A_____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION __

24 HOUR FITNESS, USA, INC. and 24 HOUR FITNESS WORLDWIDE, INC.,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN MATEO,
Respondent,

LOUISE AUSTIN, individually and as Guardian ad Litem for MAXWELL AUSTIN and CHARLES AUSTIN; HARRIET AUSTIN,
Real Parties in Interest.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO • CASE NO. CIV531455
STEVEN L. DYLINA, JUDGE • TELEPHONE NO. (650) 261-5107

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

(SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER)

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24 HOUR FITNESS, USA, INC. AND 24 HOUR FITNESS WORLDWIDE, INC.

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** p	Court of Appeal Case Number: A_____
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)* Eric S. Boorstin Bar No.: 253724 Horvitz & Levy LLP 15760 Ventura Boulevard, 18th Floor Encino, California 91436-3000 TELEPHONE NO. (818) 995-0800 FAX NO. *(Optional)* (818) 995-3157 E-MAIL ADDRESS *(Optional)* eboorstin@horvitzlevy.com ATTORNEY FOR *(Name)*: Petitioners 24 Hour Fitness etc., et al.	Superior Court Case Number: CIV531455 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER 24 Hour Fitness, USA, Inc. et al. RESPONDENT / REAL PARTY IN INTEREST Louise Austin, etc. et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: 24 Hour Fitness, USA, Inc. and 24 Hour Fitness Worldwide, Inc.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1) 24 Hour Fitness United States, Inc.	Petitioner 24 Hour Fitness USA, Inc. is a wholly-owned subsidiary of 24 Hour Fitness United States, Inc., which is a wholly-owned subsidiary of petitioner 24 Hour Fitness Worldwide, Inc., which is a wholly-owned subsidiary of 24 Hour Holdings II LLC, which is a wholly-owned subsidiary of 24 Hour Holdings I Corp.
(2) 24 Hour Holdings II LLC	
(3) 24 Hour Holdings I Corp.	
(4)	

☐ Continued on attachment 2

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 26, 2016

ERIC S. BOORSTIN

(TYPE OR PRINT NAME)

▶ Eric Boorstin

(SIGNATURE OF PARTY OR ATTORNEY)

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IN THE COURT OF APPEAL
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v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN MATEO,
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PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

INTRODUCTION: WHY A WRIT SHOULD ISSUE

This lawsuit alleges that 24 Hour Fitness, USA, Inc. and 24 Hour Fitness Worldwide, Inc. (collectively, 24 Hour Fitness) negligently responded to a medical emergency involving Terrance

Austin (Terry),[1] who died from a cardiac arrest after exercising at a 24 Hour Fitness facility. This petition seeks writ relief from the trial court's order erroneously denying 24 Hour Fitness's motion for summary judgment, or in the alternative, summary adjudication, on plaintiffs' claims for negligence. The case raises important issues regarding whether a business can be grossly negligent by failing to dial 911 on behalf of a patron with an elevated heart rate who has the ability to dial 911 but chooses not to do so and who does not request that a call be made on his behalf.

Terry had previously visited a cardiologist for chest pain and episodes of rapid heart rate. The cardiologist advised Terry not to exercise pending completion of a cardiac stress test, but he did so anyway. On the day of the incident, Larry Katsanes, a 24 Hour Fitness trainer, saw Terry resting on some lockers and sweating. Terry told Katsanes that his heart rate was elevated.

Katsanes asked coworkers to escort Terry to a break room where it was cooler. When getting up, Terry mistakenly grabbed another patron's cell phone and water bottle items. This possible confusion prompted Katsanes to ask another trainer, Cynthia Cooley, to call 911 so a medical professional could evaluate Terry, but Katsanes did not believe Terry's condition was life threatening.

Cooley talked with Terry in the break room, but decided not to call 911 based on how he looked and interacted with her, and because two coworkers were with him. Those employees spoke with

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[1] We will refer to Terry Austin and Louise Austin by their first names for the sake of clarity. (See *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, 777, fn. 1.)

Terry for 5 to 10 minutes, could see Terry was lucid and breathing without difficulty, determined Terry was just overheated due to his workout, and gave him ice and water. While in the break room, Terry was texting with his wife, Louise, and told the employees that he had arranged for her to pick him up.

Terry had been in the break room no more than 15 minutes when Louise arrived and called 911. Terry collapsed three minutes later. 24 Hour Fitness employees summoned a doctor who was exercising at the facility, placed another call to 911, retrieved an automated external defibrillator, and performed CPR until the paramedics arrived less than a minute after Terry stopped breathing. Unfortunately, Terry died in the hospital five days later.

Plaintiffs (Louise and her children) allege that 24 Hour Fitness is liable for negligence, primarily because it did not call 911 immediately after one of its employees suggested it. Plaintiffs also allege that 24 Hour Fitness is liable because it did not recognize the signs of Terry's heart attack, did not conduct appropriate medical screening, and did not properly train its employees to respond to emergencies.

24 Hour Fitness moved for summary judgment/adjudication because the liability release Terry executed barred claims of ordinary negligence and its conduct did not rise to the level of gross negligence as a matter of law. The trial court denied the motion, ruling there was a triable issue regarding whether 24 Hour Fitness was grossly negligent in not calling 911 sooner.

The trial court's order presents issues of general importance to the legal community. Courts routinely enforce fitness center

releases, making the continued viability of those releases of vital importance to every fitness center in California. Claims based on *gross* negligence cannot be released, so the Supreme Court has "emphasize[d] the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 767 (*Santa Barbara*).) If courts do not grant summary judgment on released claims where the facts cannot amount to gross negligence, a party's ability to relinquish claims willingly in exchange for access to services at a reasonable cost will be undermined.

This petition presents the important issue of whether a business is required to call 911 for a patron who is capable of calling 911 himself yet has chosen not to do so. If it is gross negligence not to call 911 any time one person among many thinks it might be warranted, businesses will be obligated to place numerous 911 calls on behalf of patrons who have decided not to call 911. This risks increasing 911 wait times for people who more clearly need and want the immediate assistance. Requiring a business to call 911 when a capable individual chooses not to call for himself also risks imposing unwanted and substantial medical costs on a person who did not want to incur them.

Here, the undisputed facts warranted summary judgment because they do not amount to gross negligence, i.e., the want of even a scant amount of care or an extreme departure from the ordinary standard of conduct. Four 24 Hour Fitness employees spoke with Terry and assessed his health, and none of them

believed his condition was life threatening. Terry himself chose not to call 911, even though he alone knew of his cardiac risk. 24 Hour Fitness employees remained with Terry to assist his recovery from perceived heat exhaustion, and they were able to help him immediately after it became clear he needed emergency care.

Plaintiffs' alternative theories of gross negligence and arguments that the release was not enforceable to bar claims of ordinary negligence (none of which were adopted by the trial court) fail for the reasons discussed in this petition.

In sum, 24 Hour Fitness is not liable for Terry's death as a matter of law. To avoid burdening the trial court with a resource-consuming, wholly unnecessary trial, a writ should issue directing the trial court to vacate its order denying 24 Hour Fitness's motion for summary judgment/adjudication, and to enter a new order granting the motion.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

Beneficial interest of petitioners; capacities of respondent and real parties in interest

1. Petitioners 24 Hour Fitness USA, Inc. and 24 Hour Fitness Worldwide, Inc. are defendants in the underlying action, *Austin v. 24 Hour Fitness, USA, Inc.*, San Mateo County Superior Court case number CIV531455. The Superior Court for the County of San Mateo is named as the respondent in this writ proceeding.

The real parties in interest are plaintiffs Louise Austin, individually and as guardian ad litem for Maxwell Austin and Charles Austin, and Harriet Austin.

Authenticity of exhibits

2. The exhibits accompanying this petition, labeled numerically and consecutively paginated, are true and correct copies of original documents on file in the trial court, except for Exhibit 17, which is a true and correct copy of the reporter's transcript of the June 8, 2016, hearing on 24 Hour Fitness's motion for summary judgment/adjudication. All exhibits are incorporated by references as if fully set forth in this petition.

