

IN THE SUPREME COURT OF FLORIDA

Case Number: SC19-487

FREDERIC GUTTENBERG, et al.,

Appellants,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY

Appellee.

**ANSWER BRIEF (ON THE MERITS) OF APPELLEE,
THE SCHOOL BOARD OF BROWARD COUNTY**

Barbara J. Myrick, Esq.
Office of the General Counsel
600 SE Third Avenue
11th Floor
Fort Lauderdale, FL 33301
754-321-2150
pleadings@browardschools.com

Eugene K. Pettis, Esq.
Debra P. Klauber, Esq.
One Financial Plaza
7th Floor
Fort Lauderdale, FL 33394
954-328-5462
service@hpslegal.com

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STATEMENT OF THE CASE AND FACTS

The facts giving rise to this case are horrific, and undisputed. Given that, there is no reason for this Court to accept the Appellants' invitation to review a newspaper article in order to obtain any underlying "facts."

On February 14, 2018, 17 individuals were killed, and 17 injured, as the result of a "murderous rampage" at Marjory Stoneman Douglas High School (R 1-9, ¶¶ 6, 10). The original Plaintiff filed a declaratory judgment action in which she alleged that she had placed the School Board on pre-suit notice of her intent to file a claim against it for the injuries suffered by her daughter, as she was required to do pursuant to section 768.28 of the Florida Statutes (R 1-9, ¶ 7, Exh. 1). She asked the trial court to interpret the statute to determine whether the School Board's exposure was capped by the language of that statute (R 1-9, ¶¶ 11-15).

The School Board, by way of a counterclaim, also sought a declaratory judgment, explaining that it had been put on notice by a "number of parties" of their intent to sue the School Board for its "negligence." (R 10-16). The School Board argued that the statutory cap applied to limit its exposure for this incident (R 10-16). The School Board was "not seeking to limit the compensation available to all of the victims of this tragedy," but argued that any additional recovery by the victims needed to be approved by the Legislature (R 10-16). Twelve additional families who were impacted by the event, the now-Appellants, sought to intervene,

which the School Board did not oppose and the trial court allowed (R 45-56; R 71-73).

Before the trial court heard the legal arguments on the School Board's motion for summary judgment (R 17-34; R 59-70), the Fourth District issued its opinion in *Dep't of Fin. Servs. v. Barnett*, 262 So. 3d 750 (Fla. 4th DCA 2018). There, under similar facts involving multiple victims of gunshot wounds who were asserting claims of the negligence against Department of Children and Families, the Fourth District applied the cap. The court held that "section 768(5) waives sovereign immunity *up to* \$200,000 for *all claims or judgments* arising out of the claims of negligent supervision ... brought in this case." *Id.* at 755.

The trial court in this case followed the Fourth District's decision in *Barnett*, as it was required to do, and granted the School Board's summary judgment. The Intervenors appealed (R 96, R 98-106).

Subsequently, the Fourth District certified the following question to this Court in *Barnett*:

WHEN MULTIPLE CLAIMS OF INJURY OR DEATH ARISE FROM THE SAME ACT OF NEGLIGENCE COMMITTED BY A STATE AGENCY OR ACTOR, DOES THE LIMITATION ON THE WAIVER OF SOVEREIGN IMMUNITY IN SECTION 768.28(5), FLORIDA STATUTES, CAP THE LIABILITY OF STATE AGENCIES AT \$200,000 FOR ALL RESULTING INJURIES OR DEATHS, AS CLAIMS AND JUDGMENTS "ARISING OUT OF THE SAME INCIDENT OR OCCURRENCE"?

Dep't of Fin. Servs. v. Barnett, 268 So. 3d 758 (Fla. 4th DCA 2019). After this Court accepted jurisdiction in *Barnett*, the School Board suggested that the Fourth District certify this case to this Court pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(B) and 9.125(c). The Intervenor and the Fourth District agreed, and this Court accepted jurisdiction. The cases are set for oral argument together.

There are currently twenty-three lawsuits that have been filed in Broward County Circuit Court in which victims from Marjory Stoneman Douglas High School have asserted claims against the School Board, among others, for the purported negligence of its agents and employees.¹ Indeed, each of the Intervenor has now filed a formal lawsuit against the School Board.

¹ See *In re: Marjory Stoneman Douglas Cases*, Broward Circuit Case Number: CACE 19-80000(26), consolidated for initial liability phase, including discovery with: CACE 19-008077 (03); CACE 19-007722 (08); CACE 19-007939(13); CACE 18-008568(26); CACE 19-007725(03); CACE 19-007699(13); CACE 19-007920(25); CACE 19-007720(02); CACE 19-008062(04); CACE 19-007924(14); CACE 19-007784(14); CACE 19-008071(05); CACE 19-007737(08); CACE 19-007802(05); CACE 19-007696(04); CACE 19-001507(08); CACE 18-009607(26); CACE 19-007727(08); CACE 19-007723(25); CACE 19-007736(13); CACE 19-007733(08); CACE 19-007732(14); CACE 19-007272(08).

SUMMARY OF THE ARGUMENT

The question presented in this case is whether the statutory cap set forth in section 768.28(5) should be applied to limit the government's exposure as a result of an event that resulted in a number of casualties and injuries. The answer is yes.

The Florida Legislature did three things when it enacted the *partial* waiver of sovereign immunity set forth in section 768.28. First, it decided that citizens injured by the tortious acts of public employees should be allowed to recover for damages. Second, it placed a cap or limit on the damages that could be recovered in order to protect the public treasury. Third, it did not cap the recovery to which a plaintiff or claimant is entitled, but retained the right to supplant that cap only by further act of the Legislature.

A review of the legislative history and the Florida cases interpreting this cap establish that the Legislature intended to limit the government's exposure for a given event, unless the Legislature, itself, determines that additional recovery is appropriate in a given case. The statute allows injured parties to recover against state agencies, but also caps the exposure to allow those governmental entities and agencies the ability to guard against the risk created by the decision to amend the common law and *partially* waive sovereign immunity. It does not, however, limit the recovery that is available to those injured parties; rather, it allows the Legislature to remain the final gatekeeper over the expenditure of public dollars.

We cannot allow the emotions from what is an undeniably tragic event lead to a decision that could destabilize the safety net that has been built around any excessive infringement on public funds. As noted in the amicus briefs filed in this case and in *Barnett*, the Appellants' proposed reading of the statute would render the cap illusory and will have an impact that is far beyond the scope of this case. It would create significant exposure that was never intended by the Legislature, which would, in turn, endanger public resources and impact the services the municipalities, counties, school board, law enforcement agencies and other governmental agencies and entities provide across Florida.

The Fourth District's decision in *Barnett*, followed by the trial court here, properly concluded that when the statute is strictly, or narrowly, construed the cap applies to a case such as this, where there are multiple injuries resulting from the purported negligence of state employees. This Court should reaffirm that: (1) the Legislature has enacted a *limited* waiver of sovereign immunity; (2) the statutory cap applies not to limit the Appellants' recovery, but to limit the School Board's potential exposure arising out of this tragic event; and (3) any additional recovery beyond the cap, or changes to the laws governing sovereign immunity, should come from the Legislature.

ARGUMENT

- I. When the Legislature enacted the *partial* waiver of sovereign immunity, it simultaneously capped the liability of governmental entities and agencies. The cap does not, however, limit what an individual plaintiff can recover; it simply requires an act of the Legislature to approve any additional impact on public funds.**
- A. The statute, which constitutes a *partial* waiver of sovereign immunity, must be narrowly construed to protect the public treasury.**

The Appellants have seemingly ignored their insurmountable hurdle. First, they admit that the common usage of the terms “incident” and “occurrence” are insufficient to allow this Court to interpret the statute. Next, they acknowledge that the Court must resort to statutory construction and look to the legislative intent underlying the statute. Yet they claim, without a clear explanation, that this Court should not resort to “a strict-construction canon.”

