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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

CONSOLIDATED REPLY BRIEF OF PETITIONERS

Respectfully submitted,

DAVID C. RASH, P.A.
1655 North Commerce Parkway, Suite 303
Weston, Florida 33326
Telephone (954) 515-0072
-and-
RUSSO APPELLATE FIRM, P.A.
6101 S.W. 76th Street
Miami, Florida 33143
Telephone (305) 666-4660

Counsel for Petitioners

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ARGUMENT

A. Overview - the real issues versus the off point parade of horribles

The Answer Brief of Respondent School Board of Lee County and the *amicus* briefs raise a host of alarmist warning flags with which they surround *the wrong issues;* they seek to stave off rulings that Petitioners *do not seek.* Respondent and *amici* predict staggeringly adverse social and economic consequences for Florida and its schools and businesses if the Court were to rule that there is a duty to use AEDs and/or that there is a duty for laymen in schools and businesses to diagnose and perform skilled medical treatment. Petitioners, however, have not asked the Court for such rulings. Rather, Petitioners have requested the Court to address just two subjects.

First, Petitioners seek a correction of the conflict created by the Second District's statement that, in determining the ***legal*** issue of ***duty***, Florida's courts are to use "an objective 'reasonably prudent person standard,' which is what a reasonably prudent person would have done under the circumstances." *Limones v. School Dist. of Lee County*, 111 So. 3d 901, 905 (Fla. 2d DCA 2013). That statement incorrectly confuses the courts' role in determining duty with the fact finders' role in determining breach.

Petitioners' second request is for a determination that, when the conflict is eliminated and the correct law applied, the facts in this particular case present an

issue of breach, not duty. As the Second District's opinion acknowledged, Florida law has already established schools' duties in connection with students' athletic participation; and, that in the narrow post-injury area involved here, the duty is to utilize appropriate post-injury efforts to protect the injury against aggravation. *Limones,* 111 So. 3d at 905 (citing *Leahy v. Sch. Bd. of Hernando County*, 450 So. 2d 883, 885 (Fla. 5th DCA 1984)). With that being the duty, the fact issue as to breach was whether reasonable care was exercised under the circumstances, which were that an AED trained coach determined that a collapsed soccer player had no pulse and was in cardiac arrest, yelled for the AED that was 10 to 20 feet away, but did not have it handed to him by any of the nearby school personnel, many of whom were also AED trained, as a result of which the boy is now permanently brain-damaged.

Despite the exaggerated fears voiced by Respondent and the *amicus* participants, this case does not call for any general rulings about laymen's duties to use AEDs or duties to diagnose and provide skilled medical treatment. In this case, the coach in question had already recognized that the boy had no pulse and was in cardiac arrest, so there is no question presented as to whether he had an antecedent duty to diagnose the cardiac arrest. And, the coach was AED trained. He testified that he knew that he needed to use an AED and that he yelled for one, so there is also no question presented about whether he had a duty to use an AED. The only

question presented was whether, given those established record facts, it was reasonable under the circumstances for the school personnel not to hand the coach the available AED that was 10 or 20 feet away from where he was trying to attend to the boy, who had no pulse. Those facts did not present a question about what duty the Respondent had; the duty was already established, to wit, to utilize appropriate post-injury efforts to protect the injury against aggravation. The question raised by those facts was about breach, i.e., whether it was reasonable care not to hand the nearby AED to the coach who was yelling for it.

As another initial matter, lest it have raised a question, we briefly address Respondent's overreaching statement that it was "undisputed that not one person heard anyone ask for an AED." (Answer Brief, p 26). For this statement, Respondent cites testimony from just four of the many people who were at the scene - four of Respondent's own, management level, employees. (*Id.*). Their testimony serves only to present credibility questions for a jury. Respondent cites, for example, identically-worded affidavit testimony from the principal and vice-principal of Riverdale High in which they testified that they were "within a few feet of Limones, Jr." from the time he collapsed until when he was put in the ambulance, and that "no one asked for the AED including Coach Busatta." (R 3, pp 311-312). Coach Busatta, on the other hand, testified that he yelled repeatedly for the AED in between CPR breaths. (R 11, pp 1004-1006). Respondent also notes

that a cardiac nurse who had come to the field to assist the coach with the CPR "never requested an AED" (*Id.*), which is also just jury argument, and not very persuasive at that because the nurse would have no reason to call for the AED with the coach right next to her already yelling for it. Perhaps the more telling inference is that the cardiac nurse never countermanded the coach's request for the AED.

