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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

The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

The Respondent would respectfully restate the issues on appeal from the Trial Court's judgment in favor of the Plaintiff on her wrongful death and survival claims as follows:

Duty of Care

I. Did the Trial Court correctly state the law as to the Plaintiff's burden of proving that Sandpiper Independent and Assisted Living owed its Resident/Delila Parrott a legal duty of care to conduct a daily check?

II. Is there any evidence of record to support the Trial Court's finding that the Defendant owed a duty to Resident/Delila Parrot to conduct a daily check?

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

Proximate Cause and Damages

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

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

Comparative Negligence

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

STATEMENT OF THE CASE

This is a negligence action brought on behalf of the Estate of Delila Parrott, a former resident of Sandpiper Independent and Assisted Living, arising from a three-day period in June 2014, during which Ms. Parrott laid on the floor of her apartment after she fell and suffered a broken hip. A complaint originally was filed on October 11, 2016, asserting survival and wrongful death cause of actions against Sandpiper based on Sandpiper's failure to conduct daily wellness checks. [Compl. ¶ 17.] An amended (second) complaint was filed on December 11, 2019. [Am. Complaint.] Sandpiper served its answer to the amended (second) complaint on December 26, 2019, denying that it owed any duty to Ms. Parrott and further denying that it breached any duty that proximately caused any injury to her. [Answer ¶ 3.] Sandpiper also asserted affirmative defenses of assumption of the risk and comparative negligence. [Answer ¶¶ 25, 28.]

By agreement of the parties, the case was tried on the merits before the Circuit Court Judge, the Honorable Bentley Price, sitting without a jury. [Trial Day 1 Tr. p. 47:21-22, Consent Order entered January 25, 2018.] The trial was conducted on September 8 - 10, 2020. [Trial Day 1 Tr. p. 1-192; Trial Day 2 Tr. p. 1-168; Trial Day 3 Tr. p. 1-198.] Judge Price rendered a verdict in favor of the Plaintiff and awarded actual damages of $500,000 on the survival claim and $500,000 on the wrongful death claim. [Trial Day 3 Tr. p. 197:12-16.; formal Order filed October 16, 2020.] Defendant Sandpiper filed a post-trial motion for reconsideration on October 26, 2020, which was denied by Order, filed November 18, 2020. [Posttrial Motion; Order Den. Def's. Post-Trial Motion.] Sandpiper served a notice of appeal on December 17, 2020. [Def's NOA.]

STATEMENT OF THE FACTS

By consent of the parties, this matter was tried nonjury with the Trial Judge sitting as the finder of fact. Judge Price issued a detailed, formal order setting forth his findings of fact and conclusions of law. Under the applicable "any evidence" standard of review[1], Judge Price's findings of fact are supported by evidence of record as set forth below.

Background Facts

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

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

This finding of facts is supported by the testimony of Corrine Carrington and the lease agreement. [Trial Day 1 Tr. pp. 3-4; Pl. Ex. 1 Lease 001-0010.]

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

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

[1] Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011).

> allowing her to live a healthy, active and normal live. By all accounts, she lived a normal life as an active and healthy senior. [Order ¶ 2.]

This finding of facts is supported by the testimony of Ms. Parrott's daughter and her attending physician Dr. Mills. [Trial Day 1 Tr. pp. 25:8-68:5; Trial Day 2 Tr. pp. 89:8-119:6.] Ms. Parrott's age and personal history were established by testimony of daughter, Joan Acosta. [Trial Day 1 Tr. pp. 25-80.] Her medical history and health status were established by testimony of her attending physician, Richard Mills, M.D, who opined that she was doing well for someone of her age, and she had no medical conditions that would have shortened her life expectancy. [Trial Day 2 Tr. pp. 95:13-96:21.] The actuary table establishes her life expectancy. [Trial Day 2 Tr. pp. 97:12-98:4.]

Facts Regarding Sandpiper's Daily Check Policy and Procedure

The Plaintiff's negligence claims rest on the core/central fact that Sandpiper had a policy of conducting daily checks to confirm the wellbeing of the independent living residents, such as Ms. Parrott. Although Sandpiper denied the existence of any such a policy in its pleadings and discovery responses and deposition testimony, the existence of the policy was proven, beyond dispute, by the document produced on the eve of trial[2] which explicitly states: "<u>DAILY CHECK SHEET</u>: 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, got to the apartment and check on them."[3] [Pl. Ex. 1 Policy 001-006.] The Trial Judge addressed the existence of the policy in his Findings of Fact 11:

---

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

[3] A Sandpiper employee (Beth Auld) testified that the policy had been in effect for approximately 25 years. [Trial Day Tr. pp. 145:1-146:19.]

> 11. The wellness check policy existed during the time that Parrott became a resident of Sandpiper. The Policy was in writing and was known to all staff and all residents. The policy required that the Sandpiper staff confirm each resident's wellbeing once every 24 hours. [*Supra* note 3.] It appears, that as a general procedure, these checks were conducted during the afternoon/evening.] The Policy required staff to mark or initial each resident's name on a list once the resident was seen by staff. If the resident had not been seen, then staff was to call the resident's apartment and confirm the resident's wellbeing if the resident answered the telephone. If the resident did not answer the telephone, then staff was to go to the resident's apartment and knock on the door. If the door knock was not answered, staff would then use a duplicate key and enter the apartment to check on the resident. At previous times, these wellness check records were maintained by Sandpiper. However, Sandpiper never produced any record of the wellness check sheets for the three days in issue. [Order ¶ 11.]

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

> 3. Prior to signing the lease with Sandpiper, Ms. Parrott and her daughter (Joan Acosta) met with the Executive Director of Sandpiper, Corrine Carrington, more than once to gain information about Sandpiper's apartments and amenities. During one of those meetings, Carrington told Ms. Parrott and Acosta prior to Ms. Parrott signing the lease, that Sandpiper had a policy to check on each resident daily. After hearing about the policy, Ms. Parrott signed the lease. Ms. Parrott relied on the representations of Carrington regarding the Policy in making the decision to enter into the lease agreement at Sandpiper because she wanted to live independently but also wanted a place where she would be checked on regularly. The existence of the policy, the details of the policy and its implementation, together with Sandpiper's breach of that policy are each discussed in more detail below. [Order ¶¶ 4-5.]

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

> Q. Tell the Court what, if anything, Ms. Carrington said about the policy.
>
> A. About the policies, specifically?
>
> Q. Yes.
>
> A. They had a 24-hour visualization of every resident policy. Now, they did not

> necessarily see every resident every 24 hours. They would call the ones that were not visualized during that day. They had a sign-off sheet, and every resident was to be checked off every day at the time you've been seen or checked.
>
> Q. Was that policy important to you?
>
> A. It was paramount to me, absolutely. I was in Columbia. I was counting on that 24-hour check policy.
>
> Q. And Ms. Carrington told your mother at the same time that she told you about this policy?
>
> A. Yes. I mean, it was very much part of our first meeting. [Trial Day 1 Tr. p. 34: 16-23.]

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

> Q. Ms. Carrington, when you met with Joan Acosta and her mother, Delilah Parrott, before Ms. Parrott became a resident there, do you recall discussing with them a policy that Sandpiper had regarding the visual confirmation of the wellbeing or presence of each resident on a daily basis?
>
> A. I believe it was with just Ms. Acosta -- and I could be wrong, but I think she toured first by herself and then brought Ms. Parrott over later.
>
> Q. Could you tell the Court what the policy was in regards to what Sandpiper promised to do for each of the residents on a daily basis?
>
> A. We check the residents daily, make sure we saw them. If we hadn't seen the residents by a certain time at night, we were to be calling them. If they didn't answer their phone, we should be going to the units to check on them, to make sure we saw them. [Trial Day 1 Tr. pp. 84:24-85:17.]

