IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

LOIS M. FOWLER, Personal Representative of the Estate of GARY FOWLER, Deceased,	)	
Plaintiff,	)	No. 07 L 12258 Calendar X Judge James D. Egan Room 2205
vs.	)	
BALLY TOTAL FITNESS CORP.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The matter before the Court is Defendant Bally Total Fitness Corporation's ("Bally") Motion to Dismiss Plaintiff's Complaint at Law pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. All Parties having notice thereof, the Court being fully advised in the premises, THIS COURT FINDS AS FOLLOWS:

I. Factual Background.

On November 7, 2005, Decedent suffered a heart-attack while exercising at a Bally fitness facility located in Montgomery County, Maryland. During Decedent's cardiac arrest, several patrons performed CPR, while Bally's employees called 911 for emergency assistance. After approximately six to eight minutes, emergency medical service ("EMS") personnel arrived and began applying electric shocks with a defibrillator in an attempt to restart Decedent's heart. Unfortunately, they were unsuccessful. Bally did not have an automated external defibrillator ("AED") at this particular facility at that time which would have allowed Bally's employees or patrons to attempt to resuscitate Decedent prior to the arrival of EMS personnel.

In January, 2005, the Montgomery County Legislature passed an ordinance requiring the placement of AEDs in local health clubs by July 1, 2005. However, Gaithersburg, Maryland, a local municipality in Montgomery County, was exempt from this ordinance pursuant to a "Home Rule" exception. None of Bally's facilities in Gaithersburg, Maryland, maintained AEDs on their premises. Nevertheless, it is alleged several other non-Bally health clubs in Gaithersburg deployed AEDs in spite of the Home Rule exemption. Furthermore, several other states, including Illinois, passed legislation prior to Decedent's death requiring the placement of AEDs in their respective state's health clubs, including states where Bally did business.

Decedent, a resident of Maryland, was a Bally member since December 31, 2003. The Membership Agreement Decedent signed with Bally was executed in Maryland. The agreement contained a Waiver and Release provision which purported to insulate Bally from negligence claims arising from the use of Bally facilities or services brought by Bally members, their families and guests. It also provided for Maryland law to be the governing law relating to any contractual issues or disputes involving the Membership Agreement.

Plaintiff, as Personal Representative, subsequently filed a six-count wrongful death action against Bally. The six counts are as follows: Count I – Breach of Express Warranty; Count II – Breach of Implied Warranty; Count III – Negligence; Count IV – Gross Negligence; Count V – Consumer Fraud as to Releases; and Count VI – Consumer Fraud as to Damages. However, during oral argument on this matter, Plaintiff agreed that her breach of implied warranty claim in Count II should be dismissed.

In its Motion to Dismiss, Bally makes several arguments: (1) the negligence counts should fail because Bally owed no duty to decedent to maintain and utilize AEDs at its facilities; (2) the breach of express warranty count should be dismissed because no such warranty to maintain and utilize AEDs at Bally's facilities existed between the Parties; and (3) the consumer fraud counts should be dismissed because Bally executed a valid Waiver and Release with Decedent.

II. Legal Standard.

A 2-615 motion attacks defects in the factual pleadings and questions whether sufficient facts have been properly pled which would entitle the plaintiff to relief. *Grund v. Donegan*, 298 Ill.App.3d 1034 (1st Dist. 1998). The only matters for the court to consider in ruling on a 2-615 motion are the allegations of the pleadings themselves, rather than the underlying facts. *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475 (1991). On the other hand, a 2-619 motion admits the legal sufficiency of a complaint, but raises defects and defenses that act to defeat plaintiff's claim. *Joseph v. Chicago Transit Authority*, 306 Ill.App.3d 927 (1st Dist. 1999). While a motion to dismiss pursuant to 2-615 or 2-619 admits the truth of all well-pleaded facts in the complaint, *Storm & Assoc., Ltd. V. Cuculich*, 298 Ill.App.3d 1040 (1st Dist, 1998), neither motion admits legal or factual conclusions that are unsupported by specific factual allegations. *Oravek v. Community Sch. Dist. No. 146*, 264 Ill.App.3d 895 (1st Dist. 1994). Additionally, in deciding on a motion to dismiss, all well-pleaded facts must be interpreted in the light most favorable to the plaintiff. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482 (1996).

III. Analysis.

In the instant case, there are three main issues for this Court to decide relating to Bally's Motion to Dismiss: (1) whether Bally's duty to act reasonably with regard to the welfare of its business invitees encompassed a duty to maintain an AED at its Gaithersburg, Maryland facility; (2) whether the Waiver and Release Decedent signed is valid and enforceable in this action, or whether, and to what extent, the Waiver and Release is void as against public policy; and (3) whether Plaintiff has successfully pleaded causes of action for consumer fraud. Each issue will be examined by the Court *infra*. However, before this Court can begin its analysis, it must first determine which state's substantive law is applicable to the various issues in this case.

