THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Appellate Case No. 2023-000569

Case No. 2019-CP-26-07075

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SC Court of Appeals

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

v.

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

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

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**RECORD ON APPEAL**
**VOLUME IV**

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|---|---|
| C. Mitchell Brown, Esquire<br>Blake T. Williams, Esquire<br>Nelson Mullins Riley & Scarborough LLP<br>1320 Main St/ 17th Floor<br>Post Office Box 11070<br>Columbia, SC 29201<br>(803) 799-2000<br><br>Joseph D. Thompson, III, Esquire<br>Elizabeth F. Morrison, Esquire<br>Daniel R. Fuerst, Esquire<br>Hall Booth Smith, P.C.<br>111 Coleman Blvd./Suite 301<br>Mount Pleasant, SC 29464<br>(843) 720-3460 | W. Mullins McLeod, Jr., Esquire<br>H. Cooper Wilson, III, Esquire<br>McLeod Law Group, LLC<br>3 Morris St./Suite A<br>Charleston, SC 29403<br>(843) 277-6655<br><br>G. Murrell Smith, Jr., Esquire<br>Austin T. Reed, Esquire<br>Frederick N. Hanna, Jr., Esquire<br>Smith Robinson Holler DuBose Morgan, LLC<br>26 N. Main Street Sumter, SC 29151<br>PO Box 580<br>Sumter, SC 29151-0580<br>(803) 778-2471 |
| *Attorneys for Appellant Lack's Beach Service* | *Attorneys for Respondent Meswast Abel* |

## RECORD ON APPEAL INDEX

### VOLUME I

**Orders and Judgment**

Order Denying Motion for Appointment of Receiver and Granting Motion to Stay, filed May 19, 2023 ..... 1

Order on Lack's Beach Service's Motions for JNOV, New Trial Absolute, and New Trial Nisi Remittitur, April 10, 2023 ..... 5

Order on Post Trial Review of Punitive Damages, filed November 28, 2022 ..... 44

Form 4 Judgment and Jury Verdict, filed August 1, 2023 ..... 50

**Pleadings**

Answer of City of Myrtle Beach, filed March 17, 2020 ..... 56

Answer of Lack's Beach Service, filed February 7, 2020 ..... 65

Summons & Complaint, filed November 1, 2019 ..... 74

**Transcripts**

Transcript of Hearing on Pretrial Motions, July 22, 2022 ..... 89

Trial Transcript – Day 1, July 25, 2022 ..... 143

Trial Transcript – Day 2, July 26, 2022 ..... 328

### VOLUME II
### (starts at ROA_500)

Trial Transcript – Day 3, July 27, 2022 ..... 520

Trial Transcript – Day 4, July 28, 2022 ..... 663

### VOLUME III

Trial Transcript – Day 5, July 29, 2022 ..... 1001

Transcript of Hearing on Post-Trial Motions, March 9, 2023 ..... 1116

**Motions and Memoranda**

Lack's Beach Service's Motion to Stay Execution Pending Appeal & Exhibit, April 10, 2023: ..... 1238
Notice of Appeal with exhibits ..... 1243

Lack's Beach Service's Supplemental Memorandum in Opposition to Motion to Appoint a Receiver, filed March 8, 2023 ..... 1300

Lack's Beach Service's Motion to Reconsider Order on Post Trial Review of Punitive Damages, filed December 2, 2022 ..... 1305

Lack's Beach Service's Reply in Support of Motion to Stay Execution, filed December 2, 2022 ..... 1315

Plaintiff's Memorandum in Opposition to Motion to Stay, filed November 15, 2022 ..... 1320

Lack's Beach Service's Memorandum in Opposition to Motion to Appoint a Receiver, filed November 3, 2022 ..... 1329

Lack's Beach Service's Motion to Stay Execution and Appointment of a Receiver & Exhibit, filed October 19, 2022 ..... 1334
A – Motion for Appointment of Receiver ..... 1339

Plaintiff's Motion to Appoint a Receiver & Exhibit, filed October 12, 2022 ..... 1347
A – Protopapas CV and Receivership list ..... 1355

Lack's Beach Service's Reply in Support of Conditional Motion, filed September 16, 2022 ..... 1358

Lack's Beach Service's Reply in Support of Post-trial Motions, filed September 16, 2022 ..... 1366

Plaintiff's Memorandum in Opposition to Lack's Beach Service's Conditional Motion, filed August 22, 2022 ..... 1405

Plaintiff's Consolidated Memorandum in Opposition to Lack's Beach Service's Post-trial Motions & Exhibits, filed August 22, 2022 ..... 1416
Glenn v Fisher Controls verdict forms ..... 1482
Scheer v Southern Myrtle verdict form ..... 1486
Hilliard v Southern Health Partners verdict ..... 1488
Provence v. Dominion Energy verdict form ..... 1491
Cross v. XPO Express verdict form ..... 1493
Holland v Kessing Supplemental Order on Punitive Damages ..... 1496

## VOLUME IV

Lack's Beach Service's Motion for JNOV, filed August 8, 2022 ..... 1502

Lack's Beach Service's Motion for a New Trial Absolute, filed August 8, 2022 ..... 1517

Lack's Beach Service's Motion for a New Trial Nisi Remittitur, filed August 8, 2022 ..... 1549

Lack's Beach Service's Conditional Motion to Reduce the Judgment, filed August 8, 2022 ..... 1566

Plaintiff's Letter & Supplemental Exhibit, filed July 21, 2022 ..... 1571
Condensed Deposition of Julian Chandler ..... 1572

Plaintiff's Memorandum in Opposition to City of Myrtle Beach's Motion for Summary Judgment & Exhibits, filed July 19, 2022 ..... 1594
1 – CDC Study ..... 1622
2 – Strategies to Reduce Ocean Drowing Occurrences in Myrtle Beach ..... 1658
3 – 2008 Revocation letter ..... 1739
4 – Franchise Agreement ..... 1740
5 – Robinson deposition excerpts ..... 1755
6 – Lack Deposition excerpts ..... 1776
7 – City of NMB Incident Report ..... 1789
8 – Wolde deposition excerpts ..... 1792
9 – Horry County Coroner File ..... 1805
10- USLA Letters 2016 &1996 ..... 1827
11 – August 9, 2018 email complaint ..... 1833
12 – Griffiths deposition excerpts ..... 1835
14 – CMB Answer ..... 1852
15 – Pedersen deposition excerpts ..... 1861
16 – Plt Memo in Opp to CMB Motion for Summary Judgment, 5/28/21 ..... 1864
17 – Plt Memo in Opp to CMB Motion for Reconsideration, 8/27/21 ..... 1885

## VOLUME V

Plaintiff's Memorandum in Opposition to Lack's Beach Service's Motion for Partial Summary Judgment As to Dual Role & Exhibits, filed July 19, 2022 ..... 1892
1 – CDC Study ..... 1901
2 – Strategies to Reduce Ocean Drowing Occurrences in Myrtle Beach ..... 1937
3 – 2008 Revocation letter ..... 2018
4 – Lack's Sales Receipts ..... 2019
5 – Griffiths, June 15, 2022 deposition excerpts ..... 2020

City of Myrtle Beach's Motion for Summary Judgment & Exhibit, filed June 20, 2022 ..... 2025

A – Franchise Agreement 2018 ..... 2042

City of Myrtle Beach's Motion in Limine, filed June 20, 2022 ..... 2057

Lack's Beach Service's Motion in Limine, filed June 17, 2022 ..... 2064

Lack's Beach Service's Motion Summary Judgment, filed June 17, 2022 ..... 2081

Lack's Beach Service's Motion for Partial Summary Judgment, filed June 17, 2022 ..... 2091

**Trial Exhibits**
**Plaintiff Exhibits** ..... 2097

Pltf.'s Exhibit 1, Survey ..... 2097

Pltf.'s Exhibit 3-9, Photos ..... 2098

Pltf.'s Exhibit 10, Training Manual ..... 2105

Pltf.'s Exhibit 11, January 21st Letter from Chris Brewster ..... 2138

Pltf.'s Exhibit 12, January 27th Letter from Chris Brewster ..... 2139

Pltf.'s Exhibit 13, September 11 Letter from Lack's Beach Service ..... 2140

Pltf.'s Exhibit 14, October 14 USLA Letter ..... 2141

Pltf.'s Exhibit 15, Franchise Agreement ..... 2144

Pltf.'s Exhibit 16, Enlarged Chart ..... 2159

Pltf.'s Exhibit 17, Chart of Stands ..... 2160

Pltf.'s Exhibit 18, Stand Totals ..... 2161

Pltf.'s Exhibit 19 – Death Certificate ..... 2162

Pltf.'s Exhibit 20, Coroner Report ..... 2163

Pltf.'s Exhibit 21, Autopsy Report ..... 2166

Pltf.'s Exhibit 22, March 26 USLA Letter ..... 2171

Pltf.'s Exhibit 23, USLA Certification ..... 2172

Pltf.'s Exhibit 26, Pederson Email 8-27-16 ..... 2190

Pltf.'s Exhibit 27, Email Chain/Philip Cain ..... 2191

Pltf.'s Exhibit 28, Surf School Agenda 2018 ..... 2192

Pltf.'s Exhibit 29, Kacper Palacz Records ..... 2197

Pltf.'s Exhibit 30, Lucakasz Jaworski Records ..... 2214

Pltf.'s Exhibit 31, Aleksandr Dineev Records ..... 2230

**Defendant Exhibits**

Def.'s Exhibit 1, Photograph ..... 2265

Def.'s Exhibit 2, Photograph ..... 2266

Def.'s Exhibit 3, Kacper Palacz Records (See Pltf's Ex. 29) ..... 2197

Def.'s Exhibit 4, Lucakasz Jaworski Records (See Pltf's Ex. 30) ..... 2214

Def.'s Exhibit 5, Alexandr Dineev Records (See Pltf's Ex. 31) ..... 2230

Def.'s Exhibit 6, Lack's Team Photo 2018 ..... 2267

Def.'s Exhibit 7, Narrative from Jaworski ..... 2268

Def.'s Exhibit 8, Narrative from Palacz ..... 2269

Def.'s Exhibit 9, Lack's Balance Sheet ..... 2270

**Court Exhibits**

Court's Exhibit 2, Transcript of Video Deposition of Julian Chandler, July 20, 2022 ..... 2272

Court's Exhibit 5, Video Deposition of Dr. Thomas Griffiths, June 15, 2022 ..... 2294

Court's Exhibit 6, Defendant's Designations of Deposition of Julian Chandler and Objections to Plaintiff's Designations ..... 2360

Court's Exhibit 7, Jury Question ..... 2363

Court's Exhibit 8, Jury Question ..... 2364

Court's Exhibit 9, Judge's Response to Jury's Question .....2365

**VOLUME VI**

**Other Material/Miscellaneous**

Surety Bond, filed May 25, 2023 .....2366

Notice of Appeal, filed April 10, 2023 .....2373

Lack's Beach Service's Letter to Judge Curtis & Enclosed Proposed Orders, filed March 26, 2023 .....2426

Lack's Beach Service's Objections to Plaintiff's Proposed Order Denying Post-trial Motions & Exhibit, filed December 8, 2022 .....2499

Plaintiff's Designations of Deposition of Dr. Thomas Griffiths.....2587

Lack's Beach Service's Designations of Deposition of Dr. Thomas Griffiths.....2592

Transcript of Deposition of Dr. Thomas Griffiths, September 9, 2021 .....2597

Plaintiff's Page Line Designations of Julian Chandler's Deposition.....2798

Certificate of Counsel

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| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | **FOR THE 15TH JUDICIAL CIRCUIT** |
| **COUNTY OF HORRY** | ) | **CASE NO.: 2019-CP-26-07075** |
| **MESWAET ABEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ZERIHUN WOLDE,** | ) | |
| **Plaintiff,** | ) | **DEFENDANT LACK'S BEACH SERVICE, INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)** |
| **v.** | ) | |
| **LACK'S BEACH SERVICE, INC.,** | ) | |
| **Defendant.** | ) | |

Pursuant to Rule 50 and all other applicable rules of the South Carolina Rules of Civil Procedure, Defendant Lack's Beach Service, Inc. ("Lack's" or "LBS") moves for Judgement Notwithstanding the Verdict (JNOV). For purposes of this motions, LBS incorporates the arguments and points made in its prior motions for summary judgment, motions *in limine*, motions for directed verdict and also incorporates its arguments, motions and points otherwise before, during, or after trial, if consistent herewith. Additionally, LBS specifically incorporates by reference any and all background information, recitation of trial facts and or arguments made in its Motion for Nisi Remittitur and Motion for New Trial Absolute filed contemporaneously herewith.

## STANDARD OF REVIEW

When reviewing a motion for JNOV, this Court should view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Allegro, Inc. v. Scully, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). The court must grant JNOV "if no reasonable jury could have reached the challenged verdict." Id.

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## BACKGROUND

For efficiency, the "Background" set forth in Lack's Motion for New Trial Absolute is hereby incorporated as if set forth verbatim.

## ARGUMENTS

**I. The evidence was legally insufficient for the Court to submit the survival cause of action to the jury; directed verdict should have been granted; and now the Court should grant judgment notwithstanding the verdict on the survival cause of action.**

Plaintiff's survival action should not have been submitted to a jury. It is the Court's responsibility to remedy this error and grant LBS judgment notwithstanding the verdict on Plaintiff's survival cause of action.

"The test of a survival action is whether the decedent suffered conscious pain and suffering." Rutland v. South Carolina Dept. of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct.App. 2010), *affirmed as modified by* Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012). The evidence taken in the light most favorable to Plaintiff was that Wolde, at some unidentified time, began to realize he was in trouble while in the ocean, presumably as a result of being unable to stand on the bottom and hold his daughter, who clung to his shoulder in fear of deep water. He yelled for help. Then he submerged, and was next discovered in an unconscious, unresponsive state.[1]

---

[1] At trial, Wubit Wolde testified, for the first time, that after they started yelling, her father went under and came up gasping for air, perhaps more than once. However, that testimony was directly contradicted by her prior deposition testimony. To wit:

> Q. So you and your dad and brother got in trouble, you called for help, and then the next thing you realize or remember is that you could stand in knee deep water?
>
> A. Yes. I don't remember it. I just remember yelling for help, and that I think – I don't know how we got out of it, honestly, but I just remember that eventually we were at the shore and I was walking towards the shore.
>
> Q. Do you know about how long that lasted?
>
> A. No.

[W. Wolde Dep. p. 61-62]. Importantly, when confronted with this prior testimony on cross-examination, Wubit admitted that the deposition testimony was the truth and what she remembered happening in the ocean.

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Importantly, Plaintiff did not produce any evidence or testimony from anyone, and the record is completely devoid, of any evidence of the drowning process. When does it start?[2] How long does it last? What does a drowning person experience in the drowning process? The record does not contain *any* evidence answering *any* of these questions. Of course, if these generic questions cannot be answered, it cannot be reasonably argued that the record includes sufficient evidence of Wolde's drowning experience.

It also cannot be seriously argued that the drowning process is within the knowledge and/or understanding of a layperson. Indeed, the drowning process is a technical matter that necessarily requires the explanation of an expert witness. Plaintiff did not provide any evidence of the drowning process at all, much less any expert testimony.

There are no known reported decisions in South Carolina regarding conscious pain and suffering that might be experienced by a drowning victim. Remarkably, one of the first cases to address the question of pain and suffering of a drowning victim came from the United States Supreme Court in 1892. In The Corsair, 145 U.S. 335, 12 S.Ct. 949, 36 L.Ed. 727 (1892), the Supreme Court noted that pain and suffering was "substantially contemporaneous" with death in a drowning victim and "inseparable, as matter of law, from it." Id. at 438. The Court concluded that "the very fact she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death." Id. Other jurisdictions that have confronted the issue in more modern times require ***evidence*** of consciousness and expert testimony on the pathophysiology of drowning, which did not exist here.

Jurisdictions that have generally allowed the issue of conscious pain and suffering to be submitted to a jury have done so in cases where expert testimony provided the jury with

[2] This is an exceptionally important unanswered question. If the drowning process does not start until submersion, then the above water struggle, if any, would not be sufficient evidence to support a survival action award.

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information as to the technical pathophysiology of drowning. Freed v. D.R.D. Pool Service, Inc., 186 Md. App. 477, 974 A.D.2d 978 (2009) (Summary judgment granted on survival action reversed where physician specializing in anesthesiology and intensive care medicine offered specific testimony about the pathophysiology of drowning); Dontas v City of New York, 584 N.Y.S. 134, 183 A.D.2d 868, (1992) (Expert testimony provided support for award of conscious pain and suffering, although $2 million award found excessive for small period of time in drowning process); Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746, 749–50 (9th Cir. 1980) (Pathologist testimony about consciousness of victim after being submerged in the water provided enough evidence for a jury to find victim was conscious during his asphyxiation); Walker v. Daniels, 200 Ga. App. 150, 157, 407 S.E.2d 70, 76 (1991) (Appellees' expert witness testimony concerning methodology of a "wet drowning" was sufficient evidence to support questions concerning the decedent's pain and suffering for jury to decide); Rickwalt v. Richfield Lakes Corp., 246 Mich. App. 450, 633 N.W.2d 418 (2001) (Pain and suffering properly instructed to jury where expert testimony and witness testimony indicated decedent had consciously aspirated water prior to death).

Here, while there was evidence that Wolde struggled in the water, Plaintiff offered no expert testimony or evidence as to the pathophysiology of the drowning process. Moreover, Plaintiff offered no expert testimony about what a person may experience physically, emotionally, and/or mentally or, how long such might be expected to be experienced, or when the drowning process even begins. This is an important, significant deficiency because South Carolina has never adopted "pre-impact fear" as an element of recoverable damages. Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012) (declining to decide the issue of whether to recognize pre-impact fear as an element of damages in a survival action and leaving it an "open

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question in this State"). If the drowning process starts after submersion, then the pre-submersion struggles would be considered "pre-drowning" fear and, like "pre-impact fear," should not be considered a recoverable element of damage.

In sum, Plaintiff' failed to produce any expert evidence or testimony to provide the Court or the jury with any guidance as to what constitutes the drowning process, the amount of time involved in the drowning process and, most of all, what a drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process. With the absence of such evidence, the jury was erroneously left to decide the survival action on unsubstantiated speculation. Tallon v. Seaboard Coast Line R. Co. 270 S.C. 362, 365, 242 S.E.2d 418, 420 (1978) ("Verdicts are not allowed to rest on conjecture or speculation."). The evidence was legally insufficient to submit the survival cause of action to a jury, and thus a directed verdict should have been granted. The Court should therefore grant judgment notwithstanding the verdict on the survival cause of action

**II. The evidence was legally insufficient for the Court to submit the dual role lifeguard negligence theory to the jury; directed verdict should have been granted; and now the Court should grant judgment notwithstanding the verdict on the dual role lifeguard negligence theory.**

Since the beginning of the case, Plaintiff has advanced the "dual role" lifeguard as the central theme of the case against Lack's. Few, if any, witnesses escaped questioning about the legitimacy of, or the challenge to, the "dual role" lifeguard (which is expressly permitted by the South Carolina Code, see S.C. Code Ann. § 5-7-145(B)). Plaintiff's theme was simple; a lifeguard charged with public safety cannot effectively discharge that duty while engaged in a commercial transaction on the beach, *e.g.* renting umbrellas and chairs to beachgoers. However, Plaintiff's theory was unsupported by any evidence in the record and, therefore, LBS was entitled to directed verdict on that issue and is now entitled to entry of judgment notwithstanding the verdict given

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

how heavily influenced the jury was by Plaintiff's claims of negligence based on the "dual role" lifeguard theory.

**A. There was no direct evidence that any Lack's lifeguard was engaged in any commercial transaction (*i.e.* engaged in a non-lifeguarding role) at the time of Wolde's drowning incident.**

First, there was absolutely no direct evidence of any relevant lifeguard participating in any commercial transaction at the time Wolde got into trouble in the water. Not a single witness offered proof that any relevant lifeguard was actually engaged in a commercial transaction immediately before, or during, the time of Wolde's drowning incident. Indeed, even Plaintiff's aquatics safety expert Thomas Griffiths expressly conceded that, despite his extensive and intensive review of the evidence, he did not find any evidence that any relevant lifeguard was actually engaged in a commercial transaction in the relevant time frame around Wolde's drowning incident. In short, there was not even a scintilla of direct evidence that LBS lifeguards were engaged in any commercial transaction when Wolde's drowning incident occurred. Accordingly, Defendant was entitled to directed verdict on that issue and is now entitled to entry of judgment notwithstanding the verdict given how heavily influenced the jury was by Plaintiff's claims of negligence based on the "dual role" lifeguard theory.

**B. There was no indirect or circumstantial evidence that any LBS lifeguard was engaged in any commercial transaction (*i.e.* engaged in a non-lifeguarding role) at the time of Wolde's drowning incident.**

There was also no circumstantial or indirect evidence that any lifeguard was engaged in any commercial activity at any relevant time. "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." Moriarity v. Garden Sanctuary Church of God, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (quoting State v Needs, 333 S.C. 134, 156 n.13, 508 S.E.2d 857, 868 n.13 (1998)). Importantly, "[w]here circumstantial evidence is relied

upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965).

Here, Plaintiff claimed that the lifeguards' arrival on the scene after Wolde was brought to the water's edge by bystanders was indirect or circumstantial evidence of the lifeguards' engagement in commercial activities. However, the alleged circumstantial evidence does not establish proof of a chain of facts that lead back to the transaction of commercial activity by any lifeguard.

First, Plaintiff offered no evidence of how long Wolde was in trouble or how long he might have struggled before submerging. To charge the lifeguards with distraction or delay in response, Plaintiff needed to establish: (1) that there was enough time for a fully attentive, on-duty lifeguard to observe Wolde and (2) get to him in time to change the outcome. Indeed, Plaintiff's aquatics safety expert did not offer an opinion that a fully attentive lifeguard could have been able to change the outcome. The simple reason is that there was no competent temporal evidence in the case – no evidence of when Wolde first started to experience trouble; no evidence of how much time passed after Wolde first experienced trouble before he was submerged; no evidence of how much time passed from when Wolde submerged to when he was brought to the water's edge by bystanders; and no evidence of how much time passed from the moment Wolde was brought to the edge of the shore and the arrival of lifeguard personnel. It was fundamentally unfair and unjust to charge LBS with a delayed response when there was absolutely no evidence of the passage of time for any of the relevant events.



ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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While the lack of temporal evidence was enough to break the circumstantial evidence chain, the infinite number of possibilities as to what the lifeguards at L-22 and L-20 were doing when Wolde got into trouble renders any connection to commercial activities as nothing more than rank conjecture and speculation. The possibilities of how or why L-22 or L-20 did not get to the scene before Wolde was at the edge of the shore are endless. For example:

- The lifeguards could have been doing acceptable lifeguard activities including visually scanning the water where the incident occurred yet initially missed what could have been a very fast drowning event (recall no competent temporal evidence).

- The lifeguards could have been doing acceptable lifeguard activities like interacting with the public (providing information about the surf, tides, currents, *etc.*); intervening in a conflict on the beach (like a football hitting a sunbather who takes offense); or helping a parent with a lost child. All of these activities are recognized in the USLA Open Water Lifesaving Manual as "additional functions" of open water lifeguards.[3]

- The lifeguards could have been off their towers patrolling the edge of the surf (an activity approved by Plaintiff's expert especially when rip currents exist or are possibilities) and then not have been in a vantage point where they could have seen what was happening when Wolde got into trouble.

While one or both of the lifeguards could have been doing any one of the aforementioned activities, none of the examples would implicate or link a chain back to a *commercial transaction* that occurred during the time of Wolde's drowning event. To the contrary, the aforementioned activities would actually be no evidence of any liability at all.

In the final analysis, with the absence of any affirmative evidence of what the lifeguards were actually doing, the *possibilities* of what they ***might*** have been doing were too endless to be able to assign to them what Plaintiff extensively argued throughout the trial – that the lifeguards were negligently engaged in some commercial activity that distracted them from their job as a

[3] Importantly, the record included a written statement of the lifeguard stationed at L-22 in which he stated that he was explaining the warning flag system to a beachgoer when he was alerted to a radio call from L-20 responding to the Wolde emergency.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

lifeguard which then proximately caused or contributed to Wolde's drowning. The South Carolina Supreme Court has held:

> The plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death, in order to entitle him to a verdict. The burden was upon him, in the absence of positive evidence of that fact, to show not only the existence of such possible responsibility, but proof of circumstances which would furnish a reasonable basis for the inference by the jury of the ultimate fact that the death was caused by the wrongful act of the defendant....

Leek v. New South Express Lines, 192 S.C. 527, 7 S.E.2d 459, 462 (1940). Here, there simply was no direct or circumstantial evidence that any relevant lifeguard was engaged in any commercial transaction that caused, or contributed to, Wolde's drowning death. Since the possibility of any lifeguard engaging in a commercial transaction is no more likely than any of the other endless numbers of possibilities improperly left a jury with nothing more than rank conjecture or speculation on which to base a liability determination, LBS was entitled to directed verdict on that issue and is now entitled to entry of judgment notwithstanding the verdict given how heavily influenced the jury was by Plaintiff's claims of negligence based on the "dual role" lifeguard theory. Tallon v. Seaboard Coast Line R. Co. 270 S.C. 362, 365, 242 S.E.2d 418, 420 (1978) ("Verdicts are not allowed to rest on conjecture or speculation.")

**III. The evidence was legally insufficient to submit the case to the jury due to a failure of proof of proximate cause; directed verdict should have been granted; and now the Court should grant judgment notwithstanding the verdict based on the failure of proof of proximate cause.**

To prevail on a negligence cause of action, a plaintiff must prove: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (citation omitted). If the proof of proximate cause fails, the entire negligence cause of action fails as a matter of law.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

"A negligent act or omission proximately causes an injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Bailey v Segars, 346 S.C. 359, 366, 550 S.E.2d 910, 914 (Ct. App. 2001).

> Proximate cause requires proof of (1) causation in fact and (2) legal cause. Causation in fact is proved by establishing that the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause,... the plaintiff need not prove that the actor should have contemplated the particular event which occurred,.... The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.

Bramlette v. Charter-Medical Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (internal citations omitted).

Here, Plaintiff's proof completely failed as to the requisite elements of both causation in fact and proximate cause. There is not *any* evidence connecting any alleged negligent act by LBS to Wolde's death in a "but for" analysis, or as a matter of proximate cause.

**A. Alleged negligence in failing to close the water.**

While Plaintiff's expert boldly opined that the water should have been closed, the opinion was without any evidentiary support. The expert conceded that he has never been to Myrtle Beach; has never researched the weather for the date of loss; and has no knowledge as to the then-existing wind speeds, wind direction, and/or surf conditions on the date of loss.

While there was evidence that a longshore current existed (generally moving swimmers from north to south down the beach), Plaintiff's expert specifically conceded that longshore currents are not hazardous, in and of themselves. A longshore current only becomes hazardous when it pushes a swimmer into a hazard such as a pier, a groin, or a rip current.

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While there was some evidence regarding rip currents, the overriding principal concern with a rip current is its unpredictability, both in terms of location and longevity. There is no recognized method for predicting either.

Here, there is no evidence in the record that, on the date of the loss, at any time prior to the occurrence at 12:45 pm, anyone identified any rip current activity in the area of the drowning incident. Importantly, no testimony or evidence was presented that LBS negligently missed identifying any rip current prior to the Wolde drowning. Assuming for the purposes of argument that the Wolde family members got into a rip, there was no evidence in the record that the rip was in existence for any period of time or was otherwise discoverable in a reasonable time frame prior to the Wolde family trouble. Further, there was no evidence of any rescues or any other people getting into trouble in the area of the drowning from the time the lifeguards took the beach around 8 am to the time of the drowning incident around 12:45 pm.[4]

In the final analysis, Plaintiff's expert's opinion that the water should have been closed was not factually supported at all and, therefore, the alleged failure to close the water prior to Wolde's drowning cannot possibly be considered a cause in fact of Wolde's drowning. Proximate cause was therefore absent; directed verdict should have been granted; and the Court should now remedy the matter by granting judgment notwithstanding the verdict in favor of Defendant.

**B. Alleged negligence in performing dual-role activities.**

As argued extensively hereinabove, there was no direct or circumstantial evidence of any lifeguard performing any commercial activity (the secondary role) at any relevant time period before or during the period Wolde's family experienced trouble in the water. There was no evidence that Wolde's drowning would not have occurred "but for" any commercial activity of

[4] The consistent testimony across all witnesses was that there was a large number of people both on the beach and in the water in the area where the incident occurred, all the way up to the time of the incident at 12:45 pm.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

any relevant lifeguard. Proximate cause was therefore absent; directed verdict should have been granted; and the Court should now remedy the matter by granting judgment notwithstanding the verdict in favor of Defendant.

**C. Alleged negligence in being understaffed on the date of loss.**

On the date of loss, the LBS beach lineup demonstrated a missing "lifeguard only" ("LGO") at a tower located in the area of 6th Avenue South (LGO 6th) – three city blocks away from the Wolde drowning incident in the area of L-21 at 9th Avenue South. While LBS was required to have that LGO on the beach on the date of the loss, there is no evidence that the missing LGO proximately caused Wolde's drowning incident. Indeed, the LGO was assigned a territory of six stands and was not assigned to be at any particular stand at any particular time. It was and is pure speculation where the missing LGO might have been when Wolde got into trouble, resulting in a complete absence of proximate cause. The complete absence of evidence of Wolde's trouble and what could have been seen from the beach or, more importantly, from a lifeguard's vantage point, all militate against any proximate cause proof. Proximate cause was therefore absent; directed verdict should have been granted; and the Court should now remedy the matter by granting judgment notwithstanding the verdict in favor of Defendant.

**D. Alleged negligence in having an empty lifeguard chair when the lifeguard went to lunch.**

The clear weight of the evidence was that Wolde was brought ashore by bystanders in vicinity of L-21 around 12:45 pm. The lifeguard assigned to L-21 was on a regularly scheduled lunch break from 12:15 pm to 1 pm and was not on the beach at the time of Wolde's trouble.[5]

[5] While witness Julian Chandler suggested seeing a "lifeguard" in the area (presuming to be L-21), he specifically testified that the "lifeguard" was wearing red shorts and no shirt. However, the express terms of the Franchise Agreement required lifeguards to wear blue shorts and to wear a yellow t-shirt between the hours of 10 am and 2 pm. Chandler's testimony was entirely speculation and there is no evidence the individual Chandler described was a LBS lifeguard.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

The lifeguard towers were positioned to allow adjacent lifeguards to have overlapping visual coverage of the water. When a lifeguard went to lunch (such as at L-21), the adjacent lifeguards would be responsible for scanning the water of the at-lunch lifeguard (here, that would be L-22 to the north and L-20 to the south). Importantly, Plaintiff offered no testimony or evidence that the positioning of the towers in 2018 violated any standard or that the adjacent lifeguards were assigned too much water to watch. Of course, Plaintiff offered no evidence of what the lifeguards at L-22 and L-20 were doing, at all, during *any* relevant time prior to or during Wolde's trouble in the water.

Proximate cause was therefore absent; directed verdict should have been granted; and the Court should now remedy the matter by granting judgment notwithstanding the verdict in favor of Defendant.

**IV. <u>The evidence was legally insufficient to submit the case to the jury on punitive damages; directed verdict should have been granted; and now the Court should grant judgment notwithstanding the verdict based on the failure of proof to support an award of punitive damages.</u>**

Punitive damages exist to punish a defendant for conduct which is clearly "willful, wanton, or undertaken in reckless disregard of plaintiff's rights." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000).

> Conduct is willful, wanton, or reckless when it is committed with a *deliberate intention* under such circumstances that a person of ordinary prudence would be *conscious* of it as an invasion of another's rights. It is the *present consciousness of wrongdoing* that justifies the assessment of punitive damages against the tortfeasor.

*Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (citation omitted) (emphasis added). Punitive damages are not proper when the evidence demonstrates ordinary or gross negligence. *See Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 519-20, 334 S.E.2d 834, 837 (Ct. App. 1985); *Cohen*, 291 S.C. at 40, 351 S.E.2d at 900 (reversing punitive damage award because there was "no proof of a present consciousness of wrongdoing on

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Allendale's part"); F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 595 (3d ed. 2004) (noting that "punitive damages are not awarded for negligence, whether simple or 'gross'").

"Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568. The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). Further, recklessness or conduct justifying punitive damages must be proven by clear and convincing evidence, as was charged to the jury by this Court. There was no evidence here of a clear and convincing quality to warrant the submission of punitive damages to the jury. There was no evidence of recklessness by LBS. Plaintiff's case was one of character attack as to George Lack, of evoking passion and sympathy for Plaintiff, and one of imposing liability because LBS was a "for profit" entity and there was speculation that had things been done differently, Wolde would not have drowned.

Such speculation and improper evidence and argument cannot, as a matter of law, sustain an award of punitive damages and judgment notwithstanding the verdict should be granted to Lack's as to punitive damages.

LBS hereby specifically incorporates its arguments and grounds in its Motion for New Trial, Conditional Motion for Reduction of Judgment, and Motion for New Trial *Nisi Remittitur* in support of this Motion, to the extent not inconsistent herewith. LBS also reserves the right to file a supplemental memorandum in support of any of its post-trial motions.

Respectfully submitted,

**HALL BOOTH SMITH, P.C.**

*/s/Joseph D. Thompson, III*
Joseph D. Thompson, III, SC Bar No. 66580
Email: jthompson@hallboothsmith.com
Paul B. Trainor, SC Bar No. 101405
Email: ptrainor@hallboothsmith.com
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
Phone: 843.720.3460

*Attorneys for Defendant Lack's Beach Service, Inc.*

August 8, 2022
Mount Pleasant, South Carolina

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | **FOR THE 15TH JUDICIAL CIRCUIT** |
| **COUNTY OF HORRY** | ) | **CASE NO.: 2019-CP-26-07075** |
| **MESWAET ABEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ZERIHUN WOLDE,** | ) | |
| **Plaintiff,** | ) | **DEFENDANT LACK'S BEACH SERVICE, INC.'S MOTION FOR NEW TRIAL ABSOLUTE** |
| **v.** | ) | |
| **LACK'S BEACH SERVICE, INC.,** | ) | |
| **Defendant.** | ) | |

Pursuant to Rule 59 and all other applicable rules of the South Carolina Rules of Civil Procedure, Defendant Lack's Beach Service, Inc. ("LBS" or "Lack's") moves for a New Trial Absolute. For purposes of this motion, LBS incorporates the arguments and points made in its concurrently filed Motion for New Trial Nisi Remittitur and Motion for Judgment Notwithstanding the Verdict, as well as prior motions for summary judgment, motions *in limine*, motions for directed verdict and its arguments, motions and points otherwise before, during, or after trial, if consistent herewith.

## INTRODUCTION

As a result of the disregard by the jury of the Court's instructions, Plaintiff's counsel making improper arguments and introducing improper evidence, the jury deciding the case based on speculation, sympathy and passion and delivering an excessive verdict, the Court handling the bifurcated trial improperly, and on the other arguments and points set forth below, the Court should grant a new trial absolute.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP260705

## STANDARD OF REVIEW

Following a jury trial, a new trial may be granted on all or part of the issues presented at trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there. Bowers v. Watkins Carolina Exp., Inc., 259 S.C. 371, 376, 192 S.E.2d 190, 192 (1972). Nevertheless, the trial court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness. *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921, 925 (Ct. App. 2008) (citing Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994)); see also Palmetto Bank v. Rowland, 275 S.C. 38, 40, 267 S.E.2d 426, 426 (1980) (upholding trial judge's grant of motion for new trial where he committed reversible error in excluding a juror based upon a misconception of the law).

Additionally, a trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). While a jury's determination of damages is entitled to substantial deference, the trial judge *must* grant a new trial absolute if the amount of the verdict is grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 9, 466 S.E.2d 727, 731 (1996); McCourt by and through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). The failure of the trial judge to grant a new trial absolute under such circumstances amounts to an abuse of discretion, which will be reversed on appeal. Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## BACKGROUND

The following was the evidence at trial:

- Zerihun Wolde and his two oldest children (then 12 and 9) voluntarily entered the water in the vicinity of L-22.[1] It was undisputed that Wolde's body was brought to shore at or just south of L-21.

- The lifeguard assigned to L-22 was on duty, at all relevant times prior to the accident.

- The lifeguard assigned to L-21 was on a regularly scheduled lunch break when the accident occurred around 12:45 pm.[2]

- The lifeguard towers were positioned to allow adjacent lifeguards to have overlapping visual coverage of the water. When a lifeguard went to lunch (such as at L-21), the adjacent lifeguards would be responsible for scanning the water of the at-lunch lifeguard (here, that would be L-22 to the north and L-20 to the south). Importantly, Plaintiff offered no testimony or evidence that the positioning of the towers in 2018 violated any standard or that the adjacent lifeguards were assigned too much water to watch.

- Plaintiff offered no direct evidence of what the lifeguards at L-22 and L-20 were doing, at all, during any relevant time prior to or during Wolde's trouble in the water.[3]

- There was no circumstantial evidence to explain what the lifeguards at L-22 and L-20 were doing at any relevant time prior to or during Wolde's trouble in the water.

- Not a single "bystander witness" offered testimony that he/she heard or saw Wolde and/or either child in trouble prior to Wolde's submersion and unconscious state. To the contrary, both "bystander" witnesses[4] who testified at trial testified quite clearly that neither heard any yelling from the family members but, instead, heard yells for help from an unidentified woman who apparently was the first to assist the family in the water.

- Both "bystander" witnesses admitted that when they first observed Wolde, he was in an unconscious and nonresponsive condition. Both "bystander" witnesses admitted to never

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[1] The lifeguard towers on the beach (designated "L") are numbered in descending chronological order from north to south.

[2] While witness Julian Chandler speculated at seeing a "lifeguard" in the area (presuming to be L-21), he testified that the person was wearing red shorts and no shirt. However, it was undisputed that the express terms of the Franchise Agreement required lifeguards to wear blue shorts and to wear a yellow t-shirt between the hours of 10 am and 2 pm. The only probative evidence, as opposed to speculation, was that the individual Chandler described was not a LBS lifeguard.

[3] Importantly, the record included a written statement of the lifeguard stationed at L-22 in which he stated that he was explaining the warning flag system to a beachgoer when he was alerted to a radio call from L-20 responding to the Wolde emergency.

[4] Jeffrey Bender and Julian Chandler offered testimony at trial. Both were located on the beach when they first realized there was trouble.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

seeing or hearing either Wolde or his children prior to Wolde's unconscious and nonresponsive condition.

- There was no evidence, and only speculation, as to the actual length of time Wolde was in trouble in the water. Further, at a minimum, some of Wolde's trouble in the water would have had nothing to do with whether anyone could have helped rescue him. He voluntarily entered the water with his two children at the same time, and the ocean poses obvious risks at all times. He and the children thereafter encountered trouble swimming.

- There was no evidence as to how far from the water's edge Wolde was when he was in trouble.

- There was no evidence as to how far Wolde was away from any lifeguard tower when he was in trouble.

- There was no evidence that the lifeguards at L-22 or L-20, assuming they saw Wolde in trouble, could have been able to get to Wolde in enough time to change the outcome.[5]

- There was no evidence as to the length of time that passed from Wolde's trouble to the time he submerged.

- There was no evidence as to the length of time that passed from when Wolde submerged to the time he was brought to the water's edge by bystanders.

- Plaintiff's expert admitted that a lifeguard's duties regularly included things such as communicating with the public, intervening in conflicts among beachgoers, and assisting with lost children. In other words, lifeguards have duties other than scanning the water at all times.

- Plaintiff's expert admitted that a certain amount of "internal noise" and/or distractions cannot be eliminated and can interfere with a lifeguard's ability to see what is happening in front of him.

- Plaintiff's expert admitted that a full trained, fully attentive on-duty lifeguard does not guarantee a beachgoer's safety. He further admitted that drownings are possible in front of a beach fully staffed by fully trained lifeguards. The risk of drowning is ever-present in any water environment, particularly the unpredictable surf environment.

- Plaintiff's expert opined that the water should have been closed due to the then-existing weather conditions. However, the expert conceded he has never been to Myrtle Beach; has never researched the weather for the date of loss; and has no knowledge regarding wind speeds, wind direction, and/or surf conditions. Plaintiff's expert conceded that a

[5] Indeed, the evidence is that the bystanders who brought Wolde to the beach were either on the beach at the water's edge, or in close proximity to, Wolde in the water. Either way, the bystanders were indisputably closer to Wolde than any lifeguard on duty on the beach.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

determination of whether to close the water is a combination of objective and subjective determinations, the latter of which has to come from the persons on the beach who observe the conditions.

- While there was evidence that a longshore current existed (generally moving swimmers from north to south down the beach), Plaintiff's expert specifically conceded that longshore currents are not hazardous, in and of themselves. A longshore current only becomes hazardous when it pushes a swimmer into a hazard such as a pier, a groin, or a rip current.

- While there was an amount of evidence regarding rip currents, the overriding and uncontradicted consensus was that a rip current is unpredictable, both in terms of location and longevity. There is no recognized method for predicting either.

- There was no evidence in the record that on the date of the loss, at any time prior to the occurrence at 12:45 pm, that anyone identified any rip current activity in the area of the drowning incident. More remarkable, while the lifeguards were on the beach by 8 am, there was no evidence of any rescues or any other people getting into trouble in the area of the drowning incident prior to 12:45 pm.[6]

- Testimony from LBS was that red warning flags were posted in the vicinity of where Wolde and his children entered the water. It was undisputed that LBS employed and followed the International Life Saving Federation flag system.

- For 40+ years, LBS provided dual-role lifeguarding services to the City of Myrtle Beach under varying agreements. Plaintiff's case did not include any evidence of any negative history of drowning incidents in front of any dual-role lifeguard on the City's beaches. No drowning statistics or any other substantially similar drowning event was ever offered into evidence, much less admitted into evidence. As a result, the ONLY drowning event that the jury was ever provided information about was Wolde's drowning event. If anything, the decades of lifeguarding service provided by LBS while employing dual-role lifeguards on the City's beaches for well over 100 million visitors without any evidence of any substantially similar event occurring was proof of an historically safe beach safety provider.

## ARGUMENTS

**I. The submission of the legally insufficient survival action to the jury prejudicially tainted the deliberations and the jury's verdict on the survival action was clearly the result of confusion and/or improper consideration of the mortality table data.**

[6] The testimony across all witnesses was that there were a large number of people both on the beach and in the water in the area around the incident, all the way up to the time of the incident at 12:45 pm. However, the only individuals to experience trouble were Wolde and his children.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

As discussed in detail in Defendant's Motion for Judgment Notwithstanding the Verdict, Plaintiff's survival action should not have, respectfully, been submitted to the jury.[7] Plaintiff's attorney emphasized Wolde's alleged struggles and drowning in his closing. The argument, based on speculation, emotionally charged the jury and the submission of the legally insufficient cause of action prejudicially tainted the jury's entire deliberation. Further, the jury failed to follow the court's instructions with regard to survival and wrongful death damages. As a result, the only remedy is for the Court to grant a new trial absolute.

**A. The jury failed to follow the Court's instruction on the mortality table and Wolde's life expectancy and improperly used the data to calculate an award for the survival action.**

While the jury should not have had a survival action to deliberate, there can be no doubt that the jury's award on the survival action was contrary to the Court's instructions. The jury was charged on the South Carolina mortality table and instructed that it could use Wolde's life expectancy at the time of his death (37.3 years) as a "guide" in considering an award of damages on the ***wrongful death*** cause of action. Indeed, Wolde's life expectancy was the centerpiece of Plaintiff's counsel's calculation of a possible award for the wrongful death cause of action.[8] However, the jury incorrectly and inappropriately used the 37.3 year life expectancy to award $100,000 per year of life expectancy as the award on the survival action.[9] The mortality tables

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[7] All discussion and arguments as to the legal insufficiency of the survival action addressed in Defendant's Motion for Judgement Notwithstanding the Verdict and Memorandum in Support are incorporated by reference as if fully set forth herein.

[8] In his closing, Plaintiff's counsel suggested a method for the jury to calculate an award for the wrongful death claim by assessing an hourly rate ($10) of compensation for the children's loss over the 37.3 year life expectancy. The argument was for $10 per hour, for 15 hours per day ($150/day), which equated to a yearly rate of $54,750. Counsel did simple math and multiplied the yearly rate times 37 years for a total of $2.025 million. He then multiplied that loss times the four children and arrived at the $8.1 million he suggested as a calculation of the wrongful death award.

[9] When a jury's award is based on an erroneous consideration and/or is inconsistent with the Court's instructions, it must be set aside. Williams v. Robertson Gilchrist Const. Co., 301 S.C. 153, 155, 390 S.E.2d 483, 484 (Ct. App. 1990), *overruled on other grounds by* O'Neal v. Bowles, 314 S.C. 525, 555, 431 S.E.2d 658, 658 (1993) (concurring in the circuit court's conclusion that a damages award in the exact amount of the economic losses as presented by the plaintiff's expert economist indicated the jury's disregard of testimony concerning a funeral bill and non-

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

and life expectancy were not appropriate "guides" at all for the survival action and the jury's award clearly demonstrates its confusion and legally deficient misapplication of the Court's jury charge on the mortality table and Wolde's life expectancy. There is no opportunity to cure this misapplication of the law other than to grant a new trial absolute.

**B. The evidence was legally insufficient to submit the survival action to the jury.**

Plaintiff's survival action should have never been submitted to a jury. Because the evidence and arguments of counsel regarding the survival action tainted the jury's deliberations on the wrongful death cause of action, the only remedy is to grant Defendant a new trial absolute.

"The test of a survival action is whether the decedent suffered conscious pain and suffering." Rutland v. South Carolina Dept. of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct.App. 2010), affirmed as modified by Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012).

There are no known reported decisions in South Carolina regarding conscious pain and suffering that might be experienced by a drowning victim. Remarkably, one of the first cases to address the question of pain and suffering of a drowning victim came from the United States Supreme Court in 1892. In The Corsair, 145 U.S. 335, 12 S.Ct. 949, 36 L.Ed. 727 (1892), the Supreme Court noted that pain and suffering was "substantially contemporaneous" with death in a drowning victim and "inseparable, as matter of law, from it." Id. at 438. The Court concluded that "the very fact she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death." Id. Other jurisdictions that have confronted the issue in more

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economic losses); Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 494, 361 S.E.2d 775, 777 (Ct. App. 1987), *overruled on other grounds by* O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (holding the circuit court properly granted a new trial *nisi additur* based on the jury's award matching the exact amount of proven economic loss and failing to award noneconomic damages).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

modern times require ***evidence*** of consciousness and expert testimony on the pathophysiology of drowning, which did not exist here.

Jurisdictions that have generally allowed the issue of conscious pain and suffering to be submitted to a jury have done so in cases where expert testimony provided the jury with information as to the technical pathophysiology of drowning. Freed v. D.R.D. Pool Service, Inc., 186 Md. App. 477, 974 A.D.2d 978 (2009) (Summary judgment granted on survival action reversed where physician specializing in anesthesiology and intensive care medicine offered specific testimony about the pathophysiology of drowning); Dontas v City of New York, 584 N.Y.S. 134, 183 A.D.2d 868, (1992) (Expert testimony provided support for award of conscious pain and suffering, although $2 million award found excessive for small period of time in drowning process). Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746, 749–50 (9th Cir. 1980) (Pathologist testimony about consciousness of victim after being submerged in the water provided enough evidence for a jury to find victim was conscious during his asphyxiation); Walker v. Daniels, 200 Ga. App. 150, 157, 407 S.E.2d 70, 76 (1991) (Appellees' expert witness testimony concerning methodology of a "wet drowning" was sufficient evidence to support questions concerning the decedent's pain and suffering for jury to decide); Rickwalt v. Richfield Lakes Corp., 246 Mich. App. 450, 633 N.W.2d 418 (2001) (Pain and suffering properly instructed to jury where expert testimony and witness testimony indicated decedent had consciously aspirated water prior to death).

Here, while there was evidence that Wolde struggled in the water, Plaintiff offered no expert testimony or evidence as to the pathophysiology of the drowning process. Moreover, Plaintiff offered no expert testimony about what a person may experience physically, emotionally, and/or mentally or, how long such might be expected to be experienced, or when the drowning

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

process even begins. This is an important, significant deficiency because South Carolina has never adopted "pre-impact fear" as an element of recoverable damages. Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012) (declining to decide the issue of whether to recognize pre-impact fear as an element of damages in a survival action and leaving it an "open question in this State."). If the drowning process starts after submersion, then the pre-submersion struggles would be considered "pre-drowning" fear and, like "pre-impact fear", should not be considered a recoverable element of damage. Plaintiff did not produce any expert evidence or testimony to provide the Court or the jury with any guidance as to what constitutes the drowning process, the amount of time involved in the drowning process and, most of all, what a drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process. With the absence of such evidence, the jury was left to decide the survival action on unsubstantiated speculation. Tallon v. Seaboard Coast Line R. Co. 270 S.C. 362, 365, 242 S.E.2d 418, 420 (1978)("Verdicts are not allowed to rest on conjecture or speculation.").[10]

Further, as shown, the jury applied the mortality tables information to the survival claim. Hence, the jury confused survival and wrongful death. Plaintiff's counsel's arguments regarding Wolde's struggles do not and could not have substituted for the required expert evidence as to the survival claim damages. As a result, Defendant should be granted a new trial absolute.

## II. There was no direct or circumstantial evidence of any lifeguard's involvement in any allegedly distracting commercial activity that proximately caused injury or death of Wolde.

Prior to trial, Defendant moved for partial summary judgment on the dual role lifeguard issue and, during trial, Defendant moved for directed verdict at the close of Plaintiff's case and at

[10] In addition, at minimum, under any facts, the initial fear and trouble experienced by the swimmer could not be pain and suffering of the swimmer chargeable against another unless the swimmer should have been precluded from entering the water at the outset. While Plaintiff attempted to advance this theory, his expert failed to provide any probative opinion in this regard on cross-examination.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

the close of Defendant's case. Defendant repeatedly objected during Plaintiff's expert's testimony as to any and all testimony and/or opinions about the dual role lifeguard. All objections were overruled. The impact and prejudice of the "dual role" lifeguard issue was magnified by the prejudicial admission of yearly gross sales data from LBS and Plaintiff's counsel's constant and repeated labeling of LBS as a "for profit" company. However, there was no evidence that any lifeguard was engaged in any allegedly distracting commercial activity at any relevant time and, therefore, Plaintiff's arguments prejudicially infected the entire case and the only remedy is for the Court to grant a new trial absolute.

Since the beginning of the case, Plaintiff has advanced the "dual role" lifeguard as the central theme of their case against LBS. Few, if any, witnesses escaped questioning about the legitimacy of, or the challenge to, the "dual role" lifeguard. Plaintiff's theme was simple; a lifeguard charged with public safety cannot effectively discharge that duty while engaged in a commercial transaction on the beach, *e.g.* renting umbrellas and chairs to beachgoers.[11] However, Plaintiff's theory was unsupported by any evidence. Again, there was no evidence that any lifeguard was engaged in any allegedly distracting commercial activity at any relevant time. Thus, Lack's was entitled to directed verdict, or at minimum a new trial absolute.

**A. There was no direct evidence that any Lack's lifeguard was engaged in any commercial transaction (*i.e.* engaged in a non-lifeguarding role) at the time of Wolde's drowning incident.**

There was no direct evidence of any relevant lifeguard participating in any commercial transaction at the time Wolde got into trouble in the water.[12] Not a single witness offered any

[11] Of course, the most important aspect of the "dual role" theme to Plaintiff's case was that Defendant derived monetary benefit from the commercial activities of the lifeguards on the beach. It was the only support for Plaintiff's counsel's continued derogatory reference to LBS as a "for profit" enterprise.

[12] When reference is made to the "relevant lifeguards" or anything similar, the reference is to the three lifeguards who would have had visual water coverage responsibility in the area where Wolde's drowning occurred including Lukasz Jaworski (L-22), Kacper Palacz (L-21) and Alex Dineev (L-20).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

evidence that any relevant lifeguard was actually engaged in a commercial transaction immediately before, or during, the time of Wolde's drowning incident. Indeed, even Plaintiff's aquatics safety expert Thomas Griffiths expressly conceded that, despite his extensive and intensive review of the evidence, he could not find any evidence that any relevant lifeguard was actually engaged in a commercial transaction in the relevant time frame around Wolde's drowning incident..[13]

Accordingly, Defendant Lack's was entitled to directed verdict on that issue and is now entitled to a new trial absolute, given how heavily influenced the jury was by Plaintiff's claims and arguments of negligence based on the "dual role" lifeguard theory.

**B. There was no indirect or circumstantial evidence that any Lack's lifeguard was engaged in any commercial transaction (*i.e.* engaged in a non-lifeguarding role) at the time of Wolde's drowning incident.**

There was also no circumstantial or indirect evidence that any lifeguard was engaged in any commercial activity at any relevant time. "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." Moriarity v. Garden Sanctuary Church of God, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (quoting State v Needs, 333 S.C. 134, 156 n.13, 508 S.E.2d 857, 868 n.13 (1998)). Importantly, "[w]here circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965).

Here, Plaintiff claimed that the lifeguards' arrival on the scene after Wolde was brought to the water's edge by bystanders was indirect or circumstantial evidence of the lifeguards'

[13] Importantly, the record included a written statement of the lifeguard stationed at L-22 in which he stated that he was explaining the warning flag system to a beachgoer when he was alerted to a radio call from L-20 responding to the Wolde emergency.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

engagement in commercial activities. However, the alleged circumstantial evidence does not establish proof of a chain of facts that lead back to the transaction of commercial activity by any lifeguard.

First, Plaintiff offered no evidence of how long Wolde was in trouble or how long he might have struggled before submerging. To charge the lifeguards with distraction or delay in response, Plaintiff needed to establish: (1) that there was enough time for a fully attentive, on-duty lifeguard to observe Wolde and (2) get to him in time to change the outcome. However, there was no competent temporal evidence in the case – no evidence of when Wolde first started to experience trouble; no evidence of how much time passed after Wolde first experienced trouble before he was submerged; no evidence of how much time passed from when Wolde submerged to when he was brought to the water's edge by bystanders; and no evidence of how much time passed from the moment Wolde was brought to the edge of the shore and the arrival of lifeguard personnel. A lifeguard simply cannot be charged with a delayed response when there is absolutely no evidence of the passage of time for any of the relevant events.

While the lack of temporal evidence is enough to break the circumstantial evidence chain, the infinite number of possibilities as to what the lifeguards at L-22 and L-20 were doing when Wolde got into trouble renders any connection to commercial activities as nothing more than rank conjecture and speculation. The possibilities of how or why L-22 or L-20 did not get to the scene before Wolde was at the edge of the shore are endless. For example:

- The lifeguards could have been doing acceptable lifeguard activities including visually scanning the water where the incident occurred yet initially missed what could have been a very fast drowning event (there is no competent evidence as to the length of the incident).

- The lifeguards could have been doing acceptable lifeguard activities like interacting with the public (providing information about the surf, tides, currents, *etc.*); intervening in a conflict on the beach (like a football hitting a sunbather who takes offense); or helping a

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

parent with a lost child. All of these activities are recognized in the USLA Open Water Lifesaving Manual as "additional functions" of open water lifeguards.

- The lifeguards could have been off their towers patrolling the edge of the surf (an activity approved by Plaintiff's expert especially when rip currents exist or are possibilities) and then not have been in a vantage point where they could have seen what was happening when Wolde got into trouble.

While one or both of the lifeguards could have been doing any one of the aforementioned activities, none of the examples would implicate or link a chain back to a *commercial transaction* that occurred during the time of Wolde's drowning event.[14] To the contrary, the aforementioned activities would actually be no evidence of any liability at all.

In the final analysis, with the absence of any affirmative evidence of what the lifeguards were actually doing, the *possibilities* of what they ***might*** have been doing were too endless to be able to assign to them what Plaintiff extensively argued throughout the trial – that the lifeguards were negligently engaged in some commercial activity that distracted them from their job as a lifeguard which then proximately caused or contributed to Wolde's drowning. The South Carolina Supreme Court has held:

> The plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death, in order to entitle him to a verdict. The burden was upon him, in the absence of positive evidence of that fact, to show not only the existence of such possible responsibility, but proof of circumstances which would furnish a reasonable basis for the inference by the jury of the ultimate fact that the death was caused by the wrongful act of the defendant....

Leek v. New South Express Lines, 192 S.C. 527, 7 S.E.2d 459, 462 (1940). LBS was entitled to directed verdict on the dual role issue and is now entitled to a new trial absolute given how heavily influenced the jury was by Plaintiff's claims and arguments of negligence based on the "dual role" lifeguard theory. Tallon v. Seaboard Coast Line R. Co. 270 S.C. 362, 365, 242 S.E.2d 418, 420

[14] As described herein, the record included a statement from the lifeguard stationed at L-22 that he was engaged in an appropriate lifeguard function (*i.e.* informing a beachgoer of the warning flag system) when he was alerted to the emergency situation over the radio by the lifeguard stationed at L-20.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

(1978) ("Verdicts are not allowed to rest on conjecture or speculation."). As a result, Defendant should be granted a new trial absolute.

**III. Plaintiff's case was legally deficient in failing to provide proof of proximate cause and, Plaintiff's argument and submissions were speculation and therefore, Defendant is entitled to a new trial absolute.**

To prevail on a negligence cause of action, a plaintiff must prove: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (citation omitted). "A negligent act or omission proximately causes an injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Bailey v Segars, 346 S.C. 359, 366, 550 S.E.2d 910, 914 (Ct. App. 2001).

> Proximate cause requires proof of (1) causation in fact and (2) legal cause. Causation in fact is proved by establishing that the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause,... the plaintiff need not prove that the actor should have contemplated the particular event which occurred,.... The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.

Bramlette v. Charter-Medical Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (internal citations omitted).

Here, Plaintiff's proof completely failed as to the requisite element of causation in fact. There simply is not any evidence connecting any alleged negligent act to Wolde's death in a "but for" analysis. But even assuming *arguendo* there was evidence, the injection of objectionable speculation and arguments throughout the trial by Plaintiff on the issue of proximate cause necessitates a new trial.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP260707

**A. Alleged negligence in failing to close the water.**

While Plaintiff's expert boldly opined that the water should have been closed, the opinion was without any evidentiary support. The expert conceded that he has never been to Myrtle Beach; has never researched the weather for the date of loss; and has no knowledge as to the then-existing wind speeds, wind direction, and/or surf conditions on the date of loss.

While there was evidence that a longshore current existed (generally moving swimmers from north to south down the beach), Plaintiff's expert specifically conceded that longshore currents are not hazardous, in and of themselves. A longshore current only becomes hazardous when it pushes a swimmer into a hazard such as a pier, a groin, or a rip current.

While there was some evidence regarding rip currents, the overriding concern with a rip current is its unpredictability, both in terms of location and longevity. There is no recognized method for predicting either.

Here, there was no evidence in the record that, on the date of the loss, at any time prior to the occurrence at 12:45 pm, anyone identified any rip current activity in the area of the drowning incident. Importantly, no testimony or evidence was presented that Lack's negligently missed identifying any rip current prior to the Wolde drowning. Assuming for the purposes of argument that the Wolde family members got into a rip, there was no evidence in the record that the rip was in existence for any period of time or was otherwise discoverable in a reasonable time frame prior to the Wolde family trouble. Of course, there was no evidence of any rescues or any other people getting into trouble in the area of the drowning from the time the lifeguards took the beach around 8 am to the time of the drowning incident around 12:45 pm.[15]

[15] The consistent testimony across all witnesses was that there was a large number of people both on the beach and in the water in the area where the incident occurred, all the way up to the time of the incident at 12:45 pm.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP260707

In the final analysis, Plaintiff's expert's opinion that the water should have been closed was not factually supported at all and, therefore, the alleged failure to close the water prior to Wolde's drowning cannot possibly be considered a cause in fact of Wolde's drowning. Proximate cause was therefore absent and a directed verdict should have been granted. Failing that, the Court should remedy the matter of erroneous speculation by Plaintiffs' expert by granting a new trial absolute.

**B. Alleged negligence in performing dual-role activities.**

As argued hereinabove, there was no direct or circumstantial evidence of any lifeguard performing any commercial activity (the secondary role) at any relevant time period before or during the period Wolde's family experienced trouble in the water. There was clearly no evidence that Wolde's drowning would not have occurred "but for" any commercial activity of any relevant lifeguard. Proximate cause was therefore absent; directed verdict should have been granted; and failing that, the Court should grant a new trial absolute.

**C. Alleged negligence in being understaffed on the date of loss.**

On the date of loss, the Lack's beach lineup demonstrated a missing "lifeguard only" ("LGO") at a tower located in the area of 6th Avenue South (LGO 6th) – three city blocks away from the Wolde drowning incident in the area of L-21 at 9th Avenue South. While Lack's was required to have that LGO on the beach on the date of the loss, there was no evidence that the missing LGO would have been anywhere near the drowning incident when it occurred.

It was uncontested and undisputed that LBS "lifeguard only" personnel were assigned a territory of six (6) stands. LGOs were not required to check in at any tower at any particular time during the day. As a result, the "missing" LGO on the date of loss could have been up to five (5) stands away from the drowning incident with no ability to change the outcome. Proximate cause

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

was therefore absent and directed verdict should have been granted. Failing that, the Court should grant a new trial absolute, due to the injection of improper speculation and argument by Plaintiff as to causation.

**D. Alleged negligence in having an empty lifeguard chair when the lifeguard went to lunch.**

The clear weight of the evidence was that Wolde was brought ashore by bystanders in vicinity of L-21 around 12:45 pm. The lifeguard assigned to L-21 was on a regularly scheduled lunch break from 12:15 pm to 1 pm and was not on the beach at the time of Wolde's trouble.

The lifeguard towers were positioned to allow adjacent lifeguards to have overlapping visual coverage of the water. When a lifeguard went to lunch (such as at L-21), the adjacent lifeguards would be responsible for scanning the water of the at-lunch lifeguard (here, that would be L-22 to the north and L-20 to the south). Importantly, Plaintiff offered no testimony or evidence that the positioning of the towers in 2018 violated any standard or that the adjacent lifeguards were assigned too much water to watch. Of course, Plaintiff offered no evidence of what the lifeguards at L-22 and L-20 were doing, at all, during any relevant time prior to or during Wolde's trouble in the water.

Proximate cause was therefore absent and directed verdict should have been granted. Failing that, the Court should grant a new trial absolute, due to the injection of improper speculation and argument by Plaintiff as to causation.

## IV. <u>There was error in the admission of irrelevant, non-probative and grossly prejudicial evidence that can only be remedied by the granting of a New Trial Absolute</u>

While the admission or exclusion of evidence is left to the sound discretion of the trial judge, "an abuse of discretion occurs when the trial court's ruling is based on an error of law." State v McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "[T]o warrant reversal based

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Id. "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). As set forth below, several errors in the admission of various evidence warrant the grant of a new trial absolute.

**A. Error in admission of evidence of workers' compensation insurance litigation.**

A party may not normally be impeached with evidence of a *criminal* conviction older than 10 years. SCRE 609(b). Here, George Lack was "impeached" on *LBS's* position taken in *civil litigation* that began in 1994 and ended in 2002 with regard to the classification of LBS employees as "attendants" or "lifeguards" for purposes of underwriting workers' compensation insurance coverage. The cross-examination of Lack was extensive and included, over objection, publication of several excerpts from the final Order in violation of SCRE 608(a) and (b) and SCRE 613. This evidence was grossly remote in time, nonprobative, and unduly prejudicial. State v Bight, 323 S.C. 221, 473 S.E.2d 851, 853 (Ct. App. 1996) ("[E]ven if the evidence was admissible, the remoteness of the occurrences and prejudicial nature of the testimony would preclude the introduction of the evidence. Evidence that may otherwise be relevant may lose its probative value when it becomes too far removed from the event in question.") (citing State v. Dubose, 288 S.C. 226, 341 S.E.2d 785 (1986)).

The final Order in that litigation included a conclusion, as a matter of law, that LBS lifeguards were, in fact, lifeguards and not beach attendants and that LBS should pay workers'

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

compensation premiums based on the lifeguard classification. It was uncontested that LBS paid workers compensation premiums based on the classification of its employees as lifeguards from 2002 through the date of the accident in 2018. In other words, for sixteen (16) years, LBS dutifully paid workers compensation insurance premiums based on the classification of its employees as lifeguards. The evidence of litigation that began twenty-four (24) years prior to the subject incident and that ended sixteen (16) years prior to the incident, was irrelevant, non-probative and highly prejudicial for being exceptionally remote in time. Lyons v. Butler, 288 S.C. 498, 501, 343 S.E.2d 630, 632 (Ct. App. 1986) ("A witness may not be impeached by evidence of specific acts of misconduct, except for crimes involving crimes of moral turpitude and not too remote in time." (citing State v Harvey, 275 S.C. 225, 268 S.E.2d 587 (1980))).

**B. Error in admission of evidence of USLA membership, certification and/or decertification and all communications as to same.**

Perhaps the centerpiece of Plaintiff's unrelenting character impeachment of George Lack was the introduction of evidence and testimony about his communications with USLA[16] representatives beginning in 1996 and ending in 2008. The evidence included the introduction of multiple letters and the live testimony of Christmas Brewster, the former president of the USLA, and current chair of the USLA's National Certification Committee.

First and foremost, the State of South Carolina does not require any lifeguarding service, public or private, on any coastal beach to be certified by any association or organization, much less the USLA. See S.C. Code Ann. § 5-7-145(B)(4) ("[L]ifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality."). Indeed, the relevant Franchise Agreement between the City of Myrtle Beach and LBS did not

[16] USLA is the acronym for the United States Lifesaving Association.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

require USLA certification. As a result, any and all evidence offered by Plaintiff regarding USLA certification or decertification was irrelevant, non-probative and grossly prejudicial.

Second, Lack was "impeached" by communications between him and officials at USLA about LBS's lifeguard roles and activities in the time frame from 1996 through 2008. Importantly, LBS was "decertified" by USLA in 2008 due to the dual-role activities of its lifeguards. The decertification was irrelevant, non-probative, and highly prejudicial evidence especially in light of the fact that USLA certification was not required by the City when it and LBS entered into the applicable franchise agreement in 2018. None of the evidence and/or testimony should have been admitted.

Third, the letters and live testimony of Christmas Brewster eventually resulted in Brewster testifying that Lack had "bamboozled" the USLA and that Lack had intentionally misrepresented the dual role activities of LBS lifeguards. This testimony was especially prejudicial in light of the simple fact that the activities of LBS dual role lifeguards in 2018 were known *and* authorized by the City of Myrtle Beach. Any alleged prior "concealment" or "misrepresentation" as to USLA was not relevant, at all, to the actual situation in 2018 when the City was indisputably aware of the activities of LBS' dual role lifeguards (and such role is expressly permitted by the South Carolina Code, *see* S.C. Code Ann. § 5-7-145(B)). In short, there was no reason or basis to "impeach" Lack regarding any alleged "misrepresentation" to the USLA eleven (10) to twenty-two (22) years prior to the subject 2018 drowning incident. The evidence was irrelevant, non-probative and grossly prejudicial. A new trial should be granted as a result.

**C. Error in admission of evidence of yearly gross sales of Lack's Beach Service and other financial data.**

Over objection, Plaintiff entered into evidence the gross sales of LBS for the calendar year 2018. Additionally, the Court allowed evidence of sales tax calculations for LBS for gross sales

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

for a three month period of time in and around the August 24, 2018 incident. None of this evidence was relevant to any issue in the case and was highly prejudicial to Defendant, especially in the manner in which Plaintiff's counsel used the evidence throughout the trial and in his closing argument.

First, the fact that certain LBS lifeguards conducted commercial activity on the City's beaches in 2018 was never in dispute. In fact, it was the business model that had been employed by the City and LBS for 40+ years. The City's former City Manager John Pederson testified unequivocally to that fact. Given that the commercial activity of the LBS lifeguards was undisputed, there was no possible relevance to the yearly gross sales evidence or sales tax evidence that was admitted at trial.

Second, Plaintiff's counsel used the financial evidence exactly as it should not have been used. At every possible opportunity, counsel described LBS as the "for profit Defendant." The $1.5 million in gross sales for 2018 was gratuitously repeated for the jury's consumption. Of course, the 2018 sales figure had no relevance, whatsoever to what happened on the beach on August 24, 2018. The admission of business income of this kind and nature has been forbidden by the South Carolina Supreme Court. *See* Branham v. Ford Motor Co., 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010) (only evidence of net worth allowed in punitive phase of trial).

Third, while George Lack was on the witness stand, Plaintiff's counsel fumbled through various calculations using the gross sales figures to try and demonstrate that LBS would still be able to make money if it employed separate personnel to conduct commercial activity. While he never got it right with the witness, counsel kept repeating the gross sales numbers—not net income—and suggesting that LBS made more than enough money to hire beach attendant personnel in lieu of having the lifeguards do it. While the "alternative" method for conducting

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

business on the beach was not relevant, especially in light of the express provisions of the franchise agreement allowing LBS to conduct business with dual role lifeguards, the repeated fumbling simply allowed large *gross* sales numbers to get before the jury for no legitimate evidentiary purpose. The evidence was irrelevant, non-probative and grossly prejudicial. A new trial should thus be granted.

## V. The Court improperly permitted the jury to make a finding of recklessness in the first phase of the bifurcated proceedings, and otherwise failed to properly instruct the jury.

The Court should grant Lack's motion for a new trial because the issue of recklessness was improperly tried in the first phase of the trial in contravention of South Carolina's punitive damages statutes, and because the Court declined to otherwise instruct the jury by way of charge or on the verdict form as to the meaning/relevance of their decision as to whether to find Lack's to have been reckless.

The South Carolina Code provides that "[a]ll actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, ***must be conducted in a bifurcated manner*** before the same jury." S.C. Code Ann. § 15-32-520(A) (emphasis added). The bifurcation statute provides a series of requirements and expectations for the two halves of the bifurcated proceedings.

The Code provides that in the first stage: "the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages." § 15-32-520(B). These are the ***only*** findings contemplated in the first phase. Leaving no doubt, this section states that "[e]vidence relevant only to the issues of punitive damages is ***not admissible*** at this stage." *Id.* (emphasis added).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP260707

If (and only if) compensatory or nominal damages are awarded in the first stage of the trial, "punitive damages ***may*** be considered." § 15-32-520(C) (emphasis added). Even then, "[p]unitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct." § 15-32-520(D). The statute provides that "[i]n the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages." § 15-32-520(E).

Therefore, pursuant to the punitive damages statute, ***any information or evidence relating in any way to punitive damages*** (including but not limited to, any statement or suggestion that LBS's alleged conduct was "wilful, wanton, or reckless,") should not have been allowed to be made or placed before the jury until the second phase of the case. Defendant raised the bifurcation demand in its Answer and prior to trial and expected the Court to conduct the trial in accordance with the express terms of the statute. The jury should not have been permitted to make a finding of recklessness or consider any evidence on that issue during the first phase, and it was reversible error for the court to place this issue before the jury at that stage.

Unless and until actual damages were found to be appropriate at the initial stage of a bifurcated trial, under section 15-32-520, it was improper and prejudicial to allow the jury to hear any evidence or statements by counsel that related in any way to the issue of punitive damages—whether by testimony, exhibit, demonstrative exhibit, or argument of counsel. *See* Rules 401, 402, and 403, SCRE. This was the only proper way to conduct the trial under the punitive damages statute.

Furthermore, the Court failed to explain the import and relevance of a finding of recklessness on the verdict form, after permitting the issue of recklessness to be introduced in the

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

first phase. The jury should have at the very least, been properly informed that a finding of recklessness would mean that the trial would proceed to a second phase examining whether Plaintiff was entitled to punitive damages. By failing to do so, the jury was required to answer a question about "recklessness" without any context as to the meaning and impact of such a finding. These errors warrant a new trial absolute as to both actual and punitive damages. A new trial may not be awarded in the circumstances of this case, based on the evidence, for punitive damages only. *See* S.C. Code Ann. § 15-33-125 ("Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages."); *see also* Reid v. Harbison Dev. Corp., 289 S.C. 319, 322, 345 S.E.2d 492, 493 (1986), *overruled on other grounds by* O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993) ("Generally, actual damages should not be separated from punitive damages for a retrial on actuals alone. Punitive damages may only be awarded if actuals are recovered, and therefore, retrial only on actual damages may be improper since punitive damages may change depending on the actual damage award. In the interest of justice and fairness to all parties, both actual and punitive damages should be reconsidered together on retrial."); Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012) (citing Reid with approval).

## V. The jury's actual damages awards on the survival action and wrongful death causes of action were grossly excessive and not based on any factual evidence in the record requiring the Court to grant Defendant a New Trial Absolute.

South Carolina law unequivocally establishes that a party is entitled to a new trial absolute where the verdict is grossly excessive, inconsistent with the evidence or motivated by improper considerations. "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). "If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). "The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." Vinson v. Hartley, 324 S.C. 389, 405 (Ct. App. 1996); see also Welch v. Epstein, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000) ("[T]o warrant a new trial absolute, the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury.")

