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S.C. SUPREME COURT

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

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

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Civil Case No. - 2016-CP-10-05379

Ct. App. Op. No. 6067, filed June 26, 2024

Sup. Ct. App. Case No. 2024-001377

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The Estate of Delila Parrott,

Petitioner,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Respondent.

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# BRIEF OF PETITIONER

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## STATEMENT OF THE 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 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 Judge's judgment and damages award to the Estate because the Court of Appeals ignored the proper "any evidence" standard of review of the verdict rendered by the Trial Judge sitting as the fact finder in the place of a jury?

### REMAINING ISSUES RAISED ON APPEAL BUT NOT ADDRESSED BY THE COURT OF APPEALS [1]

III. Is there any evidence of record to support the Trial Judge's finding that the Defendant breached the duty owed to Plaintiff's decedent by failing to conduct a daily wellness check on June 4 and 5th?

[1] In some cases where an opinion of the Court of Appeals is reversed, this Court will address the remaining issues rather than remand unaddressed issues to the Court of Appeals "in the interest of bringing finality to this litigation." Roche v. Young Bros., of Florence, 332 S.C. 75, 83, 504 S.E.2d 311, 315 (1998).

IV. Is there is any evidence of record to support the Trial Judge's finding that that the Defendant's failure to conduct daily wellness checks was a proximate cause of injury to the Plaintiff's decedent and a proximate cause contributing to her death?

V. Is there is any evidence of record to support the Trial Judge's rejection of Sandpiper's comparative negligence defense?

VI. Is there is any evidence of record to support the amount of the Trial Judge's award of damages on the survival and wrongful death causes of action?

## STATEMENT OF THE CASE

This is a negligence action brought on behalf of the Estate of Delila Parrott, a former resident of Sandpiper Independent and Assisted Living, arising from a three-day period in June 2014, during which Ms. Parrott laid on the floor of her apartment after she fell and suffered a broken hip. A complaint originally was filed on October 11, 2016, asserting survival and wrongful death cause of actions against Sandpiper based on Sandpiper's failure to conduct daily wellness checks. [R.p. 035 ¶ 17.] An amended (second) complaint was filed on December 11, 2019. [R.p. 056.] Sandpiper served its answer to the amended (second) complaint on December 26, 2019, denying that it owed any duty to Ms. Parrott and further denying that it breached any duty that proximately caused any injury to her. [R.p. 067.] Sandpiper also asserted affirmative defenses of assumption of the risk and comparative negligence. [R.pp. 071-072 ¶¶ 25, 28.]

By agreement of the parties, the case was tried on the merits before the Circuit Court Judge, sitting without a jury. [R.p. 001; R.p. 121:21-22.] The trial was conducted on September 8 - 10, 2020. [R.pp. 075-632.] At the conclusion of the trial, the Trial Judge rendered a verdict in favor of the Plaintiff and awarded actual damages of $500,000 on the survival claim and $500,000 on the wrongful death claim. [R.p. 631:12-16.] A formal order was filed October 16, 2020. [R.p. 003.] Defendant Sandpiper filed a post-trial motion for reconsideration on October 26, 2020, which was denied by Order, filed November 18, 2020. [R.p. 773; R.p. 026.] Sandpiper served a notice of appeal on December 17, 2020. [R.p. 1161.]

After briefing and oral argument, the Court of Appeals issued its opinion on June 26, 2024, reversing the judgment entered on the Trial Court's verdict. [App. 1.] Est. of Parrott v. Sandpiper Indep. & Assisted Living-Delaware, LLC, 443 S.C. 405, 904 S.E.2d 455 (Ct. App. 2024). A Petition for Rehearing was timely made on Jul 11 2024, and ruled upon by the Court of Appeals

on July 24, 2024. [App. 16; App. 37.] This Court granted the Petition for a Writ of Certiorari by Order of February 12, 2025.

## STATEMENT OF THE FACTS

As noted above, the parties consented for this matter to be tried nonjury with the Trial Judge sitting as the finder of fact. After a three-day trial, the Trial Judge issued a detailed, formal order setting forth his findings of fact[2] and conclusions of law with references to the supporting evidence admitted at trial and to the applicable caselaw. Each and all of the Trial Judge's findings of fact are supported by evidence of record as documented by the Record on Appeal page and line number references as provided in the Brief of Respondent filed in the Court of Appeals and set forth below.

**Background Facts**

The Trial Judge's Finding of Fact 1 addresses the nature of the Sandpiper facility and the lease with Ms. Parrott:

> Sandpiper is in Mt. Pleasant, South Carolina and offers an independent living lifestyle to the senior residents who lease the apartments. Under the lease agreement, Sandpiper promised each resident two meals per day, resident activities, transportation to and from the facility and social events. Delila Parrott signed a lease for an independent living apartment on April 26, 2013. [R.p. 006 ¶ 1.]

This finding of fact is supported by the testimony of Sandpiper's Director, Corrine Carrington, and the lease agreement. [R.pp.156-217 – testimony; R.p. 1124-1134 - Pl. Ex. 1 Lease.]

The Trial Judge's Finding of Fact 2 addresses certain basic biographical information as to Ms. Parrott, including her age, her work history, her family relationships, and her physical and mental health which evidences that 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:

[2] For clarification, there are no findings of fact numbered as 8 or 14.

> Ms. Parrott was born on April 20, 1934. At the time she signed the lease with Sandpiper, she was a 79-year-old widow who had lived alone after the death of her second husband. She had enjoyed a 35-year career as a nurse anesthetist before she retired. She had three children. Her daughters were Joan Acosta and June Connor, and she had a son, Bert Christopher. Joan testified that all the children were close to Ms. Parrott, how much they loved each other, and describe how Ms. Parrott's death impacted them. As testified to by her attending physician, she was in excellent physical health for her age. According to the actuary tables, she had a life expectancy of eighty-nine years. While she had a prior history of mental health issues five years previous to her fall, those conditions were well under control, allowing her to live a healthy, active and normal live. By all accounts, she lived a normal life as an active and healthy senior. [R.p. 006 ¶ 2.]

This finding of fact is supported by the testimony of Ms. Parrott's daughter and her attending physician Dr. Mills. [R.pp. 099-142 (Daughter); R.pp. 355:8-385:6 (physician).] Ms. Parrott's age and personal history were established by testimony of daughter, Joan Acosta. [R.pp. 099-154.] Her medical history and health status were established by testimony of her attending physician, Richard Mills, M.D, who opined that she was doing well for someone of her age, and she had no medical conditions that would have shortened her life expectancy. [R.pp. 361:13-362:21.] The actuary table establishes her life expectancy. [R.pp. 363:12-364:4.]

**Facts Regarding Sandpiper's Daily Check Policy and Procedure**

The Plaintiff's negligence claims rest on the core/central fact that Sandpiper had an established policy of conducting daily checks to confirm the wellbeing of the independent living residents, such as Ms. Parrott. Although Sandpiper denied the existence of any such a policy in its pleadings and discovery responses and deposition testimony, the existence of the policy was proven, beyond dispute, by a Sandpiper document produced on the eve of trial[3] which explicitly states: "DAILY CHECK SHEET: All residents must be seen by staff and initialed

[3] See Finding of Fact 10 regarding Sandpiper's refusal to admit the existence of the policy until four days prior to trial. [R.p. 009 ¶11.]

off every day. If you do not see someone call them, if you can't get them on the phone, go to the apartment and check on them."[4] [R.p. 1135-1140 - Pl. Ex. 1.] The Trial Judge addressed the existence of the policy in his Finding of Fact 11:

> 11. 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. [*Supra* note 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 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.p. 009 ¶ 11.]

