

CITYWIDE FITNESS CENTER, INC.©

Dr. Vontz looked at Tommy Jetson with a scowl. "This is serious, Tommy. You are a prime candidate for a heart attack at age 48. Your blood cholesterol level is 310 mg/dL, you have high blood pressure, you're overweight, and you don't exercise." Tommy left Dr. Vontz's office feeling depressed, so he went to see a movie at the Multiplex Theatre in the Eastfield Mall. Although he was irritated by the commercials that were run prior to the showing of the movie, he thought that the movie was outstanding. After the movie Tommy dined on sprouts and seaweed at a health food restaurant.

Not thrilled with the prospect of a continued health food diet of sprouts, seaweed, and sawdust, Tommy resolved to exercise more. He hoped that exercise would result in his losing weight and the lowering of both his blood pressure and blood cholesterol level.

The morning following his visit to Doctor Vontz, Tommy had an intensive discussion with his wife, Jitsy, regarding his health and lack of exercise. Jitsy had joined the local Citywide Fitness Center the previous year with the expressed intent to "get in shape." Subsequent to her joining Citywide Fitness Center, Jitsy had continually encouraged Tommy to join her at the Spa telling him "since starting my workout program I feel great and I think the exercise would be good for your health." Tommy was steadfast in his refusal to join his wife at Citywide Fitness Center telling her that her "constant nagging about his health and exercise did nothing but cause an increase in his blood pressure." However, following this latest discussion regarding Tommy's visit to Doctor Vontz, Jitsy asked Tommy if he would at least accompany her to Citywide Fitness Center that morning to watch her exercise. Tommy agreed, saying "I'll just drop you off and pick you up after your session is over."

Tommy did just that. He drove Jitsy to Citywide Fitness Center, dropped her off and returned to pick her up. Jitsy was not waiting outside of Citywide Fitness Center when Tommy arrived to pick her up so Tommy parked his car and entered Citywide Fitness Center to wait in the lobby until his wife was finished. Tommy found a seat in the lobby where he could sit and wait. While waiting for his wife, Tommy suddenly collapsed to the floor.

A Citywide Fitness Center employee saw Tommy collapse and rushed to his side. He checked Tommy for breathing and a pulse. Determining that Tommy was not breathing, had no pulse and appeared to be unconscious and unresponsive, the employee directed that Emergency Medical Service (EMS) assistance be called. The Citywide Fitness Center employee then began administering cardiopulmonary resuscitation (CPR). The only medical aid that the employee was able to administer was CPR since Citywide Fitness Center did not have an automated external defibrillator (AED) on the premises. The employee continually administered CPR until two emergency medical technicians (EMT's) arrived 12 minutes after being summoned. After assessing the situation and determining that Tommy was still not breathing, had no pulse and was unconscious, one EMT assumed the continued administration of CPR while the second EMT attached electrode pads from an AED that was one item of the EMT's emergency equipment. Following proper procedures the EMT administered a first shock, then a second shock, and then a third shock, in accordance with appropriate guidelines. The EMT was unable to discern a pulse. CPR was resumed for one minute. There still being no pulse, an additional set of three quick shocks was administered. Again no pulse was detected. Tommy was transported to the nearest emergency trauma center. While transporting Tommy to the trauma center, the EMTs continued with CPR and defibrillation in compliance with appropriate procedures. Upon arrival at the trauma center, Tommy's care was transferred to the on-duty physician. Subsequent attempts to revive Tommy failed.

An autopsy performed following Tommy's death indicated that he did not die from a heart attack but rather from sudden cardiac arrest (SCA). According to medical experts, the only accepted treatment to restore an effective heart rhythm in victims of sudden cardiac arrest is defibrillation using an automatic external defibrillator (AED). Cardiopulmonary resuscitation (CPR) alone is not effective in treating SCA.

Tommy's wife, Jitsy, is contemplating suing Citywide Fitness Center for negligence.

On behalf of Citywide Fitness Center, Mr. Beau Flex has hired your firm to provide an analysis of the situation. Initially, Mr. Flex provided your firm with copies of letters exchanged between himself and Chaise Lounge. In addition, Mr. Flex provided your firm with some data relating to age at death and blood cholesterol levels.

After reviewing the information provided by Mr. Flex a meeting was arranged by your firm to discuss this matter further with Mr. Flex. During that meeting Mr. Flex provided additional information including the following: Citywide Fitness Center Mission Statement and Corporate Vision; a magazine article from the "Journal of Medicine & Science in Sports"; a newspaper article from the "Hometown Tribune"; a copy of a Gould Court of Appeals Case (Fogel v. Get 'N Go Markets); a copy of Gould Health & Safety Code, §§ 204-205; and a copy of Gould Evidence Code, § 966.

