IN THE SUPREME COURT OF FLORIDA

FREDERIC GUTTENBERG, ETC., ET AL.,

Appellants,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Appellee. /

Case No. SC19-487
Lower Case Nos. 4D19-229; 062018CA009397XXXCE

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPELLANTS' INITIAL BRIEF

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STATUTES*

* For the ease of reference, the Parkland Parents are filing an Appendix containing versions of somewhat older statutes and other legislative materials which may be more difficult to locate.

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

A. Introduction

This case arises from the horrific events that took place at Marjory Stoneman Douglas High School in Parkland, Florida on February 14, 2018. That day, a 19-year-old gunman entered the Broward County public school and opened fire. His murderous rampage through the halls and classrooms left seventeen students and staff dead and an equal number seriously injured.

After the School Board of Broward County sought a declaratory judgment that the total extent of its liability for all of the shootings is $300,000 on the theory that all of the anticipated wrongful death and personal injury claims "ar[ose] out of the same incident or occurrence" under subsection 786.28(5), Florida Statutes (2018), the appellants here (the "Parkland Parents")[1] intervened to oppose the

[1] The Parkland Parents consist of: Frederic Guttenberg, as personal representative of the Estate of Jaime T. Guttenberg, deceased; Ashley Maria Baez, a minor by and through her parents and natural guardians, Katherine Baez and Juan David Baez; Isabel Chequer, a minor, by and through her parents and natural guardians, Gabriela Chequer and Amin Chequer; Anthony and Jennifer Montalto, as proposed co-personal representatives of the Estate of Gina Rose Montalto, deceased; Kong Fen Wang a/k/a Jacky Wang and Hui Ying Zhang a/k/a Linda Wang, as co-personal representatives for the Estate of Peter Wang, deceased; Martin Duque and Daisy Anguiano, as parents of Martin Duque, deceased; Manuel Oliver and Patricia Paday, as co-personal representatives of the Estate of Joaquin Oliver, deceased; Stacy Lippel; Linda Beigel, as personal representative of the Estate of Scott Beigel, deceased; Andrew Pollack, as co-personal representative of the Estate of Meadow Pollack, deceased; Shara Kaplan, as co-personal representative of the Estate of Meadow Pollack, deceased; Max Schachter, as personal representative of

School Board's premature request. This statutory language, properly viewed, supports treating each separate shooting as a distinct "incident or occurrence" subject to its own $200,000 per victim damage cap. A careful examination of the language and history of the statute reveals that the Legislature borrowed the terminology "incident or occurrence" from the field of liability insurance, a context in which the courts of this state, including this Court, have consistently held that multiple shootings constitute multiple incidents or occurrences. Alternatively, if the text, context and history of the statute fall short of persuading the Court that those decisions are consistent with the Legislature's intent, the Parkland Parents also caution that it would be premature to adjudicate the School Board's aggregate liability for judgments that may arise from the school shootings without consideration of potentially distinct claims on behalf of materially differently situated victims.

B. Facts and Course of Proceedings

This case comes to the Court with an unusually sparse factual record, even as far as allegations go. This deficit stems from its atypical procedural history. The sole operative complaint in this case, filed by Laura Menescal, the parent of a

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the Estate of Alex Schachter, Benjamin E. Wikander; and Philip and April Schentrup, as co-representatives for the Estate of Carmen Schentrup, deceased. R.98-99.

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child injured in the shootings, D.M., less than three months after the events, pleads precious few facts about the underlying events. Record ("R.") 2. D.M. "was in a classroom in building 1200" which the shooter was unable to enter. *Id.* ¶ 6. As a result, he "shot out the door window and began spraying the room with numerous rounds from the AR-15." *Id.* The complaint adds that after shooting D.M., the gunman "continued his murderous rampage, ultimately killing 17 people and wounding many more people." *Id.*

Prior to filing the complaint, Menescal made a claim for her child's injuries with the School Board in accordance with subsection 768.28(6), Florida Statutes (2018). R.6-7. In response, the School Board's third-party claims administrator, Johns Eastern Company, Inc., wrote to Menescal that "[n]o policy defenses are being asserted at this time" and that "this unfortunate and tragic incident involves multiple parties, and is being handled as a multi-party claim under one occurrence." R.8.

The School Board filed a counter-claim for declaratory relief, which did not elucidate any further factual allegations regarding the details of the shootings. R.12, ¶ 4. The School Board moved for summary judgment on its counter-claim, seeking a declaration "applying the aggregate statutory cap of $300,000 to limit The School Board's exposure for all claims arising out of the school shooting." R.32. The motion did not identify any specific claims that had been threatened

against it. It mentioned that the "massive shooting spree" gave rise to the service upon the School Board of numerous victims' intent to sue it for negligence (R.18), but it did not attach those notices of claim or otherwise make them part of the record. Menescal opposed the summary judgment motion, confirming that D.M. had "suffered from gunshot injuries" received while trying to hide from the shooter. R.37-38, ¶¶ 5-6.

After learning of the suit and the School Board's motion for summary judgment, the twenty Parkland Parents who are appellants here, representing a dozen of the victims, moved to intervene in order to oppose the motion for summary judgment. The trial court permitted the intervention but did not require the filing of a separate pleading. R.71-72.

