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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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 A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Lack's Beach Service, Inc. ("Lack's") petitions this Court to issue a writ of certiorari to review the Court of Appeals' opinion in the matter styled *Abel v. Lack's Beach Service et al.*, Op. No. 6118 (S.C. Ct. App. filed July 16, 2025) (Howard Adv. Sh. No. 26 at 92) ("Opinion"). This Court should grant Lack's Petition and reverse the Court of Appeals.

This case embodies the adage that hard cases make bad law. In addressing a tragic event, the Opinion creates a significant public policy problem for South Carolina's beach municipalities and South Carolina tourists. It allows a huge verdict to stand based on speculation, inaccuracies, and in violation of this Court's precedents on inadmissible evidence. Oceans are inherently dangerous, and municipalities have the option of providing no lifeguards at all. By, *inter alia*, allowing improper standard of care evidence and by finding non-prejudicial the admission of ***annual gross sales data*** of a private lifeguard business where plaintiff's case focused on Lack's as a "for profit" distracted from safety, the Opinion creates a scenario where the lifeguard options made available by the General Assembly to coastal municipalities are illusory. Fewer lifeguards at South Carolina beaches is the highly likely end result, which is a result never intended or desired by the General Assembly.

The standards envisioned for certiorari under Rule 242, SCACR are more than met. The Court of Appeals' opinion conflicts with the prior precedent of this Court in several respects including *Branham v. Ford Motor Co.* The Court of Appeals erroneously determines novel public policy issues regarding the interpretation and implementation of coastal city franchise agreements

entered into with private companies pursuant to statute.[1] Other novel and important legal issues are involved, as explained below. The writ should thus issue

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals Err in Failing to Grant JNOV Because it Imposed the Wrong Standard of Care and Respondent Failed to Prove Proximate Cause?

II. Did the Court of Appeals Err in Failing to Grant JNOV when the Survival Verdict was Based on Speculative Evidence of Pain and Suffering and on the Mortality Tables (which was supposed to be used by the jury for wrongful death)?

III. Did the Court of Appeals Err in Failing to Order a New Trial Based on Admission by the trial court of Gross Annual Sales Data of Lack's, a Decades-Old Administrative Law Order Regarding Worker's Compensation Premiums, Disputes Between George Lack and non-party USLA, and its Bifurcating Without Informing the Jury of Why They Were Being Asked to Answer Whether Lack's was Reckless in Phase One?

IV. Did the Court of Appeals Err in Upholding the Punitive Damages Verdict, and in Failing to Conduct a De Novo Punitive Damages Review, Including Considering the Required Statutory Factors?

V. Did the Court of Appeals Err in Failing to Remand for A Determination of the Applicability of S.C. Tort Claims Act Caps Under the Delegated Sovereign Immunity Doctrine?

STATEMENT OF THE CASE

This $20 million plus verdict arose from the drowning of Zurihun Wolde ("Mr. Wolde") in a rip current at Myrtle Beach, South Carolina. (Compl.; R. 74.) Appellant Lack's Beach Service, Inc. ("Lack's") contracted with the City of Myrtle Beach to provide lifeguard services on the City's public beaches pursuant to a Franchise Agreement and South Carolina statute. (Franchise Agreement; R. 1740.) Under the Franchise Agreement, Lack's provided lifeguard services along a thirteen mile stretch of beach and, in exchange, was permitted to derive revenue

[1] The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on September 22, 2025.

from engaging in limited commercial sales renting beach equipment. The parties referred to this at trial as the "dual role."

Meswaet Abel ("Respondent") filed this wrongful death action against Lack's and the City of Myrtle Beach on November 1, 2019. Respondent's Complaint alleged that both Lack's and the City of Myrtle Beach breached a duty owed to Mr. Wolde to "conduct their water safety program in a reasonably safe manner," and that his drowning was a proximate cause of those breaches. The Court granted summary judgment to the City on grounds that the discretionary immunity exception applied. (R. 91-92.) There was no appeal of this ruling.

The matter proceeded to trial against Lack's from July 25 to July 29, 2022. (R. 143, 328, 520, 663, 1001.) At the end of trial, the jury returned a verdict in favor of Respondent and awarded $3.73 million on the survival claim, $10 million on the wrongful death claim, and $7 million in punitive damages. (R. 52.)

Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial *nisi remittitur*, along with a separate, but concurrently filed, Conditional Motion for Reduction of Damages[2] ("Conditional Motion") asking the court to apply the South Carolina Tort Claims Act's cap on damages if the other motions were denied. (Post-trial Motions; R. 1502, 1517, 1549, 1566.)

On March 9, 2023, the trial court held a hearing on all pending motions (including the Conditional Motion, Respondent's motion to appoint a receiver, and Lack's motion to stay. (3/9/2023 Hearing Transcript; R. 1116.) During that hearing, and in light of Respondent's position that the Conditional Motion should be denied based on waiver and failure to raise immunity in the

[2] In the Conditional Motion for Reduction of Judgment ("Conditional Motion"), Lack's noted that the trial court should grant its other post-trial motions first, which would moot the arguments raised in the Conditional Motion. (Conditional Motion; R. 1566.) However, Lack's argued that if the court allowed any verdict amount to stand as a judgment, it ***must***, at a minimum, reduce the amount of any judgment to the SCTCA cap on actual damages as a matter of law and reduce the punitive damages to $0 since the SCTCA does not permit recovery of punitive damages. (*Id.*)

Lack's Answer, Lack's orally moved to amend its Answer pursuant to Rule 15(b), SCRCP. (*Id.* at 48:2-49:6; R. 1163-64.)

On April 10, 2023, the trial court entered an Order denying Lack's motions for JNOV, new trial absolute, and new trial *nisi remittitur*. (Order on Post-Trial Motions; R. 5.) The trial court did not rule on or address the Conditional Motion or the oral motion to amend the Answer pursuant to Rule 15(b), SCRCP. Importantly, the trial court also did not address Lack's motion for discretionary stay. Meanwhile, Respondent had moved to place Lack's into a Receivership. Faced with these difficult circumstances, Lack's proceeded to appeal in order to trigger the automatic stay which attaches to the appeal, it posted a bond, and it argued no receivership was justified. The trial court thereafter granted the motion to stay based on the appeal and denied the motion by the Respondent to place Lack's into a receivership. The trial court continued to decline to address the conditional motion regarding the caps. After the appeal, Lack's requested a limited remand to permit the trial court to rule on the conditional motion regarding the caps and the motion to amend to plead the caps (to the extent such amendment was deemed a requirement). The Court of Appeals denied the limited remand motion without prejudice to Lack's arguing that its Conditional Motion and motion to amend remain pending and are properly before the trial court.[3]

This appeal followed. Lack's asserted that the trial court erred in refusing to grant JNOV due to: (1) misapprehending the applicable standard of care where applicable law expressly approved of the "dual role" arrangement, (2) failing to acknowledge the lack of evidence supporting proximate cause, (3) overlooking the lack of evidence on conscious pain and suffering which could support a survival claim, and (4) disregarding the lack of evidence supporting

[3] Ultimately, the Court of Appeals never addressed the issue of the remand to the trial court to address the caps issue, although Lack's did point this discrepancy out to the Court of Appeals in its Rehearing Petition. This failure to rule on this question of remand also justifies the issuance of a writ of certiorari by this Court. *See Argument § VIII , infra.*

recklessness that could support a claim for punitive damages. Lack's also asserted that the trial court erred by failing to grant a new trial absolute where it: (1) admitted three categories of highly prejudicial evidence, (2) disregarded the jury's improper use of the mortality tables in arriving at their survival damages award, (3) failed to appropriately bifurcate the actual and punitive damages phases, and (4) overlooked the excessiveness of the actual and punitive damages. Finally, Lack's contended that the trial court erred in its post-judgment review of punitive damages by failing to fully consider the *Mitchell, Gamble,* and statutory factors.

After oral argument, the Court of Appeals issued its Opinion on July 16, 2025. The Court of Appeals affirmed the trial court in full and denied Lack's Petition for Rehearing and Suggestion for Rehearing En Banc. Lack's now petitions this Court for a writ of certiorari.

STATEMENT OF THE FACTS

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

Mr. Wolde drowned in the general vicinity in front of Lack's lifeguard station L-21. (Trial Tr. 359:10-13; R. 501.) At the time of the incident, lifeguard L-21 was on his regularly scheduled lunch break as contemplated and permitted by the terms of the Franchise Agreement between Lack's and the City of Myrtle Beach. (Trial Tr. 359:10-13; R. 501.) Lifeguards L-20 and L-22 were tasked with covering that sector of the ocean (the ocean in front of L-21) for the short lunch period while he was away. (Trial Tr. 719:4-8; Franchise Agreement p. 4; R. 861, 1742.)

