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 REPLY BRIEF OF APPELLANT

C. Mitchell Brown
Blake T. Williams
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Joseph D. Thompson, III
Elizabeth F. Morrison
Daniel R. Fuerst
Hall Booth Smith, P.C.
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
(843) 720-3460

Attorneys for Appellant Lack's Beach Service, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

ARGUMENT

The trial of this case became a referendum on the business practices of Lack's Beach Service ("Lack's")—which were authorized by State law and Lack's contract with the City of Myrtle Beach, and long acquiesced to and approved by the City—and an unfair smearing of Mr. Lack rather than whether acts or omissions of Lack's Beach Service proximately caused the death of Mr. Wolde. As Respondent's brief acknowledges, Lack's has provided lifeguard services to the City of Myrtle Beach since 1974. Respondent nevertheless sought to have the jury hold Lack's strictly liable under a *res ipsa loquitur* theory. Because Lack's provided beach safety oversight and lifeguarding pursuant to its contract with the City and Mr. Wolde drowned, the incident was necessarily Lack's fault per Respondent, which is not the correct standard for proving negligence. Respondent also introduced irrelevant, highly prejudicial evidence in furtherance of narratives that Lack's (a South Carolina small business with a long presence on the Grand Strand) was only motivated by profit in disregard of safety and that its owner George Lack was untrustworthy based on long-past events not germane to the case.

The trial court erred by refusing to grant JNOV or a new trial because: (1) the "dual role" issue was improperly put before the jury and (2) there was insufficient evidence supporting proximate cause.

Furthermore, the improper evidence noted above, in addition to the related arguments of counsel and misunderstanding of the jury of the trial court's instructions, motivated the jury to render a verdict that was driven by passion and prejudice, necessitating a new trial.

The trial court also erred in failing to grant a new trial due to: (1) its error in permitting punitive damages issues to be tried during the first phase of the bifurcated proceedings and (2) the excessiveness of each component of the verdict.

Finally, the trial court erred by submitting punitive damages to the jury in the first instance and further in its post-judgment review of the punitive damages award to ensure it comported with due process. The trial court erroneously upheld the award on its *de novo* review despite the applicable factors weighing against punitive damages. This error was made more apparent considering the actual damages verdict had already well exceeded Lack's available assets and insurance coverage, and the jury nonetheless proceeded with awarding a multi-million punitive damages verdict.[1]

I. The trial court erred by failing to grant JNOV or a new trial where the "dual role" issue was improperly injected into the trial.

A. The "dual role" issue should have never been put to the jury.

This was another key issue that Respondent used to transform the case into a referendum on Lack's business practices.[2] Respondent frames this point as the "dangerous" practice of lifeguards engaged in limited commercial activity while also continuing their lifeguarding duties.[3]

---

[1] In addition to its post-trial motions raising these arguments, Lack's also made a conditional motion to reduce the judgment and oral motion to amend its answer. Respondent's brief fails to acknowledge that while the Court denied this motion, it was "***without prejudice to Appellant's ability to argue that the motions remain pending and are properly before the circuit court.***" (Order p. 2.) Contrary to Respondent's contention, Lack's was not required to file a motion to reconsider since the motions remain properly pending before the trial court. As Lack's has noted, the issues raised therein would only ripen if and when the judgment is affirmed and jnov and new trial are rejected (which should not be the case).

[2] The parties to this case used the shorthand term "dual role" to refer to how certain Lack's lifeguards operated, but this was not intended to be a technical or legal classification. Respondent contends that Lack's is the "only beach safety company in the country to employ such a system," (Br. of Resp. pp. 4, 47) but does not cite ***any*** evidentiary support from the record for this proposition.

[3] Prior to the start of trial, the trial court acknowledged that the "dual role" was generally allowed by law. (Pretrial Hearing Tr. 9:12-17, 45:10-46:13; R. 151, 187-188.) However, the court denied Lack's motion for summary judgment, and also denied its motion in limine to exclude any testimony about the "dual role" or its propriety. (*Id.* at 10:8-15, 17:14-18; R. 152, 159.) On Day 1 of the trial, the Court reiterated that Respondent would be permitted to elicit evidence and testimony on this issue. (Trial Tr. 83:13-20; R. 225.) Lack's maintained a running objection throughout Respondent's expert testimony as to his opinions about dual role as well. (*Id.* at 148:7-12; R. 290.) Thus, the issue was preserved contrary to Respondent's assertion. *See, e.g., State v. Jones*, 435 S.C. 138, 144–45, 866 S.E.2d 558, 561 (2021), *reh'g denied* (Feb. 3, 2022) ("[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of 'gotcha,' where form is elevated over substance.").

However, this practice was allowed by law and approved by the City.

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). 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). In exchange, the municipality may grant "the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality." *Id.* at (B)(3). The court acknowledged as much pretrial. (*See* Pretrial Hr'g Tr. 45:11-12 ("I think [] the dual role is allowed and contemplated by the statute."); R 187.)

This business structure is inherent in the Franchise Agreement, which specifically delineates between regular Lack's lifeguards and "lifeguard onlys."[4] (*See* Pltf. Ex. 15, Franchise Agreement; R. 2144.) The Franchise Agreement was amended in 2017 to specify the addition of "lifeguard only" employees. (Trial Tr. 248:19-249:7; R. 390-391.) As George Lack explained, this delineation was necessary because the regular lifeguards are permitted to engage in dual role activities. (*See* Trial Tr. 446:22-25; R. 588.) Moreover, the unrebutted testimony from Myrtle Beach City Manager Doug Pederson, excerpted in full below in Part III.C., established that the City was aware of Lack's operational structure and approved of Lack's lifeguards engaging in limited commercial sales while also simultaneously fulfilling their role in overseeing beach safety and, if necessary, providing ocean rescue lifeguarding services. (Trial Tr. 634:2-25; R. 776.) Respondent did not present any evidence or testimony from any state or local officials supporting

[4] "Lifeguard onlys" did not engage in any commercial activities. (Trial Tr. 330:8-15; R. 472.)

that Lack's business practices were improper or in violation of the law or the Franchise Agreement.

