

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000569

Case No. 2019-CP-26-07075

RECEIVED

MAR 04 2024

SC Court of Appeals

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

Respondent,

v.

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

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

Appellant,

**RECORD ON APPEAL
VOLUME VI**

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

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Certificate of Counsel

GO COPY

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT

Bond # SU 1195795

MESWAET ABEL, AS PERSONAL
REPRESENTATIVE OF THE
ESTATE OF ZERIHUN WOLDE

Plaintiff,

v.

LACK'S BEACH SERVICE, INC.,

Defendants. , et al.

C.A. No.: 2019-CP-26-07075

STAY OF EXECUTION BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, Lack's Beach Service, Inc. as Principal, and Arch Insurance Company, as Surety, are hereby held and firmly bound unto Meswaet Abel, as the Personal Representative of the Estate of Zerihun Wolde as the obligee in the above referenced case, in the maximum amount of One Million Dollars and no/100 (\$1,000,000.00), lawful money of the United States, for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents:

Whereas, the above named Principal has duly applied to this court for a stay of execution against the Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde in this action, according to the statute in such cases provided.

FILED
HOBBS COUNTY
2019 MAY 25 P 2:02
JEROME N. ELVIS
CLERK OF COURT
HOBBS COUNTY, SC

NOW THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That, if the said Defendant shall pay the said Plaintiff such damages as he sustains by reason of said stay of execution, if the Court finally decided that the said Plaintiff is not entitled thereto, then this obligation shall be void, otherwise to remain in force and effect, however, not to exceed in any event the face amount of the Bond.

IN WITNESS WHEREOF, We have hereunto set our hands and seals, this 22nd day of May, 2023.

Signed, Sealed and Delivered:

ARCH INSURANCE COMPANY

By: Kathleen Marcinkus (SEAL)
Kathleen Marcinkus, Attorney-in-fact

By: _____ (SEAL)

FILED
HERRY COUNTY
2023 MAY 25 P 2:02
RENEE N. ELVIS
CLERK OF COURT
HERRY COUNTY, SC

AS SURETY:

Arch Insurance Company

By: Kathleen Marcinkus

Its: Attorney-in-Fact

WITNESSES :

Mary Coco
Enelye Rios

STATE OF PENNSYLVANIA)

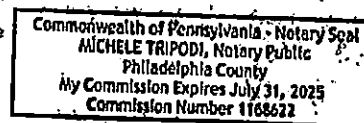
COUNTY OF PHILADELPHIA)

ACKNOWLEDGEMENT

Subscribed, sworn to and acknowledged before me by Kathleen Marcinkus,
who is the Attorney-in-Fact of Arch Insurance Company, and subscribed and
sworn to before me by personally appeared before me this day and acknowledge the due execution
of the foregoing instrument.

Michele Tripodi
Notary Public of Pennsylvania

My Commission Expires: _____



FILED
HARRY COUNTY
2023 MAY 25 P 2:02
GENEE N. ELVIS
CLERK OF COURT
HARRY COUNTY, SC

AS PRINCIPAL:

WITNESSES :

Chise Prombo
[Signature]

Lack's Beach Service, Inc.

By: [Signature]

Its: PRESIDENT

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

ACKNOWLEDGEMENT

Subscribed, sworn to and acknowledged before me by
GEORGE LACK, who is the PRESIDENT of Lack's Beach Service, Inc, and
subscribed and sworn to before me by personally appeared before me this day and acknowledge
the due execution of the foregoing instrument.

[Signature]
Notary Public of South Carolina
My Commission Expires: 6/8/2027

FILED
HORRY COUNTY
2023 MAY 25 P 2:02
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated. Not valid for Note, Loan, Letter of Credit, Currency Rate, Interest Rate or Residential Value Guarantees.

POWER OF ATTORNEY

Know All Persons By These Presents:

That the Arch Insurance Company, a corporation organized and existing under the laws of the State of Missouri, having its principal administrative office in Jersey City, New Jersey (hereinafter referred to as the "Company") does hereby appoint:

Diane C. Stone, Kathleen Marcinkus and Miltland Minderjohn of Philadelphia, PA (EACH)

its true and lawful Attorney(s)-in-Fact, to make, execute, seal, and deliver from the date of issuance of this power for and on its behalf as surety, and as its act and deed: Any and all bonds, undertakings, recognizances and other surety obligations, in the penal sum not exceeding Ninety Million Dollars (90,000,000.00). This authority does not permit the same obligation to be split into two or more bonds in order to bring each such bond within the dollar limit of authority as set forth herein.

The execution of such bonds, undertakings, recognizances and other surety obligations in pursuance of these presents shall be as binding upon the said Company as fully and amply to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal administrative office in Jersey City, New Jersey.

This Power of Attorney is executed by authority of resolutions adopted by unanimous consent of the Board of Directors of the Company on December 11, 2020, true and accurate copies of which are hereinafter set forth and are hereby certified to by the undersigned Secretary as being in full force and effect:

"VOTED, That the Chairman of the Board, the President, or the Executive Vice President, or any Senior Vice President, of the Surety Business Division, or their appointees designated in writing and filed with the Secretary, and the signature of the Secretary, the seal of the Company, and certifications by the Secretary, may be affixed by facsimile on any power of attorney or bond executed pursuant to the resolution adopted by the Board of Directors on December 11, 2020, and any such power so executed, sealed and certified with respect to any bond or undertaking to which it is attached, shall continue to be valid and binding upon the Company. In Testimony Whereof, the Company has caused this instrument to be signed and its corporate seal to be affixed by their authorized officers, this 23rd day of June, 2021

This Power of Attorney is signed, sealed and certified by facsimile under and by authority of the following resolution adopted by the unanimous consent of the Board of Directors of the Company on December 11, 2020:

VOTED, That the signature of the Chairman of the Board, the President, or the Executive Vice President, or any Senior Vice President, of the Surety Business Division, or their appointees designated in writing and filed with the Secretary, and the signature of the Secretary, the seal of the Company, and certifications by the Secretary, may be affixed by facsimile on any power of attorney or bond executed pursuant to the resolution adopted by the Board of Directors on December 11, 2020, and any such power so executed, sealed and certified with respect to any bond or undertaking to which it is attached, shall continue to be valid and binding upon the Company. In Testimony Whereof, the Company has caused this instrument to be signed and its corporate seal to be affixed by their authorized officers, this 23rd day of June, 2021

Attested and Certified

Regan A. Shulman

Regan A. Shulman, Secretary

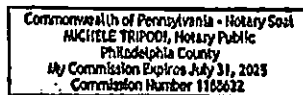


Arch Insurance Company

Stephen C. Ruschak
Stephen C. Ruschak, Executive Vice President

STATE OF PENNSYLVANIA SS
COUNTY OF PHILADELPHIA SS

I, Michele Tripodi, a Notary Public, do hereby certify that Regan A. Shulman and Stephen C. Ruschak personally known to me to be the same persons whose names are respectively as Secretary and Executive Vice President of the Arch Insurance Company, a Corporation organized and existing under the laws of the State of Missouri, subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they being thereunto duly authorized signed, sealed with the corporate seal and delivered the said instrument as the free and voluntary act of said corporation and as their own free and voluntary acts for the uses and purposes therein set forth.



Michele Tripodi
Michele Tripodi, Notary Public
My commission expires 07/31/2025

CERTIFICATION

I, Regan A. Shulman, Secretary of the Arch Insurance Company, do hereby certify that the attached Power of Attorney dated June 23, 2021 on behalf of the person(s) as listed above is a true and correct copy and that the same has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate; and I do further certify that the said Stephen C. Ruschak, who executed the Power of Attorney as Executive Vice President, was on the date of execution of the attached Power of Attorney the duly elected Executive Vice President of the Arch Insurance Company.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the Arch Insurance Company on this 22 day of May, 2023.

Regan A. Shulman
Regan A. Shulman, Secretary

This Power of Attorney limits the acts of those named therein to the bonds and undertakings specifically named therein and they have no authority to bind the Company except in the manner and to the extent herein stated.

PLEASE SEND ALL CLAIM INQUIRIES RELATING TO THIS BOND TO THE FOLLOWING ADDRESS:

Arch Insurance - Surety Division
3 Parkway, Suite 1500
Philadelphia, PA 19102



To verify the authenticity of this Power of Attorney, please contact Arch Insurance Company at SuretyAuthentic@archinsurance.com
Please refer to the above named Attorney-In-Fact and the details of the bond to which the power is attached:



NELSON MULLINS

Blake T. Williams
T: 803.255.9597
blake.williams@nelsonmullins.com

COPY

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

1320 Main Street, 17th Floor
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T: 803.799.2000 F: 803.255.7500
nelsonmullins.com

May 25, 2023

Via Hand Delivery

Horry County Clerk of Court
Attn: Bridgette Williamson, Common Pleas Supervisor
1301 Second Avenue
Conway, SC 29526

RE: Abel v. Lack's Beach Service, Inc.
Case No. 2019-CP-26-07075
Our File No. 075329/01500

Dear Ms. Williamson:

Pursuant to our discussion, enclosed please find the original stay of execution bond, acknowledgements of Lack's Beach Service, Inc. and Arch Insurance Company, and power of attorney for Arch Insurance Company. These materials are being submitted in satisfaction of the directive of the Court's Order dated May 19, 2023.

Please do not hesitate to let me know if you require anything further. Thank you for your attention to this matter.

Very truly yours,

/s/ Blake T. Williams

Blake T. Williams

BTW:btw
Enclosures

FILED
HORRY COUNTY
2023 MAY 25 P 2:02
TENESE M. ELMIS
CLERK OF COURT
HORRY COUNTY, SC

CALIFORNIA | COLORADO | DISTRICT OF COLUMBIA | FLORIDA | GEORGIA | MARYLAND | MASSACHUSETTS | MINNESOTA
NEW YORK | NORTH CAROLINA | OHIO | PENNSYLVANIA | SOUTH CAROLINA | TENNESSEE | TEXAS | VIRGINIA | WEST VIRGINIA

ROA_02371

May 24, 2023

Page 2

cc: William M. McLeod, Jr., Esquire (via email)
Harry C. Wilson III, Esquire (via email)
John C. Pracht V, Esquire (via email)
Elizabeth F. Morrison, Esquire (via email)
Joseph D. Thompson III, Esquire (via email)
Paul B. Trainor, Esquire (via email)
James P Walsh, Esquire (via email)
C. Mitchell Brown, Esquire (via email)

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Horry County
2023 MAY 25 P 2:02
RENEE H. ELVIS
CLERK OF COURT
Horry County, SC

ROA_02372

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2019-CP-26-07075

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Apr 10 2023

SC Court of Appeals

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

Respondent,

v.

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

Appellant,

NOTICE OF APPEAL

Lack's Beach Service, Inc. ("Lacks") appeals: (1) the Order filed April 10, 2023, denying Lack's post-trial motions, (2) the Order filed November 28, 2022 on punitive damages, (3) the jury verdict and the judgment entered thereon, and (4) the evidentiary and other rulings adverse to Lack's before and during trial. Copies of the orders and the Form 4 order/judgment/verdict form are attached hereto. Lack's received written notice of the order denying its post-trial motions on April 10, 2023.

Signature on Following Page

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

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Attorneys for Defendant Lack's Beach Service, Inc.

April 10, 2023

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

MESWAET ABEL, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF ZERIHUN WOLDE AND AS)
NATURAL PARENT AND LEGAL)
GUARDIAN OF ADAM WOLDE AND)
WUBIT WOLDE,)

Plaintiff,)

v.)

LACK'S BEACH SERVICE, CITY OF)
MYRTLE BEACH, AND JOHN DOE)
LIFEGUARD,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-07075

RECEIVED

Apr 10 2023

SC Court of Appeals

ORDER ON POST-TRIAL MOTIONS
FOR JNOV, NEW TRIAL, AND NEW
TRIAL NISI REMITTITUR

This matter is before this Court on the Post-Trial Motions of Defendant Lack's Beach Service ("Defendant" or "LBS"), pursuant to Rules 50 and 59, SCRPC, seeking judgment notwithstanding the verdict or, in the alternative, a new trial absolute or a new trial *nisi remittitur*. A hearing on Defendant's post-trial motions took place on March 9, 2023.

After a thorough and careful review of the trial transcript, the briefs submitted by the parties, and the evidence and testimony at trial, this Court finds: (1) the jury's verdict is supported by the evidence; (2) the jury's carefully considered damages awards are fair, proportionate to the injuries suffered, and not the result of any improper impulse, passion, or prejudice; and (3) there was no prejudicial trial event or error to justify post-trial relief. Defendant's Post-Trial Motions are, accordingly, denied.

BACKGROUND

This wrongful death action arises out of the tragic death of Zerihun Wolde, a forty-one-year-old father of four, who drowned at a public beach where Defendant LBS was responsible for

providing lifeguard services. Defendant LBS is a beach safety company that contracted with the City of Myrtle of Beach to provide lifeguard protection at the City's public beaches in exchange for the privilege of operating as the sole vendor for beach concessions, such as umbrella and chair rentals, on those same public beaches. Plaintiff Meswaet Abel is the decedent's surviving fiancé and mother to his four young children, Adam, Wubit, Eden, and Edom.

Trial testimony indicated that on August 23, 2018, Mr. Wolde and Ms. Abel traveled with their four children from the family's home in Maryland to Myrtle Beach for a summer vacation. After an eight-hour drive, the family arrived in Myrtle Beach. Around 12:00 p.m. on the following day, the family went to the beach and settled in near lifeguard stand L21. As Ms. Abel watched the couple's two youngest children play in the sand, Mr. Wolde took Adam and Wubit to the water's edge to play in the surf. Mr. Wolde was an avid swimmer. Adam and Wubit were also adept swimmers and regularly attended swim lessons.

Once at the water's edge the children began playing and jumping in the waves with their father. According to Adam, they were in water that came up to his waist. They felt comfortable and believed the swimming conditions were safe. However, unbeknownst to the children and Mr. Wolde, LBS had received warnings earlier that day of dangerous swimming conditions due to rip and longshore currents. While playing in the surf, the children began to get pulled out to sea, causing Adam and Wubit to struggle and hang on to their father. According to Adam and Wubit, they were unintentionally getting deeper and deeper. As they got deeper in the water, they became scared. Mr. Wolde and the children began yelling for help. After trying to swim toward the shore, Adam, who was pulled out in front of his father and sister, began swimming to his left. Eventually, he was able to swim out of the rip current and make it back to shore. As Adam approached the

beach, Wubit continued to struggle and hold onto her father. Wubit and Mr. Wolde continued to yell and wave their arms for help.

As they struggled, it became obvious to bystanders on the beach that there was a problem. While clinging to her father, Wubit witnessed him begin to go under and then resurface, where he gasped for air and yelled for help. This process of going under, resurfacing, gasping for air and yelling for help went on for a period time. At this point, bystanders entered the water and pulled Mr. Wolde and Wubit to shore. Mr. Wolde was later pronounced dead of asphyxia due to drowning.

Following Mr. Wolde's death, Plaintiff filed suit against LBS,¹ alleging LBS knowingly breached numerous standards of care in operating its beach safety business and that these breaches were a proximate cause of Mr. Wolde's death. Among the breaches alleged was LBS's use of "dual-role" lifeguarding, *i.e.*, the practice of entrusting lifeguards with two conflicting roles: 1) providing lifeguard protection; and 2) transacting sales of beach merchandise and performing related customer service. Plaintiff alleged LBS's unauthorized use of this dual-role practice cost LBS its lifeguard certification in 2007. Since that time, LBS was on notice that dual-role lifeguarding posed a dangerous safety risk to swimmers, yet LBS continued the practice anyway. In addition to other standard of care breaches, Plaintiff also alleged that LBS was required to provide lifeguards that were both tested and certified, yet it failed to do so. Consequently, had LBS complied with beach safety and lifeguard protection standards, the drowning incident that cost Mr. Wolde his life could have been averted.

The case was tried before a jury in Horry County during the week of July 25-29, 2022. At trial, Plaintiff presented evidence and testimony that LBS received a warning from the National

¹ The City of Myrtle Beach was dismissed prior to trial.

Weather Service that hazardous conditions were present on the day of the incident. Despite the National Weather Service warning, LBS presented no witnesses who had any personal knowledge of having provided any warnings or efforts to guard against the dangerous swim conditions present that day. Instead, numerous witnesses testified that there were no warnings and no indication that LBS took measures to guard against the hazardous swim conditions or prevent swimmers from entering the water.

Plaintiff presented expert testimony that LBS violated the prevailing standard of care by engaging in dual role lifeguarding, by failing to properly train and supervise the lifeguards, and by allowing lifeguard towers to go unattended with no other safety strategy to ensure constant, proper water observation. Plaintiff's expert further testified that LBS violated the standard of care by failing to close areas for swimming or provide adequate warning of the hazardous conditions. Plaintiff also presented evidence that LBS was understaffed at the section of the beach where Mr. Wolde drowned. The owner of LBS, George Lack, admitted that being understaffed as they were on the day Mr. Wolde drowned could make all the difference between life and death. LBS did not call an expert to rebut Plaintiff's expert as to the standard of care, nor did LBS call any witnesses who had any personal knowledge that LBS complied with the standard of care on the day Mr. Wolde drowned.

The jury entered a verdict in favor of the Plaintiff and awarded \$3,700,000.00 in survival damages, \$10,000,000.00 in wrongful death damages, and \$7,000,000.00 in punitive damages. LBS now seeks judgment as a matter of law notwithstanding the jury's verdict, or, in the alternative, a new trial absolute, or a reduction of the damages by way of a new trial *nisi remittitur*.

STANDARD OF REVIEW

When ruling on a motion for directed verdict or JNOV, the trial court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022). “A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). “The motion[] should be denied when either the evidence yields more than one inference or its inference is in doubt.” *Garrison*, 435 S.C. at 576, 869 S.E.2d at 803 (quoting *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007)). In considering a directed verdict or JNOV motion, “neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Id.* (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006)).

South Carolina’s “thirteenth juror” doctrine allows the trial court to grant a new trial absolute only if the court finds, in its discretion, that the evidence does not justify the verdict. *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). A new trial absolute is likewise warranted where a verdict is so “shockingly disproportionate” to the injuries suffered as to indicate that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000) (citing *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)). “Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 829 (2015) (citation and quotations omitted). “A verdict which may be supported by any rational

view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive.” *Kunst v. Loree*, 424 S.C. 24, 46-47, 817 S.E.2d 295, 306 (Ct. App. 2018) (quoting *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969)).

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice. *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citing *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993)). However, the jury’s determination of damages is entitled to substantial deference. *Id.* (citing *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)). In considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented. *Id.* (citing *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)). Further, the trial court “cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs.” *Vinson*, 324 S.C. at 407, 477 S.E.2d at 724 (quoting *South Carolina State Hwy. Dep’t v. Miller*, 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960)). “[T]he verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be.” *Id.* Thus, “compelling reasons” must be given to justify invading the jury’s province in this manner. *Riley*, 414 S.C. at 192, 777 S.E.2d at 828 (2015) (citations omitted); *see also Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (finding appellant’s arguments did not constitute compelling reasons to justify the grant of a new trial *nisi remittitur*).

DISCUSSION

I. Proximate Cause

LBS moves for JNOV or, in the alternative, a new trial absolute, arguing there was insufficient evidence to create a jury issue that its conduct, including its use of dual role lifeguarding, contributed to Mr. Wolde's death by drowning.

On directed verdict, LBS asked this Court to grant judgment in its favor on the ground it maintained there was "no amount of time that the family struggled" and no evidence that a lifeguard could have reached Mr. Wolde in time to change the outcome. Specifically, LBS argued:

"[T]hen this is a quick one ... the evidence of proximate cause doesn't exist, either direct or circumstantially, for the same or similar reasons that I've just described with the dual role, the fact that there's no amount of time that the family struggled, no evidence that a lifeguard could get from his or her location to Mr. Wolde to change his outcome. . . there's just no direct or circumstantial evidence to indicate proximate cause has been . . . proved or that should go to the jury"

(Trial Tr. 618:25-619:8). Contrary to LBS's contention, the Court finds the evidence on this issue conflicting. Therefore, the issue was appropriately submitted to the jury.

The jury heard testimony from multiple witnesses that the incident lasted for a period of time sufficient to create a jury question as to whether LBS's lifeguards—if acting in accordance with the standard of care—could have changed the outcome. Wubit, who was with her father during the incident, testified they struggled for a "long period of time" and that the entire incident up until they got to shore lasted 10 to 15 minutes.² The evidence also shows that Adam, Wubit, and Mr. Wolde were all screaming, yelling, and waving for help.³ Wubit testified they were yelling as loudly as they could.⁴ And not only were they positioned close enough to see the beach, Wubit

² Trial Tr., 586:1-4; 589:18-24.

³ Trial Tr., 585:3-11.

⁴ Trial Tr., 585:3-11.

explained that from where they were yelling, she could see bystanders on the beach.⁵ Adam testified he could see the shore.⁶ He explained that they yelled as loudly as they possible could, many times.⁷ And even the bystanders, who observed their calls for help from the beach, could not get the attention of Lack's lifeguards nor could they find any.⁸ This evidence shows the incident was not quick or instantaneous, and, in fact, bystanders were able to see their distress and attempt a response.

Plaintiff's expert, Dr. Griffiths, also provided testimony that Mr. Wolde was a distressed swimmer before he drowned, meaning LBS's lifeguards should have observed his distress with enough time to respond:

- Q. Does the literature differentiate between silent drownings and distressed swimmer drownings?
- A. That's a good point. The progression, there is a progression in drowning. If you're a non-swimmer, most non-swimmers enter into a drowning scenario very quickly which is quick, quiet and subtle. They can't cry out for help. There's very few visual signs of drowning. Someone who can swim first becomes distressed and when they're distressed they can call out for help and they can wave for help. But when they're distressed, if they don't help themselves or someone doesn't rescue them quickly then they rapidly move from a distressed victim to a drowning victim....But Mr. Wolde apparently was a distressed victim that could have and should have been easily recognizable by attentive lifeguards.⁹

This evidence was sufficient to create a jury issue as to proximate cause, and sufficient to support the resulting factual findings implicit in the jury's verdict.¹⁰

⁵ Trial Tr., 586:13-20.

⁶ Trial Tr., 543:9-12.

⁷ Trial Tr., 543:6-544:5.

⁸ Trial Tr., 196:17-24; 197:3-10.

⁹ Griffiths, 96:23 – 97:16.

¹⁰ See *RFT Mgmt. Co.*, 399 S.C. at 331, 732 S.E.2d at 170-171 (“[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.”) (citing *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973)).

The evidence at trial also shows other breaches of the standard of care linked to Mr. Wolde's drowning. In particular, Plaintiff's expert testified that LBS's conduct violated the standard of care in multiple respects, was dangerous, and was a contributing cause to Mr. Wolde's death:

A. Clearly by all the evidence provided in this case, the lifeguards were not adequately tested, not trained, not on duty at the time, if you look at the beach service line up at any given time during this incident. People were out to lunch without alternative coverage. They were supposed to have even lifeguard onlys on duty, they had less than half of the required amount. And plus provided the dual role is unacceptable. It's both unacceptable in our industry and it's dangerous. Lifeguards cannot be performing other duties that divert their attention from the water. And so, lack of training, lack of testing, lack of supervising, and the people on the stands were put in a position of failure. They were not adequately trained or supervised or tested to be providing ocean lifeguarding service, surf guarding service protection for the people.

Q. Yes sir. And was operating this endeavor in a dangerous and unsafe manner a contributing cause to Mr. Wolde's death?

A. Yes, I believe it was a direct cause to his death. Yes sir.¹¹

As to training, evidence was offered that LBS's lifeguards were untrained and unequipped to comply with the standard of care. LBS's chief operator, Weslyn Lack-Chickering, testified that LBS had no training records for any of the lifeguards, including those assigned to stands at L-20, L-21, and L-22.¹² She further admitted that these lifeguards missed multiple days of training because they were not in the country when the training took place.¹³ The evidence at trial also showed LBS was understaffed on the day of the incident and that understaffing was a contributing cause to Mr. Wolde's death.¹⁴ In fact, George Lack, the owner of Lack's, conceded that being

¹¹ Griffiths, 111-112.

¹² Trial Tr., 842:7-15.

¹³ Trial Tr., 838:8-839:4.

¹⁴ Trial Tr., 362:3-6.

short a lifeguard in the section where Mr. Wolde drowned was “theoretically” enough to make a difference in a lifesaving situation, such as the instant case:

Q. Under your testimony, you’re one short. Well, can’t one short make all the difference between life and death when it’s the tower responsible for the section of the public beach where Mr. Wolde drowned to death?

A. Theoretically, yes.¹⁵

There was also evidence that LBS’s failure to close the beach was a breach of the standard of care.¹⁶ Specifically, Plaintiff’s expert testified that the National Weather Service warning provided notice of a hazardous condition which, at a minimum, warranted extra caution. Yet LBS took no action to close the beach and failed even to take minimum measures to effectively notify and warn the public. Dr. Griffiths further testified that LBS had a duty and obligation to warn the public of known hazards.¹⁷ The evidence showed that LBS, however, failed to place a single rip current warning anywhere on the beach, much less close to the water’s edge as required by the standard of care.¹⁸

While LBS argues the staff member assigned to L-21 was on a regularly scheduled lunch break at the time of the incident, the Court fails to see how this fact could be dispositive. Instead, viewing it in the light most favorable to the Plaintiff, an inference could be drawn that the L-21 lifeguard left the tower unoccupied at a time when LBS knew there were dangerous swimming conditions present. As Dr. Griffiths testified: “[a] lifeguard is never supposed to abandon their

¹⁵ Trial Tr., 451:14-18.

¹⁶ Griffiths, 101-102.

¹⁷ Griffiths, 102:22-103:6.

¹⁸ Griffiths, 93:1-9; 93:22-23.

post without someone else filling in for them, taking their stand, or closing the water. Otherwise, *it's a dereliction of duty.*"¹⁹

From this evidence, the jury could reasonably infer that LBS failed to provide acceptable, effective, and critical lifeguard protection and beach safety measures that could have prevented Mr. Wolde's premature and untimely death. To the extent there is conflicting evidence, it is not the function of this Court to weigh the evidence and resolve those conflicts. *See Welch*, 342 S.C. at 300, 536 S.E.2d at 419 (finding conflicting evidence sufficient to deny JNOV, noting "[i]t is not the function of this Court to weigh the evidence and resolve those conflicts."). Because the evidence, viewed in the light most favorable to the Plaintiff, supports the factual findings implicit in the jury's verdict, LBS's motion for JNOV on proximate cause is denied. *See Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) (a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings). For these same reasons, the Court further finds the evidence justifies the verdict; thus, LBS's motion for new trial absolute on proximate cause is likewise denied.

II. Dual Role Negligence

As to dual role negligence, LBS challenges the sufficiency of the evidence linking LBS's dual role lifeguarding practice to Mr. Wolde's death. Specifically, LBS maintains there is no direct or circumstantial evidence establishing that any LBS lifeguard was performing a sale or related commercial duties at the time of the incident.

Contrary to Lack's contention, bystander Julian Chandler provided evidence from which the jury could infer that the lifeguard at L-22 was engaged in commercial activity during the time

¹⁹ Griffiths, 68:21-25.

of Mr. Wolde's distress. Chandler provided direct testimony that the L-22 lifeguard was on the beach talking to two people near the umbrella line with his back to the ocean.²⁰ That the L-22 lifeguard was talking to two people near the umbrella line is evidence from which the jury could infer that the lifeguard was conducting umbrella or chair rental sales or performing related customer service. Likewise, from this evidence, an inference could be drawn that the staff member positioned at L-22—closest to where the Wolde family entered the water—was distracted by commercial activity and this distraction impeded a proper lifeguard response.

In addition, Plaintiff offered evidence that the City of Myrtle Beach required lifeguard protection on the tower and that positioning on the tower is consistent with the standard of care. Because the L-22 lifeguard was at the umbrella line and was not on the tower, an inference can be drawn that he was not performing lifeguard duties and was instead engaged in performing revenue-generating duties which were required by LBS.

Evidence at trial further shows LBS's staff were required to make commercial sales, were financially motivated to make sales,²¹ were required to keep track of all sales activity, were required to immediately update all sales records, and were required to maintain a seating chart—all in addition to their lifesaving duties.²² Indeed, the sales totals for the date of the incident established that LBS's staff did in fact make sales at the three lifeguard towers closest to the drowning incident, towers L-22, L-21 and L-20.²³ Consistent with this evidence, Plaintiff's expert testified that: "all three [lifeguards, *i.e.*, L-22, L21 and L-20] were engaged in sales. And I would

²⁰ Chandler Video Tr., 16:10-19:1.

²¹ Trial Tr., 307:9-12 (confirming that LBS lifeguards earn commissions based on sales of umbrella and beach chair rentals).

²² Plt. Trial Ex. 10, p.10.

²³ Plt. Trial Ex. 17.

say that, in part, contributed—that dual role in part led to the accident.”²⁴ Dr. Griffiths testimony was preceded by the acknowledgment that the sales receipts from L20, L21, and L22 “exemplif[y] and highlight[] the fact that sales were taking place during the day.”²⁵ These sales receipts establish that the three lifeguards monitoring the beach where Mr. Wolde’s drowning occurred generated \$1,173.50 in sales that day.²⁶

Moreover, there was evidence that Mr. Wolde was in distress for a “long period of time,” and at no time during the estimated ten to fifteen-minute drowning event did any LBS staff member respond or attempt lifesaving efforts, despite yells for help by both the Wolde family and bystanders.²⁷ Even the bystanders on the beach could not get the attention of Lack’s lifeguards nor could they find any.²⁸

This evidence, viewed in the light most favorable to the Plaintiff, is sufficient to create a jury question as to whether LBS’s use of dual role lifeguarding prevented an adequate lifeguard response to Mr. Wolde and his family’s distress in the water. LBS’s motion for JNOV on the issue of dual role negligence is, therefore, denied.²⁹ Because the Court finds the evidence as to LBS’s

²⁴ Griffiths, 232:6-8.

²⁵ *Id.* at 232:2-10.

²⁶ Plt. Ex. 17.

²⁷ Trial Tr., 543:6-544:5; 585:3-11; 586:1-20; 589:18-24.

²⁸ Trial Tr., 196:17-24; 197:3-10.

²⁹ To the extent LBS argues that evidence of dual role negligence led to confusion of the issues, mislead the jury, constituted undue delay or a waste of time, LBS never objected to this evidence or argument at trial. *See* Rule 403, SCRE. Rather, LBS’s sole objection to this evidence was prior to trial and based on the false assumption that “[w]hile Plaintiff’s attorneys are expected to harp on profits over people the completely conjectural and speculative evidence as to commercial activities of the lifeguards would be irrelevant, non-probative and highly prejudicial.” (*See* Def. MIL, p. 9). However, the prejudice LBS alleged before trial did not occur at trial. At no time during the trial was there any reference to “profits over people.” Notwithstanding, as shown above, evidence of LBS’s dual role practice was properly admitted as relevant to the liability issues of standard of care, breach, and proximate cause. *See* Rule 401, SCRE (evidence is admissible if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

dual role practice justifies the verdict, the Court further denies LBS's alternative motion for new trial absolute on dual role negligence.

III. Admission of Evidence

LBS next challenges several evidentiary rulings, arguing the evidence was so prejudicial as to warrant a new trial absolute. As addressed in turn below, the Court finds no error and no prejudice sufficient to warrant the relief requested.

"[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v Mitchell*, 286 S.C. 572, 573, 247 S.E.2d 334, 337 (1978).

A. LBS's Inconsistent Factual Position in Prior Litigation

LBS's owner, George Lack, maintained at trial that the young adults his company hired to conduct public safety were lifeguards and not beach attendants. He contended that the lifeguards were trained, that they watched the water for distressed swimmers, and that only a small part of their working day was spent selling commercial equipment. For these reasons, Plaintiff sought to introduce evidence that George Lack had taken the opposite position in litigation before the South Carolina Workers Compensation Commission. In that litigation, Lack submitted to the Commission that his lifeguards' duties were 99.995% commercial sales and .0047% lifeguarding. Plaintiff maintained at trial that this opposing position before the Commission is highly relevant to this case because LBS's lifeguarding practices were the same then as they were on the day of Mr. Wolde's drowning.

As an initial matter, LBS opened the door to this evidence by claiming at trial that its lifeguards perform all lifeguarding and only minimal commercial sales. Cross-examination on the inconsistency between LBS's position in this case and that before the Workers' Compensation Commission was, therefore, permissible and appropriate. *See Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985) (upholding admission of settlement in prior Workers' Compensation claim to impeach personal injury plaintiff's testimony of pain and suffering as a result of a later accident). Likewise, LBS was permitted and did elicit testimony from George Lack in its cross regarding the background and rationale for the percentages provided to the commission.

While LBS argues the evidence is "grossly remote in time, nonprobative, and unduly prejudicial,"³⁰ the evidence shows Lack's lifeguarding practices were exactly the same in 2018 as they were in 2002 during the workers' compensation litigation. On this basis alone, the probative value of the evidence outweighs any alleged prejudice.

Further, the admission of evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion, commission of a legal error, and prejudice. *Hall v. Palmetto Enterprises II, Inc., of Clinton*, 282 S.C. 87, 91, 317 S.E.2d 140, 142-43 (Ct. App. 1984). No abuse of discretion or legal error has been demonstrated. Finally, even if there was error, there is no evidence Lack's suffered any prejudice because George Lack conceded at trial that his company's lifeguards performed commercial duties and engaged in dual-role lifeguarding. *See Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

B. Lack's USLA Decertification

Throughout the trial of this case, the United States Lifeguard Association ("USLA") was consistently recognized as the lifeguard industry's standard of care. LBS, however, claims

³⁰ *See* Lack's Mot. New Trial Absolute, p. 18.

reversible error in the admission of this standard of care evidence and, more specifically, in admitting evidence of its failure to meet the standard of care set by the USLA, as evidenced by communications with the USLA and the USLA's resulting decision to decertify Lack's as an accredited lifeguard service. The Court finds LBS's arguments unavailing. The facts show this evidence was highly probative and essential to the liability issues of notice, foreseeability, willfulness, and recklessness.

Chris Brewster, the former President of the USLA, testified that his organization plays a large role in establishing the national standard of care for ocean lifeguards.³¹ George Lack conceded the USLA is the standard of care for lifeguarding. Indeed, Lack testified he sought to secure USLA certification so his company could advertise the same to the public—*i.e.*, he wanted to hold out to the public that his lifeguards were trained and competent because they met the criteria of the USLA. Brewster testified that Lack concealed from USLA the fact that his lifeguards were participating in commercial activities in addition to lifeguarding. It was not until Brewster traveled to Myrtle Beach in 2007 that the USLA was apprised of the misrepresentation.³² The USLA thereafter de-certified LBS as a USLA compliant lifeguard service. As this evidence demonstrates, LBS's USLA certification and decertification is highly probative of both (1) the standard of care relevant to this case, and (2) Lack's knowledge that its practices violated the standard of care.

Further, Brewster also explained that it would be impossible for any Lack's lifeguard to meet the USLA training requirements required by the franchise agreement because dual-role lifeguarding is entirely inconsistent with USLA standards.³³ Brewster testified that the USLA trains lifeguards to watch the water, minimize distractions, and prevent people from even getting

³¹ Trial Tr., 473:15-17 (“... we [USLA] do set the standard.”).

³² Trial Tr., 495:18-25.

³³ Trial Tr., 478:5-9.

into danger in the water. If a company knowingly introduces distractions to its lifeguards in the form of selling commercial goods, and then trains them on how to sell the equipment, they are knowingly and intentionally violating USLA training.³⁴ Evidence of LBS's USLA membership, certification, and decertification is, thus, highly relevant to the standard of care applicable to this case as well as to LBS's breach and the foreseeability that LBS's breach could pose a dangerous safety risk to beachgoers like Mr. Wolde. Moreover, because LBS concedes its lifeguards perform dual roles and earn commissions from selling beach concessions, it cannot complain of prejudice resulting from evidence that it lost USLA certification because of this practice. The Court finds no error in admitting this evidence much less one that would warrant a new trial absolute.

C. LBS's Gross Commercial Sales from Lifeguards for 2018

LBS next challenges the admission of its 2018 gross sales from lifeguards as well as sales tax calculations for the three-month period surrounding the incident. LBS maintains the evidence, which reflected \$1,520,918.00 in gross sales, is not relevant and so "highly prejudicial" as to warrant a new trial.

The Court finds no error or prejudice warranting a new trial based on the sales records. While there was no dispute at trial that LBS's lifeguards performed commercial sales while also entrusted with performing lifeguard protection duties, the sales totals offer insight as to the time and frequency in which LBS's lifeguards were engaged in commercial duties. This evidence is relevant to essential elements of Plaintiff's negligence claim, such as LBS's knowledge that it engaged in a water safety practice that was directly contrary to its duty of providing lifeguard protection, and that LBS violated the standard of care and the Franchise Agreement by failing to

³⁴ Trial Tr., 478:5-9.

“ensure minimum lifeguard staffing in each zone.”³⁵ Further, the sales evidence was limited in scope and tailored to the week, month, and year of the incident. The Court finds this limitation was sufficiently tailored to the liability issues of whether LBS was in fact engaging in dual role lifeguarding, whether this practice put swimmers—and Mr. Wolde—at risk, whether it violated the standard of care and the Franchise Agreement, and whether it was a contributing cause of Mr. Wolde’s death.

As to prejudice, the Court is unable to find any. LBS’s gross sales are a matter of public record by virtue of its franchise agreement with the City of Myrtle Beach. Moreover, the sales evidence reflects only gross sales and is not an indicator of LBS’s financial position or net profits. Gross sales, being entirely distinct from the amount of money LBS made off its beach rentals, are not prejudicial in the manner complained of by LBS.³⁶

LBS’s reliance on *Branham v. Ford Motor Co.* for the assertion that “business income of this kind and nature has been forbidden by the South Carolina Supreme Court” is misplaced.³⁷ The court in *Branham* did no such thing. Rather, in *Branham*, the court found plaintiff’s counsel “went far beyond the pale in submitting evidence of Ford’s Senior Management compensation,” finding such evidence improper because it introduces an “arbitrary factor” in a jury’s consideration and assessment of punitive damages. *Id.* at 240, 701 S.E.2d at 25. The improper evidence there included that “the Ford Chairman and Chief Executive Officer was compensated by stock options worth \$5,300,000; the Ford President and Chief Operating Officer received a salary \$1,458,000 in 2005; the Ford Executive Vice President received a salary of \$972,000 in 2005; the Ford Chief

³⁵ Franchise Agreement, Plt. Trial Ex. 15, p. 2:29-30.

³⁶ See Lack’s Mot. New Trial Absolute, p. 21.

³⁷ See Lack’s Mot. New Trial Absolute, p. 21 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010)).

Financial Officer received a salary of \$916,000 in 2005; a former Ford chairman received \$880,000 in 2005[;]” and that “[i]n 2005, they didn’t pay bonuses [but] in 2004, they did pay bonuses: \$2 Million, \$1 Million, \$1 Million and \$1 Million plus stock and other compensation.” *Id.* LBS’s 2018 gross sales figures are entirely distinguishable from this type of “arbitrary” and prejudicial financial testimony.

Furthermore, to the extent LBS’s takes issue with the “manner in which Plaintiff’s counsel used the evidence throughout the trial and in his closing argument,”³⁸ LBS’s never once objected to the manner in which this evidence was used. In fact, LBS never made a single objection to Plaintiff’s closing. This failure constitutes a waiver of any right to challenge the evidence on this basis now. *See e.g. Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (the general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver.”); *Scott*, 340 S.C. at 167, 530 S.E.2d at 393 (“Ordinarily, if an appellant fails to object the first time a statement is made in closing argument, he or she waives the right to raise the issue on appeal”).³⁹

In sum, LBS waived its right to challenge the manner in which the sales records were used, and as to its admissibility, Lack’s argument fails on probative value alone. Any suggestion of

³⁸ *See* Lack’s Mot. New Trial Absolute, p. 21.

³⁹ This rule is subject to one very narrow exception “in flagrant cases where a vicious inflammatory argument results in clear prejudice.” *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (quoting *Toyota of Florence*). In *Dial*, the court made clear that the “vicious inflammatory argument” contemplated in the exception must be a closing argument that “constitutes abuse of a party or witness.” *Id.* at 259, 509 S.E.2d at 272. In *Toyota of Florence*, the court found that racist posters about the party opponent that counsel used as props in a closing argument met this narrow exception. 314 S.C. at 263, 442 S.E.2d at 615. LBS’s challenge to the admission of a public record showing its yearly gross sales is hardly comparable to the type of vicious inflammatory argument referenced in *Dial* or *Toyota of Florence*. Reference to gross sales is simply not “flagrant” or “vicious” nor is it an “abuse” of LBS so as to warrant deviation from the strict rule barring consideration of an allegedly prejudicial closing statement despite a failure to object.

prejudice is further undercut by the fact the sales record is a public document, reflects only gross sales (not net income), and is required by the Franchise Agreement. There is, thus, no error in admitting evidence of the 2018 stand totals, much less any error warranting a new trial. LBS's new trial motion based on the admission of the 2018 stand totals and sales tax calculations is denied.

IV. JNOV on Survival

LBS challenges the sufficiency of the evidence supporting the jury's award of survival damages, arguing it is entitled to a JNOV on the ground the evidence at trial failed to show that Mr. Wolde endured a period of conscious pain and suffering to warrant submission of the survival claim to the jury.

The South Carolina survival statute provides that a cause of action for personal injuries survives the decedent's death. S.C. Code Ann. § 15-5-90. Damages for a decedent's conscious pain and suffering are recoverable, but there must be proof that the decedent consciously suffered prior to death. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000); *Croft v. Hall*, 208 S.C. 187, 193, 37 S.E.2d 537, 539 (1946). "If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," it should be submitted to the jury. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991). In deciding whether to submit a claim of conscious pain and suffering claim to a jury, all evidence and any inferences reasonably therefrom must be viewed in the light most favorable to the plaintiff. *Vereen*, 306 S.C. at 432; 412 S.E.2d at 431.

Here, the evidence meets and exceeds the requisite standards. Two of Mr. Wolde's children, Adam and Wubit, witnessed their father struggle for his life in the water. Adam testified that the entire drowning event lasted for an extended period—including being pulled out to sea,

fighting for his life, yelling and waiving his arms for help. Adam testified he watched his father struggle while trying to save Wubit.⁴⁰

Wubit's testimony was equally powerful and even more direct because she was in her father's arms during his struggle to stay afloat. She not only saw but also felt his struggle, his gasps for air, and his calls for help.⁴¹ She testified her father repeatedly went under water, came back to the surface, and gasped for air while fighting to stay afloat.⁴² This terrifying sequence lasted for a "long period of time."⁴³ Wubit went on to explain that eventually the yelling, gasping, and going under came to a frightening stop, and she just held onto her father.⁴⁴ Wubit estimated the entire incident lasted for ten to fifteen minutes.⁴⁵ As Wubit's testimony shows, she was not only able to see and hear her father's struggle, but she was also able to feel the tremendous suffering and pain associated with his struggle.

Bystander testimony also supports Mr. Wolde's pain and suffering. One of the bystanders, Julian Chandler, testified he was sitting on the beach approximately 100 feet from the ocean when he heard cries for help in the water.⁴⁶ He rushed into the ocean using a mix of walking and swimming to reach Mr. Wolde, a process which took several minutes.⁴⁷ When Chandler finally got to Mr. Wolde, he had been assisted closer to shore into waist deep water.⁴⁸ Chandler testified

⁴⁰ Trial Tr., 543:23-544:5.

⁴¹ Trial Tr., 584:7-13.

⁴² Trial Tr., 584:7-13; 585:17-586:4.

⁴³ Trial Tr., 586:1-4.

⁴⁴ Trial Tr., 586:1-4; 587:11-588:3; 606:24-607:3.

⁴⁵ Trial Tr., 589:18-24.

⁴⁶ Chandler Video Tr., 59:19-22.

⁴⁷ *Id.*, 31:2-5.

⁴⁸ *Id.*, 62:8-11.

that when brought to shore, Mr. Wolde's eyes were bulging, he was spitting up water and sand, and he had a pulse.⁴⁹ Chandler went on to explain:

[T]he nurse and the larger gentlemen that were there that pulled him out to the sand issued CPR[.] The issue was the water and sand would come out and then get sucked back in, so she asked me to roll him, so I then rolled him on his side[.] She began clearing everything out of his mouth to then try to roll him back and administer CPR."⁵⁰

Based on this testimony, the evidence was not that Mr. Wolde died instantaneously; rather, he was still alive at the time he was brought back to shore. But as the coroner later confirmed, the rescue attempt on shore was unsuccessful and Mr. Wolde ultimately died from asphyxia due to drowning.⁵¹ At trial, the coroner explained that the asphyxia diagnosis meant Mr. Wolde's lungs filled up with water and prevented oxygen from getting into his blood.⁵² In other words, the process of going under, swallowing water, and gasping for air eventually caused him to suffocate to death.⁵³

Viewing this evidence in the light most favorable to the Plaintiff, the Court finds sufficient evidence to create a jury issue as to pain and suffering. This is not a situation where an individual is knocked unconscious, falls in the water, and immediately drowns; nor is this akin to a toddler falling in the water and immediately sinking to the bottom. Notwithstanding, LBS argues that in order to submit the survival claim to the jury expert testimony on the pathophysiology of the drowning process was required. While such expert testimony may be helpful or even necessary in some cases, in light of the direct witness testimony recounted above, this is not one of those cases.

⁴⁹ *Id.*, 21:11-19.

⁵⁰ *Id.*, 22:1-9.

⁵¹ Trial Tr., 466:2-4.

⁵² Trial Tr., 466:8-10.

⁵³ The coroner's report indicated that at the time of Mr. Wolde's drowning he was trying to save his daughter's life. *See* Ex. 20, p. 4.

Moreover, it is not Plaintiff's burden to prove survival damages through expert testimony. Rather, as in this case, Plaintiff's burden is to offer sufficient evidence from which the jury can infer conscious pain and suffering. *Scott v. Porter*, 340 S.C. 158, 171, 530 S.E.2d 389, 394-95 (Ct. App. 2000) (affirming survival damages award of \$600,000 based on circumstantial evidence from from which the jury could infer pain and suffering which preceded the decedent's coma and death) *Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 (stating jury could infer conscious pain and suffering from evidence).

Lack's reliance on *The Corsair*, 14 U.S. 335 (1892), is also misplaced. Unlike the witness testimony here, there were no witnesses in *Corsair*. The *Corsair* court did not have the benefit of testimony recounting the decedent's pain, consciousness, or duration of suffering. Rather, the only evidence available in *Corsair* was that the decedent drowned when the steam tug she was riding in struck the bank of the Mississippi River and sank. *See id.* In stark contrast to *Corsair*, the evidence recited above is sufficient for the jury to infer that Mr. Wolde endured pain and suffering which preceded his death by asphyxiation due to drowning. LBS's reference to "pre-impact fear" is also unavailing. Pre-impact fear pertains to accident victims prior to the impact which renders them unconscious or instantly causes death.⁵⁴ This is not a motor vehicle accident or similar situation involving an impact resulting in instantaneous death or unconsciousness. Accordingly, because the evidence is sufficient for the jury to infer conscious pain and suffering, LBS's motion for JNOV on the submission of Plaintiff's survival claim to the jury is, therefore, denied. *See Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 ("If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," it should be submitted

⁵⁴ *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 214-15, 734 S.E.2d 142, 144-45 (2012) (discussing pre-impact fear as a possible element of conscious pain and suffering from death by motor vehicle accident but declining to adopt or reject rule under the facts of this case).

to the jury). For these same reasons, the Court finds the jury's survival verdict is supported by the evidence; thus, LBS's request for a new trial absolute is likewise denied.

V. Motion for New Trial on Survival Damages

LBS maintains the jury's award of \$3.73 million in survival damages is so excessive as to suggest it was improperly motivated by passion or prejudice warranting a new trial absolute, or that it is merely unduly liberal entitling LBS to a reduction of the award by way of a new trial *nisi remittitur*.

As an initial matter, LBS argues—for the first time—that the Court's instruction on the mortality table was confusing and may have mislead the jury so as to taint the award. Having never raised the error it now claims as a basis to set aside the jury's award, LBS is barred from assigning any error now.⁵⁵ It is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)). If the instruction on survival and wrongful death damages was so confusing as to warrant a new trial, it was incumbent on LBS to object to the court's instruction or seek a clarification. Indeed, LBS could have objected both before the court approved the instruction and again when the instruction was given. LBS also neglected yet another opportunity when the court asked counsel: "[a]ny additions or anything else . . . before we send the jury back to deliberate."⁵⁶ Because LBS failed to object or otherwise address its concerns—despite multiple opportunities—LBS is barred from doing so now.

⁵⁵ *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) ("It is well settled that an issue may not be raised for the first time in a post-trial motion.")).

⁵⁶ Trial Tr., 939:19-22 (responding, "None from the defendant, Your Honor.").

As to LBS's argument that the award was motivated by improper prejudice, passion, or other outside influence, LBS merely reiterates the same arguments raised in its JNOV motion, *i.e.*, that there was no evidence of the specific duration of the drowning incident, and no expert evidence of the drowning process to inform the jury as to the effects a drowning victim might experience. For the same reasons this Court rejected LBS's JNOV arguments, the Court finds LBS's arguments unavailing.

As set forth above, the jury heard evidence that: (1) Mr. Wolde was conscious and struggling to stay afloat for a period of time; (2) during this time, Mr. Wolde repeatedly went under water, gasped for air, and cried for help; and (3) the incident lasted 10-15 minutes from the time Mr. Wolde became distressed until he was brought to shore. This evidence was more than sufficient for the jury to infer conscious pain and suffering. Accordingly, the Court finds the jury's award of survival damages is properly supported by the evidence. LBS's request for a new trial absolute is, therefore, denied.

As to LBS's alternative request to reduce the award by *nisi remittitur*, the Court likewise finds no basis to justify invading the jury's province. In considering a motion to reduce a damages award by *nisi remittitur*, the jury's determination of damages is entitled to substantial deference. *Smalls*, 339 S.C. at 215, 528 S.E.2d at 686 (citation omitted). Again, the direct testimony of Mr. Wolde's daughter who provided firsthand knowledge of Mr. Wolde's drowning experience, including the duration of the event and his pain and suffering in the process, provides more than sufficient evidence.⁵⁷ Further, the coroner testified as to the cause of Mr. Wolde's death, explaining what death by asphyxia due to drowning entails.⁵⁸ In considering this evidence, the

⁵⁷ Wubit testified the sequence of "going under and coming back up, . . . gasp[ing] for air and [] yell[ing] for help" lasted for "a long period of time." (Trial Tr., 586:1-4).

⁵⁸ Trial Tr., 456:2-10; 468:4-10; 469:11-12; *See* Plt. Ex, 19, 20 & 21.

jury could reasonably infer that the suffocation process endured by Mr. Wolde, while conscious and drowning, was painful and resulted in a period of conscious pain and suffering.

Indeed, courts have denied similar defense motions on much less. In *Smalls v. S.C. Dep't of Educ.*, the court of appeals upheld an award of survival damages, finding no error in the trial court's denial of JNOV and new trial *nisi remittitur* despite scant evidence of the decedent's consciousness prior to her death. 339 S.C. at 216–17, 528 S.E.2d at 686. There, the decedent, who was fatally injured in a car accident, was found unconscious and, in fact, never regained consciousness. *Id.* However, the decedent's father testified she was "gasping for air" when he found her, though there was no further evidence of any consciousness. The court of appeals upheld the trial court's denial of *nisi remittitur*, finding the "gasping for air" testimony was sufficient to support the jury's award of survival damages for conscious pain and suffering. Here, the evidence supporting conscious pain and suffering, including the detailed account from Wubit, far exceeds that in *Smalls*. Considering the facts in evidence, the Court finds the jury's award of \$3.73 million in survival damages is reasonable, measured, and supported by the evidence and testimony in this case. Accordingly, LBS's motion for new trial *nisi remittitur* is denied.

VI. Wrongful Death Damages

LBS asserts it is entitled to a new trial absolute on the grounds the jury's award of \$10 million in wrongful death damages is grossly excessive or, in the alternative, that it is entitled to a reduction of the award on the ground it is unduly liberal. LBS also asserts it is entitled to a new trial absolute under the thirteenth juror doctrine.

The issue of damages in a wrongful death claim is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death. *Welch*, 342 S.C. at 304, 536 S.E.2d at 421 (citing *Zorn v. Crawford*, 252 S.C. 127, 165

S.E.2d 640 (1969); *Self v. Goodrich*, 300 S.C. 349, 387 S.E.2d 713 (Ct. App. 1989)). Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Id.*

Here, the jury was presented with the tragic loss of a forty-one-year-old father of four young children who drowned while saving his daughter's life when they became entrapped in a deadly rip current. The decedent's family testified as to the enormous effect Mr. Wolde's death had on his four young children, of whom Mr. Wolde was the primary caretaker.⁵⁹ Mr. Wolde's fiancé, Meswaet Abel, was a registered nurse at George Washington hospital and worked long hours to provide for the family.⁶⁰ Mr. Wolde handled everything at home—he made the meals, he helped the children with homework, he went to the grocery store, he got them ready for school, and he was home for them when they arrived at the end of the day.⁶¹ In fact, on the morning Mr. Wolde died, he was the one who went to Wal-Mart to pick up groceries, who made the family's breakfast, who helped the children get ready for the beach, and who put on their sunscreen.⁶²

Ms. Abel, Adam, and Wubit further testified at length as to what his loss has meant to their family. They would set a place for him at the dinner table every night until it became too unbearable to see the empty seat.⁶³ They now eat dinner in the family room instead.⁶⁴ Adam, who enjoyed watching the Redskins on television with his father, could no longer watch football after

⁵⁹ Trial Tr., 587:11-588:3.

⁶⁰ Trial Tr., 570:15-22; 226:14-227:14.

⁶¹ Trial Tr., 570:20-571:8; 528:23-529:9.

⁶² Trial Tr., 232:2-8; 536:18-19.

⁶³ Trial Tr., 243:22-244:2.

⁶⁴ *Id.*

his father died—now he watches alone at their townhome with a collection of the memorabilia his father had given to him.⁶⁵ One of the twin daughters recently refused to re-paint her room because she did not want to remove the paint her father had applied.⁶⁶ As Ms. Abel testified, life without their father has been inconceivably difficult:

Our life changed. Our house is dark. We're living in no hope, with no answers to my kids, "Who is going to walk me down the aisle when I get married?" If I change, I would give my life. It's not because I love him; it's because of the kids. They need him more than me. . . He's done everything. He teach how to swim. He teach how to study. He teach them how to ride a bike. He painted their rooms.⁶⁷

In other words, Mr. Wolde was an active, involved, and loving father.

The children also testified as to the immeasurable trauma and shock experienced in witnessing their father's death in such a horrific manner. Wubit endured the entire event latched onto her father's shirt, where she could see, hear, and feel his suffering. The horrifying experience continued on shore as Wubit saw foam coming out of her father's mouth when the bystanders were performing CPR.⁶⁸ Bystanders Jeff Bender and Julien Chandler also testified as to the children's presence during the horrific event. Bender testified Wubit was floating on her father, "using him like a life preserver," at the time he began assisting them to shore.⁶⁹ Chandler testified that he stopped Adam from getting too close to his father's body and encouraged him to be strong for his younger twin sisters, after which Adam and his sisters kneeled and prayed.⁷⁰ The children also witnessed their mother "hysterically flailing and screaming."⁷¹ This evidence all plays a factor in determining wrongful death damages. *See Lucht v. Youngblood*, 266 S.C. 127, 136–37, 221 S.E.2d

⁶⁵ Trial Tr., 246:10-23.

⁶⁶ Trial Tr., 249:12-15.

⁶⁷ Trial Tr., 249:5-13.

⁶⁸ Trial Tr., 590:12-13.

⁶⁹ Trial Tr., 197:22-198:1.

⁷⁰ Chandler Video, Tr., 25:16-26:3

⁷¹ *Id.*, 26:6-9.

854, 859 (1976) (noting wrongful death damages includes the damages sustained by the beneficiaries from the death, such as mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the decedent's society).

Considering the wide range of losses encompassed by wrongful death damages, Plaintiff's counsel, during closing argument, appropriately suggested a per diem calculation as a method the jury could apply to arrive at a damages award for the children's nonpecuniary wrongful death damages. Counsel further made clear that whether to award and how much, if any, was entirely up to them. *See Edwards v. Lawton*, 244 S.C. 276, 281, 136 S.E.2d 708 (1964) (accepting a per diem calculation as acceptable in a closing argument). The per diem suggested was based on the children's loss of companionship and loss of society given their father's 37.3 years of remaining life expectancy. Under this calculation, the estimated per diem of \$10 an hour, multiplied by fifteen hours per day, translated to \$54,750.00 per year, per child. In total, this calculation amounts to roughly \$8.1 million over the remaining 37.3 years of Mr. Wolde's life expectancy.⁷² After three hours of deliberation, the jury awarded \$10 million, or \$2.5 million per child. Considering all objective evidence, the jury's award of \$10 million in wrongful death damages is reasoned, measured, and proportionate to the injuries suffered.

In challenging the propriety of the jury's damages award, LBS points to no concrete basis to suggest the award was motivated by anything but the evidence. LBS's attempt to challenge this jury's award by cherry picking various verdicts in other wrongful death cases is equally unavailing.⁷³ Though comparisons to other verdicts are only persuasive at best, LBS omits numerous wrongful death verdicts in which the actual damages awards are consistent with and

⁷² Trial Tr., 905:14-906:11.

⁷³ *See* Lack's Mot. New Trial Absolute, pp. 26-28; New Trial Nisi, pp. 6-8.

even higher than that in this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858 (stating that while the comparison approach is sometimes helpful, each case must be evaluated as an individual one, within the framework of its distinctive facts and, when comparing awards in previous cases, recognition must be given to the continuing erosion in the purchasing power of the dollar); *see e.g., Reeves v. Town of Cottageville et al.*; Case No. 14-11-070043 (2014) (compensatory award for wrongful death of \$7.5 million and \$90 million in punitive damages); *Givens v. Samkharadze*, Case No. 21-10-130012 (2021) (compensatory pain and suffering of \$25 million and \$8 million in punitive damages); *Bales v. Martinez*, Case No. 14-03-170022 (2014) (\$20 million award for loss of service, \$30 million in punitive damages); *Dial v. Toyota Motor Sales USA Inc.*, Case No. 18-10-220036 (2018) (\$6 million in compensatory damages and \$6 million for loss of service); *Bannister v. Columbia Urological Associates, P.A.*, No. 2015-CP-40-4794 (2017) (\$10 million in compensatory damages); *Huff v. XPO Express, Inc.*, Case No. 19-11-120022 (2019) (compensatory pain and suffering of \$7 million); *Oickle and Oickle v. XPO Express Inc. f/k/a Express 1 Inc.*, Case No. 19-03-200062 (2019) (loss of services award of \$5 million).

The Court further finds no basis to exercise its discretion as the thirteenth juror. As the thirteenth juror, the Court is charged with reviewing what happened, what was presented and what was not presented, in the trial of this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. Here, there was simply not “any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality.” *See Clark v. Ross*, 284 S.C. at 568, 328 S.E.2d at 106. The Court further finds there is no “compelling reason” to invade the jury’s province and reduce the verdict. *See Proctor v. Dep’t of Health & Env’t Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) (“compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.”). Considering the ample evidence

supporting the award of wrongful death damages, the Court finds the jury's \$10 million award or \$2.5 million per child is justified, is not grossly excessive, and is not unduly liberal. LBS's motions for new trial absolute and new trial *nisi remittitur* are, therefore, denied.

VII. Punitive Damages

LBS challenges the jury's award of \$7 million in punitive damages, arguing it is entitled to a JNOV or, in the alternative, a new trial absolute or a new trial *nisi remittitur*. As with the jury's survival and wrongful death awards, there is nothing meriting a JNOV, a new trial absolute, or a reduction of the punitive damages award.

In South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (citations omitted). Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damages." *Id.*

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence that the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights. S.C. Code Ann. § 15-33-135; *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996); *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). "A conscious failure to exercise due care constitutes willfulness." *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419). When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Id.*

(citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The amount of damages, actual or punitive, remains largely within the discretion of the finder of fact, as reviewed by the trial judge. *Id.* (citing *Gamble*, 305 S.C. 104, 406 S.E.2d 350).

A. JNOV on Punitive Damages

The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419). Where, as here, the Plaintiff presented testimony and evidence that LBS was aware of a dangerous condition and failed to take action to minimize or avoid the danger, an inference could be drawn that LBS's conduct was reckless, willful, and wanton. Thus, whether there is clear and convincing evidence of willful and reckless conduct to support punitive damages was appropriately submitted to the jury. *See id.* (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)).

If the jury believes the plaintiff established willful, wanton, or reckless conduct by clear and convincing evidence, the jury has considerable discretion to determine the amount of punitive damages. *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907–08 (Ct. App. 2021), reh'g denied (May 12, 2021) (citing *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404–05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages)).

In *Mishoe v. QHG of Lake City, Inc.*, the South Carolina Court of Appeals affirmed the denial of JNOV on the issue of punitive damages where there was evidence the defendant was provided "actual, written notice" of a dangerous condition on its premises—a hole in the pavement near the defendant's emergency room exit—and failed to take any action to repair the hole or to

warn visitors or patients of the existence of the hole. 366 S.C. at 201–02, 621 S.E.2d at 366. Having neglected to take any corrective action for nearly a year since being notified, the *Mishoe* court specifically found the written notice informing QHG of the hole was sufficient evidence of QHG’s willful, wanton, reckless, or malicious conduct to warrant submission of punitive damages to the jury. *Id.*

Here, the evidence of LBS’s willfulness and recklessness is even more glaring. While QHG’s conduct in failing to take corrective action within a year of notice was deemed sufficient, LBS’s intentional disregard for its known standard of care violations went on for not just one but *ten years*. In the ten years since being decertified by the USLA for its unsafe practices, LBS took no corrective action whatsoever. Not only did LBS have notice that its practices posed a threat to the safety of swimmers,⁷⁴ but LBS also concealed that its practices violated the standard of care—thereby further endangering the beachgoing public who trusted that the City’s beach was safely guarded by adequate and trained lifeguards.

