

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Case No. 2019-CP-26-07075
Appellate Case No. 2025-002122

RECEIVED

Nov 19 2025

S.C. SUPREME COURT

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, City of Myrtle Beach, and
John Doe Lifeguard, Defendants,

Of which Lack's Beach Service is the.....

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Respondent Meswaet Abel respectfully submits this Return to the Petition for Writ of Certiorari filed by Lack’s Beach Service (“Lack’s”) seeking review of the decision of the court of appeals in *Abel v. Lack’s Beach Service*, 446 S.C. 434, 920 S.E.2d 283 (Ct. App. 2025), *reh’g denied* (Sept. 22, 2025) (“Opinion”).¹

Despite Lack’s “world is falling” rhetoric, the Opinion does not create any public policy problems for coastal municipalities, private beach safety companies, or tourists. Rather, it affirms the jury’s decision to hold Lack’s liable for the harm caused by its “dual role” lifeguarding practice, a practice that is universally recognized as violating the standard of care. Lack’s misses the point horribly in suggesting the Opinion “could detrimentally impact beach safety[.]” Pet. at 10. The opposite is true. Reversing the court of appeals would send a message that “beach safety” companies like Lack’s can engage in any number of reckless lifeguarding practices so long as they have cover under a franchise agreement with the municipality. That is not the law in South Carolina; nor should it be.

Although Lack’s attempts to sever any causal connection between Mr. Wolde’s August 24, 2018 drowning and its lifeguards’ commercial activities, there was sufficient evidence for the jury to determine the dual role practice proximately caused Mr. Wolde’s death. As Respondent details below, there was witness testimony that the lifeguard closest to Mr. Wolde was talking to beachgoers in the umbrella line, with his back to the water, during the same timeframe as this incident. There was also evidence that the three lifeguards in the vicinity of the incident generated over \$1100 in sales on the day in question. Lack’s efforts to dismiss this evidence as “no[t] direct” and “speculative” are unavailing. This is not the “rare or exceptional” case where proximate cause

¹ Respondent points the Court to the recitation of facts set forth in the Opinion.

can be decided as a matter of law. *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013).

Of course, the jury's liability determination was not based solely upon the lifeguards' commercial activities. Respondent also presented evidence that Lack's (i) failed to properly train and supervise its lifeguards; (ii) failed to properly warn beachgoers of the hazardous conditions on August 24, 2018; (iii) failed to provide a full complement of lifeguards on August 24, 2018; and (iv) allowed lifeguard towers to sit unattended without a proper procedure for ensuring water observation. Although Lack's failed to preserve any argument to the contrary, there was sufficient evidence for the jury to conclude this conduct breached the standard of care and proximately caused Mr. Wolde's death.

At bottom, this is a straightforward negligence case in which a jury found that a private lifeguard company utterly failed to meet the minimum applicable standard of care, and as a result, the life of a loving fiancé and father of four young children was forever lost. Despite Lack's call for reversal, the justice system worked exactly as it should: the jury considered the admissible evidence and found in favor of Respondent, the trial court properly supervised the proceedings and denied Lack's post-trial motions, and the court of appeals correctly applied settled legal principles on review.

Lack's now presents this Court with a number of unavailing arguments to support its claim of lower court error. Some of these arguments are not preserved, but all are without merit. Lack's arguments to the Court largely consist of requests to reweigh evidence and reassess witness credibility—functions reserved exclusively for the jury. And where Lack's suggests legal error in the record below, it fails to demonstrate any conflict with controlling precedent. Therefore, certiorari should be denied.

ARGUMENT

I. JNOV

Lost from the Petition is Lack's acknowledgment of the appellate courts' deferential standard of review when a party appeals the denial of a JNOV. "When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). Reversal is only appropriate when "there is no evidence to support the ruling or when the ruling is governed by an error of law." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010). "[JNOV] motions should be denied when either the evidence yields more than one inference or its inference is in doubt." *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007). Appellate courts, in this scenario, do not have the authority to determine credibility issues or to resolve conflicts in the testimony or evidence. *Erikson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). This deferential standard of review is fatal to each of Lack's JNOV arguments.

A. The Franchise Agreement did not establish an inflexible standard of care, and Respondent presented sufficient evidence for the jury to conclude that Lack's breaches of the standard of care proximately caused Mr. Wolde's death.

Lack's argues that the underlying statutory framework and Franchise Agreement executed between Lack's and the City of Myrtle Beach established an ironclad standard of care to be applied in this case. Pet. at 7-10. This stance is fundamentally flawed—both legally and factually. Neither the statute nor the Franchise Agreement provide Lack's with the shelter it so desperately seeks.

