

RECEIVED

Apr 04 2022

SC Court of Appeals

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

Appeal from Charleston County
Court of Common Pleas

Bentley D. 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.

FINAL REPLY BRIEF OF APPELLANT

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. There is no evidence to support a reasonable, non-speculative conclusion that Defendant caused Ms. Parrot’s death from her “loss of the will to live”—and nowhere in Plaintiff’s brief is it shown otherwise.	1
2. Like that of the trial court, Plaintiff’s view of comparative negligence is mistaken.	12
3. It is clear that the judgment in favor of Plaintiff/against Defendant is based on the trial court’s failure to recognize that Defendant did not cause Ms. Parrott to suffer a “long lie”—at most, it caused an <i>extension</i> of what was already some 24-plus hours of a “long lie,” for which, by Plaintiff’s own admission, Defendant bears no responsibility at all.	15
4. The trial court erred in finding that the Daily Check-In created a legal duty of care owed by Defendant to Ms. Parrott.	19
CONCLUSION	24

TABLE OF AUTHORITIES

Page

Cases

<i>Baggerly v. CSX Transp., Inc.</i> , 370 S.C. 362, 635 S.E.2d 97 (2006).....	2
<i>Berberich v. Jack</i> , 392 S.C. 278, 709 S.E.2d 607 (2011).....	13, 14
<i>Bramlette v. Charter-Med.-Columbia</i> , 302 S.C. 68, 393 S.E.2d 914 (1990).....	12, 13
<i>Carson v. Adgar</i> , 326 S.C. 212, 486 S.E.2d 3 (1997).....	23
<i>Cunningham ex rel. Grice v. Helping Hands, Inc.</i> , 532 S.C. 485, 575 S.E.2d 549 (2003).....	13
<i>Davenport v. Cotton Hope Plantation</i> , 333 S.C. 71, 508 S.E.2d 565 (1998).....	13
<i>Frazier v. Smallseed</i> , 384 S.C. 56, 682 S.E.2d 8 (Ct. App. 2009).....	3
<i>Gibson v. Epting</i> , 426 S.C. 346, 827 S.E.2d 178 (Ct. App. 2019).....	24
<i>Gladden v. S. 286 Ry. Co.</i> , 142 S.C. 492, 141 S.E. 90 (1928).....	14
<i>Glenn v. E. I. DuPont De Nemours & Co.</i> , 254 S.C. 128, 174 S.E.2d 155 (1970).....	2
<i>Grainger v. Greenville, S. & A. R. Co.</i> , 101 S.C. 399, 85 S.E. 968 (1915).....	1
<i>Humphrey v. Day & Zimmerman Inc.</i> , 997 F. Supp. 2d 388 (D.S.C. 2014).....	15

<i>Koester v. Carolina Rental Ctr., Inc.</i> , 313 S.C. 490, 443 S.E.2d 392 (1994)	2
<i>Madison v. Babcock Ctr., Inc.</i> , 371 S.C. 123, 638 S.E.2d 650 (2006)	23
<i>Nelson v. Concrete Supply Co.</i> , 303 S.C. 243, 399 S.E.2d 783 (1991)	12
<i>Osteen v. Southern Ry., Carolina Division</i> , 76 S.C. 368, 57 S.E. 196 (1907).....	2
<i>Roddy v. Wal-Mart Stores E., LP, U.S.</i> , 415 S.C. 580, 784 S.E.2d 670 (2016)	15
<i>Scott v. Greenville Pharmacy</i> , 212 S.C. 485, 48 S.E.2d 324 (1948).....	2
<i>The Huffines Co., LLC v. Lockhart</i> , 365 S.C. 178, 617 S.E.2d 125 (Ct. App. 2005).....	4
<i>Watson v. Ford Motor Co.</i> , 389 S.C. 434, 699 S.E.2d 169 (2010)	3
<i>Weaver v. Lentz</i> , 348 S.C. 672, 561 S.E.2d 360 (Ct. App. 2002).....	2
<i>Wickersham v. Ford Motor Co.</i> , 432 S.C. 384, 853 S.E.2d 329 (2020)	2
<i>Woods v. Rabon</i> , 295 S.C. 343, 368 S.E.2d 471 (Ct. App. 1988).....	12
<i>Wright v. PRG Real Estate management, Inc.</i> , 426 S.C. 202, 826 S.E.2d 285 (2019)	19, 20
Statutes	
S.C. Code Ann. § 15-51-10.....	1

Other Authority

§ 323 of the Restatement (Second) of Torts (1965)..... 20, 21, 22, 23

ARGUMENT IN REPLY

Defendant¹ makes the following points in reply to Plaintiff's brief.

