

**WARNING, NO LIFEGUARD ON DUTY — SWIM AT YOUR OWN RISK:
DUAL-ROLE LIFEGUARDING AND MUNICIPAL LIABILITY UNDER S.C.
CODE ANN. § 5-7-145**

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I. INTRODUCTION

The beach, a landscape formerly feared by our ancestors and associated with dangers like shipwrecks, natural disasters, and dangerous wildlife, is now

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an iconic recreation destination.¹ Today, Americans take an estimated 400 million trips annually to the country's coastlines to lie in the sand and swim in the ocean.² Still, the inherent dangers of the beach that our ancestors feared persist. Inclement weather, aggressive wildlife, and sun poisoning are just some of the risks posed to individuals who travel to the beach.³ Approximately 4,000 fatal unintentional drownings and 8,000 nonfatal drownings occur in the United States each year.⁴ Of the annual cases that involve individuals over the age of 14, half occur in natural waters like oceans.⁵ To address the dangers associated with the beach, local governments employed beach lifeguards.⁶ The first ocean lifesavers rescued shipwrecked sailors in the 1700s, but when recreational ocean swimming gained popularity in the late 1800s and early 1900s, particularly at resorts, beach lifeguarding emerged as a full-time occupation that is now viewed as essential to protecting ocean swimmers.⁷ However, the beach lifeguard profession lacked uniformity and relied on regional exchanges of trade practices until the second half of the twentieth century.⁸ In 1964, a group of Southern Californian lifeguards formed the United States Life Saving Association (USLA).⁹ Originally known as the National Surf Life Saving Association, the USLA's "primary goal . . . is to '[e]stablish and maintain high standards of professional surf and open water lifesaving for the maximizing of public safety.'"¹⁰ To achieve its goal of maximizing public safety, the organization created a national training manual¹¹ and a Lifeguard Agency Certification Program through which over

1. See ALAIN CORBIN, *THE LURE OF THE SEA: THE DISCOVERY OF THE SEASIDE IN THE WESTERN WORLD* (Jocelyn Phelps trans., Polity Press 1994) (1988); see also Daniela Biel, *Inventing the Beach: The Unnatural History of a Natural Place*, SMITHSONIAN MAG. (June 23, 2016), <https://www.smithsonianmag.com/history/inventing-beach-unnatural-history-natural-place-180959538/> [<https://perma.cc/S5RR-GCZ9>]; Amancay Tapia, *These American Beach Towns Have the Most People Year Round*, NEWSWEEK (Sep. 24, 2021, 7:00 PM), <https://www.newsweek.com/american-beach-towns-most-people-visitors-year-round> [<https://perma.cc/QY6E-L65N>].

2. See Tapia, *supra* note 1.

3. *Nine Dangers at the Beach*, NOAA, <https://oceanservice.noaa.gov/hazards/beach-dangers/> [<https://perma.cc/24K9-JF9S>].

4. *Drowning Facts*, CDC (Oct. 7, 2022), <https://www.cdc.gov/drowning/facts/index.html> [<https://perma.cc/B89K-8AE4>].

5. *Id.*

6. See *United States Lifesaving Association (USLA) History*, U.S. LIFESAVING ASS'N, <https://www.usla.org/page/HISTORY/United-States-Lifesaving-Association-USLA-History.htm#early> [<https://perma.cc/9QLF-E4ZA>] (providing a history of beach lifeguarding in the United States).

7. See *id.*

8. See *id.*

9. See *id.*

10. *Id.*

11. See *id.*

one hundred and forty local lifeguard agencies have received their national certification.¹²

A national organization like the USLA is essential to ensuring public safety on the country's shoreline. However, in the absence of federally legislated standards, the success of their guidelines is reliant upon local compliance. Some state legislatures, recognizing the role that proper beach practices play in promoting public safety for tourists and residents, enacted statutes requiring the construction of beach signage that alert the public of certain dangers.¹³ Others list specific qualifications each beach lifeguard must possess.¹⁴ In 1999, South Carolina joined other coastal states when it passed its own beach safety legislation.¹⁵ The statute is distinct, however, because it explicitly authorizes municipal authority to provide a lifeguarding service through a "private beach safety company."¹⁶ Section 5-7-145 reads as follows:

(A) Each municipality bordering on the Atlantic Ocean is authorized to provide lifeguard and other safety related services on and along the public beaches within its corporate limits. A coastal municipality may enact and enforce regulations it determines necessary for the safety of all persons on the beach.

(B) Lifeguard services may be provided using municipal employees or by service agreement with a private beach safety company.¹⁷

The statute goes on to list additional criteria a municipality must meet if it provides lifeguards through a private lifeguarding service: the municipality must comply with the State Procurement Code; the agreement shall be no longer than seven years; the lifeguards employed should be adequately trained; and any commercial activity conducted by the company shall not interfere with the public's recreational use of the land.¹⁸

II. THE SOUTH CAROLINA GENERAL ASSEMBLY'S INTENT WHEN LEGISLATING § 5-7-145

The general assembly's intent in enacting § 5-7-145 is not entirely clear. The statute does not denote an explicit legislative purpose; however, a brief

12. See *USLA Certified Programs*, U.S. LIFESAVING ASS'N, <https://www.usla.org/page/CERTIFIEDAGENCIES> [<https://perma.cc/AS44-X3WW>].

13. See, e.g., FLA. STAT. § 380.276 (2022).

14. See, e.g., MINN. STAT. § 471.1912 (West 2022).

15. See S.C. CODE ANN. § 5-7-145(A)-(B) (2004).

16. See *id.* § 5-7-145(B).

17. *Id.* § 5-7-145(A)-(B).

18. *Id.* § 5-7-145(B).

history of local legislative control and a 1992 drowning incident provide a likely explanation for the legislature's interest in empowering municipalities to provide lifeguarding services. Prior to the 1970s, local legislative control was centralized at the South Carolina State House, and local legislative delegations served as governing entities for South Carolina counties.¹⁹ The "delegations consisted of one state Senator from each county and a specific number of House members" based on the county population.²⁰ The infinitesimal degree of governmental control counties and municipalities had is best summarized by historian David Duncan Wallace: "If the courthouse grounds need a new fence, the state legislature must approve before money can be spent to provide for it."²¹ Through constitutional amendments proposed by the West Committee, and the passing of the Home Rule Act in 1975, South Carolina counties and municipalities gained greater governing authority.²²

Despite the legislature's attempt to empower local governments through legislation and constitutional amendments, their derivation of power still, in part, relies on the general assembly.²³ As the South Carolina Supreme Court put it in 1995, "[a]lthough the General Assembly was required to implement home rule, new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have."²⁴

Local governments' continued reliance on the general assembly is a likely explanation for the enactment of § 5-7-145, considering the additional amendments made to the South Carolina Code under House Bill 3357.²⁵ In addition to authorizing municipalities to provide a lifeguarding service, Act 113 amended two additional statutes relevant to § 5-7-145(b).²⁶ The first, § 4-9-30(11), which gives county governments the authority "to grant franchises in areas outside the corporate limits," was amended to extend that authority to "grant[ing] franchises and contracts for the use of public beaches."²⁷ In addition, § 5-7-30, titled "Powers Conferred Upon Municipalities," was

19. Charles F. Reid, *The Home Rule Act of 1975 and Remnants of Legislative Control Concerning Local Issues 2–3* (Sept. 28, 2015) (unpublished manuscript) (on file with author).

20. *Id.* at 2.

21. *Id.* at 3.

22. *Id.* at 5–6. The Home Rule Act of 1975 "allowed counties to choose, from several options, a form of government that best suited their needs and desires." *Id.* at 5.

23. *See id.* at 9.

24. *Hosp. Ass'n of S.C. v. County of Charleston*, 320 S.C. 219, 225–26, 464 S.E.2d 113, 117 (1995).

25. Act of June 30, 1999, No. 113, § 21(A), 1999 S.C. Acts 1154, 1169–70 (codified as amended at S.C. Code Ann. § 5-7-145 (2004)).

26. S.C. CODE ANN. § 4-9-30(11) (2021); *see also* S.C. CODE ANN. § 5-7-30 (Supp. 2022).

27. COMM. OF FREE CONF., FREE CONF. REP., H.R. 113-3357, 113th Sess., at 15–16 (S.C. 1999).

amended to include the ability to “grant franchises and make charges for the use of public beaches.”²⁸ The concurrent enactment of these statutes is doubtfully coincidental. The provisions were related to a local government’s ability to “grant franchises . . . for the use of public beaches.”²⁹

The general assembly’s concern with local governments’ authority to franchise beach lifeguarding services was likely rooted in the history of local legislative control, as evinced from the language of § 5-7-145(b) and the amendments to § 4-9-30(11) and § 5-7-30. Still, that does not explain the legislature’s sudden interest in legitimizing a municipality’s ability to employ lifeguards through franchise agreements. In Horry County, the City of Myrtle Beach contracted with private lifeguarding companies for decades prior to the legislation’s passage.³⁰ So, why would the general assembly suddenly care if a municipality like Myrtle Beach were statutorily authorized to execute such an agreement? A possible explanation is successful lobbying campaigns from private beach lifeguarding companies after the drowning of a Myrtle Beach tourist named Tommy Corbett.