Start first with the statute. Lack's is correct that there is no statutory requirement that local governments provide lifeguards. See S.C. Code Ann. § 5-7-145. Lack's is also correct that the

statute permits a municipality to (i) provide lifeguarding services through an agreement with a private beach safety company and (ii) allow that company the exclusive right to rent and sell beach equipment. *Id.* However, that is all the support the statute offers Lack's. The statute contemplates the "beach safety company" renting beach equipment—not lifeguards. *Id.* § 5-7-145(B)(3). The statute clearly distinguishes between "additional personnel" hired for rentals and "lifeguard personnel[.]" *Id.* § 5-7-145(B)(3), (4). Additionally, the statute explicitly prohibits against commercial sales "prevent[ing] or interfere[ing] in a substantial way with the peaceful, recreational use of the public beach by the general public." *Id.* § 5-7-145(B)(5). As the court of appeals correctly determined, "the statute does not specifically authorize lifeguards to rent equipment." Opinion at 9.

Nor does the statute give municipalities and private companies the privilege of manufacturing a standard of care that obviates the duty to conform to generally recognized and accepted lifeguarding practices. Although Lack's argues otherwise, the only authority it cites is the statutory provision requiring lifeguards to be "tested and certified as required by the municipality[.]" *Id.* § 5-7-145(B)(4). That provision represents the floor, not the ceiling, of lifeguard companies' responsibilities. To take Lack's argument on its face, a municipality and private company could contract away the common law duty to exercise "reasonable care" when providing lifeguarding services. While such an arrangement might theoretically help municipal budgets, it would create an inevitable "race to the bottom" at the cost of public safety.

Policy concerns aside, this Court's precedent forecloses Lack's arguments about the Franchise Agreement. In *Dorrell v. S.C. Department of Transportation*, 361 S.C. 312, 319, 605 S.E.2d 12, 15 (2004), the Court rejected an identical argument and held a contractor's common law duty to exercise due care exists "independently" of a contract with a governmental entity. The

Court reversed the circuit court's ruling that a paving company was not liable for an accident caused by work performed pursuant to a contract with SCDOT. Irrespective of the contractual provisions applicable in that case, the Court held the "duty of care included, at minimum, a duty to pave the road in a manner that provided for the safety of the traveling public[.]" *Id.* at 320, 605 S.E.2d at 16.

For these reasons, the court of appeals correctly recognized the applicable standard of care required conformance with "generally recognized and accepted practices in [the] profession." Opinion at 8 (quoting *Doe v. Am. Red Cross Blood Servs., S.C. Region*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989)). Indeed, the trial court charged the common law definition of due care to the jury *without any objection from Lack's*. (R. 1070-71, 1086-88). Therefore, in determining whether Lack's was negligent, it was proper for the jury to consider (i) all instances where the common law standard of care was violated—including those instances where the standard of care conflicted with or supplemented the terms of the Franchise Agreement, and (ii) all instances where Lack's violated the requirements of the Franchise Agreement.

1. There was sufficient evidence for the jury to conclude Lack's violations of the common law standard of care proximately caused Mr. Wolde's death.

Respondent presented substantial evidence demonstrating the standard of care applicable to ocean lifeguards, as well as evidence of Lack's deviations from that standard. Regardless of the provisions of the Franchise Agreement, it was proper for the jury to consider this evidence in finding Lack's liable for Mr. Wolde's death.

The evidence at trial showed that Lack's violated the standard of care by tasking lifeguards with commercial rentals and sales in addition to their lifeguarding duties. Not only were the lifeguards tasked with these non-lifeguard duties, but they were also *enticed* by Lack's to perform them by receiving commissions from these sales. (R. 449, 864). As Dr. Thomas Griffiths testified,

this dual role practice “interfere[ed] with the primary responsibility of the lifeguard of watching the water.” (R. 2313). USLA President Chris Brewster condemned the method as fundamentally in conflict with a lifeguard’s primary role: protecting at risk swimmers by maintaining constant observation of the water. (R. 620, 627, 630). Brewster also explained that dual role lifeguarding is entirely inconsistent with the USLA’s standards, and George Lack conceded that there is a national standard of care applicable to lifeguards that the USLA helps define. (R. 429-31, 442, 620). Of course, beyond its claim that dual role lifeguarding was somehow permitted by the Franchise Agreement,² Lack’s presented no evidence that the practice conformed with the standard of care.³

Respondent also presented evidence that Lack’s violated the standard of care by allowing lifeguard towers to sit unattended during lunch hours. Although Lack’s argued it was proper for the two adjacent lifeguards to “cross-scan” the water in front of the empty lifeguard tower (R. 861), Dr. Griffiths testified this practice violated the standard of care: “[a] lifeguard is never supposed to abandon their post without someone else filling in for them, taking their stand, or closing the water.” (R. 2311). Dr. Griffiths explained that the standard of care required Lack’s to either close that portion of the beach or have someone else guard the tower during the lunch break. (R. 2313). Unfortunately, Lack’s did not take either of these measures, and Mr. Wolde drowned in front of an empty lifeguard tower while the L-21 employee was at lunch. (R. 501, 857-58).

