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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v. FSC CASE NO. SC13-932

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

Respondents.
_____/

Discretionary Proceedings to Review a Decision by the Second District Court of Appeal, State of Florida

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RESPONDENTS' ANSWER BRIEF ON THE MERITS

Traci T. McKee, Esq.
Florida Bar No. 0053088
Scott A. Beatty, Esq.
Florida Bar No. 0084638
Henderson, Franklin, Starnes & Holt, P.A.
Post Office Box 280
Fort Myers, FL 33902-0280
239-344-1263 (telephone)
239-344-1539 (facsimile)
ATTORNEYS FOR RESPONDENTS

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PRELIMINARY STATEMENT

Respondents, SCHOOL DISTRICT OF LEE COUNTY and SCHOOL BOARD OF LEE COUNTY, shall refer to themselves collectively as the School Board or Respondent. Petitioners concede, and the School Board agrees, that the only proper Defendant is the School Board of Lee County. App. 2, n.1.

Respondent shall refer to Petitioner, ABEL LIMONES, SR., as Mr. Limones or Petitioner.

Respondent shall refer to Petitioner, SANJUANA CASTILLO, as Ms. Castillo or Petitioner.

Respondent shall refer to Petitioner, ABEL LIMONES, JR., as Abel Limones, or Petitioner.

Respondent shall refer to the Second District's decision, *Limones v. School District of Lee County*, Case No. 2D11-5191 (Fla. 2d DCA 2013), as *Limones*.

Citations to the Record on Appeal shall be noted as "R." followed by the appropriate volume number, and the appropriate page number. If applicable, the appropriate page/line designation will be included after the page number.

Citations to the Second District's decision, which is included in Petitioner's Appendix, shall be noted as "A" followed by the relevant page number.

Citations to Petitioners' Brief on Jurisdiction shall be noted as "Pet. Br. on Juris." followed by the relevant page number.

Citations to Petitioners' Brief on the Merits shall be noted as "Pet. Br. on Merits" followed by the relevant page number.

Citations to Florida Statutes shall be to the 2008 version, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

A. Brief Overview of the Case and the Second District's Decision

Petitioners seek review of the unanimous decision of the Second District Court of Appeal based upon an alleged express and direct conflict with the precedent of this Court. This Court, however, lacks jurisdiction because there is no express and direct conflict, as required by the Florida Constitution, because the Courts of this State routinely determine the scope and extent of a defendant's legal duty, as a matter of law.

Moreover, a review of the merits reveals that Petitioners seek to hold the School Board responsible because its teachers and school administrators did not diagnose the need for or render skilled medical treatment to a student-athlete. Specifically, Petitioners seek monetary damages against the School Board on grounds that the scope of the School Board's general duty included an affirmative duty to diagnose a complex medical condition and to use an Automated External Defibrillator (AED) on a student-athlete who collapsed during a soccer game. At its core, this is a medical malpractice action against laymen.

The effect of imposing such an expansive scope of a school board's duty of care presents an untenable situation for school boards and school board employees of this State. Neither the common law nor Florida Statutes impose an affirmative duty on school board employees to diagnose the need for an AED or to utilize such

AED on a student-athlete. Accordingly, the Second District correctly determined that the scope of the School Board's general duty to Abel Limones did *not* include a duty to provide skilled medical treatment or advanced life support through the use of an AED. The Second District also correctly determined that the School Board was immune from suit based upon the plain language of the Cardiac Arrest Survival Act. Either of these findings, standing alone, is dispositive of the case.

B. Facts of the Case

Abel Limones was a student-athlete at East Lee County High School ("East Lee"). (R.I.003). While attending East Lee, Abel Limones voluntarily participated on the varsity soccer team. (*Id.*). East Lee was and is a member of the Florida High School Athletics Association (FHSAA). (R.V.519:23-520:3). Abel Limones' mother, Ms. Castillo, executed a Consent and Release of Liability Certificate on October 14, 2008 which authorized Abel Limones to participate on the soccer team and released the school from any and all liability for any injury or claim resulting from Mr. Limones' athletic participation. (R.II.249-251).

On November 13, 2008, Abel Limones was participating in an interscholastic soccer game between his team, East Lee, and Riverdale High School (Riverdale), a fellow member of the FHSAA. The soccer game took place at the Riverdale soccer field in Lee County. (R.V.462:15-18). The soccer coach for East Lee, Thomas Busatta, and the soccer coach for Riverdale, Lisa Karcinski,

were both present during the game. (R.V.470:5-16, 471:13-15, R. 519:15-520:15; XI.1071 (19:23-25), 1074 (30:15-20)).

In addition to coaches Busatta and Karcinski, the following School Board employees were present at the soccer game: Gerald Demming (Riverdale Principal), Susan Zellers (Riverdale Assistant Principal), Thomas Roszell, Sr. (Riverdale Athletic Director), and Thomas Roszell, Jr. (Riverdale Football Coach/maintenance employee). (R.III.311; IV.314; V.464:4-6, 469:6-14, 521:17-522:1, 527:2-528:4). It is undisputed that at least two of the School Board employees in attendance that evening—Athletic Director Roszell and Thomas Roszell, Jr.—were trained and certified in the use of AEDs. (R.III.312; IV.315; V.475:10-476:10, 539:18-540:1). It is also undisputed that a fully operational AED was located on a golf cart parked near the south end zone of the soccer field. (R.II.249; III.312; IV.315; V.480:7-481:3, 485:12-22, 486:12-487:3, 527:2-11, 538:13-539:9). This AED was in addition to a *second* AED located in either the gymnasium or the front lobby of Riverdale. (R.V.480:7-481:3).

Shortly before 7:43 p.m. on November 13, 2008, during the first half of the game, Abel Limones collapsed while running on the field. (R.V.466:12-15, 528:12; XI.1074 (30:15-24)). It was not uncommon for soccer players to "go to the ground" during a soccer game. (R.XI.1074 (32:4-16)). In fact, Coach Busatta had been on the field numerous times working cramps out of players' legs.

(R.XI.1074 (32:4-16)). After Abel Limones' collapse, Coach Busatta waited briefly on the sidelines before he ran onto the field. (R.XI.1074 (32:4-18)). In addition, Coach Karcinski, Principal Demming, Assistant Principal Zellers, and Athletic Director Roszell rushed onto the field near Abel Limones. (R.V.461:16-18, 472:5-474:16, 530:6-531:11, 545:6-8). At this time, Abel Limones "popped up," said "coach," was trying to talk, and then laid back down. (R.III.311; IV.314; V.473:11-16, 475:5-9, 494:5-11, 531:12-533:6; XI.1075 (35:3-36:7)).

Within one minute of his collapse, at 7:43 p.m., Assistant Principal Susan Zellers called 911 and requested an ambulance be sent to the field. (R.II.249; III.311; IV.314; V.478:11-22, 545:2-5; XI.1102-11). The 911 dispatch and EMT records reveal that Assistant Principal Zellers reported "seizure/convulsions" and an "unconscious/fainting" male at Riverside. (R.XI.1102-11). Athletic Director Roszell and Principal Demming also believed Abel Limones was suffering from a seizure. (R.V.478:7-10, 533:7-10; XI.1065).

Within three or four minutes of his collapse, two nurses who were watching the game from the stands rushed to Abel Limones. (R.II.250, III.312; IV.315; V.483:4-15, 533:11-16; XI.1076-77 (40:22-42:19)). One of the nurses, Jacci C. Steffen, was a 30-year nurse, and the other nurse, Millie Milagros Resto, worked for a cardiologist. (R.II.250; III.312; IV.315; V.483:4-12). At some point while Abel Limones was laying on the field, he stopped breathing. (R.III.312; IV.315;

V.476:18-478:6, 478:23-479:8; XI.1075 (36:8-37:10)). It is undisputed that Coach Busatta and Nurse Resto began CPR on Abel Limones immediately after he stopped breathing. (R.II.250; III.312; IV.315; V.478:23-479:22, 535:17-536:15, 1075 (40:22-45:7)). Nurse Resto performed chest compressions and Coach Busatta performed mouth-to-mouth resuscitation. (R.III.312; IV.315; V.503:24-504:11, XI.1077 (43:5-45:7)). When Principal Demming, Athletic Director Roszell, and Assistant Principal Zellers first heard Coach Busatta say that Abel Limones had stopped breathing, they could see the fire truck driving through the gates to the athletic fields. (R.III.312; IV.315; V.503:14-18).

