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In the Supreme Court of Florida

CASE NO.: SC13-932

ABEL LIMONES, SR. and SANJUANA CASTILLO, individually and as 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

INITIAL BRIEF OF PETITIONERS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

A. Overview of the key facts and the Second District's decision

The Second District decision accepted for conflict review arose from a claim made by Petitioners for severe brain injury suffered by their 15-year old son as a result of delays in resuscitating him after he collapsed on the field during a high school soccer game. (A 1).[1] At issue was the liability of Respondent School Board of Lee County, for whom the trial court had entered summary judgment. (A 2, n 1).

In affirming the defense summary judgment, the Second District's decision stated the facts, in pertinent portion, as follows:

> [Petitioners' son] Abel, who was playing for East Lee County, abruptly collapsed on the field at about 7:40 p.m. Abel lost consciousness, stopped breathing, and had no discernible pulse within three minutes. Riverdale's Assistant Principal called 911 at 7:43 p.m. while East Lee County's coach, Thomas Busatta, and a nurse bystander performed CPR. Coach Busatta testified that he called for an AED [automated external defibrillator] but no one responded. * * * Sadly, it appears that there was an AED on a golf cart that was parked near the soccer field's end zone. The Fire Department arrived at the soccer field at 7:50 p.m. and used a defibrillator to deliver a shock to Abel's heart with no success. Emergency Medical Service personnel arrived on the scene almost simultaneously and changed out the Fire Department's defibrillator for their own. They delivered four additional shocks and administered a

[1] References to the original record on appeal prepared by the Clerk of the trial court appear herein by volume and page number, as follows: (R 1, pp 4-11). A conformed copy of the Second District's decision has been made an Appendix hereto, and is referenced by Appendix page number (A 4). Unless otherwise indicated, all emphasis in this brief has been supplied by undersigned counsel.

> series of intravenous medications. Abel was resuscitated at 8:06 p.m., which was twenty-three minutes after the 911 call.

(A 2-3). The Second District's opinion went on to note the expert medical testimony on causation, which was filed by Petitioners in opposition to the defense motion for summary judgment:

> Had an AED been provided to [Coach] Thomas Busatta when he requested it and had it been used on Abel Limones, Jr. within 1 to 2 minutes of the time he became unconscious, stopped breathing, and had no pulse, Abel Limones, Jr. would not have required so many additional defibrillations or shocks and would not have sustained the permanent and catastrophic anoxic brain injury leaving him in a near persistent vegetative state requiring life-long 24 hour care.

(A 3).

In reviewing the trial court's summary final judgment, the Second District began with the threshold question of law as to whether the Respondent School Board had any duty under the facts of the case. (A 4). The Second District acknowledged that the Respondent *did* have such a duty based on established Florida law:

> Florida courts generally recognize a school's duty to adequately supervise its students, and this duty extends to athletic events. *See Leahy v. Sch. Bd. of Hernando Cnty.*, 450 So. 2d 883, 885 (Fla. 5th DCA 1984) (citing *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982)). This common law duty arises from the idea that the school stands "'partially in place of the student's parents.' " *Id.* (quoting *Rupp,* 417 So. 2d at 666). The school's duties regarding athletic activities include (1) providing adequate instruction, (2) supplying appropriate equipment, (3) reasonably selecting or matching athletes, (4) properly supervising the event, and (5) utilizing

> appropriate post-injury efforts to protect the injury against aggravation. *Id.* ***Thus, as specifically relevant to this case, the School Board had a common law duty to use appropriate post-injury efforts to protect Abel's injury against aggravation.***

(A 4).

It was Petitioners' position that, once it has been determined as a matter of law that a duty exists, the question of breach is for the jury. (A 3). Petitioners argued that, given the evidence that the coach had called for an AED, that the Respondent School Board claimed that it already had an AED available on a golf cart parked at the soccer field ten or twenty feet from where the boy collapsed, and that, had the AED been provided to the coach when he asked for it, Abel would not have sustained catastrophic brain injury, it was for the jury to determine whether the School Board had breached its duty to use appropriate post-injury efforts to protect Abel's injury against aggravation. (A 3-4; R 4, p 315).

Instead of leaving the question of breach for the jury, which is what Petitioners submit is required by Florida law, the Second District imported a legal principle from a Nebraska case that is in conflict with Florida law. (A 4-5). Specifically, the Nebraska law interjects another area of inquiry to be determined by the court as a matter of law ***after*** the legal question of duty has been determined, to wit, inquiry as to the "***scope and extent***" of the duty. The Second District said:

> Once a determination is made that a duty to use appropriate post-injury efforts exists, the court must determine the scope and extent of the duty. *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.,* 262 Neb. 66, 628 N.W. 2d 697, 703 (2001).

(A 4-5). Citing this Nebraska case, the Second District stated *as a question of law* that which, under Florida law, is the *jury* question of breach:

> Generally this standard is an objective "reasonably prudent person standard," which is what a reasonably prudent person would have done under the circumstances. *Id.* at 703-04. But the analysis of the scope and extent of a school's duty in a sports setting depends largely on the particular facts and the circumstances of the case. *Id.*

(A 5). The decision then identified the 'scope and extent question of law for the court as "whether reasonably prudent post-injury efforts for Abel would have required making available, diagnosing the need for, or using an AED" (A 5), and decided that "no" was the answer to all phases of the question. (A 5).

