IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
WEST PALM BEACH, FLORIDA

RECORD ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

FREDERIC GUTTENBERG, ET AL. **APPELLANT**	**CACE 18-9397 (25)** **CASE NUMBER:**
VS **THE SCHOOL BOARD OF BROWARD COUNTY** **APPELLEE**	**4D19-229** **APPEAL NUMBER:**

RECORD ON APPEAL

CC: DAYRON SILVERIO, ESQ.
STEVEN C. MARKS, ESQ.
KRISTINA M. INFANTE, ESQ.
STUART Z. GROSSMAN, ESQ.
ALEX ARTEAGA-GOMEZ, ESQ.
WILLIAM P. MULLIGAN, ESQ.
DAMAN BRODY, ESQ.
MICHAEL A. HAGGARD, ESQ.
CHRISTOPHER MARLOWE, ESQ.
TODD J. MICHAELS, ESQ.
DAVID W. BRILL, ESQ.

JOSEPH J. RINALDI, JR. ESQ.
CHELSEA R. EWART, ESQ.
JOEL S. PERWIN, ESQ.
TRACY CONSIDINE, ESQ.
DAVID W. BRILL, ESQ.
CURTIS B. MINER, ESQ.
JULIE BRAMAN KANE, ESQ.
PATRICK MONTOYA, ESQ.
ROBERT M. STEIN, ESQ.
JEFFREY A. TEW, ESQ.

MASTER INDEX ON APPEAL
APPELLATE DIVISION

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Appeal NO: 4D19-229

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PROGRESS DOCKET

CASE NO. CACE-18-009397

Laura Menescal	§	Location:	**Civil**
Plaintiff	§	Judicial Officer:	**25 Phillips, Carol-Lisa**
vs.	§	Filed on:	**04/26/2018**
	§	4th District Court of Appeals:	**4D19-229**
School Board of Broward County	§		
Defendant	§	Uniform Case Number:	**062018CA009397AXXXCE**

CASE INFORMATION

Statistical Closures
08/07/2018 Dismissed Before Hearing - Other

Case Type: **Other**

Case Status: **11/05/2018 Reclosed Case**

Case Flags: **Appeal Filed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	CACE-18-009397
Court	Civil
Date Assigned	04/26/2018
Judicial Officer	25 Phillips, Carol-Lisa

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Menescal, Laura** *1877 S Federal HWY* *STE 302* *Boca Raton, FL 33432*	**Lawlor, Patrick W, ESQ.** *Retained* 561-372-3501(F) 561-372-3500(W) *Lawlor | Zigler, LLC* *One Royal Palm Place* *1877 South Federal* *Highway, Suite 302* *Boca Raton, FL 33432* plawlor@lawlorzigler.co
Defendant	**School Board of Broward County** *600 SE 3rd AVE* *STE 10* *Fort Lauderdale, FL 33301*	**Pettis, Eugene K** *Retained* 954-522-2512(F) 954-523-9922(W) *Haliczer Pettis & Schwamm PA* *100 SE 3rd Avenue, 7th Floor* *Fort Lauderdale, FL 33394-0000* Service@hpslegal.com

DATE — EVENTS & ORDERS OF THE COURT

DISPOSITIONS

12/20/2018 **Judgment**
Comment (DECLARATORY)

08/07/2018 **Notice of Voluntary Dismissal W/Out Prejudice**
Comment (LAURA MENESCAL)

PROGRESS DOCKET

CASE NO. CACE-18-009397

EVENTS

02/21/2019 Appeals - Signing and Sealing
Payor: PODHURST ORSECK, P.A. ; Userid: CTS-vallwardt ; Receipt: 20191AP1A000166; Comments: CK #8943 ;
Amount: 7.00

02/21/2019 Appeals - Preparation Fee
Payor: PODHURST ORSECK, P.A. ; Userid: CTS-vallwardt ; Receipt: 20191AP1A000166; Comments: CK #8943 ;
Amount: 37.80

02/13/2019 Pre-billed Appellant pending payment of:
$44.80

02/11/2019 Notice of Filing
TRANSCRIPT OF DECEMBER 12, 2018 HEARING
Party: Plaintiff Menescal, Laura

02/11/2019 Directions to Clerk/Appeal

01/24/2019 4th DCA Order
ORDERED that appellant shall pay the $300.00 filing fee or file the circuit court clerk's determination of indigent status in this court within ten (10) days from the date of this order

01/24/2019 Acknowledgment
4D19-229

01/22/2019 Appeal Filing Fee CC->DCA
Payor: AARON S. PODHURST ; Userid: CTS-fg/t ; Receipt: 20191FA1A011408; ;
Amount: 100.00

01/18/2019 Notice of Appeal

12/07/2018 Reply
TO PETITIONER AND INTERVENORS' RESPONSES TO MOTION FOR SUMMARY JUDGMENT
Party: Defendant School Board of Broward County

12/05/2018 Response to Motion
The Intervenors, Frederic Guttenberg and Jennifer Guttenberg

11/05/2018 Agreed Order
ON NON-PARTIES' MOTION TO INTERVENE /GRANTED

11/01/2018 Supplemental
Party: Defendant School Board of Broward County

10/10/2018 Notice of Hearing

10/03/2018 Notice of Hearing

10/03/2018 Notice of Cancellation

09/28/2018 Motion to Intervene
The Interested Non-Parties/ Dayron Silverio FBN 112174

09/25/2018 Notice of Hearing

08/15/2018 Notice of Cancellation

08/10/2018 Response to Motion
Party: Plaintiff Menescal, Laura

07/19/2018 Notice of Hearing

PROGRESS DOCKET

CASE NO. CACE-18-009397

06/19/2018	Counter Pet-Cross Claim-3rd pty - Fee Paid *Payor: GONZALO PEREZ ; Userid: CTS-fg/t ; Receipt: 20181FA1A082256; ;* Amount: 395.00
06/18/2018	Motion for Summary Judgment Party: Defendant School Board of Broward County
06/11/2018	Answer and Counterclaim Party: Defendant School Board of Broward County
04/27/2018	Summons Issued Fee *Payor: PATRICK W. LAWLOR ESQ ; Userid: CTS-fg/t ; Receipt: 20181FA1A056407; ;* Amount: 10.00
04/27/2018	Filing Fee *Payor: PATRICK W. LAWLOR ESQ ; Userid: CTS-fg/t ; Receipt: 20181FA1A056407; ;* Amount: 401.00
04/26/2018	eSummons Issuance *School Board of Broward County*
04/26/2018	Complaint (eFiled) Party: Plaintiff Menescal, Laura
04/26/2018	Civil Cover Sheet

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

LAURA MENESCAL
As Parent and Natural Guardian
of DANIELA MENESCAL, a Minor

Case No.:
Judge:

Petitioner,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Respondent.

_____/

COMPLAINT FOR DECLARATORY RELIEF

The Petitioner, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a Minor, (hereinafter known as "MENESCAL") , hereby files this her Complaint for Declaratory Relief against Respondents, THE SCHOOL BOARD OF BROWARD COUNTY, (hereinafter known as "BROWARD COUNTY") and hereby alleges as follows:

GENERAL ALLEGATIONS:

1. This is an action for Declaratory Relief, and other relief, brought pursuant to, *inter alia*, F.S. 86.11 *et seq.*

2. This Court has subject matter jurisdiction over the instant action.

3. The Petitioner, MENESCAL, is resident of Parkland, Broward County, Florida whose minor daughter, DANIELA MENESCAL, as of February 14, 2018, was a student in the Broward County School System, to wit: a junior at Marjory Stoneman Douglas High School, located in Parkland, Broward County, Florida.

4. Respondent, THE SCHOOL BOARD OF BROWARD COUNTY, acting by

and through the Broward County School Board, oversees the operation of all public schools which exist and operate within Broward County, Florida. This includes the operation of Marjory Stoneman Douglas High School located in Parkland, Broward County, Florida.

5. All conditions precedent to the filing of this action have been met, or have been waived.

6. Petitioner's daughter, DANIELA MENESCAL, was in the 1200 building on the campus of Marjory Stoneman Douglas High School on February 14, 2018, when Nikolas Jacob Cruz entered onto the campus brandishing an AR-15 assault rifle. Upon entering building 1200 he began shooting at students, faculty and staff. DANIELA MENESCAL was in a classroom in building 1200 when Nikolas Jacob Cruz, who could not enter the classroom, shot out the door window and began spraying the room with numerous rounds from the AR-15. As a result of his rampage, DANIELA MENESCAL sustained physical injuries from bullet shrapnel and mental and psychological injuries. Nikolas Jacob Cruz continued his murderous rampage, ultimately killing 17 people and wounding many more people.

7. As a result of DANIELA'S physical and psychological injuries, Daniel and Laura Menescal, as parents and natural guardians of Daniela Menescal, through the undersigned attorney, filed on April 6, 2018, notices of claim pursuant to Florida Statute §768.28 to the Superintendent of Schools for Broward County and the Florida Department of Financial Services (Attached as Petitioners Exhibit #1 are copies of said Notices).

8. On April 13, 2018, the Petitioner received a letter from Johns Eastern

Company, Inc. who is the third-party claims administrator for the School Board of Broward County. It identified that the School Board of Broward County, Florida is a self-insured political subdivision of the State of Florida and subject to the Florida Statutes, Chapter §768.28 Sovereign Immunity limits of $200,000.0 per person and $300,000.00 per occurrence. (Attached as Petitioners Exhibit #2 is a copy of said letter from April 18, 2018).

9. However, the letter from Johns Eastern Company, Inc., further identified in paragraph #4 of the letter, "This letter is to advise you that this unfortunate and tragic incident involves multiple parties, and is being handled as a MULTI-PARTY claim under ONE OCCURRENCE"

10. The context of this statement is that the School Board of Broward County is maintaining that the murderous rampage Nikolas Jacob Cruz went on at Marjory Stoneman Douglas High School on February 14, 2018 should be considered "ONE OCCURRENCE" and limit the compensation to all of the victims to a total of $300,000.00

11. The Petitioner maintains the shooting by Nikolas Jacob Cruz involves separate shootings of multiple victims, including DANIELA MENESCAL. The shootings throughout Nikolas Jacob Cruz's rampage are, therefore, "MULTIPLE OCCURRENCES" and do not arise out of a single incident or occurrence. These shootings should not be considered "ONE OCCURRENCE"

12. The Petitioner's position is that the "ONE OCCURRENCE" under the facts of this shooting refers to each separate shot that resulted in a separate injury to a separate victim. Each shot fired constitutes a separate occurrence and the Petitioner's

child, DANIELA MENESCAL, and the other victims of the gunshots should be entitled to an amount of $200,000.00 to each gunshot victim and not $300,000.00 for all of the gunshot victims.

13. Based upon the facts, as alleged herein, the Petitioner is in doubt as to the existence or nonexistence of a legal right; i.e., the Petitioner is maintaining that each shot fired by Nikolas Jacob Cruz constitutes a separate occurrence. However, the Respondent maintains that the entire murderous shooting rampage by Nikolas Jacob Cruz is "One Occurrence" and all of the gunshot victims should be limited to the sum recovery of $300,000.00.

14. As a result of the foregoing, the Respondent's claim an actual, present, adverse and antagonistic interest to the Petitioner in the present subject matter.

15. By way of the relief sought herein, the Petitioner is seeking a determination that: each shooting of a separate victim constitutes a separate occurrence and not one occurrence, such that the shooting injuries suffered by the Petitioner's daughter, DANIELA MENESCAL, as well as all other shooting victims, is a separate occurrence and entitled to compensation from the Respondent up to $200,000.00, pursuant to Florida Statute 768.28.

16. Petitioner possesses a real, present interest in this Court's declaration as to the relief requested hereby.

17. Absent an Order of this Court regarding the foregoing, Petitioner will remain unable to determine the potential compensation available to her and others.

WHEREFORE the Petitioner, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor, demands judgment against the

Respondent set forth herein, that this Court enter a declaratory judgment which holds that DANIELA MENESCAL'S shooting injuries constituted a separate occurrence and not one occurrence, as maintained by the Respondent, THE SCHOOL BOARD OF BROWARD COUNTY, and not limit her potential compensation to a total of $300,000.00 for all shooting victims at Marjory Stoneman Douglas High School as a result of the murderous shooting rampage by Nikolas Jacob Cruz, and that this Court grant the Petitioner such other and further relief as the Court deems just and proper.

Respectfully submitted this 26th day of April, 2018.

Respectfully submitted,

PATRICK W. LAWLOR, ESQ.
LAWLOR & ASSOCIATES
One Royal Palm Place
1877 S. Federal Highway, Suite 302
Boca Raton, FL 33432
Telephone: 561-372-3500
Facsimile: 561-372-3501
FBN: 969941
E-Mail: Pat@pwlawlor.com
Secondary E-Mail: Tammy@pwlawlor.com

Patrick W. Lawlor
Board Certified Civil Trial Attorney
Also Admitted in U.S. Supreme, Appeals and District Courts

Nicholas A. Marzuk
Also Admitted to the U.S. District Court, Southern District of Florida

Lawlor & Associates

Personal Injury Trial Attorneys

April 6, 2018

SENT VIA CERTIFIED U.S. MAIL 7017 0190 0000 3915 0364

Superintendent of Schools
Broward County Public Schools
600 SE 3rd Ave
Ft. Lauderdale, FL 33301

Re: Our Client: **Daniel and Laura Menescal, as parents and natural guardians of Daniela Menescal, a minor child**

Date of Injury: **2/14/2018**

To Whom It May Concern:

Please be advised this firm represents Daniel and Laura Menescal, as parents and natural gaurdians of Daniela Menescal, a minor child, concerning serious and significant injuries he sustained at Majorie Stoneman Douglas High School on February 14, 2018.

PERTINENT FACTS:

On February 14th 2018, Daniela Menescal, a minor child, was attending class at Marjory Stoneman Douglass High School when there was a school shooting. With confusion of alarms going off, students began to disburse from their classrooms to head outside. At the time, gunshots were heard throughout the same hallway Daniela was in. Daniela was injured to her right leg, back, and spine, and suffered shrapnel in her body as a result of the shooting. She was transported to North Broward Medical Center.

Pursuant to Florida Statute 768.28 (6), the following information is provided:

Claimant : Daniel and Laura Menescal, as parents and natural guardians of Daniela Menescal, a minor child

a.	Date of Birth:	9/01/2000
b.	Social Security Number:	XXX-XX-XXXX
c.	Marital Status	Single

The Claimant states that there is no amount of adjudicated penalties, fines, fees, victim restitution fund and other judgments in excess of $200 and there are no prior adjudicated unpaid claims in excess of $200.

Please contact this office once you have had an opportunity to review this letter and conduct any needed investigations, so that we may move towards an acceptable resolution. I look forward to hearing from you in the very near future.

Very truly yours,

Patrick W. Lawlor, Esq
//: Mr

cc: Florida Department
Risk Management
11200 East Gaines St
Tallahassee, FL 32399-0336

JOHNS EASTERN COMPANY, INC.
P.O. Box 110239 Lakewood Ranch, FL 34211
TEL: (941) 907-3100 FAX: (954)688-5038

Claim Adjusters &
Third Party Administrators

April 13, 2018

Lawlor & Associates
1877 S. Federal Highway
Suite 302
Boca Raton, FL 33432

RE: Our Client : School Board of Broward County
Date of Loss : 02/14/2018
Our File : 824289
Your Client : Daniela Menescal

Dear Mr. Lawlor:

Johns Eastern Company, Inc., is the third-party claims administrator for the School Board of Broward County. If you would, please direct future communications on this claim to me.

The School Board of Broward County, Florida, is a self-insured political subdivision of the State of Florida, and subject to the Florida Statutes, Chapter 768.28 Sovereign Immunity limits of $200,000.00 per person and $300,000.00 per occurrence. No policy defenses are being asserted at this time. However, we reserve our right to do so should any such defenses become known at a later date.

We ask that you state your theory of liability against the School Board of Broward County, and produce your evidence in support of it, along with documentation of damages being claimed. We would like to request a statement from your client. Please advise if you will work with us to arrange a date and time on which I can interview your client by phone. Finally, I have attached a Health Insurance Claim Number form, which we need to ask be filled out as to your client's Medicare status, and returned to us.

This letter is to advise you that this unfortunate and tragic incident involves multiple parties, and is being handled as a multi-party claim under one occurrence.

Nothing in this letter is to be construed as either an acceptance or denial of this claim. As a Florida political subdivision, the liability of Broward County School Board and its officers, employees, and agents, are subject to substantial limitations, including but not limited to those contained in Florida Statute 768.28, as amended by Chapter 87-134. Please be advised that, by formal action, the Board has adopted the position that the purchase of insurance does not constitute a waiver of any available defense of sovereign immunity or otherwise waive any limitations on the liability of the Board or its officers, employees and agents. Please also be advised that neither we nor attorneys, agents, or employees have the authority to waive any of the defenses or limitations on liability and that no action or inaction taken or not taken by the

Board or its officers, employees, agents, adjusters, or respective attorneys shall constitute a waiver.

We trust this information is responsive to your request for disclosure of coverage. If it is not, please let us know immediately.

We thank you and your client for your cooperation in our investigation of this claim.

Cordially,

Jessica Jenkins, ACA
Liability Claims Adjuster
Johns Eastern Company, Inc.
P.O. Box 110239
Lakewood Ranch, FL 34211
Phone: (877) 287-4823
FAX: (954) 688-5038
jjenkins@johnseastern.com ☆

Enclosures

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

CASE NO.: CACE-18-009397 (25)

ANSWER AND COUNTERCLAIM

The SCHOOL BOARD OF BROWARD COUNTY hereby files its Answer and Counterclaim and states as follows:

1. Admitted.

2. Admitted.

3. Without knowledge, therefore denied and strict proof demanded.

4. Admitted.

5. Without knowledge, therefore denied and strict proof demanded.

6. Without knowledge, therefore denied and strict proof demanded.

7. Admitted that the documents speak for themselves.

8. Admitted that the documents speak for themselves.

9. Admitted that the documents speak for themselves.

10. Denied.

11. Denied.

12. Denied.

13. Admitted that the School Board maintains that the claims arising out of this tragedy constitute a single incident or occurrence under the applicable statute, and that there is clearly a dispute between the Parties subject to this Court's jurisdiction, otherwise denied.

14. Admitted that there is an issue to be determined by the Court, otherwise denied.

15. Denied.

16. Admitted that there is an issue to be determined by the Court, otherwise denied.

17. Admitted that there is an issue to be determined by the Court, otherwise denied.

COUNTERCLAIM

1. This is an action for declaratory relief brought pursuant to Chapter 86 of the Florida Statutes.

2. This Court has subject matter jurisdiction over this declaratory judgment action pursuant to §86.011 of the Florida Statutes.

3. Venue is proper in Broward County, as both the Petitioner/Counter-Respondent, MENESCAL, and the Respondent/Counter-Petitioner, SCHOOL BOARD,

reside in or conduct business in Broward County, Florida, and the incident giving rise to this lawsuit occurred in Broward County, Florida.

4. On or about February 14, 2018, after being away from the campus for one year, Nikolas Cruz returned to the campus of Marjory Stoneman Douglas High School where he shot and injured, or killed, a number of students and staff.