Lack's ensured that its lifeguards had the City-required qualifications at the time of hiring and underwent the necessary training. (Trial Tr. at 804:16-21, 808:11-14, 809:9-20, 810:8-811:3, 834:8-22; R. 946, 950, 951, 952-53, 976.) Moreover, 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.)

In light of the foregoing, the trial court erred by permitting Respondent to turn the trial into a referendum on whether the "dual role" practice should have been allowed, and on whether that practice was good or bad. The practice was legally allowed and Respondent's repeated assertions that the Franchise Agreement contemplated distinct functions is not supported by the record. Once Respondent was permitted to criticize this practice generally, counsel seized on this and made it a central theme of their case, painting it as nefarious several times both in opening and closing arguments. (Trial Tr. 96:6-14, 97:1-98:16, 894:7-11, 895:22-896:21; R. 238, 239-40, 1036, 1037-38.) In reality, it was authorized by law, contract, and longstanding practice. The trial court erred by failing to grant JNOV or a new trial as a result of it improperly permitting argument and evidence that the "dual role" practice should not have been allowed or used.

B. There is no evidence, even circumstantial, that any Lack's guards were engaged in any commercial activity at the time of the incident.

Respondent told the court at the start of trial they would present evidence that the Lack's lifeguards were engaging in commercial activities at the time of the drowning incident. (*See* Pretrial Hr'g Tr. 14:12-17; R. 156.) However, ***there was no evidence presented that any lifeguards were engaged in commercial activity at the time of the drowning incident.***

Respondent's brief and the trial court's Order on Lack's post-trial motions hinge the relevance of the dual role issue almost entirely on the testimony of bystander witness Julian

Chandler. As Lack's detailed in its opening brief, however, all that Mr. Chandler stated was that when he was walking to the beach, he saw "a lifeguard" who was "sitting on the back end of the stand" talking to beachgoers. (Chandler Dep. at 17:5-15; R. 2276.) This occurred around five to ten minutes prior to when Mr. Chandler first heard the calls for help. (*Id.*)

Contrary to Respondent's assertion, this was no circumstantial evidence that any lifeguards were engaged in commercial sales at the time of the incident because this was not a reasonable evidentiary conclusion that could be drawn by the jury.[5] *See McCready v. Atl. Coast Line R. Co.*, 212 S.C. 449, 455, 48 S.E.2d 193, 196 (1948) ("Any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proved, lead to the conclusion with ***reasonable certainty***.").

Likewise, the mere fact that there were sales receipts from the day of the incident does not support a reasonable inference that the relevant Lack's lifeguards were engaged in commercial sales either. Respondent's expert Dr. Thomas Griffiths even 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.)

Respondent extensively argues that the supposed length of the incident of "10 to 15 minutes" nevertheless supports this conclusion. Respondent glosses over the fact that the only witness who testified as to the length of the incident was Mr. Wolde's daughter Wubit (who was

[5] As Lack's detailed in its opening brief, Chandler's later testimony demonstrated that it was speculative as to whether the person he saw was even 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, 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 and safety personnel patrolled the beach, including 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. 576-577.) Thus, assuming *arguendo* the individual was a "lifeguard," the reasonable evidentiary inference was that the individual was not a ***Lack's*** lifeguard.

nine years old at the time), and she contradicted her testimony about the "10 to 15 minutes" on cross-examination. On cross, she conceded that her testimony on direct examination was not consistent with her deposition and, in fact, she did not actually remember what happened. Specifically, she testified:

> Q But everybody was yelling?
> A Yes.
> Q And you don't know how long that lasted, do you?
> A No.
> Q I mean, you can't provide any estimate for that, can you?
> A No. I mean . . .
> Q And so, at some point, do you know how everything stopped?
> A Not exactly.
> Q Is it the – your testimony that you were yelling and, then, really the next thing you knew is you were standing on your feet?
> A I don't remember anything in between that.
> . . .
> Q If you'll turn to page 61. All right. Starting at line 12.
> A Mm-hmm.
> Q The question: "So you and your dad and brother got in trouble. You called for help. And then the next thing you realize or remember is that you could stand in knee-deep water?"
> A "Yes."
> Q Your answer?
> A "Yes. I don't remember it. I just remember yelling for help and that I think I don't know how we got out of it, honestly, but I just remember that, eventually, we were at the shore, and I was walking towards the shore."
> Q "Do you know about how long all of that lasted?"
> A "No."
> Q Okay. And does that help refresh your recollection?
> A Yes.

(Tr. 603:24-605:21; R. 745-747.) Regardless, even if the above evidence from the 9-year-old Wubit supported that the incident lasted 10 to 15 minutes, it would not have been reasonable for the jury to infer that this necessarily meant that the Lack's guards were engaged in commercial activity during that time period.

Based on the above, the trial court erred by failing to grant JNOV or, at a minimum, a new trial in light of the improper injection of the dual role issue into the case. The essence of the jury's

verdict was a determination that the dual role practice was improper (a legal conclusion)—not whether Lack's was negligent because the evidence supported that its lifeguards were engaged in commercial activity at the time of the drowning. This Court should thus reverse.

II. The trial court erred by failing to grant JNOV or a new trial where there was insufficient evidence supporting a breach of the standard of care or proximate cause.

