

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

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

Civil Case No. - 2016-CP-10-05379
Ct. App. Op. No. 6067, filed June 26, 2024
Sup. Ct. App. Case No. 2024-001377

The Estate of Delila Parrott,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

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S.C. SUPREME COURT

Petitioner,

Respondent.

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The Estate of Delila Parrott, Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware,
LLC, Appellant.

Appellate Case No. 2020-001643

Appeal From Charleston County
Bentley Price, Circuit Court Judge

Opinion No. 6067
Heard March 12, 2024 – Filed June 26, 2024

REVERSED

Stephen Lynwood Brown, Russell Grainger Hines,
Matthew Oliver Riddle, Donald Jay Davis, Jr., and James
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Respondent.

GEATHERS, J.: In this wrongful death and survival action, Sandpiper Independent & Assisted Living-Delaware, LLC (Sandpiper) challenges the circuit court's order following a bench trial finding Sandpiper liable for the death and conscious pain and suffering of Delila Parrott and awarding \$1,000,000 to Parrott's estate (Respondent).

Sandpiper argues that the circuit erred in finding that (1) Sandpiper owed Parrott a duty, (2) Sandpiper's breach of that duty proximately caused Parrott's death, and (3) Sandpiper failed to establish comparative negligence as a defense. Sandpiper also contests the circuit court's calculation of damages, arguing the award was wholly undue and speculative or excessive. We reverse.

FACTS

Tragically, Delila Parrott, who was eighty years old, fell from a rocking chair she was standing on to hang curtains in her apartment at Sandpiper's independent living community. Though the exact timeline is disputed, Parrott could have fallen as early as the evening of Tuesday, June 3, 2014. The fall caused comminuted fracturing of Parrott's hip, resulting in complete immobility as she laid until the evening of June 6, when Sandpiper's staff entered Parrott's apartment and called emergency services.

Parrott spent four days in the hospital to treat her broken hip and other conditions related to her fall before being discharged and sent to a rehabilitation facility owned by Sandpiper. From rehab, she was moved into an assisted living community. Having never returned to an independent living community, she was hospitalized in January 2015 for mental health reasons, entered hospice care on January 31, 2015, and died on February 9, 2015—eight months after the fall. Her death certificate listed her causes of death as "failure to thrive" and "chronic schizophrenia," among other things. Respondent contended at the bench trial that Parrott's death was the result of a "long lie"—a medical condition that occurs when an elderly person is left immobile after a fall for an extended period as they await rescue—as opposed to her broken hip from the fall.¹ See *4 Attorneys Medical Advisor* § 33:123 (Monique Leahy ed., 2024) (explaining long lies in both injured and uninjured "fallers" and noting studies showing that older fallers who could not get up were "more likely to suffer a lasting decline in activities of daily living," but

¹ Included in the record as a trial exhibit is a 1996 special article from the New England Journal of Medicine examining the long lie phenomenon. This article notes that "[t]he total mortality was [67%] for patients who were estimated to have been helpless for more than [seventy-two] hours, as compared with [12%] for those who had been helpless for less than [one] hour." However, the study acknowledged that it was unable "to determine the independent influence of functional status, the length of time spent helpless, the extent of social support, diagnosis, demographic variables, or a number of other factors on the outcomes of persons found dead or helpless in their homes."

that the increased likelihood of death and hospitalization arising therefrom was not statistically significant).

I. Background on Sandpiper and its Check-In Policy

In the independent living community where Parrott lived, Sandpiper offered several amenities to its residents. These amenities included two meals per day, planned activities for the residents, general maintenance services, weekly laundry and housekeeping services, and transportation for social events. Though it was not contained in the lease, 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[. If you can't get them on the phone, go to the apartment and check on them." Corrine Carrington, the executive director of Sandpiper's independent living community, further explained:

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.

Carrington also explained that Sandpiper had duplicate keys for each apartment in addition to a master key and that if a resident who had not yet been checked on did not answer the door, the staff would use one of these keys to enter the apartment.

Residents at Sandpiper were also issued a "panic button"—a wearable device that allowed residents to call for help in an emergency. Carrington testified that although "the majority [of residents] probably wore their panic button[,] . . . it was not uncommon for some of them not to wear it." Carrington and Beth Auld, a longtime Sandpiper employee, agreed that the panic button was Sandpiper's primary response to falls. It is undisputed that Parrott was not wearing her panic button when she was attempting to hang the curtains.

