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In the Supreme Court of Florida

Case No. SC13-932
L.T. Case No. 2D11-5191

ABEL LIMONES, SR. and SANJUANA CASTILLO, Individually and as natural parents and next friends of ABEL LIMONES, JR.,

Petitioners,

v.

SCHOOL DISTRICT OF LEE COUNTY and SCHOOL BOARD OF LEE COUNTY,

Respondents

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF FLORIDA SCHOOL BOARDS ASSOCIATION, INC. ON BEHALF OF RESPONDENTS

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PRELIMINARY STATEMENT

The Florida School Boards Association, Inc. ("FSBA") appears as amicus curiae on behalf of the Respondents, the School District of Lee County and the School Board of Lee County ("School Board"), in this appeal from an opinion rendered by the Second District Court of Appeal.

The record on appeal will be referred to as "R" followed by the corresponding volume and page number.

STATEMENT OF IDENTITY AND INTEREST

The Florida School Boards Association is a nonprofit corporation representing school board members in the 67 school districts in Florida. FSBA has been the collective voice of Florida school districts since 1930 and is closely allied with other educational and community agencies to work toward improvement of education in Florida. FSBA's ultimate mission is to support and assist school boards in shaping and improving education in Florida.

In the instant appeal, the Second District Court of Appeal's decision recognized that school boards and their employees do not have a duty to make available, diagnose the need for and use an automated external defibrillator ("AED"). A reversal of this decision and the imposition of a duty on a school board and its employees would have significant repercussions for all FSBA members. Ensuring a quality education for and the safety of students are the

primary concerns of FSBA members, but they must address these concerns with very limited resources. Becoming insurers and requiring their employees, who are lay persons, to have the responsibilities of medical professionals will have a deleterious effect on FSBA and its members and will lead to a reevaluation of athletics programs in the schools. FSBA has a direct interest in ensuring that any duty imposed on school boards and their employees is one that they have the capability and resources to carry out. For this reason, FSBA seeks affirmance of the Second District's decision. A determination that jurisdiction was improvidently granted or an affirmance of the Second District's decision will clarify that school boards are not insurers of students' safety and that their employees are not medical professionals. Accordingly, FSBA has a vested interest in the outcome of this matter.

SUMMARY OF THE ARGUMENT

The Second District properly examined the scope of the School Board's duty to take proper post-injury procedures to protect against aggravation of injury and determined that the School Board did not have a duty to make available, diagnose the need for or use an AED on Abel Limones. By calling 911 and performing CPR, the School Board met its duty of care.

Public policy supports the Second District's decision. With multiple sports offered and several sports having tiered levels, in the event this Court were to

establish a duty to make available, diagnose the need for and use an AED, providing adequate numbers of AEDs and trained personnel would be a responsibility that most School Boards would be unable to carry out. Moreover, School Board employees are not trained medical professionals and even with training cannot be expected to act as trained medical professionals with the ability to diagnose the need for and use an AED. To impose on the School Board the duty to make available, diagnose the need for and use an AED would result in the School Board being the insurer of student safety and medical treatment.

The Second District correctly found that the Cardiac Arrest Survival Act provides immunity to the School Board even if a duty to make available, diagnose the need for and use an AED exists. The legislative intent behind the Act was to encourage the acquisition of AEDs. Holding acquirers liable when an AED is not used would be contrary to the legislative intent and would discourage the acquisition of AEDs.

ARGUMENT

I. THE SECOND DISTRICT CORRECTLY DETERMINED THAT THE SCOPE OF THE SCHOOL BOARD'S GENERAL DUTY DID NOT INCLUDE A DUTY TO MAKE AVAILABLE, DIAGNOSE THE NEED FOR, OR USE AN AED ON ABEL LIMONES.

In this tragic case, Abel Limones Jr. suffered permanent brain damage after collapsing on the field during a high school soccer game. (R. XI 1105). An

Assistant Principal called 911, and his coach and a nurse bystander performed CPR. (R. II 249; III 311; II 250; III 312; III 315). An automated external defibrillator ("AED") was not used. Abel Limones' parents sued the School Board alleging that it negligently failed to maintain an AED, to make it available for use or to use it on Abel Limones. (R. I 2-14). The trial court granted the School Board's motion for summary judgment, and Limones' parents appealed to the Second District Court of Appeal. (R. XII 1191-95). The Second District found that "the School Board had no common law duty to make available, diagnose the need for, or use an AED on Abel." *Limones v. School Dist. of Lee County*, 111 So. 3d 901 (Fla. 2d DCA 2013). Limones' parents petitioned this Court for review alleging that the Second District's decision conflicted with this Court's decisions in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992); *U.S. v. Stevens*, 994 So. 2d 1062 (Fla. 2008) and *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001). This Court accepted jurisdiction on February 6, 2014. The main issue in this appeal is whether the Second District correctly affirmed the trial court's granting of final summary judgment for the School Board by finding that no duty of care existed to make available, diagnose the need for or use an AED on Abel Limones. Since this issue involves a pure legal question, the standard of review is de novo. *See Smith v. Florida Power and Light Co.*, 857 So. 2d 224 (Fla. 2d DCA 2003).

