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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
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,

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by refusing to grant JNOV where:

    (i) Evidence and testimony of the "dual role" served by Lack's Beach Service lifeguards did not properly create a jury question for liability in this case;

    (ii) There was insufficient evidence to create a jury question as to whether Lack's breached the standard of care or whether any act or omission of Lack's proximately caused Mr. Wolde's drowning;

    (iii) As to the survival claim, there was no evidence of any conscious pain and suffering; and

    (iv) As to punitive damages, there was no evidence supporting recklessness?

2. Did the trial court err by failing to grant a new trial absolute where:

    (i) The trial court improperly admitted irrelevant and prejudicial evidence of Lack's gross sales revenues, statements from a two-decade old administrative proceeding, and inflammatory communications between Lack's and a lifeguarding certification organization from a decade prior;

    (ii) There was insufficient evidence supporting punitive damages;

    (iii) The trial court failed to properly instruct the jury as to punitive damages and the bifurcated nature of the proceedings;

    (iv) The survival award was excessive and the jury failed to follow the trial court's instructions, with the jury evaluating survival damages based improperly on mortality tables and motivated by passion and prejudice; and

    (v) The jury's punitive damages award was erroneously designed to bankrupt Lack's as a going concern, against instructions by the trial court;

3. Did the trial court err in its post-judgment review of the punitive damages award, which did not comport with due process and where the trial court failed to fully consider the *Mitchell, Gamble*, and statutory factors?

STATEMENT OF THE CASE

This matter arose from the drowning of Zurihun Wolde ("Mr. Wolde") in a rip current at Myrtle Beach, South Carolina. (Compl.; R. 74.) Appellant Lack's Beach Service, Inc. ("Lack's") contracted with the City of Myrtle Beach to provide lifeguard services on the City's public beaches pursuant to a Franchise Agreement and South Carolina law. (Franchise Agreement; R. 1740.) Under the Franchise Agreement, Lack's provided lifeguard services along a thirteen mile stretch of beach and, in exchange, was permitted to derive revenue from engaging in limited commercial sales renting beach equipment. (*See generally id.*)

Meswaet Abel ("Respondent") filed this wrongful death action against Lack's and the City of Myrtle Beach on November 1, 2019. Respondent's Complaint alleged that both Lack's and the City of Myrtle Beach breached a duty owed to Mr. Wolde to "conduct their water safety program in a reasonably safe manner," and that Mr. Wolde's drowning was a proximate cause of those breaches. Respondent's Complaint pled survival and wrongful death claims, and sought both actual and punitive damages.

The Court granted summary judgment to the City of Myrtle Beach at the pretrial hearing, finding that the discretionary immunity exception applied. (Transcript of July 22, 2022 Pretrial Hearing 3:12-4:9; R. 91-92.) There was no appeal of this ruling by Respondent.

The matter proceeded to trial against Lack's from July 25 and July 29, 2022. (Trial Transcripts; R. 143, 328, 520, 663, 1001.) At the conclusion of trial, the jury returned a verdict in favor of Respondent and awarded $3.73 million on the survival claim, $10 million on the wrongful death claim, and $7 million in punitive damages. (Jury Verdict; R. 52.) On August 1, 2022, the trial court entered a Form 4 judgment stating the jury had rendered a verdict in this amount. (Form 4 Judgment; R. 50.)

Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial *nisi remittitur*, along with a separate, but concurrently filed, Conditional Motion for Reduction of Damages[1] ("Conditional Motion") to reduce the judgment in accordance with the South Carolina Tort Claims Act's cap on damages if the other motions were denied. (Post-trial Motions; R. 1502, 1517, 1549, 1566.) Respondent meanwhile opposed those motions, and moved to have a receiver appointed and to immediately execute on the judgment, which Lack's opposed. (Mot. to Appoint Receiver; Resp. in Opp'n to Mot. to Appoint Receiver; R. 1347.) Lack's moved for a stay of execution order from the trial court pending the disposition of post-trial motions. (Mot. to Stay; R. 1334). On March 9, 2023, the trial court held a hearing on all pending motions including the Conditional Motion, the motion to appoint a receiver, and the stay motion. (Hearing Transcript; R. 1116.) During that hearing, and in light of Respondent's position that the Conditional Motion should be denied based on waiver and failure to raise immunity in the Lack's Answer, Lack's orally moved to amend its Answer pursuant to Rule 15(b), SCRCP. (3/9/2023 Hrg. Tr. 48:2-49:6; R. 1163-64.)

On April 10, 2023, the trial court entered an Order denying Lack's motions for JNOV, new trial absolute, and new trial *nisi remittitur*. (Order on Post-Trial Motions; R. 5.) The trial court did

[1] In the Conditional Motion for Reduction of Judgment ("Conditional Motion"), Lack's noted that the trial court should grant its other post-trial motions first, which would moot the arguments raised in the Conditional Motion. (Conditional Motion; R. 1566.) However, Lack's argued that if the court allowed any verdict amount to stand as a judgment, it ***must***, at a minimum, reduce the amount of any judgment to the SCTCA cap on actual damages as a matter of law. (*Id.*) Moreover, Lack's argued the court must also remit the punitive damages award to $0 since the SCTCA does not permit recovery of punitive damages. (*Id.*) As the Conditional Motion detailed, the City of Myrtle Beach properly delegated its governmental power to Lack's and, as a result, the doctrine of derivative sovereign immunity applies. (*Id.*) Because the State of South Carolina has only waived its sovereign immunity subject to the provisions of the SCTCA, the statutory caps of the SCTCA apply to limit Respondent's recovery against Lack's. (*Id.*)

not rule on or address the Conditional Motion or the oral motion to amend the Answer pursuant to Rule 15(b), SCRCP. The trial court also did not rule on the motion to stay execution pending disposition of post-trial motions, nor did the trial court rule on Respondent's motion to appoint a receiver and execute on the judgment. Under these procedural circumstances, Lack's filed a notice of appeal that same day, and filed a new stay motion based on the mandatory stay provisions resulting from an appeal under S.C. Code Ann. § 18-9-130. (Mot. to Stay; R. 1238, 2373.) In the new stay motion, Lack's noted that the Conditional Motion and motion to amend remained pending and awaiting a ruling. (*Id.*) On May 19, 2023, the trial court issued an Order granting the stay motion pursuant to Rule 62(d), SCRCP and S.C. Code Ann. § 18-9-130, and denying Respondent's motion to appoint a receiver. (Order Granting Stay and Denying Motion to Appoint a Receiver; R. 1). The trial court still did not rule on the Conditional Motion or related oral motion to amend.

On June 1, 2023, based on the belief that the trial court was not going to rule on the Conditional Motion or motion to amend, Lack's moved this Court for a limited remand to permit the trial court to rule on those motions. Respondent opposed this motion for limited remand. On August 29, 2023, this Court entered an Order denying a limited remand without prejudice to Lack's arguing that its Conditional Motion and motion to amend remain pending and are properly before the trial court. Consistent with the Conditional Motion and the arguments therein, if Lack's succeeds on appeal and this Court finds that its motion for JNOV or a new trial should have been granted, it will moot the Conditional Motion as there will be no judgment to reduce. Otherwise, the Conditional Motion and related oral motion to amend remain pending before the trial court, to be addressed in the future by that court, should such become necessary.

