IN THE SUPREME COURT OF FLORIDA
CASE NO. SC01-1346
District Court of Appeal,
Third District Case No. 3D00-1718

CARIDAD SANCHEZ, individually,
ILEEN SANCHEZ, her daughter and
GEORGE A. SANCHEZ, her son,
Appellants/Petitioners,

vs.

DADE COUNTY SCHOOL BOARD,
a political subdivision of the State of Florida,
Appellee(s)/Respondent(s).

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONERS' INITIAL BRIEF ON THE MERITS

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OTHER AUTHORITIES

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INTRODUCTION[1]

This is a case about a twenty-five-year public-school teacher who was sexually assaulted and brutally beaten by a known trespassor during lunch period in the faculty parking lot, after school security personnel had been instructed to inspect that lot every ten to fifteen minutes. I.B. at 1-3; RVII-1255-Pl. Depo. at 8, 15-21, 34, 38.

STATEMENT OF THE CASE AND FACTS

C. Statement of the Case

Caridad Sanchez sued the School Board for negligence in failing to detect and provide security against a trespasser. RI-1-19. The trial court denied the School Board's motion to dismiss on July 14, 1999. RI-49, RI-26-28. The School Board answered and asserted various affirmative defenses, including the Workers'

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[1] The record indexing of Plaintiff's numerous "mini-depositions", with multiple depositions pages reduced onto each indexed page, is unclear and cumbersome for the Court. Plaintiff's multiple depositions on one mini-deposition page were indexed in the record as one page. The factual record in this case is extensive. So, in the interest of accuracy and ease of judicial review, Appellant uses the following record cites coupled with more intuitive record cites so that citations can be easily confirmed.

R__-__-____ at ___, refers to the record on appeal and volume number-first page of the cited mini-deposition-name of deponent at the actual deposition page number. **__ Exh. __** refers to the respective deposition exhibit and at actual exhibit page number. ***Laing* App. __ at ___** refers to the *Dade County School Board v. Laing*, 731 So. 2d 19 (Fla. 3d DCA 1999), appendix carried with this appeal, by volume and page number within that volume.

All facts and their inferences are properly presented in the light most favorable to Caridad Sanchez, as the non-moving party on the summary judgment below, with all controverted facts highlighted as well.

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Compensation immunity under § 440.11, Fla. Stat. (1998 Supp.). The trial court grant summary judgment to the Dade County School Board on the § 440.11(1) "unrelated works" exception and Workers' Compensation immunity, citing *Dade County School Board v. Laing*, 731 So. 2d 19 (Fla. 3d DCA 1999). I.B. at 1-2; RVIII-1434-35. Ms. Sanchez appealed and moved for judicial notice of the Third Districts' own *Laing* record, which motion and *Laing* appendix were carried with Sanchez's appeal. The Third District Court of Appeal affirmed per curiam the summary judgment in favor of the Dade County School Board on March 28, 2001, and denied Appellant/Petitioner's "Motion for Rehearing/Rehearing en banc, Clarification, and Certification" on May 30, 2001. Ms. Sanchez timely filed Notice to Invoke Discretionary Jurisdiction on June 13, 2001, and served her Petition for Discretionary Review on June 23, 2001, timely filed on June 25, 2001, to which Respondent timely responded. On April 25 and April 30, 2002, respectively, the Court lifted the stay of these proceedings and accepted jurisdiction.

B. Statement of the Facts

1. A Known Trespasser Attacks Sanchez at School During Lunch.

On February 11, 1998, Caridad Sanchez returned to her School around 12 p.m. after taking a personal half-day. RVII-1255-Pl. Depo. at 40-41. Classes and lunch periods were both ongoing then. RVII-1255-Pl. Depo. at 53.

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She parked her Ford Explorer in her usual spot, exited, walked to the other side, opened the front passenger door to remove two teachers' lunches and flowers to take to the teacher's lounge, and then a roughly twenty-year-old male in a very white T-shirt and dark shorts quickly approached her from the School's interior. RVII-1255Pl. Depo. at 42-46, 53, 61.

Two teachers, Tania Cruz and Barbara Phelps, told Sanchez that this attacker had been seen trespassing several days before. RVII-1255-Pl. Depo. at 82-84, 105-06. Twice on the morning of this attack School security had been notified by at least two other teachers that a threatening trespasser in his twenties was on school property; in particular, one teacher earlier saw this trespasser in this lot where Sanchez was attacked. RVII-1346-Guerrero Depo. at 30-35, RVII-1319-Hernandez Depo. at 16-18, 27, RVII-1386-Cubberly Depo. at 5-7 & Pl. Exh. "1", RVII-1255-Pl. Depo. at 61-62, 88-90, 95, 98-99, 105, RVI-1231-Costa Depo. at 40-41, 45-47, 55-57, RVII-1333-Jose Perez Depo. at 21.

Before lunch that day, Security Monitor Juan Perez asked the West Miami Middle School then-Assistant Administrator Adolfo Costa for permission to close the gate to that faculty lot, to which Costa responded "no" because of inconvenience. RVII-1319-Hernandez Depo. at 27-28, RVI-1231-Costa Depo. at 35-37. Costa had directed two School security officers to inspect this lot at alternating ten to fifteen

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minute intervals during that day's lunch periods. RVII-1346-Guerrero Depo. at 30-35, RVII-1319-Hernandez Depo. at 16-18, 27, RVII-1386-Cubberly Depo. at 5-7 & Pl. Exh. "1", RVII-1255-Pl. Depo. at 61-62, 88-90, 95, 98-99, 105, RVI-1231-Costa Depo. at 40-41, 45-47, 55-57, RVII-1333-Jose Perez Depo. at 21.

School Maintenance employee, Nick Hernandez, testified he returned from lunch, saw the attacker's bicycle parked near the lot, entered the lot to look for the attacker, saw the attacker atop Sanchez, and then ran after the attacker. RVII-1319-Hernandez Depo. at 22-23, 24-25, RVI-1231-Costa Depo. at 52. Nick Hernandez testified he too saw no security personnel near that lot when he arrived. RVII-1319-Hernandez Depo. at 24.

Costa admitted he could not prove the Security Monitors had actually inspected that day. RVI-1231-Costa Depo. at 48. The attacker had ample time to (1) grab and threaten to kill Sanchez if she screamed or fought his sexual assault, (2) place Sanchez in a headlock, (3) choke her, (4) then throw Sanchez to the ground, (5) pull up her sweater, (6) cover her face, (7) for Sanchez to fight the attacker off and grab his testicles, (8) for the attacker to then chase Sanchez down the lot after she got up and resumed running, (9) for the attacker to, then, tackle Sanchez by her left ankle and pull her down again, (10) for the attacker to repeatedly kick and punch Sanchez "everywhere", including her breasts, face and head, (11) for Sanchez to throw her car

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keys away in the lot, (12) for the attacker to find Sanchez's car keys that she threw in the lot, (13) for the attacker to begin forcing Sanchez toward the backseat of her Explorer as she lay flat on the ground to continually resist his moving her, and (14) for the attacker to resume pulling Sanchez by the hair, kicking her in the face and choking her. RVII-1255-Pl. Depo. at 56, 58-65. The Security Monitors ordered to inspect this lot had noticed none of this.

After Ms. Sanchez screamed for help and fell back to the ground, RVII-1255-Pl. Depo. at 67-68, one of the Security Monitors, Juan Perez, near the band room next to the parking lot, heard screaming from the parking lot, went to the lot, looked at Sanchez, turned and then radioed the office for rescue. RVII-1255-Pl. Depo. at 68-70, RVII-1281-Juan Perez Depo. at 34. That was the first time that Sanchez saw Juan Perez that day. RVII-1255-Pl. Depo. at 70. While Juan Perez testified he stayed with Sanchez until Nick Hernandez arrived, Sanchez testified he did not come near her, instead disappearing after he saw her. RVII-1255-Pl. Depo. at 68-70, RVII-1281-Juan Perez Depo. at 34.

