IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

EILEEN B. WALSH, as Independent Administrator for the Estate of RITA SAUNDERS, Deceased, **Plaintiff,**	)	
v.	)	**No. 20-cv-04505**
SSC WESTCHESTER OPERATING COMPANY LLC, a Foreign Limited Liability Company d/b/a WESTCHESTER HEALTH AND REHABILITATION CENTER,	)	**Honorable Manish S. Shah**
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE

NOW COMES Plaintiff EILEEN B. WALSH, as Independent Administrator for the Estate of RITA SAUNDERS, Deceased, by and through her attorneys, and submits this Response in Opposition to Defendant SSC WESTCHESTER OPERATING COMPANY LLC d/b/a WESTCHESTER HEALTH AND REHABILITATION CENTER'S ("Winchester") Rule (b)(6) Motion to Dismiss and Rule 12(f) Motion to Strike. In opposition, Walsh states as follows:

INTRODUCTION AND BACKGROUND

This action was brought by Plaintiff, Eileen Walsh, as Independent Administrator for the Estate of Rita Saunders, a 64-year-old resident of Defendant's nursing home who died after contracting COVID-19 at Westchester's facility. Westchester's mismanagement, misallocation of resources and staffing, repeated violations of government standards evidenced, and actions taken that assured the spread, rather than the curtailment, of a deadly virus, and exposed Saunders to the foreseeable consequences of COVID-19.

In moving to dismiss, Winchester tries to have it both ways. It asserts that no current cause of action exists for negligence under the Illinois Nursing Home Care Act (INHCA) because of a gubernatorial executive order. It then argues no cause of action exists under the executive order because the higher liability standards it imposes are not part of the INHCA. Each alternative basis for liability prevents the other from being operable, abrogating all possible liability for its misconduct. The circular nature of its argument betrays the poverty of its position.

Even at face value, Westchester's arguments are affirmative defenses, not grounds for dismissal. Still, because of the uncertainty of the applicable standard, the negligence and wanton and willful counts are pleadings in the alternative, as authorized by Fed. R. Civ. P. 8(d)(2). Westchester's motions to strike are also ill-taken, both substantively and for failure to even assert any prejudice.

ARGUMENT

I. LEGAL STANDARD FOR A MOTION TO DISMISS.

A motion to dismiss tests the legal sufficiency of a complaint with the defendant bearing the burden to prove insufficiency. *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 806 (7th Cir. 2020). Courts construe the complaint "in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in [the nonmoving party's] favor.'" *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289-90 (7th Cir. 2016) (citations omitted).

II. WESTCHESTER'S ARGUMENTS COMPRISE AFFIRMATIVE DEFENSES, NOT GROUNDS FOR DISMISSAL.

A. Count I States a Claim for Negligence.

Westchester does not argue that Walsh has failed to plead sufficient facts for negligence under the INHCA. Instead, Westchester argues that the claim is preempted by the greater level of egregiousness necessary for liability as imposed by the Governor's declarations. Asserting that it

qualifies for this special treatment because it rendered assistance to the State, Westchester seeks dismissal of the negligence claims because the orders adopt "a gross negligence or willful misconduct" standard. Westchester Mot. 5, at ¶ 13.

Westchester asserts a form of state-based preemption: without repealing the underlying statute, it must yield to a superior authority while the overriding law is in place. *Lily Lake Rd. Defs. v. Cty. of McHenry*, 156 Ill. 2d 1, 8, 619 N.E.2d 137, 140 (1993). After all, the negligence cause of action under the Act was not repealed. There is also a legitimate dispute about whether Westchester was rendering assistance to the State to qualify for the higher liability standard. Mere regulatory compliance, which Westchester suggests it did by "implementing additional infection prevention strategies and guidance for COVID-19," Westchester Mot. 5, ¶ 12, does not constitute help to the State but an obligation imposed by law. Cf. *Watson v. Philip Morris Cos*., Inc., 551 U.S. 142, 153 (2007) (where a private company complies with laws, rules, and regulations, even those that are highly detailed and under a government officer's close supervision and monitoring does not constitute "acting under" a federal "official.")

If applicable and valid, the assertion of preemption "is an affirmative defense, and pleadings need not anticipate or attempt to circumvent affirmative defenses." *Bausch v. Stryker Corp*., 630 F.3d 546, 561 (7th Cir. 2010) (citations omitted). Even if not forms of preemption, Westchester's claim that a different standard applies still constitutes an affirmative defense, which is a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's ... claim, even if all the allegations in the complaint are true." *Bell v. Taylor*, 827 F.3d 699, 705 (7th Cir. 2016) (citation omitted). Critically, "'[a]ffirmative defenses do not justify dismissal under 12(b)(6).'" *Bausch*, 630 F.3d at 561 (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003)). Westchester is obliged to file an answer, pleading its affirmative defenses. *Id*.

The Complaint states a plausible cause of action for negligence by pleading duties Westchester failed to discharge that resulted in injuries to Saunders. Neither Rule 8 nor Rule 12(b)(6) require more. However, if more were identified as necessary, which Westchester's motion fails to do, Rule 15 permits Brady to file an amended complaint. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 519 (7th Cir. 2015). The motion to dismiss Count I should be denied.

B. Count II States an Alternate Claim, Consistent with Executive Orders.

Westchester attacks the Complaint's second count because the INHCA provides no cause of action for wanton and willful misconduct. Westchester Mot. 6-7, ¶¶ 14, 15. Yet, Governor Pritzker issued executive orders that purport to provide immunity under certain conditions, absent gross negligence or wanton misconduct. (See Exhibit A and Exhibit B). The executive orders do not establish a new cause of action but impose a new standard on preexisting ones. Count II was pleaded in the alternative to assert allegations sufficient to meet the heightened requirements of the executive orders.

1. The executive orders do not establish a separate cause of action but purport to impose different standards on existing causes of action.

Executive Order 20-19 (Exh. A) relies on the Illinois Emergency Management Agency Act (IEMA), 20 ILCS 3305/15, to establish a "gross negligence or willful misconduct" standard for the liability for certain health-care providers, as well as the Emergency Medical Services Systems Act (EMSSA), 210 ILCS 50/3.150. Exh. A, cls. 10, 13. The EMSSA specifies that "[n]othing in this Act shall be construed to create a cause of action or any civil liabilities." 210 ILCS 50/3.150(h). In addition, nothing in the executive order establishes a private right of action. Thus, any action still emanates from the INHCA.

