STATE OF MICHIGAN

IN THE SUPREME COURT

COSETTE ROWLAND, Personal Representative of the Estate of VIRGINIA KERMATH, deceased,

Plaintiff-Appellant,

v

INDEPENDENCE VILLAGE OF OXFORD, LLC d/b/a Independence Village of Waterstone; UNIFIED MANAGEMENT SERVICES, LLC d/b/a Senior Village Management; and SENIOR VILLAGE MANAGEMENT, LLC d/b/a Independence Village Management,

Defendants-Appellees,

Supreme Court No. 161007

Court of Appeals No. 345650

Lower Court No. 16-156377-NO

PLAINTIFF'S REPLY TO DEFENDANTS-APPELLEES' RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

DONNA M. MACKENZIE (P62979)
JULES B. OLSMAN (P28958)
LISA K. WINER (P61730)
OLSMAN MACKENZIE PEACOCK & WALLACE, P.C.
Attorneys for Plaintiff-Appellant
2684 West Eleven Mile Road
Berkley, MI 48072
248-591-2300 / 248-591-2304 [fax]

Date: June 29, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

A. The evidence in this case proves that Defendants' facility is not "independent" living.

Defendants do not deny that they provide room and board and supervised personal care to 21 or more unrelated people who are 55 years of age or older. Defendants do not deny that they have avoided the home for the aged licensure requirements simply because the person that provided "room" and the person that provided "supervised personal care" were related and had a supervised personal care arrangement that was in effect for at least 2 consecutive years before the date of the facility's request.[1]

Even more telling, in their request to the state of Michigan for an exemption to the statutory requirement that the facility be licensed, Defendants ***admit*** that Independence Village *does provide* "supervised personal care" and "room or board or both." (Exhibit 19) Defendants also ***admit*** on this form that "**personal care has been continuously provided at this facility since 01/2006**."[2] (Exhibit 19)

Despite the above, Defendants continue to falsely maintain that they are "independent" living. In fact, in its response brief on appeal, Defendants use the word "independent" 60 times! As the exemption application proves, however, Defendants' facility was not independent, but

[1] "Related is defined to mean any of the following personal relationships by marriage blood or adoption: spouse, child, parent, brother, sister, grandparent, grandchild, aunt, uncle, stepparent, stepbrother, stepsister, or cousin. Related also means an entity owns or is owned by a person that has a direct or indirect ownership interest in another entity that provides a component of operations or service as defined by MCL 333.21311a(8)(b)." (Exhibit 19)

[2] These admissions were made in a signed document which stated: "I further certify by my signature below that the information contained herein is true and accurate and that the penalty for submitting a false or inaccurate attestation is an administrative fine of $5,000. Submitting false or inaccurate information could result in a denial of this request and/or revocation of an exemption." (Exhibit 19)

instead had been providing personal care continuously since 2006.[3]

Moreover, Defendants' attempt to claim that *only* 37 of the apartments at Independent Village were "enhanced" living, and that the rest were "independent," is also not supported by the exemption application. In fact, a review of the licensure exemption application reveals that Independence Village ***requested the exemption for all 290 residents*** of its facility! The import of Defendants' continued misrepresentations are critical in this case, especially because the trial court granted defendants' motion in the midst of discovery in this matter.

Moreover, the fact that Defendants were able to avoid licensure because of a legal loophole does not immunize Defendants from their *common law* duties to their residents. Notably, nothing in the licensing statute abolishes any common law duty for licensed or non-licensed facilities.

B. <u>The evidence in this case proves that Defendants had a special relationship with Ms. Kermath.</u>

Defendants' improperly rely on *Holles v Sunrise Terrace, Inc*, 509 SE2d 494 (Va 1999) in support of their claim that a special relationship did not exist in this case. In *Holles*, the estate of a former resident of a county senior center sued the facility's management services provider arising out of a rape and robbery of a resident by an intruder. The Court found that the management services provider owed no common law duty of care to the resident. Putting aside the fact that the *Holles* decision was considered under Virginia statutes and law and is not binding or persuasive to this court, the *Holles* court did not consider the duty of the *facility*, Lincolnian Senior Center. Instead, *Holles* only considered the duty of the facility's *management services provider*. This is

[3] This is further supported by the testimony of leasing agent Susan Taylor, who stated that a resident was able to get additional personal care services from the on-site home care company, Senior Home Care Solutions, regardless of whether they resided in the alleged "independent" living or "enhanced" living section of the building. (Exhibit 3 to Plaintiff's Application for Leave to Appeal, Deposition of Susan Taylor, pp. 19-20, 25-26)

an important distinction because the issue in this case is whether the *facility* (Independence Village) – not the management services provider (Senior Home Care Services) – is responsible for Ms. Kermath's injuries.