During lunch, Security was ordinarily not in the west parking lot where Sanchez was attacked. RVII-1281-Juan Perez Depo. at 28. Security Monitor Juan Perez was not assigned to that lot. RVII-1281-Juan Perez Depo. at 22. And he thought someone should have been there. RVII-1281-Juan Perez Depo. at 22.

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Rather, Security Monitors Juan Perez and Jose Perez had been assigned that day to the spill-out area some fifteen to twenty yards away. Juan Perez at 21-28, RVII-1333-Jose Perez Depo. at 20. The spill-out area was not readily visible to the parking lot where Sanchez was attacked. RVII-1281-Juan Perez Depo. at 28, RVII-1333-Jose Perez Depo. at 20. Security Monitors Martica and Julia had been assigned that day to the cafeteria. Juan Perez at 21-28, RVII-1333-Jose Perez Depo. at 20.

Sanchez's attack was next to Raul Guerrero's classroom, where he was beginning a class and where Nick Hernandez had specifically seen the attacker earlier that day. RVII-1346-Depo. at 36, RVII-1319-Hernandez Depo. at 16-18, RVI-1231-Costa Depo. at 39.

After Nick Hernandez's arrival, the attacker ran into the school. RVII-1255-Pl. Depo. at 78-79. While Security Monitor Jose Perez testified he pursued the attacker through the School, RVII-1333-Jose Perez Depo. at 24-25, RVII-1255-Pl. Depo. at 82, Hernandez testified he ran around the perimeter of the School, and saw the attacker walking inside the school–several steps in front of one of the Security Monitors talking on his radio. RVII-1319-Hernandez Depo. at 24-25. Nick Hernandez and Security Monitor Jose Perez later confronted the attacker, the attacker resumed running, and Security Monitor Jose Perez pursued him from inside the school into the streets.

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RVII-1319-Hernandez Depo. at 24-25, RVII-1333-Jose Perez Depo. at 24-25, RVI-1231-Costa Depo. at 53.

Nick Hernandez ran back to Sanchez, lifted her from the gravel lot, and placed her on the grass, while the administration and teachers arrived. RVII-1255-Pl. Depo. at 70-72, RVII-1319-Hernandez Depo. at 21-23, 25-26. Sanchez was badly beaten. RVII-1255-Pl. Depo. at 70-74, RVII-1281-Juan Perez Depo. at 35. She was covered in blood, bruised, swollen, and ultimately hospitalized. RVII-1255-Pl. Depo. at 70-74, RVII-1281-Juan Perez Depo. at 35.

Costa testified he got a 315 radio call from Security Monitor Jose Perez identifying a "double emergency", RVI-1231-Costa Depo. at 33-34, and ran from the cafeteria to the parking lot. RVI-1231-Costa Depo. at 35. Nick Hernandez asked the principal for permission to allow the Security Monitor to accompany him to locate the attacker, which the principal denied. RVII-1319-Hernandez Depo. at 26-27.

2. These Particular West Miami Middle School Co-Employees Are Primarily Assigned to Unrelated Works.

a. The Zone Mechanic Is Primarily Assigned to Repairs, Not Security or Education.

Nick Hernandez, then an eleven-year School Board employee and zone mechanic at West Miami Middle School, agreed that "his primary assignment has nothing to do with the education of the students". RVII-1319-Hernandez Depo. at 8-

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11, 14. He had neither security nor education-related responsibilities. RVII-1319-Hernandez Depo. at 8-11, 14.

He reported to the "maintenance satellite", not the principal, and the principal has no supervisory authority over him. RVII-1319-Hernandez Depo. at 12-13. Any safety issues concerning him were "in relation to the building or the structure or. . .the maintenance." RVII-1319-Hernandez Depo. at 33. And his "only relationship" with a teacher was in "repair[ing] things and mak[ing] their work environment a little bit better." RVII-1319-Hernandez Depo. at 15-16.

b. West Miami Middle School Teachers Are Primarily Assigned to Education, Not Security.

Teachers are instructional staff. RVII-1346-Guerrero Depo. at 42. Raul Guerrero, a teacher for twenty-four years for the School Board and at West Miami Middle School for eight years, agreed that:

> primary assignments as a teacher at West Miami Middle School are instructional. RVII-1346-Depo. at 15-16, 5, 9.

West Miami Middle School Principle, Marcos Moran, also admitted the teacher's primary assignment are:

> ***to educate and teach*** the students pursuant to the curriculum. RIV-790-Moran Depo. at 57-58. [A]s a teacher you are assigned ***primarily to educating and teaching*** the children [with] *security* [only] *incidental* to the education and the teaching of the children. RVI-1231-Costa Depo. Depo. at 18 (emphasis added).

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Then-Assistant Administrator Costa also confirmed this:

Q. But as a teacher you are assigned primarily to educating and teaching the children?

A. Yes.

Q. And whatever "security" quote, unquote, *security you would perform or safety you would perform, would only be* ***incidental*** *to the education and the teaching of the children*?

A. *Correct*. RVI-1231-Costa Depo. at 18 (emphasis added).

Security Monitor Jose Perez agreed:

Q. And it is your understanding that *the job as a teacher is to educate* the students.

A. That is *correct*. RVII-1333-Jose Perez Depo. at 14 (emphasis added).

Teachers and administrative assistants were not trained in security and the extent of their "security" efforts were "to provide an orderly dismissal" and supervising conduct "in the classroom". RVII-1346-Guerrero Depo. at 11-12, 16, RVI-1231-Costa Depo. at 64.

Teacher Raul Guerrero also could recall no memos to teachers specifically addressing "security". RVII-1346-Guerrero Depo. at 38. Likewise, the State of Florida curriculum guidelines for teachers "contain[ed] no specific reference to the security of the school or the premises". RVII-1346-Guerrero Depo. at 17. The "safe

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learning environment" referenced in curriculum guidelines for teachers referred to "the classroom". RVII-1346-Guerrero Depo. at 18.[2]

As to teachers' security responsibilities outside their classrooms, those were limited to standing outside their respective rooms after every single period "[t]o make sure everything is okay, and that there is visibility of teachers [and] supervision." RVI-1231-Costa Depo. at 33, RVII-1346-Guerrero Depo. at 40-41.

Additionally, the Dade County Public Schools Procedures for Promoting a Safe Learning Environment, by Principal Moran's own admission, nowhere mentioned teachers or suggested teacher-involvement in confronting unauthorized persons on campus. RIV-790-Moran Depo. at 73-78, 80 & Pl. Exh. "2" at 3, 21-22. Indeed, teachers were not to confront trespassers or remove them from School premises; they were to notify School Administration, Law Enforcement or a School Monitor if they saw trespassers. RVII-1346-Guerrero Depo. at 25-26, 29, RIV-790-Moran Depo. at 84, 128-29; Juan Perez Depo. at 19-20. Principal Marcos Moran admitted the School:

> do[es]n't want teachers to attempt to handle a situation that may be a dangerous situation with a trespasser, no. RIV-790-Moran Depo. at 51-52.

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[2]

Q. And I believe you testified to this earlier. . .*<u>the only security or safety that the teachers would provide</u>* would be because of the necessity or a school or a school resource officer not being present?

A. In *<u>the classroom</u>*, yes. RVI-1231-Costa Depo. at 26-27 (emphasis added).

c. West Miami Middle School Monitors Are Primarily Assigned to School Security and Are Primarily Physically Separate.

Security monitors and teachers shared none of the same assignments, objectives or services. RVII-1281-Juan Perez Depo. at 30, 36. Security Monitors and Law Enforcement School Board Officers comprised School "security staff" and they:

(1) did not instruct staff,

(2) did not attend education workshops to assist teachers, and

(3) "*d[id] not assist the teachers at all with the education **process** in the classroom*". RVII-1346-Guerrero Depo. at 42-43 (emphasis added), RVI-1231-Costa Depo. at 26, 63, RIV-790-Moran Depo. at 69-71.

Principal Moran admitted Security Monitors "*[we]re not there to educate the children*. No, they're not". RIV-790-Moran Depo. at 52-53 (emphasis added). Rather, the School security was assigned "primarily for school safety and school security". RVI-1231-Costa Depo. at 13, 16, RVII-1281-Juan Perez Depo. at 21.

