DEFENDING CLAIMS OF NEGLIGENT RESPONSE TO MEDICAL EMERGENCY

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I. Introduction to the Issues Involved

Problematic Scenarios

It is an unfortunate certainty that most businesses operating in the hospitality industry will, at some point, face the scenario were a guest or patron will fall ill in the premises and require emergency medical treatment. In many of these situations, the severity will be such that the guest/patron will become helpless and depend on the establishment's employees to take charge and ensure medical treatment is provided. With most serious emergencies, particularly those involving cardiac arrests, seizures, and choking, time is not just of the essence but often the single most important factor that will determine whether the guest or patron will survive, and/or survive without serious permanent deficits.

Guided by human, moral, and even economic considerations, the majority of owners and operators in the hospitality industry take medical emergencies very seriously, and more often than not, strive to respond quickly and effectively, motivated to save the lives of their guests and patrons. Unfortunately, however, given the very nature of medical emergencies, death and/or permanent disability cannot always be avoided, best interests, preparation, and efforts notwithstanding.

High Expectations and High Emotions Lead to High Damages

With the advent of medical advances such as relatively easy to use AED defibrillators, and perhaps the popularity of medical television shows, often showcasing the heroic efforts of emergency personnel, and even laypersons, successfully resuscitating unfortunate victims (who often and unrealistically appear to emerge completely unscathed and with no apparent deficits), the expectations of the average guest and patron are very high. Now, more than ever, guests expect that the businesses they patronize will be equipped to deal with most medical emergencies and frequently pursue legal action when anything less than an optimal result is achieved following an emergency response. As can be expected, litigation involving allegations of negligence stemming from inadequate response to a medical emergency can prove very costly and long-lasting.

Summary Adjudication Should be Paramount Goal of Business Owners

Because medical emergencies often result in death or profound injury, especially those that develop into claims and lawsuits, emotions loom prominently and factor importantly when assessing the value of the case. Juries are understandably sympathetic towards victims of medical emergencies and their families and may find it difficult to ignore emotions when assessing whether the business owner was negligent in its response, even when the business owner did not bring about the underlying emergency. In most cases, the extent of the damages claimed by the family members of a lost loved one, or by an incapacitated person will be very significant, often into the seven and eight figure range. These realities often lead business owners and operators facing suit to consider very large settlements, even when evidence suggesting negligence is lacking. As such, laying the groundwork to facilitate summary adjudication should be a paramount goal of business owners and operators. As evidenced by the jurisprudence, this is not always a straightforward or simple undertaking.

II. Duty of Care / Duty to Intervene Owed to Guests and Patrons

The Scope of the Duty of Care and Obligation to Intervene to a Medical Emergency

The principle that a general duty to aid or protect exists where there is a special relationship is stated in §314A. Courts often apply §314A and precedent interpreting it when deciding cases involving medical emergencies, especially when the defendant is an entity operating in the hospitality industry (e.g. gyms, hotels, restaurants, casinos, etc.).

§ 314A recognizes four types of categories giving rise to a special relationship: 1) a common carrier; 2) an innkeeper; 3) a possessor of land who holds it open to the public; and 4) one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection. Under § 314A, the actor owes a duty to take reasonable action to (a) protect against unreasonable risk of physical harm, and (b) to give first aid after he/she knows or has reason to know that the person is ill or injured, and to care for the person until he/she can be cared for by others. Courts applying §314A often cite the comments to the section, which provide a good measure of clarification. Comment c, for example, clarifies that the duty of care applies only where the risk of harm or of further harm arises in the course of the special relationship. In other words, the duty to take reasonable action does not apply when, for example, the injured guest of an innkeeper is away from the premises.

Comment d clarifies that the duty to give aid is not tied to the defendant's fault, and extends to cases where the plaintiff’s injury stems from natural causes and even from his or her own negligence. Comment e clarifies that the applicable duty is one of reasonable care and the defendant will not be liable in the absence of notice (i.e. where he neither knew nor should have known of the unreasonable risks or of illness or injury).