STATEMENT OF THE FACTS

On August 24, 2018, Mr. Wolde and his two oldest children were visiting Myrtle Beach on vacation. (Compl. ¶¶ 42-43; R. 81.) That afternoon, they entered the water to swim and were caught in a rip current. (Compl. ¶ 45; R. 82.) Mr. Wolde was unable to escape and tragically drowned. (*See* Compl. ¶¶ 42-43; R. 81.) His children were able to make it to safety. (Compl. ¶ 47; R. 82.)

Mr. Wolde drowned in the general vicinity in front of Lack's lifeguard station L-21. (Trial Tr. 359:10-13; R. 501.) 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. (Trial Tr. 359:10-13; R. 501.) Lifeguards L-20 and L-22 were tasked with covering that sector of the ocean (the ocean in front of L-21) for the short lunch period while he was away. (Trial Tr. 719:4-8; Franchise Agreement p. 4; R. 861; 1742.) At trial, Respondent offered no direct evidence of what the lifeguards at L-20 and L-22 were doing immediately prior to or during the incident.

Lifeguard L-22's written statement was introduced into evidence wherein he stated that he was explaining the flag system to beachgoers around the time of the incident. (Trial Tr. 823:25-824:3; Def.'s Ex. 7, Stmt. of Lukasz Jaworski; R. 965-66; 2268.) Once he heard the emergency code on the radio at station L-20, he "immediately started running [in] that direction." (*Id.*) A manager for Lack's, Randall Smith, testified that a lifeguard who he believed was L-20 was who he heard call in a Code 3, which is a shore emergency. (*Id.* at 742:1-9; R. 884.) Lifeguard L-22's statement also supported that L-20 called in the Code 3. (Trial Tr. 823:25-824:3; Def.'s Ex. 7; R. 965-66; 2268.) Another Lack's manager, Patrick Flaherty, testified at trial that he arrived on the scene right as Mr. Wolde was being pulled out of the water by lifeguard L-20, a Lack's supervisor, and several bystanders. (Trial Tr. 699:10-18; R. 841.) The supervisor started CPR, and Flaherty

attempted to use an AED device as they worked to try and save Wolde. (*Id.* at 699:19-701:9; R. 841-843.)

Respondent did not present any evidence supporting that lifeguards L-20 or L-22 could have or should have observed Mr. Wolde in distress or that, had they done so, they would 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 or his children in trouble prior to Mr. Wolde's submersion and loss of consciousness. Both "bystander" witnesses stated that when they first observed Mr. Wolde, he was in an unconscious and nonresponsive condition. (Trial Tr. 61:24-62:2; 212:13-14; R. 203-04; 354.)

The only evidence presented as to the length of time Mr. Wolde struggled in the water was vague and came from Mr. Wolde's children. Respondent did not present any non-speculative 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. Further, Respondent did not present any probative evidence detailing the drowning process.

As detailed below, the trial devolved into a referendum on Lack's overall business practices, its annual revenue, disputes with the United States Lifeguarding Association ("USLA"), worker's compensation insurance premium disputes, and whether Mr. Lack had misled people in various contexts. Instead of a trial regarding what occurred on the beach the day of this tragic accident and whether any actions of Lack's were a proximate cause of the drowning, Respondent extensively focused on what they framed as a should-be-prohibited "dual role" served by Lack's lifeguards, due to their ability to conduct limited commercial sales as part of their job duties under the Franchise Agreement. This was the focus ***despite there being no evidence that any of the relevant Lack's lifeguards were actually engaged in commercial sales at the time of the Wolde***

drowning incident. The trial court permitted Respondent (over objection from Lack's) to introduce highly prejudicial and irrelevant evidence during the liability phase including: (1) Lack's gross sales revenue information for the entire year of 2018, (2) nearly two decade old filings from an administrative law proceeding concerning workers compensation premiums payable by Lack's to cover Lack's lifeguards, and (3) correspondence between Lack's and the USLA and testimony from a USLA representative about Lack's USLA certification and related disputes, all of which predated this incident by a decade. The result was a fundamentally tainted trial and a jury verdict driven by passion and prejudice against Lack's and its founder George Lack. This Court should reverse.

STANDARD OF REVIEW

I. JNOV.

"When reviewing the trial court's ruling on a motion for directed verdict or a JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). The plaintiff bears the burden to produce affirmative evidence—not mere speculation or the absence of evidence—to support each element of the claim. *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779 (Ct. App. 2010). If the plaintiff's evidence is insufficient to support the jury's verdict, the trial court should grant JNOV for the defendant. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). Moreover, the court must grant JNOV "if no reasonable jury could have reached the challenged verdict." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). A trial court's failure to direct a verdict or grant JNOV is reversible error. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013).

II. New trial absolute and new trial *nisi remittitur*.

A trial court "may grant a new trial absolute when it finds the evidence does not justify the verdict. *Trivelas v. S.C. Dept. of Transp.*, 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004). 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); *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).

A new trial absolute is warranted when the verdict is so excessive that it clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. *Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). 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). A trial court's decision to deny a new trial will be reversed if it "is wholly unsupported by the evidence or the conclusion reached was controlled by error of law." *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978) (citations omitted).

III. Punitive damages.

"In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135. "If there is a claim that an award of punitive damages violates due process, an appellate court examines the trial court's constitutional review de novo." *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*,

433 S.C. 278, 289, 857 S.E.2d 902, 907 (Ct. App. 2021). Under the factors set forth in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009), 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." *Id.* The Court should also consider the factors required by the punitive damages statute in reviewing a punitive damages award. S.C. Code Ann. § 15-32-520(E)-(F).

ARGUMENT

I. The trial court erred by failing to grant Lack's motion for directed verdict and, later, JNOV.

A. The "dual role" was permitted by law, the trial court improperly allowed Respondent to present proof and testimony on this issue, and such could not create a jury question on liability in this case.

1. The dual role was expressly allowed by law and contract.

Respondent's theory of the case relied heavily on characterizations of Lack's lifeguards serving a "dual role" and the impropriety of that arrangement. (Pltf. Resp. to Post-trial Motions at 33 (noting that this was a "critical factual component" of their negligence claim); R. 1448.) Respondent argued at trial that because Lack's lifeguards were permitted to engage in limited commercial activity as part of their duties, that was what the relevant lifeguards were doing at the time of the incident involving Mr. Wolde, and the commercial activity interfered with their work as lifeguards. (*See* Trial Tr. 95:13-97:32; R. 237-239.)

Prior to the start of trial, the trial court acknowledged that "dual role" was generally allowed by law. (Pretrial Hrg. Tr. 45:10-46:13; R. 133-134.) Respondent's counsel stated that direct evidence would be submitted to allow the jury to conclude that the relevant lifeguards were

engaged in commercial activity at the time of the drowning. (*Id.* at 14:12-17; R. 102.) However, ***this evidence was never submitted.***

Importantly, the "dual role" arrangement was expressly permitted by S.C. Code Ann. § 5-7-145 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. *See* S.C. Code Ann. § 5-7-145(A)-(B).[2] 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, allowing Lack's to rent beach equipment in return for its provision of water safety service and other consideration. (*See* Franchise Agreement, §4; R. 1742.) At trial, Respondent 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 agreement. (*See, e.g.*, Trial

[2] The City of Myrtle Beach Code of Ordinances provide that "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 define "appropriate authorities" to include those who have been "granted lifeguard status under beach franchise agreements." *Id.* § 5-1. One of the negligent acts alleged by Respondent is that Lack's should have closed the beach to swimmers entirely at the time of the drowning.