1. **There is no evidence to support a reasonable, non-speculative conclusion that Defendant caused Ms. Parrot's death from her "loss of the will to live"—and nowhere in Plaintiff's brief is it shown otherwise.**

The two causes of action Plaintiff asserts against Defendant (wrongful death and survival) are based on a single theory of liability (Defendant's alleged negligence), and the trial court's \$1,000,000 judgment in favor of Plaintiff/against Defendant comprises \$500,000 on the wrongful death claim and another \$500,000 on the survival claim. Even though they are both "negligence" claims, it is important to remember that wrongful death and survival are not the same claim.²

The South Carolina wrongful death statute provides a cause of action to the decedent's personal representative if the wrongful act, neglect, or default that caused the decedent's death is such as would have, had the decedent lived, entitled the decedent to maintain an action for damages. S.C. Code Ann. § 15-51-10. The right of action permitted by the wrongful death statute, however, is not the survival

¹ Shorthand references already defined in Defendant's principal brief are continued in this reply brief (e.g., "Defendant" refers to Defendant/Appellant, Sandpiper Independent and Assisted Living-Delaware, LLC; "Plaintiff" refers to Plaintiff/Respondent, The Estate of Delila Parrott; and "Ms. Parrott" refers to the decedent, Delila Parrott).

² While two causes of action may exist upon the death of an injured person, wrongful death and survival are different, independent claims. *Grainger v. Greenville, S. & A. R. Co.*, 101 S.C. 399, 85 S.E. 968 (1915).

of an action that the decedent had in her lifetime but is a new cause of action,³ and it is purely statutory. *Glenn v. E. I. DuPont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970).

“A wrongful death cause of action does not exist before death and arises only upon the death of the injured person.” *Weaver v. Lentz*, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). To prevail on a claim for wrongful death, it is essential that the decedent’s estate prove that the alleged wrongful act of the defendant proximately caused the decedent’s *death*,⁴ not merely that it caused some “injury” to the decedent other than death.

Plaintiff’s brief overlooks the fact that proving proximate cause requires proving *both* cause-in-fact *and* legal cause. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). Where the claim is wrongful death, proving cause-in-fact means proving that the decedent’s death would not have occurred “but for” the defendant’s negligence. *Wickersham v. Ford Motor Co.*, 432 S.C. 384, 391, 853 S.E.2d 329, 332 (2020).⁵

³ *Osteen v. Southern Ry., Carolina Division*, 76 S.C. 368, 57 S.E. 196, 200 (1907).

⁴ *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E.2d 324, 326 (1948).

⁵ As for legal cause, “foreseeability is considered ‘the touchstone . . . ,’ and it is determined by looking to the natural and probable consequences of the defendant’s act or omission.” *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (quoting *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

Given the medically complex and novel nature of Plaintiff’s loss-of-will-to-live theory (and assuming a loss-of-will-to-live claim is actually cognizable), proof of the necessary but-for causation had to come from medical expert testimony. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (“*Expert testimony* may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and *is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.*”) (emphasis added); *id.* (“Stated differently, *expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.*”) (emphasis added).

Plaintiff admits that no basis of liability against Defendant arose until the very end of Ms. Munoz’s workday on June 4th, which was at or about 9:00 pm. (Br. of Resp. p. 40 (“Plaintiff . . . continues to maintain that [Defendant’s] neglect *began* at the point where Ms. Munoz neglected to check on Ms. Parrott on the evening of June 4th”) (emphasis added).) Thus, to prove Defendant liable for wrongful death, Plaintiff had to present evidence from which a reasonable, non-speculative conclusion⁶ could be drawn that if Ms. Parrott had “only” fallen and

But where, as here, there is a failure of proof as to cause-in-fact, the issue of legal cause is moot.

