IN THE SUPREME COURT OF FLORIDA

Case No. SC13-932

ABEL LIMONES, SR., ET AL.,

Petitioners,

v.

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

Respondents.

On Review from District Court of Appeal,
Second District, Florida
(Case No. 2D11-5191)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

State Statute

Miscellaneous

Page

INTRODUCTION

Abel Limones collapsed during a soccer game at a Lee County school. Adults on-scene called 911 and performed CPR, but could not revive Abel. When the emergency medical personnel arrived, they restarted Abel's heart with a semi-automatic defibrillator and intravenous medication. He survived, but is severely brain-damaged, in a persistent vegetative state. *Limones v. School Dist. of Lee Cty.*, 111 So. 3d 901, 903 (2013). Abel's parents sued the School District and School Board on a common law negligence claim, alleging that the School Board breached its duty to provide a reasonably safe environment for Abel and to protect the injury from aggravation, and a statutory claim based on the Florida statute governing automated external defibrillator (AED) requirements at certain public schools. *Id.* The court below recognized a general duty to supervise students in athletic activities, which includes a duty to make appropriate efforts to protect injured students from further aggravation of their injury. *Id.* at 904. But the court declined to extend this so far as to a require the specific availability and use of an AED. *Id.* at 906.

This Court should affirm. A property owner, including a school district, owes no common law duty to keep on hand any specific device in the event of a medical emergency. Instead, the landowner must take reasonable steps to prevent or address foreseeable harms. Courts should not use the common law to dictate the purchase of specific kinds of equipment that must be purchased and maintained, and on which

personnel must be trained to use. Under existing law, these decisions are made first by owners and operators of the premises, who are required to use their own judgment to anticipate likely risks and appropriate preventative steps; and second, by the Legislature, which may choose to standardize a particular duty of care. In this case, the Legislature, to the extent that it has codified public policy related to AEDs on school grounds, imposes a statutory duty only to purchase the devices, register their locations, and train personnel to use them. Fla. Stat. § 1006.165 (2008). Common law tort duties must remain flexible to remain relevant across advances and changes in biotechnology, and should not be held to require a school district, or any other property owner, to respond to a medical emergency with a specific medical device.

ARGUMENT

I

PUBLIC POLICY SUPPORTS A LIMITED DUTY FOR PROPERTY OWNERS CONFRONTED WITH A MEDICAL EMERGENCY

The tragic facts of this case arose during a high-school soccer match. The nature of the duty that Plaintiffs propose, however, could not be limited to school-owned playing fields. Instead, because the duty sought to be established is one of common law, not statutorily confined to a particular type of defendant, the decision in this case will apply to recreational sports fields of all types, both publicly and

privately owned.[1] For this reason, Amicus Curiae approaches the issue as one of premises liability, common to an array of recreational sports facilities, rather than cabined to the law relating to school districts. *Cf. Kirton v. Fields*, 997 So. 2d 349, 354 (Fla. 2008) (noting similarity of community- and school-supported activities, although distinguishing those from certain commercial enterprises).

A. Premises Liability Is Based on Dangers Inherent in the Property, Not Dangers Inherent in the People Present

School districts, like other property owners, have a duty to those on the premises to provide a reasonably safe environment. *Green v. School Bd. of Pasco County*, 752 So. 2d 700, 701 (Fla. 2d DCA 2000) ("Once a government entity builds or takes control of property or an improvement, it has the same common law duty as a private landowner to properly maintain and operate the property.").[2] Property owners, including schools, are held responsible for the condition of their premises because they are in a superior position both to know of and to remedy dangerous instrumentalities or conditions on their property. A school owes a duty of care that varies with the circumstances, and "may consist of taking reasonable precautions so

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[1]The decision may well serve as precedent for cases of medical emergencies in other locations as well. *See*, *e.g.*, *Verdugo v. Target*, California Supreme Court docket no. S207313 (plaintiffs seek common law duty to use AEDs on stricken shoppers at big box stores).

[2] For schools, this duty includes reasonable supervision of students. *Barrera v. Dade County School Bd.*, 366 So. 2d 531, 532 (Fla. 3d DCA 1979).

as to minimize or eliminate the likelihood of a dangerous condition arising in the first instance." *Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256, 259 (Fla. 2002).