² Although the Franchise Agreement uses the term “Lifeguard Only” when referring to certain personnel (R. 2145), the court of appeals correctly noted that the Franchise Agreement “does not ‘expressly’ approve the dual-role set up.” Opinion at 8. Indeed, Respondent submitted substantial evidence at trial demonstrating that the Franchise Agreement does not permit lifeguards to engage in commercial activity. (R. 477-80, 780-81). Regardless, for the reasons set forth above, the Franchise Agreement does not dictate whether dual role lifeguarding violates the standard of care.

³ Respondent discusses the evidence demonstrating that the dual role practice proximately caused Mr. Wolde’s drowning in Section I.B.1 below.

Clearly, it was proper for the jury to conclude that, had Lack's closed the unguarded portion of the beach or filled the L-21 tower with other personnel, this tragic outcome could have been avoided.

Finally, Respondent presented evidence that Lack's violated the standard of care by failing to properly warn and guard against the dangerous conditions present on August 24, 2018, including deadly rip and longshore currents. Just a few hours before this incident, Lack's received a warning from the National Weather Service that hazardous conditions were present and there was a potential for rip currents. (R. 2315). Despite this warning, numerous witnesses testified that there were no flags or other warnings informing beachgoers of the dangerous conditions. (R. 337, 375-76, 680, 721). In fact, it was undisputed that there were no warning flags present at the L-21 tower, the tower closest to Mr. Wolde when he lost his life. (R. 910). Dr. Griffiths testified that Lack's failed to properly respond to this warning in multiple respects, opining that Lack's should have closed the entire beach or affected portions of the beach, had lifeguards patrol the waterline, and provided more effective warnings. (R. 2315-16). Again, a jury could reasonably conclude that, had Lack's taken these measures, this incident would not have happened.

2. There was sufficient evidence for the jury to conclude Lack's violations of the Franchise Agreement proximately caused Mr. Wolde's death.

Even accepting Lack's erroneous argument that the common law standard of care is completely irrelevant in this case, Respondent presented evidence demonstrating Lack's violations of the Franchise Agreement. Namely, Respondent showed that Lack's (i) failed to train its lifeguards as required by the Franchise Agreement and (ii) failed to provide the required number of lifeguards on the day Mr. Wolde lost his life.

As to training, the Franchise Agreement required that each Lack's lifeguard "[s]uccessfully 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." (R. 2044). Chris Brewster testified

that this USLA-approved training included topics like “recognizing what a victim in distress looks like, learning about rip currents so they understand what rip currents are and what somebody in distress in a rip current might look like.” (R. 646).

Lack’s violated this requirement of the Franchise Agreement in multiple respects. Brewster explained that “training in a manner that allows the person on the stand to be involved in vending would be inconsistent with the USLA’s training standards.” (R. 648). Moreover, the evidence showed an utter failure to provide training in the aspects of open water lifesaving that could have made all the difference for Mr. Wolde. Under Lack’s schedule, video training on rip currents would only be provided if weather prevented alternative training on the beach. (R. 983-84, 2196). There was no evidence that training on rip currents was ever provided in 2018. *Id.* Additionally, the L-20, L-21, and L-22 lifeguards, those closest to Mr. Wolde, missed several of the required sessions because they were not in the country when the training was provided. (R. 977-82). Therefore, the jury could reasonably conclude Lack’s proximately caused Mr. Wolde’s death by failing to provide training on rip currents and failing to ensure the relevant lifeguards received all required training.

Lack’s also violated the Franchise Agreement by failing to have the required number of “lifeguard onlys” present on the day of this incident. Under the Franchise Agreement, Lack’s was required to provide six lifeguard onlys beginning the third week of August. (R. 2144-45). Although Lack’s claimed it was only required to provide four lifeguard onlys, there was no dispute that only three were present on the day of this drowning. (R. 592-93, 2159). Crucially, the lifeguard only who did not report to work was scheduled to report between towers L-23 and L-24. (R. 2159). Thomas Griffiths testified Lack’s violated the standard of care in understaffing the beach in this manner. (R. 2321). Notably, George Lack acknowledged that being one lifeguard

only short in the section of the beach where Mr. Wolde drowned could have made all the difference between life and death. (R. 593).

As the foregoing discussion demonstrates, there was ample evidence for the jury to conclude Lack's breached the common law standard of care, as well as its responsibilities under the Franchise Agreement, in a manner that proximately caused Mr. Wolde's death.

B. The court of appeals did not err in affirming the trial court's decision to submit the issue of proximate cause to the jury.

In its directed verdict motion, Lack's made only two arguments relating to proximate cause. First, Lack's argued there was no evidence that would allow the jury to conclude the relevant lifeguards were engaged in commercial activity at the time of the drowning. (R. 758-60). Second, Lack's argued Respondent failed to prove proximate cause because there was no evidence of the "amount of time that the family struggled" or "that a lifeguard could get from his or her location to Mr. Wolde to change this outcome." (R. 760-61).⁴ Lacks did not make any directed verdict motion as to other breaches of the standard of care unrelated to its dual role practice, nor did Lack's argue that those breaches could not have proximately caused Mr. Wolde's death as a matter of law.