Tr. 310:23-311:14 (questioning George Lack about the dual role, asking whether he attends church and whether the Bible says it is difficult to "serve two masters"); R. 452-453.)

Lack's ensured that its lifeguards had the City-required qualifications at the time of hiring and underwent the necessary training. (*Id.* at 804:16-21, 808:11-14, 809:9-20, 810:8-8:11-3, 834:8-22; R. 946, 950, 951, 952, 976.) Lack's training included ensuring that even when engaged in limited commercial activity, the lifeguards' eyes remained on the water. (*Id.* at 725:1-726:7; R. 867-68.) Respondent presented no evidence that Lack's training failed to comply with the requirements of the Franchise Agreement.[3]

Therefore, Respondent should not have been permitted to introduce evidence and testimony about the impropriety of the "dual role" because it was not relevant to Respondent's negligence claims, and because the arrangement attacked was specifically allowed by law. Regardless of its erroneous admission, that evidence was not probative of liability. Hence, no reasonable jury could have found in favor of Respondent, and the trial court erred in denying Lack's motions for directed verdict and JNOV.

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

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[3] Instead, Respondent called Chris Brewster, a representative of the United States Lifesaving Association, at trial. He was improperly permitted to offer opinion testimony (over objection) about whether Lack's training could comply with (inapplicable) USLA standards. He testified that if lifeguards were engaged in a dual role, they could ***never*** satisfy the USLA's "training standards." (*See* Trial Tr. 505:8-12; R. 647.) This was his personal opinion and should not have been allowed since he was not an expert witness. Regardless, the applicable standard in this case was set forth by the Franchise Agreement, which required all lifeguards to undergo training in accordance with the training schedule prepared by Lack's and approved by City authorities. (*See* Franchise Agreement, §4; R. 1742.) The Franchise Agreement did ***not*** require USLA certification of Lack's or its lifeguards. The only reference to the USLA was in the lifeguard requirements section, which stated that each lifeguard must "***complete a course*** consisting of a total of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association." (*Id.* (emphasis added).)

The trial court further erred by permitting Respondent to inject the dual role issue into the case because there was no evidence that any of the relevant lifeguards were actually engaged in commercial activity at the time of the incident. In its order denying Lack's post-trial motions, the only testimony cited by the court was from a bystander witness (Julian Chandler) and Respondent's expert (Dr. Thomas Griffiths), neither of whose testimony established this point.

The trial court in its Order found that the jury could have inferred from bystander witness Chandler's testimony that the lifeguard at stand L-22: "was engaged in commercial activity during the time of Mr. Wolde's distress." (Order pp. 11-12; R. 15-16.) Mr. Chandler, however, merely stated that he saw "a lifeguard" who was "sitting on the back end of the stand" talking to beachgoers when he was walking out to the beach. (Chandler Dep. at 17:5-15; R. 2276.) When asked about the timing, he stated that this was "approximately ***five to ten minutes***" prior to when he first heard a yell for help. (Chandler Dep. at 17:5-15; R. 2276.) 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) which did not actually say the guard was even engaged in commercial activity.

Moreover, Chandler's later testimony demonstrated that it was speculative as to whether the "lifeguard" seen was a Lack's lifeguard. Mr. Chandler stated the individual he assumed was a lifeguard had on red shorts and no shirt. (Chandler Dep. 56:20-57:7; R. 2286.) However, the evidence was that Lack's lifeguards were contractually required to wear yellow shirts and blue shorts. (Trial Tr. 812:4-7; R. 954.) Further, the evidence supported that other lifeguards did patrol from time to time on the beach, such as those affiliated with the City of Myrtle Beach Police Department's Beach Patrol and the Fire Department's Ocean Rescue. (*Id.* at 434:21-435:17; R.

576-77.) As a result, there is no probative evidence that Mr. Chandler even saw a Lack's lifeguard when he walked out onto the beach.

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. (*Id.* at 699:10-18; R. 841.) The supervisor started CPR and Flaherty attempted to use an AED device as they worked to try and save Wolde. (*Id.* at 699:19-701:9; R. 841-43.)

Regardless, even assuming *arguendo* that Chandler saw a Lack's lifeguard, 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 (rather than 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. . . .

(Trial Tr. 823:25-824:3; R. 965-66.)[4]

Next, the trial court's Order cited Respondent's expert, Dr. Griffiths, who speculated that sales receipts showed that the lifeguards were engaged in sales and that this contributed to the accident. (*See* Griffiths Dep. 232:2-10; R. 2352.) 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 case, ***he did not find any evidence that the relevant lifeguards were engaged in a commercial transaction during at the time of the incident.*** (Griffiths Dep. at 230:21-231:11; R. 2352.) Therefore, his testimony was based on conjecture and improper. *See Young v. Tidecraft,*

[4] The Order's statement that, because L-22 was at the umbrella line and not on the tower, an inference could be drawn that he was instead engaging in revenue-generating activities, is entirely speculative and respectfully not a legitimate inference from the record evidence.

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 trial court's discussion of the supposed length of the incident and the fact that bystanders could not find any Lack's lifeguards near the incident scene when Mr. Wolde was struggling in the water does not create reasonable inferences as to why such may have been the case. That evidence is not probative of a conclusion that the lifeguards were serving a "dual role" at the time of the event and engaging in commercial activity, distracting them from lifeguarding.

Therefore, there is no record evidence supporting that any of the relevant lifeguards were engaged in commercial activity at the time of Mr. Wolde's drowning, and thus the "dual role" issue was not a proper subject for the jury's consideration. Since this formed a central basis of Respondent's proximate cause theory at trial, the trial court erred by failing to grant directed verdict or JNOV to Lack's (or at a minimum should have granted a new trial based on the admission of unduly prejudicial and irrelevant opinion and other testimony).[5]

B. The trial court erred by failing to grant directed verdict or JNOV where there was no evidence supporting a breach of the standard of care or proximate cause.