5. Following this tragic event, Nikolas Cruz was indicted on 17 counts of First Degree Murder and 17 counts of Attempted First Degree Murder, which charges remain pending.

6. Pursuant to §768.28 of the Florida Statutes, the Counter-Petitioner, SCHOOL BOARD, has been put on notice of a number of parties' intent to sue the SCHOOL BOARD for its own alleged negligence which they claim contributed to the injuries suffered by the victims of the tragedy.

7. In 1973, the Florida Legislature placed statutory limits on tort claims made against the state and its agencies. That law, now set forth in §768.28 of the Florida Statutes has historically included a monetary cap on damages that can be recovered from sovereign entities and political subdivisions of the State of Florida.

8. The current version of the statute states, in pertinent part:

> 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 arising out of the same incident or occurrence, exceeds the sum of $300,000.

See §788.28(5), Fla. Stat.

9. The Legislative intent behind this statute was a *limited* waiver of sovereign immunity, and the statutory caps have been enforced by the Florida courts.

10. Even with the statutory caps on damages, the law does allow injured plaintiffs to recover amounts over the statutory caps by "further act of the legislature." *Id.*

11. In this context, there are significant public policy considerations at issue. One of those is the protection of public funds, which are designed to allow public agencies, like the SCHOOL BOARD, to provide governmental services to the citizens of the State of Florida (here, the educational services provided by the SCHOOL BOARD through its 40,000 employees to its nearly 270,000 students). The other is to allow those injured by the acts of the government to recover without disrupting the orderly administration of the government services that must be provided (again, here, the educational services provided to the students of this District).

12. Contrary to the Counter-Respondent's allegations (Complaint, ¶10), the SCHOOL BOARD is not seeking to limit the compensation available to all of the victims of this tragedy; rather, the SCHOOL BOARD seeks to apply the law, as enacted by the Legislature, to this case.

13. If a particular plaintiff can successfully obtain a judgment in excess of that statutory cap, the law allows for the possibility of additional recovery through the claims bill process and any liability insurance that is available to the applicable agency.

14. The SCHOOL BOARD respectfully disagrees with the Counter-Respondent's contention (Complaint, ¶11-12) that the separate actions of Nikolas Cruz apply to the limited waiver of sovereign immunity.

15. To the contrary, it is the purported negligence on the part of the SCHOOL BOARD that is pertinent to the determination of sovereign immunity, not the intentional and horrific acts of Nikolas Cruz (i.e., the "separate" shots fired).

16. The Parties clearly disagree about the interpretation of the statute, specifically §768.28(5) of the Florida Statutes, and the SCHOOL BOARD also asks this Court to determine the Parties rights under this statute as it is authorized to do under Chapter 86 of the Florida Statutes.

17. The stated purpose of the Declaratory Judgment Act is "to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *See* §86.101, Fla. Stat.

18. There is a current, bona fide dispute between the Parties that is subject to this Court's jurisdiction and determination.

19. The SCHOOL BOARD respectfully submits that the relevant underlying facts here are not in dispute and that the interpretation of this statute is a question of law to be decided by the Court.

WHEREFORE, the Counter-Petitioner, SCHOOL BOARD OF BROWARD COUNTY, respectfully requests that this Court declare that the statutory caps set forth in §768.72(5) are applicable to this case, that the purported claims against the SCHOOL

BOARD for its purported liability for the injuries arising out of this tragedy constitute one "incident or occurrence" under the statute, and affording such other and further relief as this Court deems proper under the circumstances.

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed and served via Florida's e-filing portal on *11th day of June, 2018*, to all parties on the attached mailing list.

HALICZER, PETTIS & SCHWAMM, P.A.
One Financial Plaza, Seventh Floor
100 SE 3rd Avenue
Fort Lauderdale, FL 33394
954-523-9922
E-MAIL: service@hpslegal.com
Attorneys for School Board of Broward County

By: Eugene K. Pettis
EUGENE K. PETTIS
FBN: 508454

EKP/DPK/ek
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MAILING LIST
DANIEL & LAURA MENESCAL/DANIELA MENESCAL V. SBBC
CASE NO. CACE 18-009397 DIV 25
OUR FILE NO. 1025.1474

Patrick Lawlor, Esq.
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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

Case: CACE-18-009397 (25)

THE SCHOOL BOARD OF BROWARD COUNTY'S MOTION FOR SUMMARY JUDGMENT

THE SCHOOL BOARD OF BROWARD COUNTY, by and through its undersigned attorneys and pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, hereby files its Motion for Summary Judgment and, in support thereof, states as follows:

I. Undisputed Facts

This lawsuit arises out of competing declaratory judgment actions filed by The School Board of Broward County and Laura Menescal as the Parent and Natural Guardian of Daniela Menescal, who was shot and injured on the campus of Marjory Stoneman Douglas High School on February 14, 2018. The Parties seek this Court's guidance on the interpretation of the statutory sovereign immunity caps set forth in section 768.28(5) of the Florida Statutes. While The School Board contests any claims that the actions of its agents or employees caused or contributed to the tragedy, The

School Board is on notice that a number of those injured or killed at the hands of the shooter intend to assert such claims. Accordingly, The School Board respectfully submits that if those claims against it are permitted to proceed, the aggregate statutory cap limits The School Board's exposure in any and all cases arising out of the incident of February 14, 2018. As provided under Florida law, the victims' ability to recover anything in excess of $300,000 must be handled by seeking a claims bill through the Florida Legislature.

There is no dispute as to the material facts. An individual engaged in a massive shooting spree on the campus of Marjory Stoneman Douglas High School on February 14, 2018. A number of individuals, including the Plaintiff here, have put The School Board, and others, on notice of their intent to bring suit for negligence that caused or contributed to this event, as they are required to do by section 768.28 of the Florida Statutes.

The School Board maintains that the statute in question caps its exposure for all lawsuits arising out of that tragic incident at $300,000, and that while further recovery is possible, it must be obtained from the Legislature. The Plaintiff disagrees with this interpretation of the statute, which gives rise to this declaratory judgment action. There is no need for discovery, given that the material facts are agreed upon and the interpretation of a statute is a question of law for this Court to decide.

II. Legal Standard

A. The History of Sovereign Immunity

Sovereign immunity's roots extend to medieval England and the doctrine flows from the general idea that no one could sue the king in his own courts. *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981). The concept was accepted by the United States Supreme Court in 1821 and followed by the majority of the American states, leaving a general, common law rule that state governments, their agencies, and their subdivisions could not be sued in state courts without state consent. *Id.* at 381. The citizens of Florida vested the power to waive sovereign immunity in the Florida Legislature in 1868, but common law sovereign immunity remained in full force and effect until the Florida Legislature first enacted section 768.28 in 1973. *Id.*

"The enactment in 1973 of Section 768.28(5) was 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 [negatively impacted] by litigation. 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. . . ." *Berek v. Metro. Dade Cnty.*, 396 So. 2d 756, 758 (Fla. 3d DCA 1981). This *limited* waiver of sovereign immunity applies equally to all constitutionally authorized governmental entities, including school boards. *Cauley*, 403 So. 2d at 387.

B. The Current Statute

The current version of §768.28(5) states, in relevant part:

> 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.

It is worth noting that this statutory provision does not limit the recovery to which an injured party is entitled. It simply caps the exposure to the public agency, like the School Board here. The statute goes on to provide a method by which the injured party can recover in excess of the statutory cap, explaining:

> However, 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 treasure is warranted in a particular case." *Berek*, 396 So. 2d at 759 n.4.

C. Rules of Statutory Construction

This case involves statutory construction, specifically the interpretation of section 768.28(5) of the Florida Statutes. As such, it presents a question of law for the Court to decide. *See, e.g., Maggio v. Fla. Dept. of Labor & Employment*, 899 So. 2d 1074 (Fla. 2005). The ultimate guide for the Court when interpreting a statute is the legislative intent. *Id.* at 1076. Here, that legislative intent is clearly set forth, above: the purpose is to

allow for a *limited* waiver of sovereign immunity, which allows those injured to recover while maintaining a cap on the sovereign entity's exposure absent some further act of the Legislature.

It is also important for the Court to recognize that since this statute is contrary to the common law (in which sovereign immunity prevented all claims against the government), the statute must be strictly construed. In other words, the statute should not be interpreted in a way that would extend the waiver of sovereign immunity beyond the limits that are set forth in the statute. *Berek*, 396 So. 2d at 758 (*citing Spangler v. Florida State Turnpike Auth.*, 106 So. 2d 421 (Fla. 1958)).

Here, the specific language at issue is the statute's application of an aggregate cap to all claims arising out of the same "incident or occurrence." These terms are defined by the Oxford English Dictionary as follows:

> Incident: "an instance of something happening; an event or occurrence."
> Occurrence: "an incident or event."

Both terms are synonymous with an "event", which is defined as "a thing that happens or takes place, especially one of importance." 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 be limited to a combined aggregate $300,000 limit unless the Legislature considers the matter on a case-by-case basis 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.

III. Argument

The tragic shooting at Marjory Stoneman Douglas High School on February 14, 2018 is a single "incident or occurrence" for the purposes of sovereign immunity.

A. The Florida case law on sovereign immunity supports the School Board's argument that the aggregate cap on damages limits its exposure here, and that the injured parties would be required to seek additional funds from the Legislature.

1. Multi-party Cases

The School Board recognizes that a separate claim exists for each person who was injured or killed in this tragic incident, but respectfully submits that the aggregate cap must apply to limit The School Board's total exposure for this horrific event. A number of Florida courts have addressed the issue of sovereign immunity in situations involving multiple claimants seeking recovery. In each instance, the courts have found that the aggregate cap applies. If fact, there is not a single reported appellate decision in Florida where an individual plaintiff, or multiple plaintiffs, have ever been permitted to recover any amount over the aggregate cap in a legal proceeding (i.e., without the additional involvement of the Legislature as the statute contemplates).

In *Rumbough v. City of Tampa*, 403 So. 2d 1139 (Fla. 1981), 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 court held that the aggregate cap applied to the damages recoverable by all of the homeowners. *Id.* at 1142. The court specifically addressed the issue of "continuing torts"

since the claim was one for nuisance, and the appellate court noted that it was unable to see "how such torts could be divided into time segments so as to permit multiple recoveries simply because nuisances are usually continuing in nature." *Id.* at 1143.

There was a similar result in *Trianon Park Condo. Ass'n. v. City of Hialeah*, 423 So. 2d 911 (Fla. 3d DCA 1983), when a number of condominium owners discovered structural defects and sued the city for negligently inspecting and certifying the construction of their building. Again, the court concluded that the "per incident" level of recovery rather than the "per person" level should apply. *Id.* at 914. Although each individual unity owner was separately damaged by the city's negligence, and could have maintained an independent action, the city was only liable up to the "per incident" level for the total aggregate amount provided for in the statute. *Id.*

2. Negligence Cases

The School Board has been placed on notice that approximately 40 of those injured or killed on that fateful day intend to pursue claims against it for negligence. In each of those instances, it is alleged that some act or omission of The School Board caused or contributed to the injuries or deaths. The Florida courts have addressed the issue of sovereign immunity in negligence cases and, in every instance, have applied the statutory caps.

In *State, Dept. of Health and Rehabilitative 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 thirteen years in which they were in foster care, i.e., through separate acts of physical abuse. The Third District found that the trial court had misinterpreted subsection (5) of the applicable statute when it tried to have 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 further recognized that each girl could seek recovery for all of the damages she suffered as a result of the negligence, but that she would be required to seek the portion of the judgment exceeding the statutory cap from the Legislature. *Id.*

Again, The School Board can only be held responsible for the negligence of its own agents and employees in the operational-level decisions that were made, assuming that negligence can be causally linked to the shooting incident on February 14, 2018. The School Board *cannot* 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, supports the application of the aggregate cap here.

In all of the reported decisions involving negligence claims, the courts have concluded that the aggregate cap applies. *See also, Orange Cnty. v. Gipson*, 539 So. 2d 526, 529-30 (Fla. 5th DCA 1989)(agreeing with county that the statute required it to pay $50,000 per claim and $100,000 as an aggregate cap as the "absolute maximum"). Likewise, even where a plaintiff has recovered on two separate theories of liability, where they are based on the same purported negligence, the courts have found that to constitute a single incident or occurrence under the statute. *See School Bd. of Broward Cnty. v. Greene*, 739 So. 2d 668 (Fla. 4th DCA 1999). *See also Comer v. City of Palm Bay*, 147 F. Supp. 2d 1292, 1297-98 (M.D.Fla. 2001)(noting that the per person limit applies to all claims that were, or should have been, brought by a single plaintiff).

B. The Florida case law involving separate incidents or occurrences is not applicable here.

Although there are a few Florida cases that have found multiple "occurrences," in the context of sovereign immunity, those cases are distinguishable. First, in each of those cases, there was only one plaintiff, so the cases do not specifically address the issue before the Court in this proceeding, which is one involving multiple plaintiffs.

Second, those cases ultimately held that the aggregate statutory cap still applied and limited the liability of the state agency or entity absent the involvement of the Legislature. *See, e.g., Zamora v. Florida Atlantic Univ. Board of Trustees*, 969 So. 2d 1108 (Fla. 4th DCA 2007)(employee could recover for both discrimination and retaliation, but aggregate limit applied to cap the liability without legislative involvement); *Pierce v. Town of Hastings*, 509 So. 2d 1134 (Fla. 5th DCA 1987)(holding that malicious

prosecution and false imprisonment were separate and distinct occurrences); s*ee also, Edman v. Marano*, 2005 WL 8154993 (S.D.Fla. 2005)(holding that claims for false arrest and statutory violations were separate incidents or occurrences, but still holding that the aggregate cap applied to the recovery).

These cases address the question of whether an individual plaintiff can have more than one claim arising out of a given set of facts. That is not an issue here. Thus, the discussion of the issues of res judicata and the splitting of causes of action do not apply in this context where we have multiple plaintiffs. The School Board does not challenge that each person injured is entitled to pursue a separate claim against it. Rather, The School Board's argument is that its exposure for all of those claims is capped, by the statute, at $300,000 in the aggregate and any additional recovery must come from the Legislature. And, in fact, these cases support The School Board's argument, where they ultimately held that the aggregate cap on damages applied to limit the sovereign entity's exposure.

C. The Florida case law in the insurance context is also not applicable here.

The School Board anticipates that Ms. Menescal will attempt to reply upon the Florida Supreme Court's decision in *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003). However, *Koikos* is not applicable here, as it is not a case that addresses the issue of sovereign immunity and its holding is expressly limited to the specific language of the insurance policy at issue.

Koikos involved a situation in which two restaurant patrons were shot, and the court was asked to interpret the language of the applicable commercial general liability

insurance policy. The bar owner argued that each shot was a separate occurrence under the specific language of the policy, and the insurance company argued that the incident was a single occurrence. The court applied 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. In that context, the court discussed that the "cause theory" that is applicable to insurance policies, and the fact that it is the act which causes the damage that constitutes the "occurrence." The cause theory cannot, however, be applied in the sovereign immunity context, as it the sovereign entity's purported negligence that is at issue in determining its liability, not the cause of the injuries.

Importantly, the *Koikos* decision makes no reference to the term "sovereign immunity," which was not an issue involved in the case. Additionally, a review of the certified question being answered by the court illustrates its limited application – which involved the interpretation of a single insurance policy. *Id.* 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?'"). Finally, it is also critical to note that the Florida Supreme Court readily recognized that, notwithstanding its determination that there was separate coverage for both of those injured in the shooting, there was an aggregate cap 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.").

None of the underlying policy considerations, tenets of contractual interpretation, or the ultimate findings in the insurance context addressed by the 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 aggregate statutory cap against a sovereign agency like The School Board. Simply put, the $300,000 aggregate cap applies to limit The School Board's exposure in this case.

D. Case law from other jurisdictions further supports The School Board's contention that the aggregate cap applies to this case.

1. No Recovery Against School Districts or Officials

While the facts of this case are undoubtedly tragic, across the country, the families of shooting victims have been precluded from recovering against school boards and their agents and employees for various reasons. In fact, in a very 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 in December of 2012 from recovering against the Newtown Board of Education and the town of Newtown. *Lewis v. Newtown Board of Education,* 2018 WL 2419001 (Conn. Super. May 7, 2018).

Similarly, claims against school officials arising out of the shooting at Columbine High School were unsuccessful. *See, e.g., Ireland v. Jefferson Cnty. Sheriff's Dept.*, 193

F. Supp. 2d 1201 (D. Colo. 2002)(dismissing federal claims under §1983 against various school defendants); *Castaldo v. Stone*, 192 F. Supp. 2d 1124 (D. Colo. 2001)(finding school teachers and administrators were immune from claims of willful and wanton conduct and were entitled to qualified immunity); *Ruegsegger v. Jefferson Cnty. School Dist.*, 187 F. Supp. 2d 1284 (D. Colo. 2001)(dismissing claims against school district, principal, assistant principal and other school officials).

Additionally, two families filed suit against the Commonwealth of Virginia following the deaths of students during the mass shooting at Virginia Polytechnic Institute. Although the trial court allowed the claims to go to a jury, and each family was awarded $4,000,000, the trial court reduced each verdict to $100,000 in accordance with that state's limited waiver of sovereign immunity. Ultimately, though, the Supreme Court of Virginia concluded that there was no duty upon which such a claim should be granted and it held that the case should be dismissed altogether.

2. Applying Statutory Caps

Other states have addressed the iissue now being addressed by this Court in cases involving multiple claimants and injuries and the application of sovereign immunity. Most recently, in *Larimore Public Sch. Dist. 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 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 $500,000 aggregate cap. One of the court's stated reasons for upholding the cap involved 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 aggregate 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 aggregate cap and applied it to the case. *See also, Lee v. Colorado Dept. of Health*, 718 P.2d 221 (Colo. 1986)(applying statutory cap to the claims of an injured driver, his wife, and five children).

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 $300,000 to the court, by way of an interpleader, as 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 aggregate statutory cap applied to the claims.

IV. Public Policy Considerations

The public policy considerations underlying Florida's *limited* waiver of sovereign immunity are evident from the facts of the present case. The Legislature clearly realized, when it decided to waive sovereign immunity on a *limited* basis, that there had to remain some protection for state funds. The Plaintiff/Petitioner cannot cite to a single reported decision in Florida where a public agency or entity has been held responsible for more than the aggregate cap set forth in section 768.28(5), which is currently $300,000. As explained in the introduction to this motion, the statute specifically provides that

decisions about access to state funds beyond the statutory caps should be made by the Legislature, not the courts. If this Court were to apply the law in the unprecedented manner suggested by the Plaintiff/Petitioner, the ramifications to The School Board, its 300+ schools, 40,000 employees, and the 270,000 students it serves in this community, would be profound. And if it is ultimately held responsible for causing or contributing to this tragic incident, its liability could rise into the tens millions of dollars. That is simply not what the Legislature intended when it put these statutory caps in place, and provided a remedy for additional recovery to be addressed, by the Legislature itself, on a case-by-case basis.

V. Conclusion

The School Board's exposure for the tragic events that unfolded at Marjory Stoneman Douglas High School on February 14, 2018, is limited by statute. This does not necessarily mean that the recovery of those who were injured and killed on that day is equally limited. The statute provides an alternative method by which these families can recover additional funds, through an act of the Legislature.

