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,

Defendants-Appellants.

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

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

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

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ARGUMENT

I. THE APPELLATE COURT CORRECTLY HELD THE STATUTE CREATED A PRIVATE RIGHT OF ACTION

The appellate court correctly held that the Physical Fitness Facility Medical Emergency Preparedness Act (the PFFMEPA) created a private right of action for willful and wanton use or non-use of an AED. It based its reasoning on the four factors set forth by this court in *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455 (1999). The *Fisher* court, however, cited to *Rodgers v. St. Mary's Hospital*, 149 Ill.2d 302 (1992). In *Rodgers*, the supreme court found the so-called X-ray Retention Act created a private right of action allowing a patient to sue for violations of the Act. After considering the now-familiar four factors, the court further explained:

> "[A]dministrative remedies would not provide an adequate remedy to those injured by violation of the Act. Additionally, the threat of liability is a much more efficient method of enforcing the regulation than requiring the Public Health Department to hire inspectors to monitor the compliance of hospitals with the provision of the Act. Thus, it is reasonable to believe that the legislature intended that those persons protected by the Act have a right to bring a private action against the offending hospital for damages caused by a breach of the statute." *Rodgers*, 149 Ill.2d at 309.

Given the plain language of the statute at issue in this case, it is even more reasonable to form the same belief here. In the case *sub*

judice, the legislature actually discussed a right of action. As the appellate court stated, "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 and wanton misconduct.*" *Dawkins v. Fitness Int'l, LLC*, 2020 IL App (3d) 170702, note 3 at ¶40.

The phrase "except for willful and wanton misconduct" is a type of prepositional phrase called an adverbial phrase.[1] In this case, the adverbial phrase answers the question *Under what conditions does an exception exist?* It modifies the entire clause which comes before it, *i.e.*, "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,..."

Moreover, it would be an incorrect reading of the sentence's grammar to classify the phrase as a "non-essential" or "non-restrictive" element. That is because one cannot remove it without fundamentally affecting the sentence's meaning.

The statute clearly states that except for willful and wanton misconduct, a right of action does not exist. The clear implication,

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[1] The Illinois Trial Lawyers Association acknowledges and thanks Robert Mawyer, Professor of English, Chair of Composition and Literature, Rock Valley College, Rockford, Ill., for his contribution to this brief *amicus curiae*.

therefore, is that a right of action *does* exist for willful and wanton misconduct in connection with the use or non-use of an AED. No other interpretation makes sense.

Here, as in *Rodgers*, all four factors which are commonly used to find a private right of action are easily met. Furthermore, any reading of the statute which would deny a right of action does violence to the plain wording of the law and ignores an essential clause.

The primary objective in statutory construction is to ascertain and give effect to the intent of the legislature. The most reliable indicator of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. *Haage v. Zavala*, 2021 IL 125918, ¶44. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Id.*

The statutory language plainly supports the existence of a cause of action for willful and wanton misconduct in the use or non-use of a AED in a physical fitness facility. Therefore, the appellate court's holding on this issue should be affirmed.

II. THE APPELLATE COURT CORRECTLY HELD THE FITNESS FACILITY HAD A DUTY OF CARE

The appellate court held the PFFMEPA created a duty for physical fitness facility staff who are properly trained in the use of an

AED to use it under appropriate circumstances. *Dawkins v. Fitness Int'l, LLC*, 2020 IL App (3d) 170702, ¶26.

This amicus wholeheartedly agrees with that holding and the reasoning employed by the appellate court. We will not reiterate those reasons; however, we respectfully submit there are additional persuasive reasons to find the law creates a duty to render aid to a person in distress. Those can be found in the PFFMEPA itself, in other statutes, and in the common law.