The Trial Judge's Finding of Fact 3 addresses information about Sandpiper's daily check policy that was provided by Sandpiper's executive director to Ms. Parrott (and her daughter) when she was considering entering into a lease agreement:

> 3. Prior to signing the lease with Sandpiper, Ms. Parrott and her daughter (Joan Acosta) met with the Executive Director of Sandpiper, Corrine Carrington, more than once to gain information about Sandpiper's apartments and amenities. During one of those meetings, Carrington told Ms. Parrott and Acosta prior to Ms. Parrott signing the lease, that Sandpiper had a policy to check on each resident daily. After hearing about the policy, Ms. Parrott signed the lease. Ms. Parrott relied on the representations of Carrington 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. The existence of the policy, the details of the policy and its implementation, together with Sandpiper's breach of that policy are each discussed in more detail below. [R.p. 007 ¶¶ 4-5.]

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

Both the testimony of Ms. Parrott's daughter and the testimony of Sandpiper's executive director support the finding as to what the executive director told Ms. Parrott and/or her daughter about the daily check policy before the lease was signed. Ms. Acosta, the Daughter, testified that:

> Q. Tell the Court what, if anything, Ms. Carrington said about the policy.
>
> A. About the policies, specifically?
>
> Q. Yes.
>
> A. They had a 24-hour visualization of every resident policy. Now, they did not necessarily see every resident every 24 hours. They would call the ones that were not visualized during that day. They had a sign-off sheet, and every resident was to be checked off every day at the time you've been seen or checked.
>
> Q. Was that policy important to you?
>
> A. It was paramount to me, absolutely. I was in Columbia. I was counting on that 24-hour check policy.
>
> Q. And Ms. Carrington told your mother at the same time that she told you about this policy?
>
> A. Yes. I mean, it was very much part of our first meeting. [R.p. 108:16-23.]

The testimony of Ms. Carrington, Sandpiper's executive director at that time, confirms Ms. Acosta's testimony of the substance of that policy:

> Q. Ms. Carrington, when you met with Joan Acosta and her mother, Delilah Parrott, before Ms. Parrott became a resident there, do you recall discussing with them a policy that Sandpiper had regarding the visual confirmation of the wellbeing or presence of each resident on a daily basis?
>
> A. I believe it was with just Ms. Acosta -- and I could be wrong, but I think she toured first by herself and then brought Ms. Parrott over later.
>
> Q. Could you tell the Court what the policy was in regards to what Sandpiper promised to do for each of the residents on a daily basis?
>
> A. We check the residents daily, make sure we saw them. If we hadn't seen the residents by a certain time at night, we were to be calling them. If they didn't answer their phone, we should be going to the units to check on them, to make sure we saw them. [R.pp. 158:24 -159:17.]

**Facts Regarding Sandpiper's Failure to Follow its Daily Check Policy and Procedure**

As found by the Trial Judge, testimony establishes that Sandpiper did not follow its policy. The Trial Judge's findings on this pivotal fact are set forth in detail and supported by ample evidence to meet the any evidence standard.

In his Finding of Fact 4, the Trial Judge recounts the basic facts of Ms. Parrott's fall on June 3 and Sandpiper's failure to check on her for three days:

> 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 ¶ 5.]

The timing and circumstances of Ms. Parrott's fall are supported by the EMS and hospital records[5] and Sandpiper's own record, which included Ms. Carrington's notes/report of the incident as relayed by Ms. Parrott after she was found. [R.p 169:23-25; R.p. 1055 - Pl. Ex. 1 Mills Record.] 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 in his written findings.[6]

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

[5] The EMS record and timeline records indicate that Ms. Parrott herself reported that she fell on Tuesday, June 3. [R.p. 1055 - Pl. Ex. 1 Mills Records; R.p. 881.]

[6] Sandpiper criticized the Trial Judge's comprehension of the timeline with reference to the Trial Judge's mention during the trial that Ms. Parrott laid on the floor for five days. [*See* Appellant's Brief, p. 3-4 n.9.] However, transcript reflects that the Plaintiff's counsel promptly apprised the Trial Judge that the period was three days. [R.p. 626:9-22.] Moreover, the written order controls regardless of the Judge's verbal comments from the bench at trial. *See* Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court.")

> [FOF] 12. 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 [fn. 4 - 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. 010 ¶ 12.]

This finding of facts is more than amply supported by the testimony of Rebecca Munoz, the Sandpiper receptionist. She testified as to the Sandpiper policy of visually confirming the presence or the wellbeing of each resident on a daily basis and admitted that she never completed a check of Ms. Parrott on June 4th. [R.pp. 276:15-277:6.] Ms. Munoz testified that she had not visually confirmed Ms. Parrott's condition that day, and so she followed the procedure by first attempting to call her, but she did not get an answer. [R.p. 276:20-25.] By her own testimony, the facts establish that: Munoz then went to the apartment and knocked but no one answered; when she attempted to enter the apartment, the master key did not work; and she did not make any effort to go back to the office to obtain a copy of Ms. Parrott's key. [R.pp 277:7-278:7.]

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

> [FOF] 13. 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 ¶ 13.]

As referenced by the Trial Judge, Sandpiper tried to establish that Ms. Parrott was seen on June 5th, by Sandpiper employee, Beth Auld. Ms. Carrington, the Sandpiper director, did testify that after they found Ms. Parrott, she conducted an investigation and reviewed the daily checkoff sheet and she saw that it contained Beth's initials indicating that she had seen Ms. Parrott on June 5th. [R.p. 202:17-20.] However, Sandpiper never produced any of the daily checkoff sheets for the days in question, and while Ms. Auld did testify at trial, she admitted that she did not have any independent recollection of seeing Ms. Parrott that day. [R.p. 222:20-25.] In contrast to the unverified/unsubstantiated testimony of the Sandpiper employees, another Sandpiper resident, Ms. Lila Waters, who was a close friend of Ms. Parrott and regularly dined with her, testified that she never saw Ms. Parrott on June 5th. [R.p. 663:11-14.]

***June 6***: The timing of Ms. Parrott's discovery on the evening of June 6th, is established by Sandpiper's records and the medical records. [R.p. 806 - Pl. Ex. 1 Carrington; R.p. 1058 - Mills Records.]

**Facts Regarding the "Long Lie"[7]**

This time of lying after a fall is referred to by the medical expert and used throughout this case as a "long lie:"

> A long lie, is very simply when a person falls and can't get up and when they're unable to call for help and, unfortunately, the result is they are on the ground in a helpless situation for many hours or sometimes many days." [R.p. 714:7-21.]

[7] "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.]

In considering the questions of when Sandpiper checked on her and how long she laid in her apartment with a broken hip, the Trial Judge also considered other evidence including phone records and medical records/testimony.