At trial, Respondent offered no direct evidence of what the lifeguards at L-20 and L-22 were doing immediately prior to or during the incident. However, Lifeguard L-22's written

statement that he was explaining the flag system to beachgoers around the time of the incident was admitted into evidence. (Trial Tr. 823:25-824:3; Def.'s Ex. 7, Stmt. of Lukasz Jaworski; R. 965-66, 2268.) Once L-22 heard the emergency code on the radio at station L-20, he "immediately started running [in] that direction." (*Id.*) A manager for Lack's, Randall Smith, testified that a lifeguard he believed to be L-20 called in a Code 3, which is a shore emergency. (Trial Tr. 742:1-9; R. 884.) Another Lack's manager, Patrick Flaherty, testified at trial that he arrived on the scene right as Mr. Wolde was being pulled out of the water by lifeguard L-20, a Lack's supervisor, and several bystanders. (Trial Tr. 699:10-18; R. 841.) The supervisor started CPR, and Flaherty attempted to use an AED device as they worked to try and save Mr. Wolde. (*Id.* at 699:19-701:9; R. 841-843.)

Respondent did not present any evidence supporting that lifeguards L-20 or L-22 could have or should have observed Mr. Wolde in distress or that, had they done so, they would have physically been able to reach Mr. Wolde quickly enough to change the outcome. Likewise, there were no "bystander" witnesses who testified they heard or observed Mr. Wolde or his children in trouble prior to Mr. Wolde's submersion and loss of consciousness. Both "bystander" witnesses stated that when they first observed Mr. Wolde, he was in an unconscious and nonresponsive condition. (Trial Tr. 61:24-62:2; 212:13-14; R. 203-04; 354.)

The only evidence presented as to the length of time Mr. Wolde struggled in the water was vague and came from Mr. Wolde's children. Respondent did not present any non-speculative evidence of how long Mr. Wolde struggled to swim or tread water, or the length of time that passed from the start of the struggle to his submersion and drowning. Further, Respondent did not present any probative evidence detailing the drowning process.

The trial devolved from a determination as to whether any negligence proximately caused Mr. Wolde's drowning into a referendum on Lack's overall business practices, its annual gross revenue, disputes with the United States Lifeguarding Association ("USLA"), worker's compensation insurance premium disputes, and whether Mr. Lack had misled people in various past contexts. Respondent extensively focused on what they framed as a should-be-prohibited policy of permitting generally a "dual role" of Lack's lifeguards due to their ability to conduct limited commercial sales as part of their job duties under the Franchise Agreement. ***This was despite there being no evidence that any of the relevant Lack's lifeguards were actually engaged in commercial sales at the time of the Wolde drowning incident***. The trial court also permitted Respondent (over objection from Lack's) to introduce highly prejudicial and irrelevant evidence during the liability phase including: (1) Lack's gross sales revenue information for the entire year of 2018, (2) nearly two decade old filings from an administrative law proceeding concerning workers compensation premiums payable by Lack's to cover Lack's lifeguards, and (3) correspondence between Lack's and the USLA and testimony from a USLA representative about Lack's USLA certification and related disputes, all of which predated this incident by a decade. The result was a fundamentally tainted trial and a verdict driven by passion and prejudice against Lack's and its founder George Lack. This Court should grant certiorari and reverse.

ARGUMENT

I. The Court of Appeals erred in its analysis of the applicable standard of care and should have granted JNOV.

The Court of Appeals rejected 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.[4] That was error. A jury here was allowed to determine that the General Assembly's policy options, set forth by statute, should never have been allowed, and thus Lack's was found liable based on an inapplicable alleged national "industry" standard for lifeguarding.

South Carolina law authorizes local governments to provide lifeguards ***if they choose to do so***. S.C. Code Ann. § 5-7-145. Thus, the starting point is -- no lifeguards are required. No duty of care is owed where no lifeguard is provided. *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").

No doubt concluding that coastal cities may prefer lifeguard presence for safety and tourism, the General Assembly expressly provided options to a local government which ***does*** choose to provide lifeguards. The local government can provide the lifeguards itself, or it can enter into an exclusive agreement with a private company to provide lifeguards by way of a franchise agreement. To incent a private company to enter into such an agreement, the statute permits giving the company exclusive rights to conduct merchandising on the beach (*e.g.*, renting umbrellas, chairs, etc.). *See* S.C. Code Ann. § 5-7-145(B)(4).