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

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

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

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

The timing and circumstances of Ms. Parrott's fall are supported by the EMS and hospital records[4] and Sandpiper's own record, which included Ms. Carrington's notes/report of the incident as relayed by Ms. Parrott after she was found. [Trial Day 1 Tr. p. 95:23-25; Pl. Ex. 1 Mills Record 004.] Sandpiper's failure to conduct a check of Ms. Parrott for three days is supported by the testimony of its employees and other witnesses as referenced by the Trial Judge in his written findings.[5]

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

> 12. The testimony establishes that Sandpiper did not follow the Policy. Although there is no evidence as to Tuesday, June 3rd, the Plaintiff does not contend that Sandpiper breached its duty to check on that day. However, the Plaintiff alleges and proved by a preponderance of evidence that Sandpiper breached its duty on Wednesday, June 4th. On June 4th, Ms. Parrott had not been seen by staff, so a staff member (Munoz) called her, then receiving no answer, Munoz went to Ms. Parrott's apartment to check on her. When Ms. Parrott failed to answer the door Munoz attempted to open the door but had realized she did not have the correct key. The correct key was in the possession of Sandpiper at the time Parrott fell and was accessible to Sandpiper the entire time Parrott was on the floor. However, when Munoz determined that she had the wrong key, she did not return the very short distance [fn. 4 - Ms. Parrott's apartment was situated within about a thirty second walk from where the Sandpiper's office was located.] to retrieve the correct key

[4] The EMS record and timeline records indicate that Ms. Parrott herself reported that she fell on Tuesday, June 3. [Pl. Ex. 1 Mills Records 0004; Timeline 011.]

[5] Sandpiper tries to criticize the Trial Judge's comprehension of the timeline with reference to the Trial Judge's mention during the trial that Ms. Parrott laid on the floor for five days. [*See* Appellant's Initial Brief, p. 4 citing to Trial Day 3 Tr. pp. 191:21–192:18.] However, transcript reflects that the Plaintiff's counsel promptly apprised the Trial Judge that the period was three days. [Trial Day 3 Tr. p. 192:9-22.] Moreover, the written order controls regardless of the Judge's verbal comments from the bench at trial. Brailsford v. Brailsford, 380 S.C. 443, 451, 669 S.E.2d 342, 346 (Ct. App. 2008).

> from the office. Even though Ms. Parrott had not been checked on as required by the policy, Munoz simply completed her shift and went home. I find that Sandpiper did not conduct a wellness check of Ms. Parrott on June 4th. [Order ¶ 12.]

This finding of facts is more than amply supported by the testimony of Rebecca Munoz, the Sandpiper receptionist. She testified as to the Sandpiper policy of visually confirming the presence or the wellbeing of each resident on a daily basis and admitted that she never completed a check of Ms. Parrott on June 4th. [Trial Day 2 Tr. pp. 10:15-11:6.] Ms. Munoz testified that she had not visually confirmed Ms. Parrott's condition that day, and so she followed the procedure by first attempting to call her, but she did not get an answer. [Trial Day 2 Tr. p. 10:20-25.] Munoz then went to the apartment and knocked but no one answered; when she attempted to enter the apartment, the master key did not work and she did not make any effort to go back to the office to obtain a copy of Ms. Parrott's key. [Trial Day 2 Tr. pp. 11:7-12:7.]

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

> 13. Sandpiper introduced evidence through the testimony of Beth Auld that Ms. Parrott was checked off as having been seen on Thursday June 5th by Auld. However, at trial, Ms. Auld testified that she could not truthfully testify that she remembered seeing Ms. Parrott on Thursday or whether another staff member told Auld they had seen Parrott. Executive Director Carrington testified that when she investigated the incident after the fact, no other staff members, including the kitchen and cafeteria staff and the activities director, reported having seen Ms. Parrott on Thursday June 5th. I find that Sandpiper did not check on Ms. Parrott on June 5th. Lila Waters, a resident of Sandpiper, testified about her meal and activity routines with Ms. Parrott. She said she ate with Ms. Parrott each day, but that she did not see Ms. Parrott on Wednesday, Thursday, or Friday, until Waters and the staff found Ms. Parrott in her apartment at or about 8 p.m. While Ms. Waters may have been confused as to certain details, I find her testimony credible as it relates to her routine with Ms. Parrott to eat meals together and her testimony that she did not see Ms. Parrott for any meals on the days in question. [Order ¶ 13.]

As referenced by the Trial Court, Sandpiper tried to establish that Ms. Parrott was seen on June 5th, by Sandpiper employee, Beth Auld. Ms. Carrington, the director, testified that after they found Ms. Parrott, she conducted an investigation and reviewed the daily checkoff sheet and she saw that

it contained Beth's initials indicating that she had seen Ms. Parrott on June 5th. [Trial Day 1 Tr. p. 128:17-20.] However, Sandpiper never produced any of the daily checkoff sheets for the days in question, and while Ms. Auld did testify at trial, she admitted that she did not have any independent recollection of seeing Ms. Parrott that day. [Trial Day 1 Tr. p. 148:20-25.] In contrast to the unverified/unsubstantiated testimony of the Sandpiper employees, another Sandpiper resident, Ms. Lila Waters, who was a close friend of Ms. Parrott who regularly dined with her, testified that she never saw Ms. Parrott on June 5th. [Waters Dep. p. 11:11-14.]

June 6: The timing of Ms. Parrott's discovery on the evening of June 6th, is established by Sandpiper's records and the medical records. [Pl. Ex. 1 Carrington 001; Mills Records 007]

Facts Regarding the "Long Lie"

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

> A long lie, is very simply when a person falls and can't get up and when they're unable to call for help and, unfortunately, the result is they are on the ground in a helpless situation for many hours or sometimes many days." [Bergmann Dep. p. 12:7-21.]

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

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

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

The telephone records, admitted as part of Plaintiff's Exhibit 1 establish the absence of any calls for those days and certainly constitute "any evidence" to sustain the Trial Court's finding regarding when Ms. Parrott fell and how long she laid there. [Pl. Ex. 1 Telephone Records 001-057.]

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

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

The medical records were admitted without objection. [Trial Day 1 Tr. p. 6:10-7:5; Pl. Ex. 1 Mills Record 001-072; Timeline 001-181.] Dr. Mills, Ms. Parrott's treating physician (a board-certified internist who was qualified as an expert witness without objection), testified that based on his review of the lab results and his knowledge of his patient's medical history: "I would be willing to say with a reasonable degree of medical certainty that she was on the ground most likely, in my mind, somewhere between 36 hours to three days." [Trial Day 2 Tr. p. 130:5-10.]

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

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

> [FOF] 5. After Ms. Parrott was finally discovered on the evening of June 6th, emergency services were called and she was transported by ambulance to a hospital. The medical record describes Parrott's condition upon admission by noting that she was thirsty, had a comminuted fracture to the hip. In addition to the broken hip, she was soaked in urine and caked in feces; she was dehydrated with dry mucosa, her skin showed signs of dehydration, and she had cracked lips. She also had developed a vaginal infection and a urinary infection. Ms. Parrott had spent days in these conditions. [Order ¶ 5.]

As noted by the Trial Judge, the medical records conclusively establish the details of Ms. Parrott's dreadful condition. [Pl. Ex. 1 Mills Record 007.] Dr. Mills testified as to those conditions that related to the long lie after and apart from the broken hip itself. He testified about how the long lie resulted in dehydration and the associated symptomatology that manifested in her lips and skin. [Trial Day 2 Tr. p. 111:4-14.] Dr. Mills also testified about how lying in her feces and urine for that long time resulted in vaginal and urinary infections. [Trial Day 2 Tr. p 111:18-25.]