The jury's award in this case was not based on any evidence, and was purely, and solely, the result of improper motives, passion, caprice and prejudice. The jury awarded $3.73 million for the survival action, *i.e.* Wolde's alleged conscious pain and suffering, and an additional $10 million for the wrongful death action. However, there was no evidence presented of (1) how long the drowning process occurred before Mr. Wolde died nor (2) the effects that a drowning victim may experience. To be clear, any evidence that Mr. Wolde was struggling in the water would not constitute evidence of conscious pain and suffering. See Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012) (declining to decide the issue of whether to recognize pre-impact fear as an element of damages in a survival action and leaving it an "open question in this State"). Moreover, the two bystander witnesses who testified at trial confirmed that Wolde was unresponsive and unconscious from the time they first saw him until the time he was transported from the beach, further highlighting the absence of any evidence to support such an award.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Importantly, as to the wrongful death cause of action, Plaintiff did not present any evidence of economic or pecuniary loss and, therefore, Defendant LBS was granted directed verdict on that element of loss. As a result, the wrongful death claim damages that were submitted to the jury comprised only the beneficiaries' mental shock and suffering, wounded feelings, grief, sorrow and loss of society and companionship. Ballard v. Ballard, 314 S.C. 40, 42, 443 S.E.2d 802 (1994).

A survey of reported wrongful death verdicts since 2010 does not provide support for the jury's $13.73 million actual damages award in this case.[17] See Pratt v. Varaly, D.O., No. 2016-CP-46-3181 (S.C. Ct. Comm. Pl. Feb. 10, 2020) (death of a 66-year-old, $360,000 award for survival action, $0 for wrongful death action); Gibson v. Full House Sportzaria, LLC, No. 2017-CP-23-06352 (S.C. Ct. Comm. Pl. July 26, 2019) (death of a 58-year-old, total compensatory damages award of $2,523,500); Scheer v. Southern Myrtle Inpatient Services, LLC, No. 2017-CP-26-01571 (S.C. Ct. Comm. Pl. May 24, 2019) (death of a 26-year-old, $500,000 for survival action, $3,000,000 combined for two (2) wrongful death beneficiaries); Bannister v. Faith, Hope and Charity Retirement, LLC, No. 2017-CP-04-00431 (S.C. Ct. Comm. Pl. Apr. 11, 2019) (death of adult female, total compensatory damages award of $234,860.55); Glenn v. Carboline Co., No. 2015-CP-04-01607 (S.C. Ct. Comm. Pl. Jan. 25, 2019) (death of adult male, $1,000,000 award for survival action; $1,000,000 for wrongful death action); Huff v. XPO Express, Inc., No. 2:16-CV-01254, 2018 WL 9989866 (D.S.C. Sept. 6, 2018) (death of 50-year-old, $7,000,000 total compensatory damages award); Dial v. Toyota Motor Corp., No. 2013-CP-04-01483 (S.C. Ct. Comm. Pl. May 31, 2018) (death of 17-year-old, $6,000,000 award for survival action, $6,000,000

[17] As the Supreme Court has acknowledged that while each case must be evaluated individually, comparing verdicts to awards in other matters "is helpful and sometimes forceful." *Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976); *see also Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 663, 869 S.E.2d 819, 849 (Ct. App. 2021), reh'g denied (Feb. 25, 2022) ("As to noneconomic damages, the circuit court first examined awards for pain and suffering in comparable cases.").

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

award for wrongful death action); Steele v. XPO Express, Inc., No. 2:15-CV-02481, 2018 WL 7815190 (D.S.C. May 3, 2018) (death of 7-month-old, $1,000,000 award for survival action); Oickle v. XPO Express, Inc., No. 2:15-CV-02773, 2018 WL 7822184 (D.S.C. May 2, 2018) (death of adult female, $5,000,000 award for loss of services); Spencer v. Lexmed, Inc., No. 2016-CP-32-01931 (S.C. Ct. Comm. Pl. Mar. 30, 2018) (death of 85-year-old, $200,000 award for survival action, $250,000 award for wrongful death action); Edwards v. Scapa Waycross, Inc., No. 2013-CP-46-00368 (S.C. Ct. Comm. Pl. Feb. 9, 2018) (death of 69-year-old, $600,000 award for survival action; $100,000 for wrongful death action); Bannister v. Columbia Urological Associates, P.A., No. 2015-CP-40-4794 (S.C. Ct. Comm. Pl. Oct. 6, 2017) (death of 70-year-old, $10,000,000 total compensatory damages); Wickersham v. Ford Motor Co., No. 9:13-CV-01192, 2016 WL 4708993 (D.S.C. Aug. 26, 2016) (death of 55-year-old, $1,250,000 award for survival action; $1,375,000 award for wrongful death action); Rivero v. Sheriff Loftis, No. 2013-CP-23-06522, 2015 WL 6756101 (S.C. Ct. Comm. Pl. Oct. 13, 2015) (death of 38-year-old, $750,000 award for survival action; $500,000 for wrongful death action); Reynolds v. South Carolina Heart Center, No. 2013-CP-40-00785 (S.C. Ct. Comm. Pl. Mar. 20, 2015) (death of 66-year-old, $1,000,000 award for survival action; $1,000,000 for wrongful death action); Jackson v. John Doe, No. 2012-CP-46-3907 (S.C. Ct. Comm. Pl. Oct. 8, 2014) (death of adult male, $1,103,000 total compensatory award); Easler v. Paladugu, M.D., No. 2012-CP-42-00053 (S.C. Ct. Comm. Pl. Aug. 18, 2014) (death of adult female, $900,000 award for survival action; $600,000 for wrongful death action); Blair v. Easley OB-GYN Associates, No. 2009-CP-39-01615, 2012 WL 6584675 (S.C. Ct. Comm. Pl. Mar. 9, 2012) (death of adult female, $1,400,000 total compensatory award); Reeves v. Town of Cottageville, No. 2:12-CV-02765, 2014 WL 5788788 (D.S.C. Oct. 15, 2014) (death of adult

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

male, $7,500,000 total compensatory award)[18]; Riley v. Ford Motor Co., No. 2008-CP-05-00235, 2014 WL 3406028 (S.C. Ct. Comm. Pl. Sept. 29, 2011) (death of adult male, $300,000 total compensatory award); Kirksey v. South Carolina Emergency Physicians, No. 09-CP-46-02113 (S.C. Ct. Comm. Pl. Apr. 8, 2011) (death of 51-year-old, $500,000 award for survival action; $0 for wrongful death action); Bellamy v. Jones, No. 2008-CP-26-01437, 2010 WL 5574113 (S.C. Ct. Comm. Pl. Mar. 1, 2010) (death of 7-year-old, $755,000 award for survival action); Fay v. Grand Strand Med Ctr, LLC, 412 S.C. 185, 771 S.E.2d 639 (Ct.App. 2015) (adult female, $3 million award for wrongful death) (**Horry County**); Johnson v. Horry County Solid Waste Authority, 389 S.C. 528, 698 S.E.2d 835 (Ct.App. 2010) (adult male, $500,000 award for wrongful death)(**Horry County**).

The inescapable conclusion is that the jury ignored the evidence and rendered a verdict based purely on passion, prejudice, improper motives, speculation, and at the urging of improper arguments of Plaintiff's counsel. The excessiveness of the jury's award, and the improper motives and considerations underlying same, were highlighted by the jury's award of punitive damages. After the jury had awarded $13.73 million in compensatory damages, and after the jury was presented evidence that LBS had only $3 million in applicable insurance coverage and a negative net worth of nearly $500,000 at the close of business in 2021, the jury awarded **an additional $7 million in punitive damages**. The jury was specifically instructed that it could not affect economic bankruptcy on LBS—yet, after hearing the net worth of LBS and available insurance coverage (which was effectively exhausted by the jury's compensatory damages award), the jury did exactly what they were instructed not to do—render a punitive damages award that would,

[18] Plaintiff's counsel in the present case represented the plaintiff in the Reeves matter.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

effectively, bankrupt LBS. This award, despite the clear instructions from the court, only underscores the grossly excessive damages awarded in this case and warrants a new trial absolute.

## VI. The Court should grant New Trial Absolute pursuant to the "thirteenth juror" doctrine in order to correct the injustice of this jury's verdict.

Under the "thirteenth juror" doctrine, a trial judge has the discretion to grant a new trial absolute if the judge finds the evidence does not justify the verdict. The judge exercising this power sits in essence as an additional juror, with the full ability to effectively "hang" the jury if it disagrees with the other jury members on their verdict based on the facts. Here, this Court should not agree with the jurors on their verdict based on the facts. The South Carolina Supreme Court has described the "thirteenth juror" doctrine as follows:

> Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercise the discretion vested in him with fairness and impartiality.

Worrell v. South Carolina Power Co., 186 S.C. 306, 313-14, 195 S.E.2d 638, 641 (1938). "The trial judge, sitting as the thirteenth juror charged with seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996)(citing Graham v Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984)).

> Traditionally in South Carolina circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. The thirteenth juror doctrine is a vehicle by which the trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict.

Todd v. Owen Indus. Products, Inc., 315 S.C. 34, 35, 431 S.E.2d 596, 597 (Ct. App. 1993) (citing Folkens v. Hunt, 300 S.C. 251, 387 265 (1990)).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Importantly, the evidence does not have to be overly one-sided to any party for a judge to grant a new trial absolute as the thirteenth juror. Indeed, the trial court may grant a new trial on conflicting evidence and that decision will still be upheld on appeal. The Supreme Court has explicitly held that "[i]f the testimony and evidence are in conflict, this court has consistently held that the trial judge's granting a new trial upon the facts has support and will not be disturbed on appeal." Folkens v. Hunt, 300 S.C. 251, 255, 387 S.E.2d 265, 268 (1990) (trial court's thirteenth juror ruling upheld where conflicting evidence was presented on liability and damages issues).

The recitation of the facts, or more accurately the lack of facts, of what happened on August 24, 2018, readily supports this Court granting a new trial absolute pursuant to the "thirteenth juror" doctrine. There is not even a scintilla of evidence, much a less a conflict in the evidence, that on August 24, 2018, any LBS lifeguard either acted negligently, or negligently failed to act, and that such negligence proximately caused Wolde's drowning incident. There is likewise no evidence of recklessness which proximately caused Wolde's drowning incident. Knowing the paucity of factual evidence, Plaintiff's counsel systematically and relentlessly attacked the character of George Lack. The large amount of irrelevant, non-prohibitive and highly prejudicial character evidence incited and inflamed the jury and the resulting fire and flame in their eyes prevented a reasonable consideration of the factual evidence of what happened on August 24, 2018.

Additionally, the jury disregarded or confused the Court's instructions on the mortality table and Wolde's life expectancy by awarding $3.73 million on the survival action based on Wolde's 37.3 years of life expectancy ($100,000 per year for Wolde's 37.3 years of life expectancy). The Court instructed the jury that the mortality table and life expectancy could be used as a "guide" in the determination and calculation of damages on the wrongful death cause of action. However, the jury clearly used the life expectancy to calculate an award on the survival

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

action cause of action. Instead of awarding damages based on the conscious pain and suffering of Wolde *prior* to his death (of which there was no evidence), the jury awarded damages based on what Wolde would have been entitled to if he had *survived* the incident. The jury misunderstood the Court's charge on what the survival action entailed as well as the application of the mortality table and life expectancy. There is simply no legitimate remedy for this gross confusion and disregard for instructions other than with a grant of a new trial absolute.

Finally, the jury's passion, prejudice and sympathy boldly manifested itself in the punitive damages award. In a very brief presentation, the jury received evidence that LBS had only $3 million in applicable liability coverage to meet a verdict and that LBS had a *negative* net worth of $473,350.51 at the close of calendar year 2021.[19] Despite having already awarded $13.73 million in actual damages, and despite being charged that a punitive damage award should not effectuate economic bankruptcy, the jury returned a punitive damages award of $7 million against LBS, again disregarding the Court's instructions. The Court also charged the jury that it could not base its verdict on passion or speculation. Even the most financially unsophisticated person, when reviewing LBS's 2021 Balance Sheet, can see there is nothing in it that even closely resembles $7 million. Indeed, the jury's punitive damages award is obvious evidence that the jury was motivated by something other than the facts of the case and the Court's instructions. The jury's passion, prejudice and sympathy infected the entire deliberations and, therefore, this Court should grant a new trial absolute as the "thirteenth juror" in order to rectify the patent injustice of this jury's verdict.

Lack's hereby specifically incorporates its arguments and grounds in its Motion for JNOV Conditional Motion for Reduction of Judgment, and Motion for New Trial Nisi Remittitur in

[19] LBS's 2021 year-end Balance Sheet was admitted into evidence.

support of this Motion, to the extent not inconsistent herewith. Lack's also reserves the right to file a supplemental memorandum in support of any of its post-trial motions.

Respectfully submitted,

**HALL BOOTH SMITH, P.C.**

*/s/Joseph D. Thompson, III*
Joseph D. Thompson, III, SC Bar No. 66580
Email: jthompson@hallboothsmith.com
Paul B. Trainor, SC Bar No. 101405
Email: ptrainor@hallboothsmith.com
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
Phone: 843.720.3460

*Attorneys for Defendant Lack's Beach Service, Inc.*

August 8, 2022
Mount Pleasant, South Carolina

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ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | **FOR THE 15TH JUDICIAL CIRCUIT** |
| **COUNTY OF HORRY** | ) | **CASE NO.: 2019-CP-26-07075** |
| **MESWAET ABEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ZERIHUN WOLDE,** | ) | |
| **Plaintiff,** | ) | **DEFENDANT LACK'S BEACH SERVICE, INC.'S MOTION FOR NISI REMITTITUR** |
| **v.** | ) | |
| **LACK'S BEACH SERVICE, INC.,** | ) | |
| **Defendant.** | ) | |

Defendant Lack's Beach Service, Inc. ("Lack's" or "LBS") respectfully moves for a new trial *nisi remittitur* as to the jury's verdict on both the survival and wrongful death actions. If this Court chooses not to grant judgment as a matter of law to LBS and/or not to grant a new trial absolute, then this Court should grant a new trial *nisi remittitur*.

## BACKGROUND

This is a negligence case arising from the drowning of Zerihun Wolde in the ocean off of the beach in the City of Myrtle Beach on August 24, 2018. After approximately two and one half hours of deliberations, the jury returned a verdict in favor of Plaintiff on the survival action for $3,730,000 and a verdict in favor of Plaintiff on the wrongful death action for $10,000,000. In a bifurcated proceeding and after an additional forty-five minutes of deliberations, the jury returned a verdict for $7 million additional in punitive damages. For the purposes of this Motion, LBS specifically incorporates by reference any and all background information, recitation of trial facts and or arguments made in its Motions for JNOV and New Trial Absolute filed contemporaneously herewith.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## STANDARD OF REVIEW

In South Carolina, the trial judge "has the power, and with it the responsibility," of reducing a damages award that is "unduly liberal" or "merely excessive." Easler v. Hejaz Temple of Greenville, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985); see also Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635, 529 S.E.2d 758, 762 (Ct. App. 2000).

Following a jury trial, a new trial may be granted to all or any of the parties and on all or part of the issues "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. "A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). An order granting a new trial *nisi due to an excessive verdict* contemplates not the striking down of the verdict altogether, but remission of part of it and the granting of a new trial in default thereof. Howard v. Roberson, 376 S.C. 143, 155, 654 S.E.2d 877, 883 (Ct. App. 2007) (citing Elliott v. Black River Elec. Co-op., 233 S.C. 233, 263, 104 S.E.2d 357, 372 (1958)).

A new trial *nisi remittitur* is proper when the jury's verdict is merely excessive or "unduly liberal," but not necessarily "actuated by passion, caprice, or prejudice" sufficient to warrant a new trial absolute.[1] Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). However, 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 ruling upon a motion for new trial *nisi remittitur*, the trial judge must consider the adequacy of the verdict in light of the evidence

[1] If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge *must* grant a new trial absolute. Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). Lack's has asserted, pursuant to its Motion for New Trial Absolute, that such is the case here. If the Court declines to so hold, it should find the verdict unduly liberal and merely excessive and reduce it via new trial *nisi* order.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

presented. Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). The critical inquiry is whether the award excessively compensates the injured party. See Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). While there is no formulaic measure for an actual or punitive damages award, "if the trial judge 'is convinced that the amount awarded is overly liberal, he has the authority and corresponding *duty* to reduce the verdict by order *nisi.*'" Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (emphasis in original) (quoting Hicks v. Herring, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965)).

## ARGUMENT

### I. The $3.73 million jury verdict on the survival action was unduly excessive and, therefore, the Court should grant LBS a new trial nisi additur.

As discussed in detail in Defendant's Motion for Judgment Notwithstanding the Verdict, Plaintiff's survival action should never have been submitted to the jury.[2] By allowing the legally insufficient cause of action, the Court gave license to Plaintiff's attorney to emphasize and capitalize on Wolde's alleged struggles and drowning in his closing. The argument, based on speculation, emotionally charged the jury and the submission of the legally insufficient cause of action prejudicially tainted the jury's entire deliberation. As a result, the Court should grant a new trial *nisi remittitur*.

#### A. The evidence in the record does not support an award of $3.73 million for the survival action.

"The test of a survival action is whether the decedent suffered conscious pain and suffering." Rutland v. South Carolina Dept. of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct.App. 2010), *affirmed as modified by* Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734

[2] All discussion and arguments as to the legal insufficiency of the survival action addressed in Defendant's Motion for Judgement Notwithstanding the Verdict and Memorandum in Support are incorporated by reference as if fully set forth herein.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

S.E.2d 142 (2012). The evidence taken in the light most favorable to Plaintiff was that Wolde, at some unidentified time, began to realize he was in trouble, presumably as a result of being unable to stand on the bottom and hold his daughter, who clung to his shoulder in fear of deep water. He yelled for help. Then he submerged, and was next discovered in an unconscious, unresponsive state.[3]

Importantly, Plaintiff did not produce any evidence or testimony from anyone, and the record is completely devoid, of any evidence of the drowning process. When does it start?[4] How long does it last? What does a drowning person experience in the drowning process? The record does not contain *any* evidence answering *any* of these questions. Of course, if these generic questions cannot be answered, it cannot be reasonably argued that the record includes sufficient evidence of Wolde's drowning experience.

It also cannot be seriously argued that the drowning process is within the knowledge and/or understanding of a layperson. Indeed, the drowning process is a technical matter that necessarily requires the explanation of an expert witness. Of course, Plaintiff did not provide any evidence of the drowning process at all, much less any expert testimony. In short, the award of $3.73 million

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[3] At trial, Wubit Wolde testified, for the first time, that after they started yelling, her father went under and came up gasping for air, perhaps more than once. However, that testimony was directly contradicted by her prior deposition testimony. To wit:

> Q. So you and your dad and brother got in trouble, you called for help, and then the next thing you realize or remember is that you could stand in knee deep water?
>
> A. Yes. I don't remember it. I just remember yelling for help, and that I think – I don't know how we got out of it, honestly, but I just remember that eventually we were at the shore and I was walking towards the shore.
>
> Q. Do you know about how long that lasted?
>
> A. No.

[W. Wolde Dep. p. 61-62]. Importantly, when confronted with this prior testimony on cross-examination, Wubit admitted that the deposition testimony was the truth and what she remembered happening in the ocean.

[4] This is an exceptionally important unanswered question. If the drowning process does not start until submersion, then the above water struggle, if any, would not be sufficient evidence to support a survival action award.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

on this little, if any, evidence is excessively liberal and this Court should grant a new trial *nisi remittitur*.

**B. In contravention of the Court's charge, the jury erroneously applied the mortality table and life expectancy of the deceased to the calculation of the damages in the survival action directly leading to an unduly excessive award.**

As discussed in the motions filed contemporaneously herewith, the jury indisputably confused the Court's instructions on the mortality table and Wolde's life expectancy by awarding $3.73 million on the survival action based on Wolde's 37.3 years of life expectancy (clearly, $100,000 per year for Wolde's 37.3 years of life expectancy). The Court instructed the jury that the mortality table and life expectancy could be used as a "guide" in the determination and calculation of damages on the wrongful death cause of action. However, the jury clearly and inappropriately used the deceased's life expectancy to calculate an award on the survival cause of action. Instead of awarding damages based on the conscious pain and suffering of Wolde *prior* to his death, the jury awarded damages based on what Wolde would have been entitled to if he had *survived* the incident. The jury misunderstood the Court's charge on what the survival action entailed as well as the application of the mortality table and life expectancy. As a result, the jury's award was unduly liberal and excessive. Accordingly, the Court should grant a new trial *nisi remittitur*.

**II. <u>The $10 million jury verdict on the wrongful death action was unduly excessive and, therefore, the Court should grant LBS a new trial nisi additur.</u>**

While the loss of a father is indisputably tragic and emotionally charged, the judge and the jury must still apply reasoned and rational thought to an award of damages for the alleged wrongful death The need for reasoned and rational thought was even more important where, as here, there

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

was no evidence of economic or pecuniary loss.[5] As a result, the jury was left to its own devices to assess the emotionally charged non-economic losses of the beneficiaries including mental shock and suffering, wounded feelings, grief, sorrow and loss of society and companionship.[6] Ballard v. Ballard, 314 S.C. 40, 42, 443 S.E.2d 802 (1994).

A survey of reported wrongful death verdicts since 2010 demonstrates how excessively liberal the jury's $10 million actual damages award was in this case.[7] See Gibson v. Full House Sportzaria, LLC, No. 2017-CP-23-06352 (S.C. Ct. Comm. Pl. July 26, 2019) (death of a 58-year-old, total compensatory damages award of $2,523,500); Scheer v. Southern Myrtle Inpatient Services, LLC, No. 2017-CP-26-01571 (S.C. Ct. Comm. Pl. May 24, 2019) (death of a 26-year-old, $3,000,000 combined for two (2) wrongful death beneficiaries); Bannister v. Faith, Hope and Charity Retirement, LLC, No. 2017-CP-04-00431 (S.C. Ct. Comm. Pl. Apr. 11, 2019) (death of adult female, total compensatory damages award of $234,860.55); Glenn v. Carboline Co., No. 2015-CP-04-01607 (S.C. Ct. Comm. Pl. Jan. 25, 2019) (death of adult male, $1,000,000 for wrongful death action); Huff v. XPO Express, Inc., No. 2:16-CV-01254, 2018 WL 9989866 (D.S.C. Sept. 6, 2018) (death of 50-year-old, $7,000,000 total compensatory damages award); Dial v. Toyota Motor Corp., No. 2013-CP-04-01483 (S.C. Ct. Comm. Pl. May 31, 2018) (death of 17-year-old, $6,000,000 award for wrongful death action); Oickle v. XPO Express, Inc., No. 2:15-CV-02773, 2018 WL 7822184 (D.S.C. May 2, 2018) (death of adult female, $5,000,000 award for loss of services); Spencer v. Lexmed, Inc., No. 2016-CP-32-01931 (S.C. Ct. Comm. Pl. Mar. 30,

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[5] Defendant LBS was granted directed verdict on the element of economic and/or pecuniary loss.

[6] The beneficiaries of the wrongful death claim were decedent's children who were 12, 9, 6 and 6 at the time of their father's death on August 24, 2018.

[7] The Supreme Court has acknowledged that while each case must be evaluated individually, comparing verdicts to awards in other matters "is helpful and sometimes forceful." Lucht v. Youngblood, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976); see also Jolly v. Gen. Elec. Co., 435 S.C. 607, 663, 869 S.E.2d 819, 849 (Ct. App. 2021), reh'g denied (Feb. 25, 2022) ("As to noneconomic damages, the circuit court first examined awards for pain and suffering in comparable cases.").

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

2018) (death of 85-year-old, $250,000 award for wrongful death action); Edwards v. Scapa Waycross, Inc., No. 2013-CP-46-00368 (S.C. Ct. Comm. Pl. Feb. 9, 2018) (death of 69-year-old, $100,000 for wrongful death action); Wickersham v. Ford Motor Co., No. 9:13-CV-01192, 2016 WL 4708993 (S.C. Ct. Comm. Pl. Aug. 26, 2016) (death of 55-year-old, $1,375,000 award for wrongful death action); Rivero v. Sheriff Loftis, No. 2013-CP-23-06522, 2015 WL 6756101 (S.C. Ct. Comm. Pl. Oct. 13, 2015) (death of 38-year-old, $500,000 for wrongful death action); Reynolds v. South Carolina Heart Center, No. 2013-CP-40-00785 (S.C. Ct. Comm. Pl. Mar. 20, 2015) (death of 66-year-old, $1,000,000 for wrongful death action); Jackson v. John Doe, No. 2012-CP-46-3907 (S.C. Ct. Comm. Pl. Oct. 8, 2014) (death of adult male, $1,103,000 total compensatory award); Easler v. Paladugu, M.D., No. 2012-CP-42-00053 (S.C. Ct. Comm. Pl. Aug. 18, 2014) (death of adult female, $600,000 for wrongful death action); Blair v. Easley OB-GYN Associates, No. 2009-CP-39-01615, 2012 WL 6584675 (S.C. Ct. Comm. Pl. Mar. 9, 2012) (death of adult female, $1,400,000 total compensatory award); Reeves v. Town of Cottageville, No. 2:12-CV-02765, 2014 WL 5788788 (D.S.C. Oct. 15, 2014) (death of adult male, $7,500,000 total compensatory award)[8]; Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) (death of adult male, $300,000 total compensatory award; *additur* granted to $900,000); Rutland v. South Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012) (adult female, mother of infant, $300,000 award for wrongful death); Singletary v. Shuler, 433 S.C. 600, 861 S.E.2d 591 (Ct. App. 2021) (adult male, $1,500,000 award for wrongful death); Keene v. CNA Holdings, LLC, 426 S.C. 357, 827 S.E.2d 183 (Ct.App. 2019)(adult male, $5 million award for wrongful death); Fay v. Grand Strand Med Ctr, LLC, 412 S.C. 185, 771 S.E.2d 639 (Ct.App. 2015) (adult female, $3 million award for wrongful death) (**Horry County**); Johnson v. Horry County Solid Waste

[8] Plaintiff's counsel in the present case represented the plaintiff in the Reeves matter.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Authority, 389 S.C. 528, 698 S.E.2d 835 (Ct.App. 2010) (adult male, $500,000 award for wrongful death)(**Horry County**).

The inescapable conclusion is that the jury ignored the evidence and rendered their verdict based on factors outside of the record. The excessiveness of the jury's award, and the improper motives and considerations underlying same, were highlighted by the jury's award of punitive damages. That is, after the jury had awarded $13.73 million in compensatory damages, and after the jury was presented evidence that LBS had only $3 million in applicable insurance coverage and a negative net worth of nearly $500,000 at the close of business in 2021, the jury awarded **an additional $7 million in punitive damages**. The jury was specifically instructed that it could not affect economic bankruptcy on LBS—yet, after hearing the net worth of LBS and available insurance coverage (which was effectively exhausted by the jury's compensatory damages award), the jury did exactly what they were instructed not to do—render a punitive damages award that would, effectively, bankrupt LBS. The punitive award, despite the clear instructions from the court, only underscores the excessive damages awarded in this case and warrants a new trial *nisi remittitur*.

## III. The $7 million jury verdict for punitive damages was unsupported by the evidence, was unduly excessive and, therefore, the Court should vacate the punitive damages award or grant LBS a new trial nisi additur.

LBS is entitled to a new trial *nisi remittitur* with respect to the unduly liberal award of punitive damages of $7,000,000 because the evidence of LBS's alleged culpability is insufficient to support the award. The jury's punitive damage award is grossly excessive and violates LBS's constitutional rights to procedural and substantive due process. Plaintiff failed to present evidence sufficient to meet the clear and convincing threshold required to recover punitive damages. S.C.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Code Ann. § 15-32-520. As such, a proper post-judgment consideration of the punitive damages award demonstrates that this court should vacate the award in its entirety.

**A. General Principles Governing Punitive Damages.**

Punitive damages exist to punish a defendant for conduct which is clearly "willful, wanton, or undertaken in reckless disregard of plaintiff's rights." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000).

> Conduct is willful, wanton, or reckless when it is committed with a *deliberate intention* under such circumstances that a person of ordinary prudence would be *conscious* of it as an invasion of another's rights. It is the *present consciousness of wrongdoing* that justifies the assessment of punitive damages against the tortfeasor.

Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (citation omitted) (emphasis added). Punitive damages are not proper when the evidence demonstrates ordinary or gross negligence. See Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 519-20, 334 S.E.2d 834, 837 (Ct. App. 1985); *Cohen*, 291 S.C. at 40, 351 S.E.2d at 900 (reversing punitive damage award because there was "no proof of a present consciousness of wrongdoing on Allendale's part"); F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 595 (3d ed. 2004) (noting that "punitive damages are not awarded for negligence, whether simple or 'gross'").

"Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." Gore, 517 U.S. at 568. The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P., 347 F.3d 672, 676 (7th Cir. 2003)). In Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court articulated the test to be used in conducting post-judgment review of a punitive damage award based on the Gore guideposts. Id.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

at 587, 686 S.E.2d at 185. First, the court should consider "the degree of reprehensibility of the defendant's conduct." Id. Second, the court should consider "the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award," known as the ratio. Id. at 587–88, 686 S.E.2d at 186. Third, the court "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id. Applying these factors demonstrates that the punitive damages award is unconstitutional and must be completely eliminated/vacated.

In determining the amount of punitive damages, a jury should consider all the following factors:

> (1) the defendant's degree of culpability;
>
> (2) the severity of the harm caused by the defendant;
>
> (3) the extent to which the plaintiff's own conduct contributed to the harm;
>
> (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;
>
> (5) the existence of similar past conduct;
>
> (6) the profitability of the conduct to the defendant;
>
> (7) the defendant's ability to pay;
>
> (8) the likelihood the award will deter the defendant or others from like conduct;
>
> (9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;
>
> (10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

> (11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

S.C. Code Ann. § 15-32-520(E). The court must consider the same factors in reviewing a punitive damages award. S.C. Code Ann. § 15-32-520(F). Here, all factors weigh *against* an award of punitive damages. Factor 1 is discussed below in the "reprehensibility" section. *See infra,* at argument III.B.i. Factor 2, the "severity of the harm," requires that it be "caused by the Defendant." The evidence is that Wolde entered the ocean with his children voluntarily. There was evidence of red warning flags introduced by LBS. Wolde got into trouble while swimming. No others in the ocean had problems with swimming at the time of the incident. Therefore, this predicament was not caused by LBS Factor 3 thus weighs against punitive liability for LBS.

As argued in LBS's other post-trial motions, which arguments are incorporated herein as if set forth to the extent consistent herewith, Plaintiff failed to show any proximate causation between any act or omission by LBS and the Wolde drowning incident. Instead, improper, generalized attacks on the LBS/City of Myrtle Beach contract, standards, number of personnel, and unfounded closure of the beach arguments were made, along with arguments that the nature of a "for profit" business entails automatic liability, since the "profit" could always be used to add more lifeguards or make conditions safer. This specific type of argument has been flatly rejected by the South Carolina Supreme Court. See Claytor v. General Motors Corp., 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982) (rejecting Plaintiff's theory that simply because a product can be made safer, there should be liability affixed to the Defendant for harm caused by the product, Court noting "[m]ost any product can be made more safe.")[9]

[9] While this is not a products liability case, the same rationale applies. The question is not whether a particular practice can be made safer but whether the particular practice at issue is unreasonably dangerous or unsafe. As discussed extensively throughout Defendant's post-trial motions, LBS and the City of Myrtle Beach employed dual role lifeguards on the City's beaches for 40+ years yet the ONLY evidence of any drowning incident on a City beach

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Factor 4 weighs in favor of LBS. There was no evidence on the duration of this incident, nor was there evidence of any awareness/concealment by LBS. Factor 5 weighs in favor of LBS. There was no evidence of similar past conduct. Factors 6 and 7 weigh in favor of LBS, as evidenced by its balance sheet. Factor 8 weighs in favor of LBS because the specific conduct supposedly to be deterred by the award was not identified by Plaintiff – instead, the generalized attacks were made on LBS as discussed. There was no evidence of Factors 9-11, and thus those factors necessarily weigh in favor of LBS.

Further, any court reviewing a punitive damages award is required to consider the degree of reprehensibility of the defendant's conduct. Fortis, 385 S.C. at 587, 686 S.E.2d at 185. The factors to be considered include whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. Id. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." Campbell, 538 U.S. at 419.

For 40+ years, LBS has provided dual-role lifeguarding services to the City of Myrtle Beach under varying agreements. Remarkably, Plaintiff's case did not include any evidence, at all, of any negative history of drowning incidents in front of any dual-role lifeguard on the City's beaches. At a hearing on pre-trial motions *in limine*, this Court provided guidance that prior drowning statistics and/or drowning incidents would be considered admissible at trial if a proper

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was the subject incident. While much evidence and testimony was offered ***suggesting*** the practice was unsafe, the record is devoid of any evidence that the dual role lifeguard system, as practiced, was an unsafe or unreasonably dangerous practice.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

foundation was provided.[10] While Plaintiff's counsel promised a proper foundation would be laid, the simple fact of the matter is that no drowning statistics or any other substantially similar drowning event was ever offered into evidence, much less admitted into evidence. As a result, the ONLY drowning event that the jury was ever provided information about was the Wolde drowning event.[11] If anything, the decades of lifeguarding service provided by LBS while employing dual-role lifeguards on the City's beaches without any evidence of any substantially similar event occurring is the antithesis of reprehensible conduct.

The $7,000,000 million punitive damages award is unduly liberal and must be vacated or remitted.

**B. The $7,000,000 punitive damages award is unduly liberal and must be vacated or at minimum, failing that, reduced.**

The court must eliminate the punitive damages award because it is unconstitutional or reduce the award because it is unduly liberal and does not comport with the evidence presented at trial.

**i. Degree of Reprehensibility**

LBS did not engage in any reprehensible conduct based on the factors provided by Fortis:

- At all relevant times, LBS was operating in accordance with the express terms of a Franchise Agreement ("FA") with the City of Myrtle Beach.
- The FA specifically contemplated and provided for the employment of dual role lifeguards on the City's beachfront. Plaintiff's argument that the words "dual role" do not appear in the FA is meaningless. The FA specifically and expressly provided for the employment of

[10] Because evidence of similar incidents can be highly prejudicial, courts require a plaintiff "to establish a factual foundation to show substantial similarity" of a particular incident before it will be admitted as proof of some fact in dispute. Watson v Ford Motor Co., 389 S.C. 434, 454, 699 S.E.2d 169, 179 (2010). "Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute. Id. (citing Whaley v CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005)).

[11] Remarkably, there was evidence in the case that the City of Myrtle Beach experiences 14 million to 18 million visitors annually, with a majority making a visit to the beach itself. In the ten years prior to the Wolde's drowning, the City would have welcomed well over 100 million visitors to its beach, yet the jury was only made aware of a single drowning incident – the subject drowning.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

a specified number of "lifeguard only" personnel, in addition to the front line lifeguards. The only reason lifeguards would be designated as "lifeguard only" is to differentiate them from the lifeguards engaged in dual role activities.

- The FA specifically and expressly provided for lifeguards to take lunch on a rotating basis such that an at-lunch lifeguard's water responsibility would be covered by the two adjacent lifeguards. Plaintiff offered no evidence that the positioning of the towers was defective or negligent and there was there no expert testimony offered that the lifeguards were assigned too much water to watch.

- On the date of loss, the LBS beach lineup demonstrated a missing "lifeguard only" ("LGO") at a tower located in the area of 6th Avenue South (LGO 6th) – three city blocks away from the Wolde drowning incident in the area of L-21 at 9th Avenue South. While LBS was required to have that LGO on the beach on the date of the loss, there is no evidence that the missing LGO proximately contributed to Wolde's drowning incident. Indeed, the LGO was assigned a territory of six stands and was not assigned to be at any particular stand at any particular time. It was and is pure speculation where the missing LGO might have been when Wolde got into trouble. The complete absence of proximate cause militates against any reprehensibility.

- While Plaintiff's expert opined that the water should have been closed due to the then-existing weather conditions, the expert conceded he has never been to Myrtle Beach; has never researched the weather for the date of loss; and has no knowledge as to wind speeds, wind direction, and/or surf conditions. While there was an amount of evidence regarding rip currents, the overriding principal concern with a rip current is its unpredictability, both in terms of location and longevity. There is no recognized method for predicting either. In the final analysis, rip currents have to be identified by trained observers who are on the beach, not at the National Weather Service office in Wilmington, North Carolina and certainly not in Plaintiff's expert's office located at Penn State University in Pennsylvania.

- There is no evidence in the record that on the date of the loss, at any time prior to the occurrence at 12:45 pm, that anyone identified any rip current activity in the area of the drowning incident. More remarkable, while the lifeguards were on the beach by 8 am, there was no evidence of any rescues or any other people getting into trouble in the area of the drowning incident prior to 12:45 pm.[12]

- There was no actual reliable evidence (corroborated by documents produced in discovery or testimony of corporate representatives or any other witness) that the drowning incident was the result of intentional malice, trickery, or deceit, as opposed to an accident and/or some simple negligent conduct.

- For 40+ years, LBS has provided dual-role lifeguarding services to the City of Myrtle Beach under varying agreements. Plaintiff's case did not include any evidence, at all, of

[12] The consistent testimony across all witnesses was that there was a large number of people both on the beach and in the water in the area where the incident occurred, all the way up to the time of the incident at 12:45 pm.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

any negative history of drowning incidents in front of any dual-role lifeguard on the City's beaches. No drowning statistics or any other substantially similar drowning event was ever offered into evidence, much less admitted into evidence. As a result, the ONLY drowning event that the jury was ever provided information about was the Wolde drowning event. If anything, the decades of lifeguarding service provided by LBS while employing dual role lifeguards on the City's beaches without any evidence of any substantially similar event occurring is the antithesis of reprehensible conduct.

Therefore, this guidepost weighs in favor of the Court vacating the punitive damages award in this case. In the alternative, the low degree of reprehensibility mandates that the punitive damages award be remitted.

**ii. Ratio**

The United States Supreme Court has instructed that "few awards exceeding a *single-digit* ratio between punitive and compensatory damages ... will satisfy due process." Campbell, 538 U.S. at 425 (emphasis added). Moreover, where, as here, "compensatory damages are *substantial*, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. (emphasis added). "The Supreme Court has reserved the upper echelons of constitutional punitive damage—a 9 to 1 ratio—for conduct done with the most vile of intentions." In re Exxon Valdez, 472 F.3d at 614 (citations omitted); see also Casumpang v. Int'l Longshore & Warehouse Union, 411 F. Supp. 2d 1201, 1220-22 (D. Haw. 2005) (1 to 1 ratio appropriate because the damages were substantial).

As described hereinabove, as well as has been argued in Defendant's Motion for New Trial Absolute, the actual damages awarded on the survival and wrongful death actions were, at best, unduly liberal and excessive or, at worst, grossly excessive due to the jury's improper passion, prejudice and sympathy. As a result, it would be improper to assess the ratio of punitive damages to the actual damages awarded by the jury because the ratio would be unduly skewed. For example, if actual damages on the wrongful death cause of action were remitted to $1 million, an award of

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP260707

$7 million in punitive damages would present an unconscionably (and unconstitutionally) improper ratio under the Gore guideposts. Unless and until the actual damages awards are reduced to overcome the jury's excessive and/or grossly excessive awards, the ratio due process analysis cannot be fairly considered.

**iii. Comparable Civil Penalty**

Finally, the Court "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Fortis, 385 S.C. at 588, 686 S.E.2d at 186. This punitive damages award is not justified by comparing it to any civil or criminal penalties for similar conduct because LBS is/was not subject to any civil penalty for its alleged conduct. Hence, none of the Fortis guidelines support the punitive damages award in this case. Therefore, this Court should vacate or reduce the punitive damages award.

## CONCLUSION

If the Court denies LBS's motions for JNOV and motion for new trial absolute, the Court should grant a new trial *nisi remittitur* as to the actual and punitive damages awards. The compensatory damages should be remitted to $1 Million,[13] while the punitive damages award should be reduced to zero but if not, the maximum amount allowed, in accordance with constitutional 1:1 ratio in large actual damages matters, should be an additional $1 Million.[14]

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[13] LBS continues to argue and maintain that the survival action should not have been submitted to the jury and that there should not be any award for the survival action. However, if the Court does not vacate the survival action award, LBS submits that the Court should consider the evidence of the extremely short duration of the alleged conscious pain and suffering and remit the survival action award to a sum no greater than $300,000 – which is the South Carolina Tort Claims Act cap limit and consistent with the survey of awarded sums for this claim herein referenced above. Further, consistent with LBS's conditional motion to reduce the judgment, the entirety of the compensatory damages should be capped at $300,000. Failing that, the Court should remit the entirety of actual damages via *nisi remittitur* to $1 million.

[14] LBS does not waive and instead advances its JNOV motion as to punitive damages and its other conditional motion to reduce the judgment under the South Carolina Tort Claims Act to zero for punitive damages. If the Court permits the punitive damages award to stand, however, it should be remitted. If the Court awards actual damages of $300,000, and permits punitive damages, then the 1:1 ratio requires punitive damages to be remitted to $300,000. If

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP260707

LBS specifically incorporates its arguments and grounds in its Motion for JNOV, Conditional Motion for Reduction of Judgment, and Motion for New Trial Absolute in support of this Motion, to the extent not inconsistent herewith. LBS also reserves the right to file a supplemental memorandum in support of any of its post-trial motions.

Respectfully submitted,

**HALL BOOTH SMITH, P.C.**

*/s/Joseph D. Thompson, III*
Joseph D. Thompson, III, SC Bar No. 66580
Email: jthompson@hallboothsmith.com
Paul B. Trainor, SC Bar No. 101405
Email: ptrainor@hallboothsmith.com
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
Phone: 843.720.3460

*Attorneys for Defendant Lack's Beach Service, Inc.*

August 8, 2022
Mount Pleasant, South Carolina

the Court fails to eliminate punitive damages, and declines to reduce them to $300,000, they should be no more than $1 million as set forth herein.

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | **FOR THE 15TH JUDICIAL CIRCUIT** |
| **COUNTY OF HORRY** | ) | **CASE NO.: 2019-CP-26-07075** |
| **MESWAET ABEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ZERIHUN WOLDE,** | ) | |
| **Plaintiff,** | ) | **DEFENDANT'S CONDITIONAL MOTION FOR REDUCTION OF JUDGMENT** |
| **v.** | ) | |
| **LACK'S BEACH SERVICE, INC.,** | ) | |
| **Defendant.** | ) | |

The Court should grant Defendant Lack's Beach Service, Inc.'s ("LBS") motion for JNOV or, failing that, motion for a new trial absolute. If the Court does not grant JNOV or a new trial, the Court should grant LBS's motion for a new trial *nisi remittitur*. However, if the Court allows any verdict amount to stand as a judgment, the Court ***must***, at a minimum, reduce the amount of to the South Carolina Tort Claims Act 's ("SCTCA") cap on actual damages as a matter of law. The Court must also remit the punitive damages award to $0 since the SCTCA does not permit recovery of punitive damages. The City of Myrtle Beach properly delegated its governmental power to LBS and, as a result, the doctrine of derivative sovereign immunity applies. Because the State of South Carolina has only waived its sovereign immunity subject to the provisions of the SCTCA, the statutory caps of the SCTCA apply to limit Plaintiff's recovery against LBS.

## Argument

### I. Derivative sovereign immunity applies under these facts.

As the SCTCA explains, the State of South Carolina and its political subdivisions and employees are immune from liability while acting within the scope of official duty except as waived by the SCTCA. S.C. Code Ann. § 15-78-20(b).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

The doctrine of derivative sovereign immunity provides that a government contractor who contracts with an entity which is entitled to claim sovereign immunity is not subject to suit if: "(1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." Cunningham v. Gen. Dynamics Info. Tech., Inc., 888 F.3d 640, 643 (4th Cir. 2018). As the Fourth Circuit explained in Cunningham, the doctrine derives from the government's "unquestioned need to delegate government functions," as imposing liability on private agents of the government would "directly impede the significant governmental interest in the completion of its work." Id. (quoting Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000)).

South Carolina courts have not addressed the applicability of the derivative sovereign immunity doctrine under South Carolina law. However, the same rationale as explained by the Fourth Circuit in Cunningham should apply pursuant to the SCTCA. See, e.g., S.C. Code Ann. § 15-78-20 (explaining that the Tort Claims Act is the "***exclusive*** civil remedy available for ***any tort committed by a governmental entity, its employees, or its agents***" and "[a]ll other immunities applicable to a governmental entity, its employees, and agents are expressly preserved" (emphasis added)).

Here, the South Carolina Code expressly permits the City of Myrtle Beach and other coastal municipalities to provide lifeguard and other safety services, to enact and enforce regulations deemed necessary for the safety of all persons on the beach, and either provide lifeguard services through municipal employees ***or through a service agreement with a private beach safety company*** such as Lack. See S.C. Code Ann. § 5-7-145(A)-(B). If a municipality elects to use a private company, personnel employed by the company "must be tested and certified as required by the municipality." Id. at (B)(4).

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

The City of Myrtle Beach properly elected to delegate its governmental power to provide beach safety services pursuant to a valid contract with LBS, which set forth the standards required for the lifeguards and expectations regarding LBS's duties, as contemplated and permitted by the South Carolina Code.

The City of Myrtle Beach Code of Ordinances further delegate governmental power to LBS. The Ordinances provide that "appropriate authorities" may, in their discretion, recall persons from the water or surf where, among other things, they are more than chest deep and are in danger of "drowning or becoming imperiled." Id. § 5-3(A). They may also recall any person at any time when the conditions constitute a danger to the life, health, or safety of that person or any others. Id. § 5-3(B). Appropriate authorities may create zones restricting aquatic activities or beachfront activities in "exigent circumstances that may pose a danger to the health, life or safety of any person due to a hazardous condition, hazardous operation, hazardous weather or hazardous structure whether temporary or permanent." Id. § 5-3(C). The Ordinances state that "[i]n exercising this authority, beach franchise lifeguards shall immediately notify the appropriate public safety officials of any such closures." Id. "Appropriate authorities" is defined to include those who have been "granted lifeguard status under beach franchise agreements." Id. § 5-1.

Plaintiff advanced liability theories and made arguments at trial critical of the standards, numbers of personnel, and operations of LBS, which were validly approved by the City. Plaintiff also advanced a theory and made a liability argument that LBS should have closed the entire beach due to conditions. LBS refuted these theories and arguments at trial, and many of Plaintiff's theories were grounded on speculation and what should have been deemed inadmissible evidence.

Nevertheless, Plaintiff's claims necessarily depend on the delegated governmental power to provide beach safety services by the City of Myrtle Beach to LBS. As a result, the doctrine of

ELECTRONICALLY FILED - 2022 Aug 08 4:18 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

derivative sovereign immunity applies. The City of Myrtle Beach both authorized LBS's actions and validly conferred the authorization to LBS.

**II. The S.C. Tort Claims Act caps limit LBS's liability to $300,000 total.**

Because LBS is entitled to derivatively share in the City of Myrtle Beach's sovereign immunity, Plaintiff's recovery is subject to the confines of the State's limited waiver of that sovereign immunity through the SCTCA. Pursuant to that Act, "no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved." See S.C. Code Ann. § 15-78-120(a)(1). Moreover, the SCTCA expressly provides that punitive damages are **not** recoverable. S.C. Code Ann. § 15-78-120(b) ("No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment.").

The caps of the SCTCA apply as a matter of law. Thus, the "liability cap articulated within the Tort Claims Act is NOT an affirmative defense and the failure to plead the specific limitation on the amount of recovery allowed under the Tort Claims Act is NOT a waiver of the cap." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 289, 607 S.E.2d 711, 718 (Ct. App. 2005) (emphasis in original); see also Garrison, 2022 WL 222553, at *7 (approving of Parker and relying on its holding to find that the punitive damages caps need not be raised as affirmative defenses).

The Court of Appeals recently reaffirmed Parker *in* Campbell v. City of N. Charleston, 431 S.C. 454, 463-64, 848 S.E.2d 788, 793-94 (Ct. App. 2020), reh'g denied (Oct. 29, 2020). As the court explained, the plain meaning of the SCTCA supports that the "cap must be executed regardless of whether a defendant has filed a responsive pleading raising this cap as a defense," as it "expressly states the liability 'shall' not exceed the Act's limits and this damages cap does not require any special findings that would affect the proof at trial, which establishes the application

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of the cap is mandatory and self-executing." Id. Thus, Campbell held that "under the plain meaning of section 15-78-120(a), courts ***must apply the statutory cap to actions brought pursuant to the Act.***" Id. (emphasis added).

Therefore, the Court must apply the SCTCA caps as a matter of law pursuant to the derivative sovereign immunity doctrine. LBS was not required to plead the applicability of the caps. As a result, LBS's liability is limited to $300,000 total in actual damages—for both the wrongful death and survival claims combined, as the Act cap is for the loss arising from a single occurrence—and $0 in punitive damages as expressly stated by the Code.[1]

Respectfully submitted,

**HALL BOOTH SMITH, P.C.**

*/s/Joseph D. Thompson, III*
Joseph D. Thompson, III, SC Bar No. 66580
Email: jthompson@hallboothsmith.com
Paul B. Trainor, SC Bar No. 101405
Email: ptrainor@hallboothsmith.com
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
Phone: 843.720.3460

*Attorneys for Defendant Lack's Beach Service, Inc.*

August 8, 2022
Mount Pleasant, South Carolina

[1] Plaintiff is prohibited from arguing that LBS's maintenance of liability insurance of $3 million, which is in excess of the statutory caps, waived sovereign immunity up to the coverage limits. See Wright v. Colleton Cnty. Sch. Dist., 301 S.C. 282, 287-88, 391 S.E.2d 564, 568 (1990) (rejecting this argument). As Wright explained, the Tort Claims Act is clear that it waives liability for torts only within pursuant to the strictures of that chapter and it would contravene the legislature's "directive to construe provisions of the Tort Claims Act relating to limitations on and exemptions to the liability of the State liberally, in favor of limiting liability of the State." Id. (citing S.C. Code Ann. § 15-78-20(f).

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Direct Dial: 843-277-6655 email: cooper@mcleod-lawgroup.com

July 21, 2022

**VIA E-FILING**
Horry County Clerk of Court
PO Box 677
Conway, SC 29526

Re: Meswaet Abel, as Personal Representative over the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian for Adam Wolde and Wubit Wolde v. Lack's Beach Service, City of Myrtle Beach and John Doe Lifeguard
Case No.: 2019-CP-26-07075
MLG File No.: 19-1014

Dear Sir or Madam:

Enclosed for filing please find a supplemental exhibit, the condensed deposition of Julian Chandler, marked as Exhibit 18 to Plaintiff's Memorandum in Opposition of Defendant City of Myrtle Beach's Motion for Summary Judgment in the above-referenced matter filed July 19, 2022. Please accept this letter and its attachment as a supplemental exhibit to Plaintiff's Memorandum in Opposition of Defendant City of Myrtle Beach's Motion for Summary Judgment.

Please call our offices with any questions or concerns. Thank you for your time and assistance in this matter.

Sincerely,

*s/ H. Cooper Wilson, III*
H. Cooper Wilson, III

HCW/bad

Enclosure:
Exhibit 18 – Julian Chandler Deposition

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IN THE CIRCUIT COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

CASE NO.: 2019-CP-26-07075

MESWAET ABEL, as Personal Representative over the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian for Adam Wolde and Wubit Wolde,

Plaintiffs,

vs.

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

Defendants.

VIDEO DEPOSITION OF JULIAN CHANDLER

Taken on behalf of the Plaintiffs

July 20, 2022

at 3:07 p.m.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



INDEX

QUESTIONS BY:
Mr. McLeod 7
Mr. Thompson 39
Ms. Sullivan 73
Mr. McLeod 78

INDEX OF EXHIBITS

(No exhibits marked)



IN THE CIRCUIT COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF HORRY
CASE NO.: 2019-CP-26-07075

MESWAET ABEL, as Personal Representative over the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian for Adam Wolde and Wubit Wolde,
Plaintiffs,
vs.
Lack's Beach Service, City of Myrtle Beach and John Doe Lifeguard,
Defendants.

THE VIDEO DEPOSITION OF WITNESS, JULIAN CHANDLER, produced, sworn and examined on July 20, 2022, between the hours of 8:00 in the forenoon and 5:00 in the afternoon of that day via Zoom, before Suzanne Benoist, a Certified Court Reporter within and for the States of Missouri, Kansas, Iowa and Illinois; in a certain cause now pending In The Court of Common Pleas, State of South Carolina, County of Horry, wherein MESWAET ABEL, et al. are Plaintiffs and Lack's Beach Service, et al are Defendants.



APPEARANCES

FOR THE PLAINTIFF:
MCLEOD LAW GROUP LLC
MR. W. MULLINS McLEOD
3 Morris Street, Suite A
Charleston, SC 29403
(843) 277-6655
mullins@mcleod-lawgroup.com
-and
THOMASON & PRACHT, LLP
MR. J. CHRISTOPHER PRACHT
303 E. Greenville Street
Anderson, South Carolina 29622
(864) 226-7222
chris@864law.com

FOR THE DEFENDANT LACK'S BEACH SERVICE:
HALL BOOTH SMITH PC
MR. JOSEPH (TREY) THOMPSON
111 Coleman Blvd., Suite 301
Mount Pleasant, SC 29464
(843) 720-3460
jthompson@hallboothsmith.com



FOR THE DEFENDANT CITY OF MYRTLE BEACH:
TURNER PADGET GRAHAM & LANEY PA
MS. KELLI SULLIVAN
1901 Main Street, 17th Floor
Columbia, SC 29201
(843) 576-2800
ksullivan@turnerpadget.com

Reported by:
Ms. Suzanne Benoist, RPR, CCR-MO, CCR-KS, CSR-IL, CSR-IA
Mr. Caleb Arndt, Videographer
Veritext Legal Solutions
701 Market Street, Suite 310
St. Louis, MO 63101
(314) 230-7260

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 6

IT IS HEREBY STIPULATED AND AGREED by and between Counsel for the Plaintiff and Counsel for the Defendant, that this deposition may be taken by Suzanne Benoist, a Certified Court Reporter and Notary Public, and thereafter transcribed into typewriting, with the signature of the witness being expressly waived.

-oOo-

VIDEOGRAPHER: We are now on the record. My name is Caleb Arndt representing Veritext Legal Solutions. Today's date is July 20th, 2022 and the time is approximately 3:07 p.m. Central Time. This deposition is being held remotely via Zoom. The caption of this case is Meswaet Abel v Lack's Beach Service, et al. This case is filed in the Court of Common Pleas, State of South Carolina, County of Horry, case number 2019 dash CP dash 26 dash 07075. The name of the witness is Julian Chandler.

Will counsel please identify themselves?

MR. McLEOD: Mullins McLeod on behalf of the estate of Mr. Wolde.

MR. THOMPSON: Trey Thompson on behalf of Lack's Beach Service.

Page 7

MR. SULLIVAN: Kelli Sullivan for City of Myrtle Beach.

VIDEOGRAPHER: Thank you.

Our court reporter is Sue Benoist and she will now swear in the witness.

(WHEREUPON, THE WITNESS WAS SWORN)

EXAMINATION

QUESTIONS BY MR. McLEOD:

Q. Mr. Chandler, good afternoon. I'm Mullins McLeod. How are you, sir?

A. Good afternoon, sir. I'm great, how are you?

Q. I'm good.

Could you please tell the jury where you are today?

A. I am upstairs in my home in my office space stationed at Scott Air Force base near St. Louis, Illinois.

Q. We appreciate you making yourself able to us today. Okay?

A. Not a problem.

Q. Mr. Chandler, how long have you been in the military?

A. It will be 12 years August 17th, sir.

Q. And could you tell the ladies and gentlemen of the jury whether you're married and have a family?

Page 8

A. I am married 12 years, together 13, we have four children together.

Q. And what's your wife's name please, sir?

A. Her name is Liliana Maria Chandler.

Q. And in the Air Force what is your current rank?

A. I am an E7 master sergeant.

Q. Okay. In the Air Force has it been your experience that training and certification is important for safety purposes?

MR. THOMPSON: Objection.

A. Absolutely, sir.

Q. (BY MR. McLEOD) And could you share with the ladies and gentlemen of the jury why based upon your experience training and certification is important for safety purposes?

MR. THOMPSON: Objection.

Q. (BY MR. McLEOD) Whenever he objects don't worry about that, you just answer, okay?

A. Roger that, sir.

Safety saves lives in short, both from an individual involved and people trying to

Page 9

assist with tasks, safety is there for a reason.

Q. Yes, sir. And based on your experience when it comes to safety is prevention normally the first priority to prevent any type of injury?

MR. THOMPSON: Objection.

A. Absolutely. We have guides and manuals for everything we do, whether it's physical, formational, military, prevention is always our first step.

Q. (BY MR. McLEOD) Yes, sir. And as far as competency to perform a task has it been your experience that it's important for men or women to be trained for the specific task that they're performing?

MR. THOMPSON: Objection.

A. Yes, sir. In my experience every individual is trained by an already trained proficient airman and then they have a standard eval team to come back through and double check that training.

Q. (BY MR. McLEOD) And has it been your experience that if people are untrained in a specific task that that can cause safety concerns and problems?

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 10

MR. THOMPSON: Objection.
A. That is my understanding, sir.
Q. (BY MR. McLEOD) Has that also been your experience, sir?
A. Absolutely. Individuals have been removed from doing those tasks because people's life can be put at risk.
Q. In the summer of 2018 did you and your family go on a family vacation to Myrtle Beach?
A. We did, sir. We made a short stop there, yes.
Q. If you're like me and getting the family all together on vacation sometimes can be a difficult task, just finding the time. Is that the same with you?
A. That's fair. That's a very fair statement, sir.
Q. About how long had you planned in advance the family vacation to Myrtle Beach?
A. Actually it was a spur of the moment thing. We were on our way back home from Florida, we were visiting family down there, and on our way back it was a surprise for my mom who had come along on the trip laboriously to stop at Myrtle

Page 11

Beach.
Q. Yes, sir. So on the trip to Myrtle Beach how long, when did you all arrive, what date, if you can recall?
A. I can't recall the exact date. I know it was, I believe it was a Friday evening pretty late, we literally just turned off the highway and headed towards Myrtle Beach to stop for the night.
Q. Yes, sir. The drowning incident happened on August the 24th. Did you arrive two days before, one day before, do you recall?
A. We were there the day before. We pulled in and got our hotel room the night before that happened.
Q. Yes, sir. And where did you and your family stay when you were in Myrtle Beach?
A. The hotel I believe was a Hampton Inn, I can't remember exactly the name. It was just the next street over from the actual beachfront.
Q. Yes, sir. And so in order to go to the beach share with the ladies and gentlemen of the jury how far you had to walk from the hotel to the actual beach itself?

Page 12

A. Okay. So from the front entrance we would cross the road that the hotel was sitting on, there were buildings there, on the back side of those buildings is where the public beach access started. We walked up a little wooden plank over an initial dune and we were on the beach from there. So a few hundred feet.
Q. Yes, sir. Were your kids excited about going to the beach that day?
A. Absolutely. Absolutely.
Q. And do you recall approximately what time you all got on the beach the day of August 24th, 2018, just approximately?
A. I do not, I know it was later morning, it wasn't yet noon because we had gone to get breakfast and stopped to pick up essential snacks and things like that early in the morning. So it wasn't super early but it hadn't been noon yet.
Q. Yes, sir.
From the time that you all first arrived on the beach until the time you first started, you first heard any yelling towards the water's edge, about how long a time period passed?
MR. THOMPSON: Objection.

Page 13

A. I want to say from the time we got on to the beach to the time the commotion started, maybe 20, 25 minutes, sir.
Q. (BY MR. McLEOD) Okay. So on August 24th, 2018 you heard at some point commotion towards the water's edge, is that correct?
A. Correct, sir.
Q. And did you first hear that commotion approximately 20 minutes after you and your family first arrived on the beach?
A. Around that, sir, yes.
Q. What did you and your family do when you first got to the beach?
A. We came over the ledge, we carried all of our stuff down, the cooler, the little spread for the beach, the umbrellas. We set up at a good open spot there on the beach, set up to give the kids snacks and all of that stuff, we usually prop all of our stuff first before we head to the water then we took a trip down to the water's edge to check it out, see how the water was.
Q. At any time from the time that you arrived on the beach until the time that you first saw Mr. Wolde, did any lifeguard provide you or your family any type of verbal warnings about any

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 14

sort of life safety hazards present in the water that day?
A. No, sir.
Q. From the time that you arrived on the beach until the time that you first saw Mr. Wolde did, were there any rip current warning flags on the beach itself warning swimmers not to go in the water?
A. Not that I could see, no, sir.
Q. From the time that you arrived on the beach until the time that Mr. Wolde, you first saw Mr. Wolde in the water, did you receive any warnings of any kind that would have led you to believe that the swimming conditions were unsafe that day?
MR. THOMPSON: Objection.
A. No, sir. Neither myself or anyone in my family received any warnings.
Q. (BY MR. McLEOD) Were there, however, indications based upon people being in the water and it being a lifeguarded beach that led you to believe that the swimming conditions were safe?
MR. THOMPSON: Objection.
A. Yes, sir, the water was pretty full of people. There were individuals pretty far out,

Page 15

at least waist deep or higher and I didn't see any visible reasons why the water would be unsafe.
Q. (BY MR. McLEOD) Did you at any time see any type of warnings or receive any type of warnings regarding limiting swimmers to a certain depth once in the ocean?
A. No, sir, I did not.
Q. From the time you got on the beach until the time you first saw Mr. Wolde in distress did you have any reason to believe that there were any life safety hazards in the water that day?
MR. THOMPSON: Objection.
A. No, sir, I did not.
Q. (BY MR. McLEOD) Now, when you all got on the beach could you share with the ladies and gentlemen of the jury whether you happened to notice any lifeguard or beach personnel close to where you and your family set up for the day?
A. Yes, sir. So the beach access point that we came through to my right-hand side if I'm facing the water there was a lifeguard stand approximately 30, 40 feet from us.
Q. Yes, sir. And did you and your, was that lifeguard stand situated close to the water's edge or was it situated close to the sand dunes?

Page 16

A. It was definitely further away from the water. It was closer back toward the sand dunes where we came on to the beach. There was a small trail where you could tell ATVs were riding back and forth, and the lifeguard stand was just on the other side of that.
Q. Yes, sir. And do you recall whether the lifeguard stand was located in close proximity to the umbrella line?
A. I recall there being a mass stack of bulk chairs and umbrellas next to the lifeguard stand, so if that's the umbrella line, then yes.
Q. And can you share with the ladies and gentlemen of the jury when you first realized that there was something happening there at the water's edge or in the water?
A. Can you restate that, sir? I'm sorry.
Q. Yes, sir.
What was the first thing that caused you to believe that somebody was in distress in the water, what happened?
A. Gotcha.
So I had laid down with the kids, the baby, my daughter at the time, and had my back

Page 17

towards where the lifeguard stand was and I heard the yelling for help towards the water's edge in that direction on that side of my body and looked over and saw individuals running towards the water.
Q. Okay. And did you happen to see what, if anything, the lifeguard was doing at that time?
A. So I noticed on my way up to the beach tower before I laid down that the lifeguard was in the same position that we saw when we first came out, he was sitting on the back end of the lifeguard stand chatting with a few individuals with his back to the water.
Q. And were the individuals that he was chatting with within the line of umbrellas?
A. They were near them, yes, sir.
Q. About how much time passed between the time that you saw the lifeguard with his back to the water talking to the two people at the umbrella line did you first hear the screams at the water's edge?
A. So the question is between when I saw him going back to the beach and when I heard the screams, correct?
Q. Yes, sir. The question is when you

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 18

were walking back, you had gone to the water's edge, is that right?
A. Yes, sir.
Q. And then were you walking back to where your family was setting up for the day?
A. Yes, sir.
Q. And did you notice the lifeguard at that time with his back to the water talking to the two people at the umbrella line?
A. Yes, sir.
Q. And approximately how much time passed between the time you saw that and the time that you heard the first yell for help?
A. Gotcha, understood. Approximately five to 10 minutes, sir.
Q. And tell the ladies and gentlemen of the jury what you did when you first heard a yell for help.
A. So when I first heard it -- excuse me. My reaction was to look and see what was going on. I saw two male individuals struggling to carry another gentleman out about waist deep in the water and there was another female pulling another lady out shortly there behind them and there were a few bystanders there at the water's edge yelling for

Page 19

help.
Q. And share with the ladies and gentlemen of the jury what you witnessed as far as Mr. Wolde's daughter being pulled from the water.
A. So the lady that was pulling her in was just maybe a little bit bigger than her, she pulled her in to the beach and laid her down on the sand just outside of the break, so the water was still kind of hitting her. The daughter looked completely exhausted, the water was still splashing her in the face and she looked out of it but the lady that pulled her up was exhausted as well so bystanders were attending to her.
Q. Did the lady who helped get Mr. Wolde's daughter out of the water appear to you to be tired and exhausted and is that why she dropped her while she was still in the water?
MR. THOMPSON: Objection.
A. Yes. She looked extremely tired and exhausted from trying to get her in, and she didn't mean to drop her in the water, she was up on the beach, she looked like she was going to be safe but the waves were still coming up.
Q. (BY MR. McLEOD) Because of the objection I'll ask you one more time.

Page 20

A. No problem.
Q. Did the bystander who helped Mr. Wolde's daughter out of the water appear exhausted to you?
MR. THOMPSON: Objection.
A. Yes, sir.
Q. (BY MR. McLEOD) Tell the ladies and gentlemen of the jury please, sir, what you saw with regard to Mr. Wolde.
A. So after I heard the commotion I handed my daughter who was in my hands to my mom and I ran to the water, I made it in about waist deep to take Mr. Wolde from the gentleman, the smaller of the two gentlemen that was trying to bring him in because he was absolutely beat and tired so we pulled him in from there, we dragged him far enough on the beach that the waves weren't hitting him but he was still kind of at an incline so we had to lift him up and bring him a little bit further and lay him down. And then at that time I remember hearing a lady scream I'm a nurse as she was coming running up to where we were laying Mr. Wolde down on the beach.
Q. Do you remember whether the nurse who came running up came from the northerly direction

Page 21

or the southerly direction?
A. I do not, sir. I remember hearing her voice but the trajectory came from I guess it would be the west, so towards up further on the beach. I couldn't tell from what direction. At this time there was kind of a crowd of bystanders standing there as well.
Q. Yes, sir. Okay. And share with the ladies and gentlemen of the jury what happened next?
A. So she came barging through to help with Mr. Wolde, we originally laid him down on his back and at the point where we laid him down there was a lot of water and sand coming out of his mouth, his eyes you can tell were bulging a bit. He was in a very desperate situation. She immediately checked for pulls as first signs of life, she said it was very weak but she had one and they began administering CPR at that time.
MR. THOMPSON: Objection. Move to strike. Hearsay.
Q. (BY MR. McLEOD) And share with the ladies and gentlemen of the jury what happened next?
A. So both the nurse and the larger

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 22

gentleman that were there that pulled him out to the sand issued CPR, the issue was the water and sand would come out and then get sucked back in, so she asked me to roll him, so I then rolled him on his side, she began clearing everything out of his mouth to then try to roll him back and administer CPR again. I remember at that time looking up and noticing the crowd that had surrounded us as we were trying to help both men do what we could.

MR. THOMPSON: Object. Move to strike.

Q. (BY MR. McLEOD) And were the resuscitation efforts that you performed that day, were they performed in an effort to prevent Mr. Wolde's death?

A. Yes, sir, they were.

Q. And did there come a time when any lifeguard showed up once Mr. Wolde was out of the water?

A. There was one that showed up, he did not assist, I remember looking up during the process and he was standing there in the crowd with the rest of the bystanders, sir.

Q. And was that gentleman the same gentleman that you had seen just earlier at the

Page 23

lifeguard stand with his back to the water?

A. Yes, sir, it was.

Q. And what do you recall, if anything, that lifeguard did to help or assist Mr. Wolde with anything during this period of time?

A. Mr. Wolde in particular, sir? Nothing.

Q. Did the lifeguard based upon your personal observations appear to be competent?

MR. THOMPSON: Objection.

A. To answer your question, sir, no. To use the phrase loosely looked like a deer in the headlights. He was standing there with the crowd with no clue what to do.

Q. (BY MR. McLEOD) Tell the ladies and gentlemen of the jury what happened next please, sir.

A. So at that moment when I did look up and see him I yelled directly to the lifeguard go check on the daughter. The daughter, my wife at the time had run up to check on her and she was still pretty out of it and I watched him walk off, and then we went back to trying to deal with Mr. Wolde.

Q. And based upon what you observed with

Page 24

the nurse performing CPR did it appear she was able to get oxygen into his lungs but then the sand and the water within his lungs were compromising his breathing?

MR. THOMPSON: Objection.

MR. SULLIVAN: Object to form.

A. I could say from what I could see the compressions were causing the water and sand to come out but once the compression was being released it was being succeeded back in, yes, sir.

Q. (BY MR. McLEOD) Now, was it, did you at some point see what turned out to be Mr. Wolde's wife running towards the crowd where Mr. Wolde was laid on the beach?

A. I did, sir. She would have been coming from the north side behind me. I actually heard her screaming before I turned and saw her, but yes, I saw her running down the beach towards everything.

Q. And could you tell the ladies and gentlemen of the jury what you saw next?

A. I saw her and then shortly there behind her was Mr. Wolde's, which I found out after the fact was his oldest son and their two younger kids trailing closer behind her. She screamed and

Page 25

collapsed on her knees and I immediately ran to the children to make sure the son stopped before he got to his father and he kept repeatedly asking me is my dad dying, is he okay, can they help him, just kind of in a frantic mess.

Q. Yes, sir. Can you share with the ladies and gentlemen of the jury why you wanted to stop Mr. Wolde's son before he got to his father?

A. As a father of five I would not want my child to witness what he had to witness. It was a very dire situation and of the children that were there I knew he was the strongest one, the other two were screaming hysterical but I didn't know them so I was trying to use the oldest son to calm them down.

Q. And could you share with the ladies and gentlemen of the jury, you said to the older son to try to calm him and his siblings down.

A. Absolutely. After he repeatedly asked me about his father I told him they're doing the best that they can, they're helping him, what I need you to do is be a rock for your brother and sister, I need you to help me with them, I need you to help me with them and after he calmed down he grabbed the two other kids and said okay, let's

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 26

pray, and the three of them dropped to their knees on the beach and he started leading them in a prayer to try to calm the other two kinds down.
Q. Yes, sir. And what was their mother doing at that time?
A. She was hysterically flailing and screaming on the beach 20 feet away which was extremely distracting to try to calm the kids down because their mother was absolutely losing it.
Q. Yes, sir.
Now, was it your understanding based on what you saw that day that Mr. Wolde had gone in to the water some distance to the north of where he was brought out of the water?
MR. THOMPSON: Objection.
A. Correct. Correct, sir. That was my understanding.
Q. (BY MR. McLEOD) And at any time from the time Mr. Wolde was brought to shore by the bystanders until the time that CPR was performed on him by the nurse, did you ever see a lifeguard come from the northerly direction to assist or help in any way?
A. No, sir.
MR. THOMPSON: Objection.

