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COURT OF APPEALS

STATE OF NEW YORK

GREGORY C. MIGLINO, JR.,

Respondent,

-against-

No. 10

BALLY TOTAL FITNESS OF GREATER
NEW YORK, INC.,

Appellant.

20 Eagle Street
Albany, New York 12207
January 03, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 10, Miglino
2 versus Bally Total Fitness.

3 Counselor, do you want any rebuttal time?

4 MR. HEERMANCE: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go
7 ahead.

8 MR. HEERMANCE: May it please the court, my
9 name is Brian Heermance, and I represent the
10 defendant, Bally Total Fitness of Greater New York.

11 JUDGE READ: Could I ask you to clarify
12 something for me? This lawsuit was brought against
13 the local company and the national company?

14 MR. HEERMANCE: Yes.

15 JUDGE READ: The national company was
16 dismissed?

17 MR. HEERMANCE: Yes.

18 JUDGE READ: And that's not been appealed.

19 MR. HEERMANCE: Correct.

20 JUDGE READ: All right. Thank you.

21 MR. HEERMANCE: So it's just the local - -
22 -

23 JUDGE READ: Just the local.

24 MR. HEERMANCE: - - - club in Lake Grove,
25 New York that remains.

1 CHIEF JUDGE LIPPMAN: Counselor, there's -
2 - - what does the statute mean if we say that - - -
3 in this case before discovery, that there is no
4 possibility that the club could be held liable?

5 MR. HEERMANCE: By the statute, I assume
6 you're referring to 627-a?

7 CHIEF JUDGE LIPPMAN: Yeah.

8 MR. HEERMANCE: Yes.

9 CHIEF JUDGE LIPPMAN: What could it mean if
10 it - - - does it make it meaningless if we were to
11 hold that in no circumstances, even when you have the
12 machine, you have someone who has the ability to use
13 it and they don't use it, that it could never, never
14 - - - even if we let it go, looked into the
15 circumstances - - - does it make the statute
16 meaningless - - -

17 MR. HEERMANCE: No.

18 CHIEF JUDGE LIPPMAN: - - - if there's no
19 duty?

20 MR. HEERMANCE: There is no duty. The
21 statute - - -

22 CHIEF JUDGE LIPPMAN: Why can there never
23 be a duty? That's what I'm saying to you. What's
24 the - - -

25 MR. HEERMANCE: As the statute - - -

1 CHIEF JUDGE LIPPMAN: What's the purpose of
2 the statute if it didn't create some duty in certain
3 circumstances?

4 MR. HEERMANCE: The duty the statute
5 creates is the duty it states that it creates which
6 is, one, to have the device, the AED, and two, to
7 have someone trained in the club to use it.

8 CHIEF JUDGE LIPPMAN: What's the purpose of
9 having the device and someone trained if they don't
10 use it?

11 MR. HEERMANCE: The purpose of the statute
12 - - -

13 CHIEF JUDGE LIPPMAN: And again, I'm not
14 pre-judging in this particular case, but can there
15 never be a duty created? The statute doesn't create
16 any duty in any circumstance?

17 MR. HEERMANCE: The purpose of the - - -

18 CHIEF JUDGE LIPPMAN: And in this case, we
19 don't know all the circumstances - - -

20 MR. HEERMANCE: Correct.

21 CHIEF JUDGE LIPPMAN: - - - because it's
22 pre-discovery. Go ahead.

23 MR. HEERMANCE: My read of the statute, and
24 I think any rational person's read of the statute,
25 certainly any layperson's read of the statute, would

1 indicate that it requires what it requires, and it
2 doesn't require what it doesn't say it requires. It
3 says you've got to have a device; Bally did. It says
4 you have to have someone trained to use the device;
5 Bally did.

6 JUDGE SMITH: But you would agree that
7 there's not a lot of point having the devices there
8 and someone trained if no one ever uses them?

9 MR. HEERMANCE: Absolutely.

10 JUDGE SMITH: So you're - - - what you're
11 really saying, then, is that the legislature is
12 thinking, let's make sure the things are there, let's
13 make sure trained people are there, and then the
14 likelihood is they'll get used but we're not going to
15 require that?

16 MR. HEERMANCE: Correct. I think what the
17 legislature had in mind is to have the device
18 present. It is a fairly sophisticated piece of
19 equipment, but it requires training to use properly.
20 To have someone trained to use it in the hopes that
21 the person who is trained, when something happens at
22 the club, will volunteer, step up and use the device.
23 And that's - - -

24 JUDGE SMITH: And if that volunteer - - -

25 MR. HEERMANCE: - - - that's the

1 terminology the statute uses.