Required

Your firm has been hired by Citywide Fitness Center to provide an analysis of the situation. Write a report using the report writing guide from the course website. Before beginning to write the report, what issues must be addressed in the case? Does your firm require additional information? If so, what is the additional information needed?

Your answer should include concepts 1, 4, and 5 from statistics, concepts 2 and 5 from business law, and material in ethics.

Citywide Fitness Center, Inc.
Corporate Headquarters
15821 Fitness Lane
Powerlift City, Gould 00050

October 12, 2008

Mr. Beau Flex
Director of Risk Management
Citywide Fitness Center, Inc.
1400 Treadmill Lane
Powerlift City, Gould 00049

Re: Automatic External Defibrillators

Dear Mr. Flex:

The Board of Directors for Citywide Fitness Center, Inc. has directed me to write this letter to you. The purpose of this letter is to request that you research several issues relating to Automatic External Defibrillators (AED's).

As you know, the Board has been struggling with the issue of whether to provide AED's at all of Citywide Fitness Center health facilities. Major questions have been raised as to the costs associated with the purchase of these machines. In order to facilitate further discussion by the Board, it is interested in your analysis of the following issues:

1. Costs associated with the AED – purchase cost, maintenance and testing costs, education and training costs, etc.;
2. The reliability of AED's;
3. Potential liability for coming to another's aid – the Good Samaritan issue;
4. Who will be trained to use the AED and what is the availability of the individual – must there be at least one employee on duty at all times who is trained in the use of the AED;
5. How fast must the response be in order to prevent significant neurological damage or death;
6. Is there an increased risk of liability for using an AED; (Would providing AED's create a higher duty on Citywide Fitness Center part by deciding to make an AED available even though not required by law - is there potentially more liability by having an AED and not being perfect with performance and availability than there is in not having one available at all - since currently there is no requirement to have an AED on the premises is it therefore most likely that no liability exists in not having one on the premises;
7. Any other issues you believe must be considered by the Board.

Your timely response to this inquiry is appreciated.

Sincerely,

Chaise Lounge

Chaise Lounge
Chairman of the Board
Citywide Fitness Center, Inc.

Department of Risk Management
Beau Flex, Director
Citywide Fitness Center, Inc.
1400 Treadmill Lane
Powerlift City, Gould 00049

November 1, 2008

Ms. Chaise Lounge
Chairperson of the Board
Citywide Fitness Center, Inc.
15821 Fitness Lane
Powerlift City, Gould 00050

Re: Automated External Defibrillators

Dear Chairperson Lounge:

In an effort to assist the Board of Directors in deciding whether or not to provide Automated External Defibrillators at all of its health facilities, an analysis of the numerous questions raised by the Board is hereby provided. I apologize for the length of this letter. However, the issues presented are complex and require, at times, lengthy analysis. The seven questions raised in your earlier letter are specifically addressed below.

Costs associated with the Automated External Defibrillator (AED) – purchase cost, maintenance and testing costs, education and training costs.

AED Cost - Originally, when AED units first became available the cost was approximately \$10,000 per unit. However, today, small, lightweight units cost less than \$3500. The units range in cost from between \$1500 to \$3500 per unit. The average cost of an AED unit is approximately \$2500.

Maintenance/Testing Costs - AEDs are complicated electronic devices and require regular maintenance and testing. AEDs are powered by batteries that have an approximate life span of two to five years depending on the type and capacity of the battery and patterns of usage of the AED. Batteries range in price with an average cost of approximately \$150 per battery. In light of the concerns of AED reliability, it is recommended that each AED unit have a spare battery backup. AED's also require use of disposable pads that deliver the electric shock to the victim. Generally, disposable pads have a shelf life of approximately 18 months. Each AED unit also requires at least one additional back-up set of pads. The pads must be replaced by the expiration date whether or not used. The cost of a single set of disposable pad is, on average, approximately \$65.

Some AED units can perform self-testing functions. Each AED has a maintenance and testing schedule recommended by its manufacturer. It is important that the Board understands that AEDs cannot just be purchased and hung on a wall and be forgotten until the need for the AED's use arises. The cost of routine testing of an AED unit would be negligible and can be included in an employee's daily responsibilities.

Education and Training Costs - Training classes are available from various organizations. Courses generally include cardiopulmonary resuscitation (CPR) and AED training. Courses differ in length from four to six hours. The cost of a training course ranges from \$40 to \$60 per participant. The American Heart Association recommends that those trained in the use of AEDs receive a refresher course every 6 months and complete retraining every two years. Currently all

employees are CPR certified and are retrained every two years. The additional cost of including initial AED training along with CPR certification is approximately \$5 per employee. The cost of a refresher course every six months for every employee would be approximately \$15 per employee. These costs, although approximate, are believed to be reliable estimates.

