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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

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

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF ISSUES ON APPEAL

Zerihun Wolde lost his life in a terrifying 10-15-minute struggle to save his daughter from a rip current at a public beach where Lack's Beach Service was entrusted—but failed—to provide lifeguard services. Following a jury verdict against Lack's for its unsafe practices resulting in Mr. Wolde's death, Lack's appealed, presenting the following for the Court's consideration:

1. Whether, under the highly deferential *any* evidence standard, the trial court correctly denied directed verdict and JNOV where:

    i. Evidence that the lifeguard closest to Mr. Wolde provided no aid during the 10-15-minute drowning event because he was distracted by selling beach concessions created a jury question as to Lack's dual-role practice;

    ii. Evidence that standard of care violations by Lack's prevented a proper lifeguard response created a jury question as to proximate cause;

    iii. Testimony from Wubit, who was clinging to her father during the drowning event, established the drowning was not instantaneous and further showed Mr. Wolde endured tremendous pain and suffering, creating a jury question as to the survival claim; and

    iv. Evidence that Lack's willfully employed unsafe practices, including dual-role lifeguarding, despite knowledge of its dangerous risk to beachgoers, created a jury question as to whether Lack's acted recklessly for purposes of punitive damages?

2. Whether, under the highly deferential new trial standard, and giving substantial deference to the jury's damages awards, this Court should affirm the denial of a new trial where:

    i. There were no errors in the admission of evidence, the bifurcated nature of the trial, or to the jury instructions, much less any prejudice sufficient to warrant a new trial;

    ii. The jury's award of wrongful death damages was reasonable and supported by the evidence;

    iii. The jury's survival award was reasonable given the detailed testimony of Wubit, who could not only see and hear Mr. Wolde's agonizing struggle to breathe but could feel his pain while clinging to his body; and

    iv. The jury's punitive damages award, which was less than a 1:1 ratio to compensatory damages, was reasonable to deter Lack's from repeating the unsafe and dangerous practices that resulted in Mr. Wolde's untimely death?

3. Whether this Court, on preservation grounds, should decline to address the constitutionality of punitive damages where Lack's waived its right to challenge the award on this ground by failing to raise the issue at trial, and even if preserved, the award satisfies the factors set forth in *Mitchell* and the punitive damages statute?

STATEMENT OF THE CASE

This is an appeal of a $20.73 million verdict against Appellant Lack's Beach Company, Inc. ("Lack's") whose failure to provide adequate beach safety practices and lifeguard protection resulted in the tragic death of Zerihun Wolde ("Mr. Wolde"). Mr. Wolde, a 41-year-old father of four, drowned on August 24, 2018, off a popular stretch of Myrtle Beach where Lack's was entrusted—but failed in Mr. Wolde's case—to provide lifeguard protection. Having traveled to Myrtle Beach for a summer vacation, the Wolde family never anticipated the risk of drowning at a public guarded beach, much less that Mr. Wolde and two of his children would struggle in a rip current for an agonizing 10-15 minutes and *not a single* lifeguard would come to their aid.

Mr. Wolde's drowning was no accident. The lifeguards guarding the beach that day were understaffed, undertrained, and unacceptably required by Lack's to perform dual conflicting responsibilities, *i.e.*, that of simultaneously providing lifeguard protection while also transacting commercial sales—a clear violation of the known standard of care. What's more, Lack's knew that its dual-role practice was unsafe and that it violated the standard of care set by the United States Lifesaving Association ("USLA").

Critically, Lack's also knew that its dual-role practice violated the very franchise agreement that authorized Lack's to operate. Lack's Franchise Agreement with the City of Myrtle of Beach required Lack's to provide lifeguard protection for the safety of residents and visitors. In exchange, the Agreement granted Lack's the exclusive right to sell concessions on the beach. The Agreement, however, was abundantly clear: these two functions were separate and distinct. Nowhere in the Agreement is there any mention or even hint at authorizing lifeguards to engage in commercial sales. Indeed, authorizing lifeguards to simultaneously perform sales is fundamentally against the sole purpose of the arrangement, *i.e.,* to "protect[]" Myrtle Beach's

tourist and residential population through an "effective water safety program." Yet, despite having no authority to do so, Lack's engaged its lifeguards in the hazardous dual-role practice—and it did so with keen awareness of its known safety risks.

Lack's also knew that dangerous rip and longshore currents on August 24, 2018 posed a serious threat to the safety of beachgoers. This threat was especially dangerous considering Lack's understaffing—specifically, being short a lifeguard in the area where Mr. Wolde drowned. Yet, despite the known safety risks, Lack's continued its unsafe practices and took no measures to guard against the risks present. Had Lack's operated the "effective water safety program" the Franchise Agreement required, there is little doubt this tragedy would have been avoided.

Respondent Meswaet Abel ("Ms. Abel"), Mr. Wolde's fiancé and mother to their four children, filed this wrongful death action against Lack's and the City of Myrtle Beach on November 1, 2019. As to Lack's, Ms. Abel alleged Lack's knowingly breached numerous standards of care in operating its beach safety services and that these breaches were a proximate cause of Mr. Wolde's death. The case was tried before a jury in Horry County on July 25 – 29, 2022. At the conclusion of the trial, the jury entered a verdict in favor of Ms. Abel and awarded Mr. Wolde's surviving children $3,730,000.00 in survival damages, $10,000,000.00 in wrongful death damages, and $7,000,000.00 in punitive damages against Lack's. The $20,730,000.00 judgment was entered against Lack's on August 1, 2022.

Lack's timely filed post-trial motions seeking judgment as a matter of law notwithstanding the jury's verdict, or, in the alternative, a new trial absolute, or, failing that, a new trial *nisi remittitur*. The trial court denied Lack's post-trial motions by order dated April 10, 2023.[1] Lack's

[1] Lack's also filed a conditional post-trial motion to reduce the damages award under the novel theory that as a third-party contractor to a government entity, Lack's should be granted derivative immunity under the South Carolina Tort Claims Act. None of these arguments were raised to the

noticed this appeal on April 11, 2023. Following several extension requests and an unsuccessful motion by Lack's to remand this appeal,[2] Lack's initial brief was submitted on October 30, 2023. Ms. Abel submits the instant opposition brief requesting this Court to affirm the verdict and damages awards.

STATEMENT OF FACTS

A. Lack's lifeguard and beach concessions business

Since 1974, Lack's Beach Service, Inc. has contracted with the City of Myrtle of Beach to provide lifeguard protection at the City's public beaches. In exchange for this service, Lack's enjoyed the lucrative privilege of operating as the sole vendor for beach concessions on those same public beaches. (R. p. 2144; p. 476, lines 18-22). The Franchise Agreement was clear, however, that Lack's water safety services, *i.e.,* lifeguard services, were separate and distinct from its beach concessions business. (*Id.*). But Lack's ignored this language of the Agreement. Lack's also ignored prevailing industry standards. Specifically, Lack's was the *only* beach safety company in the country to employ a system referred to as "dual-role," a practice whereby Lack's requires its lifeguards to simultaneously take on conflicting roles of (1) performing lifeguarding duties, *and* (2) renting out beach equipment for company profit while receiving a commission based on sales generated. (R. p. 449, lines 9-12).

Unaware of Lack's dual-role practice, the USLA recognized Lack's as a certified lifeguard service for years. Then in 2007, after visiting the beach and witnessing Lack's dual-role practice firsthand, USLA President Chris Brewster formally condemned the method as fundamentally in

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trial court prior to Lack's post-trial motions. The trial court never addressed this motion or Lack's novel legal position, and Lack's never filed a motion for reconsideration to obtain a ruling.

[2] Within days of its initial briefing deadline, Lack's moved to remand this case to the trial court to obtain a ruling on the conditional motion. This Court denied Lack's motion on August 29, 2023.

conflict with a lifeguard's primary role: protecting at risk swimmers by maintaining constant observation of the water. (R. p. 620, lines 5-17; p. 627, line 5-p. 630, line 18; p. 635, lines 16-21; p. 637, lines 18-25; p. 646, line 5-p. 648, line 14). Brewster observed that a lifeguard distracted by selling merchandise, performing customer service, and engaging in related administrative functions cannot properly watch for and protect swimmers in distress. (*Id*.). The USLA thereafter stripped Lack's of its lifesaving certification. (R. p. 630, line 3-p. 633, line 23; p. 637, line 18-25).