On July 17, 1992, Tommy Corbett and his wife, Valorie Corbett, were on vacation in Myrtle Beach, South Carolina.³¹ That afternoon, Mr. Corbett went to the beach and rented an ocean float while his wife rested in their hotel room.³² Mr. Corbett was in the ocean when he fell off of the float and struggled to stay above water.³³ Three lifeguards employed by John’s Beach Service, the City of Myrtle Beach’s franchisee, unsuccessfully attempted to rescue Mr. Corbett.³⁴ As Mrs. Corbett returned to the beach from their hotel room, she watched EMS personnel’s unavailing attempts to resuscitate her husband.³⁵

Ms. Corbett subsequently filed a wrongful death action against the City of Myrtle Beach and John’s Beach Service.³⁶ Using the South Carolina

28. *Id.* at 16; S.C. CODE ANN. § 5-7-30 (Supp. 2022).

29. COMM. OF FREE CONF., FREE CONF. REP., H.R. 113-3357, 113th Sess., at 16 (S.C. 1999).

30. See Adam Benson, *After Seven-Figure Lawsuit, Will Myrtle Beach Abandon Its Decades-Old Lifeguarding System?*, SUN NEWS (Sept. 4, 2022, 5:44 PM), <https://www.myrtlebeachonline.com/news/local/article264946204.html> [<https://perma.cc/8U8E-G7UH>].

31. *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 604, 521 S.E.2d 276, 278 (Ct. App. 1999).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 605, 521 S.E.2d at 278.

Recreational Land Use Statute³⁷ as a defense to absolve itself from a duty of care owed to the decedent, the City of Myrtle Beach successfully argued for the dismissal of the claim on summary judgment.³⁸ John's, after unsuccessfully raising the same defense, settled the claim with the plaintiff outside of court.³⁹ Corbett's lawsuit provides a possible explanation for the 1999 statutory enactments. A Myrtle Beach lifeguarding company, facing scrutiny after the death of a beachgoer, is likely to lobby for statutory protection. The success of such a lobbying campaign would make sense given that one of the four House members who drafted the initial bill represented Horry County,⁴⁰ where Myrtle Beach is located.⁴¹ Horry County saw additional representation during the legislative process when one of its senators served on the conference committee⁴² that negotiated the bill's language.⁴³ Beaufort County, which includes the City of Hilton Head (another municipality that franchises lifeguarding services)⁴⁴ also saw representation in the conference committee.⁴⁵ Given the legislators' geographical ties, a desire to legitimize municipal authority to franchise lifeguards is understandable and may explain private lifeguarding companies' successful lobbying efforts.

37. The South Carolina Recreational Land Use Statute says a private landowner who lets the public access their land for free does not owe a duty of care to those who enter the land. S.C. CODE ANN. § 27-3-30 (2007).

38. *Corbett*, 336 S.C. at 605 n.1, 521 S.E.2d at 278 n.1.

39. Like the City of Myrtle Beach, John's claimed immunity under the South Carolina Recreational Land Use Statute, and the circuit court granted summary judgment in its favor. The South Carolina Court of Appeals reversed, stating John's was not protected by the statute because it did not qualify as an "owner." *See id.* at 605, 608, 521 S.E.2d at 278, 280; *see also* Order Approving Settlement at 2, *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 521 S.E.2d 276 (Ct. App. 1999) (No. 94-CP-26-1773).

40. *See* COMM. OF FREE CONF., FREE CONF. REP., H.R. 113-3357, 113th Sess., at 1 (S.C. 1999) (listing Representative Hayes, who represents Horry County, as a sponsor of the bill); *Representative Jackie E. "Coach" Hayes*, S.C. LEGISLATURE, <https://www.scstatehouse.gov/member.php?code=0802272631> [<https://perma.cc/H5HN-H8P2>].

41. *See* Benson, *supra* note 30 (discussing public-private franchise agreements in Myrtle Beach, Horry County).

42. Conference committees occur when the House and the Senate cannot agree on a piece of pending legislation. Three members from each body are selected to resolve the disagreements. *See* LOIS T. SHEALY, SOUTH CAROLINA'S LEGISLATIVE PROCESS 5-7 (4th ed. 1978).

43. *See* COMM. OF FREE CONF., FREE CONF. REP., H.R. 113-3357, 113th Sess., at 24 (S.C. 1999); *see also* Senator Luke A. Rankin, SOUTH CAROLINA LEGISLATURE, <https://www.scstatehouse.gov/member.php?code=1511363455> [<https://perma.cc/43FF-HEXM>].

44. *See* HILTON HEAD ISLAND BEACH PATROL, <https://www.shorebeach.com/> [<https://perma.cc/6GT8-3TVK>] (explaining that Shore Beach Service has provided services on Hilton Head Island since 1974).

45. *See* COMM. OF FREE CONF., FREE CONF. REP., H.R. 113-3357, 113th Sess., at 24 (S.C. 1999); Senator Holly A. Cork, SOUTH CAROLINA LEGISLATURE, <https://www.scstatehouse.gov/member.php?code=404545406&chamber=S> [<https://perma.cc/CB6K-STL4>].

III. MUNICIPAL RESPONSIBILITY IMPLICATED BY § 5-7-145

As illustrated in *Corbett*, prior to the passage of § 5-7-145, the Recreational Land Use Statute relieved South Carolina municipalities of a duty of care owed to beachgoers.⁴⁶ The codification of § 5-7-145 challenged *Corbett's* holding; had the legislature statutorily established a duty of care owed, independent of the Recreational Land Use Statute?⁴⁷ *Mena v. Lack's Beach Service*, another wrongful death action involving a Myrtle Beach franchisee, addressed this issue.⁴⁸

On June 11, 2005, Jose L. Mena Jr. and three of his friends traveled to Myrtle Beach, South Carolina “for the purpose of enjoying the public beach and swimming.”⁴⁹ Upon arrival, Mena and his friends interacted with a lifeguard who told them there were chairs and umbrellas available for rent.⁵⁰ The four decided not to rent any umbrellas or chairs but instead headed to the water to swim.⁵¹ Soon after entering the water, “Mena was overcome by a wave and submerged.”⁵² His friends, who were in the water with him, rushed to one of the lifeguard’s stands to get help. By the time Mena’s friends got to the stand, he was no longer visible.⁵³ The lifeguard asked the friends questions to determine where Mena submerged, but the guard never entered the water.⁵⁴ More lifeguards arrived at the scene, but none of them entered the water to search for Mena, either.⁵⁵ A tourist, sitting on their hotel balcony, eventually spotted his body.⁵⁶ He was retrieved from the water and taken to Grand Strand Regional Medical Center where he died “as a consequence of drowning.”⁵⁷

The administratrix of Mena’s estate filed a subsequent wrongful death action against the City of Myrtle Beach.⁵⁸ The city removed the case to federal

46. See *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605 n.1, 521 S.E.2d 276, 278 n.1 (Ct. App. 1999).

47. See S.C. CODE ANN. § 5-7-145(A)–(B) (2004) (explicitly authorizing municipalities to take affirmative steps “necessary for the safety of all persons on the beach” and requiring lifeguard personnel be “tested and certified”).

48. See *Mena v. Lack’s Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *1 (D.S.C. Apr. 16, 2008).

49. *Id.* at *2.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at *1.

court on diversity grounds and filed a 12(b)(6) motion,⁵⁹ asserting the plaintiff's claim failed because the South Carolina Recreational Land Use Statute dissolved any duty of care owed to the decedent.⁶⁰ In opposition to the defendant's 12(b)(6) motion, the plaintiff asserted the City of Myrtle Beach, after exercising its § 5-7-145 authority to franchise with Lack's Beach Service, had created an independent basis for municipal liability, despite the Recreational Land Use Statute.⁶¹ The District Court found the defendant's "arguments to be sufficiently persuasive" and held that the plaintiff's claim failed because § 5-7-145 did not create an independent basis of liability for the City of Myrtle Beach.⁶² Subsequently, the Recreational Land Use Statute, like in *Corbett*, absolved the city of all liability.⁶³

Corbett v. City of Myrtle Beach and *Mena v. Lack's Beach Service* are paradigmatic of South Carolina courts' interpretation of municipal liability for the negligence of their lifeguarding services.⁶⁴ Accordingly, without facing repercussions, the City of Myrtle Beach continued to execute franchise agreements with Lack's and John's Beach Services.⁶⁵ Most recently, in 2018, the City of Myrtle Beach renewed an existing franchise agreement with Lack's that permitted the continuation of the private company's services.⁶⁶ The franchise agreement extended the city's partnership with Lack's an additional seven years,⁶⁷ the maximum duration permitted under § 5-7-145.⁶⁸ The sixteen-page commitment contains standard provisions present in most franchise agreements: the periods that the company must provide services, the level of competency required by their employees, the equipment and uniforms

59. *Id.* The Federal Rules of Civil Procedure allow a party to make a 12(b)(6) motion when the opposing party "failed to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Typically, 12(b)(6) motions are raised when the moving party believes that the opposing party failed to allege an essential element of the claim. See *Tackling the Most Important Topics of Law School: Rule 12(b)(6)'s "Failure to State a Claim,"* THOMSON REUTERS: LAW SCHOOL INSIGHTS (Aug. 3, 2019), <https://legal.thomsonreuters.com/blog/12b6-failure-to-state-a-claim/> [https://perma.cc/97UT-7R92].