2 JUDGE SMITH: If that volunteer does that
3 and he uses it in a grossly negligent manner, then
4 he's liable, and I guess, if he's a health club
5 employee, the health club is liable, right?

6 MR. HEERMANCE: Correct.

7 JUDGE SMITH: Suppose he makes a grossly
8 negligent decision not to use it, does he have any
9 liability?

10 MR. HEERMANCE: No.

11 JUDGE SMITH: Is that - - - isn't that a
12 bad idea to say the safe thing is to leave the thing
13 in its case?

14 MR. HEERMANCE: No. I think the statute as
15 written requires the device, someone trained to use
16 it in the hopes that that person, under the right set
17 of circumstances, will step up and use it.

18 CHIEF JUDGE LIPPMAN: But what if - - -

19 JUDGE SMITH: I understand the argument,
20 but isn't it terribly bad policy to put more burden
21 on the guy who does use it than the guy who doesn't?

22 MR. HEERMANCE: I think it's bad policy to
23 read into a statute an obligation, a legal duty that
24 is not present.

25 CHIEF JUDGE LIPPMAN: Well, let's put it in

1 graphic terms. What if the person who is trained to
2 do it has the defibrillator in his hands or her
3 hands, and the person is dying, and this person's
4 been trained, this club that's mandated to have it,
5 and the person just sits there with his arms folded
6 and says, huh-uh, I'm not going to get involved in
7 this, I don't want to use it, I don't - - - I refuse
8 to use it. I know it's going to save his life, but
9 I'm not going to use it. No duty?

10 MR. HEERMANCE: Well, I'd start with the
11 proposition that there's no certainty that these
12 devices save anyone's life. They can. They have the
13 propensity to do that, but in all likelihood, given
14 all the literature I've read, is that you're still
15 seventy-six percent certain of dying even with prompt
16 CPR and AED use.

17 CHIEF JUDGE LIPPMAN: Yeah, but we've all
18 seen incidents, including in courthouses around this
19 state, where people have been saved because of it.

20 MR. HEERMANCE: Yes, they can be, but there
21 was a New England Journal of Medicine study published
22 years ago saying - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but I'm saying
24 you take the worst-case scenario. You got a human
25 being that's involved. You have a statute that was

1 designed to save human beings' lives. Could it be
2 that all the legislature wanted to do is put the
3 device there with a trained person, but there's no
4 duty whatsoever in any circumstance, no matter how
5 gross - - -

6 MR. HEERMANCE: There can't be because - -
7 -

8 CHIEF JUDGE LIPPMAN: - - - by inaction?

9 MR. HEERMANCE: There can't be because if
10 that were the case, the terms "volunteer" and
11 "voluntary" would not appear in the statute, and they
12 do.

13 JUDGE GRAFFEO: Well, can we just take a
14 step back.

15 MR. HEERMANCE: To interpret the statute in
16 that fashion - - -

17 JUDGE GRAFFEO: What would be the common
18 law duty? Forget the statutes.

19 MR. HEERMANCE: This - - -

20 JUDGE GRAFFEO: What would be the common
21 law duty?

22 MR. HEERMANCE: No state in New York - - -

23 JUDGE GRAFFEO: Is there any common law
24 duty?

25 MR. HEERMANCE: No - - - there's no

1 decision in New York ever saying that there's a
2 common law duty to use an AED in an emergency
3 situation.

4 JUDGE SMITH: Is there a common law duty to
5 use the telephone?

6 MR. HEERMANCE: This court ruled as much in
7 DiGiulio back in June of 2011 that there was no such
8 common law duty.

9 JUDGE GRAFFEO: So if the legislature
10 passed the statute, then they had to have something
11 else in mind since - - -

12 MR. HEERMANCE: This is the statute - - -

13 JUDGE GRAFFEO: - - - the common law duty
14 is you can just stand there with your arms folded,
15 right? You don't have to be a Good Samaritan.

16 MR. HEERMANCE: That's a little unclear in
17 the case of business invitees. There are some prior
18 cases that say that if you've got a business invitee
19 on your premises, your obligation is de minimis.
20 Call 911. Perhaps render some first aid.

21 JUDGE SMITH: Why do you have a common law
22 duty to use the telephone but not the AED if - - -
23 assuming you're trained in the AED.

24 MR. HEERMANCE: The AED is a much more
25 sophisticated piece of advice - - - device, and

1 requires - - -

2 JUDGE SMITH: Yeah, but you had training.
3 You're required by law - - - there's a guy there
4 who's required by law to have had training.