In finding that Ms. Parrott fell on June 3rd and laid for three days without Sandpiper checking on her, the Trial Judge considered Ms. Parrott's telephone records:

> [FOF] 15. Plaintiff introduced the telephone records for Ms. Parrott's cell phone and her landline for the week that she fell and for the three months previous. These records show that Ms. Parrott made no outgoing calls, nor did she answer any incoming calls to either line during the three days she was on the floor. This evidence further supports my finding that Ms. Parrott fell on June 3rd and laid there until she was found. [R.p. 011 ¶ 15.]

The telephone records, admitted as part of Plaintiff's Exhibit 1 establish the absence of any calls for those days and certainly constitute "any evidence" to sustain the Trial Judge's finding regarding when Ms. Parrott fell and how long she laid there. [R.pp. 814 – 870 - Pl. Ex. 1 Telephone Records.]

Perhaps more significantly, the Trial Judge also considered medical records and medical opinion testimony in finding that Ms. Parrot fell on June 3rd and laid there until she was found on the evening of June 6th:

> [FOF] 16. Both Plaintiff's and Defendant's experts testified as to the medical evidence that spoke to how long Ms. Parrott laid on the floor. Both experts referenced her BUN value which is a test that measures the amount of nitrogen in the blood which comes from the waste product urea. In this context it was introduced to show Parrott's level of dehydration and how long she had gone without food or water. I find the BUN lab values taken at the hospital from June 6 through June 10 more likely than not show Ms. Parrott to have been on the floor for three days, beginning on June 3, 2014. There were additional lab values and objective medical evidence that showed Ms. Parrott to have endured a "long lie," the term used by the experts, including Ms. Parrott's own statements to EMS that she fell on Tuesday evening, the decubitus ulcers on her hip, her creatinine level and the ratio between the creatinine and BUN, her CPK6 reading, her dehydration and her skin condition upon admission. I find the cumulative medical evidence to be proof of a long lie and that the long lie more likely than not began on June 3, 2014. [R.p. 011 ¶ 16. Footnote omitted.]

The medical records were admitted without objection. [R.pp. 1052-1123 - Pl. Ex. 1 Mills Record; R.pp. 871-1051.] Dr. Mills, Ms. Parrott's treating physician (a board-certified internist who was qualified as an expert witness without objection), testified that based on his review of the lab results and his knowledge of his patient's medical history: "I would be willing to say with a reasonable degree of medical certainty that she was on the ground most likely, in my mind, somewhere between 36 hours to three days." [R.p. 396:5-10.]

**Facts Regarding Ms. Parrott's Medical Condition and Decline in Health and Death**

Ms. Parrott's condition when she was found after lying there for three days is well documented in the record as found by the Trial Judge:

> [FOF] 5. 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 ¶ 5.]

As noted by the Trial Judge, the medical records conclusively establish the details of Ms. Parrott's dreadful condition. [R.p. 1058 - Pl. Ex. 1 Mills Record.] Dr. Mills testified as to those conditions that related to the long lie after and apart from the broken hip itself. He testified about how the long lie resulted in dehydration and the associated symptomatology that manifested in her lips and skin. [R.p. 377:4-14.] Dr. Mills also testified about how lying in her feces and urine for that long time resulted in vaginal and urinary infections. [R.p. 377:18-25.]

The Trial Judge also made findings of facts regarding Ms. Parrott's subsequent decline in physical and mental health after the broken hip healed:

> [FOF] 6. Ms. Parrott never returned to her prior good health and she was never able to live independently again. Ms. Parrott spent four days in the hospital for repair of the fractured hip and treatment of her conditions, and upon discharge, she went to

> a rehabilitation facility. The medical record credibly supports that Ms. Parrott never returned to independent living after she was rescued; instead, she had to move to assisted living facility. Ms. Parrott was subsequently rehospitalized in October 2014 for issues related to her psychiatric condition and altered mental status. Then she was hospitalized yet again in January 2015, for her altered mental status and significant decline. The medical record credibly supports that she entered hospice care on January 31, 2015 and passed away on February 9, 2015. [R.p. 007 ¶ 6.]
>
> [FOF] 7. The medical record credibly supports Ms. Parrott's decline after she was rescued. Ms. Parrott's health was managed by her treating physician, Richard Mills, M.D. who had treated her for over twenty years prior to the fall. Dr. Mills and her daughter both testified about Ms. Parrott's physical, mental, and emotional decline after the fall and long lie. Dr. Mills testified that Parrott recovered completely from her broken hip and there was no physiological reason she should not have completely recovered simply from the broken hip; however, Ms. Parrott's preexisting mental conditions had been aggravated by the physical and emotional/mental trauma she endured during the long time that she laid on her apartment floor, and that the "long lie" [fn. "Long lie" is the term used by the medical experts to denote the time that Ms. Parrott laid on the floor after her fall.] impacted her from the date of the fall until she died. In addition to the medical evidence, Joan Acosta, Ms. Parrott's daughter, testified that based upon her observations, her mother never recovered from the long lie as evidenced by the facts that she suffered nightmares, was fearful, was tormented and never trusted anyone again. [R.p. 008 ¶ 7.]

Again, as recounted by the Trial Judge, Ms. Parrott's subsequent medical condition and medical treatments are fully documented in various medical records. [R.pp. 1054-1120 - Pl. Ex. 1 Mills Record; R.pp. 871-1051.] In addition, Dr. Mills testified as to his treatment of Ms. Parrott and established that her broken hip had healed well and he opined she should have been able to return to her prior level of living after some rehabilitation time: "would have expected her to eventually complete rehab and get back to her independent living state." [R.p. 366:7-13.] Dr. Mills furthered offered his expert opinion that the long lie was a cause of her declining physical and mental condition:

> Q. Do you have an opinion whether the long lie of three days on the ground contributed to her failure to thrive?
>
> A. Yes, sir, I do. I think it harmed her both physically and emotionally, to a great extent.

> Q. Do you have an opinion, to a reasonable degree of medical certainty that it contributed to -- she only lived eight months after this, rather than eight years. Do you have an opinion that this long lie shortened her life?
>
> A. Yes, sir, I do. [R.pp. 382:22-383:18.]
>
> ****
>
> In her case she recovered well from the physical surgery. And I would have normally expected her to live many more years. I would, you know, given a range four to eight years is expected, even a little longer sometimes. I would not have expected her to pass away within eight months, because she didn't have the life threatening complications; clots, infections, pneumonia after her surgery. [R. pp. 383:22-384:5.]

Dr. Bergmann, a clinical psychologist and counselor qualified as trauma expert,[8] testified that Ms. Parrott never returned to her prior living conditions and her condition declined until she passed in February. [R.pp. 727:2-728:20.] Dr. Bergmann testified that the literature supported the finding that the longer an elderly person is on the floor, the less chance they have of returning to independent living. [R.pp. 728:21-729:4; R. pp. 790-796 - Pl. Ex. 1 NEJM 001-007.] The 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; p. 28:3-11.]

The Trial Judge's summarization of Ms. Acosta's account of her mother's decline after the long-lie is supported that her testimony of record. She observed that her mother recovered from the broken hip without complications, but from an emotional and psychological state, "She was never herself again;" she was unhappy and lost her will to live; "those last months of her life were absolutely horrible. And it had nothing to do with that hip. She never trusted another human being again." [R.p. 138:14-18.]

[8] [R.pp. 711-712.]

