about that, you know, it doesn't say
22 dual role but what does it say? Lifeguards only. If you have
23 lifeguards only, there's no reason to have that in the
24 agreement if that's all they do. But there are lifeguards
25 doing other things, and they have to be distinguished from

1 lifeguards only.

2 So the agreement clearly contemplates that, if there was
3 ever any question about it, we put John Pedersen on the stand,
4 and he said, We know exactly what's going on out there, and we
5 condone it. And this is what we're doing. This is how we do
6 our business. This is fine.

7 Dr. Griffiths says you shouldn't do it. Dr. Griffiths,
8 apparently, doesn't know about state law that allows the
9 municipalities to contract with vendors like Lack's Beach
10 Service that provides lifeguards and that state law allows the
11 City to set the standards for their lifeguards. That's the
12 state law. And doesn't apparently know that the City, then,
13 enters into a franchise agreement and adopts it as an
14 ordinance. It's City law.

15 So I really want to just end and close with this: Change
16 the outcome. If you can't, there's no liability. There's
17 been nothing demonstrated to you here today that anything
18 would have been different. That breaks my heart. Right?
19 That touches my heart, because you can't do anything. Lack's
20 couldn't have done anything for this family. It's
21 unfortunate. The ocean is a tough environment. It is.

22 And Dr. Griffiths provided a long list of you can't stop
23 everything in the ocean environment, you can't prevent
24 accidents, you can't prevent drownings. He said that.

25 Plaintiff's case has all been, Look, if you do everything

1 right, there won't be a drowning. That's not what their paid
2 expert says. It's not.

3 If you can't change the outcome, there can't be any
4 liability.

5 I'll echo Mr. McLeod's sentiments: It's been a long
6 week. I appreciate your time and patience. Thank you.

7 MR. McLEOD: Very briefly, Your Honor.

8 THE COURT: Yes, sir.

9 FINAL CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

10 MR. McLEOD: It takes a very different type of defendant
11 to stand before a jury and, in one breath, say they broke the
12 family rule because they went swimming where there was no
13 lifeguard, and, in the next breath, say there was a lifeguard
14 and he had that red sign.

15 It takes a uniquely different for-profit to stand before
16 this community and tell you that there's no evidence how long
17 this took when the person who has that evidence is his damn
18 daughter, and she testified right there it took between 10 to
19 15 minutes. It takes a different defendant to do that.

20 The same defendant that made up his own word, LGO, to
21 bamboozle the USLA, to cut a side deal outside the City
22 agreement. All I can ask is please don't let him bamboozle
23 you. Your verdict is going to make a difference. Now it's
24 time for each one of you to decide the kind of difference you
25 want to make. Thank you.

JURY CHARGE

THE COURT: Okay. Ladies and gentlemen, it's my turn now to instruct you on the law. Let me ask: Do you need a short break before we go into jury instructions? If you're good, I'm good.

Once again, we want to thank you for your time this morning and this whole week. We know that this probably wasn't your first choice of places to be, but our system is a great system, and I think it's the greatest in the world. It cannot function without you-all putting aside your entire lives for the week, all of your family responsibilities, your work. We don't take for granted all that you have had to do to make sure that you could be here each day, and so we greatly appreciate it.

I remind you that, during this trial, you and I have certain duties to perform. As the trial judge, it's my responsibility to preside over the trial of the case, and I also have the duty to rule on the admissibility of the evidence that's offered during the trial.

You are to consider only the evidence before you. You are to consider only the testimony which has been presented from the witness stand and any exhibits which have been made a part of the record in this case.

I have the additional duty to charge you the law that applies in this case. It is your duty as jurors to accept and

1 apply the law as I now state it to you. If you think you have
2 any idea as to what the law is or what the law should be and
3 it does not comport with what I tell you the law is now, you
4 have to forget that previous idea, because you're sworn to
5 accept the law and apply the law exactly as I state it to you
6 now.

7 In every case tried in this court before the jury, the
8 jury becomes the sole and exclusive judge of the facts. A
9 trial judge cannot comment on or make any statement about the
10 facts in a case. Since you're the sole judges of the facts,
11 please don't think by anything that I have said or done during
12 the course of this trial that I have any opinion about the
13 facts. I am not permitted to have an opinion. That is solely
14 for you to determine.

15 The plaintiff has the burden of proof in a civil case and
16 must prove each of the elements of her case by a preponderance
17 of the evidence. A preponderance of the evidence simply means
18 the greater weight of the evidence. It's evidence which, as a
19 whole, shows that the facts sought to be proved is more likely
20 true than not true.

21 This can be illustrated by imagining a set of scales.
22 When the case begins, the scales are even. After all the
23 evidence has been presented, if the scales remain even or if
24 they tip even slightly in favor of the defendant, then the
25 plaintiff has failed to meet the burden of proof and would not

1 be entitled to recover in this case. If, on the other hand,
2 the scales tip even slightly in favor of the plaintiff, the
3 plaintiff will have met the burden of proof, and you should
4 return a verdict for the plaintiff.

5 The preponderance of the evidence is not determined by
6 the number of witnesses; instead, it must be determined by the
7 greater weight of all the of the evidence.

8 There are two types of evidence which are presented
9 during a trial. There's direct evidence and there's
10 circumstantial evidence. Of course, direct evidence is the
11 testimony of a person who claims to have actual knowledge of a
12 fact, such as an eyewitness. It's evidence which immediately
13 establishes the main fact to be proved.

14 Circumstantial evidence is proof of a chain of facts and
15 circumstances indicating the existence of a fact. It is
16 evidence which immediately establishes collateral facts from
17 which the main fact may inferred. Circumstantial evidence is
18 based on inference and not on personal knowledge or
19 observation.

20 For circumstantial evidence to be sufficient to warrant
21 the finding of fact, the circumstances must lead to that fact
22 with reasonable certainty. The facts and circumstances should
23 be considered in light of ordinary experience and common
24 sense. The existence of a fact cannot be based on
25 speculation, surmise, or conjecture.

1 The law makes absolutely no distinction between the
2 weight or value to be given to either direct or circumstantial
3 evidence nor is a greater degree of certainty required of
4 circumstantial evidence than of direct evidence. You should
5 weigh all of the evidence.

6 Necessarily, you must determine the credibility of
7 witnesses who have testified in this case, and credibility
8 simply means believability.

9 It becomes your duty as jurors to evaluate the evidence
10 and determine which evidence convinces you of its truth. In
11 determining the believability of witnesses who have testified,
12 you may believe one witness over several or several witnesses
13 over one witness. You may believe a part of a testimony of a
14 witness and reject the remaining part of the testimony of the
15 same witness. You may believe the testimony of a witness in
16 its entirety or you may reject the testimony of a witness in
17 its entirety. You may consider whether the witness has an
18 interest in the result of the trial, whether the witness is
19 prejudiced toward either the plaintiff or the defendant, the
20 opportunity for the witness to have seen the matters and
21 things the witness is testifying about, and the way the
22 witness acts on the witness stand, what their demeanor is.

23 In this trial, certain testimony has been entered into
24 evidence in the form of a deposition. A deposition is
25 testimony taken under oath for trial in the presence of the

1 parties' attorneys and preserved by a written transcript or
2 video. You are to consider such testimony just as if the
3 witness had given the testimony in the courtroom.

4 The Rules of Evidence ordinarily do not permit witnesses
5 to testify to opinions or conclusions. An exception to this
6 rule exists for witnesses that we call expert witnesses. This
7 is a witness who, by education and experience, has become
8 expert in some art, science, or professional, and they may
9 give an opinion as to the subject the witness claims to be an
10 expert in, and they may also give the reasons for the opinion.

11 You should consider any expert opinion given by a witness
12 and, like any other evidence, give it the weight you think it
13 deserves. If you decide that an expert witness's opinion is
14 not based on sufficient education and experience or if you
15 decide that the reasons given in support of the opinion are
16 not sound or that the opinion is outweighed by other evidence,
17 you may disregard the opinion entirely.

18 An expert witness's testimony is to be given no greater
19 weight than that of other witnesses simply because the witness
20 is an expert, and you do not have to accept an expert's
21 opinion even though it is uncontradicted.

22 In this case, the plaintiff, in her capacity as the
23 personal representative of the Estate of Zerihun Wolde, claims
24 that Zerihun Wolde sustained injuries and died as a result of
25 the negligent acts or omissions of the defendant, Lack's Beach

1 Service.

2 Under the South Carolina Wrongful Death Act, the
3 plaintiff has asserted negligence claims against the
4 defendant, which it denies. A wrongful death action is
5 brought by the personal representative of the decedent's
6 estate for the benefit of those persons named in the statute;
7 in this case, the children of Zerihun Wolde.

8 The plaintiff alleges that the beneficiaries are entitled
9 to damages as a consequence of the wrongful death of Zerihun
10 Wolde to compensate them for their losses resulting from
11 Mr. Wolde's premature death.

12 In order to establish the cause of action for negligence,
13 the plaintiff must prove the following four things by the
14 greater weight or the preponderance of the evidence: First, a
15 duty of care owed by the defendant to the plaintiff; second, a
16 breach of the duty of care by the defendant; third, resulting
17 damages to the plaintiff; and, fourth, that the damages
18 suffered by the plaintiff were proximately caused by the
19 defendant's breach of the duty of care.

20 First, the plaintiff must prove by a preponderance or
21 greater weight of the evidence that the defendant owed the
22 plaintiff a duty of care. Next, the plaintiff must prove by a
23 preponderance of the evidence that the defendant breached the
24 duty of care with negligent conduct. Negligence means that a
25 person has done something that a reasonable person would not

1 have done or has failed to do something that a reasonable
2 person would have done in the same situation.

3 The plaintiff must also prove by a preponderance or
4 greater weight of the evidence that she suffered damages as a
5 result of the defendant's breach of duty.

6 Finally, the plaintiff must prove by a preponderance or
7 greater weight of the evidence that the damages were
8 proximately caused by the defendant's breach of duty.
9 Proximate cause is something that produces a natural chain of
10 events, which, in the end, brings about the death. It is the
11 direct cause of the death.

12 To prove that the defendant's negligence proximately
13 caused Mr. Wolde's death, the plaintiff must first prove
14 causation and fact. This is proven by showing that the death
15 would not have occurred but for the defendant's negligence.

16 The plaintiff must also prove legal cause. Legal cause
17 is proven by showing that the death was foreseeable. This
18 means that the death occurred as a natural and probable
19 consequence of the defendant's negligence. The plaintiff must
20 prove that the injury from the defendant's negligence was
21 foreseeable but does not have to prove that the particular
22 injury that occurred was foreseeable.

23 Proximate cause does not mean the only cause. The
24 defendant's act can be a proximate cause of the plaintiff's
25 death if it was at least one of the direct concurring causes

1 of the injury.

2 Defendant claims that Mr. Wolde's death was an
3 unavoidable accident. A defendant cannot be held liable for a
4 mere accident or an unavoidable accident which may be defined
5 as an occurrence not proximately due to or caused by, either
6 in whole or in part, any negligence or willfulness on the part
7 of any person or entity. In other words, an occurrence that
8 is free from fault arising from human agency.

9 The concept of duty and tort liability will not extend
10 beyond reasonable limits. The sole fact that a safer method
11 of performing some act may have existed is not sufficient to
12 establish negligence. The fact that there may have been a
13 safer method than that employed or that danger might have been
14 avoided by action in a different manner does not make an act
15 negligent.

16 When prudent persons differ as to which of two courses is
17 safer, negligence generally cannot be predicated on the
18 adoption of either. One who chooses the more dangerous course
19 may be deemed negligent in the absence of an emergency, sudden
20 peril, or other circumstances justifying such choice.

21 Moreover, where a defendant has actual or constructive
22 knowledge of the position and situation of the plaintiff and,
23 thereafter, instead of exercising the required degree of care
24 to avoid injuring the plaintiff, takes the action which
25 immediately and instantly inflicts injury, the action which

1 occasions the injury is an act of negligence.

2 In addition to claiming that the defendant was negligent,
3 the plaintiff also claims that the defendant acted with
4 recklessness, willfulness, and wantonness. Recklessness means
5 a conscious failure to use reasonable care. A person who is
6 negligent acts carelessly; however, a person who acts
7 recklessly, willfully, and wantonly is not only careless but
8 is also aware that he or she is being careless.

9 To show reckless, willful, or wanton conduct, the
10 evidence must establish that the defendant's conduct showed a
11 conscious failure to exercise due care or a conscious
12 indifference to the rights and safety of others or a reckless
13 disregard thereof.

14 The plaintiff must prove reckless, willful, or wanton
15 conduct by clear and convincing evidence. Clear and
16 convincing evidence is more than just a preponderance or
17 greater weight of the evidence, which requires only proof
18 which persuades you that a party's claim is more likely true
19 than not true.

20 On the other hand, clear and convincing evidence is not
21 as high as the burden of proof in a criminal case, which is
22 proof beyond a reasonable doubt. Clear and convincing proof
23 leaves no substantial doubt in your mind. It means that the
24 evidence is not ambiguous, not doubtful, not equivocal or
25 contradictory. Convincing means persuading by proof or

1 argument, causing one to believe in the truth of what is
2 asserted. Clear and convincing proof establishing in your
3 mind not only that the fact is probable but that it is highly
4 probable.

5 The defendant claims that Mr. Wolde's own negligence
6 proximately caused his injuries. If you find that the
7 defendant, Lack's Beach Service, was negligent, you must then
8 decide whether Mr. Wolde was negligent. The defendant must
9 prove by a preponderance or greater weight of the evidence
10 that the plaintiff breached a duty which proximately caused
11 the plaintiff's injuries. The same law which I told you to
12 use in deciding whether the defendant was negligent should be
13 used in deciding whether Mr. Wolde was negligent.

14 If you find that the negligence of both Mr. Wolde and
15 Lack's Beach Service proximately caused Mr. Wolde's death, you
16 must then decide how much the negligence of each contributed
17 to Mr. Wolde's injuries. In deciding the percentage of
18 negligence of the plaintiff and the defendant, you may
19 consider, among other things, the following factors:

20 First, whether each party's conduct was only inadvertent
21 or whether it was engaged in with an awareness of the danger
22 involved;

23 Second, the magnitude of the risk created by each party's
24 conduct, including the number of persons endangered and the
25 possible severity of the injury;

1 Third, the significance of the goal that each party was
2 trying to reach and the need to achieve the goal in that
3 manner;

4 Fourth, each party's capabilities and abilities to
5 realize and eliminate the risk involved;

6 Fifth, the particular circumstances confronting each
7 party at the time the conduct occurred, such as the existence
8 of an emergency requiring a quick decision;

9 Sixth, the relative closeness of the causal relationship
10 of the negligent conduct of the defendant and the harm to the
11 plaintiff;

12 And, seven, whether the conduct of either party involved
13 a violation a safety statute or regulation.

14 I will give you written questions on a special verdict
15 form for you to reach your verdict. The form will have spaces
16 for you to write your decisions about the percentages of the
17 negligence, if any, of both parties which proximately caused
18 the plaintiff's injuries.

19 In South Carolina, we have a statute that states each
20 municipality bordering on the Atlantic Ocean is authorized to
21 provide lifeguard and other safety-related services on and
22 along the public beaches within its corporate limits. A
23 coastal municipality may enact and enforce regulations it
24 deems necessary for the safety of all persons on the beach.
25 Lifeguard services may be provided using municipal employees

1 or by service agreement with a private beach safety company.
2 If the municipality elects to provide the services by an
3 agreement with a private beach safety company, the following
4 conditions should apply -- shall apply. The agreement between
5 the municipality and private beach safety company may last no
6 longer than seven years. The municipality may grant the
7 exclusive right to the beach safety company to rent only the
8 beach equipment and to sell only the items to the public on
9 the beach that are allowed by the municipality on the
10 effective date of this section, provided, however, that on and
11 after the effective date of this section, there shall be no
12 granting of the right to rent any other additional tangible
13 items or to sell any beverages to the public on the beach or
14 otherwise, unless and until additional personnel are hired for
15 the additional rentals and additional activities sufficient in
16 number so that employees already employed on the effective
17 date of this section will not be unduly burdened as determined
18 by the appropriate municipal governing body.

19 Lifeguard personnel employed by the private beach safety
20 company must have tested and certified as required by the
21 municipality, and the conduct of the limited commercial
22 activities granted to the private beach safety company shall
23 not prevent or interfere in a substantial way with the
24 peaceful recreational use of the public beach by the general
25 public.

1 In this wrongful death action, the plaintiff, as personal
2 representative of Mr. Wolde's estate, claims that Mr. Wolde
3 wrongfully died as a result of the negligent acts or omissions
4 of the defendant. Whenever the death of a person is
5 proximately caused by the wrongful act or negligence of
6 another and the act or neglect is one which would have
7 entitled the deceased to recover damages if the deceased had
8 not died, the personal representative of the estate of the
9 deceased may bring an action for wrongful death.

10 The personal representative has a right to recover
11 compensatory damages for the wrongful death. It is not
12 necessary to show the money value of the deceased's life,
13 since direct proof of the value of human life is not possible.
14 What is reasonable compensation is left to your sound
15 discretion and judgment.

16 The damages in an action for wrongful death include
17 mental shock and suffering, wounded feelings, grief and
18 sorrow, loss of companionship, and loss of the use and comfort
19 of the deceased's society, including the loss of the
20 deceased's experience, knowledge, and judgment in managing the
21 affairs of the deceased and its beneficiaries.

22 It is not necessary to show the exact amount of damages
23 suffered by the beneficiaries or that the beneficiaries
24 suffered a monetary loss. In addition, the person whose
25 benefit the action is brought -- excuse me, the person for

1 whose benefit the action is brought does not have to be
2 dependent on the deceased for support.

3 To aid you in this determination, you may consider as
4 evidence a statute enacted by the state legislature, commonly
5 called the life expectancy table. According to the table, a
6 man who was 41 years of age today has a life expectancy of
7 37.39 years. This fact, of which the Court takes judicial
8 notice, is now in evidence to be considered by you in arriving
9 at the amount of damages to be awarded in the event that you
10 find the plaintiff is entitled to a verdict.

11 Also, before considering the life expectancy table, you
12 must first have concluded that the plaintiff has proved by a
13 preponderance of the evidence that Zerihun Wolde's death was a
14 proximate result of the defendant's negligence. The life
15 expectancy is merely an estimate of the probable average
16 remaining length of life of all persons in our state of a
17 given age. You may consider all other facts and circumstances
18 in evidence bearing on the life expectancy of the plaintiff,
19 including his occupation, habits, and state of health.

20 Pursuant to South Carolina law, Mr. Wolde's personal
21 representative may recover for his conscious pain and
22 suffering. If you find by a preponderance of the evidence
23 that the plaintiff has presented sufficient proof that
24 Mr. Wolde was conscious and simultaneously suffering prior to
25 his death, then you may award damages for that. However,

1 South Carolina law does not permit recovery for pre-impact,
2 fright, or fear.

3 We are going to send you back into the jury room with a
4 verdict form that asks you a series of questions. I'm going
5 to go over that with you.

6 The first question that we'll ask you is: Was the
7 defendant, Lack's Beach Service, negligent? If you answer
8 that question yes, it will prompt you to go to Question 2. If
9 you answer that question no, you will stop your deliberations
10 there and notify the bailiff that you have completed your
11 deliberations.

12 Please don't read anything into the fact that one answer
13 comes first and one comes second. There's no significance to
14 that other than one has to come first and one has to come
15 second.

16 The second question it will ask you is: Was the
17 defendant's negligence a proximate cause of Mr. Wolde's death?
18 Again, you'll answer either yes or no. If you answer yes, it
19 will prompt you to go to Question 3. If you answer no, you
20 will stop your deliberations.

21 Question No. 3 states: Was the defendant, Zerihun Wolde,
22 negligent? Again, you will answer yes or no. If you answer
23 yes, it prompts you to go to Question 4. If you answer no, it
24 prompts you to go to Question 7.

25 Question 4 asks: Was Mr. Wolde's negligence a proximate

1 cause of his death? Again, it will give you the choices of
2 yes or no. It will prompt you, if you answer yes, go to
3 Question 5. If you answer no, go to Question 7.

4 Question 5 states: Using the combined negligence that
5 proximately caused Mr. Wolde's injuries as 100 percent, what
6 percentage of that negligence is attributed to Mr. Wolde, and
7 what percentage is attributable to the defendant, Lack's Beach
8 Service? It gives you a blank here next to the word
9 "plaintiff" and a blank next to "defendant" to write in any
10 percentages. The total percentage must equal 100. And it
11 gives you that instruction on here as well.

12 The next questions asks: Was Plaintiff's negligence
13 greater than 50 percent? Again, if you choose yes, it prompts
14 you to stop your deliberations. If you choose no, it prompts
15 you to go to Question 7.

16 Question 7 states: We, the jury, unanimously find
17 Plaintiff Meswaet Abel, as personal representative of the
18 Estate of Zerihun Wolde, is entitled to the following damages,
19 if any. It gives you, first, actual damages to the Estate of
20 Zerihun Wolde for his conscious pain and suffering, and
21 there's another line here for actual damages to the Estate of
22 Zerihun Wolde for the benefit of his statutory beneficiaries.
23 In this case, his statutory beneficiaries are listed: Adam
24 Zerihun, Wubit Zerihun, Eden and Edom Zerihun.

25 And there is a note here: Do not reduce the plaintiff's

1 total damages based on the percentage of negligence of any
2 party.

3 After you have answered these questions, the judge will
4 complete the amount of damages for which the defendant is
5 responsible based on the percentages that you have indicated
6 above. You are to determine only the total amount of the
7 plaintiff's damages and enter that amount below here.

8 No. 8 asks: Do you, the jury, unanimously find that
9 Plaintiff, Meswaet Abel, as personal representative of the
10 Estate of Zerihun Wolde, established by clear and convincing
11 evidence that Lack's Beach Service acted in a reckless,
12 willful, or wanton manner, and that such recklessness caused
13 the injuries claimed by the plaintiff? And there's a space
14 for yes and a space for no. You'll choose one.

15 And then, Ms. Petit, you will sign -- once the jury has
16 reached a unanimous verdict, you will sign the bottom on
17 behalf of the entire jury panel.

18 Again, your verdict must be unanimous.

19 Any additions or anything else that we need to discuss
20 before we send the jury back to deliberate?

21 MR. McLEOD: None from the plaintiff, Your Honor.

22 MR. THOMPSON: None from the defendant, Your Honor.

23 THE COURT: Okay. Ladies and gentlemen, I'm going to let
24 you go on back. I'm going to ask our alternate juror if
25 you'll just remain in the courtroom with us for a moment, as

1 long as the other 12, everybody is good to begin
2 deliberations.

3 We're going to bring back to you the verdict form and all
4 the exhibits. It will take us a minute to make sure that we
5 have gathered all the exhibits. We have had lunch brought in
6 for you. I don't know if it's here yet, but we are bringing
7 lunch in for you.

8 If there's anything that needs to be brought to my
9 attention, you can write a note to me, and the bailiffs will
10 get that to me.

11 All right. Thank you so much. You can begin your
12 deliberations.

13 (The jury, excluding the alternate juror, exited the
14 courtroom at 12:03 p.m.)

15 THE COURT: I just wanted to thank you for your service.
16 It's tough being the alternate when you have listened to
17 everything and then you don't get to participate in the
18 deliberations. We do appreciate very much you being here,
19 especially in the land of COVID. We have had more than one
20 occasion where we have gone through all the alternates.

21 You know, we've sometimes gotten in a precarious
22 situation where we just didn't know if we'd be able to go
23 forward because we lose jurors. We were a little nervous when
24 we lost the first juror before we even made it through day
25 one, so thank you so much.

1 The fact that you were here gave all of us comfort that
2 we were going to be able to get through this trial and not
3 have to declare a mistrial, so we appreciate you very much.

4 JUROR NO. 344: Thank you.

5 THE COURT: You're welcome to leave or stay, whatever you
6 want to do. If you want to stay, you can have a seat in the
7 courtroom; otherwise, you are welcome to be excused. And,
8 again, thank you.

9 JUROR NO. 344: I'm going to go get back to my job.
10 Thank you, guys.

11 THE COURT: Thank you, ma'am.

12 MR. McLEOD: Thank you.

13 MR. THOMPSON: Thank you.

14 (Alternate Juror No. 344 exited the courtroom at
15 12:04 p.m.)

16 THE COURT: Okay. If I could just ask y'all to make sure
17 we have all the exhibits going back and nothing going back
18 that shouldn't go back.

19 MR. McLEOD: And I don't want to put the cart before the
20 horse, but if they find reckless, there's one thing I want to
21 talk to you about before we start the next thing.

22 Trey, I was just telling her, I don't want to put the
23 cart before the horse -- I mean, there's not telling what the
24 jury will do, but if they find for the reckless, you know, you
25 just argued to them that one reason why their folks weren't

1 responsible is because nobody else got in trouble that day.

2 MR. THOMPSON: Before that. Before that.

3 MR. McLEOD: No, no. The first time you said was that
4 day.

5 THE COURT: Here's what we're going to do. We're going
6 to see what they do, and then we'll excuse them and have some
7 discussion, obviously, before we go any further.

8 MR. McLEOD: Thank you.

9 (A recess was taken from 12:05 p.m. to 12:35 p.m., while
10 the jury deliberates.)

11 JURY QUESTION

12 THE COURT: Okay. So we have a note from the jury. It
13 states: "The jury would like to see a written definition of
14 'negligent.'"

15 So, you know, normally, we bring them in and give them
16 oral instructions. I really -- I don't have any big
17 difficulty with giving them a written definition from our
18 instructions that I have already given. How do you-all feel
19 about that?

20 MR. McLEOD: Do you have the --

21 MR. THOMPSON: I'll start, Your Honor, if you want.

22 THE COURT: Sure.

23 MR. McLEOD: Go ahead.

24 MR. THOMPSON: I would object to having the jury be
25 provided a written instruction on a portion of your charge

1 that would be in the jury room without all of the rest of the
2 charge. So I think, just like you described, generally
3 speaking, when there's a question about the part of the
4 charge, then bring the jury back in, and then recharge them on
5 the section they're asking about or the issue they're asking
6 about. But I would object to having a written -- just a
7 portion of the charge -- written charge be submitted or have
8 it back in the jury room.

9 THE COURT: Yeah, I think the school of thought is that
10 they'll get hung up on that to the exclusion, I guess, of
11 other issues. Sometimes I have sent the jury back with the
12 entire charge, but then it seems to me they really get bogged
13 down with looking through all these pages of charge.

14 So then this begs the question -- you know, I have got
15 the charge on negligence that defines "negligence." And so
16 the next issue is, do we charge negligence and comparative
17 negligence? I can give them the entire charge of negligence
18 that sets out the different elements. You know, the portion
19 that defines negligence is basically that "the plaintiff must
20 prove by a preponderance of the evidence that the defendant
21 breached the duty of care with negligent conduct. Negligence
22 means that a person has done something that a reasonable
23 person would not have done or has failed to do something that
24 a reasonable person would have done in the same situation."

25 So, I mean, we can give them the short answer or the long

1 answer.

2 MR. McLEOD: I want you to define "negligence" and that
3 will educate them on how to use negligence in the comparative
4 negligence context. So I would say the short answer, Your
5 Honor.

6 MR. THOMPSON: Well, Your Honor, I think that negligence
7 includes duty, breach, proximate cause, damages. So the --
8 including negligence includes these elements.

9 THE COURT: Tell me your thoughts about, basically, just
10 charging them with the four elements -- the entire charge, I
11 guess, on negligence.

12 MR. THOMPSON: Yes, Your Honor.

13 THE COURT: You're not requesting comparative negligence
14 as well?

15 MR. THOMPSON: No, Your Honor.

16 MR. McLEOD: That will be fine, Your Honor.

17 THE COURT: Okay. If you'll bring them back in. Thank
18 you.

19 (The jury entered the courtroom at 12:40 p.m.)

20 THE COURT: Okay. Thank you, ladies and gentlemen. We
21 have a certain procedure that we go through when we have a
22 question from the jury, and so I'm going to read you the
23 charge on negligence in response to your question.

24 In order to establish a cause of action for negligence,
25 the plaintiff must prove the following four things by the

1 greater weight or preponderance of the evidence:

2 One, a duty of care owed by the defendant to the
3 plaintiff;

4 Two, a breach of the duty of care by the defendant;

5 Three, resulting damages to the plaintiff;

6 And, four, that the damages suffered by the plaintiff
7 were proximately caused by the defendant's breach of the duty
8 of care.

9 First, the plaintiff must prove by a preponderance or
10 greater weight of the evidence that the defendant owed the
11 plaintiff a duty of care. Next, the plaintiff must prove by a
12 preponderance of the evidence that the defendant breached the
13 duty of care with negligent conduct. Negligence means that a
14 person has done something that a reasonable person would not
15 have done or has failed to do something that a reasonable
16 person would have done in the same situation.

17 The plaintiff must also prove by a preponderance or
18 greater weight of the evidence that she suffered damages as a
19 result of the defendant's breach of duty.

20 Finally, the plaintiff must prove by a preponderance or
21 greater weight of the evidence that the damages were
22 proximately caused the defendant's breach of duty. Proximate
23 cause is something that produces a natural chain of events
24 which, in the end, brings about the death. It is the direct
25 cause of the death.

1 To prove that the defendant's negligence proximately
2 caused the plaintiff's death, the plaintiff must first prove
3 causation and fact. This is proven by showing that the death
4 would not have occurred but for the defendant's negligence.
5 The plaintiff must also prove legal cause. Legal cause is
6 proven by showing that the death was foreseeable. This means
7 that the death occurred as a natural and probable consequence
8 of the defendant's negligence.

9 The plaintiff must prove that the injury from the
10 defendant's negligence was foreseeable but does not have to
11 prove that the particular injury that occurred was
12 foreseeable. Proximate cause does not mean the only cause.
13 The defendant's act can be a proximate cause of the
14 plaintiff's death if it was at least one of the direct,
15 concurring causes of the injury.

16 Okay. Ladies and gentlemen of the jury, that is the
17 negligence charge.

18 MADAM FORELADY: Is there a reason we can't have a copy
19 of that, that just read?

20 THE COURT: Generally, we do not send it back into the
21 jury room without sending the entire thing, and it's not our
22 preference to do that. Thank you.

23 Okay. You can resume your deliberations.

24 (The jury exited the courtroom at 12:43 p.m.)

25 THE COURT: Okay. Are y'all still good with me not

1 sending it back in writing?

2 MR. WILSON: Yes, ma'am.

3 MR. McLEOD: Yes, Your Honor.

4 MR. THOMPSON: Yes, Your Honor.

5 THE COURT: All right. Thank you.

6 MR. McLEOD: And, yeah, if you send the whole thing back
7 there, you're right; they'll be so wrapped around the axle on
8 that thing, we'd be here -- you might not make it to Italy.

9 (Court's Exhibit No. 7, Jury Question, was marked for
10 identification.)

11 (A recess was taken from 12:44 p.m. to 2:30 p.m., while
12 the jury deliberates.)

13 JURY QUESTION

14 THE COURT: Okay. We have a note from the jury. I'm not
15 entirely certain what they're asking, but it states: The jury
16 would like clarification on whether or not the \$8.1 million
17 figure came from a life expectancy chart and if it was part of
18 the judge's instructions an example.

19 And I'm glad to let y'all take a look at it if you wanted
20 to look at it.

21 MR. McLEOD: So, I mean, what -- I don't know what to do,
22 but the mortality table and then 8.1 was just me suggesting a
23 method of calculation.

24 THE COURT: Yeah. I'm turning back to the life
25 expectancy table.

1 MR. McLEOD: It was 37.9.

2 MR. WILSON: Times ten dollars an hour.

3 THE COURT: So I guess what I would propose is something
4 in the nature of a bit of recharge on the life expectancy
5 table, just to say this is -- the life expectancy table is an
6 aid to help you in determining a measure of damages, but that
7 no specific figure is suggested within the life expectancy
8 table, but that's --

9 MR. McLEOD: Totally up to whatever they --

10 THE COURT: -- completely in their discretion.

11 MR. THOMPSON: Your Honor, again, it sounded to me
12 like -- I mean, again, the question of whether the 8.1 came
13 from that -- there needs to be some form of instruction that
14 the judge -- the Court hasn't provided any numbers at all;
15 that the damages are completely up to them, whatever the -- if
16 there's a charge or part of the charge that's read that, you
17 know, they are the ones who determine. And then, certainly,
18 nothing has come from the Court with regard to a suggestion of
19 any numbers.

20 MR. McLEOD: I would think, Your Honor, I'd agree if they
21 just were instructed what the mortality table is and then
22 instructed that the amount of damages, if any, is entirely up
23 to them. Because if you try to explain the 8.1, then you're
24 commenting on my closing. See what I'm saying? So it seems
25 to me like that's the safest way to do it.

1 MR. THOMPSON: I mean, I think that making sure that they
2 understand that it didn't come from the Court -- no numbers
3 have been offered by the Court or wouldn't be offered by the
4 Court, that is their sole province, if any, and that the
5 mortality table is an aid. It's not a requirement.

6 MR. McLEOD: And, Your Honor, we're okay with sending a
7 note back, if you don't want to bring them back in here.

8 THE COURT: Okay. So let me tell me exactly what I'm
9 thinking my response would be, is that: No amount of damages
10 was suggested by either the Court or by the life expectancy
11 table itself. The life expectancy table is simply an aid to
12 help you determine the amount of damages, if any. Of course
13 the amount of damages is solely within the discretion of the
14 jury.

15 MR. McLEOD: That's fine. Yeah, life expectancy was the
16 37. Then that's fine.

17 MR. THOMPSON: They didn't ask for the number. They have
18 got that. They're just asking -- all they're asking about is
19 the significance of 8.1.

20 THE COURT: Do y'all -- tell me how you feel, Mr.
21 Thompson. Do you want me to bring them out here and give them
22 that orally, or do you want me to send it back in writing?

23 MR. THOMPSON: If I can just see the writing, just to
24 make sure, I can look at it. I don't have any problem with
25 sending it back to them.

1 MR. McLEOD: Maybe just tell them to keep deliberating
2 while you type up --

3 THE COURT: It won't take me long.

4 We'll mark that.

5 (Court's Exhibit No. 8, Jury Question, was marked for
6 identification.)

7 THE COURT: Okay. If you'd let them take a look at that,
8 and we'll mark one and send one to the jury.

9 MR. McLEOD: No objection from the plaintiff, Your Honor.

10 MR. THOMPSON: No objection, Your Honor.

11 THE COURT: Do you mind handing me those back up, and
12 we'll give one to the plaintiff to give to the jury and mark
13 one as a Court's exhibit.

14 (Court's Exhibit No. 9, Judge's Response to Court's
15 Exhibit 8, was marked for identification.)

16 THE COURT: Okay. We'll be in recess.

17 (A brief recess was taken from 2:42 p.m. to 3:13 p.m.
18 while the jury continues to deliberate.)

19 THE COURT: Everybody back in? I understand that we do
20 have a verdict.

21 MR. McLEOD: Your Honor, we're bringing the family down
22 from the waiting room.

23 THE COURT: Okay. We're ready for the jury.

24 (The jury entered the courtroom at 3:16 p.m.).

25 VERDICT

1 THE COURT: Okay. Ladies and gentlemen, I understand
2 that you have reached a verdict?

3 MADAM FORELADY: Yes, ma'am.

4 THE COURT: And if I could ask you to please give your
5 verdict form to the bailiff.

6 Okay. The verdict is as follows:

7 No. 1: Was the defendant, Lack's Beach Service,
8 negligent? The answer was yes.

9 No. 2: Was the defendant's negligence a proximate cause
10 of Mr. Wolde's death? And the answer is yes.

11 No. 3: Was the decedent, Zerihun Wolde, negligent? The
12 answer is no.

13 No. 4: Was Mr. Wolde's negligence a proximate cause of
14 his death? That is blank because of the answer to No. 3.

15 No. 5 is blank where it says: Using the combined
16 negligence that proximately caused Mr. Wolde's injuries is 100
17 percent. That portion is blank.

18 No. 6, as to: Was the plaintiff's negligence greater
19 than 50 percent? It's blank.

20 As to No. 7, it states: We, the jury, unanimously find
21 for actual damages to the Estate of Zerihun Wolde, for his
22 conscious pain and suffering, 3.73 million. For actual
23 damages to the Estate of Zerihun Wolde for the benefit of his
24 statutory beneficiaries, 10 million.

25 And for the last question, No. 8: Do you, the jury,

1 unanimously find that the plaintiff established by clear and
2 convincing evidence that Lack's Beach Service acted in a
3 reckless, willful, or wanton manner and that such recklessness
4 caused the injuries claimed by the plaintiff? And the answer
5 is yes.

6 Ladies and gentlemen, let me ask: Is this your verdict?

7 JURORS: Yes.

8 THE COURT: Okay. I'm going to ask -- I'm not excusing
9 you at this point. I'm going to ask if you'll please step
10 back to the jury room while we take up a few matters. Thank
11 you so much.

12 (The jury exited the courtroom at 3:19 p.m.)

13 THE COURT: I first wanted to see if you-all wanted to
14 take a look at the verdict form. You're welcome to.

15 MR. PRACHT: Thank you, Your Honor.

16 MR. TRAINOR: Your Honor, may I approach?

17 THE COURT: Yes, please.

18 Okay. So tell me how y'all would propose that we go into
19 the next phase? I'm going to cut-and-paste the punitive
20 damages charge to give them. But I guess my first question
21 is: Did either side intend to present any further testimony
22 or evidence?

23 MR. McLEOD: Your Honor, the only thing that I would add
24 is, you know, in his closing, he specifically argued to the
25 jury that nobody else got in trouble that day, and I think

1 that is very disingenuous concerning he knows that somebody
2 else drowned two hours later on the same beach guarded by the
3 same defendant.

4 And so I think, at a minimal, we should be allowed to let
5 the jury know that, in fact, another person drowned on the
6 same beach within two hours of Mr. Wolde because it goes
7 directly to this defendant's degree of culpability and the
8 harm that it's caused. And he argued it to the jury. I
9 couldn't believe he was doing it. I about fell out of my
10 chair.

11 And so we have every right to now, at a minimum, do that.
12 I was going to call Tom Gwyer, the fire chief, and go through
13 and establish the 22 drownings that have happened in the last
14 nine years, I believe, during life-guarded hours, but because
15 of time issues, I'm not. But I certainly would appreciate the
16 Court at least allowing me to admit that fact into the
17 evidence in this piece and then argue, obviously, the factors
18 pursuant to 15-32-520, Your Honor.

19 THE COURT: Mr. Thompson?

20 MR. THOMPSON: Your Honor, may it please the Court. My
21 argument to the jury, if it was misstated about the whole day,
22 it was clearly what happened from the time in the morning
23 until the time of the death, that nobody had gotten in
24 trouble, that nobody identified rips, that nobody had been
25 rescued. That's what I talked about. I didn't talk about the

1 whole day. If I misstated and said nothing had happened the
2 entire day -- I don't remember saying that -- that was a
3 mistake.

4 But, at the end of the day, the entire part of my
5 argument and everything I said was look what happened up until
6 that point. Nothing happened. And that was the import of
7 what I was trying to communicate with the jury. I was not --
8 didn't say, Look for the rest of the day, nothing else
9 happened, did it? Right? The only thing that happened that
10 day was this. It is the time period before, the time period
11 to. That's what I was focusing on.

12 MR. McLEOD: I am willing to bet my dollars to
13 Mr. Thompson's donuts. He said it twice. The first time he
14 said nobody else got in trouble that day. Then he came back
15 and he said nobody got in trouble before Mr. Wolde drowned.

16 And I have -- Your Honor, I have been patient. They have
17 argued stuff to this Court that is so demonstrably false
18 throughout this case, and they just can't continue to get away
19 with it. I mean, it's just -- it's not right to the system.
20 It's not right to this jury, that another person drowned two
21 hours after Mr. Wolde.

22 THE COURT: I mean, the issue that I have is we don't
23 know what the circumstances of that were, if it was a medical
24 event. I don't know if it was a medical event or not. I know
25 I heard some claim to that effect.

1 MR. THOMPSON: Yes, Your Honor.

2 And, Your Honor, none of the evidence was in the record
3 whatsoever about a second drowning. I mean, there's nothing.
4 And, Your Honor, I don't believe that the punitive stage,
5 then, is to go back and vouch for or provide additional
6 evidence of gross negligence or willful conduct. It's already
7 been established.

8 And so, now, the only question is: Are you going to
9 award punitive damages? Now, Your Honor, I do know that,
10 obviously, one of the aspects of the ability to pay is part of
11 the question on punitives. I'm working right now as quickly
12 as I can to get the financial statements of Lack's Beach
13 Service for 2021 because their net worth is the calculator for
14 the jury's consideration of ability to pay.

15 And, Your Honor --

16 MS. CHICKERING: I have it. I just don't know how to
17 print it.

18 MR. THOMPSON: I need to print it. Is there a method to
19 print? Can we send it to you?

20 THE CLERK: Mm-hmm.

21 MR. THOMPSON: So we would put Weslyn on the stand to
22 provide testimony about -- or evidence about the net worth or
23 the balance sheet can be provided.

24 MR. McLEOD: And if they do, Your Honor, I have got
25 Dwyer's report. I have got where the assistant fire chief of

1 the City of Myrtle Beach did a comprehensive study and
2 determined that a majority of the drownings happened on this
3 guarded beach. And if they put her up, then I absolutely have
4 a right to get into it.

5 It's funny how they fight financial discovery the whole
6 case: You can't have anything, can't have anything, can't
7 have anything. And then, once they get hit, now they want to
8 print off a sheet and try to use it to their advantage.

9 If they want to put her on the stand, that's fine, but I
10 get to go to everything I get to do consistent with the
11 statutes, Your Honor.

12 MR. THOMPSON: Your Honor, Chief Dwyer -- again, this
13 doesn't -- we're not now going back over the Court's rulings
14 with regard to prior drownings. There's not a substantial
15 similarity that's going to be demonstrated in this courtroom.

16 So questioning Weslyn about Dwyer's statistics or Dwyer's
17 drownings, there's not going to be a foundation and there's
18 not going to be an establishment of similar situation or
19 substantial similarity. So I'm not real sure -- I mean, Chief
20 Dwyer, I don't think is here, and so that information, that
21 evidence is not going to be available for this jury through
22 any witness.

23 THE COURT: I'm not going to allow into evidence the
24 issue of other drownings.

25 MR. McLEOD: Okay. Your Honor, I'm pulling the incident

1 report from the second drowning that day. And it may have had
2 some medical issues as well, so that's fine. I don't ever
3 want to put in this record something that's not substantially
4 similar, Your Honor.

5 THE COURT: Tell me your thoughts with respect to now the
6 testimony about the financial statement.

7 MR. McLEOD: So, you know, the ability to pay or net
8 worth is just one factor that the jury can consider in
9 arriving at a punitive award, and that's set forth in *Welch v.*
10 *Epstein*. And we're not going to offer their net worth, and
11 the net worth is not required, as far as our burden is
12 concerned. What we'll do is we'll argue the degree of
13 culpability, the severity of the harm, the duration of the
14 conduct, and the need for a deterrence, Your Honor.

15 MR. THOMPSON: So, Your Honor, the case law is very clear
16 that net worth is relevant for the jury's consideration on
17 punitive damages. So I have -- and the case law is also very
18 clear, it's the most recent statement of net worth that is
19 relevant, not '18-'19. It's '20-'21.

20 I have the balance sheet from Lack's Beach Service, and
21 the net worth is listed as a negative 473,000. So that's
22 going to be very relevant to this jury to see that Lack's
23 Beach Service doesn't have a positive net worth. It has, in
24 fact, a negative net worth.

25 MR. McLEOD: And we have had no ability to conduct any

1 discovery on that. We have got no financial information. We
2 had to fight tooth and nail to get any finances, and we
3 ultimately got it from the City. We didn't even get it from
4 the defendant.

5 THE COURT: So tell me what you're proposing, that you
6 are going to put her on the stand, or you want to introduce
7 that without putting her on the stand?

8 MR. THOMPSON: Right. Well, I'm just fine with having it
9 as an exhibit -- defendant's exhibit for purposes --

10 MR. McLEOD: No. Well, go ahead.

11 MR. THOMPSON: I understand Mr. McLeod is taking issue
12 with that and wants, apparently, Ms. Lack-Chickering to take
13 the stand to validate and authenticate this document. We're
14 happy to do that, Your Honor. I am concerned about where that
15 additional amount of questioning is going to come. It's going
16 to be a very limited examination. I mean, the net worth is
17 what the net worth says on this piece of paper, and that's
18 negative \$473,350. I mean, that's their net worth in 2021.

19 THE COURT: Okay. I'm going to let you put her on the
20 witness stand if that's what you want to do. I think she's
21 got to be on the witness stand for that to come into evidence.

22 MR. McLEOD: Can I at least have a copy?

23 MR. THOMPSON: She's got it. I just got a copy. You can
24 have mine.

25 THE COURT: So I'm going to print out for you the

1 additional charge I intend to give them on punitives, and
2 then, at same time, I'm going to go ahead and do a verdict
3 form for this. I'm trying to craft a punitive damages form
4 here.

5 MR. McLEOD: We, the jury, unanimously find the amount of
6 blank punitive damages.

7 THE COURT: I think there needs to be some provision that
8 they can find no punitive damages or some punitive damages.

9 MR. McLEOD: Well, then, maybe it's "if any."

10 THE COURT: So I'm thinking: Plaintiff is not entitled
11 to punitive damages, Plaintiff is entitled to punitive
12 damages, and then, if so, in the following amount.

13 MR. McLEOD: That's fine, Your Honor.

14 Your Honor, the only question I have -- I want to look at
15 another case. I don't know if it should say: The plaintiff's
16 entitled to punitives. It may be that it's "we find blank
17 punitive damages against the defendant." You know, these
18 damages are awarded against the defendant because of the
19 defendant's conduct as opposed to, to the plaintiff for
20 compensatory damages. And I'm just trying to pull a verdict
21 form from another case, Your Honor.

22 (Pause in the proceedings.)

23 MR. McLEOD: Your Honor, we're going to email a little
24 blurb to your clerk, if that's okay.

25 THE COURT: Can I ask you to just email it to me?

1 MR. McLEOD: Yes, Your Honor.

2 THE COURT: It's kcurtisj.

3 MR. McLEOD: What we'll send to Your Honor is --
4 basically what it will say: Did the plaintiff prove by clear
5 and convincing evidence that defendant's conduct rose to the
6 level of willful, wanton, reckless -- well, I guess they have
7 already found that.

8 MR. WILSON: What amount of punitive damages is
9 Plaintiff, Meswaeat Abel, as personal representative of the
10 Estate of Zerihun Wolde, entitled to recover from Defendant
11 Lack's Beach Service? Answer in dollars and cents.

12 MR. McLEOD: Yep.

13 MR. THOMPSON: If any.

14 MR. McLEOD: If any.

15 MR. WILSON: I'll add it. "What amount of punitive
16 damages, if any?" Okay. I'm going to send it to Your Honor
17 right now. It's been emailed, Your Honor.

18 THE COURT: I think I have got the same language here.

19 MR. McLEOD: Mr. Cooper told me I couldn't touch his
20 computer because I messed it all up.

21 MR. WILSON: Slammed it down and broke it.

22 I just sent you the second verdict form.

23 THE COURT: Okay. Are we ready for the jury?

24 MR. McLEOD: Plaintiff is ready, Your Honor.

25 MR. THOMPSON: Yes, Your Honor.

1 (The jury entered the courtroom at 3:46 p.m.)

2 THE COURT: Okay. Ladies and gentlemen of the jury,
3 thank you so much. We have a little bit further work for you
4 to ask of you, and this may seem like a mean trick to pull on
5 you after you have worked so hard all week. But state law
6 provides that the issue of actual damages and punitive damages
7 are bifurcated. So the issue of punitive damages does not
8 come in front of the jury unless and until you have awarded
9 some actual damages and you have found that there was
10 reckless, willful, wanton conduct.

11 So we're going to have a bit of a short proceeding with
12 regard strictly to the issue of punitive damages. I'm going
13 to give you instruction just on punitive damages. We're going
14 to send you back to the jury room to deliberate on the issue
15 solely of punitive damages.

16 Mr. Thompson?

17 MR. THOMPSON: May it please the Court, Your Honor. I
18 call Weslyn Lack-Chickering to the stand.

19 WESLYN LACK-CHICKERING,

20 after having been duly sworn, was examined and testified
21 to as follows:

22 DIRECT EXAMINATION

23 BY MR. THOMPSON:

24 Q Weslyn, this will be very brief. At the time of
25 Mr. Wolde's drowning, Lack's Beach Service, Inc., carried

1 insurance in the amount of \$3 million; is that correct?

2 A Yes, sir.

3 Q Two million dollars in primary and then a million-dollar
4 umbrella; is that right?

5 A Yes, sir.

6 Q And then I'm going to show you what I'm going to mark as
7 Exhibit --

8 (Defendant's Exhibit No. 9, Balance Sheet, was marked for
9 identification.)

10 BY MR. THOMPSON:

11 Q And this is a balance sheet for Lack's Beach Service for
12 the year ending December 31, 2021, and this -- was this
13 provided to you this afternoon?

14 A Yes, sir, it was.

15 Q And is this the most recent balance sheet for Lack's
16 Beach Service?

17 A Yes, sir.

18 Q And then, on the second page, there is a net worth
19 calculation based on -- at the end of December 31, 2021. What
20 was the net worth of Lack's Beach Service?

21 A I'm sorry; is that this line here? That would be
22 negative 473,350.51.

23 Q Okay. Thank you, Weslyn.

24 MR. THOMPSON: No further questions.

25 MR. McLEOD: I just have a couple of questions, Your

1 Honor.

2 CROSS-EXAMINATION

3 BY MR. McLEOD:

4 Q Ms. Chickering, who prepared this document?

5 A My office manager, Carrie Holland.

6 Q How long has Ms. Holland been with you?

7 A Over ten years.

8 Q When was she asked to prepare this?

9 A I called her --

10 Q You didn't do anything wrong. I'm just --

11 A No, I know. I called her about 20, 30 minutes ago and
12 asked her to please send me that from '20-'21.

13 Q Okay. Right here, there's a swimming pool listed as an
14 asset. Where is the swimming pool?

15 A I do not own a swimming pool. We rent Pepper Geddings
16 from the City.

17 Q But under the company's fixed assets, there's a swimming
18 pool listed as a covered asset. I'm just wondering where the
19 swimming pool was.

20 A I do not own a swimming pool. I would need to ask my
21 office manager what that means.

22 Q Well, the company.

23 A No, the company doesn't own a swimming pool.

24 Q All right. Now, right here, other current liabilities.
25 Do you see that? Do you know what other current liabilities

1 are in QuickBooks?

2 A I do not.

3 Q Do you have any accounting background?

4 A None. I'm a social worker by education, yes.

5 Q Well, I'm not good with math. Everybody in here knows

6 that.

7 A I'm terrible at it.

8 Q But I can read.

9 A Yes.

10 Q What -- see this loan of \$1.2 million to the furniture

11 company? Do you know what that's about?

12 A I would imagine that that would be to cover the rental of

13 the equipment in the building. I believe George...

14 Q Do you know whether that \$1,218,320.04 loan was made from

15 this company to the furniture company within the last 30

16 minutes?

17 A No. Shouldn't have been.

18 Q Do you know when this loan was made?

19 A I would imagine after -- I do not know when that loan was

20 made, but by logic and ethics, I would imagine that the books

21 were closed at the end of the year, and we're now in 2022.

22 Q And you don't have any personal knowledge?

23 A Of when the loan was paid?

24 Q Or when it was made.

25 A No, I do not. That's my business manager.

1 MR. McLEOD: Your Honor, I would just object to the
2 document coming into evidence because -- and it's not her
3 fault, but she doesn't have an accounting background. She
4 didn't prepare the document herself. She only asked that it
5 be prepared within the last 30 minutes. There's a
6 \$1.2 million loan on here. Her dad solely owns the Beach
7 Service. He also is the sole owner of the furniture company.
8 For all we know, in the last 30 minutes, Dad is trying to pull
9 1.2 million out.

10 THE COURT: I'm going to allow it in, since she's the
11 office manager.

12 MR. McLEOD: Fair enough, Your Honor.

13 THE COURT: I think it's admissible. Thank you.

14 (Defendant's Exhibit No. 9 was received into evidence.)

15 THE COURT: Any further questions?

16 MR. THOMPSON: No, Your Honor.

17 THE COURT: Thank you, ma'am. You can step down.

18 Anything further before I go into the instructions for
19 the jury?

20 MR. McLEOD: None from the plaintiff.

21 MR. THOMPSON: No, Your Honor.

22 JURY CHARGE

23 THE COURT: Okay. Ladies and gentlemen of the jury, I'm
24 going to give you some instruction on the award of punitive
25 damages.

1 If you award actual damages, you may also consider an
2 award of punitive damages. Punitive damages are intended to
3 punish the defendant for extraordinary and outrageous
4 misconduct and to prevent the defendant and others from
5 committing similar acts in the future.

6 Punitive damages can only be awarded when conduct of the
7 defendant has been something more than mere negligence. The
8 evidence must establish the defendant's act were reckless,
9 willful, and wanton, meaning there was a conscious failure to
10 exercise due care or a conscious indifference to the rights
11 and safety of others or a reckless disregard thereof.

12 If you find that the defendant's conduct was willful,
13 wanton, or reckless, you may award the plaintiff punitive
14 damages. To support an award of punitive damages, the
15 plaintiff must prove by clear and convincing evidence that the
16 conduct complained of included a consciousness of wrongdoing
17 at the time of the conduct.

18 Clear and convincing evidence is more than just a
19 preponderance or greater weight of the evidence, which
20 requires only proof which persuades you that a party's claim
21 is more likely true than not true. On the other hand, clear
22 and convincing proof is not as high a standard as the burden
23 of proof in criminal cases, which is proof beyond a reasonable
24 doubt.

25 Clear and convincing proof leaves no substantial doubt in

1 your mind. It means that the evidence is not ambiguous, not
2 doubtful, equivocal, or contradictory. Convincing means
3 persuading by proof or argument, causing one to believe in the
4 truth of what is asserted. Clear and convincing proof
5 establishes in your mind not only that the fact is probable
6 but that it is highly probable.

7 Before awarding punitive damages, you must consider and
8 weigh four elements which may be pertinent to the facts of
9 this case. You must first consider the relationship between
10 any punitive damage award and the harm caused. Any penalty
11 imposed should take into account the reprehensibility of the
12 conduct, the harm caused, the defendant's awareness of the
13 conduct's wrongfulness, the duration of the conduct, and any
14 concealment. Thus, any penalty imposed should bear a
15 relationship to the nature and extent of the conduct and the
16 harm caused, including the compensatory damage award made by
17 you.

18 Secondly, any penalty imposed should take into account,
19 as a mitigating factor, any other penalty that may have been
20 imposed or which may be imposed for the conduct involved,
21 including any criminal or civil penalty or any other punitive
22 damages award arising out of the same conduct.

23 Next, you should consider whether the award of and the
24 amount of any punitive damages award may deprive the defendant
25 of any profits derived from the improper conduct and whether

1 the ill-gotten profits should be properly awarded to the
2 plaintiff.

3 Finally, any award of punitive damages must be limited to
4 punishment, and, thus, may not effect economic bankruptcy. To
5 this end, the defendant's ability to pay any punitive damages
6 award should be considered. However, the economic bankruptcy
7 factor is not an absolute bar to an award of punitive damages.

8 Any exceptions or additions on the part of the plaintiff?

9 MR. McLEOD: None from the plaintiff, Your Honor.

10 THE COURT: Mr. Thompson?

11 MR. THOMPSON: No, Your Honor.

12 THE COURT: Okay. Ladies and gentlemen, we're going to
13 send you back with a verdict form that is strictly as to
14 punitive damages. It's very simple. It states: "Punitive
15 damages verdict form." And it states: "What amount of
16 punitive damages, if any, is the plaintiff, Meswaet Abel, as
17 personal representative of the Estate of Zerihun Wolde,
18 entitled to receive?" And there is a blank for you to put
19 your answer.

20 And, again, Ms. Petit, if you'll please sign on behalf of
21 the jury. Again, your verdict must be unanimous.

22 Anything further before we release the jury to begin
23 deliberating?

24 MR. McLEOD: May we approach, Your Honor?

25 BENCH CONFERENCE

1 (The following bench conference was held outside of the
2 hearing of the jury and others:)

3 MR. McLEOD: I think, generally, we're allowed to give a
4 short argument at this point, Your Honor.

5 THE COURT: That's kind of why I was asking before I said
6 "anything further" before.

7 MR. McLEOD: Well, I thought it was evidence-wise.

8 MR. THOMPSON: No, I mean -- that's what I understood,
9 that we were going right into the charge. Now, it's too late
10 for argument.

11 MR. McLEOD: Whatever.

12 THE COURT: Okay.

13 (Open court resumes as follows:)

14 THE COURT: Okay. Thank you, ladies and gentlemen. You
15 can begin your deliberation.

16 (The jury exited the courtroom at 3:57 p.m.)

17 (A recess was taken from 3:57 p.m. to 4:48 p.m., while
18 the jury deliberates.)

19 (The jury entered the courtroom at 4:48 p.m.)

20 VERDICT

21 THE COURT: Okay. I understand that you have reached a
22 verdict. If you would please hand it to the bailiff. Thank
23 you so much.

24 Okay. We have the verdict form, and it states: What
25 amount of punitive damages, if any, is the plaintiff entitled

1 to receive? And the answer is \$7 million.

2 And, ladies and gentlemen of the jury, is this your
3 verdict?

4 JURORS: Yes.

5 THE COURT: Okay. Once again -- first of all, anything
6 further from the plaintiff or defendant before I release the
7 jury?

8 MR. McLEOD: Nothing from the plaintiff, Your Honor, and
9 thank you for y'all's service.

10 MR. PRACHT: Thank you.

11 MR. THOMPSON: No, Your Honor.

12 THE COURT: All right. Ladies and gentlemen, I know it's
13 been a long week. Once again, I want to thank you so much for
14 your service.

15 When the juror summons go out -- every week they go out,
16 and so then the phone calls start coming in of people -- some
17 very valid, some not so valid -- of the reasons that they
18 cannot serve. And then there's a whole other class of people
19 that quietly rearranges their entire lives to be here, and
20 y'all fall into that category. So, once again, thank you very
21 much for your service, and you are free to go.

22 (The jury exited the courtroom at 4:49 p.m.)

23 THE COURT: All right. Thank y'all very much. Do you
24 want some period of time to submit post-trial motions?

25 MR. THOMPSON: Yes, please, Your Honor. If we could get

1 the ten days, by rule.

2 THE COURT: Sure, absolutely. I will not be back in the
3 office for a couple of weeks, so I won't be ruling on those
4 before a couple of weeks is up.

5 MR. McLEOD: And after his, I guess, GNOV, we'll also
6 have to do -- I think the Court has to do, you know, a
7 punitive damages analysis for due process and, obviously,
8 whenever Your Honor wants to -- us to brief it, we'll brief
9 it. Go have fun, enjoy your vacation.

10 MR. THOMPSON: And do the Gamble analysis at another
11 time.

12 THE COURT: I will. I just -- don't be expecting that
13 from me in the next couple of weeks.

14 MR. THOMPSON: Enjoy your vacation, Judge.

15 MR. McLEOD: We understand.

16 MR. WILSON: Enjoy your vacation.

17 THE COURT: I want to thank y'all, though, very much. It
18 was a great experience for -- this is my law clerk's last day,
19 and for my judicial observation experience student. So many
20 times, people don't get to see good lawyers, and I wish
21 everybody who had something negative to say about the legal
22 professional could come and watch this trial, because y'all
23 did a great job. I appreciate your professionalism.

24 It is unanimous that your children are the best behaved
25 children that I have ever had in the courtroom. So thank

1 y'all very much.

2 (The trial concluded at 4:54 p.m.)

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1 CERTIFICATE OF COURT REPORTER

2
3 State of South Carolina)
4 County of Horry)

5 RE: *Meswaet Abel v Lack's Beach Service*
6

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14
15 Submitted: *August 10, 2022*
16

17 *Bobbi Fisher*

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COUNTY OF HORRY }

COURT OF COMMON PLEAS

MESWAET ABET, AS P.R. OF)
THE ESTATE OF ZERIHUN)
WOLDE,)

PLAINTIFF,)

v.)

LACK'S BEACH SERVICE, INC.)

DEFENDANT.)

TRANSCRIPT OF RECORD
09-CP-26-7075

March 9, 2023
Sumter, South Carolina

B E F O R E :

THE HONORABLE KRISTI F. CURTIS, JUDGE

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1 THE COURT: So, if y'all don't mind us
2 putting on the record for just a moment kind of
3 where we are procedurally. So, the trial at the end
4 of July. We had timely posttrial motions. We had a
5 bit of a briefing schedule with respect to those
6 posttrial motions. I issued a ruling by email at
7 the end of November along with my order on the
8 punitive damages, so we had some back and forth
9 regarding the drafting of that order. There was a
10 request for a hearing on all pending motions. We
11 had set up a date for January 27th for that hearing.
12 A few days before that hearing, we had a joint
13 request to postpone that hearing so the parties can
14 engage in some mediation which ultimately, I guess,
15 was the parties reached an impasse. So we are here
16 today basically to have a hearing on any of those
17 posttrial motions. But I did want to put on the
18 record kind of why it's now February and that was
19 March and we're kind of where we are so that if this
20 goes to the appellate court, they don't wonder why
21 I'm waiting six months to have a hearing. So, thank
22 you for indulging, indulging me with that,
23 appreciate it.

24 MR. BROWN: Thank you, Your Honor.

25 MR. MCLEOD: Thank you, Your Honor. And

1 Mullins McLeod on behalf of the plaintiff. The
2 only -- procedurally, I'm trying to figure out
3 exactly what we're doing as well because on November
4 the 23rd you emailed the parties asking my office to
5 prepare a proposed order; and in that email, that's
6 when you let us know that you were uploading the
7 punitive damages order, and you asked that I provide
8 them a copy of the proposed order before I e-filed
9 it to you, which I did. And before I sent the
10 proposed order to you, they filed what is the most
11 recent filing, basically their objections to the
12 proposed order. And Your Honor is right, you've
13 been available to the parties since the trial. You
14 know, we purposely asked the Court for some time
15 both for briefing and to see if we can resolve it,
16 so we appreciate the Court being always available
17 for us.

18 THE COURT: Which is perfectly fine. I
19 was happy to do that. I just, yeah, that's just for
20 my own purposes so if it goes up people don't wonder
21 why, you know, I -- don't think I sat on it for
22 months on end.

23 MR. MCLEOD: That's correct, Your Honor.

24 THE COURT: So I think I'm gonna turn it
25 over to y'all ---

1 MR. BROWN: Yes.

2 THE COURT: ---at this point ---

3 MR. BROWN: Thank you, Your Honor.

4 THE COURT: ---and hear from you.

5 MR. BROWN: I'm Mitch Brown representing
6 the Defendant Lack's Beach Service. And thank you,
7 Your Honor, for the background. We have pending
8 the -- several motions. I just list those to start
9 off. I'm gonna try to do this with no wire so I
10 apologize if I have to struggle a little bit. We
11 have the JNOV motion. We have the motion under Rule
12 59(e) that went to Your Honor's punitive damages
13 order. We have a motion for a new trial absolute.
14 We have a conditional motion to reduce the judgment
15 pursuant to the Tort Claims Act caps. We have a
16 motion for new trial nisi remittitur, and then we
17 have a motion to stay execution which you wouldn't
18 hear unless and until you deal with all the other
19 ones first. And to stay their motion to appoint a
20 receiver, which has also been filed. So those are
21 all of the posttrial motions that I would say are in
22 front of the Court in this case.

23 Your Honor, I'd like to begin with the --
24 even though I briefly struggle about how to start on
25 this, but I think it just makes sense to start with

1 the JNOV motion. As Your Honor will recall, you
2 granted summary judgment to the City of Myrtle Beach
3 in this case on the grounds of -- I think the
4 statute is 15-78-60, subsections 2 and 4 as I
5 recall, and maybe 5, exercise of discretion. And
6 the Court at that time stated that the case against
7 Lack's Beach Service would move forward because the
8 Plaintiff's case against Lack's did not -- was not
9 based on a public duty, all right. As the case kind
10 of unfolded, Your Honor, and I'm gonna get into this
11 in some detail at Your Honor's discretion, the case
12 turned into one about public duty actually, and
13 that's one of the reasons for the conditional motion
14 which I'll talk about later.

15 But just for JNOV purposes, Your Honor, we
16 don't have res ipso loquitur in this state. It's
17 not been -- it's been very clearly numerous times
18 has been asked to be adopted and it's been rejected.
19 I argued a case in the supreme court called Carter
20 Watson v. Ford Motor Company which may be the most
21 recent time the court said we're not -- we don't
22 have that. So the Plaintiff has the burden of proof
23 and the Plaintiff has to prove duty, breach of that
24 duty, and they have to prove proximate cause. And,
25 Your Honor, we -- we have issues with those

1 elements, but I want to focus here. And I --
2 anything I don't say that's in our briefing, Your
3 Honor, I'm not waiving obviously.

4 THE COURT: Sure.

5 MR. BROWN: But with regard to the
6 proximate cause, there's just a lack of evidence,
7 Your Honor, we would submit. There's -- we were
8 accused -- and I have very high, high respect for
9 Plaintiff's counsel; I want to make that clear.
10 They are zealous advocates, so I'm not trying to
11 throw them under the bus with any of my commentary,
12 but I'm just describing some things here. The
13 Plaintiff put in a variety of different types of
14 evidence, much of which was objected to by
15 Mr. Thompson. Your Honor had to sustain it. Your
16 Honor will recall several times having to tell the
17 jury to disregard things and you're not supposed to
18 consider this and you're not supposed to consider
19 that. But when you look down at what the Plaintiff
20 really has in terms of evidence, they had a very
21 unfortunate and terrible event. Mr. Wolde drowned.
22 There were lifeguard stands; they proved that. They
23 proved that the dual role was in existence for
24 certain of the lifeguards because that's what the
25 franchise agreement between the City of Myrtle Beach

1 and Lack's Beach Service permitted. There was also
2 proof that there were some, what we're calling IGOs,
3 lifeguard onlies; those people did not have a dual
4 role. There was some proof that there was a missing
5 one of those at the time because apparently he had
6 called in sick. But if you think about -- and then
7 Plaintiff's counsel put in some evidence that
8 questioned the training, that questioned whether the
9 lifeguards were up to USLA certification standards.
10 They questioned could these lifeguards speak English
11 well. There were some points that they were from
12 Poland, I think. One of them was from maybe Russia.
13 But there was no evidence of what the -- I want to
14 backtrack, Your Honor.

15 There was evidence that at the lifeguard
16 stand most close to where the drowning incident
17 happened, that that lifeguard that was in that stand
18 was at lunch. And Your Honor will recall because
19 Your Honor ruled on this during the trial, that that
20 lifeguard was allowed to be at lunch under the
21 franchise agreement. Plaintiff's counsel tried to
22 put in evidence of a different system, North Myrtle
23 Beach, I think, that had a rotating type of system
24 where if somebody went to lunch, there was someone
25 that filled in at that stand and so on. But the

1 franchise agreement here did not require that and
2 Your Honor so found in the trial. So the fact that
3 that lifeguard wasn't there and was at lunch, very
4 bad coincidence that at the time he's at lunch is
5 when the drowning happened, that's there.

6 Then the other evidence is we're up two
7 adjacent lifeguards on either side whose duty it was
8 to, quote, watch the water or cover. There's no
9 evidence of what they were doing because they
10 weren't available to testify at trial. There was
11 some written notation that was put into evidence
12 about one of them was talking at some point in there
13 to a beachgoer about the flag system, so performing
14 a lifeguard related function, okay.

15 So the problem here, Your Honor, or one of
16 the problems, is proximate cause because if you have
17 the most highly trained lifeguard on earth -- I'm
18 gonna just use Mark Spitz. That's an old name; but
19 that's somebody I know, Olympic swimmer, all right.
20 If you can't prove Mark Spitz is able to see the
21 person that's apparently in distress, it doesn't
22 matter that he's Mark Spitz; you didn't prove that
23 he could see this person. There was evidence that
24 there were high waves, relatively speaking, and that
25 the beach was somewhat crowded, all right. They --

1 there really wasn't a good quantification of what
2 that meant, but the evidence was that there were
3 quite a number of people out there in the water.