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

> 6. Ms. Parrott never returned to her prior good health and she was never able to live independently again. Ms. Parrott spent four days in the hospital for repair of the fractured hip and treatment of her conditions, and upon discharge, she went to a rehabilitation facility. The medical record credibly supports that Ms. Parrott never returned to independent living after she was rescued; instead, she had to move to assisted living facility. Ms. Parrott was subsequently rehospitalized in October 2014 for issues related to her psychiatric condition and altered mental status. Then she was hospitalized yet again in January 2015, for her altered mental status and significant decline. The medical record credibly supports that she entered hospice care on January 31, 2015 and passed away on February 9, 2015. [Order ¶ 6.]
>
> 7. The medical record credibly supports Ms. Parrott's decline after she was rescued. Ms. Parrott's health was managed by her treating physician, Richard Mills, M.D. who had treated her for over twenty years prior to the fall. Dr. Mills and her daughter both testified about Ms. Parrott's physical, mental, and emotional decline after the fall and long lie. Dr. Mills testified that Parrott recovered completely from her broken hip and there was no physiological reason she should not have completely recovered simply from the broken hip; however, Ms. Parrott's preexisting mental conditions had been aggravated by the physical and emotional/mental trauma she endured during the long time that she laid on her apartment floor, and that the "long lie" [fn. "Long lie" is the term used by the

> medical experts to denote the time that Ms. Parrott laid on the floor after her fall.] impacted her from the date of the fall until she died. In addition to the medical evidence, Joan Acosta, Ms. Parrott's daughter, testified that based upon her observations, her mother never recovered from the long lie as evidenced by the facts that she suffered nightmares, was fearful, was tormented and never trusted anyone again. [Order ¶ 7.]

Again, as recounted by the Trial Judge, Ms. Parrott's subsequent medical condition and medical treatments are fully documented in various medical records. [Pl. Ex. 1 Mills Record 003-069; Timeline 001-181.] In addition, Dr. Mills testified as to his treatment of Ms. Parrott and established that her broken hip had healed well and he opined she should have been able to return to her prior level of living after some rehabilitation time: "would have expected her to eventually complete rehab and get back to her independent living state." [Trial Day 2 Tr. p. 100:7-13.] Dr. Mills furthered offered his expert opinion that the long lie was a cause of her declining physical and mental condition:

> Q. Do you have an opinion whether the long lie of three days on the ground contributed to her failure to thrive?
>
> A. Yes, sir, I do. I think it harmed her both physically and emotionally, to a great extent.
>
> Q. Do you have an opinion, to a reasonable degree of medical certainty that it contributed to -- she only lived eight months after this, rather than eight years. Do you have an opinion that this long lie shortened her life?
>
> A. Yes, sir, I do. [Trial Day 2 Tr. p. 116:22-117:18.]
>
> ****
>
> In her case she recovered well from the physical surgery. And I would have normally expected her to live many more years. I would, you know, given a range four to eight years is expected, even a little longer sometimes. I would not have expected her to pass away within eight months, because she didn't have the life threatening complications; clots, infections, pneumonia after her surgery. [Trial Day 2 Tr. pp. 117:22-118:5.]

Dr. Bergmann, a clinical psychologist and counselor qualified as trauma expert,[6] testified that Ms. Parrott never returned to her prior living conditions and her condition declined until she passed in February. [Bergmann Dep. pp. 25:2-26:20.] Dr. Bergmann testified that the literature supported the finding that the longer an elderly person is on the floor, the less chance they have of returning to independent living. [Bergmann Dep. pp. 26:21-27:4; Pl. Ex. 1 NEJM 001-007.] The trauma expert also testified that the long lie was a horrible and traumatic experience for her and that the trauma continued to trouble her until her death. [Bergmann Dep. pp. 16:8-17:17; *see also* p. 28:3-11.]

The Trial Judge's summarization of Ms. Acosta's account of her mother's decline after the long-lie is supported that her testimony of record. She observed that her mother recovered from the broken hip without complications, but from an emotional and psychological state, "She was never herself again;" she was unhappy and lost her will to live; "those last months of her life were absolutely horrible. And it had nothing to do with that hip. She never trusted another human being again." [Trial Day 1 Tr. p. 64:14-18.]

The facts of Ms. Parrott's death are documented by the death certificate which proves that she died on February 9, 2015, and that certificate lists "failure to thrive" as one cause of her death. [Pl. Ex. 1 Mills Record 004.]

The Trial Court's findings of facts related to the pain and suffering that Ms. Parrott endured during the long lie and her subsequent decline will be discussed below in the context of Sandpiper's challenges to the damages awarded. Similarly, his findings of facts as to the proximate cause issues raised by Sandpiper will also be discussed below.

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[6] [Bergmann Dep. p. 9-10.]

ARGUMENT

STANDARD OF REVIEW

As recognized by the Trial Judge, to recover on her negligence claim, the Plaintiff must prove by a preponderance of the evidence that: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006); Roddey v. Wal-Mart Stores E., LP, 415 S.C. 580, 590, 784 S.E.2d 670, 675 (2016). [See Order p. 10.] The Trial Judge found that Sandpiper owed a duty to Ms. Parrott exercise reasonable care in conducting daily 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 awarded actual damages of $500,000 on the survival cause of action and $500,000 on the wrongful death cause of action.

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

> 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).

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

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

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

As discussed below, the Trial Court did not make any error of law in determining that Sandpiper owed a duty to Ms. Parrott. In addition, the Trial Judge's findings of facts are supported by ample -- more than just "any" -- evidence in the record, and he did not abuse his discretion in awarding actual damages in either the survival cause of action or the wrongful death cause of action. Accordingly, the judgment should be affirmed.

Sandpiper's Duty of Care & Breach

I. THE EVIDENCE OF RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT SANDPIPER UNDERTOOK/ASSUMED A DUTY OF CARE TO PROVIDE DAILY CHECKS OF THE RESIDENTS IN THE INDEPENDENT APARTMENTS AND BREACHED THAT DUTY IN FAILING TO FOLLOW ITS OWN DAILY CHECK-IN POLICY AND PROCEDURES.

A. The Trial Judge correctly stated the law as to the Plaintiff's burden of proving that Sandpiper Independent and Assisted Living undertook/assumed a legal duty of care to conduct a daily check of its residents in the independent living units.

The law is clear that the existence of a legal duty of care owed by the defendant to the plaintiff is a predicate to maintain an action for negligence. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The existence of a legal duty is a question of law for the court. Madison, 638 S.E.2d at 656. However, when the existence of a duty in a particular case depends on the existence of particular facts, then the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder. Miller v. City of Camden, 329 S.C. 310, 314–15, 494 S.E.2d 813, 815 (1997).

In Miller, the Supreme Court addressed the issue of when a legal duty of care is created by an actor's voluntary assumption or undertaking of such a duty: "The common law ordinarily imposes no duty on a person to act. If an act is voluntarily undertaken, however, the actor assumes the duty to use due care. While the law imposes this duty on a volunteer, the question whether such a duty arises in a given case may depend on the existence of particular facts." 494 S.E.2d at 815 (citations omitted). In Madison, the Supreme Court restated the law on the assumption or undertaking of a duty as set forth in Miller and also addressed the creation of a legal duty by special circumstances:

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

638 S.E.2d at 656–57 (citations omitted).

Sandpiper contends that the Trial Court misconstrued the law on creating a duty of care and argues that it owed no duty because it did not create the harm. In one sense, Sandpiper's argument relies on its attempt to define the harm as Ms. Parrott's fall. However, the Plaintiff has not alleged any liability against Sandpiper for the fall or her broken hip; rather, the Plaintiff has consistently maintained that Sandpiper's failure to check on her caused a long lie. In attempting to articulate its contention, Sandpiper misconstrues the Supreme Court's decision in Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). In that case, the Court stated: "[T]he common law ordinarily imposes no duty on a person to act. Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." Id. (citations omitted). However, that decision stands separate and apart from the appellate decisions, including those cited by the Trial Court, that clearly articulate the legal premise that a legal duty of care may be created when an actor assumes a duty by a voluntary undertaking.

The Trial Judge correctly cited to applicable legal principles as laid out in Miller and Madison, and found evidence sufficient to conclude that Sandpiper had established a policy of providing daily wellness checks and that such policy created a duty to follow the protocol established in its own policy:

> Here, the preponderance of the evidence presented in this case is more than sufficient to convince me and support my conclusion that that Defendant Sandpiper had a policy of providing daily wellness checks and that this policy created a duty to follow the protocol established in its own policy. Simply put, the Sandpiper had a duty to exercise reasonable care in utilizing the system/protocols it put in place for checking on the well-being of every resident at least once every 24 hours. The policy was in writing, every relevant staff member and every resident was aware of the policy, and the policy had been carried out for several years prior to Ms. Parrott taking up residence at Sandpiper's facility. In addition,

> Ms. Parrott relied on that policy as a significant/decisive factor in selecting Sandpiper as a residence. Both the existence of the policy and the special relationship between Sandpiper and the resident, Ms. Parrott, created a duty owed by Sandpiper to follow its own policy. [Order p. 11.]

