

IN THE SUPREME COURT OF FLORIDA

FREDERIC GUTTENBERG, etc., et
al.,

Appellants,

Case No. SC19-487

v.

THE SCHOOL BOARD OF
BROWARD COUNTY,

Appellee.

_____ /

**BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION IN
SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
INTRODUCTION	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
MANY SCHOOL DISTRICTS DELIBERATELY CHOOSE TO SELF-INSURE RATHER THAN SHIFT THE RISK TO AN INSURER. THEY SHOULD NOT BE ABLE TO ARGUE THAT APPELLANTS’ INTERPRETATION OF “INCIDENT OR OCCURRENCE” WOULD EXPOSE THEM TO SIGNIFICANT FINANCIAL CONSEQUENCES.	3
A. The insurance crisis of the 1980s.....	4
B. Many school districts in Florida have chosen to self-insure.....	6
C. Self-insurance is a deliberate choice to retain risk.....	8
D. Financial impact and the interpretation of subsection 768.28(5).	10
E. The availability of “active shooter” insurance.....	11
CONCLUSION.....	14
CERTIFICATE OF SERVICE	15
CERTIFICATE OF TYPE SIZE & STYLE.....	16

TABLE OF AUTHORITIES

Cases

<i>Bordeaux Inc. v. Am. Safety Ins. Co.</i> , 186 P.3d 1188 (Wash. Ct. App. 2008).....	9
<i>Dep’t of Fin. Servs. v. Barnett</i> , 262 So. 3d 750 (Fla. 4th DCA 2018), rev. granted, No. SC19-87 (Fla. Mar. 12, 2019)	2, 3, 10
<i>Doucette v. Pomes</i> , 724 A.2d 481 (Conn. 1999)	9
<i>Fellhauer v. Alhorn</i> , 838 N.E.2d 133 (Ill. App. Ct. 2005)	5, 9
<i>Hillegass v. Landwehr</i> , 499 N.W.2d 652 (Wis. 1993).....	9
<i>Iowa Ass’n of Sch. Boards v. Iowa Dept. of Educ.</i> , 739 N.W.2d 303 (Iowa 2007)	9
<i>Jackson v. Donahue</i> , 457 S.E.2d 524 (W.Va. 1995).....	9
<i>Keyspan Gas E. Corp. v. Munich Reinsurance Am.</i> , 37 N.Y.S.3d 85 (N.Y. App. Div. 2016)	9
<i>Koikos v. Travelers Ins. Co.</i> , 849 So. 2d 263 (Fla. 2003).....	11
<i>Martin v. Powers</i> , 505 S.W.3d 512 (Tenn. 2016).....	9
<i>Moore v. Nayer</i> , 729 A.2d 449 (N.J. App. Div. 1999).....	9
<i>N. Indiana Pub. Serv. Co. v. Bloom</i> , 847 N.E.2d 175 (Ind. 2006)	9

<i>Philadelphia Indem. Ins. Co. v. Pace Suburban Bus Serv.</i> , 67 N.E.3d 556 (Ill. App. Ct. 2016)	10
<i>Spangler v. Fla. State Tpk. Auth.</i> , 106 So. 2d 421 (Fla. 1958).....	3
<i>State Farm Mut. Auto. Ins. Co. v. Du Page Cnty.</i> , 955 N.E.2d 67 (Ill. App. Ct. 2011)	10
<i>Uniroyal Inc. v. Home Ins. Co.</i> , 707 F. Supp. 1368 (E.D.N.Y. 1988)	10
<i>Young v. Progressive Se. Ins. Co.</i> , 753 So. 2d 80 (Fla. 2000).....	8

Statutes

Fla. Stat. § 1001.42(10)(k)	6
Fla. Stat. § 768.28(5).....	1, 2, 13, 14

Other Authorities

Amy Rock, <i>More School Districts Purchasing Active Shooter Insurance</i> , Campus Safety Magazine, Mar. 22, 2018.....	12, 13
Andrew P. Lannon et al., <i>Risk[y] Business: Transitioning to a Stand-Alone Self-Insurance Program</i> , 46 Stetson L. Rev. 563 (2017)	9
Anthony DePalma, <i>Strapped Districts Trying Self-Insurance</i> , N.Y. Times., N.J. Weekly, at 11, Aug. 30, 1981	5
Eric Mills Holmes & Mark S. Rhodes, <i>Appleman on Insurance</i> (2d ed. 1996).....	8
Fla. Dep’t of Educ., Fla. School Districts, http://web03.fldoe.org/schools/schoolmap_text.asp	6