Security Monitor Jose Perez yet further crystallized the differences in primary assignments of security personnel versus teachers:

Q. You don't work as a teacher?

A. No.

Q. Do you provide any education-related services?

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A. Not to the school.

Q. Would it be fair to say that your primary assignment at the school consists of patrolling the school to make sure that there are no trespassers, that kids are going to class and there is no vandalism?

A. Right. No disruptions or anything like that. RVII-1333-Jose Perez Depo. at 14.

Security Monitor Juan Perez removed any uncertainty in the unrelatedness of security's primary assignments versus teachers' primary assignments:

Q. Are you providing security so that there's no damage to the premises, the school?

A. Yes.

Q. Do you provide any supervision in any classes?

A. No, I don't.

Q. Do you supervise the instruction or education of the students in any manner?

A. No, I don't.

Q. *Do you get involved in the teaching of the students at all*?

A. *No*.

Q. *Are you involved in education related services*?

A. *No*.

Q. So, it would be fair to say *your primary assignment as security monitor* is for the *protection of the students and the property*?

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A. And the school.

Q. And the faculty?

A. *And the faculty*. RVII-1281-Juan Perez Depo. at 16 (emphasis added).

As to the physical separateness between teachers and security, School Security personnel were "usually downstairs in the [main] parking lot." RVII-1255-Pl. Depo. at 33. They also "supervise[d] the cafeteria" and the spill-out and bus areas on the School's periphery. RVII-1255-Pl. Depo. at 36, RVII-1281-Juan Perez Depo. at 21-28, RVII-1333-Jose Perez Depo. at 20.

Q. . . . .The security staff that you identified, do they also walk the hallways?

A. When?

Q. At any time.

A. Barely.

Q. What do they do?

A. They are usually downstairs in the parking lot. R-VII-Sanchez Depo. at 33.

School Monitor Jose Perez confirmed this: "I am assigned [t]o what they call the spill-out area" during lunch-time. . . about 15, 20 yards" from where Caridad Sanchez was attacked. RVII-1333-Jose Perez Depo. at 20. His "first post is the spill-out area and the basketball court", then checking the halls and restrooms "to make sure that we have all the students in class and no trespassers" after the bell rings, then

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the 400 wing, the trailer section and the portable section, then he is assigned to the spill-out area during lunch time, then he returns to his earlier assigned areas, and then his assigned area at the end of the day is the private bus field. RVII-1281-Juan Perez Depo. at 14-15, 17. Patrolling classrooms is not one of those primary assignments.

Indeed, School security personnel are "usually downstairs in the [main] parking lot." RVII-1255-Pl. Depo. at 33. They also "supervise the cafeteria" and the spill-out and bus areas on the School's periphery. RVII-1255-Pl. Depo. at 36, RVII-1281-Juan Perez Depo. at 21-28,RVII-1333-Jose Perez Depo. at 20.

The responsibility for patrolling faculty parking lots and confronting trespassers was primarily assigned to School Security Monitors and Law Enforcement, not Teachers. RIV-790-Moran Depo. at 73-78, 80; RVII-1281-Juan Perez Depo. at 20.[3] Security Monitor Juan Perez explained:

Q. Have you ever seen any teachers assisting in the removal or stopping of trespassers?

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[3] *See also* Moran Depo, Pl. Comp. Exh. "1", Secondary School Teacher Job Description & Basic Objectives ("This is a professional position responsible for the instruction of one or more subjects to secondary school students"), School Monitor Job Description & Basic Objectives (Under general direction from the school principal, he/she performs duties to monitor student activity in promoting and maintaining a safe learning environment"), School Resource Specialist & Basic Objectives ("This is school security work assisting school administrators in creating and maintaining a safe and secure environment. . . .Work is performed under the general supervision of the Region Captain and according to the standard methods, practices and procedures").

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A. No. RVII-1281-Juan Perez Depo. at 20.

Juan Perez further explained their divisions:

Q. Are you providing security so that there's no damage to the premises, the school?

A. Yes.

Q. Do you provide any supervision in any classes?

A. No, I don't.

Q. Do you supervise the instruction or education of the students in any manner?

A. No, I don't.

Q. Do you get involved in the teaching of the students at all?

A. No, I don't.

Q. *Are you involved in any education related services*?

A. *No*.

Q. So, would it be fair to say *your primary assignment as security monitor is for the protection of the students and the property*?

A. And *the school*.

Q. And the faculty?

A. And *the faculty*. RVII-1281-Juan Perez Depo. at 16-17 (emphasis added).

West Miami Dade Middle School Security Monitor Jose Perez agreed. RVII-1333-Jose Perez Depo. at 13.

Q. [*Y]our primary assignment as a security monitor is to patrol, to make sure the kids are in classes, no vandalism, no disruptions and keep trespassers out*?

A. That is *correct*.

Q. And it is your understanding that *the job as a teacher is to educate* the students.

A. That is *correct*. RVII-1333-Jose Perez Depo. at 14 (emphasis added).

Security monitors report to Principal Moran. RVI-1231-Costa Depo. at 19-21, RIV-790-Moran Depo. at 60-61. The Security Monitor's official supervisor was Dade County School Board principal and assistant principal. RVII-1333-Jose Perez Depo. at 18. Security Monitors "were trained by the M-DCSB police." *See also* RVII-1333-Jose Perez Depo. at 15-16. Security monitors were not trained by Principal Moran. RVI-1231-Costa Depo.. Depo. at 62, RVII-1333-Jose Perez Depo. at 15. They were trained by Miami-Dade Public Schools. RVI-1231-Costa Depo. at 62, RVII-1333-Jose Perez Depo. at 15. They reported to the Principal, the Assistant Principal, and the Dade County School Police to provide security. RVII-1333-Jose Perez Depo. at 16-17. The School Board did "most of the training" for the security monitors. RVII-1333-Jose Perez Depo. at 18, RVII-1367-Monroe (Chief of the School Board Police)

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Depo. at 17. The School Board police did not supervise or assign duties to the security monitors. RVII-1333-Jose Perez Depo. at 18, RVII-1367-Monroe Depo. at 17. Jose Perez, a School Monitor for seven years at West Miami Dade Middle School, explained that School Monitors are employed by the School Board. RVII-1333-Jose Perez Depo. at 16-17.

Q. So, the ultimate decisions involving your employment are made by the [M-DCSB]?

A. Yes.

Q. Okay. Not the [M-DCSB] police?

A. No. It is by the School Board, however, *we are really under the school police because they do most of the training for us.*

* * *

Q. Indirectly, I mean, other than assisting them, are you involved with the School Board police?

A. Well, when it comes to work, we are. RVII-1333-Jose Perez Depo. at 17-19 (emphasis added).

d. Like West Miami Middle School Monitors, the School Resource Officer Is Primarily Assigned to Law Enforcement and Security and Is Physically Separate.

Principal Moran admitted a School Board Resource Officer was merely there to assist "the principal with any and all issues that concern *safety, security*, they *monitor the area in and around the school*, they assist and provide information for *security* officers." RIV-790-Moran Depo. at 57-58 (emphasis added). He admitted

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that the School Board Police had "nothing to do with any School Board staff" such as teachers, zone mechanics or principals. RVII-1367-Monroe Depo. at 25-26.

In February, 1998, the Miami-Dade region-district office had assigned a School Resource Officer, licensed Police Officer John Ramirez, to West Miami Middle School. RVI-1231-Costa Depo. at 19, 22, 26, RIV-790-Moran Depo. at 60-61. He reported to a different division. RVI-1231-Costa Depo. at 19-21, RIV-790-Moran Depo. at 60-61. His official supervisor was Dade County School Police. RVII-1333-Jose Perez Depo. at 18. School Resource Officers *were primarily law enforcement* that carried weapons, made arrests, and assisted School Security Monitors. RVI-1231-Costa Depo. at 20-21, 23, RVII-1367-Monroe Depo. at 28.

