IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DAMIEN WARE, as Independent Administrator of the Estate of ROSITA MCKINNIS, Deceased,	) Case No.: 2021 L 001185
CHARLES BULOW, as Independent Administrator of the Estate of LUCILLE ANN BULOW, Deceased	) Case No.: 2022 L 000154
NEARIS THARPE, as Independent Administrator for the Estate of WAYNE THARPE, Deceased,	) Case No. 2022 L 000200
BARBARA VOOGD, as Independent Administrator for the Estate of RITA FREGEAU, Deceased,	) Case No. 2022 L 000209
HOPE LUMPKINS, as Independent Administrator for the Estate of MARGARET POLLNITZ, Deceased,	) Case No. 2022 L 000226
DALE METKE, as Independent Administrator for the Estate of DIANA METKE, Deceased,	) Case No. 2022 L 000235
PATRICIA KLOTZ, as Independent Administrator for the Estate of CECILIA SZYMANSKI, Deceased,	) Case No. 2022 L 000346
STEPHEN TREMPER, as Independent Administrator for the Estate of PHYLLIS TREMPER, Deceased,	) Case No. 2022 L 000392
Plaintiffs, vs.	
BUTTERFIELD HEALTH CARE, INC., an Illinois Corporation d/b/a MEADOWBROOK NURSING & REHAB OF BOLINGBROOK, and BUTTERFIELD HEALTH CARE GROUP, INC., an Illinois Corporation,	
Defendants,	

ORDER

THIS CAUSE COMING ON for the court's ruling after legal argument on Defendant's Motion to Dismiss pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619. The court has considered

Defendant's Motion to Dismiss, Plaintiffs' Response to Defendant's Motion to Dismiss, Defendant's Reply in Support of Motion to Dismiss, the Amicus Curiae Brief filed by the Attorney General, the Sur-Reply Briefs by both Plaintiffs and Defendant, all applicable exhibits and pleadings, the arguments of counsel, and applicable case and statutory law.

THE COURT RULES AS FOLLOWS:

Factual History

Plaintiff's decedent, Rosita McKinnis, was admitted to Meadowbrook Nursing & Rehab of Bolingbrook ("Defendant") on May 8, 2018 and remained there as a resident until her death on May 2, 2020. (Complaint, p. 2).

Numerous cases of pneumonia were detected in Wuhan, China on December 31, 2019 and, on January 7, 2020, the outbreak was identified as 2019-nCoV (hereinafter referred to as "COVID-19"). (Complaint, p. 7). Shortly thereafter, on January 23, 2020, the World Health Organization confirmed the first COVID-19 case in the United States, and, just one day later, the second case was reported in Chicago, Illinois. (Complaint, p. 8). Plaintiff brings this cause of action for negligence and willful and wanton conduct as a result of Plaintiff's decedent contracting COVID-19 at Defendant's nursing home facility, resulting in her death. (*See* Complaint, *generally*).

1. Motion to Consolidate

On July 18, 2022, Defendant filed a motion to consolidate the instant case with seven other cases brought against the same Defendant. (July 18, 2022 Motion to Consolidate). Each case was factually and legally similar in that each decedent was a resident of Defendant's facility in March and April 2020, and that each decedent contracted, and ultimately died from, COVID-19. *Id.* pp. 3-4. In addition, on February 10, 2022, Charles Bulow brought suit on behalf of Lucille Ann Bulow, who was a resident at Defendant's facility when she died on May 8, 2020 with "COVID-19 and Pneumonia." (Motion to Consolidate, Exhibit 2, para. 2). On February 28, 2022, Nearis Tharpe brough suit on behalf of Wayne Tharpe, who was a resident at Defendant's facility when he died on May 3, 2020 due to "COVID-19." (Motion to Consolidate, Exhibit 3, para. 2). On March 2, 2022, Barbara Voogd brought suit on behalf of Rita Fregeau, who was a resident at Defendant's facility when she died on April 25, 2020 due to "COVID-19 pneumonia respiratory failure." (Motion to Consolidate, Exhibit 4, para. 2). On March 8, 2022, Hope Lumpkins brought suit on behalf of Margaret Pollnitz, who was a resident at Defendant's facility when she died on May 12, 2020 due to "COVID-19." (Motion to Consolidate, Exhibit 5, para. 2). On March 10, 2022, Dale Metke brought suit on behalf of Diana Metke, who was a resident at Defendant's facility when she died on April 18, 2020 with "respiratory failure and COVID-19." (Motion to Consolidate, Exhibit 6, para. 2). On April 15, 2022, Patricia Klotz brought suit on behalf of Cecilia Szymanski, who was a resident at Defendant's facility when she died on May 14, 2020 due to "respiratory failure, pneumonia, and COVID-19." (Motion to Consolidate, Exhibit 7, para. 2). Finally, on April 28, 2022, Stephen Tremper brought suit on behalf of Phyllis Tremper, who was a resident at Defendant's facility when she died on May 28, 2020 with "COVID-19." (Motion to Consolidate, Exhibit 8, para. 2). This court granted the Defendant's motion to consolidate and

allowed such consolidation for purposes of discovery and case management. (September 6, 2022 Order).