Lack's dual-role practice was also in violation of the Franchise Agreement. Nowhere in the Agreement is there any reference to, or even tacit authorization of, engaging lifeguards in simultaneous dual roles. (R. pp. 2144-2158).[3] In fact, this practice runs counter to the very purpose of the Agreement: "to protect[] [Myrtle Beach's] tourist and residential population through an efficient and effective water safety program," the "successful implementation" of which is "imperative along the City's twelve miles of oceanfront." (R. p. 2144, lines 3-8; p. 475, line 24-p. 476, line 5). Despite violating the Franchise Agreement and USLA industry standards, Lack's continued its use of the dual-role method—notwithstanding the known dangers posed by lifeguards distracted by selling concessions for profit.

B. The drowning incident and failed lifeguard response

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. (R. p. 371, lines 14-22). Around 12:00 p.m. on the following day, the family went to the beach and settled in near lifeguard stand L21. (R. p. 373, line 24-p. 375, line 24). As Ms. Abel watched the couple's two youngest

[3] For example, the Agreement references the sale of beach equipment after hours but requires lifeguards to be "on duty *at all times* that beach equipment is on the beach." (R. p. 2144, lines 46-49). If the Agreement contemplated lifeguards renting equipment, requiring that they also be on duty would be superfluous. Further, the Agreement specifically states that "Franchisee"—not lifeguards—"may rent beach equipment." (*Id*.).

children play in the sand, Mr. Wolde took his son, Adam, and his daughter, Wubit, to the water's edge to play in the surf. (R. p. 376, lines 15-17). Once in the water, the children began playing and jumping in the waves with their father. (R. p. 682, line 20-p. 683, line 7). According to Adam, they were in water that came up to his waist. (R. p. 682, lines 20-24). They felt comfortable and believed the swimming conditions were safe. (R. p. 682, line 25-p. 683, line 7; p. 724, line 12-p. 725, line 21).

However, the conditions were anything but safe. At 10:00 a.m. that morning, Lack's had received a warning from the National Weather Service that hazardous conditions were present, including deadly rip and longshore currents. (R. p. 2315). Yet, no red flag or warning signs were present on the lifeguard stand at L21 where the Wolde family entered the water. (R. p. 375, line 11-p. 376, line 4; p. 378, line 13-p. 379, line 9). Nor was there any effort by Lack's to close the area of the beach at risk. And while there should have been at least four lifeguards monitoring the water, only three lifeguards were on duty. (R. p. 504, lines 3-6). What's more, the L21 lifeguard tower closest to where the Woldes entered the water was unattended, presumably due to a scheduled lunch break. Making matters worse, the Lack's lifeguards serving L20 and L22 were supposed to cover the L21 section but these lifeguards were simultaneously tasked with selling beach rentals.

Meanwhile, Mr. Wolde and his two children proceeded to wade into the surf. While playing in the surf, a rip current began slowly pulling the children out to sea, causing Adam and Wubit to struggle and hang on to their father. (R. p. 683, lines 16-24; p. 725, line 23-p. 726, line 6). According to Adam and Wubit, they were unintentionally getting deeper and deeper. (*Id.*). As they got deeper in the water, they became scared. Mr. Wolde and the children began yelling for help. (R. p. 684, line 12-p. 686, line 5; p. 726, line 7-p. 727, line 11). After trying to swim toward

the shore, Adam, who was pulled out in front of his father and sister, began swimming to his left. (R. p. 686, lines 6-12). Eventually, he was able to swim out of the rip current and make it back to shore. (R. p. 686, line 13-p. 687, line 10). As Adam approached the beach, Wubit continued to struggle and hold onto her father. (R. p. 687, lines 11-15). Wubit and Mr. Wolde continued to yell and wave their arms for help. (R. p. 729, lines 8-14).

As they struggled, it became obvious to bystanders (but not lifeguards) that there was a problem. (R. p. 687, lines 1-10; p. 729, lines 13-16). While clinging to her father, Wubit witnessed him begin to go under and then resurface, where he gasped for air and yelled for help at each interval. (R. p. 727, line 17-p. 728, line 20). This process of going under, resurfacing, gasping for air and yelling for help went on for a long period of time. (R. p. 731, lines 18-24; p. 738, lines 1-4). Eventually, bystanders entered the water and pulled Mr. Wolde and Wubit to shore. (R. p. 687, lines 1-10; p. 729 lines 13-16). But by the time they finally made it to shore, it was too late for Mr. Wolde. He was later pronounced dead of asphyxia due to drowning. (R. p. 611, lines 11-14). Wubit estimated that the event lasted between ten and fifteen minutes, yet *not a single* lifeguard came to Mr. Wolde's aid while they struggled in the water nor did any lifeguard assist in pulling the Woldes to safety. (R. p. 689, lines 13-19; p. 731, lines 10-24).

C. Wrongful Death Action Against Lack's

Following Mr. Wolde's death, Ms. Abel filed suit against Lack's, alleging Lack's 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. The case was tried before a jury in Horry County during the week of July 25-29, 2022.

At trial, Ms. Abel presented evidence and testimony that Lack's received a warning from the National Weather Service that hazardous conditions were present on the day of the incident.

(R. p. 2315). Despite the National Weather Service warning, Lack's presented no witnesses who had any personal knowledge of having provided any warnings or efforts to guard against the dangerous swimming conditions present that day. Instead, numerous witnesses testified that there were no warnings and no indication that Lack's took measures to guard against the hazardous swim conditions or prevent swimmers from entering the water. (R. p. 337, lines 9-25; p. 375, line 20-p. 376, line 4; p. 379, lines 7-9 and 17-24; p. 2315, pp. 2317-2322).

Lack's presented no evidence that the lifeguards stationed near the Woldes were properly performing their lifeguard duties of scanning the water for signs of distress or that any lifeguard was properly positioned on the tower to expand their vantage point to properly watch for distressed swimmers or signs of strong rip currents. Again, Mr. Wolde struggled for a long period estimated at ten-to-fifteen minutes. (R. p. 731, lines 18-22). At no time during this prolonged period did any lifeguard come to Mr. Wolde or his children's aid. (R. p. 689, lines 13-19; p. 731, lines 10-17).

Instead, Julian Chandler, a bystander who later assisted Mr. Wolde to shore, testified that around the time of the incident a male lifeguard was standing in the umbrella line talking to beachgoers with his back to the ocean. (R. pp. 2276-77). Chandler estimated this took place about five to ten minutes before he heard other bystanders calling for help—at which time, the Wolde's would have already been in distress for at least several minutes. (*Id.*). Other than mere speculation, Lack's presented no direct evidence to challenge Chandler's eyewitness testimony nor any direct evidence that its lifeguards were engaged in anything other than selling beach concessions at the time Mr. Wolde and his children were in distress.

Lack's did not call an expert to rebut Ms. Abel's expert's testimony that Lack's violated the prevailing standard of care by: (1) engaging in dual role lifeguarding; (2) failing to properly train and supervise the lifeguards; (3) failing to close areas for swimming or provide adequate

warning of the hazardous conditions; and (4) allowing lifeguard towers to go unattended with no other safety strategy to ensure constant, proper water observation. (R. pp. 2315-2322). For instance, Lack's was required to provide a minimum number of lifeguards per stand who were both tested and certified, yet it failed to do so. Lack's owner, George Lack, further admitted that being understaffed as they were on the day Mr. Wolde drowned could make all the difference between life and death. (R. p. 593, lines 14-18).