Further, LBS was on notice by the National Weather Service that hazardous rip and longshore currents posed a dangerous threat to the safety of beachgoers, yet LBS failed to close the beach and failed to warn beachgoers of the hidden threat posed by these dangerous conditions. This cumulative misconduct, as established by clear and convincing evidence at trial, more than satisfies the willful, wanton or reckless standard to warrant submission of punitive damages to the jury. As the evidence shows, Plaintiff’s punitive damages claim is not mere speculation. The

⁷⁴ As set forth above in Plaintiff’s proximate cause, negligence, and recklessness arguments, the evidence established at trial shows LBS had actual notice that its beach safety services violated the standard of care and created a hazardous condition in numerous respects, including its non-compliance with USLA standards by engaging in dual role lifeguarding, its failure to provide 40 hours of training as required by USLA standards and its contract with the City of Myrtle Beach, and by its understaffing and failing to provide backup protection when a lifeguard leaves a tower unattended. Plaintiff refers to and relies on these arguments and the evidence therein.

evidence recounted above clearly and convincingly supports a finding that LBS was willful and reckless in committing standard of care violations it knew posed serious and life-threatening safety risks.

Further, as to LBS's claim of prejudice by being labeled a for-profit entity, LBS never objected to any such reference during trial and has therefore waived its right to do so now.⁷⁵ In sum, LBS's motion for JNOV ignores the ample evidence supporting Plaintiff's punitive damage claim, inappropriately suggest the jury's verdict was based on speculation, and inappropriately claims prejudice as a result of an alleged character attack that also finds no support in the record. For these reasons, Lack's motion for JNOV as to punitive damages is denied.

B. Recklessness in First Phase of Trial

LBS's arguments challenging the propriety of trying the issue of recklessness during the liability phase of this bifurcated proceeding are unavailing. As an initial matter, LBS consented to, and in fact agreed it was proper in phase one to have the jury determine whether Plaintiff proved willful, reckless, and willful conduct.⁷⁶

PLAINTIFF'S COUNSEL: I thought that you did the reckless question on the first verdict form, and that way -- I've done that in front of Judge Young, is the way we did it. And, that way, when they render that verdict, you know whether or not there's going to be a second phase, because they either find reckless, willful, or wanton, or they don't. You see what I'm saying?

THE COURT: Yeah. I mean, it either eliminates the need to go forward with the second phase --

PLAINTIFF'S COUNSEL: Right. And we don't make punitive damages arguments to the jury in the first phase, *but the evidence of recklessness comes in*, and if they make that determination, then I guess we bring them back in, and then we would argue the Gamble factors.

⁷⁵ See *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 111, 498 S.E.2d 395, 406 (Ct. App. 1998) (failure to object constitutes a waiver of issue).

⁷⁶ Trial Tr., 845:11-846:19.

COURT: What are your thoughts, Mr. Thompson?

COUNSEL FOR LACK'S: Your Honor, *I think that's correct*. I mean, the first question is liability, damages, actuals. And then the question to the jury is: Do you find evidence, whatever the question would be, for the punitive conduct. And then it's just yes or no. And then, if yes, there will be a second receiving or a second -- something along the lines.⁷⁷

That LBS's agreed to the same verdict form to which it now objects, at a minimum, amounts to a waiver of this issue. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form); *Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013) (failure to object to verdict form until after verdict was read amounted to a waiver of issue).

As to the merits, evidence of recklessness in the liability phase of the trial is appropriate because it is not "evidence relevant *only* to the issues of punitive damages." S.C. Code Ann. §15-32-520 (B) (emphasis added). First and foremost, a finding of recklessness is a determination of liability. Negligence and recklessness are not different merely as a matter of degree. By definition, they are distinct types of fault. *See Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (providing different legal definitions of "negligence" and "recklessness" and observing that "[t]he element distinguishing negligence from willful tort is inadvertence") (citation omitted)); *Fairchild v. S.C. Dept. of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411-12 (2012) ("Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence.").

Due to these distinct types of fault, Plaintiff was procedurally required to try her entire case on liability, including evidence of both negligence and recklessness, during the first stage—the

⁷⁷ Trial Tr., 845:11-846:6.

fault stage—of this trial bifurcated pursuant to S.C. Code Ann. § 15-32-520. Pursuant to § 15-32-520, plaintiffs *have to* present theories of a defendant’s negligence and recklessness during the liability stage of a bifurcated trial. *See* S.C. Code Ann. § 15-32-520 (“In the first stage of a bifurcated trial, the jury shall determine *liability* for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant *only to* the issues of punitive damages is not admissible at this stage.” (emphasis added)). At the close of that first stage, the jury deliberates and determines fault and compensatory damages, if any. On the same verdict form, typically as the last question, the jury also determines whether the defendant’s conduct was reckless, willful, or wanton, as opposed to merely negligent. This widely used format was properly followed in this case. In fact, this precise format has been followed in trials across this state.

Not only is this procedure appropriate and sanctioned throughout South Carolina, it also serves the interests of judicial economy. If the jury *had not* found recklessness, then there would have been no need to waste their valuable time, and that of the Court, with a second phase of trial. Only when the jury finds recklessness does the trial move into the punitive damages stage, where the evidence is generally limited to the defendant’s financial condition and ability to pay punitive damages, followed by closing arguments solely on punitive damages. *See, e.g., Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994) (observing that evidence of a defendant’s net worth is relevant only to the amount of punitive damages, and therefore not admissible until the bifurcated punitive phase of trial). Accordingly, LBS’s request for a new trial on this basis is denied.

C. New Trial Absolute on Punitive Damages

LBS seeks a new trial absolute on the basis that it believes the jury’s award of \$7 million in punitive damages is so grossly excessive as to be motivated by passion, caprice, prejudice, or

some improper influence. However, LBS fails to support this contention with anything more than conclusory statements or the improper assertion that the award is excessive based on size alone.

The extraordinary relief of new trial absolute is only warranted “[i]f the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence.” *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). “[T]he jury’s determination of damages is entitled to substantial deference.” *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citation omitted).

Here, there is simply no evidence that the jury’s award considered anything other than the relevant evidence, and LBS cites to none. LBS instead contends that given evidence of its negative net worth, the trial court’s instruction on economic bankruptcy must have been deficient. However, the actual language of the economic bankruptcy instruction, as is consistent with South Carolina law, states in full:

Any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the Defendant’s ability to pay any punitive damage award should be considered. *However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.*⁷⁸

Thus, as is consistent with the court’s instruction, economic bankruptcy is not an absolute bar to punitive damages. That the award was nearly half the amount of actual damages suggests the jury took this instruction into account.

In light of its financial position, LBS contends the punitive damage award is in itself evidence that it was motivated by passion, prejudice, or some other improper influence. But again, the size of the award does not in and of itself justify a new trial, especially given the evidence in this case and the fact the award is less than a 1:1 ratio to actual damages. Indeed, a punitive award

⁷⁸ Trial Tr., 968:3-7.

that is less than three times the amount of a compensatory award is *per se* reasonable. *See* S.C. Code Ann. § 15-32-530 (setting statutory cap on punitive damages of three times the amount of a compensatory award; only if that cap is exceeded is it relevant for the court to consider additional factors in determining the awards reasonability). The jury's \$7 million punitive award is almost half the \$13.7 million compensatory award—far under the multiplier set forth in the statutory cap. Accordingly, considering the evidence supporting punitive damages in this case, the Court finds the jury's \$7 million punitive award is not grossly excessive so as to result from improper influence nor is it unduly liberal to warrant a reduction by *nisi remittitur*. LBS's motions for new trial absolute and new trial *nisi remittitur* as to punitive damages are, therefore, denied.⁷⁹

CONCLUSION

Accordingly, for the foregoing reasons, Defendant's Post-Trial Motions for JNOV, new trial absolute, and new trial *nisi remittitur* are denied.

IT IS SO ORDERED.

Kristi F. Curtis, Circuit Court Judge

Sumter, South Carolina
April 10, 2023

⁷⁹ The Court has issued a separate due process analysis of the constitutionality of the punitive damages award in this case. Consistent with that opinion, the Court denies LBS's post-trial motions to the extent they challenge the constitutionality of the award.



Horry Common Pleas

Case Caption: Meswaet Abel , plaintiff, et al VS Lacks Beach Service , defendant, et al
Case Number: 2019CP2607075
Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2023-04-10 10:54:06 page 39 of 39

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

MESWAET ABEL, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF ZERIHUN WOLDE)
)
Plaintiff,)
)
vs.)
)
LACK'S BEACH SERVICE, INC.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-26-07075

**ORDER ON POST-TRIAL REVIEW OF
PUNITIVE DAMAGES AWARD**

RECEIVED

Apr 10 2023

SC Court of Appeals

This case came before the court on July 25, 2022. At the end of a week-long trial, the jury returned a verdict in favor of the Plaintiff in the amount of \$13,730,000.00 actual damages and \$7,000,000 in punitive damages.

The practice of awarding punitive damages originated in principles of common law "to deter the wrongdoer and others from committing like offenses in the future." Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964) (quoting Bowers v. Charleston & W. C. Ry. Co., 210 S.C. 367, 42 S.E.2d 705 (1947)). "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." B.M.W. of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996). The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting Mathias v. Accor Economy Lodging, Inc. and Motel 6 Operating L.P., 347 F.3d 672, 676 (7th Cir.2003)). Nevertheless, "while States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." State Farm v. Campbell, 538 U.S.

408, 416 (2003). “To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” Id. at 417.

This Court must consider the three guideposts that indicate whether the due process requirement of fair notice has been met. In determining the constitutionality of a punitive damages award, Gore directed that courts consider: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Gore, 517 U.S. at 575.

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is “perhaps the most important indicium of the reasonableness of a punitive damages award.” Gore, 517 U.S. at 575. “This principle reflects the accepted view that some wrongs are more blameworthy than others.” Id. In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. Campbell, 538 U.S. at 419.

In this case, the harm to Mr. Wolde was physical and resulted in the loss of his life at forty-one years of age. The conduct of Lack’s in employing a decades-long system of “dual role” lifeguards even in the face of repeated warnings from USLA that the practice was

dangerous and violated USLA safety standards supports the punitive damages award. Furthermore, there was testimony that Lack's knowingly misrepresented to USLA that its lifeguards were no longer actively engaged in concessions in order to maintain its USLA certification for several years and then continued the practice even after losing its USLA certification. In addition, Lack's incentivized the lifeguards to focus more on the concessions role than the lifeguarding role by paying the guards a commission based on their beach rentals, all while knowing that the inattention would jeopardize public safety.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." Gore, 517 U.S. at 580. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 424-25. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." Id. at 425-26. When determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, the court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result

from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award. In this case, the punitive damages awarded by the jury were less than the actual damages awarded and were less than a 1:1 ratio. While the actual damages awarded in this case were significant, they were not unreasonable given the fact that Mr. Wolde was only forty-one years of age at the time of his death, he left behind a widow and four young children, and he was the primary caregiver for the children. The jury was apprised of the defendant's net worth and the limits of its liability coverage and presumably took those factors into consideration in awarding punitive damages. Given the evidence that Lack's business practices posed a significant threat to public safety to an area that is a major attraction for tourists, the award is both reasonably related to the grave harm likely to result from the conduct and large enough to deter the defendant from continuing to engage in like conduct.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant. In this case, there are no authorized civil penalties applicable or comparable to this case. As Plaintiff points out, there was testimony from Chris Brewster that Lack's was the only beach safety provider in the country to employ dual role lifeguards in such a setting.

This court has reviewed the Gore guideposts, along with the Gamble factors, and finds that the punitive damages award in this case is reasonable, is not grossly excessive or unduly

liberal, was not actuated by passion, caprice, or prejudice, or some other influence outside of the evidence, and does not violate due process.

IT IS SO ORDERED.

Kristi F. Curtis, Circuit Court Judge

Sumter, SC
November 2, 2022



Horry Common Pleas

Case Caption: Meswaet Abel , plaintiff, et al VS Lacks Beach Service , defendant, et al
Case Number: 2019CP2607075
Type: Order/Damages

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2022-11-23 12:34:57 page 6 of 6

RECEIVED
FORM 4

STATE OF SOUTH CAROLINA **Apr 10 2023**

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS Court of Appeals

JUDGMENT IN A CIVIL CASE
CASE NUMBER **2019CP2607075**

Meswaet Abel Zerihun Wolde Zerihun Wolde Estate	Adam Zerihun Meswaet Abel Prs Wubit Zerihun	Lacks Beach Service Myrtle Beach City Of	John Doe Lifeguard

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk Of Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit)
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

We, the jury, unanimously find in favor of the plaintiff in the amount of \$13.73 million actual damages and \$7 million punitive damages.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Meswaet Abel Zerihun Wolde Zerihun Wolde Estate Adam Zerihun Meswaet Abel Prs Wubit Zerihun	Lacks Beach Service John Doe Lifeguard	\$20,730,000.00

If applicable, describe the property, including tax map information and address, referenced in the order: _____

ELECTRONICALLY FILED - 2023 Apr 10 1:14 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075
ELECTRONICALLY FILED - 2022 Aug 01 12:08 PM - HORRY - COMMON PLEAS - CASE#2019CP2607075

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Wisk Carter
Circuit Court Judge

2762

Judge Code

7/29/2022

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Harry Cooper Wilson III 3 Morris Street Suite A
Charleston, SC 29403
William Mullins McLeod Jr. PO Box 21624 Charleston, SC
29413
John Christopher Pracht V PO Box 4025 Anderson, SC
29622

Elizabeth Fulton Morrison 111 Coleman Boulevard Suite
301 Mount Pleasant, SC 29464
Joseph DuRant Thompson III 111 Coleman Boulevard, Suite
301 Mount Pleasant, SC 29446
David Richard Sligh 1303 Third Ave. Conway, SC 29576
Robert Gerald Chambers Jr. PO Box 1473 Columbia, SC
29202
Virginia Patterson Bozeman PO Box 1473 Columbia, SC
29202
Kelli Lister Sullivan PO Box 1473 Columbia, SC 29202
Paul Barry Trainor 191 Peachtree Street, NE Suite 2900
Atlanta, GA 30303

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter - Bobbi Fisher

Renee N. Elvis - Clerk of Court

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCF.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY FOR THE 15th JUDICIAL CIRCUIT

Case No. 2019-CP-26-07075

MESWAET ABEL, AS PERSONAL,
REPRESENTATIVE OVER THE
ESTATE OF ZERIHUN WOLDE,

Plaintiff,

VERDICT FORM

LACK'S BEACH SERVICE

Defendant.

-
1. Was the defendant Lack's Beach Service negligent?
☒ YES - Go to Question 2
☐ NO - Stop deliberations
 2. Was the defendant's negligence a proximate cause of Zerihun Wolde's death?
☒ YES - Go to Question 3
☐ NO - Stop deliberations
 3. Was the decedent Zerihun Wolde negligent?
☐ YES - Go to Question 4
☒ NO - Go to Question 7
 4. Was Mr. Wolde's negligence a proximate cause of his death?
☐ YES - Go to Question 5

____ NO - Go to Question 7

5. Using the combined negligence that proximately caused Mr. Wolde's injuries as one hundred percent (100%), what percentage of that negligence is attributable to Mr. Wolde and what percentage is attributable to the defendant Lack's Beach Service? [The percentages must add up to 100%.]

Plaintiff _____ %

Defendant _____ %

Total _____ %

6. Was the plaintiff's negligence greater than fifty percent?

____ YES - Stop deliberations

____ NO - Go to Question 7

7. We, the jury, unanimously find Plaintiff, Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde, is entitled to the following damages, if any: [Do not reduce the plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the judge will compute the amount of damages for which the defendant is responsible based on the percentage of the defendant's negligence which you have decided proximately caused the plaintiff's injuries. You are to determine only the total amount of the plaintiff's damages and enter that amount below.]

\$ 3.73 million Actual Damages to the Estate
of Zerihun Wolde for his conscious pain and suffering,

\$ 10 million Actual Damages to the Estate
of Zerihun Wolde for the benefit of his statutory beneficiaries Adam
Zerihun, Wubit Zerihun, Eden Zerihun and Edom Zerihun.

8. Do you, the jury, unanimously find that Plaintiff Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde, established by clear and

convincing evidence that Lack's Beach Service acted in a reckless, willful, or wanton manner, and that such recklessness caused the injuries claimed by the Plaintiff.

✓ YES

 NO

Elizabeth M. P. P.
FOREPERSON

WHEN YOU HAVE COMPLETED THE QUESTIONS, NOTIFY THE BAILIFF.

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY FOR THE 15th JUDICIAL CIRCUIT

Case No. 2019-CP-26-07075

MESWAET ABEL, AS PERSONAL,
REPRESENTATIVE OVER THE
ESTATE OF ZERIHUN WOLDE,

Plaintiff,

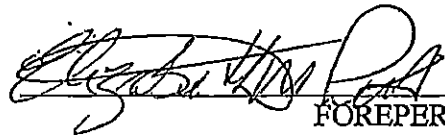
LACK'S BEACH SERVICE

PUNITIVE DAMAGES VERDICT FORM

Defendant.

What amount of punitive damages, if any, is the Plaintiff Meswaet Abel, as
Personal Representative of the Estate of Zerihun Wolde, entitled to receive:

\$7 million Dollars.


FOREPERSON

WHEN YOU HAVE COMPLETED THE VERDICT FORM, PLEASE
NOTIFY THE BAILIFF.



C. Mitchell Brown
T: 803.255.9595
mitch.brown@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

1320 Main Street, 17th Floor
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March 26, 2023

Via E-Mail

The Honorable Kristi F. Curtis
215 North Harvin Street
Sumter, SC 29150
kcurtissc@sccourts.org

Law Clerk Laurel Christmas (kcurtislc@sccourts.org)

RE: Abel v. Lack's Beach Service, Inc.
Case No. 2019-CP-26-07075
Our File 075329/01500

Dear Judge Curtis:

Thank you again for agreeing to the hearing on March 9 and allowing presentation of the parties' positions. Attached are courtesy copies in word format of proposed orders for Your Honor's review. We are also simultaneously filing these in support of Lack's positions, as Plaintiff did.

The proposed orders represent alternatives the Court can use. Lack's seeks, of course, JNOV, and failing that, new trial, and failing that, the application of tort claims act limits, and failing that new trial nisi remittitur. For example, if the Court chooses to deny the JNOV motion, it could so state and instead, e.g., order a new trial absolute under the 13th Juror Doctrine (form order also attached). If the Court chooses to issue a new trial for a basis other than the 13th juror doctrine basis, the Court would deny the JNOV motion and adopt so much of the proposed new trial order as the Court determines.

Separately, there is a proposed order on the imposition of the SC Tort Claims Act caps. If the Court grants JNOV or new trial absolute, the Court could choose not to address this order at this time. Otherwise, Lack's suggests the Court should rule one way or the other on the caps.

March 26, 2023

Page 2

There is a separate proposed order granting new trial nisi remittitur. There, the Court would deny the JNOV and new trial absolute motions, likely deny the caps motion, and grant so much of the remittitur order as the Court determines appropriate.

Plaintiff's counsel took the position at the March 9 hearing that the Court should address motions chronologically, in the order they were filed. If the Court were to follow that logic, it should rule on all of the post-trial motions filed by Lack's first in writing and issue the orders. If the orders favor Lack's Beach service, such likely would render the motion to stay execution and motion for receivership moot, and they would not need to be addressed at all. If the orders favor Plaintiff, Lack's Beach Service can appeal and by right stay the orders by posting the appeal bond it has offered to post for some time, pursuant to the appeal bond statute.

If the Court decides to not address motions chronologically, Lack's suggests it should:
1) grant the stay of execution and require Lack's to post either the appeal bond amount or a bond in the amount of "double the property" (meaning hard assets) of Lack's; and
2) address the post-trial motions, which would result in the motion for receivership being moot.

If the Court is inclined to address the motion for receivership for some reason out of order and prior to the request to stay execution pursuant to the offer to post a bond, Lack's asserts that would be error. Nevertheless, a proposed order is attached for Your Honor's consideration that denies the motion for receivership. The reasoning for doing so is set forth in the draft order denying the motion for receivership.

Thank you,

Very truly yours,



C. Mitchell Brown

CMB:eh

Attachments

cc: Via e-mail:

William M. McLeod, Jr., Esquire (mullins@mcleod-lawgroup.com)
John C. Pracht V, Esquire (chris@864law.com)
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ROA_02427

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,	)	ORDER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Lack's Beach Service, Inc.'s ("LBS" or "Lack's") Motion for Judgment Notwithstanding the Verdict (JNOV) pursuant to Rules 50 and 59, SCRCP, filed August 8, 2022. This case was tried before a jury in Horry County from July 25-29, 2022. The jury returned a verdict in favor of the Plaintiff and awarded \$3,700,000 on the survival claim, \$10,000,000 for the wrongful death claim, and \$7,000,000 in punitive damages. Lack's timely filed post-trial motions including motions for JNOV, new trial absolute, and new trial *nisi remittitur*. The Court held a hearing on all pending motions on March 9, 2023.

Having considered the transcript, evidence and testimony presented at trial, and the parties' briefing and argument at the hearing, the Court hereby **GRANTS** Lack's Motion for JNOV.

I. BACKGROUND

This action arises from the drowning of Zerihun Wolde ("Mr. Wolde") at Myrtle Beach. Defendant Lack's is a beach safety company which the City of Myrtle Beach contracted with to provide lifeguard services on the city's public beaches.

On August 24, 2018, Mr. Wolde and his two oldest children were visiting the beach on vacation. That afternoon, they entered the water to swim and were caught in a rip current. Mr.

Wolde was unable to escape and tragically drowned. His children were able to make it to safety. Mr. Wolde drowned in the general vicinity in front of lifeguard station L-21.

At the time of the incident, lifeguard L-21 was on his regularly scheduled lunch break as provided for by the terms of the Franchise Agreement between Lack's and the City of Myrtle Beach. Lifeguards L-20 and L-22 were tasked with scanning that sector of the ocean (the ocean in front of L-21) for the short lunch period while he was away. At trial, Plaintiff offered no direct evidence of what the lifeguards at L-20 and L-22 were doing immediately prior to or during the incident. Plaintiff introduced considerable evidence and testimony about the ability of Lack's lifeguards generally to serve a "dual role" by engaging in sales of certain beach equipment. However, none of the evidence or testimony presented at trial showed that any of the relevant lifeguards were engaged in such activities at the time of the drowning incident. Speculation cannot take the place of evidence.

Plaintiff did not present any evidence supporting that lifeguards L-22 or L-20 could have or should have observed Mr. Wolde in distress, or that had they done so, they could have or should have physically been able to reach Mr. Wolde quickly enough to change the outcome.

There were no bystander witnesses who testified they heard or observed Mr. Wolde and either of his children in trouble prior to Mr. Wolde's submersion and unconscious state. Both bystander witnesses stated that when they first observed Mr. Wolde, he was in an unconscious and nonresponsive condition. The bystanders who did testify stated that they heard/saw another beachgoer asking for help, who may have heard Mr. Wolde and/or his children, but this third beachgoer did not testify at trial. The only evidence presented as to the length of time Mr. Wolde struggled in the water was speculative and vague, and came from Mr. Wolde's children. Moreover, Plaintiff did not present any concrete evidence of how long Mr. Wolde struggled to swim or tread

water, or the length of time that passed from the start of the struggle to his submersion and drowning. Finally, Plaintiff did not present any probative evidence detailing the drowning process.

II. 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.*

III. THE COURT’S ANALYSIS

1. The Plaintiff’s “dual role” evidence and argument.

Plaintiff’s theory of the case relied heavily on the “dual role” issue. Plaintiff’s response brief acknowledged that the dual role was a “critical factual component” of their negligence claim. (Pltf. Resp. at 33.)

Plaintiff’s theory at trial was that because Lack’s lifeguards were permitted to engage in commercial activity as part of their duties, that was what the relevant lifeguards were doing at the time of the incident involving Mr. Wolde. According to Plaintiff’s theory, had Lack’s lifeguards not been permitted to engage in commercial activity, they would have prevented the drowning incident.

Prior to the start of trial, the Court acknowledged that “dual role” was generally allowed by law. (Pretrial Hrg. Tr. 45-46.) Plaintiff’s counsel stated that direct evidence would allow the jury to conclude that the relevant lifeguards were engaged in commercial activity at the time of the drowning. (*Id.* at 14.) However, the Court agrees with Lack’s that in the end, the evidence presented at trial ultimately did not establish these facts. No reasonable jury could have found in favor of Plaintiff and thus Lack’s is entitled to JNOV.

As noted, the “dual role” arrangement was expressly permitted by statute and Lack’s contract with the City of Myrtle Beach. The South Carolina Code allows the City of Myrtle Beach and other coastal municipalities to provide lifeguard and other safety services, to enact and enforce regulations deemed necessary for the safety of all persons on the beach, and either provide lifeguard services through municipal employees or through a service agreement with a private beach safety company such as Lack’s. *See* S.C. Code Ann. § 5-7-145(A)-(B). If a municipality elects to use a private company, personnel employed by the company “must be tested and certified as required by the municipality.” *Id.* at (B)(4). The municipality may also grant “the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality.” *Id.* at (B)(3).

The Franchise Agreement between the City and Lack’s follows the arrangement permitted by the statute. The Agreement allows Lack’s to rent beach equipment in return for its provision of water safety service and other consideration. (*See* Franchise Agreement, §4.)

Plaintiff contends that the testimony of Dr. Griffiths and bystander Julian Chandler supported that the lifeguards were engaged in dual role activities in a manner that directly affected the lifeguard’s abilities to rescue Mr. Wolde. (Pltft. Resp. at 23.) However, Chandler’s testimony was only that he saw “a lifeguard” talking to a beachgoer around five or ten minutes prior to the incident. (Chandler Dep. at 17:5-15.) Mr. Chandler specifically stated that “the lifeguard” had on no shirt and red shorts. However, the only evidence was that some lifeguards not belonging to Lack’s Beach Service also were on the beach at various times, and that Lack’s Beach Service lifeguards wore gold shirts and did not wear red shorts. Lack’s guards were contractually required to wear yellow shirts and blue shorts, and there was no evidence that the “lifeguard” described by Mr. Chandler was in fact a Lack’s lifeguard. (Tr. 812:4-7.) Moreover, Plaintiff’s expert Griffiths

agreed he had not seen evidence supporting that the relevant lifeguards were actually engaged in a commercial transaction during at the time of the incident. (Griffiths Dep. at 230:21 – 231:11).

Therefore, because the dual role arrangement was permitted by law and contract and Plaintiff presented no evidence that it had any impact on the relevant Lack's Beach Service lifeguards' ability to observe and prevent the drowning involved here, the Court finds that Lack's motion for JNOV should be granted.

This Court also finds that JNOV should be entered in Lack's favor because Plaintiff's case relied on speculation and conjecture about what could *potentially* have occurred differently rather than presenting any evidence that a specific act or omission by Lack's actually led to Mr. Wolde's death. South Carolina does not follow *res ipsa loquitur*. *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010). Therefore, Lack's motion for JNOV should be granted for this additional reason.

Here, proximate cause centered on the events of the distressed swimming of Mr. Wolde and his unfortunate drowning. Plaintiff conceded at trial that they were not pursuing any claims regarding the resuscitation efforts, and the Court granted directed verdict on that issue.

The Court agrees with Lack's that the record evidence was insufficient to establish proximate cause and no reasonable jury could have found in Lack's favor on this issue. The Court finds that Plaintiff failed to prove: (1) how long Wolde was a distressed swimmer, (2) that a lifeguard at his stand should have seen Wolde in the location of the drowning, (3) how long Mr. Wolde was in deep water prior to the drowning, or (4) that, had a lifeguard seen Mr. Wolde from one of the adjacent stands, that he could have saved both Mr. Wolde and his daughter who was clinging to him during the time he drowned. The Court further agrees with Lack's argument that Plaintiff failed to prove that any lifeguard would have seen a rip current where the Woldes were

swimming in time to whistle them away or that, had they whistled, the Woldes could have moved towards shore in response.

Plaintiff's central proximate cause argument was that Lack's lifeguards were negligent because they did not observe Mr. Wolde or rescue him while he was in the water. However, there was no testimony that Mr. Wolde should have been visible to the lifeguards or that the lifeguards could have gotten to him in time to prevent the drowning. The only testimony cited by Plaintiff to support this point was from one of the bystander witnesses who was permitted to opine (over objection) that: "If the lifeguards would have been present, I think the outcome would have been different." (Tr. 207:15-16 (emphasis added).) This was both improper opinion testimony and speculation. Plaintiff also cites Mr. Chandler's statement that before and after Mr. Wolde was brought on shore, he saw a "lifeguard" in red shorts with no shirt who stood by and did not assist. (Chandler Dep. 22:17-23, 56:24-57:7.) However, the Court agrees with Lack's that this was speculation as to a "lifeguard" or, even if the person was a lifeguard, the lifeguard was not a Lack's Beach Service lifeguard. (Tr. 202:24-203:1.)

Plaintiff's secondary proximate cause theory was that Lack's could have prevented the accident by closing the beach or the sector where Wolde was swimming entirely, relying on their expert to support this point. However, the expert had not been to the beach, did not know the weather conditions, and was not opining on water closure based on any knowledge of wind, wave height, or any objective standard. He was basing his opinion on the statements of a deponent that there had been a national weather warning the morning of the incident about the potential for hazardous conditions such as rip currents which might exist in the general area. Moreover, Griffiths acknowledged that the decision to close a section of water is not based on a National Weather Service bulletin or any objective set of standards but, instead, the decision "depends

upon the experts, the competent qualifying surf staff on duty to make that call.” (Griffiths Dep. p. 168: 7-14.) Griffiths admitted that the ocean is a dangerous environment and rip currents are unpredictable. Finally, there was no proof of any duty owed to Mr. Wolde specifically (as opposed to the public at large) to close the beach as Plaintiff argued Lack’s should have done in any event.

Plaintiff’s final proximate cause theory contended that if Lack’s had had the required number of “lifeguard onlys” working the day of the incident (they were one short), it would have made a difference. The trial testimony did establish that Lack’s had one less “lifeguard only” working that day than required by the Franchise Agreement, because the lifeguard called in sick. However, Plaintiff introduced no proof that had he been working that day he would have been in the vicinity at the time of the incident and such testimony would have been conjecture in any event. The only evidence was that the lifeguard onlys roamed and covered many blocks of territory, and thus again, the Court cannot replace evidence with speculation that had the lifeguard only not called in sick (or had he been replaced that day), the lifeguard only would have been positioned in the vicinity of Mr. Wolde’s drowning incident at the time of that incident.

Therefore, in light of the foregoing, the Court agrees with Lack’s that none of Plaintiff’s arguments in support of proximate cause show there was sufficient evidence to establish any act or omission of Lack’s as the proximate cause of Wolde’s death. This critical and essential element of Plaintiff’s claim rested solely on unreasonable inferences and speculation. No reasonable jury could have found in Plaintiff’s favor and, as a result, the Court grants JNOV in Lack’s favor.

2. The survival claim should not have been submitted to the jury.

This Court finds that Lack’s is entitled to JNOV on the survival claim for the additional reason that there was no reliable evidence of any *conscious* pain and suffering presented at trial.

“Conscious” is defined as: “having mental faculties not dulled by sleep, faintness, or stupor” and “perceiving, apprehending, or noticing *with a degree of controlled thought or observation.*” Merriam-Webster, Online Dictionary (last visited March 25, 2023), <https://www.merriam-webster.com/dictionary/conscious> (emphasis added). As the District of South Carolina has explained, under South Carolina law a survival claim “requires that the deceased consciously endure pain and suffering,” and where the evidence “does not demonstrate that the decedent had time to consciously perceive the means of his death, much less consciously suffer pain,” the claim fails. *Hoskins v. King*, 676 F. Supp. 2d 441, 451 (D.S.C. 2009).

Here, the only testimony supporting Mr. Wolde’s consciousness came from his daughter Wubit. She testified about his gasping and struggling. However, she acknowledged her deposition testimony that she did not actually remember how long it lasted. (Tr. 603:24-605:21.) Bystander witnesses Julian Chandler and Julian Bender both stated that Wolde was unconscious when he was pulled from the water. (Tr. 61:24-62:2; 212:13-14.) Mr. Wolde’s son Adam testified generally that they were yelling for an unspecified period of time, but he ultimately did not see what happened to his father. (Tr. 567:1-568:3.)

Plaintiff also cites the coroner’s report as evidence of Mr. Wolde’s conscious pain and suffering. However, the report merely stated that Mr. Wolde’s cause of death was asphyxiation, which the deputy coroner testified means a lack of oxygen. (Tr. 466:5-10.) It did not describe the drowning process or what a victim experiences and did not detail any specifics about what happened in this particular case.

Therefore, Plaintiff presented no evidence supporting Mr. Wolde’s *conscious pain and suffering*. At most, the record reflects gasping and yelling and that Mr. Wolde ultimately and unfortunately drowned. Thus, the Court agrees with Lack’s that Plaintiff did not sufficiently

establish a jury question on this claim. *See Rutland v. S.C. Dep't of Transportation*, 390 S.C. 78, 84, 700 S.E.2d 451, 454 (Ct. App. 2010), *aff'd as modified sub nom. Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012) (finding that the record did not support conscious pain and suffering where the decedent did not respond to being called by name and did not make any noises despite her having a pulse); *see also Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944) (holding the evidence failed to show an accident victim was conscious of pain and suffering where one witness heard the victim groan and the other witnesses saw no signs of life).¹

Additionally, the Court finds that the survival claim also lacked sufficient proof because Plaintiff failed to present expert testimony about what occurs when a person experiences drowning. As Lack's argued in its motions for JNOV and New Trial Absolute, jurisdictions that have permitted conscious pain and suffering to be submitted to the jury have typically done so where there was expert testimony about the drowning process.² Here, Plaintiff did not produce any expert

¹ The Court agrees with Lack's that Plaintiff's reliance on *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000) is misplaced. *Smalls* involved a vehicle hitting a child, not a drowning. Moreover, there was conflicting testimony from the child's father who said that she was unconscious when he found her but also that the child was gasping and moaning at the scene. *Id.* The daughter lived for three additional days and the father testified that he spoke with his daughter while she was at the hospital and she moved her fingers. *Id.* The court noted that while the evidence was "somewhat contradictory," this was enough to submit the survival claim to the jury.

² *See, e.g., 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" sufficient evidence to

testimony to provide the Court or the jury with any guidance as to what happens during the drowning process or, most importantly, what the drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process. The need for expert testimony was particularly acute in this matter since South Carolina has never adopted “pre-impact fear” as an element of recoverable damages. *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). The Court agrees with Lack’s that if the drowning process starts after submersion, then the pre-submersion struggles would be considered “pre-drowning” fear and, like “pre-impact fear,” should not be considered a recoverable element of damage.

For all these reasons, the lack of sufficient proof supporting the survival claim supports that no reasonable jury could have found in Plaintiff’s favor on the survival claim. JNOV should be granted on this issue for this additional reason.

3. Punitive damages should not have been submitted to the jury.

Punitive damages require that the Plaintiff prove recklessness by clear and convincing evidence. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000). Critically, the reckless action must have a proximate causal relationship to the harm. *See Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (noting that the plaintiff must show a “present consciousness of wrongdoing” by the defendant at the time of the action).

Plaintiff did not meet this burden here. Their proximate cause argument fails as a matter of law, as detailed above. However, even if it did not, none of the alleged acts or omissions of

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).

Lack's rose to the level of recklessness. Plaintiff contends that lifeguard L-21 was at lunch, but that was allowed by law. He had posted a red flag indicating some danger sometime prior to stepping down for lunch, which negates any alleged conscious indifference to safety by Lack's or its personnel. Plaintiff also asserts that Lack's used some lifeguards that were able to serve a dual role, which was again permitted by law. Plaintiff then contends that Lack's was one "lifeguard only" short on the day of the incident, but these workers were "roving" and covered a large area. There is no proof that the missing "lifeguard only" would have been in the area of the drowning if he had not been out sick that day. Next, Plaintiff asserts that Lack's did not close the beach, but as detailed above, the reports had only indicated the *potential* for dangerous conditions. There is no clear and convincing evidence that Lack's acted with conscious disregard and should have closed the beach or the beach area where Mr. Wolde entered the water at the time of his entry.

Lastly, Plaintiff contends that lifeguards L-20 and L-22 did not see or hear the Woldes. However, again, there was no proof that they were consciously disregarding their duties. No other safety personnel witnessed the incident either (fire department, ocean rescue, police, etc.), and there is no proof or allegation that they were failing to do their job. In fact, the testimony supported that lifeguard L-20 called in a code 3 (shore emergency) when he learned of the incident and Lifeguard at L-22, upon hearing the Code 3, began "running towards" the beach area. This evidence negates any conscious indifference to safety. Although Plaintiff points to the dual role issue, there is no evidence that these two lifeguards were engaging in merchandising at or near the time of the drowning. This cannot simply be assumed, and Plaintiff's speculation is not evidence. As noted above, South Carolina law does not recognize *res ipsa loquitur* and Lack's is not a guarantor of safety. This is especially so considering the inherently dangerous nature of the ocean and the fact that drownings cannot be 100% prevented.

Therefore, for all these reasons, the Court finds that the punitive damages issue should not have been submitted to the jury for these additional reasons and JNOV is appropriate.

IV. CONCLUSION

Based on the foregoing, the Court finds that Lack's motion for JNOV should be granted. The Court **GRANTS** Lack's motion, vacates the judgment, and directs the Clerk to enter judgment in Lack's favor.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE
CASE NO. 2019-CP-26-07075

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

Lack's Beach Service, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: C. Mitchell Brown

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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 Lack's Beach Service, Inc.'s Motion for a New Trial Absolute. The Court **GRANTS** Lack's motion pursuant to the Thirteenth Juror doctrine, based on the facts. The Court finds the evidence does not justify the verdict. See *Lane v. Gilbert Const. Co.*, 383 S.C. 590, 597-98, 681 S.E.2d 879, 883 (2009).

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[illegible]

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,	)	ORDER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	

This matter comes before the Court on Defendant Lack's Beach Service, Inc.'s ("Lack's") Motion for a New Trial Absolute (JNOV) pursuant to Rules 59, SCRPC, filed August 8, 2022. This case was tried before a jury in Horry County from July 25-29, 2022. The jury returned a verdict in favor of the Plaintiff and awarded \$3,700,000 on the survival claim, \$10,000,000 for the wrongful death claim, and \$7,000,000 in punitive damages. Lack's timely filed post-trial motions including motions for JNOV, new trial absolute, and new trial *nisi remittitur*. The Court held a hearing on all pending motions on March 9, 2023.

Having considered the transcript, evidence and testimony presented at trial, and the parties' briefing and argument at the hearing, the Court hereby **GRANTS** Lack's Motion for a New Trial Absolute.

I. BACKGROUND

This action arises from the drowning of Zerihun Wolde ("Mr. Wolde") at Myrtle Beach. Defendant Lack's is a beach safety company which the City of Myrtle Beach contracted with to provide lifeguard services on the city's public beaches.

On August 24, 2018, Wolde and his two oldest children were visiting the beach on vacation. That afternoon, they entered the water to swim and were caught in a rip current. Mr. Wolde was unable to escape and tragically drowned. His children were able to make it to safety. Mr. Wolde drowned in the general vicinity in front of lifeguard station L-21. At the time of the incident, lifeguard L-21 was on his regularly scheduled lunch break as provided for by the terms of the Franchise Agreement between Lack's and the City of Myrtle Beach.

II. 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), SCRPC. 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).

II. THE COURT'S ANALYSIS

1. **Lack's motion for a new trial should be granted because the Court erroneously allowed the jury to consider unduly prejudicial and irrelevant evidence whose unfair prejudice outweighed its probative value.**

- A. ***Branham* and *Sulton* require a new trial due to the improper admission of evidence of Lack's gross sales data.**

The Court agrees with Lack's that it was error to permit Plaintiff to introduce evidence and testimony regarding Lack's gross sales data for 2018. Over objection by Lack's counsel, Plaintiff was allowed to introduce evidence of Lack's gross sales data for the entire year of 2018. (Tr. 387:12-24, 391:17-24.) The jury heard that Lack's had total gross revenues for fiscal year 2018 of \$1,520,918. (Tr. 394:10:15.) Plaintiff also introduced Lack's sales tax filing from 2018 into evidence.

Lack's maintained that this financial information was irrelevant to what occurred on the day of the incident and did not support that any of the relevant lifeguards were engaged in "dual role" sales activities at the time of Mr. Wolde's drowning. Moreover, its probative value was greatly outweighed by the danger of unfair prejudice.

After review of the briefing and consideration of the parties' oral arguments, the Court agrees that *Branham v. Ford Motor Co.*, 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010) and

Sulton v. HealthSouth Corp., 400 S.C. 412, 420-21, 734 S.E.2d 641, 646 (2012) require a new trial.

In *Branham*, the Supreme Court reversed a multi-million verdict and ordered a new trial, holding that the wealth of a defendant is a relevant factor in assessing punitive damages, but only “evidence of net worth and extrapolations from net worth may be introduced on the issue.” 390 S.C. at 239-40, 701 S.E.2d at 24-25. Even as to net worth evidence, the *Branham* court warned that such evidence must be handled cautiously since “the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” *Id.*

In *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420-21, 734 S.E.2d 641, 646 (2012), the Supreme Court again reversed a multi-million verdict and ordered a new trial where similarly inappropriate evidence was admitted. In *Sulton*, the trial court permitted the jury to hear evidence of a corporation’s net operating revenue. The court explained that this was improper under *Branham* and the “prejudicial effect of doing so [wa]s self-evident” since “[n]et revenue has no necessary relation to net worth.” *Id.* Putting the large sum of money in the minds of the jury “reflecting the company’s net income but accounting for none of its expenses and obligations, was almost certainly misleading.” *Id.*

Under *Branham* and *Sulton*, it would have been error to admit the gross sales revenue even if introduced only during the punitive damages phase and would have necessitated a new trial. Therefore, these decisions compel a new trial here. The Court agrees with Lack’s that it was prejudicial for its admission during the actual damages phase. The jury’s excessive verdict here confirms its prejudicial effect.

The Court disagrees with Plaintiff's arguments about the admissibility and relevance of the evidence overcoming the clear prohibition of such evidence by *Branham* and *Sulton*. First, Plaintiff contends that the data were admissible because they were public records. Although this may have been sufficient to establish foundation or a hearsay exception, it had no bearing on whether they were relevant or whether their probative value outweighed their prejudice as required by Rules 401 and 403, SCRE.

As to relevance, the Court finds that Plaintiff's arguments are not compelling. First, Plaintiff contends that Lack's had to provide the sales data to the City of Myrtle Beach under the Franchise Agreement. However, this fact has no bearing on whether the data has any relevance to this negligence action.

Second, Plaintiff argues that the data were relevant to show "consideration" for Lack's legal obligation to provide effective lifeguard protection. Lack's never disputed that it was permitted under the Franchise Agreement to rent certain beach equipment in addition to providing lifeguard protection. The gross sales revenues were thus not necessary to establish this point.

Third, Plaintiff asserts that the sales data were appropriate to show that Lack's failed to deliver on its obligations to provide effective lifeguard services. The Court is not persuaded by this argument because, if accurate, a plaintiff could introduce exactly the kinds of evidence that cases like *Branham* forbid to support liability arguments (for example, that a business spent too much time and money on a non-safety-related item and not enough time and money on another safety-related item) in nearly any negligence matter. The undue prejudice emanating from this evidence far outweighs any probative value of such a point. Moreover, the mere fact that Lack's made sales of beach equipment rentals does not mean that Lack's could not provide lifeguard services, nor that it was negligent.

Finally, Plaintiff argues that the data were relevant to showing a “safer alternative,” namely that Lack’s could have hired additional lifeguards and employees designed to work solely as beach attendants. Plaintiff extensively cross-examined George Lack about this while repeating the gross sales number. This was misleading and confusing to the jury since, of course, only net income would show the “profit” that Lack’s could have used for other purposes such as hiring additional guards. Moreover, the sales data were not necessary to establish this point since George Lack acknowledged on cross-examination that Lack’s could have had attendants who were solely responsible for sales while lifeguards solely performed water observation. (Tr. 310:6-9.) The Court agrees with Lack’s that any probative value of the evidence in this regard was far outweighed by the unfair and undue prejudice.

As detailed above, while it is without question true that evidentiary matters are matters largely within the discretion of the trial judge, *Branham* and *Sulton* are clear that the gross sales revenue evidence and testimony was not appropriate and its admission would be reversible error on appeal. Therefore, the Court is compelled to grant Lack’s motion for a new trial.

B. The Court’s error in admitting evidence and testimony regarding an administrative law court proceeding from 2001 and 2002 involving Lack’s also warrants a new trial.

Lack’s took the position in an administrative litigation, which first began in 1994, that its workers should be classified as “attendants” rather than lifeguards for workers compensation purposes, because a very small percentage of their physical activities (the relevant risk covered by workers’ compensation) involved performing high risk activities such as water rescues. (Tr. 428:2-429:24.) The Administrative Law Court ultimately disagreed and found that they should be classified as lifeguards, which resulted in Lack’s employees being classified as lifeguards for its workers compensation coverage ever since that order in 2002.

At trial, Plaintiff “impeached” George Lack with this information. The Court agrees with Lack’s that this was not proper impeachment evidence. When the issue first arose, the Court explained that this evidence was not admissible absent a proper foundation. (Tr. 285:1-17.) That foundation, however, was never laid and Plaintiff impeached Mr. Lack over objection. (See Tr. 417-20.) As the Supreme Court explained in *Anderson v. Elliott*, 228 S.C. 371, 375–76, 90 S.E.2d 367, 369 (1955), the right to cross-examine a witness as to a previous contradictory statement “must be founded on the existence and showing of a material variance between the statements made on the two occasions.” *Id.* Here, George Lack’s testimony was that Lack’s employees had a “*responsibility* to perform lifeguard duties 100% of the time.” (Tr. 418:16-20 (emphasis added).) The “impeachment” evidence was an excerpt from the administrative law court’s order noting that Lack argued in the administrative matter that, with regard to risky lifeguard activities such as rushing to save someone drowning in the ocean, Lack’s employees “only have the potential to be performed 0.0047 percent of the time.” (Tr. 419:20-420:5.) The Court agrees with Lack’s that these were not inconsistent statements because the question of the employees’ responsibilities is different from what activities they may be engaged in at any specific moment. The Court finds that this evidence about an administrative proceeding from two decades prior only served to mislead and confuse the jury, and any probative value it had was outweighed by the unfair and undue prejudice from that evidence.

In her response brief, Plaintiff justified the admission of this information by asserting that Lack’s is “judicially estopped” from taking the position in this matter that its employees are lifeguards. Judicial estoppel requires the party seeking its application to show: (1) two inconsistent positions taken by the same party; (2) taken in the same or related proceedings involving the same party; (3) the party taking the position must have been successful in maintaining that position and

have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). The Court finds Plaintiff's argument fails to satisfy these elements.

First, administrative law proceedings over insurance coverage from two decades ago are not related to the present personal injury/negligence action. Second, the positions were not inconsistent since, as noted, what Lack's argued was that solely for workers compensation purposes the employees should not be classified as lifeguards since they only engaged in the high-risk physical activities associated with lifeguarding on an infrequent basis. Third, Lack's was unsuccessful in maintaining its position and was required to pay \$26,000 in higher premiums. (Tr. 419:7-11.) Finally, there is no evidence of any intentional effort by Lack's to mislead the Court in this case, and Plaintiff does not seriously suggest any such conduct. Therefore, judicial estoppel does not apply here.

For all these reasons, the Court agrees with Lack's that the jury's verdict was also irreparably tainted by the prejudicial effect of the evidence and testimony about this decades-old administrative law court matter. Therefore, a new trial must be granted.

C. The Court further finds that it was error to admit evidence and testimony regarding Lack's relationship with the USLA.

The Court also agrees with Lack's argument that the evidence and testimony concerning the USLA was unduly prejudicial and served to inflame the jury against George Lack and Lack's Beach Service. Plaintiff relied on this evidence extensively in advancing their theme that Lack's failed to prioritize safety. (See Pltf. Closing Argument, Tr. 899:8-11("And so then what followed was an investigation that was done by the USLA into the fact that they had been bamboozled by

this for-profit on something as important as public safety.”).) However, Lack’s relationship with the USLA had nothing to do with the relevant matters to be determined by the jury.

Plaintiff’s argument as to the relevance of the USLA letters and the testimony of its representative Chris Brewster is premised on the characterization of the USLA as the “industry standard of care.” But Lack’s had a state-statute mandated standard of care pursuant to its Franchise Agreement. All that the Franchise Agreement required was USLA-complaint training, not USLA certification.

The Court agrees with Lack’s that the evidence and testimony concerning communications between George Lack and the USLA from 1996 to 2007, culminating in the “decertification” in 2007, had no bearing on whether the relevant lifeguards who were on the beach the day of the incident in 2018 were trained in accordance with the requirements of the Franchise Agreement.

The testimony of Chris Brewster demonstrated that point. He testified that he felt George Lack had “bamboozled” the USLA and intentionally misrepresented the dual role activities of Lack’s lifeguards between 1996 and 2007. (Tr. 422:11-18.) However, the City of Myrtle Beach had knowledge of and authorized the “dual role” arrangement throughout the course of its relationship with Lack’s, including in 2018. (Tr. 630:8-21, 633:12-20.) Ultimately, the effect of the USLA letters and Brewster’s testimony was to prejudice the jury and paint Lack’s as having improper motivations despite the USLA decertification issue having no bearing on Lack’s relationship with the City and whether it complied with the requirements of the Franchise Agreement.

Therefore, the Court finds the improper admission of the USLA communications and testimony regarding whether Lack’s “bamboozled” USLA and the “decertification” of Lack’s by the USLA also warrants a new trial. The unduly prejudicial nature of this evidence resulted in the

trial becoming a referendum on Lack's business model and rights under its franchise agreement with the City as opposed to the proper question of whether Lack's was negligent or reckless with respect to Mr. Wolde's drowning and whether there was any proximate cause between Lack's actions or omissions and the drowning. The Plaintiff was allowed to convert this trial into a case about whether lifeguards should be allowed to serve dual roles, and whether, as between Lack's and the USLA, who was unfair to whom in that dispute. Therefore, the Court finds that this also warrants granting Lack's motion for a new trial.

2. The bifurcation issue was properly preserved and warrants a new trial.

The Court also finds that Lack's motion for a new trial should be granted because the issue of recklessness was improperly tried in the first phase of the trial in contravention of statute, 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 on 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). 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.*

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 Lack’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. The Court agrees that under the statute, the jury should not have been permitted to make a finding of recklessness or consider any evidence on that issue during that first phase. While it is true that both Lack’s and Plaintiff agreed to the jury verdict form containing a finding of whether Lack’s had been “reckless” in the first phase, Lack’s specifically requested that the jury be given instructions explaining the import of such a finding of “recklessness,” namely, that if the jury made that finding, there would be a second phase of trial for the consideration of punitive damages. Plaintiff argued against such an instruction and the Court did not make this instruction.

Upon reflection, the jury should have, at the very least, been 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. This means that there is a high likelihood that the jury’s high verdict in the actual damages

contained a “punitive” damage component, which would be improper. Thus, this error warrants a new trial absolute as to both actual and punitive damages.¹

3. The Court finds that the jury’s damages award was grossly excessive, and this also supports granting a new Trial.

This Court finds the verdict was so grossly excessive that it shocks the conscience. The survival award, the wrongful death award, and the punitive damages award were all excessive and thus had to be driven by the jury’s passion and prejudice. Therefore, South Carolina law requires a new trial in this circumstance.

A. The jury misunderstood the Court’s proper instruction on evaluating survival damages.

The Court agrees with Lack’s that the jury was confused by the mortality tables application and misunderstood its instructions on the mortality tables. The jury was correctly informed that the mortality tables should be taken into consideration when looking at the amount of damages for wrongful death. The jury was also correctly charged on assessing damages for the survival claim without reference to the mortality tables. As Lack’s contended and the Court’s charges support, the mortality table is entirely irrelevant to assessing the pain and suffering Wolde may have endured prior to death.

¹ Plaintiff has argued that this issue is not preserved. However, at trial, Lack’s contended that the Court must provide context to the jury if it intended to permit them to make a finding of recklessness in the first phase. (Tr. 845:25-846:14.) Counsel further asserted that if the Court intended to use Plaintiff’s verdict form which included a question regarding recklessness, there needed to be a note informing the jury that there would be further proceedings or additional deliberations if they marked yes. (Tr. 868:17-23.) As defense counsel explained, having the jury answer yes or no to that question without context was improper. (Tr. 838:24-869:2.) This argument aligned with the issue raised in Lack’s post-trial motions that the jury should not have been permitted to make a finding of recklessness in the first phase under the punitive damages statute but, since the court opted to proceed in that manner, it should have provided the jury with the necessary context at the very minimum. Therefore, the issue is preserved.

After the charge, the jury asked a question about the proper use of the mortality tables, (Tr. 947:15-180), which was indicative of the jury's failure to understand their application despite the Court's instructions. The Court then re-charged the jury on the proper use of the tables. (Tr. 948:8-14.) Despite this, the jury's verdict reflects improper use of the tables. Mr. Wolde's life remaining expectancy was 37.3 years, and the jury's survival damages award was \$3,730,000—in other words, \$100,000 for each remaining year of his life expectancy. There was no other evidence of the number 37.3 (or 3.73) put before the jury. The verdict, therefore, was not anchored to the pain and suffering Mr. Wolde experienced as was required by law for the survival claim. (*See* Jury Charge, Tr. 937:20 (explaining that the jury may award damages for conscious pain and suffering if it found “by a preponderance of the evidence that the plaintiff has presented sufficient proof that Mr. Wolde was conscious and simultaneously suffering prior to his death”).) Therefore, the Court finds this verdict reflects juror confusion and failure to follow the Court's instructions, and warrants a new trial.

B. The survival damages award was excessive and supports that the jury was motivated by passion and prejudice.

The Court finds that there was a dearth of reliable evidence of any *conscious* pain and suffering presented at trial. Yet, the survival award was for \$3.73 million. Therefore, this shocking verdict amount supports granting a new trial.

The only testimony supporting Wolde's consciousness came from his daughter Wubit. She testified about his gasping and struggling and said that the entire drowning incident lasted around ten to fifteen minutes. However, on cross-examination she acknowledged her deposition testimony that she did not actually remember how long it lasted. (Tr. 603:24-605:21.) Bystander witnesses Julian Chandler and Julian Bender both stated that Wolde was unconscious when he was pulled from the water. (Tr. 61:24-62:2; 212:13-14.) Moreover, Wolde's son testified generally

that they were yelling for an unspecified period of time but he ultimately did not see what happened to his father. (Tr. 567:1-568:3.)

Plaintiff also cites the coroner's report as evidence of Wolde's conscious pain and suffering. However, the report merely stated that Wolde's cause of death was asphyxiation, which the deputy coroner testified means a lack of oxygen. (Tr. 466:5-10.) It did not describe the drowning process or what a victim experiences and did not detail any specifics about what happened in this particular case.

Therefore, Plaintiff presented little evidence supporting Wolde's conscious pain and suffering. At most, the record reflects gasping and yelling and that Wolde ultimately died.

Moreover, Plaintiff failed to present expert testimony about what occurs when a person experiences drowning. As Lack's correctly noted, jurisdictions that have permitted conscious pain and suffering to be submitted to the jury in drowning cases have typically done so where there was expert testimony about the drowning process. Here, Plaintiff did not produce any expert testimony to provide the Court or the jury with any guidance as to what happens during the drowning process or, most importantly, what the drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process. The need for expert testimony was particularly acute in this matter since South Carolina has never adopted "pre-impact fear" as an element of recoverable damages. *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). The Court agrees with Lack's that 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.

A survey of awards for conscious pain and suffering in other drowning cases demonstrates the outlier nature of this verdict. *See, e.g., Jutzi-Johnson v. United States*, 263 F.3d 753, 760-61

7th Cir. 2001) (collecting cases and noting that an appropriate award for a claim involving an allegation of asphyxiation would have been in the \$15,000 (\$25,108.14 adjusted for inflation) to \$150,000 (\$251,081.36 adjusted for inflation) range of prior awards in drowning cases); *Trinh ex rel. Tran v. Dufrene Boats, Inc.*, 6 So. 3d 830, 844-45 (La. Ct. App. 2009) (finding that award of \$15,000 (\$20,715.03 adjusted for inflation) was appropriate and rejecting Plaintiff's request to increase it to \$100,000); *Dontas v. City of New York*, 183 A.D.2d 868, 869, 584 N.Y.S.2d 134, 135-36 (1992) (remitting \$2 million award for conscious pain and suffering to \$50,000 (\$105,586.60 adjusted for inflation), noting that although the evidence supported that a drowning victim experiences conscious pain and suffering, the award was excessive "in view of the fact that the experts from both sides indicated that a drowning victim would lose consciousness in just a few minutes"); *Landreth v. Reed*, 570 S.W.2d 486, 492-93 (Tex. Civ. App. 1978) (finding jury's \$65,000 award to be excessive and reducing it to \$30,000 (\$136,323.31 adjusted for inflation) where expert testimony stated that the drowning victim would have remained conscious and suffered pain for approximately two minutes, noting there was "no precedent for an award as large as that made here for so short a period of suffering").

In fact, in a recent case the Kentucky Supreme Court affirmed an award of \$0 for conscious pain and suffering despite the Plaintiff's presentation of expert testimony as to what a drowning victim experiences. *See Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508, 518 (Ky. 2021).

This Court finds the amount of the award here demonstrates that the jury was motivated by passion, caprice, confusion, or prejudice rather than the record evidence regarding pain and suffering damages. The verdict amount far exceeds the other drowning case award discussed above. Accordingly, a new trial is warranted.

C. The wrongful death verdict is also grossly excessive and warrants a new trial.

The excessiveness of the wrongful death award further evidences that the jury's passion and prejudice motivated the verdict. Lack's presented extensive data about other wrongful death verdicts under South Carolina law and how, if permitted, to stand, this would be one of the larger wrongful death verdicts in South Carolina history.

Having reviewed the record evidence, the Court agrees with Lack's that this verdict was an outlier and was motivated by the jury's passion, prejudice, and desire to punish Lack's rather than the record evidence. The jury appears to have premised its verdict on the improperly admitted evidence detailed herein rather than appropriate considerations.

The jury returned a verdict even higher than what Plaintiff's counsel suggested at trial. In closing, counsel argued that a fair assessment of damages might be \$10 per hour for 15 hours per day for the remaining life expectancy of Wolde, which resulted in a yearly rate of \$54,750. Multiplying that total by the approximately 37 years of life expectancy gave an amount of \$2.025 million, which counsel then multiplied by four for each of the children, arriving at a total of \$8.1 million. The jury's verdict, however, came in \$1.9 million dollars higher than even what Plaintiff's counsel suggested.

For all these reasons, the jury's award was based on improper considerations, the verdict was excessive and shocks the conscience, thus a new trial absolute is warranted.

D. The punitive damages award was based on improper evidence, motivated by the jury's passion and prejudice, and was excessive.

Plaintiff presented little evidence supporting any willful, wanton, or reckless action by Lack's. Therefore, the Court finds that a new trial absolute must be ordered, as a new trial is not appropriate solely on punitive damages in this matter. *See 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. . . . In the interest of justice and fairness to all parties, both actual and punitive damages should be reconsidered together on retrial.”). South Carolina statutory law also compels this result, prohibiting a trial on punitive damages only unless a directed verdict on liability is justified against a Defendant.

There is a dearth of evidence supporting that acts or omissions of Lack’s rose to the level of recklessness. Plaintiff contends that lifeguard L-21 was at lunch, but that was allowed by law. He had posted a red flag indicating some danger sometime prior to stepping down for lunch, which negates any alleged conscious indifference to safety by Lack’s or its personnel. Plaintiff also asserts that Lack’s used some lifeguards that were able to serve a dual role, which was again permitted by law. Plaintiff then contends that Lack’s was one “lifeguard only” short on the day of the incident, but these workers were “roving” and covered a large area. There is no proof that the lifeguard only would have been in the area of the drowning if he had not been out sick that day. The evidence was that the lifeguard onlys had several blocks of area they covered, which was approved under Lack’s franchise agreement with the City of Myrtle Beach. The jury is not allowed to assume or speculate that had the lifeguard only not called in sick, he would have been in the vicinity of Mr. Wolde’s drowning incident at the time of the drowning. Next, Plaintiff asserts that Lack’s did not close the beach, but reports had only indicated the potential for dangerous conditions, and Lack’s had discretion to close the beach pursuant to municipal ordinance authority and the duty to do so to the public at large, not only with respect to Mr. Wolde (thus implicating the “public duty rule”).

Lastly, Plaintiff contends that lifeguards L-20 and L-22 did not see or hear the Woldes. However, again, there was no proof that they were consciously disregarding their duties. No other

safety personnel witnessed the incident either (fire department, ocean rescue, police, etc.), and there is no proof or allegation that they were failing to do their job. In fact, the testimony supported that lifeguard L-20 called in a Code 3 (shore emergency) when he learned of the incident and lifeguard L-22, upon hearing the Code 3, began “running towards” the beach area. (Tr. 823:23-824:8.) This evidence negates any conscious indifference to safety. Although Plaintiff points to the dual role issue, there is no evidence that these two lifeguards were engaging in merchandising at or near the time of the drowning. This cannot simply be assumed, and Plaintiff’s speculation is not evidence. South Carolina law does not recognize *res ipsa loquitur* and Lack’s is not a guarantor of safety. This is especially so considering the inherently dangerous nature of the ocean and the fact that drownings cannot be 100% prevented.

The Court agrees with Lack’s that the jury appears to have been improperly motivated by passion, prejudice, and sympathy for the Plaintiff and a desire to excessively punish Lack’s. The jury’s significant award, despite the evidence showing that Lack’s had a negative net worth in 2018, also demonstrates its improper motivations. As Weslyn Lack-Chittering testified, Lack’s had a negative \$473,350.51 net worth in 2018. (Tr. 962:18-22.) Moreover, the available insurance coverage was only \$3 million. (Tr. 961:24-962:5.) This information was provided to the jury in the punitive damages phase, coupled with instructions from the Court that the jury should generally not award punitive damages to effect an economic bankruptcy. (Tr. 962:3-5.) Despite this, the jury returned an award of \$7 million on top of the actual damages award exceeding \$13 million—a total number reflecting the jury’s intention to destroy Lack’s as a going concern.