The Executive Order goes on to indicate that nursing homes like the one operated by Westchester are covered by the purported new standard to the extent it could be deemed "rendering assistance to the State by providing health care services in response to the COVID-19 outbreak." Exh. A, § § § 1(a)(i), 3. Its plain language indicates that the immunity it conveys only applies to injuries occurring in connection with COVID-19 health care services rendered in assistance to the State. If Westchester were appropriately involved in helping the State and is constitutional, both conditions Walsh denies, the "wanton and willful" count would then apply.

On May 13, 2020, a further, clarifying executive order, 20-37 (Exhibit B), was issued to explain that rendering assistance to the State meant "measures such as increasing the number of beds, preserving and properly employing personal protective equipment, conducting widespread testing, and taking necessary steps to provide medical care to patients with COVID-19 and to prevent further transmission of COVID-19." Exh. B, §§ 2(a)(1) & (a)(4).

Westchester treats Walsh's alternate pleading conforming to the standard set in the executive orders as an attempt to "plead around the immunity protection" of the executive orders. Westchester Mot. 8, ¶ 18. The executive orders plainly apply to existing causes of action, as Westchester concedes by asserting its immunity by virtue of the executive orders. However, the executive orders are not a one-way rachet, providing immunity for negligence without imposing a different standard of liability. By their very terms, immunity only exists, if at all, to the extent that there is no "gross negligence or willful misconduct."

The executive orders plainly anticipate that "gross negligence or willful misconduct" will be pleaded under the statute that provides a private cause of action. While "plaintiffs need not anticipate and attempt to plead around all potential defenses," *Xechem, Inc. v. Bristol-Myers*

Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004), there is no bar to doing so. Still, Walsh did not "plead around" the defense, but asserted an authorized alternative basis for liability.

2. Illinois law treats "gross negligence or willful misconduct" exactly the same as the "willful and wanton"standard.

The executive orders' heightened liability standards prompted Brady to plead the willful and wanton count in an abundance of caution. Under Illinois law, including "where there is no liability for negligence, such allegations are required to establish liability." *Yuretich v. Sole*, 259 Ill. App. 3d 311, 315, 631 N.E.2d 767, 771 (4th Dist. 1994).

Because the underlying cause of action originates under Illinois law, assertions of "gross negligence or wanton misconduct" must meet the substantive state requirements. The executive orders do not define either term. Still, venerable Illinois law recognizes gross negligence to comprise a "presumption of willfulness or wantonness … such as to imply a disregard of consequences or a willingness to inflict injury." *Bremer v. Lake Erie & W.R. Co*., 318 Ill. 11, 21, 148 N.E. 862, 866 (1925). Quite recently, in a contractual dispute where liability existed for "willful misconduct or gross negligence," an appellate court said the "net effect" was to exclude liability "for acts of ordinary negligence committed in good faith but [permit liability] for actions taken in bad faith, i.e., acts constituting 'willful misconduct or gross negligence.'" *Home Healthcare of Illinois, Inc. v. Jesk*, 2017 IL App (1st) 162482, ¶ 40, 112 N.E.3d 594, 603.

Willful and wanton misconduct is also the prerequisite for local government liability under the state's tort immunity act. 745 ILCS 10/3–106. There, willful and wanton conduct is "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1–210. Statutes and precedent, then, establish that gross negligence and

wanton misconduct is willful and wanton misconduct. Given the novel nature of the executive orders' interplay with the INHCA, a prudent plaintiff, pleads it separately.

B. The Ample Willful and Wanton Allegations Survive a Motion to Dismiss.

Alternatively, Westchester asserts that Walsh has insufficiently pleaded facts to support a willful and wanton misconduct claim. Westchester Mot. 9-10, ¶ 21. Only a willful misreading of the pleading could support such an assertion. Walsh agrees with Westchester that the applicable standard includes "intentional misconduct, but also encompasses conduct that, while perhaps not intentional, may occur where the actor failed, after knowledge of impending danger, to exercise ordinary care to prevent the danger." Westchester Mot. 9, ¶ 20 (citing *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267, 273, 641 N.E.2d 402, 405 (1994)).

The Complaint makes that case with facts common to both counts that include a detailed timeline for the outbreak of COVID-19, including the foreseeability that Chicagoland would be hit by the pandemic and that nursing homes were particularly vulnerable if they did not take the types of steps that government agencies recommended. Compl. ¶¶ 38-72. The Complaint further details Westchester's repeated state health regulatory violations, was the subject of repeated violations of IDPH regulations, failed to comply with its own plans to remedy those violations, and that these violations foretold a likely outbreak of COVID-19 at the facility. Compl. ¶¶ 73-88. These facts evince knowledge of the impending danger of a highly communicable virus and a conscious disregard for the health of residents, including Ms. Smith. Compl. ¶¶ 93, 94.

The Complaint also details Westchester's "Careless and Reckless Acts, Omissions and Mismanagement," Compl. § D, ¶¶ 89-117, including instances that can only be described as a reckless disregard for the health and safety of Saunders and other residents, such as staff testing positive for COVID-19 being ordered to continue to work, rather than isolate and self-

quarantine, and an alarming spread of symptoms among residents, including Saunders. *See, e.g.*, Compl. ¶¶ 96-111. Predictably, Saunders subsequently developed symptoms, which Westchester refused to test for, and subsequently succumbed to the virus. Compl. ¶¶ 104-109, 112.

O'Brien v. Twp. High Sch. Dist. 214, 83 Ill. 2d 462, 415 N.E.2d 1015 (1980), provides helpful guidance on the sufficiency of pleadings under Illinois law. In *O'Brien*, the plaintiff alleged ordinary negligence and willful and wanton conduct. The defendant argued the willful and wanton count should be dismissed as insufficient and merely duplicative of Count I. The Illinois Supreme Court held dismissal was inappropriate and evidence in support of both liability theories should be allowed.

Illinois courts have held that plaintiffs may plead separate counts for negligence and willful and wanton, being subject to having the one that was not supported by the record dismissed before submission to the jury. *See, e.g., Coleman v. Williams*, 42 Ill. App. 3d 612, 613 (2d Dist. 1976); *Lewandowski v. Bakey*, 32 Ill. App. 3d 26, 28-29 (2d Dist. 1975). That approach makes eminent good sense because, "to recover damages based on willful and wanton conduct, a plaintiff must plead and prove the basic elements of a negligence claim" *and* additionally "allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare." *Jane Doe-3*, 2012 IL 112479, ¶ 19 (citations omitted).