Believing the Second District's express statements as to the steps involved in analyzing the elements of a negligence claim to be in conflict with Florida law established by this Court, Petitioners timely filed their notice to invoke this Court's jurisdiction on grounds of express and direct conflict. This Court accepted the case for review by order dated February 6, 2014.

B. Further detail as to the record facts and the parties' positions

1. The incident on the soccer field

On November 13, 2008, 15-year old Abel Limones, Jr., a varsity player for

East Lee County High School, collapsed on the soccer field during a game at Riverdale High School. (R 1, pp 2-4; R 11, p 999). Within three minutes of his collapse, Abel had stopped breathing and lost his pulse. (R 11, p 1038). His coach, Thomas Busatta, who had run out onto the field to attend to the boy, testified that he knew that when Abel stopped breathing and had no pulse there was an urgent need for the use of an AED. (R 11, p 1005). The coach testified that he yelled for the AED several times while performing CPR as an interim measure until he got the AED:

Q: [A]ny time before the firefighters got there, do you remember any discussion about an AED?

A: Yes.

Q: Tell me about that.

A: I asked for an AED. I said someone get an AED.

Q: Who did you ask that of?

A: I yelled it out.

Q: Did anyone respond with anything, like, we don't have one, anything or there is or –

A: I never heard anyone say we don't have one or there it is.

Q: Did you ever hear a response one way or the other, any kind of verbal response?

A: I don't recall having heard anyone respond to me.

Q: Okay. Did you do it once or numerous times?

A: Numerous times.

Q: How many times?

A: At least three.

Q: One right after another or how far apart?

A: Well, it was between working on him.

Q: You had already started CPR?

A: Correct.

(R 11, pp 1004-1005).

Q: But you yelled it soon after you got there, soon after you arrived at Abel? Do you yell it right before you started CPR, or was there a gap?

A: When I checked to see if he was breathing and he wasn't breathing, I believe at that point I asked if we had an AED.

Q: And then how soon after that did you start CPR?

A: I went through the normal procedure of checking, how long it takes to check if he has a pulse, shook him, if there is any breath, if there's - his stomach moving, his chest moving, anything.

Q: And you found none?

A: Correct.

Q: And then you yelled for that AED?

A: Good possibility.

Q: Three times?

A: Not three times then. I would have yelled it once, then started working and then while I was working, right.

Q: So you are yelling it in between chest compressions and breaths?

A: Correct.

Q: The second time, and the third? First time was before you started?

A: Yeah.

Q: Okay. So you yelled it, start CPR, yelled it again, keep doing CPR, yelled again, is that how it went?

A: Correct.

(R 11, pp 1005-1006).

The Assistant Principal of the school who was present when Abel collapsed testified that one of the school's AED machines was "ten or twenty feet from where he collapsed" "near the end zone of the soccer field." (R 4, p 315). Nonetheless, the AED was never brought to Coach Busatta despite his repeated requests. (R 11, pp 1005-1006).

Coach Busatta had also asked for a 911 call, which was made at 7:44 p.m. (R 11, pp 1001, 1027). In response to the 911 dispatch, Fort Myers Shores Fire Department and Lee County Emergency Medical Services responded to the scene.

(R 11, pp 1103-1111). The Fort Myers Shores Fire Department's unit arrived first, took over the CPR that was in progress, and attached their semi-automatic AED to Abel. (R 11, p 1103). The Fort Myers Shores Fire Department delivered the first AED "shock" to Abel at 7:53 pm. (R 11, pp 1103, 1105). Thus, thirteen minutes had passed since Abel collapsed, and ten minutes since his pulse had stopped. (R 11, pp 1065, 1102, 1103, 1105). Concurrent with the application of the first shock, the Lee County Emergency Medical Services personnel also arrived on the scene, switched out the Fire Department's AED with their own fully automatic AED with which they delivered four additional "shocks," administered a series of advanced life support medications, and finally resuscitated Abel at 8:06 p.m., twenty-six minutes after he collapsed. (R 11, p 1105).

As a result of lapse of time without an AED, Abel suffered catastrophic anoxic brain injury leaving him in a near persistent vegetative state requiring life-long 24 hour care. (R 11, pp 1039-1040). David M. Systrom, M.D., a board certified pulmonary and critical care physician at Massachusetts General Hospital and Assistant Professor of Medicine at Harvard Medical School, expertly opines within a reasonable degree of medical probability that:

> _. On November 13, 2008, at 7:40 p.m. Abel Limones, Jr. collapsed from a previously undetected and pre-existing heart disease known as arrhythmogenic right ventricular dysplasia ("ARVD") while on the soccer field during a match between his visiting team, East Lee County

High School, and the home team, Riverdale High School;

_. Within 3 minutes of his collapse, or by 7:43 p.m., Abel Limones, Jr. had become unconscious, stopped breathing and had no pulse therefore requiring immediate intervention with cardio pulmonary resuscitation ("CPR") and defibrillation, which is able to be performed in public places such as the subject soccer field by use of an automated external defibrillator ("AED") if available;

_. The coach of the East Lee County High School soccer team, Thomas Busatta, recognized the urgent need to initiate CPR and to defibrillate Abel Limones, Jr. when he became unconscious, stopped breathing and had no pulse. Mr. Busatta immediately began CPR and several times called for an requested an AED. However, no AED was produced or provided to Mr. Busatta;