The common law establishes limitations on duty because, in addition to identifying the party that caused the harm, courts must consider public policy to determine who should bear the cost of the harm. *Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982) ("The student has an interest in freedom from suffering negligent injury; the school has an interest in avoiding responsibility for a duty which it cannot realistically carry out."). Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. "At some point," therefore, "it is generally agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982).

Florida law establishes only a very limited duty to come to the aid of another. While a school, or a business, cannot "'ignore' an injured or incapacitated patron and must 'take some minimal steps to safeguard' him," *L.A. Fitness Intern. LLC v. Mayer*, 980 So. 2d 550, 558 (Fla. 4th DCA 2008), *rev. denied*, 1 So. 3d 172 (Fla. 2009), there is no "duty to perform medical rescue procedures." *Id.* However, a school board

need not insure the safety of those on the premises. *Benton v. School Bd. of Broward County*, 386 So. 2d 831, 834 (Fla. 4th DCA 1980) ("An analysis of school injury cases begins with the recognition that teachers and school boards are neither insurers of the students' safety, nor are they strictly liable for any injuries which may occur to them."); *Rodriguez v. Discovery Years, Inc.*, 745 So. 2d 1148, 1149 (Fla. 3d DCA 1999) ("[S]ome accidents occur without the attachment of liability on others.").

The "special relationship" that may exist between a school and participants in after-school activities on the premises does not change the limited nature of the common law duty. *See Rupp*, 417 So. 2d at 666 (the duty of a school to supervise parents is based on the mandatory schooling laws that require parents to rely on teachers to protect children while they attend school). The duty of a school differs from that between, for example, a hospital and a patient, or a cruise ship and a passenger. In the latter instances, the special relationship situation generally involves a dependency or reliance derived from the fact that the stricken person can only receive assistance from persons already on the premises. A hospital patient's health is in the hands of the hospital doctors and nurses. A cruise ship passenger has no means of disembarking and seeking other care if the ship is at sea. If the hospital patient or cruise ship passenger suffers a medical emergency, he or she depends on the hospital or ship's personnel to provide care beyond simply calling for assistance. The enhanced duty makes sense in these limited circumstances, because medical

personnel are standing by for the specific purpose of assisting those who require it and who have no other options for obtaining it. In contrast, a voluntary participant in a school-based or recreational sports league does not have any kind of unique dependency or reliance on the owner of the field to provide medical care beyond the usual duty of a property owner to summon help.

Moreover, under the general rules governing a special relationship between a land or business owner and a guest or patron, a defendant has no duty to protect the victim from potential harm where the defendant has no knowledge of circumstances that could lead to harm. *See Jackson Hewitt, Inc. v. Kaman*, 100 So. 3d 19, 30-31 (Fla. 2d DCA 2011), *rev. dismissed*, 83 So. 3d 708 (Fla. 2012) (defendant did not create or control the circumstances leading to the injury, nor did the defendant have "reason to anticipate" it). Florida tort law does not require people to be good Samaritans, and ordinarily does not impose liability for mere nonfeasance. *See Peterson v. State*, 765 So. 2d 861, 868-69 (Fla. 5th DCA 2000), *rev. denied*, 786 So. 2d 1188 (Fla. 2001) (statute that criminalizes conduct of adult children who willfully breach an assumed duty of care toward their parents is distinguished from general rule that the law does not "punish mere presence, or wholly passive conduct;" any such duty of care involves public policy considerations best left to the Legislature); *see also Romero v. Superior Court*, 89 Cal. App. 4th 1068, 1089, 1094 (2001) ("[I]t is not enough to assert that it is *conceivable*" that harm could befall a guest on the

landowner's premises, and courts will not require premises owners to engage in "continuous supervision" of those invited onto their property.). Field owners and operators of a recreational sports field must be presumed ignorant of the medical histories of those who play games on the premises as they lack any right to inquire about the sports participants' medical histories.[3] *See State v. Johnson*, 814 So. 2d 390, 393 (Fla. 2002) (noting person's medical records enjoy "confidential status by virtue of the right to privacy" in the state constitution).