Timeliness of the petition

3. This petition seeks writ relief from an order entered on June 22, 2016, denying 24 Hour Fitness's motion for summary judgment, or in the alternative, summary adjudication. (Vol. 3, exh. 19, pp. 661-664.) Notice of entry of the order was served on June 24, 2016, by fax, email, and mail. (Vol. 3, exh. 19, pp. 660, 666.)

4. A writ petition challenging an order denying a motion for summary judgment and summary adjudication must be filed within 20 days after service of written notice of entry of that order, which is extended 5 days if the notice was served by mail within California or 2 court days if the notice was served by fax or email. (Code Civ. Proc., § 437c, subd. (m)(1); Cal. Rules of Court, rule

2.251(h)(2).) The court may also grant an additional extension of that deadline of up to 10 days. (Code Civ. Proc., § 437c, subd. (m)(1).) On June 27, 2016, respondent court granted petitioners' application for a 10 day extension of their deadline for seeking writ relief. (Vol. 3, exh. 20, pp. 667-668.)

5. The deadline for filing this writ petition therefore expires no sooner than July 26, 2016, which is 32 days after the June 24, 2016, fax/email service of notice of entry of the order denying petitioners' motion for summary judgment/adjudication. Thus, this petition is timely.

Chronology of pertinent events

The operative pleadings

6. Plaintiff Louise Austin is the surviving spouse of decedent Terry Austin. (Vol. 1, exh. 1, p. 13.) Plaintiffs Maxwell Austin, Charles Austin, and Harriet Austin are the surviving children of Terry Austin. (*Ibid*.)

7. Plaintiffs' first amended complaint seeks to recover compensatory damages against 24 Hour Fitness based on general negligence. (Vol. 1, exh. 1, pp. 8-15.)

8. Plaintiffs alleged that Terry experienced physical distress while exercising at a 24 Hour Fitness facility, and that defendants, who were aware of Terry's distress, failed to reasonably and timely provide emergency care, contact emergency services, or otherwise assist or seek assistance for Terry. (Vol. 1, exh. 1, p. 14.)

Plaintiffs alleged that as a result of defendants' negligence, Terry did not receive timely medical care that probably would have allowed him to avoid or survive the cardiac arrest that occurred at the facility and led to his death five days later. (*Ibid.*)

9. More specifically, plaintiffs alleged that, although Terry had a high pulse rate, nausea, shortness of breath, and an inability to ambulate normally, defendants did not summon emergency medical care until after Louise arrived and called 911, approximately 75 minutes or more after the defendants knew or should have known that Terry was experiencing a severe medical emergency. Plaintiffs also alleged that defendants did not adequately train their employees to handle medical emergencies. (Vol. 1, exh. 1, p. 15.)

10. 24 Hour Fitness answered plaintiffs' first amended complaint, generally denying the allegations and asserting affirmative defenses. (Vol. 1, exh. 2, pp. 16-21.) The 10th affirmative defense asserted by 24 Hour Fitness stated: "Decedent executed a Club Membership Agreement which contains an exculpatory provision therein. Pursuant to such provision, Decedent agreed to waive any and all claims for ordinary negligence and bodily injury against this responding Defendant or any 24 Hour Fitness related entity." (Vol. 1, exh. 2, p. 18.)

24 Hour Fitness's Motion for Summary Judgment/Adjudication

11. 24 Hour Fitness moved for summary judgment, or in the alternative, summary adjudication, of the following issues:

a. "Whether Plaintiffs' sole cause of action for general negligence is barred by the liability release contained in Decedent Terry Austin's Membership Agreement"; and

b. "Whether 24 Hour Fitness' Tenth Affirmative Defense based on the assumption of risk and liability release in Decedent Terry Austin's Membership Agreement applies to defeat Plaintiffs' claims for ordinary negligence against 24 Hour Fitness." (Vol. 1, exh. 3, p. 23.)

12. 24 Hour Fitness argued that: (1) Terry expressly released 24 Hour Fitness from liability (vol. 1, exh. 3, p. 32); (2) the release is enforceable to bar claims for ordinary negligence (vol. 1, exh. 3, pp. 33-34); (3) the alleged incident falls within the scope of the release (vol. 1, exh. 3, pp. 34-35); and (4) 24 Hour Fitness's alleged conduct did not amount to gross negligence as a matter of law (vol. 1, exh. 3, pp. 36-39).

13. 24 Hour Fitness filed a separate statement showing, inter alia, that the following facts were undisputed:

a. Terry first became a member of 24 Hour Fitness in 2012 (vol. 1, exh. 4, p. 43; see vol. 1, exh. 5, p. 91);

b. On July 18, 2014 (about a week before the incident), Terry was examined by a cardiologist for evaluation of his complaints of chest pain and episodes of rapid heart rate. (Vol. 1,

exh. 4, p. 47; see vol. 2, exhs. 8, p. 252, 10, pp. 460-461.) Terry told the cardiologist that he had three episodes of elevated heart rate while he was exercising on a treadmill. (Vol. 1, exh. 4, p. 47; see vol. 2, exh. 8, p. 252; vol. 2, exh. 10, p. 461.) The cardiologist expressed concern about this, referred Terry for a cardiac stress test, and cautioned Terry not to exercise pending completion of the stress test and review of the results. (Vol. 1, exh. 4, p. 47; see vol. 2, exhs. 8, p. 253, 10, pp. 463, 466.) Terry failed to have the stress test done before the incident occurred (vol. 1, exh. 4, p. 47; see vol. 2, exh. 8, p. 253);

c. Terry signed another membership agreement with 24 Hour Fitness on the date of incident: July 25, 2014 (vol. 1, exh. 4, p. 43; see vol. 1, exh. 5, pp. 91, 109, 113-116);

d. The first page of Terry's membership agreement disclosed that the agreement contained a liability release:

> **ACKNOWLEDGMENT OF AGREEMENT TERMS – BUYER RIGHT TO CANCEL – E-SIGNATURE – AGREEMENT TERM**
> **THIS AGREEMENT INCLUDES A RELEASE OF LIABILITY AND ASSUMPTION OF RISK PROVISION IN SECTION 10.**

(vol. 1, exh. 4, p. 44; see vol. 1, exh. 5, p. 113);

e. The liability release stated, in pertinent part:

> Using the 24 Hour Fitness USA, Inc. (24 Hour) facilities involves the risk of injury to you or your guest, whether you or someone else causes it. Specific risks vary from one activity to another and the risks range from minor injuries to major injuries, such as catastrophic injuries including death. **In consideration of your participation in the**

> **activities offered by 24 Hour, <u>you understand and voluntarily accept this risk and agree that 24 Hour</u>, its officers, directors, employees, volunteers, agents and independent contractors <u>will not be liable for any injury</u>, including, without limitation, personal, bodily, or mental injury, economic loss or any damage to you, your spouse, guests, unborn child, or relatives resulting from the negligence of 24 Hour or anyone on 24 Hour's behalf of anyone using the Facilities <u>whether related to exercise or not</u>**. . . . You further agree to hold harmless, defend and indemnify 24 Hour from all liability, damages, defense costs, including attorneys' fees, or from any other costs, incurred in connection with claims for bodily injury, wrongful death or property damage brought by you, your guests, or minors, even if 24 Hour Fitness was negligent.

