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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,

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Pursuant to 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant Lack's Beach Service, Inc. ("Lack's") requests rehearing of this Court's July 16, 2025 Opinion affirming the circuit court and the judgment in Respondent's favor. *See Abel v. Lack's Beach Service et al.*, Op. No. 6118 (S.C. Ct. App. filed July 16, 2025) ("Opinion"). The Court overlooked or misapprehended several important points, discussed below. The Court should consequently grant rehearing and reverse the circuit court rulings based on the arguments herein. Lack's also incorporates into this petition and expressly reasserts all arguments raised in its prior briefing and at oral argument and does not abandon or waive such arguments.

While addressing a tragic event, the Opinion respectfully creates a significant public policy problem for South Carolina's many beach municipalities and allows a huge verdict to stand based

on speculation and inaccuracies. Oceans can be inherently dangerous, and municipalities have the option of providing no lifeguards at all. By allowing improper standard of care evidence and by finding non-prejudicial the admission of annual gross sales data of a private life guard business where the recognized "main theory" of plaintiff's case was that Lack's was a "for profit" and was focused on merchandising rather than lifeguarding, among other conclusions, the Opinion is creating a scenario where the lifeguard options available to coastal municipalities, which were provided as options by the General Assembly expressly, are illusory.

I. The Court misapprehended the applicable standard of care.

The Court's Opinion rejects Lack's argument that the Franchise Agreement between it and the City of Myrtle Beach and the applicable statutes and ordinances authorizing said agreement provided the applicable standard of care.[1] Respectfully, this is a misapprehension.

South Carolina law authorizes local governments to provide lifeguards ***if they choose to do so***. S.C. Code Ann. § 5-7-145. Therefore, the starting point is no lifeguards required. Moreover, even where a local government ***does*** choose to provide lifeguards, it faces no liability pursuant to the South Carolina Recreational Use Statute, S.C. Code Ann. § 27–3–60, unless the Plaintiff can show grossly negligent, willful, or malicious failure to guard or warn against a dangerous condition. *See Mena v. Lack's Beach Serv., Inc.*, No. 4:06-CV-2536-TLW, 2008 WL 8850813, at *2 (D.S.C. Apr. 16, 2008) (concluding that the City there owed the plaintiff "no duty of care to protect him, or warn him of, any dangers inherent in swimming in the Atlantic Ocean").

[1] In reaching this holding, the Court noted that Lack's agreed that "there is a national standard of care." Opinion p. 4. This statement was made by George Lack on cross examination about compliance with safety rules and competency generally. (Tr. 288:9-289:5; R. 430-431.) Mr. Lack was in no way agreeing that there was a national standard which overrode the responsibilities and duties contemplated by the Franchise Agreement. Mr. Lack was not abandoning, by this one statement made on cross-examination, the entire defense of Lack's Beach Service, Inc. that the Franchise Agreement and the operations of Lack's approved by the City were controlling.

In *Corbett v. City of Myrtle Beach, S.C.*, 336 S.C. 601, 521 S.E.2d 276 (Ct. App. 1999), this Court confirmed that where a local government retains a private contractor to provide lifeguarding services, the contractor cannot rely on the Recreational Use Statute because it is not an "occupant" of the land and is not "in control of the premises." *Id.* at 606, 521 S.E.2d at 279. However, the Court remanded for further development to determine what duty, ***if any***, [the company] owed" to the Plaintiff. *Id.* (emphasis added).[2] As the Court explained, a duty exists if "created by **statute**, **contract**, relationship, status, property interest, or some other special circumstance." *Id.* at 610, 521 S.E.2d at 281 (emphasis added).

Here, a private company was utilized, and the Franchise Agreement (specifically authorized by statute) is the sole mechanism for setting any standard, just as this Court suggested in *Corbett*. Here, the Court's Opinion acknowledges that the Franchise Agreement "appears to acknowledge that some of Lack's lifeguards would engage in a dual role." *See* Opinion p. 8. However, the Court nevertheless disagreed that the arrangement was appropriate, concluding that the Franchise Agreement set forth no standards for the dual role employees.[3] Respectfully, however, the Court overlooked the testimony of the City Manager for Myrtle Beach which explained that the City, through the governing City Council, was well versed with Lack's operational structure, procedures, and training requirements and it ***expressly approved*** of and allowed Lack's lifeguards to engage in limited commercial sales while also simultaneously