Here, the City entered into a Franchise Agreement with a private company (Lack's). The statute, in mandatory language, provides that "lifeguard personnel employed by the private beach

[4] In reaching this holding, the Court stated that Lack's agreed at trial "there is a national standard of care." Opinion p. 4. While George Lack on cross examination made a statement about safety rules and competency generally in lifeguarding, (Tr. 288:9-289:5; R. 430-431), he was in no way agreeing there was some national standard which overrode the responsibilities and duties contemplated by the Franchise Agreement to which his company and the City were bound. Mr. Lack was not abandoning, by a single 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 regarding number of lifeguards, "lifeguard onlys," lunch breaks, etc., all of which was spelled out by the Franchise Agreement.

safety company ***must*** be tested and certified ***as required by the municipality***. § 5-7-145(B)(3) (emphasis added). These requirements were included in the Franchise Agreement entered into by Lack's with the City, and longstanding practices pursuant to the Franchise Agreement were engaged in with the full knowledge and approval by the City. This included allowing some, but not all, lifeguards to engage in merchandising at times on the beach. Other lifeguards were called "lifeguard onlys" because they were not permitted to do any merchandising on the beach. The number of lifeguards, lifeguard onlys, positioning, lunch breaks, etc. were all detailed in the Franchise Agreement. (R. 1740-54.)

The Court of Appeals recognized 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.[5] Yet, 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 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 Court of Appeals erred by determining that ***additional*** duties and standards of care (over and above the franchise agreement and City-approved operation) were owed by Lack's to

[5] There would 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 approved.

beachgoers.[6] The Court's holding about the standard of care creates serious public policy and economic implications for private lifeguarding companies. If private companies have liability over and above the agreed Franchise Agreement terms, the Franchise Agreement loses one of its primary functions, and private companies may be dissuaded from continuing in, or entering into, such an arrangement. Further, local governments may determine (as many have throughout the State) 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. *See Fluehr v. City of Cape May*, 732 A.2d 1035, 1040 (N.J. 1999) (discussing an amicus brief that raised these 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 "the potential dangers of the ocean either by restricting access to coastal waters or removing lifeguards to avoid the potential for liability"). The Court should thus grant certiorari and reverse.

II. The Court of Appeals erred by failing to grant JNOV where there was insufficient evidence supporting proximate causation.

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

There was insufficient evidence of causation at trial, and the standard of care imposed by the Court of Appeals essentially creates strict liability for Lack's. JNOV as to causation should have been granted. At its heart, Respondent's theory of causation was that the Lack's lifeguards

[6] 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, again despite this arrangement being expressly condoned by City via the Franchise Agreement, longstanding practice and statutory authorization.

could have, but failed to, spot Mr. Wolde struggling in the water, and they could have, but failed to, reach him in time to save him from the rip current.[7] Yet, there was ***no*** direct evidence to support Respondent's theory. Although testimony and evidence supported that lifeguard L-21 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."[8] (*See* Franchise Agreement § 2; R. 2147.)

Hence, without any direct evidence, Respondent attempted to turn to circumstantial evidence. However, 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 was the lifeguards' true focus (rather than scanning the water and addressing other safety issues such as a lost child, jellyfish stings, etc.).[9] The Court of Appeals cited 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*** error, and was highly prejudicial. In *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 646 (2012), this Court expressly found the

[7] Respondent disclaimed any claim concerning 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.)

[8] This is precisely the situation at the time of the incident, with one lifeguard out of three on his lunch break. The Court of Appeals 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.)

[9] Respondent also used this evidence to further their theme that Lack's prioritized profit over safety. Respondent's counsel referred to Lack's as being a "for-profit" on no less than thirteen times across his opening statement and closing arguments. (Trial Tr. 95:14, 18; 96:6; 97:18; 883:16, 892:6, 893:21, 897:12, 899:10, 16, 904:3, 905:25, 922:15; R. 237, 238, 239, 1025, 1034, 1035, 1039, 1041, 1046, 1047, 1064.)

