IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Lisa Pasquinelli, and Brian Kean, as independent co-executors of the estate of Joan Kean, deceased, and as special administrators of the estate of Thomas Kean, deceased,	)	
Plaintiffs,	)	
v.	)	
Sodexo, Inc., a Maryland corporation, CK Franchising, Inc., an Ohio corporation d/b/a Comfort Keepers and Helpsource of North Shore, Inc., an Illinois corporation d/b/a Comfort Keepers,	)	No. 17 L 10395 consolidated with No. 18 L 11239
Defendants,	)	
CK Franchising, Inc. d/b/a Comfort Keepers and Helpsource of North Shore, Inc. d/b/a Comfort Keepers,	)	
Defendants-counter-plaintiffs,	)	
v.	)	
Lisa Pasquinelli, and Brian Kean as special administrators of the estate of Thomas Kean, deceased,	)	
Counter-defendants.	)	

Imelda Reyes,	)
	)
Plaintiff,	)
	)
v.	)
	)
Estate of Thomas Kean,	)
	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

To establish a cause of action for negligence, a plaintiff must plead and prove a legally cognizable duty owed by the defendant to the plaintiff. The defendants in this case did not owe the plaintiffs' decedents a duty of care either to prevent carbon monoxide poisoning from car exhaust or to rescue. Absent the existence of a valid duty, the defendants' motion should be granted and the case dismissed with prejudice.

Facts

On March 23, 2015, Thomas Kean executed a client care agreement with Comfort Keepers for homemaker services to be rendered to his wife, Joan. A care plan made part of the agreement identified the services a Comfort Keepers' employee was to supply on a daily basis. For Joan, these services included various types of light housekeeping, laundry, personal care, and assistance with ambulation, including the use of a gait belt. Under the "other services or notes" section, "wheelchair" and "stair lift" are written in by hand, but no other additional services are identified.

On October 17, 2016, Thomas executed a second client care agreement with Comfort Keepers for homemaker services to be rendered to him. The included care plan listed various services to be provided, including bathing, dressing, toileting, reminding to

take medications, as well as housekeeping, laundry, linen changing, and grocery shopping. The care plan does not identify any other services other than those circled on the form.

Both client care agreements contained the following two paragraphs:

> 5. The Client acknowledges that Comfort Keepers employees who are not providing nursing services under the Plan of Care are not qualified or authorized to provide any medical services to the Client. The Client further acknowledges that if a medical emergency arises while any Comfort Keepers employee is providing services to the Client or is otherwise present, that employee will not provide any medical services to the Client, but the employee may call 911 for emergency assistance. The Client agrees to hold harmless Comfort Keepers and its employee for any medical services or other care that the employee may provide to the Client from instructions given by any 911 provider.
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> 6. . . . . The Client will not hold Comfort Keepers or its employee responsible for any bodily injury to the Client if the Client fails to follow the employee's instructions and/or the injury occurs while the Client is not in the presence of the employee. The Client further agrees not to hold Comfort Keepers or its employee responsible for any bodily injury, property damage, fire, theft, collision or public liability claims arising out of the operation of a motor vehicle that is not being operated or controlled by a Comfort Keepers employee.

Imelda Reyes, a Comfort Keepers' employee, provided the homemaker services for Joan and Thomas pursuant to both agreements.

At approximately 4:00 p.m. on November 4, 2016, Joan, Thomas, and Reyes arrived by car at the Keans' house, located at

1084 Bonita Drive in Park Ridge. Thomas drove, Joan sat in the front passenger seat, and Reyes sat in the back seat. Reyes helped Joan out of the car and into the house while Thomas parked and exited the car in the garage. Thomas failed to turn off the car's engine, leaving it running in the closed garage.

Thomas entered the house, and Reyes began cooking dinner. After dinner, all three prepared to go to bed at approximately 8:45 p.m. It is undisputed that the Keans' house did not contain any carbon monoxide detectors.