2. Second Amended Complaint

Plaintiffs filed their Second Amended Complaint on October 12, 2022 in each of the consolidated cases, which is the operative pleading at issue before this court. It maintained the same ten counts against Defendant, comprising of both negligence and willful and wanton conduct counts. However, Plaintiffs added additional language to its willful and wanton counts to account for the numerous citations that Defendant received from the Illinois Department of Public Health from 2013 through 2021, specifically stating that Defendant "knew, or should have known, that having its staff treat large numbers of nursing home residents in a single day could increase the risk of transmitting respiratory diseases, including COVID-19, because [Defendant] received numerous citations from the Illinois Department of Public Health for ongoing failures to implement adequate infection control practices, including proper hand washing and changing of gloves after providing care to residents, but with utter indifference for the safety and wellbeing of its residents." (Second Amended Complaint, para. 157). Defendant received numerous citations for violations of 42 C.F.R. 483.65 and 42 C.F.R. 483.30, for reasons including failure to establish handwashing practices before and after caring for patients, failure to timely change patients, and failure to timely change bedding and work to alleviate a bed bug infestation. *Id.* at pp. 14-19. Plaintiff incorporated the eighteen citations against Defendant into its willful and wanton counts to demonstrate an alleged pattern of utter indifference and subsequent knowledge of such unlawful practices to support the scienter element of a willful and wanton cause of action. *Id.*

Defendant filed its initial Motion to Dismiss Plaintiffs' Second Amended Complaint on December 28, 2022, but subsequently filed an Amended Motion to Dismiss on March 13, 2023. Defendant's Motion to Dismiss was two-fold, a 2-615 Motion to Dismiss the willful and wanton counts II, IV, VI, VIII, and X, and a 2-619 Motion to Dismiss based on an affirmative matter that barred liability under negligence counts I, III, and V. The affirmative matter was Executive Order 2020-19 (hereinafter referred to as "EO 2020-19"), which was put into effect as a response to the COVID-19 outbreak and provided that Health Care Facilities "shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak, unless it is established that such injury or death was caused by gross negligence or willful misconduct." EO 2020-19, § 3. The Executive Order defined what it meant by "rendering assistance to the State," and wrote that assistance includes "measures such as increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." *Id.*, § 2.

In support of its argument that it is immune from civil liability under EO 2020-19, Defendant provided both Affidavit and Deposition Testimony of Isabel Perez to demonstrate that it was in fact rendering assistance to the State at the time the deaths occurred. Isabel Lopez is the Director of Nursing at Defendant's facility and has served in that role from October 2007 through present. (Affidavit, para. 2.). In an effort to preserve personal protective equipment, Perez stated

that Defendant "enacted policies and procedures focused on optimizing the supply of PPE" by "scheduling staff to dedicated areas and modifying shifts to reduce PPE waste . . . [and] dedicated staff that were assigned to double shifts would use the same PPE to preserve PPE." (Affidavit, paras. 5-6). In support of these statements, Perez testified that hours were modified such that "instead of utilizing three nurses a day, you went to using two nurses for where you were doing 12-hour shifts." (Deposition Testimony, p. 30). In addition, in an effort to further preserve PPE, each nurse would be secluded to set patients and would utilize the same gown for one patient by placing a hook outside the door where nurses would place the gown after leaving the room, such that "you are utilizing the same PPE going in and out of that room." *Id.* at p. 33.

In an effort to increase the number of beds available to COVID-19 patients in hospitals, Defendant "accepted 143 patients from acute care hospitals, freeing up these beds" to patients with COVID-19. (Affidavit, para. 15). In addition, Defendant worked with Will County hospitals and, in furtherance of freeing up hospital beds, Defendant "undertook the construction of a COVID-19 unit, a unit for residents suspected of possibly having COVID-19 . . . and a new isolation unit for new admissions." *Id.* at para. 17. Specifically, the isolation unit is for patients under investigation where "one could have been exposed to COVID but were not testing positive . . . or someone that is showing signs and symptoms but are not testing positive." (Deposition, pp. 51-52). This was implemented in an effort to control the spread of COVID-19 in Defendant's facility.

Moreover, Perez testified that Defendant facility undertook additional measures and protocols to limit the potential of exposure and spread of COVID-19 within the facility. For patients who were transferred to the facility from acute care hospitals, there were different protocols implemented for individuals who tested positive, tested negative, or who did not have any test results. (Affidavit, para. 23). In addition, nurses were mandated to take vitals more frequently, every shift with all patients and every four hours with COVID-19 positive patients. (*Id.* at para. 32; Deposition, pp. 69-70). Defendant also "conducted facility-wide training on proper disinfecting and cleaning techniques, which included frequent disinfecting of high touch surfaces." (*Id.* at para. 40). Prior to COVID-19, cleaning was generally reserved for housekeeping, but following new protocols all staff members were required to disinfect surfaces as they were used. (Deposition, p. 84). Defendant also began screening visitors and employees prior to entry into the facility, including completion of a screening questionnaire and a temperature check. (*Id.* at paras. 44-46). To limit potential exposure, Defendant implemented a universal mask policy for all staff, residents, and visitors, restricting vendors from entering the facility, along with implementing social distancing for patients, and suspending communal dining and group activities for the patients. (*Id.* at paras. 43, 50-54).

In Plaintiffs' response to Defendant's Motion to Dismiss, they deny the arguments set forth by Defendant and assert that the additional pleadings surrounding the citations to the facility are sufficient for a willful and wanton conduct pleading. (Plaintiffs' Response, p. 3). Regarding the 2-619 Motion to Dismiss, Plaintiffs do not dispute anything stated by Perez in either the Affidavit or the Deposition but rather argue that the statements are conclusory and not sufficient to demonstrate that Defendant was "rendering assistance to the State" at the time the deaths occurred. *Id.* at 5-8. Plaintiffs then assert arguments of statutory construction, alleging that the Executive Order

incorporates a causal connection requirement, as well as requires "substantial assistance" rather than mere "assistance." *Id.* at 9. Plaintiffs then argue that the Executive Order does not provide for blanket immunity, only immunity related to COVID-19 if the facility meets certain requirements. *Id.* at 10. Finally, Plaintiffs argue that the Executor Order itself is unconstitutional for multiple reasons, including separation of powers, equal protection, special legislation, due process, and the takings clause. *Id.* at 11-20.

