**NO. 127561**

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**IN THE**
**SUPREME COURT OF ILLINOIS**

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LEO DAWKINS, Individually and as Next Friend of DOLLETT SMITH DAWKINS, a Disabled Person,

*Plaintiff-Appellee,*

v.

FITNESS INTERNATIONAL, LLC, L.A. FITNESS and L.A. FITNESS OSWEGO,

*Defendant-Appellant.*

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On Appeal from the Third District Appellate Court, No. 3-17-0702
There Heard on Appeal from the Circuit Court of Will County, No. 15 L 00675
The Honorable Raymond E. Rossi and Honorable Michael J. Powers, Judges Presiding

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# BRIEF AND ARGUMENT OF PLAINTIFF-APPELLEE

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**ORAL ARGUMENT REQUESTED**

E-FILED
2/16/2022 2:01 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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## ISSUE PRESENTED FOR REVIEW

Plaintiff's wife became profoundly disabled when she sustained cardiac arrest at defendant's fitness facility and the defendant's staff member who was trained in the use of automatic external defibrillators as mandated by statute, knowing of the patron's dire emergency, took no action to render aid by using defendant's statutorily required AED. The issue presented is whether the appellate court correctly decided that plaintiff's complaint stated a cause of action for willful and wanton misconduct, thereby rejecting defendant's argument that it had no duty to use the defibrillator.

## STATUTES INVOLVED

Physical Fitness Facility Medical Emergency Preparedness Act, 210 ILCS 74/1 et seq. (Appendix to this Brief, A-1)

Automated External Defibrillator Act, 410 ILCS 4/1 et seq. (Appendix to this Brief, A-5)

Appellant listed the statutes involved but did not provide the text of the statutes to the court as is required. In accordance with Rule 341(h)(5), the text of both statutes is contained in the Appendix to this brief.

## ADDITIONAL STATEMENT OF FACTS

Because this case is on appeal upon the dismissal with prejudice of plaintiff's complaint, the facts of the occurrence are derived from the complaint. The Third Amended Complaint (C381) is the last complaint. (C529) Only the willful and wanton counts of that complaint are now at issue.

**The Third Amended Complaint**

Defendant Fitness International, LLC ("Fitness" or "Defendant")[1] operated a fitness center in Oswego, Illinois. That facility was a "physical fitness facility" within the meaning of the Illinois Physical Fitness Facility Medical Emergency Preparedness Act, 210 ILCS 74/1 et seq. ("PFFMEPA" or "Act"). (C381, ¶¶ 1, 2) Fitness knew that life-threatening medical events were likely to occur to its patrons due to it being an exercise facility. (¶ 3)

At all relevant times, Fitness was required:

- To have a functioning AED on site and to have staff properly trained in the assessment of patrons and the use of AEDs. (¶ 4)
- To have properly trained staff who were required to know to assess patrons who became unconscious for breathing and signs of pulse and circulation in preparation for employing an AED device. (¶ 5)
- To have a Medical Emergency Plan for responding to medical emergencies. (¶ 6)
- Pursuant to the training of AED operators, the Fitness Medical Emergency Plan, and the PFFMEPA, Fitness was required to assess unconscious patrons for signs of breathing, pulse and circulation. (¶ 7)
- The Fitness staff were required to assess unconscious patrons for use of an AED. (¶ 8)
- The Fitness staff were required to attach the AED pads on an unconscious patron who had no breathing, no pulse or no signs of circulation, and to follow the visual and voice prompts on the AED. (¶ 9)

On November 18, 2012, Mrs. Dawkins, while a patron at the Fitness facility, collapsed, stopped breathing, and lost her pulse and circulation out in the open and public area of the

[1] The naming of the other defendants, L.A. Fitness and L.A. Fitness Oswego, has been stated by Fitness to be incorrect, and Fitness has filed its appearance and all documents in this case as Fitness International, LLC. (C21, 36)

facility. (¶¶ 10, 11) That medical event was known to Fitness. (¶ 12) Other Fitness patrons began to unsuccessfully attempt to administer CPR to Mrs. Dawkins and shouted to Fitness staff for aid and assistance, and the Fitness staff knew this. (¶ 13) The Fitness staff knew that the patrons were not using an AED on Mrs. Dawkins. (¶ 14)

The Medical Emergency Plan, the PFFMEPA and the training of the AED staff required Fitness to assess Mrs. Dawkins, to attach the AED pads to her and to follow the prompts of the AED. (¶ 15)

Armed with the knowledge set out above, and with knowledge of the requirement to assess and treat her with the AED, Fitness and its staff violated the training of properly trained AED operators, violated its Plan, violated the PFFMEPA, and acted willfully, wantonly and with utter disregard and indifference for the safety of Mrs. Dawkins in one or more of the following ways:

a. Failed to have a functioning AED device on the premises in violation of its Medical Emergency Plan and the PFFMEPA.

b. Failed to have properly and adequately trained staff on the premises in violation of its Medical Emergency Plan and the PFFMEPA.

c. Refused to assess Mrs. Dawkins for breathing in violation of AED operator training, the Medical Emergency Plan and the PFFMEPA.

d. Refused to assess Mrs. Dawkins for signs of pulse or circulation in violation of AED operator training, the Medical Emergency Plan, and the PFFMEPA.

e. Refused to apply the AED to Mrs. Dawkins and follow the voice and visual prompts in violation of AED operator training, the Medical Emergency Plan, and the PFFMEPA.

f. Refused to apply the AED electrical therapy to Mrs. Dawkins in violation of AED operator training, the Medical Emergency Plan, and the PFFMEPA.

g. Refused to follow its Medical Emergency Plan.

h. Refused to comply with the requirements of the PFFMEPA.

i. Refused to follow AED training and certification.

(C383, ¶ 16)

The Third Amended Complaint alleges that as a proximate result of those willful and wanton acts of conscious indifference and utter disregard for her safety, Mrs. Dawkins suffered ongoing lack of heart function and loss of oxygenated blood to her brain, which resulted in permanent and severe brain damage and related damages. (¶ 17)

An AED is able to diagnose ventricular fibrillation and treat it through defibrillation by electrical therapy. (¶ 18) Uncorrected ventricular fibrillation leads to cardiac arrest and anoxic brain injury. (¶ 19)

While at the Fitness facility, Mrs. Dawkins was experiencing a ventricular fibrillation which was the type of heart dysfunction that the AED treats. (¶ 20) It takes less than one minute to apply AED treatment. (¶ 21) Fitness failed to apply the AED to Mrs. Dawkins for over eight minutes. (¶ 22)

Had Fitness connected the AED device to Mrs. Dawkins as required, it would have advised "SHOCK" or similar language, and would have issued prompts which would have delivered the electrical therapy, and restored cardiac function and oxygenated blood to her brain. (¶ 23)

The failure of Fitness to apply the AED caused permanent damage to Mrs. Dawkins' brain. (¶ 24) Had Fitness timely applied the AED, Mrs. Dawkins' brain damage would have been lessened or avoided. (¶ 25)

Mrs. Dawkins is a disabled adult, who is entirely without understanding or capacity to make or communicate decisions regarding her person and she is totally unable to manage her estate or affairs. (¶ 26)

Count II is a derivative claim brought for loss of consortium by Mrs. Dawkins' husband, Leo Dawkins. (C385)

**The Prior Complaints and The Motions to Dismiss**

Prior to the Third Amended Complaint, plaintiff filed his original Complaint (C7) which consisted of two counts alleging negligence, a (First) Amended Complaint (C79) which consisted of four counts, two of them for willful and wanton misconduct, and a Second Amended Complaint (C276) which also consisted of four counts, two for ordinary negligence and two for willful and wanton misconduct.

Fitness filed motions to dismiss each of the complaints. (C36, C92, C291 and C401) Rounds of briefing were filed with respect to each motion to dismiss.

After the filing of the first motion to dismiss, plaintiff was granted leave to file the (First) Amended Complaint, and the motion to dismiss the original complaint was withdrawn. (C66)

The Motion to Dismiss the (First) Amended Complaint asserted that an exculpatory clause barred Counts III and IV, the negligence claims. With respect to Counts I and II, the willful and wanton claims, Defendant filed both Section 2-615 and Section 2-619 motions to dismiss. The Section 2-615 motion alleged that the complaint failed to allege proximate cause and duty. (C92) Defendant alleged that the PFFMEPA protects Fitness from civil liability for negligence related to the use or non-use of an AED so long as there is a working AED on site, a trained AED user on staff, and an approved medical plan on

file with the Illinois Department of Public Health, and that as a result, Counts III and IV, the negligence counts, should be dismissed. (C106)

With respect to the Section 2-619 portion of that motion, defendant stated:

> "Section 45 'Liability' of the PFFMEPA states a right of action does not exist in connection with use or non-use of an automated external defibrillator at a facility governed by this Act, except for willful and wanton misconduct, provided the facility has adopted the medical plan, has an AED at the facility, and has maintained the AED. 210 ILCS 74/45." (C104)

Defendant filed affidavits in support of that motion attesting to the existence of an exculpatory agreement (C124), the existence of a written plan for responding to medical emergencies pursuant to the PFFMEPA which had been approved by the Illinois Department of Public Health (C137), and that an employee of Fitness who was working at the facility at the time of Mrs. Dawkins' collapse was a "trained AED user" (C138).

After a full round of briefing, that motion to dismiss was heard by Judge Michael J. Powers on November 14, 2016. (R2) On that same date, Judge Powers entered his order which provided:

1) Counts III and IV are dismissed with prejudice as negligence and derivative negligence are barred by the exculpatory clause;
2) Counts III and IV are also dismissed, based on compliance with the PFFMEPA, with prejudice;
3) Counts I and II are dismissed without prejudice, ¶ 2-615 for willful and wanton; and
4) Plaintiff was granted leave to replead Counts I and II. (C274)

During colloquy with counsel at the hearing on November 14, 2016, Judge Powers commented as follows:

> "The Court: Let me ask you this. What is the point of having an AED and training people and having a policy on it if it's not going to be administered to the members at the club? What's the point?
>
> Mr. Rozak (defense counsel): What's the point is to have it available for people to use.

> The Court: To say that you had it available?
> ….
> The Court: Hold on. How is it any different than me going to a YMCA or a fitness club and I am swimming and they have a guard there, a lifeguard, and I'm having distress in the pool and they don't act on it and they call 911? I mean, how is that any different?
> ….
> The Court: It is complicated, but your employee was trained on it.
> ….
> The Court: Presumably the argument is, and maybe he needs to plead it more, presumably time is of the essence, right? I mean, that's the whole idea. And the quicker someone can administer an AED until the professionals, the paramedics, get there, it would seem to me that's the whole -- I agree it might be a little thin on what's alleged, but I'm not understanding the public policy on encouraging having AEDs and treating [sic] them and then not utilizing it.
> ….
> The Court: We are just at the pleading stage.
> ….
> The Court: I'm going to deny the 619's as to the willful and wanton counts. I am going to grant it as to 615. I do think you have to put in more facts in terms of that the delay in administering the AED, … how that proximately caused the injuries to your client." (R11-15)

The Second Amended Complaint added additional facts to the willful and wanton counts, Counts I and II, and repeated Counts III and IV, the negligence counts, as a matter of preserving them for possible appeal. (C276) Defendant's Motion to Dismiss the Second Amended Complaint, after another round of briefing, was heard on March 9, 2017, but this time by Judge Raymond E. Rossi. The order entered on that date provided as follows:

> "Defendant's Motion to Dismiss Counts I and II, willful and wanton and derivative, granted under Section 2-619 – previous.
>
> Plaintiffs allowed to plead willful and wanton one last time, if dismissed again it will be with prejudice." (C379)

After the Third Amended Complaint was filed (C381), defendant moved to dismiss again. (C401) After a full round of briefing, the motion to dismiss was heard by Judge Rossi, on September 20, 2017. (R36) The court explained its ruling:

> "All right. I think Counts I and II are to be dismissed because Defendant Fitness was in compliance. I don't believe that there is anything that creates the duty to use the AED. And I think the strongest argument is that the mere presence of an AED on the premises, even with the plan that has to be undertaken, does not impose a legal duty to provide medical assistance. So I am going to dismiss the action." (R49)

The order entered on September 20, 2017, provided:

> "After hearing Counts I and II of plaintiff's Third Amended Complaint are dismissed with prejudice. Counts III and IV previously dismissed with prejudice. Case dismissed. (C529)

**Plaintiff's Discovery was Stayed**

Two weeks after the filing of the (First) Amended Complaint (C79), plaintiff's efforts at discovery were stayed. "Plaintiff's discovery issued is stayed pending ruling." (C90)

Thereafter, in plaintiff's response to defendant's motion to dismiss, plaintiff asked for the alternative relief of discovery if the court found the pleading to be deficient, to seek, "for example more information as to willful and wanton – which is within the knowledge of the defendant." (C158, 160)

Plaintiff renewed that request for discovery in the response to defendant's Motion to Dismiss the Third Amended Complaint, again in the alternative. (C470, 485) Those motions were never allowed. Defense counsel's position was "I don't think that we are in that situation where discovery at all would help. It's a legal question about the duty." (R41)

The successive complaints were dismissed by the court.