The record presents conflicting facts as to subsequent events. Reyes testified in her deposition that she and Thomas smelled something while going upstairs to the Keans' bedroom. Lisa Pasquinelli's interrogatory answer confirms this version of events based on Reyes's statements to Pasquinelli later at the hospital. Reyes's interrogatory answer states that she and Thomas smelled something in the stairwell and that Thomas said it was probably from outside. Reyes testified that she checked around the stairwell and the bedrooms "a little bit," but could not locate the smell. Despite these statements, Reyes also testified in her deposition, and later averred in an affidavit, that she did not smell anything around 8:45 p.m.

Regardless of these inconsistencies, it is undisputed that Reyes put the Keans to bed, took a shower, and went to her own room to sleep. Reyes testified that she felt hotter and more tired than usual, but assumed it was because Thomas liked to keep the house hot. Around 3:00 a.m. (November 5, 2016), Reyes awoke to Thomas shouting from the bathroom that he could not breathe. Reyes testified there was a strong gassy smell and it was difficult to breathe. She testified this was the first time she smelled something in the house. This account coincides with what Reyes told providers at the hospital.

Reyes called 9-1-1. Reyes testified that the dispatcher told Reyes to leave the house. Reyes responded that she could not leave because the Keans were in the house. The dispatcher did

not instruct Reyes to take the Keans outside. The Park Ridge Police Department arrived, and Reyes answered the door. The police took Reyes outside where she quickly became unconscious.

The Park Ridge Fire Department (PRFD) arrived and immediately used a four-gas meter that detected dangerous levels of carbon monoxide. Paramedics and firefighters had difficulty evacuating the Keans from the upstairs bedroom and bathroom because the stairs were narrow and Joan and Thomas were both unconscious. Thomas weighed 222 pounds while Joan weighed 130 pounds. It took two to three persons to remove the Keans from the house. A member of the PRFD located the Keans' car in the attached garage with the engine running and indicated it was the source of the carbon monoxide.

The PRFD transported Joan, Thomas, and Reyes to Lutheran General Hospital by ambulance. Thomas died soon after arrival, at 4:18 a.m. The Cook County medical examiner opined that Thomas died of: (1) carbon monoxide intoxication; (2) vitiated atmosphere; and (3) residential infusion from motor vehicle exhaust. Joan died approximately two weeks later. The medical examiner listed her cause of death as Alzheimer's disease. Reyes survived.

On February 5, 2018, two of the Keans' five children, Lisa Pasquinelli and Brian Kean, filed a three-count, first-amended complaint. Counts one and two are brought on Joan's behalf pursuant to the Wrongful Death Act, 740 ILCS § 180/1, *et seq.*, and the Survival Act, 755 ILCS 5/27-6. Count three is brought on Thomas's behalf pursuant the Wrongful Death Act; there is no corresponding Survival Act claim. In each count, the complaint alleges that the defendants owed Joan and Thomas a duty of reasonable care to provide the defendants' services. The complaint claims that the defendants breached their duty of care by failing to: (1) provide adequate medical and personal care and supervision; (2) provide necessary services in accordance with their duties; (3) provide care and services to prevent injury or death; (4) assess and reassess the Keans' requirement for

assistance; (5) update a care plan; (6) implement appropriate interventions, including appropriate level of monitoring and supervision; (7) notify the Keans' physician, family members, or first responders regarding the Keans' condition; (8) provide nursing measures to meet individual care needs; (9) ensure that the Keans' environment remained free of accident hazards; (10) investigate a strange odor; (11) take appropriate measures to ensure the Keans' safety after smelling a strange odor; (12) monitor and supervise the Keans; (13) provide care to the Keans; (14) provide services in compliance with all applicable professional standards; (15) promote the Keans' care in a safe manner; (16) ensure the car was turned off; (17) monitor and supervise the Keans while under the defendants' care; and (18) properly train Reyes.

On March 8, 2018, the Defendants answered the first amended complaint. On October 18, 2018, the defendants filed a motion to dismiss the complaint with prejudice. The court entered and continued briefing the motion for the parties to complete supplemental written discovery and to depose various witnesses. On February 14, 2020, the plaintiffs responded to the defendants' motion. On February 27, 2020, the defendants filed their reply. This court has reviewed all of the parties' submissions.