Coach Busatta testified that he asked for an AED three times—once before performing CPR and two times while he was performing CPR on Abel Limones. (R.XI.1079-81 (53:12-58:9)). However, there is no evidence that any person on the field that evening—School Board employees, players, referees, or the two volunteer nurses—ever heard anyone ask for an AED or mention an AED. (R.III.312; IV.315; V.481:21-482:12, 483:1-3, 502:23-503:10, 536:16-25). Neither of the nurses, including the cardiac nurse who performed CPR on Abel Limones, ever asked for an AED. (R. III.312;, IV.315; V.485:2-7). Coach Busatta admits that no one responded in any way to his purported requests for an AED. (R. XI.1079-080 (53:21-54:3)).

While CPR was being performed on Abel Limones, the emergency responders arrived at the field. The Fort Myers Shores Fire Protection squad was the first emergency responder to reach the soccer field, arriving at the scene at 7:50 p.m.—seven minutes after Assistant Principal Zellers called 911. (R.II.250; V.487:12-23, XI.1077 (44:22-45:12), 1079 (50:17-21, 51:14-53:7)). Nurse Resto and Coach Busatta continued CPR until the firefighters reached Abel Limones on the field. (R.II.250; III.312; IV.315; XI.1076-77 (40:22-45:12), 1079 (50:17-21, 51:14-53:7)). Once the firefighters reached Abel Limones, they checked his vitals, took over CPR, and used their AED to shock him. (R.V.487:12-489:7, 538:4-12; XI.1079 (52:23-53:11)). Only one to two minutes had lapsed from the time CPR was started by Nurse Resto and Coach Busatta until the firefighters used their AED on Abel Limones. (R.III.312; IV.315, V.487:5-7, 537:22-538:3). Unfortunately, despite the firefighters' efforts, they were unable to obtain a pulse utilizing their AED—the same defibrillation device as the device maintained by Riverdale.

Two minutes after the firefighters arrived, at 7:52 p.m., the EMT crew arrived at the soccer field. (R.II.250; XI.1079 (50:17-21; 51:14-53:7); 1102-11). It wasn't until the EMT crew utilized their semi-automatic defibrillator and injected Abel Limones with multiple medications that they were able to get a pulse. (R.V.488:1-25, 547:12-20; XI.1103-11). Abel Limones was then transported by ambulance to the hospital with Coach Busatta at his side. (R.V.488:16-18;

XI.1083 (66:16-19)). The doctors later determined that Abel suffered from an undetected heart condition known as arrhythmogenic right ventricular dysplasia, a genetic heart disease. (R.XI.1112-15).

C. Procedural Posture

Approximately one year after the incident, on December 2, 2009, the parents of Abel Limones, Mr. Limones and Mrs. Castillo, filed a personal injury lawsuit against the School Board, alleging negligence arising out of Abel Limones' injuries that occurred during the soccer game. (*See* R.I.02-14). The lawsuit alleged 2 theories of liability: general negligence and negligence pursuant to Florida Statute § 1006.165. (*See id.*). The Petitioners contend that Abel Limones suffered severe anoxic brain injury due to the time period that lapsed between his collapse until the Fort Myers' Fire Department and EMS personnel arrived on the scene. (R.I.04). The Petitioners contend that the School Board is liable for Abel Limones' injury because the School Board failed to use an AED on Abel Limones after he collapsed during the soccer game. (*See* R.I.02-14). The Petitioners seek damages from the School Board on behalf of themselves and their son. (*See id.*).

On March 1, 2011, the School Board filed a Motion for Final Summary Judgment, arguing that there was no common law or statutory duty on behalf of the School Board to diagnose the need for an AED and to use an AED on a student-athlete having a medical emergency. (R.VIII.749-52). The School Board filed a

Memorandum of Law in Support of the Motion for Summary Judgment on August 22, 2011. (R.XI.960-71). On August 24, 2011, the Petitioners filed a Response in Opposition to the Motion for Summary Judgment. (R.XI.972-1062). The trial court heard argument on the School Board's Motion for Summary Judgment on August 29, 2011. (R.XII.1140). Based on the evidence in the record, argument of counsel, applicable case law, and memoranda of law submitted by both parties, the trial court granted the School Board's Motion for Summary Judgment and entered Final Summary Judgment in the School Board's favor. (R.XII.1191-95). The Petitioners appealed the Final Summary Judgment. (R.XII.1200-06).

On appeal, following written briefs and oral argument, the Second District, recognizing that the case presented an issue of first impression, held that the scope of the School Board's general duty to supervise its students does not include a duty to maintain, make available, or use an AED. App. 5, 12. The court below acknowledged that a school board owes a general duty to adequately supervise its students, which in the context of athletic activities, includes a duty to utilize appropriate post-injury efforts to protect the injury against aggravation. App. 4. However, the appellate court determined that the scope of the School Board's general duty did not include the duty to make available, diagnose the need for, or use an AED on Abel. App. 7. In reaching this decision, the Second District analogized to the Fourth District's decision in *L.A. Fitness Int'l, LLC v. Mayer*,

which held that a business owner does not have a common law duty to provide CPR or to maintain or use an AED when a business invitee collapses. App. 5 (citing *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550 (4th DCA 2008), *rev. denied,* 1 So. 3d 172 (Fla. 2009)). The Second District, however, cautioned that the duty of care owed by a school board to a student athlete was not a stagnant proposition but was based upon the specific facts of each case:

> But we caution that the existence of a duty to utilize appropriate post-injury efforts is not necessarily the same for all high school sports or athletes and is definitely not a stagnant proposition.

App. 7. Thus based upon the facts of this case and the state of the law in Florida, the Second District held that the scope of the School Board's general duty did not include a duty to maintain, make available, or use an AED. App. 12.

In addition, the Second District further held that

> [T]he School Board did not voluntarily undertake the duty to use an AED by acquiring one and providing training on its use and as required by section 1006.165. And neither the Good Samaritan Act nor the Cardiac Arrest Survival Act sets forth a duty to use an AED. Finally, even if there had been such a duty, the School Board would have been entitled to immunity from civil liability under the Cardiac Arrest Survival Act because under the terms of that Act, it acquired an AED and made it available for use by having it in the end zone of the soccer field.

App. 12. Thus, the Second District properly affirmed the trial court's entry of final summary judgment in favor of the School Board based upon two dispositive determinations, each of which is dispositive of the case: (1) the scope of the

School Board's general duty of care did not include a duty to use an AED on Abel Limones; and (2) the Cardiac Arrest Survival Act provides immunity to the School Board for its alleged failure to use an AED. App. 12.

On May 2, 2013, Petitioners filed a Notice to Invoke the Discretionary Jurisdiction of this Court, arguing that *Limones* directly and expressly conflicts with "existing Florida law as to the elements of a negligence claim and which are to be decided by the courts and by juries." Pet. Br. on Jur. 10. Petitioners argue that the Second District's determination that the School Board owed a general duty of care to Abel Limones was sufficient to open the courthouse doors, and that the lower court improperly determined the scope and extent of the School Board's general duty. Petitioners rely upon *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992), *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), and *U.S. v. Stevens*, 994 So. 2d 1062 (Fla. 2008), as the basis for conflicts jurisdiction pursuant to Article V § 3(b)(3) of the Florida Constitution. On February 6, 2014, this Court entered an Order accepting jurisdiction pursuant to Article V § 3(b)(3) of the Florida Constitution.