Fla. League of Cities’ Amicus Curiae Brief, <i>Barnett v. Dep’t of Fin. Servs.</i> , No. SC19-487 (Fla. May 30, 2019)	4
Fla. Office of Ins. Reg., Active Company Search, https://www.flair.com/CompanySearch/	6
George L. Priest, <i>The Current Insurance Crisis and Modern Tort Law</i> , 96 Yale L.J. 1521 (1987)	5
Hannah McCartney, <i>Cincinnati insurer explains: What is active shooter coverage?</i> , Cincinnati Bus. Courier, Sept. 7, 2018	12
Jonathan Berr, <i>Schools are now buying insurance against mass shootings</i> , CBS News, June 8, 2018.....	12
Kyle D. Logue, <i>Toward a Tax-Based Explanation of the Liability Insurance Crisis</i> , 82 Va. L. Rev. 895 (1996).....	4
Lawrence Hsieh, <i>New products show insurers reassessing risk in U.S. mass shootings</i> , Reuters, Feb. 20, 2018.....	12
Natalie Delgadillo, <i>With Shootings on the Rise, Schools Turn to ‘Active Shooter’ Insurance</i> , Governing, June 2018	11
Rory A. Goode, Note, <i>Self-Insurance as Insurance in Liability “Other Insurance” Provisions</i> , 56 Wash. & Lee L. Rev. 1245 (1999)	6, 9
Sch. Bd. of Broward Cnty., <i>Comprehensive Annual Financial Report (2016-2017)</i>	8
Steven Plitt et al., <i>Couch on Ins.</i> (3d ed.)	5
Suzanne Barlyn & Noor Zainab Hussain, <i>Insurers’ new business: ‘active shooter’ policies for U.S. schools</i> , Reuters, Mar. 21, 2018	11
Wash. Post, <i>Civil Liability Crisis Wanes as Decade Ends</i> , Dec. 24, 1989	5
Washington Cnty. Sch. Bd. et al.’s Unopposed Motion for Leave to File Amicus Brief in Support of the School Board of Broward County, <i>Guttenberg v. Sch. Bd. of Broward Cnty.</i> , No. SC19-487 (Fla. Apr. 26, 2019)....	4

INTRODUCTION

The Florida Justice Association is a large, voluntary, and statewide association of more than 3,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The lawyer members of the FJA care deeply about the integrity of the legal system and, toward this end, have established an amicus curiae committee. The FJA has been involved as amicus in hundreds of cases in the Florida appellate courts, including this Court.

The issue in this case is whether a school district's total exposure for a mass shooting is \$300,000 under Florida Statutes subsection 768.28(5). The case is important to the FJA because, if the Court answers yes, the innocent victims of government negligence in mass-shooting cases will be deprived of any meaningful compensation for the injuries they suffer as a result of the negligence.

SUMMARY OF THE ARGUMENT

It is unfortunate but true that mass shootings, especially on school campuses, are on the rise. A mass shooting at a public school implicates sovereign immunity. Under the state's limited waiver of sovereign immunity, a government entity's liability is capped at \$300,000 for claims "arising out of the same incident or occurrence." Fla. Stat. § 768.28(5).

In *Department of Financial Services v. Barnett*, which is what the trial court here relied on, the Fourth District held that the government's underlying negligence and not each shooting of a separate victim is the "incident or occurrence" within the meaning of the statute. 262 So. 3d 750 (Fla. 4th DCA 2018), *rev. granted*, No. SC19-87 (Fla. Mar. 12, 2019).