II. Background on Parrott

Parrott signed a lease to live at Sandpiper in April 2013. Joan Acosta, Parrott's daughter and personal representative, explained that, prior to this, even though

Parrott "was still independent," Acosta "wanted to be proactive . . . and get [Parrott] in a situation where there would be transportation available, where she would have activities available, [and] where she was checked [on] every[]day." The lease Parrott signed contained the following language:

Sandpiper is not responsible for the negligence of its [o]ccupants including acts or omissions that cause injury or death to other persons or damage to property. . . . You agree to be responsible . . . and hold Sandpiper . . . harmless from and against[] any and all claims . . . resulting from any injury to or death of any person and/or any damage to property caused by, resulting from, attributable to, or in any way connected with acts or omissions of or on the part of you as occupant.

The lease further stated:

Both Sandpiper and you agree that your freedom to make personal health and *non-health related decisions*, the freedom to travel, to come and go as you please, *the decisions that [a]ffect and control your day-to-day activities* should all remain within your sole decision so long as it does not adversely affect other occupants. As such, both Sandpiper and you understand and realize that such decision making ability carries an inherent possibility of adversity that may directly or indirectly affect you as occupant. *Therefore, you . . . agree to assume such risk and related consequences and, as it relates to Sandpiper, . . . waive any and all liability against [Sandpiper] from any and all damages, both direct and indirect, that may result from such activities, the risks[,] and the . . . damages resulting from such activities.*

(emphases added). Though Parrott began suffering from mental health problems around 2009, which included periods of delusions, her condition was considered stable prior to the fall. In her report following Parrott's fall, Carrington described Parrott as "very private" and noted that Parrott had told her at least once that she (Parrott) did not want anyone in her apartment. Consequently, Carrington made a note on Parrott's file that Parrott was "fearful of people coming in without her knowledge" and that "no one is allowed in [Parrott's apartment] without [Parrott]

being present." Carrington also testified that Parrott "was probably concerned about her privacy[] more than any other resident," but noted that a resident's privacy should not deter staff from entering for the purposes of conducting a check-in.²

Carrington also stated that about four months prior to the fall, Parrott had changed her locks. Carrington explained that she learned about the changed locks only after she came upon Parrott struggling to unlock her apartment and that though Parrott was hesitant to provide Sandpiper with a duplicate key for the changed locks, she ultimately relented and provided one.

III. Parrott's Fall and Long Lie

Though the parties disputed at trial the timeline for Parrott's fall, the circuit court accepted Respondent's formulation: Parrott fell on the evening of Tuesday, June 3, and was not found until Friday, June 6, despite the daily check-in policy. Towards the end of the day on Wednesday, June 4, one of Sandpiper's employees, Rebecca Munoz, noticed that Parrott was not signed off on the daily check-in sheet. Consequently, Munoz walked over to Parrott's unit with the master key to check on her after unsuccessfully trying to call her. Munoz knocked on the door, but no one answered. Munoz attempted to enter the apartment using the master key, but it did not work because Parrott had changed her locks. However, Munoz did not walk the "very short distance" back to the office from Parrott's apartment to obtain the duplicate key that would have allowed her to enter the apartment.³ Instead, she called Auld, who, in addition to being a longtime Sandpiper employee, is also Munoz's mother. Together, they decided Munoz did not need to enter Parrott's apartment that night to complete the check-in; instead, Munoz asked Auld to check on Parrott on Thursday. Although Auld did not recall the details of the conversation with Munoz, she agreed that Parrott's privacy concerns "definitely" factored into the decision not to enter Parrott's apartment, and Munoz testified to the same. Munoz completed her shift and went home having never visually confirmed Parrott's wellbeing. Munoz was not scheduled to work again until Friday, June 6.

² Carrington later seemed to acknowledge that even though it *should* not impact a decision on whether to enter a resident's apartment, it *could*.

³ Munoz claimed that she did not know where to find the duplicate key for Parrott's apartment after she tried to enter unsuccessfully with the master key. However, she answered affirmatively when asked if she knew where to locate the key when she eventually returned and entered Parrott's apartment Friday evening.

The next day—Thursday, June 5—Auld reported to work and signed off on having seen Parrott. Auld later maintained to Carrington that her marking the check-in sheet was accurate and reflected the fact that Auld had seen Parrott on June 5. However, even though Sandpiper's practice was to preserve records of the check-in sheets, the June 5 record with Auld's signature no longer existed at the time of the trial. Additionally, Auld could not recall at trial exactly when or where she purportedly saw Parrott on Thursday. A friend and neighbor of Parrott's, Lila Watters, stated that she did not see Parrott on June 5 even though the two regularly dined together.