It is well established that the existence of a duty of care is a legal question to be decided by the trial court. *See McCain*,593 So. 2d at 502; *Smith*, 857 So. 2d at 229. It is the threshold legal requirement in a negligence case, and only if a duty of care exists will the "courthouse doors" be opened. *See McCain*, 593 So. 2d at 502; *Smith*, 857 So. 2d at 229.

In the school setting, the courts have held that a School Board owes a general duty to supervise the students in its care. *See Benton v. School Bd. of Broward County*, 386 So. 2d 831 (Fla. 4th DCA 1980). In reaching this determination of a school board's duty, the court in *Benton* recognized that "teachers and school boards are neither insurers of the students' safety, nor are they strictly liable for any injuries which may occur to them." *Id.* at 834. This Court in *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982) reiterated that "[a] public school, at least through the high school level, undoubtedly owes a general duty of supervision to the students placed within its care." *Id.* at 666.

In determining whether a duty existed in the particular case, both this Court and the court in *Benton* addressed the scope of the duty to supervise. *See Rupp*, 417 So. 2d at 666 ("we must define the scope of the school's and employee's duty to supervise"); *Benton*, 386 So. 2d at 834 ("where lack or insufficiency of supervision is charged, the teacher's duty of care to the pupil is either described as reasonable, prudent, and ordinary care, or as that care which a person of ordinary

prudence, charged with the duties involved, would exercise under the same circumstances"). Only upon addressing the scope of the duty was the legal question of whether a duty existed answered.

In the context of a student athlete, the duty to supervise encompasses the duty to provide adequate instruction in the activity, supply proper equipment, make a reasonable selection or matching of participants, provide nonnegligent supervision of the particular contest, and take proper post-injury procedures to protect against aggravation of the injury. *See Leahy v. School Bd. of Hernando County*, 450 So. 2d 883, 885 (Fla. 5th DCA 1984). It is the last element, the duty to take proper post-injury procedures to protect against aggravation of an injury, which is at issue in the instant case. In accordance with *Benton* and *Rupp* the Second District found, in examining the scope of the duty to protect against aggravation of an injury, that there was no duty to make available, diagnose the need for and use an AED on Abel Limones. Thus, the Petitioner's contention that the Second District erred in the instant case by addressing the scope of the duty and that the Second District's opinion thereby conflicts with *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), *U.S. v. Stevens*, 994 So. 2d 1062 (Fla. 2008) and *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), is unavailing.

In reaching its decision, the Second District recognized the special relationship between a school and its students, but in accordance with the Second

Restatement of Torts and case law involving other special relationships, determined that the duty owed in this case was only to render basic first aid which the School Board did by calling 911 and performing CPR (which actually is beyond basic first aid). *See Limones*, 111 So. 3d at 905. Relying on *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008), the Second District found that basic first aid does not include the need to diagnose the need for or use an AED. While the Petitioners contend that the special relationship between a school and a student is different than the special relationship between a business and an invitee at issue in *L.A. Fitness*, the Petitioners cite no authority suggesting that the duty owed to a student athlete needing aid is different than the duty owed by a business to an invitee needing aid. When special relationships are involved, the courts have consistently held that the duty owed is to render basic first aid. *See Coccarello v. Round Table of Coral Gables, Inc.*, 421 So. 2d 194, 195 (Fla. 3d DCA 1982) ("A proprietor of a public place has a duty only to take reasonable action to give or secure first aid after he knows that a patron is ill or injured"); *Abramson v. Ritz Carlton Hotel Co., LLC*, 480 Fed. Appx. 158, 161 (3d Cir. 2012) ("We thus concluded that an innkeeper must only summon medical care when the need becomes apparent, and take reasonable first aid measures until medical care arrives"); *Salte v. YMCA of Metropolitan Chicago Foundation*, 814 N.E. 2d 610, 613 (Ill. App. Ct. 2004) (holding that YMCA owed an invitee "a duty to render

first aid"). Employees of the School Board in this case immediately called 911 and provided CPR to Abel Limones. Public policy does not support expanding the care beyond that which was provided by the School Board.