<u>Analysis</u>

The defendants bring their motion to dismiss pursuant to Code of Civil Procedure section 5/2-619(a)(9). *See* 735 ILCS 5/2-619(a)(9). A section 2-619(a)(9) motion provides for the involuntary dismissal of a claim based on "affirmative matter" outside the pleadings. *Id.* Affirmative matter includes an affirmative defense, which is "something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). A claimed lack of duty is an affirmative defense since duty is an essential element of any negligence cause

of action. *See Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011) (citing *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007)).

There exist two interrelated procedural and substantive problems with the defendants' motion to dismiss that must be addressed at the outset. First, as a procedural matter, the motion is untimely at this juncture because the defendants previously answered the plaintiffs' amended complaint. As a result, the defendants have waived any objection to the form or substance of the amended complaint. *See* 735 ILCS 5/2-612(c) ("All defects in pleadings, either in form or substance, not objected to in the trial court are waived."); *see People ex rel. Schad v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶ 90. In short, the defendants cannot now bring a motion to dismiss. Second, and as a substantive matter, the defendants' motion is not a motion to dismiss. The defendants argue that they owed the Keans no duties either to care or to rescue based on the client care agreements. Those arguments do not assert affirmative matter negating the plaintiffs' claims, but, instead, assert that the plaintiffs do not have the evidence to prove their claims. The defendants' motion is, therefore, properly a summary judgment motion.

Luckily for the defendants, there are procedural and substantive safe harbors. First, the defendants' motion – as a summary judgment motion – is timely because they presented it to this court more than 45 days prior to trial. *See* Cook Cnty. Cir. Ct. R. 2.1(f). Second, there is no prejudice to any of the parties to consider the motion to dismiss as a summary judgment motion since, on appeal, if any, this court's ruling will be subject to *de novo* review. *See Safford-Smith, Inc., v. Intercontinental East, LLC*, 378 Ill. App. 3d 236, 240 (1st Dist. 2007) (citing *Gouge v. Central Ill. Pub. Serv., Co.*, 144 Ill. 2d 535, 541-42 (1991)); *see also Friends of the Parks v. Chicago Park Dist.*, 203 Ill. 2d 312, 319-320 (2003) (citing cases).

The Code of Civil Procedure authorizes the issuance of summary judgment, "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. A court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed. of the City of Chicago*, 202 Ill.2d 414, 421, 432 (2002).

In this instance, the defendants argue that the plaintiffs lack sufficient evidence to establish the duty element essential to their causes of action. Such an approach is termed a *Celotex* motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. Courts are, however, admonished to grant summary judgment on a *Celotex* motion only if the record indicates that a plaintiff had extensive opportunities to establish their case but failed in any way to demonstrate that it could be achieved. *See Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

The defendants' central argument in support of their motion is that they owed the defendants no duty to: (1) ensure that the Keans' home complied with the Carbon Monoxide Detector Act; or (2) turn off the car's ignition. In both respects, the defendants argue that the terms of the client care agreements: (1) do not require the services the plaintiffs argue should have been provided; and (2) explicitly exempt the defendants from liability resulting from Thomas's operation of a motor vehicle. The defendants also argue that Joan's death was not proximately caused by carbon monoxide exposure.

The plaintiffs in response look not to the agreements, but to the common law. The plaintiffs argue that the defendants owed the decedents a duty of care based on the "prudent-person standard" applicable to all defendants. In support, the plaintiffs cite to a singular case, *Collins v. Northern Trust Co.*, 391 Ill. App.