Directed verdict or JNOV was also warranted because Respondent's case relied solely on speculation about what ***could have*** occurred differently rather than evidence of a specific act or

[5] The trial court's statement that Lack's never objected to evidence involving the dual role issue is inaccurate. Lack's 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 trial 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).

omission by Lack's constituting a breach of the standard of care which 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). However, such was the central theme of Respondent's case, *viz.*: Lack's was tasked with providing lifeguard services and had lifeguards on the beach, yet Mr. Wolde drowned and thus Lack's is liable.[6]

1. The evidence did not establish that Lack's breached the standard of care.

The trial court primarily relied on the opinions of Respondent's expert witness, Dr. Griffiths, in support of supposed breaches of the standard of care by Lack's. These opinions were all offered at his pre-trial deposition, which Respondent used in lieu of live testimony at trial, and which 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. (Griffiths Dep. 66:15-67:10; R. 2311.) As the record evidence supported, however, when one guard went on lunch break, the neighboring guards were tasked with covering that sector of the water.[7] (Trial Tr. 719:4-8; R. 861.) Dr. Griffiths also inaccurately stated that Lack's had "less than half" of the required amount of "lifeguard onlys"[8] on the day of the incident. (Griffiths Dep. 111:20-112:6; R. 2322.) However, the testimony elicited at trial supported that,

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[6] Causation centered on the distress and drowning of Mr. Wolde. Respondent conceded at trial that they were not pursuing claims regarding the resuscitation efforts, and the trial court granted directed verdict on that issue.

[7] 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; R. 2344.)

[8] The descriptor "lifeguard only" was used to describe Lack's personnel tasked with covering the entire Lack's beach area and be "wherever they seem to be needed or where a supervisor may send them." (Trial Tr. 443:25-444:5; R. 585-86.) This is differentiated from where a lifeguard would be assigned to a tower.

at most, Lack's was one short (the contract called for four and three were present that day) because one unexpectedly called in sick. (Trial Tr. 361:17-362:6; R. 503-04.) Third, Dr. Griffiths opined on the impropriety of the dual role but, again, this was not a violation of the standard of care since it was expressly permitted by law and contract and there was no evidence supporting its relevance in any event. Thus, none of these opinions supported the existence of a jury question on breach of the standard of care.

Next, the trial court found that the evidence supported that Lack's breached the standard of care by failing to close the beach.[9] The conditions at the time of the incident, however, did not

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[9] At trial, Respondent 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 should not have formed 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). 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). The essential purpose of the Code section at issue was not to protect against a particular harm to a particular class of persons. Rather, the statute contemplates a general duty owed to the beachgoing public at large. What Respondent argued to the jury here was a general failure by Lack's as an entity 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, negating the central element of duty in Respondent's negligence claim. The judgment should not, therefore, rest on this public duty.

necessitate closure of the beach. The National Weather Service report discussed at trial flagged the ***potential*** for hazardous conditions due to the presence of a longshore current and possibility of rip currents, but did not direct or recommend that beaches be closed. (Trial Tr. 711:6-15; R. 853.) Lack's appropriately posted red flags to warn of these conditions and imposed a waist-deep limit for swimming.[10] (*Id.* at 727:5-21; R. 869.) Even Dr. 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. 168: 7-14; R. 2336.) Dr. Griffiths also acknowledged that a longshore current is only hazardous when combined with other factors such as a rip current. (*Id.* at 176: 6-13; R. 2338.) Again, he had not been to the beach, did not know the weather conditions, and was not opining on closure based on knowledge of wind, wave height, or other such factors. (*See id.* at 176:6-77:22; R. 2338.) Thus, his opinion that the beach should have been closed was not based on an objective standard of reasonableness based on the facts as they existed the date of the incident. As a result, it is not probative and should be disregarded as evidence.

Finally, the Order cites lifeguard L-21 being at lunch as a standard of care violation, finding that the lifeguard taking a lunch break supported an inference that he left the tower unoccupied when Lack's knew dangerous conditions were present. (*See* Order on Post-trial Motions pp. 10-11; R. 14-15.) Again, however, as the record evidence supported, when one guard went on lunch break, the neighboring lifeguards were tasked with covering that sector of the water in addition to

[10] Contrary to the trial court's statement, (*see* Order on Post-trial Motions at 10; R. 14), there was no evidence that the "standard of care" required Lack's to place specific rip current warnings on the beach.

their other lifeguarding duties. (Trial Tr. 719:4-8; R. 861.) This was done pursuant to the protocol permitted by the franchise agreement. (*Id.* at 659:7-13, 745:17-29, 748:10-12; R. 801, 887, 890.)

None of the points identified by the trial court supported a breach of the applicable standard of care and it committed reversible error by refusing to grant directed verdict and, later, JNOV.

2. There was insufficient evidence to establish a jury question that Lack's proximately caused Mr. Wolde's drowning.

In denying Lack's motions for JNOV and a new trial absolute, the trial court's Order adopted Respondent's theories for proximate cause that, respectfully, cannot be reconciled. (*See generally* Order on Post-trial Motions pp. 7-11; R. 11-15.) First, the trial court attributed the drowning incident to ill-trained lifeguards and their performance of a "dual role" and commercial activity during the incident. However, the court's alternative basis was that the proximate cause of the drowning incident was Lack's failure to close the beach (which would have made the lifeguards and their training irrelevant). Finally, the court reasoned that the cause of the incident was a Lack's lifeguard being at lunch at the nearest tower to the drowning and the fact that Lack's was one "lifeguard only" short on the day of the incident because a "lifeguard only" called in sick on the day in question. The error in these conflicting and contradictory proximate cause bases supporting the judgment is evident and reflects that Respondent's case, and the trial court's judgment, rests on speculation.

Respondent urged at trial 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 where he was in the ocean or that they could have gotten to him in time to prevent the drowning. The only testimony arguably addressing

this point was from bystander witness Bender who stated: "If the lifeguards would have been present, I ***think*** the outcome would have been different." (*Id.* at 207:15-16; R. 349 (emphasis added).) This was both improper opinion testimony and speculation.

The trial court's order also cites the testimony of Dr. Griffiths as supporting proximate cause. Again, Dr. Griffiths had no personal knowledge of the event and merely opined that a lifeguard ***could*** have potentially seen Mr. Wolde because he was a distressed swimmer. (*See* Griffiths Dep. 97:14-16; R. 2318.) However, he conceded that he did not know the timing of events and that there is no evidence that the Lack's lifeguards had any indication of the issues with Mr. Wolde until after he was back on the beach.[11] Thus, this expert testimony cannot support that any act or omission by Lack's was the proximate cause for Mr. Wolde's distress and drowning.

In its Order, the trial court also agreed with Respondent that there was a lack of proof that the Lack's lifeguards had sufficient training, and that this also supported a jury question on proximate cause. Again, this finding rests on the erroneous premise that additional training of the Lack's lifeguards could have prevented the incident that occurred with Mr. Wolde. There is no evidence in the record supporting this conclusion. The evidence showed that Lack's ensured that its lifeguards had the required qualifications at the time of hiring and underwent the necessary training required by the City. (Trial Tr. 723:14-18, 725:1-726:7, 804:16-21, 808:11-14, 809:9-20, 810:8-811-3, 834:8-22; R. 865, 867-68, 946, 950, 951, 952-53, 976.) The Order's finding that Lack's presented no evidence showing its lifeguards received any training is, therefore,

[11] 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; R. 2353.) He further clarified: "Q. How long was it that he was in distress? A. I can't say that and I'm not going to venture a guess. I can't say that." (Griffiths Dep. 236:8-10; R. 2353.)

contradicted by the record. Lack's general manager, 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. (*Id.* at 810:8-8:11-3, 834:8-22; R. 952-53, 976.) Moreover, the training included ensuring that even when engaged in limited commercial sales, the lifeguards' eyes remained on the water. (*Id.* at 725:1-726:7; R. 867-68.)

