In the Supreme Court of Florida

CASE NO.: SC13- ____

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

PETITIONERS' BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

The decision of the Second District of which review is sought arises from a claim made for severe brain injury suffered by Petitioners' teenaged son as a result of delays in resuscitating him after he collapsed on the field during a high school soccer game. (Op, p 1).[1] At issue was the liability of Respondent School Board of Lee County, for whom the trial court entered summary judgment. (Op, p 2, n 1).

The Second District's decision, affirming the defense summary judgment, 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 series of intravenous medications. Abel was resuscitated at 8:06 p.m., which was twenty-three minutes after the 911 call. (Op., pp 2-3).

The Second District went on to note the expert testimony filed in opposition to the defense summary judgment:

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[1] A copy of the Second District's Opinion is attached as an Appendix, and references to the Opinion appear by page number, as follows: (Op. 1). Unless otherwise indicated, all emphasis herein is supplied by undersigned counsel.

> 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 not have sustained the permanent and catastrophic anoxic brain injury leaving him in a near persistent vegetative state requiring life-long 24 hour care. (Op., p 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 had any duty under the facts of the case. (Op., p 4). The Second District acknowledged that the Respondent *did* have such a duty based on existing 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.*** (Op., p 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. (Op., p 3). Petitioners argued that, given the evidence that the coach had called for an AED, that the Respondent already had an AED available on a golf cart parked near the soccer field's end zone, 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. (Op., pp 3-4).

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. (Op., pp 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.

> 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). (Op., pp 4-5).

Citing the Nebraska case, the Second District stated *as a question of law* that which, under Florida law, is the question of breach to be determined by the jury:

> 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.*

(Op., p 5). The decision then identified the question 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" (Op., p 5), and decided that "no" was the answer to the question.

Believing the Second District's express statements as to the steps involved in analyzing a negligence claim to be an unsound departure from Florida law established by this Court, Petitioners timely filed their notice to invoke this Court's jurisdiction on grounds of express and direct conflict.

SUMMARY OF ARGUMENT

Petitioners respectfully 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 established 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 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 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." (Op., p 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 "what a reasonably prudent person would have done under the circumstances." (Op., p 5). But, under Florida law, this 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. Review is warranted to nip this undesirable development in the bud.

ARGUMENT

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 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 Respondent'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 it was available***: "[T]here was an AED on a golf cart that was parked near the soccer field's end zone." (Opinion, p 3). 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 Respondent's coach ***knew*** that the AED was there; that he knew that it was the equipment needed to address Abel's emergency condition; and that he called for the AED to be brought to him. (Op., pp 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[.]" (Op., p 3).

The ***duty*** was "to use appropriate post-injury efforts to protect Abel's injury against aggravation." (Op., p 4). Given the record evidence about the close-to-hand AED, the coach's 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 to provide adequate training to the staff and nurse as to retrieving the available equipment upon request. 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.

Petitioners submit that the Second District's opinion - with its express interjection of a "scope and extent of duty" inquiry requirement for courts in negligence cases - is a slippery slope of the first order. This Court has established simple, direct rules for how the components of a negligence case are to be addressed, rules that have served the courts of Florida well for decades. It could seem that adding the "scope and extent of the duty" inquiry is a matter of no great significance. But, the parameters of "scope and extent" are ill-defined, and the task is to be performed under a "what a reasonably prudent person would have done under the circumstances" standard that commingles the otherwise separate duty and breach components of current Florida negligence law. If left to stand, the opinion will foreseeably create confusion for Florida's courts and litigants, and thus unnecessary litigation in a hitherto settled area of Florida law that has shown no need for this change.[2]

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[2] The need for review is not undercut by the opinion's reference to the Cardiac Arrest Survival Act, §768.1325(3), Fla. Stat., which self-evidently applies only to injury that may arise from the ***use*** of an AED. There is no claim in this case that

CONCLUSION

Based on the foregoing facts and authorities, Petitioners respectfully submit that this Court has the basis for exercise of conflict jurisdiction, and that jurisdiction should be accepted to resolve the conflict now created by the Second District's decision and the existing Florida law as to the elements of a negligence claim and which are to be decided by the courts and by juries.

Respectfully submitted,

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Abel was injured by the use of an AED on him.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic mail this 13th day of May, 2013 to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

Barbara Harley-Price

From: Yvonne Fernandez [Yvonne@russoappeals.com]
Sent: Monday, May 13, 2013 4:09 PM
To: e-file
Subject: 2D11-5191 Filing in Limones v. School District of Lee County
Attachments: Brief-Jurisdiction.doc

Limones v. School District of Lee County
Petitioner's Brief on Jurisdiction

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