The reliability of AED's.

It is clear that AED's are of proven clinical benefit when used to defibrillate individuals experiencing sudden cardiac arrest. AED's are electronic devices and as such component failures do occur. It is estimated that in the last three years more than 100,000 AED's have been recalled. In 2006 there more than 30,000 AED's were recalled. A complete list detailing the reason for the recalls is available. In addition, data is available relating to the number of AED's subject to FDA recalls; annual AED advisory notices issued by the FDA; the number of AED malfunctions reported to the FDA; and a detailed listing of the specific AED models that have been the subject of recalls and the purpose for the recalls. If the Board desires a thorough analysis of the available data, it is recommended that the Board contact the renowned statistical consulting firm of Tontz De Leon and Associates.

Although AEDs have a distressing failure rate, the medical community stresses that the number of lives that are saved by having AED's readily available clearly outweigh the risks associated with the number of observed malfunctions.

Potential liability for coming to another's aid – the Good Samaritan issue.

The Good Samaritan statute is a statute which exempts from liability a person who voluntarily renders aid to an injured person but who negligently causes injury while rendering the aid. The Gould state legislature is currently considering adopting a statute that specifically exempts owners of health studios and their boards of directors, managers and employees from civil damages resulting from any act or omission in rendering emergency care using or attempting to use an AED. It is important to note, however, that one is not exempt from liability for civil damages when the actions of the one rendering aid are deemed to be grossly negligent or willful or wanton misconduct.

Who will be trained to use the AED and what is the availability of the individual – must there be at least one employee on duty at all times who is trained in the use of the AED.

The American Heart Association notes that Emergency Medical Response is more effective if multiple certified personnel are present during an incident. Ambulances and paramedics can have variable response times. Conducting CPR as part of the initial response is very rigorous and can cause significant fatigue with just one rescuer. In addition, should there be a need to use an AED at least two certified personnel should be available to render aid, one individual administering CPA and the other individual operating the AED.

How fast must the response be in order to prevent significant neurological damage or death.

According to the American Heart Association, defibrillation within the first minute of sudden cardiac arrest can save the lives of up to 90% of its victims. The sooner the shock is delivered, the better. With each minute of delay until defibrillation, the survival rate drops by 10%. If a sudden cardiac arrest victim is not defibrillated within 10 minutes, his or her chance of survival is less than 2%.

Is there an increased risk of liability for using an AED? (Would providing AED's create a higher duty on Citywide Fitness Center part by deciding to make an AED available even though not required by law - is there potentially more liability by having an AED and not being perfect with performance and availability than there is in not having one available at all - since currently there is no requirement to have an AED on the premises is it therefore most likely that no liability exists in not having one on the premises?)

In deciding whether to implement or not to implement a program that affects our members, it is certainly appropriate for the Board of Directors to consider and evaluate the relative risks and benefits that flow from the decision. Presently, there are no know court cases where judgments have been rendered against the user of an AED based upon negligent or improper use of the AED. The few cases that have been filed based upon liability for the negligent operation of AED's have apparently been difficult to win because it was not easy to establish that the operator caused harm to the victim in attempting to resuscitate the victim who, absent the use of the AED, was dead or close to death when the AED was used.

However, the lifesaving benefits of AED's, the cost of the units and program implementation and the lack of treatment alternatives provide strong arguments for concluding that a duty may be owed to members, guests, etc. who may suffer sudden cardiac arrest while present at one of our facilities. It may very well be that the failure to purchase and or use AED's might subject the Corporation to an increased risk of liability in this rapidly evolving area.

For further clarification of the issues relating to legal liability and the decision to provide or not provide AED's at the Corporation's health facilities, it is recommended that the Board contact Ms. Elle Woods, in-house counsel.

Other issues.

There are several other issues that the Board may wish to consider. The decision to purchase AED's must also consider that a comprehensive policy must be developed to deal with all aspects of AED's including: annual review of records of inspection, testing and maintenance; dissemination to employees of information about the AED policy; location and storage of AED's; review of requests for the purchase of AED's, replacement batteries, pads and other supplies; etc. The Board should also consider the probability that a member will suffer sudden cardiac death in light of the population age group of our members. Employee receptivity to AED training must also be considered. Lastly, the Board must consider the extent of exposure to liability on the part of the Corporation if AED's are not provided in each of its facilities.