Perhaps the most often cited comment is Comment f, which specifies that the defendant is not required to take action *until* he knows or has reason to know that the plaintiff is endangered, or is ill or injured. At that point, the defendant is not required to take any action beyond that which is reasonable under the circumstances. Comment f further specifies that in the case of an ill or injured person, the defendant will seldom be required to do more than give such first aid as he reasonably can, take reasonable steps to turn the sick person over to a physician, or to those who will look after him or her and see that medical assistance is

obtained. The defendant is not required to give any aid to a person who is in the hands of persons that appear to be competent or whose friends are present and apparently in a position to give him or her all necessary assistance. Many courts applying § 314A have interpreted comment f to hold that the defendant fulfills its duty of care to sick or injured guest or patron simply by summoning medical assistance within a reasonable time.

Reasonable First Aid and Duty to Summon Medical Assistance – Actions Needed to Satisfy the Obligation to Intervene: Examining *Lundy* and *L.A. Fitness*

Lundy

Perhaps one of the leading and most cited cases in this topic is *Lundy v. Adamar of N.J., Inc*.,
34 F.3d 1173 (3d Cir.1994), where in 1994, the Third Circuit Court of Appeals affirmed the district court's entry of summary judgment in favor of a casino, whose employees assisted a patron after he suffered a heart attack. In analyzing the lower court's decision, the Lundy court noted it could not find any decision by a New Jersey court articulating the scope of a business' duty, if any, to aid or assist a business invitee when an invitee requires emergency aid through no fault of the landowner. Accordingly, the court resorted to treatises and decisions in other jurisdictions to determine how the New Jersey Supreme Court would rule.

Lundy, a 66-year-old man with a history of coronary artery disease suffered cardiac arrest while gambling at a blackjack table at a casino in New Jersey. Immediately after his collapse, three patrons, that by coincidence were medical professionals, responded and started CPR. The patrons immediately noted that Lundy was unresponsive, not breathing and pulseless.

The Blackjack dealer at the table where Lundy had been gambling pushed an emergency call button that alerted the casino's security command post. The Security Command Post was electronically designed to identify the location of the alarm and record the time the alarm was sounded. The alarm prompted a Security Command Post employee to phone the security posts located near the area were Lundy collapsed. Two minutes after the alarm was sounded, the Security Command Post employee radioed directions to all of the guards in the casino floor and requested they go to Lundy's location.

Two of the guards arrived within 15 seconds of the radio message and immediately requested that someone contact the casino medical station, located one floor above the casino. The nurse on duty, who was employed by an independent contractor physician hired to provide medical services at the casino, arrived at the scene within a minute or two of being summoned. As soon as the nurse arrived, she instructed a security guard to call an ambulance. According to the casino's log, the ambulance was summoned approximately three minutes after Lundy's collapse.

The casino nurse brought with her medical equipment that included oxygen, an ambu-bag to assist in respiration, and an "airway", which is a plastic apparatus that keeps the mouth open and holds the tongue in place. She did not, however, bring an intubation kit, which is equipment used to insert an endotracheal tube and establish a more efficient airway than the one that can be established within an ambu-bag. While the casino did not keep an intubation kit, it did maintain a laryngoscope with intubation tube as part of its inventory of equipment. The nurse testified in deposition that she did not take the intubation tube with her because she was not qualified to use it.

As soon as she arrived at the scene, the nurse began assisting the three patrons in performing CPR. When the physician/patron requested an intubation kit, the nurse indicated it was casino policy not to have one on the premises and noted she was not qualified to use it. While CPR was underway, the EMT unit arrived. EMT technicians intubated Lundy, albeit with difficulty given his stout physique and muscle tone. After Lundy regained his pulse and his color improved, the ambulance departed with Lundy to the hospital. At the time, approximately thirty minutes had transpired since his initial
collapse.