Although not addressed in the Second District's opinion, courts, when examining the duty issue, also consider whether policy favors finding the existence of a duty. In *Rupp*, this Court noted:

> "'Duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." The student has an interest in freedom from suffering negligent injury; the school has an interest in avoiding responsibility for a duty which it cannot realistically carry out.

417 So. 2d at 667 (citations omitted); *see also Biglen v. Florida Power & Light Co.*, 910 So. 2d 405, 409 (Fla. 4th DCA 2005) ("finding that a legal duty exists in a negligence case involves the public policy decision that a 'defendant should bear a given loss, as opposed to distributing the loss among the general public'") (citations omitted). FSBA submits that policy considerations in this case weigh in favor of affirming the decision of the Second District.

A School Board's main concern is the education and safety of the students entrusted to its care. It recognizes the special relationship it has with its students and will use the means within its power to safeguard its students. However, neither its power nor its resources are limitless, and the law must recognize that a

School Board's duty to supervise and protect against post injury aggravation must not include a duty it cannot realistically carry out.

There are over 600 public high schools in Florida, and there are approximately 455 public high schools with athletics programs (excludes special/alternative high schools, charter schools and other high schools that do not have athletics programs and are not members of the Florida High School Athletics Association ("FHSAA")). *See* http://www.fldoe.org/eias/eiaspubs/pubschool.asp (providing a listing of all the public high schools in Florida); http://www.fhsaa.org/sites/default/files/12-13_directory.pdf. (providing the members of FHSAA). These high schools may offer the following sports:

Fall (August – December)

(1) Boys Bowling;
(2) Girls Bowling;
(3) Boys Cross Country;
(4) Girls Cross Country;
(5) Football;
(6) Boys Golf;
(7) Girls Golf;
(8) Boys Swimming and Diving;
(9) Girls Swimming and Diving;
(10) Girls Volleyball

Winter (October – March)

(11) Boys Basketball;
(12) Girls Basketball;
(13) Competitive Cheerleading;
(14) Boys Soccer;
(15) Girls Soccer;

(16) Girls Weightlifting;
(17) Wrestling

Spring (February – May)

(18) Baseball;
(19) Girls Flag Football;
(20) Boys Lacrosse;
(21) Girls Lacrosse;
(22) Softball;
(23) Boys Tennis;
(24) Girls Tennis;
(25) Boys Track and Field;
(26) Girls Track and Field;
(27) Boys Volleyball;
(28) Boys Water Polo;
(29) Girls Water Polo;
(30) Boys Weightlifting.

The majority of these sports have both varsity and junior varsity teams and a few such as football and baseball have freshmen, junior varsity and varsity teams. Each of these sports and teams has practices and games. Some sports like bowling, golf, cross country and swimming occur off school campuses. Thus, on any given day during the school year, there are or will be multiple athletic activities occurring both on and off school campuses.

Although not all sports are offered at all high schools, the majority of schools offer multiple sports. For instance, Leon County, which is not a large county, has five public high schools. The only sports from the list above that are not offered at any of the high schools are Boys and Girls Water Polo, Girls Lacrosse and Boys Volleyball.

Additionally, many of the approximately 600 public middle schools in Florida also offer sports. Like the high schools, they have multiple practices and games occurring throughout the school year.

The impact of imposing a duty on School Boards to make available, diagnose the need for and use an AED given these numbers is substantial. How many AEDs will the School Boards have to provide? How many employees trained in the use of AEDs will be needed? Do they have to provide AEDs at off campus sites for sports such as golf and swimming? Where do they keep the AED for sports like golf and cross country which cover large distances with students dispersed throughout the course? What happens when there are multiple activities occurring at the same time? The complexity of these questions demonstrates why public policy does not support the imposition of a duty in this case.

To impose a legal duty on the School Boards will result in the School Boards having to provide an AED and trained personnel at every practice and game of each freshmen, junior varsity and varsity team in every sport, both on campus and off campus. Simply having an AED on school grounds as required by section 1006.165, Florida Statutes will be insufficient. The School Boards will be required to purchase multiple AEDs and provide training for multiple personnel. In golf and cross country, the School Boards would be required to have multiple AEDs throughout the courses with trained personnel left with each of the AEDs.

