STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Bentley Price, Circuit Court Judge

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

The Estate of Delila Parrott,

Petitioner,

V

Sandpiper Independent and Assisted Living-Delaware, LLC,

Respondent.

PETITION FOR WRIT OF CERTIORARI

This is a negligence action brought by the Estate of Delila Parrott, on behalf of the deceased Ms. Parrott who was 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. The Estate does not allege that Sandpiper was negligent in connection with Ms. Parrott's fall or her broken hip; rather, the Estate alleges that by creating a policy to check on each resident daily, advertising that policy and using the policy to induce her to live there, Sandpiper owed a duty to Ms. Parrott and that Sandpiper was negligent in failing to comply with its own policy of conducting daily wellness checks and such failures resulted in her suffering a "long lie" for days after her fall.[1]

[1] "Long lie" is the term used by the medical experts to denote the time that Ms. Parrott laid on the floor after her fall. [See R.p. 008; see also R.p. 553:17, R.p. 86:9-18.]

By consent of the parties, the claim came before the Trial Court for a 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 undertook and 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 and until the evening of June 6. The Trial Judge also found that the failure to check on her 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 a verdict in favor of the Estate and awarded actual damages of $500,000 on the survival claim and $500,000 on the wrongful death claim. The Court of Appeals reversed the Trial Judge's verdict based on its own view of the evidence and conclusion that Sandpiper did not owe a legal duty to Ms. Parrott to comply with its own daily wellness check policy.

The Estate submits this petition pursuant to Rule 242, SCACR, asking this Court to grant a writ of certiorari to review the decision because the Court of Appeals has ignored or failed to abide by the established standard of review of the verdict rendered by the Trial Judge sitting as the fact finder in the place of a jury. Moseley v. All Things Possible, Inc., 395 S.C. 492, 719 S.E.2d 656 (2011); Brown v. Dick Smith Nissan, Inc., 414 S.C. 101, 777 S.E.2d 208 (2015).[2] Instead of reviewing the evidence of record to determine whether there is any evidence which reasonably supports the Trial Judge's findings, the Court overstepped the bounds of the proper standard of review by examining the evidence and substituting its own view of the facts. In addition, the Court of Appeals' ruling is in conflict with this Court's prior decisions on the issue of when a legal duty of care is created by an actor's voluntary assumption or undertaking of such a duty. Miller

[2] *Reversing* Op. No. 2012–UP–688 (Ct. App. filed Dec. 28, 2012).

v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997); Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650 (2006); Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 826 S.E.2d 285 (2019).[3]

For these special and important reasons, as well as those also covered in the Final Brief of Respondent, the Petitioner Estate respectfully requests that the Court grant this Petition to review the opinion of the Court of Appeals and affirm the judgment entered by the Trial Judge. The evidence of record supports all of the Trial Judge's factual findings, including the ultimate findings that (1) Sandpiper undertook/assumed a duty of care to provide daily checks of the residents in the independent apartments by establishing the policy and presenting that policy to Ms. Parrott, who relied upon the policy in choosing to enter into a lease with Sandpiper, and that (2) Sandpiper breached that duty in failing to conduct any check on June 4th and 5th. The issue of when a policy established by a senior living center requiring daily wellness checks on the senior residents becomes a "duty" is an important issue that will become even more important in the years to come and the final word on this issue should be articulated by this Court.

Certification by Counsel

The Court of Appeals issued its opinion on June 26, 2024. The Estate timely filed a Petition for Rehearing on July 11, 2024, which was denied by the order filed July 24, 2024.

Questions Presented for Review

I. Did the Court of Appeals err in holding that Sandpiper owed no legal duty to Ms. Parrott where the Trial Judge correctly stated and applied the law in concluding that Sandpiper undertook/assumed a duty of care to its Resident to conduct a daily check where the evidence shows that (1) Sandpiper had an established policy of conducting daily wellness checks; (2) Sandpiper affirmatively represented the existence of that policy to Ms. Parrott; and (3) Ms. Parrott relied upon the policy in choosing to enter into a lease?

A. Did the Court of Appeals err in its consideration of the written protocol/procedure as

[3] *Reversing* 413 S.C. 276, 775 S.E.2d 399 (Ct. App. 2015).

an internal policy that could not create a duty of care?

B. Did the Court of Appeals err in its finding that there was no evidence that Ms. Parrott's harm was caused by her reliance on the daily check policy?