Officer Ramirez's primary assignment was prevention of violations of law:

Q. . . . . *Your primary assignment, would it be fair to say, would be to prevent violations of the law from occurring* --

A. *Yes*.

Q. -- at West Miami Middle School?

A. Yes. RVII-1299-Ramirez Depo. at 12-13, 15 (emphasis added).

Officer Ramirez's School Board Resource Chief, Vivian Monroe, agreed:

Q. Your job [as Chief of the School Board resource officers] *simply is to make sure that the schools and the school property are from violations of the law*?

A. *Yes*. RVII-1367-Monroe Depo. at 48-49 (emphasis added).

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As to the co-employee divisions, Officer Ramirez had his own supervisor. RVI-1231-Costa Depo. at 19-21, RIV-790-Moran Depo. at 60-61. Principal Moran was not Officer Ramirez's supervisor, did not set his hours, did not determine his pay, did not evaluate him, and did not tell him when to go for training. RVII-1299-Ramirez Depo. at 50-51, 30, RVII-1367-Monroe Depo. at 38, 52-53, RVI-1231-Costa Depo. at 66. While Officer Ramirez took direction from the Principal, RVII-1299-Ramirez Depo. at 46, the Principal was simply the person in charge where he was assigned. RVII-1299-Ramirez Depo. at 50-51, 30, RVII-1367-Monroe Depo. at 38, 52-53, RVI-1231-Costa Depo. at 66.

Officer Ramirez and Dade County School Board Police Chief Vivian Monroe removed any ambiguity in Officer Ramirez being primarily assigned to security:

Q. Other than speaking to students on occasion, do you have any other involvement in any type of education-related services.

A. No, sir. RVII-1299-Ramirez Depo. at 10.

Dade County School Board Police Chief Vivian Monroe further clarified that Officer Ramirez's role was *not education-related*:

Q. And does Officer Ramirez have anything to do with the education of the students?

A. No. *Does he have any involvement in any type of education related services*?

* * *

No. RVII-1367-Monroe Depo. at 29 (emphasis added).

Officer Ramirez's presentations at the School were no different from a lawyer or mechanic coming to speak on job day, RVII-1367-Monroe Depo. at 30-31, no more "educators" than Officer Ramirez.

Additionally, Dade County School Board Police Chief Monroe, to whom Officer Ramirez reported, confirmed that they had no involvement "in any policy making as to what type of education services students are to receive" or "in any decision-making" in that regard. RVII-1367-Monroe Depo. at 30-31. "Security staff" do not instruct staff; they do not attend education workshops to assist teachers; and they "*d[o] not assist the teachers at all* ***with the education process*** *in the classroom*". RVII-1346-Guerrero Depo. at 42-43 (emphasis added); RVI-1231-Costa Depo. at 26, 63, RIV-790-Moran Depo. at 69-71. Likewise, patrolling faculty parking lots and confronting trespassers were projects primarily assigned to Security Monitors and Law Enforcement, not Teachers. RIV-790-Moran Depo. at 73-78, 80, RIV-790-Moran Depo Pl. Comp. Exh. "1", Secondary School Teacher Job Description & Basic Objectives ("This is a professional position responsible for the instruction of one or more subjects to secondary school students"), School Monitor Job Description & Basic Objectives (Under general direction from the school principal, he/she performs duties to monitor student activity in promoting and maintaining a safe

learning environment"), School Resource Specialist & Basic Objectives ("This is school security work assisting school administrators in creating and maintaining a safe and secure environment. . . .Work is performed under the general supervision of the Region Captain and according to the standard methods, practices and procedures").

If a trespasser resisted leaving, Security Monitors were supposed to contact the School Resource Officer or the Administration, who, in turn, was to contact the School Resource Officer. RVII-1367-Monroe Depo. at 20-22. Officer Ramirez was supposed to be at the School each day from 8 a.m. to 4 p.m. RVI-1231-Costa Depo. at 48-49, Jose Perez Depo. at 26, RVII-1299-Ramirez Depo. at 19, RVII-1367-Monroe Depo. at 28. If a School Resource Officer was absent when an incident occurred, "we would call Metro-Dade Police". RVI-1231-Costa Depo. at 33, RVII-1333-Jose Perez Depo. at 26-27. Officer Ramirez was absent for training the day of Sanchez's attack. RVI-1231-Costa Depo. at 48-49, RVII-1333-Jose Perez Depo. at 26, RVII-1299-Ramirez Depo. at 19, RVII-1367-Monroe Depo. at 28.

C. Standards of Review

Summary judgments are reviewed on appeal *de novo,* and the test for evaluating them is whether there are factual questions whose resolution would permit a reasonable jury to decide in a way different than that directed by the court,[4] under a two-step

[4] *See Moore v. Moore*, 475 So. 2d 666 (Fla. 1985).

process: (1) whether a genuine issue of material fact exists and (2) whether the trial court applied the correct rule of law.[5] The School Board, as the summary judgment movant, has the burden of "show[ing] conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought."[6]

SUMMARY OF THE ARGUMENT

Florida's Workers' Compensation Act was passed to provide for compensation benefits payments whenever disability or death resulted from an injury arising out of and in the course of employment. § 440.01 et seq., Fla. Stat. Even the Act's structure is legislative recognition that employees can be carrying out their work assignments "in the furtherance of their employer's business," and still maintain a cause of action, if the injured worker's assigned work activity is primarily unrelated to that of the employee responsible for the injury. Additionally, under the rules of statutory construction, § 440.11(1) "unrelated works" must have been intended to have applied equally to employees on the same job sites, with emphasis on the unrelatedness between the co-employee's "primary assignments".

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[5] *See* Padovano, Fla. App. Prac. § 9.4 at 148-49.

[6] *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *see D'Attilio v. Fifth Avenue Business Ass'n, Inc.*, 710 So. 2d 117 (Fla. 2d DCA 1998).

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Florida courts have repeatedly noted that the "unrelated works" exception was undefined by the legislature and that, in struggling to give meaning to that undefined exception, they have done so in disparate ways. To resolve the turmoil and conflict among the districts, this State's Highest Court needs to be heard on the proper test to ascertain whether co-employees are "primarily assigned to unrelated works". Under Caridad Sanchez's test for ascertaining "primarily assigned to unrelated works", courts can look at co-employee positions and primary assignments, roles, responsibilities, and work locations. Sanchez's test is fair to the employer because it incorporates the two elements driving any employment tort test: co-employees' respective responsibilities and control. The employer is in the best position to know which group of employees it has specifically entrusted with that the duty alleged to have been breached. And Sanchez's test is also fair to the employees because employees know the position responsibilities and roles for which they have been hired and promoted and what factors fall within their primary control. It is also a test capable of predictable application by the lower courts.

Here, these admittedly negligent security personnel[7] and this seriously injured teacher were no more engaged in the "related works" of education as a matter of law

[7] Respondent admitted this during taped oral argument before the Third District Court of Appeal.

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than the construction supervisor and maintenance worker in *Lake v. Ramsay,* 566 So. 2d 845 (Fla. 4th DCA 1990). This record contains extensive testimonial and documentary evidence that School Security and Teachers were "primarily assigned to unrelated works": (1) these Security Monitors and School Resource Officer did not educate and (2) this attack in the faculty parking lot was separate from the classroom where teachers do educate. The "primary assignment" of this plaintiff, like all teachers, was to teach. Not patrol the faculty parking lot. Not confront and remove dangerous trespassers. The School Board's erroneous interpretation of § 440.11(1) and *Laing*, furthers the very public employee blanket-immunity rule at odds with the plain language of the Act that this Court disapproved in *Holmes*. For the reasons and legal authorities set forth herein, it is respectfully submitted that the courts below applied the wrong test to ascertain "primarily assigned to unrelated works", that this summary judgment on the "unrelated works" exception was error, and that the judgment should be reversed and the case remanded for further proceedings.

ARGUMENT

Summary judgment was error here because the extensive testimony on the issue of whether the Plaintiff, a teacher, and the security monitors and the resource officer were co-employees assigned primarily to unrelated works was an issue of controverted fact not properly decided in the School Board's favor.