Page 27

A. I did not see a lifeguard with my own two eyes, no, sir. Not until much later when the entire crew came in a pickup truck. But no, I didn't see any lifeguard that was present on the beach making his way down.
Q. When the pickup truck arrived had Mr. Wolde already passed away?
MR. THOMPSON: Objection.
A. I couldn't say, I'm not a medical professional. I know the compressions and CPR life saving efforts were performed until the individuals in the pickup truck arrived with breathing apparatuses and things of that nature.
Q. (BY MR. McLEOD) Yes, sir.
When the lifeguard that did show up showed up did he have any type of defibrillator or oxygen or any life saving tools to assist in any way?
A. I'm sorry, which lifeguard are you referring to, sir?
Q. The gentleman that you had seen just earlier at the umbrella line.
A. No, sir, I did not see any of those items with him.
Q. Do you now know that there were rip

Page 28

currents that were present that day?
MR. THOMPSON: Objection.
MR. SULLIVAN: Objection.
A. I was told after the fact, sir.
Q. (BY MR. McLEOD) And with that knowledge can you share with the ladies and gentlemen of the jury whether or not you believe the beach goers that day should have received some type of warning about life safety hazard in the water?
MR. THOMPSON: Objection.
MS. SULLIVAN: Same objection.
A. Absolutely. With the amount of individuals that were in the water and present at the beach that day there should have been some kind of warning for that.
Q. (BY MR. McLEOD) Have you and your family had occasion to go to other guarded beaches on other vacations?
A. Absolutely. My wife is from Miami, that's where I met her, and we frequent the beaches there all the time.
Q. Yes, sir. Can you share with the ladies and gentlemen of the jury what you've had occasion to witness as far as other lifeguards at

Page 29

other beaches providing warnings to swimmers?
MR. THOMPSON: Objection.
MS. SULLIVAN: Same objection.
A. Yes, sir. So I can speak for Fort Lauderdale beach in particular, the lifeguard stands have signs on the sides of them with the flag colors and the meaning of those flags. They have large flags that come out on the lifeguard stands themselves. If the water, if there is a swimming distance area that you need to stay in there are buoys that are put out, the lifeguards blow whistles and patrol the beach. They will yell at you from the stand, if there are issues they let you know if there are wildlife in the water and stuff.
Q. (BY MR. McLEOD) Has it been your experience lifeguard will whistle and yell at swimmers to keep them at a certain swimming depth?
MR. THOMPSON: Objection.
A. Absolutely. Yes, sir.
Q. (BY MR. McLEOD) And is it your understanding that when other lifeguards at other beaches have done that they did that for safety reasons?
MR. THOMPSON: Objection.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 30

MS. SULLIVAN: Same objection.
A. That's my understanding, sir.
Q. (BY MR. McLEOD) The lifeguard that you saw near the umbrella line, can you think of any reason why he could not have heard the same yells that you heard?
MR. THOMPSON: Objection.
MS. SULLIVAN: Same objection.
Q. (BY MR. McLEOD) You can answer.
A. No problem.
I cannot see why he would not have. I cannot give you a definitive reason why he didn't, or if he did or didn't. They were loud enough.
Q. Do you believe based upon how loud the yells were that you heard that based upon where that lifeguard was he should have been able to hear the same noise that you did?
MR. THOMPSON: Objection.
A. Yes. Yes, sir, I believe they should have been able to hear that.
Q. (BY MR. McLEOD) Yes, sir. And approximately how much time passed between the time that you heard that first yell and the time that that lifeguard actually showed up and stood with

Page 31

the crowd?
A. So between me running down to help pull him out, the initial shift from the stand and administering CPR, maybe five minutes total, sir, before I noticed him.
Q. And about how long -- well, let me strike that.
When the police arrived did they ask you what happened or do any type of investigation?
A. So I had a couple of police officers come to my hotel across the street after the fact and ask me to come down from my room to discuss it with them, they asked me questions about the situation, yes, sir.
Q. And could you share with the ladies and gentlemen of the jury what in general you shared with the police?
A. Pretty much the same thing we said here, the fact that we had our morning routine, we went to eat, we went to buy things from the beach store, we headed out as a family, set up, went and checked the water, did our thing, came back and laid down and then we heard the yells over our right-hand shoulder. The officer asked me specifically if I saw the individuals go in the

Page 32

water, I told him I did not, I saw them coming out, but the exact same testimony I'm giving here, sir.
Q. Yes, sir.
Did you also share with the police officers your concerns about the lifeguard that you witnessed with his back towards the water?
A. I made mention of it at the time, but I didn't, I wasn't, it wasn't a point of interest in the conversation.
Q. The police officers weren't focused or interested in what the lifeguard was doing, is that correct?
MR. THOMPSON: Objection.
MS. SULLIVAN: Objection.
A. Correct. Not as much, sir. They were more asking me about what I saw during the incident than anything to do with the lifeguards, correct.
Q. (BY MR. McLEOD) Did the police officers that came to your room ask you anything about what you witnessed as far as the lifeguards were concerned?
A. Not that I can recall, sir.
Q. Yes, sir. Did they appear based upon the conversation you had with them to be concerned

Page 33

or worried about the fact that the lifeguards did not arrive until after Mr. Wolde was pulled out of the water and until after Mr. Wolde had had CPR performed on him by a bystander?
MR. THOMPSON: Objection.
MS. SULLIVAN: Objection, form.
A. No, sir, that was not even a topic of conversation.
Q. (BY MR. McLEOD) Yes, sir.
Did you know at that time that the lifeguard that you saw on the beach that day was supervised by the Myrtle Beach Police Department?
MS. SULLIVAN: Object to the form.
A. No, sir, I did not. I had no knowledge of those lifeguards.
Q. (BY MR. McLEOD) Based upon your history with the military does an investigation of one's self usually lead to solid conclusions as compared to an outside agency who is neutral and not biased conducting the investigation?
MS. SULLIVAN: Objection, form.
MR. THOMPSON: Objection.
A. Yes, sir. That's, we have standards and evaluations, it's a completely separate section of the military that is there to do third party

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 34

outside investigations and standards checks.
Q. (BY MR. McLEOD) So they objected so I'll ask it one more time.
A. Not a problem, sir.
Q. In the military are there ways that their investigation is done to determine whether or not personnel do their jobs properly?
A. Yes, there are.
MS. SULLIVAN: Same objection.
Q. (BY MR. McLEOD) And can you share with the ladies and gentlemen of the jury what is done based on your personal knowledge?
MR. THOMPSON: Objection.
MS. SULLIVAN: Same objection.
A. I can state that in our programs like I say we have a senior ranking individual who does the supervision initially and runs through a checklist that has been provided by standards and evaluations and secondarily to certify that individual standards and eval does their own training evaluation over that individual.
Q. And are the standards and evaluations people separate and apart from the department that is being evaluated?
A. They are, sir.

Page 35

Q. And is there a reason for that based upon your personal knowledge?
MR. THOMPSON: Objection.
MS. SULLIVAN: Same objection.
A. There is, sir.
Q. (BY MR. McLEOD) And in, I know I have to ask you the obvious, but what is the reason, sir?
A. You don't want the same people grading their programs and training that also administer, the separation of duties, sir.
Q. Yes, sir.
Have you ever heard of a police officer writing him or her self a citation?
MS. SULLIVAN: Object to the form.
MR. THOMPSON: Objection.
A. I've never heard of that, no, sir.
Q. (BY MR. McLEOD) I'm almost done, sir, because I know your time.
A. Not a problem.
Q. Is valuable, and I just want to take you back to the water's edge again.
Can you share with the ladies and gentlemen of the jury whether what you witnessed was traumatic for you as a man in the military --

Page 36

MR. THOMPSON: Objection.
MS. SULLIVAN: Same objection.
A. I can say for me personally as a father it was very traumatic. Myself and my family have not gone back to the beach because of that. Not there, Myrtle Beach.
Q. (BY MR. McLEOD) Do you and your family based upon what you experienced that day feel that Myrtle Beach is unsafe?
MR. THOMPSON: Objection.
MS. SULLIVAN: Object to the form.
Q. (BY MR. McLEOD) I'll ask a better question.
A. Okay.
Q. Is one of the reasons why you have not returned to Myrtle Beach to this day is because you're concerned about the beach's safety?
MR. THOMPSON: Objection.
Q. (BY MR. McLEOD) You can answer.
A. Yes, sir. We found it disturbing that we found out after the fact about the longshore rip current there in that area and had not been told otherwise beforehand.
Q. Yes, sir.
When I talked to you earlier today

Page 37

for the first time, is that right?
A. Yes, sir.
Q. And did I share with you that I wanted to tell you generally what I wanted to ask because I didn't want you to feel any surprise or anything like that?
MR. THOMPSON: Objection.
A. Very general conversation, sir.
Q. (BY MR. McLEOD) Did I also tell you that I wouldn't attempt to compel you to testify based out of respect for your service and your family?
MS. SULLIVAN: Objection.
A. That's correct.
Q. (BY MR. McLEOD) Did you agree to testify anyway?
A. I did, sir.
Q. And could you share with the ladies and gentlemen of the jury why?
A. I felt it was the right thing to do. Like I said, that whole incident was very traumatic, I felt terribly for the children and that wife especially finding out that they weren't from the area but coincidentally enough they actually lived in the area where me and my family

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 38

lived. So I saw a bit of myself and my family in that incident and it took a lot out of me.
Q. Yes, sir.
Is one of the reasons why you agreed to testify is because you don't want to see what happened to Mr. Wolde happen to anybody else?
A. Absolutely, sir.
MR. THOMPSON: Objection.
MS. SULLIVAN: Object to the form.
Q. (BY MR. McLEOD) You can answer.
A. Absolutely, sir. Like I said, it was gut wrenching, I wouldn't want any family to have to deal with that.
Q. Yes, sir.
I think that's all the questions I have right now. I certainly appreciate you taking the time this afternoon.
A. Not a problem, sir.
VIDEOGRAPHER: Is that everybody?
MS. SULLIVAN: Trey you can go first, you're first on the pleadings.
MR. THOMPSON: I just want to make sure everyone's comfortable to continue.
Mr. Chandler, are you good?
THE WITNESS: I'm good.

Page 39

EXAMINATION
QUESTIONS BY MR. THOMPSON:
Q. Mr. Chandler, my name is Trey Thompson, I represent Lack's Beach Service and I have some questions for you today.
Mr. McLeod indicated he spoke with you today, is that correct?
A. Briefly, yes, sir.
Q. Okay. When did you speak with his office before today?
A. Approximately 45 minutes before this testimony.
Q. I'm not asking about today, I'm asking about you spoke with maybe not Mr. McLeod but you might have spoken with Mr. Pracht or Mr. Wilson or somebody else from his office before today, correct?
A. Correct. With Mr. Pracht.
Q. When did you speak with Mr. Pracht?
A. Last week was the first call.
Q. Okay. Last week as in July 2022?
A. Yes, sir.
Q. Okay. And was that the first you were made aware that there was this case pending in South Carolina?

Page 40

A. Yes, sir.
Q. Nobody had contacted you before then?
A. No, sir.
Q. Okay. You indicated that the family lived in an area where you lived at some point in time, is that correct?
A. Yes, sir.
Q. In Maryland?
A. Yes, sir. I was stationed at Ford Meade, I read in the paper about him being from down the road there.
Q. And then did you reach out to the family to let them know that you were going to be or willing to be a witness in the case?
A. No, sir. I did not.
Q. All right. So it was the family's lawyer who reached out to you to inform you that there was a lawsuit pending and then asked you to be a witness in the case, correct?
A. Yes, sir.
Q. And when Mr. Pracht reached out to you about a week ago he told you that there was a lawsuit pending, correct?
A. Correct.
Q. He told you who was being sued,

Page 41

correct?
A. He told me there was a lawsuit pending with that family and something to do with Myrtle Beach, sir.
Q. And he told you what happened and what the theories were and why they were suing those two entities, the City and Lack's Beach Service, correct?
A. No. So actually the first phone call was hey, your name finally popped up, what if anything do you remember from that time. So he asked me what I remember first from that time before anything was said about what's going on with the case.
Q. Okay. And was that the first phone call with Mr. Pracht? Did you have others with him?
A. Only to make sure we could set up the time for this testimony, sir.
Q. How about with anybody else that represents the family in this case?
A. No, sir.
Q. So the only communication you've had is the one call with Mr. Pracht about a week ago, is that right?

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 42

A. Yes, sir. That was our initial conversation, like I said there were other communications about making sure he could get me schedule wise ready for the testimony. That was it.
Q. And, but I'm, the point is that you talked with Mr. Pracht for how long about a week ago?
A. Our initial conversation was maybe 30, 40 minutes.
Q. And then you didn't speak with anybody again about anything with regard to the case or testimony until you spoke with Mr. McLeod this morning, is that correct?
A. So I spoke with Mr. Pracht about setting up for the testimony and making sure I had the time and schedule and how we were going to do it, those types of conversations, sir. But not, no in-depth conversation about anything else.
Q. And then you spoke with Mr. McLeod today prior to this testimony, correct?
A. I did, sir.
Q. And did he tell you the questions that he was going to ask you?
A. No. We spoke just in a general

Page 43

statement about kind of what my testimony was, what I remember, that kind of thing. It was an introduction as well because it was the first time I was speaking to him.
Q. Okay. Have you ever provided testimony in a case before?
A. Not other than my own, no, sir.
Q. Okay. When you say on your own or your own what kind of case were you involved in?
A. Family law over my oldest son.
Q. Okay. With regard to Myrtle Beach was this your first visit to Myrtle Beach?
A. No, sir.
Q. Okay. Again, when I say this, we're talking about August 24, 2018. How many times had you been to Myrtle Beach before that date?
A. Twice.
Q. And when were those visits?
A. One was the year prior with my wife's son and then the first, my initial time to Myrtle Beach was during a track meet in college back in 2005.
Q. Okay. Now, just curious, back in 2005 when you were here for a track meet or in Myrtle Beach for a track meet do you go to the

Page 44

beach at that time?
A. No, sir, I did not.
Q. Too busy on the track I guess.
A. Yes, sir.
Q. All right. With regard to 2017 how long were you in Myrtle Beach?
A. We were just there for a few days.
Q. Okay. What's a few days?
A. I want to say three days, sir.
Q. And where did you stay in 2017?
A. The name of the hotel. I can't remember, sir. I know it was directly next to a go cart, outdoor go cart track and crab restaurant, but I can't remember the name of the hotel right off the top of my head.
Q. In 2017 when you came to Myrtle Beach did you stay on the beach?
A. No, sir.
Q. It was an off beach property, correct?
A. Correct, sir.
Q. And when you came to the beach in 2018 you were off the beach as well, correct?
A. The next street over, yes, sir.
Q. And as I understand it when you went

Page 45

to the beach on the date of this incident that you used the public beach access, is that correct?
A. Yeah, it was a wooden walkway that had beach access, yes, sir.
Q. And when in 2017 you went to the beach did you use a public beach access?
A. I don't recall. More than likely, yes, but we were in a different part of the beach.
Q. I understand. But presumably when you were there in 2017 you would have driven to a point where you would have parked.
A. Yes, sir.
Q. And then used a public beach access to get to the beach, correct?
A. Yes, sir.
Q. When you, in 2018 on the date of this incident accessed the beach through the public beach access did you read or notice any of the signs that were on the beach access?
A. No, sir. I didn't notice any of them on my way out to the beach.
Q. Can you tell this jury that there was or was not signage on your beach access?
A. I cannot say definitively whether there or was not on the beach access point, no.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 46

Q. So for example do you recall seeing a sign that demonstrated or explained the flag system employed by the lifeguards on the beach?
A. I do not recall seeing that, sir.
Q. But you can't say that it wasn't there, can you?
A. I cannot say that it wasn't there.
Q. And did you see the signage that described what rip currents were, how they formed and how to I guess extricate yourself from a rip current, did you see that sign?
MR. McLEOD: Objection, lack of foundation. Asked and answered.
Q. (BY MR. THOMPSON) Did you see that sign?
A. No, sir.
Q. And can you tell us that that sign did not exist in August of 2018?
MR. McLEOD: Objection, lack of foundation. And asked and answered.
A. I cannot say definitely, no, sir.
Q. (BY MR. THOMPSON) Do you have any recollection how the streets are numbered in Myrtle Beach?
A. I do not.

Page 47

Q. Numbered north to south, 7th, 8th, 9th, that sort of thing?
A. No. Not off the top of my head, sir.
Q. The reason I ask is do you recall the avenue or the street for the public access that you used for the beach on August 24, 2018?
A. No, sir, I do not.
Q. Like it was 8th Avenue, 10th Avenue, do you have any recollection?
A. I do not, sir, I do not recall that.
Q. Now you mentioned earlier you were staying in a Hampton Inn, is that right?
A. I think it was, sir.
Q. Had you stayed there before?
A. No, I had not.
Q. How did you know where or how to get to the beach from the Hampton Inn?
A. We could literally see the water from the entrance of the hotel.
Q. Right. But how, you know, there are hotels on the front of the beach, how did you decide or how could you figure out which way to go, either between them, through them, to get to the beach?
A. Like I said, the access we took had a

Page 48

beach sign on the road, the front side of the road where the hotel was and we could see the wooden walkway.
Q. Basically it was a direction to you that it was a public access point, correct?
A. Correct, sir.
Q. And you went to the beach that day, it was you and your wife, is that right?
A. Me, my wife, my mother at the time and my two children.
Q. And your two children, how old were they at the time?
A. My son was six, my daughter was one.
Q. I'm not going to ask the question about the one year old, I assume the one year old was not a swimmer at the time.
A. Correct.
Q. How about the six year old?
A. Capable, shaky in the ocean.
Q. I'm sorry?
A. I said he's capable, he could swim at the time but shaky in the ocean. He wasn't in the ocean often.
Q. And did you have any sort of rule, family rule about going in to the water for your

Page 49

kids?
A. A family rule, no. Not necessarily a family rule. I always go to check the water before the kids get in.
Q. Did anybody get in the water before the incident occurred?
A. Anyone -- I'm sorry, sir? Anyone.
Q. In your family.
A. Me and my mother briefly, not for very long and not far out, no.
Q. How about you?
A. Myself and my mother briefly.
Q. All right. How far did you go in?
A. Maybe knee height, that was about it.
Q. Okay. What did you think of the water at the time?
A. It was choppy, there were a lot of waves, but the water was full of people, so.
Q. Right. But had you ever seen a similar condition in your visits to other beaches?
A. Yes, sir.
Q. Did you know what a rip current was before you came to Myrtle Beach in August 2018?
A. As someone that grew up around the beach, yes, I know what a rip current is.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 50

Q. I mean you had experience at least somewhere in the course of your lifetime, you learned what a rip current is, correct?
A. I've learned, yes.
Q. And you know that they occur on the beach, correct?
A. Correct.
Q. And they are a risk for anybody that's on a beach, correct?
A. Correct.
Q. I mean you know that, right?
A. Yes. I know that.
Q. Okay. So at the time I guess when you went to the beach in August 2018 in Myrtle Beach you didn't need any instruction on what a rip current was, did you? You already knew.
A. Correct. I knew what a rip current was, yes.
Q. Okay. When you went to the beach on August 24, 2018 do remember what time it was?
A. The exact time, no. I remember it was before noon because it wasn't yet mid morning. But it wasn't very, very early.
Q. Before noon?
A. I believe so, yes, sir.

Page 51

Q. All right. And then how long after you arrived on the beach before noon did the incident occur?
A. Total, approximately 20, 25 minutes I would say.
Q. So then the commotion, the incident that you witnessed, that would have occurred some time in the 12:20, 12:25 range, is that correct?
A. That's a guess. It was a while ago so I'm trying to recall exactly what time of day it was, but.
Q. Had you and your family had any kind of lunch before you went?
A. We went and had breakfast that morning before we went out.
Q. Did you bring food, drinks with you to the beach?
A. We did bring snacks with us to the beach, yes, sir.
Q. Now I want to understand, when you arrived to the beach you cross over the walkway as you described, and let me make sure I'm clear about that. There was a wood walkway that you used to access the beach?
A. That I remember, yes, sir.

Page 52

Q. In other words there wasn't just a sandy path, you had to physically use some form of wooden walkway to access the beach?
A. There was steps, yes, sir, there was sand blown over it as you can imagine in the dune area of the beach but I do remember wood.
Q. So at the end of the wooden walkway did that end at the beach or did you have to walk an additional amount through the dunes to get to the beach?
A. I can't recall exactly, sir.
Q. Okay. So when you got to the beach itself, in other words got through the beach access if you will, could you see a lifeguard tower?
A. Yes.
Q. Okay. What color was it?
A. I don't remember the exact color. I remember seeing chairs, umbrellas and then a wooden structure but I don't remember the exact color of the lifeguard stand.
Q. Any idea?
A. Not right offhand, sir.
Q. Was there a umbrella on the tower?
A. I don't remember, I don't remember seeing an umbrella on the tower itself. I remember

Page 53

seeing umbrellas stacked and a couple of umbrellas in the tower. There may have been but I don't remember seeing it.
Q. That was going to be my next question, are you telling the jury that there was not one or you don't remember one way or the other?
A. I don't remember one way or the other whether there was an umbrella on the stand itself.
Q. What about a flag, a weather flag?
A. I did not see a weather flag.
Q. Do you know what a weather flag is when I say that?
A. Yes.
Q. What is it that you, if I say the term or use the phrase weather flag what does that mean to you?
A. You mean the wind directional types of flags are you talking about or are you talking about a specific -- there's different types of flags for lifeguards.
Q. So did you at any time while you were on the beach on August 24, 2018 ever see any flags flying anywhere near a lifeguard tower?
A. I did not, sir.
Q. And are you telling this jury that it

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 54

didn't exist at all?
A. I am not saying it didn't exist, I'm saying that I did not see it.
Q. Okay. Did you look for one?
A. Did I look for a flag?
Q. Yeah.
A. I usually do, sir.
Q. So again, are you telling this jury you looked for a flag and it wasn't there?
A. Yes, sir. I'm saying I went out to the beach, I did not see a flag.
Q. But you were looking for one, why?
A. We always do, when we go to the beach we always look for the flags. They usually let us know whether there's marine life in the water or not.
Q. Okay. Well flags mean more than marine life, is that right?
A. Absolutely, sir.
Q. You've had that experience and you know that they have different colors based on what the seas, the winds, the potential hazards are for the day on that beach, correct?
A. Yes, sir, I do.
Q. So when you went to the beach on

Page 55

August 24, 2018 you looked for a flag.
A. I did. I just didn't see one.
Q. Did you look for a flag up and down the beach, in other words if there wasn't one at that lifeguard tower did you look north to see if there was a lifeguard tower nearby with a flag in front of it?
A. Pretty far away, I didn't look that way for another flag, no, sir.
Q. So for you to say it was pretty far away you looked and saw a tower.
A. I looked down there and saw another lifeguard stand, yes.
Q. And did it have a flag in front of it?
A. I do not recall, sir.
Q. How about to the south, did you see a lifeguard tower to the south?
A. No, sir.
Q. Did you look for one?
A. Not further south, no, sir.
Q. When you say further south when you came across the beach access where specifically was the tower that you saw?
A. The tower that I saw was on my

Page 56

right-hand side which would have been south on the beach.
Q. How far was it from the beach access? I'm not talking about the end of the beach access from that, but in relation to if you walk straight out from the beach access and you turn right to go to that tower how far would that distance be?
A. I couldn't say exactly. I know once we hit the beach access there was a gentleman on an ATV that came riding in front of us and that trail of ATV tracks, the lifeguard stand was just on the other side of that. Maybe 30 feet, 40 feet. I don't know how far it is. Closer to the dunes than it is to the water.
Q. I understand. I'm trying to figure out from the beach access how much further south it was from the beach access.
A. Not much. It was pretty close. I couldn't give you an exact determination.
Q. And as I understand it when you went on to the beach that day some time right before noon there was a lifeguard at that tower.
A. Yes, sir.
Q. Okay. And what was the lifeguard wearing?

Page 57

A. I remember shorts, I don't remember any other clothing on him, sir.
Q. What color were the shorts?
A. I want to say they were red, not 100 percent though.
Q. Was the lifeguard wearing a shirt?
A. No, sir.
Q. What did the lifeguard look like?
A. He was a Caucasian gentleman, curly hair, I believe, it was kind of wind blown at the time. But not anything, I wasn't that involved in what he looked like.
Q. Okay. How tall was he?
A. He was sitting when I saw him so I couldn't determine his height, sir.
Q. And you mentioned an ATV earlier, who was on the ATV?
A. I didn't notice, it was a gentleman, I didn't notice who he was.
Q. Was it a lifeguard, was it police, was it fire department, do you know?
A. It could have been a lifeguard, I don't recall it being police or anything of that nature. I would assume it would have been a lifeguard of some sort.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 58

Q. What was that person on the ATV wearing?
A. A T-shirt and some shorts.
Q. What color?
A. I don't remember. He went by pretty quickly.
Q. Was there any markings on the T-shirt to indicate who the person was with?
A. I don't recall, sir.
Q. Do you recall what the weather was like when you went to the beach on August 24, 2018?
A. To some degree. It wasn't too hot, there were a few clouds, nothing out of the normal or nothing that would raise any red flags for me.
Q. At any point in time did you use your phone to take any photos or videos of what happened that day?
A. I'm sure we did at some point. More than likely my wife or my mother did, but I don't remember using mine, no, sir.
Q. Did you take any photos of the lifeguard that you talked about?
A. No. Not that I can remember, sir.
Q. Now I want to explore with you what happened on the beach on August 24, 2018. It's my

Page 59

understanding you were there for approximately 20 to 25 minutes when you heard something, is that right?
A. Yes, sir.
Q. Was that the first thing that brought your attention to the water?
A. At that moment, yes, sir.
Q. Had you seen anybody in the water in distress or struggling before you heard something?
A. No. But I wasn't looking at the water at the time.
Q. All right. So the first thing you became aware of that there was anything going on was some amount of yelling, is that right?
A. Yes, sir.
Q. And that was the commotion, is that right?
A. Yes, sir.
Q. How far away were you from the water's edge when that happened?
A. We were about halfway down the beach so I want to say maybe 100 feet tops.
Q. And were you sitting on the beach at that time?
A. I was laying down on the beach, yes.

Page 60

Q. On your stomach, on your back?
A. I was on my side.
Q. Looking at your kids, your wife?
A. Yeah. I had my one year old in front of me, she was playing with a water bottle at the time. I remember because when the commotion went off I grabbed her and everything I had handed her to my mother.
Q. And what did you hear?
A. I heard someone yell help was what I heard.
Q. And so initially did you know where that was coming from?
A. Initially it came over my back shoulder so I had to turn around to look, but other than that, no. I had to figure it out.
Q. When the yell happened or when the noise happened you had your back to the water, correct?
A. I had my feet to the water, my back was towards where the south side of the beach would be.
Q. And so then what was the next thing that happened that sort of got your attention?
A. What do you mean, sir?

Page 61

Q. Well, you hear a yell and you look to figure out what it is, what did you then see?
A. So I heard the yell, I saw a few people standing at the water and my eyes immediately darted towards the water because that's where they were looking and I saw two gentleman struggle to try to pull another one out, they were maybe chest deep, maybe a little shallower and closely behind them was another woman trying to pull another individual, a younger female out of the water.
Q. So to be clear, when you heard the yell, and it was a very short, very quick time after that that you then saw two persons pulling an individual in from the water, is that right?
A. Correct, sir.
Q. You never saw that individual, the person they were pulling in, you never saw him before then, did you?
A. No, sir.
Q. Never saw that individual in the water with any children, did you?
A. No, sir.
Q. So the first time that you saw the individual that was being brought to the edge of

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 62

the beach, that person was unconscious, correct?
A. Correct, sir.
Q. Had to be assisted to the shore, correct?
A. Correct.
Q. And did you go assist?
A. I did, sir.
Q. And how far into the water did you go?
A. By the time I got there they were about waist deep in the water.
Q. Do you recall when it was or how deep they were when you first saw them?
A. As I stated earlier when I first saw them they were about chest level in that water. So they were somewhere between trying to walk and paddle. The two people were.
Q. The two people trying to assist this person, correct?
A. They were, yes, sir.
Q. They were about chest deep.
A. Yes, sir.
Q. Okay. And so the individual was brought to, or you went out and by the time that you got there he was waist deep, is that right?

Page 63

A. Yes, sir.
Q. Or were you waist deep?
A. I was, so myself and the individuals that were standing and pulling him in were about waist deep.
Q. And then you got him to the beach?
A. Yes, sir.
Q. The lifeguard that you described earlier, that lifeguard was how far away from the water's edge when all this was happening?
A. The lifeguard stand was approximately, maybe 10 to 20 feet further away from the water's edge from where I was lying as far as distance from the water.
Q. So approximately 120 feet away from the water?
A. Maybe. Give take.
Q. I'm sorry?
A. I said give take, about that maybe.
Q. But the lifeguard was on the stand or was at the stand the last you saw him.
A. Yes, sir.
Q. And then the lifeguard was, or got to the individual on the water's edge as the individual's being brought to the water's edge?

Page 64

A. So we drug him up to the sand and laid him down and that's when I looked up and noticed the lifeguard standing there with the rest of the crowd.
Q. In other words he was there at the time that the individual was brought to the edge of the water. He was there.
A. Loosely. Yes, sir.
Q. Loosely. You described he was standing there, I understand you say he didn't assist in any fashion, but he was there, correct?
A. Correct.
Q. And that's the same guy you saw earlier?
A. Yes, sir.
Q. In other words he was on the beach the entire time.
A. He was there on the beach in some fashion, yes, sir.
Q. Okay. Had you ever seen the individual that was brought to the beach, had you ever seen him at any time on the beach that day?
A. No, sir.
Q. Or any of his family members before this event happened?

Page 65

A. No, sir.
Q. Do you have any emergency medical training?
A. I do, sir.
Q. Are you an EMT?
A. I am not. We are CPR and shock trained for the military. But I am not an EMS, no, sir.
Q. Did you participate in the resuscitative effort?
A. Yes, sir.
Q. Were you doing the compressions?
A. No, sir, I was elevating legs and rolling because he was pretty heavy so the nurse was the one doing the compressions as well as the other gentleman that came and brought him on shore with me.
Q. You described at some point you spoke with one or more police officers after this event, is that right?
A. I did, sir.
Q. And you gave a written statement, is that correct?
A. No. I gave a verbal statement, sir.
Q. Did you sign a statement?

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 66

A. I may have, I don't recall.
Q. Do you remember writing a statement and signing it?
A. No, I remember the two individuals came to the hotel, asked me to come down and we spoke next to the hotel. I don't remember writing a statement down, sir.
Q. All right. Have you ever been, have you ever seen a copy of a statement with your signature on it?
A. No, sir.
Q. I'm going to share a screen if I can.
(WHEREUPON, A DISCUSSION WAS HELD OFF THE RECORD)
Q. (BY MR. THOMPSON) Mr. Chandler, can you see the screen now?
A. I can see you, sir.
Q. Do you see the screen now?
A. I do, sir.
Q. Is there a statement there?
A. There is.
Q. At the bottom there is a signature. Is that your signature?
A. It is, sir.
Q. You haven't seen this statement before today?

Page 67

A. It doesn't look familiar. I may have signed the statement but it's not my handwriting, no.
Q. Okay. Do you see at the bottom where it talks about if you sign the statement it's a correct statement and if you give a false statement there's certain potential problems?
A. Yes.
Q. Do you see that?
A. Uh-huh.
Q. And did you read the paragraph that says unlawful to make false complaint, did you read that before signing?
A. Yes.
Q. And did you read the paragraph where it says by signing below I have certified I've read the provisions of the above section which is the paragraph just above it and that you understand the contents, did you see that?
A. Yes, sir.
Q. And it also says that you certify and have read the above statement, the paragraph above where it says the details, that you've read it and it is true and correct to the best of your knowledge. Do you see that?

Page 68

A. Correct, sir.
Q. All right. So going up then to the body of this statement that you signed.
A. Uh-huh.
Q. It says family sitting under green tents.
A. Uh-huh.
Q. Was the family under an umbrella or a tent?
A. So that statement was not written with me, that was in conversation with the two officers that were there. I told them the conversation that I had about where the family was so this was in conversation, sir.
Q. I understand. And we prefaced our comments here and our discussion that you signed this statement, correct?
A. Correct.
Q. And it says that you read it and that the statements in the statement are correct and true.
A. Correct.
Q. See that? Okay.
A. I do see that, sir.
Q. So then it says the family sitting

Page 69

under green tents, had their daughter pulled out in the current.
A. Correct.
Q. Did you see that?
A. No. That's what the son told me.
Q. Okay. Did you -- okay. So that's not something you saw.
A. No. His son told me that his sister was pulled out in the current.
Q. Says the father tried to run out to save her.
A. Again, that's what the son told me and again this would have been conversation with the officer.
Q. So again the father was on the beach, ran into the water to save the child, is that the statement that you signed?
A. That is the statement that I signed.
Q. That's not what you saw though, is it?
A. That portion of the statement is not what I physically saw, no, sir.
Q. Okay.
A. There's also a lot that we spoke about that isn't in that statement, sir.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 70

Q. That's what I'm trying to figure out, all of the things that you testified to today that aren't in this statement and there's things in this statement that you haven't testified today about, correct?
A. Correct.
Q. So you disagree or you take issue with the statements that are in this or the account of what happened in this statement?
A. I will say that what's written in this statement was more in context of a conversation I was having with the officers, not as much of what I saw per se.
Q. I understand, and you had a conversation and whether you wrote it or whether they wrote it it was a statement that was handed to you, you read it, you agreed with paragraph that says this is what I saw, this is what I'm saying is the truth and you signed it, correct?
A. Correct. That's the statement, that's how it reads, sir.
Q. Bear with me.
A. Not a problem.
Q. At least I got to share, now I can't get it to get back to what I need.

Page 71

(WHEREUPON, A DISCUSSION WAS HELD OFF THE RECORD)
VIDEOGRAPHER: We are going off the record at 4:23 p.m.
(WHEREUPON, A RECESS WAS TAKEN BY THE PARTIES)
VIDEOGRAPHER: We are back on the record at 4:26 p.m.
Q. (BY MR. THOMPSON) Mr. Chandler, thank you for your patience during the technical difficulties that I had.
A. Not a problem.
Q. It's always a challenge to do things remotely and just when you think you understand how it all works, you know, so thank you for your patience.
Mr. Chandler, we were talking about you spoke with the police. Did you ever address or speak with any of the lifeguards?
A. Shortly after the event I was standing on the back side of the pickup truck, I want to say it was a pickup truck and I had a conversation with a male there about kind of recalling what I went through and what happened and what I saw, that kind of thing.
Q. And who was that?
A. I don't recall who he was. He may

Page 72

have been a lifeguard, he may have been some other, I don't recall off the top of my head, sir.
Q. When did you leave Myrtle Beach?
A. The day after, sir.
Q. Have you ever lived in South Carolina?
A. I have not.
Q. Have you been back to South Carolina?
A. Not since that incident, no, sir.
Q. At any time did you see the son, the boy, in the water?
A. No, sir.
Q. Bear with me.
A. Not a problem.
Q. Have you ever worked as a lifeguard?
A. No, I have not.
Q. Ever done any MP work in the military?
A. MP, military police?
Q. MP, military police.
A. No, sir. I assume a cyber operator.
Q. You say cyber operator?
A. Cyber, yes, sir.
Q. Nice.
Mr. Chandler, I think those are all

Page 73

the questions I have for you today. Thank you for your patience and certainly thank you for your service to this country.
A. I appreciate it. Not a problem.
EXAMINATION
QUESTIONS BY MS. SULLIVAN:
Q. I think I get to play cleanup Mr. Chandler.
My name is Kelli Sullivan, I represent the City of Myrtle Beach.
A. How are you, ma'am?
Q. Good. How are you?
A. Good.
Q. Thank you for doing this. You mean you don't want to come to South Carolina where it's 112 degrees in the shade?
A. My folks live in North Carolina, that's about as far south as I'm going to go right now.
Q. It's pretty warm down here.
I want to echo what Mr. Thompson said, thank you for making your time today and being available to us.
Couple of brief questions.
A. Uh-huh.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 74

Q. You told me or you told us earlier this trip to Myrtle Beach was kind of a spur of the moment decision for you and your family?
A. It was, ma'am.
Q. And did you take any time before you went to the beach to look at any weather reports that day or weather service bulletins?
A. I did not. No, ma'am.
Q. Did you look to see if the City of Myrtle Beach had any information on that website about the beach conditions on any particular day?
A. I did not. We drove in late at night, so no, I did not, ma'am.
Q. Okay. But you didn't check the morning before you went out to the beach either.
A. No, ma'am, we went and had breakfast and picked some things up and headed right over to the beach.
Q. And likewise you didn't check any Myrtle Beach Facebook page or anything like that.
A. No, ma'am, I don't even Facebook, sorry.
Q. Okay. You mean you're a cyber guy and you don't Facebook?
A. That's why I don't Facebook.

Page 75

Q. Probably a very good point you just made.
Let me ask you this: The person that you saw on the ATV, you saw them before this whole commotion started?
A. I did.
Q. About how long before, do you recall?
A. It was literally right as we were walking on to the beach they came driving by.
Q. Okay. So if you had been on the beach 15 or 20 minutes this person had driven by about the same time you got on the beach before the commotion, correct?
A. I'd say 25 or 30 minutes, yes. That's a ball park, around 10 minutes.
Q. Do you know if that person was a male or a female?
A. It was a male.
Q. And I think you testified earlier that you didn't know what agency, if any, that person was with.
A. I do not, ma'am. I do not remember any specific symbols or anything on him, no, ma'am.
Q. Okay. And a few minutes ago when Mr. Thompson showed you your statement you indicated

Page 76

that there was information on there that the son, Mr. Wolde's son had told you?
A. Yeah. So when I was on the beach asking him, you know, trying to calm him and his siblings down I asked him what happened and that was information that he gave me. So like I said that statement was a, not written by me, in conversation I did mention those things, yes.
Q. Did Mr. Wolde's son ever indicate to you that he had been in the ocean with his family at the time?
A. No. He didn't, no.
Q. And I believe you told me that when you first saw the bystanders trying to help Mr. Wolde out that the water was roughly chest deep?
A. Yes, ma'am. To my recollection, it's been a few years, but yes, about chest deep.
Q. Okay. Now, is the first time that you saw the Wolde family in the water when you first heard the help cries, you had not noticed him before that?
A. Correct, ma'am. Like I said before I wasn't looking towards the beach before that.
Q. So is it fair to say you don't know how long Mr. Wolde and his daughter had been

Page 77

struggling before you noticed?
A. Correct, ma'am.
Q. And it's also fair to say that the first time you noticed they were already in the arms of the bystander?
A. Correct. They were in the arms of someone trying to pull him out of the water.
Q. And is it also true that while you were assisting the bystander and Mr. Wolde you weren't looking for a lifeguard at that point?
A. Looking for one, no, noticed one standing in the crowd above me, yes.
Q. Okay. Was that after you had already pulled Mr. Wolde in?
A. Yes, ma'am. That was after we had already pulled him all the way up on to the sand.
Q. But I'm talking about in the process, in the process of pulling Mr. Wolde in do you have any idea what the lifeguard's doing?
A. No, ma'am, I do not.
Q. I don't think I have any further questions for you Mr. Chandler. See, I didn't have many at all.
A. Appreciate it, ma'am.
MR. McLEOD: Mr. Chandler, I've just

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Page 78

got a couple questions just to clear up a couple things please, sir.
THE WITNESS: Okay.
EXAMINATION
QUESTIONS BY MR. THOMPSON:
Q. You didn't see Mr. Wolde go in the water, did you, sir?
A. I'm sorry, say that again, sir.
Q. You didn't see the point on the beach where Mr. Wolde went in to the water, did you?
A. I did not, sir.
Q. You saw Mr. Wolde when he was being dragged out of the water, is that correct?
A. Correct, sir.
Q. And who was assisting him or who was dragging him out of the water? Were they bystanders or were they lifeguards?
A. They were bystanders. It was a gentleman and his girlfriend I think, younger lady that was with him that were in the water and then a larger gentleman that had run out to help to pull him in.
Q. So at any time from the time that you first saw Mr. Wolde in the water until the time that the bystanders had him at the water's edge did

Page 79

any lifeguard provide any rescue efforts whatsoever?
A. No, sir. Not to my knowledge.
Q. And when Mr. Wolde was brought ashore you and a nurse performed life resuscitation, or performed CPR on him, is that correct?
A. Me, the nurse and the other gentleman who helped pull him from the water all kind of helped tag team that effort.
Q. And those efforts were undertaken in an effort to prevent his death, is that correct?
MR. THOMPSON: Objection.
A. That was my assumption after the nurse said she had a weak pulse, sir.
MR. THOMPSON: Objection, move to strike.
Q. (BY MR. McLEOD) Now, the lifeguard that you saw when you got on the beach, did he arrive at any time before Mr. Wolde was dragged from the water by bystanders and CPR was performed on him by bystanders?
A. By arrived you mean down towards the scene, sir?
Q. Yes, sir.
A. I did not see him, I did not notice

Page 80

him, no, sir.
Q. Did you first notice him once a crowd, once there had been time for a crowd to gather around Mr. Wolde?
MR. THOMPSON: Objection.
A. That was the first time I noticed him, sir, was when we were actually performing CPR on Mr. Wolde.
Q. (BY MR. McLEOD) And did you notice the lifeguard in the crowd or did you notice him assisting in some way?
A. I noticed him standing at the front of the crowd is what I noticed.
Q. And when you noticed the lifeguard there is that when you saw a person that in your words looked like a deer in headlights?
MR. THOMPSON: Objection.
A. Correct, sir.
Q. (BY MR. McLEOD) Okay. They asked you a couple questions about this statement and let me ask you this: This is the phone number that appears on the statement: (410) 507-7866. Had that phone number ever been associated with you?
A. Yes, sir. It sounds familiar.
Q. Is that your phone number?

Page 81

A. It's not my current phone number, no, sir.
Q. Okay. The statement that they provided you indicates that a gentleman named Nicholas dove out into the water. Did you notice anybody named Nicholas on the beach that day?
A. No, sir. Not to my knowledge.
Q. When you were talking to law enforcement did you trust and believe that they would take down accurately what you had shared with them?
A. Yes, sir.
Q. Now that Mr. Thompson has showed you the statement that they prepared did they do that or did they fail to do that?
MR. THOMPSON: Object.
A. I believe there was a lot of our conversation that was left out of that statement, sir.
Q. (BY MR. McLEOD) For example, the statement doesn't mention anything about Mr. Wolde having a pulse and CPR being performed at the water's edge, does it?
MR. THOMPSON: Objection.
A. Correct. It does not.

ELECTRONICALLY FILED - 2022 Jul 21 2:11 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



Q. (BY MR. McLEOD) Would that be a fact that you would have failed to tell the police or did you tell the police that?
MR. THOMPSON: Objection.
MS. SULLIVAN: Object to form.
A. No, sir, I would not have forgotten the details of what I actually witnessed with my own eyes.
Q. (BY MR. McLEOD) With regard to what Mr. Wolde's son told you, did you share that with them in an effort to try to give them all the information that you had on that day?
A. Correct, sir. It was given in context of the conversation.
Q. I think those are all the questions I have, sir. Thank you that your time today.
A. Absolutely.
VIDEOGRAPHER: Off the record?
We're going off the record at 4:40 p.m.
MR. McLEOD: He'll waive reading and signing.



REPORTER CERTIFICATE

I, SUZANNE BENOIST, Certified Shorthand Reporter, do hereby certify that there came before me via Zoom, the above-referenced parties, that the proceeding was translated and proofread using computer-aided transcription, and the above transcript of proceedings is a true and accurate transcript of my notes as taken at the time of said event.

I further certify that I am neither attorney nor counsel for nor related nor employed by any of the parties to the action in which this examination is taken; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

Dated this 20th day of July, 2022.

Ms. Suzanne Benoist, RPR,
CCR-MO, CCR-KS, CSR-IL, CSR-IA
Notary Public No. 07541281
State of Missouri - Jefferson County
My commission expires: 5/10/2024

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>MESWAET ABEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ZERIHUN WOLDE AND AS NATURAL PARENT AND LEGAL GUARDIAN OF ADAM WOLDE AND WUBIT WOLDE,<br><br>Plaintiff,<br><br>v.<br><br>LACK'S BEACH SERVICE, CITY OF MYRTLE BEACH, AND JOHN DOE LIFEGUARD,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>FOR THE 15TH JUDICIAL CIRCUIT<br>CASE NO.: 2019-CP-26-07075<br><br>**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT CITY OF MYRTLE BEACH'S MOTION FOR SUMMARY JUDGMENT** |

Plaintiff Meswaet Abel, as personal representative of the estate of Zerihun Wolde, and as natural parent and legal guardian of Adam Wolde and Wubit Wolde, submits the instant memorandum opposing the City of Myrtle Beach's Motion for Summary Judgment, filed June 20, 2022. (*See* CMB Motion and Memorandum in Support of Summary Judgment, June 20, 2022). The City's latest filing seeks summary judgment despite the fact this Court has already found sufficient evidence of gross negligence—a finding which mandates trial by jury and, essentially, renders this motion moot. (*See* Order Denying Summary Judgment on Recreational Use Statute; CMB Answer at ¶ 45, asserting "all defenses" under the SCTCA). Nonetheless, the City's present motion would have this Court believe it is immunized from liability. The City's argument, however, finds no support in the law or the evidence and must, therefore, be denied.

## INTRODUCTION

Lifeguarding services in the United States have been an important form of public safety since the 1800s. The first lifeguard service was established in 1912 to prevent injury and drowning

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

incidents at aquatic settings in the United States. (Ex. 1, CDC Study, p. 3). In 1964, the United States Lifesaving Association (USLA) was formed to standardize lifeguard practices and improve professionalism among beach lifeguard organizations around the country. (*Id.* at p. 4). The USLA continuously studies drowning incidents and compiles statistics to prevent drownings. From 1988-1997, the USLA recorded fewer than 100 drownings with more than 75% of those drownings occurring at beaches that were not guarded. (*Id.*). USLA statistics further indicate the chance of drowning at a beach protected by lifeguards trained under USLA standards is *less than one in 18 million per year*. (*Id.* at p. 1 (emphasis added)).

Regrettably, the number of drownings that have occurred in Myrtle Beach since the City and Lack's Beach Service began providing lifeguard services is alarmingly high when compared to other public beaches. For example, Edisto Beach, which is unguarded, only had one drowning death from a rip current from 2001 through 2012. (*See* Ex. 2, Strategies to Reduce Ocean Drowning Occurrences in Myrtle Beach, p. 75). Based on published reports, there have been three such drowning on the City's beach in the *last month* alone. This fact is of particular concern considering this case was to be tried on June 20, 2022 but was continued at the Defendants' request. If a verdict had been reached during the June term of court, the three drowning deaths that have occurred since Defendants' continuance may very well have been prevented.

Also preventable was the tragic death of Mr. Wolde, a forty-one-year-old father of four, who drowned at the City's beach while swimming with his children. The record in this case contains overwhelming evidence that the City and its co-defendant, Lack's, operated their for-profit lifeguard business in a dangerous and unsafe manner. Even more troubling is the overwhelming evidence proving these Defendants knew the manner in which they provided lifeguard services would result in drowning deaths.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

In 2008, Defendant Lack's lifeguard certification was revoked by USLA because the manner in which these Defendants provided lifeguard services was dangerous: it required their lifeguards to take their eyes off the water to simultaneously generate revenue from renting beach chairs and umbrellas (*See* Ex. 3, USLA 2008 Revocation Letter). It is universally accepted within the aquatic safety community that this type of dual role operation violates the standard of care and places beachgoers at risk of drowning. The Center for Disease Control cautions that "[l]ifeguards assigned to supervise an aquatic area shall not be subject to duties that would distract or intrude their attention from proper observation of persons in the waterfront area." (Ex. 1, p. 8). And "[s]pecifically, lifeguards assigned to water surveillance shall not be assigned to any duties other than public safety." (*Id.*). The CDC further states: "it is clear . . . that swimming facilities must be staffed adequately to ensure effective and continuous patron surveillance, and that lifeguards should be given *no other task* that would distract them from this work." (*Id.* at p.7).

Furthermore, on September 30, 2016 the City received a letter from the USLA which stated:

> "Based on emails, media reports and preliminary investigations of recent drowning cases, the USLA has identified the Myrtle Beach system combining lifesaving and commercial activities to be an unreliable means of protecting swimmers. In addition, it was found that at times local lifeguard providers have falsely claimed to meet the standards of USLA certification and illegally used the USLA logo on agency apparel....
>
> "The USLA will not certify any beach lifeguard agency that assigns lifeguards to a dual role of public safety and commercial activity because all water safety professionals agree that a distracted lifeguard cannot properly maintain safe surveillance of the water. In the interests of public safety, we encourage Myrtle Beach to change its standards in accordance with USLA certification standards..."
>
> (Ex. 10, USLA Letter, 2016)

Notwithstanding the dangers of Defendants' dual role lifeguarding, even basic safety standards like ensuring its lifeguards were properly tested and certified were ignored. In fact,

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

ensuring its lifeguards were "tested and certified" is an express statutory requirement under S.C. Code § 5-7-145—and one of import because § 5-7-145 defines the City's limited authority to provide lifeguard services, *i.e.*, its power or scope of official duty.

Scope of official duty delineates the reach of the South Carolina Tort Claims Act, which provides limited immunity to government actors but only for tortious conduct within their scope of official duty. The City's scope of official duty as a municipality extends only so far as authorized by the General Assembly through general law. *See* S.C. Const. Art. 8, § 9. Where, as here, there is an express statute specifying the City's powers regarding beach safety, as in the case of § 5-7-145, the City is limited to operating within the conditions of the statute. If the City fails to operate within those limitations, as it did in this case, its conduct falls outside the authority granted by the General Assembly and, thus, outside the protections of the Tort Claims Act.

But even if the Act were to apply, the immunity provisions raised by the City—S.C. Code 15-78-60(1)(2)(4)(5) and (20)—are unavailing. The City's assertion of discretionary immunity, legislation-related immunity, and immunity for acts of third parties are all inapplicable. In fact, the provision authorizing legislation-related immunity does just the opposite. Section 15-78-60(4) specifically omits the "failure to comply" with any law from the enumerated legislative-related immunities afforded under that provision. For obvious reasons, this omission is consistent with the language and intent of the legislature to limit the Act's protections to conduct within the scope of official duties—in this case, conduct only as authorized in § 5-7-145.

Just as the City's violation of § 5-7-145 renders its conduct outside the protections of the Act, so to does its recklessness in knowingly creating the safety risks that led to Mr. Wolde's tragic death. The City was well aware that its practice of dual role lifeguard protection presented a safety risk to beachgoers. Yet it continued this practice anyway. And the dangerous rip currents on the

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

day of Mr. Wolde's death should have warranted beach closure. But beach closure was strongly discouraged as the City would have been denied lucrative beach rental income. No Tort Claims Act exception—nor the Recreational Use Statute—extends immunity for such grossly negligent conduct. Simply put, the immunity the City seeks does not exist. Nor would the public policy of this state provide for such immunity. The City's motion must, therefore, be denied.

## FACTUAL BACKGROUND

In the summer of 2018, Mr. Wolde and his fiancé, Meswaet Abel, traveled with their four children to Myrtle Beach, an attractive vacation spot within driving distance from the family's home in Maryland. After an eight-hour drive, the family arrived in Myrtle Beach on the evening of August 23, 2018. They rented a room at the Seacrest Oceanfront Resort located on Ocean Boulevard, between 8th and 9th Avenue. After a restful evening, the Wolde family awoke on August 24, 2018, in anticipation of enjoying a day at the beach.

At the time the family arrived at the beach, they had no reason to believe any life-threatening safety hazards were present or that the swimming conditions were anything other than safe. There was a lifeguard stand providing a watchful eye of the water. (Ex. 4, Franchise Agreement). There were no posted warnings or flags notifying beachgoers of any hazards. (Ex. 5, Robinson at 9:10-13, 19:23-10:23; 25:5-14; 44:12-45:19). There was nothing unusual about the beach surf. Numerous people were enjoying the water and playing in the sand. Unbeknownst to the Wolde family, however, the conditions on this beach day were anything but safe. (*Id.* at 48:3-10; 52:6-13).

Earlier that morning, Lack's, which monitored the beachfront through a contract with the City (Ex 4, Franchise Agreement), received a warning from the National Weather Service that hazardous conditions were present, including deadly rip and longshore currents. (*Id.* at 48:3-10).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

As explained by Lack's owner, George Lack, such conditions are incredibly hazardous, yet they are not visible to the average beachgoer. (Ex. 6, Lack Depo., 46:4-47:23; 49:12-55:2). In Myrtle Beach in particular, these conditions occur after a southeast wind turns out of the west creating wind tunnels that breach the sand bar and cause a current when the waves break and recede. (*Id.* at 48:4-17). When such warnings occur in the morning, the conditions typically worsen as the wind gets stronger throughout the day. Consequently, such a threat generally requires beach closure, which means swimmers are not permitted to wade into the water. (Ex. 5, Robinson at 52:6-53:2; 55:1-11).

Having no notice of any concealed dangerous condition posed by the presence of rip and longshore currents, the family planned for Mr. Wolde to take the two oldest children swimming. Mr. Wolde was an experienced swimmer who swam regularly at his local pool and at the local beaches. (Ex. 7, City of Myrtle Beach Incident Report, p. 3). He was very comfortable in the water according to Ms. Abel. (*Id.*). Around 12:30 p.m., Mr. Wolde waded into the water with his two oldest children. (Ex. 5, Robinson at 25:5-7). Regardless of conditions, the children were not permitted to swim in depths greater than chest deep. However, not long after entering the water, the children, began experiencing trouble with the current. (Ex. 8, Adam Wolde Depo. at 99:20-101:17, explaining they were jumping in the waves and standing with their feet on the ocean floor when they could feel the water push them out to sea). Mr. Wolde, who was wading in waist-deep water, began to help his struggling children but he too was being pushed out to sea by the current. (Ex. 5, Robinson at 24:7-13; Ex. 8, Adam Wolde at 101:16-102:15; 105:6-16, stating they tried to swim back to shore but they were being pulled out, "we started going and then we couldn't"). They fought the waves and the current while Mr. Wolde battled to get his children back to shore. (*Id.* at 108:1-109:17). As he struggled, it became obvious to people on the beach that there was a

problem. (*Id.* at 107:8-11). Several beachgoers went into the water to assist Mr. Wolde and get him to shore. (*Id.* at 111:11-21; 112:12-113:13; 116:15-19; Ex.7, City of Myrtle Beach Incident Report, p. 3). While he was able to get his two children safely back to shore, Mr. Wolde was unable to save himself. He died of asphyxia due to drowning. (Ex. 7, Incident Report, p. 3; Ex. 9, Horry County Coroner File).

Not a single lifeguard came to Mr. Wolde's aid while he struggled in the water. (Ex. 5, Robinson at 79:13-17). In fact, unbeknownst to the Wolde family, many of the lifeguards apparently guarding the beach with their "watchful eyes" were simultaneously charged with the dual role of selling beach rentals. This dual role lifeguarding practice has long been admonished as a serious safety risk. (Ex. 10, USLA Letters, 2016 & 1996). The City even lost its USLA lifeguard certification for this very reason. (Ex. 10, 2016 Letter). But not only did the City continue to employ this practice with knowledge of its danger, it encouraged its lifeguards to make beach rental sales by providing compensation incentives for their sales. (Ex. 5, Holly Robinson Depo. 68: 9-12).

On the day of Mr. Wolde's tragic drowning, Lack's was also short staffed. (Ex. 5, Holly Robinson Depo. 26:2-9). There were only three people working the day of Mr. Wolde's death whose sole responsibility was to provide lifeguard services. (*Id.* at 28:13-29:8). No red flag or warning signs were present on the lifeguard stand at L21. (*Id.* at 25:5-14; 93:19-94:11). No effort was made by the City or Lack's to close the beach when it knew hazardous conditions were present that day and that its failure to do so posed a significant risk to public safety. It wasn't until 3:00 p.m., after another drowning incident, that the City and Lack's finally closed the beach. (*Id.* at 53:14-20; 59:9-60:5; Ex. 6, Lack Depo. at 116:3-13).



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Ms. Abel filed this wrongful death and survival action against the City and Lack's on December 18, 2019, alleging claims of negligence, gross negligence, and bystander liability for their recklessness in creating the hazardous situation that caused Mr. Wolde's drowning. The City now seeks immunity from suit despite its reckless conduct—conduct outside the scope of its legislatively mandated authority under § 5-7-145, and so reckless that even assuming the Tort Claims Act or the Recreational Use Statute apply, the City's conduct would fall outside their protections.

## STANDARD OF REVIEW

"Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law." *Grooms v. Marlboro County School Dist.*, 307 S.C. 310, 311, 414 S.E.2d 802, 803 (Ct. App. 1992). Furthermore, to determine "whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

## ARGUMENT

### I. The Tort Claims Act does not apply to the City's conduct in providing lifeguard services—conduct outside its municipal power and, thus, outside the scope of the Act.

The South Carolina Tort Claims Act does not immunize municipalities for conduct outside the scope of official duty, such as the City's conduct exceeding its authority under § 5-7-145.[1] The

[1] Article 8 of the State Constitution provides: "The structure and organization, powers, functions, and responsibilities of the municipalities shall be established by general law." S.C. Const. Art. 8, § 9. The Municipal Code is that general law. Within the municipal code is a specific statute pertaining to "lifeguard and safety services provided by coastal municipalities." S.C. Code § 5-7-145. Here, the City's powers regarding lifeguard services were granted and limited by the legislature under this precise statute, § 5-7-145.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

limited immunity provided for in the Act is contingent on the political subdivision acting within its municipal powers. The plain language of the Act makes clear that to invoke its protections, the tortious acts must be performed "within the scope of official duty." S.C. Code § 15-78-20(b) ("The General Assembly in this chapter intends to grant the State, its political subdivisions.....*while acting within the scope of official duty*, immunity from liability and suit for any tort except as waived in this chapter.").[2] To be sure, the Act similarly provides that government entities acting outside the scope of their powers are liable for their torts just as any private party under like circumstances. S.C. Code § 15-78-40 ("....and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages and exemptions from liability and damages contained herein.").

This reading of the Act is likewise consistent with South Carolina case law. *See Wells v. City of Lynchburg,* 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (observing that in determining whether cause of action against government entity is barred under Tort Claims Act, all functions exercised by municipal corporations *under powers constitutionally granted to them by the General Assembly* are considered public and governmental). Just as all powers granted to a municipality by the General Assembly are considered governmental, those powers outside the authority granted by the General Assembly are not. *Id.* Thus, where the conduct at issue is outside a political

[2] *See also Hawkins v. City of Greenville*, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004) ("The provisions of the Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, *while acting within the scope of official duty*, must be liberally construed in favor of limiting liability of the State." (citing S.C. Code Ann § 15–78–20(f) (Supp. 2003); *Steinke v. South Carolina Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999); *Arthurs v. Aiken County,* 338 S.C. 253, 270, 525 S.E.2d 542, 551 (Ct. App. 1999); *Staubes v. City of Folly Beach,* 331 S.C. 192, 205, 500 S.E.2d 160, 167 (Ct.. App. 1998)).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

subdivision's official duties, no limitations apply. In the same way a private individual would be held liable under like circumstances, the City is liable.

Section 5-7-145 limits the City's power and authority to provide lifeguard services through a private beach safety company. It sets a pre-requisite requiring that the City do so by a "service agreement" and, further, it conditions the City's provision of third-party lifeguard services on five requirements:[3]

> (1) the municipality shall follow the procedures of the State Procurement Code, as found in Chapter 35 of Title 11, or the procedures of the municipal procurement code, in the awarding of contracts with private beach safety companies;
>
> (2) the agreement between the municipality and private beach safety company may last no longer than seven years;
>
> (3) the municipality may grant the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality on the effective date of this section; provided, however, that on and after the effective date of this section there shall be no granting of the right to rent any additional tangible items, or to sell any beverages to the public on the beach, or otherwise, unless and until additional personnel are hired for the additional rentals and additional activities sufficient in number so that employees already employed on the effective date of this section will not be unduly burdened as determined by the appropriate municipal governing body;
>
> (4) lifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality; and
>
> (5) the conduct of the limited commercial activities granted to the private beach safety company shall not prevent or interfere in a substantial way with the peaceful, recreational use of the public beach by the general public.

S.C. Code Ann. § 5-7-145. Failure to satisfy these requirements is a violation of municipal authority—one which brings the City's conduct outside the scope of official duty, and outside the Act's protections. And the City did just that.

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[3] S.C. Code § 5-7-145 (providing "authoriz[ation] to provide lifeguard and other safety related services on and along the public beaches within its corporate limits . . . using municipal employees or *by service agreement with a private beach safety company*." (emphasis added)).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

First, the City did not enter into a service agreement with Lack's. Instead, it entered a franchise agreement. (Ex. 4, Franchise Agreement). Second, the City failed to contract with a private beach safety company. Rather, the City entered into a joint venture with "concessionaires of beach equipment." (Ex. 4, Franchise Agreement). Further, the personnel the Defendants masqueraded as lifeguards were not certified, trained, or competent to perform their important public safety responsibilities. They were required by the Franchise Agreement to "successfully complete a course consisting of a total of not less than 40 hours in open water life-saving which meet the criteria of the United States Lifeguard Association"—but they never did:

> Q. I guess what I am asking, though, prior to the lifeguards starting their work seasonally for your group, they haven't received the 40 hours of USLA-approved ocean water training?
>
> A. No sir.

(Ex. 6, George Lack Depo, 98:13-17; Ex. 4, Franchise Agreement p. 4). That the City conducted no testing or certification is significant because its limited authority to perform lifeguard services granted by the Legislature was conditioned on "test[ing] and certify[cation] as required by [the City]." S.C. Code § 5-7-145. In other words, Defendants were not authorized to provide lifeguard services if the lifeguards were not "tested and certified."

Moreover, the City's for-profit operation threatens "the peaceful, recreational use of the public beach" by posing a serious safety risk—one so serious it resulted in the loss of Mr. Wolde's life. S.C. Code § 5-7-145. As early as 2016, the USLA warned the City that its dual role lifeguarding threatened public safety. (Ex. 10. USLA Letter, stating "the Myrtle Beach system combining lifesaving and commercial activities [had been identified as] an unreliable means of protecting swimmers."). The USLA made clear that: "[l]ifeguards assigned to water surveillance have the primary responsibility of observing and managing persons in the water, as well as to

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

provide assistance to persons in the water and shall not be assigned to any duties other than public safety." *Id.* In the interest of public safety, the USLA encouraged Myrtle Beach to change its practices, cautioning:

> The USLA will not certify any beach lifeguard agency that assigns lifeguards to a dual role of public safety and commercial activity because all water safety professionals agree that a distracted lifeguard cannot properly maintain safe surveillance of the water. In the interest of public safety, we encourage Myrtle Beach to change its standards in accordance with USLA certification standards with respect to this and other points of the USLA certification program.

*Id.* Yet despite these warnings in 2016, the City continued its lucrative dual role lifeguarding practice, placing public safety at risk for its commercial interests in collecting revenue from the sale of Lack's beach rental products.

The City was again made aware of safety risks posed by its dual role system just two weeks before Mr. Wolde's death. The complaint even concerned lifeguard station L21, the precise location where Mr. Wolde's drowning occurred. On August 9, 2018, Lack's received a complaint that the lifeguard stationed near the Sea Crest hotel spent six minutes talking with a customer rather than overseeing the safety of those in the water. The lack of attention was so alarming that the caller posted a youtube video of the incident with a disclaimer stating:

> "Families Beware . . . If you visit Myrtle Beach beware that many of the 'Lifeguards' are actually 'Salesmen/Women' employed by a private company. These 'Lifeguards' are actually only there to sell or rent beach chairs/umbrellas at upwards of $100 a day. Their main concern is not the safety of your loved ones."

(Ex. 11, Aug. 9, 2018, Email Complaint). Again, despite this warning, the City took no action to increase the number of lifeguards on the beach or to change its model of allowing dual role lifeguarding or even the incentivizes in its pay structure. As a result, the City had substandard lifeguards on its beaches whose motives were not to protect Mr. Wolde or his family but rather to sell beach chairs and umbrellas. "The peaceful, recreational use" of the City's beaches was, thus,

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

threatened by this dangerous dual role practice—a practice so dangerous that it cost Mr. Wolde his life.

Despite knowledge of the public safety risks, the City's continued use of this practice, its failure to test and certify its lifeguards, and its continued joint venture with Lack's demonstrate that § 5-7-145 was not just ignored, it was intentionally disregarded. Because the City defied the conditions imposed by the legislature by (1) entering a "franchise agreement" with Lack's, (2) by failing to test and certify its lifeguards as required under § 5-7-145, and (3) by interfering with the peaceful, recreational use of the beach through creating a safety hazard through its substandard practices, its conduct falls outside the scope of its municipal powers and, thus, outside the Act's protections.

## II. Even if the Act were to apply, it does not extend immunity for the City's failure to comply with § 5-7-145.

Liability for a municipality's conduct outside the scope of its statutory authority is so fundamental that it is recognized in the Act's preamble. S.C. Code Ann. § 15-78-20 (the General Assembly "intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein"). The Act's exceptions to the waiver of immunity further solidify the Legislature's intent to hold government actors liable for conduct in defiance of the law. In fact, § 15-78-60(4), which exempts political subdivisions from liability for "*adoption, enforcement, or compliance* with any law or *failure to adopt or enforce any law. . .*," specifically omits the "failure to comply with any law."[4] That the legislature included three active methods of "adoption, enforcement or compliance" with

[4] It is well settled that an "inclusion in [a] statute of certain specified exclusions leaves the inference that the Legislature intended no other exclusions from the exemption." *Curiel v. Hampton Cnty. E.M.S.*, 401 S.C. 646, 651, 737 S.E.2d 854, 856 (Ct. App. 2012) (quoting *W.Va. Pulp & Paper Co. v. Riddock,* 225 S.C. 283, 288, 82 S.E.2d 189, 190 (1954)).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

any law, yet as to the failure to do these things, specifically left out the "failure to comply" is more than telling—it is consistent with the Act's premise: that it provides limited immunity to government actors but only for tortious conduct *within the scope of official duties*.

A city cannot flout the conditions of its statutorily granted municipal powers and maintain its conduct falls within the scope of official duties. By specifically excluding "failure to comply" while including "failure to adopt or enforce" the Legislature clearly intended to exempt the City from liability for failure to adopt or enforce a law but not from a failure by the entity itself to comply with a law.

## III. Even assuming the Act applies, the immunity provisions asserted by the City are unavailing.

The City maintains 15-78-60(1), (2), (4), (5), and (20) apply to provide discretionary immunity, legislative-related immunity, and immunity for acts of third parties. But none of these exceptions apply. In fact, as noted above, exception (4) does the opposite.

### A. Discretionary immunity - §15-78-60(5)

Discretionary immunity applies only to acts of discretion by government officials and not, as in this case, to operational acts such as the operation of beach safety services. Conduct that is operational in nature—such as the Department of Public Safety's conduct in carrying out a high-speed pursuit—is not the type of discretionary act contemplated by the Tort Claims Act. *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 305-06, 578 S.E.2d 16, 23 (Ct. App. 2002), *aff'd*, 363 S.C. 377, 608 S.E.2d 573 (2005). In *Clark*, a wrongful death suit involving a high-speed chase, the Department of Public Safety asserted discretionary immunity for the state troopers' conduct in carrying out the chase based on the Department's high-speed pursuit policy. *Id.* Finding this conduct operational in nature, and not discretionary, the Department could not avail itself of the Act's immunity from suit. *Id.* Importantly, the court observed the policy was merely a general

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

statement of law enforcement guidelines and on that basis was an operational function of the Department. *Id.* The court further reasoned "[t]he fact that the employees had to make decisions or exercise some judgment in their activities is not determinative." *Id.*

Like the Department's conduct in carrying out a high-speed pursuit based on law enforcement guidelines, the City's conduct regarding the operation of its beach safety services against recommended guidelines is similarly operational. The City's lifeguards and the dual role practice pursuant to which they operate are operational in nature. Whether the beach safety personnel exercise some discretion in carrying out their dual role functions, this does not make their conduct discretionary. Further, even accepting the City's assertion that the dual role practice was in place due to some function of discretion, it was the City's policy and the City's practice. It is, therefore, operational. To read the discretionary immunity exception so broadly as to include even operational acts would encompass all conduct involving some degree of decision making, "but the[se] are not the type of discretionary acts envisioned under the Tort Claims Act." *Id.* Simply put, as an operation of the beach safety services, the lifeguard protection that was supposed to have been provided to Mr. Wolde was anything but discretionary.

Further, conduct that is repugnant to accepted professional standards, like lifeguard safety standards, is not discretionary. *See Pike v. South Carolina Dept. of Transp.,* 343 S.C. 224, 540 S.E.2d 87 (2000) (observing that for discretionary immunity to apply, the government entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them). Nothing about the dangerous manner in which the City's provided lifeguard services or its conduct on the day of Mr. Wolde's death aligns with professional safety standards. (*See* Ex. ____ Griffiths Depo. June 15, 2022 at 66: 15-67:10.). On the morning of Mr. Wolde's drowning, the City was on notice of a National

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Weather Service warning of rip currents so dangerous that beach closure should have been a consideration. (Ex. 5, Holly Robinson Depo. 48: 3-17). Providing adequate lifeguard protection on this day was the bare minimum. Yet the City failed to do even that. Conduct that is contrary or below minimum standards is not discretionary—it is *per se* negligent and evidence of gross negligence. Even assuming the City's conduct in providing beach safety services involved some exercise of discretion, the City is still liable for its gross negligence. *See Proctor v. Dept. Health and Env Control* 628 S.E.2d 496 (Ct. App. 2006) ("the performance of discretionary duties does not give rise to immunity if [the City] acted in a grossly negligent manner.").

**B. Legislative-Related Immunity – 15-78-60(1), (2), and (4)**

The City's assertion of "legislative-related immunity" is equally unavailing. In asserting this basis for immunity, the City centers its focus on the franchise agreement with Lack's, arguing Plaintiff's claims are based on the franchise agreement. But the Tort Claims Act does not apply to contractual liability. *See Wright v. Smallwood*, 308 S.C. 471, 473, 419 S.E.2d 219, 220 (1992) ("The Act applies only to the *torts* of a governmental entity", and "[c]ontractual liability is expressly excluded from immunity: 'Nothing in this Chapter affects liability based on contract....'").

In fact, the City's legislative or administrative conduct is not even at issue. At issue is the City's failure to exercise even slight care, despite a common law duty to do so. By providing lifeguard services in a dangerous and unsafe manner, failing to ensure the testing and certification of its lifeguards, failing to provide sufficient lifeguard supervision of swimmers like Mr. Wolde, and failing to have the proper beach safety mechanisms in place on the day Mr. Wolde struggled for his life without any lifeguard response, the City willfully disregarded Mr. Wolde's safety. None of these acts have anything to do with legislative or administrative conduct.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

### C. Acts of Third Parties – § 15-78-60(2)

That Lack's was also involved in the joint venture with the City is irrelevant to the City's liability for its own negligence. The City is liable for its torts in the same manner as a private individual except as provided in the Act. When the City undertook to provide lifeguard protection, the City did so with the understanding that it would use due care in providing these services—services that are critical to the life and death of beach goers. The City cannot contract away its exposure to liability, especially where, as here, the City was statutorily charged with overseeing the contract, the testing and certification of the lifeguard services, and the peaceful, recreational use of its beaches by the public.

That the City undertook to provide beach safety services to the public does not bring its conduct within the protections of the public duty rule. The City's assertion of the public duty rule is misguided. The public duty rule only applies where the duty is one imposed by statute, and there is no statutory duty in this case. Instead, the City acted outside its municipal authority and undertook a common law duty to provide beach safety services with reasonable care and in accordance with accepted professional standards. *See Trousdell v. Cannon*, 351 S.C. 636 (2002) (clarifying that the public duty rule applies "'[w]hen, and only when, the plaintiff relies upon a statute as creating the duty'" (quoting *Arthurs v. Aiken County*, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001)).

In any event, sidestepping its duty of care based on third party conduct is especially offensive where, as here, Mr. Wolde's death was foreseeable to the City. Though unforeseeable to the average beachgoer, the City knew that hazardous conditions were present on August 24, 2018, and as a result, it had a duty to close the beach and to provide adequate warning and lifeguard protection. (Ex. 13, Griffiths Depo. at 60:16-22; 62:10-63:25; 76:17-77:25; 78:1-10; 80:2-1; 87:1-

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

8). The City also knew the failure to close the beach or to provide adequate warning and lifeguard protection could result in serious injury or death, of which it did—twice on this day. In fact, within fifteen minutes of Mr. Wolde's death, another swimmer was swept away by the current and drowned. (Ex. 6, Lack Depo. at 116:3-13).

As explained by George Lack, Lack's provides water safety under the notion that most tourists visiting Myrtle Beach are not familiar with rip and longshore current. (Ex. 6, Lack Depo. at 46:4-17). Lack conceded that even strong swimmers can get swept away by rip currents. (*Id.* at 52:11-16). Lack's employs the flag system and trains their lifeguards to prevent beachgoers from getting into a dangerous situation, such as a rip current, precisely to avert drowning deaths (*Id.* at 46:18-47:23). Of course, these safeguards only work when they are employed. With no lifeguard, no red flag, and no warnings at the time the Wolde family arrived at the beach and entered the water, the false sense of safety created by the numerous assurances provided by the City and Lack's effectively lured Mr. Wolde to his death.

The inapplicability of immunity for third party acts is further supported by *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990). In *Martin*, the government actor, a city auditorium, alleged immunity for injuries caused by a third party where the plaintiff was injured by a glass bottle thrown by a patron during a rock concert. The court declined to apply immunity for third-party conduct, reasoning that the auditorium's conduct created the reasonably foreseeable risk of such third-party conduct. *Id.* (observing that only 14 security guards were present for 6000 concert goers; there were no efforts to curb drinking and unruly behavior; thus, that it was a foreseeable risk that an unruly concert attendee would throw a glass bottle causing plaintiff's injuries). Here, as in *Martin*, the City is not entitled to immunity for the acts of Lack's or any other third party. The City is instead liable for its conduct which created the reasonably

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

foreseeable risk that the understaffed dual-role lifeguards would fail to provide adequate water safety. In providing substandard lifeguard services, and in failing to take proper precautions to close the beach, the City engaged in conduct it knew was unsafe and would put the public at risk. The Tort Claims Act does not disclaim such reckless conduct under the exception for third party acts, or any other exception.[5]

## IV. The City's assertion of the Recreational Use Statute—like the Tort Claims Act—is misguided.

Though already twice rejected, the City again asserts the Recreational Use Statute, S.C. Code Ann. § 27-3-10, as a defense to liability in this case. However, the Recreational Use Statute does not apply.