The School District in this case is being sued because it owns the premises where Abel Limones collapsed. But when liability is invoked not because of any dangerous condition created by the property or the property owner, but *solely* because of the presence of a person who brings the potential for harm with him, the owner's duty must be narrowly construed. The existing duty to summon aid sufficiently balances the policy favoring assistance to the stricken with the policy that property

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[3]Even if Abel Limones' own school had medical records that might have divulged a potential issue, the game in which he collapsed was an "away" game, on another schools' field. *Limones*, 111 So. 3d at 903. In general, there is nothing unique to a school or sports field that draws individuals with medical problems; athletes, coaches, and spectators fall all along the spectrum of health and well-being and the School District, like all businesses and government-owned properties, must make the premises not only available, but accessible, to potential invitees with a wide range of medical and other disabilities. *See Maggio v. Fla. Dep't of Labor and Emp't Sec.*, 899 So. 2d 1074, 1078-79 (Fla. 2005) (discussing requirements of Florida Civil Rights Act); *McGuire v. Peabody Hotel Group*, 99 So. 3d 984, 985 (Fla. 1st DCA 2012) (discussing access requirements of federal American with Disabilities Act and Florida Civil Rights Act).

owners cannot be made uniquely responsible for insuring the safety of every person who enters the premises. *See L.A. Fitness*, 980 So. 2d at 559-60 (citing cases that limit a business owner's duty to summoning medical assistance within a reasonable time and refusing to impose a duty to use a particular medical procedure, *e.g.*, the Heimlich maneuver or CPR); *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 241 (2005) ("[I]t long has been recognized that restaurant proprietors have a special-relationship-based duty to undertake relatively simple measures such as providing 'assistance [to] their customers who become ill or need medical attention and that they are liable if they fail to act.' . . . Such measures may include telephoning the police or 911 for assistance.") (citations omitted); *Campbell v. Eitak, Inc.*, 893 A.2d 749 (Pa. Super. 2006) (The extent of the duty of a restaurant to a choking patron is the "summoning of medical assistance within a reasonable time.").

Courts in other jurisdictions have declined to extend the duty of reasonable care to include providing medical care or medical rescue services. For example, a Kansas court held that a company is not obligated to use an AED as part of rendering emergency care to an employee when a company nurse or emergency medical technician was not available. *Adee v. Russell Stover Candies, Inc.*, 186 P.3d 840, 847 (Kan. Ct. App. 2008). Ohio's intermediate appellate court held that the managers of a swimming pool did not have a duty to have an AED nearby, despite expert testimony that having an AED on site would make the swimming pool area safer.

Bae v. Dragoo & Assocs., Inc., 804 N.E.2d 1007, 1015 (Ohio 10th DCA 2004). *See also Lundy v. Adamar of N.J., Inc*., 34 F.3d 1173, 1179 (3d Cir. 1994) (affirming summary judgment for casino owner sued by patron who suffered a cardiac arrest and alleged that the casino breached its duty to provide medical care because it did not have an intubation kit on the premises or the personnel necessary to perform an intubation).

In *Abramson v. Ritz Carlton Hotel Co., LLC*, 480 Fed. Appx. 158 (3d Cir. 2012), a hotel guest's widow sued the hotel when her husband suffered a fatal heart attack while dining in the hotel restaurant. She alleged that the hotel breached its duty of care by failing to properly maintain the medical equipment provided during the emergency. The court held that "a common understanding of 'first aid' does not encompass the use of an oxygen tank or AED any more than it encompasses an intubation kit. Rather, 'first aid' involves simple procedures that can be performed with minimal equipment and training, such as bandaging and repositioning." *Id*. at 162. Because the hotel "fulfilled its limited common law duty to summon help and, until help arrived, provide basic first aid," it was not liable for the guest's death. *Id*. *See also Salte v. YMCA of Metro. Chi. Found*., 351 Ill. App. 3d 524, 529 (2004) (Business was required to provide "whatever first aid that, under the circumstances, they were reasonably capable of providing," but it was not required to be "prepared

to provide[] all medical care that it could reasonably foresee might be needed by a patron.") (citations omitted).

In *Boller v. Robert W. Woodruff Arts Center, Inc.*, 311 Ga. App. 693, 695 (2011), the court rejected a widow's lawsuit against an arts center for the death of her husband, allegedly because of the center's failure to have onsite either an ambulance or someone certified to use an AED, as well as failure to have a plan to deal with medical emergencies. It held that no statutory or common law duty existed that would require the center "to provide emergency medical services to the patrons of its concerts." *Id*. at 696. *See also* Kevin M. Rodkey, *Medical Technology Meets the Maryland General Assembly: A Case Study in Handling Advances in Automated External Defibrillator Technology*, 12 J. Health Care L. & Pol'y 81, 87 (2009) (comprehensive listing of jurisdictions).