**Plaintiff Brought This Appeal**

While plaintiff's Notice of Appeal (C538) appealed from the orders dismissing all four counts of plaintiff's complaint, plaintiff by his appellate brief narrowed the issues on

appeal to the error in dismissing Counts I and II of the Third Amended Complaint, which are the willful and wanton misconduct counts.

**The Appellate Court Reinstated the Complaint**

The appellate court reversed the order of dismissal, holding:

> "[T]he question presented on review of the circuit court's granting of Fitness's section 2-619(a)(9) motion to dismiss is whether Dawkins could prove any set of facts that could entitle him to relief. Specifically, the question is whether Dawkins could possibly provide evidence establishing that, under the particular facts and circumstances presented in this case, Fitness' employees' failure to render AED treatment to Dollett after she collapsed amounted to willful and wanton conduct that breached the duty that Fitness owed to Dollett and proximately caused her injuries. At this early stage of the litigation, such a possibility cannot be ruled out as a matter of law. Taking the allegations in Dawkins' complaint as true, the complaint may not be dismissed as a matter of law. Accordingly, the circuit court's dismissal of Dawkins' third amended complaint was improper."

Order, ¶ 44.

Justice Robert L. Carter was a member of the panel which issued the initial Supreme Court Rule 23 Order below. The modified order upon denial of rehearing, in which he did not participate, made only minute changes in that initial order.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED IN DISMISSING COUNTS I AND II OF THE THIRD AMENDED COMPLAINT WHICH SUFFICIENTLY ALLEGED WILLFUL AND WANTON MISCONDUCT BY DEFENDANT'S TRAINED STAFF IN FAILING TO USE ITS AED, DESPITE KNOWLEDGE OF MRS. DAWKINS' SUDDEN CARDIAC ARREST.

#### A. Standard of Review.

Although Defendant's various motions to dismiss purported to be segregated between Section 2-615 and Section 2-619 motions, Defendant's arguments oscillated between contentions based upon factual insufficiency, thereby invoking Section 2-615, and arguments grounded more upon the PFFMEPA, thereby attempting to invoke Section 2-

619. Judge Powers' original dismissal of Counts I and II was on the basis of Section 2-615, with leave to replead. The last two dismissals by Judge Rossi were on the basis of Section 2-619.

Under both sections, the standard of review is *de novo*. *Henderson Square Condominium Assn. v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 62. (Sec. 2-615) *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 116 (1993). (Sec. 2-619)

A court is not to dismiss a complaint pursuant to Section 2-615 unless it clearly appears that no set of facts can be proved that would entitle the plaintiff to recovery. *Henderson Square Condominium Assn.*, ¶ 62. The same holds true when ruling upon a section 2-619(a)(9) motion. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8.

For analytical clarity, plaintiff suggests that defendant's motion to dismiss the Third Amended Complaint is not a proper 2-619(a)(9) motion. Defendant grounded the entirety of its motion on section 2-619 (C404, 405, 407, 411), and the circuit court granted dismissal on that motion. (A44)

This Court has very recently stated the proper function of such a motion:

> "Section 2-619(a)(9) of the Code permits involuntary dismissal where the claim asserted against [the] defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." (Internal citation removed)

*Munoz v. Bulley & Andrews, LLC*, 2022 IL 127067, ¶ 18.

It can be seen from even the headings of defendant's brief to this Court that defendant is not relying upon "affirmative matter" in its arguments, but is rather asserting the absence of a duty in the first instance. ("No Affirmative Duty Exists – By Statute or Common Law – To Use an AED on a Patron…." (Argument I); "The Appellate Court

Erred in Creating a Private Right of Action for Non-Compliance With the PFFMEPA." (Argument II))

Because all of the relevant rules of decision and consequences under either section 2-615 or section 2-619 are identical with respect to this appeal, it might not matter to the outcome whether the dismissal was properly made under section 2-619, or whether it was in effect a ruling under section 2-615. However, plaintiff develops this point here to hopefully assist this Court in understanding that in some of the conflated arguments made within defendant's brief, defendant does not truly rely upon any affirmative matter to support the erroneous dismissal of this complaint.

When deciding a motion based on section 2-619, a court is to accept all well-pleaded facts in the complaint as true and will grant the motion only when it appears that no set of facts could be proved that would allow the plaintiff to recover. *Lawler v. University of Chicago Med. Ctr.*, 2017 IL 120745, ¶ 11. The same holds true for a section 2-615 motion. *Cahokia Unit School Dist. No. 187 v. Pritzker*, 2021 IL 126212, ¶ 24.

### B. Two Illinois Statutes Bear Upon the Use of Automated External Defibrillators.

Two Illinois statutes relating to AEDs were in force at the time of Mrs. Dawkins' cardiac arrest on November 18, 2012. The text of both statutes is contained in the Appendix to this Brief. 410 ILCS 4/1 et seq. is the Automated External Defibrillator Act. The intent of that Act is expressly stated:

> "The General Assembly finds that timely attention in medical emergencies saves lives, and that trained use of automated external defibrillators in medical emergency response can increase the number of lives saved. It is the intent of the General Assembly to encourage training and life-saving first aid, to set standards for the use of automated external defibrillators and to encourage their use." § 5.

The characteristics of an AED are set out in the definitions, and include that it "is capable of determining, without intervention by an operator, whether defibrillation should be performed." Further, an AED is capable of automatic delivery of electrical impulse and it is to be "set to operate in the automatic mode." § 10(2)-(4). A "trained AED user" is defined to be:

> "A person who has successfully completed a course of instruction in accordance with the standards of a nationally recognized organization such as the American Red Cross or the American Heart Association or a course of instruction in accordance with the rules adopted under this Act to use an automated external defibrillator, …." § 10.

Section 30(d) of the AED Act, dealing with "exemption from civil liability" provides in part:

> "An AED user is not liable for civil damages as a result of any act or omission involving the use of an automated external defibrillator in an emergency situation, except for willful or wanton misconduct, if the requirements of this Act are met." § 30(d).

210 ILCS 74/1 et seq. is the Physical Fitness Facility Medical Emergency Preparedness Act ("PFFMEPA"). The definition of an AED for this Act is incorporated from the AED Act Section 5.5. Section 5.25 of the Act defines a physical fitness facility. Here, Defendant does not contest that it operates such a facility subject to this Act. Section 10 of the Act provides that a physical fitness facility must implement a written plan for responding to medical emergencies during the time that the facility is open for use by its members. A copy of the plan must be filed with the Illinois Department of Public Health.

Section 15 requires that every physical fitness facility must have at least one AED on the premises. Further:

> "A physical fitness facility must ensure that there is a trained AED user on staff during staffed business hours. For purposes of this Act, 'trained AED

user' has the meaning ascribed to that term in Section 10 of the Automated External Defibrillator Act." § 15(b).

The Illinois Department of Public Health is to establish a training program:

"The Department shall adopt rules that establish programs to train physical fitness facility staff on the role of cardiopulmonary resuscitation and the use of automated external defibrillators. The rules must be consistent with those adopted by the Department for training AED users under the Automated External Defibrillator Act." § 20.

Section 45 of the Act, captioned "Liability," provides in pertinent part as follows:

"…A right of action does not exist in connection with the use or non-use of an automated external defibrillator at a facility governed by this Act, except for willful or wanton misconduct, provided that the person … operating the facility has adopted a medical emergency plan as required under Section 10 of this Act, has an automated external defibrillator at the facility as required under Section 15 of this Act, and has maintained the automated external defibrillator in accordance with the rules adopted by the Department."

**C. AEDs are Automated Devices Which are Easily Operated, and Certainly So by Trained Users. AEDs are Effective to Reduce Mortality, But Time is of the Essence for Their Use.**

The nature and efficacy of AEDs is widely known and beyond question:

"An automated external defibrillator is a portable device that checks the heart rhythm and can send an electric shock to the heart to try to restore normal rhythm. AEDs are used to treat sudden cardiac arrest (SCA).

SCA is a condition in which the heart suddenly and unexpectedly stops beating. When this happens, blood stops flowing to the brain and other vital organs.

SCA usually causes death if it is not treated within minutes. In fact, each minute of SCA leads to a 10% reduction in survival. Using an AED on a person who is having SCA may save the person's life."

National Heart, Lung, and Blood Institute,
https://www.nhlbi.nih.gov/health-topics/automated-external-defibrillator

Further:

"AEDs are lightweight, battery-operated, portable devices that are easy to use. Each unit comes with instructions, and the device will even give you

> voice prompts to let you know if and when you should send a shock to the heart.
>
> Learning how to use an AED and taking a CPR course are helpful. *Id.*
>
> Timely use of an AED is of the critical essence:
>
> "The efficacy of defibrillation is directly tied to how quickly it is administered. Although the outside limit of the 'window of opportunity' in which to respond to a victim and take rescue actions is approximately 10 minutes, the sooner the AED is utilized within that time period, the more likely it is that it will be effective and that a patient will have a normal heartbeat restored and fully recover. As the length of time between the onset of sudden cardiac arrest and defibrillation increases, the less the chance of restoration of heartbeat and full recovery. In general, for every minute that passes between the event and defibrillation, the probability of survival decreases by seven to 10 percent. After 10 minutes, the probability of survival is extremely low. The importance of rapid and positive intervention is reflected in the American Heart Association's 'chain of survival' concept.
>
> Today's AEDs are relatively inexpensive and usable by persons with limited training…."

Guidelines for Public Access Defibrillation Programs in Federal Facilities, 66 F.R. 28495-01, 2001 WL 538737 (2001).

These functions of AEDs and their relationship to Mrs. Dawkins' situation were clearly alleged in the Third Amended Complaint. Plaintiff alleges that Mrs. Dawkins collapsed and lost her pulse in the open area of the Fitness facility and that Fitness knew about it. (C381, ¶¶ 10-12) Patrons shouted to Fitness staff for assistance. (¶ 13) Fitness staff were trained and knew that they were to assess Mrs. Dawkins, to attach the AED pads to her, and to follow the prompts of the AED. (¶ 15)

Mrs. Dawkins was experiencing ventricular fibrillation, the type of heart dysfunction that the AED treats. (¶ 20) Fitness failed to apply the AED to Mrs. Dawkins for over eight minutes. (¶ 22) Plaintiff alleges that the failure of Fitness to apply the AED

caused permanent damage to Mrs. Dawkins' brain, and that if Fitness had timely acted, her brain damage would have been lessened or avoided. (¶¶ 24, 25)

### D. The PFFMEPA and the Common Law Recognize the Existence of a Duty on the Staff of a Facility Subject to That Act to Use the AED and Further Recognize a Cause of Action Predicated on a Failure to Use the AED. Alternatively, a Private Right of Action Should be Implied.

