SECOND DIVISION
DECEMBER 27, 2011

No. 1-10-3178

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN SMITH, and BEST WAY TRUCK TRAINING, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 08 L 6401
OPPORTUNITY FRANCHISING, INC., d/b/a Jani-King,	)	Honorable Jeffrey Lawrence, Judge Presiding.
Defendant-Appellee.	)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

¶1 *Held*: The trial court properly dismissed the plaintiffs' third amended complaint on the counts of battery, breach of contract, negligence and violation of the Consumer Fraud and Deceptive Practices Act because the plaintiffs failed to state a claim that would entitle them to relief.

¶2 This appeal arises from a February 11, 2010 order entered by the circuit court of Cook County which granted defendant-appellee Opportunity Franchising, Inc., d/b/a Jani-King's (Jani-King) motion to dismiss plaintiffs-appellants John Smith and Best Way Truck Training, Inc.'s (Smith

and Best Way) third amended complaint on all counts with prejudice and without leave to amend. On appeal, Smith and Best Way argue that: (1) they adequately stated a cause of action for assault and battery against Jani-King; (2) the trial court erred in dismissing the breach of contract count in the complaint; (3) they adequately pled an alternative cause of action for negligence; and (4) they properly stated a cause of action for a violation of the Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2008)). For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3 BACKGROUND

¶4 John Smith is an individual residing in Illinois, and is the sole shareholder, sole officer and sole director of Best Way Truck Training, Inc. Jani-King is a Texas corporation registered to do business in the state of Illinois. Jani-King does business in Cook County, Illinois. In 2004, defendant Milton Kinnison (Kinnison) entered into a Franchise Agreement with Jani-King that granted Kinnison a license to use methods, procedures and products developed by Jani-King in the business of operating a professional cleaning services company. In 2006, a woman representing that she was a saleswoman for Jani-King solicited Smith and Best Way to purchase Jani-King's janitorial services for Smith and Best Way's office in Chicago, Illinois. On or around May 3, 2006, Kinnison presented Smith and Best Way with a signed proposal letter for janitorial services. The letter contained multiple provisions that are in dispute in this matter, and stated in relevant part:

> *"**JANI-KING** appreciates this opportunity, and enclosed is our completed proposal for a professionally customized cleaning program, along with your customized cleaning schedule.*

> *The total monthly charge represents your only cost, and is inclusive of:*
>
> ***All labor***
>
> ***All supervision***
>
> ***All material for cleaning***
>
> ***All equipment for cleaning***
>
> ***All payroll, payroll taxes, insurance.***
>
> *Each **JANI-KING** representative is fully covered by an insurance program that protects you in several ways. The Commercial Cleaning Service Bond, General Liability and Workers' Compensation coverages provide protection to our customers for claims due to loss of property or personal injuries that are the result of actions by **JANI-KING** personnel.*
>
> *Please do not hesitate to contact me for any additional information you deem necessary in assessing our proposal* ***."

¶5 On May 8, 2006, Smith and Best Way entered into a two-year Maintenance Agreement with Jani-King for janitorial services that was signed by both parties. The Maintenance Agreement did not contain any of the language in the May 3, 2006 proposal letter. Around January 2007, Smith and Best Way claim that they began complaining about Jani-King's poor cleaning services, and that Jani-King and Kinnison assured Smith and Best Way that the services would improve. Smith and Best Way claim that the service continued to deteriorate, and in March 2008 Smith sent a letter to

Jani-King stating that he was terminating the contract between the parties. Smith and Best Way claim that in response, they received a telephone call from a woman identifying herself as a Jani-King employee. The employee allegedly told Smith and Best Way that they could not cancel the Maintenance Agreement without paying $500 to buy out of the contract. Smith and Best Way stated that they refused to comply and informed Jani-King that they would not continue to pay for the defective services.[1]

¶6 On April 11, 2008, Smith and Best Way claim that Kinnison came to their office at 12655 S. Doty, Chicago, Illinois, to persuade Smith not to terminate the Maintenance Agreement. Smith and Best Way allege that after Smith refused to comply with Kinnison's verbal requests to continue the Maintenance Agreement, Kinnison assaulted and beat Smith about the head, face, back and body. Smith and Best Way allege that Smith sustained severe and permanent injuries including a stroke and disfigurement in and about his head, face, spine, nervous system, and cardiovascular system. Smith and Best Way claim that Smith contacted Jani-King and demanded that Kinnison and Jani-King pay for his injuries, or otherwise provide insurance coverage pursuant to the language in the May 3, 2006 proposal letter. Smith and Best Way allege that Jani-King and Kinnison refused to compensate Smith and refused to provide insurance coverage for his injuries.