A. Choice of Law Determination.

Subject to constitutional limitations, the forum court applies the choice-of-law rules of its own state. *See Ingersoll v. Klein*, 46 Ill.2d 42 (1970) (applying the choice-of law methodology of the Restatement (Second) of Conflict of Laws (1971)). Furthermore, in Illinois, different issues in the same case may be decided or governed by different states' laws, depending on the factual circumstances involved in each issue. *See Townsend v. Sears, Roebuck and Co.*, --- N.E.2d ----, 2007 WL 4200826 at *7 (2007) (Illinois courts utilize the process of *depecage*, "which refers to the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis."). However, it should be noted that a choice-of-law determination is required only when a difference in applicable law will make a difference in the outcome of the case. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 307 Ill.App.3d 92, 101 (5th Dist. 1999); *Kramer v. Weedhopper of Utah, Inc.*, 204 Ill.App.3d 469, 478 (1st Dist. 1990) ("[s]ince the outcome under either [state's] law is the same, the circuit court did not err in declining to formally choose which law to follow.").

1. Plaintiff's wrongful death (negligence) claims.

Regarding Plaintiff's wrongful death (negligence/gross negligence) claims, the Parties contend there is no difference in the analysis required under either Illinois or Maryland law that would lead to a difference in the outcome of said claims. This Court agrees. Both Illinois and Maryland courts employ a traditional duty analysis, and both states have specifically adopted Section 314A of the Restatement (Second) of Torts which imposes a duty on premises owners to act reasonably for the protection of their business invitees against unreasonable risks of physical harm and to render reasonable emergency care in the event of injury. *See Marshall v. Burger*

King, 222 Ill.2d 422, 438 (2006); *Patton v. U.S.A. Rugby*, 381 Md. 627, 640 (2004). As such, since there is no appreciable difference in applicable law that will make a difference in deciding the outcome of Plaintiff's wrongful death claims, this Court declines to formally choose which state's law to follow, and for the sake of convenience, will apply Illinois law for the purpose of deciding those issues.

Assuming *arguendo* that the outcome would be different under Maryland law, and pursuant to a formal choice of law analysis, this Court were to determine that Maryland law is applicable as relating to Plaintiff's wrongful death claims, Illinois law would still be the proper substantive law to be applied. As noted by Plaintiff, Maryland's Wrongful Death Act, Section 3-903 states "[i]f the wrongful act occurred in another state ... a Maryland court shall apply the substantive law of that jurisdiction." *See also Jones v. Prince George's County*, 378 Md. 98, 107-08 (2003) (in a Maryland wrongful death action, based upon a wrongful act occurring outside of Maryland, it is the place of the wrongful act, and not the place of the wrongful death, which determines the substantive tort law to be applied in a particular wrongful death action). In the instant case, the alleged "wrongful act" is Bally's corporate decision not to deploy AEDs in its Gaithersburg, Maryland facilities despite doing so in other states. Said decision was allegedly made at Bally's corporate headquarters in Illinois. Thus, even if Maryland law were found to be applicable pursuant to a conflict of law analysis, Maryland law commands that Illinois' substantive tort law be applied in this matter.

This Court disagrees with Bally's contention that "there is more than one interpretation of where the claimed 'wrongful act' may have occurred." (Bally's Reply at p. 2). Bally argues the "wrongful act" is the absence of the AED in the subject facility itself, rather than the corporate decision to omit AEDs from Bally's Gaithersburg, Maryland facilities. Such an argument fails because, as Plaintiff notes, all Bally facilities are owned and operated by Bally itself, as opposed to independent franchisees who are able to make decisions largely independent of Bally's corporate control. As such, this Court will apply Illinois law as it relates to Plaintiff's wrongful death claims.

2. Plaintiff's breach of warranty and consumer fraud claims.

Regarding Plaintiff's contract claims relating to breach of express warranty and consumer fraud, the Membership Agreement between the Parties specifically provides for Maryland law to be the governing law in the event of any subsequent legal action. "Under Illinois' choice of law rules, an express choice-of-law provision will be given effect if the provision does not

contravene Illinois public policy and the state chosen bears a reasonable relationship to the parties or the transaction." *Hubbert v. Dell Corp.*, 359 Ill.App.3d 976, 982 (5th Dist. 2005). As far as this Court can tell, there is no discernable public policy obstacle to enforcing the choice of law provision contained in the Membership Agreement, and there certainly exists a reasonable relationship between Maryland and the Parties considering the agreement was signed in Maryland and the Parties are either residents of or do business in the state of Maryland. Therefore, there is no reason why Maryland law should not be the governing law in deciding Plaintiff's contractual issues in this case. *See also Potomac Leasing Co. v. Chuck's Pub, Inc.*, 156 Ill.App.3d 755, 759 (2d Dist. 1987) ("the public policy considerations must be strong and of a fundamental nature to justify overriding the chosen law of the parties.").

In any event, even if this Court's analysis is erroneous regarding the applicability of Maryland law to Plaintiff's contract claims, the Parties agree, and this Court concurs, that Illinois and Maryland law are similar in evaluating the kinds of public interest factors that would support invalidation of contractual provisions such as the Waiver and Release provision at issue in this case. For similar reasons, since Plaintiff's consumer fraud actions are also based on the same contractual provisions of the Membership Agreement, Maryland substantive law would be applicable regarding those claims as well. Finally, the Parties agree that actions for consumer fraud in both Illinois and Maryland are substantively similar, and the outcome of Plaintiff's claims under either state's law would be the same. As such, this Court will honor the choice-of-law provision from the Membership Agreement applying Maryland law to the Parties' contractual issues.

B. Duty Analysis.

Given the nature of the relationship between the Parties in this case as premises owner/business invitee, this Court will examine the scope of any duty owed by Bally to Decedent pursuant to both Section 314A of the Restatement (Second) of Torts and pursuant to a traditional duty analysis.