The casino filed a motion for summary judgment, which the district court granted. In granting the motion, the court held the casino fulfilled its duty of care by immediately summoning medical attention once it became aware Lundy needed it. The court also found that the very fact that the casino contracted with a physician was evidence that it fulfilled its duty to aid injured patrons, specifically by having at least one nurse available, trained in emergency care, who could immediately size up a patron's medical situation and summon appropriate emergency medical personnel equipment by ambulance to respond to the patrons emergency needs.

The Court of Appeals' Analysis and Decision

On appeal, the Lundys alleged that §314A applied and thus created a special relationship between the casino and the Lundys. Additionally, the Lundys argued that the special relationship gave rise to a duty to provide medical care, and that the casino breached this duty when it failed to keep on- site the equipment and skilled personnel necessary to perform an intubation.

The court reviewed §314A and accompanying comments, acknowledging that the Supreme Court of New Jersey would likely apply it in a case involving a casino and its patron. However, the court rejected the Lundys' arguments concerning the scope of the duties alleged and held that the duty recognized by §314A does not require the provision of all medical care that an innkeeper could reasonably foresee might be needed by a patron. Specifically, the court noted that to accept the Lundys' position that intubation should have been administered would be tantamount to a requirement of having a full-time on-site physician. Such an imposition, the court further held, goes far beyond the "first-aid" contemplated by the Restatement.

L.A.
Fitness

Like the court in *Lundy*, the court in *L.A. Fitness Intern., LLC v. Mayer*, 980 So.2d 550, 553 (Fla. 4th DCA 2008) was tasked to analyze an issue of first impression in Florida and determine the scope of the duty owed by a health club owner to a patron that experienced a medical emergency and subsequently passed away. The plaintiff alleged L.A. fitness was negligent for failing to administer CPR and maintain AED defibrillators in the premises. The case went to trial resulting in a significant award for the plaintiff. L.A. Fitness appealed and Florida's intermediate Court of Appeals (Fourth District) reversed and remanded with instructions that judgment be entered in favor of L.A. Fitness.

At trial, one of L.A. Fitness' employees testified he was sitting at his desk when he

heard someone call for help. The employee got up from his desk and told the receptionist to dial 911. He then ran to the back of the gym where the call emanated from and found Mr. Tringali lying on his back surrounded by other patrons. The employee noticed that Mr. Tringali was bleeding from a gash above his head, his face was red, yellow foam was coming from his mouth, and he was convulsing.

The employee touched Mr. Tringali to determine if he was responsive and checked for a pulse, which he found to be faint. The employee concluded that Mr. Tringali had an oxygen supply because of the red color of his face. He did not, however, put his face next to Tringali to determine if he was in fact breathing. Up to this point, the employee was unaware of the true nature of Mr. Tringali's emergency and assumed that Mr. Tringali had slipped from the exercise machine and suffered a concussion. Accordingly, and out of fear that he could exacerbate the injuries to Mr. Tringali's neck and/or back, the employee opted not to do a "chin tilt" to open an airway, a necessary first step to performing CPR. The employee further assumed that Tringali had suffered a stroke or seizure, and decided that attempting to perform CPR would only make his injuries worse. The employee observed Mr. Tringali turn blue just as the paramedics arrived. He estimated they arrived within three to four minutes of the first cry for help.

The general manager of the health club, who was also present that night, testified that he also instructed the receptionist to call 911. He said he returned to the receptionist to ensure that the call was in fact made, and that he spoke to the 911 operator who asked if Mr. Tringali was breathing. He relayed the 911 responder's question to the employee who reported that Mr. Tringali was in fact breathing. The general manager estimated that four to six minutes elapsed between the first cry for help and the arrival of the paramedics.