[2] Few cases have addressed claims arising out of alleged negligent ***ocean*** lifeguarding, and the handful that do so review it in the governmental tort claims act liability context. *See, e.g.*, *Stempkowski v. Borough of Manasquan*, 506 A.2d 5, 7-8 (N.J. Super. Ct. App. Div. 1986) ("There can be no liability on the part of the municipality for injuries caused exclusively by the action of the ocean."); *Fluehr*, 732 A.2d at 1040 ("Since 1987, California courts, like the Third Circuit in *Kowalsky* interpreting the TCA, have consistently refused to permit recoveries against municipalities for injuries proximately caused by natural conditions of the ocean, regardless of whether lifeguards were present.").

[3] There can be no reason for providing for "lifeguard only" positions if the other employees were performing only lifeguard services. Direct testimony from the City Manager demonstrated that "Dual Role" lifeguarding was contemplated, the City was aware of it, and it was condoned.

fulfilling their role in overseeing beach safety and, if necessary, providing ocean rescue lifeguarding services – in other words, "dual role." (Trial Tr. at 633:12-20, 634:2-25; R. 775-776.)

The Opinion is thus in error and misapprehends that the testimony of the head of a private nonprofit or Plaintiff's expert witness could overlay ***additional*** duties or standards of care (over and above the franchise agreement and City-approved operation) owed by the company to beachgoers.[4] The Court's holding about the standard of care could have serious public policy and economic implications because private companies may be unwilling to contract to provide lifeguarding services in the face of this decision. Local governments may determine (as many throughout the State already have) that they lack the expertise or funding to directly staff the beach with government-employed lifeguards. The end result will be less beaches with lifeguards, which could detrimentally impact beach safety in addition to having other ramifications like a negative impact on tourism.[5] The Court should thus grant rehearing and reverse.

II. The Court overlooked the dearth of evidence supporting causation.

A. Respondent's "dual role" evidence was speculative, and its prejudice greatly outweighed any probative value.

Further, there was insufficient evidence of causation and the standard of care imposed by the opinion essentially creates strict liability. At its heart, Respondent's theory of the causation was that the Lack's lifeguards failed to spot Mr. Wolde struggling in the water.[6] There was no direct evidence that any lifeguard failed to spot Mr. Wolde, however. Although testimony and

[4] The Opinion, for example, holds that the USLA correspondence alone could support the jury's conclusion that the dual role was an "unsafe practice and in violation of the accepted standard of care," Opinion p. 9, despite such being expressly condoned by City via the Franchise Agreement and longstanding practice.

[5] *See Fluehr v. City of Cape May*, 732 A.2d 1035, 1040 (N.J. 1999) (discussing an amicus brief filed in that case raising those very concerns because "even the most vigilant lifeguards are not guarantors of the safety of those who venture into the ocean" and if liability was imposed, municipalities would address it either by restricting access to coastal waters or removing lifeguards to avoid the potential for liability").

[6] Respondent disclaimed any claim about the resuscitative efforts once Mr. Wolde was on the beach and the trial court granted directed verdict on that issue. (Trial Tr. 615:14-19; R. 757.)

evidence supported that lifeguard L-21 (not L-22) was on his lunch break ***as permitted by the Franchise Agreement***, both adjacent lifeguards were covering his sector along with their own ***in accordance with the procedure approved under the Franchise Agreement***. The Franchise Agreement provided that the schedule for lunch breaks would be jointly determined by the City and Lack's, staggering them so that "only every third lifeguard will be off-stand during designated lunch hours."[7] (*See* Franchise Agreement § 2; R. 2147.)

Therefore, without any direct evidence, Respondent turned to circumstantial evidence. A critical component of Respondent's circumstantial case utilized Lack's gross sales revenues, which Respondent used to give the jury the impression that making commercial sales were the lifeguards' true focus (rather than scanning the water and ensuring safety). Even the Opinion cites the daily sales revenue of $1,100 for stands L-20, L-21, and L-22 as support for a standard of care violation despite acknowledging that the admission of this evidence was "arguably error." *See* Opinion pp. 6, 9. The introduction of this evidence was highly prejudicial. In *Sulton*, the Supreme Court expressly found the prejudice from informing the jury about a corporation's net operating revenue is "***self-evident***," *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 646 (2012) (emphasis added). Here, however, the Opinion holds otherwise. If such evidence is too prejudicial for the punitive damages phase—where the defendant has already been found both liable and to have acted recklessly—it cannot be nonprejudicial in the actual damages/liability phase. The Court's holding to the contrary renders *Sulton* and *Branham v. Ford Motor Corp*. 390 S.C. 203, 701 S.E.2d 5 (2010), on which it relied, toothless on this point.

