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 REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED COUNTS I & II OF THE THIRD AMENDED COMPLAINT PURSUANT TO 735 ILCS 5/2-619(a)(9) AFTER FINDING THAT DEFENDANT/APPELLANT WAS IN COMPLIANCE WITH THE PFFMEPA AND THAT THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE PFFMEPA DOES NOT MANDATE USE OF THE AED

Plaintiff responds that the Third Amended Complaint was factually sufficient, and dismissal of Counts I & II (for willful and wanton conduct) by the trial court was error. In fact, the trial court dismissed Counts I & II (Willful & Wanton Conduct) of the Third Amended Complaint, the only counts on appeal, pursuant to 735 ILCS 5/2-619(a)(9) after determining that Defendant, as an affirmative matter, was compliant with the requirements of the Physical Fitness Facility Medical Emergency Preparedness Act (210 ILCS 74/1 *et seq*. (West 2012)) (PFFMEPA) and that the PFFMEPA did not mandate use of the AED. (C 529).

A. Changes made to the Appellate Order Modified Upon Denial of Rehearing Filed July 14, 2021 are not "minute."

Plaintiff responds that the changes made in the Modified Order were "minute." Fitness disagrees.

In the initial Appellate Court Order dated December 7, 2020, the last three sentences of Paragraph 6 state:

"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." Order 12/7/2020, ¶ 6.

In the Modified Appellate Court Order dated July 14, 2021, the aforementioned three sentences were deleted and the following two sentences were substituted:

"Nevertheless, the Fitness employee who was trained to use the AED did not use it on Dollett. Nor did any other Fitness employee." Modified Order, ¶ 6.

The analysis and finding of the Appellate Court did not change between the initial order and the modified order, even though the initial order had been based on the factual understanding, that a Fitness employee used an AED on Ms. Dawkins, but only after an eight minute delay. The Appellate Court's orders, regardless of underlying facts of use or non-use, created an affirmative statutory duty mandating use of an AED in every medical emergency under the PFFMEPA without supporting plain and unambiguous language in the statute and regardless of the intent of the statute being "preparedness." Further, the Appellate Court found a common law duty mandating use of an AED, even though Ms. Dawkins was attended by patrons and receiving CPR before the ambulance arrived. The significant changes in the allegations demonstrate that the facts of this case, as set forth by plaintiff and taken as true, were not central to the orders provided by the Appellate Court.

B. The Appellate Court erred in reinstating the Third Amended Complaint after ruling on Counts I & II of the Third Amended Complaint only, so Counts III & IV should not be reinstated.

Plaintiff's response echoes the Appellate Court's error in reinstating the Third Amended Complaint without referencing the counts on appeal. The Modified Appellate Order does not differentiate the counts in the Third Amended Complaint that were the subject of the appellate court's opinion. Modified Order, ¶ 44. Only Counts I & II for willful and wanton conduct were before the trial court when the Motion to Dismiss pursuant to 735 ILCS 5/2-619(a)(9) was granted. (C 529). Count III (Negligence) and Count IV (Negligence – Loss of Consortium) were pled within the Third Amended Complaint but had been dismissed with prejudice on November 14, 2016. (C 274).

The trial court dismissed Count III (Negligence) and Count IV (Negligence – Loss of Consortium) of the Amended Complaint with prejudice on November 14, 2016 pursuant to 735 ILCS 5/2-619(a)(9) on two separate grounds, a valid exculpatory clause which was supported by an affidavit, and compliance with the PFFMEPA based on two (2) supporting affidavits, one of which was from the Illinois Department of Public Health. (C 274). Therefore, Count III (Negligence) and Count IV (Negligence – Loss of Consortium) of the Third Amended Complaint are not part of this appeal and should not be reinstated by the inclusive language used in the Appellate Order. Modified Order, ¶ 44.

C. The Trial Court Properly found Fitness International, LLC's compliance with the requirements of the PFFMEPA 210 ILCS 74/1 *et seq.* as an affirmative matter that barred allegations based on non-compliance in Counts I & II for Willful and Wanton Conduct in the Third Amended Complaint.