¶7 On June 11, 2008, Smith filed a complaint in the circuit court of Cook County against

[1]The record contains two letters from Phil Arrington, Assistant Operations Manager of Jani-King, Illinois, dated March 27, 2008. The letters are not mentioned in the arguments of either party. The first letter denies Smith and Best Way's request to terminate the contract. The second letter offers to release Best Way from all liability if it agreed to pay "the sum of $390 in full satisfaction of any claims under the contract." It is unclear whether these letters were signed or whether Smith and Best Way received these letters.

Kinnison and Jani-King for assault and battery.[2] In response, Jani-King filed a motion to strike and dismiss Smith's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2008)). On October 27, 2008, the trial court granted Jani-King's motion to dismiss and also granted Smith leave to file his first amended complaint *instanter*. Smith's first amended complaint alleged the same assault and battery claims, and also alleged that Jani-King was liable under the doctrine of *respondeat superior*. On November 12, 2008, Jani-King filed a motion to dismiss Smith's first amended complaint pursuant to section 2-615 and section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2008)). As an attachment to its motion, Jani-King presented and affidavit of the Jani-King General Counsel which stated that Kinnison purchased a Jani-King unit franchise, but that Kinnison had never been an employee, contractor, representative, managing agent or franchisee of Jani-King Franchising, Inc. The affidavit also stated that Jani-King had not operated, managed, controlled, directed, maintained or supervised the operations of Kinnison. On January 14, 2009, the trial court granted Jani-King's motion to dismiss and granted Smith leave to amend. The trial court instructed Smith to include "facts supporting allegations that Kinnison's activities [were] foreseeable by [Jani-King]."

¶8 On July 7, 2009, Smith filed his second amended complaint. In addition to the claims previously alleged, Smith's second amended complaint claimed that he relied upon the representations made by the saleswoman of the quality and reputation of Jani-King in deciding to

[2]For the entirety of this matter, Kinnison and Jani-King are represented by different counsel. Smith did not join Best Way as a plaintiff in this matter until the third amended complaint was filed.

enter into a contract. Smith also claimed that Kinnison held himself out as an employee or managing agent of Jani-King. Smith claimed that Jani-King should have known that Kinnison was prone to violence, and that Jani-King was in a position to control Kinnison's behavior. Smith alleged that Jani-King ratified Kinnison's acts by falsely asserting that Kinnison was at another location on the date of the incident; by defending Kinnison and his actions; and by refusing to alter its procedures in response to customer complaints. On August 4, 2009, Jani-King filed a motion to dismiss Smith's second amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2009)). Before a ruling on this motion was given, at a case management conference on August 10, 2009, Smith requested and was granted leave to file a third amended complaint.

¶9 On August 13, 2009, Smith filed a motion for default against Kinnison. On August 24, 2009, Smith filed his third amended complaint in which he added Best Way as a plaintiff. In addition to all the claims previously alleged, Smith and Best Way alleged that Jani-King contracted to provide supervision of Kinnison and represented that it would provide Smith and Best Way with insurance coverage for injuries caused by Jani-King employees. Smith and Best Way separated the third amended complaint into four distinct counts: (1) battery against Kinnison and against Jani-King through the doctrine of *respondeat superior*; (2) breach of contract against Jani-King for failure to provide cleaning services, failure to supervise Kinnison, and failure to provide insurance coverage for Smith and Best Way's damages and personal injuries; (3) negligence for failure to supervise Kinnison and failure to provide insurance coverage for Smith and Best Way; and (4) breach of the Consumer Fraud Act against Jani-King for misrepresenting that Jani-King supervised Kinnison, misrepresenting that Kinnison was an "owner/operator" of Jani-King, and misrepresenting that Jani-

King customers are covered by insurance.