Therefore, for all these reasons, the Court grants Lack’s motion for a new trial on punitive damages.

E. The *Mitchell* factors support that the punitive damages award was not consistent with due process.

The Court further finds that a new trial is appropriate for the reasons detailed in the Court's order granting Lack's motion to reconsider its order conducting the post-judgment review of punitive damages.

III. CONCLUSION

For all these reasons, the Court finds that Lack's is entitled to a new trial absolute. The Court hereby **GRANTS** Lack's motion for a new trial. The Clerk is directed to place this matter on the next available common pleas jury roster.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

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,	)	ORDER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Lack's Beach Service, Inc.'s ("LBS" or "Lack's") Motion for a New Trial *nisi remittitur*. This case was tried before a jury in Horry County from July 25-29, 2022. The jury returned a verdict in favor of the Plaintiff and awarded \$3,700,000 on the survival claim, \$10,000,000 for the wrongful death claim, and \$7,000,000 in punitive damages. Lack's timely filed post-trial motions including motions for JNOV, new trial absolute, and new trial *nisi remittitur*. The Court held a hearing on all pending motions on March 9, 2023.

Having considered the transcript, evidence and testimony presented at trial, and party briefings and arguments, this Court hereby **GRANTS** Defendant's Motion and orders a new *nisi remittitur* of the judgment as detailed below.

I. 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), SCRCF. “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. *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 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)).

II. THE COURT'S ANALYSIS

1. **The jury's damage award was flawed in a number of respects, which the Court finds compels a new trial *nisi remittitur*.**

This Court finds the verdict was unduly liberal. Further, the Court finds compelling reasons to order a new trial *nisi remittitur*.

- A. **The jury misunderstood the Court's proper instruction on evaluating survival damages.**

The Court agrees with Lack's that the jury was confused by and misapplied the mortality tables. Lack's argument is properly preserved because it does not concern the substance of the court's charge but rather the jury's application of the same. The jury was correctly informed that the mortality tables should be taken into consideration when looking at the amount of damages for wrongful death. The jury was also correctly charged on assessing damages for the survival claim without reference to the mortality tables. As Lack's contended and the Court's charges support, the mortality table is entirely irrelevant to assessing the pain and suffering Wolde may have endured prior to death.

Nevertheless, the Court agrees with Lack's that the jury appears to have improperly considered the table in arriving at its award. Wolde's life remaining expectancy was 37.3 years, and the jury's survival damages award was \$3,730,000—in other words, \$100,000 for each remaining year of his life expectancy. The verdict, therefore, was not anchored to the pain and suffering Wolde experienced as was required by law for the survival claim. (*See* Jury Charge, Tr. 937:20 (explaining that the jury may award damages for conscious pain and suffering if it found “by a preponderance of the evidence that the plaintiff has presented sufficient proof that Mr. Wolde was conscious and simultaneously suffering prior to his death”).) Therefore, the Court finds this

verdict reflects juror confusion with, and failure to adhere to, the Court's instructions, and warrants remittitur of the survival award.

B. The survival damages award was excessive and demonstrated the jury's motivations of passion and prejudice.

The only testimony supporting Wolde's consciousness came from his daughter Wubit. She testified about his gasping and struggling and said that the entire drowning incident lasted around ten to fifteen minutes. However, on cross-examination she acknowledged her deposition testimony that she did not actually remember how long it lasted. (Tr. 603:24-605:21.) Bystander witnesses Julian Chandler and Julian Bender both stated that Wolde was unconscious when he was pulled from the water. (Tr. 61:24-62:2; 212:13-14.) Moreover, Wolde's son testified generally that they were yelling for an unspecified period of time, but he ultimately did not see what happened to his father. (Tr. 567:1-568:3.)

Plaintiff also cites the coroner's report as evidence of Wolde's conscious pain and suffering. However, the report merely stated that Wolde's cause of death was asphyxiation, which the deputy coroner testified means a lack of oxygen. (Tr. 466:5-10.) It did not describe the drowning process or what a victim experiences and did not detail any specifics about what happened in this particular case.

Therefore, Plaintiff presented little evidence supporting Wolde's conscious *pain and suffering*. At most, the record reflects gasping and yelling and that Wolde ultimately died.

Moreover, Plaintiff failed to present expert testimony about what occurs when a person experiences drowning. As Lack's correctly noted, jurisdictions that have permitted conscious pain and suffering to be submitted to the jury have typically done so where there was expert testimony

about the drowning process.¹ Here, Plaintiff did not produce any expert testimony to provide the Court or the jury with any guidance as to what happens during the drowning process or, most importantly, what the drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process. The need for expert testimony was particularly acute in this matter since South Carolina has never adopted “pre-impact fear” as an element of recoverable damages. *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). The Court agrees with Lack’s that 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.

A survey of awards for conscious pain and suffering in other drowning cases demonstrates the outlier nature of this verdict. *See, e.g., Jutzi-Johnson v. United States*, 263 F.3d 753, 760-61 7th Cir. 2001) (collecting cases and noting that an appropriate award for a claim involving an allegation of asphyxiation would have been in the \$15,000 (\$25,108.14 adjusted for inflation) to \$150,000 (\$251,081.36 adjusted for inflation) range of prior awards in drowning cases); *Trinh ex rel. Tran v. Dufrene Boats, Inc.*, 6 So. 3d 830, 844-45 (La. Ct. App. 2009) (finding that award of

¹ *See, e.g., 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” 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).

\$15,000 (\$20,715.03 adjusted for inflation) was appropriate and rejecting Plaintiff's request to increase it to \$100,000); *Dontas v. City of New York*, 183 A.D.2d 868, 869, 584 N.Y.S.2d 134, 135-36 (1992) (remitting \$2 million award for conscious pain and suffering to \$50,000 (\$105,586.60 adjusted for inflation), noting that although the evidence supported that a drowning victim experiences conscious pain and suffering, the award was excessive "in view of the fact that the experts from both sides indicated that a drowning victim would lose consciousness in just a few minutes"); *Landreth v. Reed*, 570 S.W.2d 486, 492-93 (Tex. Civ. App. 1978) (finding jury's \$65,000 award to be excessive and reducing it to \$30,000 (\$136,323.31 adjusted for inflation) where expert testimony stated that the drowning victim would have remained conscious and suffered pain for approximately two minutes, noting there was "no precedent for an award as large as that made here for so short a period of suffering"). In fact, in a recent case the Kentucky Supreme Court affirmed an award of \$0 for conscious pain and suffering despite the Plaintiff's presentation of expert testimony as to what a drowning victim experiences. *See Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508, 518 (Ky. 2021).

This Court finds that although a jury's assessment of pain and suffering is entitled to substantial deference, this deference "does not abrogate the authority of the trial court to grant a new trial *nisi* upon finding 'the amount of the verdict to be merely inadequate or excessive.'" *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 638-39, 529 S.E.2d 758, 763 (Ct. App. 2000).

Therefore, in light of the dearth of evidence regarding conscious pain and suffering, the improper use of the mortality tables, and the unduly liberal award, the Court grants Lack's motion for a new trial *nisi remittitur* of the survival award to \$150,000.

C. The wrongful death verdict would be one of the largest wrongful death verdicts in South Carolina history and should be remitted.

Lack's presented extensive data about other wrongful death verdicts under South Carolina law and how, if permitted, to stand, this would be one of the larger wrongful death verdicts in South Carolina history. Having reviewed the record evidence, the Court agrees with Lack's that this verdict was an outlier and is unduly liberal.

The returned a verdict even higher than what Plaintiff's counsel suggested at trial. In closing, counsel argued that a fair assessment of damages might be \$10 per hour for 15 hours per day for the remaining life expectancy of Wolde, which resulted in a yearly rate of \$54,750. Multiplying that total by the approximately 37 years of life expectancy gave an amount of \$2.025 million, which counsel then multiplied by four for each of the children, arriving at a total of \$8.1 million. The jury's verdict, however, came in \$1.9 million dollars higher than even what Plaintiff's counsel suggested.

The Court finds that the jury's verdict was motivated by the introduction of improper evidence as outlined in Lack's post-trial motions, the request for a finding of "recklessness" on the jury verdict form without a court instruction (requested by Lack's) that the jury be told why it was being asked to make that finding and that if it found recklessness to exist, there would be another punitive damages phase to the trial. There are compelling reasons to believe the jury's verdict, which is very large, included inappropriate punitive damage amounts or was motivated by improper evidence. For all these reasons, the Court grants a new trial *nisi remittitur* of the wrongful death award to \$2,850,000.00.

D. The punitive damages award was based on improper evidence, motivated by the jury's passion and prejudice, and was excessive.

Based on the arguments and submissions by Lack's, and acknowledging the Court's instructions to the jury that generally, punitive damages should not be awarded to effectuate an economic bankruptcy, the Court finds punitive damages should not have been awarded or should be reduced to the nominal sum of \$1.

CONCLUSION

Based on the foregoing, this Court finds the jury's damage award was inherently flawed on several grounds, was unduly liberal, and compelling reasons justify that it must be remitted. Therefore, the Court **GRANTS** Lack's motion for a new trial *nisi remittitur* of the survival award to \$150,000, the wrongful death award to \$2,850,000, and the punitive damages award to \$1.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

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,	)	ORDER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Lack's Beach Service, Inc.'s ("LBS" or "Lack's") Conditional Motion to Reduce Judgment and oral motion to amend its Answer. This case was tried before a jury in Horry County from July 25-29, 2022. The jury returned a verdict in favor of the Plaintiff and awarded \$3,700,000 on the survival claim, \$10,000,000 for the wrongful death claim, and \$7,000,000 in punitive damages. Lack's timely filed post-trial motions including the conditional motion to reduce the judgment pursuant to the caps of the South Carolina Tort Claims Act ("SCTCA"). The Court held a hearing on all pending motions on March 9, 2023. At the hearing, Lack's orally moved pursuant to Rule 15(b), SCRCF to amend its Answer to assert the defense of sovereign immunity (and the application of the Tort Claims Act caps) because the issue was tried via consent. Plaintiff did not offer any argument in opposition the motion to amend.

Having considered the transcript, evidence and testimony presented at trial, and parties' briefing, the Court agrees with Lack's that the sovereign immunity issue was tried by consent and that Plaintiff's claims are subject to the SCTCA. Therefore, the Court **GRANTS** Lack's motion to amend. The Court also **GRANTS** Lack's conditional motion, and remits the judgment in accordance with the SCTCA statutory caps as set forth below.

I. THE COURT'S ANALYSIS

A. Lack's motion pursuant to Rule 15(b) should be granted because the sovereign immunity issue was tried by consent.

As detailed above, Lack's raised the issue of the SCTCA's caps in its conditional motion. Lack's then orally moved to amend its pleading to assert these defenses at the March 9, 2023 hearings. Plaintiff did not offer any response to this argument. The Court finds that Lack's motion to amend should be granted.¹

It is well-settled in South Carolina that Rule 15(b) permits a party to move to amend its pleading to add an unpled affirmative defense to conform to the evidence presented at trial. Rule 15(b), SCRPC; *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224-25 (2010). When unpled issues are tried by the express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings." *Staubes v. City of Folly Beach*, 339 S.C. 406, 413, 529 S.E.2d 543, 546 (2000) (quoting Rule 15(b)). "Ordinarily, amendments to conform to proof should be liberally allowed." *Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). Amendment to conform to the evidence can be done "upon motion of any party at any time, even after judgment." Rule 15(b), SCRPC.

As the Supreme Court explained in *Pool v. Pool*, 329 S.C. 324, 325, 494 S.E.2d 820, 821 (1998), the "focal inquiry" is whether the party opposing the amendment of the pleading to confirm to the evidence can meet their burden to demonstrate prejudice. *Id.* The Supreme Court held "[t]he prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a

¹ By failing to respond, Plaintiff can be deemed to have conceded the point. *See, e.g., Campbell v. Rite Aid Corp.*, No. 7:13-cv-02638-BHH, 2014 WL 3868008, at *2 (D.S.C. Aug. 5, 2014) ("Plaintiff failed to respond to [Defendant's] argument regarding causes of action 1 and 2, and the Court can only assume that Plaintiff concedes the argument."); *Stenlund v. Marriott Int'l, Inc.*, 172 F. Supp. 3d 874, 887 (D. Md. 2016) ("In failing to respond to this argument, Plaintiff concedes the point.").

lack of opportunity to refute it.” *Id.* at 328-29, 494 S.E.2d at 823. Thus, under *Pool*, if the party opposing the amendment was aware that the new issue was going to be litigated and had the opportunity to litigate it, there is no prejudice under Rule 15(b).

The Supreme Court explained that its prejudice analysis comports with Rule 15(b)’s “intended purpose to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel.” *Id.*; *cf. Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999) (reversing the denial of a motion to amend a complaint based on a lack of prejudice because the non-moving party “had notice that Defendant wanted to supplement the complaint”); *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 287, 607 S.E.2d 711, 717 (Ct. App. 2005) (applying *Pool*’s prejudice analysis and reversing the denial of a motion to amend an answer to add a tort claims act defense as an abuse of discretion since the amendment sought “was not a surprise”).

In this case, the Plaintiff was the party that introduced evidence and testimony—over objection—asserting that Lack’s lawful activities made Lack’s liable under the South Carolina Code, Franchise Agreement between the City of Myrtle Beach and Lack’s, and City ordinances under which the City delegated authority over beach safety to Lack’s. Plaintiff posited and sought to prove that Lack’s exceeded its authority under State law and the Franchise Agreement regarding dual role and lifeguard coverage, or misled the City of Myrtle Beach on those issues, and Lack’s countered with its own evidence that they did not. Therefore, the Court agrees with Lack’s that Plaintiff tried the issue of public duties emanating from state law by implication in this matter. As a result, Plaintiff cannot complain of any prejudice by permitting Lack’s to amend its pleading.

First, Plaintiff introduced evidence and testimony about the dual role, which was permitted by law and the Franchise Agreement, as the City Manager testified at trial. (Tr. 634:8-14, 661:16-

18.) Plaintiff's expert Dr. Thomas Griffiths testified as to the impropriety of the dual role. (*See* Griffiths Dep. at 111:20-112:6.) Plaintiff also elicited testimony and introduced exhibits that criticized the dual role issue from USLA representative Chris Brewster. (*See* Tr. 482:4-494:18, 505:6-506:12.) Finally, Plaintiff questioned George Lack extensively on the dual role issue as well the language of the Franchise Agreement and Lack's relationship with the City of Myrtle Beach. (Tr. 303:17-314:11, 330:8-331:4, 331:12-351:12, 426:17-427:11.)

Plaintiff also elicited testimony about Lack's posting lifeguards in certain zones. Section 2 of the Franchise Agreement provided which locations Lack's agreed to post lifeguards, (*see* p. 2 & Attachment A), and Plaintiff asked George Lack about the zones and posting requirements, (Tr. 346:20-347:3, 355:2-24).

Third, Plaintiff presented testimony and evidence about the training given to Lack's lifeguards. The training requirements are also governed by statute and the Franchise Agreement. Section 15-5-145(4) states that "lifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality." *Id.* Moreover, Section 2 of the Franchise Agreement governs standards of performance and lifeguard certification and details all of the certification and training requirements. Plaintiff questioned Weslyn-Lack Chittering extensively about the training that Lack's lifeguards received. (Tr. 828:24-829:8, 838:8-839:4, 842:7-15.) Plaintiff also elicited testimony from Dr. Griffiths and Chris Brewster concerning their views on whether the training was sufficient. (Griffiths Dep. pp. 111-12; Tr. 478:5-9.)

Fourth, Plaintiff presented argument to the jury about the lifeguard's lunch break and implied that it was improper. Section 2 of the Franchise Agreement, however, provides that Lack's and the City would determine an appropriate schedule for lunch breaks in a staggered arrangement.

The Court had a colloquy with counsel in discussing the deposition designations for Dr. Griffiths and reached this exact conclusion. (*See* Tr.146:22-147:4 (noting that the lunch arrangement was “specifically permitted under the [franchise] agreement”).) Despite this, in closing argument, Plaintiff’s counsel implied that the lifeguard at lunch had done something improper despite there being no evidence or testimony that the lunch break was not in accordance with the process approved by the Franchise Agreement. (Tr. 886:12-19 (“So then they say, well, he was at lunch. That’s why there was no red flag there. And for the life of me, I have been trying to figure out how is that a defense? In my mind, that creates additional legal responsibility.”).)

Finally, Plaintiff introduced evidence regarding Lack’s failure to close the beach. Lack’s authority over the beach derived from the South Carolina Code’s provision permitting municipalities to provide “lifeguard and other safety related services” either directly or through a private beach safety company. S.C. Code Ann. § 5-7-145(A)-(B). The City of Myrtle Beach opted to provide such services many years ago, and contracted with Lack’s to provide said services. The City of Myrtle Beach’s ordinances further delegated the City’s discretionary authority over safety to Lack’s. The City Ordinances provided that “appropriate authorities” may, in their discretion, recall persons from the water or surf where, among other things, they are more than chest deep and are in danger of “drowning or becoming imperiled.” *Id.* § 5-3(A). Appropriate authorities may create zones restricting aquatic activities or beachfront activities in “exigent circumstances that may pose a danger to the health, life or safety of any person due to a hazardous condition, hazardous operation, hazardous weather or hazardous structure whether temporary or permanent.” *Id.* § 5-3(C). “Appropriate authorities” is defined to include those who have been “granted lifeguard status under beach franchise agreements,” which includes Lack’s pursuant to the Franchise Agreement. *Id.* § 5-1.

Plaintiff elicited testimony and argued to the jury that Lack's should have closed the beach. For example, Dr. Griffiths testified that Lack's should have closed the beach or, if it thought portions could be safely operated, then closed the dangerous sectors. (Dr. Griffiths Dep. 85:7-86:8.) Plaintiff also questioned George Lack about Lack's authority to close the beach. (Tr. 364:10-365:6.) Finally, Plaintiff argued to the jury that Lack's should have closed the beach and was in fact "required" to do so. (Tr. 883:17-19, 893:15-19, 916:7-23, 916:24-917:2.)

There is no common law duty to close the water to any particular individual. Rather, there must be some source of statutorily derived power and authority which would create such a duty. The Court agrees with Lack's that this derives from the South Carolina Code and City of Myrtle Beach ordinances.

For all these reasons, the Court agrees with Lack's that Plaintiff based her claims on these public duties and placed the issue directly before the jury at trial. Plaintiff had also originally sued the City, which had pled sovereign immunity as a defense. Plaintiff attempted (at times) to argue the actions and omissions of Lack's exceeded their Franchise Agreement duties or responsibilities, or that Lack's violated discretionary duties (provided by ordinance to Lack's) related to closing the beach. Therefore, the Court finds that Plaintiff tried the issues of sovereign immunity and SCTCA by consent is not prejudiced by the amendment. Therefore, the Court finds that Lack's unopposed motion to amend to conform to the evidence under Rule 15(b) should be granted.²

B. Lack's is entitled to derivative sovereign immunity and the tort claims act caps apply

Under the SCTCA, the State of South Carolina and its political subdivisions, employees, and agents are immune from liability while acting within the scope of official duty except as

² As Lack's conditional motion detailed, it was not required to plead the applicability of the tort claims act caps regardless. The caps are not affirmative defenses in and of themselves. The Court agrees.

waived by the SCTCA. *See* 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”).

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)).

While South Carolina courts have not addressed the applicability of the derivative sovereign immunity doctrine under South Carolina law, this Court holds the same rationale as explained by the Fourth Circuit in *Cunningham* applies pursuant to the SCTCA.

South Carolina Code § 5-7-145(A)-(B) 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’s. If a municipality elects to use a private company, personnel employed by the company “must be tested and certified as required by the municipality.” S.C. Code Ann. § 5-7-145 (B)(4).

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

The concept of derivative sovereign immunity exists to cover circumstances like this where a governmental entity has entirely outsourced a discretionary power to an agent. *See Federico v. Lincoln Mil. Hous., LLC*, 127 F. Supp. 3d 623, 637 (E.D. Va. 2015) ("Derivative governmental immunity also applies to government contractors who perform a discretionary function within the scope of a valid government contract."); *see also Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996) (holding that derivative governmental immunity applies "to the extent that this case involves a discretionary governmental function which has been delegated to the private sector"). In this circumstance, "[c]ontractors are protected to the same extent as the Government when they exercise appropriately delegated discretionary power." *Federico*, 127 F. Supp. 3d at 637.

As the Supreme Court explained in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988): "Derivative sovereign immunity exists because the government and its contractors have the same interest in getting the Government's work done." *Id.* Hence, "[w]hen acting under valid governmental authority, therefore, a contractor is immunized 'to the same extent as the Government' would be if it stood in the contractor's shoes." *Ruddell v. Triple Canopy, Inc.*, No. 115CV01331LMBJFA, 2016 WL 4529951, at *5 (E.D. Va. Aug. 29, 2016).

State courts have recognized the applicability of this concept to state law claims as well. *See, e.g., Smith v. Rogers Grp., Inc.*, 72 S.W.3d 450, 455-56 (Ark. 2002) ("The doctrine of acquired immunity provides that a contractor who performs in accordance with the terms of its contract with

a governmental agency and under the direct supervision of the governmental agency is not liable for damages resulting from that performance.”); *Stewart v. New Jersey Tpk. Auth./Garden State Parkway*, 268 A.3d 346, 354 (N.J. 2022) (“Independent contractors, such as Earle, ‘share to a limited extent the immunity of public entities with whom they contract.’” (quoting *Vanchieri v. N.J. Sports & Exposition Auth.*, 104 N.J. 80, 85, 514 A.2d 1323 (1986))).

The Court finds Plaintiff’s negligence claim asserting failure to close the beach was necessarily premised on the delegated governmental power to provide beach safety services by the City of Myrtle Beach to Lack’s. Plaintiff advanced liability theories and made arguments critical of the standards, numbers of personnel, and operations of Lack’s, which were validly approved by the City. Plaintiff also advanced a theory that Lack’s should have closed the entire beach due to conditions.

Lack’s authority over the beach derived from the South Carolina Code’s provision permitting municipalities to provide “lifeguard and other safety related services” either directly or through a private beach safety company. S.C. Code Ann. § 5-7-145(A)-(B). The City of Myrtle Beach opted to provide such services many years ago and contracted with Lack’s to provide said service. The City of Myrtle Beach’s ordinances further delegated the City’s discretionary authority over safety to Lack’s, as detailed above. Because there is no common law duty to close the water to any particular individual, there must be some source of statutorily derived power and authority which would create such a duty. Here, that derives from the South Carolina Code and City of Myrtle Beach ordinances.

The Court agrees with Lack’s that Plaintiff’s claims necessarily depend on the delegated governmental power to provide beach safety services by the City of Myrtle Beach to Lack’s and, as a result, the doctrine of derivative sovereign immunity applies. The City of Myrtle Beach both

authorized Lack's to oversee beach safety and validly conferred said authorization to Lack's. Therefore, Lack's is entitled to share in the City's immunity and SCTCA caps apply. Consistent with this, Lack's decision regarding whether to exercise the delegated discretion in closing the beaches would still warrant application of SCTCA caps for any resulting tort liability, just as it would if the City's discretion was at issue.

The Court finds that Lack's conditional motion should be granted, and the damages reduced pursuant to the SCTCA caps.

C. The S.C. Tort Claims Act caps limit Lack's liability.

Because Lack's 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. As the Court of Appeals has explained, 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 v. Target Corp.*, 435 S.C. 566, 582, 869 S.E.2d 797, 806 (2022) (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 *Campbell* 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 of the cap is mandatory and self-executing.” *Id.* Thus, “under the plain meaning of section 15-78-120(a), courts must apply the statutory cap to actions brought pursuant to the Act.” *Id.*

Therefore, the Court agrees with Lack’s that the SCTCA caps apply as a matter of law. Under S.C. Code Ann. § 15-78-120.

D. Lack’s conduct did not exceed the scope of its delegated authority.

This Court is not persuaded by Plaintiff’s arguments attempting to avoid the doctrine’s applicability. Plaintiff primarily contends that derivative sovereign immunity does not apply because Lack’s failed to comply with requirements of the South Carolina Code and the Franchise Agreement, thus exceeding the confines of its delegated authority.

However, the Court finds that Plaintiff’s assertions that Lack’s failed to comply with the statutory requirements are not supported by the record. First, Plaintiff’s contention that Lack’s was not in reality a “beach safety company.” Trial testimony reflects, however, that Lack’s lifeguards did act in a lifeguard role, and Plaintiff failed to show that the lifeguards in the area of Mr. Wolde’s drowning were engaging in commercial sales at the time of the drowning incident. Likewise, evidence was presented regarding the training regimen provided by Lack’s and Plaintiff did not show how that training failed to be approved by the City of Myrtle Beach.

The Court additionally finds that, contrary to Plaintiff's argument, Lack's complied with the Franchise Agreement and its actions were not in violation of the contract. The Franchise Agreement and supporting record evidence establishes Lack's decades-long business arrangement with the City (whereby lifeguards were permitted to engage in limited commercial activity) was acknowledged by the City Manager and City Council. While Plaintiff correctly notes that Lack's was one "lifeguard only" short on the day of the Wolde incident, no evidence or testimony supports the assumption that having the additional "lifeguard only" responsible for patrolling a large area of the beach on that day would have made any difference to the outcome because there was no evidence that the lifeguard only, had he been on the job, would have been in a location to assist Mr. Wolde during the drowning incident. It is just speculation to assume he might have. Finally, Plaintiff did not show how Lack's exceeded any authority or acted impermissibly under the ordinance with regard to beach closure. Instead, Plaintiff argued that Lack's made incorrect decisions in failing to close the beach or areas of the beach.

For all these reasons, Plaintiff's arguments fail to overcome the clear, express delegation of authority from the City of Myrtle Beach to Lack's supporting the applicability of derivative sovereign immunity and the SCTCA caps.

II. CONCLUSION

Based on the foregoing, the Court **GRANTS** Lack's motion to amend and **GRANTS** Lack's conditional motion. The Clerk is directed to enter an amended judgment consistent with the SC Tort Claims Act caps.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

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,	)	ORDER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Lack's Beach Service, Inc.'s ("LBS" or "Lack's") Motion to Reconsider Order on Post-trial Review of Punitive Damages Award. This case was tried before a jury in Horry County from July 25-29, 2022. The jury returned a verdict in favor of the Plaintiff and awarded \$3,700,000 on the survival claim, \$10,000,000 for the wrongful death claim, and \$7,000,000 in punitive damages. The Court issued its order on post-trial review of punitive damages on November 28, 2022. Lack's timely filed its motion to reconsider pursuant to Rule 59(e) on December 2, 2022. The Court held a hearing on all pending motions on March 9, 2023.

Having considered the transcript, evidence and testimony presented at trial, and parties' briefing, this Court hereby **GRANTS** Defendant's Motion to Reconsider, **VACATES** its prior Order and the jury's punitive damages award, and enters judgment in Lack's favor on the issue of punitive damages.

I. THE COURT'S ANALYSIS

I. The Court agrees with Lack's that the *Mitchell* factors support that the punitive damages award was not consistent with due process.

Having reviewed and considered Lack's motion and the parties' arguments at the hearing, the Court finds that its original Order failed to sufficiently evaluate the *Mitchell* factors. *See Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009) (explaining that the Court should consider: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"). After further review of the relevant factors, the Court finds that the jury's punitive damages award failed to comport with due process and does not withstand scrutiny. Therefore, under the *Mitchell* factors, Court finds that the jury's award cannot be permitted stand.

A. Lack's did not act reprehensibly.

In assessing reprehensibility, *Mitchell* provides that the Court should examine: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Considering these factors, the Court finds that four weigh in Lack's favor. Regarding the first factor, it is undisputed that the harm was physical as opposed to economic and thus that factor weighs in favor of Plaintiff. However, the other reprehensibility factors weigh in favor of Lack's. First, Mr. Wolde did not have a particular financial vulnerability that Lack's actions targeted.

Second, the case involved a single drowning incident. Third, there is also no evidence that the harm to Mr. Wolde resulted from any intentional malice, trickery, or deceit. The Court's previous Order relying on the "dual role" lifeguard arrangement to support such a finding was error. As Lack's correctly notes, the "dual role" arrangement was expressly permitted by statute and by contract between Lack's and the City of Myrtle Beach. Moreover, the evidence did not support that the alleged negligence evinced an "indifference to or a reckless disregard for the health or safety of others."

The Court agrees with Lack's argument that the Court's Order's reliance on the "dual role" served by Lack's lifeguards and Lack's dealings with the USLA to uphold the punitive damages award was error. This evidence and testimony was not proper since the State of South Carolina and City of Myrtle beach expressly approved of the dual role arrangement via statute and franchise agreement. Moreover, there was no evidence that the Lack's lifeguards at the time of the Wolde incident were serving a "dual role" by attempting to earn sales commissions at the time of the incident. There was also no evidentiary link, from a causation perspective, of any "dual role" function with the incident involving Mr. Wolde. It is unconstitutional to award punitive damages against a party based on actions (or inaction) it has taken related to persons other than the Plaintiff. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

For all these reasons, the Court finds that the reprehensibility factors do not justify the jury's punitive damages award and the verdict cannot withstand due process scrutiny. Therefore,

the Court's prior Order should be vacated and judgment should be entered in Lack's favor on Plaintiff's claim for punitive damages.

B. The Court's Order also failed to consider the remaining *Gamble* factors, which also weigh in Lack's favor.

As *Mitchell* noted, the *Gamble* factors remain "relevant to the post-judgment due process analysis" insofar as they add substance to the analysis. *Mitchell*, 385 S.C.at 587, 686 S.E.2d at 185. Having further reviewed the *Gamble* factors, the Court agrees with Lack's that those factors also overall weigh in its favor.

The reprehensibility factors from *Mitchell* overlap with the first four *Gamble* factors, *see id.* at 587 n.7, 686 S.E.2d at 185 n.7, and thus do not need to be repeated. The remaining factors are: (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate." *Id.* at 586-87, 686 S.E.2d at 184-85.

The Court agrees with Lack's that each of these factors weighs in its favor. First, the punitive damages award will not deter future conduct because the "dual role" conduct complained of by Plaintiff in this case was not shown to have any direct causative relationship to the incident involving Mr. Wolde, and certainly not by the clear and convincing evidence required by statute in order to uphold a punitive damages award. S.C. Code Ann. § 15-32-520(D) ("Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct.").

Additionally, the defendant's ability to pay heavily weighs in Lack's favor. The judgment is far beyond Lack's available insurance coverage, which coverage was revealed to the jury in the punitive damages phase of the trial. Further, the evidence at trial established that Lack's had a negative net worth. Punitive damages are not meant to be used to bankrupt defendants. *See, e.g.,*

Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co., 515 F. Supp. 64, 106 (D.S.C. 1979) (“[I]t is well-known that the purpose of punitives is not to ‘bankrupt’ a defendant, but simply to deter him and others from similar conduct in the future. Thus the extent of the defendant’s wealth constitutes a limit on the amount of damages which can be awarded. (citations omitted)); *In re Thomas*, 254 B.R. 879, 886 (D.S.C. 1999) (explaining that any punitive damages award “must not effect economic bankruptcy”); *see also State Farm Mut. Auto. Ins. Co. v. Brewer*, 191 So. 3d 508, 511 (Fla. Dist. Ct. App. 2016) (“[A]n award of punitive damages that bankrupts or financially devastates the defendant is unconstitutionally excessive.”). While in South Carolina the inability to pay is not an absolute bar to an award of punitive damages, this factor clearly weighs in favor of Lack’s.

Finally, the Court agrees with Lack’s argument that the problems inherent with the evidence presented to the jury and the injection of the “dual role” issue into the case fundamentally tainted the proceedings. This is an appropriate consideration under the eighth factor.

Therefore, the *Gamble* factors also support that the jury’s punitive damages award cannot withstand constitutional scrutiny. The Court finds that this further supports vacatur of its Order and entry of judgment in Lack’s favor on punitive damages.

C. The ratio of punitive damages to actual damages.

Although the jury’s punitive damages award is less than a 1:1 ratio, this Court nevertheless finds that vacatur of the damages award is appropriate because of the other reasons detailed herein.

D. Comparable civil penalties do not justify punitive damages in this amount.

The last *Mitchell* factor directs this Court to consider “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” 385 S.C. at 585, 686 S.E.2d at 184. This Court’s previous Order accurately states that there are

no civil penalties applicable to this case. However, the Court agrees with Lack's that its Order failed to properly consider the import of this fact. There are no civil penalties in this context because this was simply an accident. Thus, as Lack's correctly notes, punitive damages are not justified. This factor also weighs in Lack's favor and supports the vacatur of the Court's prior Order and entry of judgment in Lack's favor.

II. The Court finds that its prior Order improperly overlooked the statutory factors.

Finally, the Court also holds that its prior Order failed to account for and consider the factors required by the punitive damages statute, which further supports vacatur of the Court's prior Order. The punitive damages statute requires that the court consider the factors listed in S.C. Code Ann. § 15-32-520(E) in reviewing a punitive damages award. S.C. Code Ann. § 15-32-520(F). Those factors are:

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

(10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and

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

S.C. Code Ann. § 15-32-520(E).

The first, fourth, fifth, seventh, and eighth factors all overlap with elements of the *Mitchell* analysis and the Court reasserts its findings here on those points. The Court additionally finds the remaining considerations also weigh in Lack's favor. First, the "severity of the harm" factor requires that it be "caused by the Defendant." Here, the evidence showed that Mr. Wolde voluntarily entered the ocean with his children and continued into deeper water. There was evidence that there were warning flags and that Mr. Wolde did not swim in a manner to escape the rip current, although his son Adam fortunately did. Ultimately, Mr. Wolde's conduct contributed to the incident. This statutory factor does not require "negligence" on the part of the plaintiff. As to the sixth factor, there is no evidence that Lack's profited from any alleged conduct that had a causative relationship to the incident involving Mr. Wolde. The Plaintiff argued Lack's is a "for profit" business and that this factor weighs in favor of Plaintiff; however, no evidence was presented that Lack's acts or omissions were directly and proximately involved with the Wolde incident. Finally, neither the ninth, tenth, nor the eleventh factor is involved in this case. This was the only lawsuit arising out of the act or course of conduct complained of by the Plaintiff, and Lack's has not been assessed any civil fines or had any criminal penalties imposed.

Therefore, the statutory factors also weigh against the jury's punitive damages award. The Court finds that they further support vacatur of its prior Order and entry of judgment in Lack's favor on punitive damages.

II. CONCLUSION

For the reasons stated above, the Court **GRANTS** Lack's motion to reconsider and vacates its prior Order on Post-Trial Review of Damages. The Court finds the jury's punitive damages award fails to comport with both the due process requirements as set forth in *Mitchell* and *Gamble* and the statutory factors. The Clerk is directed to **VACATE** the punitive damages award and enter judgment in Lack's favor on punitive damages.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

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,	)	
	)	ORDER GRANTING MOTION TO
Plaintiff,	)	STAY EXECUTION
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Lack's Beach Service, Inc.'s ("Lack's") Motion to Stay Execution on and Enforcement of the Judgment. For the reasons stated below, the Court **GRANTS** Lack's Motion to Stay.

BACKGROUND

This matter was tried between July 25, 2022 and July 29, 2022. The jury found in Plaintiff's favor and awarded \$3.73 million on the survival claim, \$10 million on the wrongful death claim, and \$7 million in punitive damages. On August 1, 2022, the Court entered a Form 4 judgment stating the jury had rendered a verdict in this amount. Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial *nisi remittitur*. Plaintiff then filed a Motion for Appointment of a Receiver and Lack's filed a Motion to Stay.¹

¹ Plaintiff contends that Lack's motion to stay was untimely. South Carolina courts do not appear to have expressly addressed the timing of a motion under Rule 62. However, in *Taylor v. Taylor*, 434 S.C. 307, 314, 863 S.E.2d 335, 339 (Ct. App. 2021), the Court of Appeals did not take issue with the timing of a Rule 62 motion despite 30 days elapsing between the final order and the Rule 62 motion. *See id.* Moreover, the language of Rule 62 does not include any express time limitation. *See generally* Rule 62, SCRCP; *see also Shipley v. Hypercom Corp.*, No. 1:09-CV-0265-RGV, 2012 WL 12874267, at *2 (N.D. Ga. Jan. 25, 2012) ("Shipley's argument that Hypercom's motion is untimely is without merit as Rule 62 does not establish a time limit for

THE COURT'S ANALYSIS

I. The Court finds that Lack's Motion to Stay should be granted.

Rule 62(b), SCRCP governs stay of execution or enforcement of a judgment pending the Court's ruling post-trial motions for a new trial or to alter or amend. Pursuant to that Rule, the Court may issue a stay of proceedings to enforce a judgment in its discretion "and on such conditions for the security of the adverse party as are proper." Rule 62(b), SCRCP. Once appeal is taken from the judgment, Rule 62(d) then provides that a party may obtain a stay as to the enforcement of the judgment "by giving a supersedeas bond." Rule 62(d), SCRCP.

As Lack's motion detailed, if the Court denies its post-trial motions, it intends to appeal and is prepared to post a supersedeas bond in accordance with the limits imposed by S.C. Code Ann. § 18-9-130(A)(1). Pursuant to section 18-9-130(A), the maximum supersedeas bond following appeal by an individual or a business entity that employs fifty persons or fewer or which has revenue of less than \$5 million in the previous tax year is \$1 million or the amount of the judgment, whichever is less. S.C. Code Ann. § 18-9-130(A)(1)(b). Under Rule 62(d) and S.C. Code Ann. § 18-9-130 (A)(1), "if a judgment debtor is able to post a bond, then execution of the judgment will be stayed on appeal as a matter of right." *Davis v. Agape Nursing Rehab. Ctr., Inc.*, No. 2018-002236, 2022 WL 702579, at *4 (S.C. Ct. App. Mar. 9, 2022) (unpublished but cited as an example of persuasive reasoning); 11 Charles A. Wright, et al., *Federal Practice and Procedure* § 2905 (3d ed. 2022).

Lack's has represented to the Court that it meets the criteria of subsection (a)(1)(b), which is also evidenced by the operating revenue evidence introduced at trial and therefore, by statute,

filing a motion to stay execution of a judgment."'). Therefore, the Court finds that there was no time restriction on Lack's moving to stay.

the amount of the bond would be \$1 million as consistent with the appeal bond statute. The Court has not yet addressed Lack's post-trial motions. Plaintiff should not be allowed to take steps to execute on or enforce the judgment because: 1) the Court may vacate or substantially reduce the judgment based on the post-trial motions of Lack's; and 2) if the Court denies Lack's post-trial motions, Lack's would be able to stop execution as of right by appealing and posting the aforementioned appeal bond. Plaintiff has not presented any basis to the Court for allowing it to execute or enforce the contested judgment now.

In light of the foregoing, the Court finds that Lack's motion to stay should be granted. Lack's is directed to post a bond in the amount of \$1 million with the Clerk of Court for Horry County within thirty days of the date of this order.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Lack's motion to stay. Lack's is directed to post a bond in the amount of \$1 million with the Clerk of Court for Horry County within thirty days of the date of this order.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

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,	)	
	)	ORDER DENYING MOTION TO
Plaintiff,	)	APPOINT A RECEIVER
v.	)	
	)	
LACK'S BEACH SERVICE, INC.,	)	
	)	
Defendant.	)	

This matter comes before the Court on Plaintiff's Motion for Appointment of a Receiver. Defendant. For the reasons stated below, the Court **DENIES** Plaintiff's motion.

BACKGROUND

This matter was tried between July 25, 2022 and July 29, 2022. The jury found in Plaintiff's favor and awarded \$3.73 million on the survival claim, \$10 million on the wrongful death claim, and \$7 million in punitive damages. On August 1, 2022, the Court entered a Form 4 judgment stating the jury had rendered a verdict in this amount. Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial *nisi remittitur*. Plaintiff then filed a Motion for Appointment of a Receiver and Lack's filed a Motion to Stay.

THE COURT'S ANALYSIS

The Court finds that Plaintiff's motion to appoint a receiver should be denied.

As the Supreme Court has explained, appointment of a receiver "is a *drastic remedy*, and should be *granted only with reluctance and caution*." *Midlands Util., Inc. v. S.C. Dep't of Health & Env'tl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989) (emphasis added). Thus, a receiver will not be appointed during the progress of a cause "unless there is the strongest reason

to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined.” *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887). The Court agrees with Lack’s that the drastic remedy of a receiver is not warranted.

First, the Court finds that Plaintiff’s motion should be denied because of the grounds stated in Lack’s Motion to Stay Execution. The purpose of a stay generally is to preserve the rights of the parties pending further proceedings. Plaintiff’s motion to appoint a receiver is premised on: 1) the existence of the verdict in this matter and 2) Lack’s negative net worth and thus “imminent insolvency” in light of that verdict. However, as Lack’s correctly notes, the reason Lack’s faces this threat is because of Plaintiff’s efforts to execute on the judgment, regarding which this Court has not yet even addressed post-trial motions, much less an appeal of any rulings on the same. The Court finds that Lack’s agreement to post security sufficient to satisfy the appeal bond statute - as a matter of law - adequately protects Plaintiff’s interests while the post-trial motions and appeal stages progress, which the General Assembly has expressly acknowledged through its adoption of S.C. Code Ann. § 18-9-130. The General Assembly’s expression of public policy regarding the propriety of staying execution on a judgment is expressed clearly via S.C. Code Ann. § 18-9-130. This Court is not free to ignore that legislative pronouncement of public policy.

Under Rule 69 and the South Carolina Code, the proper mechanism for attempting to execute on the judgment is for Plaintiff to seek a writ of execution once the judgment is final. If that returns *nulla bona*, the Plaintiff may institute the supplemental proceedings process. *See* S.C. Code Ann. § 15-39-30 (2005) (providing that writs of execution may issue on *final* judgments); Rule 69, SCRPC (“Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.”); *see also Johnson v. Serv. Mgmt., Inc.*, 319 S.C.

165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995), *aff'd*, 324 S.C. 198, 478 S.E.2d 63 (1996) (discussing the writ of execution and supplemental proceedings process). The Court agrees with Lack's that Plaintiff's request to appoint a receiver is an attempt to circumvent this established process. The proper procedure here is for the merits to be decided regarding the post-trial motions, an appeal taken if necessary, and execution on the judgment stayed by the posting of a statutory appeal bond if an appeal is needed. If Plaintiff in the interim wishes to pursue supplemental proceedings regarding Lack's property and pursue discovery regarding its assets, it may attempt to do so. However, to skip the normal processes and move straight to the appointment of a receiver is incorrect procedurally.

The Court also finds that Plaintiff's motion should be denied because appointment of a receiver could potentially impair Lack's contract with the City of Myrtle Beach. Section 9 of the Franchise Agreement between Lack's and the City only permits the franchise to be transferred to another franchise holder subject to 60 days' notice, approval of the City manager, and upon a Resolution approving the transfer passed by City Council. Similarly, the Franchise Agreement provides that it may not be assigned in whole or in part except upon written consent of the City of Myrtle Beach. If the Court appoints a receiver, such an Order could run afoul of these restrictions and result in a potential cancellation of the franchise by the City. The problems posed by the receivership, in other words, could easily outweigh any benefits. There was no evidence presented that a receiver would be able to continue the business of Lack's. Further, the motion to appoint a receiver is improperly grounded on allegations that Lack's will not take actions in its own interests, but Plaintiff has presented no evidence supporting such allegations.

Further, granting Plaintiff's motion would result in the Court utilizing the general receivership statutory process to override and nullify a more specific statute that permits the City

of Myrtle Beach to contract with a private beach safety company such as Lack's (and not with a court appointed receiver). The receivership statutes are general statutes that detail the process for appointing a receiver in instances where the circuit court deems it appropriate and the applicable requirements are met. *See* S.C. Code Ann. § 15-65-10 *et seq.* On the other hand, S.C. Code Ann. § 5-7-145 is a specific statute permitting municipalities like the City of Myrtle Beach to contract with beach safety companies such as Lack's Beach Service subject to the conditions detailed by the statute. *See* S.C. Code § 5-7-145(B) ("Lifeguard services may be provided using municipal employees or by service agreement with a private beach safety company."). The Court agrees with Lacks' that appointing a receiver would improperly conflict with the more specific statute in violation of established policy weighing against this result. *See James v. S.C. Dep't of Transp.*, 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) ("Generally, when a general statute and a specific statute conflict, the specific statute prevails."). A specific statute and a municipal ordinance and Franchise Agreement authorizing Lack's Beach Service to provide lifeguarding and beach closure services cannot be ignored or superseded by the general receivership statute.

Finally, failing all else, via supplemental memorandum Lack's offered to post a bond in the amount of double the value of its hard asset property, under S.C. Code Ann. § 15-65-50, to stop the appointment of the receivership. Plaintiff responded by stating that the bond that would be required would need to be double the judgment amount. The Court does not believe such a huge bond should be required under the circumstances of this case, including the state statute authorizing the franchise agreement with Lack's and the appeal bond statute. The Court notes that costs, charges, expenses, and actual damages could be assessed against Plaintiff if the Court were to improperly appoint a receiver. *See* S.C. Code Ann. § 15-65-90. The Court thus deems a bond under § 15-65-50 to be unnecessary.

In light of the foregoing, the Court finds that Plaintiff's motion to appoint a receiver should be denied.

CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiff's motion for appointment of a receiver.

SO ORDERED this ____ day of _____, 2023.

The Honorable Kristi Curtis
Presiding Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF ZERIHUN WOLDE,	)	
	)	DEFENDANT LACK'S BEACH
Plaintiff,	)	SERVICE, INC.'S OBJECTION TO
v.	)	PLAINTIFF'S PROPOSED ORDER
	)	DENYING LACK'S POST-TRIAL
LACK'S BEACH SERVICE, INC.,	)	MOTIONS AND SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF
Defendant.	)	POST-TRIAL MOTIONS
	)	

Defendant Lack's Beach Service, Inc.'s ("Lack's") submits this objection to Plaintiff's Proposed Order denying Lack's post-trial motions (the "Proposed Order") and supplemental memorandum in support of its post-trial motions. Lack's objects to the entirety of Plaintiff's Proposed Order. The Court should decline to enter the proposed order and instead should grant the relief Lack's requested in its post-trial motions.

Lack's has already objected to and refuted many of the factual and legal assertions contained in the proposed order. Some assertions in the proposed order appear in different sections than they appeared in Plaintiff's post-trial briefing. Lack's incorporates all prior arguments—oral and written—made before, during, or after trial into this objection and memorandum, regardless of the manner in which those arguments were raised or the specific section of any brief in which they appear. Further, Plaintiff's proposed order is attached as an exhibit to this objection and memorandum. *See Exhibit A*.

Any order entered by this Court should state that the Court has considered all arguments and grounds, written and oral, in ruling on the pending motions.

OBJECTIONS¹

I. The Proposed Order erroneously denies JNOV and denies a new trial despite the lack of sufficient proof of proximate cause.

The Proposed Order makes a number of conflicting and inconsistent findings, and it would be error for the Court to adopt it as a result. For example, Plaintiff puts forth several different theories for proximate cause that cannot be reconciled. First, they allege that the incident was caused because of ill-trained lifeguards and their performance of a “dual role.” However, Plaintiff alternatively argues that the proximate cause was Lack’s failure to close the beach (which would have made the lifeguards and their training irrelevant). Finally, they assert that the cause of the incident was a Lack’s guard being at lunch and the fact that it was one lifeguard only short. If this is true, however, then the first ground cannot be the proximate cause since no amount of training or elimination of the dual role would have made any difference. The conflicts are inherent in this framing of the Proposed Order, and it should be rejected on this basis in the first instance. The explanation of these conflicting and contradictory proximate cause theories is evident- the Plaintiff’s causation case rests on speculation.

As to the specific findings on proximate cause, the Proposed Order first finds that there was conflicting evidence sufficient to support a jury question as to whether Lack’s lifeguards could have seen the problem and changed the outcome. As Lack’s has argued throughout its post-trial briefing, however, there is no testimony in the record that any Lack’s guards were: (1) in the vicinity of the incident to where they could have seen what was happening, (2) saw the incident, or (3) could have reached Wolde in time to assist and save Wolde (even had they been in the

¹ Lack’s objects to each and every statement of fact in the “Background” section of the Proposed Order to the extent that contradicts the evidence and testimony at trial.

vicinity). The testimony cited in the Proposed Order only supports that the Woldes were shouting in the water.

The Proposed Order also asserts that bystanders could not get the attention of Lack's lifeguards nor could they find any. The only testimony cited in support of this point was from bystander Bender. However, his actual testimony was just that he did not see any Lack's lifeguard "around" when Wolde was brought on shore. He testified as follows:

Q Can you share with the ladies and gentlemen of the jury what happened next?

A We were getting out of the water. My wife and kids were in front of me. I was just about to step on the shore when I heard a lady yelling for help behind me. I looked back and saw a lady with a child and it appeared to be someone bobbing in the water. I looked up to the lifeguard stand. There was no one in it. Didn't see any lifeguards around. So I told my wife and kids to go find lifeguards, and I went back in the water.

...

Q Okay. And is that when you asked your wife to go find lifeguards?

A Yes, because I looked up in the chair and didn't see a lifeguard. Didn't see any around us. So I asked them to go find lifeguards.

(Tr. 196:15-197:10.)

The Proposed Order then cites the testimony of Plaintiff's expert Dr. Griffiths as supporting proximate cause. Dr. Griffiths, of course, had no personal knowledge of what occurred on the beach that day. He merely opined that a lifeguard *could* have potentially seen Mr. Wolde because he was a distressed swimmer. However, he conceded that he did not know the timing of events and that there is no evidence that the Lack's guards had any indication of the issues with Wolde until after he was back on the beach.² Again, *none* of this testimony supports that any act or

² Dr. Griffiths specifically testified: "Q. So we're clear on the answer there, you don't know how much time there was available for a lifeguard to observe Mr. Wolde in distress, because you don't even know how long Mr. Wolde was in distress. A. No. (Griffiths Dep. 235:8-12). He further

omission by Lack's was the proximate cause for Mr. Wolde's struggles in the water and eventual demise from drowning during this incident.

The Proposed Order then cites additional opinions from the Plaintiff's expert about breaches of the standard of care. However, as Lack's briefing detailed, these opinions were based on a fundamentally flawed view of the facts which were contradicted at trial. For example, Dr. Griffiths incorrectly testified that the Lack's lifeguards went to lunch without alternate coverage. As the record evidence supported, however, when one guard went on lunch break, the neighboring guards were tasked with scanning that sector of the water.³ (Tr. 719:4-8.) Dr. Griffiths also inaccurately stated that Lack's had "less than half" of the required amount of "lifeguard onlys" on the day of the incident. However, the testimony elicited by Plaintiff's counsel supported only that, at most, Lack's was one short (the contract called for four and three were present that day) due to unforeseen staffing issues. (Tr. 361:17-362:6.) Third, Dr. Griffiths opined on the impropriety of the dual role but, as detailed in Lack's briefing and below, this was not a violation of the standard of care since it was expressly permitted by contract⁴ and, regardless, *there is no evidence the relevant lifeguards were actually engaged in commercial activity at the time.*⁵ Therefore, none of these opinions establishes the existence of a jury question on breach of the standard of care.

clarified: "Q. How long was it that he was in distress? A. I can't say that and I'm not going to venture a guess. I can't say that." (Griffiths Dep. 236 8-10).

³ Dr. Griffiths endorsed the overlapping coverage concept: "Q. At the time that Mr. Kacper [L-21] was at lunch, the lifeguards at L-22 and L-20 would be on duty responsible for over watching his water. A. That is correct. That's the way it's supposed to work." (Griffiths Dep. 200:14-18).

⁴ It is critical to recall that the City of Myrtle Beach was under no obligation to provide any lifeguards at all, as is the case with many beaches in South Carolina. The City determined that as part of its service to its citizens and visitors it would provide this service in accordance with the standard set forth in the Franchise Agreement. The Proposed Order imposes a heightened duty on Lack's which has no basis in South Carolina law.

⁵ This issue is discussed in Section II, *infra*.

The Proposed Order then finds that a lack of proof that the Lack's lifeguards had sufficient training supported a jury question on proximate cause. Again, this finding rests on the erroneous premise that additional training of the Lack's guards could have prevented the incident that occurred with Wolde. There is no evidence in the record supporting this conclusion. Moreover, the un rebutted evidence showed that Lack's ensured that its guards had the required qualifications at the time of hiring and underwent the necessary training. (Tr. 804:16-21, 808:11-14, 809:9-20, 810:8-8:11-3, 834:8-22.) The Proposed Order's finding that Lack's presented no evidence showing its lifeguards received any training is, therefore, contradicted by the record. While Plaintiff correctly notes that Lack's did not produce any written training logs or sign-in sheets, there was extensive testimony regarding the training that each Lack's lifeguard receives. (Tr. 723:14-18, 725:1-726:7, 810:8-8:11-3, 834:8-22.) Wesyln Lack-Chittering testified that in 2018 each Lack's lifeguard went through rookie school their first year, and received ongoing classroom and in-ocean surf school training and instruction. (Tr. 810:8-8:11-3, 834:8-22.) Moreover, the training including ensuring that even when engaged in limited commercial activity, the lifeguards' eyes remained on the water. (*Id.* at 725:1-726:7.)

The Proposed Order then cites the fact that Lack's was "understaffed" by one lifeguard only on the day of the incident as supporting proximate cause. However, there was no evidence supporting that Lack's being one "lifeguard only" short on the day in question caused Wolde's drowning or that having the extra "lifeguard only" been on the beach that day (where he would have patrolled a large area) would have changed the outcome for Wolde at the particular part of the ocean involved. There was no evidence that the other lifeguards should have seen Wolde struggling where he was and could have saved him from drowning. Instead of evidence, Plaintiff's arguments relied on speculation of what may have occurred differently depending on the number

of lifeguards involved and what they may have been doing. But the jury verdict cannot rest on speculation.

Next, the Proposed Order finds that the evidence supported that Lack's breached the standard of care by failing to close the beach.⁶ The conditions on the day of the incident, however, did not necessitate closure of the beach. The National Weather Service did not direct for the

⁶ At trial, Plaintiff premised this argument on a general duty owed to the public by Lack's pursuant to the City of Myrtle Beach's delegation of authority over beach safety to Lack's, in accordance with S.C. Code Ann. § 5-7-145. Because this claim was based on violation of this duty owed to the general public, it is not viable and should not form the basis of the Court's order.

The public duty rule applies where "the plaintiff relies upon a statute as creating the duty." *Arthurs ex rel. Est. of Munn v. Aiken Cnty.*, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001). The rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public," and thus such "statutes create no duty of care towards individual members of the general public." *Summers v. Harrison Constr.*, 298 S.C. 451, 455-56, 381 S.E.2d 493, 496 (Ct. App. 1989). Exceptions to the doctrine exist where a statute creates a "special duty to particular individuals." *Scott v. McAlister*, 436 S.C. 324, 335, 871 S.E.2d 620, 626 (Ct. App. 2022). The public duty rule is a legal argument which negates the critical element of duty and cannot be waived by failure to plead, as it is not an affirmative defense. *See Steinke v. S.C. Dep't of Lab., Licensing & Regul.*, 336 S.C. 373, 389, 520 S.E.2d 142, 150 (1999). Although South Carolina courts do not appear to have examined whether the doctrine extends to private parties to which governmental authority has been delegated, at least one other jurisdiction has found that it does. *See, e.g., Houle v. Galloway Sch. Lines, Inc.*, 643 A.2d 822, 826 (R.I. 1994) (explaining that the public-duty doctrine may protect both the town and a private contractor hired to design a municipal bus route as this was a discretionary governmental activity).

Here, the six factors detailing when a special duty may exist are not satisfied. *See Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 562, 521 S.E.2d 153, 158 (1999). Critically, the essential purpose of the Code section at issue was not to protect against a particular harm to a particular class of persons that were prior to the enactment of the provision. Rather, the statute provides for a general duty owed to the beachgoing public at large. It would be a different scenario if, for example, there was evidence that a lifeguard saw a particular person in trouble and failed to act as there was the possibility of a voluntarily assumed duty. However, what Plaintiff argued to the jury here was a general failure by Lack's as an entity as a whole to ensure safety for the public at large, placing this matter squarely within the public duty rule.

The Code section permitting cities to provide lifeguard and other beach safety related services did not create a special duty which would create tort liability under these facts. Because the statute did not create a special duty, the public duty rule (which Lack's is entitled to assert derivatively) negates the central element of duty in Plaintiff's claim for negligence and supports granting JNOV or a new trial.

beaches to be disclosed. The report merely flagged the *potential* for hazardous conditions due to the presence of a longshore current and potential for rip currents. (Tr. 711:8-15.) Lack's appropriately posted red flags to warn of these conditions and imposed a waist-deep limit for swimming. (*Id.*, 727:5-21.) Plaintiff's own expert acknowledged that the decision to close a section of water is not based on a National Weather Service bulletin or any objective set of standards but, instead, the decision "depends upon the experts, the competent qualifying surf staff on duty to make that call." (Griffiths Dep. p. 168: 7-14). Dr. Griffiths also recognized that a longshore current is only hazardous when combined with other factors such as a rip current. (Griffiths Dep. p. 176: 6-13). Contrary to the Proposed Order's statement, there was no evidence that the "standard of care" required Lack's to place specific rip current warnings on the beach.

The Proposed Order then cites L-21 being at lunch as a standard of care violation, finding that it supported an inference that the guard left the tower unoccupied when Lack's knew dangerous conditions were present. Again, however, as the record evidence supported, when one guard went on lunch break the neighboring guards were tasked with scanning that sector of the water. (Tr. 719:4-8.) This was done pursuant to the protocol permitted by the franchise agreement. (Tr. 659:7-13, 745:17-29, 748:10-12.)

Although the Proposed Order does not expressly rely on this argument, Plaintiff's response brief also asserted there was no evidence that the relevant lifeguards, L-20, L-21, and L-22, complied with the standard of care. However, Plaintiff was required to show the standard of care applicable to Lack's, then prove a failure by Lack's to meet the standard of care, in addition to proximate cause. Plaintiff contended that the Lack's staff did not attempt to rescue Wolde or provide care to him while in the water. However, there was no testimony that Wolde was actually visible from the beach or that the lifeguards could have gotten to him in time to prevent the

drowning. The only testimony cited by Plaintiff to support this point was from one of the bystander witnesses who was permitted to opine (over objection) that: “If the lifeguards would have been present, *I think* the outcome would have been different.” (Tr. 207:15-16 (emphasis added).) This improper opinion testimony is rank speculation. Plaintiff also cited the other bystander’s statement that after Wolde was brought on shore, he saw a “lifeguard” in red shorts with no shirt who stood by and did not assist. (Chandler Dep. 22:17-23, 56:24-57:7.) However, it was pure speculation that this person was in fact a lifeguard. The statement was based solely on the fact that the person had on red shorts. (Tr. 202:24-203:1.) Lack’s guards were contractually required to wear yellow shirts and blue shorts. (Tr. 812:4-7.) Moreover, testimony supported that Lack’s personnel did become actively involved in trying to revive and save Wolde. As Lack’s manager Patrick Flaherty testified, he arrived on the scene right as Wolde was being pulled out of the water by lifeguard L-20, a Lack’s supervisor, and several bystanders. (Tr. 699:10-18.) The supervisor started CPR and Flaherty attempted to use an AED device as they worked to try and save Wolde. (Tr. 699:19-701:9.)

Plaintiff’s brief also contended that the lack of response by Lack’s lifeguards was “direct evidence” that they failed to do their job. However, this argument is also premised on inaccurate statements. Plaintiff claimed that L-22 was not on his tower and the jury could “reasonably conclude” he was not performing lifeguard duties and was instead engaged in revenue-generating duties. (Plft. Resp. at 27.) This is flatly contradicted by that lifeguard’s statement. (Tr. 823:25-824:3.)

Therefore, there was no probative, admissible evidence *at all* supporting proximate cause. Therefore, the case should not have been submitted to the jury in light of Plaintiff’s failure to satisfy this critical element of her claim. The Court should refuse to adopt the Proposed Order and grant

JNOV in Lack's favor or, failing that, a new trial should be ordered based on the unreasonable inferences and speculation and improper opinion testimony relied upon by the Plaintiff.

II. The Proposed Order erroneously finds that the "dual role" issue was appropriate for consideration by the jury.

As Lack's post-trial briefing argued, permitting evidence and testimony on this issue was error and warrants JNOV or a new trial. The Court should decline to adopt the Proposed Order's erroneous analysis of this issue.

A. The dual role issue was not relevant.

Throughout the case, Plaintiff's argument has essentially been that because Lack's lifeguards were permitted to engage in limited commercial activity as part of their duties, such was necessarily what the relevant lifeguards were doing at the time of the incident involving Wolde. Conversely, Plaintiff's theory posited, had Lack's lifeguards not been permitted to engage in commercial activity, they would have prevented the incident. The deficiency with Plaintiff's argument is that there is no evidence in the record supporting this conclusion, and again, this is engaging in speculation.

First, the supposed "dual role" arrangement was expressly permitted by statute and Lack's contract with the City of Myrtle Beach. The South Carolina Code allows the City of Myrtle Beach and other coastal municipalities to provide lifeguard and other safety services, to enact and enforce regulations deemed necessary for the safety of all persons on the beach, and either provide lifeguard services through municipal employees *or through a service agreement with a private beach safety company* such as Lack's. See S.C. Code Ann. § 5-7-145(A)-(B). If a municipality elects to use a private company, personnel employed by the company "must be tested and certified *as required by the municipality.*" *Id.* at (B)(4) (emphasis added). The municipality may also grant

“the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality.” *Id.* at (B)(3).

The Franchise Agreement between the City and Lack’s follows the arrangement permitted by the statute. The Agreement allows Lack’s to rent beach equipment in return for its provision of water safety service and other consideration. (*See* Franchise Agreement, §4.) The Franchise Agreement sets forth the expected standard for Lack’s lifeguards, requiring that they be tested to ensure that they can swim 500 meters over a measured course in 12 minutes, possess sufficient faculties to perform the duties of open water lifeguarding, possess a valid lifeguard card, possess a community first aid certification or equivalent, possess a CPR certification or equivalent, and successfully complete a course consisting of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association (“USLA”). (Franchise Agreement, §3.)