#### 1. The PFFMEPA both recognized and additionally created a duty for a trained staff member at a fitness facility to use an AED.

Plaintiff asserts that there are multiple bases supporting the existence of a duty of a trained staff member at a physical fitness facility subject to the Act to use the AED which is required by statute to be available. The appellate court likewise found such multiple bases to exist.[2]

After examining section 45 of the PFFMEPA and section 30(d) of the AED Act, and focusing on the phrase in common between those two sections, "except for willful and wanton misconduct, the appellate court concluded:

> "The plain and unambiguous meaning of this phrase is that civil liability may attach to willful and wanton failures to use an AED.
>
> Moreover, other sections of the statutes, when read together clearly suggest that the PFFMEPA creates a duty for fitness facility staff members who are properly trained in the use of an AED to use it under appropriate circumstances. …
>
> These requirements clearly suggest that the legislature intended to impose a duty on properly trained staff to assess unconscious patients and to use the AED when appropriate."

Order, ¶¶ 25, 26, 28.

[2] In any given case, including this one, whether that duty was breached, and whether that breach constituted willful and wanton misconduct, are entirely separate questions not present in this appeal. The dismissal of plaintiff's complaint in the circuit court was solely on the basis that the circuit judge did not believe that a duty existed.

Major determinants of the outcome of this appeal are the terms and consequences of the PFFMEPA. In turn, the primary heart of the analysis of that statute for this case is the following excerpt from Section 45 of the Act:

> "…**A right of action** does not exist **in connection with the use or non-use** of an automated external defibrillator at a facility governed by this Act, **except for willful or wanton misconduct**, provided that the person … operating the facility has adopted a medical emergency plan as required under Section 10 of this Act, has an automated external defibrillator at the facility as required under Section 15 of this Act, and has maintained the automated external defibrillator in accordance with the rules adopted by the Department." (Emphasis added.)

210 ILCS 74/45.

That section of the Act accomplishes two things. First, it sets out the requirements for a fitness facility to acquire immunity against a negligence cause of action. Second, it establishes and recognizes that "a right of action does not exist … except for willful and wanton misconduct…." In other words, a right of action does exist for willful and wanton misconduct. The statute cannot be read in any other manner.

Even defendant recognized that the statute negated only a cause of action for negligence. Defendant filed a combined motion to dismiss all counts of the complaint. With respect to Counts I and II, the willful and wanton counts, as that motion relates to this appeal, defendant moved for dismissal under §2-615 claiming that the factual allegations as to conduct and proximate cause were insufficient. Defendant moved to dismiss Counts III and IV, the negligence counts, pursuant to §45 of the PFFMEPA. Defendant's motion states that "Section 45 'Liability' of the PFFMEPA states a right of action does not exist in connection with use or non-use of an automated external defibrillator … <u>except for willful and wanton misconduct</u>, provided the facility has adopted the medical plan, has an AED at the facility, and has maintained the AED. 210 ILCS 74/4." (Emphasis added.)

(C104). Defendant, in its own words, recognized that a cause of action for willful and wanton use or non-use exists. Judge Powers did not grant any part of defendant's 2-619 motion with respect to the willful and wanton counts but rather dismissed them under §2-615 with leave to replead "to put in more facts in terms of … the delay in administering the AED … - how that proximately caused the injuries…." (R11-15; C274).

Defendant's position with respect to the application of the Act and §2-619 to the willful and wanton counts morphed thereafter, primarily on defendant's theory that if there cannot be liability for negligence under the Act, there cannot be liability for willful and wanton misconduct. ("You can't go back and put the tooth paste back in the tube and then use that same thing as a basis for willful and wanton conduct, saying that they weren't in compliance." (R38)) However, Judge Powers' apparent belief was correct that the statute did not bar claims for willful and wanton non-use and, with respect, to the extent that Judge Rossi later thought to the contrary, he was in error.

The Act explicitly recognizes a right of action for the willful or wanton "use, or non-use" of an AED. The Act made it mandatory that Fitness have a properly working and maintained AED, and have on site at all times that they were open personnel trained to use the AED. The statutory duty was then to not willfully or wantonly use, or fail to use, that mandatory equipment.

The words of section 45 of the PFFMEPA plainly recognize liability for the willful or wanton misconduct relating to the non-use of an AED. Section 45 is captioned "Liability." That section provides that for fitness facilities which are in compliance with the Act, as defendant has established and asserted that it is, the "use" or "non-use" of an AED are treated in identical fashion, without the slightest difference. "A right of action

does not exist in connection with the use … of an automated external defibrillator …, except for willful or wanton misconduct…." In complete congruence, "a right of action does not exist in connection with the … non-use of an automated external defibrillator … except for willful or wanton misconduct…." The meaning of the key phrase "except for" is plain and without controversy. The entry for that phrase in the Oxford English Dictionary is "exception being made for, were it not for, but for." (2022, Oxford University Press, accessed online through a subscribing institution.) Thus, there is "an exception made for," from immunity for willful or wanton misconduct. Or, a right of action does not exist in connection with the non-use of an AED, "but for willful or wanton misconduct." *See Rickman v. Commonwealth*, 195 Ky. 715, 243 S.W. 929, 930 (1922) ("The expression "except for" is synonymous in many instances with "but for" and "only for."). That an exception for willful and wanton non-use of an AED was made by the legislature to the first part of the sentence that a right of action does not exist necessarily implies that the "excepted" action does in fact exist, and therefore is a recognized cause of action.

The words of the Act are sufficiently plain without resort to statutory history, but the relevant statutory history resolves any doubt. *Roberts v. Alexandria Transp., Inc.*, 2021 IL 126249, ¶ 44. Senator Sandoval presented the bill which became this Act for a third reading. He related that the bill was named the Colleen O'Sullivan bill, after an attorney who worked in the Speaker's Office for many years and died from a cardiac arrest while working out at a sports facility in Chicago. The senator stated that she died several weeks later as a result of, perhaps, a defibrillator not being present that would have saved her life. He further narrated the interest of the American Heart Association and the American Red Cross in this topic. Senator Sandoval stated:

> "This Act allows a right of action in cases where there is a willful or wanton misconduct in connection with the use of an AED." (C492).

That simple sentence could not be more plainly declarative. And, that expression of legislative intent is expressed in the language of the Act as passed. 53 Causes of Action, 2d, at 625 (Thomson Reuters 2017), recognizes the Act as providing for the cause of action alleged here: "In (some jurisdictions), the relevant statute may provide that a right of action for the use or non-use of an AED exists only for willful or wanton misconduct. See, e.g., 210 ILCS 74/45." At § 9.

Defendant asks this Court to "consider" three foreign cases. (Br., pp. 14-16) Two of those three cases are categorically inapposite because the statutes in the two involved states do not require the purchase of an AED or that the staff be trained. Defendant states that in *Trim v. YMCA of Central Maryland, Inc.*, 165 A.3d 534 (Md. App. 2017), "the court noted that by requiring the AED to be on the premises with a trained user, the 'legislature did not surreptitiously incorporate an affirmative duty to use an AED.' *Id.* at 543." (Br., p. 15) That sentence significantly misrepresented the Maryland statute, which does not "require the AED to be on the premises." Rather, the statute provides "each facility that desires to make automated external defibrillation available shall possess a valid certificate…." *Trim*, at 540, quoting the controlling statute. Defendant cites *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886 (Tenn. 2016). (Br., p. 16) Tennessee, unlike Illinois, but like Maryland, also does not require a business to have an AED:

> "Importantly for purposes of the issue in this appeal, however, Tennessee's AED statutes only encourage businesses and other entities to acquire and make AEDs available for use in emergency situations. They do not impose any mandatory duty on businesses to do so…." (Emphasis in original.)

*Wallis*, at 901.

Defendant's remaining case, *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 985 N.E.2d 128 (N.Y. 2013) is at least factually on point, but it offers only scant support to defendant. (Br., p. 15) In *Miglino*, the intermediate New York appellate court squarely ruled in favor of plaintiff that there was a duty to use a statutorily mandated AED in a fitness center. That court began by referencing a prior opinion in an unrelated case, and then moved to its decision:

> "The Court of Appeals left open the question of whether (the statute) creates a duty upon a health club to use the AED which it is required to provide. We conclude that there is such a duty.
>
> The risk of heart attacks following strenuous exercise is well recognized, and it has also been documented that the use of AED devices in such instances can be particularly effective if defibrillation is administered in the first few minutes after the cardiac episode commences …
>
> Although the statute does not contain any provision that specifically imposes an affirmative duty upon the facility to make use of its required AED, it also does not contain any provision stating that there is no duty to act … Moreover, it is illogical to conclude that no such duty exists …
>
> Applying these principles, and inasmuch as there is no dispute that (the statute) requires certain health club facilities to provide an AED on the premises, as well as a person trained to use such a device, it is anomalous to conclude that there is no duty to use the device should the need arise. Stated differently, why statutorily mandate a health club facility to provide the device if there is no concomitant requirement to use it?"

*Miglino v. Bally Total Fitness of Greater New York, Inc.*, 92 A.D.3d 148, 155-157 (2011).

On review, the Court of Appeals of New York disagreed with the reasoning of the intermediate appellate court on the interpretation of the statute but recognized that the common law aspect of the case was not yet ripe for decision because "*Miglino* has at least pleaded a viable cause of action at common law." 20 N.Y.3d 342, 351 (2013), 985 N.E.2d 128 (N.Y. 2013).

The court's chief judge dissented on the question of statutory interpretation:

> "Because I do not believe that the statute should be interpreted in a way that renders it virtually meaningless, I respectfully dissent from that portion of the decision. …
>
> It should go without saying that the presence of an AED will be of no benefit whatsoever to a person in cardiac arrest unless, of course, it is actually used.
>
> In the absence of any explicit statement concerning whether or not the statute imposes a duty to use the AED, the statute should be interpreted in a way that is consistent with its spirit and benevolent aim."

*Miglino*, Lippman, C.J. dissenting. 20 N.Y.3d at 352.

Foreign cases are, of course, not controlling. It is for this Court to determine whether the case has any persuasive value, and if so, whether the weight of persuasion lies with the majority, or instead with the chief judge's dissent and the unanimous intermediate court. Plaintiff respectfully suggests that the weight of reason is with the latter.

**2. The duty owed by Fitness to plaintiff created and recognized by the PFFMEPA and the AED Act also arises independently by consideration of common law principles.**

The appellate court correctly held that the common law recognizes a duty in this instance, regardless of whether the statutes are regarded as having created a duty:

> "[E]ven assuming arguendo the statutes at issue did not create a duty to use an AED in this case, such a duty is recognized under the common law…. Consideration of these factors (as found in *Marshall v. Burger King Corp.*, 222 Ill.2d 422 (2006)) supports the conclusion that Fitness had a common law duty to use an AED on Dollett under the facts presented in this case."

Order, ¶¶ 33, 34.

A fitness club and its members, such as Fitness and Mrs. Dawkins here, are not strangers. They have a specific business relationship with each other such that the business of Fitness was to encourage membership and assist its members in physical exertion and exercise. Mrs. Dawkins was a business invitee upon the premises of defendant. The entire PFFMEPA exists in recognition of the enhanced risk of cardiac events which attends

physical exertion at physical fitness facilities. It is for that safety reason that AEDs are statutorily required to be present and maintained, with a "trained user" on the site "during staffed business hours." 210 ILCS 74/15(b).