The information provided herein is based upon extensive research of available materials that deal with AED's. The sources of the information will be gladly furnished to the Board upon request.

Sincerely,

Beau Flex

Beau Flex
Director of Risk Management

Citywide Fitness Center

Mission Statement

The Mission of Citywide Fitness Center and Health Spa is to promote the health, well-being and fitness skills of its members by providing the best and most up to date fitness equipment and fitness knowledge for strength training, cardiovascular training, and health and nutrition programs. Through a passionate and first class Team, we strive to inspire our members to achieve their greatest individual potential.

Core Values

PROVIDING THE HIGHEST QUALITY FITNESS EQUIPMENT AND PROGRAMS

Passion for Fitness

We appreciate the health benefits that derive from being physically fit. We strive to improve each of our members' quality of life.

Standards of Quality

We have high standards and our goal is to provide the highest quality of fitness equipment and programs we possibly can.

SATISFYING AND DELIGHTING OUR MEMBERS

Our Members

Our members are our most important stakeholders. They are the lifeblood of our business. We can satisfy the ends of our other stakeholders only by satisfying our members first.

Extraordinary Member Service

We go the extra mile to satisfy and delight our members. We strive to meet or exceed their expectations on every visit to our facilities. We are aware that by doing so, our members will become advocates for programs. Advocates do more than just use our facilities, they talk about Citywide Fitness Center to their friends and others. We want to serve our members completely, effectively, warmly and with a smile.

Education

We can generate greater appreciation and loyalty from our members by providing educational programs on fitness and related issues including health, nutrition and the environment.

Meaningful Value

We offer value to our members by providing them with the highest quality of fitness equipment and health programs, caring service at competitive fees. We constantly strive to improve the value of our business to our members.

Inviting and Safe Environment

We create a fitness environment that is inviting fun and safe. We want our gym's to become meeting places where our members meet their friends and make new ones. We want our members to feel and be safe during every visit.

Citywide Fitness Center Corporate Vision

Our corporate vision is:

1. To develop a professional fitness Team. Each member of the Team will be well educated in health and fitness programs and issues; loyal to the team and our gym members; and oriented to achieve personal and gym members' success.
2. To provide a health and fitness service and message to our members and the community. We will strive to provide up-to-date programs based upon the latest research in the industry; pro-active services for our members; and a message of good health and fitness to the community through a professional marketing, advertising and branding strategy.
3. To be a recognized leader in the fitness industry. Based upon sound medical information and technology, we will strive to be at the forefront in promoting health and fitness for our entire community.
4. To provide opportunities for all Team members to further individual career goals. The promotion of internal growth and development of increased responsibilities for the purpose of promoting individual Team members is desirable.
5. To provide a safe environment for Team and gym members. All Team members will be trained in the proper use of all fitness equipment. In addition, all Team members will be trained to provide assistance in the event of any medical emergency.

CITYWIDE FITNESS CENTER, INC. LIBRARY

Article appearing in the Journal of Medicine & Science in Sports - January 5, 2008

NCAA Committee Considers Mandatory Placement of AED's at Division I Sporting Venues

The NCAA Committee on Competitive Safeguards and Medical Aspects of Sports is currently considering a proposal that would mandate the placement of at least one automatic external defibrillator (AED) at all Division I sporting venues.

The Committee has recently completed a survey of head athletic trainers at all 326 Division I NCAA universities. Surveys were completed and returned by 244 institutions. There were 35 cases of AED use for sudden cardiac arrest with 77% (27/35) occurring in older non-students, 14% (5/35) in intercollegiate athletes, and 3% (1/35) in a non-intercollegiate athlete. The immediate resuscitation rate was 54% (19/35). A shock was delivered in 21 cases with a resuscitation rate of 71% (15/21). None of the intercollegiate athletes were successfully resuscitated. The average cost per AED was \$2460. In a ten year model (expected useful life of an AED), the cost per life immediately resuscitated was \$52,400, and the estimated cost per life-year gained ranged from \$10,500 to \$22,500.

Every year hundreds of thousands of Americans die from cardiac incidents. Medical experts indicate that the key to survival is the timely administration of first aid including cardiopulmonary resuscitation (CPR) and, if necessary, the restoration of an effective heart rhythm using a medical device called an automatic external defibrillator (AED).