Three health club patrons also testified at the trial. Their testimony concerning the incident, and initial response did not vary significantly from the testimony of L.A. Fitness' employees. Overall, the evidence indicated that Mr. Tringali appeared to have been breathing, at least initially, that no one performed CPR, and that the crowd of patrons around Mr. Tringali merely encouraged him to breathe.

The evidence also indicated that Mr. Tringali began turning blue approximately five minutes after his fall, and the L.A. Fitness' employees directed the receptionist to call 911. The patrons' estimates of the time between the first cry for help and the arrival of the paramedics ranged from two to twelve minutes. The paramedics found Mr. Tringali unresponsive, not breathing, and without a pulse. The technicians performed CPR and defibrillation with an AED, but the efforts were unsuccessful. In sum, the L.A. Fitness court found that LA Fitness, through its employees, fulfilled its duty of reasonable care in rendering aid to Mr. Tringali by summoning paramedics within a reasonable time after being alerted of the emergency. Moreover, the court held that L.A. Fitness did not owe a legal duty to have CPR qualified employees on site at all times, and that their employees were under no legal duty to administer CPR. Further, the court found that L.A. Fitness had no legal duty to have a defibrillator on the premises for emergency use.

The Court of Appeals' Analysis and Decision

From the outset, the court noted this was a case of first impression. While both parties agreed a special relationship existed between L.A. Fitness and Tringali and that L.A. Fitness

owed a duty of reasonable care, they disagreed as to the nature and extent of the duty owed. L.A. Fitness argued it fulfilled its duty of care by promptly summoning medical assistance. L.A. Fitness also argued that its duty to render "first aid" did not include sophisticated medical procedures such as CPR and defibrillation. To determine the scope of the duty owed, the court surveyed numerous opinions from Florida and other jurisdictions, several applying §314A of the Restatement.

The court examined several decisions from Florida jurisdictions, including Lundy, where other courts held that business owners satisfied their legal duty to come to the aid of a patron experiencing a medical emergency by summoning medical assistance within a reasonable time. These courts, the L.A. Fitness court noted, declined to extend a duty of reasonable care to include providing medical care or medical rescue services.

Regarding the provision of CPR, the L.A. Fitness court stated that while the procedure is relatively simple and widely known, it nonetheless requires training and recertification, and represents intervention that is "more than mere 'first aid'." The court added that even non-medical employees certified in CPR remain laypersons and should have discretion in deciding when to utilize the procedure. The L.A. Fitness court found support for this conclusion in decisions that applied the same rationale when considering the Heimlich maneuver. *Id.* at 559 – 560, citing *Campbell v. Eitak, Inc.*, 893 A.2d 749 (Pa.Super.2006); *Baker v. Fenneman & Brown Props., LLC*, 793 N.E.2d 1203 (Ind.App.2003); *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (Nev.2001); *Drew v. LeJay's Sportsmen's Cafe*, 806 P.2d 301, 305 (Wyo.1991).

Regarding the failure to maintain AED defibrillators in the premises, in addition to some of the decisions cited above, the court found there was no common law or statutory duty requiring a business to maintain an AED on its premises.

Gingele
skie

Gingeleskie v. Westin Hotel Co., 145 F.3d 1337 (9th Cir. 1998) is instructive largely because the Ninth Circuit Court Of Appeals, applying Arizona law, reversed the summary judgment that the district court entered in favor of Westin Hotel Company ("Westin") citing issues of material fact as to whether Westin met its duty under §314A. Joseph Gingeleskie was a guest at the Westin hotel. He approached the front desk to advise the Westin employee he was not feeling well and to ask for a medical facility on site. Gingeleskie then decided he wanted to go to an emergency room. According to Westin's records, Gingeleskie, who was overweight and in his mid-forties, appeared "pale and sweating" and "flushed white."

The Westin employee was unaware of Westin's policy requiring employees to call hotel security in the event a guest requested medical assistance. Instead he called another employee to request he summon a taxicab for Gingeleskie. As Gingeleskie was leaving the hotel, the hotel's manager of guest services asked him how he was, to which Gingeleskie responded he was "not feeling too well." Although the court's opinion does not explicitly state it, given the fact that his estate brought suit, it can be inferred that Gingeleskie died sometime thereafter.