prejudice from informing the jury about a corporation's net operating revenue is "***self-evident***," (emphasis added). Putting a large sum of money in the minds of the jury "reflecting the company's net income but accounting for none of its expenses and obligations, ***was almost certainly misleading***." *Id.* (emphasis added). If such evidence is too prejudicial for the punitive damages phase—it cannot be non-prejudicial in the actual damages/liability phase. Here, however, the Court of Appeals held otherwise, conflicting with this Court's precedent. This Court in *Branham v. Ford Motor Corp*. 390 S.C. 203, 701 S.E.2d 5 (2010) and *Sulton* has now stated twice that such evidence is unduly prejudicial and cannot be admitted for the jury's consideration. Yet the Court of Appeals' decision will allow this admonition to be eroded to the point of being meaningless if, in the actual damages phase, the jury is shown such evidence in the name of proving some theoretical point regarding liability.

In addition to the "self-evident" undue prejudice, the gross sales data was particularly problematic here. The jury heard and saw detailed daily, monthly, and yearly lifeguard 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***. 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 likely did this because it 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 this Court in *Branham* and *Sulton* that such evidence is inadmissible. Because there was no direct, admissible, or non-speculative circumstantial evidence of causation, JNOV should have been ordered.[10]

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

The Court of Appeals also incorrectly stated 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 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

[10] Respondent's other "evidence" regarding lifeguards and causation was also speculative. The Court of Appeals contended that the jury could have reasonably relied on "bystander" witness Julian Chandler's testimony. Lack's lifeguards wore yellow shirts and blue shorts. (Tr. 812:4-20; R. 954.) Mr. Chandler's testimony regarding an otherwise unidentified "lifeguard" was a description of a person with no shirt wearing red shorts. (Chandler Dep. 16:7-17:6, 56:20-57:7; R. 2276, 2286.) The Court of Appeals embraced the **speculation** put forward by Plaintiff's counsel that the individual Chandler saw was a Lack's lifeguard. The **evidence** does not show this, however. 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.) If anything, assuming Mr. Chandler really saw a "lifeguard," the evidence was that this individual was ***not*** working for Lack's.

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).

C. The Court of Appeals wrongly imposed a strict liability standard.

In addition to its holding on the impropriety of the dual role, the Court of Appeals identified what it described as 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 being on his lunch break, yet Lack's did not close that sector of the beach. 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. (Trial Tr. 659:7-13, 719:4-8, 745:17-29, 748:10-12; R. 801, 861, 887, 890.)

Second, the Court of Appeals cites Respondent's expert, Dr. Thomas Griffiths', opinion that Lack's failed to properly train the lifeguards[11] and that Mr. Wolde was a distressed swimmer and should have been recognizable by attentive lifeguards. Opinion p. 10. These opinions were speculative and unreliable, and the Court's adoption of them amount to the imposition of a strict

[11] This finding rests on the erroneous premise that additional training of the Lack's lifeguards could have prevented the incident that occurred with Mr. Wolde. There is no evidence in the record supporting this conclusion. The evidence showed that Lack's ensured that its lifeguards had the required qualifications at the time of hiring and underwent the necessary training required by the City. (Trial Tr. 723:14-18, 725:1-726:7, 804:16-21, 808:11-14, 809:9-20, 810:8-811-3, 834:8-22; R. 865, 867-68, 946, 950, 951, 952-53, 976.) The training included ensuring that even when engaged in limited commercial sales, the lifeguards' eyes remained on the water. (*Id.* at 725:1-726:7; R. 867-68.)

liability standard.[12] 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 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 certiorari, reverse, and remand for entry of JNOV.

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[12] The court also noted 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. This 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 court stated 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 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 of the drowning, however.

III. The Court of Appeals erred by disregarding the lack of evidence supporting conscious pain and suffering and jury's misapplication of the mortality tables in its survival verdict, and should have granted JNOV on this claim.

The Court of Appeals essentially held that damages for conscious pain and suffering during drowning are inherent, stating it is "common sense" that the struggle to escape is part of the drowning process. Opinion p. 11. However, the court overlooked that this could **only** be true if the person is placed in such a position by the defendant. Respectfully, the Court of Appeals misconstrued 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.