The trial court then cited the fact that Lack's was "understaffed" by one "lifeguard only" on the day of the incident as further support for a jury question on proximate cause. Although Lack's had one "lifeguard only" less than what Franchise Agreement contemplated the day of the incident, Respondent introduced no proof that had the additional "lifeguard only" not called in sick, he would have been in the vicinity of Mr. Wolde at the time of the incident. Such testimony would have been conjecture in any event. The "lifeguard onlys" roamed and covered many, many blocks of territory. Again, the trial court erred by replacing evidence with speculation.

For all these reasons, the record evidence was insufficient to establish a jury question on proximate cause. Respondent failed to prove: (1) how long Mr. Wolde had been in deep water before the drowning, (2) that a lifeguard at his stand should have seen Mr. Wolde, (3) how long Mr. Wolde was in distress prior to the drowning, or (4) that, had a lifeguard seen the distress, he could have saved both Mr. Wolde and his daughter (who was clinging to him as he struggled). Respondent also 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. The ocean is a dangerous environment and rip currents are unpredictable, facts with which Respondent's expert agreed. As detailed above, there was not sufficient evidence to establish any act or omission of ***Lack's*** as the proximate cause of Mr. Wolde's death. This critical and essential element of Respondent's claim rested solely on

unreasonable inferences and speculation, and no reasonable jury could have found in Respondent's favor based on the evidence. As a result, the trial court erred by refusing to grant directed verdict and, later, JNOV.

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

JNOV should have been granted 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. On direct examination. she testified about his gasping and struggling for "10 to 15" minutes (Trial Tr. 589:18-22; R. 731). However, on cross-examination, she agreed that her deposition testimony was that she did not remember how long it lasted. (*Id.* at 603:24-605:21; R. 745-47.) Moreover, she agreed that she did not remember anything from time they began yelling for help until she was on her feet again in the water. (*Id.*) Bystander witnesses Julian Chandler and Jeffrey

Bender both stated that Mr. Wolde was ***unconscious*** when he was pulled from the water.[12] (Chandler Dep. 61:24-62:2; Trial Tr. 212:13-14; R. 2287-88; 354.) Finally, Adam Wolde testified that they were yelling for an unspecified period of time, but he ultimately did not see what happened to his father. (Trial Tr. 567:1-568:3; R. 709-10.)

Thus, Respondent presented no evidence supporting Mr. Wolde's conscious pain and suffering. At most, the record reflects gasping and yelling prior to the tragic drowning.[13] South Carolina has never adopted "pre-impact fear" as an element of recoverable damages. *See Rutland v. S.C. Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). The pre-drowning struggles are analogous to "pre-impact fear," and thus should not be considered a recoverable element of damage. A struggling swimmer who recovers and comes to shore and escapes the drowning has no damages. Hence, the evidence here was not sufficient to establish a jury question on this claim. *Rutland v. S.C. Dep't of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), *aff'd as modified* 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).

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[12] This was consistent with the testimony of Patrick Flaherty, a manager at Lack's who assisted with the rescue efforts, who testified that he never saw Mr. Wolde conscious, could not get a pulse, and did not know of anyone who saw him conscious. (Trial Tr. 709:14-21; R. 851.)

[13] The trial court's Order also suggested the coroner's report was 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. (Trial Tr. 466:5-10; R. 608.) It did not describe the drowning process or what a victim experiences. Therefore, it was also not a proper underpinning for the survival claim.

The survival claim also lacked sufficient proof because Respondent failed to present expert testimony about what occurs when a person experiences drowning and what the drowning victim might be expected to experience from a scientific, pathophysiological perspective. As Lack's argued to the trial court, 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.[14]

For all these reasons, the lack of sufficient proof supporting the survival claim supports that no reasonable jury could have found in Respondent's favor on the survival claim. The trial court thus erred by failing to grant JNOV on this claim for this additional reason.

D. Punitive damages should not have been submitted to the jury and the trial court erred by failing to grant Lack's directed verdict and later JNOV motions.

Punitive damages require that the Respondent 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

[14] *See, e.g., Freed v. D.R.D. Pool Service, Inc.*, 974 A.2d 978 (Md. Ct. App. 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 (Sup. Ct. App. Div. 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 was enough evidence for a jury to find victim was conscious during his asphyxiation); *Walker v. Daniels*, 407 S.E.2d 70, 76 (Ga. 1991) (expert 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.*, 633 N.W.2d 418 (Mich. 2001) (pain and suffering properly instructed to jury where expert and fact witness testimony indicated decedent had consciously aspirated water prior to death).

that the plaintiff must show a "present consciousness of wrongdoing" by the defendant at the time of the action).

Respondent's proximate cause evidence and breach of the standard of care evidence fails as a matter of law, as detailed above. However, even if it did not, none of the alleged acts or omissions of Lack's rose to the level of recklessness as a matter of law. Contrary to Respondent's arguments in their post-trial brief: the dual role was authorized by law, lifeguard L-20 was at lunch in accordance with the Franchise Agreement and the adjacent lifeguards were tasked with scanning his sector of the water per the protocol, there was no proof that an additional "lifeguard only" would have been in the area of the drowning, the weather reporting only indicated a potential for danger and did not require closure of the beach, and the mere fact that Lack's lifeguards did not witness the distress in no way established that they were consciously disregarding their duties.

Additionally, there was ample evidence that the incident was called in, Lack's employees arrived almost right after Mr. Wolde was brought to shore, and they attempted emergency assistance and aided with transport to the hospital. (Trial Tr. 699:10-701:9; R. 841-43.) 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 area of the incident. (Trial Tr. 823:25-824:3; Def.'s Ex. 7, Stmt. of Lukasz Jaworski; R. 965-66; 2268.) This evidence negates any conscious indifference to safety. 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.

As noted above, South Carolina law does not recognize *res ipsa loquitor* 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 all agree drownings cannot be 100% prevented. Therefore, for all these

reasons, the punitive damages issue should not have been submitted to the jury and the trial court erred in denying JNOV.

II. The trial court erred by failing to grant a new trial absolute.

A. The admission of certain evidence constituted reversible error and the trial court erroneously denied Lack's motion for a new trial.

1. The trial court's admission of Lack's gross sales data for 2018 is reversible error under *Branham* and *Sulton*.

During the actual damages phase, the trial court admitted evidence of Lack's gross sales data for the entire year of 2018 over objection from Lack's counsel as to both its relevance and prejudicial nature. (Trial Tr. 387:12-24, 391:17-24; R. 529, 533.) Respondent introduced Lack's sales tax filing from 2018 into evidence, and the jury heard testimony that Lack's had total gross revenues for fiscal year 2018 of $1,520,918. (Trial Tr. 394:10-15; R. 536.)

The trial court's error in admitting this evidence and testimony requires a new trial. 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. Branham* ***compels*** a new trial here as the gross revenue evidence would not have been appropriate even during the punitive damages phase.

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.* (emphasis added). *Sulton* thus also compels a new trial here.

The entire theme of Respondent's case was that the defendant prioritized profits over safety, and the impact of such improper evidence was only confirmed by the excessive verdict award here. Respondent'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. (Trial 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; R. 237, 238, 239, 1025, 1034, 1035, 1039, 1041, 1046, 1047, 1064.)