As the Trial Judge found in the Finding of Fact 9, Ms. Parrott died on February 9, 2015, and the death certificate listed "failure to thrive" as one of the causes of death. [R.p. 1055.] The Trial Judge 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.

## ARGUMENT

***Standard of Review of Questions of Law:***

The existence of a legal duty is a question of law for the court. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650, 656 (2006). "[T]his Court reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). However, when the existence of a duty in a particular case depends on the existence of particular facts, then the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder. Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997).

***Standard of Review of Findings of the Fact-finder:***

As a consequence of the parties' consent to a nonjury trial on the merits, the Trial Judge is the fact-finder and his decision is the equivalent of a jury verdict. The applicable standard for review of the Trial Judge's findings of facts is the "any evidence" standard of review:

> In an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed if there is any evidence which reasonably supports the judge's findings. The judge's findings in such an instance are equivalent to a jury's findings in a law action. *Townes Assoc., Ltd. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)[9]. Our scope of review extends merely to the correction of errors of law. *Temple v. Tec–Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009).

[9] *Abrogated on other grounds by*, In re Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018).

Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011). *See also* Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church, 439 S.C. 284, 303–04, 887 S.E.2d 508, 518 (2022) (citing Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006) "a question of fact in a law action [is] subject to an any evidence standard of review when tried by a judge without a jury" (citation omitted)).

Within this purview, the Trial Judge has the exclusive role of determining credibility and weighing of the evidence and the Judge's decisions in those regards are not to be second guessed on appeal:

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

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

Just as with a jury trial, the Trial Judge sitting nonjury has wide discretion in making an award of damages:

> The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. *Collins Entm't Corp. v. Coats & Coats Rental Amusement,* 355 S.C. 125, 584 S.E.2d 120 (Ct. App.2003); *Kuznik v. Bees Ferry Assocs.,* 342 S.C. 579, 538 S.E.2d 15 (Ct. App.2000). Because of this discretion, our review on appeal is limited to the correction of errors of law. *Kuznik,* 342 S.C. at 611, 538 S.E.2d at 32; *Welch v. Epstein,* 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. *See Hutson v. Cummins Carolinas, Inc.,* 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310–11, 594 S.E.2d 867, 873 (Ct. App. 2004).

When, on appeal from a bench trial, the Court of Appeals ignores the proper standard of review of a trial judge's findings of fact and substitutes its own findings, the Supreme Court will

reverse and uphold the trial judge's verdict if there is any evidence to support the trial judge's findings: "Despite evidence in the record to support the trial judge's findings of fact, the Court of Appeals ignored those findings and substituted its own. By doing so, the Court of Appeals exceeded its standard of review. Accordingly, we reverse the Court of Appeals and reinstate the trial judge's decision." Brown v. Dick Smith Nissan, Inc., 414 S.C. 101, 109, 777 S.E.2d 208, 212 (2015).

***Summary of Argument***

This negligence action arises from the 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. First, to clarify the basis of the Plaintiff's claim, 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.

Second, to clarify the nature of the trial process, both parties consented to a bench trial wherein the Trial Judge sat as judge of the law and in place of the jury as the finder of facts. The Trial Judge 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.

By supplanting the Trial Judge's factual findings, 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., *supra*; Brown v. Dick Smith Nissan, Inc., *supra*. 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 that Sandpiper did not owe any duty to Ms. Parrott 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 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).

For these reasons, the decision of the Court of Appeals should be reversed and the judgment entered by the Trial Judge should be affirmed because 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.

## I. THE COURT OF APPEALS ERRED IN HOLDING THAT SANDPIPER OWED NO LEGAL DUTY TO MS. PARROTT.

In Miller, 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, 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 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 this Court's prior decisions in Miller, and Madison. Sitting as judge of the law and the finder of the facts, the Trial Judge 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.

The Court of Appeals reversed the Trial Court verdict and 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." [App. 7-8; 904 S.E.2d at 461.] The Court of Appeals' 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.[10] However, the Estate had gathered and presented testimonial evidence of witnesses from the Sandpiper Executive Director and other staffers to prove the existence of Sandpiper's daily check policy and the steps established by Sandpiper to ensure that the staff saw or talked to each resident every day. Then just four days before the trial, Sandpiper produced a written document that irrefutably confirmed the existence of the policy and laid out the protocols and procedures for the Sandpiper staff 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

[10] See FOF 10 - discussed above.

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 withheld until 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 such a policy. In addition, the written policy/procedure created by Sandpiper provided evidence of the standard of care of the duty established by the witness testimony of the Director and others. There is no valid basis in the evidence of record or the applicable caselaw to support any holding that Sandpiper's written policy/procedure was improperly considered by the Trial Judge.

To the extent that the cases cited by the Court of Appeals, as 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[11] -- does not stand alone in this case. Second, the caselaw cited by the Court of Appeals 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 that Wal-Mart owed a legal duty to a third-party victim of sexual abuse based on the store's internal policy regarding processing photographs depicting nudity. In that case, 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 striking contrast, here, the evidence of record establishes that Sandpiper, through the actions of its Director, made express representations to Ms. Parrott and her daughter as to existence of the daily wellness checks and that they relied upon those representations in choosing to live at Sandpiper's facility.

In Doe 2 v. Citadel, 421 S.C. 140, 805 S.E.2d 578 (Ct. App. 2017), the Citadel was sued by a plaintiff who had been sexually abused as a child by a counselor who had previously worked at a summer camp associated with the College. Although the plaintiff had never attended the college or it's summer camp programs, he attempted to impose liability on the theory that the college had violated its policy regarding internal investigations of sexual abuse accusations made

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

against the camp counselor during a previous 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, Caldwell was not a negligence case; rather, the claims were for slander and false imprisonment resulting from an alleged shoplifting incident. Nothing in the Caldwell or Peterson opinions supports the Court of Appeals' conclusion that Sandpiper owed no duty to conduct daily checks. In fact, none of these South Carolina appellate cases dealt with a policy that the defendant voluntarily established, affirmatively marketed, and implemented by setting and routinely following protocols and procedures set forth in a written "internal policy" and upon which the victim herself relied.

Likewise, neither of 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), or Bernstein v. Walmart, Inc., No. 2:22-CV-1637-BHH, 2024 WL 476300, at *1 (D.S.C. Feb. 7, 2024), support the Court of Appeals'

rejection or limitation of the evidentiary relevance 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 the Sandpiper Director represented the existence of a daily check to Ms. Parrott and her daughter. The testimony of the Director and Ms. Parrott's daughter are "more." The witnesses' 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 Walmart on a claim arising from a trip and fall when the plaintiff customer caught his foot on the wheel of a shopping cart. The district court's ruling was 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 in that case do not support the conclusion that Sandpiper's written policy/protocols could 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.**

In reversing the Trial Judge, the Court of Appeals relies upon a conclusory comment in *Prosser and Keeton* : "'In most of the cases finding liability [for a voluntary undertaking], the defendant has made the situation worse, either by increasing the danger, by misleading the plaintiff into the belief that [the danger] has been removed, or by depriving him of the possibility of help from other sources.' W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56 at 381 (5th ed. 1984).'" [App. 10; 904 S.E.2d at 462.] This observation in the treatise is not consistent with the relevant South Carolina caselaw as found in Miller and Madison.