1. The proximate cause arguments presented to the trial court were properly rejected.

"Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." *Gause*, 403 S.C. at 150, 742 S.E.2d at 649. "The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006). "A

⁴ At the close of evidence, Lack's simply referred to the arguments made in its previous directed verdict motion. (R. 1021).

motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

As an initial matter, Lack’s proximate cause arguments are based on the premise that Lack’s could not have acted differently to identify and rescue Mr. Wolde once he was in distress. This argument overlooks the evidence demonstrating that Lack’s proximately caused this drowning by permitting Mr. Wolde to swim in dangerous, unguarded waters to begin with. As discussed above, Respondent presented evidence that Lack’s violated the standard of care by (i) failing to close the portion of the beach while the L-21 lifeguard was at lunch and (ii) failing to respond to the known risk of rip currents by closing the affected portions of the beach, patrolling the waterline, and providing effective warnings. Regardless, even accepting Lack’s framing of the issue, the trial court did not err in allowing the jury to decide proximate cause.

First, as to the length of the struggle and drowning event, the courts below correctly concluded there was sufficient evidence for a jury to find that a lifeguard complying with the standard of care could have recognized the crisis and prevented this death.

As noted above, testimony from Wubit and Adam established the drowning event lasted “a long period of time” estimated at an excruciating 10-15 minutes. (R. 728, 731). Wubit and Adam testified that, during that time-period, they were waving their arms above their heads and yelling for help. (R. 685, 726-27). Wubit also explained that they were positioned such that they could see the beach and people on the beach. (R. 728). Dr. Griffiths therefore testified that Mr. Wolde was a “distressed victim that could have and should have been easily recognizable by attentive lifeguards.” (R. 2318). The jury also heard evidence that bystanders heard the cries for help and ultimately pulled Mr. Wolde from the water. (R. 2277). Importantly, one of these bystanders was swimming toward Mr. Wolde and Wubit when he passed Adam, who had escaped the deadly rip

current shortly before. (R. 687). That is ample evidence for the jury to determine that properly staffed, trained, and undistracted lifeguards could have saved Mr. Wolde's life.

Second, the courts below correctly found there was sufficient evidence for the jury to conclude the relevant lifeguards' commercial activities proximately caused Mr. Wolde's death. Julian Chandler provided evidence through which the jury could reasonably conclude the L-22 lifeguard was engaged in commercial activity during the time of Mr. Wolde's distress. Chandler testified the L-22 lifeguard was "sitting on the back end of the lifeguard stand chatting with a few individuals" near the "umbrella line." (R. 2276-77). Chandler made this observation five to ten minutes before he heard calls for help from bystanders who were attempting to pull Mr. Wolde and Wubit to shore. *Id.* Chandler's testimony, coupled with Wubit's 10 to 15 minute estimate of the duration of the incident, places the time of Mr. Wolde's distress at the precise time Chandler observed the L-22 lifeguard with his back to the water talking to customers in the umbrella line. (R. 731).

In addition to Chandler's testimony, Respondent also presented evidence that the lifeguards at L-20, L-21, and L-22 made over \$1,110 in combined sales on the day of the drowning. (R. 2160). Specifically, the record shows that the L-22 lifeguard generated nearly \$450 in sales, and the L-20 generated over \$150. *Id.* The evidence also showed that, when completing a sale, lifeguards were required to (i) keep track of all rental activity, (ii) keep books and charts neat, (iii) record all rentals on a seating chart, and (iv) provide a receipt. (R. 2121). The jury also heard evidence that lifeguards were required to check umbrellas throughout the day. (R. 461).

Responding to this evidence, Lack's offers two arguments. Lack's first claims Chandler's testimony about the L-22 lifeguard's conduct minutes before the drowning was "speculative." Pet. at 13 n.10. Lack's takes that position because there was evidence presented at trial that Lack's

lifeguards wore blue shorts and yellow shirts, and Chandler testified “I want to say [the lifeguard’s shorts] were red, not 100 percent though.” (R. 2286). That is not the bombshell Lack’s makes it out to be. At most, it is a conflict in the evidence squarely within the jury’s province to resolve. *See Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (explaining that, at the JNOV stage, the court is “concerned with the existence of evidence, not its weight” and the court does not have “authority to decide credibility issues or to resolve conflicts in the testimony or the evidence” (citation omitted)).

Lack’s argument relating to the evidence of sales generated by lifeguards L-20, L-21, and L-22 on August 24 also fails. Although Lack’s contends the evidence was not precise enough to show exact times sales were consummated, that argument once again goes to weight—not the existence of evidence sufficient to defeat a JNOV. Additionally, Lack’s misrepresents the Opinion in claiming the court of appeals held the admission of evidence showing sales *made on the day in question* was “arguably error.” Pet. at 11. Instead, the court of appeals properly relied on that evidence in holding it was appropriate for the jury to determine whether the dual role practice proximately caused this incident. Opinion at 9. The court of appeals’ discussion of potential error was limited to the admission of gross sales data for all of 2018. Opinion at 14-15.⁵

2. Lack’s additional standard of care and proximate cause arguments are unpreserved and without merit.

As discussed above, Lack’s made a narrow directed verdict argument related to dual role and proximate cause. (R. 758-61). The court of appeals properly held the additional arguments raised in Lack’s JNOV were unpreserved. Opinion at 9-10. In the Petition, Lack’s argues this was error, but Lack’s fails to identify the additional arguments it claims to have raised. Pet. at 13-14.