Ms. Abel's expert, Dr. Thomas Griffiths, went on to testify that Lack's failed to take required and reasonable measures to guard against the safety risks posed by the rip and longshore currents that day. (R. p. 2315, 2317). Dr. Griffith's further testified that Lack's dual role practice was inherently unsafe and contrary to a lifeguard's preeminent duty, *i.e.,* to maintain a watchful eye on the water. (R. p. 2313). Evidence was also presented that Lack's, having lost its lifeguard certification in 2007 because of its controversial dual-role practice, was on notice that dual-role lifeguarding posed a dangerous safety risk to swimmers yet it continued the practice anyway. (R. p. 637, lines 18-25). Lack's did not call a single witnesses who had personal knowledge that Lack's complied with the standard of care on the day Mr. Wolde drowned.

At the close of Ms. Abel's case, Lack's moved for directed verdict on the issues of dual role negligence, proximate cause, punitive damages, and as to Ms. Abel's survival claim. The trial court denied the motion finding the evidence created issues of fact to be decided by the jury. At the conclusion of the trial, the jury found against Lack's and entered a verdict in favor of Ms. Abel.

The jury awarded Mr. Wolde's surviving children $3,730,000.00 in survival damages, $10,000,000.00 in wrongful death damages, and $7,000,000.00 in punitive damages. Lack's filed post-trial motions challenging the verdict and the amount of the awards. The trial court denied Lack's post-trial motions on April 10, 2023. This appeal follows.

ARGUMENT

Despite the numerous issues raised, this is not a complicated appeal. This is a simple case where the jury was confronted with overwhelming evidence as to Lack's multiple failures, some of which Lack's knew posed a serious threat of harm. The jury chose to believe Ms. Abel's testimony and evidence, and it did so properly. The jury calculated damages awards based on its view of the evidence, which was within its province. There were no evidentiary errors, much less any that rise to the level of prejudice to warrant a new trial. Simply put, this appeal presents no error or abuse of discretion by the trial court, nor any prejudicial trial event that would call into question the jury's carefully considered verdict. This Court should affirm.[4]

I. The trial court properly denied Lack's motions for directed verdict and JNOV.

Unless there is *no evidence* to support the claim or verdict, the trial court's rulings on directed verdict and JNOV must be affirmed. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004) (providing the appellate court will reverse only where there is no evidence to support the ruling below). This highly deferential standard of review accords necessary deference to the trial judge, who saw the witnesses, heard their testimony, and evaluated the evidence during the trial of this case. *See id.* Lack's appeal fails to show that the evidence was somehow deficient such that there was not at least some evidence to warrant submitting Ms. Abel's case to the jury.[5]

A. The trial court correctly submitted dual-role negligence to the jury because witness testimony and sales records admitted at trial established a direct link between Lack's dual-role practice and the absence of any lifeguard response.

[4] In addition to the arguments in this brief, Respondent requests that this Court affirm the order of the trial court for any ground(s) appearing in the record as provided by Rule 220(c), SCACR.
[5] Should this Court disagree as to the evidence on JNOV, Respondent respectfully requests a new trial pursuant to Rule 50(d), SCRCP.

Bystander Julian Chandler provided *direct* evidence that the lifeguard at L-22 was engaged in commercial activity during the time of Mr. Wolde's distress. Chandler testified the L-22 lifeguard was on the beach talking to two people at the lifeguard stand near the umbrella line with his back to the ocean. (R. pp. 2276-77). Chandler stated he made this observation five to ten minutes before he heard calls for help from bystanders who were attempting to pull Mr. Wolde and Wubit to shore. (*Id*.). Chandler's testimony, coupled with Wubit's 10–15-minute estimate of the duration of the incident, places the time of Mr. Wolde's distress at the precise time Chandler observed the L-22 lifeguard with his back to the water talking to customers in the umbrella line. (R. p. 731, lines 18-24). That the L-22 lifeguard had his back to the ocean and 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 with his back to the ocean, 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. (R. p. 488, line 25-p. 489, line 2). Likewise, lifeguard protection on the tower is 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.

The evidence likewise proved that Lack's required its staff to: (1) make commercial sales, (2) track all sales activity, (3) update sales records immediately after a transaction, and (4) maintain a seating chart—all *in addition to* their lifesaving duties. (R. p. 2121). What's more, Lack's also

provided financial incentives in the form of commissions to motivate its staff to make sales. (R. p. 449, lines 9-12). Indeed, the sales totals for August 24, 2018, established that Lack's lifeguards at L-22, L-21, and L-20 made numerous sales that day. (R. p. 2160).

Testimony from Ms. Abel's expert, Dr. Griffiths, further links the dual-role practice to the absence of necessary lifeguard aid: "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." (R. p. 2352). 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." (*Id*.). These sales receipts establish that the lifeguards that were supposed to be protecting Mr. Wolde instead made $1,173.50 in sales. (R. p. 2160). This testimony, the sales records, and the testimony of Julian Chandler, viewed in the light favorable to Ms. Abel and with all inferences construed in her favor, more than satisfies the *any* evidence standard requiring this Court to affirm the denial of directed verdict and JNOV on dual-role negligence. *See Elam*, 361 S.C. at 27–28, 602 S.E.2d at 782 (providing the appellate court will reverse only where there is no evidence to support the ruling below).

i. Lack's arguments regarding dual-role negligence are meritless.

Lack's takes the untenable position that it should bear no responsibility for Mr. Wolde's tragic and untimely death simply because it followed the requirements of its Franchise Agreement with the City of Myrtle Beach. (Appl. Brief, p. 10). This argument strains credulity considering there was no evidence Lack's even complied with the Franchise Agreement. The evidence at trial instead set forth a different narrative: that Lack's willfully violated the express terms of the Franchise Agreement in numerous particulars.

Further, merely a gauge of *minimum* requirements, the Franchise Agreement is hardly the equivalent of a standard of care. It is well-settled that a party's duty of care to a third party exists independently of any contract.[6] *Dorrell v. S.C. Dep't of Transp.,* 361 S.C. 312, 605 S.E.2d 12 (2004). No contract relieves a private lifeguarding company of its duty to provide lifeguard services with due care. That Lack's relies on the Franchise Agreement to absolve it of its duty of due care underscores the utter absence of care in this case.

What's more, the Franchise Agreement *does not* authorize dual-role nor does it reference the possibility of lifeguards performing beach concessions, *anywhere*. (R. pp. 2144-2158). George Lack even concedes that the Agreement bears no mention of dual-role and further concedes that it instead references lifeguards and beach concessions as distinct and separate functions throughout. (R. p. 477, line 2-p. 480, line 25; p. 483, lines 13-15; 484, lines 5-18; p. 487, line 22-p. 488, line 19). City Manager John Penderson likewise conceded that the Franchise Agreement does not specifically authorize dual-role, agreeing that the term lifeguard appears nowhere in the section authorizing beach concessions. (R. p. 780, lines 17-25). Lack's argument to the contrary is utterly disingenuous.

Given Lack's disregard for the language of the Franchise Agreement with regard to dual-role, it is not surprising that Lack's further neglected to meet the Agreement's minimum requirements. Though Lack's maintains, at page 11 of its brief, that it ensured "its lifeguards had the City-required qualifications at the time of hiring and underwent the necessary training," this was not supported by the evidence. Per the Franchise Agreement, each lifeguard was required to

[6] In *Dorrell*, the South Carolina Supreme Court addressed this precise issue, finding that a paving company's contract with SCDOT did not limit its liability for its negligence causing injuries to third parties as result of motor vehicle accident; the contract specifically required the paving company to take action necessary to protect the safety of the traveling public, and the paving company had a duty of care to third parties that was independent of its state contract.

"complete a course consisting of a total of not less than 40 hours in open water lifesaving which meet the criteria of the [USLA]." (R. p. 2146, lines 11-14). Lack's provided *no evidence* that such training ever took place. Rather, the evidence showed that many of the lifeguards, which mostly comprised Eastern European students, were *not even in the country* during Lack's alleged training. (R. p. 977, line 1-p. 982, line 15). USLA representative Chris Brewster further discredited Lack's training, testifying that Lack's lifeguards could *never* satisfy USLA training standards because the lifeguards were trained to perform dual roles—a practice the USLA condemned as unsafe and in direct conflict with the primary job of a lifeguard. (R. p. 620, lines 5-17; p. 637, lines 18-25; p. 646, line 5-p. 648, line 14).