¶10 On August 28, 2009, Kinnison was granted leave to file his appearance through counsel. On September 29, 2009 Kinnison filed a response to Smith and Best Way's third amended complaint. On October 28, 2009, Jani-King filed a motion to dismiss Smith and Best Way's third amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2009)). On February 11, 2010, the trial court granted Jani-King's motion to dismiss Smith and Best Way's third amended complaint on all counts with prejudice and without leave to amend against Jani-King. The trial court ruled that the case was to continue only as to Kinnison. The trial court also ruled that Kinnison's actions were unforeseeable as to Jani-King and therefore outside the scope of his employment. On March 8, 2010, counsel for Kinnison filed a motion to withdraw, and the motion was granted on March 15, 2010. On May 17, 2010, Smith presented and filed a motion for default against Kinnison. On June 10, 2010, Kinnison was held in default for failing to file an appearance. The case was set for prove-up on July 29, 2010 but was dismissed for want of prosecution. On September 3, 2010, Smith presented a motion to vacate the dismissal which was granted. On October 20, 2010, at a prove-up hearing, the court ruled in favor of Smith and entered a judgment against Kinnison in the amount of $65,000, plus costs. Smith and Best Way appeal only the dismissal of their third amended complaint regarding Jani-King. The notice of appeal was filed on October 21, 2010.

¶11 ANALYSIS

¶12 On October 28, 2009, Jani-King filed its fourth motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2009)), for failure to state a cause of action. On February 11, 2010, the trial court granted Jani-King's motion to dismiss on all counts with prejudice and without

leave to amend. The case continued only as to Kinnison and a default judgment was entered against Kinnison on October 20, 2010. On October 21, 2010 Smith and Best Way timely filed a notice of appeal pursuant to Illinois Supreme Court Rule 303(a)(1) (eff. June 4, 2008). Therefore, we have jurisdiction to consider Smith and Best Way's arguments on appeal.

¶13 We determine whether the trial court properly granted Jani-King's motion to dismiss Smith and Best Way's third amended complaint. An order granting a motion to dismiss is reviewed by this court using the *de novo* standard of review. *Toombs v. City of Champaign*, 245 Ill. App. 3d 580, 583, 615 N.E.2d 50, 51 (1993). The court must construe the facts in the light most favorable to the plaintiff and determine whether the allegations of the complaint are sufficient to state a cause of action upon which relief can be granted. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12, 828 N.E.2d 1155, 1161 (2005). However, as Jani-King points out, "[t]he question of whether to grant or deny leave to amend a complaint is within the trial court's discretion." *Weidner v. Midcorn Corp*., 328 Ill. App. 3d 1056, 1059, 767 N.E.2d 815, 818 (2002). Absent an abuse of discretion, the trial court's decision will not be reversed. *Id*. at 1059, 767 N.E.2d at 818. "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815-16, 886 N.E.2d 1182, 1187-88 (2008) (citing *People v. Illgen*, 145 Ill. 2d 353, 364, 583 N.E.2d 515, 519 (1991)).

¶14 We first examine Smith and Best Way's argument that they properly stated a claim for battery and that Jani-King is liable through the doctrine of respondeat superior. Under the respondeat superior theory, an employer can be held liable for the tortious acts of their employees including

"negligent, wilful, malicious, or even criminal acts of [their] employees when such acts are committed in the course of employment and in furtherance of the business of the employer." *Alms v. Baum*, 343 Ill. App. 3d 67, 71, 796 N.E.2d 1123, 1127 (2003) (citing *Brown v. King*, 328 Ill. App. 3d 717, 722, 767 N.E.2d 357, 360 (2001)). In Illinois, the court looks to the Second Restatement of Agency (the Restatement) when determining whether an employee was acting in the scope of his employment when he committed the acts the plaintiff complains of. *Rodman v. CSX Intermodal, Inc.*, 405 Ill. App. 3d 332, 336, 938 N.E.2d 1136, 1139 (2010). According to the Restatement, three criteria must be met for an employee's acts to be considered within the scope of employment: (1) the act is of the kind the person is employed to perform; (2) the act occurs substantially within the authorized time and space limits; and (3) the act is committed, at least in part, for the purpose of serving the master. *Id*. at 336, 938 N.E.2d at 1139-40. Furthermore, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id*. at 336, 938 N.E.2d at 1140 (citing *Restatement (Second) of Agency* § 228 (1958)).