Respondent's claims asserted that Lack's was negligent. Negligence differs from strict liability, with the former requiring a showing of a failure to exercise reasonable care proximately causing the injury where the latter does not. *See Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). In other words, negligence focuses on the conduct of the defendant. *Id.* Moreover, South Carolina does not follow *res ipsa loquitur*, and thus a plaintiff cannot rely solely on the fact that an accident occurred to prove a negligence case. *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010).

Respondent's claims here were founded on *res ipsa loquitur* and essentially represented an effort to hold Lack's strictly liable.[6] Respondent flipped the analysis on its head: a tragic accident occurred, and therefore someone must be at fault. Accordingly, since Lack's was tasked with overseeing beach safety, it must automatically bear responsibility according to Respondent. However, South Carolina law required Respondent to prove a specific breach of the standard of care by Lack's which proximately caused the drowning.[7]

---

[6] Respondent's own expert acknowledged that lifeguards are not guarantors of safety and a person can drown in the ocean in front of a fully guarded beach of vigilant lifeguards. (Dep. of Dr. Griffiths 130:12-132:4; R. 2327.) Unlike other situations where a safety mechanism could preclude an injury, there is no way to prevent all drownings in the unpredictable ocean. Again, Respondent's contention that had Lack's performed an "effective water safety program" as required by the Franchise Agreement the tragedy would have been avoided is not supported by the record and is in essence an improper attempt to hold Lack's strictly liable.

[7] The Franchise Agreement provided the applicable standard of care. Absent the Franchise Agreement, Myrtle Beach would have been unattended by any lifeguards. The Franchise Agreement set forth the expectations that Lack's would meet for licensure and training for its personnel and how it would operate. Plaintiff, of course, bore the burden of establishing a breach of the applicable standard of care, and Lack's was not obligated to present a rebuttal expert contrary to Respondent's assertion.

As Lack's detailed in its opening brief, that was not done here. Lack's reincorporates those arguments in full, but will briefly address Respondent's points in turn.[8] As an overarching matter, as detailed below and in Lack's opening brief, United States Lifesaving Association ("USLA") certification was not required by the Franchise Agreement and thus was not the standard of care. Nevertheless, despite not being qualified as an expert, Chris Brewster of the USLA was permitted to extensively testify about whether Lack's business practices complied with USLA standards. (*See generally* Trial Tr. 472-506; R. 614-648.) This was not a proper basis for any finding of a breach of the standard of care or proximate cause.

Respondent's next argument is that since the incident lasted 10 to 15 minutes, Lack's personnel should have observed it. However, as noted, the only support for the length of time was the testimony from Mr. Wolde's daughter, and she conceded on cross examination that she did not actually remember how long the incident lasted. Therefore, there was no support for this being a lengthy incident that Lack's personnel should have observed and been able to perform a successful rescue.

Respondent also contends that Lack's failed to present any evidence that the lifeguards stationed near the Woldes were properly performing their duties, but this contention again flips the burden of proof. It was incumbent on Respondent to prove that the lifeguards were committing an act or omission in contravention of the standard of care, which they failed to do for the reasons Lack's detailed in its opening brief.

Respondent then takes issue with lifeguard L-21 being at lunch. However, this was in

[8] Respondent contends that Lack's proximate cause arguments were not preserved. However, Lack's moved for both directed verdict and JNOV contending that there was insufficient evidence to establish proximate cause, which was sufficient to preserve the issue. (*See* Trial Tr. 618:22-619:11; Lack's Mot. for JNOV; R. 760-71 1502.) The argument in Lack's opening brief was specifically tailored to raise this same insufficiency of evidence ground and addressed the issue in light of the trial court's findings in its Order on Lack's post-trial motions.

accordance with the procedure permitted by the Franchise Agreement where the two adjacent guards scanned that territory in his absence in addition to their assigned territories. (Trial Tr. 659:7-13, 719:4-8, 745:17-29, 748:10-12; R. 801, 861, 887, 890.) Dr. Griffiths' implication that the lifeguard who went to lunch "abandoned" his post was thus misleading and improper. (*See* Br. of Resp. p. 19; Dep. of Dr. Griffiths 68:21-25; R. 2311.) In fact, later in his deposition, he endorsed the overlapping coverage concept, noting it was "the way it's supposed to work." (Griffiths Dep. 200:14-18; R. 2344.)

Similarly, Respondent cites the fact that only three of the four "lifeguard onlys"—Lack's personnel who be "wherever they seem to be needed or where a supervisor may send them," (Trial Tr. 443:25-444:5; R. 585-86)—were on the beach that day because one called in sick. However, Respondent introduced no proof that the additional "lifeguard only" would have been in the vicinity of Mr. Wolde at the time of the incident, and it was pure conjecture to the extent the jury assumed otherwise. These "lifeguard onlys" covered a six-stand territory (with each stand spaced approximately one city block apart) and had no set schedule for where they would be and when.[9] (Trial Tr. 445:1-446:16, 696:10-16; R. 587-88, 838.) Rather, they were designed to provide additional support on an *ad hoc* basis. (*Id.*) Again, Respondent is, in essence, attempting to hold Lack's strictly liable and/or flip the burden of proof on to Lack's.

[9] Respondent contends that George Lack conceded that the being short one "lifeguard only" "could have made the difference between life and death" regarding the Wolde incident. (Br. of Resp. p. 18, 27.) In the testimony cited by Respondent, George Lack was responding to a hypothetical from counsel and simply acknowledging that "theoretically" having an extra lifeguard in the vicinity of the Woldes could have made a difference. And of course it ***could***. However, again, there is no evidence that an additional "lifeguard only" ***would*** have been in the proximity of the Wolde or that it ***would*** have actually made a difference. The City of Myrtle Beach's Beach Patrol and Ocean Rescue were also on the beach patrolling that day and did not observe the Wolde incident either. (Tr. 431:21-432:17; R. 573-74.) Thus, Respondent's contention is pure speculation since, among other reasons, ***additional resources beyond what Lack's had on the beach were already present and it did not change the outcome***. *See Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 346, 433 S.E.2d 905, 907 (Ct. App. 1993) (explaining that causation based on a possibility rather than a probability is not sufficient).