[7] This is precisely the situation at the time of the incident, with one lifeguard out of three on his lunch break. The Court nevertheless cites this as a standard of care violation, *see* Opinion p. 10, despite it being expressly permitted by the Franchise Agreement. (*See* Franchise Agreement § 2; R. 2147.)

In addition to the "self-evident" undue prejudice, the sales data was particularly problematic here. The jury heard and saw detailed daily, monthly, and yearly stand revenues for Lack's. This data, however, in no way supported that any relevant lifeguard was ***actively engaged in a commercial sale around the time of the Wolde incident***.[8] Instead, the jury was allowed to speculate that since sales were ongoing throughout these periods of time, the lifeguards must have been making sales and not paying attention at the time of the incident.

Additionally, this evidence was also prejudicial because during the actual damages phase the jury heard this misleading gross sales revenue information, which gave the impression Lack's was a successful business that generated over $1.5 million dollars in rental sales revenue alone each year. Then, in the punitive damages phase, the jury heard that Lack's actually had a negative net worth and Respondent's counsel attacked Lack's witness's credibility on this issue. (*See* Tr. 963:4-964:25; R. 1105-06.) Despite being charged that punitive damages are not designed to bankrupt the defendant, (Tr. 968:3-7; R. 1110), the jury then awarded $7 million on top of the $13 million in actual damages it had already awarded. The jury did this because they heard gross sales revenue evidence that made the net worth evidence look untrustworthy or appear as if something nefarious was happening with Lack's business valuation. If this ruling is not reversed, trials will be infected with this kind of evidence going forward, in violation of the clear pronouncements from the Supreme Court in *Branham* and *Sulton* that such evidence is inadmissible. Such evidence

[8] The filings from the workers' compensation proceeding about which Respondent cross examined George Lack, and the USLA correspondence from 10+ years prior, served a similar speculative and improper purpose. The objections to this evidence should have been sustained, not overruled. This Court relies upon the improper, objected to cross examination of Mr. Lack as probative evidence supporting Respondent's causation points. Mr. Lack should not have been forced to answer questions about these irrelevant topics. None of this was reliable circumstantial evidence, either. As the trial court correctly charged the jury, to support a finding of fact, the circumstances must lead to that fact with "reasonable certainty" and its existence cannot be based on "speculation, surmise, or conjecture." (Tr. 925:20-25; R. 1067.) Respondent introduced no evidence, direct or circumstantial, which would support a conclusion that any of the relevant lifeguards were distracted to a ***reasonable certainty***.

will be offered in the actual damages/liability phase based on some argument of relevance and, if permitted at trial, then the appellate court on review can speculate that the erroneously admitted evidence probably did not affect the jury's determination. The Supreme Court's admonitions in *Branham* and *Sulton* that this type of evidence should not be admitted are clear. The Court should therefore grant rehearing and reverse.

B. Lack's preserved its other breach of duty and proximate cause arguments.

The Court found that Lack's did not preserve any standard of care or proximate cause arguments except for those related to "dual role." Opinion p. 9-10. However, Lack's moved for both directed verdict and JNOV contending that there was insufficient evidence to establish a breach of duty or proximate cause, which was sufficient to preserve these grounds. (*See* Trial Tr. 618:22-619:11; Lack's Mot. for JNOV; R. 760-71, 1510-13.) Lack's focused on the dual role on directed verdict initially, but the Court then explained that there was a jury question as to whether the lifeguards were negligent generally. (Trial Tr. 618:22-619:11; R. 760-61.) Therefore, counsel proceeded to address proximate cause since the court had already found that a reasonable jury could find a breach of duty. Counsel argued that "there's just no direct or circumstantial evidence to indicate proximate cause has been . . . proved or that should go to the jury" and incorporated Lack's summary judgment arguments which had raised a litany of reasons why there was insufficient evidence of a breach of the standard of care or proximate cause. (Tr. 619:6-11; Lack's Mot. for Summ. J. pp. 3-4; R. 760, 2083-84.) The trial court reiterated that there was a jury question on proximate cause. Therefore, Lack's arguments on duty, breach, and proximate cause were preserved. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

As Lack's contended in its briefing to this Court, 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 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, this was the crux 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. The Court should grant rehearing since this was not sufficient to establish a breach of any duty or proximate cause, and Lack's arguments were preserved, which the Opinion overlooked.