1. Section 314A of the Restatement (Second) of Torts.

Bally maintains it was under no common-law duty to maintain or deploy an AED at its Gaithersburg, Maryland facility, especially considering decisions from other jurisdictions, including Illinois, in which courts have found no duty owed on the part of health clubs to maintain AEDs on their premises for the benefit of their patrons. *See Salie v YMCA*, 351

Ill.App.3d 524 (2d Dist. 2004); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580 (2002); and *Rutnik v. Colonie Center Court Club, Inc.*, 249 A.D.2d 873 (1998). *See also Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173 (3d Cir. 1994) (no duty to maintain or use intubation kit by nurse employed by casino); *Baker v. Fenneman and Brown Properties, LLC*, 793 N.E.2d 1203 (Ind. App. 2003) (no general duty placed on businesses to hire employees trained to diagnose and provide medical services). For the following reasons *infra*, this Court disagrees.

In *Salte*, a case of first impression in Illinois, the Second District held that the defendant health club facility did not have a duty to place an AED on its premises and to use the AED on the injured plaintiff in that case. *Salte*, Ill.App.3d at 529. After examining comment f of Section 314A of the Restatement and case law outside of Illinois, the Second District specifically held:

> Defendant's duty was only to provide to its business invitee the level of aid that was reasonable under the circumstances. (citations omitted). This simply means that defendant and its staff were required to render whatever first aid that, under the circumstances, they were reasonably capable of providing to [plaintiff]. (citations). This duty, however, did not require defendant to provide, or to be prepared to provide, all medical care that it could reasonably foresee might be needed by a patron. (citations).

Id.. However, while the factual similarities between *Salte* and the instant case are undeniable, the Second District's holding in *Salte* is not the final word on this matter.

To begin, our Supreme Court has subsequently criticized such "fact-specific" determinations utilized by the *Salte* majority in its duty analysis. *See Marshall v. Burger King Corp.*, 222 Ill.2d 422 (2006). In *Marshall*, the plaintiff, who was a patron of the defendant's restaurant at the time of the occurrence, was hit by a car that crashed through the restaurant wall. The defendant argued it owed no duty to its business invitees to protect them "against the possibility of an out-of-control car penetrating the restaurant." *Marshall*, 222 Ill.2d at 431. The defendant characterized the incident as "highly extraordinary" and "tragically bizarre" and, therefore, not reasonably foreseeable. *Id.* The trial court granted the defendant's 2-615 motion to dismiss; however, the Second District overturned the trial court's decision. On appeal to the Supreme Court, *Marshall* rejected defendant's arguments and affirmed the Second District's holding. In so doing, the *Marshall* court reiterated the duty of care owed by a premises owner to business invitees as:

> [A] specific statement of the general rule articulated in Section 314A of the Restatement, and long recognized by this court, that certain special relationships may give rise to an affirmative duty *to aid or protect another against unreasonable risk of physical harm.*

Id. at 438 (emphasis added). As such, the *Marshall* court went on to note:

> Thus, the issue in this case is not whether the defendants had a duty to install protective poles, or a duty to prevent a car from entering the restaurant, or *some such fact-specific formulation.* Because of the special relationship between defendants and the decedent [business invitee], they owed the decedent a duty of reasonable care. The issue is whether, in light of the particular circumstances of this case, defendants breached that duty. *The question cannot be answered at this stage of the proceedings.*

Id. at 443-44 (emphasis added).

Similarly, the issue in the instant case is not whether Bally had a duty to maintain an AED on its premises, or a duty to train its employees to deploy such a device, "or some such fact-specific formulation." Because of the special relationship between the Parties, Bally owed an affirmative duty to aid or protect the Decedent against unreasonable risks of physical harm. That Bally owed such a duty pursuant to Section 314A of the Restatement is unquestioned. What is questioned is whether Bally breached such a duty by not maintaining or deploying an AED on its Gaithersburg, Maryland premises. As *Marshall* already suggests, such a question "cannot be answered at this stage of the proceedings." *Id.* As such, the issue of whether Bally breached its duty by failing to maintain an AED on its premises should be determined by a trier-of-fact.

However, even if this Court is wrong in choosing to follow the Supreme Court's analysis in *Marshall* as opposed to the Second District's analysis in *Salte*, the instant case is factually distinguishable from *Salte* in numerous aspects. To begin, a lot has happened in terms of the statutory law regarding AEDs, not only in Illinois, but nationwide. The Second District made its decision in light of the circumstances that existed at the time of the plaintiff's cardiac arrest on April 29, 2003. Furthermore, at the time of Decedent's death in the instant case, at least 7 other states passed laws requiring the use of AEDs in health clubs, including Illinois. (Pl. Compl., ¶ 59). Furthermore, the prevalence of AEDs is much more widespread post-*Salte*, and their use has become much more common, almost bordering on standard practice in many customer-related industries. (*See* Pl. Compl., ¶¶ 25-26, 28, 79(d), 79(g)). Indeed, this Court need look no further than its own hallway at the Richard J. Daley Center to find an AED deployed on the premises. Such devises are located on every floor of the Daley Center. As such, when one considers the rapid societal and technological changes involving the use and availability of

AEDs post-*Salte*, Justice Callum's dissent in that case is far more persuasive given the factual context of the instant matter.