3d 882 (2d Dist. 2009). In *Collins*, the court found the applicable standard of care in any instance is at least partially subjective and incorporates an actor's capacity to react to specific, apparent risks. *Id.* at 888-89. *Collins* is, however, neither factually relevant nor legally persuasive. *Collins* concerned a guardian's alleged mismanagement of an investment fund on behalf of two wards. *Id.* at 884-85. No agreement controlled the relationship between the guardian and the wards, but the Probate Act governed the guardian's investment choices. *Id.* at 887 (citing 755 ILCS 5/11-13(b), 5/21-2(a) & (c)). The court recognized that the standard of care for managing a ward's investments is, "'the same degree of vigilance, diligence and prudence as a reasonable man would use in managing his own property.'" *Id.* at 888 (quoting *Parsons v. Estate of Wambaugh*, 110 Ill. App. 3d 374, 377 (1st Dist.1982) and other cases). As a consequence, a court may consider the prudent-person standard if the defendant raises a mistake-in-judgment defense. *Id.* at 889. The defendants here do not raise such a defense.

Although *Collins* is not insightful in this case, the decision prompts an analysis of the common law duty principles that the plaintiffs argue apply. Generally, a person has a duty to all others to exercise ordinary care to guard against injury naturally flowing as a reasonably probable and foreseeable consequence of their actions. *See Doe-3 v. McLean County Unit Dist. No. 5,* 2012 IL 112479, ¶ 21. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See id.*, ¶ 22 (quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006)). The relationship is "a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id.* (citing *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18). A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the

weight accorded to each based on the case's particular circumstances. *Id.*

As to the first factor, it is plain that the occurrence causing a plaintiff's injury, "must not have been simply foreseeable . . . ; it must have been reasonably foreseeable. The creation of a legal duty requires more than a mere possibility of occurrence." *Cunis v. Brennan*, 56 Ill. 2d 372, 375-76 (1974). "In judging whether harm was legally foreseeable we consider what was apparent to the defendant at the time of his now complained of conduct, not what may appear through exercise of hindsight." *Id.* at 376. It is also well settled that a negligence claim will not stand if the plaintiff's injury results from, "freakish, bizarre or fantastic circumstances . . . ." *Washington v. City of Chicago*, 188 Ill. 2d 235, 240 (1999) (quoting *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 376 (1990)).

In this case, the inexorable conclusion is that Joan's injuries and Thomas's death were the result of a horrific and wholly extraordinary set of circumstances. It is simply not reasonably foreseeable that this tragedy would occur because Reyes did not know that Thomas had left the car's engine running in the garage for hours after arriving back home. Indeed, the only way to find the outcome to be reasonably foreseeable would be to assume the opposite – that Reyes knew the car was idling in the garage, a wholly counterfactual conclusion, and did nothing about it.

The third factor – the magnitude of the burden of guarding against the injury – also weighs against imposing a duty on the defendants. In essence, the plaintiffs seek to impose on Reyes a duty to presume things beyond her knowledge. It is unexplained how Reyes could have been expected to know either that a particular odor could be life threatening or that she was expected to locate the odor's source. The purported burden runs head on into the uncontested fact that Reyes could only smell the odor in the stairway. In short, the situation inside the Keans' home did not present Reyes with even minimal clues that could have

supported further investigation. To expect more from Reyes under such conditions is untenable.

The fourth factor – the consequences of placing the burden on the defendant – follows from the third. If the plaintiffs are correct that Reyes owed the Keans a duty to investigate the cause of the odor under these circumstances, then her duties are effectively limitless. Reyes's limited duties would be transformed into a hawkish duty to retrace the Keans' every action; ensuring they did not leave a facet running, swallow medication and not poison, or disclose personal information in a telephone or on-line scam. Reyes's burden of following up on all of the Keans' past conduct would unquestionably have reduced the amount of time she had to devote to their current needs. That is not a burden reasonably imposed.

This court's conclusion that the defendants owed the decedents no common law duty is, ultimately, useful but not controlling. The common law, prudent-person standard is unavailing in light of uniform precedent holding that, if a contract exists between the parties, the defendant's duties are imposed by the contract, not the common law. In *Ferentchak v. Village of Frankfort*, for example, the court held that the skill and care required of a licensed, professional engineer depended on contract terms, not the common law. *See* 105 Ill. 2d 474, 482 (1985). "'The scope of that duty, although based upon tort rather than contract, is nevertheless defined by the . . . contract' between the engineer and the developer." *Id.* (quoting *Bates & Rogers Constr. Corp. v. North Shore Sanitary Dist.*, 92 Ill. App. 3d 90, 97 (2d Dist. 1980)).