II. Did the Court of Appeals err in reversing the Trial Court's judgment and damages award to the Estate because the Court of Appeals ignored the proper standard of review of the verdict rendered by the Trial Judge sitting as the fact finder in the place of a jury?

STATEMENT OF THE CASE

By agreement of the parties, the case was tried on the merits before the Circuit Court Judge sitting without a jury. The Trial Judge reviewed the documentary evidence, heard the testimony of each witness and weighed the evidence. After hearing and considering the arguments of Counsel for both parties, the Trial Judge issued a 17-page order with detailed findings of fact and conclusions of law and a formal order denying posttrial motions. The Petitioner craves this Court's reference to the Trial Court's order(s), and herein below summarizes certain key points with citation to the Record which supports each and every one of the Trial Court's findings of fact.

- FOF 1. Sandpiper operates an independent living facility of apartments for senior residents. Delila Parrott signed a lease for an independent living apartment on April 26, 2013.

This finding of fact is supported by the testimony of Sandpiper's Director and the lease agreement. [R.pp.156-217; R.p. 1124-1134.]

- FOF 2. At the time she signed the lease with Sandpiper, Ms. Parrott was a 79-year-old widow who was living a normal life as an active and healthy senior.

Ms. Parrott's age and personal history were established by the testimony of her daughter, Joan Acosta. [R.pp. 099-154.] Her medical history and health status were established by testimony of her attending physician. [R.pp. 361:13-362:21.]

- FOF 3. Prior to signing the lease with Sandpiper, Ms. Parrott and her daughter met with the

Executive Director of Sandpiper who told them that Sandpiper had a policy to check on each resident daily. The Trial Judge specifically found: "Ms. Parrott relied on the representations of [the Director] regarding the Policy in making the decision to enter into the lease agreement at Sandpiper because she wanted to live independently but also wanted a place where she would be checked on regularly." [R.p. 006]

The testimony of Ms. Parrott's daughter and the Director supports the finding as to what the Director told them about the daily check policy before the lease was signed. [R.pp. 108:16-23 (Daughter); 158:24 -159:17 (Director).]

- FOF 4. The Trial Judge specifically found that: "On the evening of June 3, 2014, while hanging a curtain in her apartment, Ms. Parrott fell and broke her hip. She was rendered immobile, unable to reach her phone. No one on Sandpiper's staff checked on Ms. Parrott at any time the next day on June 4th. No one checked on her on June 5th. No one checked on her until approximately 8 p.m. on June 6th, when she was found by a staffer and another resident, Lila Waters." [R.p. 007]

The timing and circumstances of Ms. Parrott's fall are supported by the EMS and hospital records and Sandpiper's own records, which included Ms. Carrington's notes/report of the incident as relayed by Ms. Parrott after she was found. [R.p. 169:23-25, 1055.] The timing of Ms. Parrott's discovery on the evening of June 6th, is established by Sandpiper's records and the medical records. [R.pp. 806, 1058.] Sandpiper's failure to conduct a check of Ms. Parrott for three days is supported by the testimony of its employees and other witnesses as referenced by the Trial Judge's further findings [FOF 12 and 13] as covered below.

- FOF 5. The Trial Judge specifically found: "After Ms. Parrott was finally discovered on the evening of June 6th, emergency services were called and she was transported by ambulance to

a hospital. The medical record describes Parrott's condition upon admission by noting that she was thirsty, had a comminuted fracture to the hip. In addition to the broken hip, she was soaked in urine and caked in feces; she was dehydrated with dry mucosa, her skin showed signs of dehydration, and she had cracked lips. She also had developed a vaginal infection and a urinary infection. Ms. Parrott had spent days in these conditions." [R.p. 007]

The medical records and medical expert testimony establish the details of Ms. Parrott's dreadful condition when she was finally found and how they related to her long lie. [R.pp. 1058; 377:4-14; 377:18-25.]