Because Plaintiff raised constitutionality arguments against the Executive Order, the Attorney General filed a Motion to Intervene to defend the constitutionality of the Order after being notified by Plaintiffs' counsel. (June 8, 2023 Motion to Intervene). The Attorney General's brief seeks to uphold the constitutionality of the Order, while also agreeing with Plaintiffs that it does not provide blanket immunity to Health Care Facilities and should instead be read with "context." (Attorney General Brief, p. 2). In particular, the Attorney General notes that the Order actually means that immunity is provided for any death or injury while the Health Care Facility was "engaged in the course of rendering COVID-19 assistance *in connection* with that assistance, and does not immunize conduct that was unrelated to such assistance but happened to occur at the same time." *Id.* (Emphasis added). The brief then sets out why each of Plaintiffs' constitutionality arguments fail and holds that the Executive Order should be upheld as constitutional. *Id.* at 6-14.

735 ILCS 5/2-615 Motion to Dismiss

A court will grant a motion to dismiss pursuant to 735 ILCS 5/2-615 when "the allegations in the complaint, construed in the light most favorable to the plaintiff, fail to state a cause of action upon which relief can be granted." *Floyd v. Rockford Park Dist.*, 355 Ill. App. 3d 695, 699 (2d Dist. 2005). In determining whether a cause of action for willful and wanton conduct has been adequately pled to survive a 2-615 motion to dismiss, this court is limited to the "four corners of the complaint." *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 742 (1st Dist. 2009). While all well-pleaded facts will be construed in favor of the plaintiff, "conclusory allegations unsupported by any other factual allegations of the complaint or the exhibits attached thereto are not considered admitted for the purpose of a motion to dismiss." *Panorama of Homes, Inc. v. Catholic Foreign Mission Soc., Inc.*, 84 Ill. App. 3d 142, 145 (2d Dist. 1980). When a pleading in the complaint is substantially insufficient at law, the appropriate remedy is dismissal with prejudice. *Badillo v. DeViro*, 161 Ill. App. 3d 596 (1987). The issue of whether a defendant's actions amount to willful and wanton conduct is a question for the jury. However, "a court may decide as a matter of law whether a plaintiffs' allegations of willful and wanton conduct are sufficient to state a cause of action." *Leja v. Community Unit School Dist. 300*, 2012 IL App (2d) 120125 ¶ 11 (citing *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 300-01 (2d Dist. 2010)).

Defendant has filed a 2-615 Motion to Dismiss Counts II, IV, VI, VIII, and X of the operative complaints for each case. Each count asserts facts alleged to show willful and wanton conduct by the Defendant. Illinois recognizes two types of willful and wanton conduct, intentional and reckless. *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 48 (1995). Intentional willful and wanton conduct requires an actual intent to harm, where reckless willful and wanton conduct is assessed on a sliding scale requiring less than actual intent but more than negligence. *Id.* at 47. Ill

will is not required for reckless willful and wanton conduct; however, the acting party "must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury." *Kirwan v. Lincolnshire-Riverwoods Fire Protection Dist.*, 349 Ill. App. 3d 150, 155 (2d Dist. 2004) (quoting *Bartolucci v. Falleti*, 382 Ill. 168, 143 (1943)). In order to sufficiently plead willful and wanton conduct in a manner to survive a motion to dismiss, "a plaintiff must allege not only duty, breach, and proximate cause, but also that the defendant engaged in a course of action that showed a deliberate intention to harm or an utter indifference to or conscious disregard for the plaintiffs' welfare." *Floyd v. Rockford Park Dist.*, 355 Ill. App. 3d 695, 699 (2d Dist. 2005).

This court granted Defendant's prior motion to dismiss counts II, IV, VI, VIII, and X pursuant to 735 ILCS 5/2-615 and granted Plaintiffs leave to file an amended complaint. (September 15, 2022 Court Order). The Plaintiffs subsequently filed amended complaints that contained additional facts and allegations within the specified counts. This court must consider the allegations contained in the prior complaints and compare them to the allegations within the Second Amended Complaint to determine whether Plaintiffs have cured the deficiencies to allow these counts to survive a 2-615 motion to dismiss. The difference between the prior complaints and the current operative complaints is that it is no longer simply relying on the knowledge surrounding the COVID-19 outbreak from its infancy in January 2020 through April 2020. The Second Amended Complaints now rely, in addition, on prior citations for infectious spread issued against Defendant to support the added element that the act was done "with actual intention or with a conscious disregard or indifference for the consequences when the known safety of other persons was involved." *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill.2d 429, 451 (1992).

As indicated by this court in earlier proceedings, in its infancy, it was not known the best manner in which to handle the outbreak of COVID-19, and the knowledge that was known at the time was insufficient to constitute a basis for conscious disregard or indifference against Defendant. Masks were not required at the outset, and the rules and regulations concerning proper procedures were constantly evolving at the outset of the pandemic. This uncertainty does not rise to the "knowledge of surrounding circumstances" that is required to sufficiently plead a cause of action for willful and wanton conduct. *Kirwan*, 349 Ill. App. 3d at 155. Considering the allegations of the time of contraction and ultimate death due to COVID-19, these facts alone are insufficient to amount to willful and wanton conduct when given the uncertainty that the nation was facing at that time. The mere allegation of defendant's failure to purchase PPE, without providing any additional facts, is nothing more than alleged negligence.