4 THE COURT: I guess my question is, didn't
5 the eyewitness testimony create a jury question
6 based on what they had seen, ---

7 MR. BROWN: Your Honor ---

8 THE COURT: ---testified to?

9 MR. BROWN: Your Honor, the -- this was
10 eyewitness testimony that came in from the -- there
11 were two bystanders. One of them was allowed,
12 improperly we would say, to give an opinion
13 testimony because he had come from Delaware. He had
14 been out to Delaware beaches. That was his
15 experience and he talked about it. And he said, in
16 my opinion if lifeguards had been there, it would
17 have made a difference to the outcome. That's a
18 fact witness opinion objected to. That's not
19 evidence; that is speculation, Your Honor. The
20 other bystander, as I recall, was brought to the
21 attention of him; but by the time he arrived,
22 Mr. Wolde was, Mr. Wolde was already unconscious and
23 had drowned and I think the same thing was true of
24 the first bystander.

25 There's some evidence that the second

1 bystander who testified that he thought there was a
2 lifeguard nearby. He described that person as
3 having no shirt and red shorts. None of the Lack's
4 Beach Service lifeguards wore that attire so this
5 is, again, speculation by this person that this is
6 the lifeguard. His description of the person does
7 not match any of the evidence of lifeguards from
8 Lack's Beach Service. Keep in mind, Your Honor,
9 that the -- if you would, there were also Myrtle
10 Beach rescue people there from the police. There
11 were also trained lifeguards. There was also -- and
12 I'm talking about there. When I say "there," I mean
13 at the beach in the broad sense. Who were moving
14 around, roving around, and there was also a fire
15 department rescue people that were also on the beach
16 roving around. So I don't know who that person saw,
17 but the description that he gave does not match the
18 only evidence in the case about what Lack's
19 lifeguards wore, okay. So we would say that that --
20 the fact that he said he saw a person standing by, I
21 think, a nearby area talking to some people, we
22 don't know what he was talking about. And then I
23 think this was the same individual he said showed up
24 at the resuscitation scene, Your Honor, and said it
25 looked like deer in the headlights to him, okay.

1 This is a person with no shirt and red shorts. So,
2 Your Honor, that is very important in terms of the
3 record evidence that came in at trial.

4 The Court knows that the Court granted a
5 directed verdict in this case on resuscitative
6 evidence, resuscitative claims I should say.

7 Mr. McLeod, you know, conceded that he wasn't trying
8 to show that, so what we're talking about is only
9 one thing and that's it. We're only talking about
10 did they prove that a lifeguard should have seen
11 Mr. Wolde in swimming distress and would have been
12 able to, had he had the opportunity, save Mr. Wolde.
13 That's what we have to -- that's what they have to
14 have evidence of, Your Honor, for the JNOV. They
15 did not present evidence of that. What they did --
16 and Mr. McLeod at the very beginning of the trial, I
17 read through this thing, he said that -- that the
18 plaintiff would show that the -- that there was
19 specific evidence at the window of time; these were
20 his words. In the window of time of the drowning
21 that the Lack's Beach lifeguards were engaging in
22 commercial transactions. That never happened; they
23 never proved that. What they did instead was they
24 put in evidence of dual role functionality and dual
25 role activities over actually months of time, and I

1 will get to that in just a minute, Your Honor.

2 But I want to talk about this proximate
3 cause. If I prove -- if I'm the plaintiff and I
4 prove this is a terribly trained lifeguard, but
5 guess what, he actually saved the person, okay,
6 there's no -- there's no claim. If I prove this is
7 a incredibly great lifeguard, but he was unable to
8 save the person, he didn't have enough time, there's
9 no claim. If I prove that the lifeguard could
10 have -- should have heard or seen the distressed
11 swimmer and would have had enough time to save that
12 distressed swimmer, maybe I could get somewhere,
13 they don't have that evidence; that evidence did not
14 exist. So the unfortunate reality is, people drown
15 in the oceans and the Court heard even their expert
16 say no one can guarantee that someone is not gonna
17 drown. When I was reflecting about this case, Your
18 Honor, I was thinking, well, you know, when would
19 the lifeguards ever be responsible. That's a fair
20 question to ask. When would they -- when would they
21 be responsible? Well, if there was evidence that
22 the lifeguard saw this person in distress and had
23 time to and opportunity to save that person but
24 couldn't do it because they had bad training or they
25 were not fit or something like that, then you're

1 talking about some evidence.

2 Imagine this, imagine that we're in a
3 setting where there's two people drowning; and guess
4 what, we actually had something of this in this case
5 where a little girl unfortunately was right there
6 clinging to her father, right. But assume that
7 these people are in different areas. The lifeguard
8 can only save, or try to save, one of these people.
9 What about the other one? You're just gonna get
10 sued for that? What about if the lifeguard is
11 spending time trying to help with a safety incident
12 on the beach: Someone has fallen, someone has
13 broken their leg, whatever, they're down there doing
14 that and then someone drowns over here because he's
15 doing this role. The evidence -- and Mr. Thompson
16 pointed this out in his cross-examine of the expert
17 for the plaintiff -- is that lifeguards, putting
18 aside commercial role, lifeguards have many roles
19 that they perform, many different roles. They're
20 not machines just sitting and looking at the water.
21 That is not reality; that's not what they do. They
22 sometimes explain the flag system; that's what
23 happened here. Sometimes they have to help someone.
24 They have to break up fights. They have to do these
25 things. They just did not prove proximate cause in

1 the case, Your Honor.

2 Now I'm gonna -- unless Your Honor has a
3 question, I want to move to punitive damages for
4 JNOV. With punitive damages, you not only have to
5 prove those recklessness by clear and convincing
6 evidence, but you've got to show conscious disregard
7 and that has to relate. Again, this conduct that
8 they have to prove has to relate to the injury. You
9 cannot go out and just prove that somebody is, in
10 your opinion, a bad person. That is not proper for
11 punitive damages. The seminal case on this that
12 made this very clear is State Farm v. Campbell,
13 United States Supreme Court, where the U.S. Supreme
14 Court came down and told everybody you can't punish
15 someone for being a disreputable business or
16 anything like that or about their business because
17 they're business. You have to look at the conduct
18 related to the plaintiff, all right, so there
19 they're linking that to what you have to prove.
20 Here you have a lack of evidence that I've already
21 pointed out about proximate cause, and you have no
22 evidence of reckless conduct. Again, lifeguard's at
23 lunch as allowed by law; that is allowed by the
24 franchise agreement. That's something they harped
25 on.

1 There was a posting of a red flag by the
2 lifeguard that was in evidence. That shows -- that
3 is negating a conscious disregard, okay. That's
4 evidence that there wasn't a conscious disregard.
5 There's some evidence that there was a dual role.
6 I'll get into that in a minute, or new trials but
7 mainly, but new role -- I mean, dual role is allowed
8 by law by the franchise agreement, and Your Honor
9 stated this at the beginning of the trial. It is
10 allowed. And so that is not a conscious disregard,
11 the fact that the lifeguards ---

12 THE COURT: No, but there was pretty
13 substantial evidence they had been warned repeatedly
14 by USLA that it was not safe practice. So I guess,
15 you know, if -- if I have a contract that says I can
16 run a ski resort and I've got the right to, you
17 know, let beginners go up a lift that has only
18 expert runs below. I think there's some things that
19 can't negate my duty. You know, I've got a duty to
20 warn those people. Whether it's in the contract or
21 not, I feel like there's some duties that I don't
22 know how you can be a lifeguard service and not
23 perform the essential functions of the job.

24 MR. BROWN: I understand Your Honor's
25 point.

1 THE COURT: 'Cause there was significant
2 evidence that the practice of the dual role was not
3 a safe practice and that they had been repeatedly
4 warned it was not a safe practice.

5 MR. BROWN: Right. And here's the
6 distinction that I'm trying to draw, Your Honor,
7 which I think is critical and it's the linkage of
8 that to this drowning, all right. Mr. McLeod did
9 a -- and Mr. Wilson helped him do this. They did a,
10 you know, they did a very thorough job of trying to
11 show that dual role as a business model is not a
12 good id-- that's not a good idea. That's what they
13 projected to the Court through their witnesses,
14 through their arguments, that it was for profit. It
15 was all about money. It was putting money and
16 business over the people, those kinds of points,
17 which by the way are proper according to the law
18 that I'll hand up in a minute. But the points that
19 they were making, Your Honor, had to do with a
20 generalized attack on dual role. And whether
21 Mr. Brewster or anybody else comes in and says, you
22 know, this is a bad idea what you're doing, they had
23 a legal right to do it under the franchise agreement
24 and by the statute. And Your Honor charged the
25 statute, and Your Honor agreed at the outset of this

1 case that dual role was allowed. In fact, Mr. --
2 Mr. McLeod disagreed with you. And in the beginning
3 of the trial, Your Honor, you said, look, I just
4 don't agree, dual role is allowed. What I think
5 Your Honor was doing was Your Honor was saying --
6 and, of course, you know what you were doing; but I
7 think Your Honor was saying from the transcript,
8 that if you prove that the dual role activity
9 interfered with your function as a lifeguard with
10 respect to Mr. Wolde's drowning, I'm gonna let you
11 come in and prove that, okay. The fact that they
12 generally can do dual role, that doesn't -- that's
13 not a complete defense to them. That's what I
14 thought you were doing. But then the case morphed
15 into general attacks on the dual role system or
16 methodology of business which is improper, and
17 that's where it became a case about the revenues of
18 Lack's Beach Service for not only that day but that
19 month, the month before that, the month after that.
20 None of that, Your Honor, is relevant.

21 I'd like, if I can, to approach. I'd like
22 to approach on this, on this point, 'cause I'm
23 moving over. I'm gonna finish talking for now about
24 JNOV, and I'm gonna move transition because the dual
25 role issue also relates to the new trial ground,

1 Your Honor, that we're making. So if I might
2 approach and hand you -- hand you something.

3 Your Honor, for the record, I'm handing up
4 a transcript, Pages 386 through 392, and they relate
5 to gross sales records. And the cases of Branham v.
6 Ford Motor Company and Sulton v. HealthSouth,
7 Corporation.

8 THE COURT: Okay.

9 MR. BROWN: Your Honor, in the transcript
10 you'll see these are pages relating to the
11 Plaintiff's Exhibit 17 and Plaintiff's Exhibit 18
12 that had to do with general sales records. Stand
13 totals for sales were served for lifeguard stands,
14 and it was over a period of time. Mr. Thompson
15 objected several times and at one point pointing out
16 that these are -- you know, on Page 391 at the top
17 he said, we're talking about stands in July with
18 regard to financials. This occurred in August.
19 And, Your Honor, at the end, Page 392 at the top
20 said, I'm going to let it in because this looks to
21 me like it's limited to July, August, and September
22 of 2018. All right.

23 The -- I feel a little bit like deja vu
24 here because I have had two cases, multimillion
25 dollar verdict cases, Your Honor, where this exact

1 type of evidence was attempted to put in, or was put
2 in; and in both of the cases the court reversed,
3 multimillion dollar jury trials. The Branham case
4 and the Sulton case. Branham was a rollover case
5 resulting in death. The Sulton case was a rehab
6 hospital case involving a very large pressure point
7 ulcer that had developed on an individual, very
8 serious injuries. The Branham case was a
9 30 million-dollar verdict. The Sulton case was a
10 12.5 million-dollar verdict. In both of those
11 cases, Your Honor, the Supreme Court reversed the
12 cases because of this exact type of data coming in;
13 and what the courts said is, they cited to some old
14 Court of Appeals cases. One of them was a case I
15 dealt with years and years ago called Orangeburg
16 Sausage. Another one is a case called Bryant where
17 the Court of Appeals said, it's all right, we think
18 it's within discretion to let in these monthly
19 reports or those types of sales, you know, a monthly
20 basis or daily basis. And the Supreme Court in
21 Branham, Your Honor, stated -- and I handed the
22 cases up and they're highlighted where they stated
23 this. The Supreme Court in Branham said those
24 precedents from the Court of Appeals have not been
25 tested recently, and the Supreme Court proceeded on

1 to say they're not right. The U.S. Supreme Court
2 has come down and the U.S. Supreme Court has said
3 you can't put these kinds of data in, that this type
4 of data -- the only net worth data can come in, not
5 this other type of data.

6 Now Mr. McLeod and maybe Mr. Wilson, I
7 can't remember which, argued to Your Honor that it
8 could come in for some other reason, not to show
9 profit but to show, I think they said feasibility,
10 is, I believe, something they were trying to argue.
11 That same effort was made by Johnny Parker, Your
12 Honor, in the Branham v. Ford Motor Company case.
13 In the Branham v. Ford Motor Company case Johnny
14 Parker argued to the jury that Ford Motor Company
15 valued people -- I mean, valued profits over people,
16 and they wanted to show that by showing how much
17 they paid to their executives. They wanted to show
18 that by showing how much they paid -- they received
19 at a certain month, how much money they received
20 here or there versus the cost of engaging in certain
21 safety product enhancements or changes, and they
22 wanted to show those things. Our court said, no,
23 you cannot not do that. They reversed those cases.
24 It didn't matter how bad they were. It didn't
25 matter how big the verdict was, they reversed on

1 those two cases. And this is the same exact
2 situation, Your Honor. We're gonna go up on this
3 exact same argument if Your Honor doesn't order a
4 new trial yourself on this. We'll be back in front
5 of the court with the same exact problem.

6 Your Honor, another issue I take has to do
7 with the standard of review. If you look at the
8 standard of review section of the Plaintiff's brief,
9 they argue, Your Honor, that the -- this Court's
10 review is very limited and, basically, we're dealing
11 with just any evidence. And let's say, let's see,
12 they say -- Page 3 of their brief. This is their
13 consolidated brief. They say the thirteenth juror
14 doctrine allows the trial court to grant a new trial
15 absolute only if the court finds the evidence does
16 not justify the verdict. Same paragraph, the very
17 next sentence, a new trial is only warranted in
18 extraordinary cases where a verdict is shockingly
19 disproportioned to the injuries suffered. This is a
20 misstatement under standard of review, Your Honor.
21 It's completely wrong, and I will show it to you, if
22 Your Honor please, the -- I'd like to hand up --
23 well, I'll just, instead of bothering you with this
24 I'm just gonna cite it from here. I can hand the
25 cases up if Your Honor wants you -- wants me to.

1 But in the -- in the cases pretty well known, Gamble
2 v. Stevenson, the court held -- let's see if I have
3 got the right one. Okay. McAlhaney v. McElveen
4 which is a case from the Court of Appeals 413299
5 states clearly that when Your Honor is conducting a
6 due process review of punitive damages, it is to be
7 de novo. You don't give deference to the jury.
8 It's de novo.

9 THE COURT: Well, are you talking about
10 the new trial standard, or are you talking about
11 punitive -- the review of punitive damages standard?

12 MR. BROWN: Well, I'm talking about new
13 trial as it relates to punitive damages at this
14 moment. That the court in considering the punitive
15 damages is to do it on a de novo basis when due
16 process is raised, which is what that McAlhaney case
17 says. And the Gamble v. Stevenson case, which I
18 started to cite, says if the trial judge is
19 convinced that the amount awarded is over liberal,
20 she has the authority and corresponding duty --
21 underlined. This is italicized by the court, duty
22 to reduce the verdict, okay, so that's about
23 reduction. But you don't need to find that the
24 verdict was shockingly disproportionate to order a
25 new trial and, in fact, you're supposed to not be

1 deferring to the jury when you're conducting the
2 punitive damages reviewed, Your Honor. You're
3 supposed to be doing a de novo review. So one of
4 the things that we brought up in our Rule 59 motion
5 regarding Your Honor punitive damages order is that
6 you said in one of the places in that order that --
7 you said, I charged the jury that they are not
8 supposed to effectuate an economic bankruptcy, and I
9 know that insurance, the amount of insurance and the
10 negative net worth is put in front of the juries.
11 Presumably they considered those things. That is
12 not the, with all due respect, the proper standard
13 review the Court should have given to them. The
14 Court is supposed to de novo look at that and say, I
15 know that these factors -- that if I'd been on the
16 jury, which I'm about to get to in a minute, the
17 Court is supposed to look at it, in my opinion and
18 say, if I had been on the jury I would never have
19 put 7 million-dollars down for punitive damages when
20 the maximum insurance was 3 million and there's a
21 negative net worth number. And, Your Honor, the
22 reason I say put yourself on the jury in that manner
23 is because we have made a motion for a new trial
24 based on the Thirteenth Juror Doctrine.

25 And, Your Honor, in this case gross

1 revenues were admitted over objection which I
2 pointed out. There was an improper impeachment of
3 Mr. Lack based on this 1994 legal proceeding in
4 front of the ALJ, and Your Honor instinctively knew
5 that that was something Mr. McLeod should not be
6 allowed to do. When I was reading through the
7 transcript Your Honor said, wait a minute, I'm not
8 gonna let you get into the 1994 administrative law
9 judge proceeding; and Mr. McLeod said, let me try to
10 impeach him, let me lay the right foundation. And
11 Your Honor said, well, you know, if you can somehow
12 lay a foundation, I'll let you do it. The
13 foundation he laid was not correct to allow for that
14 to be used as impeachment, Your Honor. What
15 Mr. Lack said -- and I went back and looked at it
16 very carefully. He was asked about performance of
17 duties by Mr. McLeod. Do the lifeguards at Lack's
18 -- and he was talking not about lifeguard only I
19 guess, it wasn't clear from the question but, do the
20 lifeguards at Lack's 100-percent perform lifeguard
21 services all the time, 100-percent of the time.
22 Mr. Lack said they have a responsibility to be a
23 lifeguard. That was his word, a responsibility. He
24 did not pick up on Mr. McLeod's did you perform at
25 100-percent. So when Mr. McLeod comes in, he then

1 uses the ALJ filing, which I think was not even for
2 this company, to impeach this thing that Mr. Lack
3 never even said. Mr. McLeod's question was rounded
4 in performance of lifeguard work. Mr. Lack's answer
5 was responsibility for lifeguard protection and then
6 Mr. McLeod, quote, impeached him on -- on that,
7 which was not proper.

8 Your Honor, I'm gonna talk about something
9 that the jury did here. This also has to do with
10 new trial, and then I'll circle back to the
11 thirteenth juror in a minute as the overall standard
12 that we would urge Your Honor to use. The jury
13 improperly used the mortality tables and did not
14 follow Your Honor's instructions on use of mortality
15 tables. Interestingly, Mr. McLeod in his closing
16 argument made it very clear himself to the jury what
17 the mortality tables were for; they were for
18 wrongful death. He made that clear in his closing.
19 Your Honor made it very clear in your charges that
20 that's what it was for. The jury came out with this
21 question, as Your Honor will recall, of confusion
22 saying, are we supposed to use the 8.1 million with
23 the thing -- I mean, they -- they were trying to mix
24 the court and Mr. McLeod together somehow about the
25 mortality tables, and Your Honor recharged them a

1 second time about the mortality tables and their
2 proper use, and what did the jury do? The jury came
3 back with 3.73 million-dollars for survival. Where
4 in the world did they get 3.73 million-dollars.
5 There's only one place, and that's the mortality
6 table. It's the only place they could have possibly
7 gotten it from, which Your Honor read to them was
8 37.3 years. They took those mortality tables
9 against Your Honor's instructions and they got
10 confused. They were already showing you they were
11 confused. Your Honor recharged them and they still
12 messed it up, and they put it -- and it's not
13 Mr. McLeod's fault; it's the jury's fault. He even
14 argued that it wasn't right, you know, that he
15 argued that the wrongful damages were correct use of
16 mortality tables. But the jury came back and found
17 that -- imported for survival.

18 And, Your Honor, there are some cases if I
19 can put my hands on them; but there's some cases,
20 Your Honor, where the court has come out and said,
21 you know, generally you don't parse verdicts and you
22 don't question verdicts. But when it's incredibly
23 obvious what they've done, you can look at that.
24 And in this case, here's a case called *Waring v.*
25 *Johnson*, all right, overruled on other grounds. And

1 I can hand this case to Your Honor, if you'd like.

2 THE COURT: Sure.

3 MR. BROWN: Okay. The jury returned a
4 verdict in that case of \$23,237.28, and the -- there
5 was an issue about attitude in that case. The trial
6 judge said, you know, you didn't award anything for
7 pain and suffering, I mean, you gave them the
8 medical bills. And the defendant in that case said,
9 well, wait a minute, that jury verdict might have
10 been part, partly medical bills and partly pain and
11 suffering. Well, it could have been, maybe, but the
12 court did not throw its common sense totally out the
13 window. It said that is an untenable suggestion
14 that's what the jury did. They awarded the exact
15 amount. That's what they did. So it's clear they
16 didn't give anything but the medical bills. You can
17 make a hypothetical argument that they really did
18 all these other things and somehow by wild
19 coincidence the jury came back in this case and
20 awarded 3.73 million in survival damages just by
21 total coincidence that matches with \$100,000 a year
22 for his life expectancy. That's just -- just a
23 total coincidence.

24 Your Honor, I would suggest this Waring
25 case says, no, you don't throw your common sense out

1 and you look at that and you -- you say that's
2 what -- you call it for what it really is. It's an,
3 in this case, improper use of mortality tables on
4 the survival claim. Same thing, Your Honor, in
5 Williams v. Gilchrist Corporation, same thing. The
6 jury returned a verdict in the amount of \$170,590.
7 Attitude was a issue because the economic losses
8 suffered by the deceased beneficiaries was shown to
9 be 170,590 -- \$170,590. The funeral bill was shown
10 to be 4,972. Here's the argument the defendant made
11 in that case. Very similar what I think you're
12 gonna here at the end. He said, we reject the
13 defendant's argument that the jury simply reduced
14 the amount of economic loss and then added the
15 funeral bill. We hold although this is possible, it
16 is most improbable and highly conjectural, all
17 right. So they said the attitude was proper in that
18 case because that's what -- they could tell that's
19 what the jury did. And that's what they did here,
20 Your Honor, is they improperly used the mortality
21 tables. Supposed to be for wrongful death, they
22 used them for survival by taking the mortality table
23 years, 37.3 years, and multiplying by \$100,000 a
24 year. That's how they came up with their verdict.
25 That's what they had to do. There's zero evidence

1 of any other way they could get that number. So
2 that was a failure of the jury, Your Honor, to
3 follow the Court's instructions.

4 The Court did not follow -- I already
5 covered court [sic] didn't follow Your Honor's
6 instruction with regard to punitive damages. They
7 threw 7 million-dollars on top of evidence of
8 negative net worth and only 3 million in insurance
9 coverage. That's not following your instructions.
10 Your Honor instructed them they couldn't award fear
11 damages as well. And even assuming -- and I don't
12 mean to take -- I am not trying diminish what
13 happened with Mr. Wolde in any way. It was a
14 terrible thing to happen, but they can't get
15 recovery for him swimming in the ocean or treading
16 water. They cannot get recovery for that. They
17 cannot get recovery for fear because Your Honor told
18 the jury they can't, okay, and I'm talking about
19 survival claim again. The only thing they can get
20 recovery for would be conscious pain and suffering
21 during the drowning process, and that's if they
22 could show proximate cause from something Lack's did
23 or omitted to do that could have stopped this, all
24 right, which they didn't prove.

25 Your Honor, we cited in our briefing that

1 courts that are permitted conscious pain and
2 suffering on drowning cases have always put in
3 experts to show what the drowning process feels like
4 if you're unconscious, okay. So it's conscious pain
5 and suffering. If you're unconscious when you
6 drown, you don't have any feeling for it. You can't
7 recover for fear that I'm going to drown because
8 Your Honor charged them they can't do that. So
9 it's -- did they prove that at all? And we would
10 say they didn't, which would be JNOV, if you find
11 they didn't; but at a minimum, you've got this
12 3.73 million-dollar survival claim on, on really no
13 evidence. Mr. McLeod and Wilson, they put a
14 Wikipedia page in to the court about water boarding.
15 Well, that wasn't discussed in trial. They're
16 trying to persuade you that drowning has to be, you
17 know, really, really terrible. I'm sure it is, but
18 in some settings. In some settings it's not; it
19 just depends on what happened, how did this event
20 occur. And there wasn't evidence, I will grant,
21 there was not evidence that Mr. Wolde had a heart
22 attack or something like that. But there was also
23 equally not evidence that he -- of how long he
24 struggled in the water or whether he ---

25 THE COURT: Well, we did have the

1 children's testimony about what took place, which
2 was pretty compelling about what he went through as
3 he was struggling.

4 MR. BROWN: So let me address -- thank
5 you, Your Honor, for that question. I want to
6 address the two children to talk about this. So
7 Adam testified that they got into a rip current and,
8 ultimately, he was able to figure out a way to swim
9 out of it, okay. He testified that they were
10 yelling. All three of them were yelling. He did
11 testify to that. And he did testify that there --
12 that they were waving their arms, all right. Wubit
13 testified that they were not waving their arms. He
14 did not recall. She said, I was holding on to my
15 dad, he wasn't waving his arms, all right. There
16 wasn't any testimony about waving arms. She did say
17 they were yelling. When asked about how long, the
18 only thing you have, the only thing you have here,
19 is Wubet saying a long time. What does that mean?
20 I think there was a statement that I'm trying to
21 give, you know, as much credit as I can to the
22 record here. I think there was a guess of twenty
23 times that Mr. Wolde might have yelled. Now think
24 about this, Your Honor. He's out at the -- in the
25 ocean in deeper water, all right. Even if he is

1 yelling for twenty times, what is the evidence that
2 a Lack's lifeguard should have heard it?

3 THE COURT: I mean, right now we're just
4 talking about the evidence of his drowning.

5 MR. BROWN: Right. Right, Your Honor.
6 But in terms of should have heard and been able to
7 respond to the drowning, and I'm sorry I'm skipping
8 around on you some, so let me make sure I'm
9 addressing your question. The evidence on the pain
10 and suffering is what you were asking about, I
11 think, Your Honor. So Wubit testified that he was
12 struggling, going under the water and would come
13 back up, take a breath of air, and yell. And she
14 did not say how long that was. There was a 10 to
15 15-minute reference in the trial that a different
16 lawyer, not -- I don't think -- I think it was
17 Mr. Pratt -- asked Wubit about. But his question
18 was, how long was it between when your trouble
19 started and when Mr. Wolde ended up at the beach,
20 you know, having been brought back in. She said 10
21 to 15-minutes; Wubit did. And then he followed up
22 with that, is that your best guess? She said yes.
23 I mean, this is literally a guess, which, you know,
24 is not evidence anyway but; but that's what she said
25 and that's encompassing the entirety of the time so.

1 But I'm talking about how long did it take for
2 Mr. Wolde to drown? No one knows. No one knows.
3 There's no evidence of it. There's evidence of him
4 ---

5 THE COURT: I mean, we heard testimony
6 that her best guess was 20 minutes is evidence.

7 MR. BROWN: No, her best guess of how long
8 it took -- and let me try to be clear on this, Your
9 Honor. Her best guess was 10 to 15-minutes of time
10 between when they first got in trouble and when
11 Mr. Wolde ended up all the way on the beach. Now
12 when people went out waist deep to retrieve
13 Mr. Wolde from the water, he was already drowned.

14 THE COURT: I understand, but she
15 testified ---

16 MR. BROWN: Already unconscious.

17 THE COURT: ---he went under, yelled 20
18 times, it was 10 to 15 minutes for the whole thing.
19 When would you ever have, I'm drowning, let me start
20 my stopwatch and let me tell exactly how long my
21 father is, you know, in the process of drowning when
22 she's a kid.

23 MR. BROWN: Right.

24 THE COURT: But her testimony of the
25 process is some evidence of what happened out there;

1 is it not?

2 MR. BROWN: I think, sure. I totally
3 agree with Your Honor that this is a child, and
4 she's giving her best estimate and she said it was
5 a, quote, long time. But they have to prove not
6 only whatever that means, Your Honor, but they have
7 to prove that the Lack's lifeguards had enough time
8 had they -- first of all, they have to prove they
9 could have seen or heard this. Then they have to
10 prove they had enough time to get to him, all right,
11 for proximate cause purposes. On pain and
12 suffering, she talked about him going up out of the
13 water and then going back down under water. There
14 really wasn't any evidence of, you know, him
15 having -- screaming out in pain or something. He
16 was yelling for help, okay, but Your Honor charged
17 the jury that there's no fear, you can't award fear
18 damage, so it's -- and that's what the charge was.
19 And so, Your Honor, we just -- had they put in an
20 expert that says in every case where somebody is
21 conscious at one point and then drowns, this is the
22 physiological process that someone goes through,
23 they do experience pain, and -- that's what the
24 other cases and we cited those in our brief, that's
25 what they had. And the court said, well, yeah,

1 we'll let that go in. Here, they didn't have that.
2 So, Your Honor, I want to point out that -- and I
3 alluded this earlier. Mr. McLeod made an argument
4 in his closing about the light side of the moon and
5 the dark side of the moon. I mean, I think even
6 Your Honor would have probably stood up and objected
7 if he said, now there's good and then there's evil,
8 okay. If he had done that, I think even Your Honor
9 would have said, all right, I'm gonna blow a
10 whistle, we'll all have to leave now and start this
11 over. Instead, he used dark side of the moon, light
12 side of the moon. Regardless of his terminology,
13 Your Honor, this became an attack on Mr. Lack and I
14 pointed that out earlier that the Supreme Court has
15 forbidden punitive damages for that type of thing.
16 You can't attack the person. And he tried to do it
17 by saying that Mr. Lack bamboozled Chris Brewster of
18 the USLA about what lifeguards are doing. Well,
19 what does that have to do with Mr. Wolde drowning
20 incident? It doesn't have anything to do with it;
21 it's not proximately related to that. It's just an
22 effort by Plaintiff's counsel to paint Mr. Lack as
23 being on the dark side of the moon; that's what it
24 was. They -- there was an allegation that Mr. Lack
25 lied to the United States government about the visa

1 applications in these lifeguards. That's not have
2 anything to do with Mr. Wolde's drowning. You know,
3 if they could say, if they could prove that -- well,
4 it does and here's how. Because this person
5 training in a swimming pool in Poland and when he
6 came over here he saw the drowning incident, but
7 because he wasn't trained in ocean swimming, he
8 couldn't make it to the drowner. All right, if they
9 proved all that, yes, we might have an issue. They
10 did not prove any of that, none. They -- they also
11 even implied that the City of Myrtle Beach was
12 somehow bamboozled by Mr. Lack, that he, you know,
13 led them to believe that he was doing something
14 different than he was doing. And Mr. McLeod has
15 consistently, I mean, I give him credit for being
16 very consistent on this. He has repeatedly
17 disagreed with the Court that the franchise
18 agreement allows for dual role. He thinks it does
19 not allow for dual role. Mr. Thompson made an
20 excellent point it's got to be right that, well,
21 what does lifeguard only mean. I mean, the
22 agreement talks about lifeguard only in several
23 places so it has to mean dual role; and so Your
24 Honor even said that, yeah, it does allow dual role,
25 at the beginning of the trial. And, Your Honor,

1 even if somehow it's ambiguous, guess what? The two
2 parties to the agreement -- the City and Lack --
3 both came into court and said it wasn't me. They
4 said dual role was allowed. So even if somehow
5 there's any ambiguity about it, the two parties that
6 entered into the agreement came into court and
7 stated their intent. So if you wanted to know what
8 was the intent of this contract, Your Honor had the
9 only evidence that it could have been, which was the
10 two parties talking about it.

11 And then finally, Your Honor, on this
12 before I move to the thirteenth juror standard that
13 I want Your Honor to please focus on, I'd like to
14 talk about the bifurcation of the trial. Your
15 Honor's instinct when the bifurcation issue came up
16 was right on point in my opinion. Your Honor said,
17 you know, looking at this it looks like recklessness
18 is supposed to be in the second phase. That's what
19 Your Honor said. Mr. McLeod changed Your Honor's
20 mind and said, no, it's really supposed to be in the
21 first phase. Well, Your Honor was correct, finding
22 of recklessness is supposed to be in the second
23 stage. Mr. Thompson didn't say that to you; but
24 what Mr. Thompson did ask for, was he said, Your
25 Honor, you need to charge the jury why they are

1 finding recklessness in the first phase and explain
2 to them what they are doing finding recklessness or
3 not recklessness, what does this mean, you need to
4 tell them so that they understand there's gonna be
5 another phase if they find it, all right.
6 Mr. McLeod didn't like that. I understand why he
7 didn't like it because he thought, well, the jury
8 might be tired, they may just want to quit and they
9 might not want another phase. But Mr. Thompson
10 asked Your Honor to do that and Your Honor decided
11 not to; and we think, Your Honor, that was an error
12 because here's the problem. You've got a jury
13 making this arbitrary ruling. You know, they're
14 just asked this question: Do you find that Lack's
15 was reckless? All right. Well, this is just
16 arbitrary question with, no, there's no context, why
17 are we even asked this question. And then they put
18 this big number on the first phase,
19 13.73 million-dollars is what they come up with. We
20 submit, Your Honor, that contained punitive damages
21 inside it already, which is exactly the reason Mr.
22 Thompson wanted you to give the charge that, hey,
23 now, you're gonna have another phase to deal with
24 punitive damages, but he didn't get that charge that
25 he asked for. And the Court will remember that when

1 the jury came back because you're trying to get out
2 of town and go to Italy I think you were headed out.
3 I hope that was fun; I've never been. But the Court
4 said, when the jury came back said, you know, quote,
5 this may seem like a mean trick, quote, but you're
6 gonna have to come in and have another proceeding.
7 In other words, the Court understood the jury might
8 have been surprised by this, that they're gonna have
9 to come back and do even more deliberating on this.
10 So we think that was also an error and we assert
11 that, Your Honor.

12 And so summing up on this new trial issue,
13 we're -- we are -- I am urging you to exercise power
14 that only you have. You're the only person that has
15 this power. The appellate courts have no power to
16 do this, and that is to become the thirteenth juror
17 in the case. The -- I've had one judge do this.
18 Other judges have done it. I've had them do it.
19 I've had one do it in a multimillion dollar case.
20 What Your Honor -- what I'm asking Your Honor to do
21 is if imagine you were sitting on that jury, you
22 would not have allowed them to be confused about the
23 mortality tables, you would not have allowed them to
24 put 7 million-dollars down in a box for punitive
25 damages with the evidence in front of the court.

1 You would not have allowed them to put
2 3.73 million-dollars in the survival box. You
3 wouldn't have allowed them to do anything because it
4 doesn't make any sense with the facts. And Your
5 Honor has the unique power in our state under the
6 Thirteenth Juror Doctrine to sit now, if we make the
7 motion which we did make, as that juror you're
8 allowed to sit as that juror as if you were sitting
9 in that jury room and you can say, you know what, if
10 this is what you're gonna do, I'm not going to
11 agree, and it becomes a hung jury. That is exactly
12 what you should do. A new trial would be ordered.
13 If Your Honor says, I disagree with the verdict on
14 the facts, Your Honor will not be reversed.

15 It was interesting, Your Honor, when I
16 read the closing of Mr. McLeod, he told the jury,
17 which I was kind of surprised that he told them
18 this, but I mean, it worked so. He said, your
19 verdict will stand, is what he told the jury.
20 That's before Your Honor had a chance to hear any
21 posttrial motions so that's somewhat presumptuous by
22 him but. He got them to put a big number on both
23 actual and punitive damages. Your Honor's
24 thirteenth juror ruling will, in fact, stand if
25 that's what Your Honor does because the cases are

1 abundantly clear that if the court disagrees on the
2 facts and that's all you say, I grant thirteenth
3 juror new trial absolute, I disagree on the facts on
4 this verdict, that is it, it is ballgame over. They
5 are not going to be able to reverse that under any
6 circumstances, Your Honor. So we would urge you to
7 do that. Now, if you say I'm not gonna do that,
8 that's your discretion; you don't have to. I'm not
9 telling you it's a -- would be an error for you to
10 say, no, I'm not gonna use my power. It's just a
11 power that belongs to just you, and we would ask
12 that you use it because of how important it is. If
13 you don't use it, Your Honor, we're entitled to JNOV
14 and new trial anyway because of all of these errors
15 that I've been going through. And so then you would
16 have to -- we would prepare an order that would say
17 here's why I'm issuing a new trial, this happened,
18 the jury disregarded my instructions, this happened,
19 that's happened, this happened, all those things;
20 but Your Honor has to put one sentence down for a
21 Thirteenth Juror Doctrine and that's the end of it,
22 okay.

23 So I would like to move on now to the
24 motion for conditional reduction unless Your Honor
25 has questions or unless Your Honor wants to hear

1 what the other side says about any-- anything I've
2 said. I don't know how Your Honor pleases. I'll do
3 whatever you want.

4 THE COURT: So let's just press forward
5 please.

6 MR. BROWN: Press forward, yes. The
7 motion for conditional reduction, Your Honor, is an
8 argument we have. This is a very unusual situation,
9 Your Honor, where -- you know, I've got a place down
10 at Litchfield Beach. There are not any lifeguards,
11 nobody. They just go out there and swim. There's
12 nobody out there. You don't have to have any.
13 State law makes it clear you don't have to have any
14 if you're Myrtle Beach, or you can choose to have
15 them if you want to have them. So Myrtle Beach
16 choose to have them because, I guess, tourism. They
17 want to, you know, people might feel better or
18 whatever. But the lifeguards aren't guarantors of
19 safety, we know that. No one is gonna stand up and
20 tell you that they are, no one. Even Mr. McLeod
21 will not say that.

22 Myrtle Beach is empowered by state law to
23 either not have lifeguards or have them; and if they
24 choose to have them, they have a choice by state
25 law. They can say we're going to employ our own

1 employees as lifeguards, all right. That's one of
2 the choices they can do. Had they done that, guess
3 what? This whole case would be out already on
4 summary judgment with the -- along with the rest of
5 the case that you threw out against the City of
6 Myrtle Beach, correctly I think. That would be the
7 end of it, all right. What the statute allows
8 Myrtle Beach to do, however, is they can enter into
9 a franchise agreement. Instead of employing their
10 own lifeguards, they can enter into a franchise
11 agreement with a private company.

12 THE COURT: Well, and I guess I'm -- I
13 disagree with you a little bit. I think that Myrtle
14 Beach has hired this company because they just
15 don't -- they don't want tourists to just feel
16 better, they also don't want them to drown.

17 MR. BROWN: Well, ---

18 THE COURT: I mean, I can be as cynical as
19 the next person, but I think they actually want the
20 people to not drown and not just feel good about the
21 fact that they might not drown.

22 MR. BROWN: Fair enough. I think that's
23 ---

24 THE COURT: We're pulling hairs a little,
25 but I'd like to think that they really want for

1 people to not drown.

2 MR. BROWN: You know what, you're right,
3 and I'm totally wrong about that. I totally agree
4 with you that is what they want. Nobody wants
5 anybody to drown, I agree. So I misstated my point
6 there. The -- but I do not think I misstated the
7 point that the lifeguards are not guarantors for
8 safety.

9 THE COURT: Sure.

10 MR. BROWN: They're not. And the ocean is
11 a rough place, it just is. I mean, there's
12 jellyfish. There's all kinds of stuff in the ocean.
13 Nevertheless, many people, including myself, go in
14 there as much as I possibly can find time to do,
15 right. And here we have Myrtle Beach deciding they
16 are gonna have lifeguards. They are not gonna use
17 their own employees; and instead, they're going to
18 use private company's employees. How are they
19 supposed to do that? Under state law it tells you
20 how. You have a franchise agreement and the state
21 law permits them to enter into this exclusive
22 arrangement, which they did with Lack's.

23 Now, there's -- the statute, Your Honor,
24 the statute gives Myrtle Beach the -- if I were to
25 do that, it's 5-7-145 I think. Yeah, that's it.

1 And then there's another thing that I haven't gotten
2 to yet, but this -- this plays along with this
3 motion, and I include it by reference into the prior
4 motions, is this idea of closing the water, all
5 right, which Mr. McLeod got up in his closing
6 argument and said everything stops and starts with
7 they didn't close the water. And he -- he made that
8 statement twice in the closing argument. It stops
9 and starts there; they didn't close the water. Now
10 where did they get the power to close the water,
11 allegedly? I can't, you know, I've got the house in
12 Litchfield. I cannot walk out on the beach and just
13 close the water down. I mean, I don't have any
14 authority to do that. The only way the lifeguards
15 have any authority to do that is they were given the
16 authority by ordinance, all right, which came from a
17 statute so the statute gives the regulatory power to
18 the City and the City gives it over to Lack's Beach
19 Service. Under those circumstances, Your Honor, we
20 have argued that there should be derivative
21 sovereign immunity for Lack's so.

22 And what we are arguing, Your Honor, on
23 this is that the -- the Tort Claims Act specifically
24 applies to governmental entities, their employees,
25 and also agents, okay, so it's not just employees

1 but also agents. And we have argued that at
2 absolute minimum, if Your Honor doesn't throw this
3 case out and order a new trial, which we suggest you
4 should, or grant JNOV, you should apply the tort
5 claims caps to the recoveries in this case and say
6 this here, the State has power over the beach, the
7 state gave the power to the City of Myrtle Beach and
8 all the other coastal cities along the beach. The
9 City in turn delegated certain of those powers to
10 Lack's; and in that setting, when they're doing
11 something within their discretion, close or don't
12 close the water, they are only doing that pursuant
13 to that power. That's it. They have no other duty
14 to do that, all right. And when that happens, Your
15 Honor, the Tort Claims Act should apply, and so the
16 limits -- the limits would absolutely apply. They
17 made the argument that, well, we waive this because
18 nobody raised that issue before. Your Honor, these
19 are cap limits. They aren't liability questions.
20 They aren't affirmative defenses. In the case of
21 Garrison v. Target, the Supreme Court came out and
22 corrected the Court of Appeals on punitive damages
23 caps and said, no, you don't have to plead these
24 caps. And in that very case, they cited to a case
25 called Parker which dealt with the tort claims caps.

1 They actually cited to that case. So we don't have
2 to raise the caps in a defense. Even if we did
3 somehow have to raise any of these defenses, Your
4 Honor, we hereby move under Rule 15(b) to amend the
5 Answer to conform to the evidence to include those
6 defenses.

7 This case was tried by Plaintiff's counsel
8 in every way you can think of directly attacking the
9 franchise arrangement: The dual role arrangement,
10 you didn't close the beach right, you didn't do the
11 franchise, you know, you shouldn't have done dual
12 role, here's the monthly sales, that's wrong, all of
13 the -- you can't take your eyes off the water to do
14 a transaction, all of those things. All of that was
15 tried in the case, and therefore, under Rule 15(b),
16 we should be allowed to assert these defenses. That
17 would include, Your Honor, we would ask that the
18 public duty rule also be included. Your Honor
19 stated at the very beginning of the trial that they
20 weren't asserting a public duty. A public duty is
21 what Your Honor stated. They ended up asserting
22 public duties. That's what they -- they did. The
23 closing of the beach only comes from the ordinance,
24 the public duty. And Your Honor is aware the public
25 duty rule states that if there's a duty owed to the

1 general public, that doesn't give an individual a
2 right to bring a claim. So I looked at the Answer
3 of Lack Beach Service to see, did they raise failure
4 to state a claim. Yes, they did. Did they deny a
5 duty to Mr. Wolde? They did. They did deny a duty.
6 So I'm hereby asking you to also apply that defense.

7 With regard to closure of the water,
8 there's only one possible duty, Your Honor, only
9 one, and it comes from the public duty, the
10 ordinance duty; and that is a discretionary duty,
11 completely discretionary of the lifeguards. They
12 can close it or not close it. Imagine if, Your
13 Honor, anyone who drowned or had any kind of problem
14 in the ocean could sue the beach lifeguard service
15 for not closing the water at that time. Think about
16 all the possibilities: Somebody is horse playing
17 too much, somebody's -- it's too crowded or there
18 might be a thunderstorm. All, whatever you can come
19 up with, there are jellyfish. If they can be sued
20 every time they don't close the beach, pretty soon
21 you're not gonna have Myrtle Beach period because
22 they will be having to close the beach all over the
23 place all the time. That is not something they are
24 required to do. They have a discretion, and it's
25 only a public duty to the generalized public. It's

1 not a duty directed to Mr. Wolde as an individual.

2 So, Your Honor, the last thing we would
3 argue on this, I think we pointed out our issues on
4 the Court's punitive damages order that it didn't
5 consider certain things under the right standard of
6 review with all due respect, Your Honor, and that it
7 didn't also consider certain of the statutory
8 factors that are listed, such as the -- one of the
9 statutory factors has to do with the -- whether the
10 injured person had any, anything to do with the
11 injury, okay. It's not asking was the injured
12 person negligent; it doesn't say that. It says did
13 they cause anything in part. It doesn't say if they
14 were negligent. It said did they cause anything;
15 that's one of the factors. We would say there's
16 evidence that they did, that they did, because their
17 family rule is you don't get out past some -- I
18 think, I can't remember what exactly the words were,
19 but it's very low level and they went out into the
20 water anyway beyond that level. And so we would say
21 that that should have been factored in.

22 So that leaves the new trial nisi
23 remitter, Your Honor, and I've already said you have
24 a duty by law -- a duty, not a discretion. It's a
25 duty to reduce the punitive damages if you find them

1 to be overly liberal under the Gamble case and by
2 statute because there is no basis for the
3 3.73 million-dollar survival award at all in our
4 view. You should remit that to zero. But if you do
5 find that there was some evidence of conscious pain
6 and suffering, then you should at a minimum
7 dramatically reduce that, dramatically reduce that.
8 That was based on mortality tables, Your Honor, and
9 you should dramatically reduce it. And then the --
10 as we briefed -- and I won't go through this, but as
11 we briefed, the 10 million-dollar wrongful death is
12 also overly liberal, unduly liberal, and we pointed
13 out the comparative cases.

14 And, Your Honor, the remittitur power of
15 the Court here can be viewed as almost like a -- in
16 some ways as a settlement overture from the court.
17 If the Court doesn't grant a new trial absolute and
18 the Court doesn't grant JNOV which we say you
19 should, you can cut this in various ways. You can
20 get rid of the punitive damages entirely. You can
21 reduce the survival down, way down. You can reduce
22 the wrongful death down and put a number there. We
23 would suggest it should be -- you know, if you
24 reduce -- we would suggest there's no basis for
25 punitive damages or survival. If survival at all,

1 it should be very minimal. Wrongful death, you
2 know, put it at the insurance amount if you want to,
3 Your Honor, but. They proved wrongful death
4 damages. I will not contest that they proved
5 wrongful death damages.

6 That leaves, Your Honor, the motion to
7 stay execution, which we filed, is the only other
8 motion I think we have. Then they have their motion
9 to appoint a receiver. The motion to stay
10 execution, Your Honor, is something that I have,
11 frankly, not had to do. I'm 59-years old; I've been
12 doing this a long time. And most of the time when
13 the court is gonna look at whether to reduce or get
14 rid of parts of verdicts and things, we don't have
15 to file a motion to stay execution. If he tries to
16 execute on property, he's supposed to post a two
17 times bond, I think, himself to try to execute on
18 the property. But nevertheless, they made overtures
19 like they were gonna try to go execute on Mr. Lack's
20 business and so we made this motion to stay. And
21 what we're saying, Your Honor, is, don't let them go
22 try to shut down Lack's business while you're
23 considering this. If Your Honor wants us to post a
24 bond, we will post a bond; and I'll get into what
25 the alternative bonds are in just a second. But,

1 Your Honor, I want to make this point and I don't
2 know that I've said this to Mr. McLeod either, and
3 I'm not threatening. I'm not threatening in any
4 way; I'm just making a statement of facts. Bond
5 premiums, so the amount of money that the insurance
6 company has to pay for a bond premium to post a bond
7 is a taxable cost if we win on appeal. It is a
8 taxable cost. And they're gonna say, well, so what,
9 Mr. Wolde is deceased and life doesn't have any
10 money. No, but if we win on appeal and they got a
11 new claim, all this premium cost is gonna be a
12 setoff against whatever they do, okay, in another
13 trial, if they have another trial. So I would urge
14 they just drop this because -- and most of the time
15 I've not had to do any of this, post bonds; and it
16 is a waste of money, Your Honor. The bond is a
17 waste of money. You're paying money to another
18 company to stand up for this company to pay the
19 judgment, and it's just premium money that goes in a
20 hole. No one gets any benefit from it so. We would
21 ask that Your Honor consider those things in
22 determining bonds; but if you are gonna require a
23 bond and if the Plaintiffs are gonna insist on us
24 paying for one, you should be guided by 18-9-130.
25 That is the statute, Your Honor, that has to do with

1 appeal bonds. 18-9-130. And it says that any
2 business entity which has a revenue less than
3 5 million-dollars of a previous year is allowed to
4 post a 1 million-dollar bond and that will stay off
5 -- that will stay execution efforts. Your Honor,
6 the -- and that's the maximum bond.

7 Now why would the legislature decide this
8 in public policy. For the very reason that because
9 of situations like this, that's exactly why that
10 statute exists. Situation just like this where
11 there's a relatively small business and there's this
12 massive verdict, if you make the small business post
13 some huge, huge bond, they can't; so the legislature
14 stepped in, realized that is ridiculous situation,
15 we should not -- we should not require that, and
16 they passed 18-9-130 which says that
17 1 million-dollars is the maximum amount.

18 They have moved for a receiver to be
19 appointed which is somewhat ironic because one of
20 the things they're arguing is that there's imminent
21 insolvency. And I, I won't do the whole receiver
22 thing because we -- Mr. McLeod's motion, but I will
23 say that is ironic because the Court charged this
24 jury don't, you know, you need to really think about
25 not effecting an economic bankruptcy with your

1 verdict. And here we are with Mr. McLeod making a
2 motion to appoint a receiver because of imminent
3 insolvency? From what? This verdict. That is the
4 only thing you've pointed at.

5 So, Your Honor, we would say that what you
6 should do, with all due respect is, just enter a
7 stay, period, and don't even ask for a bond or
8 require the 1 million-dollar bond. We filed a
9 supplemental brief last night because we noticed
10 something in the receivership statute that says that
11 a receiver can't be appointed if the other -- the
12 party for whom receivership is asked for, posts a
13 bond of two times the amount of the property. So we
14 went and looked at the exhibit that has the balance
15 sheet that came in, Your Honor, in the trial. And
16 even if you do that, it's 2.something billion. I
17 can't remember the exact number, Your Honor, but I
18 can get -- I can get it to you. I think it's in our
19 papers. But, you know, if we have to post that
20 bond, we'll post that bond; but, I mean, that would
21 just be much bigger premiums cost, again, going to
22 no one, not going to them. It can only be -- work
23 to their detriment if we win the appeal, if we have
24 appeal; hopefully, we don't. Hopefully Your Honor
25 will grant the new trial. But we would ask that you

1 not make us post that bond; but if you want us to,
2 we will post it. And that's -- that's all I've got,
3 Your Honor. I really very much appreciate Your
4 Honor's time and agreeing to hold this in person
5 because it's almost impossible to do this over
6 Webex, so I really appreciate it.

7 THE COURT: It's not ideal.

8 MR. BROWN: Thank you, Your Honor.

9 THE COURT: Thank you.

10 Mr. McLeod.

11 MR. MCLEOD: May it please the Court, Your
12 Honor. First I just wanted to note for the record
13 that Rule 59(f) does allow Your Honor to rule on
14 these motions without the need of oral argument, and
15 certainly Your Honor was within her powers to send
16 us the email informing us that you had denied the
17 motions and asking my office to draft the proposed
18 order. I just wanted to point that out for the
19 Court. That's certainly within your authority, your
20 discretion to do so, Your Honor.

21 THE COURT: Sure. We -- we do that from
22 time to time; and generally, in a case this big, I
23 will -- if the parties request oral argument, I'm
24 happy to do it.

25 MR. MCLEOD: Yes, Your Honor. And I'm

1 gonna try to go through the arguments. I'm gonna
2 try to go pretty much in order; and obviously, Your
3 Honor, if there's something that you have a question
4 about, please let me know, I'm happy to answer any
5 questions the Court had. But let me start by
6 saying, and I mean this with all due respect to
7 Mitch, Mr. Brown, the record simply doesn't agree
8 with most, if not all, of what he just argued to the
9 Court, Your Honor. Everything he just argued to the
10 Court has also already been heard by the Court. And
11 at this juncture of the proceeding, in order for
12 this Court to grant a new trial based upon the
13 admission of evidence, it's their burden to: One,
14 demonstrate that, Your Honor committed legal error
15 by allowing some evidence to be heard by the jury;
16 but two, they have to go the next step and prove
17 that, because the jury heard that evidence, they --
18 that resulted in them being prejudiced in some way,
19 shape, or form. Your Honor, we've cited that in our
20 brief. I think we pointed out the Fields v. J.
21 Haynesworth Builders case.

22 And if you'll recall during the trial,
23 when we got to different evidentiary issues that
24 they objected to, I don't know if you remember me
25 saying, so Your Honor, I'm still trying to

1 understand what is the prejudice? What is it that
2 they don't want the jury to hear? I've shown
3 through a foundation that it's relevant under 401.
4 And the question then becomes, okay, well, yes, it's
5 relevant, it's probative, but it's unfairly
6 prejudicial under 403. That's the traditional way
7 that these trials go. And, for example, on the dual
8 role, their defense in the case is we're allowed to
9 do it, there's nothing wrong with it. Okay. So
10 then what is the prejudice in the jury knowing about
11 dual role. And it just -- it doesn't make any
12 sense. And the problem is, they wanted to try this
13 case where they got to basically say their defense
14 is because I say so. For example, we're allowed to
15 do the dual role. What is the evidence that they're
16 allowed to do the dual role? There was none. There
17 was none. The franchise agreement doesn't say
18 they're allowed to do dual role. Mr. Lack, I went
19 over it with him. I went over it with the City's
20 witness. Mr. Brown said that the meeting of the
21 minds between these two parties testified. Well,
22 the meeting of minds was that they agreed the dual
23 role was not set forth in the contract; but they had
24 a meeting, Mr. Peterson, Mr. Lack, and some other
25 individual, and decided that it was okay. That was

1 what the evidence was in this record, Your Honor.
2 There was no meeting of the minds.

3 If you'll -- if Your Honor will recall,
4 during George Lack's testimony I pointed out lines
5 46 through 49. I went through different sections of
6 the franchise agreement to demonstrate not only does
7 it not say that you're allowed to dual role; but
8 this document clearly intends that lifeguards do
9 lifeguarding and concessions do concessions. At
10 lines 46 through 49 of the franchise agreement --
11 and, Your Honor, I forget what number it went into
12 evidence; I want to say like 22, but I'm not sure.
13 But under the franchise agreement it states,
14 Franchisee may rent beach equipment outside said
15 peer of operation provided, however, that lifeguards
16 must be on duty at all times that beach equipment is
17 on the beach. The franchisee shall provide
18 lifeguards as deemed necessary in consultation with
19 the City." So the franchise agreement says that,
20 yes, you can sell beach concessions after lifeguard
21 hours; but if you do that, you have to make sure a
22 lifeguard is present. So I asked Mr. Lack, "Sir,
23 that's my question. If the lifeguards are allowed
24 to rent umbrellas, why do you have that language
25 requiring lifeguards to be present because he's

1 already there selling umbrellas?" And Mr. Lack's
2 response was, "Sir, I didn't write the contract; the
3 attorney for the City wrote the contract." No
4 witness testified that the franchise agreement
5 allowed them to do dual role.

6 And, in addition, the evidence at trial
7 was that dual role violated the standard of care.
8 At no time has it ever been standard of care in this
9 country that I'm aware of that lifeguards are
10 allowed to perform other responsibilities other than
11 lifeguard services, water observation. Mr. Brewster
12 testified in that. Mr. Brewster was a former head
13 of the USIA, America's premier nonprofit. He works
14 with the CDC in the study that the CDC did, I
15 believe in 2001, that reiterated and that was in
16 evidence through Dr. Rivers' testimony, that
17 lifeguards cannot be assigned any other task other
18 than water observation. And the reason, both
19 Brewster, Dr. Griffith, and a CDC report, is because
20 if they do have competing responsibilities it is
21 foreseeable that drownings will occur. And so the
22 dual role was admissible, one, to prove that, no,
23 you are not allowed to do it. Two, it was
24 admissible to show that they violated the standard
25 of care. And three, was admissible to show for

1 foreseeability.

2 Now the only way they would have a
3 legitimate argument on the dual role is if, for
4 example, there was testimony in the case that the
5 lifeguard saw the distressed swimmer and did
6 nothing. I.e., the dual role played no role in
7 their negligence. Here, there is overwhelming
8 evidence that the dual role was a proximate cause of
9 this wrongful and premature death. Number one, Dr.
10 Griffith testified that the dual role was a
11 contributing cause to Mr. Wolde's death.
12 Number two, it was in evidence that they were
13 motivated to sell during the day. Three, it was in
14 evidence that they were paid commissions to sell.
15 They were required to sell. There was evidence that
16 day that the sales receipts from the stands at
17 issue, they were selling on that day. And in
18 addition, and I, I guess I just call this a kind of,
19 you know, stick your head in the sand defense, it's
20 like they stick their head in the sand and they say
21 there's no evidence of dual role playing proximate
22 cause. And then they stick their head in the sand
23 and just literally tune out this entire record that
24 we built over a week. Mr. Chandler testified point
25 blank when he came on the beach with his family, he

1 noticed the lifeguard not in the tower conducting
2 water observation, but on the ground at the umbrella
3 line talking to two people. I asked him
4 specifically, at the time that you heard the
5 distressed sounds at the water's edge, how long was
6 that after you had seen that lifeguard on the ground
7 talking to those two people at the umbrella line.
8 His precise answer was between five to ten-minutes.
9 Well, it is, I would say it is abundantly reasonable
10 for the jury to infer that the lifeguard was doing
11 his job that day. His job is either on the tower
12 conducting water observation or on the ground
13 assisting with customers. And because he was on the
14 ground and he was not on the tower, he was doing the
15 other part of his job. And at issue, Your Honor ---

16 THE COURT: Is this the same gentlemen
17 that Mr. Brown points out that was wearing the red
18 shorts versus the Lack's Beach Service?

19 MR. MCLEOD: He is. And I think Your
20 Honor that -- I don't think that -- I don't think
21 that Mr. Chandler offered he was wearing red shorts.
22 I think that was my question. I think, when did the
23 guy show up wearing red shorts. You follow me? And
24 so, anyway, in addition, George Lack testified when
25 he was on the stand -- and this is at Page 319 of

1 the trial transcript lines 14 through 19. He
2 testified that, quote, they check umbrellas, quote,
3 all day as part of what they do. That is direct
4 evidence that they're required all day, which would
5 include the time period when Mr. Wolde drowned, to
6 deal with the merchandise to keep the umbrellas the
7 same height and to deal with customers.

8 As far as the dual role for the proving
9 violations of standard of care, I asked Mr. Lack --
10 and this, Your Honor, is on day two of the trial
11 transcript beginning at Page 288, Line 17, and it
12 goes through Page 289, Line 1. My question, and
13 this again was Mr. Lack. "And there is a national
14 standard of care when it comes to lifeguards and how
15 they follow safety rules; isn't that correct, sir?"
16 His answer, "There are national standards." My next
17 question, "And you're well aware of that; aren't
18 you, sir?" His answer, "Yes, sir." My next
19 question, "And those national standards are
20 professional standards for professional lifeguards;
21 isn't that correct?" His answer, "Yes, sir." Then
22 my next question -- this is -- starts on Page 301.
23 "Would you agree with me, sir, that the USLA are a
24 proponent of the standard of care?" His answer,
25 "Yes, sir."

1 Now Mr. Brewster, when he was asked about
2 the standard of care, I think Mr. Wilson asked him
3 if they were a proponent of the standard of care;
4 and this would be, Your Honor, on day four of the
5 trial transcript beginning at Page 473, Lines 15
6 through 17. Mr. Wilson asked Mr. Brewster, "Does
7 USLA help set the national standard of care for
8 ocean lifeguards?" Mr. Brewster's response was,
9 "Well, I think we do set the standard," because they
10 do. They establish the standard of care, USLA does,
11 Your Honor.

12 And so, again, what they want to tell the
13 jury is we're allowed to assign lifeguards
14 conflicting responsibilities and then we're not
15 allowed to prove that, no, you weren't allowed to do
16 that, and doing that violated standard of care and
17 doing that was a proximate cause of Mr. Wolde's
18 wrongful and premature death. When Brady Oliver
19 testified, he was one of the witnesses that they
20 called in their case in chief -- and, Your Honor,
21 this is on day four for the trial transcript
22 beginning at Page 785, part of my cross. And if
23 Your Honor remembers, Mr. Oliver worked somewhere
24 other than Lack's Beach Service prior to coming to
25 go work for Lack's as a supervisor and that other

1 place was North Myrtle Beach. My question to him,
2 you mentioned two prior jobs as a lifeguard before
3 coming to work for Lack's Beach Service. His
4 answer, "Yes, sir." "And those prior jobs, one of
5 them was at a pool right?" His answer was, "That's
6 correct." "And at that pool, were you allowed to do
7 anything other than water observation when you were
8 lifeguarding at that pool?" "No, sir." Next
9 question, "And the other job you mentioned ocean
10 lifeguarding and that was a different employer than
11 Lack's; is that right?" Question. His answer,
12 "That's correct." "When you were performing ocean
13 lifeguarding services for that employer, were you
14 allowed to do anything other than water observation
15 when you were on the tower at that location?" "No,
16 sir." Again, clear evidence that the dual role is
17 violating the professional standards of care.

18 Dr. Griffith's testimony, again on Page
19 76, Your Honor, Line 17 through Page 77, Line 14.
20 Question, "Does it violent standard of care for an
21 employer to require lifeguards for performing tasks
22 other than lifeguarding?" "Yes. That violates all
23 the agency's requirements as far as not interfering
24 with a primary responsibility of the lifeguard of
25 watching the water." My next question, "And does

1 that requirement the lifeguard sell merchandise,
2 does that put swimmers at risk?" "Yes, sir,
3 definitely." "And is that risk well documented in
4 the literature over the years." "Yes, sir." We
5 offered extensive testimony about how the lifeguards
6 used to be called life savers. I believe
7 Mr. Brewster testified to that and I know Dr.
8 Griffith's testified to that 'cause I did Dr.
9 Griffith's direct. And what he shared with the jury
10 was that there was a time when the emphasis in the
11 life -- in the aquatic safety community was on the
12 lifesaving role, the rescue attempt. And what
13 Mr. Brown is arguing is he wants this Court to only
14 look at the rescue attempt and nothing else. But
15 what happened is, over time these standards
16 developed and now the lifeguard is called a
17 lifeguard. Why? Because prevention, an ounce of
18 prevention is worth a pound of cure. And Dr. Rivers
19 testified to that in his direct and specifically
20 shared with the jury that the reason why the aquatic
21 safety community, many years ago, changed to put the
22 emphasis on prevention was because it would reduce
23 drowning statistics and, in fact, that's exactly
24 what happened. This is on Page 20, Lines 5 through
25 13, Dr. Griffith's testimony. "And, sir, over the

1 years did the development of the standards with
2 regard to ocean lifeguarding improve the nation's
3 drowning statistics?" "They went down dramatically.
4 And there's a variety of studies compiling all the
5 drownings that took place on USLA beaches; and since
6 they developed their training, since they began
7 certifying beaches around the country, the drowning
8 rate dropped significantly."

9 Now, going back to the nexus between this
10 assigning these kids conflicting responsibilities in
11 this particular wrongful death, Julian Chandler at
12 Page 18, Lines 11 through 15, testified as follows.
13 "And did you notice a lifeguard at that time with
14 his back to the water talking to the two people at
15 the umbrella line?" Answer, "Yes, sir." "And
16 approximately how much time passed between the time
17 you saw that and the time you heard the first yell
18 for help." His answer, "Approximately five to ten
19 minutes." And he continued to answer. "And there
20 was one that showed up, he did not assist. I
21 remember looking up during the process, and he was
22 standing there in the crowd with the rest of the
23 bystanders." My next question, "And was that
24 gentleman the same gentlemen that you had just seen
25 earlier in the lifeguard stand with his back to the

1 water?" "Yes, sir, it was." They argue, again,
2 that there is no -- they -- I think exactly what he
3 said was, it's our burden to prove that there was
4 enough time for a lifeguard to see Mr. Wolde. It's
5 our burden to prove that there was enough time that
6 the lifeguard would have been able to make a
7 difference. That is not our burden, Your Honor, and
8 that's a perfect example of how I think their --
9 with all due respect, their arguments to the Court
10 are not entirely genuine because they know that our
11 entire case was built on the fact that you should
12 never be in the water because of the rip current
13 warning that you were aware of that day. Mr. Lack
14 testified on his cross. He conceded to me that when
15 there is a rip current, there is no swimming. Their
16 manual, their training manual which went into
17 evidence, specifically says it is a lifeguard's
18 responsibility to identify rip currents when they
19 open. Well, in this case the lifeguards were AWOL.
20 Now they say that the one lifeguard was at lunch.
21 Your Honor, there is no evidence in -- there was no
22 evidence before this jury that he was at lunch.
23 Their evidence on that point was similar to the
24 "because I say so." He was at lunch because that's
25 what the schedule says. Nobody has any personal

1 knowledge of whether he was at lunch. Nobody
2 offered that testimony. They say that these
3 lifeguards weren't available. Your Honor, there's
4 no showing they weren't available. They never tried
5 to depose them that we're aware of. They never
6 filed affidavits with this Court saying they weren't
7 available. They may say they're unavailable when
8 their trial strategy didn't work. There's a reason
9 why they didn't call them; I don't know what it is.
10 But it certainly -- it shouldn't get the benefit for
11 that, particularly when there was no showing that
12 they were unavailable and were particularly that
13 they were somehow prejudiced by those witnesses'
14 unavailability. This idea that we argue that you
15 have to close the beach as if we argued you have to
16 shut down the beach itself, and that's why they're
17 trying to wiggle in the back door of some regulation
18 to make this some type of statutory thing to try to
19 grab a hold of some type of immunity that they're
20 not legally entitled to get. That was never our
21 case. Close the beach for swimming was our case,
22 and that was always our case. And I made that point
23 in the closing, that if the beach is closed for
24 swimming, then people may not need or want the
25 umbrellas and chairs because they can't get in the

1 water and they may leave the beach. We never argued
2 that you shut the beach down and you can't let
3 anybody on that piece of property; that was not our
4 case, Your Honor.

5 Dr. Griffiths testified that they filed --
6 they violated standard of care by failing to close
7 the beach for swimming. And he said that you can do
8 it multiple ways, one of which is you have no -- no
9 swimming signs or flags. Another way you can do it
10 is, you can set up where you can swim within the --
11 I can't remember the -- the buoys, swim between the
12 buoys. But the point is, is that you close the
13 hazardous area to swimming. In particular, Dr.
14 Griffith testified -- and I wrote these down because
15 in their JNOV motion they argued as if I'm not -- I
16 mean, it's just -- Page 76. Dr. Griffith says,
17 "They violated standard of care requiring kids to
18 perform tasks other than water observation." Page
19 84, "They violated standard of care by failing to
20 warn." Page 99, "They failed to recognize Wolde as
21 a distressed swimmer. They failed to provide rescue
22 efforts. That was a violation of standard of care.
23 They failed to close the beach for swimming. That
24 was a stat-- that was violation of standard of care.
25 The dual role violates the standard of care. They

1 violated standard of care by only having three LGOs
2 present on the beach that day. They also violated
3 standard of care by being understaffed that day."
4 And, you know, really good creative lawyers can, you
5 know, cut and paste the trial transcript and make it
6 look like something that that is not what happened,
7 and this is a good example. They argue to this
8 Court that the guy was at lunch. There's no
9 evidence in this record that he was at lunch. The
10 only evidence is he would have been at lunch because
11 he was scheduled. Well, guess what, the evidence is
12 that the LGO is supposed to fill in even if he is at
13 lunch -- you follow me? -- when he's at lunch. But
14 we know, and it's not even contested, that the LGO
15 that should have been there that day at the precise
16 location where Mr. Wolde lost his life did not show
17 up for work. And to add insult to injury, the
18 testimony in this record is that -- and I forget
19 the -- she was calling their case in chief. I
20 forget her name, Your Honor, and I apologize. But
21 she testified that on that day, the day of the
22 drowning, some people didn't show up to work. They
23 were short on personnel. And the personnel, they
24 made a decision that all the money making stands
25 were fully staffed, whereas, this LGO stand that

1 would have been specifically for this area of the
2 beach, no one was there.