The summary judgment hearing proceeded without any presentation of the facts concerning the timing, manner or location of each intervenor's shooting. Those salient details were later conspicuously made part of the public record through comprehensive news reports, but they are not part of the record in this case. The Parkland Parents therefore shall not reference them.[2] And because few

[2] However, should the Court deem it appropriate to consider them for guidance, even as hypotheticals, for purposes of giving greater shape to the issues presented, it may wish to consult, *e.g.*, *Unprepared and Overwhelmed*, SUN SENTINEL, (Dec. 28, 2018), http://projects.sun-sentinel.com/2018/sfl-parkland-school-shooting-critical-moments/.

substantive lawsuits had been filed by Parkland victims at the time the trial court ruled, the declaratory judgment was issued without considering how distinct claims of negligence, implicating different facts, might impact the analysis. *See* R.139, 141-42.

The hearing before the trial court focused primarily on the Fourth District's recent decision in *Department of Financial Services v. Barnett*, 262 So. 3d 750, 751-52 (Fla. 4th DCA 2018), which held that "the murders of four children and the shooting of a fifth child, by separate gunshots, delivered in separate locations, at separate times" arose "out of the same incident or occurrence" under subsection 768.28(5), Florida Statutes. The School Board embraced *Barnett* as on all fours with this case, while the Parkland Parents pointed out that even though the trial court was bound by the Fourth District's holding that an "incident or occurrence" under the statute references the underlying claim of governmental negligence, it was premature to conclude "in the abstract" whether or not substantive negligence claims that had yet to be asserted against the School Board were the "same" for purposes of the statutory cap. *See* R.85, 139, 141-42, 148-49. The Parkland Parents emphasized that in a prior case, *Zamora v. Fla. Atlantic Univ. Bd. of Trustees*, 969 So. 2d 1108, 1112 (Fla. 4th DCA 2007), the Fourth District had recognized that if a plaintiff asserted two distinct theories of injury that resulted in separate damages, they could qualify as separate incidents or occurrences under

subsection 768.28(5), Florida Statutes. The trial court granted the School Board's motion, finding *Zamora* distinguishable, and following *Barnett*. *See* R.156. It subsequently rendered a final declaratory judgment in favor of the School Board, granting its motion for summary judgment. R.96.

The Parkland Parents timely appealed to the Fourth District. After this Court granted review in *Barnett*, based on the Fourth District's certification of a question of great public importance in that case, the School Board suggested that the Fourth District certify this case for immediate review by this Court pursuant to Florida Rule of Appellate Procedure 9.125. The Parkland Parents joined in that request. The Fourth District did not articulate the specific certified question in this case, but did certify

> this appeal. . . as one which requires immediate resolution by the Florida Supreme Court because the issues pending in this District Court of Appeal are of great public importance or will have a great effect on the proper administration of justice throughout the state.

Guttenberg v. Sch. Bd. of Broward Cty., No. 4D19-0229 (Fla. 4th DCA Mar. 28, 2019). This Court accepted jurisdiction and set this case for oral argument with *Barnett*.

SUMMARY OF THE ARGUMENT

The discrete legal issue presented in this appeal charges this Court with discerning how the Florida Legislature intended the caps on governmental liability

for damages in tort to be applied to circumstances involving multiple claims or judgments. The Fourth District in *Barnett*, and the trial court in this case, bound to follow *Barnett* on this question, both answered this question by redoubt to a strict-construction canon for statutes waiving sovereign immunity. The Parkland Parents respectfully submit that such a retreat is unwarranted, since traditional tools of statutory interpretation reveal the Legislature's intent to tether the scope of governmental tort liability in multiple-claim situations to recognized principles of liability insurance law.

While the terms "incident" and "occurrence" in subsection 768.28(5), Florida Statutes (2018) are not defined, and the common usages of those words do not by themselves answer how to assess a complex event to discern whether the circumstances that gave rise to one victim's claim are "the same" as those that spawned another victim's claim, the text of section 768.28 indicates that the Legislature had liability insurance foremost in mind when it crafted the scheme of which subsection (5) is a part. The present-day version of the statute maintains those hallmarks, and the history of the statute confirms that the waiver of Florida sovereign immunity for limited tort liability was inextricably intertwined with the availability of insurance to public entities for that exposure to liability. That interconnectedness between opening public entities up to liability in damages for their wrongdoing and ensuring their ability to purchase insurance to cover it

explains why the Legislature turned to prevailing insurance policy terminology, "incident or occurrence," in subsection 768.28(5), Florida Statutes.

That specialized language has been given a definitive interpretation by this Court in *Koikos v. Travelers Insurance Company*, 849 So. 2d 263 (Fla. 2003), which also happens to have applied the term "occurrence" in the context of claims of negligent security for a mass shooting. Drawing upon principles of insurance law and prior precedent, the *Koikos* Court held that to distinguish one "occurrence" from another involves focusing, as a point of reference, upon the immediate injury-producing event for each victim. Where those events are properly segregable and cause separate injuries, as in the case of a gunman who fires separate shots at each victim, they constitute distinct "incidents or occurrences" under the law of liability insurance.

Given the plain legislative intent to make government tort liability congruent with liability insurance for torts, interpreting subsection 786.28(5), Florida Statutes consistently with the dictates of liability insurance law in Florida is consistent with the statutory scheme. Resorting instead to a strict-construction canon, as the Fourth District did in *Barnett*, pays insufficient heed to the historical synergistic relationship between governmental tort liability in Florida and liability insurance. Consistent with *Koikos*, this Court should hold that to determine whether two or more claims or judgments against a governmental entity arose from "the same

incident or occurrence" for purposes of the damage caps in subsection 786.28(5), Florida Statutes, one must compare the immediate injury-producing acts.

