

**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

JULIE WINSLOW,

Petitioner,

Case No.: SC10-2459
L.T. Case Nos.: 1D10-1046
01-2009-CA-3590
(Alachua County)

v.

SCHOOL BOARD OF ALACHUA COUNTY,

Respondent.

_____ /

**ANSWER BRIEF
OF RESPONDENT SCHOOL BOARD OF ALACHUA COUNTY**

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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TABLE OF CONTENTS

Table of Authorities iii

Statement of the Case and of the Facts 1

Summary of the Argument.....6

Argument.....8

Issue on Appeal.....8

WHETHER THE TRIAL COURT PROPERLY DISMISSED
PETITIONER’S SECOND AMENDED COMPLAINT BECAUSE
HER ALLEGATIONS FAILED TO ESTABLISH A LEGAL DUTY
OR RELIED ON A PLANNING-LEVEL DECISION TO WHICH
SOVEREIGN IMMUNITY APPLIES?

Standard of Review.....8

Discussion.....8

I. A school board has a duty to safely transport a student on the school bus, but that duty springs from the school board’s physical custody of the student11

A. A school board gains physical custody of the student after the school bus arrives at the bus stop.....12

B. Before the school bus arrives, parents, guardians, and students are responsible for the students’ safety because they are outside of the school board’s physical custody.....20

C. Where no physical custody exists, there is no duty, and without a duty, there is no claim for negligent training or supervision25

II.	A school board does not have a duty to warn of the open and obvious danger of crossing a street mid-block.....	27
	A. The danger of crossing a street mid-block does not constitute a virtual trap and thus does not give rise to a duty to warn	28
	B. Even assuming, <i>arguendo</i> , that the school board owed a duty, its alleged failure to warn did not proximately cause the student’s injuries here.....	33
III.	Sovereign immunity bars a claim founded upon a planning-level decision such as the placement of twin bus stops on both sides of the street	36
	A. A school board is immune from liability for planning-level decisions	37
	B. There exists no applicable waiver of sovereign immunity	39
	C. Designing twin bus stops on opposite sides of the street is a planning-level decision and the design does not give rise to an operational duty	41
	Conclusion	43
	Certificate of Compliance	a
	Certificate of Service	a

TABLE OF AUTHORITIES

Cases

<i>Anthony v. Jacksonville Transportation Authority</i> , 383 So. 2d 650 (Fla. 1st DCA 1980)	32
<i>Circuit Court of the Twelfth Judicial Circuit v.</i> <i>Department of Natural Resources</i> , 339 So. 2d 1113 (Fla. 1976).....	37
<i>Commercial Carrier Corporation v. Indian River County</i> , 371 So. 2d 1010 (Fla. 1979).....	37
<i>Dade County School Board v. Radio Station WQBA</i> , 731 So. 2d 638 (Fla. 1999).....	13
<i>Department of Environmental Protection v. Hardy</i> , 907 So. 2d 655 (Fla. 5th DCA 2005)	25-26
<i>Department of Transportation v. Konney</i> , 587 So. 2d 1292 (Fla. 1991).....	33
<i>Duval County School Board v. Dutko</i> , 483 So. 2d 492 (Fla. 1st DCA 1986)	17, 28, 31, 32-33
<i>Florida Department of Corrections v. Abril</i> 969 So. 2d 201 (Fla. 2007).....	8
<i>Francis v. School Board of Palm Beach County</i> , 29 So. 3d 441 (Fla. 4th DCA 2010)	<i>passim</i>
<i>Harrison v. Escambia County School Board</i> , 434 So. 2d 316 (Fla. 1983).....	<i>passim</i>
<i>Harrison v. Escambia County School Board</i> , 419 So. 2d 640 (Fla. 1st DCA 1982)	9, 37-38