3 I mean, you look at Polly Robinson, Your
4 Honor. You look at Jeff Bender. Jeff Bender, this
5 is his testimony on day two of the trial transcript,
6 Your Honor, Page 195. I think it begins at Lines 22
7 through 25. I look back and I saw a lady with a
8 child and there appeared to be someone bobbing in
9 the water. I looked up to the lifeguard stand.

10 There was no one in it. Didn't see any lifeguards
11 around. So I told my wife and kids to go find
12 lifeguards and I went back in the water. He
13 continues the testimony on Page 197, Lines 15
14 through 21. "Got out to the lady with the child and
15 a man bobbing in the water face down. The current
16 was very strong. I rolled the man over. He had
17 foam in his mouth. I grabbed a hold of him and the
18 lady said she could get in with the child. And I
19 started to go in, and I think one or two other
20 people showed up that were beach goers and helped me
21 bring the man to shore." This idea, they want the
22 jury -- they wanted this jury to render a verdict
23 for the defendant based upon complete conjecture and
24 speculation. They wanted this jury to think that
25 the lifeguards were doing everything properly,

1 complied with the standard of care and it just
2 happened. That's what they wanted the jury to
3 believe. The problem is that the evidence did not
4 support that strategy, Your Honor.

5 For --- for Mr. Bender, they argued that
6 somehow I convinced you to let him testify to
7 something that he shouldn't be allowed to testify,
8 and that's not true. On day two, on day two of the
9 trial transcript, Page 205, my question was,
10 "Mr. Bender, share with the ladies and gentlemen of
11 the jury what else you told Corporal Hunt at the
12 time about what you saw that day." His answer, "I
13 was kind of upset and mad because I told him where I
14 come from, Delaware beaches, this wouldn't have
15 happened." Mr. Trainer objected. Your Honor said
16 that he can't give an opinion. And specifically
17 what she says, I'm going to allow him to testify
18 about that he told the officer that day. Because if
19 you remember, a lot of the testimony was about these
20 police reports. You know, they didn't have any
21 witnesses, you know. This is the only case I've
22 tried in 25 years we got a death and four children
23 in their tender years of life and the defendant
24 doesn't call a single witness who has an ounce of
25 personal knowledge about anything. I mean, it is

1 odd. I mean, it's really odd. But they were trying
2 to use these police statements to try to get in
3 basically the evidence and that's why Your Honor
4 allowed him to say what he told the police at which
5 point he said, "I told the officer that this
6 probably wouldn't have happened on a Delaware beach
7 because there are two lifeguards at each station and
8 they're constantly watching the water." I'm not
9 saying the people don't get in trouble or have
10 issues out in the water; but that's what the
11 lifeguards are there for, to protect the people, and
12 there was none present that day. They made a trial
13 strategy to tell the jury that what happened to Mr.
14 Wolde that day was a, quote, mystery. That was the
15 way they decided to try this case. There was no
16 mystery. They knew before the jury was selected
17 that Adam testified about what happened. They knew
18 before they picked this jury that Wubit testified
19 about what happened. They knew before they picked
20 this jury that Mr. Chandler testified about what
21 happened because Mr. Chandler's deposition was taken
22 in advance of trial via video because he serves in
23 armed forces and was unavailable for trial. So I
24 asked Mr. Bender who was able to come, this is on
25 day two of the trial transcript. Defendant's

1 attorney shared with the jury in his opening that
2 what happened to Mr. Wolde, that it was a mystery.
3 Now this is a guy who was there who has actual
4 personal knowledge. "Do you agree that?" "No."
5 "And can you share to the ladies and gentlemen of
6 the jury why?" "If the lifeguards would have been
7 present, I think the outcome would have been
8 different." And so even under their argument that
9 it's all about the rescue effort and that's the only
10 way they can be legally responsible, they lose there
11 too based upon the evidence in this record. But in
12 reality, what the evidence was both from the
13 experts, from their own witnesses, and from the fact
14 witnesses is that they failed to warn at all; they
15 failed to guard at all. And I don't know if you
16 remember in my closing I said, it honestly just
17 doesn't make sense. They are trying to blame us for
18 getting in the water when it was their
19 responsibility under the prevailing standard of care
20 to keep us from getting in the water.

21 On the punitive damages, Your Honor --
22 and, again, it's like we -- you know, you live with
23 a case and you try it, and then you get these
24 motions and you're like, what, I don't even
25 understand what these arguments are. It's like

1 they're arguing about a different case. In this
2 case, the defendant filed an answer on punitive
3 damages. And his affirmative defenses as they
4 relate to punitive damages appear at page -- at
5 Paragraph 51 of the Answer and Paragraph 52. They
6 concede by their Answer that the 7 million-dollars
7 in punitive damages is appropriate. The only thing
8 they objected to in the Answer was pursuant to
9 statute, LBSI demands that the claim for punitive
10 damages be bifurcated/separated from the liability
11 and actual damages phase of the trial of this case.
12 They got that; that's exactly what happened. Then
13 Paragraph 51, and I quote, "Any punitive damage
14 award against LBSI cannot exceed the statutory cap
15 as provided in South Carolina Code 15-32-530." So
16 by their own responsive pleading, a punitive damage
17 award within the cap, they don't object to. They
18 don't raise an affirmative defense that punitive
19 damages are unconstitutional; or if they do, I don't
20 see it here. They didn't raise a defense that
21 punitive damages are not awardable against this
22 particular defendant. They just said we want it to
23 serve by a bifurcated trial and you can't give them
24 an award of what the legislature has says is
25 appropriate. But yet, they come before this court

1 and they argue that this punitive damage award is so
2 excessive that Your Honor should, I guess, rethink
3 the order, the well reasoned order that Your Honor
4 has -- Your Honor has already issued on that point.

5 The size of the verdict, they cited in the
6 brief a number of cases for the purported purpose of
7 trying to persuade Your Honor that this verdict was
8 excessive when compared to other verdicts. Now they
9 don't cite any appellate court case that I'm aware
10 of that says that 2.5 million per child for the loss
11 of their father is excessive. And they're certainly
12 in the case that I'm aware of, appellate court case
13 in this state, that says that 2.5 million per child
14 is excessive in a case where the children experience
15 the death, where the daughter floated on her father,
16 and I don't think that our Supreme Court will find
17 that to be excessive. But what they do is, they
18 cite you these cases and I've -- and I pulled just a
19 sample of them to see exactly what they were; and
20 what kind of raised my suspicion was, one of the
21 cases they cited was the Reaves case which is a case
22 that I tried in front of Judge Norton in federal
23 court. And the -- what they are attempting to
24 persuade Your Honor is the Reaves case, the jury
25 awarded 7.5 million in damages. It was a wrongful

1 death case. Therefore, 10 million is excessive.
2 Well, no. This jury awarded less money on the
3 wrongful death claims than the very jury that they
4 are citing to this Court as support for our verdict
5 being excessive.

6 In the Reaves case there were two
7 statutory beneficiaries, two children. You divide
8 seven-and-a-half million by two and that number is
9 greater than 2.5. It wasn't my decision or Your
10 Honor's decision. It was a prudent decision by our
11 legislature to require that the multiple damages
12 claims be brought under one caption per the wrongful
13 death statute. That way you don't have four
14 different lawsuits for each statutory beneficiary.
15 And that's 15-51-40, I believe, Your Honor. They
16 cited you another case, again, for the purported
17 reason that it shows that our verdict was excessive.
18 The Oickle v. XPO Express, that was a case where
19 there was a 5 million-dollar wrongful death verdict.
20 Well, there were two statutory beneficiaries in that
21 case, a mother and a father, who lost their adult
22 child as a result of a trucking company's provable
23 negligence. So, again, 5 million under wrongful
24 death claim divided by two is two-and-a-half million
25 which is ac-- which is actually the same number that

1 this jury awarded per child in this case.

2 The Huff v. XPO Express, that was another
3 case that they cited to Your Honor. That one they
4 cited 7 million-dollars for wrongful death damages,
5 again, to try to convince Your Honor that 7 is less
6 than 10. Well, if you're comparing apples to
7 apples, 7 is less than 10. But when you're
8 comparing apples to oranges, it's a little
9 disingenuous to argue what they've argued. So in
10 the Huff case, again, with 7 million-dollars and
11 that was for parents' claim, again, for loss of
12 their daughter. You have two parents. You divide
13 the 7 million by two and you arrive at 3.5 million
14 per statutory beneficiary. And I think the courts
15 actually point out that that's exactly how the
16 money -- I mean, not only the courts, but the
17 statute provides that the moneys allocated that way
18 equally. They also cite the Dow v. Toyota case, and
19 that case there was a 6 million-dollar verdict.
20 There was a mother and a father who lost their
21 child. Six million divided by 2 is 3. Again, that
22 jury awarded more money than the jury did in our
23 case on the wrongful death claim.

24 On the survival action argument, there is
25 no evidence anywhere that this jury used the

1 mortality table to come up with their number for
2 conscious pain and suffering. There's no evidence
3 of that. Had Mr. Thompson feared that that's what
4 they had done, he had the right to say something at
5 the time the jury awarded the verdict. He could
6 have asked for Your Honor to poll the jury, but he
7 didn't suspect anything. It was only after the fact
8 when they're trying valiantly, I may add, to
9 undermine the jury's verdict. In my closing, Your
10 Honor, on the survival action -- and I've got the
11 transcript; we just pulled it back up. All I said
12 on the survival action was that it is for you to
13 determine what, if any -- I say that every jury. I
14 never say "you must," "you shall." What, if any,
15 damages you award, it is your decision, it is your
16 close; it ain't my decision. What, if any, damages
17 you award are entirely up to you. And then when I
18 told them, which is what I always say to juries, you
19 use your common everyday life experiences to arrive
20 at that number. And I think I told them you don't
21 have to have a law degree or, you know, be a medical
22 doctor. That is, you know, your power and you do
23 that. So I didn't argue the mortality tables. Your
24 Honor didn't instruct them to use the mortality
25 tables on the survival action claim.

1 And, again, there's no evidence -- they
2 are completely just grabbing straws out of the sky.
3 This idea that we had to prove with a basically a
4 death-and-dying expert is what Mr. Brown's referring
5 to, to prove the dying process in a drowning
6 incident, that that was our burden and because we
7 failed to offer expert testimony that Your Honor
8 should throw out the conscious pain and suffering.
9 That is not our burden, Your Honor. It has never
10 been our burden. And, in fact, I believe I argued
11 this case at the directed verdict stage; but *Smalls*
12 *v. South Carolina Department of Education*, this is a
13 case that's found at 520 SE 2d. It begins on Page
14 682. This is a Court of Appeals decision. But in
15 this decision they cite to *Croft v. Hall* which is a
16 South Carolina Supreme Court decision. In *Croft v.*
17 *Hall*, the medical doctors testified that the
18 decedent had no conscious pain and suffering. And I
19 quote from the opinion, "The attending physician,
20 the nurses, and others, testified the victim did not
21 consciously suffer pain after being injured in the
22 wreck." In contrast, the victim's mother testified
23 her daughter made, quote, terrible noises, jerked
24 her arms and legs while in her hospital bed and
25 opened her eyes several times when she spoke to her.

1 So not only is expert testimony not required, but
2 fact witnesses' testimony can trump expert testimony
3 when it comes to survival damages. And it's clearly
4 set forth in Croft v. Hall.

5 Now in the Smalls v. South Carolina
6 Department of Education case here, and again, the
7 standard on submitting the survival action to the
8 jury is a scintilla of evidence which Your Honor
9 pointed out at the directed verdict stage and we've
10 briefed that same standard here. But in this Smalls
11 case -- well, so the Smalls case and referring to
12 Croft says, "The court concluded the factual showing
13 thereabout was weak." Now this is where the doctor
14 said no conscious pain and suffering but the father
15 said there was based upon noises. And although it
16 was weak, there was more than a scintilla of
17 evidence tending to prove that point. The
18 circumstances of the wreck and the fact that the
19 interstate -- I mean, the testate survived the
20 finally fatal injuries for about 29 hours with some
21 movement abet, pointing to the fact of suffering.
22 Then the Smalls court said, in this case the father
23 testified that his daughter was unconscious but then
24 later testified that she was conscious. So the
25 father, the fact witness on the conscious pain and

1 suffering, contradicted himself. Nonetheless, the
2 court said that was sufficient to allow that issue
3 to be determined by the finder of fact because
4 that's their job.

5 The, you know, they -- they kind of argue
6 that it was the waves were big that day and the
7 beach was crowded and they want -- they -- I guess
8 they wanted the jury to think based purely on
9 conjecture that the lifeguard just couldn't, just
10 couldn't get to him, lifeguards were doing other
11 things. But the problem is, the testimony in the
12 record was this was a beautiful sunny day. In my
13 closing I went over the photograph that showed the
14 twins who were on the beach with their mother
15 playing in the sand, and you saw the people in the
16 water. The waves were this big, the first breakers.
17 And they were with boogie boards. The testimony in
18 this case was the children first went down with
19 their boogie boards, then put them up, and then came
20 back in the water with their dad. They tried
21 valiantly to convince this jury that they were out
22 in deep water, but that was not the evidence in the
23 case. When they finally got to Mr. Wolde, according
24 to Mr. Bender, he was chest deep. That was after he
25 had been pulled out and then down the beach by the

1 long shore current.

2 I wanna -- I'm just trying to get Your
3 Honor everything they hit in fear of missing
4 something. Obviously if I miss something, we'll
5 rely, you know, and stand on our briefs.

6 They say that it's our burden of proof
7 that the lifeguard failed to see him as a distressed
8 swimmer. Well, we proved that. We proved that. I
9 mean, the testimony was by Dr. Griffith that there
10 are two types of drowning incidences. One is what's
11 called a silent drowning. And it's well documented
12 in the literature, I'm not making this stuff up.
13 And a silent drowning is when the person is
14 generally not able to swim and the drowning happens
15 very quickly, okay. And what I really think
16 happened here, they wanted this case to be the Mena
17 case. I don't know if you remember, Your Honor, we
18 talked about the Mena case. That's what they wanted
19 to try. The problem was, these were different
20 facts. In the Mena case there was no rip current.
21 And the testimony was that the guy went under,
22 nobody saw him, no bystanders, no nobody, and he was
23 found later down the beach. That's what they wanted
24 to try. The problem is, that wasn't this case.

25 Dr. Griffith testified that you have

1 silent drownings and then you have distressed
2 swimmer drowning. Distressed swimmer drownings are
3 those where the person is able to swim, number one.
4 The evidence in this case was -- not only was Mr.
5 Wolde a swimmer, he was a good and an avid swimmer.
6 The children had been to swim classes. Their father
7 had taken them to swim classes. I believe the
8 testimony from their mother was that the father swam
9 at the YMCA three days a week. Swimming was a form
10 of exercise for him and so he first becomes a
11 distressed swimmer. And Dr. Griffith testified
12 point blank they failed to recognize him as a
13 distressed swimmer; and because they failed to
14 recognize him as a distressed swimmer, that is a
15 proximate cause of the death.

16 Now this is what -- sorry, Your Honor, I'm
17 getting there. This is what happens when I type
18 myself too many notes; I get lost. And I promise
19 I'm getting there, I'm sorry. So this idea that,
20 again, they're trying to try the Mena case. That
21 wasn't this case. Adam testified -- and this is at
22 Page 543, day four of the trial transcript. "We
23 were shouting help and we were waving our arms."
24 Now for one, it defies logic for this defendant to
25 argue that the lifeguard, that they were in a place

1 where the lifeguard couldn't have heard them when
2 bystanders who were not trained to identify
3 distressed swimmers and who don't have any legal
4 responsibility to aid or assist did see them and
5 then went to help. Adam also said on Page 544,
6 "Help, the same thing all three of us were yelling."
7 Adam says, "Since swimming straight didn't work, I
8 chose to go to the side." So this drowning event,
9 first, they begin to be drug offshore by the rip
10 current. They begin yelling for help. According to
11 Adam at Page 543, all three of them were yelling for
12 help. There then came a time when Adam swam out
13 from the rip current, and he was able to get away
14 from it. There was also time for Adam to get back
15 to shore to run up the beach to tell his mother.
16 And if you remember, Your Honor, they then ran down
17 the beach when Mr. Wolde and Wubit were being pulled
18 out of the water by the bystanders. Adam says, "I
19 was getting closer and closer to shore. I couldn't
20 stand, but I passed the guy who was coming to save
21 us." That guy was a bystander. That's the whole
22 problem with this case, just on the rescue part.
23 Wubit testified, "My father was going under and
24 coming back up and then went, gasp, and then yelled
25 for help." My question, "And this went on for a

1 period of time?" I'm sorry, that would have been
2 Mr. Pratt's question. Her answer, "Yes, a long
3 period of time." His next question, "Could you see
4 people on the beach?" "Yes." And when he started
5 to swim away or swim to the left -- talking about
6 her brother. "Was that after y'all had been yelling
7 for some period of time?" "Yes, and we were still
8 yelling." So Wubit establishes that they're yelling
9 for help, just like I just shared with the Court.
10 Adam then is able to swim out of the rip current and
11 start heading towards shore, and she and her father
12 are still yelling at that point. Wubit also
13 testified, "I was trying to get out of the water,
14 get my dad medical attention." At page 588, "At
15 some point three or four people took my dad and a
16 lady helped me to shore." And, again, they asked
17 Wubit on the stand -- and they made a decision to
18 try the case this way, not me. And they said,
19 quote, well, you can't provide an estimate at all,
20 can you?" And her answer was, "Well, I did." And
21 their question was, "I'm sorry?" And she said, "I
22 did give an estimate." Because she had testified in
23 her direct, just like Your Honor recalled, that it
24 was between -- the struggle lasted between 10 or 15
25 minutes. Your Honor, that's on trial transcript day

1 four, Page 589, Line 22. So then they made a
2 decision to try to impeach Wubit on that testimony,
3 and Mr. Thompson pulled out her trial transcript and
4 attempted to impeach her on that. That's exactly
5 what juries are for, Your Honor.

6 Jeff Bender, again, he's an eyewitness,
7 he's a bystander. He testified he and his family
8 set up close to the lifeguard stand. The lifeguard
9 stand was to his right. There was no off duty sign.
10 There were no -- no no-swimming flags. He saw no
11 flags whatsoever on the lifeguard tower. Now if you
12 remember, they just told you we put up a red flag,
13 therefore, we can't be responsible. Well, that was
14 not the evidence in the case, Your Honor. And in
15 the closing, I showed the jury a picture that
16 clearly showed that the lifeguard stand closer to
17 the children did not have a red flag. And I
18 remember I shared with the jury. Now they told you
19 'cause they had the big red flag, that got a red
20 flag and then walked over here and they said the
21 evidence is gonna show that one of those was up and
22 down the beach. And I asked the jury, did that
23 prove to be true? And I showed the photograph. But
24 they're still -- it's like they stick their head in
25 the sand and they want to ignore the record.

1 They're still arguing that to Your Honor. And it's
2 just -- the record just doesn't agree with that
3 argument.

4 The -- on the -- real quickly on the no
5 swimming. And I can find the page line designation
6 for Your Honor if he needs it -- if you need it.
7 But George Lack admitted that when there are rip
8 currents there should be no swimming; he admitted
9 it. And this idea that there was no evidence of a
10 rip current, it's just simply, again, the record
11 doesn't agree with that argument. The children's
12 testimony established the rip current. The National
13 Weather Service testified -- I mean, established the
14 rip current. The rip current warning was well in
15 advance of -- it was in the early morning of the day
16 that Mr. Wolde drowned. The evidence was that rip
17 currents are to be detected at the time that they
18 form, and they failed to do that. The coroner's
19 report, which went into evidence -- I think the
20 portion that went into evidence was without
21 objection by defense counsel -- clearly says that
22 the father drowned trying to save his daughter from
23 a rip current; it's in evidence. That same evidence
24 also says that the time of death is 3:54 p.m. But
25 yet, they're asking the Court to believe that it was

1 just this spontaneous "poof" death, and it's just
2 not what this record demonstrates, Your Honor.

3 The ALJ order, the ALJ order -- and
4 there's no other way for me to explain it 'cause
5 I've thought about -- this is really what they're
6 saying. You committed legal error by not allowing
7 them to commit a fraud on this court and this jury.
8 Just think about it. This -- Mr. Lack had taken the
9 position in another proceeding that these lifeguards
10 performed lifeguard respon-- I mean, performed the
11 concession responsibilities 99.95 percent of the
12 time. That was a disputed issue of fact in this
13 case. I told you, Your Honor, if you remember
14 before when I think it was at the hearing when you
15 granted summary judgment to the City; if not, I know
16 it's pretrial. I said to Your Honor we are going to
17 prove they are not lifeguards, and that's exactly
18 what we did. We proved that they were not
19 lifeguards. These kids had no training. Now they
20 say that there's evidence of training. You know
21 what the evidence of training is? It's because I
22 say so. Ms. Chicory testified that they were all
23 trained at the beginning of the summer, and that's
24 their evidence. They know better than that. Do you
25 think any jury is gonna believe, well, they were

1 trained, therefore, they were trained. No jury is
2 gonna believe that. These juries are smart. They
3 ain't stupid. The way you prove they were trained
4 is you offer a witness who has an ounce of personal
5 knowledge of having trained those people, which they
6 did not. The way you prove they were trained is you
7 offer evidence, records, indicating they were, in
8 fact, trained. They offered none. The records that
9 did go in related to training, if you recall, one of
10 them is dated April 22nd, so I guess it would have
11 been 2018, and it's a spreadsheet and it has all the
12 swimmers, I mean, the lifeguards. They say by their
13 own document that they trained this kid in a pool in
14 Myrtle Beach, but he was in Poland when they say he
15 trained him. These juries are not stupid. I have
16 so much respect for twelve people and their
17 collective wisdom. They weren't fooled by anything.
18 And I don't believe they were confused by anything.

19 So on the ALJ order, it's a disputed issue
20 of fact and they say you -- it shouldn't have come
21 in. What's the prejudice? That I don't get to
22 maintain in this court something absolutely opposite
23 than what I maintain in another court? I don't call
24 that prejudice, Your Honor. That's not prejudice.
25 And I pointed out in the trial stage that there's a

1 doctrine of judicial estoppel. I didn't ask for
2 directed verdict on that issue. I didn't do
3 anything. I just pointed out that the courts
4 generally don't tolerate people taking inconsistent
5 positions on certain issues in different proceedings
6 because it's a waste of judicial resources, and it
7 is, in fact, fraud upon the court.

8 The -- on the bifurcation, Your Honor, I
9 think what they said was I convinced you to do it
10 the way we did it, and that's just simply not true.
11 I read the record, the trial transcript, again last
12 night. Your Honor said -- and I can pull it up.
13 Your Honor said, I think said should we -- I know I
14 said I think that's the way you do it. You have the
15 reckless question on the first verdict. I'm
16 positive I said I think that's the way you do it.
17 And you asked Mr. Thompson, what is your opinion?
18 And he said, quote, yes, Your Honor, I think that's
19 correct. But now they complain about the reckless
20 question being on the verdict form.

21 Now one case that they cite in their brief
22 on the money being prejudicial to them is the Sulton
23 v. HealthSouth Corporation, and that's the case that
24 was the medical negligence claim, I believe. There
25 was a 12 million-dollar verdict I think that the

1 Supreme Court reversed. Well, in that case guess
2 how they handled the reckless question? Exactly the
3 way Your Honor did it. So on Page 645 of that same
4 opinion that they offer to prove a different point,
5 they concede this point. After the jury returned a
6 verdict finding HealthSouth reckless, willful, and
7 wanton, the court proceeded to a punitive damages
8 phase of trial in which the jury returned an
9 8 million-dollar verdict against HealthSouth.
10 That's exactly what happened here.

11 THE COURT: Mr. Brown's argument said I
12 should have explained to them that if they find --
13 if they make such a finding, it would then lead to a
14 second proceeding to determine the amount of
15 punitive damages; and that by not giving them that
16 indication, that they may have been looking at
17 punitive damages before they got to that part of the
18 trial.

19 MR. MCLEOD: Well, that argument doesn't
20 make sense because Your Honor specifically charged
21 them before they deliberated the first phase what
22 damages they could consider, and that's why Your
23 Honor was specific not to charge anything as it
24 relates to punitive damages until after the first
25 verdict. So they were specifically instructed what

1 damages they were allowed to consider in that phase,
2 and there's no evidence that they did anything other
3 than exactly what the Court instructed, Your Honor.

4 On the money piece, this is not the Sulton
5 case and this is not the Branham case. In both of
6 those cases, money was offered for the purpose of
7 punitive damages, and we're talking about billions
8 of dollars, okay. And in the Sulton case, the court
9 specifically said such evidence must be handled
10 cautiously, that is evidence offered for punitive
11 damages ability to pay, must be held cautiously
12 since the presentation of evidence of a defendant's
13 net worth creates the potential that juries will use
14 their verdicts to express biases against big
15 businesses, particularly those without strong local
16 presence. So the concern that our courts have
17 stated with financials was not in play here because,
18 one, we're not talking about billions of dollars.
19 Number two, we're not talking about a business who
20 had no local affiliation or connection. We're
21 talking about a small locally owned business. And
22 what they forget to realize is that evidence can be
23 admissible for more than one purpose. What they've
24 argued to this court is, when it's offered for
25 punitives, Sulton and Branham says reverse. That's

1 not why this evidence was offered, Your Honor. In
2 this case the financial information was admissible
3 because it created the duty. It was the benefit of
4 the bargain. There is a long line of unbroken cases
5 in this state that probably originate from Section
6 323 of restatement, that says that one who
7 voluntarily or for consideration, one who
8 gratuitously or for consideration voluntary
9 undertakes dot, dot, dot, they have to exercise
10 reasonable care. Here, the benefit of the bargain
11 between the citizens of Myrtle Beach and this
12 defendant was that you can make this money and with
13 that money you provide professional lifeguard
14 services. That fact, Your Honor, was not in dispute
15 and Mr. Lack conceded that himself. His answer --
16 I'm going to find this. Page 334 of the trial
17 transcript beginning on Lines 2 going through Lines
18 22. And, again, Your Honor, I never used the word
19 profits over people. And their only objection to
20 the limited financial stuff that was allowed was
21 pretrial they filed a motion in limine and they
22 didn't want me to use that and argue these profits
23 over people. I think if you remember, I said I
24 don't try my cases that way. I don't know who came
25 up with that; I don't like it. Those words never

1 came out of my mouth. What this case was about was
2 you were given a privilege to generate revenues, and
3 your responsibility in return for that privilege was
4 to provide lifeguard services. And the reason why I
5 showed the blue shirts and the yellow shirts and the
6 money was to show that there was enough money to do
7 exactly which he had obligated himself to do. My
8 question to George Lack, "Isn't it true, sir, the
9 City gave you a franchise, a privilege to make money
10 on the public beach?" His answer, "That's what pays
11 for everything. Yes, sir." That's what pays for
12 everything. Now what -- and then my next question,
13 "In exchange for that privilege, the City required
14 you to provide nonprofit public safety; isn't that
15 true, sir?" "I don't think it says anything about
16 that in here." Well, my question is, "Well, isn't
17 it true that in exchange for the City giving you
18 this privilege to make money on the public's beach,
19 you agree to provide lifeguard protection on the
20 same public beach?" His answer, "Yes, sir." And so
21 then, what I thought could happen, is they come in
22 because I offered that evidence to show that he's
23 losing money to try to curry favor with the jury so
24 the jury then wouldn't award a significant -- a full
25 verdict. They didn't do that. And, in fact, George

1 client testified -- and I don't know if it was -- I
2 think it was in response to my question, the jury
3 was not left to believe that he was making all this
4 tons of money that would somehow bias or prejudice
5 then against him. He testified at Page 397 in
6 response to my -- one of my questions. "I guess in
7 a world where your business model works that way;
8 but in our business model where we're spending
9 350,000 and 500,000 a year on beach equipment, plus
10 the insurance, plus everything that a normal
11 business would have to pay for, no, sir." So the
12 jury heard evidence that they have to operate this
13 business twelve months out of the year. They also
14 heard evidence that the season, if you will, where
15 there's a demand where they make the money is only
16 four months out of the year. The jury also heard
17 that it's an expensive endeavor. \$500,000 a year,
18 not including these other things that George Lack
19 testified to. So there was no prejudicial effect
20 because there was no big number that this jury could
21 have concluded that he was making; and, therefore,
22 that would influence their verdict. The money was
23 offered to demonstrate it was part of the
24 consideration, the benefit of the bargain, and that
25 is how his legal obligation, the duty to provide

1 lifeguard services arose. And just like Mr. Brown
2 said, it's our burden to prove duty, breach,
3 causation, and damages. And so unlike in Branham
4 and Sulton where it's offered for punitives, his
5 limited financial data was offered to show how the
6 duty was created and what his responsibilities were
7 under the franchise agreement. They say in the --
8 throughout the trial, the franchise agreement
9 controls, begins and it ends there. So how are they
10 prejudiced from showing the jury that those
11 moneys -- and the contract says it. In exchange for
12 this money, you have to provide professional
13 services. Why is that prejudicial? The contract
14 itself requires the moneys to be audited; it's
15 public record. What is the prejudice? And there is
16 none, Your Honor.

17 If I have missed anything, I promise it's
18 not because I meant to. It may be the best thing to
19 do is should I sit down and if Your Honor has any
20 questions or?

21 THE COURT: Do you want to address the
22 stay and the receivership?

23 MR. MCLEOD: Yes, Your Honor. So, on the
24 way, procedure, the way it happened was, we had the
25 verdict, the posttrial motions were briefed

1 extensively and briefed well by both parties, and I
2 then filed a motion to have a receiver appointed.
3 And in particular, the motion was based upon the
4 statute. I believe it's 16-- 15-65-10, Your Honor,
5 and that statute clearly gives this court the
6 discretion to appoint a receiver prior to judgment
7 or after judgment. And in particular, Your Honor,
8 15-65-10 states, "A receiver may be appointed by a
9 judge of the circuit court either in or out of
10 court, one before judgment on the obligation of
11 either party when he establishes an apparent right
12 to property which is the subject of the action at
13 which is in possession of an adverse party and the
14 property. or its rents, profits," da da da da da da.
15 And if you'll recall in the Murdaugh cases, they
16 filed for motion to appoint a receiver long before
17 there was a verdict, and the court granted that
18 motion pursuant to this statute. Now their response
19 to that is, well, if you appoint a receiver -- well,
20 if we post a bond, then you can't point -- appoint a
21 receiver, and they cite to Your Honor 15-65-50 or
22 16-65-60. I know it's one of those two on that
23 point. Well, in the section, the code section that
24 they cite saying if we post a bond you can't do a
25 receiver, that statute specifically says that the

1 bond has to be two-and-a-half times the value of the
2 property. The property in this case is the verdict.
3 And here's how -- and this is what I'm afraid is
4 gonna happen. We get the verdict. The reality of
5 it is, is that Mr. Lack's, Lack's Beach Services'
6 largest asset is its claim against his insurance
7 company. That's not part of this record, and I'm
8 not gonna go there. But that in my professional
9 opinion, that is his largest asset. Well, our --
10 that's why our motion to appoint a receiver
11 specifically asks the court to give the receiver the
12 ability to basically preserve that asset and
13 prosecute it if need be. If a receiver is not
14 appointed, this how -- they walk between the rain
15 drops on this verdict and escape all legal
16 responsibility is how they do it. They post a bond.
17 They convince Your Honor not to appoint a receiver.
18 The appeal takes five years. The bad faith claim
19 now is no longer viable because the statute of
20 limitations has run. And, oh, guess what, Mr. Lack,
21 it's our understanding, was able to get a new
22 agreement, a new seven-year deal on the same stretch
23 of beach, but not with Lack's Beach Service, but a
24 different LLC that he owns. And I just find that to
25 be offensive. I don't know. I mean, I understand

1 they don't like the outcome; I understand it. But,
2 you know, they're not the victim and they should not
3 be allowed to walk between the rain drops, Your
4 Honor, and that's why we'd ask that a receiver be
5 appointed. We're not asking that the receiver pay
6 any moneys to us. You just account for it and
7 preserve. We'll litigate the appeal; and if we win,
8 then those moneys come to us. And if they lose,
9 then they get the money back. They still get to run
10 the business, but you just have an independent
11 making sure that assets aren't squandered. And I
12 honestly don't see the prejudice in that and it
13 actually enures to Mr. Lack's benefit. So that down
14 the road we can't argue that he did something
15 nefarious to avoid paying the verdict. For example,
16 statute of limitations would be one way we would do
17 that. Well, this prevents all that. So, Your
18 Honor, with that I'll sit down and I'll answer any
19 questions Your Honor has. I'm more than happy to
20 answer them.

21 THE COURT: Do you want to address the, I
22 guess, the stay on execution?

23 MR. MCLEOD: So the stay on the execution
24 is, we filed the motion to appoint the receiver.
25 Then they filed the motion to stay. And so

1 procedurally, the motion to appoint receiver was
2 filed first, and I think that's what Your Honor
3 should rule on. If Your Honor rules to appoint a
4 receiver, then the motion to stay to a certain
5 extent, it is moot because now you've got a receiver
6 in place who can make sure that assets aren't
7 squandered. You follow me? And that's all we care
8 about. I mean, 'cause look, we don't think we're
9 gonna collect on the verdict next month. The asset
10 that we're gonna collect on is the claim that we're
11 concerned he's squandering right now.

12 THE COURT: Okay. Mr. Brown.

13 MR. BROWN: Thank you, Your Honor. I'll
14 try to address these points. And I might be a
15 little out of order with them, but I'll go as fast
16 as I can. If I might hand this up to Your Honor.

17 THE COURT: Sure.

18 MR. BROWN: Your Honor, one of the points
19 Mr. McLeod made was, there was no evidence put in
20 that the lifeguard was at lunch. This is evidence
21 that the lifeguard was at lunch. That's one point.
22 Another point Mr. McLeod made was that the dual role
23 was never agreed upon by the City. It was never
24 anything, any evidence of that, and it was all
25 something Lack's was doing, no one knew. But Mr.

1 McLeod and the Court is aware of -- he cited to it
2 actually. Mena case from 2008, okay. In the Mena
3 case it involved the City of Myrtle Beach and
4 Lack's. Interestingly, there was an attack by the
5 plaintiff there. The plaintiff suggested defendant
6 was grossly negligent in emergency responders'
7 response to reports of merged swimmer.
8 Specifically, plaintiff challenges the employment of
9 a dual role lifeguard scenario and then it goes on.
10 The defendant counters indicates the South Carolina
11 legislature has explicitly approved the City's use
12 of dual lifeguards along its beaches. This has
13 been -- and the court went on to find immunity for
14 the City there despite everybody agreeing that dual
15 lifeguards were specifically contemplated by the
16 legislature and that was the City and Lack's
17 presenting that very point to the court. It's --
18 it's a -- it's a not a reported case, Your Honor,
19 but I mean, Mr. McLeod cited it and I think the
20 Court's familiar with it. Mena v. Lack's Beach
21 Service and the City of Myrtle Beach, 2008 West Law
22 8850813, okay.

23 The -- Mr. McLeod talks about did they
24 essentially prove proximate cause by simply proving
25 Mr. Wolde was a swimmer and not somebody that

1 couldn't swim. He talked about a distressed swimmer
2 and that made a big difference. Your Honor, I would
3 just submit that while there are plenty of drownings
4 that would happen with people that can't swim, there
5 are also drownings that happen with people that can
6 swim, and that is not enough to get you past
7 proximate cause just simply showing that someone was
8 a swimmer and then got in trouble. That is not
9 enough. That would mean anybody who was a swimmer
10 automatically gets to the jury if a lifeguard
11 doesn't save them. That's essentially what he's
12 projecting which is not -- is not correct.

13 He points to -- on the conscious pain and
14 suffering to the Croft case. And, Your Honor, the
15 evidence there is different because the evidence in
16 the Croft case was there's an injured person and
17 that person is injured already and they're making
18 terrible noises or in Mr. McLeod's words, terrible
19 noises, and they're responding to questions by
20 opening their eyes to the person looking at them,
21 okay. So they're already injured and then they're
22 responding. That's not this fact pattern. This
23 fact pattern is not that. This fact pattern is
24 someone is dog paddling and the person sees them;
25 and then the reality is whether anybody wants to

1 admit it or not, they just don't have the evidence
2 on the actual drowning. They have evidence of
3 swimming, struggling swimming, and Your Honor ruled
4 out fear being allowed to be awarded on the jury
5 instructions; and so you're just saying, well,
6 what's the evidence of conscious pain and suffering
7 from a drowning. They just didn't call anybody to
8 talk about it, and that's the end. The Croft case
9 does not -- does not stand otherwise. Your Honor,
10 he makes the pretty alarming, in my opinion,
11 argument that you can put in these gross revenues
12 numbers, and again, that's what they are; they're
13 gross sale numbers. In the regular case, as long as
14 it's not in the punitive phase, that I think you
15 rapidly see how this type of evidence would come in
16 all the time, you know, if somebody could figure out
17 an angle to say, well, it's sort of relevant to this
18 or this issue or this shows that they could have
19 afforded to put an additional safety feature on this
20 car or this could -- they could have afforded to pay
21 the safety people more money, or they could have
22 afforded to have more lifeguards or they, whatever.
23 You can't put gross sales numbers in evidence,
24 period. That is what the courts effectively have
25 held. It happened to have come up in the punitive

1 damages phase. Mr. McLeod, clever enough to try to
2 put it into the actual damages phase, but that does
3 not render it perfectly fine to do. Why? Because
4 everybody already admitted, which he stood up here
5 and said. Everyone admitted there's a dual role and
6 we're getting paid. You don't need to put it in the
7 gross sale numbers like he did. The only reason to
8 put this gross sale numbers in was to inflame the
9 jury, look how much money they're making, look at
10 all the money they're making. He called -- now, I
11 don't think he said -- I think he's correct when he
12 said I never said the words people over profit, but
13 I think he called Lack's Beach Service a for-profit
14 about who knows how many times, many, many, many,
15 many times. So it's just another way of
16 highlighting, look at this money, look at this
17 money, and impassioning the jury, and that's exactly
18 what Sulton and Branham said. We don't want that.
19 We do not want that and not allowing this,
20 especially gross numbers. I know they're gonna say,
21 well, profit versus making. I mean, that's just the
22 gross sale numbers. And so that is, that is just
23 out of bounds totally and you can't justify it with
24 what he -- what he said.

25 Your Honor, he talked about the ALJ

1 filing. I want to put that in a little more context
2 although Your Honor knows what it is, but I think
3 Your Honor pointed out this at the trial. He
4 brought up judicial estoppel. It's not judicial
5 estoppel. He didn't even prevail in his ALJ filing
6 when he was arguing in essence that he's never
7 lowered workers corp premium for these employees
8 because they're high risk activity jumping into the
9 water to save someone is very -- is not -- there's
10 not much time they spend doing that. They spend
11 much more time sitting in a chair or, you know,
12 doing things that aren't high risk. That was what
13 they were trying to argue there. To allow that into
14 evidence, Your Honor -- Your Honor, your first
15 instinct was not, oh, my gosh, it's gonna be a fraud
16 on the court, we don't allow it in. Your Honor's
17 instinct was, you know, I don't think I can put that
18 in. And then he convinced you, well, let me see if
19 I can prove -- create a foundation, let me impeach
20 him with it. And he -- and he thought that he did
21 do that, but as I've demonstrated, Your Honor,
22 technically, he didn't do it. He did not really
23 impeach the person. Mr. Lack did not testify
24 opposite, exactly opposite of what the file was.
25 And this was not prior testimony. This is -- this

1 is a filing in another case involving a different
2 entity by an attorney, I think, in a different
3 proceeding. This should not have been allowed.
4 It's just prejudicial, very prejudicial to the case.
5 No one, no one denied -- Lack's never ever denied
6 that they had dual role. In fact, they said, yeah,
7 we have dual role. We have these IGOs also,
8 lifeguard onlies, but we do have the lifeguards that
9 are doing dual roles. No one, no one denied that.
10 So you don't need to come in and try to prove it
11 through this highly prejudicial prior ALJ workers
12 comp premium filing. That is totally irrelevant.
13 It should not have been allowed in.

14 On the evidence of the rip current, Your
15 Honor, I believe that there was evidence of, quote,
16 rough surf. I think if you search the transcript
17 that's what you'll see is, I believe, is evidence of
18 rough surf. There may have been -- he talks about
19 the coroner's report including something about a rip
20 current in there and then that came into evidence.
21 Even if it did, the coroner was not there. The
22 coroner -- it is total speculation for the coroner
23 to be talking about a rip current somewhere, I mean.

24 THE COURT: I thought that someone from
25 Lack's did testify that there was -- the National

1 Weather Service had issued a warning that morning.

2 MR. MCLEOD: Randy Smith, Your Honor.

3 THE COURT: Not necessarily
4 contemporaneous with this, but that there had been
5 rip current warning that morning.

6 MR. BROWN: Right. It might have --
7 maybe, Your Honor, record will speak for itself on
8 that or we can search for it but. If they did, Your
9 Honor, the evidence was that rip currents, they
10 don't always come up in exactly the same place and
11 they move, they do different things. They're not
12 predictable so that was -- that was the evidence. I
13 don't think you're going to be able to say, well,
14 there was some evidence that there was a rip current
15 and, therefore, the beach exactly where Mr. Wolde's
16 drowning incident happened should have been closed,
17 which is what he's trying to say. That -- that
18 can't happen.

19 Now I want to read, Your Honor, section
20 5.3 of Myrtle Beach ordinances. This is section
21 5.3. You can pull it up; it's public record. And
22 this goes to Mr. McLeod's point. He says our case
23 was not closed to beach, it was closed the beach for
24 swimming he says, okay. So let's see, what did the
25 Myrtle Beach ordinance say? It says appropriate

1 authorities, which include lifeguards in this case,
2 granted by the City, may restrict beach use, object
3 structure placement, or aquatic activities when in
4 their discretion -- okay, that is very important.
5 The use, object, or structure placement constitutes
6 a danger. That's what it says. They're getting
7 their authority directly from the Myrtle Beach
8 ordinance, and that is why -- he comes in here and
9 he tried the whole case like this. He even stated
10 that he did. When he comes in here and he attacks
11 the power and says, you should have closed this, you
12 should have closed the water here, you should have
13 closed it there, he is directly attacking the
14 discretionary powers granted only by -- they only
15 belong to the state and then the City, given the
16 City, and then the city through the franchise
17 agreement gives it to Lack's; that's it.

18 THE COURT: So my recollection is that
19 that, at least with the recreational use immunity,
20 that the Court of Appeals had rejected that argument
21 previously and said -- I can't remember if it was
22 Lack's or if it was a different beach service that
23 said beach service, you don't get out of the case on
24 City's recreation use immunity, that that does not
25 extend to you.

1 MR. BROWN: If they did that, Your
2 Honor -- you got a good memory on that. If they
3 said that, that still would mean the cap ----

4 THE COURT: That's the Corbett case.

5 MR. BROWN: Right. It still wouldn't
6 mean, I don't believe, that the caps would not
7 apply. It was -- if the immunity was waived for
8 something like that, they would still apply to caps
9 so we would say that the caps would apply even if
10 that's true. Your Honor, Mr. McLeod brought up the
11 lifeguard only and said, you know, he didn't show up
12 for work, that's got to be negligence that is
13 involved. Well, the LGO didn't show up for work.
14 Apparently, that was the evidence, that he was sick.
15 Number one, you can't -- you're not gonna be able to
16 award punitive damages for somebody being sick and
17 not showing up for work. I mean, 7 million-dollars
18 punitive damages for somebody being sick is --
19 really ridiculous. And the evidence showed that the
20 LGOs were roaming persons and that they hadn't
21 covered a multi-block area. Now Mr. McLeod might
22 want to complain about that and say how can this guy
23 cover all of this area, that's too much. Well,
24 guess what, it's in the franchise agreement. It's
25 specifically allowed by law for them to cover that

1 area. And there was no evidence that had that ---
2 this person not been sick and had he been at work,
3 that he would have been anywhere near where
4 Mr. Wolde's drowning incident occurred. He covered
5 a multi-block area, I think eight blocks or
6 something like that; but it was multiple blocks,
7 whatever it is. So they're not linking up -- once
8 again, they're the general complaints. You're using
9 dual role, that's bad. You're not -- you don't have
10 enough people; that's bad. Somebody is at lunch,
11 that's bad. These things aren't connected to the
12 Wolde incident or they're specifically allowed by
13 law, either one; but either way, they're either not
14 connected or they're allowed by law. You cannot put
15 responsibility on Lack's for that.

16 The page --- I wanted to talk about
17 Mr. Chandler because Mr. McLeod was trying to go by
18 memory and it is a lot to remember; I agree with him
19 on that. So this is from Mr. Chandler's deposition.
20 He said he thought he remembered asking a question
21 about red shorts, but that wasn't how it happened.
22 Here's what Chandler said. "I remember shorts. I
23 don't remember any other clothing on him, sir."
24 This is when Chandler is talking about the, quote,
25 lifeguard that he saw, closed quote. Keep in mind,

1 Myrtle Beach, City of Myrtle Beach had some
2 lifeguards out there too. It could have been one of
3 those people. No one asked him, why'd you think
4 this person was a lifeguard? Nobody asked him that,
5 okay. But here's what he said. Quote, I remember
6 shorts. I don't remember any other clothing on him,
7 sir. Mr. McLeod or Pratt, whoever it was, said,
8 "What color were the shorts?" "I want to say red.
9 Not 100 percent though." "Was the lifeguard wearing
10 a shirt?" "No, sir." Okay. The only evidence is
11 that Lack's had gold shirts and blue shorts, or
12 yellow shorts, I can't remember which one, but they
13 didn't have red -- I'll put it that way -- and they
14 always had shirts. And they said Life Lack's on the
15 back, lifeguard on the front. That's what they
16 all -- that's the only evidence. So I don't know
17 who this person was, whether he's a Myrtle beach
18 lifeguard or why the guy thought he was a lifeguard;
19 but whatever it is, that's the record.

20 Your Honor, the -- Mr. McLeod basically
21 talked about -- again, and I'm almost through
22 here -- the business model and he talked about the
23 relevance of the benefit of the bargain evidence and
24 this kind of thing. That is an assault on the
25 business model again, which is allowed by law under

1 the statute. Where Your Honor was trying to steer
2 him in the early part of the trial and what he said
3 he could do, but then he ended up expanding it out.
4 He said I'm going to be able to prove that they were
5 engaging directly in commercial activity right at
6 that window of time; that's what he said. Right in
7 this window of time when Mr. Wolde drowned, I'm
8 gonna show that. Well, instead it became general
9 attack on it's a bad idea to have dual role
10 lifeguards, this is a bad business model, you're
11 making money on this, this is a benefit of your
12 bargain, here's your sale records, all of that is --
13 it's not relevant to his case; it doesn't prove his
14 case and it's unduly prejudicial, Your Honor.

15 On the receivership, Your Honor, with all
16 due respect, this is monumentally putting the cart
17 before the horse to deal with this like this.
18 The -- you're talking about a company that's been in
19 business with the City of Myrtle Beach for many,
20 many years. They've had multiple, I think multiple
21 franchise terms. And this is who Myrtle Beach is
22 relying upon to provide lifeguards for this upcoming
23 year, or at least I -- it's news to me that they've
24 created some other company; I don't know about that.
25 So I don't know anything about that. But what I do

1 understand is for him to ask Your Honor to on some
2 speculative, there's some bad faith claim out here
3 somewhere, there's some other claim out here
4 somewhere in some insurance case or something, this
5 is -- this case is what we're talking about. We're
6 not talking about other cases. In this case we have
7 a verdict. We have us passively doing our very best
8 to convince Your Honor to fix this verdict yourself
9 and not make us go on appeal or suggest any dramatic
10 reduction to the verdict so that maybe something
11 else can happen here. But we're asking you to do
12 that, number one. Number two, we're saying if you
13 don't do that, there's a statute right on point that
14 allows us to post a bond for -- it doesn't have to
15 post a bond for the full amount. It doesn't matter
16 whether somebody believes there's some bad faith
17 case somewhere. The statute doesn't say any of that
18 stuff. It just simply says, you have less than 5
19 million-dollars of revenue in the past year,
20 1 million-dollars is the maximum bond. That's what
21 it says. So the legislature has spoken on this, and
22 they have stated what the public policy in South
23 Carolina is and that's what you should do. He's
24 saying that I have to make a motion -- apparently,
25 he's saying you are restricted to just do things in

1 exact chronological order that things were filed in.
2 That's not true at all, Your Honor. There's a -- as
3 I said, I have not encountered in all the years I've
4 been doing this, which is a lot, people forcing us
5 to file a motion to stay judgment. They usually
6 don't care. They're making post-judgment interest
7 in running on the judgment the whole time, you know,
8 because that's separate from the execution. And
9 they're perfectly happy, they don't care. They're
10 not trying to take assets and remove that
11 post-judgment interest rate. I mean, that makes no
12 sense. And so what it is, it's a pressure -- I
13 would submit -- it's pressure being applied, efforts
14 to get the court to come in, appoint someone else,
15 which the court really has no power to do this
16 either by the way.

17 The receivership is a general statute in
18 South Carolina. The statute pursuant to which
19 Lack's Beach Service has a contract with Myrtle
20 Beach is a specific statute that allows them to do
21 it. You -- we would submit, Your Honor, the court
22 doesn't even have power under a code equal statute
23 to come in and just say, well, I'm gonna, I'm gonna
24 totally break your contract between you and whoever
25 you have and I'm just gonna appoint some other

1 person to be the receiver. The court would involve
2 itself in all kinds of monitoring, and I want to let
3 the Court know this if the Court doesn't -- isn't
4 aware, that the -- any order creating a receivership
5 is immediately appealable by law under 14-23-30. I
6 can't remember the subsection. And there's an
7 automatic stay as well that applies. So if Your
8 Honor is going to allow him to circumvent the
9 natural order of things and do this kind of thing,
10 it's gonna be immediately appealed and we're gonna
11 have those kinds of problems with the Court of
12 Appeals so.

13 We -- we are respectfully asking you to
14 let us submit proposed orders on all these motions
15 to you. One of them will be very short. It'll have
16 one line; that'll be one of your options. It'll
17 say, I disagree with the verdict on the facts,
18 thirteenth juror. That's gonna be one of them. I
19 can do that on the way, you know, out to lunch or
20 something but. The other ones we'll go through
21 these steps and then we'll, you know -- and we'd
22 like the opportunity to submit those, Your Honor.
23 We can do it fairly quickly and let Your Honor
24 consider those. But if Your Honor decides that
25 you're not gonna change any of the results, then

1 what the Court should do is stay the execution of
2 the judgment, which means there's absolutely no
3 reason for a receivership anymore. The whole basis
4 for the receivership they're asking for is imminent
5 insolvency and all this. If they want to -- I don't
6 want to tell them how to practice 'cause they know
7 how to practice; but if they want to engage in some
8 type of discovery, there's this supplemental
9 proceedings exist. I don't have the statute
10 memorized off the top of my head, but they can do
11 things pursuant to supplementary proceedings. But
12 you -- this receivership, what does the Court say
13 about it when the first case you pull up on
14 receivership is a drastic remedy. That's what --
15 that what reports say about it. It's a drastic
16 remedy. It's not something to be done lightly. He
17 brings up Alex Murdaugh. Talk about drastic remedy
18 needed, yes. I mean, he admitted to millions and
19 millions and millions of dollars of financial fraud
20 so I'm sure. I can see a receivership there; that's
21 pretty easy. We don't need one here. You're gonna
22 be interfering with a state sanctioned contract by
23 doing this which I don't even think the court's in
24 power to do it. Thank you.

25 THE COURT: ' Okay. I'm gonna take this

1 under advisement. I never have liked the practice
2 of saying both sides do proposed orders and have
3 both sides through all that work. I usually prefer
4 to make a ruling and then tell one side to do the
5 order, rather than generate a lot of work for the
6 other side. And y'all gonna think that I'm always
7 going on vacation, but I'm going on vacation
8 tomorrow; it just so happens. I promise we have
9 allotted amount of vacation and I take every day of
10 it, but I only take the allotted amount. It
11 doesn't -- it just doesn't play well that I'm on
12 vacation again.

13 MR. BROWN: How lucky you are.

14 MR. MCLEOD: Purely a coincidence.

15 THE COURT: Be that as it may, I'm gonna
16 be gone for a week so I certainly -- if you want to
17 do a proposed order and let me take a look at it, I
18 have no problem with that. I will not be doing
19 anything until I get back and then I'm immediately
20 going to Richland when I get back so that's
21 perfectly fine with me.

22 Yes, sir.

23 MR. BROWN: Thank you, Your Honor.

24 MR. MCLEOD: The only thing I would add,
25 Your Honor, certainly we -- you'll be on vacation.

1 We understand that you'll be gone for a week. We've
2 already submitted our proposed order. That's kind
3 of what got us here and, you know, we submit --- we
4 gave them a copy of the proposed order with the
5 intent of let's working through it, and they never
6 called us, never anything. Next thing we know, they
7 file these objections with Your Honor so I really
8 think it's time for Your Honor to rule. I mean,
9 we've sent a proposed order. If they have a
10 proposed order that they want to send that you can
11 compare the two, they're both in Word format, I
12 just -- I don't want to create work for the Court.
13 I just think that -- I think it's ---

14 THE COURT: And I understand. We've kind
15 of done this backwards in that I out of ---

16 MR. MCLEOD: Yes, Your Honor. That's all
17 I was pointing out.

18 THE COURT: ---order and then we've had
19 hearings so I understand it's a little out of order.
20 I'm not gonna sign the order earlier than, I would
21 say, before the 27th because as soon as I get back
22 again we've got a term in Richland. I don't know if
23 it's gonna take the whole week so I would say
24 probably the 27th is realistically the earliest that
25 I would sign anything.

1 MR. MCLEOD: Thank you, Your Honor.

2 MR. BROWN: Thank you, Your Honor, very
3 much. Appreciate the Court's patience.

4 THE COURT: Thank y'all. I appreciate you
5 coming here.

6

7 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 13th day of April, 2023.

Frances B. Ray

FRANCES B. RAY, RPR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	MOTION TO STAY EXECUTION
Plaintiff,	)	ON THE JUDGMENT PENDING
v.	)	APPEAL
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	

Defendant Lack's Beach Service, Inc. ("Lack's") hereby moves the Court for an Order staying execution on and enforcement of the judgment during the pendency of the appeal. Lack's further moves that this Court hear, consider, and rule on this motion prior to consideration and ruling on Plaintiff's Motion to Appoint a Receiver. The Court's rulings on this motion to stay execution moot Plaintiff's Motion to Appoint a Receiver at this time, and thus Lack's respectfully suggests this is the proper sequence in which the Court should proceed with addressing the remaining outstanding motions.

PROCEDURAL HISTORY

This matter was tried between July 25, 2022 and July 29, 2022. The jury found in Plaintiff's favor and awarded \$3.73 million on the survival claim, \$10 million on the wrongful death claim, and \$7 million in punitive damages. On August 1, 2022, the Court entered a Form 4 judgment stating the jury had rendered a verdict in this amount. Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial *nisi remittitur*. The Court denied those motions via Order dated April 10, 2023 and, therefore, the judgment is final for purposes of appeal. On April 10, 2023, Lack's served and filed a notice of appeal. That notice of appeal is attached as

an Exhibit to this motion. Still pending is Lack's Conditional Motion for Reduction of Judgment. That motion is still before this Court here, as it is not necessarily affected by the appeal of this Court's decision to deny JNOV and to deny new trial. As the Court knows from the hearing, in conjunction with that Conditional Motion, Lack's also orally moved to amend its Answer pursuant to Rule 15(b), SCRPC to assert the applicable caps, should the caps be deemed by the Court to be required to be pled. This Court should thus issue an Order on these motions.

ARGUMENT

Rule 62(a) provides for an automatic stay of enforcement of a judgment of 10 days. *See* Rule 62(a), SCRPC. Rule 62(b), SCRPC governs stay of execution or enforcement of a judgment pending post-trial motions for a new trial or to alter or amend. Once appeal is taken from the judgment, Rule 62(d) then provides that a party may obtain a stay as to the enforcement of the judgment "by giving a supersedeas bond." Rule 62(d), SCRPC.

The Court denied Lack's post-trial motions and Lack's has now appealed. Lack's is prepared to post a supersedeas bond in accordance with the limits imposed by S.C. Code Ann. § 18-9-130(A)(1). Pursuant to section 18-9-130(A), the maximum supersedeas bond following appeal by an individual or a business entity that employs fifty persons or fewer or which has revenue of less than \$5 million in the previous tax year is \$1 million or the amount of the judgment, whichever is less. S.C. Code Ann. § 18-9-130(A)(1)(b).

Under Rule 62(d) and S.C. Code Ann. § 18-9-130 (A)(1), "if a judgment debtor is able to post a bond, then execution of the judgment will be stayed on appeal as a matter of right." *Davis v. Agape Nursing Rehab. Ctr., Inc.*, No. 2018-002236, 2022 WL 702579, at *4 (S.C. Ct. App. Mar. 9, 2022) (emphasis added) (unpublished but cited as an example of persuasive reasoning); 11 Charles A. Wright, et al., *Federal Practice and Procedure* § 2905 (3d ed. 2022).

Plaintiff's Motion for Appointment of a Receiver is based entirely on: 1) the existence of the judgment in this matter and 2) Lack's negative net worth and thus "imminent insolvency" in light of that verdict. If the Court grants a stay of execution of the judgment, with an undertaking, there is no need to consider the Motion for Appointment of a Receiver at this time, as it is moot. Here, Lack's had revenues of less than \$5 million in the prior tax year. Therefore, any bond imposed by the Court should be equal to or less than the statutory maximum of \$1 million under the appeal bond statute.

The purpose of the stay generally is to preserve the rights of the parties pending further proceedings. Plaintiff's Motion to Appoint Receiver puts the proverbial "cart before the horse," as Plaintiff desires to totally change the status quo of the parties.¹ S.C. Code Ann. § 18-9-130(A)(1)(b)—reflects that the public interest lies in a stay of execution upon the posting of an appropriate bond, and that the bond amount should be, under circumstances as set forth here, \$1 million or less. Further, the public interest lies in Lack's continuing on as a going concern, and not being placed into Receivership, especially considering its franchise agreement with the City of Myrtle Beach. A stay of execution order should therefore issue as of right under these circumstances, the Court should instruct that the clerk receive the appeal bond, and this should moot, at least during the pendency of the appeal, the motion to appoint a receiver. *Se. Booksellers'*

¹ As the Supreme Court has explained, appointment of a receiver "is a **drastic remedy**, and should be **granted only with reluctance and caution**." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). Thus, a receiver will not be appointed during the progress of a cause "unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined." *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887). Plaintiff has not established that the drastic remedy of a receiver is appropriate here—particularly considering Lack's is ready and willing to post a supersedeas bond up to the statutory maximum pending appeal.

Ass'n v. McMaster, 233 F.R.D. 456, 458-59 (D.S.C. 2006); *see also Morris v. Bland*, No. 5:12-cv-3177-RMG, 2015 WL 12911349 (D.S.C. Mar. 23, 2015).

CONCLUSION

Based on the above, Lack's respectfully requests this Court grant this motion and stay execution on the judgment. The Court should order that a \$1Million bond be posted by Appellant. Consultation regarding this Motion would serve no useful purpose. Lack's reserves the right to file a further supplemental memorandum supporting this motion.

Signature on Following Page

Respectfully submitted,

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Attorneys for Defendant Lack's Beach Service, Inc.

April 10, 2023

EXHIBIT

(Notice of Appeal)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2019-CP-26-07075

RECEIVED
Apr 10 2023
SC Court of Appeals

Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde, ...	Respondent,
v.	
Lack's Beach Service, Inc., ...	Appellant,

NOTICE OF APPEAL

Lack's Beach Service, Inc. ("Lacks") appeals: (1) the Order filed April 10, 2023, denying Lack's post-trial motions, (2) the Order filed November 28, 2022 on punitive damages, (3) the jury verdict and the judgment entered thereon, and (4) the evidentiary and other rulings adverse to Lack's before and during trial. Copies of the orders and the Form 4 order/judgment/verdict form are attached hereto. Lack's received written notice of the order denying its post-trial motions on April 10, 2023.

Signature on Following Page

Respectfully submitted,

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Attorneys for Defendant Lack's Beach Service, Inc.

April 10, 2023

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

MESWAET ABEL, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF ZERIHUN WOLDE AND AS)
NATURAL PARENT AND LEGAL)
GUARDIAN OF ADAM WOLDE AND)
WUBIT WOLDE,)

Plaintiff,)

v.)

LACK'S BEACH SERVICE, CITY OF)
MYRTLE BEACH, AND JOHN DOE)
LIFEGUARD,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-07075

RECEIVED

Apr 10 2023

SC Court of Appeals

ORDER ON POST-TRIAL MOTIONS
FOR JNOV, NEW TRIAL, AND NEW
TRIAL NISI REMITTITUR

This matter is before this Court on the Post-Trial Motions of Defendant Lack's Beach Service ("Defendant" or "LBS"), pursuant to Rules 50 and 59, SCRCP, seeking judgment notwithstanding the verdict or, in the alternative, a new trial absolute or a new trial *nisi remittitur*. A hearing on Defendant's post-trial motions took place on March 9, 2023.

After a thorough and careful review of the trial transcript, the briefs submitted by the parties, and the evidence and testimony at trial, this Court finds: (1) the jury's verdict is supported by the evidence; (2) the jury's carefully considered damages awards are fair, proportionate to the injuries suffered, and not the result of any improper impulse, passion, or prejudice; and (3) there was no prejudicial trial event or error to justify post-trial relief. Defendant's Post-Trial Motions are, accordingly, denied.

BACKGROUND

This wrongful death action arises out of the tragic death of Zerihun Wolde, a forty-one-year-old father of four, who drowned at a public beach where Defendant LBS was responsible for

providing lifeguard services. Defendant LBS is a beach safety company that contracted with the City of Myrtle of Beach to provide lifeguard protection at the City's public beaches in exchange for the privilege of operating as the sole vendor for beach concessions, such as umbrella and chair rentals, on those same public beaches. Plaintiff Meswaet Abel is the decedent's surviving fiancé and mother to his four young children, Adam, Wubit, Eden, and Edom.

Trial testimony indicated that on August 23, 2018, Mr. Wolde and Ms. Abel traveled with their four children from the family's home in Maryland to Myrtle Beach for a summer vacation. After an eight-hour drive, the family arrived in Myrtle Beach. Around 12:00 p.m. on the following day, the family went to the beach and settled in near lifeguard stand L21. As Ms. Abel watched the couple's two youngest children play in the sand, Mr. Wolde took Adam and Wubit to the water's edge to play in the surf. Mr. Wolde was an avid swimmer. Adam and Wubit were also adept swimmers and regularly attended swim lessons.

Once at the water's edge the children began playing and jumping in the waves with their father. According to Adam, they were in water that came up to his waist. They felt comfortable and believed the swimming conditions were safe. However, unbeknownst to the children and Mr. Wolde, LBS had received warnings earlier that day of dangerous swimming conditions due to rip and longshore currents. While playing in the surf, the children began to get pulled out to sea, causing Adam and Wubit to struggle and hang on to their father. According to Adam and Wubit, they were unintentionally getting deeper and deeper. As they got deeper in the water, they became scared. Mr. Wolde and the children began yelling for help. After trying to swim toward the shore, Adam, who was pulled out in front of his father and sister, began swimming to his left. Eventually, he was able to swim out of the rip current and make it back to shore. As Adam approached the

beach, Wubit continued to struggle and hold onto her father. Wubit and Mr. Wolde continued to yell and wave their arms for help.

As they struggled, it became obvious to bystanders on the beach that there was a problem. While clinging to her father, Wubit witnessed him begin to go under and then resurface, where he gasped for air and yelled for help. This process of going under, resurfacing, gasping for air and yelling for help went on for a period time. At this point, bystanders entered the water and pulled Mr. Wolde and Wubit to shore. Mr. Wolde was later pronounced dead of asphyxia due to drowning.

Following Mr. Wolde's death, Plaintiff filed suit against LBS,¹ alleging LBS knowingly breached numerous standards of care in operating its beach safety business and that these breaches were a proximate cause of Mr. Wolde's death. Among the breaches alleged was LBS's use of "dual-role" lifeguarding, *i.e.*, the practice of entrusting lifeguards with two conflicting roles: 1) providing lifeguard protection; and 2) transacting sales of beach merchandise and performing related customer service. Plaintiff alleged LBS's unauthorized use of this dual-role practice cost LBS its lifeguard certification in 2007. Since that time, LBS was on notice that dual-role lifeguarding posed a dangerous safety risk to swimmers, yet LBS continued the practice anyway. In addition to other standard of care breaches, Plaintiff also alleged that LBS was required to provide lifeguards that were both tested and certified, yet it failed to do so. Consequently, had LBS complied with beach safety and lifeguard protection standards, the drowning incident that cost Mr. Wolde his life could have been averted.

The case was tried before a jury in Horry County during the week of July 25-29, 2022. At trial, Plaintiff presented evidence and testimony that LBS received a warning from the National

¹ The City of Myrtle Beach was dismissed prior to trial.

Weather Service that hazardous conditions were present on the day of the incident. Despite the National Weather Service warning, LBS presented no witnesses who had any personal knowledge of having provided any warnings or efforts to guard against the dangerous swim conditions present that day. Instead, numerous witnesses testified that there were no warnings and no indication that LBS took measures to guard against the hazardous swim conditions or prevent swimmers from entering the water.

Plaintiff presented expert testimony that LBS violated the prevailing standard of care by engaging in dual role lifeguarding, by failing to properly train and supervise the lifeguards, and by allowing lifeguard towers to go unattended with no other safety strategy to ensure constant, proper water observation. Plaintiff's expert further testified that LBS violated the standard of care by failing to close areas for swimming or provide adequate warning of the hazardous conditions. Plaintiff also presented evidence that LBS was understaffed at the section of the beach where Mr. Wolde drowned. The owner of LBS, George Lack, admitted that being understaffed as they were on the day Mr. Wolde drowned could make all the difference between life and death. LBS did not call an expert to rebut Plaintiff's expert as to the standard of care, nor did LBS call any witnesses who had any personal knowledge that LBS complied with the standard of care on the day Mr. Wolde drowned.

The jury entered a verdict in favor of the Plaintiff and awarded \$3,700,000.00 in survival damages, \$10,000,000.00 in wrongful death damages, and \$7,000,000.00 in punitive damages. LBS now seeks judgment as a matter of law notwithstanding the jury's verdict, or, in the alternative, a new trial absolute, or a reduction of the damages by way of a new trial *nisi remittitur*.

STANDARD OF REVIEW

When ruling on a motion for directed verdict or JNOV, the trial court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022). “A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). “The motion[] should be denied when either the evidence yields more than one inference or its inference is in doubt.” *Garrison*, 435 S.C. at 576, 869 S.E.2d at 803 (quoting *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007)). In considering a directed verdict or JNOV motion, “neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Id.* (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006)).

South Carolina’s “thirteenth juror” doctrine allows the trial court to grant a new trial absolute only if the court finds, in its discretion, that the evidence does not justify the verdict. *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). A new trial absolute is likewise warranted where a verdict is so “shockingly disproportionate” to the injuries suffered as to indicate that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000) (citing *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)). “Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 829 (2015) (citation and quotations omitted). “A verdict which may be supported by any rational

view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive.” *Kunst v. Loree*, 424 S.C. 24, 46-47, 817 S.E.2d 295, 306 (Ct. App. 2018) (quoting *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969)).

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice. *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citing *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993)). However, the jury’s determination of damages is entitled to substantial deference. *Id.* (citing *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)). In considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented. *Id.* (citing *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)). Further, the trial court “cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs.” *Vinson*, 324 S.C. at 407, 477 S.E.2d at 724 (quoting *South Carolina State Hwy. Dep’t v. Miller*, 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960)). “[T]he verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be.” *Id.* Thus, “compelling reasons” must be given to justify invading the jury’s province in this manner. *Riley*, 414 S.C. at 192, 777 S.E.2d at 828 (2015) (citations omitted); *see also Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (finding appellant’s arguments did not constitute compelling reasons to justify the grant of a new trial *nisi remittitur*).

DISCUSSION

I. Proximate Cause

LBS moves for JNOV or, in the alternative, a new trial absolute, arguing there was insufficient evidence to create a jury issue that its conduct, including its use of dual role lifeguarding, contributed to Mr. Wolde's death by drowning.