This is precisely why expert testimony was necessary. Two questions went unanswered at trial: (1) at what point did his swimming and initial difficulties become active drowning such that Mr. Wolde was experiencing pain and suffering? and (2) at what point during the struggle 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).[13]

[13] A survey of awards for conscious pain and suffering in other drowning cases, adjusted for inflation to the 2022 date of the verdict, demonstrates the outlier nature of this verdict. *See, e.g., Jutzi-Johnson v. United States*, 263 F.3d 753, 760-61 7th Cir. 2001) (collecting cases and noting that an appropriate award would have been in the $15,000 (**$24,791.89** adjusted for inflation)[13] to $150,000 (**$247,918.87** adjusted for inflation) range of awards in prior drowning cases); *Trinh ex rel. Tran v. Dufrene Boats, Inc.*, 6 So. 3d 830, 844-45 (La. Ct. App. 2009) (finding that

The Court of Appeals also erred by finding that Lack's argument about the jury's misapplication of the mortality tables was unpreserved. This issue was raised to and ruled upon by the trial court. As Lack's explained, the trial court correctly charged 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 under the survival claim, awarding $3.73 million (*i.e.*, $100,000 for the remaining 37.3 years of Mr. Wolde's life). Lack's timely raised its argument about the improper use of the tables at the appropriate time in its post-trial motions. The trial court directly addressed this argument and rejected it, finding that Lack's failed to object to the jury charges (which was erroneous itself since the issue was not an error with the charge but, rather, the jury's misapplication of the charge). Therefore, because the argument was properly raised to the trial court and ruled upon, this issue was preserved, and the Court of Appeals erred by holding otherwise. Therefore, for all these reasons, Court should grant certiorari, reverse, and remand for entry of JNOV as to the survival claim. No admissible evidence supported that claim, and the jury's entire award on that claim was clearly the result of the erroneous application of the trial court's charge on the mortality tables.

award of $15,000 (**$20,461.86** adjusted for inflation) was appropriate and rejecting plaintiff's request to increase it to $100,000); *Dontas v. City of New York*, 183 A.D.2d 868, 869, 584 N.Y.S.2d 134, 135-36 (1992) (remitting $2 million award for conscious pain and suffering to $50,000 (**$104,283.52** adjusted for inflation), noting that although the evidence supported that a drowning victim experiences conscious pain and suffering, the award was excessive "in view of the fact that the experts from both sides indicated that a drowning victim would lose consciousness in just a few minutes"); *Landreth v. Reed*, 570 S.W.2d 486, 492-93 (Tex. Civ. App. 1978) (finding jury's $65,000 award to be excessive and reducing it to $30,000 (**$134,589.09** adjusted for inflation) where expert testimony stated that the drowning victim would have remained conscious and suffered pain for approximately two minutes, noting there was "no precedent for an award as large as that made here for so short a period of suffering"); *cf. Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508, 518 (Ky. 2021) (affirming jury's award of $0 for conscious pain and suffering despite the plaintiff's presentation of expert testimony as to what a drowning victim experiences").

IV. The Court of Appeals also erred by overlooking the lack of evidence supporting recklessness justifying an award of punitive damages.

As detailed above, there was insufficient evidence to support a duty, breach, or proximate cause, which should have been dispositive on liability, much less recklessness. To support its holding on this issue, the Court of Appeals again cited the supposed impropriety of the "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. At minimum, there can be no clear and convincing evidence of recklessness when Lack's was complying with the Franchise Agreement and the City's understanding regarding all activity of its lifeguards who reasonably could have been in the general area of the drowning incident. The Court should also grant certiorari to review this error and remand for entry of JNOV on punitive damages.

V. The Court of Appeals erred by failing to order a new trial absolute based on numerous evidentiary errors.

There were three categories of highly unduly prejudicial and improper "evidence" 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 and in the vicinity of the drowning incident***. First, 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***.[14] At minimum, the introduction of this evidence was an error justifying a new trial.

[14] As noted, the Court of Appeals acknowledged that the admission of this evidence was "arguably error due to its broad scope" but nevertheless found that Lack's was not prejudiced due to the "compelling evidence" of negligence and recklessness regardless of the sales receipts. Opinion pp. 14-15. In support of its finding no prejudice, the court cited Lack's introduction of net worth evidence during the "damages phase." Lack's, however, did not introduce this evidence until the ***punitive*** damages phase, when net worth information is almost always introduced in accordance

Second, the court erroneously permitted Respondent to "impeach" George Lack through administrative filings from a matter from over 15 years prior involving a different entity (Lack's Outdoor Furniture) and concerning the classification of Lack Outdoor Furniture's employees for the purpose of workers' compensation insurance.[15] (Trial Tr. 429:20-24; R. 571.)