_. It was not until the Fort Myers Shores Fire Department arrived on scene and immediately applied their own AED that the first defibrillation or shock was able to be provided to Abel Limones, Jr. at 7:53 p.m., which was 10 minutes after Abel Limones, Jr. became unconscious, stopped breathing and had no pulse;

_. After 4 additional defibrillations or shocks, and the administration of advanced life support medications, the Lee County Emergency Medical Service personnel, who had taken over for the Fort Myers Shores Fire Department, were able to obtain a pulse and resuscitate Abel Limones, Jr.;

_. The reason Abel Limones, Jr. required 5 defibrillations or shocks and the administration of the atypical and prolonged course of advanced life support medications was because of the delay of 10 minutes between the time he became unconscious, stopped breath[ing] and had no pulse and the time of the initial defibrillation performed by the Fort Myers Shores Fire Department at 7:53 p.m.;

_. As a direct result of the 10 minute delay between the time Abel Limones; Jr. became unconscious, stopped breathing and had no pulse and the time of the initial defibrillation performed by the Fort Myers

Shores Fire Department, Abel Limones, Jr. sustained a permanent and catastrophic anoxic brain injury leaving him in a near persistent vegetative state requiring life-long 24 hour care; and,

_. Had an AED been provided to Thomas Busatta when he requested it and had it been used on Abel Limones, Jr. within 1 to 2 minutes of the time he became unconscious, stopped breathing and had no pulse, Abel Limones, Jr. would not have required so many additional defibrillations or shocks and would have not sustained the permanent and catastrophic anoxic brain injury leaving him in a near persistent vegetative state requiring life-long 24 hour care.

(R 11, pp 1039-1040).

2. The statutory requirement that the School Board have an AED available for use

At the time of the subject November 13, 2008 scheduled soccer match between Riverdale High School and East Lee County High School, both high schools were members of the Florida High School Athletic Association ("FHSAA"), which governs regulations for high school athletic events. (R 1, pp 2-3; R 6, p 597). The varsity soccer match was sanctioned by the FHSAA. (R 1, p 3; R 6, p 603). An AED is required to be available (along with personnel familiar with and trained in its use) during FHSAA sanctioned interscholastic sports competitions by § 1006.165, Fla. Stat., which states, in relevant part:

(1) Each public school that is a member of the Florida High School Athletic Association must have an operational automated external defibrillator on the school grounds. . . .

(2) Each school must ensure that all employees or volunteers who are reasonably expected to use the device obtain appropriate training, including completion of a course in cardiopulmonary resuscitation or a basic first aid course that includes cardiopulmonary resuscitation training, and demonstrated proficiency in the use of an automated external defibrillator.

(3) The location of each automated external defibrillator must be registered with a local emergency medical services director.

(4) The use of automated external defibrillators by employees and volunteers is covered under ss. 768.13 and 768.1325.

§ 1006.165, Fla. Stat.

The School Board of Lee County not only met the statutory requirement that there be an AED ***on school grounds***, but added its own requirement that there be AEDs ***at all games and practices***. (R 6, p 1101; R 11, p 1026). School Board Director Herbert Wisemen stated the Board's policy in that regard in an e-mail to Thomas Busatta sent shortly after the incident, on December 18, 2008:

> Principals have been told that it is ***required*** to have an AED at all games and practices. Never did I state that "it is strongly recommended." . . . If we have some schools that are not complying I need to know so the proper action can be taken to remedy the problem. . . .[W]e are serious about this compliance.

(R 6, p 1101; R 11, p 1026).

During the course of this litigation, the School Board said that it complied with the statute and had an AED available during the match along with personnel trained in its use. (R 8, p 750). There was some factual dispute about whether in

fact there was any AED available at or near the field, as Coach Busatta's testimony was that he never saw an AED at the field, and certainly no AED was provided to him when he repeatedly asked for it knowing it to be necessary for Abel's resuscitation. (R 11, pp 1004-1006).

The testimony of the Riverdale principal and athletic director placed the AED just yards away from Abel, on a golf cart. (R 5, pp 478-479, 535-536). The Assistant Principal said it was ten to twenty feet from where Abel lay collapsed on the field. (R 4, p 315). The Principal testified that at least three of the five people at Abel's side with Coach Busatta knew the AED was only yards away. (R 5, pp 478-479).[2] The testimony of Coach Busatta, again, was that no AED was available or provided to him despite his repeated calls for the device. (R 11, pp 1004-1006). At the point that Abel stopped breathing and had no pulse, the use of an AED became the most critical factor in his ability to be resuscitated and make a full recovery. (R 11, pp 1005, 1037-1040).

[2] According to the School Board's statement of facts in its summary judgment motion, there were at least six School Board employees near Abel at various points during the incident in question, including the Riverdale Principal, Assistant Principal and the two soccer coaches, the Riverdale football coach, and the Riverdale athletic director, at least the latter four of whom were trained in the use of AEDs. (R 11, p 961).

C. The lawsuit, summary judgment proceedings, and trial court's ruling

The Petitioners' suit against the School Board asserted a common law negligence claim based on the School Board's duty to provide a reasonably safe environment for Abel and its failure to do the same against the backdrop of its obligation to provide an AED at school sporting events (and have employees trained in its use and knowledge of where it was). (R 1, pp 9-11). Petitioners also alleged a separate negligence claim against the School Board based on its failure to comply with § 1006.165. (R 1, pp 11-12).