On directed verdict, LBS asked this Court to grant judgment in its favor on the ground it maintained there was "no amount of time that the family struggled" and no evidence that a lifeguard could have reached Mr. Wolde in time to change the outcome. Specifically, LBS argued:

"[T]hen this is a quick one ... the evidence of proximate cause doesn't exist, either direct or circumstantially, for the same or similar reasons that I've just described with the dual role, the fact that there's no amount of time that the family struggled, no evidence that a lifeguard could get from his or her location to Mr. Wolde to change his outcome. . . there's just no direct or circumstantial evidence to indicate proximate cause has been . . . proved or that should go to the jury"

(Trial Tr. 618:25-619:8). Contrary to LBS's contention, the Court finds the evidence on this issue conflicting. Therefore, the issue was appropriately submitted to the jury.

The jury heard testimony from multiple witnesses that the incident lasted for a period of time sufficient to create a jury question as to whether LBS's lifeguards—if acting in accordance with the standard of care—could have changed the outcome. Wubit, who was with her father during the incident, testified they struggled for a "long period of time" and that the entire incident up until they got to shore lasted 10 to 15 minutes.² The evidence also shows that Adam, Wubit, and Mr. Wolde were all screaming, yelling, and waving for help.³ Wubit testified they were yelling as loudly as they could.⁴ And not only were they positioned close enough to see the beach, Wubit

² Trial Tr., 586:1-4; 589:18-24.

³ Trial Tr., 585:3-11.

⁴ Trial Tr., 585:3-11.

explained that from where they were yelling, she could see bystanders on the beach.⁵ Adam testified he could see the shore.⁶ He explained that they yelled as loudly as they possible could, many times.⁷ And even the bystanders, who observed their calls for help from the beach, could not get the attention of Lack's lifeguards nor could they find any.⁸ This evidence shows the incident was not quick or instantaneous, and, in fact, bystanders were able to see their distress and attempt a response.

Plaintiff's expert, Dr. Griffiths, also provided testimony that Mr. Wolde was a distressed swimmer before he drowned, meaning LBS's lifeguards should have observed his distress with enough time to respond:

- Q. Does the literature differentiate between silent drownings and distressed swimmer drownings?
- A. That's a good point. The progression, there is a progression in drowning. If you're a non-swimmer, most non-swimmers enter into a drowning scenario very quickly which is quick, quiet and subtle. They can't cry out for help. There's very few visual signs of drowning. Someone who can swim first becomes distressed and when they're distressed they can call out for help and they can wave for help. But when they're distressed, if they don't help themselves or someone doesn't rescue them quickly then they rapidly move from a distressed victim to a drowning victim....But Mr. Wolde apparently was a distressed victim that could have and should have been easily recognizable by attentive lifeguards.⁹

This evidence was sufficient to create a jury issue as to proximate cause, and sufficient to support the resulting factual findings implicit in the jury's verdict.¹⁰

⁵ Trial Tr., 586:13-20.

⁶ Trial Tr., 543:9-12.

⁷ Trial Tr., 543:6-544:5.

⁸ Trial Tr., 196:17-24; 197:3-10.

⁹ Griffiths, 96:23 – 97:16.

¹⁰ See *RFT Mgmt. Co.*, 399 S.C. at 331, 732 S.E.2d at 170-171 (“[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.”) (citing *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov’t Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973)).

The evidence at trial also shows other breaches of the standard of care linked to Mr. Wolde's drowning. In particular, Plaintiff's expert testified that LBS's conduct violated the standard of care in multiple respects, was dangerous, and was a contributing cause to Mr. Wolde's death:

A. Clearly by all the evidence provided in this case, the lifeguards were not adequately tested, not trained, not on duty at the time, if you look at the beach service line up at any given time during this incident. People were out to lunch without alternative coverage. They were supposed to have even lifeguard onlys on duty, they had less than half of the required amount. And plus provided the dual role is unacceptable. It's both unacceptable in our industry and it's dangerous. Lifeguards cannot be performing other duties that divert their attention from the water. And so, lack of training, lack of testing, lack of supervising, and the people on the stands were put in a position of failure. They were not adequately trained or supervised or tested to be providing ocean lifeguarding service, surf guarding service protection for the people.

Q. Yes sir. And was operating this endeavor in a dangerous and unsafe manner a contributing cause to Mr. Wolde's death?

A. Yes, I believe it was a direct cause to his death. Yes sir.¹¹

As to training, evidence was offered that LBS's lifeguards were untrained and unequipped to comply with the standard of care. LBS's chief operator, Weslyn Lack-Chickering, testified that LBS had no training records for any of the lifeguards, including those assigned to stands at L-20, L-21, and L-22.¹² She further admitted that these lifeguards missed multiple days of training because they were not in the country when the training took place.¹³ The evidence at trial also showed LBS was understaffed on the day of the incident and that understaffing was a contributing cause to Mr. Wolde's death.¹⁴ In fact, George Lack, the owner of Lack's, conceded that being

¹¹ Griffiths, 111-112.

¹² Trial Tr., 842:7-15.

¹³ Trial Tr., 838:8-839:4.

¹⁴ Trial Tr., 362:3-6.

short a lifeguard in the section where Mr. Wolde drowned was “theoretically” enough to make a difference in a lifesaving situation, such as the instant case:

Q. Under your testimony, you’re one short. Well, can’t one short make all the difference between life and death when it’s the tower responsible for the section of the public beach where Mr. Wolde drowned to death?

A Theoretically, yes.¹⁵

There was also evidence that LBS’s failure to close the beach was a breach of the standard of care.¹⁶ Specifically, Plaintiff’s expert testified that the National Weather Service warning provided notice of a hazardous condition which, at a minimum, warranted extra caution. Yet LBS took no action to close the beach and failed even to take minimum measures to effectively notify and warn the public. Dr. Griffiths further testified that LBS had a duty and obligation to warn the public of known hazards.¹⁷ The evidence showed that LBS, however, failed to place a single rip current warning anywhere on the beach, much less close to the water’s edge as required by the standard of care.¹⁸

While LBS argues the staff member assigned to L-21 was on a regularly scheduled lunch break at the time of the incident, the Court fails to see how this fact could be dispositive. Instead, viewing it in the light most favorable to the Plaintiff, an inference could be drawn that the L-21 lifeguard left the tower unoccupied at a time when LBS knew there were dangerous swimming conditions present. As Dr. Griffiths testified: “[a] lifeguard is never supposed to abandon their

¹⁵ Trial Tr., 451:14-18.

¹⁶ Griffiths, 101-102.

¹⁷ Griffiths, 102:22-103:6.

¹⁸ Griffiths, 93:1-9; 93:22-23.

post without someone else filling in for them, taking their stand, or closing the water. Otherwise, *it's a dereliction of duty.*"¹⁹

From this evidence, the jury could reasonably infer that LBS failed to provide acceptable, effective, and critical lifeguard protection and beach safety measures that could have prevented Mr. Wolde's premature and untimely death. To the extent there is conflicting evidence, it is not the function of this Court to weigh the evidence and resolve those conflicts. *See Welch*, 342 S.C. at 300, 536 S.E.2d at 419 (finding conflicting evidence sufficient to deny JNOV, noting "[i]t is not the function of this Court to weigh the evidence and resolve those conflicts."). Because the evidence, viewed in the light most favorable to the Plaintiff, supports the factual findings implicit in the jury's verdict, LBS's motion for JNOV on proximate cause is denied. *See Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) (a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings). For these same reasons, the Court further finds the evidence justifies the verdict; thus, LBS's motion for new trial absolute on proximate cause is likewise denied.

II. Dual Role Negligence

As to dual role negligence, LBS challenges the sufficiency of the evidence linking LBS's dual role lifeguarding practice to Mr. Wolde's death. Specifically, LBS maintains there is no direct or circumstantial evidence establishing that any LBS lifeguard was performing a sale or related commercial duties at the time of the incident.

Contrary to Lack's contention, bystander Julian Chandler provided evidence from which the jury could infer that the lifeguard at L-22 was engaged in commercial activity during the time

¹⁹ Griffiths, 68:21-25.

of Mr. Wolde's distress. Chandler provided direct testimony that the L-22 lifeguard was on the beach talking to two people near the umbrella line with his back to the ocean.²⁰ That the L-22 lifeguard was talking to two people near the umbrella line is evidence from which the jury could infer that the lifeguard was conducting umbrella or chair rental sales or performing related customer service. Likewise, from this evidence, an inference could be drawn that the staff member positioned at L-22—closest to where the Wolde family entered the water—was distracted by commercial activity and this distraction impeded a proper lifeguard response.

In addition, Plaintiff offered evidence that the City of Myrtle Beach required lifeguard protection on the tower and that positioning on the tower is consistent with the standard of care. Because the L-22 lifeguard was at the umbrella line and was not on the tower, an inference can be drawn that he was not performing lifeguard duties and was instead engaged in performing revenue-generating duties which were required by LBS.

Evidence at trial further shows LBS's staff were required to make commercial sales, were financially motivated to make sales,²¹ were required to keep track of all sales activity, were required to immediately update all sales records, and were required to maintain a seating chart—all in addition to their lifesaving duties.²² Indeed, the sales totals for the date of the incident established that LBS's staff did in fact make sales at the three lifeguard towers closest to the drowning incident, towers L-22, L-21 and L-20.²³ Consistent with this evidence, Plaintiff's expert testified that: "all three [lifeguards, *i.e.*, L-22, L21 and L-20] were engaged in sales. And I would

²⁰ Chandler Video Tr., 16:10-19:1.

²¹ Trial Tr., 307:9-12 (confirming that LBS lifeguards earn commissions based on sales of umbrella and beach chair rentals);

²² Plt. Trial Ex. 10, p.10.

²³ Plt. Trial Ex. 17.

say that, in part, contributed—that dual role in part led to the accident.”²⁴ Dr. Griffiths testimony was preceded by the acknowledgment that the sales receipts from L20, L21, and L22 “exemplif[y] and highlight[] the fact that sales were taking place during the day.”²⁵ These sales receipts establish that the three lifeguards monitoring the beach where Mr. Wolde’s drowning occurred generated \$1,173.50 in sales that day.²⁶

Moreover, there was evidence that Mr. Wolde was in distress for a “long period of time,” and at no time during the estimated ten to fifteen-minute drowning event did any LBS staff member respond or attempt lifesaving efforts, despite yells for help by both the Wolde family and bystanders.²⁷ Even the bystanders on the beach could not get the attention of Lack’s lifeguards nor could they find any.²⁸

This evidence, viewed in the light most favorable to the Plaintiff, is sufficient to create a jury question as to whether LBS’s use of dual role lifeguarding prevented an adequate lifeguard response to Mr. Wolde and his family’s distress in the water. LBS’s motion for JNOV on the issue of dual role negligence is, therefore, denied.²⁹ Because the Court finds the evidence as to LBS’s

²⁴ Griffiths, 232:6-8.

²⁵ *Id.* at 232:2-10.

²⁶ Plt. Ex. 17.

²⁷ Trial Tr., 543:6-544:5; 585:3-11; 586:1-20; 589:18-24.

²⁸ Trial Tr., 196:17-24; 197:3-10.

²⁹ To the extent LBS argues that evidence of dual role negligence led to confusion of the issues, mislead the jury, constituted undue delay or a waste of time, LBS never objected to this evidence or argument at trial. *See* Rule 403, SCRE. Rather, LBS’s sole objection to this evidence was prior to trial and based on the false assumption that “[w]hile Plaintiff’s attorneys are expected to harp on profits over people the completely conjectural and speculative evidence as to commercial activities of the lifeguards would be irrelevant, non-probative and highly prejudicial.” (*See* Def. MIL, p. 9). However, the prejudice LBS alleged before trial did not occur at trial. At no time during the trial was there any reference to “profits over people.” Notwithstanding, as shown above, evidence of LBS’s dual role practice was properly admitted as relevant to the liability issues of standard of care, breach, and proximate cause. *See* Rule 401, SCRE (evidence is admissible if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

dual role practice justifies the verdict, the Court further denies LBS's alternative motion for new trial absolute on dual role negligence.

III. Admission of Evidence

LBS next challenges several evidentiary rulings, arguing the evidence was so prejudicial as to warrant a new trial absolute. As addressed in turn below, the Court finds no error and no prejudice sufficient to warrant the relief requested.

"[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v Mitchell*, 286 S.C. 572, 573, 247 S.E.2d 334, 337 (1978).

A. LBS's Inconsistent Factual Position in Prior Litigation

LBS's owner, George Lack, maintained at trial that the young adults his company hired to conduct public safety were lifeguards and not beach attendants. He contended that the lifeguards were trained, that they watched the water for distressed swimmers, and that only a small part of their working day was spent selling commercial equipment. For these reasons, Plaintiff sought to introduce evidence that George Lack had taken the opposite position in litigation before the South Carolina Workers Compensation Commission. In that litigation, Lack submitted to the Commission that his lifeguards' duties were 99.995% commercial sales and .0047% lifeguarding. Plaintiff maintained at trial that this opposing position before the Commission is highly relevant to this case because LBS's lifeguarding practices were the same then as they were on the day of Mr. Wolde's drowning.

As an initial matter, LBS opened the door to this evidence by claiming at trial that its lifeguards perform all lifeguarding and only minimal commercial sales. Cross-examination on the inconsistency between LBS's position in this case and that before the Workers' Compensation Commission was, therefore, permissible and appropriate. *See Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985) (upholding admission of settlement in prior Workers' Compensation claim to impeach personal injury plaintiff's testimony of pain and suffering as a result of a later accident). Likewise, LBS was permitted and did elicit testimony from George Lack in its cross regarding the background and rationale for the percentages provided to the commission.

While LBS argues the evidence is "grossly remote in time, nonprobative, and unduly prejudicial,"³⁰ the evidence shows Lack's lifeguarding practices were exactly the same in 2018 as they were in 2002 during the workers' compensation litigation. On this basis alone, the probative value of the evidence outweighs any alleged prejudice.

Further, the admission of evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion, commission of a legal error, and prejudice. *Hall v. Palmetto Enterprises II, Inc., of Clinton*, 282 S.C. 87, 91, 317 S.E.2d 140, 142-43 (Ct. App. 1984). No abuse of discretion or legal error has been demonstrated. Finally, even if there was error, there is no evidence Lack's suffered any prejudice because George Lack conceded at trial that his company's lifeguards performed commercial duties and engaged in dual-role lifeguarding. *See Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

B. Lack's USLA Decertification

Throughout the trial of this case, the United States Lifeguard Association ("USLA") was consistently recognized as the lifeguard industry's standard of care. LBS, however, claims

³⁰ *See* Lack's Mot. New Trial Absolute, p. 18.

reversible error in the admission of this standard of care evidence and, more specifically, in admitting evidence of its failure to meet the standard of care set by the USLA, as evidenced by communications with the USLA and the USLA's resulting decision to decertify Lack's as an accredited lifeguard service. The Court finds LBS's arguments unavailing. The facts show this evidence was highly probative and essential to the liability issues of notice, foreseeability, willfulness, and recklessness.

Chris Brewster, the former President of the USLA, testified that his organization plays a large role in establishing the national standard of care for ocean lifeguards.³¹ George Lack conceded the USLA is the standard of care for lifeguarding. Indeed, Lack testified he sought to secure USLA certification so his company could advertise the same to the public—*i.e.*, he wanted to hold out to the public that his lifeguards were trained and competent because they met the criteria of the USLA. Brewster testified that Lack concealed from USLA the fact that his lifeguards were participating in commercial activities in addition to lifeguarding. It was not until Brewster traveled to Myrtle Beach in 2007 that the USLA was apprised of the misrepresentation.³² The USLA thereafter de-certified LBS as a USLA compliant lifeguard service. As this evidence demonstrates, LBS's USLA certification and decertification is highly probative of both (1) the standard of care relevant to this case, and (2) Lack's knowledge that its practices violated the standard of care.

Further, Brewster also explained that it would be impossible for any Lack's lifeguard to meet the USLA training requirements required by the franchise agreement because dual-role lifeguarding is entirely inconsistent with USLA standards.³³ Brewster testified that the USLA trains lifeguards to watch the water, minimize distractions, and prevent people from even getting

³¹ Trial Tr., 473:15-17 (“... we [USLA] do set the standard.”).

³² Trial Tr., 495:18-25.

³³ Trial Tr., 478:5-9.

into danger in the water. If a company knowingly introduces distractions to its lifeguards in the form of selling commercial goods, and then trains them on how to sell the equipment, they are knowingly and intentionally violating USLA training.³⁴ Evidence of LBS's USLA membership, certification, and decertification is, thus, highly relevant to the standard of care applicable to this case as well as to LBS's breach and the foreseeability that LBS's breach could pose a dangerous safety risk to beachgoers like Mr. Wolde. Moreover, because LBS concedes its lifeguards perform dual roles and earn commissions from selling beach concessions, it cannot complain of prejudice resulting from evidence that it lost USLA certification because of this practice. The Court finds no error in admitting this evidence much less one that would warrant a new trial absolute.

C. LBS's Gross Commercial Sales from Lifeguards for 2018

LBS next challenges the admission of its 2018 gross sales from lifeguards as well as sales tax calculations for the three-month period surrounding the incident. LBS maintains the evidence, which reflected \$1,520,918.00 in gross sales, is not relevant and so "highly prejudicial" as to warrant a new trial.

The Court finds no error or prejudice warranting a new trial based on the sales records. While there was no dispute at trial that LBS's lifeguards performed commercial sales while also entrusted with performing lifeguard protection duties, the sales totals offer insight as to the time and frequency in which LBS's lifeguards were engaged in commercial duties. This evidence is relevant to essential elements of Plaintiff's negligence claim, such as LBS's knowledge that it engaged in a water safety practice that was directly contrary to its duty of providing lifeguard protection, and that LBS violated the standard of care and the Franchise Agreement by failing to

³⁴ Trial Tr., 478:5-9.

“ensure minimum lifeguard staffing in each zone.”³⁵ Further, the sales evidence was limited in scope and tailored to the week, month, and year of the incident. The Court finds this limitation was sufficiently tailored to the liability issues of whether LBS was in fact engaging in dual role lifeguarding, whether this practice put swimmers—and Mr. Wolde—at risk, whether it violated the standard of care and the Franchise Agreement, and whether it was a contributing cause of Mr. Wolde’s death.

As to prejudice, the Court is unable to find any. LBS’s gross sales are a matter of public record by virtue of its franchise agreement with the City of Myrtle Beach. Moreover, the sales evidence reflects only gross sales and is not an indicator of LBS’s financial position or net profits. Gross sales, being entirely distinct from the amount of money LBS made off its beach rentals, are not prejudicial in the manner complained of by LBS.³⁶

LBS’s reliance on *Branham v. Ford Motor Co.* for the assertion that “business income of this kind and nature has been forbidden by the South Carolina Supreme Court” is misplaced.³⁷ The court in *Branham* did no such thing. Rather, in *Branham*, the court found plaintiff’s counsel “went far beyond the pale in submitting evidence of Ford’s Senior Management compensation,” finding such evidence improper because it introduces an “arbitrary factor” in a jury’s consideration and assessment of punitive damages. *Id.* at 240, 701 S.E.2d at 25. The improper evidence there included that “the Ford Chairman and Chief Executive Officer was compensated by stock options worth \$5,300,000; the Ford President and Chief Operating Officer received a salary \$1,458,000 in 2005; the Ford Executive Vice President received a salary of \$972,000 in 2005; the Ford Chief

³⁵ Franchise Agreement, Plt. Trial Ex. 15, p. 2:29-30.

³⁶ See Lack’s Mot. New Trial Absolute, p. 21.

³⁷ See Lack’s Mot. New Trial Absolute, p. 21 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010)).

Financial Officer received a salary of \$916,000 in 2005; a former Ford chairman received \$880,000 in 2005[;]" and that "[i]n 2005, they didn't pay bonuses [but] in 2004, they did pay bonuses: \$2 Million, \$1 Million, \$1 Million and \$1 Million plus stock and other compensation." *Id.* LBS's 2018 gross sales figures are entirely distinguishable from this type of "arbitrary" and prejudicial financial testimony.

Furthermore, to the extent LBS's takes issue with the "manner in which Plaintiff's counsel used the evidence throughout the trial and in his closing argument,"³⁸ LBS's never once objected to the manner in which this evidence was used. In fact, LBS never made a single objection to Plaintiff's closing. This failure constitutes a waiver of any right to challenge the evidence on this basis now. *See e.g. Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (the general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver."); *Scott*, 340 S.C. at 167, 530 S.E.2d at 393 ("Ordinarily, if an appellant fails to object the first time a statement is made in closing argument, he or she waives the right to raise the issue on appeal").³⁹

In sum, LBS waived its right to challenge the manner in which the sales records were used, and as to its admissibility, Lack's argument fails on probative value alone. Any suggestion of

³⁸ *See* Lack's Mot. New Trial Absolute, p. 21.

³⁹ This rule is subject to one very narrow exception "in flagrant cases where a vicious inflammatory argument results in clear prejudice." *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (quoting *Toyota of Florence*). In *Dial*, the court made clear that the "vicious inflammatory argument" contemplated in the exception must be a closing argument that "constitutes abuse of a party or witness." *Id.* at 259, 509 S.E.2d at 272. In *Toyota of Florence*, the court found that racist posters about the party opponent that counsel used as props in a closing argument met this narrow exception. 314 S.C. at 263, 442 S.E.2d at 615. LBS's challenge to the admission of a public record showing its yearly gross sales is hardly comparable to the type of vicious inflammatory argument referenced in *Dial* or *Toyota of Florence*. Reference to gross sales is simply not "flagrant" or "vicious" nor is it an "abuse" of LBS so as to warrant deviation from the strict rule barring consideration of an allegedly prejudicial closing statement despite a failure to object.

prejudice is further undercut by the fact the sales record is a public document, reflects only gross sales (not net income), and is required by the Franchise Agreement. There is, thus, no error in admitting evidence of the 2018 stand totals, much less any error warranting a new trial. LBS's new trial motion based on the admission of the 2018 stand totals and sales tax calculations is denied.

IV. JNOV on Survival

LBS challenges the sufficiency of the evidence supporting the jury's award of survival damages, arguing it is entitled to a JNOV on the ground the evidence at trial failed to show that Mr. Wolde endured a period of conscious pain and suffering to warrant submission of the survival claim to the jury.

The South Carolina survival statute provides that a cause of action for personal injuries survives the decedent's death. S.C. Code Ann. § 15-5-90. Damages for a decedent's conscious pain and suffering are recoverable, but there must be proof that the decedent consciously suffered prior to death. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000); *Croft v. Hall*, 208 S.C. 187, 193, 37 S.E.2d 537, 539 (1946). "If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," it should be submitted to the jury. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991). In deciding whether to submit a claim of conscious pain and suffering claim to a jury, all evidence and any inferences reasonably therefrom must be viewed in the light most favorable to the plaintiff. *Vereen*, 306 S.C. at 432; 412 S.E.2d at 431.

Here, the evidence meets and exceeds the requisite standards. Two of Mr. Wolde's children, Adam and Wubit, witnessed their father struggle for his life in the water. Adam testified that the entire drowning event lasted for an extended period—including being pulled out to sea,

fighting for his life, yelling and waiving his arms for help. Adam testified he watched his father struggle while trying to save Wubit.⁴⁰

Wubit's testimony was equally powerful and even more direct because she was in her father's arms during his struggle to stay afloat. She not only saw but also felt his struggle, his gasps for air, and his calls for help.⁴¹ She testified her father repeatedly went under water, came back to the surface, and gasped for air while fighting to stay afloat.⁴² This terrifying sequence lasted for a "long period of time."⁴³ Wubit went on to explain that eventually the yelling, gasping, and going under came to a frightening stop, and she just held onto her father.⁴⁴ Wubit estimated the entire incident lasted for ten to fifteen minutes.⁴⁵ As Wubit's testimony shows, she was not only able to see and hear her father's struggle, but she was also able to feel the tremendous suffering and pain associated with his struggle.

Bystander testimony also supports Mr. Wolde's pain and suffering. One of the bystanders, Julian Chandler, testified he was sitting on the beach approximately 100 feet from the ocean when he heard cries for help in the water.⁴⁶ He rushed into the ocean using a mix of walking and swimming to reach Mr. Wolde, a process which took several minutes.⁴⁷ When Chandler finally got to Mr. Wolde, he had been assisted closer to shore into waist deep water.⁴⁸ Chandler testified

⁴⁰ Trial Tr., 543:23-544:5.

⁴¹ Trial Tr., 584:7-13.

⁴² Trial Tr., 584:7-13; 585:17-586:4.

⁴³ Trial Tr., 586:1-4.

⁴⁴ Trial Tr., 586:1-4; 587:11-588:3; 606:24-607:3.

⁴⁵ Trial Tr., 589:18-24.

⁴⁶ Chandler Video Tr., 59:19-22.

⁴⁷ *Id.*, 31:2-5.

⁴⁸ *Id.*, 62:8-11.

that when brought to shore, Mr. Wolde's eyes were bulging, he was spitting up water and sand, and he had a pulse.⁴⁹ Chandler went on to explain:

[T]he nurse and the larger gentlemen that were there that pulled him out to the sand issued CPR[.] The issue was the water and sand would come out and then get sucked back in, so she asked me to roll him, so I then rolled him on his side[.] She began clearing everything out of his mouth to then try to roll him back and administer CPR."⁵⁰

Based on this testimony, the evidence was not that Mr. Wolde died instantaneously; rather, he was still alive at the time he was brought back to shore. But as the coroner later confirmed, the rescue attempt on shore was unsuccessful and Mr. Wolde ultimately died from asphyxia due to drowning.⁵¹ At trial, the coroner explained that the asphyxia diagnosis meant Mr. Wolde's lungs filled up with water and prevented oxygen from getting into his blood.⁵² In other words, the process of going under, swallowing water, and gasping for air eventually caused him to suffocate to death.⁵³

Viewing this evidence in the light most favorable to the Plaintiff, the Court finds sufficient evidence to create a jury issue as to pain and suffering. This is not a situation where an individual is knocked unconscious, falls in the water, and immediately drowns; nor is this akin to a toddler falling in the water and immediately sinking to the bottom. Notwithstanding, LBS argues that in order to submit the survival claim to the jury expert testimony on the pathophysiology of the drowning process was required. While such expert testimony may be helpful or even necessary in some cases, in light of the direct witness testimony recounted above, this is not one of those cases.

⁴⁹ *Id.*, 21:11-19.

⁵⁰ *Id.*, 22:1-9.

⁵¹ Trial Tr., 466:2-4.

⁵² Trial Tr., 466:8-10.

⁵³ The coroner's report indicated that at the time of Mr. Wolde's drowning he was trying to save his daughter's life. *See* Ex. 20, p. 4.

Moreover, it is not Plaintiff's burden to prove survival damages through expert testimony. Rather, as in this case, Plaintiff's burden is to offer sufficient evidence from which the jury can infer conscious pain and suffering. *Scott v. Porter*, 340 S.C. 158, 171, 530 S.E.2d 389, 394-95 (Ct. App. 2000) (affirming survival damages award of \$600,000 based on circumstantial evidence from from which the jury could infer pain and suffering which preceded the decedent's coma and death) *Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 (stating jury could infer conscious pain and suffering from evidence).

Lack's reliance on *The Corsair*, 14 U.S. 335 (1892), is also misplaced. Unlike the witness testimony here, there were no witnesses in *Corsair*. The *Corsair* court did not have the benefit of testimony recounting the decedent's pain, consciousness, or duration of suffering. Rather, the only evidence available in *Corsair* was that the decedent drowned when the steam tug she was riding in struck the bank of the Mississippi River and sank. *See id.* In stark contrast to *Corsair*, the evidence recited above is sufficient for the jury to infer that Mr. Wolde endured pain and suffering which preceded his death by asphyxiation due to drowning. LBS's reference to "pre-impact fear" is also unavailing. Pre-impact fear pertains to accident victims prior to the impact which renders them unconscious or instantly causes death.⁵⁴ This is not a motor vehicle accident or similar situation involving an impact resulting in instantaneous death or unconsciousness. Accordingly, because the evidence is sufficient for the jury to infer conscious pain and suffering, LBS's motion for JNOV on the submission of Plaintiff's survival claim to the jury is, therefore, denied. *See Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 ("If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," it should be submitted

⁵⁴ *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 214-15, 734 S.E.2d 142, 144-45 (2012) (discussing pre-impact fear as a possible element of conscious pain and suffering from death by motor vehicle accident but declining to adopt or reject rule under the facts of this case).

to the jury). For these same reasons, the Court finds the jury's survival verdict is supported by the evidence; thus, LBS's request for a new trial absolute is likewise denied.

V. Motion for New Trial on Survival Damages

LBS maintains the jury's award of \$3.73 million in survival damages is so excessive as to suggest it was improperly motivated by passion or prejudice warranting a new trial absolute, or that it is merely unduly liberal entitling LBS to a reduction of the award by way of a new trial *nisi remittitur*.

As an initial matter, LBS argues—for the first time—that the Court's instruction on the mortality table was confusing and may have mislead the jury so as to taint the award. Having never raised the error it now claims as a basis to set aside the jury's award, LBS is barred from assigning any error now.⁵⁵ It is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)). If the instruction on survival and wrongful death damages was so confusing as to warrant a new trial, it was incumbent on LBS to object to the court's instruction or seek a clarification. Indeed, LBS could have objected both before the court approved the instruction and again when the instruction was given. LBS also neglected yet another opportunity when the court asked counsel: "[a]ny additions or anything else . . . before we send the jury back to deliberate."⁵⁶ Because LBS failed to object or otherwise address its concerns—despite multiple opportunities—LBS is barred from doing so now.

⁵⁵ *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) ("It is well settled that an issue may not be raised for the first time in a post-trial motion.")).

⁵⁶ Trial Tr., 939:19-22 (responding, "None from the defendant, Your Honor.").

As to LBS's argument that the award was motivated by improper prejudice, passion, or other outside influence, LBS merely reiterates the same arguments raised in its JNOV motion, *i.e.*, that there was no evidence of the specific duration of the drowning incident, and no expert evidence of the drowning process to inform the jury as to the effects a drowning victim might experience. For the same reasons this Court rejected LBS's JNOV arguments, the Court finds LBS's arguments unavailing.

As set forth above, the jury heard evidence that: (1) Mr. Wolde was conscious and struggling to stay afloat for a period of time; (2) during this time, Mr. Wolde repeatedly went under water, gasped for air, and cried for help; and (3) the incident lasted 10-15 minutes from the time Mr. Wolde became distressed until he was brought to shore. This evidence was more than sufficient for the jury to infer conscious pain and suffering. Accordingly, the Court finds the jury's award of survival damages is properly supported by the evidence. LBS's request for a new trial absolute is, therefore, denied.

As to LBS's alternative request to reduce the award by *nisi remittitur*, the Court likewise finds no basis to justify invading the jury's province. In considering a motion to reduce a damages award by *nisi remittitur*, the jury's determination of damages is entitled to substantial deference. *Smalls*, 339 S.C. at 215, 528 S.E.2d at 686 (citation omitted). Again, the direct testimony of Mr. Wolde's daughter who provided firsthand knowledge of Mr. Wolde's drowning experience, including the duration of the event and his pain and suffering in the process, provides more than sufficient evidence.⁵⁷ Further, the coroner testified as to the cause of Mr. Wolde's death, explaining what death by asphyxia due to drowning entails.⁵⁸ In considering this evidence, the

⁵⁷ Wubit testified the sequence of "going under and coming back up, . . . gasp[ing] for air and [] yell[ing] for help" lasted for "a long period of time." (Trial Tr., 586:1-4).

⁵⁸ Trial Tr., 456:2-10; 468:4-10; 469:11-12; *See* Plt. Ex, 19, 20 & 21.

jury could reasonably infer that the suffocation process endured by Mr. Wolde, while conscious and drowning, was painful and resulted in a period of conscious pain and suffering.

Indeed, courts have denied similar defense motions on much less. In *Smalls v. S.C. Dep't of Educ.*, the court of appeals upheld an award of survival damages, finding no error in the trial court's denial of JNOV and new trial *nisi remittitur* despite scant evidence of the decedent's consciousness prior to her death. 339 S.C. at 216–17, 528 S.E.2d at 686. There, the decedent, who was fatally injured in a car accident, was found unconscious and, in fact, never regained consciousness. *Id.* However, the decedent's father testified she was "gasping for air" when he found her, though there was no further evidence of any consciousness. The court of appeals upheld the trial court's denial of *nisi remittitur*, finding the "gasping for air" testimony was sufficient to support the jury's award of survival damages for conscious pain and suffering. Here, the evidence supporting conscious pain and suffering, including the detailed account from Wubit, far exceeds that in *Smalls*. Considering the facts in evidence, the Court finds the jury's award of \$3.73 million in survival damages is reasonable, measured, and supported by the evidence and testimony in this case. Accordingly, LBS's motion for new trial *nisi remittitur* is denied.

VI. Wrongful Death Damages

LBS asserts it is entitled to a new trial absolute on the grounds the jury's award of \$10 million in wrongful death damages is grossly excessive or, in the alternative, that it is entitled to a reduction of the award on the ground it is unduly liberal. LBS also asserts it is entitled to a new trial absolute under the thirteenth juror doctrine.

The issue of damages in a wrongful death claim is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death. *Welch*, 342 S.C. at 304, 536 S.E.2d at 421 (citing *Zorn v. Crawford*, 252 S.C. 127, 165

S.E.2d 640 (1969); *Self v. Goodrich*, 300 S.C. 349, 387 S.E.2d 713 (Ct. App. 1989)). Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Id.*

Here, the jury was presented with the tragic loss of a forty-one-year-old father of four young children who drowned while saving his daughter's life when they became entrapped in a deadly rip current. The decedent's family testified as to the enormous effect Mr. Wolde's death had on his four young children, of whom Mr. Wolde was the primary caretaker.⁵⁹ Mr. Wolde's fiancé, Meswaet Abel, was a registered nurse at George Washington hospital and worked long hours to provide for the family.⁶⁰ Mr. Wolde handled everything at home—he made the meals, he helped the children with homework, he went to the grocery store, he got them ready for school, and he was home for them when they arrived at the end of the day.⁶¹ In fact, on the morning Mr. Wolde died, he was the one who went to Wal-Mart to pick up groceries, who made the family's breakfast, who helped the children get ready for the beach, and who put on their sunscreen.⁶²

Ms. Abel, Adam, and Wubit further testified at length as to what his loss has meant to their family. They would set a place for him at the dinner table every night until it became too unbearable to see the empty seat.⁶³ They now eat dinner in the family room instead.⁶⁴ Adam, who enjoyed watching the Redskins on television with his father, could no longer watch football after

⁵⁹ Trial Tr., 587:11-588:3.

⁶⁰ Trial Tr., 570:15-22; 226:14-227:14.

⁶¹ Trial Tr., 570:20-571:8; 528:23-529:9.

⁶² Trial Tr., 232:2-8; 536:18-19.

⁶³ Trial Tr., 243:22-244:2.

⁶⁴ *Id.*

his father died—now he watches alone at their townhome with a collection of the memorabilia his father had given to him.⁶⁵ One of the twin daughters recently refused to re-paint her room because she did not want to remove the paint her father had applied.⁶⁶ As Ms. Abel testified, life without their father has been inconceivably difficult:

Our life changed. Our house is dark. We're living in no hope, with no answers to my kids, "Who is going to walk me down the aisle when I get married?" If I change, I would give my life. It's not because I love him; it's because of the kids. They need him more than me. . . He's done everything. He teach how to swim. He teach how to study. He teach them how to ride a bike. He painted their rooms.⁶⁷

In other words, Mr. Wolde was an active, involved, and loving father.

The children also testified as to the immeasurable trauma and shock experienced in witnessing their father's death in such a horrific manner. Wubit endured the entire event latched onto her father's shirt, where she could see, hear, and feel his suffering. The horrifying experience continued on shore as Wubit saw foam coming out of her father's mouth when the bystanders were performing CPR.⁶⁸ Bystanders Jeff Bender and Julien Chandler also testified as to the children's presence during the horrific event. Bender testified Wubit was floating on her father, "using him like a life preserver," at the time he began assisting them to shore.⁶⁹ Chandler testified that he stopped Adam from getting too close to his father's body and encouraged him to be strong for his younger twin sisters, after which Adam and his sisters kneeled and prayed.⁷⁰ The children also witnessed their mother "hysterically flailing and screaming."⁷¹ This evidence all plays a factor in determining wrongful death damages. *See Lucht v. Youngblood*, 266 S.C. 127, 136–37, 221 S.E.2d

⁶⁵ Trial Tr., 246:10-23.

⁶⁶ Trial Tr., 249:12-15.

⁶⁷ Trial Tr., 249:5-13.

⁶⁸ Trial Tr., 590:12-13.

⁶⁹ Trial Tr., 197:22-198:1.

⁷⁰ Chandler Video. Tr., 25:16-26:3

⁷¹ *Id.*, 26:6-9.

854, 859 (1976) (noting wrongful death damages includes the damages sustained by the beneficiaries from the death, such as mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the decedent's society).

Considering the wide range of losses encompassed by wrongful death damages, Plaintiff's counsel, during closing argument, appropriately suggested a per diem calculation as a method the jury could apply to arrive at a damages award for the children's nonpecuniary wrongful death damages. Counsel further made clear that whether to award and how much, if any, was entirely up to them. *See Edwards v. Lawton*, 244 S.C. 276, 281, 136 S.E.2d 708 (1964) (accepting a per diem calculation as acceptable in a closing argument). The per diem suggested was based on the children's loss of companionship and loss of society given their father's 37.3 years of remaining life expectancy. Under this calculation, the estimated per diem of \$10 an hour, multiplied by fifteen hours per day, translated to \$54,750.00 per year, per child. In total, this calculation amounts to roughly \$8.1 million over the remaining 37.3 years of Mr. Wolde's life expectancy.⁷² After three hours of deliberation, the jury awarded \$10 million, or \$2.5 million per child. Considering all objective evidence, the jury's award of \$10 million in wrongful death damages is reasoned, measured, and proportionate to the injuries suffered.

In challenging the propriety of the jury's damages award, LBS points to no concrete basis to suggest the award was motivated by anything but the evidence. LBS's attempt to challenge this jury's award by cherry picking various verdicts in other wrongful death cases is equally unavailing.⁷³ Though comparisons to other verdicts are only persuasive at best, LBS omits numerous wrongful death verdicts in which the actual damages awards are consistent with and

⁷² Trial Tr., 905:14-906:11.

⁷³ *See* Lack's Mot. New Trial Absolute, pp. 26-28; New Trial Nisi, pp. 6-8.

even higher than that in this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858 (stating that while the comparison approach is sometimes helpful, each case must be evaluated as an individual one, within the framework of its distinctive facts and, when comparing awards in previous cases, recognition must be given to the continuing erosion in the purchasing power of the dollar); *see e.g., Reeves v. Town of Cottageville et al.*; Case No. 14-11-070043 (2014) (compensatory award for wrongful death of \$7.5 million and \$90 million in punitive damages); *Givens v. Samkharadze*, Case No. 21-10-130012 (2021) (compensatory pain and suffering of \$25 million and \$8 million in punitive damages); *Bales v. Martinez*, Case No. 14-03-170022 (2014) (\$20 million award for loss of service, \$30 million in punitive damages); *Dial v. Toyota Motor Sales USA Inc.*, Case No. 18-10-220036 (2018) (\$6 million in compensatory damages and \$6 million for loss of service); *Bannister v. Columbia Urological Associates, P.A.*, No. 2015-CP-40-4794 (2017) (\$10 million in compensatory damages); *Huff v. XPO Express, Inc.*, Case No. 19-11-120022 (2019) (compensatory pain and suffering of \$7 million); *Oickle and Oickle v. XPO Express Inc. f/k/a Express 1 Inc.*, Case No. 19-03-200062 (2019) (loss of services award of \$5 million).

The Court further finds no basis to exercise its discretion as the thirteenth juror. As the thirteenth juror, the Court is charged with reviewing what happened, what was presented and what was not presented, in the trial of this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. Here, there was simply not “any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality.” *See Clark v. Ross*, 284 S.C. at 568, 328 S.E.2d at 106. The Court further finds there is no “compelling reason” to invade the jury’s province and reduce the verdict. *See Proctor v. Dep’t of Health & Env’t Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) (“compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.”). Considering the ample evidence

supporting the award of wrongful death damages, the Court finds the jury's \$10 million award or \$2.5 million per child is justified, is not grossly excessive, and is not unduly liberal. LBS's motions for new trial absolute and new trial *nisi remittitur* are, therefore, denied.

VII. Punitive Damages

LBS challenges the jury's award of \$7 million in punitive damages, arguing it is entitled to a JNOV or, in the alternative, a new trial absolute or a new trial *nisi remittitur*. As with the jury's survival and wrongful death awards, there is nothing meriting a JNOV, a new trial absolute, or a reduction of the punitive damages award.

In South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (citations omitted). Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damages." *Id.*

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence that the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights. S.C. Code Ann. § 15-33-135; *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996); *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). "A conscious failure to exercise due care constitutes willfulness." *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419). When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Id.*

(citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The amount of damages, actual or punitive, remains largely within the discretion of the finder of fact, as reviewed by the trial judge. *Id.* (citing *Gamble*, 305 S.C. 104, 406 S.E.2d 350).

A. JNOV on Punitive Damages

The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419). Where, as here, the Plaintiff presented testimony and evidence that LBS was aware of a dangerous condition and failed to take action to minimize or avoid the danger, an inference could be drawn that LBS's conduct was reckless, willful, and wanton. Thus, whether there is clear and convincing evidence of willful and reckless conduct to support punitive damages was appropriately submitted to the jury. *See id.* (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)).

If the jury believes the plaintiff established willful, wanton, or reckless conduct by clear and convincing evidence, the jury has considerable discretion to determine the amount of punitive damages. *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907–08 (Ct. App. 2021), reh'g denied (May 12, 2021) (citing *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404–05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages)).

In *Mishoe v. QHG of Lake City, Inc.*, the South Carolina Court of Appeals affirmed the denial of JNOV on the issue of punitive damages where there was evidence the defendant was provided "actual, written notice" of a dangerous condition on its premises—a hole in the pavement near the defendant's emergency room exit—and failed to take any action to repair the hole or to

warn visitors or patients of the existence of the hole. 366 S.C. at 201–02, 621 S.E.2d at 366. Having neglected to take any corrective action for nearly a year since being notified, the *Mishoe* court specifically found the written notice informing QHG of the hole was sufficient evidence of QHG's willful, wanton, reckless, or malicious conduct to warrant submission of punitive damages to the jury. *Id.*

Here, the evidence of LBS's willfulness and recklessness is even more glaring. While QHG's conduct in failing to take corrective action within a year of notice was deemed sufficient, LBS's intentional disregard for its known standard of care violations went on for not just one but *ten years*. In the ten years since being decertified by the USLA for its unsafe practices, LBS took no corrective action whatsoever. Not only did LBS have notice that its practices posed a threat to the safety of swimmers,⁷⁴ but LBS also concealed that its practices violated the standard of care—thereby further endangering the beachgoing public who trusted that the City's beach was safely guarded by adequate and trained lifeguards.

Further, LBS was on notice by the National Weather Service that hazardous rip and longshore currents posed a dangerous threat to the safety of beachgoers, yet LBS failed to close the beach and failed to warn beachgoers of the hidden threat posed by these dangerous conditions. This cumulative misconduct, as established by clear and convincing evidence at trial, more than satisfies the willful, wanton or reckless standard to warrant submission of punitive damages to the jury. As the evidence shows, Plaintiff's punitive damages claim is not mere speculation. The

⁷⁴ As set forth above in Plaintiff's proximate cause, negligence, and recklessness arguments, the evidence established at trial shows LBS had actual notice that its beach safety services violated the standard of care and created a hazardous condition in numerous respects, including its non-compliance with USLA standards by engaging in dual role lifeguarding, its failure to provide 40 hours of training as required by USLA standards and its contract with the City of Myrtle Beach, and by its understaffing and failing to provide backup protection when a lifeguard leaves a tower unattended. Plaintiff refers to and relies on these arguments and the evidence therein.

evidence recounted above clearly and convincingly supports a finding that LBS was willful and reckless in committing standard of care violations it knew posed serious and life-threatening safety risks.

Further, as to LBS's claim of prejudice by being labeled a for-profit entity, LBS never objected to any such reference during trial and has therefore waived its right to do so now.⁷⁵ In sum, LBS's motion for JNOV ignores the ample evidence supporting Plaintiff's punitive damage claim, inappropriately suggest the jury's verdict was based on speculation, and inappropriately claims prejudice as a result of an alleged character attack that also finds no support in the record. For these reasons, Lack's motion for JNOV as to punitive damages is denied.

B. Recklessness in First Phase of Trial

LBS's arguments challenging the propriety of trying the issue of recklessness during the liability phase of this bifurcated proceeding are unavailing. As an initial matter, LBS consented to, and in fact agreed it was proper in phase one to have the jury determine whether Plaintiff proved willful, reckless, and willful conduct.⁷⁶

PLAINTIFF'S COUNSEL: I thought that you did the reckless question on the first verdict form, and that way -- I've done that in front of Judge Young, is the way we did it. And, that way, when they render that verdict, you know whether or not there's going to be a second phase, because they either find reckless, willful, or wanton, or they don't. You see what I'm saying?

THE COURT: Yeah. I mean, it either eliminates the need to go forward with the second phase --

PLAINTIFF'S COUNSEL: Right. And we don't make punitive damages arguments to the jury in the first phase, *but the evidence of recklessness comes in*, and if they make that determination, then I guess we bring them back in, and then we would argue the Gamble factors.

⁷⁵ See *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 111, 498 S.E.2d 395, 406 (Ct. App. 1998) (failure to object constitutes a waiver of issue).

⁷⁶ Trial Tr., 845:11-846:19.

COURT: What are your thoughts, Mr. Thompson?

COUNSEL FOR LACK'S: Your Honor, *I think that's correct*. I mean, the first question is liability, damages, actuals. And then the question to the jury is: Do you find evidence, whatever the question would be, for the punitive conduct. And then it's just yes or no. And then, if yes, there will be a second receiving or a second -- something along the lines.⁷⁷

That LBS's agreed to the same verdict form to which it now objects, at a minimum, amounts to a waiver of this issue. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form); *Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013) (failure to object to verdict form until after verdict was read amounted to a waiver of issue).

As to the merits, evidence of recklessness in the liability phase of the trial is appropriate because it is not "evidence relevant *only* to the issues of punitive damages." S.C. Code Ann. §15-32-520 (B) (emphasis added). First and foremost, a finding of recklessness is a determination of liability. Negligence and recklessness are not different merely as a matter of degree. By definition, they are distinct types of fault. *See Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (providing different legal definitions of "negligence" and "recklessness" and observing that "[t]he element distinguishing negligence from willful tort is inadvertence") (citation omitted)); *Fairchild v. S.C. Dept. of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411-12 (2012) ("Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence.").

Due to these distinct types of fault, Plaintiff was procedurally required to try her entire case on liability, including evidence of both negligence and recklessness, during the first stage—the

⁷⁷ Trial Tr., 845:11-846:6.

fault stage—of this trial bifurcated pursuant to S.C. Code Ann. § 15-32-520. Pursuant to § 15-32-520, plaintiffs *have to* present theories of a defendant's negligence and recklessness during the liability stage of a bifurcated trial. *See* S.C. Code Ann. § 15-32-520 ("In the first stage of a bifurcated trial, the jury shall determine *liability* for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant *only* to the issues of punitive damages is not admissible at this stage." (emphasis added)). At the close of that first stage, the jury deliberates and determines fault and compensatory damages, if any. On the same verdict form, typically as the last question, the jury also determines whether the defendant's conduct was reckless, willful, or wanton, as opposed to merely negligent. This widely used format was properly followed in this case. In fact, this precise format has been followed in trials across this state.

Not only is this procedure appropriate and sanctioned throughout South Carolina, it also serves the interests of judicial economy. If the jury *had not* found recklessness, then there would have been no need to waste their valuable time, and that of the Court, with a second phase of trial. Only when the jury finds recklessness does the trial move into the punitive damages stage, where the evidence is generally limited to the defendant's financial condition and ability to pay punitive damages, followed by closing arguments solely on punitive damages. *See, e.g., Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994) (observing that evidence of a defendant's net worth is relevant only to the amount of punitive damages, and therefore not admissible until the bifurcated punitive phase of trial). Accordingly, LBS's request for a new trial on this basis is denied.

C. New Trial Absolute on Punitive Damages

LBS seeks a new trial absolute on the basis that it believes the jury's award of \$7 million in punitive damages is so grossly excessive as to be motivated by passion, caprice, prejudice, or

some improper influence. However, LBS fails to support this contention with anything more than conclusory statements or the improper assertion that the award is excessive based on size alone.

The extraordinary relief of new trial absolute is only warranted “[i]f the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence.” *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). “[T]he jury’s determination of damages is entitled to substantial deference.” *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citation omitted).

Here, there is simply no evidence that the jury’s award considered anything other than the relevant evidence, and LBS cites to none. LBS instead contends that given evidence of its negative net worth, the trial court’s instruction on economic bankruptcy must have been deficient. However, the actual language of the economic bankruptcy instruction, as is consistent with South Carolina law, states in full:

Any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the Defendant’s ability to pay any punitive damage award should be considered. *However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.*⁷⁸

Thus, as is consistent with the court’s instruction, economic bankruptcy is not an absolute bar to punitive damages. That the award was nearly half the amount of actual damages suggests the jury took this instruction into account.

In light of its financial position, LBS contends the punitive damage award is in itself evidence that it was motivated by passion, prejudice, or some other improper influence. But again, the size of the award does not in and of itself justify a new trial, especially given the evidence in this case and the fact the award is less than a 1:1 ratio to actual damages. Indeed, a punitive award

⁷⁸ Trial Tr., 968:3-7.

that is less than three times the amount of a compensatory award is *per se* reasonable. *See* S.C. Code Ann. § 15-32-530 (setting statutory cap on punitive damages of three times the amount of a compensatory award; only if that cap is exceeded is it relevant for the court to consider additional factors in determining the awards reasonability). The jury's \$7 million punitive award is almost half the \$13.7 million compensatory award—far under the multiplier set forth in the statutory cap. Accordingly, considering the evidence supporting punitive damages in this case, the Court finds the jury's \$7 million punitive award is not grossly excessive so as to result from improper influence nor is it unduly liberal to warrant a reduction by *nisi remittitur*. LBS's motions for new trial absolute and new trial *nisi remittitur* as to punitive damages are, therefore, denied.⁷⁹

CONCLUSION

Accordingly, for the foregoing reasons, Defendant's Post-Trial Motions for JNOV, new trial absolute, and new trial *nisi remittitur* are denied.

IT IS SO ORDERED.

Kristi F. Curtis, Circuit Court Judge

Sumter, South Carolina
April 10, 2023

⁷⁹ The Court has issued a separate due process analysis of the constitutionality of the punitive damages award in this case. Consistent with that opinion, the Court denies LBS's post-trial motions to the extent they challenge the constitutionality of the award.



Horry Common Pleas

Case Caption: Meswaet Abel , plaintiff, et al VS Lacks Beach Service , defendant, et al
Case Number: 2019CP2607075
Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2023-04-10 10:54:06 page 39 of 39

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
MESWAET ABEL, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF ZERIHUN WOLDE)
Plaintiff,)
vs.)
LACK'S BEACH SERVICE, INC.,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-26-07075

**ORDER ON POST-TRIAL REVIEW OF
PUNITIVE DAMAGES AWARD**

RECEIVED

Apr 10 2023

SC Court of Appeals

This case came before the court on July 25, 2022. At the end of a week-long trial, the jury returned a verdict in favor of the Plaintiff in the amount of \$13,730,000.00 actual damages and \$7,000,000 in punitive damages.

The practice of awarding punitive damages originated in principles of common law “to deter the wrongdoer and others from committing like offenses in the future.” Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964) (quoting Bowers v. Charleston & W. C. Ry. Co., 210 S.C. 367, 42 S.E.2d 705 (1947)). “Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition.” B.M.W. of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996). The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that “the punishment should fit the crime.” Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting Mathias v. Accor Economy Lodging, Inc. and Motel 6 Operating L.P., 347 F.3d 672, 676 (7th Cir.2003)). Nevertheless, “while States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.” State Farm v. Campbell, 538 U.S.

408, 416 (2003). “To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” Id. at 417.

This Court must consider the three guideposts that indicate whether the due process requirement of fair notice has been met. In determining the constitutionality of a punitive damages award, Gore directed that courts consider: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Gore, 517 U.S. at 575.

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is “perhaps the most important indicium of the reasonableness of a punitive damages award.” Gore, 517 U.S. at 575. “This principle reflects the accepted view that some wrongs are more blameworthy than others.” Id. In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. Campbell, 538 U.S. at 419.

In this case, the harm to Mr. Wolde was physical and resulted in the loss of his life at forty-one years of age. The conduct of Lack’s in employing a decades-long system of “dual role” lifeguards even in the face of repeated warnings from USLA that the practice was

dangerous and violated USLA safety standards supports the punitive damages award. Furthermore, there was testimony that Lack's knowingly misrepresented to USLA that its lifeguards were no longer actively engaged in concessions in order to maintain its USLA certification for several years and then continued the practice even after losing its USLA certification. In addition, Lack's incentivized the lifeguards to focus more on the concessions role than the lifeguarding role by paying the guards a commission based on their beach rentals, all while knowing that the inattention would jeopardize public safety.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." Gore, 517 U.S. at 580. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 424-25. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." Id. at 425-26. When determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, the court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result

from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award. In this case, the punitive damages awarded by the jury were less than the actual damages awarded and were less than a 1:1 ratio. While the actual damages awarded in this case were significant, they were not unreasonable given the fact that Mr. Wolde was only forty-one years of age at the time of his death, he left behind a widow and four young children, and he was the primary caregiver for the children. The jury was apprised of the defendant's net worth and the limits of its liability coverage and presumably took those factors into consideration in awarding punitive damages. Given the evidence that Lack's business practices posed a significant threat to public safety to an area that is a major attraction for tourists, the award is both reasonably related to the grave harm likely to result from the conduct and large enough to deter the defendant from continuing to engage in like conduct.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant. In this case, there are no authorized civil penalties applicable or comparable to this case. As Plaintiff points out, there was testimony from Chris Brewster that Lack's was the only beach safety provider in the country to employ dual role lifeguards in such a setting.

This court has reviewed the Gore guideposts, along with the Gamble factors, and finds that the punitive damages award in this case is reasonable, is not grossly excessive or unduly

liberal, was not actuated by passion, caprice, or prejudice, or some other influence outside of the evidence, and does not violate due process.

IT IS SO ORDERED.

Kristi F. Curtis, Circuit Court Judge

Sumter, SC
November 2, 2022



Horry Common Pleas

Case Caption: Meswaet Abel , plaintiff, et al VS Lacks Beach Service , defendant, et al
Case Number: 2019CP2607075
Type: Order/Damages

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2022-11-23 12:34:57 page 6 of 6

RECEIVED
FORM 4

STATE OF SOUTH CAROLINA **Apr 10 2023**

JUDGMENT IN A CIVIL CASE
CASE NUMBER **2019CP2607075**

COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
Circuit Court of Appeals

Meswaet Abel Zerihun Wolde Zerihun Wolde Estate	Adam Zerihun Meswaet Abel Prs Wubit Zerihun	Lacks Beach Service Myrtle Beach City Of	John Doe Lifeguard

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk Of Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT:** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT:** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit)
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

We, the jury, unanimously find in favor of the plaintiff in the amount of \$13.73 million actual damages and \$7 million punitive damages.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Meswaet Abel Zerihun Wolde Zerihun Wolde Estate Adam Zerihun Meswaet Abel Prs Wubit Zerihun	Lacks Beach Service John Doe Lifeguard	\$20,730,000.00

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2762	7/29/2022
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

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Charleston, SC 29403
William Mullins McLeod Jr. PO Box 21624 Charleston, SC
29413
John Christopher Pracht V PO Box 4025 Anderson, SC
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Elizabeth Fulton Morrison 111 Coleman Boulevard Suite
301 Mount Pleasant, SC 29464
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Kelli Lister Sullivan PO Box 1473 Columbia, SC 29202
Paul Barry Trainor 191 Peachtree Street, NE Suite 2900
Atlanta, GA 30303

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter - Bobbi Fisher

Renee N. Elvis - Clerk of Court

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT

Case No. 2019-CP-26-07075

MESWAET ABEL, AS PERSONAL,
REPRESENTATIVE OVER THE
ESTATE OF ZERIHUN WOLDE,

Plaintiff,

VERDICT FORM

LACK'S BEACH SERVICE

Defendant.

-
1. Was the defendant Lack's Beach Service negligent?
☒ YES - Go to Question 2
☐ NO - Stop deliberations
 2. Was the defendant's negligence a proximate cause of Zerihun Wolde's death?
☒ YES - Go to Question 3
☐ NO - Stop deliberations
 3. Was the decedent Zerihun Wolde negligent?
☐ YES - Go to Question 4
☒ NO - Go to Question 7
 4. Was Mr. Wolde's negligence a proximate cause of his death?
☐ YES - Go to Question 5

_____ NO - Go to Question 7

5. Using the combined negligence that proximately caused Mr. Wolde's injuries as one hundred percent (100%), what percentage of that negligence is attributable to Mr. Wolde and what percentage is attributable to the defendant Lack's Beach Service? [The percentages must add up to 100%.]

Plaintiff _____ %

Defendant _____ %

Total _____ %

6. Was the plaintiff's negligence greater than fifty percent?

_____ YES - Stop deliberations

_____ NO - Go to Question 7

7. We, the jury, unanimously find Plaintiff, Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde, is entitled to the following damages, if any: [Do not reduce the plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the judge will compute the amount of damages for which the defendant is responsible based on the percentage of the defendant's negligence which you have decided proximately caused the plaintiff's injuries. You are to determine only the total amount of the plaintiff's damages and enter that amount below.]

\$ 3.73 million Actual Damages to the Estate
of Zerihun Wolde for his conscious pain and suffering,

\$ 10 million Actual Damages to the Estate
of Zerihun Wolde for the benefit of his statutory beneficiaries Adam
Zerihun, Wubit Zerihun, Eden Zerihun and Edom Zerihun.

8. Do you, the jury, unanimously find that Plaintiff Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde, established by clear and

convincing evidence that Lack's Beach Service acted in a reckless, willful, or wanton manner, and that such recklessness caused the injuries claimed by the Plaintiff.

✓ YES

 NO

Elizabeth M. Lack
FOREPERSON

WHEN YOU HAVE COMPLETED THE QUESTIONS, NOTIFY THE BAILIFF.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT

Case No. 2019-CP-26-07075

MESWAET ABEL, AS PERSONAL,
REPRESENTATIVE OVER THE
ESTATE OF ZERIHUN WOLDE,

Plaintiff,

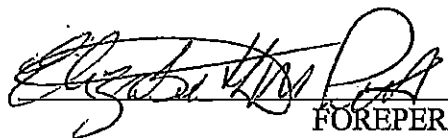
LACK'S BEACH SERVICE

PUNITIVE DAMAGES VERDICT FORM

Defendant.

What amount of punitive damages, if any, is the Plaintiff Meswaet Abel, as
Personal Representative of the Estate of Zerihun Wolde, entitled to receive:

\$7 million Dollars.


FOREPERSON

WHEN YOU HAVE COMPLETED THE VERDICT FORM, PLEASE
NOTIFY THE BAILIFF.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED
Apr 10 2023
SC Court of Appeals

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,

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Lack's Beach Service, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

Pleading(s): Notice of Appeal

Served: William Mullins McLeod, Jr., Esquire
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Attorneys for Lacks Beach Service



Eileen Hindman
Administrative Assistant

4/10, 2023

Eileen Hindman

From: Eileen Hindman
Sent: Monday, April 10, 2023 12:41 PM
To: mullins@mcleod-lawgroup.com; chris@864law.com; cooper@mcleod-lawgroup.com; emorrison@hallboothsmith.com; JThompson@hallboothsmith.com; ptrainor@hallboothsmith.com; jwalsh@clarksonwalsh.com; Mitch Brown; Blake Williams
Subject: Able v. Lack's Beach Service, Inc. - Case No. 2019CP2607075
Attachments: Wolde - Notice of Appeal.pdf; Wolde - Proof of Service.pdf; 2023.04.10 [ECF] Order on Post-Trial Motions for JNOV, New Trial, and New Trial NISI Remittitur (Lack's) - 4856-5779-9004 1.pdf; 2022.11.28 [ECF] (Lack's Beach) Order on Punitive Damages - 4855-9463-6101 1 - 4866-7917-3973 1.pdf; 2022.08.01 Form 4 Judgment and Verdict Form - 4865-8506-8636 1.pdf

Good afternoon,

Attached for service upon you is a Notice of Appeal (with attachments) and Proof of Service in the above matter.

Thank you,

 **NELSON MULLINS**

EILEEN HINDMAN SENIOR ADMINISTRATIVE ASSISTANT
eileen.hindman@nelsonmullins.com
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NELSONMULLINS.COM

RECEIVED
Apr 10 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	SUPPLEMENTAL MEMORANDUM IN
Plaintiff,	)	OPPOSITION TO MOTION TO
v.	)	APPOINT A RECEIVER
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	

Defendant Lack's Beach Service, Inc. ("Lack's") submits that Plaintiff's motion to appoint a receiver should be denied for two additional reasons: (1) S.C. Code Ann. § 5-7-145 is a specific statute which prevails over the more general receivership statutes; (2) Plaintiff's motion attempts to circumvent the appropriate process for executing on a judgment. However, even if the Court disagrees with all the arguments raised by Lack's on the merits of the receivership issue, S.C. Code Ann. § 15-65-50 prohibits appointment of a receiver at this time because Lack's is willing to offer a bond in accordance with that statute's requirements.

I. S.C. Code Ann. § 5-7-145 is a specific statute which controls over the general receivership statutes, S.C. Code Ann. § 15-65-10 *et seq.*

An additional basis for denying Plaintiff's motion is that appointment of a receiver would conflict with the more specific statute that permits the City of Myrtle Beach to contract only with a private beach safety company such as Lack's, not a court appointed receiver.

The rules of statutory interpretation provide that "[a] statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v.*

Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). “General and special statutes should be read together and harmonized if possible. But to the extent of any conflict between the two, the special statute must prevail.” *S.C. Dep’t of Consumer Affs. v. Cash Cent. of S.C. LLC*, 435 S.C. 192, 203, 865 S.E.2d 789, 794 (Ct. App. 2021) (quoting *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 293, 188 S.E.2d 459, 464 (1972)); *see also James v. S.C. Dep’t of Transp.*, 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) (“Generally, when a general statute and a specific statute conflict, the specific statute prevails.”).

Here, the receivership statutes are general statutes. *See* S.C. Code Ann. § 15-65-10 *et seq.* These statutes detail the process for appointing a receiver generally in instances where the circuit court deems it appropriate and the applicable requirements are met.

S.C. Code Ann. § 5-7-145 is a specific statute. That Code section permits municipalities like the City of Myrtle Beach to contract with beach safety companies such as Lack’s Beach Service subject to the conditions detailed by the statute. *See* S.C. Code § 5-7-145(B) (“Lifeguard services may be provided using municipal employees or by service agreement with a private beach safety company.”). For example, the statute requires municipalities to go through the procurement process in awarding any such contract and the agreement may not last more than seven years. *See id.*

Appointing a receiver would conflict with the more specific statute. The lifeguarding statute expressly restricts the public-private relationship to agreements that have undergone the procurement process and are between a municipality and a private beach safety company – ***not a court imposed receivership***. The general receivership statute cannot override the more specific lifeguarding statute in that manner. Thus, the Court should deny Plaintiff’s motion to appoint a receiver for this additional reason.

II. Appointment of a receiver is an extraordinary remedy that would contravene the traditional process for collecting on a judgment.

Plaintiff's motion to appoint a receiver should also be denied because it improperly seeks to circumvent the statutory process for judgment execution and the stay of same. As Lack's has consistently stated, it is prepared to post the security required by S.C. Code Ann. § 18-9-130(A)(1), which the General Assembly has acknowledged will sufficiently protect the Plaintiff's interests pending resolution of the appeal.¹

Under Rule 69 and the South Carolina Code, the proper mechanism for attempting to execute on the judgment is for Plaintiff to seek a writ of execution once the judgment is *final* and, if that returns nulla bona, Plaintiff may institute the supplemental proceedings process. *See* S.C. Code Ann. § 15-39-30 (2005) (providing that writs of execution may issue on *final* judgments); Rule 69, SCRCP ("Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise."); *see also Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995), *aff'd*, 324 S.C. 198, 478 S.E.2d 63 (1996) (discussing the writ of execution and supplemental proceedings process). Supplemental proceedings would permit discovery of assets and give the plaintiff a "means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action." *Johnson*, 319 S.C. at 167, 459 S.E.2d at 902.

¹ Even if the Court granted Plaintiff's motion, Lack's would be entitled to an immediate appeal, which would stay the issue. *See* S.C. Code Ann. § 14-3-330(4) (providing that an interlocutory order "granting, continuing, modifying, or refusing the appointment of a receiver" is immediately appealable); Rule 241(a)-(b), SCACR (providing for a stay of the matters decided in a judgment or order as a general rule and detailing the exceptions, which do not include receiverships).

Plaintiff's request to appoint a receiver is an attempt to evade this established process and undercut Lack's ability to pursue its due process rights to post-trial and appellate review in good faith.

As the Supreme Court has explained, appointment of a receiver "is a *drastic remedy*, and should be *granted only with reluctance and caution*." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). The Court should not resort to such drastic relief in this matter.

III. In the alternative, Lack's will post bond in accordance with S.C. Code Ann. § 15-65-50, which prohibits appointment of a receiver.

As Lack's has consistently argued, the appeal bond statute should govern the requisite security necessary to stay the matter and supports denying Plaintiff's motion to appoint a receiver. However, if the Court disagrees, then S.C. Code Ann. § 15-65-50 would still prohibit appointment of a receiver at this juncture. This code section provides that "[n]o receiver of the property of any person or corporation shall be appointed before final judgment in the cause if . . . the party in possession thereof shall offer a bond, in the penalty of double the value of the property, with sufficient security." S.C. Code Ann. § 15-65-50.

Lack's balance sheet was made an exhibit during the punitive damages phase of the trial. As the balance sheet details, Lack's total assets are valued at \$1,392,840.01. (*See* Balance Sheet, attached as **Exhibit A**.) Twice that amount would be \$2,785,680.02. Lack's is willing to post a bond in this amount if the Court refuses its motion to stay and is otherwise inclined to grant Plaintiff's motion to appoint a receiver. As the statute details, a receiver cannot be appointed as a matter of law if Lack's posts a bond in this amount until final judgment, which has yet to occur in light of the pending post-trial motions and anticipated appeal.

CONCLUSION

For the reasons stated above and in the prior briefing, the Court should deny Plaintiff's Motion to Appoint a Receiver and grant Lack's Motion to Stay.

Respectfully submitted,

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March 8, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	DEFENDANT LACK'S MOTION TO
Plaintiff,	)	RECONSIDER ORDER ON POST-
v.	)	TRIAL REVIEW OF PUNITIVE
	)	DAMAGES AWARD
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant Lack's Beach Service ("Lack's") moves to alter or amend the Court's Order on Post-Trial Review of Punitive Damages ("Order"). Lack's incorporates all prior arguments from its post-trial briefing and requests that this Court reconsider and vacate its Order or, failing that, amend its Order.¹ Respectfully, the Court also overlooked or failed to properly consider certain arguments raised by Lack's regarding the *Mitchell/Gore* factors and failed to properly consider the analysis of the factors from the punitive damages statute as required by S.C. Code Ann. § 15-32-520(F).

ARGUMENT

I. The *Mitchell* factors support that the punitive damages award was not consistent with due process.

The Court's Order includes a statement that the Court has conducted a post-judgment review of the jury's punitive damages award to ensure that it comports with due process and finds that it withstands this scrutiny. Respectfully, under the applicable *Mitchell* factors, the

¹ Lack's expressly incorporates all of its prior arguments on punitive damages as set forth in its Motion for JNOV, Motion for a New Trial Absolute, Motion for a New Trial Nisi Remittitur, and Consolidated Reply in Support of its Motions for JNOV, New Trial Absolute, and New Trial Nisi Remittitur.

award should not be permitted to stand. The Court overlooked or failed to properly address several of Lack's arguments on this point.