Therefore, the duty owed by Fitness to Mrs. Dawkins, as recognized in section 45 of Act is buttressed by, and can be supported independently by, common law principles. Restatement (Second) of Torts, §314A, is captioned "Special Relations Giving Rise to Duty to Aid or Protect." It provides in pertinent part as follows:

> "(1) A common carrier is under a duty to its passengers to take reasonable action;
>
> (a) to protect them against unreasonable risk of physical harm, and
> (b) give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> …
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation."

Comment b states that "the duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found." (The general rule referred to is section 314.)

Comment d states that "the duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, … or to the negligence of the plaintiff himself…."

Comment f provides:

> "The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be

> required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician…."

The application of section 314A has been "long recognized by" the Illinois Supreme Court. *Marshall v. Burger King Corp.,* 222 Ill.2d 422, 438 (2006).

*Marshall* stated that "the touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of a plaintiff." At 436. Referencing section 314A, the court stated that both the Restatement and the Supreme Court recognize four "special relationships" which "may give rise to an affirmative duty to aid or protect another against unreasonable risk of physical harm." One of those relationships, which was at issue in *Marshall*, is "the relationship between a business inviter and invitee." At 438.

The *Marshall* court stated, "that the existence of a duty turns in large part on considerations of public policy," and that:

> "This court often discusses the policy considerations that inform this inquiry in terms 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 that burden on the defendant."

*Marshall*, 222 Ill.2d 422, 436, 441 (2006).

Analysis of those traditional four factors further buttresses the inescapable conclusion that a duty exists in this case.

The clear purpose of the PFFMEPA is to enable help to be available because of the reasonable foreseeability of cardiac events at physical fitness facilities where physical exertion is the entire reason for existence of the facility. The likelihood of cardiac events at physical fitness facilities is greater than would be encountered at other commercial

establishments, such as a retail store. The magnitude of the burden of guarding against the injury has already been declared by the legislature to be warranted, in that a fitness facility is required to have an AED and a trained user on staff at all times. Lastly, the consequence of placing that burden on the defendant is eminently reasonable. The legislature has already decreed that a fitness facility must take the precautions called for here. A patron in sudden cardiac arrest is helpless to care for herself. The potential liability of a fitness facility may be managed through its insurance program. Further, *Marshall*, in analyzing this factor, states the recognition of a duty "is not the same as concluding the duty has been breached," and that "concluding that the duty applies does not constitute an automatic broad-based declaration of negligence liability."

*Marshall* also offers a concise refutation of defendant's position here that no duty exists:

> "On the contrary, the no-duty rule defendants would have this court adopt lacks a sound basis in policy."

*Marshall*, at 441.

As noted previously in this brief, the AED Act contains the express legislative statement of policy that "the General Assembly finds that timely attention in medical emergencies saves lives, and that trained use of automated external defibrillators in medical emergency response can increase the number of lives saved." 410 ILCS 4/5. To interpret the PFFMEPA, or to pronounce the common law, to mean that a fitness facility which makes no attempt to use an AED is effectively immune from that failure would defeat the intended purpose of both of the acts and would discourage the use of AEDs in emergency situations.

The appellate court below exquisitely identified its understanding of where proper public policy lies in this case. It, too, noted the expressions of legislative intent in the AED Act:

> "In section 5 of the AED Act, the legislature articulated its findings that 'timely attention in medical emergencies saves lives, and that trained *use* of [AEDs] in medical emergency response can increase the number of lives saved.' (Citation omitted.) The legislature also noted its intent 'to encourage training in lifesaving first aid, to set standards for the use of [AEDs] and *to encourage their use*.'" (Both instances of emphasis added are in the court's Order.) (Order, ¶ 26)

After reviewing the requirements imposed upon a fitness facility by the PFFMEPA, the court below continued with its perception of legislative policy:

> "These requirements clearly suggest that the legislature intended to impose a duty on properly trained staff to assess unconscious patients and to use the AED when appropriate." (Order, ¶ 28)

The appellate court concluded:

> "Fitness's reading would negate the expressed purpose of the statutes, which is to protect patrons of fitness facilities and to save lives by encouraging the proper use of AEDs, and it would render the statutes absurd and ineffectual. … (Fitness's) interpretation flouts the plain language of the statutes, their expressed purposes, and common sense. As Dawkins' counsel aptly stated before the circuit court, Fitness's reading would allow covered facilities to be in full compliance … even if they use the AED only as 'wall art.' We must avoid construing a statute in a manner that would render it absurd, pointless or ineffectual." (Order, ¶ 32)

If this Court were to reverse the appellate court and hold that a refusal, even in willful and wanton circumstances, to use an AED is completely immunized then the use of an AED by any facility would be severely discouraged. In the event of such a holding by this Court, any person <u>using</u> an AED would be potentially liable under the narrow willful and wanton circumstances decreed by the statute. However, everyone who <u>refused to use</u> the AED, no matter how callous that refusal might be, would be completely immunized

from any potential liability by that action of this Court. Any entity that wished to act with an eye toward maximum protection of its interest would instruct its staff to never use the AED. That would be a completely safe course of action for the fitness facility, but would lead to the death or severe injury of its patrons. It is impossible to reconcile such an outcome with the plain statements of legislative intent to encourage the use of AEDs and it is antithetical to the legislature having named the bill after its deceased beloved aide, Colleen O'Sullivan, hoping to save other persons from a similar demise.

Part of the genius of the law of negligence is that it is flexible, and like the fabric of the common law, is adaptable to the circumstances of the myriad fact patterns in which cases are presented to courts. As noted in Comment e to §314A, the duty is to exercise reasonable care. The nature of reasonable care is not only flexible but is also the quintessential question of fact.

The appellate court below noted that "Fitness relies upon *Salte v. YMCA of Metropolitan Chicago Foundation*, 351 Ill.App.3d 524 (2004), to establish that no such duty exists." (Order, ¶ 36) Indeed, Fitness stated in its appellate brief that "The precise issue of whether a duty exists to use an AED has already been decided in Illinois" as the preface to its discussion of *Salte*. (Defendant's appellate brief, p. 21) The appellate court below readily distinguished *Salte* concluding that "*Salte* is of little relevance in determining the scope of Fitness's common law duty in this case." Before this Court, Fitness has not made the slightest mention of *Salte* in its brief. Because plaintiff cannot know whether Fitness has conceded the obvious lack of relevance of *Salte*, or whether Fitness is planning to discuss that case in its Reply brief, out of caution plaintiff will explain here why *Salte* is

of no relevant assistance to Fitness, and note that it also contains a strong dissent offering the view that *Salte* itself was wrongly decided.

The occurrence in *Salte* took place before the effective date of the PFFMEPA. There, plaintiff suffered cardiac arrest while using a treadmill at a health club. The club did not have an AED on its premises. It was not required to have one in 2003. There was a paramedic on staff. Plaintiff alleged that the defendant had a duty to equip its staff with AEDs. Plaintiff did not explicitly allege that defendant had a duty to use a defibrillator, but "because complaints are to be liberally construed," the court read plaintiff's complaint so as "to include the allegation that defendant had a duty to use a defibrillator." At 526. The court concluded that "the special relationship set forth in §314A(3) of the Restatement includes the relationship of business owner and business invitee." At 527. The court concluded that "accordingly, defendant owed (plaintiff) a duty to render first aid and to care for him." At 527. The issue the court then took up was "whether defendant's duty to aid (plaintiff) included a duty to have a defibrillator on its premises and to use such a defibrillator on him." The court began its analysis by noting that "the duty to render aid is 'a duty to use reasonable care under the circumstances.'" That was followed by examination of Comment f. At 527. The court ruled for defendant, saying "we hold that defendant did not have a duty to have a defibrillator on its premises and that its staff did not have a duty to defibrillate (plaintiff)." At 529. The majority disagreed with the extensive dissenting opinion in which Justice Callum stated:

> "Defendant's duty, as it acknowledges, was to render reasonable first aid until professional assistance arrived. See Restatement (Second) of Torts, § 314A, Comment f, at 120. Whether reasonable assistance encompasses the use of a defibrillator by defendant's staff paramedic is, I believe, a factual question. I further believe that a reasonable jury could find defendant did

> not provide reasonable first aid to Terry when it failed to equip its paramedic with a defibrillator to use on Terry. …
>
> It is conceivable that a reasonable jury would find significant the presence of a staff member who was employed as a paramedic, that a defibrillator is necessary equipment for such a professional, and that defendant should have equipped its paramedic with such a device. Indeed, the majority concedes that a jury could find that defendant did not provide reasonable first aid to Terry when it failed to use a defibrillator on him." *Salte*, dissent, at 532-4.

*Salte* is not controlling or precedential in any manner with respect to the case here for decision because the passage of the PFFMEPA eliminated the fundamental premise of *Salte*, which was its holding that "defendant did not have a duty to have a defibrillator on its premises." *Salte*, at 529. Here, in stark contrast, the defendant is required by the PFFMEPA to have an AED on its premises, and it did so.

A further significant difference between *Salte* and the case here for decision is that in *Salte* "nor did the law require defendant to have a paramedic on its staff to provide such medical care," saying that "the use of a defibrillator requires specific training." *Salte*, at 530. But again in stark contrast, defendant here was required to have, and did have at the time of this injury, a staff member present who was trained to provide "such medical care," meaning use of an AED. Also, the Fitness staff member had the "specific training" for "the use of a defibrillator" which the *Salte* court noted to be absent there.

Thus, under a common law analysis, the defendant here must be regarded as being required to render aid within the meaning of §314A because it is indeed such aid "as he reasonably can" deliver because of the mandated, and actual, availability of both the AED and a "trained user."

While plaintiff respectfully urges that this common law analysis alone is sufficient to mandate the conclusion that Fitness had a duty to employ its AED on Mrs. Dawkins'

behalf in the short window of time in which she could have been saved from her debilitating injury, this Court need not ground its reversal of the circuit court on that reason alone. Returning back to section 45 of the PFFMEPA, with that knowledge of the common law in mind, removes any doubt that section 45 must be read to mean, as its language states, that a right of action does exist "for willful and wanton misconduct," for either the "use or non-use of an automated external defibrillator."

The language of section 45 is clear and is not in need of interpretation. "Where the language of the statute is clear and unambiguous, we apply it as written." *Christopher E. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois*, 2015 IL 118955 ¶10. However, to the extent that this Court is of the opinion that construction of the language is required, fundamental principles of statutory construction all militate in favor of reversal of the circuit court. The AED Act contains the express findings of the general assembly that "timely attention in medical emergencies saves lives, and that trained use of automated external defibrillators in medical emergency response can increase the number of lives saved." Further, the AED Act states that "it is the intent of the general assembly to encourage training and lifesaving first aid, to set standards for the use of automated external defibrillators and to encourage their use." 410 ILCS 4/5. As a critical aside at this point, the court is respectfully asked to give weight to that legislative description of the use of AEDs as in fact being "lifesaving <u>first aid</u>" in this court's consideration of the duty requirements of section 314A of the Restatement as set out above. (Emphasis added.) As discussed above, and as was held in *Salte*, the obligation of Fitness was to, at a minimum, provide reasonable first aid.

"[I]n determining the intent of the legislature, the court may properly consider not

only the language of the statute, but also the reason and necessity for the law, an evil sought to be remedied, and the purpose to be achieved." *In re Detention of Lieberman*, 201 Ill.2d 300, 308 (2002). "[A] court may consider the reason for the law, the problem sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or the other." *Bowman v. Ottney*, 2015 IL 119000, ¶ 5.