60. See *Mena*, 2008 WL 8850813, at *1.

61. *Id.* In the alternative, the plaintiff argued that the wrongful death action was outside the scope of the Recreational Land Use Statute because the defendants were grossly negligent in allowing Lack's to assign lifeguards a lifeguarding function while also allowing them to rent out recreational beach equipment. *Id.* at *4.

62. *Id.* at *8.

63. *Id.*

64. See *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605 n.1, 521 S.E.2d 276, 278 n.1 (Ct. App. 1999) (holding that municipalities do not owe a duty of care to beach visitors); *Mena*, 2008 WL 8850813 at *8 (affirming *Corbett* despite the codification of § 5-7-145).

65. CITY OF MYRTLE BEACH, 2018-2025 SEASONS WATER SAFETY FRANCHISE 12 (2018) [hereinafter WATER SAFETY FRANCHISE AGREEMENT].

66. See *id.* at 10-12.

67. *Id.* at 1.

68. See S.C. CODE ANN. § 5-7-145(B)(2) (2004).

to be provided by the company, and financial reporting required by the franchisee.⁶⁹

The agreement's most consequential section, Section 4, permits Lack's to serve as a lifesaving entity and shopkeeper: "In return for the provision of water safety services . . . the Franchisee is hereby authorized to rent the following beach equipment: (1) Chairs & footrests, (2) Umbrella Windbreaks, (3) Floats, (4) Soft Boogie Boards."⁷⁰ The language describes the "dual-role" lifeguarding system where a lifesaving agency provides "safety services" while simultaneously renting beach equipment for a profit.⁷¹ Like the 2018 agreement, the dual-role system was permitted when the incidents in *Corbett* and *Mena* occurred.⁷² The USLA, recognizing the danger that a distracted lifeguard poses to beach-swimmers, formally condemned the method in 2008 (the year *Mena* was decided) when it stripped Lack's of their lifesaving certification.⁷³ Despite the USLA's rebuke, and despite the tragic losses of life in *Corbett* and *Mena*, Myrtle Beach continued to authorize a system that required lifeguards to juggle multiple tasks.⁷⁴ In 2016, the USLA went one step further and wrote a letter to Myrtle Beach's mayor and all of its city council members, warning them of the dangers associated with employing lifeguards with dual-roles: "Based on emails, media reports, and preliminary investigations of recent drowning cases, the USLA has identified the Myrtle Beach system combining lifesaving and commercial activities to be an unreliable means of protecting swimmers."⁷⁵ These warnings were not enough, and Myrtle Beach still executed the 2018 franchise renewal with Lack's.⁷⁶ Less than three months after that renewal, Zurihun Wolde, a man on vacation with his fiancé and four children, drowned at Myrtle Beach while Lack's lifeguards rented out beach umbrellas.⁷⁷

69. See WATER SAFETY FRANCHISE AGREEMENT, *supra* note 65, at 2–7.

70. *Id.* at 6.

71. Ashley Boles, *Lifeguarding in Myrtle Beach: Do Changes Need to Be Made?*, WMBF NEWS (Sept. 14, 2022, 7:03 PM), <https://www.wmbfnews.com/2022/09/14/lifeguarding-myrtle-beach-do-changes-need-be-made/> [<https://perma.cc/8849-5QYH>].

72. See *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 604, 521 S.E.2d 276, 278 (Ct. App. 1999) (indicating that the decedent rented a floatation device from a John's lifeguard); *Mena v. Lack's Beach Serv.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *2 (D.S.C. Apr. 16, 2008) (showing that Mena and his friends were approached by Lack's lifeguards about renting beach chairs).

73. See Boles, *supra* note 71.

74. *Id.*

75. *Id.*

76. See WATER SAFETY FRANCHISE AGREEMENT, *supra* note 65, at 10.

77. See Complaint ¶¶ 10–11, 45–49, *Abel v. Lack's Beach Service, Inc.*, No. 2019-CP-26-07075 (S.C. Ct. C.P. Nov. 1, 2019).

On August 24 2018, Mr. Wolde and his family traveled to Sea Crest Resort in Myrtle Beach.⁷⁸ During the day, Mr. Wolde and two of his children were swimming in the ocean when they were swept into a rip current.⁷⁹ Mr. Wolde swam after his children but struggled to save them.⁸⁰ Other beach visitors saved the children, but Mr. Wolde was not rescued.⁸¹ His body washed up on the shore, where citizens attempted to perform CPR.⁸² Paramedics rushed him to the hospital, where he ultimately perished.⁸³ Lack's lifeguards arrived at the scene only after the children had been saved and Mr. Wolde's body was found on the shore.⁸⁴ Thereafter, Wolde's estate filed a wrongful death action against Lack's Beach Service and the City of the Myrtle Beach.⁸⁵ The basis of the lawsuit rested on the inherent risks posed by the dual-role lifeguarding system,⁸⁶ and, in 2022, a Horry County jury issued a \$20,730,000 judgment against Lack's Beach Service.⁸⁷ However, shortly before trial, the City of Myrtle Beach was dismissed from the case.⁸⁸

Corbett, Mena, and Abel are indicative of a recurrent problem in Myrtle Beach, South Carolina.⁸⁹ Swimmers enter the water under the assumption that the lifeguards along the shore are focused on protecting them.⁹⁰ Instead, the guards are assigned tasks that distract them from their ultimate purpose: lifesaving.⁹¹ In consequence, multiple individuals lost their lives.⁹² Yet Lack's Beach Services is still, for now, permitted to provide lifesaving

78. *Id.* ¶ 42.

79. *Id.* ¶ 45.

80. *Id.* ¶ 46.

81. *Id.* ¶ 47.

82. *Id.* ¶ 48.

83. *Id.* ¶ 49.

84. *Id.* ¶ 48.

85. *Id.* ¶¶ 1, 5, 6.

86. *Id.* ¶ 65.

87. See Judgment in a Civil Case, *Abel v. Lack's Beach Service, Inc.*, No. 2019-CP-26-07075 (S.C. Ct. C.P. Aug. 1, 2022).

88. WMBF News Staff, *City of Myrtle Beach Dismissed from 2019 Lawsuit Alleging Negligence in Fatal Drowning*, WMBF NEWS (Aug. 2, 2022, 2:56 PM), <https://www.wmbfnews.com/2022/08/02/city-myrtle-beach-dismissed-2019-lawsuit-alleging-negligence-fatal-drowning/> [<https://perma.cc/5HR8-NCCP>].

89. See *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605, 521 S.E.2d 276, 278 (Ct. App. 1999) (drowning death occurred while John's Beach Service lifeguards were on duty); *Mena v. Lack's Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *2 (D.S.C. Apr. 16, 2008) (drowning death occurred while Lack's Beach Service lifeguards were on duty); Complaint, *supra* note 77, ¶ 48 (drowning death occurred before on-duty lifeguards even responded to the scene).

90. See *Boles*, *supra* note 71.

91. See *id.*

92. See *Corbett*, 336 S.C. at 605, 521 S.E.2d at 278; *Mena*, 2008 WL 8850813, at *2; Complaint, *supra* note 77, ¶¶ 48–50.

services for the City of Myrtle Beach.⁹³ After severe public ridicule, Myrtle Beach's City Council is considering alternative lifeguarding methods.⁹⁴ Still, public scorn will not meaningfully protect South Carolina beachgoers. Without municipal liability, beachgoers remain vulnerable to dangerous beach policies. Dual-role lifeguarding exemplifies this notion. For years, Myrtle Beach had no incentive to consider other beach practices. It was relieved of the burden of hiring, training, and paying lifeguards while still reaping the financial benefit of beach tourism. Additionally, it was rewarded with 3% of its franchisee's gross sales from rented beach equipment.⁹⁵ If South Carolina's cities are not faced with the risk of financial repercussions, similar pernicious policies will inevitably follow.

