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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2016-CP-10-05379
Appellate Case No. 2024-001377

The Estate of Delila Parrott,

Petitioner,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Respondent.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

Respondent Sandpiper Independent and Assisted Living-Delaware, LLC ("Sandpiper" or "Respondent") has an "independent living" retirement community in Mt. Pleasant where residents live in private apartments they rent from Sandpiper

[1] This Court should not consider issues that Petitioner did not include in her Petition for Writ of Certiorari. *See* Rule 242, SCACR ("The petition may be granted or denied on *any question presented*. *If the petition is granted*, the Clerk shall notify each party or each party's attorney specifying the question or questions to be considered, and *the parties shall prepare briefs addressing the question(s)*." (emphases added)). This Court granted certiorari on sole issue the Court of Appeals considered and ruled on: duty. The Court of Appeals did not address numerous other issues because they were unnecessary to reach in light of its ruling regarding lack of duty. Should this Court reverse the decision of the Court of Appeals, the issues Sandpiper, as the underlying Appellant, raised but the Court of Appeal did not consider should be reviewed and considered on the merit by the Court of Appeals.

pursuant to a written lease. (R. p. 6.) These independent living apartments *are not an assisted living facility*, much less a nursing home or skilled care facility. (R. p. 235; R. p. 414-16.) Although not a term or requirement of the residents' leases, Sandpiper's staff would internally confirm that every resident had been seen or heard from every day ("daily check-in policy"). (R. p. 159; R. p. 219-20; R. p. 238; R. pp. 1142-52.)

Reception staff kept a checklist with each resident's name at the reception desk, and whenever reception staff saw or spoke with a resident, or another staff member informed reception staff that they had done so, reception staff would note it on the checklist. (R. pp. 193-94; R. p. 219-20; R. p. 238.) Toward the end of the day, if a resident had not yet been accounted for on the checklist, reception staff would try to contact the resident by phone. (R. p. 159; R. p. 219-20.) If staff could not contact the resident by phone, they would go to the resident's apartment and knock on the door. (R. p. 159; R. p. 219-20.) If no one answered the door, a master key and copies of every individual apartment key were kept at the reception desk, and staff would generally proceed to unlock the door themselves and enter the resident's apartment. (R. pp. 159-60; R. p. 219-20.)

On June 6, 2014, Sandpiper staff entered eighty-year-old resident Delila Parrott's apartment and found her on the floor with a broken hip caused by a fall. (R. pp. 6-7; R. p. 85:24-25.) How Ms. Parrott fell is undisputed: She was alone in

her apartment, with the door locked, not wearing her panic button,[2] standing on a rocking and reclining chair while trying to hang curtains or a curtain rod.[3] (R. p. 123:25 – p. 124:21; R. p. 509:4-14; R. p. 1142; R. p.1160.)

Sandpiper staff called emergency services, and they transported Ms. Parrott to the hospital where she received treatment for four days. (R. p. 7; 385.) Ms. Parrott then went to Sandpiper's "rehabilitation facility"[4] where she made a full recovery from all of her physical injuries over the course of about one hundred days. (R. pp. 365-366; R. p. 383, 385.) After Ms. Parrott completed her rehabilitation around September of 2014, her family moved her to Ashley River Plantation, an assisted care facility not associated with Sandpiper. (R. p. 128, 385.) At Ashley River Plantation, Ms. Parrott received a higher degree of care and supervision, was no longer around her friends at Sandpiper, and ultimately passed away five months after moving into Ashley River Plantation. The record clearly demonstrates it was anathema to Ms. Parrott to ever lose her privacy or her right to live independently and without supervision.

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[2] Sandpiper issued these twenty-four-hour emergency call buttons that were wearable as a bracelet or pendant to every resident. (R. pp. 143-44.) Sandpiper cannot require residents to wear their panic buttons because it is an independent living facility.

[3] Ms. Parrott decided to try to do this herself without telling anyone rather than take advantage of the maintenance services included in her lease with Sandpiper. Even Ms. Parrott's counsel called this "a stupid thing to do." (R. p. 509:10-11.)

[4] Sandpiper's rehabilitation facility is separate and distinct from its independent living facility.