"[W]here the language of a statute admits of two constructions, one of which would make the enactment absurd, … while the other renders it reasonable and wholesome, the construction which leads to an absurd result will be avoided." *Ill. Nat. Bank v. Chegin*, 35 Ill.2d 375, 378 (1966), *Palm v. Holocker*, 2017 IL App(3d) 170087, ¶ 22.

Those principles must be applied with an eye towards the very practical and serious consequences which would result if defendant's proposed interpretation of the Act were to be adopted by this court. It is clear beyond any contradiction that AEDs can and should be instantly applied by anyone, but certainly by "trained users" in a facility which is required by law to have AEDs available because of the higher risk involved in such a facility. It is equally important that the legislature has recognized the value of "timely attention" with respect to the operation of AEDs," and that the legislature has acted "to encourage their use." 410 ILCS 4/5. It is also beyond discussion that in the event of cardiac arrest, that every minute counts, that the odds of success decrease by the minute, and that ten minutes marks the outside edge of the envelope in which AED intervention is considered to be sufficiently therapeutic. All of these considerations militate in favor of only one conclusion, which is that AEDs must be <u>used</u> quickly, and that their rapid <u>use</u> is highly beneficial and was a primary goal of the legislature.

Defendant's entire position is that even though it was required by statute to have an

AED and a staff member trained in accordance with the statute and regulations in its use, that it had no duty to make any use of that AED to save its patron. Defendant argues both that it had no common law duty and that that duty cannot be gleaned from either the AED or PFFMEPA acts. "No affirmative duty exists – by statute or common law – to use an AED on a patron of a fitness facility in distress." (Br., p. 8) As plaintiff vividly argued below, "Fitness would have this court believe that having a functioning AED at a fitness club … is sufficient if it serves as wall art." C476. Defendant's interpretation is an absurd result, within the meaning of the controlling principles of statutory construction. In contrast, an interpretation which recognizes that the legislature intended that AEDs be used is a beneficial and reasonable construction. That pragmatic, practical, life or death difference in the construction of the Act must weigh heavily in measuring the consequences of this Court's decision in the lives of the people of Illinois:

> "[T]he process of statutory construction should not be divorced from consideration of real-world results (citation). Here, (defendant's) construction of the amended statute would lead to real-world results that the legislature could not have intended."

*People v. Hunter,* 2017 IL 121306, ¶ 28.

That principle strongly militates in favor of affirmance of the appellate court.

Defendant had a duty to use the AED under the words of the Act. A duty is also recognized under the common law, as expressed in Restatement §314A. The Restatement also informs this Court's interpretation of the statute.

**3. A private right of action is to be implied from the PFFMEPA.**

Beyond the above grounds for the imposition of a duty and thus a right of action, this Court may also, if it reaches this point, imply a private right of action under the Act. The appellate court below properly decided that "even if there were no applicable common-

law cause of action, we agree with Dawkins that a private right of action can be implied from the PFFMEPA." (Order, ¶ 38) The appellate court further stated:

> "[T]he PFFMEPA arguably acknowledges a private right of action by stating that '[a] right of action does not exist in connection with the use or non-use of an [AED] at a facility governed by this Act, *except for willful or wanton misconduct*.' (Emphasis added.) 210 ILCS 74/75 (West 2012)."

Order, ¶ 40, fn. 4.

*Pilotto v. Urban Outfitters West, LLC*, 2017 IL App (1st) 160844 offers powerful guidance. There, the court implied a private right of action under the Restroom Access Act, 410 ILCS 39/1 et seq. as a remedy for the defendant business owner not permitting the plaintiff to use a restroom under circumstances delineated in that act. The Restroom Access Act is in the same Public Health and Safety Chapter (Ch. 410 ILCS) of the Illinois Revised Statutes as is the PFFMEPA. *Pilotto* observed:

> "Duty is defined as 'a legal obligation to conform one's conduct to a certain standard for the benefit or protection of another.' … A tort duty can derive either from the common law or from statute. … A statute may create a duty expressly, or it may do so impliedly where it is 'designed to protect human life or property.'"

*Pilotto*, 2017 IL App(1st) 160844 ¶18.

The structure of the Restroom Access Act is usefully analogous to the PFFMEPA. The Restroom Access Act mandates that a retail establishment allow a customer to use the employee toilet facility if the situation of the plaintiff and requirements of the Act conform to that law. That Act then provides:

> "A retail establishment or an employee of a retail establishment is not civilly liable for any act or omission in allowing a customer that has an eligible medical condition to use an employee toilet facility … If the act or omission meets all of the following: (1) it is not willful or grossly negligent.…"

410 ILCS 39/15.

*Pilotto* stated that even if there were no applicable common-law cause of action, "we agree with plaintiff that a private right of action can be implied from the statute." ¶ 22. In order to find an implied private right of action, the following elements must be satisfied:

> (1) the plaintiff is a member of the class for whose benefit the statute was enacted, (2) the plaintiff's injury is one the statute was designed to prevent, (3) a private right of action is consistent with the underlying purpose of the statute, and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute."

*Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 460 (1999).

Each of those elements are satisfied here. Mrs. Dawkins was a patron at the Fitness facility, which is the target business and type of patron that the PFFMEPA was enacted to protect. Mrs. Dawkins' injury caused by her cardiac arrest is the sole type of injury which the PFFMEPA was enacted to protect against. A private right of action is completely consistent with the underlying purpose of the statute as expressed not only in the words of the Act, but also by Senator Sandoval in the legislative history. Lastly, implying a private right of action is necessary to provide an adequate remedy for violations of the statute. A private right of action, if the other grounds for a duty are found to be unpersuasive, is essential for the statute to have any meaning. Otherwise, the Act, and its required AED hanging on a wall, would protect no one, and would accomplish no legislative purpose.

In sum, on various but consistent bases, defendant had a duty to use the AED, and plaintiff has a cause of action predicated on the breach of that duty.

### E. Defendant Has Injected Several Spurious Themes Which Neither Assist this Court's Analysis Nor Detract from the Correctness of the Appellate Decision Below.

Defendant has interspersed throughout its brief several terms which are invoked frequently but which have not been couched in any developed argument. They add nothing

to the analysis of this case.

From the outset, even in the phrasing of its "Questions Presented," defendant posits the question to be whether a "lay person" has a duty to use an AED in a medical "emergency." (Br., p. 1) Defendant also invokes the idea of a "volunteer." (Br., pp. 14, 18, 19) Defendant also writes as if "emergencies" should be exempted from requiring action by the defendant. (Br. pp. 1, 9, 14, 19) Defendant also invokes the concept of a "Good Samaritan," without ever attempting to develop a legal argument predicated on that term. (Br. pp. 7, 9, 17, 18)

The notion of a volunteer does not have the slightest relevance to this case, nor does it have relevance to any decision which might be rendered by this Court. Mrs. Dawkins was a business invitee of defendant Fitness. Defendant acknowledges and affirmatively asserts that it had an employee upon the premises who had been properly trained in the use of an AED, as it must admit in order to assert the immunity it has advanced. This was not an eleemosynary undertaking by Fitness, but rather was mandated by statute because of the business it is in:

> "A physical fitness facility must ensure that there is a trained AED user on staff during staffed business hours. For purposes of this Act, 'trained AED user' has the meaning ascribed to that term in Section 10 of the Automated External Defibrillator Act." 210 ILCS 74/15(b).

Rather than the employees of Fitness being volunteers, they were paid by Fitness to perform Fitness' statutory obligation of having a trained, competent employee on staff who was knowledgeable about and prepared to use their required AED devices.

Defendant has also strewn the word "emergency" throughout its brief. The germ of an irrelevant inference which defendant is attempting to plant with this Court is that it was acceptable for defendant's employee to take no action in this case because Mrs.

Dawkins' situation constituted an "emergency," an unexpected event with respect to which it would be unreasonable to expect anyone to react.

There are multiple errors in that effort by defendant. First, defendant's attempt to have "emergencies" constitute a reason for inaction ignores language of the statutes precisely on this point. Second, defendant is making a factual argument which it should make at trial, and which has no place in the analysis of this grant of a motion to dismiss. The very nature of an AED is that it is to be used in "emergencies." In the absence of an emergency, there would never be reason for its use, nor even for its invention. This fundamental fact has been recognized by the legislature. The "intent" of the AED Act relates to emergencies:

> "The General Assembly finds that timely attention in medical emergencies saves lives, and the trained use of automated external defibrillators in medical emergency response can increase the number of lives saved...." 410 ILCS 4/5.

The PFFMEPA defeats the argument of defendant that "volunteers" or "bystanders" should not be expected to act in "emergencies." That Act defines a medical emergency and speaks to the role of an average, reasonable person in such an event:

> "'Medical emergency' means the occurrence of a sudden, serious, and unexpected sickness or injury that would lead a reasonable person, possessing an average knowledge of medicine and health, to believe that the sick or injured person requires urgent or unscheduled medical care." 210 ILCS 74/5.20.

The legislature expressly imposed an obligation upon fitness facilities to be prepared to deal with emergencies:

> "[E]ach person or entity ... that operates a physical fitness facility must adopt and implement a written plan for responding to medical emergencies that occur at the facility during the time that the facility is open for use...." 210 ILCS 74/10(a).

The PFFMEPA also defeats defendant's thought that only a medical professional can be expected to use an AED and that it is "unreasonable" to expect a non-professional, a "lay person," to be required to use the AED. The court is well familiar with the fact that "a physical fitness facility must ensure that there is a trained AED user on staff during staffed business hours." The PFFMEPA adopts the definition of a "trained AED user" from the AED Act. 210 ILCS 74/15(b). The expectation of the legislature even expressly goes beyond the mandatory requirement of having trained AED users on staff:

> The Department shall adopt rules that encourage any non-employee coach, non-employee instructor, or other similarly situated non-employee anticipated rescuer who uses a physical fitness facility ... to complete a course of instruction that would qualify such a person as a trained AED user...." 210 ILCS 74/15(b-5).

The various ideas advanced by defendant that "volunteers," or non-medical professionals, cannot be expected to use an AED in an "emergency" are entitled to no consideration.

Defendant's frequent incantation of the phrase "Good Samaritan" does not add anything to the court's analysis of this case. Defendant's use of that phrase is completely divorced from the facts of this case. For instance, defendant writes that "the appellate court's opinion erodes the protections ordinarily afforded non-medical Good Samaritans…." (Br., p. 7) But the trained staff members of Fitness do not fit that description. They have received, as defendant has established by an affidavit in support of its motion to dismiss, training required by statute from competent organizations. Further, as noted above, they are not volunteers or Good Samaritans, but rather paid staff members who are performing a function required by statute.

For the first time in the long progress of this case, defendant has cited a section, but only one section, of the Good Samaritan Act. (Br., p. 17) Defendant has forfeited the right

to rely upon that statute, having never raised it before. In the absence of that argument having been made previously, the appellate court below never had reason to treat it.

Even so, that Act, 745 ILCS 49/10, has no application by examination of its plain words. It applies only to persons who act "not for compensation." The Fitness staff member at issue in this case was an employee, paid by Fitness to fulfill the statutory requirement that Fitness have a trained staff member present at all times that the facility was open for business. *Tobin v. AMR Corp.*, 637 F. Supp. 2d 406, 418 (N.D. Tex. 2009) (applying Illinois law) ("On-duty flight attendants are required to receive training in emergency services…. They are not 'Good Samaritans' as that term is used in the statute; rather, they are professionals performing services within their job duties. They perform such services for compensation, and thus are not entitled to immunity under the Good Samaritan Act."). It is further seen that that section offers no assistance to defendant here because it provides for immunity for negligence but has no application if "the acts or omissions constitute willful and wanton misconduct."

This Court is left to guess as to why defendant did not attempt to rely upon 745 ILCS 49/12, the following section of the statute which, with more particularity, applies to "use of an automated external defibrillator." It too requires that the person seeking immunity under that section be acting "without fee or compensation," and it too provides for liability "for willful and wanton misconduct."