Lack's argument that the South Carolina Code sanctions the use of lifeguards for conducting beach sales is equally disingenuous. Lack's asserts on page 10 of its brief that "the 'dual role' arrangement was expressly permitted by S.C. Code Ann. § 5-7-145." However, the South Carolina Code contains no mention of lifeguards performing dual roles. *See* S.C. Code Ann. § 5-7-145(A)-(B). Rather, § 5-7-145 merely permits a municipality to outsource lifeguard and other safety services to a private company, and further permits the municipality to grant the private company the exclusive right to rent beach equipment on the beach. Nowhere in § 5-7-145 is there any acknowledgment of the dangerous dual-role practice much less any reference to sanctioning this practice. It further strains credulity to believe the General Assembly would authorize dangerous lifeguarding practices in violation of the well-known standard of care. (*See* R. p. 615, line 15-p. 617, line 2; p. 618, line 22-p. 620, line 17) (lifeguards are not to be assigned tasks other than public safety; assigning lifeguards to watch the water *and* sell beach chairs is inconsistent with USLA standards).

As to Lack's critique of Chandler's testimony, this too is a mischaracterization. Chandler testified he saw the lifeguard talking to beachgoers—engaged in what appeared to be some form of beach concessions or related service—approximately five to ten minutes prior to when he heard yells for help by bystanders. As Wubit and Adam testified, the drowning event was an excruciating 10-15 minutes. Thus, by the time the bystanders called for help, Mr. Wolde, Wubit and Adam would have already been in distress for a prolonged period of time. Chandler's testimony, therefore, directly links the lifeguard's failed response to commercial activity occurring around the time of the Wolde's distress.

To the extent Lack's presented competing testimony that the lifeguard may have been explaining the flag system, it was for the jury to decide whose testimony to believe. *See Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("In considering a JNOV, the trial [court] is concerned with the existence of evidence, not its weight."). Likewise, Lack's attempt to downplay Chandler's testimony by arguing it was speculative that he observed a Lack's lifeguard similarly fails. Any conflict in the evidence presented goes to its weight, which is appropriately reserved for the jury. *Id*. That the jury ultimately determined Chandler's testimony more credible than Lack's is not a basis for challenging the denial of JNOV—it's quite the opposite. *See id.* ("When 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."). Resolving conflicts in the evidence is the seminal job of the jury and the precise reason directed verdict and JNOV are inappropriate in this matter.

Finally, Lack's argument that its personnel intervened during resuscitation efforts on shore is wholly irrelevant. There is no claim or liability question regarding resuscitation efforts. Notwithstanding, this delayed intervention was not until after the rescue efforts by bystanders—

none of whom could find a single lifeguard to assist. Because the referenced evidence supports the inference that a Lack's lifeguard was engaged in the profit generating role of his job instead of responding to Mr. Wolde's distress, the trial court properly denied Lack's motions for directed verdict and JNOV as to dual-role negligence.

B. The trial court correctly submitted proximate cause to the injury based on evidence that Lack's standard of care breaches prevented a proper lifeguard response.

i. Only the grounds raised by Lack's at trial are preserved for appellate review, neither of which supports directed verdict or JNOV.

When Lack's moved for directed verdict on proximate cause at trial, Lack's referenced only two grounds: (1) that "there's no amount of time that the family struggled;" and (2) that there was "no evidence that a lifeguard could get from his or her location to Mr. Wolde to change the outcome." (R. p. 760, line 25-p. 761, line 8). These two grounds, being the only grounds raised at trial, define and limit the scope of this Court's review. Thus, any JNOV arguments appearing in Lack's initial brief but *not raised* at trial are not preserved for review. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 170–71 (2012) (holding grounds not raised in directed verdict motion are not preserved on appeal).

The trial court correctly found sufficient evidence of both time and proximity such that the issue of proximate cause was appropriately submitted to the jury. As noted above, testimony from Wubit and Adam established the drowning event lasted a long period of time and was estimated to have lasted an excruciating 10-15 minutes. (R. p. 731, lines 18-24). Ten to fifteen minutes is certainly more than enough time for properly staffed and trained lifeguards—who would be constantly scanning the water, as opposed to having their backs to the ocean performing commercial sales—to see the Wolde family's visible distress and hear their cries for help. Indeed, properly staffed, trained, and undistracted lifeguards would certainly have enough time to at least

attend to the bystanders unanswered calls for help. (R. p. 728, lines 1-4). Further, based on Wubit's testimony they were positioned close enough to see the beach and bystanders. (R. p. 728, lines 13-20). There is simply no excuse why a properly trained lifeguard would not be able to see or reach Mr. Wolde when untrained bystanders could. (R. p. 338, lines 17-24; p. 339, lines 3-10).

Further, based on Dr. Griffiths' testimony that Mr. Wolde was a distressed swimmer before he drowned, Lack's lifeguards should have observed his distress with enough time to respond. (R. pp. 2318-20). Lack's lifeguards, thus, could have and should have responded. Viewing this evidence in the light most favorable to Ms. Abel and construing all inferences in her favor, this evidence certainly exceeds the *any* evidence standard. This Court should, therefore, affirm the trial court's denial of JNOV as to proximate cause. *See Hurd v. Williamsburg Cty.*, 363 S.C. 421, 427-28, 611 S.E.2d 488, 492 (2005) (questions of proximate cause are traditionally for a jury to decide).

ii. Lack's arguments challenging standard of care and causation evidence are unpreserved but, even if preserved, the trial court committed no error.

Though Lack's provided no expert of its own, Lack's scrutinizes the trial court's reliance on Dr. Griffiths' opinion testimony. However, none of these challenges were raised to the trial court when Lack's moved for a directed verdict. Accordingly, they are not appropriately before this court. *See RFT Mgmt. Co.*, 399 S.C. at 331-32, 732 S.E.2d at 170–71 (holding grounds not raised in directed verdict motion are not preserved on appeal). But even if preserved, Lack's still fails to point to any evidence suggesting the trial court erred in denying directed verdict and JNOV.

Lack's first maintains that Dr. Griffiths opinions were based on facts that were contradicted at trial; however, this is misleading. For instance, Dr. Griffiths testified that if a lifeguard leaves his post unattended, he should close it down or ensure alternate coverage exists. Here, the L-21 guard who was allegedly at lunch did not have another guard to replace him, which is a violation

of the standard of care. That is not in dispute. Lack's argues, however, that there was no violation because the remaining two guards were tasked with covering the area left unattended as well as their own areas. Though Lack's may deem its alternative was sufficient, it is not in compliance with Dr. Griffiths' standard of care testimony.

Next, Lack's argues Dr. Griffiths was incorrect in stating Lack's had less than half the required "lifeguard onlys" ("LGOs") on the day of the incident. However, Dr. Griffiths actual testimony was consistent with the evidence—he stated four LGOs were required and only three were present; he also noted that Lack's manager Holly Robinson testified that six were required and based on that testimony, Dr. Griffiths was correct in stating that only half the required LGOs were present. (R. pp. 2321-22). Nonetheless, whether Lack's was understaffed by half or by one is irrelevant because Lack's admitted to being short staffed. George Lack further admitted that that being short a "lifeguard only" in the section where Mr. Wolde drowned was enough to make a difference between life and death. (R. p. 593, lines 14-18)

As to Dr. Griffiths' testimony on dual-role lifeguarding, Lack's repeats its arguments that dual-role is somehow sanctioned by South Carolina law and the Franchise Agreement. But, as discussed above, this is disingenuous. Section 5-7-145 never mentions the term dual-role much less sanctions the practice. The same can be said for the Franchise Agreement, which is *not* the standard of care. Given the frailty of these arguments, and considering the testimony and sales records referenced above, there is ample evidence that Lack's dual-role practice was a breach of the standard of care that prevented a proper lifeguard response.