A. Lack's did not act reprehensibly.

As the Court correctly noted, in assessing reprehensibility, it should examine: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

The Court's Order, however, does not directly address four of these factors, all of which weigh in Lack's favor. As Lack's post-trial briefing acknowledged, it is undisputed that the harm was physical as opposed to economic and thus that factor weighs in favor of Plaintiff. However, the other reprehensibility factors weigh in favor of Lack's. Wolde did not have a particular financial vulnerability that Lack's actions targeted. Second, the only drowning incident in this record involved Mr. Wolde. This was an unfortunate accident, but thankfully an isolated incident particularly when considered in the context of the millions of people who visit Myrtle Beach every year without issue. There is no support in the record of any repeated negligent conduct leading to similar incidents. Third, there is also no evidence that the harm to Mr. Wolde resulted from any intentional malice, trickery, or deceit. To the extent the Court's Order relies on the "dual role" lifeguard arrangement to support such a finding, that constitutes error since the City of Myrtle Beach was aware of—and approved of—this arrangement. Further, the evidence did not support that the alleged negligence evinced an "indifference to or a reckless disregard for the health or safety of others." Also, the Court has not yet issued a final

order on the challenges to this evidence raised by Lack's in its post-trial motions. Thus, this factor also weighs in favor of Lack's.

The Court's Order does not base its findings on any one factor, but instead cites the "dual role" served by Lack's lifeguards and Lack's dealings with the USLA² as supporting the punitive damages award generally. As the post-trial briefing detailed, the City of Myrtle beach approved of the dual role arrangement and there was no evidence that the Lack's lifeguards on the beach at the time of the Wolde incident were serving a "dual role" by attempting to earn sales commissions at the time of the incident. Moreover, none of the dealings between Lack's and the USLA over ten years prior to the incident had any bearing on whether the lifeguards on the beach the day of Wolde's drowning were properly trained and in compliance with their safety duties. There was also no evidentiary showing linking, from a causation perspective, any "dual role" function with the incident involving Mr. Wolde. It is unconstitutional to award punitive damages against a party based on actions (or inaction) it has taken related to persons other than the Plaintiff. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

For all these reasons, the reprehensibility factors do not justify the jury's punitive damages award. Respectfully, the Court overlooked these factors, and the Court should reconsider the Order and vacate it or, failing that, amend it to remit the award at the appropriate time and in the proper sequence to an amount that comports with due process and that is free from the defects set forth herein and in Lack's post-trial motions and supportive memorandum.

² Lack's also challenges this evidence as improperly admitted and as warranting a new trial due to its admission.

B. The Court failed to consider the remaining *Gamble* factors, which also weigh in Lack's favor.

As *Mitchell* noted, the *Gamble* factors remain “relevant to the post-judgment due process analysis” insofar as they add substance to the analysis. *Mitchell*, 385 S.C.at 587, 686 S.E.2d at 185. The Court’s Order also overlooked these factors, all of which weigh in favor of Lack’s.

The reprehensibility factors overlap with the first four *Gamble* factors, *see id.* at 587 n.7, 686 S.E.2d at 185 n.7, and thus do not need to be repeated. The remaining factors are: (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant’s ability to pay; and (8) any other factors deemed appropriate.” *Id.* at 586-87, 686 S.E.2d at 184-85.

Here, the punitive damages award will not deter future conduct because this was an accident. Unfortunately, accidents are unavoidable because swimming in the ocean can be a dangerous endeavor even under the best conditions and supervision, and it is impossible to prevent all risks. For the same reason, the award is not reasonably related to the harm likely to result from such conduct considering, again, this case involves an unfortunate accident. Again, the “dual role” conduct complained of by Plaintiff in this case was not shown to have any direct causative relationship to the incident involving Mr. Wolde, and certainly not by the clear and convincing evidence required by statute in order to uphold a punitive damages award. S.C. Code Ann. § 15-32-520(D) (“Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant’s wilful, wanton, or reckless conduct.”). There was no proof that if Lack’s had no “dual role” lifeguards, this incident would have been avoided.

The defendant’s ability to pay heavily weighs in Lack’s favor. As noted above, this judgment is far beyond Lack’s available insurance coverage. Further, the evidence was that

Lack's had a negative net worth. Punitive damages are not meant to be used to bankrupt defendants. *See, e.g., Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 106 (D.S.C. 1979) ("[I]t is well-known that the purpose of punitives is not to "bankrupt" a defendant, but simply to deter him and others from similar conduct in the future. Thus the extent of the defendant's wealth constitutes a limit on the amount of damages which can be awarded. (citations omitted)); *In re Thomas*, 254 B.R. 879, 886 (D.S.C. 1999) (explaining that any punitive damages award "must not effect economic bankruptcy"); *see also State Farm Mut. Auto. Ins. Co. v. Brewer*, 191 So. 3d 508, 511 (Fla. Dist. Ct. App. 2016) ("[A]n award of punitive damages that bankrupts or financially devastates the defendant is unconstitutionally excessive.").

Finally, the problems inherent with the evidence presented to the jury and the injection of the "dual role" issue into the case fundamentally tainted the proceedings. This is an appropriate consideration under the eighth factor.

Therefore, the remaining *Gamble* factors also support that the punitive damages award cannot withstand constitutional scrutiny. The Court overlooked these factors and should reconsider and amend its Order to address these issues, all of which tip in Lack's favor.

C. The ratio of punitive damages to actual damages.

Although the punitive damages award is less than a 1:1 ratio based purely on the jury's verdict, as Lack's detailed in its post-trial briefing, the actual damages and punitive damages awards should be eliminated or, failing that, reduced considerably and the punitive damages remitted to a 1:1 ratio at a maximum.

D. Comparable civil penalties do not justify an award in this amount.

The last factor directs the court to consider “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Mitchell*, 385 S.C. at 585, 686 S.E.2d at 184. The Court’s Order accurately states that there are no civil penalties applicable to this case. However, that fact actually weighs *against* the punitive damages award. The reason there are no civil penalties in this context is because this was simply an accident, and thus punitive damages are not appropriate. The Court should amend and reconsider its Order to address this issue as well.

II. The Court’s Order overlooks the statutory factors.

In addition, the Court in its Order fails to consider all of the factors required to be considered from the punitive damages statute. The statute requires that the court consider the factors listed in S.C. Code Ann. § 15-32-520(E) in reviewing a punitive damages award. S.C. Code Ann. § 15-32-520(F). Those factors are:

- (1) the defendant’s degree of culpability;
- (2) the severity of the harm caused by the defendant;
- (3) the extent to which the plaintiff’s own conduct contributed to the harm;
- (4) the duration of the conduct, the defendant’s awareness, and any concealment by the defendant;
- (5) the existence of similar past conduct;
- (6) the profitability of the conduct to the defendant;
- (7) the defendant’s ability to pay;
- (8) the likelihood the award will deter the defendant or others from like conduct;

(9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;

(10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and

(11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

S.C. Code Ann. § 15-32-520(E).

The first, fourth, fifth, seventh, and eighth factors all overlap with elements of the *Mitchell* analysis and Lack's reasserts its arguments herein on those points. The remaining considerations also weigh in Lack's favor. First, the "severity of the harm" factor requires that it be "caused by the Defendant." Here, the evidence showed that Wolde voluntarily entered the ocean with his children and continued into deeper water. There was evidence that there were warning flags. There was evidence that Wolde did not swim in a manner to escape the rip current. Note that the text of the statute says "own conduct" and does not say "own negligent conduct." Wolde's conduct definitely contributed to the incident. Moreover, the trouble Wolde and his family encountered was not caused by Lack's. For the same reasons, the "plaintiff's own conduct" factor weighs in Lack's favor. The Court failed to mention this factor in its Order. As to the sixth factor, there is no evidence that Lack's profited from any alleged conduct that had a causative relationship to the incident involving Mr. Wolde in any way. The Plaintiff has argued that Lack's is a "for profit" business and that this factor weighs in favor of Plaintiff; however, there was no evidence, as explained herein and in Lack's other post-trial briefing, that Lack's acts or omissions were directly and proximately involved with the Wolde incident. Finally, neither the ninth, tenth, nor the eleventh factor is involved in this case. This was the

only lawsuit arising out of the act or course of conduct complained of by the Plaintiff, and Lack's has not been assessed any civil fines or had any criminal penalties imposed.

Therefore, the statutory factors also weigh against the jury's punitive damages award. The Court's Order erroneously omits them from the analysis, and the court should reconsider and vacate its Order as a result.

III. The sequence of the Court's rulings constitutes error.

Finally, vacatur of the Court's Order is warranted because it is premature. Although the Court emailed the parties and indicated that it intended to deny Lack's post-trial motions, no order has been entered to that effect. Therefore, the amount of actual damages—as well as the Court's rulings on all of Lack's other post-trial arguments—is not yet final and could be modified.³ Nevertheless, the Court's Order proceeds find that the ratio between actual damages and punitive damages satisfies due process. Respectfully, this cannot be properly done at this time.

Further, the Court relies on the “dual role” evidence in its Order justifying the punitive damages award, but that evidence, as well as other evidence relied upon in the Order, is subject to challenges in Lack's post-trial motions, and there has been no ruling on those challenges.

³ See *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) (“An order is not final until it is written and entered by the clerk of court. . . . Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly.”); *Bayne v. Bass*, 302 S.C. 208, 210, 394 S.E.2d 726, 727 (Ct. App. 1990) (providing an oral ruling “is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the [j]udge[,] and delivered for recordation”).

In light of this, Lack's again incorporates by reference and reasserts in their entirety the arguments raised in its Motion for JNOV; Motion for a New Trial Absolute; Motion for a New Trial Nisi Remittitur; Consolidated Reply in Support of its Motions for JNOV, New Trial Absolute, and New Trial Nisi Remittitur; Conditional Motion for Reduction of Judgment; and Reply in Support of Conditional Motion for Reduction of Judgment. The Court should hold a hearing these motions in addition to this Motion to Reconsider and Lack's Motion to Stay Execution on the Judgment prior to entering any final orders.

Again, therefore, the Order is premature. In addition, there is not yet a ruling on Lack's JNOV motion or new trial motion. If there were no actual damages judgment, as a result of a ruling for Lack's with respect to JNOV or with respect to new trial absolute, the punitive damages award could not stand. Yet the Court has issued its Order prior to an actual ruling on Lack's motions for JNOV or new trial. Finally, the Court has not yet ruled on Lack's remaining motion regarding limit of liability caps. As a result of this as well, this Order is premature. The sequencing of the adjudication of the Order is thus improper and constitutes error. Therefore, the Court should vacate the Order.

CONCLUSION

Lack's requests that the Court reconsider and vacate its order, or, failing that, amend its Order and strike punitive damages, order a new trial absolute, or, at a minimum, reduce the award consistent with the arguments advanced herein. All other grounds previously briefed and argued are adopted herein and made in support of this motion.

Signature on Following Page

Respectfully submitted,

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December 2, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	REPLY IN SUPPORT OF MOTION TO
Plaintiff,	)	STAY EXECUTION ON THE
v.	)	JUDGMENT
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

I. The Court should grant Lack's motion in light of the analogous appeal bond statute.

As Lack's detailed in its motion to stay, the appeal bond statute governs the amount of bond required for a stay of execution pending appeal. Lack's is prepared to post the supersedeas bond as required by the Court up to the limits imposed by that statute. Pursuant to section 18-9-130(A), the maximum supersedeas bond following appeal by an individual or a business entity that employs fifty persons or fewer or which has revenue of less than \$5 million in the previous tax year is \$1 million or the amount of the judgment, whichever is less. S.C. Code Ann. § 18-9-130(A)(1)(b). Further, as Lack's motion details, if the Court grants Lack's motion, it will moot Plaintiff's motion to appoint a receiver. Therefore, Lack's respectfully requests that the Court grant its motion to stay and deny Plaintiff's motion as moot upon Lack's posting of the security required by the Court (not to exceed the \$1 million statutory cap).

II. There is no time limit for filing a Rule 62 motion.

Plaintiff's response to Lack's motion incorrectly asserts that it is untimely. Unlike Rule 59, Rule 62 has no time limitation and Plaintiff cites no authority to support this contention. Likewise, there is no authority supporting Plaintiff's assertion that a motion to stay is improper

when it is filed after the Plaintiff has moved to appoint a receiver or undertaken other efforts to execute on the judgment.

South Carolina courts have not expressly addressed the timing issue (presumably since there is no time restriction under Rule 62). However, in *Taylor v. Taylor*, 434 S.C. 307, 314, 863 S.E.2d 335, 339 (Ct. App. 2021), a mother was found in contempt by the family court. The court issued a final order on August 1, 2017, and the mother filed a Rule 59 motion on August 11, 2017. On August 15, 2017, the family court denied the motion. On August 31, 2017, the mother then moved (1) pursuant to Rule 62, SCRCF, and Rule 241, SCACR, to stay the effect of the Final Order's financial portions because it was not automatically stayed by the notice of appeal and (2) to deposit with the court pursuant to Rule 67, SCRCF, money ordered payable to Father because the fees were disputed on appeal. On October 31, 2017, the family court granted the motion. The court did not take issue with the timing of the Rule 62 motion despite a total of 30 days elapsing between the final order and the Rule 62 motion.

Additionally, at least one federal district court looking at the analogous federal Rule 62 has found that there is no time limitation. See *Shipley v. Hypercom Corp.*, No. 1:09-CV-0265-RGV, 2012 WL 12874267, at *2 (N.D. Ga. Jan. 25, 2012). As the *Shipley* court explained: "Shipley's argument that Hypercom's motion is untimely is *without merit as Rule 62 does not establish a time limit for filing a motion to stay execution of a judgment.*" *Id.* (emphasis added). Even though the plaintiff had already obtained writs of execution, the court noted that "Rule 62 authorizes the Court to stay the execution of a judgment and any proceedings to enforce it, which includes any prospective action on the previously obtained writs of execution." *Id.*

Therefore, for all these reasons, Plaintiff's timeliness argument is without merit.

III. The factors for a stay weigh in Lack's favor.

Plaintiff's next argument asserts that the Court should apply the four factors for analyzing whether to grant a stay as applied by federal courts. South Carolina courts have not yet expressly adopted the factors. Assuming these factors do apply, however, they weigh in Lack's favor.

First, as the post-trial briefing detailed, Lack's has identified several potentially meritorious grounds of error by the trial court. Lack's should be permitted to raise those grounds to the appellate courts for review and consideration, as is its right. Plaintiff's aggressive efforts to execute on the judgment and interfere with Lack's business through appointment of a receiver is an attempt to undermine and thwart Lack's efforts to secure its right to have the judgment reviewed by a higher court.

Second, Lack's will suffer considerable harm absent a stay. As Lack's motion to stay detailed, Plaintiff's actions post-trial appear to be a concerted effort to destroy Lack's business and its continued viability as a going concern.

Third, the Plaintiff will not suffer any harm by the Court's preservation of the status quo.¹ As Lack's has represented to the Court, it is willing and able to post a supersedeas bond up to the statutory maximum of \$1 million. As the General Assembly has determined, this will provide sufficient security for Plaintiff pending resolution of the appeal. Plaintiff's arguments to the contrary are without merit.

Finally, the public interest would not be served by permitting Plaintiff to engage in premature efforts to execute on the judgment where Lack's is still in the process of seeking, in good faith, post-trial and appellate review of said judgment. Plaintiff's argument on this factor

¹ This is all that Lack's motion requests. Plaintiff's contention that Lack's motion "effectively asks this Court to nullify the jury's award and LBS's legal responsibility for the judgment" is manifestly without merit.

demonstrates that their intent is to destroy Lack's as a going concern, expressly stating that it would be against the public interest to "allow LBS to continue to operate its unsafe business 'as usual.'" (Pltf. Resp. at 2.)

Therefore, assuming the stay factors recognized by the federal courts apply here, they weigh in favor of granting Lack's motion to stay execution.

IV. Plaintiff's motion to appoint a receiver should be denied.

As detailed above, if the Court grants Lack's motion to stay, it will moot Plaintiff's request for a receiver. However, this motion should be denied regardless. As Lack's prior briefing detailed, Plaintiff's argument is circular. They contend that a receiver is necessary because Lack's is in imminent danger of insolvency, but it is only because of Plaintiff's aggressive, premature efforts to collect on the judgment that this threat looms.

As the Supreme Court has explained, appointment of a receiver "is a *drastic remedy*, and should be *granted only with reluctance and caution*." *Midlands Util., Inc. v. S.C. Dep't of Health & Env'tl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). Thus, a receiver will not be appointed during the progress of a cause "unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined." *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887).

Plaintiff has not established that the drastic remedy of a receiver is appropriate here—particularly considering Lack's is ready and willing to post a supersedeas bond up to the statutory maximum pending appeal. Therefore, for all these reasons, the Court should deny Plaintiff's motion to appoint a receiver.

CONCLUSION

For the reasons stated in Lack's motion to stay and herein, Lack's respectfully requests this Court grant its motion to stay. This Court should schedule a hearing on the motion to stay and rule on it before turning to the Motion to Appoint a Receiver, as the latter may become moot. Lack's reserves the right to file a further supplemental memorandum supporting this motion.

Respectfully submitted,

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December 2, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	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,	)	
	)	
Plaintiff,	)	PLAINTIFF'S RESPONSE
v.	)	IN OPPOSITION TO
	)	DEFENDANT'S MOTION TO STAY
LACK'S BEACH SERVICE, CITY OF	)	EXECUTION OF JUDGMENT
MYRTLE BEACH, AND JOHN DOE	)	AND TO STAY MOTION FOR
LIFEGUARD,	)	APPOINTMENT OF RECEIVER
	)	AND FOR SEQUENCING OF MOTIONS
	)	
Defendants.	)	
	)	

Plaintiff Meswaet Abel, as personal representative of the estate of Zerihun Wolde and as natural parent and legal guardian of Adam and Wubit Wolde, submits the following Response in Opposition to Defendant Lack's Beach Service's Motion to Stay Execution on the Judgment and to Stay Appointment of a Receiver and for Sequencing of Motions to be Heard and Orders Issued. For the reasons that follow, the relief requested by Defendant is untimely, unfounded, against the public interest, and likely to result in irreparable harm and a miscarriage of justice to Plaintiff if granted. Accordingly, Plaintiff respectfully requests that the court deny Defendant's motion in its entirety.

BACKGROUND

On July 29, 2022, following a week-long jury trial, Plaintiff was awarded \$20,730,000.00 in compensatory and punitive damages for the wrongful death of Zerihun Wolde. LBS filed post-trial motions for JNOV, new trial and nisi remittitur. Notably, however, LBS did not seek to stay execution on the judgment at this time.

On October 12, 2022, Plaintiff filed its motion to appoint a receiver over LBS during the pendency of this litigation and any proceedings to collect on the judgment, for the purposes of managing LBS's assets, including its claims against its insurers, and to oversee LBS's cash intensive business to ensure its profits are preserved and not transferred, concealed, hidden or otherwise squandered. Not until after Plaintiff filed its motion to appoint a receiver did Defendant file the instant request to stay execution of the judgment.

In essence, the instant motion to stay, filed on October 19, 2022, asks this court to disregard the statutory authority set forth in § 15-65-10 for appointment of a receiver and to nullify the jury's verdict by allowing LBS to continue as usual its unsafe business practices. For the reasons that follow, LBS's motion to stay execution and to stay Plaintiff's motion for appointment of a receiver must be denied.

ARGUMENT

I. A Stay of Execution is Untimely, Prejudicial, and Unfounded.

LBS's request for a stay being both untimely and premature is inappropriate for consideration at this juncture. Defendant's motion improperly seeks to stay execution despite failing to promptly raise the issue post-trial, and further inappropriately seeks to prospectively stay execution pending an appeal, if necessary. (See LBS Mot. to Stay, p. 2). Even if timely, LBS, as the debtor, has not and cannot demonstrate any factors suggesting a stay of execution would be warranted in this case. In fact, just the opposite is true—granting a stay in this case would not only threaten Plaintiff's likelihood of recovery but LBS's dangerous and deceptive business practices would be permitted to continue as usual, posing further risk to the safety of the beachgoing public.

A. LBS failed to promptly seek a stay of execution.

Having failed to raise the issue of a stay until after Plaintiff's receivership motion, LBS should be barred from doing so at this late juncture. Following issuance of the verdict and judgment against LBS, Defendant timely filed post-trial motions for JNOV, new trial absolute, and nisi remittitur. LBS did not, however, move to stay the execution of the judgment pursuant to Rule 62, SCRCP. Instead, LBS delayed seeking this relief until after Plaintiff sought to preserve LBS's assets through appointing of a receiver. No authority supports the proposition that relief requested by a party who failed to act promptly should be prioritized over that sought by one who acted with urgency.

The right to seek a stay of execution of judgment pending post-trial motions is governed by Rule 62(b), SCRCP, which provides, in relevant part:

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or [. . .] of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50 . . .

Rule 62(b), SCRCP. Critically, the court's discretion to grant a stay is contingent "on such conditions for the security of the [creditor] as are proper. . ." Rule 62(b). In other words, the policy expressed in Rule 62(b) favors the creditor, *i.e.*, Mr. Wolde's estate, over the debtor, LBS. *See Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 275–76 (2007) (stating the policy expressed in Rule 62(b) favors the creditor over the debtor).!

If LBS required a stay of enforcement of the judgment pending disposition of its post-trial motions, the burden was on LBS to timely move to seek this relief under Rule 62(b), SCRCP. *See Stearns Bank Nat. Ass'n*, 375 S.C. at 426, 653 S.E.2d at 275-76 (finding judgment creditor was entitled to enforce judgment, despite the pendency of motion for relief from judgment, where

judgment debtor never sought stay). LBS's failure to seek a stay until now is prejudicial to Plaintiff, who has taken steps and expended time and resources to execute on the judgment. Likewise, given the trial evidence establishing LBS's financial distress and propensity for deceptive business practices, there is no guarantee LBS would not take actions to impair Plaintiff's recovery on the judgment should a stay be granted. Accordingly, the stay sought by LBS jeopardizes Plaintiff's eventual recovery, and should, thus, be denied.

B. A stay pending appeal is premature but even in the event of an appeal such relief is improper and highly prejudicial to Plaintiff, the creditor.

As to LBS's request for a stay of execution pending an appeal "if necessary," this ground too is improper because (1) it is premature; and (2) even if proper, Defendant has not and cannot demonstrate sufficient grounds to support such relief pending an appeal.

Under Rule 62(d), SCRCP, and Rule 241, SCACR, a stay of execution can be denied or granted in the discretion of the trial court. *See Stearns Bank Nat. Ass'n*, 375 S.C. at 426, 653 S.E.2d at 276 ("Whether to grant such a stay rests in the court's discretion on such conditions for the security of the [creditor] as are proper"). While South Carolina provides no specific guidance on how such discretion should be exercised, federal cases interpreting the parallel federal rule are instructive. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."); *see also* Comments to Rule 62, SCRCP (noting that "Rule 62 is drawn from the Federal Rule"). The United States Supreme Court in *Hilton v. Braunskill* interpreted the parallel federal rule, laying out four factors to consider when determining a motion to stay execution:

- (i) movant's likelihood of success on the merits;
- (ii) the extent of movant's injury absent a stay;
- (iii) the extent of injury to non-movants if a stay is granted; and

(iv) the public interest.

481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987). Applying the standard set forth in *Hilton*, not a single factor weighs in favor of the stay sought by LBS in this case.

First, LBS's likelihood of success on the merits is highly doubtful. As set forth in Plaintiff's consolidated memorandum in opposition to LBS's post-trial motions, LBS fails to present a compelling reason to justify a new trial or a reduction of the jury's measured awards of survival, wrongful death, and punitive damages. Nor could it because the jury's verdict is aptly supported by the evidence at trial and the damages awards are more than reasonable considering the tragic facts of this case, the unimaginable loss suffered by Mr. Wolde's children, and the reckless conduct of LBS. (*See* Plt. Consolidated Mem. In Opp., Filed Aug. 22, 2022). Indeed, the sheer amount of the jury's damages awards reflect the highly reckless nature of LBS's conduct and, in essence, the reason LBS's business should be in a receivership and not permitted to continue as usual.

Second, LBS fails to show any injury if a stay is denied. LBS merely argues that allowing execution on the judgment would cause it to suffer irreparable harm, referencing Plaintiff's Motion to Appoint a Receiver. (*See* LBS Mot. to Stay, p. 4). But a receiver would only aid LBS by ensuring proper protections and controls are in place to preserve assets. This is consistent with the statute's goal of preserving the rights of the parties pending appeal. Notwithstanding, the fact that execution on the judgment or a receivership could cause LBS to cease operations is not really in issue—this result is likely even absent a stay given LBS's already questionable financial position as evidenced at trial. Thus, there should be no further injury if a stay were denied, and, in fact, denial of a stay in favor of a receivership is intended to benefit LBS, not cause injury.

Third, a stay would irreparably injure Plaintiff's recovery in this case, resulting in both injury and a miscarriage of justice. A stay on execution would inappropriately permit LBS to continue its business as usual, without any receiver to oversee its dealings and to ensure profits and assets are not transferred, concealed, squandered, or hidden. In fact, LBS's potential propensity for such conduct was established at trial. At trial, LBS entered a balance sheet that was prepared an estimated twenty minutes before LBS's Chief Operations Officer, Weslyn Lack-Chickering, took the stand. Among the assets listed on the balance sheet was a swimming pool. Yet Ms. Chickering testified the company did not own a swimming pool:

- Q. But under the company's fixed assets, there's a swimming pool listed as a covered asset. I'm just wondering where the swimming pool is?
- A. I do not own a swimming pool. I would need to ask my office manager what that means.
- Q. Well, the company.
- A. No, the company doesn't own a swimming pool.

(Trial Trans., Day 5, 963:17-23). Further, LBS's balance sheet showed a seven-figure loan from LBS to Lack's Outdoor Furniture which is also wholly owned by George Lack. Not coincidentally, LBS operates out of the furniture company's warehouse located at 531 Robert Grissom Parkway in Conway. When asked whether the transfer of \$1,218,320.04 from LBS to Lack's Outdoor Furniture happened immediately after the jury's verdict, Ms. Chickering testified she had no personal knowledge of when the loan was made. (Trial Trans., Day 5, p. 964).

Finally, LBS makes no showing that the public interest is somehow better served if execution is stayed. On the contrary, a stay is strongly against the public interest because it would allow LBS to continue to operate its unsafe business "as usual" despite the jury's unanimous verdict. During the punitive phase of trial, in an effort to persuade the jury that a punitive verdict would put LBS out of business, LBS elicited testimony from Ms. Chickering that LBS had \$3 million in insurance coverage and a negative net worth of \$437,350.51. However, despite LBS's

apparent net worth, the jury still went on to award \$7,000,000.00 in punitive damages. That the jury considered LBS's weak financial state yet still awarded \$7 million in punitive damages is a clear indication the public interest is **not** served by allowing LBS's continued operation.

Notwithstanding the public interest, LBS's motion to stay effectively asks this Court to nullify the jury's award and LBS's legal responsibility for the judgment. Given that LBS's franchise agreement with the City of Myrtle Beach does not expire until 2025, staying execution pending an appeal would provide LBS a windfall to operate unscathed since any appeal would not likely be resolved until after the expiration of the franchise agreement. Although desired by LBS, such a scenario would violate the public interest by allowing a drastically undercapitalized entity to provide public safety services it clearly cannot afford to provide. Indeed, the public's interest would be far better served by appointing a receiver to oversee LBS and ensure the company ceases the reckless practices and public safety risks that caused Mr. Wolde's tragic death. Because these factors favor denial of a stay, LBS's requested relief must be denied.¹

II. Plaintiff's Motion for Appointment of Receiver is Timely and Should be Heard in the Order in Which it was Filed.

Plaintiff's motion for appointment of a receiver is timely pursuant to S.C. Code § 15-65-10, and should, thus, be heard in the order in which it was filed. Contrary to LBS's contention, § 15-65-10(4) does not require an unsatisfied execution of judgment as a prerequisite to warrant

¹ There being no appeal at this time, LBS's request for an unsecured stay on appeal is premature. Nonetheless, adequate bond is generally required to obtain a stay on appeal. *See* Rule 62(d), SCRCF, ("[w]hen an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay . . . [t]he stay is effective when the supersedeas bond is approved by the court."); *Southeast Booksellers Ass'n v. McMaster*, 233 F.R.D. 456, 457 (D.S.C. 2006) (finding state officials failed to establish valid reason for excusing bond requirement in seeking stay pending appeal); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760 (D.C. Cir. 1980) (stating the purpose of bond is to secure the appellee from loss resulting from the stay of execution, and because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, a full supersedeas bond should be the requirement in normal circumstances).

appointment of a receiver. Here, Plaintiff is seeking a receiver not to carry the judgment into effect at this time but due to LBS's imminent danger of insolvency pursuant to § 15-65-10(4). Section 15-65-10(4) permits a trial court to appoint a receiver if a corporation is "in imminent danger or insolvency . . ." S.C. Code Ann. § 15-65-10(4). "[I]mminent danger of insolvency" is the only condition required to permit the court to grant a receivership in this instance. Given LBS's negative net worth as admitted by LBS at trial, Plaintiff has a reasonable basis to presume that LBS is in imminent danger of insolvency. The need for a receiver to preserve LBS's assets is, thus, triggered and appropriate pursuant to § 15-65-10(4).

As is customary, Plaintiff's motion for appointment of a receiver should be heard in the order in which it was filed. Having failed to raise the issue of a stay until nearly three months following entry of the judgment, LBS cannot now challenge the sequencing of motions. In the appropriate sequence, LBS will have the opportunity to raise any challenges it may have to Plaintiff's rightful effort to preserve LBS's assets through appointment of a receiver. Indeed, if the court appoints a receiver, the receivership would obviate the need for a stay of execution, rendering moot LBS's delayed motion.

Moreover, LBS's interests as the debtor are inferior—not superior—to those of the Plaintiff in this case. *See* Rule 62(b), SCRCP (requiring court to consider such conditions for the security of the adverse party, i.e., the creditor, in determining whether to grant a stay); *See Stearns Bank Nat. Ass'n*, 375 S.C. at 426, 653 S.E.2d at 275–76 (stating the policy expressed in Rule 62(b) favors the creditor over the debtor). Plaintiff should not suffer prejudice merely because she filed her motion for appointment of a receiver before LBS filed its delayed motion for a stay. If a stay of execution was so critical, LBS had more than ample time to raise the issue post-trial. Yet, it was not until Plaintiff moved to appoint a receiver that LBS apparently decided a stay would better

protect its interests. The court should not allow LBS to benefit from its failure to timely seek relief.

CONCLUSION

For the foregoing reasons, LBS's motion seeking a stay of execution on the judgment and for sequencing of motions or to stay Plaintiff's motion for appointment of receiver must be denied.

Respectfully submitted,

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November 15, 2022
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
	)	
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	MEMORANDUM IN OPPOSITION
Plaintiff,	)	TO MOTION TO APPOINT RECEIVER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

Defendant Lack's Beach Service, Inc. ("Lack's") submits this memorandum in opposition to Plaintiff's Motion to Appoint a Receiver. As detailed in Lack's Motion to Stay Execution of the Judgment and herein, appointment of a receiver is not appropriate or warranted in this case. Therefore, Plaintiff's motion should be denied.

ARGUMENT

Plaintiff's motion seeks drastic and unwarranted relief including asking the Court to inject a third-party receiver into the attorney-client relationship between Lack's and its counsel and suggesting that the Court should encourage the receiver to assert claims against Lack's insurers. *See* Pltf. Mot. at 1 (asking that the Court give the receiver power to "investigate and make all claims Lack's Beach Service, Inc. may have against its insurer and/or others which have caused irreparable financial harm"). The Court should deny Plaintiff's motion first for the reasons stated in Lack's motion to stay execution on the judgment, which Lack's incorporates in full herein. Lack's timely filed a motion for JNOV, motion for new trial absolute, motion for new trial nisi remittitur, and conditional motion for reduction of the judgment. Plaintiff's motion is presumptuous with respect to this Court's disposition of the post-trial motions. The Court's rulings

on Lack's post-trial motions and/or its motion to stay execution of the judgment could moot Plaintiff's Motion to Appoint a Receiver.

Further, if this Court declines to grant JNOV or a new trial absolute, Lack's will appeal and is prepared to post a supersedeas bond in accordance with the limits imposed by S.C. Code Ann. § 18-9-130(A)(1). Pursuant to section 18-9-130(A), the maximum supersedeas bond following appeal by an individual or a business entity that employs fifty persons or fewer or which has revenue of less than \$5 million in the previous tax year is \$1 million or the amount of the judgment, whichever is less. S.C. Code Ann. § 18-9-130(A)(1)(b).

Plaintiff's Motion for Appointment of a Receiver is based entirely on: 1) the existence of the verdict in this matter and 2) Lack's negative net worth and thus "imminent insolvency" in light of that verdict. Plaintiff's argument is premised on circular logic, asserting that Lack's faces imminent insolvency because of the judgment while failing to acknowledge that the only reason this threat looms over Lack's is because of Plaintiff's premature efforts to execute on the judgment and/or reach Lack's insurers. This flawed reasoning should not form the basis for appointing a receiver.

If this Court orders JNOV or a new trial, there is no verdict. There would thus be no need to consider the Motion for Appointment of a Receiver as it would moot the issue. If the Court grants a stay of execution of the judgment, with or without an undertaking, there is no need to consider the Motion for Appointment of a Receiver.

Lack's will suffer irreparable harm if the court grants Plaintiff's Motion to Appoint a Receiver. Plaintiff has made it clear the intention to seize control entirely of Lack's business via that process. Court appointment of a receiver could also implicate Section 9 of the Franchise Agreement, which only permits the franchise to be transferred to another franchise holder subject

to 60 days' notice, approval of the City manager, and upon a Resolution approving the transfer passed by City Council. Similarly, the Franchise Agreement provides that it may not be assigned in whole or in part except upon written consent of the City of Myrtle Beach. The City of Myrtle Beach entrusted Lack's to perform this specialized service based on its longstanding relationship with the City of Myrtle Beach, cultivated over four decades, and good service record. If a receiver is appointed, the City may cancel the franchise and, with it, the income generating component of Lack's business, which is sales revenue generated from renting beach equipment.

Appointment of a receiver would also require management and oversight by the Court.

The courts duties would potentially include the following:

- If a bond is given after appointment of a receiver, the Court must revisit the issue by vacating the appointment of the receiver and directing redelivery of the property to the party from whose possession it was taken and require that sufficient security be given to reimburse the receiver for payment of lawful charges and expenses in case they should be thereafter finally adjudged to be chargeable against the property. S.C. Code. Ann. § 15-65-60.
- Alternatively, if the security becomes insufficient the court will also have to revisit the issue and require that the security be made sufficient. S.C. Code. Ann. § 15-65-80.
- Moreover, it if is ultimately determined that the receiver was improperly appointed, Lack's may apply to the court and have the issue referred to a master, referee, or jury to have its actual damages "by reason of such receivership ascertained and assessed and for judgment therefor against the party or parties having procured such receiver." S.C. Code. Ann. § 15-65-90.
- The Court will also have to provide for compensation for any receiver. *See* S.C. Code. Ann. § 15-65-100 (noting that the receiver "shall be allowed such commissions as may be fixed by the court appointing them").
- If a party admits via pleading or examination that he has money or other things capable of delivery, being the subject of litigation, is held by him as trustee for another party or which belongs or is due to another party, "the court may order such money or other thing to be deposited in court or delivered to such party, with or without security, subject to the further direction of the court." S.C. Code. Ann. § 15-65-110.
- The Court will have to monitor to ensure that any order for deposit, delivery or conveyance of money or other property has been followed and address any such orders

if they have been disobeyed. The Code provides that the Court, “besides punishing the disobedience as for contempt, may make an order requiring the sheriff or constable to take the money or property and deposit, deliver or convey it in conformity with the direction of the court.” S.C. Code. Ann. § 15-65-120.

As Lack’s detailed in its motion to stay, the purpose of a stay is to preserve the rights of the parties pending further proceedings. Plaintiff’s Motion to Appoint Receiver puts the proverbial “cart before the horse,” as Plaintiff desires to totally change the status quo of the parties before post-trial motions have even been considered. Plaintiff has not shown that the issuance of a stay is unfair to Plaintiff, as the public policy of South Carolina regarding a supersedeas bond amount that operates to stay a judgment on appeal is reflected by the above-mentioned statute. Similarly, that statute – S.C. Code Ann. § 18-9-130(A)(1)(b) – reflects that the public interest lies in a stay of execution upon the posting of an appropriate bond, and that the bond amount should be, under circumstances as set forth here – \$1 million or less. Further, the public interest lies in Lack’s continuing on as a going concern, and not being placed into Receivership, especially considering its franchise agreement with the City of Myrtle Beach. A stay of execution order should therefore issue as detailed in Lack’s motion to stay, *Se. Booksellers’ Ass’n v. McMaster*, 233 F.R.D. 456, 458-59 (D.S.C. 2006); *see also* as an example of persuasive reasoning, *Morris v. Bland*, No. 5:12-cv-3177-RMG, 2015 WL 12911349 (D.S.C. Mar. 23, 2015), and the Court should deny Plaintiff’s motion to appoint a receiver.

CONCLUSION

For the reasons stated above and in Lack’s Motion to Stay, the Court should deny Plaintiff’s Motion to Appoint a Receiver and grant Lack’s Motion to Stay.

[signature on following page]

Respectfully submitted,

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November 3, 2022

Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	MOTION TO STAY EXECUTION
Plaintiff,	)	ON THE JUDGMENT AND STAY
v.	)	MOTION FOR APPOINTMENT OF
	)	RECEIVER AND FOR SEQUENCING
LACK'S BEACH SERVICE, INC.,	)	OF MOTIONS TO BE HEARD AND
	)	ORDERS ISSUED
Defendant.	)	

Defendant Lack's Beach Service, Inc. ("Lack's") hereby moves the Court for an Order staying execution on and enforcement of the judgment during the pendency of the post-trial motions and, if necessary, appeal. Lack's further moves that this Court hear, consider, and rule on Lack's post-trial motions and this motion to stay execution of the judgment prior to consideration and ruling on Plaintiff's recently filed Motion to Appoint a Receiver (Motion w/out exhibits attached as Exhibit A).

PROCEDURAL HISTORY

This matter was tried between July 25, 2022 and July 29, 2022. The jury found in Plaintiff's favor and awarded \$3.73 million on the survival claim, \$10 million on the wrongful death claim, and \$7 million in punitive damages. On August 1, 2022, the Court entered a Form 4 judgment stating the jury had rendered a verdict in the stated amount. Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial *nisi remittitur*. Lack's motions remain pending and are awaiting a hearing. Therefore, the final judgment amount, if any, has not yet been determined by this Court, as it has not yet heard nor adjudicated the post-trial motions.

After the post-trial motions were fully briefed but before this Court could hear and consider Lack's post-trial motions, Plaintiff filed a Motion for Appointment of Receiver. (Exhibit A). By filing the motion, Plaintiff boldly presumes this Court's disposition of the post-trial motions in Plaintiff's favor. Lack's hereby moves to stay execution on the judgment, and further moves that the Court consider Lack's post-trial motions and rule on them and on Lack's motion to stay execution prior to considering Plaintiff's Motion to Appoint a Receiver.¹ The Court's rulings on Lack's post-trial motions and/or its motion to stay execution motion could moot Plaintiff's Motion to Appoint a Receiver, and thus Lack's respectfully suggests this is the proper sequence in which the Court should proceed with addressing the outstanding post-trial motions.

ARGUMENT

Rule 62(a) provides for an automatic stay of enforcement of a judgment of 10 days. *See* Rule 62(a), SCRCP. Rule 62(b), SCRCP governs stay of execution or enforcement of a judgment pending post-trial motions for a new trial or to alter or amend. Pursuant to that Rule, the court may issue a stay of proceedings to enforce a judgment in its discretion "and on such conditions for the security of the adverse party as are proper." Rule 62(b), SCRCP. Once appeal is taken from the judgment, Rule 62(d) then provides that a party may obtain a stay as to the enforcement of the judgment "by giving a supersedeas bond." Rule 62(d), SCRCP.

Here, as stated, post-trial motions are pending. If this Court declines to grant JNOV or a new trial absolute, Lack's will appeal and is prepared to post a supersedeas bond in accordance with the limits imposed by S.C. Code Ann. § 18-9-130(A)(1). Pursuant to section 18-9-130(A), the maximum supersedeas bond following appeal by an individual or a business entity that employs fifty persons or fewer or which has revenue of less than \$5 million in the previous tax

¹ Lack's will file a separate memorandum in opposition to Plaintiff's Motion to Appoint a Receiver.

year is \$1 million or the amount of the judgment, whichever is less. S.C. Code Ann. § 18-9-130(A)(1)(b).

South Carolina courts have not outlined the standard that a trial court should apply in determining the need for, or the amount of, an undertaking or security aside from the appeal bond statute. However, federal rule of civil procedure 62 is substantially similar to South Carolina's Rule 62, and cases interpreting that rule are instructive. Under the corresponding federal rule, a district court may, in its discretion, issue a stay of execution *with no bond requirement*:

Rule 62(d) does not address, and hence does not preclude, issuance of a stay on the basis of some lesser bond, or indeed, no bond. It follows, logically, that this Rule leaves unimpaired a district court's inherent, discretionary power to stay judgments pending appeal on terms other than a full supersedeas bond.

Alexander v. Chesapeake, Potomac & Tidewater Books, Inc., 190 F.R.D. 190, 192 (E.D. Va. 1999); *see also Se. Booksellers' Ass'n v. McMaster*, 233 F.R.D. 456, 458-59 (D.S.C. 2006) (noting that when an applicant for a stay of judgment does not provide a supersedeas bond, whether to grant a stay is still within the discretion of the court due to "undue financial hardship," and applying *Hilton v. Braunskill* factors to stay decision).

The Motion for Appointment of a Receiver is based entirely on: 1) the existence of the verdict in this matter and 2) Lack's negative net worth and thus "imminent insolvency" in light of that verdict. If this Court orders JNOV or a new trial, there is no judgment. There would thus be no need to consider the Motion for Appointment of a Receiver. Further, if the Court grants a stay of execution of the judgment, with or without an undertaking, there is no need to consider the Motion for Appointment of a Receiver. Insofar as a required undertaking/bond, the Court should look to the appeal bond statute as the appropriate guide for evaluating the amount of the bond. Here, Lack's had revenues of less than \$5 million in the prior tax year. Therefore, any bond

imposed by the Court should be equal to or less than the statutory maximum of \$1 million under the appeal bond statute.

Through its post-trial motions and supportive briefing, Lack's has shown this Court its arguments/positions as to the merits. Lack's will suffer irreparable harm from allowing execution on the judgment. In fact, the Motion to Appoint a Receiver demonstrates this as well, as Plaintiff has made it clear the intention to seize control entirely of Lack's business via that process. Under such circumstances, a stay of execution is appropriate and should issue.

The purpose of the stay generally is to preserve the rights of the parties pending further proceedings. Plaintiff's Motion to Appoint Receiver puts the proverbial "cart before the horse," as Plaintiff desires to totally change the status quo of the parties before post-trial motions have even been considered. Plaintiff has not shown that the issuance of a stay is unfair to Plaintiff, as the public policy of South Carolina regarding a supersedeas bond amount that operates to stay a judgment on appeal is reflected by the above-mentioned statute. Similarly, that statute – S.C. Code Ann. § 18-9-130(A)(1)(b) – reflects that the public interest lies in a stay of execution upon the posting of an appropriate bond, and that the bond amount should be, under circumstances as set forth here – \$1 million or less. Further, the public interest lies in Lack's continuing on as a going concern, and not being placed into Receivership, especially considering its franchise agreement with the City of Myrtle Beach. A stay of execution order should therefore issue. *See Booksellers' Ass'n v. McMaster*, 233 F.R.D. 456, 458-59 (D.S.C. 2006); see also as an example of persuasive reasoning, *Morris v. Bland*, No. 5:12-cv-3177-RMG, 2015 WL 12911349 (D.S.C. Mar. 23, 2015). This Court should order that no bond be required in light of the financial status of Lack's, or, in the alternative, that a bond of no more than \$1 million be required in accordance with the appeal bond statute.

CONCLUSION

Based on the foregoing, Lack's respectfully requests the Court grant this motion. This Court should schedule a hearing on this motion and on the pending post-trial motions and consider and rule on them before turning to the Motion to Appoint a Receiver, as the latter may be mooted by the disposition of the former. Consultation regarding this Motion would serve no useful purpose. Should Lack's not prevail in its post-trial motions but should it prevail on appeal thereafter, all premium costs required to be paid for appeal bonds will be sought against Plaintiff as taxable costs per applicable law. Lack's reserves the right to file a further supplemental memorandum supporting this motion.

Respectfully submitted,

HALL BOOTH SMITH, P.C.

/s/Joseph D. Thompson, III

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Attorneys for Defendant Lack's Beach Service, Inc.

October 19, 2022
Mount Pleasant, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	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,	)	
	)	MOTION FOR APPOINTMENT
Plaintiff,	)	OF RECEIVER
	)	
v.	)	
	)	
LACK'S BEACH SERVICE, CITY OF	)	
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE that Plaintiff Meswaet Abel, as personal representative of the estate of Zerihun Wolde, by and through undersigned counsel, hereby moves the Court pursuant to South Carolina Code Ann. § 15-65-10 for an order appointing Peter Protopapas¹, Esquire, as receiver over the assets of Lack's Beach Service, Inc. with the exclusive power to: (i) account for and safekeep the corporation's assets; (ii) vest all of Lack's Beach Service, Inc.'s rights as the client in any attorney-client relationship between Lacks Beach Service, Inc. and any attorney hired or retained by Lacks Beach Service, Inc. or hired and retained by any insurer to represent Lack's Beach Service, Inc.; (iii) obtain the entire file contents related to representation of Lack's Beach Service, Inc. in the above-captioned matter that are in the possession of Arch Specialty Insurance Company and/or any attorney who provided legal representation to Lack's Beach Service, Inc. at any time including the present; and (iv) investigate and make all claims Lack's Beach Service, Inc. may have against its insurer and/or others which have caused irreparable financial harm.

¹ Curriculum Vitae is attached herewith.

This motion is based on the grounds that the \$20,730,000.00 judgment entered in this matter on August 1, 2022, against Lack's Beach Service, Inc. significantly exceeds Defendant's net worth and earnings, rendering Lack's Beach Service in imminent danger of insolvency as contemplated by S.C. Code Ann. § 15-65-10(4). (*See* Ex. 1, 8/1/2022 Order and Verdict Form). Further, Lack's Beach Service's assets, including its claims against its insurer and others, as well as the company's profits, are at risk of being lost or injured should a receiver not be appointed by this Court.

RELEVANT BACKGROUND

A. Lack's Cash Intensive Business

Lack's Beach Service, Inc. is a for-profit business located in Horry County whose primary source of revenue derives from a Franchise Agreement with the City of Myrtle Beach wherein Defendant is granted the exclusive right to engage in commercial sales on a thirteen mile stretch of beach in exchange for providing lifeguard services thereon. The commercial sales consist primarily of beach chair and umbrella rentals, which Lack's Beach Service leases from a separate outdoor furniture manufacturing business run by the same owner, George Lack. The beach rental sales are high volume, low dollar cash transactions conducted throughout the beach at various beach stands.

Lack's Beach Service's rental revenues are recorded and accounted for on an ongoing and daily basis. Given the high volume of cash transactions, Defendant's employees are required to directly account for the daily revenues without exception or excuse. Specifically, Defendant instructs its employees to "keep track of rental activity in a timely fashion—must be updated IMMEDIATELY." (Ex. 2, Training Manual, p. 17). Likewise, Defendant instructs that "receipts must be given out whenever money changes hands!" *Id.*

Lack's Beach Service is further required to account for its sales in the form of yearly sales reports provided to the City no later than the first of December for each year during the term of its contract with the City. (Ex. 3, FA, lines 10-12). Lack's yearly sales reports for 2018 and 2019 reported revenues of \$1,351,964.00 and \$1,396,698.00 respectively. (Ex. 4, 2018 Stand Totals).

B. Other Assets – Lack's Claims Against its Insurer and Others.

On April 13, 2022, and after more than two years of discovery in this matter, Defendant's insurer, Arch Specialty Insurance Company, received settlement correspondence which stated:

THIS IS AN OFFER TO FULLY RESOLVE ALL CLAIMS AGAINST LACK'S BEACH SERVICE, INC. AND MUST BE COMMUNICATED IN ITS ENTIRETY TO THE CLIENTS, INCLUDING THE INSURED, THE INSURANCE REPRESENTATIVES AT ARCH SPECIALTY INSURANCE COMPANY AND ALL INSURANCE DECISION MAKERS.

(Ex. 5, 4/13/2022 Ltr). As advised in the correspondence, the offer was Arch's last opportunity to settle for its \$3,000,000 policy limit and if not accepted by May 2, 2022, Plaintiff would proceed to trial, exposing its insured to significant legal and financial exposure. Instead of securing a full release of all claims in favor of its insured, Arch rejected Plaintiff's final settlement demand and further failed to make any reasonable, meaningful offer to settle the case on or before May 2, 2022. In rejecting the Plaintiff's offer to settle within the available coverage, Arch failed to point to a single fact from which it could reasonably contest liability or damages. Rather, the insurer stated: "without responding to every disputed assertion contained in the referenced settlement demand, Arch and Lack's must disagree with your assertions of liability in this matter." (Arch Ltr. 5/2/22).

On June 7, 2022, approximately one month after Arch rejected the time demand, Arch made a "net" settlement offer in the amount of \$250,000. Arch failed to provide any basis for this settlement offer nor did the company provide the purported good faith basis for its belief that a mere \$62,500.00 for each of the decedent's four children was fair and reasonable compensation

for the wrongful death of their father. On June 17, 2022, Arch extended a second offer in the amount of \$750,000.000. Again, Arch failed to provide the reasonable or good faith basis for offering only 25% of the indemnity dollars purchased by Lack's Beach Service, Inc., nor did the insurer identify any evidence which could possibly lead a factfinder to return a verdict in favor of its insured.

Having failed to reach a meaningful settlement, the ensuing weeklong trial concluded in a verdict in favor of Plaintiff and a monetary judgment of \$20,730,000.00 against Lack's Beach Service, Inc.—roughly \$17,000,000.00 in excess of Lack's policy limits. As a result of Arch's conduct in fabricating a good faith basis to reject Plaintiff's time demand for the policy limits, Lack's is now exposed to significant financial liability.

What's more, Arch also failed to advise or ensure Lack's secured independent counsel to adequately guard its interests. Due to the problematic tripartite relationship between and among an insured, its carrier, and the defense counsel hired by the carrier, the standard of care requires that the insured be advised of the limits of the assigned counsel's representation, including the carrier's right to control the defense and settlement under the insurance contract. *See* ABA Formal Ethics Opinion 96-403. The standard of care further requires assigned counsel to ensure Lack's Beach Service had independent counsel *prior to* rejecting the April 13, 2022, time demand. But at no time did Arch or its assigned counsel ensure that Defendant was adequately represented by independent counsel before obtaining Lack's "consent" to reject the time demand and otherwise place itself in financial jeopardy. (*See*, Arch Ltr. 5/2/22, stating "please be advised that Arch has consulted with Lack's about the facts and circumstances surrounding this matter and the Demand, and Lack's has advised Arch that the Demand should be declined.").

The independent counsel standard of care exists, of course, due to the inherent and obvious financial conflict between assigned counsel's duties to their client and the conflicting personal interests of counsel in preserving their relationship with the carrier (*i.e.*, ensuring the assignment of future cases). These competing interests are undoubtedly a "personal interest to the lawyer" and therefore a conflict of interest. *See*, Rule 1.7(a). Consequently, Arch should have ensured that Lack's Beach Service had independent counsel to assess its liability and exposure in light of Plaintiff's time demand. But it did not and the policy limit demand was rejected, exposing Lack's to significant liability in excess of the policy limits.

In excess verdict cases such as this, our Supreme Court admonishes conduct that exposes an insured to excess liability. However, an insurer in this situation can protect its insured, and potentially avoid bad faith liability, by satisfying the judgment after trial. *See, Reeves v. SCMIRF*, 862 S.E.2d 248 (S.C. 2021) ("when the verdict far exceeded any view of policy limits, the Fund settled the case, leaving its insureds insulated from any excess judgment. While it is conceivable an insurer may subject itself to liability for consequential damages for bad faith conduct in some other respect, we do not condone the idea an insurer may incur bad faith liability for simply taking a case to the jury, *when the insurer satisfied the judgment after trial without exposing the insured to excess liability.*"). But again, Arch has failed to do so, leaving its insured in imminent danger of insolvency. (*See* Ltr. 9/12/22).

LAW AND ARGUMENT

The decision to appoint a receiver is within the discretion of the circuit judge. *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (citations omitted). Given the threat of insolvency posed by the significant excess judgment against Lack's Beach

Service, Inc., the appointment of a receiver is necessary and appropriate to protect Lack's Beach Service and its assets as the judgment debtor in this case.

Section 15-65-10 of the South Carolina Code sets forth the circumstances under which the appointment of a receiver is appropriate. Subsection 15-65-10(4) specifically authorizes the court to appoint a receiver "when a corporation has been dissolved, is insolvent or *in imminent danger of insolvency*...." See S.C. Code Ann. § 15-65-10(4) (emphasis added). The "insolvency" provided for in § 15-65-10(4) is "that condition of the debtor where his entire property and assets are insufficient to pay his debts." *Miller v. Southern Land & Lumber Co.*, 53 S.C. 364, 31 S.E. 281 (S.C. 1898). "Imminent danger of insolvency" as used in subsection (4) means "danger of insolvency from the standpoint of preserving its assets, that is to say, that unless a receiver be appointed, a corporation just about to become insolvent will have its assets wasted." *In re Maplecroft Mills*, 218 F. 659, 670 (W.D.S.C. 1914), *rev'd sub nom. Maplecroft Mills v. Childs*, 226 F. 415 (4th Cir. 1915).

Here, Arch's conduct in fabricating a good faith basis to reject Plaintiff's time demand for the policy limits has exposed Lack's Beach Service to a significant excess judgment. The excess verdict in this action greatly exceeds Lack's Beach Service's net worth and earnings through its cash intensive beach rental business, presenting a reasonable and imminent threat of insolvency. At trial, Lack's Beach Service's sole owner, George Lack, maintained that the business's net worth was negative \$437,350. (Trial Tr., p. 958:16-21, stating, "the net worth is what the net worth says on this piece of paper, and that's negative \$437,350."). The excess judgment in this action thus places Lack's Beach Service in imminent danger of insolvency as contemplated by 15-65-10(4), warranting the appointment of a receiver to preserve and protect Defendant's assets during the pendency of this litigation or any supplemental proceedings or efforts to execute the judgment.

With yearly revenues reported at or around \$1.3 - \$1.4 million, the cash heavy nature of the business further necessitates the appointment of a receiver to ensure proper accounting and financial controls are in place to preserve and maintain Defendant's assets and income stream throughout the pendency of this litigation and any proceedings to execute the judgment. Unlike publicly held corporations whose corporate governance contains rigorous checks and balances, Defendant is a privately owned business with one shareholder. Thus, without the benefit of a receiver there will be no oversight to ensure proper safeguarding of the judgment debtor's assets and income.

Finally, Lack's Beach Service is solely owned by George Lack, who also operates four other beach rental businesses as well as an outdoor furniture manufacturing business and a restaurant. The appointment of a receiver is thus necessary to ensure that no assets or earnings are transferred, concealed, or hidden through any of George Lack's other businesses or through other means.

CONCLUSION

For the foregoing reasons, the appointment of a receiver to oversee Lack's Beach Service, Inc. is just and proper pursuant to S.C. Code § 15-65-10 and is required to protect the judgment debtor and its assets. Accordingly, Plaintiff respectfully requests that the court issue an order appointing Peter Protopapas, Esquire, as receiver over the assets of Lack's Beach Service, Inc. with the exclusive power to: (i) account for and safekeep the corporation's assets; (ii) vest all of Lack's Beach Service, Inc.'s rights as the client in any attorney-client relationship between Lacks Beach Service, Inc. and any attorney hired or retained by Lacks Beach Service, Inc. or hired and retained by any insurer to represent Lack's Beach Service, Inc.; (iii) obtain the entire file contents related to representation of Lack's Beach Service, Inc. in the above-captioned matter that are in

the possession of Arch Specialty Insurance Company and/or any attorney who provided legal representation to Lack's Beach Service, Inc. at any time including the present; and (iv) investigate and make all claims Lack's Beach Service, Inc. may have against its insurer and/or others which have caused irreparable financial harm.

Respectfully submitted,

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H. Cooper Wilson, III (74939)

THOMASON & PRACHT, LLP

s/J. Christopher Pracht

J. Christopher Pracht, V (S.C. Bar #: 77534)
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Attorneys for the Plaintiff

October 12, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
MESWAET ABEL, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF ZERIHUN WOLDE AND AS)
NATURAL PARENT AND LEGAL)
GUARDIAN OF ADAM WOLDE AND)
WUBIT WOLDE,)
Plaintiff,)
v.)
LACK'S BEACH SERVICE, CITY OF)
MYRTLE BEACH, AND JOHN DOE)
LIFEGUARD,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-07075

**MOTION FOR APPOINTMENT
OF RECEIVER**

PLEASE TAKE NOTICE that Plaintiff Meswaet Abel, as personal representative of the estate of Zerihun Wolde, by and through undersigned counsel, hereby moves the Court pursuant to South Carolina Code Ann. § 15-65-10 for an order appointing Peter Protopapas¹, Esquire, as receiver over the assets of Lack's Beach Service, Inc. with the exclusive power to: (i) account for and safekeep the corporation's assets; (ii) vest all of Lack's Beach Service, Inc.'s rights as the client in any attorney-client relationship between Lacks Beach Service, Inc. and any attorney hired or retained by Lacks Beach Service, Inc. or hired and retained by any insurer to represent Lack's Beach Service, Inc.; (iii) obtain the entire file contents related to representation of Lack's Beach Service, Inc. in the above-captioned matter that are in the possession of Arch Specialty Insurance Company and/or any attorney who provided legal representation to Lack's Beach Service, Inc. at any time including the present; and (iv) investigate and make all claims Lack's Beach Service, Inc. may have against its insurer and/or others which have caused irreparable financial harm.

¹ Curriculum Vitae is attached herewith.

This motion is based on the grounds that the \$20,730,000.00 judgment entered in this matter on August 1, 2022, against Lack's Beach Service, Inc. significantly exceeds Defendant's net worth and earnings, rendering Lack's Beach Service in imminent danger of insolvency as contemplated by S.C. Code Ann. § 15-65-10(4). (*See* Ex. 1, 8/1/2022 Order and Verdict Form). Further, Lack's Beach Service's assets, including its claims against its insurer and others, as well as the company's profits, are at risk of being lost or injured should a receiver not be appointed by this Court.

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What's more, Arch also failed to advise or ensure Lack's secured independent counsel to adequately guard its interests. Due to the problematic tripartite relationship between and among an insured, its carrier, and the defense counsel hired by the carrier, the standard of care requires that the insured be advised of the limits of the assigned counsel's representation, including the carrier's right to control the defense and settlement under the insurance contract. *See* ABA Formal Ethics Opinion 96-403. The standard of care further requires assigned counsel to ensure Lack's Beach Service had independent counsel *prior to* rejecting the April 13, 2022, time demand. But at no time did Arch or its assigned counsel ensure that Defendant was adequately represented by independent counsel before obtaining Lack's "consent" to reject the time demand and otherwise place itself in financial jeopardy. (*See*, Arch Ltr. 5/2/22, stating "please be advised that Arch has consulted with Lack's about the facts and circumstances surrounding this matter and the Demand, and Lack's has advised Arch that the Demand should be declined.").

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Here, Arch's conduct in fabricating a good faith basis to reject Plaintiff's time demand for the policy limits has exposed Lack's Beach Service to a significant excess judgment. The excess verdict in this action greatly exceeds Lack's Beach Service's net worth and earnings through its cash intensive beach rental business, presenting a reasonable and imminent threat of insolvency. At trial, Lack's Beach Service's sole owner, George Lack, maintained that the business's net worth was negative \$437,350. (Trial Tr., p. 958:16-21, stating, "the net worth is what the net worth says on this piece of paper, and that's negative \$437,350."). The excess judgment in this action thus places Lack's Beach Service in imminent danger of insolvency as contemplated by 15-65-10(4), warranting the appointment of a receiver to preserve and protect Defendant's assets during the pendency of this litigation or any supplemental proceedings or efforts to execute the judgment.

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the possession of Arch Specialty Insurance Company and/or any attorney who provided legal representation to Lack's Beach Service, Inc. at any time including the present; and (iv) investigate and make all claims Lack's Beach Service, Inc. may have against its insurer and/or others which have caused irreparable financial harm.

Respectfully submitted,

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Tel. 843-277-6655
Fax 843-277-6660

s/W. Mullins McLeod, Jr.

W. Mullins McLeod, Jr. (14148)
H. Cooper Wilson, III (74939)

THOMASON & PRACHT, LLP

s/J. Christopher Pracht

J. Christopher Pracht, V (S.C. Bar #: 77534)
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Anderson, South Carolina 29622
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Fax: (864) 226-7224

Attorneys for the Plaintiff

October 12, 2022
Charleston, South Carolina

Exhibit A

CURRICULUM VITAE

PETER D. PROTOPAPAS

ADDRESS Rikard & Protopapas, LLC
2110 North Beltline BLVD
Columbia, SC 29210

LICENSURE South Carolina State Bar 11/2000

EDUCATION

1992 BA University of Massachusetts at Amherst
1994 MA University of Florida
2000 JD University of South Carolina School of Law

RECEIVERSHIP EXPERIENCE

Appointed Receiver for more than fifteen entities in South Carolina Circuit Court. Attached as exhibit A is a list of Receivership entities. Have collected over \$125 million in Receivership litigation against insurers and other professionals. Manage more than forty lawyers in the prosecution and defense of hundreds of claims by and against the Receiverships in federal and state courts primarily in South Carolina and North Carolina.

PROFESSIONAL EXPERIENCE

10/2010-Present Rikard & Protopapas. Columbia, SC
Partner in Civil litigation firm
2000-2010 Lewis & Babcock. LLP
Associate then Partner in civil litigation firm

MEMBERSHIPS

South Carolina Association of Justice, Chair of Ethics Division & Member
National Trial Lawyers Association, Member
South Carolina Bar and Richland County Bar Associations, Member
John Belton O'Neill Inn of Court, Member
Top Rated Professional Liability Attorney by Super Lawyers (2017-2022)
Legal Elite in Business Litigation by the Columbia Business Monthly (2020, 2021)
Former Board Member South Carolina Legal Services

**EXHIBIT A
RECEIVERSHIPS**

	Receivership	Case Appointed In	Order Date
1.	Beaty Investments Inc	2022CP4001241	August 24, 2022
2.	Covil Corporation	2018CP4004940	November 2, 2018
3.	Davis Mechanical Contractors Inc	2021CP4003484	December 7, 2021
4.	Flame Refractories Inc	2021CP4003484	August 27, 2021
5.	General Boiler Casing Company, Inc.	2021CP4003484	August 27, 2021
6.	Great Barrier Insulation Co	2020CP4002692	November 3, 2020
7.	Heat & Frost Insulation Company Inc	2021CP4006190	April 6, 2022
8.	HEFCO Inc	2021CP4003484	December 7, 2021
9.	J&L Insulation Inc	2020CP4001952	March 2, 2021
10.	JR Deans Company Inc	2021CP4003484	December 7, 2021
11.	Payne & Keller Company	2021CP4003484	August 27, 2021
12.	Piedmont Insulation Inc	2020CP4004475	June 28, 2021
13.	Pipe & Boiler Insulation Inc / Carolina Industrial Insulation Co / Wind Up LTD	2020CP4001952	March 16, 2021
14.	Presnell Insulation Co Inc	2020CP4001364	June 30, 2021
15.	Southern Insulation Inc	2019CP4003968	June 17, 2020
16.	Stafford Insulation Company	2021CP4003484	December 7, 2021
17.	Standard Insulation Company of NC Inc	2021CP4003484	September 24, 2021
18.	Starr Davis Company Inc / Starr Davis Company of SC Inc	2019CP4000076	February 21, 2019
19.	United Construction Co. of Rome	2021CP4003484	August 27, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	DEFENDANT'S REPLY IN SUPPORT
Plaintiff,	)	OF CONDITIONAL MOTION FOR
v.	)	REDUCTION OF JUDGMENT
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	

Lack's submits this reply in support of its conditional motion for reduction of the judgment pursuant to the caps of the South Carolina Tort Claims Act ("SCTCA"). First, Lack's did not waive this issue and *Campbell v. City of N. Charleston*, 431 S.C. 454, 463-64, 848 S.E.2d 788, 793-94 (Ct. App. 2020), *reh'g denied* (Oct. 29, 2020) is dispositive of Plaintiff's argument. Second, this is a unique situation where a governmental entity expressly delegated its sovereign powers, including its discretionary decision-making, to a private party. This lending of discretion warrants recognition and application of derivative sovereign immunity in this limited context where the government has entirely outsourced its oversight of beach safety. Therefore, the Court should find that derivative sovereign immunity applies and that the statutory caps of the SCTCA require reduction of the actual damages award to \$300,000 and the punitive damages award to \$0.

I. Lack's did not waive this argument.

Plaintiff's response entirely ignores *Campbell v. City of N. Charleston*, 431 S.C. 454, 463-64, 848 S.E.2d 788, 793-94 (Ct. App. 2020), *reh'g denied* (Oct. 29, 2020). *Campbell* found that the plain meaning of the SCTCA supports that the "cap must be executed regardless of whether a defendant has filed a responsive pleading raising this cap as a defense," as it "expressly states the

liability ‘shall’ not exceed the Act’s limits and this damages cap does not require any special findings that would affect the proof at trial, which establishes the application of the cap is mandatory and self-executing.” *Id.* Thus, *Campbell* held that “under the plain meaning of section 15-78-120(a), courts *must apply the statutory cap to actions brought pursuant to the Act.*” *Id.* (emphasis added).

Again, this is because the “liability cap articulated within the Tort Claims Act is NOT an affirmative defense and the failure to plead the specific limitation on the amount of recovery allowed under the Tort Claims Act is NOT a waiver of the cap.” *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 289, 607 S.E.2d 711, 718 (Ct. App. 2005).

Thus, Lack’s did not waive the argument that the statutory caps apply since they are self-executing. Additionally, Plaintiff cannot seriously claim that she was not on notice of the potential applicability of the South Carolina Tort Claims Act considering she sued the City of Myrtle Beach and the limitations of the SCTCA were critical components of its defense. (*See* City of Myrtle Beach Ans. ¶ 45; City of Myrtle Beach Mot. for Summ. J. pp. 3-10.)

II. Plaintiff’s statutory language argument is without merit.

As Plaintiff correctly notes, the SCTCA provides that it is the “*exclusive* civil remedy available for *any tort committed by a governmental entity, its employees, or its agents.*” S.C. Code Ann. § 15-78-20 (emphasis added). Plaintiff contends that a separate subsection’s definition of “agency” is what the term “agents” is meant to reference. Aside from the obvious fact that these are different words with different meanings, the statutory definition of “agency” expressly details the types of *governmental entities* that are covered under the TCA. *See generally* § 15-78-30. Plaintiff’s suggested interpretation would render the reference to “agents” superfluous. When interpreting a statute, the Court must, of course, presume the legislature did not intend such a futile

act. *See Duke Power Co. v. Laurens Elec. Co-op., Inc.*, 344 S.C. 101, 106, 543 S.E.2d 560, 563 (Ct. App. 2000).

An agent is defined as “someone who is authorized to act for or in place of another; a representative.” *Certus Bank, N.A. v. Bennett*, No. 2014-001248, 2016 WL 757501, at *2 (S.C. Ct. App. Feb. 24, 2016) (quoting Black’s Law Dictionary). This concept is what the statute is attempting to capture and demonstrates why the SCTCA extends to Lack’s under these facts.

III. Governmental power and discretion were delegated to Lack’s.

A central component of Plaintiff’s negligence claim was that Lack’s breached the standard of care because it had the discretionary authority to close the beach and failed to exercise that authority on the day of the incident. For example, Plaintiff’s consolidated response brief to Lack’s motions for JNOV, new trial, and new trial nisi remittitur contended:

- “Third, testimony at trial established Lack’s failure to close the beach when presented with a known hazard of rip and longshore currents was a breach of the standard of care, and one which cost Mr. Wolde his life.” (p. 20).
- “This tragic drowning occurred because Lack’s failed to close the beach, failed to provide adequate warning, and none of Lack’s improperly trained “lifeguards” provided any rescue efforts or assistance at any time.” (p. 43).
- “In addition, Lack’s was further on notice by the National Weather Service that hazardous rip and longshore currents posed a dangerous threat to the safety of beachgoers, yet Lack’s failed to close the beach and failed even to warn beachgoers of the hidden threat posed by these dangerous conditions.” (p. 52)

As Lack’s conditional motion detailed, the City of Myrtle Beach expressly delegated its discretionary power over beach safety to Lack’s. The South Carolina Code permits municipalities to provide “lifeguard and other safety related services” either directly or through a private beach safety company. S.C. Code Ann. § 5-7-145(A)-(B). The City of Myrtle Beach opted to provide such services many years ago, and contracted with Lack’s to provide said service.

