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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

DISCUSSION

I. Proximate Cause

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

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

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

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

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

[2] Trial Tr., 586:1-4; 589:18-24.
[3] Trial Tr., 585:3-11.
[4] Trial Tr., 585:3-11.

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

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

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

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

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[5] Trial Tr., 586:13-20.
[6] Trial Tr., 543:9-12.
[7] Trial Tr., 543:6-544:5.
[8] Trial Tr., 196:17-24; 197:3-10.
[9] Griffiths, 96:23 – 97:16.
[10] *See RFT Mgmt. Co.*, 399 S.C. at 331, 732 S.E.2d at 170-171 ("[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.") (citing *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973)).

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

> A. Clearly by all the evidence provided in this case, the lifeguards were not adequately tested, not trained, not on duty at the time, if you look at the beach service line up at any given time during this incident. People were out to lunch without alternative coverage. They were supposed to have even lifeguard onlys on duty, they had less than half of the required amount. And plus provided the dual role is unacceptable. It's both unacceptable in our industry and it's dangerous. Lifeguards cannot be performing other duties that divert their attention from the water. And so, lack of training, lack of testing, lack of supervising, and the people on the stands were put in a position of failure. They were not adequately trained or supervised or tested to be providing ocean lifeguarding service, surf guarding service protection for the people.
>
> Q. Yes sir. And was operating this endeavor in a dangerous and unsafe manner a contributing cause to Mr. Wolde's death?
>
> A. Yes, I believe it was a direct cause to his death. Yes sir.[11]

As to training, evidence was offered that LBS's lifeguards were untrained and unequipped to comply with the standard of care. LBS's chief operator, Weslyn Lack-Chickering, testified that LBS had no training records for any of the lifeguards, including those assigned to stands at L-20, L-21, and L-22.[12] She further admitted that these lifeguards missed multiple days of training because they were not in the country when the training took place.[13] The evidence at trial also showed LBS was understaffed on the day of the incident and that understaffing was a contributing cause to Mr. Wolde's death.[14] In fact, George Lack, the owner of Lack's, conceded that being

[11] Griffiths, 111-112.
[12] Trial Tr., 842:7-15.
[13] Trial Tr., 838:8-839:4.
[14] Trial Tr., 362:3-6.

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

> Q. Under your testimony, you're one short. Well, can't one short make all the difference between life and death when it's the tower responsible for the section of the public beach where Mr. Wolde drowned to death?
>
> A Theoretically, yes.[15]

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

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

[15] Trial Tr., 451:14-18.
[16] Griffiths, 101-102.
[17] Griffiths, 102:22-103:6.
[18] Griffiths, 93:1-9; 93:22-23.

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

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

II. Dual Role Negligence

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

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

[19] Griffiths, 68:21-25.

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

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

Evidence at trial further shows LBS's staff were required to make commercial sales, were financially motivated to make sales,[21] were required to keep track of all sales activity, were required to immediately update all sales records, and were required to maintain a seating chart—all in addition to their lifesaving duties.[22] Indeed, the sales totals for the date of the incident established that LBS's staff did in fact make sales at the three lifeguard towers closest to the drowning incident, towers L-22, L-21 and L-20.[23] Consistent with this evidence, Plaintiff's expert testified that: "all three [lifeguards, *i.e.*, L-22, L21 and L-20] were engaged in sales. And I would

[20] Chandler Video Tr., 16:10-19:1.
[21] Trial Tr., 307:9-12 (confirming that LBS lifeguards earn commissions based on sales of umbrella and beach chair rentals).
[22] Plt. Trial Ex. 10, p.10.
[23] Plt. Trial Ex. 17.

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

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

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

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[24] Griffiths, 232:6-8.
[25] *Id.* at 232:2-10.
[26] Plt. Ex. 17.
[27] Trial Tr., 543:6-544:5; 585:3-11; 586:1-20; 589:18-24.
[28] Trial Tr., 196:17-24; 197:3-10.
[29] To the extent LBS argues that evidence of dual role negligence led to confusion of the issues, mislead the jury, constituted undue delay or a waste of time, LBS never objected to this evidence or argument at trial. *See* Rule 403, SCRE. Rather, LBS's sole objection to this evidence was prior to trial and based on the false assumption that "[w]hile Plaintiff's attorneys are expected to harp on profits over people the completely conjectural and speculative evidence as to commercial activities of the lifeguards would be irrelevant, non-probative and highly prejudicial." (*See* Def. MIL, p. 9). However, the prejudice LBS alleged before trial did not occur at trial. At no time during the trial was there any reference to "profits over people." Notwithstanding, as shown above, evidence of LBS's dual role practice was properly admitted as relevant to the liability issues of standard of care, breach, and proximate cause. *See* Rule 401, SCRE (evidence is admissible if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

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

III. Admission of Evidence

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

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

A. LBS's Inconsistent Factual Position in Prior Litigation

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

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

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

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

B. Lack's USLA Decertification

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

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

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

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

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

[31] Trial Tr., 473:15-17 ("… we [USLA] do set the standard.").
[32] Trial Tr., 495:18-25.
[33] Trial Tr., 478:5-9.

