Case No. 127561

In the
Supreme Court of Illinois

LEO DAWKINS, individually and as next friend of DOLLETT SMITH DAWKINS, a disabled person,

Plaintiff-Appellee,

vs.

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

Defendant-Appellant,

On Appeal from the Illinois Appellate Court,
Third District, Appeal No. 3-17-0702

On Appeal from the Circuit Court of Will County, Illinois, No. 15 L 00675
The Honorable Raymond E. Rossi and Honorable Michael J. Powers, Judges Presiding

DEFENDANT-APPELLANT BRIEF

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Through four, successive complaints – each of which was dismissed by the trial court – Leo Dawkins, individually and as next friend to his wife, Dollett Smith Dawkins ("Dawkins"), seeks to recover from Fitness International, LLC ("Fitness") for personal injuries and loss of consortium as a result of the Mrs. Dawkins' cardiac arrest while exercising at a Fitness' club. The sole causes of action at issue on this appeal allege willful and wanton misconduct by Fitness in failing to use an automated external defibrillator ("AED") on Ms. Dawkins.

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is an affirmative duty – created by statute or in the common law – for a layperson to use an AED on someone who is experiencing a medical emergency.

2. Whether a private right of action exists in the Physical Fitness Facility Medical Emergency Preparedness Act, 210 ILCS 74/1 et seq. ("PFFMEPA") based on a layperson's non-use of an AED.

JURISDICTION

Fitness brings this appeal pursuant to Supreme Court Rule 315. On November 24, 2021, this Court allowed Fitness' petition for leave to appeal. Fitness filed a Notice of Election to File and Additional Brief pursuant to Illinois Supreme Court Rule 315(h) on December 3, 2021. In an Order, dated July 14, 2021 and modified upon rehearing, the Appellate Court reversed the Order of the Circuit Court of Will County, dated September 20, 2017, which had dismissed the complaint.

STATUTES INVOLVED

The Physical Fitness Facility Medical Emergency Preparedness Act, 210 ILCS 74/1 et seq. ("PFFMEPA") and the Automated External Defibrillator Act ("AED Act"), 410 ILCS 4/1 et seq.

STATEMENT OF FACTS

In November of 2012, Dollett Smith Dawkins collapsed while working out on equipment at a fitness center in Oswego, Illinois operated by Fitness. Prior to the date of her collapse, Ms. Dawkins had a pacemaker implanted, and she was aware that she had a cardiac condition. (C 194-95, #17-18; C 250).

The PFFMEPA requires that fitness facilities, such as the one operated by Fitness in Oswego, must comply with certain requirements. (C 131-36; A36-A39). The statute requires that all fitness facilities have a medical emergency plan filed with the Illinois Department of Public Health ("IDPH"), an AED on the premises, and staff trained on the use of the AED present during business hours. Fitness satisfied all of these requirements. The IDPH received and approved the medical emergency plan for the subject facility. (C 59). Fitness had a working AED at the premises on the date of Ms. Dawkins' collapse. (C 60-65). The Fitness employee working at the front desk of the facility at the time of plaintiff's medical event was a trained AED user. (*Id.*). Based on these facts, the Circuit Court of Will County found that Fitness complied with the PFFMEPA. Plaintiff did not contest that finding.

Over the course of four successive complaints, however, plaintiff Leo Dawkins, individually and as next friend of his wife Dollett Smith Dawkins, has sought to recover from Fitness for injuries Ms. Dawkins sustained in her medical event based on allegations

that Fitness did not revive her quickly enough using an AED and/or provide other care. (C 7-10). The original Complaint set forth two negligence counts alleging that Ms. Dawkins suffered injuries due to Fitness' negligent failure to have a medical emergency plan, failure to have a properly functioning AED, failure to have properly AED trained personnel at the premises, and failure to use the AED on Ms. Dawkins. Fitness moved to dismiss that complaint pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619 based upon the expiration of the statute of limitations, the membership agreement containing an exculpatory clause, compliance with the PFFMEPA, and lack of factual support. (C 36-65).

Amended Complaint

In response to Fitness' motion to dismiss, plaintiff was granted leave to amend the complaint. (C 66). In the Amended Complaint, plaintiff alleged two counts of willful and wanton misconduct for Fitness' alleged refusal to use an AED on Ms. Dawkins. (C 79-84). The other two counts alleged negligence for Fitness' failure to adequately staff the facility, monitor activities, and/or respond to an emergency and failure to have an AED device and trained personnel. (C 84-89). Fitness moved to dismiss the Amended Complaint pursuant to 735 ILCS 5/2-619(a)(5), 735 ILCS 5/2-619(a)(9), 735 ILCS 5/2-615, and 735 ILCS 5/2-619(a)(2). (C 92-143). The Circuit Court held that the two counts for negligence and derivative negligence were barred by the exculpatory clause in the membership agreement, and it also dismissed them with prejudice based on compliance with the PFFMEPA. The Circuit Court dismissed the two counts alleging willful and wanton misconduct without prejudice and granted plaintiff leave to re-plead those two counts. (C 274; A5).

Second Amended Complaint

Thereafter, plaintiff filed a Second Amended Complaint containing four counts. (C 276-289). The first two counts again alleged willful and wanton conduct for Fitness' failure to employ an AED device. (C 276-283). More specifically, plaintiff asserted that Fitness acted in a willful and wanton manner by abandoning all monitoring of the events concerning Ms. Dawkins, by taking no steps to assess Ms. Dawkins' condition in order to employ an AED, and by taking no steps to employ an AED on Ms. Dawkins. (C 278, ¶15, 281, ¶15). The remaining two counts alleged negligence for failing to adequately staff the facility, monitor activities and respond to medical emergency, and a derivative claim for loss of consortium for failure to have an AED device and trained personnel. (C 283-289).

Fitness again filed a motion to dismiss Counts I and II pursuant to 735 ILCS 5/2-619(a)(9) and 735 ILCS 5/2-615 and to Strike/Dismiss Counts III & IV pursuant to the court's prior order. (C 291-335). The Circuit Court dismissed the first two counts without prejudice pursuant to 735 ILCS 5/2-619 and held that Counts III and IV had been previously dismissed with prejudice. (C 379; A44). The court granted plaintiff leave to re-plead Counts I and II, alleging willful and wanton conduct, one final time. (*Id.*).

Third Amended Complaint

On March 30, 2017, plaintiff filed a Third Amended Complaint, the operative complaint at issue on this appeal, containing four counts. Counts III & IV, which alleged negligence, had been previously dismissed. (C 381-398; A44). Counts I & II for willful and wanton conduct allege refusal to employ an AED device (Count II is the derivative claim for loss of consortium). (C 381-390). The willful and wanton counts

allege that after the medical event occurred to Ms. Dawkins, Fitness patrons unsuccessfully began to attempt to administer CPR to her. (C 383, ¶13, C 387, ¶13). In the previous iteration of the complaint, plaintiff alleged that throughout the entire time that Ms. Dawkins was collapsed, she was tended to by patrons and was having CPR performed on her until the ambulance arrived. (C 284, ¶ 10; C 287, ¶ 10). Plaintiff alleges further that Fitness acted in a willful and wanton manner because it:

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 DOLLETT SMITH DAWKINS for breathing in violation of AED operator training, the MEDICAL EMERGENCY PLAN, and the PFFMEPA;

d. Refused to assess DOLLETT SMITH 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 DOLLETT SMITH 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 DOLLETT SMITH 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; and

i. Refused to follow AED training and certification.

(C 383, ¶ 16; 387, ¶ 16).

Fitness again brought a motion to dismiss the two counts alleging willful and wanton conduct pursuant to 735 ILCS 5/2-619(a)(9) and 735 ILCS 5/2-615 and to Strike/Dismiss the other two counts based on the prior order. (C 401-468). On September 20, 2017, the Circuit Court dismissed Counts I and II with prejudice and found that Counts III and IV had been previously dismissed with prejudice. (C 529; A44). Presiding Judge Raymond E. Rossi held, "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." (R. 49-50).

The Appellate Court's July 14, 2021 Order and Fitness' Petition for Leave to Appeal

Plaintiff appealed. On appeal, plaintiff narrowed the issues to the Circuit Court's dismissal of Counts I and II of the Third Amended Complaint that allege willful and wanton misconduct. In its modified order upon denial of rehearing, the Appellate Court held that "the circuit court erred by dismissing the plaintiff's complaint under section 2-619(a)(9) of the Code, where the plaintiff could show that the defendant violated a duty of care under applicable statutes and the common law, and where an applicable statute created an implied private right of action." (A4). In interpreting the relevant sections of the PFFMEPA and the AED Act, the Appellate Court concluded that neither the PFFMEPA nor the AED Act immunize a defendant from liability arising from the failure to use an AED on an injured person, provided that such failure was willful and wanton (A11) and that "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." (A12). Following this reasoning, the Appellate Court concluded that the statutory 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." (A12). The Court found further that the duty to use an AED was not just within the statutes but also exists at common law. (A15). Additionally, the Appellate Court agreed with plaintiff that a private right of action can be implied from the PFFMEPA and that implying a private right of action was necessary to provide an adequate remedy for violations of the statute. (A18). Based on its analyses, the Appellate Court reversed the order of the Circuit Court, denied Fitness' motion to dismiss the Third Amended Complaint and remanded the case for further proceedings. (A4-22).

Fitness petitioned for leave to appeal to this Court, asserting that the Appellate Court impermissibly created a duty of care to include an affirmative duty of non-medical personnel to use an AED, despite the lack of statutory support or common law precedent and without regard to the non-medical person's discretion or other attendant circumstances, such as ongoing aid being performed by others. In addition, the Appellate Court's opinion erodes the protections ordinarily afforded non-medical Good Samaritans despite the plain language of the PFFMEPA that states that the law shall not be construed to limit exemptions from civil liability. 210 ILCS 74/45. Fitness argued further that the Appellate Court's opinion misapprehends the plain language of the PFFMEPA to create an implied private right of action that was not intended by the General Assembly. On November 24, 2021, this Court allowed Fitness' petition for leave to appeal. (A3). Fitness now submits

this brief in support of its appeal pursuant to its election to do so under Supreme Court Rule 315(h). (A1).

STANDARD OF REVIEW

This Court's review of the Circuit Court's dismissal and Appellate Court's reversal under section 2-619(a)(9) is *de novo*. *Kean v. Wal-Mart Stores, Inc*., 235 Ill. 2d 351, 361 (2009).

ARGUMENT

I. NO AFFIRMATIVE DUTY EXISTS - BY STATUTE OR COMMON LAW- TO USE AN AED ON A PATRON OF A FITNESS FACILITY IN DISTRESS, AND THEREFORE, THE APPELLATE COURT'S ERRONEOUS DECISION MUST BE REVERSED

The trial court was correct in dismissing two counts of willful & wanton conduct, pursuant to 735 ILCS 5/2-619(a)(9), after determining that there is no affirmative duty to apply an AED, to a distressed patron of a fitness facility, under the plain language of the applicable statutes or at common law. The Appellate Court ignored the intention of the legislature to make AEDs more widely available while not creating liability for those premises owners who purchase or possess an AED for public use. Similar to fire extinguishers or first-aid kits, an AED is another tool to be made available in an emergency. The Physical Fitness Facility Medical Emergency Preparedness Act (§§ 74/1- 74/100) (the "PFFMEPA") creates a framework that makes use of a working AED available and more readily employable, in a medical emergency, due to the preparedness of the facility.