- FOF 6. Ms. Parrott never returned to her prior good health, and she was never able to live independently again. After spending four days in the hospital for repair of the fractured hip and treatment of her conditions, she went to a rehabilitation facility, but she never returned to independent living. After a significant decline, she entered hospice care on January 31, 2015 and passed away on February 9, 2015. [R.p. 007]
- FOF 7. The medical record and testimony of Ms. Parrott's treating physician established her physical, mental, and emotional decline after the fall and long lie. Dr. Mills testified that the "long lie" [4] impacted her from the date of the fall until she died. The Trial Court found:

> [B]ased on the totality of the medical evidence, the medical expert opinions, and the lay evidence, that after her rescue, Ms. Parrott declined over time and she never returned to her previous level of activity and independence. Based on the expert testimony, I find that Ms. Parrott endured significant, constant, and unmitigated pain for the time she was on the floor from June 3rd until the night of June 6th, when EMS began to provide fentanyl to reduce the pain. I further find that the conditions endured by Parrott during the long lie also were a cause of her emotional and psychological trauma including loss of enjoyment of life, loss of quality of life, fear that she would not be found, fear that she would die alone, anxiety, mental anguish, trauma from urinating on herself, trauma from

[4] "Long lie" is the term used by the medical experts to denote the time that Ms. Parrott laid on the floor after her fall. [See R.p. 008; see also R.p. 553:17, R.p. 86:9-18.]

defecating on herself, emotional injury, psychological injury. [R.p. 008]

The Trial Judge's FOF 6 and 7 are supported by the various medical records that fully document Ms. Parrott's subsequent medical condition and medical treatments. [R.pp. 1054-1120, 871-1051.] His findings are also supported by medical expert opinion testimony that the long lie was a cause of her declining physical and mental condition, that the long lie of three days on the ground contributed to her failure to thrive, and "harmed her both physically and emotionally, to a great extent.", and that this long lie shortened her life. [R.pp. 382:22-383:18.] A trauma expert also testified that the long lie was a horrible and traumatic experience for her and that the trauma continued to trouble her until her death. [R. pp. 718:8-719:17; see also R. p. 730:3-11.

FOF 9. Ms. Parrott died on February 9, 2015. The death certificate listed "failure to thrive" as one of the causes of death. {R.p. 1055.] The Trial Court found: "The evidence and medical record shows, and I find, that the long lie aggravated, caused and/or contributed to her death on February 9, 2015." [R.p. 009]

The medical records and the medical expert testimony cited above otherwise support the Trial Judge's finding that the long lie was a cause of her death.

- FOF 11. The Trial Judge found that Sandpiper had an established wellness check policy[5]:

> The wellness check policy existed during the time that Parrott became a resident of Sandpiper. The Policy was in writing and was known to all staff and all residents. The policy required that the Sandpiper staff confirm each resident's wellbeing once every 24 hours.[3] [[3]It appears, that as a general procedure, these checks were conducted during the afternoon/evening.] The Policy required staff to mark or initial each resident's name on a list once the resident was seen by staff. If the resident had not been seen, then staff was to call the resident's apartment and confirm the resident's wellbeing if the resident answered the telephone. If the resident did not answer the telephone, then staff was to go to the resident's apartment and knock on the door. If the door knock was not

[5]Throughout the pleading and pretrial discovery process, Sandpiper had repeatedly denied that the Policy existed until four days before the trial when Sandpiper finally produced the written policy document. [See FOF 10, R.p. 009]

answered, staff would then use a duplicate key and enter the apartment to check on the resident. At previous times, these wellness check records were maintained by Sandpiper. However, Sandpiper never produced any record of the wellness check sheets for the three days in issue. [R.pp. 009-110]

This finding of fact is supported by the document itself.[6] [R.p. 1135-1140.] In addition, the existence of the policy and the procedure for conducting the daily checks is supported by the testimony of the Director (and other staffers[7]) as noted above in regard to FOF 3 which addresses information about Sandpiper's daily check policy that was provided by Sandpiper's Director to Ms. Parrott (and her daughter) when she was considering entering into a lease agreement.

- FOF 12. The Trial Judge found that Sandpiper did not check on Ms. Parrott on June 4th:

  The testimony establishes that Sandpiper did not follow the Policy. Although there is no evidence as to Tuesday, June 3rd, the Plaintiff does not contend that Sandpiper breached its duty to check on that day. However, the Plaintiff alleges and proved by a preponderance of evidence that Sandpiper breached its duty on Wednesday, June 4th. On June 4th, Ms. Parrott had not been seen by staff, so a staff member (Munoz) called her, then receiving no answer, Munoz went to Ms. Parrott's apartment to check on her. When Ms. Parrott failed to answer the door, Munoz attempted to open the door but had realized she did not have the correct key. The correct key was in the possession of Sandpiper at the time Parrott fell and was accessible to Sandpiper the entire time Parrott was on the floor. However, when Munoz determined that she had the wrong key, she did not return the very short distance [Ms. Parrott's apartment was situated within about a thirty second walk from where the Sandpiper's office was located.] to retrieve the correct key from the office. Even though Ms. Parrott had not been checked on as required by the policy, Munoz simply completed her shift and went home. I find that Sandpiper did not conduct a wellness check of Ms. Parrott on June 4th. [R,p. 110]