Since the client care agreements and the care plans establish the scope of the defendants' duties owed to the decedents, the focal issue as to the defendants' motion is one of contract interpretation. Those rules are well settled. The primary objective of the court in interpreting a contract is to give effect to the parties' intent. *See Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). That goal is achieved by looking to the contract's

language. *Id.* at 233. A contract is to be construed as a whole, viewing each provision in light of all others. *Id.* In other words, the parties' intent cannot be determined by viewing a clause or provision in isolation. *Id.* If the words in the contract are clear and unambiguous, they are to be given their plain, ordinary, and popular meaning. *Central Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004).

With these legal principles, the scope of the defendants' duties to each decedent must be addressed in light of the agreements' language. First, as to Thomas, the care plan appended to his client care agreement assigned Reyes limited tasks of assisting with bathing, dressing, toileting, reminding to take medications, as well as housekeeping, laundry, linen changing, and grocery shopping. The agreement neither states explicitly nor contemplates a duty to protect Thomas from harming himself or others. Neither the client care agreement nor the care plan identifies a duty to ensure that a car's ignition be turned off after Thomas drove. Second, as to Joan, the care plan provides a longer list of Reyes's duties. These included various types of light housekeeping, laundry, personal care, and assistance with ambulation, including the use of a gait belt. Under the "other services or notes" section, the use of a wheelchair and stair lift are indicated, but no other additional services are identified.

Neither Thomas's nor Joan's client care agreement or care plan explicitly or implicitly imposed a duty on Reyes to control in any manner the operation of a motor vehicle. Such an omission is consistent with Reyes' general unfamiliarity with vehicles. Reyes did not own or drive a car, and she did not have a driver's license. She had never operated Thomas's car. If the contract had imposed on Reyes a duty as to the use of a motor vehicle, such a provision would have been fundamentally at odds with Reyes' lack of abilities in that area.

The client care agreement and care plans are also silent on other duties the plaintiffs argue or imply are imposed on the

defendants. For example, the agreements and plans do not require Reyes to investigate and identify the source of odors in the Keans' house. The documents also do not require Reyes to call 9-1-1 or to evacuate or assist in evacuating either Joan or Thomas under any circumstances.

The clarity of the client care agreements and care plans as to the scope of Reyes's duties is further reflected in two of the agreements' explicit exculpatory clauses. First, paragraph five provides that: "The Client agrees to hold harmless Comfort Keepers and its employee for any medical or other care that the employee may provide to the Client from instructions given by any 911 service provider." That provision is important because Reyes testified that the 9-1-1 dispatcher did not instruct her to provide any medical or other care. Rather, the dispatcher told her to evacuate the house, an instruction Reyes did not follow because the Keans were also in the house.

Second, paragraph six explicitly provides that: "The Client further agrees not to hold Comfort Keepers or its employees responsible for any bodily injury property damage, fire, theft, collision or public liability claims arising out of the operation of a motor vehicle that is not being operated or controlled by a Comfort Keepers employee." This plain exculpatory language is not limited to injury incurred when a vehicle is driven. Rather, the clause applies to a vehicle's "operation," a word that has much broader application. It is plain that Thomas's car was still operating because its engine remained on as a result of Thomas's forgetfulness. The record is equally plain that Reyes never operated or controlled Thomas's car at any time on November 4 or 5, 2016. Thus, even if any other portion of the care agreements or plans could be interpreted to impose a contractual duty on Reyes vis-à-vis Thomas's car, the plain language of the exculpatory clause in paragraph six absolves the defendants of any liability they might have otherwise owed to the decedents.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' summary judgment motion is granted;
2. Case 17 L 10395 is dismissed with prejudice as to all defendants and all third-party claims;
3. Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason for delaying either enforcement or appeal or both of this court's order;
4. Case 18 L 11239 continues as to all parties; and
5. This matter shall be set for case management upon further notice of the court.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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