While at Ashley River Plantation in a more assisted living environment, Ms. Parrott suffered "a progressive downhill course" and "a tremendous and very sudden decline" in her mental status. (R. pp. 132-34; R. p. 386.) Ms. Parrott was hospitalized in October 2014 and January 2015 for her psychiatric conditions and altered mental status. (R. p. 7, R. pp. 132-34.) Ms. Parrott entered hospice care on January 31, 2015 and passed away on February 9, 2015. (R. p. 7.) Her death certificate listed her cause of death as failure to thrive and chronic schizophrenia among other things. (R. p. 9, 407.) Ms. Parrott was never referred to a counselor, psychiatrist, or psychologist in relation to the alleged loss of her will to live as a result of her "long lie." (R. pp. 389-393).

Ms. Parrott's estate ("Petitioner") brought this wrongful death and survival action alleging only that Sandpiper was negligent in not checking on Ms. Parrott on June 4 and June 5 of 2014. (R. pp. 60-63.) Petitioner's counsel conceded that Ms. Parrott's fall and the first twenty-four hours she was on the floor were not part of her claims. (R. p. 593.) Petitioner asserted that Sandpiper owed Ms. Parrott a legal duty to check on her based solely on its internal procedure to check off residents that had been accounted for each day, and Sandpiper's negligence in failing to check on Ms. Parrott after she fell during the evening of June 3, 2014 resulted in two additional

days[5] she went without help that ultimately caused her to lose her will to live and resulted in her death eight months after her fall.

The Honorable Bentley D. Price presided over a non-jury trial that began on September 8, 2020 and concluded on September 10, 2020. (R. pp. 75-632; 653-757.) The circuit court announced its ruling for Petitioner from the bench after considering the case for less than an hour, awarding Petitioner $1,000,000: $500,000 on the wrongful death and $500,000 on the survival claim. (R. pp. 620:8 – p. 631:16.) The circuit court entered a formal order on October 16, 2020 in which it found that Sandpiper's "policy of providing daily wellness checks . . . created a duty to follow the protocol established in its own policy" and "Ms. Parrott relied on that policy as a significant/decisive factor in selecting Sandpiper as a residence." (R. pp. 13.) The circuit court also found that Sandpiper breached that duty by failing to check on Ms. Parrott on June 4 and June 5 i.e., after the first twenty-four hours following her fall, and that Sandpiper's breach of that duty resulted in a "long lie" that ultimately caused Ms. Parrott's death. (R. pp. 13-16.)

On appeal, the Court of Appeals reversed the circuit court's judgment. *Est. of Parrott v. Sandpiper Indep. & Assisted Living-Delaware, LLC*, 443 S.C. 405, 423, 904 S.E.2d 455, 465 (Ct. App. 2024). First, the Court of Appeals reversed the circuit court's finding that Sandpiper owed Ms. Parrott a duty "[t]o the extent that

[5] Again, Petitioner concedes that Ms. Parrott's fall and the following twenty-four hours are not a

[it] relied on the mere existence of Sandpiper's check-in policy." *Id.* at 421, 904 S.E.2d at 46. The Court of Appeals reiterated extensive precedent that the mere existence of an "internal polic[y] cannot, standing alone, create a duty in South Carolina." *Id.* at 415, 904 S.E.2d at 461.

Next, the Court of Appeals reversed the circuit court's finding that Sandpiper owed Ms. Parrott a duty because "no evidence in the record support[ed] the circuit court's conclusion that [Ms.] Parrott's reliance on the check-in policy caused her harm." *Id.* at 421, 904 S.E.2d at 464. The Court of Appeals noted that Petitioner "proffered no evidence to suggest that [Ms.] 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." *Id.* at 422, 904 S.E.2d at 464. The Court of Appeals also explained that it was unnecessary to analyze whether "Sandpiper's negligent execution of its check-in policy increased [Ms.] Parrott's risk of harm" because "the circuit court made no [such] finding. *Id.* at 423, 904 S.E.2d at 465 (citing *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.")). The Court of

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part of her cause of action or claim for injuries or damages.