Although federal pleading standards apply when a court sits in diversity, *Tamburo v. Dworkin*, 601 F.3d 693, 700 (7th Cir. 2010), the federal standards follow the same principles, allowing pleading in the alternative, even if the pleadings are inconsistent. *Alper v. Altheimer & Gray*, 257 F.3d 680, 687 (7th Cir. 2001) (citing 5 Charles Alan Wright & Arthur R. Miller, Fed. Prac. and Proc. § 1283 (2d ed. 1990, Supp. 2001)). In comparable circumstances, where a plaintiff pleaded the same claim as alternative counts, one under Illinois law and one under

California law, this Court denied a motion to dismiss, because the plaintiff was free "to plead violations of the applicable law of both states as alternative means of recovery." *Zabors v. Chatsworth Data Corp*., 735 F. Supp. 2d 1010, 1014 (N.D. Ill. 2010). The *Zabors* Court reasoned that "Plaintiff will not be able to recover under both theories because ultimately a determination will be made as to the law that will govern these claims." *Id*. In the interim, it held, "at this stage of the litigation Plaintiff has pled sufficient allegations to justify relief under either California or Illinois law." *Id*.

The same considerations apply here because liability will be assessed only under one count. Should the relevant executive orders be deemed applicable and valid, and thereby render Plaintiff's ordinary negligence counts invalid for failing to plead a heightened level of negligence, Plaintiff's willful and wanton claims provide the appropriate alternate pleading needed. Westchester's motion to dismiss Count II is ill-taken. It should be denied.

IV. WESTCHESTER ASSERTS NO COGNIZABLE BASIS TO STRIKE ANY PART OF PLAINTIFF'S COMPLAINT.

A. Legal Standard for Motion to Strike.

Federal Rule of Civil Procedure 12(f) states that the Court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Even so, motions to strike portions of pleadings are "disfavored and will usually be denied." *Cumis Ins. Soc., Inc. v. Peters*, 983 F. Supp. 787, 798 (N.D. Ill. 1997) (citation omitted). *See also Silicon Graphics, Inc. v. ATI Techs. ULC*, No. 06-C-611-C, 2007 WL 5312633, at *1 (W.D. Wis. Mar. 12, 2007) (explaining that "they consume scarce judicial resources and may be used for dilatory purposes.") (citing *Custom Vehicles, Inc. v. Forest River, Inc*., 464 F.3d 725, 727 (7th Cir. 2006)).

To succeed, a motion to strike a pleading the allegations must be "so unrelated to plaintiff's claim as to be void of merit and unworthy of any consideration" *and* "unduly prejudicial." *Cumis Ins. Soc., Inc. v. Peters*, 983 F. Supp. 787, 798 (N.D. Ill. 1997) (citation omitted). To constitute necessary prejudice, the challenged allegations must "confus[e] the issues or [be] so lengthy and complex that it places an undue burden on the responding party." *Id*. The defendant's obligation is to describe, with particularity, how it would be prejudiced," and failure to do so "is fatal to their motion to strike." *Oswalt v. Rekeweg*, No. 117CV00278TLSSLC, 2017 WL 5151205, at *2 (N.D. Ind. Nov. 7, 2017). See also *Fox v. Will Cty*., No. 04 C 7309, 2011 WL 6206238, at *2 (N.D. Ill. Dec. 7, 2011) (denying motion to strike portions of plaintiff's complaint where defendant failed to explain precisely why plaintiff's allegations are "unduly prejudicial" (citing *Davis v. Ruby Foods*, 269 F.3d 818, 821 (7th Cir. 2001))); *Ind. Ins. Co. v. Westfield Ins. Co*., No. 10 C 2660, 2010 WL 3404971, at *3 (N.D. Ill. Aug. 26, 2010) (same).

B. Westchester Makes No Claim of Prejudice.

In addition to multiple other flaws in its motion to strike, Westchester makes no attempt to demonstrate any prejudice from the portions of the Complaint it seeks to strike. That failure is fatal to its motion even without considering the substance of its objections, none of which survive scrutiny. For this reason alone, the motion to strike must be denied.

1. Westchester Offers No Legitimate Basis to Strike the Introduction.

Beyond failing to articulate how it is prejudiced by the Introduction, which is sufficient in itself to deny the motion, Westchester's argument consists solely of characterizing the Introduction as "rambling, argumentative, and entirely conclusory." Westchester Mot. 11, ¶ 25. That inaccurate description of the two-paragraph introduction, even if true, is not an arguable basis for a motion to strike. The only authority Westchester musters is a state court case.

However, decisions under state law are irrelevant, as the issue is governed by federal procedural law. *Tamburo*, 601 F.3d at 700. In addition, Illinois is a fact-pleading jurisdiction and has different standards and procedural rules than the applicable federal rules. *Doe v. Coe*, 2019 IL 123521, ¶32.

In federal court, "[p]roviding an overview of the case in a preliminary statement" is "a common practice." *Fox v. Will Cnty*., No. 04 C 7309, 2011 WL 6206238, at *2 (N.D. Ill. Dec.7, 2011). This well-recognized pleading practice of utilizing an introduction serves as a "preliminary statement" to aid the reader (both defendant and judge) of the merits of the action and its overall thrust before undertaking a lengthy review of the applicable facts and law. See Elizabeth Fajans, Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 Legal Writing: J. Legal Writing Inst. 3, 26 (2009). In this instance, the introduction constitutes a well-supported preview of the thrust of specific allegations in the lengthy pleading. Westchester presents no viable reason it should be struck.

2. Paragraphs containing legal conclusions are not subject to striking.

Westchester complains that Paragraphs 7- 8, 10-18, 24-26, and 28 are legal conclusions and should be struck because they either "relate to the content of various statutes and allegedly applicable State and Federal regulations" or allege that Westchester was not assisting the State. Westchester Mot. 11-12, ¶ ¶ 26, 27.

In rejecting another motion to strike pleadings that "contain statements of law," this Court found those particular legal conclusions were "not entirely immaterial," provided "context" for the allegations, "len[t] to the plausibility of [the] allegations," and, perhaps most importantly, did could not "be said to cause undue prejudice or confusion of the issues." *Zebulon Enterprises, Inc. v. DuPage Cty*., 438 F. Supp. 3d 881, 893 (N.D. Ill. 2020). Indeed, "[t]here is

no explicit bar in the Federal Rules of Civil Procedure to the inclusion of legal conclusions in an initial pleading." *Walker v. Walker*, No. 11 C 2967, 2011 WL 3757314, at *1 (N.D. Ill. Aug. 25, 2011).