The City is correct in stating that § 27-3-10 was designed to "encourage *owners of land* to make land and water available to the public for recreational purposes by limiting their liability towards persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10. But the City is not a "landowner." The City does not own the beach. Rather, the people of the State of South Carolina own the beaches along the State's coastline. The City even concedes this fact. (Ex. 15, Pedersen 30(b)(6) Depo, 108:14-18). Likewise, the City does not possess a fee interest, leasehold, or any easement rights on the beach owned by the taxpayers of South Carolina. Presumably, the City believes the words "or person in control of the premises" contained in § 27-3-20(c) establishes

[5] In its Answer, the City asserts an affirmative defense alleging all exceptions within the Tort Claims Act. (Ex. 14, CMB Answer at ¶ 45, asserting "all defenses" under the SCTCA). The City's assertion of all exceptions incorporates those exceptions which include an exemption for gross negligence. When an exception including the gross negligence exemption is asserted, the gross negligence standard is construed to apply to all other exceptions. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation,* 336 S.C. 373, 395-96, 520 S.E.2d 142, 153-54 (1999) (stating that when a government entity asserts various exceptions to the waiver of immunity, the correct approach is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the gross negligence standard). Thus, even assuming the Tort Claims Act applies, the City will not be immunized for gross negligence.

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its legal status as an owner. This presumption, however, is incorrect. Had the legislature intended the statute to apply to those in control of "land" it would have said so. Rather, the legislature used the word "premises" in § 27-3-20(c) because the definition of "land" in the preceding subsection includes buildings and structures. *See*, S.C. Code § 27-3-20(b). Thus, under the plain language of the statute, "premises" was intended to apply to buildings and structures, not to the "land" forming the beach or the "water" of the Atlantic Ocean. *See id.* Any argument that this definition implies to the City is an "owner" is thus misleading.

Nonetheless, even if the City were an "owner", the City did *not make the beach available* to the public for recreational use for purposes of § 27-3-30. The City of Myrtle Beach became a city in 1957. South Carolinians and visitors to the State had long made use of the beach for recreational purposes well before the City of Myrtle Beach even existed. Further, the legislature conditioned the protections afforded by the Recreational Use Statute to "persons who have sought and obtained permission to use it for recreational purposes." S.C. Code § 27-3-30. At no time since the City's incorporation have the citizens of South Carolina ever sought, nor have they needed, the City's permission to go to the beach.

Even if the statute applied it would have no application to the claims asserted in this case. Under South Carolina law, the City's legal obligations, *i.e.,* duty, depend on its legal status. The Plaintiff's claims are based upon the negligent manner in which the City operated its for-profit lifeguard services—not upon the City's ownership of land, *i.e.,* the beach, which the City concedes it does not own. (Ex. 15, Pederson Depo. 108:3-13). By way of example, if a landowner made a pond on his property available for recreational use, the Recreational Use Statute would apply to claims made by people injured while swimming in the pond. However, if the same landowner was tending a field next to the pond and ran over a child with his tractor, the Recreational Use Statute

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would not apply because the child's injuries would be premised upon the operator of the tractor's failure to exercise due care. The same is true for this case. The City is liable to the Wolde family for its failure to exercise due care in its provision of lifeguard protection and beach safety services.

The Recreational Use Statute is thus inapplicable based on the language of the statute and on the City's legal status defining its duty in this case. Should any question remain as to the applicability of the Recreational Use Statute, that question should be resolved by a jury. *See Harris v. University of S.C.*, 706 S.E.2d 45 (Ct. App. 2011) (observing that whether the Recreational Use Statute applied to negligence action against state university for slip and fall by licensee on university property was a question of fact for the jury).

## V. The City's liability for gross negligence is not only supported by the evidence, it is the law of the case.

Even if the Tort Claims Act or the Recreational Use Statute were to apply, the City cannot escape liability for gross negligence. Critically, this is not the first time the City has raised gross negligence as a defense. The City already raised—and lost—its argument for summary judgment based on gross negligence under the Recreational Use Statute, which provides tort liability immunity to owners of recreational areas unless their conduct is grossly negligent. In fact, this Court not only rejected the City's gross negligence argument in its initial motion, it rejected it a second time in denying the City's motion for reconsideration. (*See* Order denying CMB Motion for Reconsideration).

Though the law of the case doctrine precludes the City from raising this argument yet again, the City nonetheless seeks to reargue the Recreational Use Statute's immunity for mere negligence. The Recreational Use Statute does not, as in this case, abrogate a landowner's duty to guard or warn against a dangerous condition, use, structure, or activity when the landowner's conduct in breaching this duty constitutes gross negligence. S.C. Code Ann. § 27-3-60 (2007)("Nothing in

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this chapter limits in any way any liability which otherwise exists: (a) [f]or grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."); *see also Kimsey v. City of Myrtle Beach*, 109 F.3d 194, 195 (4th Cir. 1997) (affirming summary judgment to the landowner because the Plaintiff failed to refute the City's evidence of slight care, thus the gross negligence exception did not apply). The South Carolina Supreme Court defines gross negligence as the "absence of care that is necessary under the circumstances." *Hollins v. Richland County School Dist. One,* 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993). While gross negligence is ordinarily a mixed question of law and fact, in most cases gross negligence is a factually controlled concept whose determination best rests with the jury. *Solanki v. Walmart Store Number 2806*, 410 S.C. 229, 763 S.E.2d 615, 619 (Ct. App. 2014). Thus, whether the facts of this case support the application of the Recreational Use Statute, and whether the Defendant was grossly negligent, are questions best left to a jury.

As discussed above, the Plaintiff presented evidence in the form of the Franchise Agreement, documents, emails, letters, and witness testimony demonstrating facts on which reasonable minds could differ as to the application of the Recreational Use Statute, the duty owed by the City, and the City's gross negligence. This evidence presents a question of fact for the jury rather than a purely legal question to be determined by the court. *See Brooks v. Northwood Little League*, 327 S.C. 400, 402, 489 S.E.2d 647, 648 (Ct. App. 1999) ("[g]ross negligence ordinarily presents a hybrid question of law and fact, but when evidence supports but one inference, the question becomes one of law for the court.").

As its sole basis for challenging the sufficiency of Plaintiff's evidence of gross negligence, the City overlooks the evidence referenced above and resorts instead to mischaracterizing the testimony of Plaintiff's expert, Dr. Griffiths. The City suggests Dr. Griffiths testimony is

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somehow defective solely because it omits the words "gross negligence"—a legal term outside the realm of admissible expert testimony. Use of the term "gross negligence" is no indicator of whether the substance of the testimony establishes evidence of gross negligence. Further, experts cannot opine on an issue of law, such as the existence or nonexistence of gross negligence. Neither can lay witnesses. The City's argument demonstrates an unfamiliarity with the South Carolina Rules of Evidence and our State's substantive law on gross negligence.

Perhaps more critically, the City fails to recognize that violations of the standard of care are evidence of gross negligence. Our courts have consistently defined gross negligence as the failure to do that which it is incumbent upon one to do. The standard of care establishes what was incumbent upon the City and its violations prove its failure to do just that. In *Bass v. S.C. Dept. of Soc. Services*, 780 S.E.2d 252 (2015), the Supreme Court confirmed that standard of care evidence and specific instances of breach are more than sufficient to establish gross negligence. In reversing the trial court, the *Bass* court found sufficient evidence of gross negligence based on expert testimony "as to the proper standard of care" and testimony as to "specific instances of DSS's breach of such." *Id.*; *see also, Rainey v. DSS,* 863 S.E.2d 470 (2015). Here, as in *Bass*, Dr. Griffiths testified that the City and Lack's violated the standard of care in numerous respects, including:

- by not closing the beach despite having actual knowledge of the dangerous swimming conditions present on August 24, 2018. (Griffiths at 102:8-16)
- by only having three beach personnel whose sole responsibility was to provide lifeguard services on the day Mr. Wolde drowned. (*Id.* at 108:20 – 109:19)
- by failing to provide any lifeguard rescue attempt of Mr. Wolde. (*Id.* at 101:1-14)
- by failing to take extra safety precautions when warned of hazardous conditions present on the day of Mr. Wolde's drowning. (*Id.*)

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

- by failing to test whether beach safety information taught to the foreign, non-English speaking lifeguards was retained by them. (*Id.* at 54:11-19)

In fact, any one of these violations of care standing alone is sufficient to establish gross negligence. For instance, understaffing at any time, let alone during hazardous conditions is evidence of gross negligence:

> Q. So Dr. Griffiths, would it be a violation of the standard of care for these Defendants provide only three people whose sole responsibility was to provide lifeguarding services for this 12 miles of beach?
>
> A. Yes, and particularly under these weather and water conditions.
>
> Q. And would that place beachgoers at risk?
>
> A. Yes, it—it would and it did.
>
> Q. And where was the closest lifeguard whose sole responsibility was to provide lifeguarding services situated in relation to where Mr. Wolde drowned?
>
> A. I think seven or eight blocks away I believe to the best of my knowledge.

(*Id.* at 108:20 –109:19.). And as to the standard of care violation by the utter lack of lifeguard protection to Mr. Wolde, Dr. Griffiths testimony most certainly implies gross negligence:

> In this case, it was particularly [a violation of the standard of care] because [the City and Lack's] knew, they were forewarned of the hazardous conditions and they didn't take any precautions and didn't kick it up a notch [sic] as a result [they] allow[ed] patrons to enter the water during hazardous conditions.

(*Id.* at 101:1–14.). These faults aside, the City's failure to require its Lifeguards to be tested or to comprehend, let alone speak, English is yet additional evidence of gross negligence. Two of the beach personnel in the closest proximity to where Mr. Wolde drowned were from Poland, while the next closest was from Russia. The record is devoid of any evidence indicating the City verified whether these lifeguards retained any of the training which Defendants' claim occurred.

> Q. Is there any evidence based upon your review of the file that the Defendants did anything to verify whether or not whatever was taught at this elementary school was retained by the lifeguards?

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

A. No, sir.

Q. And is that a violation of the standard of care?

A. Yes, sir, yes sir.

Q. Based upon your having been a professor at three major universities, do you think it would be difficult to teach a subject to a classroom where the students do not speak your language?

A. Yes, sir. I think it would be difficult, yes.

(*Id.* at 54:11-19). According to the City, it doesn't matter whether these lifeguards could speak English because "I think they visually provide surveillance on the beach. Generally speaking if they want to wave them in, they blow a whistle and waive them in. I don't think it requires a long conversation." (Ex. 15, Pedersen Depo, 77:3-19). While a "long conversation" may not be necessary, the ability to understand when someone asks for help or, in Mr. Wolde's case, cries for help is critical—as even George Lack's conceded, lifeguards cannot always tell visually when someone needs help, but they know when a person cries out for it.

The City ignores this critical standard of care testimony. It also ignores the evidence which this court has already found sufficient in denying the City's previous summary judgment motion on this precise issue. (*See* Ex. 16, Plt. Memo. in Opp. to CMB Motion for Summary Judgment, May 28, 2021; Ex. 17, Plt. Memo. in Opp. to CMB Motion for Reconsideration, Aug. 27, 2021). Instead, the City asks this court to overlook the substance of this credible evidence in favor of the absurdity that a witness need only state certain magic words. Such an argument will never suffice, especially where, as in this case, the only reasonable conclusion from the evidence is that the City was grossly negligent.

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## VI. Proximate cause is supported by ample evidence in the record.

Typically a jury issue, proximate cause is especially so in this case. The abundant evidence already recounted above more than establishes that but for the City's conduct, Mr. Wolde's life could, and should, have been saved. Proximate cause requires proof of cause-in-fact and legal cause. Foreseeability is the touchstone of legal cause and is determined by looking at the natural and probable consequences of the defendant's acts of omissions. *Wickersham v. Ford Motor Co.*, 432 S.C. 384 (2019). The City cannot credibly argue that it was not foreseeable that swimmers will drown at a lifeguarded beach if:

1) the lifeguards are not competent, trained, or certified to perform the public safety responsibilities of being a lifeguard;

2) the lifeguard providers incentivize lifeguards to sell merchandise at the expense of patron surveillance and against the safety standards of the CDC and USLA;

3) the lifeguard providers fail to take any measures to inform, warn or protect swimmers from a latent life-threatening safety hazard known to the lifeguard provider; or

4) the lifeguard providers provide no rescue efforts on behalf of a distressed swimmer.

The City knowingly engaged in all of the above. And it was warned of the dangers of such conduct in 2016. In fact, long before the Wolde tragedy, the City had actual knowledge that its practices could mean "rescue may come too late for a struggling victim":

> "The City of Myrtle Beach Lifeguard Agreement allows for the lifeguard services to rent various beach items. The lifeguard makes a commission, the lifeguard service makes money, and the City gets a percentage as well. Nearly 92% of the participating departments reported that the lifeguards do not do anything other than guard the beaches. Again, the USLA (2012) states the chances of drowning are 1 in 18 million when on a guarded beach. But if the lifeguard is not watching the water because someone wants to rent a beach umbrella, *rescue may come too late for a struggling victim.* This practice is a revenue generator for the City, the lifeguard and the service, however this must be changed."

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(*See* Ex. 2, Strategies to Reduce Ocean Drowning, Gwyer, pp. 50-51). Again, the City also knew that hazardous conditions were present on August 24, 2018, and at a minimum, it had a duty to provide adequate lifeguard protection. It also had a duty to close the beach and to provide adequate warning. (Ex. 12, Griffiths Depo. at 60:16-22; 62:10-63:25; 76:17-77:25; 78:1-10; 80:2-1; 87:1-8). The City knew its failure to close the beach, to provide adequate warning, or to provide lifeguard protection could result in serious injury or death, and it did—in fact it happened twice on this day. (Ex. 6, Lack Depo. at 116:3-13). There being ample evidence that the City knew its conduct could result in Mr. Wolde's horrific drowning death, the City's proximate cause argument fails, and Plaintiff's gross negligence claim should proceed to trial.

## CONCLUSION

The facts of this case are tragic, the trauma and injuries to Mr. Wolde and his family horrific. But perhaps even more horrific is the knowing failure of the City to take proper safety measures it knew should have been taken and would have saved lives. But it did not. The South Carolina Tort Claims Act does not provide immunity for such reckless conduct outside the scope of the City's duties under § 5-7-145. Neither does the Recreational Use Statute. Accordingly, the City's attempt to avoid liability must be denied, and this case must proceed to trial.

Respectfully submitted,

**MCLEOD LAW GROUP, LLC**
3 Morris Street, Suite A
Charleston, SC 29403
Tel. 843-277-6655
Fax 843-277-6660

*H. Cooper Wilson, III*
W. Mullins McLeod, Jr. (14148)
H. Cooper Wilson, III (74939)

and

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

**THOMASON & PRACHT, LLP**

*s/ J. Christopher Pracht*
J. Christopher Pracht, V (S.C. Bar #: 77534)
THOMASON & PRACHT, LLP
303 E GREENVILLE Street
Anderson, South Carolina 29622
Telephone: (864) 226-7222
Fax: (864) 226-7224

*Attorneys for the Plaintiff*

July 19, 2022
Charleston, South Carolina

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CDC™

Injury Prevention




# Lifeguard Effectiveness:

## A Report of the Working Group



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Editors: Christine M. Branche, Ph.D.
Steven Stewart, M.S.
Division of Unintentional Injury Prevention
National Center for Injury Prevention and Control
Centers for Disease Control and Prevention
Department of Health and Human Services



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**Centers for Disease Control and Prevention**
Jeffrey P. Koplan, M.D., M.P.H., Director

**National Center for Injury Prevention and Control**
Sue Binder, M.D., Director

**Division of Unintentional Injury Prevention**
Christine M. Branche, Ph.D., Director

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ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Contributing Authors ..... v
Executive Summary ..... vii
Introduction ..... 1
A Brief History and Background of Lifeguarding Services in the United States ..... 3
Events Describing the Efficacy of Lifeguarding Services
in Preventing Drowning Deaths ..... 5
Patron Surveillance: A Key Component of Lifeguarding Services ..... 7
Use of Design Criteria to Reduce Drownings at Lakefront Facilities ..... 9
The Economic Costs of Drowning Deaths ..... 11
Legal Implications of Providing Lifeguard Protection ..... 13
Decision Maker's Guide to Lifeguard Protection ..... 15
Summary and Conclusions ..... 17
References ..... 18
Resource Guide ..... 19
Appendix ..... 21

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Christine M. Branche, Ph.D.
Director
Division of Unintentional Injury Prevention
National Center for Injury Prevention and Control
Centers for Disease Control and Prevention
Atlanta, Georgia

B. Chris Brewster
San Diego Lifeguard Service
San Diego, California

Mike Espino
American Red Cross
Health & Safety Services, National Headquarters
Falls Church, Virginia

John Fletemeyer, Ph.D.
Palm Beach Police Department
Law Enforcement Division
Palm Beach, Florida

Ralph Goto
Water Safety Administrator
Department of Parks and Recreation
Honolulu, Hawaii

Rick Gould
Safety Officer
City of Santa Cruz
Santa Cruz, California

Brad Keshlear
Natural Resources Management Branch
U.S. Army Corps of Engineers
Atlanta, Georgia

Fred A. Mael, Ph.D.
Research Scientist
The American Institutes for Research
Washington, District of Columbia

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Carl Martinez
Water Safety Coordinator
National Park Service
U.S. Department of the Interior
Gateway NRA Headquarters
Brooklyn, New York

Michael A. Oostman
Jeff Ellis and Associates, Inc.
Kingwood, Texas

Frank Pia
Pia Consulting Services
Larchmont, New York

William Richardson
President, U.S. Lifesaving Association
Huntington Beach, California

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Each year, about 4,000 people die from drowning in the United States. Drowning was a leading cause of unintentional injury death among all ages in 1998, and the second leading cause of unintentional injury death among children ages 1-14 that same year. Approximately 50-75% of drownings occur in open water such as oceans, lakes, rivers, and ponds. About 60% of drowning deaths among children occur in swimming pools.

Many organizations, including the Centers for Disease Control and Prevention (CDC), routinely respond to inquiries regarding the efficacy of lifeguards in preventing drownings. Community and local government officials facing decisions about whether to begin, retain, or discontinue lifeguarding services typically want to know whether lifeguards are truly effective in preventing drowning and other aquatic mishaps, and whether the value of providing lifeguard protection outweighs the costs. Most drownings are preventable through a variety of strategies, one of which is to provide lifeguards in public areas where people are known to swim and to encourage people to swim in those protected areas. Some estimates indicate that the chance of drowning at a beach protected by lifeguards can be less than one in 18 million. There is no doubt that trained, professional lifeguards have had a positive effect on drowning prevention in the United States.

The significance of the patron surveillance and supervision that lifeguards provide is emphasized by understanding how people drown. Many people assume that drowning persons are easy to identify because they exhibit obvious signs of distress. Instead, people tend to drown quietly and quickly. Children and adults are rarely able to call out or wave their arms when they are in distress in the water, and can submerge in 20-60 seconds. For these reasons, managers should never assign lifeguards duties that distract them from keeping an eye on the water, such as selling admission tickets or refreshments. In addition, the presence of lifeguards may deter behaviors that could put swimmers at risk for drowning, such as horseplay or venturing into rough or deep water, much like increased police presence can deter crime.

When making decisions about using lifeguards and other means of increasing public safety in aquatic settings, policy makers should use available local evidence. This evidence includes:

- the effects that lifeguards have had on patrons' safety and attitudes;
- the number of people using the facility or beach area during the past years;
- the incidence of water-related injuries and drownings at the facility or beach area during those time periods;
- data on the number of water-related injuries and drownings at pools and beaches in the local area or state with and without lifeguards, for comparison; and
- the level of lifeguards provided (e.g., number of lifeguards per number of persons using the facility).

In addition to these factors, policy makers should consider public attitudes about lifeguards and legal issues related to using lifeguards.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Each year, about 4,000 people die from drowning in the United States (National Center for Health Statistics, 2000). Drowning was a leading cause of unintentional injury death among all ages in 1998, and the second leading cause of unintentional injury death among children ages 1-14 that same year (National Center for Health Statistics, 2000). Approximately 50-75% of drownings occur in open water such as oceans, lakes, rivers, and ponds (Dietz & Baker, 1974). About 60% of drowning deaths among children occur in swimming pools (Dietz & Baker, 1974).

Most drownings are preventable through such means as restricting swimming areas, posting warning signs, and fencing the perimeters of pools and waterways. Two important preventive strategies are providing lifeguards in public areas where swimmers frequent, and encouraging use of such protected areas. The United States Lifesaving Association (USLA) compiles statistics for drownings that occur at about 95% of ocean beaches and at some non-ocean sites patrolled by lifeguards.[1] For the years 1988-1997, USLA recorded fewer than 100 drownings at these sites with more than three-quarters occurring during hours when the beaches were unguarded (USLA, 2000). These data indicate that the vast majority of drownings each year occur at unguarded locations (Mael, Seck, & Russell, 1999); about 60%-70% of U.S. beaches are unguarded (Brewster & Richardson, 2001). USLA statistics estimate that the chance of drowning at a beach protected by lifeguards trained under USLA standards is less than one in 18 million per year (USLA, 2001).[2]

The Centers for Disease Control and Prevention (CDC), the American Red Cross and USLA routinely respond to inquiries regarding the efficacy of lifeguards in preventing drownings. Community and local government officials facing decisions about whether to begin, retain, or discontinue lifeguarding services typically want to know whether lifeguards are truly effective in preventing drowning and other aquatic mishaps, and whether the value of providing lifeguards outweighs the costs. Officials often use cost as the primary criterion in their decision-making.

This report is the result of a 1998 meeting CDC convened with a panel of experts to identify gaps in lifeguard effectiveness at recreational waters, and ways to remedy them. This meeting was intended as a discussion about the issues related to the provision of lifeguards. This working group discussed:

- the problem of retaining lifeguards and evaluating the efficacy of existing lifeguard services;
- drowning fatalities and other hazards resulting when lifeguards were removed from facilities;

[1] Open water lifeguard agencies submit reports on annual beach attendance, rescues, preventive actions, drownings and other information to USLA, which reports lifesaving statistics from eight regions, with typically over 85 agencies and beaches reporting (USLA, 2001).

[2] This calculation is based on ten years of reports from USLA affiliated lifeguard agencies, comparing estimated beach attendance to the number of drownings in areas under lifeguard protection.



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- the best methods to communicate information about the efficacy of lifeguards to relevant constituents; and
- sources of information about the efficacy of lifeguards, additional data, resources, and case studies.

The report includes a brief history of lifeguarding services in the United States; data and findings related to the use of lifeguards in preventing drowning in open water and swimming pool facilities; the experience of an agency which does not provide lifeguards at its water recreation facilities; and economic and legal issues related to the provision of lifeguards. We also provide suggestions for decision makers and alternative solutions for preventing drowning.

Drowning prevention, much like other areas of injury prevention, is a young and emerging field. This report aims to stimulate new ideas and approaches. The authors of this report hope it is useful to local policy makers who must make vital decisions about the provision of lifeguards and other interventions to enhance water safety in their communities.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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In the 1800s, swimming, then known as bathing, became an increasingly popular recreational activity in the United States. Entrepreneurs built resorts in places like Atlantic City, New Jersey, to attract people from inland cities to escape the summer heat. As water activity increased, so did the incidence of drowning. In fact, by the early 1900s as many as 9,000 people drowned each year in the United States (American Red Cross, 1995).

Initial efforts to reduce drownings included installing lifelines.[3] However, lifelines proved inadequate because struggling swimmers were not always able to hold on to them. Duke Kahanamoku, the famed Hawaiian surfer, introduced the rescue board between 1910 and 1915, and Captain Harry Sheffield of South Africa is credited with developing the first rescue float (American Red Cross, 1995). Some municipalities assigned police officers to perform water rescues, but this diverted resources from law enforcement. Eventually, municipalities began to hire persons trained and equipped specifically for water rescue. They were called "lifeguards."

The lack of a consistent lifeguard presence at all bathing areas led the Young Men's Christian Association (YMCA) to develop a volunteer National Lifesaving Service in 1912. In 1914, Commodore Wilbert E. Longfellow established the American Red Cross Lifesaving, which trained swimmers throughout the United States in lifesaving and resuscitation, organized them into a volunteer corps, and encouraged them to accept responsibility for supervision of bathing activities in their communities.

At their inception, these lifesaving training programs primarily emphasized personal water safety: how to prevent drownings and protect oneself in emergencies. Nonswimming rescue methods, such as throwing a rope or a floating object to the person in the water, were encouraged. Lifeguards considered swimming rescues a last resort due to the hazard presented by a panicked person in the water.

However, swimming rescues were unavoidable for professional beach lifeguards in the United States. Special tools, such as the landline[4] and the dory,[5] were developed to assist in swimming rescues. Over time, improved lifesaving devices were created by beach lifeguards in the United States. These include the rescue buoy, the rescue tube, and the rescue board[6] which are commonly used around the world at beaches, pools, and water parks. Today, many beach lifeguards use powerboats and personal watercraft to assist them in reaching off-shore swimmers in distress quickly and use scuba equipment for deep water rescues.

In 1964, the organization now known as the United States Lifesaving Association (USLA) was founded by members of several California surf lifeguard agencies originally to enhance lifesaving efforts and drowning prevention, to standardize beach lifeguard practices, to educate the public about water safety, and to improve professionalism among

[3] Lifelines are ropes tied onshore and to poles in the ocean water, to which bathers can cling.

[4] The landline is a rope used by a lifeguard during a swimming rescue. A lifeguard swims with the landline to a victim in the water, and people sonshore pull both lifeguard and victim to safety.

[5] The dory is a small boat rowed out to rescue victims in distress.

[6] The rescue board is a surfboard modified for rescuing drowning victims.

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beach lifeguard organizations around the country. Membership has since expanded to include any employee of an ocean, bay, lake, river or other open water rescue service (Brewster, 2001). In 1980, the World Waterpark Association was formed to address needs in aquatic amusement parks. Following this, Ellis and Associates, through the National Pool and Waterpark Lifeguard Training program, established specialized water-park lifesaving standards and certification programs. In 1983 and 1986, respectively, the American Red Cross and YMCA expanded their training programs to provide nationally standardized instruction for lifeguards at both swimming pools and beaches. Local employers continue to provide lifeguard training at most surf beaches. The American Red Cross, USLA and Ellis and Associates establish standards which are universally adopted for lifeguard training.

Lifeguards have always provided first aid as well as rescue. Cardio-pulmonary resuscitation (CPR) and general first aid training are standard requirements for most lifeguards. In addition, many lifeguards are now both trained and certified to use advanced lifesaving tools such as the external defibrillator and portable oxygen. In some communities, lifeguards have taken on broader public safety responsibilities, such as advanced life support, coastal cliff rescue, and law enforcement.

Major aquatic safety organizations in the United States have continually emphasized prevention rather than rescue as the primary method to reduce drownings. Public safety education and onsite supervision by lifeguards have helped keep drowning rates low for 40 years, and have significantly reduced the number of drownings in the United States. Since 1960, both beach attendance and rescues by lifeguards have risen steadily, although the total number of reported drownings on lifeguarded beaches remained relatively stable with fewer than 106 cases each year (USLA, 2000). In fact, from 1986 through 1999, USLA reported that in California, while beach attendance has increased, so has the amount of lifeguard education (See Figure 1 in Appendix) (USLA 2000). Although rescue activity fluctuated, the number of drownings is down.

Estimates indicate that today, U.S. lifeguards rescue more than an estimated 100,000 persons from drowning annually. USLA data show a rescue-to-drowning ratio in the 1960s of one drowning for every 2,004 rescues at beaches with on-duty lifeguards. In the 1990s, however, the ratio improved to one drowning for every 4,832 rescues at lifeguarded beaches. In addition, for every rescue, an effective lifeguard makes scores of preventive actions, such as warning an individual away from a dangerous area and suggesting that poor swimmers stay in shallow water. There is no doubt that trained, professional lifeguards have had a positive effect on drowning prevention in the United States.

While the number of Americans participating in water recreation has grown tremendously since the late 1800s and the popularity of aquatic activities has increased, the annual incidence of drowning in the United States has declined from about 6,300 persons in 1981 to about 4,000 persons in 1998 (National Center for Health Statistics, 2000). Nevertheless, despite the advances in rescue techniques and the decline in drowning rates in the United States, drowning remains a leading cause of unintentional injury death, especially among children and youth. If the incidence of drowning is to be reduced further, greater attention to prevention, including the staffing and training of lifeguards, is essential.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Evidence suggests that lifeguard services benefit public safety by saving lives, lowering drowning rates, and preventing injuries in aquatic recreational environments. Lifeguards also indirectly provide economic and social benefits. They add to the savings in emergency medical care and long-term hospital treatment involving cases of near-drowning (Hassell 1997) and alleviate emotional trauma and social costs to family and friends.

Communities sometimes choose to discontinue lifeguards as a cost-saving measure. We provide a series of case studies to demonstrate the impact of lifeguards on drowning. A few caveats are worth noting when considering these case studies. First, geography, environmental conditions, demographics, and other local conditions may be factors in drownings. Also, national data are not available to assess the number of drownings that occur on beaches without lifeguards because no centralized reporting system exists. Nonetheless, case studies help illustrate the potential effects of lifeguards on public safety.

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### *Case 1: American Beach (Nassau County), Florida*

In 1989 the Nassau County Commission decided to eliminate lifeguards on American Beach in order to save county expenses. Less than a year later on Memorial Day, 1990, five persons drowned and 20 others nearly drowned when rough ocean conditions and strong winds caused rip currents to form immediately offshore, making this one of the worst drowning episodes in Florida's history. Shortly after this tragedy, local officials reestablished lifeguarding services. In the eight years since, no one has drowned.

### *Case 2: Keawaula Beach, Hawaii*

Keawaula Beach at Kaena Point State Park is located at the westernmost point on the island of Oahu. The beach is exposed to high surf; a strong shore break; and a strong, often severe, current. The remote, pristine site attracts many surfers, sunbathers, swimmers, and waders. The combination of dangerous physical features and heavy use by patrons increases the risk for water-related injury and death. From 1985 to 1991, two drownings and 40 near-drownings occurred at Keawaula Beach. Although the State of Hawaii does not provide lifeguards, it elected to contract with the City and County of Honolulu to place lifeguards at Keawaula Beach beginning in January, 1992. Since then, no drownings have occurred at this beach.

### *Case 3: Ocean Beach, San Francisco, California*

Ocean Beach covers more than five miles of the Pacific shore in the City and County of San Francisco. Rip currents are common in the water off this beach. The beach is administered by the U.S. National Park Service and is part of the Golden Gate National Recreation Area (GGNRA). Until the early 1990s, GGNRA provided lifeguards at several beaches in the region, including Stinson Beach, China Beach, and Aquatic Park near

Fisherman's Wharf, with occasional patrols and emergency response to Ocean Beach. As a result of budgetary concerns, lifeguards for Aquatic Park, China Beach, and Ocean Beach were gradually removed in the early 1990s. However, the beach-going public continued to swim at Ocean Beach, and drownings continued to occur, despite the development of an aquatic response team by the San Francisco Fire Department, which accomplished a number of rescues. During the late spring and early summer of 1998, there were seven drownings at Ocean Beach, which exceeded the previous six-year total. These drownings generated extensive media attention and resulted in calls by several major groups and prominent individuals for lifeguard protection. GGNRA consulted with USLA to develop a plan to employ, train, and deploy aquatic rescue personnel at Ocean Beach. On-site lifeguard services began before the summer of 1999, and since that time, no drownings have occurred at Ocean Beach.

*Case 4: Ocean Beach, San Diego, California*

In 1918, 13 people drowned in rip currents in a single day at San Diego's Ocean Beach, garnering local and national news attention. Beach attendance that day was estimated at 5,000. City officials cited inadequate lifeguard protection as a cause of the tragedy, and as a result, initiated a municipal lifeguard service. The ocean conditions have changed little since then. San Diego's local leaders view the 17 miles of oceanfront shoreline, which include Ocean Beach, as a safely managed tourist attraction due to the presence of lifeguards. Despite an average estimated annual attendance of 15 million people and over 7,000 rescues at the major lifeguarded beaches, the average number of drownings in areas under lifeguard protection is between zero and one annually.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Lifeguards play an important role in a swimming facility's risk management program. Lifeguards are trained to monitor the aquatic environment, supervise patrons, inform patrons about the potential for injury, educate them about the consequences of injury-producing behavior, and enforce rules and regulations that prevent injuries. They are also, of course, expected to perform rescues to prevent drownings and to provide immediate first aid and CPR. But to do so, they must first identify persons who are in distress in the water.

Patron surveillance is key to preventing aquatic injury. It involves maintaining a constant watch over persons both in and out of the water and over the aquatic facility in order to identify circumstances that may cause injury. Action can then be taken to prevent or minimize injury. For example, a lifeguard may notice a small child playing alone in the water near a known drop-off and intervene before the child steps in water that is too deep. A lifeguard may also observe a person struggling in the water and perform a timely rescue.

The importance of lifeguards providing patron surveillance, especially monitoring the behavior of swimmers, can be demonstrated with a brief description of how persons drown. Many people assume that drowning persons are easy to identify because they will exhibit obvious signs of distress in the water, such as yelling or waving their arms. However, this kind of behavior is not common. Instead, people tend to drown in more quiet, less attention-getting ways. Drowning persons usually struggle to keep their mouth above the surface of the water in order to breathe. Struggling to stay afloat and possibly suffocating, they are rarely able to call out or wave their arms. Observational studies of persons at flat water (non-surf) beaches have revealed that non-swimming adults who find themselves in water over their heads are generally able to struggle on the surface of the water for about 60 seconds, while infants and very small children can submerge in as little as 20 seconds. These characteristics of drowning – the inability of a person to call or wave for help and the short time period before submerging – emphasize the need for lifeguards as a source for continuous surveillance and immediate action.[7]

However, supervisors and managers at aquatic facilities sometimes make the mistake of assigning lifeguards unrelated duties to perform while also expecting them to conduct effective patron surveillance. Because drowning can occur quickly and quietly, it is not surprising that lifeguards, distracted from keeping an eye on the water by other assigned duties, have failed to spot drowning persons in time to rescue them. Indeed, unobserved drownings have occurred even while lifeguards were stationed 20 feet from the water, taking tickets of those entering the facility or selling refreshments. It is clear, therefore, that swimming facilities must be staffed adequately to ensure effective and continuous patron surveillance, and that lifeguards should be given no other task that would distract them from this work. This concept is also supported by the USLA. The USLA

[7] These characteristics of persons in distress in the water have been called the Instinctive Drowning Response by Pia (Pia F., 1971, On Drowning, 2nd rev. ed, Water Safety films, Inc., Larchmont, NY; Pia F., 1974 Observations on the drowning of nonswimmers. Journal of Physical Education, The YMCA Society of North America, Warsaw, IN).

requires lifeguard agencies seeking USLA certification to adhere to the following principles: "Lifeguards assigned to supervise an aquatic area shall not be subject to duties that would distract or intrude their attention from proper observation of persons in the waterfront area, or that prevent immediate assistance to persons in distress in the water. Specifically, lifeguards assigned to water surveillance shall not be assigned to any duties other than public safety" (USLA, 2000).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Although providing quality lifeguarding services at water recreational facilities is effective in preventing drowning, some decision makers may elect not to hire lifeguards. In that case, environmental modifications to the facility can still improve safety for patrons. This section describes some environmental design changes that one water recreation provider used to reduce drownings at facilities that did not employ lifeguards.

The U.S. Army Corps of Engineers is the second largest provider of outdoor recreation facilities in the United States, managing more than 7 million surface acres of water and 4.5 million acres of land. Corps lakes are located in 43 states, and in 1998 staff recorded 2.6 billion visitor hours at these lakes. Approximately 58% of these hours (1.5 billion hours) are attributable to water recreation, such as swimming, wading, boating, water skiing, and fishing.

As a policy developed to limit liability, the Corps does not assign lifeguards to its facilities; it has a "swim at your own risk" policy. However, to reduce the number of drownings occurring at its beaches, the Corps established specific design criteria for its lakefront swimming beaches in 1987. These design criteria appear to have helped. Between 1971 and 1987, before the criteria were implemented, an average of 330 swimmers drowned each year. The design criteria were introduced between 1988 and 1998, and over that decade the yearly average fell to 183 drownings. These criteria are intended for inland lakes rather than surf beaches, where surf action makes them difficult to implement.

The majority of the design criteria for Corps swimming beaches relate to environmental controls. The priorities in the design of a beach are safety of the user, effects the physical features of the site will have on the beach, and future operation and maintenance considerations.

The Corps design criteria include estimating expected patron visitation levels; providing access for disabled persons; creating slope gradients that gradually and smoothly lead to deeper water; making efforts to ensure that the swimming area is protected from possible sources of contamination; maintaining consistent water levels; prohibiting diving platforms and swim floats; using buoys and markers to delineate the swim area and keep boats out; and ensuring the availability of additional safety measures such as rings, buoy lines, and poles. The complete design criteria for Corps swimming beaches can be found in Engineer Manual [EM -1110-1-400], Recreation Planning and Design Criteria, July 31, 1987.

The U.S. Army Corps of Engineers also supports a comprehensive water safety information campaign. Corps employees who work in water safety throughout the United States develop a coordinated, annual water safety campaign. Evaluations of previous campaigns allow the Corps to identify specific water safety issues each year for a full-scale educational campaign at all its facilities. The campaigns include print and television public service announcements. Many of the messages target school-aged children, a high-risk group.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



Public safety education and onsite supervision by lifeguards have helped keep drowning rates low for 40 years, and have significantly reduced the number of drownings in the United States. Still, the cost of a single catastrophic injury or death while using an aquatic facility can be substantial. Experts have described the costs of unintentional death through two measures. The economic costs framework measures the victim's productivity loss and the expenses related to the event.[8] Comprehensive costs include the economic loss, as well as the value of lost quality of life associated with the death or injury.

In 1997, the National Safety Council placed the economic value of each unintentional injury death at $790,000 and the comprehensive cost at $2,790,000 (National Safety Council, 1997). Using the drowning figures from beaches in the USLA reporting system, the comprehensive costs of drowning on coastlines in 1997 amounted to $273,420,000. From 1960 to the present, the total cost of drowning deaths at these USLA beaches is estimated to have been $4.2 billion. Factoring in costs of drowning in other aquatic facilities and the estimated annual cost of $138,000 per incapacitating injury, and the $180,000 annual cost for a catastrophic injury, the total costs of unintentional injury begin to climb geometrically. For comparison, salaries and benefits (typically 50% of costs) for full-time beach lifeguards range from $26,500 to $32,000 in Hawaii, Southern California and South Florida, where lifeguards work year-round. It is clear that providing a safe aquatic environment and instituting programs to prevent aquatic injury or death offer significant economic and social savings to society as a whole.

Although water-related injuries and drownings already result in tremendous costs, they would be substantially higher without lifeguards. One way of describing these costs is to estimate that one percent of the total rescues made by lifeguards would have resulted in a drowning death in the absence of lifeguards. In 1997, USLA recorded approximately 77,000 rescues for areas served by lifeguards. If one percent of these rescues (770) had instead resulted in death, either because the rescue had not taken place or because there were no lifeguards, then the economic cost of these deaths would be more than $600 million, and the comprehensive cost would exceed $2.1 billion.[9]

Using the same assumption, that one percent of the rescues instead resulted in incapacitating injuries (i.e., ones that would disable persons and permanently prevent them from performing some or all work), would yield a cost of approximately $4.1 billion per year over and above initial economic or comprehensive costs. If one percent of the rescues had instead resulted in nonincapacitating injuries (i.e., ones that required medical care or hospitalization but would not result in disability), then the anticipated cost would be about $10.7 million for economic costs per year and $27.5 million per year for comprehensive costs. Table 1 in the Appendix includes cost estimates for different models using a lifeguard rescue effectiveness ranging between 1% and 36%.

[8] Included in the components of economic losses are: wages and productivity; medical expenses; administrative expenses of law enforcement, legal fees and insurance costs; and employer costs.

[9] These figures do not estimate the costs of converting a death to an incapacitating injury because of a rescue.

While these estimates help demonstrate the range of costs of drownings and water-related injuries and the benefits of prevention on a national scale, the numbers may be so large that they do not assist decision makers working with a single, community facility. Mael, Seck, and Russell (1999) provide a helpful method of estimating costs on a smaller scale by converting the ratios to a given baseline of 10,000 patrons. They estimate the number of rescues needed if no preventive actions are taken, the number of injuries if there are no rescues, and the number of drownings if there are no rescues (i.e., no lifeguards present to intervene). This method provides minimum and maximum estimates of both the economic and the comprehensive costs of drownings and injuries at unprotected sites. They calculate that the total economic costs for not having lifeguards per 10,000 patrons ranges from $202,500 to $4.6 million and the total comprehensive costs per 10,000 patrons ranges from $705,380 to $16.1 million (see Table 2 in Appendix).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

The decision to provide lifeguard protection can be influenced by civil liability laws, which may hold the owners of aquatic areas and the lifeguards they employ responsible for fatal and nonfatal injuries.

One aspect of liability involves malfeasance. In most states, lifeguards, like other safety providers, are expected to act within a standard of care set by their training, local protocols, and past court rulings. A variation from the standard of care may result in liability. Another aspect of liability involves the condition of the facility and the quality of warning or protection provided. Some laws absolve federal, state, or local governments of liability for injuries resulting from natural conditions, such as currents and surf action. In California, for example, local governments are immune from injuries sustained at beaches as a result of natural conditions, regardless of the presence or absence of lifeguards or warning signs. This approach neither discourages nor encourages the placement of lifeguards.

Some state laws hold governments liable for natural conditions under certain circumstances. The Supreme Court of Hawaii (Kaczmarczyk vs. City and County of Honolulu, 1982) has determined that while a municipality is not an insurer of the safety of those using public beaches and adjacent waters, governments must exercise reasonable care in maintaining these facilities and in supervising their use by the public.

The court has found that the municipality has a duty to warn of extremely dangerous conditions known to the municipality which would not be obvious to an ordinary person. One method of warning is the placement of signs, and Hawaii is assessing the adequacy of warning by signage.

In Florida, municipalities have discretionary authority to operate a designated swimming area at a beach, but once they decide to operate a swimming facility, they assume a common law duty to operate it safely. In determining liability for drownings, Florida courts look for a previous knowledge of the danger, the presence of lifeguards, and the adequacy of warnings. Generally, a private Florida landowner, such as a hotel owner, has no duty to post lifeguards on public beaches or warn guests of hazardous ocean conditions. If, however, the hotel designates the beach as a swimming area, it incurs a duty to provide adequate warnings and safety precautions. Even if an area is not designated as a swimming area, a duty still may be placed on the landowner to operate the area safely through local ordinances or contractual agreements with beach vendors.

Liability definitions categorize swimming pools into those open to the public, those accessible by fee, and those provided by hotels. For public pools, some states and local jurisdictions specifically define the required level of lifeguard protection. In other areas, the level of protection may be left to the pool owner, but in the case of an incident, assessing the quality of protection may be a matter of what is considered reasonable by a judge or jury. In most states, hotels must simply post signs with approved or commonly accepted language. This passive approach to water safety may limit liability, but it also limits injury prevention. It is clear that lifeguards can significantly reduce the

incidence of water-related injury and death. Therefore, laws which encourage placement of lifeguards, although more expensive, can logically be expected to enhance public safety.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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The decision to protect the public in an aquatic facility, either by providing lifeguards or using another preventive strategy such as signage, requires careful assessment of the alternatives available to the facility or jurisdiction. This section offers some suggestions about how decision makers might approach such a choice and frame the alternatives.

In order to assist in evaluating the need for providing lifeguards in a facility or local jurisdiction, consider these steps:

(1) Use any relevant data available on the facility or jurisdiction. Data may include:

- The number of people using the facility or beach area during past years;
- The incidence[10] of water-related injuries and drownings at the facility or beach during those times;
- The number of water-related injuries and drownings at pools and beaches in the locality or state with and without lifeguards, for comparison; and
- the level of lifeguards provided (e.g., number of lifeguards per number of persons using the facility).

(2) If lifeguards are already provided, then ask the questions:

- How have lifeguards affected patrons' safety and attitudes?
- Is the drowning rate increasing, decreasing, or has it remained unchanged?

(3) Assess proposed alternatives (e.g., hiring lifeguards, placing warning signs, modifying the aquatic environment or restricting access to the facility). As various alternatives are developed, use history and precedence to assess them.

- Try to estimate the cost-effectiveness of each alternative.
- Assess legal implications and opinions that are critical to the issue and the alternatives.

[10] Incidence is the number of drownings (or number of water-related injuries) divided by the total number of visitors at the facility or jurisdiction, multiplied by the period of time in question (e.g., 1 year).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

When making choices about drowning prevention interventions in their areas, decision makers must balance a sincere desire to protect the public with "real-world" issues of budgets and legal liability. In this report, we have attempted to provide useful information and relevant questions that can be applied when making these decisions. One effective drowning prevention intervention is to provide trained, professional lifeguards to conduct patron surveillance and supervision at aquatic facilities and beach areas.

USLA data during 1988-1997 indicate that more than three-quarters of drownings at USLA sites occurred at times when beaches were unguarded and that the chances of drowning at a beach protected by lifeguards trained under USLA standards is less than one in 18 million. The four case studies provided in this report also describe the positive impact of lifeguards at beaches where multiple drownings had occurred when unguarded. When lifeguards are employed, it is vital that they be trained effectively in detecting persons in distress, and when assigned to water surveillance not be given duties other than public safety. The presence of lifeguards may deter behaviors that could put swimmers at risk for drowning, such as horseplay or venturing into rough or deep water, much like increased police presence can deter crime. Also, the experiences of the U.S. Army Corps of Engineers suggests that environmental design changes (at inland lakes) and safety information campaigns can also play a role in reducing drowning deaths. Owners and managers of natural water recreation venues should consider these design characteristics, regardless of the presence or absence of lifeguards.

Regardless of the evidence, or lack thereof, of lifeguard effectiveness, some communities insist on lifeguard services, based on local circumstances. Policy makers need to make use of the available local evidence and consider public attitudes and the legal environment when making decisions about lifeguard services and other means for increasing public safety in aquatic settings. Providing a safe aquatic environment and instituting programs to prevent water-related injury or death offer significant economic savings. Table 2 in the Appendix can serve as a useful tool for estimating the human and economic impact of not providing lifeguards.

Finally, if a community develops water recreational facilities to attract patrons who spend money in the local area, then it can be argued that the community has an obligation to protect these patrons. When weighing the costs and legal implications of interventions to prevent drowning, decision makers should never lose sight of the enormous importance of protecting people from harm and preventing tragedy at beaches and pools, places where people go for pleasure, for health, and for solace.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



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ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



**Organizations and Associations that Promote Lifeguarding and Water Safety**

**American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD)**
1900 Association Drive
Reston, Virginia 22091
(703) 476-3400

**American Red Cross**
**Health and Safety Division**
8111 Gatehouse Rd.
Falls Church, Virginia 22042
(703) 206-7180

**BOAT/U.S. Foundation**
880 S. Pickett Street
Alexandria, Virginia 22304
(703) 823-9550

**Boy Scouts of America**
1352 Walnut Hill Lane
Irving, Texas 75038-3096
(214) 580-2000

**The Canadian Red Cross Society**
1800 Alta Vista Drive
Ottawa, Ontario
Canada K1G4J5
(613) 739-3000

**The Commodore Longfellow Society**
2531 Stonington Rd.
Atlanta, Georgia 30338

**Girl Scouts of America**
420 Fifth Avenue
New York, New York 10018
(212) 852-5720

**Jeff Ellis and Associates, Inc.**
3506 Spruce Park Circle
Kingwood, Texas 77345
(713) 360-0606

**National Intramural and Recreational Sports Association (NIRSA)**
850 SW 15th Street
Corvallis, Oregon 97333
(503) 737-2088

**National Recreation and Park Association (NRPA) Aquatic Section**
650 West Higgins Road
Hoffman Estates, Illinois 60195
(708) 843-7529

**National Association of State Boating Law Administrators (NASBLA)**
Box 11099
Lexington, Kentucky 40512-1009

**National Safe Boating Council**
2911 Russell Road
Ostrander, Ohio 43061
(614) 666-3009

**National Water Safety Congress Administrative Services**
1181 Shake Rag Road
Buckhead, Georgia 30625
(706) 342-3775

**The Royal Life Saving Society Australia**
P.O. Box 1567
North Sidney, NSW 2059
02-957-4799
FX 02-929-5726

**The Royal Life Saving Society Canada**
287 McArhur Ave.
Ottawa, Ontario
Canada K1L 6P3
(613) 746-5694

**The Royal Life Saving Society UK**
Mountbatten House
Studley
Warwickshire
B80 7NN United Kingdom
+ 0527 853943

**U.S. Army Corps of Engineers**
Safety Office
20 Massachusetts Avenue, NW
Washington, DC 20314-1000
(202) 761-8600

**United States Coast Guard (USCG)**
Commandant (G-NAB)
2100 Second Street, SW
Washington, DC 20593-0001

**United States Coast Guard Auxiliary**
3131 North Abingdon Street
Arlington, Virginia 22207

**United States Lifesaving Association**
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Huntington Beach, California 92648
www.usla.org

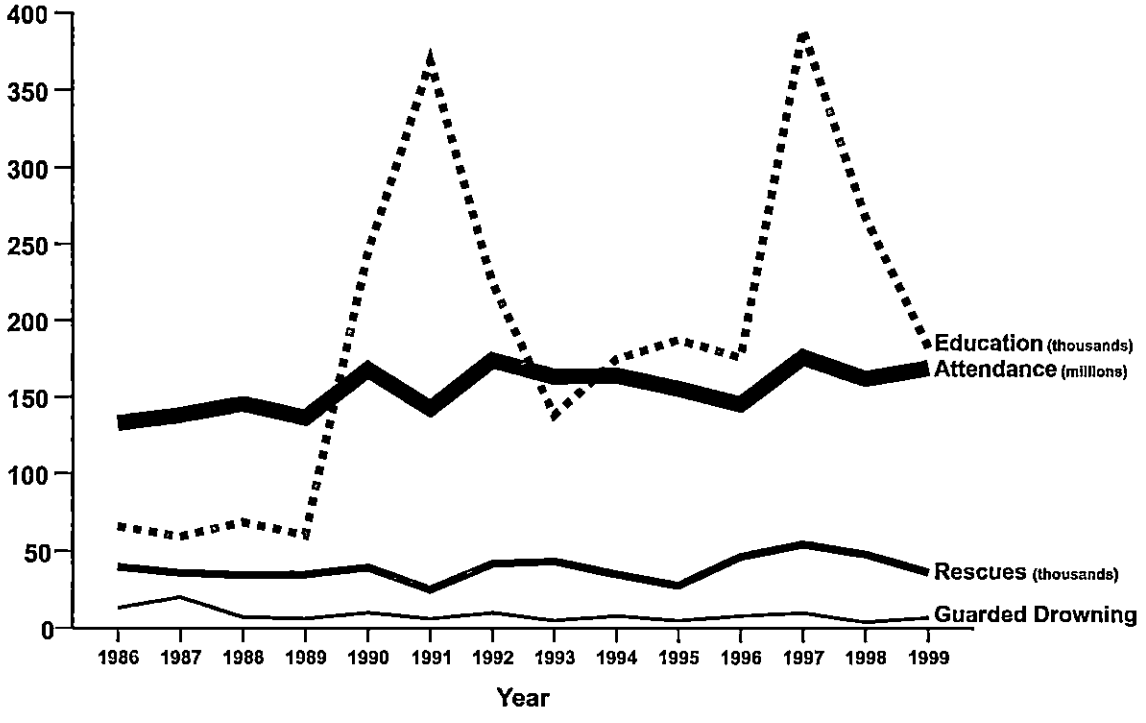
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Chicago, Illinois 60606
1-800-872-9622

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(212) 614-2700

**World Waterpark Association**
P.O. Box 14826
Lenexa, Kansas 66285-4826
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**Figure 1**
**California Beach Activity 1986–1999**




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**Table 1**
**Estimated Cost if Percent of 770,000 Reported Rescues in 1997**
**Had Not Been Made by Lifeguards***

| Percentages: | 1% | 5% | 10% | 16% | 20% | 36% |
|---|---|---|---|---|---|---|
| Economic costs of deaths | $609,130,000 | $3,045,650,000 | $6,091,295,000 | $9,746,072,000 | $12,182,590,000 | $21,928,662,000 |
| Comprehensive costs of deaths | $2,151,230,000 | $10,756,150,000 | $21,512,295,000 | $34,419,672,000 | $43,024,590,000 | $77,444,262,000 |
| Economic costs of incapacitating injury | $31,767,000 | $158,836,000 | $317,673,000 | $508,276,000 | $635,345,000 | $1,143,621,000 |
| Comprehensive costs of incapacitating injury | $106,405,000 | $532,000,000 | $1,064,050,000 | $1,702,478,000 | $2,128,100,000 | $3,830,576,000 |
| Monthly costs of incapacitating injury** | $4,163,700,000 | $20,818,350,000 | $41,636,700,000 | $66,618,720,000 | $83,273,400,000 | $149,892,120,000 |
| Economic costs of nonincapacitating injury | $10,718,000 | $53,588,000 | $107,176,000 | $171,482,000 | $214,352,000 | $385,833,000 |
| Comprehensive costs of nonincapacitating injury | $27,527,000 | $137,632,000 | $275,265,000 | $440,424,000 | $550,530,000 | $990,953,000 |

Source: USLA rescue data.

* Percentages represent assumed percent of deaths or injuries that would occur if rescues were not performed.
** $15,000 per month, assumption of 30 years continued life = $5,400,000



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**Table 2**
**Number of Preventive Actions, Events Requiring Rescues, Drownings, Injuries, Costs and Estimated Savings for Every 10,000 Beach Patrons**

| **Maximum Estimates:** | | **Economic Cost** | **Comprehensive Cost** |
|---|---|---|---|
| Preventive actions | 97.4 | | |
| Number of rescues if no preventive action | 35.0 | | |
| Number of (nonincapacitating) injuries if no rescues | 12.6 | $175,450 | $450,600 |
| Number of drownings if no rescues | 5.6 | $4,431,640 | $15,650,960 |
| **Total Savings for each 10,000 Patrons** | | **$4,607,090** | **$16,101,560** |
| **Minimum Estimates:** | | **Economic Cost** | **Comprehensive Cost** |
| Preventive actions | 97.4 | | |
| Number of rescues if no preventives | 4.9 | | |
| Number of (nonincapacitating) injuries if no rescues | 0.73 | $10,150 | $26,080 |
| Number of drownings if no rescues | 0.25 | $192,350 | $679,300 |
| **Total Savings for each 10,000 Patrons** | | **$202,500** | **$705,380** |

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# Strategies to Reduce Ocean Drowning Occurrences in Myrtle Beach, South Carolina

Thomas M. Gwyer

Myrtle Beach Fire Department

Myrtle Beach, South Carolina

August 2012

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Certification Statement

I hereby certify that this paper constitutes my own product, that where the language of others is set forth, quotation marks so indicate, and that appropriate credit is given where I have used the language, ideas, expressions, or writings of another.

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## Abstract

The City of Myrtle Beach is located on the Atlantic Ocean in South Carolina. Due to the large number of visitors and local residents that swim and play in the ocean, the City continues to experience ocean drowning and near drowning incidents. Part of the reason was because a community risk assessment specific to the ocean was not completed. This research was intended to reduce ocean drowning and near drowning incidents by the development of a program from an ocean risk assessment. The descriptive research method was used to answer four research questions. The four questions answered what hazards are off the coast of Myrtle Beach that may contribute to drowning incidents, what commonalities the drowning victims and incidents share, how other public safety organizations lessen the risk of ocean drowning, and how ocean drowning prevention and safety was viewed by residents and visitors. The research methods used consisted of surveying other coastal fire departments, Myrtle Beach Fire Department (MBFD) employees, visitors, and residents. Drowning reports were reviewed from the Horry County Coroner, the MBFD, and the Myrtle Beach Police Department. Interviews were conducted with three subject matter experts, and personal conversations were had with several others. The author used personal observation of people's behaviors while on the beach. The results revealed that most ocean drowning fatalities are male, and that rip currents are the major hazard. The MBFD is similar to other coastal fire departments by lacking in ocean safety education, however most other departments have ocean rescue teams. Most visitors and residents prefer to get ocean safety information from warning signs on the beach. The recommendations included better education for residents, including school children, and visitors, using technology more effectively, improving signage, and adding a minimal ocean rescue component to the MBFD.

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Table of Contents

Abstract....3

Table of Contents....4

Introduction....5

Background and Significance....6

Literature Review....10

Procedures....23

Results....31

Discussion....47

Recommendations....53

References....57

Appendix A Shoreface Geology of Myrtle Beach....62

Appendix B Rip Current Warning Sign used in Myrtle Beach....63

Appendix C Paul Gayes Interview....64

Appendix D Michael Slattery Interview....67

Appendix E Steven Pfaff Interview....69

Appendix F Significant Near Drowning Data....71

Appendix G Horry County Coroner Drowning Data....73

Appendix H NOAA Rip Current Drowning Data for the Carolinas....74

Appendix I Coastal Fire Department Survey Results....76

Appendix J MBFD Survey Results....79

Appendix K Visitor Survey Results....80

Appendix L Resident Survey Results....81

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## Introduction

With the lure of sandy beaches and ocean waters attractive to many people, drowning incidents continue to occur. More than half of the United States' population resides in coastal counties (United States Geological Survey, 2009). According to the Centers for Disease Control and Prevention (CDC), there were nearly 4,000 drowning deaths in 2010 (Centers for Disease Control and Prevention, 2012). The CDC also reports that unintentional drowning incidents are the second leading cause of death in children between the ages of one and 14 years, and the fifth leading cause of unintentional death in people of all ages (Centers for Disease Control and Prevention, 2012). Almost four children die every day from drowning (Lawrence, 2010). Statistics from the CDC show that from 2005 to 2009 there was an average of over 3,500 deaths per year from unintentional drowning (Centers for Disease Control and Prevention, 2012). These deaths exclude deaths on the water from boating incidents. In fact, 43% of the drowning deaths in 2007 occurred in natural waters, two and a half times more than the number of swimming pool drowning deaths. From 1999 to 2006 there were 1.55 deaths per 100,000 residents in South Carolina. This places South Carolina in the top ten in the United States for drowning (Nasrullah & Muazzam, 2011).

Even when a person survives a drowning, the complications can be severe. The CDC reports that for every death from drowning, another five people survive but require treatment in a hospital emergency room (ER). Of the individuals that are treated in the ER, half of them require in-hospital care, compared to only six percent of all other unintentional injuries (Centers for Disease Control and Prevention, 2012). The hospital stays can be costly, and can take a large emotional toll on the families of the victim. Even if the victim is discharged from the hospital,

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the drowning incident can cause permanent brain damage, memory loss, and significant learning disabilities in children (Centers for Disease Control and Prevention, 2012).

The City of Myrtle Beach is a large tourist destination on the east coast. The major attraction is the beach and the ocean. The Myrtle Beach Area Chamber of Commerce (2012) reports that 93% of vacationers visit the beach on their trip. Sometimes the visitors may not understand the risks and dangers associated with the ocean, and the power it possesses. The problem is the City of Myrtle Beach continues to experience ocean drowning incidents and the lack of a community risk assessment may be prohibiting these numbers from decreasing.

The purpose of this research is to reduce ocean drowning and near drowning incidents through a comprehensive program established from an ocean risk assessment. The descriptive research method will evaluate four research questions: a) What are the ocean risks and hazards off the coast of Myrtle Beach that may contribute to drowning incidents? b) What commonalities, if any, do the drowning victims and incidents share? c) What do other public safety organizations do to lessen the risk of drowning incidents in the ocean? d) What are the attitudes and views of local residents as well as visitors towards ocean drowning prevention?

## Background and Significance

The background to the research problem is connected to the City of Myrtle Beach being a popular vacation destination on the Atlantic Ocean. The City of Myrtle Beach is located in Horry County, South Carolina, in the northeastern corner of the state. The City is approximately 25 square miles, and has about 12 miles of beachfront on the Atlantic Ocean (City of Myrtle Beach, 2011). According to the 2010 United States Census, the City of Myrtle Beach has 27,059 year-round residents (United States Census Bureau, 2010). This number, however, swells in the

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summer months due to a large influx of visitors, and the City estimates a daily average population of 105,000 (City of Myrtle Beach, 2011).

The City of Myrtle Beach has worked hard over the past three decades to move from a small beach community to a major vacation destination that draws 14.7 million visitors annually (City of Myrtle Beach, 2011, p. vii). Due to the City's efforts in promoting itself and its many amenities, it has received numerous tourism related awards such as the "#1 Best Beach in the United States" by Tripadvisor in 2011, one of the Travel Channel's "Top Ten Vacation Spots for 2011," and a "Best Vacation" by *US News and World Reports* (Myrtle Beach Area Chamber of Commerce, 2012, p. 5). With such a heavy significance on tourism, the City relies on tourist dollars to help fund the budget. In 2009 the Myrtle Beach City Council passed a one percent local options sales tax within the city limits which enabled an 80% reduction in residential property taxes, and property taxes now only account for 15% of the entire City revenue (City of Myrtle Beach, 2011, p. 19).

Tourism is the top industry in the City, and the heart and soul of the community in general. The beach is by far the number one draw of the area, and if ocean drowning incidents continue to rise visitors may not feel safe in the ocean. Also, the bad publicity generated from a spike in ocean drowning incidents will certainly affect the City's reputation, and may cause visitors to vacation elsewhere. A drop in visitors will translate into a drop in revenue, and this could play havoc on the local economy.

The Myrtle Beach Fire Department (MBFD) is partially charged with making sure visitors and residents feel safe. The department is a Class 1 fire department rated by the Insurance Services Office (ISO) and is an all-hazards organization. The department provides fire, medical, technical rescue, and hazardous materials emergency response. All of the

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employees are Emergency Medical Technicians and over one-third are paramedics. The department is a host site for the state's Urban Search and Rescue Type II team, and handles all forms of technical rescue. The department even has members on the state's Helicopter Aquatic Rescue Team (HART). The only rescue discipline that does not fall under the MBFD's realm of responsibility is ocean and water rescue. This area falls under the Myrtle Beach Police Department's (MBPD) Beach Patrol.

The fire department handled ocean rescue up until the 1970's. During the 1970's the Beach Patrol was formed under the MBPD with one full-time employee. The other members were volunteers, mostly school teachers and high school coaches during their summer vacations. As the number of visitors grew, the need for better ocean rescue continued to develop. The Blue Ribbon Committee was formed to evaluate emergency services within the City, and one of the outcomes was providing better protection on the beachfront. With this, the MBPD continued to expand the beach patrol, eliminated the volunteers, and the City began guarding the beaches. When asked why the fire department is tasked with all forms of rescue except ocean and water rescue, Fire Chief Alvin Payne (personal communication, July 5, 2012) stated that it was more of a "natural fit" for the police. The Beach Patrol was already on the beach patrolling for people breaking the law, and since they were on the beach they just kind of slid into the rescue aspect (J. A. Payne, personal communication, July 5, 2012).

Like many other fire departments, the MBFD performs a lot of public education and community relations. The MBFD has developed an award winning public education division, winning the Richard S. Campbell award for excellence in public education in South Carolina six times since 1993. The MBFD addresses many risks within the public education program, but ocean safety and drowning prevention are not included. When asked why the MBFD does not

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do ocean safety education, Chief Payne replied that he did not know how to go about informing visitors, but he would not be against some sort of ocean drowning prevention program (J. A. Payne, personal communication, July 5, 2012).

Mike Guthinger, a supervisor with the MBPD Beach Patrol, said they do some public education about the ocean, but with limited staffing and a high number of calls for service, it makes a large outreach program difficult. He added that he began a Junior Life Saving program at Myrtle Beach Elementary School in 2011 that had about 20 participants (M. Guthinger, personal communication, May 16, 2012). Basically the program addresses the dangers of the ocean's waves and currents, how to administer cardiopulmonary resuscitation (CPR), first aid, etc. Even though the MBFD is not responsible for ocean rescue, not providing public education pertaining to ocean safety appears to be a great opportunity. The MBFD had 69,943 public education contacts in 2011 according to public education officer Christian Sliker (personal communication, July 26, 2012), and if only half of these contacts received ocean safety information, a great impact could have been made.

Taking the lead on reducing community risk is directly related to the entire course Executive Analysis of Community Risk Reduction (EACRR). The course stresses the importance of the role of the executive fire officer (EFO) in recognizing community risk, and developing a program to lessen it. This research directly links to Chapter two in the EACRR book regarding assessing community risk and identifying hazards and casual factors (National Fire Academy, 2011, p. sm 2-3). This research also links to the United States Fire Administration's first goal in the Strategic Plan to "Reduce risk at the local level through prevention and mitigation" (United States Fire Administration, 2010). Being able to reduce the risk from ocean drowning for residents and visitors will increase the overall quality of life and

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further the City of Myrtle Beach's desire to be the premiere coastal community to live and vacation.

## Literature Review

The initial literature research was conducted on ocean safety and drowning within fire service journals at the Learning Resource Center (LRC) at the National Fire Academy. A search was also conducted on the Internet through various online search engines. A more thorough review was done at Kimbel Library on the campus of Coastal Carolina University, as well as the City of Myrtle Beach's Chapin Memorial Library.

Drowning is described in an article by *World of Anatomy and Physiology* (2007) as "fluid obstruction of the airway, usually by immersion in water." Drowning begins when the victim panics because they feel they are in danger. Moon and Long (2002) report that after the panic begins, the drowning sequence has begun with their initial surprise and immediate struggle. Next, the victim will be exhaling only a little air, but swallowing a lot (Moon & Long, 2002). The body's natural coping mechanism will have kicked in causing an increase in respirations and even hyperventilation. As breathing increases, the likelihood of allowing water to enter the trachea increases which results in spasming of the muscles that close the vocal cords. The *World of Anatomy and Physiology* (2007) states that this is known as laryngospasm. The victim then begins a violent struggle and starts to convulse. Finally, Moon and Long (2002) say death occurs. Death, though, is usually caused by the airway being blocked from larygospasm. Once the victim relaxes after becoming unconscious, water pours into the lungs according to *World of Anatomy and Physiology* (2007). These facts, along with the drowning sequence, reveal the importance of early detection of possible drowning victims.

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The makeup of ocean water is also problematic with drowning. Ocean water is more dense that freshwater and it contains salt. The average ocean water contains approximately 24 grams of salt per kilogram (Sverdrup, Duxbury, & Duxbury, 2005, p. 138). Once the salty ocean water is introduced into the lungs, there is an immediate drop is arterial oxygenation due to respiratory acidosis. The salty ocean water is a hypertonic solution, meaning it has a high salt concentration. Through osmosis, water will move from the area of lower salt concentration to an area of higher concentration. Since the ocean water has a higher salt concentration when it is in the lungs, the water in the body will move from the lower concentration of salt in the plasma to the area of higher concentration in the lungs (Moon & Long, 2002).

Moon and Long (2002) report that if the victim survives the initial drowning, there is a 50% chance they will develop pneumonia. If they do develop pneumonia, there is around a 10% chance of death (Gregorakos, et al., 2009, p. 96). Fortunately for those victims that survive the initial drowning and reach the hospital, 80% will survive (Moon & Long, 2002). Victims that do not require respiratory support within the first 24 hours usually only require short hospital stays. And even victims that had severe respiratory problems but that are not in a coma, improve rather quickly (Gregorakos, et al., 2009).

In order to understand hazards the ocean can create, an understanding of the ocean itself is necessary. The Atlantic Ocean was formed about 200 million years ago when a single landmass broke apart. Pangaea was the one super continent on earth, and the remainder of the planet was covered by the massive Panthalassic Ocean (Sverdrup, Duxbury, & Duxbury, 2005, p. 83). As the current continent of North America continued to break away, the North Atlantic Ocean was formed (United States Geological Survey, 2009, p. 38). As the other continents continued to move away, water was flooding into the North Atlantic Ocean and into the area that

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is the current location of the Caribbean Sea. Finally, at the end of the Cretaceous period, about 95 million years ago, the Atlantic Ocean was nearly completely developed (Sverdrup, Duxbury, & Duxbury, 2005). The fact the Atlantic Ocean was created by shifting land masses is key, as it illustrates the continuous movement of the ocean, beaches, and seafloors, and these movements can create hazardous conditions to those that enter.

The City of Myrtle Beach lies in the curvature of South Carolina that runs between Southport, North Carolina and Winyah Bay, South Carolina. Due to this curvature, the City is tucked back nearly 100 miles from the edge of the continental shelf. The continental shelf is a gradual decline towards the ocean floor that slowly decreases at an angle of one-half of a degree, and where the ocean is relatively shallow, 150 feet on average (Pinet, 2009, p. 98). The continental shelf ends at the shelf break where the ocean depth drops dramatically to over 1,600 feet. The shelf break continues to the continental slope which is a four to five degree decline seaward (Pinet, 2009, p. 35) that has a sudden, steep slope where the depths can reach 10,000 feet (Sverdrup, Duxbury, & Duxbury, 2005, p. 104). It is on the continental slope where mud, sediment, rock, and sand can be found (Pinet, 2009). The rock, mud, sand, and sediment can be pushed by tides and currents towards the beach causing changes in the ocean floor. Understanding that these changes can increase the risks to swimmers due to stronger tides, currents, and waves is essential when educating the public about ocean safety and drowning prevention. It is also important to realize these changes cannot be controlled.

There are three main elements that must be monitored to help safeguard the ocean waters. They are the bathymetry, which is the ocean floor topography, the type and location of sediment, and the composition of rocks and older sediment that are sitting on the ocean floor (United States Geological Survey, 2009). It is important because any shift can change the ocean floor, thus

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affecting current flow that may be hazardous and loose rocks and hard sediment can cause trauma to swimmers that may not be aware of these items. Depending on the size of the sediment, they are categorized into three measures: large, intermediate, and small; or gravel, sand, and mud respectively. Mud has two subcategories, sand has five, and gravel has four subcategories. The sediment ranges in diameter from the smallest that is less than one one-hundreth of a millimeter to boulders that are greater than 256 millimeters in diameter (Pinet, 2009, p. 112).

The United States Geological Survey (USGS) conducts research to monitor the sediment. There are three different methods they use, and although they are different, they all use sound navigation and ranging (SONAR) waves (United States Geological Survey, 2009) that detect the features of the ocean floor and the send the information to receivers on land (Murray, Gibson, & Ward, 2008). In conjunction with the SONAR testing, observation stations are utilized from fixed positions on buoys that measure temperature, waves, wind, and current (Murray, Gibson, & Ward, 2008). During tests off the coast of Myrtle Beach, it revealed numerous areas with high density sediment. Basically, a large portion of the area has coarse sand, gravel, and rock on the ocean floor (United States Geological Survey, 2009). See Appendix A. This may contradict what most people who enter the ocean believe when they see sandy beachfronts.

Not only can the makeup of the ocean floor cause hazards and risks that may contribute to drowning, the natural processes of the ocean play a role. The oceans have surface currents that are affected by the wind. The wind driven surface currents only occur in about ten percent of the ocean, but it is these currents that can play a role in ocean safety (Pinet, 2009). Water is more than 1,000 times denser than air, so once it begins to move, inertia will keep it moving (Sverdrup, Duxbury, & Duxbury, 2005). The air molecules from the windblown air collide with

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the water molecules. When this happens the friction creates a rise in the water, thus creating a wave and current. Therefore, according to Pinet (2009) the windier it is, usually the higher the waves and stronger the current. This correlates into a higher danger to individuals in the ocean when the winds are higher. Another important fact is that the currents usually run about three to four percent of the wind speed (Pinet, 2009, p. 195).

The speed of the wind is one of three factors determining the wind's affect on waves. The longer the wind blows in one direction and the distance it blows over the water play a key factor in determining wave height (Pinet, 2009). The overall stronger the wind is in these three aspects, the larger and more dangerous the waves become. Once waves reach four feet, swimming is not recommended (Kim, n.d.). When wave sets are approaching the coastline where people are in the ocean, it is usually when they break that causes injuries. One reason people get hurt and drown is because they do not understand the power of water, and often underestimate it (Kim, n.d.).

The reason a wave breaks is due to its steepness on top and the stability from the bottom. Most waves break by the top of the wave spilling down the front slope. This is known as a spilling breaker. A surging breaker is a wave that is flat and barely breaks, but rather rolls up the beach, and returns to the ocean with a greater amount of energy. These types of waves may pull a swimmer seaward, away from the beach and increasing the risk of drowning. The final type of breaking wave is a plunging breaker. These are the most likely to cause injury, and even knock someone unconscious and potentially drown. A plunging breaker is steep, and then the wave curls and plunges all of its energy downward at the same time. Plunging breakers are dangerous to people in the ocean and can lead to severe injuries, which in turn can lead to drowning (Pinet, 2009).