Lack's further criticizes Dr. Griffiths beach closure and warning testimony but Lack's arguments go not to the substance of the testimony but to the irrelevant fact that Dr. Griffiths had not visited Myrtle Beach or personally researched the weather conditions on the day of the

drowning. Given the National Weather Service warning, there was no need for Dr. Griffiths to visit the beach or conduct research. Further, while Lack's claims it posted red flags and imposed a waist deep limit for swimming, *none* of the witnesses on the beach that day saw any red flags nor were they aware of the rip current warning. (R. p. 337, lines 9-21; p. 375, line 20-p. 376, line 4; p. 379, lines 7-24). As Ms. Abel testified, there were no signs, no warnings and no indicator that the conditions were threatening. (R. p. 375, line 20-p. 376, line 4). Jeff Bender similarly testified that he saw no signs, no warnings, and no indicators of hazardous rip currents. (R. p. 337, lines 9-21).

Lack's goes on to make the illogical argument (without support by expert testimony) 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. However, there was 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 safety risk. (R. p. 853, lines 16-20; p. 855, line 25-p. 856, line 21). 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 National Weather Service warning.

Finally, Lack's attempts to excuse its failures in this case by disclaiming that the staff member assigned to L-21 was on a regularly scheduled lunch break. However, even assuming the L-21 guard was at lunch, and assuming the other two lifeguards on duty were tasked with also overseeing the vacancy left by the L-21 guard, Lack's still violated the standard of care, according to Dr. Griffiths, because Lack's was one lifeguard short. (R. pp. 2313, 2321-22). 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*." (R. p. 2311).

And, "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." (R. p. 2311).

None of Lack's arguments come close to satisfying the relevant *no* evidence burden. Rather, the trial court heard abundant proximate cause evidence as to numerous standard of care breaches directly connected to the lack of lifeguard aid resulting in Mr. Wolde's death. This evidence certainly exceeds the *any* evidence criteria to affirm the trial court.

iii. Lack's challenge to the trial court's reliance on multiple standard of care violations is not preserved for review; nonetheless, the evidence sufficiently established a jury question.

Lack's further challenges the trial court's reliance on multiple standard of care violations in establishing proximate cause, claiming that the multiple breaches cannot be reconciled. Again, this issue is not properly preserved for this Court's review because it was not presented to the trial court when Lack's moved for directed verdict at trial. *See RFT Mgmt. Co.*, 399 S.C. at 331-32, 732 S.E.2d at 170–71 ("[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.").

Even if preserved, this argument merely highlights the magnitude of recklessness in this case. It is well settled that an injury can be proximately caused by multiple concurrent negligent acts. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) ("[T]he plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury."); *see also Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997); *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 176, 348 S.E.2d 617, 620 (Ct. App. 1986). There is nothing irreconcilable about the evidence attributing Mr. Wolde's death to Lack's dual-role practice, undertraining, understaffing, and failure to take precautions like

sectioning off no swim zones. These are all concurrent causes, none of which are by a third party or intervening in any way.

Again, an appellate court reviewing the denial of directed verdict and JNOV must affirm the trial court's decision where there is *any* evidence to support it. *See Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (ruling on a JNOV motion will not be reversed unless there is no evidence to support it or where the ruling is controlled by an error of law). As discussed, the evidence established that: (1) Lack's was made aware of hazardous rip and longshore currents and failed to properly warn beachgoers or close the understaffed section of beach where the Wolde family entered the water; (2) Mr. Wolde, Wubit and Adam were in distress for a long period estimated at 10-15-minutes, during which time all three were yelling and waving their arms for help; (3) Wubit and Adam could see the beach as well as bystanders on the beach; (4) bystanders on the beach were able to see and hear Mr. Wolde's distress; (5) during this time, a lifeguard was standing near the umbrella line talking to two people with his back to the ocean; (6) at this same time, another lifeguard was apparently at lunch with no additional lifeguard to cover; (7) the only LGO assigned to cover this section of beach called in sick and Lack's provided no backup despite falling below the minimum required by the Franchise Agreement; (8) bystanders eventually waded into the water and dragged Wubit and Mr. Wolde to shore; and (9) no Lack's lifeguard ever responded to the Wolde family's visible distress despite lasting an excruciating 10-15-minutes. 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 directed verdict and JNOV as to proximate cause.

C. The trial court properly denied directed verdict and JNOV as to survival because eyewitness testimony established Mr. Wolde endured conscious pain and suffering.

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 v. Liberty Life Ins. Co.,* 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct.App.1991)(emphasis added). Damages in a survival action include recovery for the deceased's conscious pain and suffering and medical expenses. *Smalls v. S.C. Dep't of Educ.* 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,* 355 S.C. at 320, 585 S.E.2d at 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).

Rarely is a victim's pain and suffering witnessed by someone as close to the tragedy as Wubit was in this case. Wubit, who was in her father's arms and witnessed his horrifying struggle to stay afloat, testified she saw him struggle and heard him call for help. (R. p. 726, lines 7-13). She testified Mr. Wolde repeatedly went under, came back to the surface, and gasped for air while fighting to stay afloat. (R. p. 727, line 17-p. 728, line 4). This terrifying sequence lasted for a "long period of time." (R. p. 728, lines 1-4). But eventually the yelling, gasping, and going under came to a frightening stop. (R. p. 729, line 11-p. 730, line 3; p. 748, line 24-p. 749, line 3). Wubit held

on to her father as they floated down the beach in the ocean. (R. p. 731, lines 18-24). Wubit estimated the struggle lasted for 10-15-minutes—an eternity in a drowning situation. (*Id*.). 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 attached to the victim during the event. Mr. Wolde's son Adam, who also witnessed the event, further corroborated Wubit's testimony. Adam testified that the entire drowning event lasted for an extended period. (R. p. 685, line 23-p. 686, line 5).

Bystander testimony further establishes the extent and duration of Mr. Wolde's pain and suffering. Julian Chandler testified he was sitting on the beach approximately 100 feet from the ocean when he heard cries for help in the water. (R. p. 2287). He rushed into the ocean using a mix of walking and swimming to reach Mr. Wolde, a process which took several minutes. (R. p. 2276-77). When Chandler finally got to Mr. Wolde, he had already been assisted closer to shore into waist deep water. (R. p. 2288). 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. (R. p. 2277-78). 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. (R. p. 608, lines 2-4; p. 611, lines 11-14). 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. (R. p. 608, lines 8-10). In other words, he suffocated to death while enduring an excruciating struggle for his life.[7] Based on this

[7] The coroner's report indicated that at the time of Mr. Wolde's drowning he was trying to save his daughter's life. *See* R. p. 2165.

testimony, the evidence was not that Mr. Wolde died instantaneously in the water; rather, he was spitting up water and sand during CPR efforts on shore.[8]

As Wubit, Adam, and Chandler testified, 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.[9] 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. (R. p. 370, lines 2-10). Mr. Wolde undeniably fought as hard and for as long as he possibly could.

Ignoring this critical survival testimony and evidence, Lack's takes the position that Ms. Abel should have proven the pathophysiology of the drowning process by expert testimony. But it is not Ms. Abel's burden to prove survival damages through expert testimony. Rather, her 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 based on circumstantial evidence from which the jury could infer pain and suffering); *Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 (stating jury could infer conscious pain and suffering from evidence). And, as established by the testimony above, that is precisely what she did.

In fact, expert testimony is only helpful in cases where there are *no eyewitnesses*—unlike the instant case—and even in those cases, the testimony could be rejected as speculative. *See University of Maryland Medical System Corporation v. Malory,* 143 Md. App. 327, 348, 795 A.2d

[8] R. p. 2277-78 ("Q. And were the rescucitation efforts that you performed that day, were they performed in an effort to prevent Mr. Wolde's death? A. Yes, sir, they were.").
[9] *See* R. p. 2165.