(vol. 1, exh. 4, pp. 44-45; see vol. 1, exh. 5, p. 121);

f. 24 Hour Fitness member Stephen Hollman first noticed Terry when Hollman was getting ready for his 5:00 p.m. personal training session. (Vol. 1, exh. 4, p. 46; see vol. 1, exh. 5, pp. 128-130.) At that time, Terry was leaning over some lockers propped up on his elbows and forearms with his head up and his shirt soaked wet with what Hollman assumed was perspiration (vol. 1, exh. 4, p. 46; see vol. 1, exh. 5, pp. 128-135);

g. About one to two minutes into Hollman's personal training session, he noticed that Terry's posture had changed such that he was no longer resting on his elbows and forearms; Hollman brought this to the attention of his personal trainer, Larry Katsanes, who immediately halted training with Hollman and went

over to speak with Terry (vol. 1, exh. 4, pp. 46, 48; see vol. 1, exh. 5, pp. 136-139, 203);

h. Terry told Katsanes, "I can't seem to get my heart rate down." (Vol. 1, exh. 4, p. 48; see vol. 1, exh. 5, p. 203.) Katsanes immediately brought an exercise bench over for Terry to sit on. (Vol. 1, exh. 4, p. 48; see vol. 1, exh. 5, pp. 139-140, 203.) Terry appeared to be breathing without difficulty and was coherent. (Vol. 1, exh. 4, p. 49; see vol. 1, exh. 5, p. 203.) Katsanes believed that Terry was experiencing heat exhaustion since Terry was not complaining of chest pain, shortness of breath, or numbness (vol. 1, exh. 4, pp. 48-49; see vol. 1, exh. 5, p. 203);

i. A short time later, Katsanes decided that the employee break room would be a better place for Terry to rest because it was the coolest place in the gym. (Vol. 1, exh. 4, p. 49; see vol. 1, exh. 5, p. 203.) As Terry started walking to the employee break room, he mistakenly took Hollman's nearby cell phone and water bottle. (Vol. 1, exh. 4, p. 49; see vol. 1, exh. 5, pp. 143, 203.) When Hollman informed Terry that the phone and water bottle were his, Terry apologized in a lucid and polite manner, without slurring, and returned the objects (vol. 1, exh. 4, p. 49; see vol. 1, exh. 5, pp. 143-144, 203);

j. Katsanes asked 24 Hour Fitness employees to escort Terry to the break room and stay with him while he cooled down. (Vol. 1, exh. 4, p. 50; see vol. 1, exh. 5, p. 203.) As Terry walked to the break room, he did not require any assistance and did not lose his balance. (*Ibid.*) Because Katsanes thought that Terry's actions in grabbing someone else's cell phone and water bottle

showed possible confusion, Katsanes asked another trainer, Cynthia Cooley, to call 911 so that a medical professional could evaluate Terry. (*Ibid.*) At that time, it did not appear to Katsanes that Terry's condition was life threatening (*ibid.*);

k. Terry arrived at the break room at about 5:05 p.m. (Vol. 1, exh. 4, pp. 50; see vol. 1, exh. 5, p. 207; vol. 2, exh. 8, p. 255). 24 Hour Fitness employees Jorge Rosales (an Assistant Fitness Manager) and Will Hobson were in the employee break room with him. (Vol. 1, exh. 4, p. 51; see vol. 1, exh. 5, p. 207.)

l. Terry looked pale, so Rosales asked Terry how he was doing. (Vol. 1, exh. 4, p. 51; see vol. 1, exh. 5, p. 207.) Terry responded by saying that he was feeling a little dizzy and explained that his heart rate had become elevated while exercising. (*Ibid.*) Rosales asked Terry what exercise he was doing, and Terry responded he was doing "interval training" on a treadmill, in which he would run as fast as he could for five minutes, then slow down until he recovered, then run for another five minutes as fast as he could. (*Ibid.*) Terry also said it was his first day back after taking a break from exercising. (*Ibid.*) Rosales said that the exercise Terry was doing was probably too much for him at that point. (*Ibid.*) Terry mentioned that his wife would be upset with him for working out because she told him not to. (*Ibid.*) During their conversation, Rosales and Hobson gave Terry a bag of ice to put on the back of his neck to help him cool down along with a glass of water (*ibid.*);

m. Rosales's conversation with Terry lasted five to ten minutes. (Vol. 1, exh. 4, p. 52; see vol. 1, exh. 5, p. 207.) At all times during their discussion, Terry spoke with a clear voice, sat

upright in a chair without assistance, was lucid and did not have any trouble saying words or expressing thoughts. (*Ibid.*) Terry was breathing without difficulty and did not have any shortness of breath. (*Ibid.*) While in the employee break room, Terry started to feel better. (Vol. 1, exh. 4, p. 53; see vol. 1, exh. 5, p. 208.) It appeared to Rosales that Terry was just overheated due to his workout and needed time to cool down (*ibid*);

n. Terry exchanged a series of text messages with his wife during his conversation with Rosales and Hobson. (Vol. 1, exh. 4, pp. 53, 54; see vol. 1, exh. 5, pp. 92-98, 119, 208.) Louise offered to pick Terry up from the gym, but he texted back that he just needed to recover. (Vol. 1, exh. 4, p. 55; see vol. 1, exh. 5, pp. 97, 125.) A few minutes later, Terry texted Louise and asked her to come pick him up. (*Ibid.*) Terry informed her that he was in the trainer's office, and clarified which 24 Hour Fitness he was visiting (*ibid.*);

o. Terry informed Rosales and Hobson that his wife was coming to pick him up. (Vol. 1, exh. 4, p. 55; see vol. 1, exh. 5, pp. 97, 125.) Rosales and Hobson remained with Terry while Terry waited for his wife to arrive.[2] (Vol. 1, exh. 4, p. 53; see vol. 1, exh. 5,

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[2] Plaintiffs purported to dispute this fact because, according to Louise, at the moment she arrived no one was *in* the break room with Terry. (Vol. 2, exh. 8, p. 257.) But also according to Louise, she was met immediately *outside* the break room upon her arrival by a 24 Hour Fitness employee who suggested that she call 911. (Vol. 2, exh. 9, p. 272; see vol. 3, exh. 10, p. 475.) The natural inference is that this employee had been in the break room with Terry immediately before Louise's arrival and had exited to greet her.

p. 208.) Terry did not ask Rosales or Hobson for medical assistance, nor did he ask them to call 911, nor did he call 911 himself (*ibid.*);

p. It took Louise five minutes or less to reach the gym after changing her clothes. (Vol. 1, exh. 4, p. 56; see vol. 1, exh. 5, pp. 98-99.) Upon reaching the break room, Louise called 911 at between 5:18 p.m. and 5:19 p.m. (Vol. 1, exh. 4, p. 56; see vol. 1, exh. 5, pp. 100, 167.) Terry had been in the break room between 10 to 15 minutes before Louise arrived and called 911 (vol. 1, exh. 4, p. 56; see vol. 1, exh. 5, pp. 100, 167, 207);

q. When Louise arrived, Terry was awake, breathing, alert and answering Louise's questions (which Louise relayed for the 911 dispatcher). (Vol. 1, exh. 4, p. 57; see vol. 1, exh. 5, pp. 101-102.) Terry was sitting in a chair next to a table. (Vol. 1, exh. 4, p. 57; see vol. 1, exh. 5, p. 101.) Louise relayed to the 911 dispatcher that Terry told her he was "a little bit hyperventilating" and having difficulty speaking between breaths. (Vol. 1, exh. 4, p. 57; see vol. 1, exh. 5, p. 194.) Terry said his heart rate had been up for an hour and a quarter (*ibid.*);

r. Terry collapsed about three minutes into the call. (Vol. 1, exh. 4, p. 58; see vol. 1, exh. 5, pp. 194-195.) Rosales and Hobson caught Terry as he was falling and placed Terry on his back on the floor. (Vol. 1, exh. 4, p. 58; see vol. 1, exh. 5, p. 208.) Terry then started having what appeared to be a seizure (vol. 1, exh. 4, p. 58; see vol. 1, exh. 5, p. 103);

s. As soon as Terry collapsed, a 24 Hour Fitness employee announced a "Code Blue," which initiated the procedure for emergency medical response. (Vol. 1, exh. 4, pp. 58-59; see

vol. 1, exh. 5, pp. 204, 208, 211.) This included calling 911 and making an emergency announcement that asked for any physicians or emergency personnel to report to the scene where the event was occurring. (*Ibid*.) Hobson also called 911 on his personal cell phone (vol. 1, exh. 4, p. 59; see vol. 1, exh. 5, p. 200);

t. Immediately after the Code Blue procedure was initiated, Katsanes brought an automated external defibrillator (AED) from its cabinet near the front of the gym to the break room. (Vol. 1, exh. 4, p. 59; see vol. 1, exh. 5, pp. 204, 208, 211.) Dr. Lorin Kreitzer, a 24 Hour Fitness member, arrived at the break room shortly after the Code Blue announcement (vol. 1, exh. 4, p. 65; vol. 1, exh. 5, p. 150);