The codification of § 5-7-145 bolstered the dual-role system by validating a municipality's authority to make franchise agreements with private companies.⁹⁶ When the South Carolina General Assembly promulgated the statute, Lack's Beach Service was still an accredited lifesaving agency, and the USLA had not yet rebuked its dual-role system.⁹⁷ However, once the USLA condemned the practice, the general assembly did not take the opportunity to prohibit the dual-role system under § 5-7-145 and protect their constituents and tourists. South Carolina courts worsened the situation by allowing municipalities to hide behind legislation like the South Carolina Tort Claims Act and the South Carolina Recreational Land Use Statute to absolve municipalities of all liability from the negligent acts of their lifeguarding service.⁹⁸

Using the defenses raised in *Abel v. Lack's Beach Services* as an analytical framework, this Note addresses common litigation defenses that protect government entities and how those defenses are erroneously applied

93. WATER SAFETY FRANCHISE AGREEMENT, *supra* note 65, at 10.

94. See Adam Benson, *Take a Look at the 5 Options for the Future of Myrtle Beach Life Guarding Policies*, SUN NEWS (Mar. 12, 2023, 9:02 AM), <https://www.myrtlebeachonline.com/news/local/article272870295.html> [<https://perma.cc/Y8VW-5KCQ>].

95. *Id.* at 7.

96. See S.C. CODE ANN. § 5-7-145(B) (2004).

97. See Act of June 30, 1999, No. 113, § 21(A), 1999 S.C. Acts 1154, 1177 (codified as amended at S.C. CODE ANN. § 5-7-145 (2004)) (showing § 5-7-145 was enacted in 1999); Boles, *supra* note 71 (stating Lack's accreditation was not revoked until 2008).

98. See *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605 n.1, 521 S.E.2d 276, 278 n.1 (Ct. App. 1999) (granting summary judgment in favor of the City of Myrtle Beach because of the Recreational Land Use Statute); *Mena v. Lack's Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *8 (D.S.C. Apr. 16, 2008) (accepting the Recreational Land Use Statute as a defense to lifeguard negligence); Defendant City of Myrtle Beach's Motion and Memorandum in Support of Motion for Summary Judgment, *Abel v. Lack's Beach Service, Inc.*, No. 2019-CP-26-07075 (S.C. Ct. C.P. June 20, 2022) [hereinafter Motion for Summary Judgment] (allowing the defendant to raise affirmative defenses under the Tort Claims Act and Recreational Land Use Statute).

to South Carolina beach lifeguarding. South Carolina's legislative and judicial branches must address dual-role lifeguarding and the absence of municipal liability for beach lifeguard negligence. First, the general assembly should amend § 5-7-145 and eliminate a municipality's authority to franchise with private lifeguarding companies that utilize the dual-role system. Dual-role lifeguarding is unaccepted at the national level because it distracts lifeguards from protecting vulnerable beachgoers.⁹⁹ Accordingly, the method should cease to garner support in South Carolina.

The South Carolina judiciary also has a responsibility to overturn the erroneous holdings in *Corbett* and *Mena*.¹⁰⁰ Those courts interpreted the Recreational Land Use Statute as a vindicator for municipalities.¹⁰¹ In doing so, their opinions assumed that Myrtle Beach graciously held the beach open for public use, thus absolving the municipality of any duty of care owed.¹⁰² However, the Public Trust Doctrine requires entities with control over the beach to hold that land open to the public.¹⁰³ Accordingly, the Recreational Land Use Statute, which is intended to incentivize landowners to hold their land open to the public for free,¹⁰⁴ is inapplicable in the context of the beach because municipalities are legally obligated to make the beach accessible.

If the beach is a narrow exception to the Recreational Land Use Statute, the *Restatement (Second) of Torts* § 323 is instructive.¹⁰⁵ A municipality that provides a lifeguarding service has a duty to provide those services in a reasonable manner.¹⁰⁶ Requiring cities to provide lifeguarding services in a reasonable manner would not encourage an “uncontrolled spread of lawsuits” as critics of government liability suggest.¹⁰⁷ Rather, it would deter the continuance of unacceptable practices like dual-role lifeguarding and promote safer beach recreation in South Carolina.

99. See Boles, *supra* note 71.

100. *Joseph v. S.C. Dep't Lab. Licensing & Regul.*, 417 S.C. 436, 451, 790 S.E.2d 763, 770–71 (2016) (“There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. . . . There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment.” (quoting *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012))).

101. See *Corbett*, 336 S.C. at 605 n.1, 521 S.E.2d at 278 n.1; see *Mena*, 2008 WL 8850813, at *8.

102. See *Corbett*, 336 S.C. at 606, 521 S.E.2d at 279; see *Mena*, 2008 WL 8850813, at *8.

103. See *Public Trust Doctrine*, LEGAL INFO. INST. (May 2020), https://www.law.cornell.edu/wex/public_trust_doctrine [<https://perma.cc/NAE6-92TK>].

104. S.C. CODE ANN. § 27-3-10 (2007).

105. See RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965) (stating that a reasonable duty of care is owed when an individual or entity undertakes a service).

106. See *id.*

107. Yong S. Lee, *Civil Liability of State and Local Governments: Myth and Reality*, 47 PUB. ADMIN. REV. 160, 160 (1987).

Finally, the focus of this Note's substance is on the City of Myrtle Beach and its franchisees because the majority of South Carolina case law surrounding beach lifeguard negligence comes from this region. That said, the legal arguments presented below are applicable to all South Carolina municipalities that provide beach lifeguards, even when those lifeguards are direct municipal employees.

IV. REBUTTING THE ASSERTION THAT MUNICIPALITIES DO NOT OWE A DUTY OF CARE WHEN EMPLOYING LIFEGUARDS

The South Carolina Tort Claims Act (SCTCA) regulates state and local government tort liability.¹⁰⁸ While the statute does not create a cause of action against government entities, it does waive the sovereign immunity provided under the common law.¹⁰⁹ In essence, “under the Tort Claims Act . . . the state is liable for negligence just like any other person or entity.”¹¹⁰ Therefore, if a municipal actor causes the death of an individual through a negligent act, a representative of the deceased's estate may bring a wrongful death action on their behalf.¹¹¹ In South Carolina, a plaintiff asserting that a negligent act resulted in a wrongful death “must show: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was an actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered injury or damages.”¹¹² In *Abel*, Myrtle Beach's legal defense rested on an asserted lack of a duty owed to the decedent.¹¹³ Where the defendant does not owe a duty of care to the plaintiff, “the defendant in a negligence action is entitled to a judgment as a matter of law.”¹¹⁴ The City of Myrtle Beach argued that it was entitled to a judgment as a matter of law because of the exceptions to the immunity waiver under the Tort Claims Act and because of the Recreational Land Use Statute.¹¹⁵

108. See S.C. CODE ANN. § 15-78-20(b) (2005).

109. See S.C. CODE ANN. § 15-78-20(a) (2005).

110. Kyle J. White, *Overview of State and Federal Claims Against the Government*, in NAVIGATING THE STORMY SEAS: GOVERNMENTAL LIABILITY LITIGATION 10, 10 (S.C. Bar Continuing L. Educ. Div. 2020).

111. See S.C. CODE ANN. § 15-51-10 (2005).

112. *Wright v. PRG Real Est. Mgmt.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019) (citing *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004)).

113. See Motion for Summary Judgment, *supra* note 98, at 9.

114. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135–36, 638 S.E.2d 650, 656 (2006).

115. See Motion for Summary Judgment, *supra* note 98, at 3–4, 10–13.

A. *Acts of Third Parties Under the Tort Claims Act*

The Tort Claims Act's waiver of broad municipal immunity under the common law is limited.¹¹⁶ The City of Myrtle Beach attempted to exploit that limitation to support its Motion for Summary Judgment.¹¹⁷ Myrtle Beach first argued that it was entitled to judgment as a matter of law because of the nature of its agreement with Lack's Beach Service.¹¹⁸ Citing *Smith v. Regional Medical Center*, Myrtle Beach identified Lack's as an independent contractor to absolve itself of a duty of care owed to the plaintiff.¹¹⁹ *Smith* involved a negligence claim brought against a state-funded medical facility for a negligent act committed by the hospital's independently contracted physician.¹²⁰ The *Smith* court found the hospital was not responsible for the negligence of its independently contracted staff physician because the Tort Claims Act explicitly stated that independent contractors did not fall under the definition of an employee.¹²¹ Since the independently contracted physician was not an "employee acting within the scope of his official duty" for the state-funded hospital, the immunity waiver under the Tort Claims Act was not triggered.¹²² Accordingly, the hospital had delegated a duty to the contractor and absolved itself of liability for any breach of that duty.¹²³

To liken the facts of *Abel* to *Smith*, the City of Myrtle Beach, in support of its motion for summary judgment, identified Lack's as their independent contractor.¹²⁴ However, a plain reading of the party's agreement denotes a clear relationship: Lack's is the city's franchisee, not its independent contractor. If the title, "2018-2025 Seasons Water Safety Franchise," is not in itself indicative of a franchisor/franchisee relationship, the South Carolina Supreme Court's definition of "franchise" in *Quality Towing v. City of Myrtle Beach* likely suffices: "A franchise has been defined as a special privilege granted by the government to particular individuals or companies to be exploited for private profits."¹²⁵ Following *Quality Towing's* definition, the city's granting of a "seven-year franchise to operate . . . beach concession on

116. See S.C. CODE ANN. § 15-78-60 (2005 & Supp. 2022) (listing forty separate exceptions to the Tort Claims Act immunity waiver).