¶15 The court should decide, as a matter of law, that the employee was acting outside the scope of his employment only if no reasonable person could conclude that the employee was acting within the scope of his employment. *Maras v. Milestone, Inc.*, 348 Ill. App. 3d 1004, 1007, 809 N.E.2d 825, 828 (2004). If the act is committed in part to serve the master and in part for the venting of the employee's emotion, the employer may be vicariously liable. *Id*. at 1008, 809 N.E.2d at 828. However, if the act is committed solely for the employee's own benefit then the employer is not liable. *Id*. "Where an employee's deviation from the course of employment is slight and not unusual,

a court may find as a matter of law that the employee was still executing the employer's business***. Conversely, when a deviation is exceedingly marked and unusual, as a matter of law the employee may be found to be outside the scope of employment." *Pyne v. Witmer*, 129 Ill. 2d 351, 361, 543 N.E.2d 1304, 1309 (1989) (citing *Boehmer v. Norton*, 328 Ill. App. 17, 21, 65 N.E.2d 212, 214 (1946)).

¶16 In their brief, Smith and Best Way refer this court to section 229 of the Restatement. This section sets forth additional factors which the court should consider in determining whether the complained-of act of the employee is similar enough to employer-authorized conduct to fall within the scope of employment. The additional factors include, among other factors, the following: whether the act is commonly done by employees; the time, place, and purpose of the act; the previous relationship between the employer and the employee; whether the employer has reason to expect the act to be done; whether the employer furnished the instrumentality by which the harm is done; the extent of the departure from the normal method of accomplishing an authorized result; and whether the act is seriously criminal. *Restatement (Second) of Agency* § 229 (1958). Although Smith and Best Way attempt to use these factors to show that Kinnison's acts were within the scope of his employment, they are actually detrimental to Smith and Best Way's argument. As shown in the record, Kinnison, as a franchisee of Jani-King, was employed to provide cleaning services to third-parties based on a Maintenance Agreement. In no way do such duties require or give rise to physical contact between the service provider and the third-party. A severe beating that causes harmful physical injuries to the third-party is certainly not within the duties. This type of battery is not commonly committed by employees providing cleaning services, and it is a complete departure

from the normal method of providing cleaning services to a client. The employer or principal had no reason to expect such acts to be done. We hold that it was unforeseeable that an employee hired to provide cleaning services would severely batter a client.

¶17 Smith and Best Way allege that Kinnison was sent by Jani-King to resolve the contract dispute between the parties, yet they provide no facts to support this allegation. Furthermore, nowhere in the Maintenance Agreement does it provide that Kinnison's duties include contract negotiations. At most, the Maintenance Agreement provides the method by which either party could terminate the contract. Kinnison's actions in battering Smith clearly fell outside the agreement. In response, Jani-King cites numerous cases that have found that conduct which escalates to battery falls within the scope of one's employment only where hostile physical contact is common to the duties of the job or expected to occur in some capacity. *Rubin v. Yellow Cab Co.*, 154 Ill. App. 3d 336, 507 N.E.2d 114 (1987) (finding that it is improbable that a cab driver's duties would include using force or attacking a person, therefore beating another driver with a metal pipe during a traffic accident dispute is not within the scope of employment); *Stern v. Ritz Chicago*, 299 Ill. App. 3d 674, 702 N.E.2d 194 (1998) (the touching of clients' sexual organs is not within the scope of employment because it is not expected that masseurs would sexually assault a client during a massage); *Maras*, 348 Ill. App. 3d 1004, 809 N.E.2d 825 (employer may be liable for battery by an employee because, in caring for disabled children, physical restraint can be proper and predictable); *Sunseri v. Puccia*, 97 Ill. App. 3d 488, 422 N.E.2d 925 (1981) (whether a bartender biting off a patron's ear falls within the scope of employment is a question for the jury because excessive force may be anticipated under certain circumstances as part of a bartender's duties). We find that this case falls in line with the

reasoning of the cited cases. Because there was no reasonable expectation of physical contact between the parties in Kinnison's cleaning duties, the battery committed by Kinnison against Smith is not of the kind or scope of duties that Kinnison was employed to perform. It therefore falls outside of the scope of employment.