Appeals concluded that it was also unnecessary to address Petitioner's remaining issues in light of its ruling that Sandpiper owed Ms. Parrott a duty. *Id.*

STATEMENT OF THE FACTS

Ms. Parrott had just turned 79 years old when she signed her lease agreement with Sandpiper on April 26, 2013, and she moved into her apartment about a month later, in late May of 2013. (R. p. 112:12-13; R. p. 58, ¶ 4; R. pp. 1142-1152.) Before that, Ms. Parrott had been living by herself in a townhouse. (R. p. 107:10-12.) According to Ms. Parrott's daughter, Jean Acosta, Sandpiper's Executive Director Corrine Carrington informed both Ms. Parrott and Ms. Acosta about the daily check-in policy when Ms. Parrott was in the process of deciding whether to move there. (R. pp. 107-08.) Ms. Carrington, however, only recalled informing Ms. Acosta about the daily check policy. (R. pp. 158-59.)

The impetus for Ms. Parrott's move was not her inability or difficulty living on her own. The record shows that Ms. Acosta, not Ms. Parrott, "wanted to get [Ms. Parrott] in a situation . . . where she was checked everyday [sic]." (R. p. 107:6-9.) Ms. Acosta testified that she wanted Ms. Parrott to move to Sandpiper because Ms. Acosta "wanted to be proactive" in light of her mother's age and thought it was a good idea for Ms. Parrott to move to a "senior-living type place." (R. p. 106:16 – p. 107:5.) Ultimately, Ms. Parrott was the decision maker, she was fully capable of continuing to live independently, and she decided to do so at Sandpiper.

While the daily check-in policy may have been of "paramount" importance to *Ms. Acosta,* the record contains no evidence that *Ms. Parrott* relied on the daily check policy in deciding to live at Sandpiper.[6] (R. p. 107:16 – p. 109:1.) In fact, Ms. Acosta testified that Ms. Parrott was interested in Sandpiper because Ms. Parrott "wanted independent living" and had some friends who lived there. (R. p. 142:10-14.) Indeed, the record shows that Ms. Parrott was very concerned about people coming into her apartment without her knowledge. (R. p. 246; R. p. 1159.) Ms. Acosta expressly acknowledged at trial that her mother did not want anyone to go inside her apartment when she was not there. (R. p. 146:22-25.) Privacy and independence were Ms. Parrott's primary concerns.

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

[6] Ms. Acosta was not a party to the lease between Sandpiper and Ms. Parrott. (R. pp. 1142-52.)

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

On Wednesday, June 4, 2014, part-time receptionist Rebecca Munoz called Ms. Parrott's apartment because she had not seen Ms. Parrott that day. (R. p. 276.) After Ms. Munoz failed to reach Ms. Parrott by telephone, Ms. Munoz went to Ms. Parrott's apartment and knocked on the door. (R. pp. 276-77.) When Ms. Parrott did not come to the door and Ms. Munoz did not hear a response, Ms. Munoz attempted to unlock the door with the master key, but the master key did not work after Ms. Parrott changed the lock on her door. (R. p. 277; R. p. 283.)

Ms. Munoz then called Ms. Auld,[7] a twenty-plus-year veteran on the Sandpiper staff, to discuss how to proceed. (R. pp. 283.) In light of Ms. Parrott's concerns for privacy and concerns about who could enter her apartment, it was determined that Ms. Munoz would not make any further attempt to enter Ms. Parrott's apartment at that

[7] Ms. Auld is also Ms. Munoz's mother. (R. pp. 221-22.)

time, and that Ms. Auld would make a point to check on Ms. Parrott when she got to work the next day. (R. pp. 289-90.)

Throughout trial, Petitioner referred to the time Ms. Parrott allegedly spent on the ground without help after the first twenty-four hours following her fall as a "long lie." Petitioner's counsel said a "long lie" was "defined by the literature [a]s when an elderly [person] falls and can[no]t get up for over an hour." (R. pp. 86:11-15.) The sole article Petitioner's counsel used to support this definition did not limit its scope to elderly people falling; it included everything from botched suicide attempts to other situations where individuals of different ages were immobilized for various periods of time. (R. pp. 790-96.) While recognizing that terminology may vary, Sandpiper's counsel notes that they have not located any case law establishing liability, much less liability for wrongful death, that references Petitioner's "long lie" theory, and the circuit court did not cite any such authority in its orders. (*See* R. pp. 3-19; R. pp. 26-30.)