In addition, *Holles* involved criminal activity, a rape and a robbery by an intruder. This case does not involve criminal acts by a third party. This case involves negligent action of a facility that was being paid to provide a safe living environment to a resident. Plaintiff's injury was not caused by an intruder, but by Defendants' failure to adequately protect its vulnerable residents.

Finally, Defendants improperly attempt to distinguish this case from *Washnock v. Brookdale Senior Living, Inc.*, 2:12-cv-11607-JAC-MAR, p. 10 (E.D. Mich February 6, 2014) (Exhibit 17 to Plaintiff's Application for Leave To Appeal). Defendants try to distinguish this case from *Washnock* by arguing that a substantial number of people in the facility in *Washnock* had some degree of cognitive impairment. However, this is not a distinction, but a similarity. In fact, the evidence in this case shows that at Independence Village, like in *Washnock*, **a significant number of the residents at Defendants' facility had some degree of cognitive impairment**. In fact, Susan Taylor, the leasing agent for the facility who met with potential residents and/or their families to give them a tour and/or sign leasing paperwork, testified that ***50% of the time, she would deal only with a family member of the resident***! ((Exhibit 3 to Plaintiff's Application for Leave to Appeal, Deposition of Susan Taylor, p. 15) 30% of the time she communicated with a family member and the resident, and ***only 20% of the time she dealt exclusively with the resident***. (*Id.*) Taylor also testified that if a family member signed the lease, they would need to be a duly appointed power of attorney or court appointed guardian of the resident. (Deposition of Susan Taylor, pp. 31-33) Therefore, Defendants' leasing agent was dealing with a power of attorney or

guardian *at least* 50% of the time; this is clearly a substantial number of the residents, similar to *Washnock.*

Defendants further argue that *Washnock* should not apply here because Ms. Kermath was given keys to her apartment. Putting aside the fact that whether the resident in *Washnock* was given keys was not the sole factor for the court's decision, there were in fact residents in the facility in *Washnock*, who, like Ms. Kermath, were given keys. In fact, residents in *Washnock* who owned cars and were able to drive were given keys to the facility. The Court's decision in *Washnock* established that **the facility had a duty to all of its residents**, not only certain residents who were not given keys.

Likewise, Defendants' attempt to distinguish the instant case because of the fact that Ms. Kermath hired her own caregiver to provide support is also misplaced. Whether Ms. Kermath hired her own caregiver, or Defendants' on-site home care provider Senior Home Care Solutions, to provide support only heightens the duty owed to Ms. Kermath by Independence Village. The fact that Ms. Kermath hired assisted living services is further proof that she was a vulnerable adult who needed personal care services. The fact that Independence Village referred Ms. Kermath to the independent caregiver proves that Independence Village was aware of Ms. Kermath's needs. In fact, Independence Village referred Ms. Kermath's family to the private caregiver to replace Defendants' on-site caregiver, Senior Home Care Solutions, because Senior Home Care Solutions had been making mistakes administering Ms. Kermath's medication, including her dementia medication. (Exhibit 5 to Plaintiff's Application for Leave To Appeal, Transcript of Cosette Rowland's Deposition, p. 10) Again, this is further proof that Independent Village was aware of Ms. Kermath's cognitive impairment.

The evidence in this case very clearly proves a special relationship between Ms. Kermath

and Independence Village. Independence Village has admitted to the state of Michigan that it provided "supervised personal care" and "room or board or both," to vulnerable adults who need to reside in a senior care environment for their own safety and protection. Allowing the Court of Appeals decision to stand would give unlicensed senior care facilities a license to neglect vulnerable adults. This message would be detrimental to the safety of residents of unlicensed senior care facilities, and is a harmful public policy for the state of Michigan and its residents.

C. In considering foreseeability, Defendants ignore their own *actual knowledge* and focus on what Ms. Kermath and her family knew.