117. See Motion for Summary Judgment, *supra* note 98, at 3–10.

118. See *id.* at 8–10.

119. See *id.* at 8 n.25.

120. *Smith v. Reg'l Med. Ctr. of Orangeburg & Calhoun Cntys.*, 394 S.C. 110, 112, 713 S.E.2d 656, 658 (Ct. App. 2011).

121. See *id.* at 116, 713 S.E.2d at 659; S.C. CODE ANN. § 15-78-30(c) (Supp. 2022).

122. See *Smith*, 394 S.C. at 116, 713 S.E.2d at 659.

123. See *id.*

124. See Motion for Summary Judgment, *supra* note 98, at 8–10.

125. *Quality Towing v. City of Myrtle Beach*, 345 S.C. 156, 165, 547 S.E.2d 862, 867 (2001).

the public beach”¹²⁶ established a franchisor/franchisee relationship because the ability to rent equipment on the beach is a special privilege to create revenue that is not available to others.

Confirming the franchisor/franchisee relationship between Lack’s and the City of Myrtle Beach is only part of the analysis. Section 15-78-30 indicates that independent contractors are not considered “employees” of a government entity for the purpose of the SCTCA.¹²⁷ Subsequently, a claimant does not have a valid claim against a municipality for any negligent act committed by that contractor.¹²⁸ However, the SCTCA’s definition of “employee” is silent on franchisees: “‘employee means any officer, employee, or agent of the State or its political subdivisions, including . . . persons acting on behalf or in service of a governmental entity.’”¹²⁹ South Carolina courts have not addressed whether a franchisee would be likened to an employee under the SCTCA. However, *Jamison v. Morris*, a case involving an action against a private franchisor for the negligence of their franchisee, serves as a model for when a franchisee’s actions constitute “acting on behalf or in service of a governmental entity”¹³⁰ and thus would be considered an employee under the Tort Claims Act.¹³¹ In *Jamison*, the court found that a franchisor’s liability for the franchisee’s negligence is determined by the degree of control the franchisor has over the franchisee: “a franchisor is not vicariously liable for a tort committed . . . unless the plaintiff can show that the franchisor exercised more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services”¹³² The franchise agreement between Lack’s and the city supports a finding that the city exercised a sufficient degree of control over Lack’s to be held liable for its negligence.¹³³

First, in Section 1, the City of Myrtle Beach set the hours and weeks out of the year that Lack’s is to “conduct water safety.”¹³⁴ Additionally, Section 1 sets the percentage of Lack’s lifeguards that must be on patrol at any given week.¹³⁵ Lack’s inability to set the time that its lifeguards operate and its inability to determine the number of lifeguards it may have on the beach in a given week is indicative of a lack of control of its business operations that is characteristic of an employee. Section 2 demonstrates a similar notion:

126. WATER SAFETY FRANCHISE AGREEMENT, *supra* note 65, at 1.

127. S.C. CODE ANN. § 15-78-30(c) (Supp. 2022).

128. *See id.*

129. *Id.*

130. *Id.*

131. *See Jamison v. Morris*, 385 S.C. 215, 220–21, 684 S.E.2d 168, 170–71 (2009).

132. *Id.* at 222–23, 684 S.E.2d at 172.

133. *See* WATER SAFETY FRANCHISE AGREEMENT, *supra* note 65, at 2–10 (setting multiple standards and policies that the franchisee must implement).

134. *Id.* at 2.

135. *Id.*

requiring each lifeguard to be at least seventeen years of age, ensuring that each lifeguard can swim 500 meters within a certain time interval, and requiring that Lack's create a training program that complies with "city requirements."¹³⁶ Finally, Section 4, which authorizes the "dual-lifeguarding" system, restricts Lack's ability to rent equipment to only four items.¹³⁷

Undoubtedly, the requirements relate to "quality of service." However, to preclude liability when operating standards relate to service quality would inhibit franchisor liability in any situation; franchisors would never set standards for the franchisee that did not ensure quality of service because doing so would be antithetical to running a successful business. However, setting hours of operation, hiring criteria, rental agreements, and training protocol are beyond the scope of what is "necessary to ensure uniformity of appearance and quality of services."¹³⁸ Rather, they are an exercise of control by the City of Myrtle Beach over Lack's ability to independently operate its business.

If a municipality, under § 5-7-145(b), establishes a franchise agreement with a private lifeguarding company, that franchisee would likely be considered an "employee" as defined by the Tort Claims Act. Lack's Beach Service is its own entity; however, the City of Myrtle Beach has substantial control over its business operations. In contrast, "independent contractor[s] . . . contract[] to do a piece of work according to [their] own methods, without being subject to the control of [their] employer."¹³⁹ The Tort Claims Act would not hold defendants like the hospital in *Smith* liable for a negligent action or practice that they did not have direct control over. When, however, a franchisee is under the supervision of the government entity, the immunity waiver under the Tort Claims Act should be triggered. Accordingly, a wrongful death action brought against Myrtle Beach should not be automatically precluded, contrary to the city's argument in its motion for summary judgment.¹⁴⁰

B. Government Actors' Exercise of Discretion

In addition to seeking protection under the "third-party" exception to the Tort Claims Act's common law immunity waiver, the City of Myrtle Beach raised § 15-78-60(5) to support its motion for summary judgment.¹⁴¹ Section

136. *Id.* at 3–4.

137. *Id.* at 6.

138. *Jamison v. Morris*, 385 S.C. 215, 223, 684 S.E.2d 168, 172 (2009).

139. *Cherry v. Myers Timber Co.*, 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013) (quoting *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 116, 512 S.E.2d 510, 521 (Ct. App. 1998)).

140. *See* Motion for Summary Judgment, *supra* note 98, at 9–10.

141. *See id.* at 4–7.

15-78-60(5) says, “[t]he governmental entity is not liable for a loss resulting from . . . (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.”¹⁴² Myrtle Beach claimed that the decision to renew the franchise agreement with Lack’s Beach Service in 2018 was a discretionary function that triggered the immunity waiver exception under § 15-78-60(5).¹⁴³

Pike v. South Carolina Department of Transportation provides clarity as to what governmental decisions are considered “discretionary” and subsequently trigger § 15-78-60(5).¹⁴⁴ In *Pike*, the plaintiff filed a wrongful death action against the South Carolina Department of Transportation (SCDOT) after his wife died in an automobile collision.¹⁴⁵ The basis of the claim rested on the department’s decision to maintain the presence of a highway sign that blocked oncoming traffic.¹⁴⁶ The department asserted that it was immune from liability under § 15-78-60(5) because the decision to maintain the sign was a discretionary act.¹⁴⁷ At the trial level, a jury concluded that the SCDOT failed to meet its burden in asserting the affirmative defense.¹⁴⁸ On appeal, the department asserted that it only needed to produce “some evidence” that it weighed “competing considerations and utilized accepted professional standards in order to be entitled to discretionary immunity.”¹⁴⁹ The South Carolina Supreme Court found that argument to be “wholly meritless” and that adopting the department’s suggested standard would in essence relieve government entities of their burden in proving affirmative defenses.¹⁵⁰ Instead, the court held that a government entity may receive discretionary immunity when the entity proves its “employees, faced with alternatives, actually weighed competing considerations and made a conscious choice.”¹⁵¹ Additionally, the entity must show that when weighing those considerations it “utilized accepted professional standards appropriate to resolve the issue before them.”¹⁵²

As evidence that the renewal of the franchise agreement with Lack’s Beach Service was a discretionary decision, the City of Myrtle Beach cited

142. S.C. CODE ANN. § 15-78-60(5) (2005).

143. See Motion for Summary Judgment, *supra* note 98, at 7.

144. *Pike v. S.C. Dep’t Transp.*, 343 S.C. 224, 230, 540 S.E.2d 87, 90–91 (2000).

145. *Id.* at 225–26, 540 S.E.2d at 88.

146. *Id.* at 226, 540 S.E.2d at 88.

147. *Id.* at 226–27, 540 S.E.2d at 88 (raising both § 15-78-60(5) and § 15-78-60(15) as defenses).