An AED is used to deliver an electrical shock to the heart of a victim of sudden cardiac arrest (SCA). SCA is not a heart attack (medically referred to as a myocardial infarction). A heart attack occurs when a blockage in a blood vessel interrupts the flow of oxygen-rich blood to the heart, causing heart muscle to die. However, SCA, also referred to as sudden cardiac death

(SCD), occurs when the heart's electrical system malfunctions resulting in electrical impulses of the heart suddenly becoming chaotic, causing the heart to abruptly stop pumping blood effectively to the rest of the body. The victim becomes unresponsive, loses consciousness, has no pulse and stops breathing. The only accepted treatment to restore an effective heart rhythm is defibrillation. Cardiopulmonary resuscitation (CPR) alone is not effective in treating SCA.

Defibrillation is the technique involving the administration of an electric shock that can restore the heart's normal rhythm. While this procedure historically has been available only from paramedics or in hospital settings, the development of a portable computer (AED) that can analyze a person's heart rhythm has enabled lay people, coaches and sports-medicine staff members to be trained to perform this procedure. These portable devices, about the size of a lightweight laptop computer, are increasingly more practical to have available.

SCA is responsible for approximately one-half of all heart disease deaths. Every day in the United States nearly 1,000 individuals suffer a cardiac arrest, and only about 50 will survive. In many instances death results merely because lifesaving defibrillation does not reach the victim in time. Paramedic life-saving attempts in cases of cardiac arrest are rarely successful. The time it takes for the emergency squad to respond to an emergency call is usually greater than ten minutes. Those precious minutes are the critical difference between life and death. Statistics indicate that the success rate of restoring normal heart rhythm through CPR techniques is less than 5 percent. Combining CPR with defibrillation within the first minute after arrest increases the success rate to 95 percent. However, each minute of delay in administering lifesaving defibrillation decreases an SCA victim's chance of survival by 10 percent. After a delay of ten minutes, more than 90 percent of SCA victims will die if their heart has not been defibrillated. Communities that have initiated

Public Access Defibrillator programs that place AEDs in ambulances, police cars, and other public locations are experiencing SCA survival as high as 43 percent, compared with large cities with no such programs where the survival rate is as low as 1 percent.

Although the value of having AED's readily available appears obvious, concerns regarding liability, rapid availability of emergency

personnel, training, cardiac risk of the population and maintenance of the defibrillators are concerns that have been raised regarding the need for having AEDs at athletic venues.

Although the cost of AED's is declining, most still range between \$2,000 and \$4,000, the statistics speak for themselves and the cost of saving one life arguably justifies the purchase price of a unit.

Article Appearing in the Community Newspaper

HOMETOWN TRIBUNE/ October 31, 2008

**ASSEMBLY CONSIDERS REQUIRING
AEDS AT HEALTH CLUBS**

Hometown, Gould. Last week, the Gould Legislative Assembly met to consider legislation that would require all health clubs and spas in the state to have an automatic external defibrillator (AED) on their premises. Sudden cardiac arrest is the cause of death in more than 250,000 people in the United States each year. More than 90 percent of the victims die when defibrillation is not prompt. It is estimated that as many as 50 percent of cardiac arrest victims could be saved if they were defibrillated within seven minutes or less. However, medical experts caution that any such rescue must be swift if the victim is to survive neurologically intact.

Evidence of the effectiveness of AEDs is seen from the results of placing 49 AEDs in the two international airports located in metropolitan Hometown. During the first 12 months after the 49 AED's were placed in the two airports, 14 cardiac arrests occurred (12 going into

ventricular fibrillation). Nine of the victims were revived with an AED with no neurological damage. Further, in nine of the incidents, airport travelers – not staff personnel- successfully operated the devices.

How likely is it for a member of a health club to suffer cardiac arrest in the health club facility? The answer to this question is not precisely known. However, in one database of more than 2.9 million commercial health club members, 71 deaths were reported in a two-year period or about 1 death per 2.6 million workout sessions.

In a survey of 65 randomly selected Gould health clubs, 17 percent reported a club member having a sudden cardiac death or heart attack during a five-year period. It is important to note that the demographics of health club membership are rapidly changing. More than half of all fitness centers now have a membership base of people 35 years and older. In addition, the fastest growing membership segment is in the 55 and older age group.

**FERN A. FOGEL, Appellee-Plaintiff, vs. GET 'N GO MARKETS, INC.,
Appellant-Defendant**

COURT OF APPEALS OF GOULD, FIRST DISTRICT

70 Gou.App.3d 1048, 23 P.3d 1480

July 4, 2006, Decided

PRIOR HISTORY: APPEAL FROM THE VANDENBURGH SUPERIOR COURT. The Honorable Minerva McGonagal, Judge.

DISPOSITION: Affirmed.

JUDGES: RAVENCLAW, Judge. HUFFLEPUFF, J., and SLYTHERIN, J., concur.