Plaintiff was improperly permitted to use the existence of the “dual role” arrangement as a strawman, suggesting that it was something nefarious and inappropriate when, in reality, it was exactly the type of arrangement contemplated by South Carolina law and the City. The issue should not have been presented to the jury as a result.

Second, the dual role issue was not relevant because there is no evidence that it prohibited Lack’s employees from complying with the standards required by the franchise agreement. Lack’s ensured that its guards had the required qualifications at the time of hiring and underwent the necessary training. (Tr. 804:16-21, 808:11-14, 809:9-20, 810:8-8:11-3, 834:8-22.) Lack’s training including ensuring that even when engaged in limited commercial activity, the lifeguards’ eyes

remained on the water. (*Id.* at 725:1-726:7.) Plaintiff presented no evidence that Lack's training failed to comply with the requirements of the Franchise Agreement.⁷

Therefore, Plaintiff should not have been permitted to argue the "dual role" issue in the first instance because it was not relevant to Plaintiff's negligence claims. Lack's business arrangement was expressly permitted by South Carolina law and its contract with the City of Myrtle Beach, and there was no evidence that the Lack's guards could not comply with the requirements of the Franchise Agreement.

B. Plaintiff presented no evidence supporting that the Lack's lifeguards were engaged in commercial activity at the time of the incident.

Injection of the dual role issue into the case was also improper because there was no evidence (direct or circumstantial) that any of the relevant lifeguards were actually engaged in commercial activity at the time of the Wolde incident. The *only* testimony cited in the Proposed Order was from bystander Julian Chandler and Plaintiff's expert Dr. Griffiths, and neither established this point.

The Proposed Order first finds that Chandler stated the "lifeguard responsible for the water where Mr. Wolde drowned was engaged in sales or customer service." Chandler's testimony, however, merely stated that he saw a lifeguard talking to beachgoers when he was walking out to the beach. When asked about the timing, he stated:

Q. Okay. And did you happen to see what, if anything, the lifeguard was doing at that time?

⁷ The USLA representative, Brewster, was improperly permitted to offer opinion testimony (over objection) about whether Lack's training could comply with USLA standard. He testified that if lifeguards were engaged in dual role lifeguarding they could *never* satisfy this requirement. (Tr. 505:8-12 ("So I think the -- the easiest way to answer your question is -- or the most direct way to answer your question is training in a manner that allows the person on the stand to be involved in vending would be inconsistent with the USLA's training standards.")). This was his personal opinion and should not have been allowed since he was not an expert witness and it invaded the province of the jury. Regardless, the applicable standard was the Franchise Agreement standard.

A. So I noticed on my way up to the beach tower before I laid down that the lifeguard in the same position that we saw when we first came out, he was sitting on the back end of the lifeguard stand chatting with a few individuals with his back to the water.

Q. And were the individuals that he was chatting with within the line of umbrellas?

A. They were near them, yes, sir.

Q. And approximately how much time passed between the time you saw that and the time that you heard the first yell for help?

A. Gotcha, understood. Approximately five to 10 minutes, sir.

(Chandler Dep. at 17:5-15.) Thus, the supposed direct evidence of commercial activity was testimony: (1) about what a lifeguard was doing five to ten minutes prior to the incident and (2) did not actually say the guard was even engaged in commercial activity. In any event, Chandler's testimony was consistent with lifeguard L-22's statement that he was *explaining the safety flag system* to beachgoers around the time of the incident, not engaging in commercial activity:

When I was explaining the meaning of different colors of the flags to the mom, who inquired about it, I heard Code 3 on the radio on L-20. I immediately started running that direction. . . .

(Tr. 823:25-824:3.)⁸

The Proposed Order's discussion of Lack's sales practices is irrelevant and speculative. Lack's has never disputed that its guards could make sales and earn commission or that sales activity occurred on the date of the incident. The ability to make sales is a key component of the Franchise Agreement with the City. The important question is whether there is any evidence that the guards were, in fact, engaged in commercial activity at the time of the incident in a manner which would have prevented them from observing and assisting Wolde. There is no such evidence.

⁸ The Proposed Order's statement that because L-22 was at the umbrella line and not on the tower, an inference could be drawn that the lifeguard was instead engaging in revenue-generating activities, is entirely speculative, and this is not a legitimate inference.

Nevertheless, the Proposed Order cites Plaintiff's expert Dr. Griffiths who speculated that the sales receipts showed that the lifeguards were engaged in sales and that this contributed to the accident. He was, of course, not an eyewitness and had no personal knowledge about the incident. Moreover, he conceded that, despite his extensive review of the evidence, ***he did not find any evidence that the relevant lifeguards were actually engaged in a commercial transaction during at the time of the incident.*** (Griffiths Dep. at 230:21 – 231:11.) Therefore, his testimony was based on pure conjecture and was improper. *See Young v. Tidecraft, Inc.*, 270 S.C. 453, 470, 242 S.E.2d 671, 679 (1978) (finding that an expert's opinion based on nothing more than mere conjecture and speculation was "devoid of probative value and cannot support a verdict"); *see also State v. Irick*, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) ("An expert's opinion is admissible if it is relevant and based on some factual predicate in the record.").

Finally, the Proposed Order's discussion of the length of the incident and the fact that bystanders could not find any Lack's lifeguards when Wolde was struggling in the water is irrelevant to whether the guards were serving a dual role at the time of the event.

Again, Plaintiff introduced no evidence that any of the relevant lifeguards were engaged in any commercial activity at the time of the incident so as to make the "dual role" issue relevant.⁹ The Court should decline to adopt the Proposed Order and grant JNOV to Lack's given how heavily influenced the jury was by Plaintiff's reliance on the argument about the supposed

⁹ The Proposed Order's statement that Lack's never objected to evidence involving the dual role issue is without merit. Lack's has consistently maintained the position throughout this case that the issue was not relevant in light of the Franchise Agreement's express approval of the arrangement. However, the Court rejected these arguments and permitted the issue to be tried. Lack's was not required to keep objecting following this ruling. *See State v. Jones*, 435 S.C. 138, 144-45, 866 S.E.2d 558, 561 (2021), *reh'g denied* (Feb. 3, 2022) ("[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of 'gotcha,' where form is elevated over substance.")

impropriety of the “dual role” lifeguards. Failing that, the Court should grant a new trial since Plaintiff’s arguments on this issue prejudicially infected the entire case. Without specific evidence connecting commercial activity of a lifeguard to the time of the incident, the trial devolved into a referendum on the character of George Lack, Lack’s Beach Services’ prior worker’s compensation disputes regarding premiums, who was right and who was wrong in the dispute between Lack’s and the USLA, and whether “dual role” lifeguarding is good or bad. The jury verdict amount confirms the confused and inflamed jury, and that a new trial should be ordered.

III. The admission of certain evidence constituted reversible error and the Proposed Order improperly refuses Lack’s motion for a new trial.

A. Error in admission of evidence and testimony regarding the administrative law court proceeding from 2001 and 2002.

The jury’s verdict was irreparably tainted by the prejudicial effect of the evidence and testimony about the decades-old administrative law matter. The only purpose that this evidence served was to yet again further Plaintiff’s narrative that Lack’s was about profit over safety.

As Lack’s contended in its motions, George Lack was improperly permitted to be “impeached” regarding a position that Lack’s took in this administrative litigation (which began in 1994). The proceedings concerned whether Lack’s employees should be classified as “lifeguards” for workers compensation purposes. (Tr. 429:20-24.) Lack’s took the position that they did not need to be because a very small percentage of their physical activities (the relevant risk covered by workers’ compensation) involved performing high risk activities such as water rescues. (Tr. 428:2-429:19.) The Administrative Law Court disagreed and found that they should be classified as lifeguards, which resulted in Lack’s employees being classified as lifeguards for its workers compensation coverage ever since that order in 2002. The effect was a significant *increase* in Lack’s workers’ compensation premiums. (Tr. 419:4-11.)

The Proposed Order's finding that the evidence was properly admitted asserts that Lack's "opened the door" to this evidence by claiming that the lifeguards perform "all lifeguarding and only minimal commercial sales." Plaintiff, however, had ample evidence that Lack's employees were permitted to, and did, engage in commercial activity, and this issue was not disputed. Further, Plaintiff wanted the jury to see (and prevailed upon the Court to allow the jury to see) that a judicial body had made a finding (with respect to worker's compensation insurance) against Lack's. The introduction into evidence of the judicial finding by an administrative body unfairly and unduly prejudiced Lack's, in addition to putting the issue of insurance in front of the jury. Introducing evidence regarding an administrative ruling on worker's compensation insurance from two decades prior only served to mislead and confuse the jury, and any probative value it had was outweighed by the unfair and undue prejudice from that evidence. The admission of this evidence was reversible error and warrants a new trial.

Although the Proposed Order does not make a finding to this effect, Plaintiff's response brief also contended that Lack's was "judicially estopped" from taking the position in this matter that its employees are lifeguards. Judicial estoppel requires the party seeking its application to show: (1) two inconsistent positions taken by the same party; (2) taken in the same or related proceedings involving the same party; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Plaintiff's argument fails to satisfy several of these elements

First, administrative law proceedings over insurance coverage from two decades ago are not related to the present personal injury/negligence action. Second, the positions were not

inconsistent since, as noted, what Lack's argued was that solely for workers compensation purposes the employees should not be classified as lifeguards since they only engaged in the high-risk physical activities associated with lifeguarding on an infrequent basis. Third, Lack's was unsuccessful in maintaining its position and was required to pay \$26,000 in higher premiums. (Tr. 419:7-11.) Finally, there is no evidence of any intentional effort by Lack's to mislead the court in this case, and Plaintiff does not seriously suggest any such conduct. Therefore, Plaintiff's judicial estoppel argument is without merit and should not form a basis of the Court's order.

B. Error in admission of evidence and testimony regarding Lack's relationship with the USLA.

As Lack's detailed in its post-trial briefing, the evidence and testimony concerning the USLA was also highly and unfairly prejudicial and its primary purpose was to inflame the jury against George Lack and Lack's. This evidence was also central to Plaintiff's profit over safety theme. (*See* Pltf. Closing Argument, Tr. 899:8-11 "And so then what followed was an investigation that was done by the USLA into the fact that they had been bamboozled by this for-profit on something as important as public safety.".) Although the Proposed Order cites the USLA as being the "industry's standard of care," there is no evidence supporting that USLA certification was the applicable standard of care in this case. Lack's relationship with the USLA had nothing to do with the relevant matters to be determined by the jury.

The Proposed Order's finding the USLA letters and the testimony of its representative Chris Brewster were relevant because the USLA represented the "industry standard of care" adopts Plaintiff's improper conflation between USLA *certification* and USLA-compliant *training*. All that the Franchise Agreement required was the latter. However, Plaintiff's presentation to the jury suggested that the former was necessary:

. . . And what did they do? *They revoke his certification.*

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

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

(Tr. 900:18-25 (emphasis added).)

There is a significant distinction between a requirement that Lack's be USLA "certified" as a company and whether Lack's could offer training consistent with the USLA's training criteria as required by the Franchise Agreement. The only relevant question was the latter and, as George Lack testified, Lack's developed training in accordance with those standards and this was reported to the City:

Q So Duke Brown is still with the USLA; is he not?

A Yes, he is.

Q In other words, he's still affiliated with the organization?

A Oh, yes, sir.

Q Are you aware that he's involved in the certification for USLA?

A Duke is a certification agent.

...

Q In 2018, Duke provided the outline or agenda for your surf school?

A Yes, he did.

Q And he provided the outline or the information of the things that you needed to train to that you then submitted to the City?

A Yes, he did.

Q And Duke Brown, at that time, he wasn't providing the training. He was just providing the outline of the training; correct?

A Yes, sir.

Q Because you -- at that time, Lack's Beach Service had in-house training?

A Yes, sir. We had people that had gone through USLA programs and had been -- actually, one person that was on our training staff was a lifeguard instructor and there's not but a few of those in the United States.

Q And, so, since that time, has Duke Brown provided additional training and assistance to Lack's Beach Service?

A Daily.

(Tr. 439:8-15, 440:19-441:13.)

Plaintiff presented no evidence that Lack's training failed to comply with the requirements of the Franchise Agreement. As detailed above in footnote 7, the USLA representative, Brewster, was improperly permitted to offer opinion testimony (over objection) about whether Lack's training could comply with USLA standard. This was his personal opinion and should not have been allowed since he was not an expert witness and it invaded the province of the jury.

Furthermore, the evidence and testimony concerning communications between George Lack and the USLA from 1996 to 2007, culminating in the "decertification" in 2007, had no bearing on whether the relevant lifeguards who were on the beach the day of the incident in 2018 were trained in accordance with the requirements of the Franchise Agreement.

The testimony of Chris Brewster drove home the prejudice. He testified that he felt George Lack had "bamboozled" the USLA and intentionally misrepresented the dual role activities of Lack's lifeguards between 1996 and 2007. (Tr. 422:11-18.) However, as Lack's has repeatedly argued, this spat with USLA in 2007 is entirely irrelevant to this negligence action. The City of Myrtle Beach had knowledge of and authorized the "dual role" arrangement throughout the course of its relationship with Lack's, including in 2018. As the City Manager of Myrtle Beach testified:

Q And the franchise agreement -- if you could explain to the jury what the franchise agreement was for.

A The beach itself is owned by the public, in this case, under the care of the City, and in order for any company to do business with the City, they had to have a franchise agreement. We had to franchise that out and basically give an exclusive contract.

In our case, the arrangement with the beach safety services was that they had the right to rent chairs to the public, rent umbrellas to the public, and I think boogie boards as well, according to ordinance. They had the right to do that, the exclusive right to do it. In exchange, they were required to provide water safety services in the form of lifeguards.

...

Q And the information was provided to City Council about the operation of Lack's Beach Service; correct?

A Yes, sir.

Q And that included how they rented umbrellas and chairs on the beach?

A Yes, sir.

Q And, before 2018, you knew that Lack's Beach Service had lifeguards that rented beach equipment; did you not?

A Yes, sir.

(Tr. 630:8-21, 633:12-20.) Again, the sole effect of the USLA letters and Brewster's testimony was to prejudice the jury and paint Lack's as having improper motivations despite the USLA decertification issue having no bearing on Lack's relationship with the City and whether it complied with the requirements of the Franchise Agreement.

The improper admission of the USLA communications and testimony regarding whether Lack's "bamboozled" USLA and the "decertification" of Lack's by the USLA also warrants a new trial. The unduly prejudicial nature of this evidence essentially amounted to a character assassination of George Lack and Lack's and a referendum on Lack's business model and rights under its franchise agreement with the City, as opposed to whether Lack's was negligent or reckless with respect to the drowning here, and whether there was any proximate cause between Lack's actions or omissions and the drowning. The Plaintiff prevailed upon this Court to allow it to go very far afield and convert the trial into a case about whether lifeguards should be allowed to serve dual roles, and whether, as between Lack's and the USLA, who was unfair to whom in that dispute. That is not what the trial should have been about. As a result of the undue prejudice from the admission of all of this evidence, the Court should refuse to enter the Proposed Order and instead grant Lack's a new trial.

C. Admission of Lack's gross sales data constitutes reversible error under *Branham* and *Sulton*.

During the actual damages phase, Plaintiff prevailed upon the Court to allow the introduction of evidence of Lack's gross sales data for 2018. Plaintiff first sought to introduce sales data from the date of the incident, to which Lack's counsel objected and the Court overruled. (Tr. 387:12-24.) Plaintiff's counsel then introduced Lack's sales tax filing from 2018 into evidence. Plaintiff questioned George Lack about Lack's gross sales data for the entire months of July, August, and September 2018. Lack's counsel objected to any of the data being introduced, arguing:

July and September. Those are not relevant to anything that happened in August. Again, I'm still objecting overall on the financial data and gross sales. That's more of an argument for punitives. The issue simply was the financials, what was happening on August 24, you know, showing that there was financial activity. I understand your ruling there, but when we get outside of August 23 [sic], you're just throwing numbers in front of the jury.

(Tr. 391:17-24.) After the exhibit was admitted over objection, Plaintiff's counsel proceeded to cross-examine George Lack about the filing's notation of Lack's total gross revenues for fiscal year 2018, which were of \$1,520,918. (Tr. 394:10:15.)

Therefore, the jury heard testimony about all of this data and had the tax filing as an exhibit in evidence. This financial information would not have been relevant *even during the punitive damages phase*. As the Supreme Court explained in *Branham v. Ford Motor Co.*, 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010) in reversing a multi-million verdict and ordering a new trial, the wealth of a defendant is a relevant factor in assessing punitive damages, but only "evidence of net worth and extrapolations from net worth may be introduced on the issue." *Id.* Moreover, *even as to net worth evidence*, the *Branham* Court warned, such evidence must be handled cautiously, since "the presentation of evidence of a defendant's net worth creates the potential that juries will

use their verdicts to express biases against big businesses, particularly those without strong local presences.” *Id.* Here, the Plaintiff prevailed upon this Court to allow it to introduce gross revenue evidence during the liability/actual damages phase. Such evidence, per *Branham*, would have been improper to admit and would have mandated a new trial *even* if introduced *only* in the punitive damages phase. *Branham* thus compels a new trial ruling here.

In *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420–21, 734 S.E.2d 641, 646 (2012), the Supreme Court reversed a multi-million verdict and ordered a new trial where similarly inappropriate evidence was admitted. In that matter, the trial court permitted the jury to hear evidence of a corporation’s net operating revenue. The court explained that this was improper under *Branham* and the “prejudicial effect of doing so [wa]s self-evident” since “[n]et revenue has no necessary relation to net worth.” *Id.* Putting the large sum of money in the minds of the jury “reflecting the company’s net income but accounting for none of its expenses and obligations, was almost certainly misleading.” *Id.* *Sulton* thus also compels a new trial ruling here from this Court.

Where, as here, the entire theme of Plaintiff’s case was that the defendant prioritized profits over safety, the improper impact of such improper evidence can be predicted but is certainly also confirmed by the excessive verdict award here. Plaintiff’s counsel referred to Lack’s as being a “for-profit” on no less than *thirteen* times across his opening statement and closing arguments, driving home the fundamental tainting of the jury by this evidence. (Tr. 95:14, 18; 96:6; 97:18; 883:16, 892:6, 893:21, 897:12, 899:10, 16, 904:3, 905:25, 922:15.)¹⁰

¹⁰ The Proposed Order’s finding that Lack’s “never once objected” to this information being introduced and thus waived this issue is inaccurate, as detailed above. Lack’s raised a contemporaneous objection to the data’s admission at the time it was offered and was overruled, which preserved the issue.

Nevertheless, the Proposed Order erroneously finds that the gross sales revenue information was appropriately admitted into evidence. First, it notes that the sales data was probative to generally show how often Lacks' lifeguards engaged in commercial duties. Again though, this is not relevant in any way as to whether the relevant lifeguards were engaged in such activities at the time of the Wolde incident such that they could not perform their duties. Moreover, contrary to Plaintiff's suggestion, the sales evidence was not "limited in scope"—the jury heard the gross sales revenue for the *entire 2018 year*.

The Proposed Order then finds that the evidence was not prejudicial. First, it states that the data were public records. Although this may have been sufficient to establish foundation and/or a hearsay exception, it had no bearing on whether they were *relevant* or whether its *probative value outweighed their prejudice* as required by Rules 401 and 403, SCRE.

The Proposed Order then concludes that the data was not prejudicial because it only gross sales and was not an indicator of Lack's financial position. However, as detailed above, this is precisely the danger behind such evidence because it gave the jury a false impression about the company's financial state, which is what *Branham* and *Sulton* cautioned against. The Proposed Order's discussion of *Branham* and *Sulton* focuses on isolated facts from those cases and fails to address their clear holding that *only* evidence of net worth is appropriate and *only* at the punitive damages stage.

Furthermore, although the Proposed Order does not make findings to this effect, Plaintiff's response memo raised several additional arguments that should not form a basis of the Court's order. First, Plaintiff contended that the data was relevant to show "consideration" for Lack's legal obligation to provide effective lifeguard protection. However, the consideration for the contractual arrangement between Lack's and the City of Myrtle Beach is irrelevant to Plaintiff's negligence

action. Further, Plaintiff did not offer this justification as a basis for admitting the evidence at trial. In addition, Lack's has never disputed that it was permitted under the Franchise Agreement to rent certain beach equipment in addition to providing lifeguard protection. It appears the only true purpose this evidence served was to poison the well with the jury and further Plaintiff's "profits over safety" theme.

Plaintiff's brief also asserted that the sales data was appropriate to show that Lack's failed to deliver on its obligations to provide effective lifeguard services. This argument proves too much. If this argument were correct, a Plaintiff could always show exactly the kinds of evidence that cases like *Branham* forbid—namely, that a business spent too much time and money on one item and not enough time and money on another item—the undue prejudice emanating from this evidence far outweighs any probative value of such a point. The mere fact that Lack's made sales of beach equipment rentals does not mean that Lack's could not provide lifeguard services or that it was negligent.

Finally, Plaintiff's brief argued that the data was relevant to show a "safer alternative," meaning that Lack's could have hired additional lifeguards and employees designed to work solely as beach attendants. Again, however, Plaintiff did not need to present the jury with financial data in order to establish this point, and any probative value of the evidence in this regard was far outweighed by the unfair and undue prejudice of such evidence. A portion of the testimony quoted in Plaintiff's response brief demonstrates why this information was not relevant. On cross-examination the following exchange occurred between Plaintiff's counsel and George Lack:

Q Okay. While Madam Court Reporter is marking those for identification purposes, there is another way to perform lifeguard services and beach concessions on Myrtle Beach, isn't there?

A I'm sure there could be several different ways.

Q For example, the beach attendants could wear a blue shirt, couldn't say?

A Yes, sir.

Q And they would only be in charge of and responsible for the task of beach rentals; isn't that true, sir?

A Yes, sir.

Q And lifeguards could wear the yellow shirt; isn't that true, sir?

A Yes, sir.

Q And then the lifeguard's sole responsibility would be to perform water observation; isn't that right, sir?

A Yes, sir.

(Tr. 310:6-19.) This testimony was elicited without reference to any financial revenue data. Again, presenting the jury with the financial data was unnecessary and served no purpose aside from prejudicing the jury.

As Lack's post-trial motions detailed, admission of evidence of this kind was reversible error under *Branham* and *Sulton* and thus the Court should order a new trial. While it is without question true that evidentiary matters are matters largely within the discretion of the trial judge, this type of evidence has been specifically declared out of bounds by the South Carolina Supreme Court twice in other multi-million verdict matters. Plaintiff should not have pressed for the admission of this unduly prejudicial evidence, and its admission has now led to yet another excessive verdict result. Hence, this Court should decline to enter the Proposed Order and instead order a new trial.

IV. The Proposed Order erroneously finds that the survival claim was appropriately submitted to the jury.

Lack's should be granted JNOV as to the survival claim because there was no reliable evidence of any conscious pain and suffering. "Conscious" is defined as: "having mental faculties not dulled by sleep, faintness, or stupor" and "perceiving, apprehending, or noticing *with a degree of controlled thought or observation.*" Merriam-Webster, Online Dictionary (last visited Sept. 9, 2022), <https://www.merriam-webster.com/dictionary/conscious>. As the District of South Carolina

has explained, under South Carolina law a survival claim “requires that the deceased consciously endure pain and suffering,” and where the evidence “does not demonstrate that the decedent had time to consciously perceive the means of his death, much less consciously suffer pain,” the claim fails. *Hoskins v. King*, 676 F. Supp. 2d 441, 451 (D.S.C. 2009).

The Proposed Order cites the testimony of Wolde’s son and daughter and bystander Chandler. However, the only testimony supporting *consciousness* came from Wolde’s daughter Wubit. On direct examination, she testified about her father gasping and struggling in the water. However, on cross examination, she conceded this was not consistent with her deposition and, in fact, she did not actually remember what happened. Specifically, she testified:

Q But everybody was yelling?

A Yes.

Q And you don’t know how long that lasted, do you?

A No.

Q I mean, you can’t provide any estimate for that, can you?

A No. I mean...

Q And so, at some point, do you know how everything stopped?

A Not exactly.

Q Is it the -- your testimony that you were yelling and, then, really the next thing you knew is you were standing on your feet?

A I don’t remember anything in between that.

Q Okay. You don’t remember anything from the time you were yelling -- from the time the yelling started to the time you were on your feet on the water; is that right?

MR. PRACHT: Objection, Your Honor. Mischaracterizes her testimony.

THE COURT: Rephrase, if you would, please.

BY MR. THOMPSON:

Q Wubit, I thought I just heard you. You didn’t hear anything or remember anything from the time the yelling started until the time that you could stand; is that correct?

A Yes.

Q Okay. And you don’t know how much time passed from the time the yelling started to the time that you could stand?

A I don’t know exactly.

Q Well, you can’t provide an estimate at all, can you?

A Well, I did.

Q I'm sorry?

A I did give an estimate.

Q If you'll turn to page 61. All right. Starting at line 12.

A Mm-hmm.

Q The question: "So you and your dad and brother got in trouble. You called for help. And then the next thing you realize or remember is that you could stand in knee-deep water?"

A "Yes."

Q Your answer?

A "Yes. I don't remember it. I just remember yelling for help and that I think I don't know how we got out of it, honestly, but I just remember that, eventually, we were at the shore, and I was walking towards the shore."

Q "Do you know about how long all of that lasted?"

A "No."

Q Okay. And does that help refresh your recollection?

A Yes.

(Tr. 603:24-605:21.)

Wolde's son acknowledged during cross-examination that he did not actually see what happened with his father and sister:

Q And so, then, at some point, there was -- your sister and you and your father were yelling?

A Yes.

Q You don't know how long that was?

A No.

Q You have no clue, do you?

A I don't remember.

Q And you don't know how far away you were from the beach at that point, do you?

A No.

Q Now, at some point, you decided to swim sideways?

A Yes.

Q How did you know to do that?

A It was just instinct. When swimming straight didn't work, supposed to swim to the left.

Q Did you tell your father to swim to the side?

A Yes. I said, "Calm down, follow me."

Q And then you swam to the side, and the pulling sensation was over?

A Yeah.

Q And then you were able to swim towards shore?

A Correct.

Q And when you got to shore, that's when you ran to your mother; is that right?

A Yes.

Q And you didn't ever see what happened to your father and your sister?

A No.

(Tr. 567:1-568:3.)

Finally, none of the testimony from Chandler supported that Wolde was conscious when he was pulled from the water. In fact, Chandler testified as follows:

Q. So the first time that you saw the individual that was being brought to the edge of the beach, that person was unconscious, correct?

A. Correct, sir.

(*Id.* 61:24-62:2 (emphasis added).)¹¹

The Proposed Order then cites the coroner's report as evidence of Wolde's conscious pain and suffering. However, the report merely stated that Wolde's cause of death was asphyxiation, which the deputy coroner testified means a lack of oxygen. (Tr. 466:5-10.) It did not describe the drowning process or what a victim experiences and, of course, did not detail any specifics about what happened in this particular case. Therefore, it is not a proper underpinning for the survival claim either.

Finally, although the Proposed Order does not rely on this, Plaintiff's response brief cited the Wikipedia definition of "waterboarding" as support for what Wolde experienced and analogized it to "torture." This, of course, was not part of the evidence at trial and does not offer any *evidentiary* support for Plaintiff's survival claim.

¹¹ The other bystander, Julian Bender, also stated that Wolde was unconscious. (Tr. 212:13-14.) As did Lack's manager Patrick Flaherty, who testified that he never saw Wolde conscious, could not get a pulse, and did not know of anyone who saw him conscious. (Tr. 709:14-21.)

As the testimony excerpts quoted above support, Plaintiff offered no evidence supporting Wolde's conscious pain and suffering aside from the testimony from Wubit, which she directly recanted on cross-examination. No other testimony or evidence supported consciousness, much less conscious pain and suffering. Therefore, Plaintiff did not sufficiently establish a jury question on this claim. *See Rutland v. S.C. Dep't of Transportation*, 390 S.C. 78, 84, 700 S.E.2d 451, 454 (Ct. App. 2010), *aff'd as modified sub nom. Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012) (finding that the record did not support conscious pain and suffering where the decedent did not respond to being called by name and did not make any noises despite her having a pulse); *see also Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944) (holding the evidence failed to show an accident victim was conscious of pain and suffering where one witness heard the victim groan and the other witnesses saw no signs of life). Therefore, this claim should not have been permitted to go to the jury.

Additionally, the survival claim also lacked sufficient proof because Plaintiff failed to present expert testimony about what occurs when a person experiences drowning. As Lack's argued in its motions for JNOV and New Trial Absolute, jurisdictions that have permitted conscious pain and suffering to be submitted to the jury have typically done so where there was expert testimony about the drowning process. (*See* Mot. for JNOV pp. 3-5; Mot. for New Trial Absolute pp. 7-9.) Here, Plaintiff did not produce any expert testimony to provide the Court or the jury with any guidance as to what constitutes the drowning process, the amount of time involved and, most importantly, what the drowning victim might be expected to experience from a scientific, pathophysiological perspective during the drowning process.

The need for expert testimony was particularly acute in this matter since South Carolina has never adopted "pre-impact fear" as an element of recoverable damages. *See Rutland v. South*

Carolina Dept. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012). If the drowning process starts after submersion, then the pre-submersion struggles would be considered “pre-drowning” fear and, like “pre-impact fear”, should not be considered a recoverable element of damage.

For all these reasons, the lack of sufficient proof supporting the survival claim warranted directed verdict in Lack’s favor and now supports JNOV. The Court should reject the Proposed Order’s conclusions and grant JNOV in Lack’s favor on the survival claim.

V. The Proposed Order improperly refuses to grant a new trial on the survival claim due in light of the excessiveness of the jury’s award.

The verdict was shockingly and grossly excessive, as detailed below and in Section VI. The survival award, the wrongful death award, and the punitive damages award were all excessive and driven by the jury’s passion and prejudice. Therefore, South Carolina law requires a new trial and it would be reversible error to deny a new trial in this circumstance. The Court should decline to adopt the Proposed Order as a result. Moreover, even if the Court disagrees regarding a new trial absolute, it should find that the award was unduly liberal at a minimum and reduce the total compensatory damages to a maximum \$1 million and the punitive damages award reduced accordingly to a maximum of \$1 million in accordance with the constitutional 1:1 ratio.¹²

A. The jury misunderstood the Court’s proper instruction on evaluating survival damages.

The Proposed Order explains away this critical issue by finding that Lack’s did not object to the Court’s jury instructions and thus waived any argument about the misapplication of the mortality tables. This mischaracterizes Lack’s argument. Lack’s is not contending that the Court gave an incorrect or confusing instruction regarding the use of mortality tables. Rather, Lack’s

¹² As Lack’s contended in its conditional motion to reduce the judgment, the entirety of the compensatory damages award should be capped at \$300,000 pursuant to the South Carolina Tort Claims Act. Moreover, the punitive damages award should be remitted to \$0.

argument is that the jury was told the Court's proper instructions, yet it misapplied them in an erroneous way.

The Court correctly informed the jury that the mortality tables should be taken into consideration when looking at the amount of damages for wrongful death. The Court also correctly charged the jury on assessing damages for the survival claim without reference to the mortality tables. As Lack's contended and the Court's charges supported, the mortality table is entirely irrelevant to assessing the pain and suffering Wolde may have endured prior to death.

Nevertheless, the jury clearly relied on the table in arriving at its award. Wolde's life remaining expectancy was 37.3 years, and the jury's survival damages award was \$3,730,000—in other words, \$100,000 for each remaining year of his life expectancy. The verdict, therefore, was not tied to the pain and suffering Wolde experienced as was required by law for the survival claim. (*See* Jury Charge, Tr. 937:20 (explaining that the jury may award damages for conscious pain and suffering if it found “by a preponderance of the evidence that the plaintiff has presented sufficient proof that Mr. Wolde was conscious and simultaneously suffering prior to his death”).). This verdict is thus a reflection of juror disobedience of the Court's instructions, and warrants a new trial.

B. The survival damages award was excessive and demonstrated the jury's motivations of passion and prejudice.

The Proposed Order does not discuss Lack's extensive survey of awards for conscious pain and suffering in other drowning cases demonstrates the outlier nature of this verdict. *See, e.g., Jutzi-Johnson v. United States*, 263 F.3d 753, 760-61 7th Cir. 2001) (collecting cases and noting that an appropriate award for a claim involving an allegation of asphyxiation would have been in the \$15,000 (\$25,108.14 adjusted for inflation) to \$150,000 (\$251,081.36 adjusted for inflation) range of prior awards in drowning cases); *Trinh ex rel. Tran v. Dufrene Boats, Inc.*, 6 So. 3d 830,

844–45 (La. Ct. App. 2009) (finding that award of \$15,000 (\$20,715.03 adjusted for inflation) was appropriate and rejecting Plaintiff's request to increase it to \$100,000); *Dontas v. City of New York*, 183 A.D.2d 868, 869, 584 N.Y.S.2d 134, 135-36 (1992) (remitting \$2 million award for conscious pain and suffering to \$50,000 (\$105,586.60 adjusted for inflation), noting that although the evidence supported that a drowning victim experiences conscious pain and suffering, the award was excessive “in view of the fact that the experts from both sides indicated that a drowning victim would lose consciousness in just a few minutes”); *Landreth v. Reed*, 570 S.W.2d 486, 492-93 (Tex. Civ. App. 1978) (finding jury's \$65,000 award to be excessive and reducing it to \$30,000 (\$136,323.31 adjusted for inflation) where expert testimony stated that the drowning victim would have remained conscious and suffered pain for approximately two minutes, noting there was “no precedent for an award as large as that made here for so short a period of suffering”).

In fact, in a recent case the Kentucky Supreme Court affirmed an award of \$0 for conscious pain and suffering despite the Plaintiff's presentation of expert testimony as to what a drowning victim experiences. *See Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508, 518 (Ky. 2021). Even though Plaintiff's expert testified that drowning victims suffer great pain while they are conscious and the jury saw surveillance video of the decedent's death, the court noted that pain and suffering damages are not presumed in wrongful death cases. *Id.*

The amount of the award here demonstrates that the jury was motivated by passion, caprice, or prejudice rather than the record evidence regarding pain and suffering damages. The verdict amount far exceeds the other drowning case award discussed above. Accordingly, a new trial is warranted.

Furthermore, as the Court of Appeals has explained, although a jury's assessment of pain and suffering is entitled to substantial deference, this deference “does not abrogate the authority

of the trial court to grant a new trial *nisi* upon finding ‘the amount of the verdict to be merely inadequate or excessive.’ *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 638–39, 529 S.E.2d 758, 763 (Ct. App. 2000). Here, the excessive nature of the award requires a new trial *nisi remittitur* at a minimum. As Lack’s noted in its motion, it maintains that the survival action should not have been submitted to the jury. However, even if the Court refuses to order a new trial absolute or vacate the survival award, it should consider the very limited evidence and testimony supporting alleged conscious pain and suffering of a short duration to a sum no greater than \$300,000.

The Proposed Order’s reliance on *Smalls v. S.C. Dep’t of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000) to support the award is misplaced. *Smalls* involved a vehicle hitting a child, not a drowning. Moreover, there was conflicting testimony from the child’s father who said that she was unconscious when he found her but also that the child was gasping and moaning at the scene. *Id.* The daughter lived for three additional days and the father testified that he spoke with his daughter while she was at the hospital and she moved her fingers. *Id.* The court noted that while the evidence was “somewhat contradictory,” this was enough to submit the survival claim to the jury.

Therefore, for all these reasons, the Court should refuse to adopt the Proposed Order and grant a new trial or, failing that, a new trial *nisi remittitur* on the survival claim. The jury’s award on the survival claim was motivated by passion and prejudice and was not “reasonable, measured, and supported by the evidence and testimony” as the Proposed Order erroneously finds.

VI. The Proposed Order permits one of the largest wrongful death verdicts in South Carolina history to stand.

The excessiveness of the wrongful death award further evidences that the jury’s passion and prejudice motivated the award. Lack’s has extensively reviewed the publicly available data on jury verdicts under South Carolina law and identified the largest wrongful death verdicts that

were either affirmed on appeal or satisfied post-trial. Verdicts that were obtained against judgment proof defendants, arose in a default posture, or later settled post-trial for undisclosed amounts were removed from the analysis.¹³ Collecting the top twelve such verdicts and adjusting for inflation, this would be the fifth largest wrongful death verdict in South Carolina history:

Name	Amount of WD Damages	Year	Case Type	Subsequent Developments	Final Total	Adjusted for Inflation
Steinke v. Beach Bungee, Inc., 105 F.3d 192, 194 (4th Cir. 1997) (applying SC law)	12,000,000	1995	Premises liability	Remitted, then affirmed	6,000,000	11,664,409
Reeves v. Town of Cottageville, No. 2:12-cv-02765-DCN (DSC)	7,500,000	2015	1983/Shooting	Settled post-trial with 8,600,000 allocated to WD.	8,600,000	10,750,172
McCallister v. S.C. Dep't of Transp., No. 2001-CP-42-1939 (S.C. Ct. Comm. Pl.)	6,700,000	2009	Motor vehicle	Satisfied	6,700,000	10,788,911
Cornett v. USA, 2:99-cv-00243 (Mar. 12, 2001)	6,300,000	2001	Boating accident	Affirmed on appeal	6,000,000	10,043,254
Huff v. XPO, No. 2:15-cv-01254-BHH (DSC)	7,000,000	2018	Motor Vehicle	Satisfied	7,000,000	8,259,156
Williams ex rel. Estate of Williams v. CSX Transp., Inc., No. 2007-MO-001, 2007 WL 8434527, at *1 (S.C. Jan. 2, 2007)	4,500,000	2009	Motor vehicle	Affirmed on appeal	4,500,000	7,245,880
Keene v. CNA Holdings, LLC, 436 S.C. 1, 870 S.E.2d 156 (2021)	5,000,000	2015	Asbestos	Affirmed on appeal	5,000,000	6,250,100
Burroughs v. Worsham, No. 1998-CP-23-1280	3,500,000	2000	Medmal	Affirmed on appeal	3,500,000	6,021,870
Cross v. XPO, No. 2:15-cv-02480-BHH (DSC)	5,000,000	2018	Motor vehicle	Satisfied	5,000,000	5,899,397
McKissick v. Jarrell, No. 2015-CP-10-02514 (S.C. Ct. Comm. Pl.)	3,750,000	2017	Dram shop/ motor vehicle	Fast-track jury trial meaning verdict automatically stood	3,750,000	4,532,617
Jackson v. Pettit, No. 2017-CP-10-00989 (S.C. Ct. Comm. Pl.)	3,718,000	2018	Motor vehicle	Satisfied	3,718,000	4,386,792
Bannister v. Columbia Urological, No. 2015-CP-40-04794 (S.C. Ct. Comm. Pl.)	10,000,000	2017	Medmal	Settled post-trial with 3,375,000 allocated to WD.	3,375,000	4,079,355

This data, therefore, demonstrates the stark outlier nature of this verdict and supports that it was motivated by the jury's passion, prejudice, and desire to punish Lack's rather than the record evidence. Lack's does not dispute that Mr. Wolde's loss was tragic for his family, but the verdict must nevertheless be appropriate and justified by the record evidence.

The jury's improper motive was further demonstrated by the fact that the jury returned a verdict even higher than what Plaintiff's counsel suggested at trial. In closing, counsel argued that a fair assessment of damages might be \$10 per hour for 15 hours per day for the remaining life expectancy of Wolde, which resulted in a yearly rate of \$54,750. Multiplying that total by the

¹³ The Proposed Order's statement that Lack's has "cherry picked" examples is incorrect. As detailed above, Lack's engaged in extensive research to identify all of the largest judgments that stood following appellate review or the defendants' acceptance of the outcome and were actually collectible. A \$20 million award for wrongful death damages against a judgment proof defendant who is either in default or does not appeal is of little usefulness to evaluating whether the wrongful death verdict in this case is excessive under South Carolina law. Likewise for a verdict that was settled on undisclosed terms (meaning almost certainly for a lesser amount) following trial.

approximately 37 years of life expectancy gave an amount of \$2.025 million, which counsel then multiplied by four for each of the children, arriving at a total of \$8.1 million. The jury's verdict, however, came in \$1.9 million dollars *higher* than even what Plaintiff's counsel suggested (which presumably was what he believed to be a best-case scenario).

For all these reasons, the jury's award was based on improper considerations and a new trial absolute is warranted. The jury verdict was excessive and should shock the conscience of the court, and thus a new trial absolute must be ordered. This also supports the Court's exercise of its discretion under the thirteenth juror doctrine.

Failing that, the Court should grant a new trial *nisi remittitur*. As Lack's argued in its motion for a new trial *nisi remittitur*, if the Court does not grant JNOV or a new trial absolute, the total compensatory damages award should be remitted to \$1 million, with a maximum of \$300,000 allocated to the survival claim.

The Court should decline to adopt the Proposed Order and grant the relief requested by Lack's in its post-trial motions.

VII. The Proposed Order improperly refuses to grant Lack's a new trial on punitive damages despite the jury basing its excessive award on improper evidence and motivations of passion and prejudice.

A. Lack's is entitled to JNOV or a new trial absolute on punitive damages.

As detailed in the motion briefing and herein, Lack's should have received a directed verdict on liability and is now entitled to JNOV. If the Court agrees, that would necessarily encompass the punitive damages award.

However, even if the Court disagrees with Lack's arguments as to liability and actual damages, the evidence did not support any genuine issue of fact on punitive damages. As Lack's has shown, Plaintiff's case was premised entirely on circumstantial evidence of alleged omissions

which they assert could have *potentially* changed the outcome of an accident. Plaintiff has not identified any willful, wanton, or reckless action by Lack's. Moreover, they did not provide any evidence that, had the alleged omissions not occurred, the result would have been any different. Therefore, the Court should grant JNOV in Lack's favor on the punitive damages claim or, at a minimum, a new trial.

Nevertheless, the Proposed Order finds that there was sufficient support for punitive damages because of Lack's "intentional disregard" of the known standard of care for 10 years, citing the issues with the USLA and the decertification. However, as detailed above, USLA certification was not required and the City of Myrtle Beach was aware of and approved Lack's business operations and training requirements.

The Proposed Order then finds that punitive damages were appropriate because Lack's should have closed the beach and ignored warnings. However, again, the National Weather Service report did not require closure. Moreover, it did not warn of the specific rip current that Wolde got caught in or any other rip current. It merely established that there were *potential* hazards warranting caution. As Lack's manager Randall Smith testified:

Q And these water conditions, where it says, "Rip Current Activity," it says, "strong." What does that mean?

A That means there's a possibility for strong rip currents because of the longshore current, the wind and condition, and depends on if it was low tide or high tide. It's an assessment we make in the meetings in the morning, and George stayed in contact with the National Weather Service and also Libor, 115, and he would be in on that discussion, and we would make a decision to go to single red flag due to the strong possibility of rip currents.

Q And so when you say "strong," I mean, you're not looking into the ocean at every lifeguard stand to say the rip current activities at every lifeguard stand, are you?

A No. That would be impossible. They come and go and open up in different spots, so that would be the whole beach.

(Tr. 711:6-21.) On the day of the incident, visibility was good and the weather was fine. (Tr. 726:22-727:21.) However, with the rougher water, it was harder to see swimmers. (*Id.*) Therefore, Lack's made the decision to post single red flags to warn beachgoers and ensure that the guards kept swimmers waist deep as a preventative measure. (*Id.*) Lack's took appropriate measures based on the conditions that day.

Therefore, for all these reasons, the Court should refuse to enter the Proposed Order and should grant JNOV on punitive damages.

B. The Proposed Order incorrectly finds that Lack's waived its argument that the jury was improperly permitted to find recklessness in the first phase.

At trial, Lack's argued that the Court must provide *context* to the jury if it intended to permit them to make a finding of recklessness in the first phase. (Tr. 845:25-846:14.) Counsel further asserted that if the Court intended to use Plaintiff's verdict form which included a question regarding recklessness, the jury needed to be informed that there would be further proceedings or additional deliberations if they marked yes. (Tr. 868:17-23.) As defense counsel explained, having the jury answer yes or no to that question without context was improper. (*Id.* at 838:24-869:2.) The argument in Lack's post-trial motions that the jury should not have been permitted to make a finding of recklessness in the first phase under the punitive damages statute aligns with the argument at trial. Since the Court opted to proceed in that manner, it should have provided the jury with the necessary context at the very minimum as defense counsel argued.

Lack's, therefore, preserved its argument as to the Court's error in handling the bifurcation. Once the Court disagreed with Lack's position and adopted Plaintiff's verdict form, Lack's argument was preserved for the record. *See State v. Jones*, 435 S.C. 138, 144–45, 866 S.E.2d 558, 561 (2021), reh'g denied (Feb. 3, 2022) (“[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely

foster a game of ‘gotcha,’ where form is elevated over substance.”). The Proposed Order’s finding to the contrary is incorrect.

The Proposed Order then inaccurately concludes that evidence of recklessness was appropriate in the first phase. 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).

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 Lack’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. 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.

Therefore, the Court's failure to explain the context and meaning to the jury of recklessness in the first phase finding was error. The Court should thus decline to enter the Proposed Order and grant a new trial.

C. Lack's is entitled to a new trial on punitive damages.

As detailed above in Section VII.A, Lack's is entitled to a JNOV or, failing that, a new trial absolute on punitive damages. As Lack's detailed in its briefing, the jury's decision to award \$7 million in punitive damages on top of \$13.37 million in actual damages despite having knowledge of Lack's net worth and that the actual damages were far in excess of the available insurance coverage shows their improper motivations. Specifically, the improperly admitted evidence caused the jury to be motivated by passion, prejudice, and sympathy for the Plaintiff due to Plaintiff's character assassination of George Lack and presentation of Lack's as being solely motivated by profit. The jury's significant award despite hearing evidence that Lack's had a negative net worth in 2018 drives home its improper motivations. Despite hearing testimony that Lack's had a negative \$473,350.51 net worth in 2018 and available insurance coverage of only \$3 million, (Tr. 962:3-22), the jury returned an award of \$7 million on top of the actual damages award exceeding \$13 million—a total number reflecting the jury's intention to destroy Lack's as a going concern. Punitive damages are not designed to bankrupt defendants.¹⁴ *See, e.g., Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 106 (D.S.C. 1979) (“[I]t is

¹⁴ The portion of the jury charge quoted in the Proposed Order reinforces this point. The italicized statement that the potential effect of economic bankruptcy is not an “absolute bar” to an award of punitive damages simply means that the jury is not prohibited from awarding punitive damages in this situation. However, it does not mean that the jury can be *motivated* by a desire to bankrupt the defendant.

well-known that the purpose of punitives is not to “bankrupt” a defendant, but simply to deter him and others from similar conduct in the future. Thus the extent of the defendant’s wealth constitutes a limit on the amount of damages which can be awarded. (citations omitted)); *In re Thomas*, 254 B.R. 879, 886 (D.S.C. 1999) (explaining that any punitive damages award “must not effect economic bankruptcy”); *see also State Farm Mut. Auto. Ins. Co. v. Brewer*, 191 So. 3d 508, 511 (Fla. Dist. Ct. App. 2016) (“[A]n award of punitive damages that bankrupts or financially devastates the defendant is unconstitutionally excessive.”).

Finally, the Proposed Order’s finding that the punitive award was “per se” reasonable because it was less than three times the amount of actual damages finds no footing in South Carolina law. “Per se reasonableness” is not a recognized legal doctrine. Rather, juries and the Court are tasked with ensuring that the damages award is supported by the record evidence and proper considerations. As detailed above, here it was not. Therefore, the Court should decline to adopt the Proposed Order and grant a new trial to Lack’s.

C. Lack’s incorporates by reference the arguments in its Motion to Reconsider the Court’s Order on Post-judgment Review of Punitive Damages.

As the Proposed Order states, the Court has entered a separate order detailing its due process review of the punitive damages award. Lack’s filed a Motion to Reconsider which raises several errors with the Court’s post-judgment review of the punitive damages award. Lack’s incorporates and asserts the due process arguments raised in its post-trial briefing (regarding applicability of the *Mitchell* and *Gamble* factors as well as the statutory factors from the punitive damages statute) and its Motion to Reconsider herein in full.

VIII. The Proposed Order does not address Lack's arguments regarding the applicability of the South Carolina Tort Claims Act.

Finally, the Proposed Order does not address Lack's arguments concerning the applicability of the caps of the South Carolina Tort Claims Act ("SCTCA") and Lack's incorporates those arguments by reference in full and requests that the Court rule on those arguments in any final order.

A. 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).

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

The City of Myrtle Beach Code of Ordinances further delegate governmental power to Lack’s. 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 Lack’s, which were validly approved by the City. Plaintiff also advanced a theory and made a liability argument that Lack’s should have closed the entire beach due to conditions. Lack’s refuted these theories and arguments at trial, and many 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 Lacks. As a result, the doctrine of derivative sovereign immunity applies. The City of Myrtle Beach both authorized Lack’s actions and validly conferred the authorization to Lack’s. The Court’s order should address this argument and find in Lack’s favor.

II. The S.C. Tort Claims Act caps limit Lack’s liability to \$300,000 total.

Because Lack’s 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 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. Lack’s was not required to plead the applicability of the caps. As a result, Lack’s liability is limited to \$300,000 total in actual damages—for both the wrongful death and survival claims combined, as the Act cap is for the loss arising from a single occurrence—and \$0 in punitive damages as expressly stated by the Code. The Court’s order should find accordingly.

B. Plaintiff's arguments in her response to Lack's conditional motion are unavailing.

1. Lack's did not waive this issue.

Plaintiff first argues that Lack's waived this issue. *Campbell* and *Parker*, discussed above, are dispositive of this question and establish that no waiver occurred. Additionally, Plaintiff cannot seriously claim that she was not on notice of the potential applicability of the South Carolina Tort Claims Act considering she sued the City of Myrtle Beach and the limitations of the SCTCA were critical components of its defense. (*See City of Myrtle Beach Ans.* ¶ 45; *City of Myrtle Beach Mot. for Summ. J.* pp. 3-10.)

2. Plaintiff's statutory language argument is without merit.

Next, Plaintiff argues that the statutory language weighs against Lack's argument. However, this is a unique situation where a governmental entity expressly delegated its sovereign powers, including its discretionary decision-making, to a private party. This lending of discretion warrants recognition and application of derivative sovereign immunity in this limited context where the government has entirely outsourced its oversight of beach safety.

As Plaintiff correctly notes, the SCTCA provides that it is the "*exclusive* civil remedy available for *any tort committed by a governmental entity, its employees, or its agents.*" S.C. Code Ann. § 15-78-20 (emphasis added). Plaintiff contends that a separate subsection's definition of "agency" is what the term "agents" is meant to reference. Aside from the obvious fact that these are different words with different meanings, the statutory definition of "agency" expressly details the types of *governmental entities* that are covered under the TCA. *See generally* § 15-78-30. Plaintiff's interpretation would render the reference to "agents" superfluous. When interpreting a statute, the Court must, of course, presume the legislature did not intend such a futile act. *See*

Duke Power Co. v. Laurens Elec. Co-op., Inc., 344 S.C. 101, 106, 543 S.E.2d 560, 563 (Ct. App. 2000).

An agent is defined as “someone who is authorized to act for or in place of another; a representative.” *Certus Bank, N.A. v. Bennett*, No. 2014-001248, 2016 WL 757501, at *2 (S.C. Ct. App. Feb. 24, 2016) (quoting Black’s Law Dictionary). This concept is what the statute is attempting to capture and demonstrates why the SCTCA extends to Lack’s under these facts.

A central component of Plaintiff’s negligence claim was that Lack’s breached the standard of care because it had the discretionary authority to close the beach and failed to exercise that authority on the day of the incident. For example, Plaintiff’s consolidated response brief to Lack’s motions for JNOV, new trial, and new trial nisi remittitur contended:

- “Third, testimony at trial established Lack’s failure to close the beach when presented with a known hazard of rip and longshore currents was a breach of the standard of care, and one which cost Mr. Wolde his life.” (Plft Resp. at 20).
- “This tragic drowning occurred because Lack’s failed to close the beach, failed to provide adequate warning, and none of Lack’s improperly trained “lifeguards” provided any rescue efforts or assistance at any time.” (*Id.* at 43).
- “In addition, Lack’s was further on notice by the National Weather Service that hazardous rip and longshore currents posed a dangerous threat to the safety of beachgoers, yet Lack’s failed to close the beach and failed even to warn beachgoers of the hidden threat posed by these dangerous conditions.” (*Id.* at 52)

Here, the City of Myrtle Beach expressly delegated its discretionary power over beach safety to Lack’s. The South Carolina Code permits municipalities to provide “lifeguard and other safety related services” either directly or through a private beach safety company. S.C. Code Ann. § 5-7-145(A)-(B). The City of Myrtle Beach opted to provide such services many years ago, and contracted with Lack’s to provide said service. The City of Myrtle Beach’s ordinances then further delegated the City’s discretionary authority over safety to Lack’s, as detailed above.

The concept of derivative sovereign/governmental immunity exists to cover this type of scenario where a governmental entity has entirely outsourced a discretionary power to an agent. *See Federico v. Lincoln Mil. Hous., LLC*, 127 F. Supp. 3d 623, 637 (E.D. Va. 2015) (“Derivative governmental immunity also applies to government contractors who perform a discretionary function within the scope of a valid government contract.”); *see also Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996) (holding that derivative governmental immunity applies “to the extent that this case involves a discretionary governmental function which has been delegated to the private sector”). In this circumstance, “[c]ontractors are protected to the same extent as the Government when they exercise appropriately delegated discretionary power.” *Federico*, 127 F. Supp. 3d at 637. As the Supreme Court explained in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988): “Derivative sovereign immunity exists because the government and its contractors have the same interest in getting the Government’s work done.” *Id.* Hence, “[w]hen acting under valid governmental authority, therefore, a contractor is immunized ‘to the same extent as the Government’ would be if it stood in the contractor’s shoes.” *Ruddell v. Triple Canopy, Inc.*, No. 115CV01331LMBJFA, 2016 WL 4529951, at *5 (E.D. Va. Aug. 29, 2016).

The concept is not restricted to federal law. Several states have recognized the applicability of this concept to state law claims. *See, e.g., Smith v. Rogers Grp., Inc.*, 72 S.W.3d 450, 455–56 (Ark. 2002) (“The doctrine of acquired immunity provides that a contractor who performs in accordance with the terms of its contract with a governmental agency and under the direct supervision of the governmental agency is not liable for damages resulting from that performance.”); *Stewart v. New Jersey Tpk. Auth./Garden State Parkway*, 268 A.3d 346, 354 (N.J. 2022) (“Independent contractors, such as Earle, ‘share to a limited extent the immunity of public entities with whom they contract.’”).

As Lack's contended in its motion, Plaintiff's negligence claim asserting that Lack's improperly failed to close the beach was necessarily premised on the delegated governmental power to provide beach safety services by the City of Myrtle Beach to Lack's. The verdict was a general verdict, meaning this allegation—that the beach should have been closed—formed a basis for the jury's finding that Lack's was liable for Wolde's death. As a result, the doctrine of derivative sovereign immunity applies under these facts. The City of Myrtle Beach both authorized Lack's to oversee beach safety and validly conferred said authorization to Lack's. Therefore, Lack's is entitled to share in the City's immunity and, therefore, the SCTCA caps apply. Lack's might make an incorrect decision about whether to exercise the delegated discretion in closing the beaches, but then the SCTCA caps would apply regarding any resulting tort liability just as it does when the City's discretion is at issue.

3. Lack's conduct did not exceed the scope of its delegated authority.

Plaintiff's final argument is that derivative sovereign immunity does not apply because Lack's failed to comply with requirements of the South Carolina Code and the Franchise Agreement and thus exceeded the confines of its delegated authority.

Plaintiff's assertion that Lack's failed to comply with the statutory requirements are without merit. First, its statement that Lack's was not a "beach safety company" and Lack's lifeguards were merely "beach attendants" is belied by the record. The testimony supported that Lack's lifeguards were primarily tasked with ensuring safety and only engaged in occasional limited commercial activity while continuing to maintain their focus on ensuring safety. Plaintiff's statement that Lack's lifeguards did not receive the training required by the Franchise Agreement is also contradicted by the record. There was ample evidence of the training regimen provided by Lack's and that each lifeguard was required to undergo the training contemplated by the Franchise

Agreement. Finally, the record evidence also conflicts with Plaintiff's statement that Lack's "dual role lifeguarding practices" interfered with the peaceful, recreational use of the beach by the public as required by S.C. Code § 5-7-145. As Lack's contended there was no evidence or testimony supporting that the "dual role" had any relevance to this incident.

Regarding the alleged violations of the Franchise Agreement, the Proposed Order again overlooks the record evidence. First, there was no testimony or evidence supporting that Lack's decades-long business arrangement with the City (whereby lifeguards were permitted to engage in limited commercial activity) was actually forbidden by the Franchise Agreement. To the contrary, the City Manager at the time, John Pedersen, acknowledged that he and City Council were aware of the arrangement. Plaintiff's statement that City Council "rejected" this "dangerous practice" is entirely devoid of *any* evidentiary support. As for the finding of inadequate training, as noted, there was testimony that each Lack's lifeguard received the required training and had the proper certifications. Lastly, while Plaintiff correctly notes that Lack's was one "lifeguard only" short on the day of the Wolde incident, there was no evidence or testimony supporting that having the additional "lifeguard only" (who would have patrolled a large area) on the beach that day would have made any difference on the outcome.

For all these reasons, Plaintiff failed to overcome the clear, express delegation of authority from the City of Myrtle Beach to Lack's, which supports the applicability of derivative sovereign immunity under these unique facts. The Court should consider and rule on Lack's argument in any final order and find that the doctrine applies here.

Conclusion

Lack's maintains that the Court should grant the relief requested in its post-trial motions for the reasons Lack's stated before, during, and after trial. Lack's objects to numerous statements

in Plaintiff's proposed order for the reasons stated in this objection and supplemental memorandum. Lack's asks that the Court reject the Plaintiff's proposed Order.

Respectfully submitted,

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Attorneys for Defendant Lack's Beach Service, Inc.

December 8, 2022

EXHIBIT A

(Plaintiff's proposed order)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
	)	
MESWAET ABEL, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF ZERIHUN WOLDE AND AS	)	
NATURAL PARENT AND LEGAL	)	
GUARDIAN OF ADAM WOLDE AND	)	
WUBIT WOLDE,	)	
	)	<u>ORDER ON POST-TRIAL MOTIONS</u>
Plaintiff,	)	<u>FOR JNOV, NEW TRIAL, AND NEW</u>
v.	)	<u>TRIAL NISI REMITTITUR</u>
	)	
LACK'S BEACH SERVICE, CITY OF	)	
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	

This matter is before this Court on the Post-Trial Motions of Defendant Lack's Beach Service ("Defendant" or "LBS"), pursuant to Rules 50 and 59, SCRCPP, seeking judgment notwithstanding the verdict or, in the alternative, a new trial absolute or a new trial *nisi remittitur*.

After a thorough and careful review of the trial transcript, the briefs submitted by the parties, and the evidence and testimony at trial, this Court finds: (1) the jury's verdict is supported by the evidence; (2) the jury's carefully considered damages awards are fair, proportionate to the injuries suffered, and not the result of any improper impulse, passion, or prejudice; and (3) there was no prejudicial trial event or error to justify post-trial relief. Defendant's Post-Trial Motions are, accordingly, denied.

BACKGROUND

This wrongful death action arises out of the tragic death of Zerihun Wolde, a forty-one-year-old father of four, who drowned at a public beach where Defendant LBS was responsible for providing lifeguard services. Defendant LBS is a beach safety company that contracted with the

City of Myrtle Beach to provide lifeguard protection at the City's public beaches in exchange for the privilege of operating as the sole vendor for beach concessions, such as umbrella and chair rentals, on those same public beaches. Plaintiff Meswaet Abel is the decedent's surviving fiancé and mother to his four young children, Adam, Wubit, Eden, and Edom.

On August 23, 2018, Mr. Wolde and Ms. Abel traveled with their four children from the family's home in Maryland to Myrtle Beach for a summer vacation. After an eight-hour drive, the family arrived in Myrtle Beach. Around 12:00 p.m. on the following day, the family went to the beach and settled in near lifeguard stand L21. As Ms. Abel watched the couple's two youngest children play in the sand, Mr. Wolde took Adam and Wubit to the water's edge to play in the surf. Mr. Wolde was an avid swimmer. Adam and Wubit were also adept swimmers and regularly attended swim lessons.

Once at the water's edge the children began playing and jumping in the waves with their father. According to Adam, they were in water that came up to his waist. They felt comfortable and believed the swimming conditions were safe. However, unbeknownst to the children and Mr. Wolde, LBS had received warnings earlier that day of dangerous swimming conditions due to rip and longshore currents. While playing in the surf, the children began to get pulled out to sea, causing Adam and Wubit to struggle and hang on to their father. According to Adam and Wubit, they were unintentionally getting deeper and deeper. As they got deeper in the water, they became scared. Mr. Wolde and the children began yelling for help. After trying to swim toward the shore, Adam, who was pulled out in front of his father and sister, began swimming to his left. Eventually, he was able to swim out of the rip current and make it back to shore. As Adam approached the beach, Wubit continued to struggle and hold onto her father. Wubit and Mr. Wolde continued to yell and wave their arms for help.

As they struggled, it became obvious to bystanders on the beach that there was a problem. While clinging to her father, Wubit witnessed him begin to go under and then resurface, where he gasped for air and yelled for help. This process of going under, resurfacing, gasping for air and yelling for help went on for a period time. At this point, bystanders entered the water and pulled Mr. Wolde and Wubit to shore. Mr. Wolde was later pronounced dead of asphyxia due to drowning.

Following Mr. Wolde's death, Plaintiff filed suit against LBS,¹ alleging LBS knowingly breached numerous standards of care in operating its beach safety business and that these breaches were a proximate cause of Mr. Wolde's death. Among the breaches alleged was LBS's use of "dual-role" lifeguarding, *i.e.*, the practice of entrusting lifeguards with two conflicting roles: 1) providing lifeguard protection; and 2) transacting sales of beach merchandise and performing related customer service. Plaintiff alleged LBS's unauthorized use of this dual-role practice cost LBS its lifeguard certification in 2007. Since that time, LBS was on notice that dual-role lifeguarding posed a dangerous safety risk to swimmers, yet LBS continued the practice anyway. In addition to other standard of care breaches, Plaintiff also alleged that LBS was required to provide lifeguards that were both tested and certified, yet it failed to do so. Consequently, had LBS complied with beach safety and lifeguard protection standards, the drowning incident that cost Mr. Wolde his life could have been averted.