<i>Hale v. Adams</i> 117 So. 2d 524 (Fla. 1st DCA 1960)	8
<i>Kaweblum v. Thornhill Estates Homeowners Association,</i> 801 So. 2d 1015 (Fla. 4th DCA 2001).....	33
<i>Orlando v. Broward County, Florida,</i> 920 So. 2d 54 (Fla. 4th DCA 2005).....	9, 10, 29, 30, 37
<i>Payne v. Broward County,</i> 461 So. 2d 63 (Fla. 1984).....	10, 29-30, 42-43
<i>Pollock v. Florida Department of Highway Patrol,</i> 882 So. 2d 928 (Fla. 2004).....	10
<i>Rupp v. Bryant,</i> 417 So. 2d 658 (Fla. 1982).....	11-12, 18
<i>School Board of Broward County v. Surette,</i> 394 So. 2d 147 (Fla. 4th DCA 1981).....	3, 17
<i>Sumner v. Gros</i> 958 So. 2d 1038 (Fla. 1st DCA 2007)	8
<i>Vincent v. C.R. Bard, Inc.,</i> 944 So. 2d 1083 (Fla. 2d DCA 2007).....	34
<i>Wallace v. Dean,</i> 3 So. 3d 1035 (Fla. 2009).....	10
<i>Watson v. City of Hialeah,</i> 552 So. 2d 1146 (Fla. 3d DCA 1989).....	26
<i>Winslow v. School Board of Alachua County,</i> 48 So. 3d 81(Fla. 1st DCA 2010)	5, 18-19

Out of State Authority

Norton v Canandaigua City School District,
624 NYS 2d 695 (N.Y. Ct. App. 1995)23

Pratt v. Robinson,
349 N.E. 2d 849 (N.Y. Ct. App. 1976)..... 15, 22-23

Constitution, Statutes, Rules, and Regulations

Article X, Section 13, Florida Constitution37

§ 1001.42, Florida Statutes (2008).....39

§ 1003.31, Florida Statutes (2008)..... 15, 21-22

§ 1006.09, Florida Statutes (2008).....39, 40

§ 1006.10, Florida Statutes (2008).....9, 11, 26, 39, 40

§ 1006.21, Florida Statutes (2008).....14, 39, 40

§ 1006.22, Florida Statutes (2008).....14, 39, 40

§ 234.03, Florida Statutes (2008).....17

§ 768.28, Florida Statutes (2008).....37

Rule 9.210, Florida Rules of Appellate Procedure a

Rule 6A-3.0121(2)(c), Florida Administrative Code Rule9, 11, 21, 24

Secondary Sources

Restatement (Second) of Torts § 320.....23

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner's Statement of the Case and Facts requires clarification because it does not reference key allegations (or, specifically, the absence of allegations).

The initial Complaint alleged that on June 4, 2008, Tiffany Chancey (“Chancey”), Petitioner's daughter and a 14-year-old student, stepped into traffic on SW 20th Avenue in Gainesville, Florida, and was struck by a motor vehicle. (R.1 at 2-3 ¶¶ 5, 8.) Chancey’s designated school bus stop is the Lyons bus stop, comprised of both a northern and southern gathering place. (R.1 at 2-3 ¶5). These gathering places are located on opposite sides of SW 20th Avenue, where it intersects the Lyons Apartments’ entrance driveway. (R.1 at 2-3 ¶5.)

On the morning of the accident, Chancey arrived at the southern gathering point of the Lyons bus stop and then crossed to the northern gathering point “prior to the arrival of the school bus[.]” (R.1 at 3 ¶8.) After arriving at the northern gathering spot, Chancey then crossed the street again back to the southern gathering spot to socialize with a friend. (R.1 at 3 ¶8.) At that time, she stepped into traffic and was struck by the car. (R.1 at 3 ¶8.) Her behavior was contrary to the School Board’s policy requiring students to wait on their own side of the street until the school bus arrived. (R.1 at 2-3 ¶9.)