5 MR. HEERMANCE: We are now, under this
6 statute, but the question that the judge asked had to
7 do with common law. And under the common law,
8 there's never been a decision in this state or any
9 other, to my knowledge, saying that a business owner
10 owes to its invitee a legal duty to use an AED in the
11 absence of the statute.

12 JUDGE GRAFFEO: Well, so when the
13 legislature adopted this statute, then they must have
14 intended something in addition to the common law
15 duty.

16 MR. HEERMANCE: They most certainly did.
17 And what they intended was to arm and equip clubs
18 with a device and someone trained to use it so that
19 that person would, as the statute states, volunteer
20 and engage, if they did, in using the device
21 voluntarily to use the device. To interpret the
22 statute any differently is to write out, to ignore
23 those two terms in the statute, "volunteer" and
24 "voluntarily". And that, as I have indicated in our
25 brief, is not permitted. It's not permitted under

1 New York law. The statute's Section 231 says you
2 cannot - - -

3 CHIEF JUDGE LIPPMAN: But on the other side
4 of the coin - - -

5 MR. HEERMANCE: - - - render language in
6 the statute - - -

7 CHIEF JUDGE LIPPMAN: But on the other side
8 of the coin - - - on the other side of the coin,
9 wouldn't your interpretation render the statute
10 meaningless?

11 MR. HEERMANCE: Absolutely not, Your Honor,
12 respectfully. As I said before, what the statute
13 intends is for a device to be present and someone
14 trained to use it so that that person will feel
15 comfortable - - -

16 CHIEF JUDGE LIPPMAN: But isn't this
17 different - - -

18 MR. HEERMANCE: - - - volunteering to
19 respond.

20 CHIEF JUDGE LIPPMAN: Isn't this different
21 than DiGiulio where he thought it was locked in the
22 closet or whatever it was - - -

23 MR. HEERMANCE: This is an easier case.

24 CHIEF JUDGE LIPPMAN: - - - and that was
25 after discovery where we knew what happened, and then

1 there could be a finding, gee, in that circumstance
2 okay, and in this circumstance, maybe you look and
3 say, oh, there's a doctor there, and maybe there's a
4 very good reason not to use it, but don't you need to
5 know more, and if you don't, then the statute is
6 totally meaningless?

7 MR. HEERMANCE: Respectfully, no. This
8 case is much easier on the fact than DiGiulio was.
9 DiGiulio, as you will recall, involved a situation in
10 which 911 was called, CPR was rendered, and the AED
11 which was present in the club wasn't used because - -
12 -

13 JUDGE SMITH: I mean, you - - -

14 MR. HEERMANCE: - - - the employees thought
15 it was locked away and it wasn't.

16 JUDGE SMITH: But on the facts we know, I
17 agree with you that this is probably even a better
18 case than DiGiulio, but the difference is that this
19 is a 3211 motion. Don't we have to assume, and
20 nothing in the record to indicate it, but don't we
21 have to assume that the plaintiff can prove gross
22 negligence?

23 MR. HEERMANCE: First of all, gross
24 negligence was never asserted in the complaint.
25 That's not the case we're defending against. It's

1 never been claimed. It's not part of this case.

2 JUDGE SMITH: Well, but that's not the
3 basis for dismissing it, a failure to plead gross
4 negligence. I mean, don't we have to assume on this
5 motion that the plaintiff's case is the best case you
6 can imagine for a plaintiff in this situation?

7 MR. HEERMANCE: Even if you were to do that

8 - - -

9 JUDGE SMITH: I mean, it doesn't look like
10 it is, but don't we have to assume that?

11 MR. HEERMANCE: Even if you were to do
12 that, Your Honor, it's not a gross negligence case.
13 You just held in DiGiulio in June 2011 that on the
14 facts of that case, that wasn't gross negligence.
15 That what was the finding before - - -

16 JUDGE SMITH: Yeah, but we had facts in
17 that case.

18 MR. HEERMANCE: And just last week, the
19 Chappill case, the First Department held the same
20 thing, so it's not - - -

21 JUDGE SMITH: Isn't there - - - the
22 question really is, isn't there a difference between
23 a summary judgment case like DiGiulio and a 3211 case
24 like this one?

25 MR. HEERMANCE: I don't think there is when

1 the pertinent facts, the material facts are
2 undisputed. The pertinent and undisputed facts in
3 this case are that we had the device; we had someone
4 trained to use it. CPR was administered by a medical
5 doctor on the scene. 911 was promptly called. EMTs
6 were on the scene within eight minutes, according to
7 the trip sheet report. That's a pretty good response
8 time in most cases. Those are the material facts.