The Appellate Court's mandate for application of an AED to every person in distress at a fitness club is unprecedented and without legal basis. The erroneous decision exposes fitness clubs and their employees to allegations amounting to medical malpractice claims and exposure to exemplary damages if the AED is not used. While the PFFMEPA

requires compliance, and Fitness was in compliance, there is no legal or logical basis for imposing an affirmative duty to apply a medical device to every person in distress in a fitness club. The Appellate Court's decision has removed the situational discretion of Good Samaritans, advocates severe punishments for non-compliance by Good Samaritans while employing the obfuscating phrase "robust built-in enforcement mechanisms," and eliminated the immunity for negligent non-use of an AED under the PFFMEPA, by making non-use willful and wanton conduct. The Appellate Court's erroneous and overreaching decision must be reversed.

A. NEITHER THE AED ACT NOR THE PFFMEPA CREATE AN AFFIRMATIVE DUTY TO USE AN AED BY THEIR PLAIN LANGUAGE AND THE APPELLATE COURT'S ERRONEOUS DECISION SUBVERTS THE INTENTION OF THE LEGISLATURE TO ENCOURAGE PREPAREDNESS WHILE PRESERVING THE EXEMPTIONS FROM CIVIL LIABILITY

It is clear from the plain language of the statute that in enacting the Automated External Defibrillator Act (§§ 4/1-4/30) (the "AED Act"), effective January 1, 2005, the General Assembly intended to encourage use of an AED, not mandate use. Specifically, the AED Act states:

> "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**." [Emphasis added in bold] 410 ILCS 4/5 Findings; intent.

The PFFMEPA also became effective January 1, 2005 and does not contain a specific section that sets forth the intent of the General Assembly for the enactment of the statute. The PFFMEPA does not in plain language, in any section, create the requirement that an AED be employed in a medical emergency at a physical fitness facility. 210 ILCS

74/1-100. A plain reading of the requirements of the PFFMEPA shows that the intention is for applicable facilities to have a working AED available for use and a medical plan in place to respond to medical emergencies. "Medical emergency" is defined in the PFFMEPA as "…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. In none of the one hundred sections reserved for the PFFMEPA does it state that the statute requires use of an AED at a fitness facility in the event of a medical emergency. In fact, given the broad definition, "medical emergency" encompasses many situations, and is not limited to conditions that would benefit from the application of an AED. The Appellate Court gives no guidance on which of the medical emergencies would give rise to exposure to willful and wanton conduct for non-use of an AED.

The intention of the PFFMEPA is to be prepared (as set forth in the title) for emergency situations and encourage use of an AED when appropriate. 410 ILCS 4/5. Therefore, despite the Appellate Court's conclusion, the intent of the PFFMEPA is not to mandate AED use, but to be prepared for a medical emergency.

The AED Act does not address "non-use" of an AED, and sets forth in relevant part:

> "**(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. 410 ILCS 4/30(c).
>
> **(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." 410 ILCS 4/30(d)."

Thus, if a non-medical person uses an AED, or uses an AED improperly in an emergency situation based on some omission, there is no liability except for willful and wanton conduct. The interpretation makes perfect sense within the larger, laudable purpose of making AEDs available and encouraging their use without making such use mandatory or making a user subject to liability for good faith use. Clearly, it is within the context of the AED Act, which does not require use of an AED, that the language of the PFFMEPA should be considered.

However, the Appellate Court interpreted the AED Act and concluded that the legislature actually meant "non-use" when it used the word "omission," stating with certainty, "An 'omission involving the use of' an AED clearly encompasses the failure to use the AED in the appropriate circumstance." (A14, ¶ 31). While the Appellate Court advocated a plain and ordinary language analysis in some circumstances, it failed to do so in surmising that "…as a result of an act or omission involving the use of an automated external defibrillator in an emergency situation…" impliedly meant **non-use**. As the same language is used in 410 ILCS 4/30(c) and 410 ILCS 4/30(d), it is clear that the Appellate Court has determined that local governments, police departments and school districts also have an affirmative statutory duty to use an AED, so that non-use can now subject those entities to allegations of willful and wanton conduct and exposure to exemplary damages for that cause of action.

Section 45 of the PFFMEPA [210 ILCS 74/45], states under the Liability heading:

> "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 [410 ILCS 4/1 et seq.] 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 [210 ILCS 74/10], has an automated external defibrillator at the facility as required under Section 15 of this Act [210 ILCS 74/15], and has maintained the automated external defibrillator in accordance with the rules adopted by the Department."

The PFFMEPA exempts non-use of an AED from liability. *Id*. The remaining language of the PFFMEPA tracks the language of the AED Act allowing for willful and wanton use that results in injury. The Appellate Court opines that the plain language of the PFFMEPA creates liability for willful and wanton non-use of an AED. However, the Appellate Court does not supply the plain language that statutorily creates a duty to use an AED under either the AED Act or the PFFMEPA.

The Third Amended Complaint alleges the same non-use of the AED, pled as the basis for negligence and found to have exempted Fitness from liability, to be the basis for a claim of willful and wanton liability in Counts I & II. How can non-use be exempt from liability and non-use be willful and wanton under the PFFMEPA? The AED Act never mentions non-use and the PFFMEPA exempts non-use as negligence. The Appellate Court's decision that "non-use" is willful and wanton, is only possible after extrapolating a duty to use an AED under both statutes, despite the lack of plain language. If the General Assembly had intended a duty to use an AED in these statutes for every medical emergency, the non-use of the AED would not have been immunized in the PFFMEPA and the duty to use would be evident in the plain language of the statutes, which it is not. In order to be immune for non-use under the PFFMEPA, the facility would have to be in compliance as Fitness was found to have been. If non-use was the result of the failure to

maintain an AED or comply with other PFFMEPA requirements, there can be no immunity for negligent non-use.

As State Senator Martin Sandoval stated when presenting the PFFMEPA bill for vote by the Illinois Senate, "[t]his Act allows a right of action in cases where there is a willful or wanton misconduct in connection with the use of the AED." Illinois Senate Transcript, 2004 Reg. Sess. No. 109, at p. 70 (emphasis added). Thus, the legislative intent does not support a statutory duty to use an AED. If the AED is used, the user is immune from liability for ordinary negligence, but willful or wanton misuse may be actionable. If the order of the Appellate Court is upheld, the exemption from liability for negligent non-use ceases to exist, as the same non-use can be re-titled in a cause of action with the caption of "willful and wanton," thereby expanding liability under the PFFMEPA.

The PFFMEPA, states:

> "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[410 ILCS 4/1 et seq.] or under any other provision of law." 210 ILCS 74/45.

The position for which Dawkins advocates, and the decision of the Appellate Court created, is a limitation from the exemptions from civil liability under the AED Act by mandating the use of an AED. Prior to the Appellate Court's order, purchasing but not using an AED was not actionable. Therefore, the Appellate Court's ruling violates Section 45 of the PFFMEPA and must be reversed.

The PFFMEPA and the AED Act have a laudable purpose, to make AEDs more readily available and encourage their use. See 410 ILCS 4/5. That purpose is completely undermined if a layperson's failure to use it – particularly in this case, where the individual

having the medical event was undergoing Cardiopulmonary Resuscitation ("CPR"), results in a violation of a legal duty that would subject them to liability.

Giving effect to the legislative intent does not require anyone, including non-medical volunteer trained AED users, to use an AED in an emergency. Rather, the PFFMEPA requires physical fitness facilities to adopt a medical emergency plan and file a copy with the Illinois Department of Public Health; have at least one AED on the premises; and ensure there is a trained AED user on the premises during business hours. 210 ILCS 74/10-15. The PFFMEPA stresses the importance of making AEDs available, but nothing in the statute mandates the duty to use an AED. If the General Assembly wanted to mandate the use of AEDs in physical fitness facilities, it would have done so and set forth applicable guidelines for use in various situations.

The more widespread availability of AEDs is a relatively recent phenomenon. As a result, there are few citable cases in Illinois to rely upon for guidance. For this additional reason, it is important that this Court consider well-reasoned decisions from other states that have also promoted public access to AEDs by statute, and addressed "non-use" of an AED.

Consider *Trim v. YMCA of Central Maryland, Inc.*, 165 A.3d 534 (Md. Ct. Spec. App. 2017), in which the Maryland intermediate court analyzed a Maryland statute (Md. Educ. Code Ann. § 13-517) that established a public access program for AEDs. *Id.* at 536. Section 13-517 was designed to encourage the installation of AEDs in places of business and public accommodation, to ensure the devices are operable, and that they are to be used by people with proper training. *Id.* In *Trim*, and similar to the facts in the instant case, a 53-year old man collapsed while playing basketball at a YMCA. *Id.* A YMCA instructor, who

was trained in the use of AEDs, saw that the plaintiff had no pulse and was gasping for breath. *Id*. She began to administer CPR and directed a bystander to call 911. *Id*. Although the YMCA had an AED that was outside the doors of the basketball court, the employee did not retrieve it or ask anyone else to do so. *Id*. The plaintiff's widow filed a wrongful death action against the YMCA, asserting that the YMCA had the statutory and/or regulatory duty to utilize the AED after the plaintiff's collapse. The YMCA successfully moved to dismiss the complaint. On appeal, the Maryland intermediate court held that Section 13-517 and the corresponding regulations did not establish a statutory duty of care that required the use of AED under the circumstances. *Id*. at 538. In considering the legislative history, 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. Similar facts in this matter require the same result.

Miglino v. Bally Total Fitness of Greater N.Y., Inc., 985 N.E.2d 128 (N.Y. 2013), from New York's highest court, also provides guidance. In that case, Mr. Miglino collapsed while near racquetball courts at a health club owned and operated by the defendant. A personal trainer employed by the defendant was at the front desk with the receptionist when he learned of the medical emergency. *Id*. The receptionist immediately called 911 and brought the health club's AED to Mr. Miglino's side. *Id*. An individual who was certified to operate an AED and to administer CPR rushed to assist Mr. Miglino. He did not start CPR or use the AED, stating that according to his training, it was inappropriate in light of a breathing individual with detectable pulse. *Id*. Mr. Miglino's estate thereafter brought a wrongful death suit against the defendant alleging it did not have a person at the club certified to operate an AED or perform CPR required by New York law and that employees

negligently failed to use an available AED or failed to use it within sufficient time to save Mr. Miglino's life. *Id*. at 130. The defendant's motion to dismiss based on immunity under New York's Good Samaritan Law was denied. The intermediate appellate court determined that NY CLS Gen. Bus. § 627-a, which mandated certain health clubs to maintain an AED on premises with trained personnel, imposed an affirmative duty of care upon the facility so as to give rise to a cognizable statutory cause of action. *Id*. New York's highest court, analyzing whether Section 627-a created an affirmative duty to use AEDs in the event of a cardiac emergency, stated the provisions of Section 627-a read together with the Good Samaritan Law refers to the words "volunteer" and "voluntarily," which demonstrated the legislature's intent to protect health clubs and their employees for ordinary negligence with respect to AEDs. *Id*. at 131-32. Noting New York had already concluded there was no common law duty to use an AED, the Court of Appeals stated Section 627-a did not create a duty to use an AED even though it was required to be maintained on site. *Id*. at 132.