Petitioner did not allege that Chancey was under the supervision or control of the School Board at the time of the accident. (R.1 at 2-6.) The school bus was

not present when the accident occurred. (R.1 at 3 ¶8.) Petitioner did not allege that there were any School Board employees present. (R.1 at 2-6.) Petitioner did not allege that there were any School Board employees supervising students at the bus stop at the time of the accident or even that the School Board had any duty to supervise students at bus stops. (R.1 at 2-6.) In fact, Petitioner has conceded that the School Board is not required to staff bus stops with supervisors. (Appellant’s Int. Brief to First DCA, at 8 n.4.) Instead, Petitioner alleged that the School Board “owed a duty to [students] to transport them as safely as reasonably possible to and from school” and claimed that the duty begins at the moment that students arrive at a bus stop. (R.1 at 4 ¶11.) Petitioner did not allege or set forth any ultimate facts to support any contentions that any student was ever previously struck or that this particular bus stop was unusually dangerous. (R.1 at 2-6.)

After the School Board moved to dismiss the Complaint (R.1 at 9-17), Petitioner sought leave to amend in order to “clarify language” and “better frame her claim and the issues” (R.1 at 18 ¶4). The School Board did not oppose Petitioner's request and the trial court granted Petitioner's motion. (R.1 at 26.)

In her second attempt, the substantive allegations of Petitioner’s claim remained essentially the same. (R.1 at 20-25.) The School Board again moved to dismiss because she failed to state a cause of action for which relief can be granted. (R.1 at 31-40.) After a hearing, the trial court dismissed the Amended Complaint

without prejudice and “although the Court [was] concerned that further attempts to amend this cause of action may prove futile,” it granted leave to amend “one further time in an effort to state a cause of action which is not barred by sovereign immunity.” (R.1 at 73, 74.) The trial court also concluded that the Amended Complaint failed under a duty analysis. (R.1 at 73, 74.) The trial court found that Petitioner's reliance on *School Board of Broward County v. Surette*, 394 So. 2d 147 (Fla. 4th DCA 1981) was misplaced because the school board in that case did not have sovereign immunity due to a statutory waiver provision that was later repealed. (*See* R.1 at 73-74.)

On her third attempt to state a cause of action in her Second Amended Complaint, Petitioner included a string citation to five Florida Statutes to support her argument that the School Board waived sovereign immunity. (R.1 at 76 ¶2.) However, Petitioner failed to describe how any of these statutes exposed the School Board to liability. (R.1 at 76-87.)

Instead, Petitioner only alleged in a conclusory fashion that the School Board “had ‘control’ over students transported on the [School Board’s] transportation from the moment the students (including Tiffany Chancey) arrived at the Lyons school bus stop (either gathering area),” but cited no statutory or common law authority for that proposition. (R.1 at 80 ¶13.) Petitioner also attached partial deposition transcripts (which were obtained in a guardianship proceeding)

as exhibits to her Second Amended Complaint, which she claimed demonstrated the School Board's "control of students at bus stops and procedures available to enforce compliance with [the School Board's] rules." (R.1 at 88-106.)

In addition, Petitioner added a second count alleging negligent training and supervision of the School Board's bus driver, Ms. Jones. (R.1 at 85-87.) Petitioner claimed that the School Board owed a duty to instruct Ms. Jones "regarding the design of the Lyons bus stop and the safety crossing rule" and for Ms. Jones to require compliance with the safety crossing rule, write up students who failed to comply, and inform her supervisor regarding same. (R.1 at 85 ¶25.) However, Petitioner did not allege that the School Board knew or should have known of Ms. Jones' alleged failure to enforce safety rules. (R.1 at 76-87.) Petitioner also did not allege that the School Board had constructive or actual notice that Ms. Jones was unfit to work as a school bus driver or that the School Board failed to investigate, discharge, or reassign Ms. Jones as necessary. (R.1 at 76-87.)