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Josh Basile was 18 years old when he was paralyzed in the ocean. A plunging breaker hit and drove him headfirst into the sand, breaking his neck. The sand on the ocean floor can be as hard as concrete (Kim, n.d.). This left him paralyzed, but it could have easily cost him his life if no one would have seen him. He was injured at Bethany Beach, Delaware, a beach he was familiar with. However, over time due to erosion and the constant beach processes, the shore can become steep (Kim, n.d.). When this occurs the waves do not lose any energy thus they break stronger, with full force on the shore.

The final ocean processes that can contribute to drowning are caused by the ocean's natural circulation within the surf zone. A longshore current is a current that runs parallel to the shore (Pinet, 2009, p. 384). A long shore current can be dangerous as it may sweep a person off of their feet. However, the current will usually only move the person parallel with the coastline, and will not pull them seaward by itself. There are several factors that cause this type of current to be dangerous. First, the trauma caused by a fall from a long shore current may render a person incapacitated, and simply being face down may cause drowning. Second, since the current moves parallel to shore, a person may be removed from a location where others were watching them, and if no one is watching the person and they get in trouble in the water, help may not be around. Furthermore, they may be pulled to an area of danger near natural or manmade structures or into a rip current. When wave heights and energy are just right and the longshore current moves apart from the wave setup in just the right fashion, the development of a rip current is possible (Pinet, 2009, p. 385).

Most people have heard of a rip current, even though they often mistakenly refer to it as an undertow or riptide (Powell, 2007). Rip currents, also known simply as rips, kill between 100 and 150 people every year in the United States (Fletemeyer & Leatherman, 2010). To put these

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statistics into context, Fletemeyer and Leatherman (2010) report rips kill more people annually than floods, tornadoes, and hurricanes combined. The United States Lifesaving Association (USLA) estimates that 80% of rescues are caused by people caught in a rip current, and that nearly 32,000 people were rescued from rip currents in 2011 (USLA, 2012).

Lifeguards have known the serious risks rip currents cause for years. A 1956 article in *The Saturday Evening Post* chronicled ocean lifeguards in Atlantic City, New Jersey. One of the lifeguards, Ed Stetser, when asked what kills swimmers in the ocean, replied, "What makes bathers drown in the sea, is the sea itself" (Price, 1956). According to Price (1956), Stetser went on to describe a rip current and its characteristics, although they were not named rip currents yet, they were referred to as a sea puss.

In the Myrtle Beach area heavy focus is placed on hurricane preparedness and rightfully so with the impacts a land falling hurricane can, and have made on the area. But the statistics on rips cannot be ignored. Rips can occur at anytime, anywhere along the beach, and it does not care who is caught in it. These statistics influenced this research by recognizing how deadly rips can be, and when compared to hurricane preparedness education in Myrtle Beach, information on rip currents is relatively nonexistent.

Scientists are familiar with rip currents, yet they do not completely understand why they form. The basis theory is that they usually form from sediment on the ocean floor. As waves approach the shore they break and throw water on the shore, then the water flows back out into the ocean (Jozefowicz, 2006). Petit (2001) reports that the bigger the waves, the more water and energy. During this process, sediment is picked up and carried into the ocean and deposited not too far from shore. The deposited sediment creates a sandbar that is parallel to the shore. A depression or grove is then created that runs perpendicular through the sandbar, and rushing

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water then makes the channel larger. All of the water flow is channeled into the rip, and the rip flows out into the ocean. Jozefowicz (2006) reports that the flow of the rip current can reach six miles per hour, faster than an Olympic swimmer. Rip currents are also common at low tide. Since there is less area for the water in the channel, it moves faster, thus intensifying the current (Jozefowicz, 2006).

The National Oceanic and Atmospheric Association (NOAA) states that a rip current is comprised of three different components: the head, neck, and feeder. The feeder is the main energy portion of the rip. As waves break over the sandbar, the water follows the path of least resistance, and is pulled seaward in the channel of the sandbar. The classic rip current model shows a rip having two feeders, one on each side. However, a rip can be sustained with only one feeder (NOAA, 2011). The neck is the higher velocity of water being pulled out (NOAA, 2011). The USLA (2012) reports the neck is where most swimmers get in trouble, and is the location where most deaths occur. The neck area can have widths up to 100 feet (NOAA, 2011). The final part of a rip is the head. The head is the where the circulation of the rip begins to spread out and dissipate. The circulation decreases the farther away from the sandbar (USLA, 2012), so the head of the rip is usually located quite a distance offshore (NOAA, 2011).

There are also various types of rip currents. The classic description of a rip is usually illustrated on warning signs. See Appendix B. In actuality, rips can be very deceiving and do not always appear as they do on the warning signs. There are four types of rips that can occur in the ocean off Myrtle Beach according to NOAA. The first type is a fixed rip, or a structural rip. These rips are usually in the same location and near a permanent structure that is in the ocean, such as jetties, groins, or piers. A flash rip is short, but unpredictable. A flash rip is caused by heavy surf and strong waves, often times from hurricanes and storms hundreds of miles away. A

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

traveling rip is just that, it travels. This type of rip moves as the wind and wave direction moves. When waves and winds are hitting one area of the beach, a traveling rip may form. As the wind and waves move away, the rip will weaken, and a new rip will form where the waves are more concentrated. The final type of rip is the fixed rip. They are fixed in one location, however they are in an area where there are no manmade structures. Since they stay in one location, they are influenced by the wind and waves, and fluctuate in intensity (NOAA, 2011).

Predicting rip currents is difficult. Through the years it seems that rips have continued to defy forecasters. Over the past three decades, scientists have tried to research rips, but it is difficult. Scientists have tried to film rips, which is the simplest way to monitor them, and have even inserted tracer dye into the rips. However, since not all rips exhibit the same or the classic characteristics that are often used to describe them, this has only yielded limited results (Fletemeyer & Leatherman, 2010).

Another reason it is difficult to research them is because they are a moving flow of water, similar to a river, and the equipment is far too expensive to lose. In 2001 Tim Stanton and Jamie MacMahan from the Naval Postgraduate School (NPS) in Monterey, California, attempted to study rip currents. They were using equipment funded by the Navy's Rip Current Field Experiment (RIPEX) program that would measure water depth, current speed, and water temperature (Petit, 2001). Unfortunately, due to the waves and currents, they were unable to install all of their equipment, and some of the equipment that was installed was torn from their moorings. Their research ended with spotty results due to the issues with the equipment, but the research did reveal some interesting facts. First is that rip currents are likely to form on a sandy beach where the waves can reshape the ocean floor, and where waves approach the beach at a 90-degree angle (Powell, 2007). This is due to the dynamic nature of the ocean floor changing

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

faster than expected. And second, because of the rapidly changing ocean floor it is difficult to predict the location of rips. This was illustrated on another day of research when they planned to study the water that was in between two rip currents that were 300 feet apart. The morning of the research, the two other rips were gone, and a new rip was formed where they wanted to conduct their research (Petit, 2001).

In 2003, Tim Stanton and Jamie MacMahan were once again researching rip currents. This time armed with some less expensive equipment, they were able to drop drifters into the rips to measure speed and direction. One of the drifters was rapidly taken seaward into the rip. It moved about 300 feet in 30 seconds, then turned sharply to the left and was doubling back on itself. This illustrates that rips are not always straight. Powell (2007) reports they can be more like a whirlpool and return towards the shore, and that the strength of the rip can change quickly. Infragravity waves, which are long, low frequency waves, can causes surges in the ocean which will make a rip go from slow to fierce in minutes (Powell, 2007).

Rip currents have been at the forefront of ocean safety. There are numerous websites that offer rip current information, and the NOAA website has a tremendous amount of rip current information. NOAA also sponsors the National Rip Current Awareness Week the first week of June. South Carolina Sea Grant has been an advocate for rip current awareness programs, and hosted a rip current awareness workshop at Coastal Carolina University in 2007. The workshop was attended by 50 different agencies in the state such as the National Weather Service, fire departments, and the media. The MBFD did not send a representative. Three years after the workshop, South Carolina Sea Grant conducted a survey to determine what method of educating the state's beach visitors was most effective. Surveys were given to visitors at three different beaches in the state. The City of Myrtle Beach was used, and 60 surveys were distributed. The

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

results revealed that most visitors did not know the specifics about rips, but they did know it pulled people away from shore. Visitors also indicated they prefer to receive information about rip currents from television messages and signs (McCoy, Howe, Ellis, & Bacon, 2010).

The survey concluded the best way to inform the visitors about rip current safety is during their stay on the beach (McCoy, Howe, Ellis, & Bacon, 2010). Another informational program that came from the workshop was the distribution of magnets that had rip current information on them to local hotels. There were 1,000 distributed to Myrtle Beach hotels (M. P. Slattery, personal communication, June 20, 2012). However, after contacting visitors in the hotels where the magnets were distributed, only 1% of them stated that they remember seeing a magnet in their room (M. P. Slattery, personal communication, June 20, 2012).

The USLA and Australia's Surf Life Saving (SLS) have both invested a great deal of time and money in to rip current education. In 2011, the USLA (2012) conducted ocean safety classes for over 232,000 people as well as continued to sponsor the "Break the Grip of the Rip" campaign to raise awareness towards rip current safety. Personnel from Surf Life Saving have educated over 132,000 students in 1,000 schools. They have traveled thousands of miles to educate children from the coast to the rural bush of Australia (SLS, 2010). They have even created a smartphone application. The application gives real-time information about 12,000 beaches in Australia. It provides information on weather, tides, currents, waves, water temperature, and hazards. It also gives information on protective services and beach regulations (SLS, 2011). Hoag Memorial Hospital in Newport Beach, California, has started Project Wipeout to teach children about ocean and rip current safety. This provides school age children with various child friendly instruments such as cartoons and coloring books to help educate them about rip currents (USLA, 2012).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Despite the community outreach from NOAA, USLA, SLS, and Project Wipeout, people still drown in the ocean from rip currents. Part of the reason is because the education on how to escape a rip is partially wrong. Most posters and brochures instruct swimmers caught in a rip to swim parallel to the coast. However, if the head of the rip is swirling or there is also a long shore current, swimming parallel may not be the best advice. The rip and long shore current may actually turn and head back to shore, and as the research of Tim Stanton and Jamie MacMahan revealed, this is quite possible. If this is the case, when the victim swims parallel but heads the wrong way and goes into the current, they will become fatigued and will lose to the strength of the current. Dr. Slattery stated that from his research, "about 80% of rips circle around and come back to the beach" (M. P. Slattery, personal communication, June 20, 2012). Because of this, victims should just be told to tread water and relax, signal for help, and once the current stops moving seaward, attempt to return to shore (Fletemeyer & Leatherman, 2010).

Another problem with education is the way warning signs are used. They depict a classic rip, but relying on someone to be able to identify an actual rip in the ocean is difficult, especially when some professional lifeguards can have problems locating rips (Fletemeyer & Leatherman, 2010). The problems with the signs influenced this project by again showing the need for education. And the education needs to be from personal contact as much as possible, not simply from an inanimate object.

The ocean does not always cause drowning by itself. In a study conducted in Australia by Driscoll, Harrison, and Steenkamp (2004), from July 2000 to June 2001, it was discovered that nearly one-fifth of the drowning cases that were studied revealed alcohol was a contributor to the fatal drowning. These results were consistent with results from previous studies that suggest alcohol contributes to 25% to 50% of unintentional drowning. Also, from 1959 to 1983,

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

21% of male drowning victims in Australia had alcohol intake prior to the incident, and nearly one-quarter of all drowning victims in New Zealand from 1992 to 1994 had a blood alcohol level greater that 0.1 grams per milliliter (Driscoll, Harrison, & Steenkamp, 2004, p. 179). Finally, when Michael Winerip, a writer for the *New York Times*, did an article on the ocean, a mother of an ocean lifeguard asked her son about a rescue of several people one day, the son replied, "Only one was really drunk" (Winerip, 2008).

Swimming in the ocean without lifeguards and swimming alone have been shown to increase the risk of drowning in the ocean. The USLA (2012) estimates a person's risk of drowning on a guarded beach is 1 in 18 million. Studies have shown that adults who cannot swim struggle to keep their head above water for one minute, and young children for less than 20 seconds (Moran, 2009). This illustrates the need for immediate rescue and the importance of rapid response because drowning is rapid. It is also important to have parental supervision for children in addition to the lifeguards. Moran (2009) reports that in a study in New South Wales, Australia, 29% of adults surveyed stated they did not stay close to their children under age five while in the ocean. And nearly half stated they watched their five to nine year olds from the beach, they were not in the ocean with them. Regrettably, the lack of supervision is identified as the primary cause of drowning in children over 80% of the time (Palmer, 2005).

Another issue that arises from drowning occurs when people attempt to rescue someone that is struggling in the ocean. The USLA advises that no one should attempt to rescue someone. In reality though, if the victim is a loved one or close friend, the helpless feeling of doing nothing may be too great to overcome. Certainly if the victim is a child, the parent's natural instinct will be to try and recue the child. Tragically, many would-be rescuers end up as victims. Franklin and Pearn (2011) refer to this as the aquatic victim-instead-of-rescuer (AVIR) syndrome.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Franklin and Pearn (2011) did a study at the University of Queensland, Australia, that revealed 27 victims drowned from 2002 to 2005 in an attempt to save a primary victim. Sixteen of these would-be rescuers were adults trying to save a child. In Ireland, eight would-be rescuers drowned trying to save victims that were attempting suicide by drowning. Also conducted in the study was a test to determine how effective an adult is at throwing a rescue rope. Twenty percent of the adults could not get the rope within six feet of the victim, and another 20% did not hold on to the rope when they threw it (Franklin & Pearn, 2011, p. 46). This demonstrates the need to train and educate people how to help in a drowning emergency without becoming a victim themselves.

Being a minority increases the chance of drowning. African Americans are more likely to drown compared to whites, and drowning rates decline drastically for whites after age 15. African American children are three times as likely to drown as white children, and African American boys are twice as likely to drown compared to African American girls. Finally, 70% of African American children between six and 16 years of age have either a low ability to swim or cannot swim, which is twice the rate of whites. Hispanic children have nearly a 60% non-swimming rate (Lawrence, 2010).

## Procedures

The descriptive research method was used for this research. After establishing the research questions and conducting the literature review, the next step was to identify what hazards are located along the Myrtle Beach coast that may contribute to an increased risk of ocean drowning. To identify the possible hazards, it was important to speak with several subject matter experts on the topic of ocean drowning and the associated hazards on the local beach. Dr. Paul Gayes, Ph.D., is the Director of the Burroughs and Chapin Center for Marine and

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Wetland Studies in Conway, South Carolina, as well as the Palmetto Professor of Marine Science at Coastal Carolina University. Dr. Gayes was selected due to his extensive knowledge in coastal processes, coastal evolution and sea change, and his familiarity of Myrtle Beach's coastal waters. Dr. Gayes has conducted a great deal of research in the Myrtle Beach area since the 1980's. He has published numerous articles and made numerous presentations related to ocean processes. He has worked on several ocean research cruises and been awarded over $500,000 in research grant monies. See Appendix C.

The second subject matter expert interviewed was Dr. Michael Slattery, Ph. D. Dr. Slattery is the South Carolina coastal processes specialist for South Carolina Sea Grant. Dr. Slattery performed his undergraduate work at Coastal Carolina University which afforded him many opportunities to study the Myrtle Beach coastal waters. In his current position, he also works as a community outreach educator and has frequent contact with the public through ocean safety programs. Dr. Slattery has research interests in sediment dynamics, wave dynamics, and coastal morphology as well as being published in professional journals. He possesses a great deal of field research experience, most recently performing coastal monitoring for wave prediction and rip currents. See Appendix D.

The final interview was conducted with Steven Pfaff. Mr. Pfaff is the warning coordination meteorologist with the Nation Weather Service (NWS) in Wilmington, North Carolina. The Wilmington section of the NWS covers the Myrtle Beach area. Mr. Pfaff is an experienced meteorologist that has a thorough background in ocean processes, namely rip currents, and has conducted research through the NOAA. He has extensive knowledge in rip currents and is currently researching tidal activities to help improve rip current predictions. Mr.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Pfaff has published a dozen articles, and helped establish rip current awareness programs in The Netherlands, South Korea, and Australia. See Appendix E.

In order to determine if there were any commonalities with the drowning victims, it was necessary to study the drowning reports. This was started by conducting a query of the MBFD incident report database. The database used by the MBFD is Fire Programs. This program has been used since 2000, with several changes in the data entry for medical responses over the years. Fire Programs meets the requirement for the National Fire Incident Reporting System (NFIRS) and every call for service is documented in this database. From 2005 until 2009, the MBFD entered medical call information into the EMS section of the NFIRS report. The drowning incidents were able to be queried by searching the drowning code from the cause of injury/illness field within the EMS section. This query resulted in 112 incidents with the primary cause of injury/illness as drowning. Each report was read and reviewed. Demographic information such as age, race, gender, as well as location was documented for any drowning incident that was deemed to be significant. For the purpose of this ARP, a significant incident required the victim to be transported to a medical facility with advanced life support procedures being administered, and a minimum of an altered level of consciousness or respiratory compromise. After screening the reports, 56 were determined to be significant.

In 2010 the MBFD switched from using the EMS section of the NFIRS report, to a separate EMS report module within Fire Programs. The department used this report for one year only. There was no way to query drowning responses in 2010 because the EMS module did not have drowning as a data point in the report. When asked about this, MBFD's data systems manager John Dobson stated, "It was just an oversight on the part of Fire Programs" (A. J. Dobson, personal communication, July 11, 2012). In 2011 the department switched to EMS

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Charts, a completely different reporting system. A query was completed using EMS Charts for 2011. The identical screening process was used to determine what drowning incidents were significant, and ten met the criteria. There were a total of 66 significant near drowning incidents from 2005 until 2011, not including 2010. See Appendix F.

The Horry County Coroner's Office was contacted to determine the number of fatal ocean drownings within the City of Myrtle Beach. See Appendix G. This information was available through the Freedom of Information Act (FOIA). The coroner's office was able to provide ocean drowning data from 2005 until 2011. The information provided was the victim's age, gender, race, time of death, and location of the incident. Due to privacy laws, this was the only information that was distributed. A historic tides chart was utilized to determine if the incident occurred at low or high tide. If the incident occurred within 90 minutes of the actual tide time it was labeled as the corresponding tide, other wise it was labeled "B" for between tides. Finally, the day of the week was determined for each ocean drowning incident.

A request for ocean drowning reports from the MBPD Beach Patrol was also made. There was some initial resistance, however reports were made available for 2010 and 2011. These reports were reviewed for more detailed information than what the medical reports contained. The police reports were reviewed for witness statements, weather conditions, presence of rip currents, and any other information that may be useful.

In order to understand what other public safety organizations do to lessen the risk of ocean drowning incidents, a survey was created. The survey was created electronically through surveymonkey.com, which is an online survey service where the responses are kept anonymous. The survey was sent to 113 coastal fire departments. The departments were selected via their location on the oceanfront, or extremely close proximity to the ocean where they may serve as

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

mutual aid or their citizens may utilize the beach. The survey was sent to departments on the Atlantic coast from Virginia to Florida, the Gulf coast from Florida to Texas, and southern California on the Pacific coast. The questions were created to determine how the departments protect citizens near the ocean, and what programs they use to lessen the risk of ocean drowning.

Along with gaining an understanding of what other agencies do, it was important to gain a solid understanding of the operations within the City of Myrtle Beach since ocean safety and rescue is handled by the police department. Personal conversations were held with two Beach Patrol supervisors at different times. Discussions covered ocean rescue response and how they educate the public on ocean safety and drowning prevention. Also, the City's lifeguard agreement and requirements were reviewed.

After speaking with the Beach Patrol supervisors, it appeared necessary to get the MBFD employee's views about ocean drowning prevention and ocean rescue. A survey was created, again using surveymonkey.com, asking the employees to share their experiences and views regarding ocean drowning education and ocean response, and to gage their interest in the topic. This survey was sent to all 143 emergency service personnel.

In order to better understand how visitors and local residents view ocean drowning, it was imperative to get their feedback. The "Executive Fire Officer Survey for Visitors" was created and it was geared towards visitors. The questions were generated to describe the visitor's behavior and attitude toward the ocean, and in what manner they would be open to receive ocean drowning prevention information. The survey was printed in a hardcopy form, and the data was gathered in several ways. A local hotel was willing to distribute the surveys to guests as they checked in. A stack of surveys was left at the front desk, along with a box on the front counter marked "Surveys" where the completed surveys were to be returned. The surveys were dropped

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

off prior to Memorial Day weekend, as the general manager stated they had near 100% occupancy. Unfortunately, after several weeks of limited surveys returned, and observing the front desk workers not distributing them to the guests, it was obvious this method was not effective.

The other method used was simply approaching people on the beach and asking them to participate in the survey, and most people were willing. Data was also collected when visitors would stop by the fire station for a tour, and they were asked to take the survey. There were 125 visitor surveys completed. The only selection criterion of the participants was that they were over the age of 18 years. There was no bias based on gender, race, or national origin.

A local resident survey was created, with the same intentions as the visitor survey. The "Executive Fire Officer Survey for Residents" asked the same questions, with two exceptions. The surveys were distributed to local residents to complete. The questions were generated to describe the resident's behavior and attitude toward the ocean, and in what manner they would be open to receive ocean drowning prevention information. There were 137 resident surveys completed.

It was also important to gage the interest of local businesses and what their level of participation, if any, would be. Different local businesses were contacted about participating in an ocean drowning prevention campaign. The media, hotels, restaurants, and other retailers were contacted by phone and/or in person. Furthermore, when discussing ocean drowning prevention, getting the message into the schools is essential. A meeting was set up with James LaPier, principal of Lakewood Elementary. Lakewood serves pre-kindergarten to fifth grade, and is located 1.1miles from the ocean. In the meeting, Mr. LaPier was asked about the school's interest in ocean drowning prevention and what could be done to lessen the risk to children.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

The final research method used was personal observation by going to the beach and observing the behaviors of beachgoers and lifeguards. The signage was also observed, and the amount of people on the beach.

There were limitations to the research. The first, and by far the largest, was the lack of good documentation in all of the reports. First, the Horry County Coroner's Office does not have a computer system. According to Deputy Coroner Duane Brown (personal communication, May 10, 2012) the office doesn't have access to a simple spreadsheet tool. This made collecting the ocean drowning reports time consuming, and some information was missing. The research was done by an employee of the coroner's office, and it took quite some time to get the data. Also, since a human being was manually looking through files, it is quite possible that an incident was missed, or inaccurate data was relayed.

Next, the MBPD's data was simply disorganized. There were numerous reports that could not be found. Investigator Guthinger stated that the MBPD has switched data management systems several times over the past decade, and since the drowning and near drowning reports are not a criminal act, they get less priority. Added to that is the fact that two years ago the MBPD switched to a new Computer Aided Dispatch (CAD) system. Since the new CAD went on line, the police officers document their reports into the CAD. The new CAD does not have a code for drowning, so the officer has to complete a written report on all fatal drowning incidents. Another problem lies in the fact they do not do a report for non-fatal near drowning incidents, so there is no current statistics on near drowning incidents from the Beach Patrol.

The MBFD also has documentation shortcomings. Prior to using electronic medical reports in 2005, all medical reports were handwritten on state approved patient care forms. These reports are now archived, and the only way to get drowning information would be to read

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

every report looking for drownings. Since 2000 there have been four different ways to document medical responses. This has created difficulties locating reports at times. For example, there is no way to query drowning reports at all from 2010. That is a complete year of data that is missing.

Coding errors were also discovered while reviewing the MBFD reports that were coded as drowning. It was discovered that many reports were coded as a drowning simply because they occurred in or near the ocean. One example is a report that was coded as a drowning incorrectly, when actually it was a separated shoulder from a skim board accident where the victim was sitting at the edge of the surf. The call was dispatched as a near drowning, but the cause of the injury was a fall, not a drowning as it was coded. These errors contribute to false data, and it was only discovered after in depth reviews of the reports.

Privacy laws were another limitation. Due to patient privacy laws, there is no way to access medical records. Because of this there is no way to ascertain if alcohol, drugs, or anything else may have played a role in the drowning. Privacy laws also affect the Beach Patrol's data, as a victim may be transported to the hospital alive but in critical condition. The Beach Patrol cannot get any further information regarding the victim's status from the hospital, thus not allowing for completely accurate data from the Beach Patrol's aspect.

The final limitation was the number of completed surveys. Both the resident and visitor surveys had a good number of completions. However, with 14.7 million visitors annually the question can be raised as to how many visitor surveys need to be completed to get a better representation. Even if the percentage needed was merely one percent, it would be extremely difficult to complete over 147,000 surveys. The surveys sent to the fire departments received less than a half completion rate. Many of the participants sent additional feedback via e-mail,

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

however it would have been more valuable to receive more participants. Finally, the survey sent to MBFD personnel received about a 60% completion rate. Again, having the completion rate closer to 80% or 90% for employees would have given a better reflection of the personnel's views.

## Results

Dr. Gayes, Dr. Slattery, and Mr. Pfaff all provided a comprehensive list of hazards off of the Myrtle Beach coast that may contribute to drowning. The unanimous top three were rip currents, waves, and debris. Some of the other risks included marine animal attacks, lightning, waterspouts, and tsunamis. Far and away though, the biggest hazard is rip currents. This is consistent with the literature and with the findings in the incident reports. According to the confirmed drowning incidents that occurred between 2007 and 2011 in Myrtle Beach, 37% were caused by rip currents. This is only the confirmed rips, there may have been more but due to the lack of credible witnesses and other information they cannot be confirmed. There are also a large number of near drowning reports that stated the victim was pulled out into the ocean. These incidents may very well have been caused by a rip, but with the lack of definitive diagnosis by a professional, they cannot be counted even though the probability is high some of them were caused by rips.

The next hazard is the waves. Again, all three subject matter experts were in agreement. The reports show that close to one-third of the near drowning victims were knocked down by a wave, causing the near drowning incident. In a 2011 near drowning incident involving a male and female victim on Beach Club Drive, both victims were hit by a large, plunging breaker and this contributed to the near drowning. There were fatal drowning reports that had waves as a

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

possible cause as well. Often times the victim that was knocked over by a wave was then caught in a rip and was pulled seaward, or a longshore current that pulled them down the shoreline.

The final hazard is debris. Due to the currents and tides, debris is continuously moving in and out. With a large amount of the ocean floor in Myrtle Beach being rocky, these rocks break away and are moved around by the waves and currents. These rocks can cause injuries that may contribute to drowning. Dr. Gayes has photos of rocks coming ashore at 18th Avenue South and 52nd Avenue North. Other debris includes seaweed that may tangle up a swimmer, and trash. Dr. Gayes stated that there is a lot of debris still offshore from hurricanes, even Hurricane Hugo that hit in 1989. He added that there is rebar stuck in parts of the ocean floor as well as concrete and construction materials.

Litter is a problem too. Litter on the beach gets pulled into the ocean by the tides. This can range from aluminum cans to beach chairs and canopies that people leave overnight and the tide pulls them into the ocean. Not to mention the litter people throw in the ocean from the piers. All of these may injure a swimmer and contribute to drowning.

There were, however, no documented drowning or near drowning incidents from debris. There were drownings caused by trauma from hitting the bottom of the ocean, but nothing from coming in contact with debris. After personal observation, it was noticed that the beach is kept relatively clean. It does not appear that litter from the beach is much of a problem. The City's Public Information Officer, Mark Kruea (personal communication Aug 4, 2012), stated that the beach is swept and raked daily by heavy machinery around 3:30 a.m., and trash is cleaned up daily as well.

This author was present on the beach observing behaviors of people while on the beach and in the ocean. It did appear most young children had an adult near them, within ten feet.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

However, when the child was older, roughly beginning at the early teen years, many were in the ocean alone or with friends, but no accompanying adult.

Another observation on the beach was the vast amount of people. This raised the question as to how many people one lifeguard can effectively protect and watch. For example, lifeguard stand #13 is in front of a large high-rise resort. The resort contains 526 guest rooms. If 80% of the rooms are occupied with just two guests, there are 841 guests that may be on the beach. This is not including people entering from public beach accesses or people from neighboring hotels. The sheer number of people on the beach actually creates a hazard because it is difficult to monitor them. When asked about this observation, Dr. Gayes confirmed the population on the beach can create problems, but he added, "How do you know when too many people become too many" (P. Gayes, personal communication, June 20, 2012)? He did add that overcrowding is a problem elsewhere as well, but municipalities are having a tough time regulating it and deciding when to close the beach, and how to monitor it.

When reviewing the various reports, there are some definite commonalities found in the data. The coroner's data shows 22 fatal ocean drowning incidents occurred from 2007 to 2011. The data reveals that 12 of the 18 drowning incidents from 2007 to 2011 with known occurrence times happened at low tide. Also during this timeframe, 19 of the drowning victims were male, and only three female. Whites accounted for twice as many drowning victims than blacks and Hispanics. The data also reveals adults are much more likely to drown than minors, as only two victims were under the age of 18, with none being less than 12 years of age. Nearly half of the victims were between 33 and 44 years of age. Excluding 2008 where the incidents times are unknown, half of the drownings occurred while lifeguards were present, and the other half occurred when lifeguards were not on duty.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

When examining the locations for the fatal drowning incidents, there is no set pattern. The incidents seem to range all over the City. The day of the week really does not seem to matter either. Saturday, Wednesday, and Thursday are all tied for the most drowning incidents with four each. Tuesday and Friday had the least over the time period with one and two respectively. Time of the day is random as well, although about 25% of the 18 incidents with known times occurred between midnight and 5:00 a.m.

When evaluating the near drowning incidents from 2005 until 2011, males experienced near drowning incidents about twice as often as females. The significant near drowning incidents frequently happened on Saturday. In fact, Saturday has twice as many near drowning incidents than the next busiest day which is Friday. Fridays, Saturdays, and Sundays make up the bulk of the near drowning incidents, 11, 22, and 10 respectively, with nearly two-thirds occurring on the weekends. Less than one-third of the incidents occurred when lifeguards were not present. Race does not appear to be a significant factor, although blacks suffered seven more near drowning incidents compared to the 28 incurred by whites. Time seems to be a commonality, of the 66 significant near drowning incidents, 39 of them occurred between 1:00 p.m. and 6:00 p.m.

The location of the incidents is more significant in near drowning rather in fatal drowning. In some years there is more of a commonality regarding the location than in others. In 2005, of the 20 near drowning incidents that occurred, 14 were in an approximately 22 block area from 11$^{th}$ Ave South to the state park, and three others occurred between 24$^{th}$ Avenue North and 26$^{th}$ Avenue North. In 2006, all but one of the near drowning incidents occurred between 9$^{th}$ Avenue North and 26$^{th}$ Avenue North. Six of the near drowning incidents in 2007 took place sporadically throughout the City, with the three exceptions happening between 7$^{th}$ Avenue North

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

and 9th Avenue North. In 2008, there were some clustering of near drowning incidents as three happened between 11th Avenue South and 12th Avenue South, three occurred between 15th Avenue North and 18th Avenue North, and two occurred at 30th Avenue North. There were ten significant near drowning incidents in 2009. Of these, four happened between 5th Avenue North and 7th Avenue North, three between 18th Avenue North and 20th Avenue North, and two occurred at 4th Avenue South. As with 2009, there were ten significant near drowning incidents in 2011. This time, the incident locations moved towards the north end of the City limits. Half of the incidents occurred in a nine block area from 74th Ave North to Beach Club Drive. Two others occurred at 5th Avenue North.

There have been 18 victims that have drowned because of a rip current according to NOAA. See Appendix H. When evaluating the commonalities for the victims that drowned in a rip current, gender is significant. Of the 16 confirmed rip current drowning incidents in Myrtle Beach since 2001 where the gender is known, 13 were male. In fact, the last 20 confirmed rip current drowning victims in North and South Carolina have been male. Age is another noteworthy commonality, of the 16 confirmed rip drowning victims where the age is known, eleven have between 30 and 50 years old.

Since the MBFD does not handle ocean rescue, nor provide ocean safety education, when answering the third research question it was necessary to completely understand the scope of services provided by the MBPD Beach Patrol. The Beach Patrol does just what the name suggests, it patrols the beach and waterfront. It also monitors and oversees the operations of the four contracted lifeguard services within the City of Myrtle Beach.

Investigator Guthinger (personal communication, July 17, 2012) stated there were usually two Beach Patrol officers working at all times. There may be more, but two is the average.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Their job is to respond to any beach emergency. They also oversee the City's four different contracted lifeguard services. When a drowning call comes in, two officers respond. The first officer on scene swims out to keep the victim afloat and assist lifeguards if they are present. The second officer will launch the jet ski and affect the rescue if the victim has not been returned to shore (M. Guthinger, personal communication, July 17, 2012).

As far as education, the Beach Patrol really does not do much. They will speak to civic organizations when requested, and there is the Junior Lifesaving Program at Myrtle Beach Elementary that 20 children participated in school year 2011/12. Sergeant Phillip Cain (personal communication, June 2, 2012) says they also look at trends and will address them as needed. This is more reactive than proactive. An example cited by Sergeant Cain is Hispanics swimming in full clothing. The MBPD Beach Patrol has noticed an increase in Hispanics wearing full clothing, including blue jeans, while swimming in the ocean. Sergeant Cain added that they have approached Hispanic churches and tried to educate them on wearing proper swim attire to reduce their risk of drowning (P. Cain, personal communication, June 2, 2012).

When asked whether or not their fire department performs ocean rescue, 60.8% of the fire departments participating in the survey do. The other 31.2% do not. The next question asked if lifeguards have other tasks besides protecting the ocean, and overwhelmingly 91.5% answered that they do not. This is in sharp contrast between the lifeguard operations in Myrtle Beach. The lifeguard services in Myrtle Beach are permitted to rent boogie boards, beach chairs, and umbrellas. During personal observation there were 40 rental umbrellas each with two rental chairs between lifeguard stands 10 and 11, all were rented and occupied. This illustrates the density of the crowd on the beach. The City's lifeguard agreement allows for the rental of these

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

items, but also requires every tenth stand to be "lifeguard only" with no rentals (City of Myrtle Beach, 2008).

Over half of the respondents' lifeguards were employed by the fire department. This is in contrast to the 11.6% of organizations that contract to an outside agency as the City of Myrtle Beach does. A surprising statistic is that less than half of the departments provide ocean safety within their public education message. And when asked how they get ocean safety messages to visitors, signs and billboards were used 20% of the time, and pamphlets and handouts were distributed 28.9% of the time. There were 42.2% that replied in the "other" category. About half of the comments reported the department did nothing. And others mentioned speaking to community groups and using social media. No one used text messages, illustrated in Figure 1.

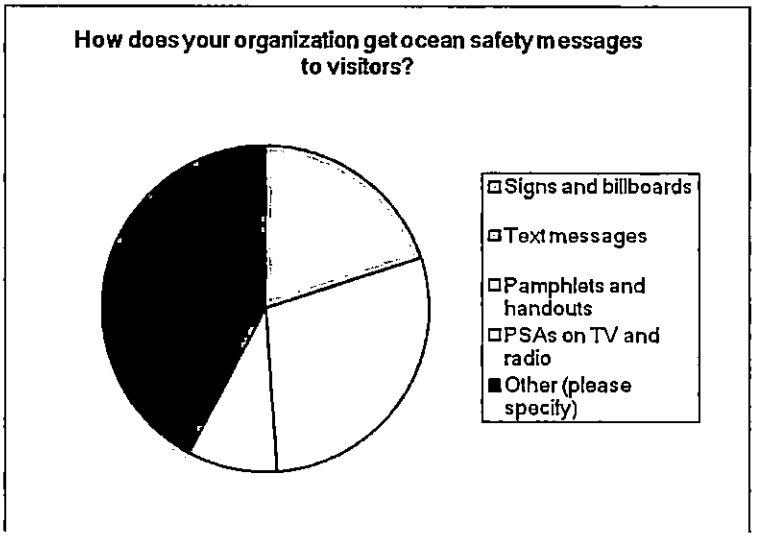



*Figure 1.* How other coastal fire departments provide ocean safety messages to visitors.

When asked if the department has received support from local businesses for ocean safety, nearly 81% responded they have not. Of the 19.1% that have, most have received

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financial support, uniforms, or equipment. One department stated they have entered into a partnership with Toyota. Toyota provides the vehicles, in exchange for certain naming and marketing rights.

There were 29 responses about what programs have been effective in reducing drowning incidents. The most popular and effective was the implementation of a Junior Lifeguard Program. Another popular means was simply maintaining an excellent lifeguard service that also promotes safety and talks to visitors on the beach about ocean safety. The other two effective strategies were increasing lifeguard stand staffing by opening the stands at 7:00 a.m. and closing them at 8:00 p.m., instead of the traditional eight to five o'clock hours, and outlawing alcohol on the beach.

When asked what local ordinances have improved overall ocean safety the number one measure was a minimum distance that boats must remain away from shore. The distance ranged from 300 to 500 yards. Several others also mentioned designated swimming areas, designated activity areas for surfing, kayaking, etc., no swimming around natural or manmade structures, and no alcohol on the beach. One area outlawed the use of inflatables. In contrast, another area distributed personal inflatable devices.

After understanding what the MBPD Beach Patrol does, and how other fire departments handle ocean safety, it was important to gain an understanding of the how the employees of the MBFD view ocean safety. Surveys were sent to all personnel within the Emergency Services Division, and 86 were completed. Over 80% of the participating employees reported that they have responded to an ocean drowning where the victim had a minimum of an altered level of consciousness. Nearly 60% of the respondents reported arriving on scene of a possible ocean

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

drowning and the victim was still in the water. Current MBFD policy does not allow for personnel to enter the ocean.

While on duty, 53.5% of the participants stated that they have been asked about ocean safety. Almost everyone, 97.7%, would like ocean safety and drowning prevention to be included in the department's public education program, with 2.3% of the respondents not wanting the inclusion. And nearly 75% are willing to teach ocean safety and drowning prevention in public education events. Finally, when asked about being part of an ocean rescue team, 91.9% of the employees that responded to the survey would be interested in ocean rescue response.

When administering the surveys to residents and visitors, a lot of feedback was received. Many people gave comments and the survey was well received. Many visitors shared their experiences of the beach being closed due to excessive rips or large waves, to seeing the fire department work on a drowning victim. Most residents received the survey well also, and many made comments about an ocean drowning prevention program is long overdue. One participant even expressed thanks and gratitude and stated, "All of this information is excellent and will save lives. Thank you."

When attempting to ascertain the attitudes and views of visitors and residents about ocean drowning prevention, and how they could be educated on the topic, it was important to compare the responses to understand the differences in the two groups. When asked about swimming abilities, both groups believed they were either excellent or average. About 10% more residents believed they were excellent swimmers compared to the visitors. And more visitors believed they were below average swimmers compared to the residents as seen in Figure 2.

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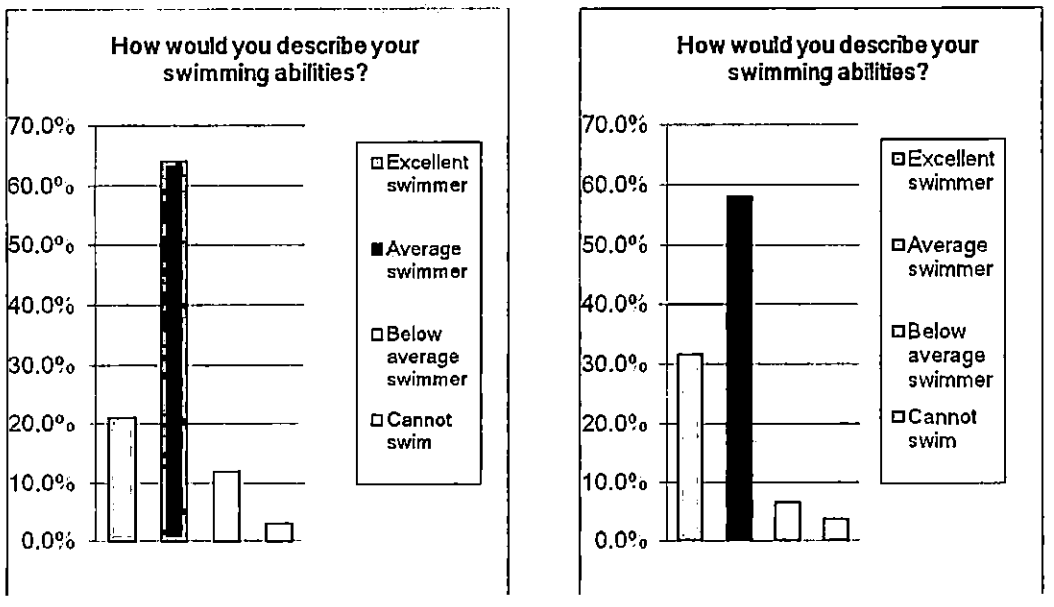



*Figure 2.* Visitor (left) and resident (right) view of their swimming abilities.

Figure 3 shows that when deciding where to stay on the beach, 28.8% of the visitors prefer to stay near a lifeguard, compared to 19.7% of residents. However, the vast majority have no preference whether they are near a lifeguard, but nearly 6% of residents intentionally avoid the lifeguard.

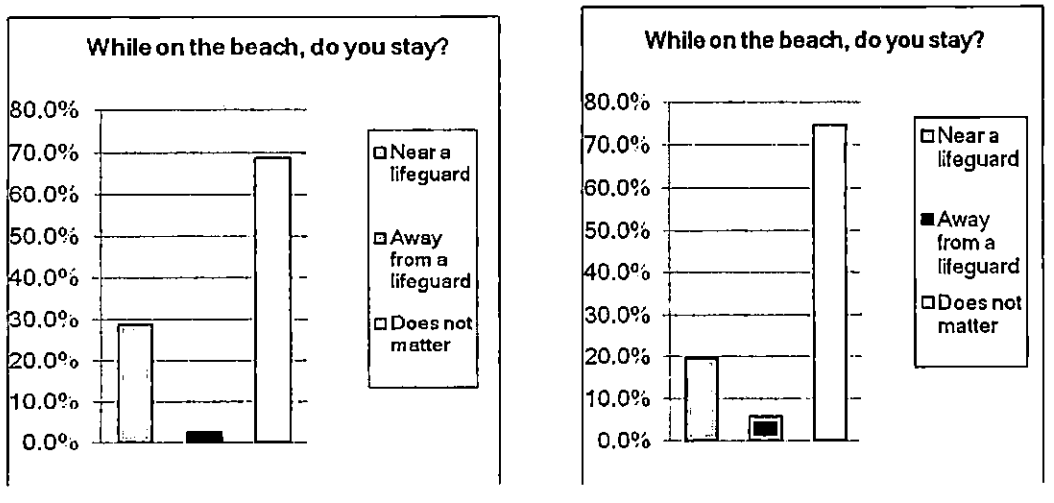



*Figure 3.* Where visitors (left) and residents (right) stay on the beach.

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Overwhelmingly both groups pay attention to the warning flags posted by lifeguards on the beach; 90.4% of visitors and 84.6% of residents as Figure 4 reveals. A good follow-up to this would be determining if they actually know what the flags mean.

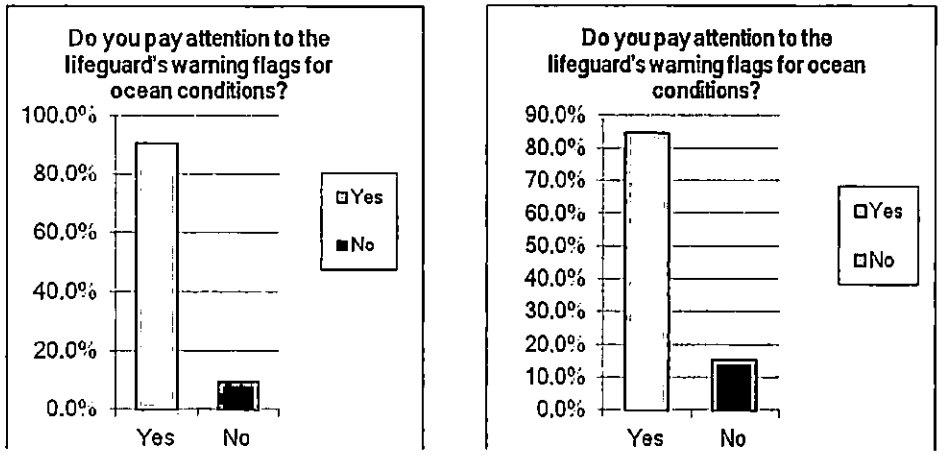



*Figure 4.* Whether or not visitors (left) and residents (right) pay attention to warning flags.

Nearly 80% of residents have received information regarding ocean safety and rip currents. This contrasts to the 63.2% of visitors that have been informed about ocean safety and rip currents as shown in Figure 5.

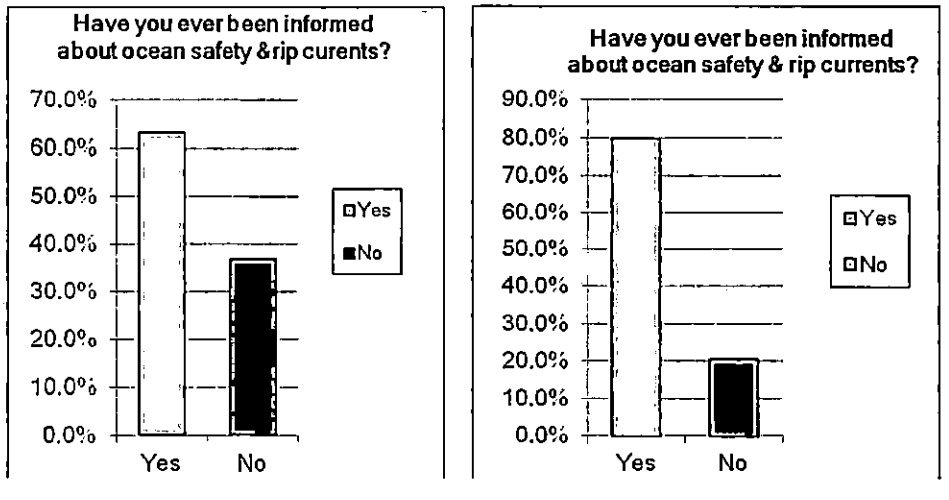



*Figure 5.* Percent of visitors (left) and residents (right) informed about ocean safety and rips.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Figure 6 illustrates another difference is in the way the two groups perceive the ocean. 35.2% of visitors believe the ocean is very dangerous, which is about 8% higher than the way residents perceive the danger level of the ocean.

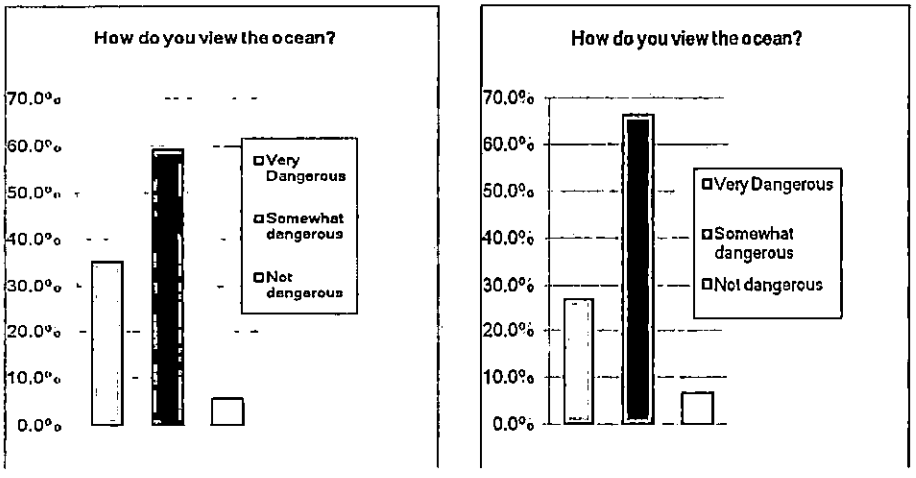



*Figure 6.* How visitors (left) and residents (right) view the ocean.

Nearly 54% of visitors responded they would definitely read a pamphlet on ocean drowning prevention if one was made available to them at check-in. Under 41% of local residents would definitely read the ocean drowning prevention pamphlet illustrated by Figure 7.

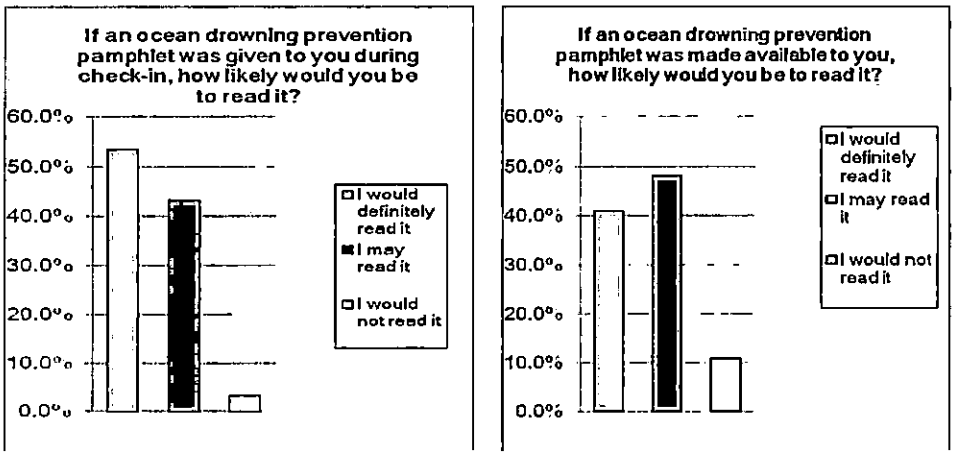



*Figure 7.* Likelihood of visitors (left) & residents (right) reading drowning prevention pamphlets.

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Both groups have similar views about public service announcements (PSA) on television and radio. Figures 8 shows the numbers are close in the belief they may be very or somewhat effective. However, twice as many visitors believe they would not be effective.

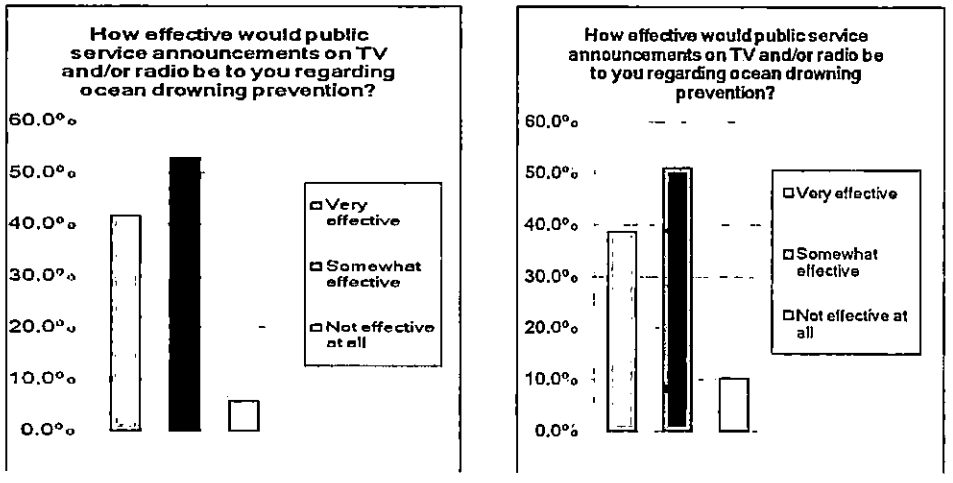



*Figure 8.* Effectiveness of PSAs as viewed by visitors (left) and residents (right).

When asked if they would attend a short ocean safety program conducted at the resort or by the realtor, only 16% of visitors said they would definitely attend, and 32% said they would not attend. The residents were basically evenly split as shown in Figure 9.

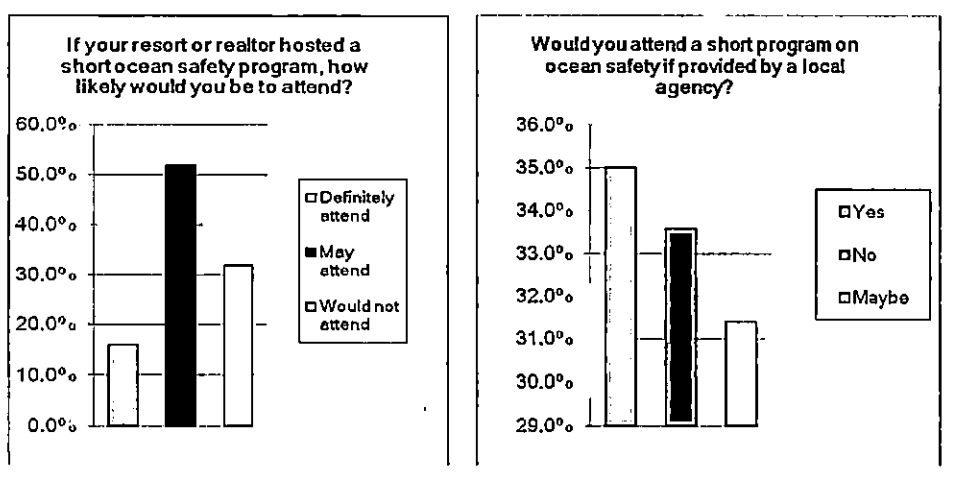



*Figure 9.* Likelihood of visitors (left) and residents (right) to attend a safety program.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

When responding to how they would like to receive information on ways to reduce ocean drowning, one-third of the visitors would prefer warning signs on the beach. Pamphlets and handouts along with radio and television messages were the next most popular choices. 12% of the visitors would like to receive text messages, and there were several people that stated they would like to see the messages sent via social media outlets. See Figure 10.

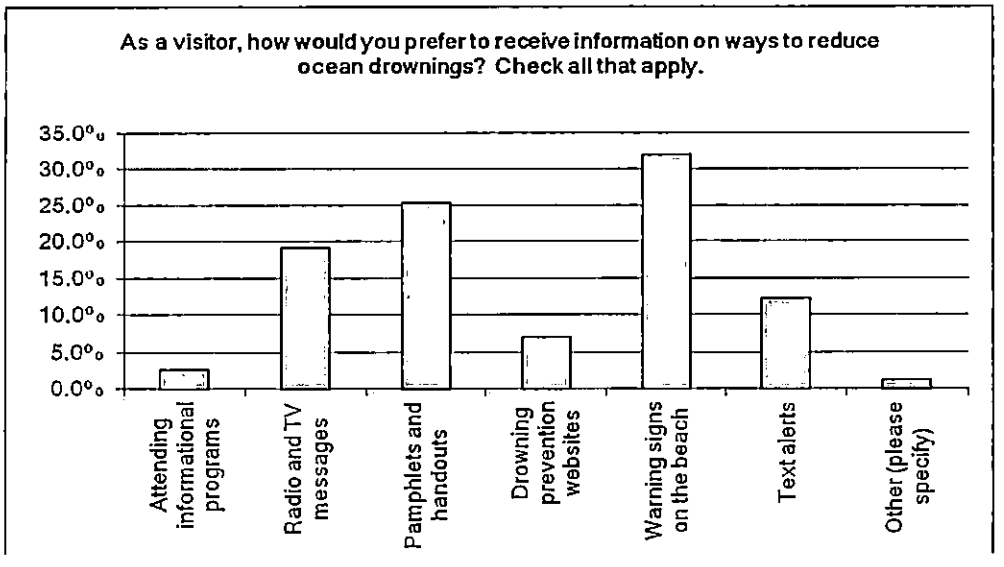



*Figure 10.* Visitor preference in receiving ocean drowning reduction information.

Warning signs on the beach and radio and television messages each received over 75% as preferred ways residents would like to receive ocean drowning prevention information. Text alerts were popular with 34.4%, and it appears most residents do not want to attend an informational program, as this received the lowest amount of selections. In the other category, one person believed the fire department should be canvassing the beach to inform visitors,

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

another believed real life stories should be shared on television, and the final participant believes it should be the school's responsibility. See Figure 11.

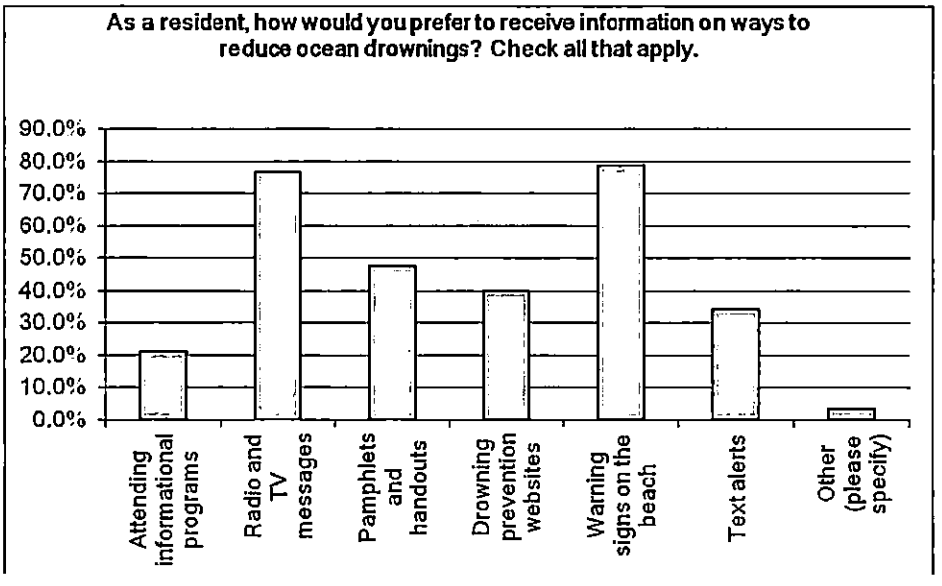



*Figure 11.* Visitor preference in receiving ocean drowning reduction information.

The final question was only asked to the residents, and that was about whether or not ocean safety and drowning prevention should be taught in school. An overwhelming 86% of the resident participants believe that it should be. With this in mind, a meeting was set up with James LaPier, principal of Lakewood Elementary. This elementary school is located just over one mile from the beach. When asked if the school district has a water safety program, he replied, "No, there is no district-wide water safety program" (J. LaPier, personal communication, August 6, 2012). He added that during the guidance period, children are taught about illegal drugs, strangers, and gun safety, but nothing about the water. He went on to say that a water safety program could be added at Lakewood during guidance, but it would be taught in that school only as it would be difficult to make a change across the entire district.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

He continued by saying that standardized testing has made it difficult to add anything extra to the curriculum, and that teachers cannot deviate much, they simply do not have that autonomy. The federal government makes it hard to add anything because the schools need to make their benchmarks every year. And taking time away from academics is a bad move if the school does not achieve their benchmarks. "Most administrators are not going to add something that we aren't held accountable for to sacrifice something we are held accountable for" (J. LaPier, personal communication, August 6, 2012).

Mr. LaPier did add his support for a complete ocean safety program for the school. He recognizes the need for water safety in general, and ocean safety in particular at Lakewood since it is close to the ocean and its students live close to the ocean. He added that he would be willing to offer this type of program during the guidance period, and maybe it will become a platform for all coastal schools in the district.

Schools were not the only community entity investigated regarding community participation in ocean drowning awareness and prevention. Several local hotels were contacted about their willingness to host or participate in a drowning prevention program. No definitive responses were given one way or another, but there did appear to be resistance to the suggestion. Almost all hotels that were asked play rip current awareness videos on their closed loop television channel in guest rooms. Attempts were made to contact the Hotel-Motel Association in order to reach a larger hotel pool, but no contact was ever able to be made.

Support was pledged by local businesses outside of the accommodations arena. One large big-box store was willing to pledge support, as well as a large national warehouse wholesaler. A national fast food restaurant chain stated they would participate, as well as a popular worldwide restaurant chain. Janice Duffy, Director of Marketing for the Hard Rock

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Café, stated, "We will do whatever you need us to do. I think this is a great idea" (J. Duffy, personal communication, June 14, 2012). A local radio station was approached about doing public service announcements. The radio station offered to do free recordings of PSAs delivered by fire department employees, and that they would be willing to play them on all of the other local stations the company owns. Finally, the MBFD has a corporate sponsor team that supports the department's public education program which brings another dozen more businesses into play.

## Discussion

The biggest hazard associated with ocean drowning in Myrtle Beach is rip currents. This is consistent with the information found through the literature review as well. The USLA states that 80% of their 32,000 rescues in 2011 were caused by rip currents (USLA, 2012) and rips kill between 100 to 150 people annually. The statistics show that in 2011, 60% of the fatal ocean drownings in Myrtle Beach were caused by rip currents. Some of the near drowning reports also have documented information about possible rip current involvement, but these cannot be confirmed. These findings firmly illustrate the need for implementation of rip current education.

The next two hazards are caused from waves and debris. Kim discussed the incident where a plunging break knocked over an 18 year old male, driving him into the ocean floor and causing permanent paralysis (Kim, n.d.). A similar incident recently occurred in Myrtle Beach in early July, 2012. A 71 year old male was struck by a wave, hit his head on the ocean floor, and sustained a fractured cervical vertebra. The victim is now paralyzed from the neck down. The findings are also consistent with the three subject matter experts regarding the dangers of waves. SONAR imaging of the ocean floor in Myrtle Beach reveals that it is made up of hard sediment and rock. As Kim stated, the sand on the ocean floor can be as hard as concrete (Kim, n.d.).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Debris in the form of loose sediment and rock is pushed towards the shoreline from the continental shelf (Pinet, 2009). The Myrtle Beach ocean floor is comprised of coarse sediment (United States Geological Survey, 2009), and this can be hazardous and cause trauma to those in the ocean. The three subject matter experts agreed on this, and Dr. Gayes provided photos he has taken showing rocks washed up on the beach around 18th Ave South and 52nd Avenue North. He also provided evidence of debris from hurricanes that was in the ocean. This certainly appears to be a legitimate hazard, although when reading the drowning and near drowning reports, none appeared to be caused by entanglement or trauma from debris. Also, the amount of large debris that can potentially be pulled into the ocean from the beach in the summertime is probably minimal due to the efforts of the City in raking, dragging, and thoroughly cleaning the beach nightly (M. Kruea, personal communication, August 4, 2012).

The last finding in the results for the first research question came from personal observation, and this was the large volume of people on the beach. This raises the question as to how many people can one lifeguard effectively protect, and in what amount of area. As Dr. Gayes offered, it is difficult to place a number on how many people can be on the beach, and a community that relies on the ocean and beach does not want to close its primary attraction. Nonetheless the sheer amount of people on the beach can create a hazard as lifeguards cannot possibly see everyone and emergency response vehicles have greater difficulty maneuvering to a call due to the congestion. It even gets difficult for parents to watch their children. The USLA (2012) reports the chances of drowning while on a beach protected by lifeguards is 1 in 18 million, but they do not mention the number of lifeguards needed per person. And as stated by Palmer (2005), 80% of drownings are partially due to a lack of supervision. Further research

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

into the amount of people that can be safely protected by lifeguards should be conducted as well as how the City will go about monitoring the congestion.

According to the CDC (2012), unintentional drowning is the second leading cause of death in children under the age of 14. The results indicate that one victim was in that age range and the incident occurred in 2009. The reports did not reveal if any of the victims were trying to perform a rescue of another. However, in the MBPD Beach Patrol witness statements, each drowning that occurred in 2011, someone attempted to rescue the victim. This corresponds to the Australian study about AVIR syndrome. The would-be rescuers put their selves in harm's way to help someone else (Franklin & Pearn, 2011). In some of the 2011 cases they knew the victim, in others they did not.

Lawrence (2010) states that African Americans are three times more likely to drown compared to whites. The results reveal that whites had over twice the number of fatal drownings than African Americans. However, when it came to near drownings, African Americans had more incidents than whites. This illustrates the need to educate everyone equally on ocean drowning prevention, and not just profile based on national statistics. A glaring result was based on gender. Males drowned six times more often than females, and suffered twice as many near drownings. It is difficult to assume why this is happening without verifiable data and research, but this is an area that definitely needs further examination.

Alcohol can play a role in drowning. As illustrated in Driscoll, Harrison, and Steenkamp's 2004 study, up to half of unintentional drownings are caused by alcohol. Unfortunately, any information pertaining to alcohol or drugs in the victim's system was unobtainable. While observing people's behavior on the beach, there were an exorbitant number of people drinking alcohol on the beach, even though it is a violation of City ordinance (City of

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Myrtle Beach, 2011). Even though there is no firm data regarding alcohol involvement with drowning in Myrtle Beach, Sergeant Cain of the Beach Patrol (personal communication, June 2, 2012) offered his experience. He stated in his opinion anyone that has a drowning or near drowning incident after 11:00 p.m. has been drinking. He believes that alcohol lessens their decision making abilities and that is why they go in the ocean when it is late. "People are having fun, partying. Then someone says 'let's go swim in the ocean.' They think it's a good idea, but it's not." He added that he has arrested people for swimming in the ocean at night and "usually they're drunk" (P. Cain, personal communication, June 2, 2012).

When looking at other public safety organizations, the results indicate that most participating departments are similar to the MBFD when it comes to public education. The USLA and SLS have provided excellent public education, but the fire service has not. Two-thirds of the departments provide ocean rescue, but less than half provide education relating to the ocean, and only a quarter provide it in the schools. With the scrutiny of public education it is easy to comprehend why extra curricula are not taught in school. But all of the participating agencies are on or near the ocean, and it seems that school children should be educated on the risks of the ocean.

One result that was in sharp contrast to what occurs in the City of Myrtle Beach is regarding the lifeguards' duties. The City of Myrtle Beach Lifeguard Agreement (2008) allows for the lifeguard services to rent various beach items. The lifeguard makes a commission, the lifeguard service makes money, and the City gets a percentage as well. Nearly 92% of the participating departments reported that the lifeguards do not do anything other than guard the beaches. Again, the USLA (2012) states the chances of drowning are 1 in 18 million when on a guarded beach. But if the lifeguard is not watching the water because someone wants to rent a

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

beach umbrella, rescue may come too late for a struggling victim. This practice is a revenue generator for the City, the lifeguard, and the service, however this must be changed. The USLA's statistics prove that the ocean must be guarded, and this cannot be done if other tasks become a priority over public safety.

The employees of the MBFD seem to have a strong interest in ocean safety and drowning prevention. Nearly 98% of the employees that participated in the survey believe ocean safety and drowning prevention should be included in the department's public education message. This is an overwhelming finding, one that illustrates the employee's recognition of educating the public about pertinent community risks. Nearly three-quarters of the employee participants stated they would be willing to teach ocean safety and drowning prevention. This again shows the dedication and buy-in of the employees to this important topic. The employees are willing to take on extra responsibilities. Adding ocean safety to the public education message will be an easy sell to the employees, and this is an opportunity the department should not pass up.

When comparing the responses from the residents and visitors, most of the results were pretty similar. One major difference was in reading material for ocean safety and drowning prevention. The visitors were more likely to definitely read a pamphlet or brochure than the residents. This makes the point that visitors will read information if it is provided, but most do not want to spend their vacation at a safety program on ocean drowning prevention. This also shows the importance of getting the information to the visitors, as most will read it.

Warning signs on the beach are the most popular way residents and visitors want to receive ocean safety information. Fletemeyer and Leatherman (2010) discuss that because rip currents do not always look like the classic version, signs can be misleading. The literature is opposite of what the citizens say they want. In spite of the literature, signs should be used if this

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

will get the message to both visitors and residents. Residents also stated that they believe PSAs on television and radio will be very effective. The visitors have less stock in the PSAs, but this is not surprising as they do not live in town year round. The residents will get more from PSAs since they are exposed to local media more than transient visitors.

When it comes to getting the local businesses involved there appears to be support. The businesses that were contacted seemed to embrace the idea, and willing to do whatever is needed. The one area of concern is with the hotels and resorts. The fact they are somewhat hesitant to advertise ocean safety may be from several different reasons. The simple involvement of more governmental regulations may be difficult for the hotels and resorts to embrace. They may be frustrated with government, and simply do not want to do anymore than is already required by law. The reasons why they are hesitant is another area that should be examined.

Dr. Slattery had a theory on why the resorts and hotels resist doing ocean safety. He stated when he contacted hotels and resorts within the past year about rip current safety, the results he received were similar to the results in this ARP. He spoke to several managers that stated they were afraid of litigation. They believed that recognizing there may be hazards in the ocean would open them up to civil liability if someone gets hurt. Basically, they would acknowledge the danger, inform their guests of the possible danger, but not do anything to stop them from entering the danger. The other aspect was of false advertising. They were afraid that they advertised the ocean and beach, but when the guest arrives they give them a list of dangers and how to avoid getting hurt or killed. In their opinions, giving out ocean safety and drowning prevention information would be opening the door to lawsuits. (M. P. Slattery, personal communication, June 20, 2012).

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## Recommendations

The purpose of this research was to create a program based on an ocean risk assessment that would lower the number of drowning and near drowning incidents. Based on the data collected and the literature, there are several items that can be done to achieve the goal of lowering the number of drowning and near drowning incidents.

Education must be provided to residents and visitors. An ocean safety and drowning prevention program should be created. The MBFD should train all employees in ocean safety and drowning prevention that are certified as state public educators. This should be in conjunction with South Carolina Sea Grant, the USLA, and NOAA. The program must include rip current awareness, wave and tidal information, and other ways to remain safe at the beach including such topics as lightning safety and the roles of lifeguards. The program will be administered at public education events, and offered to churches, civic organizations, and held monthly at the community room at fire station #6. This program should begin no later than March 31, 2013.

The ocean safety and drowning prevention program needs to be implemented in the schools. The newly created education program should be reviewed by the principal of Lakewood Elementary. The program can be tweaked to meet the needs of elementary school children. This will be a pilot program delivered by the MBFD public education officer along with the school's guidance counselors. The program should be ready for delivery by the second week of January, 2013.

Informational signs must be used to help educate the public. The signs must be specific to the dangers for various locations in the City. One simple, generic sign will not be effective. The signs should be placed at beach accesses and provide information about the possible dangers

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at that location. All of the signs should also provide rip current information. Information regarding specific dangers for specific beach locations within the City can be ascertained from research conducted by South Carolina Sea Grant and Coastal Carolina University. The signs should be in place by Easter weekend, 2013.

The final two educational recommendations are for the distribution of rip current information to visitors and the use of the internet. Rip current information should be given to hotel or resort guests when they check-in. Or, the hotel or resort may send the guest an electronic version of the document via e-mail. Finally, hotels and resorts should be encouraged to post rip current awareness on their websites, or a link to NOAA's website for rip currents. The official City of Myrtle Beach website will also provide rip current information, as well as other ocean safety information. These requirements should be in place by Easter weekend, 2013.

There are several engineering recommendations, the first being the use of geographic information systems (GIS). The City will map the drowning and near drowning incidents as they occur using the City's GIS program. This will help track patterns and possible problem areas. Another engineering recommendation will be the creation of an ocean drowning prevention PSA. Several will be recorded for the radio. Local television stations should be approached as well, for the use of PSAs on television.

The final two engineering recommendations are the collection of data and use of text alerts. A database for all ocean drowning and near drowning incidents should be started. This will be in conjunction with the MBPD Beach Patrol, and all drowning and near drowning incidents will be documented. As incidents occur, the information should be forwarded to NOAA in Wilmington to provide them with accurate data. Text alerts will be sent to anyone that signs up for them. The text alerts will include the rip current threat for the day from the NWS,

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water temperature, tide times, wind speed and direction, and wave heights. When conditions worsen, additional text alerts will provide any necessary warning information. All of the engineering recommendations should be in place by Easter weekend, 2013, except for the joint database that will begin January 1, 2013.

With regard to enforcement, a clear and definitive standard should be created to define when the beach should be closed because it is too dangerous. The standard should address the requirements for this, and allow the Beach Patrol supervisor to close certain sections of the beach as they are affected. This should also be done in conjunction with forecasting from the NWS and data from offshore buoys through NOAA and Coastal Carolina University.

Another key enforcement aspect is increasing the amount of "lifeguard only" stands on the beach. Currently every tenth stand must be "lifeguard only," the others can rent various beach amenities. These rentals generate revenue, and that should be taken into consideration. However, since this can redirect a lifeguard's attention away from watching the ocean, every fifth stand should be "lifeguard only." This change should be made in the City's lifeguard agreement and included in the 2013 Request for Proposals for Lifeguard Services.

With the MBPD Beach Patrol handling ocean rescue and the MBFD administration unwilling to enter into ocean rescue, there is not much that can be done in emergency response. The MBFD already provides advanced life support with aggressive drowning interventions and protocols. One way to assist the lifeguards and the Beach Patrol is to place paddleboards on the utility vehicles at fire stations that cover beachfront. The response assignment for an ocean drowning incident will add one extra unit, and the utility vehicle will respond on the beach. A trained employee can deploy the paddleboard while wearing a personal floatation device. This will limit the risk to the employee, avoid putting the employees on scene in a no-win situation by

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not being able to help when the citizens are expecting them to, and provide an action that may save someone from drowning. Training can be conducting by the MBPD Beach Patrol for selected employees, and done while on duty to avoid overtime costs. A response policy should be implemented by Easter weekend, 2013. The cost of outfitting the four stations that cover beachfront with a ten foot paddleboard is approximately $2,200.