First, it is significant that the Trial Judge understood that the Estate was not making any claim about whether Sandpiper checked on Ms. Parrott on June 3rd. The testimony of Munoz indisputably supports the finding that Sandpiper did not check on Ms. Parrott on June 4th. [R.pp. 276-278.]

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[6] A Sandpiper employee (Auld) testified that the policy had been in effect for approximately 25 years. [R.pp. 219:1-220:19.]

[7] See testimony of Munoz [R.pp. 276:15-277:6.]

- FOF 13. The Trial Judge found that Sandpiper did not check on Ms. Parrott on June 5th:

> Sandpiper introduced evidence through the testimony of Beth Auld that Ms. Parrott was checked off as having been seen on Thursday June 5th by Auld. However, at trial, Ms. Auld testified that she could not truthfully testify that she remembered seeing Ms. Parrott on Thursday or whether another staff member told Auld they had seen Parrott. Executive Director Carrington testified that when she investigated the incident after the fact, no other staff members, including the kitchen and cafeteria staff and the activities director, reported having seen Ms. Parrott on Thursday June 5th. I find that Sandpiper did not check on Ms. Parrott on June 5th. Lila Waters, a resident of Sandpiper, testified about her meal and activity routines with Ms. Parrott. She said she ate with Ms. Parrott each day, but that she did not see Ms. Parrott on Wednesday, Thursday, or Friday, until Waters and the staff found Ms. Parrott in her apartment at or about 8 p.m. While Ms. Waters may have been confused as to certain details, I find her testimony credible as it relates to her routine with Ms. Parrott to eat meals together and her testimony that she did not see Ms. Parrott for any meals on the days in question. [R.p. 011]

The Trial Judge's finding is supported by the witnesses' testimony: Auld testimony at R.p. 222:20-25; Carrington testimony at R.p. 202:17-20; and Waters at R.p. 663:11-14.

- FOF 15. The Trial Judge also relied upon telephone records for Ms. Parrott's cell phone and her landline for the week that she fell and for the three months previous in finding Ms. Parrott fell on June 3rd and laid there until she was found.

The telephone records establish the absence of any calls for those days and provide support for the Trial Judge's findings on the timing of the fall and the long lie. [R.pp. 814 – 870.]

- FOF 16. The Trial Judge found that the long lie more likely than not began on June 3, 2014.

The Trial Judge's finding is supported by the medical records and the testimony of the medical experts, as discussed above, who testified as to how long Ms. Parrott laid on the floor based on her condition and on testing conducted at the hospital when Ms. Parrott was admitted.

ARGUMENT

I. The Court of Appeals erred in holding that Sandpiper owed no legal duty to Ms. Parrott.

The existence of a legal duty is a question of law for the court. Madison, 638 S.E.2d at 656. 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, 494 S.E.2d at 815. The Trial Judge correctly stated the law as to the Estate'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, and Madison.

The Court of Appeals 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. Rather than applying the applicable decisions of this Court, the Court of Appeals instead misapplied appellate opinions and authorities which simply do not apply to the claims presented on the facts of this case.

A. The Court of Appeals erred in its consideration of the written protocol/procedure as an internal policy that could not create a duty of care.

It is apparent from the Court of Appeals' focus on its perception of Sandpiper's "internal policies" that the Court 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. As recounted by the Trial Judge, Sandpiper had denied the existence of the daily check policy in its pleadings and throughout the discovery process.[8] However, the Estate had gathered and presented testimonial evidence of witnesses from the Sandpiper Executive Director and other staffers to prove 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

[8] See FOF 10 - discussed above.

four days before the trial, Sandpiper produced a written document that irrefutably confirmed the existence of the policy and the laid out the protocols and procedures for the staff who were to conduct the daily checks. The Estate also presented testimonial evidence that Ms. Parrott was made aware of the policy and relied on that policy in deciding to live at Sandpiper. 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, the Court of Appeals 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 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 of Appeals focuses on isolated statements from various appellate opinions for the proposition that internal policies created by defendants cannot establish a voluntary undertaking. Those court rulings do not apply here because the Estate 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 Director and Ms. Parrott's daughter 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 Director and others. Thus, the written policy was not improperly considered by the Trial Judge.