u. Dr. Kreitzer observed that Terry was breathing on his own, and that his eyes were open and he was looking around. (Vol. 1, exh. 4, p. 61; see vol. 1, exh. 5, pp. 153, 155-156, 159.) (Dr. Kreitzer later explained that a person who is breathing is not in cardiac arrest.) (Vol. 1, exh. 4, p. 61; see vol. 1, exh. 5, p. 153.) Dr. Kreitzer got on the phone with the 911 dispatcher and identified himself as a doctor. (Vol. 1, exh. 4, pp. 60-61; see vol. 1, exh. 5, pp. 151-152);

v. A moment after informing the 911 dispatcher that Terry was breathing, Dr. Kreitzer informed the dispatcher that he believed Terry had just stopped breathing. (Vol. 1, exh. 4, p. 62; see vol. 1, exh. 5, p. 197.) Evan McDaniel, a 24 Hour Fitness trainer certified in CPR and former EMT, began chest compressions. (Vol. 1, exh. 4, p. 62; see vol. 1, exh. 5, pp. 157-158, 211.) According

to Dr. Kreitzer, McDaniel appeared to be doing the chest compressions properly (vol. 1, exh. 4, p. 62; see vol. 1, exh. 5, p. 160);

w. Within 33 seconds of Dr. Kreitzer informing the dispatcher that Terry had stopped breathing, the San Mateo County Fire Department paramedics arrived at the break room. (Vol. 1, exh. 4, p. 62, exh. 5, p. 197.) The paramedics took over the scene, continued CPR, assessed Terry, and initiated cardiac defibrillation. (Vol. 1, exh. 4, p. 63; see vol. 1, exh. 5, pp. 174, 180-181, 183.) Terry had a return of spontaneous circulation, meaning he was pumping blood on his own (vol. 1, exh. 4, p. 64; see vol. 1, exh. 5, p. 177); and

x. Terry was taken to the hospital and arrived there with a pulse and heart rate. (Vol. 1, exh. 4, p. 64; see vol. 1, exh. 5, pp. 184-186.) Unfortunately, Terry did not regain consciousness and died five days later. (See vol. 1, exh. 5, pp. 106-107.)

14. Plaintiffs opposed the motion. Plaintiffs did not dispute most of the facts relied upon by 24 Hour Fitness, although plaintiffs did object to defendants' characterization of some of the facts and file evidentiary objections.[3] (See vol. 2, exh. 8, pp. 249-265; vol. 3, exh. 11, pp. 553-555.) Plaintiffs also asserted additional facts, including:

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[3] Based on testimony from Louise, plaintiffs purported to dispute that Terry had been in the break room for only between 10 to 15 minutes before Louise arrived and called. (Vol. 2, exh. 8, p. 259.) However, the court excluded that portion of Louise's declaration on grounds of hearsay, lack of foundation, speculation, and conflict with undisputed facts establishing the true timeline. (Vol. 3, exh. 19, p. 664 [sustaining defendants' evidentiary objection number 1], exh. 17, p. 624.)

a. The membership agreement stated that Terry could rescind and cancel the agreement within five business days after signing it (vol. 2, exh. 9, p. 267; see vol. 1, exh. 5, pp. 113, 116);

b. The facility was air-conditioned and very cool inside (vol. 2, exh. 9, p. 268; see vol. 2, exh. 10, pp. 337, 344);

c. At 5:08 p.m. or 5:09 p.m., Katsanes had determined that 911 should be called for Terry. (Vol. 1, exh. 9, p. 270; see vol. 2, exh. 10, p. 326.) Katsanes asked another trainer, Cynthia Cooley, to "Call 911 and get in touch with his wife and next of kin." (Vol. 2, exh. 9, p. 270; see vol. 2, exh. 10, pp. 326, 346.) Katsanes did not himself call 911 because he wanted to continue working with his own client, Hollman (vol. 2, exh. 9, p. 271; see vol. 2, exh. 10, pp. 327);

d. Cooley did not call 911 or ask anyone else to do so.[4] (vol. 2, exh. 9, p. 271; see vol. 2, exh. 10, pp. 305, 311);

e. When Louise arrived at 5:16 p.m., a 24 Hour Fitness employee was standing in front of the closed door to the break room. He said, "[b]efore you go in, I think you should call 911." (Vol. 2, exh. 9, p. 272; see vol. 3, exh. 10, p. 475.) Katsanes also told Louise to call 911 for Terry. (*Ibid*.) The first call to 911 was made by Louise between 5:18 and 5:19 p.m. (vol. 2, exh. 9, p. 273);

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[4] According to Cooley, Katsanes had asked her to make sure Terry's wife was coming, and if not, to call 911. (Vol. 2, exh. 10, p. 311.) Cooley checked on Terry in the break room, and did not call 911 because of how Terry looked and how he was interacting with her, and because Rosales and Hobson were sitting with him. (Vol. 2, exh. 10, pp. 304-305.)

f. When Louise first saw Terry in the break room, he was alone. (Vol. 2, exh. 9, p. 273; see vol. 3, exh. 10, p. 475.) It was clear to Louise that Terry was not well. (Vol. 2, exh. 9, p. 274; see vol. 2, exh. 10, pp. 403-404.) Terry told Louise that his heart rate had been elevated for one hour and fifteen minutes (vol. 2, exh. 9, p. 274; see vol. 2, exh. 10, p. 402);

g. San Mateo Fire department paramedics arrived at the facility at 5:22 p.m., which was about four minutes after Louise called 911. (Vol. 2, exh. 9, p. 276.) If a 24 Hour Fitness employee had called 911 when asked to do so by Katsanes at 5:08 p.m. or 5:09 p.m., the San Mateo paramedics would have arrived by 5:13 p.m., which would have been about 12 to 13 minutes before Terry stopped breathing (*ibid.*);

h. Dr. Anthony Abbott, an expert in fitness instruction and emergency medical response retained by plaintiffs, opined that 24 Hour Fitness's conduct breached the standard of care in four respects that contributed to Terry's death: (1) it failed to conduct appropriate medical screening during the membership enrollment process; (2) it failed to recognize the signs and symptoms of Terry's heart attack; (3) it failed to call 911 even though a 24 Hour Fitness employee asked that 911 be called; and (4) it failed to adequately train its employees to handle emergency situations (vol. 2, exh. 9, p. 277; see vol. 3, exh. 10, pp. 479-480); and

i. According to Dr. Abbott, fitness instructors should recognize the signs of a person who is experiencing a heart attack. (Vol. 2, exh. 9, p. 279; see vol. 3, exh. 10, p. 483.) The symptoms of a heart attack frequently include an elevated heart rate that does not

subside, confusion, dizziness, anxiousness, flushed skin, fatigue, and profuse sweating. (*Ibid.*) During a heart attack, victims are commonly reluctant to admit that they are having a problem. (Vol. 2, exh. 9, p. 280.) Terry was experiencing some or all of these symptoms of serious cardiovascular complications, yet 24 Hour Fitness employees failed to recognize that Terry was experiencing serious cardiovascular complications (vol. 2, exh. 9, pp. 279-280; see vol. 3, exh. 10, p. 483).

15. Plaintiffs argued that the court should deny 24 Hour Fitness's motion because: (a) 24 Hour Fitness's release was unenforceable as against public policy to the extent it negated a duty to call 911 (vol. 2, exh. 7, p. 225-233); (b) 24 Hour Fitness's conduct amounted to gross negligence, which is beyond the scope of a liability release (vol. 2, exh. 7, pp. 233-239); and (c) Terry was denied the opportunity to rescind the agreement containing the release (vol. 2, exh. 7, pp. 239-240).

16. 24 Hour Fitness filed a reply in support of the motion, arguing that its agreement was enforceable, and that there was no substantial evidence of any gross negligence that could overcome Terry's express release of its liability. (Vol. 3, exh. 13, pp. 559-575.) 24 Hour Fitness also filed written objections to plaintiffs' evidence. (Vol. 3, exh. 17, pp. 623-638.)