Additionally, Petitioner's theory is that the total length of Ms. Parrott's "long lie" lasted three days. Yet somehow, in announcing its ruling, the circuit court was under the mistaken belief that Ms. Parrott had "been on the floor in the dark for [five] days," that "she sat there and survived it for [five] days." (R. p. 625:21 – p. 626:18.) Not only is there no evidence that Ms. Parrott's "long lie" lasted five days, Petitioner

did not contend that it lasted five days. Petitioner's counsel had to interject to explain this to the court. (R. p. 626:19.)

STANDARD OF REVIEW

"An action in tort for damages is an action at law." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). "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).

"Whether the law recognizes a particular duty is an issue of law to be decided by the court." *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997). "In some circumstances, however, the question of whether a duty arises depends on the existence of particular facts." *Id.*

ARGUMENT

I. The Court of Appeals properly found that Sandpiper owed no legal duty to Ms. Parrott.

Section 15-51-10 of the South Carolina Code creates a cause of action to recover damages for the wrongful death of a person. S.C. Code Ann. § 15-51-10. "[T]he plaintiff in a wrongful death action must establish that the wrongful act or negligence of the defendant caused the death of the decedent." *Land v. Green Tree Servicing, LLC*, 140 F. Supp. 3d 539, 545 (D.S.C. 2015). "[T]o establish a claim for

negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011).

"First, the court must determine, as a matter of law, whether the law recognizes a particular duty." *Id.* "If there is no duty, the defendant is entitled to a judgment as a matter of law." *Id*. Moreover, "if no duty has been established, evidence as to the standard of care is irrelevant." *Id.* at 247, 711 S.E.2d at 912. "Only when there is a duty would a standard of care need to be established." *Id.*

Under South Carolina law, "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). In this case, the only relevant exception to that rule is "where the defendant voluntarily undertakes a duty." *Id.* South Carolina courts have consistently cited section 323 of the Restatement (Second) of Torts when addressing this exception.

> 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*.

Id. at 136, 638 S.E.2d at 657 (emphasis added) (quoting Restatement (Second) of Torts § 323 (Am. L. Inst. 1965)).

A. The Court of Appeals properly found that internal policies, standing alone, cannot establish the voluntary undertaking of a duty.

"[I]nternal policies 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." *Doe 2 v. Citadel*, 421 S.C. 140, 148, 805 S.E.2d 578, 583 (Ct. App. 2017); s*ee 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. Rather, it could simply serve as evidence of the standard of care, *once that duty was established by law*." (emphasis added)).

The Court of Appeals correctly applied relevant authority and determined that internal policies on their own cannot establish the voluntary undertaking of a duty. Petitioner attempts to put the cart before the horse and use Sandpiper's alleged deviation from its internal policy as evidence that it owed Ms. Parrot a duty. Our state's case law makes clear that violations of internal policies are only relevant in determining whether there is a breach of duty, not the existence of a duty. If there is no duty, then deviations from internal policies are irrelevant because one cannot breach a duty that does not exist. Accordingly, the Court of Appeals did not err in finding that the mere existence of Sandpiper's internal policy could not establish its

voluntary undertaking of a duty. *See id.* at 248, 711 S.E.2d at 912 ("We also hold Wal–Mart did not voluntarily undertake a duty. It is undisputed that Wal–Mart created an internal policy that was subsequently violated . . . . 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."). The same holds true in this case. Sandpiper did not undertake a duty to Ms. Parrott.

B. The Court of Appeals properly found that Ms. Parrott's harm was not caused by her reliance on Sandpiper's daily check policy.