WHEREFORE, The School Board of Broward County respectfully requests this Court enter an order GRANTING its Motion for Summary Judgment, and applying the aggregate statutory cap of $300,000 to limit The School Board's exposure for all claims arising out of the school shooting (without prejudice to those injured to seek appropriate remedies through the Florida Legislature).

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed and served via Florida's e-filing portal on this 18th day of June, 2018, to all parties on the attached mailing list.

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MAILING LIST

DANIEL & LAURA MENESCAL/DANIELA MENESCAL V. SBBC
CASE NO. CACE 18-009397 DIV 25

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Filing # 76102530 E-Filed 08/07/2018 03:37:32 PM

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA

CASE NO: CACE18-009397 Div. 25

LAURA MENESCAL, as Parent and Natural Guardian
of DANIELA MENESCAL, a minor,
Plaintiff,

v.

THE SCHOOL BOARD OF BROWARD COUNTY,
Defendant.
_____/

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

The Plaintiff, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor, by and through the undersigned counsel, hereby voluntarily dismisses the Defendant, THE SCHOOL BOARD OF BROWARD COUNTY, from the above action without prejudice with each party to bear its own fees and costs.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was electronically filed with the Florida Courts' E-Filing Portal and that service has been effectuated through the Portal in compliance with Rule 2.516, Fla. R. Jud. Admin., to: Eugene K. Pettis, Esq., Haliczer Pettis & Schwamm, P.A., One Financial Plaza, Seventh Floor, 100 S.E. 3rd Avenue, Fort Lauderdale, FL 33394, (E-service: pleadings@browardschools.com), this 7th day of August, 2018.

LAWLOR & ASSOCIATES
One Royal Palm Place
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Boca Raton, FL 33432
Telephone: 561-372-3500 / Facsimile: 561-372-3501

By: _____
PATRICK W. LAWLOR, ESQ.
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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: CACE-18-009397 (25)

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

v.

THE SCHOOL BOARD OF BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

PLAINTIFF'S RESPONSE TO THE SCHOOL BOARD OF BROWARD COUNTY'S, MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiff, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL. A minor, by and through their undersigned attorney and hereby file this Response to the Defendant, THE SCHOOL BOARD OF BROWARD COUNTY'S, Motion for Summary Judgment, and as grounds would therefore state as follows:

I.
STANDARD OF REVIEW

1. Florida Rule of Civil Procedure 1.510(c) states that, "summary judgment should be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on the file together with affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law".

2. Where the facts are such that, if established there could be no recovery, or where the undisputed facts are such as would preclude recovery, then the question becomes one of law for determination of the Court and a proper matter for disposition by Summary Judgment. See Florida Bar v. Greene, 926 So.2d 1195 (Fla. 2006); see also Yost v. Miami Transit Company, 66 So.2d 214 (Fla. 1953); and Holl v. Talcott, 191 So.2d 40 (Fla. 1966).

3. The moving party must meet the burden of overcoming all reasonable inferences that may be drawn in favor of the opposing party. Harvey Building, Inc. v. Haley, Fla., 175 So.2d 780 (Fla. 1965). Only after a conclusive showing that the party moved against cannot offer proof to support the position on genuine and material issues may the right to trial be foreclosed. Holl v. Talcott at 47.

II.
STATEMENT OF FACTS

4. On the tragic day of February 14, 2018, DANIELA MENESCAL, a minor, was a student at Marjory Stoneman Douglas High School in Parkland, Florida. At or around 2:30 p.m. on that day, DANIELA was attending her Holocaust class in Room 116 in the 1200 building.

5. In the middle of the class, there were repetitive loud bangs which she and her classmates thought was gunfire, but they thought it may be part of an active shooter drill However, after she and her classmates look to hide they could hear, smell and see gunshots coming into the room through the glass window that had been shattered by the shooter.

6. During the shooting, DANIELA was struck by gunfire which left her bleeding from her legs and buttocks area. It is undisputed that DANIELA suffered from gunshot injuries from the murderous rampage inflicted by the shooter, Nicholas Cruz

7. DANIELA was subsequently taken by ambulance to North Broward Health Center. She was treated for her gunshot wounds and release. Presently, she still has gun shrapnel in here body as a result of the shooting.

8. Pursuant to Florida Statute 768.28, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor, filed the statutory required "Notice of Claim" to the Defendant, THE SCHOOL BOARD OF BROWARD COUNTY of her intent to bring suit for negligence that was caused by the employees, agents or the like for the Defendant.

9. The Plaintiff maintains the Florida Statute 768.28 (5) 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 $200,000.00 or any claim or judgment, or its 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 $300,000.00." The shooting of the Plaintiff, DANIELA is a claim of one person arising from single incident, that being DANIELA being struck by a bullet fired by Nicholas Cruz.

10. The Defendant is attempting to take the this case and have this Honorable Court make a conclusion as to any and all claims that could be filed in a result of this tragic shooting should be limited by statute to a total cap of $300,000 for all potential victims.

11. However, here the Plaintiff was requesting the Court to specifically address the legal status of the Plaintiff, LAURA MENESCAL, as Parent and Natural Guardian of DANIEL MENESCAL, a minor and not every potential victim of this mass shooting.

AGRUMENT

12. The Plaintiff argues that the shooting at Marjory Stoneman Douglas High School on February 14, 2018 is not a single "incident or occurrence" with multiple victims who are limited whom totaled together with all other claims be paid up to $300,000.00.

13. The Plaintiff maintains that her claim is to ONE person from one specific incident, that is the Plaintiff, DANIELA MENESCAL being shot with a bullet fired by Nicholas Cruz.

14. The Defendant is not addressing the issue that was outlined in the Declaratory Action initially brought by the Plaintiff. The issue before this court in the case of the Plaintiff, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor is not the full extent recovery that she may be entitled to over the statutory caps. It is the issue that the claim of the Plaintiff is not a single "incident or occurrence" with multiple injured parties. The Plaintiff is a claim brought by one person as a result of one event. The Plaintiff, DANIELA being struck by a bullet.

15. The Plaintiff would ask the Court to find specifically to the Plaintiff, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor is a result of a claim by one person as a result of a single incident and entitled to the one claim statutory immunity sum of $200,000.

LEGAL ANALYSIS

16. The School Board is correct in that the Plaintiff is relying on the Florida Supreme Court's decision in *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003). The fact that *Kiokos* doesn't involve an injury case involving sovereign immunity is irrelevant to the factual and legal conclusions it reaches as it pertains to claims as a result of gunshot injuries.

17. The conclusion of the *Koikos* court was clear and unequivocal, "Each shooting of a separate victim constitutes a separate occurrence". The School Board maintains that the injuries resulted from an alleged negligence and that constituted a single "occurrence" with multiple victims. *Koikos* argued that the force that caused the injuries was the gunshots and therefore each shot injuring a victim was a separate occurrence.

18. The *Koikos* decision discussed it is the "caused theory" that should be applied when determining what event actually caused the damage. Here, as in *Koikos*, there are multiple gunshot victims as a result of a single shooter firing multiple gunshots. Here, as in *Koikos* is the theory of liability alleged among many is that of negligent security.

19. The *Koikos* court was asked to interpret as to whether each gunshot was a separate occurrence with a single claimant or that the incident was a single occurrence with multiple victims. This analysis is consistent with the argument presented before the court in this case. As to each interpretation there is a specific amount of financial coverage available.

20. The *Koikos* court focused on the "cause theory", that independent immediate acts give rise to the injuries and the liability. Here the "cause" of the injury the Plaintiff

was a bullet fired by Cruz. The "Occurrence" was not a result of the entire shooting spree, the "Occurrence" here was a result of a separate injury, from a separate gunshot to a separate victim.

CONCLUSION

21. Based upon the facts as they specifically pertain to the Plaintiff, LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor, confirm that the Plaintiff's claim is a separate claim from a separate occurrence and not a result of the same incident or occurrence.

WHEREFORE, the Plaintiff would respectfully request this Honorable Court to DENY the Defendant, THE SCHOOL BOARD OF BROWARD COUNTY'S Motion for Summary Judgment and not apply the aggregate statutory cap of $300,000 to limit to the Plaintiff, LAURA MENESCAL as Parent and Natural Guardian of DANIELA MENESCAL, a minor.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was electronically filed with the Florida Courts' E-Filing Portal and that service has been effectuated through the Portal in compliance with Rule 2.516, Fla. R. Jud. Admin., to: Eugene K. Pettis, Esq., Haliczer, Pettis & Schwamm, P.A., One Financial Plaza, Seventh Floor, 100 SE 3rd Avenue, Fort

Lauderdale, FL 33394, (E-service addresses: service@hpslegal.com); this 10th day of August, 2018.

LAWLOR & ASSOCIATES.
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By: _____
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JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

LAURA MENESCAL, as
Parent and Natural Guardian of
DANIELA MENESCAL, a Minor,
Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF
BROWARD COUNTY,
Respondent/Counter-Petitioner.
_____/

Case: CACE-18-009397 (25)

NOTICE OF CANCELLATION OF HEARING
(SPECIAL SET – 1 HOUR)

YOU ARE HEREBY NOTIFIED that the undersigned will ***not*** call up for hearing before the **Honorable Carol-Lisa Phillips** one of the Judges of the above-styled Court, at the Broward County Courthouse, 201 S.E. 6th Street, Courtroom WW15175 Ft. Lauderdale, Florida, on Friday, the 17th day of August, 2018 at 9:00 a.m.:

THE SCHOOL BOARD OF BROWARD COUNTY'S
MOTION FOR SUMMARY JUDGMENT

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed and served via Florida's E-Filing Portal on this *15th day of August 2018,* to all parties on the attached mailing list

SCHOOL BOARD OF BROWARD COUNTY
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DANIEL & LAURA MENESCAL/DANIELA MENESCAL V. SBBC
CASE NO. CACE 18-009397 DIV 25

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IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.: CACE-18-009397 (25)

LAURA MENESCAL, as
Parent and Natural Guardian of
DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF
BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

NON-PARTIES' UNOPPOSED MOTION TO INTERVENE AND FOR LEAVE TO FILE SUPPLEMENTAL RESPONSE BRIEF IN OPPOSITION TO THE SCHOOL BOARD'S MOTION FOR SUMMARY JUDGMENT AND TO FILE CROSS-MOTION FOR SUMMARY JUDGMENT

The interested non-parties, Frederic Guttenberg and Jennifer Guttenberg, as co-personal representatives of the Estate of Jaime T. Guttenberg; [redacted] a minor by and through her parents and natural guardians, Katherine Baez and Juan David Baez; [redacted], a minor, by and through her parents and natural guardians, Gabriela Chequer and Amin Chequer; Anthony and Jennifer Montalto, as Proposed Co-Personal Representatives of the Estate of Gina Rose Montalto, deceased; Kong Feng Wang a/k/a Jacky Wang and Hui Ying Zhang a/k/a Linda Wang, as Co-Personal Representatives of the Estate of Peter Wang, deceased; Martin Duque and Daisy Anguiano, as parents of the Martin Duque, deceased; Manuel Oliver and Patricia Padauy, as Co-Personal Representatives of the Estate of Joaquin Oliver, deceased; Stacy Lippel; Linda Beigel, as Personal Representative of the Estate of Scott Beigel, deceased; Andrew Pollack, as Co-Personal Representative of the Estate of Meadow Pollack, deceased;

Shara Kaplan, as Co-Personal Representative of the Estate of Meadow Pollack, deceased; Max Schachter, as Personal Representative of the Estate of Alex Schachter, Benjamin E. Wikander; Philip and April Schentrup, as Co-Representatives for the Estate of Carmen Schentrup, deceased (the "Non-Parties"), hereby move to intervene in this case with leave of Court to file a supplemental response brief in opposition to the School Board's pending motion for summary judgment and to file a cross-motion for summary judgment on the same statutory interpretation question.

BACKGROUND & PROCEDURAL POSTURE

On February 14, 2018, Nikolas Cruz, armed with an AR-15 semi-automatic assault rifle, opened fire at Marjory Stoneman Douglas High School in Parkland, Florida. He murdered 17 students and staff, and caused bodily injury to 17 more. That tragedy has engendered numerous legal proceedings, including the current declaratory judgment action pending before this Court, *Menescal v. School Bd. of Broward Cnty.*, No. CACE-18-009397.

On April 26, 2018, Petitioner Laura Menescal, as the parent and guardian of Daniela Menescal, filed a declaratory judgment action against the School Board of Broward County seeking this Court's construction of Florida Statutes § 768.28(5). The School Board counterclaimed on the same issue on June 11, 2018, before Menescal voluntarily dismissed her action. The School Board then moved for summary judgment, and Menescal filed a response brief. The School Board's motion has not yet been set for hearing.

STANDARD

Florida Rule of Civil Procedure 1.230 states, "[a]nyone claiming an interest in pending litigation may, at any time, be permitted to assert a right by intervention, but the intervention must be in subordination to, and in recognition of, the propriety of the main proceeding unless otherwise ordered by the court in its discretion." "[A]ny time a party seeks to intervene in a cause of action, a two-step process

is implicated. First, the court must address whether intervention is proper. . . . [Second, the court considers] the merits of the intervenor's claim." *Sullivan v. Sapp*, 866 So. 2d 28, 33 (Fla. 2004).

ARGUMENT

The pending *Menescal* case, while facially a controversy between Petitioner Menescal and the School Board, concerns the construction of Florida Statutes § 768.28(5), which provides the School Board's maximum civil exposure to a state law tort claim.[1] Critically, in adjudicating the motion for summary judgment, this Court will decide whether $300,000 is the School Board's maximum civil liability, to be recovered and shared by ***all victims***, or whether each victim is entitled to up to $200,000. Intervention is proper because the Non-Parties, all of them victims of Nikolas Cruz's mass shooting, have a direct, shared interest in the School Board's maximum exposure of $300,000 that would be immediately affected by this Court's construction of § 768.28(5).

For intervention to be proper, an intervenor must assert an interest that is "the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation." *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). Courts have generally found that an interest in property that is the subject of the pending litigation is sufficiently direct and immediate to warrant intervention, even where the resolution of the litigation would only have a "potential impact" on the intervenor. In *National Wildlife Federation v. Glisson*, 531 So. 2d 996, 997 (Fla. 1st DCA 1988), for instance, several conservationist groups sought to intervene in a lawsuit against

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[1] The only way to recover more against the School Board in a state law tort claim is by filing a claims bill with the Florida Legislature, as the School Board explained in its motion for summary judgment. *See* School Board's Mot. for Summ. J. at 4 (June 18, 2018).

Alachua County challenging the validity of certain amendments to the county's land use plan. In support of their motion to intervene, the conservationist groups contended that their members used the land in question and that a plaintiffs' victory would have a "potential impact on their lives and businesses." *Id.* at 998. The trial court denied intervention, but on appeal the First DCA found those contentions, which were supported by affidavits submitted by the conservationist groups' members, to be sufficiently "direct and immediate." *Id.*

Like the conservationist groups' interest in the land at issue in *National Wildlife Federation*, the Non-Parties each have a shared interest in the School Board's maximum exposure of $300,000 that would be directly affected by this Court's construction of § 768.28(5). As a state agency or subdivision, the School Board is not "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." From a victim's perspective, then, § 768.28(5)'s liability framework creates two mutually exclusive scenarios: either recovery is ***independent*** of the other victims' recovery (because each plaintiff is allocated $200,000) or it is ***dependent*** on the other victims' recovery (because every plaintiff must share $300,000).

In light of that dichotomy, under which the $300,000 operates as a fixed asset, this Court's adjudication of questions regarding that asset—and, in particular, its disposition of any right of recovery—affects every person with a potential recovery against the shared asset, including the Non-Parties. To illustrate, take the following hypothetical in which this Court enters a declaratory judgment in favor of Petitioner Menescal. Currently, each victim has an expected, maximum within-sovereign-immunity

recovery against the School Board of $104,411.76.[2] A plaintiff has that expected maximum recovery because he or she (or their estate) has access to ***either*** $200,000 ***or*** $300,000 shared by all 34 victims. The sum of the two, equally possible scenarios—50% times $200,000 and 50% times $8,823.53 (which is $300,000 divided by the 34 victims)—yields $104,411.76.[3]

But were Petitioner Menescal to prevail in isolation and have access to $200,000, it would immediately affect the remaining plaintiffs' expected, maximum within-sovereign-immunity recovery against the School Board. To flesh that point out, suppose there were only two victims with possible lawsuits against the School Board: Petitioner Menescal and a second victim.[4] Suppose also that the second victim brings a declaratory action against the School Board that is identical to the one at issue in this case, and suppose that, in that later-in-time proceeding, the School Board's interpretation of § 768.28(5) prevails—that is, that the shooting is a single "incident or occurrence," School Board's Mot. for Summ. J. at 6 (June 18, 2018).[5] Since the School Board may not pay "a claim . . . which, when totaled with all other claims or judgment paid . . . arising out of the same incident or occurrence, exceeds the sum of $300,000," § 768.28(5), the second victim's maximum recovery against the School Board will have been adversely affected by Petitioner Menescal's litigation because he or she must share the liability cap with another victim that is not bound by the same limitation. Petitioner Menescal would proceed and recover a

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[2] For the sake of simplicity, that number does not take into account any non-death or non-bodily injury victim, and it divides the $300,000 equally between the wrongful-death and bodily injury victims.

[3] I assume, again for simplicity, that the probabilities of the two scenarios are equal. But they need not be.

[4] Obviously, in this case there are many more.

[5] The second victim could not collaterally estop the School Board from relitigating the § 768.28(5) issue because she was not a party to Petitioner Menescal's litigation. In Florida, "mutuality of parties" is necessary for collateral estoppel to apply. *See Stogniew v. McQueen*, 656 So. 2d 917, 919–21 (Fla. 1995). The only way for the second victim to be deemed a party to Petitioner Menescal's lawsuit is if she is in privity with Petitioner Menescal such that she would be bound by the outcome. No other victim would be bound by Petitioner Menescal's declaratory judgment action. And if this Court were to disagree—because, for instance, the Court determines that the victims' interests are so closely aligned that Petitioner Menescal is their "virtual representative," *Stogniew*, 656 So. 2d at 920 (citing *Aerojet-General Corp. v. Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied,* 423 U.S. 908, 96 S. Ct. 210 (1975))—then unquestionably the Non-Parties have a sufficient interest in this declaratory judgment action to warrant intervention.

maximum within-sovereign-immunity amount of $200,000, leaving the second victim with $100,000, as opposed to $150,000.

Granted, the second victim's predicament manifests itself only if she loses her later-in-time declaratory judgment action. But that does not make the effect of Petitioner Menescal's declaratory judgment any less "direct." *Union Cent.*, 593 So. 2d at 507. First, the second victim's ***expected*** maximum within-sovereign-immunity recovery decreases ***the moment*** Petitioner Menescal prevails in this action.[6] Second, as *National Wildlife Federation* demonstrates, even a "potential impact" on a non-party's interest in a shared, fixed asset—there, the land; here, the $300,000—provides that non-party with a sufficiently "direct and immediate" interest to warrant intervention. *See National Wildlife*, 531 So. 2d at 998. *See also Genauer v. Downey & Downey, P.A.*, 190 So. 3d 131, 135 (Fla. 4th DCA 2016) (concluding that trust beneficiaries had sufficiently direct interest because they "***could*** lose over $150,000 of their inheritance" if the plaintiff succeeded in its lawsuit) (emphasis added).

