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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2016-CP-10-05379
Appellate Case No. 2020-001643
Op. No. 6067, filed June 26, 2024

The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

PETITION FOR REHEARING

This is a negligence action brought on behalf of the Estate of Delila Parrott, a former resident of Sandpiper Independent and Assisted Living, arising from a three-day period in June 2014, during which Ms. Parrott laid on the floor of her apartment after she fell and suffered a broken hip. By consent of the parties the claim came before the Trial Court for a non-jury, bench trial, after which the Trial Judge – sitting as judge of the law and in place of the jury as the finder of facts -- found that Sandpiper owed a duty to Ms. Parrott to exercise reasonable care in conducting daily wellness checks and that Sandpiper breached that duty by failing to check on her

on June 4 and June 5. The Trial Judge further found that the failure to check on Ms. Parrott resulted in a long lie which caused her pain and suffering and ultimately was a cause of her death. On those findings, the Trial Judge rendered verdict favor of the Plaintiff and awarded actual damages of $500,000 on the survival cause of action and $500,000 on the wrongful death cause of action. This Court has reversed the Trial Judge's verdict based on its own conclusion that Sandpiper owed no duty to Ms. Parrott.

Pursuant to Rule 221, SCACR, Plaintiff respectfully petitions for a rehearing on the grounds that this Court has overlooked or misapprehended the relevant, applicable controlling case law regarding the duty of care owed by Sandpiper to Ms. Parrott which was created by Sandpiper's voluntary undertaking to conduct daily checks. In addition, the Court has overlooked or misapprehended the core nature of the Plaintiff's claims as well as the correct standard of appellate review which must be applied to the factual findings made by the Trial Judge sitting non-jury as the finder of the facts.

First, and foremost, the Court has overlooked or misapprehended that the Plaintiff's claim does not raise out of Ms. Parrott's fall. Plaintiff does not allege that Sandpiper was negligent in any manner that caused or contributed to her fall or injuries sustained during the initial period that she laid on the floor of her unit from the evening of June 3rd through the evening of June 4th. Rather, the claim rests on Sandpiper's failure to conduct a daily check on June 4th or June 5th which caused her to lie there and endure pain and suffering from the evening of June 4th when the staff consciously/deliberately failed to make the effort to check on Ms. Parrott before clocking out until the staff finally made the effort to check on her on the evening of June 6th.

As noted below and as fully discussed in the Respondent's Brief, which is incorporated as if fully restated herein, the Trial Judge did not make any error of law in determining that Sandpiper

owed a duty to Ms. Parrott to conduct daily wellness checks because it undertook that duty. In addition, the Trial Judge's findings of facts, in particular those facts regarding the daily wellness check policy, are supported by ample -- more than just "any" -- evidence in the record.

Despite the incontrovertible evidence of its failure to conduct daily checks on those days, Sandpiper boldly denied that it owed any duty to check on Ms. Parrott. Relying on traditional landlord-tenant law, Sandpiper asserted that it was a landlord and it owed no duty to conduct daily checks of its residents/tenants, and until the eve of trial, Sandpiper denied that there was any daily check policy. When Sandpiper's Executive Director (as well of as other staff) testified that Sandpiper did have a daily check policy and the Defendant finally produced a written policy with protocols for conducting daily checks, Sandpiper insisted that the daily checks were merely offered as a courtesy for which they could not be held liable in negligence when they failed to honor that courtesy.

However, the evidence adduced at trial supports the Trial Judge's factual findings that during their initial meeting, the Executive Director of Sandpiper affirmatively represented to Ms. Parrot that Sandpiper had a policy to check on each resident daily and that Ms. Parrott relied upon that representation in making the decision to enter into the agreement to reside at Sandpiper. The evidence also fully supports the Trial Judge's findings regarding the specific protocols/procedures established by Sandpiper for implementing the daily check policy, and the findings that the Sandpiper staff were negligent in failing to conduct the daily checks on both June 4th and 5th.

As noted below and as fully discussed in the Respondent's Brief, the Trial Judge did not make any error of law in determining that Sandpiper undertook a duty to Ms. Parrott to conduct daily checks. In addition, the Trial Judge's findings of facts, in particular those facts regarding the daily check policy and the protocols implementing that policy are supported by ample evidence in

the record. Accordingly, the Court should grant this petition and affirm the Trial Judge's judgment as supported by the applicable, controlling precedent and the evidence adduced at the bench trial on each and all the grounds as ruled upon by the Trial Judge.