¶18 We also hold that Kinnison's acts occurred outside the authorized time and space limits of his employment. In this case, Smith and Best Way first communicated to Jani-King that they were terminating their contract in March 2008. The record provides two letters addressed to Smith from Jani-King on March 27, 2008. The letters acknowledge Smith's desire to terminate the contract and offer Smith a release from contract terms and liability for a fee of $390. Smith and Best Way further allege that Smith received a telephone call from a woman, who identified herself as a Jani-King employee, telling Smith he would have to pay $500 to buy out of the contract. Smith refused and explained that he would no longer pay for defective services. When Kinnison visited Smith on April 11, 2008, it was clear that Smith had no intention of continuing the contract. Once Kinnison's requests to negotiate were unpersuasive, he began to physically attack Smith.

¶19 This court recognizes, and Jani-King cites, an Illinois Appellate Court case that is particularly instructive on the time and space requirements of conduct within the scope of employment. In *Awe v. Striker*, 129 Ill. App. 2d 478, 263 N.E.2d 345 (1970), the plaintiffs played a carnival "bottle game" at a county fair. After being unhappy with the results of the game, the plaintiffs began to walk away from the concession when one plaintiff stated that the game was crooked and that he should notify the sheriff. *Id*. at 480, 263 N.E.2d at 346. In response, the carnival workers jumped on top of the plaintiff and hit him with hammers and their fists, breaking his leg in two places. *Id*. In *Awe*, this

court held that the business dealings between the parties ended at the conclusion of the bottle game, therefore, the subsequent battery committed by the carnival workers was outside the scope of their employment. *Id*. at 481-83, 263 N.E.2d at 346-47. The events in this case are analogous to *Awe*. As discussed, Kinnison was employed to provide cleaning services to Smith and Best Way. Thus, Kinnison's attempts at contract negotiation were most likely outside the scope of his employment because this was not the kind of conduct he was employed to perform. However, even if we were to hold that the negotiations were within the conduct he was employed to perform, his duties effectively ended when Smith refused to negotiate further and insisted on terminating the contract. Clearly, by the time Kinnison began to batter Smith the negotiations were over. Thus, Kinnison's battery falls outside the authorized time and space limits and outside his scope of employment.

¶20 Finally, we hold that Kinnison's battery was in no way related to the furtherance of his employment or to serve his employer. Although an employer may be liable for an employee's acts when they are motivated in part by a purpose to serve the employer and in part by the venting of emotion, an employer will not be liable when an employee's acts are committed wholly for his own benefit. *Maras*, 348 Ill. App. 3d at 1009, 809 N.E.2d at 828. In this case, we are unable to see how Kinnison's battery could serve his employer in any way after Smith clearly and repeatedly stated that the contract was at an end. It is entirely unreasonable to believe that beating Smith to the point of hospitalization would induce him to renew a contractual relationship with Jani-King. The battery seems to be motivated wholly by Kinnison's anger over Smith's failure to agree to Kinnison's demands, which escalated into a violent confrontation. Therefore, we hold that Kinnison's battery fell outside the scope of his employment and Jani-King could not be vicariously liable for those

actions as a matter of law. Therefore, the trial court did not err in dismissing the battery count in Smith and Best Way's third amended complaint.

¶21 Smith and Best Way next claim that the trial court erred in dismissing the breach of contract count in their third amended complaint against Jani-King. Smith and Best Way claim that Jani-King breached the contract between the parties by failing to provide cleaning services, failing to supervise Kinnison thereby allowing the battery to occur, and failing to provide insurance coverage for Smith's personal injuries. They base their argument on the language in the May 3, 2006 proposal letter which reads, in relevant part:

> *"The total monthly charge represents your only cost, and is inclusive of:*
>
> ***All labor***
>
> ***All supervision***
>
> ***All material for cleaning***
>
> ***All equipment for cleaning***
>
> ***All payroll, payroll taxes, insurance.***
>
> *Each **JANI-KING** representative is fully covered by an insurance program that protects you in several ways. The Commercial Cleaning Service Bond, General Liability and Workers' Compensation coverages provide protection to our customers for claims due to loss of property or personal injuries that are the result of actions by **JANI-KING** personnel*."

On May 8, 2011, the parties then entered into the Maintenance Agreement which contained none of the quoted language in the proposal letter. Jani-King points out that the language in the proposal letter was not part of the final contract language which was agreed to by Smith. Jani-King also argues: that Smith did not have standing to sue under the contract; that Smith and Best Way had repudiated the contract prior to the date of the battery; and that Kinnison was acting outside the scope of his employment and therefore outside the contract when he battered Smith. Because we hold that the language in the May 3, 2006 proposal letter was not part of the contract, we do not consider Jani-King's additional arguments.

