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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Charleston County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

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The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

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# FINAL BRIEF OF APPELLANT

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CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*Attorneys for Appellant*

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## STATEMENT OF ISSUES ON APPEAL

**I. Did the trial court err in failing to recognize that Defendant did not cause Ms. Parrott to suffer a "long lie"—and that at most, it caused an extension of what was already 24-plus hours of a "long lie," for which, by Plaintiff's own admission, Defendant bears no responsibility at all—such that the damages awards (for both survival and wrongful death) are wholly undue and speculative or, alternatively, excessive?**

**II. With regard to the wrongful death claim in particular, did the trial court err in failing to grant judgment in Defendant's favor?**

**III. Did trial court err in failing to find comparative negligence on the part of Ms. Parrott?**

**IV. Did the trial court err in finding that the Daily Check-In created a legal duty of care owed by Defendant to Ms. Parrott?**

**A. Did the trial court err in failing to recognize that the legal relationship between Defendant and Ms. Parrott was simply that of landlord and tenant and governed by the SCRLTA and the terms of Ms. Parrott's Lease and in failing to recognize Defendant's rights under the Lease?**

**B. Is the Daily Check-In a *courtesy* service?**

**C. Did the trial court err in finding that the Daily Check-In was a "wellness" check, i.e., that the purpose of the check was to protect Ms. Parrott from the kind of harm Plaintiff complains about in this case, or that Defendant assumed any such duty?**

**D. Did the trial court conflate the threshold question of the existence of a legal duty of care with the question of whether such a duty (once found to exist) was or was not breached, viewing the very existence of the Daily Check-In as establishing the existence of a duty of care on the part of Defendant?**

## INTRODUCTION

About 8:00 p.m. on Friday, June 6, 2014, Ms. Parrott[1], age 80, was found on the floor of her private apartment in Sandpiper Village, an independent-living retirement community in Mount Pleasant. Her hip "shattered"[2] from a fall, she had been lying there for some time before being discovered, unable to move. EMS was immediately called to take her to the hospital.

*When* Ms. Parrott fell is hotly contested, but *how* she fell is *undisputed*: She was alone in her apartment, with the door locked, not wearing her panic button,[3] standing on a rocker-recliner chair (a "big cushy chair," a La-Z-Boy or the like, that rocked and reclined) trying to hang curtains (or a curtain rod),[4] having for some reason decided not only to try to do this herself (as opposed to, for instance, simply taking advantage of the maintenance services included in her lease with Defendant[5]) but also to not tell anyone about it. Even Plaintiff's[6] counsel called this "a stupid thing to do." (R. p. 509:10-11.)

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1 "Ms. Parrott" refers to the late Delila Parrott, the decedent whose estate brought this wrongful death and survival action.

2 (R. p. 82:13-18; R. p. 85:2-3.)

3 Wearable as a bracelet or a pendant, a 24-hour emergency call button, or "panic button," is issued to every Sandpiper Village resident.

4 (*See* R. p. 123:25 - p. 124:21; R. p. 509:4-14; R. p. 1142; R. p. 1160.)

5 "Defendant" refers to Defendant/Appellant, Sandpiper Independent and Assisted Living-Delaware, LLC.

6 "Plaintiff" refers to Plaintiff/Respondent, The Estate of Delila Parrott.

Ms. Parrott passed away about 8 months after the fall, on February 9, 2015. According to Plaintiff, Ms. Parrott made a full recovery from all of her *physical* injuries, and it was the psychological toll of the "long lie" that doomed her, taking away her will to live.[7]

Contending that the fall happened sometime on the "evening" of Tuesday, June 3, 2014,[8] Plaintiff claims the negligence of Sandpiper Village staff in not taking action to find Ms. Parrott two days earlier (on Wednesday, June 4, 2014) caused her to suffer two extra days without help and, ultimately, as a result of the addition of these two days to the "long lie," to lose her life.[9]

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[7] Throughout trial, Plaintiff's counsel used the term "long lie," which was said to be "defined by the literature [a]s when an elderly [person] falls and can't get up for over an hour." (R. p. 86:11-15.) While recognizing that terminology may vary, Defendant's counsel would note that they have not located any case law establishing liability, much less liability for wrongful death, that reference Plaintiff's "long lie" theory, and none were cited by the trial court. (*See* R. pp. 3-19; R. pp. 26-30.)

[8] (R. p. 366:14-16; R. p. 58 ¶¶ 6-7.) By definition, the word "evening" carries with it a certain imprecision, in that (unlike the word "noon," for instance) it does not denote any particular hour of the day but rather a general part of the day comprising a number of hours. *See Evening*, Merriam-Webster, https://www.merriam-webster.com/dictionary/evening (last visited August 9, 2021) (defining "evening" as (1a) "the latter part and close of the day and early part of the night," (1b) "*chiefly Southern US and Midland US*: AFTERNOON," and (1c) "the period from sunset or the evening meal to bedtime.") (emphasis in original).

[9] Again, please note that the parties dispute when the fall occurred. Defendant contends it was not until Thursday, June 5, 2014. For present purposes, however, it is sufficient to assume, *arguendo*, it occurred sometime on the "evening" of Tuesday, June 3, 2014, as Plaintiff claims. To be clear, under Plaintiff's theory, the total length of Ms. Parrott's "long lie" was three days. Somehow, in announcing its ruling, the trial court was under the belief that Ms. Parrott had "been on the floor in the dark for 5 days," that "she sat there and survived it for 5 days." (R. p. 625:21 - p.

It is important to understand just how difficult a needle Plaintiff's theory of Defendant's liability is to thread. First off, Plaintiff, of course, concedes that Defendant bears no responsibility whatsoever for Ms. Parrott's fall or the injuries and pain and suffering it caused. And on top of that, Plaintiff concedes that if Ms. Parrott had been found at 8:00 p.m. on Wednesday, June 4, 2014, instead of at 8:00 p.m. on Friday, June 6, 2014, there would be no case against Defendant at all. (*See* R. p. 84:10-11 ("[I]f [Sandpiper Village staff member] Rebecca [Munoz] had done on Wednesday what she did on Friday, we wouldn't be here today.").) Thus, under Plaintiff's own theory of the case, Defendant is not only *not* liable for the fall or the injuries and pain and suffering it caused, Defendant is also *not* liable for any damages caused by Ms. Parrott laying on the floor for the first 24-plus hours after the fall.[10]

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626:18.) Not only is there no evidence that Ms. Parrott's "long lie" lasted five days, there is no contention that it did, as Plaintiff's counsel interjected to explain to the court. (R. p. 626:19.)