Respondent Wolde then cites the fact that she did not ***see*** any flags posted, and that bystander witness Jeffrey Bender testified similarly. However, this testimony was specifically rebutted by a Lack's witness who confirmed that they were, in fact, posted that day. (Trial Tr. 726:22-727:21; R. 868-69.) Further, Ms. Wolde did not testify that had she seen the flags, her family members would not have entered the ocean. (*See generally* Trial Tr. 215-269; R. 357-411.)

There was also no evidence or testimony supporting that Lack's was required to close the beach at the time of the incident. The National Weather Service Report only identified the potential for hazardous conditions. (Trial Tr. 711:6-15; R. 853.) Even Respondent's expert conceded that the personnel on the beach have to make the call as to whether one is present. (Griffiths Dep. 179:17-24; R. 2339.) Here, there was no testimony supporting that anyone saw the rip current prior to this incident. Moreover, rip currents are unpredictable and move around, even within the same day. (Trial Tr. 433:1-16; R. 575.) One may arise and subside with another appearing shortly thereafter in a different location. (Trial Tr. 433:17-22; R. 575.) There was no evidence or testimony supporting that anyone identified a rip current, at any time, the day of the drowning prior to the Wolde incident.

Finally, Respondent cites Julian Chandler's testimony about seeing a "lifeguard" talking to a beachgoer as he walked out to the beach five to ten minutes before hearing the commotion from the drowning. As detailed above, his testimony was speculative as to whether the person was even a lifeguard at all or a Lack's lifeguard and, to the extent the jury concluded that this meant the lifeguard was engaged in a commercial transaction, it was pure conjecture and not a reasonable inference from the evidence. Respondent's implication that Chandler's testimony supported that

the lifeguard was "engaged in what appeared to be some form of beach concessions or related service," (Br. of Resp. p. 15), is not supported by the testimony.

Therefore, for all of the reasons detailed in Lack's opening brief and herein, there was insufficient evidence to support that any act or omission by Lack's proximately caused Mr. Wolde's drowning. The trial court erred by refusing to grant JNOV or, failing that, a new trial. This Court should reverse.

III. The trial court's admission of highly improper prejudicial evidence and testimony requires a new trial.

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

The trial court committed clear error and an abuse of discretion by admitting evidence of Lack's gross sales data for the entire year of 2018. The Supreme Court has held on two separate occasions in the punitive damages context that this exact type of financial data is not admissible, as only net worth and extrapolations therefrom are appropriate. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010); *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420–21, 734 S.E.2d 641, 646 (2012). In *Sulton*, the court reversed where the plaintiff introduced evidence regarding the defendant's operating revenue, explaining the prejudice of such evidence was "self-evident" since "[n]et revenue has no necessary relation to net worth." *Sulton*, 400 S.C. at 420-21, 734 S.E.2d at 646. The Supreme Court stated that putting such information in front 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). If the evidence would have been out of bounds during the punitive damages stage, it was absolutely improper during the actual damages phase of this trial where the risk of unfair prejudice was only heightened.

In her brief, Respondent contends that this information was needed to show that sales were ongoing on the day of the incident. However, Lack's has never disputed that Lack's personnel were permitted to engage in commercial sales, nor did Lack's dispute that some Lack's personnel were engaged in sales on the date of the incident. Although there is no evidence supporting it, one of Respondent's proximate cause theories discussed prior to trial was that Lack's lifeguards were engaged in commercial sales ***at the time of the drowning incident,*** and that is why they did not see Mr. Wolde in distress. (*See* Pretrial Hr'g Tr. 14:12-17; R. 102.) The actual evidence did not reflect this, however. Further, the monthly and yearly sales data allowed into evidence certainly bore no relation to what occurred on the beach the day of the incident.

As Lack's has consistently maintained—including via its contemporaneous objection at trial—this data was both irrelevant and unduly and improperly prejudicial. The evidence did not support that Lack's lifeguards were engaged in commercial sales and "distracted" thereby at the time of the drowning incident. The trial court nevertheless permitted Respondent during the liability/actual damages phase to introduce Lack's 2018 tax filing reflecting its total gross revenue data for the entire year ***and*** elicit testimony from George Lack that Lack's total sales revenues for the year were $1,520,918. (Tr. 394:10:15; R. 536.) Contrary to Respondent's contention, this evidence was not "minimal and specifically tailored data on Lack's sales limited in scope and time," (Br. of Resp. p. 31)—it was the exact opposite.

The probative value of the sales revenue data from the entire year of 2018 was greatly outweighed by the danger of unfair prejudice. It did not have any bearing on whether Lack's acted negligently towards Mr. Wolde and would have been improper even at the punitive damages stage.

Respondent attempts to avoid the clear directives of *Branham* and *Sulton* by contending that the holdings of those cases are limited to situations where a very large business is the

defendant.[10] Although both cases did involve entities larger than Lack's, their holdings do not indicate that they are so limited. The same policy concerns expressed by *Branham* and *Sulton* are present because the data did not paint an accurate picture of Lack's financial condition. The gross revenues gave the jury the impression that Lack's was a $1.5+ million-dollar business when, in fact, its ***net worth*** (the relevant consideration for punitive damages under *Branham* and *Sulton*) was negative, which the jury did not hear until the punitive damages phase. The gross sales revenue information was misleading to the jury just as it was in *Sulton*.

The trial court erred by failing to order a new trial in light of the admission of this improper evidence. Even the data from the day of the incident was arguably not relevant, but at a minimum, the probative value of the monthly and yearly sales information was substantially outweighed by the danger of unfair prejudice. This Court should thus reverse.