This Court *does*, however, strictly or narrowly construe statutes such as the one at issue here. The statute, section 768.28(5), which constitutes a *partial* waiver of sovereign immunity, alters the common law, and must be narrowly construed to protect the public treasury. This Court has held that the statutory waiver of sovereign immunity must be “clear and unequivocal” or “clearly expressed” and “strictly construed.” *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958); *Gerard v. Dep’t of Transp.*, 472 So. 2d 1170, 1172 (Fla. 1985).

In *Berek v. Metro. Dade County*, 396 So. 2d 756 (Fla. 3d DCA 1981), *approved*, 422 So. 2d 838 (Fla. 1981), the Third District specifically addressed the statutory cap set forth in subsection (5), and held that it must be construed strictly, against any waiver of immunity beyond the amount set forth in the statute. *Id.* at 758. As similarly explained in *Windham v. Fla. Dep't of Transp.*, 476 So. 2d 735, 739 (Fla. 1st DCA 1985), “sovereign immunity is the rule, rather than the exception,” and “a waiver of sovereign immunity should be strictly construed in favor of the state and against the claimant.”

In the companion case, *Barnett*, the Fourth District made it clear that because the waiver of sovereign immunity is “an abrogation of the sovereignty of the state,” the courts have strictly construed any statute waiving it. *Barnett*, 262 So. 3d at 752. In its ultimate conclusion, the court found that it “must construe [the statute] strictly,” and that “the statute does not clearly and unambiguously waive sovereign immunity to the extent that the shooting of each child constitutes a separate occurrence.” *Id.* at 754. The court went on to hold that “to construe it in such a manner would be contrary to the policies supporting sovereign immunity.” *Id.* Additionally, in its order certifying the issue to this Court, the Fourth District also acknowledged that it had narrowly construed this provision to limit the waiver of sovereign immunity, as it was compelled to do. *See Barnett*, 268 So. 3d at 759.

Despite the Appellants' attempts to side-step this hurdle, the need for a narrow construction of this statute, in favor of the government and to protect the public treasury, is the simple reason why this Court should follow the Fourth District's decision in *Barnett* and apply the statutory cap.

B. Statutory Construction

1. The statutory language caps the government's exposure for a single event, absent the further involvement of the Legislature.

Statutory construction begins with a review of the "plain and obvious meaning of the statute's text." *W. Fla. Reg'l Med. Ctr. v. See*, 79 So. 3d 1, 9 (Fla. 2012). Here, the subject provision in subsection (5) of section 768.28 states:

Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a 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.

This provision does not limit the recovery to which injured parties are entitled. It simply caps the exposure to the public agency or governmental entity, like the School Board here. The statute goes on to provide a method by which injured parties can recover in excess of the statutory cap, explaining:

. . . a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$200,000 or \$300,000 as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the

Legislature, but may be paid in part or in whole only by further act of the Legislature.

Id. This process “allows the Legislature, not a court, to determine whether further encroachment on the public treasury is warranted in a particular case.” *Berek*, 396 So. 2d at 759 n.4.

The specific language at issue here is the statute’s application of an aggregate cap to all claims arising out of the same “incident or occurrence.” As recognized by the Fourth District in *Barnett*, the Legislature has not defined these terms, but several cases have applied the statutory language to different factual scenarios. *Barnett*, 262 So. 3d at 752.

“To discern legislative intent, this Court looks first to the plain and obvious meaning of the statute’s text, which a court may discern from a dictionary. If that language is clear and unambiguous and conveys a clear and definite meaning, the Court will apply that unequivocal meaning and not resort to the rules of statutory interpretation and construction. If, however, ambiguity exists, the Court should look to the rules of statutory construction to help interpret legislative intent.” *See*, 79 So. at 9.

As the other briefs suggest, the terms “incident” and “occurrence” are generally defined as:

Incident: “an instance of something happening; an event or occurrence.”
Occurrence: “an incident or event.”

Oxford English Dictionary 2d. Ed. (1989). Both terms are synonymous with an “event”, which is defined as “a thing that happens or takes place, especially one of importance.” *Id.*

When considering the common usage of these words, it is clear that the legislative intent was to limit multiple claimants involved in the same “event” to a specific dollar amount, unless the Legislature considers the matter, through a claims bill, and determines that additional compensation is appropriate. To read the statute any other way would be both unreasonable and contrary to the intent of the statute. A review of the legislative history further supports this interpretation.

2. The Legislature intended to limit the waiver of sovereign immunity and cap the amount that could be paid by government agencies and entities.

Sovereign immunity is a doctrine that operates to shield the sovereign (governmental entities) from suit in the sovereign’s courts. *City of Miami v. Valdes*, 847 So. 2d 1005 (Fla. 3d DCA 2003). Under this doctrine, adopted in Florida in 1822, compensation for wrongs committed by governmental entities could be obtained “solely from the Legislature.” *Id.* at 1007. The Florida courts have found that the doctrine of sovereign immunity rests on two public policy considerations: (1) “the protection of the public against profligate encroachments on the public treasury;” and (2) “the need for the orderly administration of government which, in the absence of immunity, would be disrupted if the state

could be sued at the instance of every citizen.” *Berek.*, 396 So. 2d at 758 (citations omitted).

As noted in the initial brief, in 1953, the Legislature enacted section 455.06 (renumbered as section 286.28 in 1979) which allowed counties to obtain insurance and waived sovereign immunity, for accidents resulting from the use of state-owned motor vehicles, up to those insurance limits. Ch. 28-220, Laws of Fla. (1953)(App. 30). Simply put, this statute waived sovereign immunity to the extent of the available insurance coverage. *Avallone v. Bd. of County Comm’rs of Citrus County*, 493 So. 2d 1002, 1004 (Fla. 1986). It was subsequently amended to include bodily injuries or property damages resulting from the use of motor vehicles, watercraft or aircraft, and accidents or occurrences on state-owned property. *See* § 455.06, Fla. Stat. (App. 32-38).

In 1969, the Legislature enacted section 768.15 which waived sovereign immunity with certain exceptions (such as discretionary decisions), with no statutory limit. Ch. 69-116, Laws of Fla. However, that statutory provision was repealed in the same legislative session. Ch. 69-357, Laws of Fla.; *Everton v. Willard*, 468 So. 2d 936, 944 n.8 (Fla. 1985). It was subsequently revived for causes of action that accrued during a one-year period between July of 1969 and July of 1970. Ch. 71-165, Laws of Fla.; *Churruca v. Miami Jai-Alai, Inc.*, 353 So. 2d 547, 552 n.2 (Fla. 1977).

Thereafter, in 1973, the Legislature enacted the statute at issue here, section 768.28, which constitutes a *partial* waiver of sovereign immunity. Ch. 73-313, § 1(1), Laws of Fla. (App. 9-12). The introduction to the act specifically states:

AN ACT relating to claims against the state; authorizing suits against the state or any of its agencies or political subdivisions for the tortious acts of their employees; providing a definition; providing for assistance; providing for appeals; *providing for maximum claims*; providing for notice; providing for service; providing a maximum on attorneys' fees; providing that officers and employees shall not be personally liable; providing the limitations of this act shall not apply when the entity has insurance; providing that the state or its agencies or subdivisions may purchase insurance if allowed by law; providing that claims must be filed within a certain period; providing that no action may be brought under certain circumstances; providing an effective date.

(App. 9-12)(Emphasis, throughout this brief, is that of the authors unless otherwise indicated.) Of note, this statute only applied to claims where the governmental entity did not have liability insurance in place, and the earlier statute section 455.06) continued to apply – waiving sovereign immunity *up to* the limits of available insurance coverage. *See* § 768.28(10), Fla. Stat. (1973) (App. 10).