17. On June 8, 2016, the court heard argument on the motion. (Vol. 3, exh. 18, pp. 639-659.)

18. On June 22, 2016, the court entered its final order denying 24 Hour Fitness's motion for summary judgment/adjudication in its entirety. (Vol. 3, exh. 19, pp. 661-664.)

The court ruled that "there is a triable issue as to whether defendants' failure to call 911—even after defendants' employees became aware that Terry Austin may have needed emergency medical-services—rises to the level of gross negligence." (Vol. 3, exh. 19, p. 662.) The court sustained some of plaintiffs' evidentiary objections and some of 24 Hour Fitness's evidentiary objections. (Vol. 3, exh. 19, pp. 663-664.) These evidentiary rulings are noted where relevant.

Basis for relief and absence of other remedies.

19. The court erred by denying 24 Hour Fitness's motion for summary judgment, or in the alternative, summary adjudication. The order is not appealable. (See Code Civ. Proc., § 904.1, subd. (a).) It would be futile to challenge the denial of summary judgment after a trial and adverse verdict. (See *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 836.) Accordingly, petitioners' only immediate and realistic remedy is to seek writ relief from this court, as contemplated by the statute governing their motion. (Code Civ. Proc., § 437c, subd. (m)(1); see Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶¶ 15:106-15:106.1, p. 15-54.)

20. "Where the trial court's denial of a motion for summary judgment would result in a trial on nonactionable claims, a writ of mandate will issue." (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 25; accord, *Hill Bros. Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1005; *Knowles v. Superior Court*

(2004) 118 Cal.App.4th 1290, 1294-1295; see also *United States Borax & Chemical Corp. v. Superior Court* (1985) 167 Cal.App.3d 406, 409 ["mandate is appropriate when a trial court's denial of a summary judgment motion is wrong as a matter of law"].)

21. Unless this court intervenes by issuing an appropriate writ, 24 Hour Fitness will be forced to spend the time and resources necessary to prepare for trial. (See *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320 ["[I]f the court permits this case to go to trial [by denying summary judgment] based on erroneous rulings of law, substantial trial expenses will be needlessly incurred. Thus, we conclude that this is an appropriate matter to be considered on a petition for writ of mandate."]; *Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 468 ["One purpose of summary judgment is to provide a speedy legal resolution of uncontested facts; '. . . a denial . . . when it should as a matter of law have been granted should open the door to an equally speedy review of the matter' "].) Likewise, the judicial system will be forced to needlessly expend its limited resources in this litigation.

22. An appeal following trial and entry of a judgment in this action would be neither a speedy nor an adequate legal remedy. (See *Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 Cal.App.4th 633, 643 [issuing a writ following the denial of summary judgment because "Vineyard has no plain speedy and adequate remedy; it is headed for trial"].)

23. This court should spare the parties and the trial court the time and expense of further unnecessary proceedings by issuing a peremptory or alternative writ directing the trial court (a) to

vacate and set aside its order denying the petitioners' motion for summary judgment/adjudication, and (b) to enter a new order granting summary judgment (or at least summary adjudication).

24. As explained below, writ relief is particularly appropriate here because this petition presents significant legal issues regarding the enforceability of releases executed by patrons of fitness centers in California, and a business's responsibility to summon emergency services for a patron who is capable of calling 911 himself yet has chosen not to.

25. The issues presented by this petition are important and warrant writ review. (*Los Angeles Gay and Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 300 ["review [by writ] is appropriate where the order raises an issue of first impression of general importance to the legal community"]; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1448 ["Writ review is appropriate where the petition presents a significant issue of first impression"];*Toshiba America Electronic Components, Inc. v. Superior Court* (2004) 124 Cal.App.4th 762, 767 ["We believe these issues are sufficiently novel and important to justify review by extraordinary writ"].)

PRAYER

WHEREFORE, petitioners 24 Hour Fitness USA, Inc. and 24 Hour Fitness Worldwide, Inc. pray that this court:

1. Issue a peremptory writ of mandate and/or prohibition in the first instance (Code Civ. Proc., § 1088) directing respondent superior court to set aside and vacate its June 22, 2016 order denying 24 Hour Fitness's motion for summary judgment, or in the alternative, summary adjudication; or

2. Should it deem such action necessary and appropriate, issue an alternative writ directing respondent superior court either to grant the relief specified in paragraph 1 of this prayer, or to show cause why it should not be ordered to do so, and upon the return to the alternative writ, if any, issue a peremptory writ as set forth in paragraph 1 of this prayer; and

3. Issue a temporary stay while this court considers this writ petition; and

4. Award petitioners their costs of suit herein; and

5. Grant such other relief as may be just and proper.

July 26, 2016

HORVITZ & LEVY LLP
PRINDLE, AMARO, GOETZ, HILLYARD, BARNES & REINHOLTZ LLP

By: 

Eric S. Boorstin

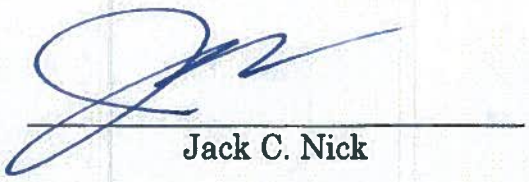
Attorneys for Petitioners
24 HOUR FITNESS, USA, INC. and 24 HOUR FITNESS WORLDWIDE, INC.

VERIFICATION

I, Jack C. Nick, declare as follows:

I am one of the attorneys representing petitioners 24 Hour Fitness, USA, Inc. and 24 Hour Fitness Worldwide, Inc., in proceedings in the Superior Court of the State of California for San Mateo County captioned *Austin v. 24 Hour Fitness, USA, Inc.*, case number CIV531455, out of which this Petition for Writ of Mandate and/or Prohibition, or Other Appropriate Relief, arises. I have read the foregoing petition and know its contents. The facts alleged in the petition are personally known to me, and I know these facts as stated therein to be true. Because of my familiarity with the records, files, and proceedings described herein, I, rather than my clients, verify this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on July 26, 2016, at Long Beach, California.



Jack C. Nick

MEMORANDUM OF POINTS AND AUTHORITIES

THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT, OR AT LEAST SUMMARY ADJUDICATION, BECAUSE PLAINTIFFS' CLAIMS ARE BARRED AS A MATTER OF LAW.

A. Terry executed a liability release that barred plaintiffs' claims of ordinary negligence.

1. Fitness center contracts that release claims of ordinary negligence are enforceable.

A contractual release of liability bars claims for ordinary negligence, but does not bar claims for gross negligence (*Santa Barbara*, *supra*, 41 Cal.4th at p. 750) or for violations of statutes (*Capri v. L.A. Fitness Intern., LLC* (2006) 136 Cal.App.4th 1078, 1087).

Liability releases in agreements governing access to fitness facilities are routinely enforced. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638 [liability release barred ordinary negligence claim arising from an exercise machine's sudden failure]; *Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1351, 1355, 1357-1358 [liability release barred claims based on falling television]; *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738 [liability release barred claim arising from trainer's weightlifting instructions]; *Sanchez v. Bally's Total Fitness*

Corp. (1998) 68 Cal.App.4th 62, 69 [liability release barred claim arising from an exercise class].)

Here, it is undisputed that the membership agreement Terry executed on the day of the incident contained a provision releasing 24 Hour Fitness from liability for negligence. (Vol. 2, exh. 8, pp. 250-251.) Terry's previous membership agreement also contained a similar release provision. (Vol. 3, exh. 15, p. 601.)

Plaintiffs did not argue that 24 Hour Fitness's alleged conduct fell outside of the release language. Instead, plaintiffs argued that the release was unenforceable as against public policy because all businesses owe a duty to call 911 to assist patrons in distress, and 24 Hour Fitness's release purported to "negate" that duty. (Vol. 1, exh. 7, pp. 233-239.)