In the alternative, if the Court declines to so hold, and instead adopts the *Barnett* court's rule focusing on the underlying acts of negligence at issue in each claim or judgment, the Court should nonetheless quash the judgment of the trial court in this case. In granting the School Board's motion for summary judgment, the trial court's declaratory judgment approved the School Board's request that its aggregate liability for all future lawsuits arising out of the shootings at Stoneman Douglas High School is the statutory limit of $300,000 applicable to claims "arising out of the same incident or occurrence." § 768.28(5), Fla. Stat. (2018). But even if the statutory focal point for segregating distinct claims were the underlying acts of negligence involved, it was premature to assess whether or not potential future judgments against the School Board from tort suits that had not yet even been filed when the trial court granted a declaratory judgment would focus on the same acts of negligence by the same government actors. Given the complexity of the events that occurred during the shootings, it is possible that some victims were differently situated from others such that distinct acts of negligence are implicated in their claims.

ARGUMENT

I. When Determining Whether Multiple Claims or Judgments Arose Out of the Same "Incident or Occurrence" for Purposes of Applying the Waiver of Sovereign Immunity to Tort Liability, the Legislature Intended Courts to Look to the Immediate Cause of Each Injury.

The central issue in this appeal – how the Legislature intended courts to determine whether multiple claims or judgments arose out of the same "incident or occurrence" under subsection 768.28(5), Florida Statutes (2018) – presents a question of statutory interpretation reviewed *de novo*. Subsection (5) of the statute provides:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000.

Id. The Fourth District in *Barnett*, which the trial court in this case followed, did not undertake its own textual or contextual examination of the statute, but relied on other courts' applications of the provision. 262 So. 3d at 752-53.

A comprehensive analysis of the text and context of subsection 768.28(5) reveals that the Legislature borrowed the terms "incident" and "occurrence" from the insurance context. Its use of that terminology at the time of the enactment of section 768.28 was part of the Legislature's overall scheme to promote and

facilitate general liability insurance coverage to run consistent with its limited waiver of sovereign immunity for governmental liability in tort. The term "incident or occurrence" was designed to coincide with its meaning in standard liability insurance policies of the time. This Court has already explored the evolution and meaning of these terms in the insurance context. *See Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003). This essential context of subsection 768.28(5) compels the conclusion that the Legislature's intended point of reference to define an "incident or occurrence" is the immediate cause of the injury giving rise to the claim or judgment, not the government actor's underlying negligent act or omission as the Fourth District concluded.

A. The Plain Text of Section 786.28, Florida Statutes, Does Not Restrict the Meaning of "Incident or Occurrence" to an Underlying Act of Negligence.

"A court's determination of the meaning of a statute begins with the language of the statute." *Halifax Hosp. Med. Ctr. v. State*, 44 Fla. L. Weekly S149, No. SC18-683, 2019 WL 1716374, at *2 (Fla. Apr. 18, 2019); *accord Jimenez v. State*, 246 So. 3d 219, 227 (Fla. 2018). When the statutory language "'is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the

statute must be given its plain and obvious meaning.'" *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

The Legislature did not define "incident or occurrence" in subsection (5), or anywhere else in the statute. In the absence of a statutory definition, dictionary definitions can in some circumstances supply the plain meaning of a statutory term. *Jimenez,* 246 So. 3d at 227; *Debaun v. State*, 213 So. 3d 747, 751 (Fla. 2017).

The dictionary definitions for "incident" and "occurrence" themselves do not yield a clear meaning that reveals the intended point of reference. According to one dictionary, the primary meaning of "incident," when used as a noun, is "a separate and definite occurrence: EVENT." *Incident*, WEBSTER'S II NEW COLLEGIATE DICTIONARY (3d ed. 2001). And "occurrence" is similarly defined either as: "[a]n act or instance of occurring," or as "[a]n event: INCIDENT." *Occurrence,* WEBSTER'S II NEW COLLEGIATE DICTIONARY (3d ed. 2001). A legal dictionary offers slightly more fulsome definitions. "Occurrence" means "[s]omething that happens or takes place; specif., an accident, event or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party." *Occurrence*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that this "specific sense is the standard definition of the term under most liability policies"). And "incident" means "[a] discrete occurrence or happening; an event, espec[ially] one that is unusual,

important, or violent." *Incident*, BLACK'S LAW DICTIONARY (10th ed. 2014). Resort to legal dictionaries published closer in time to the date subsection (5) was enacted, 1973, yields similar definitions.[3]

In simple cases, understanding the statutory terms "incident or occurrence" as simply referencing the "event" that defines the claim or resulting judgment may suffice. In such cases, the act of negligence and the immediate injury-producing act are the same or tend to merge: a county bus driver's negligence in taking his eyes off the road immediately causes the injury-producing act, the bus crashing into a tree. The claims of two bus passengers against the county for negligence in that circumstance plainly arise from the same "incident or occurrence," regardless of whether those terms refer to the underlying act of negligence or the bus striking a tree.

But in more complex circumstances, like one involving derivative liability for negligence alleged to have permitted an intentional tortfeasor to harm minors in the government's custody, a gulf opens between the underlying acts of negligence and the immediate injury-producing event. In such a situation, the plain meanings of the terms "incident" and "occurrence" do not by themselves indicate which of

[3] *See, e.g.*, *Occurrence*, BLACK'S LAW DICTIONARY (4th ed. 1979) ("A coming or happening[;] any incident or event, especially one that happens without being designed or expected"); *Occurrence*, BLACK'S LAW DICTIONARY (3d ed. 1968) (same).

the two possible events the Legislature intended to be consulted to distinguish distinct claims or judgments from ones that are the "same." Resort therefore must be had to rules of statutory construction to ascertain the legislative intent. *See Jimenez*, 246 So. 3d at 227; *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003).