Contrary to plaintiff's contention, the first argument in the Motion to Dismiss the Third Amended Complaint brought pursuant to 735 ILCS 5/2-619(a)(9) sought dismissal of Paragraph 16 (a-f) & (h) in both Count I & II due to defendant's compliance with the PFFMEPA. (C 401). Paragraph 16 in both Counts I & II of the Third Amended Complaint allege non-compliance with the PFFMEPA as willful and wanton conduct. (C 383 ¶ 16; C 387-388 ¶ 16).

As an affirmative matter, the Motion to Dismiss the Third Amended Complaint pursuant to 735 ILCS 5/2-619(a)(9) informed the trial court of the previous finding of compliance with the PFFMEPA. (C 404-405). The same affidavits supporting dismissal of the Amended Complaint were attached as supporting exhibits to the Motion to Dismiss the Third Amended Complaint, including one from the Illinois Department of Public Health. (C 463; C 462). The affidavits established that the fitness club was in compliance

with the requirements of the PFFMEPA by having a working AED, a trained employee on staff, and a written plan that was received and approved by the Illinois Department of Public Health. (C 274).

Contrary to plaintiff's recasting the § 2-619(a)(9) motion at issue as combined, it is clear that compliance with the PFFMEPA is an affirmative matter which defeats the legal effects of statutory non-compliance as pled. "Affirmative matter" in a section 2-619(a)(9) motion is a defense, which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Illinois Graphics Co. v. Nickum,* 159 Ill. 2d 469, 486 (1994). The affirmative defense may be supported by affidavit or materials attached to the motion. *Barber-Colman Co. v. A & K Midwest Insulation Co.,* 236 Ill.App.3d 1065, 1073 (5th Dist. 1992). Immunity from suit under a tort immunity statute is an affirmative matter properly raised under 735 ILCS 5/2-619(a)(9). *Van Meter v. Darian Park Dist.*, 207 Ill. 2d 359, 367 (2003). By presenting adequate affidavits supporting the asserted defense the defendant satisfies the initial burden of going forward on the motion. The burden then shifts to the plaintiff. *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 116 (1993). "If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed." *Id*. at 116.

Plaintiff's brief in opposition to the Motion to Dismiss Counts I and II of the Third Amended Complaint 735 ILCS 5/2-619(a)(9) did not contain an affidavit that challenged compliance with the requirements of the PFFMEPA. (C 470). Thereafter, the trial court found defendant in compliance with the PFFMEPA and dismissed Counts I & II after also

finding that the PFFMEPA did not mandate use of the AED. (C 529). Therefore, there is no basis for questioning that dismissal was granted pursuant to 735 ILCS 5/2-619.

II. PLAINTIFF FAILED TO DEMONSTRATE THAT THE PHYSICAL FITNESS FACILITY MEDICAL EMERGENCY PREPAREDNESS ACT STATES IN PLAIN AND UNAMBIGUOUS LANGUAGE THAT THE EMPLOYEE REQUIRED TO BE TRAINED ON USE OF AN AED IS MANDATED TO USE AN AED IN EVERY MEDICAL EMERGENCY

Rather than admit that there is no statutory language mandating the use of an AED, plaintiff's response brief spirals away in a detailed analysis of the synchronicity and intertwined relationships of conditional phrases such as, "except for," "but for" and "only for." If plaintiff has to dust off the Oxford English Dictionary to bridge the gap in meaning from what a statute expressly says, and what the plaintiff and the Appellate Court would like it to say one is unlikely to find plain and unambiguous language supporting mandated AED use in the PFFMEPA.

The trial court properly found, in the second part of the argument made in support of the Motion to Dismiss Counts I & II of the Third Amended Complaint, that nothing in the PFFMEPA required use of the AED. (R 50, 1-3). None of the many briefs submitted by plaintiff, nor the Appellate Order, can point this Court to the express language within the PFFMEPA that plainly and unambiguously imposes the duty/statutory obligation that plaintiff claims exists in the statute.

The General Assembly did not include such language in the Automated External Defibrillator Act (AED Act) (410 ILCS 4/1 *et seq*. (West 2012)), so it does not contain plain and unambiguous language that mandates use of an AED in a medical emergency. The trial court was correct in finding that the PFFMEPA does not in plain and unambiguous language mandate for application of an AED in every medical emergency…because no

such language exists. (C 529). The trial court correctly dismissed the complaint and the Modified Order of the Appellate Court should be reversed.