⁶ *See Frazier v. Smallseed*, 384 S.C. 56, 61, 682 S.E.2d 8, 11 (Ct. App. 2009) (“In an action at law tried by a judge without a jury, the appellate court . . . must affirm the trial court’s factual findings unless no evidence *reasonably* supports those

shattered her hip and lied immobilized on her apartment floor for a “mere” 24-plus hours, she would not have lost her will to live, i.e., that but for the “long lie” (again, already 24-plus hours long before Defendant’s alleged negligence even enters the picture) having been *extended beyond this 24-plus-hour threshold* by Defendant’s alleged negligence, Ms. Parrott would not have died.

As shown in Defendant’s principal brief, neither of Plaintiff’s experts (namely, Dr. Mills and Dr. Bergmann) gave the necessary testimony for Plaintiff to prove the required but-for causal connection between Defendant’s alleged negligence and Ms. Parrott’s death. (*See Br. of App. pp. 23-28.*) Rather, they both expressly testified that they were unable to give such testimony:

Dr. Mills

Q. The question is, Doctor, whether you can quantify the extent to which there would have been a difference [in terms of the impact on Ms. Parrott’s psychological condition depending on whether she had been on the floor for 24 to 36 hours versus 48 hours or more?⁷]

A. *That’s extremely hard to do. And I don’t know if anyone can tell you that with absolute certainty.*

findings.”) (emphasis added); *The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”).

⁷ (R. p. 396:18-23 (“My question for you is with regard to your opinion as to impact on her psychological condition. You can’t state with a reasonable degree of medical certainty that there would have been a difference between 24 to 36 hours on the ground versus 48 hours or more?”).)

My impression in my medical judgment would be that it had a very significant impact on her. And given the severity impact, combined with the physical findings and combination -- and plus just what the patient said -- what she said is that she had been on the ground since Tuesday. I tend to believe all those things. And that leads me to support the assumption that she was on the ground for a prolonged period of time. And that that led to a worsening of all her underlying psychiatric condition. Can I quantify it would have been 24 versus 48 versus 72? No. But I think it's a degradation on the longer she was on the ground for, the worst the issues would have been.

(R. p. 397:12 - p. 398:6 (emphasis added).)

Dr. Bergmann

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

A. Yes.

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

Q. [Y]ou're not able to state with any specificity the degree of difference it would have made in terms of her alleged psychological decline between one scenario and the other [(i.e., between when Plaintiff claims the fall occurred and when Defendant claims the fall occurred)]?

A. Oh, I think I might be able to do that. I think if she had expected to be rescued because people may or may not have been checking on her, the more time went by the more helpless she would have been and the more desperate she might have been as well. *Now, where exactly what that time frame is, I don't think I can really describe that. I don't think anybody else can either.*

Q. You don't know what difference precisely it would have made in her psychological decline between a period of time lying on the ground for 24 hours after the fall versus 48 hours?

A. *No, I'm not so concerned about that number.*

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

Indeed, this point—that neither Dr. Bergmann nor Dr. Mills gave the necessary testimony for Plaintiff to prove the required but-for causal connection between Defendant's alleged negligence and Ms. Parrott's death—is underscored by the testimony cited in Plaintiff's own brief:

Re: Dr. Mills's Testimony

Dr. Mills explained that the physical and mental trauma of the long lie exacerbated [Ms. Parrott's] 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.

(Br. of Resp. p. 29 (quoting R. p. 382:22 - p. 383:8) (emphasis added).)