To the extent that the cases cited by the Court of Appeals, discussed below, 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, the Court of Appeals misapprehended the scope of those statements in the context of the circumstances presented in those cases. First, the written document – if it should even be considered an "internal" policy[9] -- 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 as evidence supporting the conclusion that Sandpiper voluntarily undertook a duty of care by establishing, implementing and marketing 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. 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

[9] 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.

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 of Appeals 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 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.

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 of Appeals 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. In fact, 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" and upon which the victim herself relied.

The federal district court orders in Pacicca v. Jackson, No. 3:21-CV-03136-DCC, 2023

WL 8242180, at *4 (D.S.C. Nov. 28, 2023), and Bernstein v. Walmart, Inc., No. 2:22-CV-1637-BHH, 2024 WL 476300, at *1 (D.S.C. Feb. 7, 2024), do not support the Court of Appeals' rejection or limitation of Sandpiper's written protocols/procedures for conducting the daily check. In Pacicca, 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. The policy actually existed and it constituted a voluntary undertaking of a duty to check on every resident every day. The testimony of the Director and Ms. Parrott's daughter are "more." The witness's testimony is, in fact, the primary evidence of existence of the policy which constitutes the undertaking of a legally cognizable duty as well as the representation made to Ms. Parrott and her reliance.

In Bernstein, 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 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 district court's rulings do not support the conclusion that Sandpiper's written policy/protocols did not create a duty to Ms. Parrott.

B. The Court of Appeals erred in its finding that there was no evidence that Ms. Parrott's harm was caused by her reliance on the daily check policy.

Under South Carolina law, 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. In Miller v. City of Camden, *supra*, the Supreme Court addressed the issue of when a legal duty of care is created by an actor's voluntary assumption or undertaking of such a duty: "The common law ordinarily imposes no duty on a person to act. If an act is voluntarily

undertaken, however, the actor assumes the duty to use due care. While the law imposes this duty on a volunteer, the question whether such a duty arises in a given case may depend on the existence of particular facts." 494 S.E.2d at 815 (citations omitted). In Madison v. Babcock Center, *supra*, the Supreme Court restated the law on the assumption or undertaking of a duty as set forth in Miller and also addressed the creation of a legal duty by special circumstances:

> An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Moreover, it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care.

638 S.E.2d at 656–57 (citations omitted). The Trial Judge – sitting as judge of the law and the finder of the facts – found that (1) Sandpiper voluntarily undertook a policy to conduct daily wellness checks on all its residents, (2) the policy was reflected in the written document proving the procedures and protocols for conducting the daily checks, and (3) that daily check policy that was marketed and promised to Ms. Parrott before she signed the lease.

In reversing the Trial Judge, the Court of Appeals relies upon a conclusory comment in *Prosser and Keeton* which is not the law in South Carolina, and overlooks (or misapprehends) the most relevant authority as set forth in this Court's opinion in Wright v. PRG Real Est. Mgmt., Inc., *supra.*, which 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 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 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 were 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. 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 Director, those conflicts were resolved by the Trial Judge, sitting in place on the jury in this nonjury bench trial.

In discussing the Wright opinion, the Court of Appeals 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: The Court of Appeals 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 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: The Court of Appeals declares that the evidence suggests that Ms. Parrott was not keen 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: The Court of Appeals 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."

It is apparent that the Court of Appeals 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 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, the Court of Appeals 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 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, the Court of Appeals' 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.

II. The Court of Appeals failed to follow the correct standard of review of the findings made by the Trial Judge sitting non-jury as the finder of the facts.

This case presents a legal claim for negligence which the parties consented to try without a jury such that the Trial Judge presided as the judge of the law and the finder of the facts. Accordingly, 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. Moseley v. All Things Possible, 719 S.E.2d at 658; *see also* Brown v. Dick Smith Nissan, 777 S.E.2d at 210. Within this purview, the Trial Judge has the exclusive role of determining credibility and weighing of the evidence and the Trial Judge's decisions in those regards are not to be second guessed on appeal. Sheek v. Crimestoppers Alarm Sys., Div. of Glen Curt Consultants, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989); Golini v. Bolton, 326 S.C. 333, 482 S.E.2d 784, 789 (Ct.App.1997) ("In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial judge.") As set forth above, each and all of the Trial Court's findings of fact are supported by evidence of record. Having first misapplied or

ignored controlling Supreme Court precedent, the Court of Appeals then chose to recast the facts to support its underlying decision and articulated its own view of the evidence in the following particulars.