SUMMARY OF THE ARGUMENT

This Court should discharge jurisdiction and dismiss its review of *Limones* for lack of jurisdiction because no direct or express conflict exists between *Limones* and the precedent of this Court, as required by Article V, Section 3(b) of the Florida Constitution. The Second District's determination of the scope and extent of the School Board's general duty of care is consistent with the precedent of this Court, as well as other Florida and out-of-state courts. *See McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992); *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550 (4th DCA 2008), *rev. denied,* 1 So. 3d 172 (Fla. 2009).

Alternatively, this Court should hold that the Second District correctly determined that the scope of the School Board's general duty of care did not include the duty to make available, diagnose the need for, or use an AED on Abel Limones. Although school board employees owe a duty to adequately supervise students in their care, school board employees have no duty to supervise all movements of all students at all times. *Rupp*, 417 So. 2d at 668, n. 26 (citing *Benton v. Sch. Bd. of Broward County*, 386 So. 2d 831, 834 (Fla. 4th DCA 1980)). A school board's general duty of care requires employees to use reasonable, prudent, and ordinary care, which in the context of an injury in a sporting event requires employees to take proper post-injury procedures to protect against

aggravation of the injury. *Leahy v. School Bd. of Hernando Cty.*, 450 So. 2d 883, 885 (Fla. 5th DCA 1984).

When the allegations of negligence against a defendant are based upon nonfeasance, rather than misfeasance, a special relationship must exist and even then, the defendant's obligations to provide aid are not unlimited. *U.S. v. Stevens*, 994 So. 2d at 1068 (quoting Restatement (Second) of Torts §§ 314, 314A, 315). Courts of this State, as well as out-of-state courts, have determined that the common law duty to provide aid mandates only that a defendant immediately summon medical assistance and render basic first aid, but that such defendant has no duty to render skilled medical treatment. *L.A. Fitness*, 980 So. 2d at 557; *Coccarello v. Round Table of Coral Gables, Inc.*, 421 So. 2d 194 (Fla. 3d DCA 1982). Because the sole allegation against the School Board was it failure to use an AED on Abel Limones, the Second District properly found that the scope of the School Board's duty included summoning medical assistance and giving basic first aid but that the scope of the School Board's duty did *not* include a duty to render skilled medical treatment such as an AED. The School Board fulfilled its common law duty of care owed to Abel Limones by immediately calling 9-1-1 and performing CPR until the first responders arrived.

In addition, the public policy of this State demands that a school board have no affirmative duty to diagnose the need for or use an AED on a student-athlete.

School Board employees are laymen, not trained medical personnel, and to impose such a duty on school board employees would be equivalent to allowing a medical malpractice action to proceed against laymen.

There are likewise no statutes that impose an affirmative duty on the School Board to use an AED on a student. Section 1006.165, Florida Statutes, does not create a statutory duty on the School Board to have used and AED on Abel Limones. Furthermore, it is clear that the School Board complied with the unequivocal language of Section 1006.165 by acquiring an AED and having employees present during the soccer game who were certified in the use of an AED. To the extent the Petitioners imply that the School Board's internal policy to have AEDs at sporting events creates a legal duty, the precedent of this Court expressly rejects such implication. *Pollock v. Fla. Dept. of Highway Patrol*, 882 So. 2d 928, 934 (Fla. 2004). Thus, there is no common law or statutory duty on the School Board to have diagnosed the need for or used an AED on Abel Limones.

Petitioners' argument that the Undertaker's Doctrine provides a basis for liability, solely because the School Board acquired an AED, is completely without merit. There is no evidence that the School Board's acquisition of an AED increased the harm to Abel Limones or that anyone relied upon the School Board's acquisition of the AED and thus refrained from rendering aid to Abel Limones.

L.A. Fitness, 580 So. 2d at 561; *White v. Advanced Neuromodulation Systems, Inc.*, 51 So. 3d 631, 636 (Fla. 2d DCA 2011). The School Board acquired the device in compliance with a regulatory statute which provides no private right of action. Further, the Cardiac Arrest Survival Act provides immunity to the School Board for its acquisition of the device. In addition, the notion that an person can be held liable under the Undertaker's Doctrine simply for acquiring an AED undercuts the public policy of Florida to encourage persons and entities to acquire these devices.

The Second District properly relied upon the Fourth District's decision in *L.A. Fitness* because the duty owed by a business to its invitee is similar to the duty owed by a school to its students—the duty to use "reasonable, prudent, and ordinary care." *L.A. Fitness*, 980 So. 2d at 557-58; *Benton*, 386 So. 2d at 834.

Finally, the School Board is immune from suit pursuant to the plain language of the Cardiac Arrest Survival Act, which provides immunity to both users and acquirers of AED devices. The undisputed evidence establishes that the School Board acquired two AEDs and made them available on the campus of Riverdale, qualifying the School Board for immunity under the Act.

ARGUMENT

A. THIS COURT SHOULD DISCHARGE JURISDICTION AND DISMISS ITS REVIEW OF *LIMONES* BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT AMONG PRECEDENTS.

The School Board respectfully submits that this Court should discharge jurisdiction and dismiss its review of *Limones* for lack of jurisdiction. *See e.g. Brantley v. State*, 115 So. 3d 360, 361 (Fla. 2013) (discharging jurisdiction initially granted based upon express and direct conflict and dismissing review proceeding after concluding, upon further consideration, "that jurisdiction was improvidently granted."); *Martin County Conservation Alliance v. Martin County*, 122 So. 3d 243, 243 (Fla. 2013) (same).

"The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." *Gandy v. State*, 846 So. 2d 1141, 1143 (Fla. 2003). The Florida Constitution provides the Court with discretionary jurisdiction to review a decision of a district court which "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. Consequently, the measure of conflict jurisdiction is not whether this Court would necessarily have arrived at a different result. *Kincaid v. World Ins. Co.*, 157 So. 2d 517, 517 (Fla. 1963). Instead, the Constitutional standard is whether the decision, on its face, collides with a prior decision of this Court or another district

court on the same point of law so as to create a conflict among precedents. *Id.* The Constitutional limitation on the Florida Supreme Court's authority to review cases is based upon the premise that district courts of appeal are intended to be final appellate courts. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure*, 416 So. 2d 1127, 1127 (Fla. 1982).

Here, Petitioners incorrectly argue that *Limones* directly and expressly conflicts with "existing Florida law as to the elements of a negligence claim and which are to be decided by the courts and by juries." Pet. Br. on Juris. 10. Petitioners generally cite to *McCain v. Fla. Power Corp.*, 593 So. 2d 500 (Fla. 1992), *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), and *U.S. v. Stevens*, 994 So. 2d 1062 (Fla. 2008), as the basis for conflicts jurisdiction. The Petitioners argue that the Second District's determination of the "scope and extent" of the School Board's general duty improperly added "another prong" to the court's determination of duty and that this approach expressly and directly conflicts with existing Florida law without citation to those cases for which they claim a conflict. Pet. Br. 7. Petitioners further argue that by determining the scope of the School Board's general duty, the Second District improperly crossed into the jury question as to breach. App. 4-8.