Furthermore, the *Salte* court's own analysis lends credence to Plaintiff's arguments. In denying that the defendant in *Salte* owed any duty to maintain an AED on its premises, the court specifically noted:

> [t]his simply means that defendant and its staff were required to render whatever first aid that, under the circumstances, *they were reasonably capable of providing*... This duty, however, did not require defendant to provide, or to be prepared to provide, all medical care that it could reasonably foresee might be needed by a patron.

Salte, Ill.App.3d at 529 (emphasis added). In other words, a defendant in any case need only provide the level of care that it is reasonably able to provide given the circumstances. Given the dearth of facts from the plaintiff's complaint in *Salte* involving AEDs and their use at that time, the *Salte* court apparently felt that the factual circumstances in that particular case did not lend itself to the establishment of a legal duty on the part of the defendant to maintain an AED on its premises in the event one of its patrons suffered a heart attack. In so doing, the *Salte* majority referred to AEDs as "sophisticated" medical devices, *Id.* at 532, requiring "specific training" and "use ... far beyond the type of 'first aid' contemplated by Restatement section 314A." *Id.* at 530.

However, as discussed *supra*, the factual circumstances regarding this issue have changed quite significantly since that time. Additionally, given Plaintiff's well-pleaded factual allegations involving the prevalence of AEDs and their ease of use, such allegations are sufficient to raise a genuine issue of fact as to what Bally was "reasonably capable of providing" in terms of first aid for its patrons at the time of Decedent's heart attack. What the defendant in *Salte* was "reasonably capable of providing" is irrelevant for purposes of this Court's determination of what Bally was "reasonably capable of providing." *See also Salte*, 351 Ill.App.3d at 532 (Callum, J. dissenting) (the reasonableness of the care exercised by the defendant is generally a question of fact and becomes a matter of law only where reasonable people could not disagree as to the conclusions resulting from the facts.)

Perhaps the most convincing analysis regarding this matter is found in the recent decision of *Ksypka v. Malden YMCA*, 2007 WL 738463 (Mass. Super. 2007). In that case, which is also on point factually to the instant matter, the Massachusetts trial court noted:

> [Notwithstanding *Salte* and the other foreign case authority cited by Defendant], issues of material fact exist at least as to whether in March 2002 the duty of reasonable care owed by the Malden YMCA in providing health fitness services

> required it to have an [AED] available to its clients and whether such availability would have made a difference to [Plaintiff's] outcome. The Court is not of the view that the Malden YMCA's standard of care was necessarily limited by the emergency services the Malden facility decided to have available to its clients. *The Court sees no reason why the standard of care, even for emergency services, should not be regarded as an ever evolving concept, measured in some way by the acceptance of the need for and efficacy of new emergency treatment procedures and equipment.*

Ksypka, 2007 WL 738463 at *1 (emphasis added). As already stated in *Salta*, Bally's duty in terms of providing first-aid for its patrons is what it was "reasonably capable of providing" under the circumstances. Therefore, given Plaintiff's factual allegations and the reasonable inferences to be drawn from said allegations, dismissal at this time regarding the question of whether or not Bally was "reasonably capable of providing" first-aid which included the deployment of AEDs is unwarranted, especially considering the "ever evolving concept ... and acceptance" of emergency treatment procedures and equipment. *Id.*

2. Traditional Duty Analysis.

Under a traditional duty analysis, Maryland courts consider, among other things: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered the injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; (7) and the availability, cost and prevalence of insurance for the risk involved. *Patton v. United States of America Rugby Football*, 381 Md. 627, 637 (2004). However, where the failure to exercise due care creates risks of personal injury, the principal determinant of duty becomes foreseeability, and the foreseeability test is simply intended to reflect *current societal standards* with respect to an acceptable nexus between the negligent act and the ensuing harm. *Patton*, 381 Md. at 637. Additionally, in determining whether a duty exists, it is important to consider the *policy reasons* supporting a cause of action in negligence. *Id.*

In the instant case, the factors *supra* weigh in favor of the creation of a duty. Common sense dictates that heart-attacks are a reasonably foreseeable type of injury likely to occur in instances where strenuous physical activity and exercise is encouraged. Regardless, Plaintiff highlights a study conducted by Bally finding that an average of 35 Bally members die of cardiac events each year. (*See* Pl. Compl., ¶ 40). Furthermore, since the foreseeability test is intended to

reflect *current societal standards*, such standards were trending towards mandatory AED requirements at the time of Decedent's death. (*See* Pl. Compl., ¶¶ 24, 9) (by November 7, 2005, at least 7 states, 2 counties, and several municipalities required health clubs to have AEDs in their facilities. Also, by November 2000, all 50 states enacted Good Samaritan laws immunizing lay AED users and providers).

Additionally, the magnitude of such a burden is not at all high in comparison to the potential lives saved. Bally is already required in many states to have AEDs at their facilities. AEDs are relatively cheap and training is inexpensive. (Pl. Compl., ¶¶ 16, 49). Regarding the policy of preventing future harm, it is worth noting that since the Montgomery County ordinance went into effect, AEDs have been used on four occasions by health clubs, saving the lives of all four individuals on those occasions. (Pl. Comp., ¶ 71). Bally's cost to acquire AEDs for all its facilities nationwide and to train its employees on their use would be approximately $2 million. By comparison, in a typical three-month fiscal quarter, Bally spends over $15 million on advertising alone. (Pl. Compl., ¶¶ 73, 79(j)). As such, the consequences of imposing such a duty are relatively insignificant. Most interestingly, when it comes to the question of the "moral blame attached to defendant's conduct," Bally never once addresses why it has been and continues to be so adamantly opposed to the use of AEDs in their health clubs.