Intervention being proper, this Court should exercise its discretion and permit the Non-Parties to intervene. *See Genauer*, 190 So. 3d at 135. First, the Non-Parties' intervention does not present a risk of undue delay. After all, this Court has not yet heard oral argument on the School Board's motion for summary judgment. Second, the Non-Parties' leave to file a supplemental brief does not unfairly prejudice any party. It certainly would not prejudice Petitioner Menescal, who seeks the same outcome the Non-Parties do—a declaration that the entire shooting is ***not*** a single "incident or occurrence" under § 768.28(5). And, with an appropriate briefing schedule, it likewise would not prejudice the School Board because the School Board would have, for instance, an opportunity to reply to the Non-Parties'

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[6] In this case, Petitioner Menescal's victory would directly affect the other 33 victims' expected, maximum within-sovereign-immunity recovery as follows. Instead of (.5 * $200,000) + (.5 * ($300,000/34)), the remaining plaintiffs would expect a maximum, within-sovereign-immunity recovery of (.5 * $200,000) + (.5 * ($100,000/33)), which yields $101,515.15. Because Petitioner Menescal would recover $200,000, the remaining plaintiffs would have to share $100,000, which would be the School Board's maximum exposure.

supplemental brief. If anything, the School Board has an interest in resolving the statutory construction question in one fell swoop against more, not fewer, potential claimants. Finally, permitting the Non-Parties to file a cross-motion for summary judgment likewise does not prejudice any party because the Non-Parties would be seeking a declaratory judgment on the very same issue raised by both Petitioner Menescal and the School Board: the proper interpretation of § 768.28(5).

For these reasons, this Court should grant the Non-Parties' motion to intervene with leave to file a supplemental brief in opposition to the School Board's motion for summary judgment.

DATED: September 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court and e-served on all counsel of record named on the Service List on September 28, 2018.

s/ Dayron Silverio
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IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: CACE 18-009397 DIV 25

LAURA MENESCAL
as Parent and Natural Guardian
of DANIELA MENESCAL, a
minor,

Petitioner,

v.

THE SCHOOL BOARD OF
BROWARD COUNTY,

Respondent.
_____/

NOTICE OF CANCELLATION OF HEARING

YOU ARE HEREBY NOTIFIED that undersigned counsel is cancelling the request for parties to appear at Calendar Call before the **Honorable Carol Lisa-Phillips**, one of the Judges of the above-styled Court, at the Broward County Courthouse, on **Thursday**, the **8th** day of **November** at **10:00 a.m.**, on Defendant's Motion for Summary Judgment.

CASE NO: CACE 18-009397 DIV 25

I HEREBY CERTIFY that the foregoing document was electronically filed and served via Florida's E-filing Portal this 3 day of Oct. 2018.

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

Case: CACE-18-009397 (25)

THE SCHOOL BOARD OF BROWARD COUNTY'S SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

THE SCHOOL BOARD OF BROWARD COUNTY, by and through its undersigned attorneys and pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, hereby files its Supplement to its previously filed Motion for Summary Judgment and, in support thereof, states as follows:

The Fourth District Court of Appeal recently issued the attached opinion in *Dept. of Fin. Svcs. v. Barnett*, --- So. 3d ---. No. 4D18-2840, 2018 WL 4959643 (Fla. 4th DCA Oct. 10, 2018), which addresses the precise issue before the Court in this case, noting that it is an issue of first impression for the court. The motions for rehearing, rehearing en banc, and certification, filed by the plaintiff/appellees, remain pending before the Fourth District at the time of the filing of this Supplement.

In *Barnett*, the fathers of five children, four of whom were killed and one injured by their stepfather on "one murderous night," claimed that DCF negligently investigated the family, which led to the tragedy. The trial court determined that the death of each child constituted an independent "incident or occurrence" for the purposes of the statutory cap in the statute applicable to the waiver of sovereign immunity (§ 768.79(5), Fla. Stat). The Fourth District reversed, holding that since statutes waiving sovereign immunity must be strictly construed, and any statute waiving sovereign immunity must be clear and unequivocal, the trial court erred in finding that each death or injury constituted an independent incident or occurrence.

Before the trial court, the plaintiff/fathers framed the issue as "whether the murders of four children and the shooting of a fifth child, by separate gunshots, delivered in separate locations, at separate times, are five separate 'incidents or occurrences' for purposes of sovereign immunity."

In its decision, the Fourth District set forth a detailed discussion of the history of sovereign immunity explaining that because the statutory waiver of sovereign immunity is an abrogation of the sovereignty of the state, "courts have strictly construed any statute waiving immunity to protect the public purse." Even though the statute does not define "incident or occurrence," the Fourth District recognized that the case involved a "single claim of negligence" against DCF in the failure to properly investigate the family, and concluded that each claim thus arose from the "same incident of negligence."

Critical to this Court's analysis, the Fourth District held that if it were to follow the rationale being pushed by the plaintiffs, their interpretation would "write out the $200,000 limitation on liability entirely." The court held that while the "res judicata" argument being pushed by those plaintiffs might be useful in determining whether a single plaintiff has single or multiple claims, "it has no application to cases where there are multiple plaintiffs asserting a single claim of negligence against the state actor."

The Fourth District also expressly held that the Florida Supreme Court's decision in *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003) is inapplicable in this context. *Koikos* involved the interpretation of a commercial insurance policy and the question of whether injuries caused by separate gunshots in a bar brawl were considered separate "occurrences" *under the policy language.* (Emphasis by court). There, the Florida Supreme Court held, in that context, that the occurrence was the act that caused the damages, not the underlying negligence by the insured.

Fourth District concluded that *Koikos* was inapplicable in the sovereign immunity context for two glaring reasons. First, it was based upon the definition of an "occurrence" in a particular insurance policy – a definition that is not found in the statute that is at issue here. Second, "and most importantly," *Koikos* involved the interpretation of an insurance policy which must be construed liberally in favor of the insured and against the drafter of the policy. According to the court, "this is exactly opposite to the sovereign immunity waivers, which must be strictly construed with any ambiguities being resolved against waiver." The Fourth District concluded that section 768.28(5) waived sovereign

immunity up to $200,000 for "all claims or judgments arising out of the claims of negligent supervision by DCF brought in this case" and then recognized that even though the statute limited the plaintiffs' recovery to $200,000, the law continues to allow them to seek a claims bill authorizing further compensation.

This case addresses precisely the issue before this Court, and the School Board respectfully submits that this Court should follow that law[1] and conclude that section 768.28(5) waives sovereign immunity up to $300,000 "for all claims or judgments" arising out of the claims of negligence by the School Board. As explained by the Fourth District, even though the statute may limit their recovery, the Plaintiffs/Intervenors are not without a remedy. They can seek a claims bill authorizing further legislation. "While this is a cumbersome process, the legislature has deemed it necessary to assure the protection of the state's revenues to the good of the entire population. If the process is objectionable to the public in situations such as this, where multiple parties make claims against a state actor for a single tort, then the remedy is to petition the legislature to change the law."

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[1] *See, e.g., Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992)("The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts – District Courts of Appeal.")(*quoting State v. Hayes*, 333 So. 2d 51 (Fla. 4th DCA 1976)(noting that a Circuit Court is equally bound by a decision of a District Court of Appeal regardless of its appellate district).

WHEREFORE, The School Board of Broward County respectfully requests this Court enter an order GRANTING its Motion for Summary Judgment, and entering a declaratory judgment holding that the aggregate statutory cap of $300,000 limits the School Board's exposure for "all claims or judgments" arising out of the purported negligence that gave rise to the school shooting (without prejudice to those injured to seek appropriate remedies through the Florida Legislature).

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed and served via Florida's e-filing portal on this 1st day of November, 2018, to all parties on the attached mailing list.

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2018 WL 4959643
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District Court of Appeal of Florida, Fourth District.

State of Florida, DEPARTMENT OF FINANCIAL SERVICES, Florida Department of Children and Families and City of Riviera Beach, a Florida municipal corporation, Appellants,
v.
Michael BARNETT, individually, as natural father and guardian of R.B., a minor, and as the Personal Representative of the Estates of Daniel Barnett, Diane Barnett and Bryan Barnett, and Leroy Nelson, Jr., as Personal Representative of the Estate of Javon Xavier Nelson, a minor, Appellees.

No. 4D17-2840
|
[October 10, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case Nos. 502012CA004183MBAJ and 502012CA000179MB.

Attorneys and Law Firms

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Vincent E. Miller of the Law Offices of Vincent E. Miller, P.A., Delray Beach, for appellee Leroy Nelson, Jr.

Opinion

Warner, J.

***1** The issue presented in this case is one of first impression involving section 768.28(5), Florida Statutes (2010), waiver of sovereign immunity in tort actions. That statute limits to $200,000 the amount of liability of the state or its subdivisions for all claims or judgments "arising out of the same incident or occurrence." This underlying suit was brought by the fathers of children killed and injured by their stepfather on one murderous night. The fathers claimed negligence by the Department of Children and Families in its investigation of the family, and the trial court determined that the death of each child constituted an independent "incident or occurrence" for purposes of the statutory cap in the waiver statute. Therefore, each wrongful death or personal injury claim would be eligible for the $100,000 per person and $200,000 total claims limitations. Because statutes waiving sovereign immunity must be strictly construed, and any statute waiving sovereign immunity must be clear and unequivocal, the trial court erred in concluding that each death or injury constituted an independent incident or occurrence. We reverse.

Patrick Dell and Natasha Dell were married and had two children together. Natasha also had five children from two previous relationships, four with appellee Michael Barnett and one with Leroy Nelson. All of the children lived with her. According to the complaint filed in this action, the relationship between Patrick and Natasha was marred by domestic violence, and police had been called to their home many times. On December 20, 2009, a particular incident occurred where Patrick threatened Natasha with a knife and uttered threats against the entire family. That altercation was reported to DCF, which launched an investigation. After interviewing both parties, as well as the older children who all said that they did not fear for their safety, the investigator closed his file.

Nine months after the investigation was closed, Patrick, now an estranged husband, entered the home, where he shot and killed three of the Barnett children and the Nelson child. The other Barnett child was injured but not killed. The Dell children were not harmed. Patrick then killed Natasha and himself.

In their capacity as personal representatives of their children's estates and on behalf of the injured child, the fathers filed separate suits against DCF for negligence in its investigation. In its answer, DCF alleged that there was sovereign immunity for any amounts recovered above the statutory caps contained in section 768.28(5), Florida Statutes (2010). The Department of Financial Services—the agency in charge of payment of any judgment—was granted leave to intervene. It filed a declaratory judgment, requesting the court to determine each of the fathers' rights under section 768.28(5), Florida Statutes (2010), which provides in part:

> ***2** 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 $100,000 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 $200,000.

After further discovery, the fathers filed a motion for summary judgment against both DCF and DFS. The motion framed the issue as "whether the murders of four children and the shooting of a fifth child, by separate gunshots, delivered in separate locations, at separate times, are five separate 'incidents' or 'occurrences' for purposes of sovereign immunity." In rendering a declaratory judgment, the trial court found that each claim, as presented in this particular case, constituted an independent incident or occurrence. Therefore, it concluded that "each wrongful death or personal injury claim [was] eligible for the $100,000 per person and $200,000 per claim limitation found in Florida Statute § 768.28(5)." DFS appeals the declaratory judgment.[2] We review statutory construction de novo. *Maggio v. Fla. Dep't of Labor & Emp't Sec.*, 899 So.2d 1074, 1076 (Fla. 2005).

At common law, the state possessed immunity from suit as an aspect of its sovereignty. *See Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla. 1958). "Sovereign immunity's roots extend to medieval England. The doctrine flows from the concept that one could not sue the king in his own courts; hence the phrase 'the king can do no wrong.' " *Cauley v. City of Jacksonville*, 403 So.2d 379, 381 (Fla. 1981). Pursuant to the Florida Constitution, however, "The people of Florida vested the power to waive immunity in the Florida legislature at an early date." *Id.* (citing Art. IV, § 19, Fla. Const. (1868) (now Art. X, § 13, Fla. Const.)). However, because waiver is an abrogation of the sovereignty of the state, courts have strictly construed any statute waiving immunity to protect the public purse.

> Inasmuch as immunity of the state and its agencies is an aspect of sovereignty, the courts have consistently held that statutes purporting to waive the sovereign immunity must be clear and unequivocal. Waiver will not be reached as a product of inference or implication. The so-called 'waiver of immunity statutes' are to be strictly construed. 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.

Spangler, 106 So.2d at 424. As such, "[s]tatutes purporting to waive sovereign immunity are strictly construed, and must be clear and unequivocal." *State ex rel. Div. of Admin. v. Oliff*, 350 So.2d 484, 486 (Fla. 1st DCA 1977) (alteration added).

The legislature did not define "incident or occurrence" in section 768.28(5). Limited case law has applied the statute to cases involving multiple claimants and a single tortious act. In *Rumbough v. City of Tampa*, 403 So.2d 1139, 1142-43 (Fla. 2d DCA 1981), the court considered the meaning of the terms in determining whether a city-created nuisance was one incident or occurrence when it produced injury to properties over time. In *Rumbough*, landowners sued the city for nuisance, claiming that foul odors from an expanded landfill impaired the use of their land. *Id.* at 1140. Prior to the suit, the city had already paid $100,000 in damages to other landowners for the same nuisance. *Id.* at 1142. The court found that because the nuisance amounted to an "occurrence," "continuing in nature" and creating damage over time, the city's payment of other claims were payments arising out of the same occurrence which had exhausted the statutory aggregate limit. *Id.* at 1142-43. The "occurrence" was tied to the negligence of the state actor, not to the damages resulting from the negligent acts. *Id.*

***3** In *Orange County v. Gipson*, 539 So.2d 526, 527 (Fla. 5th DCA 1989), the county was sued for creating an attractive nuisance. Two children were crossing a canal over sewer pipes owned by the city. *Id.* One of the children slipped into the water and became entangled in weeds. *Id.* The other jumped in to save him and both drowned. *Id.* Their estates sued the city and the county. *Id.* Those claims were treated as one "incident." *Id.* at 529-30.

In *City of Miami v. Valdez*, 847 So.2d 1005, 1006 (Fla. 3d DCA 2003), the court considered the application of the statutory caps to a case where two vehicle occupants were injured in an accident with a police vehicle. One occupant

filed suit against the city and obtained a multi-million dollar verdict on a single count of negligence. *Id.* The city settled, paying the occupant the $100,000 statutory cap, and then assisted him in the passage of a legislative claims bill for him to obtain the $4.9 million balance. *Id.* When the other occupant filed suit, the city maintained that because of the legislative payment to the first occupant, it was not liable to the second occupant for the statutory cap of $100,000 per person. *Id.* The city further argued it also exhausted the $200,000 cap per incident because of its compliance with the $4.9 million special claims bill in favor of the first occupant. *Id.* The appellate court affirmed the trial court's determination that the city was liable for the $100,000 left on the aggregate statutory cap and could not offset that obligation through the legislative payment to the first occupant. *Id.* at 1009. In other words, both vehicle occupants could collect $100,000, because the combined total did not exceed the aggregate $200,000 statutory cap. *Id.* Thus, *Valdez* applied the cap where there was a single tortious act causing multiple injuries.

In a case brought by two sisters claiming negligent supervision by DCF, similar to the present case, the court held that each child presented a single claim of negligent supervision, even though the negligence spanned several years and involved multiple individual acts of negligence. *State Dep't of Health & Rehab. Servs. v. T.R. ex rel. Shapiro*, 847 So.2d 981, 985 (Fla. 3d DCA 2002). All of the children's damages were limited by the $100,000 per person limitation in the statute. *Id.* The court considered the negligent claim against the Department as a single claim for each child, despite the fact that there were several acts of negligence by various state employees included in that claim.

The current case involves a single claim of negligence against the Department in the failure to properly investigate the family and the stepfather before closing its file. Thus, each estate's claim and the claim of the injured child arise from the same incident of negligence of the Department. Therefore, the $200,000 cap per incident or occurrence applies to limit recovery for all claims.

The appellees rely on *Zamora v. Florida Atlantic University Board of Trustees*, 969 So.2d 1108 (Fla. 4th DCA 2007), as support for their position that each murder constituted a separate "incident or occurrence." *Zamora*, however, involved a single plaintiff making two separate and distinct claims of discrimination and retaliation against the appellee. Our court was not applying the aggregate cap but determining whether two disparate claims occurred. *Id.* at 1114. We applied the doctrine of res judicata to determine whether there were one or two claims brought by the single plaintiff. Because two separate negligent acts resulted in two separate incidents of discrimination and two separate damage awards, a separate statutory damage cap would apply to each claim. *Id.*

***4** Appellees contend that we should apply the principle of res judicata to this case as well. Under res judicata, they argue, because there is no identity of persons, the claims do not constitute a single claim. However, that would mean that where there are multiple claimants, res judicata would *never* bar claims, because separate claims would lack identity of parties. Thus, even in cases such as *Valdez*, involving a single auto accident causing damages to two persons, they would be considered two separate incidents. Such an interpretation would write out the $200,000 limitation on liability entirely. While res judicata is useful in determining whether a single plaintiff has multiple claims or a single claim, it has no application to cases where there are multiple plaintiffs asserting a single claim of negligence against the state actor.

The trial court and appellees also rely on *Koikos v. Travelers Ins. Co.*, 849 So.2d 263 (Fla. 2003), involving the interpretation of a commercial insurance policy. There, during a brawl in a restaurant, two patrons were injured by shots fired by another patron. *Id.* at 265. The restaurant was sued for negligence, and it filed a declaratory judgment against its insurance company, asserting that each injury was a separate "occurrence" *under the policy language.* *Id.* The case was removed to a federal district court. *Id.* The case reached the supreme court on a question from the federal court, and the supreme court held that when the insured is being sued for negligence in failing to provide security, the "occurrence" under the policy is the act that caused the damages, not the underlying negligence by the insured. *Id.* at 271.

Koikos, however, is inapplicable for two reasons. First, it is based upon the definition of "occurrence" under an insurance policy, a definition which is not found in the statute. Second, and most importantly, insurance policies are to be construed liberally in favor of the insured, which *Koikos* relied on in reaching its construction. Any ambiguities must be construed against the drafter of the policy. This is exactly opposite to the sovereign immunity waivers, which must be strictly construed with any ambiguities being resolved against waiver. *See Spangler*. Therefore, the *Koikos* analysis does not apply to section 768.28(5).

We acknowledge that if we were to construe the statute liberally in favor of a waiver, the trial court's construction is reasonable. But we must construe it strictly, and 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.

Although appellees' recoveries through a judgment may be substantially limited by section 768.28(5), they are not without remedy. The legislature may approve a claims bill authorizing further compensation. While this is a cumbersome process, the legislature has deemed it necessary to assure the protection of the state's revenues to the good of the entire population. If the process is objectionable to the public in situations such as this, where multiple parties make claims against a state actor for a single tort, then the remedy is to petition the legislature to change the law.