B. The conflict point

Respondent's Answer Brief - the only brief that addresses the conflict issue - ends up illustrating precisely the conflict problem and why it will predictably create further mischief if allowed to stand. Petitioners' argument is that the Second District's statements below conflict with existing Florida law by conflating the duty and breach elements of a negligence claim. The Second District calls upon courts to decide the legal issue of whether a duty exists by determining 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.

Limones, 111 So. 3d at 905.

The Second District ***says*** that its second step in a duty inquiry calls for a determination of the 'scope and extent of the duty,' but what it ***directs the courts to***

do is to make that determination by looking to what a reasonably prudent person would have done under the circumstances. Florida law has heretofore held this to be a jury question. *See, e.g., Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1193 (Fla. 2003) (Pariente, J., concurring) ("whether [the defendant] exercised reasonable care under the circumstances would be for the jury to determine"); *Markowitz v. Helen Homes of Kendall Corp.,* 826 So. 2d 256 (Fla. 2002) (defendant's exercise of reasonable care under the circumstances is a jury question); *Orlando Exec. Park v. Robbins,* 433 So. 2d 491, 493 (Fla. 1983), *receded from on other grounds, Mobil Oil Corp. v. Bransford,* 648 So. 2d 119 (Fla. 1995) ("It is peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care").

In keeping with this established Florida jurisprudence, the Florida Standard Jury Instructions expressly assign to the jury the issue of whether a defendant in a negligence case has exercised reasonable care under the circumstances. SJI Civil - 401.4 and 401.18. In pertinent portion, these instructions state:

> The issues you must decide on (claimant's) claim against (defendant) are whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that negligence was a legal cause of the loss, injury, or damage to (claimant, decedent, or person for whose injury claim is made).
>
> Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would

> not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

SJI Civil - 401.4 and 401.18.

Respondent argues that Florida law already requires a duty inquiry to include a determination of scope and extent, citing in support some cases that seem to have been located by running a word search of duty /s scope in negligence cases. Respondent assembles these cases as best it can, but not a single case has the problem language/concept that is set out in the Second District's decision here. Not one other Florida case says that a court must determine the scope, or the extent, or the scope and extent, of a duty by determining "what a reasonably prudent person would have done under the circumstances." *Limones,* 111 So. 3d at 905.

So, for example, Respondent cites this language from *McCain v. Florida Power Corp.,* 593 So. 2d 500 (Fla. 1992): "Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions." 593 So. 2d at 503. The words duty and scope do appear in the same sentence, but there is nothing in the sentence, or anywhere else in the *McCain* decision or in the other cases Respondent has cited, that says that courts must determine the scope of a duty by determining "what a reasonably prudent person would have done under the circumstances." *Limones,* 111 So. 3d at 905.

Respondent also cites *Rupp v. Bryant,* 417 So. 2d 658 (Fla. 1982), in which

the Court was considering what duty a high school had with respect to hazing activities that severed the spinal cord of a student in an incident that did not occur during the school day or on school premises. Respondents use the case to say that "[m]oreover, 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." (Answer Brief, p 19). Respondent then quotes only excerpted portions of the Court's actual comments, which were:

> A public school, at least through the high school level, undoubtedly owes a general duty of supervision to the students placed within its care. Case law is replete with instances of schools, principals and teachers being required to reasonably fulfill their duty to supervise students. [cites and footnote omitted]. Florida courts have specifically recognized that a negligent failure to act in carrying out this duty of the school is actionable. [cites omitted]. The genesis of this supervisory duty is based on the school employee standing partially in place of the student's parents. [footnote omitted]. Mandatory schooling has forced parents into relying on teachers to protect children during school activity. But our problem is complicated by the fact that the injury did not occur during the school day or on school premises. As such, we must define the scope of the school's and employee's duty to supervise.