I. THE "ANY EVIDENCE" STANDARD OF REVIEW: This Court has not applied the correct standard of review of the findings made by the Trial Judge sitting non-jury as the finder of the facts.

The Court of Appeals has overlooked or misapprehended the applicable standard of review. This case presents a legal claim for negligence. The parties consented to try the claim without a jury and the Trial Judge presided as the judge of the law and the finder of the facts. Thus, Trial Judge's decision is the equivalent of a jury verdict and the applicable standard for review of the Judge's findings of facts is the "any evidence" standard of review.

> In an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed if there is any evidence which reasonably supports the judge's findings. The judge's findings in such an instance are equivalent to a jury's findings in a law action. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Our scope of review extends merely to the correction of errors of law. Temple v. Tec–Fab, Inc., 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009).

Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011). Within this purview, the Trial Judge has the exclusive role of determining credibility and weighing of the evidence and the Judge's decisions in those regards are not to be second guessed on appeal:

> In a law case tried without a jury, questions regarding credibility and weight of evidence are exclusively for the trial judge. Wayne Smith Construction Co., Inc. v. Wolman, Duberstein, and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App.1987).

Sheek v. Crimestoppers Alarm Sys., Div. of Glen Curt Consultants, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989).

This Court has not properly applied the applicable standard of review and substituted its own view of the evidence. More particularly, the Court had overlooked/ignored or

misapprehended/misapplied the evidence that supports the Trial Judge' factual findings in the following particulars.

A. "FACTS"

1. The Court states that "the exact timeline" is disputed. To the extent that there was any conflicting testimony about the exact time of Ms. Parrott's fall, the evidence of statements from Ms. Parrott had she was found and medical evidence supports the Trial Judge's resolution of any dispute or confusion that point. The Trial Judge -- acting as the factfinder in place of the jury – found that Ms. Parrott fell on the evening of June 3rd. There is no basis in this record to disturb the Trial Judge's factual finding on the timeline.

2. The Court states that Plaintiff contended at the bench trial that Ms. Parrott's death was the result of a medical condition referred to as a long lie. This Court has overlooked or misapprehends that The Trial Judge, sitting in place of the jury in the bench trial, found that the long lie aggravated, caused and/or contributed to her death on February 9, 2015. That finding is supported that by the testimony of medical experts and the medical records and, accordingly, there is no basis in this record to second-guess or disturb the Trial Judge's finding on this point.

3. In discussing the facts regarding the long lie, this Court comments on a medical journal article on the topic of long lies that was admitted into evidence at trial without objection. This Court's consideration of that journal article cannot justify questioning or disallowing the Trial Judge's credibility decisions in weighing the testimony of the experts (which considered the journal) and findings on this point.

4. In a section titled as "Background on Sandpiper and its Check-In Policy,"[1] this Court recites that (1) Sandpiper "operated a daily check-in policy whereby a staff member would sign off for each resident on a sheet at the front desk once daily, confirming that the resident had been seen or at least heard from" and (2) there was a written document outlining procedures and policies associated with the daily check policy. However, throughout the opinion and by its ultimate reversal, the Court fails to acknowledge those facts and the legal implications under the case law applicable to the question of whether the general policy and the written document implementing procedures/policies for the daily checks constitutes a voluntary undertaking that imposed a legal duty of care.

In this section the Court discusses evidence that Sandpiper issued a panic button to residents which allowed them to call for help in an emergency and that Ms. Parrott was not wearing her button when she fell. The Court has overlooked or misapprehended the evidence and the legal significance of that panic button. The panic button was irrelevant to the question of whether Sandpiper had voluntarily undertaken to conduct daily wellness checks. Moreover, the Court's discussion of the panic button was selective and overlooked or misapprehended all the evidence regarding the panic button. While there was evidence that Sandpiper issued panic/call buttons to the residents in the independent living center,[2] there was also undisputed evidence that the residents were not required to wear them and Sandpiper was aware that some of the residents did not wear them. [R. pp. 182:23-183:5; Trial Day 1 Tr. p. 108:23-109:5.] Sandpiper's Executive

[1] First, it was not a check-in policy in the sense that the resident's checked in with the facility staff; rather, as testified to by the Executive Director and other staff, it was a policy for the staff to make sure that each resident was seen (or otherwise accounted for) each and every day.