107, 119 (2001) (finding expert testimony was speculative and could not be used as evidence of consciousness where there were no case specific facts establishing consciousness). Some jurisdictions even infer consciousness pain and suffering in drowning cases without expert or witness testimony. *See United States Steel Corp. v. Lamp,* 436 F.2d 1256, 1275-76 (6th Cir. 1970) (finding sufficient evidence of conscious pain and suffering in Jones Act case involving seamen who drowned when their ship capsized where the decedents were last seen performing their duties when the ship was taking on water and where survivors described the impact causing the ship to capsize as soft).

Further, Lack's reference to "pre-impact fear" is misplaced. Pre-impact fear pertains to accident victims prior to the "impact" which renders them unconscious or instantly causes death.[10] 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." (R. p. 731, lines 1-4). 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 consciousness and conscious pain and suffering. This testimony 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). The trial court properly denied Lack's motion for JNOV on the submission of the survival claim to the jury.

[10] *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).

D. The trial court correctly submitted the issue of recklessness to the jury because the evidence showed Lack's knew its practices posed serious safety risks.

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 v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (citing *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000)). In *Mishoe*, 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. *Id.* 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.*

Evidence of Lack's willfulness and recklessness is far more damning. 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, but Lack's also concealed that its practices violated the standard of care—thereby further endangering the beachgoing public who trusted that the beach was safely guarded by adequate and trained lifeguards.

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. Lack's was also aware of

the threat posed by its short staffing that day. Indeed, George Lack conceded that being short a lifeguard could make all the difference between life and death. (R. p. 593, lines 14-18). Yet, despite knowledge of the risks, Lack's chose not to close the understaffed section of the beach and further failed to properly 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 argument ignores this evidence. Lack's instead repeats its misleading assertion that the dual-role practice was authorized by law and relies again on the minimum requirements set by the Franchise Agreement*, i.e.*, that the L-20 lifeguard was at lunch and other guards were supposed to cover the unattended area. As before, these arguments are unavailing and disingenuous. Conveniently, Lack's also fails to address how being one lifeguard short of the minimum set by the Franchise Agreement does not rise to the level of recklessness, especially in light of its failure to take proper precautions given the Weather Service warning. 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. The trial court, therefore, committed no error in submitting the issue of punitive damages to the jury.

II. The trial court appropriately denied Lack's request for a new trial absolute.

A. There were no errors in the admission of evidence, much less a prejudicial error sufficient to warrant a new trial.

"[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).

i. Lack's arguments regarding George Lack's prior inconsistent statement are not preserved for review.

At trial, George Lack claimed the staff his company hired to conduct public safety services 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. In fact, Mr. Lack had taken the opposite position in litigation before the South Carolina Workers Compensation Commission. In that litigation, he told the Commission that his lifeguards' duties were 99.995% commercial sales and .0047% lifeguarding. The trial court properly admitted this evidence for impeachment purposes on the grounds that Lack's lifeguarding practices on the day of the drowning were the same as they were when Mr. Lack took this position before the Commission.

Though Lack's alleges the trial court erred in allowing this evidence, the argument Lack's now urges on appeal is not preserved for review. In its post-trial motion, Lack's challenged this evidence based on the argument that it was too remote in time. (R. pp. 1534-35). Abandoning this argument on appeal, Lack's now claims that the evidence was not proper impeachment evidence, claiming the workers' compensation testimony concerned "risky" lifeguard activities as opposed to general lifeguard duties. (Appl. Brief, p. 28). It is well-settled that "an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Further, "a party cannot argue one ground at trial then another ground on appeal" *State v. McCray*, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998) (citation omitted). Having failed to timely raise this issue, Lack's is barred from doing so now.

Nonetheless, even assuming Lack's argument was preserved, it mischaracterizes the workers' compensation testimony. The testimony was not that Lack's lifeguards perform "risky" activities .0047 percent of the time; it was that "[Lack's] employees perform their beach chair concession duties 99.995 percent of the time and that the lifeguard duties only have the potential to be performed .0047 percent of the time." (R. p. 561, lines 21-25). And George Lack agreed with this statement. (*Id.*) Thus, even if preserved, the testimony reflects that it is a prior inconsistent statement that was properly admitted for impeachment purposes.

ii. Lack's USLA decertification was properly admitted as probative to the issues of standard of care, negligence, and recklessness.

Lack's challenges the admission of highly relevant USLA correspondence and testimony regarding Lack's failure to comply with industry standard. Despite its obvious relevance to the issues of standard of care and breach, Lack's claims the evidence was merely inflammatory. Even more perplexing, Lack's never once objected to testimony recognizing the USLA as the lifeguard industry's standard of care.

The evidence, however, was not inflammatory and was instead highly probative of the liability issues in this case. 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. (R. p. 615, lines 15-17 ("… we [USLA] do set the standard."). George Lack even conceded the USLA is the standard of care for lifeguarding. Lack wanted to secure USLA certification so his company could advertise the same to the public. And he wanted this 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. Lack made 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. (R. p. 637, lines 18-25). The USLA thereafter de-certified Lack's as a USLA compliant lifeguard service.

Brewster also explained that it would be impossible for any Lack's lifeguard to meet the USLA training requirements of its Franchise Agreement because dual-role lifeguarding is entirely inconsistent with USLA standards. (R. p. 620, lines 5-17; p. 637, lines 18-25, p. 646, line 5-p. 648, line 12). 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 incentivizing its lifeguards to make sales), and then trains them on how to sell the equipment, they are knowingly and intentionally violating USLA training. (R. p. 620, lines 5-9). Evidence of Lack's USLA membership, certification, and decertification is, thus, overwhelmingly relevant to Lack's standard of care violations contributing to Mr. Wolde's death. The fact that this evidence was also prejudicial to Lack's does not mean the trial court erred in admitting it. *See* Rule 403, SCRE (evidence is to be excluded only when "its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."). The court's admission of this highly probative evidence was, thus, not error.

iii. Lack's 2018 beach concessions sales records were properly admitted as probative of liability and dual-role negligence.

Lack's challenges the limited admission of its 2018 stand sales—a matter of public record required by Lack's Franchise Agreement with the City of Myrtle Beach—arguing the sales data is "highly prejudicial." Lack's argument fails for at least three reasons: (1) the evidence was necessary to establish essential elements of Ms. Abel's negligence claim; (2) the evidence was not prejudicial because it was a matter of public record and was not an indicator of Lack's financial

position or net profits; and (3) Lack's waived its right to challenge the manner in which this evidence was used in closing by failing to contemporaneously object.

During opening, Lack's counsel asserted this case starts and ends with the Franchise Agreement. (R. p. 99, line 4-p. 100, line 7). Likewise, on appeal, Lack's consistently relies, to its detriment, on the Franchise Agreement. 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. 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. (R. p. 2149). Using the 2018 stand totals, which reflect a compilation of the total gross sales from all Lack's beach towers in 2018, Ms. Abel offered minimal and specifically tailored data on Lack's sales limited in scope and time to the week, month and year Mr. Wolde drowned. The limitation 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 that it was a contributing cause of Mr. Wolde's death.

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." (R. p. 2144). The sales records introduced prove just the opposite: 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 its foremost duty of providing protection. The 2018 stand totals were relevant to prove Lack's generated revenues but failed to deliver on its obligations to provide effective lifeguard services. They 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…" (R. p. 2144).

The sales records further show there was "consideration" for Lack's legal obligation and duty to provide effective lifeguard protection. South Carolina law provides that "[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,* 371 S.C. at 136, 638 S.E.2d at 657. The 2018 stand totals are highly probative of Lack's consideration—*i.e.,* the money it generated in beach rental sales—and its corresponding legal obligations to provide "protection" to Myrtle Beach's "tourist and residential population through an efficient and effective Water Safety Program." (R. p. 2144).

Lack's overlooks that the gross sales bear no insight into Lack's financial position or net profit. 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. Further, Lack's reliance on *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010), for the assertion that "business income of this kind and nature has been forbidden by the South Carolina Supreme Court" is misplaced. The court in *Branham* did no such thing. Rather, the improper evidence in *Branham* consisted of exorbitant compensation received by Ford executives in the form of stock options, salary figures, and bonuses, all in amounts well in excess of Lack's sales figures. *Id.* Lack's 2018 gross sales figures, which were relevant to establish the

number of sales taking place for purposes of liability and recklessness, is entirely distinguishable from the type of "arbitrary" financial testimony in *Branham*.