OPINION BY: RAVENCLAW

OPINION:

Get 'n Go Markets, Inc. appeals the trial court judge's denial of its motion for a directed verdict and motion for judgment n.o.v. We affirm.

Issues

The dispositive issue to our review of this appeal is whether Get 'n Go Markets, Inc. owed a duty to Fogel and if so, whether that duty was breached.

Facts

On the morning of April 1, 2000, Fern A. Fogel received extensive lacerations as the result of walking into and through a large glass panel which formed the front of the building in which Get 'n Go Markets, Inc., operated a supermarket. Fogel sued Get 'n Go Markets for damages in the Gould state court where the cause was tried and a jury verdict rendered in favor of plaintiff. Defendant filed a motion for a directed verdict at the close of all the evidence, and also filed a motion for judgment n.o.v

At this point and before proceeding to consideration of the issues presented by this appeal, we indulge in a resume of the pertinent facts. Get 'n Go Market is a self-service grocery store in Johnson County, Gould. The building faces east, and the front or east portion thereof is constructed of four transparent plate glass panels, each about ten feet square. The two center panels were in fact sliding doors but were no different in appearance from the two stationary panels. The

sliding doors were closed on the morning in question. The only other front entrance to the store was through a door located in the north portion of the front of the building. This door was perpendicular to the glass front and was behind a brick wall which ran parallel to the front of the store and extended out in front of the door approximately one foot. A soft drink vending machine was also in front of the north door, and the wall and vending machine caused the north door to be hidden from the view of a person approaching the front of the building, until the person was approximately six feet from the glass front. There were no signs or markings of any kind on the glass panels on the morning of the litigated occurrence and the glass was spotlessly clean.

Plaintiff stopped her automobile with the front facing the vending machine. She got out of the automobile eighteen or twenty feet from the front of the store and proceeded toward the building intending to enter the store not to make a purchase but to use its restroom facilities. From the testimony, the jury was warranted in finding that as plaintiff approached the store she was walking at a normal gait and with her head up; that although she was looking ahead, she did not see the glass or its bordering metal frame and saw no reflections from lights or identifying marks of any kind on the glass. She did not realize until she crashed through the glass, that what she thought was the entrance to the store was in fact a solid plate glass panel.

Defendant asserts that plaintiff failed to make a submissible case and that the court erred in failing to grant its motion for a directed verdict and motion for judgment n.o.v.

I. NEGLIGENCE

In order to prevail in a claim for negligence, the plaintiff must establish several points, referred to in the law as a prima facie case. The prima facie case for negligence requires that the plaintiff prove: (1) that a duty was owed to the plaintiff; (2) that defendant breached that duty; (3) that the breach actually (in fact) and legally (proximately) caused; (4) plaintiff to suffer damage.

Defendant contends that under all of the evidence favorable to plaintiff and giving to plaintiff the benefit of all reasonable inferences, it conclusively appears that defendant did not owe a duty to plaintiff since the evidence is clear that the plaintiff was merely on the premises for the sole purpose of using the defendant's restroom facilities and not to purchase any item(s) from the store. In addition, defendant contends that a sign was posted on the door of both the men's and women's restroom conspicuously stating "RESTROOM

FACILITIES RESTRICTED TO USE BY PATRONS ONLY." The defendant further contends that if a duty was owed, defendant did not breach that duty; that defendant was not guilty of any actionable negligence, and the issue of liability should not have been presented to the jury.

A. DUTY

We first address the argument that no duty was owed to the plaintiff. In our state the question of the existence of a duty is one for the court to determine. In making that determination Gould courts analyze three factors in determining whether to impose a duty at common law: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. *Northern Gould Public Service Co. v. Patil*, 1 Gou.3d 462, 466 (Gou. 2000). We consider each of these factors in turn.

1. THE RELATIONSHIP BETWEEN THE PLAINTIFF AND DEFENDANT

The defendant contends that there was no relationship between it and the plaintiff in as much as the plaintiff was not a customer nor prospective customer but was a trespasser. The evidence is undisputed that the sole purpose for plaintiff's intent to enter upon defendant's premises was to use the restroom facilities.

A duty of reasonable care is "not, of course, owed to the world at large," but generally arises out of a relationship between the parties." *Seamus v. Lavender*, 104 Gou.2d 929, 931 (Gou. 1991). Fogel was not a customer of Get 'n Go and there is no direct contractual relationship between Fogel and Get 'n Go. However, the absence of a direct contractual relationship does not mean that no duty exists.