A. The PFFMEPA creates a duty

The PFFMEPA requires a medical emergency plan. 210 ILCS 74/10(a)(West 2012). That same subsection states: "The plan must comply with this Act and rules adopted by the Department [of Public Health] to implement this Act." *Id.* Those rules are found in Title 77 of the Illinois Administrative Code. Section 527.400 of Part 527 of that title requires the physical fitness facility to "adopt and implement" a plan for responding to medical emergencies which occur at the facility. That plan "*shall* encompass the use of an AED and *shall* provide a timely, proper response" to the emergency. (Emphasis added) 77 Ill. Adm. Code 527.400 (eff. July 21, 2010). A "proper response" clearly means actually using an AED.

Thus, as the appellate court correctly held, the PFFMEPA and the rules adopted by the Department to implement it create a duty for

physical fitness facility staff who are properly trained in the use of an AED to use it under appropriate circumstances. In fact, the rules envision that it be used *only* by facility staff. The administrative code states: "The facility staff shall take reasonable measures to ensure that the AED is operated *only* by trained AED users for the intended purposes of the AED" (Emphasis added). 77 Ill. Adm. Code 527.800(c)(eff. July 21, 2010).

B. The Administrative Code creates a duty

When it enacted the PFFMEPA, the General Assembly designated and required the Department of Public Health to adopt rules and regulations to see that the Act was both implemented and enforced. 210 ILCS 74/5.10, 10, 15(a), 20, 30, and 45 (eff. July 21, 2010) (West 2012). For example, the section of the Act requiring the physical fitness facility to adopt and implement a written plan for responding to medical emergencies specifically states that the plan "must comply with this Act and rules adopted by the Department[2] to implement this Act." 210 ILCS 74/10(a). The Department did adopt those rules, and they are now codified in the Illinois Administrative Code. 77 Ill. Adm. Code 527.400.

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[2] "'Department' means the Department of Public Health." 210 ILCS 74/5.10 (West 2012).

That code section states, in part:

> The operator of a facility shall adopt *and implement* a plan for responding to a medical emergency at the facility. The plan shall encompass *the use* of an AED and *shall provide a timely, proper response* to the occurrence of any other 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. 77 Ill. Adm. Code 527.400 (eff. July 21, 2010)(West 2012)(emphasis added).

Administrative regulations have the force and effect of law, and the familiar rules that govern construction of statutes also apply to the construction of administrative regulations. *Haage v. Alfonso Montiel Zavala*, 2021 IL 125918, ¶ 43. See also *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 (administrative regulations have the force and effect of law and are interpreted with the same canons as statutes).

Here, the regulations use the word implement as a verb. "Implement" means to give practical effect to and ensure actual fulfillment by concrete measures. "Implement." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/implement. Accessed 14 Feb. 2022.

That same regulation requires that the facility's plan include "the use of an AED and shall provide a timely, proper response" to a medical emergency.

Clearly, the State, acting through its regulatory body, intended to create a duty to use an AED in the event of a medical emergency. Any other construction would render the words "timely, proper response" meaningless. As this court recently reiterated in *Haage*, "[e]ach word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *Haage*, 2021 IL 125918, ¶ 44.

By requiring a timely, proper response to a sudden medical emergency which encompasses the use of an AED, the State clearly intended to create a duty to use the AED in accord with the medical emergency plan. A plan which is adopted, but not put in effect to ensure fulfillment of its purpose, by concrete measures, is not implemented. A plan which is not put into action is as useless as having no plan at all. It does nothing to advance the goal of saving lives in physical fitness facilities.

C. A duty to render aid is not unique

In its brief, the defendants repeatedly assert that a duty to render aid is unprecedented and that affirmance of the appellate court would be a sea change in Illinois jurisprudence. They are wrong.

All law enforcement officers must render medical aid and assistance if a person is injured, whether as a result of a use of force or otherwise. 720 ILCS 5/7-15 (West 2012).

And everyone who drives an automobile in Illinois is required by law to render aid in the event of a motor vehicle accident. See 625 ILCS 5/11-403 (West 2012). That section of the Illinois Vehicle Code, entitled

"Duty to give information and render aid," requires Illinois drivers to "render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon or hospital." *Id.* Moreover, the duty to render aid is independent of the fault of either party.