Sulton v. HealthSouth Corp., 400 S.C. 412, 420-21, 734 S.E.2d 641, 646 (2012), is also distinguishable. The net operating revenue deemed prejudicial in *Sulton* was a whopping $1.911 billion. The prejudice stemming from the near multi-billion-dollar figure in *Sulton* is hardly comparable to Lack's $1.5 million in gross sales. Further, the figure in *Sulton* being net operating revenue is distinguishable from Lack's gross sales, which again were relevant to establish that Lack's was first and foremost a beach concessions business, not a genuine lifeguard service.

As to Lack's arguments concerning the "theme of Respondent's case . . . that [Lack's] prioritized profits over safety" and Respondent's closing arguments referring to Lack's as a "for-profit" entity, Lack's never once made an objection on these grounds. (Appl. Brief, p. 25). In fact, Lack's did not make a single objection during or directly after Respondent's closing. This failure waives any right to raise these arguments now. *See e.g. Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (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").[11] In sum, the trial court committed no error in admitting evidence of the 2018 stand totals, much less any error warranting the extraordinary relief of a new trial.

[11] 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*). 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.

C. Lack's waived its right to challenge the propriety of trying recklessness in the first phase, and even if preserved, evidence of recklessness for purposes of liability is permissible in the first phase of trial.

Lack's never once objected to the issue of recklessness being tried in the first phase of the trial. In fact, Lack's consented, and further agreed it was proper, to have the jury determine in phase one whether Plaintiff proved willful, wanton, or reckless conduct:

> 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.

(R. p. 987, line 11-p. 988, line 6). That Lack's agreed to the same verdict form to which it now objects 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 objection after verdict reached failed to preserve issue relating to verdict form); *Gause*, 403 S.C. at 151, 742 S.E.2d at 650 (failure to object until after verdict waived issue).

Lack's not only failed to preserve this argument by consenting to the verdict form, Lack's took the contrary position during trial and in its JNOV motion. In arguing for JNOV, Lack's contended that Respondent 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." (R. p. 1515). Thus, by Lack's own admission, Respondent was not only permitted, but was required, to show recklessness during the liability phase of the trial. 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.[12] Being distinct types of fault, Ms. Abel 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 the 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.[13]

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.

As to Lack's additional argument that the court failed to instruct the jury that a finding of recklessness would result in a second phase of trial, this issue is not preserved. Lack's did not

[12] *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)).

[13] *See e.g., Durham v. Vinson*, 360 S.C. 639, 644–45, 602 S.E.2d 760, 762–63 (2004) (observing that "[a]fter the liability phase of the bifurcated trial, the jury found Dr. Vinson was liable to Durham for $2,250,000 in actual damages, and the jury found his conduct to be willful, wanton, or in reckless disregard of Durham's rights."); (*see also* MIO to Post-Trial Motions, Ex. 1-5, containing verdict forms consistent with this format, R. p. 1482-95).

object to the verdict form or to the charge given. (R. p. 987, line 11-p. 988, line 6 (no objection to verdict form); p. 1081, lines 8-22 (no objection to charge)). Rule 51 of the South Carolina Rules of Civil Procedure precludes a new trial on this ground. *See* Rule 51, SCRCP ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Winters v. Fiddie*, 394 S.C. 629, 641-42, 716 S.E.2d 316, 323 (Ct. App. 2011) (holding failure to object to instruction on punitive damages precluded new trial on that ground).

Nonetheless, there was no error in the court's decision not to include this instruction. Indeed, Respondent would be unduly prejudiced by an instruction suggesting that a "yes" finding would result in a prolonged trial. After five days of trial, such an instruction could have easily swayed the jury against a finding that would require them to continue to another phase rather than conclude their jury service and retire home. Accordingly, the trial court properly provided a verdict form and jury instructions that complied with South Carolina law, complied with the evidence in this case, and, critically, was agreed to by Lack's. Moreover, having waived its right to a new trial on this ground, Lack's is precluded from arguing this issue.

D. The trial court properly denied Lack's motion for new trial as to survival damages.

i. Lack's points to no reason—other than speculation—to suggest the jury was misled or confused in any way in its calculation of survival damages.

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.[14] (R. p. 1077, line 16-p. 1079, line 2). 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 Ms. Abel'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.

During closing, Ms. Abel's counsel 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.[15] The per diem suggested was based on the children's loss of companionship and loss of society given their father's remaining life expectancy. Specifically, counsel 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 remaining life expectancy. (R. p. 1047, line 14-p. 1048, line 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 wrongful death damages—*not* survival damages. Given the propriety of the instruction and the fact that the jury was specifically instructed that mortality table was only a guide, there is no substantive basis to suggest the jury was confused or misled in any way.

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[14] *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.").
[15] This type of closing argument was specifically approved in *Edwards v. Lawton*, 244 S.C. 276, 282, 136 S.E.2d 708, 711 (1964) (no error in use of per diem calculation for illustrative purposes).

ii. The jury's thoughtful and measured award of survival damages is supported by the evidence, is not excessive, and is entitled deference.

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. 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.

"The amount of damages suffered in a personal injury action is a question for the fact-finder." *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App. 2011) (citations omitted). "The jury's determination of damages is entitled to substantial deference." *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). "Compelling reasons . . . must be given to justify invading the jury's province in this manner." *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995).

In improperly seeking to substitute its judgment for that of the jury, Lack's provides no basis to question the jury's survival verdict, and certainly nothing that is even arguably compelling. Lack's merely repeats its assertion that evidence of the "drowning process" was somehow required. As argued above, this 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." (R. p. 728, lines 1-4). There is literally no more compelling pain and suffering evidence than 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 Mr. Wolde's death, explaining what death by asphyxia due to drowning entails. (R. p. 598, lines 2-10; p. 610, lines 4-10; p. 611, lines 11-12; *see also* pp. 2162-2170). 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.

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*.

Lack's attempt to challenge this jury's award by cherry picking various verdicts in other survival cases is equally unavailing and, even, misleading. Though comparisons to other verdicts

are only persuasive at best, Lack's omits a host of survival awards that are consistent with and even higher than that in this case. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976) (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., Givens v. Samkharadze*, Case No. 21-10-130012 (2021) (compensatory pain and suffering of $25,000,000 and $8,000,000 in punitive damages); *Huff v. XPO Express, Inc.*, Case No. 19-11-120022 (2019) (Compensatory pain and suffering of $7,000,000); *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).

E. The jury's measured wrongful death award is supported by the evidence, is not unduly excessive, and is entitled to deference.

The jury's $10 million wrongful death award is more than reasonable given the totality of the evidence. "[T]he jury's determination of damages is entitled to substantial deference." *Knoke v. S.C. Dep't of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996); *Clark v. S.C. Dept. of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002). 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*, 266 S.C. at 137–38, 221 S.E.2d at 859.

In addition to the liability evidence, the jury heard evidence of the vast effect Mr. Wolde's death had on his four young children, of whom Mr. Wolde was the primary caretaker. (R. p. 729, line 11-p. 730, line 3). Ms. Abel was a registered nurse at George Washington Hospital and worked long hours to provide for the family. (R. p. 368, line 14-p. 369, line 14; p. 712, lines 15-22). 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. (R. p. 670, line 23-p. 671, line 9; p. 712, line 20-p. 713, line 8). 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. (R. p. 374, lines 2-8; p. 678, lines 18-19). Ms. Abel, Adam, and Wubit testified at length what his loss 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. (R. p. 385, line 22-p. 386, line 2). They now must eat dinner in the family room instead. *Id.* 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. (R. p. 388, lines 10-23). 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. (R. p. 391, lines 12-15). As Ms. Abel testified, life without their father has been inconceivably difficult. (R. p. 391, lines 5-13).