The case of *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886 (Tenn. 2016), is likewise instructive. There, Jerry Wallis collapsed and died after participating in a cycling class at a fitness facility owned and operated by a church. *Id*. at 889. Although the cycling class instructor and others attended to the husband and called 911 soon after his collapse, they did not utilize the AED located onsite. *Id*. The Tennessee Supreme Court granted permission to appeal and reviewed whether the church had a duty to use the AED. The Court noted that Tennessee's AED statutes encouraged businesses and other entities to acquire and make AEDs available for use in emergencies. *Id*. 901. It held that the statutes did not impose any mandatory duty on businesses to use AEDs in emergencies. *Id*. While

the Tennessee statutes encourage entities to acquire AEDs and make them available for use, these statutes do not impose any affirmative duty or mandatory duty to use them. *Id*.

Based on similar statutory language and similar facts in the case at bar, the AED Act and the PFFMEPA should be interpreted like the companion statutes in Maryland, New York and Tennessee. Applying those analyses, it is clear that these statutes are enacted to promote use and not punish non-use. Accordingly, the order of the Appellate Court cannot stand and must be reversed.

B. THE APPELLATE COURT ERRED IN CREATING A COMMON LAW DUTY THAT IMPOSES THE DUTY TO APPLY A MEDICAL DEVICE BY NON-MEDICAL PERSONNEL ON PATRONS OF A FITNESS FACILITY

In the present case, the plain language of both the AED Act and the PFFMEPA clearly and plainly express the intention to grant immunity for the use and non-use of an AED in accordance with these statutes in an effort to encourage use of these medical devices.

However, the Appellate Court's creation of a common law duty to use an AED after the enactment of these statutes violates the PFFMEPA, which exempts a person from liability for non-use of an AED. 210 ILCS 74/45. The creation of the common law duty also violates the AED Act by expanding liability to non-use of an AED. *Id*.

In addition, the creation of a common law duty to use an AED violates the Good Samaritan Act, which holds:

> "Any person trained in basic cardiopulmonary resuscitation who has successfully completed training in accordance with the standards of the American Red Cross or the American Heart Association and who in good faith, not for compensation, provides emergency cardiopulmonary resuscitation in accordance with his or her training to a person who is an apparent victim of acute cardiopulmonary insufficiency shall not, as the result of his or her acts or omissions in providing resuscitation, be liable for

> civil damages, unless the acts or omissions constitute willful and wanton misconduct." 745 ILCS 49/10.

A trained employee who chooses to perform cardiopulmonary resuscitation rather than use an AED should have immunity under the Good Samaritan Act. However, the Appellate Court's ruling eliminates protection for non-use of an AED by allowing the same non-use to be a statutory violation and evidence of actionable willful and wanton conduct.

The imposition on a layperson of a duty to perform medical services using an AED takes away the choice voluntarily to undertake an act for the aid of another. A voluntary actor has the obligation to exercise reasonable care in providing aid. Section 324 of the Restatement (Second) of Torts. The legal imposition of the duty to use an AED abrogates the rights of an actor to make the determination if they are capable of exercising reasonable care and creates exposure for willful and wanton conduct. In other words, a volunteer no longer has the right to determine if she or he would cause more harm at that moment. The creation of a mandated duty at common law to employ an AED removes all discretion and prevents other potential treatments such as the cardio-pulmonary resuscitation ("CPR") that was ongoing during the incident at issue.

Imposing the duty on landowners to perform advanced medical care on invitees is unprecedented. The Appellate Court's conclusory analysis performed under *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418 (4th Dist. 2008) does not provide appropriate guidance in the face of the statutes that govern the specific duties required in these circumstances. The cause of the alleged injury in this case, a damaged heart, was not created by the landowner. The process of heart failure was underway and was being treated with CPR during the incident. The duties of a landowner and the foreseeability of harm, due to conditions on the premises, do not extend to the duty to provide specific

interventional medical care using a specific medical device to stop an ongoing process in the body.

The first factor in determining duty is foreseeability. No legal duty arises unless the harm is reasonably foreseeable. Foreseeability is decided by the reasonableness of the landowner's actions, not by the entrant's actions. *Buerkett*, 384 Ill. App. 3d 418, 422. While heart attacks from heart disease are part of the human condition, the risk is internal and individualized. The harm does not arise from a condition of the premises of which the landowner has control in advance of the event. In fact, Ms. Dawkins had a pacemaker and her pre-existing medical condition was known to her so that she could take her own precautions. What is at issue in this case is the right of an invitee to demand specific interventional medical care for a pre-exiting condition on a retail premises and the liability of a landowner for not intervening to stop the naturally occurring event while it is already occurring.

Most significantly, the consequences of placing the burden of the duty to use an AED, as a legal requirement, on landowners is immeasurable and is not even placed on medical professionals. The liability for failing to stop a heart attack could create significant damages exposure that would drive small establishments out of business and discourage others from making AEDs available. Those who volunteer to assist have made the conscious decision about the circumstances and have concluded that they can handle an emergency. However, the responsibility for intervening during a patron’s heart attack by the use of a medical device is not a duty that should be imposed on a non-medical person or business, by a reviewing court, without any guidance. The inability of the Appellate

Court to contemplate properly the ramifications of mandating the duty to use an AED is reversible error.

The Appellate Court's reference to section 314 of the Restatement (Second) of Torts, as set forth in *Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (2006) is misplaced. Ms. Dawkins' heart condition was not the result of accidental, negligent, or intentional acts of a third person.

The Appellate Court cited to the Restatement (Second) of Torts § 343A stating that Fitness owed a duty under Illinois common law to provide "reasonable" first aid to Dollett Dawkins knowing that she had collapsed. Of course, this appeal involves the two allegations of willful and wanton conduct, as the allegations of negligence were dismissed. If having a functioning AED and a trained staff member, and not using the AED, is willful and wanton conduct, the Appellate Court has disregarded the immunity protections afforded to those who complied with the PFFMEPA. 210 ILCS 74/45.

Despite the plain language in both relevant statutes, the Appellate Court's opinion has limited the statutory and long-settled common law exemptions from civil liability by creating an affirmative duty on non-medical personnel to use an AED and then opining that non-use is enough to form the basis for a willful and wanton action. The Appellate Court's opinion has changed the intended purpose of these statutes from increasing the availability of AEDs, and creating preparedness, to laws that mandate interventional AED application by laypeople, regardless of discretion, while expanding punishments for non-use.

II. THE APPELLATE COURT ERRED IN CREATING A PRIVATE RIGHT OF ACTION FOR NON-COMPLIANCE WITH THE PFFMEPA.

In finding a private right of action in the PFFMEPA, the Appellate Court misapprehended the plain language of the statute and the AED Act. The Appellate Court's

decision should therefore be reversed for this additional reason. Fitness was in compliance with the PFFMEPA according to the trial court and that finding is not part of this appeal.

Inferring a private remedy under a statute, which does not expressly provide one, should only be done with caution. *See Metzger v. DaRosa*, 209 Ill. 2d 30 (2004); *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455 (1999); *Carmichael v. Union Pacific R.R. Co.*, 2018 IL App (1st) 170075; *Kagan v. Waldheim Cemetery Co.*, 2016 IL App (1st) 131274; *Davis v. Kewanee Hosp.*, 2014 IL App (2d) 130304. It is settled law that, in determining whether a private right of action should be inferred, all of the following elements must be present: 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." *Metzger*, 209 Ill. 2d at 36. Here, the last two elements are not present because the PFFMEPA makes clear that a private right of action is not consistent with the purpose of the statute, and it contains an adequate remedy. Thus, the Appellate Court's Order was erroneous in this regard.

The PFFMEPA's wide-reaching regulatory structure, which is monitored by the IDPH, requires physical fitness facilities to have a medical emergency plan on file, maintain an AED on the premises, and have a trained AED user on staff during business hours. As discussed in greater detail above, the PFFMEPA encourages the use of AEDs as opposed to mandating their use. Thus, a lawsuit like this one based upon an alleged failure to use as AED when there is no duty to use one is clearly not what the statute was meant to achieve.

Importantly, the PFFMEPA provides immunity related to allegations related to non-use of an AED. *See* 210 ILCS 74/45. Thus, an interpretation of the statute that creates a private right of action for conduct that is expressly immune from liability cannot stand.

Additionally, section 35 of the PFFMEPA sets forth monetary penalties for failure to comply with the requirements of the statute. Those requirements include all fitness facilities having a medical emergency plan filed with the IDPH, having an AED on the premises, and having AED-trained staff on site the during business hours. Moreover, the IDPH shall inspect a physical fitness facility after a complaint to ensure compliance. 210 ILCS 74/30. Even if the statutory penalties do not compensate the damaged party, the proper analysis is whether the "statutory penalties were sufficient to make compliance with the statute likely." *Carmichael*, 2018 IL App (1st) 170075 at ¶22. Accordingly, the ever-increasing statutory penalties along with government inspection provide an adequate remedy for the general populace by encouraging compliance. Contrary to the conclusion of the Appellate Court, those monetary penalties are adequate to remediate a violation of a provision of the statute requiring preparedness.

The PFFMEPA was not created to punish violators and compensate those who expected to receive the use of an AED at a fitness facility. A private right of action was not contemplated under the PFFMEPA by the General Assembly. First, a private right of action was not expressly provided. Second, after considering the elements to infer a private right of action, the regulatory framework of the PFFMEPA reveals the presence of a robust enforcement mechanism that provides an adequate remedy. Third, Dawkins' argument in support of a private right of action under the statute assumes a duty to use an AED, which as explained in great detail herein, does not exist. Finally, the trial court already determined

that Fitness complied with the PFFMEPA, which renders Dawkins' argument as to a private right of action, moot. (C 274, C 529; A3, A5, A34-35; R. 49-50). Accordingly, the decision of the Appellate Court cannot stand.

CONCLUSION

There is no affirmative duty – created by statute or in the common law – for a layperson to use an AED on someone who is experiencing a medical emergency [410 ILCS 4/1 et seq.; 210 ILCS 74/1 et seq.; Restatement (Second) of Torts §314(a)]. The PFFMEPA does not contain any language mandating such use of an AED even though the device is present on site and publicly available. Nor is there any duty to use an AED at common law. By reversing the order of the Circuit Court, and holding that plaintiff could show that Fitness violated a duty under applicable statutes, as well as the common law, based on the allegation of willful and wanton misconduct for non-use of an AED, the Appellate Court created a duty to use an AED that did not previously exist. This unprecedented expansion of duty and potential chilling effect on the availability of AEDs due to increased potential for liability should not be countenanced. For all of the reasons discussed above and before the lower courts, the order of the Appellate Court should be reversed and plaintiff's Third Amended Complaint dismissed, in its entirety, on the merits and with prejudice.

Moreover, the PFFMEPA does not allow for a private right of action and, in fact, provides immunity related to allegations brought due to non-use due to Fitness' compliance. *See* 210 ILCS 74/45. Thus, for this additional reason, the order of the Appellate Court should be reversed.

Dated: December 29, 2021

Respectfully submitted,

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TABLE OF CONTENTS OF THE APPENDIX

Case No. 127561

In the Supreme Court of Illinois

LEO DAWKINS, individually and as next friend of DOLLETT SMITH DAWKINS, a disabled person,

Plaintiff-Appellee,

vs.

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

Defendant-Appellant,

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

NOTICE OF ELECTION TO FILE AN ADDITIONAL BRIEF

Defendant-Appellant is electing to file an additional brief, pursuant to Illinois Supreme Court Rule 315(h).

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E-FILED
12/3/2021 3:54 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

NOTICE OF ELECTRONIC FILING/CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on December 3, 2021, the undersigned electronically filed with the Supreme Court of Illinois, through the Odyssey eFileIL Case Filing System, the foregoing Notice of Election to File an Additional Brief for Defendant-Appellant.