As the Supreme Court explained in *Anderson v. Elliott*, 228 S.C. 371, 375–76, 90 S.E.2d 367, 369 (1955), the right to cross-examine a witness as to a previous contradictory statement "must be founded on the existence and showing of a material variance between the statements made on the two occasions." *Id.* In this trial, George Lack's testimony was that Lack Beach Service's employees had a "***responsibility*** to perform lifeguard duties 100% of the time." (*Id.* at 418:16-20 (emphasis added). R. 560.) Respondent's "impeachment" evidence confronted Mr. Lack with an Administrative Law Court's order detailing Lack Outdoor Furniture's position in those proceedings that risky lifeguarding activities such as rushing to save someone drowning in the ocean "only have the potential to be performed 0.0047 percent of the time." (*Id.* at 419:20-420:5; R. 561-62.) The Administrative Law Court disagreed and found that the workers should be classified as lifeguards for workers' compensation insurance purposes. The Lack's employees had thus been classified as such since that order in 2002 and the end effect was a significant increase in Lack's workers' compensation premiums. (*Id.* at 419:4-11; R. 561.)

Mr. Lack's trial testimony was not inconsistent with Lack Outdoor Furniture's position (taken in filings by its attorneys in the administrative proceedings) because the question of the

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with *Branham* and *Sulton*. Lack's introduction of net worth evidence in the punitive damages phase cannot possibly serve as some kind of waiver or otherwise eliminate the prejudice Lack's suffered from the erroneous admission of the annual gross sales data in the liability and actual damages phase of the trial.

[15] The trial court cautioned Respondent that a proper foundation would need to be laid first, but this was never done. (*Id.* at 285:1-17, 417:8-20:5; R. 427, 599.)

employees' ***responsibilities*** is different from what activities they may be engaged in at any specific time. Thus, this was not an appropriate "impeachment," and the evidence only served to mislead and confuse the jury. This evidence was highly prejudicial, should not have been admitted, and made George Lack look like he was being duplicitous to the jury.

Third, the trial court also erred by permitting Respondent to introduce evidence and testimony regarding George Lack's history with the United States Lifeguard Association ("USLA"), consisting of letters exchanged between 1996 and 2007 and testimony from former USLA president Chris Brewster about Lack's Beach Service's USLA Certification and its revocation in 2007. The jury was erroneously permitted to consider an inference that Mr. Lack had deceived Brewster in order to obtain USLA certification. "Certification" of Lack's by the USLA, however, was ***not*** required by the Franchise Agreement or applicable law. (*See* Franchise Agreement, §4; R. 1742 (providing that each guard must "complete a course consisting of a total of not less than 40 hours in open water life saving which meet the ***criteria*** of the United States Lifeguard Association" (emphasis added)).[16] Therefore, evidence from between 10-20 years prior concerning Lack's USLA certification was entirely irrelevant to the issues of duty or proximate cause for this incident that occurred in 2018. Instead, its purpose was to inflame the jury, generate a dislike for George Lack, and suggest a greater duty of care than what was actually required.[17]

Each of these evidentiary rulings was prejudicial and independently warrant reversal. Therefore, the trial court erred by permitting the jury to hear all of this prejudicial and misleading

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

[17] Respondent also used this to further their "profit over safety" theme. (*See* Pltf. Closing Argument, Tr. 899:8-11; R. 1041 ("And so then what followed was an investigation that was done by the USLA into the fact that they had been bamboozled by this for-profit on something as important as public safety."))

evidence and testimony and rely on it in reaching its verdict and by failing to grant a new trial. The Court of Appeals then erred by failing to reverse. This Court should grant certiorari and, if it is not inclined to reverse the denial of JNOV, should reverse and remand for a new trial absolute.

VI. The Court of Appeals incorrectly found that Lack's failed to preserve its argument about the errors with the court's bifurcation procedure and the impropriety of the wrongful death award.

Lack's contended that the trial court erred by permitting the issue of recklessness to be tried in the first phase of the trial in contravention of the punitive damages statute, and by refusing to otherwise instruct the jury by way of charge or the verdict form as to the relevance of their decision on whether Lack's acted recklessly. The Court of Appeals found that Lack's did not preserve this argument. However, as Lack's has consistently argued, its 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 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, and having the jury answer whether Lack's was reckless without any context was improper. (Tr. 868:17-869:14; R. 1010-11.) The trial court nevertheless adopted a verdict form containing that question without further explanation, which necessarily rejected Lack's position and preserved it for review.