A. If the Appellate Court Opinion is allowed to stand, Illinois will be the first State to eliminate the discretion of non-medical first responders and mandate AED use in every medical emergency.

Not surprisingly, plaintiff supports the imposition of a mandate to use an AED. In support of this position, plaintiff attempts to distinguish decisions from foreign courts regarding similar statutes, but does not – because he cannot – cite to any case where a court has ruled that a statute requiring or encouraging businesses to have AEDs on site creates by implication an affirmative statutory duty to use an AED.

In *Trim v. YMCA of Central Maryland*, the statute involved required a *registered facility* to have an AED on the premises. 165 A.3d 534 (Md. Ct. Spec. App. 2017)[emphasis added by italics]. If the business was *registered*, that business was required to have an AED on site and the Court held that, "The legislature did not surreptitiously incorporate an affirmative duty to use an AED when it required an expected (or anticipated) operator to receive training before a facility could receive a certificate." *Trim*, 165 A.3d at 543.

Similarly, in *Wallis v. Brainerd Baptist Church*, the Court held that a Tennessee statute that encouraged businesses and other entities to acquire and make AEDs available for use in emergencies, did not create an affirmative or mandatory duty to use the AEDs. 509 S.W.3d 886, 901 (Tenn. 2016). Lastly, the New York Court of Appeals in *Miglino v. Bally Total Fitness of Greater New York* held that a statute mandating health clubs maintain an AED on premises with trained personnel did not create a duty to use the AED. 985 N.E.2d 128, 132 (N.Y. 2013). These foreign cases are instructive and demonstrate how Appellate Courts have ruled in cases involving similar statutes. Following the guidance

provided in other states that have considered the application of similar statutes, it is clear that the trial court was correct in dismissing the Third Amended Complaint, and the Modified Order of the Appellate Court should be reversed.

B. The intent of the legislature is best effectuated with the plain and unambiguous language enacted.

"In construing a statute, the supreme court must strive to effectuate the intent of the legislature. The plain and unambiguous language of the statute is the most reliable indicator of that intent. Whenever possible, courts must enforce clear and unambiguous statutory language as written, without reading in unstated exceptions, conditions, or limitations." *Manago v. Cty. Of Cook*, 2017 IL 121078 (2017). Plaintiff advocates for the Appellate Court's unsupported conclusion that the best way to encourage use, is not to prepare, but mandate use. Removing the discretion of non-medical first responders in medical emergencies by requiring the use of a specific medical device in every medical emergency is unprecedented.

The Appellate Court ignored the plain and unambiguous language in the statute by mandating use of an AED. The AED Act specifically states in Section 5: "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 by italics] 410 ILCS 4/5.

Plaintiff advocates for the Appellate Court's interpretation of the intent of the AED Act as not simply encouraging use, but mandating use. The Appellate Court found that encouraging AED use cannot be met without requiring use of the AED in every medical emergency. Modified Order, ¶ 32. Clearly overstepping, the Appellate Court provided no basis for the statement that encouraging use and preparing for use would not result in AED

use that saves lives. Plaintiff's and the Appellate Court's position certainly brings to life the expression, "If you are a hammer, everything's a nail." Mandating use of an AED in every medical emergency is not necessary to encourage and be prepared for use.

C. The Physical Fitness Facility Medical Emergency Preparedness Act is plainly and unambiguously titled as a statute that is meant to create preparedness for medical emergencies.

The Physical Fitness Facility Medical Emergency Preparedness Act (PFFMEPA) is, as the name states, an act that creates preparedness. Of course, with a trained user on premises and a working AED, a facility is prepared to deploy an AED.

If the intent of the General Assembly, in enacting the PFFMEPA, was to mandate AED use in every medical emergency, one might expect to find it in the definition, or at least some indicator of intent. According to the PFFMEPA in Section 5.20:

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

The definition of medical emergency does not state that all medical emergencies require application of an AED. 210 ILCS 74/5.20.