The undersigned further certifies that the aforementioned Notice of Election to File an Additional Brief was served upon the following attorneys of record on December 3, 2021, by electronic transmission:

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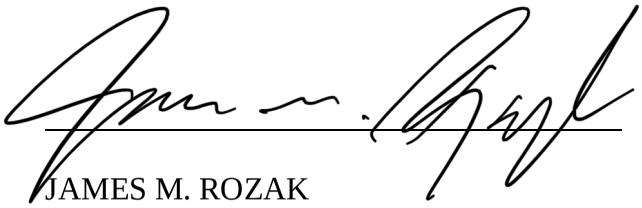
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.



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November 24, 2021

In re: Leo Dawkins, Indv., etc., Appellee, v. Fitness International, LLC, Appellant. Appeal, Appellate Court, Third District.
127561

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Carter, J., took no part.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

2020 IL App (3d) 170702-U

Order filed December 7, 2020
Modified Upon Denial of Rehearing filed July 14, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

LEO DAWKINS, Individually and as Next Friend of DOLLETT SMITH DAWKINS, a Disabled Person,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellant,	)	Appeal No. 3-17-0702
v.	)	Circuit No. 15-L-675
FITNESS INTERNATIONAL, LLC, L.A. FITNESS and L.A. FITNESS OSWEGO,	)	Honorable Raymond E. Rossi,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Daugherity concurred in the judgment.[1]

ORDER

¶ 1 *Held*: In a personal injury action, the circuit court erred by dismissing the plaintiff's complaint under section 2-619(a)(9) of the Code, where the plaintiff could show that the defendant violated a duty of care under applicable statutes and the common law, and where an applicable statute created an implied private right of action.

[1] Justice Daugherity was added to the panel for review of the defendant's petition for rehearing.

¶ 2 Leo Dawkins, individually and also as next friend of his wife, Dollett Smith Dawkins (Dollett), filed a complaint for personal injury and spousal loss of consortium against Fitness International LLC, L.A. Fitness, and L.A. Fitness Oswego (collectively, Fitness) alleging that Dollett was rendered a disabled person as a result of willful and wanton conduct by Fitness. Specifically, Dawkins alleged that Fitness employees failed to use an automated external defibrillator (AED) on Dollett in a timely fashion after she suffered cardiac arrest while exercising in a Fitness facility, which caused Dollett to suffer permanent and irreversible brain damage.

¶ 3 Dawkins filed four successive complaints. The last three complaints alleged causes of action for both negligence and willful and wanton misconduct as a result of Fitness employees' alleged failure and refusal to use the AED as was required by statute, even though there was an employee trained to use the AED on the premises at the time of the incident. The circuit court of Will County dismissed all counts of the complaints with prejudice. Plaintiff brings this appeal from the dismissal of his willful and wanton counts (counts I and II) of the third amended complaint.

¶ 4 FACTS

¶ 5 The following factual recitation is taken from the operative complaint (*i.e.*, Dawkins's third amended complaint). Because this appeal is from the circuit court's dismissal with prejudice of the plaintiff's third amended complaint, the well-pled facts of the complaint are taken as true for purposes of the appeal.

¶ 6 On November 18, 2012, Dollett was exercising at a Fitness facility in Oswego, Illinois, when she collapsed, stopped breathing, and lost her pulse and circulation. This happened in an open and public area of the facility. Fitness staff members were aware of Dollett's medical

emergency. Other patrons at the facility attempted unsuccessfully to administer CPR to Dollett and shouted to Fitness staff for aid and assistance. Fitness staff knew this. They also knew that the patrons were not using an AED on Dollett. There was an AED and an employee trained to use it on the premises at the time. Nevertheless, the Fitness employee who was trained to use the AED did not use it on Dollett. Nor did any other Fitness employee.

¶ 7 An AED is able to diagnose ventricular fibrillation and treat it through defibrillation by electrical therapy. While at the Fitness facility, Dollett was experiencing a ventricular fibrillation. It takes less than one minute to apply AED treatment. Uncorrected ventricular fibrillation leads to cardiac arrest, which leads to anoxic brain injury due to lack of an oxygenated blood supply.

¶ 8 The parties agree that the Fitness facility where Dollett's injuries occurred was covered by the Illinois Physical Fitness Facility Medical Emergency Preparedness Act (210 ILCS 74/1 *et seq.* (West 2012)) (PFFMEPA). Dawkins alleged that, at all relevant times, the PFFMEPA required Fitness to: (1) have a functioning AED[2] on site, (2) have staff properly trained in the assessment of patrons and the use of AEDs, (3) 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, and (4) have a medical emergency plan for responding to medical emergencies.

¶ 9 Dawkins further alleged that the PFFMEPA also required Fitness staff members to: (1) assess unconscious patrons for signs of breathing, pulse, and circulation pursuant to the training of the AED operators and Fitness's medical emergency plan; (2) assess unconscious patrons for

[2] The PFFMEPA incorporates by reference the definition of an AED contained in the Illinois Automated External Defibrillator Act (AED Act) (410 ILCS 4/1 *et seq.* (West 2012)).

use of an AED; (3) attach the AED pads on an unconscious patron who had no breathing, no pulse, or no signs of circulation; and (4) follow the visual and voice prompts on the AED.

¶ 10 Dawkins alleged that, with full knowledge of Dollett's medical event and of the requirements to assess and treat her with an AED, Fitness violated the PFFMEPA and acted "willfully, wantonly, and in utter disregard for [Dollett's] safety" by: (1) failing to have a functioning AED device on the premises in violation of its medical emergency plan and the PFFMEPA; (2) failing to have properly and adequately trained staff on the premises in violation of its medical emergency plan and the PFFMEPA; (3) refusing to assess Dollett for breathing in violation of AED operator training, the medical emergency plan, and the PFFMEPA; (4) refusing to assess Dollett for signs of pulse or circulation in violation of AED operator training, the medical emergency plan, and the PFFMEPA; (5) refusing to apply the AED to Dollett and follow the voice and visual prompts in violation of AED operator training, the medical emergency plan, and the PFFMEPA; and (6) refusing to apply the AED electrical therapy to Dollett in violation of AED operator training, the medical emergency plan, and the PFFMEPA.

¶ 11 Dawkins further alleged that Fitness's failure to apply the AED to Dollett caused her permanent brain damage. He claimant that, had a Fitness employee connected the AED devise to Dollett in a timely fashion "as required" and followed the AED's prompts, the AED would have restored cardiac function and oxygenated blood to Dollett's brain, thereby avoiding or lessening her brain injury.

¶ 12 Dollett is a disabled adult. She is, and continues to be, entirely without understanding or capacity to make or communicate decisions regarding her person and is totally unable to manage her estate or financial affairs.

¶ 13 Dawkins' third amended complaint pled two "willful and wanton counts" (counts I and II). Count I sought damages for Dollett's brain injury, and count II sought damages for loss of consortium. The complaint also raised two parallel counts based on ordinary negligence.

¶ 14 Fitness moved to strike or dismiss Dawkins's negligence counts because they had already been dismissed by the circuit court. The court granted that motion.[3] Fitness also moved to dismiss Dawkins's willful and wanton counts under section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)).

¶ 15 In affidavits filed in support of its motion to dismiss, Fitness acknowledged that PFFMEPA required that physical fitness facilities, such as the one operated by Fitness in Oswego, must comply with certain requirements. Specifically, PFFMEPA required that all physical fitness facilities have a medical emergency plan filed with the Illinois Department of Public Health ("IDPH"), an AED on the premises, and a trained AED on staff during business hours. However, Fitness asserted that it fulfilled each of these requirements, and was therefore immune from liability, because: (1) the IDPH has confirmed that a medical emergency plan was received and approved for the physical fitness facility operated by Fitness in Oswego; (2) Fitness had a working AED on the premises on November 18, 2012, when Dollett collapsed; and (3) the front desk employee on the premises at the time of Dollett's medical event was a trained AED user. Fitness argued that these facts established that its Oswego facility was in full compliance with the PFFMEPA at the time of Dollett's injuries, and therefore, could not be held liable for any acts or omissions relating to her injuries.

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[3] The circuit court had dismissed the negligence counts in Dawkins's prior complaint because: (1) Dollett had signed a Membership Agreement with Fitness's Oswego facility which explicitly released Fitness and its employees from any liability for negligence in the event that Dollett were to suffer a heart attack, stroke, or other injury while working out at the facility; and (2) the PFFMEPA barred actions based on negligence related to the use or non-use of an AED where the defendant is compliant with the PFFMEPA's requirements, as Fitness was in this case.

¶ 16 Fitness further maintained that the PFFMEPA created no duty to use an AED and afforded no private right of action to enforce any such duty (or any of the PFFMEPA's requirements) and that Dawkins had not pled a basis for his allegation that Fitness owed Dollett a duty to use the AED on her. Fitness also argued that neither Fitness's failure to use its AED nor any of the other alleged acts or omissions by Fitness staff rose to the level of willful and wanton conduct, and that Dawkins had failed to plead facts in support of its claim that any such actions or omissions proximately caused Dollett's injuries.

¶ 17 After briefing and oral argument, the circuit court granted Fitness's motion to dismiss Dawkins's willful and wanton counts with prejudice. The court stated:

> "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."

The written order subsequently issued by the circuit court stated: "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."

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 At issue in this appeal is whether the circuit court properly determined that, as a matter of law, Dawkins could not establish that Fitness's staff members had a duty to use its AED on

Dollett, and whether the circuit court properly dismissed Dawkins's third amended complaint on that basis under section 2-619(a)(9) of the Code.

¶ 21 Section 2-619(a)(9) provides that a defendant may file a motion for dismissal of the action on the grounds that "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). Section 2-619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact early in the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A motion for involuntary dismissal under section 2-619(a)(9) admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 931-32 (2009); *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008). When ruling on the section 2-619(a)(9) motion, the court construes the pleadings in the light most favorable to the nonmoving party (*Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55), and should grant the motion only "if the plaintiff can prove no set of facts that would support a cause of action" (*Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8). We review a circuit court's granting of a motion to dismiss under section 2-619(a)(9) *de novo*. *Kean*, 235 Ill. 2d at 361.

¶ 22 The circuit court dismissed Dawkins's willful and wanton counts because it found that Fitness was in full compliance with the PFFMEPA and that nothing created a duty for Fitness employees to use the AED on Dollett at the time of her medical emergency. By implication, the court ruled that neither the PFFPRA Act, the AED Act, nor the common law recognized or gave rise to any such duty. We disagree.

¶ 23 Section 74/45 of the PFFMEPA provides:

> "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 [AED] that are provided under the [AED] 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 [AED] 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 [AED] at the facility as required under Section 15 of this Act, and has maintained the [AED] in accordance with the rules adopted by the Department." (Emphases added.) 210 ILCS 74/45 (West 2012).

¶ 24 Similarly, section 30(d) of the AED Act, which is entitled "exemption from civil liability," provides in pertinent part:

> "An AED user is not liable for civil damages as a result of any act *or omission* involving the use of an [AED] in an emergency situation, *except for willful or wanton misconduct*, if the requirements of this Act are met." (Emphases added.) 410 ILCS 4/30(d) (West 2012).

¶ 25 By their plain terms, neither of these statutes immunize a defendant from liability arising from the failure to use an AED on an injured person, provided that such failure was willful and wanton. The italicized phrases in the above quotations from each statute make clear that a defendant covered by the statutes may not be found liable for civil damages for failure to use an AED, *except for willful or wanton misconduct*. The plain and unambiguous meaning of this phrase is that civil liability may attach to willful and wanton failures to use an AED.