¶22 This court has held that "although [l]etters of [i]ntent may generally be enforceable in Illinois***such letters are not necessarily enforceable unless the parties intend them to be contractually obligatory." *Interway, Inc. v. Algana*, 85 Ill. App. 3d 1094, 1098, 407 N.E.2d 615, 618 (1980). If the language in the letter of intent is unambiguous, then the construction of the alleged contract is a question of law to be determined by the trial court. *Id*. at 1098, 407 N.E.2d at 619. In *Interway*, this court held that a letter of intent that provided that it was "subject to" a subsequent contract was not binding on the parties. See generally *Interway*, 85 Ill. App. 3d 1094, 407 N.E.2d 615. The letter of intent in *Interway* even contained language such as "[t]his will confirm our agreement" and "we have agreed," yet this court held that the letter's overall tone exhibited the tentative nature of any agreement between the parties. *Id*. at 1100, 407 N.E.2d at 620. The *Restatement (Second) of Contracts* § 26 (1981) also provides that "[i]f the addressee of a proposal has reason to know that no offer is intended, there is no offer even though he understands it to be an offer. 'Reason to know' depends on not only the words or other conduct, but also on the

circumstances, including previous communications of the parties and the usages of their community or line of business."

¶23 We hold that the language in the proposal letter dated May 3, 2006 was not part of the Maintenance Agreement contract. Jani-King clearly did not intend to be bound by the language in the proposal letter. The letter is replete with statements showing Jani-King's appreciation of the opportunity to do business with Smith and Best Way, and their intent to continue negotiations with Smith and Best Way. Although the proposal letter did not provide that it was "subject to" a subsequent contract, it mentioned numerous times that it was a proposal. The letter also offered to provide Smith and Best Way with any additional information needed to assess its terms. The letter was in no way intended to be a final manifestation of the agreement between the parties, and Smith and Best Way clearly had reason to know that no binding offer was intended through the letter. Therefore, as a matter of law, the language in the May 3, 2006 proposal letter was not binding on the parties and the trial court did not err in dismissing Smith and Best Way's breach of contract count in their third amended complaint.

¶24 Next, Smith and Best Way argue that even if their *respondeat superior* and breach of contract counts fail, Jani-King should be found liable for Smith's injuries based on the voluntary undertaking theory of negligence. "Under the voluntary-undertaking theory, where a person voluntarily agrees to perform a service necessary for the protection of another person or their property, a duty may be imposed on the party undertaking the service; that party must perform the service in such a manner as not to increase the risk of harm to the other person who relies on the undertaking." *Claimsone v. Professional Property Management, LLC.*, 2011 IL App (2d) 101115, ¶ 21 (citing *Bourgonje v.*

Machev, 362 Ill. App. 3d 984, 996, 841 N.E.2d 96, 107 (2005)). This theory applies to cases of misfeasance (where a party performs a promised service negligently) and nonfeasance (where a party fails to perform the promised service altogether). *Claimsone*, 2011 IL App (2d) 101115 at ¶ 22. In a case involving nonfeasance, " 'a plaintiff's reliance on the defendant's promise is an independent, essential element' of the case.' " *Id*. (quoting *Bourgonje*, 362 Ill. App. 3d at 997, 841 N.E.2d at 108). Where "there is a deceptive appearance that performance had been made, or where a representation of performance has been communicated to plaintiff by defendant, or where plaintiff is otherwise prevented from obtaining knowledge or substitute performance of the undertaking," a plaintiff's reliance is reasonable. *Lewis v. Chica Trucking, Inc.*, 409 Ill. App. 3d 240, 256, 948 N.E.2d 260, 274 (2011) (quoting *Chisolm v. Stephens*, 47 Ill. App. 3d 999, 1007, 365 N.E.2d 80, 86 (1977)). In order to justify reliance, the plaintiff must be unaware of the actual circumstances and unable to determine such facts on their own. *Lewis*, 409 Ill. App. 3d at 256, 948 N.E.2d at 274 (quoting *Chisolm*, 47 Ill. App. 3d at 1007, 365 N.E.2d at 86).