Therefore, under a traditional duty analysis, this Court would reach the same conclusion it did pursuant to a Section 314A analysis.

C. Breach of Warranty.

Since Plaintiff has agreed that dismissal of her implied warranty claim in Count II is warranted, this Court will only address those arguments relating to breach of express warranty.

1. "Express" Warranty.

Count I of Plaintiff's Complaint alleges breach of an "express" warranty. The express warranty Plaintiff refers to apparently stems from literature published by the International Health Racquet and Sportsclub Association (IHRSA) and from Bally's employment manual. (*See* ¶¶ 39 and 77 of Plaintiff's Complaint). However, the Membership Agreement between Bally and Decedent contained no warranty or promise that Bally would place an AED or similar devise on its premises. Indeed, paragraph 11 of the Membership Agreement states:

> MEMBER'S RESPONSIBILITY AS TO USE OF CLUB. You (Buyer, each Member and all guests) should consult with your physician before using our

> services and clubs. You understand and acknowledge that we have no expertise in diagnosing, examining, or treating any medical condition... It is your responsibility to consult with your physician to determine if any ... medical conditions exists and, if so, whether such condition poses a direct threat to the health or safety of yourself or others.

Clearly, the terms of the Membership Agreement between Bally and Decedent provided that Bally had no expertise in treating any medical condition, such as a heart attack, yet Plaintiff asks this Court to conclude that a statement in a trade magazine or internal employment manual somehow constitutes a promise or warranty made by Bally to Decedent. However, in Maryland, only an "affirmation of fact" that becomes "part of the basis of the bargain" can be "considered an express warranty." *Rite Aid Corp. v. Ellen Levy-Gray*, 391 Md. 608, 626 (2006). Thus, absent that, no express warranty of the type Plaintiff alleges exists between the Parties based on the plain language of the Membership Agreement.

Additionally, the Complaint is devoid of any facts claiming how the alleged "warranty" became "part of the basis of the bargain" between the Parties. As Bally points out, the Plaintiff would need to establish that this purported warranty stemming from a trade magazine publication and/or employment manual somehow formed the basis of the bargain between the Parties. However, there is no allegation that Decedent ever read the purported trade publication or was ever employed by Bally. This Court agrees with Bally that even if such allegations were made in the Complaint, Plaintiff could not factually support them because unfortunately, Mr. Fowler is deceased and there would be no way for Plaintiff to put forth any credible evidence that such a warranty in a trade publication or employment manual ever formed the basis of the bargain between Decedent and Bally. Thus, Plaintiff cannot assert a valid cause of action for breach of express warranty under Maryland law.

D. Plaintiff's Consumer Fraud Claims and the Waiver and Release Provision.

Count V alleges a consumer fraud claim based on the "deceptive and unfair" Waiver and Release provision of the Membership Agreement, while Count VI is based on Plaintiff's breach of warranty claim as relating to damages. Since this Court already addressed why Plaintiff's breach of express warranty claim fails, Count VI necessarily fails as well. Therefore, this Court will limit its analysis to Plaintiff's consumer fraud claim contained in Count V.

1. Consumer Fraud.

In Maryland, "an unfair or deceptive trade practice includes but is not limited to, any false, falsely disparaging or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers." *Benson v. State of Maryland*, 887 A.2d 525, 545 (2005). With that in mind, the Waiver and Release provision executed between the Parties reads in its entirety as follows:

> You (Buyer, Member, parent, spouse, or guest, as applicable) agree that if you engage in any physical exercise or activity or use any facility on a club's premises, you do so at your own risk. This includes, without limitation, your use of equipment, locker room, showers, pool, whirlpool, sauna, steamroom, parking area, or sidewalk and your participation in any activity, class, program, personal training or other instruction now or in the future made available. You agree that you are voluntarily participating in these activities and using the equipment and facilities and assuming all risk of injury or your contraction of any illness or medical condition that might result therefrom or any damage, loss or theft of any personal property. You agree on behalf of yourself (and your personal representatives, heirs, executors, spouse, administrators, agents, assigns, or others) to release and discharge us (and our affiliates, employees, agents, representatives, successors and assigns) from any and all claims or causes of action arising out of our negligence. This Waiver and Release of all liability includes, without limitation, injuries which may occur as a result of (a) your use of any facility or its improper maintenance, (b) your use of any exercise equipment which may malfunction or break, (c) our improper maintenance of any exercise equipment, (d) our negligent instruction or supervision, (e) our negligent hiring or retention of any employee, (f) loss of consortium or (g) your slipping and falling while in any club or on the surrounding premises. YOU ACKNOWLEDGE THAT YOU HAVE CAREFULLY READ THIS WAIVER AND RELEASE AND FULLY UNDERSTAND THAT IT IS A RELEASE OF ALL LIABILITY. IN ADDITION, YOU DO HEREBY WAIVE ANY RIGHT THAT YOU MAY HAVE, BY OR ON BEHALF OF YOURSELF, YOUR SPOUSE OR ANY CHILD (MINOR OR OTHERWISE), TO BRING A LEGAL ACTION OR ASSERT A CLAIM FOR INJURY OR LOSS OF ANY KIND AGAINST US FOR OUR NEGLIGENCE OR ARISING OUT OF OR RELATING TO PARTICIPATION BY YOU, YOUR SPOUSE OR CHILD IN ANY OF THE ACTIVITIES, OR USE OF THE EQUIPMENT, FACILITIES OR SERVICES WE PROVIDE AS DESCRIBED IN THIS PARAGRAPH, OR ON ACCOUNT OF ANY ILLNESS OR ACCIDENT, OR DAMAGE TO OR LOSS OF YOUR PERSONAL PROPERTY.