¶ 26 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. 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." (Emphasis added.) 410 ILCS 4/5 (West 2012). 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*." (Emphasis added.) *Id.*

¶ 27 The PFFMEPA requires that a fitness facility like the one at issue here have a functioning AED on its premises. 210 ILCS 74/15 (West 2012). It also mandates that the facility have a staff member or members properly trained to use an AED and to assess unconscious patrons for breathing, signs of pulse, and circulation in order to determine whether to use an AED, and it mandates that a staff member with such training be present at each fitness facility during business hours. 210 ILCS 74/10 (West 2012). It also requires "each 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) (West 2012). The PFFMEPA defines "medical emergency" as "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 (West 2012).

¶ 28 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.

¶ 29 Fitness argues that the AED Act and the PFFMEPA should be read as preserving liability for willful and wanton *misuse* of an AED, but not for a *failure to use* an AED, even in circumstances where the failure to use an AED would amount to willful and wanton conduct. Fitness maintains that the statutes do not create a duty to use an AED under any circumstances. Rather, they merely provide that, *if* a fitness facility employee uses an AED on someone, they must do so without committing willful and wanton misconduct. Fitness argues that AED Act's explicit reference to acts *or omissions* involving the use of an AED and the PFFMEPA's reference to "use or non-use" of an AED are meant to proscribe only the "omissions" of acts or procedures that are necessary to the proper operation of an AED when an AED is used. They were not intended to require the use of an AED in the first instance.

¶ 30 We find Fitness's argument unpersuasive. As an initial matter, Fitness's interpretation is contrary to the plain words of the relevant statutes. Section 45 of the PFFMEPA states 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 74/45 (West 2012). This sentence unambiguously provides that liability may attach for willful and wanton *failure to use* an AED, not merely for the misuse of an AED. There is nothing in the sentence suggesting that the term "non-use" is somehow meant to convey the failure to use proper techniques or judgment while using an AED. Instead, it unambiguously contemplates civil liability for the failure to use an AED, provided that such failure is willful and wanton. Fitness's tortured reading of section 45 conflicts with the statute's plain meaning. "The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature." *In re Marriage of Goesel*, 2017 IL 122046, ¶ 13. The

best indicator of the legislature's intent is the plain and ordinary language of the statute. *Id.* Accordingly, we reject Fitness's interpretation of section 45.

¶ 31 Fitness's reading of the relevant provision of the AED is also unsupportable. In pertinent part, section 30(d) of the AED Act provides that "[a]n AED user is not liable for civil damages as a result of any act *or omission* involving the use of an [AED]***." (Emphasis added.) 410 ILCS 4/30(d) (West 2012). An "omission involving the use of" an AED clearly encompasses the failure to use the AED in appropriate circumstances. Nether section restricts liability for willful and wanton misconduct to the improper use (as opposed to non-use) of an AED. We may not read such a restriction or limitation into the statutes when such a reading contradicts the legislature's clearly expressed intent in the unambiguous statutory language. *Goesel*, 2017 IL 122046, ¶ 13.

¶ 32 Moreover, 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. On Fitness's reading, a fitness facility could fully comply with the PFFMEPA by having a functioning AED on site, training a staff member in its use, and developing an emergency medical plan, without having any obligation to implement the plan or to have the trained employee use the AED on a stricken patron under any circumstances. This interpretation flouts the plain language of the statutes, their expressed purposes, and common sense. As Dawkins's counsel aptly stated before the circuit court, Fitness's reading would allow covered facilities to be in full compliance with the statutes even if they used the AED only "as wall art." We must avoid construing a statute in a manner than would render it absurd, pointless, or ineffectual. *Croissant v. Joliet Park District*, 141 Ill. 2d 449, 455 (1990) ("Statutes are to be construed in a manner that avoids absurd *** results"); *People v.*

Hunter, 2017 IL 121306, ¶ 28 (courts should avoid construing a statute in a manner that "would lead to real-world results that the legislature could not have intended"); *Schoenbachler v. Minyard*, 110 S.W.3d 776, 783 (Ky. 2003) ("it is axiomatic that, when interpreting a provision of a statute, a court should not, if possible, adopt a construction that renders a provision meaningless or ineffectual or interpret a provision in a manner that brings about an absurd or unreasonable result").

¶ 33 However, even 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. To state a claim for negligence, a plaintiff must plead a duty owed by a defendant to that plaintiff, a breach of that duty, and injury proximately caused by that breach of duty. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Whether a duty of care exists is a question of law to be decided by the court. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422 (2008). In deciding whether a defendant owes a plaintiff a duty, the court considers (1) whether the plaintiff's injury was reasonably foreseeable, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against injury, and (4) the consequences of placing a burden on the defendant. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422 (2008).

¶ 34 Consideration of these factors supports the conclusion that Fitness had a common law duty to use an AED on Dollett under the facts presented in this case. It is certainly foreseeable that patrons could suffer cardiac events while exerting themselves at fitness centers. Indeed, the purpose of the PFFMEPA is to provide AEDs to fitness facilities and to staff those facilities with trained AED operators in order to provide life-saving treatment for such medical emergencies. Cardiac events are more likely to occur at fitness facilities than at other commercial establishments due to the fact that all of the patrons at fitness facilities are exerting themselves.

That is why the PFFMEPA's requirements are directed to fitness facilities. Moreover, the legislature has already determined that the burden of guarding against the injury should be assigned to fitness centers by requiring fitness centers to have functioning AEDs and trained AED users on staff during business hours. Further, the consequences of placing that burden on fitness centers are reasonable. A patron suffering cardiac arrest is in grave danger and helpless to care for herself. A trained AED user at a fitness facility is in a far better position to care for such patrons than are the patrons themselves or other patrons. In the PFFMEPA, the legislature has already decided that a fitness facility must take reasonable precautions to help prevent fatal injuries from cardiac arrest, strokes, or other emergency medical conditions. Moreover, the legislature has eliminated common law liability for negligent use or non-use of an AED by a fitness facility employee, thereby lessening the consequences of placing the burden on entities like Fitness.

¶ 35 Moreover, a common law duty arises from section 314A of the Restatement (Second) of Torts, which has been adopted by our supreme court. See *Marshall*, 222 Ill. 2d at 438. That section provides that the relationship between a business invitor and invitee is a special relationship that may give rise to an affirmative duty on the business invitor's part to aid or protect his invitee against unreasonable risk of physical harm. *Id.* This includes the duty to: (1) give the invitee such first aid as he reasonably can once he knows or has reason to know that the invitee is endangered, ill, or injured; and (2) care for the invitee until he can be cared for by others (*i.e.*, to take reasonable steps to turn the sick invitee over to a physician). Restatement (Second) of Torts § 343A cmt. f (1965). Accordingly, irrespective of any duty it may or may not have owed under the PFFMEPA or AED Act, Fitness owed a duty under Illinois common law to provide "reasonable" first aid to Dollett given that it knew of her condition. Because Fitness had

a functioning AED on site and a staff member trained in its proper use, "reasonable" first aid might have included use of the AED on Dollett. In any event, at this early stage of the litigation, it cannot be said that Dawkins can present "no set of facts" establishing that Fitness owed Dollett a common law duty to use the AED on her in a timely manner.

¶ 36 Fitness relies upon *Salte v. YMCA of Metropolitan Chicago Foundation*, 351 Ill. App. 3d 524 (2004), to establish that no such duty exists. However, *Salte* is distinguishable. In *Salte*, our appellate court held that a health club was not required to have an AED on site and to use it on a patron who suffered cardiac arrest while using treadmill at the health club. *Id.* at 529. However, in *Salte*, the health club did not have an AED on the premises, much less an employee properly trained in the use of an AED and in the evaluation of unconscious patrons for such use, as here. *Id.* at 525 (the events in *Salte* took place before the PFFMEPA was enacted). Accordingly, *Salte* is of little relevance in determining the scope of Fitness's common law duty in this case.

¶ 37 Fitness argues in the alternative that the PFFMEPA and AED Act abrogate any common law duty by immunizing the defendants from liability for failing to use an AED on a patient suffering from a cardiac emergency. We disagree. As noted above, the statutes clearly and unambiguously immunize only negligent conduct in connection with the use or non-use of an AED, not willful and wanton conduct. Moreover, "[t]he repeal or preemption of a common-law remedy by implication is not favored [citation], and a statute that appears to be in derogation of the common law will be strictly construed in favor of the person sought to be subjected to the statute's operation [citation]." *Heider v. Knautz*, 396 Ill. App. 3d 553, 561 (2009). "Any legislative intent to abrogate the common law must be clearly and plainly expressed, and [courts] will not presume from ambiguous language an intent to abrogate the common law." *Id.* Here, there is no such ambiguous language in the statutes at issue, and no clearly and plainly expressed

legislative intent to abrogate common law actions or remedies. To the contrary, both statutes expressly state that they are not immunizing entities subject to the statutes from liability for willful and wanton misconduct.

¶ 38 Furthermore, 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. A court may determine that a private right of action is implied in a statute that lacks explicit language regarding whether a private right of action shall be allowed. *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999); *Pilotto v. Urban Outfitters West, L.L.C.*, 2017 IL App (1st) 16084, ¶ 22. In order to find an implied private right of action, a court must find that: (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*, 188 Ill. 2d at 460; *Pilotto,* 2017 IL App (1st) 16084, ¶ 22.

¶ 39 Here, Dollett was a patron at a fitness facility, which is exactly the class of persons that the PFFMEPA was enacted to benefit. Dollett's injury (cardiac arrest caused by a ventricular fibrillation) is precisely the type of injury that an AED detects and treats, and her brain injury as the result of untreated ventricular fibrillation is exactly the type of injury that the PFFMEPA was designed to prevent. The language and the requirements of the PFFMEPA make clear that a private right of action is consistent with the underlying purpose of the statute, which is to protect patrons of fitness facilities from suffering serious injuries by having trained AED users on site who will use an AED on patients suffering cardiac events.

¶ 40 Moreover, implying a private right of action is necessary to provide an adequate remedy for violations of the statute. The only remedy for violations of the PFFMEPA expressly provided in the statute are: (1) a written administrative warning from the Director of Public Health (Director) without monetary penalty for the initial violation; (2) a civil monetary penalty of at least $1,500 but less than $2,000 imposed against the facility by the Director for a second violation; and (3) a civil monetary penalty of least $2,000 for a third or subsequent violation. Under this penalty scheme, there is virtually no incentive for a fitness facility not to commit one violation since a single violation will not incur a penalty. However, one failure to use an AED on a patron suffering cardiac arrest can result in permanent and irreversible injury or death. That is exactly what the PFFMEPA was enacted to prevent. Moreover, the PFFMEPA does not expressly provide for criminal penalties or overly burdensome fines to redress violations of the statute. Thus, contrary to Fitness's argument, the penalty scheme included in the PFFMEPA is not the type of "robust built-in enforcement mechanism" that makes compliance with the statute likely and that provides an adequate remedy for violations of the statute. See *Carmichael v. Union Pacific Railroad Co.*, 2018 IL App (1st) 170075, ¶ 22, *vacated on other grounds*, 2019 IL 123853 (collecting cases). We find this case to be analogous to *Pilotto*, 2017 IL App (1st) 16084, ¶ 32, wherein our appellate court found an implied private right of action and held that the

statute's imposition of a $100 fine for violations of the statute without requiring any investigations or further sanctions did not provide an adequate remedy.[4]

¶ 41 Fitness further argues that Dawkins failed to adequately allege willful and wanton misconduct.