148. See *id.* at 226, 540 S.E.2d at 88.

149. *Id.* at 227, 230, 540 S.E.2d at 88, 90.

150. *Id.* at 231, 540 S.E.2d at 91.

151. *Id.* at 230, 540 S.E.2d at 90 (citing *Foster v. S.C. Dep’t of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 35 (1992)).

152. *Id.* at 230, 540 S.E.2d at 90 (citing *Foster*, 306 S.C. at 525, 413 S.E.2d at 35).

the City Manager, John Pedersen, who said that moving to a single-purpose lifeguarding model was “considered.”¹⁵³ Pedersen, in his deposition, indicated that the consideration was quelled because “there’s a lot more to it than just employ[ing] the lifeguards. There is the background stuff you have to do. The hiring and the recruiting”¹⁵⁴

Myrtle Beach’s evidence in support of its discretionary immunity defense is shallow and would only suffice under the Department of Transportation’s “wholly meritless” “some evidence” standard.¹⁵⁵ A city manager’s statement that an alternative method was “considered” does not equate to carefully weighing the competing considerations. Rather, it indicates a lack of evidence that a conscious choice was made. If the single-purpose lifeguarding model was truly considered, there would be evidence of meetings with individuals familiar with the single-purpose model or financial estimates of what the transition to that model would cost the city. Consequently, the continuance of the dual-role model should not be characterized as a discretionary decision that would immunize the city from liability.

C. *The South Carolina Recreational Land Use Statute’s Application to Municipal Immunity for the Negligence of their Lifeguarding Services*

The Recreational Land Use Statute is the most successful defense employed by the City of Myrtle Beach.¹⁵⁶ In *Corbett* and *Mena*, the city used the statute to obtain dismissal of the wrongful death actions in the procedural and discovery phases of the litigation.¹⁵⁷ Unsurprisingly, Myrtle Beach raised the statute in *Abel*: “there [is] no evidence that CMB charges in any manner for the use of the beach for recreational purposes, CMB, therefore, did not owe the decedent a duty of care.”¹⁵⁸ In most cases, government landowners may use the Recreational Land Use Statute as a defense against a claim of negligence.¹⁵⁹ In the context of public beaches, however, the statute’s historic application is erroneous.

153. Motion for Summary Judgment, *supra* note 98, at 4.

154. *Id.* at 5.

155. *Pike*, 343 S.C. at 231, 540 S.E.2d at 91.

156. *See Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605 n.1, 521 S.E.2d 276, 278 n.1 (Ct. App. 1999) (finding summary judgment appropriate because of the Recreational Land Use Statute); *Mena v. Lack’s Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *8 (D.S.C. Apr. 16, 2008) (granting 12(b)(6) dismissal because of the Recreational Land Use Statute).

157. *Corbett*, 336 S.C. at 605 n.1, 521 S.E.2d at 278 n.1; *Mena*, 2008 WL 8850813, at *8.

158. Motion for Summary Judgment, *supra* note 98, at 11.

159. *See Cole v. S.C. Elec. & Gas Inc.*, 355 S.C. 183, 190–91, 584 S.E.2d 405, 409–10 (Ct. App. 2003) (finding the Recreational Land Use Statute applied at the state-owned area of Lake Murray).

All fifty states have enacted a form of the Recreational Land Use Statute.¹⁶⁰ The South Carolina Recreational Land Use Statute, enacted in 1962, states that “an owner of land owes no duty of care to keep the premises safe for entry or use . . . for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to such persons entering for such purposes.”¹⁶¹

The legislature’s “declared purpose” in passing the statute was to incentivize landowners, by limiting their level of liability, to open their privately owned land to the public for free so that it may be enjoyed for recreational purposes.¹⁶² While landowners are exempt from civil suits for negligence, “grossly negligent” acts by the landowner or a “willful or malicious failure to guard or warn” individuals of dangers associated with the private land can result in landowner liability for injuries sustained on the property.¹⁶³ Additionally, a landowner who charges a fee for entering the land is not protected by the statute.¹⁶⁴

Dating back to the Roman Era,¹⁶⁵ the Public Trust Doctrine promotes an “underlying premise . . . that some things are considered too important to society to be owned by one person.”¹⁶⁶ Evolving from its historical origin, the doctrine’s application is deeply rooted in the United States’ history. In the early 1800s, the Supreme Court of New Jersey held in *Arnold v. Mundy*, “the public, rather than the King, or the federal government, owns the nation’s navigable waters.”¹⁶⁷ In 1884, the South Carolina Supreme Court, in *State v. Pacific Guano Co.*, supported a similar notion, stating that the state held the title of the land not only for property but also in a “fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state.”¹⁶⁸ Judicial support of the doctrine persists in South Carolina. Courts continue to preserve the right of citizens to access the beach by construing any private

160. *States’ Recreational Use Statutes*, NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/state-compilations/recreational-use/> [<https://perma.cc/R684-V9GW>].

161. S.C. CODE ANN. § 27-3-30 (2007).

162. S.C. CODE ANN. § 27-3-10 (2007).

163. S.C. CODE ANN. § 27-3-60(a) (2007).

164. *Id.* § 27-3-60(b).

165. In Roman law, *res omniium communes* closely resembled modern public trust doctrine and prohibited “the sea[] and the bed of the sea” from being held in private possession. Johanna Searle, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 898 (1990).

166. *Hoyler v. State*, 428 S.C. 279, 291, 833 S.E.2d 845, 852 (Ct. App. 2019) (quoting *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127, 456 S.E.2d 397, 402 (1995)).

167. Camilla Brandfield-Harvey, Note, *The Public Trust Doctrine: A Cracked Foundation*, GEO. ENV’T L. REV., Apr. 15, 2021, at 1, 1, <https://www.law.georgetown.edu/environmental-law-review/blog/the-public-trust-doctrine-a-cracked-foundation/> [<https://perma.cc/RPN2-ZC76>].

168. *State v. Pac. Guano Co.*, 22 S.C. 50, 83 (1884).

grant of tidelands by the state against the grantee.¹⁶⁹ To do otherwise would be contrary to the law, the “zealous guardian of the public interest, bestow[ing] presumptive ownership of tidelands on the State for the benefit of the public”¹⁷⁰

Despite the emphatic judicial support of the Public Trust Doctrine, cases concerning municipal liability on South Carolina beaches ignore its underlying principle of public entitlement to access.¹⁷¹ Instead, courts apply the Recreational Land Use Statute and treat municipalities like a private landowner who generously allows the public to access the beach.¹⁷² However, state and municipal governments should not be able to employ the statute as a defense against beach lifeguard negligence. The general assembly’s declaration of purpose in passing the Land Use Statute was to encourage private landowners to hold their land open to the public.¹⁷³ Accordingly, public beaches should be a limited exception to the Recreational Land Use Statute; local governments do not need motivation to open beaches for recreational purposes because they are mandated to do so under the Public Trust Doctrine. To hold otherwise would restore ownership of the beach to the government, allowing society to revert to a time when coastal land was not available for public use.

Even ignoring the incompatible application of the Recreational Land Use Statute in the context of the Public Trust Doctrine, the statute’s applicability as a municipal defense is still erroneous. The Recreational Land Use Statute applies only when landowners permit individuals onto their land without a charge.¹⁷⁴ Given the commercial nature of beach recreation, however, the Land Use Statute is an inapplicable municipal defense.¹⁷⁵ The plaintiff in *Cole v. South Carolina Electric and Gas (SCE&G)* raised a similar argument in their appeal of the defendant’s granted summary judgment motion.¹⁷⁶ In that case, the plaintiff argued the Land Use Statute did not support summary judgment because SCE&G charged a three-dollar parking fee for cars that entered the property.¹⁷⁷ The South Carolina Supreme Court, focusing on the

169. *Hoyler*, 428 S.C. at 292, 833 S.E.2d at 852.

170. *Id.*

171. *See Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605 n.1, 521 S.E.2d 276, 278 n.1 (Ct. App. 1999); *Mena v. Lack’s Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *8 (D.S.C. Apr. 16, 2008).

172. *See Corbett*, 336 S.C. at 605 n.1, 521 S.E.2d at 278 n.1; *Mena*, 2008 WL 8850813, at *8.

173. *See* S.C. CODE ANN. § 27-3-10 (2007).

174. *Id.* § 27-3-60(b).

175. *See* TOURISM ECONOMICS, THE ECONOMIC IMPACT OF VISIT MYRTLE BEACH 14 (2021) (showing the substantial revenue recently generated by tourism in Myrtle Beach).

176. *Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 451, 608 S.E.2d 859, 862 (2005).