Based on the plain language *supra*, there appears to be nothing about the provision that was false, falsely disparaging, or misleading, nor did the Waiver and Release deceive or mislead consumers such as Decedent. In this Court's opinion, Bally clearly informed its members, including Decedent, that they were assuming the risk of

injury or contraction of a medical condition, including a heart attack, from the use of Bally's facilities and equipment. There is no factual basis for this Court to conclude anything other than Decedent freely and voluntarily signed the Membership Agreement and assumed the risks associated with strenuous physical activity and exercise at Bally's facility.

Plaintiff cites to the Maryland case of *Legg v. Castruccio*, 100 Md. App. 748, 771-73 (1994) in support of her consumer fraud claim. However, contrary to Plaintiff's assertion, this Court finds *Legg* supportive of Bally's position in this matter. In *Legg*, the court outlined and discussed the "unfair" standard applicable under Maryland's Consumer Protection Act. Specifically, the court held:

> To warrant a finding of unfairness, *the injury must satisfy three tests*. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

Legg, 100 Md. App. at 768 (emphasis added). Additionally, with respect to the third prong *supra*, the court noted:

> [n]ormally we expect the marketplace to be self-correcting, and we rely on consumer choice – the ability of individual consumers to make their own private purchasing decisions without regulatory intervention – to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.
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> ***
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> Corrective action is viewed as necessary *only* when consumers are prevented 'from effectively making their own decisions.' (internal citations omitted). The purpose of such action is to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making.

Id. at 769.

In *Legg*, which dealt with a consumer fraud claim resulting from a landlord/tenant dispute involving utility metering and service, the Maryland appellate court ultimately ruled in favor of the defendant because, pursuant to the "avoidable injury" test:

> [plaintiff] has not demonstrated that it was an injury that she could not have reasonably avoided. Since [plaintiff] learned of the utility situation early in her tenancy, there was a period of over three years during which she could have moved to another location. In addition, there is no evidence in the record that

> locating a new apartment with separate utility metering would be difficult in [plaintiff's county of residence].

Id. at 773.

Similarly, in the instant case, even assuming *arguendo* that Plaintiff can establish that Decedent's injury constitutes a "substantial" harm and that the injury suffered is not outweighed by a countervailing public benefit, Plaintiff cannot pass the "unavoidable injury" test. As the *Legg* court noted, "[w]e anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." *Id.* at 769. Here, based on Plaintiff's own allegations in her Complaint, "several other health clubs in Gaithersburg deployed AEDs [in spite Montgomery County's Home Rule exception]." (Pl. Compl., ¶ 70). As such, pursuant to the *Legg* holding, a Maryland court would undoubtedly anticipate that a "consumer" such as Decedent would "survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." *Id.* Thus, as Bally argues, "[Decedent] had the ability to simply refuse to sign the agreement and become a member of an alternative health club chain." (Bally's Memo. at p. 16). In other words, Decedent at all times maintained his ability as a consumer to choose alternative health clubs which maintained AEDs on their premises and/or did not include exculpatory clauses in their membership agreements. *Legg*, 100 Md. App. at 769 (consumer fraud exists "only when consumers are prevented from effectively making their own decisions."). Therefore, because Plaintiff cannot establish the prima facie elements needed to support a consumer fraud action under Maryland law, Count V must fail.

2. Waiver and Release.

For similar reasons, this Court finds the Waiver and Release to be valid and enforceable. The case from Maryland most factually similar to the instant matter appears to be *Seigneur v. National Fitness Institute*, 132 M.D. App. 271 (2000). In *Seigneur*, a health club member alleged she was injured while using a weight machine during an initial evaluation by the club's employee. The trial court entered summary judgment for the health club. The Maryland appellate court held that the exculpatory clause in the membership agreement validly released the club from liability for the plaintiff's injuries. The exculpatory provision found in the membership agreement from that case read as follows:

> It is further agreed that all exercises shall be undertaken by me at my sole risk and that [defendant] shall not be liable to me for any claims, demands, injuries, damages, actions or courses of action, whatsoever, to my person or property arising out of or connecting with the use of the services and facilities of [defendant] by me or to the premises of [defendant]. Further, I do expressly hereby forever release and discharge [defendant] from all claims, demands, injuries, damages, actions or courses of action and from all acts or active or passive negligence on the part of [defendant], its servants, agents, or employees.

Seigneur, 132 M.D. App. at 276. The court went on to state that "an exculpatory clause is sufficient to insulate the party from his or her own negligence as long as its language clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence." *Seigneur*, 132 M.D. App. at 280. The court also noted that nothing in the agreement "was the product of fraud, mistake, undue influence, overreaching or the like" and that the provision "expresses a clear intention of the parties to release [defendant] from liability for all acts of negligence." *Id.* at 280-81.