⁵ Respondent discusses that holding in Section II.A.1 below.

Based on that failure, and the limited scope of Lack's directed verdict argument, the court of appeals' preservation holding should not be upset. Regardless, even assuming Lack's additional standard of care and proximate cause arguments were preserved, they fail for the reasons set forth in Sections I.A.1 and I.A.2 above.

C. The court of appeals did not err in affirming the trial court's decision with respect to an award of damages for Plaintiff's survival claim.

Lack's raises two arguments concerning the jury's survival award. First, Lack's contends that there was no evidence of conscious pain and suffering for which Lack's was responsible, as the evidence did not reveal a clear point in time when it became "Lack's fault for not reaching Mr. Wolde and mitigating the drowning[.]" Pet. at 16. Second, Lack's contends the court of appeals erred in finding Lack's failed to preserve its argument about the jury's supposed "misapplication" of the mortality tables. Pet. at 17.

As with its proximate cause argument, Lack's claim that there was no evidence of pain and suffering for which Lack's was responsible is far too myopic. This argument fails to account for the evidence demonstrating that Lack's allowed Mr. Wolde to become a distressed swimmer by failing to close unguarded portions of the beach and failing to properly warn against known hazards. Contrary to Lack's position, this was not solely a failure to rescue case. There was ample evidence to support the jury's finding that Lack's negligence proximately caused Mr. Wolde to endure immense pain and suffering in his final minutes. Opinion at 11-12.

Further, the court of appeals did not err in determining Lack's failed to preserve its argument concerning the mortality tables. As the court of appeals recognized, Lack's did not obtain a ruling from the trial court in response to its argument that the jury applied mortality tables in awarding survival damages. Opinion at 20 n.8. The trial court's JNOV order only addressed Lack's arguments as to the propriety of the jury instructions. (R. 28-30). To preserve the

independent argument that the jury misapplied those instructions, Lack's was required to file a motion to reconsider. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. . . . Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.").

Lack's argument is also procedurally barred for a second reason: Lack's waited until after the jury was discharged to raise it. This Court has consistently held that a party challenging a verdict as erroneous or irregular must make an effort to correct it prior to the jury being discharged. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 132, 866 S.E.2d 542, 555 (2021) ("While the verdict is unusual, no effort was made to correct it before the jury had separated. His honor would have done so had he been requested to find out just what the jury meant, and had the verdict reformed." (quoting *Rhame v. City of Sumter*, 113 S.C. 151, 154, 101 S.E. 832, 833 (1920))); *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) ("This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.").

To be sure, Respondent contends there was nothing erroneous about the jury's survival verdict, and Lack's arguments to the contrary are rooted solely in speculation. At this stage, however, there is no opportunity for meaningful review because Lack's failed to (i) raise the issue with the jury prior to its discharge and (ii) obtain a ruling from the trial court. Even putting aside established case law that "courts should not intrude into the privacy of the jury room to scrutinize

how jurors reached their verdict,” *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995), Lack’s argument is procedurally barred.

D. Lack’s JNOV argument relating to punitive damages fails.

In its final JNOV argument, Lack’s contends there was insufficient evidence for a jury to conclude Lack’s acted recklessly. Pet. at 18. Lack’s does not offer any substantive discussion, it simply “incorporates and reasserts its prior arguments on this issue.” *Id.* Because the court of appeals correctly decided this issue, Respondent will likewise keep the discussion brief.

The evidence presented at trial was sufficient to support the jury’s finding that Respondent proved recklessness by clear and convincing evidence. *See Gurwood v. GCA Servs. Grp., Inc.*, 445 S.C. 324, 336, 914 S.E.2d 149, 156 (2025) (discussing the standard for punitive damages to be submitted to the jury). Most notably, the correspondence between Lack’s and the USLA demonstrated that Lack’s knew—decades prior to this incident—that its dual role practice was dangerous and in violation of the standard of care. (R. 2138-43). The court of appeals also cited additional evidence sufficient to support the jury’s finding that Lack’s consciously failed to exercise due care. Opinion at 12-13. Accordingly, there is no reason to review the court of appeals’ holding on this point.

II. NEW TRIAL

Also lost from the Petition is the acknowledgement of the appellate courts’ deferential standard of review when a party appeals the denial of a new trial absolute. “Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.” *Austin*, 387 S.C. at 49, 691 S.E.2d at 149. Like the JNOV standard of review, this deferential standard underscores why the Petition should be denied.

A. The court of appeals correctly affirmed the trial court’s decision not to grant a new trial based on Lack’s alleged evidentiary errors.