B. The trial court erred by permitting improper "impeachment" of George Lack regarding an administrative law proceeding from two decades prior.

The prejudicial effect of the evidence and testimony Respondent introduced about the Administrative Law Court order from 2002 further necessitates a new trial. Respondent's introduction of this evidence via purported "impeachment"[11] was not proper and this evidence and testimony also inflamed the jury's passion and prejudice.

---

[10] Respondent also contends that this information was appropriately admitted because it was contained in public records provided to the City of Myrtle Beach by Lack's. This does not make it appropriate ***evidence***. Although this may have been sufficient to establish foundation and/or a hearsay exception, it had no bearing on its relevance or whether its probative value outweighed the potential prejudice as required by Rules 401 and 403, SCRE. Just because something is in a public record does not make it automatically admissible evidence, and trial courts instruct juries to base their verdicts on the evidence presented in the trial and forbid juries from doing independent research and from considering extraneous information in their deliberations. (*See* Trial Tr. 122:21-123:2, 923:20-23; R. 264-65, 1065); *see also State v. Harris*, 340 S.C. 59, 63 n.1, 530 S.E.2d 626, 627 n.1 (2000) ("Trial courts should stress to jurors that they may not conduct independent research or investigation, but must rely solely on the judge's instruction for the law and the evidence presented in court for the facts.").

[11]Contrary to Respondent's contention, Lack's made the same argument about this constituting an improper impeachment at the hearing on the post-trial motions as it made in its brief. (*See* Tr. of 3/9/2023 Hrg.25:2-26:7; R. 1140-41.)

Respondent's brief fails to adequately explain how this was anything other than an effort to smear George Lack as a person. The testimony of Mr. Lack that Respondent sought to impeach was his statement that Lack's lifeguards had a "***responsibility*** to perform lifeguard duties 100% of the time." (*Id.* at 418:16-20 (emphasis added); R. 560.) As the Supreme Court explained in *Anderson v. Elliott*, 228 S.C. 371, 375–76, 90 S.E.2d 367, 369 (1955), the right to cross-examine a witness as to a previous contradictory statement "must be founded on the existence and showing of a material variance between the statements made on the two occasions." *Id.* Here, there was no material variance between the two statements.

George Lack's testimony at trial was not inconsistent with what was argued before the Administrative Law Court. The Order that Respondent's counsel purported to "impeach" George Lack with was addressing the classification of a different company's (Lack's Outdoor Furniture) employees for workers' compensation purposes. *See Lack's Outdoor Furniture, Inc. v. The Travelers Indemnity Company of Ill.*, No. 01-ALJ-09-0374-AP, 2002 WL 385121, at *2 (S.C. Admin. Law Ct. Feb. 20, 2002).[12] The dispute began in 1994 and progressed through the Department of Insurance and, later, the Administrative Law Court. As the Order explained, pursuant to Franchise Agreements between the City of Myrtle Beach and five beach franchise companies (one of which was Lack's Outdoor Furniture), the franchisees were allowed to rent chairs, umbrellas, and cabanas in exchange for providing lifeguard services in the areas of operation. While on duty, employees would supervise the beach and provide lifeguard services; however, "[o]nly a minimal amount of the time on duty is spent executing water rescues." *Id.* at *3 (noting that .0047% of Lack's Outdoor Furniture's business hours "consisted of executing water

[12] The Court may take judicial notice of these court proceedings. *See Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984).

rescues"). Thus, Lack's Outdoor Furniture argued that hazardous (rescue attempts) lifeguard duties "only have the potential to be performed" a very small portion of the time. *Id.*

Thus, in addition to it involving a different company and not containing any statement made by George Lack himself, the 2002 Administrative Law Court Order was not materially inconsistent with what George Lack said at this trial. As he explained at trial, the lifeguards have the ***responsibility*** to perform lifeguarding duties 100% of the time, meaning being at the ready to make a rescue when the need arises. However, they are only actively engaged in hazardous rescue activities a small sliver of the time they work.

The context of the ALC Order is also important. As Lack's noted in its opening brief, the key question before the ALC court was whether the employees were properly classified such that the insurance premium appropriately reflected the risk insured. The argument that Lack's was advancing to the ALC was that a very small percentage of the employees' activities were high risk activities, since ocean rescues were rare. (Trial Tr. at 428:2-429:19; R. 570-71.) The remainder of their duties, so the argument went, were much less risky and thus the worker's compensation premiums should be reflective of such.

This attempted "impeachment" only served to inflame, mislead, and confuse the jury since George Lack's testimony was not in conflict with what Lack's argued two decades prior, contrary to what Respondent was able to suggest to the jury. Any probative value of this evidence and testimony was substantially outweighed by the danger of unfair prejudice. Moreover, its admission improperly placed the issue of insurance in front of the jury. *See* Rule 411, SCRE. For all these reasons, the trial court committed reversible error warranting a new trial in admitting this evidence.

C. The trial court's error in admitting evidence and testimony regarding Lack's USLA certification also warrants reversal.

The trial court permitted Plaintiff to introduce a series of letters exchanged by Lack's and the USLA regarding the "dual role" practice and Lack's USLA certification as a company, and elicit testimony from Chris Brewster of the USLA regarding the same, over objection from Lack's. This evidence was also confusing and misleading to the jury and designed to improperly prejudice it against George Lack and Lack's Beach Service. The letters dated from 1996 through 2007, and thus predated the drowning incident by over a decade. The sole purpose of Brewster's testimony was to put these letters before the jury and inflame the jury against Lack's. As with the gross sales revenue data, this evidence and testimony had nothing to do with what occurred on the beach the day of the drowning or whether Lack's committed any acts or omissions that proximately caused the same.