417 So. 2d at 658. Here, too, there is no statement of any kind that Florida's courts should decide a legal issue as to duty or its scope by determining what a reasonable person would have done under the circumstances.

Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 68 N.W. 2d 697 (Neb. 2001) is the Nebraska case cited by the Second District in adding its 'scope and extent' prong to the duty inquiry, which, again, the Second District opinion said should be

determined based on what a reasonable person would have done under the circumstances. Notably, in a bridging explanation not included by the Second District in its opinion, the *Cerny* decision showed that the court was actually addressing a *standard of care* issue, i.e., what standard of care should be imposed on high school coaches in connection with injured high school athletes, given the courses and training that such coaches are required to complete in order to obtain a Nebraska teaching certificate with a coaching endorsement. The *Cerny* court decided that the standard of care should take the specialized training into account:

> Because Egger and Bowman have Nebraska teaching certificates with coaching endorsements, they necessarily possess certain specialized training and skill with respect to athletic injuries. They are not medical professionals and therefore cannot be expected or required to make medical diagnoses. However, the record reflects that the training required to obtain a coaching endorsement includes familiarization with the common symptoms of a concussion in order to enable a coach to make a reasoned determination of when to withhold a student athlete from competition until a medical professional evaluates the athlete and clearance is obtained. ***Thus, the appropriate standard of care to be applied to the actions of Egger and Bowman in this case is that of the reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement.***

68 N.W. 2d at 705-706. *Cerny* was thus actually addressing standard of care in its scope and extent discussion, and its decision was that the standard of care should include reference to the high school teacher's specialized training.

In sum, the Second District may or may not have intended to say something different than it did in its opinion. But, whatever the case may be in that regard, the

opinion was issued as written and it says that Florida courts must undertake a two-pronged duty inquiry, the second prong of which will decide the scope and extent of the duty by determining what a reasonably prudent person would do under the circumstances. This conflicts with existing Florida law which requires courts to decide duty issues as a matter of law, and fact finders to decide breach issues as a matter of fact by determining whether a defendant acted as a reasonably prudent person would have under the circumstances.

Respondent's own Answer Brief illustrates the problem with the Second District's conflation of duty and breach. Respondent advises the Court in one sentence that Respondent had a duty to Petitioners' son, and that *as a matter of law it was not breached*: "The School Board fulfilled its common law duty of care owed to Abel Limones by immediately calling 911 and performing CPR until the first responders arrived." (Answer Brief, p 13). The Second District's decision has created a conflict, and Petitioners respectfully submit that it should be resolved.

C. This case presents a jury issue on its specific facts, and does *not* implicate the broad policy concerns raised in the Answer and *amicus* briefs

1. The actual jury question presented in this case

The already established duty in this narrow area of school liability is to use appropriate post-injury efforts to protect a student athlete's injury against aggravation. As indicated above, the unique facts in this case created a jury issue

as to whether the duty was breached by the school personnel's failure to hand the AED to the coach when he called for it. The record evidence shows that the AED-trained coach had determined that the boy had no pulse, was in cardiac arrest, and needed defibrillation. The jury question is whether it constituted reasonable care under those circumstances for the school personnel not just to give the coach the AED that they testified was right at the scene - 10 or 20 feet away from him. The risks of not using the AED on the boy were great, as is borne out by the medical testimony that because the period of oxygen deprivation was too long, the boy sustained permanent brain damage that has left him in a persistent vegetative state.

The issues as to the reasonableness of the school personnel's conduct given the gravity of the risk, of which many of them were specifically aware because they, like the coach, were AED-trained; whether they heard the coach yelling for the AED; or whether anyone was lying about what happened at the scene, are just jury questions. Summary judgment should not have been entered in favor of the Respondent, or affirmed by the Second District. With the resolution of the conflict problem, the case should be remanded with directions to vacate the final summary judgment in Respondent's favor and allow the Petitioners to proceed to trial.