C. The Court's holding imposes a strict liability standard.

In addition to its holding on the impropriety of the dual role, the Court identified several other standard of care violations. First, the Court noted that the lifeguard stand closest to the incident, L-21, was "not staffed" at the time of the incident due to the lifeguard's lunch break, yet that sector of the beach was not closed. Again, however, this was the procedure anticipated by the Franchise Agreement and the City did not require Lack's to close the beach in this circumstance since the adjacent lifeguards were to cover that sector in addition to their own.

Second, the Court cites Respondent's expert's opinion that Lack's failed to properly train the lifeguards and that Mr. Wolde was a distressed swimmer and should have been recognizable by attentive lifeguards.[9] Opinion p. 10. These opinions were speculative and unreliable and the

[9] The Opinion also notes that Dr. Griffiths testified that Lack's violated the standard of care due to its: (1) failure to warn about the hazardous conditions or close the affected sections of the beach and (2) understaffing the beach. The first opinion overlooked that the weather report merely flagged the ***potential*** for hazardous conditions and possibility of rip currents. It did not identify any active rip current activity. Moreover, there ***was*** testimony that Lack's appropriately posted red flags to warn of these conditions and imposed a waist-deep limit for swimming. (*Id.* at 727:5-21; R. 869.) Testimony that someone "did not see" the flags is not evidence they did not exist, and there was affirmative evidence they were there. As to the staffing issue, although there was one less "lifeguard only" than contemplated by the Franchise Agreement on the day of the incident due to someone unexpectedly calling out sick, (Trial Tr. 361:17-362:6; R. 503-04), it was entirely speculative to assume that this lifeguard only would have been anywhere near the vicinity of the incident since these staff members covered a six block territory and had no set schedule for where they would be or when. (Trial Tr. 445:1-446:16, 696:10-16; R. 587-88, 838.) Although the Opinion states that Lack's agreed that an additional lifeguard "could have made a difference if he or she had been present," this was not the concession that it is painted to be. This quote came from George Lack's testimony

Opinion's adoption of them imposes a strict liability standard. Under Dr. Griffith's standard, if a swimmer is in distress, a lifeguard ***must*** see and rescue that victim to satisfy the standard of care. The ocean is inherently dangerous and unpredictable, and swimmers assume a degree of risk when they enter. *See, e.g.*, *Sartoris v. State*, 133 A.D.2d 619, 619, 519 N.Y.S.2d 728, 729 (1987) ("One who engages in water sports assumes the reasonably foreseeable risks inherent in the activity."); *cf. Mena v. Lack's Beach Serv., Inc.*, No. 4:06-CV-2536-TLW, 2008 WL 8850813, at *4 (D.S.C. Apr. 16, 2008) (noting "the obvious risks inherent in ocean swimming"); *Fuhrer v. Gearhart By The Sea, Inc.*, 719 P.2d 1305, 1308 (Or. Ct. App. 1986) (noting that the state owed no duty of care to the "users of the ocean in its natural state," which would include "riptides and undertows"). Respectfully, if this is indeed the standard of care for ocean lifeguarding, no local government or private company will ever be willing to provide these services.

The plaintiff bears the burden to produce affirmative evidence—not mere speculation[10] or the absence of evidence—to support each element of her claims. *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779 (Ct. App. 2010). Respondent failed to meet this standard here. This Court should grant this petition, reverse, and remand for entry of JNOV.

III. The Court overlooked the lack of evidence supporting conscious pain and suffering and jury's misapplication of the mortality tables in its survival verdict.