The enactment of section 768.28 was considered by the courts a “legislative declaration that the countervailing public policy of allowing citizens injured by the tortious action or inaction of the state to sue for the recovery of damages outweighed the state’s interest in not being discommoded by litigation.” *Berek*, 396 So. 2d at 758. “But at the same time the Legislature permitted the state to be sued, it chose to continue to protect against profligate encroachments on the public

treasury by *limiting the waiver of sovereign immunity to a specified dollar amount*” (then, \$50,000). *Id.* See also, *Avallone*, 493 So. 2d at 1004 (noting that there were “statutory caps” placed on the damages “unless there is insurance coverage in excess of the statutory cap”).

Critically, in 1977, the Legislature found it necessary “to clarify” these statutes for two reasons. First, to make clear that the statute also applied to municipalities; and, second, because local governments were “experiencing difficulty obtaining liability insurance and, if the liability insurance [was] available, the rates [were] exorbitant and often beyond the ability of the local taxpayers to afford.” Ch. 77-86, Laws of Fla. (App. 13-14).

Accordingly, a section was added that specifically allowed the state and its agencies and subdivisions to: be self-insured, to enter into risk management programs, to purchase liability insurance, or to have any combination thereof. § 768.28(14), Fla. Stat. (1977) (now codified in § 768.28(16), Fla. Stat.). The Legislature also repealed subsection (10), which extended tort liability beyond the statutory limit (then \$50,000/\$100,000) to the extent that liability insurance was in place. Ch. 77-86, Laws of Fla. (App. 13-14). As explained in the Summary of General Legislation (1977), the act was designed to:

. . . repeal the provision which extends tort liability beyond the \$50,000/\$100,000 *ceilings* to the extent that a government entity ha[d] insurance in excess of those amounts. Therefore, the *ceilings* shall apply regardless of how much insurance coverage exists.

Fla. J. Legis. Mgmt. Comm., 1977 Summary of General Legislation at 228-29 (1977)(<https://fall.fsulawrc.com/collection/FlSumGenLeg/FlSumGenLeg1977.pdf>).

Subsequently, in 1987, the Legislature repealed section 286.28 altogether, and further amended section 768.28(5) to further clarify that government agencies were permitted to resolve claims within the limits of available insurance coverage, but that the existence of the insurance coverage did not constitute a further waiver of sovereign immunity or increase the agency's liability beyond the statutory limits (then \$100,000/\$200,000). Ch. 87-134 § 3, Laws of Fla. (App. 25-27). *See also*, FLA. H.R. JOUR. 426 (Reg. Sess. May 13, 1987); FLA. H.R. JOUR. 859 (Reg. Sess. June 1, 1987)(noting that HB 285 was designed to “provide political subdivisions with authority to settle claims under certain circumstances” and to “clarify the extent of waiver of sovereign immunity by political subdivisions which purchase liability insurance”); *Pensacola Jr. College v. Montgomery*, 539 So. 2d 1153, 1155 n.1 (Fla. 1st DCA 1989)(explaining the repeal of section 286.28 and clarifying that the purchase of liability insurance did not constitute a further waiver of sovereign immunity).

In other, more recent revisions, the legislative staff has similarly described these amounts as the “maximum statutory dollar caps for damages.” *See* Fla. S. Comm. on Gen. Gov't Approp. and Comm. on Govtl. Oversight & Prod., CS for SB 1138 (2003) Staff Analysis 2 (April 15, 2003). Pertinent to this case, that cap

was increased to \$200,000/\$300,000 for claims arising on or after October 1, 2011. Ch. 2010-26, Laws of Fla.; § 768.28(5), Fla. Stat. Again and again, the Legislature has set forth the intent that this constitutes a cap, or ceiling, on the amount that can be recovered against a governmental entity or agency like the School Board here.

3. The Florida courts have consistently held that the Legislature intended to put a cap, or ceiling, on the government's exposure.

Another way for this Court to consider the legislative intent is to look to the existing case law to see how the statute has been interpreted. The cases, too, support the argument that there is a cap on the government's exposure, but not on the injured parties' right to recover.

a. The statute has been construed as providing a "cap," a "ceiling," or a "maximum" limit on what the government can be required to pay, absent a further act of the Legislature.

A review of the case law discussing subsection (5) of the statute shows that this provision was intended place a "cap," a "ceiling," or a "maximum" limit on the exposure to governmental entities that would result from the Legislature's decision to *partially* waive sovereign immunity. This Court addressed the issue in *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979), when it upheld the constitutionality of the "statutory *cap*." Shortly thereafter, when discussing the applicability of that *cap* to municipalities, this Court referenced the "qualified power of a legislative body to impose *a ceiling on claims recoverable in*

a court proceeding” and specifically found the statute, and its cap, applicable. *Cauley v. City of Jacksonville*, 403 So. 2d 376, 385 (Fla. 1981). Similarly, in *Gerard*, 472 So. 2d at 1170, this Court affirmed a decision which held that section 768.28(5) expressly imposes a *cumulative per-incident limitation on aggregate recovery*.”

This Court also referred to the sovereign immunity cap in *St. Mary’s Hosp., Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), when discussing statutory caps in the context of medical negligence. There, this Court noted, “where the Legislature has intended to limit claimants’ damages *in the aggregate* in other contexts, they have done so explicitly.” *Id.* at 968 (discussing § 768.28(5)).

A review of the decisions of the Florida district courts discussing this cap, regardless of the context, further supports an interpretation that the cap is intended to be the most the governmental entity or agency will be required to pay without the further involvement of the Legislature. *Dep’t of Env’tl. Prot. v. Garcia*, 99 So. 3d 539, 542 (Fla. 3d DCA 2011)(noting that the city paid the “statutory limits of liability”); *Kilpatrick v. Ogden Ent., Inc.*, 745 So. 2d 492 (Fla. 1st DCA 1999) (county paid “statutory maximum amount of its liability under section 768.28(5)”); *Evanston Ins. Co. v. City of Homestead*, 563 So. 2d 755 (Fla. 3d DCA 1990)(explaining that the “statutory maximum amount of recovery is an absolute limit to a city government’s liability”); *Orange County v. Gipson*, 539 So. 2d 526,

530 (Fla. 5th DCA 1989)(“section 768.28(5) imposes a cumulative per incident limitation on total recovery”); *Jaar v. Univ. of Miami*, 474 So. 2d 239, 244 (Fla. 3d DCA 1985)(statutory cap was the “limit of liability” for the state agency); *Rumbough v. City of Tampa*, 403 So. 2d 1139, 1142 (Fla. 2d DCA 1981)(multiple claims had to be “aggregated” for the purposes of the \$100,000 maximum).

As explained in *Berek*, when the Legislature enacted this statute, putting in place a *partial or limited* waiver of sovereign immunity, it simultaneously, in subsection (5) chose to place a specific dollar limit to also protect the public treasury unless it, the Legislature, felt it appropriate to allow recovery beyond that cap. *Berek*, 396 So. 2d at 758. The concept that this cap is, indeed, the maximum exposure that should be faced by a governmental entity, is also furthered by Florida decisions applying this statute to various factual scenarios. For example, the Florida courts have concluded that the cap:

- includes attorneys’ fees and costs;²
- is also shared by *all* governmental entities or agencies involved in the subject incident or accident;³ and

² *Berek*, 396 So. 2d at 759 (“[i]n a word, the Legislature has said \$50,000, whatever the components may be, is the *most* the Legislature will permit a court to award a claimant”). *See also*, *Gallagher v. Manatee County*, 927 So. 2d 914, 918 (Fla. 2d DCA 2006)(discussing the statutory limitation on liability as “encompassing all components of a monetary judgment); *Evanston*, 563 So. 2d at 758 (cap includes “damages, costs and post judgment interest”).