2. THE REASONABLE FORESEEABILITY OF HARM TO THE PLAINTIFF

The most important of these considerations in establishing duty is foreseeability of harm to the plaintiff. As a general principal, a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." (citation omitted). In the instant case patrons of the store are clearly foreseeable. In addition, defendant's posting of the sign on the restroom doors restricting use to "PATRONS ONLY" clearly demonstrates that plaintiff's presence on the property was foreseeable. Otherwise, what purpose of the defendant is to be served by the posting of such a notice?

The designation of an individual as a business "invitee" or "licensee" or "trespasser" was abolished by our Supreme Court in the case of *Rowling v. Christianson*, 120 Gou. 2d 180 (1998). Thus, the existence or non-existence of the duty imposed on the proprietor of a business establishment toward individuals who may come upon his premises is not contingent on whether the individual is classified as an invitee, licensee or trespasser. Following *Rowling*, a business proprietor is under a duty to use due care to keep in a reasonably safe condition the premises where individuals may be expected to come and go; if there is a dangerous place on the premises, the business owner must safeguard those who come thereon by warning them of the condition and risk involved. "The true ground of liability is the proprietor's superior knowledge of the dangerous condition over individuals who may

come upon the property and his failure to give warning of the risk." *Id.* at 187.

3. PUBLIC POLICY CONCERNS

There are numerous points that are considered in the area of public policy concerns. Among the points are: the moral blame attached to the defendant's conduct; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, the policy of preventing future harm; and the availability, cost and prevalence of insurance for the risk involved.

Although a business owner is not an insurer against all accidents which may befall him upon the premises, in the instant case we believe that the burden placed upon the defendant by imposing a duty to exercise care is slight. In addition, we believe that the policy of preventing future harm and the availability of insurance to cover the risk involved in this case require a finding that Get 'n Go owed a duty to Fogel. The trial court was not in error in instructing the jury as to that point.

B. Breach of Duty

Defendant argues that even if this court were to find that defendant owed a duty to Fogel it nevertheless is not liable for Fogel's injuries because it did not breach that duty.

Courts approach the question of breach of duty in several ways. However, these various approaches generally attempt to measure three things: (1) the probability of the accident's occurring; (2) the magnitude or gravity of the injury suffered by the plaintiff if an accident occurs; and (3) the burden placed on the defendant to take adequate precautions to avert the accident.

Judge Learned Hand, in the case of *United States v. Carroll Towing Co.*, 159 F.2d 169 (Second Circuit, 1947), attempted to give content to a relatively simple concept of determining whether a defendant had breached a duty - failed to exercise ordinary care - owed to the plaintiff. Hand's attempt to explain the notion of ordinary care using these three criteria was stated "in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P:

i.e., whether $B < PL$.”

In economic terms multiplying the cost of an accident if it occurs by the probability of its occurrence provides a measure of the benefit than can be anticipated from incurring the costs necessary to prevent the accident (the benefit of not having to pay out tort damages outweigh the costs incurred to prevent the accident from occurring). The cost of prevention is what Hand meant by the “burden of adequate precautions” against the accident. It may be the cost of making the activity safer, or the benefit forgone by curtailing or eliminating the activity. If the cost of safety measures or curtailment - whichever cost is lower - exceeds the benefit in accident avoidance to be gained by incurring that cost, an enterprise would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability. If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, the enterprise is better off if those costs are incurred and the accident averted, and thus the enterprise is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments.

It is important to note that Hand’s evaluation of the breach of duty in algebraic terms was not intended to convey the notion that the three factors are easily quantifiable and produce precise results. What can be said about the process is this: as the probability for injury and or the severity of the injury increases, the burden imposed or the cost that must be incurred by the defendant, to avoid being deemed as having breached a duty owed to the plaintiff, also increases.

1. PROBABILITY OF THE ACCIDENT OCCURRING

Apparently, the Gould Supreme Court has not had occasion to deal with a plate glass case, but other jurisdictions have. Cases where plaintiff recovered for injuries resulting from contact with plate glass walls or doors are numerous (citations omitted). In addition, the question of liability for

injuries resulting from contact with plate glass walls or doors is the subject of an Annotation in the American Law Reports (citation omitted).

Here, plaintiff, a citizen of our neighboring state of Grace returning home from a vacation, was a complete stranger to the defendant's premises and had never seen the market before. The invisibility of transparent glass, by its very nature, is likely to deceive the most prudent person, particularly where, as here, the construction was designed to give the market an open front appearance. Furthermore, as noted the north entrance door was obscured from view by the wall and vending machine and was not readily discernible until one approaching the glass front was within six feet thereof. The jury was not required to speculate as to the dangerous and unsafe condition created by the glass front. There was evidence to that effect. A former employee of defendant testified that during a period of eight months he observed four or five persons come in contact with the glass front and 'bounce off'. A safety engineer testified it was a hazardous arrangement, and detailed the methods that could have been employed to correct the lack of visibility of the glass.