One of the Fourth District's concerns in *Barnett* was the financial impact an opposite interpretation would have on the government. The unexamined premise of the concern appears to be that many government entities in Florida, including many school districts, are self-insured. And as a result, the entities could be exposed to significant liability if the statute was not read in the way the Fourth District read it. But many of those entities deliberately choose to self-insure: They elect to retain the risk of losses instead of purchasing commercial liability insurance. When the choice turns out to be bad, it should not redound to the entities' benefit once it comes time to interpret "incident or occurrence."

ARGUMENT

MANY SCHOOL DISTRICTS DELIBERATELY CHOOSE TO SELF-INSURE RATHER THAN SHIFT THE RISK TO AN INSURER. THEY SHOULD NOT BE ABLE TO ARGUE THAT APPELLANTS' INTERPRETATION OF "INCIDENT OR OCCURRENCE" WOULD EXPOSE THEM TO SIGNIFICANT FINANCIAL CONSEQUENCES.

The trial court in this case followed the Fourth District's recent decision in *Department of Financial Services v. Barnett* to conclude that a stepfather's shootings of several stepchildren over the course of one night constituted one "incident or occurrence" under Florida Statutes subsection 768.28(5). 262 So. 3d 750 (Fla. 4th DCA 2018), *rev. granted*, No. SC19-87 (Fla. Mar. 12, 2019).

In *Barnett*, the appellate court's interpretation of the statutory phrase "incident or occurrence" was motivated in part by the policy underlying sovereign immunity and its limited waiver: the protection of the public treasury.¹

Amicus curiae Florida League of Cities in the *Barnett* case argues that adoption of Appellants' interpretation of the statute—that each shooting of a separate victim constitutes a separate incident or occurrence—would devastate municipali-

¹ See *id.* at 752 ("This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the state. It is enforced as a protection of the public against profligate encroachments on the public treasury." (quoting *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958)); *id.* at 754 ("[T]he legislature has deemed it necessary to assure the protection of the state's revenues to the good of the entire population.").

ties in Florida. Fla. League of Cities’ Amicus Curiae Brief at 3, 6-7, *Barnett v. Dep’t of Fin. Servs.*, No. SC19-87 (Fla. May 30, 2019). And it is anticipated that amici curiae Washington County School Board et al. will sound a similar note in this case. See Washington Cnty. Sch. Bd. et al.’s Unopposed Motion for Leave to File *Amicus* Brief in Support of the School Board of Broward County at 3, *Guttenberg v. Sch. Bd. of Broward Cnty.*, No. SC19-487 (Fla. Apr. 26, 2019).

The unexamined premise of the Fourth District and amici appears to be that many government and municipal entities, including school districts, are self-insured. Because they are self-insured, an interpretation contrary to that adopted by the Fourth District in *Barnett* would expose such entities to serious, and perhaps debilitating, financial liabilities.

This brief addresses the premise and its implications in the following order: 1) the insurance crisis of the 1980s; 2) the prevalence of school districts in Florida that have chosen to self-insure; 3) self-insurance as a deliberate choice to retain risk; and 4) the growing availability of “active shooter” insurance.

A. The insurance crisis of the 1980s.

From 1984 to 1986, a crisis in the commercial liability-insurance market in the United States led to a sharp reduction in the availability of certain types of liability coverage and a large spike in premiums. Kyle D. Logue, *Toward a Tax-*

Based Explanation of the Liability Insurance Crisis, 82 Va. L. Rev. 895, 895-96 (1996). The crisis affected many kinds of CGL consumers.

Among them were municipalities. *See generally* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1521-22 (1987). Even before then, school districts faced difficulties obtaining liability insurance. *See* Anthony DePalma, [*Strapped Districts Trying Self-Insurance*](#), N.Y. Times., N.J. Weekly, at 11, Aug. 30, 1981.

Like other CGL consumers, local-government entities, including many school districts, turned to self-insurance. Though discussed in more detail below, self-insurance has been described briefly as follows:

So-called “self-insurance” is not insurance at all but rather is the antithesis of insurance; the essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer, while the essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract.

1A Steven Plitt et al., *Couch on Ins.* § 10:1 n.1 (3d ed.) (citing *Fellhauer v. Alhorn*, 838 N.E.2d 133 (Ill. App. Ct. 2005)).