177. *Id.*

Land Use Statute's definition of "charge,"¹⁷⁸ found the parking fee was not sufficient to reverse summary judgment because "not everyone must pay it for admission to the property."¹⁷⁹

While the South Carolina Supreme Court found the parking fee too insubstantial to constitute a charge, the court's holding is incompatible with the nature of beach recreation and should be narrowly construed. The cost of traveling and staying at the beach is substantial, and Cole's holding does not consider the true economic cost associated with beach admission.¹⁸⁰ A financial impact report prepared for the City of Myrtle Beach found that in 2019 "non-local" visitors spent \$4.5 billion in the Myrtle Beach area.¹⁸¹ Of that \$4.5 billion, the industries that saw the most financial gain were retail stores, restaurants, and lodging providers.¹⁸² The revenue that tourism generates for the Myrtle Beach region cannot all be attributed to beach recreation.¹⁸³ However, beach recreation is the region's top tourist attraction, and a large portion of the area's tourist revenue should be attributed to the beach.¹⁸⁴

The costs associated with a trip to the beach call for a broader interpretation of the Recreational Land Use Statute's definition of "charge."¹⁸⁵ Although lodging, shopping, dining, and renting beach equipment are not required to access the beach, they are inseparable costs associated with beach recreation.¹⁸⁶ Accordingly, *Cole's* holding is too narrow.¹⁸⁷ The Georgia Court of Appeals offers a more appropriate

178. "'Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land." S.C. CODE ANN. § 27-3-20(e) (Supp. 2022).

179. *Cole*, 362 S.C. at 451, 608 S.E.2d at 862.

180. *See* TOURISM ECONOMICS, *supra* note 175, at 12.

181. *Id.* at 1, 12.

182. *Id.* at 33.

183. *See* EQUATION RESEARCH, MYRTLE BEACH 2019 ECONOMIC IMPACT STUDY 45 (2020), <https://static1.squarespace.com/static/59cee0356f4ca3b2086235fd/t/5f22e0f01df8df21c812e8de/1596121331919/Myrtle+Beach+2019+Economic+Impact+Report+6-22-20+update.pdf> [<https://perma.cc/X32V-PL4P>] (showing that visitors also participated heavily in other activities such as shopping, miniature golf, and live entertainment theaters).

184. *See Top 10 Reasons to Visit Myrtle Beach*, VISIT MYRTLE BEACH, <https://www.visitmyrtlebeach.com/blog/post/top-10-reasons-to-visit-myrtle-beach/> [<https://perma.cc/CZE3-CR9U>] (showing that the city's top reason to visit is its "60 miles of beaches").

185. *See* S.C. CODE ANN. § 27-30-20(e) (Supp. 2022).

186. *See* TOURISM ECONOMICS, *supra* note 175, at 33 (indicating that expenses incurred through shopping, dining, lodging, recreation, and entertainment are associated with a trip to the beach).

187. *See* *Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 455, 608 S.E.2d 859, 864 (2005).

interpretation of a Land Use Statute in *Anderson v. Atlanta Committee for the Olympic Games*.¹⁸⁸

Anderson involved wrongful death and personal injury actions arising out of the 1996 Centennial Olympic Park Bombing.¹⁸⁹ The Atlanta Committee for the Olympic Games (ACOG), which leased Centennial Park from the state of Georgia, was granted summary judgment at the trial level after raising the “Recreational Property Act” as a defense.¹⁹⁰ On appeal, the Georgia Court of Appeals questioned the lower court’s finding that the park was recreational property rather than commercial property.¹⁹¹ While visitors of the park were allowed to enter the premises for free, the park contained a memorabilia “Super Store” run by the ACOG, a large food court, a sports bar, a Coca-Cola Center, and other commercial businesses sub-licensed by the ACOG.¹⁹² Finding Georgia case law unhelpful for situations where recreational spaces blended with commercial activity, the court looked to a balancing test provided by the Wisconsin Court of Appeals: “[t]he test requires that all social and economic aspects of the activity be examined.”¹⁹³ The Wisconsin court considered “the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity’s purpose and consequence.”¹⁹⁴

Entry into Centennial Park was free and, once visitors entered the park, there were several free attractions for visitors to interact with.¹⁹⁵ However, a multitude of commercial attractions were also available.¹⁹⁶ In addition, the record presented conflicting “subjective views” about the nature of the park.¹⁹⁷ The ACOG portrayed the park as a place for the public to gather for free, while the plaintiffs viewed the park as a place for corporate vendors to make a profit.¹⁹⁸ Given the conflicting evidentiary record, the Georgia Court of Appeals found that summary judgment in favor of the ACOG was

188. *Anderson v. Atlanta Comm. for the Olympic Games*, 584 S.E.2d 16, 20 (Ga. Ct. App. 2003).

189. *See id.* at 18.

190. *Id.* Like the South Carolina Recreational Land Use Statute, the Recreational Property Act was passed “to encourage landowners to make their property available to the public for recreational purposes by limiting the liability of such owners.” *Id.* at 19.

191. *See id.* at 19.

192. *Id.* at 18.

193. *Id.* at 19 (quoting *Anderson v. Atlanta Comm. for the Olympic Games, Inc.*, 537 S.E.2d 345, 349 (Ga. 2000)).

194. *Id.*

195. *Id.* at 20.

196. *Id.* at 18.

197. *Id.* at 20.

198. *Id.*

inappropriate because a genuine issue of material fact existed as to whether the Recreational Property Act applied.¹⁹⁹

The balancing test in *Anderson* is relevant to wrongful death and personal injury incidents that occur on South Carolina beaches. Like the visitors of Centennial Park, beachgoers do not pay to enter the beach. Likewise, people can bird watch, swim in the ocean, and lounge in the sand for free. However, plenty of commercial activity also occurs.²⁰⁰ For example, while lying in the sand is free, the beach chairs that Lack's lifeguards rent to visitors are not.²⁰¹ If a visitor wants to fish at the pier, they must purchase a fishing pass and rent a rod if they did not bring their own.²⁰² Finally, the "Boardwalk and Promenade [which] traverses through the sand" hosts multiple gift shops and restaurants.²⁰³ If those commercial activities do not constitute a "charge" for the purpose of the Recreational Land Use Statute, they should at the very least create a genuine issue of fact so as to allow the case to proceed out of the procedural and discovery phases of litigation.²⁰⁴

V. SOURCES OF MUNICIPAL LIABILITY: ESTABLISHING A DUTY OF CARE

Myrtle Beach continues to successfully argue South Carolina statutory law absolves the city from owing a duty of care to beach visitors.²⁰⁵ Subsequently, the city is shielded from liability for negligent acts perpetrated by its franchised lifeguarding service.²⁰⁶ As outlined above, its arguments for statutory protection are flawed. The Tort Claims Act and the Recreational Land Use Statute should not absolve municipalities of owing a duty of care to beachgoers.

However, concluding that South Carolina statutory law does not protect local governments does not establish what duty of care *is* owed by a municipality that provides a beach lifeguarding service under § 5-7-145. Section 5-7-145 does not require a municipality to provide lifeguards on the

199. *Id.*

200. See TOURISM ECONOMICS, *supra* note 175, at 33.

201. WATER SAFETY FRANCHISE AGREEMENT, *supra* note 65, at 6.

202. *Myrtle Beach State Park: Things to Do*, SOUTH CAROLINA STATE PARKS, <https://southcarolinaparks.com/myrtle-beach/things-to-do> [<https://perma.cc/7SB9-XQXH>].

203. *Myrtle Beach Boardwalk*, VISIT MYRTLE BEACH, <https://www.visitmyrtlebeach.com/things-to-do/attractions/boardwalk/> [<https://perma.cc/UQ49-SKJ8>].

204. *Contra Corbett v. City of Myrtle Beach*, 336 S.C. 601, 605 n.1, 521 S.E.2d 276, 278 n.1 (Ct. App. 1999) (noting the trial court had granted the city's motion for summary judgment); *Mena v. Lack's Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *8 (D.S.C. Apr. 16, 2008) (dismissing the case in the procedural stage).

205. *Corbett*, 336 S.C. at 605 n.1, 521 S.E.2d at 278 n.1; *Mena*, 2008 WL 8850813, at *8.

206. *Corbett*, at 605 n.1, 521 S.E.2d at 278 n.1; *Mena*, 2008 WL 8850813, at *8.

beach.²⁰⁷ However, when an act is voluntarily undertaken, “a duty to use due care may arise.”²⁰⁸ South Carolina’s “voluntarily assumed duty” originates from the *Restatement (Second) of Torts* § 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.²⁰⁹

Several cases affirm South Carolina’s adoption of the *Restatement* standard.²¹⁰ Applying this standard, when a South Carolina municipality provides beach lifeguards, it has a duty to provide them in a reasonable manner.²¹¹ Once a municipality exercises its § 5-7-145 authority to provide beach lifeguards, whether through municipal employees or a franchise agreement with a private company, the municipality has chosen to gratuitously undertake a service that is necessary to protect beach visitors. The beach is inherently dangerous, and providing specially trained guards to combat those dangers is essential for beachgoer protection.²¹² Finally, both § 323(a) and § 323(b) support imposing a reasonable duty of care. In accordance with § 323(a), when a lifeguard negligently supervises swimmers,

207. S.C. CODE ANN. § 5-7-145(B) (2004) (“Lifeguard services *may* be provided using municipal employees or by service agreement with a private beach safety company.” (emphasis added)).