For the foregoing reasons, we hold that section 768.28(5) waives sovereign immunity up to $200,000 for all claims or judgments arising out of the claims of negligent supervision by DCF brought in this case.

Reversed and remanded for entry of a declaratory judgment consistent with this opinion.

May and Forst, JJ., concur.

All Citations

--- So.3d ----, 2018 WL 4959643

Footnotes

1 Prior to 1981, the limit was $50,000 per person and $100,000 for all claims arising out of the same incident or occurrence. The limit was increased to $100,000 per person and $200,000 for all claims arising out of the same incident or occurrence in 1981. *See* Ch. 81-317, § 1, Laws of Fla. After 2010, the legislature amended the statute again, and the limit was increased to $200,000 per person and $300,000 for all claims arising out of the same incident or occurrence. *See* Ch. 10-26, § 1, Laws of Fla.

2 We have jurisdiction because the declaratory judgment terminates the case as to a party (DFS). *See* Fla. R. App. P. 9.110(k). The order also ruled on entitlement to sovereign immunity as a matter of law. Thus, it is appealable pursuant to Florida Rule Appellate Procedure 9.130(a)(3)(C)(xi).

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE18009397 DIVISION 25 JUDGE Carol-lisa Phillips

Laura Menescal
Plaintiff(s) / Petitioner(s)
v.
School Board of Broward County
Defendant(s) / Respondent(s)
_____/

AGREED ORDER ON NON-PARTIES' MOTION TO INTERVENE

The interested non-parties filed a motion to intervene in this matter and for leave of Court to file a supplemental brief in opposition to the School Board's pending motion for summary judgment. The School Board does not oppose the motion. This Court **GRANTS** the motion and orders:

1. The following parties may intervene in this matter (the "Intervenors"): Frederic Guttenberg and Jennifer Guttenberg, as co-personal representatives of the Estate of Jaime T. Guttenberg; Ashley Maria Baez, a minor by and through her parents and natural guardians, Katherine Baez and Juan David Baez; Isabel Chequer, a minor, by and through her parents and natural guardians, Gabriela Chequer and Amin Chequer; Anthony and Jennifer Montalto, as Proposed Co-Personal Representatives of the Estate of Gina Rose Montalto, deceased; Kong Feng Wang a/k/a Jacky Wang and Hui Ying Zhang a/k/a Linda Wang, as Co-Personal Representatives of the Estate of Peter Wang, deceased; Martin Duque and Daisy Anguiano, as parents of the Martin Duque, deceased; Manuel Oliver and Patricia Padauy, as Co-Personal Representatives of the Estate of Joaquin Oliver, deceased; Stacy Lippel; Linda Beigel, as Personal Representative of the

Estate of Scott Beigel, deceased; Andrew Pollack, as Co-Personal Representative of the Estate of Meadow Pollack, deceased; Shara Kaplan, as Co-Personal Representative of the Estate of Meadow Pollack, deceased; Max Schachter, as Personal Representative of the Estate of Alex Schachter, Benjamin E. Wikander; Philip and April Schentrup, as Co-Representatives for the Estate of Carmen Schentrup, deceased.

2. The Intervenors are granted leave to file a response brief in opposition to the School Board's motion for summary judgment.
3. The Intervenors must file their response brief at least 7 days before the hearing on the School Board's Motion for Summary Judgment. The School Board may file a reply brief, not to exceed 10 pages, at least 3 days before the hearing.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 11-05-2018.

CACE18009397 11-05-2018 8:14 AM

CACE18009397 11-05-2018 8:14 AM
Hon. Carol-lisa Phillips
CIRCUIT JUDGE
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IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE-18-009397 (25)

LAURA MENESCAL, as
Parent and Natural Guardian of
DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF
BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

INTERVENORS' RESPONSE IN OPPOSITION TO THE SCHOOL BOARD'S MOTION FOR SUMMARY JUDGMENT

The Intervenors, Frederic Guttenberg and Jennifer Guttenberg, as co-personal representatives of the Estate of Jaime T. Guttenberg; Ashley Maria Baez, a minor by and through her parents and natural guardians, Katherine Baez and Juan David Baez; Isabel Chequer, a minor, by and through her parents and natural guardians, Gabriela Chequer and Amin Chequer; Anthony and Jennifer Montalto, as Proposed Co-Personal Representatives of the Estate of Gina Rose Montalto, deceased; Kong Feng Wang a/k/a Jacky Wang and Hui Ying Zhang a/k/a Linda Wang, as Co-Personal Representatives of the Estate of Peter Wang, deceased; Martin Duque and Daisy Anguiano, as parents of the Martin Duque, deceased; Manuel Oliver and Patricia Padauy, as Co-Personal Representatives of the Estate of Joaquin Oliver, deceased; Stacy Lippel; Linda Beigel, as Personal Representative of the Estate of Scott Beigel, deceased; Andrew Pollack, as Co-Personal Representative of the Estate of Meadow Pollack, deceased; Shara Kaplan, as Co-Personal Representative of the Estate of Meadow Pollack, deceased; Max Schachter, as Personal

Representative of the Estate of Alex Schachter, Benjamin E. Wikander; Philip and April Schentrup, as Co-Representatives for the Estate of Carmen Schentrup, deceased, hereby file this response in opposition to the School Board's motion for summary judgment.

INTRODUCTION

The School Board has asked this Court to declare that "the purported claims against the School Board for its purported liability for the injuries arising out of [the Marjory Stoneman Douglas High School shooting] constitute one 'incident or occurrence' under the statute." Answer and Counterclaim at 5–6. That wide-sweeping declaration, if granted, would limit the School Board's exposure from the shooting to $300,000 in the aggregate—that is, $300,000 to be shared by each and every person and family harmed, no matter the number or kinds of claims they assert against the School Board. This Court should deny the School Board's motion for summary judgment because the requested declaration, in the abstract, is inconsistent with precedent from the Florida Supreme Court and in contravention of binding precedent in the Fourth DCA authorizing certain claims to constitute separate incidents or occurrences.

BACKGROUND

Petitioner Menescal, a surviving victim of the Marjory Stoneman Douglas High School shooting, filed a complaint for declaratory relief against the School Board on April of 2018. She sought a declaration that her injury was a distinct "occurrence" under Florida Statutes § 768.28(5). The School Board answered and counterclaimed with its own demand for declaratory relief on § 768.28(5). Although Petitioner Menescal voluntarily dismissed her complaint on August 7, 2018, the School Board did not relent. It instead filed a motion for summary judgment on June 18, 2018, seeking an order limiting the School Board's "exposure for all claims arising out of the school

shooting" to an aggregate $300,000 under § 768.28(5). Def.'s Mot. for Summ. J. at 16. Petitioner Menescal responded on August 10, 2018.

The Intervenors, all victims of the shooting as well, sought to intervene and supplement Petitioner Menescal's response. This Court authorized intervention on November 5, 2018, and granted the Intervenors leave to file a supplemental response brief. Oral argument on the motion is set for December 12, 2018.

ARGUMENT

This Court should deny the School Board's motion for summary judgment because the requested declaratory judgment interprets § 768.28(5) in a manner inconsistent with Florida Supreme Court precedent and in a manner that forecloses a construction of the statute provided by the Fourth DCA.

I. Because each bullet is a distinct, immediate cause of death or injury, each bullet is a separate occurrence.

This Court should conclude that the word "occurrence" in § 768.28(5) refers to the immediate injury-producing act—here, the separate shots fired by Nikolas Cruz at Marjory Stoneman Douglas High School on February 14, 2018. Although that construction was recently rejected by the Fourth DCA in *Dep't of Fin. Servs. v. Barnett*, No. 4D17-2840, 2018 WL 4959643 (Fla. 4th DCA Oct. 10, 2018), that case was wrongly decided and is inconsistent with the Florida Supreme Court's reasoning in *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003).

A. The *Koikos* Opinion.

In *Koikos*, the plaintiff, a restaurant owner, sued his insurer for failing to adequately cover him under a policy containing a "per occurrence" limit. 849 So. 2d at 264. The case arose after two patrons were shot at the plaintiff's restaurant during a fraternity's graduation party. *See id.* at 264-65. During the party, two men attempted to enter the restaurant but were turned away after a

heated exchange with several fraternity members. *Id.* at 265. A few minutes later, the rejected party-crashers returned to the restaurant to start trouble. *Id.* One of them pulled out a handgun and began firing his weapon. *Id.* He fired two separate—but nearly concurrent—rounds. Two fraternity members were shot. *Id.* The plaintiff filed a declaratory judgment action against his insurer for coverage. *Id.* The parties filed motions for summary judgment asking the court to determine whether the underlying shooting incident constituted one "occurrence" or two. *Id.* The question was eventually certified to the Florida Supreme Court. *Id.*

The Florida Supreme Court held that each shooting of a separate victim constituted a separate "occurrence." *Id.* at 273. The insurance policy at issue defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[1] *Id.* at 266. The term "accident" covered "injuries or damage neither expected nor intended from the standpoint of the insured." *Id.* at 267 (quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1075-76 (Fla. 1998)). The insurer argued that the "continuous or repeated exposure" clause in the definition of "occurrence" was limiting language and that the "accident" was the victims' continuous exposure to substantially the same general harmful conditions—i.e., the plaintiff's failure to keep his premises safe. *Id.* The court disagreed. *Id.*

The court explained that the "continuous and repeated exposure" language in the definition of "occurrence" was intended to ***broaden*** coverage. *Id.* In the 1960s, "accident" was restrictively defined as "an event happening suddenly," which "proved to be unsatisfactory to policyholders, the public[,] and the courts." *Id.* Hence, in 1972, standard comprehensive general liability policies were amended to (1) replace the word "accident" with the word "occurrence," and (2) define

[1] This is almost identical to the definition of "occurrence" in Black's Law Dictionary: "Something that happens or takes place; specifically, an accident, event, or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party." *Occurrence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

"occurrence" broadly to mean "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.* The "continuous or repeated exposure" language, the court reasoned, "does not restrict the definition of 'occurrence' but rather expands it by including ongoing and slowly developing injuries, such as those in the field of toxic torts." *Id.* at 268.

The Florida Supreme Court then determined the number of occurrences. The insurer argued, as the School Board does here, that all of the shots should be considered one "occurrence" because of their close "proximity in time and place." *Id.* at 272. The court disagreed, noting that delving into such an inquiry would be arbitrary and indiscernible. *Id.* ("To hold that the number of occurrences is determined by the time between each shot would turn an insurance coverage issue into an intensive fact-based inquiry requiring the selection of an arbitrary time interval to distinguish a single occurrence from multiple occurrences."). The better option is to look at the "independent *immediate* acts that give rise to the injuries," *id.* at 273 (emphasis in original), which is "the number of shots fired . . . because each individual shooting is distinguishable in time and space," *id.* at 272.

This better option, the court explained, is consistent with Florida's embrace of the "cause theory"—"that in the absence of clear language to the contrary, when the insured is being sued for negligent failure to provide security, 'occurrence' is defined by the ***immediate injury-producing act*** and not by the underlying tortious omission." *Id.* at 271-72 (emphasis added). In other words, one must look to the immediate cause of the damage—here, as in *Koikos*, the third party's gunshots—rather than the negligent failures of the defendant tortfeasor. *See id.* ("Thus, in this case, the immediate causes of the injuries were the intervening intentional acts of the third party—the

intruder's gunshots."). It held, therefore, that the shooting incident constituted two occurrences, one for each injury-producing bullet.

B. The *Barnett* Opinion.

Whether the reasoning of *Koikos* applied in the context of the sovereign immunity statute was an issue of first impression for the Fourth DCA in *Barnett*. In *Barnett*, the plaintiffs were the natural fathers of five children who were murdered and injured by their stepfather, Patrick Dell. *See* 2018 WL 4959643, at *1. Prior to the murders, Patrick had made threats against the children, which were reported to the Department of Children and Families ("DCF"). DCF launched an investigation but eventually closed the file. Nine months later, Patrick shot and killed four of the children, shot and injured another child, and then killed himself. The plaintiffs sued DCF for negligence in its investigation. *Id.* In its answer, DCF alleged that section 768.28(5) capped the plaintiffs' ultimate recovery. *Id.* at *2. The Department of Financial Services ("DFS") then intervened and filed a declaratory judgment requesting that the court determine each of the plaintiffs' rights under section 768.28(5). *Id.* After discovery, the plaintiffs filed a motion for summary judgment against DCF and DFS, which framed the issue as "whether the murders of four children and the shooting of a fifth child, by separate gunshots delivered in separate locations, at separate times, are five separate 'incidents' or 'occurrences' for purposes of sovereign immunity." *Id.* The trial court sided with the plaintiffs and granted summary judgment in their favor, holding that "each wrongful death or personal injury claim was eligible for the $100,000 per person and $200,000 per claim limitation . . . ."[2] *Id.* DFS appealed. *Id.*

[2] "Prior to 1981, the limit was $50,000 per person and $100,000 for all claims arising out of the same incident or occurrence. The limit was increased to $100,000 per person and $200,000 for all claims arising out of the same incident or occurrence in 1981. After 2010, the legislature amended the statute again, and the limit was increased to $200,000 per person and $300,000 for all claims arising out of the same incident or occurrence." *Id.* at *1 n.1. (citations omitted).

On appeal, the Fourth DCA reversed the trial court and ruled in favor of DFS. *Id.* at *4. The court strictly construed section 768.28(5) against waiver, holding 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 *4. Instead, all the plaintiffs would share in a $200,000 limit "for all claims or judgments arising out of the claims of negligent supervision by DCF brought in th[e] case." *Id.* According to the Fourth DCA, the "case involve[d] a single claim of negligence against the Department in the failure to properly investigate the family and the stepfather before closing its file. *Id.*at *3. Thus, each estate's claim and the claim of the injured child ar[o]se from the same incident of negligence of the Department." *Id.*

C. *Barnett* was wrongly decided.

In *Barnett*, the Fourth DCA rejected the argument that *Koikos* applied in the sovereign immunity context, reasoning that the *Koikos* was distinguishable because, in that case, the Florida Supreme Court defined the term "occurrence" in an insurance policy rather than in the sovereign immunity statute. *Id.* But the Fourth DCA erred in relying on an artificial distinction. There are strong reasons to read the term "occurrence" in § 768.28(5) consistently with its meaning in liability insurance policies, as interpreted by the Florida Supreme Court.

First, the court's rationale in *Koikos* supports the proposition that the term "occurrence" in the sovereign immunity statute should be consistent with its interpretation in the insurance context. The sovereign immunity statute and the insurance policy at issue in *Koikos* provide coverage for the same types of injury. The insurance policy covered "bodily injury" and "property damage," 849 So. 2d at 266; and the sovereign immunity statute covers "injury or loss of property, personal injury, or death." Fla. Stat. § 768.28(1) (2018). In *Koikos*, the insurance company made the same argument that the School Board is now making in this case: that the focal point is on the insured's/tortfeasor's underlying act. *See Koikos*, 849 So. 2d at 269. But the Florida Supreme Court

outright rejected this argument because liability attaches when the injuries occur, not when the tortfeasor acts negligently. *Id.* at 271 ("Although [the tortfeasor's] alleged negligence in failing to provide security is the basis for which liability is sought to be imposed, it was the shooting that gave rise to the injuries that were neither expected nor intended from the [tortfeasor's] standpoint."). The same rationale applies here: the cause of action against the School Board accrues at the time of injury, not before.

Second, the legislative history and backdrop of the sovereign immunity statute suggests that the Florida legislature meant to use the term "occurrence" consistently with its meaning in the insurance context. In an opinion cited to by the School Board, the Second DCA explained that the Florida legislature likely intended to use "occurrence" in the sovereign immunity statute because of its ties to insurance. *See Rumbough v. City of Tampa*, 403 So. 2d 1139, 1142-43 (Fla. 2d DCA 1981). Specifically, "by using the word occurrence in the statute, the legislature may have intended that it receive a similar interpretation since the limited waiver of sovereign immunity contemplates that governmental agencies might carry liability insurance up to the statutory maximum of liability." *Id.*

The Second DCA's theory squares with the historical tracking of Florida's sovereign immunity statute and the use of the term "occurrence" in insurance policies. As explained above, in 1972, insurers changed standard comprehensive general liability policies, transitioning from "per accident" insurance policies to "occurrence-based" insurance policies. *See Koikos*, 849 So. 2d at 267. This change took place ***years before*** § 768.28(5) went into effect, which was in 1974 for the executive branch and 1975 for all other agencies and subdivisions of the state. *See* § 768.30, Fla. Stat. (1975). Clearly, the Legislature was well aware of the connotations associated with the term "occurrence"—mainly, that it was (and still is) insurance lingo. Indeed, we assume this is so.

The canons of statutory interpretation instruct courts to presume that words take their ordinary meaning, considering the contextual background in which the legislative body was legislating. *See Perrin v. United States*, 444 U.S. 37, 42–43, 100 S. Ct. 311, 314, 62 L. Ed. 2d 199 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term . . . at the time Congress enacted the statute . . . .") (citations omitted); *United States v. Wilson*, 290 F.3d 347, 354 (D.C. Cir. 2002) (explaining that courts should consider ambiguities in text against "the contextual background against which [the legislative body] was legislating").

Moreover, the sovereign immunity statute, when first made effective in 1975, expressly referenced a government entity's ability to procure insurance coverage for any claims against it:

> If the state or its agency or subdivision ***is insured against liability for damages for any negligent or wrongful act, omission, or occurrence*** for which action may be brought pursuant to this section, then the limitations of this act shall not apply to actions brought to recover damages therefor to the extent ***such policy of insurance shall provide coverage***. Agencies or political subdivisions presenting homogeneous risks may join together to ***purchase insurance protection*** or to provide other means of meeting obligations for damages as provided by this act.

See § 768.28(10), Fla. Stat. (1975) (emphasis added); *see also* JOINT LEGIS. MGMT. COMM. OF THE FLORIDA LEG., SUMMARY OF GENERAL LEGISLATION 1973, Regular Sess. Apr. 3–June 6, 1973, at 153–54 (1973), http://fall.law.fsu.edu/collection/FlSumGenLeg/FlSumGenLeg1973.pdf. Given this contextual backdrop, the Fourth DCA erred in finding that the Florida Supreme Court's interpretation of the term "occurrence" in an insurance policy does not bear on the interpretation to the same term in the sovereign immunity statute.

Third, the Fourth DCA's decision in *Barnett* contradicts the Third DCA's decision in *Dep't of Health and Rehab. Servs. v. T.R.*, 847 So. 2d 981 (Fla. 3d DCA 2002). In *T.R.*, the plaintiffs, two foster children, sued DCF for negligently failing to protect them from abusive doctors and

foster parents, and for negligently failing to arrange for their adoption. *Id.* at 981. The children alleged that they were sexually and physically abused while under the care of DCF. *Id.* After a jury trial, the jury awarded each foster child over $2,000,000. *Id.* At the trial, the judge had the jury decide how many "incidents" of negligence there were because, in the judge's view, the children could recover $100,000 per identified act of DCF's negligence. *Id.* at 983. The jury identified eight incidents of negligence, and thus, the judge decided that each child was entitled to an $800,000 limitation on damages. *See id.*

The issue on appeal was whether each separate "incident" of negligence adds $100,000 to the statutory cap for each child's award for damages. The Third DCA held that each child was limited to $100,000 because "the behavior at issue . . . does not change the fact that the claims in full amounted to no more than each girl's single claim against [DCF] for the injuries she suffered while under its supervision." *Id.* at 985. The Third DCA noted that looking at the government's negligence "could lead to the absurd result of making the statutory cap . . . meaningless[:]"

> For example, 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 $100,000 caps. Moreover, in the weeks that followed, if the 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 $100,000 statutory caps.