Lack’s argues that a new trial was required because certain evidence was improperly admitted by the trial court. Pet. at 18-21. Specifically, Lack’s takes issue with the admission of (i) sales data, (ii) workers’ compensation testimony, and (iii) USLA correspondence and testimony. *Id.* Lack’s is incorrect with respect to each. The evidence was admissible, and even if erroneously admitted, there is nothing to suggest that Lack’s was prejudiced by such evidence. *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) (explaining the appealing party has the burden to prove evidence was both inadmissible *and* prejudicial).

“The admission of evidence is within the sound discretion of the trial [court], and absent a clear abuse of discretion amounting to an error of law, the trial court’s ruling will not be disturbed on appeal.” *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373,375 (2005). “Only relevant evidence is admissible.” *State v. Hamilton*, 344 S.C. 344, 354, 543 S.E.2d 586, 591 (Ct. App. 2001). Evidence is relevant if “it tends to establish or make more or less probable some matter at issue upon which it directly bears.” *Id.* Relevant evidence should only be excluded when its probative value is *substantially outweighed* by the danger of unfair prejudice. Rule 403, SCRE. Of course, “[a]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” *State v. Bratschi*, 413 S.C. 97, 115, 775 S.E.2d 39, 48 (Ct. App. 2015).

1. The sales data was admissible.

Lack’s challenges the admission of its 2018 gross stand sales—a matter of public record with the City of Myrtle Beach pursuant to the terms of the Franchise Agreement—arguing the sales data was used improperly to suggest that its lifeguards were distracted by making sales at the time of the incident. Pet. at 18-19. It also argues this evidence was prejudicial because it provided

misleading information about the company's finances. *Id.* at 11-13. These arguments fail for several reasons.⁶

First, the sales data was relevant to prove central issues in this case—specifically, whether Lack's dual role system created dangerous conflicts between lifeguarding duties and commercial activities. Although Lack's contends the sales data for 2018 could not be used to prove the relevant lifeguards were engaging in commercial activities at the time of this incident, our evidentiary rules do not require the level of precision Lack's calls for. Rule 406, SCRE, provides that evidence of **“the routine practice of an organization**, whether corroborated or not and regardless of the presence of eyewitnesses, **is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”** (emphasis added). The gross sales data was a permissible vehicle for Respondent to use in demonstrating that Lack's had a repeated practice of tasking lifeguards with commercial sales. (R. 2161). Importantly, this evidence was also permissible support for Respondent's contention that, adjusting for labor costs, beach sales attendants could have been hired to conduct sales. (R. 535-36, 553).⁷ For these reasons, Lack's cannot carry its burden of demonstrating the trial court abused its discretion in allowing this evidence.

Second, this Court's decisions in *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010), and *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 734 S.E.2d 641 (2012), do not provide the support Lack's needs. Those cases involved the introduction of financial evidence beyond net worth during the punitive damages phase of trial. The Court held that only net worth (and

⁶ Respondent disagrees with the court of appeals' comment that the trial court's admission of 2018 gross sales data was “arguably error.” Opinion at 14.

⁷ Importantly, no evidence of Lack's net revenue was produced in discovery to allow Respondent to make this feasibility argument. Respondent had to make this argument with the information available.

extrapolations from net worth) is relevant to assessing the “ability to pay” factor in awarding punitive damages. *Branham*, 390 S.C. at 239-40, 701 S.E.2d at 24-25; *Sulton*, 400 S.C. at 420, 734 S.E.2d at 645-46. The evidence admitted in *Branham* (executive salaries, stock options, and bonuses) and *Sulton* (net operating revenue of a large business) had no evidentiary purpose but to stir jury bias. Here, however, the evidence was relevant to establish liability and Lack’s repeated practice of distracting lifeguards from their safety obligations. For these reasons, the principles set forth in *Branham* and *Sulton* do not preclude the admission of financial information relevant to liability issues.

Third, even assuming the introduction of this sales data constituted an abuse of discretion, Lack’s cannot demonstrate the requisite prejudice. *See Fields*, 376 S.C. at 557, 658 S.E.2d at 86 (“Prejudice is a reasonable probability that the jury’s verdict was influenced by the challenged evidence”). Lack’s claim that the sales data somehow caused the jury to disregard the evidence of negative net worth introduced in the punitive damages phase is based entirely on speculation. The court of appeals thoughtfully considered all the evidence supporting the jury’s finding of liability, its actual damages award, and its punitive damages award, and correctly held “the record contains other compelling evidence such that we find it was unlikely the 2018 sales data evidence influenced the jury’s verdict as to either liability or damages.” Opinion at 16.

2. The workers’ compensation testimony was admissible.

Lack’s also complains of error stemming from the admission of testimony and documentation concerning a prior workers’ compensation proceeding involving George Lack. Pet. at 19-20. The court of appeals correctly held that this was proper impeachment evidence.