A. Legal Standard

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The question presented is whether the exclusive remedy provisions of § 440.11(1), Fla. Stat. (1998), bar the action of a seriously injured teacher for damages resulting from the School security's negligence in failing to provide security against a known trespasser. Section 440.11(1) exempts workers' compensation immunity when employees are "operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment."[8]

B. "Unrelated Works" Was Never Intended to Mean "Unrelated Entities".

> "The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."
> O.W. Holmes, Jr., The Common Law, Lecture 1, at 1 (1881).

Contemporary workers' compensation laws originated during the Industrial Revolution to compensate workers for workplace injuries.[9] The underlying concept

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[8] § 440.11(1), Fla. Stat. (1998).

[9] William E. Sadowski *et al.*, *The 1979 Workers' Compensation Reform: Back to Basics*, 7 Fla. St. U. L. Rev. 640, 641-48 (1979); *see also* Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206, 228-31 (1952); James Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 Lab. Hist. 156, 156-67 (1967); Paul Z. Gurtler, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 Hamline J. Pub. L. & Pol'y 127, 133 (1989).

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was simple. In the event of a workplace injury, regardless of fault, workers forfeited the right to sue their employers in exchange for guaranteed and defined benefits.[10]

Florida's Workers' Compensation Act was passed to provide for the payment of compensation benefits whenever disability or death resulted from an injury arising out of and in the course of employment.[11] Despite its original simplicity, however, workers' compensation has evolved into a complicated and confusing area of law. *See* Petitioner's Brief on Jurisdiction.

Section 440.11(1) provides that compensation under the act is the exclusive remedy for an employee.[12] But § 440.11(1) provides for specific exceptions to otherwise blanket employer/fellow-employee immunity, including the "unrelated works" exception.

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[10] The fundamentals of workers' compensation discussed in a speech given by John F. Burton, Jr. *See* John F. Burton, Jr., Workers' Compensation: The Fundamental Principles Revisited *in* Workers' Compensation Desk Book V8-V15 (1992).

[11] § 440.01 et seq., Fla. Stat.; *see Broward v. Jacksonville Medical Center*, 690 So. 2d 589 (Fla. 1997) (quoting *Surace v. Danna*, 248 N.Y. 18, 161 N.E. 315, 315-16 (N.Y. 1928) (citations omitted)) ("Workmen's Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability. He was to be saved from becoming one of the derelicts of society, a fragment of human wreckage. . . .").

[12] Section 440.11(1) provides:

> The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter.

> Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, ***nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.***[13]

The statute nowhere defines what is meant by "when each is operating in furtherance of the employer's business but. . .assigned primarily to unrelated works". And only the roughest seas during hurricane season provide as much twisting, uncertainty and confusion over identifying when a claim against a co-employee arises under that § 440.11 immunity exception.

The Third District was the first to address the concept of "unrelated works" in *Johnson v. Comet Steel Erection, Inc.*[14] Johnson was an employee of the general contractor who had been injured by the ordinary negligence of a subcontractor's employee. Both were employed on-site. Both were on the same construction project. The Third District held that the fact that appellant was a common laborer for the general contractor and the tortfeasor was a welder for the subcontractor did not make their work "unrelated" within the meaning of § 440.11(1), and that, therefore, the

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[13] § 440.11(1), Fla. Stat. (1998) (emphasis added).

[14] *Johnson v. Comet Steel Erection, Inc.*, 435 So. 2d 908 (Fla. 3d DCA 1983).

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subcontractor was immune from suit.[15] There is no indication in the four corners of that case that the litigants presented the Court with any testimony on their respective primary, unrelated assignments. But the decision would appear to misapprehend the exception: "when each is operating in furtherance of the employer's business but. . .assigned primarily to unrelated works" because two people working for the same employer on the same site with non-overlapping primary assignments are plainly "operating in furtherance of the employer's business" while capable of being "primarily assigned to unrelated works".

And that is what the Fourth District Court of Appeal recognized in *Lake v. Ramsay*,[16] in reversing a summary judgment in favor of a co-employee under § 440.11(1) on the "unrelated works" exception. That court considered, as a threshold matter, whether a maintenance worker and a construction supervisor working for the same employer were assigned primarily to unrelated works. The court noted that both types of work could be involved in the same construction job.[17] However, because the facts were disputed, the Fourth District reversed summary judgment and remanded for further proceedings.[18]

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15 *Id*. at 909.

16 *Lake v. Ramsay*, 566 So. 2d 845 (Fla. 4th DCA 1990).

17 *Id*. at 848.

18 *Id*.

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Then, in 1995, this Court, in *Holmes County School Board v. Duffell*,[19] recognized that Florida Statutes §§ 440.11(1), 440.39(1) and 768.28(9)(a) allowed a public employee, just like a private employee, to pursue a claim against an employer based on the negligent acts of another employee primarily assigned to unrelated works, even though the employee accepted an employer's workers' compensation benefits.[20] There, Duffell, a custodian of the Holmes County School Board, was injured while helping students exit a school bus through the rear door during an evacuation drill. During the drill, the driver of a school bus immediately behind Duffell allowed his bus to move forward. The bus pinned Duffell against the next bus and seriously injured Duffell. Duffell received workers' compensation benefits and sued to recover for the negligence of his fellow employee under § 768.28(9).[21]

The Board argued Duffell's selection of workers' compensation benefits precluded him from advancing a negligence claim. The Board posited that § 440.11(1) granted it immunity from negligence actions and the legislature did not intend §§ 768.28(9)(a) and 440.11(1) to be read and applied together.[22]

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19 *Holmes County School Board v. Duffell*, 651 So. 2d 1176 (Fla. 1995).
20 *Id.* at 1179.
21 *Id.* at 1177.
22 *Id.* at 1178-79.

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This Court disagreed. It held Duffell was entitled to sue under §§ 440.11(1) and 440.39(1), explained § 440.11(1)'s "unrelated works" exception:

> The section provides that the same immunity extends to each employee of the employer when such employee is acting in furtherance of the employer's business. However, this same section contains exceptions under which the employee immunity is not applicable. ***One such exception is where employees of the same employer operating in furtherance of the employer's business are assigned primarily to unrelated work***.[23]

The Court's holding in *Holmes* ultimately turned on the fact that Duffell was suing the Board as a "surrogate defendant" for the negligent acts of its employee, rather than in its capacity as Duffell's employer.[24] The Court reasoned the legislature, when it amended § 768.28(9) in 1980, could not have intended to eliminate a public employee's rights under 440.11(1), while leaving intact a private employee's rights under the same section.[25]

The Court's *Holmes* decision approved[26] the First District's *Holmes* opinion,[27] which cited with approval its *Department of Corrections v. Koch*[28] decision holding

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[23] *Id*. at 1177-78.

[24] *Id.* at 1179.

[25] *Id*.

[26] *Id.* at 1177.

[27] *Holmes County School Bd. v. Duffell*, 630 So. 2d 639, 640 (Fla. 1st DCA 1994).

[28] *Department of Corrections v. Koch*, 582 So. 2d 5 (Fla. 1st DCA), *rev. den'd*, 592 So. 2d 679 (Fla. 1991).

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that "an injured employee of a governmental entity may sue the governmental entity in a civil action, despite the occurrence of the injury in the workplace, so long as the injured employee does not work in a job related to the tortfeasor's job". There is no question in *Holmes* that both were employees of the School, operating in the furtherance of their employer's general objective of education. But they were plainly assigned primarily to unrelated works within their employment. One employee was dedicated to transporting school children while the other was dedicated to cleaning the buildings in which these children were educated.

After *Holmes*, the Second District Court of Appeal followed the reasoning of *Johnson* in *Abraham v. Dzafic*,[29] and held that the co-employee immunity provisions barred that lawsuit. Although one of the employees was a painter and the other was a fluorescent lighting technician, they were both employees of the same contractor working on the same construction site. The court held that, while their work skills may have been "unrelated," their work was not.[30] Like *Johnson*, there is no indication in *Abraham* that the litigants presented the court with the statute's legislative history and, as will be set forth more fully below, had such legislative history been before court, *Abraham* would have probably been decided differently.