Clearly, the question that was put to and answered by Dr. Mills in the above-quoted exchange was premised on a “long lie of three days on the ground.” But, again, as expressly acknowledged in Plaintiff’s brief, no basis of liability against Defendant arose until the end of Ms. Munoz’s workday at about 9:00 pm on June 4th.⁸ To establish Defendant’s liability for wrongful death, it was not enough for Dr. Mills to opine that the three-day “long lie” shortened Ms. Parrott’s life. Rather, under the particular circumstances of this case and the novel theory of wrongful death liability Plaintiff chose to pursue, he had to tie Ms. Parrott’s cause of death to the specific period of time for which Defendant’s alleged liability is on the clock, i.e., the period of time (which did not even begin until 24-plus hours after the start of

⁸ (Br. of Resp. p. 40 (“Plaintiff . . . continues to maintain that [Defendant’s] neglect *began* at the point where Ms. Munoz neglected to check on Ms. Parrott on the evening of June 4th”)) (emphasis added).)

the “long lie”) that Plaintiff claims the “long lie” was *extended* because of Defendant’s alleged negligence, and without question, Dr. Mills did not do so.

Re: Dr. Bergmann’s Testimony

In addition to the testimony of the treating physician [Dr. Mills], Plaintiff also presented testimony from Dr. Bergmann, a clinical psychologist and counselor, who was qualified as trauma expert. Although he had not treated or examined Ms. Parrott, he reviewed her records and the pertinent depositions 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.

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.

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.

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.*

(Br. of Resp. pp. 29-31 (quoting R. p. 717:19 - p. 718:2; R. p. 718:3 - p. 719:2; R. p. 719:20 - p. 720:3; R. p. 747:2-7) (emphasis added) (internal citations omitted).)

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.

(Br. of Resp. p. 32 (quoting R. p. 730:3-11) (emphasis added).)

As with Dr. Mills, the questions that were put to and answered by Dr. Bergmann were not directed specifically to the *extended* period of the "long lie" for which Plaintiff alleges Defendant is liable but rather to the whole time "while she was on the floor and before she was found." Accordingly, like Dr. Mills, Dr. Bergmann fails to tie Ms. Parrott's cause of death to the specific period of time for which Defendant's alleged liability is on the clock. In fact, Dr. Bergmann expressly acknowledges his lack of certainty as to the period of time in question ("whatever period of time that is") and, for that matter, the inability of himself, or anyone else, to say when it was during the course of the "long lie" that Ms. Parrott

began to feel hopeless and desperate (“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.”).⁹

The most that Plaintiff’s experts could say, and, at that, only in generalized and imprecise terms, was that the *entire three-day* “long lie” contributed to Ms. Parrott’s death and that the longer the “long lie” the worse it was for Ms. Parrott. But as for what this means in terms of whether Defendant’s alleged negligence (which, again, does not even make its first appearance in the story of this case until after Ms. Parrott had already suffered a shattered hip and a “long lie” of 24-plus hours for which Plaintiff admits Defendant bears no responsibility) did in fact cause Ms. Parrott’s death is simply left unsaid, leaving an evidentiary gap in Plaintiff’s wrongful death claim that could not possibly be bridged without resorting to improper speculation, as the trial court erroneously did.

⁹ Plaintiff mischaracterizes Defendant’s argument as relying on an unduly strict—even impossible—evidentiary standard. (*See* Br. of Resp. pp. 35-36.) Defendant merely seeks faithful adherence to well-established law that the plaintiff bears the burden of proving all elements of the claim asserted and cannot leave any elements to speculation. Given Plaintiff’s theory of liability and damages, and the admitted fact that Defendant bears no liability whatsoever for the fall (which was, of course, catastrophic in and of itself, shattering Ms. Parrott’s hip and rendering her immobilized and in intense pain) and the first 24-plus hours of the “long lie” thereafter, it is was essential that Plaintiff present evidence to distinguish, in a meaningful, non-speculative way, the effect on Ms. Parrott of the fall and the first 24-plus hours of the “long lie” from that of the remainder, and Plaintiff did not do so. The difficulty, which indeed Plaintiff admits to having, in presenting such evidence is not a function of any overly harsh standard urged by Defendant but simply of the application of the established burden of proof to the exceedingly ambitious case Plaintiff chose to pursue.