After serving its answer and affirmative defenses (R 7, pp 724-726), the School Board filed the summary judgment motion and supporting memorandum that ultimately led to these appellate proceedings. (R 8, pp 749-752; R 11, pp 960-971). The School Board argued that it was entitled to summary judgment because § 1006.165, Fla. Stat. does not create a private cause of action, because *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008) held that a commercial health club did not have a duty to acquire and have an AED available for customers, and because § 768.1325, Fla. Stat. provides certain immunities in connection with the use or attempted use of AEDs. (R 8, pp 749-752).

Petitioners responded that their common law negligence claim was independent of any statutory claim; that *L.A. Fitness* was distinguishable because

private enterprises like the *L.A. Fitness* health club have no duty to have AEDs available, unlike the School Board here which did have such a duty and which claimed that it did, in fact, *have* the AED, and had it *at the field 10 or 20 feet away from Abel*; and that § 768.1325, Fla. Stat. applies only to provide immunity from liability arising from the use or attempted use of an AED, neither of which was involved in this case. (R 11, pp 972-1062). Petitioners also argued that the School Board had liability on the basis of the undertaker doctrine, asserting that the School Board undertook a duty to safeguard Abel by acquiring an AED, training personnel in its use, and requiring it to be at all games, and partially performed by having the AED at the field but failed to complete performance of its assumed duty by not using it on Abel when he was in cardiac arrest thus aggravating the effects of his collapse on the soccer field. (R 11, pp 983-984).

The trial court essentially accepted all of the School Board's arguments, and entered final summary judgment in its favor. (R 12, pp 1191-1195). Petitioners timely appealed the final summary judgment to the Second District Court of Appeal. (R 12, 1200-1206).

D. The additional reasons discussed in the Second District's affirmance

On appeal, the Second District affirmed the final summary judgment entered by the trial court in the School Board's favor. (A 1-12). Detailed in the initial

section above was the ruling in the Second District's opinion that Petitioners had no common law negligence claim ***as a matter of law*** because the duty element of a negligence claim is lacking even though the opinion also expressly acknowledged that the School Board owed a specific duty to Petitioner's son: "[T]he School Board had a common law duty to use appropriate post-injury efforts to protect Abel's injury against aggravation." (A 4).

In making the ruling that the School Board had no duty under the circumstances of this case because the *scope* of any duty would not include providing the ready-to-hand AED to Coach Busatta pursuant to his direct request, the Second District also relied on the decision in *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008), as had the trial court. The Second District said:

> We are unable to distinguish *L.A. Fitness* and the cases cited therein in a manner that would support finding a common law duty on behalf of the School Board in this case. The fact that a school stands partially in the place of parents does not create a duty on the school to itself provide medical care or rescue such as through the use of an AED. Also, although the sources of the legal duty are different for school boards and business owners, the circumstances under which the AEDs would be provided and used are strikingly similar. ***Thus, we conclude that under the current state of the law, the School Board had no common law duty to make available, diagnose the need for, or use an AED on Abel.***

(A 6-7).

Disregarding fact questions raised by the record as to subsections (1) and (2)

of § 1006.165, Fla. Stat., the Second District said that it was declining to address whether subsections (1) through (3) create a private right of action because it said that the School Board had complied with the requirements of those subsections:

> The only requirements that subsections (1) through (3) impose are to have an operational AED on school grounds, to register its location, and to provide appropriate training. We decline to decide today whether subsections (1) through (3) create a private cause of action for negligence because there is no question that the School Board complied with these requirements.

(A 9).

The Second District noted that because subsection (4) of § 1006.165 provides that the "use" of AEDs in FHSAA high schools is governed by § 768.13, Fla. Stat., the Good Samaritan Act, and § 768.1325, Fla. Stat., the Cardiac Arrest Survival Act, it would analyze the duty issue under those provisions. The Second District then held that there was no duty under the Good Samaritan Act because "[w]hile this provision requires a person who undertakes a duty to render aid to do so reasonably, this provision does not set forth a duty to render aid." (A 10). The Second District also held that there was no duty under the Cardiac Arrest Survival Act: "As with the immunity provision in section 768.13, section 768.1325 does not create a legal duty to render aid through the use of an AED." (A 10).

Finally, the Second District held that the School Board was altogether immune from suit under the Cardiac Arrest Survival Act, providing the Second District's

interpretation that "this statute provides immunity from civil liability for 'any person who acquired the device and makes it available for use.'" (A 11). Petitioners had pointed out that the Cardiac Arrest Survival Act is directed to providing immunity for "any person who uses or attempts to use" and to the provider of the AED to such persons, as the provider might have liability arise from acquiring and owning the device, whereas there was no use or attempted use of an AED in this case. (R 11, p 988). Petitioners had also pointed out that the Act excludes from immunity failures in training and harm caused by gross negligence or reckless disregard, conduct Petitioners alleged was exhibited by the School Board employees who simply disregarded Coach Busatta's calls for the nearby (according to the School Board) AED despite the fact that Coach Busatta was known to be trained in the need for and use of the AED and despite the fact that such devices are intended to - and would have in this case - prevent the devastating effects of prolonged hypoxia due to lack of a pulse. (R 11, pp 988-989).

Finally, Petitioners had argued that the statute applies to provide immunity to "any person who acquired the device and makes it available for use," while the problem here was that the School Board employees did *not* make the AED available for use on Abel although it was right there, desperately needed, and requested by another employee who would know if it was needed under the

circumstances. (R 11, pp 988-989). The Second District's comment on that argument was: "[T]he School Board made the AED available for use by having it in the end zone of the soccer field. The fact that bystanders did not hear *or respond to* Coach Busatta's call for an AED does not eliminate the School Board's immunity under the statute." (A 12).