After a hearing upon the School Board's motion and considering the case law and argument presented by the parties, the trial court entered an order granting the School Board's Motion to Dismiss the Second Amended Complaint with prejudice. (R.1 at 144-45.) The trial court cited the reasons set forth in its previous order dismissing the Amended Complaint, *i.e.* that the allegations of the Second Amended Complaint failed under both a duty analysis and a sovereign immunity

analysis. (R.1 at 73-74, 144-45.) Moreover, the trial court cited the reasons stated at the hearing, concluding that the allegations of the Second Amended Complaint did not transform the School Board's planning-level decision (for which the School Board is immune) into an operational function. (R.1 at 140; 144-45.)

The First District Court of Appeal agreed with the trial court's determination. After reviewing the record, receiving the appellate briefs, and hearing oral argument, the court issued a "per curiam affirm" opinion. *Winslow v. School Board of Alachua County*, 48 So. 3d 81, 81 (Fla. 1st DCA 2010). It stated in its entirety:

Julie Winslow appeals a final order dismissing with prejudice her second amended complaint seeking damages from the School Board of Alachua County, appellee, for injuries suffered by her daughter, Tiffany Chancey, when she walked into traffic at a school bus stop and was struck by a motor vehicle. Because the School Board did not have control over this student at the time of the accident, the School Board had no duty to the student. *Francis v. School Bd. of Palm Beach County*, 29 So. 3d 441, 444-45 (Fla. 4th DCA 2010); *Harrison v. Escambia County School Bd.*, 434 So. 2d 316, 319-20 (Fla. 1983). Accordingly, we affirm.

Winslow, 48 So. 3d at 81. The First DCA denied Petitioner's motion for rehearing and issued its mandate on December 7, 2010.

On December 16, 2010, Petitioner invoked this Court's discretionary jurisdiction. On June 27, 2011, this Court accepted conflict jurisdiction with three Justices dissenting.

SUMMARY OF THE ARGUMENT

This Court should affirm the First DCA's opinion below and the trial court's determination. Petitioner seeks to hold the School Board liable for injuries that occurred when, prior to the arrival of a school bus, a fourteen-year-old student crossed and then re-crossed a two-lane road to socialize with a friend near her school bus stop. A vehicle struck the student when she ran into traffic for the second time. After three attempts, the trial court below found that the Second Amended Complaint failed to allege a legal duty and also found that the doctrine of sovereign immunity barred the claim.

A duty did not arise in this case because the student was not under the School Board's supervision or custody at the time of the accident. A school board has a duty to safely transport its students, but that duty begins when the bus arrives to take physical custody of the students and extends until the students reach the school door. Before a school bus arrives at the bus stop, parents or guardians are responsible for the safety of their students and for any required supervision.

Furthermore, a school board has no duty to warn students or parents of the open and obvious dangers of crossing a street mid-block. Such danger is so conspicuous that it eliminates any duty to warn. However, even assuming such a duty existed and that the school board breached its duty, the alleged failure here did not cause Chancey's injuries. Chancey reached the bus stop safely on the north

side of the street. Then she left the safety of that bus stop and entered traffic for the second time. She was not trying to reach the north side bus stop when the car struck her. Rather, she was running away from it.

Moreover, no matter how she tries to characterize the allegations, Petitioner's claim involves a planning-level decision. Even if a school board owes a duty, sovereign immunity bars liability for planning-level decisions, such as the designation of twin bus stops on both sides of the street. Petitioner's arguments regarding the foreseeability of injury or the danger of the twin bus stop design fails for this reason.

Important policy considerations require affirmance. The Legislature has not provided funding for student supervision at every bus stop, every day, across the State. It would be impossible for Florida's school boards to implement the type of supervision suggested by Petitioner. The Legislature has determined that this is a parent or guardian's responsibility and the State's agencies agree. The First and Fourth District Courts of Appeal have so held and this Court's prior precedent also linked a school board's duty to physical custody of the student. Altering this long-standing doctrine would open a Pandora's Box of liability for schools.