The case was tried before a jury in Horry County during the week of July 25-29, 2022. At trial, Plaintiff presented evidence and testimony that LBS received a warning from the National Weather Service that hazardous conditions were present on the day of the incident. Despite the National Weather Service warning, LBS presented no witnesses who had any personal knowledge

¹ The City of Myrtle Beach was dismissed prior to trial.

of having provided any warnings or efforts to guard against the dangerous swim conditions present that day. Instead, numerous witnesses testified that there were no warnings and no indication that LBS took measures to guard against the hazardous swim conditions or prevent swimmers from entering the water.

Plaintiff presented expert testimony that LBS violated the prevailing standard of care by engaging in dual role lifeguarding, by failing to properly train and supervise the lifeguards, and by allowing lifeguard towers to go unattended with no other safety strategy to ensure constant, proper water observation. Plaintiff's expert further testified that LBS violated the standard of care by failing to close areas for swimming or provide adequate warning of the hazardous conditions. Plaintiff also presented evidence that LBS was understaffed at the section of the beach where Mr. Wolde drowned. The owner of LBS, George Lack, admitted that being understaffed as they were on the day Mr. Wolde drowned could make all the difference between life and death. LBS did not call an expert to rebut Plaintiff's expert as to the standard of care, nor did LBS call any witnesses who had any personal knowledge that LBS complied with the standard of care on the day Mr. Wolde drowned.

The jury entered a verdict in favor of the Plaintiff and awarded \$3,700,000.00 in survival damages, \$10,000,000.00 in wrongful death damages, and \$7,000,000.00 in punitive damages. LBS now seeks judgment as a matter of law notwithstanding the jury's verdict, or, in the alternative, a new trial absolute, or a reduction of the damages by way of a new trial *nisi remittitur*.

STANDARD OF REVIEW

When ruling on a motion for directed verdict or JNOV, the trial court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022). "A

motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). “The motion[] should be denied when either the evidence yields more than one inference or its inference is in doubt.” *Garrison*, 435 S.C. at 576, 869 S.E.2d at 803 (quoting *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007)). In considering a directed verdict or JNOV motion, “neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Id.* (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006)).

South Carolina’s “thirteenth juror” doctrine allows the trial court to grant a new trial absolute only if the court finds, in its discretion, that the evidence does not justify the verdict. *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). A new trial absolute is likewise warranted where a verdict is so “shockingly disproportionate” to the injuries suffered as to indicate that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000) (citing *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)). “Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 829 (2015) (citation and quotations omitted). “A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive.” *Kunst v. Loree*, 424 S.C. 24, 46-47, 817 S.E.2d 295, 306 (Ct. App. 2018) (quoting *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969)).

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice. *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citing *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993)). However, the jury's determination of damages is entitled to substantial deference. *Id.* (citing *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)). In considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented. *Id.* (citing *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)). Further, the trial court "cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs." *Vinson*, 324 S.C. at 407, 477 S.E.2d at 724 (quoting *South Carolina State Hwy. Dep't v. Miller*, 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960)). "[T]he verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be." *Id.* Thus, "compelling reasons" must be given to justify invading the jury's province in this manner. *Riley*, 414 S.C. at 192, 777 S.E.2d at 828 (2015) (citations omitted); *see also Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (finding appellant's arguments did not constitute compelling reasons to justify the grant of a new trial *nisi remittitur*).

DISCUSSION

I. Proximate Cause

LBS moves for JNOV or, in the alternative, a new trial absolute, arguing there was insufficient evidence to create a jury issue that its conduct, including its use of dual role lifeguarding, contributed to Mr. Wolde's death by drowning.

On directed verdict, LBS asked this Court to grant judgment in its favor on the ground it maintained there was “no amount of time that the family struggled” and no evidence that a lifeguard could have reached Mr. Wolde in time to change the outcome. Specifically, LBS argued:

“[T]hen this is a quick one ... the evidence of proximate cause doesn’t exist, either direct or circumstantially, for the same or similar reasons that I’ve just described with the dual role, the fact that there’s no amount of time that the family struggled, no evidence that a lifeguard could get from his or her location to Mr. Wolde to change his outcome. . . there’s just no direct or circumstantial evidence to indicate proximate cause has been . . . proved or that should go to the jury”

(Trial Tr. 618:25-619:8). Contrary to LBS’s contention, the Court finds the evidence on this issue conflicting. Therefore, the issue was appropriately submitted to the jury.

The jury heard testimony from multiple witnesses that the incident lasted for a period of time sufficient to create a jury question as to whether LBS’s lifeguards—if acting in accordance with the standard of care—could have changed the outcome. Wubit, who was with her father during the incident, testified they struggled for a “long period of time” and that the entire incident up until they got to shore lasted 10 to 15 minutes.² The evidence also shows that Adam, Wubit, and Mr. Wolde were all screaming, yelling, and waving for help.³ Wubit testified they were yelling as loudly as they could.⁴ And not only were they positioned close enough to see the beach, Wubit explained that from where they were yelling, she could see bystanders on the beach.⁵ Adam testified he could see the shore.⁶ He explained that they yelled as loudly as they possible could, many times.⁷ And even the bystanders, who observed their calls for help from the beach, could

² Trial Tr., 586:1-4; 589:18-24.

³ Trial Tr., 585:3-11.

⁴ Trial Tr., 585:3-11.

⁵ Trial Tr., 586:13-20.

⁶ Trial Tr., 543:9-12.

⁷ Trial Tr., 543:6-544:5.

not get the attention of Lack's lifeguards nor could they find any.⁸ This evidence shows the incident was not quick or instantaneous, and, in fact, bystanders were able to see their distress and attempt a response.

Plaintiff's expert, Dr. Griffiths, also provided testimony that Mr. Wolde was a distressed swimmer before he drowned, meaning LBS's lifeguards should have observed his distress with enough time to respond:

- Q. Does the literature differentiate between silent drownings and distressed swimmer drownings?
- A. That's a good point. The progression, there is a progression in drowning. If you're a non-swimmer, most non-swimmers enter into a drowning scenario very quickly which is quick, quiet and subtle. They can't cry out for help. There's very few visual signs of drowning. Someone who can swim first becomes distressed and when they're distressed they can call out for help and they can wave for help. But when they're distressed, if they don't help themselves or someone doesn't rescue them quickly then they rapidly move from a distressed victim to a drowning victim....But Mr. Wolde apparently was a distressed victim that could have and should have been easily recognizable by attentive lifeguards.⁹

This evidence was sufficient to create a jury issue as to proximate cause, and sufficient to support the resulting factual findings implicit in the jury's verdict.¹⁰

The evidence at trial also shows other breaches of the standard of care linked to Mr. Wolde's drowning. In particular, Plaintiff's expert testified that LBS's conduct violated the standard of care in multiple respects, was dangerous, and was a contributing cause to Mr. Wolde's death:

- A. Clearly by all the evidence provided in this case, the lifeguards were not

⁸ Trial Tr., 196:17-24; 197:3-10.

⁹ Griffiths, 96:23 – 97:16.

¹⁰ See *RFT Mgmt. Co.*, 399 S.C. at 331, 732 S.E.2d at 170-171 (“[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.”) (citing *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973)).

adequately tested, not trained, not on duty at the time, if you look at the beach service line up at any given time during this incident. People were out to lunch without alternative coverage. They were supposed to have even lifeguard onlys on duty, they had less than half of the required amount. And plus provided the dual role is unacceptable. It's both unacceptable in our industry and it's dangerous. Lifeguards cannot be performing other duties that divert their attention from the water. And so, lack of training, lack of testing, lack of supervising, and the people on the stands were put in a position of failure. They were not adequately trained or supervised or tested to be providing ocean lifeguarding service, surf guarding service protection for the people.

Q. Yes sir. And was operating this endeavor in a dangerous and unsafe manner a contributing cause to Mr. Wolde's death?

A. Yes, I believe it was a direct cause to his death. Yes sir.¹¹

As to training, evidence was offered that LBS's lifeguards were untrained and unequipped to comply with the standard of care. LBS's chief operator, Weslyn Lack-Chickering, testified that LBS had no training records for any of the lifeguards, including those assigned to stands at L-20, L-21, and L-22.¹² She further admitted that these lifeguards missed multiple days of training because they were not in the country when the training took place.¹³ The evidence at trial also showed LBS was understaffed on the day of the incident and that understaffing was a contributing cause to Mr. Wolde's death.¹⁴ In fact, George Lack, the owner of Lack's, conceded that being short a lifeguard in the section where Mr. Wolde drowned was "theoretically" enough to make a difference in a lifesaving situation, such as the instant case:

Q. Under your testimony, you're one short. Well, can't one short make all the difference between life and death when it's the tower responsible for the section of the public beach where Mr. Wolde drowned to death?

¹¹ Griffiths, 111-112.

¹² Trial Tr., 842:7-15.

¹³ Trial Tr., 838:8-839:4.

¹⁴ Trial Tr., 362:3-6.

A Theoretically, yes.¹⁵

There was also evidence that LBS's failure to close the beach was a breach of the standard of care.¹⁶ Specifically, Plaintiff's expert testified that the National Weather Service warning provided notice of a hazardous condition which, at a minimum, warranted extra caution. Yet LBS took no action to close the beach and failed even to take minimum measures to effectively notify and warn the public. Dr. Griffiths further testified that LBS had a duty and obligation to warn the public of known hazards.¹⁷ The evidence showed that LBS, however, failed to place a single rip current warning anywhere on the beach, much less close to the water's edge as required by the standard of care.¹⁸

While LBS argues the staff member assigned to L-21 was on a regularly scheduled lunch break at the time of the incident, the Court fails to see how this fact could be dispositive. Instead, viewing it in the light most favorable to the Plaintiff, an inference could be drawn that the L-21 lifeguard left the tower unoccupied at a time when LBS knew there were dangerous swimming conditions present. As Dr. Griffiths testified: "[a] lifeguard is never supposed to abandon their post without someone else filling in for them, taking their stand, or closing the water. Otherwise, *it's a dereliction of duty.*"¹⁹

From this evidence, the jury could reasonably infer that LBS failed to provide acceptable, effective, and critical lifeguard protection and beach safety measures that could have prevented Mr. Wolde's premature and untimely death. To the extent there is conflicting evidence, it is not the function of this Court to weigh the evidence and resolve those conflicts. *See Welch*, 342 S.C.

¹⁵ Trial Tr., 451:14-18.

¹⁶ Griffiths, 101-102.

¹⁷ Griffiths, 102:22-103:6.

¹⁸ Griffiths, 93:1-9; 93:22-23.

¹⁹ Griffiths, 68:21-25.

at 300, 536 S.E.2d at 419 (finding conflicting evidence sufficient to deny JNOV, noting “[i]t is not the function of this Court to weigh the evidence and resolve those conflicts.”). Because the evidence, viewed in the light most favorable to the Plaintiff, supports the factual findings implicit in the jury’s verdict, LBS’s motion for JNOV on proximate cause is denied. *See Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) (a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury’s findings). For these same reasons, the Court further finds the evidence justifies the verdict; thus, LBS’s motion for new trial absolute on proximate cause is likewise denied.

II. Dual Role Negligence

As to dual role negligence, LBS challenges the sufficiency of the evidence linking LBS’s dual role lifeguarding practice to Mr. Wolde’s death. Specifically, LBS maintains there is no direct or circumstantial evidence establishing that any LBS lifeguard was performing a sale or related commercial duties at the time of the incident.

Contrary to Lack’s contention, bystander Julian Chandler provided evidence from which the jury could infer that the lifeguard at L-22 was engaged in commercial activity during the time of Mr. Wolde’s distress. Chandler provided direct testimony that the L-22 lifeguard was on the beach talking to two people near the umbrella line with his back to the ocean.²⁰ That the L-22 lifeguard was talking to two people near the umbrella line is evidence from which the jury could infer that the lifeguard was conducting umbrella or chair rental sales or performing related customer service. Likewise, from this evidence, an inference could be drawn that the staff member

²⁰ Chandler Video Tr., 16:10-19:1.

positioned at L-22—closest to where the Wolde family entered the water—was distracted by commercial activity and this distraction impeded a proper lifeguard response.

In addition, Plaintiff offered evidence that the City of Myrtle Beach required lifeguard protection on the tower and that positioning on the tower is consistent with the standard of care. Because the L-22 lifeguard was at the umbrella line and was not on the tower, an inference can be drawn that he was not performing lifeguard duties and was instead engaged in performing revenue-generating duties which were required by LBS.

Evidence at trial further shows LBS's staff were required to make commercial sales, were financially motivated to make sales,²¹ were required to keep track of all sales activity, were required to immediately update all sales records, and were required to maintain a seating chart—all in addition to their lifesaving duties.²² Indeed, the sales totals for the date of the incident established that LBS's staff did in fact make sales at the three lifeguard towers closest to the drowning incident, towers L-22, L-21 and L-20.²³ Consistent with this evidence, Plaintiff's expert testified that: "all three [lifeguards, *i.e.*, L-22, L21 and L-20] were engaged in sales. And I would say that, in part, contributed—that dual role in part led to the accident."²⁴ Dr. Griffiths testimony was preceded by the acknowledgment that the sales receipts from L20, L21, and L22 "exemplif[y] and highlight[] the fact that sales were taking place during the day."²⁵ These sales receipts establish that the three lifeguards monitoring the beach where Mr. Wolde's drowning occurred generated \$1,173.50 in sales that day.²⁶

²¹ Trial Tr., 307:9-12 (confirming that LBS lifeguards earn commissions based on sales of umbrella and beach chair rentals).

²² Plt. Trial Ex. 10, p.10.

²³ Plt. Trial Ex. 17.

²⁴ Griffiths, 232:6-8.

²⁵ *Id.* at 232:2-10.

²⁶ Plt. Ex. 17.

Moreover, there was evidence that Mr. Wolde was in distress for a “long period of time,” and at no time during the estimated ten to fifteen-minute drowning event did any LBS staff member respond or attempt lifesaving efforts, despite yells for help by both the Wolde family and bystanders.²⁷ Even the bystanders on the beach could not get the attention of Lack’s lifeguards nor could they find any.²⁸

This evidence, viewed in the light most favorable to the Plaintiff, is sufficient to create a jury question as to whether LBS’s use of dual role lifeguarding prevented an adequate lifeguard response to Mr. Wolde and his family’s distress in the water. LBS’s motion for JNOV on the issue of dual role negligence is, therefore, denied.²⁹ Because the Court finds the evidence as to LBS’s dual role practice justifies the verdict, the Court further denies LBS’s alternative motion for new trial absolute on dual role negligence.

III. Admission of Evidence

LBS next challenges several evidentiary rulings, arguing the evidence was so prejudicial as to warrant a new trial absolute. As addressed in turn below, the Court finds no error and no prejudice sufficient to warrant the relief requested.

²⁷ Trial Tr., 543:6-544:5; 585:3-11; 586:1-20; 589:18-24.

²⁸ Trial Tr., 196:17-24; 197:3-10.

²⁹ To the extent LBS argues that evidence of dual role negligence led to confusion of the issues, mislead the jury, constituted undue delay or a waste of time, LBS never objected to this evidence or argument at trial. *See* Rule 403, SCRE. Rather, LBS’s sole objection to this evidence was prior to trial and based on the false assumption that “[w]hile Plaintiff’s attorneys are expected to harp on profits over people the completely conjectural and speculative evidence as to commercial activities of the lifeguards would be irrelevant, non-probative and highly prejudicial.” (*See* Def. MIL, p. 9). However, the prejudice LBS alleged before trial did not occur at trial. At no time during the trial was there any reference to “profits over people.” Notwithstanding, as shown above, evidence of LBS’s dual role practice was properly admitted as relevant to the liability issues of standard of care, breach, and proximate cause. *See* Rule 401, SCRE (evidence is admissible if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

“[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). “Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” *State v Mitchell*, 286 S.C. 572, 573, 247 S.E.2d 334, 337 (1978).

A. LBS’s Inconsistent Factual Position in Prior Litigation

LBS’s owner, George Lack, maintained at trial that the young adults his company hired to conduct public safety were lifeguards and not beach attendants. He contended that the lifeguards were trained, that they watched the water for distressed swimmers, and that only a small part of their working day was spent selling commercial equipment. For these reasons, Plaintiff sought to introduce evidence that George Lack had taken the opposite position in litigation before the South Carolina Workers Compensation Commission. In that litigation, Lack submitted to the Commission that his lifeguards’ duties were 99.995% commercial sales and .0047% lifeguarding. Plaintiff maintained at trial that this opposing position before the Commission is highly relevant to this case because LBS’s lifeguarding practices were the same then as they were on the day of Mr. Wolde’s drowning.

As an initial matter, LBS opened the door to this evidence by claiming at trial that its lifeguards perform all lifeguarding and only minimal commercial sales. Cross-examination on the inconsistency between LBS’s position in this case and that before the Workers’ Compensation Commission was, therefore, permissible and appropriate. *See Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985) (upholding admission of settlement in prior Workers’ Compensation claim to impeach personal injury plaintiff’s testimony of pain and suffering as a result of a later

accident). Likewise, LBS was permitted and did elicit testimony from George Lack in its cross regarding the background and rationale for the percentages provided to the commission.

While LBS argues the evidence is “grossly remote in time, nonprobative, and unduly prejudicial,”³⁰ the evidence shows Lack’s lifeguarding practices were exactly the same in 2018 as they were in 2002 during the workers’ compensation litigation. On this basis alone, the probative value of the evidence outweighs any alleged prejudice.

Further, the admission of evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion, commission of a legal error, and prejudice. *Hall v. Palmetto Enterprises II, Inc., of Clinton*, 282 S.C. 87, 91, 317 S.E.2d 140, 142-43 (Ct. App. 1984). No abuse of discretion or legal error has been demonstrated. Finally, even if there was error, there is no evidence Lack’s suffered any prejudice because George Lack conceded at trial that his company’s lifeguards performed commercial duties and engaged in dual-role lifeguarding. *See Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

B. Lack’s USLA Decertification

Throughout the trial of this case, the United States Lifeguard Association (“USLA”) was consistently recognized as the lifeguard industry’s standard of care. LBS, however, claims reversible error in the admission of this standard of care evidence and, more specifically, in admitting evidence of its failure to meet the standard of care set by the USLA, as evidenced by communications with the USLA and the USLA’s resulting decision to decertify Lack’s as an accredited lifeguard service. The Court finds LBS’s arguments unavailing. The facts show this evidence was highly probative and essential to the liability issues of notice, foreseeability, willfulness, and recklessness.

³⁰ See Lack’s Mot. New Trial Absolute, p. 18.

Chris Brewster, the former President of the USLA, testified that his organization plays a large role in establishing the national standard of care for ocean lifeguards.³¹ George Lack conceded the USLA is the standard of care for lifeguarding. Indeed, Lack testified he sought to secure USLA certification so his company could advertise the same to the public—*i.e.*, he wanted to hold out to the public that his lifeguards were trained and competent because they met the criteria of the USLA. But in order to obtain the certification, Lack concealed that his lifeguards were participating in commercial activities in addition to lifeguarding. It was not until Brewster traveled to Myrtle Beach in 2007 that the USLA was apprised of the misrepresentation.³² The USLA thereafter de-certified LBS as a USLA compliant lifeguard service. As this evidence demonstrates, LBS's USLA certification and decertification is highly probative of both (1) the standard of care relevant to this case, and (2) Lack's knowledge that its practices violated the standard of care.

Further, Brewster also explained that it would be impossible for any Lack's lifeguard to meet the USLA training requirements required by the franchise agreement because dual-role lifeguarding is entirely inconsistent with USLA standards.³³ Brewster testified that the USLA trains lifeguards to watch the water, minimize distractions, and prevent people from even getting into danger in the water. If a company knowingly introduces distractions to its lifeguards in the form of selling commercial goods, and then trains them on how to sell the equipment, they are knowingly and intentionally violating USLA training.³⁴ Evidence of LBS's USLA membership, certification, and decertification is, thus, highly relevant to the standard of care applicable to this case as well as to LBS's breach and the foreseeability that LBS's breach could pose a dangerous

³¹ Trial Tr., 473:15-17 (“... we [USLA] do set the standard.”).

³² Trial Tr., 495:18-25.

³³ Trial Tr., 478:5-9.

³⁴ Trial Tr., 478:5-9.

safety risk to beachgoers like Mr. Wolde. Moreover, because LBS concedes its lifeguards perform dual roles and earn commissions from selling beach concessions, it cannot complain of prejudice resulting from evidence that it lost USLA certification because of this practice. The Court finds no error in admitting this evidence much less one that would warrant a new trial absolute.

C. LBS's Gross Commercial Sales from Lifeguards for 2018

LBS next challenges the admission of its 2018 gross sales from lifeguards as well as sales tax calculations for the three-month period surrounding the incident. LBS maintains the evidence, which reflected \$1,520,918.00 in gross sales, is not relevant and so “highly prejudicial” as to warrant a new trial.

The Court finds no error or prejudice warranting a new trial based on the sales records. While there was no dispute at trial that LBS's lifeguards performed commercial sales while also entrusted with performing lifeguard protection duties, the sales totals offer insight as to the time and frequency in which LBS's lifeguards were engaged in commercial duties. This evidence is relevant to essential elements of Plaintiff's negligence claim, such as LBS's knowledge that it engaged in a water safety practice that was directly contrary to its duty of providing lifeguard protection, and that LBS violated the standard of care and the Franchise Agreement by failing to “ensure minimum lifeguard staffing in each zone.”³⁵ Further, the sales evidence was limited in scope and tailored to the week, month, and year of the incident. The Court finds this limitation was sufficiently tailored to the liability issues of whether LBS was in fact engaging in dual role lifeguarding, whether this practice put swimmers—and Mr. Wolde—at risk, whether it violated the standard of care and the Franchise Agreement, and whether it was a contributing cause of Mr. Wolde's death.

³⁵ Franchise Agreement, Plt. Trial Ex. 15, p. 2:29-30.

As to prejudice, the Court is unable to find any. LBS's gross sales are a matter of public record by virtue of its franchise agreement with the City of Myrtle Beach. Moreover, the sales evidence reflects only gross sales and is not an indicator of LBS's financial position or net profits. Gross sales, being entirely distinct from the amount of money LBS made off its beach rentals, are not prejudicial in the manner complained by LBS.³⁶

LBS's reliance on *Branham v. Ford Motor Co.* for the assertion that "business income of this kind and nature has been forbidden by the South Carolina Supreme Court" is misplaced.³⁷ The court in *Branham* did no such thing. Rather, in *Branham*, the court found plaintiff's counsel "went far beyond the pale in submitting evidence of Ford's Senior Management compensation," finding such evidence improper because it introduces an "arbitrary factor" in a jury's consideration and assessment of punitive damages. *Id.* at 240, 701 S.E.2d at 25. The improper evidence there included that "the Ford Chairman and Chief Executive Officer was compensated by stock options worth \$5,300,000; the Ford President and Chief Operating Officer received a salary \$1,458,000 in 2005; the Ford Executive Vice President received a salary of \$972,000 in 2005; the Ford Chief Financial Officer received a salary of \$916,000 in 2005; a former Ford chairman received \$880,000 in 2005[;]" and that "[i]n 2005, they didn't pay bonuses [but] in 2004, they did pay bonuses: \$2 Million, \$1 Million, \$1 Million and \$1 Million plus stock and other compensation." *Id.* LBS's 2018 gross sales figures are entirely distinguishable from this type of "arbitrary" and prejudicial financial testimony.

³⁶ See Lack's Mot. New Trial Absolute, p. 21.

³⁷ See Lack's Mot. New Trial Absolute, p. 21 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010)).

Furthermore, to the extent LBS's takes issue with the "manner in which Plaintiff's counsel used the evidence throughout the trial and in his closing argument,"³⁸ LBS's never once objected to the manner in which this evidence was used. In fact, LBS never made a single objection to Plaintiff's closing. This failure constitutes a waiver of any right to challenge the evidence on this basis now. See e.g. *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (the general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver."); *Scott*, 340 S.C. at 167, 530 S.E.2d at 393 ("Ordinarily, if an appellant fails to object the first time a statement is made in closing argument, he or she waives the right to raise the issue on appeal").³⁹

In sum, LBS waived its right to challenge the manner in which the sales records were used, and as to its admissibility, Lack's argument fails on probative value alone. Any suggestion of prejudice is further undercut by the fact the sales record is a public document, reflects only gross sales (not net income), and is required by the Franchise Agreement. There is, thus, no error in admitting evidence of the 2018 stand totals, much less any error warranting a new trial. LBS's new trial motion based on the admission of the 2018 stand totals and sales tax calculations is denied.

³⁸ See Lack's Mot. New Trial Absolute, p. 21.

³⁹ This rule is subject to one very narrow exception "in flagrant cases where a vicious inflammatory argument results in clear prejudice." *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (quoting *Toyota of Florence*). In *Dial*, the court made clear that the "vicious inflammatory argument" contemplated in the exception must be a closing argument that "constitutes abuse of a party or witness." *Id.* at 259, 509 S.E.2d at 272. In *Toyota of Florence*, the court found that racist posters about the party opponent that counsel used as props in a closing argument met this narrow exception. 314 S.C. at 263, 442 S.E.2d at 615. LBS's challenge to the admission of a public record showing its yearly gross sales is hardly comparable to the type of vicious inflammatory argument referenced in *Dial* or *Toyota of Florence*. Reference to gross sales is simply not "flagrant" or "vicious" nor is it an "abuse" of LBS so as to warrant deviation from the strict rule barring consideration of an allegedly prejudicial closing statement despite a failure to object.

IV. JNOV on Survival

LBS challenges the sufficiency of the evidence supporting the jury's award of survival damages, arguing it is entitled to a JNOV on the ground the evidence at trial failed to show that Mr. Wolde endured a period of conscious pain and suffering to warrant submission of the survival claim to the jury.

The South Carolina survival statute provides that a cause of action for personal injuries survives the decedent's death. S.C. Code Ann. § 15-5-90. Damages for a decedent's conscious pain and suffering are recoverable, but there must be proof that the decedent consciously suffered prior to death. *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000); *Croft v. Hall*, 208 S.C. 187, 193, 37 S.E.2d 537, 539 (1946). "If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," it should be submitted to the jury. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991). In deciding whether to submit a claim of conscious pain and suffering claim to a jury, all evidence and any inferences reasonably therefrom must be viewed in the light most favorable to the plaintiff. *Vereen*, 306 S.C. at 432; 412 S.E.2d at 431.

Here, the evidence meets and exceeds the requisite standards. Two of Mr. Wolde's children, Adam and Wubit, witnessed their father struggle for his life in the water. Adam testified that the entire drowning event lasted for an extended period—including being pulled out to sea, fighting for his life, yelling and waving his arms for help. Adam testified he watched his father struggle while trying to save Wubit.⁴⁰

Wubit's testimony was equally powerful and even more direct because she was in her father's arms during his struggle to stay afloat. She not only saw but also felt his struggle, his

⁴⁰ Trial Tr., 543:23-544:5.

gasps for air, and his calls for help.⁴¹ She testified her father repeatedly went under water, came back to the surface, and gasped for air while fighting to stay afloat.⁴² This terrifying sequence lasted for a “long period of time.”⁴³ Wubit went on to explain that eventually the yelling, gasping, and going under came to a frightening stop, and she just held onto her father.⁴⁴ Wubit estimated the entire incident lasted for ten to fifteen minutes.⁴⁵ As Wubit’s testimony shows, she was not only able to see and hear her father’s struggle, but she was also able to feel the tremendous suffering and pain associated with his struggle.

Bystander testimony also supports Mr. Wolde’s pain and suffering. One of the bystanders, Julian Chandler, testified he was sitting on the beach approximately 100 feet from the ocean when he heard cries for help in the water.⁴⁶ He rushed into the ocean using a mix of walking and swimming to reach Mr. Wolde, a process which took several minutes.⁴⁷ When Chandler finally got to Mr. Wolde, he had been assisted closer to shore into waist deep water.⁴⁸ Chandler testified that when brought to shore, Mr. Wolde’s eyes were bulging, he was spitting up water and sand, and he had a pulse.⁴⁹ Chandler went on to explain:

[T]he nurse and the larger gentlemen that were there that pulled him out to the sand issued CPR[.] The issue was the water and sand would come out and then get sucked back in, so she asked me to roll him, so I then rolled him on his side[.] She began clearing everything out of his mouth to then try to roll him back and administer CPR.”⁵⁰

⁴¹ Trial Tr., 584:7-13.

⁴² Trial Tr., 584:7-13; 585:17-586:4.

⁴³ Trial Tr., 586:1-4.

⁴⁴ Trial Tr., 586:1-4; 587:11-588:3; 606:24-607:3.

⁴⁵ Trial Tr., 589:18-24.

⁴⁶ Chandler Video Tr., 59:19-22.

⁴⁷ *Id.*, 31:2-5.

⁴⁸ *Id.*, 62:8-11.

⁴⁹ *Id.*, 21:11-19.

⁵⁰ *Id.*, 22:1-9.

Based on this testimony, the evidence was not that Mr. Wolde died instantaneously; rather, he was still alive at the time he was brought back to shore. But as the coroner later confirmed, the rescue attempt on shore was unsuccessful and Mr. Wolde ultimately died from asphyxia due to drowning.⁵¹ At trial, the coroner explained that the asphyxia diagnosis meant Mr. Wolde's lungs filled up with water and prevented oxygen from getting into his blood.⁵² In other words, the process of going under, swallowing water, and gasping for air eventually caused him to suffocate to death.⁵³

Viewing this evidence in the light most favorable to the Plaintiff, the Court finds sufficient evidence to create a jury issue as to pain and suffering. This is not a situation where an individual is knocked unconscious, falls in the water, and immediately drowns; nor is this akin to a toddler falling in the water and immediately sinking to the bottom. Notwithstanding, LBS argues that in order to submit the survival claim to the jury expert testimony on the pathophysiology of the drowning process was required. While such expert testimony may be helpful or even necessary in some cases, in light of the direct witness testimony recounted above, this is not one of those cases. Moreover, it is not Plaintiff's burden to prove survival damages through expert testimony. Rather, as in this case, Plaintiff's burden is to offer sufficient evidence from which the jury can infer conscious pain and suffering. *Scott v. Porter*, 340 S.C. 158, 171, 530 S.E.2d 389, 394-95 (Ct. App. 2000) (affirming survival damages award of \$600,000 based on circumstantial evidence from from which the jury could infer pain and suffering which preceded the decedent's coma and

⁵¹ Trial Tr., 466:2-4.

⁵² Trial Tr., 466:8-10.

⁵³ The coroner's report indicated that at the time of Mr. Wolde's drowning he was trying to save his daughter's life. *See* Ex. 20, p. 4.

death) *Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 (stating jury could infer conscious pain and suffering from evidence).

Lack's reliance on *The Corsair*, 14 U.S. 335 (1892), is also misplaced. Unlike the witness testimony here, there were no witnesses in *Corsair*. The *Corsair* court did not have the benefit of testimony recounting the decedent's pain, consciousness, or duration of suffering. Rather, the only evidence available in *Corsair* was that the decedent drowned when the steam tug she was riding in struck the bank of the Mississippi River and sank. *See id.* In stark contrast to *Corsair*, the evidence recited above is sufficient for the jury to infer that Mr. Wolde endured pain and suffering which preceded his death by asphyxiation due to drowning. LBS's reference to "pre-impact fear" is also unavailing. Pre-impact fear pertains to accident victims prior to the impact which renders them unconscious or instantly causes death.⁵⁴ This is not a motor vehicle accident or similar situation involving an impact resulting in instantaneous death or unconsciousness. Accordingly, because the evidence is sufficient for the jury to infer conscious pain and suffering, LBS's motion for JNOV on the submission of Plaintiff's survival claim to the jury is, therefore, denied. *See Vereen*, 306 S.C. at 432, 412 S.E.2d at 431 ("If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," it should be submitted to the jury). For these same reasons, the Court finds the jury's survival verdict is supported by the evidence; thus, LBS's request for a new trial absolute is likewise denied.

V. Motion for New Trial on Survival Damages

LBS maintains the jury's award of \$3.73 million in survival damages is so excessive as to suggest it was improperly motivated by passion or prejudice warranting a new trial absolute, or that

⁵⁴ *See Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 214-15, 734 S.E.2d 142, 144-45 (2012) (discussing pre-impact fear as a possible element of conscious pain and suffering from death by motor vehicle accident but declining to adopt or reject rule under the facts of this case).

is merely unduly liberal entitling LBS to a reduction of the award by way of a new trial *nisi remittitur*.

As an initial matter, LBS argues—for the first time—that the Court’s instruction on the mortality table was confusing and may have mislead the jury so as to taint the award. Having never raised the error it now claims as a basis to set aside the jury’s award, LBS is barred from assigning any error now.⁵⁵ It is a litigant’s duty to bring to the court’s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)). If the instruction on survival and wrongful death damages was so confusing as to warrant a new trial, it was incumbent on LBS to object to the court’s instruction or seek a clarification. Indeed, LBS could have objected both before the court approved the instruction and again when the instruction was given. LBS also neglected yet another opportunity when the court asked counsel: “[a]ny additions or anything else . . . before we send the jury back to deliberate.”⁵⁶ Because LBS failed to object or otherwise address its concerns—despite multiple opportunities—LBS is barred from doing so now.

As to LBS’s argument that the award was motivated by improper prejudice, passion, or other outside influence, LBS merely reiterates the same arguments raised in its JNOV motion, *i.e.*, that there was no evidence of the specific duration of the drowning incident, and no expert evidence of the drowning process to inform the jury as to the effects a drowning victim might experience. For

⁵⁵ *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”)).

⁵⁶ Trial Tr., 939:19-22 (responding, “None from the defendant, Your Honor.”).

the same reasons this Court rejected LBS's JNOV arguments, the Court finds LBS's recycled arguments unavailing.

As set forth above, the jury heard evidence that: (1) Mr. Wolde was conscious and struggling to stay afloat for a period of time; (2) during this time, Mr. Wolde repeatedly went under water, gasped for air, and cried for help; and (3) the incident lasted 10-15 minutes from the time Mr. Wolde became distressed until he was brought to shore. This evidence was more than sufficient for the jury to infer conscious pain and suffering. Accordingly, the Court finds the jury's award of survival damages is properly supported by the evidence. LBS's request for a new trial absolute is, therefore, denied.

As to LBS's alternative request to reduce the award by *nisi remittitur*, the Court likewise finds no basis to justify invading the jury's province. In considering a motion to reduce a damages award by *nisi remittitur*, the jury's determination of damages is entitled to substantial deference. *Smalls*, 339 S.C. at 215, 528 S.E.2d at 686 (citation omitted). Again, the direct testimony of Mr. Wolde's daughter who provided firsthand knowledge of Mr. Wolde's drowning experience, including the duration of the event and his pain and suffering in the process, provides more than sufficient evidence.⁵⁷ Further, the coroner testified as to the cause of Mr. Wolde's death, explaining what death by asphyxia due to drowning entails.⁵⁸ In considering this evidence, the jury could reasonably infer that the suffocation process endured by Mr. Wolde, while conscious and drowning, was painful and resulted in a period of conscious pain and suffering.

Indeed, courts have denied similar defense motions on much less. In *Smalls v. S.C. Dep't of Educ.*, the court of appeals upheld an award of survival damages, finding no error in the trial

⁵⁷ Wubit testified the sequence of "going under and coming back up, . . . gasp[ing] for air and [] yell[ing] for help" lasted for "a long period of time." (Trial Tr., 586:1-4).

⁵⁸ Trial Tr., 456:2-10; 468:4-10; 469:11-12; *See* Plt. Ex, 19, 20 & 21.

court's denial of JNOV and new trial *nisi remittitur* despite scant evidence of the decedent's consciousness prior to her death. 339 S.C. at 216–17, 528 S.E.2d at 686. There, the decedent, who was fatally injured in a car accident, was found unconscious and, in fact, never regained consciousness. *Id.* However, the decedent's father testified she was "gasping for air" when he found her, though there was no further evidence of any consciousness. The court of appeals upheld the trial court's denial of *nisi remittitur*, finding the "gasping for air" testimony was sufficient to support the jury's award of survival damages for conscious pain and suffering. Here, the evidence supporting conscious pain and suffering, including the detailed account from Wubit, far exceeds that in *Smalls*. Considering the facts in evidence, the Court finds the jury's award of \$3.73 million in survival damages is reasonable, measured, and supported by the evidence and testimony in this case. Accordingly, LBS's motion for new trial *nisi remittitur* is denied.

VI. Wrongful Death Damages

LBS asserts it is entitled to a new trial absolute on the grounds the jury's award of \$10 million in wrongful death damages is grossly excessive or, in the alternative, that it is entitled to a reduction of the award on the ground it is unduly liberal. LBS also asserts it is entitled to a new trial absolute under the thirteenth juror doctrine.

The issue of damages in a wrongful death claim is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death. *Welch*, 342 S.C. at 304, 536 S.E.2d at 421 (citing *Zorn v. Crawford*, 252 S.C. 127, 165 S.E.2d 640 (1969); *Self v. Goodrich*, 300 S.C. 349, 387 S.E.2d 713 (Ct. App. 1989)). Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the

use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Id.*

Here, the jury was presented with the tragic loss of a forty-one-year-old father of four young children who drowned while saving his daughter's life when they became entrapped in a deadly rip current. The decedent's family testified as to the enormous effect Mr. Wolde's death had on his four young children, of whom Mr. Wolde was the primary caretaker.⁵⁹ Mr. Wolde's fiancé, Meswaet Abel, was a registered nurse at George Washington hospital and worked long hours to provide for the family.⁶⁰ Mr. Wolde handled everything at home—he made the meals, he helped the children with homework, he went to the grocery store, he got them ready for school, and he was home for them when they arrived at the end of the day.⁶¹ In fact, on the morning Mr. Wolde died, he was the one who went to Wal-Mart to pick up groceries, who made the family's breakfast, who helped the children get ready for the beach, and who put on their sunscreen.⁶²

Ms. Abel, Adam, and Wubit further testified at length as to what his loss has meant to their family. They would set a place for him at the dinner table every night until it became too unbearable to see the empty seat.⁶³ They now eat dinner in the family room instead.⁶⁴ Adam, who enjoyed watching the Redskins on television with his father, could no longer watch football after his father died—now he watches alone at their townhome with a collection of the memorabilia his father had given to him.⁶⁵ One of the twin daughters recently refused to re-paint her room because

⁵⁹ Trial Tr., 587:11-588:3.

⁶⁰ Trial Tr., 570:15-22; 226:14-227:14.

⁶¹ Trial Tr., 570:20-571:8; 528:23-529:9.

⁶² Trial Tr., 232:2-8; 536:18-19.

⁶³ Trial Tr., 243:22-244:2.

⁶⁴ *Id.*

⁶⁵ Trial Tr., 246:10-23.

she did not want to remove the paint her father had applied.⁶⁶ As Ms. Abel testified, life without their father has been inconceivably difficult:

Our life changed. Our house is dark. We're living in no hope, with no answers to my kids, "Who is going to walk me down the aisle when I get married?" If I change, I would give my life. It's not because I love him; it's because of the kids. They need him more than me. . . He's done everything. He teach how to swim. He teach how to study. He teach them how to ride a bike. He painted their rooms.⁶⁷

In other words, Mr. Wolde was an active, involved, and loving father.

The children also testified as to the immeasurable trauma and shock experienced in witnessing their father's death in such a horrific manner. Wubit endured the entire event latched onto her father's shirt, where she could see, hear, and feel his suffering. The horrifying experience continued on shore as Wubit saw foam coming out of her father's mouth when the bystanders were performing CPR.⁶⁸ Bystanders Jeff Bender and Julien Chandler also testified as to the children's presence during the horrific event. Bender testified Wubit was floating on her father, "using him like a life preserver," at the time he began assisting them to shore.⁶⁹ Chandler testified that he stopped Adam from getting too close to his father's body and encouraged him to be strong for his younger twin sisters, after which Adam and his sisters kneeled and prayed.⁷⁰ The children also witnessed their mother "hysterically flailing and screaming."⁷¹ This evidence all plays a factor in determining wrongful death damages. *See Lucht v. Youngblood*, 266 S.C. 127, 136–37, 221 S.E.2d 854, 859 (1976) (noting wrongful death damages includes the damages sustained by the

⁶⁶ Trial Tr., 249:12-15.

⁶⁷ Trial Tr., 249:5-13.

⁶⁸ Trial Tr., 590:12-13.

⁶⁹ Trial Tr., 197:22-198:1.

⁷⁰ Chandler Video. Tr., 25:16-26:3

⁷¹ *Id.*, 26:6-9.

beneficiaries from the death, such as mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the decedent's society).

Considering the wide range of losses encompassed by wrongful death damages, Plaintiff's counsel, during closing argument, appropriately suggested a per diem calculation as a method the jury could apply to arrive at a damages award for the children's nonpecuniary wrongful death damages. Counsel further made clear that whether to award and how much, if any, was entirely up to them. *See Edwards v. Lawton*, 244 S.C. 276, 281, 136 S.E.2d 708 (1964) (accepting a per diem calculation as acceptable in a closing argument). The per diem suggested was based on the children's loss of companionship and loss of society given their father's 37.3 years of remaining life expectancy. Under this calculation, the estimated per diem of \$10 an hour, multiplied by fifteen hours per day, translated to \$54,750.00 per year, per child. In total, this calculation amounts to roughly \$8.1 million over the remaining 37.3 years of Mr. Wolde's life expectancy.⁷² After three hours of deliberation, the jury awarded \$10 million, or \$2.5 million per child. Considering all objective evidence, the jury's award of \$10 million in wrongful death damages is reasoned, measured, and proportionate to the injuries suffered.

In challenging the propriety of the jury's damages award, LBS points to no concrete basis to suggest the award was motivated by anything but the evidence. LBS's attempt to challenge this jury's award by cherry picking various verdicts in other wrongful death cases is equally unavailing.⁷³ Though comparisons to other verdicts are only persuasive at best, LBS omits numerous wrongful death verdicts in which the actual damages awards are consistent with and even higher than that in this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858 (stating the

⁷² Trial Tr., 905:14-906:11.

⁷³ *See* Lack's Mot. New Trial Absolute, pp. 26-28; New Trial Nisi, pp. 6-8.

comparison approach is sometimes helpful, each case must be evaluated as an individual one, within the framework of its distinctive facts and, when comparing awards in previous cases, recognition must be given to the continuing erosion in the purchasing power of the dollar); *see e.g., Reeves v. Town of Cottageville et al.*; Case No. 14-11-070043 (2014) (compensatory award for wrongful death of \$7.5 million and \$90 million in punitive damages); *Givens v. Samkharadze*, Case No. 21-10-130012 (2021) (compensatory pain and suffering of \$25 million and \$8 million in punitive damages); *Bales v. Martinez*, Case No. 14-03-170022 (2014) (\$20 million award for loss of service, \$30 million in punitive damages); *Dial v. Toyota Motor Sales USA Inc.*, Case No. 18-10-220036 (2018) (\$6 million in compensatory damages and \$6 million for loss of service); *Bannister v. Columbia Urological Associates, P.A.*, No. 2015-CP-40-4794 (2017) (\$10 million in compensatory damages); *Huff v. XPO Express, Inc.*, Case No. 19-11-120022 (2019) (compensatory pain and suffering of \$7 million); *Oickle and Oickle v. XPO Express Inc. f/k/a Express I Inc.*, Case No. 19-03-200062 (2019) (loss of services award of \$5 million).

The Court further finds no basis to exercise its discretion as the thirteenth juror. As the thirteenth juror, the Court is charged with reviewing what happened, what was presented and what was not presented, in the trial of this case. *See Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. Here, there was simply not “any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality.” *See Clark v. Ross*, 284 S.C. at 568, 328 S.E.2d at 106. The Court further finds there is no “compelling reason” to invade the jury’s province and reduce the verdict. *See Proctor v. Dep’t of Health & Env’t Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) (“compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.”). Considering the ample evidence supporting the award of wrongful death damages, the Court finds the jury’s \$10 million award or

\$2.5 million per child is justified, is not grossly excessive, and is not unduly liberal. LBS's motions for new trial absolute and new trial *nisi remittitur* are, therefore, denied.

VII. Punitive Damages

LBS challenges the jury's award of \$7 million in punitive damages, arguing it is entitled to a JNOV or, in the alternative, a new trial absolute or a new trial *nisi remittitur*. As with the jury's survival and wrongful death awards, there is nothing meriting a JNOV, a new trial absolute, or a reduction of the punitive damages award.

In South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (citations omitted). Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damages." *Id.*

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence that the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights. S.C. Code Ann. § 15-33-135; *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996); *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). "A conscious failure to exercise due care constitutes willfulness." *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419). When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Id.* (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The amount

of damages, actual or punitive, remains largely within the discretion of the finder of fact, as reviewed by the trial judge. *Id.* (citing *Gamble*, 305 S.C. 104, 406 S.E.2d 350).

A. JNOV on Punitive Damages

The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (citing *Welch*, 342 S.C. at 301, 536 S.E.2d at 419). Where, as here, the Plaintiff presented testimony and evidence that LBS was aware of a dangerous condition and failed to take action to minimize or avoid the danger, an inference could be drawn that LBS's conduct was reckless, willful, and wanton. Thus, whether there is clear and convincing evidence of willful and reckless conduct to support punitive damages was appropriately submitted to the jury. *See id.* (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)).

If the jury believes the plaintiff established willful, wanton, or reckless conduct by clear and convincing evidence, the jury has considerable discretion to determine the amount of punitive damages. *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907–08 (Ct. App. 2021), reh'g denied (May 12, 2021) (citing *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404–05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages)).

In *Mishoe v. QHG of Lake City, Inc.*, the South Carolina Court of Appeals affirmed the denial of JNOV on the issue of punitive damages where there was evidence the defendant was provided “actual, written notice” of a dangerous condition on its premises—a hole in the pavement near the defendant's emergency room exit—and failed to take any action to repair the hole or to warn visitors or patients of the existence of the hole. 366 S.C. at 201–02, 621 S.E.2d at 366.

Having neglected to take any corrective action for nearly a year since being notified, the *Mishoe* court specifically found the written notice informing QHG of the hole was sufficient evidence of QHG's willful, wanton, reckless, or malicious conduct to warrant submission of punitive damages to the jury. *Id.*

Here, the evidence of LBS's willfulness and recklessness is even more glaring. While QHG's conduct in failing to take corrective action within a year of notice was deemed sufficient, LBS's intentional disregard for its known standard of care violations went on for not just one but *ten years*. In the ten years since being decertified by the USLA for its unsafe practices, LBS took no corrective action whatsoever. Not only did LBS have notice that its practices posed a threat to the safety of swimmers,⁷⁴ but LBS also concealed that its practices violated the standard of care—thereby further endangering the beachgoing public who trusted that the City's beach was safely guarded by adequate and trained lifeguards.

Further, LBS was on notice by the National Weather Service that hazardous rip and longshore currents posed a dangerous threat to the safety of beachgoers, yet LBS failed to close the beach and failed to warn beachgoers of the hidden threat posed by these dangerous conditions. This cumulative misconduct, as established by clear and convincing evidence at trial, more than satisfies the willful, wanton or reckless standard to warrant submission of punitive damages to the jury. As the evidence shows, Plaintiff's punitive damages claim is not mere speculation. The evidence recounted above clearly and convincingly supports a finding that LBS was willful and

⁷⁴ As set forth above in Plaintiff's proximate cause, negligence, and recklessness arguments, the evidence established at trial shows LBS had actual notice that its beach safety services violated the standard of care and created a hazardous condition in numerous respects, including its non-compliance with USLA standards by engaging in dual role lifeguarding, its failure to provide 40 hours of training as required by USLA standards and its contract with the City of Myrtle Beach, and by its understaffing and failing to provide backup protection when a lifeguard leaves a tower unattended. Plaintiff refers to and relies on these arguments and the evidence therein.

reckless in committing standard of care violations it knew posed serious and life-threatening safety risks.

Further, as to LBS's claim of prejudice by being labeled a for-profit entity, LBS never objected to any such reference during trial and has therefore waived its right to do so now.⁷⁵ In sum, LBS's motion for JNOV ignores the ample evidence supporting Plaintiff's punitive damage claim, inappropriately suggest the jury's verdict was based on speculation, and inappropriately claims prejudice as a result of an alleged character attack that also finds no support in the record. For these reasons, Lack's motion for JNOV as to punitive damages is denied.

B. Recklessness in First Phase of Trial

LBS's arguments challenging the propriety of trying the issue of recklessness during the liability phase of this bifurcated proceeding are unavailing. As an initial matter, LBS consented to, and in fact agreed it was proper in phase one to have the jury determine whether Plaintiff proved willful, reckless, and willful conduct.⁷⁶

PLAINTIFF'S COUNSEL: I thought that you did the reckless question on the first verdict form, and that way -- I've done that in front of Judge Young, is the way we did it. And, that way, when they render that verdict, you know whether or not there's going to be a second phase, because they either find reckless, willful, or wanton, or they don't. You see what I'm saying?

THE COURT: Yeah. I mean, it either eliminates the need to go forward with the second phase --

PLAINTIFF'S COUNSEL: Right. And we don't make punitive damages arguments to the jury in the first phase, *but the evidence of recklessness comes in*, and if they make that determination, then I guess we bring them back in, and then we would argue the Gamble factors.

COURT: What are your thoughts, Mr. Thompson?

⁷⁵ See *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 111, 498 S.E.2d 395, 406 (Ct. App. 1998) (failure to object constitutes a waiver of issue).

⁷⁶ Trial Tr., 845:11-846:19.

COUNSEL FOR LACK'S: Your Honor, *I think that's correct*. I mean, the first question is liability, damages, actuals. And then the question to the jury is: Do you find evidence, whatever the question would be, for the punitive conduct. And then it's just yes or no. And then, if yes, there will be a second receiving or a second -- something along the lines.⁷⁷

That LBS's agreed to the same verdict form to which it now objects, at a minimum, amounts to a waiver of this issue. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form); *Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013) (failure to object to verdict form until after verdict was read amounted to a waiver of issue).

As to the merits, evidence of recklessness in the liability phase of the trial is appropriate because it is not "evidence relevant *only* to the issues of punitive damages." S.C. Code Ann. §15-32-520 (B) (emphasis added). First and foremost, a finding of recklessness is a determination of liability. Negligence and recklessness are not different merely as a matter of degree. By definition, they are distinct types of fault. *See Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (providing different legal definitions of "negligence" and "recklessness" and observing that "[t]he element distinguishing negligence from willful tort is inadvertence") (citation omitted)); *Fairchild v. S.C. Dept. of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411-12 (2012) ("Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence.").

Due to these distinct types of fault, Plaintiff was procedurally required to try her entire case on liability, including evidence of both negligence and recklessness, during the first stage—the fault stage—of this trial bifurcated pursuant to S.C. Code Ann. § 15-32-520. Pursuant to § 15-32-

⁷⁷ Trial Tr., 845:11-846:6.

520, plaintiffs *have to* present theories of a defendant's negligence and recklessness during the liability stage of a bifurcated trial. See S.C. Code Ann. § 15-32-520 ("In the first stage of a bifurcated trial, the jury shall determine *liability* for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant *only to* the issues of punitive damages is not admissible at this stage." (emphasis added)). At the close of that first stage, the jury deliberates and determines fault and compensatory damages, if any. On the same verdict form, typically as the last question, the jury also determines whether the defendant's conduct was reckless, willful, or wanton, as opposed to merely negligent. This widely used format was properly followed in this case. In fact, this precise format has been followed in trials across this state.

Not only is this procedure appropriate and sanctioned throughout South Carolina, it also serves the interests of judicial economy. If the jury *had not* found recklessness, then there would have been no need to waste their valuable time, and that of the Court, with a second phase of trial. Only when the jury finds recklessness does the trial move into the punitive damages stage, where the evidence is generally limited to the defendant's financial condition and ability to pay punitive damages, followed by closing arguments solely on punitive damages. See, e.g., *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994) (observing that evidence of a defendant's net worth is relevant only to the amount of punitive damages, and therefore not admissible until the bifurcated punitive phase of trial). Accordingly, LBS's request for a new trial on this basis is denied.

C. New Trial Absolute on Punitive Damages

LBS seeks a new trial absolute on the basis that it believes the jury's award of \$7 million in punitive damages is so grossly excessive as to be motivated by passion, caprice, prejudice, or some improper influence. However, LBS fails to support this contention with anything more than conclusory statements or the improper assertion that the award is excessive based on size alone.

The extraordinary relief of new trial absolute is only warranted “[i]f the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence.” *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). “[T]he jury’s determination of damages is entitled to substantial deference.” *Welch*, 342 S.C. at 303, 536 S.E.2d at 420 (citation omitted).

Here, there is simply no evidence that the jury’s award considered anything other than the relevant evidence, and LBS cites to none. LBS instead contends that given evidence of its negative net worth, the trial court’s instruction on economic bankruptcy must have been deficient. However, the actual language of the economic bankruptcy instruction, as is consistent with South Carolina law, states in full:

Any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the Defendant’s ability to pay any punitive damage award should be considered. *However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.*⁷⁸

Thus, as is consistent with the court’s instruction, economic bankruptcy is not an absolute bar to punitive damages. That the award was nearly half the amount of actual damages suggests the jury took this instruction into account.

In light of its financial position, LBS contends the punitive damage award is in itself evidence that it was motivated by passion, prejudice, or some other improper influence. But again, the size of the award does not in and of itself justify a new trial, especially given the evidence in this case and the fact the award is less than a 1:1 ratio to actual damages. Indeed, a punitive award that is less than three times the amount of a compensatory award is *per se* reasonable. *See* S.C. Code Ann. § 15-32-530 (setting statutory cap on punitive damages of three times the amount of a

⁷⁸ Trial Tr., 968:3-7.

compensatory award; only if that cap is exceeded is it relevant for the court to consider additional factors in determining the awards reasonability). The jury's \$7 million punitive award is almost half the \$13.7 million compensatory award—far under the multiplier set forth in the statutory cap. Accordingly, considering the evidence supporting punitive damages in this case, the Court finds the jury's \$7 million punitive award is not grossly excessive so as to result from improper influence nor is it unduly liberal to warrant a reduction by *nisi remittitur*. LBS's motions for new trial absolute and new trial *nisi remittitur* as to punitive damages are, therefore, denied.⁷⁹

CONCLUSION

Accordingly, for the foregoing reasons, Defendant's Post-Trial Motions for JNOV, new trial absolute, and new trial *nisi remittitur* are denied.

IT IS SO ORDERED.

Kristi F. Curtis, Circuit Court Judge

Sumter, South Carolina
December __, 2022

⁷⁹ The Court has issued a separate due process analysis of the constitutionality of the punitive damages award in this case. Consistent with that opinion, the Court denies LBS's post-trial motions to the extent they challenge the constitutionality of the award.

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 OVER THE	)	
ESTATE OF ZERIHUN WOLDE AND	)	
AS NATURAL PARENT AND LEGAL	)	PLAINTIFFS PAGE LINE DESIGNATIONS
GUARDIAN FOR ADAM WOLDE,	)	FOR THE DEPOSITION OF THOMAS
AND WUBIT WOLDE,	)	GRIFFITHS
	)	
Plaintiffs,	)	
v.	)	
	)	
LACK'S BEACH SERVICE, CITY OF	)	
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFFS PAGE-LINE DESIGNATIONS FOR THE
DEPOSITION OF THOMAS GRIFFITHS**

Plaintiff respectfully submits the following page and line designations and exhibits for
Thomas Griffiths, Ed.D. which was taken on June 15, 2022 pursuant to Rule 32, SCRPC:

Page 9, Line 13 through Page 12, Line 3
Page 12, Line 8 through line 17
Page 12, Line 17 through Page 15, Line 21
Page 16, Line 1 through Page 19, Line 2
Page 19, Line 15 through Page 21, Line 23
Page 22, Line 2 through Page 23, Line 2
Page 23, Line 6 through Page 23, Line 17
Page 23, Line 23, through Page 24, Line 5
Page 24, Line 9, through Page 25, Line 10
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Page 28, Lines 6-16
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Page 30, Line 13 through Page 31, Line 12
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Respectfully Submitted,

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s/ H. Cooper Wilson, III
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Attorneys for the Plaintiff

June 20, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07075
MASWAET ABEL, AS PERSONAL,	)	
REPRESENTATIVE OVER THE	)	
ESTATE OF ZERIHUN WOLDE AND	)	
AS NATURAL PARENT AND LEGAL	)	
GUARDIAN FOR ADAM WOLDE,	)	
AND WUBIT WOLDE,	)	
	)	DEFENDANT LACK'S BEACH
	)	SERVICE'S DESIGNATIONS OF
Plaintiff,	)	DEPOSITION OF THOMAS
	)	GRIFFITHS TAKEN JUNE 15, 2022
v.	)	AND OBJECTIONS TO PLAINTIFF'S
	)	DESIGNATIONS
LACK'S BEACH SERVICE, CITY OF	)	
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	

Pursuant to Rule 32(a)(5) of the South Carolina Rules of Civil Procedure, the undersigned counsel hereby designates the following excerpts from the deposition of Thomas Griffiths taken on June 15, 2022, including objections to Plaintiff's designations:

OBJECTIONS

1. Page 19, Line 19 [Leading; foundation]
2. Page 21, Line 25 [DR – possible withdrawal]
3. Page 23, Line 4, [Leading - DR], Line 19 [Leading - DR]
4. Page 24, Line 7 [DR – possible withdrawal]]
5. Page 25, Line 12 [Withdrawn]
6. Page 26, Line 4 [Withdrawn], Line 19 [Withdrawn]
7. Page 27, Line 8 [Withdrawn]
8. Page 28, Line 4 [Withdrawn], 18 [Relevance]
9. Page 29, Line 17 [Withdrawn]
10. Page 30, Line 9 [Leading, possible withdrawal]
11. Page 31, Line 14 [Leading, argumentative]
12. Page 34, Line 25 [Leading]
13. Page 35, Line 12 [Withdrawn], Line 21 [Withdrawn]
14. Page 36, Line 5 [Withdrawn], Line 14 [Withdrawn], Line 23 [Withdrawn]
15. Page 37, Line 10 [Leading – possible withdrawal]
16. Page 38, Line 8 [Leading, argumentative]

17. Page 47, Line 11 [Misleading, foundation, no question – possible withdrawal]
18. Page 50, Line 25 [“Public trust”; misrepresentation, leading]
19. Page 54, Line 5 [Relevance, no prox cause connection], Line 16 [Withdrawn]
20. Page 55, Line 8 [Relevance, no prox cause connection]
21. Page 56, Line 7 [“Public trust”; misrepresentation, leading]
22. Page 59, Line 19 [DR, misrepresentation of “concessionaires”, leading, argumentative]
23. Page 60, Line 3 [DR, misrepresentation of “concessionaires”, leading, argumentative]
24. Page 61, Line 12 [Leading, relevance], Line 21 [Leading, relevance]
25. Page 62, Line 7, Line 17 [“Public trust”; misrepresentation, leading, no prox cause]
26. Page 63, Line 5, Line 18 [Relevance, misrepresentation, foundation]
27. Page 64, Line 3 [Relevance, misrepresentation, foundation]
28. Page 65, Line 5, Line 19 [“Public trust”; misrepresentation, leading, no prox cause]
29. Page 66, Line 20 [Leading, relevance, “for profit”, no prox cause, mention of NMB]
30. Page 67, Line 12, Line 16 [Leading, relevance, no prox cause, mention of NMB, statute]
31. Page 68, Line 3, Line 17 [Leading, relevance, no prox cause, statute]
32. Page 69, Line 4, Line 11, Line 23 [Relevance, NMB, foundation, non-responsive – move to strike answer]
33. Page 70, Line 5, Line 19 [Relevance, NMB, foundation, leading]
34. Page 71, Line 6, Line 19 [Relevance, NMB, foundation, leading]
35. Page 72, Line 5, Line 14, Line 24 [Relevance, NMB, foundation, leading]
36. Page 73, Line 10 [Relevance, NMB, foundation, leading]
37. Page 74, Line 10 [Relevance, leading]
38. Page 75, Line 1, Line 21 [Leading, misrepresentation, argumentative, statute]
39. Page 76, Line 13 [DR - Leading, relevance, no prox cause, statute]
40. Page 77, Line 3, Line 10 [DR - Leading, relevance, no prox cause, statute]
41. Page 78, Line 1, Line 21 [Leading, relevance, no prox cause, statute]
42. Page 80, Line 1, Line 12 [“Public trust”, misrepresentation, leading, relevance, no prox cause]
43. Page 81, Line 1 [Withdrawn], Line 13 [Withdrawn], Line 22 [Relevance, no prox cause]
44. Page 82, Line 8 [Leading, improper invasion of jury province], Line 24 [Withdrawn]
45. Page 84, Line 15 [Leading, asked and answered], Line 25 [Leading, relevance, no prox cause]
46. Page 86, Line 13 [Leading, foundation, relevance, no prox cause]
47. Page 87, Line 8 [Leading, foundation, relevance]
48. Page 88, Line 16 [Foundation, relevance]
49. Page 89, Line 9 [Leading, foundation, relevance]
50. Page 90, Line 6, Line 19 [Leading, foundation, relevance]
51. Page 91, Line 6 [Leading, foundation, relevance]
52. Page 92, Line 2, Line 18 [Leading, foundation, relevance]
53. Page 93, Line 11, Line 20 [Leading, foundation, relevance, no prox cause]
54. Page 94, Line 25 [Leading, foundation, relevance]
55. Page 96, Line 11 [Leading*]
56. Page 97 Line 18 [Answer non-responsive; move to strike last paragraph]
57. Page 98, Line 11 [Withdrawn]

58. Page 99, Line 6 [Withdrawn], Line 12 [Speculation, foundation] Line 20 [Speculation, foundation]
59. Page 100, Line 5, Line 16 [Leading, speculation, foundation, “public trust”]
60. Page 101, Line 5 [Leading, speculation, foundation], Line 20 [Withdrawn]
61. Page 102, Line 6 [Move to strike last sentence of answer, non-responsive, relevance, prejudice] Line 12 [Withdrawn]
62. Page 103, Line 8 [Withdrawn]
63. Page 104, Line 14 [Move to strike last two sentences of answer, non-responsive, relevance, prejudice]
64. Page 105, Line 1 [Leading, misrepresentation, relevance, foundation]
65. Page 107, Line 1 [Withdrawn], Line 13 [DR, relevance]
66. Page 108, Line 10 [Leading, misrepresentation]
67. Page 109, Line 1, Line 8 [Leading, relevance, foundation]
68. Page 110, Line 2 [Withdrawn], Line 13 [Speculation, relevance, foundation], Line 22 [Leading, foundation, relevance, no prox cause]
69. Page 111, Line 7, Line 16 [Leading, foundation, relevance, no prox cause]
70. Page 112, Line 18 [Leading, foundation, relevance, no prox cause]
71. Page 113, Line 5 [Leading, argumentative]
72. Page 114, Line 16 [Leading, relevance]
73. Page 115, Line 6, Line 17 [Leading, relevance]
74. Page 116, Line 4, Line 24 [Leading, relevance, foundation, prejudice]
75. Page 117, Line 10, Line 23 [Leading, relevance, foundation, prejudice, no prox cause]
76. Page 118, Line 8 [Leading, relevance, foundation, prejudice, no prox cause]
77. Page 244, Line 20 [Withdrawn]
78. Page 245, Line 8 [Leading, relevance, NMB], Line 14 [Leading, relevance, NMB], Line 23 [Leading, relevance, NMB]
79. Page 246, Line 15 [Leading, improper redirect]
80. Page 247, Line 2, Line 15 [Leading, improper redirect]
81. Page 248, Line 10, Line 22 [Leading, improper redirect]
82. Page 249, Line 7 [Leading, improper redirect], Line 21 [“Public trust”, leading, relevance, DR]
83. Page 250, Line 6, Line 18 [Leading, improper redirect, relevance, foundation, prejudice]
84. Page 251, Line 2, Line 16, Line 23 [Leading, improper redirect, relevance, foundation, prejudice]
85. Page 252, Line 3 [Leading, improper redirect, relevance, foundation, prejudice], Line 12 [Leading, improper redirect, relevance, foundation, prejudice], Line 24 [Leading, improper redirect, relevance, foundation, prejudice, “AWOL” misrepresentation]
86. Page 253, Line 8 [Withdrawn]; Line 22 [Leading, improper redirect, relevance, foundation, prejudice, “Public trust”]
87. Page 254, Line 1 [Leading, improper redirect, relevance, foundation, prejudice, “Public trust”]

Exhibits (Objections)

#2 – Relevance

- #3 - Relevance
- #4 – Relevance
- #6 – Redaction necessary (insurance, indemnity)
- #7 – Relevance, foundation
- #8 – Relevance, foundation
- #10 – Relevance, prejudice, hearsay

EXCERPTS

1. Page 119, Line 9 through Page 125, Line 10
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29. [Conditional – dual role] Page 205, Line 3 through Page 208, Line 2
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- 38. Page 229, Line 1 through Page 230, Line 7
- 39. [Conditional – dual role] Page 230, Line 8 through Page 232, Line 1
- 40. [Conditional – dual role] Page 232, Line 17-21
- 41. [Conditional – dual role] Page 233, Line 22-25
- 42. [Conditional – dual role] Page 234, Line 4-19
- 43. Page 234, Line 20 through Page 235, Line 12
- 44. Page 236, Line 8 through Page 241, Line 2
- 45. Page 241, Line 17-21
- 46. [Conditional] Page 242, Line 5 through 243, Line 21

Lack's respectfully reserves the right to amend, revise, add to, subtract from and/or supplement these objections and experts in accordance with the Rules.