B. Property Owners Catering to Athletes Have No Special Duty To Use AEDs

Just as school districts offer physical education and extracurricular sports opportunities to benefit students' health, fitness clubs promote themselves as caring for the health and well-being of their customers.[4] This is their primary draw to

[4]*See, e.g.*, Fitness Club of Florida's Mission Statement: "to provide its participants the most effective exercise programs so that they may achieve their overall wellness, improve the quality of their life, and get into their best shape all while having fun." *Available at* http://fitnessclubflorida.com/ (last visited May 29, 2014); 24 Hour (continued...)

customers. Yet health clubs and other sports and fitness facilities are not held to a legal duty to provide medical services beyond calling 911 when someone on the premises suffers a medical emergency. *See Rotolo v. San Jose Sports and Entertainment, LLC*, 151 Cal. App. 4th 307, 314-15 (2007).

In *Digiulio v. Gran, Inc.*, 74 A.D.3d 450, 903 N.Y.S.2d 359 (App. Div. 2010), *aff'd* 17 N.Y.3d 765, 952 N.Y.S.2d 71 (2011), a health club member suffered a cardiac arrest while on a treadmill. One club employee immediately called 911 and began administering CPR and another employee, in a panicked state, tried but failed to bring an AED to the member's aid. A state statute required that both an AED and a certified employee be on the health club premises, and it was. The actions of the panicked employee, however, meant that it was not used. The member and his wife sued, arguing that the health club had a common law legal duty to maintain a defibrillator on the premises and train its employees in the proper use of the equipment. The New York appellate court disagreed, holding that "[a]fter the heart attack, the club's employees more than fulfilled their duty of care by immediately calling 911 and performing CPR, had no common-law duty to use the AED, and could not be held liable for not using it." *Id*. at 452.

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[4](...continued)
Fitness/Orange Orlando focuses on "changing lives through fitness." *Available at* http://www.24hourfitness.com/FindClubDetail.mvc?clubid=632 (last visited May 29, 2014).

Subsequently, in *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364 (2013), a fitness club member collapsed and the club called 911 and brought an AED to the stricken member's side. A certified employee sought to assist Miglino, but neither used the AED nor administered CPR, finding both to be inappropriate given Miglino's condition (breathing, with a pulse). Two other members, medical professionals, administered CPR. Miglino died and his son sued, based on Bally's failure to use the AED. The court rejected the plaintiff's statutory claims and while it deferred ruling on the common law claim, the court's tone in addressing it suggested skepticism, because "New York courts have viewed health clubs as owing a limited duty of care to patrons struck down by a heart attack or cardiac arrest while engaged in athletic activities on premises." *Id*. at 350. The complaint asserted that Bally did not " 'employ or properly employ life-saving measures regarding [Miglino]' after he collapsed." *Id*. at 343. In response, Bally submitted affidavits that contradicted this claim, by showing that "the minimal steps adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident—i.e., calling 911, administering CPR, and/or relying on medical professionals who are voluntarily furnishing emergency care—were, in fact, undertaken." *Id*. at 351. *See also Salte*, 351 Ill. App. 3d at 529 (affirming dismissal of action brought against health club owner by wife of health club member who suffered cardiac arrest while using treadmill and holding that owner did not have a

duty to have a cardiac defibrillator on its premises and its staff did not have a duty to use a defibrillator on the health club member); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1224 (Pa. 2002) (holding that tennis club owed no duty to tennis club member who suffered heart attack to acquire and maintain a defibrillator on its premises for emergency use); *Rutnik v. Colonie Ctr. Court Club, Inc.*, 249 A.D.2d 873, 875, 672 N.Y.S.2d 451, *cert. denied*, 92 N.Y.2d 808 (1998) (holding that racquetball club was not negligent in failing to have a defibrillator present on premises for immediate emergency use; also noting that there was no defect in the premises themselves).