The Court's Opinion essentially holds that damages for conscious pain and suffering during drowning are inherent, noting that it is "common sense" that the struggle to escape is part of the

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responding to a ***hypothetical*** from plaintiff's counsel which broadly asked that he acknowledge that having an extra lifeguard ***in the vicinity of the tower where the incident occurred*** could have made a difference to which he responded "theoretically, yes." (Tr. 451:14-18.) There was **no evidence** that such a "lifeguard only," had he not been sick, would have been in the vicinity, however.

[10] Lack's lifeguards wore yellow shirts and blue shorts. (Tr. 812:4-20; R. 954.) The Chandler testimony regarding a "lifeguard" was that the lifeguard had no shirt and red shorts. (Chandler Dep. 16:7-17:6, 56:20-57:7; R. 2276, 2286.) The Opinion embraces the speculation put forward by Plaintiff's counsel that the individual Chandler saw was a Lack's lifeguard. The **evidence** does not show this. There were other lifeguards on and around the beach from Ocean Rescue and the Police Department's Beach Patrol. (Tr. 434:21-435:17, R. 576-77.)

drowning process. Opinion p. 11. However, the Court overlooks that this could **only** be true if the person is placed in such a position by the defendant. Respectfully, the Court misapprehends the manner in which this accident occurred. It is undisputed that the Woldes chose to enter the ocean to swim and there was no evidence of any active rip current activity at that location prior to the incident. Mr. Wolde willingly entered the ocean, which can be dangerous and unpredictable even absent rip current activity, and then began to struggle as the family got caught in the current. This scenario cannot support damages for conscious pain and suffering for which ***Lack's*** is liable. Otherwise, any person who enters the ocean and starts to struggle with the waves could sue the lifeguards for not mitigating the length of their struggling.

And this is why expert testimony was necessary to establish the requisite causal connection. Two questions went unanswered at trial: (1) at what point did the struggle become active drowning such that Mr. Wolde was experiencing pain and suffering? and (2) at what point during the struggles did it become Lack's fault for not reaching Mr. Wolde and mitigating the drowning? The jury was permitted to speculate about both of these questions and find that the entire struggle from start to finish supported an award of damages against Lack's, which they valued in the millions (a significant outlier compared to the other survival awards in drowning cases identified by Lack's).

The Opinion also misapprehends the mortality table issue, finding this to be unpreserved. This issue was raised to and ruled upon by the trial court. As Lack's explained, the trial court correctly informed the jury that the mortality tables should be taken into consideration when assessing the amount of damages for the wrongful death. The jury, however, used the mortality tables in assessing its award for conscious pain and suffering, awarding $3.73 million (*i.e.*, $100,000 for the remaining 37.3 years of Mr. Wolde's life). Lack's raised its argument about the improper use of the tables. The trial court directly addressed this argument and rejected it, finding

that Lack's failed to object to the jury charges. Because the argument was properly raised to the trial court and ruled upon, this issue was preserved.[11] The Opinion overlooks these critical issues on the survival claim. The Court should grant rehearing, reverse, and remand for entry of JNOV.

IV. The Opinion overlooked the lack of evidence supporting recklessness justifying an award of punitive damages.

Again, there was insufficient evidence to support a duty, breach, or proximate cause, which was dispositive on liability much less recklessness. On this issue, the Opinion again cites the impropriety of dual role lifeguarding, the procedure authorized for lunch by the Franchise Agreement, and the training and staffing issues. Lack's incorporates and reasserts its prior arguments on this issue, which it contends the Court overlooked or misapprehended.

V. The Opinion overlooked the prejudicial evidentiary errors warranting a new trial absolute.

As detailed above, the three categories of highly unduly prejudicial evidence identified by Lack's were all used by Respondent to give the illusion that Lack's lifeguards were actively engaged in commercial sales pursuant to their (authorized by law and contract) dual role ***at the time of the incident***. The sales data reflected daily, monthly, and yearly stand totals. However, it is entirely speculative to assume when sales were occurring during the day, much less that the ***specific lifeguards in question were distracted because they were performing a sale at the time of the incident***.[12] The workers compensation filings served a similar purpose, encouraging the

[11] As the Supreme Court explained in *Elam*, a party "must" file a Rule 59(e) motion when an argument has been raised to, but not ruled on, in order to preserve it. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). A Rule 59(e) is discretionary and not required for preservation when the party merely believes that the court "has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* As the Opinion acknowledged, the trial court did not fail to rule but rather Lack's contended that it "mischaracterized" Lack's argument when it ruled upon it. Opinion p. 20. Therefore, another Rule 59(e) motion was not required to preserve the issue.