[10] Because Plaintiff bears the burden of proof, and because the record does not narrow down the time of the fall any further than to the "evening," to have any chance of success, Plaintiff's theory of liability must be able to withstand the possibility that the fall occurred at any time during the "evening." For example, if it is essential to Plaintiff's claim that the fall happened after 7:00 p.m., Plaintiff's claim must fail, because there is no evidence in the record that can reasonably support such a conclusion, and Plaintiff's claim cannot rest on speculation. *The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). Thus, sticking with the example of 7:00 p.m. (though, again, Plaintiff's claim must be able to withstand the possibility that the fall occurred earlier in the "evening"), Defendant could not possibly be liable for any damages caused by Ms. Parrott laying on the floor for the first 25 hours after the fall. In other words, and given that, per Plaintiff's theory, a "long lie" starts at one hour after the fall, this means that Ms. Parrott had

As explained below, Plaintiff did not thread the aforementioned needle. But so far, after a non-jury trial where, among other errors, the court even refused to find any comparative negligence at all on the part of Ms. Parrott, Defendant has a $1,000,000 judgment against it. Most respectfully, this is erroneous and unjust and should be reversed by this Court.

## STATEMENT OF THE CASE

Plaintiff filed this wrongful death and survival action against Defendant on October 11, 2016, in the Charleston County Court of Common Pleas.[11] Plaintiff's only theory of liability against Defendant is negligence.[12] As further explained below, Plaintiff claims that Defendant owed Ms. Parrott a duty of care to confirm her wellbeing by making contact with her at least once a day and that this duty was breached when Sandpiper Village staff failed to make contact with her on Wednesday, June 4, 2014, causing her to suffer two extra days without help and,

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already suffered more than one whole day of a "long lie" before Defendant's alleged liability is even on the clock.

[11] Technically, Plaintiff's original summons and complaint, filed October 11, 2016, are against Premier Senior Living, LLC ("Premier") (R. pp. 31-39), and Plaintiff's amended summons and amended complaint, filed December 21, 2016, substituted Defendant in place of Premier. (R. pp. 40-48.) Plaintiff's operative complaint was filed December 11, 2019. (R. pp. 56-66.)

[12] Although Plaintiff's operative complaint pleads both negligence and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 to -180 ("SCUTPA") (*see* R. pp. 57-66), Plaintiff withdrew the SCUTPA cause of action at trial. (R. p. 596:13-15.)

ultimately, by adding these two extra days to her "long lie," to lose her life. (*See* R. pp. 57-66)

Defendant timely answered, denying its alleged liability and raising a number of affirmative defenses,[13] and after a period of discovery, the case came on for a non-jury trial before the Honorable Bentley D. Price, which began on September 8, 2020. (*See generally* R. pp. 75-632; R. pp. 653-757.)

At the conclusion of trial on September 10, 2020, having considered the case (and the unusual and unwieldy issues presented in it) for less than an hour, the court announced its ruling from the bench, finding for Plaintiff in the total amount of $1,000,000—specifically, $500,000 on the wrongful death claim and another $500,000 on the survival claim. (R. p. 620:8 - p. 631:16.)[14] A formal order and judgment to this effect were filed/entered on October 16, 2020. (R. pp. 3-25.)

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[13] (R. pp. 49-55; R. pp. 67-74.)

[14] Of additional concern here is that the trial court apparently believed discovery abuse had occurred in the form of Defendant "hid[ing]" a document. For its part, Defendant categorically denies this. The trial court, however, at the same time as it conceded that it could "not say that [any discovery abuse occurred], I can't prove that," nonetheless found it to be "probably one of the most telling parts of my decision." (R. p. 629:11-22.) Where discovery abuse can be established, which, as the trial court conceded, is not the case here, a court has sanctions and other tools at its disposal to address it. But basing a $1,000,000 award on admittedly unproven speculation about discovery abuse is not one of them. This is another reason the trial court should be reversed.

On October 26, 2020, Defendant timely moved for post-trial/judgment relief pursuant to Rules 41, 50, 52, and/or 59, SCRCP,[15] which motion the trial court heard on November 4, 2020,[16] and denied by order filed November 18, 2020. (R. pp. 26-30.)

By notice served and filed December 17, 2020, this appeal timely follows. (R. pp. 1161-1166.)

## STATEMENT OF FACTS

### Independent Living at Sandpiper Village

Sandpiper Village is an *independent*-living retirement community. It is *not* an assisted-living facility, a long-term-care facility, or any other type of regulated care provider. Its residents live in *private* apartments that they rent from Defendant pursuant to a written lease. (*See* R. p. 413:22 - p. 416:21; R. pp. 1142-1152.)

### The Daily Check-In

Although not a term or requirement of the residents' leases, at all relevant times, it was standard practice at Sandpiper Village for staff (i.e., at least one staff member, it did not matter which one: it could be any staff member from any department) to make some sort of contact with every resident every day (the "Daily Check-In").[17]

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[15] (R. pp. 773-789.)

[16] (R. pp. 633-702.)

[17] The parties disagree about whether the Daily Check-In is properly labeled a "policy," as opposed to something else, like a "practice" or "procedure." Plaintiff says yes, while Defendant says no, as the term "policy" can have a

No particular interaction between staff and resident was required for the Daily Check-In. Indeed, there did not have to be any "interaction" at all. A staff member could speak with the resident (either in person or on the telephone) or even just see the resident (i.e., simply laying eyes on them, without speaking).

A checklist with each resident's name on it was kept at the reception desk. In the course of a given day, whenever reception staff would make contact with a resident, or they were told that another staff member had done so, they would note it on the checklist. The reception desk closed at 9:00 p.m. Toward the end of the day, if contact had not yet been made with a resident, reception staff would try to contact the resident by phone. If staff could not contact the resident by phone, they would go to the resident's apartment and knock on the door. If no one answered the door, a master key and copies of every individual apartment key were kept at the reception desk, and staff would then proceed to unlock the door themselves and enter the resident's apartment.

**Ms. Parrott's Move to Sandpiper Village**

Born April 20, 1934, Ms. Parrott had just turned 79 years old when she signed her lease agreement with Defendant on April 26, 2013 (the "Lease" or "Ms. Parrott's

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significance in the regulated-care arena that it does not have in the context of an independent-living community. But in any event, the real question here (in this negligence case) is not what the Daily Check-In should be called but whether it gave rise to a legal duty of care owed by Defendant to Ms. Parrott. And as

Lease"),[18] and she actually moved in to Sandpiper Village about a month after that, in late May of 2013. (*See* R. p. 112:12-13; R. p. 58 ¶ 4.)

Before that, Ms. Parrott had been living by herself in a townhouse. (R. p. 107:10-12.) The impetus for Ms. Parrott's move was not that she was having any trouble living on her own but that her daughter Joan Acosta ("Ms. Acosta"),[19] "want[ing] to be proactive" in light of her mother's age, thought it was a good idea for Ms. Parrott to move a "senior-living type place." (R. p. 106:16 - p. 107:5.) The particular interest in Sandpiper Village came from Ms. Parrott, as she had some friends who lived there. (R. p. 142:10-14)

Ms. Acosta "wanted to get [Ms. Parrott] in a situation . . . where she was checked every day." (R. p. 107:6-9.) Although there is no mention of it in the Lease, according to Ms. Acosta, Sandpiper Village Executive Director Corrine Carrington ("Ms. Carrington") told her and her mother about the Daily Check-In when Ms. Parrott was in the process of deciding whether to move there,[20] and to her (Ms. Acosta), the Daily Check-In was of "paramount" importance. (R. p. 107:16 - p. 109:1.)