9 JUDGE SMITH: How does any of this make the
10 complaint insufficient on its face?

11 MR. HEERMANCE: On its face, the claim was
12 simply that Bally didn't timely employ the AED,
13 didn't use the AED and that it was legally obligated
14 to do so. And that's not a viable claim under the
15 statute. The statute does not require that the
16 device be used. It merely requires that the device
17 be present and someone trained to use it.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.
19 You'll have rebuttal. Let's hear from your
20 adversary. Thank you.

21 MR. DECOLATOR: Good afternoon, Your
22 Honors. I'm John Decolator. I represent Gregory
23 Miglino.

24 Judge, you kind of stole my thunder. If
25 there's no duty to use the AED when indicated or when

1 the need arises, this statute is utterly meaningless.
2 The stated purpose of the statute is to ensure help
3 to the health and safety of patrons of health clubs.

4 JUDGE READ: So then why did the
5 legislature use words like "volunteer" and
6 "voluntary"?

7 MR. DECULATOR: But you have to look at the
8 entire legislative scheme here, Judge. They went
9 through the trouble of not only requiring them to
10 have an AED, have someone trained to use it on the
11 premises at all times, right there that's meaningless
12 unless they have - - -

13 JUDGE SMITH: Well, why is it so - - - I
14 mean - - - but you can - - - it's easy to supervise
15 that. You can - - - either they had the AED or they
16 don't. Either they have the trained person or they
17 don't. And if they don't, they violated the statute.
18 But if they fail to use the statute (sic) when they
19 should use it, then you've got a - - - fail to use
20 the AED when they should use it, that's a lot harder
21 to figure out. You're going to have a big argument
22 about whether use of the AED was indicated or not.
23 Couldn't the legislature rationally say, I'm going to
24 require the clear provable things, the presence of
25 the device, the presence of a trained person, and

1 then I'm going to leave it to the common sense and
2 good will of the people in the health club to use the
3 thing?

4 MR. DECOLATOR: Exactly, Judge. It would
5 be awfully awkward to say, you all should use it when
6 indicated or when you're - - -

7 JUDGE SMITH: You want to say he should use
8 it always, whether it's indicated or not?

9 MR. DECOLATOR: No, no. I want to say, as
10 the Second Department said, you should - - - you've
11 got to use it when it's indicated, but - - -

12 JUDGE SMITH: Okay.

13 MR. DECOLATOR: - - - but that's got to be
14 a reasonable decision - - -

15 JUDGE SMITH: And yet you say there's a
16 treble damage remedy for that.

17 MR. DECOLATOR: Treble damage?

18 JUDGE SMITH: Yeah, it's treble damages
19 under the General Business Law, 628.

20 MR. DECOLATOR: All right. That's very
21 possible but - - -

22 JUDGE SMITH: You really think the
23 legislature intended that?

24 MR. DECOLATOR: I'm saying they're saying
25 you have to have made a reasoned decision to use it

1 or not.

2 JUDGE PIGOTT: Why isn't this like - - -
3 all the restaurants have to have a CPR sign and, I
4 guess, all the schools are supposed to have those
5 little fire extinguishers, you know, that are in the
6 - - - that nobody uses. In this case, when you look
7 at it, I mean, there are health clubs that are three
8 stories tall. You got to have one. So, I mean, it
9 doesn't tell you where to put it, doesn't tell you
10 it's got to be within the vicinity of the person
11 that's trained to do it. All it - - - it seems to me
12 this is an awareness statute, saying this a piece of
13 equipment that can work; have one, and have somebody
14 equipped to train - - - trained to do it. And that's
15 it.

16 MR. DECOLATOR: It can't be, Judge, and the
17 reason is, if the stated goal was to save the lives
18 of the health club members - - -

19 JUDGE PIGOTT: So is the CPR sign.

20 MR. DECOLATOR: - - - you can't leave it to
21 - - - the legislature could not have intended this to
22 be left to the whim of the trained person whether to
23 use it or not. By counsel's argument, it's entirely
24 at his whim whether he wants to use it. He can fold
25 his arms - - -

1 JUDGE SMITH: What do you say - - -

2 JUDGE GRAFFEO: A standard or gross
3 negligence standard?

4 MR. DECOLATOR: There's no gross - - - I'm
5 glad you brought that up. There's no gross
6 negligence standard here, unlike DiGiulio, because no
7 medical treatment was rendered by this club.