SUMMARY OF ARGUMENT

The main matter of concern in these review proceedings is that the Second District's decision has created conflict with established Florida law. Petitioners also respectfully submit that the decision was wrong on the merits.

As to the conflict point, Petitioners submit that the Second District's opinion imports Nebraska law to create a new step in analyzing the elements of a negligence claim and thereby conflicts with Florida law. The newly added step confounds the breach and proximate causation elements of a negligence claim with the duty element in a manner certain to spawn wholly unnecessary confusion in an otherwise settled and functioning area of Florida law. The Florida law of negligence as established by this Court has heretofore been plain in holding that the threshold issue of whether a duty exists is a question of law for the courts, and that thereafter the issues of breach and proximate causation are questions of fact to be decided by juries. *See, e.g., McCain v. Florida Power Corp.,* 593 So. 2d 500

(Fla. 1992). The Second District's opinion has now turned the determination of duty into a two-step process, in which the second step overlaps with what has thus far been the jury question as to breach.

Specifically, the Second District here began with the traditional Florida threshold legal issue of determining whether the Respondent School Board had a duty, and concluded that, under existing Florida law, the Respondent did have a duty, which was "to use appropriate post-injury efforts to protect [Petitioners' son's] injury against aggravation." (A 4). Then, citing a Nebraska court decision, the Second District went on to articulate a ***second*** step in analyzing the issue of duty, to wit, determining the "scope and extent of the duty," in which the measuring standard is said by the Second District to be "what a reasonably prudent person would have done under the circumstances." (A 5). Under Florida law, "what a reasonably prudent person would have done" is clearly a jury question.

It was the newly added second step in the duty analysis that led to the Second District's holding that, even though it had been determined that the Respondent *did* have an applicable duty here - such that breach and proximate causation would have become jury questions under existing Florida law - the Respondent has no liability as a matter of law. Petitioners submit that the Second District's new step, which expressly tasks courts with determining the "scope and extent" of an

already-established duty, is an infelicitous invitation for Florida's trial and appellate courts to invade what existing Florida law has established as the province of juries. The Second District's new, confusing, and wholly unnecessary addition to Florida's approach to addressing the question of duty as an element of negligence claims should be eliminated by reversal of its decision.

The Second District's decision should also be reversed on the merits because it affirmed an unwarranted defense summary judgment for the School Board. The record evidence showed that there were at least four School Board employees on the field after Abel collapsed who were trained in the use of AEDs, which of course included training as to when to use them, including the two soccer coaches, the Riverdale football coach, and the Riverdale athletic director. All of them would know from their training that, when Coach Busatta called for the AED to use on Abel, it was because an AED was needed to resuscitate the boy who was in cardiac arrest The School Board itself has asserted that the AED was on a golf cart by the field, *10 or 20 feet from Abel.*

So, when Coach Busatta called for the AED, either the School Board employees were negligent, even grossly negligent, in not bringing the AED to Busatta to use on this student who was clearly in cardiac arrest such that ***only*** an AED - and not CPR - would help him, or the School Board provided insufficient

AED training to them such that they did not know the urgency of the request and the critical need to respond to it immediately since every minute without a pulse can inflict anoxic injury and then further anoxic injury - which is just what left this young boy in a persistent vegetative state. Petitioners submit that this record evidence clearly created a jury question as to the negligence of the School Board and its employees such that summary judgment could not possibly have been proper.

The trial court's and Second District's multiple rulings on duty and immunity were in error. There was at a minimum a common law duty here, and the record facts were such that the questions of breach and causation were for a jury to determine.

The Second District's decision should be reversed to eliminate its incorrect two-step duty analysis. The decision should also be reversed for its rulings that no duty on the part of the School Board existed here and that the School Board was also immune from liability under the Cardiac Arrest Survival Act. The reversal should require remand to the trial court to vacate the final summary judgment for the School Board and to allow the Petitioners to proceed to trial with their claim.

STANDARD OF REVIEW

A summary judgment is reviewed *de novo*. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

ARGUMENT

A. The conflict point

This Court has established that "a claim of negligence . . . consists of four components," to wit:

> 1. 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.
>
> 2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty....
>
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
>
> 4. Actual loss or damage[.]

U.S. v. Stevens, 994 So. 2d 1062, 1065 (Fla. 2008) (citing *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2004)). The existence of a duty is a question of law. *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). This Court has stated that the "imposition of a duty is nothing more than a threshold requirement that if satisfied, merely opens the 'courthouse doors.'" *Whitt v.*

Silverman, 788 So. 2d 210, 221 (Fla. 2001) (citation omitted).

Existing Florida law also holds that once the threshold, first question as to whether a duty exists has been answered as a matter of law, the remaining questions as to breach, causation, and damages are for the jury. *See, e.g., McCain,* 593 So. 2d at 502. In particular, how the duty of due care should be met in a given case is for the jury: "It is peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care." *Orlando Exec. Park v. Robbins*, 433 So. 2d at 493 (Fla. 1983), *receded from on other grounds, Mobil Oil Corp. v. Bransford,* 648 So. 2d 119 (Fla. 1995). *See also, e.g., Williams v. Davis*, 974 So. 2d 1052, 1057 n. 2 (Fla. 2007).