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explained via below, as one of a number of arguments for reversal of the trial court, it did not.

[18] (R. pp. 1142-1152.)

[19] Ms. Acosta is the personal representative of Ms. Parrott's estate.

[20] For her part, Ms. Carrington clearly remembered telling Ms. Acosta about the Daily Check-In, but she did not recall Ms. Parrott being present at the time.

Ultimately, though, it was Mrs. Parrott herself who was the decision maker, and without question, she was fully capable of continuing living independently and wanted to do so at Sandpiper Village. (R. p. 142:10 - p. 143:8.)

**Pertinent Terms of Ms. Parrott's Lease**

In pertinent part, the Lease provides as follows:

> This Lease Agreement (Agreement) explains the responsibilities of all parties.
>
> ***
>
> Once signed by all Parties, this Agreement becomes an enforceable contract. Therefore, if anything in this Agreement is confusing or different from what has been previously explained, you are encouraged to ask for a written explanation and to seek legal counsel before signing.
>
> [Defendant] has agreed and you have accepted to lease Unite number **S6** (Unit). In addition, [Defendant] will provide the following services: (1) two meals per day per each Occupant; (2) weekly housekeeping services; (3) weekly flat laundry service; (4) availability of laundry facilities; (5) water and sewer service; (6) general maintenance service; (7) planned activities—social, cultural, recreational; (8) the services of a social-recreational director; (9) free parking at Sandpiper for one automobile owned or leased by the Occupant; (10) carpeting throughout your Unit excluding kitchen and bathrooms; (11) scheduled local transportation; and (12) a kitchen in the Unit, including stove top and refrigerator.

(R. p. 1142.)

*Monthly Service Fee*

[Y]ou agree to pay a Monthly Service Fee through the term of your occupancy. This fee includes both rental of your Unit and the services listed above.

(R. p. 1143.)

*Limitation of Liability and Personal Property / Rental Insurance*

[Defendant] is not responsible for the negligence of its Occupants including acts or omissions that cause injury or death to other persons or damage to prope1ty. This includes acts or omissions on the part of Village occupants, guests or invitees. You agree to be responsible, defend, and hold Sandpiper and its owners, managers, officers, employees and agents harmless from and against, any and all claims, damages, suits, actions, judgments, fines, penalties, costs and/or expenses, including attorney's fees and court costs, resulting from any injury to or death of any person and/or any damage to property caused by, resulting from, attributable to, or in any way connected with acts or omissions of or on the part of you as occupant or any of your guests or invitees.

***

*Assumption of Risk*

Both [Defendant] and you agree that your freedom to make personal health and non-health related decisions, the freedom to travel, to come and go as you please, the decisions that effect and control your day-to-day activities should all remain within your sole decision so long as it does not adversely affect other occupants. As such, both [Defendant] and you understand and realize that such decision making ability carries an inherent possibility of adversity that may directly or indirectly affect you as

> occupant. Therefore, you and your representative, if appropriate, agree to assume such risk and the related consequences and, as it relates to [Defendant] and its agents, officers and assigns, waive any and all liability against such individuals and entities from any and all damages, both direct and indirect, that may result from such activities, the risks and the resulting damages resulting from such activities.

(R. p. 1145.)

> *Additional Conditions*
>
> This Agreement will be binding upon the successor and assigns of [Defendant]. No amendment of this Agreement, other than an increase of the Monthly Service Fee, a change in [Defendant's] posted rules and regulations or a change in the Services to be provided, will be valid unless in writing and executed by [Defendant] and you. [Defendant] may change its posted rules and regulations at any time and at its sole discretion. The invalidity of any restriction, condition, or other provision of this Agreement or any part will not impair or affect in any way the validity of enforceability of the remainder of this Agreement. The Sections above titled "*Limitation of Liability and Personal Property / Rental Insurance*" and "*Assumption of Risk*" . . . , if signed, are all a material part of this Agreement and incorporated by reference herein. Notwithstanding anything in this Agreement to the contrary, the terms and conditions of those sections and attachment shall survive the termination, cancelation and/or expiration of this Occupant Admission Agreement.
>
> ***
>
> By signing this Agreement, you are stating and certifying that they have read and understand the foregoing and agree to the terms and conditions of this

> Agreement and all posted rules and regulations (which may change from time to time).

(R. pp. 1147-1148.)

**The Emergency Response System, a/k/a the "Panic Button"**

At all relevant times, Sandpiper Village used a 24-hour emergency response system ("ERS") to respond to falls or emergent needs of its residents. Like all residents, Ms. Parrott was issued a portable ERS monitor with an alarm button, or "panic button," on a pendent or bracelet. When the panic button was pushed, the device worked like a GPS system throughout the premises, telling responders both whose button had been pushed and its location on the Sandpiper Village campus. (R. p. 143:10 - p. 144:7; R. p. 1141.) Since Sandpiper Village is an independent-living community, it can only *encourage* residents to wear their panic buttons; it cannot *require* them to do so.

**Ms. Parrott's Privacy and Security Concerns**

On June 6, 2013, Ms. Parrott called Ms. Carrington to her apartment claiming that some coins of hers were missing. (R. p. 1158.) Ms. Parrott was concerned about people coming in to her apartment without her knowledge, and she told Ms. Carrington that no one was allowed in her apartment unless she (Ms. Parrott) was present. (R. p. 1159.)[21] Ms. Parrott declined Ms. Carrington's offer to call the

[21] At trial, Ms. Acosta expressly acknowledged that her mother did not want anyone to go inside her apartment when she was not there. (R. p. 146:22-25.)

police, as did Ms. Acosta, who, when Ms. Carrington contacted her about the situation, doubted that any coins were in fact missing and informed Ms. Carrington that Ms. Parrott had a history of anxiety/paranoia. (R. pp. 1158-1159.)

On September 9, 2013, Ms. Parrott called Ms. Carrington to her apartment to tell her that early that morning, about 3:30 a.m., she had seen a white van outside and that she believed she was being stalked. (R. pp. 1154-1155.) Although Ms. Carrington explained to Ms. Parrott that the van most likely belonged to the newspaper delivery person, Ms. Parrott was unconvinced, insisting she was being stalked. (R. pp. 1154-1155.) After Ms. Parrott declined Ms. Carrington's offer to call the police or a family member to address the matter, Ms. Carrington reminded Ms. Parrott to use her panic button if it happened again. (R. pp. 1154-1155.)