Gingeleskie's estate proffered testimony from a hotel management expert who opined

that Westin’s personnel did not conduct themselves in accord with accepted standards of hotel management. He further opined that hotel employees should have made Gingeleskie as comfortable as possible and called for an ambulance immediately. Notwithstanding this evidence, the district court granted summary judgment in favor of Westin.

On appeal, the court recognized that Arizona courts have adopted §314A to define a duty of care owed by an innkeeper to a guest. Id at *2, citing *DeMontiney v. Desert Manor Convalescent Center, Inc.,* 144 Ariz. 6, 695 P.2d 255, 259-60 (Ariz.1985) (In Banc). The court noted that § 314A states that an innkeeper must take reasonable steps to care for a patron, once it is known or there is reason to know of a patron's illness, which includes the duty to take reasonable steps to “turn the sick man over to a physician.” *Id.* The court then evaluated Westin's employees’ response and concluded a jury could conclude Westin had reason to know that Gingeleskie was ill and yet failed to take reasonable steps in response. The court specifically held that the expert testimony taken together with Gingeleskie's request for emergency medical assistance, the knowledge of three Westin employees that Gingeleskie was ill, and their violation of Westin's policies, created a genuine issue of material fact as to whether Westin met its duty under § 314A.

A Heightened Standard to Provide More Than First Aid May Be Coming

A significant development recently occurred when the Third Restatement of Torts, and more importantly § 40, was formally adopted and promulgated on May 16, 2012. Section 40 finds its counterpart in §314A of the Second Restatement and includes the same special relationships that §314A recognized (supra) and identifies three others (i.e. employer-employee, schools and their students, and landlords and their tenants).

Perhaps the most significant difference between the two Restatements concerns the scope of the duties they articulate. Comment d in §40 of the Third Restatement points out that the affirmative duty recognized in Section 314A of the Second Restatement was limited to providing first aid and temporary care until appropriate medical care could be obtained. Section 40, on the other hand, adopts a more general duty of reasonable care that “recognizes both the variety of situations in which the duty may arise and advancements in medical technology that may enable an actor to provide more than mere first aid.” Section 40 further notes that “[a] duty of reasonable care is flexible enough to account for a wide variety of situations.”

Because of the recency the Third Restatement’s adoption, courts have yet to interpret the scope of the duty of care articulated therein. However, the Reporters’ Note to Section 40, comment d, indicates that even the Second Restatement recognized that there might be circumstances in which an actor would have a duty to do more than provide first aid and obtain appropriate medical attention. The Reporters’ Note further acknowledges that technological advances justify employing a reasonable-care standard. This viewpoint was revealed in the adoption in 2004 of a regulation by the Federal Aviation Authority requiring airlines to carry a defibrillator aboard all aircraft with a flight attendant.

Since courts have yet to issue an opinion interpreting and applying § 40, it remains to be seen whether this “expanded” reasonable duty of care owed to guests and patrons of establishments such as hotels, restaurants, gyms and other businesses in the hospitality industry will ultimately include requirements for advanced medical technology in emergencies, such as AEDs

III. Negligent Voluntary Undertaking

Alternate Theories of Negligence – Defendant Undertook a Duty Not Owed and Failed to Reasonably Carry it Out

Restatement (Second) of Torts §323 is often invoked by plaintiffs seeking to establish an alternative theory of negligence premised on allegations that the defendant undertook a duty not previously owed and failed to carry it out reasonably (often as an added safeguard, in expectation the court will find the defendant fulfilled its duty under 314A). Specifically, §323 imposes liability for the physical harm resulting from the failure to exercise reasonable care when performing services undertaken either gratuitously or for consideration, in situations where the defendant should have recognized that the services are necessary for the protection of persons or things. Under §323, liability follows if the failure to exercise reasonable care increases the risk of harm, or the person suffers because of their reliance upon the actor's undertaking.