A common-law duty also arises from section 314A of the Restatement (Second) of Torts, which this court adopted in *Marshall v. Burger King Corp.*, 222 Ill.2d 422 (2006). In *Marshall* this court relied on that section of the Restatement to support its conclusion that a business owner who opens its establishment to the general public for business purposes has a duty to protect its patrons. *Marshall*, 222 Ill.2d at 440.

Section 314A of the Restatement (Second) of Torts states:

> (1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive

> the other of his normal opportunities for protection is under a similar duty to the other. Restatement (Second) of Torts §314A (1965).

By operating a physical fitness facility, Fitness is a possessor of land who holds itself open to the public for business purposes. At common law, the possessor's responsibility to its customers includes a duty to render first aid.

Another example of a common-law duty can be found in *Barnett v. Zion Park Dist.*, 171 Ill.2d 378 (1996). That case involved a 10-year-old boy who drowned in a park district's swimming pool. The boy's estate sued the park district for its failure to initiate lifesaving procedures to rescue the boy. *Barnett*, 171 Ill.2d at 383. The complaint alleged that the District committed the following willful and wanton misconduct:

> (a) Failed to initiate lifesaving procedures to [rescue the boy] after being told by another patron of the pool that [he] had slipped, [fallen] and struck his head on a diving board and dropped into the water:
>
> (b) Did not initiate lifesaving procedures to [rescue the boy] after being told by another patron of the pool that [he] was drowning;
>
> (c) Did not initiate lifesaving procedures to [rescue the boy] after being told by another person at the pool that [he] was having trouble swimming. *Id.*

The breach-of-duty allegations in *Barnett* are strikingly similar to those at issue in this case: a failure to render aid.

The park district defended itself by claiming it did not owe a duty of care. This court correctly rejected that argument. "We agree with the appellate court that the [park district] owed [the boy] a common law duty of reasonable care. Unquestionably, at common law a private operator of a public swimming pool or public bathing resort would have owed [the boy] a duty to make reasonable provisions and to take reasonable precautions for his safety." *Barnett*, 171 Ill.2d at 387.

The type of rescue which the plaintiff in this case required is akin to the rescue of the drowning victim in *Barnett*. Both were completely unable to help themselves. Both were completely dependent on others to render lifesaving assistance. And the similarities don't end there. The rules implementing the PFFMEPA require the facility to post the equivalent of a no-lifeguard-on-duty sign whenever the AED becomes inoperable. Section 527.600(b) states, in part, "Patrons shall be notified when an operable AED is not on the premises." 77 Ill. Adm. Code 527.600(b)(eff. July 21, 2010).

The PFFMEPA and the rules found in the administrative code clearly create a duty to use an AED under appropriate circumstances. Duties to render aid to others are not unusual. In fact, every motorist in Illinois must be prepared to render aid in the event of an accident regardless of fault. There is a common-law duty for possessors of land who hold their property open to the general public for business

purposes. Such a duty can also be found in the Restatement (Second) of Torts and in Illinois decisional law.

D. The defendant's references to the Good Samaritan Act are irrelevant

The fitness facility argues throughout its brief that the Good Samaritan Act would be somehow eroded if a private right of action exists for non-use of an AED. Though the defendant does not explain its rationale in any coherent manner, its argument—which lacks any citation to relevant authority—is nonsensical.

First, good Samaritans are, by definition, those "who volunteer their time and talents to help others." (745 ILCS 49/2 (West 2012)). A good Samaritan is one who acts to render aid to another in distress. In *Home Star Bank and Financial Services v. Emergency Care and Health Organization, Ltd.*, 2014 IL 115526, this court said:

> "[A] 'good Samaritan law' has a commonly understood meaning in the law. See Black's Law Dictionary 715 (8th ed. 2004)(explaining that a 'good-samaritan law' is a 'statute that exempts from liability a person (*such as an off-duty physician*) who *voluntarily* renders aid to another in imminent danger but negligently causes injury while rendering the aid" (emphases added))." *Home Star Bank*, at ¶40 (emphasis in original).