To the extent that the existence of the duty owed by Sandpiper particular depends on the particular facts of this case then the existence of a duty became a mixed question of law and fact to be resolved by the Trial Judge as the fact-finder, and his findings must be sustained because they are supported by the evidence as discussed below.

B. The evidence of record supports the Trial Judge's finding that Sandpiper owed a duty to Resident/Delila Parrot to conduct a daily check.

It appears necessary to first clarify the use of the use of the word "wellness" as an adjective to describe the nature/scope of legal duty owed by Sandpiper to Ms. Parrott. Contrary to Sandpiper's contentions, Plaintiff did not allege that Sandpiper had a duty to ensure the general safety of its residents or to monitor their health. [*See generally* Trial Day 2 Tr. pp. 53:16-54:1.] Nor did Plaintiff allege that Sandpiper had any duty to protect Mrs. Parrott from the fall or seek any damages incurred from the broken hip.[7] It is clear from Finding of Fact #11, that the Trial Judge understood the "daily wellness check" policy as it was documented in the written document and as explained in the testimony of the Sandpiper employees.

The document created and produced by Sandpiper specifically delineates a mandatory process that: "All residents ***must*** be seen by staff and initialed off every day. If you do not see

[7] To the extent that Sandpiper tries to argue that the assumption of risk clause of the lease should act as an absolute defense, Plaintiff is not seeking to hold Sandpiper liable for her decision to hang her curtains without wearing her panic button. That clause does not apply to the duty Sandpiper undertook -- apart from its contractual obligations as defined in the lease -- to check on her once daily. As discussed in the section on Sandpiper's comparative negligence defense, while the resident's lived "independently" and made they own life decisions, the daily check policy was supposed to provide a type of safety net whereby the Sandpiper staff could arrange for assistance if/when the residents fell or suffered injury and could not activate their panic button.

someone, call them, if you can't get them on the phone, go to the apartment and check on them." (Emphasis added.) [Def. Ex. 1 Policy 001-006.] Another Sandpiper employee (Munoz) further admitted in her trial testimony that: "There was a policy at Sandpiper where you and other staff people would visually confirm the presence or the *wellbeing* or just the fact that a resident was there and okay on a daily basis...." (Emphasis added.) [Trial Day 2 Tr. p. 9: 1-7.] Sandpiper's executive director (Carrington) testified that the goal of the policy was to confirm visually the *wellbeing* of residents such as Ms. Parrott. [Trial Day 1 Tr. pp. 84:24-85:17; *see also* Trial Day 1 Tr. pp. 92:6-93:12.] This evidence fully supports the Trial Judge finding as to the existence of a daily check-in policy and the specific procedures established by Sandpiper to confirm each resident's wellbeing once every 24 hours.

Beyond contesting the existence and nature of the policy, Sandpiper complains that the Trial Judge erred in failing to recognize that its only relationship with Ms. Parrott was as landlord-tenant and that the lease exclusively defined its limited duties/obligations to Ms. Parrott. Sandpiper further argues it had no obligation to conduct daily check-ins because it was a courtesy service upon which no legal duty can be founded to support a negligence action. It is Sandpiper, however, that refuses to acknowledge that the existence of a lease/rental agreement does not -- as a matter of law – negate the creation or assumption of a legal duty based on other facts and/or special circumstances under the legal precedent as set forth in Miller and Madison and other cases that address the creation of a legal duty of care beyond or apart from the terms of a contractual agreement. *See* Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 219, 826 S.E.2d 285, 294

(2019) (discussing analysis of how landlord may undertake/assume a duty to provide security to tenants of apartment complex).[8]

The Supreme Court's decision in Wright v. PRG Real Est. Mgmt., Inc. supports the Trial Judge's analysis of the legal duty issue on several significant points. In that case, a tenant who had been kidnapped in 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 in negligence if the landlord undertakes to provide security measures – at least to the extent of the landlord's undertaking.

The Court's opinion in Wright is of particular interest on the point of the Court's focus on the evidence relevant to the existence of a duty of care. The Court explicitly stated that the defendant's representations to the plaintiff was a probative fact: "[W]e must examine the question of the existence of a duty of care with a focus upon the undertaking as it was described to Wright [tenant]." 826 S.E.2d at 294. As recounted by the Court in that case, the plaintiff/tenant testified that during her search for an apartment home, one of the important factors was security, and when she entered the lease with the defendant/landlord, the manager had informed her that there were security officers on duty; and she further testified that she entered into the lease with that

[8] In a comparable case decided in Illinois, a nightclub employee sued his employer for negligence for failing to discover him when he was unconscious in his car in the nightclub's parking lot and was not discovered until the next day. Applying the theory of voluntary undertaking, the Court held that a legal duty was created by virtue of the employer establishing a courtesy patrol to patrol its parking lot and adopting written duties and responsibilities for the patrol. Urbas v. Saintco, Inc., 264 Ill. App. 3d 111, 115, 636 N.E.2d 1214, 1217 (1994). Comparably, Sandpiper established a daily check-in policy (which it marketed to prospective tenants) and adopted a written procedure to accomplish the check-ins.

expectation. While contesting that any representations had been made about security, the landlord conceded at oral argument, that the plaintiff/tenant had been told that there were security officers. Of note, the Court expressly considered the evidence that the plaintiff/tenant relied upon that representation in choosing to lease with the defendant/landlord. Evidence was presented (on a motion for summary judgment) that the landlord had a courtesy officer program allowing residents affiliated with law enforcement to receive reduced rent in exchange for certain limited services under terms of independent contract agreements, but the tenants were not apprised on the limited extent of the security measures. At the time of the abduction, there were no security officers under contract (and that there had not been any for the prior two months), and again the tenants had not been informed of the total absence of security during that time.

The *Wright* Court held, as noted above, that the legal question of whether a duty arises may be fact-specific, and as a consequence, "the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." 826 S.E.2d at 290. On that standard, the Court ultimately held that the evidence created genuine issues of material fact requiring that Wright's claim be submitted to a jury as the fact finders.

This case is on appeal from a judgment rendered after trial on the merits in which the Trial Judge was the fact finder, and thus his findings are subject to review on the any evidence standard. In striking parallels to the facts in Wright, there is testimony as to the representations about the daily check in policy made to Ms. Parrott during her inquiries about leasing at Sandpiper, and there also is testimony as to Ms. Parrott's reliance on that representation in entering into a lease with Sandpiper. The evidence, created a question of fact as to whether Sandpiper undertook/assumed a duty to make daily checks, and that evidence supports the Trial Judge's finding that Sandpiper

did voluntarily undertake a duty to provide daily checks under the procedure as described to Ms. Parrott and documented in Sandpiper's policy.

C. The evidence of record supports the Trial Court's finding that Sandpiper breached the duty owed to Ms. Parrott by failing to conduct a check on June 4 and 5th.

The Trial Judge found that Sandpiper breached its own policy on June 4th and June 5th:

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

In a one paragraph argument, Sandpiper contends that the Trial Judge ignored the testimony of its expert (Brian Lancenese) that the industry standard for responding to falls was the panic button or emergency call button system and that a daily check system was not used in the industry to respond to falls or otherwise check on the well-being of residents. Respondent respectfully submits that this issue should be deemed abandoned. Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 520, 763 S.E.2d 200, 203 (2014) (an issue is not preserved for review on appeal where argument on a point is conclusory and is not supported by any authority); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review"). However, the argument is also not supported by the law or the record.