Plaintiffs' argument missed the mark. To determine whether a release is enforceable to bar a claim of ordinary negligence or whether it is void as against public policy, California law "focuses upon the overall transaction"; this means the relevant inquiry concerns the contractual interaction between the parties and the nature of the services provided rather than "the degree or extent of the misconduct at issue." (*Santa Barbara*, *supra*, 41 Cal.4th at p. 762; see *Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92, 98-101; *Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 670 ["The trial court apparently believed its duty was to decide whether the YMCA's release should be enforced to bar the specific negligence claims raised by Gavin and his parents . . . . This was error."].) Thus, the alleged misconduct at issue—the

failure to call 911—is not relevant when determining whether the liability release is void as a matter of public policy.

Because sports and recreation programs "do not concern necessary services, and hence do not transcend the realm of purely private matters and implicate the 'public interest' under *Tunkl*," agreements releasing liability for future ordinary negligence in this context are enforceable. (*Santa Barbara*, *supra*, 41 Cal.4th at p. 759 & fn. 12 [collecting cases upholding releases of liability concerning ordinary negligence related to gymnasiums and fitness clubs]; see, *ante*, pp. 34-35.) Plaintiffs did not attempt to distinguish the authorities upholding the enforceability of recreational or fitness center releases because they cannot.

In sum, Terry released 24 Hour Fitness from any liability for ordinary negligence, and that release is enforceable to bar plaintiffs' negligence claims in this litigation.

2. 24 Hour Fitness did not violate any statutes.

Plaintiffs have implied that 24 Hour Fitness violated Health & Safety Code section 104113, subdivision (e)(2)(E), by failing to call 911 promptly, therefore making its conduct not subject to the liability release. (See vol. 2, exh. 7, pp. 228, 234.) Any such argument is meritless.

Health & Safety Code section 104113, subdivision (e)(2)(E), requires health studios to ensure they have an emergency plan that includes "immediate notification of 911 and trained office personnel at the start of automatic external defibrillator procedures."

Here, it is undisputed that 911 had already been notified, both by Louise and a 24 Hour Fitness employee, at the time that AED procedures were started. (See vol. 2, exh. 8, pp. 260-261.) It is undisputed that a 24 Hour Fitness employee certified in CPR and use of an AED immediately began CPR when Terry stopped breathing. (See vol. 2, exh. 8, p. 263.) Plaintiffs did not contend that 24 Hour Fitness lacked an emergency plan, and indeed 24 Hour Fitness initiated its "Code Blue" procedure as soon as Terry collapsed. (Vol. 1, exhs. 4, pp. 58-59, 5, pp. 204, 208, 211.) Thus, there is no statutory violation that can render 24 Hour Fitness's release unenforceable.

3. The membership agreement's cancellation clause does not void the liability release.

Plaintiffs briefly argued that Terry did not agree to the release of liability because he had the right to cancel his membership agreement at the time he was incapacitated. (Vol. 2, exh. 7, pp. 245-246.) This argument is unavailing.

There was no evidence that Terry intended to cancel his membership agreement; in fact, the only evidence is to the contrary. Terry entered into a membership agreement containing a liability release in 2012, and he again executed a membership agreement containing a substantially identical release on the date of the incident. (Vol. 2, exh. 8, pp. 250-251; vol. 3, exh. 15, p. 601.)

Even if Terry had decided to cancel the 2014 agreement, 24 Hour Fitness would have been entitled to retain Terry's payment

for any services he received prior to cancellation. (See Civ. Code, § 1812.85, subd. (b)(5); see also Civ. Code, § 1691 [rescission of a contract requires giving notice and restoring to the other party everything of value which was received].) Because the liability release was part of what 24 Hour Fitness received in exchange for allowing Terry to access its services, 24 Hour Fitness would be entitled to retain that benefit even if Terry had decided to cancel the agreement going forward. Moreover, even if the 2014 agreement had been cancelled, an extension of the 2012 agreement (including the liability release) would have been implied by the parties' conduct. (See *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.* (1987) 194 Cal.App.3d 81, 91 [extension of agreement past expiration date may be implied by parties' conduct].)

Plaintiffs' cancellation argument relied solely on *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461 (*Rodriguez*), in which the court declined to enforce the arbitration clause in an agreement to provide medical services where the patient died within the statutory rescission period applicable to such agreements. But *Rodriguez* is distinguishable because it turned on "an individual's constitutional right to a jury trial." (*Id.* at p. 1470.) That concern is not applicable here because summary judgment does not infringe the right to a jury trial.

Moreover, in *Rodriguez* there were "earmarks" that the plaintiff may not have knowingly and voluntarily waived her right to a jury trial because she "was presented with the Arbitration Agreement only four days before her scheduled surgery under circumstances in which she could have believed she must sign the

agreement in order to have [her doctor] perform the surgery." (*Id.* at p. 1469.) Here, there is no evidence of similar compulsion to sign the membership agreements.

Rodriguez's analysis of a medical services contract is also irrelevant because liability releases are generally not enforceable at all in the medical services context. (See *Santa Barbara*, *supra*, 41 Cal.4th at p. 773, fn. 46.) Thus, a court's decision not to enforce a particular contractual provision in the medical services context does not suggest the same provision is unenforceable in the sports or recreation context.

B. The trial court erred by ruling there was a triable issue of whether 24 Hour Fitness's conduct rose to the level of gross negligence.

1. The gross negligence standard, plaintiffs' theories of gross negligence, and the court's ruling.

"Gross negligence" is either a "want of even scant care or an extreme departure from the ordinary standard of conduct." (*Santa Barbara*, *supra*, 41 Cal.4th at p. 754, internal quotation marks omitted.) By contrast, ordinary negligence is "a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." (*Id.* at pp. 753-754.) Although claims for gross negligence may involve triable issues of fact, the Supreme Court has

"emphasize[d] the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances." (*Id.* at p. 767.)

Plaintiffs primarily argued that 24 Hour Fitness's conduct amounted to gross negligence because 24 Hour Fitness did not call 911 immediately after a 24 Hour Fitness employee suggested that 911 be called. (Vol. 2, exh. 7, pp. 244-245.) The trial court's sole reason for denying summary judgment was whether the failure to immediately call 911 created a triable issue of fact as to gross negligence. (Vol. 3, exh. 19, p. 662.)

Plaintiffs also argued that 24 Hour Fitness acted with gross negligence based on its alleged failure to: (a) recognize the signs and symptoms of Terry's heart attack; (b) conduct appropriate medical screening during the membership enrollment process; and (c) provide adequate training to handle emergency situations. (Vol. 2, exhs. 7, pp. 244-245, 9, p. 276; see vol. 3, exh. 10, pp. 479-480.) The court did not base its order denying summary judgment on any of these circumstances. (Vol. 3, exh. 19, pp. 661-664.)

As a matter law, none of these alleged circumstances can support a finding of gross negligence.

2. Declining to call 911 immediately was not gross negligence as a matter of law.

To determine when conduct constitutes gross negligence, the factfinder must not look at a particular action in isolation; rather, it

must determine whether the " 'overall circumstances' " constitute gross negligence. (*People v. Von Staden* (1987) 195 Cal.App.3d 1423, 1429; see *Olea v. Southern Pac. Co.* (1969) 272 Cal.App.2d 261, 264 [in assessing whether conduct is willful or wanton, the "entire course of conduct" is considered]; *Laird v. T.W. Mather, Inc.* (1958) 51 Cal.2d 210, 215 [whether conduct exhibits due care is assessed "as a whole in the light of all the circumstances"].) Thus, the relevant question is whether the overall circumstances demonstrate either a "want of even scant care" or an "extreme departure from the ordinary standard of conduct." (See *Santa Barbara*, *supra*, 41 Cal.4th at p. 754, internal quotation marks omitted.)

Here, viewing its conduct as a whole, the undisputed facts show that 24 Hour Fitness exhibited more than a scant degree of care, and its actions were not far outside the realm of ordinary responses to the situation it confronted.

Katsanes spoke with Terry upon discerning that he might need help. (Vol. 1, exh. 4, pp. 46, 48; see vol. 1, exh. 5, pp. 136-139, 203.) Katsanes believed that Terry was experiencing heat exhaustion, so he asked coworkers to escort Terry to the break room and stay with him while he cooled down. (Vol. 1, exh. 4, pp. 49-50; see vol. 1, exh. 5, p. 203.) Those employees stayed in the break room with Terry at least 5 or 10 minutes, talked with Terry about how he was doing, determined that he was overheated and just needed time to rest, and got him water and a bag of ice to help him cool down. (Vol. 1, exh. 4, pp. 51-53; see vol. 1, exh. 5, pp. 207-208.)