8 JUDGE SMITH: So you're saying it's simple
9 negligence?

10 MR. DECOLATOR: I'm sorry?

11 JUDGE SMITH: You say it's simple - - - or
12 you say it's absolute - - - well, it's got to be
13 simple negligence.

14 MR. DECOLATOR: Well, I think under the
15 unique circumstances here, there's a common law duty
16 to use the AED for a lot of - - -

17 JUDGE SMITH: An absolute duty?

18 MR. DECOLATOR: There's - - -

19 JUDGE SMITH: Even if it was perfectly
20 reasonable not to use it, they had an absolute duty
21 to use it?

22 MR. DECOLATOR: Part of the calculus in
23 determining whether they acted reasonably under these
24 circumstances - - -

25 JUDGE SMITH: Okay. You say you acted - -

1 - you say it's ordinary negligence test?

2 MR. DECOLATOR: Yes.

3 JUDGE GRAFFEO: From what we know at this
4 juncture in the proceedings, do you agree that there
5 was a physician attending this individual?

6 MR. DECOLATOR: Absolutely not. There are
7 no facts. This is a motion to dismiss. I don't
8 understand why courts are accepting this man's
9 affidavit.

10 JUDGE GRAFFEO: If there was - - - just
11 presume hypothetically, if there was a physician
12 there working out who then went over and gave CPR to
13 this - - - to the victim - - -

14 MR. DECOLATOR: Well, first of all, I - - -
15 no one said he's - - -

16 JUDGE GRAFFEO: I'm saying hypothetically -
17 - -

18 MR. DECOLATOR: - - - that's he's giving
19 CPR to anybody.

20 JUDGE GRAFFEO: I'm saying hypothetically.
21 If somebody is there and giving CPR, actively giving
22 CPR, you're saying that the club has to come, push
23 that person away and start using a defibrillator?

24 MR. DECOLATOR: No, no. I think there has
25 to be a determination as to whether the AED is used.

1 For example, here, did the doctor know how to use an
2 AED? Did Mr. LaGrega ask him, do you know how to use
3 an AED?

4 JUDGE READ: Maybe the doctor - - -

5 MR. DECOLATOR: I know how to use one;
6 should I use it?

7 JUDGE READ: Maybe the doctor didn't think
8 it was indicated.

9 MR. DECOLATOR: Well, we don't know. We
10 have no idea. There's no facts.

11 JUDGE SMITH: You mean when a doctor is
12 bent over a sick person, you're supposed to say
13 excuse me, Doctor, do you know how to use an AED?

14 MR. DECOLATOR: What if the - - -

15 JUDGE SMITH: And you can be sued if you
16 don't ask that question?

17 MR. DECOLATOR: Well, we don't know what
18 kind of doctor this is. What if he's a - - -

19 JUDGE SMITH: I should have checked his
20 credentials?

21 MR. DECOLATOR: Well, but this is a secret,
22 but the doctor turns out to be a psychiatrist. I
23 know it's off the record. He didn't even know how to
24 use an AED. So you can't presume that he even knows
25 that, whereas you have a man trained and certified to

1 use it.

2 JUDGE SMITH: Okay. So you're saying that
3 if I am a health club employee and I see someone who
4 I know to be a doctor, I don't know what kind of
5 doctor it is, and I let him handle the situation and
6 I don't go charging in with my AED, you're saying I'm
7 liable in damages because I didn't ask him what his -
8 - - what kind of degree he had?

9 MR. DECOLATOR: No, Judge. I think - - -
10 but I think you have to bring the AED to his
11 attention, ask him, do you know how to use an AED
12 because I do if you don't.

13 JUDGE SMITH: Couldn't you reasonably think
14 that he had other things on his mind at the moment?

15 MR. DECOLATOR: Well, Judge, this is all
16 part of the calculus as to whether they actually knew
17 - - -

18 CHIEF JUDGE LIPPMAN: Say he knew he was a
19 psychiatrist.

20 MR. DECOLATOR: I'm sorry, Judge?

21 CHIEF JUDGE LIPPMAN: Say he knew he was a
22 psychiatrist, what does he do then?

23 MR. DECOLATOR: I think he needed to ask
24 him, do you know how to use an AED because I do; if
25 you don't, I will use it, but we got to decide that

1 very quickly; this man is dying.