[12] In support of its finding no prejudice, the Court cites Lack's introduction of net worth evidence during the "damages phase." Lack's, however, did not introduce this until the ***punitive*** damages phase when net worth information is

jury to speculate that over 99% of the lifeguards' duties were associated with sales, which was not what those legal filings concerned or represented in any way. They were solely discussing the insurable ***risk*** and were irrelevant in any event due to being from nearly two decades prior. Finally, the USLA letters were used to show this nonprofit organization disapproved of the dual role arrangement and further suggest that Lack's was focused on making sales rather than safety. The Court noted that the letters were relevant to showing Lack's "knowledge of the dangers of dual-role lifeguarding," but, again, the City expressly contemplated and approved of this arrangement, pursuant to the Franchise Agreement allowed by statute. Moreover, these letters were also from ten plus years prior and thus were not remotely relevant to what was occurring on the beach on the day of the incident. The Court overlooked these points. The jury relied on this improper evidence in reaching its verdict. Therefore, the Court should grant rehearing and, if it is not inclined to reverse the denial of JNOV, should reverse and remand for a new trial absolute.

VI. The Court misapprehended Lack's preservation of its arguments on the errors with the court's bifurcation procedure and the impropriety of the wrongful death award.

The Court found that Lack's did not preserve its argument on the bifurcation issue because Lack's agreed to a verdict form with a question on recklessness. However, as noted, Lack's counsel asserted that if the Court used that verdict form, it needed to couple that with an instruction explaining what that finding would mean (a second phase). (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. 868:17-869:2; R. 1010-11.) As Lack's counsel argued, having the jury answer yes or no to that question without context

almost always introduced in accordance with *Branham* and *Sulton* (and gross sales revenues have expressly been found to be inherently prejudicial and inappropriate evidence).

was improper. (*Id.* at 868:24-869:14; R. 980-1011.) The court nevertheless adopted the verdict form containing that question without further explanation, which necessarily rejected Lack's position and preserved it for review. Moreover, although the Court contends that Lack's failed to cite authority supporting the propriety of such an instruction, the punitive damages statute itself justifies it. *See* S.C. Code Ann. § 15-32-520(B) (noting that in the first stage of bifurcated proceedings "the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damage").

Second, Lack's argument about the wrongful death verdict exceeding Respondent's counsel's suggestion lending credence to the jury's improper motivations was not abandoned. Lack's detailed the specific statements of Respondent's counsel in closing, (*see* Trial Tr. 905:18-906:5; R. 1047-48), and although did not give an express record cite, Respondent's counsel did not dispute that this an accurate recitation of its closing or otherwise contend this was an inaccurate recitation of their statements (and in fact they cited to the relevant portion of the record – *see* Br. of Resp. p. 42). Respectfully, finding that this issue was abandoned was error.

VII. The Court's due process review overlooked the lack of reprehensible conduct and improperly found that Lack's argument on the statutory factors was not preserved.

Here, again, the Court relied on the inadequate training records, understaffing especially due to the authorized lunch procedure, and use of dual role lifeguarding to find a "moderate degree of reprehensibility" justifying the jury's award under its due process review. However, none of these factors established liability for negligence as detailed above, much less reprehensible conduct. The Court characterized this as "recidivist" conduct but, again, it was expressly authorized and approved by the Franchise Agreement, City approval, and longstanding practice.

The Court also found that Lack's did not preserve its argument that the trial court erred by failing to apply the statutory factors in conducting its post-judgment review, *see* S.C. Code Ann. § 15-32-520(E)-(F). Respectfully, this was error. After the post-trial briefing closed, the trial court entered a *sua sponte* Order solely addressing its due process review of punitive damages on November 28, 2022. Lack's moved to reconsider that order via a Rule 59(e) motion filed December 2, 2022. All pending motions were heard on March 9, 2023. The trial court then entered an order on April 10, 2023. Importantly, in Footnote 79, the trial court denied all of Lack's arguments on punitive damages, stating it "has issued a separate due process analysis of the constitutionality of the punitive damages award in this case. Consistent with that opinion, the Court denies LBS's post-trial motions to the extent they challenge the constitutionality of the award." (Order on Post-trial Motions p. 38 n.27; R. 42.) This was a ruling on Lack's Rule 59(e) motion. Therefore, this Court erred in finding this issue was not preserved.