Id. The *Barnett* opinion, however, promotes precisely the type of artful pleading that the Third DCA considered "absurd." By making a defendant's negligence the focal point in deciding each "incident" or "occurrence" under the sovereign immunity statute, the *Barnett* court encourages plaintiffs to plead additional causes of actions to expand the universe of available statutory caps.

This Court should adopt the interpretation of "occurrence" from the Florida Supreme Court's decision in *Koikos* and find that, in the present case, each injury-producing shot fired by Nikolas Cruz was a separate "occurrence" under the sovereign immunity statute.

II. Even if the tortfeasor's negligent actions are the proper focus of the inquiry, the declaratory judgment requested by the School Board should be denied because it contravenes binding precedent that authorizes distinct causes of actions—that is, distinct theories of liability—to constitute separate occurrences.

In its counterclaim, the School Board has asked this Court to declare, unequivocally and without nuance, that "the purported claims against the School Board for its purported liability for the injuries arising out of [Marjory Stoneman Douglas High School shooting] constitute one 'incident or occurrence' under the statute." Answer and Counterclaim at 5–6. The School Board's requested relief would have all potential claims arising out of this tragedy, no matter their quantity, nature, or underlying operative facts, constitute a single incident or occurrence under § 768.28(5). Such a broad pronouncement, however, contravenes binding precedent from the Fourth DCA because it leaves no room for distinct causes of action to constitute separate incidents or occurrences under § 768.28(5). On that basis, the School Board's motion should be denied.

The Fourth DCA has held that causes of action that are ***not*** "*required to be brought* in the same case or be barred by res judicata or [the rule against] splitting the cause of action" constitute separate incidents or occurrences for purposes of § 768.28(5). *See Zamora v. Fla. Atl. Univ. Bd. of Trustees*, 969 So. 2d 1108, 1112 (Fla. 4th DCA 2007) (emphasis in original). In *Zamora*, the plaintiff sued his former employer, Florida Atlantic University, for age discrimination and retaliation. *See id.* at 1110. A jury found for the plaintiff and delivered a verdict in which it awarded damages separately for each cause of action. *See id.* 1114. Following trial, the trial court considered both causes of action to be a single incident or occurrence and limited the plaintiff's recovery to $100,000 total. The plaintiff appealed, contending that because his claims were "separate

incidents—one of employment discrimination and one for retaliation—he [was] entitled to a statutory limit of $100,000 for each claim." *Id.* at 1112.

On appeal, the Fourth DCA reversed. It first observed that § 768.28(5) "incorporates the concept of res judicata or splitting the cause of action in determining its scope." *Id.* After summarizing both legal concepts, the court explained that, to determine whether two claims constitute separate incidents or occurrences, the question is whether establishing one cause of action would function as a res judicata bar to the second, or whether bringing only one of the two claims in a lawsuit would be barred by the rule against splitting the cause of action. *See id.* at 1112–1114. Applying that analysis to the two claims in *Zamora*, the Fourth DCA concluded that, because discrimination and retaliation "require[ ] the proof of different facts," and because the jury had awarded damages separately, the two claims were separate incidents, each entitled to their own statutory cap. *See id.* at 1114.

In this case, the School Board, without so much as identifying a single one of the "purported claims," Answer and Counterclaim at 5, that it seeks to foreclose, has asked this Court to construe § 768.28(5) in the abstract and declare that every cause of action that could possibly be asserted against it following this tragedy constitutes a single incident or occurrence. That, of course, runs afoul of the Fourth DCA's interpretation of § 768.28(5) in *Zamora*, which ***does*** allow certain claims to proceed as separate incidents or occurrences. *See also Pierce v. Town of Hastings*, 509 So. 2d 1134, 1135–36 (Fla. 5th DCA 1987) (concluding that two counts of malicious prosecutions were separate incidents or occurrences because they "were not the result of the same facts or evidence"). This Court should decline the School Board's invitation to enter a sweeping

declaratory judgment that interprets § 768.28(5) in a way that directly forecloses an interpretation authorized by the Fourth DCA.[3]

Because the specific declaration requested by the School Board ignores and contravenes *Zamora*, summary judgment on the operative pleading, the School Board's counterclaim, is incorrect as a matter of law. This Court therefore should deny the School Board's motion. At most, this Court should deny the School Board's requested declaration and instead enter a declaratory judgment that leaves room for the construction provided in *Zamora*—that to the extent the purported claims against the School Board are ***not*** "*required to be brought* in the same case or be barred by res judicata or [the rule against] splitting the cause of action," *Zamora*, 969 So. 2d at 1112, such claims constitute separate incidents or occurrences for purposes of § 768.28(5).

CONCLUSION

For the reasons stated above, the Intervenors request that this Court deny the School Board's motion for summary judgment.

[3] *Zamora* remains good law after the Fourth DCA's recent decision in *Dep't of Fin. Servs. v. Barnett*, No. 4D17-2840, 2018 WL 4959643 (Fla. 4th DCA Oct. 10, 2018). First, the School Board does not argue otherwise. *See* Def.'s Supp. to Mot. for Summ. J. at 1–4 (discussing only *Barnett*'s implication for the applicability of *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003), in the context of § 768.28(5)). Second, the two decisions are consistent because *Barnett* only involved a single cause of action. Third, even if *Zamora* and *Barnett* were in conflict, this Court would be bound by the earlier *Zamora* decision. A three-judge panel cannot overrule or recede from a decision by a prior three-judge panel. *See Taylor Eng'g, Inc. v. Dickerson Fla., Inc.*, 221 So. 3d 719, 723 n.3 (Fla. 3d DCA 2017). Accordingly, even after *Barnett*, this Court is bound by *Zamora* and cannot enter a declaratory judgment that, in the abstract, interprets § 768.28(5) in a manner precluding *Zamora*'s interpretation of the same statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court and e-served on all counsel of record named on the Service List on December 5, 2018.

/s/ Dayron Silverio
Dayron Silverio

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

Case: CACE-18-009397 (25)

THE SCHOOL BOARD OF BROWARD COUNTY'S REPLY TO PETITIONER AND INTERVENORS' RESPONSES TO MOTION FOR SUMMARY JUDGMENT

THE SCHOOL BOARD OF BROWARD COUNTY, by and through its undersigned attorneys, files this, it's Reply in support of its previously filed Motion for Summary Judgment and, in support thereof, states as follows:

The Petitioner's response was filed before the Fourth District's ruling in *Dep't of Fin. Servs. v. Barnett*, 4D17-2940, 2018 WL 4959643 (Fla. 4th DCA Oct. 10, 2018), which speaks directly to the issue in this case and which held, as a matter of first impression, the actions of one individual in killing four children and injuring one constituted a single incident or occurrence for purposes of the state governing sovereign immunity. The Intervenors' response suggests that *Barnett* was "wrongly decided." The bottom line is that the Fourth District's recent decision in *Barnett* is binding and clearly

applicable here for two glaring reasons. First, *Barnett* is the most factually similar Florida case involving the application of the aggregate cap in the sovereign immunity context. Second, the Fourth District considered, and rejected, all of the arguments presented in the Intervenors' Response.

The Intervenors' argument is three-fold. First, they claim that the Fourth District should have decided *Barnett* differently, given the Florida Supreme Court's ruling in *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003). Second, they argue that the Fourth District's decision in *Barnett* conflicts with the Third District's decision in *Dep't of Health and Rehab. Servs. v. T.R.*, 847 So. 2d 981 (Fla. 3d DCA 2002). Third, they claim that the Fourth District's decision in *Barnett* contradicts its own, earlier, decision in *Zamora v. Fla. Atl. Univ. Bd. of Trustees*, 969 So. 2d 1108 (Fla. 4th DCA 2007).

The problem with the arguments presented to this Court is that the Fourth District flatly rejected all of them. In response, this Court need only review – again – the Fourth District's opinion in *Barnett*. Rather than rephrase or summarize the Fourth District's ruling, the School Board simply offers, below, the Fourth District's own language as to each of the arguments raised by the Plaintiffs/Petitioners/Intervenors:

1. *Koikos*

> The trial court and appellees also rely on *Koikos v. Travelers Ins. Co.*, 849 So.2d 263 (Fla. 2003), involving the interpretation of a commercial insurance policy. There, during a brawl in a restaurant, two patrons were injured by shots fired by another patron. *Id.* at 265. The restaurant was sued for negligence, and it filed a declaratory judgment against its insurance company, asserting that each injury was a separate "occurrence" *under the policy language.* *Id.* The case was removed to a federal district court. *Id.* The case reached the supreme court on a question from the federal court, and the supreme court held that when the insured is being sued for negligence in failing to provide security, the

"occurrence" under the policy is the act that caused the damages, not the underlying negligence by the insured. *Id.* at 271.

Koikos, however, is inapplicable for two reasons. First, it is based upon the definition of "occurrence" under an insurance policy, a definition which is not found in the statute. Second, and most importantly, insurance policies are to be construed liberally in favor of the insured, which *Koikos* relied on in reaching its construction. Any ambiguities must be construed against the drafter of the policy. This is exactly opposite to the sovereign immunity waivers, which must be strictly construed with any ambiguities being resolved against waiver. *See Spangler* [v. *Fla. State Tpk. Auth*, 106 So.2d 421, 424 (Fla. 1958).]. Therefore, the *Koikos* analysis does not apply to section 768.28(5).

We acknowledge that if we were to construe the statute liberally in favor of a waiver, the trial court's construction is reasonable. But we must construe it strictly, and 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.

2. *T.R.*

In a case brought by two sisters claiming negligent supervision by DCF, similar to the present case, the court held that each child presented a single claim of negligent supervision, even though the negligence spanned several years and involved multiple individual acts of negligence. *State Dep't of Health & Rehab. Servs. v. T.R. ex rel. Shapiro*, 847 So.2d 981, 985 (Fla. 3d DCA 2002). All of the children's damages were limited by the $100,000 per person limitation in the statute. *Id.* The court considered the negligent claim against the Department as a single claim for each child, despite the fact that there were several acts of negligence by various state employees included in that claim.

The current case involves a single claim of negligence against the Department in the failure to properly investigate the family and the stepfather before closing its file. Thus, each estate's claim and the claim of the injured child arise from the same incident of negligence of the Department. Therefore, the $200,000 cap per incident or occurrence applies to limit recovery for all claims.

3. *Zamora*

The appellees rely on *Zamora v. Florida Atlantic University Board of Trustees*, 969 So.2d 1108 (Fla. 4th DCA 2007), as support for their position that each murder constituted a separate "incident or occurrence." *Zamora*, however, involved a single plaintiff making two separate and distinct claims of discrimination and retaliation against the appellee. Our court was not applying the aggregate cap but determining whether two disparate claims occurred. *Id.* at 1114. We applied the doctrine of res judicata to determine whether there were one or two claims brought by the single plaintiff. Because two separate negligent acts resulted in two separate incidents of discrimination and two separate damage awards, a separate statutory damage cap would apply to each claim. *Id.*

The School Board respectfully submits that *Barnett* was correctly decided, it applies to this case, and is binding on this Court. *See, e.g., Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992)(if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it). Accordingly, the aggregate cap of $300,000 applies to this case. As the Fourth District also recognized in *Barnett*, even though the statute, §768.28(5) limits the Plaintiffs' ability to recovery, they are not without a remedy.

> **The legislature may approve a claims bill authorizing further compensation.** While this is a cumbersome process, the legislature has deemed it necessary to assure the protection of the state's revenues to the good of the entire population. If the process is objectionable to the public in situations such as this, where multiple parties make claims against a state actor for a single tort, then the remedy is to petition the legislature to change the law.

WHEREFORE, the Respondent, the SCHOOL BOARD OF BROWARD COUNTY, respectfully request that this Court grant its summary judgment and, relying on *Barnett*, find that section 768.68(5) waives sovereign immunity up to $300,000 for all claims or judgments arising out of any negligence by the School Board.

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed and served via Florida's e-filing portal on this 7th day of December, 2018.

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE18009397 DIVISION 25 JUDGE Carol-lisa Phillips

Laura Menescal
Plaintiff(s) / Petitioner(s)
v.
School Board of Broward County
Defendant(s) / Respondent(s)
_____/

AGREED ORDER

DECLARATORY JUDGMENT

THIS CAUSE having come before the Court on the SCHOOL BOARD OF BROWARD COUNTY'S, Motion for Summary Judgment in this declaratory judgment action, and the Court having reviewed the motion and responses, pertinent case law, and having heard argument of counsel and being otherwise advised, it is hereby ORDERED AND ADJUDGED that the SCHOOL BOARD's motion is GRANTED.

As stated on the record, this Court must follow the Fourth District Court of Appeal's recent decision in *Dept. of Financial Servs. v. Barnett,* No. 4D17-2840, --- So. 3d --- (Fla. 4th DCA Oct. 10, 2018)(rehearing pending). There being no further business before this Court in this declaratory judgment action, this shall be deemed the final order in the case and the Plaintiffs and Intervenors shall go hence without day.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 12-20-2018.

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Hon. Carol-lisa Phillips
CIRCUIT JUDGE
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IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE-18-009397 (25)

LAURA MENESCAL, as
Parent and Natural Guardian of
DANIELA MENESCAL, a Minor,

Petitioner/Counter-Respondent,

vs.

THE SCHOOL BOARD OF
BROWARD COUNTY,

Respondent/Counter-Petitioner.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that the interested non-party intervenors:

Frederic Guttenberg, as Personal Representative of the Estate of Jaime T. Guttenberg;

Ashley Maria Baez, a minor by and through her parents and natural guardians, Katherine Baez and Juan David Baez;

Isabel Chequer, a minor, by and through her parents and natural guardians, Gabriela Chequer and Amin Chequer;

Anthony and Jennifer Montalto, as Proposed Co-Personal Representatives of the Estate of Gina Rose Montalto, deceased;

Kong Feng Wang a/k/a Jacky Wang and Hui Ying Zhang a/k/a Linda Wang, as Co-Personal Representatives of the Estate of Peter Wang, deceased;

Martin Duque and Daisy Anguiano, as parents of the Martin Duque, deceased;

Manuel Oliver and Patricia Padauy, as Co-Personal Representatives of the Estate of Joaquin Oliver, deceased;

Stacy Lippel; Linda Beigel, as Personal Representative of the Estate of Scott Beigel, deceased;

Andrew Pollack, as Co-Personal Representative of the Estate of Meadow Pollack, deceased;

Shara Kaplan, as Co-Personal Representative of the Estate of Meadow Pollack, deceased;

Max Schachter, as Personal Representative of the Estate of Alex Schachter, Benjamin E. Wikander;

Philip and April Schentrup, as Co-Representatives for the Estate of Carmen Schentrup, deceased;

by and through their undersigned counsel, appeal to the Fourth District Court of Appeal the court's final Declaratory Judgment rendered on December 20, 2018 attached as Exhibit A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court and e-served on all counsel of record named on the Service List on January 18, 2019.

/s/ Dayron Silverio
Dayron Silverio

Filing # 82447993 E-Filed 12/20/2018 06:37:54 PM

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE18009397 DIVISION 25 JUDGE Carol-lisa Phillips

Laura Menescal
Plaintiff(s) / Petitioner(s)
v.
School Board of Broward County
Defendant(s) / Respondent(s)
_____/

AGREED ORDER

DECLARATORY JUDGMENT

THIS CAUSE having come before the Court on the SCHOOL BOARD OF BROWARD COUNTY'S, Motion for Summary Judgment in this declaratory judgment action, and the Court having reviewed the motion and responses, pertinent case law, and having heard argument of counsel and being otherwise advised, it is hereby ORDERED AND ADJUDGED that the SCHOOL BOARD's motion is GRANTED.

As stated on the record, this Court must follow the Fourth District Court of Appeal's recent decision in *Dept. of Financial Servs. v. Barnett,* No. 4D17-2840, --- So. 3d --- (Fla. 4th DCA Oct. 10, 2018)(rehearing pending). There being no further business before this Court in this declaratory judgment action, this shall be deemed the final order in the case and the Plaintiffs and Intervenors shall go hence without day.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 12-20-2018.

CACE18009397 12-20-2018 1:57 PM

CACE18009397 12-20-2018 1:57 PM
Hon. Carol-lisa Phillips
CIRCUIT JUDGE
Electronically Signed by Carol-lisa Phillips

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EXHIBIT A

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. CACA 18-009397 (25)

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor,

Plaintiff,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Defendant.
_____/

DIRECTIONS TO CLERK

Plaintiff/Appellee, LAURA MENESCAL, hereby directs the clerk to prepare the record on appeal in accordance with Rule 9.200(a)(1), Fla. R. App. P. Plaintiff has recently obtained an additional transcript proceedings in this cause–specifically, the transcript of the December 12, 2018 hearing on the Defendant's Motion for Summary Judgment–and shall file it in the Circuit Court. That transcript should be made a part of the record on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court and e-served on all counsel of record named on the Service List on February 11, 2019.

/s/Dayron Silverio
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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. CACA 18-009397 (25)

LAURA MENESCAL, as Parent and Natural Guardian of DANIELA MENESCAL, a minor,

Plaintiff,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY,

Defendant.
_____/

NOTICE OF FILING TRANSCRIPT OF DECEMBER 12, 2018 HEARING

Plaintiff, LAURA MENESCAL, by and through undersigned counsel, files the attached transcript of the December 12, 2018 hearing on Defendant's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ Dayron Silverio
Dayron Silverio

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 18-009397 DIV 25

LAURA MENESCAL
as Parent and Natural Guardian
of DANIELA MENESCAL, a minor,

Petitioner,

vs.

THE SCHOOL BOARD OF
BROWARD COUNTY,

Respondent.
_____/

Proceedings had and taken before The Honorable CAROL-LISA PHILLIPS, one of the Judges of said Court, Fifteenth Floor, Room WW15175, Broward County, Florida, on the 12th day of December, 2018, commencing at or about the hour of 10:35 o'clock a.m., and being a special set hearing.

- - - - - -

Stenographically Reported By:
VERTINA L. YEARGIN, FPR
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(Thereupon, the following proceedings were had:)

THE COURT: All right. We're here this morning on the case of Menescal vs. School Board of Broward County.

And, counsels, if you would all please state your names and who you represent.

MR. LAWLOR: Yes, good morning, Your Honor. Patrick Lawlor on behalf of Laura Menescal, for her minor child, Daniela Menescal.

MR. SILVERIO: Good morning, Your Honor. Dayron Silverio on behalf of the intervenors.

MR. PETTIS: Eugene Pettis, Debbie Klauber, Barbara Myrick, as well as Marylin Batista, all on behalf of the School Board of Broward County.

THE COURT: All right. Good morning, Mr. Pettis.

MR. PETTIS: Good morning, Your Honor.

THE COURT: And this is the School Board of Broward County's motion for summary judgment; is that correct?