> " 'A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting reckless disregard for the safety of others, such as a failure, after knowledge of an impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' " *Ziarko v. Soo Line Railroad Co.*, 161 Ill. 2d 267, 273 (1994) (quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569 (1946)).

There is a continuum of conduct within the spectrum of conduct which is "willful and wanton." *Id.* at 275. At the lower end of the spectrum, "willful and wanton acts share many similar characteristics with acts of ordinary negligence," where willful and wanton misconduct "may be only degrees more than ordinary negligence." *Id.* At the other end of the spectrum, "willful and wanton acts may be only degrees less than intentional wrongdoing." *Id.* at 276.

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[4] Moreover, our supreme court has held that the presence of administrative enforcement mechanisms like those authorized by the PFFMEPA does not preclude an implied right of action for civil damages. *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 391 (1982) (holding that the fact that the legislature provided for departmental enforcement of regulations promulgated under the Brokers Licensing Act by the Department of Registration and Education, which included the authority to suspend or revoke a certificate of registration or censure a registrant when the Department found that a registered broker had violated the Act, did "not necessarily mean that the [legislature] must not have intended to create a private right of action"). Moreover, none of the administrative remedies prescribed by the PFFMEPA would compensate fitness facility patrons harmed by a defendant's violations of the statute, even though the protection of such patrons is the primary purpose of the PFFMEPA. In addition, the 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 74/45 (West 2012). For all these reasons, finding an implied right of action for civil damages in the PFFMEPA seems particularly appropriate.

¶ 42 In this case, Dawkins alleged that Fitness was required by its medical emergency plan and by the training provided to its staff to assess unconscious patrons for the use of an AED, and to attach the AED pads to a patron and follow the voice prompts where the patron was unconscious and had no signs of breathing, circulation, or a pulse. Dawkins further alleged that Fitness failed to do this despite the fact that Fitness knew that Dollett had collapsed, stopped breathing, and lost her pulse in an open and public area of the facility, and despite the fact that Fitness knew that other patrons were calling to Fitness staff for help. Dawkins alleged that Fitness failed to follow its medical emergency plan and failed to use the AED on Dollett, which proximately caused her to suffer permanent and irreversible brain damage. 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.

¶ 43 Finally, Fitness argues that it would be bad policy to require non-medical personnel to use AEDs. We are not persuaded by this argument. The legislature chose to eliminate liability for ordinary negligence but not for willful and wanton conduct. The language and purposes of the Act demonstrate that the legislature has imposed a limited duty to use an AED by allowing liability only for a failure to use that would amount to willful and wanton misconduct. The legislature has therefore concluded that such limited liability adequately protects fitness clubs and their staff while allowing injured plaintiffs a limited cause of action against them. We will not second guess the legislature's policy determinations on this issue.

¶ 44 As noted above, the 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 produce 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 a 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's complaint as true, the complaint may not be dismissed as a matter of law. Accordingly, the circuit court's dismissal of Dawkins's third amended complaint was improper.

¶ 45 We have considered the remaining arguments made by Fitness and have found them to be meritless.

¶ 46 CONCLUSION

¶ 47 For the reasons set forth above, we reverse judgment of the circuit court of Will County and remand for further proceedings.

¶ 48 Reversed. Cause remanded.

2020 IL App (3d) 170702-U

Order filed December 7, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

LEO DAWKINS, Individually and as Next Friend of DOLLETT SMITH DAWKINS, a Disabled Person,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-17-0702 Circuit No. 15-L-675
FITNESS INTERNATIONAL, LLC, L.A. FITNESS and L.A. FITNESS OSWEGO,	)	Honorable Raymond E. Rossi,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: In a personal injury action, the circuit court erred by dismissing the plaintiff's complaint under section 2-619(a)(9) of the Code, where the plaintiff could show that the defendant violated a duty of care under applicable statutes and the common law, and where an applicable statute created an implied private right of action.

¶ 2 Leo Dawkins, individually and also as next friend of his wife, Dollett Smith Dawkins (Dollett), filed a complaint for personal injury and spousal loss of consortium against Fitness

International LLC, L.A. Fitness, and L.A. Fitness Oswego (collectively, Fitness) alleging that Dollett was rendered a disabled person as a result of willful and wanton conduct by Fitness. Specifically, Dawkins alleged that Fitness employees failed to use an automated external defibrillator (AED) on Dollett in a timely fashion after she suffered cardiac arrest while exercising in a Fitness facility, which caused Dollett to suffer permanent and irreversible brain damage.

¶ 3 Dawkins filed four successive complaints. The last three complaints alleged causes of action for both negligence and willful and wanton misconduct as a result of Fitness employees' alleged failure and refusal to use the AED as was required by statute, even though there was an employee trained to use the AED on the premises at the time of the incident. The circuit court of Will County dismissed all counts of the complaints with prejudice. Plaintiff brings this appeal from the dismissal of his willful and wanton counts (counts I and II) of the third amended complaint.

¶ 4 FACTS

¶ 5 The following factual recitation is taken from the operative complaint (*i.e.*, Dawkins's third amended complaint). Because this appeal is from the circuit court's dismissal with prejudice of the plaintiff's third amended complaint, the well-pled facts of the complaint are taken as true for purposes of the appeal.

¶ 6 On November 18, 2012, Dollett was exercising at a Fitness facility in Oswego, Illinois, when she collapsed, stopped breathing, and lost her pulse and circulation. This happened in an open and public area of the facility. Fitness staff members were aware of Dollett's medical emergency. Other patrons at the facility attempted unsuccessfully to administer CPR to Dollett and shouted to Fitness staff for aid and assistance. Fitness staff knew this. They also knew that

the patrons were not using an AED on Dollett. There was an AED and an employee trained to use it on the premises at the time. Nevertheless, the Fitness employee who was trained to use the AED did not immediately use it on Dollett. Nor did any other Fitness employee. More than eight minutes elapsed before Fitness personnel applied the AED to Dollett.

¶ 7 An AED is able to diagnose ventricular fibrillation and treat it through defibrillation by electrical therapy. While at the Fitness facility, Dollett was experiencing a ventricular fibrillation. It takes less than one minute to apply AED treatment. Uncorrected ventricular fibrillation leads to cardiac arrest, which leads to anoxic brain injury due to lack of an oxygenated blood supply.

¶ 8 The parties agree that the Fitness facility where Dollett's injuries occurred was covered by the Illinois Physical Fitness Facility Medical Emergency Preparedness Act (210 ILCS 74/1 *et seq.* (West 2012)) (PFFMEPA). Dawkins alleged that, at all relevant times, the PFFMEPA required Fitness to: (1) have a functioning AED[1] on site, (2) have staff properly trained in the assessment of patrons and the use of AEDs, (3) 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, and (4) have a medical emergency plan for responding to medical emergencies.

¶ 9 Dawkins further alleged that the PFFMEPA also required Fitness staff members to: (1) assess unconscious patrons for signs of breathing, pulse, and circulation pursuant to the training of the AED operators and Fitness's medical emergency plan; (2) assess unconscious patrons for use of an AED; (3) attach the AED pads on an unconscious patron who had no breathing, no pulse, or no signs of circulation; and (4) follow the visual and voice prompts on the AED.

[1] The PFFMEPA incorporates by reference the definition of an AED contained in the Illinois Automated External Defibrillator Act (AED Act) (410 ILCS 4/1 *et seq.* (West 2012)).

¶ 10 Dawkins alleged that, with full knowledge of Dollett's medical event and of the requirements to assess and treat her with an AED, Fitness violated the PFFMEPA and acted "willfully, wantonly, and in utter disregard for [Dollett's] safety" by: (1) failing to have a functioning AED device on the premises in violation of its medical emergency plan and the PFFMEPA; (2) failing to have properly and adequately trained staff on the premises in violation of its medical emergency plan and the PFFMEPA; (3) refusing to assess Dollett for breathing in violation of AED operator training, the medical emergency plan, and the PFFMEPA; (4) refusing to assess Dollett for signs of pulse or circulation in violation of AED operator training, the medical emergency plan, and the PFFMEPA; (5) refusing to apply the AED to Dollett and follow the voice and visual prompts in violation of AED operator training, the medical emergency plan, and the PFFMEPA; and (6) refusing to apply the AED electrical therapy to Dollett in violation of AED operator training, the medical emergency plan, and the PFFMEPA.

¶ 11 Dawkins further alleged that Fitness's failure to apply the AED to Dollett caused her permanent brain damage. He claimant that, had a Fitness employee connected the AED devise to Dollett in a timely fashion "as required" and followed the AED's prompts, the AED would have restored cardiac function and oxygenated blood to Dollett's brain, thereby avoiding or lessening her brain injury.

¶ 12 Dollett is a disabled adult. She is, and continues to be, entirely without understanding or capacity to make or communicate decisions regarding her person and is totally unable to manage her estate or financial affairs.

¶ 13 Dawkins' third amended complaint pled two "willful and wanton counts" (counts I and II). Count I sought damages for Dollett's brain injury, and count II sought damages for loss of consortium. The complaint also raised two parallel counts based on ordinary negligence.

¶ 14 Fitness moved to strike or dismiss Dawkins's negligence counts because they had already been dismissed by the circuit court. The court granted that motion.[2] Fitness also moved to dismiss Dawkins's willful and wanton counts under section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)).

¶ 15 In affidavits filed in support of its motion to dismiss, Fitness acknowledged that PFFMEPA required that physical fitness facilities, such as the one operated by Fitness in Oswego, must comply with certain requirements. Specifically, PFFMEPA required that all physical fitness facilities have a medical emergency plan filed with the Illinois Department of Public Health ("IDPH"), an AED on the premises, and a trained AED on staff during business hours. However, Fitness asserted that it fulfilled each of these requirements, and was therefore immune from liability, because: (1) the IDPH has confirmed that a medical emergency plan was received and approved for the physical fitness facility operated by Fitness in Oswego; (2) Fitness had a working AED on the premises on November 18, 2012, when Dollett collapsed; and (3) the front desk employee on the premises at the time of Dollett's medical event was a trained AED user. Fitness argued that these facts established that its Oswego facility was in full compliance with the PFFMEPA at the time of Dollett's injuries, and therefore, could not be held liable for any acts or omissions relating to her injuries.

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[2] The circuit court had dismissed the negligence counts in Dawkins's prior complaint because: (1) Dollett had signed a Membership Agreement with Fitness's Oswego facility which explicitly released Fitness and its employees from any liability for negligence in the event that Dollett were to suffer a heart attack, stroke, or other injury while working out at the facility; and (2) the PFFMEPA barred actions based on negligence related to the use or non-use of an AED where the defendant is compliant with the PFFMEPA's requirements, as Fitness was in this case.

¶ 16 Fitness further maintained that the PFFMEPA created no duty to use an AED and afforded no private right of action to enforce any such duty (or any of the PFFMEPA's requirements) and that Dawkins had not pled a basis for his allegation that Fitness owed Dollett a duty to use the AED on her. Fitness also argued that neither Fitness's failure to use its AED nor any of the other alleged acts or omissions by Fitness staff rose to the level of willful and wanton conduct, and that Dawkins had failed to plead facts in support of its claim that any such actions or omissions proximately caused Dollett's injuries.

¶ 17 After briefing and oral argument, the circuit court granted Fitness's motion to dismiss Dawkins's willful and wanton counts with prejudice. The court stated:

> "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."