2. The broader concerns expressed by Respondents and *amici* which are *not* implicated by the facts in this case

Respondent and *amici* are anxious to retain the broad negative rulings made

by the Second District as to what duties a school board does ***not*** have; to wit, that a school board and its employees do ***not*** have any duty to diagnose the need for using an AED and do ***not*** have any duty to use one. But, those holdings were not necessary given the facts in this case, and therefore should not have been made.

Regardless of whether Coach Busatta had a duty to diagnose the need for using an AED, he *had made* that diagnosis. There is no reason for the courts at any level to make abstract legal rulings on issues that are not presented by the cases before them. A holding that there is no duty to diagnose the need for an AED is meaningless here because no party is contending that the coach failed to diagnose the need for an AED. As a matter of undisputed fact, he did diagnose the need.

Neither was there, or is there, any need to make a ruling on the issue of whether school boards and their personnel have a general duty to use AEDs. That issue, too, is not presented by the facts of this case. The issue here is whether the already established duty to use appropriate post-injury efforts to protect an injury against aggravation was breached by not providing a ready-to-hand AED to an AED trained coach who had diagnosed the need for and asked for the AED so he could use it on this boy.

This case does not, in short, call upon the Court to make any broad rulings either that there is always a duty to use AEDs or that there is never a duty to use AEDs. The issue is one of breach of the duty to use appropriate post-injury efforts

to protect an injury against aggravation, and depends on the facts and circumstances of cases as they arise. There are protections and immunities already in place, as discussed by both sides in their briefing. But, the facts of this case show that, even if there were rulings that there are no duties to diagnose the need for an AED or to use an AED, there can be facts and circumstances where there would nonetheless be actionable negligence warranting trial to a fact finder. A rule that there is no duty to use an AED would not shield a defendant for *preventing* another from using an available AED despite a diagnosed need for it.

The public policy concerns expressed by Respondent and *amici* all stem from an assumption that reversal of the Second District's decision will require a ruling that schools and their personnel - and, by extension, businesses and their personnel - have a duty to have AEDs, a duty to diagnose when AEDs are needed, and a duty to use AEDs. Hence, Respondent and *amici* have cited case law from around the country and provided their projections as to the massive costs such duties would generate if imposed. As set out above, however, this case does not call for the Court to make the rulings so feared by Respondents and *amici.* Reversing the Second District's decision requires only (1) removal of the decision's incorrect articulation of how Florida courts are to make legal rulings on duty, and (2) a determination that regardless of how the law may ultimately treat liability surrounding the acquisition, use, and determination of when to use AEDs, this case

presents a jury question because the record evidence shows an already acquired, available AED, the need for which had been determined. There is no legal issue presented as to whether there was an obligation to acquire an AED or an obligation to diagnose the need for its use. There is only a fact issue about whether Respondent's personnel breached their duty to provide appropriate post-injury efforts to protect against aggravating this boy's injury by not handing the coach the AED when he asked for it.

In *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008) and the other cases cited by Respondent and *amici* for the proposition that there is no duty to have or use AEDs or to provide injured or ailing students/business invitees anything other than basic first aid, the plaintiffs were contending, or urging the courts to rule, that the defendants in question had affirmative duties to have and use AEDs. Petitioners here argue only that *if* a school already has an AED, and *if* the AED is readily available, and *if* a school coach has determined that the AED is needed to defibrillate a student with no pulse in cardiac arrest, and *if* that school coach, who is in the interim performing CPR, asks that the AED be brought to him, a jury should be allowed to decide if the duty to use reasonable care to protect against aggravation of the student's condition was breached when none of the school personnel right there on the scene complied with the request. It is highly doubtful that such circumstances will converge again, and

no broader ruling is required than fits the facts of this case.