2. THE MAGNITUDE OF INJURY

There is little doubt that one may suffer injury from accidental contact with a plate glass wall or door. The extent of that injury may certainly vary in range from no injury at all to slight to moderate to severe life threatening injury and even death. Our prior reference to cases where plaintiff recovered for injuries resulting from contact with plate glass walls or doors cases or recovery and the American Law Reports on the subject confirm this belief.

3. THE BURDEN OF ADEQUATE PRECAUTIONS

To be sure, transparent plate glass is recognized as a suitable and safe material for use in construction of buildings, indeed, it is common knowledge that such glass is used rather extensively in commercial buildings. However, it seems to us that the number of reported cases, some of which are cited infra, involving personal injuries from bodily contact with transparent glass doors and walls is some indication that with the advantages that may be derived from such construction are concomitant risks which the proprietor must assume. However, in the present case, the danger incident to the use of

transparent plate glass may be significantly lessened by the placement of a sticker on the glass that would alert individuals to the presence of the glass. Interference with the architectural aesthetics of construction using transparent plate glass is so slight that it is outweighed by the danger to be anticipated from a failure to use it.

Thus, given the relatively high probability of injury and the significant severity of that injury when compared to the nominal cost to the defendant of adequate precautions to prevent the injury, we find no error in the jury's conclusion that Get 'n Go breached the duty it owed to

Fogel.

Without further discussion, we conclude and hold that there was substantial evidence from which the jury could find: (1) that the glass front constituted a dangerous and unsafe condition; (2) that plaintiff was exercising ordinary care for his own safety; (3) that there was a duty on the part of defendant to warn its patrons of the condition and (4) that defendant breached its duty.

The judgment is affirmed.

Gould Health & Safety Code

Division 301 - Disease Prevention & Health Promotion

Part 1 - Chronic Disease

Chapter 12 - Cardiovascular Disease

§ 204. Each year, sudden cardiac arrest, also known as sudden cardiac death, is responsible for the death of more than 250,000 residents of the United States. Medical research indicates that the key to survival of sudden cardiac arrest is the timely implementation of a “chain of survival” including cardiopulmonary resuscitation (CPR) and the restoration of an effective heart rhythm by defibrillation. Recent technological breakthroughs have resulted in the availability of a portable lifesaving device called an “automated external defibrillator” or “AED.” In order to promote the health and safety of its citizens the following statutes are enacted.

§ 205

(a) Commencing one year after the enactment of this section:

(1) Every health studio, as defined in subdivision (h) shall acquire an automated external defibrillator (AED).

(2) Every health studio, as defined in subdivision (h), shall maintain, and train personnel in the use of an automated external defibrillator acquired pursuant to this section, and shall not be liable for civil damages resulting from the use or attempted use of an automatic external defibrillator as provided in this section.

(b) An employee of a health studio who renders emergency care or treatment is not liable for civil damages resulting from the use or attempted use of an automatic external defibrillator, except in the case of personal injury or wrongful death that results from gross negligence or willful or wanton misconduct on the part of the person who uses, attempts to use an automatic external defibrillator to render emergency care or treatment.

(c) When an employee uses or attempts to use, an automatic external defibrillator consistent with the requirements of this section to render emergency care or treatment, the members of the board of directors of the facility shall not be liable for civil damages resulting from any act or omission in rendering the emergency care or treatment, including the use or attempted use of an automatic external defibrillator.

(d) When an employee of a health studio renders emergency care or treatment using an automatic external defibrillator, the owners, managers, employees, or otherwise responsible authorities of the facility shall not be liable for civil damages resulting from any act or omission in the course of rendering that emergency care or treatment.

(h) For purposes of this section, "health studio" means any facility permitting the use of its facilities and equipment or access to its facilities and equipment, to individuals or groups for physical exercise, body building, reducing, figure development, fitness training, or any other similar purpose, on a membership basis. "Health studio" does not include any hotel or similar business that offers fitness facilities to its registered guests for a fee or as part of the hotel charges.

Gould Evidence Code

Division 10. Burden of Proof; Burden of Producing Evidence; Presumptions and Inferences

Chapter 6. Presumptions and Inferences

Article 8. Presumptions Affecting the Burden of Proof

§ 966. Failure to exercise due care

(a) The failure of a person to exercise due care is presumed if:

- (1) The person violated a statute, ordinance, or regulation of a public entity;
- (2) The violation resulted in death or injury to person or property;
- (3) The death or injury to person or property resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent, and
- (4) The person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.