Contrary to the position of plaintiff and the Appellant Court, the PFFMEPA does not set forth specific medical examination procedures, such as guidelines for when an AED has to be deployed, or the assessment contained in ¶ 9 of the Modified Order. The requirements for accessing unconscious patrons for signs of breathing, pulse, and circulation as set forth in the Appellate Court's order do not exist in the PFFMEPA. 210 ILCS 74/1 *et seq*.; Modified Order, ¶ 9. The PFFMEPA requires that a medical emergency plan be filed with the Illinois Department of Public Health, but the section of the statute does not mandate use of an AED nor does it provide lists of required assessments. 210

ILCS 74/10. The penalties for violating the PFFMEPA do not impose penalties for failing to use an AED. 210 ILCS 74/35.

Contrary to plaintiff's position, Section 45 of the PFFMEPA does not state, in plain and unambiguous language, that an AED must be used in every medical emergency. Plaintiff's response brief states: "Defendant had a duty to use the AED under the words of the Act." Yet, no plain and unambiguous words are referenced or set forth thereafter. The reason is obvious, no such words exist in the language of the PFFMEPA. Contrary to plaintiff's position and the opinion of the Appellate Court, the PFFMEPA does not state in plain and unambiguous language that a trained staff member has to be the one to use the AED in the event of a medical emergency. Section 15 of the PFFMEPA is entitled "Automated external defibrillator required." 210 ILCS 74/15. The section does not mandate use of the AED, only that certain facilities have an AED and have a trained user on staff during business hours. 210 ILCS 74/15. The statute also does not limit use of an AED to employees of the facilities that must have them present. Section 15 is consistent with the stated name of the act which intends to make physical fitness facilities prepared in the event of an AED is warranted. 210 ILCS 74/15.

D. The PFFMEPA does not mandate use nor does it mandate that a specific trained AED user employee is the only person that can use this publicly available AED.

Plaintiff argues that a volunteer does not have the slightest relevance to this case. Defendant disagrees. Because there is no support in the plain and unambiguous language of either the AED Act or the PFFMEPA for the mandatory application of the AED by one specifically trained employee; every trained person who offers to respond to a medical emergency is a volunteer. Plaintiff has to ignore the stated intent of the AED Act and the

very name of the PFFMEPA to create a legal obligation of mandatory use of an AED in every medical emergency, which, as a result, would leave no free will or discretion in responding to a medical emergency. Logic dictates that every collapse or fainting spell does not require the application of an AED. Logic also dictates that those who volunteer to respond, do so for the right reasons, and will be prepared to use an AED if deemed necessary.

Plaintiff's arguments that Section 45 of the PFFMEPA creates the mandatory duty to use an AED, so that non-use can be willful and wanton conduct, impermissibly limits the exemptions of the PFFMEPA, which is inconsistent with the plain language of the AED Act. Section 45 of 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. 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. 210 ILCS 74/45 [emphasis added by italics].

The *Exemptions from civil liability* section of the AED Act states in relevant part:

"(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 and wanton conduct, if the requirements of this Act are met." 410 ILCS 4/30.

Reading the two statutes together, it becomes clear that nothing in the PFFMEPA shall be construed to limit the exemptions from civil liability in connection with the purchase of an AED, beyond those provided in the AED Act. Non-use of an AED is not actionable under the AED Act and is also not actionable in the PFFMEPA. The only way

non-use of an AED becomes actionable as willful and wanton misconduct is to ignore the exemptions for liability in the AED Act, which is impermissible in the first sentence of Section 45 of the PFFMEPA. In other words, the only way the words "except for willful and wanton conduct" of the PFFMEPA in Section 45, do not violate the PFFMEPA is if they are used in reference to the use of an AED. Further, as no part of the AED Act or the PFFMEPA mandates use of an AED in every medical emergency, non-use cannot be actionable as willful and wanton conduct. The argument that the word "omission" in 410 ILCS 4/30 refers to non-use in the AED Act is as creative as it is impermissible given the plain language of the statute.