[2] Notably, evidence that Sandpiper was issuing and monitoring/responding to the call button supports the Trial Judge's finding that this was not a traditional landlord-tenant relationship.

Director testified that one reason for the daily check system was to find those people who were in need of help but were not wearing their button or could not push it. [R.p. 226:4-10; Trial Day 1 Tr. p. 152:4-10.] Most significantly, Sandpiper's Director basically acknowledged Ms. Parrott was entitled to be rescued even if she did not use her panic button. [R.p. 213:4-9; Trial Day 1 Tr. p. 139:4-9.] The Executive Director also testified that there was nothing in the Sandpiper policies that excused or discharged compliance with the daily check procedure if the emergency call button was not used. [R. p. 214:11-15; Trial Day 1 Tr. p. 140:11-15.] Accordingly, none of the evidence about Ms. Parrott's decision to not wear the panic button supports this Court's conclusion that Sandpiper did not owe her any duty to conduct the daily checks.

5. In a section titled "Background on Parrott," the Court acknowledges the evidence that Ms. Parrott wanted to live where she would be checked on every day. Yet the Court fails to comprehend that that evidence establishes reliance and supports the Trial Judge's findings.

In this section, the Court mentions certain hold-harmless and assumption of the risk portions of the lease agreement. The Court has overlooked or misapprehended that the duty, as proven by the Plaintiff and found by the Trial Judge, does not arise from the lease, but rather, arises from the voluntary undertaking separate from the lease agreement. The lease does not contain an integration clause and does not prohibit the creation of a duty separate from, but in addition, to the other lease provisions.

In this section, the Court also discusses Ms. Parrott's mental health[3] and evidence that Ms. Parrott was "very private" and that she did not want anyone in her apartment, and that there was a note on her file that she was fearful of people coming into her apartment. However, the Trial Judge

[3] It is difficult to fathom any legitimate significance of the Court's consideration of Ms. Parrott's mental health in relation to the issues of the existence of the duty owed to conduct daily wellness checks.

– as the factfinder – found that the policy required that the Sandpiper staff confirm each resident's wellbeing once every 24 hours and that staff would use a duplicate key and enter the apartment to check on the resident if the resident had not answered the telephone or a knock of the door. None of the evidence about Ms. Parrott's fears and privacy concerns justifies disturbing the Trial Judge's factual finding or establishes any legitimate excuse for the failure of the Sandpiper staff to perform the daily check on June 4th or June 5th, particularly where the Executive Director testified that Ms. Parrott's fears and privacy concerns did not disqualify her from receiving a daily check, they would not trump doing what was necessary, and they should not have impacted the protocol for entering the resident's apartment if they had not been able to see or speak to her during the day. [R.p. 165:17-23; R.p. 182:4-8; Day 1, pp. 91, 108.]

In this section, the Court also discusses evidence that Ms. Parrott had changed her locks several months prior to the incident. However, the Executive Director testified that Ms. Parrott had provided a duplicate key and that the staff knew where it was kept. There is no evidence that changing the lock disqualified Ms. Parrott from receiving daily checks or excused the failure to access the duplicate key to check on her on June 4th and June 5th.

Discussion and consideration of these matters clearly shows that the Court has failed to comprehend that the daily check policy was unconditional. Sandpiper promised that it would check on each resident at least once every day. None of the evidence about panic buttons and changing locks and privacy concerns could relieve Sandpiper of its unconditional/unqualified duty to check on Ms. Parrott or excuse its liability for failing to conduct daily checks on June 4th and June 5th

6. The Court's discussion of the fall and long lie was selective and overlooked or misapprehended all the evidence regarding those matters. In the section "Parrott's Fall and Long

Lie," the Court recounts its own description of the facts regarding how the Sandpiper staffer (Munoz) failed to make the effort to get the duplicate key to check on Ms. Parrott on the evening. The Court relies on some testimony of the staffer that her decision to not enter Ms. Parrott's apartment on the evening of June 4th was based on her knowledge of the privacy concerns. Yet, the Court overlooked (or ignores) the evidence that the staffer (Munoz) claimed that she did not know where the duplicate was, and yet she admitted that she knew where to find it on June 6th when she finally used it to check on Ms. Parrott. The Court misapprehends that the excuses offered by Munoz for failing to conduct the daily check on June 4th are wholly irrelevant because the daily check protocols did not provide any option or basis for a staff to make a discretionary decision not to complete the daily check. The fact, as found by the Trial Judge and supported by the evidence, is that the policy called for a daily check and Munoz completed her shift without conducting the check on June 4th., and her explanation for failing to do so cannot excuse her failure.