2. Like that of the trial court, Plaintiff's view of comparative negligence is mistaken.

First off, Plaintiff is mistaken in arguing that comparative negligence could not be found against Ms. Parrott because Defendant did not establish that Ms. Parrott owed *Defendant* a duty of care. (See Br. of Resp. p. 40.) “The defense of contributory negligence does not depend on any duty owed by the injured party to the party sued. All that is necessary to establish the defense is to prove to the satisfaction of the jury *that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.*” *Woods v. Rabon*, 295 S.C. 343, 346, 368 S.E.2d 471, 473 (Ct. App. 1988) (emphasis added).¹⁰

Moreover, Plaintiff is mistaken in citing *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), as providing “[s]upport for the Trial Judge’s rejection of [Defendant’s] comparative negligence defense” (Br. of Resp. p. 41.) *Bramlette* held that where a duty exists to prevent a patient from committing suicide, the very suicide, which the defendant has the duty to prevent, cannot constitute

¹⁰ Although “contributory” negligence has been abolished in favor of “comparative” negligence, *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), in respect of the legal principle at hand there is no difference between the two doctrines. In other words, the “negligence” (or fault) component of both doctrines is the same. The difference has only to do with the consequences of such negligence, with doctrine of comparative negligence ameliorating the harshness of the old all-or-nothing ruling under the doctrine of contributory negligence by allowing

assumption of the risk as a matter of law.¹¹ But as our Supreme Court explained in *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 532 S.C. 485, 493, 575 S.E.2d 549, 553 (2003), the *Bramlette* rule does not extend beyond the factual situation of *Bramlette* (which involved the specific duty of a health professional to prevent the suicide of a person who is known by the health professional to be suicidal), which is obviously not the factual situation involved in the instant case.

Here, there is no question that Ms. Parrott had a duty to exercise reasonable care for her own safety and, as explained in Defendant’s principal brief, that she breached this duty¹² and that her doing so was a direct and proximate cause of every bit of the harm that Defendant’s alleged negligence is alleged to have caused her—and had she not failed to exercise reasonable care for her own safety, all of the harm that Defendant’s alleged negligence is alleged to have caused her would have been avoided.

recovery so long as the plaintiff’s fault does not exceed that of the defendant. *See Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011).

¹¹ In *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 88, 508 S.E.2d 565, 574 (1998), our Supreme Court held that assumption of the risk was essentially subsumed by the law of comparative negligence.

¹² Again, the fall happened when Ms. Parrott, age 80, was alone in her apartment, with the door locked, not wearing her panic button, standing on a rocker-recliner chair (a “big cushy chair,” a La-Z-Boy or the like, that rocked and reclined) trying to hang curtains (or a curtain rod), having for some reason decided not only to try to do this herself (as opposed to, for instance, simply taking advantage of the maintenance services included in her lease with Defendant) but also to not tell anyone about it. Even Plaintiff’s counsel called this “a stupid thing to do.” (R. p. 509:10-11.)

Ms. Parrott’s conduct—to include specifically, but by no means limited to, her decision to place herself in the precarious position from which she fell while not wearing her panic button—is just the sort of conduct that must be compared with Defendant’s alleged negligence to properly determine each party’s relative fault. See *Berberich*, 392 S.C. at 285, 709 S.E.2d at 611 (“Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.”) (quoting *Gladden v. S. 286 Ry. Co.*, 142 S.C. 492, 522–23, 141 S.E. 90, 99 (1928)); *id.* at 293, 709 S.E.2d at 615 (“We hold that, under our comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. By this method, each party’s relative fault in causing the plaintiff’s injury will be given due consideration.”) (footnote omitted)).

As explained in Defendant’s principal brief, there is no reasonable view of the evidence under which Ms. Parrott is not guilty of at least some comparative negligence. Indeed, because the only reasonable view of the evidence is that Ms.

If more than this is required for a finding of comparative negligence, the doctrine is

Parrott's comparative negligence exceeds 50%,¹³ Plaintiff should be barred from any recovery. But at a minimum, assuming, *arguendo*, the existence of a proper basis on which to assess negligence liability against Defendant, having duly raised and supported a comparative negligence defense, Defendant was (and is) entitled to a finding in its favor thereon and a corresponding reduction of any damages to which Plaintiff may be entitled based on Ms. Parrott's comparative fault.