The trial court's justification for the relevance of this evidence cannot overcome this clear precedent. The court first stated that the sales data was probative to generally show how often Lacks' lifeguards engaged in commercial duties. However, this was not relevant to whether the relevant lifeguards were engaged in a commercial transaction at the time of the Wolde incident. Moreover, the gross sales revenue evidence was not "limited in scope" as the court characterized it because it covered the entire year of 2018. This evidence, like the aforementioned other "dual role" evidence, should not have been admitted and requires a new trial to be ordered.

The trial court also justified its admission by stating that the evidence was not prejudicial because the information was contained in public records. However, although this may have been sufficient to establish foundation and/or a hearsay exception, it had no bearing on whether its

probative value outweighed its prejudice as required by Rules 401 and 403, SCRE. The trial court also stated that the data was not prejudicial because it was only gross data and thus was not an indicator of Lack's financial position. However, this is precisely the danger behind such evidence that *Branham* and *Sulton* cautioned against because it gives the jury a false impression about the company's financial state.

Admission of evidence of this kind was reversible error under *Branham* and *Sulton* and requires a new trial. Although evidentiary matters are matters largely within the discretion of the trial judge, this type of evidence has been expressly disqualified by the Supreme Court twice in other multi-million-dollar verdict matters. This type of improper evidence has resulted in yet another excessive verdict here. This Court should reverse and remand for a new trial.

2. The trial court erred by admitting evidence and testimony regarding an administrative law court proceeding from over twenty years ago.

The jury's verdict was also irreparably tainted by the prejudicial effect of evidence and testimony about a decades-old administrative law matter. The only purpose that this evidence served was to further Respondent's narrative that Lack's was about profit over safety. Reversal for a new trial is also warranted for this reason.

The administrative proceedings centered on whether Lack's employees should be classified as "lifeguards" for workers compensation premium purposes. (Trial Tr. 429:20-24; R. 571.) Lack's took the position that they should not 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. (*Id.* at 428:2-429:19; R. 570-71.) The Administrative Law Court disagreed and found that they should be classified as lifeguards. The result was Lack's employees

being classified as lifeguards for its workers compensation coverage ever since that order in 2002. The end effect was a significant increase in Lack's workers' compensation premiums. (*Id.* at 419:4-11; R. 561.)

At trial, the court improperly permitted Respondent to "impeach" George Lack with this information. When the issue first arose, the court explained that evidence about this proceeding would not be admissible absent a proper foundation. (*Id.* at 285:1-17; R. 427.) That foundation, however, was never laid and Respondent "impeached" Mr. Lack over objection. (*See id.* at 417:8-20:5; R. 559.)

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.* In this trial, George Lack's testimony was that Lack's employees had a "***responsibility*** to perform lifeguard duties 100% of the time." (*Id.* at 418:16-20 (emphasis added). R. 560.) The "impeachment" evidence was an excerpt from the administrative law court's order describing Lack's argument in the administrative proceedings that risky lifeguarding activities such as rushing to save someone drowning in the ocean "only have the potential to be performed 0.0047 percent of the time." (*Id.* at 419:20-420:5; R. 561-62.) 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 time. Thus, this was not an appropriate "impeachment," and the evidence only served to mislead and confuse the jury.

In denying Lack's motion for a new trial, the trial court found that the evidence was properly admitted because Lack's "opened the door" by claiming that the lifeguards perform "all lifeguarding and only minimal commercial sales." (*See* Order on Post-trial Motions p. 15; R. 19.)

Respondent, however, had ample other evidence that Lack's employees were permitted to, and did, engage in commercial activity. In reality, Respondent simply 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 admission into evidence of the administrative law court's findings from two decades prior unfairly prejudiced Lack's and only served to mislead and confuse the jury—in addition to improperly placing the issue of insurance in front of the jury. *See* Rule 411, SCRE. Any probative value the evidence this issue had was outweighed by its unfair and undue prejudice, and its admission was reversible error warranting a new trial.

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

Finally, the trial court also erred by failing to grant a new trial where Respondent was permitted to introduce evidence and testimony regarding George Lack's history with the USLA, consisting of letters exchanged between 1996 and 2007 and testimony from former USLA president Chris Brewster. The primary purpose of this information was to inflame the jury against George Lack and Lack's, as this information was central to Respondent'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."); R. 1041.) This evidence and related argument were highly, and unfairly, prejudicial to Lack's and warrants a new trial.

As noted above, Respondent's trial presentation conflated USLA ***certification*** with training in accordance with USLA standards. (*See* Pltf. Closing Argument, Tr. 900:18-25 (highlighting how the USLA "revoked [Lack's] certification"); R. 1042.) USLA certification,

however, was not required by the statute at issue here or the Franchise Agreement between Lack's and the City of Myrtle Beach. (*See* Franchise Agreement, §4; R. 1742.) The only reference to the USLA in the Franchise Agreement stated that one of the lifeguard requirements was that each guard must "***complete a course*** consisting of a total of not less than 40 hours in open water life saving which meet the ***criteria*** of the United States Lifeguard Association."[15] (*Id.* (emphasis added).)

Respondent introduced no evidence supporting that USLA certification was the applicable standard of care, nor could Respondent do so, since the standard was embodied in the Franchise Agreement. Respondent presented no evidence that Lack's training failed to comply with the requirements of the Franchise Agreement.[16] Lack's history with the organization had nothing to do with the matters to be determined by the jury. Therefore, the trial court erred in permitting Respondent to introduce this evidence and testimony. The letters from over a decade prior concerning Lack's USLA certification as a company had no relevance to 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, much less whether this incident could have been prevented.

The testimony of Mr. Brewster drove home this unfair prejudice. He testified that he felt George Lack had "bamboozled" the USLA and made intentional misrepresentations about the dual

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[15] As George Lack testified, Lack's developed training in accordance with those standards and this was reported to the City as required by the Franchise Agreement. (*See* Trial Tr. 439:8-15, 440:19-441:13 (explaining that Duke Brown of Lack's Beach Service is a certification agent for the USLA and provided the training outline for Lack's as well as daily training and assistance); R. 581, 582.)

[16] As detailed above in Footnote 2, the only testimony remotely related to this point was improper ***opinion*** testimony from ***fact*** witness Chris Brewster who testified that a lifeguard engaged in "dual role" activities could never comply with USLA "training standards." (*See* Trial Tr. 505:8-12; R. 647.)

role activities of Lack's lifeguards between 1996 and 2007. (Trial Tr. 422:11-18; R. 564.) The City of Myrtle Beach, however, had knowledge of and authorized the "dual role" arrangement throughout the course of its relationship with Lack's, including in 2018. The Myrtle Beach City Manager testified at trial and agreed that lifeguards were permitted to engage in limited commercial sales in exchange for providing lifeguard services under the Franchise Agreement. He also confirmed that City Council knew about the arrangement between the City and Lack's. (*Id.* at 630:8-21, 633:12-20; R. 772, 775.)