This Court should not adopt a common law duty requiring owners of recreational sports fields to use a specific medical device—an AED—on athletes who collapse while on the premises. The creation of such a duty would extend beyond school districts, whose fields are indistinguishable from fields maintained by cities, parks departments, universities, or other property owners who make their space available to the public for sporting events. Florida courts acknowledge the benefits of volunteer-driven, community-based organizations that offer athletic activities to children. *Applegate v. Cable Water Ski, L.C.*, 974 So. 2d 1112, 1115 (Fla. 5th DCA 2008), *rev. denied*, 5 So. 3d 668 (Fla. 2009). Even at the high school level, not all students play on the school team. *Cf. Florida High School Athletic Ass'n v. Melbourne Central Catholic High School*, 867 So. 2d 1281, 1285 (Fla. 5th DCA

2004) (referencing non school athletic programs offered by "AAU, American Legion, club settings, etc."). There is no principled distinction between a public school's high school team and a community youth recreation league; in both cases the risks of cardiac arrest among student participants are quite remote. *See* Daniel P. Connaughton & John O. Spengler, *Automated External Defibrillators in Sport and Recreation Settings: An Analysis of Immunity Provisions in State Legislation*, 11 J. Legal Aspects Sport 51, 51 n.4 (2001) (sixteen sudden cardiac deaths occur each year among high school and college athletes combined, nationwide). If this Court requires parent volunteer coaches and referees to use AEDs at the risk of incurring tort liability, these valuable community organizations may find fewer volunteers willing to run the programs, to the great detriment of Florida's youth. *See Kirton*, 997 So.2d at 357 ("[V]olunteers . . . faced with the threat of lawsuits and the potential for substantial damage awards, . . . could . . . decide that the risk is not worth the effort.").

C. Other Medical Conditions That Require Immediate Assistance Do Not Impose Duties on Property Owners

Any person—even a young person—may carry with him the risk of a heart attack as he moves through his days, in and out of homes, businesses, government buildings (including schools), and streets. Many people bear significant risks, as a result of their genetic dispositions or lifestyle choices, that might lead to a medical emergency wherever they might go. For example, many individuals have nut

allergies and require an immediate injection of epinephrine (Epipens) upon contact with nuts. Asthmatics depend on immediate use of inhalers to restore their ability to breathe. And diabetics may need an immediate injection of insulin or a drink of juice to counter sudden changes in blood sugar. In none of these situations, however, do courts place a duty on premises owners to provide these medical devices.

For example, in *Chiney v. American Drug Stores, Inc.*, 21 S.W.3d 14, 15-16 (Mo. App. 2000), a drug store pharmacist refused to provide an albuterol inhaler to a patron who was suffering an acute asthma attack because she had no current prescription; she therefore had to travel by ambulance to a medical center for treatment. The court defined the relationship between the pharmacist and the plaintiff as one of a pharmacist to a potential customer. *Id*. at 17. The pharmacist's job was to fill and dispense prescriptions according to the directions of health care providers who are authorized to prescribe medication. *Id.* The court held that the pharmacist was under no legal duty to provide prescription medication (the inhaler), call a doctor, or consult with the plaintiff because the plaintiff had never filled a prescription at his pharmacy before and he never received a prescription drug order. *Id*. at 18. *Cf. Burns v. City of Redwood City*, 737 F. Supp. 2d 1047, 1052-54 (N.D. Cal. 2010) (not only did movie theater in which diabetic patron suffered disorientation and odd behavior not provide any medical assistance, but it called the police, who forcibly subdued and arrested him for intoxication); *American Nurses Ass'n v. Torlakson*, 57 Cal. 4th 570,

577 (2013) ("The need for insulin can arise anytime and anywhere."); *Pace v. State*, 425 Md. 145, 169-70 (2012) (state had no duty of care under the National School Lunch Act to prevent cafeteria workers from giving peanut butter sandwich to a student with a severe allergy; no common law tort duty alleged in the complaint).

In these analogous situations, a relatively inexpensive medical device or drug could be administered (or, in the case of low blood sugar, a candy bar or juice box). Yet courts do not impose common law duties on landowners, schools, or employers to provide these specific types of medical care.

II

A RIGID RULE REQUIRING AEDS VIOLATES TORT JURISPRUDENCE THAT FAVORS FLEXIBLE CONCEPTS OF DUTY

This Court should not adopt an inflexible rule concerning the prophylactic measures a school district must take in the event of a medical emergency. The common law of torts, including the concept of duty, evolves in light of the changing conditions and circumstances of society. *Washington v. Resolution Trust Corp.*, 68 F.3d 935, 938 (5th Cir. 1995); *see also Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730, 731 (Fla. 2d DCA 1972) (the duty of care is not described by "rigid pigeonholes"), *cert. denied*, 284 So. 2d 691 (Fla. 1973). Courts acknowledge that duty is a flexible concept. *Bass v. Gopal, Inc.*, 395 S.C. 129, 138 (2011); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007) ("The flexible

standards of negligence law are well-equipped to handle varying fact situations.") (footnote omitted). Negligence is "not absolute, but is always relative to some circumstances of time, place, manner or person." *Aikens v. Debow*, 208 W. Va. 486, 593 (2000) (Starcher, J., concurring) (citations omitted).