The Second District cited a Supreme Court of Nebraska case, *Cerny v. Cedar Bluffs Junior/Senior Public School*, presumably because the facts of *Cerny* are analogous, i.e. an injury to a student-athlete related to school-sponsored athletics. A4-A5 (citing *Cerny*, 628 N.W. 2d 697 (Neb. 2001)). The Second District's reference to *Cerny* was not essential, but certainly not inappropriate, because *Cerny* is consistent with this Court's precedent requiring Florida courts to determine the scope and extent of a defendant's duty as a matter of law.[1] *See McCain*, 593 So. 2d at 503 ("Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions."); *Whitt*, 788 So. 2d at 217 (determining that the scope of a commercial landowner's general duty to avoid negligent acts or omissions includes the duty to maintain foliage); *Stevens*, 994 So. 2d at 1066-68 (finding that the scope of the government's legal duty included a duty to refrain from exposing the public to an unreasonable risk of contamination as a result of unauthorized interception and disbursement of anthrax); *see also L.A. Fitness*, 980. So. 2d at 562 (holding that while a health club

[1] A majority of states agree that the determination of the scope and extent of a defendant's duty of care is a question of law. *See, e.g., Saucedo v. Phillips Petroleum Co.*, 670 F.2d 634 (5th Cir. 1982) (Texas); *Ericson v. Fed. Express Corp.*, 77 Cal. Rptr.3d 1 (Cal. Ct. App. 2008) (California); *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111 (2nd Cir. 2000) (New York); *Anderson v. Sammy Redd and Assoc.*, 650 A.2d 376 (N.J. Super Ct. App. Div. 1994) (New Jersey); *Metro. Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980) (Colorado); *McClung v. Delta Square Ltd. Partnership*, 937 S.W. 2d 891 (Tenn. 1996) (Tennessee).

owes a general duty to its invitees, the scope of a health club's duty does not include a duty to perform CPR or maintain or use an AED on an invitee).

In fact, this Court denied review of the Fourth District's decision in *L.A. Fitness*, where the Fourth District determined that the scope of a health club's general duty of care to its patrons did not include the duty to perform cardiopulmonary resuscitation (CPR) or to use an AED on a patron who went into cardiac arrest. *Mayer v. L.A. Fitness Intern., LLC*, 1 So. 3d 172 (Fla. 2009). The Second District in *Limones* engaged in the same inquiry and determination as the Fourth District in *L.A. Fitness*, yet this Court declined to accept jurisdiction under Article V, Section 3(b). *Id.*

Moreover, in the context of schools, the Florida Supreme Court has expressly sanctioned a court's determination of the scope of a school board's duty of care to a student. *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982). In *Rupp v. Bryant*, this Court recognized that although a high school owes a "general duty of supervision to the students placed within its care," it is nonetheless incumbent on the court to "define the scope of the school's and employee's duty to supervise." 417 So. 2d 658, 666 (Fla. 1982); *see also Kazanjian v. Sch. Bd. of Palm Beach County*, 967 So. 2d 259, 264 (Fla. 4th DCA 2007), review denied, 980 So. 2d 489 (Fla. 2008). The student in *Rupp* was severely injured after being hazed during his initiation into a school-sponsored club. 417 So. 2d at 660. The initiation event

where the hazing took place occurred off school premises and outside of the school day. *Id.* at 666. In reaching its determination that the scope of the School Board's duty included a duty to the student who was hazed, this Court recognized that there are situations where the scope of a school board's general duty does not extend to the allegations of a specific case. *Id.* at 668, n. 26 (citing *Benton*, 386 So. 2d 831 at 834 ("[A] teacher has no duty to supervise all movements of all pupils all the time.")). Similarly, following *Rupp* and *McCain*, the Fourth District in *Kazanjian v. School Board of Palm Beach County* determined that the scope of a school board's general duty to supervise its students did not include a duty to prevent a high school student from leaving school without authorization. 967 So. 2d at 264. This Court properly declined to accept jurisdiction of *Kazanjian* under Article V, Section 3(b) because, similar to the case at hand, no express and direct conflict exists with any case in Florida since the scope and extent of a defendant's duty is determined as a matter of law.

Turning to the instant case, the Second District's determination of the scope and extent of the School Board's general duty is not only consistent with this Court's precedent but is consistent with the policy of this State. The general duty of a school board to supervise its students cannot equate to a school board owing a legal duty to a student in every case under every possible set of facts and allegations. Otherwise, school boards would become the insurers of the safety of

all students attending public schools—a result Florida courts have consistently rejected. *E.g. Rupp*, 417 So. 2d at 666; *Benton*, 386 So. 2d at 834. Thus, this Court lacks jurisdiction to review the decision below because it does not expressly or directly conflict with this Court's or any other district courts' decisions on the same question of law, as required by Article V § 3(b)(3) of the Florida Constitution. The School Board therefore respectfully submits that jurisdiction is improper, and the Court should dismiss this review proceeding.

B. 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.

It is well-established 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." *Benton*, 386 So. 2d at 834. Thus, in order for a school board to be liable for an injury to a student, the student must establish four elements which comprise a negligence cause of action; the first element, and the only element at issue in this case, is a "duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Clay Elec. Co-op., Inc. v. Johnson,* 873 So.2d 1182, 1185 (Fla. 2003) (citation omitted). The determination of the existence of a duty of care is a question of law to be determined by the court. *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1110 (Fla. 2005) (citing *McCain,* 593 So. 2d at 502).

Specifically in the context of schools, a School Board owes a general duty of care to adequately supervise students placed within its care. *Leahy v. School Bd. of Hernando Cty.*, 450 So. 2d 883, 885 (Fla. 5th DCA 1984) (citing *Rupp*, 417 So. 2d at 658). Under Petitioners' analysis, this general duty of care alone is sufficient to open the courthouse doors in a lawsuit. However, this Court has previously rejected this blanket approach and determined that even though a school owes a general duty to supervise its students, a teacher has no duty to supervise all movements of all pupils all the time. *Rupp*, 417 So. 2d at 668, n. 26 (citing *Benton*, 386 So. 2d at 834). Thus, contrary to Petitioner's argument, a school board's general duty to supervise it students, without more, is insufficient to establish a legal duty in every case; rather, the scope of the school board's duty of care depends upon the facts of each case.

A school board's general duty of care to a student 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." *Benton*, 386 So. 2d at 834. With regard to school athletic activities, it has been generally held by Florida courts that

> The duty owed an athlete takes the form of giving adequate instruction in the activity, supplying proper equipment, making a reasonable selection or matching of participants, providing nonnegligent supervision of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury.

Leahy, 450 So. 2d at 885 (citing Annot., 35 A.L.R.3d 725, 734 (1971) (footnotes omitted) (emphasis removed)).

Moreover, since the Petitioners seek to impose liability on the School Board for nonfeasance, i.e. a failure to diagnose and perform skilled medical treatment by using an AED, rather than misfeasance, the Court must also consider and analyze the "special relationship" that existed between the School Board and Abel Limones. *See Knight v. Merhige*, 133 So. 3d 1140, 1144 (Fla. 4th DCA 2014) (identifying that the imposition of a legal duty of care under the facts of the case was tied to a special relationship existing between the plaintiff and defendant). As this Court recognized in *United States v. Stevens*,

> The duties described [in sections 302, 302A, and 302B of the Restatement] attach to acts of *commission,* which historically generate a broader umbrella of tort liability than acts of *omission,* which are the subject of §§ 315 and 314A. This distinction is expressed in Comment a, Section 302 of the Restatement of Torts (Second):
>
> > This section is concerned only with the negligent character of the actor's conduct, and not with his [or her] duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable [person] to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situation[s] where there is a special relation between the actor and the other which gives rise to the duty.