One is liable for the physical harm of another if they fail to exercise reasonable care in performing a duty voluntarily undertaken and "(a) [the] 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). The Court of Appeals aptly explained why Petitioner's reliance on *Wright v. PRG Real Estate Mgmt., Inc.*[8] is misplaced. In *Wright*, an apartment complex gave law enforcement officers a discounted rent if they agreed to be a courtesy officer for the apartment complex. 426 S.C. at 207, 826 S.E.2d at 287. The courtesy officers were required to walk the property, answer calls from tenants, and report to the property manager daily. *Id.*

[8] 426 S.C. 202, 826 S.E.2d 285 (2019).

The plaintiff in *Wright* was the victim of an armed robbery in the apartment complex's parking lot. *Id.* at 207–09, 826 S.E.2d at 287–88. Prior to moving into the apartment complex, a manager told the plaintiff there were security officers on duty, even though an internal employee manual instructed employees not to inform residents that the complex provided security. *Id.* at 206, 826 S.E.2d at 287. The South Carolina Supreme Court held that summary judgment was inappropriate because there were genuine issues of material fact regarding the analyses of section 323 (a) and (b) that a jury needed to resolve. 426 S.C. at 221, 826 S.e.2d at 295.

The Court of Appeals properly distinguished *Wright* from this case by noting the record in *Wright* contained conflicting evidence as to whether the plaintiff relied on the courtesy officer program and whether plaintiff's harm arose from that reliance, thus rendering summary judgment inappropriate. *Parrott*, 443 S.C. at 421–23, 904 S.E.2d at 464–65. The Court of Appeals also noted that the *Wright* court was not asked to address or consider whether the courtesy officer program constituted an internal policy, and the *Wright* court empathized that its holding was tailored to the narrow facts of that case. *Id.* at 422, 904 S.E.2d at 464.

The Court of Appeals properly found that no evidence supported the circuit court's conclusion that Ms. Parrott suffered the harm from her "long lie" by relying on Sandpiper's daily check policy. The record contains no evidence that Ms. Parrott decided to live at Sandpiper due to its daily check-in policy. The record also contains

no evidence that Ms. Parrott decided to hang curtains while standing on a rocking chair in reliance on the daily check-in policy. Such would be illogical. On the other hand, the record contains ample evidence of Ms. Parrott's aversion to the daily check-in policy, which undermines Petitioner's argument that Ms. Parrot's harm was caused by her reliance on the daily check policy. *Id.* at 412, 904 S.E.2d at 459 (noting that Sandpiper staff described Ms. Parrott as "very private" and that Ms. Parrott told Sandpiper staff she was "fearful of people coming in [her apartment] without her knowledge).

Because the circuit court made no finding under section 323(a), it is irrelevant whether Sandpiper's alleged failure to exercise due care in performing the check-in policy increased Ms. Parrott's risk of harm. Accordingly, the Court of Appeals properly found that no evidence supported that Ms. Parrott's harm was caused by her reliance on Sandpiper's daily check-in policy. As such, Sandpiper did not owe Ms. Parrott a duty under the circumstances presented.

II. The Court of Appeals applied the correct standard of review.

"Wrongful death and survival actions are actions at law." *See 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."). "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) (emphasis added).

Contrary to Petitioner's arguments, the Court of Appeals did not ignore the findings of the circuit court. Instead, the Court of Appeals found the record contained "no evidence supporting the circuit court's conclusion that [Ms.] Parrott suffered the harm from her long lie because of her reliance on Sandpiper's check-in policy." *Parrott*, 443 S.C. at 422, 904 S.E.2d at 464. Issues of law are reviewed without any particular deference to the trial court. *Frazier*, 384 S.C. at 61, 682 S.E.2d at 11. A trial court's findings are properly reversed where no evidence reasonably supports them. *Id*. Therefore, the Court of Appeals applied the correct standard of review in reversing the trial court.

III. Sandpiper's failure to conduct the daily check-in did not cause Ms. Parrott's injuries and death.

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

defendant's negligence." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (emphasis added); *see also id.* (explaining that when expert testimony is the only evidence of proximate cause relied upon, the testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection.").