On February 28, 2014, Ms. Carrington was walking through the courtyard of Ms. Parrott's apartment building when she saw that Ms. Parrott was having trouble unlocking the door to her apartment. (R. p. 1156.) Upon telling Ms. Parrott that she had the master key and could help her, Ms. Carrington learned for the first time that Ms. Parrott had changed the lock on her door without telling Sandpiper Village staff or providing them a copy of her new key. (R. pp. 1156-1157.) Ms. Carrington explained to Ms. Parrott that Sandpiper Village staff needed a key to her apartment, but Ms. Parrott disagreed, telling Ms. Carrington that she did not want anyone else to have access to her apartment. (R. pp. 1156-1157.) A short while later, however,

on March 4, 2014, Ms. Parrott brought Ms. Carrington a copy of the new key to her apartment but told Ms. Carrington that she (Ms. Carrington) was to be the only person to have access to it and reiterating that she (Ms. Parrott) did not want anyone in her apartment. (R. p. 1156.) Ms. Carrington put the key where copies of the residents' individual apartment keys are kept at the reception desk, telling receptionist Beth Auld ("Ms. Auld") that she had done so and instructing Ms. Auld to advise Sandpiper Village security of the same. (R. p. 1156.)

**Ms. Parrott is Found in Her Apartment with a Broken Hip**

At about 8:00 p.m. on Friday, June 6, 2014, Ms. Parrott was found on the floor of her apartment, her hip badly broken in multiple places from a fall. (R. p. 85:24-25.) According to Plaintiff, the fall happened sometime on the "evening" of Tuesday, June 3, 2014, when Ms. Parrott, then age 80, alone in her apartment and not wearing her panic button, was standing on a rocking-reclining chair trying to hang a curtain rod.[22] The fall "shattered" her hip, rendering her unable to move. (R. p. 82:13-18; R. p. 85:2-3.)

The next day, Wednesday, June 4, 2014, part-time receptionist Rebecca Munoz ("Ms. Munoz"), who happens to be Ms. Auld's daughter, was scheduled to work from 5:00 p.m. until the reception desk closed at 9:00 p.m. Before concluding her shift,

[22] Again, according to Defendant, the fall did not happen until Thursday, June 5, 2014, but for present purposes, it is assumed, *arguendo*, that Plaintiff's version of the story is true.

Ms. Munoz went over the checklist and saw that no Daily Check-In with Ms. Parrott was noted. After first unsuccessfully attempting to reach Ms. Parrott on the telephone, Ms. Munoz went to Ms. Parrott's apartment and knocked on the door. When Ms. Parrott did not come to the door, Ms. Munoz attempted to unlock the door with the master key, but the master key did not work, Ms. Parrott having changed the lock on her door some three months prior, as explained above.

Ms. Munoz then called her mother, Ms. Auld, a twenty-plus-year veteran on the Sandpiper Village staff, to discuss how to proceed. They decided that Ms. Munoz would not make any further attempt to enter Ms. Parrott's apartment at that time but that Ms. Auld would make a point to check on Ms. Parrott when she got to work the next day, which was Thursday, June 5, 2014—though, according to Plaintiff, neither Ms. Auld nor any other Sandpiper Village staff member actually did so.[23]

To be clear, Plaintiff does *not* claim that Defendant bears any responsibility for Ms. Parrott's fall; nor does Plaintiff claim that there was any failure in respect

[23] Here again, this assumes, *arguendo*, that Plaintiff's version of events is correct. Consistent with Ms. Munoz and Ms. Auld's discussion about how to handle the situation Ms. Munoz faced when she was unable to unlock Ms. Parrott's door with the master key on the night of Wednesday, June 4, 2014, and also with Defendant's contention that Ms. Parrott did not actually fall until Thursday, June 5, 2014, there is contemporaneous documentary evidence (in the form of a report Ms. Carrington prepared on Saturday, June 7, 2014, i.e., the day after Ms. Parrott was found) that Ms. Auld did indeed make contact with Ms. Parrott on Thursday, June 5, 2014, and the EMS record from when Ms. Parrott was found, states that, although Ms. Parrott herself claimed that she had been on the floor since Tuesday,

of the Daily Check-In on Tuesday, June 3, 2014, i.e., on the day Plaintiff contends the fall occurred. Plaintiff's theory of Defendant's liability is based solely on Sandpiper Village staff's alleged negligence in, first, not conducting a proper Daily Check-In, with Ms. Parrott on Wednesday, June 4, 2014, and, then, in repeating that failure on Thursday, June 5, 2014.

Despite acknowledging, that Ms. Munoz attempted to make contact with Ms. Parrott on the night of Wednesday, June 4, 2014 (first by trying to reach her on the phone, then by knocking on her door, then by trying to unlock the door with the master key), Plaintiff faults Ms. Munoz for not retrieving the copy of Ms. Parrott's new key from the reception desk to gain entry into her apartment. In so doing, Plaintiff explicitly contrasts Ms. Munoz's allegedly improper actions on the night of Wednesday, June 4, 2014, with her admittedly proper actions on the night of Friday, June 6, 2014. (R. p. 84:10-11 ("[I]f [Ms. Munoz] had done on Wednesday what she did on Friday, we wouldn't be here today.").)

**Ms. Parrott Passes Away Approximately 8 Months After the Fall**

Ms. Parrott passed away about 8 months after the fall, on February 9, 2015. According to Plaintiff, although she made a full recovery from all of her *physical* injuries, the "long lie" cost Ms. Parrott her will to live. (R. p. 86:11-15 ("[W]hat happened to Ms. Parrott is called a long lie. And that's been defined by the literature

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June 3, 2014, neighbors reported seeing her walking around on Thursday, June 5,

is when an elderly falls and can't get up for over an hour, that's defined as a long lie."); R. p. 86:24 - p. 87:2 ("[W]hat happened with the long lie is it took the life out of [Ms. Parrott]. While she recovered from the hip, she never recovered from the long lie.").)

**Ms. Parrott's Treatment/Recovery Prior to Her Death**

Following surgery, Ms. Parrott's hip healed well, and she developed no infections or complications.[24] (R. pp. 365-366; R. p. 383.) Her primary care physician, Dr. Richard Mills, testified on her behalf at trial. He testified that, after her initial hospitalization and surgery, Ms. Parrott was sent to Defendant's rehabilitation unit (a separate and distinct facility from Sandpiper Village) for some 100 days. (R. p. 385.)[25] According to Dr. Mills, "no trauma induced cognitive decline" was noted in her records during this period or at any time prior to her death. (R. p. 386.) After 100 days in the rehabilitation unit, Ms. Parrott "then went to a five star place . . . Ashley River Plantation." (R. p. 385.) In other words, Ms. Parrott was moved to a new facility, away from her friends and familiar surroundings at Sandpiper Village, and *then*, as Dr. Mills admitted, she had kind of a "progressive downhill course over *that* time." (R. p. 386.) During the entire time from the fall to her death, Ms. Parrott was never referred to a counselor,

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2014. (R. p. 1153; R. p. 1160.)

[24] Ms. Parrott's broken hip was comminuted fracture, i.e., the bone was broken into several pieces. (R. p. 376.)

psychiatrist, or psychologist (i.e., the type of medical expert Dr. Mills admitted one would typically rely on to diagnose and treat trauma-induced cognitive decline) in relation to the alleged loss of her will to live as a the result of her "long lie." (R. pp. 389-393.)

## STANDARD OF REVIEW

"When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment." Rule 52(b), SCRCP. And while the standard for reviewing such findings on appeal is highly deferential to the trial court, they are properly reversed where no evidence reasonably supports them. *See Frazier v. Smallseed*, 384 S.C. 56, 61, 682 S.E.2d 8, 11 (Ct. App. 2009) ("In an action at law tried by a judge without a jury, the appellate court . . . must affirm the trial court's factual findings unless no evidence reasonably supports those findings."); *cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.").