The following pronouncement of law in the Second District's opinion conflicts with the existing Florida law set by this Court because it adds another prong to the court's determination of the threshold issue of duty, and, in so doing, tasks the courts with performing what was heretofore the jury function of deciding "what a reasonably prudent person would have done under the circumstances:"

> Once a determination is made that a duty to use appropriate post-injury efforts exists, the court must determine the scope and extent of the duty. *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.,* 262 Neb. 66, 628 N.W. 2d 697, 703 (2001). Generally this standard is an objective "reasonably prudent person standard," which is what a reasonably prudent person would have done under the circumstances. *Id.* at 703-04. But the analysis of the scope and extent of a school's duty in a sports setting depends largely on the particular facts and the circumstances of the case. *Id.*

The facts in the instant case are an illustration of how the Second District's added second-step in the duty analysis runs counter to Florida's division of tasks between court and jury. The Second District opinion recognized that the threshold duty element has been met in this case, holding that Respondent had the "duty to use appropriate post-injury efforts to protect Abel's injury against aggravation." (Op., p 4). In conducting its self-imposed inquiry into the "scope and extent" of the Respondent School Board's duty, however, the Second District crossed into the province of the jury.

The Second District *stated* that it needed to decide whether there is *generally* a legal requirement for businesses or schools to have AEDs, but, as reflected in the facts recited in the opinion, ***this*** school had already determined to have an AED available, ***and claimed that it was available.*** The Second District said: "[T]here was an AED on a golf cart that was parked near the soccer field's end zone." (A 3),[3] and the Assistant Principal said that it was ten or twenty feet from Abel after he collapsed. (R 4, p 315). It will be recalled that the School Board Director had advised all principals in the District that they were required to have an AED at all

[3] There was actually a fact question as to whether there was an AED at the field based on Coach Busatta's testimony that he never saw an AED and none was provided to him despite his repeated requests, but the Second District - incorrectly, in the summary judgment context, just accepted the School Board's position on that subject.

games and practices. The only reasonable inference to be drawn from the fact that the AED had been placed *at the soccer field itself* was that it was there for use in medical emergencies at the games or practices.

Further, there was record evidence that School Board employees trained in the use of AEDs ***knew*** that the AED was there, and that Coach Busatta knew that the AED was the equipment needed to address Abel's emergency condition and called for it to be brought to him. (A 2-3). Finally, there was record evidence that the lack of response to the coach's request for the nearby AED was the proximate cause of Abel's current persistent vegetative state: "Had an AED been provided to [coach] Busatta when he requested it and had it been used on Abel ... within 1 to 2 minutes of the time he became unconscious, stopped breathing, and had no pulse, Abel ... would not have ... sustained the permanent and catastrophic anoxic brain injury[.]" (A 3).

The ***duty*** was "to use appropriate post-injury efforts to protect Abel's injury against aggravation." (A 4). Given the record evidence about the close-to-hand AED, the coach's specific knowledge that he needed to use it and his request that it be brought to him, the next issue for determination was whether "the duty to use appropriate post-injury efforts to protect Abel's injury against aggravation" was breached by a failure of the School Board employees to respond to the request or

by a failure of the School Board itself to provide adequate AED training to the staff such that they would have realized the absolute necessity of responding to the request when made. The Second District treated the question as one of law for the court in determining "scope and extent" of duty under the Nebraska decision. Under Florida law, it was a fact question as to breach.

The Second District's decision should be reversed in its holding that the legal determination as to whether a duty exists is a two-step process first requiring a determination of duty and then requiring a determination of the "scope and extent of the duty" which is to be decided by a court examining "what a reasonably prudent person would have done under the circumstances." The result of such a reversal is that the conflict with the existing Florida law cited above will be eliminated. And, as to the instant case, the result will be that Petitioners will be able to proceed to have a jury determine the breach, causation and damages issues in the case because as a matter of law, the Respondent School Board *did* have an applicable legal duty, to wit: "[T]he School Board had a common law duty to use appropriate post-injury efforts to protect Abel's injury against aggravation." (A 4). *And see Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *Leahy v. Sch. Bd. of Hernando Cnty.*, 450 So. 2d 883, 885 (Fla. 5th DCA 1984).

B. The statutory requirement that schools have AEDs does not, as the Second District implied, eliminate a common law duty

The common law duty to use appropriate post-injury efforts to protect Abel's injury against aggravation could certainly be breached by the School Board employees' failure to hand the nearby AED to the resuscitating coach upon request regardless of whether or not § 1006.165 creates a private right of action. Petitioners separately pled a common law negligence claim apart from a claim under §1006.165. Regardless of whether particular statutes create a private right of action, "[v]iolations of statutes . . . may be either negligence *per se* or evidence of negligence." *Lingle v. Dion*, 776 So. 2d 1073, 1077 (Fla. 4th DCA 2001) (*quoting deJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198 (Fla. 1973)). As stated in the *Florida Standard Jury Instructions in Civil Cases:*

> If you find that a person alleged to have been negligent violated such a [statute], you may consider that fact, together with the other facts and circumstances, in determining whether such person was negligent.

Florida Standard Jury Instructions in Civil Cases 401.9.