Changes in biotechnology eventually will render a device-specific duty obsolete. People suffering from cardiac arrest, for example, may be treated with drugs rather than a defibrillator. Oregon Health and Science University is currently conducting a study that compares the effectiveness of two drugs frequently administered by first responders to a person suffering cardiac arrest. Dylan Fitzwater, *OHSU Gets New NIH Science Research Funding for Cardiac Arrest Study*, Science Market Update (July 31, 2012).[5] Following another path of research, scientists at the Hohenstein Institute developed an entirely different type of therapy for sudden cardiac arrest victims based on extremely rapid cooling down of the patient's body. Innovative cooling pads, which require no power source, induce "therapeutic hypothermia," thus slowing circulation and allowing more time for the patient to receive critical care before suffering irreparable neurological damage. Hohenstein Institute, *Help for Cardiac Arrest Patients—Fast and Without Electricity*,

[5]*Available at* http://info.biotech-calendar.com/?Tag=Cardiac%20Arrest (last visited May 29, 2014).

ScienceDaily (June 29, 2012).[6] Even traditional cardiopulmonary resuscitation (CPR) has undergone changes due to biotechnological advances. Studies currently are being conducted to determine whether handheld mechanical devices can provide more consistent and effective pumping action than a human being. S.C. Brooks, et al., *Mechanical chest compression machines for cardiac arrest*, Cochrane Summaries (Feb. 26, 2014).[7]

By the same token, given the rapid changes in biotechnology, if the Court opens the door to establishing duties on commercial property owners to maintain particular medical devices on the premises, at what point does such a duty arise? How accessible and inexpensive must the device be? Who determines when a cheap, easy-to-use device has achieved a level of ubiquity that could justify a requirement that every commercial establishment keep on the premises? Construing the common law to demand the presence of one particular type of medical device opens the door for future plaintiffs to argue that premises owners and operators should have other types of medical devices on hand. As businesses and property owners struggle to discern what potential medical devices might be retroactively demanded by the common law, their uncertainty translates into fear of lawsuits and higher prices and

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[6]*Available at* http://www.sciencedaily.com/releases/2012/06/120629120326.htm (last visited May 29, 2014).

[7]*Available at* http://summaries.cochrane.org/CD007260/mechanical-chest-compression-machines-for-cardiac-arrest (last visited May 29, 2014).

the cost of the anticipated litigation is factored into the price of goods and services. *See* Testimony of Elizabeth Milito, *Litigation Abuses*, House of Representatives Comm. on the Judiciary Subcomm. on the Constitution at 5 (Mar. 13, 2013) (The fear of litigation can be extremely effective in corralling employers into settling even the most frivolous of claims.). The retroactivity of the declared new duty is a further reason why the imposition of any new affirmative duties belongs in the legislative realm, where the public has input, and legislators are better suited to weighing the social costs of new regulations and potential benefits to the public welfare. The common law duty of landowners, including schools and other recreational sports field owners, to provide reasonable aid to a stricken athlete, coach, or spectator on the property cannot be tied to specific devices or treatments, which will likely become obsolete with biotechnological advances.

CONCLUSION

There is nothing inherent about the sports field in this case that makes the athletes, coaches, or spectators more likely to suffer a heart attack there than anywhere else. Public policy does not support expanding a duty to this extent. As the New Jersey Supreme Court recently wrote:

> [T]he function of the law, and in particular the common law governing tort recoveries, cannot be driven by sympathy or overshadowed by the effects of tragedy. Rather, the function of tort law is deterrence and compensation, and absent circumstances in which the definition of the duty can be applied both generally and justly, this Court should stay its

> hand. In the end, although creating a cause of action to suit these facts might serve the ends of these particular plaintiffs, we cannot say that it would advance the public interest or lead to a rule that would sensibly, predictably, and fairly govern future conduct.

Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 329-30 (2013).

This Court should affirm the decision below and hold that there is no common law duty to use a specific medical device—an AED—when someone on the premises suffers a medical emergency.

DATED: May 29, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: May 29, 2014.

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