994 So. 2d 1062, 1068 (Fla. 2008). There is no duty to take affirmative action unless a "special relationship" exists such that a defendant is obligated to take such

affirmative action. *U.S. v. Stevens*, 994 So. 2d at 1068 (quoting Restatement (Second) of Torts §§ 314, 314A, 315). However, the duty to take affirmative action to aid another is not unlimited; rather, such duty mandates that the defendant act reasonably by rendering basic first aid and summoning medical assistance. *L.A. Fitness*, 980 So. 2d at 557 (determining that a health club's legal duty of care was fulfilled when employees called 9-1-1 after a patron collapsed, and further finding that the scope of the health club's duty did not include the duty to perform CPR); *Coccarello*, 421 So. 2d at 194 (affirming summary judgment by holding that a restaurant fulfilled its legal duty of care to a patron who was choking on food when employees immediately called a rescue team and another patron attempted to treat the victim to no avail); *see also* Restatement (Second) of Torts § 314A, comment f. More importantly, these courts have expressly determined that rendering "skilled medical treatment," such as CPR, an AED, or the Heimlich maneuver, is not within the scope of a defendant's reasonable duty of care.[2]

Here, the sole allegation of negligence against the School Board is its failure to use an AED on Abel Limones after he collapsed on the soccer field.[3] Because

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[2] This point cannot be overstated where, as here, the Florida Legislature has declared cardiac defibrillation as a form of "advanced life support." Fla. Stat. §401.23 (2008).

[3] Respondent has since learned that the audio recording of the Oral Argument in front of the Second District is not available. However, at oral argument, in response to at least one, if not two, questions from the 3-judge panel, counsel for

the allegations are those of nonfeasance rather than misfeasance, the School Board's duty to provide aid rested upon the "special relationship" existing between the School Board and Abel Limones. The duty to render aid to Abel Limones required the School Board to use "reasonable, prudent, and ordinary care"; in the context of athletics, reasonable care means taking proper post-injury procedures to protect against aggravation of the injury. *Benton*, 386 So. 2d at 834; *Leahy*, 450 So. 2d at 885. Florida courts, as well as several out-of-state courts and the Restatement, hold that the duty to use reasonable care in rendering aid is limited to rendering basic first aid and summoning medical assistance. *L.A. Fitness*, 980 So. 2d at 557; *Coccarello*, 421 So. 2d at 194; Restatement (Second) of Torts § 314A; *Digiulio v. Gran, Inc.*, 74 A.D.3d 450, 452, (N.Y. App. Div. 2010) *aff'd, Digiulio v. Gran, Inc.*, 2011 WL 2313798 (N.Y. 2011) (finding that the defendant's employees "more than fulfilled their duty of care by immediately calling 911 and performing CPR, had no common-law duty to use the AED, and could not be held liable for not using it"); *Salte v. YMCA of Metropolitan Chicago Foundation*, 814 N.E.2d 610 (Ill. App. Ct. 2004) ("[T]he law nonetheless did not require defendant to provide all emergency medical care that its patrons might foreseeably require; nor did the law require defendant to have a paramedic on its staff to provide such medical care. The use of a defibrillator requires specific training and we believe

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the Petitioners conceded that the sole allegation of negligence against the School

that its use is far beyond the type of 'first aid' contemplated by Restatement § 314A.").

Turning to the facts of the instant case, the undisputed testimony establishes that Assistant Principal Zellers called 911 within three minutes of Abel Limones collapsing on the soccer field. (R.II.249; III.311; IV.314; V.478:11-22, 545:2-5; XI.1102-11). The undisputed testimony also establishes that an AED was located on the soccer field during the game, and that at least two School Board employees certified in the use of an AED were present on the field. (R.II.249; III.312; IV.315; V.475:10-476:10, 480:7-481:3, 485:12-22, 486:12-487:3, 527:2-11, 538:13-540:1). Even though Coach Busatta testified that he yelled for an AED, it is undisputed that not one person heard anyone ask for an AED or even mention an AED. (R.III.312; IV.315; V.481:21-482:12, 483:1-3, 502:23-503:10, 536:16-25). Nurse Resto, a cardiac nurse and bystander at the game, performed CPR on Abel Limones and never requested an AED. (R. III.312;, IV.315; V.485:2-7). It is also undisputed that Coach Busatta and Nurse Resto performed CPR on Abel Limones up until first responders took over. (R.II.250; III.312; IV.315; XI.1076-77 (40:22-45:12), 1079 (50:17-21, 51:14-53:7)).

As the Second District correctly explained, there is no authority for Petitioners' position that the scope of the School Board's duty of care includes the

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Board was its failure to use an AED.

duty to render skilled medical treatment or "advanced life support," such that the failure to perform CPR or to use an AED on a student-athlete provides a basis for tort liability. Contrary to Petitioners' arguments, the Second District did not "cross into the province of the jury" because the court was required to determine whether the failure to use an AED was within the scope of the general duty imposed on the School Board to render basic first aid and to summon medical assistance. *L.A. Fitness*, 980 So. 2d at 557; *Coccarello*, 421 So. 2d at 194; Restatement (Second) of Torts § 314A.

The Second District's determination of the scope of the School Board's duty in *Limones* is virtually identical to the determination made by the Fourth District in *L.A. Fitness*. In *L.A. Fitness*, the Fourth District determined that there is no common law duty on a business owner to render skilled medical treatment, such as CPR, defibrillation by an AED, or even the Heimlich maneuver, to a business invitee having a medical emergency. 980 So. 2d 550. In *L.A. Fitness*, the personal representative of the decedent's estate filed a wrongful death suit against the owner of a fitness club. *Id.* The personal representative alleged that the fitness club breached its duty to render aid to the decedent during a medical emergency when the decedent suffered a cardiac event while using a stepper machine. *Id.* at 552. The personal representative contended that the fitness center's employees were negligent in (1) failing to follow protocol for CPR assessment; (2) failing to

perform CPR; and (3) failing to have an AED on its premises and to use an AED on the decedent. *Id.* At trial, the evidence established that the fitness club employees heard a patron yell for help and ran to the decedent. *Id.* at 552. Within one to nine minutes of the decedent collapsing, an employee of the fitness club called 9-1-1. *Id.* at 552-53. One of the fitness club employees, who was trained in CPR, took the decedent's pulse but did not perform CPR. *Id.* at 552-53. L.A. Fitness did not have an AED on the premises. *Id.* Three minutes after receiving the call for 911, the emergency responders arrived at the fitness club. *Id.* at 553. The emergency responders were unable to re-establish the decedent's pulse. *Id.*

After listening to the evidence, the jury returned a verdict of $729,000 for the personal representative of the decedent's estate. On appeal, the Fourth District reversed the jury verdict and remanded for entry of judgment in favor of L.A. Fitness. The appellate court made the following findings:

> . . . L.A. Fitness, through its employees, fulfilled its duty of reasonable care in rendering aid to the deceased by summoning paramedics within a reasonable time. L.A. fitness did not have a legal duty to have CPR-qualified employees on site at all times, and their employees were under no legal duty to administer CPR to the deceased. Further, L.A. Fitness had no legal duty to have a defibrillator on the premises for emergency use on the deceased. Because we determine as a matter of law that L.A. Fitness took reasonable action to secure first aid for the deceased and did not breach any duty of reasonable care to him, we reverse and remand for entry of judgment for L.A. Fitness.

Id. at 562. In reaching this decision, the Fourth District specifically determined that a business owner's duty of care does not include the duty to perform skilled medical treatment. *Id.* at 559. The appellate court identified that CPR, which requires training and re-certification, is more than mere first aid. *Id.* "Unlike first responders, for whom performing CPR is routine, non-medical employees certified in CPR remain laymen and should have discretion in deciding when to utilize the procedure." *Id.*

The instant case falls squarely within the decision of the Fourth District in *L.A. Fitness*. The scope of the duty owed by a school board does not include a duty to diagnose the need for skilled medical treatment and to perform skilled medical treatment on a student-athlete. It is undisputed that similar to CPR, users of an AED require training and re-certification. Such requirements and training make the use of an AED skilled medical treatment and certainly more than "mere first aid." *Id.* at 559; *see* Fla. Stat. § 401.23 (defining "advanced life support" as including "cardiac defibrillation"). Further, as pointed out by the Fourth District, non-medical employees, who are certified in CPR or the use of an AED, are not first responders but remain laymen. *Id.* This point cannot be overstated in the context of a school board. The School Board employees trained in the use of AEDs, such as those in attendance during the soccer game on November 13, 2008, are high school coaches, athletic directors, and school administrators. These

employees are non-medical employees who are not hired because of their training, ability and expertise in diagnosing medical conditions and providing skilled medical treatment. It is unreasonable and to place such a heavy onus on laymen. Rather, consistent with Florida case law, the duty of care owed by school board employees, who remain layman, is to summon paramedics within a reasonable time when a medical emergency is identified. *See Benton*, 386 So. 2d at 834; *L.A. Fitness*, 580 So. 2d at 557-58, 562. To hold otherwise would open the courthouse doors to a medical malpractice action against laymen.