In addressing this issue, the Court of Appeals misapprehends the most relevant authority as set forth in this Court's opinion in Wright v. PRG Real Est. Mgmt., Inc., *supra*,[12] 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. This 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 Wright 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 Court held that the jury would have to resolve the disputes on the material facts. In comparison, the evidence in this record is uncontroverted that Sandpiper had been routinely conducting the daily wellness checks for years. And, if there was any conceivable conflicting evidence about whether Ms. Parrott relied upon the daily check policy as represented by the Sandpiper Director, any such conflicts were resolved by the Trial Judge, sitting in place of the jury in this bench trial.

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

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 of Appeals' reasoning is based on its misreading of the holding 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 to bring someone to rescue her if she fell. [App. 14; 904 S.E.2d at 464-65.] While there was evidence adduced at trial that Sandpiper issued panic buttons to the residents, there also was 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.] In fact, Sandpiper's director testified that one reason for the visual 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.] She also basically acknowledged Ms. Parrott was entitled to be rescued even if she did not use her panic button. [R.p. 213:4-9.] Moreover, 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/intentional contemplation that, if she fell, the staff would find her and rescue her when they performed the daily wellness check. To require that a victim must consciously consider the duty of a tortfeasor owes them before the duty attaches is a standard no court has required and would be impossible to meet.

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. [App. 14; 904 S.E.2d at 465.] 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. [App. 14; 904 S.E.2d at 465.] This Court held in Wright that: "[A] jury must determine (a) whether any failure by Respondents to exercise due care in performing the undertaking increased the risk of harm to Wright ***or*** (b) whether any harm suffered by Wright arose from her reliance upon Respondents' undertaking." Wright, 826 S.E.2d at 295 (emphasis added). This Court's use of "OR" speaks of alternatives -- increased risk of harm is not ***the*** essential element to be proven. Here, the Plaintiff presented evidence of the alternate element -- reliance -- evidence that the harm suffered by Ms. Parrott arose from her reliance upon Sandpiper's daily wellness check policy. And, the Trial Judge DID make findings in his conclusions of law that "as a result of Sandpiper's failures to check on her well-being, Ms. Parrott experienced a long lie of over three days before she was discovered" and that "breach of the duty to conduct daily wellness checks was a cause of Ms. Parrott's long lie." [R.p. 015.]

It is apparent that the Court of Appeals has overlooked or ignored that this Court was critical of a narrow focus taken by the Court of Appeals' panel [775 S.E.2d 399] that had considered the initial appeal in Wright, on the matters of certain internal policies and decisions that limited the security guard program. This 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." 826 S.E.2d at 294. As in Wright, the Court of Appeals again 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 well-being every day by laying eyes on her or talking to her – no exceptions were described. In a similar manner, the Court of Appeals' focus here 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. The evidence overwhelmingly establishes the fact of her reliance as found by the Trial Judge.

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 Ms. Parrott relied under the promise of daily wellness checks and that Sandpiper's failure to conduct the daily checks on those days did cause her to suffer during the long lie. Those findings are supported by evidence in the record and should not be disturbed. Unfortunately, however, the Court of Appeals failed to follow the proper standard of review of the Trial Judge's findings of fact, and instead, substituted its own view of the evidence.

## 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.

As stated above -- but it bears repeating -- the parties consented to a bench trial at which the Trial Judge presided as the finder of the facts and the judge of the law. Accordingly, the 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 every one of the Trial Judge's findings of facts are supported by evidence of record as clearly shown by the page and line references to the Record on Appeals provided in the above Statement of the Facts. Having misapplied or ignored controlling Supreme Court precedent as discussed above, the Court of Appeals also chose to recast the facts to support its underlying decision to reverse the Trial Judge and improperly articulated its own view of the evidence in the following particulars.

ONE: 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 the medical

evidence supports the Trial Judge's resolution of any dispute or confusion on that point. There is no valid basis in this record to question or disturb the Trial Judge's factual finding on the timeline.

TWO: 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 the medical experts and the medical records and, accordingly, there is no legitimate basis in this record to second-guess or disturb the Trial Judge's finding on this point.

THREE: In discussing the facts regarding the long lie, the Court of Appeals makes comments about a medical journal article on the topic of long lies that was admitted into evidence at trial without objection. The Court of Appeals' own independent consideration of that journal article does not 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.

FOUR: 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. [App. 3; 904 S.E.2d at 458.] However, throughout the opinion and by its ultimate reversal, the Court of Appeals failed to accept or 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.

In this background 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 of Appeals' 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.

FIVE: 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 .

SIX: The Court of Appeals' discussion of Ms. Parrott's fall and long lie was selective and skewed. 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 of Appeals 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 had 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[13] 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." However, 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, as provided for its long-established and routinely-implemented policy which the Sandpiper Director represented and promised to Ms. Parrott, will signal to senior living centers

[13] 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.").

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. Public policy factors and settled case law fully support the Trial Court's conclusion that Sandpiper had a legal duty to conduct daily wellness checks where the evidence establishes that the facility established and marketed its policy upon which the resident relied. Accordingly, this Court should reverse the Court of Appeals and affirm the Trial Court's judgment.

## REMAINING ISSUES RAISED ON APPEAL BUT NOT ADDRESSED BY COURT OF APPEALS

On appeal from the Trial Court's verdict and judgment, Sandpiper raised issues as to the Trial Court's rulings on causation, comparative negligence, and the amount of the damages awarded. Having found that there was no legal duty, the Court of Appeals found it unnecessary to address these issues. In some cases where an opinion of the Court of Appeals is reversed, this Court will address the remaining issues rather than remand unaddressed issues to the Court of Appeals "in the interest of bringing finality to this litigation." Roche v. Young Bros., of Florence, 332 S.C. 75, 83, 504 S.E.2d 311, 315 (1998). *See also* Stone v. Thompson, 426 S.C. 291, 296, 826 S.E.2d 868, 870 (2019); S.C. Pub. Int. Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 122, 804 S.E.2d 854, 861 (2017); Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 12, 791 S.E.2d 128, 134 (2016); Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs., 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003). In the interest of judicial efficiency and finality, the Petitioner urges this Court to consider whether there is any evidence to support the Trial Judge's finding on the remaining issues; rather than remand to the Court of Appeals that already refused/failed to follow the proper standard of review.

## III. THE EVIDENCE OF RECORD SUPPORTS THE TRIAL JUDGE'S FINDING THAT THE DEFENDANT BREACHED THE DUTY OWED TO PLAINTIFF'S DECEDENT BY FAILING TO CONDUCT A DAILY WELLNESS CHECK ON JUNE 4 AND 5TH.

The Trial Judge found that Sandpiper breached its own policy by failing to check on Ms. Parrott on June 4th and June 5th:

> Sandpiper breached the policy when the staffer did not make the minimal effort to obtain the correct key to check on Ms. Parrott on June 4th. Sandpiper further breached the policy when no staffer checked on her on June 5th. At the time Sandpiper finally checked on her on June 6th at approximately 8 p.m., it had been approximately 68 hours since Ms. Parrott that been seen by anyone. Simply put, I find and conclude that the Sandpiper's failure to follow its own policy resulted in the Defendant breaching its duty owed to Ms. Parrott. [R.p. 014 p. 12.]