The statute here protects a special class (high school sports participants); protects a particular interest that was invaded (the safety of those participants after an injury, which was invaded here); protects the safety interest from the type of harm that resulted (namely that an AED will enable resuscitation and prevent lack of oxygen to the brain); and thus protects students against severe brain injury after

cardiac arrest. Thus, § 1006.165 may well provide the basis for a negligence *per se* instruction in connection with Petitioners' common law negligence claim. *See, e.g., deJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198 (Fla. 1973).

Whether a school board has breached its duty is judged under the "person of ordinary prudence" standard, and thus the School Board is liable "for reasonably foreseeable injuries caused by the failure to use ordinary care." *Wyke v. Polk County School Board*, 129 F. 3d 560, 571 (11th Cir. 1997) (applying Florida law). Abel's collapse from a cardiac problem was a reasonably foreseeable injury during a high school athletic game, which is exactly why the School Board had its own policy requiring an AED to be by the field. As the School Board Director said: "Principals have been told that it is required to have an AED at all games and practices." (R 11, p 1026). It was also reasonably foreseeable that failure to restart Abel's pulse as quickly as possible would result in severe brain injury. The record reflects that Abel's injury was aggravated by the failure of the School Board (or the failure of those under its control) to give the AED to Coach Busatta to use on Abel, despite his repeated requests.

Coach Busatta has testified that Abel stopped breathing within one or two minutes of 7:40 pm, ***before*** the 911 call was made at 7:43 to report an unconscious and unresponsive victim. He testified that he knew an AED should be available

and recognized the urgent need for its use. He yelled out for it several times while Abel lay there with no pulse for at least ten minutes until emergency responders arrived and began to use their AEDs. Dr. Systrom's testimony was that the efforts and length of time required by the emergency responders to finally bring Abel back into sinus rhythm demonstrated that Abel was in cardiac arrest within moments of his collapse.

Whether or not § 1006.165 creates a private right of action, the School Board had a common law duty to use appropriate post-injury efforts to protect Abel's injury against aggravation. Under the facts of record, a jury could certainly determine that the duty was breached by the failure of the School Board employees to hand to the person attempting resuscitation the one, ready-to-hand device that was most needed to protect Abel from aggravation of his cardiac arrest - the AED. The evidence indicating breach by the School Board and its employees and subsequent causation of Abel's severe injuries show that it was wrong to enter, or affirm, the summary judgment here.

C. The School Board's undertaken duty

Although not necessary for reversal of the Second District's decision, Petitioners submit that the Second District was also wrong in making such short shrift of Petitioners' undertaker argument. School boards have a recognized duty of

care towards their students under Florida law, and, by the testimony and statements of the School Board Director here, this School Board also affirmatively undertook a duty to safeguard students such as Abel by requiring an AED to be at the fields of all school games along with personnel trained in its use. By undertaking that duty, the School Board and its employees were required to act non-negligently in performing the duty.

It is well settled in Florida that the affirmative undertaking of an act, *even if under no obligation to do so*, obligates the person undertaking the act to then act with reasonable care. *See Union Park Mem. Chapel v. Hutt*, 670 So. 2d 64, 66–67 (Fla. 1996). The doctrine applies, and liability arises, when those performing the undertaking put the injured party "in a *worse position than he was in before*, ... because the actual danger of harm to the [injured party] ***has been increased by the partial performance...*** ." *Wallace v. Dean*, 3 So. 3d 1035, 1051 (Fla. 2009) (citing and quoting *Restatement (Second) of Torts* § 323 & cmt. c).

The School Board on its own 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 for resuscitation of students in cardiac arrest. By not providing the nearby AED to Coach Busatta as he was calling for it, when the School Board employees had the power and were fully able to do so, the

School Board only partially performed and thus put Abel in a worse position as he lay there, with no pulse, for more than ten minutes before emergency personnel arrived. The questions of whether the School Board's partial performance of its undertaking fell below the standard of reasonable care and caused Abel's permanent brain injury should be for the jury based on the undertaker doctrine. *See Whitt v. Silverman*, 788 So. 2d 210, 217 (Fla. 2001). For this reason, too, the Second District was in error in affirming a summary judgment for Respondent.

D. The Second District's misplaced reliance on the *L.A. Fitness* decision

The decision in *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008), which the Second District proclaimed to be indistinguishable and controlling of its decision, was in fact both distinguishable and inapposite. *L.A. Fitness* concerned an adult patron who suffered cardiac arrest at his private health club. The health club had no AED on its premises and the legislature had passed no law requiring it to have an AED. The health club was certainly not operated by a School Board with a duty to use appropriate post-injury efforts to protect against aggravation of a student's injury sustained during participation in a school athletic event. Furthermore, the health club had not undertaken a duty since it had adopted no policy requiring an AED to be available for use at all, much less at specific events and sites on its premises.

Thus, *L.A. Fitness* is not at all like this case in which a high school student suffered severe injuries while under the supervision of a school board charged with a duty to provide for his safety, and that had also undertaken to provide for his safety by having an AED available at athletic competitions in the event of cardiac arrest. Neither did *L.A. Fitness* have an applicable statute, as the School Board did here, mandating the availability of an AED on school premises for interscholastic sports. § 1006.165. Furthermore, it is recognized that the reason a school board has a duty to act reasonably to provide for the safety of its students is because it is assuming a quasi-parental role over the students who are physically entrusted to its care. *See Rupp*, 417 So. 2d at 666. No such custodial entrustment existed in *L.A. Fitness*. Petitioners accordingly submit that the Second District incorrectly concluded that *L.A. Fitness* was dispositive of this case.