Unlike factual findings, issues of law are reviewed without any particular deference to the trial court. *See Frazier*, 384 S.C. at 61, 682 S.E.2d at 11 ("In an

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[25] This number varies from 90 to 100 throughout the trial record.

action at law tried by a judge without a jury, the appellate court will correct any error of law . . . ."); *see, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

## ARGUMENT

### I. The trial court erred in failing to recognize that Defendant did not cause Ms. Parrott to suffer a "long lie"—at most, it caused an *extension* of what was already 24-plus hours of a "long lie," for which, by Plaintiff's own admission, Defendant bears no responsibility at all—and the damages awards (for both survival and wrongful death) are wholly undue and speculative or, alternatively, excessive.

"Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, *the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence*." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (emphasis added); *see also id.* (When expert testimony is the only evidence of

proximate cause relied upon, the testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection.").

Not only does Plaintiff concede that Defendant is not responsible for the fall itself and any damages caused thereby, but because Plaintiff's theory rests solely on Defendant's alleged breach of a duty to conduct the Daily Check-In, Plaintiff also concedes that Defendant is not responsible for the first 24-plus hours after the fall and any damages causes thereby. Accordingly, the only damages recoverable under Plaintiff's theory are those that can be proved (beyond speculation[26]) to have been suffered by Ms. Parrott, not because of the fall and the state she was in for the first 24-plus hours of her "long lie" thereafter, but because of what she went through from approximately hour 25 (or more) until she was found.

The trial court does not recognize the undeniable fact that Plaintiff's theory of the case necessarily concedes that it was not until Ms. Parrott had already suffered a "long lie" *plus approximately one whole day* that Plaintiff even attempts to point any finger of blame at Defendant. And even then, the most that Plaintiff can say is not that Defendant "created" any harm to Ms. Parrott, but rather that, had Defendant done something, as explained below, it was indeed under no legal

[26] *See Huffines*, 365 S.C. at 188, 617 S.E.2d at 130.

obligation to do, i.e., the Daily Check-In, the harm Ms. Parrott created for herself would have been discovered sooner.

The trial court never explains or otherwise accounts for how the damages awarded were determined in a reasonable, non-speculative way that deals with the undeniable fact that Defendant's alleged role in the harm Ms. Parrott suffered does not, even under Plaintiff's theory, begin until Ms. Parrott had suffered a comminuted hip fracture that left her on the floor of her apartment unable to move for at least some 24-plus hours. Failing to do so, the trial court's damages awards (for both survival and wrongful death) are wholly undue and speculative or, alternatively, excessive. Further, as previously noted, they are based upon a wholly improper consideration, i.e., speculation about admittedly unproven discovery abuse. (R. p. 629.)

This is especially so given the trial court's view that, "[t]o the extent that Ms. Parrott had some degree of pre-existing mental health conditions, it was certainly foreseeable that those pre-existing conditions would be exacerbated by the pain and agony from that long lie." (R. p. 15.) While Defendant denies that there is sufficient evidence to support this assertion insofar as foreseeability is concerned, the potential for Ms. Parrott's pre-existing mental health conditions to be exacerbated by the "long lie" makes it all the more important for any proper award of damages against Defendants to be free of speculation, so that any such award is only for damages that would not have occurred not simply in the absence of the "long lie" but solely because

of approximately hour 25 (or more) of the "long lie" to the end—as, without question, all injuries/damages from the fall itself and the first some 24-plus hours thereafter and all attendant future consequences therefrom, to include any/all ways in which all of the foregoing were exacerbated by Ms. Parrott's pre-existing mental health conditions, are not Defendant's fault and Defendant cannot be held liable therefor.

## II. With regard to the wrongful death claim in particular, the trial court erred in failing to grant judgment in Defendant's favor: No evidence reasonably supports the trial court's ruling that Defendant caused Ms. Parrott's death.

With respect to wrongful death in particular, Plaintiff's theory requires her to prove (by presenting medical expert testimony from which a reasonable, non-speculative conclusion can be reached, *see Hughes*, 269 S.C. at 398, 237 S.E.2d at 757; *Ellis*, 323 S.C. at 125, 473 S.E.2d at 795) that Ms. Parrott's death was, to a reasonable degree of medical certainty, most probably caused not just by "delay" in discovering her, but specifically by the delay from approximately hour 25 (or more) on. In other words, Plaintiff's experts needed to testify that, to a reasonable degree of medical certainty, had Ms. Parrott only been lying there from when she fell on the "evening" of Tuesday, June 3, 2014, until about 8:00 p.m. on Wednesday, June 4, 2014, she most probably would not have died.

Plaintiff's experts' testimony falls short of the "most probable"/reasonable degree of medical certainty standard that is required to substantiate a non-speculative causal relationship between the alleged negligence and Ms. Parrott's

death. They could not quantify the significance of the length of Ms. Parrott's "long lie" and admitted they could not say at what point the hours would have (supposedly) caused her to lose her will to live and ultimately die 8 months later.

The testimony of Plaintiff's expert Dr. Lawrence Bergmann, offered as an expert in trauma and its impact, was presented via *de benne esse* deposition. (R. p. 711:24 - p. 712:2.) Dr. Bergmann recognized that Ms. Parrott had a serious pre-existing psychological condition that in 2009 had required her hospitalization for delusional parasitosis, i.e., for her delusional belief that insects were infesting her body by crawling into her bodily orifices and laying eggs, this belief having progressed to the point that Ms. Parrott was using duct tape to cover her body to keep the insects out and, indeed, to the point that Ms. Parrott's medical records from the time reflect suicidal ideation, with Ms. Parrott having formulated a plan to take her own life by overdosing on pain medication. (R. p. 735:21 - p. 737:2.) While he believed that Ms. Parrott's symptoms seemed to have been "managed fairly well" going forward,[27] Dr. Bergmann did acknowledge that Ms. Parrott had continued to experience delusions in the weeks and months leading up to the fall in June of 2014. (R. p. 737:16-19.) Dr. Bergmann also acknowledged that Ms.

[27] (R. p. 733:21 - p. 736:4.)

Parrott's vision was adversely impacted by macular degeneration[28] and that she had had mini strokes. (R. p. 738:3-15.)

With regard to the "long lie," how long it was, and what its effect was on Ms. Parrott at what point in time, Dr. Bergmann provided no testimony that could reasonably support finding Defendant liable for Ms. Parrott's wrongful death:

> Q. Now, with regard to the delay, the alleged delay in finding M[s]. Parrott, you don't know how long she lay on the ground after this fall, do you?
>
> A. No, I don't.