The Court also discusses evidence about whether or not a staffer [Auld] conducted a daily check on June 5th. There was conflicting evidence on that point, Auld claimed that she has signed the list evidencing that she had seen Ms. Parrott on June 5th; however, the list was never produced or introduced at trial and Auld could not recall any specifics about supposedly seeing Ms. Parrott on June 5th. This point is resolved by the finder of fact. In finding that Sandpiper did not conduct a daily check on June 5th the Trial Judge relied on credible testimony from another resident that she had not seen Ms. Parrott that day and Ms. Parrott's phone records which showed inactivity on her line, and medical testimony that the long lie had already begun on June 3rd. There is no basis to disturb the Trial Judge's finding that no daily check was made on June 5th.

II. THE APPLICABLE CASELAW ON THE DUTY OF CARE: This Court overlooked or misapprehended the relevant, applicable caselaw on the duty of care that Sandpiper voluntarily undertook to conduct daily wellness checks.

The existence of a legal duty is a question of law for the court. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650, 656 (2006). However, when the existence of a duty in a particular case depends on the existence of particular facts, then the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder. Miller v. City of Camden, 329 S.C. 310, 314–15, 494 S.E.2d 813, 815 (1997). The Trial Judge correctly stated the law as to the Plaintiff's burden of proving that Sandpiper undertook/assumed a legal duty of care to conduct a daily check of its residents, citing and following Miller v. City of Camden, 329 S.C. 310, 314–15, 494 S.E.2d 813, 815 (1997), and Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006).

This Court has reversed the Trial Court judgment, holding that "Sandpiper owed Parrott no duty because (1) internal policies cannot, standing alone, create a duty in South Carolina, and (2) there is no evidence that Parrott's harm was caused by her reliance on the check-in policy." The Court's consideration of the written policy as an "internal policy" that cannot create a duty in South Carolina overlooks or misapprehends the findings of the Trial Judge as supported by the evidence and the relevant and controlling caselaw precedent, and this Court has instead misapprehended and misapplied appellate opinions and authorities which simply do not apply to the claims presented on the facts of this case.

A. Evidence Establishing the Existence of the Daily Check Policy

It is apparent from the Court's focus on the perception of Sandpiper's "internal policies," this Court has misapprehended the distinction between the general concept of the daily check policy and the written document which outlined the protocols and procedures for implementing

the daily check policy. The record shows, as found by the Trial Judge, that Sandpiper had denied the existence of the daily check policy in its pleadings and throughout the discovery process.[4] However, the Plaintiff gathered and presented testimonial evidence of witnesses from the Sandpiper Executive Director and other staffers that evidenced the existence of the daily check policy and the steps set forth to ensure that the staff saw or talked to each resident every day. Then just four days before the trial, Sandpiper produced a written document that memorialized the policy as testified to by the Plaintiff and the Executive Director and further set protocols and procedures for the staff who were to conduct the daily checks. The Plaintiff also presented testimonial evidence that Ms. Parrott was made aware of the policy and relied on that policy in deciding to live at Sandpiper. On this latter point, the Trial Judge specifically found: "In addition, I found the testimony of the deceased daughter, Joan Acosta credible and extremely compelling. Ms. Acosta's testimony was clear that they knew of Sandpiper's policy regarding wellness checks and the policy was influential and compelling towards Ms. Parrott and Ms. Acosta's decision to select Sandpiper over other similar living facilities." Relying on the testimony AND the written document, the Trial Judge found that the evidence established that there was a daily check policy and Ms. Parrott relied upon that policy in choosing the Sandpiper living center, and he concluded that those facts established a duty owed by Sandpiper to follow its own policy.