First, the Trial Judge did mention that Sandpiper had presented testimony of its expert Brian Lancenese, an expert in assisted living facilities. [Order p. 3.] The fact that the Trial Judge did not summarize or analyze that expert testimony in his order(s) does not justify reversing the

Trial Judge's judgment. Although a trial judge's findings of fact are reviewed under the same "any evidence" standard as applies to jury findings, the trial judge sitting nonjury is required to "find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. However, Rule 52 does not require a trial judge sitting nonjury to set out detailed findings on all the myriad factual questions arising in a particular case, the findings need only "be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010). Nor does Rule 52 require the trial judge to explain his weighing of the evidence presented on each element. *See* Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 886 (1994) (trial court findings were adequate to review order where it contained a succinct statement that evidence was insufficient to prove an element).

Sandpiper's expert (Lancenese), a licensed skilled nursing administrator in Virginia, was qualified as "an expert in the expert senior living, and skilled as it applies to nursing administrator." [Trial Day 3 Tr. p. 134:13-18.] As described by Sandpiper, the expert testified that "the industry standard for responding to falls was the panic button or emergency call button system and that a daily check system was not used in the industry to respond to falls or otherwise check on the well-being of residents." [Appellant's Initial Br., p. 35.] However, the expert, in fact, testified that daily check sheets are a standard in independent living facilities, although he insisted that they are not set in place as safety mechanism, but that they are only intended to help the staff monitor activities:

> Q. Now, from your prospective, one of the arguments in this case is that this created a duty to check daily the wellbeing and ultimate safety of every resident every day. From your prospective, as an expert in the industry, is that what the daily check system was ever designed for?

> A. So in each community it may be a little bit different. But in general an independent living daily check sheets are in place for the staff to -- a lot of times monitor activities. It's not typically set in place as a safety mechanism. [Trial Day 3 Tr. p. 141:11-16.]

Again, such testimony and Sandpiper's slanted argument about its significance misses the mark because, as discussed above, Plaintiff has not argued that the daily check-in policy/procedure was intended to ensure the ultimate health and safety of the residents.

In addition, even though the Plaintiff did not present its own expert, Defendant's "expert opinion" does not prevent the Trial Judge from finding that Sandpiper's failure to follow its own daily check-in policy amounted to actionable negligence. Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) ("[T]he fact that the testimony of its expert was not directly refuted does not automatically entitle it to a directed verdict. As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness.") Notably, while Sandpiper's expert spoke about what he considered "typical" in the independent living industry, he acknowledged that "each community it may be a little bit different." Perhaps even more significantly, the expert admitted that if an independent living facility adopts a procedure, then it is expected to perform it reasonably:

> Q. And if it's a procedure that they adopted, would you expect them to perform it reasonably?
>
> A. Yes, sir. [Trial Day 3 Tr. p. 139:20-25.]

As discussed above, the evidence establishing the existence of Sandpiper's adoption of a policy and procedure for daily check-ins can support the finding that it undertook/assumed a legal duty and that breach of such policy/procedure can also establish negligence:

> The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines.

> ***
>
> [W]hen defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages."

Madison, 638 S.E.2d at 659 (citing *Caldwell v. K–Mart Corp.*, 306 S.C. 27, 31–32, 410 S.E.2d 21, 24 (Ct.App.1991)). *See also* Peterson v. Nat'l R.[R.P.assenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) (evidence of defendant's deviation from own their internal policies is admissible to show the element of breach); Caldwell v. K-Mart Corp., 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) ("In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care.").

Proximate Cause and Damages

II. THERE IS EVIDENCE OF RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT SANDPIPER'S FAILURE TO CONDUCT DAILY WELLNESS CHECKS WAS A PROXIMATE CAUSE OF INJURY TO MS. PARROTT.

There is no dispute that a plaintiff bears the burden of proving proximate cause in order to make a claim for negligence. However, as the Trial Judge recited the applicable law on proximate cause, Plaintiff was not required to prove that Sandpiper's failure to follow its daily check in policy was the sole proximate cause of injury to Ms. Parrott; rather, the burden was to prove that the failure was at least one of the proximate causes of injuries she suffered:

> "The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). [Order p. 13.]

Also as noted by the Trial Judge, the question of proximate cause is one of fact for the jury. Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966). *See also* McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct.App.1998). On appeal, the jury's findings

on proximate cause are to be affirmed if supported by any evidence. Carter v. Anderson Mem'l Hosp., 284 S.C. 229, 233, 325 S.E.2d 78, 81 (Ct. App. 1985).

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

> I find, based on the totality of the medical evidence, the medical expert opinions, and the lay evidence, that after her rescue, Ms. Parrott declined over time and she never returned to her previous level of activity and independence. Based on the expert testimony, I find that Ms. Parrott endured significant, constant, and unmitigated pain for the time she was on the floor from June 3rd until the night of June 6th, when EMS began to provide fentanyl to reduce the pain. I further find that the conditions endured by Parrott during the long lie also were a cause of her emotional and psychological trauma including loss of enjoyment of life, loss of quality of life, fear that she would not be found, fear that she would die alone, anxiety, mental anguish, trauma from urinating on herself, trauma from defecating on herself, emotional injury, psychological injury. [Order ¶ 8.]

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

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

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

> Based on the preponderance of the evidence, I find and conclude that Sandpiper's failure to follow its policy of checking on the well-being of each resident was a proximate cause of injury to Ms. Parrott. If Sandpiper had followed its own policy, then one of the Sandpiper employees, agents or servants would have checked on the well-being of Ms. Parrott on Wednesday evening June 4th; or if Sandpiper had followed its own policy the next day, then one of the Sandpiper staffers would have checked on her on June 5th. Instead, as a result of Sandpiper's failures to check on her well-being, Ms. Parrott experienced a long lie of over three days before she was discovered. To the extent that Ms. Parrott had some degree of pre-existing mental health conditions, it was certainly foreseeable that those pre-existing conditions would be exacerbated by the pain and agony from that long lie.
>
> Based on the preponderance of the evidence, I find and conclude that breach of the duty to conduct daily wellness checks was a cause of Ms. Parrott's long lie. I further find and conclude that a natural and proximate result of lying with a broken hip for so long that decubitus ulcers formed on her skin and dehydration set in contributed to and exacerbated both her physical pain and mental anguish during the long lie, and after her initial treatment and recovery period, and during the follow-up rehabilitation. I further find and conclude that the long lie was a cause of Ms. Parrott's mental, emotional, and physical decline even after her hip healed that continued through the months prior to her death. I also find and conclude that the long lie as a cause of her loss of a will to live and the failure to thrive that led to her death. [Order pp. 13-14.]

The Trial Judge's findings should not be overturned because they are supported by evidence that Ms. Parrot endured considerable pain and suffering after her fall during the long lie, and she continued to experience pain and suffering even after her broken hip healed which persisted up to the time of her death and was a contributing cause of her death eight months later.

In the first numbered argument presented it is brief, Sandpiper presents a jumbled argument about proximate cause along with a challenge to the amount of the damages awarded. It appears that the crux of Sandpiper's argument is that the award of damages is speculative because the Trial Judge never explains how he determined the extent of the pain and suffering caused from the long lie separate from the broken hip suffered in the fall. As will be discussed below in the section on damages, the Order reflects the Trial Judge's understanding of the distinction of the Plaintiff's survival claim for damages for the pain and suffering during the long lie after Ms. Munoz failed

to complete her check on June 4th and through June 5th until her discovery on the evening of June 6th. Otherwise, to the extent that the Sandpiper argues that the Trial Judge erred in failing to recognize that it did not cause Ms. Parrott to suffer a "long lie" and that there was insufficient evidence that the long lie proximately caused her death, the evidence more than amply supports the Trial Court's findings on proximate cause in both the survival and wrongful death causes of action.

Sandpiper cites to and quotes from the Supreme Court's decision in Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996), but the holding therein offers little to support its contentions. In that opinion, the Court discussed the requisite standard for medical expert testimony of causation in a medical malpractice action, stating:

> In a medical malpractice action, it is incumbent on the plaintiff to establish proximate cause as well as the negligence of the physician. *Armstrong v. Weiland,* 267 S.C. 12, 225 S.E.2d 851 (1976). Negligence is not actionable unless it is a proximate cause of the injury complained of, and negligence 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, 237 S.E.2d 753 (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. *Armstrong v. Weiland, supra.* The reason for this rule is the highly technical nature of malpractice litigation. Since many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary. When it is the only evidence of proximate cause relied upon, it must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection. *Green v. Lilliewood,* 272 S.C. 186, 249 S.E.2d 910 (1978).