MR. PETTIS: Yes, Your Honor.

THE COURT: Okay. And I have had the opportunity to review and read the motion, as well as the response in opposition, as well as the cases that were presented and the supplemental case out of the

Fourth that is dated in October of 2018. I do have one quick question before we begin.

MR. PETTIS: Certainly.

THE COURT: Has that been finalized at this point?

MR. PETTIS: No, ma'am. The Barnett case is still before the Fourth DCA. There is a motion for rehearing. There is a motion for en banc. As of yesterday it is still pending. I'm looking at Ms. Klauber, my appellate lawyer, but that's the information that we have.

THE COURT: Okay.

MR. PETTIS: And the materials that we attached to our motion submission was the most updated record from the court.

THE COURT: All right. Yes, sir?

MR. PETTIS: Certainly. Again, Your Honor, Eugene Pettis.

Judge, the way that we got here was that Mr. Lawlor, on behalf of his client, the Menescals, filed a motion for summary judgment on this point seeking some determination from the Court. We filed a similar motion on the eve of the hearing. They decided to voluntarily dismiss theirs. We elected not to and we elected not to for one simple reason.

This is a core issue that all of the lawyers are talking about. I've met with the plaintiffs' lawyers' group, Bob Kelly, and others. We need an answer to this question. And so it's a central issue, so --

THE COURT: And if I could stop you just for a second.

MR. PETTIS: Certainly.

THE COURT: I have reviewed the DCF Barnett case. And it really appears to be --

MR. PETTIS: It's on point.

THE COURT: -- on all fours. I mean, I can't find anything distinguishable about that case except for the specific facts. But the facts are similar in the way that they are laid out. And, in fact, it addresses the Koikos case and goes into depth about why they distinguish it from that case.

MR. PETTIS: And it also goes into the Zamora case, the other case --

THE COURT: -- didn't go into all the cases.

MR. PETTIS: All of the cases --

THE COURT: But, I mean, the Koikos case was the case that was most, you know --

MR. PETTIS: Debated, if you will.

THE COURT: Debated, yeah.

MR. PETTIS: You're absolutely right.

THE COURT: -- and so forth.

MR. PETTIS: You're absolutely right. And in preparing for this morning, I don't remember hearing of this magnitude with such simplicity, for lack of a better word. All lawyers, we've talked about it. We know where are the issues.

First of all, the school board recognizes that $300,000 cap is totally insufficient for the losses that occurred on February 14th. There's just no question.

I was before a joint meeting with the school board and the Broward delegation last week. And we heard from three parents, one, Ms. Nixon [sic], who lost her husband, and two parents who lost their children. The pain that comes from them just gives us a little glimpse of what they're going through. So there's nothing about this motion that's valuing the losses that this community and those families, in particular, are feeling.

But our legislature spoke way back in mid 70s. When they first opened the immunity that we had, hence, prior to that, and said, we're going to allow citizens to sue the state and its agencies and subdivisions.

THE COURT: Well, it doesn't stop the victims from going to the legislature.

MR. PETTIS: You're absolutely right. Under the same provision, Judge, that the courts capped as currently a max aggregate of $300,000, they clearly provide in there - and we've all had experiences; Mr. Lawlor, I'm sure, has as well as all counsels in this case - that we have a claims bill process. And the reason -- and the courts have been very clear on this, that the courts can't legislate this issue. We send it to the legislature, and you file a claims bill.

We know that's where these cases are going to end up. And understandably so. And there's efforts already on both sides as if they're trying to create a pathway, an expedited pathway to Tallahassee so we can do this in an orderly fashion.

We have upwards of 70 claims that we've received notice on. At any point in time, those claims are -- you know, we're passed the notice for it. We're going to get into the litigation.

Broward Sheriff's Office has been -- put on a number of these cases. City of Coral Springs, DCF. There is a lot of public agencies. But the law is the law and the law is clear. Under 768.28(5), as

you know, Judge, it limits the aggregate to $300,000 and directs the litigants to the claims bill process.

We have looked at -- and I put in our brief, Judge, a number of cases, and there is not a single case in the State of Florida dealing with sovereign immunity that differs from what we're asking you to do. There is not a single case on this point.

So you mentioned the Koikos case, and I've had lawyer to lawyer discussions with the plaintiffs on this issue. The case is so clearly distinguished, and the Fourth DCA and the Barnett case just in October -- and we're all waiting around for that decision. This was filed back in August -- June and August, I think it was, that this has been pending before you. And we knew that decision was going to come down at any point in time, and it did. But that's an insurance case. And what they did -- even that particular case doesn't use the word sovereign immunity one single time. And the Court was very careful in their decision that that was a specific decision for that particular insurance policy. Nothing more.

And the effort to try to expand that, which is even a different standard than what we utilized in statutory interpretation, when the courts are looking

in -- and the Barnett case talked to us about that.

THE COURT: Yeah, it went into great --

MR. PETTIS: Great detail on that. When the courts are looking at insurance policies --

THE COURT: I don't see how in all -- talk to the other side, obviously. But I don't see where I would have any discretion. I mean, it's a Fourth DCA case. Under Pardo that's the law that I must follow, and it appears to be directly on point. And certainly Koikos peeked my interest when I initially read it. Oh, okay, well, maybe there is an argument here that I need to hear about.

But then when I -- because I took everything in line. I read the plaintiff's motion for summary judgment first. Then I read the defendant's. Then I saw the supplement. When I saw that supplemental case, I was like, oh, okay, and they went in an entire case note over Koikos.

MR. PETTIS: It was a very thorough review of the law that controls here. And I was speaking to Ms. Klauber. I said, you know, while we have an hour set aside, my argument is, you know, I'll just be sitting here repeating what you've obviously already read.

One of the things, Judge, that - and you'll

appreciate this from your review - is that this is strict construction of the statute. And I've been around dealing with the statute for 34 years. I've never even had anybody to challenge this in this manner because it's so clear. It's one of the few things we have in this area of law that's crystal clear. It's a cap. We negotiate cases all the time, recognizing on both sides that's the cap. You know, we do it for decades.

To come in now and to say, well, every single one of those unfortunate individuals that got injured would have their own cap just flies in the face of practice, the legal state of the law.

And this is a very important area, because Judge French, up in Palm Beach, stated in his hearing that led to the Barnett case, I just don't think this is fair, you know. None of us think $300,000 is fair for 80 or 90 people and what lawsuits we have here.

THE COURT: But that's the legislature.

MR. PETTIS: That's the legislature, and that's where we're blending here, Judge, the judicial position of enforcing the law and trying to allow, you know, the legislature to change the law.

Go to Tallahassee if you want that to be $500,000, a million cap, if you want everybody to

have a cap. It's not for this particular case to try to change or even -- I don't even now how you can make that interpretation of this position in light of the Barnett case.

So we think, Judge, it's pretty clear. If you don't mind, I'm going to wait and save the remainder of my time to hear what counsel has to say, and I'll respond. But I think the blueprint on this particular case is the Barnett case. It's your -- it's our district. It's the most recent comprehensive review of these cases. And to do otherwise, even going back to some of the cases to say -- to do what the plaintiffs are asking the Court -- it was a Third DCA in that particular case. Said if you interpret it that way, then every single time on a medical situation of say Broward General Hospital, the doctor opens the patient up. That's $100,000. Close the patient. That's $100,000.

If you're looking at the acts that are involved in this particular case, it states, unequivocally, that the aggregate is $300,000. And even on the Zamora case that they cited, that Court, too, enforced it to -- it was $200,000 at that point in time - recognized the aggregate controls.

So that's the law that needs to be clear. I

think most counsel involving in this recognize that. We don't have a courtroom full of people, even though there have been some joinders, some dozen or two dozen people that have joined. I think the law is crystal clear, and I will tender the time at this point in time and hold it for rebuttal.

THE COURT: Yes, Mr. Lawlor?

MR. LAWLOR: Yes, I'm going to take about 15 minutes.

THE COURT: Okay.

MR. LAWLOR: Mr. Silverio is going to take another 15 minutes.

THE COURT: Sure. And obviously, you've heard my questions and comments to Mr. Pettis. So, really, I'm trying to figure out -- you know, I understand that, you know, I'm here in the judicial capacity, not in the legislative capacity, and I understand how horrible the situation is.

MR. LAWLOR: Your Honor, I think I can direct you to a unique thing. When I looked at this case when the Barnett case came out, I looked at that. I find a very unique relationship between them because of what's going on.

We can all agree that even in the Barnett case it said it's a case of first impression because it's

dealing with a shooting situation, multiple shooting victims suing a governmental entity. Okay?

And go back to Koikos because that was a precedential case that was the Supreme Court which was also a very unique procedural aspect. Obviously the U.S. District Court made a decision saying that it was a single event with multiple victims. It went up to the 11th Circuit on appeal. The 11th Circuit said, hey, under the policy there, the definition of occurrence is so convoluted we need the Florida Supreme Court to address this issue.

That's the critical aspect in this case, because if you look at the actual certified question that the 11th Circuit sent down to the Supreme Court, it's very unique because it addresses these facts here specifically. Because in totality in that case, the Koikos case, what the Supreme Court did is they defined what is an occurrence in a multiple shooting case. Think about that for a minute, Your Honor. That they defined that an occurrence in a multiple shooting case is under the cause theory and that every time a bullet is shot, that is a separate incident. That was the decision.

So in that particular case it was not deciding an insurance policy, although it did look at the

policy. It decided what the word occurrence in that policy meant. And whether it means an insurance policy or whether it means a statute, the Supreme Court defined what an occurrence is. Not in an auto case. Not in a medical malpractice case. In a multiple shooting case. And that's critical, Your Honor, because we have our Supreme Court defining that.

And I want to go through, because if you look at actually the certified question, I'm going to substitute the facts of this case. And I'm reading it. It says, when the insured is sued -- and let's change that. Where it says when a school board is sued based on a negligent failure to provide security arising from separate shootings of multiple victims, are there multiple occurrences under the terms of the policy? And I'll stop right there.

But if you substituted the issues here, when the school board is sued based on negligent failure to provide adequate security, which is one of the claims that will be made in the case, arising from separate shootings of multiple victims. We have all those facts here.

Are they multiple occurrences under the terms of the insurance policy? If you substitute in multiple

terms under the terms of the statute, that defines occurrence as an accident including continuous or repeated exposure to substance of the same general, harmful condition. That defines occurrence, Your Honor.

That was the issue the 11th -- the Supreme Court dealt with, that language under the policy of what occurrence is. Even the Supreme Court said that it's not clear. Let us give you a clear definition in the facts here dealing with multiple shootings on what it is. And what they said, an occurrence is defined under shooting with multiple victims, that each shooting constitute a separate occurrence. Thus, there are multiple occurrences, not a single occurrence with multiple victims. That's what the conclusion was.

What the school board wants the Court to look at is that that's a differentiation here, Your Honor, is if we have one specific thing. What does occurrence mean in a policy? What does occurrence mean in the statute? I believe that the 4th District did not get it right. They simply did a very simple summary of why the Koikos case doesn't apply.

And it first says it's because the statute does not define what an occurrence is. Well, the Supreme

Court has defined it. The language in the statute is very, very basic. It says, come -- arising out of the same incident or occurrence as to whether or not whether it is, because that's what we're looking at here. Are these victims part of a single event with multiple victims where you're limited to $300,000 or are they separate events with separate victims?

And the second reason they say is because it's an insurance policy, those are to be liberally construed while this is an attempt to waive statutory immunity and therefore they're not liberally construed.

That doesn't even apply here. Do you want to know why, Your Honor? Because, simply, occurrence has been defined. There is no liberally construed strictly construing it. Under what the school board is saying, the term occurrence is, under the Barnett case, simply says that it is a single event with multiple victims.

And that case, they said that based on -- they didn't even say that. They said based on DCF's failure to supervise and investigate, that is the cause of the injuries. That's completely contradictory to Koikos. Koikos said that does not apply. It's not the negligence of the party. It's

the negligence of the intentional person who came in and shot. In this case, Cruz. That's what they look at.

So in looking at that -- and they did a very basic -- they even said at the bottom that, we acknowledge that the statute was liberally construed in favor of waiver, then Judge French's construction would be reasonable.

What happened in this case -- and I believe that if they did have an en banc hearing, it will be reversed simply because nobody looked at the Koikos in its totality on what it did. Because we always talk about -- and we look at cases. We look at apples to apples and oranges to oranges. And when I look at that -- you look at that certified question that the 11th Circuit sent down and you substitute, then you absolutely have to find that in this case the occurrences is the shooting. Each bullet that shot, each victim is a separate claim under the statute.

Now, you will see that their whole key they said when the first one is a definition of occurrence under insurance policy is defined. Let me talk to you about that in Koikos. It was defined, but the Supreme Court said -- even the 11th Circuit sent it

down and said, we can't figure this out. You need to give us a definition of what this means, occurrence, under that policy. What does it mean?

So there was no ambiguity when the Supreme Court case in Koikos defined what an occurrence is under the facts of a multiple shooting case. Exactly what we have here.

And the second part about liberally construing it versus they're saying it must be strictly construed when dealing with sovereign immunity waivers, there is no ability to strictly or liberally because it's been defined. In the statute, all it says, incidents or occurrence.

So if it's not defined and you look at if the legislature has not defined it, you look at legal interpretation of that particular phrase. The only case out there, Your Honor, only cause out there defining occurrence in multiple shootings is the Koikos case.

So I believe in this case, the Fourth District rushed to judgment to somehow conclude that, in fact, it didn't apply, because you'll see in the Koikos, in their ultimate decision that said -- Let me find it here for a minute.

THE COURT: So --

MR. LAWLOR: Yes?

THE COURT: -- are you asking the trial court to tell the Fourth District Court of Appeal that they got it wrong and expect a different outcome? I mean, I'm trying to -- They directly address Koikos, so I'm trying to find out -- I know you don't agree with it and maybe if they go -- if they agree to hear it en banc, something could change. I have no idea, but it does appear to be the law of the land at this time. And they do discuss Koikos from the Supreme Court and distinguish it. So the power of the trial court is to follow the law of the higher courts.

MR. LAWLOR: And that's a difficult situation I understand the Court is in. But I think what happens is that, you know, one of the things that the school board brought up, and also in the Barnett case, is that we're looking to have sovereign immunity waivers, and that's what we're seeking. That's not what we're seeking. We're seeking the Court to define where are the clients in this case, the 17 people who died and the 17 people that were injured by bullets, where they fall under this statute.

We're not saying that -- you know, they're saying, well, if you fall under the secondary aggregate, then you could go for claims bill. We all

know where claims bills have been going lately, although Mr. Pettis has been working with the different attorneys, not in this case, to do something based on this horrific incident.

I understand under the law where it is in terms of this Barnett case, that the Court may have its hands tied. But I think that we're not looking to waive it; we're looking to have the definition of where our clients fall.

And we're not -- we understand the unfairness. We're not talking about the unfairness that's the statute. And the Koikos was a case that just clearly, unequivocally laid out what it was in defining what an occurrence is. And I think the Fourth District rushed to judgment and didn't really read the Koikos case because, you know, they didn't -- they identified it in two paragraphs, two-and-a-half paragraphs. Really two paragraphs in its opinion, when it's exactly on point factually with the case here.

So, you know, understanding that the Court may be handcuffed because it is, you know -- follow the rule of the Fourth, you know, I think that the Court can look at this and offer some type of decision here in terms of, you know, procedurally might not be a

basis for the Court. But I think that something needs to be done in the Fourth to readdress this issue.

I know that those are the issues that I want to raise to the Court. I know Mr. Silverio wants to talk about another case, even lower case and how that may apply in other issues. I yield my time to him. Thank you.

THE COURT: All right. Thank you, Mr. Lawlor.

MR. LAWLOR: Thank you, Your Honor.

THE COURT: Yes, sir?

MR. SILVERIO: Good morning, Your Honor.

THE COURT: Good morning.

MR. SILVERIO: Your Honor, we raise the Koikos issue in the intervenors' response. We're going to rest on that argument. We understand it's binding precedent. I'm only here to ask you to follow binding precedent in the Fourth DCA, and that's Zamora, which Barnett left completely untouched.

If you look at the specific declaration the school board is asking you to issue -- and the words matter, Your Honor.

THE COURT: Okay.

MR. SILVERIO: The specific declaration they're asking you to issue is -- and that's on Page 5 of

their counterclaim after the 19th paragraph. They want you to say that the purported claims against the school board for its purported liabilities for the injuries arising out of this tragedy constitute one incident or occurrence under the statute. And I think the key, operative phase there is the purported claims.

And it's very general and very broad. It means any purported claim you could possibly bring against the school board. If you issued this declaration, Your Honor, it will be one incident or occurrence once you declare what they're asking you to do.

The problem with that declaration, Your Honor, is it doesn't comport with Zamora, which is binding precent in this district. It also doesn't comport with Barnett, which, by the way, left Zamora completely untouched.

If you read Barnett, Barnett has a discussion of Zamora. And I completely disagree with opposing counsel on what Barnett does to Zamora. They basically say Barnett distinguishes Zamora. It doesn't really do that. Barnett says, while res judicata is useful in determining whether a single plaintiff has multiple claims or a single claim - this is talking about Zamora's analysis of when you

apply res judicata to determine when multiple claims are separate occurrences - it has no application to a case where there are multiple plaintiffs asserting a single claim --

THE COURT: Are you looking at Barnett?

MR. SILVERIO: Yes, Barnett at Page 4, Your Honor. Sorry. The first...

THE COURT: I'm at the bottom, where it says, the appellees rely on Zamora. Is that where you were?

MR. SILVERIO: Yes. And so the very next paragraph after that, Your Honor, which is, appellees contend that we should apply the principle of res judicata to this case as well.

I think it's the paragraph right after.

THE COURT: Appellees contends we should apply the principle of -- Okay.

MR. SILVERIO: Right. So this is the portion of Barnett that distinguishes a very specific nuance in Zamora. Zamora says, look, sometimes -- Zamora is a case where one plaintiff brought discrimination and retaliation. Right? So two separate claims. And the question was, are those separate claims separate occurrences for purposes of the statute, of the cap? And Zamora says, yes, and here's where you're going

to determine that. Apply res judicata and claims splitting principles. Use that analysis. Right? Use that inquiry to determine whether they're separate occurrences.

Barnett says -- in Barnett, the argument that's raised is, well, if you apply Zamora's analysis this is clearly going to be a separate occurrence because there's separate people who died. And Barnett, of course, says, well, that doesn't make any sense because in any claim where there are multiple plaintiffs you would never have res judicata because there's no immunity of parties.

So Barnett says, in a case were there are multiple plaintiffs asserting a single claim, which is the last sentence in that paragraph, then you can't just say there is no immunity of parties so everybody has a separate occurrence. That's not the way that works, because then we would never have a cap when there are multiple plaintiffs.

So what they say, instead is, in a case where there's one plaintiff, or just basically a plaintiff that asserts multiple claims, if you're going to determine whether those claims are separate incidents or occurrences Zamora is still good law. You apply res judicata for each episode.

And Barnett leaves Zamora untouched. So I think Zamora remains binding precedent in this district, Your Honor. Not only that, Barnett really couldn't have an occasion to overrule Zamora because Barnett dealt with a single claim of negligence. So it's not like -- it's not like Barnett was dealing with multiple claims of negligence. They didn't have an occasion to address that fact pattern.