In its opinion, this Court acknowledges the existence of the daily check policy:

> Sandpiper also operated a daily check-in policy whereby a staff member would sign off for each resident on a sheet at the front desk once daily, confirming that the resident had been seen or at least heard from. Specifically, an internal document outlining procedures and policies for Sandpiper's front desk workers stated, "All residents must be seen by staff and initialed off every day. If you do not see

[4] Sandpiper denied the existence of the policy in its discovery responses to interrogatories and in its responses to Plaintiff Request to Admit. In addition, the Regional Director of Sandpiper denied the existence of any such policy in his sworn deposition testimony.

> someone, call them[. I]f you can't get them on the phone, go to the apartment and check on them."

Yet, inexplicably, the Court focuses on isolated statements from various appellate opinions for the proposition that internal policies created by defendants cannot establish a voluntary undertaking. To the extent that the quoted and cited opinions make such holdings, this Court has overlooked that those court rulings do not apply here because the Plaintiff never claimed, and the Trial Judge did not find that Sandpiper's written policy for conducting the daily wellness checks was the sole evidence proving that Sandpiper undertook a duty to conduct daily checks. Rather, it is the testimony of Sandpiper's Executive Director and the Plaintiff which established that Sandpiper did in fact have such a "policy" of conducting daily checks. The policy was longstanding and routinely implemented and was well known to the staff and residents of Sandpiper. The written policy, which Sandpiper waited to produce on the eve of trial, provided corroborative evidence of the existence of the policy in the face of Sandpiper's steadfast denial throughout the litigation that there was no policy. In addition, the written policy created by Sandpiper provided evidence of the standard of care of the duty established by the witness testimony of the Executive Director and others. Thus, the written policy – once produced and entered into evidence without objection – was not improperly considered by the Trial Judge under the rulings of the decisions cited by this Court.

To the extent that the cited cases contain statements that certain internal policies could not be said to constitute the voluntary undertaking of a "duty," and could serve only as evidence of the standard of care, this Court has misapprehended the scope of those statements in the context of the circumstances presented in those cases. The statements in those opinions and orders do not support reversing the Trial Judge's findings and conclusions that Sandpiper undertook a duty to conduct daily checks.

First, the written document – if it should even be considered an "internal" policy[5] -- does not stand alone in this case. Second, the caselaw does not support the proposition that the written "internal" policy cannot be used to corroborate the testimony of witnesses (particularly, the Executive Director and the Plaintiff) as evidence supporting the conclusion that Sandpiper voluntarily undertook a duty of care by establishing, marketing, and implementing a policy of conducting daily checks of all residents.

In Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 248, 711 S.E.2d 908, 912 (2011), the plaintiff sought to establish a duty to a third party victim of sexual abuse based on the store's internal policy regarding processing photographs depicting nudity. While the Court held that this internal policy did not constitute the voluntary undertaking of a duty, it did indicate that the policy could serve as evidence of the standard of care. In that case, unlike here, there was no evidence that Wal-Mart made any representations or promises to the customer that might have constituted a voluntary undertaking of a duty to the third party victim.

In Doe 2 v. Citadel, 421 S.C. 140, 805 S.E.2d 578 (Ct. App. 2017), the Citadel was sued by a plaintiff who had been sexually abused as a child by a counselor who had previously worked at a summer camp associated with the College. Although the plaintiff had never attended the college or it's summer camp programs, he attempted to impose liability on the theory that the college had violated its policy regarding internal investigations of sexual abuse accusations made against the camp counselor during a previous past time period. The Court held: "[W]e find the internal policies created by The Citadel do not establish a voluntary undertaking of a duty; rather, they can only serve as evidence of the standard of care if the duty was established by law." Id. at

[5] The testimony evidences that the protocols and procedures for conducting the daily check set forth in the written document was known to the residents and experienced by them on a daily basis.

583. Again, in that case, unlike here, there was no evidence that The Citadel made any representations or promises to the plaintiff victim (or his parents) that might have constituted a voluntary undertaking of a duty to identify the assailant as a danger so that future third parties might be on alert to avoid any relationship/association with him.