Mr. Lack testified at trial that Lack’s lifeguards had a responsibility to perform lifeguard duties 100% of the time. (R. 560). He attempted to convince the jury that Lack’s lifeguards are

“lifeguards all day from 8:00 to 5:00, so there’s nothing to keep them from being a lifeguard at any time.” *Id.* This was in direct contravention to the position Lack’s took in front of the South Carolina Workers’ Compensation Commission. There, Lack’s asserted its employees “perform their beach chair concession duties 99.995% of the time and that the lifeguard duties only have the potential to be performed 0.0047% of the time.” (R. 561). This was proper impeachment evidence. And Lack’s was given the opportunity to better explain its position and provide whatever clarity it wanted to during its cross-examination of Mr. Lack. Accordingly, there was no error, and even if there was, Lack’s cannot show the requisite level of prejudice to justify the necessity of a new trial.

3. The USLA correspondence and testimony was admissible.

Finally, Lack’s argues it was error for certain correspondence and testimony concerning the USLA to be admitted at trial. Pet. at 20. Again, Lack’s is incorrect. This evidence was properly admitted at trial as it was highly probative of the liability issues in this case.

The evidence at issue involved various communications and testimony that the USLA had provided specific notice to Lack’s (over the course of many years) that its dual role lifeguarding practices were dangerous and were not in line with the applicable standard of care. (R. 2138-43). The evidence also established that Lack’s failed to comply with the requirement in the Franchise Agreement that Lack’s provide training in accordance with the criteria of the USLA. (R. 2146).

Lack’s continues to advance the incredulous argument that this evidence was not relevant because the Franchise Agreement did not specifically require USLA *certification*. That argument is a red herring. Irrespective of the fact that Lack’s dual role practice cost it its certification, the evidence revealed that “Lack’s was on notice that its dual-role lifeguarding violated an accepted standard of care in the industry.” Opinion at 17. Additionally, the evidence showed that Lack’s violated the requirement that each lifeguard “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.” (R. 2146). Both the correspondence and the testimony of Chris Brewster, the former President of the USLA, demonstrated that any training permitting lifeguards to engage in sales would be inconsistent with the standards set forth by the USLA. (R. 648). Finally, Lack’s argument is particularly misplaced in light of George Lack’s acknowledgment that the USLA helps define the standard of care for lifeguards. (R. 442-43). Accordingly, there was no error, and even if there was, Lack’s cannot show the requisite level of prejudice to justify the necessity of a new trial.

B. Lack’s arguments relating to the bifurcation procedure and wrongful death award do not warrant a new trial.

Lack’s raises two additional arguments in support of its request for a new trial. First, Lack’s claims the trial court erred in refusing to instruct the jury that a finding of recklessness would result in a second phase of trial for punitive damages. The court of appeals properly found this issue was abandoned, as “Lack’s cite[d] no support for its contention that the jury was required to be instructed that a finding of recklessness would result in a second phase of trial to assess whether Abel was entitled to punitive damages.” Opinion at 18 n.6 (quoting *Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 172-73 (Ct. App. 2016) (“When an appellant provides no legal authority regarding a particular argument, the argument is abandoned and the court can decline to address the merits of the issue.”)).

Lack’s now argues, for the first time, that the “punitive damages statute itself justifies” such an instruction, citing section 15-32-520(B). Pet. at 21. Of course, that provision of the statute simply explains what the jury is to determine in the first stage of a bifurcated trial. The statute does not speak to the instruction a trial court must provide when, as here, a party consents to the issue of recklessness being determined in the first stage of trial. Opinion at 18 n.6 (noting that

Lack's "agreed to a verdict form containing a finding of whether Lack's had been 'reckless' in the first phase"). The trial court did not abuse its discretion in refusing to provide the requested instruction in this unique scenario. As Respondent argued, the requested instruction would have been prejudicial, particularly considering that the jury charge and deliberations took place on a Friday afternoon. (R. 1011).

Second, Lack's argues the court of appeals erred in rejecting its argument that the wrongful death award was excessive because it exceeded the suggestion of Plaintiff's counsel in closing argument. Pet. at 22. The court of appeals held this issue was abandoned because "Lack's [did] not cite any authority, or even to the record, to support its argument." Opinion at 20 n.8. In the Petition, Lack's only response is to cite the relevant portion of Respondent's closing argument. Lack's does not cite any authority for the proposition that a jury award is excessive simply because it exceeds counsel's suggestion.

This Court has never applied such a hardline rule in evaluating the amount of a jury verdict. The proper standard requires courts to give substantial deference to the jury's determination of damages and only grant a new trial where "the verdict is so grossly excessive that it shocks the conscience of the court[.]" *Knoke v. S.C. Dep't of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). That is not the situation here. There is nothing shocking about a jury awarding \$10 million in damages for wrongful death—\$2.5 million to each of the young children Mr. Wolde left behind—under the facts of this case.

III. PUNITIVE DAMAGES

Lack's offers two arguments relating to the court of appeals' de novo review of the jury's punitive damages award. First, Lack's offers the conclusory (and rather outrageous) assertion that the court of appeals "ignored the lack of any reprehensible conduct" on the part of Lack's. Pet. at

22. Respectfully, the only error in the court of appeals’ punitive damages review was its finding that the *Mitchell*⁸ factors indicated only a “moderate degree of reprehensibility.” Opinion at 22. The evidence demonstrated that Lack’s conduct—ranging from dual role, to unmanned lifeguard towers, to improper training, to insufficient staffing—caused Mr. Wolde’s death, evidenced a reckless disregard for the safety of others, and took place repeatedly over the course of numerous years. *See Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (discussing reprehensibility factors).