(R. p. 745:6-10; *see also* R. p. 746:9-11 ("I know there are several different scenarios [as to when the fall occurred] and I'm not at a place to judge which scenario might be accurate.").) Indeed, Dr. Bergmann does a nice job of helping to make *Defendant's* point:

> Q. I'll read this [excerpt from your prior deposition] and you can just tell me if I have read it correctly. Question: Do you intend to provide the opinion at trial that her decline and death would not have occurred but for some alleged delay in finding her? Answer: *I don't think there's anybody that can say that*. Did I read that correctly?
>
> A. Yes.

[28] (R. p. 735:15-20.)

(R. p. 742:6-13 (emphasis added); *see also* R. p. 743:16-19 ("Q. All right. So just to be clear, your opinion is the same today as it was at the time I took your deposition? A. I think so.").)

> Q. [Y]ou're not able to state with any specificity the degree of difference it would have made in terms of her alleged psychological decline between one scenario and the other [(i.e., between when Plaintiff claims the fall occurred and when Defendant claims the fall occurred)]?
>
> A. Oh, I think I might be able to do that. I think if she had expected to be rescued because people may or may not have been checking on her, the more time went by the more helpless she would have been and the more desperate she might have been as well. *Now, where exactly what that time frame is, I don't think I can really describe that. I don't think anybody else can either.*
>
> Q. You don't know what difference precisely it would have made in her psychological decline between a period of time lying on the ground for 24 hours after the fall versus 48 hours?
>
> A. *No, I'm not so concerned about that number*.

(R. p. 746:21 – p. 747:12 (emphasis added).)

Dr. Mills, too, failed to offer testimony to substantiate a claim for wrongful death. After admitting that it is "hard to know exactly" how long Ms. Parrott had been lying on floor after the fall,[29] he conceded that at the 24-hour point (a time

[29] (R. p. 366.)

before the time that Defendant's alleged liability is even alleged to be triggered) it would be "a very traumatic event" that he would expect to have a "great effect" on her:

> Q. . . . What affect would you -- is expected to have on her psychological, physically, mentally however you want to answer it, after she laid there for 24 hours and no one had come to check on her?
>
> A. Well, I think that could have a great effect on her. I think that even a person that did not have any psychiatric history or problems in the past, that would be a very traumatic event that would be seared into their memory, that they could flash back to. It would make someone very anxious, very depressed depression, that combined with the pain for a long period of time would be a very traumatic event.
>
> In her case, I think that could react as a trigger to make her mental illness worse, make her more anxious, more suspicious.

(R. p. 378:7-23.) Thus, at 24-hours on the floor, a point at which the alleged Daily Check-In failure has not yet even ripened into an issue, Ms. Parrott's own treating physician says she would have suffered "a very traumatic event" that he would expect to have a "great [adverse] effect" on her that impacted her will to live.

Indeed, in his pre-trial deposition, Dr. Mills had testified as follows:

> Q. And I'll read this and again you can tell me if I read it correctly. The question was, do you intend to offer an opinion at the trial in this case to a reasonable degree of medical certainty, that had Ms. Parrott fallen, fractured her hip in multiple places and remained on the floor for 24 to 36 hours, and not a longer period of time,

> that she would not have died nine months later? Answer, *I can't say that.* Question, *and you would agree with me that the reason that you can't say that is because it's inherently speculative; correct? Answer, yes.* Now, Doctor, that was your deposition testimony; correct?
>
> A. Yes.

(R. p. 402:3-17 (emphasis added).) And although (based primarily on his review of an medical journal article that Plaintiff's counsel had sent him after his deposition), Dr. Mills tried to walk back his earlier testimony at trial,[30] in the end, the substance of his testimony was the same. Asked to quantify when it was, as the hours of her "long lie" passed, that Ms. Parrott lost her will to live, he answered, "That's extremely hard to do. And I don't know that anyone can tell you that with absolute certainty. . . . *Can I quantify [if] it would have been 24 versus 48 versus 72? No.*" (R. p. 397:15 – p. 398:4 (emphasis added.))

At most, what Plaintiff and Plaintiff's experts are talking about here is some sort of ersatz form of the loss-of-chance doctrine, which is a doctrine our state has expressly rejected. *See Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371 (1995).

## III. The trial court erred in failing to find comparative negligence on the part of Ms. Parrott.

[30] (R. p. 402:25 - p. 404:11.) Dr. Mills conceded that his clinical background did not include much in the way of relevant history. (R. p. 383:17-21 ("I don't have the background of many patients having suffered this, to tell you. I have looked at some articles about this. And the longer a person is on the ground, the worse the condition is.").)

In the trial court's order filed October 16, 2020, it did not address comparative negligence at all. (*See* R. pp. 3-19.) When Defendant took issue with this via its post-trial/judgment motion, the court responded simply, "This Court further affirms that I reached my verdict while analyzing and rejecting Sandpiper's argument that Ms. Parrott was contributorily negligent." (R. p. 29.)

The undisputed evidence is that Ms. Parrott, at age 80, her physical condition (including her eyesight) having already gotten to the point that she no longer drove a car, home alone, with her door locked, and without telling anyone, *stood* on a *rocking-reclining* chair to try to hang curtains/a curtain rod, all while failing to wear her panic button and, for that matter, failing to take advantage of the maintenance services included in her Lease.

Even in Dr. Mills's view, the hip fracture contributed to Ms. Parrott's decline at death. (R. p. 408.) Plaintiff's counsel even said Ms. Parrott had done a "stupid thing." (R. p. 509.)

When the evidence establishes that the negligence of a plaintiff is a cause of some or all of the harm suffered, it must be considered and addressed in determining damages. *Cf. Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). Here, there is *no* reasonable view of the evidence under which Ms. Parrott is not guilty of at least some comparative negligence. Defendant duly raised and supported a comparative negligence defense and is entitled to a finding in its favor

on the same. Indeed, because the only reasonable view of the evidence is that Ms. Parrott's comparative negligence exceeds 50%,[31] Plaintiff should be barred from recovery, but at a minimum, Defendant is entitled to a reduction of any damages to which Plaintiff may be entitled based on Ms. Parrott's comparative fault.

## IV. The trial court erred in finding that the Daily Check-In created a legal duty of care owed by Defendant to Ms. Parrott.

### A. The trial court erred in failing to recognize that the legal relationship between Defendant and Ms. Parrott was simply that of landlord and tenant and governed by the SCRLTA and the terms of Ms. Parrott's Lease and in failing to recognize Defendant's rights under the Lease.

The undisputed evidence shows that Sandpiper Village is not an assisted-living facility, a long-term-care facility, or any other type of regulated entity, but rather that it is an *independent*-living community, where Ms. Parrott lived *independently* in her own *private* apartment pursuant to a written lease with Defendant. The legal relationship between Defendant and Ms. Parrott was simply that of landlord and tenant, and it was governed by the South Carolina Residential

[31] *Roddy v. Wal-Mart Stores E., LP, U.S.*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) ("In a comparative negligence case, the trial court *should* grant a directed verdict motion if the sole reasonable inference from the evidence is the nonmoving party's negligence exceeded fifty percent.") (emphasis added); *see, e.g., Humphrey v. Day & Zimmerman Inc.*, 997 F. Supp. 2d 388 (D.S.C. 2014) (finding, as a matter of law, on summary judgment, the plaintiff's negligence greater than the negligence attributable to the defendant and, accordingly, the plaintiff's claims barred under the doctrine of comparative negligence).