Finally, the public policy implicated by placing an affirmative duty on school board employees to have to diagnose and use an AED on a student-athlete weighs heavily in favor of finding no such legal duty exists. The duty inquiry in a negligence case involves weighing "'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" *Rupp,* 417 So. 2d at 667; *Knight*, 133 So. 3d at 1149.

> 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." A legal "[d]uty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed."

Knight, 133 So. 3d at 1149-50 (quoting *Biglen v. Florida Power & Light Co.,* 910 So. 2d 405 (Fla. 4th DCA 2005)). In *Gracey v. Eaker*, this Court quoted William L. Prosser and acknowledged that the concept of 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 [or not]." 837 So.2d 348, 354 (Fla. 2002) (quoting *Rupp,* 417 So.2d at 667 and *Handbook of the Law of Torts,* § 53, at 325-26 (4th ed. 1971)) (emphasis added); *see also Clay Elec. Co-op., Inc.*, 873 So. 2d at 1202 (J. Cantero, dissenting).

Here, public policy demands that a school board have no affirmative duty to diagnose the need for an AED or to use an AED on a student, such that the failure to diagnose or to use an AED subjects a school board to liability. The practical effect of such an affirmative duty presents an untenable situation for school boards. For example, what happens in a situation where a cross country runner or golfer collapses during a match and the closest AED is at the start line or the first hole which is a half-mile away? What happens in a situation where a school has an AED on school grounds, but does not have enough AEDs to put on the sidelines of every extracurricular athletics match being played that day? What happens if School Board employees, such as Principal Demming, Assistant Principal Zellers, and Athletic Director Roszell, believe that the student is having a seizure rather than a cardiac issue?[4] What happens when, just as in the instant case, a bystander

[4] Such a "diagnosis" by a layman is not uncommon. In *L.A. Fitness*, the health club employee who was certified in CPR believed that the patron was having a seizure or stroke and decided not to attempt CPR for fear of possibly making matters worse. 980 So. 2d at 552.

cardiac nurse begins treating the student, does not identify a cardiac issue, and does not request an AED? In each of these situations, School Board employees would not be in a position to use an AED on a student-athlete for varying reasons. To impose a duty on school board employees, who are not medical professionals but laymen, is equivalent to allowing a medical malpractice action to proceed against a school board. Such a position is not only unreasonable but would be impossible for the School Boards of this State to comply with. For these reasons, this Court should hold that the scope of the School Board's general duty did not include the duty to provide skilled medical treatment by diagnosing the need for or using an AED on Abel Limones.

C. There is No Statutory Duty to Use an AED.

As a threshold matter, the Petitioners have failed to identify any statutory language that imposes an *affirmative duty* to use an AED in a medical emergency. *See* Fla. Stat. §§ 1006.165; 768.13; 768.1325. Petitioners' arguments that a defendant's alleged violation of a statute can be evidence of a breach of the standard of care is irrelevant to the question at hand because the Court must first determine that a duty of care exists. *Johnson v. Badger Acquisition Of Tampa LLC*, 983 So. 2d 1175, 1182 (Fla. 2d DCA 2008). Thus, the question before the district court, as well as this Court, is whether the common law or statutes created

an affirmative duty for the School Board to use an AED on Abel Limones. As explained above, the School Board did not owe a common law duty to diagnose the need for, or to use an AED on Abel Limones.

1. Section 1006.165, Florida Statutes, Does Not Create a Legal Duty.

Contrary to Petitioners' arguments and implications, Florida Statute § 1006.165 does not impose a statutory duty on a school board to use an AED on Abel Limones. Section 1006.165 is a regulatory statute which requires certain schools have an operational AED on school grounds. Statutes enacted for the benefit of the general public, such as Section 1006.165, do not automatically create an independent duty to individual citizens or a specific class of citizens. *Trianon Park*, 468 So. 2d at 917. "When the legislature creates a regulatory statute that does not expressly create a private right of action against the private individuals who are regulated by the statute, the courts have been cautious about concluding that the statute creates a private right of action against them." *Dep't of Children & Family Svcs. v. Chapman,* 9 So. 3d 676, 684 (Fla. 2d DCA 2009) (citing *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994); *Miulli v. Fla. High Sch. Athletic Ass'n*, 998 So. 2d 1155 (Fla. 2d DCA 2008)).

The Second District previously analyzed Chapter 1006, Florida Statutes, and determined that it does *not* impose civil liability on a defendant. *Miulli*, 998 So. 2d at 1157. In *Miulli*, a student was engaged in a physical activity associated with his

high school baseball team when he fell to the ground, lost consciousness, and died. *Id.* at 1156. The Personal Representative of the Estate filed a wrongful death lawsuit against the FHSAA, alleging that, pursuant to Section 1006.20, the FHSAA was required to adopt bylaws that required all students to pass a medical evaluation prior to participating in interscholastic athletic competitions, tryouts, workouts, or other physical activity associated with an interscholastic athletic team. *Id.* at 1156. On appeal, the Second District affirmed the trial court's dismissal of the lawsuit, finding that the statute did not establish a cause of action against the Defendant. In reaching its decision, the Second District stated:

> Chapter 1006 of the Florida Statutes, as a whole, contains various regulations regarding the health, safety, and welfare of students. However, the only provision which expressly provides for civil liability is section 1006.24 which imposes tort liability on district school boards for claims arising out of the use of a school bus or other motor vehicle used to transport students. Neither this provision, nor any other, specifically imposes civil liability upon the FHSAA [Defendant]. Under the doctrine of *inclusio unius est exclusio alterius,* the express authorization to pursue a private right of action for tort claims arising out of school bus accidents demonstrates that the legislature did not intend to provide a private cause of action with regard to other claims arising under the chapter.

Id. (citing *Murthy,* 644 So. 2d at 986 (stating that, in general, a statute that does not purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability)); *Horowitz v. Plantation Gen. Hosp. Ltd. Partnership,* 959 So. 2d 176 (Fla. 2007) (holding that § 458.320, Florida Statutes, which outlines the financial

responsibility requirements for Florida physicians, did not create a cause of action against hospitals for failing to ensure the financial responsibility of their staff-privileged physicians)). The clear and unambiguous holding in *Miulli*, which is consistent with this Court's precedent, establishes that Section 1006.165, Florida Statutes, does not impose a statutory duty on the School Board.

Furthermore, notwithstanding *Miulli*, Section 1006.165 adopts the Cardiac Arrest Survival Act, which explicitly provides that the Act "does not establish any cause of action." Fla. Stat. §§ 1006.165(4), 768.1325(5). Thus, as explained in greater detail below, to the extent the Petitioners imply that § 1006.165 imposed a legal duty on the School Board to use an AED on Abel Limones, the Cardiac Arrest Survival Act expressly negates this argument.

2. The Plain Language of Section 1006.165 Does Not Mandate the Use of an AED on a Student-Athlete, and the School Board Complied with the Terms of the Statute.