³ *Gerard*, 472 So. 2d at 1172 (noting that the cumulative, aggregate limit applies “regardless of whether the source is a single governmental entity or multiple governmental entities”); *Gipson*, 539 So. 2d at 530 (cap applies regardless of

- applies regardless of the existence of insurance coverage in excess thereof. *See* § 768.28(5), (16), Fla. Stat.

The clear language of the statute, the legislative history, and the Florida decisions interpreting the statute, all demonstrate that the language in subsection (5) was intended to provide Florida's public entities and agencies with a maximum amount of risk against which they could choose to self-insure, pool resources, or obtain liability insurance to guard against. It was, and is, a cap on the government's exposure.

b. The *Barnett* decision properly interpreted the statute and applied the cap to multiple claims brought against a government agency by individuals who were shot by a third party.

Barnett is the only Florida decision that interpreted this provision of the statute in a case involving multiple claimants and multiple claims of negligence against a government agency. *Barnett* was properly decided and the Fourth District's interpretation should be adopted by this Court.

The Fourth District's opinion first discussed sovereign immunity and the need for a strict construction of "any statute waiving immunity to protect the public purse." *Barnett*, 262 So. 2d at 752. The lawsuit arose out of the purported negligence of DCF in investigating the perpetrator who shot and injured or killed

whether the source is a single governmental entity or multiple governmental entities)(included claims against city, county and school board).

the children, and the court concluded that the statutory cap applied. Ultimately, the Fourth District concluded that the statute “does not clearly and unambiguously waive sovereign immunity to the extent that the shooting of each child constitutes a separate occurrence. To construe it in such a manner would be contrary to the policies supporting sovereign immunity.” *Id.*

The Fourth District also recognized that even though the statute capped the overall recovery against DCF, the families were not without a remedy. “[T]he Legislature has deemed it necessary to assure the protection of the state’s revenues to the good of the entire population.” *Id.* at 754. The court recognized that if a change is to be made for situations such as this, where multiple parties make claims, the remedy is one for the Legislature. *Id.* at 755. The same rationale applies to this case.

c. All the Florida cases involving multiple claimants have applied the cap.

Several other Florida decisions have addressed the cap in situations involving multiple claimants (more than two) seeking recovery. Although those cases involved claims of property damage, as opposed to personal injuries, in each instance, the court applied the cap to limit the government’s exposure. In fact, there is not a single reported appellate decision in Florida where multiple plaintiffs have been permitted to recover any amount over the cap in a legal proceeding (*i.e.*, without the additional involvement of the Legislature, as the statute contemplates).

In *Rumbough*, a number of homeowners sued the city for damages caused to their homes by the operation of a nearby sanitary landfill (dump). Because it found that an “occurrence” is generally interpreted to include liability for damages which are inflicted over a period of time, the appellate court held that the cap applied to the damages recoverable by all of the homeowners. 403 So. 2d at 1142. The court specifically addressed the issue of “continuing torts” since the claim was one for nuisance, and noted that it was unable to see “how such torts could be divided into time segments so as to permit multiple recoveries.” *Id.* at 1143. As noted in *Barnett*, the court in *Rumbough* tied the “occurrence” to the negligence of the state, not to the damages resulting from the negligent acts. *Barnett*, 262 So. 2d at 753.

There was a similar result at the trial level in *Trianon Park Condo. Ass’n. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985). There, a number of condominium owners discovered structural defects and sued the city for negligently inspecting and certifying the construction of their building. Although this Court ultimately held that the city had no liability, at the trial court level, the jury’s verdict, in favor of 49 unit owners, was “limited to the maximum amount provided under section 768.28(5).” *Id.* at 915.

The Appellants also seem to have overlooked, or ignored, the First District’s decision in *Windham*, 476 So. 2d at 735. The question in *Windham* was whether the partial waiver of sovereign immunity in section 768.28 could be applied to a

cause of action that accrued after the statute went into effect, even though the purportedly negligent actions took place long before. *Id.* at 738-39. In discussing the term “incident,” as used in the statute, the First District first recognized that it is “capable of conveying numerous meanings.” Next, the court noted that the crucial question was: “whether the actual injury complained of is to be regarded under the statute as the ‘incident’ or whether the ‘incident’ is the wrongful act or event causing the injury.” *Id.*

Ultimately, after discussing the underlying public policy related to sovereign immunity, and the need for a strict construction, the court concluded that it was *the negligent act of the government* that constitutes the incident that gives rise to liability under the statute. *Id.* Even though the *Windham* court was addressing the timing of the injury, its interpretation of the term “incident,” can also be applied in the context of this case. It is the purported negligence of the School Board that gives rise to its potential responsibility under the statute, not the independent acts of the individual who caused the injuries and deaths at issue.

d. Similarly, all the negligence cases have applied the cap.

Similarly, the Florida courts have addressed the issue of sovereign immunity in a number of negligence cases, albeit with only one or two plaintiffs, including some where plaintiffs have asserted (as they do here and in *Barnett*) that there were

multiple, independent acts of negligence on the part of the state's agents and employees. Again, in each instance, the court has applied the statutory cap.

In *State Dep't of Health and Rehab. Servs. v. T.R.*, 847 So. 2d 981 (Fla. 3d DCA 2002), the court addressed the claims of two girls who had been in the foster care system for 13 years. They claimed that HRS had negligently failed to protect them from abusive doctors, foster parents and other third parties. Each child claimed to have been injured multiple times during the many years in which they were in foster care, through separate acts of physical abuse. The Third District found that the trial court had misinterpreted subsection (5) of the applicable statute when it asked the jury determine the number of "incidents" of negligence that had occurred. *Id.* at 984. Rather, the court found that each girl had a *single* claim for the department's negligence while under its care, noting:

The fact that the behavior at issue spanned a number of years and included a number of different actions by a number of state employees does not change the fact that the claims in full amounted to no more than each girl's single claim against the department for the injuries she suffered while under its supervision.

Id. at 985.

The court even commented on the fact that the plaintiffs' interpretation of the statute would "lead to the absurd result of making the statutory cap prescribed by section 768.28(5) meaningless," noting:

. . . such a reading would allow a plaintiff, after having been operated on, to accuse a state hospital surgeon of using the wrong medicine,

performing some procedure too slowly, and closing in an improper manner, and as such performing three separate “incidents” of negligence, thereby subjecting the state hospital to three separate . . . caps. Moreover, in the weeks that followed, if this patient’s doctors or nurses did several more things in a negligent fashion, the plaintiff could proceed to tack on a few more incidents, and take advantage of a few more . . . statutory caps. We do not find such an interpretation of section 768.28(5) to be either reasonable or functional.

Id. While it is true that each of the girls had her own individual claim against the department, the state agency’s responsibility was still limited by the statutory cap. *See also, Barnett*, 262 So. 3d at 753 (noting that the *T.R.* court held that each child had a single claim despite the fact that there were “several acts of negligence by various state employees included in that claim”).

In *Gipson*, 539 So. 2d at 529-30, two children drowned in a drainage canal owned by the county, which encompassed sewer pipes owned by the city. After settling the claim, the city sought contribution from the county and the school board. When discussing the total exposure to the government, the court explained that “[s]ection 768.28(5) imposes a *cumulative per incident limitation on total recovery.*” *Id.* at 530. The court agreed with the city that the statutory cap was the “*absolute maximum*” to which it could be exposed. *Id.* at 529. *See also, State Bd. of Regents v. Yant*, 360 So. 2d 99, 101 (Fla. 1st DCA 1978)(applying statutory *cap* to minor claimant and his mother’s independent claims resulting from agency’s negligence); *Dep’t of Health and Rehab. Servs. v. McDougall*, 359 So. 2d 528, 532 (Fla. 1st DCA 1978) (noting that statutory *cap*, or “\$100,000 *ceiling*” would apply

to recovery to decedent's widow and children for negligence of the sheriff's office).