Although the Court of Appeals did not directly address this issue, the Court's description of "Parrott's Fall and Long Lie" (though skewed towards the Sandpiper employees' excuses) recounts that no one completed a daily check of Ms. Parrot on June 4th. As discussed above, the Court of Appeals reviewed the conflicting evidence as to whether someone checked on Ms. Parrott on June 5th, but the Trial Judge resolved that conflict and found that no one checked on her that day which finding is supported by evidence of record.

On appeal, Sandpiper's argument took the form of a challenge to the question of whether the daily check policy/procedure was the industry standard of care. As discussed in more detail in the briefs submitted to the Court of Appeals, Sandpiper made a conclusory (one paragraph) argument that the Trial Judge ignored the testimony of its expert (Brian Lancenese) 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. The Petitioner (Respondent below) argued that this issue should be deemed abandoned. Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 520, 763 S.E.2d 200, 203 n.4 (2014) (an issue is not preserved for review on appeal where argument on a

point is conclusory and is not supported by any authority). However, the argument is also not supported by the law or the record.

First, the Trial Judge did mention that Sandpiper had presented testimony of its expert Brian Lancenese, an expert in assisted living facilities. [R.p. 005 p. 3.] The defense expert testified that daily check sheets are a standard in independent living facilities, although he insisted that they are not set in place as safety mechanism, but that they are only intended to help the staff monitor activities. [R.p. 575:11-16.] However, Plaintiff had not argued that the daily check-in policy/procedure was intended to ensure the ultimate health and safety of the residents. More significantly, the expert admitted that if an independent living facility adopts a procedure, then it is expected to perform it reasonably. [R.p. 573:20-25.]

"The standard of care in a given case may be established and defined by … a defendant's own policies and guidelines. *** [W]hen defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages." Madison, 638 S.E.2d at 659. *See also* Peterson v. Nat'l R.[R.P.assenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) (evidence of defendant's deviation from own their internal policies is admissible to show the element of breach); Caldwell v. K-Mart Corp., 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) ("In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care."). And, even though the Plaintiff did not present its own expert, Defendant's "expert opinion" does not prevent the Trial Judge from finding that Sandpiper's failure to follow its own daily check-in policy amounted to actionable negligence. Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) ("[T]he fact that the testimony of its expert was not directly refuted does not automatically entitle

it to a directed verdict. As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness.")

## IV. THERE IS EVIDENCE OF RECORD TO SUPPORT THE TRIAL JUDGE'S FINDING THAT THAT THE DEFENDANT'S FAILURE TO CONDUCT DAILY WELLNESS CHECKS WAS A PROXIMATE CAUSE OF INJURY TO THE PLAINTIFF'S DECEDENT AND A PROXIMATE CAUSE CONTRIBUTING TO HER DEATH.

There is no dispute that a plaintiff bears the burden of proving proximate cause in order to make a claim for negligence. However, as the Trial Judge recited the applicable law on proximate cause, Plaintiff was not required to prove that Sandpiper's failure to follow its daily check in policy was the sole proximate cause of injury to Ms. Parrott; rather, the burden was to prove that the failure was at least one of the proximate causes of injuries she suffered. [R. p. 015.] Also as noted by the Trial Judge, the question of proximate cause is one of fact for the jury. Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966). On appeal, the jury's findings on proximate cause are to be affirmed if supported by any evidence. Carter v. Anderson Mem'l Hosp., 284 S.C. 229, 233, 325 S.E.2d 78, 81 (Ct. App. 1985).

Here, the question of proximate cause was one of fact for the Trial Judge who found that Sandpiper's failure to check on Ms. Parrott was a cause of the long lie and thereby a proximate cause of injury (in the form of pain and suffering) to her after the fall during the long lie as well as pain and suffering to her after her discovery throughout her rehabilitation and during her decline. The Trial Judge further found that the trauma from the long lie was a proximate cause of her failure to thrive which ultimately contributed to her death. As to the question of Ms. Parrott's pain and suffering, the Court made the following Finding of Facts (unnumbered 8.):

> I find, based 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 defecating on herself, emotional injury, psychological injury. [R.p. 008 ¶ 8.]

As to the separate cause of action for wrongful death, the Court made the following Finding of Fact:

> 9. Ms. Parrott died on February 9, 2015. One of the causes of death listed on her death certificate was "failure to thrive." Defendant's expert, Dr. Davidson, testified that Ms. Parrott recovered completely from the broken hip and that the ultimate cause of Ms. Parrott's death was her loss of will to live. Her attending physician, Dr. Mills, testified that in his expert medical opinion, Ms. Parrott's pain and suffering while on the floor (as opposed to the broken hip itself) was a cause of her loss of will to live and a cause of both her loss of quality of live [sic] during the remaining eight months of her life and led to her death. 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 ¶ 9.]

In his Conclusions of Law, the Trial Judge further addressed his findings on proximate cause:

> Based on the preponderance of the evidence, I find and conclude that Sandpiper's failure to follow its policy of checking on the well-being of each resident was a proximate cause of injury to Ms. Parrott. If Sandpiper had followed its own policy, then one of the Sandpiper employees, agents or servants would have checked on the well-being of Ms. Parrott on Wednesday evening June 4th; or if Sandpiper had followed its own policy the next day, then one of the Sandpiper staffers would have checked on her on June 5th. Instead, 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. To 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.
>
> Based on the preponderance of the evidence, I find and conclude that breach of the duty to conduct daily wellness checks was a cause of Ms. Parrott's long lie. I further find and conclude that a natural and proximate result of lying with a broken hip for so long that decubitus ulcers formed on her skin and dehydration set in contributed to and exacerbated both her physical pain and mental anguish during the long lie, and after her initial treatment and recovery period, and during the follow-up rehabilitation. I further find and conclude that the long lie was a cause of Ms. Parrott's mental, emotional, and physical decline even after her hip healed that continued through the months prior to her death. I also find and conclude that the

> long lie as a cause of her loss of a will to live and the failure to thrive that led to her death. [R.pp. 015-016.]

To the extent that the Sandpiper argues that the Trial Judge erred in failing to recognize that it did not cause Ms. Parrott to suffer a "long lie" and that there was insufficient evidence that the long lie proximately caused her death, there is ample evidence of record that Ms. Parrot endured considerable pain and suffering after her fall during the long lie, and she continued to experience pain and suffering even after her broken hip healed which persisted up to the time of her death and was a contributing cause of her death eight months later.

The evidence supports findings that Ms. Parrott indisputably suffered pain and suffering from the broken hip she sustained in the initial fall for a period of time from the moment of the fall through the hours that she lay on the floor until she was discovered. Without a doubt she continued to suffer pain and suffering from each and all of these conditions during her hospitalization and rehabilitation while her hip was healing. Dr. Mills, her treating physician testified[14] that she recovered well from the broken hip and he would have expected her to return to her life in the independent living facility after some time in rehabilitation. [R.p. 383:22-25.] However, there was also considerable testimony from Dr. Mills and her daughter that even after her hip healed, Ms. Parrott suffered emotional and mental health issues. [R.p. 129:14, *see also* R.p. 138:14-18.] Dr. Mills explained that the physical and mental trauma of the long lie exacerbated her prior mental health issues, and he opined that the mental health decline resulted in a failure to thrive that was a contributing cause of her death. [R.pp. 382:22-383:8.]