In response to this court's decision granting Defendant's motion to dismiss, Plaintiffs filed the Second Amended Complaint which supplements the willful and wanton pleadings by emphasizing Defendant's history of failed practices of preventing infectious spread and utilizing multiple interchanging nurses to assist multiple patients. Plaintiffs' Second Amended Complaint emphasizes eighteen times Defendant was cited by the Illinois Department of Public Health for violations between 2013 and 2021. (Plaintiffs' Second Amended Complaint, 14-19). These violations were for simple tasks, such as failure to wash hands before and after providing resident

care, failure to follow standards of infection control practices, failure to wash hands when caring for infected patients, failure to alleviate bed bug infestation, and failure to provide timely incontinence care. *Id.* Of the eighteen citations, Defendant was cited five times in the last three years, with the last citation being on November 18, 2021. *Id.* at 18-19.

Since Plaintiffs' Second Amended Complaint coupled its willful and wanton counts with allegations demonstrating Defendant's history of failed practices of preventing infectious spread of diseases and utilizing multiple nurses to assist multiple patients, the court must consider whether these pleadings are enough to satisfy the scienter element to allow the counts to stand. *Kirwan*, 349 Ill. App. 3d at 155. Looking at the facts in a light most favorable to the Plaintiffs, the court finds that the pleadings at least minimally surpass the threshold at this point to provide a pattern of disregard given the continual citations that satisfies the scienter element required for willful and wanton conduct. Plaintiffs have pled a history of failed practices of preventing infectious spread and that Defendant disregarded these citations to try and comply up to and including during the COVID-19 pandemic. If Plaintiffs can prove that Defendant not only was cited for these failed practices but did not try to rectify or correct its practices up to and including during the pandemic, it is possible that a count for willful and wanton conduct could withstand. For these reasons, the Defendant's 2-615 Motion to Dismiss counts II, IV, VI, VIII, and X is denied.

735 ILCS 5/2-619 Motion to Dismiss

"A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). The purpose of such a motion is to dispose of issues of law and fact early in litigation. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). When reviewing a 2-619 motion to dismiss, the court must "accept as true all well-pleaded facts in plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). In ruling on a 2-619 motion to dismiss, the trial court may consider depositions, pleadings, and affidavits submitted by the parties. *Raintree Homes v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). For a 2-619 motion to dismiss to be properly brought before the court, the motion "(1) must be filed 'within the time for pleading,' and (2) must concern one of nine listed grounds." *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 275 (2009) (quoting 735 ILCS 5/2-619(a) (West 2006)). Of the nine listed grounds, the pertinent ground to the instant case is that "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2008).

Defendant argues that this court must dismiss counts I, III, and V of the Second Amended Complaint, alleging that the claims are barred by Governor Pritzker's Executive Order 2020-19 and the IEMA Act. (March 13, 2023 Amended Memorandum of Law, p. 6). Specifically, Section 3 of the Executive Order states:

> Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c), I direct that during the pendency of the Gubernatorial Disaster Proclamation, Health Care Facilities, as defined in Section 1 of this Executive Order, shall be immune from civil

> liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak, unless it is established that such injury or death was caused by gross negligence or willful misconduct of such Health Care Facility, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

See EO 2020-19, § 3. In order for this provision to apply in this case, it must be proven first that Defendant qualifies as a health care facility entitled to protection.

1. Defendant is a Health Care Facility

The issue before this court is whether Defendant has met their burden on their affirmative matter of immunity under the Executive Order. It is noted at the outset that Plaintiffs do not challenge that Defendant could be a health care facility as defined in the Executive Order, but instead claim that it does not qualify because it was not rendering assistance to the State, it was not causally related to this patient, or, at the very least that it is a question of fact that should be determined by the trier of fact. Section 1 of the Executive Order defines a Health Care Facility as a facility "licensed, certified, or approved by any State agency . . . ." EO 2020-19, § 1(a)(1). It is undisputed that Defendant qualifies as a Health Care Facility under § 1(a)(1). Those Health Care Facilities outlined in § 1 were directed to "render assistance in support of the State's response to the disaster recognized by the Gubernational Disaster Proclamations." EO 2020-19 § 2. For Health Care Facilities, "rendering assistance" must include "measures such as increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." *Id.*

The court now looks to see if Defendant rendered assistance consistent with the Executive Order to even be considered for immunity protection from negligence claims. Defendant submitted the Affidavit of Isabel Perez, who was the Director of Nursing at Meadowbrook Bolingbrook from October 2007 through present. (Affidavit, para. 2). The Affidavit contains numerous facts in sufficient detail to outline Defendant's actions taken to render assistance to the State, such as "enact[ing] policies and procedures focused on optimizing the supply of PPE" and "took administrative measures to reduce PPE usage by scheduling staff to dedicated areas and modifying shifts to reduce PPE waste." *Id.* paras. 6-7. Due to the scarcity of PPE throughout the nation at the outset of the pandemic, Perez asserted that Defendant "began placing PPE orders with alternative vendors to ensure adequate PPE was on hand for staff." *Id.* para. 10. Moreover, Defendant continued to "accept transfers from acute care hospitals . . . [in an effort to] increase the number of available hospital beds . . . conducted facility-wide training on proper disinfecting and cleaning techniques . . . screen[ed] all visitors and vendors for COVID-19 before permitting entrance into the building . . . suspended all residents' pass privileges . . . [and] implemented social distancing for staff and residents." *Id.* paras. 14-15, 40, 45, 50, 52. Plaintiffs do not rebut the Affidavit but instead assert that the claims within the Affidavit are conclusory, which is not the case.

In conjunction with Perez's Affidavit, a deposition was conducted that this court can consider as well. Perez stated that Defendant's daily shifts were extended in an effort to utilize two nurses a day versus three in order to preserve PPE throughout the facility. (Deposition, p. 30). The nurses would also preserve PPE by using the same gown for the same area so that nurses were "utilizing the same PPE going in and out of that room," with the exception being within the COVID positive areas. *Id.* at p. 33. Specifically, each nurse would be secluded to set patients and would utilize the same gown for one patient by placing a hook outside the door where nurses would place the gown after leaving the room, such that "you are utilizing the same PPE going in and out of that room." *Id.* Moreover, to increase the number of beds available in hospitals, Defendant "continued to take back any patients . . . to free up any space at the hospital" and even created a new wing for COVID-19 patients to keep them secluded from the public[1]. *Id.* at pp. 43, 57-58.