Here, the School Board can only be held responsible for the negligence of its own agents and employees for operational-level decisions, if that purported negligence can ultimately be causally linked to the injuries and deaths at issue. The School Board *cannot*, however, be held liable for the independent, and clearly intentional, actions of the shooter himself. So regardless of the number of shots, or the number of bullets, the Court's analysis from a sovereign immunity context must be focused on the purported negligence of the School Board which, as the case law suggests, constitutes a single incident or occurrence, and is subject to the cap.

The Appellants' attempt to circumvent this interpretation, by arguing that the School Board's agents and employees may have engaged in separate and distinct acts of negligence, finds no support in the case law. As explained in these negligence cases, regardless of the number of separate *acts* of negligence on the part of public agents or employees, there is but a single *claim* of negligence against the state agency. Indeed, the courts have consistently applied the caps in cases involving more than one governmental entity or agency which claims, it seems, cannot be based on a single act of negligence by a single government actor. *See* fn. 3, *supra*.

4. Courts from other jurisdictions have similarly applied caps to multi-claimant, tragic incidents. And, in school shooting cases across the country, plaintiffs' claims against school-based defendants have been dismissed altogether.

Other states have addressed the issue of how sovereign immunity caps should be handled in cases against school boards and school districts by numerous claimants. These cases clearly discuss the rationale underlying partial waivers of sovereign immunity, as well as the continuing need for some limitation on the government's exposure in incidents involving multiple injuries or deaths.

Most recently, in *Larimore Public School Dist. No. 44 v. Aamodt*, 908 N.W.2d 442 (N.D. 2018), the parents of children who were injured or killed in a bus/train collision made claims for damages. The school district and its insurance carrier brought an interpleader action and deposited funds equal to the statutory damage cap into the court's registry. The parents sued, claiming the cap was unconstitutional. The Supreme Court of North Dakota concluded that the damage cap did not violate the families' constitutional rights and upheld the applicability of the cap because of the public interest served by it:

Unlike private entities, political subdivisions are required to provide certain enumerated public services and there is a legitimate governmental goal for fiscal planning and continued financial viability of local governmental entities within their applicable taxing authority. . . . The statutory damage cap is part of a statutory framework that limits liability to an amount within affordable coverage for political subdivisions, relative to their limited taxing authority. The damage cap for the liability of a political subdivision advances that legitimate legislative goal.

Id. at 459. The court was not unmindful of the plaintiff's claims that they had suffered catastrophic injuries, but nevertheless recognized the dangers inherent in allowing an award that could spell financial ruin for a public defendant. *Id.* at 460.

Along the same lines, the Supreme Court of Utah upheld its statutory aggregate cap in a case involving two high-school students who were killed and three who were seriously injured in an automobile accident on a return trip from an out-of-state debate tournament. *See Tindley v. Salt Lake City School Dist.*, 116 P.3d 295 (Utah 2005). In discussing the objective of the statutory cap, the court noted:

By limiting the damages payable by governmental entities, the Act protects an entity's operating budget from the possibility of substantial damage awards and the financial havoc they may wreak. We find this to be a legitimate governmental purpose. Although we recognize that the aggregate cap may impose significant financial and emotional burdens on those injured by a governmental entity, it is not our province to rule on the wisdom of the Act or to determine whether the Act is the optimal method for achieving the desired result. Rather, our inquiry is limited to the Act's constitutionality.

Id. at 303. Again, the court upheld the cap and applied it to the case. *See also, Los Fresnos Consol., Indep. School Dist. v. Southworth*, 156 S.W.3d 910, 919 (Tex. App. 2005)(noting that school district could only be held liable "up to" the maximum limit set forth in sovereign immunity statute for multiple injuries arising out of bus accident).

The same issue was addressed by the Supreme Court of Oklahoma in a case where a number of young children were injured, or killed, when a hot water heater exploded in an elementary school cafeteria. *Wilson v. Gipson*, 753 P. 2d 1349 (Okla. 1988). The school district's insurance carrier tendered to the court, by way of an interpleader, the school district's "maximum liability" pursuant to the state's tort claims act, which allowed a total aggregate recovery of \$300,000 "for any number of claims arising out of a single occurrence." *Id.* at 1351. Again, the court recognized the purposes of such a statutory cap: to compensate victims of government tortfeasors, while at the same time protecting the public treasury. *Id.* The court rejected the constitutional challenges and held that the statutory cap applied to the claims.

These cases provide insight into the underlying reasons why there must be a cap on the government's exposure, and why states around the country have only allowed *limited* or *partial* waivers of sovereign immunity. Notwithstanding the states', including Florida's, decision to allow injured citizens to recover, there remains a legitimate governmental interest in also making sure that such claims do not place unreasonable financial burdens on governmental agencies, like the School Board, whose resources are, almost by definition, already strained.

Additionally, it bears noting that, across the country, victims of mass shootings have been precluded from recovering *altogether* against school boards

and their agents and employees. In a recent decision, a superior court in Connecticut concluded that governmental immunity precluded the families of the victims of the shooting at Sandy Hook Elementary School from recovering against the Newtown Board of Education and the town of Newtown. *Lewis v. Newtown Bd. of Educ.*, 2018 WL 2419001, CV-156075650S (Conn. Super. May 7, 2018)(unpublished opinion). *See also, Rudd v. Pulaski County Special School Dist.*, 20 S.W.3d 310, 315 (Ark. 2000)(finding school district was immune from tort liability with respect to shooting death of high school student); *Kreutzer v. Alpo Leopold High School*, 409 P.3d 930, 940 (N.M. App. 2017)(holding that the tort claims act did not waive immunity for a negligence claim asserted against a school in a case involving a student-on-student assault on campus); *Parmertor v. Chardon Local Schools*, 47 N.E.3d 942, 948-49 (Ohio App. 2016)(affirming dismissal of claims against school district and school board members, following school shooting, based upon statutory immunity); *James v. Wilson*, 95 S.W.3d 875, 903 (Ken. App. 2002)(discussing, in school shooting case, that school boards, as agencies of the state, are shielded from civil liability under sovereign immunity).

Similarly, although several families obtained jury verdicts following the shooting at Virginia Tech (which verdicts were subsequently reduced in accordance with the state's limited waiver on sovereign immunity), the Virginia Supreme Court ultimately concluded that the school had no cognizable duty upon

which claims could be made. *Commonwealth v. Peterson*, 749 S.E.2d 307 (Va. 2016). Likewise, all the state and federal claims against school officials arising out of the shooting at Columbine High School were unsuccessful. *See, e.g., Ireland v. Jefferson County Sheriff's Dep't*, 193 F. Supp. 2d 1201 (D. Colo. 2002); *Castaldo v. Stone*, 192 F. Supp. 2d 1124 (D. Colo. 2001); *Ruegsegger v. Jefferson County School Dist.*, 187 F. Supp. 2d 1284 (D. Colo. 2001).

C. The Appellant's arguments about legislative intent are unavailing, and the cases they rely upon are inapplicable.

1. *Koikos* is not a sovereign immunity decision and it cannot be applied in this context.

The Appellants suggest that the Legislature borrowed the “incident” or “occurrence” language from the insurance industry in an effort to convince this Court to follow its decision in *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003). First, they have provided no actual legislative history to support their contention. Second, the Legislature did not choose to define the terms “incident” or “occurrence.” Nor did it remove the also undefined term “accident” from the related waiver statute in section 455.06 (later section 286.28), which counters the Appellants’ argument that the Legislature was intentionally avoiding the use of that term. *See, e.g., McPhee v. Dade County*, 362 So. 2d 74, 78-79 (Fla. 3d DCA 1978)(discussing language of 1975 version of section 455.06). Third, the rationale followed by this Court in *Koikos* cannot be applied here.