The sole purpose of the USLA letters and Brewster's testimony was to inflame the jury rather than to show whether there was any proximate cause between any of Lack's acts or omissions and the accident. This Court should reverse and remand for a new trial.

B. The trial court also erred in failing to grant a new trial as a result of the jury's punitive damages award.

Additionally, the evidence did not support any genuine issue of fact on punitive damages. Respondent's case was premised entirely on circumstantial evidence of alleged omissions which they assert could have ***potentially*** changed the outcome of an accident. Respondent did not identify any willful, wanton, or reckless action by Lack's. Moreover, there is no evidence that, had the alleged omissions not occurred, the result would have been any different.

Assuming *arguendo* that punitive damages were properly submitted to the jury, the jury's $7 million dollar award, despite the evidence showing that Lack's had a negative net worth in 2018, demonstrates its improper motivations and that a new trial must be awarded. As Weslyn Lack-Chittering testified, Lack's had a negative $473,350.51 net worth in 2018. (Trial Tr. 962:18-22; R. 1104.) Moreover, the available insurance coverage was only $3 million. (*Id.* at 961:24-

962:5; R. 1103-04.) This information was provided to the jury in the punitive damages phase, coupled with instructions from the trial court that the jury should not award punitive damages to affect an economic bankruptcy. (*Id.* at 962:3-5; R. 1104.) Despite this, the jury returned an award of $7 million on top of actual damages exceeding $13 million—a total reflecting the jury's intention to destroy Lack's as a going concern.

Therefore, for the trial court erred by failing to order a new trial absolute. *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.").[17]

C. The trial court erred in failing to grant a new trial where Lack's requested instructions on bifurcation were rejected.

The trial court also erred by permitting the issue of recklessness to be tried in the first phase of the trial in contravention of the punitive damages statute, and by refusing to otherwise instruct the jury by way of charge or the verdict form as to the relevance of their decision on whether Lack's acted recklessly. 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.

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[17] 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. *See* S.C. Code Ann. § 15-33-125.

In the first stage: "the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages." § 15-32-520(B). This section further states that "[e]vidence relevant only to the issues of punitive damages is not admissible at this stage." *Id.* These are the only contemplated findings.

If (and only if) the jury awards compensatory or nominal damages 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 before the jury until the second phase of the case. Likewise, the jury should not have been permitted to make a finding of recklessness or consider any evidence on that issue during that first phase. Although Lack's and Respondent agreed to a 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" (that a second phase of trial would follow). Trial court, however, declined to give it.

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 Respondent was entitled to punitive damages. The trial court's failure to do so required the jury to answer a question about

"recklessness" without any context as to the meaning and impact of such a finding. There is a high likelihood that the jury's high actual damages verdict erroneously contained a "punitive" damage component as a result. The trial court's error warrants a new trial absolute as to both actual and punitive damages.

D. The trial court erred by failing to grant a new trial in light of the excessiveness of the jury's award on the survival claim and because the jury failed to follow the trial court's instructions.

The survival award, the wrongful death award, and the punitive damages award were all excessive and/or driven by the jury's passion and prejudice and failure to follow the trial court's instructions. Therefore, South Carolina law required the trial court to grant a new trial. This Court should reverse.

1. The jury misunderstood and misapplied the trial court's proper instruction on evaluating survival damages.

The trial court erred by refusing to grant a new trial despite the jury's confusion over the applicability of the mortality tables and misapprehension of the court's instructions. The trial court correctly informed the jury that the mortality tables should be taken into consideration when assessing the amount of damages for ***wrongful death***. The trial court further properly charged the jury on considering damages for the survival claim[18] without reference to the mortality tables. As Lack's argued, and the trial court's charges supported, the mortality tables are entirely irrelevant to the survival claim.

Nevertheless, the jury relied on the mortality tables in arriving at its survival claim award. Mr. Wolde's remaining life expectancy was 37.3 years, and the jury's survival damages award was

[18] Lack's position, however, is that there was no survival claim damages, and JNOV should have been granted as a result. *See supra.*

$3,730,000—in other words, $100,000 for each remaining year of his life expectancy. The verdict, therefore, was not tied to the alleged pain and suffering Mr. Wolde experienced as required by law for a survival claim. (*See* Jury Charge, Trial 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"); R. 1079.) The verdict reflects the jury's clear disobedience of the court's instructions. This Court should reverse and remand for a new trial for this additional reason.[19]

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

The trial court should have granted a new trial for the same reasons that it should have granted JNOV for the reasons detailed above. Additionally, the excessive nature of the $3.73 million survival award also warranted granting a new trial.

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 would have been in the $15,000 (**$24,791.89** adjusted for inflation)[20] to $150,000 (**$247,918.87** adjusted for inflation) range of awards in prior 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 (**$20,461.86** adjusted for inflation) was

[19] In denying Lack's motion for a new trial, the trial court explained away this critical issue by finding that Lack's did not object to the Court's jury instructions. However, this mischaracterized Lack's argument. (Order on Post-Trial Motions p. 24; R. 28.) Lack's was not contending that the court gave an incorrect or confusing instruction regarding the use of mortality tables but rather that the court correctly instructed the jury yet it nevertheless misapplied the tables.

[20] The inflation-adjusted numbers detailed here are for the year 2022, which is when the jury rendered its verdict, using the Federal Reserve Bank of Minneapolis's inflation calculator: https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator.

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 (**$104,283.52** 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 (**$134,589.09** 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). In *Lindsey*, the 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. *Id.* However, the court noted that pain and suffering damages are not presumed in wrongful death cases. *Id.*

Here, the amount of the award, which far exceeded the other representative awards detailed above, demonstrated that the jury was motivated by passion, caprice, or prejudice rather than the record evidence on pain and suffering damages. The verdict thus shocks the conscience and requires a new trial. *Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 891 S.E.2d 682, 700 (Ct. App. 2023), *reh'g denied* (Sept. 21, 2023). The trial court erred by refusing a new trial.[21]

[21] The trial court'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) was misplaced. *Smalls* involved a vehicle hitting a child, not a drowning.

E. The trial court erred by failing to grant a new trial on the wrongful death claim due in light of the excessiveness of the jury's award.

The excessiveness of the wrongful death award further evidences that the jury's passion and prejudice motivated the award and erroneously included a punitive component. 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 motives were demonstrated by their return of a verdict even higher than what Respondent'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 Mr. 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 Respondent's counsel suggested (which they presumably expected to be a best-case scenario).

The jury's wrongful death verdict was excessive and shocks the conscience of the court, and thus the trial court erred in refusing to grant a new trial.

F. The trial court erred by failing to grant a new trial on punitive damages.

The jury's decision to award $7 million in punitive damages despite knowing that Lack's had a negative net worth and the actual damages were already far in excess of the available insurance coverage further shows the jury's inappropriate motivations. The punitive damages

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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, her father testified that he spoke with her 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. *Id.*

award was driven by the improperly admitted evidence and the jury's prejudice against Lack's due to the court-sanctioned character assassination of George Lack and his company.

As stated above, the jury heard that Lack's 2018 net worth was negative $473,350.51 and its available insurance coverage was only $3 million, (Trial Tr. 962:3-22; R. 1104), the jury awarded $7 million in punitive damages on top of the actual damages award of $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. *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) (same); *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.").