¶25 The plaintiff must also show that the defendant's negligence was the proximate cause of the plaintiff's injury. Generally, proximate cause is a factual issue, however, it can be determined as a matter of law when the facts show that the plaintiff would never be able to recover. *Lewis*, 409 Ill. App. 3d at 257, 948 N.E.2d at 275. In *Lewis*, the plaintiff truck driver suffered injuries when the brakes on his truck failed. *Id*. at 248, 948 N.E.2d at 268. The plaintiff alleged that the defendant employer voluntarily undertook the duty to inspect and repair the truck's brakes after the plaintiff complained and the defendant sent the truck to a different garage for a complete inspection. *Id*. at 247-50, 948 N.E.2d at 267-70. The defendant filed a motion for summary judgment arguing that it

had no duty to maintain the truck and the trial court found in its favor. *Id.* at 2450-51, 948 N.E.2d at 269. On appeal, this court found that the defendant's duty was limited, at most, to making sure that the truck was inspected, but the defendant itself was not bound to inspect the truck. *Id.* at 257, 948 N.E.2d at 275. Furthermore, this court also found that even if the defendant breached its duty, the breach still would not be the proximate cause of the plaintiff's injuries because the defendant's conduct would have no impact on whether the other garage repaired the truck's brakes. *Id.*

¶26 The instant case is analogous to *Lewis*. Jani-King did not have a duty to prevent a battery against Smith. Jani-King's duty to supervise Kinnison in the performance of his duties related to his employment did not include a duty to foresee that Kinnison would batter Smith. Therefore, Jani-King's actions, or lack there of, were not the proximate cause of Smith's injuries as a matter of law. Therefore, Smith is not able to recover on the voluntary undertaking theory of negligence and the trial court did not err in dismissing that count of Smith's third amended complaint.

¶27 Lastly, Smith and Best Way argue that they properly stated a cause of action against Jani-King for a breach of the Consumer Fraud Act. For a private cause of action based on a breach of the Consumer Fraud Act, the four elements that must be fulfilled are: (1) a deceptive act or practice; (2) intent that the plaintiff rely on the deception; (3) the deception occurred in the course of trade or commerce; and (4) the plaintiff's injury was proximately caused by the fraud complained of. *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 121, 858 N.E.2d 56, 62 (2006). In order for a claim to be valid, the plaintiff must show that the alleged consumer fraud proximately caused their injury. *Id.* at 124, 858 N.E.2d at 64. "[A] 'deceptive act or practice' involves more than the mere fact that a defendant promised something and then failed to do it. That type of

'misrepresentation' occurs every time a defendant breaches a contract." *Zankle v. Queen Anne Landscaping*, 311 Ill. App. 3d 308, 312, 724 N.E.2d 988, 993 (2000).

¶28 We hold that Smith and Best Way's argument under this theory fails for multiple reasons. First, Smith and Best Way's argument is simply a restatement of their breach of contract count, and therefore their allegations do not qualify as deceptive acts. As discussed, Kinnison's behavior was unforeseeable. Smith and Best Way present no facts that show that Jani-King had any reason to know of or expect Kinnison's behavior, or that any action by Jani-King would have prevented Kinnison's behavior. Thus, even if Jani-King engaged in a deceptive practice, such deception would have no impact on the proximate cause of Smith's injuries. Therefore, Smith and Best Way are unable to state a claim for breach of the Consumer Fraud Act and the trial court did not err in dismissing that count of their third amended complaint.

¶29 Finally, we hold that the trial court did not abuse its discretion in dismissing Smith and Best Way's third amended complaint with prejudice and without leave to amend. Smith filed three amendments to the original complaint and each failed to state a cause of action. The trial court repeatedly asked Smith to plead specific facts in his complaint that would show that Kinnison's actions were foreseeable by Jani-King. Yet, in each amendment of the complaint, Smith failed to comply with the order. Upon dismissing Smith and Best Way's third amended complaint, the trial court found that Kinnison's actions were unforeseeable and therefore outside the scope of any alleged employment. We agree with this conclusion. Although the trial court did not include its reasoning for dismissing each count of Smith and Best Way's final complaint without leave to amend, it is clear that Smith and Best Way would not be able to recover on any of these counts as a matter of law.

Smith and Best Way present no evidence to show that the trial court's ruling was in any way arbitrary or unreasonable. Therefore, its ruling is affirmed.

¶30 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing with prejudice Smith and Best Way's third amended complaint.

¶31 Affirmed.