The letters and associated testimony were irrelevant in the first instance because they concerned ***certification*** by the United States Lifesaving Association of Lack's Beach Service as a company. This certification was never required by South Carolina law, the City of Myrtle Beach, or the Franchise Agreement between the City and Lack's. The only reference to the USLA in the Franchise Agreement stated that one of the requirements for lifeguards was that each "***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."[13] (*See* Franchise Agreement, §4 (emphasis added); R. 1742.) Therefore, the status of Lack's USLA certification was entirely irrelevant.

Moreover, the City Manager for the City of Myrtle Beach, Doug Pederson, testified that the City was aware of and approved of Lack's business practices:

[13] 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. 581-82.)

> Q. As the city manager responsible for developing these contracts and discussing these matters with third parties, did you provide the information to City Council about Lack's Beach operations?
>
> A Yes, sir.
>
> Q Okay. And so, then, the information was provided to City Council about the lifeguards providing dual role selling or renting beach chairs or umbrellas when they were considering adopting this 2018 ordinance?
>
> A Yes, sir. We would actually review that in each City Council meeting, and each member of the City Council would have a copy of the proposed ordinance in front of them.
>
> Q And, then, did City Council adopt the ordinance and adopt the franchise agreement?
>
> A Yes, sir.
>
> Q And that franchise agreement allowed Lack's Beach Service, the lifeguards on the beach, to rent beach equipment, including umbrellas and chairs?
>
> A Yes, sir.
>
> Q And the City knew that they were doing that?
>
> A Yes, sir.
>
> Q And allowed them to do that?
>
> A Yes, sir.

(Trial Tr. 634:2-25; R. 776.) Discussing this "dual role" arrangement, Mr. Pederson noted "the City Council was aware this is a practice" which had been in place for "at least 50 years." (*Id.* at 637:8-13; R. 779.) Respondent's assertion that Lack's position is "utterly disingenuous," (Br. of Resp. p. 13), lacks credibility in the face of this testimony.

The sole purpose of this evidence and testimony appears to, again, have been designed to try and make George Lack look untrustworthy in the eyes of the jury and inflame them against Lack and his business. (Trial Tr. 422:11-18; R. 564.) Respondent's counsel highlighted the "revocation" of Lack's USLA certification in closing arguments. (Tr. 900:18-25; R. 1042.) The evidence and testimony regarding events from over a decade prior had nothing to do with whether any acts or omissions of Lack's led to Mr. Wolde's drowning. The trial court erred by allowing admission of this irrelevant and misleading evidence, and this Court should reverse for a new trial.

IV. The trial court erred by failing to grant a new trial where bifurcation of the liability and punitive damages phases was improperly accomplished and the requested charge of Lack's was not given.

As Lack's detailed in its opening brief, the bifurcation statute provides a series of requirements and expectations for the two halves of the bifurcated proceedings. Lack's trial counsel requested that a jury instruction be given, consistent with the two phases of the trial, that should they find recklessness, a second phase would be required and further deliberations by them would be required.

Contrary to Respondent's assertion, this issue was preserved because Lack's argued at trial that the Court must provide ***context*** to the jury if it intended to permit them to make a finding of recklessness in the first phase of the trial. (Tr. 845:25-846:14; R. 987-88.) Lack's counsel further asserted that if the trial court intended to use Plaintiff's verdict form, which included a question regarding recklessness, the jury needed to be informed that there would be further proceedings or additional deliberations if they marked yes. (Tr. 868:17-23; R. 1010.) As Lack's trial counsel explained, having the jury answer yes or no to that question without context was improper. (*Id.* at 838:24-869:2; R. 980-1011.) Lack's argument that the jury should not have been permitted to make a finding of recklessness in the first phase under the punitive damages statute absent this instruction thus aligns with the argument at trial.[14] The trial court erred in declining to give that requested instruction. The trial court's error warrants a new trial absolute as to both actual and punitive damages.

V. The trial court erred by failing to grant JNOV or a new trial as to Respondent's survival claim where there was no proof of conscious pain and suffering.

---

[14] Once the trial court rejected Lack's request for such an instruction, it was sufficient to preserve the issue. *Nedrow v. Pruitt*, 336 S.C. 668, 677–78, 521 S.E.2d 755, 760 (Ct. App. 1999) ("[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at [the] conclusion of the court's instruction (quoting *State v. Johnson*, 333 S.C. 62, 65 n. 1, 508 S.E.2d 29, 31 n. 1 (1998))).

A. Respondent did not show conscious pain and suffering sufficient to establish a viable survival claim.

The trial court should not have submitted Respondent's survival claim to the jury because there was no reliable evidence of any conscious pain and suffering. None of the testimony cited in Respondent's brief changes that result. Bystander witnesses Julian Chandler and Jeffrey Bender both testified that Mr. Wolde was ***unconscious***.[15] (Chandler Dep. 61:24-62:2; Trial Tr. 212:13-14, 709:14-21; R. 2287-88; 354; 851.) Moreover, Adam Wolde agreed that he ultimately did not see what happened to his father after they initially were yelling for help. (Trial Tr. 567:1-568:3; R. 709-10.) The only testimony that was even tangentially related to consciousness was from Wubit and, as detailed above, discussed gasping in addition to yelling.[16] These pre-drowning struggles are akin to pre-impact fear, which South Carolina law does not recognize as proper survival damages, *see Rutland v. S.C. Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012).