The trial court found 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 trial court then found 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 or warn of the specific rip current that Mr. Wolde got caught in or any other rip current. It merely established that there were ***potential*** hazards warranting caution. (Trial Tr.

711:6-21; R. 853.) On the day of the incident, visibility was good and the weather was fine. (*Id.* at 726:22-727:21; R. 868-69.) 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 lifeguards kept swimmers waist deep as a preventative measure in light of the conditions that day. (*Id.*) Lack's took appropriate measures based on the conditions that day.

Finally, the trial court justified the punitive damages award by finding that it was "per se" reasonable because it was less than three times the amount of actual damages. This finds no footing in South Carolina law. "Per se reasonableness" is not a recognized legal doctrine. Rather, juries and the courts are tasked with ensuring that the damages award is supported by the record evidence and proper considerations. As detailed above, here it was not.

Respondent's case was premised entirely on circumstantial evidence of alleged omissions which they assert could have ***potentially*** changed the outcome of an accident. Respondent did not identify 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 trial court erred by refusing to grant a new trial and this Court should reverse.

III. The trial court erred in its post-judgment review of the punitive damages award by finding it comported with due process.

Under the applicable *Mitchell* factors, the punitive damages award should not have been permitted to stand. The trial court overlooked or failed to properly address several of Lack's arguments on this point, and this Court should reverse following its de novo review. *See Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907 (Ct. App. 2021) (providing for de novo appellate review).

A. Lack's did not act reprehensibly.

In assessing reprehensibility, courts examine: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

The trial court did not directly address four of these factors, all of which weigh in Lack's favor. It is undisputed that the harm was physical as opposed to economic and thus that factor weighs in favor of Respondent. However, the other reprehensibility factors weigh in favor of Lack's. Mr. Wolde did not have a particular financial vulnerability that Lack's actions targeted. Second, the only drowning incident before the jury was the Wolde drowning incident. Millions of people visit Myrtle Beach every year without issue. There is no support in the record of any repeated negligent conduct leading to similar incidents. Third, there is also no evidence that the harm to Mr. Wolde resulted from any intentional malice, trickery, or deceit. Finally, 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 trial court did not base its findings on any one factor, but instead cited the "dual role" served by Lack's lifeguards and Lack's dealings with the USLA as supporting the punitive damages award generally. However, the dual role was authorized by law and contract. Moreover, again, neither of these issues made this accident more probable or prevented Lack's from rescuing Mr. Wolde sooner. There was no evidentiary showing linking, from a causation perspective, any "dual role" function or the USLA certification issues to 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 Respondent. *State Farm Mut. Ins. Co. v. Campbell,* 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

For all these reasons, the reprehensibility factors do not justify the jury's punitive damages award. Respectfully, the trial court overlooked these factors in its due process review and erred by failing to eliminate or dramatically reduce the punitive damages award accordingly. This Court thus should reverse.

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

As *Mitchell* noted, the *Gamble* factors remain "relevant to the post-judgment due process analysis" insofar as they add substance to the analysis. *Mitchell*, 385 S.C.at 587, 686 S.E.2d at 185. The trial court's Order also overlooked these factors, all of which weigh in favor of Lack's.

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

Here, the punitive damages award will not deter future conduct because this was an accident. Unfortunately, accidents are unavoidable because swimming in the ocean can be a dangerous endeavor even under the best conditions and supervision, and it is impossible to prevent all risks. For the same reason, the award is not reasonably related to the harm likely to result from

such conduct. Again, the "dual role" conduct complained of by Respondent 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. *See* S.C. Code Ann. § 15-32-520(D).

The defendant's ability to pay heavily weighs in Lack's favor. As noted above, this judgment is far beyond Lack's available insurance coverage and Lack's had a negative net worth.

Thus, the problems inherent with the evidence presented to the jury and the injection of the "dual role" issue into the case fundamentally tainted the proceedings. This is an appropriate consideration under the eighth factor.

Therefore, the remaining *Gamble* factors also support that the punitive damages award cannot withstand constitutional scrutiny. The trial court overlooked these factors, further supporting reversal.

C. The ratio of punitive damages to actual damages.

Although the punitive damages award is less than a 1:1 ratio based purely on the jury's verdict, the flaws with the jury's verdict support that the trial court should have eliminated actual damages as to the survival claim, or, failing that, reduced the actual damages considerably, after which the punitive damages at a 1:1 ratio would be likewise considerably lower. The ratio factor cannot be used to justify excessive punitive damages when the actual damages award is excessive.

D. Comparable civil penalties do not justify an award in this amount.

The last factor directs courts to consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell*, 385 S.C. at 585, 686 S.E.2d at 184. The trial court's order accurately stated that there are no civil penalties applicable to this case. Thus, this fact weighs against the punitive damages award. The

reason there are no civil penalties in this context is because this was simply an accident, and thus punitive damages are not appropriate.

Therefore, under the *Mitchell* and *Gamble* factors, the jury's punitive damages award does not comport with due process. This Court should reverse the punitive damages award.

E. The trial court erred by failing to consider the statutory factors governing punitive damages.

Finally, the trial court erred by failing to consider all of the factors required by the South Carolina Code in reviewing a punitive damages award. *See* S.C. Code Ann. § 15-32-520(E)-(F).[22]

The first, fourth, fifth, seventh, and eighth factors all overlap with elements of the *Mitchell* analysis, and Lack's reasserts its arguments herein on those points. The remaining considerations weigh in Lack's favor.

First, the "severity of the harm" factor requires that it be "***caused by the Defendant***." Further, the statute requires an examination of whether the plaintiff' "own conduct" contributed to his injury. Here, the evidence showed that Mr. Wolde voluntarily entered the ocean with his children and continued into deeper water. There was evidence that warning flags were posted. Moreover, there was evidence that Mr. Wolde did not swim in a manner to escape the rip current. Importantly, the text of the statute only contemplates an examination of the plaintiff's "own

[22] The statutory 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.

conduct" contributing to his injury and does not require that conduct to rise to the level of negligence.

As to the sixth factor, there is no evidence that Lack's profited from any alleged conduct that had a causative relationship to the incident involving Mr. Wolde in any way. Respondent has argued that Lack's is a "for profit" business and that this factor weighs in favor of Respondent; however, there was no evidence, as explained herein, that Lack's acts or omissions were directly and proximately involved with the Wolde incident.

Finally, neither the ninth, tenth, nor the eleventh factor is involved in this case.

Therefore, the statutory factors also weigh against the jury's punitive damages award. The trial court reviewing the punitive damages award erroneously failed to consider them. This Court should reverse for this reason as well.

CONCLUSION

Based on the forgoing, the Court should reverse the judgment of the trial court and enter judgment in favor of Appellant Lack's Beach Service. Failing this, the Court should reverse and remand for a new trial absolute.

Respectfully submitted,

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March 4, 2024

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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

The undersigned certifies that the Appellant's final briefs comply with Rule 211(b), SCACR.

SIGNATURE PAGE ATTACHED

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

PROOF OF SERVICE

I, the undersigned Paralegal, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Lack's Beach Service, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-03, and a copy of that electronic mail.

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