The City of Myrtle Beach's ordinances further delegated the City's discretionary authority over safety to Lack's. The City Ordinances provide that "appropriate authorities" may, in their discretion, recall persons from the water or surf where, among other things, they are more than chest deep and are in danger of "drowning or becoming imperiled." *Id.* § 5-3(A). Appropriate authorities may create zones restricting aquatic activities or beachfront activities in "exigent circumstances that may pose a danger to the health, life or safety of any person due to a hazardous condition, hazardous operation, hazardous weather or hazardous structure whether temporary or permanent." *Id.* § 5-3(C). The Ordinances state that "[i]n exercising this authority, beach franchise lifeguards shall immediately notify the appropriate public safety officials of any such closures." *Id.* "Appropriate authorities" is defined to include those who have been "granted lifeguard status under beach franchise agreements," which includes Lack's pursuant to the Franchise Agreement. *Id.* § 5-1.

The concept of derivative sovereign/governmental immunity exists to cover this type of scenario where a governmental entity has entirely outsourced a discretionary power to an agent. *See Federico v. Lincoln Mil. Hous., LLC*, 127 F. Supp. 3d 623, 637 (E.D. Va. 2015) ("Derivative governmental immunity also applies to government contractors who perform a discretionary function within the scope of a valid government contract."); *see also Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996) (holding that derivative governmental immunity applies "to the extent that this case involves a discretionary governmental function which has been delegated to the private sector"). In this circumstance, "[c]ontractors are protected to the same extent as the Government when they exercise appropriately delegated discretionary power." *Federico*, 127 F. Supp. 3d at 637.

As the Supreme Court explained in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988): “Derivative sovereign immunity exists because the government and its contractors have the same interest in getting the Government’s work done.” *Id.* Hence, “[w]hen acting under valid governmental authority, therefore, a contractor is immunized ‘to the same extent as the Government’ would be if it stood in the contractor’s shoes.”” *Ruddell v. Triple Canopy, Inc.*, No. 115CV01331LMBJFA, 2016 WL 4529951, at *5 (E.D. Va. Aug. 29, 2016).

The concept is not restricted to federal law. Several states have recognized the applicability of this concept to state law claims. *See, e.g., Smith v. Rogers Grp., Inc.*, 72 S.W.3d 450, 455–56 (Ark. 2002) (“The doctrine of acquired immunity provides that a contractor who performs in accordance with the terms of its contract with a governmental agency and under the direct supervision of the governmental agency is not liable for damages resulting from that performance.”); *Stewart v. New Jersey Tpk. Auth./Garden State Parkway*, 268 A.3d 346, 354 (N.J. 2022) (“Independent contractors, such as Earle, “share to a limited extent the immunity of public entities with whom they contract.”).

As Lack’s contended in its motion, Plaintiff’s negligence claim asserting failure to close the beach was necessarily premised on the delegated governmental power to provide beach safety services by the City of Myrtle Beach to Lack’s. The verdict was a general verdict, meaning this allegation – that the beach should have been closed - formed a basis for the jury’s finding that Lack’s was liable for Wolde’s death. As a result, the doctrine of derivative sovereign immunity applies under these facts. The City of Myrtle Beach both authorized Lack’s to oversee beach safety and validly conferred said authorization to Lack’s. Therefore, Lack’s is entitled to share in the City’s immunity and, therefore, the SCTCA caps apply. Lack’s might make an incorrect decision about whether to exercise the delegated discretion in closing the beaches, but then the SCTCA

caps would apply regarding any resulting tort liability just as it does when the City's discretion is at issue. The judgment should be reduced pursuant to the statutory caps as a result.

IV. Lack's conduct did not exceed the scope of its delegated authority.

Plaintiff asserts several arguments in an attempt to avoid the doctrine's applicability, contending that derivative sovereign immunity does not apply because Lack's failed to comply with requirements of the South Carolina Code and the Franchise Agreement and thus exceeded the confines of its delegated authority. These arguments restate the same arguments Plaintiff raised in her consolidated response to Lack's motion for JNOV, motion for a new trial, and motion for a new trial nisi remittitur. Lack's incorporates its arguments from its consolidated reply by reference herein.

Plaintiff's assertions that Lack's failed to comply with the statutory requirements are without merit. First, their claim that Lack's was not a "beach safety company" and Lack's lifeguards were merely "beach attendants" is belied by the record. The testimony supported that Lack's lifeguards were primarily tasked with ensuring safety and only engaged in occasional limited commercial activity while continuing to maintain their focus on ensuring safety. Likewise for Plaintiff's assertion that Lack's lifeguards did not receive the training required by the Franchise Agreement. There was ample evidence of the training regimen provided by Lack's and that each lifeguard was required to undergo the training contemplated by the Franchise Agreement. Finally, the record evidence also contradicts Plaintiff's assertion that Lack's "dual role lifeguarding practices" interfered with the peaceful, recreational use of the beach by the public as required by S.C. Code § 5-7-145. As Lack's contended there was no evidence or testimony supporting that the "dual role" had any relevance to this incident.

Regarding the alleged violations of the Franchise Agreement, Plaintiff again glosses over the record evidence. First, there was no testimony or evidence supporting Plaintiff's contention that Lack's decades-long business arrangement with the City (whereby lifeguards were permitted to engage in limited commercial activity) was actually forbidden by the Franchise Agreement. To the contrary, as Plaintiff appears to concede, the City Manager at the time, John Pedersen, acknowledged that he and City Council were aware of the arrangement. Plaintiff's assertion that City Council "rejected" this "dangerous practice" is entirely devoid of *any* evidentiary support. As for the assertion of inadequate training, as noted, there was testimony that each Lack's lifeguard received the required training and had the proper certifications. Finally, while Plaintiff correctly notes that Lack's was one "lifeguard only" short on the day of the Wolde incident, there was no evidence or testimony supporting that having the additional "lifeguard only" (who would have patrolled a large area) on the beach that day would have made any difference on the outcome.

For all these reasons, Plaintiff's arguments fail to overcome the clear, express delegation of authority from the City of Myrtle Beach to Lack's, which supports the applicability of derivative sovereign immunity under these unique facts.

Conclusion

For the reasons stated herein and in Lack's conditional motion, the Court must apply the SCTCA caps as a matter of law pursuant to the derivative sovereign immunity doctrine. Lack's was not required to plead the applicability of the caps. As a result, Lack's liability is limited to \$300,000 total in actual damages—for both the wrongful death and survival claims combined, as the Act cap is for the loss arising from a single occurrence—and \$0 in punitive damages as expressly stated by the Code.

Respectfully submitted,

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September 16, 2022
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	DEFENDANT LACK'S BEACH
Plaintiff,	)	SERVICE, INC.'S REPLY IN
v.	)	SUPPORT OF MOTIONS FOR JNOV,
	)	NEW TRIAL ABSOLUTE, AND NEW
LACK'S BEACH SERVICE, INC.,	)	TRIAL NISI REMITTITUR
	)	
Defendant.	)	
	)	

Plaintiff's response to Lack's Beach Service, Inc.'s ("LBS" or "Lack's") Motion for JNOV, Motion for a New Trial Absolute, and Motion for New Trial Nisi Remittitur fails to overcome the numerous deficiencies and errors with the verdict in this matter and the unreasonableness of the jury's determination. For the reasons stated in Lack's motions and herein, the Court should grant JNOV in Lack's favor or, at a minimum, a new trial absolute. Failing that, the Court should order a new trial *nisi remittitur*.

I. The jury was permitted to consider highly and unduly prejudicial and irrelevant evidence, which resulted in a verdict driven by passion and prejudice.

A. *Branham* and *Sulton* require reversal due to the improper admission of evidence of Lack's gross sales data.

During the actual damages phase, Plaintiff prevailed upon the Court to allow the introduction of evidence of Lack's gross sales data for 2018. Plaintiff first sought to introduce sales data from the date of the incident, to which Lack's counsel objected and the Court overruled. (Tr. 387:12-24.) Plaintiff's counsel then introduced Lack's sales tax filing from 2018 into evidence. Plaintiff questioned George Lack about Lack's gross sales data for the entire months of

July, August, and September 2018. Lack's counsel objected to any of the data being introduced, arguing:

July and September. Those are not relevant to anything that happened in August. Again, I'm still objecting overall on the financial data and gross sales. That's more of an argument for punitives. The issue simply was the financials, what was happening on August 24, you know, showing that there was financial activity. I understand your ruling there, but when we get outside of August 23 [sic], you're just throwing numbers in front of the jury.

(Tr. 391:17-24.)¹ After the exhibit was admitted over objection, Plaintiff's counsel proceeded to cross-examine George Lack about the filing's notation of Lack's total gross revenues for fiscal year 2018, which were of \$1,520,918. (Tr. 394:10:15.)

Therefore, the jury both heard testimony about all of this data and had the tax filing as an exhibit in evidence. This financial information would not have been relevant *even during the punitive damages phase*. As the Supreme Court explained in *Branham v. Ford Motor Co.*, 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010) in reversing a multi-million verdict and ordering a new trial, the wealth of a defendant is a relevant factor in assessing punitive damages, but only "evidence of net worth and extrapolations from net worth may be introduced on the issue." *Id.* Moreover, *even as to net worth evidence*, the *Branham* Court warned, such evidence must be handled cautiously, since "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* Here, the Plaintiff prevailed upon this Court to allow it to introduce gross revenue evidence during several months of business operations of Lack's, during the liability/actual damages phase. Such evidence, per *Branham*, would have been

¹ Plaintiff's argument that Lack's "never once objected" to this information being introduced and thus waived this issue, (*see* Plft. Resp. at 40), is wrong.

improper to admit and would have mandated a new trial *even* if introduced *only* in the punitive damages phase. *Branham* thus compels a new trial ruling here.

In *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420–21, 734 S.E.2d 641, 646 (2012), the Supreme Court reversed a multi-million verdict and ordered a new trial where similarly inappropriate evidence was admitted. In that matter, the trial court permitted the jury to hear evidence of a corporation’s net operating revenue. The court explained that this was improper under *Branham* and the “prejudicial effect of doing so [wa]s self-evident” since “[n]et revenue has no necessary relation to net worth.” *Id.* Putting the large sum of money in the minds of the jury “reflecting the company’s net income but accounting for none of its expenses and obligations, was almost certainly misleading.” *Id.* *Sulton* thus also compels a new trial ruling here from this Court.

Where, as here, the entire theme of Plaintiff’s case was that the defendant prioritized profits over safety, the improper impact of such improper evidence can be predicted but is certainly confirmed by the excessive verdict award. Plaintiff’s counsel referred to Lack’s as being a “for-profit” on no less than *thirteen* times across his opening statement and closing arguments, driving home the fundamental tainting of the jury by this evidence. (Tr. 95:14, 18; 96:6; 97:18; 883:16, 892:6, 893:21, 897:12, 899:10, 16, 904:3, 905:25, 922:15.)

The arguments in Plaintiff’s response brief are unavailing. First, Plaintiff contends that the data was admissible because they were public records. Although this may have been sufficient to establish foundation and/or a hearsay exception, it had no bearing on whether they were *relevant* or whether its *probative value outweighed their prejudice* as required by Rules 401 and 403, SCRE.

Plaintiff’s arguments as to this information’s relevance are without merit. First, Plaintiff contends that Lack’s had to provide the data to the City of Myrtle Beach under the Franchise

Agreement. This fact, of course, has no bearing on whether the data has any relevance to this negligence action (which it does not).

Second, Plaintiff argues that the data was relevant to show “consideration” for Lack’s legal obligation to provide effective lifeguard protection. The consideration for the contractual arrangement between Lack’s and the City of Myrtle Beach is irrelevant to Plaintiff’s negligence action. Further, Plaintiff did not offer this justification as a basis for admitting the evidence at trial. In addition, Lack’s has never disputed that it was permitted under the Franchise Agreement to rent certain beach equipment in addition to providing lifeguard protection. It appears the only true purpose this evidence served was to poison the well with the jury and further Plaintiff’s “profits over safety” theme.

Third, Plaintiff asserts that the sales data was appropriate to show that Lack’s failed to deliver on its obligations to provide effective lifeguard services. This argument proves too much. If this argument were correct, a Plaintiff could always show exactly the kinds of evidence that cases like *Branham* forbid – namely, that a business spent too much time and money on one item and not enough time and money on another item – the undue prejudice emanating from this evidence far outweighs any probative value of such a point. The mere fact that Lack’s made sales of beach equipment rentals does not mean that Lack’s could not provide lifeguard services or that it was negligent.

Finally, Plaintiff argues that the data was relevant to showing a “safer alternative,” meaning that Lack’s could have hired additional lifeguards and employees designed to work solely as beach attendants. Again, however, Plaintiff did not need to present the jury with financial data in order to establish this point, and any probative value of the evidence in this regard is far outweighed by the unfair and undue prejudice of such evidence. A portion of the testimony quoted in Plaintiff’s

response brief actually demonstrates why this information was not relevant. On cross-examination the following exchange occurred between Plaintiff's counsel and George Lack:

Q Okay. While Madam Court Reporter is marking those for identification purposes, there is another way to perform lifeguard services and beach concessions on Myrtle Beach, isn't there?

A I'm sure there could be several different ways.

Q For example, the beach attendants could wear a blue shirt, couldn't say?

A Yes, sir.

Q And they would only be in charge of and responsible for the task of beach rentals; isn't that true, sir?

A Yes, sir.

Q And lifeguards could wear the yellow shirt; isn't that true, sir?

A Yes, sir.

Q And then the lifeguard's sole responsibility would be to perform water observation; isn't that right, sir?

A Yes, sir.

(Tr. 310:6-19.) This testimony was elicited without reference to any financial revenue data. Again, presenting the jury with the financial data was unnecessary and served no purpose aside from prejudicing the jury.

Admission of evidence of this kind was reversible error under *Branham* and *Sulton* and thus the Court should order a new trial. While it is without question true that evidentiary matters are matters largely within the discretion of the trial judge, this type of evidence has been specifically declared out of bounds by the South Carolina Supreme Court twice in other multi-million verdict matters. Plaintiff should not have pressed for the admission of this unduly prejudicial evidence, and its admission has now led to this excessive verdict result. Respectfully, this Court should not require Lack's to appeal and overturn this verdict pursuant to this binding precedent. It should order the new trial itself.

B. Error in admission of evidence and testimony regarding Lack's relationship with the USLA.

As Lack's noted in its motions, the evidence and testimony concerning the USLA was also highly and unfairly prejudicial and its primary purpose was to inflame the jury against George Lack and LBS. This evidence was also central to Plaintiff's profit over safety theme. (*See* Pltf. Closing Argument, Tr. 899:8-11 "And so then what followed was an investigation that was done by the USLA into the fact that they had been bamboozled by this for-profit on something as important as public safety.") Lack's relationship with the USLA had nothing to do with the relevant matters to be determined by the jury.

Plaintiff's argument as to the relevance of the USLA letters and the testimony of its representative Chris Brewster is premised on the mischaracterization of the USLA as the "industry standard of care." Plaintiff, however, has consistently made an improper conflation between USLA *certification* and USLA-compliant *training*. All that the Franchise Agreement required was the latter. However, Plaintiff's presentation to the jury suggested that the former was necessary:

... And what did they do? *They revoke his certification.*

And did you note, when I cross-examined him, I said, "Isn't it true, sir, that every two years you have to get recertified? And what did you tell them around that time in your application?" He certified to them that his lifeguards on the tower were only responsible for water observation.

You see, the dark side of the moon is just different.

(Tr. 900:18-25 (emphasis added).)

The evidence and testimony concerning communications between George Lack and the USLA from 1996 to 2007, culminating in the "decertification" in 2007, had no bearing on whether the relevant lifeguards who were on the beach the day of the incident in 2018 were trained in accordance with the requirements of the Franchise Agreement.

The testimony of Chris Brewster drove home that point. He testified that he felt George Lack had “bamboozled” the USLA and intentionally misrepresented the dual role activities of LBS lifeguards between 1996 and 2007. (Tr. 422:11-18.) However, as Lack’s has repeatedly argued, this spat with USLA in 2007 is entirely irrelevant to this negligence action. The City of Myrtle Beach had knowledge of and authorized the “dual role” arrangement throughout the course of its relationship with Lack’s, including in 2018. As the City Manager of Myrtle Beach testified:

Q And the franchise agreement -- if you could explain to the jury what the franchise agreement was for.

A The beach itself is owned by the public, in this case, under the care of the City, and in order for any company to do business with the City, they had to have a franchise agreement. We had to franchise that out and basically give an exclusive contract.

In our case, the arrangement with the beach safety services was that they had the right to rent chairs to the public, rent umbrellas to the public, and I think boogie boards as well, according to ordinance. They had the right to do that, the exclusive right to do it. In exchange, they were required to provide water safety services in the form of lifeguards.

...

Q And the information was provided to City Council about the operation of Lack's Beach Service; correct?

A Yes, sir.

Q And that included how they rented umbrellas and chairs on the beach?

A Yes, sir.

Q And, before 2018, you knew that Lack’s Beach Service had lifeguards that rented beach equipment; did you not?

A Yes, sir.

(Tr. 630:8-21, 633:12-20.) Again, the sole effect of the USLA letters and Brewster’s testimony was to prejudice the jury and paint Lack’s as having improper motivations despite the USLA decertification issue having no bearing on Lack’s relationship with the City and whether it complied with the requirements of the Franchise Agreement.

The improper admission of the USLA communications and testimony regarding whether Lack’s “bamboozled” USLA and the “decertification” of Lack’s by the USLA also warrants a new

trial. The unduly prejudicial nature of this evidence essentially amounted to a character assassination of George Lack and Lack's and a referendum on Lack's business model and rights under its franchise agreement with the City, as opposed to whether Lack's was negligent or reckless with respect to the drowning here, and whether there was any proximate cause between Lack's actions or omissions and the drowning. The Plaintiff prevailed upon this Court to allow it to go very far afield and convert the trial into a case about whether lifeguards should be allowed to serve dual roles, and whether, as between Lack's and the USLA, who was unfair to whom in that dispute. That is not what the trial should have been about. As a result of the undue prejudice from the admission of all of this evidence, a new trial should be ordered.

C. Error in admission of evidence and testimony regarding the administrative law court proceeding from 2001 and 2002.

The jury's verdict was also irreparably tainted by the prejudicial effect of the evidence and testimony about this decades-old matter. The only purpose that this evidence served was to yet again further Plaintiff's narrative that Lack's was about profit over safety.

As Lack's contended in its motions, George Lack was improperly permitted to be "impeached" regarding a position that LBS took in this administrative litigation (which began in 1994). The proceedings concerned whether Lack's employees should be classified as "lifeguards" for workers compensation purposes. (Tr. 429:20-24.) Lack's took the position that they did not need to be because a very small percentage of their physical activities (the relevant risk covered by workers' compensation) involved performing high risk activities such as water rescues. (Tr. 428:2-429:19.) The Administrative Law Court disagreed and found that they should be classified as lifeguards, which resulted in Lack's employees being classified as lifeguards for its workers compensation coverage ever since that order in 2002. The effect was a significant *increase* in Lack's workers' compensation premiums. (Tr. 419:4-11.)

In her response brief, Plaintiff's primary justification for the admission of this evidence was that Lack's is "judicially estopped" from taking the position in this matter that its employees are lifeguards. Judicial estoppel requires the party seeking its application to show: (1) two inconsistent positions taken by the same party; (2) taken in the same or related proceedings involving the same party; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Plaintiff's argument fails to satisfy several of these elements.

First, administrative law proceedings over insurance coverage from two decades ago are not related to the present personal injury/negligence action. Second, the positions were not inconsistent since, as noted, what Lack's argued was that solely for workers compensation purposes the employees should not be classified as lifeguards since they only engaged in the high-risk physical activities associated with lifeguarding on an infrequent basis. Third, Lack's was unsuccessful in maintaining its position and was required to pay \$26,000 in higher premiums. (Tr. 419:7-11.) Finally, there is no evidence of any intentional effort by Lack's to mislead the court in this case, and Plaintiff does not seriously suggest any such conduct. Therefore, the judicial estoppel argument is without merit.

Plaintiff's other justification for the introduction of this evidence was that Lack's "opened the door" to this evidence by claiming that the lifeguards perform "all lifeguarding and only minimal commercial sales." (Pltf. Resp. p. 34.) Plaintiff, however, had ample evidence that Lack's employees were permitted to, and did, engage in commercial activity, and this issue was not disputed. Further, Plaintiff wanted the jury to see (and prevailed upon the Court to allow the jury

to see) that a judicial body had made a finding (with respect to worker's compensation insurance) against Lack's. The introduction into evidence of the judicial finding by an administrative body unfairly and unduly prejudiced Lack's, in addition to putting the issue of insurance in front of the jury. Introducing evidence regarding an administrative ruling on worker's compensation insurance from two decades prior only served to mislead and confuse the jury, and any probative value it had was outweighed by the unfair and undue prejudice from that evidence. The admission of this evidence was thus also reversible error and warrants a new trial.

II. Plaintiff's "dual role" argument demonstrated why that issue should never have been presented to the jury and fundamentally tainted these proceedings.

Plaintiff's theory of the case relied heavily on the "dual role" issue. Plaintiff's response brief acknowledged that the dual role was a "critical factual component" of their negligence claim. (Pltf. Resp. at 33.) Permitting evidence and testimony on this issue was error and warrants JNOV or a new trial.

A. The dual role issue was not relevant.

Plaintiff's argument was essentially that because Lack's lifeguards were permitted to engage in limited commercial activity as part of their duties, that was necessarily what the relevant lifeguards were doing at the time of the incident involving Wolde. Conversely, Plaintiff's theory posited, had Lack's lifeguards not been permitted to engage in commercial activity, they would have prevented the incident. The deficiency with Plaintiff's argument is that there is no evidence in the record supporting this conclusion.

First, the supposed "dual role" arrangement was expressly permitted by statute and Lack's contract with the City of Myrtle Beach. The South Carolina Code allows the City of Myrtle Beach and other coastal municipalities to provide lifeguard and other safety services, to enact and enforce regulations deemed necessary for the safety of all persons on the beach, and either provide

lifeguard services through municipal employees *or through a service agreement with a private beach safety company* such as Lack's. *See* S.C. Code Ann. § 5-7-145(A)-(B). If a municipality elects to use a private company, personnel employed by the company "must be tested and certified *as required by the municipality.*" *Id.* at (B)(4) (emphasis added). The municipality may also 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." *Id.* at (B)(3).

The Franchise Agreement between the City and Lack's follows the arrangement permitted by the statute. The Agreement allows Lack's to rent beach equipment in return for its provision of water safety service and other consideration. (*See* Franchise Agreement, §4.) The Franchise Agreement sets forth the expected standard for Lack's lifeguards, requiring that they be tested to ensure that they can swim 500 meters over a measured course in 12 minutes, possess sufficient faculties to perform the duties of open water lifeguarding, possess a valid lifeguard card, possess a community first aid certification or equivalent, possess a CPR certification or equivalent, and successfully complete a course consisting of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association ("USLA"). (Franchise Agreement, §3.)

Plaintiff was improperly permitted to use the existence of the "dual role" arrangement as a strawman, suggesting that it was something nefarious and inappropriate when, in reality, it was exactly the type of arrangement contemplated by South Carolina law and the City. The issue should not have been presented to the jury as a result.

Second, the dual role issue was not relevant because there is no evidence that it prohibited Lack's employees from complying with the standards required by the franchise agreement. Lack's ensured that its guards had the required qualifications at the time of hiring and underwent the

necessary training. (Tr. 804:16-21, 808:11-14, 809:9-20, 810:8-8:11-3, 834:8-22.) Plaintiff's assertion that Lack's presented "zero evidence" showing its lifeguards received any training is, therefore, belied by the record. While Plaintiff correctly notes that Lack's did not produce any written training logs or sign-in sheets, there was extensive testimony regarding the training that each Lack's lifeguard receives. (Tr. 723:14-18, 725:1-726:7, 810:8-8:11-3, 834:8-22.) Weslyn Lack-Chickering testified that in 2018 each Lack's lifeguard went through rookie school their first year, and received ongoing classroom and in-ocean surf school training and instruction. (Tr. 810:8-8:11-3, 834:8-22.) Moreover, the training including ensuring that even when engaged in limited commercial activity, the lifeguards' eyes remained on the water. (*Id.* at 725:1-726:7.)

Plaintiff relied on obfuscation of the difference between Lack's being USLA "certified" as a company as opposed to whether Lack's could offer training consistent with the USLA's training criteria. The only relevant question was the latter and, as George Lack testified, Lack's developed training in accordance with those standards and this was reported to the City:

Q So Duke Brown is still with the USLA; is he not?

A Yes, he is.

Q In other words, he's still affiliated with the organization?

A Oh, yes, sir.

Q Are you aware that he's involved in the certification for USLA?

A Duke is a certification agent.

...

Q In 2018, Duke provided the outline or agenda for your surf school?

A Yes, he did.

Q And he provided the outline or the information of the things that you needed to train to that you then submitted to the City?

A Yes, he did.

Q And Duke Brown, at that time, he wasn't providing the training. He was just providing the outline of the training; correct?

A Yes, sir.

Q Because you -- at that time, Lack's Beach Service had in-house training?

A Yes, sir. We had people that had gone through USLA programs and had been -- actually, one person that was on our training staff was a lifeguard instructor and there's not but a few of those in the United States.

Q And, so, since that time, has Duke Brown provided additional training and assistance to Lack's Beach Service?

A Daily.

(Tr. 439:8-15, 440:19-441:13.) Plaintiff presented no evidence that Lack's training failed to comply with the requirements of the Franchise Agreement.²

Therefore, for all these reasons, Plaintiff should not have been permitted to argue the "dual role" issue in the first instance because it was not relevant to Plaintiff's negligence claims. Lack's business arrangement was expressly permitted by South Carolina law and its contract with the City of Myrtle Beach, and there was no evidence that the Lack's guards could not comply with the requirements of the Franchise Agreement. The Court should, therefore, grant JNOV or, failing that, a new trial.

B. Plaintiff presented no evidence supporting that the Lack's lifeguards were engaged in commercial activity at the time of the incident.

Injection of the dual role issue into the case was also improper because there was no evidence (direct or circumstantial) that any of the relevant lifeguards were actually engaged in commercial activity at the time of the Wolde incident. The *only* testimony Plaintiff cites in her response brief was from bystander Julian Chandler and Plaintiff's expert Dr. Griffiths, and neither established this point.

² The USLA representative, Brewster, was improperly permitted to offer opinion testimony (over objection) about whether Lack's training could comply with USLA standard. He testified that if lifeguards were engaged in dual role lifeguarding they could *never* satisfy this requirement. (Tr. 505:8-12 ("So I think the -- the easiest way to answer your question is -- or the most direct way to answer your question is training in a manner that allows the person on the stand to be involved in vending would be inconsistent with the USLA's training standards.")). This was his personal opinion and should not have been allowed since he was not an expert witness and it invaded the province of the jury.

Plaintiff first contends that Chandler stated the “lifeguard responsible for the water where Mr. Wolde drowned was engaged in sales or customer service.” (Pltft. Resp. at 23.) The portion of Chandler’s testimony she cites, however, merely provides that Chandler saw a lifeguard talking to beachgoers when he was walking out to the beach. When asked about the timing, he stated:

Q. Okay. And did you happen to see what, if anything, the lifeguard was doing at that time?

A. So I noticed on my way up to the beach tower before I laid down that the lifeguard in the same position that we saw when we first came out, he was sitting on the back end of the lifeguard stand chatting with a few individuals with his back to the water.

Q. And were the individuals that he was chatting with within the line of umbrellas?

A. They were near them, yes, sir.

Q. And approximately how much time passed between the time you saw that and the time that you heard the first yell for help?

A. Gotcha, understood. Approximately five to 10 minutes, sir.

(Chandler Dep. at 17:5-15.) Thus, the supposed direct evidence of commercial activity was testimony: (1) about what a lifeguard was doing five to ten minutes prior to the incident and (2) that did not actually say the guard was even engaged in commercial activity.

The other testimony Plaintiff cites was from her expert Dr. Thomas Griffiths. He was, of course, not an eyewitness and had no personal knowledge about the incident. Moreover, although he referenced the sales data as supporting that the guards were engaged in commercial activity, he conceded that, despite his extensive review of the evidence, he did not find any evidence that the relevant lifeguards were actually engaged in a commercial transaction during at the time of the incident. (Griffiths Dep. at 230:21 – 231:11). Therefore, his testimony was based on pure conjecture.

Again, Plaintiff introduced no evidence that any of the relevant lifeguards were engaged in any commercial activity at the time of the incident so as to potentially make the “dual role” issue

actually relevant. The Court should grant Defendant JNOV given how heavily influenced the jury was by Plaintiff's reliance on the argument about the supposed impropriety of the "dual role" lifeguards. Failing that, the Court should grant a new trial since Plaintiff's arguments on this issue prejudicially infected the entire case. Without the specific evidence connecting commercial activity of a lifeguard to the time of the incident, the trial devolved into a referendum on the character of George Lack, Lack's Beach Services' prior worker's compensation disputes regarding premiums, who was right and who was wrong in the dispute between Lack's and the USLA, and whether "dual role" lifeguarding is good or bad. The jury verdict amount confirms the confused and inflamed jury, and that a new trial should be ordered.

III. JNOV or a new trial is warranted due to the lack of sufficient proof of proximate cause.

As Lack's motions detailed, Plaintiff's proof was entirely circumstantial and relied on speculation and conjecture about what could have occurred differently rather any evidence that a specific act or omission by Lack's actually led to Mr. Wolde's death. In her response, Plaintiff makes several efforts to show otherwise. Lack's will address each of those efforts in turn.

Plaintiff first cites the lack of training records for the relevant lifeguards asserting that they were "untrained and incapable of comply with the standard of care." However, as detailed above, the testimony supported that these lifeguards were qualified and trained in accordance with the requirements of the Franchise Agreement.

Plaintiff next asserts that there was no evidence that the relevant lifeguards, L-20, L-21, and L-22, complied with the standard of care. To start, Plaintiff must prove the standard of care on Lack's, then prove a failure to meet the standard of care by Lack's, in addition to proximate cause. Plaintiff asserts that the Lack's staff did not attempt to rescue Wolde or provide care to him while in the water. However, there was no testimony that Wolde was actually visible from

the beach or that the lifeguards could have gotten to him in time to prevent the drowning. The only testimony cited by Plaintiff to support this point was from one of the bystander witnesses who was permitted to opine (over objection) that: “If the lifeguards would have been present, *I think* the outcome would have been different.” (Tr. 207:15-16 (emphasis added).) This improper opinion testimony is rank speculation. Plaintiff also cited the other bystander’s statement that after Wolde was brought on shore, he saw a “lifeguard” in red shorts with no shirt who stood by and did not assist. (Chandler Dep. 22:17-23, 56:24-57:7.) However, this was pure speculation based solely on the fact that the person had on red shorts. (Tr. 202:24-203:1.) Lack’s guards were contractually required to wear yellow shirts and blue shorts. (Tr. 812:4-7.) Moreover, testimony supported that Lack’s personnel were actively involved in trying to revive and save Wolde during this time. As Lack’s manager Patrick Flaherty testified, he arrived on the scene right as Wolde was being pulled out of the water by lifeguard L-20, a Lack’s supervisor, and several bystanders. (Tr. 699:10-18.) The supervisor started CPR and Flaherty attempted to use an AED device as they worked to try and save Wolde. (Tr. 699:19-701:9.)

Plaintiff’s next argument in support of causation was Lack’s alleged failure to close the beach when presented with a “known hazard of rip and longshore currents.” (Pltf. Resp. at 20.) The conditions on the day of the incident, however, did not necessitate closure of the beach. The National Weather Service did not direct for the beaches to be disclosed. The report merely flagged the *potential* for hazardous conditions due to the presence of a longshore current and potential for rip currents. (Tr. 711:8-15.) Lack’s appropriately posted red flags to warn of these conditions and impose a waist-deep limit for swimming. (*Id.*, 727:5-21.) Plaintiff’s own expert acknowledged that the decision to close a section of water is not based on a National Weather Service bulletin or any objective set of standards but, instead, the decision “depends upon the

experts, the competent qualifying surf staff on duty to make that call.” (Griffiths Dep. p. 168: 7-14). Dr. Griffiths also recognized that a longshore current is only hazardous when combined with other factors such as a rip current. (Griffiths Dep. p. 176: 6-13)

Plaintiff next refers to their expert’s opinions on the supposed standard of care violations. However, these opinions were based on a fundamentally flawed view of the facts which were contradicted at trial. For example, Dr. Griffiths incorrectly testified that the Lack’s lifeguards went to lunch without alternate coverage. (*See* Pltf. Resp. at 21 (quoting this testimony).) As the record evidence supported, however, when one guard went on lunch break, the neighboring guards were tasked with scanning that sector of the water.³ (Tr. 719:4-8.) Dr. Griffiths also inaccurately stated that Lack’s had “less than half” of the required amount of “lifeguard onlys” on the day of the incident. However, the testimony elicited by Plaintiff’s counsel supported only that, at most, Lack’s was one short (the contract called for four and three were present that day) due to unforeseen staffing issues. (Tr. 361:17-362:6.) Third, Dr. Griffiths opined on the impropriety of the dual role, but as noted above, this was not a violation of the standard of care since it was expressly permitted by contract⁴ and, regardless, there is no evidence the relevant lifeguards were actually engaged in commercial activity at the time. Finally, he improperly asserted that the lifeguards failed to recognize Wolde as a “distressed swimmer.” Dr. Griffiths acknowledged that he did not know the timing of events and there is no evidence that the Lack’s guards had any

³ Dr. Griffiths endorsed the overlapping coverage concept: “Q. At the time that Mr. Kacper [L-21] was at lunch, the lifeguards at L-22 and L-20 would be on duty responsible for over watching his water. A. That is correct. That’s the way it’s supposed to work.” (Griffiths Dep. 200:14-18).

⁴ It is critical to recall that the City of Myrtle Beach was under no obligation to provide any lifeguards at all, as is the case with many beaches in South Carolina. The City determined that as part of its service to its citizens and visitors it would provide this service in accordance with the standard set forth in the Franchise Agreement. Plaintiff seeks to impose a heightened duty on Lack’s which has no basis in South Carolina law.

indication of the issues with Wolde until after he was back on the beach.⁵Therefore, Dr. Griffith's testimony does not overcome the deficiencies with Plaintiff's lack of proof of proximate cause.

Plaintiff's next argument cites the supposed evidence that the relevant guards were engaged in commercial activity. As detailed previously, there is no support for the proposition that the lifeguards were actually engaged in commercial activity at the time of the incident. In fact, the lifeguards' written statements directly rebut this point. L-21 was on his lunch break and L-22 was speaking with a beachgoer about the flag system. His statement provided:

When I was explaining the meaning of different colors of the flags to the mom, who inquired about it, I heard Code 3 on the radio on L-20. I immediately started running that direction. . . .

(Tr. 823:25-824:3.)

Plaintiff then cites the supposed "understaffing" in support of her proximate cause argument. Here, however, there was no evidence supporting her contention that Lack's being one "lifeguard only" short on the day in question caused Wolde's drowning or that having the extra "lifeguard only" on the beach that day (where he would have patrolled a very large area) would have changed the outcome for Wolde at the particular part of the ocean involved. There was no evidence that the other lifeguards should have seen Wolde struggling where he was and could have and should have saved him from drowning. Instead of evidence, Plaintiff relied on speculation of what may have occurred differently depending on the number of lifeguards involved and what they may have been doing. But the jury verdict cannot rest on speculation. Plaintiff also questions whether L-21 was at lunch but, as noted, that is precisely what his statement said and this was done

⁵ Dr. Griffiths specifically testified: "Q. So we're clear on the answer there, you don't know how much time there was available for a lifeguard to observe Mr. Wolde in distress, because you don't even know how long Mr. Wolde was in distress. A. No. (Griffiths Dep. 235:8-12). He further clarified: "Q. How long was it that he was in distress? A. I can't say that and I'm not going to venture a guess. I can't say that." (Griffiths Dep. 236 8-10).

pursuant to the protocol permitted by the franchise agreement.⁶ (Tr. 659:7-13, 745:17-29, 748:10-12.)

Finally, Plaintiff cites the lack of response by Lack's lifeguards as "direct evidence" that they failed to do their job. However, this argument is also premised on a number of inaccurate statements. First, Plaintiff claimed that L-22 was not on his tower and the jury could "reasonably conclude" he was not performing lifeguard duties and was instead engaged in revenue-generating duties. (Pltf. Resp. at 27.) This is flatly contradicted by that lifeguard's statement, which is quoted above. (Tr. 823:25-824:3.)

Plaintiff also asserts that bystanders "could not get the attention of Lack's lifeguards nor could they find any." (Pltf. Resp. p. 28.) The only testimony Plaintiff cites in support of this point was from bystander Bender. However, his actual testimony was just that he did not see any Lack's lifeguard "around" when Wolde was brought on shore.⁷ He stated:

Q Can you share with the ladies and gentlemen of the jury what happened next?

A We were getting out of the water. My wife and kids were in front of me. I was just about to step on the shore when I heard a lady yelling for help behind me. I looked back and saw a lady with a child and it appeared to be someone bobbing in the water. I looked up to the lifeguard stand. There was no one in it. Didn't see any lifeguards around. So I told my wife and kids to go find lifeguards, and I went back in the water.

...

Q Okay. And is that when you asked your wife to go find lifeguards?

A Yes, because I looked up in the chair and didn't see a lifeguard. Didn't see any around us. So I asked them to go find lifeguards.

⁶ Plaintiff's expert admitted that the only evidence was that L-21 was at lunch when the incident occurred: "He [L-21] said he was at lunch, and that's all we have to go by." (Griffiths Dep. 200:6-7).

⁷ Again, this happened near L-21's tower, and he was at lunch at the time in accordance with the protocol. Thus, it was not a surprise that Chandler did not see a guard on that tower at the time.

(Tr. 196:15-197:10.)

There is no support for any implication that there were lifeguards around who simply were not paying attention or who were engaged in commercial activity at the time of the Wolde incident. There is no evidence that any other lifeguards “should have” been in the immediate area of the Wolde drowning or that they could have kept him from drowning even if they were. Moreover, as detailed above, Lack’s witnesses testified that Lack’s personnel did respond and assisted with Wolde, when alerted to his presence.

Therefore, in light of the foregoing, none of Plaintiff’s arguments in support of proximate cause show that there was sufficient evidence to establish any act or omission of Lack’s as the cause of Wolde’s death. The case should not have been submitted to the jury in light of Plaintiff’s failure to satisfy this critical element of her claim. The Court should grant JNOV in Lack’s favor or, failing that, a new trial should be ordered based on the unreasonable inferences and speculation relied upon by the Plaintiff.

IV. The survival claim should not have been submitted to the jury.

Lack’s should be granted JNOV as to the survival claim. Plaintiff’s response brief repeatedly states that their survival claim was supported by evidence that Wolde was struggling in the water and “gasping” for “10 to 15 minutes.” (*See* Plft. Resp. at 6, 7, 10, 15, 44.) However, there was no reliable evidence of any conscious pain and suffering.

“Conscious” is defined as: “having mental faculties not dulled by sleep, faintness, or stupor” and “perceiving, apprehending, or noticing *with a degree of controlled thought or observation.*” Merriam-Webster, Online Dictionary (last visited Sept. 9, 2022), <https://www.merriam-webster.com/dictionary/conscious>. As the District of South Carolina has explained, under South Carolina law a survival claim “requires that the deceased consciously

endure pain and suffering,” and where the evidence “does not demonstrate that the decedent had time to consciously perceive the means of his death, much less consciously suffer pain,” the claim fails. *Hoskins v. King*, 676 F. Supp. 2d 441, 451 (D.S.C. 2009).

Here, the only testimony supporting *consciousness* came from Wolde’s daughter Wubit. On cross-examination, however, she acknowledged her testimony about her father gasping and struggling for 10-15 minutes was not consistent with her deposition and, in fact, she did not actually remember what happened. Specifically, she testified:

Q But everybody was yelling?

A Yes.

Q And you don’t know how long that lasted, do you?

A No.

Q I mean, you can’t provide any estimate for that, can you?

A No. I mean...

Q And so, at some point, do you know how everything stopped?

A Not exactly.

Q Is it the -- your testimony that you were yelling and, then, really the next thing you knew is you were standing on your feet?

A I don’t remember anything in between that.

Q Okay. You don’t remember anything from the time you were yelling -- from the time the yelling started to the time you were on your feet on the water; is that right?

MR. PRACHT: Objection, Your Honor. Mischaracterizes her testimony.

THE COURT: Rephrase, if you would, please.

BY MR. THOMPSON:

Q Wubit, I thought I just heard you. You didn’t hear anything or remember anything from the time the yelling started until the time that you could stand; is that correct?

A Yes.

Q Okay. And you don’t know how much time passed from the time the yelling started to the time that you could stand?

A I don’t know exactly.

Q Well, you can’t provide an estimate at all, can you?

A Well, I did.

Q I’m sorry?

A I did give an estimate.

Q If you’ll turn to page 61. All right. Starting at line 12.

A Mm-hmm.

Q The question: "So you and your dad and brother got in trouble. You called for help. And then the next thing you realize or remember is that you could stand in knee-deep water?"

A "Yes."

Q Your answer?

A "Yes. I don't remember it. I just remember yelling for help and that I think I don't know how we got out of it, honestly, but I just remember that, eventually, we were at the shore, and I was walking towards the shore."

Q "Do you know about how long all of that lasted?"

A "No."

Q Okay. And does that help refresh your recollection?

A Yes.

(Tr. 603:24-605:21.)

Moreover, contrary to Plaintiff's assertion, Wolde's son Adam did not testify that he saw his father "fighting for his life" or struggling to save Wubit. The following exchange occurred during Adam's cross-examination:

Q And so, then, at some point, there was -- your sister and you and your father were yelling?

A Yes.

Q You don't know how long that was?

A No.

Q You have no clue, do you?

A I don't remember.

Q And you don't know how far away you were from the beach at that point, do you?

A No.

Q Now, at some point, you decided to swim sideways?

A Yes.

Q How did you know to do that?

A It was just instinct. When swimming straight didn't work, supposed to swim to the left.

Q Did you tell your father to swim to the side?

A Yes. I said, "Calm down, follow me."

Q And then you swam to the side, and the pulling sensation was over?

A Yeah.

Q And then you were able to swim towards shore?

A Correct.

Q And when you got to shore, that's when you ran to your mother; is that right?

A Yes.

Q And you didn't ever see what happened to your father and your sister?

A No.

(Tr. 567:1-568:3.)

Plaintiff then cites the testimony of bystander Chandler as further supporting the survival claim. However, Chandler actually testified that Wolde was *unconscious* when he was pulled from the water. The portion of his testimony Plaintiff cites stated as follows:

Q. Yes, sir. Okay. And share with the 9 ladies and gentlemen of the jury what happened 10 next?

A. So she came barging through to help with Mr. Wolde, we originally laid him down on his back and at the point where we laid him down there was a lot of water and sand coming out of his mouth, his eyes you can tell were bulging a bit. He was in a very desperate situation. She immediately checked for pulls as first signs of life, she said it was very weak but she had one and they began administering CPR at that time.

(Chandler Dep. 21:8-19.) Chandler later clarified:

Q. So the first time that you saw the individual that was being brought to the edge of the beach, that person was unconscious, correct?

A. Correct, sir.

(*Id.* 61:24-62:2 (emphasis added).)⁸

Plaintiff then cites the coroner's report as evidence of Wolde's conscious pain and suffering. However, the report merely stated that Wolde's cause of death was asphyxiation, which the deputy coroner testified means a lack of oxygen. (Tr. 466:5-10.) It did not describe the drowning process or what a victim experiences and, of course, did not detail any specifics about

⁸ The other bystander, Julian Bender, also stated that Wolde was unconscious. (Tr. 212:13-14.) As did Lack's manager Patrick Flaherty, who testified that he never saw Wolde conscious, could not get a pulse, and did not know of anyone who saw him conscious. (Tr. 709:14-21.)

what happened in this particular case. Therefore, it is not a proper underpinning for the survival claim either.

Finally, Plaintiff cites the Wikipedia definition of “waterboarding” as support for what Wolde experienced and analogizes it to “torture.” (Pltf. Resp. p. 10.) This, of course, was not part of the evidence at trial and does not offer any *evidentiary* support for Plaintiff’s survival claim.

As the testimony excerpts quoted above support, Plaintiff offered no evidence supporting Wolde’s conscious pain and suffering aside from the testimony from Wubit, which she directly recanted on cross-examination. No other testimony or evidence supported consciousness, much less conscious pain and suffering. Therefore, Plaintiff did not sufficiently establish a jury question on this claim. *See Rutland v. S.C. Dep’t of Transportation*, 390 S.C. 78, 84, 700 S.E.2d 451, 454 (Ct. App. 2010), *aff’d as modified sub nom. Rutland v. S.C. Dep’t of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012) (finding that the record did not support conscious pain and suffering where the decedent did not respond to being called by name and did not make any noises despite her having a pulse); *see also Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944) (holding the evidence failed to show an accident victim was conscious of pain and suffering where one witness heard the victim groan and the other witnesses saw no signs of life).⁹ Therefore, this claim should not have been permitted to go to the jury.

Additionally, the survival claim also lacked sufficient proof because Plaintiff failed to present expert testimony about what occurs when a person experiences drowning. As Lack’s

⁹ Plaintiff’s reliance on *Smalls v. S.C. Dep’t of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000) is misplaced. *Smalls* involved a vehicle hitting a child, not a drowning. Moreover, there was conflicting testimony from the child’s father who said that she was unconscious when he found her but also that the child was gasping and moaning at the scene. *Id.* The daughter lived for three additional days and the father testified that he spoke with his daughter while she was at the hospital and she moved her fingers. *Id.* The court noted that while the evidence was “somewhat contradictory,” this was enough to submit the survival claim to the jury.

argued in its motions for JNOV and New Trial Absolute, jurisdictions that have permitted conscious pain and suffering to be submitted to the jury have typically done so where there was expert testimony about the drowning process. (See Mot. for JNOV pp. 3-5; Mot. for New Trial Absolute pp. 7-9.) Here, Plaintiff did not produce any expert testimony to provide the Court or the jury with any guidance as to what constitutes the drowning process, the amount of time involved and, most importantly, what the drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process.

The need for expert testimony was particularly acute in this matter since South Carolina has never adopted “pre-impact fear” as an element of recoverable damages. See *Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). If the drowning process starts after submersion, then the pre-submersion struggles would be considered “pre-drowning” fear and, like “pre-impact fear”, should not be considered a recoverable element of damage.

For all these reasons, the lack of sufficient proof supporting the survival claim warranted directed verdict in Lack’s favor and now supports JNOV or, in the alternative, a new trial where evidence of lack of consciousness is excluded..

V. The bifurcation issue was properly preserved and warrants a new trial.

At trial, Lack’s argued that the Court must provide context to the jury if it intended to permit them to make a finding of recklessness in the first phase. (Tr. 845:25-846:14.) Counsel further asserted that if the Court intended to use Plaintiff’s verdict form which included a question regarding recklessness, there needed to be a note informing the jury that there would be further proceedings or additional deliberations if they marked yes. (Tr. 868:17-23.) As defense counsel explained, having the jury answer yes or no to that question without context was improper. (*Id.* at 838:24-869:2.) This argument aligned with the issue raised in Lack’s post-trial motions that the

jury should not have been permitted to make a finding of recklessness in the first phase under the punitive damages statute but, since the court opted to proceed in that manner, it should have provided the jury with the necessary context at the very minimum.

Lack's, therefore, preserved its argument as to the Court's error in handling the bifurcation. Once the Court disagreed with Lack's position and adopted Plaintiff's verdict form, Lack's argument was preserved for the record. *See State v. Jones*, 435 S.C. 138, 144–45, 866 S.E.2d 558, 561 (2021), reh'g denied (Feb. 3, 2022) (“[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of ‘gotcha,’ where form is elevated over substance.”). Plaintiff's argument that Lack's “consented” to the procedure by failing to object following the Court's jury charge and the verdict is without merit.

The failure to explain the context and meaning to the jury of recklessness in the first phase finding was thus error and supports a new trial.

VI. The jury's damage award was flawed in a number of respects, which requires a new trial absolute or, at a minimum, a new trial nisi remittitur.

The verdict was shockingly and grossly excessive, as detailed below. The survival award, the wrongful death award, and the punitive damages award were all excessive and driven by the jury's passion and prejudice rather. Therefore, South Carolina law requires a new trial and it would be reversible error to deny a new trial in this circumstance. Nevertheless, if the Court disagrees, it should find that the award was unduly liberal at a minimum. As Lack's noted in its motions, if the Court denies JNOV or a new trial, the total compensatory damages award should be reduced

to a maximum \$1 million and the punitive damages award reduced accordingly to a maximum of \$1 million in accordance with the constitutional 1:1 ratio.¹⁰

A. The jury misunderstood the Court's proper instruction on evaluating survival damages.

Plaintiff's brief attempts to explain away this critical issue by asserting that Lack's did not object to the Court's jury instructions and thus waived any argument about the misapplication of the mortality tables. (Pltf. Resp. p. 11-12.) This mischaracterizes Lack's argument. Lack's is not contending that the Court gave an incorrect or confusing instruction regarding the use of mortality tables. Rather, Lack's argument is that the jury was told the Court's proper instructions, yet misapplied them in an erroneous way.

The Court correctly informed the jury that the mortality tables should be taken into consideration when looking at the amount of damages for wrongful death. The Court also correctly charged the jury on assessing damages for the survival claim without reference to the mortality tables. As Lack's contended and the Court's charges support, the mortality table is entirely irrelevant to assessing the pain and suffering Wolde may have endured prior to death.

Nevertheless, the jury clearly relied on the table in arriving at its award. Wolde's life remaining expectancy was 37.3 years, and the jury's survival damages award was \$3,730,000—in other words, \$100,000 for each remaining year of his life expectancy. The verdict, therefore, was not tied to the pain and suffering Wolde experienced as was required by law for the survival claim. (See Jury Charge, Tr. 937:20 (explaining that the jury may award damages for conscious pain and

¹⁰ As Lack's contended in its conditional motion to reduce the judgment, the entirety of the compensatory damages award should be capped at \$300,000 pursuant to the South Carolina Tort Claims Act. Moreover, the punitive damages award should be remitted to \$0. Lack's incorporates those arguments by reference herein. These proposed amounts are asserted in the alternative in the event the Court disagrees with the arguments advanced in Lack's conditional motion.

suffering if it found “by a preponderance of the evidence that the plaintiff has presented sufficient proof that Mr. Wolde was conscious and simultaneously suffering prior to his death”).). This verdict is thus a reflection of juror confusion with or disobedience of the Court’s instructions, and warrants a new trial.

B. The survival damages award was excessive and demonstrated the jury’s motivations of passion and prejudice.

A survey of awards for conscious pain and suffering in other drowning cases demonstrates the outlier nature of this verdict. *See, e.g., Jutzi-Johnson v. United States*, 263 F.3d 753, 760–61 (7th Cir. 2001) (collecting cases and noting that an appropriate award for a claim involving an allegation of asphyxiation would have been in the \$15,000 (\$25,108.14 adjusted for inflation) to \$150,000 (\$251,081.36 adjusted for inflation) range of prior awards in drowning cases); *Trinh ex rel. Tran v. Dufrene Boats, Inc.*, 6 So. 3d 830, 844–45 (La. Ct. App. 2009) (finding that award of \$15,000 (\$20,715.03 adjusted for inflation) was appropriate and rejecting Plaintiff’s request to increase it to \$100,000); *Dontas v. City of New York*, 183 A.D.2d 868, 869, 584 N.Y.S.2d 134, 135-36 (1992) (remitting \$2 million award for conscious pain and suffering to \$50,000 (\$105,586.60 adjusted for inflation), noting that although the evidence supported that a drowning victim experiences conscious pain and suffering, the award was excessive “in view of the fact that the experts from both sides indicated that a drowning victim would lose consciousness in just a few minutes”); *Landreth v. Reed*, 570 S.W.2d 486, 492-93 (Tex. Civ. App. 1978) (finding jury’s \$65,000 award to be excessive and reducing it to \$30,000 (\$136,323.31 adjusted for inflation) where expert testimony stated that the drowning victim would have remained conscious and suffered pain for approximately two minutes, noting there was “no precedent for an award as large as that made here for so short a period of suffering”).

In fact, in a recent case the Kentucky Supreme Court affirmed an award of \$0 for conscious pain and suffering despite the Plaintiff's presentation of expert testimony as to what a drowning victim experiences. See *Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508, 518 (Ky. 2021). As the *Lindsey* court explained, a party seeking damages for pain and suffering must establish it by "substantial evidence." *Id.* Even though Plaintiff's expert testified that drowning victims suffer great pain while they are conscious and the jury saw surveillance video of the decedent's death, the court noted that pain and suffering damages are not presumed in wrongful death cases. *Id.*

The amount of the award here demonstrates that the jury was motivated by passion, caprice, or prejudice rather than the record evidence regarding pain and suffering damages. The verdict amount far exceeds the other drowning case award discussed above. Accordingly, a new trial is warranted.

Furthermore, as the Court of Appeals has explained, although a jury's assessment of pain and suffering is entitled to substantial deference, this deference "does not abrogate the authority of the trial court to grant a new trial *nisi* upon finding 'the amount of the verdict to be merely inadequate or excessive.'" *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 638–39, 529 S.E.2d 758, 763 (Ct. App. 2000). Here, the excessive nature of the award requires a new trial *nisi remittitur* at a minimum. As Lack's noted in its motion, it maintains that the survival action should not have been submitted to the jury. However, if the Court does not order a new trial absolute or vacate the survival action award in toto, the Court should consider the very limited evidence and testimony supporting alleged conscious pain and suffering of a short duration to a sum no greater than \$300,000.

- C. If permitted to stand, the wrongful death verdict would be one of the largest wrongful death verdicts in South Carolina history.**

The excessiveness of the wrongful death award further evidences that the jury's passion and prejudice motivated the award. Lack's has extensively reviewed the publicly available data on jury verdicts under South Carolina law and identified the largest wrongful death verdicts that were either affirmed on appeal or satisfied post-trial.¹¹ Verdicts that were obtained against judgment proof defendants, arose in a default posture, or later settled post-trial for undisclosed amounts were removed from the analysis. Collecting the top twelve such verdicts and after adjusting for inflation, this would be the fifth largest wrongful death verdict in South Carolina history:

Name	Amount of WD Damages	Year	Case Type	Subsequent Developments	Final Total	Adjusted for Inflation
Steinke v. Beach Bungee, Inc., 105 F.3d 192, 194 (4th Cir. 1997) (applying SC law)	12,000,000	1995	Premises Liability	Remitted, then affirmed	5,000,000	11,664,409
Reeves v. Town of Cottageville, No. 2:12-cv-02765-DCH (DSC)	7,500,000	2015	1983/Shooting	Settled post-trial with 8,600,000 allocated to WD.	8,600,000	10,750,172
McCallister v. S.C. Dept of Transp., No. 2001-CP-42-1939 (S.C. Ct. Comm. Pl.)	6,700,000	2003	Motor vehicle	Satisfied	6,700,000	10,788,311
Cornett v. USA, 2:99-cv-00243 (Mar. 12, 2001)	6,300,000	2001	Boating accident	Affirmed on appeal	6,000,000	10,043,254
Hulf v. XPO, No. 2:16-cv-01254-BHH (DSC)	7,000,000	2018	Motor Vehicle	Satisfied	7,000,000	8,259,156
Williams ex ref. Estate of Williams v. CSX Transp., Inc., No. 2007-MO-001, 2007 WL 8434527, at *1 (S.C. Jan. 2, 2007)	4,500,000	2003	Motor vehicle	Affirmed on appeal	4,500,000	7,245,880
Keene v. CNA Holdings, LLC, 435 S.C. 1, 870 S.E.2d 156 (2021)	5,000,000	2015	Asbestos	Affirmed on appeal	5,000,000	6,250,100
Burroughs v. Warham, No. 1998-CP-29-1280	3,500,000	2000	Medmal	Affirmed on appeal	3,500,000	6,021,870
Cross v. XPO, No. 2:15-cv-02480-BHH (DSC)	5,000,000	2018	Motor vehicle	Satisfied	5,000,000	5,899,397
McKisick v. Jarrell, No. 2015-CP-10-02514 (S.C. Ct. Comm. Pl.)	3,750,000	2017	Dram shop/ motor vehicle	Fast-track jury trial meaning verdict automatically stood	3,750,000	4,532,617
Jackson v. Petit, No. 2017-CP-10-00989 (S.C. Ct. Comm. Pl.)	3,718,000	2018	Motor vehicle	Satisfied	3,718,000	4,385,792
Bannister v. Columbia Urological, No. 2015-CP-40-04794 (S.C. Ct. Comm. Pl.)	10,000,000	2017	Medmal	Settled post-trial with 3,375,000 allocated to WD.	3,375,000	4,079,355

This data, therefore, demonstrates the stark outlier nature of this verdict and supports that it was motivated by the jury's passion, prejudice, and desire to punish Lack's rather than the record evidence.

The jury's improper motives were further demonstrated by the fact that the jury returned a verdict even higher than what Plaintiff's counsel suggested at trial. In closing, counsel argued that

¹¹ Plaintiff criticized Lack's for not accounting for inflation in the example verdicts it cited in its motions. However, the example verdicts Plaintiff cited in her response brief were listed without any explanation as to whether those verdict amounts were affirmed on appeal or actually satisfied in full and not compromised.

a fair assessment of damages might be \$10 per hour for 15 hours per day for the remaining life expectancy of Wolde, which resulted in a yearly rate of \$54,750. Multiplying that total by the approximately 37 years of life expectancy gave an amount of \$2.025 million, which counsel then multiplied by four for each of the children, arriving at a total of \$8.1 million. The jury's verdict, however, came in \$1.9 million dollars *higher* than even what Plaintiff's counsel suggested (which presumably was what he believed to be a best-case scenario).

For all these reasons, the jury's award was based on improper considerations and a new trial absolute is warranted. The jury verdict was excessive, should shock the conscience of the court, and thus a new trial absolute must be ordered.

Failing that, the Court should grant a new trial *nisi remittitur*. As Lack's argued in its motion for a new trial *nisi remittitur*, if the Court does not grant JNOV or a new trial absolute, the total compensatory damages award should be remitted to \$1 million, with a maximum of \$300,000 allocated to the survival claim.

D. The punitive damages award was also based on improper evidence, motivated by the jury's passion and prejudice, and was excessive.

As detailed above, Lack's should have received a directed verdict on liability and is now entitled to JNOV. If the Court agrees, that will necessarily encompass the punitive damages award.

However, even if the Court disagrees with Lack's arguments as to liability and actual damages, the evidence did not support any genuine issue of fact on punitive damages. As Lack's has shown, Plaintiff's case was premised entirely on circumstantial evidence of alleged omissions which they assert could have potentially changed the outcome of an accident. Plaintiff has not identified any willful, wanton, or reckless action by Lack's. Therefore, the Court should grant JNOV in Lack's favor on the punitive damages claim or, at a minimum, a new trial.

In her response brief, Plaintiff first asserts that there was sufficient support for the punitive damages claim because of Lack's "intentional disregard" of the known standard of care for 10 years, citing the issues with the USLA. (Pltf. Resp. 51-52.) However, as detailed above, USLA certification was not required and the City of Myrtle Beach was aware of and approved Lack's business operations and training requirements.

Plaintiff also asserts again that Lack's should have closed the beach and ignored warnings. However, again, the National Weather Service report did not require closure. Moreover, it did not warn of the specific rip current or any other rip current. It merely established that there were *potential* hazards warranting caution. As Lack's manager Randall Smith testified:

Q And these water conditions, where it says, "Rip Current Activity," it says, "strong." What does that mean?

A That means there's a possibility for strong rip currents because of the longshore current, the wind and condition, and depends on if it was low tide or high tide. It's an assessment we make in the meetings in the morning, and George stayed in contact with the National Weather Service and also Libor, 115, and he would be in on that discussion, and we would make a decision to go to single red flag due to the strong possibility of rip currents.

Q And so when you say "strong," I mean, you're not looking into the ocean at every lifeguard stand to say the rip current activities at every lifeguard stand, are you?

A No. That would be impossible. They come and go and open up in different spots, so that would be the whole beach.

(Tr. 711:6-21.) On the day of the incident, visibility was good and the weather was fine. (Tr. 726:22-727:21.) However, with the rougher water, it was harder to see swimmers. (*Id.*) Therefore, Lack's made the decision to post single red flags to warn beachgoers and ensure that the guards kept swimmers waist deep as a preventative measure. (*Id.*)

The improperly admitted evidence supports that the jury was motivated by passion, prejudice, and sympathy for the Plaintiffs due to Plaintiff's character assassination of George Lack and presentation of Lack's as being solely motivated by profit.

The jury's significant award despite the evidence showing that Lack's had a negative net worth in 2018 also shows its improper motivations. As Weslyn Lack-Chickering testified, Lack's had a negative \$473,350.51 net worth in 2018. (Tr. 962:18-22.) Moreover, the available insurance coverage was only \$3 million. (Tr. 962:3-5.) Despite this evidence, the jury returned an award of \$7 million on top of the actual damages award exceeding \$13 million—a total number reflecting the jury's intention to destroy Lack's as a going concern.

Finally, Plaintiff's assertions that the punitive award was "per se" reasonable because it was less than three times the amount of actual damages finds no footing in South Carolina law. "Per se reasonableness" is not a recognized legal doctrine. Rather, juries and the Court are tasked with ensuring that the damages award is supported by the record evidence and proper considerations. As detailed above, here it was not.

Therefore, for all these reasons, the Court should grant a new trial on punitive damages. At a minimum, the Court should grant a new trial *nisi remittitur* as to punitive damages.

E. The *Mitchell* factors support that the punitive damages award was not consistent with due process.

Regardless of the above issues, the Court must still engage in the post-judgment review of the punitive damages award to ensure that it comports with due process. Under the applicable *Mitchell* factors, the award does not withstand this scrutiny. Therefore, at the very least the punitive damages award must be remitted to an amount that will satisfy due process.

1. Lack's did not act reprehensibly.

In assessing reprehensibility, the Court should examine: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of

intentional malice, trickery, or deceit, rather than mere accident. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

Here, only the first factor weighs in Plaintiff's favor as it is undisputed that the harm is physical. None of the other factors are satisfied. There is no evidence of indifference to or reckless disregard of the health and safety of others by Lack's, as detailed herein. Moreover, Wolde did not have a particular financial vulnerability that Lack's actions targeted. As to the fourth factor, the only incident in this record was the Wolde incident. This was an unfortunate accident, but thankfully an isolated occurrence particularly when considered in the context of the millions of people who visit Myrtle Beach every year without issue.

Finally, there is no evidence of any intentional malice, trickery, or deceit by Lack's. In her response brief, Plaintiff asserts that Lack's employed unsafe practices and violated the standard of care for "decades," relying on the same USLA certification argument. (Pltf. Resp. 61.) But as Lack's has shown, the spat with the USLA and Brewster's assertion that he was "bamboozled" by the dual role was entirely irrelevant and should not have been introduced or admitted into evidence. This is especially so considering the City of Myrtle Beach knew and approved of this exact arrangement.

Plaintiff also contends that Lack's engaged in "deceit" by presenting its "untrained beach attendants as trained lifeguards." (*Id.*) Lack's, however, did not conceal its arrangement with Myrtle Beach or the "dual role" its lifeguards served. Moreover, there was ample evidence that Lack's required its lifeguards to have the necessary certifications and undergo training. Plaintiff's argument is without merit.

For all these reasons, the reprehensibility factors do not justify the jury's punitive damages award.

2. The remaining *Gamble* factors also weigh in Lack's favor.

As *Mitchell* noted, the *Gamble* factors remain "relevant to the post-judgment due process analysis" insofar as they add substance to the analysis. *Mitchell*, 385 S.C.at 587, 686 S.E.2d at 185. The reprehensibility factors overlap with the first four *Gamble* factors, *see id.* at 587 n.7, 686 S.E.2d at 185 n.7, and thus do not need to be repeated. The remaining factors are: (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate." *Id.* at 586-87, 686 S.E.2d at 184-85.

Here, the punitive damages award will not deter future conduct because this was an accident. Unfortunately, accidents are unavoidable because swimming in the ocean can be a dangerous endeavor even under the best conditions and supervision and it is impossible to prevent all possible risks.¹² Therefore, there is no future harm that this verdict will deter. For the same reason, the award is not reasonably related to the harm likely to result from such conduct considering, again, this case involves an unfortunate accident.

The defendant's ability to pay heavily weighs in Lack's favor. As noted above, this judgment is far beyond Lack's available insurance coverage. Considering Lack's negative net worth, it will likely be unable to come remotely close to satisfying the full \$20,730,000 amount (as few South Carolina small businesses could).

¹² Plaintiff's water safety expert readily and appropriately conceded: that lifeguards do not guarantee patron or beachgoer safety (Griffiths Dep. 130:21-23); that accidents can happen despite best efforts to avoid them (Griffiths Dep. 130:16-18); that lifeguards cannot prevent all accidents, particularly in the surf environment (Griffiths Dep. 131:10-12); that the risk of drowning is ever present whenever in, or around water (Griffiths Dep. 131:16-18); and, most importantly, that a drowning can occur in front of a fully staffed, fully guarded beach (Griffiths Dep. 132:1-4).

Finally, the problems inherent with the evidence presented to the jury and the injection of the dual role issue into the case fundamentally tainted the proceedings. This is an appropriate consideration under the eighth factor.

Therefore, the remaining *Gamble* factors also support that the punitive damages award cannot withstand constitutional scrutiny. Accordingly, the Court should grant a new trial or, at a minimum, a new trial *nisi remittitur*.

3. The ratio of punitive damages to actual damages.

Although Plaintiff is correct that the ratio is less than 1:1, that depends on the actual damages award standing. As Lack's has argued, the Court should grant JNOV or a new trial absolute. However, even if the Court disagreed with Lack's regarding those remedies, *remittitur* is necessary at a minimum. The actual damages award should be reduced considerably and, if so, the punitive damages award should be remitted such that it does not exceed a 1:1 ratio to the actual damages amount. If the Court denies JNOV and a new trial, but opts to remit the award to \$1 million as Lack's has proposed, the punitive damages award should not exceed \$1 million in accordance with the constitutional 1:1 ratio.

4. Comparable civil penalties do not justify an award in this amount.

The last factor directs the court to consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell*, 385 S.C. at 585, 686 S.E.2d at 184. Plaintiff avoids addressing this factor by citing to punitive damages awards in other litigation, which they allege are comparable. This is not what the *Mitchell* analysis requires and is not relevant to this factor. The plain fact is, of course, that there are no civil penalties authorized in the context of an accident. Therefore, this factor also weighs in favor of Lack's.

5. The punitive damages award should be reduced to comport with due process.

The *Mitchell* factors weigh in Lack's favor and support reduction of the verdict to an amount that comports with due process. The \$7 million award was excessive and should not be permitted to stand. The Court should either grant a new trial on punitive damages or, failing that, a new trial *nisi remittitur*.

F. The statutory factors also warrant a new trial or new trial nisi remittitur.

The South Carolina Code provides that in determining the amount of punitive damages, a jury should consider all the following factors:

- (1) the defendant's degree of culpability;
- (2) the severity of the harm caused by the defendant;
- (3) the extent to which the plaintiff's own conduct contributed to the harm;
- (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;
- (5) the existence of similar past conduct;
- (6) the profitability of the conduct to the defendant;
- (7) the defendant's ability to pay;
- (8) the likelihood the award will deter the defendant or others from like conduct;
- (9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;
- (10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and
- (11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

S.C. Code Ann. § 15-32-520(E). The court must consider the same factors in reviewing a punitive damages award. S.C. Code Ann. § 15-32-520(F).