As Lack's contended in its opening brief, Respondent's survival claim lacked sufficient proof because she failed to present expert testimony about what occurs when a person experiences drowning. Respondent introduced no evidence detailing what the drowning victim under the circumstances would be expected to experience from a scientific, pathophysiological perspective. As this Court has explained, expert testimony is required when the question is "a matter outside the common knowledge and experience of most lay persons." *Spartanburg Reg'l Med. Ctr. v. Bulsa*, 308 S.C. 322, 324, 417 S.E.2d 648, 650 (Ct. App. 1992); *see also* Note, Rule 701, SCRE

---

[15] Respondent's contention that beachgoers were able to see and hear Mr. Wolde's distress is not supported by the evidence or testimony in the record. (*See* Resp. Br. p. 21.) Moreover, Mr. Chandler did not testify that he witnessed the Woldes' "cries for help in the water" as Respondents assert. (*See* Resp. Br. p. 23.)

[16] Respondent cites the deputy coroner's testimony about how Mr. Wolde drowned as further support for conscious pain and suffering. However, she only testified that Mr. Wolde died from asphyxiation. (Trial Tr. 466:5-10; R. 608.) Respondent's counsel attempted to ask her about what occurs during the drowning process, but the trial court expressly excluded any such testimony. (*Id.* at 465:10-17; R. 607.) No proffer of that testimony was made.

(same). Such testimony was necessary here since the average person would not have common knowledge about the drowning process. This is consistent with the many other reported decisions cited in Lack's brief in which the issue was submitted to the jury only upon expert testimony.

The lack of sufficient proof of conscious pain and suffering supporting the survival claim supports that no reasonable jury could have found in Respondent's favor on that claim and thus the trial court erred by failing to grant JNOV or a new trial.

VI. The trial court erred by failing to grant JNOV or a new trial on punitive damages where there was insufficient evidence of recklessness.

As detailed above and in Lack's opening brief, the evidence was insufficient to establish negligence much less recklessness with a proximate causal relationship to the harm by clear and convincing evidence. *See Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000); *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (noting that the plaintiff must show a "present consciousness of wrongdoing" by the defendant at the time of the action). Respondent failed to identify any act or omission of Lack's that proximately caused Mr. Wolde's drowning. Moreover, as Lack's noted in its opening brief, there was ample evidence that once Lack's lifeguards became aware of the incident, they immediately called it in, Lack's personnel arrived almost immediately 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, 823:25-824:3; Def.'s Ex. 7, Stmt. of Lukasz Jaworski; R. 841-43, 965-66; 2268.) This evidence negates any conscious indifference to safety.

For all the reasons stated in Lack's opening brief and herein, the punitive damages issue should not have been submitted to the jury and the trial court erred in denying JNOV or, at a minimum, a new trial. Respondent's case was entirely circumstantial and dependent on inferences about what could have ***potentially*** changed the outcome of an accident. Respondent did not

identify any willful, wanton, or reckless action by Lack's which bore a causal relationship to the drowning incident. This Court should reverse for 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) (explaining that actual damages should not be separated from punitive damages for a retrial); *see also* S.C. Code Ann. § 15-33-125 (prohibiting a trial on punitive damages only unless a Plaintiff's directed verdict on liability is justified).

VII. The jury misused the mortality tables in arriving at their survival damages verdict, also warranting a new trial.

The trial court also erred by failing to grant a new trial in light of this error. Respondent misconstrues Lack's argument on this point in attempting to establish an issue preservation issue. Contrary to Respondent's assertion, Lack's has never contended that the trial court's charge was improper. The court correctly informed the jury about the mortality tables and how Mr. Wolde's life expectancy could be taken into consideration when assessing wrongful death damages. The court also properly charged the jury that it may award damages on the survival claim for conscious pain and suffering it if 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." (Jury Charge, Trial Tr. 937:20; R. 1079.)

Thus, there was no error in the trial court's charge. The problem was with the jury's ***application*** of the charges, which only became evidence after they rendered a verdict reflecting their reliance on the mortality tables in arriving at the survival damages. Mr. Wolde's remaining life expectancy was 37.3 years, and the jury's survival damages award was $3,730,000—in other words, $100,000 for each remaining year of his life expectancy. The verdict, therefore, was not tied to the alleged conscious pain and suffering Mr. Wolde experienced as required by law for a survival claim, but rather was intended to award a certain amount of damages for each year of his

remaining life expectancy. The verdict reflects the jury's clear disobedience of the court's instructions and warrants reversal for a new trial.

VIII. The trial court erred by failing to grant a new trial where each component of the verdict was excessive.

The irrelevant, highly prejudicial evidence that Respondent introduced to transform the trial into a referendum on Lack's business operations and to smear George Lacks the jury's passion and prejudice and resulted in each component of the verdict being grossly excessive.

A. The survival damages award was not in line with comparable verdicts.

As the Supreme Court has recognized, reviewing "past verdicts for similar injuries" is instructive in assessing excessiveness so long as the "buying power" of the verdict is considered. *Smoak v. Seaboard Coast Line R. Co.*, 259 S.C. 632, 639, 193 S.E.2d 594, 597 (1972). In its opening brief, Lack's did just that, citing to examples of all of the awards for conscious pain and suffering that it was able to locate and adjusting for inflation. In her brief, Respondent cited to survival damages awards from cases that did not involve a drowning. Therefore, these are not proper comparisons since they were not past verdicts for similar injuries.

B. The wrongful death verdict exceeded the amount suggested by Respondent's counsel in closing by $1.9 million.

The jury's passion and prejudice in rendering its verdict was particularly evident in its wrongful death damages award. Respondent's counsel suggested the jury award of $8.1 million on the wrongful death claim and yet the jury exceeded what counsel likely believed was a best-case scenario by $1.9 million. Respondent attempts to downplay this by contending that these numbers are in "close proximity" and stating that there is "not much of a difference." (Br. of Resp. pp. 37, 42.) As much as Respondent would like to discount it, however, this is a substantial sum and the improper evidence drove the jury's desire to punish Lack's beach service through each component of its verdict.