Respectfully Submitted,

HALL BOOTH SMITH, P.C.

/s/Joseph D. Thompson, III

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Attorneys for Defendant Lack's Beach Service

July 21, 2022

Mount Pleasant, South Carolina

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT

MESWAET ABEL, AS PERSONAL) STATE OF SOUTH CAROLINA
REPRESENTATIVE OVER THE)
ESTATE OF ZERIHUN WOLDE)
AND AS NATURAL PARENT AND) COUNTY OF HORRY
LEGAL GUARDIAN FOR ADAM)
WOLDE, AND WUBIT WOLDE,)

) Case No.
) 2019-CP-26-07075

Plaintiffs,)

- vs -)

) DEPOSITION OF:
) THOMAS J. GRIFFITHS, ED.D.

LACK'S BEACH SERVICE,)
CITY OF MYRTLE BEACH,)
AND JOHN DOE LIFEGUARD,)

) DEPOSITION DATE:
) December 9, 2021
) Thursday, 9:00 a.m.

Defendants.)

FILED ON BEHALF OF:
Defendant Lack's
Beach Service

COUNSEL OF RECORD FOR
THIS PARTY:
Joseph Thompson, Esq.
HALL BOOTH SMITH, P.C.
111 Coleman Boulevard
Suite 301
Mt. Pleasant, SC 29464
843-720-3469

REPORTED BY:
Tammie Elias, RPR
Notary Public
No. TE80531

1 DEPOSITION OF THOMAS J. GRIFFITHS, ED.D., a
2 witness, called by the Defendant Lack's Beach
3 Service for examination, in accordance with the
4 Pennsylvania Rules of Civil Procedure, taken by and
5 before Tammie Elias, RPR and Notary Public in and
6 for the Commonwealth of Pennsylvania, at The Penn
7 Stater Hotel & Conference Center, 215 Innovation
8 Boulevard, State College, Pennsylvania, on Thursday,
9 December 9, 2021, commencing at 9:00 a.m.

10 APPEARANCES:

11 FOR THE PLAINTIFFS:

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FOR THE DEFENDANT CITY OF MYRTLE BEACH:

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ALSO PRESENT:

George Lack (via phone)

EXAMINATION INDEX

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1 THOMAS J. GRIFFITHS, ED.D.,
2 having been duly sworn,
3 was examined and testified as follows:

4 - - - -

5 EXAMINATION

6 - - - -

7 BY MR. THOMPSON:

8 Q. Could you state your full name, please?

9 A. Yes. My legal name is Thomas John Griffiths,
10 G-R-I-F-F-I-T-H-S. I typically go by Tom.

11 Q. Dr. Griffiths, my name again is Trey Thompson.
12 We met just a couple of minutes ago. I
13 represent Lack's Beach Service in a lawsuit
14 brought as a result of an incident that
15 happened down in Myrtle Beach, South Carolina.
16 I'm here to take your deposition.

17 I know you have been through this
18 before. I have got a list of all of the times
19 that you've been deposed and testified in
20 trial. Have you ever been deposed in a case
21 in the State of South Carolina?

22 A. That I can't recall. I'm sorry. I may have,
23 I just don't know.

24 Q. And I only ask you that because I want to make
25 sure you understand the rules in South

1 Carolina right. So if you don't understand
2 something I have asked you, please let me know
3 that.

4 A. I will.

5 Q. It's important that obviously once you get
6 sworn in, it's your testimony, not anybody
7 else's and you don't get the chance to get any
8 assistance from anybody without perhaps me
9 knowing about what you got assistance about.
10 So if you have any questions for whatever
11 reason, please let me know and I'll be happy
12 to try and clarify, correct or explain what I
13 have asked you. Okay?

14 A. Got it.

15 Q. If you give an answer today, I'm going to
16 assume that you heard my question, you
17 understood my question and you're giving me a
18 truthful response. Is that fair?

19 A. That's fair.

20 Q. Very good. Dr. Griffiths, just some
21 housekeeping matters. I have been provided a
22 couple of things from Mr. Wilson concerning
23 you, including your CV and as I described
24 earlier, the list of cases in which you
25 provided testimony. I'm going to hand you

1 what I believe is your most recent CV and ask
2 if it is, in fact, your CV?

3 A. Yes. This appears to be it. Without going
4 through the entire thing, it looks like
5 everything on there is mine.

6 MR. THOMPSON: I'll mark that as
7 Exhibit 1.

8 - - - -

9 (Exhibit 1 marked for identification.)

10 - - - -

11 BY MR. THOMPSON:

12 Q. The next document I'm going to mark as Exhibit
13 2 is what appears to be a list of cases in
14 which you provided either deposition or trial
15 testimony. Take a look at that and let me
16 know that is what it is.

17 A. Yes, that's it.

18 MR. THOMPSON: Mark that as Exhibit
19 2.

20 - - - -

21 (Exhibit 2 marked for identification.)

22 - - - -

23 BY MR. THOMPSON:

24 Q. And I'm going to hand you a collective set of
25 documents, it's three pages. Appears to be

1 invoices from you or your company to
2 Mr. Wilson and the McLeod Law Group. There
3 are three invoices dated August, September and
4 November of 2021. Are those your invoices?

5 A. Yes, sir.

6 Q. Do you have any other invoices related to this
7 case?

8 A. They were generated this week. They are
9 probably in the process of getting to his
10 office.

11 MR. THOMPSON: We'll mark that
12 collectively as Exhibit 3.

13 - - - -

14 (Exhibit 3 marked for identification.)

15 - - - -

16 BY MR. THOMPSON:

17 Q. We'll start with Exhibit 3 actually.

18 A. Got it.

19 Q. So the first invoice that has been produced is
20 dated August 24, 2021; is that correct?

21 A. The first one I have is August 13 to August
22 19th is the first one I have. Maybe I'm
23 looking at the wrong one.

24 Q. Look at the top, August 24, 2021.

25 A. Oh, yes. Okay. I was looking at the actual

1 date of work.

2 Q. I'm looking at the date of the invoice to
3 start with and then we'll get into the meat of
4 the invoice, if you will.

5 A. Got it.

6 Q. August 24, 2021 appears to be the first
7 invoice generated from your office. Do you
8 have any other invoices earlier than that
9 date?

10 A. Not if DJS didn't apply them.

11 Q. In the August 24, 2021 invoice, there is a
12 date of August 6, 2021, which it says: "A
13 retainer payment was received." Do you see
14 that?

15 A. Not yet. I don't know why I can't see it.

16 Q. It's at the bottom of the page.

17 A. Yes. Okay. Yes.

18 Q. So I assume then that at some point prior to
19 that, you had been contacted by Mr. Wilson's
20 office about this case?

21 A. Yes, sir.

22 Q. Do you know when it was that you were first
23 contacted?

24 A. No. Again, DJS would have that, but I don't
25 keep track of that.

1 Q. What is your relationship with DJS?

2 A. They manage -- well, now I have two
3 relationships with them. Basically for about
4 the last ten years or more, they have managed
5 my files, only my court case files. So they
6 start by doing a conflict check, and that was
7 the primary reason for engaging them. And
8 then they send out a retainer agreement once a
9 conflict check is clear if the attorneys want
10 to hire me. And then they just manage my file
11 as far as getting me documents, setting up
12 inspections, depositions and so forth and so
13 on. They do all the billing, all the
14 collection and I just concentrate on work
15 product.

16 Q. So did Mr. Wilson or Mr. Wilson's law firm
17 contact you or did they contact DJS, to your
18 knowledge?

19 A. I don't know, but they usually contact me
20 first and the first thing I do is send them to
21 DJS for a conflict check before speaking about
22 the specifics of the case.

23 Q. Is there any information in your file that you
24 have that would be able to tell me when you
25 were first contacted about this case?

- 1 A. No. But again, DJS should have that. They
2 could get it to you quickly.
- 3 Q. And then the retainer, is that a DJS retainer
4 or is that something that you require?
- 5 A. Well, DJS requires it and I have them keep it.
6 They don't forward it to me. I work off of
7 that retainer.
- 8 Q. Well, I understand. I don't know whether you
9 told them I need a \$5,000 retainer or whether
10 DJS says we do \$5,000 retainers?
- 11 A. They like to do \$5,000 retainer. If I ask
12 them to eliminate that portion of the
13 contract, they would, but they like working it
14 that way.
- 15 Q. How long have you worked with DJS?
- 16 A. At least 10 years. Maybe closer to 15 years.
- 17 Q. And as I understand it then, your association
18 with DJS is primarily administrative, they do
19 the administrative stuff for your consulting
20 work?
- 21 A. Yes. I would consider them to be like
22 administrative assistants.
- 23 Q. Has DJS or anybody at DJS performed any
24 substantive analysis or provided you any
25 substantive material for this case?

1 A. No, sir.

2 Q. So DJS, its entire work or assistance in this
3 matter has been administrative for you; is
4 that right?

5 A. That's correct.

6 Q. Do you --

7 A. Before you go on, I just want to point out. I
8 know it wasn't a question and I shouldn't
9 bring something up.

10 Q. That's okay.

11 A. But I do have another business relationship
12 with them. We're in the process of developing
13 an app, a phone app for lifeguards, where they
14 can practice detecting victims, and they are a
15 50 percent partner on the expense of that. So
16 I just wanted to bring that out in case it
17 should come out later on that I didn't
18 disclose that. I also have a business
19 relationship to develop a lifeguard drowning
20 detection app.

21 Q. I appreciate that. And I'm not as technical
22 perhaps as some lawyers that you come across.
23 I'm just trying to get information, so I do
24 appreciate you providing me the information
25 and it's helpful for us to understand your

1 role in not only this case but your
2 relationship with the folks that are involved
3 either administratively or substantively.
4 Okay?

5 A. Got it.

6 Q. Do you have a list of the materials that you
7 were provided?

8 A. I have all the materials. I don't have a
9 list.

10 Q. Okay. Since you don't have a list, and I
11 understand, I see a pile of things over there,
12 let's work through what you have been provided
13 in this case.

14 A. Okay. Everything I have been provided is
15 either in that box or here. I separated out
16 what I thought was ancillary information that
17 wasn't significant to my opinion, and what's
18 on the desk is what I reviewed and consumed as
19 far as my opinion is concerned.

20 Q. Well, let's start with what you have out in
21 front of you on the desk or on the table.

22 A. Okay.

23 Q. And I don't want to go into any specific
24 detail right now. It's mostly just to try to
25 get the list of materials that you do have.

1 A. Okay. So I have a map that was an exhibit of
2 where the L22, L21 was, and this was provided
3 I think in Holly Robinson's deposition.

4 Q. Before you go there. It's just a black and
5 white photocopy of an overview of the area of
6 the beach?

7 A. That's correct.

8 Q. Okay.

9 A. And then I have the state code, the section
10 57140 -- excuse me, 145, which discusses what
11 agencies can do and what municipalities can do
12 as far as lifeguarding services are concerned.

13 Then I have the lineup from the day
14 of the incident.

15 Q. What date is that?

16 A. That is August 24, 2018.

17 Q. Okay.

18 A. And then I have --

19 Q. Now, and I apologize for interrupting, but it
20 looks like what you have just referred to is a
21 two-page document?

22 A. Yes. And I didn't even look at the second
23 page there. Yeah, it deals with the stands.
24 And I don't know if this is money generated or
25 not, I didn't review this. It's Exhibit 4,

1 Plaintiff's Exhibit 4.

2 Q. To which deposition?

3 A. Lack. George Lack's deposition.

4 Q. All right.

5 A. So I didn't refer to that. Then I have the
6 I'll call it a memo that came from
7 Mr. Wilson's office detailing the facts of the
8 case as they saw it.

9 I have the certificate of service
10 with the exhibits including the seasons 2018
11 to 2025, seasons water safety franchise.

12 Q. Let me interrupt you real quick. The top
13 portion of that looks like the complaint,
14 right, the summons, and then is the complaint
15 right behind that?

16 A. This is all I have here.

17 Q. If you would, just hand it to me for a second.
18 This is Plaintiff's memorandum and opposition
19 to Defendant City of Myrtle Beach's motion for
20 summary judgment. It looks like the exhibits
21 that went along with it.

22 A. Yes. Thank you. And a letter from UCLA dated
23 September 30, 2018.

24 Q. SLA or UCLA?

25 A. USLA. I was just testing you to see if you --

1 Q. I thought that's what you said, but, you know,
2 it is still early. Now, is that document,
3 again it's more than one page, so --

4 A. I have multiple maps. They keep popping up in
5 my documentation, so I have only referenced
6 one, and you'll have to excuse me for that.

7 Q. And then the USLA document though, it is just
8 the single letter?

9 A. It's the letter from them, yes. It's a little
10 over two pages from Peter Davis, the
11 president.

12 Q. And the date on that letter?

13 A. It's September 30, 2016.

14 Q. Okay.

15 A. Then I have separately the franchise
16 agreement, which was also part of the exhibits
17 earlier. This is a portion I believe of the
18 complaint, the factual background. And then
19 with that I have e-mails, various e-mails that
20 were sent. And this is the in-service
21 training record from 2018.

22 Q. Let me look at that. It's not necessarily a
23 consistent group of materials. Let's see. Is
24 it fair to say the materials that you brought
25 with you today, they are assembled in a manner

1 that you have assembled them, right, you put
2 things together as you would put them
3 together?

4 A. Yeah. And the best way to describe it, I
5 disorganized the file.

6 Q. Okay. I like that description. So the way
7 that the materials are today are not
8 necessarily the way in which they were
9 presented to you; they are the ways that you
10 have reviewed them and assembled them for the
11 purposes of either testifying or appearing
12 here today; is that right?

13 A. Exactly.

14 Q. So this group of documents would include part
15 of the complaint. It looks like a Lack's
16 Beach Service letter from George dated
17 November 16, 2020. A number of e-mails in and
18 around, let's see, November 19, 2020 e-mail
19 referring to the proposal. August 9, 2018
20 e-mail. This is a group of e-mails that has
21 to do with the lifeguard -- somebody was
22 reporting about the lifeguard?

23 A. Yes, sir.

24 Q. And then an in-service training 2018 document.
25 March 1, 2017 proposal letter looks like from

1 George Lack; is that correct?

2 A. Yes, sir.

3 Q. And some more of the complaint. Okay. Thank
4 you.

5 A. Thank you. Then I have a letter e-mail from
6 John Pedersen to a bunch of people about the
7 two incidents that occurred on August 24,
8 2018.

9 Q. Can I see that, please?

10 A. Yes. Then I have the lifeguard manual from
11 the City of North Myrtle Beach, which was
12 issued it's 2007. It says it's the annual
13 report, but it's their lifeguard manual as
14 well.

15 Q. Can I see that? Now, I will say as I have
16 reviewed some of the materials that you
17 brought with you here today, there are some
18 yellow highlighter, there are some circles and
19 maybe some underlines. Are those yours?

20 A. Yes.

21 Q. In other words, did any of these materials
22 come to you in a highlighted condition?

23 A. No, sir.

24 Q. So all of the highlighting and/or all of the
25 annotations are all yours?

1 A. Yes, sir.

2 Q. The City of North Myrtle Beach documentation,
3 did you receive that from Mr. Wilson or
4 Mr. Wilson's office or how did you obtain --

5 A. I don't remember exactly. I would think it
6 came from his office, but I just can't recall.
7 I apologize.

8 Q. Do you have any understanding or knowledge as
9 to why the City of North Myrtle Beach's manual
10 would have been produced?

11 A. I honestly don't know whether it's just a
12 comparison for Myrtle Beach, but --

13 Q. Right. Well, you understand that this
14 incident occurred in the City of Myrtle Beach;
15 correct?

16 A. Correct.

17 Q. And it would have been under the City of
18 Myrtle Beach's jurisdiction; correct?

19 A. Correct.

20 Q. Would the City of North Myrtle Beach's manual
21 in any way have applied to the operation of
22 Lack's Beach Service or the beach --

23 A. No.

24 Q. -- in the City of Myrtle Beach?

25 A. I'm sorry. No, sir.

1 Q. So what's the purpose of you having it?

2 A. I guess it came in my files. And to be
3 perfectly honest, the first time I read
4 through it, I thought it was Myrtle Beach's
5 manual. So then I went back and discovered it
6 wasn't Myrtle Beach's, it was the City of
7 North Myrtle Beach. So I believe it was
8 supplied to me. There's a chance that I might
9 have run it off, but I don't think so. Well,
10 I know I didn't run it off because I don't
11 have a color printer.

12 Q. Next.

13 A. Okay. Now, the rest of the documents are
14 depositions and they are of: John Pedersen,
15 Tony Flaherty, Brady Oliver, Holly Robinson,
16 and Mr. George Lack. And I do have one other
17 manual, which is Lack's North and South Strand
18 Beach Service Training Manual.

19 Q. So those are all of the I guess copied or
20 printed materials; correct?

21 A. Correct.

22 Q. And then you have a legal pad?

23 A. Yeah. And I just have very short notes of the
24 first is what I call a roster of the five
25 depositions that I read. And then I have a

1 few notes concerning section 5-7-145 that was
2 passed in 1999, just half a dozen notes about
3 that.

4 And then I just because I know your
5 document asked for publications, I couldn't
6 bring all the publications. But the two beach
7 books I wrote were: Better Beaches in 1999.
8 I did that for the National Recreation and
9 Park Association. And then in 2011, I wrote
10 Safer Beaches for Human Kinetics. And then I
11 just have a copy of the latest USLA manual.

12 Q. So let's look at your box over there.

13 A. Much of the information in the box is
14 duplicative of what I have here. I have just
15 got several copies of everything.

16 Q. I'll tell you what, it would be helpful, let
17 me just run through it if you don't mind.

18 A. Sure.

19 Q. So at first blush, a lot of this appears to be
20 copies of copies of things.

21 A. Exactly.

22 Q. One of the matters or documents in the box is
23 Ms. Abel's deposition transcript?

24 A. Yes.

25 Q. Did you review it?

1 A. I reviewed that last night, yes, I did.

2 Q. But you didn't include it in the materials?

3 A. Yeah. I just didn't think it was that
4 informative.

5 Q. Okay. I don't want to state the obvious. I
6 mean, it's not in the materials that you
7 brought with you --

8 A. Right.

9 Q. -- for the purposes of offering opinion. It's
10 just something that you have, but it's not
11 informative for the purposes of your opinion;
12 is that right?

13 A. Correct.

14 Q. There's also a letter written by Ms. Abel as
15 well in here; correct?

16 A. Yes.

17 Q. And again, this is the box of materials that
18 are not instructive or not helpful for you in
19 the purposes of providing your opinion, is
20 that fair?

21 A. Yeah. I think the best way to describe it, I
22 skimmed those documents and I studied these
23 documents.

24 Q. And when you say these and those, because this
25 is the record, right, so you skimmed the

1 documents that are in the box?

2 A. Yes.

3 Q. And then you studied the documents that we
4 have made a list of currently; correct?

5 A. Correct.

6 Q. There's a City of Myrtle Beach event report.
7 You kind of shrugged your shoulders?

8 A. Yeah. I mean, I went through it at one time,
9 but I don't recall what's in there.

10 Q. Photographs of the beach?

11 A. Yes. I believe with the twins in it.

12 Q. Right. On the date of the event; is that
13 right?

14 A. Correct.

15 Q. Did those photographs not assist you in any
16 fashion?

17 A. No, sir.

18 Q. This appears to be some North Myrtle Beach
19 printout. Again shrugging your shoulders?

20 A. Yeah. The box is the shrug-your-shoulders
21 box.

22 Q. Payroll journal for Lack's employees?

23 A. Correct.

24 Q. A lot of duplicates?

25 A. Yes.

1 Q. There's a lifeguard training, looks like maybe
2 a personnel file for one or more lifeguards?

3 A. Yes.

4 Q. Do you know which lifeguards were in which
5 post?

6 A. I'm pretty familiar with it.

7 Q. Well, you have the lineup; right?

8 A. Yes.

9 Q. Did you review any of their personnel files?

10 A. I did not.

11 Q. In other words, the ones that were in the
12 stands in the area where this incident
13 occurred?

14 A. I didn't study them. I quickly skimmed
15 through it, but I didn't study them, no.

16 Q. Well, for example, in this case are you going
17 to offer any opinion with regard to the
18 training that any of these lifeguards had
19 before they were employed by Lack's?

20 A. I didn't see any training logs of individuals
21 going through training.

22 Q. Right. It was a poor question. So the
23 personnel file would perhaps include an
24 application and/or CV or resume; correct?

25 A. Correct.

1 Q. Could?

2 A. Could.

3 Q. That would then form the basis for their
4 hiring at least in part perhaps?

5 A. Correct.

6 Q. Did you review any of those materials to
7 determine whether any of these individuals
8 should or should not have been hired in the
9 first instance?

10 A. I didn't evaluate that. I saw that they
11 had -- I saw a couple of Red Cross
12 lifeguarding certifications, I think first aid
13 and CPR, and mostly personnel items that you
14 would typically generate through the hiring
15 process.

16 Q. So the bottom line, are you going to offer any
17 opinions with regard to the hiring or the
18 qualifications of these lifeguards before they
19 became employed with Lack's?

20 A. Not prior to their employment, no.

21 Q. In other words, you're not going to offer
22 testimony that one lifeguard had never been
23 certified and never been qualified, yet he was
24 still hired?

25 A. No, sir.

1 Q. So to the best of your knowledge, they had
2 appropriate qualifications to be considered
3 for hire by Lack's as beach lifeguards; is
4 that right?

5 A. Close. But I would clarify it. It looks like
6 they had the appropriate certifications, but
7 it's up to the employer to qualify them to
8 work at the workplace. So I think they may
9 have been certified, they were certified, but
10 I'm not certain that they were qualified.

11 Q. I understand. And to be clear, right, I mean,
12 the qualification piece though is after they
13 had been hired; correct?

14 A. Correct.

15 Q. And I'm focusing on the prehire; right?

16 A. Correct.

17 Q. That these folks, these guys, these girls that
18 were hired as lifeguards, did you see anything
19 that would suggest to you that they were
20 not -- didn't have the requisite experience or
21 correct certifications in order to be hired at
22 Lack's in the first instance?

23 A. No, sir.

24 Q. So then your opinion or qualification in this
25 situation may be with regard to how they were

1 trained or how they were qualified after they
2 were hired; is that right?

3 A. Correct.

4 Q. You got a number of things about the City of
5 North Myrtle Beach. Again, did you pull any
6 of that or do you know if it was provided to
7 you?

8 A. It must have been provided to me, again
9 because they are color copies and I don't have
10 a color printer.

11 Q. Looks like a number of beach advisory
12 committee agenda --

13 A. Yes.

14 Q. -- meeting minutes?

15 A. Yes, sir.

16 Q. You reviewed those?

17 A. Yes, I did go through those.

18 Q. But they are not out on the table today?

19 A. No.

20 Q. They are in the box?

21 A. But again I didn't really rely upon those to
22 formulate my opinions.

23 Q. There is a beach safety services safety
24 improvement -- or beach safety services
25 enhancement project?

1 A. Right.

2 Q. Where is that from?

3 A. It's a copy of a PowerPoint and it's the City
4 of Myrtle Beach. It was in my file.

5 Q. Do you know when that was created?

6 A. I do not. Let me just take one look.

7 Q. Do you have any idea what time period is
8 referenced in that PowerPoint?

9 A. No, sir. No. I wouldn't want to assume. I
10 don't know. Well, here it says service calls
11 2012 to 2016. I don't know if police calls,
12 2012 to -- well, it says 1016, and it should
13 be 2016. So it seems to be around that time
14 period, but there's no other date on it.

15 Q. Here's an e-mail in the box. If you look at
16 that first paragraph, does that appear to
17 reference the --

18 A. Well, I don't know if it references that or
19 not. I'd have to read both. And I'm going to
20 start at the back and work my way forward.

21 Q. That's okay. There's just an e-mail there
22 that suggests a presentation was attached with
23 it. It's generally in the same area of the
24 box as the presentation is?

25 A. Yeah. It seems to offer initiatives for the

1 future, outreach and initiatives. Increasing
2 police coverage. Increase lifeguard only
3 stands, jet ski patrols, so forth and so on.
4 So it's proposed initiatives that appear to
5 come out at around 2016.

6 Q. Again, this is in the box; right?

7 A. Yes.

8 Q. Appear to be some city council minutes, City
9 of Myrtle Beach; right? Is that what you
10 would call that?

11 A. Yes.

12 Q. Medical records. Tax returns. This appears
13 to be a host of personnel files. There are a
14 number of incident reports, and these would
15 have been narratives from the lifeguards
16 involved?

17 A. Yes. Yes.

18 Q. Do you have those in the materials on the
19 table today?

20 A. I think so. I did read through them more than
21 once, so I did read them. I don't know if
22 they are not here or not.

23 Q. Would they not be part of the evaluation?

24 A. No, they are important.

25 Q. Are they not important?

1 A. They are important.

2 Q. We'll pull those out for a minute. There's a
3 lifeguard academy lesson plan for 2021?

4 A. Correct.

5 Q. Is that a Lack's lesson plan, is that a City
6 of Myrtle Beach lesson plan or do you know?

7 A. I think that's the plan that they filed,
8 Lack's files with the city.

9 Q. But that's the 2021 plan; is that right?

10 A. Yes, sir.

11 Q. And more incident reports?

12 A. Correct.

13 Q. Beach advisory meeting minutes from 2020. ER
14 report. Appears to be some statutory
15 sections, including 27, Title 27, landowners?

16 A. Yes.

17 Q. Did you pull those statutory sections or were
18 they provided to you?

19 A. I believe they were provided to me.

20 Q. And again, the highlighted aspects of those
21 statutes, are those your annotations?

22 A. Yes.

23 Q. All right. So I have been through the box.

24 A. I know it's early, but can I use the restroom
25 really quick?

1 Q. At any time. And I meant to say, part of the
2 deal is whenever you want to take a break, we
3 can take a break.

4 - - - -

5 There was a brief Recess in the proceedings.

6 - - - -

7 MR. THOMPSON: We're back on the
8 record.

9 BY MR. THOMPSON:

10 Q. Dr. Griffiths, I have been through the
11 documents you brought with you today and I
12 want to go back to where I started, which are
13 your invoices, so the Exhibit 3. The first
14 one was August 24, 2021, do you have that one
15 in front of you?

16 A. Yes, sir.

17 Q. And so again do you attempt to
18 contemporaneously report the time that you
19 spent on any matters?

20 A. I sent an e-mail to DJS.

21 Q. I mean, like I look at something and I write
22 it down immediately or do you look at
23 something and then maybe 10 days later try to
24 recall what it is that you did?

25 A. No. The day I complete the work, I try to

1 send in an e-mail to Rebecca at DJS saying
2 exactly what I did and how much time it took.

3 Q. In other words, for August 13, 2021, the entry
4 that you had there, it's actually listed as
5 August 13 through August 19, and I couldn't
6 tell whether the 4.55 hours that's listed
7 there was conducted over that period of time
8 or whether it was conducted solely on August
9 13?

10 A. It probably would have been several entries
11 between August 13 and August 19, probably. I
12 can't promise that's the way it was, but
13 usually whenever I finish work, I don't wait
14 until the next day, I send it in immediately.
15 It's not like me to go back for a period of
16 six days and say this is what I have done over
17 six days.

18 Q. And then how do you communicate by DJS, just
19 by e-mail?

20 A. E-mail.

21 Q. And then do you have a form or format that you
22 use or is it just kind of, hey, DJS, I spent
23 one hour on this file?

24 A. I put the date, I put the case caption and I
25 state more specifically what I did read, the

1 depositions of Lack's, Robinson and so forth.

2 Q. Do you think that the e-mails that you sent to
3 DJS would have more description than that
4 which is contained on this invoice?

5 A. It wouldn't have a lot of description, but it
6 would have more.

7 Q. And then, to your knowledge, is your time
8 billed on a monthly basis?

9 A. I don't know. I don't know. I think they
10 bill on a weekly basis. I can't guarantee
11 that, but I'm pretty sure they bill on a
12 weekly basis.

13 Q. Right. For example, the August 24, 2021 bill
14 includes obviously again the time that it
15 states, August 13 through August 19th. The
16 next bill is dated September 13th includes an
17 entry from August 23 that I would have thought
18 might have been captured in the August 24
19 bill. So you don't know how administratively
20 all of that works?

21 A. No, sir.

22 Q. And you receive copies of the bills that DJS
23 sends out?

24 A. I don't receive these, no. I just when I get
25 checks, it says what case it's for.

1 Q. In other words, but is there any kind of
2 double-checking, if you will, on the bill that
3 goes out, you don't look to make sure that
4 they have captured all of your time?

5 A. I'm smiling because my wife always hits me
6 over the head about this, why aren't you
7 double-checking. No. I send them in an
8 e-mail and then --

9 Q. And then you expect them to get it right?

10 A. I expect them to get it right. As horrible as
11 that sounds, yes, sir.

12 Q. The second bill as we reference was dated
13 September 13, 2021. It looks like you had a
14 one and a half hour conference call with
15 Mr. Wilson; is that right?

16 A. Correct.

17 Q. Do you keep any notes of any of the calls that
18 you have with the attorneys that you have in a
19 case?

20 A. I really try not to. No.

21 Q. Is there any reason for that?

22 A. I don't like to lose notes. And then if they
23 are very cryptic, spend a prolonged amount of
24 time trying to explain what my note meant. It
25 just becomes very arduous for me. I try not

1 to take very many notes at all.

2 Q. The one and a half hour telephone conference
3 call I assume would have been to discuss with
4 Mr. Wilson what you had reviewed in the four
5 and a half hours from the first bill; is that
6 right?

7 A. Perhaps. And sounds logical.

8 Q. I mean, did you spend anymore time on the case
9 before talking with Mr. Wilson?

10 A. No, sir.

11 Q. Or if you did, it wasn't captured by DJS?

12 A. Correct. Well, it wasn't captured by DJS
13 because I didn't tell them to capture it.

14 Q. And again obviously I'm coming at this from
15 it's all over and done, right, so I'm trying
16 to figure out what it is that you did and how
17 you did it and how long it took?

18 A. I understand.

19 Q. So I'm relying on a lot of these documents,
20 which you're relying on to get paid; right?

21 A. Correct.

22 Q. And so I assume you're expecting these to be
23 accurate?

24 A. Yes, sir.

25 Q. In the accurate reporting of your time?

1 A. Yes, sir.

2 Q. Do you have any recollection of the call that
3 you had with Mr. Wilson in August of 2021?

4 A. No, sir.

5 Q. And you don't have any kind of note or any
6 kind of annotation or anything about the
7 results of that conversation?

8 A. No, sir.

9 Q. Before you were retained, did you have a
10 conversation or communication with Cooper
11 Wilson's office or Cooper Wilson himself?

12 A. I usually have an initial phone call after the
13 conflict check to say, hey, these are the
14 facts of the case, this is the way we see it,
15 do you think you can help us out.

16 Q. Right.

17 A. Usually I have that type of conversation
18 before I'm retained.

19 Q. Right. So there would have been some kind of
20 contact with Mr. Wilson's office or Mr. Wilson
21 himself regarding the case and regarding the
22 facts and whether you might be able to offer
23 assistance or not?

24 A. Correct.

25 Q. In that initial call, do you offer a really

1 broad base preliminary, yeah, I think this
2 happened or I think that happened?

3 A. Depending upon how much factual information
4 they provide me with. If they offer me a
5 detailed description of exactly what took
6 place, then I typically can offer an opinion.
7 But if it's just a general overview, I usually
8 don't have enough information to construct my
9 opinions.

10 Q. Do you have any recollection of what it was
11 that Mr. Wilson or the lawyers involved in
12 this case told you and then what you told them
13 about whether you could offer assistance in
14 this case?

15 A. No, sir.

16 Q. And you, of course, didn't keep any
17 annotations or any notes from that contact?

18 A. No. I don't do that.

19 Q. Do you have any recollection whether you told
20 anyone at the McLeod Law Group or any of the
21 lawyers in this case, that you'd be able to
22 offer an opinion beneficial to their case
23 before you were retained?

24 A. I don't recall if I did that. I just can't
25 recall. I don't know.

1 Q. Have there been instances where you have been
2 contacted by an attorney, received a retainer
3 check, reviewed materials, and then have told
4 the lawyer that paid your retainer that your
5 opinion would not be favorable to their case?

6 A. Yes.

7 Q. How many times has that happened?

8 A. I usually bow out before I take the retainer.
9 But if I get the facts of the case as I start
10 reviewing the case and it doesn't mesh with
11 what the attorneys told me and if it doesn't
12 look favorable, I'll tell them and just
13 decline the case.

14 Q. Right. So again going back in this instance
15 in this case, you took the retainer, correct,
16 based on the information and the contact that
17 you had with the lawyer initially; correct?

18 A. Well, DJS took the retainer.

19 Q. Right. But DJS isn't going to take the
20 retainer without your okay; correct?

21 A. Correct.

22 Q. In other words, you're not going to get
23 blindly provided a case that you have never
24 heard about, never seen before, never talked
25 to the lawyer about, are you?

1 A. No, sir.

2 Q. In other words, again you would have had some
3 communication so that you could then authorize
4 DJS to accept the retainer?

5 A. Correct.

6 Q. The third bill in Exhibit 3 is dated November
7 24, 2021, and it looks like 2.55 hours for
8 reviewing materials as well as deposition and
9 exhibits for George Lack; is that correct?

10 A. Correct.

11 Q. And again that's the extent of the invoicing
12 that I have been provided to date. Do you
13 have information or do you have documentation
14 in your file about how much additional work
15 you have done since the time of your last
16 bill?

17 A. No, but DJS would have that.

18 Q. Do you have any kind of electronic file where
19 you keep e-mails on any open case of your
20 communications with DJS?

21 A. They would probably just be in my e-mail
22 server. They would still be there when I sent
23 Rebecca on what dates I did what work, for how
24 many hours.

25 Q. Right. But do you, for example, for this

1 case, do you have an electronic folder that is
2 Wolde versus Lack's Beach Service and then you
3 keep all of the e-mails, all the
4 communications in that electronic file?

5 A. No, sir.

6 Q. Does anybody assist you in any regard in
7 keeping your electronic data?

8 A. No, sir, unfortunately.

9 Q. So any e-mails that you may have sent to DJS
10 regarding your invoicing since November 24,
11 2021, they may or may not be in your general
12 e-mail server at this time?

13 A. I think they would be and the subject heading
14 would probably say invoice to Cooper Wilson.
15 And then the body of that would show the date
16 I did work and how long it took me to perform
17 that work.

18 Q. Because through November 24, 2021, it would
19 appear that you had spent 4.55 hours plus 2.55
20 hours in actual review of materials and then
21 1.5 hours in communication with the lawyer; is
22 that right?

23 A. Yes, sir.

24 Q. And we don't know how much time you had spent
25 since November 24, 2021, do you?

1 A. Yes. But it's substantial in the last ten
2 days or so.

3 Q. Is that a result of because I was coming to
4 ask you questions about the case?

5 A. Sure. Yes, sir.

6 Q. Dr. Griffiths, just administratively in this
7 case you were identified and named as an
8 expert witness in a supplemental discovery
9 response dated August 26, 2021, just to let
10 you know that's what happened.

11 A. Okay.

12 Q. So at the time that you were named as an
13 expert then, by that date you had spent the
14 4.55 hours on the first invoice; correct?

15 A. It appears that to be true.

16 Q. And then you would have had the 1.5 hour
17 telephone call with Mr. Wilson on August 23;
18 correct?

19 A. Correct.

20 Q. And that would have been the extent of your
21 review and work on the case prior to you being
22 named as an expert; is that right?

23 A. I may have had other calls with Mr. Wilson
24 that I just didn't bill for because I believe
25 I spoke to him more than one time, but I can't

1 document that. I didn't bill him for it.

2 Q. But as far as substantive review of materials,
3 things like that, it would have been
4 documented and recorded in the invoicing that
5 you have and that you brought with you today;
6 correct?

7 A. Yes, sir.

8 Q. In going through some of the materials that
9 you brought with you here today, one of the
10 things that you did bring was a legal pad and
11 it has some information, can you bring that
12 out for me?

13 A. Yes, sir.

14 Q. Can you take a look at it?

15 A. Uh-huh.

16 Q. Could you pull out the case list for me?

17 A. Got it.

18 Q. I want to work through some of this with you.
19 As I understand it, and certainly I couldn't
20 find in the list any incidents where you have
21 offered deposition testimony or trial
22 testimony in a case pending in South Carolina?

23 A. That's probably true.

24 Q. Do you know or have any recollection of
25 whether you have ever been retained in a case

1 that was pending or that was a claim in South
2 Carolina but in which you did not provide
3 testimony?

4 A. That's more likely, but I can't definitively
5 say I have been.

6 Q. Do you have any kind of master list, any kind
7 of documentation about any and all of the
8 cases that you have ever been retained in?

9 A. No, sir.

10 Q. Would DJS, to your knowledge?

11 A. They probably would.

12 Q. That happens; right?

13 A. Oh, yes.

14 Q. You get retained in a case, maybe review some
15 documents, but never get deposed or never
16 offer trial testimony?

17 A. Correct.

18 Q. To your knowledge or recollection, have you
19 ever been retained by the McLeod Law Group?

20 A. I don't know. I don't believe so, but I don't
21 know 100 percent.

22 Q. Do you have any independent recollection as
23 you sit here today of any case, any claim in
24 which you have reviewed or offered any kind of
25 evaluation or consultation in the State of

1 South Carolina?

2 A. I just can't recall.

3 Q. The list of cases that you have provided, they
4 date back to 1995; is that right?

5 A. Yes, sir.

6 Q. Does this list include all of the cases in
7 which you have provided deposition or trial
8 testimony in your career?

9 A. It's an attempt to do that. I know I must
10 have missed a few along the line, along the
11 way. But it's an attempt to write down every
12 case that I have provided sworn testimony in.

13 Q. Correct. Do you know when it was that you
14 started keeping this list?

15 A. Only when I think it was required where you
16 had to provide the last five years of
17 testimony I think, then I just started
18 compiling a list.

19 Q. How many of the cases that are on this list
20 involved ocean drowning or a beach drowning?

21 A. I'd have to go through, but a good amount.
22 Not the majority, but a good amount.

23 Q. I couldn't tell. There was one in which, and
24 I will direct your attention to -- if you go
25 to page 23, looks like a case in 2004?

- 1 A. A lot of pages.
- 2 Q. The page number is at the top left.
- 3 A. Okay. Page 24.
- 4 Q. It's actually page 23.
- 5 A. 23.
- 6 Q. Down towards the bottom, second one up, it's
- 7 Bilyeau, B-I-L-Y-E-A-U, versus Ocean City
- 8 Beach Patrol, do you see that?
- 9 A. Yes, sir.
- 10 Q. And it says: "Deposition in an ocean
- 11 drowning," do you see that?
- 12 A. Yes, sir.
- 13 Q. I will tell you I think I have reviewed the
- 14 list fairly clearly, but that's the only one I
- 15 saw where you at least had explicitly stated
- 16 that it was an ocean drowning?
- 17 A. Okay.
- 18 Q. Can you go through your list and tell me of
- 19 any other instances where you have provided
- 20 deposition or trial testimony in an ocean
- 21 drowning?
- 22 A. I can do that.
- 23 Q. Okay. If you take a minute.
- 24 A. And I spoke earlier, perhaps I have had cases
- 25 that -- I know I have had numerous cases that

1 were ocean drownings. Whether or not I
2 provided sworn testimony, I don't know.

3 Q. Right. And that wasn't my question. So my
4 question was: The cases in which you provided
5 deposition or trial testimony in a beach
6 drowning case?

7 A. Okay.

8 Q. And that's what I'm curious about.

9 A. And I'll try to race through these accurately
10 and efficiently here. And just point of
11 clarification, you're talking about oceans,
12 not lakes?

13 Q. Correct.

14 A. Okay.

15 Q. Now, let me ask you this real quick before we
16 get there. Would you equate the two?

17 A. Somewhat.

18 Q. Somewhat. Are they the same?

19 A. They are not the same, no. They are
20 significantly different, which they are both
21 open water, has limited visibility.

22 Q. I understand that they may have some
23 similarities, but they are not the same?

24 A. Absolutely.

25 Q. All right.

1 A. I have a beach case here, but it's a drowning
2 but it's not in the water, it's in the sand.
3 Is that what you want?

4 Q. That's not this case though, is it?

5 A. No.

6 Q. Or anything similar to this case, is it?

7 A. No. But it's a beach case.

8 Q. All right. When you say it's in the sand?

9 A. A child dug a deep hole in the sand, it
10 collapsed and he drown in the sand and died of
11 asphyxiation in the sand.

12 Q. He was buried in the sand?

13 A. Yes. Buried alive.

14 Q. I saw that one. I mean, I saw it was listed
15 as a sand issue.

16 A. Okay. Crescenzo at the very bottom, last case
17 on page 6. Crescenzo versus the City of
18 Margate, New Jersey. That was a somewhat
19 similar case.

20 Q. Okay. Tell me about that case.

21 A. I hope I get this straight. This gentleman
22 was swimming in the surf line. Outside of the
23 swimming zone in Jersey, they mark the
24 lifeguarded area with two red flags. You're
25 not allowed to swim outside of the red flags.

1 Was swimming outside the flagged area, was
2 taken down the beach by a longshore current,
3 as I recall. A surfer brought him to shore
4 and he had a head and neck injury that they
5 responded to. And so it was a non-fatal
6 drowning incident.

7 Q. And what type of opinion or opinions did you
8 offer in that case?

9 A. I believe, as I can recollect, first of all,
10 we had no witness statements. We had no one
11 who actually witnessed this accident take
12 place. So the only information that we had
13 about this non-fatal drowning event was the
14 plaintiff's description, and he was
15 significantly outside the swimming area.

16 And my opinion was in New Jersey, as
17 in this case, as in much of New Jersey, they
18 do a very good job about keeping the swimmers
19 between the red flags. And they separate
20 boogie boarders from surfers and swimmers have
21 to stay between the red flags. And he was
22 significantly outside the red flags, and there
23 were sufficient warnings throughout the beach.

24 And my opinion basically was that if
25 he had stayed between the red flags, there's a

1 good chance that the lifeguards would have
2 prevented or responded in a more timely
3 fashion to this incident. Keeping in mind
4 that in Jersey they usually have two
5 lifeguards in a stand plus ATV patrols. So as
6 I recollect, that's it.

7 Q. Was there any issue in that case with regard
8 to the lifeguards having to warn or having to
9 bring those that are outside the flags back
10 within the swimming zone?

11 A. There was testimony that they had been
12 whistling people back into the swimming zone
13 and correcting people for being outside the
14 swimming zone during the day.

15 Q. And this guy just ignored it or --

16 A. Yeah. We just don't have enough information
17 about this specific gentleman and what
18 happened prior to his incident.

19 Q. Now, and I have seen this, and so I am a
20 novice. So a non-fatal drowning, first of
21 all, how do you define a drowning?

22 A. Yeah, that's a good question and there's a lot
23 of confusion about it. I don't mean to
24 lecture here, but --

25 Q. You need to.

1 A. Since 2001, the International Life Saving
2 Community with their physicians, you know,
3 hundreds of physicians from 50 different
4 countries around the world, try to come up
5 with a more workable, a more accurate
6 definition of drowning. And I'll start by
7 saying they said there's no near drowning.
8 There's no dry drowning. There's no passive
9 drowning. There's no active drowning. It's
10 drowning that is either fatal or non-fatal,
11 and that drowning is either with morbidity or
12 without morbidity, and that's on a continuum.

13 So there's either damaged, hypoxic
14 damage, caused by the aspiration of water or
15 there's not, but it's all drowning, either
16 fatal or non-fatal. So basically drowning is
17 asphyxia due to aspiration of water, which
18 creates hypoxic injury, and that's my
19 lifeguard definition of drowning.

20 Q. So it's asphyxia due to aspiration of water
21 and something about hypoxia?

22 A. Yeah, leading to a hypoxic injury if there's
23 morbidity. If there's injury, it's usually
24 hypoxic injury either to the lungs or the
25 heart or the brain. Now you want me to

1 continue down my list?

2 Q. I do. Thank you.

3 A. That was a good side bar. And I don't mean to
4 make light of this, it's a tragic situation.
5 But on page 6, this is a lawsuit I'm involved
6 with in the Hamptons, but it doesn't deal with
7 a drowning. It deals with traffic. So
8 obviously you don't want to know about that.

9 Q. No. And I saw that one as well.

10 A. Okay. I just didn't want to skip over
11 anything. On the bottom of page 8, I don't
12 think this is an ocean case. I'm pretty sure
13 it's a lake case, but I'm unsure. It's
14 Johnson versus Florida Gulf Coast University.
15 It dealt with a drowning at a campus facility
16 at night, so I assume it's a lake drowning.

17 Goddard versus the City of Modesto,
18 that's a river drowning. So I apologize.
19 It's not an ocean drowning.

20 Page 10, 2013, Michael Robinson
21 versus Camp Equinunk is a lake drowning.

22 2011, page 13, three down, Miller
23 versus the City of Chicago Park District.

24 That was a drowning in Lake Michigan, which is
25 considered to be a surf beach.

1 Q. Okay. What happened there?

2 A. That was a long time ago, but this was a --
3 wait, let me get it right. I believe this was
4 a drowning after hours and the individual --
5 the individual entered the lake I think and
6 drowned. And I think my main opinion was
7 there was a lack of warnings, a lack of
8 patrols, things of that nature. I can't
9 remember the exact specifics of that case.

10 Q. Let me ask you this, and again I apologize for
11 my ignorance. Are there rip currents in the
12 lakes?

13 A. Yes. If there's wind and surf, there can be
14 rip currents.

15 Q. Like Lake Michigan?

16 A. And Lake Michigan has surfers. Now, the wind
17 has to be just right, the conditions have to
18 be just right, but yes.

19 Q. How often is that? Seems like it's not a
20 regular occurrence?

21 A. Well, there's a great picture in my Better
22 Beaches, I mean, I won't go for it, where they
23 have a chain, life-saving chain. Pedestrians
24 pulling one person out after another in these
25 rips in Michigan, in a city park in Chicago.

1 And the reason why you have, another reason
2 why you have rip currents now in Lake
3 Michigan, as you now have more rip currents in
4 the Atlantic ocean than we used to.

5 And George Lack kind of referred to
6 this in his deposition. As we do so much
7 dredging and beach renourishment, whether it
8 be Lake Michigan or South Carolina or New
9 Jersey or whatever, we create these currents
10 by trenching the bottom.

11 And so, yeah, I mean, they are not
12 as frequent as the Atlantic or the Pacific
13 ocean, but they are there.

14 Q. Are they warned of, rip currents?

15 A. Excuse me?

16 Q. Are they warned of, in other words, if I went
17 to Lake Michigan to a swimming area, would rip
18 currents be a warning, a posted warning?

19 A. They should be. I know we, myself and Clarion
20 Safety Systems, we design warning signs for
21 Lake Michigan that was off a pharmaceutical
22 plant. People were attracted there by the
23 warm water, the warm runoff from the
24 pharmaceutical plant, and then went in Lake
25 Michigan and drown with regularity. So we

1 developed signs for that beach, and the
2 problem was rip currents along the jetties
3 there, so yeah.

4 Q. But that was peculiar or specifically related
5 to that area, right, because you had a
6 discharge from a pharmaceutical plant?

7 A. No. That was in -- I'm sorry. It was in a
8 small, contained area. So people would go in
9 I want to say a natural hot tub, get hot, and
10 then go in Lake Michigan to get cooled off and
11 drown there because of the currents.

12 Q. So I guess again, for example, you know the
13 City of Myrtle Beach and its public access
14 points warns of rip currents, correct, you
15 have seen those warnings?

16 A. I can't recall seeing those warnings, no,
17 other than the red flag.

18 Q. Are you familiar or have any knowledge of any
19 warnings or information provided by the City
20 of Myrtle Beach at its public beach access
21 points?

22 A. I don't recall seeing that in my file.

23 Q. Have you ever been to the City of Myrtle
24 Beach?

25 A. No, I haven't.

1 Q. Have you ever been down to the beach, the City
2 of Myrtle Beach?

3 A. What beach?

4 Q. City of Myrtle Beach.

5 A. Yeah, no, I have not.

6 Q. Have you ever been to South Carolina?

7 A. Yes, sir.

8 Q. Where have you been in South Carolina?

9 A. Well, several places. But I spent time at
10 University of South Carolina during their NCAA
11 diving qualifications.

12 Q. Was the swim auditorium, was it there at that
13 time?

14 A. I don't know which one it was. It had a 10
15 meter tower, I know that. That's all I can
16 tell you.

17 Q. Have you ever been to any beach in the State
18 of South Carolina?

19 A. I don't think so.

20 Q. Have you done any research of any City of
21 Myrtle Beach website regarding any
22 information, warnings or any kind of material
23 that might provide to visitors of this beach?

24 A. No, sir.

25 Q. What beach would you say you have the most

1 familiarity with?

2 A. Well, you'd have to say -- what beaches?

3 Q. Been to the most or had the most cases?

4 A. Well, the ones that I have been to most
5 recently for extended periods of time, Redondo
6 Beach, Hermosa Beach and Manhattan Beach in
7 Southern California.

8 Q. At those beaches, right, the public beach;
9 correct?

10 A. Yes, sir.

11 Q. Do those public beaches, the public accesses,
12 do those municipalities, did they provide
13 information, warnings, signage concerning rip
14 currents?

15 A. Yes. But point of clarification. It's wide,
16 open access. They don't channel people to the
17 beach the way they do through the dunes in
18 South Carolina and Atlantic coast. It's just
19 open access, so their warnings are on the back
20 of lifeguard chairs.

21 Q. How do you know how South Carolina channels
22 its visitors into the beach?

23 A. Well, just by looking at the -- I don't know
24 if they do it intentionally or not, but
25 there's cut throughs through the dunes as

1 evidenced by the maps.

2 Q. But you don't know what signage, if any, is
3 provided by the City of Myrtle Beach at those
4 access points?

5 A. I do not.

6 Q. Are you familiar with public versus private
7 beach access?

8 A. At Myrtle Beach?

9 Q. Yes.

10 A. I know there's -- I know there's both, but I
11 don't know what the technical difference is
12 between the two.

13 Q. In other words, an access that's provided
14 where the public can go from the street to the
15 beach as opposed to walking over private
16 property?

17 A. I'm pretty sure it exists, but again I don't
18 know the details.

19 Q. And in this case, do you know whether the
20 family involved in this case accessed the
21 beach through a public beach access or through
22 a private beach access?

23 A. They came from the Sea Crest. And I shouldn't
24 assume anything, but I'm assuming they used
25 the Sea Crest access, whatever that might be.

1 So that could have been a private access as
2 opposed to a public access at the end of a
3 city street.

4 Q. Do you know what information, warnings or
5 signage was posted at the private beach access
6 at that hotel?

7 A. I do not.

8 Q. Do you have any opinion as to whether it
9 should?

10 A. Well, of course, I believe it should.

11 Q. How about in the event that, for example, the
12 City of Myrtle Beach provides express signage,
13 warnings about rip currents at its public
14 beach accesses, would it not make sense for
15 private front beach owners to provide the same
16 amount of information to its guests?

17 A. Similar information.

18 MR. WILSON: Object to form.

19 BY MR. THOMPSON:

20 Q. I'm sorry?

21 A. Similar information, yes.

22 Q. That would be helpful; correct?

23 A. Yes, sir.

24 Q. Do you know whether the resort in which the
25 family was staying provided its guests with

1 any information regarding the use of the
2 beach?

3 A. I do not know that.

4 Q. Or any information regarding rip currents or
5 the dangerous conditions that may exist at the
6 beach?

7 A. I do not know that.

8 Q. Or any information regarding lifeguards, when
9 they might be on duty or off duty?

10 A. I don't know.

11 Q. Do you have any information to suggest that
12 the family ever accessed any information about
13 the City of Myrtle Beach's beachfront?

14 A. I don't have that information, no.

15 Q. Do you know whether they conducted any
16 research regarding whether the beach would
17 even be guarded or not?

18 A. I don't believe they did any research. They
19 relied upon their friend's recommendation I
20 believe is what Ms. Abel said.

21 Q. Do you know what information was available in
22 that time frame from the City of Myrtle Beach
23 with regard to education or warning about the
24 ocean or the oceanfront?

25 A. I do not know that.

1 Q. About rip currents?

2 A. No, sir.

3 Q. You don't know what may have been available to
4 guests by the City of Myrtle Beach on its
5 social media website or otherwise?

6 A. No, sir.

7 Q. Do visitors to the beach have any
8 responsibility for informing or educating
9 themselves about the use of the beach?

10 A. Repeat that question, please.

11 Q. Do beachgoers, folks that visit the beach, do
12 they have any responsibility for informing
13 themselves or educating themselves before
14 getting to the beach?

15 A. I do believe they have some responsibility.
16 But based upon the research that we have done,
17 we know that 75 percent of parents rely upon
18 the facility that they are going to to supply
19 them with that information as opposed to the
20 media, the American Red Cross and places like
21 that.

22 Q. When you said 75 percent of the facilities,
23 right, so people that go to a facility. I'm
24 talking about the beach, it's a very different
25 concept, the ocean, as opposed to a pool or a

1 water park, is it not?

2 A. It is, but we still consider it an aquatic
3 facility. I mean, there's three facilities,
4 there's swimming pools, water parks and
5 beaches.

6 Q. Right. And would you say that a facility
7 owner, if you want to call it that, has more
8 control over pool and water park or over the
9 ocean?

10 A. Well, that's a general question. It's
11 difficult to answer because it depends upon
12 the management and the ownership of those
13 three different venues.

14 Q. I mean, the City of Myrtle Beach can't control
15 the ocean?

16 A. No, it can't. But it has a duty to educate
17 and warn their clients that come to the ocean
18 particularly when all the testimony so far is
19 that most people who come to the beach don't
20 know about the waves and the currents. And
21 particularly in this beach, they are not great
22 swimmers.

23 Q. And that's my question. What is the
24 responsibility of the visitor, the person
25 that's going to use the beach, to seek out or

1 find that information in the first instance,
2 do they have any responsibility?

3 A. As a water safety advocate, I think everyone
4 who goes to the beach has some responsibility
5 to educate themselves about the beach.

6 However, most people that go to the beach are
7 novices, may be uneducated about water safety,
8 and just assume because there's lifeguards
9 there, that it's safe or it wouldn't be open.

10 So it's a difficult question to ask.
11 I think everyone shares some responsibility,
12 but when a person doesn't know where to go to
13 get that information and it's not readily
14 accessible and available, it might be
15 difficult for them to research the information
16 that they need to know.

17 Q. A front beach resort though, you would expect
18 them to provide their guests, their visitors,
19 the information concerning the thing that's
20 right out in front of them, right, the ocean,
21 the beach, would you not expect that?

22 A. I would expect everyone along the shoreline to
23 educate and warn the people who are visiting
24 the beach, yes, sir.

25 Q. I mean, as a matter of common sense, right, I

1 mean, the hotel is there, the resort is there
2 to accept visitors from elsewhere, and people
3 are coming from some place other than the City
4 of Myrtle Beach, right, that's common sense?

5 A. Yes.

6 Q. And so they are folks probably more likely
7 than not to not have any experience or
8 knowledge of the oceanfront perhaps?

9 A. Exactly.

10 Q. And so those resorts, those private hotels
11 that have these folks that are coming in from
12 afar, they should have a responsibility to
13 inform and educate their guests about the
14 oceanfront; correct?

15 A. Correct. But the City of -- the city should
16 also have the responsibility to make sure
17 those hotels are doing their part.

18 Q. Because at the end of the day, if a visitor is
19 staying at a private resort and accesses the
20 beach through the private resort beach access,
21 they might not have any opportunity to read or
22 review the warnings and signage that are at
23 the public beach accesses, would they?

24 A. It could be the case, but you would think that
25 the city would be responsible for making sure

1 that clear, concise and consistent message is
2 put out all along the access points, whether
3 they are private or public. And again, that's
4 why you have a beach service. I mean, the
5 beach service is there to improve safety and
6 reduce accidents.

7 Q. Well, at the end of the day, the beach service
8 is not responsible for posting the signage for
9 the city, is it, it's the city's
10 responsibility?

11 A. Well, that's a great question. I think they
12 both -- legally I don't know who's responsible
13 for that technically, but you would think a
14 reasonably prudent city and beach service
15 would provide warnings to everyone who came to
16 the beach.

17 Q. Whose property is it, who owns the beach?

18 A. I would imagine the State of South Carolina
19 owns the beach.

20 Q. Or maybe the city?

21 A. Or another municipality, yes.

22 Q. So it's ultimately the city's decision as to
23 what is posted or not posted on its property;
24 correct?

25 A. I believe so.

1 Q. So we got a little sidetracked. We're on page
2 13 of your list.

3 A. Here we go. I might be missing some of these
4 ocean cases because the description doesn't
5 tell me whether or not it is, and it may not
6 be jumping out at me.

7 Q. Some of them I would assume would be somewhat
8 obvious because they are not beach areas or
9 beach communities?

10 A. Right.

11 Q. For example, there's a Phoenix, Arizona.
12 There's a joke about beachfront property in
13 Arizona; right?

14 A. Right.

15 Q. It doesn't exist, does it?

16 A. No, sir. Again on page 22, Klujewski versus
17 the City of Evanston, Illinois. That's
18 another Lake Michigan lake drowning, and I
19 honestly don't remember the specifics there.
20 But I would consider that a surf beach.

21 Q. But you don't remember any of the facts?

22 A. No. No. I apologize. Near the bottom of
23 page 27, Stancil versus the State of Texas.

24 Q. Okay.

25 A. Yeah, that says lake drowning, but that's not

1 a lake drowning. That's a drowning, double
2 drowning, yes. A double drowning in the Gulf
3 of Mexico and the factors were strong rip
4 currents during that day.

5 Q. So you were retained in that case to offer
6 testimony for the defendant, for the State of
7 Texas it looks like; right?

8 A. Yes, sir.

9 Q. And you actually provided trial testimony?

10 A. Yes, sir.

11 Q. So tell me what was the sort of gist of your
12 opinion or trial testimony in that case?

13 A. Yeah. To access Galveston State Park, you had
14 to go directly past or under these very large
15 signs, and they are pictured in this book
16 here, that say warning, no lifeguard on duty,
17 swim at your own risk, strong currents.

18 And when you paid your parking at
19 the toll booth at Galveston State Park, that
20 big huge pressure treated wooden sign was up
21 there with either white or red letters in it.
22 When you went to the bath house to change in
23 your suit, the sign was there.