Portions of statutes, of course, must not be read in isolation, but "in the context of the entire [relevant] provision." *Halifax Hosp. Med. Ctr.*, 2019 WL 1716374, at *3 (quotation marks omitted). *See Charles v. S. Baptist Hosp. of Fla., Inc.*, 209 So. 3d 1199, 1207 (Fla. 2017) ("A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts and is not to be read in isolation, but in the context of the entire section.") (quotation marks omitted). The Fourth District's conclusion in *Barnett* that subsection (5) looks to the negligence of the state actor to determine whether a claim or judgment is the same as another, 262 So. 3d at 753, suffers from viewing that subsection in isolation, without considering material language in another subsection of the statute.

Reading the words "incident or occurrence" in subsection (5) to refer to the governmental defendant's act of negligence is difficult to square with the fact that the Legislature *expressly* referenced such acts of negligence in another, cross-

referenced subsection of the statute. Subsection (1) of section 768.28 provides in part:

> In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages . . . for injury or loss of property, personal injury, or death *caused by the negligent or wrongful act or omission of any employee* of the agency or subdivision while acting within the scope of the employee's office or employment . . . may be prosecuted subject to the limitations specified in this act.

§ 768.28(1), Fla. Stat. (2018) (emphasis added).[4] Given the Legislature's express reference to "the negligent or wrongful act or omission of any employee" in subsection (1), which even cross-references subsection (5) when it mentions "the limitations specified in this act," one would think the Legislature would have employed that same language in subsection (5) if it had wanted the negligent act to be the sole determinant of whether claims or judgments should be aggregated for damage-cap purposes. Subsection (5) might then have read:

> Neither the state nor its agencies or subdivisions shall be liable to pay . . . any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same ~~incident or occurrence~~ [negligent or wrongful act or omission of any employee], exceeds the sum of $300,000.

[4] This language remains unchanged from the originally enacted law. *Compare* Ch. 73-313, § 1(1), Laws of Fla.

But that is not the language the Legislature employed. *See Crews v. State*, 183 So. 3d 329, 335 (Fla. 2015) ("If the Legislature had intended such a meaning, it could easily have made such intention clear."). Instead, the Legislature's use of distinct terms – "incident or occurrence" and "negligent or wrongful act or omission of an employee" – "'in different portions of the same statute is strong evidence that different meanings were intended,'" *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) (quoting *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997)).

The broad terms "incident or occurrence," as used in the statute, are certainly ample enough to refer to something other than the negligent act of a government actor. Subsection (5) is part of a larger legislative scheme whereby the limitation on governmental tort liability was established alongside the authority of governmental entities to purchase liability insurance. *See* § 768.28(16)(a), Fla. Stat. (2018) (authorizing governmental entities "to purchase liability insurance for whatever coverage they may choose . . . in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section"); § 768.28(13), Fla. Stat. (2018) (noting that the statute does not restrict other laws allowing governmental entities to purchase insurance). A review of that scheme, from its origins to the present, shows that the Legislature drew the terminology "incident or occurrence" directly from the liability insurance context.

B. The Legislative History Strongly Supports the Conclusion That the Legislature Borrowed "Incident or Occurrence" From Insurance Parlance.

When the legislative history of section 768.28 is considered, it becomes abundantly clear that the Legislature that enacted subsection (5), the text of which remains unchanged since its inception in 1973, was drawing upon terminology prevalent in the insurance industry. The year before the 1973 Legislature adopted what became section 768.28, the insurance industry had just completed a concerted effort to switch to the term "occurrence" in comprehensive general liability policies. *See* 7A John Alan Appleman & Walter F. Berdal, INSURANCE LAW AND PRACTICE, § 4492, at 14-15 (rev. ed. 1979); *see also State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1075 (Fla. 1998). The term was defined to mean "an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Appleman & Berdal, at 15. This definition of "occurrence" lends itself to a focus on the immediate injury-producing event rather than upon an underlying negligent act or omission. *See Koikos*, 849 So. 2d at 270-71. The legislative history of section 786.28 makes clear that the availability of liability insurance was a critical feature of the waiver of sovereign immunity for liability in tort.

1. The backdrop: the interaction of the waiver of Florida sovereign immunity and insurance coverage.

Twenty years prior to the enactment of section 768.28, the Florida Legislature initially crafted waivers of sovereign immunity for liability in tort based upon the availability of liability insurance. In 1953, the Legislature enacted section 455.06, Florida Statutes, which "allow[ed] counties to obtain insurance and waive sovereign immunity from tort liability in certain instances." *Arnold v. Shumpert*, 217 So. 2d 116, 118 (Fla. 1968) (citing Ch. 28220, Laws of Fla. (1953)). The law permitted "public officers . . . to secure and provide . . . insurance to cover liability for damages on account of [injury or damage] arising from and in connection with the operation of any such motor vehicles" operated by the county "in the performance of their necessary functions." *Id.* The waiver was extended to other activities through several amendments in the 1950s and 1960s. *Id.* at 118-19.

Section 455.06 did not contain a static cap on damage awards, but instead pegged the cap to the coverage limits of the governmental entity's insurance policy. Subsection (2) of the statute provided:

> [T]he immunity of said political subdivision against any liability described in subsection (1) hereof as to which such insurance coverage has been provided, and suit in connection therewith, *are waived to the extent and only to the extent of such insurance coverage*[.]

§ 455.06(2), Fla. Stat. (1953) (emphasis added).[5] This language remained unchanged through 1987 and was thus on the books when the Legislature enacted section 768.28 in 1973. *See* § 455.06(2), Fla. Stat. (1973); § 455.06(2), Fla. Stat. (1975).