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

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

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

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

[34] Trial Tr., 478:5-9.

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

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

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

[35] Franchise Agreement, Plt. Trial Ex. 15, p. 2:29-30.
[36] *See* Lack's Mot. New Trial Absolute, p. 21.
[37] *See* Lack's Mot. New Trial Absolute, p. 21 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010)).

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

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

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

[38] *See* Lack's Mot. New Trial Absolute, p. 21.

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

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

IV. JNOV on Survival

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

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

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

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

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

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

[40] Trial Tr., 543:23-544:5.
[41] Trial Tr., 584:7-13.
[42] Trial Tr., 584:7-13; 585:17-586:4.
[43] Trial Tr., 586:1-4.
[44] Trial Tr., 586:1-4; 587:11-588:3; 606:24-607:3.
[45] Trial Tr., 589:18-24.
[46] Chandler Video Tr., 59:19-22.
[47] *Id.*, 31:2-5.
[48] *Id.*, 62:8-11.

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

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

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

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

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[49] *Id.*, 21:11–19.
[50] *Id.*, 22:1-9.
[51] Trial Tr., 466:2-4.
[52] Trial Tr., 466:8-10.
[53] The coroner's report indicated that at the time of Mr. Wolde's drowning he was trying to save his daughter's life. *See* Ex. 20, p. 4.

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

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

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

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

V. Motion for New Trial on Survival Damages

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

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

[55] *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) ("It is well settled that an issue may not be raised for the first time in a post-trial motion.").
[56] Trial Tr., 939:19-22 (responding, "None from the defendant, Your Honor.").

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

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

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

[57] Wubit testified the sequence of "going under and coming back up, . . . gasp[ing] for air and [] yell[ing] for help" lasted for "a long period of time." (Trial Tr., 586:1-4).
[58] Trial Tr., 456:2-10; 468:4-10; 469:11-12; *See* Plt. Ex, 19, 20 & 21.

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

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

VI. Wrongful Death Damages

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

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

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

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

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

[59] Trial Tr., 587:11-588:3.
[60] Trial Tr., 570:15-22; 226:14-227:14.
[61] Trial Tr., 570:20-571:8; 528:23-529:9.
[62] Trial Tr., 232:2-8; 536:18-19.
[63] Trial Tr., 243:22-244:2.
[64] *Id.*

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

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

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

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

[65] Trial Tr., 246:10-23.
[66] Trial Tr., 249:12-15.
[67] Trial Tr., 249:5-13.
[68] Trial Tr., 590:12-13.
[69] Trial Tr., 197:22-198:1.
[70] Chandler Video. Tr., 25:16-26:3
[71] *Id.*, 26:6-9.

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

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

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

[72] Trial Tr., 905:14-906:11.
[73] *See* Lack's Mot. New Trial Absolute, pp. 26-28; New Trial Nisi, pp. 6-8.

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

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

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

VII. Punitive Damages

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

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

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

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

A. JNOV on Punitive Damages

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

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

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

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

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

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

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

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

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

B. Recklessness in First Phase of Trial

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

> PLAINTIFF'S COUNSEL: I thought that you did the reckless question on the first verdict form, and that way -- I've done that in front of Judge Young, is the way we did it. And, that way, when they render that verdict, you know whether or not there's going to be a second phase, because they either find reckless, willful, or wanton, or they don't. You see what I'm saying?
>
> THE COURT: Yeah. I mean, it either eliminates the need to go forward with the second phase --
>
> PLAINTIFF'S COUNSEL: Right. And we don't make punitive damages arguments to the jury in the first phase, *but the evidence of recklessness comes in*, and if they make that determination, then I guess we bring them back in, and then we would argue the Gamble factors.

[75] *See Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 111, 498 S.E.2d 395, 406 (Ct. App. 1998) (failure to object constitutes a waiver of issue).
[76] Trial Tr., 845:11-846:19.

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

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

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

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

[77] Trial Tr., 845:11-846:6.

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

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

C. New Trial Absolute on Punitive Damages

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

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

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

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

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

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

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

[78] Trial Tr., 968:3-7.

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

CONCLUSION

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

IT IS SO ORDERED.

_____

Kristi F. Curtis, Circuit Court Judge

Sumter, South Carolina
April 10, 2023

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

Horry Common Pleas

Case Caption: Meswaet Abel , plaintiff, et al VS Lacks Beach Service , defendant, et al

Case Number: 2019CP2607075

Type: Order/Other

So Ordered

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