24 You could only cross at certain
25 access points over the dunes and they had

1 these little barbs in the dunes. There's no
2 way you could cross over the sand. Every time
3 you cross over a dune at every walk-over,
4 there was a big, huge sign that told you about
5 no lifeguard on duty, swim at your own risk,
6 strong currents.

7 And so a mother on Mother's Day took
8 her two children to the beach, and then
9 finally when you got to the beach, there were
10 the same signs. So I figured there were six
11 to eight times where they had an opportunity
12 to read the sign. She fell asleep on the
13 beach. Her children were in the water and
14 both got sucked out by a rip current and
15 drowned.

16 Q. How did that case turn out?

17 A. Jury trial was for the defense and they go
18 by -- I don't know the difference between, but
19 it was the defendants were zero percent
20 negligent.

21 Q. And your opinion in that case would have
22 simply been that there was plenty of signage
23 available to warn of the condition in the
24 beach or the potential condition?

25 A. Yes. And the woman shouldn't have laid down

1 horizontally and closed her eyes on the beach.
2 If she wasn't able to stay awake, she should
3 have had a babysitter. But, yeah, there was a
4 lack of supervision and an inability or
5 unwillingness to heed the warnings.

6 Q. We skipped over -- go back to page 23, talk
7 about the Bilyeau, Ocean City Beach Patrol
8 case?

9 A. You know, and I can't remember a thing about
10 that.

11 Q. Really?

12 A. I think it's a rip current, but I can't
13 remember. I can't remember anything. I
14 believe it was a rip current case, and I could
15 be wrong. I believe it was a rip current
16 case. I believe it was well signed. As I
17 recalled, they had a sign saying the next
18 guarded beach is here or there. He elected to
19 swim where there was no lifeguard. I believe
20 that the lifeguards responded, but it was too
21 little too late, but I hope I'm correct in
22 those brief set of facts.

23 Q. Do you recall the Ocean City Beach Patrol,
24 would it have been an entity that provided
25 lifeguards to that beach?

1 A. Ocean City Beach Patrol as best I understand
2 is a municipality run lifeguarding operation.

3 Q. But again, provides the lifeguards; correct?

4 A. Yes, sir.

5 Q. Myrtle Beach may have a beach patrol under the
6 police or fire department auspices, but they
7 don't provide the lifeguards?

8 A. Correct.

9 Q. That's why I'm asking the beach patrol, Ocean
10 City Beach Patrol, would have been the
11 lifeguarding entity?

12 A. Yes, sir.

13 Q. Do you know why the Ocean City Beach Patrol
14 might have been sued if it was involved in an
15 area where it was an unguarded beach?

16 A. My experience whenever you have someone
17 getting injured in the water, and there were
18 lifeguards on duty, whether or not they were
19 right in proximity or not, there's going to be
20 a lawsuit filed.

21 Q. So it doesn't matter whether they had the
22 responsibility to guard it or not?

23 A. I mean, the beach was open, but the lifeguards
24 were -- and I believe this was around Labor
25 Day. I hope I'm getting my facts right --

1 were staggered. And wherever there wasn't a
2 chair at a beach entry, they would point you
3 to the next guarded areas at such and such a
4 street or such and such a street, and the
5 gentleman ignored those warnings.

6 Q. Do you know whether Ocean City, that beach is
7 similar to New Jersey where they have
8 designated swim areas between flags or points?

9 A. I can't recall. And again, I'm not supposed
10 to assume. That's the way most of Jersey does
11 that. I can't say for certain that's what
12 Ocean City did, but most of Jersey has you
13 swim between the flags.

14 Q. Have you had any cases that you can recall
15 regarding Ocean City beach since 2004?

16 A. I may have that I didn't provide testimony in.
17 I may have, but I can't recall.

18 Q. I was just wondering if you had any
19 information concerning the signage that might
20 be available in the Ocean City beaches?

21 A. There's a lot of signage in here that have
22 been taken from Jersey beaches. I think
23 there's some Myrtle Beach information in here
24 too. I don't know if it's about signage, but
25 there's plenty of rip current signage in here.

1 Q. Right. But I just didn't know whether you
2 were familiar with, for example, in the 2016
3 to 2018 time frame, what signage might have
4 been up in the Ocean City, Maryland area?

5 A. I do not know.

6 Q. Do you have any knowledge or recollection or
7 information about this family, the Wolde
8 family having been to the Ocean City beach?

9 A. They had been to the Ocean City beaches and
10 perhaps a Delaware beach. It was their first
11 time to South Carolina beaches is my
12 understanding.

13 Q. And I'm just trying to figure out are you
14 familiar with what information or warnings
15 might have been available at any of the
16 beaches they frequented before this trip to
17 Myrtle Beach?

18 A. I just don't know. Is now another good time
19 to break?

20 Q. Absolutely.

21 - - - -

22 There was a brief Recess in the proceedings.

23 - - - -

24 MR. THOMPSON: Back on the record.

25 BY MR. THOMPSON:

1 Q. Dr. Griffiths, we have been through your list
2 of cases to try and find as best we can those
3 in which you provided testimony regarding a
4 beach or a surf kind of case. Have we done it
5 to the best of your recollection?

6 A. I think so, yes, sir.

7 Q. Very good. I want to turn to obviously the
8 case at hand and talk about what it is the
9 opinions that you're going to be offering in
10 this case. Obviously in federal court, it's a
11 little bit different. We usually get a
12 report, right? You haven't created a report
13 in this case, have you?

14 A. No, sir.

15 Q. And that's a little unusual obviously in state
16 court in South Carolina, but it does pose some
17 challenges because I don't exactly know what
18 you're going to offer an opinion about in this
19 case. So this in essence is your report;
20 right?

21 A. Right.

22 Q. We're going to find out what the opinions are
23 and then we'll find out the bases for those
24 opinions, okay?

25 A. Right.

1 Q. So I hate to say what your opinions are and
2 ask you them, but without a report at hand,
3 that's kind of where I'm left with at this
4 point.

5 A. Okay.

6 Q. Do you have or have you created in any form or
7 format an outline of your opinions?

8 A. No, I haven't.

9 Q. So they are just coming right off the top of
10 your head?

11 A. Yes, sir.

12 Q. Is it possible to list them, in other words,
13 one, two, three and four?

14 A. It would be a work in progress but, yeah, I
15 mean.

16 Q. Let me ask you this: Are you prepared to
17 offer opinions today that you would offer at
18 trial?

19 A. Yes, sir.

20 Q. Is there any amount of additional work that
21 you would anticipate or expect to do to offer
22 opinions in this case?

23 A. No, sir.

24 Q. In other words, do you feel ready, prepared,
25 as informed as you can be to provide those

1 opinions to me today?

2 A. Yes. With a caveat is if this did go to trial
3 and I was asked to appear in person in trial,
4 then I would try to make a site visitation,
5 but I don't need that based upon the testimony
6 that I have so far.

7 Q. Well, we have established you haven't been to
8 South Carolina or at least the beach where
9 this incident occurred; correct?

10 A. Correct.

11 Q. Haven't even seen any videos or photos of the
12 area or the signage that the City of Myrtle
13 Beach posts there?

14 A. Well, I have seen some photos, but I haven't
15 seen signage, no.

16 Q. So let's start with your opinions in this
17 case. Usually what I'd like to do is
18 obviously get them out and then I can decide
19 how I want to approach the facts and the
20 foundation for each. Okay?

21 A. Okay.

22 Q. So what I'm looking for currently is a list,
23 one, two, three and four, if you will.

24 A. Okay. So, first of all, on this particular
25 day, either the water or the water where the

1 incident occurred should have been closed to
2 the public because of several factors.

3 Q. We'll work on the facts supporting the
4 opinion, but the first opinion is the water
5 should have been closed; right?

6 A. Water should have been closed.

7 Q. When should it have been closed?

8 A. It should have been -- the warnings came in
9 from the National Weather Service based upon
10 the testimony that I read around 10:00.

11 Q. A.m.; correct?

12 A. Yes, sir.

13 Q. All right.

14 A. And information provided by Holly Robinson and
15 others was that it was a very high-risk day,
16 combination of rip currents and littoral
17 currents.

18 Q. I'm sorry?

19 A. A combination of rip currents and littoral
20 currents.

21 Q. Littoral?

22 A. Yeah.

23 Q. How do you spell that?

24 A. Oh, sure. Or longshore.

25 Q. I know longshore, but is it L-I-L-O-R-A-L?

1 A. It's L-I-T-T-O-R-A-L, littoral, or longshore
2 current. There was a combination of both,
3 which was a dangerous recipe. And George Lack
4 provided good information about how when the
5 wind is blowing west/southwest in that
6 particular area and because of beach
7 nourishment and because of storms, oftentimes
8 they would close that section of beach. And
9 also it came out from him and Holly and
10 others, that this had a demographic attending
11 that beach that were not as good of swimmers
12 as some of the other beaches.

13 Q. Let me stop you there real quick. Would you
14 close a beach, is it your opinion that you
15 would close a beach, just because of a
16 particular demographic and their ability or
17 inability to swim?

18 A. No. In combination of other factors I would.

19 Q. I understand, but I would think that would be
20 a very difficult concept to try and employ. I
21 mean, how can you say as a generality, that a
22 particular area of the beach is a swimming
23 group or a non-swimming group?

24 A. I'm just reiterating what was stated in the
25 depositions, is that this area was more of a

1 high-risk area as compared to other portions
2 of the City of Myrtle Beach because they were
3 not as knowledgeable or as skilled as some of
4 the others. But that needs to be stated in
5 combination with the fact that this particular
6 beach also had a history of waves creating
7 strong littoral or longshore currents and rip
8 currents, and the fact that there was no
9 lifeguard there.

10 Q. Well, I'm still grasping with the concept of
11 closing a beach because the demographic may be
12 a non-swimming group or a swimming group. I
13 can't even imagine how practically you could
14 do that and say I want to close this 100 yards
15 because all of you people, I look at you and I
16 think you're non-swimmers?

17 A. Well, I didn't say that. I said this appeared
18 to me to be a trifecta for a drowning. You
19 had a weaker population, you didn't have a
20 lifeguard on duty in that section, nor did you
21 have a LGO as required on 6th Street, and you
22 had the National Weather Service saying that
23 you're going to have a combination of strong
24 longshore currents and rip currents.

25 And the people deposed said, yeah,

1 it was a very high-risk day, it was a
2 combination of rips and littoral currents.
3 There were strong currents. Those three
4 things together point to the fact that that
5 section of the beach should be closed not just
6 because of the demographic.

7 Q. So let me make sure I'm clear. When you say
8 the water should have been closed, it's not
9 a -- how shall I say it. In and of itself,
10 the water conditions in and of themselves,
11 didn't constitute or require the beach to be
12 closed, did it?

13 In other words, if you had a beach
14 full of Olympic swimmers guarded by 15
15 lifeguards, would you close the beach just
16 because of the surf conditions?

17 A. If they were strong enough, if they were bad
18 enough, yes, I would have.

19 Q. I'm not asking about if they were. I'm asking
20 about on that specific day, you said the water
21 should have been closed. I'm asking you on
22 that specific day, was the water conditions,
23 the surf conditions in and of themselves,
24 worthy of closing that beach?

25 A. I believe so.

1 Q. Regardless of how many lifeguards?

2 A. Yes.

3 Q. Regardless of the demographics on the beach?

4 A. Yes, sir.

5 Q. The water condition itself, the surf condition
6 combining the waves, the tides, the wind,
7 whatever the natural then existing conditions,
8 required that beach to be closed; is that
9 right?

10 A. I believe so, yes, sir.

11 Q. How much of the beach?

12 A. I can't say. Wherever the rips and the
13 longshore currents were predominantly
14 occurring.

15 Q. I mean again, how much of the beach needs to
16 be closed, how much of the beach should have
17 been closed?

18 A. Wherever the risk is predominates. Rips,
19 sometimes rips will be in the same place all
20 the time based upon the sandbars that are out
21 there, based upon the channels. Sometimes
22 they migrate up and down. You just don't know
23 where they are going to be.

24 I mentioned the Southern California
25 beaches. Those lifeguards are in elevated

1 stations, but they are constantly out of their
2 stations moving people away from the rips as
3 they pop up. They are physically moving
4 people.

5 So I can't say how much because I
6 don't know how much of the City of Myrtle
7 Beach was affected by strong rip currents and
8 longshore currents.

9 Q. What is it about the physical conditions on
10 that day that would have required the beach to
11 be closed specifically?

12 A. Well, one is you had two people die within a,
13 according to Mr. Lack, a 15-minute period.

14 Q. I think you must not have understood my
15 question. My question is: You say, as I
16 understand your opinion, that the water should
17 have been closed because of the natural then
18 existing water conditions, tide, wind and all?

19 A. Yes.

20 Q. So my question is: What were those
21 conditions? I want to know specifically what
22 it was that was existing on the date of this
23 loss that would have required the closure of
24 the beach --

25 A. Well, there were --

1 Q. -- or closure of the water?

2 A. As reported by the National Weather Service,
3 there were going to be -- there was strong rip
4 currents and strong littoral currents.

5 Q. What does that mean? Is there any
6 calculation, is there a number that's
7 associated with it other than just simply
8 strong?

9 A. I don't know how the National Weather Service
10 actually reported other than it was going to
11 be a high-risk day.

12 Q. Well, and I guess that's what I'm trying to
13 figure out. I would assume there is some
14 amount of conditions that you would then
15 equate to high risk. I mean, just simply
16 saying that there's rip currents or strong rip
17 currents or there's a strong wind, I mean, we
18 can calculate what the wind is. Do you know
19 what the wind was that day?

20 A. No, sir.

21 Q. Can you calculate the longshore current?

22 A. Not at this point, no, sir.

23 Q. On a specific day, is that something that's
24 reportable, like does the National Weather
25 Service say there's a longshore current of 10

1 feet per second or 10 miles an hour or
2 something, anything like that?

3 A. I don't know that. I do know they can tell
4 you the height of the wave and the speed of
5 the wind and that helps to predict the
6 strength of the rip currents and the longshore
7 currents, but I don't know that they can be
8 that exacting predictive.

9 Q. So for the date of this loss, what were the
10 heights of the waves?

11 A. I don't know.

12 Q. What was the speed of the wind?

13 A. I don't know.

14 Q. Do you know any of the data concerning the
15 objective recording of the conditions of the
16 surf or the ocean for that day?

17 A. I don't have the data, no, sir.

18 Q. So how can you say then that the ocean should
19 have been or the water should have been closed
20 if you don't have any of that data?

21 A. Well, based upon the statements of Holly
22 Robinson and others, everyone that was deposed
23 in this day, said it was a very rough day.
24 The currents were strong, very high risk is
25 the words that the supervisor Holly Robinson

1 used.

2 Q. Let me ask you this: What does it take in
3 your opinion to close the water in an ocean
4 surf setting with regard to the natural
5 conditions themselves, what is the standard
6 that you would say, okay, if it's this, then
7 the ocean should be closed?

8 A. You would have to observe the ocean and
9 observe the currents, and if it appeared that
10 it could pose difficulty to the patrons who
11 are using the ocean, then you close the beach.

12 Q. Is that a mix of objectivity and subjectivity?

13 A. I would agree with that, yes, sir.

14 Q. I mean, because I'm having a hard time, right,
15 finding the objective standard, like if it's X
16 amount of wind or X amount of rip or X amount
17 of longshore, then it has to be closed water?

18 A. I don't think there's any standard for South
19 Carolina or any other beaches as far as that
20 goes.

21 Q. So it's a mix. It takes somebody actually
22 being on the beach to observe the conditions
23 and then based on their experience, make a
24 determination; fair?

25 A. Fair.

1 Q. It's not somebody just gets a weather service
2 bulletin and says, okay, these conditions
3 exist, I don't care what it looks like on the
4 beach, we're closing the water?

5 A. Correct.

6 Q. And so when you say that the water should have
7 been closed on this day, that's based on the
8 testimony of the folks that were on the beach
9 that day?

10 A. That were working the beach, yes.

11 Q. But they didn't close the beach until after
12 the incident; right?

13 A. Correct.

14 Q. And do you know if the beach service closed
15 the beach or whether -- and I apologize. When
16 I say close the beach, you know what I mean;
17 right?

18 A. Close the water, not the beach.

19 Q. Right. And I do it all the time and it's bad
20 terminology and I understand. It's closing
21 the water and not closing the beach; right?

22 A. Correct.

23 Q. People can still be on the sand, you just
24 can't be in the water --

25 A. Right.

1 Q. -- so we're closing the water; right?

2 A. Correct.

3 Q. Do you have an understanding about who has the
4 ability or right to close the water in the
5 City of Myrtle Beach?

6 A. I believe the city manager and/or the beach
7 service I think in communication with the city
8 I believe.

9 Q. Do you know who closed the water on the day of
10 these two incidents?

11 A. Mr. Pedersen, the city manager.

12 Q. Do you know how or why it was that he closed
13 the water?

14 A. Because they had two incidents in close
15 proximity to each other.

16 Q. He closed it because there were two incidents;
17 right?

18 A. Correct.

19 Q. He didn't close it because of any particular
20 condition at that time, did he, the water
21 condition, the surf condition? It was because
22 two incidents happened?

23 A. Yeah. But it wasn't a flat-ass calm day. I
24 mean, I don't mean any disrespect, but it
25 wasn't a calm day. Certainly either directly

1 or indirectly, the surf conditions had
2 something to do with the two incidents. Red
3 flags were running.

4 - - - -

5 (Exhibit 4 marked for identification.)

6 - - - -

7 BY MR. THOMPSON:

8 Q. How many pages are there?

9 A. I have four.

10 Q. I have handed you what is Exhibit 4. They are
11 four separate photographs. And I'll represent
12 to you, and I think you agreed with me
13 earlier, those are photographs taken on the
14 date of the incident; correct?

15 A. Correct.

16 Q. Prior to the incident occurring; correct?

17 A. Correct.

18 Q. You see the photographs. Do you see the surf?

19 A. Yes, sir.

20 Q. Now, can you determine or tell anything from
21 those photographs about the surf condition?

22 A. I can't tell. Well, you can't tell. You
23 can't see the currents in here and I can't
24 tell the magnitude of the waves, but more
25 importantly, I can't tell the velocity of the

1 currents. So there's not much I can glean
2 from these photographs.

3 Q. You can't tell anything about the surf
4 condition from those photographs?

5 A. There is surf. I can't tell exactly how much
6 there is.

7 Q. What does that mean, how much there is?

8 A. Well, waves come in periods. They don't come
9 in consistently the same way all the time. So
10 I don't know the exact height of the breaking
11 waves when they come in. I don't know how
12 strong the wash and the backwash is coming off
13 the beach. I don't know about the holes in
14 the trenches along the shoreline. I mean,
15 there's so many things that I can't tell
16 without being there at the time of the
17 incident.

18 Q. So those photographs do nothing with regard to
19 providing you information about the surf
20 condition at the time of the loss?

21 A. It indicates there is some surf. How much
22 surf with these four still photographs cannot
23 accurately depict what Mr. Wolde actually
24 experienced when he experienced it. I can't
25 tell by four still photographs.

1 Q. So the water should have been closed. You're
2 saying that it should have been closed at
3 10 a.m.?

4 A. That's when the warning came in.

5 Q. What was the warning?

6 A. That it was going to be a very hazardous day
7 with a combination of strong rips and
8 longshore currents.

9 Q. And again, your words, hazardous day, did the
10 National Weather Service say it was a
11 hazardous day?

12 A. I didn't see their report.

13 Q. But does the National Weather Service
14 typically provide descriptive kinds of
15 concepts, like dangerous, or do they just
16 provide data, the wind speed is this, the
17 tides are this, do you know?

18 A. I would think they would give an advisory as
19 to how dangerous they were, I just don't know.
20 But, for instance, small craft advisory when
21 the winds are up, they say warning, there's a
22 small craft advisory warning against small
23 craft going out on days with strong winds and
24 high winds.

25 Q. Do you know if there was a small craft

1 advisory on the date of this loss?

2 A. I do not know that.

3 Q. Have you done any research or investigation
4 into the weather conditions, the surf
5 conditions, on the date of the loss?

6 A. No. Other than what I read in the
7 depositions.

8 Q. Right. Again you're relying on the testimony
9 from folks who have been deposed in the case;
10 correct?

11 A. Yes, sir.

12 Q. You haven't gone back or tried to go back and
13 get the actual data from that day, have you?

14 A. No, sir.

15 Q. Would that be something that you would want to
16 kind of take a look at, the actual data from
17 the day?

18 A. I don't know if the actual data is going to be
19 more descriptive than what the beach personnel
20 said in their depositions. I mean, they
21 described it as a rough day, as a very
22 hazardous day as rip currents and longshore
23 currents. I mean, that's pretty descriptive.

24 Q. Right. So my bigger, better question perhaps
25 is is the time, right, was it dangerous or was

1 it hazardous from 10 a.m. on, was it hazardous
2 and dangerous from 10 a.m. to 11 a.m., was it
3 hazardous from 1 p.m. to 3 p.m., do you know?

4 A. Well, Holly Robinson said it was hazardous
5 starting at 10 a.m. She used the 10 a.m.
6 figure.

7 Q. And then was hazardous for the rest of the
8 day?

9 A. I would assume so, yes, sir.

10 Q. When you say you assume, right, I mean, you
11 can have a beach condition that is hazardous
12 for a period of time but not the entire day;
13 correct?

14 A. That's true. But the winds generally pick up
15 after 10 and closer to noon, the winds pick up
16 in the afternoon. The winds tend to be
17 subdued in the early morning hours and pick up
18 as the day goes on.

19 Q. Do you know that to be the case in Myrtle
20 Beach?

21 A. I do not.

22 Q. Have you done any research to determine that?

23 A. No, sir.

24 Q. So again, is it your opinion that the water
25 should have been closed from 10 a.m. for the

1 rest of the day?

2 A. Until the condition subsided and became safer,
3 yes.

4 Q. When was that?

5 A. I don't know. I mean, my investigation stops
6 with the incident. I don't know when they
7 stop.

8 Q. Do you know the time that this incident
9 occurred?

10 A. Approximately 12:45.

11 Q. The water should have been closed, and as I
12 understand, you were describing a number of
13 factors that would have gone into that
14 calculation, perhaps not just the actual surf
15 and wind conditions, but other things that
16 would have gone into that as well?

17 A. Yes, sir.

18 Q. And what other factors would have gone into
19 the closure of the water?

20 A. Well, it was the water and the wind conditions
21 combined with being short personnel.
22 Admittedly lifeguards had gone back to
23 college, they didn't have the numbers that
24 they would like to have had. They were down
25 LGOs, lifeguard only positions. They should

1 have had at least four. They only had three.
2 Holly Robinson was suggesting in her
3 deposition that they should have had six.

4 Q. Let me ask you this: Is it your opinion that
5 you close the water in areas where they are
6 short staffed?

7 A. Yes, sir. I would do that.

8 Q. Regardless of the condition?

9 A. I would have to see the beach and its
10 operation, but typically yes. You would close
11 the beach where you don't have staffing.
12 Either that or no lifeguard on duty, swim at
13 your own risk. Go to 9th Street or 12th
14 Street for guarded facilities. Direct the
15 guest as to where the lifeguards are, but
16 closing beaches in between lifeguard stations
17 is a common practice.

18 Q. Do you know what signage is at the City of
19 Myrtle Beach with regard to lifeguards?

20 A. I do not.

21 Q. When they are on duty?

22 A. I do not.

23 Q. When they are not on duty?

24 A. No, sir.

25 Q. What to do when lifeguards are not on duty?

1 A. No, sir.

2 Q. So if you're short personnel in an otherwise
3 guarded area, one way to alleviate that would
4 be to have appropriate signage directing folks
5 to areas that are guarded?

6 A. Yes, sir.

7 Q. Would you have to still close the water in the
8 area that is unguarded?

9 A. I would recommend that, yes. And I would have
10 people in the vehicle directing them to the
11 guarded areas.

12 Q. What other factors would have gone into
13 closing the water? We talked about the surf,
14 winds, tides. Talked about short staffing or
15 lack of staffing.

16 A. Yeah. Not only did you have a lifeguard that
17 was out to lunch in that area, but you also
18 were missing an LGO that was supposed to be
19 stationed at Avenue 6. So you were
20 significantly down in personnel in that area.

21 Q. But that's still short staffing or lack of
22 staffing concept; correct?

23 A. Yes. I was just giving you the specifics.

24 Q. Right. For whatever reason, the water would
25 be closed due to the surf conditions, tide

1 conditions, wind conditions, as well as the
2 understaffing or lack of staffing at that
3 particular time?

4 A. Correct.

5 Q. For whatever reason, the lack of staffing is
6 there?

7 A. Yes, sir.

8 Q. Any other reasons or factors that would go
9 into closing the water?

10 A. I don't think so.

11 Q. So the water should have been closed is number
12 one. What's the next opinion?

13 A. And I don't know, I don't know if the
14 lifeguards working that day were ever
15 qualified to be surf lifeguards. I do know
16 their swim test was conducted in a swimming
17 pool, which is atypical of what should be
18 done.

19 Q. Atypical?

20 A. Yes.

21 Q. As in not typical?

22 A. Yeah. They are supposed to test them in the
23 open water to see that they have swimming
24 proficiency in the surf. So the question mark
25 I have is is were these lifeguards qualified.

1 I know 80 to 85 percent came from eastern
2 European countries. I don't know what kind of
3 background they had coming in.

4 According to the franchise agreement
5 and the City of Myrtle Beach, they were
6 supposed to meet USLA standards, which they
7 did not. I have an in-service training log
8 which outlines what they are supposed to teach
9 when, but I have no roster of which guards
10 attended, you know, how they performed. I
11 don't have any information on lifeguard
12 audits. So I know we had bodies who were
13 certified. I don't know if those bodies were
14 qualified to work in Myrtle Beach in the surf
15 environment. I have no information on that at
16 all.

17 And I just if I can go one step
18 further. The City of Myrtle Beach did nothing
19 to ensure that the franchise agreement was
20 being met and that the lifeguards were, in
21 fact, qualified to be working at a surf beach.

22 Q. So is it your opinion that the lifeguards, and
23 I want to be specific to the area where this
24 incident occurred, those lifeguards were not
25 qualified to be lifeguards on the beach at

1 that time?

2 A. I can't go that far. What I'm saying is I
3 have no knowledge that they were qualified.
4 There's no information anywhere here that said
5 such and such a lifeguard performed an active
6 rescue and he or she reviewed their CPR, it
7 was adequate. There's no performance
8 indicators at all as to whether or not these
9 lifeguards were competent and confident in the
10 open water.

11 Q. Well, I'm trying to figure out what your
12 opinion is; right? Is your opinion that they
13 were qualified or is it your opinion that
14 simply you don't have enough information to
15 say whether they were qualified or not?

16 A. My opinion is the standard of care dictates
17 that we should have a written record for their
18 qualification by Lack's Beach Services and
19 that written record of their qualifying skills
20 was given to the City of Myrtle Beach for
21 their review so that they know that their
22 staff is receiving ongoing training and they
23 are keeping their skills up. All I have is a
24 log.

25 Q. Let's go at it from this way. So it's your

1 understanding that the City of Myrtle Beach
2 required the lifeguards to be qualified;
3 correct?

4 A. Correct.

5 Q. And that it was up to Lack's to provide the
6 qualifications; correct?

7 A. Correct.

8 Q. And Lack's would provide to the city the
9 outline or the methods of which the lifeguards
10 would be qualified?

11 A. Correct.

12 Q. Now, for 2018 when this incident occurred, did
13 the information Lack's provided to the City of
14 Myrtle Beach include an outline that would
15 qualify the lifeguards?

16 A. It was an outline of skills that were going to
17 be presented. I don't know if those skills
18 were actually conducted and I don't know who
19 was there.

20 Q. And I'm not asking that question.

21 A. Okay.

22 Q. You have seen the outline of the
23 qualifications; correct?

24 A. Yes, sir.

25 Q. And were those adequate?

1 A. They appear to be adequate, yes.
2 Q. In other words, did they meet the standard?
3 A. If they were conducted, yes.
4 Q. I'm not asking you that question.
5 A. The outline, the outline met the standard.
6 Q. Right. In other words, Lack's had created a
7 qualifying standard, if you will, that was
8 appropriate?
9 A. Yes, sir.
10 Q. If they were followed?
11 A. Yes, sir.
12 Q. And so that's step one. You got to come up
13 with the qualifying standard or the
14 qualifications; correct?
15 A. Correct.
16 Q. And those were there in 2018; correct?
17 A. Correct.
18 Q. And they met the standard for an ocean
19 lifeguarding outfit; correct?
20 A. The outline did, yes.
21 Q. I understand. We'll get there.
22 A. Okay.
23 Q. But the foundation was correct?
24 A. Correct.
25 Q. And then the next step would be Lack's going

1 and actually submitting their lifeguards to
2 those qualification standards?

3 A. Yes, sir.

4 Q. And making sure that they passed those
5 qualifying standards?

6 A. Correct.

7 Q. Is that right?

8 A. Yes, sir.

9 Q. And as I understand it today, you're telling
10 me you can't tell me one way or the other
11 whether these lifeguards actually submitted to
12 that lifeguard qualification standards?

13 A. Yes, sir.

14 Q. And as I understand it, your testimony is
15 there should be some written record about
16 these lifeguards completing those qualifying
17 standards?

18 A. Yes. The in-service training as well as the
19 prejob orientation, yes, sir.

20 Q. And you just don't have those records?

21 A. I haven't seen them, no, sir.

22 Q. But assuming the lifeguards were submitted to
23 you and then passed those qualifying
24 standards, then they would have been
25 qualified; correct?

1 A. If they completed all the skills that were
2 required as they were supposed to, I would say
3 that they were qualified, yes, sir.

4 Q. Because we established the qualifying
5 standards were correct?

6 A. Correct.

7 Q. And so if they were put through those
8 standards and they passed those standards and
9 they were documented in some fashion, then
10 they would be qualified?

11 A. Correct.

12 Q. You just don't have that information?

13 A. Right.

14 Q. Outside of the initial qualifying standards,
15 if you will, what other areas, if any, do you
16 find with regard to deficiency in either
17 supervising or maintaining the lifeguards by
18 Lack's Beach Service?

19 A. Well, the major problem here and the major
20 violation in the standard of care is they had
21 dual purpose lifeguards.

22 Q. I'm really more looking for like the ongoing
23 training, in-service, anything else that
24 Lack's failed to do?

25 A. They should have had a prejob orientation,

1 in-service training as they outline. And
2 there should be performance tests, audits,
3 lifeguard audits during the summer, either by
4 a swim test and/or a rescue test to do it
5 under a timed condition. That should be
6 ongoing. In-service is one thing, they
7 receive training, but the other part of that
8 is auditing the lifeguards to be certain that
9 they maintain their skills and can swim fast
10 enough and far enough and bring someone in.

11 Q. So it's in essence a performance audit?

12 A. Yes, sir.

13 Q. And the performance audit should be conducted
14 how often?

15 A. That could be -- it would vary on the beach,
16 but it could be every two weeks. It could be
17 probably once a month. It depends upon the
18 municipality and the beach, but it should be
19 done in regular intervals throughout the
20 summer.

21 Q. And the performance audit would include what?

22 A. It depends upon the beach, but it's often a --
23 it's a run, swim, row where they are timed on
24 their run, on their swim and on their rowing
25 for a rescue and it's that type of beach.

1 Jersey is really big on run, swim, row. It
2 could simply be swim a certain amount of
3 yardage under a certain time swimming through
4 the surf to get there and back. And likewise,
5 making a rescue either for time or for
6 distance.

7 Q. Are you familiar with any other lifeguarding
8 outfit or any other lifeguarding crews in the
9 State of South Carolina performing such
10 audits?

11 A. I'm not familiar with other lifeguarding crews
12 other than North Myrtle Beach having lifeguard
13 onlys and not dual purpose.

14 Q. We're not there yet.

15 A. Okay.

16 Q. So I'm just talking about the simple lifeguard
17 and what that lifeguard should experience over
18 the course of a time of employment with the
19 beach service. So there's a preemployment
20 screening; correct?

21 A. Yes, sir.

22 Q. There's the onboarding; correct?

23 A. And service training.

24 Q. The qualifying testing or standardization, if
25 you will?

1 A. During the summer, yes, sir.

2 Q. And then there's the performance audits
3 periodically through the summer; correct?

4 A. Yes, sir.

5 Q. Anything else?

6 A. And that would include resuscitation efforts,
7 but, no, nothing else.

8 Q. Do you have any information or knowledge of
9 whether Lack's conducted any periodic
10 performance audits or tests of their
11 lifeguards during the summer?

12 A. I didn't see any of that information.

13 Q. Anything else about the qualifications of the
14 lifeguards for Lack's Beach Service?

15 A. No, sir.

16 Q. Number three opinion?

17 A. They violated the standard of care by having
18 lifeguards performing dual roles. And the
19 majority of lifeguards employed and on duty
20 were engaged in renting items to patrons.

21 Q. Were any of the lifeguards in the vicinity of
22 the area where this incident occurred engaged
23 in the dual role at the time that the incident
24 occurred?

25 A. Well, there was no lifeguard closest, he was

1 out to lunch. I don't know what the other
2 lifeguards were doing as far as engaging in
3 rentals.

4 Q. So, for example, the tower, the lifeguard
5 north of the incident, do you know what that
6 lifeguard was doing at the time the incident
7 occurred?

8 A. I don't believe so, no, sir.

9 Q. Do you know if that lifeguard was in the
10 tower?

11 A. According to the map, I know they were an
12 exhibit, I know they were on duty. I know
13 that Lucas was on duty at 22, and I believe at
14 20, Alex was on duty at 20. Were they in the
15 tower specifically, I don't know if they were
16 in the tower, but I did read that they were on
17 duty.

18 Q. You know they were on duty --

19 A. Yes.

20 Q. -- correct? But do you know if they were
21 servicing a rental at the time?

22 A. I do not.

23 Q. Do you know if they were in the tower looking
24 at the water at the time?

25 A. I do not know that.

1 Q. Do you know if Lucas at tower 22 was in the
2 tower?

3 A. I don't know specifically if he was seated in
4 the tower.

5 Q. Do you know if Alex at tower 20 was in the
6 tower?

7 A. No, sir.

8 Q. Do you know if Lucas at 22 was engaged in any
9 kind of sale of any merchandise or rental of
10 any equipment at the time?

11 A. I don't know.

12 Q. Do you know if Alex at station 20 or tower 20
13 was engaged in the sale of any material or
14 rental of any equipment at the time?

15 A. I do not.

16 Q. Of course, Casper was assigned to tower 21;
17 correct?

18 A. Correct.

19 Q. And Casper was at lunch at the time of the
20 incident; correct?

21 A. Yes, sir.

22 Q. So it really didn't matter what role he was
23 playing, he was off the beach?

24 A. Correct.

25 Q. Is there anything else about the dual role

1 lifeguard concept? I mean, I get the concept,
2 shouldn't be doing two things, should only be
3 doing one, right, which is watching the water?

4 A. Yes, sir.

5 Q. Anything else about that opinion other than
6 the lifeguard should not have been performing
7 two roles?

8 A. Well, I think it's important that in all the
9 agencies, and USLA spelled this out, that all
10 the agencies agree, all the professionals
11 agree, that you cannot perform a secondary
12 duty when you're charged with the primary duty
13 of watching the people in the water.

14 And the acronym that's been used in
15 all the text up to this point has been the
16 R.I.D. factor. Frank Pia looked at hundreds
17 of cases where lifeguards were on duty and he
18 came up with the R.I.D. factor, which is a
19 failure to recognize the victim in the water
20 because intrusions and distractions of
21 secondary duties.

22 And so the mantra has been for
23 decades, since the late 1880s and early 1990s,
24 that a lifeguard providing visual surveillance
25 of the people in the water could not be

1 engaged in a secondary duty, like testing
2 water chemicals or picking up litter on the
3 beach or renting umbrellas and chairs because
4 it literally provides distractions, it
5 produces distractions, which take not only the
6 eyes but the mind off the water.

7 Q. Secondary matters as you have described were
8 not the only things that prevent lifeguards
9 from seeing what's happening in the water;
10 correct?

11 A. Say that again, please.

12 Q. I mean, you have the -- what did you call
13 them, the secondary?

14 A. Secondary responsibilities or duties.

15 Q. Second responsibilities. A lifeguard can have
16 a single primary responsibility, not have any
17 secondary, but still not see what's happening
18 in the water?

19 A. That can happen, yes, sir.

20 Q. I mean, you have written about that; correct?

21 A. Yes.

22 Q. There's a whole bunch of authoritative text
23 about that very issue, right, you don't have
24 to have a secondary thing going on, you can
25 still be primarily focused on the water and

1 still not see what happens?

2 A. That's true.

3 Q. Now, with regard to this set of circumstances,
4 right, the dual role concept in the City of
5 Myrtle Beach, do you have any information, any
6 evidence to suggest that the dual role had
7 anything to do with the loss that occurred on
8 that date with this family?

9 A. I can't prove that. But I just want to state
10 that when you have a dual role, like renting
11 equipment, not only does it distract your eyes
12 from the water but it distracts your thoughts
13 from the water. It's called internal noise.

14 I mean, a person who is filling out
15 a receipt looking at a chart for chairs,
16 handling cash or calling signal 6 for a credit
17 card, their brain is engaged in that activity.
18 Can't think about two things at one time.

19 So can I prove that it had anything
20 to do with this incident, I cannot prove that.
21 But, but the vast majority of lifeguards were
22 providing customers with product and not only
23 were their eyes engaged with that, their
24 brains were engaged with that. So there's a
25 good possibility it had a negative effect on

1 all the lifeguarding staff, which took away
2 not only their eyes but it took away their
3 thoughts from the water.

4 Q. But you can't say that any of the lifeguards
5 in this circumstance had that situation going
6 on?

7 A. I can't conclusively, no.

8 Q. I mean, you can't even offer that opinion, you
9 don't have any evidence to support that, do
10 you? You don't know what they were doing?

11 MR. WILSON: Object to form.

12 BY MR. THOMPSON:

13 Q. You don't know what any of these lifeguards --
14 you already said you don't know what Lucas was
15 doing, you don't know what Alex was doing, do
16 you?

17 A. I don't know specifically what they were
18 doing. I do know that the lifeguard on 21 was
19 out to lunch. There was no lifeguard there.

20 Q. I understand. I'm asking about the lifeguards
21 that were on duty on the beach at the time of
22 this incident, Lucas at 22 and Alex at 20.
23 What were they doing?

24 A. I don't know, but I know they weren't
25 instructed to cover the area that Casper left

1 vacant.

2 Q. I understand. I'm focusing on this concept of
3 the dual role.

4 A. Yeah.

5 Q. And I haven't heard anything from you that
6 would suggest that you know that either Lucas
7 or Alex was engaged in a secondary activity at
8 the time this incident happened?

9 A. Yeah, I can't specifically say what they were
10 engaged at the time, you're correct.

11 Q. And again, going back, I have read some of
12 your materials and the internal noise, the
13 internal distractions, those are caused by
14 lots of different things that wouldn't
15 necessarily have anything to do with renting
16 or selling a piece of beach equipment?

17 A. But renting and selling is compounding this
18 situation.

19 Q. I understand. But you have written volumes
20 about the types of distractions that
21 lifeguards have just if they are just a
22 lifeguard, not even having a secondary role;
23 correct?

24 A. Correct.

25 Q. In other words, there are things that

1 lifeguards are experiencing internally, maybe
2 their home life, lots of things that can
3 distract them from their role, their primary
4 role as a lifeguard; correct?

5 A. Correct.

6 Q. And seeing what's in front of them in the
7 water?

8 A. Correct.

9 Q. They don't have to have a secondary job or
10 responsibility to have a distraction and not
11 see what's in front of them, do they?

12 A. Yes. But if they do, it just makes the
13 situation worse --

14 Q. I understand --

15 A. -- and more difficult.

16 Q. -- you have written lots of materials about
17 that very fact --

18 A. Yes, sir.

19 Q. -- right?

20 A. Yes.

21 Q. Because most people think there's a lifeguard
22 on duty, then everything is going to be fine;
23 correct?

24 A. Correct.

25 Q. And that's not the case?

1 A. Correct.

2 Q. Anything else about the dual role lifeguard
3 opinion?

4 A. It shouldn't have been allowed. I would add,
5 yes, about the dual role. Mr. Pedersen in
6 2016 wrote an e-mail I believe to Mr. Lack
7 saying, listen, we have got to move away from
8 this model, this dual responsibility in 2016.

9 And, of course, the USLA letter was
10 specifically written about the detriments of
11 the dual role lifeguard and how that it was
12 not acceptable and basically that it was
13 irresponsible to expect a dual role lifeguard
14 to have the best safety interest of the
15 patrons in the water when they are performing
16 dual roles.

17 Q. So the USLA, have you ever been a member?

18 A. No, I have not. I have worked with them, but
19 I haven't been a member, no.

20 Q. Have you managed facilities that employed
21 lifeguards?

22 A. Yes.

23 Q. And have you had the lifeguards that you
24 employed be USLA certified?

25 A. No, because they were closed environments.

1 You wouldn't use UCLA for a water park or a
2 swimming pool.

3 Q. You would not?

4 A. No, you wouldn't.

5 Q. USLA doesn't provide certifications for those
6 kinds of facilities?

7 A. They might provide them for lakefront, but
8 it's a surf organization, a surf rescue
9 organization.

10 Q. That's all USLA is?

11 A. Primarily. Primarily.

12 Q. Okay. And so in your career, have you ever
13 sought any certifications from the USLA?

14 A. No, I have not.

15 Q. Have you ever been certified by USLA in
16 anything?

17 A. No. Well, they don't certify individuals.

18 Q. Any of the facilities or institutions where
19 you have worked been USLA certified?

20 A. Not where I have worked, no.

21 Q. Any of the facilities or institutions where
22 you have worked which could have been USLA
23 certified but were not?

24 A. No.

25 Q. So in other words, everywhere you have worked

1 to this point in time, everywhere you have
2 managed or been in charge of, none of those
3 facilities would have been subject to any kind
4 of USLA certification?

5 A. That's true.

6 Q. What is USLA?

7 A. It's United States Life Saving Association,
8 which is a nonprofit agency that trains
9 lifeguards specifically for the surf
10 environment.

11 Q. Do you know when it was created?

12 A. Oh, boy. I don't. Even there's a chapter in
13 my -- two chapters about it in both of my
14 books. I can't recall when it was created.

15 Q. Is it a private organization?

16 A. I can't answer that. I don't think it's a --
17 I don't know what constitutes a private
18 organization. It's a membership organization,
19 nonprofit.

20 Q. Is it a government organization?

21 A. No, it's not a government organization.

22 Q. In other words, founded, funded, run by, in
23 association with any government entity?

24 A. No, it's not.

25 Q. And do you know the membership of USLA, do you

1 know how many people are members, how many
2 organizations are members?

3 A. I think to date there's about 150 agencies
4 that are certified by USLA. I believe it's
5 around 150 around the country.

6 Q. When you say agencies, are those lifeguarding
7 entities?

8 A. That's like the City of Los Angeles, whatever.
9 A lot of Jersey shore lifeguards are USLA
10 members. Florida beaches. I can't recite
11 them all, but there's about 150 to the best of
12 my knowledge.

13 Q. Do you know about how many lifeguards that
14 would cover?

15 A. I can only say thousands. I don't know how
16 many.

17 Q. How about as far as a percentage of lifeguards
18 that work in that surf beach environment, do
19 you know a percentage that would be USLA
20 certified?

21 A. I do not know that.

22 Q. In other words, is it 25 percent of all ocean
23 beach lifeguards, is it 90 percent of all
24 ocean beach lifeguards, do you know?

25 A. I would not want to guess. I don't know.

1 Q. Do you have any idea?

2 A. No. No, sir.

3 Q. Next opinion?

4 A. Yeah. I know that the combination of the city
5 and Lack's Beach Service did not adequately
6 educate and warn their beachgoers about the
7 flag system and the hazards inherent in the
8 ocean, particularly with the flag system.
9 Because a constant question of when that was
10 brought up all the time was: What does the
11 flag mean? What does that flag mean? And the
12 goal should be to have that NOAA sign on the
13 back of every guard chair where the flag is
14 stating what the flags represent.

15 Also, either the supervisors or the
16 managers or the LGOs need to be more of
17 educators to tell them what the flags mean and
18 where the currents are. They have to be
19 basically traffic cops on the beach. And it
20 appears to me based upon the testimony, that a
21 predominant question of the lifeguards and the
22 staff was what do these flags mean. And so I
23 don't think they did a proper job educating,
24 warnings their public about the flag system
25 and how it works.

1 Q. We have already established you haven't seen
2 any signs --

3 A. That's true.

4 Q. -- that the City of Myrtle Beach posted near
5 their public beach accesses?

6 A. That's correct.

7 Q. And you can't say whether that was adequate or
8 not, can you?

9 A. I haven't seen their warnings, no.

10 Q. So you can't say?

11 A. Right.

12 Q. Do you have any clue as to how many visitors
13 use the beach in Myrtle Beach?

14 A. According to what I read, approximately 18
15 million.

16 Q. A year?

17 A. I believe it's 18 million a year.

18 Q. How many in the summer?

19 A. I don't know.

20 Q. How many physically on the beach in the
21 summertime on average?

22 A. I do not know that.

23 Q. Do you expect a lifeguard or supervisor to go
24 up to every one of them and instruct them on a
25 longshore current?

1 A. No. But they should have a decent and
2 adequate educational campaign to educate
3 everyone and, again, physically point out
4 where the currents are and move them up and
5 down the beach accordingly.

6 Q. Outside of somehow speaking to the beachgoers,
7 what else would they do, Lack's Beach Service
8 and/or the City of Myrtle Beach, with regard
9 to instructing?

10 A. Sandwich boards identifying where the currents
11 were and asking them to move up or down the
12 beach.

13 Q. What currents?

14 A. Littoral or rip currents, whichever one is
15 posing a threat, whichever one is there.

16 Q. So whenever a rip current shows up, then a
17 sandwich board should go out where that rip
18 current is?

19 A. Well, if it's recurring in that spot, yes.
20 And if you can't do it with a sandwich board
21 or a flag, basically you warn and educate
22 guests with a kiosk or sandwich boards or
23 flags or signs. Those are the three things.
24 But other than that more importantly, you have
25 someone patrol the beach, and again like a

1 traffic cop, moving them up and down the beach
2 and pointing out these currents to them.

3 Q. How easy is it to see a rip current?

4 A. For us it's pretty easy. For the average
5 person, it's extremely difficult. For the
6 beachgoer, it's very difficult. If you're a
7 surfer, if you're a lifeguard, it's relatively
8 easy, but even after you point it out,
9 oftentimes unless you do a good job
10 instructing someone and showing them what it
11 looks like, the average beachgoer is not going
12 to see it.

13 Q. And is a rip current stable, in other words,
14 if I saw one and went and got my sandwich
15 board and put it out there, would it still be
16 there by the time I got to put my sandwich
17 board out?

18 A. Sometimes yes, sometimes no. If they were two
19 stable sandbars out there and it created a rip
20 feeder channel between the two and those
21 sandbars were predominant and weren't going
22 anywhere, you might have that all day long.
23 If the sands and winds and the currents are
24 changing, your rips would change as well.

25 Q. So then the lifeguard is focusing on rip

1 currents as opposed to the swimmers in the
2 water? I mean, it sounds like a lot of
3 divided responsibility trying to figure out
4 where the currents are at the time?

5 A. Well, but the statistics are significant and
6 that more than 80 percent of all the water
7 rescues occur in a rip. So identifying the
8 rip current and pointing it out to individuals
9 and moving them away from that rip current,
10 educating and warning them is significant in
11 reducing water rescues and drownings. Yes,
12 and they also have to watch people in the
13 water.

14 Q. Assuming for the purpose of this question that
15 there was a rip that Mr. Wolde experienced, do
16 you know when that rip current first developed
17 that day?

18 A. I have no idea.

19 Q. Do you know if it had been there since the
20 morning time?

21 A. I don't know.

22 Q. Do you know that if it had just started in the
23 moments before he encountered the area?

24 A. I have no way of knowing.

25 Q. In other words, do you have any evidence to

1 suggest that the rip that Mr. Wolde may have
2 experienced was visible to a lifeguard in any
3 appreciable time before the incident occurred?

4 A. I just can't state that.

5 Q. Was Lack's Beach Service using a flag system?

6 A. They were using a flag system. It was a red
7 flag day, but then they weren't using it
8 effectively because when the lifeguard left
9 for lunch, he took the flag down. He took the
10 one warning that was up there that was posted
11 on his chair, he took it down. And I know
12 their practice was to remove the umbrella and
13 to remove the flag when they went on lunch
14 break indicating that there was no lifeguard
15 on duty. That is counterproductive if you
16 remove the warning flag.

17 Q. Do you know whether there's any instruction or
18 warnings provided to the public with regard to
19 an empty lifeguard chair?

20 A. I don't know that.

21 Q. In other words, at the public access points of
22 the City of Myrtle Beach, whether any of that
23 information is provided?

24 A. I don't know that.

25 Q. Do you know if the Lack's Beach Service guards

1 wear uniforms?

2 A. Yes, they did.

3 Q. Do you know what their uniforms were?

4 A. I can't specifically recall. I think they had
5 red shorts, I don't know about their tops, but
6 I can't specifically recall.

7 Q. The flag system other than from the fact of
8 the removal of the flag at a lunch period, was
9 the flag system appropriately used?

10 A. I just know that they were using a red flag
11 for that day, meaning very hazardous
12 conditions. I don't know what flags they used
13 prior to the incident, I mean other times
14 during the summer. I just have no idea what
15 they used.

16 Q. You don't have any information about their
17 flag system?

18 A. No, I do not.

19 Q. You just know it was a red flag day on the day
20 of this incident?

21 A. Yes, sir. And that they utilized the red flag
22 on that particular day.

23 Q. Do you know if they used a two flag red flag?

24 A. I'm sorry. I stand corrected. Yes. When
25 they close the water, they put up two red

1 flags.

2 Q. Does that sound like the standard flag system?

3 A. It sounds like a USLA standard, yes.

4 Q. Which is what?

5 A. Double red flag means the water is closed.

6 Q. And a red flag means?

7 A. It's very hazardous.

8 Q. Does it mean anything other than very
9 hazardous?

10 A. It means that as far as Myrtle Beach is
11 concerned, that you have to limit the depth of
12 water that they go into. It typically means
13 that there are strong currents, whether they
14 be rips or longshore currents.

15 Q. Right. But what's the standard that you're
16 referencing, what's a red flag standard, not
17 Myrtle Beach?

18 A. Dangerous water. Warning. You know, warning,
19 rough, dangerous water, caution.

20 Q. That's the standard?

21 A. Roughly, approximately that's the standard.

22 Q. I mean, does the red flag standard that you're
23 referencing include any information or
24 restriction about how far into the water
25 anybody can get?

- 1 A. Nationally, no.
- 2 Q. That's what I'm trying to find out. I'm
- 3 trying to find out what the standard is --
- 4 A. Right.
- 5 Q. -- obviously Myrtle Beach is doing whatever
- 6 its doing, but the standard you're
- 7 referencing, right? You have a red flag
- 8 standard, correct, one single red flag, which
- 9 means the standard. What does it mean?
- 10 A. Which means very rough water, hazardous water,
- 11 kind of a swim at your own risk thing or use
- 12 extreme caution.
- 13 Q. But it's not a close the water flag?
- 14 A. No, it's not.
- 15 Q. The double red flag is a close the water
- 16 flags; right?
- 17 A. Yes.
- 18 Q. What's the step down from the red flag?
- 19 A. Usually it's a yellow flag, meaning caution,
- 20 just general caution.
- 21 Q. Does it have any further requirements?
- 22 A. There might be waves or currents, but they are
- 23 not extreme. Moderate, they are moderate
- 24 hazards.
- 25 Q. Is there a green flag?

1 A. Yes. Green flag for, I just use the sailor's
2 term, for a flat-ass calm day.

3 Q. I was getting ready to say, I can't imagine a
4 green flag ever being posted on a beachfront,
5 very rarely I would think?

6 A. Yeah. Well, sometimes some oceans sometimes
7 look like a lake, I mean.

8 Q. How about Myrtle Beach?

9 A. I don't know.

10 MR. WILSON: Take another restroom
11 break at your convenience.

12 MR. THOMPSON: Absolutely.

13 - - - -

14 There was a brief Recess in the proceedings.

15 - - - -

16 MR. THOMPSON: Back on the record.

17 BY MR. THOMPSON:

18 Q. Dr. Griffiths, we took a quick break. So far
19 we have covered opinions regarding the closure
20 of the water, the qualifications of the
21 lifeguards, the dual role lifeguard concept
22 and then the failure to warn and flag system
23 concept on the date of the loss.

24 A. Right.

25 Q. Any other opinions?

1 A. Well, I think I mention, I hope I did, that I
2 think the city failed -- I didn't think. I
3 know the city failed to ensure that they were
4 getting their money's worth as far as safety
5 is concerned.

6 Q. So city oversight?

7 A. Yeah. There was no -- and I know George Lack
8 and the city had a long history of working
9 together and they seem to appreciate each
10 other's efforts and so forth, but I didn't see
11 any oversight to be certain that the city and
12 the guests, the people going to the beach,
13 were receiving the layers of protection when
14 it comes to safety that they should have
15 received.

16 Q. Let me ask you this: Are you saying they
17 didn't do enough to ensure compliance with the
18 franchise agreement?

19 A. They didn't -- twofold. They didn't make sure
20 that their franchise agreement was being
21 covered, was being followed, number one. And
22 number two is they just didn't have any checks
23 and balances in place to make sure that they
24 were getting what they paid for, so to speak.

25 Q. Right. Well, that's just again, just the

1 compliance with the franchise agreement --

2 A. Right. Right.

3 Q. -- correct?

4 A. Yes.

5 Q. Because at the end of the day, the city
6 entered into an agreement with Lack's for
7 Lack's to provide certain services on the
8 beachfront; correct?

9 A. Correct.

10 Q. And then you're telling me the city didn't do
11 its job in ensuring that Lack's was performing
12 in accordance with the franchise agreement?

13 A. Correct. But also that they weren't complying
14 with the standard of care.

15 Q. Well, what does that mean?

16 A. If I can give you a specific example. Both
17 Lack's and the city said that a prohibition
18 was that lifeguards could not use their cell
19 phones, and the reason why they say that is
20 because of distractions. So they knew that
21 external forces could be a distraction, yet
22 they allowed people to rent. The majority of
23 lifeguards could rent while they are supposed
24 to be lifeguarding.

25 On top of that, in 2016 Mr. Pedersen

1 wrote a letter of concern saying we have got
2 to move away from this model. And they had
3 complaints from people who visited the beach
4 two weeks prior to, saying that the lifeguard
5 was engaged with customer service for six
6 minutes.

7 But yet in light of the fact the
8 foreseeability that distractions were great,
9 they extended, the city extended the contract
10 to Lack's until 2024 I believe. They gave
11 them another seven years under the same
12 outline, the same model that Mr. Pedersen was
13 trying to move away from. And so I mean, they
14 had a huge foreseeability that this could and
15 would be a problem, yet they did nothing to
16 do -- to change the system.

17 Q. Right. But we have also talked about the dual
18 role lifeguard concept, but you don't have any
19 evidence to suggest that it in any way
20 contributed or caused the loss in this case?

21 A. I do not.

22 MR. WILSON: Object to form.

23 A. I do not. Although, every water agency and
24 every water professional say this will have an
25 impact, this will be the R.I.D. factor,

1 failure to recognize because of intrusions and
2 distractions.

3 BY MR. THOMPSON:

4 Q. I understand. But it's pure speculation at
5 this point in time because you don't have any
6 evidence to suggest that either of the two
7 lifeguards on either side of this incident
8 were engaged in the dual role at the time that
9 the loss occurred?

10 MR. WILSON: Object to form.

11 BY MR. THOMPSON:

12 Q. I have asked you the question, you haven't
13 given me an example.

14 A. Well, they didn't respond to a person who was
15 struggling in the surf. I mean, they didn't
16 respond until Mr. Wolde was out of the water.
17 So something must have been going on. I mean,
18 you had two lifeguards on either side who saw
19 nothing. And the fact that he entered at --
20 we believe he entered at L22 and drifted down
21 to L21, was evidence of a strong longshore
22 current there.

23 Q. Let's talk about the facts as you understand
24 them. So we established that the incident
25 occurred around 12:45; is that right?

1 A. That's right.
2 Q. Sunny?
3 A. I believe so.
4 Q. Clear?
5 A. I believe so.
6 Q. What were the wave conditions?
7 A. I can just rely upon the testimony of the
8 employees that were there that day. It was
9 very hazardous. It was very rough.
10 Q. I'm not asking that. How tall were the waves?
11 A. I don't know.
12 Q. At what frequency?
13 A. I don't know.
14 Q. What were the wind conditions?
15 A. I don't know.
16 Q. What tide was it?
17 A. I believe it was just after low tide I
18 believe.
19 Q. So tide coming in or going out?
20 A. I believe the tide was -- well, I don't know
21 what specific time during low tide it was, but
22 I believe it was shortly after low mean tide I
23 think.
24 Q. So water would have been coming back in?
25 A. I just don't know that.

1 Q. Where did Mr. Wolde enter the water?

2 A. I believe based upon Ms. Abel's testimony, he
3 went into the water in front of where they
4 accessed the beach, slightly to the right.

5 Q. What tower was closest to their location?

6 A. I believe -- well, L21, the one that was
7 vacant.

8 Q. And L21 would have been south or north of
9 their location?

10 A. I'll be perfectly honest, I don't know which
11 way is north, south, east or west.

12 Q. To the right or left?

13 A. It would have been -- 21 would have been to
14 the right of the location where he was found.

15 Q. Well, my question to you is is where was the
16 Wolde family situated and where was the
17 closest tower?

18 A. I believe L22 was the closest to where they
19 accessed the beach.

20 Q. And L22 would have been to their left or to
21 their right?

22 A. I believe she stated in her testimony the
23 tower was slightly to the right.

24 Q. So I walk out on the beach from the Sea Crest
25 hotel; correct?

- 1 A. Yes, sir.
- 2 Q. And do you know if the Woldes went left or
3 right or they just kind of went straight out
4 and sat down?
- 5 A. I can't recall specifically. I don't think
6 they ventured too far either way.
- 7 Q. And the closest tower to them would have been
8 what tower?
- 9 A. I believe as they enter the beach, L22.
- 10 Q. And L22 would have been located where, to
11 their right or to their left?
- 12 A. I think it was slightly to their right.
- 13 Q. Hand me those photos, please, I'm going to
14 test your eyesight..
- 15 A. Well, I told you it was bad.
- 16 Q. Can I come over there, do you mind?
- 17 A. Sure. No.
- 18 Q. In one of these photos, which is Exhibit 4,
19 okay, can you make out the lifeguard tower in
20 the background of that photograph?
- 21 A. Let me look closer. Excuse me. Now, you tell
22 me that's a lifeguard tower. Are you talking
23 about this one or this here?
- 24 Q. This one right here.
- 25 A. Well, I can't tell that's a lifeguard tower.

1 I mean, you're telling me it is because you
2 know it is, but I don't -- it doesn't look
3 like a lifeguard tower to me.

4 Q. Why does it not look like a lifeguard tower?

5 A. Because, I mean, my initial reaction was it
6 looks like one of those pop-up sun canopies
7 from here. I'm being honest.

8 Q. I understand. For the purposes of this
9 question, I want you to assume that in the
10 background of the photograph, which is one in
11 Exhibit 4, there's a lifeguard tower that is
12 empty. Okay?

13 A. Okay.

14 Q. If you assume that to be a lifeguard tower,
15 what lifeguard tower would you say that is as
16 you understand the facts of the case?

17 A. If this was in close proximity to the
18 incident, and I believe it was within the
19 hour, and if that is a lifeguard stand that is
20 vacant, then that would be L21.

21 Q. So as you can see where the child is located,
22 the lifeguard stand that -- and again, if I
23 represent to you that that's an empty
24 lifeguard stand, it's to the family's right,
25 correct, as they are coming onto the beach?

1 A. Yes, sir.

2 Q. And you believe that to be tower 21?

3 A. I believe so.

4 Q. Where would tower 22 then be in relation to

5 that group?

6 A. If there's no other tower there, then it

7 should be to the left.

8 Q. How close?

9 A. Oh, I don't know that.

10 Q. Do you have any opinions with regard to the

11 spacing of the lifeguard towers?

12 A. No, I really don't.

13 Q. One way or the other?

14 A. No. Only that. If they are spread out too

15 far apart, depending upon how many people in

16 the water and where they are and where the

17 currents are, you should have people on foot

18 patrol or on the ATVs or the side-by-sides

19 down by the water's edge.

20 Q. Well, are you going to offer any opinions that

21 the lifeguard towers as they were on the date

22 of this incident were too far apart?

23 A. No, I'm not.

24 Q. And is there some concept or some thought

25 process about the spacing of lifeguard towers

1 on a beach?

2 A. There are different recommendations depending
3 upon the state and the organization. Some go
4 by linear footage, but there's no consensus as
5 to exactly where those stands should be.

6 Q. Is there any such information or guidance in
7 any of your books?

8 A. I believe Better Beaches might refer to the
9 Pennsylvania beach standard as being one
10 lifeguard per 150 feet or 125 feet of linear
11 beachfront. Something like that.

12 Q. Any other guidance in any of your books about
13 the spacing of like our towers?

14 A. I don't believe I addressed that. I know I
15 addressed having lifeguards in the tower on
16 the water's edge and in the water, from that
17 perspective three different lines, but I don't
18 remember addressing the linear distance
19 between chairs.

20 Q. Is there any kind of standard, industry,
21 national?

22 A. I don't think there's a national or industry
23 standard. Again I recall 125 feet or 150 feet
24 apart between chairs for Pennsylvania I
25 believe. That maybe true for some places in

1 Jersey, but I'm not 100 percent.

2 Q. But that would be their local requirement
3 though; correct?

4 A. Yes. Yeah. I don't think there's any
5 national standard.

6 Q. Do you know when the Woldes arrived on the
7 beach?

8 A. Close to noon-ish I believe. He went to
9 Walmart in the morning, they had breakfast. I
10 think that was around 11:00.