The federal court's reliance on the Wal-Mart and Citadel opinions in the slip and fall case of Pacicca v. Jackson, No. 3:21-CV-03136-DCC, 2023 WL 8242180, at *4 (D.S.C. Nov. 28, 2023), does not support this Court's rejection or limitation of the written protocols/procedures for conducting the daily check. There, the district court stated: "These actions [per the internal policy for wet floor conditions] may be evidence of a breach of a standard of care, but do not ***by themselves, without more***, create a duty toward Plaintiff." Here, the written policy/protocols is not the only evidence that supports the finding that a daily check as was represented to Ms. Parrott, actually existed and it constituted a voluntary undertaking of a duty to check on every resident every day. The testimony of the Executive Director and the Plaintiff are "more." The witnesses testimony is, in fact, the primary evidence of existence of the policy which constates the undertaking of a legally cognizable duty.

In Bernstein v. Walmart, Inc., No. 2:22-CV-1637-BHH, 2024 WL 476300, at *1 (D.S.C. Feb. 7, 2024), the district court granted summary judgment to the store on a claim arising from a trip and fall when the plaintiff customer caught his foot on the wheel of a shopping cart. That decision was rendered based on settled legal principles governing premises liability for customers as invitees which required that the plaintiff establish the existence of a defective or dangerous condition. The fact that the federal district court cited to Pacicca, in a footnote stating that any alleged failure to follow Walmart's Standard Operating Procedure ("SOP") relating to Slip, Trip and Fall Guidelines would not create a duty towards the customer does not support the conclusion

that Sandpiper's written policy/protocols did not create a duty to Ms. Parrott. Here, the duty rests on the testimonial evidence and is merely corroborated by the written document.

In Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005), there was no issue about whether a duty was undertaken; rather, the Court held that "evidence of Respondents' deviation from their internal maintenance policies is admissible to show the element of breach" even where federal law/regulations set the standards for railroad track maintenance. In Caldwell v. K-Mart Corp., 306 S.C. 27, 29, 410 S.E.2d 21, 22 (Ct. App. 1991), the Court stated that: "In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care;" however, that was not a negligence case; rather, the claims were for slander and false imprisonment resulting from an alleged shoplifting incident. Nothing in either of those opinions supports this Court's conclusion that Sandpiper owed no duty to conduct daily checks.

None of these South Carolina cases dealt with a policy that the defendant voluntarily established, affirmatively marketed, and implemented by setting and following protocols and procedures set forth in a written "internal policy." Similarly, none of these cases dealt with circumstances where the defendant denied the existence of such a policy until the written protocols were produced and disproved their denial. Similarly, none of the opinions from other jurisdictions (which are not binding law in this State) support this Court's reasoning that the "internal policy" implementing procedures and protocols for the daily check policy cannot be relied upon to prove an undertaking.

B. The Law on Establishing a Duty by a Voluntary Undertaking

The Restatement (Second) of Torts §323 has been adopted and applied in South Carolina to matters of whether legal liability can be imposed when a defendant voluntarily undertakes a

duty (not otherwise imposed by law) and fails to exercise reasonable care in performing the duty. The Trial Judge – sitting as judge of the law and the finder of the facts – found that Sandpiper voluntarily undertook a daily check policy that was marketed and promised to Ms. Parrott and that was reflected in the written policy.

In reversing the Trial Judge, this Court relies upon a conclusory comment in a treatise that most cases imposing liability on the principle of voluntary undertaking involve certain various situations.[6] However, the Court misapprehends that *Prosser and Keeton* is not the law in South Carolina and overlooks (or misapprehends) the most relevant authority as set forth in Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 826 S.E.2d 285 (2019), *reversing* 413 S.C. 276, 775 S.E.2d 399 (Ct. App. 2015).

The Supreme Court's decision in Wright actually supports the Trial Judge's analysis of the legal duty issue on several significant points. In that case, a tenant who had been attacked in the parking lot of her apartment complex sued her landlord and the apartment managers for negligence in failing to provide security service. The Court discussed the general rule that a landlord has no common law duty to provide security to protect tenants from criminal acts of third parties, but further discussed the legal theory upon which a landlord could be held liable if it voluntarily undertook a duty to provide security services to its residents. The plaintiff tenant sought to prove a duty was owed to her by the property owner/management under the voluntary undertaking principle and she presented evidence that she was concerned about safety when she was looking

[6] It appears that the Court overlooked or misapprehended that those situations involved affirmative conduct that made the situation worse, either by increasing the danger, by misleading the plaintiff into the belief that [the danger] has been removed, or by depriving him of the possibility of help from other sources." In Wright, the Court distinguishes the factors of a defendant's affirmative act in contrast to a voluntary undertaking.