Landlord and Tenant Act, S.C. Code Ann. § 27-40-10 to -940 (the "SCRLTA"), and the terms of Ms. Parrott's Lease.

And as explained above, without question, Ms. Parrott assumed all risk of living independently and waived liability in the Lease. Defendant did not assume the duty to conduct the Daily Check-In the Lease, and to the extent it is suggested that one was created via promissory estoppel, Plaintiff does not actually have any such claim in the case—the only basis of liability asserted against Defendant in this case is negligence.

**B. The Daily Check-In is a *courtesy* service.**

Neither the SCRLTA nor the lease conferred on Ms. Parrott any right to, or imposed on Defendant any responsibility to perform the Daily Check-In. Plaintiff's theory of liability against Defendant (negligence[32]), which the trial court relied on, is entirely—and erroneously—based on the Daily Check-In somehow giving rise to a legal duty of care owed by Defendant to Ms. Parrott, even in the absence of any claim (or evidence to support such a claim) of a violation by Defendant of the SCRLTA or the terms of Ms. Parrott's lease.

[32] Negligence is Plaintiff's only cause of action against Defendant. As the trial court noted, Plaintiff had asserted a cause of against Defendant for violation of the South Carolina Unfair Trade Practices Act but dropped it at trial. (R. p. 3, n. 11; *see also* R. p. 12 (setting forth the elements of a negligence cause of action—and only a negligence cause of action—at the outset of the trial court's "Conclusions of Law").)

A person signing a contract, such as Ms. Parrott when she signed her lease, is "presumed to have read, understood, and assented to [the contract's] terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). The undisputed evidence is that Ms. Parrott wanted, and contracted with Defendant for, *independent* living. The lease terms make plain and clear all parties' understanding and agreement that Sandpiper Village is *not* an Assisted-Living Facility and that Defendant only offered an enumerated list of specified services, which included social opportunities, dining services, housekeeping and laundry service, and other such conveniences to its residents. Because she, like most residents of Sandpiper Village, was choosing to live independently at an advanced age (she was 79 when signed her lease), Ms. Parrott expressly agreed in the lease to assume the risk of, and be responsible for, her day-to-day life decisions—such as her unfortunate decision to place herself, alone and without her emergency call button, in the particularly precarious position she was in (*standing* on a *rocking* chair hanging curtains) when she fell. In fact, the lease expressly provided that Ms. Parrott assumed all risk and waived all liability associated with her "*freedom to make personal health and non-health related decisions, the freedom to travel, to come and go as you please, [and] the decisions that effect and control your day-to-day activities*." Erroneously, the trial court does not acknowledge, much less analyze, the lease and its effect on Plaintiff's claims, which effect, Defendant

maintains, is indeed to wholly undermine those claims. The trial court likewise failed to analyze this key issue on reconsideration. (*See* R. pp. 26-30.)

The trial court erroneously uses the mere existence of the Daily Check-In to transmute what was in fact a *courtesy* service—which Defendant had no obligation to provide or continue to provide and about which Ms. Parrott had no legal right to complain should Defendant not provide it or continue to provide it—into a legal duty of care, even though Defendant's supposed assumption of such a duty is not only unsupported by any consideration but also is in direct contravention of the terms of the parties' contract (i.e., the lease), which terms Ms. Parrott is presumed to have read, understood, and assented to.

### C. The trial court erred in finding that the Daily Check-In was a "wellness" check, i.e., that the purpose of the check was to protect Ms. Parrott from the kind of harm Plaintiff complains about in this case, or that Defendant assumed any such duty, and indeed, Plaintiff did not in any way dispute the testimony of Defendant's duly qualified expert about the relevant industry standard.

The trial court's characterization of the Daily Check-In as a "wellness" check, or of Defendant as having assumed any duty to protect Ms. Parrott from the kind of harm Plaintiff complained about in this case, is not supported by the evidence. *Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). Rather, the uncontroverted testimony of Defendant's duly qualified expert Brian Lancenese testified that the industry standard for responding to falls was the panic button or

emergency call button system and that a daily check system was not used in the industry to respond to falls or otherwise check on the well-being of residents, explaining that, as the undisputed facts of this case well illustrate, a daily check system allows for a person to lay on the floor for some 24 hours after a fall. (R. pp. 567-584.)

### D. The trial court conflated the threshold question of the existence of a legal duty of care with the question of whether such a duty (once found to exist) was or was not breached, viewing the very existence of the Daily Check-In as establishing the existence of a duty of care on the part of Defendant.[33]

As recognized in the trial court's order, the elements of a negligence cause of action are, of course, (1) duty, (2) breach, (3) causation, and (4) damages. (R. p. 12.) The trial court, however, failed to recognize that the question of whether a legal duty of care exists is a *separate* question from the questions of what standard of care is required to meet the duty and whether the applicable standard was met.

The first element of a negligence claim (duty) asks *the fundamental* question: Does a legal duty of care exist? If the answer is no, everything else is, of

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[33] (*Compare* R. p. 13 ("Here, the preponderance of the evidence presented in this case is more than sufficient to convince me and support my conclusion that that Defendant Sandpiper *had a policy* of providing daily wellness checks and that *this policy created a duty* to follow the protocol established in its own policy.") (emphasis added) *with* R. p. 13 ("In determining the *standard of care*, the court may look to the common law, statutes, administrative regulations, industry standards, or a defendant's own *policies* and guidelines.") (emphasis added).)

course, moot. It is only if the answer is yes that the second element (breach) even need be considered.

The breach element encompasses two questions: (a) Given that the first element of the claim (the existence of a legal duty of care owed by the defendant to the plaintiff) is met, what standard of conduct must the defendant meet to satisfy the duty of care owed? In other words, what is the *standard of care*? And (b) did the defendant meet the standard of care?

As the trial court recognized, "an affirmative legal duty to act may be created 'by statute, contract, relationship, status, property interest, or some other special circumstance.'" (R. p. 13 (citing *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997)). Notice, however, that the defendant's internal policies/procedures are not referenced here as a means for creating a duty to act. While it is true, as the trial court stated, that in determining *the standard of care*, a court may look to the defendant's own *policies*,[34] this, however, does not mean that a court can look to the defendant's policies to answer the *threshold* question of *whether a legal duty of care exists* in the first place.

Again, the undisputed evidence shows that Sandpiper Village is an *independent*-living community, where Ms. Parrott lived *independently* in her own private apartment pursuant to a written lease with Defendant. Indeed, Ms. Parrott's

[34] (R. p. 13.)

lease expressly states what services Defendant will be provide, and the Daily Check-In is not among them. Moreover, the lease includes express provisions limiting Defendant's liability and making clear Ms. Parrott's assumption of risk associated with her decision to live independently.

There is no statute, contract, relationship, status, property interest, or other special circumstance that gives rise to the existence of a legal duty of care owed by Defendant to Ms. Parrott, and where the trial court finds the creation of a legal duty based, in whole or in part, on a supposed special relationship between Defendant and Ms. Parrott[35] it is erroneous.