Even assuming *arguendo* that Section 1006.165 imposed a statutory duty on the School Board, the duty of care owed by the School Board is limited to the plain language of the statute. *Pollock v. Fla. Dept. of Highway Patrol*, 882 So. 2d 928, 934 (Fla. 2004). In *Pollock v. Florida Department of Highway Patrol*, the Plaintiff alleged the Florida Highway Patrol (FHP) had a statutory duty to remove stalled or abandoned vehicles from the state highways. *Id.* In analyzing the statute at issue, this Court identified that the statutory construct permitted the FHP to remove

disabled vehicles but did not mandate the FHP to remove disabled vehicles. *Id.* Thus, based upon the language of the statute, this Court determined that the FHP owed no duty to remove a disabled vehicle from a state highway. *Id.*

The statute at issue here is devoid of any language that mandates the use of an AED on a student-athlete or imposes liability on the School Board for not using an AED on a student-athlete. Rather, Section 1006.165 mandates *only* that each public school, which that is a member of the FHSAA, have an operational AED on the school grounds (§ 1006.165(1)); that each school ensure that any employees, who are reasonably expected to use the AED, obtain the appropriate training for use of the device (§ 1006.165(2)); and that the location of each automated external defibrillator be registered (§ 1006.165(3)). Nothing in the statute even remotely mandates the use of an AED or imposes liability on a school board for not using an AED on a student.

The undisputed testimony in this case establishes that the School Board fulfilled the requirements of Section 1006.165 by having two operational AEDs on school grounds—one of them located on the soccer field at the time of Abel Limones' collapse—*and* by having two School Board employees, who were certified and trained in the use of AEDs, present at the soccer game. (R.II.249; III.312; IV.315; V. 475:10-476:10, 480:7-481:3, 485:12-22, 486:12-487:3, 527:2-

11, 538:13-539:9, 539:18-540:1). Thus, the undisputed evidence establishes that the School Board fully complied with the requirements of Section 1006.165.

In addition, to the extent that the Petitioners imply that an alleged violation of an internal policy establishes a legal duty, the precedent of this Court contradicts such position. *Pollock*, 882 So. 2d at 936-37; *Johnson*, 982 So. 2d at 1182. Petitioners attempt to rely upon email exchanges between Coach Busatta and School Board administrators regarding the Lee County School District's internal policy of having an AED at all sporting events and practices. Any internal policies of the Lee County School Board have no bearing on whether the scope of the School Board's duty included a duty to use an AED on Abel Limones. Similar to evidence of a violation of a statute, a violation of internal procedures "only becomes relevant to a breach of a standard of care after the law has imposed a duty of care." *Johnson*, 982 So. 2d at 1182; *Pollock*, 882 So. 2d at 936-37 (ruling that the internal policies and procedures of the Florida Highway Patrol did not impose a duty to dispatch officers to the scene of a stalled tractor-trailer).

D. The Undertaker's Doctrine Does Not Apply.

The Petitioners' reliance on the Undertaker's Doctrine as a basis for liability should be deemed by this Court as meritless. Under Florida law, an action undertaken for the benefit of another, even if undertaken gratuitously, must be performed in accordance with an obligation to exercise reasonable care. *L.A.*

Fitness, 980 So. 2d at 560. This doctrine, coined the Undertaker's Doctrine, applies only if (a) the failure to exercise reasonable care in the undertaking increases the risk of such harm, or (b) the harm suffered by the injured party occurs because of another's reliance upon the undertaking. *Id.* (quoting Restatement (Second) of Torts § 323).

The Petitioners contend that the School Board "undertook a duty to safeguard Abel and other students playing field sports by having an AED available and having employees trained in its use standing by to use it." (Pet. Br. Merits 24). The Second District correctly rejected this argument because there are no facts to establish that the acquisition of the AED *increased* the harm to Abel Limones or that anyone relied upon the School Board's acquisition of the AED and thus refrained from rendering aid to Abel Limones. *See L.A. Fitness*, 580 So. 2d at 561; *White v. Advanced Neuromodulation Systems, Inc.*, 51 So. 3d 631, 636 (Fla. 2d DCA 2011) (affirming summary judgment in favor of defendants under the Undertaker's Doctrine because the nurse's actions in observing and assessing a patient's incision site did nothing to increase the risk of harm to the patient or to cause other people to refrain from rendering aid to the patient).

Moreover, Florida law required the School Board to have an AED on school grounds, and Florida law also provided immunity to the School Board for its acquisition and/or use of the AED. Fla. Stat. §§ 768.1325(4); 1006.165.

Petitioners are asking this Court to distort the Undertaker's Doctrine by finding that the School Board undertook a duty to use an AED simply because it complied with the regulatory statute. *First*, this argument flies in the face of Florida law on the Undertaker's Doctrine because there is no evidence that Abel Limones suffered greater harm or that others refrained from rendering aid because of their reliance upon the School Board's acquisition of the AED. *Second*, Petitioners' argument directly contradicts the Cardiac Arrest Survival Act which provides immunity to the School Board for acquiring the AED and making it available for use. *Third*, under Petitioners' theory, a school board's mere compliance with a regulatory statute, which provides no private cause of action, would indirectly give rise to a private cause of action simply because the school board complied with the regulatory statute. *Fourth*, the public policy issues implicated by this position are troubling to say the least. Business owners would be hesitant to acquire an AED for fear that they will be subject to tort liability just for having one on the premises. Such a result is absurd and would only serve to deter business owners from acquiring these devices. For these reasons, Petitioners' argument that the School Board undertook a duty solely by having an AED on the premises lacks merit.

Similarly, Coach Busatta's testimony that he asked for an AED did not create a duty on the part of the School Board to use an AED on Abel Limones. The record is devoid of any evidence that any person on the field that day heard

anyone request an AED. Even assuming that Coach Busatta called for an AED, such fact does not create a mandatory duty on the School Board. As aptly explained by the trial court, Coach Busatta's request for an AED is analogous to the employee in *L.A. Fitness* who attempted to take the pulse of the decedent but did not perform CPR:

> L.A. Fitness employee Strayer took the preliminary step of assessing the decedent, including taking his pulse. The question is whether that assessment committed him to performing CPR if that was indicated. Generally speaking, we do not believe that it did.

L.A. Fitness, 980 So. 2d at 560-62; *White*, 51 So. 3d at 636. Coach Busatta's request did not obligate the School Board to use an AED on Abel Limones because the purported request did not worsen Abel Limones' condition, cause him any affirmative injury, or cause any others to refrain from rendering aid to Abel Limones. *See L.A. Fitness*, 980 So. 2d at 561-62; *White*, 51 So. 3d at 636. To the contrary, Coach Busatta and Nurse Resto continued to perform CPR on Abel Limones from the time he stopped breathing up until the time that the firefighters took over. For these reasons, this Court should reject Petitioners' argument that the School Board owed a duty under the Undertaker's Doctrine.

E. The Second District Properly Relied upon the Fourth District's Decision in *L.A. Fitness International, LLC v. Mayer*.

In *L.A. Fitness*, the Fourth District determined that there is no common law duty on a business owner to render skilled medical treatment, such as CPR,

defibrillation by an AED, or even the Heimlich maneuver, to a business invitee having a medical emergency. 980 So. 2d at 550; *see White*, 51 So. 3d at 636 (citing *L.A. Fitness* with approval). Under the common law, a special relationship exists between a business owner and an invitee, giving rise to a legal duty on the part of the business owner to take reasonable steps to provide aid to an invitee in need of medical assistance. Restatement (Second) or Torts § 314A. Florida courts have similarly determined that a school board's duty of care to it students is the duty to use "reasonable, prudent, and ordinary care." *See Benton*, 386 So. 2d at 834. Thus, it was entirely appropriate for the Second District in *Limones* to rely upon *L.A. Fitness*, where the duty of care owed by both a business owner to an invitee is the same duty of care owed by a school board to a student.

The Petitioners argue that *L.A. Fitness* is distinguishable and inapposite to the instant case because *L.A. Fitness* does not involve a school board and student. (Pet. Br. Merits 25-26). The Petitioners, however, provide no case law to support this position. The decision in *L.A. Fitness* is applicable here because the duty of care owed by a business owner to an invitee—the duty to take reasonable action to give or secure first aid—is similar to the duty of school board employees to use reasonable care, prudent, and ordinary care. *See L.A. Fitness*, 980 So. 2d at 557-58; *Benton*, 386 So. 2d at 834.