One who merely stands by and does nothing, *e.g.*, an onlooker, cannot rightly be called a good Samaritan. A non-user of an AED is not a good Samaritan.

Second, the Good Samaritan Act provides a type of immunity. The Act is found in chapter 745 of the Illinois Compiled Statutes entitled "Civil Immunities." (745 ILCS 49/1, *et seq.* (West 2012)). But whether an immunity exists is not at issue in this case. Rather, the questions presented here involve duty and the existence of a private right of action. In the case *sub judice* the defendant conflates these concepts.

In *Barnett v. Zion Park Dist.*, 171 Ill.2d 378 (1996), this court instructed that "[i]t is important to recognize that the existence of a duty and the existence of an immunity are separate issues." *Barnett*, 171 Ill.2d at 388. That case involved a 10-year-old boy who drowned in a park district's swimming pool. The boy's estate sued the park district for its failure to initiate lifesaving procedures to rescue the boy. *Barnett*, 171 Ill.2d at 383. The park district defended itself by claiming it did not owe a duty of care, in part, because it was immune under the Tort Immunity Act. This court properly rejected that argument. Existence of a duty and application of an immunity are separate analyses. The *Barnett* court found a duty existed because, following abolition of sovereign immunity in 1959, "government units are liable in tort on the same basis as private tortfeasors," and "at common law a private operator of a public swimming pool or public bathing resort would have owed [the boy] a duty to make reasonable provisions and to

take reasonable precautions for his safety." *Barnett*, 171 Ill.2d at 386–87. Only after conducting its duty analysis did the *Barnett* court then turn its attention to the question of whether an immunity applied. This was the proper method of legal reasoning, and it would be improper to conflate existence of an immunity with existence of a duty and private right of action.

Third, the Good Samaritan Act cannot apply to the defendant's trained AED user. Section 12 of the Act limits its application to "any automatic external defibrillator user who in good faith and *without fee or compensation* renders emergency medical care..." (745 ILCS 49/12 (West 2012)(emphasis added). In the instant case, and by the defendant's own admission, "The Fitness employee working at the front desk of the facility at the time of plaintiff's medical event was a trained AED user." Fitness's brief, p. 2. An employee who is (a) a trained AED user, and (b) paid to be "on staff during staffed business hours,"[3] is not a volunteer entitled to claim immunity under the Good Samaritan Act. This court resolved that very issue in its *Home Star Bank* decision. At issue in that case was whether an on-duty physician could be entitled to claim immunity as a good Samaritan if he did not send a bill for his services. This court held the Good Samaritan Act

[3]77 Ill. Adm. Code 527.800 (eff. July 21, 2010)(West 2012).

was meant to apply to volunteers, not to those who treat patients within the scope of their employment who are compensated for doing so. *Home Star Bank*, at ¶¶50–52.

Defendant's repeated references to the Good Samaritan Act are misplaced and its arguments are fuzzy and irrational. Good Samaritan's are volunteers who render aid to those in distress without fee or compensation. An onlooker or bystander cannot be classified as a good Samaritan. The questions at issue in this case involve the existence of duty and a private right of action, not whether an immunity may apply. Lastly, if the fitness facility's trained AED user was paid to be on staff, then immunity under the Good Samaritan Act is not available for the same reasons articulated by this court in the *Home Star Bank* decision.

III. CONCLUSION

This *amicus curiae*, the Illinois Trial Lawyers Association, respectfully requests that this court affirm the decision of the appellate court that the PFFMEPA creates a private right of action for willful and wanton misconduct, and that the facility has a duty of care to provide a timely, proper response to a medical emergency which includes the use of an AED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b), and Rule 345. The length of this brief is **3319 words**, excluding words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a).

/s/ David F. Monteleone
David F. Monteleone