Similarly, this Court finds the Waiver and Release language from the instant case to "clearly and specifically" indicate the Parties' intent to release Bally from any and all negligence claims for personal injury "caused by the defendant's negligence." There appears nothing ambiguous about the language used. To reiterate, the Waiver and Release in the case at bar states in pertinent part as follows:

> You agree that if you engage in any physical exercise or activity or use any facility on a club's premises, you do so at your own risk. This includes, without limitation, your use of the equipment ... and your participation in any activity... You agree that you are voluntarily participating in these activities and using the equipment and facilities and assuming all risk of injury or your contraction of any illness or medical condition that might result therefrom.

Plaintiff counters that *Seigneur* is inapplicable for two reasons. First, the injury plaintiff suffered in *Seigneur* was a typical health club injury that would reasonably be understood to be barred by a general negligence release. In the instant case, Plaintiff contends neither the general language of the Waiver and Release nor the list of examples that follow would convey to a reasonable reader that Bally would be exempt from a claim alleging a negligently deficient medical response in the event of an emergency situation. Second, Plaintiff highlights that the *Seigneur* release, unlike the Waiver and Release in the instant matter, did not contain a limiting list of examples of the types of injuries covered by the release; but rather, contained only general release language. This Court finds both arguments unpersuasive.

The injury Decedent suffered is exactly the type of injury contemplated by the plain language of the Membership Agreement. Indeed, paragraph 11 of the Membership Agreement clearly states:

> MEMBER'S RESPONSIBILITY AS TO USE OF CLUB. You (Buyer, each Member and all guests) should consult with your physician before using our services and clubs. You understand and acknowledge *that we have no expertise in diagnosing, examining, or treating any medical condition*... It is your responsibility to consult with your physician to determine if any ... medical conditions exists and, if so, whether such condition poses a direct threat to the health or safety of yourself or others. (emphasis added).

Furthermore, the Waiver and Release states in pertinent part:

> You agree that you are voluntarily participating in these activities and using the equipment and facilities and assuming all risk of injury or your contraction of any illness or *medical condition* that might result therefrom... (emphasis added).

In the instant case, there is no dispute that on November 7, 2005, while using Bally's club and/or services, Decedent went into cardiac arrest. There is also no dispute that cardiac arrest is a "medical condition." Thus, while Plaintiff argues that the Waiver and Release did not specifically refer to the failure to render emergency assistance, it did serve to put Decedent on notice that he was waving any and all claims relating to *medical conditions* he may suffer as a result of his use of Bally's facilities and services.

Additionally, in reaching its decision, it should be noted that the *Seigneur* court cited approvingly to an Illinois case, *Garrison v. Combined Fitness Center, Ltd.*, 201 Ill.App.3d 581 (1st Dist. 1990). In *Garrison*, the court specifically held that in order for an exculpatory clause to be valid and enforceable:

> The precise occurrence which results in injury need not have been contemplated by the parties at the time the contract was entered into. It should only appear that the injury falls within the scope of possible dangers ordinarily accompanying the activity and thus reasonably contemplated by the plaintiff.

Garrsion, 201 Ill.App.3d at 585. In the instant case, the "precise occurrence" which Plaintiff alleges resulted in Decedent's injury was Bally's failure to maintain an AED on its premises. However, given the facts as alleged by the Plaintiff regarding the rather common occurrence of sudden cardiac arrest following strenuous physical activity, coupled with the widespread media attention surrounding the issue, (*see generally* Pl. Compl., ¶¶ 12-75), the "injury" itself, i.e. Decedent's cardiac arrest and/or death, must be the type of injury that falls "within the scope of

possible dangers ordinarily accompanying the activity and thus reasonably contemplated by the [Decedent]." *Id.*

This Court understands Plaintiff's contention made during oral argument that she is "not suing Bally because [Decedent] had a cardiac arrest at its club," but rather, "we are suing Bally because the response to the foreseeable cardiac arrest was inadequate." (Transcript, Nov. 28, 2007 at p. 26). However, such a distinction is irrelevant in this Court's opinion based on Plaintiff's own subsequent analogy. Plaintiff went on to state:

> I don't think Bally will stand here and tell you that if someone in their facility suffered a severe laceration, the release would allow him to stand there and watch him bleed out on the floor without calling 911. That release surely does not contemplate failure to respond to the medical emergency. Yes, the patient, or the member, releases the fact that he got the medical emergency whether he fell of the treadmill or he had a heart attack. But it surely doesn't release them from saying we're going to call 911. We're going to put direct pressure on the wound. We are going to jump in the pool if you're thrashing around and try to save you. They can't stand there and watch that.

(Transcript, Nov. 28, 2007 at p. 34). This Court agrees entirely with Plaintiff's statement, particularly with the argument that an exculpatory clause "surely does not contemplate failure to respond to the medical emergency." However, Plaintiff is not alleging a "failure to respond" to Decedent's medical emergency, but rather, Plaintiff is alleging Bally was negligent in its response by not having an AED on its premises. Indeed, Bally did "respond" by calling 911. Thus, this Court concludes that a reasonable reader of both the Membership Agreement and Waiver and Release in their entirety would have understood that Bally was exempting itself from negligence claims, including those alleging a *negligently deficient*, rather than *non-existent*, medical response in the event of an emergency situation involving one of its members.

However, the arguments *supra* notwithstanding, Maryland law still identifies three exceptions where the public interest will render an exculpatory clause unenforceable: (1) when the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton, or gross negligence; (2) when the bargaining power of one party is so grossly unequal so as to put that party at the mercy of the other's negligence; and (3) when the transaction involves the public interest. *Seigneur*, 132 M.D. App. at 282-83.

i. Gross Negligence.

