IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO.: 502020CA000276XXXXMB

LAURA BERMAN, Individually and as Personal Representative of the Estate of JARRETT BERMAN, deceased,

Plaintiffs,

v.

G.L. HOMES OF FLORIDA CORPORATION, DAKOTA HOMEOWNER'S ASSOCIATION, INC., GRS MANAGEMENT ASSOCIATES, INC., and 441 ACQUISITION, LLC,

Defendants.
_____/

MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants, G.L. Homes of Florida Corporation ("G.L. Homes") and 441 Acquisition, LLC ("441 Acquisition"), hereby file their Motion to Dismiss pursuant to Fla. R. Civ. P. 1.140(b), and state:

FACTUAL BACKGROUND

According to the Complaint, G.L. Homes and 441 Acquisition "owned, controlled, and/or managed the DAKOTA development." *Complaint*, ¶¶ 4 and 6. The deceased, Jarrett Berman, and the Plaintiff, Laura Berman, were homeowners in the Dakota community. *Complaint*, ¶ 8. While playing basketball in the Dakota community clubhouse, the deceased suffered cardiac arrest and passed away. *Complaint*, ¶ 12. Plaintiffs brought this action for wrongful death and negligence against G.L. Homes (Count I) and 441 Acquisition (Count IV).

STANDARD OF REVIEW

The purpose of a motion to dismiss is to "request the trial court to determine whether a complaint properly states a cause of action upon which relief can be granted, and if not, to enter an order of dismissal." *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) (citing *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022 (Fla. 4th DCA 1996)). When making the determination, a trial court "must confine itself to the four corners of the complaint and accept all allegations in the complaint as true." *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-61 (Fla. 5th DCA 1998).

Florida pleading rules require that a party plead all of the elements of a cause of action and the facts supporting those allegations to allow a defendant and the court to determine what is being alleged. *Barnett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999). In order to state a valid cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief to survive a motion to dismiss. *Visible Difference, Inc. v. Velvet Swing, LLC*, 862 So. 2d 753 (Fla. 4th DCA 2003). General allegations that are vague and conclusory are insufficient. *Beckler v. Hoffman*, 550 So. 2d, 68, 70 (Fla. 5th DCA 1989). Legal conclusions are not accepted as true in considering a motion to dismiss. *Gallego v. Wells Fargo Bank, N.A.*, 276 So. 3d 989 (Fla. 3d DA 2019).

ARGUMENT

Defendants owe no duty to Plaintiffs under any contract, statute, or case law relevant to the facts alleged in the Complaint. Therefore, the counts against G.L. Homes and 441 Acquisition must be dismissed with prejudice.

In Counts I and IV of the Complaint, Plaintiffs sued G.L. Homes and 441

Acquisition, respectively, for claims of wrongful death and negligence. The Complaint alleges that G.L. Homes and 441 Acquisition "owed a duty to the decedent, Jarret Berman, to maintain the subject premises in a reasonably safe condition, to refrain from conduct which would injure him, and/or to exercise reasonable care for the safety and protection of invitees, including Jarret Berman, in the event of a medical emergency." *Complaint*, ¶¶ 22 and 40. Specifically, the Complaint alleges negligence for the Defendants' "failing to have accessible life-saving equipment on the subject premises, and/or by failing to adequately train its staff in the use of life-saving equipment" and alleges that G.L. Homes and 441 Acquisition "disregarded the applicable standard of care for the provision of emergency first aid…" as a result of the failure to have this life-saving equipment on hand. *Complaint*, ¶ 19.

"The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). In *Limones v. School Dist. of Lee County*, the Florida Supreme Court stated:

> Florida law recognizes the following four sources of duty: (1) statutes or regulations; (2) common law interpretations of those statutes or regulations; (3) other sources in the common law; and (4) the general facts of the case.[1]

161 So. 3d 384, 389 (Fla. 2015); *see also McCall v. Alabama Bruno's, Inc.*, 647 So. 2d 175, 178 (Fla. 1st DCA 1994) (under Florida law, duties arise via statute, contract, or common law). In a negligence action, the question of whether a duty is owed to a plaintiff

[1] The "general facts of the case" source of duty refers to circumstances "arising from the acts of the defendant." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 n. 2 (Fla. 1992). Using that source to find a duty here would ignore the explicit determination by the Legislature as to the obligations of parties such as the Defendants.

is "always one of law and never one for the jury." *Fuentes v. Sandel, Inc.*, 189 So.3d 928, 932 (Fla. 3d DCA 2016). "[W]hether a 'duty of care' exists is a question of law to be determined solely by the court." *L.A. Fitness Int'l, LLC v.* Mayer, 980 So. 2d 550, 557 (Fla. 4th DCA 2008).

To advance beyond the Defendants' Motion, Plaintiffs must demonstrate the existence of a duty owed by G.L. Homes and 441 Acquisition to Plaintiffs. Plaintiffs cite no legal basis for any alleged duty to the deceased. No statute, contract, or common law concept imposes a duty upon G.L. Homes or 441 Acquisition in favor of Plaintiffs under the facts alleged. In fact, as set forth below, the Florida statutes and case law demonstrate that G.L. Homes and 441 Acquisition are entitled to a dismissal with prejudice as a matter of law.