Even if the Appellants' speculation is true, and the Legislature did use insurance language in 1973 when it enacted the *limited* waiver of sovereign immunity set forth in section 768.28, the remainder of the Appellants' argument falls apart. It simply does not follow that this Court should interpret an undefined term in a statute (which is subject to a strict or narrow construction) the same way this Court interpreted a defined term in a particular insurance policy (which is subject to a broad construction in favor of the insured).

As this Court is aware, *Koikos* involved a situation in which two restaurant patrons were shot. The case makes no reference to sovereign immunity. Rather, the Court was asked to interpret the specific language of the applicable commercial general liability insurance policy.

The bar owner, and insured under the policy, argued that each shot was a separate occurrence, and the insurance company argued that the incident was a single occurrence. This Court applied several long-standing theories specific to the interpretation of "bargained for" insurance policies, and interpreted the specific definitions set forth in the insurance policy at issue.

While the Appellants make the blanket argument that this Court should adopt the same interpretation of an "occurrence," they fail to recognize that insurance policy definitions of that term, and the interpretations of them, vary. This Court made it very clear in *Koikos* that its decision was limited in scope. In fact,

the certified question being answered by the Court in that case illustrates its limited application, as it involved the interpretation of a single insurance policy. *Koikos*, 849 So. 2d at 264. (“When the insured is sued based on negligent failure to provide adequate security arising from separate shootings of multiple victims, are there multiple occurrences under the terms of an insurance policy that defines occurrence as ‘an accident, including continuous or repeated exposure to substantially the same general harmful conditions?’”).

Additionally, this Court’s decision in *Koikos* was based on the “cause theory” that is applicable to *insurance policies*, and the fact that it is the act which causes the damage (the “injury producing event”) that constitutes the “occurrence.” However, the cause theory, which has its own critics,⁴ cannot be applied in the sovereign immunity context.

As discussed in the negligence cases above, in this context, it is the sovereign entity’s purported negligence that is in question, not the injury-producing event. Indeed, in the dissenting opinion in *Koikos*, Justice Wells, joined by Senior Justice Harding, eerily discussed the implications of that opinion (in the

⁴ While the School Board maintains that *Koikos* is simply inapplicable to the present situation, it does bear mentioning that other courts and scholars have criticized this Court’s use of the “cause” theory. See, e.g., *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Penn. 2007); *Mitsui Sumitomo Ins. Co. of Am. v. Duke Univ. Health Sys., Inc.*, 509 Fed. Appx. 233, 240 (4th Cir. 2013) (and cases cited therein). See also, Abidor, S. *Traveling Outside the Insurance Contract; The Problems With Maximizing Victim Compensation: Koikos v. Travlers Insurance Company*, 10 Conn. Ins. L. J. 349 (2004).

insurance context), as applied to a factual scenario similar to the one presented here.

The majority's decision reduces to making an occurrence equate to the number of individuals struck by the rounds or the number of shots fired by the gunman. It seems to me obvious that this is an incorrect analysis. If this gunman had used an automatic weapon and merely kept squeezing the trigger, injuring 100 people, it would be plain that there was but one occurrence because the liability of the insured covered by the policy would arise from the insured's singular failure to prevent the gunman from shooting his weapon.

Koikos, 849 So. 2d at 274 (dissent).

Another factor that warns against the interpretation of "occurrence" that is requested by the Appellants here is the concept of an aggregate limit. Notwithstanding this Court's determination that there was separate coverage for both of the individuals injured in the shooting in *Koikos*, the Court also recognized that there was still an aggregate limit on what could be recovered under the insurance policy in that case. *Id.* at 273 n.6 ("Regardless of whether there were two or two hundred shots fired, each injuring a separate victim, [the insurer's] liability" is limited to \$1,000,000.").

The Appellants' argument, that this Court should look to insurance parlance to help determine the legislative intent of the limited waiver of sovereign immunity, also supports a determination that the Legislature, in fact, intended to apply a cap or aggregate limit to the government's exposure in tort cases, as is the case with insurance coverage. As the insurance cases easily explain, an aggregate

limit is the “most” the carrier should ever have to pay.⁵ Likewise, in the sovereign immunity context, the cap is the most the governmental agency should be required to pay. The Appellants’ requested interpretation of the statute is directly counter to the concept of an aggregate limit and would obviate the cap, or limitation, entirely.

Likewise, the Florida Justice Association’s argument about self-insurance versus available liability insurance provides no guidance for this Court. In the first place, there is no record evidence in this case suggesting whether the School Board is self-insured, has liability insurance in place, or utilizes some combination of the two. But that is not relevant when the Legislature has never mandated the purchase of liability insurance, instead, leaving this decision, as with all planning-level, budgetary concerns, to each individual entity or agency. But, at bottom, the arguments – that many school districts choose to self-insure and that “active

⁵ See, e.g., *Century Sur. Co. v. Seductions, LLC*, 349 Fed. Appx. 455, 459 (11th Cir. 2009)(“The General Aggregate Limit is *the most we will pay*. . .”); *Essex Ins. Co. v. Tina Marie Enter., LLC*, 13 F. Supp. 3d 1234, 1239 (M.D. Fla. 2014)(“The Aggregate Limit shown in the Schedule above is *the most we will pay* for all damages in any one policy under the coverage provided by this endorsement. . .”); *Lantana Ins. Ltd. v. Ritchie*, No. 3:08CV64/MCR/EMT, 2010 WL 3749084 *2 (N.D. Fla. 2010)(“The Policy Aggregate Limit of Liability stated in the Declarations is *the most we will pay* in any one policy period. . .”); *TIG Ins. Co. v. Smart School*, 401 F. Supp. 2d 1334, 1339 (S.D. Fla. 2005)(“The Aggregate Limit Shown in the Declarations is *the most we will pay* for all damages under this Coverage Form.”). These discussions center around the fact that it is the insured’s negligence that gives rise to liability under the bargained-for insurance policy, just as, here, it is the purported negligence of the School Board’s agents or employees that would give rise to liability under the statute. Thus, the “occurrence” is not, and should not be based upon, the acts of the individual wrongdoer.

shooter” insurance is now becoming available – are completely irrelevant to the concern at issue here.

If this Court accepts the Appellants’ suggested interpretation, there will be no cognizable cap on the liability with which the School Board could be faced in a tragic incident like this. Certainly the “active shooter” policies the amicus mentions have aggregate limits. Thus, regardless of whether a school board or other similar governmental entity is self-insured or purchases some liability insurance, if there is no cap on the waiver of sovereign immunity, public dollars will ultimately be at issue.

In sum, none of the underlying policy considerations, tenets of contractual interpretation, or the ultimate findings in the insurance context addressed by this Court in *Koikos* can be applied to this sovereign immunity case. The issue here is one of statutory interpretation for this Court and, again, there is not a single reported decision in Florida where a court has refused to apply the statutory cap against a sovereign agency, regardless of the number of claimants or the theories of liability.

The *Barnett* court got it right, explaining that *Koikos* did not apply for two glaringly obvious reasons: first, the Court’s interpretation of the term was based upon a definition of “occurrence” that was set forth in the insurance policy, which is not found in the statute; and, second, “and most importantly,” insurance policies

are construed liberally in favor of the insured, with ambiguities against the drafter, which is “exactly opposite” to how this waiver of sovereign immunity must be interpreted (*i.e.*, strictly construed with any ambiguities resolved against waiver). *Barnett*, 262 So. 3d at 754. This Court should adopt that reasoning.

2. The other cases the Appellants rely upon are easily distinguishable.

The other cases relied upon by the Appellants also do not support their argument, as the Fourth District also recognized in *Barnett*. Although they cite a few cases in which the courts have found there to be separate incidents or occurrences, those cases are distinguishable for four reasons.