The financial and logistical responsibilities placed on School Boards that already are working with limited resources will result in some School Boards either limiting the sports offered and/or removing freshmen and junior varsity teams or eliminating athletics completely. Sports are extracurricular activities and the schools are not required to offer them. When the responsibility is beyond what a School Board can realistically carry out, the consequence will be to minimize the responsibility to a workable level even if it will limit the opportunities available to students.

Since the duty to take proper post-injury procedures to protect against aggravation of the injury is within the duty to supervise students, if a duty were found to exist, how would the duty to make available, diagnose the need for and use an AED not be applied to all students? Physical education classes involve the same exertion levels as many sports. Private schools and community athletics programs (both public and private) will fall within this duty. Imposing a duty on School Boards will have far reaching effects outside the school setting. If a duty is found to exist here, then, the duty to make available, diagnose the need for and use an AED will apply to all special relationships.

Imposing a duty on the School Boards also will result in its employees, lay persons, having to become medical personnel, responsible for diagnosing the need for and properly using the AEDs. School employees are not medical professionals.

They are educational and administration professionals. School Boards will have to find employees who are willing to undergo the necessary training and accept the responsibility of diagnosing the need for and using an AED, recognizing that they will encounter personal liability if their diagnosis is incorrect. Even with training, they are still lay persons who do not experience medical emergencies on a daily basis and may not react as medical professionals. *See, e.g., Digiulio v. Gran, Inc.*, 74 A.D. 3d 450, 453 (N.Y. App. Div. 2010), *aff'd*, 17 N.Y. 3d 765 (N.Y. 2011) (finding that there was no duty to use an AED on a health club patron even though one was on the premises and noting that the AED was only unavailable because an employee "in his agitated state did not think of trying to open the cabinet" that held the AED). There is no doubt that if School Boards had unlimited resources, they could provide medical personnel at every athletic practice, event or game. Unfortunately, the reality is that the School Boards have limited resources and must rely on employees who are not accustomed to making medical decisions in emergency situations on a regular basis.

Essentially, imposing a duty on School Boards to make available, diagnose the need for and use an AED will make them not only the insurers of the safety of their students, contrary to the decision in *Benton*, but also the insurers of the students' medical care. Although there were no precautions that the School Board could have taken to prevent Abel Limones' undetected heart condition, the

imposition of a duty in this case would make the School Board liable for failing to diagnose the condition and the treatment for it. Public policy is not served by placing this burden on School Boards that are ill equipped to assume such a duty both by lack of resources and the absence of medical professionals in their employ. The decisions of courts in other states that have considered this issue in the context of various special relationships support the decision of the Second District and the court in *L.A. Fitness* finding that neither law nor policy imposes a duty to make available, diagnose the need for and use an AED. *See Digiulio*, 74 A.D. 3d at 453; *Salte*, 814 N.E. 2d at 615; *Strong v. Noel Mgmt. Corp.*, 29 Mass. L. Rptr. 106, 2011 WL 5842047 (Mass. Super. 2011) (fitness center that called 911 and undertook CPR had no duty to use the AED that was available); *Rotolo v. San Jose Sports and Entm't, LLC*, 59 Cal. Rptr. 3d 770 (Cal. Ct. App. 2007) (operators of hockey rink had no duty to notify patrons of the location of the AED).

II. THE SCHOOL BOARD IS IMMUNE UNDER SECTION 768.1325, FLORIDA STATUTES, THE CARDIAC ARREST SURVIVAL ACT, AND SECTION 1006.165, FLORIDA STATUTES DOES NOT ABROGATE THE SCHOOL BOARD'S IMMUNITY.

Section 768.1325(3), Florida Statutes, the Cardiac Arrest Survival Act ("Act"), provides that a person who acquires an AED is immune from liability as long as certain requirements are followed. It also provides that "[t]his section does not establish any cause of action." § 768.1325(5), Fla. Stat. (2013). While section

1006.165(1), Florida Statutes, requires all schools that are members of the FHSAA have "an operational automated external defibrillator on the school grounds," it also states that the Act applies. *See* § 1006.165(4), Fla. Stat. (2013). The Second District found that the School Board is a person within the meaning of the Act and because an AED was on the soccer field at the time of the collapse of Abel Limones, the School Board, as an acquirer of an AED that was made available, was immune from liability under the Act even if a duty was owed by the School Board. The Petitioners contend that the immunity provision only applies if someone used or attempted to use the AED. However, such an interpretation is contrary to the legislative intent behind the Act and would result in the courts interfering with the policy decisions of the legislature.