And third, Your Honor, to the extent Barnett and Zamora are in conflict, the prior panel governs it in this district, and Zamora came earlier in time and it cannot be receded from. That reasoning can't be --

THE COURT: But they distinguish it by saying that Zamora was two separate incidents.

MR. SILVERIO: Two separate claims, one for --

THE COURT: Two separate incidents of discrimination and two separate damages awards -- Okay. Two separate negligence acts.

MR. SILVERIO: One for discrimination and one for retaliation which resulted in two damages awards. And in Zamora, the Court says -- Zamora says, you know, when there are two separate claims -- The big question is, are these claims just one occurrence or are they separate occurrences. Right? And Zamora says, there is a way where multiple claims can be

separate occurrences. And discrimination or retaliation are kind of similar to one another.

THE COURT: Well, they talk about negligent acts.

MR. SILVERIO: In Barnett?

THE COURT: In Zamora.

MR. SILVERIO: Right.

THE COURT: And Barnett talks about it because it says, we apply the doctrine of res judicata to determine whether there were one or two claims brought by the single plaintiff, because two separate negligent acts resulted in two separate incidents of discrimination and two separate damage awards, a separate statutory damage cap would apply to each claim.

MR. SILVERIO: Your Honor, that's referring to the discrimination and retaliation claims. But in Zamora the two claims, the two bad acts, basically, that constitute separate occurrences are the discrimination and the retaliation claims.

THE COURT: Right. I mean, I'm reading right from Barnett. I'm not making it up.

MR. SILVERIO: Right. And so our point is, if you grant the declaration they're asking you to do, you necessarily foreclose a world in which Zamora

remains good law because it doesn't allow plaintiff. Right? So let's forget about the fact there are multiple plaintiffs here. A single plaintiff can bring multiple theories of negligence against the school board.

Now, they haven't identified any of them, which is a separate problem at summary judgment. But even if you grant that they've been placed on notice through the claims process that there are going to be multiple theories brought against them, a single plaintiff, for instance, can sue under respondeat superior for whatever Peterson did or didn't do. But then they could also sue and not through vicarious liability, not through respondeat superior, but they can have a direct claim of negligence against the school board, for instance, for failure to maintain the premises properly secured or for failure to properly select the security guard, for failure to hire someone who was competent, for failure to train a security guard. These are separate theories of liability of negligence completely independent of one another.

And under Zamora which tells you that the identity of the cause of action is one of the factors we look at. This is Zamora, Your Honor, at page -

Let me try to find it - at 1112.

THE COURT: So you know that Judge Warner wrote both --

MR. SILVERIO: Yes.

THE COURT: -- the opinion for Zamora as well as Barnett?

MR. SILVERIO: Correct, which makes it even -- you know, it would -- you know, doesn't make sense that Judge Warner would overrule his own opinion interpreting 768.28.

In any event --

THE COURT: It's a she.

MR. SILVERIO: I'm sorry, Your Honor. She's a she.

In any event, she couldn't do that because, again, there's a prior panel rule. So Barnett wasn't en banc. The point is that the declaration they're asking you to do, Your Honor, it's just slightly -- it's just like a ting too broad. I'm not saying that there can't be a declaration pursuant to Barnett that says, look, each bullet, each immediate cause of injury is still one incident occurrence. Okay? We're not going to follow Koikos. I understand that's binding precedent after Barnett.

But what they're asking you to do is say any

purported claim you could possibly bring against the school board arising out of this incident, any purported claim is all going to be captured by one occurrence. The problem with that, again, is that it does not comport with Zamora which read 768.28 to say sometimes. Sometimes you can bring multiple claims. Okay? A single plaintiff can assert multiple claims of negligence and different theories, and Zamora just happened to be discrimination versus retaliation.

But sometimes you can bring multiple claims, and those claims, depending on res judicata principles, specifically, the second factor, identity of the cause of action requires that the same facts or evidence are necessary to maintain both claims or actions. That's from Zamora, Your Honor.

The same facts or evidence would not be necessary to maintain every single claim being brought here by each individual plaintiff. And I gave you as an example a couple, you know --

THE COURT STENOGRAPHER: You're talking too fast.

MR. SILVERIO: Oh, I'm sorry.

Respondeat superior through Peterson's failure to intervene versus a direct theory of negligence for the failure to train Peterson or the failure to do a

sufficient background check to make sure he was qualified, et cetera. There are many theories you can assert against the school board.

So what we would ask, Your Honor, is that the declaration you issue to say you're going to grant a summary judgment declaration is modified to leave room for Zamora's interpretation of 768.28.

And that's very simple. All it is, is instead of saying any purported claim against the school board is going to be one occurrence, you just carve out that -- you could either say, you know, pursuant to Barnett, each bullet, each immediate cause of injury is going to be one incident occurrence. Okay? So you could foreclose that theory which is what Barnett says, Koikos doesn't apply here. Okay. That makes sense.

But you also could carve out Zamora, at which, again, Barnett leaves untouched and say, you don't have to declare that any purported claim is going to be one incident occurrence. You could just let Zamora remain binding law and say, unless they fall within one of the exceptions Zamora states, or unless they're not barred by res judicata, or unless they're not necessarily -- that you don't have to bring them in the same cause of action.

You know, any one of the languages Zamora uses -- employs to give you different occurrences from different claims, as long as that's in your declaration, we submit it would comport with Zamora.

THE COURT: Anything else?

MR. SILVERIO: No, Your Honor.

THE COURT: All right. Mr. Pettis?

MR. PETTIS: Yes, really briefly, Judge. Or you could just follow the law and follow Barnett.

What counsel just stated, it could -- he took every little piece of allegation and suggests that, you know, whether it's negligent supervision, negligent this and that. It's all negligence. And the reason -- this is only addressing negligence. It's 768 -- I just left downstairs where a whole team of Mr. Brill and team, they're talking negligence. This is a negligent action.

Now, if they want to go out and find a civil rights case against the school board, that will be under a different statute. And this really we're seeking here, Judge, may not apply to that. But as long as we're within the negligent context -- And, Judge, even if we go down this path and allow every single plaintiff to have a individual claim, all of the cases recognize an aggregate cap. Zamora said

there's a cap. Barnett said there's a cap. All of the cases recognize the cap. So what we're saying -- and that goes to the heart. What we're fighting about here, Judge, is, is there more than $300,000 in the pot? And the answer, unequivocally, even taking Zamora is no. The state legislature has spoken clearly, and that's one thing that is -- can't even be in dispute, that there is an aggregate cap of $300,000.

So that's really at the core of your decision. That's consistent with Zamora. That's consistent with Barnett. That's consistent with the other cases that we have brought forth in the case. Even if every one of these claimants has as many counts as they want to bring --

THE COURT: Under negligence.

MR. PETTIS: -- under negligence, they still come face-to-face with the pot of $300,000 which is the aggregate cap. And I think we're all in agreement on that because they didn't even touch the aggregate issue.

You have a good feel for the decision, Judge, in the Koikos case. The Koikos court was very clear on the limited scope of what they were doing there, and I don't believe it's consistent with what was just

argued by counsel.

I think the Barnett case analyzed Koikos and found it to be -- and I'm not going to read because you've already recognized. You saw and you read the Barnett case. Read an analysis of Koikos.

So, Judge -- and Zamora, as Mr. Silverado had just mentioned -- I'm sorry, it's not Silverado.

MR. SILVERIO: Silverio.

MR. PETTIS: Silverio. I apologize. Mr. Silverio just mentioned it's a one -- Zamora was one individual plaintiff. And the Court said -- the Barnett court says, therefore, it's not even applicable. It's a different situation than what we're dealing with here. What we're dealing with here is all of these plaintiffs still come under the one cap, and that's the law.

And, Judge, putting aside the insurance interpretations that we've been doing, which is not applicable, if you go over to BSO and ask them for the occurrence report, there's not an occurrence report for every single child. There's one occurrence. You say how many shootings have there been at Marjory Stoneman Douglas? We've had, unfortunately, one shooting at Marjory Stoneman. It is an occurrence.

There's individuals that were harmed under that -- during that occurrence of the 14th, but every single shot is not a different statutory cap.

And that's what we're asking you to do, limiting it to 768's, you know, interpretation which is consistent with Barnett. And if these plaintiffs want to go out and try to do something, which even Columbine and the other cases around this country have not been able to do, and that's establish a civil rights case in this context. We'll deal with that separately. But under 768, there is one cap applicable to all.

THE COURT: And I'm re-going through -- I've read the Zamora case, obviously, before we came here today. But I'm relooking through it and how the Zamora case discusses other cases where they talk about, for example, negligent supervision. And although there may be different acts, it still equates to one claim --

MR. PETTIS: Correct.

THE COURT: -- within the Zamora case. The whole thing about the Zamora case, it talks about sued for both discrimination and for retaliation.

MR. PETTIS: Right. And that's why I raised the issue, Judge, if they were -- and I think counsel was

eluding to this. We're not asking you to foreclose them from coming up to anything outside of negligence.

THE COURT: Right.

MR. PETTIS: I'm dealing with negligence. And if they come up with something outside of negligence, I'll be back to the appropriate court, and we'll deal with it at that point in time.

In that case, they had two different -- you know, you had the discrimination and then you had the retaliation, and the Court recognized those as two different claims, however, still held them to the aggregates.

THE COURT: And, I mean, I'm trying to just work through with everybody here. The fact that Judge Warner wrote both opinions and discussed Zamora and the Barnett decision as well is helpful. I mean, because we all know that Judge Warner enjoys writing and usually goes through it and writes very detailed opinions. Shorter than -- a lot of mine will say, denied or granted.

MR. PETTIS: I don't think it was lost on Judge Warner. She happened to be on both sides -- both of these cases. So I think this was very intentional, and even she, in her Barnett, found it to be

inapplicable to this scenario.

THE COURT: I mean, certainly, if in the future if Barnett, if they were to agree to a rehearing, I'll hear it en banc. If something were to change within Barnett, then maybe something else certainly would be coming back before the Court. But at this time, I mean, certainly, I know the magnitude of this case, and so I did sit down and I read the cases more than once and went through everything, and I appreciate the arguments made here this morning.

But even after hearing it and going back and looking back and forth, and I tend to agree that if there are separate and distinct causes of action this would be solely on the negligence issue alone. It certainly wouldn't rise to -- I don't know what else could come forward but if there were something else.

But on the narrow issue of the negligence, I think Barnett is on all fours. It discusses the cases that have been argued here this morning and I am bound to follow the law and the construction and the construction of the statute as well. And I understand how the distinguishment of Koikos, and I'm going to follow Barnett.

MR. SILVERIO: Judge, can I say one more thing just because Zamora wasn't really addressed the first

time Mr. Pettis got up.

We're placing a lot of premium on the word negligence. Barnett only had one claim of negligence. Right? It just had one claim of negligence. Zamora tells us that the way you define a claim is by looking at what facts or evidence are necessary to maintain the cause of action. It doesn't say that you can't have two theories of negligence that constitute separate occurrences as long as there are different facts or evidence necessary to maintain them separately. And all I'm saying, Your Honor, is that in this case there is -- there could be claims.

And, again, we don't have them because this is very much in the abstract, this dec action, Your Honor, but there are claims you could present against the school, a direct claim of negligence. And I understand we're using the word negligence, but it's not all -- it's like what's their name, like Shakespeare. Not all claims of negligence are the same. A direct claim of negligence against a school board, Your Honor --

THE COURT: But how would the damages be any different in separate claims of negligence and wouldn't you have to pick your poison at the time you

go to trial because you complete in the alternative, but you can't receive double damages for separate causes of action for negligence.

MR. SILVERIO: And that may be so, but that, I think, is a distinct issue that you deal with later on on double recovery than now at this stage in the proceedings which is just if you have two different claims of negligence. And the ones that really come to mind are --

THE COURT: Okay. So taking -- if the Court were to agree with you, you're saying that if there were separate damages able to be awarded under separate theories of negligence, then the cap would be, well, if victim one had those and victim two had those, everybody would be under the same aggregate cap --

MR. SILVERIO: Per claim.

THE COURT: -- but the negligence under each cap would go to those different --

MR. SILVERIO: To the claim.

THE COURT: -- counts of negligence?

MR. SILVERIO: And I don't think there's any case where I've seen this play out all the way. Most of these cases, Your Honor, also, pretty much all of them are post verdict. Right? Or they're in a

posture where we know the single claim.

So Barnett, for instance, there was an actual underlying lawsuit and then DFS, which is, you know, the part of the government that actually pays claims, they intervened and they said, we already know there's only one claim. Tell me that's only one occurrence. Right? That was the posture in Barnett.

So I don't have an answer on a case that I can tell you, this is how it plays out. But I think that in each separate claim. Right? So, again, we're taking negligence but we're following Zamora that says it's not just a name. It's whether there is separate evidence, pieces of evidence necessary to establish each one of these claims. Right? And we say there's direct negligence against the school board for negligent retention or negligent hiring. Right? They should have done a thorough background check.

Let's say Peterson had something in the background where we knew Peterson wasn't going to act. That's a direct theory of negligence. Right? Then there's a separate one which is vicarious liability. Peterson didn't do his job and you're responsible. Okay? Those require different sets of proof to prove each one of those claims.

THE COURT: Wait. How were the damages different?

MR. SILVERIO: Right. So I don't necessarily think -- but, again, I think that's an issue to deal with later on, whether you can even get double recovery on the same -- you know, like, the plaintiffs suffered one set of damages. They went to the hospital, et cetera, for those that survived, et cetera. The damages, I don't think, would be different, but that doesn't -- I don't think that's applicable at this point which is just to say whether each claim is a separate occurrence.

Now, the way I would think it would play out in the context there were some other separate damages, I agree with you. I think the way it would work is, let's say there were two plaintiffs and they both sue on a direct theory of negligence? That's one occurrence. That's going to be bound by an aggregate cap even though -- because they're suing under one theory. But their separate theory of vicarious liability is a separate occurrence for the statutes bound by a separate cap.

That's what you're being asked to interpret here, not the kind of more comfortable question, really, which is like how are you going to prove

different damages at the very end? And I agree, I think that's a problem for another day. I think, actually, that's a problem for the underlying tort lawsuit that's going to come.

They can deal with that. The trial court can deal with that then and there. But at this very moment, what you're being asked to do is just to give us a declaration in the abstract. And I think you could give a declaration that really does comport with Zamora. And, again, there's too much premium being placed on this word negligence, because Zamora tells us that there are different ways to proving up negligence, and that's what ultimately matters under Zamora's inquiry.

And that completely survives Barnett, Your Honor, because Barnett says when you have multiple claims we can still apply res judicata principles Zamora has told us to look at.

THE COURT: Okay. Mr. Pettis?

MR. PETTIS: Well, real briefly, Judge.

I am putting some premium on negligence. That's what 768 is about, that I'm asking you to address.

Judge, I direct, just for the record, to State of Florida, Department of Health and Rehabilitation Services vs. T.R. and Y.R., through Ms. Shapiro.

And on Page 4 of that opinion, We believe the reading of the statute advocated by the plaintiffs could lead to an absurd result of making the statutory cap prescribed by 768.28(5) meaningless. For example, 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, closing in an improper manner, and as such, performing three separate incidents of negligence thereby subjecting the state hospital to three separate $100,000 caps.

Moreover, in the weeks that followed, if the patient's doctor and nurses did several more things in a negligent fashion, the plaintiff could proceed to tact on a few more incidents and take advantage of a few more $100,000 statutory caps. We do not find such interpretation of the statute to be either reasonable or functional.

I think that speaks volumes to this context. What he's arguing is not -- it's just not proper interpretation of what's applicable here. This statute applies. This statute has an aggregate of $300,000 and it's inclusive of all claimants who come. That's the law of Barnett, the law of this state and the law of this district, and that's all

we're asking you to affirm, Judge.

MR. SILVERIO: Judge, T.R. was discussed by Zamora and completely distinguished. And T.R. is a Third DCA case. Zamora is a binding Fourth DCA case that distinguishes T.R. So whatever T.R. says, it doesn't trump Zamora's ultimate goal.

THE COURT: Look at it overall here.

MR. SILVERIO: And that's at Page 1113, Your Honor.

THE COURT: Do you know under which headnote?

MR. PETTIS: Headnote that I just read, Judge?

THE COURT: Yeah, the headnote in Zamora.

MR. SILVERIO: I don't have a copy of the headnotes, Your Honor. It's a paragraph that says, similar in State Department of Health and Rehabilitative --

THE COURT: Oh, I got it. I found out.

MR. PETTIS: So, Judge, I guess that takes us right back to where we were 30 minutes ago. If Zamora distinguishes T.R., Barnett distinguishes Zamora.

THE COURT: No, I get it. I just want to make sure that I cover all basis before I make a -- you know, make my final ruling, which I've made a ruling. I just want to see if I still stand by that ruling.

Yeah, I think it's still on point. I stand by my previous ruling. And, again, if something different were to occur in Barnett in the future, well, then it may be different but I stand and I follow Barnett. It is the law of the land of the 17th Judicial Circuit, for sure. And they certainly outline and distinguish and talk about Zamora as well as Koikos and I think at this time that I must follow. And the strict construction of the statute allows for the granting of the summary judgment as to that one aspect with regards to 768, negligence.

And, Mr. Pettis, if you could have -- if you could prepare a proposed order and share it with opposing counsel either through the E-portal or through the mail.

MR. PETTIS: We will, Your Honor.

THE COURT: Okay. Thank you.

MR. PETTIS: Thank you very much for your time.

THE COURT: Thank you.

MS. KLAUBER: Thank you, Judge.

MS. MYRICK: Thank you, Your Honor.

THE COURT: Have a good day.

(Thereupon, the proceedings were concluded at 11:25 a.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
) ss:
COUNTY OF BROWARD)

I, VERTINA L. YEARGIN, Florida Professional Reporter, do hereby certify that I was authorized to and did stenographically report verbatim the foregoing proceedings, and that Pages 3 to and including 44, is a true and correct transcription of my stenographic notes of the proceedings had at the Broward County Courthouse, Broward County, State of Florida, on the 12th day of December, 2018, commencing at or about 10:35 a.m.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 10th day of February, 2019.

VERTINA L. YEARGIN, FPR
Florida Professional Reporter

17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY

CERTIFICATE OF THE CLERK

FREDERIC GUTTENBERG, ET AL. Appellant	CACE 18-9397 (25) CASE NUMBER:
vs. THE SCHOOL BOARD OF BROWARD COUNTY Appellee	4D19-229 APPEAL NUMBER:

I, HOWARD C. FORMAN, CLERK OF THE CIRCUIT COURT, 17TH JUDICIAL CIRCUIT FOR THE COUNTY OF BROWARD, STATE OF FLORIDA, DO HEREBY CERTIFY THAT THE FOREGOING **PAGES 1 TO 164,** CONTAIN A TRUE AND CORRECT COPY OF ALL SUCH PLEADINGS AND PROCEEDINGS IN SAID CAUSE AS APPEARS FROM THE RECORDS AND FILES OF MY OFFICE THAT HAVE BEEN DIRECTED TO BE INCLUDED IN SAID RECORD.

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