The paragraphs regarding assistance to the State do not reach legal conclusions, but put into dispute the factual predicates for deciding Westchester's eligibility for application of the executive orders. In addition, Westchester has made not showing of how these paragraphs prejudice it. The motion to strike paragraphs 7-8, 10-18, 24-26, and 28 should be denied.

3. Westchester offers no legitimate basis to strike paragraphs 19 and 26.

Westchester seeks to strike paragraphs 19 and 26 because they reference SSC Equity Holdings LLC, a non-party. Westchester Mot. 12, ¶ 28. Westchester offers no authority in support and no showing of prejudice. Paragraph 26 describes SSC Equity Holdings LLC as a "related party" to Westchester under federal definitions. As such, a cogent connection is alleged between the two, rendering Westchester's complaint of irrelevance doubtful. Yet, even immaterial allegations may stand against a motion to strike unless prejudicial. *Magnavox Co. v. APF Electronics, Inc*., 496 F. Supp. 29, 35 (N.D. Ill.1980) (citing 5 Wright & Miller, Fed. Prac. and Proc. § 1382, at 809-19 (1969)). The motion to strike these paragraphs should be denied.

4. Westchester Offers No Legitimate Basis to Strike Paragraph 30.

Westchester seeks to strike Paragraph 30 as irrelevant. Westchester Mot. 12-13, ¶ 29. It argues the paragraph improperly raises Westchester's "possible motivations." *Id*. However, complaints must meet a plausibility standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The existence of motivating factors that suggest particular behavior makes an allegation more plausible than not. See, e.g., *Beasley v. City of Granite City*, 442 F. Supp. 3d 1066, 1071 (S.D. Ill. 2020). Where willful and wanton misconduct is alleged, as here, motivation can provide a

basis for finding intentional or reckless conduct in disregard of another's rights. See *Bormann v. Tomlin*, 461 F. Supp. 193, 195 (S.D. Ill. 1978), *aff'd*, 622 F.2d 592 (7th Cir. 1980). Thus, Westchester's submission that the information is irrelevant rings hollow, but also is not sufficient to support striking the allegation. See *Magnavox Co.*, 496 F. Supp. at 35. Moreover, Westchester makes no showing the allegation is prejudicial. Its motion should be denied.

5. Westchester offers no legitimate basis to strike paragraphs 73-88.

Westchester asks this Court to strike Paragraphs 73-88, which describe Westchester's citations for violations of mandatory regulations, as "inadmissible hearsay," because they are "out of court statements in which the state agency, for whatever reason, concluded that WESTCHESTER allegedly violated one or more State and/or Federal regulations applicable to skilled nursing facilities." Westchester Mot. 13, ¶ 30. Westchester is wrong as a matter of law.

Federal Rule of Evidence 201 permits a court to take judicial notice of a fact not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Government agency records are subject to judicial notice under Rule 201. *Denius v. Dunlap*, 330 F.3d 919, 926-27 (7th Cir. 2003); *Opoka v. I.N.S.*, 94 F.3d 392, 394 (7th Cir. 1996). The citations for violating regulations intended to protect the health and safety of nursing home residents does not constitute impermissible hearsay.

Even if it were hearsay, the citation reports fall under the recognized exception, Federal Rule of Evidence 803(8), as the reports are made publicly available, set out the activities of the agency, and do so through the legal duty to investigate complaints made against long-term skilled nursing facilities. Even furthermore, the citations are materials that experts may rely upon to form an opinion. Fed. R. Evid. 703. As Westchester has not claimed any prejudicial effect

from such a reliance, and the federal rules plainly provide for admission of this evidence under the Public Records exception, Westchester offers no legitimate basis to strike Paragraphs 77-95.

Westchester also charges that the information is "irrelevant" to how they fell below the mark with respect to Ms. Smith. Yet, it is undeniable that if Westchester's conduct consistently violated regulations relevant to what befell Saunders at Westchester's hands by failing to take steps to address ordinary infection control, that information renders liability plausible for negligence purposes and a known danger for willful and wanton purposes because it makes it more likely or probable that Westchester's actions with respect to Ms. Smith did not meet either the ordinary care or reckless disregard standards. The allegations are thus absolutely relevant. Moreover, Westchester makes no showing that the allegation prejudices it. The motion to strike these paragraphs should be denied

6. Westchester Offers No Legitimate Basis to Strike Paragraphs 115, 116, and 117.

Westchester objects to Paragraphs 109-111, concerning other residents contracting or dying of COVID-19 after exposure at Westchester, "as this is not a wrongful death action." Westchester Mot. 14, ¶ 31. Of course, this is a case of wrongful death! In addition to not showing how it might be prejudiced, Westchester fails to show its alleged irrelevancy. These paragraphs allege that Westchester had knowledge of the dangers that COVID-19 posed for its residents, recklessly disregarded those dangers, and even took steps, such as insisting that staff members who tested positive continue working, which could only have resulted in causing illness and death to residents at the facility. Compl. ¶¶ 96-109. Westchester wrongly claims that these allegations of reckless disregard are irrelevant. The motion to strike these paragraphs should be denied.

7. Westchester offers no legitimate basis to strike paragraph 138.

Westchester asks that Paragraph 138 be struck in its entirety because it lists duties, not violations. Westchester Mot. 14, ¶ 32. The argument misapprehends pleading and the underlying causes of action.

The INHCA was adopted to address concerns of "'inadequate, improper and degrading treatment of patients in nursing homes.'" *Harris v. Manor Healthcare Corp*., 111 Ill.2d 350, 357-58, 489 N.E.2d 1374, 1377 (1986). It is "a comprehensive statute which established standards for the treatment and care of nursing home residents." *Id*. at 358, 489 N.E.2d at 1377 (1986). It "expressly granted nursing home residents a private cause of action for damages." *Eads v. Heritage Enterprises, Inc*., 204 Ill. 2d 92, 98, 787 N.E.2d 771, 774 (2003) (citing 210 ILCS 45/3–601, 3–602, 3–603).