[14] Dr. Mills testimony reflects that each and all of his opinions were given to a reasonable degree of medical certainty. [R.p. 362:1-4.]

In addition to the testimony of the treating physician, Plaintiff also presented testimony from Dr. Bergmann, a clinical psychologist and counselor, who was qualified as trauma expert and offered several opinions (to a reasonable degree of medical certainty) that she suffered a traumatic event from long lie that the impact of that trauma stayed with her past her physical healing until her death. [R. pp. 711:24-712:4; 717:19-718:2; R. pp. 718:3-719:2.] Dr. Bergmann also testified about the progression of her emotional trauma during the long lie. [R. p. 747:2-7.] Sandpiper devoted several pages in its brief quoting and citing to excerpts of testimony from Dr. Bergmann and Dr. Mills which amount to little more than an attempt to make a new "jury argument" to this Court. However, appellate review is limited to the any evidence standard, and Dr. Mills' opinion meets the any evidence standard.

Sandpiper also tried to avoid any responsibility for the pain and suffering Ms. Parrot endured during and following the long lie based on mental health issues she experienced five years earlier back in 2009. However, as found by the Trial Judge, while Ms. Parrott had a prior history of mental health issues, it is well evidenced in medical testimony that she was living a normal productive life at the time of the long lie in 2014, and that her preexisting mental health issues were aggravated by the physical and emotional/mental trauma she endured during the long time that she laid on her apartment floor. [R. pp. 729:19-730:2.] There also was testimony that Ms. Parrott suffered new, different mental health symptoms (deliriums) as a result of the trauma of the long lie [R. p. 724:9-16], and that the psychological consequences that she experienced during the long lie was a contributing cause of her death. [R. p. 730:3-11.]

Under the law, "[t]he defendant takes the plaintiff as he is found and the plaintiff is entitled to recover damages resulting from the aggravation of a pre-existing condition." Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). Thus, Sandpiper takes Ms.

Parrott as she was found and the Defendant cannot avoid liability where the evidence could support a finding that the trauma of the long lie aggravated her mental health conditions.

Sandpiper's attempts to challenge the expert's opinions with citations and quotations of isolated excerpts from the trial record do not comport with the standard of review on this appeal. The credibility and weight of a witness's opinion testimony is a question for the factfinder – in this case the Trial Judge – whose choice it is to believe one witness over another, or to believe part of a witness's testimony. Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 844 (Ct. App. 1997) (jury must "decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve"). On appeal from the bench trial, it is not the function of an appellate court to reweigh the evidence or reassess the credibility of the witnesses.

At various points in his order, the Trial Judge specifically references his reliance on the medical testimony, and in his order denying the posttrial motions, he more emphatically stated his credibility assessment:

> I placed a lot of emphasis on Dr. Mills' testimony concerning the wrongful death claim and almost completely dismissed the testimony of Dr. Wagner as it shocked the conscience of this Court that Dr. Wagner would opine that Ms. Parrott did not suffer any form of trauma from this event and that Ms. Parrott's death was probably caused by her immobility from her fractured hip. [R.p. 028.]

The expert opinions of Dr. Bergmann and Dr. Mills meet the any evidence standard to support the Trial Judge's finding that Sandpiper's failure to check on her over the hours and days of June 4-6 was a proximate cause of pain and suffering she suffered during the long lie and her subsequent decline and also a proximate cause of her death. Accordingly, Sandpiper's attempts to challenge the credibility of those witnesses does not meet the high "any evidence" standard to overturn the Trial Judge's verdicts on the survival and wrongful death causes of action.

## V. THE TRIAL JUDGE'S REJECTION OF SANDPIPER'S COMPARATIVE NEGLIGENCE DEFENSE IS SUPPORTED BY AMPLE EVIDENCE UNDER THE APPLICABLE LAW.

The Court abolished the doctrine of contributory negligence in 1991 and adopted a modified comparative negligence affirmative defense. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991); Berberich v. Jack, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011). While a plaintiff must show the requisite elements of duty, breach, injury, and proximate cause in order to establish a negligence claim, a defendant asserting comparative negligence bears the equivalent burden of proving that the plaintiff owed a duty of care to the defendant, the plaintiff breached that duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. S*ee* Nedrow v. Pruitt, 336 S.C. 668, 678, 521 S.E.2d 755, 760 (Ct. App. 1999) (comparative negligence requires a finding that the plaintiff breached a duty owed). The question of whether Ms. Parrott was negligent and any comparison with Sandpiper's negligence were questions for the Trial Judge. *See* Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 394, 665 S.E.2d 222, 226 (Ct. App. 2008). While the Trial Judge did not expressly discuss comparative negligence in his order of October 16, 2020, in his order denying Sandpiper's posttrial motion which attempted to preserve the comparative negligence defense, the Trial Judge did state: "As to the arguments that I failed to consider and address all the asserted defenses, I considered and rejected each of those defenses in rendering my verdict for the Plaintiff." [R.p. 028[15].]

In this case, Sandpiper argued at trial that Ms. Parrott was negligent in: (1) not asking Sandpiper maintenance to hang her new curtains, (2) standing in a rocker to change her curtains;

[15] As a threshold matter, Plaintiff maintains that the Trial Court's orders meet the purpose of Rule 52 and provide a sufficient basis to allow appellate review on this record. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010); Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 886 (1994) (trial court findings were adequate to review order where it contained a succinct statement that evidence was insufficient to prove an element).

and (3) not wearing her panic button while hanging the curtains.[16] Plaintiff argued that the issue of comparative negligence became moot at the point where Sandpiper's aide (Ms. Munoz) simply walked away from checking on Ms. Parrott when her master key did not open her door rather than making the minimal effort to take the few extra steps to return to the office to get the individual key to Ms. Parrott's door. [R.p. 593.] On appeal, Plaintiff continued to maintain that Sandpiper's neglect began at the point where Ms. Munoz neglected to check on Ms. Parrott on the evening of June 4th, and thus, Ms. Parrott's earlier actions do not provide any basis for a comparative negligence defense.

From one perspective, Sandpiper did not establish that Ms. Parrott owed any duty to Sandpiper in any of these particular actions as alleged. While there was evidence that Sandpiper issued panic buttons to the residents, 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.] Likewise, while Sandpiper's director testified that maintenance would have hung the curtains if she had asked, [R. p. 209:7-9], there was no evidence that imposed any duty on Ms. Parrott to make such a request. In addition, Sandpiper's director testified that one reason for the visual 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, Sandpiper's director basically acknowledged Ms. Parrott was entitled to be rescued even if she did not use her panic button. [R.p. 213:4-9.] She also testified that there was nothing in their policies that negated the daily check procedure if the emergency button was not used. [R.p. 214:11-15.]

[16] See Sandpiper's Posttrial Motion: "The undisputed evidence is that Ms. Parrott stood on a rocking chair, while failing to wear her emergency/panic button and, for that matter, failing to take advantage of maintenance services set out in her lease. There is no reasonable view of the evidence under which Ms. Parrott is not guilty of comparative negligence." [R. p. 787.]