Terry was lucid and coherent. (Vol. 1, exh. 4, pp. 49, 52; see vol. 1, exh. 5, pp. 143-144, 203, 207.) Terry arranged for his wife to pick him up, did not call for medical help, and did not ask for any assistance beyond what 24 Hour Fitness was providing. (Vol. 1, exh. 4, p. 55; see vol. 1, exh. 5, pp. 97, 125.)

Katsanes also did not believe Terry's condition was life threatening, yet he asked Cooley to call 911. (Vol. 1, exh. 4, p. 50; see vol. 1, exh. 5, p. 203.) Cooley, in turn, assessed Terry and decided not to call 911 because of how Terry looked and how he was interacting with her, and because other employees were with him. (Vol. 2, exh. 10, p. 305.) Upon Louise's arrival, no more than 15 minutes after Terry went to the break room, Katsanes suggested that she call 911. (Vol. 1, exhs. 4, p. 56, 5, pp. 100, 167, 207; vol. 2, exh. 9, p. 272; see vol. 2, exh. 10, p. 475.)

When Terry ultimately did collapse, 24 Hour Fitness employees were there to catch him, summon a doctor, place another call to 911, retrieve an AED, and perform CPR until the paramedics arrived minutes later. (Vol. 1, exhs. 4, pp. 58, 62, 5, pp. 157-158, 208, 211.)

When viewed as a whole, these undisputed facts show that 24 Hour Fitness employees exhibited a high degree of care for Terry's safety, and certainly more than scant care, even though they unfortunately could not prevent Terry's death. (See *Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 359-360 [no gross negligence where fire department used an outdated surf rescue technique and refused to let bystanders attempt to rescue]; see also *Sanchez v. Vild* (9th Cir. 1989) 891 F.2d 240, 242 ["difference of

medical opinion" does not amount to "deliberate indifference to [plaintiff's] serious medical needs"].) The record simply does not support plaintiffs' assertion that 24 Hour Fitness was "standing idly by and watching its patron die." (Vol. 2, exh. 7, p. 241.)

Under plaintiffs' failure-to-call theory, even if all four observers who interacted with the injured party and the injured party himself do not perceive a life-threatening medical emergency, the fact that one observer believes 911 should be called means that it can be *gross* negligence not to do so. Allowing plaintiffs to proceed to trial on this theory would be poor public policy for a number of reasons.

First, allowing gross negligence to be based on a business not calling 911 when a single observer out of many thinks it is warranted, despite the injured party himself *not* thinking it warranted, would interfere with the operation of the 911 system to the detriment of those who clearly need immediate assistance. "In California, public agencies each year receive *millions* of 911 dispatch calls seeking emergency, medical, and fire services." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1178.) The large number of non-emergency calls fielded by 911 dispatchers is a major problem. (Eastman, *Chapter 89: Rescuing 911?* (2009) 40 McGeorge L.Rev. 486, 486-87.) Wait times for 911 responses have soared since the advent of cell phones, and "long wait times can mean the difference between life and death for those truly in need of emergency services." (*Ibid*.) Requiring a business to call 911 every time there are conflicting assessments of medical necessity (or face *gross* negligence liability for failing to call

911) would have the unintended consequence of increasing wait times for those who are in more obvious need of immediate care.

Second, requiring a business to call 911 for a patron who can call 911 with his own cell phone yet chooses not to could impose severe unwanted financial costs on the patron. Ambulance rides are expensive. (See Toma, *Legal Impediments to Cost Effective Provision of Emergency Medical Services in California: Why Ambulance Franchising and Other Innovations to Control EMS Costs May Fail* (1995) 17 Whittier L.Rev. 47 [there is a "crisis of cost" in California ambulance services].) Hospital bills are also expensive and can be unpredictably large. (See *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 561.) A telephone call to 911 may result in a patron being transported to a hospital against his will if the paramedics deem it necessary, even if the patron refuses. (See *Haas v. County of El Dorado* (E.D.Cal., Apr. 23, 2012, No. 2:12-cv-00265-MCE-KJN) 2012 WL 1414115, at p. *1 [nonpub. opn.].) A business should not be required to impose an unwanted and substantial financial burden on its patrons to avoid the possibility of gross negligence liability.

Consistent with the view that a business should not be required to call 911 if a plaintiff can call 911 himself, the law of at least one state explicitly requires that a duty to summon medical assistance arises only if a patron's condition renders him "helpless." (*Jarrah v. Trump Hotels & Casino Resorts, Inc.* (D.N.J. 2007) 487 F.Supp.2d 522, 527, citing *Lundy v. Adamar of New Jersey, Inc.* (3d Cir. 1994) 34 F.3d 1173, 1178-1179.) Here, even if the court does not adopt New Jersey's rule that a business has *no* duty to call

911 for patrons who can help themselves, it should at least determine that respecting a patron's decision not to call 911 cannot be *gross* negligence.

3. 24 Hour Fitness's alleged failure to recognize the signs of a heart attack was not gross negligence as a matter of law.

Plaintiffs also argued that 24 Hour Fitness acted with gross negligence because its employees did not immediately diagnose Terry with a heart attack or impending cardiac arrest. (See vol. 2, exh. 7, pp. 244-245.) Plaintiffs' argument is meritless.

As a preliminary matter, plaintiffs' failure-to-diagnose theory is barred by the doctrine of primary assumption of the risk. In *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 336 (*Rostai*), the court held that a gym was not liable for failing to monitor a member's health while he worked out at the gym. Because a heart attack is a risk inherent in the activity of working out, the gym did not have a duty to protect the plaintiff from such an injury by monitoring his physical response to working out. (*Id.* at p. 337.) Under *Rostai*, because 24 Hour Fitness had no duty to monitor Terry's health, it also had no duty to diagnose an impending heart attack.

Plaintiffs' failure-to-diagnose theory is also unsupported by the facts. Terry's cardiologist had advised him not to exercise until further evaluation of his chest pain and elevated heart rate (vol. 1, exh. 4, p. 47; vol. 2, exhs. 8, pp. 252-253, 10, pp. 460-461, 463, 466),

but there is no evidence Terry disclosed these facts to 24 Hour Fitness. Terry told 24 Hour Fitness employees that he was experiencing an elevated heart rate and a little dizziness, and they could observe he was sweaty and pale, and had mistakenly grabbed another patron's items before politely returning them. (Vol. 1, exh. 4, pp. 46, 48, 50, 51; see vol. 1, exh. 5, p. 128-135, 203, 207.) But Terry did not complain of chest pain, shortness of breath, or numbness. (Vol. 1, exh. 4, pp. 48-49, 52; see vol. 1, exh. 5, pp. 203, 207.)

The American Heart Association's manual Basic Life Support (BLS) for Healthcare Providers, on which plaintiffs' expert relied, states: "Chest discomfort is the most important signal of a heart attack . . . [¶] Other signs may include sweating, nausea, vomiting, or shortness of breath. [¶] A feeling of weakness may accompany chest discomfort." (Vol. 3, exh. 10, pp. 484, 523.) Terry did not complain of the most important signal of a heart attack (chest discomfort), nor did he exhibit other signs of a heart attack such as nausea, vomiting, or shortness of breath. Although Terry was sweating and exhibited an elevated heart rate, these symptoms do not indicate a life-threatening emergency because they commonly occur at fitness facilities where people engage in strenuous physical activity. (See *Rostai*, *supra*, 138 Cal.App.4th at p. 336 [trainer did not act recklessly in misinterpreting plaintiff's physical complaints (including tiredness, shortness of breath, and profuse sweating) as "the usual signs of physical exertion due to lack of conditioning rather than as symptoms of a heart attack"].)