The Administrative Code compiles the applicable regulations. *Illinois Regulations*, 88 Ill. B.J. 417, 417 (2000). Plainly, both the Act and the Code are relevant to the liabilities raised in this action. Both the INHCA and the Code are relevant to the liabilities raised in this action because they "aid the finder of fact in deciding the standard of care in negligence actions.'" *Graves v. Rosewood Care Ctr., Inc*., 2012 IL App (5th) 100033, ¶ 37, 968 N.E.2d 103, 111 (2012) (citation omitted). Violation of a statute or ordinance constitutes prima facie evidence of negligence. *Davis v. Marathon Oil Co*., 64 Ill.2d 380, 356 N.E.2d 93, 97 (1976).

Paragraph 138 lists duties imposed upon Westchester by virtue of Illinois law. To prevail on a claim of negligence, a plaintiff must prove that the defendant owed him or her a duty. *Krywin v. Chicago Transit Auth*., 238 Ill. 2d 215, 225, 938 N.E.2d 440, 446 (2010). A complaint's paragraph detailing the duties owed need not also contain the facts that allege a breach of those duties. Because complaints are read as a whole, *Spearman v. Elizondo*, 230 F. Supp. 3d 888, 892 (N.D. Ill. 2016), it is sufficient that the breach be somewhere in the

Complaint. The Complaint amply alleges breaches of duties that correspond to legal mandates, and the motion to strike must be denied.

8. Westchester offers no legitimate basis to strike paragraphs 139-141.

Westchester argues Paragraphs 139-141 allege duties to implement isolation and infection control procedures, but labels them immaterial and conclusory because they fail to indicate those procedures were not implemented. Westchester Mot. 14-15, at ¶ 33. The objection "runs afoul of the firmly established requirement that complaints be read as a whole." *Spearman*, 230 F. Supp. 3d at 892. Plainly, the Complaint establishes that Westchester failed to implement isolation and infection control procedures and to quarantine staff infected by COVID-19, knowing vulnerable residents like Saunders would be exposed. See, e.g., Complaint ¶¶ 73-109. The facts alleged are sufficient to draw reasonable inferences that support liability, which is all Walsh was required to do. See *Iqbal*, 556 U.S. at 678. The motion should be denied.

9. Westchester Offers No Legitimate Basis to Strike Paragraphs 142(d), 142(j), 142(l), 142(m), 142(u), 142(v), and 142(aa).

Finally, Westchester argues that Paragraphs 142(j), 142(l), 142(m), 142(u), 142(v), and 142(aa) must be struck as duplicative of other paragraphs, while Paragraph 137(d) is irrelevant. Westchester Mot. 15, ¶ 34. The conclusory argument does not withstand scrutiny. For example, Westchester does not explain why failing to screen residents, including Saunders, for COVID-19, as alleged in subparagraph (d), could possibly be irrelevant. It is plainly connected to her death. Moreover, while subparagraphs (i), (j), and (d) all relate to staffing levels, and they each address different reasons that the staffing levels were inadequate: according to Westchester's care plan, in making assignments due to COVID-19 exposure, and specifically in relation to Saunder's requirements, respectively. They are obviously not redundant.

Even to the extent that some subparagraphs might be similar to others, "motions to strike are frequently denied 'when no prejudice could result from the challenged allegations, even though the matter literally is within the category set forth in Rule 12(f)." ' *Anderson v. Board of Educ*., 169 F.Supp.2d 864, 868 (N.D. Ill. 2001) (quoting 5A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1382). Indeed, any doubt about whether challenged material is redundant, according to the same contemporary entry in the leading federal courts treatise, "should be resolved in favor of the non-moving party." 5C Fed. Prac. & Proc. Civ. § 1382 (3d ed.). After all, "mere redundancy or immateriality is not enough to trigger the drastic measure of striking the pleading or parts thereof; in addition, the pleading must be prejudicial to the defendant." *Hardin v. Am. Elec. Power*, 188 F.R.D. 509, 511 (S.D. Ind. 1999). Thus, the motion to strike on these grounds also fails.

V. CONCLUSION

Neither Westchester's motion to dismiss nor its motion to strike provide cognizable grounds for the relief it seeks. For the foregoing reasons, the motions should be denied.

WHEREFORE, the Plaintiff, LORETTA BRADY, as Attorney-in-Fact for LOTTIE SMITH, by and through her attorneys, LEVIN & PERCONTI, respectfully requests this Honorable Court to deny Defendant, SSC WESTCHESTER OPERATING COMPANY LLC d/b/a WESTCHESTER HEALTH AND REHABILITATION CENTER'S Rule 12(b)(6) Motion to Dismiss and Rule 12(f) Motion to Strike.

Respectfully submitted,
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STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

Proclamation

WHEREAS, Coronavirus Disease 2019 (COVID-19) is a novel severe acute respiratory illness that can spread among people through respiratory transmissions and present with symptoms similar to those of influenza; and,

WHEREAS, certain populations are at higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people who have serious chronic medical conditions such as heart disease, diabetes, or lung disease; and,

WHEREAS, the State of Illinois is continuing its efforts to prepare for any eventuality given that this is a novel illness and given the known health risks it poses for the elderly and those with serious chronic medical conditions; and,

WHEREAS, the World Health Organization declared COVID-19 a Public Health Emergency of International Concern on January 30, 2020, and the United States Secretary of Health and Human Services declared that COVID-19 presents a public health emergency on January 27, 2020; and,

WHEREAS, on March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic, and has reported more than 750,000 confirmed cases of COVID-19 and 36,500 deaths attributable to COVID-19 globally as of March 31, 2020; and,

WHEREAS, the Centers for Disease Control and Prevention (CDC) currently recommends that all United States residents take precautions to contain the spread of COVID-19, including that they: (1) practice social distancing by maintaining 6 feet of distance from others and avoiding all gatherings; (2) be alert for symptoms such as fever, cough, or shortness of breath, and take their temperature if symptoms develop; and (3) exercise appropriate hygiene, including covering coughs and sneezes with a tissue, washing hands often with soap and water for at least 20 seconds, using of alcohol-based hand sanitizers with at least 60% alcohol if soap and water are not readily available, and routinely cleaning frequently touched surfaces and objects to increase community resilience and readiness for responding to an outbreak; and,

WHEREAS, the CDC also recommends the following precautions for household members, caretakers and other persons having close contact with a person who is symptomatic, during the period from 48 hours before onset of symptoms until the symptomatic person meets the criteria for discontinuing home isolation: (1) stay home until 14 days after last exposure and maintain social distance (at least 6 feet) from others at all times; (2) self-monitor for symptoms, including checking their temperature twice a day and watching for fever, cough, or shortness of breath; and (3) avoid contact with people at higher risk for severe illness (unless they live in the same home and had the same exposure); and,