The comments to §323 provide clarification concerning the required skilled and competence of the person giving aid and the consequences for terminating the aid. Concerning skill and competence, comment b provides that an actor is not subject to liability due to failure to have the competence or to exercise the skill normally required of persons doing such acts, provided the plaintiff is aware of the actor's incompetence. The comments, however, also note that in situations where a person receiving the aid is unconscious or otherwise incapable of deciding whether to accept or reject the assistance, it is socially desirable and legally permissible to give gratuitous aid even though the person who gives it realizes that his lack of competence and skill creates some degree of risk. As an example, the comments illustrate a scenario were an actor finds the victim severely wounded, unconscious, in a lonely place, and in urgent need of first aid treatment and provides that he should act without fear of liability to do the best he or she can even though he cannot be certain whether his efforts will be beneficial rather than harmful. On this topic, however, the comments also provide that the actor's incompetence to deal with the situation may be so extreme as to make it unreasonable for him to attempt providing assistance.

Concerning termination of services, the comments provide that a person giving aid may not abandon efforts if by giving aid he puts the other in a worse position than he was before the aid was attempted, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance. At that point, the person giving aid will be required to exercise reasonable care to terminate services in such a manner where there is no unreasonable risk of harm to the others, or to continue them until they can be so terminated. Otherwise, the person providing aid may abandon efforts at any time, regardless of the motive, even if he is stopping because of personal dislike felt towards the victim.

Lastly, Restatement of the Law of Tort (Second), §324 specifies the duty owed when an actor, being under no duty to do so, takes charge of a helpless person in need of aid. Under such scenario, an actor is liable for bodily harm caused by his failure to exercise reasonable care to secure the other's safety or by discontinuing the assistance that by doing so he leaves the victim in a *worse position* than when he first provided assistance. The comments to §324 provide that the cause of the incapacity is irrelevant, the principles in this section apply whether the victim's incapacity stems from his own tortious conduct (i.e. drunkenness) or the actions of

others.

What Constitutes Voluntary Undertaking?

In *Lundy*, the Lundys alleged the casino breached its voluntarily assumed duty as articulated by the §324 by failing to provide medical equipment that the physician/patron that responded to Lundy had requested and which was available in the casino's medical station. Specifically, the Lundys alleged that even if there was no duty to provide intubation, the casino nevertheless voluntarily assumed the duty to provide that level of care when it arranged to have a nurse on hand and a laryngoscope with intubation tube as part of its inventory of equipment. The Lundys further alleged that the nurse also breached this voluntarily assumed duty by not returning to the medical center to retrieve the intubation tube after the physician/patron requested it.

The court rejected the Lundys' argument that the casino voluntarily assumed a duty to provide intubation by contracting with a physician to maintain intubation equipment on-site and by having the nurse respond and that it breached said duty. Furthermore, the court recognized that the rule embodied by §324 had been substantially modified by New Jersey's "Good Samaritan Act," which excluded liability for acts and omissions of anyone who in good faith provided at the scene emergency medical assistance to a victim. The court rejected the pre-existing duty exception to the Act, holding that the casino's only pre-existing duty was to summon for help and to take reasonable first aid measures until help arrived.

In *L.A. Fitness*, Relying §323, Mayer also argued that even if L.A. Fitness did not owe a duty to give CPR, it nevertheless voluntarily assumed the duty once its employee undertook to assist Tringali and evaluate him for CPR. At that point, Mayer argued, L.A. Fitness owed a duty to perform CPR with reasonable care. However, the court rejected Mayer's argument, finding that the employee did not assume the duty by simply assessing Tringali, because the employee neither worsened Tringali's condition nor caused others around him to rest on their oars and refrain from assisting.