In 1963, the Legislature began to include the standard insurance policy terminology "accident" and "occurrence" in section 455.06 in the description of the permissible activities for which a local government could obtain liability coverage. The statute at that time allowed public officials to obtain liability insurance to cover bodily injury or property damages "arising from or in connection with the operation of any such motor vehicles, watercraft or aircraft, or from the ownership or operation of any such buildings or property or any other such operations, *whether from accident or occurrence.*" § 455.06(1), Fla. Stat. (1963) (emphasis added). This language too remained in place until the Legislature repealed this statute in its entirety in 1987.[6]

[5] The statute further clarified that "the court shall reduce the amount of [any] judgment or award to a sum equal to the applicable limit set forth in the [liability insurance] policy[,]" in the event a jury verdict exceeded the policy's limits. *Id.*

[6] *See* Ch. 87-134, § 4, Laws of Fla. Section 455.06 had been renumbered in 1979 as section 286.28, Florida Statutes. *See* Ch. 79-36, § 5, at 202, Laws of Fla.

2. The 1973 revision of Florida sovereign immunity.

The "Tort [C]laim [A]ct," Chapter 73-313, § 1, Laws of Florida, codified in section 768.28, Florida Statutes, "totally revised the area of sovereign immunity" in Florida. *Ingraham v. Dade Cty. Sch. Bd.*, 450 So. 2d 847, 849 (Fla. 1984). Among other things, it waived governmental entities' sovereign immunity for all torts. Prior to that date, governmental entities were authorized to waive their sovereign immunity and purchase liability insurance, but only for activities enumerated in section 455.06, Florida Statutes. *See Arnold*, 217 So. 2d at 119; *Spaulding v. Fla. Gas. Co.*, 249 So. 2d 695, 696 (Fla. 1st DCA 1971) (exemplifying such a restriction). As part of the Legislature's "overall revision" of the law on sovereign immunity, however, it "specifically provided that the statutory provisions permitting the state to purchase insurance based upon section 455.06 would continue in effect." *Ingraham*, 450 So. 2d at 849; *see* Ch. 73-313, § 1(11), Laws of Fla.

Several provisions of section 768.28 evidence this intent to dovetail with the provisions of section 455.06 and particularly that earlier statute's focus on the interplay of liability insurance and the waiver of sovereign immunity. In the preamble, the Legislature described two of the purposes of the Act as "providing [that] the limitations of this act shall not apply when the entity has insurance," and "providing that the state or its agencies or subdivisions may purchase insurance if

allowed by law." Ch. 73-313, at 711, Laws of Fla. Two provisions of the Act addressed those purposes. One provided, in relevant part:

> If the state or its agency or subdivision is insured against liability for damages for any negligent or wrongful act, omission, or occurrence for which action may be brought pursuant to this section, then the limitations of this act shall not apply to actions brought to recover damages therefor to the extent such policy of insurance shall provide coverage.

Id. §1(10). In other words, the damage caps in subsection (5) did not apply if the governmental entity carried higher liability insurance. Another provision more generally declared that "[l]aws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act." *Id.* § 1(11). As noted earlier, this language affirming the right to purchase liability insurance remains unchanged to this day. *Compare* § 768.28(13), Fla. Stat. (2018).

In subsection (5) of the Act, § 768.28(5), Fla. Stat. (1973), the Legislature utilized terminology similar to that in section 455.06 to define the scope of the limits of tort liability. Subsection (5) provided, in pertinent part:

> Neither the state nor its agencies or subdivisions shall be liable to pay . . . any claim or judgment, or portions thereof, which when totaled with all other claims or judgments paid by the state *arising out of the same incident or occurrence* exceeds the sum of $100,000.00[.]

Ch. 73-313, § 1(5), at 712, Laws of Fla. (emphasis added). This language has remained unchanged since it was enacted, save for the amount of the monetary

limits, which have been adjusted twice over the years.[7] The italicized phrases "arising out of" and "incident or occurrence" bear a striking resemblance to the language then existing in section 455.06 authorizing public entities to purchase insurance for tort liability "arising from or in connection with" certain operations "whether from accident or occurrence," § 455.06(1), Fla. Stat. (1973).

As noted, such terms as "arising out of" and "occurrence" were commonplace in comprehensive general liability insurance policies in 1973 to define the scope and limits of coverage. *See, e.g.*, Appleman & Berdal, § 4492 at 15; *Mathews v. Ranger Ins. Co.*, 281 So. 2d 345, 348 (Fla. 1973) (providing liability insurance coverage for injury "caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft," and providing a "$100,000 limit for each person and a $300,000 limit for each occurrence."). The Legislature's pivot from "accident" to "incident" in subsection 768.28(5) coincides with the movement at that time in the insurance industry to do so to avoid the controversy over the meaning of the term "accident" had generated in the insurance context. *See* Appleman & Berdal, § 4492 at 15; *St. Farm Fire & Cas. Co.*, 720 So. 2d at

[7] *See* § 768.28(5), Fla. Stat. (2018); *see also* Ch. 81-317, § 1(5), Laws of Fla. (increasing individual cap to $100,000 and aggregate cap to $200,00); Ch. 2010-26, § 1, Laws of Fla. (again increasing cap amounts to $200,000 and $300,000, respectively).