The written order subsequently issued by the circuit court stated: "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."

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 At issue in this appeal is whether the circuit court properly determined that, as a matter of law, Dawkins could not establish that Fitness's staff members had a duty to use its AED on

Dollett, and whether the circuit court properly dismissed Dawkins's third amended complaint on that basis under section 2-619(a)(9) of the Code.

¶ 21 Section 2-619(a)(9) provides that a defendant may file a motion for dismissal of the action on the grounds that "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). Section 2-619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact early in the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A motion for involuntary dismissal under section 2-619(a)(9) admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 931-32 (2009); *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008). When ruling on the section 2-619(a)(9) motion, the court construes the pleadings in the light most favorable to the nonmoving party (*Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55), and should grant the motion only "if the plaintiff can prove no set of facts that would support a cause of action" (*Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8). We review a circuit court's granting of a motion to dismiss under section 2-619(a)(9) *de novo*. *Kean*, 235 Ill. 2d at 361.

¶ 22 The circuit court dismissed Dawkins's willful and wanton counts because it found that Fitness was in full compliance with the PFFMEPA and that nothing created a duty for Fitness employees to use the AED on Dollett at the time of her medical emergency. By implication, the court ruled that neither the PFFPRA Act, the AED Act, nor the common law recognized or gave rise to any such duty. We disagree.

¶ 23 Section 74/45 of the PFFMEPA provides:

> "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 [AED] that are provided under the [AED] 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 [AED] 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 [AED] at the facility as required under Section 15 of this Act, and has maintained the [AED] in accordance with the rules adopted by the Department." (Emphases added.) 210 ILCS 74/45 (West 2012).

¶ 24 Similarly, section 30(d) of the AED Act, which is entitled "exemption from civil liability," provides in pertinent part:

> "An AED user is not liable for civil damages as a result of any act *or omission* involving the use of an [AED] in an emergency situation, *except for willful or wanton misconduct*, if the requirements of this Act are met." (Emphases added.) 410 ILCS 4/30(d) (West 2012).

¶ 25 By their plain terms, neither of these statutes immunize a defendant from liability arising from the failure to use an AED on an injured person, provided that such failure was willful and wanton. The italicized phrases in the above quotations from each statute make clear that a defendant covered by the statutes may not be found liable for civil damages for failure to use an AED, *except for willful or wanton misconduct*. The plain and unambiguous meaning of this phrase is that civil liability may attach to willful and wanton failures to use an AED.

¶ 26 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. 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." (Emphasis added.) 410 ILCS 4/5 (West 2012). 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*." (Emphasis added.) *Id.*

¶ 27 The PFFMEPA requires that a fitness facility like the one at issue here have a functioning AED on its premises. 210 ILCS 74/15 (West 2012). It also mandates that the facility have a staff member or members properly trained to use an AED and to assess unconscious patrons for breathing, signs of pulse, and circulation in order to determine whether to use an AED, and it mandates that a staff member with such training be present at each fitness facility during business hours. 210 ILCS 74/10 (West 2012). It also requires "each 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) (West 2012). The PFFMEPA defines "medical emergency" as "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 (West 2012).

¶ 28 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.

¶ 29 Fitness argues that the AED Act and the PFFMEPA should be read as preserving liability for willful and wanton *misuse* of an AED, but not for a *failure to use* an AED, even in circumstances where the failure to use an AED would amount to willful and wanton conduct. Fitness maintains that the statutes do not create a duty to use an AED under any circumstances. Rather, they merely provide that, *if* a fitness facility employee uses an AED on someone, they must do so without committing willful and wanton misconduct. Fitness argues that AED Act's explicit reference to acts *or omissions* involving the use of an AED and the PFFMEPA's reference to "use or non-use" of an AED are meant to proscribe only the "omissions" of acts or procedures that are necessary to the proper operation of an AED when an AED is used. They were not intended to require the use of an AED in the first instance.

¶ 30 We find Fitness's argument unpersuasive. As an initial matter, Fitness's interpretation is contrary to the plain words of the relevant statutes. Section 45 of the PFFMEPA states 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 74/45 (West 2012). This sentence unambiguously provides that liability may attach for willful and wanton *failure to use* an AED, not merely for the misuse of an AED. There is nothing in the sentence suggesting that the term "non-use" is somehow meant to convey the failure to use proper techniques or judgment while using an AED. Instead, it unambiguously contemplates civil liability for the failure to use an AED, provided that such failure is willful and wanton. Fitness's tortured reading of section 45 conflicts with the statute's plain meaning. "The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature." *In re Marriage of Goesel*, 2017 IL 122046, ¶ 13. The

best indicator of the legislature's intent is the plain and ordinary language of the statute. *Id.* Accordingly, we reject Fitness's interpretation of section 45.

¶ 31 Fitness's reading of the relevant provision of the AED is also unsupportable. In pertinent part, section 30(d) of the AED Act provides that "[a]n AED user is not liable for civil damages as a result of any act *or omission* involving the use of an [AED]***." (Emphasis added.) 410 ILCS 4/30(d) (West 2012). An "omission involving the use of" an AED clearly encompasses the failure to use the AED in appropriate circumstances. Nether section restricts liability for willful and wanton misconduct to the improper use (as opposed to non-use) of an AED. We may not read such a restriction or limitation into the statutes when such a reading contradicts the legislature's clearly expressed intent in the unambiguous statutory language. *Goesel*, 2017 IL 122046, ¶ 13.

¶ 32 Moreover, 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. On Fitness's reading, a fitness facility could fully comply with the PFFMEPA by having a functioning AED on site, training a staff member in its use, and developing an emergency medical plan, without having any obligation to implement the plan or to have the trained employee use the AED on a stricken patron under any circumstances. This interpretation flouts the plain language of the statutes, their expressed purposes, and common sense. As Dawkins's counsel aptly stated before the circuit court, Fitness's reading would allow covered facilities to be in full compliance with the statutes even if they used the AED only "as wall art." We must avoid construing a statute in a manner than would render it absurd, pointless, or ineffectual. *Croissant v. Joliet Park District*, 141 Ill. 2d 449, 455 (1990) ("Statutes are to be construed in a manner that avoids absurd *** results"); *People v.*

Hunter, 2017 IL 121306, ¶ 28 (courts should avoid construing a statute in a manner that "would lead to real-world results that the legislature could not have intended"); *Schoenbachler v. Minyard*, 110 S.W.3d 776, 783 (Ky. 2003) ("it is axiomatic that, when interpreting a provision of a statute, a court should not, if possible, adopt a construction that renders a provision meaningless or ineffectual or interpret a provision in a manner that brings about an absurd or unreasonable result").

¶ 33 However, even 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. To state a claim for negligence, a plaintiff must plead a duty owed by a defendant to that plaintiff, a breach of that duty, and injury proximately caused by that breach of duty. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Whether a duty of care exists is a question of law to be decided by the court. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422 (2008). In deciding whether a defendant owes a plaintiff a duty, the court considers (1) whether the plaintiff's injury was reasonably foreseeable, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against injury, and (4) the consequences of placing a burden on the defendant. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422 (2008).

¶ 34 Consideration of these factors supports the conclusion that Fitness had a common law duty to use an AED on Dollett under the facts presented in this case. It is certainly foreseeable that patrons could suffer cardiac events while exerting themselves at fitness centers. Indeed, the purpose of the PFFMEPA is to provide AEDs to fitness facilities and to staff those facilities with trained AED operators in order to provide life-saving treatment for such medical emergencies. Cardiac events are more likely to occur at fitness facilities than at other commercial establishments due to the fact that all of the patrons at fitness facilities are exerting themselves.

That is why the PFFMEPA's requirements are directed to fitness facilities. Moreover, the legislature has already determined that the burden of guarding against the injury should be assigned to fitness centers by requiring fitness centers to have functioning AEDs and trained AED users on staff during business hours. Further, the consequences of placing that burden on fitness centers are reasonable. A patron suffering cardiac arrest is in grave danger and helpless to care for herself. A trained AED user at a fitness facility is in a far better position to care for such patrons than are the patrons themselves or other patrons. In the PFFMEPA, the legislature has already decided that a fitness facility must take reasonable precautions to help prevent fatal injuries from cardiac arrest, strokes, or other emergency medical conditions. Moreover, the legislature has eliminated common law liability for negligent use or non-use of an AED by a fitness facility employee, thereby lessening the consequences of placing the burden on entities like Fitness.

¶ 35 Moreover, a common law duty arises from section 314A of the Restatement (Second) of Torts, which has been adopted by our supreme court. See *Marshall*, 222 Ill. 2d at 438. That section provides that the relationship between a business invitor and invitee is a special relationship that may give rise to an affirmative duty on the business invitor's part to aid or protect his invitee against unreasonable risk of physical harm. *Id.* This includes the duty to: (1) give the invitee such first aid as he reasonably can once he knows or has reason to know that the invitee is endangered, ill, or injured; and (2) care for the invitee until he can be cared for by others (*i.e.*, to take reasonable steps to turn the sick invitee over to a physician). Restatement (Second) of Torts § 343A cmt. f (1965). Accordingly, irrespective of any duty it may or may not have owed under the PFFMEPA or AED Act, Fitness owed a duty under Illinois common law to provide "reasonable" first aid to Dollett given that it knew of her condition. Because Fitness had

a functioning AED on site and a staff member trained in its proper use, "reasonable" first aid might have included use of the AED on Dollett. In any event, at this early stage of the litigation, it cannot be said that Dawkins can present "no set of facts" establishing that Fitness owed Dollett a common law duty to use the AED on her in a timely manner.

¶ 36 Fitness relies upon *Salte v. YMCA of Metropolitan Chicago Foundation*, 351 Ill. App. 3d 524 (2004), to establish that no such duty exists. However, *Salte* is distinguishable. In *Salte*, our appellate court held that a health club was not required to have an AED on site and to use it on a patron who suffered cardiac arrest while using treadmill at the health club. *Id.* at 529. However, in *Salte*, the health club did not have an AED on the premises, much less an employee properly trained in the use of an AED and in the evaluation of unconscious patrons for such use, as here. *Id.* at 525 (the events in *Salte* took place before the PFFMEPA was enacted). Accordingly, *Salte* is of little relevance in determining the scope of Fitness's common law duty in this case.

¶ 37 Fitness argues in the alternative that the PFFMEPA and AED Act abrogate any common law duty by immunizing the defendants from liability for failing to use an AED on a patient suffering from a cardiac emergency. We disagree. As noted above, the statutes clearly and unambiguously immunize only negligent conduct in connection with the use or non-use of an AED, not willful and wanton conduct. Moreover, "[t]he repeal or preemption of a common-law remedy by implication is not favored [citation], and a statute that appears to be in derogation of the common law will be strictly construed in favor of the person sought to be subjected to the statute's operation [citation]." *Heider v. Knautz*, 396 Ill. App. 3d 553, 561 (2009). "Any legislative intent to abrogate the common law must be clearly and plainly expressed, and [courts] will not presume from ambiguous language an intent to abrogate the common law." *Id.* Here, there is no such ambiguous language in the statutes at issue, and no clearly and plainly expressed

legislative intent to abrogate common law actions or remedies. To the contrary, both statutes expressly state that they are not immunizing entities subject to the statutes from liability for willful and wanton misconduct.