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29 *Abraham v. Dzafic*, 666 So. 2d 232 (Fla. 2d DCA 1995).

30 *Id*. at 233.

In 1997, the First District Court of Appeal held in *Vause v. Bay Medical Center*,[31] that co-employee immunity applied in the lawsuit arising from the death of a nurse, who worked primarily in medical center's obstetrics department but was also assigned to work on a regular part-time basis in the center's hyperbaric center. The nurse died as the result of the alleged negligence of her fellow employees in the hyperbaric center. The First District held that the co-employee immunity provisions applied because at the time of her injury the nurse was engaged in activity related to her primary assignment, the provision of health care to patients.[32] Again, there is nothing in the four corners of that decision suggesting the court had before it evidence of unrelated primary assignments. Indeed, *Vause* was decided not on summary judgment, but on motion to dismiss with prejudice. As a matter of law, the court said, the nurse in *Vause* was engaged in an activity to which she was regularly assigned with a co-employee in that same unit of her injury. Since there was no factual record before reaching the appellate level, *Vause* is neither procedurally or factually on point.[33] And

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[31] *Vause v. Bay Medical Center*, 687 So. 2d 258 (Fla. 1st DCA 1996), *rev. den'd*, 695 So. 2d 703 (Fla. 1997).

[32] *Id*. at 263.

[33] Like Ms. Sanchez's arguments below, Judge Miner focused in his concurring opinion in *Vause* on whether the employees' primary work assignments were substantially similar. *See Vause*, 687 So. 2d at 267 (Miner, J., concurring in part, dissenting in part). He suggested that the legislative purpose for the exception could have been "to remove workers' compensation immunity as a disincentive to employers assigning employees, primarily assigned to full-time duties in a particular

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as will be set forth more fully below, had the *Vause* court had the legislative history and a factual record before it, *Vause* might have been decided differently.

The Second District Court of Appeal in *Lopez v. Vilches*[34] applied a different analysis and reversed a summary judgment premised on workers' compensation immunity. That court held that the "unrelated works" exception did apply to those facts. There, Lopez, a funeral home employee, sued three other employees who maintained the fleet of funeral home vehicles, to recover damages for injuries sustained when he drove a funeral home vehicle. That court expressed its frustration at the legislature's failure to define "unrelated works", and decided to apply a bright-line test based on the physical location where the employees were primarily assigned and the unity of their business purpose.[35] The court noted that the legislature used the plural form, "works," rather than the singular form and further recognized that,

> [a]mong its several definitions, 'works' has been defined as '[a] factory, plant, or similar building or system of buildings where a specific type of business or industry is carried on.' American Heritage Dictionary of the

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area of employment, occasional, non-routine duties because of a legislative assumption that the danger of injury might be increased if workers were expected to perform such tasks on a relatively infrequent basis." 687 So. 2d at 267. Judge Miner distinguished the *Vause* plaintiff and other similar cases on the basis that the fellow employees and the plaintiffs there were all engaged in a single type of business.

[34] *Lopez v. Vilches*, 734 So. 2d 1095 (Fla. 2d DCA), *rev. den'd*, 749 So. 2d 504 (Fla. 1999).

[35] *Lopez*, 734 So. 2d at 1096-97.

> English Language 1474 (1973). In several cases, the First District found the exception inapplicable where the employees were all engaged in a single type of business. *See Turner v. PCR, Inc.*, 732 So. 2d 342 [] (Fla. 1st DCA 1998) (affirming summary judgment based on immunity when both employees had 'different duties as related to the same project') (quoting trial court's finding) (internal quotation marks omitted); *Vause v. Bay Med. Ctr.*, 687 So. 2d 258 (Fla. 1st DCA 1996) (holding that immunity applied because nurse, hospital administrator, and other defendants were all assigned duties related to the 'provision of health care to patients of the medical center' although they performed disparate duties in that regard). This reasoning does not appear consistent with the First District's earlier conclusion, affirmed by the Florida Supreme Court, that a custodian and school bus driver, both School Board employees, were engaged in unrelated works. *See Holmes County School Bd. v. Duffell*, 630 So. 2d 639 (Fla. 1st DCA 1994), *aff'd*, 651 So. 2d 1176 (Fla. 1995). But, as noted by the supreme court, the application of the unrelated works exception was not disputed on appeal. *See* 651 So. 2d at 1177.

The Third District followed the reasoning of *Vause* in *Dade County School Board v. Laing*.[36] In *Laing*, the plaintiff, a teacher who was hit when leaving a classroom by a golf cart operated by a school custodian, sued the School Board based on the injuries he sustained. The School Board moved for summary judgment on the ground that it was immune from suit, but the court denied the motion based on the " unrelated works" exception. The court reversed on appeal, conclusorily reasoning that, because the teacher and custodian were co-employees undertaking education-related services for students at school when the accident occurred, they

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[36] *Dade County School Board v. Laing*, 731 So. 2d at 19.

were both part of a team. The court held they were not engaged in "unrelated works" and, therefore, the School Board was immune from the teacher's suit. [37] Laing was *leaving his classroom* when he was hit by a golf cart operated by a school custodian beside that classroom. The record evidence of "relatedness", the court said, was that "Rodriguez and Laing were both working on the same project, in the sense that they were co-employees providing education related services to students at Hialeah High School." So, "[b]ecause both were engaged in *activities primarily related to the provision of education* related services, the 'unrelated works' exception to the School Board's immunity under Section 440.11(1) does not apply."

As reflected in *Laing* and its progeny, *Laing* is riddled with an expansive rule predicated on short analysis, circular reasoning, and non-evidentiary support for what was originally *dicta* on "education-related services" that other districts have now transformed into to a rule of law. While courts cite *Laing* as a case-by-case analysis, it has been upgraded by most courts to a rule of blanket immunity. Moreover, no testimony appeared in *Laing* concerning the custodian and teacher being "primarily assigned to unrelated works". [38] Unlike the custodian in *Laing*, *Laing* App. 9 at 14-15,

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[37] *Id*. at 20.

[38] Ms. Sanchez requested that the Third District take judicial notice of the *Laing* Appendix because the lower court here relied on an interpretation of *Laing* and 440.11(1) that Ms. Sanchez respectfully submitted was at odds with the intent of *Laing* and the statute. The Third District ruled that the request for judicial

25, 30-31, 32, there was no testimony here that the School Board's security staff had daily interaction with teachers in their classrooms, opening and closing teachers' classrooms, cleaning and maintaining teachers' classrooms, delivering packages to teachers, or genuinely assisting teachers in education-related services. Finally, *Laing* directly frustrated the language and purpose of the "primarily assigned to unrelated works" exception by wholly skirting the "in furtherance of the employer's business" portion of the "unrelated works" exception to hold the employer's overall project of providing education-related services to be dispositive.

The Fourth District Court of Appeal in *School Board of Broward County v. Victorin*[39] recognized both *Lopez*'s bright-line physical location/business purpose test[40] and *Laing*'s case-by-case test, and held that the plaintiff bus driver, Victorin, did

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notice would be carried with the appeal and never denied that motion. The filed *Laing* appendix, carried with the appeal and now part of the appellate record, reflects, as Ms. Sanchez argued below, that the Third District in *Laing* did not have before it specific testimony on the parties' primary assignments to unrelated works. The *Laing* appendix confirmed that the none of the witnesses in *Laing* testified on custodians and teachers being primarily assigned to unrelated works. *See Laing* App. 7 (Deposition of Custodian Jose Rodriguez), *Laing* App. 8 (Deposition of Principal Dr. Carmen Roses-Maristany), *Laing* App. 9 (Deposition of Teacher Frank Bojorge), *Laing* App. 11 (Deposition of Plaintiff Ronald Laing). The *Laing* court also did not have the legislative history of § 440.11 before it that the *Sanchez* court had. *See Laing* App.

[39] *School Board of Broward County v. Victorin*, 767 So. 2d 551 (Fla. 4th DCA 2000).