- 3. It is clear that the judgment in favor of Plaintiff/against Defendant is based on the trial court's failure to recognize that Defendant did not cause Ms. Parrott to suffer a "long lie"—at most, it caused an *extension* of what was already some 24-plus hours of a "long lie," for which, by Plaintiff's own admission, Defendant bears no responsibility at all.**

Plaintiff's brief cites the following language from the trial court's order as supposedly reflecting the trial court's correct understanding that Defendant's alleged liability did not begin until 24-plus hours after the "long lie" started:

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

essentially a dead letter in this state.

¹³ *Roddy v. Wal-Mart Stores E., LP, U.S.*, 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) ("In a comparative negligence case, the trial court *should* grant a directed verdict motion if the sole reasonable inference from the evidence is the nonmoving party's negligence exceeded fifty percent.") (emphasis added); *see, e.g., Humphrey v. Day & Zimmerman Inc.*, 997 F. Supp. 2d 388 (D.S.C. 2014) (finding, as a matter of law, on summary judgment, the plaintiff's negligence greater than the negligence attributable to the defendant and, accordingly, the plaintiff's claims barred under the doctrine of comparative negligence).

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.

(Br. of Resp. pp. 33-34 (quoting R. p. 17).)

But other language in the trial court's order, as well as in Plaintiff's own brief,¹⁴ confirms that the trial court did not appreciate (in any meaningful way) the distinction between the fall and the first 24-plus hours of the "long lie" and the period of time thereafter:

[T]he "long lie" impacted [Ms. Parrott] from the date of the fall until she died.

¹⁴ For instance, in addition to the testimony of Dr. Mills and Dr. Bergmann cited above (wherein no distinction is made between the first 24-plus hours of the "long lie" and the period of time thereafter), Plaintiff's brief states: "the Plaintiff has consistently maintained that [Defendant's] failure to check on her *caused a long lie.*" (Br. of Resp. p. 17 (emphasis added)); *id.* at 26 ("[Defendant'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.*") (emphasis added); *id.* at 27 ("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 . . .*") (emphasis added); *id.* ("It appears that the crux of [Defendant'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.*") (emphasis added); *id.* at 35 ("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.*") (emphasis added).)

(Br. of Resp. p. 6 (emphasis added) (footnote omitted).)

Based on the expert testimony, *I find that Ms. Parrott endured significant, constant, and unmitigated pain for the time she was on the floor from June 3rd until the night of June 6th, when EMS began to provide fentanyl to reduce the pain.* I further find that the conditions endured by Parrott during *the long lie* also were a cause of her emotional and psychological trauma including loss of enjoyment of life, loss of quality of life, fear that she would not be found, fear that she would die alone, anxiety, mental anguish, trauma from urinating on herself, trauma from defecating on herself, emotional injury, psychological injury.

(R. p. 8 (emphasis added).)

“Long lie” is the term used by the medical experts to denote *the time that Ms. Parrott laid on the floor after her fall.*

(R. p. 8, n.2 (emphasis added).)

The evidence and medical record shows, and I find, that *the long lie* aggravated, caused and/or contributed to her death on February 9, 2015.

(R. p. 9 (emphasis added).)

I find the cumulative medical evidence to be proof of a long lie and that *the long lie more likely than not began on June 3, 2014.*

(R. p. 12 (emphasis added).)

[A]s a result of [Defendant's] failures to check on her well-being, Ms. Parrott experienced a long lie of over three days before she was discovered.

(R. p. 15 (emphasis added).)

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* was a cause of her loss of a will to live and the failure to thrive that led to her death.

(R. pp. 15-16 (emphasis added).)

Clearly, the trial court viewed this case as being about a “long lie” of *three* days for which Defendant was wholly responsible. As quoted above, the trial court expressly stated that the term “long lie” denoted *all* of “the time that Ms. Parrott laid on the floor after her fall” and concluded that Defendant caused “Ms. Parrott [to] experience[] a long lie of over three days before she was discovered,” which three-day “long lie” was the premise upon which the trial court based its damages awards for wrongful death and survival, and which awards are, in consequence, undeniably off base, not only as to their amounts but also as to threshold question of liability, because, as explained elsewhere and, again, as indeed Plaintiff even admits, no basis of liability against Defendant arose until 24-plus hours after the

“long lie” started. (Br. of Resp. p. 40 (“Plaintiff . . . continues to maintain that [Defendant’s] neglect *began* at the point where Ms. Munoz neglected to check on Ms. Parrott on the evening of June 4th”) (emphasis added).)