473 S.E.2d at 795. This is not a medical malpractice action, but the Plaintiff did present evidence medical expert testimony that meets that standard. Moreover, there was considerable other testimony and evidence that established the condition in which Ms. Parrott was found and her subsequent decline and eventual death.

The evidence supports findings that Ms. Parrott indisputably suffered pain and suffering from the broken hip she sustained in the initial fall for a period of time from the moment of the fall through the hours that she lay on the floor until she was discovered. Without a doubt she continued to suffer pain and suffering from each and all of these conditions during her hospitalization and rehabilitation while her hip was healing. Dr. Mills, her treating physician testified[9] that she recovered well from the broken hip and he would have expected her to return to her life in the independent living facility after some time in rehabilitation. [Trial Day 2 Tr. p. 117:22-25.] However, there was also considerable testimony from Dr. Mills and her daughter that even after her hip healed, Ms. Parrott suffered emotional and mental health issues. [Trial Day 1 Tr. p. 55: 14, *see also* p. 64:14-18.] Dr. Mills explained that the physical and mental trauma of the long lie exacerbated her prior mental health issues, and he opined that the mental health decline resulted in a failure to thrive that was a contributing cause of her death:

> Q. Do you have an opinion whether the long lie of three days on the ground contributed to her failure to thrive?
>
> A. Yes, sir, I do. I think it harmed her both physically and emotionally, to a great extent.
>
> Q. Do you have an opinion, to a reasonable degree of medical certainty that it contributed to -- she only lived eight months after this rather than eight years. Do you have an opinion that this long lie shortened her life?
>
> A. Yes, sir, I do. [Trial Day 2 Tr. pp. 116:22-117:8.]

In addition to the testimony of the treating physician, Plaintiff also presented testimony from Dr. Bergmann, a clinical psychologist and counselor, who was qualified as trauma expert. [*See* Bergmann Dep. pp. 9:24-10:4.] Although he had not treated or examined Ms. Parrott, he

[9] Dr. Mills testimony reflects that each and all of his opinions were given to a reasonable degree of medical certainty. [Trial Day 2 Tr. p. 96:1- 4.]

reviewed her records and the pertinent depositions[10] and offered several opinions (to a reasonable degree of medical certainty) that she suffered a traumatic event from the long lie and that the impact of that trauma stayed with her past her physical healing until her death:

> It's my opinion that she suffered a long lie.
>
> ****
>
> I think certainly that would fit the definition of a traumatic event and for some people, for many people, it would result –- it would result in the development of psychological consequences.
>
> [Bergmann Dep. pp. 15:19-16:2.]
>
> Q. All right. Dr. Bergmann, what opinion, if any, do you have to a reasonable degree of professional certainty, as to whether Ms. Parrott suffered emotional trauma while she was on the floor and before she was found?
>
> A. Well, I don't really think there's any doubt, when you think about the helplessness of the situation, soiling herself. I think, at least one of the records indicated that she might have tried to take her life. I think there's no doubt that this was a horrible and traumatic experience for her.
>
> Q. What is your opinion as to, what, if any, longer term impact, her being on the floor under the conditions that we just talked about, after she was rescued and after she was placed in the hospital?
>
> A. I think there's ample evidence in the record that this continued to be troublesome for her. There are notes in the record that indicate that she was scared to be alone and needed a lot of reassurance. So I think that it was clear that this was more than just a bad memory. It was something that continued to bother her and be part of her life until her death. [Bergmann Dep. pp. 16:3-17:2.]

Dr. Bergmann also testified about the progression of her emotional trauma during the long lie:

> Q. Would it be your opinion that it would be reasonable to anticipate that Ms. Parrott suffered from a sense of helplessness while she was on the floor?
>
> A. Well, she was helpless, she couldn't get up. And she couldn't get the help that she needed for period of time, whatever period of time that is. So I'm sure that helplessness is part of the equation here. [Bergmann Dep. pp. 17:20-18:3.]

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[10] [*See* Bergmann Dep. p. 11:13-22.]

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> the more time went by the more hopeless 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.
> [Bergmann Dep. p. 45:2-7.]

Sandpiper spends several pages in its brief quoting and citing to excerpts of testimony from Dr. Bergmann and Dr. Mills which amount to little more than an attempt to make a new "jury argument" to this Court. However, appellate review is limited to the any evidence standard, and both Dr. Bergmann and Dr. Mills offered opinion that meets the any evidence standard.

Otherwise, the authorities cited by Sandpiper do not support its specific contention that "Plaintiff's experts needed to testify that, to a reasonable degree of medical certainty, had Ms. Parrott only been lying there from when she fell on the 'evening' of Tuesday, June 3, 2014, until about 8:00 p.m. on Wednesday, June 4, 2014, she most probably would not have died." [Appellant's Initial Br., p. 24.] Nor do the cited authorities require that the medical expert "quantify the significance of the length of Ms. Parrott's 'long lie'" or to identify precisely what point in the long lie triggered her loss of will to live. [*Id.*]

Sandpiper also tries to avoid any responsibility for the pain and suffering Ms. Parrot endured during and following the long lie based on the medical history which include mental health issues she experienced five years earlier back in 2009. However, as found by the Trial Judge, while she had a prior history of mental health issues, it is well evidenced that she was living a normal productive life at the time of the long lie in 2014, and that her preexisting mental health issues were aggravated by the physical and emotional/mental trauma she endured during the long time that she laid on her apartment floor. On this point, Dr. Bergmann testified that "it's my opinion that the long lie, her pre-existing condition, psychological condition, was exacerbated by

the long lie." [Bergmann Dep. pp. 27:19-28:2.] He further testified as to a contributing cause of her death:

> Q. Okay. Do you have an opinion as to a reasonable degree of professional certainty as to whether the long lie impacted or aggravated or contributed to her death?
>
> A. I do have an opinion.
>
> Q. What is that opinion?
>
> A. It's my opinion that the psychological consequences that she experienced contributed to her death. [Bergmann Dep. p. 28:3-11.]

Dr. Bergmann also testified that Ms. Parrott suffered new, different mental health symptoms (deliriums) as a result of the trauma of the long lie. [Bergmann Dep. p. 22:9-16.]

Under the law, "[t]he defendant takes the plaintiff as he is found and the plaintiff is entitled to recover damages resulting from the aggravation of a pre-existing condition. *Watson v. Wilkinson Trucking Co.,* 244 S.C. 217, 136 S.E.2d 286 (1964)." Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). Thus, Sandpiper takes Ms. Parrott as she was found and the Defendant cannot avoid liability where the evidence supports a finding that the trauma of the long lie aggravated her mental health conditions.

Sandpiper's attempts to challenge the expert's opinions with citations and quotations of isolated excerpts from the trial record do not comport with the standard of review on this appeal. The credibility and weight of a witness's opinion testimony is a question for the factfinder – in this case the Trial Judge – whose choice it is to believe one witness over another, or to believe part of a witness's testimony. Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 844 (Ct. App. 1997) (jury must "decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve"); State v. Smith, 227 S.C. 400, 410, 88 S.E.2d 345, 350 (1955) ("The jury may believe one witness and disbelieve another, may believe one portion of a witness'

testimony and disregard another portion of such testimony.") It is not the function of an appellate court to reweigh the evidence or reassess the credibility of the witnesses.

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

> I placed a lot of emphasis on Dr. Mills' testimony concerning the wrongful death claim and almost completely dismissed the testimony of Dr. Wagner as it shocked the conscience of this Court that Dr. Wagner would opine that Ms. Parrott did not suffer any form of trauma from this event and that Ms. Parrott's death was probably caused by her immobility from her fractured hip. [11/18/20 Order, p. 3.]