[40] Ms. Sanchez's test, advanced below, focuses on whether the co-employees' primary assignments and areas of control are unrelated, not

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not fall within the "unrelated works" exception to co-employee immunity under § 440.11(1) because the two bus drivers, one injured by the other, were co-employees assigned primarily to related works under either test. The court reversed the trial court's denial of summary judgment and rejected the lower court's reasoning that because the employees were driving different buses from different depots, the co-employee exception to the workers' compensation immunity statute did not apply.

In *Palm Beach Co. v. Kelly*,[41] the Fourth District again recognized *Lopez*'s bright-line physical location/business purpose test and *Laing*'s case-by-case test and held that, under either test, those co-employees satisfied the "primarily assigned to unrelated works" exception because one employee was primarily responsible for maintenance of county airport roads and other county employee maintained county traffic roads, and both employees furthered different business purposes of the county.

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inconsistent with the factors advanced before the Fifth District Court of Appeal, *Taylor v. School Board of Brevard County*, Fla. 5th DCA Case No. 5D00-842, in which that appellant advanced the following factual checklist to evaluate unrelatedness between the work of the mechanics and the injured school bus attendant in that case: (1) a policy which enforces separation of school bus attendants and mechanics; (2) a time lapse between the negligent act and the injury; (3) a difference in location between the negligent act and the situs of the injury; (4) different areas where the work of the two employees is performed; (5) different supervision; (6) different duties; (7) different educational requirements; (8) different training; (9) different job skills; (10) different employment status. That checklist is helpful in aiding the Court's review, but should not be treated as a dispositive.

[41] *Palm Beach Co. v. Kelly*, 810 So. 2d 560 (Fla. 4th DCA 2002).

While a statute clear and unambiguous requires no statutory interpretation,[42] when a term–"primarily assigned to unrelated works"[43] in this case–is left undefined by the statute, courts must construe the term with a "plain and ordinary meaning."[44] A statute is "[a]mbigu[ous if it] suggests that reasonable persons can find different meanings in the same language."[45] Florida courts *have* found different meanings in the same language. It is clear from our decisions that this statute contains a term screaming for judicial clarification and a court-formulated test that can give full effect to the intended meaning of "primarily assigned to unrelated works" in an simple, predictable way for our citizens and lower courts.

Stated differently, the primary and overriding consideration in statutory interpretation is that a statute be construed and applied in such a way that gives effect to the evident intent of the legislature, *even if* such construction varies from the statute's literal meaning.[46] So, in realizing that objective, courts may resort to

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[42] *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

[43] *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992).

[44] *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992).

[45] *See Forsythe*, 604 So. 2d at 455.

[46] *Deason v. Florida Dept. of Corrections*, 705 So. 2d 1374 (Fla. 1998).

> [A] literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion.

Holly, 450 So. 2d at 219 (citation omitted) (alteration in original) (quoting *State ex rel. Hanbury v. Tunnicliffe*, 98 Fla. 731, 735, 124 So. 279, 281 (1929)).

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definitions of the same term found in case law.[47] The problem here is that these decisions reflect that Florida's courts are faced with several divergent, plausible case-law interpretations of the same statutory language: "in furtherance of the employer's business and primarily assigned to unrelated works". So the legislative history becomes particularly helpful here to ascertain legislative intent.[48]

In construing this "unrelated works" exception, in the earlier, 1978 version, the Florida Legislature considered limiting the co-employee immunity exception to employees "not assigned to the same job site" and removed that limitation.

> Provided, however, employees of the same employer may have a cause of action if each is operating in the furtherance of the employer's business but they are not assigned to the same job site **or** are assigned primarily to unrelated works within private or public employment.

See Motion at Exh. "A" at A9 (emphasis added). In the Legislature's final version of § 440.11(1), the "same job site" limitation nowhere appeared. The immunity exception was not separate job-site dependent so "unrelated works" could not have ever been intended as separate job-site dependent:

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[47] *See State v. Mitro*, 700 So. 2d 643, 645 (Fla. 1997); *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980); *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602 (Fla. 2d DCA 1997).

[48] *See Magaw v. State*, 537 So. 2d 564, 566 (Fla. 1989); *cf. Hawkins v. Ford Motor Co.*, 748 So. 2d 993 (Fla. 1999) (using legislative history to support an interpretation of the plain meaning of the statute).

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> nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

§ 440.11(1), Fla. Stat. (1979).

In applying the above rules of statutory construction to the legislative history, none of the decisions on the "unrelated works" exception thus far, including *Laing*, had the guidance of the legislature's earlier, proposed 1978 amendment to add a § 440.11 "unrelated works" immunity exception.[49] *See* Appellant's Motion to Take Judicial Notice of and Leave to File Its Own Record in the Matter of *Dade County School Board v. Laing*"[50] Exh. "A" at A9. Many courts have looked to the temporal separateness, as in *Lopez,* between the negligent act–negligent mechanical maintenance–and the plaintiff co-employee's later injury as important to determining the "unrelatedness" of the work. But the burning question remains: why does temporal and physical separateness matter? What is the reason for that rule and the statutory support?

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[49] The undersigned has been unable to locate other formal legislative history discussing this particular language. The language was incorporated in Chapter 78-300, Law of Florida, but there is no memorandum of legislative intent, no staff analysis and no unsigned, undated "summary" specifically discussing this provision and the reasons for selecting the "primarily assigned to unrelated works" language.

[50] *Laing*, 731 So. 2d at 19.

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Had those courts had before them and considered this legislative history of the statute, it is respectfully submitted that the Third District's *Laing* decision and its progeny, including *Sanchez*, would have been decided in vastly greater conformity with the Fourth District's "separateness" of assignments and responsibilities analysis in *Lake* and, to some extent, the Second District's bright-line "separateness" analysis in *Lopez*.

That is because, "[w]hen a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment."[51] While the Respondent argues this removal of "same job-site" means nothing, plainly the removal of the language limiting the "unrelated works" exception to merely physically separate job sites reveals the Florida Legislature's intent that the "unrelated works" exception not require physically separate co-workers at different sites as dispositive to "unrelated works". To the contrary, the legislature had a clear opportunity to make "unrelated works" mean, as *Laing* reasoned, "unrelated entities". But the legislature removed that very language lending itself to such an interpretation.

Under the maxim of *ejusdem generis*, where an enumeration of specific things is followed by some more general word or phrase, the general phrase will usually be

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[51] *See Carlile v. Game and Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977).

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construed to refer to things of the same kind as those specifically enumerated.[52] Therefore, if physical separateness of the co-workers in different buildings is not the dispositive factor–and plainly it is not–then the "primarily assigned to unrelated works" "in furtherance of the employer's business" must mean "unrelated works" in the sense of "unrelated primary assignments". "Primarily assigned to unrelated works" must have been intended to have been read in harmony with "when each is operating in the furtherance of the employer's business".[53]

By reading those phrases in the disjunctive, the Third District in *Sanchez* and, most recently, the Fifth District in *Taylor*[54] affirmed a blanket-immunity rule that co-

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[52] *See Green v. State*, 604 So. 2d 471, 472 (Fla. 1992); *Hanna v. Sunrise Recreation, Inc.*, 94 So. 2d 597, 599-600 (Fla. 1958). The only recognized exception to this doctrine provides that where a statutory list is exhaustive of members of the class in question, then general terminology following that list should not be considered limited solely to members of the same class. See *Florida Police Benev. Ass'n, Inc. v. Department of Agric. & Consumer Servs.*, 574 So. 2d 120, 121-22 (Fla. 1991)("This is a result required by the common sense rule that all words in a statute should be construed so as to give them some effect, not so as to render them meaningless surplusage").

[53] Section 440.11(1)'s exception to workers' compensation immunity reads:

> when each are operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

[54] *Taylor v. School Bd. of Brevard County*, 790 So. 2d 1156 (Fla. 5th DCA 2001). On April 25, 2002, the Court also accepted jurisdiction and set oral argument in *Taylor v. School Bd. of Brevard County*, SC01-1924, a matter involving the same "unrelated works" issue.