Heart attacks are notoriously difficult to diagnose, even by medical professionals in a hospital setting. "The failure to diagnose an impending heart attack is a common problem, and it is the most costly type of medical malpractice claim against emergency rooms. . . . The failure to diagnose a heart attack also is a frequent claim against internists, cardiologists, and other physicians who sometimes fail to recognize their patients' often vague symptoms as signs of an imminent heart attack." (Malone, *Failure to Diagnose Impending Heart Attack*, 1 Am.Jur. Proof of Facts 3d (2016), p. 691.) Of course, fitness center employees should not be required to exhibit the same level of skill in medical diagnoses as medical professionals. (See *L.A. Fitness Intern., LLC v. Mayer* (Fla. 2008) 980 So.2d 550, 559 [obligation to provide first aid "does not encompass the duty to perform skilled treatment"]; 26 Am.Jur. Proof of Facts 2d (1981) Standard of care – In general, § 4, p. 363 ["what would constitute ordinary care on the part of a doctor could differ from what would constitute ordinary care on the part of a nurse's aide"].)

Because of the difficulty in diagnosing impending heart attacks and the ambiguity in Terry's symptoms, the fact that 24 Hour Fitness employees could not distinguish between heat exhaustion and an impending heart attack cannot mean they failed to exercise even scant care.

4. 24 Hour Fitness's alleged failure to conduct appropriate medical screening was not gross negligence as a matter of law.

Based on a declaration from their retained expert, plaintiffs argued in passing that 24 Hour Fitness should have required Terry to answer a screening questionnaire at the time he renewed his membership. (Vol. 2, exh. 7, p. 244; vol. 3, exh. 10, p. 480.)

This claim fails at the outset under the doctrine of primary assumption of the risk. *Rostai* held that not only is there no duty for a gym to monitor its patron's health, but also that there is no duty to investigate a gym patron's cardiac risk factors. (*Rostai*, *supra*, 138 Cal.App.4th at pp. 329-330.)

Moreover, plaintiffs' expert's opinion is unfounded and the questionnaire bears no relationship to Terry's injury. (See *People v. Jones* (2013) 57 Cal.4th 899, 951 [" ' "[T]he law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." ' "].) According to the materials on which the expert relied, the screening questionnaire would have indicated that a new member or user should consult with a healthcare professional prior to engaging in a program of physical activity. (Vol. 3, exh. 10, p. 511.) The materials do not support the expert's opinion that a fitness facility must require medical clearance from a doctor before allowing an individual to become a member.

Here, it is undisputed that Terry visited a cardiologist about a week before the incident, and that the doctor advised him not to exercise pending completion and review of a stress test. (Vol. 2, exh. 8, pp. 252-253.) Thus, the alleged failure to tell Terry to consult a medical professional before exercise could not have caused Terry's injury because Terry had already consulted a medical professional and knowingly disobeyed his doctor's advice. (See CACI No. 400 [negligence must be substantial factor in causing harm].) And in any event, a failure to give a questionnaire to a patron while renewing his membership, where the patron presumably already knows his physical limitations from his prior membership or otherwise, cannot support a finding of *gross* negligence.

Not surprisingly, the trial court sustained 24 Hour Fitness's evidentiary objections to the expert's unfounded assertion that applicants must receive medical clearance before being permitted to exercise if they give certain answers on a questionnaire, and his speculation that if 24 Hour Fitness had asked Terry to complete a questionnaire his answers would have prevented his exercise session and thus his death. (See vol. 3, exhs. 17, pp. 625-626, 19, p. 664 [sustaining defendants' evidentiary objections 3 and 4].) The trial court also excised plaintiffs' proposed language referring to the questionnaire from its order denying summary judgment. (Vol. 3, exh. 19, pp. 662-663.)

The trial court was correct in deeming plaintiffs' questionnaire allegation unfounded and no reason to deny summary judgment.

5. 24 Hour Fitness's alleged failure to properly train its employees to respond to emergencies was not gross negligence as a matter of law.

Plaintiffs also relied on the declaration from their retained expert to assert briefly that 24 Hour Fitness failed to provide adequate training to handle emergency situations. (Vol. 2, exh. 7, pp. 244-245.) These purported training failures included that some staff members were not certified in CPR and did not participate in adequate emergency drills, and that when drills were conducted 24 Hour Fitness's emergency response plan was discussed without hands-on practice. (Vol. 3, exh. 10, p. 489.) Again, plaintiffs' expert's opinion is unfounded and the alleged training failures have nothing to do with the injury. (See *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 ["when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests' "].)

It was undisputed that promptly after Terry collapsed, 24 Hour Fitness employees initiated the Code Blue emergency procedure. (Vol. 1, exh. 4, pp. 58-59; see vol. 1, exh. 5, pp. 204, 208, 211; vol. 2, exh. 8, pp. 260-261.) As a result, a doctor promptly arrived at the scene, and as soon as he called out for CPR to commence, a CPR-certified 24 Hour Fitness employee began performing CPR. (Vol. 1, exhs. 4, pp. 62, 65, 5, pp. 150, 157-158,

211; vol. 2, exh. 8, pp. 261, 263.) It was undisputed that this employee was performing CPR correctly, and did not stop until the paramedics arrived at the scene and took over. (Vol. 1, exhs. 4, pp. 62-63, 5, pp. 160, 174, 180-181, 183, 197; vol. 2, exh. 8, p. 263.) Thus, the allegations regarding 24 Hour Fitness's training practices are irrelevant because the alleged deficiencies could not have caused the injury here, and in any event, could not constitute gross negligence.

Moreover, because 24 Hour Fitness has not disputed that it is vicariously responsible for the actions of its employees, plaintiffs' failure-to-train theory cannot support liability because it is duplicative of the claims based on the employees' own actions, which renders evidence supporting the failure-to-train theory irrelevant and inadmissible at trial. (See *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1155, 1161 [evidence that trucking company failed to train drivers for safety should have been excluded after company offered to admit vicarious responsibility].)

C. At the very least, the trial court should have granted summary adjudication of plaintiffs' ordinary negligence claim to resolve an affirmative defense or issue of duty.

As explained above, the liability release is enforceable and covers plaintiffs' claims based on ordinary negligence. (See *ante*, Part A.) Although plaintiffs argued that the court could not summarily adjudicate their claim for ordinary negligence because

ordinary negligence is not a separate cause of action from gross negligence (vol. 3, exh. 18, pp. 647-648), summary adjudication does not require a court to resolve an entire cause of action. Summary adjudication is also properly invoked to resolve an affirmative defense or issue of duty. (Code Civ. Proc., § 437c, subd. (f)(1).)

Here, 24 Hour Fitness moved for summary adjudication as to its 10th affirmative defense, which alleged that Terry had waived any claim for ordinary negligence by entering into the membership agreement releasing 24 Hour Fitness from liability. (Vol. 1, exhs. 2, p. 18, 3, p. 23 [issue number 2].) The court should have summarily adjudicated that defense and dismissed the ordinary negligence claim that Terry released. (See *Los Angeles Cellular Telephone Co. v. Superior Court* (1998) 65 Cal.App.4th 1013, 1019 [contractual limitation of liability defense summarily adjudicated in defendant's favor]; *Baker Pacific Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1156 ["The exculpatory language is then raised as an affirmative defense, and the issue is resolved in summary proceeding or bifurcated trial"].)

Summarily adjudicating plaintiffs' ordinary negligence claim was also appropriate to resolve an issue of duty, i.e., whether 24 Hour Fitness owed a duty to exercise the reasonable care required to avoid an ordinary negligence claim. (Code Civ. Proc., § 437c, subd. (f)(1).)

CONCLUSION

For the foregoing reasons, the court should issue the writ of mandate or prohibition as prayed for in this petition.

July 26, 2016

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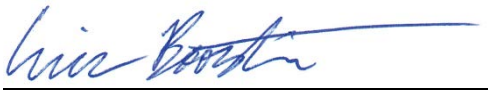
By: 
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 11,197 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: July 26, 2016

Eric S. Boorstin

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On July 26, 2016, I served true copies of the following document(s) described as **PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES (SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER)** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx, with delivery fees paid and provided for, and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 26, 2016, at Encino, California.

Jan Loza

SERVICE LIST
24 Hour Fitness USA, Inc. et al. v. Louise Austin, etc. et al.
CIV531455

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