The Affect of "Good Samaratin" Laws on Negligent Voluntary Undertaking Claims

Although addressed in dicta (in a footnote), the court's discussion of Florida's Good Samaritan Statute in *L.A. Fitness* is worth addressing, as it shines a light on the limits of protection under the Florida statute, which is similar to Good Samaritan Statutes in other jurisdictions. Specifically, the *L.A. Fitness* court characterized the protection under the statute as illusory, noting that the immunity given to a person who gratuitously renders aid to an injured person is conditioned upon that person's rendering aid "as an ordinary reasonably prudent person." This requirement, the court noted, is no different than the common law standard of care. Accordingly, the court pointed out, a business owner who has no legal duty to provide CPR to an endangered invitee in a medical emergency might consider himself better off not undertaking to administer CPR. For this reason, owners and operators need to give careful consideration to the applicable Good Samaritan Statute in their jurisdiction when developing policies and procedures concerning responses to medical emergencies.

Additionally, in *Abramson v. Ritz Carlton Hotel Co., LLC,* 2012 WL 1632591 (3d Cir. May 10, 2012), the Third Circuit Court of Appeals, applying §324, the court held that because the plaintiff failed to allege that the malfunctioning AED harmed the plaintiff, plaintiff could

not establish a cause of action negligent undertaking (the court also held the claim was precluded by New Jersey's Good Samaritan statute).

IV. Presence of AEDs (Automated External Defribulator)

Stores and Hotels are Not Required to Have AEDs on the Premises

Verdugo

In *Verdugo v. Target Corp*., 59 Cal. 4th 312, 327 P.3d 774 (2014) the Ninth Circuit court held that a retailer had no obligation under California law to acquire and make available an automatic external defibrillator for use in medical emergencies. In *Verdugo*, Mary Ann Verdugo suffered sudden cardiac arrest while shopping at a store owned by Target Corporation. Store personnel promptly called 911, but by the time emergency personnel reached Verdugo, she was dead. There was no automatic external defibrillator (AED) on the store premises.

Verdugo's family sued Target Corporation, alleging that as a commercial property owner, Target had a common law duty to maintain an AED onsite. Ruling that Target had no such duty, the district court dismissed the Verdugos' claim. The Verdugos appealed. The court of appeals certified to the California Supreme Court the following question of law: In what circumstances, if ever, does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an AED for cases of sudden cardiac arrest?

The California Supreme Court held that Target's common law duty of care to its customers did not include a duty to acquire and make available an AED for use in a medical emergency. The court of appeals accordingly affirmed the judgment of dismissal, holding that the district court's ruling was in accord with California law. Notably, Judge Pregerson wrote separately to urge the California legislature to consider enacting a law to require big box stores to have an AED onsite. Judge Pregerson also expressed the hope that hope that, until such a law is passed, Target and other big box retailers would uphold their moral obligation to ensure the health and safety of their customers by voluntarily installing AEDs in their stores.

De La Flor

De La Flor v. Ritz-Carlton Hotel Co., L.L.C., 930 F. Supp. 2d 1325 (S.D. Fla. 2013) involved a case where a Hotel patron suffered heart attack while exercising in hotel's fitness facility and the patron alleged permanent brain injury. The District court, applying Florida law, dismissed plaintiff's first complaint without prejudice an amended complaint with prejudice. In doing so, the court noted that because plaintiff conceded in the complaint that he received immediate medical care from a physician, the hotel did not owe a duty to assist. The court further found the hotel did not owe a duty to maintain an AED in the premises or to provide the AED it kept or to provide oxygen and/or aspirin. The court additionally found the hotel did not owe a duty to constantly monitor video surveillance cameras (which captured the incident) and that the fact the hotel advertised to fitness facility as "state-of-the-art" did not impact the duty owed.