The Act was adopted in 2001 to encourage the use of and increase access to AEDs. *See* Ch. 2001-76, Laws of Fla. To do so, the legislature provided civil liability immunity to acquirers of AEDs. *See* § 768.1325(3), Fla. Stat. (2013). However, the legislature also provided that the Act "does not require that an automated external defibrillator device be placed at any building or other location or require an acquirer to make available on its premises one or more employees or agents trained in the use of the device." Petitioners' contention that the Act's immunity for the acquirer of an AED only applies if someone uses or attempts to use the AED is contrary to the plain meaning of the statute. Instead of encouraging

persons and businesses to acquire an AED, Petitioners' interpretation of the statute would discourage persons and businesses from obtaining AEDs because it would make them responsible for ensuring their use. The legislature clearly intended to encourage the purchase of AEDs by not requiring trained staff or imposing liability as long as a purchaser made the AED available, properly maintained it and equipped it with directions on its use. Under Petitioners' interpretation, someone could escape liability simply by not having an AED, but would be liable if an AED was provided and not used. Under this interpretation, why would anyone acquire an AED? The acquisition of AEDs is not encouraged by imposing liability on the acquirer when those present at an emergency fail to recognize the need for its use. Petitioner's interpretation not only discourages a person from acquiring an AED, but also could lead to everyone who collapses being hooked up to an AED even if that is not the appropriate treatment, thus, delaying the appropriate treatment from being provided.

While section 1006.165, Florida Statutes requires a School Board to obtain an AED and have employees trained in its use, this statute does not abrogate the immunity that the Act provides to an acquirer of an AED. The legislature knows how to create a cause of action and has done so elsewhere in Chapter 1006, Florida Statutes. *See Miulli v. Florida High School Athletic Ass'n*, 998 So. 2d 1155 (Fla. 2d DCA 2008) (noting that section 1006.24, Florida Statutes expressly provides for

civil liability on School Boards for claims arising out of the use a school bus or other vehicle to transport students). The legislature would not have expressly referred to the Act in section 1006.165, Florida Statutes, if it was trying to except School Boards from the Act and make them strictly liable for their acquisition of an AED.

Legislatures around the country are, like Florida, trying to encourage the purchase and use of AEDs to reduce the severe consequences of sudden cardiac arrest. However, encouraging use is a far cry from dictating use especially when it is primarily lay persons who will be using the AEDs. In *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 985 N.E. 2d 128 (N.Y. 2013), New York's highest court addressed this issue. In New York, health clubs are required to have an AED and staff trained in the use of an AED. *Id.* at 132. When a member of Bally Total Fitness died at the health club, his family sued the health club for failing to use an AED when the law required it to have one and the staff to use it. *Id.* at 130. The Court of Appeals found that the statute did not create a duty to use an AED. *Id.* at 132. In reaching that conclusion, the court stated:

> [T]here is nothing meaningless or purposeless about a statute that seeks to insure the availability of AEDs and individuals trained in their use at locations – i.e. health clubs – where there is a population at higher risk of sudden cardiac arrest. Obviously, though, AEDs are not meant to be employed mindlessly. For example, the implied duty favored by the dissent would cause a dilemma for the lay health club employee whenever a volunteer medical professional is furnishing aid at the scene, as allegedly happened here . . . .

> A law that mandates the presence of AEDs and trained individuals at health clubs is easy to obey and enforce. The implied duty envisioned by the dissent is neither; such a duty would engender a whole new field of tort litigation, saddling health clubs with new costs and generating uncertainty.

Id. at 132-133.

The same reasoning applies here. The legislature, through section 1006.165, Florida Statutes, has indicated its intent to make AEDs available at schools, but by failing to expressly create a cause of action and instead referring to the Act, the legislature does not intend for School Boards to be liable for failing to diagnose the need for or use an AED. To create a new cause of action in contravention of the intent of the legislature would be to improperly invade the province of the legislature. *See Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); *Agee v. Brown*, 73 So. 3d 882 (Fla. 4th DCA 2011).

School Boards have emergency response plans and policies on AEDs. While they can dictate where an AED will be stored and can provide training on their use, it is beyond their ability to provide numerous AEDs, control every emergency and ensure proper medical diagnosis by their employees. Creating liability under these circumstances is neither required under the law nor supported by public policy.

CONCLUSION

The Second District correctly held that the School Board did not have a duty to make available, diagnose the need for and use an AED on Abel Limones. Public policy supports the Second District's decision. Even if a duty existed, the School Board is immune under section 768.1325, Florida Statutes. FSBA respectfully requests that this Court either dismiss this case for lack of jurisdiction or affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

By: */s Jennifer S. Blohm*
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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