First, in each instance, there was only a single plaintiff, as opposed to the present action where the entire argument is predicated on the fact that there are multiple plaintiffs. *Zamora v. Florida Atlantic Univ. Bd. of Tr.*, 969 So. 2d 1108 (Fla. 4th DCA 2007)(claim by employee of state university); *School Bd. of Broward County v. Greene*, 739 So. 2d 668 (Fla. 4th DCA 1999)(claim by teacher against school board); *Pierce v. Town of Hastings*, 509 So. 2d 1134 (Fla. 5th DCA 1987)(claim by businessman against town); *see also*, *Edman v. Marano*, 2005 WL 8154993 (S.D. Fla. 2005)(claim by arrestee against police officers and city); *Comer v. City of Palm Bay*, 147 F. Supp. 2d 1292, 1297-98 (M.D.Fla. 2001)(claim by employee against municipality).

Second, the plaintiffs claimed to have suffered *different damages* because of different acts that were taken at different times; and, third, the additional claims against the government agencies or entities were for theories of liability other than negligence. *Zamora*, 969 So. 2d at 1110 (claims for age discrimination and subsequent retaliation); *Greene*, 739 So. 2d at 669 (claims for negligence and invasion of privacy); *Pierce*, 509 So. 2d at 1136 (claims for malicious prosecution and false imprisonment following two separate arrests); *Edman*, 2005 WL 8154993 at *5 (claims for false arrest and statutory violation); *Comer*, 147 F. Supp. 2d at 1297-98 (claims for racial discrimination and negligent supervision). As noted above, regardless of the number of *acts* of negligence the Appellants may allege against a government agency, they still only have a single *claim* for negligence in a subsequent lawsuit, as is evidenced by their own complaints. *See* fn 1.

Fourth, and most importantly, even where the courts found there to be more than one incident or occurrence, they still held that the statutory cap limited the government's exposure. Otherwise stated, not a single one of those cases even discussed whether or not the aggregate cap applied to the claims, which is the true issue presented here. *Zamora*, 969 So. 2d at 1114 (holding that plaintiff was entitled to recover the statutory cap and anything in excess thereof could be reported to the Legislature); *Greene*, 739 So. 2d at 670 (limiting the "collectability" of the plaintiff's judgment to the statutory cap); *Pierce*, 509 So. 2d

at 1136 n.2 (noting that judgment did not exceed the statutory cap); *Edman*, 2005 WL 8154993 at *5 (affirming that the “maximum amount” the plaintiff could recover from the city was the statutory cap); *Comer*, 147 F. Supp. 2d at 1300 (noting that the city could not be required to pay a judgment in excess of the statutory cap, but inviting the plaintiff to submit the unpaid portion of the judgment to the Legislature).

The entire discussion of *res judicata* and the splitting of causes of action cannot be applied here. As the court explained in *Barnett*, allowing that argument to apply in all cases where there are multiple claimants would “write out the [cap] entirely.” *Barnett*, 262 So. 2d at 754.

No one has suggested, in the present action, that each family of someone injured or killed on February 14, 2018, is prevented from pursuing a separate claim. Rather, the argument is that the School Board’s exposure for all of these claims is capped by the statute and that any additional recovery must come from the Legislature. The Appellants have provided no authority to suggest otherwise.

D. Conclusion as to Statutory Construction

Sovereign immunity is the rule, not the exception, and any waiver of it must be clearly articulated and narrowly construed. The Legislature has *not* clearly waived sovereign immunity to the extent suggested by the Appellants in this case. Additionally, it is an “elementary principle” of statutory construction that statutes

will not be interpreted so as to yield an absurd result. *Williams v. State*, 492 So. 2d 10510 (Fla. 1986). And, here, the Appellants' interpretation is neither "reasonable" nor "functional" and it would essentially render the cap useless. *T.R.*, 847 So. 2d at 985.

The cap was designed as a ceiling to allow governmental entities to guard against the potential exposure created by the *limited* waiver of immunity. In every version of the statute, except for the one year period between 1969 and 1970, there has been a cap on the exposure to the government entities impacted by this *partial* waiver of sovereign immunity – either the cap provided by the statute itself, or the cap imposed through the purchase of insurance. Indeed, the statute authorizes the state and its agencies and subdivisions to manage this risk through self-insurance, risk management programs, liability insurance, or "any combination thereof" in anticipation of any claim or judgment they may be liable to pay as a result of the waiver. *See* § 768.28(16)(a), Fla. Stat. However, without a cap, or a ceiling on its exposure, a governmental entity or agency cannot guard against the risk created by that waiver.

While this is a unique, and tragic, situation, and everyone sympathizes with the families who have been unthinkableably impacted by it, two things remain true. First, we cannot lose sight of the fact that sovereign immunity exists for the benefit

of the public as a whole. And, second, the cap does not limit the recovery to which the Appellants may be entitled.

The Florida Justice Association's argument on this point – that if this Court applies the cap, “the innocent victims of government negligence in mass-shooting cases will be deprived of any meaningful compensation” – is misplaced. As the statute explains, and the courts have recognized, there is a remedy beyond the cap.

However, it is not the courts, but the Legislature that gets to decide when that cap should be supplanted, as has been the rule since before the limited waiver of sovereign immunity came in to play. *See, e.g., Berek*, 396 So. 2d at 759 n.4 (“We read the statute as a legislative effort to permit compensation of tort claimants against the state to the extent set forth, not an effort to put tort claimants on equal footing. Any inequities which arise are the business of the Legislature, not the courts.”); *see also, S. Broward Topeekegeeyugnee Park Dist. v. Martin*, 564 So. 2d 1265, 1267 (Fla. 4th DCA 1990)(“The mere fact that the legislative act places a cap upon the amount of damages recoverable against the governmental entity does not affect the plaintiff’s right to a judgment for his full damages. The plaintiff is entitled to recover against the entity the amount of the cap and then report the balance to the Legislature by way of a claims bill and recover so much of the balance as the Legislature may see fit to award.”). Any decision allowing

relief beyond the statutory cap, or any change to the statute itself, should be made by the Legislature, not this Court.

II. It is not premature for this Court to conclude that the multiple negligence claims arising out of the tragic event are subject to the statutory cap and that further recovery must be approved by the Legislature.

The interpretation of the statute is a legal question to be decided by the Court. The declaratory judgment action specifically limits the question before the Court to claims against the School Board for *negligence* that is alleged to have caused or contributed to the deaths and injuries at issue (R 2). It is undisputed that there are multiple claimants/plaintiffs. It is also undisputed none of the Intervenors (now Appellants) has sued the School Board for a cause of action other than negligence. *See* fn. 1. As such, there is nothing premature about the Parties' requests for a declaratory judgment, and nothing preventing this Court from making this legal determination on the record before it.

III. Public policy requires an interpretation that narrowly construes the waiver of sovereign immunity and applies the cap in this case.

When open to multiple interpretations, statutory construction suggests that this Court should avoid one that leads to an absurd result. The Appellants' requested result is not only absurd, but it flies in the face of public policy and obviates the intended cap on the waiver of sovereign immunity.

As noted in the various amicus briefs, the impact of a decision that accepts the Appellants' interpretation of the statute would profoundly change the landscape of local government in Florida. Carried out to its logical extension, the Appellants' interpretation would result in *no cap* on the damages that could be recovered in such a catastrophic incident. It would, in turn, remove services from the public at large, risk bankrupting smaller (and maybe not so small) governmental entities and agencies, and will create a risk that is virtually uninsurable.

The impact can also be illustrated based on the aftermath of this tragedy. As this Court is aware, the Legislature created a Public Safety Commission in response to this event, which was impaneled to provide "findings and recommendations" to the Governor, the President of the Senate and the Speaker of the House. § 943.687(9), Fla. Stat. The initial report, issued in January of 2019, made a number of findings and recommendations as to how to protect against another tragedy. *See* Marjory Stoneman Douglas Public Safety Comm., Initial Report (January 2, 2019) (available at <http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf>). That report clearly recognized that "[m]ore funding is needed to ensure adequate school security and prevention measures," and that physical site enhancements are "costly" and "complex." *Id.*, pp. 83, 85.