Lack’s second argument—relating to the trial court’s alleged failure in refusing to apply the statutory factors in section 15-32-520(E)—also fails. Pet. at 22-23. Even assuming this issue is properly preserved, Lack’s fails to demonstrate prejudice by showing that the factors somehow suggest the award here was the result of passion or prejudice.

These statutory factors include: (1) the defendant’s degree of culpability; (2) the severity of the harm caused by the defendant; (3) the extent to which the plaintiff’s own conduct contributed to the harm; (4) the duration of the conduct, the defendant’s awareness, and any concealment by the defendant; (5) the existence of similar past conduct; (6) the profitability of the conduct to the defendant; (7) the defendant’s ability to pay; (8) the likelihood the award will deter the defendant or others from like conduct; (9) similar awards of punitive damages; (10) criminal penalties imposed on the defendant; and (11) civil fines assessed against the defendant. S.C. Code Ann. § 15-32-520(E).

Lack’s avoids any discussion of these factors because their application to the facts of this case makes certain the award was not excessive. The last three factors (9-11) are not at play in this case. The remaining factors (1-8) tread much of the same ground covered by the *Mitchell* guideposts and weigh strongly in favor of upholding the jury’s award. The jury found Lack’s 100%

⁸ *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).

at fault and Mr. Wolde 0% at fault. (R. 1093). The harm in this case was the ultimate harm—death. The conduct, which proximately caused Mr. Wolde’s death, had been ongoing for years even though the USLA admonished Lack’s on several occasions. Rather than paying additional personnel to focus on sales, Lack’s “double dipped” by requiring its lifeguards to handle these sales, increasing its profitability. Finally, the jury’s award will deter Lack’s and others from engaging in this reprehensible behavior.

IV. DERIVATIVE SOVEREIGN IMMUNITY

In its final attempt to convince the Court of error, Lack’s asserts that certiorari is warranted because the court of appeals failed to remand or otherwise address its conditional motion regarding the imposition of statutory caps derived from the South Carolina Tort Claims Act. Pet. at 23-24. This argument fails procedurally and on the merits.

Lack’s filed its “conditional” motion for derivative sovereign immunity on August 8, 2022—the same day Lack’s filed its other post-trial motions. The trial court’s order on post-trial motions, entered on April 10, 2023, did not address the conditional motion. (R. 5-43). Rather than filing a motion to reconsider, Lack’s noticed its appeal the same day. That strategic decision benefitted Lack’s by allowing it to quickly obtain a stay of the execution of judgment under Rule 62(d), SCRCF. (R. 1-4). Importantly, however, Lack’s strategy also transferred “exclusive jurisdiction” to the court of appeals and precluded the trial court from deciding the conditional motion. *See* Rule 205, SCACR.

Lack’s must now live with the consequences of its decision to immediately appeal rather than obtain a ruling on the conditional motion. Lack’s points to no authority suggesting that the court of appeals abused its discretion in refusing to remand for the trial court’s consideration of the motion. Moreover, considerations of judicial economy weigh strongly against Lack’s request

that the Court enter an order requiring the trial court to address the motion at this stage. Granting Lack's request would result in successive appeals and years of additional litigation. Because Lack's created the dilemma it faces by failing to move for reconsideration and obtain a ruling, the court of appeals properly declined to rule on this issue.⁹

With respect to the merits, accepting Lack's derivative sovereign immunity argument would require the Court to contravene the policy determinations made by General Assembly. The analysis begins and ends with the plain language of the Tort Claims Act. The Act serves as the exclusive civil remedy for a tort committed by a governmental entity, its employees, or its agents. S.C. Code Ann. § 15-78-20(b). Crucially, however, the term "employee" is defined and "does not include an independent contractor doing business with the State or a political subdivision of the State." S.C. Code Ann. § 15-78-30(c). Nothing else in the Act indicates the General Assembly intended to extend the Act's limitations on damages to private companies that contract with a political subdivision of South Carolina. None of the policy justifications that support limitations on liability for governmental entities apply to Lack's. For these reasons, there is no basis for this Court's review of Lack's derivative sovereign immunity argument.

CONCLUSION

Based on the foregoing, the Petition should be denied.

[Signature page to follow]

⁹ Lack's also waived its derivative sovereign immunity argument in the trial court by failing to raise it at any point prior to trial. This novel argument was not raised as an affirmative defense and, because Respondent was never put on notice of Lack's theory, no discovery was conducted on this issue. Although Lack's orally moved to amend its answer, pursuant to Rule 15(b), SCRCPP, on March 9, 2023, there was no evidenced presented at trial for the pleadings to "conform" to.

Respectfully submitted,

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