VIII. The Court overlooked Lack's Conditional Motion for Reduction of Damages and Motion to Amend its Answer Pursuant to Rule 15(b).

Finally, the Court overlooked the import of this motion despite Lack's raising this in its opening brief. (Br. of Appellant pp. 3-4.) In the Conditional Motion for Reduction of Judgment ("Conditional Motion"), Lack's noted that JNOV or a new trial absolute should be granted. (Conditional Motion; R. 1566.) However, the City of Myrtle Beach delegated its governmental power to Lack's and, as a result, the doctrine of derivative sovereign immunity applies and entitles Lack's to claim the protections of the South Carolina Tort Claims Act. (*Id.*) Therefore, if the trial court allowed any verdict amount to stand as a judgment, Lack's moved that the Court must, at a minimum, reduce the amount of any judgment to the SCTCA cap on actual damages as a matter of law and remit the punitive damages to $0 since the SCTCA does not permit their recovery (*Id.*)

This Conditional Motion was made separately from Lack's other post-trial motions, as it was essentially a motion in the alternative (only needing to be addressed if the Court was going to deny Lack's JNOV and new trial motions).

The trial court did not address this motion or the related motion to amend in its final order addressing the other post-trial motions. Respondent contended that Lack's was required to file a Rule 59(e) motion to preserve the arguments in the motions. This is not correct, as the trial court simply did not yet rule on the motions. They remain pending.

Respondent also contends that Lack's appeal precluded and precludes the trial judge from ruling on the conditional motion. However, Lack's had no choice but to appeal when it did due to Respondent's aggressive efforts to execute on the judgment via appointment of a receiver (receiver appointments were very prevalent at that time) and the lack of any stay order from the lower court, despite Lack's motion for a discretionary stay. Lack's needed to appeal in order to procure the mandatory stay that statutorily emanates from the appeal, which did in fact result in a stay order from the trial court and a denial of the motion to appoint a receiver.

After appeal, Lack's moved for a limited remand to permit the trial court to address the conditional motions to the extent it was necessary at the time, but this Court denied the motion "***without prejudice to Appellant's ability to argue that the motions remain pending and are properly before the circuit court***." (Order p. 2.) The issues raised in the Conditional Motion and Motion to Amend remain pending and will only ripen if and when the judgment is affirmed and the remittitur issues. The Court should grant rehearing and expressly note that the trial court[13] shall address these motions (assuming the Court does not grant rehearing and reverse).

[13] Given Judge Curtis's election to the Court of Appeals, this motion should be remanded to be heard by the Chief Administrative Judge of the Circuit.

CONCLUSION

For the reasons stated above and in Lack's prior briefing, the Court should grant rehearing, reverse the judgment of the trial court, and remand for entry judgment in favor of Appellant Lack's Beach Service. Failing this, the Court should grant rehearing, reverse, and remand for a new trial absolute.

Respectfully submitted,

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July 31, 2025

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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 Joe Doe Lifeguard, Defendants,

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Lack's Beach Service, Inc., do certify that I have served all counsel of record in this action with a copy of the document(s) set forth below under Supreme Court Order dated April 24, 2024.

Pleading(s): Petition for Rehearing and Suggestion for Rehearing En Banc

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July 31, 2025

Via Hand Delivery
The Honorable Catherine S. Harrison
Chief Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Meswaet Abel v. Lack's Beach Service
Appellate Case No. 2023-000569
Our File No. 075329/01500

Dear Ms. Harrison:

Enclosed is our check in the amount of $50.00 for the filing fee for Appellant Lack's Beach Service, Inc.'s Petition for Rehearing and Suggestion for Rehearing En Banc in the above matter, which was electronically filed with the Court on July 31, 2025.

Sincerely,

s/ Blake T. Williams

Blake T. Williams

BTW:eh
Enclosure
cc: Via email:
William Mullins McLeod, Jr., Esq.
John Christopher Pracht, V, Esq.
Harry Cooper Wilson, III, Esq.
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