These recommendations are significant and aspirational, but the necessary changes in personnel, required additional training and recommended alterations to

physical plant operations are also expensive, and must be made within existing budgets and funding. If the Appellants' proposed interpretation of the waiver of sovereign immunity is accepted, and these claims proceed, all of the governmental agencies involved in this tragedy may be forced to utilize funds that should be used to put these new safety measures in place to, instead, pay judgments far in excess of the statutory cap or any insurance coverage that is in place.

The entire argument circles back to the need for sovereign immunity and why it has to be narrowly construed in the first place. This statute was designed to cap the governmental agency's exposure, and the interpretation sought by the Appellants renders the cap meaningless and constitutes an extensive waiver of sovereign immunity. That is not what the clear language of the statute says. It is not what the Legislature intended. And this Court should agree with the Fourth District in *Barnett*, and the trial court, here, and conclude that the statute provides a cap, which applies to this case.

CONCLUSION

The Appellee, the School Board of Broward County, respectfully requests that this Court affirm the trial court's declaration that the limitation on the waiver of sovereign immunity set forth in section 768.28(5) caps the liability of the School Board for all of the injuries and deaths arising out of the tragic incident at Marjory Stoneman Douglas High School on February 14, 2018, and that any further relief may only be obtained through an act of the Legislature.

Respectfully submitted,

Barbara J. Myrick, Esq.
Office of the General Counsel
600 SE Third Avenue
11th Floor
Fort Lauderdale, FL 33301
754-321-2150
pleadings@browardschools.com

Eugene K. Pettis, Esq.
Debra P. Klauber, Esq.
Haliczer, Pettis & Schwamm PA
One Financial Plaza, 7th Floor
Fort Lauderdale, FL 33394
954-328-5462
service@hpslegal.com

/s/ Debra P. Klauber
EUGENE K. PETTIS
Florida Bar Number: 508454
DEBRA POTTER KLAUBER
Florida Bar Number: 055646

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via Florida's e-filing portal this 21st day of June, 2019 to all counsel of record on the attached service list.

/s/ Debra P. Klauber
DEBRA POTTER KLAUBER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman, 14-point font.

/s/ Debra P. Klauber
DEBRA POTTER KLAUBER

MAILING LIST
Guttenberg et al. v. School Board

<p><i>Counsel for Estate of Jaime Guttenberg</i></p> <p>Stephen Rosenthal, Esq. Alissa Del Riego, Esq. Dayron Silverio, Esq. Podhurst Orseck, P.A. Sun Trust Int'l Center One S.E. Third Ave - #2300 Miami, FL 33131 954-463-4346 srosenthal@podhurst.com adelriego@podhurst.com dsilverio@podhurst.com</p> <p>Joel S. Perwin, Esq. 169 E. Flagler Street - #1523 Miami, FL 33131 305-779-6090 jperwin@perwinlaw.com</p>	<p><i>Counsel for Estate of Meadow Pollack</i></p> <p><i>Attorney for Andrew Pollack</i> David W. Brill, Esq. Joseph J. Rinaldi, Jr., Esq. Brill & Rinaldi, The Law Firm 17150 Royal Palm Blvd. - #2 Weston, FL 33326 954-876-4344 david@brillrinaldi.com; yamile@brillrinaldi.com; joe@brillrinaldi.com;</p> <p><i>Attorney for Shara Kaplan</i> Tracy Considine, Esq. Tracy Considine, P.A. Sleiman Pkwy., Ste 210 Jacksonville, FL 32216 904-636-9777 tconsidine@tcjaxlaw.com;</p>
<p><i>Counsel for Estate of Scott Beigel</i> <i>Counsel for Estate of Joaquin Oliver</i> <i>Counsel for Stacey Lippel</i></p> <p>Michael Haggard, Esq. Christopher Marlowe, Esq. Todd Michaels, Esq. The Haggard Law Firm 330 Alhambra Circle – 1st Floor Coral Gables, FL 33134 305-446-5700 clm@haggardlawfirm.com; mah@haggardlawfirm.com; tjm@haggardlawfirm.com; nlopez@haggardlawfirm.com;</p>	<p><i>Counsel for Ashley Baez</i> <i>Counsel for Isabel Chequer</i> <i>Counsel for Estate of Gina Montalto</i> <i>Counsel for Estate of Peter Wang</i></p> <p>Stuart Z. Grossman, Esq Andrew B. Yaffa, Esq. Manuel Arteaga-Gomez, Esq. William P. Mulligan, Esq. Grossman, Roth, Yaffa Cohen 2525 Ponce de Leon Blvd. - #1150 Coral Gables, FL 33134 305-442-8666 aag@grossmanroth.com;</p>

<p><i>Counsel for Benjamin Wikander</i> <i>Counsel for Estate of Alex Schachter</i></p> <p>Curtis Miner, Esq. Patrick Montoya, Esq. Julia Braman Kane, Esq. Colson Hicks Eidson 255 Alhambra Circle, Penthouse Coral Gables, FL 33134 305-476-7400 curt@colson.com; Patrick@colson.com; Julie@colson.com;</p>	<p><i>Counsel for Estate of Carmen Schentrup</i></p> <p>Robert Stein, Esq. Jeffrey Tew, Esq. Rennert Vogel Mandler & Rodriguez Miami Tower 100 S.E. Second Street - #2900 Miami, FL 33131 305-577-4177 305-533-8519 rstein@rvmrlaw.com; jtew@rvmrlaw.com; dperez@rvmrlaw.com;</p>
<p><i>Counsel for William Olson</i></p> <p>John Elliot Leighton, Esq. Max Panoff, Esq. Leighton Law, P.A. 1401 Brickell Avenue - #900 Miami, FL 33131 305-347-3151 John@leightonlaw.com; Max@leightonlaw.com; Carmen@leightonlaw.com; leomarys@leightonlaw.com</p>	<p><i>Counsel for Estate of Alyssa Alhadeff</i> <i>Counsel for Samantha Fuentes</i> <i>Counsel for Samantha Grady</i> <i>Counsel for Kyle Laman</i> <i>Counsel for Samantha Mayor</i></p> <p>Robert W. Kelley, Esq. Kimberly L. Wald, Esq. Kelley Uustal 500 N. Federal Highway – Suite 200 Ft. Lauderdale, FL 33301 954-522-6601 rwk@kulaw.com; klw@kulaw.com;</p>
<p><i>Counsel for Estate of Martin Duque</i></p> <p>Damian Brody, The Brody Law Firm, LLC 1688 Meridian Ave, Suite 700 Miami Beach, FL 33139 305-610-5526 305-892-4200 damian@bomlegal.com;</p>	<p><i>Co-Counsel for</i> <i>School Board of Broward County</i></p> <p>Barbara J. Myrick, Esq. Office of the General Counsel 600 SE Third Avenue Fort Lauderdale, FL 33301 754-321-2150 pleadings@browardschools.com</p>

<p><i>Amicus Curiae FJA</i></p> <p>Phillip M. Burlington, Esq. Adam Richardson, Esq. Burlington & Rockenbach, PA Courthouse Commons/Suite 350 444 West Railroad Avenue West Palm Beach, FL 33401 561-721-0400 pmb@FLAppellateLaw.com; ajr@FLAppellateLaw.com;</p>	<p><i>Amicus Curiae Washington County School Board, et al.</i></p> <p>Bob L. Harris, Esq. James J. Dean, Esq. Cameron H. Carstens, Esq. Messer Caparello, P.A. P.O. Box 15579 Tallahassee, FL 32317 bharris@lawfla.com; jdean@lawfla.com; ahopkins@lawfla.com; cearstens@lawfla.com; statecourtpleadings@lawfla.com</p>
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