Again, the undisputed evidence is that the terms of Ms. Parrott's lease with Defendant conferred upon her no right to the Daily Check-In and imposed no duty upon Defendant to do so. Citing *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997), the trial court correctly recognized that "the common law ordinarily imposes no duty on a person to act;" however, it erroneously relied on the exception to this rule that provides, "once an act is undertaken, the actor assumes the duty to use due care,"[36] without explaining what "act" Defendant is supposed to have undertaken so as to assume a duty of care to Ms. Parrott—and

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[35] (*See* R. p. 13 ("Both the existence of the policy and *the special relationship between Sandpiper and the resident, Ms. Parrott*, created a duty owed by Sandpiper to follow its own policy.") (emphasis added).)

[36] (*See* R. p. 13.)

indeed the record here discloses no act (or acts) capable of properly supporting the trial court's invocation of the aforementioned exception.

In addressing the rule that "the common law ordinarily imposes no duty on a person to act," in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992), our Supreme Court explained, "a person usually incurs no liability when he fails to take steps to protect others *from harm not created by his own wrongful conduct*." (emphasis added). The theory of Plaintiff's case is not in fact that Defendant "created" any harm "by [its] own conduct." Rather, it is that, after Ms. Parrott created harm to herself by her own conduct, i.e., after Ms. Parrott, through no fault of Defendant's whatsoever, had willfully placed herself, alone and without access to any means of communicating with the outside world (to include, most notably, without her emergency call button), in the undeniably awkward and dangerous position from which she fell (*standing* on a *rocking* chair), Defendant did not discover her soon enough.

By its very nature, Plaintiff's theory concedes that Defendant had nothing at all to do with, and cannot be blamed for, Ms. Parrott falling and hurting herself, or Ms. Parrott not being able to use her emergency call button, or even Ms. Parrott's pain and suffering (including any future consequences thereof) for approximately the first *some 24-plus hours* after the fall. In other words, her theory concedes that Defendant did not in fact cause Ms. Parrott to suffer a "long lie." As the evidence

shows, and as expressly stated in Plaintiff's pre-trial brief, "The event of an elderly person lying on the floor with the inability to get up for *any time over one hour* is referred to as a long lie." (R. p. 761 n.1 (emphasis added).) Again, Plaintiff's theory of the case necessarily concedes that it was not until Ms. Parrott had already suffered a "long lie" *plus approximately one whole day* that Plaintiff even attempts to point any finger of blame at Defendant. And even then, the most that Plaintiff can say is not that Defendant "created" any harm to Ms. Parrott but that, had Defendant done something it was indeed under no legal obligation to do, i.e., the so-called "wellness" check, the harm Ms. Parrott created for herself would have been discovered "sooner," i.e., after "only" about 25 (or more) hours. No one can, or does, say she would not have lost her will to live. In fact, the evidence was either speculative, unknown, or out and out to the contrary. (R. pp. 463-502; R. pp. 533-549.)

The idea underlying the rule that a voluntarily actor must act with due care is that the voluntarily actor must not make things worse than they would have been *had the voluntary actor not acted at all*. *See* 57A Am. Jur. 2d *Negligence* § 104 ("One who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by the failure to use such care. Thus, once a person steps into the role of caregiver, *such that others are discouraged or precluded from filling that rule*, that person

has a duty to act reasonably in fulfilling the adopted role.") (emphasis added). There is no evidence that Defendant's so-called "wellness" check policy discouraged or precluded anyone from providing aid to Ms. Parrott or otherwise increased the risk of harm to Ms. Parrott.

Even assuming Ms. Parrott found the concept of the Daily Check-In appealing in deciding to live at Sandpiper Village, there is still no evidence to support a reasonable, non-speculative[37] inference that this had any particular causal relationship to the incident at issue here. There is no evidence that Ms. Parrott would not have chosen to live at Sandpiper Village in the absence of the Daily Check-In. There is no evidence of any other living arrangements that Ms. Parrott considered or of whether any of them offered a Daily Check-In. There is no evidence that anyone else was discouraged or otherwise precluded or hindered from protecting Ms. Parrott or coming to Ms. Parrott's aid because of the so-called "wellness" check policy.

Moreover, Ms. Parrott could not possibly be found to have reasonably relied on the existence of the Daily Check-In where Defendant was under no obligation to provide it to her, and this is all the more so given express terms of her Lease, which, again, she is presumed to have read, understood, and assented to. *See Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 (A person signing a contract is

"presumed to have read, understood, and assented to its terms."). Indeed, the Lease itself expressly states, "Once signed by all Parties, this Agreement becomes an enforceable contract. Therefore, if anything in this Agreement is confusing or different from what has been previously explained, you are encouraged to ask for a written explanation and to seek legal counsel before signing." There is no claim here that the terms of Ms. Parrott's Lease were unconscionable or otherwise unenforceable—nor, again, is there is any claim that Defendant actually breached any term of the Lease or obligation imposed by the SCRLTA.

The trial court erred in finding that the Daily Check-In created a legal duty. Defendant was under no duty to do it in the first place. The trial court erred in finding that the Daily Check-In was a "wellness" check for the purpose of protecting Ms. Parrott from the kind of harm Plaintiff complains about in this case, or that Defendant assumed any such duty. There is no evidence supporting such a finding. Likewise, the trial court's use of the mere existence of the Daily Check-In to find the existence of legal duty of care is erroneous.

## CONCLUSION

For the foregoing reasons, Defendant asks this Honorable Court to reverse the trial court in full, with the Court overturning the present judgment against it and directing the entry of a new judgment in its favor as to all claims. As a lesser

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[37] *Huffines*, 365 S.C. at 88, 617 S.E.2d at 130 ("[V]erdicts may not be

alternative, Defendant asks to the Court to reverse the trial court in each and every discrete part in which it is in error (to include, without limitation, reversing the trial court for its error in not granting judgment in Defendant's favor on the wrongful death claim and/or its error in not finding any comparative negligence on the part of Ms. Parrott), with the Court overturning the present judgment against Defendant in favor a new judgment that accounts for and rectifies all of particulars in which the trial court is reversed. Defendant further asks the Court to grant it any such other and further relief as it deems to be just and proper, or which is otherwise necessary to ensure that Defendant is afforded all relief to which it is entitled to fully and completely remedy all trial court error (to include, without limitation, the remand of the case to the trial court for any further action or proceedings, to include new trial proceedings).

**<SIGNED ON THE FOLLOWING PAGE>**

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permitted to rest upon surmise, conjecture, or speculation.").

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Matthew O. Riddle (SC Bar No. 76650)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*Attorneys for Appellant*

Charleston, South Carolina

April 4, 2022

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**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Charleston County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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

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The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

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# APPELLANT'S CERTIFICATION FOR FINAL BRIEF

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CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*Attorneys for Appellant*

I, Russell G. Hines, do hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Matthew O. Riddle (SC Bar No. 76650)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
*Attorneys for Appellant*

Charleston, South Carolina

April 4, 2022