The Petitioners also argue that *L.A. Fitness* is distinguishable because the fitness club was not mandated by statute to have an AED on its premises. As set forth in further detail above, although Florida Statute § 1006.165 requires a school board to have an AED available on school grounds, this regulatory statute does not impose an affirmative duty on school boards to use an AED on students.

Finally, the undisputed facts of this case are far less alarming than the facts established in *L.A. Fitness*, where the employees and bystanders called 9-1-1 but did not perform CPR on the patron. The Fourth District underscored the importance of timely performing CPR by referencing expert testimony therein that CPR increases the likelihood that defibrillation would be successful, preserves brain function, and prolongs the time for which effective defibrillation can be administered. 980 So. 2d at 553-54. Notwithstanding this expert testimony, the Fourth District determined that the scope of L.A. Fitness' general duty of care to its patron did not include a duty to perform skilled medical treatment, such as CPR. Here, contrary to the facts of *L.A. Fitness*, no one stood idly by. The undisputed evidence reveals that the School Board employees and nurse bystander immediately called 9-1-1, began performing CPR as soon as Abel Limones stopped breathing, and did not stop CPR until the firefighters took over. The firefighters used their AED on Abel Limones but it was not until EMS injected Abel Limones with numerous medications and utilized a semi-automatic

defibrillator that a pulse could be obtained. In light of these facts, the Second District correctly held that *L.A. Fitness* was equally applicable to the facts set forth in *Limones*.

F. The School Board is Immune from Suit Pursuant to the Cardiac Arrest Survival Act.

The Cardiac Arrest Survival Act ("CASA"), Florida Statute § 768.1325,[5] provides two distinct layers of immunity. First, CASA provides immunity to "any person who uses or attempts to use an automated external defibrillator device on a victim. . . ." Fla. Stat. § 768.1325(3). Second, CASA provides immunity to "any person who acquired the device and makes it available for use. . . ." *Id.*

The CASA, by its plain language, provides the School Board with immunity from suit because the School Board constitutes a "person" who acquired an AED and made it available for use. *See* Fla. Stat. § 1.01(3) ("The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."). The CASA provides immunity to the School Board

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[5] "Notwithstanding any other provision of law to the contrary, and except as provided in subsection (4), any person who uses or attempts to use an automated external defibrillator device on a victim of a perceived medical emergency, without objection of the victim of the perceived medical emergency, is immune from civil liability for any harm resulting from the use or attempted use of such device. In addition, notwithstanding any other provision of law to the contrary, and except as provided in subsection (4), any person who acquired the device and makes it available for use, . . . is immune from such liability . . ." Fla. Stat. § 768.1325(3).

without the necessity of Section 1006.165 cross-referencing the Statute. Based upon the undisputed facts of this case, the School Board is entitled to immunity from suit because it acquired two AEDs and made them available on the campus of Riverdale High School. *See* Fla. Stat. § 768.1325(3).

The Petitioners ignore the plain language of the CASA and argue that it does not apply because (1) the Act does not cover a situation where, as here, a person does not use an AED; and (2) the AED was not "available" because it was not used on Abel Limones. Both of Petitioners arguments should be rejected. First, Petitioners' contention that the Act does not cover situations where an AED is not used, but only covers situations where an AED is used negligently, flies in the face of reason. Under Petitioners' flawed interpretation of the statute, a person who attempts to shock an individual by placing an AED on the individual's feet, rather than his chest, is immune from liability; however, a person who is aware of an AED on site, but does not diagnose the need for it or hear anyone request it (and thus does not attempt to use an AED), is not shielded from liability. An even more absurd result would occur where a person does not utilize an AED because the only AED on site is too far from the location of the individual suffering a perceived medical emergency. Although the CASA does not require an AED be placed at any particular location (Fla. Stat. § 768.1325(5)), under Petitioners' argument, the owner who acquired the AED would not be entitled to immunity

under the Act. Similar scenarios could easily occur in the context of high school athletics. These results are certainly not the results envisioned by the Legislature when it enacted this statute. *See* Ch. 2001-76, House Bill No. 1429 ("WHEREAS, limiting the liability of users *and acquirers* of automated external defibrillator devices in emergency situations may encourage the use of the devices, and result in saved lives") (emphasis added).

Petitioners' argument that the AED was not "available" because it was not *used* on Abel Limones is likewise unavailing. This position contradicts the clear language of the statute, as well as the Legislature's intent in enacting the statute, to expressly provide two layers of immunity—one for users and one for acquirers. Fla. Stat. § 768.1325(3); Ch. 2001-76, House Bill No. 1429.

Finally, Petitioners' argument that the actions of the School Board employees constitutes gross negligence or reckless disregard is disingenuous and a misrepresentation of the undisputed facts. Pet. Br. Merits 30-31. The Complaint contained in this Record is devoid of any allegation that any person acted with "willful or criminal misconduct, gross negligence, reckless disregard or misconduct, or a conscious, flagrant indifference to the rights or safety of the victim." (R.I.02-14). In their Initial Brief to the Second District, the Petitioners, for the first time in this lawsuit, made a bold assertion that the School Board's failure to provide an AED in light of Coach Busatta's request for one "may serve as

a basis for finding gross negligence and/or reckless disregard." Index to Briefs, Tab A (p. 30-31). The undisputed testimony reveals that not one person in the vicinity of Coach Busatta—referees, coaches, administrators, or bystander nurses (one of which was performing CPR with Coach Busatta)—ever heard **anyone** ask for an AED or even mention an AED. (R.III.312; IV.315; V.481:21-482:12, 483:1-3, 502:23-503:10, 536:16-25). Thus, the Petitioners' assertion that the School Board employees' conduct could constitute gross negligence or reckless disregard when not one person heard anyone request an AED, is disingenuous at best. The School Board cannot be charged as acting with willful or criminal misconduct, gross negligence or reckless disregard when not one person in the area ever heard Coach Busatta, or anyone at the scene, ask for an AED. (*Id.*).

Based upon the plain language of CASA, the School Board is entitled to immunity for acquiring an AED and making it available on the premises of Riverdale High School.

CONCLUSION

Based on the foregoing, the School Board respectfully submits that this Court should discharge its jurisdiction over *Limones*. Alternatively, the School Board submits that this Court should approve the decision below and hold that (1) the scope of the School Board's general duty of care did not include a duty to diagnose or to use an automated external defibrillator on Abel Limones; and (2) the School Board is entitled to immunity under the Cardiac Arrest Survival Act.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of Court using the E-Filing Portal System which will send a notice of electronic filing to the following:

David C. Rash, Esq.
DAVID C. RASH, P.A.
david@dcrashlaw.com
maileidys@dcrashlaw.com
2200 North Commerce Parkway, #200
Weston, Florida 33326
Telephone (954)529-2222
Counsel for Petitioners

Elizabeth K. Russo, Esq.
RUSSO APPELLATE FIRM, P.A.
e-service@russoappeals.com
ekr@russoappeals.com
6101 Southwest 76th Street
Miami, Florida 33146
Telephone (305)666-4660
Counsel for Petitioners

this 28th day of May, 2014.

HENDERSON, FRANKLIN, STARNES & HOLT, P.A.
Counsel for Respondents
Post Office Box 280
1715 Monroe Street
Fort Myers, FL 33902-0280
239.344.1263
traci.mckee@henlaw.com

By: Traci McKee
Traci T. McKee
Florida Bar No. 053088
Scott A. Beatty
Florida Bar No. 0084638

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with Florida Rule of Appellate Procedure 9.210, and has been typed in Times New Roman, 14 point.

Traci McKee

Traci T. McKee
Florida Bar No. 053088