¶ 38 Furthermore, 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. A court may determine that a private right of action is implied in a statute that lacks explicit language regarding whether a private right of action shall be allowed. *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999); *Pilotto v. Urban Outfitters West, L.L.C.*, 2017 IL App (1st) 16084, ¶ 22. In order to find an implied private right of action, a court must find that: (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*, 188 Ill. 2d at 460; *Pilotto,* 2017 IL App (1st) 16084, ¶ 22.

¶ 39 Here, Dollett was a patron at a fitness facility, which is exactly the class of persons that the PFFMEPA was enacted to benefit. Dollett's injury (cardiac arrest caused by a ventricular fibrillation) is precisely the type of injury that an AED detects and treats, and her brain injury as the result of untreated ventricular fibrillation is exactly the type of injury that the PFFMEPA was designed to prevent. The language and the requirements of the PFFMEPA make clear that a private right of action is consistent with the underlying purpose of the statute, which is to protect patrons of fitness facilities from suffering serious injuries by having trained AED users on site who will use an AED on patients suffering cardiac events.

¶ 40 Moreover, implying a private right of action is necessary to provide an adequate remedy for violations of the statute. The only remedy for violations of the PFFMEPA expressly provided in the statute are: (1) a written administrative warning from the Director of Public Health (Director) without monetary penalty for the initial violation; (2) a civil monetary penalty of at least $1,500 but less than $2,000 imposed against the facility by the Director for a second violation; and (3) a civil monetary penalty of least $2,000 for a third or subsequent violation. Under this penalty scheme, there is virtually no incentive for a fitness facility not to commit one violation since a single violation will not incur a penalty. However, one failure to use an AED on a patron suffering cardiac arrest can result in permanent and irreversible injury or death. That is exactly what the PFFMEPA was enacted to prevent. Moreover, the PFFMEPA does not expressly provide for criminal penalties or overly burdensome fines to redress violations of the statute. Thus, contrary to Fitness's argument, the penalty scheme included in the PFFMEPA is not the type of "robust built-in enforcement mechanism" that makes compliance with the statute likely and that provides an adequate remedy for violations of the statute. See *Carmichael v. Union Pacific Railroad Co.*, 2018 IL App (1st) 170075, ¶ 22, *vacated on other grounds*, 2019 IL 123853 (collecting cases). We find this case to be analogous to *Pilotto*, 2017 IL App (1st) 16084, ¶ 32, wherein our appellate court found an implied private right of action and held that the

statute's imposition of a $100 fine for violations of the statute without requiring any investigations or further sanctions did not provide an adequate remedy.[3]

¶ 41 Fitness further argues that Dawkins failed to adequately allege willful and wanton misconduct.

> " 'A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting reckless disregard for the safety of others, such as a failure, after knowledge of an impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' " *Ziarko v. Soo Line Railroad Co.*, 161 Ill. 2d 267, 273 (1994) (quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569 (1946)).

There is a continuum of conduct within the spectrum of conduct which is "willful and wanton." *Id.* at 275. At the lower end of the spectrum, "willful and wanton acts share many similar characteristics with acts of ordinary negligence," where willful and wanton misconduct "may be only degrees more than ordinary negligence." *Id.* At the other end of the spectrum, "willful and wanton acts may be only degrees less than intentional wrongdoing." *Id.* at 276.

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[3] Moreover, our supreme court has held that the presence of administrative enforcement mechanisms like those authorized by the PFFMEPA does not preclude an implied right of action for civil damages. *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 391 (1982) (holding that the fact that the legislature provided for departmental enforcement of regulations promulgated under the Brokers Licensing Act by the Department of Registration and Education, which included the authority to suspend or revoke a certificate of registration or censure a registrant when the Department found that a registered broker had violated the Act, did "not necessarily mean that the [legislature] must not have intended to create a private right of action"). Moreover, none of the administrative remedies prescribed by the PFFMEPA would compensate fitness facility patrons harmed by a defendant's violations of the statute, even though the protection of such patrons is the primary purpose of the PFFMEPA. In addition, the 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 74/45 (West 2012). For all these reasons, finding an implied right of action for civil damages in the PFFMEPA seems particularly appropriate.

¶ 42 In this case, Dawkins alleged that Fitness was required by its medical emergency plan and by the training provided to its staff to assess unconscious patrons for the use of an AED, and to attach the AED pads to a patron and follow the voice prompts where the patron was unconscious and had no signs of breathing, circulation, or a pulse. Dawkins further alleged that Fitness failed to do this despite the fact that Fitness knew that Dollett had collapsed, stopped breathing, and lost her pulse in an open and public area of the facility, and despite the fact that Fitness knew that other patrons were calling to Fitness staff for help. Dawkins alleged that Fitness failed to follow its medical emergency plan and failed to use the AED on Dollett for more than eight minutes, by which time she had suffered permanent and irreversible brain damage. 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.

¶ 43 Finally, Fitness argues that it would be bad policy to require non-medical personnel to use AEDs. We are not persuaded by this argument. The legislature chose to eliminate liability for ordinary negligence but not for willful and wanton conduct. The language and purposes of the Act demonstrate that the legislature has imposed a limited duty to use an AED by allowing liability only for a failure to use that would amount to willful and wanton misconduct. The legislature has therefore concluded that such limited liability adequately protects fitness clubs and their staff while allowing injured plaintiffs a limited cause of action against them. We will not second guess the legislature's policy determinations on this issue.

¶ 44 As noted above, the 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 produce evidence establishing that, under the particular facts and circumstances presented in this

case, Fitness' employees' failure to render AED treatment to Dollett for more than eight minutes after she collapsed amounted to willful and wanton conduct that breached a 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's complaint as true, the complaint may not be dismissed as a matter of law. Accordingly, the circuit court's dismissal of Dawkins's third amended complaint was improper.

¶ 45 We have considered the remaining arguments made by Fitness and have found them to be meritless.

¶ 46 CONCLUSION

¶ 47 For the reasons set forth above, we reverse judgment of the circuit court of Will County and remand for further proceedings.

¶ 48 Reversed. Cause remanded.

2015L000675

APPEAL TO THE APPELLATE COURT OF THE STATE OF I THIRD APPELLATE JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL WILL COUNTY, JOLIET, ILLINOIS

LEO DAWKINS, Individually and as Next Friend of DOLLETT SMITH DAWKINS, a Disabled Person.	)	
Plaintiff-Appellant,	)	
v.	)	No. 15 L 00675
FITNESS INTERNATIONAL, LLC, L.A. FITNESS and L.A. FITNESS OSWEGO	)	Honorable Raymond E. Rossi Honorable Michael J. Powers Judges Presiding
Defendant-Appellee.	)	

NOTICE OF APPEAL

Now comes the plaintiff-appellant, LEO DAWKINS, Individually and as Next Friend of DOLLETT SMITH DAWKINS, a Disabled Person, by his attorneys, Burke Wise Morrissey & Kaveny, David C. Wise of counsel, and pursuant to Supreme Court Rules 301 and 303, appeals to the Appellate Court of Illinois, Third Appellate District, from the order of September 20, 2017 granting the 735 ILCS 5/2-619 Motion to Dismiss filed by Fitness International, LLC (incorrectly also named as L.A. Fitness and L.A. Fitness Oswego) against plaintiff which terminated the case in its entirety and from the order of November 14, 2016 which granted Fitness International, LLC's 2-619 Motion to Dismiss as to the negligence counts which was

non-final when made but carried over though subsequent orders until made final by the entry of the September 20, 2017 order.

The appellants pray that this Court reverse the orders of September 20, 2017 and November 14, 2016, in their entirety, vacate their entry and remand this matter to the Circuit Court of Will County for further proceedings and trial.

DATED: October 16, 2017

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

By _____
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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

LEO DAWKINS

Plaintiff(s)

vs

FITNESS INT'L, LLC

Defendant(s)

CASE NO: 15 L 675

#35

ORDER

PLAINTIFF PRESENT	☐ YES ☒ NO	JUDGE	ROSSI	PLAINTIFF ATTORNEY	WISE ☒ YES ☐ NO
DEFENDANT PRESENT	☐ YES ☒ NO			DEFENDANT ATTORNEY	ROZAK ☒ YES ☐ NO

THE COURT BEING ADVISED IN THE PREMISES:

IT IS ORDERED:

On Motion of _____,
that this cause is continued to _____, 20____
TIME: _____ a.m. p.m. ROOM: _____
JUDGE: _____.
☐ _____ **MUST APPEAR FOR:**
☐ Status on _____
☐ Hearing on Motion/Petition for/to: _____
_____
☐ Proof of Damages
☐ Bench Trial on _____, 20____ at _____ a.m./p.m. Room _____, ☐ Will County Court House ☐ Will County Court Annex
☐ Jury Trial the week of _____, 20____ at 9:00 a.m. with Trial Status on _____, 20____ at 9:00 a.m. Room _____ (Will County Court Annex).
☐ The clerk or _____ is directed to send a copy of this order to _____.
☐ Other: _____
_____

IT IS ORDERED:

☒ Dismissed **without** Prejudice
☐ Dismissed **with** Prejudice
☐ Dismissed for Want of Prosecution
☐ Alias Summon(s) to Issue
☐ Citation to Issue

☐ **JUDGMENT** to enter:
☐ By Default
☐ Upon Trial or Hearing
☐ Defendant Having Admitted Liability
in favor of _____
and against _____
in the amount of $_____ plus attorneys' fees of $_____, costs of $_____.

☒ Miscellaneous Order: AFTER HEARING, COUNTS I + II OF PLAINTIFF'S THIRD AMENDED COMPLAINT ARE DISMISSED WITH PREJUDICE. COUNTS III + IV PREVIOUSLY DISMISSED WITHOUT PREJUDICE, & CASE DISMISSED

Attorney or Party, if not represented by Attorney
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Dated: Sept. 20, 2017

Entered: _____
Judge

ANDREA LYNN CHASTEEN, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

LEO DAWKINS, INDIVIDUALLY AND AS NEXT FRIEND OF DOLLETT SMITH DAWKINS, A DISABLED PERSON
Plaintiff/Petitioner

Appellate Court No: 3-17-0702
Circuit Court No: 2015L000675
Trial Judge: RAYMOND ROSSI

v.

FITNESS INTERNATIONAL, LLC
Defendant/Respondent

CERTIFICATION OF RECORD

The record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

1 Volume(s) of the Common Law Record, containing 551 pages
1 Volume(s) of the Report of Proceedings, containing 51 pages
0 Volume(s) of the Exhibits, containing 0 pages

I do further certify that this certification of the record pursuant to Supreme Court Rule 324, issued out of my office this 5 DAY OF DECEMBER, 2017

E-FILED
Transaction ID: 3-17-0702
File Date: 12/18/2017 8:40 AM
Barbara Trumbo, Clerk of the Court
APPELLATE COURT 3RD DISTRICT

(Clerk of the Circuit Court or Administrative Agency)

A45

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

LEO DAWKINS, INDIVIDUALLY AND AS
NEXT FRIEND OF DOLLETT SMITH
DAWKINS, A DISABLED PERSON
Plaintiff/Petitioner

Appellate Court No: 3-17-0702
Circuit Court No: 2015L000675
Trial Judge: RAYMOND ROSSI

v.

FITNESS INTERNATIONAL, LLC
Defendant/Respondent

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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I 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 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 7,064 words.

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NOTICE OF ELECTRONIC FILING/CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on December 29, 2021, the undersigned electronically filed with the Supreme Court of Illinois, through the Odyssey eFileIL Case Filing System, the foregoing Defendant-Appellant Brief.

The undersigned further certifies that the aforementioned Brief was served upon the following attorneys of record on December 29, 2021, by electronic transmission:

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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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