On Friday, June 6, Munoz returned to work. That evening, at the urging of Watters, Munoz used the duplicate key to enter Parrott's apartment and found Parrott lying on the floor. Though Parrott told EMS that she had fallen on Tuesday, she later told Carrington that she fell on Wednesday. Parrott's longtime physician, Dr. Richard Mills, testified:

I would be willing to say with a reasonable degree of medical certainty that [Parrott] was on the ground most likely, in my mind, somewhere between thirty-six hours to three days. But I don't think it was in the four-hour to the twenty-four-hour range. And I tend to think that based on the things I saw . . . in the record that it was longer than that.

Respondent's theory of the case at the bench trial was that although Parrott recovered physiologically from her broken hip, the extended period of time she spent on the floor amounted to a long lie. Further, they maintained that this long lie drained Parrott of her will to live and resulted in her death. Dr. Mills agreed at the bench trial that Parrott's long lie shortened her life. Dr. Mills explained that based on Parrott's recovery from the surgery for her hip, he expected her to live "many more years" and that her death within eight months was unexpected. Dr. Mills also testified that the longer the amount of time Parrott spent on the floor, the more adverse the consequences of the long lie would have been on her mental health.

Respondent also introduced testimony from Dr. Lawrence Bergmann, an expert witness in trauma, that Parrott's psychological condition continually declined following the fall and that the scientific literature supported finding a causal link between Parrott's time on the floor and her eventual death.⁴

⁴ Dr. Bergmann's testimony was presented via a deposition *de benne esse*.

In October 2016, Acosta, as personal representative of Parrott's estate, brought wrongful death and survival actions against Sandpiper, alleging that Sandpiper negligently caused Parrott's death by breaching its internal policy requiring a Sandpiper staff member to sign off on a check-in sheet each day indicating they had verified the wellbeing of each resident. Following a bench trial, the circuit court awarded Respondent \$500,000 for the wrongful death cause of action and \$500,000 for the survival action. Sandpiper moved post-trial for relief from the judgment, which the circuit court denied on November 18, 2020. This appeal follows.

ISSUES ON APPEAL

- I. Did the circuit court err by finding that Sandpiper owed Parrott a duty?
- II. Did the circuit court err by finding that Sandpiper's breach of the duty it owed Parrott proximately caused Parrott's conscious pain and suffering and death?
- III. Did the circuit court err by failing to find comparative negligence on the part of Parrott?
- IV. Did the circuit court err in its calculation of the \$1,000,000 award?

STANDARD OF REVIEW

"In an action at law tried by a judge without a jury, the appellate court will correct any error of law, but it must affirm the trial court's factual findings unless no evidence reasonably supports those findings." *Frazier v. Smallseed*, 384 S.C. 56, 61, 682 S.E.2d 8, 11 (Ct. App. 2009) (per curiam). Wrongful death and survival actions are actions at law. *See First Union Nat'l. Bank of S.C. v. Soden*, 333 S.C. 554, 574, 511 S.E.2d 372, 382 (Ct. App. 1998) ("[T]he character of an action as legal or equitable depends on the relief sought."); *see also Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005) ("An action in tort for damages is an action at law."); S.C. Code Ann. § 15-51-10 (2005) (establishing the wrongful death cause of action as "an action for damages.").

LAW AND ANALYSIS

We hold 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. Therefore, we reverse the circuit court.

Section 15-51-10 of the South Carolina Code imposes liability on tortfeasors who cause the death of another party through a wrongful act, neglect, or default that would have entitled the injured party to maintain an action for damages had they survived.⁵ *See generally Land v. Green Tree Servicing, LLC*, 140 F. Supp. 3d 539, 544–45 (D.S.C. 2015) (exploring the history of wrongful death actions in South Carolina and concluding that "the plaintiff in a wrongful death action must establish that the wrongful act or *negligence* of the defendant caused the death of the decedent." (emphasis added)).

"A plaintiff must prove three elements on a negligence claim: '(1) a duty of care owed by [the] defendant to [the] plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.'" *Dawkins v. Sell*, 434 S.C. 572, 581, 865 S.E.2d 1, 5 (Ct. App. 2021) (alterations in original) (quoting *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368–69, 635 S.E.2d 97, 101 (2006)). "If no duty has been established, evidence as to the standard of care is irrelevant. Only when there is a duty would a standard of care need to be established." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011). Here, Sandpiper contests the circuit court's conclusions on duty and causation.