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

III. THERE IS EVIDENCE OF RECORD TO SUPPORT THE AMOUNT OF THE TRIAL COURT'S AWARD OF DAMAGES.

As noted above, Sandpiper appears to argue that the award of damages is speculative because the Trial Judge never explains how he determined the extent of the pain and suffering caused from the long lie separate from the broken hip suffered in the fall and the Trial Judge does not differentiate between the initial hours Ms. Parrott laid on the floor immediately the fall from the hours that she laid there from the time that Ms. Munoz did not complete her check on the evening of June 4th through her discovery on the evening of June 6th. However, the order reflects the Trial Judge's understanding of the distinction of the Plaintiff's survival claim for damages for

the pain and suffering during the period of the long lie after the failed check on June 4th and through June 5th until her discovery on the evening of June 6th:

> I find that the evidence is overwhelming that Ms. Parrott experienced enormous conscious pain and suffering, and mental distress during the long lie that resulted from Sandpiper's failure to conduct timely wellness checks on June 4th and on June 5th. I further find the preponderance of the evidence also proves that Ms. Parrott continued to suffer pain and to experience mental anguish and loss of enjoyment of life even after the broken hip healed. Accordingly, I award $500,000 on Ms. Parrott's survival cause of action. [Order p. 15.]

It is true, that as a general proposition, "the existence or amount of damages cannot be left to conjecture, guess or speculation." Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968). However, the law is well established that pain and suffering is not capable of exact measurements and the factfinder has discretion in making a monetary award for such intangible damages:

> 'Pain and suffering is recognized by the Courts of this State as a very material element of damages on which a recovery may be bottomed. Damages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial judge. Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject to correction by the courts for abuse.'

Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (citations omitted).

> The amount of damages a jury may award for physical pain and suffering and for mental pain and suffering is incapable of exact measurement and is therefore left for determination by the jury.

Mims v. Florence Cty. Ambulance Serv. Comm'n, 296 S.C. 4, 8, 370 S.E.2d 96, 99 (Ct. App. 1988) (citations omitted). *See also* Watson v. Wilkinson Trucking Co., 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964) (unliquidated damages generally "cannot be determined with any degree

of certainty, but is largely a matter of judgment based upon the facts and circumstances of each case”).

On appellate review, the trial judge’s award will be sustained unless it is so grossly excessive that it would be a denial of justice to allow the verdict to stand. Mims, 370 S.E.2d at 99 (citations omitted). Or as otherwise stated, the fact finder’s award will be set aside “only when the verdict is so grossly excessive as to indicate that the jury was moved by passion or prejudice or other considerations not founded on the evidence and the instructions of the trial court.” Watson, 136 S.E.2d at 289.

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

Sandpiper attempts to avoid liability for any of Ms. Parrott’s pain and suffering because the Plaintiff did not present expert testimony to separate and quantify her pain and suffering into

component parts and time periods. It appears that Sandpiper would have the Plaintiff present evidence that monetizes her injuries by the nature of the pain and suffering and the units of time. Sandpiper complains that the Plaintiff did not separate and quantify the amount of pain and suffering specifically attributable to the broken hip and the first 24 hours that she laid in her apartment apart from the pain and suffering she suffered during the hours on after Sandpiper's employee failed to obtain the correct key to check her apartment on June 4th through June 5th when no one even tried to check on her, until the evening of June 6th when she was finally found. Sandpiper's contention would present an impossible task that is not required by the legal principle upon which it relies. Pain and suffering cannot be calculated on an hourly rate and it would be impossible to assess a monetary value to each hour that Ms. Parrott's laid on her floor, thus, impossible to calculate monetary value of pain and suffering for the hours between the evening of June 4th (when Auld did not retrieve the correct key to enter Ms. Parrott's apartment) and the evening of June 6th when she was finally discovered after her friend (Ms. Waters) insisted that they check on her.

In one sense, the pain and suffering from the broken hip and the long lie can be considered as intrinsically inseparable but the difficulty (if not impossibility) of separating and quantifying her pain and suffering in categories does not absolve Sandpiper for any liability for Ms. Parrott's suffering. *See* Rourk v. Selvey, 252 S.C. 25, 27–28, 164 S.E.2d 909, 910 (1968) (tortfeasor liable for entire harm, even if neglect was only one of concurrent causes of inherently indivisible injuries); *see also* Lovely v. Allstate Ins. Co., 658 A.2d 1091 (Me. 1995) (discussing liability for an entire amount of damages where injury results from more than one cause but the injury is indivisible). In other respects, the order reflects the Trial Judge's understanding of the nature of the Plaintiff's survival claim for damages. It was clear that Plaintiff was not seeking damages for

the broken hip sustained in the fall, and the award was for compensation of the pain and suffering during the long lie on June 4th through June 5th until her discovery on the evening of June 6th and beyond during her recovery and through her decline until her death.

The circumstances of sequential events causing overlapping/concurrent injuries can be compared to a case in which a plaintiff is injured in an automobile accident and suffers additional injuries when the ambulance carrying her to the hospital is involved in a wreck. One such situation was considered in Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 293, 504 S.E.2d 347, 349 (Ct. App. 1998), where the plaintiff had been injured in a car accident and then suffered additional injuries when a truck plowed into the ambulance carrying her to the hospital. After settling with the driver in the first accident, plaintiff then sued the trucking company whose truck collided into the ambulance. On appeal from the judgment rendered in her favor, the court discussed the testimony about her injuries and which accident caused which injuries. As would reasonably be expected, the medical testimony did not provide any definitive evidence to isolate the precise injuries caused by each accident, however, there was testimony that she suffered some degree of injury in each. However, the inability of the medical experts to differentiate which injuries were caused by the second accident and the lack of exact precision in apportioning damages for those injuries separately from the first accident did not preclude the plaintiff from recovering damages. The court found that the only reasonable inference was that *some* injury was proximately caused by the second collision with the ambulance (thereby justifying a directed verdict on liability) and the amount of damages for those additional injuries was for jury to decide: "[F]inding the only reasonable inference was that *some* injury was proximately caused by the

collision, while leaving the amount of damages up to the jury." 504 S.E.2d at 351 (emphasis in original).[11]

Here, there certainly was evidence of Ms. Parrott's pain and suffering during the long lie and following her recovery from the broken hip. Sandpiper cannot avoid liability because of the impossibility of separating her pain and suffering in those first hours from her fall until the evening of June 4th when the Sandpiper employee failed to complete the check-in because she could not be bothered to go back to the desk to get the correct key.

Sandpiper also appears to make some vague argument that the award of damages for wrongful death should be reversed because this State has never adopted the "loss of chance" doctrine. [Appellant's Initial Br. p. 21.] While Sandpiper is correct in its reference to the Supreme Court's decision in Jones v. Owings, 318 S.C. 72, 75, 456 S.E.2d 371, 373 (1995), wherein the Court held that recovery could not be predicated on when a negligent delay in a proper diagnosis or treatment of a medical condition results in the patient being deprived of a less than even chance of surviving or recovering. However, Sandpiper misapprehends the loss of chance rule and that it has no application in this case.

First, the Court's refusal to adopt a "loss of chance" doctrine turns on a legal distinction in the percent of "chance" – the Court does not allow a plaintiff to recover if the chance of survival was less than 50%; however, recovery can be warranted where expert medical testimony supports a finding that the plaintiff would have had a greater than fifty percent chance of survival but for the negligence of the doctor. *See discussion in* Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (Ct.App.2000); Martasin v. Hilton Head Health Sys., 364 S.C. 430, 442, 613 S.E.2d 795, 801 (Ct.

[11] Notably, beyond the medical evidence of her physical injuries, the plaintiff also offered evidence that she suffered from depression and permanent, short-term memory loss due to the trauma from the collision with the defendant's truck separate from the circumstances of the initial accident.

App. 2005). Second, there is no legal precedent for any requirement that Plaintiff prove that that the long lie was "a greater than 50 percent contributing factor as compared to any other factor to her demise." [*See* Bergmann Dep. pp. 37:17-38:5.]

Comparative Negligence

IV. THE TRIAL COURT'S REJECTION OF SANDPIPER'S COMPARATIVE NEGLIGENCE DEFENSE IS SUPPORTED BY AMPLE EVIDENCE UNDER THE APPLICABLE LAW.