III. THE EXPANSION OF A COMMON LAW DUTY ON BUSINESS OWNERS TO INVITEES TO PROVIDE SPECIFIC MEDICAL INTERVENTION BY APPLYING A SPECIFIC MEDICAL DEVICE TO STOP NATURALLY OCCURRING PROCESSES WITHIN THEIR BODIES IS WITHOUT PRECEDENT OR LEGAL FOUNDATION

Contrary to the assertion of plaintiff, a fitness club is not a common carrier, and those that choose to workout at a facility are not passengers. As this Court has repeatedly held, "carriers of passengers for hire, though not insurers of absolute safe carriage, are bound to exercise the highest degree of care, skill and diligence consistent with the practical operation of the road and the mode of conveyance adopted." *Sandy v. Lake S.E. R. Co.*, 235 Ill. 194, 202 (1908). Plaintiff has established no legal basis to apply the highest duty of care to Ms. Dawkins in this matter as if she was a common carrier passenger.

Plaintiff's responding brief does not set forth one case supporting the contention that a fitness club has the duty to stop CPR efforts in order to apply an AED.

Contrary to the logic stitched together by plaintiff in support of a common law duty, the defendant did not cause the cardiac arrest and the defendant was not in a superior

position to know of the conditions in Ms. Dawkins' body that caused her to collapse. The heart attack was not caused by a condition of the premises or the act of a third-party.

The Restatement of Law, Second, Torts, § 314A, Special Relations Giving Rise to the Duty to Aid or Protect, Comment f, provides in full:

> *f.* The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. *In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance*. Restatement (Second) of Torts, § 314A, Comment f [emphasis added by italics].

In plaintiff's response, there is a conspicuous failure to include full language of *Comment f*, specifically the illuminating statement that, a defendant is not required to give aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance. *Id*. In the Third Amended Complaint, Counts I & II, plaintiff alleges 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). Patrons were not only present with Ms. Dawkins, but were administering CPR, which is assistance. According to *Comment f*, Fitness was not required to give aid when plaintiff was in the hands of patrons who had recognized that she had collapsed and were providing necessary assistance. The Appellate Court clearly overstepped by finding that the common law supports a duty of care that requires intervening in ongoing assistance to provide another type of assistance such as an AED.

IV. THE APPELLATE COURT ERRED IN CREATING A PRIVATE RIGHT OF ACTION FOR FITNESS' NON-USE OF AN AED ON THIS PATRON

In addition to claiming that Fitness had a duty to use an AED in this case, plaintiff contends that this Court may imply a private right of action under the PFFMEPA and affirm that portion of the Appellate Court decision as well. (Responding Brief p. 31-21). For two reasons, however, that contention fails.

First, by its plain language, a private right of action exists under the PFFMEPA only for willful or wanton misconduct, not negligence. Although "[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). The PFFMEPA contains explicit language permitting a private right of action for willful and wanton misconduct. Yet the language of the complaint – which has been re-pleaded three times – alleges only negligence. Thus, even if the statute contemplates a private right of action for willful and wanton misconduct in non-use of an AED, that is not what happened here or what plaintiffs allege. Indeed, throughout his brief, plaintiff refers to "reasonable care," which is the touchstone of negligence. It cannot and does not support a willful and wanton cause of action. (Responding Brief p. 26). Saying so does not make it so. Because the negligence causes of action have been dismissed, plaintiff cannot now rely on the same conduct – or failure to act – and simply claim it rises to the level of willful and wanton misconduct sufficient to support a private right of action and salvage the complaint.

Additionally, and as previously addressed, two of the four elements necessary to infer a private right of action are not present because: (1) the PFFMEPA makes clear that a private right of action is not consistent with the purpose of the statute, and (2) it contains

an adequate remedy. *See Metzger v. DaRosa*, 209 Ill. 2d 30 (2004). 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. The Appellate Court therefore erred by implying a private right of action in the statute beyond what was intended by the legislature.

Plaintiff's reliance on *Pilotto v. Urban Outfitters W., L.L.C.*, 2017 IL App (1st) 160844 (2017), is misplaced. There, the court considered the Restroom Access Act, which mandates that retail establishments allow customers to use employee toilets under certain circumstances. The *Pilotto* court engaged in a private right of action analysis because the plaintiff alleged a cause of action that originated in a statute, but the statute did not set forth an express right of action. Here, in contrast, the PFFMEPA does contain an express right of action for willful and wanton misconduct. Thus, it is not necessary for this Court to engage in an analysis to imply a private right of action.