G.L. Homes and 441 Acquisition Owed No Statutory Duty to Plaintiffs

While the circumstances here are certainly unfortunate, G.L. Homes and 441 Acquisition did not fail in any statutory duty. G.L. Homes and 441 Acquisition were not required to have a defibrillator or trained emergency staff at Dakota.[2]

The Cardiac Arrest Survival Act, § 768.1325, *Florida Statutes*, addresses defibrillator devices and their usage for medical emergencies and responses to cardiac conditions. Specifically, the statute states that it "does not establish any cause of action" and it "does not require that an automated external defibrillator device be placed at any building or other location or require an acquirer to make available on its premises one or

[2] While not clear from the Complaint, if the claimed duty breached is one to render care, no such duty exists under the law. The only obligation that may exist is to reasonably summon emergency responders for a patron in cardiac distress. Emergency responders reached the decedent within minutes of the cardiac event. Therefore, any implication of claims of failure to render or summon aid or the like cannot stand on the facts alleged.

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more employees or agents trained in the use of the device." *Fla Stat.* § 768.1325(5) (emphasis added). Thus, the Legislature expressly rejected the existence of the duty alleged by Plaintiffs in this action.

G.L. Homes and 441 Acquisition Assumed No Contractual Duty to Plaintiffs

Plaintiffs did not reference or attach any contract to their Complaint that would create the alleged duties they claim were owed to Plaintiffs by G.L. Homes or 441 Acquisition.

G.L. Homes and 441 Acquisition Owed No Common Law Duty to Plaintiffs

Lastly, Plaintiffs' allegations do not establish a common law duty owed to them by G.L. Homes or 441 Acquisitions. Two cases in Florida, as well as several from outside Florida, are clear on this point.

In *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008), L.A. Fitness was sued for wrongful death stemming from the death of a client while exercising at its fitness club. After reciting the very limited duties owed with respect to the rendering of medical assistance, the Fourth District opined explicitly that L.A. Fitness had no duty to provide defibrillators. The Court stated, "There is no common law or statutory duty that a business have [a defibrillator] on its premises," and cited to Florida's Cardiac Arrest Survival Act, § 768.1325, *Fla. Stat.*, referenced above. *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 561 (Fla. 4th DCA 2008).[3]

In *Limones v. School Dist. of Lee County*, the Florida Supreme Court addressed the issue of whether use of a defibrillator is required in the context of a public school

[3] In reaching its decision, the Fourth District noted that, "whether a 'duty of care' exists is a question of law to be determined solely by the court." *Id.* at 557.

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student participating in a sporting event. 161 So. 3d 384 (Fla. 2015). Of note here, the Court began its analysis by observing that, "As a general principle, a party does not have a duty to take affirmative action to protect or aid another unless a special relationship exists which creates such a duty." *Id.* at 390. The Court's decision in *Limones* stemmed entirely from the finding of "a special relationship between schools and their students …". The Court rejected the application of the defibrillator holding of *L.A. Fitness Int'l, LLC v. Mayer* to the case before it by contrasting the special relationship of students and schools with the commercial context and involvement of adults in *L.A. Fitness*.

The Florida Supreme Court in *Limones* reiterated that *L.A. Fitness* "determined that the duty owed by a commercial health club to an adult customer only required employees of the club to reasonably summon emergency responders for a patron in cardiac distress," and that "the commercial context and relationship in these [fitness club] cases is a critical distinction from the case before us." *Id.* at 391-2. The Court stated that "Florida common law recognizes a specific duty of supervision owed to students and a duty to aid students that is not otherwise owed to the business customer." *Id.* at 392 (emphasis added). Also critical to the Court's distinction is the explicit requirement of the Florida Legislature that schools are required to have a defibrillator and train appropriate personnel in its use. *See* § 1006.165, *Fla. Stat.* In conclusion, the Court stated:

> Notably, the Legislature has not so regulated health clubs or other commercial facilities, even though the foreseeability for the need to use an AED may be similar in both contexts. [citing *L.A. Fitness*]. The relationship between a commercial entity and its patron quite simply cannot be compared to that between a school and its students. We therefore conclude that the facts of this case are not comparable to those in *L.A. Fitness.*

Id. at 392.

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The Florida Supreme Court's reasoning dictates the result here. G.L. Homes and 441 Acquisitions simply owed no common law duty to the Plaintiffs as a matter of law under the facts alleged. Accordingly, Plaintiffs may not recover from G.L. Homes or 441 Acquisitions under Counts I or IV.

WHEREFORE, Defendants, G.L. Homes of Florida Corporation and 441 Acquisition, LLC respectfully request the entry of an order granting this Motion to Dismiss, together with any such further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February 2020, a true and correct copy of the foregoing was filed with the Clerk of Court by using the Florida Courts e-filing Portal, which will send an automatic e-mail message to counsel of record registered with the e-Filing Portal system.

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