E. § 768.1325 did not afford the School Board any immunity here[4]

There can be no doubt that the legislature intended to promote the use of AEDs at Florida high school sporting events through its enactment of § 1006.165.

[4] The Second District included in its opinion an analysis of whether either § 768.13, Fla. Stat., the Good Samaritan Act, or § 768.1325, Fla. Stat., the Cardiac Arrest Survival Act, could act as a source of duty, and concluded that they could not. Petitioners have never contended otherwise, relying primarily on the common law as the source of the School Board's duty here, and on § 1006.165 as an additional source. Petitioners thus do not address the Second District's discussion of duty under § 768.13 or § 768.1325. In text, Petitioners address only the immunity provisions of § 768.1325.

It also makes sense that to further promote the use of AEDs, the legislature would extend the immunity it has long provided to those rendering aid in emergency situations to those using (or attempting to use) an AED in an emergency situation, by enacting § 768.1325 and referencing same within § 1006.165. But the plain language of § 768.1325 and the limitations on its applicability set by § 1006.165 show that there is no § 768.1325 immunity here.

First, § 1006.165 expressly states that "[t]he ***use*** of automated external defibrillators by employees and volunteers is covered under ss. 768.13 and 768.1325," and ***no more***. § 1006.165(4). It does not provide a blanket protection that extends the immunity to the ***failure*** to use an AED or other omissions. Moreover, § 768.1325 itself has limiting language as to its application. In pertinent portions, § 768.1325 provides:

> (3) 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,*** including, but not limited to, a community association organized under chapter 617, chapter 718, chapter 719, chapter 720, chapter 721, or chapter 723, ***is immune from such liability, if the harm was not due to the failure of such person to:***
>
> (a) Properly maintain and test the device; or

(b) ***Provide appropriate training*** in the use of the device to an employee or agent of the acquirer when the employee or agent was the person who used the device on the victim[.]

* * *

(4) ***Immunity under subsection (3) does not apply to a person if***:

(a) ***The harm involved was caused by that person's*** willful or criminal misconduct, ***gross negligence, reckless disregard or misconduct,*** or a conscious, flagrant indifference to the rights or safety of the victim who was harmed[.]

By its express terms, § 768.1325 is directed to providing immunity for "any person who ***uses or attempts to use***" and AED and to the provider of the AED to such persons, as the provider might have liability arise from acquiring and owning the device. Clearly the contemplated immunity is for persons who use or try to use an AED on a victim of cardiac arrest with poor or ineffective results, with the immunity likewise to extend to the provider of the AED. The provision is intended to encourage the use of AEDs without fear of civil liability in the event the resuscitation efforts are not entirely successful, also extending the immunity to whomever provided the AED if the use or attempted use does not produce the hoped for results.

By its own wording, the statute does not apply in this case. Here, there was no use or attempted use of an AED. And, insofar as the Second District and the

School Board attempted to rely in a vacuum on the language that "***any person who acquired the device and makes it available for use *** is immune from such liability,***" this case does not fit within that language either. The very problem here was that, despite specific request, the School Board's employees did ***not*** make the AED available for use on this boy who lay in cardiac arrest ten feet away from the only thing that could have saved him from the effects of ten minutes with no pulse and no oxygen to his brain. The Second District's comment that the School Board itself, as opposed to its employees, had made the AED "available" by having it lying around at the field entirely misses both the point of the § 768.1325 immunity provisions, and the fact that the School Board employees' conduct in ignoring Coach Busatta's requests for the AED made the AED ***unavailable*** to Abel.

Further the Act excludes from immunity failures in training and harm caused by gross negligence or reckless disregard, conduct a jury could certainly find was exhibited by the School Board employees who ignored Coach Busatta's calls for the nearby AED despite the fact that Coach Busatta was known to be trained in the need for and use of the AED and despite the fact that such devices are intended to - and would have in this case - prevent the devastating effects of prolonged hypoxia due to lack of a pulse. Given the record facts, the School Board certainly did not show that it was entitled to summary judgment on immunity *as a matter of law*.

The Second District also incorrectly recited that Petitioners were contending that persons present in emergencies at athletic events have a duty to *diagnose* the need for an AED. No such contention was made, and neither would it have arisen from the facts of this case. Coach Busatta had already determined that the AED was needed, and he was calling for it. The issue was not making a diagnosis as to the need for use of an AED, but responding to the request for an AED after the diagnosis had already been made.

Petitioners believe that the record shows that the § 768.1325 immunity provisions do not apply at all in this case. At an absolute minimum, the record facts would have to be weighed by a jury to determine whether the School Board has any entitlement to immunity under the statute. The Second District's affirmance of the summary final judgment in the School Board's favor on the basis of statutory immunity was error, and should be reversed.

CONCLUSION

Based on the foregoing facts and authorities, Petitioners respectfully submit that the decision of the Second District should be reversed with directions that the case be remanded to the trial court for vacation of the final summary judgment that was entered in favor of the Respondent School Board of Lee County and for further proceedings on Petitioners' reinstated claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief of Petitioners was sent by U.S. mail this 1st day of April, 2014 to:

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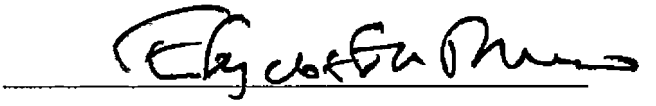

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Initial Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.