## II. THE CIRCUIT COURT FURTHER ERRED IN NOT GRANTING PLAINTIFF LEAVE TO CONDUCT DISCOVERY IN ORDER TO GARNER EVIDENCE IN ADDITIONAL SUPPORT OF THE WILLFUL AND WANTON MISCONDUCT ALLEGATIONS.

Defendant argued at length below that the failure of Fitness to take action, even in light of all of the circumstances, did not constitute willful and wanton misconduct.

However, the basis of Judge Rossi's ultimate dismissal of the case was his belief that "I don't believe that there is anything that creates the duty to use the AED," and that "I think the strongest argument is that the mere presence of an AED on the premises, even with the plan that has to be undertaken, does not impose a legal duty to provide medical assistance." (R49, A34). His ruling was not based on the details of the factual allegations.

The appellate court below took up defendant's argument there that "Dawkins failed to adequately allege willful and wanton misconduct." (Order, ¶ 41) The appellate court disposed of that argument, after reviewing the allegations of the Third Amended Complaint. The court stated:

> "Assuming the truth of these allegations, as we must, we cannot say that they are insufficient to plead a claim for willful and wanton conduct as a matter of law." (Order, ¶ 42)

Defendant has forfeited and waived making any argument as to the insufficiency of the allegations to constitute willful and wanton conduct to this court. That issue was neither mentioned nor developed in the Petition for Leave to Appeal, nor was it mentioned or developed in defendant's brief. Defendant's abandonment of that issue is understandable in light of the depth and sufficiency of the allegations in the Third Amended Complaint.

The allegations clearly satisfy the requisite pleading of "an utter indifference to or conscious disregard for the welfare of the plaintiff" branches of the definition of willful and wanton misconduct. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill.2d 497, 518 (1989). Plaintiff alleges that the Fitness staff knew of Mrs. Dawkins' collapse (Third Amended Complaint, ¶¶10-14) and despite shouted requests for assistance, and knowing that an AED was not being used, failed to follow its own Medical Plan and training by employing the AED (¶¶7-9, 15-16). The allegations of the Third Amended Complaint

contain a classic example of "a failure, after knowledge of impending danger, to exercise ordinary care to prevent it." *Ziarko v. Soo Line Railroad Co.*, 161 Ill.2d 267, 274 (1994), *Schneiderman v. Interstate Transit Lines*, 394 Ill. 569, 583 (1946). Counts I and II of the Third Amended Complaint sufficiently pled all elements of a cause of action for willful and wanton misconduct.

In light of the abandonment of that issue it is likely that plaintiff need not rely here on an additional aspect of error in the circuit court, but plaintiff does raise this issue in an abundance of caution.

If this Court were of the opinion that insufficient facts have been alleged, that insufficiency is most likely due to the circuit court's wrongful denial of discovery to plaintiff before ruling on the motions to dismiss.

Approximately two weeks after the filing of the (First) Amended Complaint, the court stayed plaintiff's efforts at discovery, ruling "plaintiff's discovery issued is stayed pending ruling." (C90).

When plaintiff filed his response to defendant's first motion to dismiss, plaintiff requested, as alternative relief, discovery both in the caption to that response and in discreet places within the response. (C158 et seq.)

Plaintiff again renewed his request for discovery in his response to defendant's motion to dismiss the Third Amended Complaint. (C470, 485). Plaintiff's motions were never allowed. Defense counsel's position was "I don't think that we are in that situation where discovery at all would help. It's a legal question about the duty." (R41)

The interplay between the sufficiency of allegations in this area and discovery is recognized by the courts. At a minimum, courts take a practical approach when the

defendant may be in possession of knowledge that the plaintiff is not in possession of at the time of drawing a complaint:

> "Where facts of necessity are in defendant's knowledge and not within plaintiff's knowledge, a complaint which is as complete as the nature of the case allows is sufficient."

*Yuretich v. Sole*, 259 Ill.App.3d 311, 313 (4th Dist. 1994).

To the same effect:

> "We recognize the practical reality that the plaintiff may be unable to plead sufficient facts alleging willful and wanton conduct when the necessary information is solely within the defendant's control. (See Richard A. Michael, 3 Civil Procedure Before Trial, §23.4, at 307-14). … Under such circumstances, a plaintiff is not foreclosed from pursuing his or her cause of action. Supreme court rules permit liberal pretrial discovery."

*Winfrey v. Chicago Park Dist.*, 274 Ill.App.3d 939, 949 (1st Dist. 1995).

*Yuretich v. Sole*, 259 Ill.App.3d 311 (4th Dist. 1994) found reversible error to exist on precisely the point presented here:

> "We next consider the fact that the trial court refused to allow discovery prior to ruling on the motion to dismiss. … [A] trial court should not refuse a discovery request and grant a motion to dismiss where it reasonably appears discovery might assist the party resisting the motion. … Especially where the facts are exclusively within the knowledge of the opponent, it may be error to deny discovery before ruling on a motion to dismiss. [Citation] We conclude the trial court should have allowed some discovery here before ruling on the motion to dismiss."

*Yuretich*, at 316, 7.

*See also Senese v. Climatemp, Inc.*, 22 Ill.App.3d 302, 320 (1st Dist. 1991) ("we believe limited discovery will cast light on unclear portions of the complaint. … For these reasons, we find the trial court abused its discretion in denying plaintiff's discovery request."); *Cole Taylor Bank v. Corrigan*, 230 Ill.App.3d 122, 127 (2nd Dist. 1992) (circuit court erred in denying relevant discovery before ruling on a motion for summary judgment).

Plaintiff respectfully asserts that he has pled sufficient facts to demonstrate a question of fact regarding willful and wanton misconduct. However, the circuit court erred in not permitting the plaintiff to pursue any discovery before proceeding to dismiss the complaint with prejudice.

## CONCLUSION

Leo Dawkins, Individually and as Next Friend of Dollett Smith Dawkins, a disabled person, by his attorneys, respectfully prays that the judgment of the appellate court, which reversed the judgment of the Circuit Court of Will County and remanded this matter for further proceedings, be affirmed, and that thereby the judgment of the Circuit Court of Will County which dismissed Counts I and II of plaintiff's Third Amended Complaint be reversed.

Respectfully submitted,

LEO DAWKINS, Individually and as Next Friend of DOLLETT SMITH DAWKINS, a Disabled Person, Plaintiff-Appellant

/s/ *Michael T. Reagan*

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**CERTIFICATE OF COMPLIANCE WITH RULE 341**

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages.

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# APPENDIX

E-FILED
2/16/2022 2:01 PM
CYNTHIA A. GRANT
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may refuse to provide needed emergency treatment to any person whose life would be threatened in the absence of such treatment, because of that person's inability to pay therefor, nor because of the source of any payment promised therefor.

P.A. 83-723, § 1, eff. Jan. 1, 1984.

Formerly Ill.Rev.Stat.1991, ch. 111 ½, ¶ 6151.

### 70/2. Findings; prohibited terms

§ 2. Findings; prohibited terms.

(a) The Illinois General Assembly makes all of the following findings:

(1) Hospital emergency services are not always the most appropriate level of care for patients seeking unscheduled medical care or for patients who do not have a regular physician who can treat a significant or acute medical condition not considered critical, debilitating, or life-threatening.

(2) Hospital emergency rooms are over-utilized and too often over-burdened with many injuries or illnesses that could be managed in a less intensive clinical setting or physician's office.

(3) Over-utilization of hospital emergency departments contributes to excess medical and health insurance costs.

(4) The use of the term "emergi-" or a similar term in a facility's posted or advertised name may confuse the public and prospective patients regarding the type of services offered relative to those provided by a hospital emergency department. There is significant risk to the public health and safety if persons requiring treatment for a critical or life-threatening condition inappropriately use such facilities.

(5) Many times patients are not clearly aware of the policies and procedures of their insurer or health plan that must be followed in the use of emergency rooms versus non-emergent clinics and what rights they have under the law in regard to appropriately sought emergency care.

(6) There is a need to more effectively educate health care payers and consumers about the most appropriate use of the various available levels of medical care and particularly the use of hospital emergency rooms and walk-in medical clinics that do not require appointments.

(b) No person, facility, or entity shall hold itself out to the public as an "emergi-" or "emergent" care center or use any similar term, as defined by rule, that would give the impression that emergency medical treatment is provided by the person or entity or at the facility unless the facility is the emergency room of a facility licensed as a hospital under the Hospital Licensing Act or a facility licensed as a freestanding emergency center under the Emergency Medical Services (EMS) Systems Act. This Section does not prohibit a person, facility, or entity from holding itself out to the public as an "urgi-" or "urgent" care center.

(c) Violation of this Section constitutes a business offense with a minimum fine of $5,000 plus $1,000 per day for a continuing violation, with a maximum of $25,000.

(d) The Director of Public Health in the name of the people of the State, through the Attorney General, may bring an action for an injunction or to restrain a violation of this Section or the rules adopted pursuant to this Section or to enjoin the future operation or maintenance of any facility in violation of this Section or the rules adopted pursuant to this Section.

(e) The Department of Public Health shall adopt rules necessary for the implementation of this Section.

P.A. 83-723, § 2, added by P.A. 93-540, § 10, eff. Aug. 18, 2003. Amended by P.A. 98-977, § 5, eff. Jan. 1, 2015.

## ACT 74. PHYSICAL FITNESS FACILITY MEDICAL EMERGENCY PREPAREDNESS ACT

Section



### 74/1. Short title

§ 1. Short title. This Act may be cited as the Physical Fitness Facility Medical Emergency Preparedness Act.

P.A. 93-910, § 1, eff. Jan. 1, 2005.

**Title of Act:**

An Act in relation to health, which may be known as the Colleen O'Sullivan Law. P.A. 93-910 approved August 12, 2004, effective January 1, 2005.

### 74/5. Definitions

§ 5. Definitions. In this Act, words and phrases have the meanings set forth in the following Sections.

P.A. 93-910, § 5, eff. Jan. 1, 2005.

### 74/5.5. Automated external defibrillator

§ 5.5. Automated external defibrillator. "Automated external defibrillator" or "AED" means an automated external defibrillator as defined in the Automated External Defibrillator Act.

P.A. 93-910, § 5.5, eff. Jan. 1, 2005.

### 74/5.10. Department

§ 5.10. Department. "Department" means the Department of Public Health.

P.A. 93-910, § 5.10, eff. Jan. 1, 2005.

### 74/5.15. Director

§ 5.15. Director. "Director" means the Director of Public Health.

P.A. 93-910, § 5.15, eff. Jan. 1, 2005.

### 74/5.20. Medical emergency

§ 5.20. Medical emergency. "Medical emergency" means the occurrence of a sudden, serious, and unexpected sickness or injury that would lead a reasonable person, possessing an

average knowledge of medicine and health, to believe that the sick or injured person requires urgent or unscheduled medical care.

P.A. 93-910, § 5.20, eff. Jan. 1, 2005.

### 74/5.25. Physical fitness facility

§ 5.25. Physical fitness facility.

(a) "Physical fitness facility" means the following:

(1) Any of the following indoor facilities that is (i) owned or operated by a park district, municipality, or other unit of local government, including a home rule unit, or by a public or private elementary or secondary school, college, university, or technical or trade school and (ii) supervised by one or more persons, other than maintenance or security personnel, employed by the unit of local government, school, college, or university for the purpose of directly supervising the physical fitness activities taking place at any of these indoor facilities: a swimming pool; stadium; athletic field; football stadium; soccer field; baseball diamond; track and field facility; tennis court; basketball court; or volleyball court; or similar facility as defined by Department rule.