By implementing these changes, ocean drowning and near drowning incidents can be reduced.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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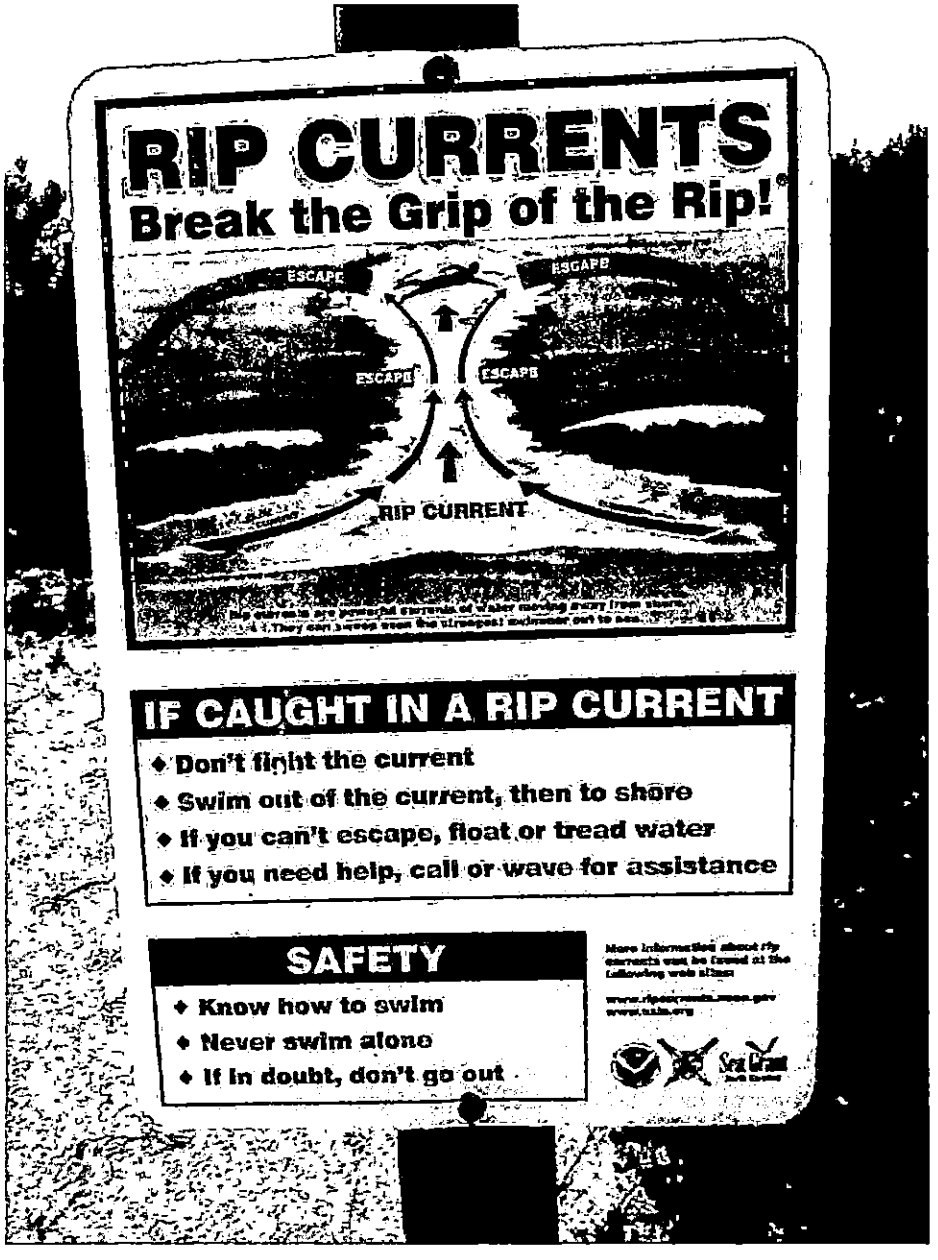
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Appendix A. The shoreface geology of Myrtle Beach between 32nd Ave South (red arrow) and 2nd Ave North (blue arrow). The lighter the shades, the harder the ocean floor (United States Geological Survey, 2009).



Appendix B. Standard rip current sign commonly used in Myrtle Beach. Photo taken at the Myrtle Beach State Park.






ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Appendix C. Curriculum Vitae and Interview with Paul T. Gayes, Ph.D., June 20, 2012 at Conway, South Carolina.

**Education**

- State University of New York at Stony Brook - Ph.D. 1987
- The Pennsylvania State University - M.S. 1983
- State University of New York at Stony Brook - B.S. 1981

**Professional Experience:**

- 1989 - Present: Director, Center for Marine and Wetland Studies
- 2000 - Present: Palmetto Professor of Marine Science and Geology
- 1987 - 2000: Asst./Assoc./Full Professor of Marine Science and Geology

**Research Interests:**

- Coastal evolution and geologic framework
- Beach processes and erosion
- Climate and relative sea change

**Publications:**

- Ojeda, G. Y., Gayes, P.T., Van Dolah, R.F. and Schwab, W.C., 2004, Spatially Quantitative Seafloor Habitat Mapping: Example From the Northern South Carolina Inner Continental Shelf: Estuarine Coastal and Shelf Science, v. 59, p. 399-416.
- Scott, D.B., Collins, E.C., Gayes, P.T. and Wright, E, 2003, Records of pre-historic hurricanes on the South Carolina coast based on micropaleontological and sedimentological evidence with comparison to other Atlantic coast records: Geological Society of America Bulletin, vol.115, no.9, pp.1027-1039, Sep 2003
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- Gayes, P.T., Schwab, W.C., Driscoll, N.W., Morton, R.A., Baldwin, W.E., Denny, J.J., Wright, E.E., Harris, M.S., Katuna, M.P. and Putney, T.R, 2003, Sediment Dispersal pathways and conceptual sediment budget for a sediment starved embayment: Long Bay: in Davis, R. Sallenger, A. and Howd, P., Coastal Sediments, American Society of Civil Engineers, St. Petersburg, FL
- Bernstein, D.F., Freeman, C., Forte, M.F., Gayes, P.T., Park, J and Mitasova, H., 2003, Survey Design Analysis for three-dimensional mapping of beach and nearshore morphology: in Davis, R. Sallenger, A. and Howd, P, Coastal Sediments, Amer. Soc. Of Civil Eng., St. Petersburg, FL
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What are ocean hazards off the coast of Myrtle Beach?

1. Definitely rip currents. They are not usually as fierce here compared to the Outer Banks of North Carolina, but they're the top risk.

2. The waves would be next. You can certainly get injured and increase the risk of drowning when hit by a plunging breaker. It seems most people tend to stay out of the water when the waves are too big, which is good. After years the beach gets eroded, the shoreline is usually steeper and the waves do not loose energy. This can create a problem

3. Debris would be third. There can be a lot of debris out in the ocean that can injure someone and contribute to drowning. After Hurricane Hugo there were pools, rebar, etc., and they're still out there. There is still debris from Hurricane Hazel. Most of the debris from the storms that missed us recently, Fran, Bonnie Floyd, Irene, it tended to stay north.

   Also the ocean floor make-up is dangerous. A lot of area is made up of a rocky substraight. The beach by Hurl Rocks Park is all rock, but it does get covered up and uncovered over time. These rocks can get loose and really do some damage to someone.

4. Marine animals can cause panic and injury and lead to drowning. There have been several bites this month.

5. Storm water runoff pipes that lead into the ocean and can cause injury and lead to secondary drowning.

6. Oyster beds and barnacles on objects in ocean can cause injury.

7. Marsh can be a problem. People venture into marsh which can be like quicksand. If it's low tide and they get stuck, when the tide comes in they could drown because marsh mud is difficult to get free of.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Appendix D. Curriculum Vitae and Interview with Michael P. Slattery, Ph. D., June 20, 2012 at Conway, South Carolina.

**Education**

- Doctor of Philosophy, Marine and Atmospheric Science, Stony Brook University, Stony Brook, New York, *December 2010*
- Master of Science, Earth Science, University of North Carolina Wilmington,
- Wilmington, NC, *2006*
- Bachelor of Science, Marine Science, Coastal Carolina University, Conway, SC, *2002*

**Professional Experience**

- Coastal Process Specialist-South Carolina, SC Sea Grant/Coastal Carolina University, Conway, SC 2011-present

**Research Interests**

- Coastal sediment dynamics
- Coastal wave dynamics
- Barrier Island migration/development
- Beach morphology and Evolution
- Coastal Marine Issues
- Environmental and Marine Education/outreach

**Field and Lad Experience**

- Coastal Monitoring-Rip currents, Stony Brook University, Stony Brook, NY 2005-2010
- Coastal Monitoring-Beach evolution, Stony Brook University, Stony Brook, NY 2005-2010
- Estuary Management, New York State Department of Environmental Conservation, East Setauket,
- Ground Water Monitoring, Guam, joint Stony Brook University and Woods Hole Oceanographic Institute, *November 2008*
- Georgica Pond Breaching, joint Stony Brook University and US Army Corps of Engineers, Stony Brook University, Stony Brook, NY, *April 2008*
- Identifying the Nature of Inner Shelf Sediments, Long Bay, NC *2003-2005*
- Barrier Island Development, North Island, Georgetown, SC

**Publications**

- Bokuniewicz, H.J., N. C. Kraus, S. Munger, M. Slattery and R. Coffey. 2011. Monitoring Incipient Breaching at an Artificial Inlet: Georgica Pond, New York. Journal of Coastal Research, Special Issue 59: *111-117*
- Slattery, M.P., H.J. Bokuniewicz, P.T. Gayes. 2011. Flash rip currents along the south shore of Long Island, NY. In S. Leatherman, J. Fletemeyer, *Rip Currents: Beach Safety Physical Oceanography and Wave Modeling.* Boca Raton, FL. CRC Press: 31-43
- Buonaiuto, F.S., M.P. Slattery, H.J. Bokuniewicz. 2011. Wave Modeling of Long Island Coastal Waters. Journal of Coastal Research, 27(3): 470-477.
- Slattery, M.P. 2010. Assessing the nature of rip currents along the south shore of Long Island, NY: Dominant rip type and insights into possible forcing mechanisms. Ph.D. Dissertation. Stony Brook University.
- Slattery, M.P. 2006. The Influence of the Cape Fear River on Characteristics of Shelf

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Sediments in Long Bay, NC. M.S. Thesis. University of North Carolina Wilmington.

What are ocean hazards off the coast of Myrtle Beach?

1. Far and away the biggest risk is from the rip currents. They are unpredictable and most people cannot recognize them. They can pop up quickly, and go from nothing, something that may tickle your feet, to something that can pull you out quickly.
2. Waves would be number 2. Even though the curvature of the state limits the size of the waves, there are still pretty big waves out there. Asymmetry causes the long shore current which is half way between the breakers and the beach. They are quite strong in Myrtle Beach and can displace you, but doesn't take you out. It can injure and cause secondary submersion.
3. Debris is a problem. People throw things off of the piers which can cause injury. Dr. Gayes has pictures of all kinds of different debris in the ocean. He also has pictures of rocks floating up on the beach. These rocks can seriously hurt someone and lead to submersion. There are ledges in downtown Myrtle Beach that pieces can break off of, and pure hard rocks on south end.
4. Bacteria can be a problem, especially around the swashes, but that's not something that will cause you to drown.
5. Marine animal attacks can cause submersion. There was a shark attack a few weeks ago (early June) and a few other bites. Probably just blue fish, but it can freak people out and cause a panic. You can't forget allergic reactions from bites and stings as well.
6. Alcohol is a hazard. People lose their ability to make good decisions. In all probability most drownings at night all alcohol related.
7. People not watching their children. The long shore current takes the child down the shoreline, and the parents forget where they are. There are a lot of lost children every day on the beach.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Appendix E. Curriculum Vitae and Interview with Steven R. Pfaff, July 17, 2012 via telephone call from Myrtle Beach to Wilmington, North Carolina.

**Education**
Kean University - Union, NJ 1991-1994, B.S. Meteorology, Minor Mathematics
Ocean County College – Toms River, NJ 1989-1991, Associates Degree Liberal Arts
**Professional Experience**

- 2008-Present Warning Coordination Meteorologist - National Weather Service Wilmington, NC
- 1998-2008 Senior Forecaster - National Weather Service Wilmington, NC
- 1996-1998 Journeyman Forecaster - National Weather Service Corpus Christi, TX
- 1994-1996 Meteorologist Intern - National Weather Service Corpus Christi, TX
- 1993-1994 Meteorologist - WNBC-TV New York, NY
- 1992-1993 Asst. Environmental Scientist - GPU Nuclear, Forked River, NJ

**Current Research**

- *Tidal influences of rip current activity in the WFO Wilmington, NC County Warning Area* 2010 to present, in an effort to improve the rip current prediction scheme.

**Publications**

- Carolinas Coast Marine Weather Portal, COOS and NOAA's NWS Working Together for the Marine Community. *Science and Management*, November 2007
- Supporting Coastal Managers Through the IOOS. *Proceedings Coastal Zones Conference* Portland, OR July 2007
- Overview and Model Analysis of the 25-26 January 2004 Carolina Coastal Plain Ice Storm. *Eastern Region Technical Attachment*, June 2007.
- A Mesoscale and Storm-Scale Analysis of the Rapid Mini-Supercell Formation and Tornadogenesis Associated with a Remnant Tropical System. *AMS 23rd Conference on Severe Local Storms*, November 2006.
- A WSR-88D Investigation of a Non-Characteristic Severe Thunderstorm Over Southeast North Carolina. *Eastern Region Technical Attachment*, September 2002.
- NOAA's Rip Current Program: Forecasting and Raising Public Awareness About the Drowning Machine. *NOAA Magazine*, August 2002
- The Dominant Wave Period: What the Forecaster May Be Missing? *Abstract: WFO Morehead City Marine and Coastal Seminar*, May 2002
- El Nino Hurricane Climatology of the Texas Coast. *Southern Region Technical Attachment*, August 1997.
- Model Performance of a South Texas Heavy Rain Event. *Southern Region Technical Attachment*, October 1996.
- QPF Biases: Which Model Performed Best During a South Texas Heavy Rain Event? *Proceedings Fifth National Heavy Precipitation Workshop*, September 1996.
- Emergency Response: A Meteorologist's Perspective. *American Nuclear Society Fourth Topical on Emergency Preparedness*, April 1994.

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What are ocean hazards off the coast of Myrtle Beach

1. Rip currents are the worst. Due to the asymmetry of the coastline rips aren't as bad as the Outer Banks of North Carolina or even the Wilmington area. But this doesn't mean they are not a risk. When there are south winds blowing from Frying Pan Shoals it will create high, dangerous rip currents for Myrtle Beach. Visitors don't understand why it may be sunny and nice outside, but if there is a bad storm in the ocean it will make for unsafe swimming due to rips.

2. Breaking waves and plunging breakers that break right near the shore can cause injury and drowning. People have been hit by waves and knocked to the ground and drown. Others have even been paralyzed by waves.

3. Any type of debris can cause problems. A swimmer could get tangled and then be unable to stay afloat. Anything that is in the ocean is a risk.

4. Piers can cause trauma by striking the pier's structural components. People that are swimming by the pier are where fish are feeding and they can end up getting a marine bite. There are also rips around piers and debris from the people on the pier.

5. Jellyfish and man o-wars can be problematic. After several days of a heavy onshore follow, a man o-war problem will be created.

6. Lightning is a risk because people won't leave when they hear thunder. If you can hear thunder then lightning is close. People run if you yell shark, but no one runs if you yell lightning. In Sunset Beach, North Carolina a man went outside after a storm and was hit by lightning. Lightning is five times hotter than the sun, so it literally blew him up. Waterspouts are a risk too, but pretty low.

7. Tsunami is a low probability, but a very high impact. If a tsunami came from Puerto Rico or the Azores, it would cause problems. A small 2 foot wave would create a large amount of inflow.

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Appendix F. Significant near drowning incidents in the City of Myrtle Beach. 2005 to 2009, and 2011 as gathered from MBFD Fire Programs and EMS Charts.

| Date | Time | Age | Race | Gender | Location |
|---|---|---|---|---|---|
| Saturday, May 28, 2005 | 18:35 | 54 | W | F | State Park |
| Saturday, June 11, 2005 | 10:04 | 18 | H | M | 27th Ave South |
| Saturday, June 11, 2005 | 12:32 | 36 | W | F | 22nd Ave North |
| Sunday, June 12, 2005 | 13:43 | 42 | W | M | 69th Ave North |
| Sunday, June 19, 2005 | 11:34 | 17 | B | M | 15th Ave South |
| Monday, June 20, 2005 | 14:23 | 14 | B | M | 32nd Ave South, |
| Monday, June 20, 2005 | 14:23 | 15 | B | M | 32nd Ave South |
| Monday, June 20, 2005 | 14:23 | 15 | B | M | 32nd Ave South |
| Sunday, June 26, 2005 | 19:26 | 33 | B | M | State Park |
| Tuesday, July 12, 2005 | 14:29 | 57 | W | M | 16th Ave South |
| Friday, July 22, 2005 | 11:25 | 15 | B | M | 3rd Ave South |
| Saturday, July 23, 2005 | 16:21 | 58 | W | M | 23rd Ave South |
| Saturday, July 23, 2005 | 18:02 | 30 | B | M | 17th Ave South |
| Monday, July 25, 2005 | 16:21 | 11 | B | M | 9th Ave North |
| Friday, August 12, 2005 | 17:53 | 12 | B | M | 11th Ave South |
| Friday, August 12, 2005 | 17:53 | 14 | B | F | 11th Ave South |
| Friday, August 26, 2005 | 13:02 | 17 | W | M | 26th Ave North |
| Saturday, August 27, 2005 | 13:26 | 26 | B | F | 18th Ave South |
| Monday, September 12, 2005 | 12:05 | 75 | W | M | 24th Ave South |
| Tuesday, October 04, 2005 | 15:22 | 61 | W | M | 26th Ave North |
| | | | | | |
| Sunday, April 23, 2006 | 13:58 | 19 | B | M | 21st Ave North |
| Thursday, June 15, 2006 | 11:13 | 20 | H | M | 20th Ave North |
| Saturday, September 02, 2006 | 11:49 | 6 | B | M | 26th Ave North |
| Friday, July 14, 2006 | 17:27 | 20 | W | M | 76th Ave North |
| Saturday, July 29, 2006 | 18:45 | 30 | B | M | 9th Ave North |
| Saturday, June 17, 2006 | 20:48 | 14 | B | M | 9th Ave North |
| Saturday, September 02, 2006 | 19:27 | 8 | B | F | 26th Ave North |
| | | | | | |
| Saturday, June 02, 2007 | 16:32 | 31 | W | M | 4th Ave South |
| Wednesday, July 04, 2007 | 17:49 | 60 | W | M | 68th Ave North |
| Saturday, July 14, 2007 | 1:02 | 35 | B | F | 12th Ave South |
| Friday, July 27, 2007 | 10:05 | 12 | B | M | 16th Ave South |
| Sunday, August 12, 2007 | 15:25 | 18 | B | M | 7th Ave North |
| Friday, June 22, 1900 | 17:49 | 16 | B | M | 15th Ave South |
| Sunday, August 19, 2007 | 18:01 | 37 | W | M | 28th Ave South |

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| | | | | | |
|---|---|---|---|---|---|
| Sunday, August 19, 2007 | 18:14 | 20 | B | F | 9th Ave North |
| Sunday, August 19, 2007 | 18:14 | 20 | W | F | 9th Ave North |
| | | | | | |
| Thursday, June 12, 2008 | 20:04 | 30 | B | F | 28th Ave South |
| Friday, July 11, 2008 | 14:03 | 22 | W | F | 11th Ave South |
| Wednesday, August 13, 2008 | 18:48 | 45 | W | M | 12th Ave South |
| Wednesday, August 13, 2008 | 18:48 | 17 | W | M | 12th Ave South |
| Wednesday, August 20, 2008 | 18:26 | 14 | B | M | 18th Ave North |
| Wednesday, August 20, 2008 | 18:26 | 37 | W | M | 18th Ave North |
| Saturday, September 06, 2008 | 19:03 | 24 | B | M | 30th Ave North |
| Saturday, September 13, 2008 | 13:46 | 34 | B | F | 72nd Ave North |
| Sunday, September 14, 2008 | 11:19 | 50 | W | F | 30th Ave North |
| Tuesday, October 14, 2008 | 13:08 | 50 | W | M | 15th Ave North |
| | | | | | |
| Friday, July 10, 2009 | 18:31 | 15 | B | M | 7th Ave North |
| Friday, July 17, 2009 | 12:21 | 25 | W | M | 5th Ave North |
| Saturday, July 18, 2009 | 12:23 | 24 | B | M | 4th Ave South |
| Saturday, July 18, 2009 | 12:23 | 29 | B | M | 4th Ave South |
| Friday, August 07, 2009 | 15:45 | 41 | W | M | 20th Ave North |
| Sunday, August 16, 2009 | 14:19 | 70 | B | M | 18th Ave North |
| Thursday, September 10, 2009 | 13:04 | 52 | W | F | 18th Ave North |
| Saturday, October 24, 2009 | 16:13 | 22 | B | M | 6th Ave North |
| Saturday, October 24, 2009 | 16:13 | 28 | B | M | 6th Ave North |
| Saturday, May 23, 2009 | 14:01 | 33 | B | F | 70th Ave North |
| | | | | | |
| Friday, May 27, 2011 | 12:32 | 22 | B | F | 17th Ave North |
| Friday, September 02, 2011 | 15:41 | 64 | W | M | 16th Ave South |
| Saturday, June 11, 2011 | 16:10 | 28 | B | M | 77th Ave North |
| Saturday, August 13, 2011 | 19:21 | 60 | W | M | 74th Ave North |
| Friday, June 03, 2011 | 15:05 | 49 | W | M | 1000 Beach Club Dr. |
| Friday, June 03, 2011 | 15:05 | 45 | W | F | 1000 Beach Club Dr. |
| Monday, July 04, 2011 | 17:36 | 21 | W | M | 5th Ave North |
| Saturday, July 16, 2011 | 14:55 | 21 | W | M | 20th Ave North |
| Monday, July 04, 2011 | 17:30 | 34 | B | M | 5th Ave North |
| Wednesday, August 03, 2011 | 17:42 | 44 | B | M | 77th Ave North |

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Appendix G. Drowning statistics from the Horry County Coroner 2007 to 2011 within the City of Myrtle Beach.

| Date | Time | Age | Race | Sex | Tide | Location |
|---|---|---|---|---|---|---|
| Wednesday, July 04, 2007 | 12:52 | 33 | His | M | High | 12th Ave South |
| Saturday, July 14, 2007 | 01:49 | 34 | B | M | Low | 12th Ave South |
| Sunday, August 12, 2007 | 15:30 | 42 | B | M | Low | 5th Ave North |
| Friday, August 24, 2007 | 08:15 | 44 | W | F | Low | 26th Ave North |
| Sunday, August 19, 2007 | 03:00 | 41 | W | M | B | Location Unknown, Myrtle Beach |
| Wednesday, July 16, 2008 | Unk | 70 | W | M | Unk | 13th Ave North |
| Thursday, August 28, 2008 | Unk | 71 | W | M | Unk | Location Unknown, Myrtle Beach |
| Wednesday, September 03, 2008 | Unk | 50 | W | M | Unk | Location Unknown, Myrtle Beach |
| Monday, September 15, 2008 | Unk | 71 | W | M | Unk | 8th Ave North |
| Sunday, May 24, 2009 | 13:00 | 16 | B | M | Low | 13th Ave North |
| Saturday, May 23, 2009 | 14:41 | 31 | W | F | Low | 68th Ave North |
| Tuesday, July 28, 2009 | 20:18 | 44 | W | M | Low | 27th Ave North |
| Friday, July 31, 2009 | 16:29 | 50 | W | M | Low | 69th Ave North |
| Wednesday, July 22, 2009 | 09:30 | 12 | B | F | B | 17th Ave North |
| Saturday, October 03, 2009 | 15:35 | 53 | B | M | Low | 32nd Ave South |
| Monday, June 14, 2010 | 18:47 | 87 | W | M | B | 48th Ave North |
| Monday, September 13, 2010 | 11:38 | 37 | W | M | High | Location Unknown, Myrtle Beach |
| Wednesday, April 27, 2011 | 13:00 | 18 | W | M | B | 24th Ave North |
| Saturday, June 18, 2011 | 18:45 | 25 | B | M | Low | 25th Ave South |
| Thursday, July 07, 2011 | 07:15 | 41 | W | M | Low | Location Unknown, Myrtle Beach |
| Thursday, July 07, 2011 | 18:45 | 42 | W | M | Low | 71st Ave North |
| Thursday, December 15, 2011 | 05:00 | 55 | W | M | Low | 7th Ave North |

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Appendix H. Confirmed rip current drownings in North and South Carolina according to NOAA.

| Date | Location | Gender | Age |
|---|---|---|---|
| **Thursday, July 19, 2001** | **Myrtle Beach** | **M** | **64** |
| **Thursday, July 19, 2001** | **Myrtle Beach** | **F** | **33** |
| **Sunday, July 29, 2001** | **Myrtle Beach** | **M** | **20** |
| **Thursday, June 24, 2004** | **Myrtle Beach** | **UNK** | **UNK** |
| **Thursday, June 24, 2004** | **Myrtle Beach** | **UNK** | **UNK** |
| **Sunday, June 26, 2005** | **Myrtle Beach** | **M** | **30** |
| **Sunday, June 26, 2005** | **Myrtle Beach** | **M** | **33** |
| **Saturday, July 23, 2005** | **Myrtle Beach** | **M** | **11** |
| **Saturday, July 23, 2005** | **Myrtle Beach** | **M** | **35** |
| **Saturday, April 15, 2006** | **Myrtle Beach** | **M** | **14** |
| **Wednesday, July 04, 2007** | **Myrtle Beach** | **M** | **33** |
| **Saturday, July 14, 2007** | **Myrtle Beach** | **M** | **34** |
| **Sunday, August 19, 2007** | **Myrtle Beach** | **F** | **41** |
| **Saturday, May 23, 2009** | **Myrtle Beach** | **F** | **31** |
| **Friday, July 31, 2009** | **Myrtle Beach** | **M** | **50** |
| **Wednesday, April 27, 2011** | **Myrtle Beach** | **M** | **18** |
| **Thursday, July 07, 2011** | **Myrtle Beach** | **M** | **41** |
| **Thursday, July 07, 2011** | **Myrtle Beach** | **M** | **42** |
| Monday, July 17, 2000 | Bogue Banks | F | 66 |
| Monday, July 17, 2000 | Emerald Isle | M | 46 |
| Monday, July 17, 2000 | Emerald Isle | M | 65 |
| Tuesday, July 18, 2000 | North Topsail Beach | F | UNK |
| Saturday, June 23, 2001 | North Myrtle Beach | UNK | UNK |
| Thursday, May 30, 2002 | Wrightsville Beach | F | 22 |
| Friday, May 31, 2002 | Atlantic Beach | UNK | UNK |
| Saturday, June 22, 2002 | Rodanthe | UNK | UNK |
| Tuesday, July 23, 2002 | Atlantic Beach | UNK | UNK |
| Monday, August 05, 2002 | Surfside Beach | M | 53 |
| Saturday, September 28, 2002 | North end of Wrightsville Beach | M | 21 |
| Saturday, September 28, 2002 | North end of Wrightsville Beach | F | 10 |
| Saturday, October 05, 2002 | Carolina Beach | M | 50 |
| Monday, June 09, 2003 | Oak Island (Yaupon) | F | 38 |
| Saturday, June 14, 2003 | Oak Island | M | UNK |
| Sunday, July 27, 2003 | Ocracoke | M | 55 |
| Thursday, September 04, 2003 | Frisco | M | 38 |
| Saturday, August 02, 2003 | Emerald Island | F | 39 |
| Thursday, September 04, 2003 | Cape Hatteras | UNK | UNK |
| Sunday, July 18, 2004 | Atlantic Beach | UNK | UNK |
| Wednesday, July 28, 2004 | Ocracoke | UNK | UNK |
| Thursday, August 05, 2004 | Nags Head | UNK | UNK |
| Summer '04 | Corolla | UNK | UNK |
| Summer '04 | Whalehead Beach | UNK | UNK |
| Sunday, September 12, 2004 | Folly Beach | UNK | 54 |
| Thursday, September 23, 2004 | Whalehead Beach | M | 35 |
| Saturday, September 25, 2004 | Murrells Inlet | UNK | UNK |

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| | | | |
|---|---|---|---|
| Saturday, September 25, 2004 | Garden City Beach | F | 45 |
| Friday, May 27, 2005 | Kill Devil Hills | M | UNK |
| Wednesday, June 22, 2005 | Nags Head | M | UNK |
| Wednesday, July 27, 2005 | Carolina Beach | F | UNK |
| Tuesday, September 20, 2005 | North Myrtle Beach Apache Pier | M | 53 |
| Sunday, June 11, 2006 | Pawleys Island SC | M | 9 |
| Sunday, June 25, 2006 | Sullivans Island SC | F | 55 |
| Monday, July 24, 2006 | Cape Lookout NS | M | 33 |
| Friday, September 22, 2006 | Rodanthe, NC | F | 32 |
| Saturday, May 05, 2007 | Atlantic Beach | M | 36 |
| Saturday, May 12, 2007 | North Topsail Beach | M | 22 |
| Monday, May 28, 2007 | Pawleys Island SC | M | 18 |
| Saturday, June 16, 2007 | Carolina Beach (north end) | F | 23 |
| Sunday, July 01, 2007 | Hatteras Village | M | 49 |
| Wednesday, July 04, 2007 | Ocracoke Island Beach | M | 42 |
| Saturday, September 22, 2007 | Pawleys Island SC | M | 35 |
| Sunday, August 31, 2008 | Fort Fisher NC | M | 46 |
| Saturday, June 06, 2009 | Kure Beach NC | F | 45 |
| Saturday, June 27, 2009 | Carolina Beach NC | M | 41 |
| Thursday, July 09, 2009 | Sullivans Island SC | F | 28 |
| Thursday, July 23, 2009 | Pawleys Island SC | M | 35 |
| Thursday, July 23, 2009 | Garden City Beach | M | 13 |
| Friday, July 24, 2009 | Hatteras Village | M | 43 |
| Saturday, August 08, 2009 | Fort Fisher NC | M | 10 |
| Monday, August 17, 2009 | Ocracoke Island Beach | M | 74 |
| Saturday, September 04, 2010 | Hunting Island SC | M | 31 |
| Friday, September 18, 2009 | Hatteras Island Beach | M | 50 |
| Monday, May 31, 2010 | Hunting Island SC | M | 9 |
| Saturday, July 03, 2010 | Edisto Beach SC | M | 19 |
| Saturday, August 07, 2010 | Ocracoke | M | 51 |
| Tuesday, August 24, 2010 | Emerald Isle | M | 48 |
| Thursday, June 30, 2011 | Waves NC (near Rodanthe) | M | 43 |
| Thursday, June 30, 2011 | Salter Path NC | M | 41 |
| Friday, July 01, 2011 | Atlantic Beach | M | 68 |
| Monday, June 04, 2012 | Bald Head Island | M | 43 |
| Tuesday, June 12, 2012 | Nags Head | M | 49 |

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Appendix I: Results from the "Executive Fire Officer Survey for Fire Departments" and a listing of department's receiving the survey. Results shown are raw data.

Web address: https://www.surveymonkey.com/s/KQFWR2B

1. Does your fire department handle ocean rescue response?
   Yes-31 No-20

2. Do your area beach lifeguards have other non-protective duties while working, such as renting beach chairs, umbrellas, boogie boards, etc?
   Yes-4 No-43

3. Which best describes your area beach lifeguard's employment status?
   Employed by the fire department-23
   Employed by another department within the municipality/agency, i.e. Police, Emergency Preparedness, etc.-8
   Completely separate department within the municipality/agency-7
   Contracted from a private, outside agency-5

4. Does your department include ocean safety within public education?
   Yes-24 No-25

5. Is ocean safety taught to local students in school?
   Yes-12 No-37

6. How does your organization get ocean safety messages to visitors?
   Signs and billboards- 9
   Text messages-0
   Pamphlets and handouts-13
   PSAs on TV and radio-4
   Other (please specify)- 19

7. Has your organization received support from local businesses for ocean safety? If yes, please describe.
   Yes-9 No-38

8. What programs implemented by your organization have been effective in reducing ocean drowning?
   34 responses, 17 skipped the question.

9. Please list any local ordinances that have improved ocean safety.
   29 responses, 22 skipped the question.

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**Fire departments that received the survey:**

**South Carolina Fire Departments**

City of Charleston
City of Folly Beach
City of Hardeeville
City of North Charleston
Georgetown County
Murrells Inlet-Garden City Fire District
Town of Beaufort
Town of Burton
Town of Mount Pleasant
City of Conway
City of Georgetown
City of North Myrtle Beach
Horry County
Midway Fire District
St. John's Fire Department
Town of Bluffton
Town of Isle of Palms
Town of Surfside Beach

**North Carolina Fire Departments**

City of Atlantic Beach
City of New Bern
Town of Duck
Town of Kill Devil Hills
Town of Surf City
City of Jacksonville
City of Wilmington
Town of Nags Head
Town for Sunset Beach
Dare County

**Georgia and Virginia Fire Departments**

City of Pooler, GA
City of Savannah, GA
City of Virginia Beach, VA
City of Hampton, VA
City of Portsmouth, VA
City of Brunswick, GA
City of Norfolk, VA
City of Newport News, VA
City of Chesapeake, VA

**Florida Fire Departments**

City of Port Orange
City of Marathon
City of Palm Coast
City of Holly Hill
City of New Smyrna Beach
City of Titusville
City of Cocoa Beach
City of Melbourne
City of Palm Bay
City of Boynton Beach
City of Deerfield Beach
City of Fort Lauderdale
City of Key West
City of Fort Myers
City of Bradenton
City of Clearwater
City of Tampa
City of Panama
Town of Palm Beach
Indian River County
St. Lucie County
Flagler County
Charlotte County
Volusia County
City of Jacksonville
City of Flagler Beach
City of Ormond Beach
City of Daytona Beach
City of Edgewater
City of Rockledge
City of Satellite Beach
City of Cape Coral
City of Fort Walton Beach
City of Delray Beach
City of Pompano Beach
City of Hollywood
City of Long Boat Key
City of Venice
City of Pinellas Park
City of Dunedin
City of Tarpon Springs
City of Panama Beach
Town of Melbourne Beach
Brevard County
Martin County
St. John's County
Palm Beach County
Village of North Palm Beach

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Miami-Dade Fire Dept.
North Naples Fire District
Sanibel Fire District

**Mississippi, Alabama, and Louisiana Fire Departments**

City of Gulfport, MS
City of Biloxi, MS
City of Daphne, AL
City of Mobile, AL
City of New Orleans, LA
St. Tammany Parish, LA
City of Pascagoula, MS
City of Bay St. Louis, MS
City of Gulf Shores, AL
City of Slidell, LA
City of Lake Charles, LA

**Texas Fire Departments**

City of Port Author
City of Galveston
City of Lavaca
City of Beaumont
City of Houston
City of Corpus Christi

**California Fire Departments**

City of San Diego
City of Oceanside
City of Long Beach
City of Santa Barbara
Los Angeles County
City of Encinitas
City of Laguna Beach
City of Los Angeles
City of Redondo Beach

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Appendix J: Results from the "Executive Fire Officer Survey for MBFD Operations Personnel." Results shown are raw data. Web address: https://www.surveymonkey.com/s/MBLPJV2

1. Have you responded to an ocean drowning or near drowning that resulted in the patient having at least an altered level of consciousness?

Yes-69 No-17

2. Have you responded to an ocean drowning where the victim was still in the ocean prior to your arrival?

Yes-51 No-35

3. Has anyone ever asked you about ocean safety while on duty?

Yes-46 No-40

4. Do you believe ocean safety and drowning prevention should be included in the department's public education message?

Yes-84 No-2

5. Would you be interested in teaching ocean safety and drowning prevention?

Yes-64 No-22

6. Would you participate in a fire department ocean rescue team?

Yes-79 No-7

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Appendix K: Results from the "Executive Fire Officer Survey for Visitors." Results shown are raw data.

1. In what state do you live?
SC-28, VA-17, IN-15, NC-11, PA-9, TN-7, KY-7, WV-4, TX-3, OH-3, MI-3, CA-3, IL-3, CN-2, AL-2, CO-2, NY-1, NJ-1, FL-2, IA-1, OR-1

2. How would you describe your swimming abilities?
Excellent swimmer- 26 Average swimmer – 80 Below average swimmer-15 Cannot swim -4

3. While on the beach, do you stay?
Near a lifeguard-36 Away from a lifeguard-3 Does not matter-86

4. Do you pay attention to the lifeguard's warning flags for ocean conditions?
Yes- 113 No- 12

5. Have you ever been informed about ocean safety and rip currents?
Yes- 79 No-46

6. How do you view the ocean?
Very Dangerous-44 Somewhat dangerous-74 Not dangerous-7

7. If an ocean drowning prevention pamphlet was given to you during check-in, how likely would you be to read it?
I would definitely read it-67 I may read it-54 I would not read it-4

8. How effective would public service announcements on TV and/or radio be to you regarding ocean drowning prevention?
Very effective-52 Somewhat effective-66 Not effective at all-7

9. If your resort or realtor hosted a short ocean safety program, how likely would you be to attend?
Definitely attend-20 May attend-65 Would not attend-40

10. As a visitor, how would you prefer to receive information on ways to reduce ocean drowning? Check all that apply.
Attending informational programs-9
Radio and TV messages-62
Pamphlets and handouts-82
Drowning prevention websites-23
Warning signs on the beach-104
Text alerts-40

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Appendix L: Results from the "Executive Fire Officer Survey for Residents." Results shown are raw data.

1. How would you describe your swimming abilities?
Excellent swimmer-43 Average swimmer-79 Below average swimmer-9 Cannot swim-5

2. While at the beach, do you stay?
Near a lifeguard-27 Away from a lifeguard-8 Does not matter-102

3. Do you pay attention to the lifeguard's warning flags for ocean conditions?
Yes-115 No-21

4. Have you ever been informed about ocean safety and rip currents?
Yes-109 No-28

5. How do you view the ocean?
Very Dangerous-37 Somewhat dangerous-91 Not dangerous-9

6. If an ocean drowning prevention pamphlet was made available to you, how likely would you be to read it?
I would definitely read it-56 I may read it-66 I would not read it-15

7. How effective would public service announcements on TV and/or radio be to you regarding ocean drowning prevention?
Very effective-53 Somewhat effective-70 Not effective at all-14

8. Would you attend a short program on ocean safety if provided by a local agency?
Yes-48 No-46 Maybe-43

9. Do you think ocean safety should be taught in local schools?
Yes -118 No-19

10. As a resident, how would you prefer to receive information on ways to reduce ocean drowning? Check all that apply.
Attending informational programs-29
Radio and TV messages-105
Pamphlets and handouts-65
Drowning prevention websites-55
Warning signs on the beach-108
Text alerts-47

# United States Lifesaving Association

PO Box 366 • Huntington Beach, California 92648 • Tel: 866-FOR-USLA (866-367-8752)

www.usla.org

B. Chris Brewster
*President*

Kevin Sweat
*Vice-President*

Nikki Bowie
*Secretary*

Rob Williams
*Treasurer*

Chris Graham
*Executive Delegate*

Peter Davis
*Liaison Officer*

Tim Gallagher
*Advisor*

Dr. Peter Wernicki
*Medical Advisor*

John "Chip" More
*Legal Advisor*

March 26, 2008

George Lack
Lack's Beach Service
P.O. Box 2365
Myrtle Beach, SC 29578-2365

Dear Mr. Lack,

This is to notify you that in accordance with the rules of the United States Lifesaving Association Lifeguard Agency Certification Program, as specified in the *Guidelines for Open Water Lifeguard Agency Certification*, certification of Lack's Beach Service has been revoked effective March 19, 2008.

The reasons for initial suspension were previously detailed in a letter to you dated October 24, 2007. All materials provided by you and your attorney were considered in the revocation decision. As previously indicated, Lack's must immediately cease using any and all USLA emblems and/or trademarks and must remove same from all buildings, structures and vehicles.

No further appeal of this decision is available under the program rules. If your organization wishes to reapply for certification, you may do so at any time. Favorable consideration of your application would, of course, be dependent upon meeting all requirements of the program in place at the time of application.

Sincerely,

Eric Bauer, Chair
National Certification Committee

cc: USLA Executive Committee

DOCSNY-300261v01



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**2018 -2025 SEASONS WATER SAFETY FRANCHISE**

WHEREAS, the City of Myrtle Beach requires the protection of its tourist and residential population through an efficient and effective Water Safety Program; and

WHEREAS, the successful implementation of a Water Safety Program is imperative along the City's twelve miles of oceanfront; and

WHEREAS, these goals can be optimally achieved through the cooperation of the City of Myrtle Beach and the Concessionaires of beach equipment; and

WHEREAS, the City Council by Ordinance duly adopted as shown by second reading has authorized the City Manager to execute franchises with the concessionaires of the beach service in accordance with the terms of this franchise:

NOW, THEREFORE, PURSUANT TO THE FRANCHISE POWER OF THE CITY OF MYRTLE BEACH (City or Franchisor) in consideration of the foregoing premises and the mutual promises of each to the other made agree as follows:

The City grants a seven (7) year franchise to operate a water safety service and beach concession on the public beach of the City in Zones 1 through 89 as described in Attachment "A" for a period time beginning April 15, 2018, and ending September 30, 2024, subject to the following terms and conditions:

**SECTION 1. - PERIOD OF OPERATION:**
Franchisee shall conduct water safety each year during the period beginning April 15 and ending September 30. Franchisee shall ensure minimum lifeguard staffing in each zone, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Sunday, according to the following schedule:

| | |
|---|---|
| April 15 through 3rd week in May: | 20% of full complement |
| 4th week in May through June 1: | 50% of full complement |
| June 2 through 2nd week of August: | Full complement |
| 3RD week of August: | 75% of full complement |
| 4th week of August through Labor Day: | 50% of full complement |
| Labor Day through September 30: | 20% of full complement |

Franchisee may rent beach equipment outside said period of operation, provided however, that lifeguards must be on duty at all times that beach equipment is on the beach. The Franchisee shall provide lifeguards as deemed necessary in consultation with the City.

From June 1 to Labor day of each year, Franchisee shall, in addition, patrol the

beach between the hours of 5:00 p.m. and 7:00 p.m. The number of lifeguard personnel shall depend on the number of zones under Franchisee's control.

In addition to lifeguards, the Franchisee shall provide the following equipment sufficient for each area of responsibility:

1. vehicle, jet ski or similar device,
2. first aid kit,
3. rescue buoy,
4. two-way radio and two-way radio with police frequency provided by the police department.

Franchisee shall in addition to their required permanent stands provide mobile lifeguards, or additional personnel approved by the City in the following areas:

1. In Zones 1, 4, 8, 12, 16, 22, 23 and 27, Lifeguard Only (LGO) for each zone.
2. In Zone 89, 2 LGOs.
3. From Zones 1-27, 1 Mobile LGO.
4. From zone 48-64 (31st North - 52nd north) minimum of (2) mobile guards
5. From Zone 69-74 ( 61st north- 67th north) minimum of (1) mobile guard
6. From zone 84-88 ( 77th north - 82nd north) minimum of (1) mobile guard

Mobile lifeguard shall be described as a guard that covers several blocks of beach by utilizing a motorized cart, ATV, or vehicle and is able to respond rapidly to the scene of an emergency.

Franchisee understands and agrees that additional stands and lifeguard personnel may be deemed necessary by the City and hereby agrees to provide such additional lifeguards after consultation with the City. The direct cost of such additional lifeguards may be deducted from the franchise payment to the City, as shown in Section 6.

From the 1st week of June through Labor Day, and during the hours of operation, for every one (1) to six (6) stands that the Franchisee controls, a minimum of one (1) Lifeguard Only is required, and for every six (6) stands thereafter. A "Lifeguard Only" may be mobile only within a six (6) stand range. Franchisee shall provide the appropriate City authority with the stand number of each "Lifeguard Only". During the hours of operation and term of the franchise agreement, for every one (1) to ten (10) stands that the Franchisee controls, a minimum of one off-stand supervisor shall be provided. A supervisor cannot be a "Lifeguard Only" except during the lunch period.

**SECTION 2. - STANDARDS OF PERFORMANCE & LIFEGUARD CERTIFICATION**

All lifeguards shall be at least seventeen (17) years of age, be of good moral character and abide by the highest standards of cleanliness and physical appearance. Prior to commencing work as a lifeguard, Franchisee will test each candidate to ensure that the individual can demonstrate an ability to swim 500 meters over a measured course in a twelve (12) minute period. Thereafter, each lifeguard shall be required, upon demand from the Police, to demonstrate an ongoing and current ability to swim 500 meters over a measured course in a twelve (12) minute period. Failure results in an immediate removal from duty until the test is taken and passed. Successive tests shall not be administered within a 24 hour period. After the third failure, the lifeguard is permanently removed from



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duty that season, and may not test again until the next season.

All lifeguards shall:

1. Possess adequate vision, hearing acuity, physical ability and stamina to perform the duties of open water lifeguard;
2. Must possess a valid lifeguard card;
3. Be in good health and demonstrate an ability to swim 500 meters over a measured course in a twelve (12) minute period;
4. Possess a Community First Aid Certification or its equivalent;
5. Possess a CPR Certification or equivalent for professional rescue; and
6. Successfully complete a course consisting of a total of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association.

At the beginning of each season, the Franchisee shall prepare a training schedule for lifeguards and shall present it to the appropriate City authority. Franchisee shall insure that all lifeguards reasonably comply with that schedule. All lifeguards shall qualify by passing the "Minimum Training on Rescue Procedures" before beginning work on the beach.

Franchisee shall prepare a lifeguard training curriculum meeting City requirements and ensure that all lifeguard personnel qualify thereunder prior to beginning work and meet all in-service training requirements. Franchisee or designated representative and all franchise lifeguards shall attend all pre-certification and in-service training sessions. Failure to attend shall result in suspension from service until requirement is met.

Franchisee, all lifeguards and other franchise employees are prohibited from consuming alcoholic beverages while on duty or from reporting to work under the influence of alcohol or other controlled substances.

Franchisee, employees and all lifeguards shall be committed to maintaining a safe and productive work environment. Alcohol or controlled substances in the workplace are dangerous because they lead to physical impairment, loss of judgment, and the risk of injury and death. Franchisee shall adopt a policy consistent with the policy of the City of Myrtle Beach on drug free workplace.

Franchisee, employees and lifeguards are prohibited from:

1. Using a cell phone for activities unrelated to their duties;
2. Reporting to work while under the influence of alcoholic beverages or controlled substances;
3. Using or possessing alcoholic beverages or controlled substances on City Premises or franchisee's time;
4. Using, possessing, swallowing, inhaling, injecting, dealing in, controlled substances (including but not limited to: marijuana, cocaine, LSD, opiates, amphetamines, barbiturates and phencyclidine), and prescription drugs which are not prescribed for the employee's use. *THIS PROHIBITION APPLIES TO USE AT ANY TIME BOTH ON THE JOB AND OFF THE JOB.*

Franchisee shall not employ any individual as a lifeguard or beach concession employee who has been convicted of or pled guilty or nolo contendere to a



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felony or is on parole or probation for a criminal offense.

Franchisee and any franchise employee who operates a motor vehicle in the performance of this franchise agreement shall possess a valid motor vehicle operator's license, and successfully complete a Police Department offered training course for the type of vehicle driven on the beach.

Franchisee and the City shall determine an appropriate schedule for lunch breaks. Lunch breaks shall be staggered or alternated so that only every third lifeguard will be off-stand during designated lunch hours. The off-stand supervisor shall remain on the beach between the hours of 11:30 a.m. and 2:00 p.m. to augment the provision of water safety services during those hours.

Franchisee shall promulgate an Employee Handbook that shall address the requirements of:

1. Professional attitude, conduct and appearance;
2. Health and Safety;
3. Lifeguard Daily Checklist;
4. Beach Rules and Regulations;
5. Interactions with Beach Patrol and Fire and Rescue; and
6. Other such administrative or employment subjects as deemed necessary.

Franchisee shall be solely responsible for any required disciplinary action of its lifeguards.

**SECTION 3. - LIFEGUARD UNIFORMS & EQUIPMENT**

All uniforms shall be of the same color and combination. All lifeguard tee shirts shall be gold with navy blue lettering. "Life Guard" shall be printed on the front. The name of the franchise shall be printed on the back. The City of Myrtle Beach Seal shall be on the right sleeve. The company or non-commercial logo may be printed on the left sleeve.

All lifeguard swim trunks shall be navy blue. "Life Guard" shall be printed in gold letters on the right front leg. Company or non-commercial logo may be applied to left front leg. Pattern may be repeated on the rear of the garment.

Female lifeguard personnel shall wear a navy blue swimsuit. "Life Guard" shall be printed in gold letters on the front.

Outerwear shall be gold, with printing as described above. Lifeguards shall wear shirts from 10:00 am. until 2:00 p.m.

All franchise stands shall be painted white and built according to City specifications. Each stand shall be maintained in good condition and be provided with the following minimum equipment:

1. Torpedo Buoy
2. Water Safety Flags (3)
3. First Aid Kit
4. Orange Lifeguard Umbrella with "Life Guard" in Navy Blue Letters
5. City Ordinance/Emergency Phone Number Sign



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Every Other Stand Shall Have a two-way radio.

Lifeguard stand shall be located at such distances and intervals as are determined by the City. In areas in which two franchises join; Franchisee shall not place beach equipment closer than twenty (20) feet to the point of junction. In addition, a twenty (20) foot opening shall be maintained at each street-end and a ten (10) foot opening at each public alleyway. In all cases, Franchisee, in setting up beach equipment, shall endeavor to provide the highest degree of public access possible. Franchisee agrees to remove fifty percent of any un-rented chairs and umbrellas after 2:30 p.m.

Each Franchisee shall have an attended two-way radio with police frequency provided by the Police Department.

**Section 4. - BEACH SERVICE EQUIPMENT**

No commercial or retail activity except as authorized herein shall be permitted on the public beach.

In return for the provision of water safety services and other consideration in Section 6, the Franchisee is hereby authorized to rent the following beach equipment:

1. Chairs & footrests
2. Umbrella Windbreaks
3. Floats
4. Soft Boogie Boards

Franchisee may not rent any "hard" equipment including but not limited to:

1. Surfboards
2. Skim Boards
3. Sailboats

Franchisee shall not display any signage other than specifically authorized herein as well as its company logo on its beach service equipment.

Franchisee is authorized to operate, in a safe and prudent manner, various types of motor vehicles in support of its water safety and beach concession operations. All such vehicles shall be maintained in excellent mechanical condition, be neat in appearance and be properly licensed and insured as required by law, and operated by a properly licensed operator.

Except in the case of emergency, Franchisee is prohibited from bringing any chemicals, including but not limited to gasoline, oil and hydraulic fluid onto the public beach and shall be solely responsible for any release from its motor vehicles used on the public beach. In the event of spillage, Franchisee shall contain said spillage and contact Beach Patrol.

The City shall have the right to inspect and approve or disapprove the use of any motor vehicle.

**SECTION 5. - BEACH CLEANLINESS**

Each Franchisee will be responsible for the cleanliness of its franchise zone(s) as



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assigned. The area of responsibility extends from the water line to the primary dune line; provided however, while on duty this obligation only extends from the water line to the umbrella line. Each Franchisee will be held accountable to the City for the cleanliness of the beach in each respective zone. Re-occurring legitimate complaints about beach cleanliness in a specified zone shall be grounds for franchise termination. At the beginning of each season, the City will provide trashcans as needed for each stand. The City shall be responsible for the trashcans pick-up on the beach.

**SECTION 6. - FINANCIAL REPORTING AND FRANCHISE FEES**

Franchisee shall provide the City a sales tax report no later than December 1 of each year during the term of this Franchise. The City may require additional financial information in its discretion.

Franchise fees shall be three percent (3%) of gross receipts, with a maximum of $1,600.00 per stand, and shall be due and payable no later than December 31 of each year. Franchisee shall be afforded a ten (10) day grace period for payment of franchise fees, after which time a ten percent (10%) late fee will be assessed. Failure to pay franchise fees and any late fees within thirty (30) days of the due date shall be grounds for revocation of the franchise.

The City shall waive some or may waive all of the franchise fee in consideration of City required additional stands and lifeguard personnel as may be deemed necessary by the City in Section 1. In compliance with Section 1 regarding mobile lifeguards in the residential areas, each required additional lifeguard shall result in a twelve thousand ($12,000.00) deduction from the total franchise fee paid to the City per year.

**SECTION 7. - INSURANCE**

Franchisee shall provide and pay for the following insurance coverage during the term hereof:

Public Liability - A general liability policy protecting Franchisee against liability or loss due to bodily injury, property damage or personal injury arising out of the performance of its franchise responsibilities and more specifically the provision of water safety service. Policy shall be written on an occurrence form and provide a combined single limit of liability of One Million Dollars ($1,000,000) per occurrence. Coverage shall be included for: Premises/Operation; Products/Completed Operation; Contractual Liability; Independent Contractors and shall include a broad form property damage endorsement. In the event this policy shall exclude coverage for Lifeguard Liability as a professional service, Franchisee shall be required to provide and pay for professional service coverage protecting Franchise against liability for the acts, errors and omissions of its water safety personnel.

Automobile Liability-A Business Automobile Liability policy protecting Franchisee against liability or loss due to bodily injury and property damage arising out of the operation of a motor vehicle in the performance of this Franchise. Policy shall be written on an occurrence basis and provide coverage for "any auto" with a combined single limit of liability of One Million Dollars ($1,000,000) per occurrence.

Worker's Compensation & Employers' Liability-A Worker's Compensation policy



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protecting Franchisee against liability or loss arising out of occupational injury or illness of its employees. This policy shall provide minimum limits of liability of: $500,000 each accident; $500,000 disease – each employee; and $500,000 disease- policy limit.

Policy Endorsements:
Both the general liability and automobile liability policies, as well as any professional services policy shall be endorsed to name the City of Myrtle Beach as an "additional insured."

All policies shall be endorsed to provide the City of Myrtle Beach sixty (60) days prior written notice of non-renewal, reduction or exhaustion of limits or cancellation.

All policies shall include a "waiver of subrogation" endorsement in favor of the City of Myrtle Beach.

Conditions:
The clause "other Insurance" in a policy in which the City of Myrtle Beach is named as an "additional insured" shall not apply to the City of Myrtle Beach. The insuring company shall have no recourse against the City of Myrtle Beach for the payment of any premiums, deductibles or assessments.

In the event Franchisee should fail to comply with the "loss reporting" requirements of any policy, that failure shall not adversely affect the coverage afforded the City, nor shall the City be responsible for complying with the reporting requirements of any policy.

**SECTION 8. - INDEMNIFICATION**
With respect to the parties, and their officials, agents, employees, volunteers, contractors, or those who act on the Franchisor's or Franchisee's behalf in any authorized capacity:
The Franchisee is informed of risks and obligations in performance of the franchise, and for valuable consideration received in the form of the granted franchise, the Franchisee agrees to assume and fully to take on to itself all of the risks and responsibilities in any way arising from, or associated with its participation in the Franchise, and

The Franchisee does release the City from any and all claims, demands, suits, judgments, damages, actions and liabilities of every name and nature whatsoever, including attorney's fees and costs, whenever occurring, whether known or unknown, contingent or fixed, at law or in equity, that the Franchisee may suffer at any time arising from or in connection with participation in the franchise, including any personal injury, commercial injury or harm or damage to any property or person.

Further, as to non-parties to this agreement, Franchisee further agrees to protect, defend, indemnify and hold the City free and harmless from and against any and all losses, fines, penalties, damages, settlements, costs, charges, professional fees or other expenses and liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings, or causes of



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

action of every kind in connection with or arising out of this Franchise and the performance hereof, that are due to acts, errors, omissions or negligence of Franchisee, its officers, agents, employees or subcontractors.

Franchisee further agrees to investigate, handle, respond to, provide defense for and defend the same at its sole expense and agrees to bear all other costs and expenses related thereto. In specific reference to the above, the Franchisee agrees to assume the legal defense, and vigorously defend upon actual notice of claim or suit, and, in doing so, completely indemnify the Franchisor from any loss including any damage model or attorneys' fees and cost, and hold harmless the Franchisor from and against any and all liabilities.

In the event a claim or suit is made against the City or those who act on its behalf, arising from the Franchisee's operation of the franchise, the same shall be transmitted by City immediately, and the Franchisee has the immediate and absolute duty to defend the claim or suit, even if it is groundless, false or fraudulent, so that the Franchisor may not incur attorney's fees and costs arising from the claim or suit of non-parties. Should the Franchisor incur attorney's fees or cost, the Franchisee shall make the Franchisor whole upon demand.

This promise binds heirs, executors, administrators, legal representatives and assigns of the Franchisee and survives this agreement for the length of time necessary under the applicable statute of limitations relating to any claim, suit or cause of action. This hold harmless, indemnification, and duty to defend shall be governed for all purposes by South Carolina law, without regard to such law on choice of law.

Within the time as may be provided by law for the answer or defense of any filed claim or proceeding, but no later than thirty (30) days after the City receives notice of the commencement of any action or other proceeding in respect of which indemnification or reimbursement may be sought hereunder, the City shall notify the Franchisee, If any such action or other proceeding shall be brought against the City and be transmitted to the Franchisee, the Franchisee shall, within thirty (30) days acknowledge in writing its receipt of such notice from the City, and shall acknowledge and confirm the Franchisee's obligation to hold harmless, indemnify, and assume the defense, and it shall be obligated to assume the defense of such action or proceeding with counsel chosen by the Franchisee.

Notwithstanding the foregoing, the City shall have the right to employ separate counsel at the City's sole cost and expense and to control its own defense of such action or proceeding if in the reasonable opinion of counsel to the City, (a) there are or may be legal defenses available to the City that are different from or additional to those available to the Franchisee and which could not be adequately advanced by counsel chosen by the Franchisee, or (b) a conflict or potential conflict exists between Franchisee and the City that would make such separate representation advisable.

The Franchisee shall not, without the prior written consent of the City, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action or proceeding to which the City is a party unless such settlement, compromise or consent includes an unconditional release of the City from all liability



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arising or potentially arising from or by reason of such claim, action or proceeding.

Notwithstanding any other provision contained herein, the franchise may be terminated upon Franchisee's failure to honor this, or other indemnification, hold harmless or duty to defend obligations due and owing to the Franchisor, arising from the operation of Franchisor's beach safety franchise.

**SECTION 9. - TRANSFER OF FRANCHISE**

A Franchisee may transfer his/her franchise to another franchise holder subject to a sixty (60) day notice to and upon approval of the City Manager. City Council must approve by Resolution any franchise transfer. All such approvals shall not be unreasonably withheld.

Violation of any provision of this Franchise Agreement shall result in the suspension of the Franchise Agreement or in the permanent revocation of the Franchise by City Council.

**SECTION 10. - ASSIGNMENT**

This Franchise may not be assigned in whole or in part except upon the written consent of the City of Myrtle Beach.

**SECTION 11. - TERMINATION**

In the event the Franchisee is determined to be in default under the terms of this Franchise, the City shall provide Franchisee written notice of default and afford the Franchisee ten (10) days in which to cure the default. Upon failure of the Franchisee to cure or show reasonable progress towards curing the default, the City shall provide written notice of termination to Franchisee and this Franchise shall be revoked by City Council.

**SECTION 12. - NOTICE AND CONTACT**

Any papers, request, demand, authorization, direction, notice, consent or waiver provided, required or permitted to be made upon, given by, or furnished to the either party with respect to this franchise shall be sufficient for every purpose hereunder if in writing and mailed by United States Mail, certified or registered mail, postage prepaid and addressed as follows:

**TO THE CITY:**
**ATTENTION: CITY MANAGER**
**P. O. BOX 2468**
**MYRTLE BEACH, SC 29578**

**TO THE FRANCHISEE**

Locks Beach Services, INC

**WITNESS THE DUE EXECUTION HEREOF ON THE DATE LAST SIGNED;**

**CITY OF MYRTLE BEACH**



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BY: John Pedersen

ITS CITY MANAGER

PRINT NAME: John Pedersen

WITNESS SIGNATURE AND PRINTED NAME:

DATE: 5/9/18

FRANCHISEE

BY:

ITS President

PRINT NAME: George Lact

WITNESS SIGNATURE AND PRINTED NAME:

DATE: 5-9-18

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**ATTACHMENT A**

**FRANCHISE AWARD:**

| | |
|---|---|
| **Lack's Beach Service** | **Zones 1 through 38, 89** |
| **John's Beach Service** | **Zones 39-88** |

**ZONE DESCRIPTION**

1. From South City Limits to center line of 29th Avenue South

2. From center line of 29th Avenue South to center line of 28th Avenue South

3. From center line of 28th Avenue South to center line of 27th Avenue South

4. From center line of 27th Avenue South to center line of 26th Avenue South

5. From center line of 26th Avenue South to center line of 25th Avenue South

6. From center line of 25th Avenue South to center line of 24th Avenue South

7. From center line of 24th Avenue South to center line of 23rd Avenue South

8. From center line of 23rd Avenue South to center line of alleyway/walkway at 22nd Avenue South

9. From center line of alleyway/walkway at 22nd Avenue South to center line of alleyway/walkway at 21st Avenue South

10. From center line of alleyway/walkway at 21st Avenue South to center line of 19th Avenue South

11. From center line of 19th Avenue South to center line of alleyway/walkway north of 18th Avenue South

12. From center line of alleyway/walkway north of 18th Avenue South to center line of 16th Avenue South

13. From center line of 16th Avenue South to center line of 15th Avenue South

14. From center line of 15th Avenue South to center line of 13th Avenue South

15. From center line of 13th Avenue South to center line of 12th Avenue South

16. From center line of 12th Avenue South to center line of 11th Avenue South

17. From center line of 11th Avenue South to center line of 10th Avenue South

18. From center line of 10th Avenue South to center line of 9th Avenue South

19. From center line of 9th Avenue South to center line of 8th Avenue South

20. From center line of 8th Avenue South to center line of 7th Avenue South

21. From center line of 7th Avenue South to center line of 6th Avenue South

22. From center line of 6th Avenue South to center line of Withers Swash

23. From center line of Withers Swash to center line of 3rd Avenue South

24. From center line of 3rd Avenue South to center line of 2nd Avenue South

25. From center line of 2nd Avenue South to center line of 1st Avenue South

26. From center line of 1st Avenue South to center line of 1st Avenue North

27. From center line of 1st Avenue North to south side 2nd Avenue North Pier

28. From north side 2nd Avenue North Pier to center line of 3rd Avenue North

29. From center line of 3rd Avenue North to center line of 4th Avenue North

30. From center line of 4th Avenue North to center line of 5th Avenue North

31. From center line of 5th Avenue North to center line of 6th Avenue North

32. From center line of 6th Avenue North to center line of 7th Avenue North

33. From center of 7th Avenue North to center line of 8th Avenue North

34. From center line of 8th Avenue North to center line of 9th Avenue North

35. From center line of 9th Avenue North to center line of alleyway/walkway south of Mr. Joe White Avenue

36. From center line of alleyway/walkway south of Mr. Joe White Avenue to center line of alleyway/walkway north of Mr. Joe White Avenue

37. From center line of alleyway/walkway north of Mr. Joe White Avenue to center line of 12th Avenue North

38. From center line of 12th Avenue North to south side of 14th Avenue North Pier

39. From north side of 14th Avenue North Pier to center line of the alleyway/walkway at 16th Avenue North

40. From center line of the alleyway/walkway at 16th Avenue North to center line of City Park at 19th Avenue North

41. From center line of City Park at 19th Avenue North to center line of alleyway/



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walkway south of 21st Avenue North

42. From center line of alleyway/walkway south of 21st Avenue North to center line of 23rd Avenue North

43. From center line of 23rd Avenue North to center line of 24th Avenue North

44. From center line of 24th Avenue North to center line of 26th Avenue North

45. From center line of 26th Avenue North to center line of alleyway/walkway at 27th Avenue North

46. From center line of alleyway/walkway at 27th Avenue North to center line of alleyway/walkway at 29th Avenue North

47. From center line of alleyway/walkway at 29th Avenue North to center line of 31st Avenue North

48. From center line of 31st Avenue North to center line of 34th Avenue North

49. From center line of 34th Avenue North to center line of 37th Avenue North

50. From center line of 37th Avenue North to center line of 38th Avenue North

51. From center line of 38th Avenue North to center line of 39th Avenue North

52. From center line of 39th Avenue North to center line of 40th Avenue North

53. From center line of 40th Avenue North to center line of 41st Avenue North

54. From center line of 41st Avenue North to center line of 42nd Avenue North

55. From center line of 42nd Avenue North to center line of 43rd Avenue North

56. From center line of 43rd Avenue North to center line of 44th Avenue North

57. From center line of 44th Avenue North to center line of 45th Avenue North

58. From center line of 45th Avenue North to center line of 46th Avenue North

59. From center line of 46th Avenue North to center line of 47th Avenue North

60. From center line of 47th Avenue North to center line of 48th Avenue North

61. From center line of 48th Avenue North to center line of 49th Avenue North

62. From center line of 49th Avenue North to center line of 50th Avenue North

63. From center line of 50th Avenue North to center line of 51st Avenue North

64. From center line of 51st Avenue North to center line of 52nd Avenue North



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

65. From center line of 52nd Avenue North to center line of 53rd Avenue North

66. From center line of 53rd Avenue North to center line of City Park at south side of Cabana Section

67. From center line of City park, south side of Cabana Section to center line Beach Place

68. From center line of Beach Place to center line of Seaside Place

69. From center line of Seaside Place to center line of alleyway/walkway south side Haskell Circle

70. From center line of alleyway/walkway south side Haskell Circle to center line alleyway/walkway north of 63rd Avenue North

71. From center line of alleyway/walkway north of 63rd Avenue North to center line of 64th Avenue North

72. From center line of 64th Avenue North to center line of 65th Avenue North

73. From center line of 65th Avenue North to center line of 66th Avenue North

74. From center line of 66th Avenue North to center line of 67th Avenue North

75. From center line of 67th Avenue North to center line of 69th Avenue North

76. From center line of 69th Avenue North to center line of 70th Avenue North

77. From center line of 70th Avenue North to center line of 71st Avenue North

78. From center line of 71st Avenue North to center line of 72nd Avenue North

79. From center line of 72nd Avenue North to center line of 73rd Avenue North

80. From center line of 73rd Avenue North to center line of 74th Avenue North

81. From center line of 74th Avenue North to center line of 75th Avenue North

82. From center line of 75th Avenue North to center line of 76th Avenue North

83. From center line of 76th Avenue North to center line of 77th Avenue North

84. From center line of 77th Avenue North to center line of 78th Avenue North

85. From center line of 78th Avenue North to center line of 79th Avenue North

86. From center line of 79th Avenue North to center line of 80th Avenue North

87. From center line of 80th Avenue North to center line of 81st Avenue North



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

88. From center line of 81st Avenue North to center line of 82nd Avenue North

89. From center line of 82nd Avenue North to northern City Limits.

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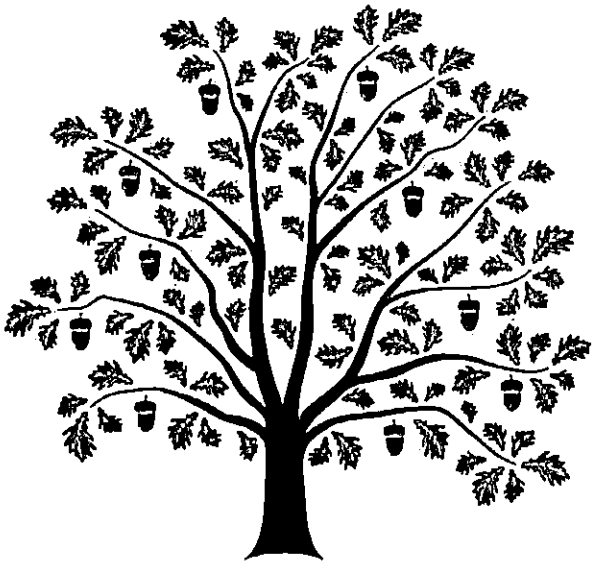
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# Transcript of the Testimony of

# **Holly Robinson**

October 21, 2020

Meswaet Abel, as PR of the Estate of Zerihun Wolde, et al. v. Lack's Beach Service, et al.



LIVE OAK
REPORTING

843.437.9697

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Q. -- to 2nd Avenue?
A. Yes, 2nd Avenue Pier.
Q. 2nd Avenue Pier?
A. Uh-huh.
Q. And I'm going to ask you -- if you don't know, fine. But if you can give me a reasonable estimate, we'll go there. How many lifeguard stands are there between 29th and 2nd?
A. Like 30-ish.
Q. This incident happened around L21, I think, at 9th Avenue. Does that sound about right?
A. Yes.
Q. And the lifeguards that are on duty in the stands, they're dual-role lifeguards; is that your understanding?
A. Yes, some of them are. And then we have some that are stationed that are just lifeguards, like they don't handle the equipment.
Q. They're called LGO's?
A. Yes.
Q. And that means lifeguard only?
A. Yes.
Q. And what is your understanding of why you all have lifeguard-only positions?



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next to them. So there's always eyes on the water.

Q. So tell me, in your own words, sort of if you are in L-21 stand, like Kacper was, what his zone of watch was supposed to be on the day of the incident.

A. So it was his, like, area; and then at least part of L-20 and then L-22.

Q. Half of each?

A. Roughly.

Q. And the purpose of that is to have multiple eyes on the water, basically?

A. Yes.

Q. If you go to -- you all have lunch during the day, I presume?

A. Yes, we do.

Q. And it's in four different shifts; is that right?

A. Yes.

Q. So if you're at lunch 2, I think that's from 12:15 to 1; does that sound about right?

A. Yes, that's correct.

Q. And so if Kacper goes to lunch from 12:15 to 1, what is he required to do to let the public know he's not there?



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running this way that day (indicating). And so when he -- when we got him out of the water, he was down over here.

Q. Can you just mark it as an X there? And I don't know --

A. Yeah, like that general area right there.

Q. Okay. And so you think that they entered -- the family entered right here at the Sea Crest around L-22?

A. Yes, that's my understanding.

Q. And you were telling me that you thought the water or the tide or whatever was pushing towards L-21?

A. Yes. There was a strong longshore current that day moving to the south.

Q. And how do you know that?

A. I'm -- the -- it's recorded on some of the statements and, um, that's one of the things that I just really remember from that day, was the longshore current pushing hard that way.

Q. And what flags would have been posted on the poles of the lifeguard stands about the --

A. We had the single red flag, and that's for high hazard water conditions.



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Q. And does that mean be up to your knees only or your waist only?

A. Well, typically, it's like waist deep, but that specific day we had strict code 6, which is we have to see the top of your -- like the top waistband of the bathing suit.

Q. And is it your understanding that our client was doing that at the time, was in waist-deep water?

A. From my understanding, yes.

Q. So he was complying with whatever instructions he was given?

A. Yes.

Q. Where is it explained to the public what the red flag means?

A. Um, there are signs posted at the public access points that have all the various flag colors that the city provides us with and like a description of like what they mean and what conditions warrant them.

Q. I think we started with this originally. Can you show me where the public access is closest to these?

A. There's one right here and one right here. It's like the drive-thru ones that we would



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use. And I believe, as far as a walking one -- I'm not sure. I know that these two for sure are like the emergency access points, and they definitely have them.

Q. This incident happened around what time? Do you remember? 12:45 or so?

A. Roughly, yeah.

Q. And at that time, is it your understanding that Kacper was at lunch?

A. He was.

Q. So his flag wasn't up?

A. Yes.

Q. Correct?

A. Yes, that's correct.

Q. I'm going to show you what I'll mark as 4.

(Plaintiff's Exhibit No. 4, Lack's Beach Service Lineup 8/24/18, was marked for identification.)

BY MR. WILSON:

Q. Plaintiff's Exhibit No. 4 is the Lack's Beach Service Lineup. Tell me who would have been responsible for watching the area where Mr. Wolde was swimming at the time?

A. That would have been A1 at L-20 and



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Lucas at L-22.

Q. Where is the closest LGO on this 8/24 day to L-21?

A. That would be Barbara at L-14, because we had to close LGO 6th Avenue, because this was late August and our American staff had already left to go back to school. So we were short a couple of people just because we -- you know, they had already left to go back to school.

Q. Yes, ma'am. Did you say Barbara was the closest LGO?

A. Yes.

Q. But Barbara was more than ten blocks away, was she not?

A. Yes.

Q. So she wouldn't really be able to see Mr. Wolde in the water if he's struggling; do you agree with that?

A. Correct.

Q. And there should have been an LGO at 6th?

A. Yes.

Q. But there wasn't that day?

A. Yes.

Q. And 6th Avenue --



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A. Yes.