As an initial matter, the language of the Waiver and Release is explicitly aimed at insulating Bally from liability from negligence only. Thus, the scope of the release, no matter

how broadly or narrowly defined, does not encompass Plaintiff's gross negligence claims, nor could it pursuant to Maryland law. However, Bally contends that even if it owed Decedent a duty to maintain an AED at its Gaithersburg, Maryland facility, a breach of said duty fails to rise to the level of gross negligence. This Court disagrees.

In Maryland, gross negligence is "the omission of that care which even inattentive and thoughtless men never fail to take of their own property, it is a violation of good faith ... it implies malice and evil intention." *Taylor v. Harford County Dept. of Social Services*, 384 Md. 213, 228 (2004). Additionally, "a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or so utterly indifferent to the rights of others that he acts as if such rights did not exist." *Taylor*, 384 Md. 213 at 228. Based on the allegations contained in Plaintiff's Complaint, Plaintiff has more than met her burden of demonstrating gross negligence on the part of Bally in refusing to maintain or deploy an AED at its Gaithersburg, Maryland facility where Decedent suffered his fatal heart attack.

The following well-pleaded facts demonstrate the depth of Bally's indifference to its patrons: at the time of Decedent's death, at least 7 other states, 2 counties, and several municipalities passed laws requiring the use of AEDs in health clubs, including states where Bally already did business. (Pl. Compl., ¶ 59). Also, all 50 states had enacted Good Samaritan laws immunizing lay AED users and providers. Yet, for some reason, even though Bally was already required to maintain AEDs in its facilities throughout Montgomery County, it chose, pursuant to Gaithersburg's "Home Rule" exception, not to include AEDs in its Gaithersburg facilities. This Court acknowledges that while Bally had no statutory obligation to do so, this Court cannot discern any logical reason why Bally would not employ AEDs at its Gaithersburg facilities considering it was already obligated to deploy AEDs throughout the rest of Montgomery County. Such action on the part of Bally smacks of indifference to the welfare of its patrons.

Additionally, the cost of deploying AEDs at Bally's Gaithersburg facilities would have been minimal, considering AEDs are relatively cheap and training is inexpensive. (Pl. Compl., ¶¶ 16, 49). Indeed, Bally's cost to acquire AEDs for all its facilities nationwide and to train its employees on their use would be approximately $2 million. By comparison, in a typical three-month fiscal quarter, Bally spends over $15 million on advertising alone. (Pl. Compl., ¶¶ 73, 79(j)).

Finally, and most compellingly, Plaintiff highlights a study conducted by Bally finding that an average of 35 Bally members die of cardiac events each year. (Pl. Compl., ¶ 40). Bally

knew this, and also knew of the relatively inexpensive and potentially lifesaving benefits of AEDs, and yet actively lobbied against legislation requiring AEDs in health clubs while refusing to place AEDs in its facilities anywhere Bally was not required by law to do so. (Pl. Compl., ¶¶ 60-64, 66-69, 79(k)). Bally counters that "the simple fact is that the number of cardiac arrests as compared to the number of individuals who work out at Bally is infinitesimally small (71 out of 3 million members ... or .0000236%)." However, regardless of the mathematics involved, there is no denying the fact that Bally knew with 100% certainty that dozens of its members would suffer heart attacks and die each year, and instead of pursuing a relatively cheap and easy solution to the problem through the deployment of AEDs at its health facilities, Bally chose to consciously disregard this known risk. That strikes this Court as the very definition of gross negligence. As such, this Court finds the allegations sufficient to support a gross negligence claim.

ii. Inequity in bargaining power and the public interest.

Regarding unequal bargaining power, the *Seigneur* court explained that in order "to possess a decisive bargaining advantage over a customer, the service offered must usually be deemed essential in nature." *Seigneur*, 132 M.D. App. at 284. However, "the services offered by [the defendant health club] simply cannot be accurately characterized as essential." *Id.* at 285. Thus, in the instant case, it cannot be said that Decedent's bargaining power was "so grossly unequal so as to put that party at the mercy of the other's negligence." *Id.* at 283.

Additionally, the *Seigneur* court noted that "the services offered by a health club are not of great importance or of practical necessity to the public as a whole. Nor is the health club anywhere near as socially important as institutions or businesses such as innkeepers, public utilities, common carriers, or schools." *Id.* at 287. Thus, the *Seigneur* court ultimately concluded that exculpatory clauses between health clubs and their members are enforceable since "[a health club] does not provide essential public service such that an exculpatory clause would be patently offensive to the citizens of Maryland." *Id.* Thus, it appears that the Waiver and Release is valid and enforceable under Maryland law, except as it relates to Plaintiff's gross negligence claims in Count IV of her Complaint.

IV. Order

WHEREFORE, for the foregoing reasons *supra*, IT IS HEREBY ORDERED:

1. Bally's Motion to Dismiss Plaintiff's Complaint Pursuant to Sections 2-615 and 2-619 is GRANTED, except:

    a. Count IV – Gross Negligence, SHALL STAND.

    b. This case is set for a case management conference on January 3, 2007 at 9:30 a.m.

ENTERED:

JUDGE JAMES D. EGAN DEC 21 2006

Judge James D. Egan No.