WHEREAS, a vaccine or drug is currently not available for COVID-19; and,

WHEREAS, despite efforts to contain COVID-19, the World Health Organization and the CDC indicate that it is expected to continue spreading; and,

WHEREAS, as of March 31, 2020, there were 5,994 confirmed cases of COVID-19 and 99 deaths in Illinois resulting from COVID-19; and,

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WHEREAS, the outbreak of COVID-19 has resulted in significant negative economic impact, including loss of income and wages, that threatens to undermine housing security and stability and overall financial stability and security for individuals and businesses throughout Illinois; and,

WHEREAS, on March 13, 2020, the President declared a nationwide emergency pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act"), covering all states and territories, including Illinois; and,

WHEREAS, on March 26, 2020, the President declared a major disaster in Illinois pursuant to Section 401 of the Stafford Act; and,

WHEREAS, I, JB Pritzker, Governor of Illinois, declared all counties in the State of Illinois as a disaster area on March 9, 2020 in response to the outbreak of COVID-19; and,

WHEREAS, based on the foregoing, the circumstances surrounding COVID-19 constitute a continuing public health emergency under Section 4 of the Illinois Emergency Management Agency Act; and,

WHEREAS, the circumstances surrounding COVID-19 have resulted in the occurrence and threat of widespread and severe damage, injury, and loss of life and property under Section 4 of the Illinois Emergency Management Agency Act; and,

WHEREAS, it is the policy of the State of Illinois that the State will be prepared to address any disasters and, therefore, it is necessary and appropriate to make additional State resources available to ensure that the effects of COVID-19 are mitigated and minimized to the greatest extent possible and that Illinoisans remain safe and secure; and,

WHEREAS, this proclamation will assist Illinois agencies in coordinating State and Federal resources, including the Strategic National Stockpile of medicines and protective equipment, to support local governments in preparation for any action that may be necessary related to the potential impact of COVID-19 in the State of Illinois; and,

WHEREAS, these conditions provide legal justification under Section 7 of the Illinois Emergency Management Agency Act for the issuance of a proclamation of disaster;

NOW, THEREFORE, in the interest of aiding the people of Illinois and the local governments responsible for ensuring public health and safety, I, JB Pritzker, Governor of the State of Illinois, hereby proclaim as follows:

Section 1. Pursuant to the provisions of Section 7 of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7, I find that a continuing disaster exists within the State of Illinois and specifically declare all counties in the State of Illinois as a disaster area. This proclamation continues the Governor's authority to exercise all of the emergency powers provided in Section 7 of the Illinois Emergency Management Agency Act, 20, ILCS 3305/7, including but not limited to those specific emergency powers set forth below.

Section 2. The Illinois Department of Public Health and the Illinois Emergency Management Agency are directed to continue to coordinate with each other with respect to planning for and responding to the present public health emergency.

Section 3. The Illinois Department of Public Health is further directed to continue to cooperate with the Governor, other State agencies and local authorities, including local public health authorities, in the development and implementation of strategies and plans to protect the public health in connection with the present public health emergency.

Section 4. The Illinois Emergency Management Agency is directed to continue to implement the State Emergency Operations Plan to coordinate State resources to support local governments in disaster response and recovery operations.

Section 5. To aid with emergency purchases necessary for response and other emergency powers as authorized by the Illinois Emergency Management Agency Act, the provisions of the Illinois

Procurement Code that would in any way prevent, hinder or delay necessary action in coping with the disaster are suspended to the extent they are not required by federal law. If necessary, and in accordance with Section 7(1) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(1), the Governor may take appropriate executive action to suspend additional statutes, orders, rules, and regulations.

Section 6. Pursuant to Section 7(3) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(3), this proclamation continues the Governor's authority, as necessary, to transfer the direction, personnel or functions of State departments and agencies or units thereof for the purpose of performing or facilitating emergency response programs.

Section 7. The Illinois Department of Public Health, Illinois Department of Insurance and the Illinois Department of Healthcare and Family Services are directed to continue to recommend, and, as appropriate, take necessary actions to ensure consumers do not face financial barriers in accessing diagnostic testing and treatment services for COVID-19.

Section 8. The Illinois State Board of Education is directed to continue to recommend, and, as appropriate, take necessary actions to address chronic absenteeism due to transmission of COVID-19 and to alleviate any barriers to the use of e-learning during the effect of this proclamation that exist in the Illinois School Code, 105 ILCS 5/1-1 et. seq.

Section 9. All State agencies are directed to cooperate with the Governor, other State agencies and local authorities in the development and implementation of strategies and plans to cope with and recover from the economic impact of COVID-19.

Section 10. Pursuant to Section 7(14) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(14), increases in the selling price of goods or services, including medical supplies, protective equipment, medications and other commodities intended to assist in the prevention of or treatment and recovery of COVID-19, shall be prohibited in the State of Illinois while this proclamation is in effect.

Section 11. This proclamation can facilitate requests for federal emergency and/or disaster assistance if a complete and comprehensive assessment of damage indicates that effective recovery is beyond the capabilities of the State and affected local governments.

Section 12. This proclamation shall be effective immediately and remain in effect for 30 days.

In Witness Whereof *I have hereunto set my hand and caused the Great Seal of the State of Illinois to be affixed.*

Done at the Capitol in the City of Springfield, this first day of April in the Year of Our Lord two thousand and twenty, and the State of Illinois two hundred and second.

Jesse White

Secretary of State

FILED
INDEX DEPARTMENT
APR 01 2020
IN THE OFFICE OF
SECRETARY OF STATE

JBP

Governor

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

May 13, 2020 Executive Order 2020-37

EXECUTIVE ORDER IN RESPONSE TO COVID-19
(COVID-19 EXECUTIVE ORDER NO. 35)

WHEREAS, Coronavirus Disease 2019 (COVID-19), a novel severe acute respiratory illness, has rapidly spread throughout Illinois in a short period of time, necessitating stringent guidance from federal, state, and local public health officials and significant measures to respond to the increasing public health disaster; and,

WHEREAS, COVID-19 spreads among people through respiratory transmissions and presents with symptoms similar to those of influenza; and,

WHEREAS, on March 9, 2020, I, JB Pritzker, Governor of Illinois, declared all counties in the State of Illinois as a disaster area (the First Gubernatorial Disaster Proclamation) in response to the outbreak of COVID-19; and,