The first, fourth, fifth, seventh, and eighth factors all overlap with elements of the *Mitchell* analysis and Lack's reasserts its arguments from above. The remaining considerations also weigh in Lack's favor. First, the "severity of the harm" factor requires that it be caused by the Defendant. Here, the evidence showed that Wolde voluntarily entered the ocean with his children and continued into deeper water despite the warning flags and the trouble Wolde and his family encountered was not caused by Lack's. For the same reasons, the "plaintiff's own conduct" factor weighs in Lack's favor. As to the sixth factor, there is no evidence that Lack's profited from the alleged conduct in any way; the Plaintiff will argue that Lack's is a "for profit" business and that this factor weighs in favor of Plaintiff. However, there was no evidence, as explained herein, that Lack's acts or omissions were directly and proximately involved with the Wolde incident. Finally, neither the ninth, tenth, nor the eleventh factor is at play in this case. This was the only lawsuit arising out of the act or course of conduct complained of by the Plaintiff, and Lack's has not been assessed any civil fines or had any criminal penalties imposed.

Therefore, the statutory factors also support granting a new trial or, at a minimum, remitting the punitive damages award.

Conclusion

For the reasons stated in Lack's Motion for JNOV and above, the Court should grant JNOV and enter judgment in Lack's favor. Failing that, the Court should grant Lack's Motion for a New Trial Absolute for the reasons stated in that motion and herein. Finally, at the very minimum, the Court should grant a new trial nisi remittitur for the reasons stated in that motion and herein and

also remit the punitive damages to an amount that comports with due process under the court's post-judgment *Mitchell* review.

Lack's reserves the right to file additional briefing and present oral argument in support of all of its post-trial motions.

Respectfully submitted,

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September 16, 2022
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	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,	)	
	)	
	)	PLAINTIFF'S MEMORANDUM
Plaintiff,	)	IN OPPOSITION TO DEFENDANT
v.	)	LACK'S BEACH SERVICE'S
	)	CONDITIONAL MOTION FOR
LACK'S BEACH SERVICE, CITY OF	)	REDUCTION OF JUDGMENT
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	

Plaintiff Meswaet Abel, as personal representative of the estate of Zerihun Wolde, and as natural parent and legal guardian of Adam Wolde and Wubit Wolde, submits the instant memorandum opposing Lack's Beach Service's Conditional Motion for Reduction of Judgment. (*See* LBS Motion for Reduction of Judgment, August 8, 2022).

To avoid legal responsibility for the wrongful death of Mr. Wolde, Lacks' latest post-trial filing raises—for the very first time—the doctrine of derivative immunity. Under Lack's derivative immunity theory, Lack's maintains the Wolde family's compensatory and punitive damage awards for the wrongful drowning death of Mr. Wolde should be reduced from 20.7 million to the statutory cap of \$300,000.00 per occurrence and \$0.00 for punitive damages. Lacks' derivative immunity argument has never been accepted by any South Carolina court. It is also contrary to the public policy, legislative intent, and plain language of the Tort Claims Act, *i.e.*, to insulate government entities from liability for ordinary negligence—not to provide unlimited immunity to private parties, like Lacks, whose willful and reckless conduct threatens the safety of

the public. In fact, even if South Carolina had adopted this type of derivative immunity, it would not apply to Lacks, whose egregious practices were neither endorsed nor authorized by the legislature. What's more, Lacks' argument being raised for the first time in this motion is not even properly before this court. Lacks' Conditional Motion for Reduction of Judgment must, therefore, be denied.

ARGUMENT

I. **Even if applicable, Lacks waived the right to assert any limitations of liability under the SCTCA.**

Waiver of the Act's limitations on liability—even assuming they could apply to a private for-profit contractor—bars consideration of the issue post-trial. 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, SCRCPP, or the limitation is waived. *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).

Lacks never raised the Act's limitations upon liability as an affirmative defense nor did Lacks assert any immunities under the Act. Therefore, its failure to plead this non-existent affirmative defense is “deemed a waiver of the right to assert it.” *Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007).

Lack's further waived this purported affirmative defense by litigating this action for almost three years without putting the Plaintiff on notice that Lack's was asserting this 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." *Garrison v. Target Corp.*, 429 S.C. 324, 360-61, 838 S.E.2d 18, 37 (Ct. App. 2020).

Not only did Lacks fail to plead the Act's limitation on liability as an affirmative defense, Lacks again waived the argument by failing to object to the propriety of the compensatory or punitive damages award at trial. *See Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994) (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). Having waived the Act's limitations by deficient pleading and by failure to object at trial, Lacks is barred from asserting the Act's liability limitations post-trial.

II. Even assuming Lacks preserved the right to assert the Tort Claims Act's limitations on liability, the Act does not permit derivative immunity for private for-profit businesses that contract with state entities.

It is axiomatic that a court cannot read into the Tort Claims Act words that do not exist or confer protections of the Act to entities not set forth in the Act. "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." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). Further, "[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." *Id.* (citation omitted).

Despite these well-settled rules of statutory construction, Lacks suggests 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, Lacks completely overlooks 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.” S.C. Code Ann. § 15-78-30. 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 business that contracts with a municipality to provide a service. 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.

III. Even if derivative immunity was a substantive affirmative defense under South Carolina law it still would not apply to Lacks.

The doctrine of derivative immunity was adopted in 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, stemming from the Supreme Court’s decision in *Yearsley*, 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). But the immunity protections would still not apply to Lacks because its conduct was not pursuant to the “sovereign’s will” or authorization, *i.e.*, it was not within the scope of official duty. *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.”).

The limitations on liability provided for in the Act are contingent on the state actor acting within its authorized powers. *See id.*; see also Plt MIO to City's Motion for Summary Judgment, filed July 18, 2022. Such is also the case under federal law. Lacks 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." *Cunningham*, 888 F.3d at 647 (internal quotations and citations omitted). Here, while there is both State and municipal authorization for Lack's operation of a beach safety service, Lacks is not shielded from liability for its intentional and pervasive violation of this limited governmental authorization. In other words, Lacks conduct exceeding the scope of its limited authorization is against the "sovereign's will" and, thus, Lack's is not entitled to protection from liability.

That Lack's conduct exceeds the scope of its limited authorization is evidenced by its violation of numerous conditions set forth in (1) § 5-7-145, the state statute authorizing municipalities to contract with a beach safety service; and (2) the Franchise Agreement, which defines the limited municipal authorization of Lack's services.

As to the statutory authorization, the General Assembly in § 5-7-145 provided municipalities along our coast limited authorization to provide lifeguard services on the State's property. Additionally, this same statute also authorizes the City of Myrtle Beach to grant an exclusive right to a beach safety company to rent beach equipment. S.C. Code Ann. § 5-7-145(B)(3). However, in order to benefit from this exclusive right Lacks was required to comply with certain conditions set out in § 5-7-145. But as detailed below, Lack's did not comply.

First, the statute required the City and Lacks to enter into a service agreement, but instead the parties entered into a Franchise Agreement. S.C. Code § 5-7-145 (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)); *see* Plt. Trial Ex. 15, Franchise Agreement. Second, the statute required Lacks to be a private beach safety company, yet Lacks was merely a “concessionaire of beach equipment.” Plt. Trial Ex. 15. Indeed, at trial, Plaintiff established that Lacks was not a beach safety company but was instead a profitable beach concessions business. State Department documents entered by Lacks showed that the three lifeguards at issue in this case were “beach attendants” according to the Defendant own evidence. In addition, the jury heard testimony from George Lack who admitted in cross-examination that his employees perform beach attendant responsibilities 99.995% of the time.

Third, the statute required testing and certification of the lifeguard personnel but the personnel Lacks 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) (“lifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality”). Plaintiff proved with clear and convincing evidence Lacks failed to comply with this requirement. More particularly, the Franchise Agreement mandated that all lifeguards “successfully complete a course consisting of a total of not less than 40 hours in open water life-saving which meet the criteria of the United States Lifeguard Association”—but they never did. *See* Plt. Trial Ex. 15, Franchise Agreement p. 4.

In fact, Lacks failed to call a single witness with personal knowledge that its personnel was trained at all much less in accordance with USLA criteria. Conversely, Chris Brewster, the former president of the USLA, testified that Lacks training violated USLA criteria because the “kids” are required to perform conflicting responsibilities of commercial sales and public safety. That Lacks

conducted no testing or certification is significant because its limited authority to perform lifeguard services granted by the Legislature was conditioned on “test[ing] and certify[cation] as required by [the City].” S.C. Code § 5-7-145. In other words, Lacks was not authorized to provide lifeguard services if the lifeguards were not “tested and certified.”

Finally, the statute’s limited authorization to Lacks required 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.” But as evidenced by the drowning death of Mr. Wolde and the numerous other drowning deaths occurring on Lacks’ watch, there is no doubt that the hazardous dual role lifeguarding practices employed by Lacks interfered substantially in the peaceful, recreational use of the beach by the public. The USLA repeatedly warned the City that its dual role lifeguarding threatened public safety, yet it continued this practice anyway despite knowledge that it could—and did—create a life-threatening safety risk to the public. In sum, given Lack’s numerous violations of the conditions of § 5-7-145, Lacks cannot plausibly argue that its conduct was in accordance with the “sovereign’s will” so as to justify derivative immunity.

Turning to the municipal authorization, Lack’s numerous violations of the Franchise Agreement likewise evince no 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 Lacks. And the evidence at trial proved with clear and convincing evidence that Lacks committed numerous violations of this municipal authorization.

First, the Franchise Agreement *does not* allow or contemplate lifeguards renting umbrellas and beach chairs. On this simple fact, there is no dispute. Both George Lack and John Pedersen

conceded as much at trial. Moreover, Lacks 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 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 Lacks lifeguards rented beach equipment. Given this testimony, the absence of any reference to the sale of such merchandise by lifeguards in the Franchise Agreement, thus, 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* Plt. Trial Ex. 15, 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 line 50 of the Franchise Agreement, stating: "Franchisee shall not employ any individual as a lifeguard *or* beach concession employee . . ." *See id.* (emphasis added). This language clearly establishes that City Council delineated between a beach attendant, *i.e.*, a blue shirt, and a lifeguard, *i.e.*, a yellow shirt, and they are not and were not 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 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.

The evidence at trial also proved Lacks violated the authorization provided by the City by placing the kids it hired as lifeguards in a 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." (Plt. Trial Ex. 15, lines 23-26). According to Lack's own witnesses, the three kids at issue in this case *did not* attend all the in-service training in 2018. *See* Trial Ex. 28.

Lack's further violated the City's authorization by failing to provide the number of LGO towers required by the City in the contract. There was absolutely zero evidence at trial from which any reasonable juror could conclude the lifeguard towers were properly staffed on the day Mr. Wolde drowned. Moreover, the uncontradicted evidence proved there were only 3 LGO towers staffed on August 24, 2018. *See* Trial Ex. 16. And the LGO tower with responsibility for overseeing Mr. Wolde's section of beach was utterly empty. Lack's own witness, Holly Robinson, conceded that Lacks did not provide the level of lifeguard protection required in the contract. She testified Lacks was "understaffed" and had to "move some people around." Critically, all the commercial sales towers were fully staffed, yet it was the LGO towers that were unoccupied. *See* Trial Ex. 10.

Based on these multiple and monumental violations of the Franchise Agreement, Lacks cannot possibly maintain that its conduct was in furtherance of the municipality's "will"—its

numerous standard of care violations certainly were not authorized by City Council, nor were they authorized by state statute. For these reasons, Lack's post-trial attempt to reduce the jury's just and reasoned verdict based on a defense never once raised during the litigation of this case is without merit and must be denied.

CONCLUSION

Lacks' last-ditch effort to drastically limit its liability—and effectively avoid accountability—by asserting derivative protections of the Tort Claims Act fails both legally and procedurally. Legally, Lacks' argument, though novel, finds no support in the language of the Act or the rules of statutory construction. Procedurally, Lacks was required and failed to raise the issue as an affirmative in its responsive pleading and again at trial by failing to contemporaneously object to the propriety of the compensatory and punitive damages awards. There being no available avenue to escape accountability, Lacks' motion for reduction of judgment must be denied.

Respectfully submitted,

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Attorneys for the Plaintiff

August 22, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	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,	)	
	)	PLAINTIFF'S CONSOLIDATED
	)	MEMORANDUM IN OPPOSITION
Plaintiff,	)	TO LACK'S BEACH SERVICE'S
v.	)	MOTIONS FOR JNOV, NEW TRIAL
	)	ABSOLUTE, AND NEW TRIAL
	)	NISI REMITTITUR
LACK'S BEACH SERVICE, CITY OF	)	
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	
	)	

Plaintiff Meswaet Abel, as personal representative of the estate of Zerihun Wolde, and as natural parent and legal guardian of Adam Wolde and Wubit Wolde, submits this Consolidated Memorandum in Opposition to Lack's Beach Service's Motions for Judgment Notwithstanding the Verdict, New Trial Absolute, and New Trial Nisi Remittitur.¹

Having failed at every stage of this case—Lack's arguments being rejected by this Court on summary judgment, in motions in limine, at directed verdict, and upon the jury's consideration of the evidence at trial—Lack's latest attempt to set aside the verdict of twelve reasonable jurors is equally deficient. Though merely a regurgitation of previously rejected arguments, Lack's post-trial motions fall even flatter because they are wrought with material misrepresentations of the facts in evidence, statements of counsel, the charging instructions, and even the issues—several of

¹ Plaintiff incorporates by reference all arguments, memoranda, responses to motions, and motions made prior to and during trial, including in Plaintiff's Memorandums in Opposition to Summary Judgment, motions in limine, responses to motions for directed verdict, and any other responses filed contemporaneously herewith.

which are not properly preserved for review. What's more, Lack's requested relief entirely disregards the highly deferential standard of review from which these motions must be evaluated—a standard which, in this case, overwhelmingly requires the court to affirm the jury's carefully considered verdict. For these reasons and those that follow, Plaintiff respectfully requests that the Court deny Lack's motions for JNOV, new trial absolute and new trial nisi remittitur, and affirm the just and reasoned verdict of the jury.²

STANDARD OF REVIEW

Under the highly deferential standard for reviewing a motion for judgment notwithstanding the verdict ("JNOV"), such relief is only permissible if "no reasonable jury" could have reached the challenged verdict:

The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.

RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quotations and citations omitted) (emphasis added). When reviewing a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004). "[I]f there is any testimony tending to prove allegations of the complaint, the motions

² For purposes of brevity, Plaintiff relies on the facts set forth in the trial transcript and as recounted herein in the arguments below. Plaintiff refutes Lack's summary of evidence set forth as "Background" in its Motion for New Trial Absolute. This summary overlooks and disregards critical trial testimony and evidence supporting the trial court's rulings, the jury's verdict, and the jury's damages awards. Indeed, the jury saw, heard, and considered all the evidence in determining its weight and credibility.

must be refused.” *Proctor v. Dep’t of Health & Env’t Control*, 368 S.C. 279, 293, 628 S.E.2d 496, 504 (Ct. App. 2006). This deferential standard “is especially strong in South Carolina where the ‘scintilla of evidence rule’ is applied.” *Id.* (citing *Sweatt v. Norman*, 283 S.C. 443, 446, 322 S.E.2d 478, 480 (Ct. App. 1984)). In essence, the court must determine whether a verdict for the opposing party “would be reasonably possible under the facts as liberally construed in [her] favor.” *Id.* 628 S.E.2d at 503 (quoting *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002)).

South Carolina’s “thirteenth juror” doctrine allows the trial court to grant a new trial absolute only if the court finds the evidence does not justify the verdict. *Trivelas v. S.C. Dep’t of Transp.*, 357 S.C. 545, 551, 593 S.E.2d 504, 507 (Ct. App. 2004). A new trial is only warranted in extraordinary cases where a verdict is so “shockingly disproportionate” to the injuries suffered as to indicate that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000) (citing *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)). In other words, to warrant a new trial absolute, the verdict reached must be so “grossly excessive” as to clearly indicate the influence of an improper motive on the jury. *Id.* (citing *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993)). In deciding a motion for new trial, the court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.* at 302-303 (citing *Vinson*, 324 S.C. 389, 477 S.E.2d 715).

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice. *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citing *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993)). However, the jury’s determination of damages is entitled to substantial deference. *Id.* (citing *Rush*, 310 S.C. 375, 426 S.E.2d 802). In considering a motion

for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented. *Id.* (citing *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)). Further, the trial court “cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs.” *Vinson*, 324 S.C. at 407, 477 S.E.2d at 724 (quoting *South Carolina State Hwy. Dep’t v. Miller*, 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960)). “[T]he verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be.” *Id.*

ARGUMENT

Lack’s kitchen sink approach to challenging the jury’s carefully considered verdict boils down to a central fallible theme: that despite the jury’s determination of what the evidence showed, Lack’s version of the facts and perception of the value of this case should override the findings of this Court and twelve reasonable jurors. This is precisely what the law counsels against. The extraordinary relief of setting aside the verdict and granting a new trial absolute is not warranted unless (1) there is no evidence to support directed verdict, (2) the jury’s verdict is unsupported by the evidence or based on some prejudicial trial event, or (3) the jury’s award of damages are shockingly disproportionate to the injuries suffered.³ Likewise, Lack’s presents no compelling reason to justify a reduction of the jury’s measured awards of survival, wrongful death, and punitive damages. Given the tragic facts of this case, these damages awards are by all means reasonable and appropriate. Moreover, there is no basis to suggest this jury’s damages awards

³ See *Proctor*, 368 S.C. at 293, 628 S.E.2d at 504 (stating on motions for directed verdict or judgment notwithstanding the verdict, the evidence and inferences reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party and the trial court must deny the motion if there is any evidence to support the jury’s findings; on motions for new trial nisi, the jury’s determination of damages is entitled to substantial deference).

were motivated by any improper motive—rather, the facts and the evidence more than support the just and reasonable awards.

As addressed in turn below, Lack's arguments, though separately labeled and raised in three motions, can effectively be reduced to five issues challenging:

1. The sufficiency of the evidence supporting Plaintiff's survival claim and the jury's award of survival damages for the conscious pain and suffering Mr. Wolde endured during the prolonged drowning event;
2. The sufficiency of evidence of proximate cause and Lack's "dual role" negligence;
3. The admission of certain limited evidence concerning Lack's USLA decertification, its gross sales for 2018, and a contrary position in previous litigation central to this case;
4. The sufficiency of evidence supporting the jury's wrongful death award; and
5. The sufficiency of evidence supporting punitive damages and the jury's punitive damages award.

As the testimony, evidence, and events at trial show, none of these grounds warrant the extraordinary relief requested by Lack's. For these reasons and the reasons that follow, Lack's motions for JNOV, new trial absolute, and new trial *nisi* must be denied.

I. THE JURY'S AWARD OF SURVIVAL DAMAGES IS SUPPORTED BY AMPLE EVIDENCE AND NO EVIDENCE OR EVENT AT TRIAL SUPPORTS LACK'S REQUEST FOR JNOV, NEW TRIAL ABSOLUTE OR *NISI* AS TO PLAINTIFF'S SURVIVAL DAMAGES.

After nearly three hours of deliberation, the jury awarded \$3.73 million in survival damages to compensate Mr. Wolde's estate for the unimaginable pain and suffering he endured as he struggled for his life, suffocating to death by asphyxiation due to drowning. Lack's post-trial attempt to set aside the jury's carefully considered survival award should be denied for the same reasons the Court denied Lack's motion for directed verdict at trial: there is more than sufficient evidence that Mr. Wolde's death by asphyxiation was unimaginably painful and resulted in a period of conscious suffering that was anything but quick and instantaneous.

As set forth below, the evidence showed that this was not an instantaneous drowning event. There was a “long period” of going under water and coming up gasping for air, all while Mr. Wolde was not just fighting for his life, but he was also fighting to save his daughter, Wubit. Carefully weighing this evidence, the jury worked tirelessly, and deliberated for close to three hours, to determine appropriate compensation for Mr. Wolde’s suffering. Given the evidence of Mr. Wolde’s unthinkable pain and suffering, the \$3.73 million award is hardly excessive. For these reasons, the court should allow the award to stand as was intended by this jury and deny Lack’s motions for JNOV, new trial absolute, or nisi remittitur as to survival damages.

A. The evidence and testimony supporting Mr. Wolde’s survival claim far exceed the applicable “any evidence” standard and Lack’s motion for JNOV should, accordingly, be denied.

A survival claim must be submitted to the jury “[i]f there is *any evidence* from which a jury could reasonably conclude a decedent experienced conscious pain and suffering.” *Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 (emphasis added). Damages in a survival action include recovery for the deceased’s conscious pain and suffering and medical expenses. *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000). In deciding whether to submit a claim of conscious pain and suffering claim to a jury, all evidence and any inferences reasonably therefrom must be viewed in the light most favorable to the plaintiff. *Vereen*, 306 S.C. at 432; 412 S.E.2d at 431. Under this “any evidence” standard, a plaintiff must provide more than a mere scintilla of evidence, but circumstantial and even “weak” evidence is sufficient. *Id.* Moreover, “[w]hen considering a JNOV, neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.” *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (alteration in

original) (quotation omitted). “The jury’s verdict must be upheld unless *no evidence* reasonably supports the jury’s findings.” *Id.* (emphasis added).

Here, the evidence was far more than circumstantial and anything but weak. Two of Mr. Wolde’s children, Adam and Wubit, witnessed their father’s horrific struggle in the water. Adam testified that the entire drowning event lasted for an extended period—including being pulled out to sea, fighting for his life, yelling and waiving his arms for help, and watching his father struggle while trying to save Wubit.⁴ Adam’s testimony on this topic was powerful and direct.

Wubit’s testimony was equally, if not more, powerful because she was in her father’s arms and witnessed his horrifying struggle to stay afloat. She saw him struggle and heard him call for help.⁵ She testified Mr. Wolde repeatedly went under, came back to the surface, and gasped for air while fighting to stay afloat.⁶ This terrifying sequence lasted for a “long period of time:”

A. My father was going under and coming back up, then he would gasp and then yell for help.

Q. And this went on for a period of time?

A. Yes, a long period of time.⁷

As Wubit explained, eventually the yelling, gasping, and going under came to a frightening stop, and she just held onto her father.⁸ Wubit held on to her father as they floated down the beach in the ocean.⁹ Wubit estimated the struggle lasted for ten to fifteen minutes—an eternity in a drowning situation.¹⁰

⁴ Trial Tr., 543:23-544:5.

⁵ Trial Tr., 584:7-13.

⁶ Trial Tr., 584:7-13; 585:17-586:4.

⁷ Trial Tr., 586:1-4.

⁸ Trial Tr., 586:1-4; 587:11-588:3; 606:24-607:3.

⁹ Trial Tr., 587:11-21; 588:9-12.

¹⁰ Trial Tr., 589:18-24.

As Wubit's testimony shows, she was not only able to see and hear her father's struggle, but she was also able to feel the tremendous suffering and pain associated with his struggle to survive. There is no clearer evidence to support a survival claim than from a person who was literally attached to the victim during the horrific event.

Bystander testimony also supports Mr. Wolde's pain and suffering. One of the bystanders, Julian Chandler, testified he was sitting on the beach approximately 100 feet from the ocean when he heard cries for help in the water.¹¹ He rushed into the ocean using a mix of walking and swimming to reach Mr. Wolde, a process which took several minutes.¹² When Chandler finally got to Mr. Wolde, he had been assisted closer to shore into waist deep water.¹³ Chandler testified that when brought to shore, Mr. Wolde's eyes were bulging, he was spitting up water and sand, and he had a pulse.¹⁴ Chandler went on to explain:

[T]he nurse and the larger gentlemen that were there that pulled him out to the sand issued CPR[.] The issue was the water and sand would come out and then get sucked back in, so she asked me to roll him, so I then rolled him on his side[.] She began clearing everything out of his mouth to then try to roll him back and administer CPR."¹⁵

But the bystanders' rescue attempt and CPR efforts were not enough. As the coroner later confirmed, Mr. Wolde ultimately died from asphyxia due to drowning.¹⁶ At trial, the coroner explained that the asphyxia diagnosis meant Mr. Wolde's lungs filled up with water and prevented oxygen from getting into his blood.¹⁷ In other words, he suffocated to death while enduring an

¹¹ Chandler Video Tr., 59:19-22.

¹² *Id.*, 31:2-5.

¹³ *Id.*, 62:8-11.

¹⁴ *Id.*, 21:11-19.

¹⁵ *Id.*, 22:1-9.

¹⁶ Trial Tr., 466:2-4.

¹⁷ Trial Tr., 466:8-10.

excruciating struggle for his life.¹⁸ Based on this testimony, the evidence was not that Mr. Wolde died instantaneously in the water; rather, he was very much alive when he was dragged to shore and the bystanders did everything they could to keep him that way.¹⁹

As Adam, Wubit and Chandler testified, Mr. Wolde's drowning was anything but quick. Mr. Wolde was alive and conscious during the drowning incident, and he was still alive, though no longer conscious, during the rescue efforts on the beach. In fact, Mr. Wolde was not pronounced dead until 3:54 p.m., three hours after he became a swimmer in distress.²⁰ This is not a situation where an individual is knocked unconscious, falls in the water, and immediately drowns; nor is this akin to a toddler falling in the water and immediately sinking to the bottom. This is a case of a healthy forty-one-year-old man, who, in fact, regularly swam laps at his local pool.²¹ Mr. Wolde undeniably fought as hard and for as long as he possibly could.

Lack's motions ignore this critical survival testimony and evidence. Instead, Lack's takes the position that Plaintiff should have proven the pathophysiology of the drowning process by expert testimony. But it is not Plaintiff's burden to prove survival damages through expert testimony. Rather, Plaintiff's burden is to offer sufficient evidence from which the jury can infer conscious pain and suffering. *Scott v. Porter*, 340 S.C. 158, 171, 530 S.E.2d 389, 394-95 (Ct. App. 2000) (affirming survival damages award of \$600,000 based on circumstantial evidence from from which the jury could infer pain and suffering which preceded the decedent's coma and death) *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct.App.1991)

¹⁸ The coroner's report indicated that at the time of Mr. Wolde's drowning he was trying to save his daughter's life. *See* Ex. 20, p. 4.

¹⁹ *Id.*, 22:12-16 ("Q. And were the resuscitation efforts that you performed that day, were they performed in an effort to prevent Mr. Wolde's death? A. Yes, sir, they were.").

²⁰ *See* Coroner File, Ex. 20, p. 4.

²¹ Trial Tr., 571:10-14 (Wubit direct, stating her Dad was a "strong swimmer")

(stating jury could infer conscious pain and suffering from evidence). And, as established by the testimony above, that is precisely what Plaintiff did.

It does not take expert testimony for a jury to conclude that fighting for your life, swallowing sea water, and gasping for air—all while trying to save your child’s life—is an unimaginably painful experience accompanied by tremendous suffering and mental anguish. Indeed, the sensation of drowning is so painful, it has been outlawed as a form of torture: “Waterboarding is a form of torture in which water is poured over a cloth covering the face and breathing passages of an immobilized captive, causing the person to experience the sensation of drowning.” See Wikipedia, the Free Encyclopedia, Waterboarding, <https://en.wikipedia.org/w/index.php?title=Waterboarding&oldid=1092466227> (last visited Aug. 13, 2022).

Lack’s reliance on *The Corsair*, 14 U.S. 335 (1892), is also misplaced. Unlike the witness testimony here, there were no witnesses in *Corsair*. The *Corsair* court did not have the benefit of testimony recounting the decedent’s pain, consciousness, or duration of suffering. Rather, the only evidence available in *Corsair* was that the decedent drowned when the steam tug she was riding in struck the bank of the Mississippi River and sank. See *id.* In stark contrast to *Corsair*, the evidence recited above directly establishes that Mr. Wolde consciously suffered a painful drowning and unsuccessful rescue attempt.

Equally unavailing is Lack’s frequent reference to “pre-impact fear” which pertains only to accident victims prior to the “impact” which renders them unconscious or instantly causes

death.²² This is not a motor vehicle accident or similar situation involving an impact resulting in instantaneous death or unconsciousness.

As established at length, this was an agonizing struggle for air while attempting to stay afloat that lasted “for a long period of time.”²³ Lack’s ignores this testimony and goes on to argue that other jurisdictions require evidence of consciousness. But as Wubit’s testimony confirms, Mr. Wolde was conscious during the drowning event and her detailed and tragic account of what transpired in this process is more than sufficient for the jury to infer conscious pain and suffering. This testimony in combination with the profound pain and anguish associated with suffocation certainly meets and exceeds the “any evidence” standard from which a jury could reasonably conclude that Mr. Wolde experienced conscious pain and suffering. *See Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 (referencing any evidence standard). Lack’s motion for JNOV and New Trial Absolute on the submission of Plaintiff’s survival claim to the jury should, therefore, be denied.

B. Lack’s challenge to the court’s instruction on survival damages is not preserved for review, and even if preserved, the instruction and the award was proper.

As an additional challenge to the survival award, Lack’s argues—for the first time—that the court’s instruction on survival damages was confusing and may have mislead the jury.

Having never raised the error it now claims as a basis to set aside the jury’s award, Lack’s is barred from assigning any error now.²⁴ It is a litigant’s duty to bring to the court’s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *S.C. Dep’t of*

²² *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 214-15, 734 S.E.2d 142, 144-45 (2012) (discussing pre-impact fear as a possible element of conscious pain and suffering from death by motor vehicle accident but declining to adopt or reject rule under the facts of this case).

²³ Trial Tr., 589:1-4 (Wubit Direct).

²⁴ *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”)).

Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)). If the instruction on survival and wrongful death damages was so confusing as to warrant a new trial, it was incumbent on Lack's to object to the court's instruction or seek a clarification. Indeed, Lack's could have objected both before the court approved the instruction and again when the instruction was given. Lack's also neglected yet another opportunity when the court asked counsel: "[a]ny additions or anything else . . . before we send the jury back to deliberate."²⁵ Because Lack's failed to object or otherwise address its concerns—despite multiple opportunities—Lack's is barred from doing so now.

But even if preserved, Lack's argument also fails on the merits. Without citing any specific language contained in the instruction, Lack's simply argues the charge on the mortality table for "wrongful death damages" was somehow confusing or misleading to the jury for its consideration of "survival damages." When properly read as a whole, however, there is nothing misleading or confusing about the charge:²⁶

Wrongful Death Charge

The damages in an action for wrongful death include mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and loss of the use and comfort of the deceased's society, including the loss of the deceased's experience, knowledge, and judgment in managing the affairs of the deceased and its beneficiaries.

It is not necessary to show the exact amount of damages suffered by the beneficiaries or that the beneficiaries suffered a monetary loss. In addition, the person whose benefit the action is brought -- excuse me, the person for whose benefit the action is brought does not have to be dependent on the deceased for support.

²⁵ Trial Tr., 939:19-22 (responding, "None from the defendant, Your Honor.").

²⁶ See *Keaton ex rel. Foster v. Greenville Hosp. System*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) ("Jury instructions must be considered as a whole, and if, as a whole they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.").

To aid you in this determination, you *may consider* as evidence a statute enacted by the state legislature, commonly called the life expectancy table. According to the table, a man who was 41 years of age today has a life expectancy of 37.39 years. This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages to be awarded in the event that you find the plaintiff is entitled to a verdict.

Also, before considering the life expectancy table, you must first have concluded that the plaintiff has proved by a preponderance of the evidence that Zerihun Wolde's death was a proximate result of the defendant's negligence. The life expectancy is merely an estimate of the probable average remaining length of life of all persons in our state of a given age. You may consider all other facts and circumstances in evidence bearing on the life expectancy of the plaintiff, including his occupation, habits, and state of health.²⁷

Survival Charge

Pursuant to South Carolina law, Mr. Wolde's personal representative may recover for his conscious pain and suffering. If you find by a preponderance of the evidence that the plaintiff has **presented sufficient proof that Mr. Wolde was conscious and simultaneously suffering prior to his death, then you may award damages for that.** However, South Carolina law does not permit recovery for pre-impact, fright, or fear.²⁸

As shown, the charge clearly distinguishes wrongful death damages and survival damages, and it clearly indicates the life expectancy table is merely a guide for wrongful death damages.

Though Lack's claims the jury inappropriately awarded \$100,000.00 per year of life expectancy as the award on the survival action, there is zero evidence the jury used this precise calculation to arrive at its conscious pain and suffering award. Lack's argument is even further diluted by the fact that Plaintiff's counsel did not use or even suggest a per year/per diem method of calculating damages for Mr. Wolde's conscious pain and suffering.²⁹

²⁷ Trial Tr., 935:16-936:19.

²⁸ Trial Tr., 936:20-937:2.

²⁹ During closing, Plaintiff suggested a per diem calculation as to how the jury could arrive at a damages award for the children's nonpecuniary wrongful death damages but clarified that whether to award and how much, if any, is entirely up to the jury. This type of closing argument was

Lack's also appears to take issue with the court's clarification that the mortality table is merely a "guide" yet this too fails to suggest a basis for confusion or misleading the jury.³⁰ When viewing this simple clarification in light of the charge referenced in full above, it is quite clear that (1) the table was referenced with regard to wrongful death damages and did not pertain to survival damages, and (2) it is no more than an aid to assist the jury. Again, if Lack's counsel thought the charge was confusing or misleading in any way, he had ample time to object or seek a curative instruction. But given the propriety of the instruction and the fact that the jury was specifically instructed that it was only a "guide," there is no substantive basis to suggest the jury was confused or mislead in any way.

Simply put, "[p]ain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured." *Edwards v. Lawton*, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (quoting *Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962)). "Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject on to correction by the courts for abuse." *Id.* Having waived its right to challenge the instruction and having failed to raise any reasonable basis to otherwise challenge the propriety of the award, Lack's challenge to this jury's carefully considered award of survival damages should be denied.

specifically approved in *Edwards v. Lawton*, 244 S.C. 276, 282, 136 S.E.2d 708, 711 (1964) (finding no error in permitting per diem calculation for illustrative purposes). The per diem suggested was based on the children's loss of companionship and loss of society given their father's remaining life expectancy. In arriving at the per diem suggested, Plaintiff used a simple calculation of \$10/hour for 15 hours/day per each of Mr. Wolde's four children multiplied by the 37.3 years of Mr. Wolde's remaining life expectancy. *See* Trial Tr., 905:14-906:11. This suggested calculation came to \$8.1 million. The jury ultimately awarded \$10 million or \$2.5 million per child. Given the close proximity of these sums, the jury clearly understood that the per diem suggested related to the wrongful death damages and not to the survival claim. Nonetheless, it was merely a suggestion and that was also clearly conveyed to the jury.

³⁰ Lack's Mot. New Trial Absolute, pp. 6-7.

C. The jury's thoughtful and measured award of survival damages is supported by the evidence, is not excessive, and is entitled deference; Lack's motion for new trial absolute or *nisi* remittitur must, therefore, be denied.

Lack's motion for new trial *nisi remittitur* effectively seeks to replace the jury's measured award with that of its own. This is not the standard.³¹ A jury's damage award is entitled to substantial deference and cannot be reduced merely due to its size. Here, there is no sound basis to justify invading the jury's province. This jury's survival award is reasonable in light of the facts and evidence available to the jury.

In considering a motion to reduce a damages award by *nisi remittitur*, the jury's determination of damages is entitled to substantial deference. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000) (citation omitted). A motion for new trial *nisi remittitur* asks the court to reduce the verdict on the sole ground it is "merely excessive." *Id.*

Lack's effort to seek a reduction merely repeats its assertion that evidence of the "drowning process" was somehow required. This also is not the standard. As before, Lack's argument completely overlooks the direct testimony of Mr. Wolde's daughter who provided firsthand knowledge of the duration of Mr. Wolde's drowning experience and his pain and suffering in the process. Wubit testified the sequence of "going under and coming back up, . . . gasp[ing] for air and [] yell[ing] for help" lasted for "a long period of time."³² There is literally no better pain and suffering evidence than from this firsthand account.

Lack's also maintains that the drowning process is not within the knowledge or understanding of a lay person but, as with many of Lack's positions, this too overlooks testimony and evidence in attempting to assign error. Specifically, the Coroner testified as to the cause of

³¹ As our Supreme Court has repeatedly stated: "The proper amounts to be rendered, as actual or punitive damages, are left, under our law, almost entirely to the trial jury and the trial judge."

³² Trial Tr., 586:1-4.

Mr. Wolde's death, explaining what death by asphyxia due to drowning entails.³³ Her testimony established that Mr. Wolde's lungs filled with water and prevented oxygen from getting to his blood. In considering this evidence, the jury could reasonably infer that the suffocation process endured by Mr. Wolde while conscious and drowning would have been unimaginably painful and would have caused tremendous suffering.

Indeed, courts have denied similar defense motions on much less. In *Smalls v. S.C. Dep't of Educ.*, the court of appeals upheld an award of survival damages, finding no error in the trial court's denial of JNOV and new trial *nisi remittitur* despite scant evidence of the decedent's consciousness prior to her death. 339 S.C. at 216–17, 528 S.E.2d at 686. There, the decedent, who was fatally injured in a car accident, was found unconscious and, in fact, never regained consciousness. *Id.* However, the decedent's father testified that she was "gasping for air" when he found her, though there was no further evidence of any consciousness. The court of appeals upheld the trial court's denial of *nisi remittitur*, finding the "gasping for air" testimony was sufficient to support the jury's award of survival damages for conscious pain and suffering. Here, the evidence supporting conscious pain and suffering, including the detailed account from Wubit, greatly exceeds that in *Smalls*.

Considering the facts in evidence set forth above, there is simply no basis to suggest the jury's award of \$3.73 million in survival damages was the result of anything but well-reasoned, thoughtful, and reflective deliberation. Because the award is reasonable and measured in light of the tragic facts of this case, it should stand as is, and Lack's motion for new trial *nisi remittitur* should be denied accordingly.

³³ Trial Tr., 456:2-10; 468:4-10; 469:11-12; See Plt. Ex, 19, 20 & 21.

II. LACK'S MOTIONS FOR JNOV AND NEW TRIAL ABSOLUTE ON PROXIMATE CAUSE AND DUAL ROLE NEGLIGENCE ARE WITHOUT MERIT AND MUST BE DENIED.

In yet another improper attempt to invade the province of the jury, Lack's claims there was insufficient evidence that its negligence, including its dual role negligence, was a proximate cause of Mr. Wolde's tragic drowning death. Lack's arguments having been rejected prior to trial and at directed verdict should once again be rejected as inconsistent with South Carolina law and the evidence established at trial.

"It is generally for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries." *Hamilton v. R & L Transfer, Inc.*, 361 S.C. 286, 290, 604 S.E.2d 397, 398 (Ct. App. 2004). Indeed, the overriding principle in South Carolina is that proximate cause "is normally a question of fact for determination by the jury" and "[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (citations omitted).

Proximate cause "may be proved by direct or circumstantial evidence." *Id.* (quoting *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972)). The touchstone of proximate cause is foreseeability which is determined by looking to the natural and probable consequences of the defendant's conduct. *Id.* (citing *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006)). Moreover, proximate cause does not mean "sole cause" and in order to establish negligence, a plaintiff is "required only to prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury." *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 398–99, 237 S.E.2d 753, 757 (1977).

Lack's central argument to support JNOV and its new trial motion is essentially that the jury chose to side with the facts and evidence favorable to the Wolde family over that presented

by Lack's. But making factual conclusions based on the evidence is precisely the jury's role. That the jury found the Wolde family's evidence more credible than that argued by Lack's is not a sufficient ground to warrant JNOV or a new trial absolute.

A. Plaintiff's proximate cause evidence was more than sufficient to submit the case to the jury.

In challenging Plaintiff's proximate cause evidence, Lack's has consistently disregarded the elementary concept that breach of a defendant's duty is proven by a negligent act *or omission*. *See Grier v. AMISUB of SC, Inc.*, 397 S.C. 532, 538-39 725 S.E.2d 693, 696-97 (2012) (citations omitted) (emphasis added). As was the case prior to trial and on directed verdict, there is overwhelming and uncontradicted evidence of Lack's numerous failures, *i.e.*, omissions, each of which were a proximate cause of Mr. Wolde's death. The evidence at trial established numerous breaches of the standard of care linked to Mr. Wolde's drowning.

First, Plaintiff proved that the lifeguards who were assigned to beach on August 24, 2018 were untrained and incapable of complying with the standard of care. Weslyn Lack-Chickering testified that Lack's had no training records for any of the lifeguards, including those assigned to stands at L-20, L-21, and L-22.³⁴ Further, she admitted that these lifeguards definitively missed multiple days of training in Myrtle Beach because they were not even in the country when the training took place.³⁵ And although the lifeguards were not in the country for training, she stated that she thought some of her company's purported trainers—who also did not testify and who produced no training records—flew to Poland and had the prospective lifeguards get into an indoor pool to see if they could swim.³⁶ As baffling as this testimony was, its credibility and weight were

³⁴ Trial Tr., 842:7-15.

³⁵ Trial Tr., 838:8-839:4.

³⁶ Trial Tr., 828:24-829:8.

appropriately reserved for the jury. In short, the evidence at trial shows Lack's recruited prospective lifeguards from Eastern Europe, told the United States they were coming to be "beach attendants,"³⁷ brought them to Myrtle Beach, did not train them, and then put them on a lifeguard stand where they earned commissions for selling chairs and umbrellas.

Second, and not surprisingly, Lack's presented no evidence that the personnel stationed at L-20, L-21, and L-22 complied with the standard of care. Indeed, not one lifeguard or Lack's staff member ever attempted to rescue Mr. Wolde or provide any care to him while he fought for his life in the water. That this failure was a proximate cause of Mr. Wolde's death is supported by the testimony of Jeff Bender, a bystander that assisted with rescue efforts. Bender, who was on the scene at the time of the incident, confirmed that had the lifeguards been present, the outcome would have been different:

Q. Defendant's attorney shared with the jury in his opening that what happened to Mr. Wolde that day was a mystery. Do you agree with that?

A. No.

Q. And can you share with the ladies and gentlemen of the jury why?

A. If the lifeguards would have been present, I think the outcome would have been different.³⁸

Bender went on to state that when bystanders were able to bring Mr. Wolde to shore, the Lack's lifeguard who finally decided to help had no idea what he was doing and the bystanders had to take over performing CPR.³⁹

³⁷ See Def.'s Trial Ex. 2 and 3.

³⁸ Trial Tr., 204:9-16.

³⁹ Trial Tr., 198:15-20.

Third, testimony at trial established Lack's failure to close the beach when presented with a known hazard of rip and longshore currents was a breach of the standard of care, and one which cost Mr. Wolde his life.⁴⁰ As Dr. Griffiths observed, the National Weather Service warning provided notice of a hazardous condition which, at a minimum, warranted extra caution. Yet Lack's took no action to close the beach and failed even to take minimum measures to effectively notify and warn the public. Dr. Griffiths further testified that Lack's had a duty and obligation to warn the public of known hazards:

Beach lifeguards, all lifeguards but particularly surf lifeguards, beach lifeguards have a duty and obligation to educate the---and warn the public before they go in the water and as they are in the water that's the responsibility of a lifeguard that's written. It's stated and it's reiterated in the industry over and over and over again.⁴¹

Lack's, however, failed to place a single rip current warning anywhere on the beach, much less close to the water's edge. As Dr. Griffiths testified:

You want to place the warning near the hazard. If you place it a distance from the hazard, the beachgoer may not associate the sign from where they're entering in the water or where the hazard exists. So it's most effective when you place a warning in close proximity to the hazard.⁴²

Thus, the evidence showed Lack's utter failure to warn the public of the concealed risk of rip currents was also a violation of the standard of care "particularly in light of the National Weather Service warning."⁴³

Dr. Griffiths further testified that Lack's multiple standard of care violations contributed to Mr. Wolde's death—in fact, they were a "direct cause" of Mr. Wolde's death:

Q. Now do you have an opinion whether or not they operated this beach service endeavor in a dangerous and unsafe manner?

⁴⁰ Griffiths, 101-102.

⁴¹ Griffiths, 102:22-103:6.

⁴² Griffiths, 93:1-9.

⁴³ Griffiths, 93:22-23.

A. Absolutely.

Q. And could you tell the ladies and gentleman of the jury why?

A. Clearly by all the evidence provided in this case, the lifeguards were not adequately tested, not trained, not on duty at the time, if you look at the beach service line up at any given time during this incident. People were out to lunch without alternative coverage. They were supposed to have even lifeguard onlys on duty, they had less than half of the required amount. And plus provided the dual role is unacceptable. It's both unacceptable in our industry and it's dangerous. Lifeguards cannot be performing other duties that divert their attention from the water. And so, lack of training, lack of testing, lack of supervising, and the people on the stands were put in a position of failure. They were not adequately trained or supervised or tested to be providing ocean lifeguarding service, surf guarding service protection for the people.

Q. Yes sir. And was operating this endeavor in a dangerous and unsafe manner a contributing cause to Mr. Wolde's death?

A. Yes, I believe it was a direct cause to his death. Yes sir.⁴⁴

Despite this evidence, Lack's boldly claims "there is not *any* evidence" connecting Lack's negligence to Mr. Wolde's death in a "but for" analysis.⁴⁵ Not only is this assertion flatly refuted for the reasons discussed, but the issues Lack's challenges actually support a finding of proximate cause.

Lack's first challenges the testimony of Dr. Griffiths, not on the substance of the testimony but on the sole ground that Dr. Griffiths had not visited Myrtle Beach or personally researched the weather conditions on the day of Mr. Wolde's drowning.⁴⁶ Indeed, as Dr. Griffiths testified, there was no need for Dr. Griffiths to visit the beach or conduct research because the National Weather Service issued a warning that morning alerting Lack's Beach of hazardous rip and longshore currents.

⁴⁴ Griffiths, 111-112.

⁴⁵ See Lack's Mot for JNOV, p. 10, Mot for New Trial Absolute, p. 14.

⁴⁶ See Lack's Mot for JNOV, p. 10.

Lack's goes on to make the illogical argument that the presence of a longshore current alone is not hazardous and only becomes hazardous when combined with other factors such as a rip current.⁴⁷ Of course, this fact only supports Plaintiff's case as there is no dispute that Lack's was made aware by the National Weather Service that both rip and longshore currents were present and that these conditions posed a hazard to swimmers. Randy Smith, the Lack's manager assigned to monitor the beach, testified regarding Lack's knowledge that the rip currents were present on beach on August 24, 2018. Smith confirmed Lack's had knowledge of "strong" rip current activity occurring on the day of the drowning, and this "strong" rip current activity applied to the whole beach.⁴⁸ His testimony likewise confirmed that rip currents, coupled with a longshore current, present a known dangerous condition to swimmers.⁴⁹ Mr. Smith testified that he told the lifeguards to be on alert for rip currents that day based on Lack's knowledge of the same.⁵⁰

Lack's further maintains there was no evidence that anyone identified a rip or longshore current prior to Mr. Wolde's drowning; however, this argument again overlooks the plain fact that the National Weather Service issued a warning that hazardous rip and longshore currents were present. Indeed, as reasonably inferred from the evidenced at trial, Lack's was aware that rip and longshore currents are not visible to the average beachgoer, and while trained eyes may be able to observe them,⁵¹ the personnel employed by Lack's was anything but trained, much less equipped to make the appropriate safety determinations to close the water in such circumstances.

Lack's goes on to argue there is no evidence that Lack's dual role lifeguarding practice was a cause of Mr. Wolde's death. Again, this is flatly refuted by the evidence. In fact, as detailed

⁴⁷ See Lack's Mot for JNOV, p. 11.

⁴⁸ Trial Tr., 711:16-20.

⁴⁹ Trial Tr., 713:25-714:2.

⁵⁰ Trial Tr., 714:13-21.

⁵¹ Trial Tr., 434:17-20.

more fully below, bystander Julien Chandler provided direct evidence from which the jury could have reasonably inferred that the lifeguard responsible for the water where Mr. Wolde drowned was engaged in sales or customer service at the time of the drowning.⁵² Lack's completely ignores this evidence.

Dr. Griffiths also testified there was evidence that Lack's lifeguards were selling merchandise and that this was a concurrent cause of Mr. Wolde's drowning.⁵³ This too was ignored in Lack's motions. Dr. Griffiths specifically states that the sales receipts from L20, L21, and L22 "exemplif[y] and highlight[] the fact that sales were taking place during the day."⁵⁴ Dr. Griffiths goes on to state that "So all three were engaged in sales. And I would say . . . that dual role, in part, led to the accident, because . . . they were all renting merchandise as well."⁵⁵ Given this testimony, it is utterly misleading to suggest the conflicting duties given to Lack's beach personnel was not a proximate cause of Mr. Wolde's death. As George Lack conceded during his examination that no man can serve two masters and that that rule is as old as the bible itself.⁵⁶

Given this overwhelming evidence, there was more than enough evidence from which the jury could conclude that Lack's negligence in assigning its untrained beach personnel conflicting responsibilities could—and did—lead to drowning incidents as in Mr. Wolde's case. The jury could also reasonably infer as much given that there was no rescue effort at any time during Mr. Wolde's 10–15-minute period of serious distress. Indeed, Dr. Griffiths testified that Lack's

⁵² Chandler Tr., 16:10-19:1.

⁵³ Griffiths, 231:6-232:10.

⁵⁴ *Id.* at 232:2-10.

⁵⁵ *Id.*

⁵⁶ Trial Tr., 311:2-6.

personnel violated the standard of care by failing to recognize Mr. Wolde as a distressed swimmer, and by failing to provide *any* rescue efforts at *any* time.⁵⁷

As to Lack's third argument concerning its understaffing, Lack's admitted they were understaffed on August 24, 2018.⁵⁸ George Lack, the owner of Lack's, conceded this fact during this cross-examination. In fact, George Lack conceded that being short a "lifeguard only" or LGO in the section where Mr. Wolde drowned was enough:

Q. Under your testimony, you're one short. Well, can't one short make all the difference between life and death when it's the tower responsible for the section of the public beach where Mr. Wolde drowned to death?

A Theoretically, yes.⁵⁹

Indeed, the fact that Lack's was down a LGO and aware of the foreseeable risk associated therewith, should have, at a minimum, warranted closure of this section of the beach.

That Lack's understaffing was a violation of the standard of care, was dangerous, and was a contributing cause to Mr. Wolde's death by drowning is further supported by Dr. Griffiths testimony referenced above. *See* Griffiths, 111-112 (stating "People were out to lunch without alternative coverage. They were supposed to have even lifeguard onlys on duty, they had less than half of the required amount. And plus provided the dual role is unacceptable. It's both unacceptable in our industry and it's dangerous.").

Finally, Lack's has repeatedly argued that the Lack's staff member assigned to L-21 was on a regularly scheduled lunch break. But Lack's did not offer a single witness with personal knowledge that L-21 was at lunch. Rather, the only evidence offered was that L-21 was

⁵⁷ Griffiths, 98:5-18; 99:14-22.

⁵⁸ Trial Tr., 362:3-6.

⁵⁹ Trial Tr., 451:14-18.

“scheduled” to be at lunch. What this evidence established was that L-21 left the lifeguard tower unoccupied at a time when Lack’s knew there were dangerous swimming conditions present. By leaving the tower vacant, when the City of Myrtle Beach required lifeguard protection, Lack’s violated the standard of care. As Dr. Griffiths testified: “[a] lifeguard is never supposed to abandon their post without someone else filling in for them, taking their stand, or closing the water. Otherwise, *it’s a dereliction of duty.*”⁶⁰

The evidence at trial further established that “in a surf environment, particularly one that is particularly hazardous, you need to either guard that stretch of water, that stand or you close it down, which is very easy to do.”⁶¹ Lack’s failure to call a single witness who had any personal knowledge that the personnel stationed at L-21 and L-22 complied with the standard of care on August 24, 2018, was not likely lost on the jury—especially considering Lack’s opening statement emphasizing to the jury that the evidence it “doesn’t hear” at trial is as important as what the jury does hear. Likewise, it was not lost on the jury that Lack’s offered no expert witness who could opine that these two lifeguards complied with the standard of care.

From this evidence, the jury could reasonably infer that Lack’s failed to take even slight care in providing acceptable, effective, and critical lifeguard protection it knew was necessary to save lives. Had Lack’s done so, Mr. Wolde’s premature and untimely death could have been prevented. The utter lack of *any* lifeguard response to Mr. Wolde is evidence enough to warrant denial of Lack’s motions for JNOV and new trial as to proximate cause. That the jury ultimately found Plaintiff’s evidence more credible than that argued by Lack’s is likewise insufficient to warrant a new trial. *See Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) (a

⁶⁰ Griffiths, 68:21-25.

⁶¹ Griffiths, 68:7-10.

factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings).

B. Testimony and sales records establish a direct link between Lack's hazardous dual role lifeguarding practice and the absence of any lifeguard response to Mr. Wolde's distress, warranting denial of Lack's JNOV and new trial motions on the issue of dual role negligence.

Though the court has consistently rejected Lack's attempt to obscure the role its hazardous dual role lifeguarding practice played in contributing to Mr. Wolde's death, Lack's yet again recycles the same arguments. But, as before, Lack's latest effort is just as unavailing.

Lack's maintains there is no evidence—direct, indirect or circumstantial—to support the inference that a Lack's lifeguard was engaged in a commercial transaction at the time of Mr. Wolde's distress. This argument not only mischaracterizes the evidence, it completely ignores the testimony. The evidence, in fact, proved Lack's staff, *i.e.*, "the kids," were required to make commercial sales, were financially motivated to make sales, were required to keep track of all sales activity, were required to update "IMMEDIATELY" all sales records, and were required to maintain a seating chart.⁶² Furthermore, the evidence included the sales totals for August 24, 2018, which established that the "kids" did in fact make sales at towers L-22, L-21 and L-20.⁶³

In addition, Julian Chandler, provided *direct* evidence that during the time of Mr. Wolde's distress the lifeguard at L-22 was engaged in commercial activity. Specifically, Chandler testified the L-22 lifeguard was on the beach talking to two people near the umbrella line with his back to the ocean.⁶⁴ The jury could easily infer from this direct evidence, that the staff member positioned at L-22—closest to where the Wolde family entered the water—was distracted by commercial

⁶² Plt. Trial Ex. 10, p.10.

⁶³ Plt. Trial Ex. 17.

⁶⁴ Chandler Video Tr., 16:10-19:1.

activity. That the L-22 lifeguard was talking to two people near the “umbrella line” is certainly evidence from which the jury could conclude that the lifeguard was conducting umbrella or chair rental sales or performing related customer service—and not the critical lifesaving responsibilities of his job.

Further, by conducting a commercial transaction on the ground, the L-22 lifeguard was not properly positioned on the lifeguard tower as was required to perform his lifeguarding duties of scanning the water for signs of distressed swimmers. Indeed, the City of Myrtle Beach required lifeguard protection on the tower. Lifeguard protection on the tower is also consistent with the standard of care, as confirmed repeatedly at trial. Because the L-22 lifeguard was not on the tower, the jury could reasonably conclude that he was not performing lifeguard duties and was instead engaged in performing revenue-generating duties.

Moreover, as referenced above, Dr. Griffiths testified that: “all three [L-22, L21 and L-20] were engaged in sales. And I would say that, in part, contributed—that dual role in part led to the accident.”⁶⁵ Dr. Griffiths testimony was preceded by the acknowledgment that the sales receipts from L20, L21, and L22 “exemplif[y] and highlight[] the fact that sales were taking place during the day.”⁶⁶ These sales receipts establish that the lifeguards that were supposed to be protecting Mr. Wolde instead made nearly \$1,200.00 in sales that day.⁶⁷ In total, the three lifeguard stations closest to the Wolde family generated \$1,173.50 from the sale of beach chairs and umbrellas—even with the beach closing early that day.

As to Lack’s assertion that there is no evidence as to the length of time that passed from Mr. Wolde’s distress to the time he submerged, this too is a mischaracterization. As recounted

⁶⁵ Griffiths, 232:6-8.

⁶⁶ *Id.* at 232:2-10.

⁶⁷ Plt. Ex. 17.

above, there is ample evidence that Mr. Wolde was in distress for a “long period of time.”⁶⁸ And during the estimated 10-15-minute drowning event,⁶⁹ Adam, Wubit and Mr. Wolde were all screaming, yelling, and waving for help.⁷⁰ Wubit testified they were yelling as loudly as they could.⁷¹ And not only were they positioned close enough to see the beach, Wubit explained that from where they were yelling, she could see bystanders on the beach.⁷² Adam testified he could see the shore.⁷³ He explained that they yelled as loudly as they possible could, many times.⁷⁴ Indeed, their visible distress and calls for help were observed by bystanders. And even the bystanders—who were on the beach—could not get the attention of Lack’s lifeguards nor could they find any.⁷⁵

Further, Dr. Griffiths testified that Mr. Wolde was a distressed swimmer before he drowned, meaning Lack’s lifeguards should have observed his distress with enough time to respond:

- Q. Does the literature differentiate between silent drownings and distressed swimmer drownings?
- A. That’s a good point. The progression, there is a progression in drowning. If you’re a non-swimmer, most non-swimmers enter into a drowning scenario very quickly which is quick, quiet and subtle. They can’t cry out for help. There’s very few visual signs of drowning. Someone who can swim first becomes distressed and when they’re distressed they can call out for help and they can wave for help. But when they’re distressed, if they don’t help themselves or someone doesn’t rescue them quickly then they rapidly move from a distressed victim to a drowning victim....But

⁶⁸ Trial Tr., 586:1-4.

⁶⁹ Trial Tr., 589:18-24.

⁷⁰ Trial Tr., 585:3-11.

⁷¹ Trial Tr., 585:3-11.

⁷² Trial Tr., 586:13-20.

⁷³ Trial Tr., 543:9-12.

⁷⁴ Trial Tr., 543:6-544:5.

⁷⁵ Trial Tr., 196:17-24; 197:3-10.

Mr. Wolde apparently was a distressed victim that could have and should have been easily recognizable by attentive lifeguards.⁷⁶

Dr. Griffiths testimony that “Mr. Wolde . . . was a distressed victim that could have and should have been easily recognized by attentive lifeguards” confirms that Lack’s lifeguards, who were touted as trained and experienced, could have and should have responded—and based on sales receipts and Lack’s incentives, there is strong evidence that the reason for the lack of response was Lack’s dual role practice.

Lack’s offers various “possibilities” as to acceptable lifeguarding duties that could have distracted its lifeguards from performing their lifesaving duties.⁷⁷ But there is zero evidence suggesting the lifeguards were engaged in any of the “possibilities” referenced. In fact, the very first possibility referenced is based on a complete mischaracterization of the drowning event: Lack’s claims its lifeguards could have been scanning the water “but missed what could have been a very fast drowning event.”⁷⁸ As Wubit and Adam testified, the drowning event was anything but fast; it was an excruciating 10-15 minutes⁷⁹—plenty of time for a lifeguard scanning the water to see and hear their distress, as well as the bystanders unanswered calls for help.

Critically, Lack’s repeatedly overlooks the uncontested fact that none of its lifeguards rendered any response to Mr. Wolde. This is direct evidence that the lifeguards failed to do their job. *See Grier*, 397 S.C. at 538-39 725 S.E.2d at 696-97 (A primary element of a negligence claim is breach of duty by “negligent act *or omission*.” (emphasis added)). The absence of any response is an omission and one which the evidence sufficiently attributes to Lack’s dual role practice.

⁷⁶ Griffiths, 96:23 – 97:16.

⁷⁷ *See* Lack’s Mot. JNOV, p. 8

⁷⁸ *Id.*

⁷⁹ Trial Tr., 589:18-24 (estimating the entire event was 10-15 minutes).

Lack's reliance on *Leek* and *Tallon* for the proposition that verdicts cannot be based on speculation and conjecture is likewise misplaced.⁸⁰ *See Leek v. New South Express Lines*, 192 S.C. 527, 7 S.E.2d 459, 462 (1940); *Tallon v. Seaboard Coast Line R. Co.*, 270 S.C. 362, 365, 242 S.E.2d 418, 420 (1978). As explained in detail above, the connection between Lack's hazardous dual role lifeguarding practice and Mr. Wolde's drowning is not based on speculation—it is based on direct evidence.

To the extent Lack's argues that evidence of "dual role" negligence—despite its overwhelming relevance to establishing liability—would somehow lead to confusion of the issues, mislead the jury, constitute undue delay or a waste of time, Lack's never objected to this evidence or argument at trial. *See* Rule 403, SCRE. Rather, Lack's sole objection to this evidence was prior to trial and based on the false assumption that "[w]hile Plaintiff's attorneys are expected to harp on profits over people the completely conjectural and speculative evidence as to commercial activities of the lifeguards would be irrelevant, non-probative and highly prejudicial to Defendants."⁸¹ However, the "prejudice" Lack's alleged before trial *did not* occur at trial because Plaintiff's counsel did not reference "profits over people" at any time during the trial. As shown above, evidence of Lack's dual role practice was properly admitted because it established Lack's (1) violations of the standard of care, (2) foreseeability, and (3) notice. *See* Rule 401, SCRE (evidence is admissible if it has a "tendency to make the existence of *any fact* that is of consequence to the determination of the action *more probable* or less probable than it would be without the evidence.").

⁸⁰ *See* Lack's Mot. New Trial Absolute, pp.13-14.

⁸¹ *See* Def. MIL, p. 9.

The JNOV and new trial standards are clear: as the non-moving party, the evidence and inferences are viewed in the light most favorable to the Plaintiff and where, as here, there is evidence to support the claim of dual role negligence, Lack's motions for JNOV and new trial must be denied. *See Elam*, 361 S.C. at 27–28, 602 S.E.2d at 782 (trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party); *Proctor*, 368 S.C. at 293, 628 S.E.2d at 504 (the deferential standard “scintilla of evidence rule” asks the court to determine whether a verdict for the opposing party “would be reasonably possible under the facts as liberally construed in his favor.”); *Welch*, 342 S.C. at 302-03, 536 S.E.2d at 420 (in deciding a motion for new trial, the court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party) (citing *Vinson*, 324 S.C. 389, 477 S.E.2d 715); *Trivelas*, 357 S.C. at 551, 593 S.E.2d at 507 (a new trial absolute under the thirteenth juror doctrine is only warranted if the evidence does not support the verdict).

III. THERE IS NO ERROR IN THE ADMISSION OF CERTAIN EVIDENCE MUCH LESS ONE SO HARMFUL AS TO JUSTIFY A NEW TRIAL ABSOLUTE; EVEN ASSUMING ERROR, THE EVIDENCE AND INFERENCES AT ISSUE WERE HARMLESS.

“[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). “Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” *State v Mitchell*, 286 S.C. 572, 573, 247 S.E.2d 334, 337 (1978). While Lack's challenges several evidentiary rulings, the challenged evidence was properly admitted by the trial court and, even assuming error, the challenged evidence was harmless in the context of the entire case.

A. Lack's inconsistent factual position taken in prior workers' compensation litigation

Lack's owner, George Lack, tried to tell this jury that the young adults his company hired to conduct public safety were lifeguards and not beach attendants. He tried to convince the jury that the lifeguards were trained, that they watched the water for distressed swimmers, and that only a small part of their working day was spent selling commercial equipment. Only, none of this was true. And George Lack knew this was false because he had taken the opposite position in litigation before the South Carolina Workers Compensation Commission. In that litigation, Lack told the Commission that his lifeguards' duties were 99.9% commercial sales and .01% lifeguarding. Indeed, this position is highly relevant to this case because Lack's lifeguarding practices were the same then as they were on the day of Mr. Wolde's drowning.

In 1997, the South Carolina Supreme court explicitly adopted the doctrine of judicial estoppel as it relates to matters of *fact* because:

"In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly."

Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251-52, 489 S.E.2d 472, 477 (1997).

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Id.* at 251 (citing *Colleton Reg. Hosp. v. MRS Med. Rev. Sys.*, 866 F.Supp. 896 (D.S.C. 1994)). The foremost function of the doctrine is to protect the integrity of the judicial process and the courts. 31 C.J.S. *Estoppel & Waiver* § 139, at 593 (1996).

In adopting judicial estoppel in *Hayne*, the court observed that the particular facts of *Hayne* offered a "vivid illustration" of the doctrine's application. *Id.*, 327 S.C. at 251, 489 S.E.2d at 477. There, in litigating a foreclosure action, the defendant contended he owned certain property by

virtue of a resulting trust. *Id.* However, this position was contrary to the defendant's position in a previous divorce action, wherein he claimed no legal interest in the property "to keep [his] wife from getting it," and instead claimed the property was owned by his son. *Id.* at 247, 489 S.E.2d at 474. When the defendant's son subsequently died, the property transferred to the son's wife, and not to the defendant, who paid for and lived at the property. *Id.* at 247, 489 S.E.2d at 475. But because the defendant had previously claimed his son owned the property, the *Hayne* court held he was judicially estopped from claiming ownership of the property in subsequent litigation. *Id.* at 252, 489 S.E.2d at 477.

As in *Hayne*, judicial estoppel should bar George Lack's inconsistent factual position taken in this case—a factual issue directly relevant to the issue of Lack's negligence. That this Court permitted Plaintiff's counsel to introduce evidence of this critical factual inconsistency is overwhelmingly supported by the doctrine's foremost function of maintaining the integrity of the judicial process and the court. Further, George Lack cannot be permitted to take—and benefit from—inconsistent factual positions whenever it suits him. The instant case is a perfect example, especially considering that the fact at issue—Lack's dual role lifeguarding practice—is a critical factual component of Plaintiff's negligence claim and punitive damages.

Despite the ample grounds for applying judicial estoppel, Lack's argues that because the workers' compensation litigation ended in 2002, the evidence is "grossly remote in time, nonprobative, and unduly prejudicial."⁸² But the alleged remoteness in time is irrelevant because the evidence shows Lack's lifeguarding practices were exactly the same in 2018 as they were in 2002. On this basis alone, the evidence is so highly probative as to outweigh any alleged prejudice.

⁸² See Lack's Mot. New Trial Absolute, p. 18.

Lack's further fails to acknowledge that it opened the door to this evidence by claiming at trial that its lifeguards perform all lifeguarding and only minimal commercial sales. Cross-examination on the inconsistency between Lack's position in this case and that before the Workers' Compensation Commission is certainly permissible and appropriate. *See Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985) (upholding admission of settlement in prior Workers' Compensation claim to impeach personal injury plaintiff's testimony of pain and suffering as a result of a later accident).

Further, the admission of evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion, commission of a legal error, and prejudice. *Hall v. Palmetto Enterprises II, Inc., of Clinton*, 282 S.C. 87, 91, 317 S.E.2d 140, 142-43 (Ct. App. 1984). No abuse of discretion has been demonstrated. Finally, even if there was, there is no evidence Lack's suffered any prejudice constituting grounds for reversal. *See Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

B. Lack's USLA decertification

Throughout the trial of this case, the United States Lifeguard Association ("USLA") was consistently recognized as the lifeguard industry's standard of care. Yet Lack's now claims reversible error in admitting this highly relevant standard of care evidence and, more specifically, in admitting evidence of Lack's failure to meet the standard of care set by the USLA as evidenced by communications with the USLA and the USLA's resulting decision to decertify Lack's as an accredited lifeguard service. Lack's arguments are again unavailing. The facts show this evidence was highly probative and essential to the liability issues of notice, foreseeability, willfulness, and recklessness.

Chris Brewster, the former President of the USLA, testified that his organization plays a large role in establishing the national standard of care for ocean lifeguards.⁸³ George Lack even conceded the USLA is the standard of care for lifeguarding. Indeed, Lack wanted to secure USLA certification so his company could advertise the same to the public—he wanted to hold out to the public that his lifeguards were trained and competent because they met the criteria of the USLA. Lack wanted USLA certification so badly that in order to obtain it, he had to conceal that his lifeguards were participating in commercial activities in addition to lifeguarding. He made this material misrepresentations to the USLA beginning in 1995 and every other year after when he sought re-certification. It was not until Brewster traveled to Myrtle Beach in 2007 that the USLA was apprised of Lack’s misrepresentation.⁸⁴ The USLA thereafter de-certified Lack’s as a USLA compliant lifeguard service. As this evidence demonstrates, Lack’s USLA certification and decertification is highly probative of both (1) the standard of care relevant to this case, and (2) Lack’s knowledge that its practices violated the standard of care.

Further, USLA training was specifically required in the franchise agreement between Lack’s and the City of Myrtle Beach, as well as by statute. *See* S.C. Code Ann. § 5-7-145 (stating “lifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality.”). Specifically, the Agreement required Lack’s to ensure its lifeguards “successfully complete a course consisting of a total of not less than 40 hours in open water lifesaving which meet the criteria of the United States Lifeguard Association.”⁸⁵ Not surprisingly, Lack’s presented zero evidence showing its lifeguards received any training, much less 40 hours of open water training. Weslyn Lack-Chickering, the operator of Lack’s, admitted

⁸³ Trial Tr., 473:15-17 (“... we [USLA] do set the standard.”).