Public Facilities and Schools Have a Duty to Maintain AEDs, but Not a Duty to Use

In *Limones v. Sch. Dist. of Lee County,* 111 So. 3d 901, 903 (Fla. 2d DCA 2013)*, reh'g denied* (Apr. 8, 2013)*, review granted,* 143 So. 3d 920 (Fla. 2014), Abel Limones, Jr. collapsed while playing soccer for his high school. Within a few minutes Abel was unconscious, had stopped breathing, and had no discernible pulse. A School Board employee called 911 within three minutes of his collapse. Both Abel's coach and a nurse attending the game attempted CPR, yet Abel remained unresponsive for at least twenty-three minutes before emergency personnel revived him through the combined use of medication and an AED.

The appellate court applied *L.A. Fitness* (infra) and held that School Board had no common law duty to make available, diagnose the need for, or use an AED on the student. The court rejected allegations of negligent undertaking holding that the plaintiffs failed to establish that the School Board's action in acquiring the AED and training personnel in its use did not compel the School Board to ensure that the AED would be used in these circumstances. The Court also found that Plaintiffs failed to show that the School Board's acquisition of the AED and its training procedures either increased the risk of harm to the student or caused the student to rely upon such acquisition or training to his detriment.

Limones establishes that under most circumstances, schools do not have an affirmative duty to use the AEDs they are required to maintain. At least for now, any school that complies with the requirements of FL Statute § 1006.165 should remain immune from civil liability. However, school boards should be wary in the future, as the *Limones* court itself warns that a School Board's duty to studentathletes is "not a stagnant proposition" and may vary depending upon the sport or athlete involved, or may change with further evolution in the law. Notably, the Plaintiff has appealed this case to the Florida Supreme Court, which has granted review, but has yet to render an opinion on the matter.

IV. Practical Considerations

Importance of Proper Planning and Preparation

For example, *Lundy* teaches, among several lessons, the importance of proper planning and preparation, especially for larger establishments with large guest traffic such as hotels, resorts, and casinos. Undoubtedly, the *Lundy* casino's prompt response to the subject medical emergency, which involved the coordinated efforts of the blackjack dealer, the nurse, and members of the security staff, required carefully thought-out policies and procedures as well as meaningful employee training to ensure the procedures were properly followed. Also key to the casino's prompt response was its ability to immediately mobilize personnel when alerted to the emergency; in their case, through an alarm system. While a similar alarm system may not be practical for every business, less costly alternatives, such as strategic placement of phones with emergency dialing instructions, can suffice to ensure that medical professionals are promptly summoned.

Proper Training of Employees and other Personnel

Just as important is the proper training of employees and other personnel to follow policies and procedures. *Lundy* illustrates how proper training likely allowed the casino to fulfill its duty of reasonable care, while *Gingeleskie* illustrates the alternative, specifically how the hotel employees' failure to follow established policies led the court to find a question of

fact preventing the entry of summary judgment. Business owners should devote sufficient resources to ensure employees become and remain familiar with their policies and procedures addressing responses to medical emergencies and are trained to follow them. Conducting periodic emergency drills can be a good method of training.

The Need for CPR Trained Employees and AED defibrillators must be evaluated on a case by case and jurisdiction by jurisdiction basis / Location of AEDs

Whether to maintain CPR trained employees and AED defibrillators in the premises is a consideration that needs to be evaluated on a case by case and jurisdiction by jurisdiction basis. Some states may require them[1], depending on the type of business and some establishments, even if not required of them, may nevertheless find that taking such precautions is sound business practice. Regardless of the reason, businesses should be familiar with applicable Good Samaritan Statutes in their jurisdiction to ascertain the level of protection afforded to them when undertaking to assist in an emergency. See *L.A. Fitness* (supra). In any event, businesses that do undertake to provide services not required under the law, need to ensure they will be able to do so competently. Thus, proper employee screening and training is key towards this goal. Additionally, if a business does choose to have an AED present at their location, it will be prudent to place the device near a location where one could foresee it being used, i.e. near a gym.