More importantly, at issue in *Pilotto* was the fact that the retail establishment failed to comply with the statute. Here, however, the trial court already determined that Fitness was in compliance with the PFFMEPA, and that is not at issue on this appeal. (C 274, C 529; A3, A5, A34-35; R. 49-50). Unlike in *Pilotto*, the issue here is not whether there should be a private right of action based on Fitness' alleged non-compliance with the statute. Plaintiff seeks to go beyond compliance with the statute and have this Court imply a private right of action for non-use of an AED even though Fitness was in compliance with the statute itself. Not only does plaintiff seek to expand the statute to subject Fitness to a private right of action for nonuse of the AED, but he seeks to render that nonuse willful

and wanton misconduct since the statute expressly immunizes negligent non-use. Such a labored expansion of potential liability under the statute is not warranted based on well-settled principles of statutory construction and case law and far exceeds what the legislature intended. Such efforts should not be countenanced.

For all of the reasons stated above and in Fitness' opening brief, 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. Accordingly, the Order of the Appellate Court cannot stand, and it should be reversed to dismiss the remaining causes of action in the third-amended complaint in their entirety, on the merits and with prejudice.

V. DISCOVERY WAS NOT WARRANTED AND WOULD NOT SALVAGE PLAINTIFF'S CLAIMS

Plaintiff contends that the trial court erred in not permitting him an opportunity to conduct discovery in support of his allegations of willful and wanton misconduct. Because discovery would not have salvaged plaintiff's claims, the trial court did not err in denying plaintiff leave to conduct discovery. Such assertions at this stage are nothing more than a distraction and futile effort to revive claims that should properly be dismissed.

Plaintiff claims that Fitness waived the right to contest the pleading as sufficiently willful and wanton and then also claims he needed discovery to plead willful and wanton misconduct. These assertions are incorrect. As a threshold matter, Fitness did not waive any challenge to the adequacy of the pleading. The viability of the pleading is the very issue on a motion to dismiss.

Second, plaintiff cannot now raise the argument that he needed discovery. Such argument has been waived and should not be considered by this Court. Plaintiff did not raise the issue of discovery before the Appellate Court, and it is therefore not an issue

before this Court. *See generally Unzicker v. Kraft Food Ingredients Corp*., 203 Ill 2d 64, 73-74, (2002) ("we may consider an issue not raised below if the issue is one of law and is fully briefed and argued by the parties"). Plaintiff's request for discovery is a factual request that has been waived and should not be considered on this appeal.

Moreover, the issues that are properly before the Court are purely legal, specifically the existence of a duty, which is an issue of law for the court (*see, e.g., Espinoza v. Elgin, Joliet & E. Ry.*, 165 Ill 2d 107, 114 (1995) ("The existence of a duty is a question of law for the court to decide")), and whether there is a private right of action for non-use of an AED, which is addressed above and in Fitness' opening brief.

In any event, discovery is not warranted because it could not salvage plaintiff's sole remaining causes of action, which allege willful and wanton misconduct in the non-use of an AED on this patron. In the absence of a duty to apply an AED, plaintiff's remaining causes of action cannot stand. No amount of discovery can change that. As addressed above and in Fitness' opening brief, there is no duty to apply an AED, and non-use of an AED does not constitute willful and wanton misconduct. Similarly, because there is no private right of action under the PFFMEPA based on Fitness' non-use of the AED, discovery is not warranted. Thus, plaintiff's request for discovery does not change the legal analysis and does not provide any basis to affirm the Modified Order appealed.

CONCLUSION

For all of the reasons discussed above and in the opening brief, the Circuit Court of Will County correctly granted the motion to dismiss which dismissed Counts I & II of the Third Amended Complaint. The Modified Order of the Appellate Court should therefore

be reversed, the Order of the Circuit Court of Will County reinstated, and the Third Amended Complaint dismissed, in its entirety, on the merits and with prejudice.

Dated: March 2, 2022

Respectfully submitted,

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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this reply 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, and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,278 words.

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NOTICE OF ELECTRONIC FILING/CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on March 2, 2022, the undersigned electronically filed with the Supreme Court of Illinois, through the Odyssey eFileIL Case Filing System, the foregoing Defendant-Appellant Reply Brief.

The undersigned further certifies that the aforementioned Brief was served upon the following attorneys of record on March 2, 2022, 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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