The jury also heard and considered evidence of the immeasurable trauma and shock experienced by the children 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. (R. p. 732, lines 12-13). Jeff Bender testified Wubit was floating on her father, "using him like a life preserver," at the time he began assisting them to shore. (R. p. 339, line 22-p. 340, line 1). 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. (R. p. 2278-79). The children also witnessed their mother "hysterically flailing and screaming." (*Id.*) This considerable evidence all

plays a factor in determining wrongful death damages. *See Lucht*, 266 S.C. at 136–37, 221 S.E.2d at 859 (providing wrongful death damages includes damages sustained by beneficiaries from the death, such as mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and loss of society).

Considering the wide range of losses encompassed by wrongful death damages, counsel appropriately suggested a per diem calculation as a method for the children's nonpecuniary wrongful death damages. As discussed above, 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. The estimated per diem of $10/hour, multiplied by 15 hours/day translated to $54,750/year per child, equated to $8.1 million. (R. p. 1047, line 14-p. 1048, line 11). After three hours of deliberation, the jury arrived at a well-reasoned and measured award of $10 million, or $2.5 million per child. Considering all objective evidence, the $10 million award was the result of thoughtful and reflective judgment.

Lack's argues the verdict was excessive merely because it was higher than the amount suggested by Ms. Abel's counsel—the recommended amount came to $8.1 million and the jury awarded $10 million. Simply because the jury chose an amount greater than that recommended in closing does not mean the award is excessive, much less so flagrantly excessive as to justify the extraordinary relief of a new trial. And a difference of $1.9 million—equating to $2.5 million per child as opposed to $2.025 per child—is not much of a difference and most certainly not enough to suggest passion, prejudice, or improper motives. Likewise, 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. The trial court's denial of a new trial on this basis was, therefore, proper and should be affirmed.

F. The jury's reasoned and measured award of punitive damages is not grossly excessive.

Lack's challenges the trial court's denial of a new trial on punitive damages arguing the $7 million award 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.

There is simply no evidence that the jury's award considered anything other than the relevant evidence, and Lack's argument fails to suggest otherwise. Instead, 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*.

(R. p. 1110, lines 3-7). 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.

Lack's suggests 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 exceeds Lack's net worth, does not in and of itself

justify a new trial on such grounds, especially given that the punitive damage award in this case is almost half the amount of actual damages. Having failed to show any reliable evidence or argument to warrant invading the jury's province, this Court should affirm the denial of Lack's motion for a new trial as to punitive damages.

III. Lack's waived the right to challenge the constitutionality of punitive damages, but even if preserved, the punitive damages award is in accordance with due process.

The constitutionality of punitive damages in this case is not preserved for appellate review. Appellant did not contest punitive damages on due process grounds at trial and further neglected to plead unconstitutionality of punitive damages in its answer. *See e.g., Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426 (Mo. Ct. App. 2015) (employer failed to preserve argument that its due process rights were violated by the grossly excessive punitive damages award to former employee where employer failed to raise a due process claim in the trial court); *French v. Hines*, 182 Md. App. 201, 957 A.2d 1000 (2008) (defendant waived issue of whether trial court erred in permitting punitive damages where defendant learned of the punitive damages claim before the case was submitted to the jury but failed to raise the issue when the trial court instructed the jury and submitted the case). Notwithstanding, even if preserved, the trial court committed no reversable error in its post-judgment due process review.

A. The jury's award of punitive damages is in accordance with due process per the *Mitchell* guideposts.

A due process analysis of a punitive damages award 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 in

comparable cases. *Mitchell,* 385 S.C. 570, 587–88, 686 S.E.2d 176, 185–86 (2009); *Gore*, 517 U.S. 559 (1996). The term "guideposts" emphasizes that these factors are merely a guide, not a bright-line rule. *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004). It is not necessary for courts to follow rigid mathematical rules when reviewing a punitive damages award. *Id.* In addition, our case law instructs that the additional eight *Gamble* factors are relevant in so far as they add substance to the *Mitchell* 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). Consideration of the *Mitchell* guideposts and the additional *Gamble* factors, confirms that the jury's carefully considered award is reasonable in this case.

i. Lack's acted reprehensibly

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.

Here, the first, second, fourth and fifth factors are especially 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.

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 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.[16] 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 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 award in this case is consistent with cases of comparable levels of recklessness and loss. 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. Lack's likewise is the only private lifeguarding company to knowingly provide lifeguard protection in violation of the USLA's

[16] "[E]vidence of net worth is not a prerequisite to a punitive damage award." *Welch*, 342 S.C. at 307, 536 S.E.2d at 423.

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 with similar levels of recklessness indicates the jury's award is line with similar cases. *See e.g.*, *Welch*, 342 S.C. at 305-07, 536 S.E.2d at 421-22 (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).

iv. Gamble Factors

The additional *Gamble* factors provide even further support. The first four *Gamble* factors overlap with the *Mitchell* guideposts on reprehensibility. As discussed, all four of those factors are met in this case.[17] As to the remaining *Gamble* considerations, they include: (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 deterrence, the hazardous beach environment created by Lack's unsafe practices simply cannot be permitted to continue; thus, the $7 million award is reasonable to deter Lack's from continuing such practices. Because the award intends to deter Lack's from employing dangerous practices that threaten the lives and safety of beachgoers, it is most certainly reasonably related to the harm at

[17] The only *Mitchell* guidepost not met with regard to reprehensibility (*i.e.,* whether the plaintiff was in a financially vulnerable position) is not a factor under *Gamble*.

issue—death by drowning—so as to satisfy the sixth *Gamble* factor. While the remaining *Gamble* factor concerning the defendant's ability to pay is truly the only *Gamble* factor that does not overwhelmingly weigh in Respondent'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. There truly is no stronger evidence of reprehensibility, culpability, reckless indifference, and certainly an essential need for deterrence.

B. The punitive damages award is in accordance with S.C. Code 15-32-520(E)-(F).

The statutory factors set forth in S.C. Code § 15-32-520(E)–(F) further support the reasonableness of the award in this case. Five of the factors outlined in 15-32-520 overlap with the *Mitchell* guideposts, each of which supports the award in this case as addressed above. The final three factors are not at issue in this case and Appellant concedes the same. This leaves the following three factors for consideration: the severity of the harm; the extent to which plaintiff's own conduct contributed to the harm; and the profitability of the conduct to the defendant.

First, the harm being death by drowning is undeniably severe. Second, Mr. Wolde's conduct bears little connection to the injury in this case: wading into the water is not a sufficient connection to the injury of drowning when the evidence shows Mr. Wolde was unaware of the dangerous conditions present and unaware that the lifeguards present were understaffed, undertrained, and were performing beach concessions instead of lifeguarding. Finally, the evidence showed that Lack's profited greatly from its beach concessions business and that Lack's use of dual-role lifeguards only contributed to this profitability by lowering the cost of employing separate staff to solely perform beach concessions. Accordingly, this Court should affirm the jury's award of punitive damages as reasonable and consistent with *Mitchell*, *Gamble*, and the statutory factors of 15-32-520(E)-(F).

CONCLUSION

Lack's appeal asks this Court to ignore what the evidence at trial showed and to replace the findings of the trial court and of twelve reasonable jurors simply because it does not comport with Lack's version of the facts and perception of the value of this case. Lack's position is no substitute for the sound rulings of the trial judge, who saw the witnesses, heard their testimony, and evaluated the evidence during the trial in this case. The ensuing verdict for the Wolde family's unthinkable loss is the product of twelve unbiased jurors who weighed the evidence, evaluated the credibility of the witnesses, and worked tirelessly to achieve a just and reasonable result. Accordingly, this Court should: (1) affirm the trial court's directed verdict and JNOV rulings; (2) affirm the jury's verdict in favor of Respondent and the denial of a new trial; and (3) affirm the jury's just and reasoned awards of survival, wrongful death, and punitive damages.

Respectfully submitted,

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March 6, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

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

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

By: */s/ W. Mullins McLeod, Jr.*

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March 6, 2024