Moreover, although the Court of Appeals found 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"). This argument was preserved and warrants reversal.

The Court of Appeals also erroneously held that Lack's abandoned its argument that the trial court erred by failing to grant a new trial where the wrongful death award exceeded even the suggestion of Plaintiff's counsel because it did not "cite any authority, or even to the record, to support its argument." Opinion p. 20. Lack's, however, expressly referenced Respondent's closing argument where counsel suggested damages of $10 per hour for 15 hours per day for the remaining life expectancy of Mr. Wolde for each of the four children, which would total $8.1 million.[18] Although Lack's did not expressly give the record cite, Respondent did not dispute that this an accurate recitation of counsel's 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). The Court of Appeals' finding that Lack's "abandoned" this issue was also error.

This Court should thus grant certiorari, reverse the Court of Appeals' findings that Lack's bifurcation and excessiveness of wrongful death rulings, and order a new trial.

VII. The Court of Appeals erred by affirming the trial court's due process review, which ignored the lack of any reprehensible conduct and the Court of Appeals improperly found that Lack's argument on the statutory factors was not preserved.

Here, again, the Court of Appeals relied on what it characterized as 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, much less reprehensible conduct. The Court also characterized this as "recidivist" conduct but, again, the structure and procedure was expressly authorized by the Franchise Agreement, approved by the City, and was a longstanding practice. Moreover, the Court of Appeals erred in finding that Lack's

[18] The yearly total of $10 per day for 15 hours a day would be $54,750. This multiplied by Mr. Wolde's approximately 37 years of remaining life expectancy would amount to $2.025 million, which multiplied by four results in the $8.1 million suggested by counsel. (Trial Tr. 905:14-906:10; R. 1047-48.)

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). 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 expressly denied ***all*** of Lack's arguments on punitive damages, stating it "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.) Therefore, the trial court ruled on all of the grounds in Lack's Rule 59(e) motion, and Lack's arguments ***were*** preserved. Because the Court of Appeals held otherwise and failed to properly review the punitive damages on appeal in violation of due process, it would be a violation of due process for this Court to decline to grant certiorari and review the statutory factors and other due process *de novo* on appeal. *See Mitchell v. Fortis Ins* 385 S.C. 570, 686 S.E.2d 176 (2009*)* (requiring punitive damages *de novo* review on appeal). Hence, certiorari should be granted.

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

Finally, certiorari is warranted because the Court of Appeals failed to address Lack's conditional motion regarding caps despite Lack's raising this in its opening brief and then later in its Petition for Rehearing. (Br. of Appellant pp. 3-4.) As Lack's Conditional Motion for Reduction of Judgment ("Conditional Motion") detailed, the City delegated its governmental power to Lack's and, as a result, the doctrine of derivative sovereign immunity (itself a novel issue in South

Carolina) applies and entitles Lack's to claim the protections of the South Carolina Tort Claims Act. (Conditional Motion; R. 1566.) Thus, if a judgment stands, Lack's moved that the Court must, at a minimum, reduce the amount of it to the SCTCA cap on actual damages and remit the punitive damages to $0 since the SCTCA forbids them. (*Id.*) The Conditional Motion was made separately from Lack's other post-trial motions, as it was a motion in the alternative.

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. However, this is not correct, as the trial court simply did not yet rule on the motions and they remain pending.

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.) Lack's so argued, but the Court of Appeals made no mention of the pending Conditional Motion. The Court should thus grant certiorari and expressly rule that the trial court[19] shall address these motions (assuming *arguendo* the Court does not grant certiorari and order JNOV or new trial).

CONCLUSION

For the reasons stated above and in Lack's prior briefing, the Court should grant certiorari, 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 certiorari, reverse, and remand for a new trial

[19] 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.

absolute. Failing all of that, the Court should grant certiorari and remand to the trial court to address Lack's conditional motion regarding the caps and the motion to amend to plead the caps.

Respectfully submitted,

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October 20, 2025

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Oct 20 2025
SC 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,

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.

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October 20, 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 $250.00 for the filing fee for Appellant Lack's Beach Service, Inc.'s Petition for a Writ of Certiorari, filed with the Court on October 20, 2025 in the above matter.

Thank you.

Sincerely yours,

s/ C. Mitchell Brown

C. Mitchell Brown

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