11 Q. I'm not asking that question. I just want to
12 know when they arrived on the beach?

13 A. I'm sorry.

14 Q. What time?

15 A. I think they got there around noon-ish.

16 Q. Do you know if L21 was at lunch at the time
17 when they arrived on the beach?

18 A. He may have. I think his lunch break was from
19 12 to 1 or something like that. He had the
20 second lunch shift. I can't recall exactly.

21 Q. Do you know whether he would have been -- his
22 flag would have been up at the time they first
23 arrived on the beach?

24 A. I don't know that.

25 Q. Do you know if the lifeguard at L22 was in his

1 stand or on the tower at the time they first
2 arrived on the beach?

3 A. I know he was on duty. I don't know where he
4 was or what he was doing, but I know he was on
5 duty. I do know he called in the code for the
6 response.

7 Q. So if that being the case, the flag would have
8 been flying at L22, correct, red flag?

9 A. It should have been.

10 Q. Do you know that it was or was not?

11 A. I don't know that.

12 Q. Can you tell me that it was not?

13 A. I can't.

14 Q. So do you know about what time it was that
15 Mr. Wolde went into the water?

16 A. It was shortly before the incident. Ms. Abel
17 said that it happened relatively quickly. The
18 incident occurred about 12:45. I don't know
19 exactly when he went in the water, but it was
20 somewhere between after 12 noon and before
21 12:45.

22 Q. Do you know how long he had been in the water
23 before the incident occurred?

24 A. I don't know specifically. I just generally
25 know that it wasn't a long period of time.

1 Q. Well, I understand that, but what is that? Is
2 that 5 minutes, 10 minutes, 20 minutes?

3 A. I don't know. Certainly was less than an
4 hour.

5 Q. Right. Do you know what he did while he was
6 in the water?

7 A. No. I only heard or only read about the
8 incident where he was with his two older kids
9 and one of them was holding onto his shirt.
10 And I guess the children were saying that he
11 was crying out for help and that he was being
12 dragged or pulled, and that's about all I
13 know.

14 Q. When you say older children, how old were the
15 kids?

16 A. 9 and 12.

17 Q. That's how old they are now. How old were
18 they then?

19 A. Oh, well, I'd have to do the math. So they
20 are approximately 6 or 7 and 9 or 10-ish.

21 Q. Do you know the swim ability or capacity or
22 capability of the two kids?

23 A. No. Only that they were swimmers. I think
24 Ms. Abel said that they were swimmers. She
25 didn't -- I don't believe she testified how

1 strong they were.

2 Q. Have you read either of the two kids'
3 testimonies?

4 A. No.

5 Q. Did you know they were deposed?

6 A. I did not.

7 Q. And have offered testimony in the case?

8 A. I did not know that.

9 Q. You haven't been provided their transcripts?

10 A. No, sir.

11 Q. But you believe that both were strong
12 swimmers?

13 A. I didn't say that. I don't know what their
14 swimming ability was. I just know that they
15 were -- I believe they were some sort of --
16 they had some swimming ability. I don't know
17 how much.

18 Q. Do you know if either of them were confident
19 in the water?

20 A. I don't know that.

21 Q. Or fearful?

22 A. I don't know that.

23 Q. Or had any experience in deep water, shallow
24 water?

25 A. I don't know that.

1 Q. Do you know how deep they were when they got
2 into trouble?

3 A. Specifically, I don't know. I'm led to
4 believe that they were in fairly shallow
5 water.

6 Q. What is fairly shallow water?

7 A. Shallow water in this particular case I think
8 would be waist-deep water, knee-deep water.
9 Something of that nature.

10 Q. How tall is Mr. Wolde?

11 A. I think he's 6, 2.

12 Q. So then waist-deep water would be how deep?

13 A. Three feet maybe.

14 Q. How tall are the kids?

15 A. I don't know.

16 Q. You think that the water would have been over
17 their waist?

18 A. Yes.

19 MR. WILSON: Object to form.

20 BY MR. THOMPSON:

21 Q. Do you know if those children could touch the
22 bottom?

23 A. I don't know.

24 Q. In other words, stand and have their head
25 fully above the water?

1 A. I don't know that.

2 Q. Have you ever made any recommendations with
3 regard to parents and having their children in
4 the water and how deep?

5 A. Well, that's a pretty general question.

6 Q. It is a general question. I can get more
7 specific, but I'm just asking in general.
8 Have you ever written about such things --

9 A. Yes.

10 Q. -- opinions about such things?

11 A. Yeah.

12 Q. What have those opinions been?

13 A. Well, my daughter and I really push life
14 jackets for non or weak swimmers in all bodies
15 of water including swimming pools. And we
16 believe in close touch supervision or
17 supervision within arm's reach for a weak or a
18 non-swimmer in water where they can stand
19 basically.

20 Q. Well, what about in the ocean, what is your
21 recommendation, have you ever made any
22 recommendations or offered any opinions about
23 children in the ocean?

24 A. I have. I developed rad cords for some
25 agencies about safety tips when they go to the

1 ocean. I can't recall if it specifically
2 addresses the depth of water, where they
3 should go, but I can't -- I have offered
4 recommendation. I can't remember exactly what
5 I recommended.

6 Q. Is it safe to have children in an ocean
7 setting where they can't touch the bottom?

8 A. Well, it depends. Again, if it's a flat-ass
9 calm day and their parents are holding them
10 and/or they are in a life jacket, that might
11 be acceptable. But if there are currents and
12 it's over their head and they don't have much
13 swimming ability, then that would not be
14 acceptable.

15 Q. Ultimately the parent was with the kids in the
16 day of this incident; correct?

17 A. Correct.

18 Q. And the parent has a responsibility for his or
19 her own child; correct?

20 A. Yes, sir.

21 Q. Not to expose them to an unsafe condition;
22 correct?

23 A. Yes. If they know about the unsafe condition,
24 they have an obligation to proceed with
25 caution.

1 Q. Right. Having the child in over their head in
2 the ocean, is that a safe condition?

3 A. As I mentioned earlier, that depends. If the
4 hazard isn't apparent and the parent believes
5 that they have control of the child, might be
6 acceptable.

7 Q. And again in any of your books, any of your
8 writings, have you ever offered any
9 recommendations or opinions with regard to
10 children being on the beach and how far in the
11 water they should be?

12 A. I don't believe so.

13 Q. What happened, what happened to Mr. Wolde and
14 the kids?

15 A. I believe they got -- I don't know
16 specifically what happened. But I believe
17 based upon the information that I read, I
18 believe that probably one or two of the
19 children got into trouble, he went to assist,
20 and they all got caught in the current,
21 whether it be a strong longshore or a rip or a
22 combination thereof.

23 Q. Where did you get that information?

24 A. It was based upon what I read. The daughter
25 clinging to his shirt, the fact that he was

1 calling for help, and that's all I have.

2 Q. I want to know who provided that testimony,
3 who provided that evidence?

4 A. Just what I read in the file here.

5 Q. Where?

6 A. I think Ms. Abel was the last one and she
7 didn't see anything.

8 Q. Ms. Abel testified she didn't see anything;
9 right?

10 A. Right.

11 Q. So she didn't see anything. None of the
12 Lack's people that have been deposed saw
13 anything; right?

14 A. Yes.

15 Q. So who did?

16 A. I don't know of anyone who -- anyone who
17 provided eyewitness account of exactly what
18 happened.

19 Q. That's what I'm trying to figure out, where
20 you're getting the information about what
21 happened in the water.

22 A. I just surmised it based upon what I read.

23 Q. But you can't surmise. There's got to be some
24 factual basis. Where did you get the facts to
25 make that surmise?

1 A. Yes, sir.

2 Q. Well, who was the witness and what did they
3 see?

4 A. I don't have any eyewitness information. I
5 just know that those currents were strong
6 running that day and he was in shallow water
7 with his kids. That's all I know.

8 Q. I understand. So how long did it take from
9 the time they started in trouble until the
10 time that he was under water?

11 A. I don't know.

12 Q. How much activity was there on the water that
13 would have potentially drawn attention to
14 them?

15 A. I read that it was a relatively busy day. I
16 don't know if that busy pertains to the sand
17 or the water or both, but that's the only
18 indication I have, it was a relatively busy
19 day.

20 Q. Do you know how many people were in the water?

21 A. No, sir.

22 Q. How much, if any, was there any kind of
23 visible struggle?

24 A. I don't -- I'm unaware of what physical
25 struggle there was, I'm just unaware. I

1 haven't read any testimony or any factual data
2 about that.

3 Q. Or how long there was, if there was a
4 struggle?

5 A. Correct.

6 Q. Do you have any information about that?

7 A. No, sir.

8 Q. Do you have any information that would suggest
9 to you that there was something in the water
10 that a lifeguard could have seen?

11 A. Repeat that, please.

12 Q. Yeah. What information do you have factually
13 that there was something that happened in the
14 water that a lifeguard could have seen, in
15 other words, could have seen Mr. Wolde and/or
16 his children in trouble?

17 A. Well, he was a large man with two kids. I
18 mean, the fact that those physical bodies
19 should have -- their presence should have
20 alerted the lifeguard that they were there.

21 Q. Along with how many other people in the water?

22 A. I don't know that.

23 Q. Well, why would they have been anymore
24 distinguishable than any others in the water?

25 A. Maybe a fact that he was a -- he had two kids

1 with him, an adult. I don't know.

2 Q. Did anybody else in the water have kids with
3 them?

4 A. I don't know.

5 Q. So my question: What is it that would have
6 factually drawn a lifeguard's attention to
7 them?

8 A. I don't have any facts other than Ms. Abel
9 relayed that her daughters -- her son and her
10 daughter were saying that he was yelling for
11 help. That's all I have.

12 Q. Do you know how far from the beach they were?

13 A. I believe they were relatively close, but I
14 can't estimate in feet.

15 Q. Because you have told me how deep they were,
16 but that doesn't necessarily tell me how far
17 away they were from the edge of the water?

18 A. Yeah. And I don't know conclusively how deep
19 they were either. I mean, I don't have any
20 depth that I can tell you that exactly they
21 were at.

22 Q. Do you have any knowledge of the beach in that
23 area, is it a gradual slope, is it a
24 significant drop in depth, do you have any
25 knowledge?

1 A. Well, based upon the photo, it all seems to be
2 relatively flat and relatively gradual. I
3 don't know what's beneath the surface of the
4 water there. There could be a deeper trench
5 created by that longshore current. There
6 could be holes. I don't know what's under the
7 surface, but the beach sand itself seems to be
8 in the general area relatively flat in
9 approaching the ocean relatively gradually.

10 Q. So when Mr. Wolde got into trouble, how far
11 away would he have been from the closest
12 tower?

13 A. Well, it's a guessing game. I don't know.

14 Q. Do you know whether the location where he got
15 in trouble, if, in fact, he yelled, could have
16 been heard in a tower on the beach?

17 A. I don't know that.

18 Q. Do you know if others in the water were making
19 noise?

20 A. I don't know.

21 Q. Others on the beach making noise?

22 A. Must be making some type of noise. I don't
23 know what the magnitude of that noise was, but
24 I mean, they must be making some noise.

25 Q. Do you know if radios are allowed on the

1 beach?

2 A. I don't know that.

3 Q. Do you know if any radios were playing?

4 A. I do not know that.

5 Q. Do you know if a lifeguard sitting in a tower
6 would be able to hear, yell for help in the
7 location where Mr. Wolde got into trouble?

8 A. I don't know.

9 Q. Do you know how long Mr. Wolde was submerged?

10 A. I do not know.

11 Q. Do you know how he was pulled from the water?

12 A. Several -- based upon what I read and the
13 testimony I read, several people pulled him to
14 the shoreline and dragged him out of the
15 water. I don't know how far that was.

16 Q. Do you know how those individuals found him?

17 A. No.

18 Q. Do you know how the children escaped the rip
19 current?

20 A. According to Ms. Abel's testimony, one of her
21 children stated that someone else there, a
22 bystander, told her how to get out of the
23 current or how to get to the beach safely.
24 And I believe her son just ran back to her, I
25 don't know if he was in the water, how deep he

1 was in. Ran back and told her that he was in
2 trouble.

3 Q. Were both children with Mr. Wolde at the time
4 he got in trouble?

5 A. Initially I believe so.

6 Q. What does initially mean?

7 A. I mean, when his trouble started, I don't know
8 that they -- apparently they weren't both with
9 him at the end of this scenario, but I think
10 they both were at the beginning.

11 Q. And then so how did the boy get out of the rip
12 current?

13 A. I don't know if he was ever in the rip
14 current. I don't know that.

15 Q. How about the girl?

16 A. She claimed she was hanging onto her father's
17 shirt, so I imagine she was in the grasp of
18 the current particularly when she -- and I
19 don't know if it was she or her brother were
20 saying that he was being pulled. Other than
21 that, I don't have any specifics.

22 Q. How do you know they were even involved in a
23 rip current?

24 A. Number one, you keep mentioning a rip current.
25 But I don't know conclusively they were in a

1 rip current. I think they were in a current,
2 could have been a longshore current. It could
3 have been a feeder current for a rip, which
4 may go along the shoreline. He was a strong
5 swimmer. I don't believe he would have gotten
6 into trouble in the water unless there was a
7 current that he couldn't handle or there was a
8 hole or a trench that caught him off guard.

9 Q. Right. You can step into a hole at the same
10 time a wave is coming in just water; correct?

11 A. Could.

12 Q. That can happen?

13 A. Yes, sir.

14 Q. And it has nothing to do with currents, it
15 just happens to do with the natural condition
16 of the beach and oceanfront; correct?

17 A. It could. Yes, sir.

18 Q. You can't tell me that happened?

19 A. No.

20 Q. But it's possible?

21 A. Anything is possible.

22 Q. Just because we have been using the word rip
23 current doesn't mean it was there, that's a
24 lot of assumption. That's why I'm asking you
25 as the expert what is it that you have by way

1 of factual evidence that this man, Mr. Wolde
2 and his kids, were caught in a rip current?

3 MR. WILSON: Object to form.

4 A. Well, again because you kept referencing a rip
5 current, number one. But number two, because
6 there was evidence that they were both
7 longshore and rip currents. I don't know
8 conclusively that he was in a rip current. I
9 would suggest that he was probably in a
10 current of some sort, which were both running
11 that day, both a rip and the longshore
12 current.

13 BY MR. THOMPSON:

14 Q. Right. But we talked about you could
15 potentially see a rip current, correct, but
16 there's another current perhaps that you can't
17 see that he might have been involved in?

18 A. Yeah. A longshore current is really detective
19 when you're in the water and you notice that
20 your beach blanket or your umbrella is to the
21 right or to the left, I mean, it's going down
22 the beach. You really unless there's a lot of
23 froth or muddy water, you won't see that.
24 You'll feel it, but you won't necessarily see
25 it.

1 Q. Well, how do we know that Mr. Wolde got in
2 trouble because of a current as opposed to a
3 natural condition and a concurrence with a
4 wave?

5 A. Based upon what I have read so far, that
6 currents were running strong that day, they
7 were running strong since 10:00. There were
8 rips and littorals. He was a strong swimmer.
9 So it seems to me like he would have been
10 adversely affected by a current.

11 Q. Do you know if when Mr. Wolde got into
12 trouble, if he could stand and touch?

13 A. I don't know that. Can I answer that? I do
14 know that often sometimes people will be in a
15 current and they can stand up, but because
16 they panic, they don't stand up. I mean, I
17 have rescued one woman in a case where all she
18 had to do was stand up, but she couldn't
19 physically do it because she was freaking out
20 that she was in a current. And all she had to
21 do was stand up, but I had to stand her up to
22 get her to do that.

23 So that's what I'm saying, if he
24 panics, even though physically he might be
25 able to stand up, psychologically or mentally

1 he may not be able to do that.

2 Q. Right. I was just more interested in the
3 facts of the case, whether you knew whether he
4 was in an area where he could stand or not?

5 A. I don't know.

6 Q. Once he was brought to the beach when he was
7 in the sand, did you see any deficiencies in
8 any of the resuscitative response?

9 A. No. And I didn't go there, and oftentimes I
10 don't. I don't consider that to be my area of
11 expertise.

12 Q. Okay. Fair enough. Do you have any clue or
13 understanding as to how long it was from the
14 time Mr. Wolde first encountered or got into
15 trouble to the point where he was brought to
16 the beach?

17 A. No, sir.

18 Q. Let's go back to make sure we have got all of
19 your opinions. Just to rehash, the water
20 should have been closed. Whether there's
21 qualified lifeguards. The dual role of
22 lifeguards. Failure to warn the flag system.
23 And then the city's oversight or compliance
24 with the franchise agreement. What other
25 opinions do you have?

1 A. I thought I stated by their admission they
2 were understaffed. They didn't have enough
3 people. And as a result, I believe they
4 should have managed that somehow, that lack of
5 personnel by either closing sections of the
6 beach or having their supervisors or managers
7 more involved, but they operated according to
8 normal operating procedures and made no
9 adjustments for the lack of personnel.

10 Q. Let's assume for the moment that there was a
11 lifeguard sitting in the tower at L21 and this
12 incident occurred, would Mr. Wolde be alive?

13 A. There would be a greater possibility along
14 with the fact that there was no LGO at 6th
15 Street.

16 Q. Well, you understand as well the LGO by the
17 agreement covered a six-stand coverage area?

18 A. Yes, sir.

19 Q. So that LGO, it wasn't guaranteed that that
20 LGO was going to be at L21 when this happened;
21 right?

22 A. Right.

23 Q. He could be five stands away --

24 A. Correct.

25 Q. -- right? And so can you tell me that at the

1 time this loss occurred, that there was some
2 schedule or some path that an LGO would have
3 been in this location at the time this
4 incident occurred?

5 A. No. But you had two possibilities and more
6 people being there, the guy in L21 and the LGO
7 at 6.

8 Q. I understand anything is possible, as we have
9 discussed. But by the agreement and by the
10 operation, there was an LGO that had a
11 six-stand coverage area; correct?

12 A. Correct.

13 Q. And did you have any understanding that the
14 LGO had to be at each particular stand within
15 a particular time frame?

16 A. No, sir.

17 Q. Like 1:00, I'm at 21; 2:00, I'm at 22; 3:00,
18 I'm at 24?

19 A. No, sir.

20 Q. So you can't tell me that at the time this
21 incident occurred, the LGO that would have
22 been in that six-stand area would have been at
23 the very location where this incident
24 occurred?

25 A. True.

1 Q. I mean, could have been five stands over and
2 been within the terms of the agreement;
3 correct?

4 A. Yes, sir.

5 Q. And to be clear, there are drownings that
6 occur when there is a fully staffed, fully
7 guarded beach; correct?

8 A. There can be, yes.

9 Q. And that can occur even with the best of
10 intentions and the best of observation, it can
11 still happen; correct?

12 A. It still can happen, but it's less likely.

13 Q. I understand. It can still happen though;
14 correct?

15 A. Yes.

16 Q. There's no guarantee that that person is going
17 to be saved?

18 A. Correct.

19 Q. In fact, because a beach is guarded, that
20 doesn't mean there's a guarantee that nobody
21 is going to drown?

22 A. That's right. You can't guarantee people's
23 safety.

24 Q. What other opinions do you have in this case?

25 A. When I said understaff, I mean in reading the

1 depositions, it also seems to be they were
2 understaffed in terms of supervisors and
3 managers. According to not only were they
4 understaffed with lifeguards, but they were
5 understaffed with managers and supervisors. I
6 believe they normally have three managers on
7 duty. On this day they only had two.

8 Q. To be clear, let me make sure I understand the
9 understaffing concept here. Are you offering
10 any opinion that the franchise agreement and
11 the staffing requirements of the franchise
12 agreement itself were deficient other than the
13 dual role piece?

14 A. Were the requirements of the franchise
15 agreement deficient?

16 Q. Yes. Like the number of lifeguards, the
17 number of towers.

18 A. No, I don't think so. I don't think so. As
19 drawn up, I don't think they were deficient.
20 As practiced, I think they were deficient.

21 Q. Just like with the qualifications; right?

22 A. Right.

23 Q. You have the right starting point, maybe not
24 the right ending point; correct?

25 A. Correct.

1 Q. So with the franchise agreement, the way it
2 was drawn up, the way that it was at least
3 contemplated again outside the dual role,
4 we'll take that piece of it out, but having
5 the bodies on the beach, it appeared to be
6 appropriate for your purposes; correct?

7 A. According to the agreement, yes.

8 Q. And then your concern or your opinion in this
9 case has to do that Lack's didn't meet those
10 standards or those requirements contained in
11 the franchise agreement?

12 A. As outlined, correct.

13 Q. So they either did or didn't, I'm not going to
14 argue with you with that. What additional
15 opinions do you have?

16 A. I hope I hit them all.

17 Q. Well, this is my purpose, right, I want to
18 know what they are.

19 A. Yeah.

20 Q. And it's the challenge when you don't put pen
21 to paper, right, in federal court and get the
22 opinions on the paper, and we all know what
23 they are; right?

24 A. I know.

25 Q. And you haven't tried to write anything down

1 in this case, so it's a challenge for both of
2 us. I'm trying to ask you and you're trying
3 to come up with them all; right?

4 A. Right.

5 Q. So as we sit here at least, do you have any
6 additional opinions that we have not
7 discussed?

8 A. I just want to stress, I think George Lack in
9 his deposition made a lot of good points for
10 why this happened. And I think his deposition
11 was strong for the plaintiff in that he said
12 most of the people come here are not ocean
13 savvy. You can step in a four-foot hole and
14 totally disappear. When the southwesterly and
15 westerly winds are blowing, a section of the
16 beach, he's closed it before, it just gets
17 really bad. You know, should have had more
18 LGOs on duty that day. He admitted to that.

19 And I think there's a lot of
20 admissions by the employees that they were, in
21 fact, negligent in this case, and I just want
22 to reiterate that. Particularly going back to
23 USLA, not being -- following the USLA
24 standards as the agreement stated that they
25 were going to be.

1 And also that the American Red
2 Cross, as USLA stated and the American Red
3 Cross states, is not an open water training
4 agency. They don't prepare people for the
5 open water. Yet, Lack's and the city depended
6 upon American Red Cross credentials; whereas,
7 the agreement and the standard of care is that
8 you use ocean water preparation for this type
9 of service.

10 Q. I understand. We have already been down that
11 path; right?

12 A. Okay.

13 Q. We have established that they had the correct
14 qualifying standards and the correct
15 qualifying outline, if you will. Whether they
16 employed it or not is another question;
17 correct?

18 A. Correct. So in essence I think I covered them
19 all. I hope I did.

20 Q. Have you done any investigation or research
21 into the statistics regarding the number of
22 drownings in the State of South Carolina?

23 A. No, sir.

24 Q. On an annual, monthly, yearly, any kind of
25 basis?

1 A. No, sir.

2 Q. Have you done any investigation or research
3 into the incidence of drownings in the City of
4 Myrtle Beach and how they compare
5 statistically either to the state, to the
6 region, to national statistics?

7 A. No, sir.

8 Q. In other words, whether there are less
9 drownings, more drownings, anything like that?

10 A. No, sir.

11 Q. I have got an outline here and I went
12 completely off script. So I'm going to go
13 back through some of this stuff. It's going
14 to probably come sideways at you a little bit.

15 A. Not allowed.

16 Q. Sorry. I understand from your CV, you do some
17 amount of consulting work for facilities;
18 correct?

19 A. Yes, sir.

20 Q. Have you done consulting or safety audits for
21 beachfront organizations?

22 A. All the beaches in the State of Connecticut,
23 including Long Island Sound. The beaches for
24 the Atlantis Resorts in Dubai and the Bahamas.
25 I consulted with the United States Navy for

1 their international bases that had waterfronts
2 and led a full-day seminar in San Diego as to
3 how to better manage their swimming areas,
4 like places like Cuba and other places around
5 the world.

6 Q. So what would you call that when you go into,
7 for example, a Connecticut beachfront, what
8 would you do for them?

9 A. I call it an aquatic safety audit. I do a
10 walk-about and now I do that with my daughter.
11 We try to cite what they are doing well and
12 what they could improve upon. And we usually
13 try to rise above the standard of care with
14 our recommendations.

15 Q. Have you conducted any such audits for any
16 entity in the State of South Carolina?

17 A. No, sir.

18 Q. The State of North Carolina?

19 A. No, sir.

20 Q. State of Georgia?

21 A. No.

22 Q. Florida?

23 A. No, sir.

24 Q. Have you ever done any kind of audit of
25 lifeguarding or a beach service kind of entity

1 like Lack's Beach Service?

2 A. Yes. And audits are a very small part of what
3 we're asked to do.

4 Q. I understand.

5 A. But I did that for the Atlantis Resorts. I
6 audited their lifeguards both in the Bahamas
7 and Dubai. I'm trying to think. I'll
8 probably think of others after I leave you
9 today, but those are the only two I can think
10 of.

11 Q. When was the last safe swimming beach seminar
12 you conducted?

13 A. It's been awhile simply because they are not
14 required, but it's been awhile. Five or seven
15 years ago maybe.

16 Q. Why did you stop doing them?

17 A. It's based upon requests and popularity. I
18 was doing this for years. When this book came
19 out, I was doing them all over the country as
20 a part of the publication of the book. And we
21 haven't done one in awhile because there
22 hasn't been a request to do it. There's no
23 course except for ours in it. And people tend
24 to do what's required as opposed to
25 supplemental training that's beneficial but

1 not required.

2 Q. To your knowledge, have any of the opinions
3 that you have ever offered in any litigated
4 case ever been refused or rejected in any
5 courtroom?

6 A. I don't believe so in testimony. I don't
7 believe any sworn testimony has been thrown
8 out, I don't believe so. And I withstood
9 Daubert challenges, so I can't recall.

10 Q. So it would be very specific to any of the
11 trial testimony that you offered. Do you ever
12 recall going into a trial and a lawyer coming
13 to you and saying you can't talk about this?

14 A. Oh, I'm sorry. Several times. I think one
15 was parental supervision, you can't -- in this
16 particular trial, you can't talk about that.
17 And I think in some cases I couldn't talk
18 about lifeguarding. Those are two that I kind
19 of remember. I might have had three or four
20 of those incidents saying the judge has said
21 that this topic is taboo, you can't discuss it
22 in the courtroom.

23 Q. Have any of those topics ever been about
24 opinions that you were prepared to offer, in
25 other words, you were going to offer an

1 opinion about parental supervision and then
2 you were told you couldn't do it?

3 A. I didn't prepare to offer opinions there. I
4 could have offered them, but I wasn't -- I was
5 told prematurely that I didn't need to go into
6 that area because it's not going to be
7 discussed. It's been ruled out.

8 Q. Any other similar concepts where you were
9 getting ready for a trial, had prepared
10 opinions and then were told, okay, we can't
11 cover opinion one and two because the judge
12 said no?

13 A. I just can't recall. I know I have had
14 several instances like that, but I can't
15 recall any other case.

16 Q. What would you say the percentage of your
17 annual income is associated with consulting on
18 litigated matters?

19 A. It usually it slides up and down, but every
20 year it varies, but it's usually more than
21 half of my income. That's the best way to
22 describe it.

23 Q. So 50 percent plus or minus or more than that?

24 A. Yeah. It could be more than that and
25 sometimes it could be less than that, but

1 usually it's more than that.

2 Q. Obviously you haven't been to the beach, you
3 haven't seen any of Lack's towers or stands,
4 have you?

5 A. No, I have not.

6 Q. You're not offering any opinion about the
7 sufficiency of any of those stands, are you?

8 A. Yeah, I can't do that, no. Not at this point.

9 Q. I saw at one point in some of these materials
10 about lifeguards being active --

11 A. Yes, sir.

12 Q. -- staying active?

13 A. Yes.

14 Q. In other words, do you expect a lifeguard to
15 sit in a tower for the entirety of that
16 lifeguard shift?

17 A. No. I would hope not, no.

18 Q. You would expect them to be off the tower and
19 around walking?

20 A. Two different ways. One, they can move around
21 in the tower. We call it sit, stand and
22 stroll. You sit for 5 minutes, stand for 5
23 minutes and then get off the tower and walk
24 for 5 minutes and get back up. But then
25 again, we really like, and we think it's very

1 effective, of roving like or foot patrols. So
2 maybe they are on the stand for a half hour
3 and then they walk along the edge of the water
4 for a half hour and then onto a stand or
5 whatever.

6 But, yeah, we believe an active,
7 interactive lifeguard will be more alert, more
8 vigilant than one that's seated simply because
9 of the lower respiration, lower heart rate
10 that they have when they are seated in an
11 elevated lifeguard stand.

12 Q. Does a lifeguard in an elevated stand have a
13 better visualization of the water?

14 A. Typically, yes. If you go -- the more
15 vertically you go up, the better view they
16 have of the surface and the bottom. The more
17 horizontal they are, the more visual
18 obstruction they have not only by other people
19 but by glare and reflection and refraction.

20 Q. So is it somewhat of a trade-off then if the
21 recommendation is for a lifeguard to be
22 somewhat active to be out of the tower, then
23 when they get out of the tower to be active,
24 they are going to have less visualization of
25 the water?

1 A. Yeah. It's always a trade-off. It's always a
2 trade-off, and that's why we recommend mixing
3 and matching. I might suggest that towers at
4 the beach that are put way back closer to the
5 dune line give you a more horizontal view of
6 the water and they really -- that elevation is
7 really eliminated because they are so far
8 back. And so if you move that chair closer to
9 the water, and I know that tides present a
10 problem here, but if you move that tall chair
11 closest to the water, then they have a better
12 viewing angle.

13 Q. Do you know if Lack's moves their chairs in
14 accordance with the tide?

15 A. I don't know that.

16 Q. You don't know?

17 A. No.

18 Q. You haven't seen that information?

19 A. No.

20 Q. I read somewhere about the complex quadruplex
21 of lifeguard blindness?

22 A. Yes, sir.

23 Q. CQLB?

24 A. Yep.

25 Q. Is that yours?

- 1 A. Yes, sir.
- 2 Q. And a number of factors, if you will, that
3 contribute to a lifeguard's either distraction
4 or inability to see what's in the water ahead
5 of them?
- 6 A. Yes, sir.
- 7 Q. Includes external distractions?
- 8 A. Yes, sir.
- 9 Q. That includes secondary duties, kind of like
10 what we talked about; right?
- 11 A. Yes. The first quadrant is the R.I.D. factor,
12 yes.
- 13 Q. And there's internal noise?
- 14 A. Yes, sir.
- 15 Q. Which it says distracts from seeing even when
16 eyes are on the water?
- 17 A. Yes, sir.
- 18 Q. Is that right?
- 19 A. Yes.
- 20 Q. So in other words, you cannot be distracted by
21 secondary duties, you can simply have internal
22 noise and not see what's in front of you in
23 the water?
- 24 A. Correct.
- 25 Q. Internal noise is difficult to manage?

1 A. Yes.

2 Q. Fair?

3 A. Yes.

4 Q. You can't eliminate it, can you?

5 A. No.

6 Q. Physical body blindness?

7 A. Yes.

8 Q. The interaction of light and water?

9 A. Uh-huh.

10 Q. Is that yes?

11 A. Yes, sir. Sorry for saying uh-huh.

12 Q. That's all right.

13 A. But that's for victims below the surface of

14 the water, submerged victim.

15 Q. Can it not also impact your ability to see if

16 there's glare on the water, like the people,

17 if you're physically looking at the water and

18 be blinded by sun coming up off the water?

19 A. Yes. And that's why we recommend polarized

20 sunglasses.

21 Q. Cognitive body blindness?

22 A. Yes.

23 Q. Denial, what does that mean?

24 A. Well, cognitive errors is your mental biases

25 that blind you from seeing reality. In other

1 words, he's not unconscious, he's just holding
2 his breath. I mean, it's how doctors kill
3 people. They assume the patient is a
4 alcoholic, when in reality they are having a
5 diabetic reaction.

6 So lifeguards often suffer from
7 unrealistic optimism. They assume that the
8 person is just holding their breath or they
9 assume they are playing games in the water,
10 they are not really drowning when they are.
11 So that's commented by it's cognitive error.

12 Q. But it's also a challenge in any
13 play-potential environment, right, whether
14 somebody is playing with their kids or whether
15 somebody is in trouble with their kids?

16 A. Yes.

17 Q. They can look alike?

18 A. That's right.

19 Q. Denial, disbelief and delay; correct?

20 A. Yes, sir.

21 Q. Those are issues that any lifeguard can
22 encounter even in the absence of secondary
23 duties or distraction?

24 A. Yes, sir.

25 Q. Have you ever offered testimony in any case

1 about drowning statistics in any setting,
2 whether it's a pool or otherwise, you know, 10
3 percent of drownings occur in the baby pool,
4 90 percent of the drownings occur in the deep
5 end, have you ever offered any of those kinds
6 of testimony?

7 A. Yes. And to be specific, one that I quote
8 often is in designing a beach, an open water
9 beach, not necessarily a surf beach, but the
10 Army Corps of Engineer did a study, a ten-year
11 longitudinal study, which found that if you
12 limit the depth of water to a maximum of 5
13 feet, you'll reduce the drowning incident by
14 50 percent. And it's one reason why you see
15 all the new hotel and apartment pools are all
16 five feet deep, five feet deep, because a
17 non-swimming adult can rescue a child in 5
18 feet of water. That's one.

19 Q. But have you ever offered testimony in a case
20 where the experience any particular location
21 was either greater than or less than a
22 statistical average somewhere?

23 A. No. I know statistics are very difficult to
24 come by because of HIPAA and other things.
25 It's really difficult in the United States to

1 get your handle on real good drowning data.

2 Q. I was reminded, it was a question I was asking
3 you earlier about any recommendations with
4 kids and the depth of water, and there is a
5 seven simple safety tests for beach managers
6 that you published; correct?

7 A. I guess so, yes.

8 Q. And one of the Seven Tips for Family Beach
9 Safety is Knee Deep is Too Deep, did you ever
10 publish that?

11 A. If my name is on it, I guess I did. Yeah. I
12 just didn't remember that.

13 Q. Do you disagree with that?

14 A. Well, it depends upon the environment. I
15 believe we did that for the Panhandle of
16 Florida, some beaches there. And they were
17 really having problems with rip currents, and
18 that's why we said knee deep is too deep. I
19 believe that's in that context.

20 Q. Seven Tips for Family Beach Safety. One,
21 "Keep kids within arm's length." You talked
22 about that earlier; correct?

23 A. Yes.

24 Q. Two, "Don't dive in?"

25 A. Right.

1 Q. Three, "Knee deep is too deep," that's one of
2 the top three?
3 A. Yeah.
4 Q. And you have said that; correct?
5 A. Yes, sir. Yes, sir.
6 Q. And that's been your recommendation to
7 families with regard to their kids, "Knee deep
8 is too deep?"
9 A. Yes, sir.
10 Q. "Know before you go, know your flags?"
11 A. Yes, sir.
12 Q. Something that the family should be educated
13 on?
14 A. Yes.
15 Q. "Take frequent breaks;" correct?
16 A. Yes, sir.
17 Q. "Go with the wind?"
18 A. Yes.
19 Q. This one doesn't apply, but "Look but don't
20 touch?"
21 A. Yeah, right.
22 Q. To do with animals on the beach; right?
23 A. Yes.
24 Q. Those are yours; right?
25 A. Yes, sir.

1 Q. You made those recommendations in a beach
2 setting before; correct?

3 A. Yes, sir.

4 Q. Have you ever written anything that says:
5 "Swim near a lifeguard?"

6 A. Well, we all say that, USLA and myself and
7 most other people who manage beaches say swim
8 near a lifeguard, yes.

9 Q. That's a recommendation you would make;
10 correct?

11 A. Yes.

12 Q. Have you ever said, "Even the best lifeguards
13 can fail and seconds of life can be lost?"

14 A. Yes, sir.

15 Q. Have you ever said, "Lifeguarding is really an
16 impossible task?"

17 A. Nearly impossible task. And I was quoting the
18 comments of psychologist Dr. Simons, who wrote
19 the book The Invisible Gorilla.

20 Q. "Too much stimulus for the human brain." Have
21 you ever said that?

22 A. I'm quoting Dance Simons, who wrote The
23 Invisible Gorilla, yes.

24 Q. But you weren't quoted as saying the same
25 things?

1 A. I could have been quoted, but I usually give
2 him credit for that.

3 Q. But I presume if you're quoting him, you're
4 adopting what he's saying; you're not just
5 saying because he says that but I say
6 something different?

7 A. Based upon a psychological perspective, yes.

8 Q. "Lifeguards cannot prevent all accidents,
9 particularly in the surf environment." Have
10 you ever said that?

11 A. Yes, sir.

12 Q. So I have here in my notes, it says South
13 Haven, Michigan. Apparently you gave a
14 presentation there and then they quit
15 lifeguarding the beach?

16 A. Well, I told them to.

17 Q. Why is that?

18 A. Yeah, I got into a lot of trouble, but I was
19 right. Because they put young teenagers in
20 the lifeguard chairs, they didn't train them,
21 they didn't qualify them, and they didn't
22 supervise them. And all they relied upon was
23 the American Red Cross certificate and they
24 were having drownings every summer.

25 And I said you're setting yourself

1 up for failure because you're putting these
2 unqualified teenagers in chairs that are more
3 interested in aesthetically-pleasing sights
4 rather than watching the water and unless
5 you're going to supervise them and service
6 training, they are going to continue to have
7 drownings.

8 So I said they were very, very
9 vigilant about their parking there and
10 ticketing for not paying the parking meters.
11 So I said -- all the parking was on a
12 precipice overlooking the beach and the water.
13 So I very astutely said make those parking
14 attendants your beach attendants, give them an
15 ATV and a radio and signal for help and when
16 you need to bring people in or whatever, and
17 that's what they did and the drowning rate
18 went down.

19 So, yeah, I was responsible for
20 getting the lifeguards off the beach because I
21 told them if they are not going to do it
22 right, don't do it at all. Get adults with a
23 badge and an ATV to do beach patrols and they
24 were very effective.

25 Q. But I also understood, I think it was in that

1 circumstance, where you really were relying on
2 others that were on the beach to bring any
3 trouble to the attention of those folks so
4 that then they could react, they were not like
5 responsible lifeguards?

6 A. They weren't lifeguards, no. It was a beach
7 patrol.

8 Q. But my point is is that they weren't there to
9 stop drownings, they were there to respond to
10 those people that identified trouble?

11 A. Yeah, but predict and prevent accidents by not
12 going too far out, not using floatation
13 devices and so forth. They were supposed to
14 be trained to look for what was hazardous in,
15 on and around the water.

16 Q. To the best of your knowledge at this time,
17 have we fully and fairly investigated and
18 discussed the opinions that you hold?

19 A. I believe so. I hope so.

20 Q. To the extent, and to be fair, in the event
21 you provide any additional information that
22 either supports or takes away from or in the
23 event that you provide additional opinions in
24 this case, would it be fair to come back and
25 talk to you about that additional information

1 or those additional opinions?

2 A. Certainly, yes.

3 MR. THOMPSON: Under that set of
4 circumstances, I'm probably done with
5 questions. For the benefit of the order, I do
6 want to make exhibits all of what he brought
7 and is sitting on table, which is a pile of
8 stuff in all honestly. I don't want the
9 books, but all of the other things because
10 there's a lot of annotations and yellow marks
11 and I don't want to go through them all today,
12 but I do want to have them as exhibits to the
13 deposition.

14 MR. WILSON: Can the court reporter
15 make a copy of everything just so he doesn't
16 lose his originals?

17 MR. THOMPSON: And that's my
18 question. Doctor, do you have any experience
19 with this in the past? Generally speaking, I
20 have not had any problem with the witness
21 providing the documents to the court reporter,
22 the court reporter will take them, make copies
23 of them and return your originals to you.

24 Now, there's nothing in there,
25 everything is a copy of a copy of something.

1 So the only thing that's important in there is
2 the annotations and the yellow marks, which is
3 really more for my benefit than yours frankly.

4 THE WITNESS: As long as I get them
5 back in a timely fashion. If this goes to
6 trial and I need to appear.

7 MR. THOMPSON: Well, the trial part,
8 that's not coming up any time soon, so we have
9 got time for that. But I do want to be able
10 to review what it is that you brought with you
11 today in more detail. Okay?

12 THE WITNESS: That's okay by me, as
13 long as it's okay by Mr. Wilson and whomever
14 else is involved.

15 MR. WILSON: Yeah. As long as it's
16 okay with the court reporter. Would it be
17 easier if she can, he or she, make a copy and
18 then just e-mail them back to Dr. Griffiths
19 and copy me, how about that?

20 MR. THOMPSON: Yeah, that's what
21 we're planning on doing. The problem is we
22 can't do it physically here in this facility.

23 MR. WILSON: That's okay.

24 MR. THOMPSON: There's a copier out
25 in the lobby, but there's a credit card thing

1 that it wants to use and God knows how much
2 it's going to charge you to make all of these
3 copies.

4 MR. WILSON: That's fine. As long
5 as we got a record and the court reporter is
6 going to copy it and give him back his
7 originals via e-mail.

8 MR. THOMPSON: The court reporters
9 are really good about this. They usually take
10 copies and --

11 THE WITNESS: It's been done before,
12 yeah.

13 MR. THOMPSON: I don't want to copy
14 them -- or make exhibits of each individual
15 one that's separate. It's going to be one
16 exhibit, Exhibit No. 5, which I will simply
17 refer to as Dr. Griffiths deposition exhibits.
18 With that, I'm done.

19 - - - -

20 (Exhibit 5 marked for identification.)

21 - - - -

22 MR. WILSON: Gerald, do you got
23 anything?

24 MR. CHAMBERS: I just got a little
25 bit.

EXAMINATION

BY MR. CHAMBERS:

Q. Dr. Griffiths, my name is Gerald Chambers. I represent the City of Myrtle Beach in this case. I appreciate your patience with us today. You're giving us a lot of information, I just want to follow up on a few questions.

You mentioned you were in South Carolina statute, I think it was 5-7-145; is that correct?

A. Yes, sir.

Q. What significance did that statute have at any of your opinions or any of your analysis?

A. I'll have to look at it again for a second, okay?

Q. Certainly.

A. Well, I think the key points were that the statute allowed for the beach service company to rent objects, but it didn't require them to do that. I mean, that was something that they had the privilege and the right to do, but there was no expectation that they had to do that in this section. They may provide that

1 service.

2 It also said that the private beach
3 company must be tested and certified as
4 required by the municipality, and the
5 municipality said that they had to be
6 certified by USLA, which they were not.

7 And I also thought that it was kind
8 of ironic that the code said that the rental
9 activities, the commercial activities, shall
10 not prevent or interfere in a substantial way
11 with the peaceful recreational use of the
12 public beach by the general public, but it
13 didn't mention interfering with the
14 surveillance of the people in the water as
15 many lifeguard codes and state codes do. You
16 can't do anything that takes away your
17 attention from the water.

18 And they allow you to go no more
19 than seven years. And in this case two years
20 after the City of Myrtle Beach knew that the
21 dual purpose lifeguard was a problem, they
22 extended the contract for the franchise for
23 the maximum allowable seven years. Other than
24 that.

25 Q. Bear with me as I go through my notes.

1 A. That's okay. It's not like I have a long
2 commute.

3 Q. We talked about on the day of the incident,
4 the National Weather Service issued a warning,
5 I believe it was a high-risk day; is that
6 correct?

7 A. Yes. According to the testimony provided in
8 her sworn deposition, Holly Robinson said that
9 they had a warning from the National Weather
10 Service at about 10:00 that it was a high-risk
11 day, probability of strong rip currents and
12 longshore currents, as I understand her
13 testimony.

14 Q. You haven't actually seen that warning from
15 that day though, have you?

16 A. I have not.

17 Q. If you get a warning like this from the
18 National Weather Service, what area does it
19 cover, I mean, how much of the beach would it
20 cover?

21 A. I can't answer that. I don't know. I would
22 think that they would give you parameters for
23 their warnings, but I can't say that. I just
24 don't know. Certainly it applied to Myrtle
25 Beach because those people that were deposed

1 all mentioned the warnings that were issued.

2 Q. Are you aware of any other beaches that allow
3 a dual purpose lifeguards, dual role?

4 A. Not at the current time. Many years ago I
5 spent a lot of time in the Outer Banks of
6 North Carolina and I know there was one beach
7 service there that operated similarly, but I
8 don't know if they still do that. But we're
9 talking at least 20 years ago, if not more.

10 MR. CHAMBERS: I don't think I have
11 any other questions. Thank you.

12 THE WITNESS: Thank you.

13 MR. THOMPSON: Cooper?

14 MR. WILSON: Just a couple, maybe
15 more than a couple.

16 MR. THOMPSON: I want to talk to
17 George real quick. I want to make sure I talk
18 to him before you ask questions because I may
19 want to ask some more questions. I just
20 wanted to give you the opportunity to finish,
21 but do you want to do it now and then me talk
22 to George or let me talk to George and then
23 you go?

24 MR. WILSON: Go ahead. That's fine.

25 MR. THOMPSON: Give me two seconds,

1 all right?

2 - - - -

3 There was a brief Recess in the proceedings.

4 - - - -

5 MR. THOMPSON: Cooper, I don't have
6 any other questions. I'm finished.

7 - - - -

8 EXAMINATION

9 - - - -

10 BY MR. WILSON:

11 Q. You have been asked a lot of questions today
12 about what was happening on the beach that
13 day; is that right?

14 A. Yes, sir.

15 Q. And this would have been on August 24th, the
16 day Mr. Wolde drowned?

17 A. Correct.

18 Q. And you read the testimony of the employees of
19 Lack's Beach Service who have indicated that
20 to their knowledge, Mr. Wolde was complying
21 with all the directives from the beach service
22 that day as far as where to be in the water,
23 how far to go; right?

24 MR. THOMPSON: Objection.

25 A. Yes, sir.

1 BY MR. WILSON:

2 Q. He wasn't swimming out deep in the ocean or
3 anything; right?

4 A. Correct.

5 MR. THOMPSON: Objection.

6 BY MR. WILSON:

7 Q. And he was standing in the amount of water
8 that the lifeguard services said was allowed;
9 right?

10 MR. THOMPSON: Objection.

11 A. That's right. I recall that now.

12 BY MR. WILSON:

13 Q. And then you read the testimony, you talked
14 earlier about Ms. Robinson and you were asked
15 a lot of questions about how do you know what
16 the currents were and all of that, do you
17 remember that?

18 A. Yes, sir.

19 Q. Do you remember in her deposition where she
20 testified that the weather service made them
21 aware of longshore currents and rip currents?

22 A. Yes.

23 Q. And do you also remember that she testified
24 that from her evaluation on the scene, that
25 they were being pulled sideways and out as any

1 longshore current and rip current at the time
2 of Mr. Wolde's death?

3 A. That's correct.

4 Q. And you also read the deposition testimony of
5 Ms. Abel, Mr. Wolde's widow, who testified
6 that her son told her that they felt like they
7 were being pulled out into the sea; right?

8 A. Yes. And I did say that, yes.

9 MR. THOMPSON: Objection.

10 BY MR. WILSON:

11 Q. Would that be an indication that there was rip
12 currents and/or longshore currents at the time
13 of Mr. Wolde's death?

14 A. Yes.

15 Q. You were asked earlier about -- I just want to
16 make sure we're on the same page. Is it a
17 violation of industry standard to utilize dual
18 role lifeguards?

19 A. Absolutely.

20 Q. And is it one of the reasons that's so is
21 because it forces the lifeguards to
22 concentrate on things other than solely
23 watching the water?

24 A. Absolutely.

25 Q. You were asked earlier about whether the

1 lifeguards on the beach I think at L20 and L21
2 and L22, were performing dual role lifeguards
3 the day that Mr. Wolde drowned, do you
4 remember that?

5 A. Yes, sir.

6 Q. And have you, in fact, reviewed their billing
7 statement from that day, which indicates
8 lifeguards at L20, L21 and L22 were, in fact,
9 selling lifeguard chairs the day Mr. Wolde
10 drowned?

11 A. Yeah. I totally forgot about that, yes.
12 You're right. Yes. Sorry about that.

13 Q. Are you aware that we have actually asked for
14 the receipts from when chairs were being sold
15 and at what time from the defendants, and they
16 have indicated to us those receipts are not
17 available, did you know that?

18 A. I just didn't recall that, no.

19 Q. All we do know is that at the time Mr. Wolde
20 drowned on August 24th, the City of Myrtle
21 Beach and Lack's Beach Service was utilizing a
22 dual role lifeguarding service; right?

23 A. That is true.

24 Q. And whether the lifeguards at L20 or L22 were,
25 in fact, selling a lifeguard stand at the

1 exact moment Mr. Wolde was drowning, is not
2 the only relevant factor, is it?

3 MR. THOMPSON: Objection.

4 A. No, sir.

5 BY MR. WILSON:

6 Q. Is the process itself that you have lifeguards
7 who are paying attention to the water and on
8 alert to sell beach chairs, is that the
9 problem?

10 A. Yes, sir.

11 MR. THOMPSON: Objection.

12 MR. CHAMBERS: Objection.

13 BY MR. WILSON:

14 Q. And isn't it a point, and let's talk about
15 this lifeguarding, is to prevent swimmers from
16 getting in trouble in the first place; is that
17 right?

18 MR. THOMPSON: Objection.

19 A. Yes. That's why they changed the name from
20 lifesaver to lifeguard. They wanted to stress
21 in the 1980s that it's more preventative and
22 predictive than just rescuing people in the
23 water.

24 BY MR. WILSON:

25 Q. And so isn't that a reason why lifeguards if

1 they had any problems with what Mr. Wolde's
2 children were doing before he drowned to
3 death, they should have made him aware?

4 A. Yes, sir.

5 Q. Did you also become aware from reading the
6 incident report from August 24 of 2018, that
7 bystanders on the beach and walking by saw
8 Mr. Wolde struggling in the water?

9 A. Yes, sir.

10 Q. Meaning he was visibility struggling to
11 anybody who was looking; right?

12 MR. THOMPSON: Objection.

13 A. Yes, sir.

14 BY MR. WILSON:

15 Q. Aren't you also aware that no lifeguard from
16 Lack's Beach Service ever pulled Mr. Wolde out
17 of the water, did they?

18 A. Correct.

19 Q. It was the bystanders; right?

20 A. Yes, sir.

21 Q. And don't you agree that the person who would
22 have had the most ability to see Mr. Wolde in
23 the water, would have been somebody at L21?

24 MR. THOMPSON: Objection.

25 A. It appears that way, yes, sir.

1 BY MR. WILSON:

2 Q. Isn't that why there's a lifeguard stand at
3 L21, to look in the water at that area of the
4 beach?

5 MR. THOMPSON: Objection.

6 A. Yes, sir.

7 BY MR. WILSON:

8 Q. You spoke earlier about this letter from the
9 USLA to the City of Myrtle Beach and their
10 city manager; right?

11 A. Yes, sir.

12 Q. What is USLA?

13 A. United States Life Saving Association, which
14 is a nonprofit lifeguard training agency.

15 Q. Do they set the industry standard for beach
16 lifeguarding?

17 A. Absolutely. Yes, sir.

18 Q. And have for years and years and years?

19 A. Yes, sir.

20 Q. Is the USLA just a club, join if you want to?

21 A. No, sir.

22 Q. And was it your understanding by reading the
23 letter, that they told the City of Myrtle
24 Beach don't use dual role lifeguarding?

25 A. Yes. They told them that if they wanted to be

1 a certified agency, they could not use dual
2 role lifeguards. And if they needed
3 assistance in complying with USLA
4 requirements, they would be happy to assist
5 them.

6 Q. Do you know if the City of Myrtle Beach ever
7 did that?

8 A. I don't believe so, no, sir.

9 Q. And, in fact, after receiving this letter, the
10 City of Myrtle Beach just kept doing what they
11 were doing with Lack's Beach Service when they
12 entered into an agreement with them in 2018,
13 did they not?

14 A. As I understand it, yes, sir.

15 Q. Is it your testimony and opinion that the City
16 of Myrtle Beach did not provide care that was
17 appropriate under the circumstances based on
18 their knowledge that dual role lifeguarding is
19 not safe?

20 MR. THOMPSON: Objection.

21 A. Yes. I agree with that statement.

22 BY MR. WILSON:

23 Q. You were asked earlier about the agreement
24 between the city and Lack's Beach Service; is
25 that right?

1 A. Yes. .

2 Q. And upon your reading of the agreement, does
3 the city cite the USLA and their requirements
4 for 40 hours of ocean training?

5 A. Yes. They -- yes, it's mentioned -- they
6 mention USLA, using their acronym in their
7 requirement, and they specifically mention the
8 40-hour training requirement.

9 Q. And have you become aware through deposition
10 testimony that the lifeguards at Lack's Beach
11 Service were using, did not have 40 hours of
12 ocean training as set forth by USLA prior to
13 starting work for Lack's Beach Service?

14 A. That is correct.

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

16 A. I believe so, yes, sir.

17 Q. And a violation of the agreement Lack's has
18 with the city?

19 A. Yes.

20 Q. Upon your reading of the agreement between
21 Lack's and the city and the statute with the
22 State of South Carolina, did the City of
23 Myrtle Beach have to provide lifeguards on the
24 beach?

25 A. No. They were not required to have

1 lifeguards. They were just allowed to have
2 lifeguards if they so wished.

3 Q. And is it your understanding that they
4 undertook, they decided to undertake that duty
5 to provide lifeguards?

6 A. Yes, they did.

7 Q. And is it your opinion that when the City of
8 Myrtle Beach made the decision to use
9 lifeguards on the beach, that they had to do
10 so reasonably?

11 A. Reasonably and prudently, yes.

12 Q. And to conform with industry standards?

13 A. Correct.

14 MR. CHAMBERS: Objection.

15 BY MR. WILSON:

16 Q. Is it fair to suggest that your opinion is
17 that the City of Myrtle Beach's decision to
18 use Lack's Beach Service and dual role
19 lifeguarding does not conform to industry
20 standard?

21 A. Yes. Particularly the dual lifeguarding part,
22 the dual roles of lifeguards.

23 Q. Have you reviewed any testimony in this case
24 that any of the Lack's Beach Service
25 lifeguards ever recognized Mr. Wolde or either

1 of his children having trouble in the water?

2 A. I don't have any testimony suggesting that
3 they identified them at all at any point in
4 time.

5 Q. You talked earlier about closing the beach, do
6 you remember that?

7 A. Yes, sir.

8 Q. And let me understand that I believe it was
9 Casper was going on a lunch break; right --

10 A. Yes, sir.

11 Q. -- from 12 to 12:45 or so; right?

12 A. Correct.

13 Q. Were there several things that the Lack's
14 Beach Service could have done to reasonably
15 protect the area of the beach where Casper
16 would have been had he not been at lunch?

17 A. Yes, sir.

18 Q. One of the things they could have done was to
19 provide a lifeguard only in the area to
20 monitor his stretch of beach; right?

21 A. That's true.

22 Q. One of the things they could have done would
23 be to close that area of the water where
24 there's no lifeguard?

25 A. Correct.

1 Q. And one of the reasons to do that on August
2 24th would be because Lack's knew that there
3 was rough waters and rip currents; right?

4 A. Correct.

5 Q. Did they do either of those things?

6 A. No, sir.

7 Q. Was it your understanding that Mr. Wolde was
8 supervising his children in the water on
9 August 24th?

10 A. Well, he was swimming with his kids in the
11 water, so I would assume that he was
12 supervising them as an adult and as a father,
13 yes.

14 Q. And you read the deposition of Ms. Abel that
15 that was a family rule, that the kids couldn't
16 go in the ocean without their dad; right?

17 A. Exactly. And she reiterated that several
18 times.

19 Q. And they were standing in water and doing
20 things that the lifeguards or Lack's Beach
21 Service was allowing them to do; right?

22 MR. THOMPSON: Objection.

23 A. As I understand it, yes.

24 BY MR. WILSON:

25 Q. As I understand it, Lack's Beach Service not

1 having a lifeguard at L21 or having somebody
2 at least fill in for them especially on this
3 rough day, would be a violation of standard of
4 care, would it not?

5 MR. THOMPSON: Objection.

6 A. I believe so, yes, sir.

7 BY MR. WILSON:

8 Q. And if they are not going to do that, then
9 they should shut down that area of the water;
10 right?

11 MR. THOMPSON: Objection.

12 A. Yes.

13 BY MR. WILSON:

14 Q. And the failure to do that is a violation of
15 the standard of care, is it not?

16 MR. THOMPSON: Objection.

17 A. Yes, it is.

18 MR. WILSON: You have been asked
19 lots of questions today, I appreciate your
20 time, sir. Thank you.

21 THE WITNESS: Thank you.

22 MR. THOMPSON: I don't have any
23 further questions.

24 MR. CHAMBERS: I don't either.

25 MR. THOMPSON: That will do it.

1 Thank you, Dr. Griffiths.

2 THE WITNESS: Thank you all very
3 much. Appreciate it.

4 MR. THOMPSON: Thank you for your
5 time and patience today.

6 THE WITNESS: Thank you.

7 COURT REPORTER: Counsel, do you
8 want etrans?

9 MR. WILSON: Cooper Wilson, I'll
10 take an etran, that's fine.

11 MR. CHAMBERS: I'll take an etran as
12 well along with the exhibits I guess. You can
13 send that in a PDF.

14 MR. THOMPSON: The original and
15 etran with exhibits.

16 - - - -

17 (Thereupon, the deposition was
18 concluded at 1:35 p.m.)

19 - - - -

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CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA)

) SS:

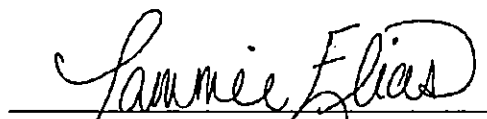
COUNTY OF INDIANA)

I, Tammie Elias, RPR and Notary Public in and for the Commonwealth of Pennsylvania, do hereby certify that the witness, THOMAS J. GRIFFITHS, ED.D., was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; that the foregoing deposition was taken at the time and place stated herein; and that the said deposition was recorded stenographically by me and then reduced to printing under my direction, and constitutes a true record of the testimony given by said witness.

I further certify that the inspection, reading and signing of said deposition were not waived by counsel for the respective parties and by the witness.

I further certify that I am not a relative or employee of any of the parties, or a relative or employee of either counsel, and that I am in no way interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 28th day of December, 2021.



Commonwealth of Pennsylvania
Tammie Elias, Notary Public
Center Township, Indiana County
My Commission Expires December 9, 2023

E R R A T A

I, THOMAS J. GRIFFITHS, ED.D., have read the foregoing pages of my deposition given on Thursday, December 9, 2021, and wish to make the following, if any, amendments, additions, deletions or corrections:

Pg. No.	Line No.	Change and reason for change:

In all other respects, the transcript is true and correct.

THOMAS J. GRIFFITHS, ED.D.

Subscribed and sworn to before me this
_____ day of _____, 2021.

Notary Public, Reference No. TE80531

NOTE: Return completed Errata Sheet within 30 days from receipt of testimony to Veritext at
cs-carolinas@veritext.com.

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 OVER THE	)	
ESTATE OF ZERIHUN WOLDE AND	)	
AS NATURAL PARENT AND LEGAL	)	PLAINTIFFS PAGE LINE DESIGNATIONS
GUARDIAN FOR ADAM WOLDE,	)	FOR THE DEPOSITION OF JULIAN
AND WUBIT WOLDE,	)	CHANDLER
	)	
Plaintiffs,	)	
v.	)	
	)	
LACK'S BEACH SERVICE, CITY OF	)	
MYRTLE BEACH, AND JOHN DOE	)	
LIFEGUARD,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFFS PAGE-LINE DESIGNATIONS FOR THE
DEPOSITION OF JULIAN CHANDLER**

Plaintiff respectfully submits the following page and line designations and exhibits for
Julian Chandler, which was taken on July 20, 2022 pursuant to Rule 32, SCRPC:

Page 7, Line 9 through Page 8, Line 13
 Page 8, Line 15 through line 19
 Page 8, Line 21 through Page 9, Line 5
 Page 9, Line 7 through Line 15
 Page 9, Lines 17 through 25
 Page 10, Line 2 through Page 12, Line 24
 Page 13, Line 1 through Page 14, Line 15
 Page 14, Line 24, through Page 15, Line 11
 Page 15, Line 13, through Page 19, Line 17
 Page 19, Line 19, through Page 20, Line 4
 Page 20, Lines 6 through Page 21, Line 19
 Page 21, Line 22 through Page 22, Line 9
 Page 22, Line 12 through Page 23, Line 9
 Page 23, Lines 11 through Page 24, Line 4
 Page 24, Line 7 through Page 26, Line 14
 Page 26, Line 18 through Line 24
 Page 27, Line 1 through Line 7
 Page 27, Line 9 through Page 28, Line 1

Page 28, Line 4 through Line 10
Page 28, Lines 13 through Page 29, Line 1
Page 29, Lines 4-18
Page 29, Lines 21-24
Page 30, Lines 2-6
Page 30, Lines 10-18
Page 30, Line 20 through Page 32, Line 12
Page 32, Line 15 through Page 33, Line 4
Page 33, Lines 7-12
Page 33, Lines 14-20
Page 33, Line 23 through Page 34, Line 8
Page 34, Lines 10-12
Page 34, Line 15 through Page 35, Line 2
Page 35, Lines 5-14
Page 35, Lines 17-25
Page 36, Lines 3-9
Page 36, Line 12-17
Page 36, Line 20 through Page 37, Line 6
Page 37, Lines 8-12
Page 37, Line 14 through Page 38, Line 7
Page 38, Lines 10-18
Page 39, Line 3 through Page 46, Line 4
Page 46, Line 22 through Page 66, Line 11
Page 66, Line 14 through Page 70, Line 21
Page 71, Line 15 Page 72, Line 4
Page 78, Line 6 through Page 79, Line 14
Page 79, Line 17 through Page 80, Line 4
Page 80, Lines 6-16
Page 80, Lines 18 through Page 81, Line 15
Page 81, Lines 17-23
Page 81, Line 25 Page 82, Line 3
Page 82, Lines 6-17

Respectfully Submitted,

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

Attorneys for the Plaintiff

July 22, 2022
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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
John Doe Lifeguard, Defendants,

Of which Lack's Beach Service is the Appellant,

CERTIFICATE OF COUNSEL FOR THE RECORD ON APPEAL

The undersigned certifies that the Record on Appeal contains all material proposed to be
included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Columbia, South Carolina
February 12, 2024