C. The jury's punitive damages award was also driven by improper motivations.

Respondent also attempts to gloss over the fact that the punitive damages award was designed to financially destroy Lack's by contending that the jury charge noted that economic bankruptcy was not a complete bar to an award of punitive damages. Here, however, the jury heard during the punitive damages phase that Lack's available insurance coverage was $3 million and it had a negative net worth of $473,350.51. (Trial Tr. 961:24-962:5, 962:18-22; R. 1103-1104.) Despite knowing that it had already awarded actual damages greatly exceeding the available coverage and Lack's net worth multiple times over, the jury nevertheless awarded an additional $7 million dollars. While the potential for economic bankruptcy was not a ***bar*** to awarding punitive damages, it was not permitted to be the jury's express ***motivation***. This verdict reflects the jury's intent to eliminate Lack's as a going concern.

Therefore, each component of the verdict was excessive and warrants reversal for a new trial absolute. If this Court finds either component shockingly excessive, a new trial absolute must be ordered. *See Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (providing that 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).,

IX. The trial court erred by finding that the punitive damages award comported with due process.

A. The *Mitchell* factors weigh against punitive damages in this matter.

Under *Mitchell v. Fortis*, the trial court was required to conduct a post-judgment review of the punitive damages award to ensure it comports with due process. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) (articulating the test "for our courts in conducting a post-judgment review of punitive damages awards"). Respondent contends that

Lack's was required to plead that punitive damages must comport with due process and failed to do so. *Mitchell* does not impose such a requirement but, in any event, Lack's did plead this as an affirmative defense.[17] (*See* Ans. of Lack's Beach Service p. 8, ¶ 53; R. 72.)

Under the applicable *Mitchell* factors, the punitive damages award should not have been permitted to stand. This Court must review these issues *de novo* and should reverse following that 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). First, for the reasons set forth in Lack's opening brief and herein, Lack's did not act reprehensibly or even negligently for that matter. Second, although the ratio of punitive damages was less than a 1:1 ratio, this factor cannot be used to justify excessive punitive damages. Finally, in considering the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases, the trial court accurately stated that there are no comparable civil penalties. Respondent's assertion that the Court should consider similar punitive damages ***awards*** is not the applicable factor set forth by *Mitchell*, *see* 385 S.C. at 585, 686 S.E.2d at 184. The reason there are no civil penalties is because this was simply an accident, and thus punitive damages are not appropriate.

Hence, 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 at a minimum.

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

Lastly, 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).[18]

---

[17] Moreover, the cases Respondent cites on this point are from other jurisdictions and are not consistent with South Carolina law as set forth in *Mitchell*.

[18] 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

Respondent's brief fails to articulate how this was not error by the trial court since the General Assembly has mandated that the trial court take each of these factors into account. As Lack's opening brief noted, the first, fourth, fifth, seventh, and eighth factors all overlap with elements of the *Mitchell* analysis, and therefore weigh in Lack's favor. Neither the ninth, tenth, nor the eleventh factor is involved in this case. 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's "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 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. Therefore, the statutory factors also weigh against the jury's punitive damages award. The trial court erroneously failed to consider them in reviewing the punitive damages award. This Court should reverse for this reason as well.

CONCLUSION

For the reasons stated in Lack's opening brief and herein, 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.

---

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.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
Blake T. Williams
S.C. Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

HALL BOOTH SMITH, P.C.

Joseph D. Thompson, III
SC Bar No. 66580
Email: jthompson@hallboothsmith.com
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
(843) 720-3460

Attorneys for Defendant Lack's Beach Service, Inc.

March 4, 2024

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams
C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
Blake T. Williams
S.C. Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

HALL BOOTH SMITH, P.C.

Joseph D. Thompson, III
SC Bar No. 66580
Email: jthompson@hallboothsmith.com
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
(843) 720-3460

Attorneys for Defendant Lack's Beach Service, Inc.

March 4, 2024

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 Joe Doe Lifeguard, Defendants,

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.

Pleading(s): Appellant's Final Brief
Appellant's Final Reply Brief

Served: William Mullins McLeod, Jr., Esquire
PO Box 21624
Charleston SC 29413
mullins@mcleod-lawgroup.com

John Chris Pracht V, Esquire
PO Box 4025

Anderson SC 29622
chris@864law.com

Harry Cooper Wilson III, Esquire
3 Morris Street Suite A
Charleston SC 29403
cooper@mcleod-lawgroup.com

G. Murrell Smith, Jr., Esquire
Smith Robinson Holler DuBose Morgan, LLC
26 N. Main Street Sumter, SC 29151
PO Box 580
Sumter, SC 29151-0580
Murrell@smithrobinsonlaw.com

Austin T. Reed, Esquire
Frederick N. Hanna, Jr., Esquire
Smith Robinson Holler DuBose Morgan, LLC
2530 Devine Street, Third Floor
Columbia, SC 29205
austin.reed@smithrobinsonlaw.com
fred.hanna@smithrobinsonlaw.com

Attorneys for Meswaet Abel

Elizabeth F. Morrison, Esquire
111 Coleman Boulevard Suite 301
Mount Pleasant SC 29464
emorrison@hallboothsmith.com

Joseph D. “Trey” Thompson III, Esquire
111 Coleman Boulevard, Suite 301
Mount Pleasant SC 29446
jthompson@hallboothsmith.com

Daniel R. Fuerst, Esquire
111 Coleman Boulevard, Suite 301
Mount Pleasant SC 29446
dfuerst@hallboothsmith.com

Attorneys for Lacks Beach Service

Bryan Eric Shytle, Esquire
Municipal Association of S.C.
1411 Gervais Street
Columbia, SC 29211

eshytle@masc.sc

Attorney for Amicus Curie
Municipal Association of South Carolina

/s/ *Meredith S. Keane*
Meredith S. Keane
Senior Paralegal

March 4, 2024