The statements and assertions in Defendant's Affidavit and deposition testimony do not refute the basics of Plaintiffs' negligence claims in Counts I, III, and V, but rather supports Defendant's immunity defense under EO 2020-19 by providing evidence that they are a Health Care Facility under the Executive Order and rendered assistance to the State during the COVID-19 pandemic. By offering evidence to support this affirmative defense, Defendant has not denied the negligence allegations set forth in Plaintiffs' Second Amended Complaint. Plaintiffs' failed to produce a counter-affidavit or supply any evidence to demonstrate Defendant is not a defined Health Care Facility under the Executive Order that rendered assistance. Plaintiffs have had an opportunity to conduct discovery and did so by deposing Perez, but they have not provided any counter-affidavit or any evidence at all to claim that Defendant was not rendering assistance during the COVID-19 pandemic. Plaintiffs have not provided a Rule 191(b) affidavit claiming more discovery is needed. Instead, Plaintiffs argue only that the Affidavit and testimony are vague, conclusory, or unsupported by documentation but that is not the case as specific facts were put forth by Defendant on this issue. This court therefore finds that Defendant is a Health Care Facility under the Executive Order as defined by rendering assistance to the State by increasing the number of beds and taking other steps to prepare and treat patients diagnosed with COVID-19 as indicated in the uncontested Affidavit and deposition of Director of Nursing Isabel Perez.

2. Immunity Exists Because of the Canons of Statutory Construction

The next issue before this court is whether Defendant having been defined and found to be a Health Care Facility is afforded immunity by the language of EO 2020-19. Executive Orders are construed similarly to a statute. As such, the canons of statutory construction apply to EO 2020-19. "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Landis v. Marc Realty, LLC*, 235 Ill. 2d. 1, 6 (2009) (citing *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 26 (2005)). The most effective indicator of the legislator's intent is "the language in the statute, which must be accorded its plain and ordinary meaning." *Id.* This court must view the statute as a whole, "construing words and phrases in light of other relevant statutory provisions and not in isolation." *People v. Casler*, 2020 IL 125117, ¶ 24. If the language of the statute is clear and unambiguous, this court shall apply the statute as

[1] It is further pointed out by Defendant that continuing assistance is rendering assistance as some facilities were refusing to help the State during the Covid pandemic.

written without resorting to any other extrinsic aids of statutory construction. *Id.* (citing *In re R.L.S.*, 218 Ill. 2d 428, 433 (2006)). Where the language of the statute is ambiguous, the court then and only then may look beyond its express language and rely on extrinsic aids such as legislative history or rules of statutory construction. *Barrall v. Board of Trustees of John A, Logan Community College*, 2019 IL App (5th) 180284, ¶ 10 (citing *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 13). In construing an ambiguous statute, this court can consider the purpose of the statute, the problems it was intended to remedy, or judicial interpretations of statutes serving similar purposes. *People v. Davis*, 296 Ill. App. 3d 923, 926 (1998); *Board of Trustees of Community College District No. 508 v. Taylor*, 114 Ill. App. 3d 318, 323 (1983).

Under Section 3 of EO 2020-19, immunity is afforded to Health Care Facilities "for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak, unless it is established that such injury or death was caused by gross negligence or willful misconduct." EO 2020-19, § 3. For reasons of statutory construction, the Preamble and Whereas clauses are read in conjunction with the relevant provision of the Executive Order. *People v. Casler*, 2020 IL 125117, ¶ 24. By doing so, it is clear that the purpose of the Executive Order that was issued in April 2020 was to ensure that the State had adequate bed capacity, enough supplies and PPE to care for such individuals, and sufficient providers to treat patients. EO 2020-19, § 2. In this case, the plain language of EO 2020-19 is clear and unambiguous, resulting in a construction as written without considering exceptions, conditions, or limitations not provided for by the Governor within the Executive Order. *Landis v. Marc Realty, LLC*, 235 Ill. 2d. 1, 6 (2009). The plain language of the Executive Order states that civil immunity is provided for any act or omission by the Health Care Facility, which death or injury occurred at a time when the facility was *engaged in the course of rendering assistance to the State*. EO 2020-19, § 3 (Emphasis added). It is this final canon of interpretation that Plaintiffs request this Court to insert conditions, exceptions, and limitations that are not plainly written and included within the Executive Order itself.

Plaintiffs assert that a causal connection between the benefit conveyed and the service the State received is required. (April 24, 2023 Response to Motion to Dismiss, p. 9). To support its position, Plaintiffs rely on the language of the Tort Immunity Act, which provides that "[n]o action for damages for injury or death against any local public entity or public employee, whether based upon tort, or breach of contract, or otherwise, *arising out of patient care* . . . ." 745 ILCS 10/8-101(b) (West 2006) (Emphasis added). The Supreme Court of Illinois took that provision of the Act to mean that the "injury is causally connected to the patient's medical care and treatment." *Kaufman v. Schroeder*, 241 Ill. 2d 194, 200 (2011). The holding in *Kaufman* does not provide a blanket rule that a causal connection is required for immunity to apply. Such holding was found because the Act itself required a causal connection. However, there is no causal connection in the Executive Order at issue in this case.