1075; *Dimmitt Chevrolet, Inc. v. S.E. Fidelity Ins. Corp.*, 636 So. 2d 700, 702-03 (Fla. 1993).[8]

This similarity in terminology between subsection (5) of the Tort Claim Act and the corresponding insurance statute, section 445.06(1), further evidences that the Legislature had insurance concepts in mind when crafting the language of subsection (5). *See Crews*, 183 So. 3d at 333 n.7 (noting that the canon of construction *in pari materia* "provides that statutes on the same subject matter may be construed in light of each other"); *cf. Debaun v. State*, 213 So. 3d 747, 753 (Fla. 2017) ("[W]hen a court looks to other statutory provisions to define a term that lacks its own statutory definition, the provision to which a court looks must be related to the provision lacking a definition."). This statutory context supports construing the terms "incident or occurrence" with the meaning they have in insurance law.

3. Subsequent developments bearing on the statute.

One of the first Florida courts to consider the meaning of "occurrence" in subsection 768.28(5) commented on the connection between the provision and

[8] A representative from the Association of Insurance Agents and an individual from the Florida Insurance Department appeared before the House Judiciary Committee during its consideration of the bill. *See* Fla. H. Jud. Comm., Committee Information Record, Proposed Comm. Bill Substitute for HB 315 & 376 (Apr. 12, 1973).

liability insurance policies. Then-Judge Grimes, writing for the Second District, observed:

> by using the word occurrence in the statute, the legislature may have intended that it receive a similar interpretation [to the term commonly used in liability insurance policies] since the limited waiver of sovereign immunity contemplates that governmental agencies might carry liability insurance up to the statutory maximum of liability.

Rumbough v. City of Tampa, 403 So. 2d 1139, 1142-43 (Fla. 2d DCA 1981). The case presented the question whether a city's maintenance of a landfill constituted an "occurrence" within the meaning of subsection (5). The court looked to the "frequent litigation over the word 'occurrence' in the insurance field" and the expansive definition the term was generally given in that context. *Id.* at 1142. Notwithstanding multiple amendments to subsection (5) since the *Rumbough* decision in 1981, the Legislature has never seen fit to alter the "incident or occurrence" language, nor supply any alternative definition of "occurrence." *See* Ch. 81-317, § 1(5), Laws of Fla. (increasing cap amounts); Ch. 87-134, § 3, Laws of Fla. (clarifying that insurance coverage above the caps does not displace them); Ch. 2010-26, § 1, Laws of Fla. (again increasing cap amounts).

Given the number of times the Legislature has amended subsection 768.28(5), its satisfaction with the operative language of that provision gives rise to a presumption of endorsement of the *Rumbough* court's understanding of the insurance-based roots of the terms "incident or occurrence." *See Morris v. Muniz*,

252 So. 3d 1143, 1154 (Fla. 2018) ("[T]he Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version.") (internal quotation marks omitted).

This presumption seems particularly warranted here given that the Legislature has twice enacted changes to section 768.28 in other areas in response to judicial and executive branch constructions of the statute. The first amendment was prompted, in part, by an opinion of the Attorney General which "failed to recognize the basis for the limitation of liability set forth in subsection (5)" and thereby led to local governments "experiencing difficulty in obtaining liability insurance." Ch. 77-86, at 161-62, Laws of Fla.[9] In response, the Legislature repealed the language in subsection (10), which had exempted governmental entities from the monetary caps in subsection (5) if they had higher liability insurance. *See id.* § 2. At the same time, the Legislature re-affirmed the rights of governmental entities to purchase liability insurance by adding subsection (14) to section 768.28, which read:

> The state and its agencies and subdivisions are hereby authorized to be self-insured, or to enter into risk management programs, *or to purchase liability insurance for whatever coverage they may choose*,

[9] The referenced opinion of the Attorney General concerned the effect of section 768.28 on municipal tort liability. It had concluded that "the state's waiver of sovereign immunity contained in s. 768.28 does not operate to limit in any substantive way the tort liability of municipalities under the doctrine of *respondeat superior*." Op. Att'y Gen. Fla. 76-41 (1976).

> or to have any combination thereof, for any claim, judgment, and claims bill which they may be liable to pay pursuant to this section.

See id. § 3 (emphasis added). This provision was subsequently renumbered to subsection 16(a). *Compare* § 768.28(16)(a), Fla. Stat. (2018).

The likely impetus for the second substantive change to the statute, ten years later, was this Court's decision in *Avallone v. Board of County Commissioners of Citrus County*, 493 So. 2d 1002, 1004 (Fla. 1986), which held that there was "no conflict" between sections 768.28 and 286.28, and gave both "full effect." *See Pensacola Jr. Coll. v. Montgomery*, 539 So. 2d 1153, 1155 n.1 (Fla. 1st DCA 1989). The 1987 Legislature repealed section 286.28, which had waived sovereign immunity for certain acts up to the limits of insurance coverage and added language to subsection 768.28(5) that "clarif[ied] its intent that the purchase of liability insurance does not constitute a further waiver of sovereign immunity." *Pensacola Jr. Coll.*, 539 So. 2d at 1155 n.1. *See* Ch. 87-134, §§ 3, 4, Laws of Fla. (adding to subsection (5) language that, among other things, a governmental entity "shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage in excess of the $100,000 or $200,000 waiver provided above."). The provisions permitting governmental entities to obtain liability insurance were left in place, *see*

§ 768.28(11) & (14), Fla. Stat. (Supp. 1986), and remain in the current version of the statute as subsections (13) and (16)(a).

The subsequent legislative history affecting section 768.28 demonstrates that the Legislature has never departed from the insurance-law origins of the phrase "incident or occurrence" in the 1973 Tort Claim Act. The question, then, is how those terms apply to the circumstances presented in this case. This Court's treatment of a nearly identical question in an insurance case involving a multiple shooting all but answers that question.