⁸⁴ Trial Tr., 495:18-25.

⁸⁵ Franchise Agreement, Plt. Trial Ex. 15, p.3

as much when she testified that she could not find any training logs or sign-in sheets for her lifeguards.

Brewster also explained that it would be impossible for any Lack's lifeguard to meet the training requirements because dual-role lifeguarding is entirely inconsistent with USLA standards.⁸⁶ Brewster explained that the USLA trains lifeguards to watch the water, minimize distractions, and prevent people from even getting into danger in the water. If a company knowingly introduces distractions to its lifeguards in the form of selling commercial goods, and then trains them on how to sell the equipment, they are knowingly and intentionally violating USLA training.⁸⁷ Evidence of Lack's USLA membership, certification, and decertification is, thus, so overwhelmingly relevant to Lack's standard of care violations contributing to Mr. Wolde's death as to far outweigh any potential prejudice. The court's admission of this highly probative evidence was, thus, not error.

C. Lack's gross commercial sales from lifeguards for 2018

Lack's challenge to the limited admission of its gross sales disingenuously asks this court to accept that Lack's 2018 stand totals—a matter of public record required by Lack's Franchise Agreement with the City of Myrtle Beach—are so “highly prejudicial” as to warrant a new trial. Lack's argument on this issue fails for several reasons, including: (1) the evidence was necessary to establish essential elements of Plaintiff's negligence claim; (2) the evidence was not prejudicial because it was a matter of public record, reflected only gross sales, and was not an indicator of Lack's financial position or net profits; and (3) Lack's failed to contemporaneously object to the

⁸⁶ Trial Tr., 478:5-9.

⁸⁷ Trial Tr., 478:5-9.

manner in which this evidence was used in Plaintiff's closing and is barred from raising this issue now.

During opening, Lack's counsel boldly asserted that this case starts and ends with the Franchise Agreement:

"Lacks Beach Service has been providing lifeguard services to the City of Myrtle Beach and to Horry County in the unincorporated areas for 40 years. They have been operating Lack's Beach Service in the City of Myrtle Beach under a franchise agreement since 2018. There were agreements before that. *And, importantly, Lack's Beach Service has to be in compliance with that agreement. It starts and ends there...*"⁸⁸

That Lack's hinges its defense on the Franchise Agreement yet now seeks to challenge evidence referenced in and required under that very agreement is confounding and, as stated above, it is simply disingenuous. The plain language of the Franchise Agreement requires Lack's to provide its yearly gross sales to the City in order to comply with the terms therein.⁸⁹ The Franchise Agreement was admitted into evidence without objection. Using the 2018 stand totals, which reflected a compilation of the total gross sales from all Lack's beach towers in 2018, Plaintiff offered minimal and specifically tailored data on Lack's sales, including: the daily sales totals for August 24, 2018; the monthly sales totals for August 2018; and the yearly sales totals which Lack's was required to produce to the City. Indeed, the sales evidence that came in was limited in scope and time to the week, month and year Mr. Wolde drowned—a limitation that was sufficiently tailored to prove that Lack's was in fact engaging in dual role lifeguarding, that this practice put swimmers—and Mr. Wolde—at risk, that it violated the standard of care and the Franchise Agreement and was a contributing cause of Mr. Wolde's death.

⁸⁸ Trial Tr., 4:5-12.

⁸⁹ Franchise Agreement, Trial Ex. 15, p. 7 (Section 6 – Financial Reporting and Franchise Fees: Franchisee shall provide the City a sales tax report no later than December 1 of each year...")

Considering that Lack's maintains its legal obligations stem from the Franchise Agreement, Lack's cannot ignore that the Agreement specifically requires "protection of its tourist and residential population through an efficient and effective Water Safety Program."⁹⁰ The sales records introduced by Plaintiff prove just the opposite—*i.e.*, that despite Lack's duty and contractual obligation to provide an effective water safety program to protect its tourist and resident population, Lack's knowingly engaged in a water safety practice that was directly contrary to this foremost duty of providing protection. Thus, the 2018 stand totals were relevant to prove Lack's generated revenues but failed to deliver on its obligations to provide effective lifeguard services. The 2018 stand totals were also relevant to show Lack's further violated the standard of care and the Franchise Agreement by failing to "ensure minimum lifeguard staffing in each zone..."⁹¹

The sales records further show, as part of Plaintiff's burden in this case, that there was "consideration" for Lack's legal obligation and duty to provide effective lifeguard protection. Indeed, under South Carolina law "[o]ne who undertakes, gratuitously or for *consideration*, to render services to another which he should recognize as necessary for the *protection* of the other's person or things is subject to liability to the other for physical harm resulting from his *failure to exercise reasonable care* to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm or (b) the harm is suffered because of the other's reliance upon the undertaking." *See*, Restatement (Second) of Torts § 323 (1965); *See also*, *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006). The 2018 stand totals are, thus, highly probative of Lack's consideration—the money it generated in beach rental sales—and its

⁹⁰ *Id.*, p. 2:3-4.

⁹¹ Franchise Agreement, Plt. Trial Ex. 15, p. 2:29-30.

corresponding legal obligations to provide “protection” to Myrtle Beach’s “tourist and residential population through an efficient and effective Water Safety Program.”⁹²

Importantly, in alleging prejudice, Lack’s overlooks that the sales records introduced—which were also a matter of public record by virtue of the Franchise Agreement—reflect only gross sales and bear no insight into Lack’s financial position or net profit. Gross sales, being entirely distinct from the amount of money Lack’s actually made off its beach rentals, are simply not prejudicial in the manner complained by Lack’s.⁹³ To the extent Lack’s claims any prejudice in the assertion that this evidence suggested Lack’s was profiting off these sales, Lack’s could have offered evidence of net sales to show the contrary.

Lack’s reliance on *Branham v. Ford Motor Co.* for the assertion that “business income of this kind and nature has been forbidden by the South Carolina Supreme Court” is misplaced.⁹⁴ The court in *Branham* did no such thing. Rather, in *Branham*, the court found plaintiff’s counsel “went far beyond the pale in submitting evidence of Ford’s Senior Management compensation,” finding such evidence improper because it introduces an “arbitrary factor” in a jury’s consideration and assessment of punitive damages. *Id.* at 240, 701 S.E.2d at 25. The improper evidence there included that “the Ford Chairman and Chief Executive Officer was compensated by stock options worth \$5,300,000; the Ford President and Chief Operating Officer received a salary \$1,458,000 in 2005; the Ford Executive Vice President received a salary of \$972,000 in 2005; the Ford Chief Financial Officer received a salary of \$916,000 in 2005; a former Ford chairman received \$880,000 in 2005[;]” and that “[i]n 2005, they didn’t pay bonuses [but] in 2004, they did pay

⁹² *Id.*, p. 2:2-4.

⁹³ See Lack’s Mot. New Trial Absolute, p. 21.

⁹⁴ See Lack’s Mot. New Trial Absolute, p. 21 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010)).

bonuses: \$2 Million, \$1 Million, \$1 Million and \$1 Million plus stock and other compensation.”

Id. Lack’s 2018 gross sales figures are entirely distinguishable from this type of “arbitrary” and prejudicial financial testimony.

What’s more, Lack’s central complaint is not even to the substance of the evidence but the “manner in which Plaintiff’s counsel used the evidence throughout the trial and in his closing argument.”⁹⁵ Critically, Lack’s never once objected to the manner in which this evidence was used. In fact, Lack’s did not make a single objection during Plaintiff’s closing. This failure constitutes a waiver of any right to challenge this evidence now. *See e.g. Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (the general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver.”); *Scott*, 340 S.C. at 167, 530 S.E.2d at 393 (“Ordinarily, if an appellant fails to object the first time a statement is made in closing argument, he or she waives the right to raise the issue on appeal”).⁹⁶

Moreover, to the extent Lack’s complains of prejudice pertaining to the use of the gross sales to show Lack’s could have hired additional staff to perform beach attendant duties, Lack’s

⁹⁵ *See* Lack’s Mot. New Trial Absolute, p. 21.

⁹⁶ This rule is subject to one very narrow exception “in flagrant cases where a vicious inflammatory argument results in clear prejudice.” *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (quoting *Toyota of Florence*). In *Dial*, the court made clear that the “vicious inflammatory argument” contemplated in the exception must be a closing argument that “constitutes abuse of a party or witness.” *Id.* at 259, 509 S.E.2d at 272. In *Toyota of Florence*, the court found that racist posters about the party opponent that counsel used as props in a closing argument met this narrow exception. 314 S.C. at 263, 442 S.E.2d at 615. Lack’s challenge to the admission of a public record showing its yearly gross sales is hardly comparable to the type of vicious inflammatory argument referenced in *Dial* or *Toyota of Florence*. Reference to gross sales is simply not “flagrant” or “vicious” nor is it an “abuse” of Lack’s so as to warrant deviation from the strict rule barring consideration of an allegedly prejudicial closing statement despite a failure to object.

counsel specifically requested a jury charge on alternative feasible design as it relates to a defendant's duty in a negligence case:⁹⁷

Your Honor, there are two others. There's what I would call—we have called it a safer alternative charge. I'll hand it up to you. It talks about the concept of duty will not extend beyond reasonable limits. The sole fact that a safer method of performing some act may have existed is not sufficient to establish negligence.

Because the court permitted Lack's requested charge and properly charged the jury on alternative feasible design—*i.e.*, "that a safer method . . . existed is not sufficient to establish negligence," Lack's cannot complain of any prejudice on this issue. In addition, Lack's counsel failed to raise an objection during the following examination:⁹⁸

Q. "...there is another way to perform lifeguard services and beach concessions on Myrtle Beach isn't there?"

A. I'm sure there could be several different ways.

Q. For example, the beach attendants could wear a blue shirt.

A. Yes, sir.

Q. And they would only be in charge of and responsible for the task of beach rentals' isn't that true, sir?

A. Yes, sir.

Q. And lifeguards could wear the yellow shirt; isn't that true, sir?

A. Yes sir.

Q. And then the lifeguard's sole responsibility would be to perform water observation; isn't that right, sir?

A. Yes, sir.

Q. Do you go to church?

A. Pardon me?

⁹⁷ Trial Tr., 854:15-23.

⁹⁸ Trial Tr., 310-311.

Q. Do you go to church?

A. Yes, sir, I do.

Q. Do you believe it is very difficult for a man to serve two masters?

A. Yes sir I do.

Q. That's as old as the Bible itself, isn't it sir?

A. Yeah, I think so.⁹⁹

As this examination shows, Plaintiff elicited testimony, without objection, that Lack's could have provided a safer lifeguarding operation by employing separate beach attendants whose sole duties are to rent equipment and are separate and distinct from lifeguards whose sole duties are to scan the water and perform beach safety. Lack's cannot now complain of prejudice or error.

In sum, Lack's waived its right to challenge the manner in which the sales records were used, and as to its admissibility, Lack's argument fails on probative value alone. Any suggestion of prejudice is further undercut by the fact the sales record is a public document, reflects only gross sales (not net income), and is required by the Franchise Agreement. There is, thus, no error in admitting evidence of the 2018 stand totals, much less any error warranting the extraordinary relief of a new trial.

IV. THE JURY'S MEASURED WRONGFUL DEATH DAMAGES AWARD IS SUPPORTED BY THE EVIDENCE AND NOT UNDULY EXCESSIVE SO AS TO WARRANT A NEW TRIAL ABSOLUTE OR NISI REMITTITUR.

Lack's again attempts to improperly invade the province of the jury by arguing this court should exercise its discretion under the Thirteenth Juror Doctrine to grant a new trial. Such extraordinary relief is rarely granted and only exercised if the judge finds there is *no* evidence to

⁹⁹ Trial Tr., 310:10-311:1.

support the jury's award. "The jury's determination of damages is entitled to substantial deference." *Knoke*, 324 S.C. at 141, 478 S.E.2d at 258; *Clark v. S.C. Dept. of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002). "In considering a motion for new trial nisi, the trial court must evaluate the adequacy of the verdict in light of the evidence presented." *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citation omitted). There must be "compelling reasons...to justify invading the jury's province by granting a new trial nisi remittitur." *Proctor*, 368 S.C. at 320, 628 S.E.2d at 518. There must be even more to justify invading the jury's province by granting a new trial absolute: the verdict must be "so flagrantly excessive as to raise a presumption that it was the result of passion and prejudice, not of sober, reflective judgment." *Lucht v. Youngblood*, 266 S.C. 127, 137–38, 221 S.E.2d 854, 859 (1976). Further, the Court must view the evidence at trial in the light most favorable to the non-moving party. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964); *Welch*, 342 S.C. at 302–03, 536 S.E.2d at 420.

A. There is neither compelling reason nor evidence of passion or prejudice to justify a new trial absolute on Plaintiff's wrongful death claim

Here, in viewing the totality of the evidence presented, there is no "compelling reason" to invade the jury's province and reduce the thoughtfully undertaken verdict, or, much less, evidence of some "passion or prejudice" necessitating a new trial absolute. In considering wrongful death damages, the jury was presented with a decedent—a forty-one-year-old father of four young children—who drowned while saving his daughter's life when they became entrapped in a deadly rip current. This tragic drowning occurred because Lack's failed to close the beach, failed to provide adequate warning, and none of Lack's improperly trained "lifeguards" provided *any* rescue efforts or assistance at *any* time. Mr. Wolde struggled in the ocean while he fought tirelessly against the rip current to save his child. Indeed, his daughter survived because of his efforts. At trial, she testified she saw and heard her father struggle, yell for help, go under the water repeatedly

and come back to the surface, gasping for air.¹⁰⁰ This sequence of events, which occurred repeatedly, led to his lungs filling up with so much water it prevented needed oxygen from getting to his blood and to his organs.¹⁰¹ His death certificate confirmed he died of “asphyxia due to drowning.”¹⁰²

The testimony also included evidence of the enormous effect Mr. Wolde’s death had on his four young children, of whom Mr. Wolde was the primary caretaker.¹⁰³ His fiancé Meswaet Abel was a registered nurse at George Washington hospital and worked long hours to provide for the family.¹⁰⁴ Mr. Wolde handled everything at home—he made the meals, he helped the children with homework, he went to the grocery store, he got them ready for school, and he was home for them when they arrived at the end of the day.¹⁰⁵ In fact, the morning he died, he went to Wal-Mart to pick up groceries, he made their breakfast, he helped get them ready for the beach, and he put on their sunscreen.¹⁰⁶ Ms. Abel, Adam, and Wubit testified at length what his loss has meant to their family. They would set a place for him at the dinner table every night until it became too unbearable to see the empty seat.¹⁰⁷ They now have to eat dinner in the family room instead.¹⁰⁸ Adam, who enjoyed watching the Redskins on television with his father, could no longer watch football after his father died—now he watches alone at their townhome with a collection of the memorabilia his father had given to him.¹⁰⁹ One of the twin daughters recently

¹⁰⁰ Trial Tr., 585:14-23; 586:1-4.

¹⁰¹ Trial Tr., 466:8-10.

¹⁰² Plt. Ex. 20, p.4.

¹⁰³ Trial Tr., 587:11-588:3.

¹⁰⁴ Trial Tr., 570:15-22; 226:14-227:14.

¹⁰⁵ Trial Tr., 570:20-571:8; 528:23-529:9.

¹⁰⁶ Trial Tr., 232:2-8; 536:18-19.

¹⁰⁷ Trial Tr., 243:22-244:2.

¹⁰⁸ *Id.*

¹⁰⁹ Trial Tr., 246:10-23.

refused to re-paint her room because she did not want to remove the paint her father had applied.¹¹⁰ As Ms. Abel testified, life without their father has been inconceivably difficult:

Our life changed. Our house is dark. We're living in no hope, with no answers to my kids, "Who is going to walk me down the aisle when I get married?" If I change, I would give my life. It's not because I love him; it's because of the kids. They need him more than me. . . He's done everything. He teach how to swim. He teach how to study. He teach them how to ride a bike. He painted their rooms.¹¹¹

In other words, Mr. Wolde was the rock for this family. His loss caused unimaginable harm.

The children also experienced immeasurable trauma and shock in experiencing their father's death in such a horrific manner. Indeed, Wubit endured the entire event latched onto her father's shirt, where she could see, hear, and feel his suffering. The horrifying experience continued on shore as Wubit saw foam coming out of her father's mouth when the bystanders were performing CPR.¹¹² Bystanders Jeff Bender and Julien Chandler also testified as to the children's presence during the horrific event. Bender testified Wubit was floating on her father, "using him like a life preserver," at the time he began assisting them to shore.¹¹³ Chandler testified that he stopped Adam from getting too close to his father's body and encouraged him to be strong for his younger twin sisters, after which Adam and his sisters kneeled and prayed.¹¹⁴ The children also witnessed their mother "hysterically flailing and screaming."¹¹⁵ This considerable evidence all plays a factor in determining wrongful death damages. *See Lucht v. Youngblood*, 266 S.C. 127, 136–37, 221 S.E.2d 854, 859 (1976) (noting wrongful death damages includes the damages sustained by the beneficiaries from the death, such as mental shock and suffering, wounded

¹¹⁰ Trial Tr., 249:12-15.

¹¹¹ Trial Tr., 249:5-13.

¹¹² Trial Tr., 590:12-13.

¹¹³ Trial Tr., 197:22-198:1.

¹¹⁴ Chandler Video. Tr., 25:16-26:3

¹¹⁵ *Id.*, 26:6-9.

feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the decedent's society).

Considering the wide range of losses encompassed by wrongful death damages, Plaintiff's counsel, during closing argument, appropriately suggested a per diem calculation as a method the jury could apply to arrive at a damages award for the children's nonpecuniary wrongful death damages. Counsel further made clear that whether to award and how much, if any, was entirely up to them. *See Edwards v. Lawton*, 244 S.C. 276, 281, 136 S.E.2d 708 (1964) (accepting a per diem calculation as acceptable in a closing argument). The per diem suggested was based on the children's loss of companionship and loss of society given their father's 37.3 years of remaining life expectancy. Under counsel's calculation at closing the estimated per diem of \$10/hour, multiplied by 15 hours/day translated to \$54,750/year per child, equating to roughly \$8.1 million over the remaining 37.3 years of Mr. Wolde's life expectancy.¹¹⁶ After three hours of deliberation, the jury arrived at a well-reasoned and measured wrongful death award of \$10 million, or \$2.5 million per child. Considering all objective evidence, this jury's award of \$10 million in wrongful death damages was the result of thoughtful and reflective judgment.

In challenging the propriety of the jury's damages award, Lack's points to no concrete basis to suggest the award was motivated by anything but the evidence. Instead, Lack's argues that simply because the \$3.7 million survival award and \$10 million wrongful death award are large figures, the jury must have been motivated by passion, prejudice, or other improper motives. But South Carolina law does not permit verdicts to be set aside based on their size alone, especially given the detailed testimony of the children's loss of companionship, loss of society, and their trauma associated with witnessing their father's horrific death.

¹¹⁶ Trial Tr., 905:14-906:11.

Lack's attempt to challenge this jury's award by cherry picking various verdicts in other wrongful death cases is equally unavailing and, even, misleading.¹¹⁷ Though comparisons to other verdicts are only persuasive at best, Lack's misleads the court yet again by omitting a host of wrongful death verdicts in which the actual damages awards are consistent with and even higher than that in this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858 (stating the comparison approach is sometimes helpful, each case must be evaluated as an individual one, within the framework of its distinctive facts and, when comparing awards in previous cases, recognition must be given to the continuing erosion in the purchasing power of the dollar); *see e.g., Reeves v. Town of Cottageville et al.*; Case No. 14-11-070043 (2014) (compensatory award for wrongful death of \$7,500,000 and \$90,000,000 in punitive damages); *Givens v. Samkharadze*, Case No. 21-10-130012 (2021) (compensatory pain and suffering of \$25,000,000 and \$8,000,000 in punitive damages); *Bales v. Martinez*, Case No. 14-03-170022 (2014) (\$20,000,000 award for loss of service, \$30,000,000 in punitive damages); *Dial v. Toyota Motor Sales USA Inc.*, Case No. 18-10-220036 (2018) (\$6 million in compensatory damages and \$6 million for loss of service); *Bannister v. Columbia Urological Associates, P.A.*, No. 2015-CP-40-4794 (2017) (\$10,000,000 in compensatory damages); *Huff v. XPO Express, Inc.*, Case No. 19-11-120022 (2019) (Compensatory pain and suffering of \$7,000,000); *Oickle and Oickle v. XPO Express Inc. f/k/a Express 1 Inc.*, Case No. 19-03-200062 (2019) (loss of services award of \$5,000,000); *Steele v. XPO Express Inc. f/k/a Express 1 INC.*, Case No. 19-03-200061 (compensatory award of \$1,000,000 with loss of services award of \$5,000,000); *R. Gibson v. Fuller*, Case No. 19-10-160035 (2019) (compensatory pain and suffering award of \$2,523,500, and punitive damages award of \$5,000,000). Moreover, in addition to liability and factual distinctions, the court must, as

¹¹⁷ *See* Lack's Mot. New Trial Absolute, pp. 26-28; New Trial Nisi, pp. 6-8.

advised in *Lucht*, also account for inflation when comparing verdicts referenced by Lack's that were rendered eight, ten and twelve years ago. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. Further, Lack's seemingly ignores that this jury's wrongful death award was to be divided by and account for the losses suffered by *four* young children. An award of \$2.5 million for the loss of a father by a child of tender age is hardly excessive.

Lack's assertion that the jury's \$7 million punitive damage award somehow undermines the propriety of its wrongful death award is also without merit. Indeed, the wrongful death award was issued before the jury heard evidence that Lack's ability to satisfy this award was questionable—its net worth being an estimated negative \$500,000.00 and its liability coverage was limited to \$3 million. There can be no doubt that Lack's net worth and liability coverage impacted the jury's consideration of punitive damages and most likely counseled against a much higher punitive damages award. This inference is irrelevant to the propriety of the jury's carefully considered and measured award of wrongful death damages of \$2.5 million per child.

Simply put, nothing in Lack's briefing suggests a remotely sound basis to disrupt this jury's reasoned and reflective award of wrongful death damages. As the thirteenth juror, the Court is charged with reviewing what happened, what was presented and what was not presented, in the trial of this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. Here, there was simply not "any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality" and Lack's fails to point out one. *See Clark v. Ross*, 284 S.C. at 568, 328 S.E.2d at 106. There is, thus, no "compelling reason" to invade the jury's province and alter the verdict. *See Proctor*, 368 S.C. at 320, 628 S.E.2d at 518; *Curtis*, 392 S.C. at 501, 709 S.E.2d at 82. Indeed, Lack's did not offer any evidence to counter Plaintiff's evidence of wrongful death or survival damages. As set forth above, there is ample evidence to support the jury's \$10

million award for wrongful death and \$3.73 million award for survival damages. *See Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (holding that “the trial court must evaluate the adequacy of the verdict in light of the evidence presented.”). There being no reasonable basis to justify setting aside the jury’s dutifully delivered award, Lack’s motions for new trial absolute and new trial nisi should be denied.

V. THE JURY’S PUNITIVE DAMAGES AWARD IS APTLY SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, IS NOT EXCESSIVE, SHOULD NOT BE REDUCED, AND IS OTHERWISE IN ACCORDANCE WITH DUE PROCESS SO AS TO WARRANT DENIAL OF LACK’S MOTIONS FOR JNOV, NEW TRIAL ABSOLUTE, AND NEW TRIAL NISI.

As with the jury’s survival and wrongful death awards, there is nothing meriting JNOV, a new trial absolute or a reduction by nisi remittitur of the jury’s thoughtful and measured punitive damages award in this case.

In South Carolina, “punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.” *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (citations omitted). Moreover, they serve “as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damages.” *Id.*

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence that the defendant’s misconduct was willful, wanton, or with reckless disregard for the plaintiff’s rights. S.C. Code Ann. § 15–33–135; *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996); *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). “A conscious failure to exercise due care constitutes willfulness.” *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch v. Epstein*, 342 S.C. 279,

301, 536 S.E.2d 408, 419 (Ct. App. 2000)). When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Id.* (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The amount of damages, actual or punitive, remains largely within the discretion of the finder of fact, as reviewed by the trial judge. *Id.* (citing *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991)).

Here, Lack's challenges the evidence supporting Plaintiff's claim to punitive damages as well as the amount of the award. Lack's also challenges the propriety of allowing the issue of recklessness to be tried in the first phase of this bifurcated trial. As set forth herein, these arguments fail to provide a sufficient extraordinary basis to warrant invading the province of the jury, especially where, as here, there is clear and convincing proof of Lack's reckless and willful violations of the standard of care.

A. The issue of punitive damages was properly submitted to the jury.

The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419).

Where, as here, the plaintiff presents testimony and evidence that Lack's was aware of a dangerous condition and failed to take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willful and reckless conduct to support punitive damages. *See id.* (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). If the jury believes the plaintiff established willful, wanton,

or reckless conduct by clear and convincing evidence, the jury has considerable discretion to determine the amount of punitive damages. *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907–08 (Ct. App. 2021), reh’g denied (May 12, 2021) (citing *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404–05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages)).

In *Mishoe v. QHG of Lake City, Inc.*, the South Carolina Court of Appeals affirmed the denial of JNOV on the issue of punitive damages where there was evidence the defendant was provided “actual, written notice” of a dangerous condition on its premises—a hole in the pavement near the defendant’s emergency room exit—and failed to take any action to repair the hole or to warn visitors or patients of the existence of the hole. 366 S.C. 195, 201–02, 621 S.E.2d 363, 366 (Ct. App. 2005). Having neglected to take any corrective action for nearly a year since being notified, the *Mishoe* court specifically found the written notice informing QHG of the hole was sufficient evidence of QHG’s willful, wanton, reckless, or malicious conduct to warrant submission of punitive damages to the jury. *Id.*

Here, the evidence of Lack’s willfulness and recklessness is far more damning than that in *Mishoe*. While *QHG’s* conduct in failing to take corrective action within a year of notice was deemed sufficient, Lack’s intentional disregard for its known standard of care violations went on for not just one but *ten years*. In the ten years since being decertified by the USLA for its unsafe practices, Lack’s took no corrective action whatsoever. Not only did Lack’s have notice that its practices posed a threat to the safety of swimmers,¹¹⁸ but Lack’s also concealed that its practices

¹¹⁸ As set forth above in Plaintiff’s proximate cause, negligence, and recklessness arguments, the evidence established at trial shows Lack’s had actual notice that its beach safety services violated the standard of care and created a hazardous condition in numerous respects, including its non-compliance with USLA standards by engaging in dual role lifeguarding, its failure to provide 40

violated the standard of care—thereby further endangering the beachgoing public who trusted that the City’s beach was safely guarded by adequate and trained lifeguards.

In addition, Lack’s was further on notice by the National Weather Service that hazardous rip and longshore currents posed a dangerous threat to the safety of beachgoers, yet Lack’s failed to close the beach and failed even to warn beachgoers of the hidden threat posed by these dangerous conditions. This cumulative misconduct, as established by clear and convincing evidence at trial, more than satisfies the willful, wanton or reckless standard to warrant submission of punitive damages to the jury.

Lack’s JNOV motion ignores this abundant evidence, claiming in a conclusory fashion that “Plaintiff’s case was one of character attack as to George Lack, of evoking passion and sympathy for Plaintiff, and one of imposing liability because LBS was a “for profit” entity and there was speculation that had things been done differently, Wolde would not have drowned.”¹¹⁹ But as the evidence shows, Plaintiff’s punitive damages claim is not mere speculation. The evidence recounted above clearly and convincingly supports a finding that Lack’s was willful and reckless in committing standard of care violations it knew would cause harm and, in this tragic case, did just that. Moreover, Lack’s conclusory argument references no line of questioning or improper statement of counsel that suggest a “character attack” on George Lack.

As to Lack’s claim of prejudice in referencing Lack’s as a for-profit entity, Lack’s never objected to any such reference during trial and has therefore waived its right to do so now.¹²⁰ In

hours of training as required by USLA standards and its contract with the City of Myrtle Beach, and by its understaffing and failing to provide backup protection when a lifeguard leaves a tower unattended. Plaintiff refers to and relies on these arguments and the evidence therein.

¹¹⁹ Lack’s Mot. for JNOV, p. 14.

¹²⁰ See *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 111, 498 S.E.2d 395, 406 (Ct. App. 1998) (failure to object constitutes a waiver of issue).

any event, any such reference, being a mere statement of undisputable fact, is hardly prejudicial. It was also necessary to distinguish for the jury Lack's role as a private entity performing a service for a public municipality. Likewise, Lack's responsibility—its duty—in undertaking beach safety services on behalf of a public entity was first and foremost for the protection of the beachgoing public—and not for profiting off of commercial sales. As Plaintiff's counsel echoed throughout the trial, Lack's privilege of being the sole provider of beach safety services and commercial beach sales comes with the responsibility of fulfilling with due and reasonable care its foremost duty of providing safe and effective beach safety services, *i.e.*, lifeguard protection. Thus, any reference to Lack's as a for-profit defendant—a mere statement of fact—is overwhelmingly relevant to the liability and causation issues in this case, and, on that additional basis is proper and harmless. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (errors are harmless where they could not have reasonably affected the trial).

In sum, Lack's motion for JNOV ignores the ample evidence supporting Plaintiff's punitive damage claim, inappropriately suggest the jury's verdict was based on speculation, and inappropriately claims prejudice as a result of an alleged character attack that also finds no support in the record. For these reasons, Lack's motion for JNOV as to punitive damages is meritless and should be denied accordingly.

B. Lack's agreed to and waived any right to challenge the issue of recklessness in the first phase of the bifurcated proceeding, and even if preserved, evidence of recklessness for purposes of liability is permissible in the first phase of trial.

Lack's arguments challenging the propriety of trying the issue of recklessness during the liability phase of this bifurcated proceeding are not only unavailing, but they are also contrary to the position Lack took during trial and even in its JNOV motion. In arguing for JNOV, Lack's contended that Plaintiff produced "no evidence in Phase 1 of this trial of a clear and convincing

quality to warrant the submission of punitive damages to the jury. There was no evidence of recklessness by LBS.”¹²¹ Thus, by Lack’s own admission, Plaintiff was not only permitted, but was required, to show recklessness during the liability phase of the trial.

In seeking a new trial absolute, Lack’s now takes the contrary position that the Court improperly allowed Plaintiff to introduce evidence of recklessness in the first phase of trial. But this sequence is, of course, appropriate because evidence of recklessness is not “evidence relevant *only to* the issues of punitive damages.” S.C. Code Ann. §15-32-520 (B) (emphasis added). First and foremost, a finding of recklessness is a determination of liability. Negligence and recklessness are not different merely as a matter of degree. By definition, they are actually distinct types of fault. *See Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (providing different legal definitions of “negligence” and “recklessness” and observing that “[t]he element distinguishing negligence from willful tort is inadvertence”) (citation omitted)); *Fairchild v. S.C. Dept. of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411–12 (2012) (“Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence.”).

Due to these distinct types of fault, Plaintiff was procedurally required to try her entire case on liability, including evidence of both negligence and recklessness, during the first stage—the fault stage—of this trial bifurcated pursuant to S.C. Code Ann. § 15-32-520. Pursuant to § 15-32-520, plaintiffs *have to* present theories of a defendant’s negligence and recklessness during the liability stage of a bifurcated trial. *See* S.C. Code Ann. § 15-32-520 (“In the first stage of a bifurcated trial, the jury shall determine *liability* for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant *only to* the issues of punitive damages is

¹²¹ *See* Lack’s Mot. JNOV, p. 14.

not admissible at this stage.” (emphasis added)). At the close of that first stage, the jury deliberates and determines fault and compensatory damages, if any. On the same verdict form, typically as the last question, the jury also determines whether the defendant’s conduct was reckless, willful, or wanton, as opposed to merely negligent. This widely used format was properly followed in this case. In fact, this precise format has been followed in trials across this State. See, e.g., Ex. 1, Verdict Form, *Glenn v. Fisher Controls*, 2015-CP-04-01607 (first-stage verdict form recently used by Justice Toal); Ex. 2 (first-stage verdict form recently used by the Honorable John C. Hayes); Ex. 3 (first-stage verdict form recently approved by the Honorable Roger E. Henderson); Ex. 4 (first-stage verdict form recently approved by the Honorable Thomas A. Russo); Ex. 5 (first-stage verdict form recently approved in federal court by the Honorable Bruce Howe Hendricks) (awards redacted).

Not only is this procedure appropriate and sanctioned throughout this State, it also serves the interests of judicial economy. If the jury *had not* found recklessness, then there would have been no need to waste their valuable time, and that of the Court, with a second phase of trial. Only when the jury finds recklessness does the trial move into the punitive damages stage, where the evidence is generally limited to the defendant’s financial condition and ability to pay punitive damages, followed by closing arguments solely on punitive damages. See, e.g., *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994) (observing that evidence of a defendant’s net worth is relevant only to the amount of punitive damages, and therefore not admissible until the bifurcated punitive phase of trial).

It further bears noting that Lack’s consented to, and in fact agreed it was proper in phase one to have the jury determine whether Plaintiff proved willful, reckless, and willful conduct:¹²²

¹²² Trial Tr., 845:11-846:19.

PLAINTIFF'S COUNSEL: I thought that you did the reckless question on the first verdict form, and that way -- I've done that in front of Judge Young, is the way we did it. And, that way, when they render that verdict, you know whether or not there's going to be a second phase, because they either find reckless, willful, or wanton, or they don't. You see what I'm saying?

THE COURT: Yeah. I mean, it either eliminates the need to go forward with the second phase --

PLAINTIFF'S COUNSEL: Right. And we don't make punitive damages arguments to the jury in the first phase, *but the evidence of recklessness comes in*, and if they make that determination, then I guess we bring them back in, and then we would argue the Gamble factors.

COURT: What are your thoughts, Mr. Thompson?

COUNSEL FOR LACK'S: Your Honor, *I think that's correct*. I mean, the first question is liability, damages, actuals. And then the question to the jury is: Do you find evidence, whatever the question would be, for the punitive conduct. And then it's just yes or no. And then, if yes, there will be a second receiving or a second -- something along the lines.¹²³

That Lack's agreed to the same verdict form to which it now objects, at a minimum, amounts to a waiver of this issue. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form); *Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013) (failure to object to verdict form until after verdict was read amounted to a waiver of issue). As is consistent with a bifurcated trial, the jury never heard any information or evidence in phase one on Lack's ability to pay a punitive damage award. In fact, Lack's told the Court it only asked their accountant to provide net worth information *after* the jury found they had been willful, wanton, and reckless. Plaintiff, thus, did not even have information on Lack's net worth or ability to pay punitive damages in phase one.

¹²³ Trial Tr., 845:11-846:6.

In sum, because the jury's determination of negligence and recklessness is essential to the jury's determination of the threshold issue of fault, or liability, evidence of recklessness is necessary and appropriate in phase one of a bifurcated trial. Consistent with this widely accepted procedure, the court properly provided a verdict form that complied with South Carolina law, complied with the evidence in this case, and, critically, was agreed to by Lack's. Accordingly, Lack's request for a new trial on this ground is without merit and should be denied.

C. The punitive damages award is *per se* reasonable under 15-32-530.

Critically, under the statutory cap set forth in S.C. Code § 15-32-530, a punitive damages award that is less than three times the amount of a compensatory award is *per se* reasonable. Section 15-32-530 sets a statutory cap on punitive damages of three times the amount of a compensatory award and only if that cap is exceeded is it relevant for the court to consider additional factors in determining the awards reasonability. S.C. Code Ann. § 15-32-530. Here, the \$7 million punitive damages award is almost half that of the \$13.7 million compensatory award. It is, thus, nowhere close to the multiplier set forth in the statutory cap. The punitive award in this case is, therefore, *per se* reasonable under § 15-32-530, and should be permitted to stand on that basis and for the additional reasons set forth below.

D. The jury's reasoned and measured award of punitive damages is not grossly excessive.

Lack's seeks a new trial absolute on the basis that it believes the jury's award of \$7 million in punitive damages—an amount that is *per se* reasonable in light of the wrongful death damages—is so grossly excessive as to be motivated by passion, caprice, prejudice or some improper influence. But again, Lack's fails to support this contention with anything more than conclusory statements or the improper assertion that the award is excessive on size alone.

The extraordinary relief of new trial absolute is only warranted “[i]f the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence.” *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). “However, the jury’s determination of damages is entitled to substantial deference.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000) (citation omitted).

Here, there is simply no evidence that the jury’s award considered anything other than the relevant evidence, and Lack’s can cite to none. Lack’s contends the trial court’s instruction on economic bankruptcy must have been deficient given the jury’s decision to award punitive damages despite evidence produced by Lack’s in the second phase of the trial showing Lack’s net worth at an estimated negative \$473,350.51. But as with many of Lack’s other arguments, this too reflects a mischaracterization of the events at trial. The actual language of the economic bankruptcy instruction, as is consistent with South Carolina law, states in full:

Any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the Defendant’s ability to pay any punitive damage award should be considered. *However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.*¹²⁴

Thus, as is consistent with the court’s instruction, the economic bankruptcy of Lack’s is not an absolute bar to punitive damages and the jury certainly took this instruction into account in arriving at an award that was less than its actual damages award.

While Lack’s suggests that the jury’s \$7 million punitive damage award in light of Lack’s financial position is in itself evidence that the award was motivated by passion, prejudice or some other improper motive. But again, that the figure is a large one, does not in and of itself justify a new trial on such grounds, especially given that the punitive damage award in this case being less

¹²⁴ Trial Tr., 968:3-7.

than a 1:1 ratio to actual damages is *per se* reasonable. Having failed to show any reliable evidence or argument to warrant invading the province of the jury by granting a new trial, Lack's motion for new trial absolute on this issue must be denied.

E. The jury's award of punitive damages is in accordance with due process per the *Mitchell* guideposts and does not warrant reduction based on mere excessiveness.

Lack's challenge to the propriety of the jury's punitive damages award by new trial *nisi remittitur* asks this court to either grant a new trial or reduce the award by claiming it is unduly excessive so as to violate due process. But as with Lack's other challenges, this too finds little support in the evidence or the law.

"The practice of awarding punitive damages originated in principles of common law 'to deter the wrongdoer and others from committing like offenses in the future.'" *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964)). "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *Id.* (quoting *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996)). The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Id.* (quoting *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (citation omitted)).

To determine if a punitive award is reasonable, a trial court must conduct a post-trial review that considers the following three factors set forth in *B.M.W. of North America, Inc. v. Gore* and adopted in our state in *Mitchell v. Fortis*: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between

the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Mitchell*, 385 S.C. at 587–88, 686 S.E.2d at 185–86; *Gore*, 517 U.S. 559. In addition, our case law instructs that the additional eight *Gamble* factors are relevant in so far as they add substance to the *Mitchell/Gore* guideposts. See *Mitchell*, 385 S.C. at 70; 686 S.E.2d at 176; *Gamble v. Stevenson*, 305 S.C.104, 406 S.E.2d 350 (1991). Here, consideration of these guideposts and the additional *Gamble* factors, confirms that the jury’s carefully considered award is reasonable.

i. Degree of reprehensibility

As set forth in *Mitchell*, in determining the degree of Lack’s reprehensibility, the following should be considered: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Id.* at 587, 686 S.E.2d at 185 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)).

Here, the first, second, fourth and fifth factors are relevant. Considering these factors, Lack’s conduct can only be construed as exhibiting an extremely high degree of reprehensibility. As to the first factor, the harm caused was not economic or even physical injury, it was the complete loss of a life—a forty-one-year-old father of four young children. Considering the second factor, there is ample evidence that Lack’s misconduct in knowingly employing unsafe and hazardous beach safety practices evinced a conscious indifference and reckless disregard for the health and safety of all beachgoers, including Mr. Wolde. In addition, Lack’s knowingly

committed these standard of care violations for decades with the knowledge that the public—and Mr. Wolde in particular—would be at risk. As to the fourth factor, there is abundant evidence that Lack's numerous standard of care violations were not an isolated incident. Lack's has consistently employed these same unsafe practices—despite repeated warnings—for the last 40 years. That Lack's deceptively masqueraded its untrained beach attendants as trained lifeguards is also evidence of trickery and deceit so as to satisfy the fifth and final factor. Considering these factors, there is no question that Lack's misconduct reflects an alarmingly high degree of reprehensibility.

The additional *Gamble* factors provide even further support. The eight *Gamble* considerations include: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354.

As to culpability, the evidence as to Lack's numerous standard of care violations and their link to Mr. Wolde's drowning exhibit a high degree of culpability. As to the duration of the conduct, again, Lack's conduct has gone on for decades. For over 40 years, Lack's has operated its beach safety service in complete disregard for the standard of care for providing lifeguard protection. This is evidenced by the testimony elicited from George Lack, Lack's staff, and from Chris Brewster former president of the USLA. Given that Lack's has been on notice since 1995 that its dual role practice violated USLA safety standards, Lack's awareness and subsequent concealment of its continued use of this hazardous practice supports the *Gamble* factor of

awareness or concealment. As to providing a deterrent effect, given the multiple standard of care violations that created a hazardous and unsafe environment for beachgoers, Lack's simply cannot be permitted to continue operating its business in this unsafe and highly dangerous manner. Likewise, because the award intends to deter such life-threatening conduct, it is most certainly reasonably related to that significant form of harm so as to satisfy the sixth *Gamble* factor. While the remaining *Gamble* factor—the defendant's ability to pay—is truly the only *Gamble* factor that does not overwhelmingly weigh in Plaintiff's favor, the fact that all remaining factors do is more than sufficient to support this jury's just and reasoned award. *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354.

In sum, the evidence in this case supports nearly every *Gamble* factor and four of the five factors in the reprehensibility test of *Mitchell/Gore*. There truly is no stronger evidence of reprehensibility, culpability, reckless indifference, and certainly an essential need for deterrence.

ii. Ratio

As to the ratio of punitive damages to actual damages, this factor also merits a finding of reasonableness. In determining the reasonableness of the ratio, the court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. *Mitchell* at 588, 686 S.E.2d at 185.

Though courts have accepted very high ratios—in *Mitchell*, our supreme court remitted a \$15 million punitive damages award, which reflected a 13.9 to 1 ratio, to \$10 million or a 9.2 to 1 ratio—the ratio here, being *less* than the actual damages award is *per se* reasonable. See *Mitchell*, 385 S.C. at 594, 686 S.E.2d at 188 (concluding a 9.2 to 1 ratio satisfied due process and comported with South Carolina law). Lack's argues extensively that the reverse ratio in this case

somehow suggests excessiveness or lack of reasonableness but its arguments overlook the fact that prior to awarding punitive damages, the jury was apprised for the first time that Lack's net worth and its limited liability coverage may prevent its ability to pay a much higher award. This evidence in light of the jury's measured award of \$2.5 million per child in wrongful death damages provides no basis to suggest that the \$7 million award of punitive damages is anything but reasonable in light of the other *Mitchell* factors.

Furthermore, given the life-threatening dangers posed by Lack's unsafe beach safety practices, the punitive damages award must be an amount sufficient to deter Lack's from engaging in future misconduct. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 53–54, 691 S.E.2d 135, 151–52 (2010) (citing *Gore*, 517 U.S. at 582, (stating “low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages”)). The jury considered Lack's evidence of its negative net worth and limited liability coverage.¹²⁵ Even considering this evidence, the jury still determined that \$7 million in punitive damages was warranted. Given that this award is nearly half the award of actual damages, it is clear the jury took into consideration Lack's ability to pay and its limited liability coverage in arriving at its award. This evidence does

¹²⁵ The wealth of a defendant, though a relevant factor in assessing punitive damages, is not necessarily controlling. *Welch*, 342 S.C. at 307, 536 S.E.2d at 423 (citing *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965)). “The financial worth of a defendant is a fact properly to be considered by the jury in determining the amount to be awarded as punitive damages, but evidence of net worth is not a prerequisite to a punitive damage award.” *Id.* (citing *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958)). While a factor to be considered, “evidence of ability to pay is not a *sine qua non* of a punitive damage award.” *Id.* There is “no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages.” *Id.* (quoting *Norton v. Ewaskio*, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963); *Clamp v. Clamp*, 293 S.C. 142, 359 S.E.2d 86 (Ct. App. 1987) (financial condition of defendant is factor to be considered by jury in awarding punitive damages but there is no requirement the defendant be a man of means before the jury is justified in awarding punitive damages)).

not counsel against the reasonableness of the award; rather, if anything, it establishes that jury very well determined upon reflective and careful consideration that its punitive damages award was necessary and warranted.

iii. Comparable cases

To further justify the reasonableness of the jury's punitive damages award, the *Mitchell* guideposts urge consideration of the award in this case to comparable cases. As an initial matter, there are no directly comparable cases or civil penalties because Lack's is the *only* beach safety services business in the country to employ dual role lifeguarding and to knowingly provide lifeguard protection and beach safety in violation of the USLA's standards of care. Indeed, Lack's practices were so offensive to the accepted industry standard of care that the USLA decertified Lack's as lifeguard and beach safety provider. That said, a review of wrongful death cases involving standard of care breaches indicates the jury's award is consistent with that of similar cases. *See e.g., Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (punitive damages of \$3.9 million was not grossly excessive or unreasonable under *Gamble* factors or *Gore* guideposts); *Reeves v. Town of Cottageville et al.*; Case No. 14-11-070043 (2014) (compensatory award for wrongful death of \$7,500,000 and \$90,000,000 in punitive damages); *Givens v. Samkharadze*, Case No. 21-10-130012 (2021) (compensatory pain and suffering of \$25,000,000 and \$8,000,000 in punitive damages); *Bales v. Martinez*, Case No. 14-03-170022 (2014) (\$20,000,000 award for loss of service, \$30,000,000 in punitive damages); *see also* Ex. 6, *Brumbaugh v. Kessing et al.*, 2010-CP-08-3595 (Judge Dennis) (affirming award of \$3 million in punitive damages where actual damage award was \$500,000).

Further, referencing only a single conclusory statement on this issue, Lack's own brief fails to present any credible argument that comparable cases or civil penalties somehow counsel against

the jury's thoroughly reasoned and measured punitive damage award in this case. Considering that the *Mitchell* guideposts unequivocally confirm the reasonableness of the jury's punitive damage award, the court should affirm the award as reasonable and in accordance with the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

This is a tragic and heartbreaking case of the preventable loss of a beloved father. As shocking and horrific as the loss of Mr. Wolde was, Lack's utter lack of slight care in operating its beach safety business and complete indifference to the safety and welfare of beachgoers like Mr. Wolde is perhaps even more shocking and horrific. The evidence as recounted herein more than supports the sound rulings of this court and the jury's just and reasonable awards of survival, wrongful death, and punitive damages. As our Supreme Court has repeatedly stated: "The proper amounts to be rendered, as actual or punitive damages, are left, under our law, almost entirely to the trial jury and the trial judge."¹²⁶ Nothing in Lack's post-trial motions comes close to justify interfering with these guiding principles.

Accordingly, for the reasons set forth herein, Lacks' motions for JNOV, New Trial Absolute and New Trial *Nisi* are without merit and must be denied in their entirety.

¹²⁶ *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (quoting *Gasque v. Heublein, Inc.*, 281 S.C. 278, 287, 315 S.E.2d 556, 561 (Ct. App. 1984) (citations omitted)).

Respectfully submitted,

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Attorneys for the Plaintiff

August 22, 2022
Charleston, South Carolina

2022 AUG 22 PM 4:24
Horry County Clerk
Case# 2019CP2607075

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) CIVIL ACTION NO. 2015-CP-04-01607

Rita Joyce Glenn, Individually and as)
Personal Representative of the Estate of)
Thomas Harold Glenn, deceased,)
Plaintiff,)
vs.)
Fisher Controls, Crosby Valves and)
Carboline Company)
Defendants.)

VERDICT FORM

NEGLIGENCE

1. We the jury find that Defendant Fisher Controls International LLC was negligent, and its negligence was a proximate cause of the Plaintiff's injuries

☒ Yes

☐ No

2. We the jury find that Crosby Valve, LLC was negligent, and its negligence was a proximate cause of Plaintiff's injuries

☐ Yes

☒ No

3. We the jury find that Carboline Company was negligent, and its negligence was a proximate cause of the Plaintiff's injuries.

☐ Yes

☒ No

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Horry County, PA
COMMON PLEAS

STRICT LIABILITY

4. We the Jury find the Defendant Fisher Controls International LLC is strictly liable for selling products that proximately caused injury to Plaintiff.

☒ Yes

☒ No

CA

5. We the Jury find the Defendant Crosby Valves, I.L.C is strictly liable for selling products that proximately caused injury to Plaintiff.

☐ Yes

☒ No

6. We the Jury find the Defendant Carboline Company is strictly liable for selling products that proximately caused injury to Plaintiff.

☐ Yes

☒ No

IMPLIED WARRANTY

7. We the Jury find the Defendant Fisher Controls International LLC breached the Implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages.

☒ Yes

☐ No

8. We the Jury find the Defendant Crosby Valve, LLC breached the implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages.

☐ Yes

☒ No

9. We the Jury find that Carboline Company breached the Implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages.

 Yes

 ✓ No

10. If you answered Yes to any of Questions 1-9, please state the amount of actual damages that have been proven by the greater weight of the evidence.

\$ Tommy Glenn's Survival Damages

\$ Wrongful Death Damages

\$ Rita Glenn's Loss of Consortium Damages

11. If you answered YES to Questions 1, 2, or 3, please answer Question 11. We, the jury, find by clear and convincing evidence that the conduct of the following Defendants were willful, wanton or reckless:

a. Fisher Controls International, LLC

 ✓ Yes No

b. Crosby Valves, LLC

 Yes ✓ No

c. Carboline Company

 Yes ✓ No

Forperson

Date

1/24/18

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) CIVIL ACTION NO. 2015-CP-04-01607
Rita Joyce Glenn, Individually and as)
Personal Representative of the Estate of)
Thomas Harold Glenn, deceased,)
Plaintiff,)
vs.)
Fisher Controls, et al.,)
Defendants.)

PUNITIVE DAMAGE VERDICT FORM

12. As to the Plaintiffs' claims against the Defendant, Fisher Controls International LLC, for punitive damages, we the jury, by unanimous consent, find:

a) ☒ for the Estate of Thomas Harold Glenn, deceased, in the amount of \$ [REDACTED] punitive damages,

OR

b) ☐ no punitive damages are awarded.

Jr [REDACTED]

1/25/19

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

David L. Scheer, as Personal Representative
of the Estate of Matthew J. Scheer,

Plaintiff,

vs.

Southern Myrtle Inpatient Services, LLC,
Nirlep A. Patel, M.D., and Rachel Ash-
Bernal, M.D.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2017-CP-26-1571

VERDICT FORM

Please check one of the two options below:

1. ☒ We, the Jury, unanimously find in favor of the Plaintiff.

OR

☐ We, the Jury, unanimously find in favor of all of the Defendants.

If you find unanimously for the Defendants, you have completed your deliberations and the foreperson should sign and date at the end of the verdict form.

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

2. What percentage of the total fault do the following bear?

- Southern Myrtle Inpatient Services, LLC 100 %
 - Dr. Nirlep Patel 0 %
 - Dr. Rachel Ash-Bernal 0 %
 - Matthew Scheer* 0 %
- =100%

(Note that the any of the above may be between 0%-100% at fault, but if you are answering this question, the total percentage of fault must add up to 100%)

**If you find Matthew to have been mentally incompetent at the time he left the hospital, then he cannot be assigned any fault for his death.*

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

3. For the survival claim brought by the Estate of Matthew Scheer, list the amount of damages you find for any conscious pain, agony, sorrow, mental anguish and emotional distress suffered by Matthew Scheer as a result of Defendant(s)' negligence:

\$ [REDACTED] for the Estate of Matthew Scheer

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

4. For the wrongful death claim brought by Estate of Matthew Scheer, list the amount of damages you find for the any grief, shock, sorrow, wounded feelings, loss of Matthew's companionship and society, and loss of Matthew's advice on family matters that each parent has suffered and/or will suffer in the future as a result of Matthew's death:

\$ [REDACTED] for David Scheer

\$ [REDACTED] for Debra Scheer

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

5. Do you find that any of the Defendants acted in a grossly negligent, willful, wanton, or reckless manner, and that such conduct was a proximate cause of Matthew Scheer's death?

• Southern Myrtle Inpatient Services, LLC	☒ Yes	☒ No
• Dr. Nirlep Patel	☐ Yes	☐ No
• Dr. Rachel Ash-Bernal	☐ Yes	☒ No

PLEASE SIGN AND DATE.

[REDACTED] May 24, 2019

Please let the bailiffs know when you have finished your deliberations.

The State of South Carolina
Marlboro County

COURT OF COMMON PLEAS

Robert Kenneth Hilliard
vs.
Southern Health Partners, Inc.

Docket Number: 2016-CP-34-00202

THE VERDICT

1. MEDICAL MALPRACTICE

As to the Plaintiff's claims for medical malpractice against Defendant Southern Health Partners, Inc., asserting that the Defendant's agents breached the standard of care and proximately caused injury to Plaintiff Robert Kenneth Hilliard, please check one of the two options below:

☒ We, the Jury, unanimously find in favor of the Plaintiff.

OR

☐ We, the Jury, unanimously find in favor of the Defendant.

Go on to the next question.

2. NEGLIGENCE

As to Plaintiff's claims for negligence against Defendant Southern Health Partners, Inc., asserting that a failure to train or educate the correctional officers was a proximate cause of injury to Plaintiff Robert Kenneth Hilliard, please check one of the two options below:

☒ We, the Jury, unanimously find in favor of the Plaintiff.

OR

☐ We, the Jury, unanimously find in favor of the Defendant.

If you answered both Question 1 and Question 2 in favor of Defendant Southern Health Partners, Inc., stop deliberations. If you answered either Question 1 or Question 2 or both Question 1 and Question 2 in favor of the Plaintiff, move on to the next question.

#L#E#U#I#W#A#N#H#A#M#D#F#I#E#B#Z#Q#O#Z#U#A#N#G#&#L#&#I#Z#A#H#I#E#F#U#R#K#N#C#E#G#U#M#W#Y#V#P#L#E#A#S#S#G#A#S#E#H#Z#U#Q#U#R#B#O#Y#U#J#S#

What percentage of the total fault do each of the following bear?

- Southern Health Partners, Inc. 100 %
 - Robert Kenneth Hilliard _____ %
- =100%

(NOTE: You may assign either party 100% fault or 0% fault or anything between 0%–100% fault, but the total percentage of fault between the two parties must add up to exactly 100%).

If you find Plaintiff Robert Kenneth Hilliard greater than 50% at fault, stop here and do not answer any further questions. If you find Plaintiff Robert Kenneth Hilliard 50% at fault or less go on to the next question.

4. DAMAGES

Please state the total amount of damages, if any, sustained by the Plaintiff.

*Do not reduce the Plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the judge will compute the amount of damages for which the defendant is responsible based on the percentage of the defendant's negligence. You are to determine only the **total** amount of the Plaintiff's damages and enter that amount below.*

- a. \$ [REDACTED] for economic damages: past medical and other healthcare services;
- b. \$ [REDACTED] for non-economic damages: pain and suffering, mental and emotional anguish, loss of enjoyment of life, disfigurement, and impairment of health;
- c. \$ [REDACTED] TOTAL ACTUAL DAMAGES (*this figure should be calculated by adding 4(a) and 4(b) together for a sum total*)

If you awarded a monetary amount anywhere in Question 4, continue on to the next question.

5. Do you find that Defendant Southern Health Partners, Inc., or its agents, acted in a grossly negligent, willful, wanton, or reckless manner and that this conduct proximately caused injury to the Plaintiff? *(Please check one of the two options below.)*

☒ Yes

OR

☐ No


SIGNED BY JURY FOREPERSON, PERRY BONEY

DATE: JUNE 21, 2019

Please let the bailiffs know when you have finished your deliberations.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2017-CP-15-0423
))
Tiffany N. Provence, as Special)
Administrator for the Estate of Jose Refugio)
Licona Larios,)
Plaintiff,)
))
vs.)
))
Dominion Energy South Carolina f/k/a)
South Carolina Electric & Gas Company,)
Defendant.)

VERDICT FORM

We, the jury, unanimously find:

(1) Did Plaintiff prove, by a preponderance of the evidence, that the Defendant SCE&G/Dominion Energy breached its duty of care and, if so, was that breach a proximate cause of Jose Larios' injuries and death?

YES X NO _____

If your answer to Question 1 is NO, simply sign the verdict form and end your deliberations. If your answer to Question 1 is YES, please proceed to Question 2.

(2) Did Defendant SCE&G/Dominion Energy prove, by a preponderance of the evidence, that Jose Larios was negligent and that his negligence was the proximate cause of his injuries and death?

YES X NO _____

If you answered NO to Question 2, then proceed to Question 4. If you answered YES to Question 2, please answer Question 3.

(3) What are Jose Larios' and Defendant SCE&G/Dominion Energy's respective percentages of fault, as proven by the preponderance of the evidence? These percentages must add up to 100%.

Defendant SCE&G/Dominion Energy: 90 %
Jose Larios: 10 %

Please proceed to Question 4.

(4) Please state the total amount of damages for the Estate of Jose Larios for any conscious pain and suffering he experienced prior to his death.

_____ Dollars

Please proceed to Question 5.

(5) Please state the total amount of damages for the wrongful death of Jose Larios including grief, sorrow, mental shock, suffering, and the loss of his companionship.

_____ Dollars

Please proceed to Question 6.

(6) Do you find that Defendant SCE&G/Dominion Energy acted in a willful, wanton, or reckless manner.

YES _____

NO X

PLEASE SIGN AND DATE THE VERDICT FORM

9/27/19
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jeremiah J. Cross, deceased, by and through his) 2:15-cv-02480-BHH
Personal Representative Valerie Steele,)
)
Plaintiff,)
)
v.)
)
XPO Express, Inc. f/k/a Express 1, Inc., XPO)
Logistics, Inc., and Timothy Craig Groshans,)
)
Defendants.)
_____)

VERDICT FORM

Timothy Groshans has conceded liability for the accident. XPO Express, Inc., as the authorized motor carrier, has accepted responsibility for Mr. Groshans' actions under the doctrine of vicarious liability.

1. Do you, the jury, also unanimously find that Defendant XPO Express, Inc., was negligent and that such negligence was a proximate cause of the death of Jeremiah J. Cross?

 / YES

_____ NO

2. Do you, the jury, also unanimously find that Defendant XPO Logistics, Inc., was negligent and that such negligence was a proximate cause of the death of Jeremiah J. Cross?

 / YES

_____ NO

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3. Taking into account the combined negligence that you have determined contributed as proximate causes of the death of Jeremiah J. Cross, we the jury, unanimously find the following percentages of fault attributable to each Defendant.

NOTE: IF YOU ANSWERED "NO" TO EITHER QUESTION 1 or 2, THEN YOU MUST PLACE A ZERO BESIDE THAT DEFENDANT.

70% Timothy Craig Groshans

15% XPO Express, Inc.

15% XPO Logistics, Inc.

NOTE: YOUR NUMBERS MUST ADD UP TO 100%

4. We, the jury, unanimously find that Valerie Steele, as Personal Representative of the Estate of Jeremiah J. Cross, is entitled to actual (or compensatory) damages in the amount of _____ dollars (\$ _____) for the wrongful death claim.

5. Do you, the jury, unanimously find that Jeremiah J. Cross experienced conscious pain and suffering prior to his death?

 / YES

 NO

IF YOU ANSWERED "YES" TO QUESTION 5, THEN ANSWER QUESTION 6:

6. We, the jury, unanimously find that the Estate of Jeremiah J. Cross is entitled to damages for conscious pain and suffering in the amount of _____ dollars (\$ _____).

7. Do you, the jury, unanimously find that Plaintiff has shown by clear and convincing evidence that the death of Jeremiah J. Cross was caused by Defendant Timothy Craig Groshans' wilful, wanton, or reckless conduct?

 / YES

 NO

ENTERED FOR JURY VERDICT FORMS FILED 2018 MAY 03 11:42 AM ELEC. REC. CLERK, COURT OF APPEALS, 1000 N. 1ST ST., SUITE 100, TAMPA, FL 33602-1000

ONLY ANSWER QUESTION 8 IF YOU ANSWERED "YES" TO QUESTION 1:

8. Do you, the jury, unanimously find that Plaintiff has shown by clear and convincing evidence that the death of Jeremiah J. Cross was caused by Defendant XPO Express, Inc.'s wilful, wanton, or reckless conduct?

____ YES
____/____ NO

ONLY ANSWER QUESTION 9 IF YOU ANSWERED "YES" TO QUESTION 2:

9. Do you, the jury, unanimously find that Plaintiff has shown by clear and convincing evidence that the death of Jeremiah J. Cross was caused by Defendant XPO Logistics, Inc.'s wilful, wanton, or reckless conduct?

____ YES
____/____ NO

Please have the jury foreperson sign and date below.

Jury Foreperson
3 MAY 2018

Date

PLEASE NOTIFY THE BAILIFF WHEN YOU HAVE COMPLETED ALL THREE VERDICT FORMS.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
Wanda Elaine Malmede Holland,)
Deceased, by and through her)
Personal Representative,)
Tonya Brumbaugh,)
Plaintiff,)
v.)
Chad Wayne Kessing, Sr.,)
Individually, Wholesale)
Transmissions & Auto Repair, GHA)
LLC, Gary Denaux, Steve English,)
John Goss and Gary Gorey,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NUMBER: 2010-CP-08-3595

**SUPPLEMENTAL ORDER
ON PUNITIVE DAMAGES**

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

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This case came before the Court for a trial by jury on June 17, 2013 and on June 18, 2013 the jury returned a verdict in favor of the Plaintiff for Five Hundred Thousand (\$500,000.00) Dollars in actual damages and Three Million (\$3,000,000.00) Dollars in punitive damages. On June 26, 2013, Defendant Kessing, by and through his counsel, timely filed a motion requesting this Court to set aside the jury's verdict and grant Defendant Kessing a judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial nisi remittitur. On July 25, 2013 the Court conducted a hearing on these matters. Present at the hearing were Peggy Urbanic, Esquire, (attorney for the Defendant) and W. Mullins McLeod, Jr., and James B. Moore (attorneys for the Plaintiff.) The Court set aside significant time for both parties to be heard on the Defendant's post-trial motions. In addition to hearing oral arguments the Court considered the memorandums of law filed by both parties. At the conclusion of the hearing the Court denied

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each of the Defendant's post-trial motions. In doing so, the Court conscientiously stated the reasons and basis for his denial of the Defendant's motions. The grounds for the Court's decision were made on the record while both parties were present in the courtroom and are incorporated by reference herein.

In addition to hearing the Defendant's post-trial motions on July 25, 2013 the Court conducted a post-trial review of the punitive damages award in this case. A post trial review of a punitive damages award must consider the three Gore guideposts: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009); B.M.W. of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996). In addition, the eight Gamble factors are relevant insofar as they add substance to the three Gore guideposts. Mitchell, 385 S.C. at 70, 686 S.E.2d at 176; Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). The eight Gamble considerations are as follows: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354.

As to the reprehensibility of the Defendant's conduct, the Court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the

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conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. State Farm v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003). Here, the first, second, and fourth State Farm factors are particularly relevant. First, Defendant's actions proximately caused the death of a forty-eight (48) year old mother and grandmother. It was undisputed during the trial that her death was a direct result of the incident caused by Defendant's conduct. As to the second State Farm factor, Defendant Kessing demonstrated a complete and total disregard for the safety of others. The evidence showed that Defendant Kessing suffered from seizures since childhood. During the Plaintiff's case in chief, Defendant Kessing admitted he knew it was unsafe for him to drive, and despite this knowledge, he made the conscious decision to drive anyway. He testified that his employer had a parts runner and that his mother-in-law worked as a secretary for Wholesale Transmissions. Nonetheless, he frequently drove to get parts because he was compensated based upon the number of transmissions he rebuilt. Perhaps the most telling testimony was when Defendant Kessing testified he would not allow his children to ride in the car with him due to the risk associated with seizure activity.

It was clear from the Defendant's testimony that he had little sympathy for Ms. Holland's death. Defense counsel attempted to argue to the jury that Defendant Kessing was remorseful; however, the Defendant never testified that he was sorry for the accident or the resulting death. In fact, Plaintiff's counsel asked the Defendant the following open-ended question: "as you sit here today is there anything you would change." Rather than taking this opportunity to tell the jury that the collision was an accident or that he was not indifferent towards the safety of others the Defendant testified he wouldn't do anything differently.

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As to the fourth State Farm factor, Defendant Kessing's indifference towards the safety of others was also demonstrated by his past driving record and his acknowledgement that he knew it was dangerous for him to drive a car. Therefore, the conduct that caused Ms. Holland's death was not an isolated incident but rather had been repeated over a period of years that preceded the accident at issue. Therefore, the duration of the conduct, the Defendant's awareness and the existence of similar past conduct are all factors that justify the punitive damages award.

As to the second Gore guidepost, the Court finds that the ratio of actual or potential harm to the punitive damages award was reasonable. The Supreme Court has remarked that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 410, 123 S.Ct. at 1516. Further, when determining the reasonableness of a ratio, the Court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Mitchell, 385 S.C. at 586-87, 686 S.E.2d at 184-85. Regarding the defendant's ability to pay, although relevant, the wealth of a defendant in assessing punitive damages is not controlling. Welch v. Epstein, 342 S.C. 279, 307, 536 S.E.2d 408, 423 (Cl. App. 2000). "[E]vidence of [a] defendant's net worth is not a prerequisite to a punitive damage award." Id. In fact courts have cautioned that "courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth." Mitchell, 385 S.C. at 596, Note 8.

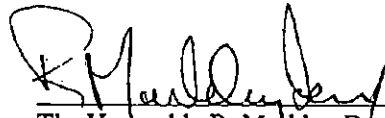
Regarding the ratio consideration, the jury's punitive damages award was six (6) times greater than their award of actual damages. This ratio does not exceed a single-digit ratio and is reasonably related to the Plaintiff's harm. Therefore, this ratio is well within the limits of due process. Furthermore, the punitive award in this case was necessary to deter Defendant Kessing and others from knowingly violating the law and driving on our State's roadways when they know or should know they are a danger to others. The jury heard evidence that Defendant Kessing had had his license revoked or suspended on occasions prior to the accident at issue. They also considered evidence that the Defendant consciously chose to violate the law when he knew it was dangerous for him to do so. Trooper Elliott testified during the Plaintiff's case-in-chief regarding the State's public safety interest in laws to protect the public and make our roadways safe. The jury could have also concluded the State had done all it could do by suspending or revoking the Defendant's license and in placing restrictions on his driving. Nonetheless, he ignored the State's efforts. Therefore, the jury could reasonably have concluded the only way to get the Defendant to stop driving was to award punitive damages.

As to the third factor, which is the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, this Court finds that this factor has been satisfied as well. This Court has examined several comparable cases and finds that the punitive damages awarded in the present case are similar to civil penalties imposed in these comparable cases. See Cody P. v. Bank of Am., N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (finding ratio of punitive to actual damages of 7.69 to 1 was reasonable); Hundley ex rel. Hundley v. Rite Aid of S.C., Inc., 339 S.C. 289, 317, 529 S.E.2d 45, 63 (Ct. App. 2000) (finding a punitive damages award of \$1,000,000 to the Hundleys, which is more than 200 times the actual damages award of \$20,000, was not excessive, as the Supreme Court has

acknowledged, "[i]ndeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards."); James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006) ("Punitive damages award in the amount of [\$]1,000,000 in insureds' bad faith action against homeowners insurer, which was 6.82 times the actual damages award, was reasonably related to the actual harm suffered and did not violate due process."). Furthermore, the Court notes the Defendant was not charged criminally and therefore the only punishment he will ever receive for taking the life of an innocent driver is the punitive damages verdict rendered by the jury. Thus, this Court finds the third Gore guidepost has been met.

IT IS THEREFORE ORDERED that the punitive damages award in this case is reasonable and not grossly excessive or unduly liberal, was not actuated by passion, caprice, or prejudice, or some other influence outside of the evidence, does not violate due process, and is hereby upheld as a result of this Court's post-trial analysis.

AND IT IS SO ORDERED this 9th day of August, 2013.



The Honorable R. Markley Dennis, Jr.
Judge, Ninth Judicial Circuit

August 9, 2013
Moncks Corner, SC