for an apartment, and that she chose the defendant's complex because the manager had told her that there were security officers on duty. The Court held that there were questions of fact for the jury to ascertain whether a duty of care arose in that case. More particularly, the Court noted that there was conflicting evidence about whether there was some other reasons beyond the safety concerns that formed the basis of her choosing the complex; and there was evidence that the plaintiff tenant had never seen security guards on the premises during the five years she had lived there.[7] The Wright Court ruled that the jury would have to resolve the disputes on the material facts. In comparison, if there was any conflicting evidence about whether Ms. Parrott relied upon the daily check policy as represented and described by the Sandpiper Executive Director, those conflicts were to be resolved by the Trial Judge, sitting in place on the jury in this nonjury bench trial.

In discussing the Wright opinion, this Court proclaims that there is no evidence to support the Trial Judge's conclusion that Ms. Parrott suffered harm from the long lie because of her reliance on the daily check policy, but the Court's reasoning is based on its misreading of the rulings in Wright and several critical misconceptions about the evidence in this record.

ONE: This Court declares that there was no evidence that Ms. Parrott took the risk of hanging curtain without wearing her panic button because she was relying on the daily check policy which would bring someone to rescue her. Nothing in the Wright opinion or any other

[7] The defendant in Wright tried to avoid liability based on its reasoning that any reliance on the original representation about the existence of security guard was dissipated because she should have/would have known that there were no security guards during the interval between when she moved in and the attack. In a similar tactic of trying to blame the plaintiff and excuse the failure to provide the promised safety feature, Sandpiper has sought to escape liability based on Ms. Parrott's privacy concerns and her failure to wear her panic button when she decided to hang new curtain. However, nothing in the law or the daily check policy supports accepting those points as negating the simple and unconditional policy that every resident was to be checked on every day.

applicable caselaw supports the proposition that a duty would only have arisen if Ms. Parrott climbed on the chair to hang her curtains with the specific contemplation that if she fell the staff would find her and rescue her when they performed the Wellness Check.

TWO: This Court declares that the evidence suggests that Ms. Parrott was not keen[8] on the daily check policy or the panic buttons. However, there is no evidence that Ms. Parrot was opposed to the daily check policy; to the contrary, the evidence was uncontroverted that she was concerned about her safety and she relied on the existence of the daily check policy in choosing to live the Sandpiper facility. Further, as discussed above, while it is undisputed that Ms. Parrot was not wearing the panic button at the time of her fall on June 3rd, her choice to not wear the panic button did not constitute any excuse for Sandpiper's failure to check on her on June 4th or June 5th because the daily check policy was unconditional.

THREE: This Court declares that the Trial Judge made no finding that Sandpiper's failure to conduct the daily check increased Ms. Parrott's risk of harm. However, the Trial Judge DID make findings of fact that "as a result of Sandpiper's failures to check on her well-being, Ms. Parrott experienced a long lie of over three days before she was discovered" and that "breach of the duty to conduct daily wellness checks was a cause of Ms. Parrott's long lie." [R.p. 015; Order p. 13.]

It is apparent that this Court has overlooked or ignored that the Supreme Court was critical of a narrow focus taken by the Court of Appeals' panel that had considered the initial appeal in Wright, on the matters of certain internal policies and decisions that limited the security guard

[8] A word search of Record for the term "keen" shows that the term cannot be found in the evidence. This Court's characterization of Ms. Parrott's understanding and appreciation of the daily check policy is not consistent with the evidence and improperly disturbs the Trial Court's weighing of the evidence and his findings.

program. The Supreme Court explained that it was required to examine "the question of the existence of a duty of care with a focus upon the undertaking as it was described to Wright." Id. at 294. As in Wright, this Panel has overlooked that the focus should be on the policy as it was described to Ms. Parrott. The evidence supports the Trial Judge's finding – sitting in the place of the jury – that the daily check policy was simply and clearly described to Ms. Parrott. She was told that the staff would confirm her wellbeing every day by laying eyes on her or talking to her – no exceptions were described. In a similar manner, this Court's focus on the reliance component is too narrow because the focus should not be whether Ms. Parrott consciously contemplated the daily check policy when she attempted to hang curtains in her unit without wearing her call button. Under the analysis and reasoning found in Wright, the proper focus should be on whether Ms. Parrott relied on the daily check policy that was explained to her when she made the decision to live at the Sandpiper facility.