WHEREAS, on April 1, 2020, I declared all counties in the State of Illinois as a disaster area (the Second Gubernatorial Disaster Proclamation) as a result of the exponential spread of COVID-19; and,

WHEREAS, on April 30, 2020, due to the expected continuing spread of COVID-19 and the resulting health impacts across the State, as well as the need to address the potential shortages of hospital beds, ICU beds, ventilators, personal protective equipment and materials for testing for the virus, I declared all counties in the State of Illinois as a disaster area (the Third Gubernatorial Disaster Proclamation, and, together with the First and Second Gubernatorial Disaster Proclamations, the Gubernatorial Disaster Proclamations); and,

WHEREAS, as the virus has spread through Illinois, the crisis facing the State has progressed and requires an evolving response to ensure hospitals, health care professionals, and first responders are able to meet the health care needs of all Illinoisans in a manner consistent with continually updated guidance from the Illinois Department of Public Health (IDPH) and the federal Centers for Disease Control and Prevention (CDC); and,

WHEREAS, ensuring 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, is of critical importance; and,

WHEREAS, eliminating obstacles or barriers to the provision of supplies and health care services is necessary to ensure the Illinois health care system has adequate capacity to provide care to all who need it; and,

WHEREAS, the Illinois Department of Financial and Professional Regulation and IDPH have taken measures, and continue to take measures, to enable inactive and out-of-state health care workers to work in Illinois through proclamations, emergency rules, and variances; and,

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B

WHEREAS, IDPH has taken measures, and continues to take measures, to enable hospitals to increase bed capacity and provide levels of care necessary to respond to the COVID-19 outbreak; and,

WHEREAS, on March 16, 2020, IDPH issued guidance recommending cancelling all elective or non-emergent surgeries and procedures to immediately decompress the health care system during the COVID-19 response; and,

WHEREAS, IDPH issued revised guidance, effective May 11, 2020, that allows hospitals and ambulatory surgical treatment centers to resume elective surgeries and procedures provided that certain requirements are met relating to surveillance of epidemiologic trends, regional hospital utilization, the hospital's own capacity, case setting and prioritization, preoperative testing for COVID-19, personal protective equipment, infection control procedures, and availability of support services, as well as other requirements; and,

WHEREAS, resumption of elective surgeries and procedures is important to the continued health and safety of the people of the State of Illinois, while at the same time ensuring that Illinois hospitals maintain the ability to accommodate a renewed surge of COVID-19 patients if necessary; and,

WHEREAS, in order to ensure that COVID-19 patients receive proper medical care, it is essential that hospitals and other types of health care facilities accept transfers of COVID-19 patients if they have the capacity and capability necessary to provide treatment for COVID-19 patients; and,

WHEREAS, IDPH has taken measures, and continues to take measures, to enable emergency medical systems to accommodate and prepare for transportation and care of COVID-19 patients; and,

WHEREAS, on April 9, 2020, IDPH issued guidelines requesting emergency medical services systems prepare for transportation of patients to non-traditional destinations, such as alternate care facilities; and,

WHEREAS, Section 6(c)(1) of the Illinois Emergency Management Agency Act (IEMA Act), 20 ILCS 3305/6, provides that the Governor is authorized to "make, amend, and rescind all lawful necessary orders, rules, and regulations to carry out the provisions of this Act within the limits of the authority conferred upon the Governor"; and,

WHEREAS, Section 15 of the IEMA Act, 20 ILCS 3305/15, provides that "Neither the State, any political subdivision of the State, nor, except in cases of gross negligence or willful misconduct, the Governor, the Director, the Principal Executive Officer of a political subdivision, or the agents, employees, or representatives of any of them, engaged in any emergency management response or recovery activities, while complying with or attempting to comply with this Act or any rule or regulations promulgated pursuant to this Act is liable for the death of or any injury to persons, or damage to property, as a result of such activity"; and,

WHEREAS, Section 21(b) of the IEMA Act, 20 ILCS 3305/21, provides that "Any private person, firm or corporation and employees and agents of such person, firm or corporation in the performance of a contract with, and under the direction of, the State, or any political subdivision of the State under the provisions of this Act shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of willful misconduct"; and,

WHEREAS, Section 21(c) of the IEMA Act, 20 ILCS 3305/21, provides that "Any private person, firm or corporation, and any employee or agent of such person, firm or corporation, who renders assistance or advice at the request of the State, or any political subdivision of the State under this Act during an actual or impending disaster, shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of willful misconduct"; and,

WHEREAS, Section 3.150(a) of the Emergency Medical Services (EMS) Systems Act, 210 ILCS 50/3.150, provides that persons "who in good faith provide[] emergency or non-emergency medical services during a Department [of Public Health] approved training course, in the normal course of conducting their duties, or in an emergency, shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions, including the bypassing of nearby hospitals or medical facilities in accordance with the protocols developed pursuant to this Act, constitute willful and wanton misconduct"; and,

WHEREAS, the Good Samaritan Act, 745 ILCS 49, provides that "the generous and compassionate acts of its citizens," specifically health care professionals, "who volunteer their time and talents to help others" should be exempt from civil liability unless such acts demonstrate willful or wanton misconduct; and,

WHEREAS, for the preservation of public health and safety throughout the entire State of Illinois, and to ensure that our health care delivery system is capable of serving those who are sick, I find it necessary to take additional measures consistent with public health guidance;

THEREFORE, by the powers vested in me as the Governor of the State of Illinois, and pursuant to Sections 7(1), 7(2), 7(3), 7(12), 15, and 21 of the IEMA Act, 20 ILCS 3305, for the duration of the Gubernatorial Disaster Proclamations, I hereby order the following:

Section 1. For purposes of this Executive Order, the following terms are defined as set forth below:

(a) "Hospitals" means facilities licensed or approved by the Hospital Licensing Act, 210 ILCS 85, or the University of Illinois Hospital Act, 110 ILCS 330.