Defendants argue that Ms. Kermath's injury was not foreseeable because her family did not think she would exit the building on her own. However, Defendants entirely ignore the fact that they had *actual knowledge* that such a scenario was not only possible, but was well-known within the senior living industry, and had in fact occurred at one of Defendants' own properties! (Exhibit 4 of Plaintiff's Application for Leave to Appeal, Deposition of Grace Derzen, p. 32-33)

In *Iliades v Dieffenbacher North America Inc*., 501 Mich 326; 915 NW2d 338 (2018), a press operator who sustained serious injuries after reaching inside a rubber molding press machine brought a products liability action against manufacturer of the machine, alleging negligence, gross negligence, and breach of warranty. The *Iliades* Court recognized that under Michigan common law, foreseeability depends on whether a reasonable person "could anticipate that a given event might occur under certain conditions." *Id.* (citations omitted) Applying that common law meaning of the phrase "reasonably foreseeable," the *Iliades* Court deemed the critical inquiry to be whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of the misuse. The Court noted that whether a manufacturer should have known of a particular misuse may depend on whether that misuse was a common practice, or if foreseeability was

inherent in the product. The court noted that the alleged misuse would only be "reasonably foreseeable" if the manufacturer could have anticipated that the "given event," i.e. reaching inside the press to remove rubber parts and transgressing the light curtain while the press was in automatic mode—might occur under certain conditions. To answer that question, the Court looked to the record evidence to decide ***whether the manufacturer knew or should have known*** of the plaintiff's conduct. To be clear, the *Iliades* Court never looked to the record evidence to decide whether the plaintiff, or a member of plaintiff's family, knew or should have known that plaintiff would try to misuse the product in the way that he did.

Applying the *Iliades* reasoning in this particular case, the court must look to the record evidence to decide ***whether Independence Village*** – not Ms. Kermath's family – ***knew or should have known of Ms. Kermath's conduct***.

The evidence in this case overwhelmingly supports a conclusion that Independence Village knew or should have known of the possibility of Ms. Kermath's conduct. The median age of a resident at Defendants' facility varied between 70 and 90 years old. At least 50% of those residents had a power of attorney or guardian who signed their lease, and another 30% of residents were accompanied by a family member when the lease was entered into. The high rates of cognitive decline in the senior population were such a concern that Defendants offered Senior Home Care Solutions to every single resident who moved into their facility, including Ms. Kermath. (Exhibit 4 to Plaintiff's Application for Leave To Appeal, Deposition of Graze Derzen, at pp. 20-21)

Moreover, there is no doubt that Defendants knew that wandering was common among elderly residents of senior living facilities who have cognitive issues. In fact, a resident of one of Defendants' own facilities had wandered before. Defendants experienced a fatal elopement after a

resident wandered away from one of their facilities in Petoskey and died. (Exhibit 4 to Plaintiff's Application for Leave To Appeal, Deposition of Grace Derzen, p. 32)

Defendants also specifically knew that Ms. Kermath had dementia and was at risk of wandering because she had previously wandered in the facility. (Exhibit 11 to Plaintiff's Application for Leave To Appeal, Deposition of Octavia Jones, p. 62)

Thus, to suggest that it was unforeseeable that a vulnerable, cognitively impaired resident like Ms. Kermath could become injured after wandering through an unmonitored side door of the facility is disingenuous. It was foreseeable and even probable that a cognitively impaired resident like Ms. Kermath could have exited the unmonitored side door of Independence Village's facility with or without keys, become locked out and suffer an injury. Therefore, the Court of Appeals decision must be reversed.

CONCLUSION

The Court of Appeals improperly affirmed summary disposition in favor of Independence Village. Independence Village had a common law duty of care to Ms. Kermath where a special relationship existed and where injury was foreseeable.

After this incident, Independence Village hired a nurse to do regular assessments of residents to ensure that the residents were appropriately placed at the facility. (Exhibit 4 to Plaintiff's Application for Leave To Appeal, Deposition of Grace Derzen, p. 30) In addition, after Ms. Kermath's injury, Defendants installed video surveillance on the exit doors to keep the residents safe from leaving the building unattended and suffering injury. (Exhibit 3 to Plaintiff's Application for Leave To Appeal, Deposition of Susan Taylor, p. 42) If the Court of Appeals decision is allowed to stand, then unlicensed senior care homes like Independent Village – which

clearly house vulnerable elderly residents – will have no incentive to implement these types of safety measures to protect those vulnerable residents from the known dangers of everyday life associated with the steady decline in their own abilities to look after themselves. Therefore, the lower courts' orders must be reversed.

DONNA M. MACKENZIE (P62979)
JULES B. OLSMAN (P28958)
LISA K. WINER (P61730)
OLSMAN MACKENZIE PEACOCK & WALLACE, P.C.
Attorneys for Plaintiff-Appellant
2684 West Eleven Mile Road
Berkley, MI 48072
248-591-2300 / 248-591-2304 [fax]

Date: June 29, 2020