Because Petitioner's theory rests solely on Sandpiper's alleged breach of a duty to conduct the daily check-in on June 4 and 5, Petitioner concedes that Sandpiper is not responsible for the fall itself and any resulting damages from the fall or the first twenty-four hours Ms. Parrott spent on the floor. Accordingly, the only damages recoverable under Petitioner's theory are those that can be proved beyond speculation[9] to have been suffered by Ms. Parrott from approximately hour twenty-five until she was found. To then allow such tortured reasoning (with a lack of supporting law) to give rise to wrongful death and survival actions five months after Ms. Parrott made a full recovery and eight months after her "long lie" would obviate all causation requirements in an action where someone later dies. This is especially true when the case involves an eighty-year-old with significant mental and other issues unrelated to the so called "long lie."

The circuit court did not recognize the undeniable fact that Petitioner's theory of the case necessarily concedes that it was not until Ms. Parrott had already

[9] *See The Huffines Co., LLC v. Lockhart,* 365 S.C. 178, 188, 617 S.E.2d 125, 130.

suffered a "long lie" *plus approximately one whole day* that Petitioner even attempts to point any finger of blame at Sandpiper. And even then, Petitioner cannot say that Sandpiper "created" any harm to Ms. Parrott. Rather Petitioner asserts that had Sandpiper done something it was under no obligation to do, the harm Ms. Parrott created for herself would have been discovered sooner; not that it would not have occurred.

With respect to wrongful death in particular, Petitioner's theory requires her to prove (by presenting medical expert testimony from which a reasonable, non-speculative conclusion can be reached, *see Hughes*, 269 S.C. at 398, 237 S.E.2d at 757; *Ellis*, 323 S.C. at 125, 473 S.E.2d at 795) that Ms. Parrott's death was, to a reasonable degree of medical certainty, most probably caused not just by "delay" in discovering her, but specifically by the delay from approximately hour twenty-five (or more) on. In other words, Petitioner's experts needed to testify that, to a reasonable degree of medical certainty, had Ms. Parrott only been lying there from when she fell on the "evening" of Tuesday, June 3, 2014, until about 8:00 p.m. on Wednesday, June 4, 2014, she most probably would not have died eight months later. The record contains no such testimony.

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

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

The testimony of Petitioner's expert Dr. Lawrence Bergmann, offered as an expert in trauma and its impact, was presented via *de benne esse* deposition. (R. p. 711:24 – p. 712:2.) Dr. Bergmann recognized that Ms. Parrott had a serious pre-existing psychological condition that required her hospitalization in 2009 for delusional parasitosis, i.e., for her delusional belief that insects were infesting her body by crawling into her bodily orifices and laying eggs. Ms. Parrott's delusional belief progressed to the point that she was using duct tape to cover her body to keep the insects out and, indeed, to the point that Ms. Parrott's medical records from the time reflect suicidal ideation, with Ms. Parrott having formulated a plan to take her own life by overdosing on pain medication. (R. p. 735:21 – p. 737:2.) While Dr. Bergmann believed that Ms. Parrott's symptoms seemed to have been "managed fairly well" going forward,[10] he did acknowledge that Ms. Parrott had continued to experience delusions in the weeks and months leading up to the fall in June of 2014. (R. p. 737:16-19.) Dr. Bergmann also acknowledged that Ms.

[10] (R. p. 733:21 – p. 736:4.)

Parrott's vision was adversely impacted by macular degeneration[11] and that she had previously suffered mini strokes. (R. p. 738:3-15.)

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

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

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

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

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

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

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

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

Dr. Mills also failed to offer testimony to substantiate a claim for wrongful death. After admitting that it is "hard to know exactly" how long Ms. Parrott had been lying on floor after the fall,[12] he conceded that at the twenty-four-hour

[12] (R. p. 366.)

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

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

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

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

> Q. And I'll read this and again you can tell me if I read it correctly. The question was, do you intend to offer an opinion at the trial in this case to a reasonable degree of medical certainty, that had Ms. Parrott fallen,

> fractured her hip in multiple places and remained on the floor for 24 to 36 hours, and not a longer period of time, that she would not have died nine months later? Answer, *I can't say that.* Question, *and you would agree with me that the reason that you can't say that is because it's inherently speculative; correct? Answer, yes.* Now, Doctor, that was your deposition testimony; correct?
>
> A. Yes.