In accordance with the case law and particularly, the most relevant decision in Wright, it was for the Trial Judge, sitting in place of the jury as the factfinder, to determine (a) whether any failure by Sandpiper to complete a wellness check of Ms. Parrott on June 4th and 5th increased the risk of harm to her from the long lie OR (b) whether the harm associated with the long lie arose from her reliance upon Sandpiper's voluntary undertaking to make daily wellness checks. The Trial Judge did find that Sandpiper's failure to conduct the daily checks on those days did increase the harm she suffered and that Ms. Parrott relied under the promise of daily wellness checks. Those findings are supported by evidence in the record and should not be disturbed.

On a final thought, this Court quotes from Araujo v. S. Bell Tel. & Tel. Co., 291 S.C. 54, 57–58, 351 S.E.2d 908, 910 (Ct. App. 1986), regarding public policy factors that are relevant to recognizing whether a duty should be imposed to protect a plaintiff. As quoted, these factors

include the policy of "deterring future tortfeasors, the moral culpability of the tortfeasor." The Court's decision overlooks these factors. The refusal to impose a duty based on the voluntary undertaking principle and to excuse/relieve Sandpiper from any accountability for its failure to comply with the daily check policy it established and marketed and implemented contravenes such factors. Allowing Sandpiper to escape any responsibility for failing to conduct a daily check it represented/promised to Ms. Parrott as evidenced by the trial testimony and written policy will signal to senior living centers that they can make promises and representations about types of safety protections to entice residents to chose their facilities and escape any liability for the complete failure to provide the promised and established safety protection.

CONCLUSION

The Court's discussion and description of the evidence indicates that the Court has overlooked or misapprehended the appropriate standard of review. It appears that the Court has reweighed and reconsidered the relevant evidence on the pertinent issues and eschewed the findings of the Trial Judge and recasts the facts against the Plaintiff. The relevant facts to the legal question of whether Sandpiper owed a cognizable duty to Ms. Parrott are whether Sandpiper voluntarily undertook a duty to perform daily wellness checks. The Trial Judge – sitting nonjury as the factfinder in place of the jury – found that in marketing the independent living facility to Ms. Parrott, Sandpiper represented and promised that they had a daily check policy and that she relied upon that representation/promise when she chose to move and live there. The Trial Judge further found that Ms. Parrott suffered harm from the long lie that she suffered when the Sandpiper staff failed to conduct the daily check on June 4th and June 5th.

As discussed above and in the appellate briefing, the findings of the Trial Judge regarding the existence of the policy are supported by the testimony of the witnesses as well as the written

protocols/procedures implementing the daily check policy and should have been left undisturbed. Likewise, the findings of the Trial Judge regarding the harm caused by her long lie are supported by the testimony of the medical experts and should have been left undisturbed.

Wherefore, based on the foregoing, the Plaintiff respectfully petitions the Court to reconsider its holding that Sandpiper owed no duty to Ms. Parrott to conduct daily wellness check as well as address the other remaining issues and affirm the Trial Judge's verdict and awards in all respects on both causes of action for the pain and suffering she suffered through her survival and for the losses suffered by her children from her wrongful death.

Respectfully submitted,

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July 11, 2024

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2016-CP-10-05379
Appellate Case No. 2020-001643

The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

PROOF OF SERVICE

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I, Paul L. Reeves, of Reeves Law Firm, LLC, counsel for the Respondent above named, do hereby certify that I have served the **Petition for Rehearing** on the below-named Counsel for Appellant by electronic service addressed as follows:

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Dated: July 11, 2024

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July 11, 2024

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Jul 11 2024
SC Court of Appeals

VIA email: ctappfilings@sccourts.org
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Re: The Estate of Delila Parrott vs. Sandpiper Independent and Assisted Living-Delaware, LLC
Appellate Case No.: 2020-001643

Dear Ms. Kitchings:

Enclosed for filing, please find Respondent's Petition for Rehearing and Proof of Service. My office will deliver a check in the amount of $50.00 for the filing fee by hand delivery today.

Thank you for your assistance. Please do not hesitate to contact me should you have any questions or require anything additional. I am,

Very truly yours,

Paul L. Reeves
Attorney at Law

PLR:jrs
Enclosure

Cc: Cc: via electronic mail:

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