4. To define an "occurrence" in the insurance context, one looks to the immediate injury-producing act.

In *Koikos*, this Court undertook a comprehensive review of the meaning of the term "occurrence" as used to limit coverage in liability insurance policies and applied it to a case arising out of a multiple shooting. The Court held that the term required reference to the immediate cause of injury, not the underlying act of negligence that gave rise to the claim. 849 So. 2d at 271.

The shooting in the case occurred after a restaurant owner, the insured, Koikos, rented it out to a college fraternity for a graduation party. *Id.* at 264-65. After a fight broke out, an armed man fired "two separate – but nearly concurrent – rounds." *Id.* at 265. Two guests were each hit by separate bullets and filed suit against Koikos for negligent failure to provide security. *Id.* Koikos' insurance

policy limited coverage to "$500,000 per occurrence." *Id.* It defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 266 (quotation marks omitted). While the policy did not define the term "accident," the Court had previously held that the default meaning of that term in standardized liability insurance policies since 1972 "encompasses not only 'accidental events,' but also injuries or damage neither expected nor intended from the standpoint of the insured." *Id*. (quotation marks omitted).

Confronted with the parties' dueling contentions over the proper point of reference for determining the "occurrence" – each separate act of shooting by the gunman versus the underlying act of negligent security by the landowner – the Court reasoned that "[i]t is the act that causes the damage, which is neither expected nor intended from the standpoint of the insured, that constitutes the 'occurrence.'" *Id*. at 271. Consistent with prior Florida cases involving multiple shootings, the *Koikos* Court held that "each shooting constitutes a separate occurrence." *Id.* at 273. *See Am. Indem. Co. v. McQuaig*, 435 So. 2d 414, 415 (Fla. 5th DCA 1983) (holding each shot fired constituted a separate occurrence under insurance policy); *New Hampshire Ins. Co. v. RLI Ins. Co.*, 807 So. 2d 171, 172 (Fla. 3d DCA 2002) (same). The focus of the inquiry must be "on the immediate cause – that is the act that causes the damage – rather than the underlying tort –

that is the insured's negligence." *Koikos*, 849 So. 2d at 271 (citing *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 492 (1924)).

C. An "Occurrence" Under Subsection 768.28(5), Florida Statutes Refers to the Immediate Injury-Producing Act.

Given the insurance-policy origins of the "incident or occurrence" language in subsection 768.28(5), it is plain that the Legislature intended those terms to be interpreted consistent with prevailing insurance policy language. And because this Court has already definitively interpreted "occurrence" in the context of tort claims arising from negligent security for a third-party's multiple shooting, that interpretation should follow for purposes of claims governed by subsection 768.28(5).

The Fourth District in *Barnett* deemed *Koikos* "inapplicable" because that Court was construing an insurance policy rather than the language of subsection 768.28(5). *Barnett*, 262 So. 3d at 754. What the Fourth District failed to consider is that the language of subsection (5) itself derived from the prevailing language of insurance policies of the time, making that distinction untenable.

The Fourth District also noted that diametrically opposite rules of construction apply when interpreting ambiguities in insurance policies and in statutes waiving sovereign immunity. *Id.* That point mistakenly assumes that the statute lends itself to a genuine ambiguity regarding the proper point of reference,

such that a canon of construction addressing ambiguity must be invoked. That is not the case. Other provisions of the statute, dating back to its origin, demonstrate that Legislature adopted the phrase "incident or occurrence" from the context of liability insurance. In that context, dating back to 1983, courts have consistently interpreted functionally identical policy language to refer to each shot fired from a gun that injures a different victim. *See McQuaig*, 435 So. 2d at 415; *New Hampshire, Ins. Co.*, 808 So. 2d at 172; *Koikos*, 849 So. 2d at 273. Given the Legislature's adoption of terms of art from the field of insurance and this Court's definitive interpretation of their meaning, there is no need to resort to a rule of construction. Furthermore, interpreting "incident or occurrence" the same way both for purposes of liability insurance and the caps on liability in subsection (5) is consistent with the legislative intent that governmental entities be able to purchase liability insurance tailored to the scope of their tort liability under the statute.

Additionally, if resort to the strict-construction canon is appropriate, the Fourth District was still mistaken to conclude that it would be "contrary to the policies supporting sovereign immunity" to view "the shooting of each child [as] a separate occurrence," *Barnett*, 262 So. 3d at 754. Under the strict-construction canon, courts should defer to the reading of the statute that minimizes the scope of the waiver of sovereign immunity. The Fourth District in *Barnett* assumed that a construction of the statute which defines "occurrence" based on the underlying act

of negligence would minimize the exposure to the public fisc. While that was true for the single instance before the court (the state's exposure to the aggregate cap was less than the potential sum of two separately capped judgments), that may not necessarily be so in all cases.

II. Regardless of the Rule the Court Adopts, It Would Be Premature to Limit the School Board's Liability to $300,000 for All Potential Claims by Parkland Victims.

Should this Court determine that "incident or occurrence" in section 768.28(5) refers to the governmental actor's negligent act or omission, the Court should still quash the trial court's order because it prematurely concluded that the School Board's maximum liability would be the $300,000 aggregate cap, even before any substantive claims by the numerous Parkland victims had been identified or filed. That conclusion was overly hasty. Even under a regime whereby an "incident or occurrence" is tethered to an underlying act of negligence, it is entirely possible that different plaintiffs (or groups of plaintiffs) could point to separate acts of negligence which uniquely caused them harm distinct from other plaintiffs who were not similarly situated.