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employees in "unrelated works" requires unrelated entities at different sites. But the Fourth District in *Lake*, on the other hand, appreciated all of this language and the workplace reality that employees of the same corporation will always be working in furtherance of the employer's business and, in so doing, cross paths, perhaps even frequently. But what is key to this exception is the separateness of tortfeasor co-employee's primary assignments from those of the injured co-employee; and that is key because that separateness in primary assignments goes to their respective responsibilities and meaningful opportunities for control to prevent those injuries.

The law favors a rational, sensible construction of a statute.[55] The plain and ordinary meaning of § 440.11's "unrelated works" exception also "can be ascertained by reference to a dictionary."[56] Common definitions of the key words in the "unrelated works" exception – "primarily", "assigned", "unrelated" and "works" – also support this interpretation of this statute.[57] Webster's New Twentieth Century Dictionary (2d ed. 1983) defines "primarily" to mean "as first; in the first instance; originally; in the first place; principally." The interpretation urged by Ms. Sanchez of

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[55] *Realty Bond & Share Co. v. Englar*, 104 Fla. 329, 143 So. 152 (1932).

[56] *Magaw v. State*, 537 So. 2d 564, 566 (Fla. 1989); *cf. Hawkins v. Ford Motor Co.*, 748 So. 2d 993 (Fla. 1999).

[57] *See generally L.B. v. State*, 700 So. 2d 370 (Fla. 1997) (court may refer to dictionary to ascertain plain and ordinary meaning which legislature intended).

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the language "primarily assigned to unrelated works" is sensible and supported by reading all the statutory language.

In contrast, the School Board's argument on the meaning of "primarily assigned to unrelated works" "leads to an unreasonable or ridiculous conclusion or to a purpose not designated by the lawmakers."[58] Accepting the School's construction of the § 440.11(1) "unrelated works" exception, "primarily assigned" gets read out of the statute altogether, and public employers are afforded the very blanket-immunity that the *Holmes* decision intended to end. Under the School Board's rigid interpretation of "unrelated works", all public employees would be precluded from suing their employer because all public employees are part of "a team" engaged in the project of "public service" "primarily related" to advancing the interests of Florida. Likewise, under the School Board's reading of "unrelated works", Ford Motor company co-employees would always be immune because its employees are part of "a team" engaged in providing car and truck production-related services. The School Board's "related project" exception is no exception at all. But under the *Sanchez* test, if a tortfeasor maintenance employee is "primarily assigned" to detecting and repairing workplace-floor holes and the injured accountant working nearby who falls in that

[58] *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1281 (Fla. 1983).

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whole is not, then determining they are "primarily assigned to unrelated works" is simple, predictable and fair to employers and employees alike.

State Dep't of Corrections v. Koch[59] also illustrates the problem. There, the personal representative of the DOT employee killed due to the negligence of a DOC employee was killed when *both were working on the same construction project* . The School Board's analysis here would have foreclosed that personal representative from instituting suit, notwithstanding that both "were co-employees assigned primarily to unrelated works." In *Koch*, the employee was from the Department of Corrections (DOC), and he picked up a truck from the Department of Transportation's (DOT) maintenance yard. While leaving, he struck a DOT employee who was arriving to work. And the plaintiffs in both *Duffell* and *Koch* were held to have stated a common law cause of action where their primary assignments were unrelated, though it cannot possibly be argued that both were not working in proximity with their co-employees and not advancing general objectives of their employer. Ms. Sanchez's proposed interpretation of the "unrelated works" exception to be read in conjunction with "primary assignments" effectuates the statute's purpose.[60]

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[59] *Koch*, 582 So. 2d at 5.

[60] *See Leon County v. Sauls*, 151 Fla. 171, 9 So. 2d 461 (1942) (since this is partial restoration of employee's common law rights, it is entitled to a liberal construction).

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Here, the evidence showing the plaintiff teacher and the defendant's security personnel were co-employees assigned primarily to unrelated works was extensive, controverted and not appropriately decided in the School's favor on summary judgment.[61] The School Board's "safe learning environment" referenced in curriculum guidelines for teachers referred only to the classroom. RVII-1346-Guerrero Depo. at 18. The State of Florida curriculum guidelines for teachers "contain[s] no specific reference to the security of the school or the premises". RVII-1346-Guerrero Depo. at 17. The Dade County Public Schools Procedures for Promoting a Safe Learning Environment in the section on confronting unauthorized persons on campus nowhere mentions teachers or suggests their involvement. RIV-790-Moran Depo. at 73-78, 80 & Pl. Exh. "2" at 3, 21-22. Teacher Raul Guerrero recalls no memos to teachers specifically addressing security. RVII-1346-Guerrero Depo. at 38. Teachers and administrative assistants are not trained in security. RVII-1346-Guerrero Depo. at 11-12, 16, RVI-1231-Costa Depo. at 64.

Then-Assistant Administrator Costa admitted that any security duties that teachers might have had were inside their classrooms:

> Q. And I believe you testified to this earlier. . .*the only security or safety that the teachers would provide* would be because of the necessity or a school or a school resource officer not being present?

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[61] *See Lake*, 566 So. 2d at 845.

A. *In the classroom*, yes. RVI-1231-Costa Depo. at 26-27 (emphasis added).

Principal Moran admitted "*we don't want teachers to attempt to handle* a situation that may be dangerous situation with *a trespasser*, no." RIV-790-Moran Depo.. at 51-52 (emphasis added). If teachers saw a trespasser, they were supposed to notify the Administration, Law Enforcement or a School Monitor. RVII-1346-Guerrero Depo. at 25-26, 29, RIV-790-Moran Depo. at 84, 128-29. Teachers were not to confront trespassers. *Id*. Teachers were not involved in removing trespassers from school premises. RVII-1281-Juan Perez Depo. at 19-20.

Finally, patrolling faculty parking lots and confronting trespassers were projects primarily, if not exclusively, assigned to security monitors and law enforcement. *See also* RIV-790-Moran Depo. Pl. Comp. Exh. "1", Secondary School Teacher Job Description & Basic Objectives ("This is a professional position responsible for the instruction of one or more subjects to secondary school students"), School Monitor Job Description & Basic Objectives ("Under general direction from the school principal, he/she performs duties to monitor student activity in promoting and maintaining a safe learning environment"), School Resource Specialist & Basic Objectives ("This is school security work assisting school administrators in creating and maintaining a safe and secure environment. . . .Work is performed under the

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general supervision of the Region Captain and according to the standard methods, practices and procedures").

Twenty-four year teacher Raul Guerrero agreed that his "primary assignments as a teacher at West Miami Middle School [were] instructional". RVII-1346-Guerrero Depo. at 15-16, 5, 9. In contrast, a school security monitor's primary assignment was not teaching or education related services; it was security. RVII-1281-Juan Perez Depo. at 16-17; *see also* RVII-1333-Jose Perez Depo. at 14. Likewise, the School Resource Officer Ramirez's primary assignment was security. RVII-1299-Ramirez Depo. at 12-13, 15.

Viewing this record in the light most favorable to Ms. Sanchez, it is the unrelatedness between the primary assignments and injury here that render the *Holmes*, *Lake*, *Duffell*, *Koch*, and Second District's *Lopez*[62] decisions the right ones supported by the statutory language. Accordingly, the summary judgment below should be reversed because this record shows that these Security Monitors and School Resource Officer were not primarily assigned to teaching and this attack in the faculty parking lot was separate from the classrooms where education-services were being rendered.

CONCLUSION

[62] *Lopez*, 734 So. 2d at 1095.

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For the reasons and legal authorities set forth herein, it is respectfully submitted that summary judgment on the "unrelated works" exception in favor of the Dade County School Board was error, was entered on a controverted record, the judgment should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by **depositing in U.S. Mail**/faxed/hand-delivered on the 25th day of May, 2002 to: Cindy J. Mishcon, Esq., Jeffrey A. Mowers, Esq., PYSZKA, BLACKMON, LEVY & MOWERS, P.A., Miami Lakes Corporate Center, 14750 Northwest 77 Court, Suite 300, Miami Lakes, Florida 33016; Telephone: (305) 512-3737.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, Times Roman 14 point proportionately spaced, as set forth in Rule 9.210, Fla. R. App. P.

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