Q. And the reason that's so is for the safety of the public, right?

A. Yes.

Q. I'm also looking at LGO 29th and LGO L-5. Just confirm to me what those mean, the X's.

A. Those are LGO towers that, again, had to be closed down because our staff had started to leave to go back to school.

Q. But there should have been LGO's there?

A. Yes. But we didn't have people to put there.

Q. In looking at the Lack's Beach Service lineup for the city beach on the day of August 24th, when Mr. Wolde drowned, tell me how many LGO's were working that day, please, ma'am.

A. There were three -- wait. Three, yes.

Q. As I read the lineup, and tell me if I'm wrong, there are LGO stands listed starting at 1st, going all the way to 30th. In between there I see seven LGO markers. Do you read that the same?

A. Yes.

Q. And earlier in the summer or maybe earlier in the week or whatever, you would



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generally have each of those LGO stands filled?

A. Yes.

Q. So you would have seven LGO's for the city beach?

A. Yes.

Q. And on the day that Mr. Wolde drowned, you only had three?

A. Yes.

Q. And you may not know this, and that's fine. And I'm sure you know this, but if you don't -- if you're not the right person for me to ask or if you don't know, let me know. Did anybody from Lack's tell the city that you all weren't going to have seven LGO's; you were going to have a reduced number?

A. I'm not sure.

Q. I presume there's an agreement with the city about the way you handle the beach to include the number of LGO's. Do you know that to be true?

A. Yes.

Q. And if they're not going to be the number required by the city, do you know whether anybody at Lack's told the city that?

A. I'm not sure. That wasn't my role at the time.



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A. Yes.

Q. And that's another reason why you need to be on guard on the specific areas, especially around hotels, because those are tourists, right?

A. Yes.

Q. Do you all provide any information to the hotels or resorts where you have stands in front of about your role on the beach or things to look for or what the flags mean or anything like that?

A. Um, not to my knowledge.

Q. If a person comes out of the exit of a hotel -- the Sea Crest and just walks right out on the beach through one of the exits, are there any signs between -- when they exit that resort to get to the beach indicating to them what the flags mean?

A. Unless the hotel decides to put them there, I don't believe so.

Q. Okay.

A. Because those are -- I believe, by the city, those are considered private accesses. So I think that would be a decision that the hotel would have to make.

Q. Understood. But it's fair to presume,



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in general, if a person walks out of the Sea Crest Ocean Resort onto the beach between L-22 and L-21, they may not see any of the signs indicating what any of the flags mean?

A. Possibly, yes.

Q. You think that's reasonable to presume?

A. Yes.

Q. And you told me earlier that Lack's doesn't advertise what the flags mean, right?

A. Yes.

Q. So how are the people supposed to know what the flags mean?

A. I don't know. I mean, we get questions about it all the time. I mean, people will walk up to the lifeguard and be like, Hey, what does the flag mean?

Q. Other than that, how are they supposed to know that?

A. I don't know.

Q. How is a person supposed to know that if a stand doesn't have somebody in it, that the lifeguard is not just in the water saving somebody?

A. I don't know.

Q. And what I mean is -- and I'm not



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the water, to be more on alert for them?

A. Yes, you could say that.

Q. And is it my understanding that at least Lack's Beach Service knew on August 24th that there was a strong rip current?

A. There were beach hazard statements out for the longshore current and the rip current risk.

Q. And where do those statements come from?

A. National Weather Service.

Q. And you all get them from the one in Wilmington; is that right?

A. I believe so.

Q. And do those come in every -- do they come in the previous day for the next day so you can prepare, or do they come in the morning of?

A. Typically the morning of, typically.

Q. And how do those come to Lack's Beach Service, the weather warnings from the National Weather Service?

A. Well, we all have -- all the managers have the weather apps on our phones, and we get notifications on it. And from my understanding, the National Weather Service actually calls us. I think that at the time Libor was the contact for



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typically pulls straight out. It's kind of like a river in the ocean. And it will pull you straight out and eventually will release you. But trying to swim against that current straight back in will exhaust you very quickly.

Q. But if you have a riptide pulling you out and a longshore current pushing you south, that's double trouble?

A. Yes.

Q. And do those two conditions together present an extreme risk to the public?

A. A very high risk, yes, which is why we had the red flag flying that day.

Q. What would it have taken for you that morning to do the double red flag and close the beach? And what I mean by that, is there a level of something that has to happen, or is it just, you know, sort of your personal view?

A. It's -- it's kind of both. I know that the city doesn't like us to close the water like, boom, first thing in the morning, nobody can touch the water. Because that tends to make people very angry. So that's typically a call that we would not make so early in the day. We would -- because the currents tend to increase in intensity or



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slack off as the tides change. So we just kind of keep monitoring it and make the call as we go.

Q. Has somebody -- and I understand hearsay, and maybe you've heard this or think that. But has somebody from the city told Lack's that they don't want you closing the beach earlier in the day?

A. It's my understanding that they don't like it.

Q. And do you know -- do you know who from the city is telling Lack's that, the city manager or --

A. I do not know.

Q. I believe that another man died on the beach on August 24th along with Mr. Wolde. Is that your understanding?

A. That's correct, yes.

Q. And was it after -- at some point during the day you all closed the beach, did you not?

A. We -- we did, I believe.

Q. Okay.

A. But I can't quite remember.

Q. Do you remember who from Lack's has the responsibility to make that decision?

A. Um --



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Q. What would be -- in your experience or understanding, what would be some of the requirements present to go Code 1, close the beach?

A. Well, obviously, lightning. We close the water for that every time. If we have been having a lot of rescues back to back, um, like, you know, one guard in the water after the other, then I've seen that call made before, okay, double red or at least go, you know, no boogie boards, strict, you know, thigh deep or knee deep.

Q. Is there a record of how many times -- every time a guard goes in the water, does he have to make a notation that he's gone in the water for some reason?

A. The manager would keep track of that, like how many, you know, Code 2's, and there should be incident reports, that sort of thing.

MR. WILSON: Mark this as 5.

(Plaintiff's Exhibit No. 5, Daily Log 8/24/18, was marked for identification.)

BY MR. WILSON:

Q. I've not forgotten about your statement. We'll come back to that. Plaintiff's Exhibit No. 5 -- let me ask you, on the back here, under



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out?

A. No. I did not fill this one out, no.

Q. Have you, in your -- have you ever had -- been required to fill out daily logs, or is that always just done by Randy Smith?

A. No. Like -- for instance, when Randy took his day off and I covered for him, I would fill one of these out.

Q. Tell me when the Code 1 was called to close the beach, please.

A. 3:00.

Q. And what was the reason Mr. Randy Smith gave for closing the beach?

A. Rough water and rips; longshore north to south current.

Q. And that's what you talked to me about earlier?

A. Yes.

Q. Well, do you know how long those conditions had been present prior to 3 p.m.?

A. Um, well, according to this, since at least 10 a.m.

Q. They had been present all day?

A. Uh-huh.

Q. Yes?



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A. Yes.

Q. And it wasn't until 3 p.m., after two people died, that Lack's decided to close the beach?

A. Yes.

Q. I'll probably just have to ask Mr. Smith what he meant by that, so I'll move on.

A. Yes. Because I have no idea.

Q. Let's talk a little bit about sort of your memory of the day and -- I'm not going to hide it from you. If you want to use your statement, fine. I'd like to ask you questions, before you use your statement, of things that you remember. Tell me what you do remember about this day, Friday, August 24th, 2018.

A. Like as far as what I had been doing for that whole day?

Q. Exactly.

A. So I had been working with Martina; we were organizing the uniform room, I believe. And I think, as I said earlier, I had gone down to talk to Enian.

Q. I'm going to interrupt you. Where is this room that you were organizing?

A. It's in the warehouse.



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A. Oh, I should know this. I feel like it's like 10 or 18 percent or something like that.

Q. And is that paid every week to the lifeguard or is it paid that day?

A. It's a percentage of the week, from my understanding.

Q. Percentage of the week?

A. Yes.

Q. So there is some incentive for the lifeguards to sell more chairs? The more chairs you sell, the more money you make?

A. The commission, yes.

Q. I want to make sure, you would agree with me that there's an incentive for the lifeguards to sell more chairs because they can make more money the more chairs they sell?

A. Yes.

Q. Do the lifeguards also get a salary on top of the commissions, or is it an either-or deal?

A. It's an either-or. It's either the hourly base pay or the commission.

Q. And is that something you choose at the start of the summer, I either want -- or can you do it for the day? How does that work?



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Q. Did you talk to any of the lifeguards in the area or supervisor managers that indicated that they saw Mr. Wolde in the water struggling?

A. I talked to Alex. Because, afterwards, he was very, very upset. And he had told me that he heard screaming, and so he started looking around, trying to find the source of it, and he saw it and that's when he started running and he called it in.

Q. By the time he heard that, the bystanders are getting Mr. Wolde out of the water?

A. From my understanding, yes.

Q. Did any of the Lack's Beach Service lifeguards see Mr. Wolde struggling in the water and attempt to save him in the water, to your knowledge?

A. Not to my knowledge.

Q. Who is Ocean Rescue? Is that a city group or is that --

A. Yeah. It's the city fire department. It's just kind of a branch of it, I guess. I think that it's overtime for them. And they're kind of supposed to be out there all day, but they just sort of come and go.

Q. Are they wearing something that says



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Q. And you can zoom in if you want.

A. Right there.

Q. And where is the pole that the flag is supposed to fly from?

A. It's like a PVC pole, and you like -- it's about at eye level, and you just kind of take it down. So half of the pole goes away with the flag. It's not like a flag like you raise it on a string or something. It's like a -- it's attached to the PVC pole, yeah.

Q. On this picture I've shown you, would the pole generally be in front of that lifeguard stand?

A. Yes. And you probably won't even be able to see it, because, like I said, the part that would still be in the ground would be just about this high, like if you're standing just about eye level.

Q. So if Kacper goes to lunch, if he had been flying a red flag, indicating danger --

A. Yes.

Q. -- when he's at lunch, that flag is not waving?

A. Yes. Because that flag is our on duty. So when you take the flag down, the guard is not



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on duty.

Q. But the flag indicates more than the guard being on duty, right, according to what you told me? A red flag indicates danger, doesn't it?

A. Yes.

Q. So between 12:15 and 1, there's no flag flying from his stand?

A. Not at that stand, correct.

Q. So even if you knew what the red flag meant, from his stand, it ain't flying, right?

A. Yes.

MR. THOMPSON: Objection.

Q. Are there any other places that the lifeguards fly flags or any demonstrations to show, Hey, green flag, the water is fine, or, Red flag, danger, other than on the poles in front of the lifeguard stands?

A. Yes. At the public beach accesses, the emergency accesses where we drive through, there is a post there that has a little PVC holder. And we put a pole in there so that it's at the public access, right next to the sign that has all of the flags on it.

Q. It's not in front of the hotel?

A. No.



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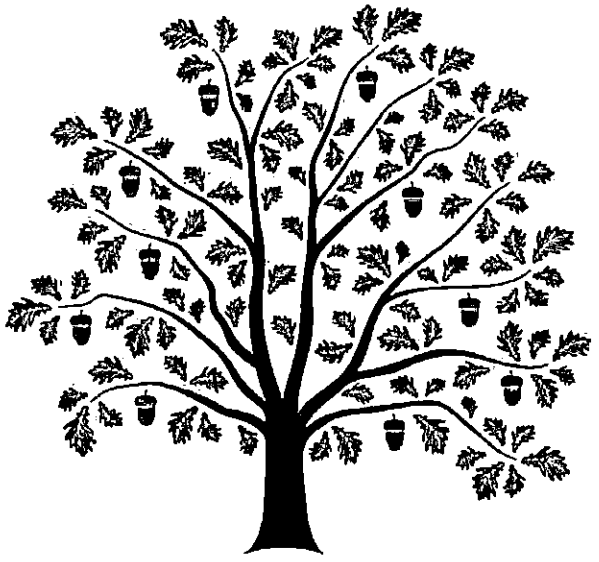
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# Transcript of the Testimony of

# **GEORGE LACK**

October 14, 2021

MESWAET ABEL v. LACK'S BEACH SVC



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who could be a potential -- we train to pick out the nonaquatic people.

BY MR. WILSON:

Q And I think I've seen in some areas that Myrtle Beach has a lot of tourists come down, right?

A Approximately 18 million.

Q Yes, sir. And a lot of those tourists, I think I've seen, aren't -- some of them aren't familiar with things like rip currents and undertows and things like that?

MR. THOMPSON: Objection.

MS. BOZEMAN: Objection.

THE WITNESS: Probably about 18 million.

BY MR. WILSON:

Q Most of them are not?

A No, sir, they're not.

Q And so one of the things that lifeguard services do is y'all are aware each morning, in theory, about what the weather's going to be like?

A Certainly.

MS. BOZEMAN: Objection.

BY MR. WILSON:

Q And whether there would be an increased risk of rip currents?



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A Yes.
Q That's the flag system?
A Right.
Q And because you know that y'all have a better understanding of that, in general, than your tourists do?
A Certainly.
Q And so one of the things that lifeguards are supposed to do is try to prevent these tourists from getting into the rip currents and bad situations?
MS. BOZEMAN: Objection.
THE WITNESS: Yes, sir.
BY MR. WILSON:
Q And one of the ways you do that is to watch the water, right?
A Correct.
Q And your lifeguards, as I understand it, are taught that, are they not?
A Taught --
Q To try to prevent tourists from getting into rip currents.
A Yes, sir.
Q What is -- I'm calling it a rip current. Is that the right lingo? Or what would you call



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it?

A Well, when I was younger, it was an undertow, but yes, a rip current or rip tides.

Q And just so I know what you know, what does that mean?

A Basically, it's contour changes in the bottom of the ocean. Where most beaches have a sand bar that accumulates, and then if you have, hypothetically, a southeast wind for several days, then the wind turns out of the west, then between these large hotels, it creates wind tunnels, and it basically can breach that sand bar. So when the tide -- the waves push in, the water's going to recede faster through that narrow gap.

Q Does the rip current, in effect, pull swimmers out into the ocean?

A Yes.

Q And is there any force of the water that sort of pulls swimmers sideways?

A That would be a longshore current.

Q Longshore current. Okay.

Do you know whether, on August 24th, 2018, that there was a rip current and a longshore current that day?

A No, I don't.



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Q In that situation in general, that would mean that a person could get pulled out to the ocean and over. Is that fair?

A Oh, absolutely. I'm not sure that -- if your longshore current, either way it's running, north or south, I'm not sure that you're going to form rip currents in that scenario because that's running east and west.

Q Yes, sir. So is it generally one or the other?

A Yes, sir.

Q If your guard sees a person in a rip current waving their hands up for help, what are the guards trained to do to deal with that situation? How do they handle that?

A At that point in time, if, indeed, it is a physical -- someone struggling, a distressed swimmer, basically, they would call in their code on the radio, which would give us the location, and the guards on either side of them, one of the guards would enter the water with the first guard, which the first guard should already be through the breakers by then, the second guard would go out, and the third guard would basically give us a blow-by-blow until he was needed, if he was needed.



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Then that would spur a mobile guard to come to that area, which would also spur a manager to come to that area.

Q It's an all hands on deck thing?

A Yes, sir.

Q And the first guard in the tower that sees the person in the water waving their arms in a rip current, do they go into the water?

A Yes.

Q And do they take one of the red buoys with them?

A Yes, sir.

Q And do they also radio over the radio to request help from one of the guards on either side?

A No. They -- basically, a water rescue is a Code 2, and they'll announce their location, "L-21, I have a Code 2." And then the second guard that gets there will call out how many victims, and then from that, if it's two victims, he'll go in the water. Then the third guard gets there, and he gives us a report and update at that point in time.

Q Understood, sort of letting the supervisor and everybody know what's happening?

A Right.

Q If there's one victim in the water, does



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only one lifeguard go get them?

A It's a three -- it's a three guard response. And I would have to say it depends on if it's a large man, then probably two guards would go out, even if one only went out halfway. If, indeed, it's a rip current, the guard is struggling as much as the victim.

Q Right. Yes, sir. And so it could be a situation if you have a man, bigger guy, that two guards would go try to get him?

A Yes.

Q Once the guard gets to the person in the rip current who's struggling, what are they trained to do next to get him safely to shore?

A Depends. If the guard is -- if the victim is workable, then basically, he'll hold onto the torpedo buoy. If the victim's in more -- a higher stage of panic, then we put the buoy under him, and we maintain him 'til we get more help. If it's an unconscious victim, then we turn -- depends. If they're face down, we turn them face up, and there will be a couple of rescue breaths given while we're waiting on the help to get to us.

Q This may be wrong, but are you taught to swim sideways in the rip current?



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A Out of a rip, yes.

Q And is that what your guards would do with a distressed swimmer, would swim sideways until they got back?

A Well, again, it depends on where they are at the time. I mean, they can get to the victim and a wave hit them and push them out of the rip.

Q Yes, sir.

A But if they're having -- they won't swim against the rip, they'll go side to side.

Q Is it fair to say that in your career, long career of being in this business, that you've seen strong swimmers struggle in rip currents?

A Yes, sir.

Q Just because somebody's struggling in a rip current doesn't mean they're a poor swimmer?

A Exactly.

Q What are the lifeguards trained to look for in the water, if anything, to determine whether there's a rip current?

A Basically, in the City of Myrtle Beach, we have swimming distances from the hill by ordinance, and so if we have the red flag up, which it was up on that day, then basically, that's waist deep. And if, indeed, we have a longshore current,



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generally, it'll be -- we'll keep them basically thigh deep, and then we have other days that you can only wade.

But when someone, especially someone who's nonaquatic, when they get in trouble in the ocean, you can see the panic in their face. The thing of getting out there and waving, I've seen that a few times in my career, but that's generally a Navy Seal with a cramp.

Q Sure. Sometimes people just go underwater?

A That's called a passive drowning.

Q Yes, sir. And because that's so that oftentimes -- that's an even more reason to be really paying attention to the water?

A Yes, sir, yes, sir.

Q And you did a good job answering, but maybe my question might have been poor. I guess sort of physically, is there something that a lifeguard can look for in the water to determine whether there's a rip current?

A Well, you'll see that person retreating from the shore.

Q So your understanding of a rip current is basically if people are getting pulled out?



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A Pulled out, yes, sir.

Q Does it have anything to do with the sand coming up in a specific area or the roughness of the waves or anything?

A All of those -- all of those are factors, but it's the receding wave is where you get the acceleration of the rip current.

Q When you have a rip current, can you see the receding wave -- without a person being struggling, can you see the receding wave and know that's a rip current?

A A lot of times you can, because it'll froth the water, but then there's many times that there's really no change until you actually see somebody start stumbling backwards, those kind of things.

Q But the people that have a better opportunity to see the rip current would be the lifeguards as opposed to the tourists. You'd agree with that?

A Well, with a caveat that about 90 percent of everyone that's saved in the ocean is saved by the person next to them, and so, generally, by the time the lifeguard could get off of the tower, our prayer is that the Good Samaritan there with him is



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holding onto him.

Q Right. Yes, sir.

Have you developed an understanding that Mr. Wolde in this case was following the instructions as far as how deep in the water he's supposed to be?

MR. THOMPSON: Objection.

MS. BOZEMAN: Objection.

THE WITNESS: I wouldn't have any idea.

BY MR. WILSON:

Q I mean, you understood that -- I just didn't know whether you've reviewed that he was actually in waist-deep water doing what he was supposed to do?

MR. THOMPSON: Objection.

MS. BOZEMAN: Objection.

THE WITNESS: I did not read the reports.

BY MR. WILSON:

Q Based on what you've gleaned in the case from being there at the time and since this has started, do you blame Mr. Wolde at all for drowning and dying?

MR. THOMPSON: Objection.

THE WITNESS: I was -- I was not there. I was not in town. I was traveling that day.



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a weekly in-service training, and we have to provide --

Q The school, beach school or whatever you call it. You call it something school, don't you?

A Yeah. There's a rookie school for -- yeah. All right. And then we have the in-service training where we have to supply the city the classwork of what we're going to do. It could be inside with CPR, it could be in the ocean.

Q Yeah. Y'all give -- you've got to give the city the training materials that you're using?

A Yes, sir, ahead of time.

Q I guess I was asking, though, prior to the lifeguards starting their work seasonally for your group, they haven't received the 40 hours of USLA-approved ocean water training?

A No, sir.

Q I'm going to be intrusive on you. I'm sorry, but Horry County's big, but it's small, so I need to know more about you.

Can I have your full name?

A George Wesley Lack.

Q And what is your address?

A My home address is 854 Folly Road, Myrtle Beach, 29588.



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authority to go to double red flag and close it down.

Q After this incident with Mr. Wolde, as I understand it, there was another death on the beach that day?

A Right.

Q Who made the decision to go to double red flags?

A We did.

Q And what was the basis of that?

A Well, we had two major incidences within 15 minutes of each other, until we could get a handle on what was going on.

Q Did you ever pull the double reds down that day?

A Yes, yes. Well, let me not answer that question.

Q I don't think you did, and so I'm not trying to trick you at all, so --

A The assumption that I had is they went back to single red, but that's just an assumption.

Q Double red means stay out of the water?

A You can wade.

Q And single red means what?

A Waist deep.



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## Summary as of 03/02/2021

### General Info

| | |
|---|---|
| **Case #** | 18-1552 |
| **Computer #** | 38312 |
| **Decedent** | Wolde, Zerihun |
| **DL/SSN** | |
| **Address** | 1712 Chapel Hill Rd.<br>Silver Spring, MD 20506 |
| **Race** | Black |
| **Sex** | Male |
| **DOB** | 10/10/1976<br>(41 at time of death) |
| **Place of Occurence** | Beach at 9th Avenue South, MBSC 29577<br>08/24/2018 1255 |
| **Place of Death** | GSRMC<br>08/24/2018 1354 |
| **Pronounced** | 08/24/2018 1354 |

### Next of Kin

**Meswaot Abel (Girlfriend)**
1712 Chapel Hill Rd.

Silver Spring, MD 20506
[redacted]

**Berket Bagnew (Cousin)**

[redacted]

### Law Enforcement Agencies

| Name | Agency |
|---|---|
| Chad Rose | Myrtle Beach Police Dept. |

### Saw Deceased Last

None Filed.

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2022 May 26 3:59 PM
HOWARD COUNTY, MARYLAND
CASE NUMBER 0000000000000

## Found Deceased

None Filed.

## Witnesses

None Filed.

## Suspects

None Filed.

## Death Info

| | |
|---|---|
| **Ambulance Service** | |
| **Funeral Home** | Burroughs |
| **Organ Donation?** | None |
| **Manner of Death** | Accidental |
| **Cause of Death** | Asphyxia due to Drowning |
| **Death Cert. Dispo.** | McSpadden |
| **Burial Permit Issued By** | GSRMC<br>Permit #359911 |

## Autopsy

| | |
|---|---|
| **Performed?** | Yes - Agency: GSRMC |
| **Doctors** | Proctor |
| **Report Received?** | Yes - 12/12/2018 |

## Photo/Statement

| | |
|---|---|
| **Photo Taken?** | No |
| **Statement Taken?** | No |

## Blood

| | |
|---|---|
| **Taken?** | Yes - Autopsy |
| **When?** | 08/24/2018 0600 |
| **Disposition** | |
| **Labeled, packaged, sealed?** | No |
| **Statement Taken?** | No |
| **Report Received?** | No |

## Highway Patrol

| | |
|---|---|
| **Report Received?** | No |
| **Weapons?** | No |

## Death Scene

None Filed.

## Medical Treatments

None Filed.

## Prescriptions

None Filed.

## Personal Effects

None Filed.

## Narrative

The patient was in the ocean near 9th Avenue South with 2 of his children (daughter age 9, son age 12). The mother of the children (patient's girlfriend) reported that the 12 year old ran to her yelling that dad needed help. Bystanders pulled him unresponsive from the water. CPR was started on the beach. The patient was transported to GSRMC but was pronounced shortly after arrival. The girlfriend reported that the patient can swim and that they visit the ocean often at home in MD. She reported no significant medical history except a recent diagnosis of gastritis. An autopsy was scheduled at the request of the girlfriend. I later learned from police that the two children were also pulled from the ocean by bystanders after being caught in a rip current. It is believed that the patient was attempting to rescue the children when he went under water. The autopsy will proceed as planned. Michelle McSpadden Deputy Coroner

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Q You didn't know that?
A No.
Q Did you think he was still in the water?
A No. I don't remember.
Q Were you even looking for him at that point?
A No.
Q Okay. So, there's you and your sister and your dad and one of the boards, is that right?
A Yes.
Q Together. And the water there was about chest-high to you at that time?
A Yes.
Q Right. However tall you were, right?
A Mm-hmm.
Q You were -- you're taller now, right?
A Yes.
Q Much taller now?
A Yeah.
Q Okay. So, what were you all doing? Just kind of jumping over the waves?
A Yeah.



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Q Jumping under the waves, that sort of thing?

A Yeah.

Q Just kind of hanging out?

A Mm-hmm.

Q Is that a yes?

A Yes.

Q And what happened?

A We felt something pushing us back.

Q Okay. Did it feel like the water was doing that?

A Yeah.

Q And when you say pushing you back, like pushing you out to sea?

A Yes.

Q Not pushing you back into the shore?

A Yeah, pushing us out towards the sea.

Q Did it feel like it was all around you or was it just at your feet level or --

A We just noticed that we were going further and further. We didn't see any, like, waves or nothing.

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Q Okay. Do you know how it was pushing you if you could stand up?

A No, it was pushing me to where I couldn't stand anymore.

Q Okay. So, maybe if you would jump up to jump over a wave, then it would kind of pull you back a little and --

A Not jumping, just even I was on the sea floor, I felt something.

Q Right. Well, I'm trying to figure out if you were standing, right, and could feel that pull?

A Yes.

Q Did you all think about just walking back into the shore?

A Well, it started pushing us back, like, to where nobody could stand up.

Q Okay. So, had you ever felt anything like that before in the ocean?

A No, no.

Q Did you know what it was?

A No.



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Q Did you have any idea?

A No.

Q Did you or your sister or your dad say anything at that time about it? Hey, this is -- I'm feeling like I'm getting pulled.

A We started trying to go forward.

Q But like, you know, did you feel it and say, hey, Wubit, do you feel that?

A I said we should -- I told them we should go back.

Q Okay. You said that?

A Yes.

Q And what did your dad say?

A He just started going. We started going and then we couldn't.

Q Did he say anything about what it was that you all were experiencing?

A No.

Q Did he give you any instruction on how to deal with it?

A No.

Q When you were feeling the pulling did

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pulled out?

A Yes.

Q And so you weren't getting anywhere when you were swimming?

A Yes.

Q When you started swimming towards the shore what do you know, if anything, your father was doing?

A He was trying to do the same thing, trying to get back.

Q What was your sister doing?

A With him, doing the same thing.

Q Everybody was swimming?

A Yes.

Q Swimming towards the shore?

A Yes.

Q All right. And when you were swimming you were just doing what the stroke was that you were taught, right?

A Yeah.

Q Just trying to swim back to the shore?

A Yeah.



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

waves where you were?

A I don't remember.

Q Or if it was flat?

A It wasn't flat, but.

Q Okay. Was there any water that was breaking onto the top of you?

A Nothing was breaking.

Q Okay. And so you started yelling?

A Yes, we all started yelling.

Q All three of you?

A All three of us.

Q Okay. Everybody was treading water?

A I don't what my -- they were behind me, my sister and my dad.

Q So, you were in front of or towards the shore side of your dad and your sister?

A Yes.

Q When you started yelling were you looking for them or were you looking at the shore, looking for help?

A I was looking at them.

Q Looking at --



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A When I was yelling, I was looking towards the shore and waving my hands.

Q Okay. But when you were doing that, you couldn't see your dad or sister, could you?

A No.

Q All right. So, what happened next?

A We felt -- the three or four people came and helped us. They told me I should swim at an angle because when I was swimming straight forward I wasn't getting anywhere. And then I started swimming, more people came, I told them to help behind me.

Q Okay. So, you got the attention of some people that were nearby?

A Yes.

Q And they came out to where you were?

A Yes.

Q And told you to swim sideways?

A Yes.

Q In other words, to the same --

A At an angle, like instead of going straight, I should go like this.

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Q Right. In other words, not straight back to shore, but sideways or angled?

A Yes.

Q Okay. And were you able to do that?

A Yes.

Q Did anybody physically have to come pick you or grab you or do anything to you?

A At first he grabbed me and he tried to take me to shore, but I said I can do this myself. I told him to go to my sister and my dad.

Q All right. So, you were able to follow their direction --

A Yes.

Q -- and swim sideways?

A Yes.

Q And then you were able to get to shore?

A Yes.

Q Okay. Do you have any recollection of how far you had to go sideways to get out of the pulling?

A No.

Q Was it very far?



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Q Now, at this point, as you're being helped, do you look for your father and sister or are you just telling them to help your father and sister behind you?

A When -- on the shore?

Q Hmm?

A When I'm where?

Q When you're in the water.

A Oh, I just start swimming, but I'm also looking back and checking on them.

Q Right. So, what do you see is going on with your dad and your sister?

A They're getting helped.

Q Are they on the top of the water?

A I don't remember.

Q When you say they were getting help, what did you see?

A Just they're having to come -- like they're helping them.

Q Okay.

A The people are assisting them.

Q But was your dad above the water at the



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

time?

A I don't remember.

Q Do you remember what your sister was doing?

A No.

Q Was she on the board?

A No, I don't think so.

Q Do you know what happened to the board?

A No.

Q Do you know how your sister stayed up?

A No.

Q When you last saw your dad and sister together were they close together?

A Yes, they were next to each other.

Q Okay. Could you see whether she was grabbing onto him?

A Yes.

Q Was she?

A I think so.

Q Grabbing onto his shoulder or arm?

A Yeah.

Q Maybe it looked like she was trying to

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get him to hold her up?

A Yeah.

Q Okay. Do you recall them saying anything?

A No, only thing that was -- I told them to calm down and then I started swimming.

Q Okay. What happened after you got to shore?

A I ran to my mom. And my grandfather was already on the shore with them.

Q How far away did you have to run?

A It was far because since I ran [sic] at an angle to run to find them.

Q When you got to the beach did you have to run to the right to get to them or did you have to run to the left to get to them?

A To the right.

Q Now, when you all went into the water the very first time, you went straight in, correct?

A Yes.

Q And then when you ended up coming back



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Q And then when you got back to the beach, then you had to run to where your mother was, correct?

A Yes.

Q Was your grandfather with your mother at that time?

A Yes.

Q Okay. And what did you tell her?

A They're in trouble, they need help.

Q You said "they are" or did you say "dad and Wubit" or --

A I don't recall exactly what I said, but it was along those lines.

Q Okay. And then what happened next?

A I saw them after -- after I got on, I saw my sister coming back the same -- running the exact same way to the right. Then I saw my dad, he was on the floor, and then there was a huddle around him.

Q Do you know how your sister got to shore?

A No.



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| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA** | ) | **IN THE COURT OF COMMON PLEAS** |
| | ) | |
| **COUNTY OF HORRY** | ) | **CASE NO.: 2019-CP-26-07075** |
| **Meswaet Abel, as Personal Representative Over the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian for Adam Wolde and Wubit Wolde,** **Plaintiff,** | ) | **CERTIFICATE OF AUTHENTICITY** |
| **v.** | ) | |
| **Lack's Beach Service, City of Myrtle Beach and John Doe Lifeguard,** **Defendants.** | ) | |

The undersigned hereby CERTIFIES THAT THE ENCLOSED DOCUMENTS ARE A COMPLETE, TRUE, AND ACCURATE COPY OF THE RECORDS AS REQUESTED AS KEPT IN THE NORMAL COURSE OF BUSINESS AT:

**Horry County Coroner's Office**

SIGNED: Katrina L. Collins

POSITION: Management Assistant

TODAY'S DATE: 03/31/2021

COMPANY: Horry County Coroner's office

ADDRESS: 2562 Main St. Conway, S.C. 29526

SWORN TO AND SUBSCRIBED before me
This 31st day of March, 2021.

NOTARY PUBLIC FOR Horry County, SC

My Commission Expires: 6/6/2028

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## Summary as of 12/12/2018

### General Info

| | |
|---|---|
| **Case #** | 18-1552 |
| **Computer #** | 36312 |
| **Decedant** | Wolde, Zerihun |
| **DL/SSN** | |
| **Address** | 1712 Chapel Hill Rd.<br>Silver Spring, MD 20506 |
| **Race** | Black |
| **Sex** | Male |
| **DOB** | 10/10/1976<br>(41 at time of death) |
| **Place of Occurence** | Beach at 9th Avenue South, MBSC 29577<br>08/24/2018 1255 |
| **Place of Death** | GSRMC<br>08/24/2018 1354 |
| **Pronounced** | 08/24/2018 1354 |

### Next of Kin

**Meswaet Abel (Girlfriend)**
1712 Chapel Hill Rd.

Silver Spring, MD 20506
[redacted]

**Berket Bagnew (Cousin)**

[redacted]

### Law Enforcement Agencies

| Name | Agency |
|---|---|
| Chad Rose | Myrtle Beach Police Dept. |

### Saw Deceased Last

None Filed.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## Found Deceased

None Filed.

## Witnesses

None Filed.

## Suspects

None Filed.

## Death Info

| | |
|---|---|
| **Ambulance Service** | |
| **Funeral Home** | Burroughs |
| **Organ Donation?** | None |
| **Manner of Death** | Accidental |
| **Cause of Death** | Asphyxia due to Drowning |
| **Death Cert. Dispo.** | McSpadden |
| **Burial Permit Issued By** | GSRMC<br>Permit #359911 |

## Autopsy

| | |
|---|---|
| **Performed?** | Yes - Agency: GSRMC |
| **Doctors** | Proctor |
| **Report Received?** | Yes - 12/12/2018 |

## Photo/Statement

| | |
|---|---|
| **Photo Taken?** | No |
| **Statement Taken?** | No |

## Blood

| | |
|---|---|
| **Taken?** | Yes - Autopsy |
| **When?** | 08/24/2018 0600 |
| **Disposition** | |
| **Labeled, packaged, sealed?** | No |
| **Statement Taken?** | No |

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## Highway Patrol

| | |
|---|---|
| **Report Received?** | No |
| **Weapons?** | No |

## Death Scene

None Filed.

## Medical Treatments

None Filed.

## Prescriptions

None Filed.

## Personal Effects

None Filed.

## Narrative

The patient was in the ocean near 9th Avenue South with 2 of his children (daughter age 9, son age 12). The mother of the children (patient's girlfriend) reported that the 12 year old ran to her yelling that dad needed help. Bystanders pulled him unresponsive from the water. CPR was started on the beach. The patient was transported to GSRMC but was pronounced shortly after arrival. The girlfriend reported that the patient can swim and that they visit the ocean often at home in MD. She reported no significant medical history except a recent diagnosis of gastritis. An autopsy was scheduled at the request of the girlfriend. I later learned from police that the two children were also pulled from the ocean by bystanders after being caught in a rip current. It is believed that the patient was attempting to rescue the children when he went under water. The autopsy will proceed as planned. Michelle McSpadden Deputy Coroner

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## Summary as of 08/27/2018

### General Info

| | |
|---|---|
| Case # | 18-1552 |
| Computer # | 36312 |
| Decedant | Wolde, Zerihun |
| DL/SSN | |
| Address | 1712 Chapel Hill Rd.<br>Silver Spring, MD 20506 |
| Race | Black |
| Sex | Male |
| DOB | [redacted]1976<br>(41 at time of death) |
| Place of Occurence | Beach at 9th Avenue South, MBSC 29577<br>08/24/2018 1255 |
| Place of Death | GSRMC<br>08/24/2018 1354 |
| Pronounced | 08/24/2018 1354 |

### Next of Kin

Meswaet Abel (Girlfriend)
1712 Chapel Hill Rd.

Silver Spring, MD 20506
[redacted]

Berket Bagnew (Cousin)

[redacted]

### Law Enforcement Agencies

| Name | Agency |
|---|---|
| Chad Rose | Myrtle Beach Police Dept. |

### Saw Deceased Last

None Filed.

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## Found Deceased

None Filed.

## Witnesses

None Filed.

## Suspects

None Filed.

## Death Info

| | |
|---|---|
| **Ambulance Service** | |
| **Funeral Home** | |
| **Organ Donation?** | None |
| **Manner of Death** | Pending Invest./Autopsy |
| **Cause of Death** | Pending Autopsy |
| **Death Cert. Dispo.** | McSpadden |
| **Burial Permit Issued By** | GSRMC<br>Permit # |

## Autopsy

| | |
|---|---|
| **Performed?** | Yes - Agency: GSRMC |
| **Doctors** | Proctor |
| **Report Received?** | No |

## Photo/Statement

| | |
|---|---|
| **Photo Taken?** | No |
| **Statement Taken?** | No |

## Blood

| | |
|---|---|
| **Taken?** | Yes - Autopsy |
| **When?** | 08/24/2018 0600 |
| **Disposition** | |
| **Labeled, packaged, sealed?** | No |
| **Statement Taken?** | No |

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## Highway Patrol

| | |
|---|---|
| Report Received? | No |
| Weapons? | No |

## Death Scene

None Filed.

## Medical Treatments

None Filed.

## Prescriptions

None Filed.

## Personal Effects

None Filed.

## Narrative

The patient was in the ocean near 9th Avenue South with 2 of his children (daughter age 9, son age 12). The mother of the children (patient's girlfriend) reported that the 12 year old ran to her yelling that dad needed help. Bystanders pulled him unresponsive from the water. CPR was started on the beach. The patient was transported to GSRMC but was pronounced shortly after arrival. The girlfriend reported that the patient can swim and that they visit the ocean often at home in MD. She reported no significant medical history except a recent diagnosis of gastritis. An autopsy was scheduled at the request of the girlfriend. I later learned from police that the two children were also pulled from the ocean by bystanders after being caught in a rip current. It is believed that the patient was attempting to rescue the children when he went under water. The autopsy will proceed as planned. Michelle McSpadden Deputy Coroner

© Horry County Government

State Birth Number

State of South Carolina
Department of Health and Environmental Control
**CERTIFICATE OF DEATH**

State File Number
18 032372

NAME OF DECEDENT Zerihun K Wolde
For use by physician or Institution

**Items 1-23c To Be Completed/Verified By: FUNERAL DIRECTOR**

1. DECEDENT'S LEGAL NAME (Include AKA's, if any) (First, Middle, Last): Zerihun K Wolde
2. SEX: Male
3. SOCIAL SECURITY:
4a. AGE-Last Birthday (Years): 41
4b. UNDER 1 YEAR: Months / Days
4c. UNDER 1 DAY: Hours / Minutes
5. DATE OF BIRTH (MM/DD/YYYY): [redacted]/1976
6. BIRTHPLACE (City and State or Foreign Country):
7a. RESIDENCE-STATE:
7b. COUNTY:
7c. CITY OR TOWN:
7d. STREET AND NUMBER:
7e. APT. NO:
7f. ZIP CODE:
7g. INSIDE CITY LIMITS? ☐ Yes ☐ No
8. EVER IN US ARMED FORCES? ☐ Yes ☐ No
9. MARITAL STATUS AT TIME OF DEATH: ☐ Married ☐ Married, but separated ☐ Widowed ☐ Divorced ☐ Never Married ☐ Unknown
10. SURVIVING SPOUSE'S NAME (If Wife, give name prior to first marriage):
11. FATHER'S NAME (First, Middle, Last):
12. MOTHER'S NAME PRIOR TO FIRST MARRIAGE (First, Middle, Last):
13a. INFORMANT'S NAME:
13b. RELATIONSHIP TO DECEDENT:
13c. MAILING ADDRESS (Street and Number, City, State, Zip Code):

14. PLACE OF DEATH (Check only one, see instructions)
IF DEATH OCCURRED IN HOSPITAL: ☐ Inpatient ☒ Emergency Room/Outpatient ☐ Dead on Arrival
IF DEATH OCCURRED SOMEWHERE OTHER THAN A HOSPITAL: ☐ Hospice facility ☐ Nursing home/Long term care facility ☐ Decedent's home ☐ Other (Specify)
15. FACILITY NAME (If not institution, give street and number): Grand Strand Regional Medical Center
16. CITY OR TOWN, STATE AND ZIP CODE: Myrtle Beach, South Carolina 29572
17. COUNTY OF DEATH: Horry
18. METHOD OF DISPOSITION: ☐ Burial ☐ Cremation ☐ Donation ☐ Entombment ☒ Removal from state ☐ Other (Specify)
19. PLACE OF DISPOSITION (Name of Cemetery, crematory, other place):
20. LOCATION-CITY, TOWN AND STATE:
21. NAME AND ADDRESS OF FUNERAL FACILITY: Burroughs Funeral Home & Cremation Services, LLC
22. SIGNATURE OF FUNERAL SERVICE LICENSEE OR OTHER AGENT:
23. LICENSE NUMBER (Of Licensee): 3558 Old Kings Hwy Murrells Inlet, SC 29576
23a. EMBALMER (Signature):
23b. EMBALMER LICENSE NUMBER:
23c. LICENSE NUMBER (Of Facility): 877

**Items 24-49 To Be Completed By: MEDICAL CERTIFIER**

(ITEMS 24-28 MUST BE COMPLETED BY PERSON WHO PRONOUNCES OR CERTIFIES DEATH)
24. DATE PRONOUNCED DEAD (MM/DD/YYYY): 08/24/2018
25. TIME PRONOUNCED DEAD: 13:54 PM
26. SIGNATURE OF PERSON PRONOUNCING DEATH (Only when applicable):
27. LICENSE NUMBER:
28. DATE SIGNED (mm/dd/yyyy):
29. ACTUAL OR PRESUMED DATE OF DEATH (Spell Month): August 24, 2018
30. ACTUAL OR PRESUMED TIME OF DEATH: 13:54 PM
31. WAS CORONER OR MEDICAL EXAMINER CONTACTED? ☒ Yes ☐ No

CAUSE OF DEATH (See instructions and examples)
32. PART 1. Enter the chain of events - disease, injuries or complications - that directly caused the death. DO NOT enter terminal events cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE. Enter only one cause on a line. Add additional lines if necessary.
IMMEDIATE CAUSE (Final disease or condition resulting in death): a. PENDING
Sequentially list conditions, if any, leading to the cause listed on line a. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST
b. Due to (or as a consequence of):
c. Due to (or as a consequence of):
d. Due to (or as a consequence of):
Approximate Interval Onset to death

PART II. Enter other significant conditions contributing to death but not resulting in the underlying cause given in PART I
33. WAS AN AUTOPSY PERFORMED? ☒ Yes ☐ No
34. WERE AUTOPSY FINDINGS AVAILABLE TO COMPLETE THE CAUSE OF DEATH? ☐ Yes ☒ No
35. DID TOBACCO USE CONTRIBUTE TO DEATH? ☐ Yes ☐ Probably ☐ No ☒ Unknown
36. IF FEMALE: ☐ Not pregnant within past year ☐ Pregnant at time of death ☐ Not pregnant, but pregnant within 42 days of death ☐ Not pregnant, but pregnant 43 days to one year before death ☐ Unknown if pregnant within the past year
37. MANNER OF DEATH: ☐ Natural ☐ Homicide ☐ Accident ☒ Pending Investigation ☐ Suicide ☐ Could not be determined
38. DATE OF INJURY (Spell Month):
39. TIME OF INJURY:
40. PLACE OF INJURY (e.g. Decedent's home, construction site, restaurant, wooded area):
41. INJURY AT WORK? ☐ Yes ☐ No
42. LOCATION OF INJURY: State: City or Town: County: Street & Number: Apartment Number: Zip Code:
43. DESCRIBE HOW INJURY OCCURRED:
44. IF TRANSPORTATION INJURY SPECIFY: ☐ Driver/Operator ☐ Pedestrian ☐ Passenger ☐ Other (Specify)

45. CERTIFIER (Check only one)
☐ Certifying physician-To the best of my knowledge, death occurred due to the cause(s) and manner stated
☐ Pronouncing and Certifying physician-To the best of my knowledge, death occurred at the time, date, and place, and due to the cause(s) and manner stated
☒ Coroner/Medical Examiner-On the basis of examination and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated
Signature of certifier: Michelle McSpadden (Electronically Certified)
46. NAME, ADDRESS, AND ZIP CODE OF PERSON COMPLETING CAUSE OF DEATH (Item 32): Michelle McSpadden, 2560 N Main St #3 Conway South Carolina 29526
46a. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER:
47. TITLE OF CERTIFIER: Deputy Coroner
48. LICENSE NUMBER:
49. DATE CERTIFIED (MM/DD/YYYY): 8/27/2018
50. FOR REGISTRAR ONLY - DATE FILED (MM/DD/YYYY):

**Items 51-55 To Be Completed By: Funeral Director**

51. DECEDENT'S EDUCATION - Check the box that best describes the highest degree or level of school completed at the time of death.
☐ 8th grade or less
☐ 9th-12th grade, no diploma
☐ High school graduate or GED completed
☐ Some college credit, but no degree
☐ Associate degree (e.g., AA, AS)
☐ Bachelor's degree (e.g., BA, AB, BS)
☐ Master's degree (e.g., MA, MS, MEng, MEd, MSW, MBA)
☐ Doctorate (e.g., PhD, EdD) or Professional degree (e.g., MD, DDS, DVM, LLB, JD)

52. DECEDENT OF HISPANIC ORIGIN? - Check the box that best describes whether the decedent is Spanish/Hispanic/Latino/ Latina. Check the "No" box if decedent is not Spanish/Hispanic/Latino/ Latina
☐ No, not Spanish/Hispanic/Latino/Latina
☐ Yes, Mexican, Mexican American, Chicano/Chicana
☐ Yes, Puerto Rican
☐ Yes, Cuban
☐ Yes, other Spanish/Hispanic/Latino/Latina
(Specify)

53. DECEDENT'S RACE - (Check one or more races to indicate what the decedent considered himself or herself to be)
☐ White
☒ Black or African American
☐ American Indian or Alaska Native
(Name of the enrolled or principal tribe)
☐ Asian Indian
☐ Chinese
☐ Filipino
☐ Japanese
☐ Korean
☐ Vietnamese
☐ Other Asian (Specify)
☐ Native Hawaiian
☐ Guamanian or Chamorro
☐ Samoan
☐ Other Pacific Islander (Specify)
☐ Other (Specify)

54. DECEDENT'S USUAL OCCUPATION (Indicate type of work done during most of working life. DO NOT USE THE TERM "RETIRED")
55. KIND OF BUSINESS/INDUSTRY

Amendment Code
Amendment Number
Date:
User ID
BRTP NO. 359911
DHEC 670 Rev. 2004

Wolde_Coroner's Report_0008



ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

CONFIDENTIAL

# ANATOMICAL PATHOLOGY AUTOPSY

## FA-18-195

## Wolde, Zerihun

---

AUTOPSY PROTOCOL

RACE/SEX: African American/Male

DATE OF BIRTH: Unknown AGE: 41

DATE OF DEATH: 8/24/18 DATE OF AUTOPSY: 8/25/18

TIME OF DEATH: Unknown TIME OF AUTOPSY: 0600

AUTHORIZING AUTHORITY: Michelle McSpadden
Horry County Deputy Coroner

PROSECTOR: EDWARD L. PROCTOR, JR, MD

ASSISTANT: LEROY RUSH

A complete autopsy was performed on the decedent identified as Zerihun Wolde at Grand Strand Regional Medical Center, autopsy facility, on 8/25/18, beginning at 06:00 am.







ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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## CASE HISTORY

This 41 year old black male was pulled underwater by a riptide while trying to rescue his children. He was pulled from the water unresponsive. Resuscitative attempts were unsuccessful and he subsequently expired.

Permission for autopsy ws granted by Horry County Deputy Coroner, Michelle McSpadden.

### EXTERNAL DESCRIPTION

The body is identified as Zerihun Wolde. The body is that of a well-developed, well-nourished black male appearing the recorded age of 41 years. The body measures 71 inches in length and has an estimated weight of approximately 225 pounds. The head is covered by receding black hair. The eyes are brown and the pupils measure 0.5 cm bilaterally. The sclerae and conjunctivae are pale. The ears and nose appear unremarkable. The mouth contains an endotracheal tube and the teeth are in fair repair. The neck is supple without masses or tracheal deviation. The chest is flat. The abdomen is flat. There are no palpable masses or fluid wave. The genitalia are those of a circumcised adult male. The testes are descended. The lower extremities contain a tibial stick in the left anterior groin area. The right upper extremity contains an intravenous line in the right antecubital fossa. The back appears unremarkable.

### INTERNAL DESCRIPTION

The body is opened in the usual manner to reveal the thoracic and abdominal organs to lie in their usual anatomic positions. There is no fluid in either pleural cavity. The pericardial sac contains approximately 5 ml of a clear fluid. The peritoneal cavity contains no fluid.

## SYSTEMS DESCRIPTION

**HEART:** The heart weighs 575 gms. The epicardium contains minimal fat. The myocardium is firm and thickened to greater than 2 cm in average thickness. The endocardium is smooth. The valve ring is intact and the valve cusps appear unremarkable. The atrial chambers are widely patent. The foramen ovale is closed. The coronary vessels show a mild degree of plaque. The aorta contains mild surface plaques.

**LUNGS:** The right lung weighs 800 gms and the left lung weighs 700 gms. The pleural

surfaces are smooth. Sections reveal a medium firm parenchyma from which moderate amounts of bloody and frothy fluid freely exude. The trachea is hyperemic.

**LIVER:** The capsule is intact and the edge is blunt. Sections reveal a pale tan parenchyma.

**GASTROINTESTINAL TRACT:** The esophagus, stomach, small and large bowels appear grossly normal.

**KIDNEYS:** The capsules strip to reveal smooth cortical surfaces. Sections reveal distinct corticomedullary demarcations and normal appearing collecting systems. The ureters and bladder appear grossly normal.

**SPLEEN, PANCREAS:** Gross examination is unremarkable.

**BRAIN:** The brain weighs 1600 gms. The covering meninges are pale and translucent. The sulci and gyri are of normal prominence. The blood vessels at the base of the brain appear unremarkable. Serial sections of the brain and cerebellum appear unremarkable.

**Additional Procedures:**

Blood was retained and submitted to National Medical Services under proper chain of custody for toxicologic evaluation.

## MICROSCOPIC INTERPRETATION:

**HEART:** Sections reveal intact myocardial fibers.

**LIVER:** Sections reveal an intact lobular architecture. Portal areas show minimal fibrosis. Central veins are intact. Hepatocytes show a generalized macrovesicular steatosis.

**KIDNEYS:** Sections reveal a mild congestion of the glomerular capillaries. The tubules and interstitium appear unremarkable.

**LUNGS:** Sections reveal a moderate congestion of the alveolar septal capillaries. Alveolar spaces contain aggregates of macrophages as well as focal accumulations of extraneous particulate matter.

**Block Summary:**

A. Heart, Liver

B. Kidneys

C. Lungs







ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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**CASE SUMMARY:**

At autopsy, examination revealed prominent pulmonary congestion and edema. There were focal accumulations of extraneous particulate matter within scattered lung spaces.

There was a cardiomyopathy of the dilated type characterized by a cardiomegaly of 575 grams with left ventricular hypertrophy and dilatation. There was mild coronary and aortic atherosclerosis.

There was generalized macrovesicular steatosis of the liver as well as generalized pulmonary and visceral congestion.

Toxicologic evaluation revealed a negative blood ethanol. A blood drug screen was positive for Caffeine.

Based on the clinical history and morphologic findings of prominent pulmonary congestion and edema, I feel that this man died as a result of asphyxia due to drowning. Although there was evidence of an underlying cardiomyopathy, I do not feel that this contributed to his demise.

The manner of death based upon this evaluation and current information from investigative authorities is accidental.

**FINAL DIAGNOSES:**

**I. ASPHYXIA DUE TO DROWNING**

**II. CARDIOMYOPATHY, DILATED TYPE**

**A. CARDIOMEGALY, 575 GRAMS, WITH LEFT VENTRICULAR HYPERTROPHY AND DILATATION**

**B. CORONARY ATHEROSCLEROSIS, MILD**

**C. AORTIC ATHEROSCLEROSIS, MILD**

**III. GENERALIZED MACROVESICULAR STEATOSIS, LIVER**

**IV. SIGNIFICANT FINDINGS**

**A. GENERALIZED VISCERAL CONGESTION**

**B. TOXICOLOGY:**

**A. BLOOD ETHANOL - NEGATIVE**

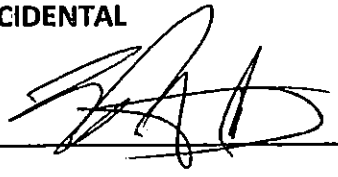
**B. BLOOD DRUG SCREEN - POSITIVE - CAFFEINE**

**CAUSE OF DEATH**

**ASPHYXIA DUE TO DROWNING**

**MANNER OF DEATH**

**ACCIDENTAL**



I certify that I personally conducted the diagnostic evaluation of the above specimen(s) and have rendered the above diagnoses.

**Edward L. Proctor, Jr, MD**

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

NMS Labs
3701 Welsh Road, PO Box 433A, Willow Grove, PA 19090-0437
Phone: (215) 657-4900 Fax: (215) 657-2972
e-mail: nms@nmslabs.com
Robert A. Middleberg, PhD, F-ABFT, DABCC-TC, Laboratory Director

**CONFIDENTIAL**

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# Toxicology Report

**Report Issued** 11/16/2018 15:10

**To:** **10130**
Horry County Coroner c/o Grand Strand RMC
Attn: Dr. E. Proctor
809 82nd Parkway
Myrtle Beach, SC 29572

| | |
|---|---|
| **Patient Name** | WOLDE, ZERIHUN |
| **Patient ID** | FA-18-195 |
| **Chain** | 18328661 |
| **Age** Not Given | **DOB** Not Given |
| **Gender** | Male |
| **Workorder** | 18328661 |



**Positive Findings:**

| Compound | Result | Units | Matrix Source |
|---|---|---|---|
| Caffeine | Positive | mcg/mL | 001 - Cardiac Blood |

See Detailed Findings section for additional information

**Testing Requested:**

| Analysis Code | Description |
|---|---|
| 8052B | Postmortem, Expanded, Blood (Forensic) |

**Specimens Received:**

| ID | Tube/Container | Volume/ Mass | Collection Date/Time | Matrix Source | Miscellaneous Information |
|---|---|---|---|---|---|
| 001 | Gray Vial | 4 mL | 08/25/2018 06:00 | Cardiac Blood | |
| 002 | Gray Vial | 3.75 mL | 08/25/2018 06:00 | Cardiac Blood | |
| 003 | Gray Vial | 3.5 mL | 08/25/2018 06:00 | Cardiac Blood | |
| 004 | Gray Vial | 3.5 mL | 08/25/2018 06:00 | Cardiac Blood | |

All sample volumes/weights are approximations.

Specimens received on 11/10/2018.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

**Detailed Findings:**

| Analysis and Comments | Result | Units | Rpt. Limit | Specimen Source | Analysis By |
|---|---|---|---|---|---|
| Caffeine | Positive | mcg/mL | 0.20 | 001 - Cardiac Blood | LC/TOF-MS |

**Other than the above findings, examination of the specimen(s) submitted did not reveal any positive findings of toxicological significance by procedures outlined in the accompanying Analysis Summary.**

**Reference Comments:**

1. Caffeine (No-Doz) - Cardiac Blood:

   Caffeine is a xanthine-derived central nervous system stimulant. It also produces diuresis and cardiac and respiratory stimulation. It can be readily found in such items as coffee, tea, soft drinks and chocolate. As a reference, a typical cup of coffee or tea contains between 40 to 100 mg caffeine.

   The reported qualitative result for this substance was based upon a single analysis only. If confirmation testing is required please contact the laboratory.

Chain of custody documentation has been maintained for the analyses performed by NMS Labs.

Unless alternate arrangements are made by you, the remainder of the submitted specimens will be discarded six (6) weeks from the date of this report; and generated data will be discarded five (5) years from the date the analyses were performed.

Workorder 18328661 was electronically signed on 11/16/2018 14:14 by:

Denice M Teem

Denice M. Teem, B.S., D-ABFT-FT
Certifying Scientist

**Analysis Summary and Reporting Limits:**

All of the following tests were performed for this case. For each test, the compounds listed were included in the scope. The Reporting Limit listed for each compound represents the lowest concentration of the compound that will be reported as being positive. If the compound is listed as None Detected, it is not present above the Reporting Limit. Please refer to the Positive Findings section of the report for those compounds that were identified as being present.

Acode 8052B - Postmortem, Expanded, Blood (Forensic) - Cardiac Blood

-Analysis by Enzyme-Linked Immunosorbent Assay (ELISA) for:

| Compound | Rpt. Limit | Compound | Rpt. Limit |
|---|---|---|---|
| Barbiturates | 0.040 mcg/mL | Salicylates | 120 mcg/mL |
| Cannabinoids | 10 ng/mL | | |

-Analysis by Headspace Gas Chromatography (GC) for:

| Compound | Rpt. Limit | Compound | Rpt. Limit |
|---|---|---|---|
| Acetone | 5.0 mg/dL | Isopropanol | 5.0 mg/dL |
| Ethanol | 10 mg/dL | Methanol | 5.0 mg/dL |

**Analysis Summary and Reporting Limits:**

-Analysis by High Performance Liquid Chromatography/Time of Flight-Mass Spectrometry (LC/TOF-MS) for: The following is a general list of compound classes included in this screen. The detection of any specific analyte is concentration-dependent. Note, not all known analytes in each specified compound class are included. Some specific analytes outside these classes are also included. For a detailed list of all analytes and reporting limits, please contact NMS Labs.
Amphetamines, Anticonvulsants, Antidepressants, Antihistamines, Antipsychotic Agents, Benzodiazepines, CNS Stimulants, Cocaine and Metabolites, Hallucinogens, Hypnosedatives, Hypoglycemics, Muscle Relaxants, Non-Steroidal Anti-Inflammatory Agents, Opiates and Opioids.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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dhec

# Supplemental Report of Medical Certification of Death
## Public Health Statistics and Information Services

Death Certificate No.: 18-032372
(State Office Use Only)

Name of Deceased: Zerihun K Wolde Age: 41

Date of Death: 08/24/2018 County of Death: Horry Sex: M

Reason for supplemental information:

- ✓ Autopsy Findings.
- ____ Additional information for Classifying Cause of Death.
- ✓ Other, specify: Toxicology Findings
- ✓ Cause of Death Pending on Original Certificate.
- ____ Requested by physician/coroner/medical examiner.
- ____ Manner of death and/or accident information.

**CAUSE OF DEATH**

ITEMS 24-28 MUST BE COMPLETED BY PERSON WHO PRONOUNCES OR CERTIFIES DEATH

| 24. DATE PRONOUNCED DEAD (MM/DD/YYYY) | 25. TIME PRONOUNCED DEAD |
|---|---|

| 26. SIGNATURE OF PERSON PRONOUNCING DEATH (Only when applicable) | 27. LICENSE NUMBER | 28. DATE SIGNED (MM/DD/YYYY) |
|---|---|---|

| 29. ACTUAL OR PRESUMED DATE OF DEATH (MM/DD/YYYY) | 30. ACTUAL OR PRESUMED TIME OF DEATH | 31. WAS CORONER OR MEDICAL EXAMINER CONTACTED? ☐ Yes ☐ No |
|---|---|---|

CAUSE OF DEATH (See instructions and examples)

32. PART I. Enter the chain of events-diseases, injuries, or complications-that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE. Enter only one cause on a line. Add additional lines if necessary.

| | | Approximate interval: Onset to death |
|---|---|---|
| IMMEDIATE CAUSE (Final disease or condition resulting in death) ---> | a. Asphyxia due to Drowning | |
| | Due to (or as a consequence of): | |
| Sequentially list conditions, if any, leading to the cause listed on line a. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST | b. | |
| | Due to (or as a consequence of): | |
| | c. | |
| | Due to (or as a consequence of): | |
| | d. | |

PART II. Enter other significant conditions contributing to death but not resulting in the underlying cause given in PART I.

33. WAS AN AUTOPSY PERFORMED? ☑ Yes ☐ No

34. WERE AUTOPSY FINDINGS AVAILABLE TO COMPLETE THE CAUSE OF DEATH? ☑ Yes ☐ No

**To Be Completed By: MEDICAL CERTIFIER**

35. DID TOBACCO USE CONTRIBUTE TO DEATH?
☐ Yes ☐ Probably
☑ No ☐ Unknown

36. IF FEMALE:
☐ Not pregnant within past year
☐ Pregnant at time of death
☐ Not pregnant, but pregnant within 42 days of death
☐ Not pregnant, but pregnant 43 days to one year before death
☐ Unknown if pregnant within the past year

37. MANNER OF DEATH
☐ Natural ☐ Homicide
☑ Accident ☐ Pending investigation
☐ Suicide ☐ Could not be determined

| 38. DATE OF INJURY (MM/DD/YYYY) | 39. TIME OF INJURY | 40. PLACE OF INJURY (e.g., Decedent's home, construction site, restaurant, wooded area) | 41. INJURY AT WORK? |
|---|---|---|---|
| 08/24/2018 | 1255 | Ocean | ☐ Yes ☑ No |

42. LOCATION OF INJURY: State: South Carolina City or Town: Myrtle Beach County: Horry
Street & Number: Beach at 9th Avenue South Apartment Number: Zip Code: 29577

| 43. DESCRIBE HOW INJURY OCCURRED: | 44. IF TRANSPORTATION INJURY, SPECIFY: |
|---|---|
| Drowning | ☐ Driver/Operator ☐ Pedestrian ☐ Passenger ☐ Other (Specify) |

*Additional information requested:

After the completion of the autopsy, toxicology and investigation, complete the Cause of Death and items 33 - 37 above.

Michelle M Bodden / 12/6/18
Signature and Title of Certifying Officer Date Signed

**(State Office Use Only)**
Death certificate updated pursuant to SC Reg. 61-19, Section 18(f)
(Nosologist)

DHEC 0627 (03/2009)

Wolde_Coroner's Report_0017

THOMASON & PRACHT LLP

Nancy Jo Thomason • nancyjo@864law.com
J. Christopher Pracht • chris@864law.com
303 East Greenville Street • Anderson, SC 29621
PO Box 4025 • Anderson, SC 29622
Office 864.226.7222 • Fax 864.226.7224
www.864law.com

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

May 21, 2019

Horry County Coroner
ATTN: Katrina
2560 Main Street, Ste. 3
Conway, SC 29528

**RE: Zurihun Kebede Wolde**
**Date of Death: August 24, 2018**
**DOB: [redacted]1976**
**SSN: [redacted]**

Dear Katrina:

I hope you are well. Please find attached the original Probate Order for Meswaet Abel to satisfy our request for the autopsy report that was completed on Zerihun Wolde following his death on August 24, 2018.

Thank you very much for your kind attention to this matter.

Very truly yours,

THOMASON & PRACHT, LLP

Laura L. Thorpe

Laura L. Thorpe, Paralegal to
J. Christopher Pracht
laura@864law.com

Enclosure

Emailed on 05/24/19

# STATE OF MARYLAND
# LETTERS OF ADMINISTRATION

ESTATE NO. W96924

I certify that administration of the Estate of

ZERIHUN KEBEDE WOLDE

was granted on the 19th day of DECEMBER, 2018,

to MESWAET ABEL

as personal representative(s) and the appointment is in effect

this 19th day of DECEMBER 2018,

☐ Will probated _____ (date)

☑ Intestate estate

Joseph M. Griffin

JOSEPH M GRIFFIN
Register of Wills for
MONTGOMERY COUNTY

VALID ONLY IF SEALED WITH THE SEAL OF THE COURT OR THE REGISTER

RW1120

ROWNET
11/2009

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**THOMASON & PRACHT LLP**

Nancy Jo Thomason • nancyjo@864law.com
J. Christopher Pracht • chris@864law.com
303 East Greenville Street • Anderson, SC 29621
PO Box 4025 • Anderson, SC 29622
Office 864.226.7222 • Fax 864.226.7224
www.864law.com

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April 18, 2019

Horry County Coroner
2560Main Street, Ste. 3
Conway, SC 29528

**RE: Zurihun Kebede Wolde**
**Date of Death: August 24, 2018**
**DOB: [redacted]1976**
**SSN: [redacted]**

Dear Sir/Madam:

I hope you are well. Our office represents Meswaet Abel on behalf of Zurihun Wolde. We are requesting a copy of the autopsy report that was completed following his death on August 24, 2018.

Enclosed, please find a signed HIPPA release as well as the Probate Order appointing Meswaet Abel as the Personal Representative of the estate. I have also enclosed a check in the amount of $50.00 for the related fees.

Thank you very much for your kind attention to this matter.

Very truly yours,

THOMASON & PRACHT, LLP

Laura L. Thorpe

Laura L. Thorpe, Paralegal to
J. Christopher Pracht
laura@864law.com

Enclosures
Check # 8624

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AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION
(HIPAA Compliant)

Patient Name: Zurihan Kebede Wolde Date of birth: [redacted]1976
Social Security No: [redacted]

The following health provider is authorized to provide medical records and disclose patient identifiable health information.

Name: Horry County Coroner - Autopsy Report

The above-named health provider is authorized to discuss my medical treatment and health information with my attorney, J. Christopher Pracht and/or Nancy Jo Thomason and Thomason & Pracht, LLP (herein known as Attorney). The above-named health provider is NOT authorized to discuss my medical treatment or health information with ANY INSURANCE COMPANY. Also, these records may be retrieved and viewed by Streamlined Record Retrieval Service.

The scope of the health information to be provided or disclosed is as follow:
All medical records for all dates of service for all medical conditions and treatments from the above-named health care provider, as well as all medical records for all dates of service for all medical conditions and treatment from other health care providers and facilities. All billing records regarding the referenced incident. All medical release authorizations, notes, memoranda, correspondence, claim forms, reports and insurance documents regarding the treatment at any time within the last ten years.

The health information is authorized to be provided to:
J Christopher Pracht and/or Nancy Jo Thomason (864) 226-7222 (telephone)
THOMASON & PRACHT, LLP (864) 226-7224 (fax)
PO Box 4025, 303 East Greenville Street
Anderson, SC 29622

My attorney is authorized to act on my behalf regarding all insurance and legal matters. The patient identifiable health information received pursuant to this release authorization is to be used for the following purpose:

For legal matters related to my injuries or medical condition.

RIGHT OF REVOCATION: I have the right to revoke this release and authorization at any time. The revocation must be in writing and be delivered to the medical provider. The revocation will not apply to records and information that have already been provided.

EXPIRATION: Unless earlier revoked, this authorization will expire upon the termination of the representation by J. Christopher Pracht, Esq. and/or Nancy Jo Thomason, Esq.

PATIENT RIGHTS: As provided in 45 CFR § 160 and § 164, I understand that I have the right to inspect or copy the information to be disclosed, to inspect and amend my medical records, and to an accounting of the use and disclosure of my health information to any third party. Additionally, I understand that I have the right to refuse to sign this authorization and the medical provider may not condition treatment, payment, enrollment, or eligibility for benefits based upon my refusal to sign the authorization unless the authorization is necessary for research related to healthcare related services provided solely for the purposes of releasing the information to a third party.

RE-DISCLOSURE: I understand that there is a potential for unauthorized re-disclosure of the information and that the re-disclosed information may not be protected by federal confidentiality rules.

Photocopies of this release are valid and may be used in lieu of the original.

DATE: 04/18/2019 BY: [signature]
Patient/Representative

Wolde_Coroner's Report_0021

# STATE OF MARYLAND
# LETTERS OF ADMINISTRATION

ESTATE NO. W96924

I certify that administration of the Estate of

ZERIHUN KEBEDE WOLDE

was granted on the 19th day of DECEMBER, 2018,

to MESWAET ABEL

as personal representative(s) and the appointment is in effect

this 19th day of DECEMBER 2018.

☐ Will probated _____ (date)

☑ Intestate estate

Joseph M. Griffin

JOSEPH M GRIFFIN

**Register of Wills for**

MONTGOMERY COUNTY

**VALID ONLY IF SEALED WITH THE SEAL OF THE COURT OR THE REGISTER**

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# United States Lifesaving Association

PO Box 366 • Huntington Beach, California 92648 • Tel: 866-FOR-USLA (866-367-8752)

www.usla.org



Peter Davis
*President*

Rob Williams
*Vice-President*

Nikki Bowie
*Secretary*

Michael Bradley
*Treasurer*

Ed Zebrowski III
*Executive Delegate*

B. Chris Brewster
*Honor Officer*

Ralph Goto
*Advisor*

Dr. Peter Wernicki
*Medical Advisor*

John "Chip" More
*Legal Advisor*


September 30, 2016

Honorable John T. Rhodes, Mayor
Honorable City Council Members
Myrtle Beach City Council
P. O. Box 7411
Myrtle Beach, SC 29572

RE: BEACH LIFEGUARD STANDARDS

The United States Lifesaving Association is America's nonprofit, professional association of beach lifeguards and open water rescuers. The USLA works to reduce the incidence of death and injury in the aquatic environment through public education, national lifeguard standards, training programs, promotion of high levels of lifeguard readiness, and other means.

Based on emails, media reports, and preliminary investigations of recent drowning cases, the USLA has identified the Myrtle Beach system combining lifesaving and commercial activities to be an unreliable means of protecting swimmers. In addition, it was found that at times local lifeguard providers have falsely claimed to meet the standards for USLA certification and illegally utilized the USLA logo on agency apparel. Since the City Council sets the requirements for Myrtle Beach lifeguard agencies, the USLA is offering our assistance to advise how your lifeguard providers can come into compliance with national norms for lifeguarding, achieve the standards required for national certification, and clear up any confusion regarding current practices.

The United States Lifesaving Association offers a national Lifeguard Agency Certification Program, which has been in existence since 1993. It is an accreditation program for beach lifeguard agencies that follow USLA minimum standards for lifeguard fitness, training, and equipment. Currently, 140 lifeguard agencies meet USLA certification standards. A list can be found on our website at: www.usla.org/certified. The list of certified agencies includes large and small agencies, municipal and private agencies, and non-profit and for-profit agencies. No Myrtle Beach lifeguard agency has demonstrated compliance with USLA standards and none are currently certified by the USLA.

We are pleased to note that the Myrtle Beach Fire Department has a team that is certified under the USLA's Aquatic Rescue Response Team (ARRT) program. This program is for non-lifeguard agencies that respond to reports

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(e.g. 9-1-1 calls) of aquatic emergencies. The emphasis of training in the ARRT program is on rescue, rather than prevention, which is a key role of lifeguards.

The fee for certification is minimal ($300 for three years). Requirements for certification include a timed swim test, minimum forty hour training course (to be provided by the agency itself), first aid and CPR certification, and appropriate lifesaving equipment. In addition, to be certified an agency must adhere to the following USLA requirement: "Lifeguards assigned to water surveillance have the primary responsibility of observing and managing persons in the water, as well as to provide assistance to persons in the water and shall not be assigned to any duties other than public safety."

The USLA will not certify any beach lifeguard agency that assigns lifeguards to a dual role of public safety and commercial activity because all water safety professionals agree that a distracted lifeguard cannot properly maintain safe surveillance of the water. In the interest of public safety, we encourage Myrtle Beach to change its standards in accordance with USLA certification standards with respect to this and other points of the USLA certification program.

For those who cite the use of American Red Cross (ARC) lifeguard standards by Myrtle Beach lifeguard providers to be sufficient, please note the ARC has consistently stated that its training is not designed nor is it appropriate for the training of lifeguards at surf beaches. The USLA works closely with the ARC nationally in a variety of areas. Just as USLA training is not appropriate for pool lifeguard work, ARC training is not appropriate for surf lifeguard work. In a variety of areas, it directly conflicts with USLA training due to the unique nature of the surf environment.

The use of the USLA trademark logo on uniforms and websites by one or more lifeguard agencies in Myrtle Beach is a violation of US trademark law. The USLA has made legal notification as appropriate when we have become aware of violations. The bottom line is that no lifeguard agency in Myrtle Beach is authorized in any way to use the USLA's logo or other intellectual property. USLA certified agencies are permitted to use USLA logos under certain limited conditions.

The USLA allows individual lifeguards to join the USLA through local chapters. The Horry County Chapter of the USLA invites all beach lifeguards and individuals to join the USLA. There are membership classifications for lifeguards and non-lifeguards. However no lifeguard agency in the USA is a USLA member because the USLA does not offer membership to lifeguard agencies. Thus the USLA provides membership opportunities to individuals, but only certification opportunities to lifeguard agencies. Any assertion by a lifeguard agency that it is a USLA member is untrue.

With the increase in public use of beaches across the nation, beach lifeguards are now recognized as professional rescuers who provide drowning prevention, water rescue, and emergency medical response to hundreds of millions of beach visitors each year. Myrtle Beach is currently one of a handful of communities left in the USA that still allows lifeguards to vend at the same time they provide public safety. The USLA strongly

encourages the Myrtle Beach City Council to define the lifeguard's responsibilities as a professional rescuer only and stands ready to assist in developing a lifeguard system to meet the standards established as such.