The doctrine of contributory negligence was abolished in South Carolina in 1991 and the Court adopted a modified comparative negligence affirmative defense. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991); Berberich v. Jack, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011). While a plaintiff must show the requisite elements of duty, breach, injury, and proximate cause in order to establish a negligence claim, a defendant asserting comparative negligence bears the equivalent burden of proving that the plaintiff owed a duty of care to the defendant, the plaintiff breached that duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. Mills v. S.C. State Ports Auth., No. 2018-001158, 2021 WL 4185659, at *4 (S.C. Ct. App. Sept. 15, 2021)[12]; *see also* Abdelgheny v. Moody, 432 S.C. 346, 350, 852 S.E.2d 225, 228 (Ct. App. 2020) (plaintiff and defendant owed duty to each other); Nedrow v. Pruitt, 336 S.C. 668, 678, 521 S.E.2d 755, 760 (Ct. App. 1999) (comparative negligence requires a finding that the plaintiff breached a duty owed). The question of whether Ms. Parrott was negligent and any comparison with Sandpiper's negligence were questions for the Trial Judge. *See* Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 394, 665 S.E.2d 222, 226 (Ct. App. 2008).

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

[12] Remittitur issued 10/8/2021.

and (3) not wearing her panic button while hanging the curtains.[13] Plaintiff argued that the issue of comparative negligence became moot at the point where Sandpiper's aide (Ms. Munoz) simply walked away from checking on Ms. Parrott when her master key did not open her door rather than making the minimal effort to take the few extra steps to return to the office to get the individual key to Ms. Parrott's door. [Trial Day 3 Tr. p. 159:2-12..]

While the Trial Judge did not expressly discuss comparative negligence in his order of October 16, 2020, in his order denying Sandpiper's posttrial motion which attempted to preserve the comparative negligence defense, the Trial Judge did state: "As to the arguments that I failed to consider and address all the asserted defenses, I considered and rejected each of those defenses in rendering my verdict for the Plaintiff." [Order Den. Def. Post-Trial J. Mot. for Relief p. 3.] As a threshold matter, Plaintiff maintains that the Trial Court's orders meet the purpose of Rule 52 and provide a sufficient basis to allow appellate review on this record. See discussion above with citation to Mathis v. Brown & Brown of S.C., Inc., supra, and Epperly v. Epperly, supra.

Plaintiff also continues to maintain that Sandpiper's neglect began at the point where Ms. Munoz neglected to check on Ms. Parrott on the evening of June 4th, and thus, Ms. Parrott's earlier actions do not provide any basis for a comparative negligence defense. From one perspective, Sandpiper did not establish that Ms. Parrott owed any duty to Sandpiper in any of these particular actions as alleged. While there was evidence that Sandpiper issued panic buttons to the residents, the residents were not required to wear them and Sandpiper was aware that some of the residents did not wear them [Trial Day 1 Tr. p. 108:23-109:5.] Likewise, while Sandpiper's director testified

[13] See Sandpiper's Posttrial Motion: "The undisputed evidence is that Ms. Parrott stood on a rocking chair, while failing to wear her emergency/panic button and, for that matter, failing to take advantage of maintenance services set out in her lease. There is no reasonable view of the evidence under which Ms. Parrott is not guilty of comparative negligence." [Def. Mot. p. 15.]

that maintenance would have hung the curtains if she had asked, [Trial Day 1 Tr. p.135:7-9.], there was no evidence that imposed any duty on Ms. Parrott to make such a request. In addition, Sandpiper's director testified that one reason for the visual check system was to find those people who were in need of help but were not wearing their button or could not push it:

> Q. And part of the reason that you would have this visual check system would be also to catch those people, you know, really were in need of help, but couldn't push their panic button or weren't wearing it or, you know, whatever; is that right?
>
> A. Yes. [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:

> Q. It's not your testimony today, Ms. Carrington, that because Ms. Parrott didn't hit her panic button ... that she was not worthy of the rescue that this policy would require; is it?
>
> A. No, that's not my testimony. [Trial Day 1 Tr. p. 139:4-9.]

She also testified that there was nothing in their policies that negated the daily check procedure if the emergency button was not used:

> Q. Ms. Carrington, there was nothing about this policy to check on a resident whereby if you didn't use your emergency button, we weren't going to check on you?
>
> A. No. [Trial Day 1 Tr. p. 140:11-15.]

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

> [A]ppellants contend Bramlette was contributorily negligent or assumed the risk as a matter of law because he was not insane and therefore acted knowingly when he

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

Id. Following such reasoning, Sandpiper's daily check policy was intended to provide help[14] for just the type of situation as here, where Ms. Parrott's actions in trying to hang her own curtains while not wearing her panic button placed in herself need of help. Thus, Sandpiper could not establish a comparative negligence defense predicated on Ms. Parrott's actions that placed her in need of such help.

CONCLUSION

As set forth in the discussions above, the evidence of record supports the Trial Court's finding that Sandpiper undertook and/or assumed a duty of care to provide daily checks of the residents in the independent apartments and breached that duty in failing to follow its own daily check-in policy and procedures on June 4th and June 5th. The evidence of record also supports the Trial Court's finding that Sandpiper's failure to conduct daily wellness checks caused Ms. Parrott to suffer a long lie that resulted in pain and suffering during the period after Sandpiper failed to check on her on June 4th, continued pain and suffering after her discovery through the eight post-trauma months and ultimately contributed to her eventual death. Likewise, there is ample evidence of record to support the amount of the Trial Court's award of damages despite the fact that the medical experts could not quantify her pain and suffering in time units separately from

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

the pain and suffering attributable to the broken hip and first hours of laying on the floor in her apartment.

On the other hand, there was no evidence to support Sandpiper's comparative negligence defense based on assertions that it was Ms. Parrott's own actions in trying to hang her new curtains without wearing her panic button that caused her injuries. Ms. Parrot owed no duty to Sandpiper in regards to her personal actions in hanging the curtain or in wearing the panic button. Moreover, Sandpiper cannot rely on Ms. Parrott's actions to avoid its liability where Sandpiper undertook a duty to provide daily wellness checks to provide help to its residents in situations just such as occurred.

Wherefore, based on the foregoing, the Plaintiff respectfully submits that the Trial Judge's verdict and awards should be affirmed 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,

REEVES AND LYLE, LLC

/S/ *Paul L. Reeves*
Paul L. Reeves (S.C. Bar # 4674)
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John G. Boswell, *Of Counsel* (S.C. Bar # 778)
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ATTORNEYS FOR RESPONDENT

November 10, 2021

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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

The Estate of Delila Parrott,

Respondent,

v.

Sandpiper Independent and Assisted Living-Delaware, LLC,

Appellant.

PROOF OF SERVICE

REEVES AND LYLE, LLC

/s/ *Paul L. Reeves*
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ATTORNEY FOR RESPONDENT

I, Paul L. Reeves, of Reeves and Lyle, LLC, counsel for the Respondent above named, do hereby certify that I have served the **Initial Brief of Respondent and Respondent's Designation of Matters to be Included in the Record on Appeal** on the below-named Counsel for Appellant by electronic service addressed as follows:

Stephen L. Brown, Esquire — sbrown@ycrlaw.com
D. Jay Davis, Jr., Esquire — jdavis@ycrlaw.co
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REEVES AND LYLE, LLC

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John G. Bowell, Of Counsel (SC Bar #778)
Attorneys for Respondent

Columbia, South Carolina
Dated: November 10, 2021

Reeves & Lyle
ATTORNEYS AT LAW

RECEIVED
Nov 10 2021
SC Court of Appeals

November 10 ,2021

VIA Upload
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: The Estate of Delilah Parrott vs. Sandpiper Independent and Assisted Living-Delaware, LLC
Appellate Case No.: 2020-001643

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Respondent and Respondent's Designation of Matters to be Included in the Record on Appeal in connection with the referenced matter.

Thank you for your assistance. Please do not hesitate to contact me should you have any questions or require anything additional. I am,

Very truly yours,

Paul L. Reeves
Attorney at Law

PLR:jrs
Cc: via electronic mail:

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