(R. p. 402:3-17 (emphasis added).) Although Dr. Mills tried to walk back his earlier testimony at trial based primarily on his review of a medical journal article that Plaintiff's counsel had sent him after his deposition,[13] in the end, the substance of his testimony was the same. Asked to quantify when it was, as the hours of her "long lie" passed, that Ms. Parrott lost her will to live, he answered, "That's extremely hard to do. And I don't know that anyone can tell you that with absolute certainty. . . . *Can I quantify [if] it would have been 24 versus 48 versus 72? No*." (R. p. 397:15 – p. 398:4 (emphasis added.))

At most, what Plaintiff and Plaintiff's experts are talking about here is some sort of ersatz form of the loss of chance doctrine, which is a doctrine our state has expressly rejected. *See Jones v. Owings*, 318 S.C. 72, 77, 456 S.E.2d 371, 374 (1995) (declining to adopt the loss of chance doctrine because liability under the

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

doctrine is "assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm").

IV. No evidence supports the circuit court's finding regarding Ms. Parrott's comparative negligence.

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

The undisputed evidence is that Ms. Parrott, at age eighty, home alone, with her door locked, and without telling anyone, *stood* on a *rocking and reclining* chair to try to hang curtains/a curtain rod, all while failing to wear her panic button and, for that matter, failing to take advantage of maintenance services included in her lease. Even in Dr. Mills's view, the hip fracture (which no one blames on Sandpiper) contributed to Ms. Parrott's decline at death. (R. p. 408.) Petitioner's counsel even said Ms. Parrott had done a "stupid thing." (R. p. 509.) Yet the circuit court found *no* comparative negligence.

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

some comparative negligence. Sandpiper duly raised and supported a comparative negligence defense and is entitled to a finding in its favor on the same. Indeed, because the only reasonable view of the evidence is that Ms. Parrott's comparative negligence exceeds fifty percent,[14] Petitioner should be barred from recovery, but at a minimum, Sandpiper is entitled to a reduction of any damages to which Plaintiff may be entitled based on Ms. Parrott's comparative fault.

V. The circuit court improperly awarded damages for survival and wrongful death under the facts of this case.

The circuit court never explained or otherwise accounted for how the damages awarded were determined in a reasonable, non-speculative way that deals with the undeniable fact that Sandpiper's alleged role in the harm Ms. Parrott suffered does not, even under Petitioner's theory, begin until Ms. Parrott had suffered a comminuted hip fracture that left her on the floor of her apartment unable to move for at least twenty-four hours. Failing to do so, the trial court's damages awards for both survival and wrongful death are wholly undue and speculative or, alternatively, excessive.

This is especially so given the trial court's view that, "[t]o the extent that Ms. Parrott had some degree of pre-existing mental health conditions, it was

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

certainly foreseeable that those pre-existing conditions would be exacerbated by the pain and agony from that long lie." (R. p. 15.) While Sandpiper denies that there is sufficient evidence to support this assertion insofar as foreseeability is concerned, the potential for Ms. Parrott's pre-existing mental health conditions to be exacerbated by the "long lie" makes it all the more important for any proper award of damages against Sandpiper to be free of speculation, so that any such award is only for damages that would not have occurred not simply in the absence of the "long lie" but solely because of approximately hour twenty-five (or more) of the "long lie" to the end—as, without question, all injuries/damages from the fall itself and the first twenty-four hours thereafter and all attendant future consequences therefrom, to include any/all ways in which all of the foregoing were exacerbated by Ms. Parrott's pre-existing mental health conditions, are not Sandpiper's fault and Sandpiper cannot be held liable therefor.

CONCLUSION

Counsel acknowledges this is a very sad case, but the Court of Appeals did as all courts should do; it avoided sympathy and good intentions and decided this case strictly on a matter of law. *SC Dept. of Transportation v. Horry County*, 391 S.C.76, 705 S.E.2d 21 (2011) (deciding cases on a purely legal basis may result in harsh results and sympathetic feelings from the court). When cases are decided

based on sympathy, bad law results. For the foregoing reasons, this Court should affirm the Court of Appeals' opinion.

[*signature page for Brief of Respondent, Appellate Case No. 2024-001377*]

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