I welcome your questions. Our organization stands ready to advise and assist as needed.

Respectfully,



Peter Davis
USLA President

cc: John Peterson, City Manager







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**Lack's Beach Service, Inc.**
P.O. BOX 2365, HWY. 707, MYRTLE BEACH, SC 29578-2365
(803) 448-7741 FAX (803) 626-4945

January 11, 1996

Mr. B. Chris Brewster
USLA Certification Committee Chair
2381 Quivira Court
San Diego, CA 92109

Dear Mr. Brewster,

Pursuant to your correspondence dated November 5, 1995, regarding the certification of Lack's and North Beach Service, Inc., please be advised that in conjunction with South Atlantic Region Certification Officers, the following plan of action was developed to satisfy USLA mandates.

Effective immediately, Lack's and North Beach Service, Inc. will employ a core of open water lifeguards who's sole responsibility will be to provide lifeguard service in designated areas of Myrtle Beach/Horry County, South Carolina. This service is in addition to services currently being provided by my company and should offer an additional level of public safety for the beach patrons of our community.

It should be noted that lifeguards assigned to this new service will not be subject to duties that would distract or intrude their attention from the observation of persons in the waterfront area, or that prevents immediate assistance to persons in distress in the water. Lack's and North Beach Service, Inc. agrees to continue to comply with USLA guidelines for agency certification.

Further, I hope Lack's and North Beach Service, Inc., can be the testing ground and standard setter for similar type beach services. Please advise if additional information is needed.

Sincerely,

George Lack

RECEIVED
PARKS & RECREATION

# United States Lifesaving Association
# National Certification Committee

Chair
B. Chris Brewster
Members
Paul Drucker
Southeast Region
Joe Pecoraro
Great Lakes Region
Tom Benlok
South Atlantic Region
Dave Shotwell
Mid-Atlantic Region
Kim Tyson
Gulf Coast Region
Kal Welser
Southwest Region
Cathy Wiederhold
Northwest Region
Dr. Peter Wernicki
Medical Advisor

January 21, 1996

George Lack
Lack's Beach Service, Inc.
PO Box 2365
Myrtle Beach, SC 29578-2365

Dear Mr. Lack:

I was most inspired to receive your letter of January 11 indicating that your company intends to make some organizational changes in an effort to adhere to the recent action of the Board of Directors. I am eager to send your final notice of certification post haste.

I would appreciate a little clarification regarding the proposed changes so that I can better understand them. You state that you, "... will employ a core of open water lifeguards whose sole responsibility will be to provide lifeguard service in designated areas of Myrtle Beach/Horry County." May I ask who will be responsible for rentals and other commercial activities if not the lifeguards? Will any lifeguards be involved in commercial activities?

I would like to make it clear that I am only trying to better understand how this will work. It seems from your letter that your plans will bring you into compliance. I join you in hoping that Lack's can be a leader in making these adjustments.

Sincerely,

B. Chris Brewster
Committee Chair

BCB

c: USLA President
President, Southeast Region

Committee Chair's Address: 2581 Quivira Court • San Diego, CA 92109
Tel: (619) 221-8832 • Fax: (619) 581-1227 • Internet: 76440.2104@compuserve.com

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# United States Lifesaving Association

## National Certification Committee

PO Box 366 • Huntington Beach, California 92648 • Tel: 500-FOR-USLA

Chair
B. Chris Brewster
Members
Paul Drucker
Southeast Region
Joe Pecoraro
Great Lakes Region
Tom Renick
South Atlantic Region
Dave Shotwell
Mid-Atlantic Region
Kim Tyson
Gulf Coast Region
Kai Weisser
Southwest Region
Cathy Wiederhold
Northwest Region
Dr. Peter Wernicki
Medical Advisor

January 27, 1996

George Lack
Lack's Beach Service, Inc.
PO Box 2365
Myrtle Beach, SC 29578-2365

Dear Mr. Lack:

USLA has now completed our review of your Horry County operation. I congratulate you on being approved as meeting USLA minimum recommended guidelines and standards for beach lifeguard agencies and enclose your certificate.

Your certification is good for a period of two years. I respectfully remind you, as I do all certified agencies, that during that period your organization retains certification so long as you maintain USLA standards you asserted during the certification process. If for any reason the standards indicated in your application to us are diminished, the certification becomes invalid.

In particular, you have agreed to modify your operation in such a way so as to ensure that lifeguards assigned to supervise the aquatic area shall not be subject to duties that would distract or intrude their attention from proper observation of persons in the waterfront area, or that prevent immediate assistance to persons in distress in the water. Specifically, your lifeguards assigned to water surveillance will not be assigned to any duties other than public safety. As you know, this change is a critical aspect of your certification.

I would like to thank you for taking the time to apply and for the modifications you have elected to make. I share your expectation that the changes you are making to comply with USLA recommended guidelines and standards will offer an additional level of public safety for the beach patrons of your community.

Sincerely,

B. Chris Brewster
Committee Chair

BCB

Committee Chair's Address: 2581 Quivira Court • San Diego, CA 92109
Tel: (619) 221-8832 • Fax: (619) 581-1227 • Internet: 76440.2104@compuserve.com

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## Crystal Edwards

**From:** Philip Cain
**Sent:** Thursday, August 9, 2018 8:36 PM
**To:** Mark Kruea; Amy Prock; Marty Brown; Tom Gwyer; Brian J. Mitchell; Tod O'Briant
**Cc:** John Pedersen; Ron Andrews; Fox Simons; Mike Shelton; Bruce Boulineau; Kaycey Vrettos; Chasity Pendergrass; Sandra Zanfini
**Subject:** Re: lifeguard complaint

I have forwarded this to Lacks BS for them to look into and address.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: Mark Kruea <[redacted]>
Date: 8/9/18 8:19 PM (GMT-05:00)
To: Philip Cain [redacted], Amy Prock <[redacted]>, Marty Brown <[redacted]>, Tom Gwyer <[redacted]>, "Brian J. Mitchell" <[redacted]>, Tod O'Briant [redacted]>
Cc: John Pedersen <[redacted]>, Ron Andrews <[redacted]>, Fox Simons <[redacted]>, Mike Shelton <[redacted]>, Bruce Boulineau <[redacted]>, Kaycey Vrettos [redacted], Chasity Pendergrass [redacted], Sandra Zanfini <[redacted]>
Subject: FW: lifeguard complaint

All...

This person called today about a lifeguard who spent six minutes talking with a customer, rather than watching the water. It was at Sea Crest in the 800 block of South Ocean Boulevard. He called here, and I spoke with him directly about this, which is how we got to the email stage of things. While he was pleasant with me, he obviously planned to share this on YouTube from the get-go. He said other families on the beach were disturbed by the lifeguard's lack of attention to the water. See his YouTube link to the video, below, and my initial email to him. Will you follow-up with the lifeguard service and see what's up with this, please? I'd like to be able to reply back to him with some sort of information, although I doubt it will change his decision to post this on the internet along with this comment:

**Published on Aug 9, 2018**
FAMILIES BEWARE - MYRTLE BEACH. If you visit Myrtle Beach beware that many of the 'Life Guards' are actually 'Sales Men/Women' employed by a private company. These 'Life Guards' are actually only there to rent beach chairs/umbrellas at upwards of $100 a day. Their main concern is not the safety of your loved ones.
Thanks,
Mark

**From:** Casey Tritt [mailto:[redacted]]
**Sent:** Thursday, August 09, 2018 7:47 PM
**To:** Mark Kruea
**Subject:** Re: lifeguard complaint

Thank you for reaching out Mark. Please click the link below to view the video.

https://youtu.be/U7pMwVdQi6c

On Thu, Aug 9, 2018 at 4:33 PM Mark Kruea <[redacted]> wrote:

> Casey…
>
> Thanks for calling today about the beach service in the vicinity of the Sea Crest at 803 South Ocean Boulevard. Please share the video you have. I will alert our beach patrol about your concerns so that they can address them with the franchise owner. As we discussed, you saw a lifeguard renting chairs and conversing with beachgoers for several minutes without keeping an eye on the water during that time.
>
> Thanks again,
> Mark Kruea
> Public Information Officer
> City of Myrtle Beach
> *** WARNING *** All e-mail correspondence to and from this address may be subject to public disclosure under the South Carolina Freedom of Information Act(FOIA). 2007

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IN THE COURT OF COMMON PLEAS
OF HORRY COUNTY, SC
* * * * * * * * *

MESWAET ABEL, AS PERSONAL REPRESENTATIVE OVER THE ESTATE OF ZERIHUN WOLDE AND AS NATURAL PARENT AND LEGAL GUARDIAN FOR ADAM WOLDE AND WUBIT WOLDE,
Plaintiff
vs.
LACK'S BEACH SERVICE, CITY OF MYRTLE BEACH AND JOHN DOE LIFEGUARD,
Defendant

Case No. 2019-CP-26-07075
MLG File No.: 19-1014

* * * * * * * * *

VIDEOTAPE DEPOSITION
OF
THOMAS GRIFFITHS, Ed.D
June 15, 2022

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school was retained by the lifeguards?
A. No, sir.
Q. And is that a violation of the standard of care?
ATTORNEY THOMPSON:
Objection.
ATTORNEY CHAMBERS:
Objection.
THE WITNESS:
Yes, sir. Yes, sir.
BY ATTORNEY MCLEOD:
Q. Based upon your having been a professor at three major universities, do you think it would be difficult to teach a subject to a classroom where the students do not speak your language?
ATTORNEY THOMPSON:
Objection.
THE WITNESS:
Yes, sir. I think it would be difficult, yes.
BY ATTORNEY MCLEOD:
Q. Okay.
Now, did your review of the file also --- did Mr. Lack, George Lack, the owner of Lack's Beach Service, did he testify whether or not they were compliant with the 40 hour open water training requirement?

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Lack's indicate whether there will be joint responsibility for the number of lifeguards on the beach?

A. Yes, it does.

Q. Does the agreement between the City and Lack's also indicate whether they will be jointly responsible for staffing lunch breaks at the beach?

A. Yes. It says that they will go to lunch at a certain period of time. I believe between 10:30 or 11:30 and 2:00. And that only every third stand will go to lunch, alternated every third stand, which means a third of their lifeguards would be off --- the way I understand it, a third of their lifeguards would be off to lunch during that lunch hour time period.

Q. And so do you have an opinions whether or not by design pursuant to this document they violated the standard of care in how they operated this for-profit lifeguarding service?

ATTORNEY THOMPSON:

Objection.

ATTORNEY CHAMBERS:

Objection.

THE WITNESS:

Yeah. According to the agreement, they put the lifeguards in a position of failure. And you

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mentioned the lunchbreaks. By design, approximately every third chair was vacated with no contingency plan, with no alternative to guard that water. And so by not outlining that that beach should be closed or another arrangement where another lifeguard would fill in, like North Myrtle Beach does, they could have complied with the standard of care. But a significant number of guards vacated their stands with no other safety strategy in place to cover their water, if you will.

ATTORNEY THOMPSON:

Objection to form.

BY ATTORNEY MCLEOD:

Q. And does that place beachgoers at risk?

ATTORNEY THOMPSON:

Objection.

ATTORNEY CHAMBERS:

Same.

THE WITNESS:

Absolutely, because your coveryou're your coverage by design in this agreement is removed during perhaps the busiest time of the day.

BY ATTORNEY MCLEOD:

Q. Yes, sir. And does the standard of care require that a lifeguard station be occupied at all times or

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Was the Defendants' failure to provide any lifeguard rescue attempt to Mr. Wolde a violation of standard of care?

ATTORNEY THOMPSON:

Objection.

ATTORNEY CHAMBERS:

Same.

THE WITNESS:

In this case, it was particularly because they knew, they were forewarned of the hazardous conditions and they didn't take any precautions and didn't kick it up a notch as a result of allowing patrons to enter the water during those hazardous conditions.

BY ATTORNEY MCLEOD:

Q. Yes sir. And with regard to the rip current, life safety hazard should they have closed the beach or that section of the beach?

ATTORNEY THOMPSON:

Objection.

THE WITNESS:

I believe so based upon the testimony of those people who were there that day, for instance Holly Robinson said, you know, starting at 10:30, it was a very hazardous day. It was highly hazardous.

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Strong longshore currents, strong rip currents. And they knew those currents were coming and they knew they were present. In fact, we had another drowning that same day.

ATTORNEY THOMPSON:

Objection, move to strike.

BY ATTORNEY MCLEOD:

Q. And was their failure to close the beach or that section of the beach a violation of the standard of care?

ATTORNEY THOMPSON:

Objection.

ATTORNEY CHAMBERS:

Same.

THE WITNESS:

In this case, I think it was. Yes sir.

BY ATTORNEY MCLEOD:

Q. Okay.

Because they left the beach open, were they required to do anything to inform the beachgoers or inform them of the life safety hazard?

A. Beach lifeguards, all lifeguards but particularly surf lifeguards, beach lifeguards have a duty, an obligation to educate the --- and warn the public before they go in the water and as they are in the

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stand number.
A. Yes.
Q. That's the second column on Exhibit 9?
A. Yes.
Q. How many lifeguards onlys did Lack's intend to provide lifeguarding services on the date that Mr. Wolde drowned?
A. I'm sorry ---.
ATTORNEY THOMPSON:
Objection.
ATTORNEY CHAMBERS:
Objection.
THE WITNESS:
Seven, they --- according to the log sheet, they intended to place seven lifeguard onlys on the stands. And as it turned out when it was filled out, four of them were missing so only three were actually on duty at the time.
BY ATTORNEY MCLEOD:
Q. So doctor --- okay. So Dr. Griffiths, would it be a violation of the standard of care for these Defendants to provide only three people whose sole responsibility was to provide lifeguarding services for this 12 miles of beach?
ATTORNEY THOMPSON:

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Objection.

THE WITNESS:

Yes, and particularly under these weather and water conditions.

BY ATTORNEY MCLEOD:

Q. And would that place beachgoers at risk?

ATTORNEY THOMPSON:

Objection.

ATTORNEY CHAMBERS:

Same.

THE WITNESS:

Yes, it --- it would and it did.

BY ATTORNEY MCLEOD:

Q. And where was the closest lifeguard whose sole responsibility was to provide lifeguarding services situated in relation to where Mr. Wolde drowned?

A. I think seven or eight blocks away I believe to the best of my knowledge.

Q. Okay.

Looking at Exhibit 9, do you see the lifeguard only at L-27?

A. Yes sir.

Q. All right.

And is that eight city blocks away from L-21 where Mr. Wolde drowned?

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VERITEXT
LEGAL SOLUTIONS

Deposition of:

# Thomas Griffiths ED.D.

*December 9, 2021*

In the Matter of:

## Abel, Meswaet Vs. Lack's Beach Service

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800.743.DEPO (3376) | Calendar-carolinas@veritext.com |
www.veritext.com

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water park, is it not?

A. It is, but we still consider it an aquatic facility. I mean, there's three facilities, there's swimming pools, water parks and beaches.

Q. Right. And would you say that a facility owner, if you want to call it that, has more control over pool and water park or over the ocean?

A. Well, that's a general question. It's difficult to answer because it depends upon the management and the ownership of those three different venues.

Q. I mean, the City of Myrtle Beach can't control the ocean?

A. No, it can't. But it has a duty to educate and warn their clients that come to the ocean particularly when all the testimony so far is that most people who come to the beach don't know about the waves and the currents. And particularly in this beach, they are not great swimmers.

Q. And that's my question. What is the responsibility of the visitor, the person that's going to use the beach, to seek out or

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mean, the hotel is there, the resort is there to accept visitors from elsewhere, and people are coming from some place other than the City of Myrtle Beach, right, that's common sense?

A. Yes.

Q. And so they are folks probably more likely than not to not have any experience or knowledge of the oceanfront perhaps?

A. Exactly.

Q. And so those resorts, those private hotels that have these folks that are coming in from afar, they should have a responsibility to inform and educate their guests about the oceanfront; correct?

A. Correct. But the City of -- the city should also have the responsibility to make sure those hotels are doing their part.

Q. Because at the end of the day, if a visitor is staying at a private resort and accesses the beach through the private resort beach access, they might not have any opportunity to read or review the warnings and signage that are at the public beach accesses, would they?

A. It could be the case, but you would think that the city would be responsible for making sure

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



that clear, concise and consistent message is put out all along the access points, whether they are private or public. And again, that's why you have a beach service. I mean, the beach service is there to improve safety and reduce accidents.

Q. Well, at the end of the day, the beach service is not responsible for posting the signage for the city, is it, it's the city's responsibility?

A. Well, that's a great question. I think they both -- legally I don't know who's responsible for that technically, but you would think a reasonably prudent city and beach service would provide warnings to everyone who came to the beach.

Q. Whose property is it, who owns the beach?

A. I would imagine the State of South Carolina owns the beach.

Q. Or maybe the city?

A. Or another municipality, yes.

Q. So it's ultimately the city's decision as to what is posted or not posted on its property; correct?

A. I believe so.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



high-risk area as compared to other portions of the City of Myrtle Beach because they were not as knowledgeable or as skilled as some of the others. But that needs to be stated in combination with the fact that this particular beach also had a history of waves creating strong littoral or longshore currents and rip currents, and the fact that there was no lifeguard there.

Q. Well, I'm still grasping with the concept of closing a beach because the demographic may be a non-swimming group or a swimming group. I can't even imagine how practically you could do that and say I want to close this 100 yards because all of you people, I look at you and I think you're non-swimmers?

A. Well, I didn't say that. I said this appeared to me to be a trifecta for a drowning. You had a weaker population, you didn't have a lifeguard on duty in that section, nor did you have a LGO as required on 6th Street, and you had the National Weather Service saying that you're going to have a combination of strong longshore currents and rip currents.

And the people deposed said, yeah,

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



it was a very high-risk day, it was a combination of rips and littoral currents. There were strong currents. Those three things together point to the fact that that section of the beach should be closed not just because of the demographic.

Q. So let me make sure I'm clear. When you say the water should have been closed, it's not a -- how shall I say it. In and of itself, the water conditions in and of themselves, didn't constitute or require the beach to be closed, did it?

In other words, if you had a beach full of Olympic swimmers guarded by 15 lifeguards, would you close the beach just because of the surf conditions?

A. If they were strong enough, if they were bad enough, yes, I would have.

Q. I'm not asking about if they were. I'm asking about on that specific day, you said the water should have been closed. I'm asking you on that specific day, was the water conditions, the surf conditions in and of themselves, worthy of closing that beach?

A. I believe so.

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



Q. Regardless of how many lifeguards?
A. Yes.
Q. Regardless of the demographics on the beach?
A. Yes, sir.
Q. The water condition itself, the surf condition combining the waves, the tides, the wind, whatever the natural then existing conditions, required that beach to be closed; is that right?
A. I believe so, yes, sir.
Q. How much of the beach?
A. I can't say. Wherever the rips and the longshore currents were predominantly occurring.
Q. I mean again, how much of the beach needs to be closed, how much of the beach should have been closed?
A. Wherever the risk is predominates. Rips, sometimes rips will be in the same place all the time based upon the sandbars that are out there, based upon the channels. Sometimes they migrate up and down. You just don't know where they are going to be.

I mentioned the Southern California beaches. Those lifeguards are in elevated

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



Q. -- or closure of the water?
A. As reported by the Natural Weather Service, there were going to be -- there was strong rip currents and strong littoral currents.
Q. What does that mean? Is there any calculation, is there a number that's associated with it other than just simply strong?
A. I don't know how the National Weather Service actually reported other than it was going to be a high-risk day.
Q. Well, and I guess that's what I'm trying to figure out. I would assume there is some amount of conditions that you would then equate to high risk. I mean, just simply saying that there's rip currents or strong rip currents or there's a strong wind, I mean, we can calculate what the wind is. Do you know what the wind was that day?
A. No, sir.
Q. Can you calculate the longshore current?
A. Not at this point, no, sir.
Q. On a specific day, is that something that's reportable, like does the National Weather Service say there's a longshore current of 10

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075



Q. So the water should have been closed. You're saying that it should have been closed at 10 a.m.?
A. That's when the warning came in.
Q. What was the warning?
A. That it was going to be a very hazardous day with a combination of strong rips and longshore currents.
Q. And again, your words, hazardous day, did the National Weather Service say it was a hazardous day?
A. I didn't see their report.
Q. But does the National Weather Service typically provide descriptive kinds of concepts, like dangerous, or do they just provide data, the wind speed is this, the tides are this, do you know?
A. I would think they would give an advisory as to how dangerous they were, I just don't know. But, for instance, small craft advisory when the winds are up, they say warning, there's a small craft advisory warning against small craft going out on days with strong winds and high winds.
Q. Do you know if there was a small craft

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF HORRY | ) | CASE NO.: 2019-CP-26-07075 |
| Meswaet Abel, as Personal Representative over the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian for Adam Wolde and Wubit Wolde, | ) | **DEFENDANT CITY OF MYRTLE BEACH'S ANSWER TO PLAINTIFF'S COMPLAINT** |
| Plaintiffs, | ) | **(Jury Trial Demanded)** |
| v. | ) | |
| Lack's Beach Service, City of Myrtle Beach and John Doe Lifeguard, | ) | |
| Defendants. | ) | |

**TO: W. MULLINS M MCLEOD, JR., ESQUIRE, H. COOPER WILSON, III, ESQUIRE AND J. CHRISTOPHER PRACHT, ESQUIRE, V, ATTORNEYS FOR PLAINTIFF:**

Defendant, City of Myrtle Beach ("MB") by and through its undersigned attorneys, subject to and without waiving its defense answers the Complaint of the Plaintiff as follows:

1. The Defendant denies each and every allegation that is not specifically admitted herein.

2. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraphs 1, 2, 3 and 4 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

3. Upon information and belief, MB admits the allegations contained in Paragraphs 5 and 6 of Plaintiff's Complaint.

4. The Defendant denies the allegations contained in Paragraph 7 of Plaintiff's Complaint.

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

5. The allegations contained in Paragraph 8 of Plaintiff's Complaint state a legal conclusion to which no response is necessary. To the extent a response is necessary, these allegations are denied.

6. The Defendant admits the allegations contained in Paragraph 9 of Plaintiff's Complaint.

7. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraphs 10, 11, 12, 13, 14, and 15 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

8. Upon information and belief, MB admits the allegations contained in Paragraph 16 of Plaintiff's Complaint.

9. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraph 17 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

10. Answering the allegations contained in Paragraphs 18 and 19 of Plaintiff's Complaint, MB craves reference to any contract between itself and LBSI and denies any allegations that are inconsistent.

11. In response to the allegations contained in Paragraphs 20, 21 and 22, MB specially refers and incorporates the terms of any franchise agreement for the duties and obligation of the parties contained therein. MB denies each and every allegation of this paragraph that are inconsistent with the expressed terms of the franchise agreement.

12. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraph 23 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

13. Answering the allegations contained in Paragraph 24 of Plaintiff's Complaint, upon information and belief, MB admits that at the time the allegations were contained in the Complaint, Lacks did not possess a voluntary certification authored by the United States Lifesaving Association. MB denies the remaining allegations and demands strict proof thereof.

14. MB craves reference to any letter dated September 30, 2016 from the President of the United States Lifesaving Association regarding the allegations contained in Paragraphs 25, 26 and 27. MB specifically denies the assertions alleged in the letter and specifically denies any allegations that are inconsistent.

15. The Defendant denies the allegations contained in Paragraphs 28 and 29 of Plaintiff's Complaint.

16. MB craves reference to the expressed terms of the applicable franchise agreement and denies any allegations of that agreement regarding the allegations set forth in Paragraph 30.

17. The Defendant denies the allegations contained in Paragraph 31 of Plaintiff's Complaint.

18. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraphs 32, 33, 34, 35 and 36 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

19. The Defendant denies the allegations contained in Paragraphs 37 and 38 of Plaintiff's Complaint.

20. MB craves reference to the National Weather Service alerts and/or documented information from August 23, 2018 regarding the allegations set forth in Paragraphs 39 and 40 of the Plaintiff's Complaint and denies any allegations that are inconsistent.

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

21. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraphs 41, 42, 43, 44, 45, 46, 47 and 48 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

22. Upon information and belief, MB admits the allegations contained in Paragraph 49.

23. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraphs 50, 51 and 52 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

**SURVIVAL ACTION**
**S.C. Code Ann §15-51-10**

24. As to the allegations of Paragraph 53, this Defendant reiterates and realleges each of its previous responses as set forth fully herein.

25. The Defendant denies the allegations contained in Paragraphs 54 and 55 of Plaintiff's Complaint.

**WRONGFUL DEATH ACTION**
**S.C. Code Ann §15-51-20**

26. As to the allegations of Paragraph 56, this Defendant reiterates and realleges each of its previous responses as set forth fully herein.

27. The Defendant denies the allegations contained in Paragraph 57 of Plaintiff's Complaint.

28. The Defendant lacks sufficient information to form a belief regarding the allegations set forth in Paragraph 58 of the Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

29. The Defendant denies the allegations contained in Paragraph 59 of Plaintiff's Complaint.

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

**GROUNDS OF LIABILITY**
**Negligence, Gross Negligence, Recklessness – All Defendants**

30. As to the allegations of Paragraph 60, this Defendant reiterates and realleges each of its previous responses as set forth fully herein.

31. MB admits that it owed certain dues according to the law and denies it breached any duties. The remaining allegations contained in Paragraph 61 are denied.

32. MB craves reference to the expressed terms of the franchise agreement with LBSI for their parties' respective duties and obligations regarding the allegations contained in Paragraph 62 of the Plaintiff's Complaint. MB denies any allegations of Paragraph 62 that conflict with and/or contradict the franchise agreement and denies the remaining allegations of the Paragraph.

33. The Defendant denies the allegations contained in Paragraphs 63, 64, 65 and 66 of Plaintiff's Complaint.

**BYSTANDER LIABILITY – ALL DEFENDANTS**

34. As to the allegations of Paragraph 67, this Defendant reiterates and realleges each of its previous responses as set forth fully herein.

35. The Defendant denies the allegations contained in Paragraphs 67, 68 and 69 of Plaintiff's Complaint.

**RELIEF REQUESTED**

36. The Defendant denies the allegations contained in Paragraphs 70, 71 and 72 of Plaintiff's Complaint.

**FOR A SECOND DEFENSE**

37. **FURTHER ANSWERING THE COMPLAINT AND AS A SECOND DEFENSE**, this Defendant alleges the Complaint fails in whole or in part to state facts sufficient to constitute a cause of action and, therefore, this action should be dismissed pursuant to Rule

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE**

38. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRD DEFENSE,** this Defendant submits the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the intervening negligence, recklessness, willfulness, wantonness, and fault of a party or parties other than this Defendant. Such intervening negligence, recklessness, willfulness, wantonness, and fault were the sole cause of the injuries and damages for which Plaintiff seeks recovery and, therefore, Plaintiff may not recover against this Defendant.

**FOR A FOURTH DEFENSE**

39. **FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH DEFENSE,** this Defendant alleges the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the sole negligence, recklessness, willfulness, wantonness, and fault of third parties for whom this Defendant is liable. Therefore, the acts or fault of third parties are the real, efficient and proximate cause of the injuries for which Plaintiff seeks recovery, and, therefore, Plaintiff cannot recover against this Defendant.

**FOR A FIFTH DEFENSE**

40. **FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH DEFENSE,** this Defendant alleges any injuries or damages sustained by the Plaintiff were due to and caused by the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness ("negligence") of the Plaintiff, combining, concurring and contributing with the negligence of this Defendant, if any, without which contributory negligence, the Plaintiff's alleged injuries and damages would not have been incurred or sustained. Should the negligence of the Plaintiff be determined to be greater than that of this Defendant if any, the Plaintiff is entitled to no recovery. If

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

the negligence of the Plaintiff be determined to be not greater than that of these defendants, if any, the Plaintiff's recovery is to be reduced by the percentage of Plaintiff's fault.

**FOR A SIXTH DEFENSE**

41. **FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH DEFENSE,** this Defendant alleges that any award of punitive damages to Plaintiff would violate the constitutional safeguards provided to this Defendant by the Due Process Clause of the Fourteenth Amendment of the Unites States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded to Plaintiff.

**FOR A SEVENTH DEFENSE**

42. **FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH DEFENSE,** any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint could not be avoided, and this Defendant pleads an unavoidable accident as a complete bar to this action.

**FOR AN EIGHTH DEFENSE**

43. **FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH DEFENSE,** this Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

**FOR A NINTH DEFENSE**

44. **FURTHER ANSWERING THE COMPLAINT AND AS A NINTH DEFENSE,** this Defendant pleads the procedures and limitations of punitive damages as provided in S.C. Code Ann. § 15-32-520.

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

**FOR A TENTH DEFENSE**

45. **FURTHER ANSWERING THE COMPLAINT AND AS A TENTH DEFENSE,** this Defendant asserts that it is a governmental entity as contemplated by the South Carolina Torts Claims Act, and it hereby asserts all defenses afforded it by the South Carolina Tort Claims Act 15-78-10, et seq., Code of Laws of South Carolina, whether or not specifically or separately pleaded herein.

**FOR AN ELEVENTH DEFENSE**

46. **FURTHER ANSWERING THE COMPLAINT AND AS AN ELEVENTH DEFENSE,** the injury or damages suffered, if any, were due to and caused by, and were the direct proximate and exclusive result of the violence of nature and such constitutes an act of God and a complete defense to all claims.

**FOR A TWELFTH DEFENSE**

47. **FURTHER ANSWERING THE COMPLAINT AND AS A TWELFTH DEFENSE,** the claims asserted by Plaintiff are barred by the South Carolina Limitation on Liability of Landowners Act, S.C. Code Ann. § 27-3-10 *et seq.*

**FOR A THIRTEENTH DEFENSE**

48. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRTEENTH DEFENSE,** this Defendant asserts the provisions of §15-78-60 (16) & (20) of the Code of Laws of South Carolina, as amended.

**WHEREFORE,** having fully answered Plaintiff's Complaint, this Defendant prays that the same be dismissed with costs and for such other and further relief as this Court may deem to be just and proper.

ELECTRONICALLY FILED - 2020 Mar 17 12:22 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

TURNER PADGET GRAHAM & LANEY P.A.

By: s/R. Gerald Chambers, Jr.
R. Gerald Chambers, Jr. (SC Bar # 12065)
Email: gchambers@turnerpadget.com
P. O. Box 1473
Columbia, SC 29202
Telephone: (803) 227-4201
Fax: (803) 799-3957

s/David R. Sligh
David R. Sligh (SC Bar # 77493)
Email: dsligh@turnerpadget.com
P.O. Box 2116
Myrtle Beach, SC 29578
Telephone: (843) 213-5519
Fax 843-213-5619

**ATTORNEYS FOR DEFENDANT CITY OF MYRTLE BEACH**

Columbia, South Carolina

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| STATE OF SOUTH CAROLINA | ) COURT OF COMMON PLEAS |
| | ) FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) CASE NO: **2019-CP-26-07075** |

MESWAET ABEL, AS PERSONAL REPRESENTATIVE OVER THE ESTATE OF ZERIHUN WOLDE AND AS NATURAL PARENT AND LEGAL GUARDIAN FOR ADAM WOLDE AND WUBIT WOLDE,

Plaintiffs,

-versus-

LACK'S BEACH SERVICE, CITY OF MYRTLE BEACH AND JOHN DOE LIFEGUARD,

Defendants.

# THE 30(b)(6) VIDEOTAPED DEPOSITION OF JOHN PEDERSEN

Friday, May the 13th, 2022
10:50 a.m. – 1:41 p.m.

The 30(b)(6) videotaped deposition of **JOHN PEDERSEN,** taken on the 13th day of May 2022, at the law offices of **TURNER PADGET GRAHAM & LANEY, P.A.**, located at 3833 Mayfair Street, Suite 101, Myrtle Beach, South Carolina 29577.

***CP-26 REPORTING***
Melissa M. Stoneking, Court Reporter/Owner
PHONE: (843) 446-1691
EMAIL: melissastoneking@cp26reporting.com

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

safety. That was, that was our requirement. We needed to make sure we had people there. If we had diminished the pool by requiring that they be English speakers only, we would never have had enough lifeguards to provide the safety services that we felt were appropriate.

Q: Well, how can the lifeguards communicate any safety concerns or any instructions to the beachgoers if they can't speak English?

A: I think they visually provide surveillance of the beach. Generally speaking, if they want to wave someone in, they blow a whistle and wave them in.

Q: All right.

A: That -- I don't think it requires a long conversation.

Q: And Number 2 says you must possess a valid lifeguard card.

A: Yes, sir.

Q: What is the city's understanding of what that means?

ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

A: But I would expect that Lack's would let us know that.
Q: Okay. Who has the -- who owns the beach?
A: The beach is publicly owned.
Q: Does the City of Myrtle Beach own the beach?
A: As I understand it, the City of Myrtle Beach operates it as the public trustee of the beach.
Q: Does the state own the beach?
A: To my knowledge, yes, but I'm, I couldn't swear to that.
Q: I mean, the city doesn't own the beach, do they?
A: No, but we do have the right to set, our own set of ordinances and to regulate the beach.
COURT REPORTER'S NOTE: (MR. MCLEOD AND MR. WILSON HAVING A SIDEBAR.)
Q: The decision to close the beach, to issue a warning, or put up whatever signs you do that the ocean is closed,

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>MESWAET ABEL, AS PERSONAL REPRESENTATIVE OVER THE ESTATE OF ZERIHUN WOLDE AND AS NATURAL PARENT AND LEGAL GUARDIAN FOR ADAM WOLDE, AND WUBIT WOLDE,<br><br>Plaintiffs,<br><br>v.<br><br>LACK'S BEACH SERVICE, CITY OF MYRTLE BEACH, AND JOHN DOE LIFEGUARD,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>FOR THE 15TH JUDICIAL CIRCUIT<br>CASE NO.: 2019-CP-26-07075<br><br>**PLAINTIFFS MEMORANDUM IN OPPOSITION TO DEFENDANT CITY OF MYRTLE BEACH'S MOTION FOR SUMMARY JUDGEMENT** |

Plaintiff Meswaet Abel, as Personal Representative over the Estate of Zurihan Wolde and as Natural Parent and Legal Guardian for Adam Wolde and Wubit Wolde, respectfully submits her Response in Opposition to the motion for summary judgment filed by Defendant City of Myrtle Beach ("the City"). For the reasons set forth below, Defendant's motions should be denied in its entirety and this case should proceed to trial.

## INTRODUCTION

On August 24, 2018, Zurihan Wolde, a forty-one (41) year old father of four (4) young children, drowned and died while on vacation in Myrtle Beach with his family. Mr. Abel died because the City of Myrtle Beach ("the City") failed to provide him the care that was necessary under the circumstances. Specifically, the City boasts on its website that it will provide lifeguards on it beaches who have "watchful eyes and are ready to assist beachgoers and swimmers." *See* https://www.cityofmyrtlebeach.com/i_want_to/learn_about/beach_conditions.php. The City's promise to its beachgoers is based on its' decision to voluntarily undertake a duty to protect them

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

through an "efficient and effective Water Safety Program." *See* Exhibit 1, Seasons Water Safety Franchise Agreement. The City apparently decided that it was beneficial to the City to provide life-guard services on its beaches. The City had two options to fulfill this duty: 1) operate the lifeguard program itself and hire qualified beach lifeguards whose only job was to be protect the people in the water like the City of North Myrtle Beach chose to do[1]; or 2) hire a franchisee to operate the lifeguard program and allow them to provide lifeguards who sold commercial goods while they were supposed to monitor the people in the ocean. The City chose Option 2.

While the City may have the right to delegate the lifeguarding duties to a franchisee, it has a non-delegable duty to the public to provide quality lifeguard services based on the City's promises and their undertakings. Specifically, the City can delegate the duty to a franchisee, but they cannot delegate the liability. The City also has an independent duty to investigate the franchisees they hire prior to entering into a contract with them. The reasoning is obvious – the City must ensure that its' franchisee is capable of operating a safe operation and is willing and able to comply with the applicable safety rules. But the City did not do any of these things. Instead, the City rubber-stamped a contract to hire Lack's Beach Service ("Lack's"), a franchisee that the City knew or should have known operated in an unsafe manner, in May of 2018.

But not only did the City fail to adequately vet Lack's, they failed to perform any supervision over them after they were hired. Specifically, the City failed to ensure: 1) Lack's lifeguards were qualified to perform ocean rescues; and 2) that Lack's was providing the appropriate number of lifeguards on the beach to protect the public. The evidence in this case will

[1] "In 2006, North Myrtle Beach City Council members voted to take complete control of beach safety, which had previously been ran by contracted independent service franchises. This step had never been taken before by a municipality in the Grand Strand area. Lifeguards are no longer "dual role" and do not rent beach chairs and umbrellas. The only function of lifeguards in North Myrtle Beach is beach safety." https://www.nmb.us/233/North-Myrtle-Beach-Ocean-Rescue

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

show had the City even looked, they would have seen that the Lack's did not provide properly trained lifeguards and they did not provide the adequate number of lifeguards to patrol the beach.

Finally, the most egregious thing that the City did was to allow Lack's lifeguards to run commercial operations (selling beach chairs and umbrellas) on the beach while they were supposed to be lifeguarding. This is called "dual role" lifeguarding and is explicitly discouraged by the United States Lifesaving Associations ("USLA"), a national organization that oversees and licenses beach lifeguards. In fact, the USLA sent a letter to the City on September 30, 2016 stating that the "USLA has identified the Myrtle Beach system combining lifesaving and commercial activities to be an unreliable means of protecting swimmers." *See* Exhibit 2, September 30, 2016 letter from the USLA to the City. In addition, the USLA told the City: "[l]ifeguards assigned to water surveillance have the primary responsibility of observing and managing persons in the water, as well as to provide assistance to persons in the water and shall not be assigned to any duties other than public safety." Id. Finally, the USLA told the City in no uncertain terms that allowing lifeguards to perform dual roles is not safe for the public. Specifically, the USLA warned:

> **The USLA will not certify any beach lifeguard agency that assigns lifeguards to a dual role of public safety and commercial activity because all water safety professionals agree that a distracted lifeguard cannot properly maintain safe surveillance of the water. In the interest of public safety, we encourage Myrtle Beach to change its standards in accordance with USLA certification standards with respect to this and other points of the USLA certification program.**
> **Id.**

Despite these clear and obvious warnings given in 2016, the City placed the public's safety at risk in order to make money. Specifically, the City made a percentage off of all of the sales of the commercial products on their beach. As a result, on August 24, 2018, the City had substandard lifeguards on its beaches whose motives were not protect Mr. Wolde or his family but rather to

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

sell a bunch of chairs and umbrellas. When Mr. Wolde's children needed assistance in the water, no lifeguards responded. Not one. Mr. Wolde was the only person who could help. While Mr. Wolde heroically saved both of his children from drowning, he was not able to save himself. Ironically, or better yet unsurprisingly, not one lifeguard or City employee ever laid their hands on Mr. Wolde while he fought for the life of his children and his own in the water. His body was removed from the ocean by beach walkers who saw the incident occurring.

The City made a conscious, intentional decision to do something which they knew was unsafe. This is literally the definition of gross negligence. This decision directly led to Mr. Wolde's horrific death which in turn brough about this lawsuit. The City does not address any of these facts in their instant Motion for Summary Judgment. Rather, they simply allege that S.C. Code Ann. §27-3-10, which is termed the Recreational Use Statute, provides them immunity from responsibility in this case. Their argument is deficient for many reasons – not the least of which is that §27-3-60 specifically provides that the City is responsible for injuries when a jury determines their conduct to be "grossly negligent, willful, or malicious...."

The evidence presented shows that instead of providing lifeguards who would provide "watchful eyes" as they represented to the public, the City knowingly and intentionally hired lifeguards whose "eyes" were more focused on selling beach chairs and umbrellas than on the water. Because the Plaintiff presents more than a scintilla of evidence that the City was grossly negligent in its operation of its beaches, we respectfully ask this Court to deny the City's Motion for Summary Judgment.

## FACTS

Mr. Wolde lived in Maryland with his long-time fiancé Meswaet Abel and their four (4) children. *See* Exhibit 3, Complaint. Mr. Wolde worked as a cab driver and was the primary

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

caretaker of their children because Ms. Abel works a full-time job as a nurse in the local hospital. In the summer of 2018, the family planned a vacation to Myrtle Beach, SC because they were all experienced swimmers and wanted to experience the beaches of South Carolina which they had heard such good things about. The family drove eight (8) hours on August 23, 2018 and arrived in Myrtle Beach that evening. They rented a room at the Seacrest Oceanfront Resort ("the Seacrest") located on Ocean Boulevard in Myrtle Beach, SC. Id. The Seacrest is located between 8th and 9th Avenues in Myrtle Beach and its beachfront is monitored by Lack's through its contract with the City. *See* Ex. 1. Lack's is required to have lifeguards at designated spots along the beach. Id., P.2. They allegedly space them out between street blocks. Id., PP.12-16.

After a restful evening, the Wolde family awoke on August 24, 2018 and planned a beach day. The family arrived to the beach around 12pm. Mr. Wolde was an experienced swimmer who swam regularly at his local pool and at the local beaches. He was very comfortable in the water as Ms. Abel confirmed in her deposition. The family made a plan for Mr. Wolde to take their two (2) oldest children, Adam and Wubit, swimming in the ocean while Ms. Abel made sandcastles with their two (2) young daughters.

In and around 12:30pm, Mr. Wolde noticed that his children were having trouble with the current and began to help them. The three (3) fought the waves and the current while they battled to get back to shore. *See* Ex. 4, Horry County Coroner file. Mr. Wolde was able to get his two (2) children safely back to shore. Unfortunately, he was not able to save himself and he inhaled enough ocean water to stop his breathing. During this time, it became obvious to the people on the beach who were looking that there was a problem. Several beachgoers went into the water to assist Mr. Wolde and drug him to shore. *See* Ex. 5, City of Myrtle Beach Incident Report. No lifeguards ever went into the water to help Mr. Wolde or his children. By the time Mr. Wolde

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

made it to shore, it was too late. Despite the efforts of the emergency medical workers, Mr. Wolde died of asphyxia due to drowning. Ex.4.

## STANDARD OF REVIEW

"Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law." Grooms v. Marlboro County School Dist., 307 S.C. 310, 311, 414 S.E.2d 802, 803 (Ct.App.1992). Furthermore, to determine "whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party". Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509. Furthermore, and in this circuit, summary judgment is warranted "only when it is clear there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." Pulliam Inv. Co. v. Cameo Props., 810 F.2d 1282, 1286 (4th Cir. 1987).

## ARGUMENT

### I. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE ARGUMENTS RAISED BY DEFENDANTS MUST BE DECIDED BY A JURY

The Defendant's Motion for Summary Judgement based on the assertion that the South Carolina Recreational Use Statute (the "SCRUS") provides them immunity should be denied because this issue presents issues of law and fact which are issues for the jury. Harris v. University of South Carolina, 391 S.C. 518, 700 S.E.2d 45 (Ct. App. 2012). More specifically, the "SCRUS" provides that if a landowner permits the use of their land without charge for recreational purposes, that the owner does not make assurances that the property is safe and the owner does not assume liability for an injury to the person. The SCRUS exists for the public policy purpose of making "land and water areas available to the public for recreational purposes by limiting their liability

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

toward persons entering thereon for such purposes." S.C. Code Ann. §27-3-10 (2007). The SCRUS operates by relieving the landowner of the duty to "keep the premises safe for recreational users" or to "give any warning of a dangerous condition, use, structure, or activity on such premises to such person entering for such purposes." S.C. Code Ann. §27-3-30 (2007).

However, the SCRUS does not provide immunity for all conduct. The SCRUS does not abrogate a landowner's duty to a recreational user to guard or warn against a dangerous condition, use, structure, or activity when the landowner's conduct in breaching the duty constitutes gross negligence. S.C. Code Ann. §27-3-60 (2007)("Nothing in this chapter limits in any way any liability which otherwise exists: (a) For grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."); see also Kimsey v. City of Myrtle Beach, S.C. 109 F.3d 194, 195 (4th Cir. 1997) (affirming the trial court's grant of summary judgment to the landowner because the Plaintiff failed to refute the City's evidence of slight care, thus the gross negligence exception did not apply). The South Carolina Supreme Court defines gross negligence as the "absence of care that is necessary under the circumstances." Hollins v. Richland County School Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993). While gross negligence is ordinarily a mixed question of law and fact, in most cases gross negligence is a factually controlled concept whose determination best rests with the jury. Solanki v. Walmart Store Number 2806, 410 S.C. 229, 763 S.E.2d 615, 619 (Ct. App. 2014).

Therefore, whether the facts of this case support the application of the SCRUS, and whether the Defendant was grossly negligent, are questions best left to a jury. For this reason alone, Defendant's Motion for Summary Judgment should be denied.

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## II. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THIS DEFENDANT UNQUESTIONABLY OWE A LEGAL DUTY TO THIS PLAINTIFF

In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Steinke v. S.C. Dept. of Labor, Licensing and Regulation,* 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). The issue of negligence is a mixed question of law and fact. *Miller v. City of Camden,* 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct.App.1994). The court must first determine whether a duty arises in one party to exercise reasonable care for the benefit of another under the facts of a given case. Miller, 317, S.C. at 31.

Duty in its most simplistic terms is an obligation to either take action or refrain from acting in order to prevent harm to another. Thus, all persons have a duty to: 1) act reasonably when we act; and 2) reasonably refrain from taking certain actions in such a way as to not cause injury or harm to another person. *See* Kemmerlin v. Wingate, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979)("Reasonable care and competence in this context means 'that they will render their services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession in the particular locality, in accordance with accepted professional standards and in good faith without fraud or collusion.'").

The City's Motion for Summary Judgment demonstrates a lack of understanding of these basic legal duties. More particularly, the City simply states they have no duty to the Plaintiff under the SCRUS because they owned the beach. This misguided effort to narrow the issue of duty into non-existence is inherently flawed and ignores the fundamental question to be addressed in all cases where legal duty is raised: Does this Defendant owe this Plaintiff a duty of due care? For the

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

reasons that will follow, the answer in this case is unequivocally YES.

The City is an active participant in beach safety along its coast. The City promises to all who will listen they will provide quality lifeguards and safe beaches. The City even admits they have a duty to provide safe beaches. John Pedersen, the City Manager, testified:

> Q And one of the responsibilities that you agree the city has is the protection of its tourists and resident population?
> A Absolutely.
>
> Q And that's a responsibility that the city bears on the city beaches here. Right?
> A Throughout the city and on the city beaches, yes.
> (Ex. 6, Pedersen Depo., p. 35, l. 20-p. 36, l. 6).

But the City does not provide lifeguards and promise safety for a charitable purpose, they make a profit based on their agreement with Lack's. *See* Ex. 1, Agreement. In fact, the week that Mr. Wolde died, Lack's earned $72,968.50 selling beach chairs and umbrellas – the City gets a cut of that money. *See* Ex. 7, Lack's Rental Sales. Yet, despite being an active for-profit participant in the beach safety industry, the City would have this Court believe it owes no legal obligations to the public arising from its operation of its business operation. If the Court were to accept the City's arguments, it would in essence grant complete immunity to the City and give it carte blanche to conduct its business of safety to the public without regard to the consequences of its negligence.

The City, however, cannot escape the basic legal obligations that apply to all individuals and corporations in South Carolina. The City must act in a reasonably prudent manner under like and similar circumstances and must refrain from conduct which poses a risk of injury to foreseeable third parties. There exists in this case numerous and genuine issues of material fact that prove the City failed to act reasonably under the circumstances by contracting with an entity that had substandard lifeguards and then allowing that entity to perform the dual-role lifeguards when the City knew that was an unsafe proposition.

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## III. EVEN IF NO DUTY INITIALLY EXISTED DEFENDANT HAS A DUTY HERE BECAUSE IT VOLUNTARILY CREATED ONE AND IT CREATED RISK OF HARM TO MR. WOLDE THROUGH ITS ACTIONS

It is well settled in South Carolina that "an affirmative legal duty may be created by statute, a contractual relationship, status, property interest or some other special circumstance." Madison ex rel. Bryant v. Babcock Center, Inc., 638 S.E.2d 650 (S.C. 2006). In addition, South Carolina law imposes a duty to control the conduct of another or to warn a third person of danger, where the defendant negligently created a foreseeable risk of harm to the third party. *E.g.*, Faile v. S.C. Dep't of Juvenile Justice, 566 S.E.2d 536, 546 (S.C. 2002). More particularly, South Carolina law specifies five circumstances where a defendant will be liable for controlling the conduct of another and, thus, liable to a third party: (1) the defendant has a special relationship with the victim; (2) the defendant has a special relationship with the injurer; (3) the defendant voluntarily undertakes a duty; (4) the defendant negligently or intentionally creates the risk; or (5) a statute imposes a duty on the defendant. *Id.*

Although only one of the foregoing is required Defendants acts and omissions in the present action satisfy two of the *Faile* requirements: (1) Defendants voluntarily undertook the duty to provide lifeguards on their beach; and (2) Defendants negligently created the risk of harm to Plaintiff by implementing a lifeguarding scheme they knew was unsafe.

### a. THE CITY VOLUNTARILY UNDERTOOK A DUTY TO PROTECT THE PUBLIC ON ITS BEACHES AND IN THE OCEAN

In South Carolina a landowner owes a duty to an invitee to guard or warn against a dangerous condition, use, structure, or activity that exists even when the danger is an open and obvious defect if the owner should anticipate that the invitee will nevertheless encounter the dangerous condition, or the invitee is likely to be distracted. Creech v. South Carolina Wildlife & Marine Res. Dep't., 328 S.C. 24, 32, 491 S.E.2d 571,575 (1997). A duty to guard or warn against

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

a dangerous condition, use, structure, or activity can also be voluntarily undertaken. Our courts have stated that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care to avoid increasing the risk of harm. Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986)( citing the Restatement (Second) of Torts, Section 324(a) (1965)). Additionally, "one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him for doing such harm." Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121, 125 (4th Cir.1976), cert. denied sub nom. Folliard v. Semler, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976); Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App.1985)(one who undertakes to protect another from harm by a third party has a duty to exercise reasonable care).

In this case, the City voluntarily undertook to guard Mr. Wolde against the dangerous conditions created by swimming in the ocean. The City is not required to provide lifeguards on its beaches. S.C. Code Ann. §5-7-145 (2007). It chose to do that. When the City made that decision, it undertook the duty to provide adequate lifeguards and to enforce regulations for the safety of all persons on the beach. S.C. Code Ann. §5-7-145 (2007). In accordance with that authority, the City entered into a Franchise Agreement with Lack's Beach Service. *See* Ex. 1. The Franchise Agreement specifically provides that the "successful implementation of a Water Safety Program is imperative along the City's twelve miles of oceanfront; and... these goals can be optimally achieved through the cooperation of the [City] and the Concessionaires of beach equipment." (Id., p.1). The City and Lack's thereby contracted with one another to jointly protect beach visitors. The Franchise Agreement explicitly authorizes Lack's to "conduct water safety."

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

(Id., p.1). The Franchise Agreement, and the requirements therein, also exist to ensure that Lack's lifeguards are competent to do their job. Mr. Pedersen testified:

> Q Let me ask you this a little bit more broadly. What is the purpose -- What's the end purpose of the requirements of this contract between the city and Lack's?
> A To outline what is required from the franchisees.
> Q And in essence to make sure that the lifeguard service is competent to do their job. Right?
> A Certainly.
> (Ex. 6, Pedersen Depo., p. 71:13-22).

Shockingly, the City performed no oversight of Lack's even though they were required to under their Agreement. Specifically, the City reserved to itself the right to monitor Lack's to ensure they were following the terms of the Agreement and providing qualified lifeguards to monitor the beach. (Id.). Further, John Pedersen, the City Manager testified:

> Q Would you agree with me that the city has a responsibility to ensure that Lack's Beach Service is following the terms of the franchise agreement that you have with them?
>
> A Certainly. We have an agreement and we would expect the terms to be abided by.
> (Id., p. 13:20-25).

And yet, despite acknowledging their duty to monitor, there is no evidence that the City did anything to ensure that group they hired to protect the beaches was doing actually doing that. Mr. Pedersen testified that he never checked on Lacks but he thought his police department or public services team might. Yet, to date the City has produced zero documents, daily reports, or correspondence that one (1) person from the City ever checked to see how Lack's lifeguards were handling the beach. These failures led to the incident on August 24, 2018.

Specifically, the Franchise Agreement required Lack's to provide a certain number of lifeguards along the beach. It also required Lack's to provide a certain number of life-guard only's

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

("LGO's") who sole role was to watch the ocean and to provide back-up to dual role lifeguards. Holly Robinson, a manager for Lack's, testified:

> Q. And so one of things that the LGO would have done on this day, had there been one, was roam the area where Kacper (L-21) was because he was at lunch?
> A. Potentially, yes.
> Q. I think you told me that would be one of the things you expect them to do; if a guard is at lunch, the LGO in the area monitors his area among other areas; true?
> A. Yes.
> Q. And the reason that's so is for the safety of the public, right?
> A. Yes.
>
> (Ex. 8, Robinson Depo., p. 27, l. 22- p. 28, l. 4 ).

On the day of Mr. Wolde's death, Lack's did not provide enough lifeguards on the beach which created a dangerous environment. Mr. Wolde and his family were swimming in an area in front of the Seacrest hotel. That area is patrolled by lifeguards operating at stands L-21 and L-22. *See* Ex. 9, Aerial Map. The area is also supposed to be monitored by an LGO at 6th Avenue. Unfortunately, when Mr. Wolde's children starting have trouble the lifeguard at L-21 was at lunch and Lack's did not provide an LGO at 6th Avenue. *See* Ex. 10, Lack's Beach Service Lineup.

As a result, there were no lifeguards to protect that area of the water. The City had a duty to monitor the activities of its franchisees to ensure it was complying with the terms of the agreement and keeping the beaches safe. It failed to do the minimum in this regard which led to Mr. Wolde's death.

b. **THE CITY HAS A DUTY BECAUSE THEY CREATED THE RISK TO MR. WOLDE THROUGH NEGLIGENT CONDUCT**

The City also undertook a duty to Mr. Wolde because it created the risk to him by entering into a scheme with Lack's that provided unqualified lifeguards who sold beach chairs instead of watching the water. Initially, the City had a duty to hire lifeguards who had proper training in ocean rescue. The Franchise Agreement states that the lifeguards that the City hires through Lack's

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

must "complete a course consisting of a total of not less than 40 hours in open water life-saving which meet the criteria of the United States Life[saving] Association." *See* Exhibit 1, p. 4. This requirement is important because the City must have lifeguards that have been trained to save people in the ocean. However, there is no evidence that the City checked to determine if the lifeguards had such training. In fact, the only evidence in the record is that the lifeguards were certified by the American Red Cross. The City knows this level of certification is not sufficient because the USLA – the same group they cite in their Franchise Agreement – specifically told them so in their 2016 letter. Specifically, the USLA advised:

> For those who cite the use of American Red Cross (ARC) lifeguard standards by Myrtle Beach lifeguard providers to be sufficient, please note that the ARC has consistently stated that **its training is not designed nor is it appropriate for the training of lifeguards at surf beaches.**
> *See* Exhibit 2, p. 2

But not only were the lifeguards unqualified, the City allowed them perform dual roles on the beach. The City knew without a doubt this was not safe. As set forth above, the USLA told them in chapter and verse in 2016 and warned: "the USLA has identified the Myrtle Beach system combining lifesaving and commercial activities to be an unreliable means of protecting swimmers." Id., p. 1. The USLA cannot make it any clearer for the City. Further, the City must have recognized an obvious issue because they considered making a change to the scheme in the summer of 2016. Specifically, John Pedersen sent correspondence to his franchisees indicating the City knew it must improve the level of safety on its beaches. Mr. Pedersen explained:

> I have absolutely no interest in the City adopting the North Myrtle Beach Model, or in doing business with any new companies, but I do think we have outgrown the current model of having lifeguards handle rentals as well as beach safety. I'd like to being discussions with you on what it would cost the City on a per stand basis to pay you to add extra staff to handle the rentals. The intent of this request is that it not cost you any more or less than it does now.

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

*See* Exhibit 11, August 27, 2016 email from John Pedersen.

Did the City follow the recommendations of the USLA? No. Did the City at least hire separate people to rent the chairs so the lifeguards could watch the water? Absolutely not. They simply entered into another contract with Lacks in May, 2018 as they had done before. These actions do not simply create a risk to the public and Mr. Wolde, they are grossly negligent. The City intentionally did something it knew was unsafe and is thus responsible to Mr. Wolde and his family for his death.

South Carolina negligence law also holds a person liable for his own actions that negligently create a reasonably foreseeable risk of harm by a third party. *E.g.*, Faile, 566 S.E.2d at 546; Greenville Memorial Auditorium v. Martin, 391 S.E.2d 546, 547 (S.C. 1990). In this case, Defendant negligently created a foreseeable risk of harm. In Martin, the plaintiff sought to hold an auditorium liable for its negligence in failing to provide adequate staffing of security officers and patrol at a concert in order to prevent a patron from throwing a bottle over the balcony, which in turn hit plaintiff on the head. Id. The South Carolina Supreme Court held the auditorium was liable for its own actions in negligently creating a reasonably foreseeable risk even though the auditorium could not have foreseen the precise course of events leading to the injury. Id. at 549. To establish liability based on the negligent creation of the risk:

> [I]t is not necessary the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen his negligence would probably cause injury to someone. He may be held liable for anything which appears to have been a natural and probable consequence of his negligence.
>
> Id.

The Defendants clearly created the risk to Mr. Wolde. They promised to provide lifeguard with "watchful eyes" on the beach and then turned around and hired lifeguards to sell chairs while

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

they were supposed to watch the water. The City's carefree actions to simply do business as usual created a risk to Mr. Wolde which cost him his life.

## IV. THE CITY'S MOTION SHOULD BE DENIED THEY WERE GROSSLY NEGLIGENT

The City had a duty under the statute to protect Mr. Wolde and his family as set forth above. However, the City has some protections under the SCRUS, the City's Motion still must be denied because the City's actions were grossly negligent. §27-3-60, a section of the RUS, specifically provides that the City is responsible for injuries when a jury determines their conduct to be "grossly negligent, willful, or malicious...." In South Carolina, gross negligence is "a relative term and means the absence of care that is necessary under the circumstances." Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 383, 608 S.E.2d 573, 577 (2005). The Plaintiff has set forth more than a scintilla of evidence to show that the City intentionally did something it knew was unsafe and failed to provide care that was necessary under the circumstances.

Although South Carolina Appellate Courts have not had the occasion to address the application of the SCRUS 's gross negligence exception in cases where the landowner's actions perpetrate the danger, the case of Covington v. U.S., 902 F. Supp. 1207 (D. Hawaii 1995), decided by the U.S. District Court for the District of Hawaii is analogous to the case at bar and instructive. In Covington, a boy drowned at an Air Force Station beach. 902 F. Supp. at 1209. The plaintiff alleged causes of actions for negligence and gross negligence against the U.S., as landowner, and the U.S. moved for summary judgment on the basis that Hawaii's recreational use statue barred the claims. Id. at 1213. The court held the Plaintiff's simple negligence claims were barred by Hawaii's recreational use statue. Id. at 1213-14. However, in addressing the allegation of gross negligence, the Court stated that "a false appearance of safety created by the placement of inadequate or untrained lifeguards on the beach, might result in a Potentially (sic) dangerous condition above

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

and beyond the natural danger created by the ocean currents and surf." Id. at 1213. Accordingly, the court found that "the government may be held liable to the extent it created, and willfully or maliciously failed to guard or warn against, this danger." Id. In determining that evidence of gross negligence was presented, the court noted that the 'government's failure to observe its own safety standards ... is important evidence in determining that it possessed constructive knowledge that injury would occur." Id. at 1214. The court found there was a genuine issue of material fact as to whether the government consciously failed to act to avoid the danger of potential injury by providing additional lifeguards. Id. at 1415.

Similarly, in the case at hand, the dangerous condition created by untrained Beach Service employees working on the beach, and being allowed to sell beach chairs and equipment, would not have existed but for the City's allowing it to occur. The City knew this was unsafe. The City's failure to take any action whatsoever to guard against or warn of the dangerous condition it knowingly created, shows an intentional, conscious failure to do something, which the City has the right and obligation to do. In fact, the City had actual notice that the lifeguards who were supposed to be watching the area where the Wolde's were swimming were not properly doing their job. The City received an email on August 9, 2018, less than two (2) weeks before the incident with Mr. Wolde, advising them the lifeguards at the Seacrest area were not paying attention and spent "6 minutes talking to a customer rather than watching the water." *See* Exhibit 12, August 9, 2016 email from Casey Tritt to the City. The person who made the Complaint also sent the City a video of the incident. The City acknowledged receipt of this email and admitted that the situation reported happens because lifeguards with dual purposes cannot provide their sole attention to helping people in the water. Mr. Pedersen testified:

> Q And would you agree with me that if a lifeguard is involved in the commercial process of renting the chair and documenting that the

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

> chair is being rented and for how much and to whom, **they are not able to provide their sole attention to the water?**
> A Yes.
>
> Q And one of the things that lifeguards are in charge of is not necessarily only saving people from drowning, but it's preventing them from getting in a bad situation. Right?
> A Correct.
>
> (Ex. 6, Pedersen Depo., p. 61:6-17).

The City is on notice from all angles about the practice of dual role lifeguards. In fact, their neighboring City of North Myrtle Beach recognized how unsafe this practice was in 2006 and promised to the public that "[l]ifeguards are no longer "dual role" and do not rent beach chairs and umbrellas. The only function of lifeguards in North Myrtle Beach is beach safety." https://www.nmb.us/233/North-Myrtle-Beach-Ocean-Rescue. The City's decision to continue a practice that they, and everyone else, knows is unsafe is the definition of gross negligence. That the lifeguards on the beach on August 24, 2018 were untrained and ill-equipped to handle water rescues should not have been a surprise. Further, it does not matter that the lifeguards were employees of Lack's because they City is responsible for them.

Specifically, the City is liable for Lack's lifeguards' gross negligence pursuant to the nondelegable duty doctrine. The nondelegable duty doctrine renders certain duties nondelegable when a special relationship exists and states that "a person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach." Smith v. Regional Med. Ctr., 394 S.C. 110, 113, 713 S.E.2d 656, 658 (Ct. App. 2011). When viewing the facts in the light most favorable to the Appellant, the Franchise Agreement shows the City was allowing Lack's to perform its necessary governmental functions as stated in the Agreement: "the City of Myrtle Beach requires the protection of its tourists and residential population through an efficient and

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
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effective Water Safety Program; and ... is imperative along the City's twelve miles of oceanfront." *See* Ex. 1, P.1. Clearly, the City either created or acknowledged its duty to swimmers though its Franchise Agreement's affirmative declarations.

Therefore, a genuine issue of material fact exists as to whether a nondelegable duty existed between the City and Lack's and whether the City is able to escape liability for the Lack's acts. In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence standard, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Moreover, "since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112,410 S.E.2d 537, 543 (Ct. App. 1991)(citations omitted); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986)("an extreme remedy to be cautiously invoked").

As discussed above, the Plaintiff presented evidence in the form of the Franchise Agreement, documents, emails, letters, and the deposition testimony demonstrating facts on which reasonable minds could differ as to the application of the RUS, the duty owed by the City, and the City's gross negligence, thus creating a question of fact for the jury rather than a purely legal question to be determined by the court. Brooks v. Northwood Little League, 327 S.C. 400, 402, 489 S.E.2d 647, 648 (Ct. App. 1999)("[ g]ross negligence ordinarily presents a hybrid question of law and fact, but when evidence supports but one inference, the question becomes one of law for the court.").

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

## CONCLUSION

Taking the facts in the light most favorable to the Plaintiff, there a genuine issue of material fact as to whether the City was grossly negligent by failing to guard or warn beach visitors of a dangerous condition created by the City in allowing untrained lifeguards to serve dual roles while serving as life-guards on the beach. When considering the evidence in the light most favorable to the Plaintiff and against the City, evidence of gross negligence was produced and raised a genuine issue of material fact to the court.

**McLeod Law Group, LLC**
3 Morris Street, Suite A
Charleston, SC 29403
Tel. 843-277-6655
Fax 843-277-6660

*s/ H. Cooper Wilson, III*
W. Mullins McLeod, Jr. (14148)
H. Cooper Wilson, III (74939)

**THOMASON & PRACHT, LLP**

*s/ J. Christopher Pracht*
J. Christopher Pracht, V (S.C. Bar #: 77534)
THOMASON & PRACHT, LLP
303 E GREENVILLE Street
Anderson, South Carolina 29622
Telephone: (864) 226-7222
Fax: (864) 226-7224

*Attorneys for the Plaintiff*

May 28, 2021
Charleston, South Carolina

ELECTRONICALLY FILED - 2021 May 28 11:24 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>MESWAET ABEL, AS PERSONAL REPRESENTATIVE OVER THE ESTATE OF ZERIHUN WOLDE AND AS NATURAL PARENT AND LEGAL GUARDIAN FOR ADAM WOLDE, AND WUBIT WOLDE,<br><br>Plaintiffs,<br><br>v.<br><br>LACK'S BEACH SERVICE, CITY OF MYRTLE BEACH, AND JOHN DOE LIFEGUARD,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>FOR THE 15TH JUDICIAL CIRCUIT<br>CASE NO.: 2019-CP-26-07075<br><br>**PLAINTIFFS MEMORANDUM IN OPPOSITION TO DEFENDANT CITY OF MYRTLE BEACH'S MOTION FOR SUMMARY JUDGEMENT** |

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach's Motion for Summary Judgement was served upon the counsel for Defendant City of Myrtle Beach and Defendant Lack's Beach Service, along with this Honorable Court, this day via Electronic Mail and United Stated Mail, postage Prepaid, as follows:

Turner Padget Graham & Laney P.A.
Gerald R. Chambers, Jr.
Post Office Box 1473
Columbia, South Carolina 29202
gchambers@turnerpadget.com

BY: Helen G. Bailey
Helen G. Bailey, Paralegal

May 28, 2021
Charleston, South Carolina

ELECTRONICALLY FILED - 2021 Aug 27 11:06 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>MESWAET ABEL, AS PERSONAL REPRESENTATIVE OVER THE ESTATE OF ZERIHUN WOLDE AND AS NATURAL PARENT AND LEGAL GUARDIAN FOR ADAM WOLDE, AND WUBIT WOLDE,<br><br>Plaintiffs,<br><br>v.<br><br>LACK'S BEACH SERVICE, CITY OF MYRTLE BEACH, AND JOHN DOE LIFEGUARD,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>FOR THE 15TH JUDICIAL CIRCUIT<br>CASE NO.: 2019-CP-26-07075<br><br>**PLAINTIFFS MEMORANDUM IN OPPOSITION TO DEFENDANT CITY OF MYRTLE BEACH'S MOTION FOR RECONSIDERATION** |

Presiding Judge: Hon. Robert E. Hood
Plaintiff's Attorney: H. Cooper Wilson, III, Esq.
Defendant's Attorney: Virginia Bozeman, Esq.
Date of Hearing: August 2, 2021

This matter is before the Court based on Defendant City of Myrtle Beach's Motion for Reconsideration, filed August 13, 2021. The Defendant asks the Honorable Robert E. Hood to reconsider his August 4, 2021 Order Denying Defendant's Motion for Summary Judgment. *See* Exhibit 1, Order. Plaintiff, by and through his undersigned counsel, respectfully submits the following Memorandum of Law in Opposition to Defendants' Motion to Reconsider.

## I. The Defendant's Motion for Reconsideration should be denied pursuant to Rule 59(g), SCRCP.

Plaintiff asserts that this Court has not been served with a copy of the Defendant's Motion for Reconsideration as required under Rule 59(g), SCRCP ("A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion."). For this reason alone, the Court should deny Defendant's Motion for Reconsideration.

ELECTRONICALLY FILED - 2021 Aug 27 11:06 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

*See* Smith v. Fedor, 422 S.C. 118, 126, 809 S.E.2d 612, 161 (Ct. App. 2017) ("Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule."). Further, our Appellate Courts have implied that trial courts may deny Motions for Reconsideration solely on the basis of the rule. *See* Gallagher v. Evert, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002).

**II. The Defendant's Motion for Reconsideration should be denied pursuant to Rule 59(e), SCRCP.**

Even if the Defendant complied with Rule 59(g) of the South Carolina Rules of Civil Procedure - which they did not - their Motion for Reconsideration should still be denied pursuant to Rule 59(e), SCRCP. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)).

The Defendants do not present any fact or law that was not already presented to the Court in their initial filings upon which the Court might reconsider its ruling. And there is no error that the Court is directed to correct. More specifically, the Defendant again tries to argue that S.C. Code Ann. §27-3-10, which is termed the Recreational Use Statute, provides them immunity from responsibility in this case. The Defendant presents the same arguments in their Motion to Reconsider that they did in their Motion for Summary Judgment. In fact, the memorandums for the two (2) separate motions look almost identical in substance. Each point now re-raised by the Defendant was made to this Court during the August 2, 2021 hearing. The Defendant's argument on this issue is as deficient now as it was three (3) weeks ago.

ELECTRONICALLY FILED - 2021 Aug 27 11:06 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

Initially, Plaintiff incorporates her Memorandum in Opposition to Summary Judgment and the attached Exhibits which detail her position with evidentiary support for the same. Specifically, Plaintiff asserts the City of Myrtle Beach had a duty of care to Mr. Wolde to act in a reasonably prudent manner under like and similar circumstances. There are numerous and genuine issues of material fact that prove the City failed to act reasonably under the circumstances by contracting with an entity that had substandard lifeguards and then allowing that entity to perform the dual-role lifeguards when the City knew that was an unsafe proposition.

Further, not only did the City violate its duty to Mr. Wolde, it acted in a grossly negligent manner which makes it responsible for his tragic death under §27-3-60, the Recreational Use Statute. Specifically, §27-3-60 provides that the City is responsible for injuries when a jury determines their conduct to be "grossly negligent, willful, or malicious...." The South Carolina Supreme Court defines gross negligence as the "absence of care that is necessary under the circumstances." Hollins v. Richland County School Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993). While gross negligence is ordinarily a mixed question of law and fact, in most cases gross negligence is a factually controlled concept whose determination best rests with the jury. Solanki v. Walmart Store Number 2806, 410 S.C. 229, 763 S.E.2d 615, 619 (Ct. App. 2014). Plaintiff presented evidence in numerous forms – to include deposition testimony, letters, emails, and documents – which supports her theory of gross negligence against the City of Myrtle Beach.

The evidence presented shows that instead of providing lifeguards who would provide "watchful eyes" as they represented to the public, the City knowingly and intentionally hired untrained lifeguards whose "eyes" were more focused on selling beach chairs and umbrellas than on the water. Because the Plaintiff presented more than a scintilla of evidence that the City of Myrtle Beach was grossly negligent in its operation of its beaches, Plaintiff asserts that the Court's

ELECTRONICALLY FILED - 2021 Aug 27 11:06 AM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Jul 19 3:59 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

August 4, 2021 Order denying Defendants Motion for Summary Judgment was correct and was supported by the facts and law. Because the Defendant does not present any fact or law that was not already presented to the Court, and because there is no error that the Court needs to correct, Plaintiff respectfully asks the Court to deny the Defendants' Motion to Reconsider.

Respectfully submitted,

**MCLEOD LAW GROUP, LLC**
3 Morris Street, Suite A
Charleston, SC 29403
Tel. 843-277-6655
Fax 843-277-6660

*s/ H. Cooper Wilson, III*
W. Mullins McLeod, Jr. (14148)
H. Cooper Wilson, III (74939)

and

**THOMASON & PRACHT, LLP**

*s/ J. Christopher Pracht*
J. Christopher Pracht, V (S.C. Bar #: 77534)
THOMASON & PRACHT, LLP
303 E GREENVILLE Street
Anderson, South Carolina 29622
Telephone: (864) 226-7222
Fax: (864) 226-7224

*Attorneys for the Plaintiff*

August 27, 2021
Charleston, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2607075

Meswaet Abel et al
PLAINTIFF(S)

Lacks Beach Service et al
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter came before the court on August 2, 2021 on Defendant City of Myrtle Beach's Motion for Summary Judgment. Based on the motion, filings, and arguments of counsel, it appears a genuine dispute of material fact remains, Rule 56, SCRCP. Therefore, the Motion for Summary Judgment is hereby DENIED.

**ORDER INFORMATION**

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/04/2021 .

Wubit Wolde
Zerihun Wolde Estate
Meswaet Abel Prs
Zerihun Wolde
Adam Wolde
John Doe Lifeguard

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**





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## Court Reporter:

**E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

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ELECTRONICALLY FILED - 2021 Aug 04 12:56 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

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Horry Common Pleas

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| **Case Caption:** | Meswaet Abel , plaintiff, et al VS Lacks Beach Service , defendant, et al |
| **Case Number:** | 2019CP2607075 |
| **Type:** | Order/Electronic Form 4 |

So Ordered

s/ R.E. Hood #2164