Plaintiff mischaracterizes Defendant’s argument here as an “attempt[] 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,” charging “that [Defendant] would have the Plaintiff present evidence that monetizes her injuries by the nature of the pain and suffering and the units of time.” (Br. of Resp. pp. 35-36.) Plaintiff has it backwards. Defendant is not insisting on too fine of a line being drawn between the first 24-plus hours of the “long lie” (for which Defendant is not even alleged to be liable) and the period of time thereafter but rather Defendant is complaining about the wholesale failure of the trial court to recognize that such a line exists at all. (*See also* footnote 9, *infra*.)

4. The trial court erred in finding that the Daily Check-In created a legal duty of care owed by Defendant to Ms. Parrott.

Regarding Defendant’s supposed voluntary assumption of a legal duty of care to Ms. Parrott via the Daily Check-In, Plaintiff is mistaken in attempting to analogize this case to *Wright v. PRG Real Estate management, Inc.*, 426 S.C. 202, 826 S.E.2d 285 (2019).

As the *Wright* Court explained, South Carolina’s recognition of a voluntarily assumed duty is rooted in § 323 of the Restatement (Second) of Torts (1965), which provides as follows:

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

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

Wright, 426 S.C. at 213, 826 S.E.2d 290–91; *id.* at 216, 826 S.E.2d at 292 (“Section 323 is the standard in South Carolina when analyzing voluntarily assumed duties.”).

As explained in the comments to § 323, subsections (a) and (b) question whether “the actor’s assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance” § 323 cmt. c.

There is no evidence in the record on which to base a reasonable, non-speculative conclusion that Defendant, by its alleged failure to properly perform the Daily Check-In, put Ms. Parrott in a worse position than she was in otherwise,

either because the actual danger of harm to Ms. Parrott was increased by the allegedly deficient performance or because Ms. Parrott, in reliance upon the Daily Check-In, was induced to forego other opportunities of obtaining assistance.

Consider the following illustration in the comments to § 323:

A, an employee of B Company, complains to the manager of the Company that she is ill, and asks that she be sent home. She is sent home in one of the Company's delivery wagons. The street leading to A's house is rough and unpaved, and although it is raining, the driver refuses to go further, and tells A to get out and walk the rest of the distance, as a result of which her illness is increased. B Company is subject to liability for the increase in A's illness caused by her exertion and her exposure to the rainy weather.

§ 323 cmt. c. As this illustration shows, to trigger liability under subsection (a) or (b) of §323, the defendant's voluntary act must be such as to make matters worse for the plaintiff than if the defendant had not acted at all. By no reasonable means can Defendant be said to have done so here.

By its very nature, Plaintiff's theory of Defendant's liability concedes that Defendant had nothing at all to do with, and cannot be blamed for, Ms. Parrott falling and hurting herself, or for Ms. Parrott not being able to use her emergency call button, or even for Ms. Parrott's pain and suffering (including any future consequences thereof) for approximately the first *24-plus hours* after the fall. In other words, her theory concedes that Defendant did not in fact cause Ms. Parrott to suffer a "long lie." Because, compared to what it would have been had

Defendant not acted at all, the actual danger of harm to Ms. Parrott was in no way increased by Defendant's allegedly deficient performance of the Daily Check-In, liability under subsection (a) of §323 is not triggered.

Even assuming Ms. Parrott found the concept of the Daily Check-In appealing in deciding to live at Sandpiper Village, there is still no evidence to support a reasonable, non-speculative conclusion that she relied upon it. Indeed, the evidence cited in Plaintiff's own brief is that the Daily Check-In was important to *Ms. Acosta*, not that it was important to Ms. Parrott herself. (Br. of Resp. p. 6.) With particular respect to Ms. Parrott's view of the matter, Ms. Acosta's testimony was simply that Ms. Carrington had *told* her about the Daily Check-In, not that Ms. Parrott had ascribed any particular importance to it. (Br. of Resp. p. 6.)¹⁵ And as Ms. Acosta acknowledged, it was Mrs. Parrott herself, not Ms. Acosta, who was the decision maker, and without question, she was fully capable of continuing living independently and wanted to do so at Sandpiper Village, where friends of hers were already living. (R. p. 142:10 - p. 143:8.)