(b) "Health Care Facilities" means:

i. Facilities licensed, certified, or approved by any State agency and covered by the following: 77 Ill. Adm. Code 1130.215(a), (c)-(f); Alternative Health Care Delivery Act, 210 ILCS 3/35(2)-(4); Emergency Medical Services (EMS) Systems Act, 210 ILCS 50; or Department of Veterans' Affairs Act, 20 ILCS 2805;

ii. State-operated Developmental Centers certified by the federal Centers for Medicare and Medicaid Services and licensed State-operated Mental Health Centers created pursuant to the Mental Health and Developmental Disabilities Administrative Act, 20 ILCS 1705/4;

iii. Licensed community-integrated living arrangements as defined by the Community-Integrated Living Arrangements Licensure and Certification Act, 210 ILCS 135/2;

iv. Licensed Community Mental Health Centers as defined in the Community Services Act, 405 ILCS 30;

v. Federally qualified health centers under the Social Security Act, 42 U.S.C. § 1396d(l)(2)(B);

vi. Alternate Care Facilities licensed by IDPH;

vii. Supportive living facilities certified by the Illinois Department of Healthcare and Family Services pursuant to the Illinois Public Aid Code, 305 ILCS 5/5-5.01(a); and,

viii. Assisted living establishments and shared housing establishments licensed by IDPH pursuant to the Assisted Living and Shared Housing Act, 210 ILCS 9.

"Health Care Facility" is the singular form of the plural "Health Care Facilities."

(c) "Health Care Professional" means all licensed or certified health care workers or emergency medical services personnel who (i) are providing health care services at a Hospital or Health Care Facility in response to the COVID-19 outbreak and are authorized to do so; or (ii) are working under the direction of the Illinois Emergency Management Agency (IEMA) or IDPH in response to the Gubernatorial Disaster Proclamations.

(d) "Health Care Volunteer" means all volunteers or medical or nursing students who do not have licensure who (i) are providing services, assistance, or support at a Hospital or Health Care Facility in response to the COVID-19 outbreak and are authorized to do so; or (ii) are working under the direction of IEMA or IDPH in response to the Gubernatorial Disaster Proclamations.

Section 2. Pursuant to Sections 15 and 21(b)-(c) of the IEMA Act, 20 ILCS 3305/15 and 21(b)-(c) and the Good Samaritan Act, 745 ILCS 49, I direct all Hospitals, Health Care Facilities,

Health Care Professionals, and Health Care Volunteers to render assistance in support of the State's response to the disaster recognized by the Gubernatorial Disaster Proclamations (COVID-19 outbreak).

(a) Hospitals and Health Care Facilities.

i. For Hospitals and Health Care Facilities, "rendering assistance" in support of the State's response must include measures such as increasing the number of beds, preserving and properly employing personal protective equipment, conducting widespread testing, and taking necessary steps to provide medical care to patients with COVID-19 and to prevent further transmission of COVID-19.

ii. For Hospitals conducting elective surgeries or procedures, "rendering assistance" in support of the State's response must also include compliance with IDPH's current guidance on conducting elective surgeries and procedures.

iii. For Hospitals, "rendering assistance" must also include accepting a transfer of a COVID-19 patient from another Hospital, including Hospital inpatients, and from State-operated entities (collectively, "transferring entities") that do not have the capacity and capability necessary to provide treatment for a COVID-19 patient. The receiving Hospital shall accept such transfer of a COVID-19 patient if it has sufficient capacity and capability necessary to provide treatment for the COVID-19 patient. In determining whether a Hospital has sufficient capacity and capability necessary to provide treatment for a COVID-19 patient, the Hospital shall consider, at a minimum, its ability to provide safe and effective treatment consistent with any current guidance from IDPH and available supplies, staffing, and ICU and medical/surgical bed capacity.

iv. For Health Care Facilities, "rendering assistance" must also include, consistent with current guidance and recommendations from IDPH (1) conducting widespread testing of residents and widespread and regular testing of staff for COVID-19, and (2) accepting COVID-19 patients upon transfer or discharge from a Hospital or Health Care Facility.

(b) For Health Care Professionals, "rendering assistance" in support of the State's response means providing health care services at a Hospital or Health Care Facility in response to the COVID-19 outbreak, or working under the direction of IEMA or IDPH in response to the Gubernatorial Disaster Proclamations.

(c) For Health Care Volunteers, "rendering assistance" in support of the State's response means providing services, assistance, or support at a Hospital or Health Care Facility in response to the COVID-19 outbreak, or working under the direction of IEMA or IDPH in response to the Gubernatorial Disaster Proclamations.

Section 3. 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 Proclamations, Hospitals that continue to cancel or postpone all elective surgeries or procedures in order to respond to the COVID-19 outbreak, or Health Care Professionals providing service in such a Hospital, shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Hospital or Health Care Professional, which injury or death occurred at a time when a Hospital or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with current guidance issued by IDPH. This section is inapplicable if it is established that such injury or death was caused by gross negligence or willful misconduct of such Hospital or Health Care Professional, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

Section 4. 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 Proclamations, Hospitals that conduct elective surgeries or procedures beginning on or after May 11, 2020, or Health Care

Professionals providing services in such a Hospital, shall be immune from civil liability for any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 alleged to have been caused by any act or omission by the Hospital or the Health Care Professional, which injury or death occurred at a time when a Hospital or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with current guidance issued by IDPH. This section is inapplicable if it is established that such injury or death was caused by gross negligence or willful misconduct of such Hospital or Health Care Professional, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

Section 5. 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 Proclamations, Health Care Facilities or Health Care Professionals providing services in a Health Care Facility, shall be immune from civil liability for any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 alleged to have been caused by any act or omission by the Health Care Facility or the Health Care Professional, which injury or death occurred at a time when a Health Care Facility or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with current guidance issued by IDPH. This section is inapplicable if it is established that such injury or death was caused by gross negligence or willful misconduct of such Health Care Facility or Health Care Professional, if 20 ILCS 3305/15 is applicable, or by willful misconduct, if 20 ILCS 3305/21 is applicable.

Section 6. Pursuant to Section 21(c) of the IEMA Act, 20 ILCS 3305/21(c), and the Good Samaritan Act, 745 ILCS 49, I direct that during the pendency of the Gubernatorial Disaster Proclamations, any Health Care Volunteer, 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 such Health Care Volunteer, which injury or death occurred at a time when the Health Care Volunteer was rendering assistance to the State in response to the COVID-19 outbreak by providing services, assistance, or support consistent with current guidance issued by IDPH. This section is inapplicable if it is established that such injury or death was caused by willful misconduct of such Health Care Volunteer.

Section 7. Nothing in this Executive Order shall be construed to preempt or limit any applicable immunity from civil liability available to any Hospital, Health Care Facility, Health Care Professional, or Health Care Volunteer.

Section 8. If any provision of this Executive Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

JB Pritzker, Governor

Issued by the Governor May 13, 2020
Filed by the Secretary of State May 13, 2020

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INDEX DEPARTMENT
MAY 13 2020
IN THE OFFICE OF
SECRETARY OF STATE