The CGL-insurance crisis abated toward the end of the decade. “[Liability insurance generally [was] available to municipalities that want[ed] it.” Wash. Post, [*Civil Liability Crisis Wanes as Decade Ends*](#), Dec. 24, 1989.

When the market stabilized, however, many self-insurers decided not to return to traditional insurance, instead electing to continue self-insurance. “Experi-

menting with self-insurance during the insurance crisis of the 1980s may have convinced management in many corporations and municipalities that they can, at least in some respects, do better on their own. Furthermore, despite the current favorable insurance market, many entities are second-guessing insurance companies' analysis of costs." Rory A. Goode, Note, *Self-Insurance as Insurance in Liability "Other Insurance" Provisions*, 56 Wash. & Lee L. Rev. 1245, 1251-52 (1999) (footnotes omitted).

B. Many school districts in Florida have chosen to self-insure.

Dozens of Florida school districts have chosen to self-insure, as they are authorized to do under Florida Statutes subsection 1001.42(10)(k).

Florida has 74 school districts. *See* Fla. Dep't of Educ., Fla. School Districts, http://web03.fldoe.org/schools/schoolmap_text.asp (last visited June 14, 2019).

Based on a search of the Florida Office of Insurance Regulation's records, it appears that thirty-seven school districts and educational consortia in Florida, including the Broward County School District, are self-insured.² *See* Fla. Office of

² The FJA's search of the office's online records revealed the following school districts which are self-insured in whole or part: Baker County School Board; Bay County School District; Bradford County School Board; Calhoun County School Board; Charlotte County School Board; Citrus County School Board; Collier County School Board; Columbia County School Board; Dixie County School District; Flagler County School Board; Gilchrist County School District; Hamilton County School District; Hardee County School District; Indian River School District; Lafayette County School District; Lee County School

Ins. Reg., Active Company Search, <https://www.floir.com/CompanySearch/> (search parameters: “Company Name” – contains “school”; “Company Type” – “Local Government Unit Payee/Self-Insurer”) (last visited June 14, 2014).

The School Board of Broward County’s 2016-2017 *Comprehensive Annual Financial Report* contains a typical statement on self-insurance:

The District is exposed to various risks of loss related to torts; theft of, damage to, and destruction of assets, errors and omissions, injuries to employees and students, and natural disasters. [G]eneral liability and health insurance coverage are being provided on a self-insurance basis up to specified limits. The District purchases commercial insurance for certain risks in excess of the self-insurance coverage and for other risks of loss. The District has contracted with an insurance administrator to administer these self-insurance programs, including the processing, investigating and payment of claims.

The District is self-insured for portions of its ... general and automobile liability insurance.... The estimated liability for self-insured risks represents an estimate of the amount to be paid on claims reported and on claims incurred but not reported. For the governmental funds, in the fund financial statements, the liability for self-insured risks is considered long-term and therefore, is not a fund liability (except for any amounts due and payable at year end) and represents a reconciling item between the fund level and government-wide presentations. Settled claims resulting from risks described above have not exceeded

Board; Liberty County School Board; Manatee County School Board; Miami-Dade County Public Schools; Monroe County School Board; Nassau County School District; Orange County School Board; Osceola County School Board; Palm Beach County School Board; Pasco County School Board; Polk County School Board; Santa Rosa County School Board; School Board of Hernando County; School District of Broward County; St. Johns County School Board; Sumter County School District; Taylor County School Board; Volusia County School Board; Washington County School Board; Panhandle Area Educational Consortium; North East Florida Educational Consortium; South Central Education Risk Management Program.

commercial coverage for the past three years.

Sch. Bd. of Broward Cnty., [*Comprehensive Annual Financial Report*](#) 81-82 (2016-2017).

As exemplified by the above report, school districts that are self-insured have chosen to do so.