The plain language of the Executive Order does not have any language creating such causal connection requirement that Plaintiffs request this court to read into the language of the Executive

Order[2]. Under the Executive Order, immunity is provided by rendering assistance to the State, not to a specific patient. Once such services are provided to the State, the Health Care Facility is immune blanketly from any negligence claim of injury or death that occurred during the time when the Facility was engaged in rendering such assistance, meaning the general timeframe that assistance was provided during the global pandemic. To require a causal connection without specific causal language, such as the phrase "arising out of," such services would create an illusory immunity provision.

If the Governor wanted a causal relationship to exist, he could have drafted such a requirement directly into the Executive Order. There are many different ways that the Executive Order could have been drafted if it wanted a causal relationship. For example, he could have simply included the language "arising out of," as was done in the Act considered in *Kaufman*. On the other hand, the Governor could have removed the phrase "at a time" and instead wrote the phrase to say the Facility is immune from a claim of injury or death that "was caused by the Facility *while engaging* in the course of rendering assistance to the State." It could have included language adding causation such as "which injury or death was caused by a facility while engaging in the course of rendering assistance to the State", or even placing the phrase "engaged in the course of rendering assistance to the State" at the outset, such as "caused by any act or omission by the facility while engaging in the course of rendering assistance". Inserting the phrase "in connection with that assistance" into the plain language of the Executive Order in conjunction with the phrase "engaged in the course of rendering assistance" could have been another draft choice instead of stretching for a causal connection without it as the Attorney General argues. As drafted, the phrase "at a time when a Health Care Facility was engaged in the course of rendering assistance to the State" is broad and provides for immunity just for any act or omission by the Facility when an injury or death occurred during the timeframe when the Facility was engaged in the course of rendering assistance to the State in this global pandemic. To take the unambiguous plain meaning of the language and read into it a causal connection component that is not present is inappropriate under the applicable canons of statutory construction that this court is bound by. *In re R.L.S.*, 218 Ill. 2d 428, 433 (2006). The role of this court is to follow the law and canons of statutory construction as set forth by the Illinois Supreme Court that the plain language of a statute or Executive Order must be followed unless it is ambiguous, which this court finds that it is not. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 26 (2005).

This conclusion is further supported by the fact that the Governor eventually did add the causal connection in subsequent Executive Orders, showing that the Governor knew precisely how to add such limitation had he wished to do so here. A sufficient canon of statutory interpretation that this court can utilize is the use of such language in other parts of the same order or in other orders. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). Specifically,

[2] It is noted that all Plaintiffs' claims result from exposure to COVID-19 and eventual death from contracting COVID-19 at Defendant's facility, which is causally related as opposed to a slip and fall in the parking lot completely unrelated to exposure to COVID-19, should immunity during this timeframe be construed in context as Plaintiffs and the Attorney General submit. As such, even if a causal connection is required (which the court does not believe is required), it is met here based on the language of the Executive Order and the allegations in Plaintiffs' Second Amended Complaint along with Defendant's Affidavit.

Defendant directs this court to the language used in EO 2020-37, which clearly incorporates a causal connection requirement in that it states that hospitals are immune "from civil liability for any injury or death *relating to* the diagnosis, transmission, or treatment of COVID-19." EO 2020-37 § 3 (Emphasis added). By looking at EO 2020-37, it is clear that Governor Pritzker knew how to use precise language to incorporate a causal connection requirement, indicating that, if he wanted such a requirement in EO 2020-19, he would have explicitly added one to the plain language. This is further supported by the Attorney General's response at oral argument that EO 2020-37 was drafted with this causal connection approximately six weeks later on May 13, 2020 because the State had learned more about COVID-19 so it provided more clarification at that time compared to April 1, 2020 when EO 2020-19 was drafted. When further pressed at oral argument, the Attorney General was not aware of any modifications or clarifications made to EO 2020-19 to include this causal connection requirement when Executive Orders were reissued periodically during the disaster proclamation as the COVID-19 pandemic continued. As such, to read into EO 2020-19 a causal connection requirement that does not exist in the plain language would yield a result contrary to the canons of statutory interpretation when the court considers other orders admittedly and knowingly using such language.

Apart from there being no causal connection requirement, there is only one temporal time requirement in the plain language of the Executive Order, which states that the injury or death giving rise to the claim "occurred *at a time* when a Health Care Facility was engaged in the course of rendering assistance to the State." EO 2020-19, § 3 (Emphasis added). If the Facility was rendering assistance, then it is immune from any act or omission that occurred during that time, aside from gross negligence or willful misconduct. To read into the plain language of the Executive Order that immunity must be tied to the exact time a specific service was being rendered to the State would extend far beyond a plain reading of the Executive Order. The Attorney General asserts that there is a set limitation to the time component in that "the Governor's use of the phrase 'at a time' . . . refers to a specific 'moment' or 'instant.'" (Attorney General Amicus Curiae Brief, p. 9). The reading referred to by the Attorney General extends beyond the plain reading and, if the Governor intended such a temporal time requirement, the Executive Order could have been made more specific in that regard. Looking to the plain language of the Executive Order, the time requirement is broadly worded to include simply rendering assistance during the COVID-19 pandemic. To read into the Executive Order the specific time requirement that Plaintiffs and the Attorney General are referencing would create impossible burdens for Health Care Facilities that would in essence undo any immunity provided to them. This is because Health Care Facilities would be required to document that the specific injury or death occurred at the exact same time that the Facility was providing assistance to the State, rather than referring to a general time frame. The plain reading of the phrase "at a time" as it appears within the sentence indicates that it is referring to the time period in which the Facility was rendering assistance to the State during the pandemic these past three years, by "increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." EO 2020-19, § 2. It could have been drafted using the phrase "at *the* time" instead of "at *a* time" to create a specific temporal requirement as Defense counsel suggested at oral argument. As drafted, the plain reading of the Executive Order indicates "at a time" to have a broad interpretation of the pandemic as a

timeframe and does not refer to a specific moment as argued by Plaintiffs and the Attorney General.