(1.5) Any of the following outdoor facilities that is (i) owned by a municipality, township, or other unit of local government, including a home rule unit, or by a public or private elementary or secondary school, college, university, or technical or trade school and (ii) supervised by one or more persons, other than maintenance or security personnel, employed by the unit of local government, school, college, or university for the purpose of directly supervising the physical fitness activities taking place at any of these facilities: a swimming pool; athletic field; football stadium; soccer field; baseball diamond; track and field facility; tennis court; basketball court; or volleyball court; or similar facility as defined by Department rule.

The term does not include any facility during any activity or program organized by a private or not-for-profit organization and organized and supervised by a person or persons other than the employees of the unit of local government, school, college, or university.

(2) Except as provided in subsection (b), any other indoor or outdoor establishment, whether public or private, that provides services or facilities focusing on cardiovascular exertion or gaming as defined by Department rule.

(b) "Physical fitness facility" does not include a facility serving less than a total of 100 individuals. For purposes of this Act, "individuals" includes only those persons actively engaged in physical exercise that uses large muscle groups and that substantially increases the heart rate. In addition, the term does not include (i) a facility located in a hospital or in a hotel or motel, (ii) any outdoor facility owned or operated by a park district organized under the Park District Code, the Chicago Park District Act, or the Metro-East Park and Recreation District Act, or (iii) any facility owned or operated by a forest preserve district organized under the Downstate Forest Preserve District Act or the Cook County Forest Preserve District Act or a conservation district organized under the Conservation District Act. The term also does not include any facility that does not employ any persons to provide instruction, training, or assistance for persons using the facility.

P.A. 93-910, § 5.25, eff. Jan. 1, 2005. Amended by P.A. 95-712, § 5, eff. Jan. 1, 2009; P.A. 96-873, § 5, eff. Jan. 21, 2010.

### 74/10. Medical emergency plan required

§ 10. Medical emergency plan required.

(a) Before July 1, 2005, each person or entity, including a home rule unit, that operates a physical fitness facility must adopt and implement a written plan for responding to medical emergencies that occur at the facility during the time that the facility is open for use by its members or by the public. The plan must comply with this Act and rules adopted by the Department to implement this Act. The facility must file a copy of the plan with the Department.

(b) Whenever there is a change in the structure occupied by the facility or in the services provided or offered by the facility that would materially affect the facility's ability to respond to a medical emergency, the person or entity, including a home rule unit, must promptly update its plan developed under subsection (a) and must file a copy of the updated plan with the Department.

P.A. 93-910, § 10, eff. Jan. 1, 2005.

### 74/15. Automated external defibrillator required

§ 15. Automated external defibrillator required.

(a) By the dates specified in Section 50, every physical fitness facility must have at least one AED on the facility premises. The Department shall adopt rules to ensure coordination with local emergency medical services systems regarding the placement and use of AEDs in physical fitness facilities. The Department may adopt rules requiring a facility to have more than one AED on the premises, based on factors that include the following:

(1) The size of the area or the number of buildings or floors occupied by the facility.

(2) The number of persons using the facility, excluding spectators.

(b) A physical fitness facility must ensure that there is a trained AED user on staff during staffed business hours. For purposes of this Act, "trained AED user" has the meaning ascribed to that term in Section 10 of the Automated External Defibrillator Act.

(b-5) The Department shall adopt rules that encourage any non-employee coach, non-employee instructor, or other similarly situated non-employee anticipated rescuer who uses a physical fitness facility in conjunction with the supervision of physical fitness activities to complete a course of instruction that would qualify such a person as a trained AED user, as defined in Section 10 of the Automated External Defibrillator Act.

(b-10) In the case of an outdoor physical fitness facility, the AED must be housed in a building, if any, that is within 300 feet of the outdoor facility where an event or activity is being conducted. If there is such a building within the required distance, the building must provide unimpeded and open access to the housed AED, and the building's entrances shall further provide marked directions to the housed AED.

(b-15) Facilities described in paragraph (1.5) of Section 5.25 must have an AED on site as well as a trained AED user available only during activities or events sponsored and conducted or supervised by a person or persons employed by the unit of local government, school, college, or university.

(c) Every physical fitness facility must ensure that every AED on the facility's premises is properly tested and maintained in accordance with rules adopted by the Department.

P.A. 93-910, § 15, eff. Jan. 1, 2005. Amended by P.A. 95-712, § 5, eff. Jan. 1, 2009; P.A. 96-748, § 5, eff. Jan. 1, 2010; P.A. 96-873, § 5, eff. Jan. 21, 2010; P.A. 96-1268, § 5, eff. Jan. 1, 2011.

P.A. 96-1268 incorporated the amendments by P.A. 96-748 and 96-873.

### 74/20. Training

§ 20. Training. The Department shall adopt rules to establish programs to train physical fitness facility staff on the role of cardiopulmonary resuscitation and the use of automated external defibrillators. The rules must be consistent with those adopted by the Department for training AED users under the Automated External Defibrillator Act.

P.A. 93-910, § 20, eff. Jan. 1, 2005.

### 74/30. Inspections

§ 30. Inspections. The Department shall inspect a physical fitness facility in response to a complaint filed with the Department alleging a violation of this Act. For the purpose of ensuring compliance with this Act, the Department may inspect a physical fitness facility at other times in accordance with rules adopted by the Department.

P.A. 93-910, § 30, eff. Jan. 1, 2005.

### 74/35. Penalties for violations

§ 35. Penalties for violations.

(a) If a physical fitness facility violates this Act by (i) failing to adopt or implement a plan for responding to medical emergencies under Section 10 or (ii) failing to have on the premises an AED or trained AED user as required under subsection (a) or (b) of Section 15, the Director may issue to the facility a written administrative warning without monetary penalty for the initial violation. The facility may reply to the Department with written comments concerning the facility's remedial response to the warning. For subsequent violations, the Director may impose a civil monetary penalty against the facility as follows:

(1) At least $1,500 but less than $2,000 for a second violation.

(2) At least $2,000 for a third or subsequent violation.

(b) The Director may impose a civil monetary penalty under this Section only after it provides the following to the facility:

(1) Written notice of the alleged violation.

(2) Written notice of the facility's right to request an administrative hearing on the question of the alleged violation.

(3) An opportunity to present evidence, orally or in writing or both, on the question of the alleged violation before an impartial hearing examiner appointed by the Director.

(4) A written decision from the Director, based on the evidence introduced at the hearing and the hearing examiner's recommendations, finding that the facility violated this Act and imposing the civil penalty.

(c) The Attorney General may bring an action in the circuit court to enforce the collection of a monetary penalty imposed under this Section.

(d) The fines shall be deposited into the General Revenue Fund.

P.A. 93-910, § 35, eff. Jan. 1, 2005. Amended by P.A. 99-933, § 5-120, eff. Jan. 27, 2017.

### 74/40. Rules

§ 40. Rules. The Department shall adopt rules to implement this Act.

P.A. 93-910, § 40, eff. Jan. 1, 2005.

### 74/45. Liability

§ 45. Liability. Nothing in this Act shall be construed to either limit or expand the exemptions from civil liability in connection with the purchase or use of an automated external defibrillator that are provided under the Automated External Defibrillator Act or under any other provision of law. A right of action does not exist in connection with the use or non- use of an automated external defibrillator at a facility governed by this Act, except for willful or wanton misconduct, provided that the person, unit of state or local government, or school district operating the facility has adopted a medical emergency plan as required under Section 10 of this Act, has an automated external defibrillator at the facility as required under Section 15 of this Act, and has maintained the automated external defibrillator in accordance with the rules adopted by the Department.

P.A. 93-910, § 45, eff. Jan. 1, 2005.

### 74/50. Compliance dates; private and public physical fitness facilities

§ 50. Compliance dates; private and public physical fitness facilities.

(a) Privately owned indoor physical fitness facilities. Every privately owned or operated indoor physical fitness facility must be in compliance with this Act on or before July 1, 2006.

(a-5) Privately owned outdoor physical fitness facilities. Every privately owned or operated outdoor physical fitness facility must be in compliance with this Act on or before July 1, 2009.

(b) Publicly owned indoor physical fitness facilities. A public entity owning or operating 4 or fewer indoor physical fitness facilities must have at least one such facility in compliance with this Act on or before July 1, 2006; its second facility in compliance by July 1, 2007; its third facility in compliance by July 1, 2008; and its fourth facility in compliance by July 1, 2009.

A public entity owning or operating more than 4 indoor physical fitness facilities must have 25% of those facilities in compliance by July 1, 2006; 50% of those facilities in compliance by July 1, 2007; 75% of those facilities in compliance by July 1, 2008; and 100% of those facilities in compliance by July 1, 2009.

(b-5) Publicly owned outdoor physical fitness facilities. A public entity owning or operating 4 or fewer outdoor physical fitness facilities must have at least one such facility in compliance with this Act on or before July 1, 2009; its second facility in compliance by July 1, 2010; its third facility in compliance by July 1, 2011; and its fourth facility in compliance by July 1, 2012.

A public entity owning or operating more than 4 outdoor physical fitness facilities must have 25% of those facilities in compliance by July 1, 2009; 50% of those facilities in compliance by July 1, 2010; 75% of those facilities in compliance by July 1, 2011; and 100% of those facilities in compliance by July 1, 2012.

P.A. 93-910, § 50, eff. Jan. 1, 2005. Amended by P.A. 95-712, § 5, eff. Jan. 1, 2009.

### 74/55. Home rule

§ 55. Home rule. A home rule unit must comply with the requirements of this Act. A home rule unit may not regulate physical fitness facilities in a manner inconsistent with this Act. This Section is a limitation under subsection (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State.

P.A. 93-910, § 55, eff. Jan. 1, 2005.

## ACT 75. ILLINOIS HOSPITAL CONSTRUCTION ACT

75/1 to 75/7.1. §§ 1 to 7.1. Repealed by P.A. 90-372, Art. 5, § 5-317, eff. July 1, 1998

## ACT 76. COMMUNITY BENEFITS ACT

Section



### 76/1. Short title

§ 1. Short title. This Act may be cited as the Community Benefits Act.

P.A. 93-480, § 1, eff. Aug. 8, 2003.

**Title of Act:**

An Act concerning health care. P.A. 93-480, approved and effective August 8, 2003.

### 76/5. Applicability

§ 5. Applicability. This Act does not apply to a hospital operated by a unit of government, a hospital located outside of a metropolitan statistical area, or a hospital with 100 or fewer beds. Hospitals that are owned or operated by or affiliated with a health system shall be deemed to be in compliance with this Act if the health system has met the requirements of this Act.

P.A. 93-480, § 5, eff. Aug. 8, 2003.

### 76/10. Definitions

§ 10. Definitions. As used in this Act:

"Charity care" means care provided by a health care provider for which the provider does not expect to receive payment from the patient or a third party payer.

"Community benefits" means the unreimbursed cost to a hospital or health system of providing charity care, language assistant services, government-sponsored indigent health care, donations, volunteer services, education, government-sponsored program services, research, and subsidized health services and collecting bad debts. "Community benefits" does not include the cost of paying any taxes or other governmental assessments.

"Government sponsored indigent health care" means the unreimbursed cost to a hospital or health system of Medicare, providing health care services to recipients of Medicaid, and other federal, State, or local indigent health care programs, eligibility for which is based on financial need.

"Health system" means an entity that owns or operates at least one hospital.

"Nonprofit hospital" means a hospital that is organized as a nonprofit corporation, including religious organizations, or a charitable trust under Illinois law or the laws of any other state or country.

"Subsidized health services" means those services provided by a hospital in response to community needs for which the reimbursement is less than the hospital's cost of providing the services that must be subsidized by other hospital or nonprofit supporting entity revenue sources. "Subsidized health services" includes, but is not limited to, emergency and trauma care, neonatal intensive care, community health clinics, and collaborative efforts with local government or private agencies to prevent illness and improve wellness, such as immunization programs.