208. *Wright v. PRG Real Est. Mgmt.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019) (quoting *Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006)).

209. RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965).

210. *Oulla v. Velazques*, 427 S.C. 428, 443, 831 S.E.2d 450, 457 (Ct. App. 2019) (“South Carolina has adopted section 323 of the *Restatement (Second) of Torts*.”); *Doe 2 v. Citadel*, 421 S.C. 140, 147, 805 S.E.2d 578, 582 (Ct. App. 2017) (affirming South Carolina’s recognition of a “voluntarily assumed duty”); *Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 504–05, 737 S.E.2d 512, 514 (Ct. App. 2012) (finding that a voluntarily assumed duty in South Carolina is “rooted in the *Restatement of Torts*”).

211. *See* RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965)

212. *Nine Dangers at the Beach*, *supra* note 3.

the risk of harm to those swimmers increases.²¹³ As for § 323(b), beachgoers inherently rely on beach lifeguards; the presence of a lifeguard in their watch tower assures the swimmer that there is someone watching and ensuring their protection from hazardous conditions.

A municipality that owes a reasonable duty of care when providing lifeguarding service *should not* be held liable for all injuries that beach visitors sustain. Likewise, a municipality will not always be subject to liability when a lifeguard fails to rescue an individual. If a lifeguard performs his or her job in a manner consistent with municipal requirements, and those requirements are consistent with nationally accredited lifeguarding agencies like the USLA, then municipal liability is inappropriate. For example, in 2020 a six-year-old drowned at Folly Beach, South Carolina.²¹⁴ At 6:30 p.m. on a Sunday evening, the child swam into a zone marked as a “no swimming” zone.²¹⁵ Employees of the Charleston County Parks and Recreation Services, a USLA-accredited lifeguarding entity,²¹⁶ were not on duty because their shifts ended at 6:00 p.m.²¹⁷ Here, a potential negligence claim against the City of Charleston would very likely fail, as there is no evidence that the municipal employee’s actions breached the duty of care owed.

Contrast that factual scenario with the facts of *Abel*, where the City of Myrtle Beach renewed its long-running agreement with Lack’s Beach Service, which had lost its USLA accreditation.²¹⁸ The agreement permits the deployment of the “dual-role” lifeguarding system, which is condemned by the USLA.²¹⁹ As a result, while Myrtle Beach’s franchisees rented out beach chairs, a man drowned.²²⁰ This is precisely when municipal liability is appropriate. The City of Myrtle Beach owed a duty of reasonable care, and its execution of a franchise agreement with an unaccredited lifesaving agency was unreasonable.

VI. POLICY CONCERNS FOR ESTABLISHING A MUNICIPAL DUTY

There is one legitimate concern in establishing a municipality’s duty to reasonably provide lifeguards. Local governments, fearful of financial

213. See *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 604, 521 S.E.2d 276, 278 (Ct. App. 1999); *Mena v. Lack’s Beach Serv., Inc.*, No. 4:06-cv-2536-TLW, 2008 WL 8850813, at *2 (D.S.C. Apr. 16, 2008); Complaint, *supra* note 77, ¶¶ 10–52.

214. Drew Tripp, *Boy, 6, Dies After Being Caught in Folly Beach Rip Current*, ABC NEWS 4 (Sept. 15, 2020), <https://abcnews4.com/news/local/boy-6-dies-after-being-caught-in-folly-beach-rip-current> [<https://perma.cc/KD7N-AL6Y>].

215. *Id.*

216. See *USLA Certified Programs*, *supra* note 12.

217. Tripp, *supra* note 214.

218. See *Boles*, *supra* note 71.

219. *Id.*

220. *Id.*

burdens arising from litigation, could forgo exercising their § 5-7-145 authority to provide lifeguards. If a lifeguard is not provided, the municipality has not undertaken a service that is necessary to protect others and subsequently would not owe a legal duty to anyone that enters the beach.

While a municipality may consider removing lifeguards to limit liability, such a decision is unlikely. Removing lifeguards may limit potential litigation expenses; however, the absence of lifeguards presents a greater financial risk to municipalities than the risks associated with providing lifeguards.²²¹ Municipalities like Myrtle Beach rely on tourism to support their economy, and a decision to remove lifeguards cuts against their economic interests.²²²

A city with a reputation of an unsafe beach will see less tourism.²²³ Removing lifeguards from the beach increases the likelihood of earning that reputation.²²⁴ The Center for Disease Control and Prevention conducted four municipal case studies and found “[l]ifeguards indirectly provide economic and social benefits.”²²⁵ In each study, when the municipality removed or failed to provide beach lifeguarding services (“as a cost saving measure”), an increase in drownings or near drownings occurred.²²⁶ In two of those cases, the beaches received backlash from “extensive media attention.”²²⁷ Ultimately, the increased drownings and media coverage influenced those municipalities to reinstate or institute lifeguarding services.²²⁸ To avoid similar ramifications, South Carolina beach towns that rely on tourism to fuel the economy are unlikely to take the risk of losing revenue by removing lifeguards. Even now, as Myrtle Beach restructures its lifeguarding model, city officials like police Master Cpl. Kevin Larke are dubious of the possibility of removing lifeguards: “The people coming to the beach for years expect lifeguards out there.”²²⁹ As Adam Benson, a reporter from a Myrtle Beach based newspaper put it, “[g]iven the decades-long presence of guards on city

221. *See, e.g.*, LIFEGUARD EFFECTIVENESS: A REPORT OF THE WORKING GROUP 11–12 (Christine M. Branche et al. eds.) (2001) (calculating the economic cost of not having lifeguards to range from “\$202,500 to \$4.6 million and the total comprehensive costs . . . from \$705,380 to \$16.1 million”).

222. TOURISM ECONOMICS, *supra* note 175, at 31.

223. *See, e.g.*, LIFEGUARD EFFECTIVENESS: A REPORT OF THE WORKING GROUP, *supra* note 221, at 11 (reporting an increase in California beach attendance with a decrease in the number of drownings).

224. *See id.* (discussing the substantially higher risk of aquatic related injury and death that would result from an absence of lifeguards).

225. *Id.* at 5.

226. *See id.* at 5–6.

227. *Id.*

228. *See id.*

229. *See* Benson, *supra* note 94.

beaches and their massive tourism draw, the notion of an unattended shore is a non-starter for city leaders.”²³⁰

VII. CONCLUSION

Lifeguards are essential to protecting the lives of beachgoers. An estimated 100,000 Americans are saved from drowning every year by lifeguards.²³¹ At its inception, § 5-7-145 could have enhanced beach lifeguarding and served as an effective model for protecting beach visitors.²³² Instead, the statute facilitated the continuance of an unaccepted model of lifeguarding that resulted in the fatal drowning of three individuals. The South Carolina municipality that authorized that dual-role model continued to do so without facing repercussions after the drownings.

In response to the dangers posed by dual-role lifeguarding, the South Carolina General Assembly should amend § 5-7-145 to stipulate, “if the municipality elects to provide the services by an agreement with a private beach safety company, that service must comply with United Life Saving Association standards.” Doing so would prevent municipalities from forming agreements with private companies like Lack’s and John’s Beach Service who use the dual-role model. This would also ensure that private lifesaving companies implement other policies that value safety over generating profit.

While a statutory amendment is a step in the right direction, an amendment, by itself, is not enough to ensure South Carolina’s beachgoers are protected. Requiring municipalities to comply with USLA standards will prevent the implementation of known threats like dual-role lifeguarding; however, a municipality, although statutorily obligated to comply with USLA standards, is not fully accountable unless a legal duty of care is owed to visitors. Accordingly, the South Carolina judiciary is obligated to reconsider the application of the Recreational Land Use Statute to municipal torts committed on public beaches. Cities do not need an incentive to grant beach access because the Public Trust Doctrine requires them to provide such access. Instead, the *Restatement (Second) of Torts* § 323 applies because cities that employ or franchise beach lifeguards gratuitously undertake a service that beachgoers rely on. Finally, once the city undertakes that service, it must be provided in a reasonable manner. Otherwise, municipalities will continue to take advantage of the financial benefits that trusting tourists bring to their communities while concurrently arguing that they do not owe those tourists a duty to act reasonably when employing lifesaving services.

230. *Id.*

231. LIFEGUARD EFFECTIVENESS, A REPORT OF THE WORKING GROUP, *supra* note 221, at 4.

232. S.C. CODE ANN. § 5-7-145 (2004).