⁵ In full, the statute reads:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

§ 15-51-10.

"A tortfeasor's duty arises from his relationship to the injured party." *Ravan v. Greenville County*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993) (quoting *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986)). "It is essential [for] liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care." *Id.* Whether a duty exists is a question of law. *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 296, 838 S.E.2d 220, 225 (Ct. App. 2020). Furthermore,

[t]here is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors come into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm.

Araujo v. S. Bell Tel. & Tel. Co., 291 S.C. 54, 57–58, 351 S.E.2d 908, 910 (Ct. App. 1986) (footnote omitted).

In South Carolina, "there is no general duty to control the conduct of another." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). Consequently, "a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). However, there are five main exceptions to this rule:

(1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant.

Babcock Ctr., 371 S.C. at 136, 638 S.E.2d at 656. Beyond these exceptions, "[a]n affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." *Id.* at 136, 638 S.E.2d at 656–57.

Here, the circuit court based its finding of duty on the third exception—where the defendant voluntarily undertakes a duty. A formulation of this exception is contained in section 323 of the Restatement (Second) of Torts and has been oft-repeated by South Carolina courts:

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

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (Am. L. Inst. 1965); *see also Doe 2 v. Citadel*, 421 S.C. 140, 147, 805 S.E.2d 578, 582 (Ct. App. 2017) ("Under South Carolina law, the Restatement [(Second)] of Torts establishes the recognition of a voluntarily assumed duty . . ."). "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). In South Carolina, both subsections of section 323 apply only to duty and not to proximate cause. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 219, 826 S.E.2d 285, 294 (2019).

I. Internal Policies as a Basis for a Legal Duty

Our courts have held that internal policies cannot establish the voluntary undertaking of a duty pursuant to section 323; instead, they can be used only as evidence to establish the contours of the standard of care once a duty has been

established. *See Citadel*, 421 S.C. at 148, 805 S.E.2d at 583 ("[W]e find the internal policies created by [the respondent] 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."); *see also Wal-Mart*, 393 S.C. at 248, 711 S.E.2d at 912 (finding that an "internal policy cannot be said to constitute the voluntary undertaking of a duty," but instead could serve only as evidence of the standard of care); *Pacicca v. Jackson*, No. 3:21-CV-03136-DCC, 2023 WL 8242180, at *3 (D.S.C. Nov. 28, 2023) ("[U]nder South Carolina law, a company's internal policies do not establish a duty for purposes of a negligence claim."); *Bernstein v. Walmart, Inc.*, No. 2:22-CV-1637-BHH, 2024 WL 476300, at *4 n.1 (D.S.C. Feb. 7, 2024) ("[W]hile a failure to follow company internal policies 'may be evidence of a breach of a standard of care,' South Carolina law is clear that [the defendant]'s alleged failure to comply with its [standard operating procedure] does not create a duty towards [the plaintiff]." (quoting *Pacicca*, 2023 WL 8242180, at *3)); *see generally Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) ("[W]e hold that evidence of [the r]espondent's deviation from their internal maintenance policies is admissible *to show the element of breach.*" (emphasis added)); *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.*" (emphasis added)).

Courts in other jurisdictions have often reached similar conclusions. *See, e.g., Killian v. Caza Drilling, Inc.*, 131 P.3d 975, 982 (Wyo. 2006) (distinguishing using violations of internal policies as evidence of the standard of care from using the same as evidence of duty); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 729 (Mich. Ct. App. 2002) ("Defendants are correct in their assertion that internal policies of an institution . . . cannot be used to establish a legal duty in a negligence claim."); *Doe v. Coe*, 135 N.E.3d 1, 12 (Ill. 2019) ("We first note that '[w]here the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required.'" (alteration in original) (quoting *Rhodes v. Ill. Cent. Gulf R.R.*, 665 N.E.2d 1260, 1272 (Ill. 1996))); *Estate of Catlin v. General Motors Corp.*, 936 S.W.2d 447, 451 (Tex. App. 1996) (holding that "the mere creation of an internal policy" prohibiting employees from drinking alcohol did not create a duty to plaintiffs injured by an inebriated employee's conduct and that "[m]ore [wa]s required"); *Doe v. Saint Francis Hosp. & Med. Ctr.*, 72 A.3d 929, 963 (Conn. 2013) ("[A]lthough a violation of an employer's work rules can be viewed as evidence of negligence, . . . regulations and policies do not themselves establish the standard of care." (quoting *Petriello v. Kalman*, 576 A.2d 474, 479 (Conn. 1990)); *Va. Ry. & Power Co. v. Godsey*, 83 S.E.