1. The Court of Appeals states that "the exact timeline" is disputed. The Trial Judge -- acting as the factfinder in place of the jury – found that Ms. Parrott fell on the evening of June 3rd. 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 as to when she was found and medical evidence supports the Trial Judge's resolution of any dispute or confusion on that point. There is no basis in this record to question or disturb the Trial Judge's factual finding on the timeline.

2. The Court of Appeals states that the Estate contended at the bench trial that Ms. Parrott's death was the result of a medical condition referred to as a long lie. 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. The Trial Judge's 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, the Court of Appeals comments on a medical journal article on the topic of long lies that was admitted into evidence at trial without objection. The Court of Appeals' own consideration of that journal article cannot justify questioning or disallowing the Trial Judge's credibility decisions in weighing the testimony of the experts who considered the journal and findings on this point.

4. In a section titled as "Background on Sandpiper and its Check-In Policy," the Court of Appeals 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 failed to acknowledge those facts and the legal implications under the case law applicable to the question of whether the policy and the written document implementing procedures/policies for the daily checks supports a finding of a voluntary undertaking that imposed a legal duty of care. [See discussion below on the applicable law on the duty of care.]

In this section the Court of Appeals 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 of Appeals overlooked or misapprehended that 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, 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.] Sandpiper's 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.] Most significantly, the Director essentially acknowledged that Ms. Parrott was entitled to be rescued even if she did not use her panic button. [R.p. 213:4-9.] The 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.] Accordingly, none of the evidence about Ms. Parrott's decision to not wear the panic button supports the Court of Appeals' conclusion that Sandpiper did not owe her any duty to conduct the daily checks.

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

The Court of Appeals 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 Estate 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.

The Court of Appeals also discusses Ms. Parrott's mental health 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 – 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 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.

The Court of Appeals also discusses evidence that Ms. Parrott had changed her locks several months prior to the incident. However, the 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 of Appeals failed to comprehend that the daily check policy was unconditional. Sandpiper had a long-established policy – that it had affirmatively represented to Ms. Parrot when she was considering leasing that - it would check on each resident 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 of Appeals' discussion of the fall and long lie was selective. In the section "Parrott's Fall and Long Lie," the Court of Appeals 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 Ms. Parrott's privacy concerns. Yet, the Court of Appeals overlooks or ignores the evidence that the staffer (Munoz) claimed that she did not know where the duplicate key 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 of Appeals misapprehends that the excuses offered by staffer 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 staffer 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 of Appeals also discusses evidence about whether a staffer [Auld] had 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, Sandpiper never produced that list and Auld could not recall any specifics about supposedly seeing Ms. Parrott on June 5th. This dispute of fact was resolved by the Trial Judge as the finder of fact whose prerogative it was to weigh the testimony[10] and nothing in the Record would support overturning his finding. 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 on Ms. Parrott's phone records which showed inactivity on her line, as well as medical testimony that the long lie had already begun on June 3rd. Since there is evidence of record to support the Trial Judge's finding that no daily check was made on June 5th, there is no basis to disturb the Trial Judge's finding on that factual point.

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On a final thought, the Court of Appeals 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."

[10] Harmon v. Bank of Danville, 287 S.C. 449, 339 S.E.2d 150, 152 (Ct. App. 1985) ("[T]he veracity and credibility of a witness can best be judged by the trial judge who heard the witness testify, and who was able to observe his demeanor. *** It was within the prerogative of the special referee to reconcile the inconsistencies in [the witness'] testimony.").

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 choose their facilities and escape any liability for the complete failure to provide the promised and established safety protection. As the population of South Carolina ages and more citizens enter senior living centers, whether establishing and advertising a daily wellness check policy upon which residents rely creates a legal duty should be articulated by this Court and not through an errant decision of the Court of Appeals.

CONCLUSION

The Court of Appeals has overlooked or misapprehended the appropriate standard of review and 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 told her about the daily check policy and that she relied upon that representation 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 briefings, 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 this Court to review the decision of the Court of Appeals 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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