There is no evidence that Ms. Parrott would not have chosen to live at Sandpiper Village in the absence of the Daily Check-In. There is no evidence of any other living arrangements that Ms. Parrott considered or of whether any of them offered a Daily Check-In. There is no evidence that anyone else was

discouraged or otherwise precluded or hindered from protecting Ms. Parrott or coming to Ms. Parrott's aid because of the Daily Check-In. Thus, there being no evidence that Ms. Parrott suffered any harm because of her reliance upon the Daily Check-In, liability under subsection (b) of §323 is not triggered either.

As for the supposed creation of a legal duty owed by Defendant to Ms. Parrott on the basis of some special circumstance, neither the trial court nor, for that matter, Plaintiff, identified any evidence or relevant legal authority that actually support finding the existence of such a duty here. The most that either the trial court or Plaintiff have done is simply cite legal authority standing for the general proposition that “[a]n affirmative legal duty may be created by . . . some other special circumstance”¹⁶ and simply declaring, in conclusory fashion, that such a circumstance exists here. (R. p. 13 (“[A]n affirmative legal duty to act may be created “by statute, contract, relationship, status, property interest, or some other special circumstance.” *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997)[.] . . . 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.”).)

¹⁵ For her part, Ms. Carrington did not even recall Ms. Parrott being present when she discussed the Daily Check-In with Ms. Acosta. (Br. of Resp. p. 6.)

¹⁶ (Br. of Resp. p. 16 (quoting *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650, 656–57 (2006)).)

There is no evidence or legal authority on which to conclude the existence of a legal duty of care owed by Defendant to Ms. Parrott—and in finding the existence of a “special relationship” the trial court cited none. The undisputed evidence shows that Sandpiper Village is not an assisted-living facility, a long-term-care facility, or any other type of regulated entity. It is an *independent*-living community, where Ms. Parrott lived *independently* in her own *private* apartment pursuant to a written lease with Defendant. The legal relationship between Defendant and Ms. Parrott simply that of landlord and tenant. It is governed by the SCRLTA and Ms. Parrott’s Lease, the terms of which do *not* provide for the Daily Check-In but *do* provide for Ms. Parrott’s *independent* living and for her waiver of liability against Defendant for “any and all damages, both direct and indirect, that may result [therefore],”¹⁷ all of which terms Ms. Parrott is “presumed to have read, understood, and assented to.” *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019).

CONCLUSION

For the foregoing reasons, along with those already set forth in its principal brief, Defendant asks this Honorable Court to reverse the trial court in full, with the Court overturning the present judgment against it and directing the entry of a new judgment in its favor as to all claims. As a lesser alternative, Defendant asks the Court to reverse the trial court in each and every discrete part in which it is in error

¹⁷ (R. p. 1145.)

(to include, without limitation, reversing the trial court for its error in not granting judgment in Defendant's favor on the wrongful death claim and/or its error in not finding any comparative negligence on the part of Ms. Parrott), with the Court overturning the present judgment against Defendant in favor a new judgment that accounts for and rectifies all of particulars in which the trial court is reversed. Defendant further asks the Court to grant it any such other and further relief as it deems to be just and proper, or which is otherwise necessary to ensure that Defendant is afforded all relief to which it is entitled to fully and completely remedy all trial court error (to include, without limitation, the remand of the case to the trial court for any further action or proceedings, to include new trial proceedings).

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Matthew O. Riddle (SC Bar No. 76650)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellant

Charleston, South Carolina

April 4, 2022

RECEIVED

Apr 04 2022

SC Court of Appeals

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

Appeal from Charleston County
Court of Common Pleas

Bentley D. 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.

APPELLANT'S CERTIFICATION FOR FINAL REPLY BRIEF

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

I, Russell G. Hines, do hereby certify that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Matthew O. Riddle (SC Bar No. 76650)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellant

Charleston, South Carolina

April 4, 2022