1072, 1073 (Va. 1915) ("A person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common.").

In *Citadel*, a young male (Doe) who was the victim of sexual abuse at the hands of a former camp counselor of The Citadel sued The Citadel alleging that it failed to act on an April 2007 report made to the college's general counsel that the counselor had sexually abused a former camper. 421 S.C. at 142–44, 805 S.E.2d at 579–80. Doe's abuse transpired from the summer of 2005 to the summer of 2007, and although Doe never attended "any summer camps or educational programs at The Citadel," he sued under the theory that but for The Citadel's failure to exercise due care in its 2007 investigation, the former camp counselor would have been exposed sooner and the harm to Doe would have been mitigated. *Id.* at 148, 805 S.E.2d at 582. The Citadel had adopted policies for the oversight of its camps and counselors, which Doe argued "required action following the April 2007 allegations." *Id.* Doe appealed the circuit court's grant of summary judgment in favor of The Citadel, arguing, in part, that these policies established the voluntary undertaking of a duty to investigate and arrest the former camp counselor. This court rejected this argument, finding that "any violation of an internal policy [requiring investigations into allegations of sexual abuse did] not give rise to the voluntary assumption of a duty and [did] not establish that The Citadel owed a duty of care as a matter of law." *Id.* at 149, 805 S.E.2d at 583.

In *Wal-Mart*, the aunt of a minor who was physically and sexually abused sued Wal-Mart for destroying photographs that the aunt had taken to prove to the Department of Social Services that the minor was being abused by the minor's father. 393 S.C. at 242–44, 711 S.E.2d at 909–10. The aunt took the roll of film containing the evidence of abuse to Wal-Mart to have the film developed, but when the aunt returned to pick up the photos, an employee told the aunt that the employee had destroyed some of them because the store's policy required destroying photos depicting nudity. *Id.* at 243, 711 S.E.2d at 909. The minor's abuse was proven several months later, and the aunt, as guardian ad litem for the minor, sued Wal-Mart, alleging that Wal-Mart caused the delay by violating its internal policies that the aunt maintained required the employee to turn the photos over to a supervisor rather than destroy them. *Id.* at 243, 711 S.E.2d at 910. Our supreme court affirmed the circuit court's grant of summary judgment to Wal-Mart, holding that Wal-Mart's internal policy requiring photos depicting nudity be turned over to management "cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law." *Id.* at 248, 711 S.E.2d at 912.

Here, the circuit court found that Sandpiper "had a policy of providing daily wellness checks and that this policy created a duty to . . . exercise reasonable care in utilizing the systems/protocols it put in place." To the extent that the circuit court relied on the mere existence of Sandpiper's check-in policy to create a duty, we reverse. *See Citadel*, 421 S.C. at 148, 805 S.E.2d at 583 (holding that internal policies do not create voluntary undertakings of a duty); *see also Wal-Mart*, 393 S.C. at 248, 711 S.E.2d at 912 ("It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law.").

II. Analysis Under Section 323 of the Restatement (Second) of Torts

Regardless of whether Sandpiper's check-in policy is an internal policy akin to those in *Citadel* and *Wal-Mart*, no evidence in the record supports the circuit court's conclusion that Parrott's reliance on the check-in policy caused her harm. Respondent points to *Wright* as controlling authority in this regard. In *Wright*, an opinion published after *Citadel* and *Wal-Mart*, our supreme court held that it was a question of fact for the jury as to whether an apartment complex voluntarily assumed a duty under section 323 when it undertook to provide a courtesy officer service to its tenants. 426 S.C. at 220–21, 826 S.E.2d at 295. Specifically, the apartment complex allowed residents affiliated with law enforcement "to receive reduced rent in exchange for their service as courtesy officers for the apartment complex." *Id.* at 207, 826 S.E.2d at 287. Employed as independent contractors for the complex, these courtesy officers were required to devote time to walking the property, answering calls from tenants about incidents on the property, and reporting daily to the property manager. *Id.* The plaintiff in *Wright* was the victim of an armed robbery in the parking lot of the apartment complex. *Id.* at 207–08, 826 S.E.2d at 287–88. Prior to moving in, an apartment complex manager told the plaintiff that there were security officers on duty even though an internal employee manual instructed employees to not indicate that the complex provided security to residents. *Id.* at 206, 826 S.E.2d at 287. However, this internal instruction was not made available to the plaintiff. *Id.* at 206–07, 826 S.E.2d at 287. Our supreme court held that summary judgment was inappropriate because resolution of the factual conflicts underlying the analyses of subsections (a) and (b) of section 323 was in the province of the jury. *Id.* at 221, 826 S.E.2d at 295. Importantly, the court in *Wright* was not asked to address or consider whether the courtesy officer program constituted an internal