2 CHIEF JUDGE LIPPMAN: So the bottom line is
3 we don't know what the circumstances were.

4 MR. DECOLATOR: We have no - - -

5 CHIEF JUDGE LIPPMAN: That's your point.
6 In a nutshell, that's your point.

7 MR. DECOLATOR: There's no facts, but if
8 you - - -

9 JUDGE SMITH: What about the - - - I mean,
10 I see your point that this is a 30- - - - I was
11 making the same point a minute ago; it's a 3211
12 motion. But if we do get to the facts, I mean, what
13 about the facts that the health club employee thought
14 the guy was breathing and had a pulse and the AED was
15 contraindicated?

16 MR. DECOLATOR: Absolutely, Judge. It
17 could turn out that's true; it was contraindicated or
18 - - - but at least make the attempt and explain to us
19 why you didn't use it. Like in DiGiulio, it appears
20 - - - it's not clear, it appears they had every
21 intention of using it. The only reason they didn't
22 is because they mistakenly thought it was locked
23 away.

24 JUDGE SMITH: If you had this record on
25 summary judgment, exactly this record, and so let's

1 suppose you had full discovery and you find out
2 nothing else except what's in this record, who wins?

3 MR. DECOLATOR: That it turns out this man
4 is correct that they were doctors?

5 JUDGE SMITH: Well, that they - - - all I'm
6 telling you is that the record you've got is the
7 record you've got. All the facts are what's there.

8 MR. DECOLATOR: I still think there's a
9 question of fact as to whether the AED was employed
10 or properly employed or indicated, whether that was
11 brought to the attention of the doctors. Was it put
12 in a place where the doctors could see it? Who are
13 these people? Do they know how to use AEDs? Could
14 it have saved his life, anyway? Is there proximate
15 cause? These all go into the question of negligence
16 here.

17 JUDGE GRAFFEO: So the standard here is
18 less than the standard under the Good Samaritan
19 statute?

20 MR. DECOLATOR: The Good Samaritan doesn't
21 even apply here, Judge, because there was - - - they
22 didn't render any medical treatment. Why should they
23 benefit from a gross negligence standard when they
24 didn't render any medical treatment? Calling 911 - -
25 -

1 JUDGE SMITH: Aren't you suggesting - - -

2 MR. DECOLATOR: - - - and taking someone's
3 pulse - - -

4 JUDGE SMITH: - - - the same kind of - - -
5 I mean, I suggested to your adversary that it seems
6 weird that you're liable for gross negligence if you
7 act and immune if you don't act. You're saying that
8 if you act you're not liable for negligence, but if
9 you don't act you are liable for negligence? Why
10 should that be right?

11 MR. DECOLATOR: If you render medical
12 treatment, you're - - -

13 JUDGE SMITH: Why shouldn't they - - -
14 can't the decision - - - can't a negligent decision
15 to do something you shouldn't do be just as harmful?

16 MR. DECOLATOR: Sure. But if you do render
17 medical treatment, it's a gross negligence standard
18 under the statute - - -

19 JUDGE SMITH: And if you don't, it's not?
20 If you decide not to render the treatment, you're not
21 protected?

22 MR. DECOLATOR: You can't - - - you can't
23 be - - - hide behind the gross negligence standard if
24 you don't render medical treatment.

25 JUDGE SMITH: Well, you say hide behind,

1 but sense does it make? Here's a person standing
2 here deciding whether it's indicated to take some
3 action or not to take action. If he - - - the
4 decision yes, he's protected by gross negligence, but
5 if he in good faith makes an equally reasonable
6 decision no, he's not protected? Why?

7 MR. DECOLATOR: Then it's just a negligence
8 standard.

9 JUDGE SMITH: Why?

10 MR. DECOLATOR: Because the idea is for him
11 to use the AED, and if he uses it, he'd be protected
12 by the gross negligence - - -

13 JUDGE SMITH: Even if it's a bad idea, the
14 idea is for him to use it?

15 MR. DECOLATOR: No, no, but he has to
16 explain why he's not using it. Here, what they're
17 saying is he doesn't have to explain at all. I don't
18 feel like using it; too bad. That is their argument.

19 JUDGE SMITH: If he were walking down the
20 street and somebody collapsed next to him, they'd be
21 right. Even if he's carrying his AED down the
22 street, he doesn't have to use it; he can keep
23 walking, go to the barbershop, right?

24 MR. DECOLATOR: I'm glad you say that
25 because this is such a different circumstance. It's

1 not - - -

2 JUDGE SMITH: I know but - - - I understand
3 that it's different. But you agree that that's the
4 principle?

5 MR. DECOLATOR: Yes.

6 JUDGE SMITH: Yeah. Okay. Go ahead.

7 MR. DECOLATOR: Yes. But here, when you
8 know your own members have died of sudden cardiac
9 arrest. You have the very device that can - - - may
10 be able to save his life. You're trained and
11 certified to use it. Every second that goes by, his
12 chances of surviving decrease.