C. Self-insurance is a deliberate choice to retain risk.

The Court said the following about self-insurance in the uninsured-motorist context:

We agree that there are important differences between insurance and self-insurance. Whereas traditional insurance involves risk shifting, self[-]insurance involves risk retention:

*[S]elf-insurance does not constitute insurance in any traditional form. In self-insurance the company, **governmental entity** or individual **chooses not to purchase insurance but rather retains the risk of loss**. In order to protect against losses, the self-insured will often set aside funds on a regular basis to provide its own pool from which losses will be paid. This can be analogized to the situation where a party purchasing traditional insurance pays premiums to the insurer on a regular basis. However, *in a self-insurance situation there is no shifting of the risk from the individual person or company to a larger group. Thus, even though self-insurance for certain types of risks may be regulated by the state insurance department, it does not constitute insurance in any real sense.**

1 Eric Mills Holmes and Mark S. Rhodes, *Appleman on Insurance*, § 1.3, at 10 (2d ed. 1996) (emphasis supplied).

Young v. Progressive Se. Ins. Co., 753 So. 2d 80, 85-86 (Fla. 2000) (emphasis in bolded italics added). Courts around the country have recognized that self-

insurance is a deliberate choice to retain risk. *See, e.g., Doucette v. Pomes*, 724 A.2d 481, 490 (Conn. 1999); *Fellhauer*, 838 N.E.2d at 137; *N. Indiana Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175, 184 (Ind. 2006); *Iowa Ass’n of Sch. Boards v. Iowa Dept. of Educ.*, 739 N.W.2d 303, 311 (Iowa 2007); *Moore v. Nayer*, 729 A.2d 449, 460 (N.J. App. Div. 1999); *Keyspan Gas E. Corp. v. Munich Reinsurance Am.*, 37 N.Y.S.3d 85, 90 (N.Y. App. Div. 2016), *aff’d*, 31 N.Y.3d 51 (2018); *Martin v. Powers*, 505 S.W.3d 512, 519 (Tenn. 2016); *Bordeaux Inc. v. Am. Safety Ins. Co.*, 186 P.3d 1188, 1192 (Wash. Ct. App. 2008); *Jackson v. Donahue*, 457 S.E.2d 524, 528 (W.Va. 1995); *Hillegass v. Landwehr*, 499 N.W.2d 652, 655 (Wis. 1993).

There are a number of advantages to self-insurance. The most important is the potential for cost-saving. Andrew P. Lannon et al., *Risk[y] Business: Transitioning to a Stand-Alone Self-Insurance Program*, 46 Stetson L. Rev. 563, 577 (2017). Self-insurers do not have to pay premiums, instead setting aside reserves for “unexpected liabilities.” *Id.* And as a result, self-insurers enjoy greater cash-flow. *Id.*

But the election to self-insure is based largely on the entity’s perceived ability to predict future losses. Goode, *supra*, at 1252-53. An entity’s unjustified perception that it can do so creates “the potential for an unanticipated catastrophic loss or accident. By self-funding losses, a major event can quickly deplete the reserves.” Lannon et al., *supra*, at 578 (footnote omitted).

That exposure is an obvious potential outcome of an entity's choice to self-insure: "Unlike an insurance policy holder, a self-insuring municipality "bears all risks itself, and settlements or awards are paid directly from government coffers.'"" *Philadelphia Indem. Ins. Co. v. Pace Suburban Bus Serv.*, 67 N.E.3d 556, 566 (Ill. App. Ct. 2016) (quoting *State Farm Mut. Auto. Ins. Co. v. Du Page Cnty.*, 955 N.E.2d 67, 74 (Ill. App. Ct. 2011)). As federal District Judge Jack Weinstein said, "Self-insurance is called 'going bare' for a reason." *Uniroyal Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1392 (E.D.N.Y. 1988) (citation omitted).

D. Financial impact and the interpretation of subsection 768.28(5).

The incident at Stoneman Douglas High School in Parkland on February 14, 2018, resulted in the deaths of seventeen students and staff and serious injuries to seventeen others. Applying the Fourth District's interpretation of subsection 768.28(5)'s "incident or occurrence" from *Barnett*, the Broward County School District's exposure for the events of February 14 is limited to \$300,000. By contrast, Appellants' interpretation of the statute would expose the district to \$6,800,000, or \$200,000 for each shooting victim.

The Fourth District's interpretation in *Barnett* was motivated in part by the concern that sovereign immunity is meant to protect the financial resources of government entities, here the school district. *See Barnett*, 262 So. 3d at 752, 754. The underlying though unexamined premise appears to be that such entities are self-

insured and, thus, would be at risk of large financial losses if they had to pay per shooting victim.