policy. The court also emphasized that its holding was tailored to the "existence of a duty under the narrow facts of this case." *Id.* at 220, 826 S.E.2d at 294.

In *Wright*, there was conflicting evidence as to whether the plaintiff relied on the courtesy officer program and whether the plaintiff's harm arose from this reliance. Here, on the other hand, there is no evidence supporting the circuit court's conclusion that Parrott suffered the harm from her long lie because of her reliance on Sandpiper's check-in policy. Specifically, Respondent proffered no evidence to suggest that Parrott took the risk of hanging curtains while standing on a rocking chair—or of not wearing her panic button—*because* she was relying on the expectation that someone from Sandpiper would have come by pursuant to the check-in policy to rescue her. If anything, the evidence in the record suggests that Parrott was not keen on Sandpiper's check-in policy and the panic button system, which undermines the notion that Parrott's harm resulted from her reliance on the check-in policy. *See* Restatement (Second) of Torts § 323(b) (Am. L. Inst. 1965) (recognizing a duty may arise when "the [plaintiff's] harm is suffered *because of* the other's reliance upon the undertaking"); *see also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56 at 381 (5th ed. 1984) ("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.").

The *Wright* court held that there was an issue of fact for the jury as to "whether any failure by [the apartment complex] to exercise due care in performing the undertaking [of offering a courtesy officer program] increased the risk of harm to [the plaintiff]." 426 S.C. at 221, 826 S.E.2d at 295. Here, however, the circuit court made no finding under subsection (a) that Sandpiper's negligent execution of its check-in policy increased Parrott's risk of harm. It is therefore unnecessary to analyze the instant case under subsection (a). *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

Because we reverse the circuit court's finding that a duty existed, Respondent's wrongful death claim against Sandpiper must fail. *See Ravan*, 315 S.C. at 467, 434 S.E.2d at 308 ("It is essential [for] liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care."). It is therefore unnecessary to address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598

(1999) (noting that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, the judgment of the circuit court is

REVERSED.

HEWITT and VINSON, JJ., concur.

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Jul 11 2024

SC Court of Appeals

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

Appeal from Charleston County
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

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

The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

PETITION FOR REHEARING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. "FACTS"

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

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

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

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

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

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

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

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

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

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

In this section, the Court also discusses Ms. Parrott's mental health³ and evidence that Ms. Parrott was "very private" and that she did not want anyone in her apartment, and that there was a note on her file that she was fearful of people coming into her apartment. However, the Trial Judge

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

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

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

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

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

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

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

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

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

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

A. Evidence Establishing the Existence of the Daily Check Policy

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

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

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

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

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

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

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

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

First, the written document – if it should even be considered an “internal” policy⁵ -- does not stand alone in this case. Second, the caselaw does not support the proposition that the written “internal” policy cannot be used to corroborate the testimony of witnesses (particularly, the Executive Director and the Plaintiff) as evidence supporting the conclusion that Sandpiper voluntarily undertook a duty of care by establishing, marketing, and implementing a policy of conducting daily checks of all residents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TWO: This Court declares that the evidence suggests that Ms. Parrott was not keen⁸ on the daily check policy or the panic buttons. However, there is no evidence that Ms. Parrot was opposed to the daily check policy; to the contrary, the evidence was uncontroverted that she was concerned about her safety and she relied on the existence of the daily check policy in choosing to live the Sandpiper facility. Further, as discussed above, while it is undisputed that Ms. Parrot was not wearing the panic button at the time of her fall on June 3rd, her choice to not wear the panic button did not constitute any excuse for Sandpiper’s failure to check on her on June 4th or June 5th because the daily check policy was unconditional.

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

Respectfully submitted,

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July 11, 2024

The South Carolina Court of Appeals

The Estate of Delila Parrott, Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware,
LLC, Appellant.

Appellate Case No. 2020-001643

ORDER

After careful consideration of the petition for rehearing, this court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

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