13 JUDGE SMITH: Are you suggesting that
14 there's not only a statutory duty but also a limited
15 common law duty to rescue in that situation?

16 MR. DECOLATOR: Yes, especially when you
17 have already come to his assistance by calling 911
18 and putting the AED next to him. You can't do that,
19 putting him in the position of safety, theoretically
20 - - -

21 JUDGE SMITH: Okay. Let's - - -

22 MR. DECOLATOR: - - - and then pull it away
23 and decide not to use it.

24 JUDGE SMITH: Let's suppose the guy does
25 what you want him to do. He uses the AED. He comes

1 to - - - he comes to the rescue, but it turns out he
2 didn't do it so well and the guy dies. Is he
3 protected by the Good Samaritan statute?

4 MR. DECOLATOR: If he comes to his rescue?

5 JUDGE SMITH: Yes.

6 MR. DECOLATOR: It depends on what he does.
7 If he renders medical treatment - - -

8 JUDGE SMITH: He renders medical treatment
9 - - -

10 MR. DECOLATOR: - - - CPR, for example - -
11 -

12 JUDGE SMITH: - - - and it fails. Huh?

13 MR. DECOLATOR: Yeah, then I - - -

14 JUDGE SMITH: Well, how can he be protected
15 by the Good Samaritan statute because on your showing
16 he's not a volunteer; he had a duty to do what he
17 did?

18 MR. DECOLATOR: This is - - - are you
19 talking about the employee?

20 JUDGE SMITH: Yes.

21 MR. DECOLATOR: Well, when you render
22 medical treatment, you can benefit from the Good
23 Samaritan statute, but - - -

24 JUDGE SMITH: I understood only if you do
25 it as a volunteer, and you're saying they had a duty

1 to use this AED.

2 MR. DECOLATOR: I'm - - - right, right.

3 But I'm saying - - -

4 JUDGE SMITH: They're not protected by the
5 Good Samaritan statute.

6 MR. DECOLATOR: No. The statute does
7 protect - - - the statute says once you use the AED
8 you are protected by the Good Samaritan statute.
9 They didn't do that. They didn't even explain why
10 they didn't use it. We don't know why they didn't
11 use it. The Good Samaritan statute, I believe, is
12 not at issue here.

13 JUDGE SMITH: But I'm asking a
14 hypothetical. You're - - - I'm trying to figure out
15 whether someone who does what you say people should
16 do would have the protection of the Good Samaritan
17 statute and you say yes, they would, and I say how
18 can they because the Good Samaritan statute only
19 protects volunteers, and you're telling us they're
20 not volunteers; they have a duty.

21 MR. DECOLATOR: The problem is the statute
22 only allows people who are trained and certified to
23 use it, anyway. Anyone else is not supposed to be
24 using it, and I don't think the statute even
25 contemplates that. And I certainly wouldn't want

1 someone not trained to use it using it anyway.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MR. DECOLATOR: All right. Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks.

5 Counselor, rebuttal?

6 MR. HEERMANCE: Yes, Your Honor, briefly.

7 Our argument, just to be clear, is that the
8 statute is very well intentioned. It requires that
9 you have the device, someone trained to use it, but
10 it, by its terms does not require that the device be
11 used. To state otherwise, to rule otherwise would be
12 to write out of the statute the terms "volunteer" and
13 "voluntary" that expressly appear in the statute, and
14 that would be a violation of statutory law.

15 JUDGE PIGOTT: There is a line there
16 though, isn't there? I mean, if your trained
17 employee is there with the AED and he just decides
18 that he's not going to do it, I mean, it'd seem to me
19 that you have - - - there's a cause of action there.
20 I mean - - -

21 MR. HEERMANCE: Well, thankfully, we don't
22 have those facts here.

23 JUDGE PIGOTT: I know, but - - -

24 MR. HEERMANCE: And even if we did, I don't
25 think - - -

1 CHIEF JUDGE LIPPMAN: We don't know the
2 facts here, though.

3 JUDGE PIGOTT: You've got - - - I mean,
4 they have a doctor that says, but for, he may have
5 survived. You're almost in summary judgment on the
6 3211 here, and it just seems to me - - - we don't
7 know where the AED was; we don't know where your guy
8 was; we don't know - - -

9 MR. HEERMANCE: And I would respectfully
10 suggest that you don't need to know any of that
11 because the claim that was asserted - - -

12 CHIEF JUDGE LIPPMAN: But you said that
13 there could be circumstances that were just not
14 there, here. How do we know where we are until you
15 have discovery? If there's a line, if Judge
16 Piggott's question - - - if your answer is yes,
17 there's a line, how can we know whether we're on
18 either side of the line if we don't do discovery and
19 find out what happened there?