D. Response to the statutory immunity argument

With respect to the arguments that Respondent has blanket immunity under § 768.1325, Fla. Stat. because it was the purchaser of the AED that was stationed by the soccer field, Petitioners adopt their arguments from the Initial Brief. The immunity afforded by § 768.1325 is for persons who *use an AED on another* to shield them from tort suits when the results of using the AED are unsuccessful or less than optimal. The immunity extends both to the person who used the AED to attempt defibrillation and to the owner or furnisher of the AED. The intent and reach of the immunity are clear. Not all AED revival efforts are successful and/or able to restore a stricken individual to precisely his/her condition prior to the need for the AED arising. The Legislature wanted to encourage Good Samaritans to use AEDs when needed in emergencies without fear of getting sued for trying to help.

As set out more fully in the Initial Brief, the statute has no application here by its terms. It applies to situations in which an AED is used on a stricken victim with less than optimal results. Respondent has no statutory immunity here where no AED was ever used. Petitioners' claim is not based on unsuccessful use of an AED, but on the failure to provide an available AED when requested. Where the Legislature intended to encourage bystanders to provide AED aid, Respondent's employees did just the opposite.

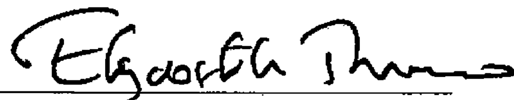
CONCLUSION

Based on the foregoing facts and authorities and those set out in the Initial Brief, Petitioners respectfully submit that the decision of the Second District should be reversed with directions that the case be remanded to the trial court to vacate the final summary judgment in favor of the Respondents and for further proceedings on Petitioners' reinstated claim.

Respectfully submitted,

DAVID C. RASH, P.A.
david@dcrashlaw.com
maileidys@dcrashlaw.com
1655 North Commerce Parkway, Suite 303
Weston, Florida 33326
Telephone (954) 515-0072
Facsimile (954) 515-0073
-and-
RUSSO APPELLATE FIRM, P.A.
e-service@russoappeals.com
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660
Facsimile (305) 666-4470

Counsel for Petitioners

By: 
ELIZABETH K. RUSSO
Florida Bar No. 260657
ekr@russoappeals.com

CERTIFICATE OF SERVICE

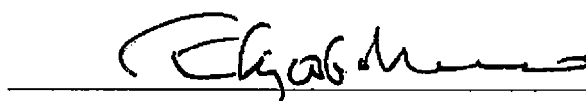
WE HEREBY CERTIFY that a true and correct copy of the Consolidated Reply Brief of Petitioners was sent by electronic mail this 21st day of July, 2014 to:

John W. Lewis, Esquire
J. Matthew Belcastro, Esquire
Traci T. McKee, Esquire
Scott A. Beatty, Esquire
Henderson, Franklin, Starnes & Holt, P.A.
Counsel for Respondents
P.O. Box 280
1715 Monroe Street
Fort Myers, Florida 33902
john.lewis@henlaw.com
matthew.belcastro@henlaw.com
traci.mckee@henlaw.com
scott.beatty@henlaw.com
lindsey.rose@henlaw.com

Mark Miller, Esquire
Christina M. Martin, Esquire
Pacific Legal Foundation
Counsel for Amicus Curiae Pacific Legal Foundation
8645 N. Military Trail, Suite 511
Palm Beach Gardens, Florida 33410
mm@pacificlegal.org
cmm@pacificlegal.org

Leonard E. Ireland, Jr., Esquire
Leonard E. Ireland, Jr., B.C.S.
Counsel for Amicus Curiae Florida
High School Athletic Association, Inc.
18 N.W. 33rd Court
Gainesville, Florida 32607
lireland@clayton-johnston.com
tbrehm@clayton-johnston.com

Jennifer S. Blohm, Esquire
Ronald G. Meyer, Esquire
Meyer, Brooks, Demma and Blohm, P.A.
Counsel for Amicus Curiae Florida School Boards Association, Inc.
P.O. Box 1547
Tallahassee, Florida 32302
jblohm@meyerbrookslaw.com
rmeyer@meyerbrookslaw.com



CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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