For instance, students who were shot on the ground floor of the building where the gunman first entered the school might point to certain acts of negligence that enabled the gunman to access them (e.g., building design, negligent perimeter security) whereas students shot later on, after the gunman went up to the third

floor, might assert different acts of negligence (e.g., failure of school resource officer to intervene, negligent operation of fire alarm). If different plaintiffs can prove that distinct negligent acts or omissions caused them harm from the negligent acts or omissions that caused *other* plaintiffs harm, their separate resulting judgments will not have arisen from the "same incident or occurrence," § 768.28(5), Fla. Stat., because they will not have implicated the same underlying negligent conduct.

This potential scenario is conceptually akin to the notion, recognized in several cases, that a single plaintiff can have more than one separately cognizable tort claim for purposes of the individual damage cap in the statute. The Fourth District in *Zamora v. Florida Atlantic University Board of Trustees*, 969 So. 2d 1108 (Fla. 4th DCA 2007), has probably most clearly articulated this concept: if a claim is sufficiently segregable from and independent of others, such that it "constitute[s] a separate tort" and "would not have been barred by [the doctrines of] res judicata or splitting the cause of action," then it is subject to its own individual cap under subsection (5). *Id*. at 1113; *see also Barnett*, 262 So. 3d at 754 (explaining *Zamora*).

In *Zamora*, the plaintiff alleged both that the university had unlawfully passed him up for promotion and discretionary raises because of his age and that it subsequently retaliated against him when he filed a complaint about the

discrimination with the university's Equal Opportunity Program office. 969 So. 2d at 1110. The jury found the university liable for both claims and awarded Zamora compensatory damages of $83,596 for his age discrimination claim and $37,000 for his retaliation claim. *Id.* At the time, the applicable limit of "liabil[ity] to pay a claim or a judgment by any one person" was $100,000. § 786.28(5), Fla. Stat. (2005). The Fourth District rejected the university's argument that Zamora's claims constituted one "occurrence" under the statute such that the $120,596 judgment should be remitted down to $100,000. It recognized that Zamora's two claims were distinct from one another: "[e]ach claim requires the proof of different facts an constitutes a separate cause of action," and each supported "a separate damage award." 969 So. 2d at 1114. Consequently, the court held that "the statutory cap applies to each claim." *Id*. Several other courts have applied similar reasoning.[10]

[10] *See Pierce v. Town of Hastings*, 509 So. 2d 1134, 1135-36 (Fla. 5th DCA 1987) (plaintiff's claims for two illegal prosecutions of two separate violations of the town's prohibition on Sunday business operation, a month apart, were separate incidents for purposes of § 768.28(5), Fla. Stat.); *Edman v. Marano*, 177 F. App'x 884, 885, 888 (11th Cir. 2006) (same for judgment for plaintiff on claims of false arrest and subsequent failure to verify the arresting officer's affidavits); *but see State Dep't of Health & Human Rehab. Servs. v. T.R. ex rel. Shapiro*, 847 So. 2d 981, 985 (Fla. 3d DCA 2002) (concluding that two girls who, while in DCF custody from 1986 to 1999, were physically and sexually abused, burned, raped, and improperly medicated, as a result of "a number of different actions by a number of state employees," nevertheless each had but a "single claim against the Department for the injuries she suffered while under its supervision").

The Fourth District in *Barnett* distinguished *Zamora* on the ground that its use of res judicata principles to distinguish between separate incidents or occurrences did not work in "cases where there are multiple plaintiffs asserting a single claim of negligence against the state actor," because different plaintiffs have distinct claims under those principles, and that would circumvent the aggregate cap for claims or judgments arising out of the "same incident or occurrence." *See Barnett*, 262 So. 3d at 754. The court did not address the scenario, that may well be presented by the Parkland Parents' various claims, where multiple plaintiffs assert claims predicated on *different* acts of negligence against a state actor. While res judicata principles may not suffice to distinguish claims in multiple-plaintiff situations, claims-splitting principles could.

This case comes to the Court essentially in a vacuum, bereft of factual detail or even the tort claims each Parkland Parent has brought against the School Board. Even under a rubric that focuses on the underlying negligent act or omission of the government actor to identify an "incident or occurrence" under subsection 768.28(5), it would be premature to conclude in the abstract that the School Board's liability for any tort claim arising from the shootings at Marjory Stoneman Douglas High School cannot exceed $300,000 under the aggregate cap. That amount would be surpassed if even two plaintiffs succeeded in asserting claims based on entirely separate acts or omissions by different county employees that

distinctly caused harm to two different victims, such that two individual $200,000 caps were available. At the hearing in the trial court, the Parkland Parents' counsel requested that, at a minimum, the court leave open this possibility. R.142. The trial court implicitly declined, and that premature ruling should be quashed.

CONCLUSION

For the foregoing reasons, the Parkland Parents urge the Court to construe the language "incident or occurrence" in subsection 768.28(5), Florida Statutes as referring to the immediate injury-producing act that gives rise to a plaintiff's claim and thereby synchronize the interpretation of the statute with its insurance law origin. If the Court instead construes the language to refer to the underlying act of governmental negligence, it should quash the ruling below in this case because it prematurely limited the School Board's liability to the aggregate cap when it is not yet apparent that all Parkland victims' claims will implicate the same acts of negligence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court and e-served on all counsel of record named on the Service List on this 23rd day of May, 2019.

/s/ Stephen F. Rosenthal
Stephen F. Rosenthal

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

/s/ Stephen F. Rosenthal
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