20 MR. HEERMANCE: The only pertinent facts
21 for purposes of the motion that we filed was the fact
22 that we had the device, someone trained to use it,
23 and it wasn't used.

24 CHIEF JUDGE LIPPMAN: Well, what about the
25 hypothetical that Judge Piggott just gave you and I

1 think I gave it before and maybe Judge Smith did,
2 where you have it, you're there, you're right there,
3 and you refuse to use it in the most extreme
4 situation?

5 MR. HEERMANCE: Well, then you're still
6 covered by the Good Samaritan Act because I - - -

7 JUDGE SMITH: Well, I - - - but isn't your
8 answer - - -

9 MR. HEERMANCE: - - - suppose it isn't
10 enough - - -

11 JUDGE SMITH: - - - isn't your answer
12 you're still immune?

13 MR. HEERMANCE: You should be immune. And
14 I would argue that you are, just as Bally is in this
15 case because - - -

16 JUDGE SMITH: No matter how outrageous you
17 are, you're just like that guy I was talking about
18 walking down the street who decides his barbershop
19 appointment is more important than saving a life; you
20 can't be sued.

21 MR. HEERMANCE: Not if you do nothing
22 perhaps, but that's not - - -

23 JUDGE SMITH: Oh, you admit that - - -

24 MR. HEERMANCE: - - - that's not the
25 agreed-to facts.

1 JUDGE SMITH: - - - you admit there's a
2 duty to call 911?

3 MR. HEERMANCE: In this case, it's
4 conceded; it's alleged in the complaint that Bally
5 called 911, brought the AED to this gentleman's side.
6 It did some things.

7 JUDGE SMITH: But then it seems to me that
8 you're admitting that there is some limited common
9 law duty to rescue of a health club to its customers.

10 MR. HEERMANCE: I said that earlier that -
11 - -

12 JUDGE SMITH: Okay. If you admit that, why
13 cannot the common law duty develop, as modern
14 technology develops, to include the use of this
15 statutorily required device?

16 MR. HEERMANCE: Well, unless it's developed
17 since June of 2011 when this court held that there
18 was no common law duty in the DiGiulio case, I don't
19 see any reason to start now. So the only - - -

20 JUDGE SMITH: I thought we held that the
21 evidence showed - - - could not possibly show gross
22 negligence. I don't think we ruled on the duty
23 question.

24 MR. HEERMANCE: I'm reading from the
25 DiGiulio decision of this court, June 2011:

1 "Defendants also did not breach any common law duty
2 to render aid to the decedent. The claim" - - -

3 JUDGE SMITH: Did not breach.

4 MR. HEERMANCE: - - - "did not breach any
5 common law duty to" - - -

6 JUDGE SMITH: Okay. But we didn't hold the
7 duty didn't exist.

8 MR. HEERMANCE: Well, I believe the
9 underlying decision in DiGiulio was that there was no
10 such duty to have the AED because it was before the
11 statute existed.

12 JUDGE PIGOTT: You got the AED in the
13 manager's office and he's gone for the day and it's
14 locked. I mean, you have an AED on premises, you've
15 got somebody trained; they can't sue you.

16 MR. HEERMANCE: Just to be clear, in
17 DiGiulio, 911 was called.

18 JUDGE PIGOTT: I know. I was here. I
19 know.

20 MR. HEERMANCE: You were here. You know.
21 And in Chappill just last week, same case, same case.
22 The court in that case, First Department said, no
23 duty.

24 JUDGE PIGOTT: Was that a 3211?

25 MR. HEERMANCE: No. That was a summary

1 judgment motion. But again, shouldn't have mattered
2 one way or the other because - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MR. HEERMANCE: - - - the principle was the
5 same when all was said and done.

6 CHIEF JUDGE LIPPMAN: Okay. Thank you
7 both. Appreciate it.

8 (Court is adjourned)

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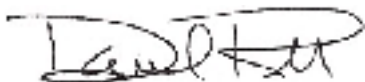
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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Gregory C. Miglino, Jr. v. Bally Total Fitness of Greater New York, Inc., No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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