P.A. 93-480, § 10, eff. Aug. 8, 2003.

### 76/15. Organizational mission statement; community benefits plan

§ 15. Organizational mission statement; community benefits plan. A nonprofit hospital shall develop:

(1) an organizational mission statement that identifies the hospital's commitment to serving the health care needs of the community; and

(2) a community benefits plan defined as an operational plan for serving the community's health care needs that:

(A) sets out goals and objectives for providing community benefits that include charity care and government sponsored indigent health care; and

(B) identifies the populations and communities served by the hospital.

P.A. 93-480, § 15, eff. Aug. 8, 2003.

### 76/20. Annual report for community benefits plan

§ 20. Annual report for community benefits plan.

(a) Each nonprofit hospital shall prepare an annual report of the community benefits plan. The report must include, in addition to the community benefits plan itself, all of the following background information:

(1) The hospital's mission statement.

(2) A disclosure of the health care needs of the community that were considered in developing the hospital's community benefits plan.

(3) A disclosure of the amount and types of community benefits actually provided, including charity care. Charity care must be reported separate from other community benefits. In reporting charity care, the hospital must report the actual cost of services provided, based on the total cost to charge ratio derived from the hospital's Medicare cost report (CMS 2552-96 Worksheet C, Part 1, PPS Inpatient Ratios), not the charges for the services.

(4) Audited annual financial reports for its most recently completed fiscal year.

(b) Each nonprofit hospital shall annually file a report of the community benefits plan with the Attorney General. The report must be filed not later than the last day of the sixth month after the close of the hospital's fiscal year, beginning with the hospital fiscal year that ends in 2004.

Repealed

3/10. § 10. Repealed by P.A. 98-692, § 115, eff. July 1, 2014

### 3/15. Duties

§ 15. Duties. The Department of Public Health, with the advice of the Atherosclerosis Advisory Committee, shall do all of the following:

(1) Develop standards for determining eligibility for support of research, education, and prevention activities.

(2) Assist in the development and expansion of programs for research in the causes and cures of atherosclerosis, including medical procedures and techniques that have a lifesaving effect in the care and treatment of persons suffering from the disease.

(3) Assist in expanding resources for research and medical care in the cardiovascular disease field.

(4) Establish or cause to be established, through its own resources or by contract or otherwise, with other agencies or institutions, facilities and systems for early detection of persons with heart disease or conditions that might lead to heart disease and for referral to those persons' physicians or other appropriate resources for care.

(5) Institute and carry on educational programs among physicians, hospitals, public health departments, and the public concerning atherosclerosis, including the dissemination of information and the conducting of educational programs concerning the prevention of atherosclerosis and the methods for the care and treatment of persons suffering from the disease.

P.A. 91-343, § 15, eff. Jan. 1, 2000.

## ACT 4. AUTOMATED EXTERNAL DEFIBRILLATOR ACT

Section


### 4/1. Short title

§ 1. Short title. This Act may be cited as the Automated External Defibrillator Act.

P.A. 91-524, § 1, eff. Jan. 1, 2000.

**Title of Act:**

An Act in relation to automated external defibrillators. P.A. 91-524, approved Aug. 13, 1999, eff. Jan. 1, 2000.

### 4/5. Findings; intent

§ 5. Findings; intent. The General Assembly finds that timely attention in medical emergencies saves lives, and that trained use of automated external defibrillators in medical emergency response can increase the number of lives saved. It is the intent of the General Assembly to encourage training in lifesaving first aid, to set standards for the use of automated external defibrillators and to encourage their use.

P.A. 91-524, § 5, eff. Jan. 1, 2000.

### 4/10. Definitions

§ 10. Definitions. As used in this Act:

"Automated external defibrillator" means a medical device heart monitor and defibrillator that:

(1) has received approval of its premarket notification, filed pursuant to 21 U.S.C. Section 360(k), from the United States Food and Drug Administration;

(2) is capable of recognizing the presence or absence of ventricular fibrillation and rapid ventricular tachycardia, and is capable of determining, without intervention by an operator, whether defibrillation should be performed;

(3) upon determining that defibrillation should be performed, either automatically charges and delivers an electrical impulse to an individual, or charges and delivers an electrical impulse at the command of the operator; and

(4) in the case of a defibrillator that may be operated in either an automatic or a manual mode, is set to operate in the automatic mode.

"Defibrillation" means administering an electrical impulse to an individual in order to stop ventricular fibrillation or rapid ventricular tachycardia.

"Person" means an individual, partnership, association, corporation, limited liability company, or organized group of persons (whether incorporated or not).

"Trained AED user" means a person who has successfully completed a course of instruction in accordance with the standards of a nationally recognized organization such as the American Red Cross or the American Heart Association or a course of instruction in accordance with the rules adopted under this Act to use an automated external defibrillator, or who is licensed to practice medicine in all its branches in this State.

"Department" means the Department of Public Health.

P.A. 91-524, § 10, eff. Jan. 1, 2000.

### 4/15. Training

§ 15. Training.

(a) The Department shall adopt rules regarding the establishment of programs to train individuals as trained AED users. Rules regarding the establishment of programs to train individuals as trained AED users shall specify the following:

(1) The curriculum of any program to train individuals shall include complete training in cardiopulmonary resuscitation (commonly referred to as "CPR") prepared according to nationally recognized guidelines.

(2) The qualifications necessary for any individuals to teach a program to train an individual as a trained AED user.

(3) The time period for which training recognition shall be valid, and the recommendation for subsequent renewal.

(b) In carrying out subsection (a), the Department shall identify an appropriate training curriculum designed for trained AED users who are members of the general public, and a training curriculum designed for trained AED users who are health professionals.

P.A. 91-524, § 15, eff. Jan. 1, 2000.

### 4/20. Maintenance; oversight

§ 20. Maintenance; oversight.

(a) A person acquiring an automated external defibrillator shall take reasonable measures to ensure that:

(1) (blank);

(2) the automated external defibrillator is maintained and tested according to the manufacturer's guidelines;

(3) any person considered to be an anticipated rescuer or user will have successfully completed a course of instruction in accordance with the standards of a nationally recognized organization, such as the American Red Cross or the American Heart Association, or a course of instruction in accordance with existing rules under this Act to use an automated external defibrillator and to perform cardiovascular resuscitation (CPR); and

(4) any person who renders out-of-hospital emergency care or treatment to a person in cardiac arrest by using an automated external defibrillator activates the EMS system as soon as possible and reports any clinical use of the automated external defibrillator.

(b) A person in possession of an automated external defibrillator shall notify an agent of the local emergency communications or vehicle dispatch center of the existence, location, and type of the automated external defibrillator.

P.A. 91-524, § 20, eff. Jan. 1, 2000. Amended by P.A. 95-447, § 10, eff. Aug. 27, 2007.

### 4/25. Illinois Department of Public Health; responsibilities

§ 25. Illinois Department of Public Health; responsibilities. The Illinois Department of Public Health shall maintain incident reports on automated external defibrillator use and conduct annual analyses of all related data. The Department shall adopt rules to carry out its responsibilities under this Act.

P.A. 91-524, § 25, eff. Jan. 1, 2000.

### 4/30. Exemption from civil liability

§ 30. Exemption from civil liability.

(a) A physician licensed in Illinois to practice medicine in all its branches who authorizes the purchase of an automated external defibrillator is not liable for civil damages as a result of any act or omission arising out of authorizing the purchase of an automated external defibrillator, except for willful or wanton misconduct, if the requirements of this Act are met.

(b) An individual or entity providing training in the use of automated external defibrillators is not liable for civil damages as a result of any act or omission involving the use of an automated external defibrillator, except for willful or wanton misconduct, if the requirements of this Act are met.

(c) A person, unit of State or local government, sheriff's office, municipal police department, or school district owning, occupying, or managing the premises where an automated external defibrillator is located is not liable for civil damages as a result of any act or omission involving the use of an automated external defibrillator, except for willful or wanton misconduct, if the requirements of this Act are met.

(d) An AED user is not liable for civil damages as a result of any act or omission involving the use of an automated external defibrillator in an emergency situation, except for willful or wanton misconduct, if the requirements of this Act are met.

(e) This Section does not apply to a public hospital.

P.A. 91-524, § 30, eff. Jan. 1, 2000. Amended by P.A. 93-910, § 100, eff. Jan. 1, 2005; P.A. 99-246, § 20, eff. Jan. 1, 2016.

## ACT 5. BURIAL OF DEAD BODIES ACT

Section
5/1. Short title.
5/2. Required depth of cover; violations; home rule units.

### 5/1. Short title

§ 1. This Act shall be known and may be cited as the Burial of Dead Bodies Act.

P.A. 84-405, § 1, eff. Jan. 1, 1986.

Formerly Ill.Rev.Stat.1991, ch. 21, ¶ 251.

Title of Act:

An Act in relation to the burial of dead human bodies. P.A. 84-405, approved Sept. 16, 1985, eff. Jan. 1, 1986.

### 5/2. Required depth of cover; violations; home rule units

§ 2. (a) All dead human bodies or the remains of persons interred in the earth within this State which are not encased in a concrete, fiberglass, or other similar hardback outer enclosure shall have a cover of not less than 18 inches of earth at the shallowest point over the receptacle in which such body or remains are placed.

(b) Any person who knowingly buries a dead human body or the remains of a person in violation of this Act is guilty of a petty offense.

(c) No home rule unit, as defined in Section 6 of Article VII of the Illinois Constitution, may change, alter or amend in any way the provisions contained in this Act, and it is declared to be the law of this State, pursuant to subsections (h) and (i) of Section 6 of Article VII of the Illinois Constitution, that powers and functions authorized by this Act are the subjects of exclusive State jurisdiction, and no such powers or functions may be exercised concurrently, either directly or indirectly, by any home rule unit.

P.A. 84-405, § 2, eff. Jan. 1, 1986. Amended by P.A. 86-293, § 1, eff. Jan. 1, 1990.

Formerly Ill.Rev.Stat.1991, ch. 21, ¶ 252.

## ACT 10. CHOKE-SAVING METHODS ACT

Section
10/1. Short title.
10/2. Food-service establishment.
10/3. Approved methods; regulation.
10/3.1. Placards containing instructions; posting.
10/3.2. Guidelines for training programs.
10/4. Posting instructions in food-service establishments.
10/5. Liability for acts of omissions.
10/5.1. Administrative Procedure Act; incorporation.
10/6. Violations; penalty.

### 10/1. Short title

§ 1. This Act shall be known and may be cited as the "Choke-Saving Methods Act".

P.A. 80-448, § 1, eff. Jan. 1, 1978.

Formerly Ill.Rev.Stat.1991, ch. 56½, ¶ 601.

Title of Act:

An Act in relation to choke-saving first aid procedures. P.A. 80-448, approved Sept. 2, 1977, eff. Jan. 1, 1978.

### 10/2. Food-service establishment

§ 2. As used in this Act, "food-service establishment" means any fixed or mobile establishment serving food to the public for consumption on the premises. The term does not include establishments operated on a temporary basis by charitable or non-profit organizations.

P.A. 80-448, § 2, eff. Jan. 1, 1978.

Formerly Ill.Rev.Stat.1991, ch. 56½, ¶ 602.

**NOTICE OF ELECTRONIC FILING / CERTIFICATE OF SERVICE**

PLEASE TAKE NOTICE that on February 16, 2022, the undersigned electronically filed the foregoing BRIEF AND ARGUMENT OF APPELLEE with the Clerk of the Supreme Court of Illinois, through the Odyssey eFileIL Case Filing System, which will electronically send notification of such filing to the following attorneys of record at the email addresses listed:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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2/16/2022 2:01 PM
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