But as explained above, self-insurance is a deliberate choice. Entities like the Broward County School District have elected to forego the purchase of typical CGL insurance and instead retain the risk of losses, on the belief, apparently unjustified, that they can predict their future losses. These entities could just as easily purchase the typical CGL policy and vastly reduce their actual financial exposure for such losses. *See Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 264 (Fla. 2003) (interpreting “incident or occurrence” in a CGL policy to mean “each shooting of a separate victim constitutes a separate occurrence”).

A school district’s choice to self-insure and retain the risk should not be rewarded with an interpretation of “incident or occurrence” that allows it to escape the consequences of its decision.

E. The availability of “active shooter” insurance.

Recent developments in the insurance market are also relevant to the Fourth District’s premise in *Barnett*.

The unfortunate rise in mass shootings on school campuses has led to greater demand for and the growing availability of “active shooter” insurance for school districts. Suzanne Barlyn & Noor Zainab Hussain, [*Insurers’ new business: ‘active shooter’ policies for U.S. schools*](#), Reuters, Mar. 21, 2018; Natalie Delgadillo, [*With*](#)

[*Shootings on the Rise, Schools Turn to 'Active Shooter' Insurance*](#), Governing, June 2018; Hannah McCartney, [*Cincinnati insurer explains: What is active shooter coverage?*](#), Cincinnati Bus. Courier, Sept. 7, 2018.

Active-shooter insurance “are policies that protect companies [and other entities] from liability arising from random violence, including mass killings conducted by a lone wolf with a gun or other handheld weapon.” Lawrence Hsieh, [*New products show insurers reassessing risk in U.S. mass shootings*](#), Reuters, Feb. 20, 2018.

Active-shooter insurance is attractive because it can cover expenses beyond the coverage provided by a CGL policy: “victim lawsuits, building repairs or total reconstruction, legal fees, medical expenses[,] and counseling.” Amy Rock, [*More School Districts Purchasing Active Shooter Insurance*](#), Campus Safety Magazine, Mar. 22, 2018. Policies also typically include preventative measures such as security assessment. *Id.*; McCartney, *supra*.

The rise in demand and increasing availability of active-shooter insurance has resulted in cost-effective solutions for school districts. While districts used to be reluctant to purchase them because they were expensive and had limited coverages, one insurance broker who provides active-shooter insurance stated “that current coverage is more affordable and flexible for schools.” Jonathan Berr, [*Schools are now buying insurance against mass shootings*](#), CBS News, June 8, 2018.

The same broker also said that “premiums are now a third of what they were two years ago.” Rock, *supra*. The article reported that “[p]remiums can range from \$1,400 per year for \$1 million in coverage for a small private school to \$50,000-\$100,000 for a \$5 million to \$10 million policy for a large public school district, according to industry executives.” *Id.* The import of the above is that small school districts with limited resources can purchase a smaller amount of coverage at a miniscule cost, while large school districts (and consortia of smaller districts like the Panhandle Area Educational Consortium) can purchase a significant amount of coverage at a reasonable cost.

In just Florida, seven South Florida school districts, including in Palm Beach County, have already chosen to purchase active-shooter insurance since the Parkland shootings. *Id.*

School districts in Florida now have the option, already exercised by some, of purchasing active-shooter insurance that is specifically designed to reduce their financial risk for mass shootings on their campuses. If those that choose to self-insure continue to do so despite this, they should not be able to then plead poverty to obtain an interpretation of subsection 768.28(5)’s “incident or occurrence” that minimizes the risk they subject themselves to.

CONCLUSION

For the above reasons, the FJA supports Appellants' position on the interpretation of Florida Statutes subsection 768.28(5).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished to all counsel on the attached service list by e-mail on June 14, 2019.

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*Representatives of the Estate of Alyssa
Alhadeff deceased; Samantha Fuentes,*

a minor, by and through her parents

and guardians James Grady and

Sovereign Grady; Samantha Mayor, a

minor, by and through her parents and

guardians Jess Mayor and Ellyn Mayor;

Kyle Laman, a minor, by and through

Her parents and guardians Franz

Laman and Marie Laman