In addition, the Executive Order provides immunity to Health Care Facilities for any injury or death "caused by *any* act or omission by the Health Care Facility." EO 2020-19, § 3 (Emphasis added). Both Plaintiffs and the Attorney General assert that EO 2020-19 does not provide blanket immunity, but that the phrase "at a time" should naturally include context surrounding the Executive Order and should instead read that immunity is granted for any death or injury that occurred "when the Health Care Facility was 'engaged in the course of' rendering COVID-19 assistance *in connection* with that assistance." (Attorney General Memorandum, p. 2). The phrase "in connection with that assistance" is not in the plain language of the Executive Order and adding such context now would change its plain and unambiguous meaning. Such a reading would not only create a specific time requirement, but it would change the unambiguous meaning of the phrase "any act or omission" to a narrower reading that is not specifically stated in the Executive Order. Section 3 of EO 2020-19 provides a general timeframe for when immunity would be granted to Health Care Facilities, and it does not create a temporal or causal requirement based on the plain language of the Executive Order. Looking at the Executive Order as a whole, including the Preamble and the Whereas clauses where it indicates that the purpose of the Executive Order is to ensure that the State of Illinois has adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, provides support for a broad reading of both the "any act or omission" requirement, as well as a broad temporal requirement. *See* EO 2020-19, p. 1. Most notably, the clause indicates that the lack of a strict temporal requirement and a lack of a causal connection requirement was done purposefully in order to ensure that the State had ample facilities to assist during the outset of the pandemic, especially taking into consideration that fact that the Executive Order was signed on April 1, 2020.

Moreover, Plaintiffs request this court to read into the Executive Order a "substantial assistance" requirement in that immunity is only provided "where the efforts rendered *substantial* assistance and still resulted in the complained-of injury." (Plaintiffs' Response, p. 9) (Emphasis added). Not only does a plain reading of the Executive Order not provide any indication of a "substantial assistance" requirement, Plaintiffs fail to provide any factual or legal support indicating what qualifies as "substantial" assistance. By adding such a requirement, the immunity provision would constantly be attacked, as there would always be a question of fact as to what qualifies as "substantial assistance." As the plain language of the Executive Order states, any assistance rendered to the State will provide immunity to the Health Care Facility. Defendant has provided sufficient evidence by way of both Affidavit and deposition testimony of Isabel Perez to support the fact that the Defendant provided assistance to the State during the timeframe giving rise to Plaintiffs' cause of action, and such evidence has gone unrebutted by Plaintiffs.

Therefore, following the analysis that this court must abide by in terms of statutory construction, the court finds that the plain language of EO 2020-19 is clear and unambiguous providing immunity to Defendant as a Health Care Facility in these matters, especially in light of EO 2020-19 as a whole and the use of other causal and relatedness language in other Executive Orders that could have but were not used here.

3. Constitutional Arguments

Finally, Plaintiffs raise a constitutional argument against EO 2020-19 by claiming that Governor Pritzker did not have authority to create such an Executive Order, and it would be unconstitutional for numerous reasons. Since the Attorney General was notified by Plaintiffs' counsel of this challenge pursuant to Illinois Supreme Court Rule 19 and the Attorney General having intervened, the issue of the constitutionality of EO 2020-19 is properly before this court. First and foremost, Governor Pritzker has been found to have the authority during the COVID-19 pandemic to issue emergency orders as held by several courts throughout Illinois. *See, e.g. Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *Fox Fire Tavern, LLC v. Pritzker*, 2020 Ill. App. 2d 200623 (2d Dist. 2020); *Village of Orland Park v. Pritzker*, 475 F. Supp. 3d 866 (N.D. Ill. 2020). It would be inconsistent for this court to claim that Governor Pritzker did not have the authority here to allow Plaintiffs' claims to move forward in light of the foregoing case law.

a. Separation of Powers

Plaintiffs' argument states that EO 2020-19 violates the separation-of-powers provision of the Illinois Constitution because Governor Pritzker has no authority to abrogate unilaterally the cause of action for negligence established by the Illinois Nursing Home Care Act. The Illinois Constitution states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970 art. II, § 3. Under the Illinois Emergency Management Agency Act (IEMA), the Governor is authorized to exercise broad emergency powers during a disaster, as well as "utilize all available resources of the State government as reasonably necessary to cope with the disaster." 20 ILCS 3305/2/(2). Further, the IEMA expressly states that one who "renders assistance . . . at the request of the State . . . during a . . . disaster shall not be civilly liable for causing the death, or injury to, any person or damage to any property except in the event of willful misconduct." *Id.* § 21(c). It is clear that the Executive Order is not seeking to suspend or abrogate any statute, as it is simply relieving Health Care Facilities from civil liability as authorized by the IEMA at § 21(c).

Plaintiffs also state that the Executive Order is unconstitutional because it interferes with the inherent powers to judges. In support, Plaintiffs rely on cases where a separation-of-powers violation occurred because the judicial branch holds the authority to reduce damages on a case by case basis. *See Lebron v. Gottlieb Mem. Hosp.*, 237 Ill. 2d 217 (2010); *Best v. Taylor Machine Works*, 179, Ill. 2d 367 (1997). However, EO 2020-19 does not require a damages cap but instead provides immunity for rendering assistance to the State. Governor Pritzker was well within his power to grant immunity pursuant to Section 21 of the IEMA as held by other Illinois and Federal Courts. The IEMA empowers the Governor to extend immunity when statutorily specified conditions are at issue, which is the case here. The ability by Governor Pritzker to issue emergency Executive Orders during his disaster proclamation has been found by other Courts to be acceptable. Any appellate court's decision, absent others, is binding and Federal Courts persuasive. As such, the ruling by the Second District discussing that Governor Pritzker under IEMA had the ability to issue emergency orders, which was not in violation of the separation of powers, is binding upon this court. *See, generally, Fox Fire Tavern, LLC v. Pritzker*, 2020 Ill. App. 2d 200623 (2d Dist.