Support for the Trial Judge's rejection of Sandpiper's comparative negligence defense can be found in one of the last "pure" contributory negligence precedents, Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990). In that case, the Court rejected a contributory negligence defense in an action based on the hospital's negligence in failing to protect the patient from his own suicide, stating:

> [A]ppellants contend Bramlette was contributorily negligent or assumed the risk as a matter of law because he was not insane and therefore acted knowingly when he killed himself. This Court has recognized a cause of action in negligence for breach of a duty to prevent a known suicidal patient from committing suicide. *Sloan v. Edgewood Sanatorium, Inc.*, 225 S.C. 1, 80 S.E.2d 348 (1954). Where such a duty exists, as here, clearly the very act which the defendant has a duty to prevent cannot constitute contributory negligence or assumption of the risk as a matter of law. *Accord Cowan v. Doering*, 215 N.J. Super. 484, 522 A.2d 444 (1987).

Id. Following such reasoning, Sandpiper's daily check policy was intended to provide help[17] for just the type of situation as here, where Ms. Parrott's actions in trying to hang her own curtains while not wearing her panic button placed in herself in need of help. Thus, Sandpiper could not establish a comparative negligence defense predicated on Ms. Parrott's actions that placed her in need of such help, and the Trial Judge properly rejected that defense.

## VI. THERE IS EVIDENCE OF RECORD TO SUPPORT THE AMOUNT OF THE TRIAL JUDGE'S AWARD OF DAMAGES.

Sandpiper argued that the award of damages is speculative because the Trial Judge never explains how he determined the extent of the pain and suffering caused from the long lie separate from the broken hip suffered in the fall and because the Trial Judge did not differentiate between the initial hours Ms. Parrott laid on the floor immediately after the fall from the hours that she laid

[17] AGAIN, the Plaintiff has not and does not contend that Sandpiper was under any duty to prevent Ms. Parrott from injuring herself. The duty, that Sandpiper undertook with its own policy/procedures, was to check on her well-being once a day. If Ms. Munoz had made the effort to get the correct key and check on Ms. Parrott on the evening of June 4th, there arguably would have been no basis to hold Sandpiper liable for any of her injuries.

there from the time that Ms. Munoz did not complete her check on the evening of June 4th through her discovery on the evening of June 6th. However, the order reflects the Trial Judge's understanding of the distinction of the Plaintiff's survival claim for damages for the pain and suffering during the period of the long lie after the failed check on June 4th and through June 5th until her discovery on the evening of June 6th:

> I find that the evidence is overwhelming that Ms. Parrott experienced enormous conscious pain and suffering, and mental distress during the long lie that resulted from Sandpiper's failure to conduct timely wellness checks on June 4th and on June 5th. I further find the preponderance of the evidence also proves that Ms. Parrott continued to suffer pain and to experience mental anguish and loss of enjoyment of life even after the broken hip healed. Accordingly, I award $500,000 on Ms. Parrott's survival cause of action. [R.p. 017.]

It is true, that as a general proposition, "the existence or amount of damages cannot be left to conjecture, guess or speculation." Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968). However, the law is well established that pain and suffering is not capable of exact measurements and the factfinder has discretion in making a monetary award for such intangible damages. Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (citations omitted). "The amount of damages a jury may award for physical pain and suffering and for mental pain and suffering is incapable of exact measurement and is therefore left for determination by the jury." Mims v. Florence Cty. Ambulance Serv. Comm'n, 296 S.C. 4, 8, 370 S.E.2d 96, 99 (Ct. App. 1988) (citations omitted).

On appellate review, the trial judge's award will be sustained unless it is so grossly excessive that it would be a denial of justice to allow the verdict to stand. Mims, 370 S.E.2d at 99 (citations omitted). Or as otherwise stated, the fact finder's award will be set aside "only when the verdict is so grossly excessive as to indicate that the jury was moved by passion or prejudice

or other considerations not founded on the evidence and the instructions of the trial court." Watson v. Wilkinson Trucking Co., 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

The evidence supports the Trial Judge's findings that Ms. Parrott indisputably suffered pain and suffering from the broken hip she sustained in the initial fall for a period of time from the moment of the fall through the hours that she lay on the floor until she was discovered. Without a doubt, she continued to suffer pain and suffering from each and all of these conditions during her hospitalization and rehabilitation while her hip was healing. The treating physician testified that she recovered well from the broken hip and he would have expected her to return to her life in the independent living facility after some time in rehabilitation. However, there was also considerable testimony from Dr. Mills and her daughter that even after her hip healed, Ms. Parrott suffered emotional and mental health issues. Dr. Mills explained that the physical and mental trauma of the long lie exacerbated her prior mental health issues, and he opined that the mental health decline resulted in a failure to thrive that was a contributing cause of her death. Dr. Bergmann also testified that the trauma exacerbated her pre-existing mental condition and the traumatic impact persisted from the time of the long lie until she passed away.

Sandpiper attempts to avoid liability for any of Ms. Parrott's pain and suffering because the Plaintiff did not present expert testimony to separate and quantify her pain and suffering into component parts and time periods. It appears that Sandpiper would have the Plaintiff present evidence that monetizes her injuries by the nature of the pain and suffering and the units of time. Sandpiper complains that the Plaintiff did not separate and quantify the amount of pain and suffering specifically attributable to the broken hip and the first 24 hours that she laid in her apartment apart from the pain and suffering she suffered during the hours on after Sandpiper's employee failed to obtain the correct key to check her apartment on June 4th through June 5th

when no one even tried to check on her, until the evening of June 6th when she was finally found. Sandpiper's contention would present an impossible task that is not required by the legal principle upon which it relies. Pain and suffering cannot be calculated on an hourly rate and it would be impossible to assess a monetary value to each hour that Ms. Parrott's laid on her floor, thus, impossible to calculate monetary value of pain and suffering for the hours between the evening of June 4th (when Auld did not retrieve the correct key to enter Ms. Parrott's apartment) and the evening of June 6th when she was finally discovered.

In one sense, the pain and suffering from the broken hip and the long lie can be considered as intrinsically inseparable but the difficulty (if not impossibility) of separating and quantifying her pain and suffering in categories does not absolve Sandpiper for any liability for Ms. Parrott's suffering. *See* Rourk v. Selvey, 252 S.C. 25, 27–28, 164 S.E.2d 909, 910 (1968) (tortfeasor liable for entire harm, even if neglect was only one of concurrent causes of inherently indivisible injuries). In other respects, the order reflects the Trial Judge's understanding of the nature of the Plaintiff's survival claim for damages. It was clear that Plaintiff was not seeking damages for the broken hip sustained in the fall, and the award was compensation of the pain and suffering during the long lie on June 4th through June 5th until her discovery on the evening of June 6th and beyond during her recovery and through her decline until her death.

## CONCLUSION

WHEREFORE, based on the foregoing, Petitioner respectfully submits that this Court should vacate the Court of Appeals' decision because the law and the evidence of record support the Trial Court's findings of fact and conclusions of law that Sandpiper owed Ms. Parrott a legal duty to follow the daily wellness check policy that it had established years prior, marketed directly to Ms. Parrott, and routinely implemented on a daily basis for years. Petitioner also requests that

this Court address the other remaining issues regarding the sufficiency of the evidence as to breach of duty, proximate cause, and damages, and affirm the Trial Judge's verdict and awards in all respects on both causes of action because there is evidence to support each and all of his findings.

Respectfully submitted,

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