2020). Therefore, the same analysis and ruling here should follow. It would be contradictory in light of these several rulings throughout Illinois and Federal Courts to hold otherwise now.

b. Equal Protection

Plaintiffs' Equal Protection argument is also unavailing. Plaintiffs argue here that EO 2020-19 violates the equal protection guarantee because there is not a rational basis for treating a COVID-19 death that occurred prior to the issuance of the Executive Order differently from a COVID-19 death that occurred after the issuance of the Executive Order. "No person shall be deprived of life, liberty, or property without due process of law nor be denied the equal protection of the laws." Ill. Const. 1970, art 1, § 2. Because the distinction between facilities that do and do not render assistance to the State do not implicate a suspect class, an equal protection challenge will be analyzed under the rational basis standard. *Wauconda Fire Prot. Dist. V. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 434 (2005). Under the rational basis standard, "[t]he court simply inquires whether the means the statute employs to achieve its purpose are rationally related to that purpose. If any set of facts can reasonably be conceived to justify the classification, it will not be construed as violating the equal protection guarantee." *Id.* Present in the instant cases are facts that can be rationally conceived to justify the classifications, such as the Governor urging facilities to render assistance to assure that there are enough beds, treatment, and personal protective equipment for individuals throughout the state. Without the Executive Order and grant of immunity in place, Health Care Facilities may have likely refused to take transfers from acute care hospitals during the COVID-19 pandemic as a way to insulate themselves from lawsuits. The immunity provided in EO 2020-19 is rationally related to purpose of the Executive Order and, as such, no equal protection violation exists.

c. Special Legislation Clause

Plaintiffs next argue that EO 2020-19 constitutes impermissible special legislation because it discriminates in favor of Health Care Facilities that self-designate as entities rendering assistance to the State. Specifically, the special legislation clause states that "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Ill. Const. 1970, art. IV, § 13. According to the clause, the special legislation prohibition applies only to the General Assembly, not to the Executive Branch. Plaintiffs have failed to cite any case law that has extended the special legislation clause to the Governor's orders, especially during an emergency time period, as is the case here. The test for a special legislation challenge is similar to that of an equal protection challenge. *Big Sky Excavating, Inc. v. Ill. Bell Tel. Co.*, 217 Ill. 2d 221, 235-37 (2005). In addition to the equal protection analysis rendered above, numerous challenges have been upheld against other Executive Orders issued by Governor Pritzker, including social distancing, mask mandates, and vaccination requirements as stated previously. It would be inconsistent for this court to usurp those cases allowing Governor Pritzker to issue such executive orders during the COVID-19 pandemic by holding in this case that he does not have the power to provide immunity to facilities providing assistance based on his directive during the same timeframe. For these reasons, EO 2020-19 does not violate the prohibition on special legislation.

d. Due Process

Due process "protect[s] an individual's personal and property rights from arbitrary and capricious government action." *People v. Stapinski*, 2015 IL 118278, ¶¶ 50-51. "Substantive due process bars governmental action that infringes upon a protected interest when such action is itself arbitrary." *People v. Pepitone*, 2018 IL 122034, ¶ 13. If such a provision does not infringe on a fundamental substantive due process right, courts shall employ the rational basis test and will uphold such provision if it is found to be rationally related to a legitimate state interest. *Marks v. Vanderventer*, 2015 IL 116228, ¶ 25. EO 2020-19 satisfies the rational basis standard. The Whereas clauses specifically state that the purpose of the Executive Order is to "ensure the State of Illinois has adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, as well as patients afflicted with other maladies." EO 2020-19, Whereas clause 5. The Preamble sets forth then that the Executive Order was seeking assistance from Health Care Facilities during a time where it was unknown whether there would be enough capacity and resources for those in need. The Executive Order exchanged immunity for assistance from Health Care Facilities to ensure a fully functional health care system. The Executive Order satisfies the rational basis analysis and does not violate due process rights.

e. Taking Clause

Lastly, Plaintiffs argue that the Executive Order is unconstitutional because it constitutes a taking of property for which the State owes Plaintiffs just compensation. "Private property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art 1, § 5. Here, Plaintiffs assert a regulatory taking of their "unadjudicated cause[s] of action for damages in tort," otherwise known as a "chose in action," *Unifund CCR Partners v. Slah*, 407 Ill. App. 3d 737, 741 (1st Dist. 2011). However, at the time the decedents died, EO 2020-19 was already in effect, and the Health Care Facilities were subject to immunity. At the time of death, Plaintiffs had no property interest in claims seeking to hold Defendants liable for injuries or deaths that occurred while Defendant was engaged in the course of rendering assistance to the State, eliminating any chose in action Plaintiffs may have had. For those reasons, this argument also fails.

Conclusion

For the reasons stated above, the court finds that Governor Pritzker's Executive Order 2020-19 is hereby constitutional and that Defendant qualifies for immunity against negligence claims based on the affirmative matter pursuant to 735 ILCS 5/2-619(a)(9) and pursuant to the language of EO 2020-19, therefore barring Plaintiffs' negligence claims. Defendant's 2-619 Motion to Dismiss the Negligence counts I, III, and V is hereby granted and those counts will be dismissed with prejudice for the reasons stated in this opinion. Defendant's 2-615 Motion to Dismiss the Willful and Wanton counts II, IV, VI, VIII, and X is denied for the reasons stated in this opinion.

SO ORDERED.

ENTERED: _____
Judge Angelo J. Kappas

DATED: 8/10/23