Because Petitioner's claim cannot survive either of the two independent defenses of (1) lack of duty or (2) sovereign immunity, the trial court's order dismissing the Second Amended Complaint with prejudice should be affirmed.

ARGUMENT

ISSUE ON APPEAL

WHETHER THE TRIAL COURT PROPERLY DISMISSED PETITIONER'S SECOND AMENDED COMPLAINT BECAUSE HER ALLEGATIONS FAILED TO ESTABLISH A LEGAL DUTY OR RELIED ON A PLANNING-LEVEL DECISION TO WHICH SOVEREIGN IMMUNITY APPLIES?

STANDARD OF REVIEW

The standard of review for an order granting a motion to dismiss for failure to state a cause of action is *de novo*. See *Fla. Dep't of Corrections v. Abril*, 969 So. 2d 201, 204 (Fla. 2007) (citation omitted). The review is restricted exclusively to the allegations within the four corners of the complaint. See *Sumner v. Gros*, 958 So. 2d 1038, 1039 (Fla. 1st DCA 2007); *Hale v. Adams*, 117 So. 2d 524, 526 (Fla. 1st DCA 1960).

DISCUSSION

A Florida school board is not liable for injuries sustained by students outside of its custody or control. This Court has established that a school board's control over its students is tied to its physical custody of those students, and its corresponding duty arises from the same physical custody. See *Harrison v. Escambia County Sch. Bd.*, 434 So. 2d 316, 319 (Fla. 1983).

The State's school boards cannot afford to provide supervision for students at every bus stop across the State on every school morning. Thus, practical considerations support a school board's lack of liability for injuries sustained by a student at or near a school bus stop before the school bus arrives. Until the bus arrives, there are no school personnel present to take physical custody of the students. Without physical custody, a school board has no duty to protect a student from the open and obvious danger of a busy road while waiting for her school bus to arrive. *See id.*; *Orlando v. Broward County, Fla.*, 920 So. 2d 54, 59-60 (Fla. 4th DCA 2005). Instead, the duty of supervision prior to the arrival of the school bus rests with parents and guardians. *See Francis v. School Bd. of Palm Beach County*, 29 So. 3d 441, 444-45 (Fla. 4th DCA 2010); §1006.10(3), Fla. Stat.; Fla. Admin. Code R. 6A-3.0121(2)(c).

While recognizing that “some potential for injury to a child would exist at any location where motor vehicle traffic exists,” this Court has declined to impose a “totally impracticable and indeed impossible” duty upon school boards to seek out a bus stop location that eliminates all danger. *Harrison*, 434 So. 2d at 319 (quoting *Harrison v. Escambia County School Board*, 419 So. 2d 640, 644 (Fla. 1st DCA 1982)). Moreover, the law is clear that a school board's decision regarding the placement or design of a school bus stop is a planning-level decision for which the School Board is immune from liability. *Harrison*, 434 So. 2d at 319.

As discussed below, creative attorneys have tried to circumvent this general lack of duty and avoid the application of sovereign immunity by cloaking their allegations within the limited “hidden trap” exception or under another operational negligence theory. These attempts have been uniformly rejected by the Florida courts. *See Payne v. Broward County*, 461 So. 2d 63 (Fla. 1984); *Harrison*, 434 So. 2d at 320; *Francis*, 29 So. 3d at 443; *Orlando v. Broward County, Florida*, 920 So. 2d 54 (Fla. 4th DCA 2005).

In this case, Petitioner similarly seeks relief not provided by any Florida court. No court has held that a school board has a duty to prevent a student from leaving the safety of her bus stop before her bus arrives. No court has held that a school board owes a duty to a student from the “moment” she arrives at a bus stop. Consistent with Florida law and long-standing precedent, this Court should reject Petitioner's arguments.

To begin the analysis, a court addressing governmental liability first determines whether a duty is owed to the student. *See Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932-33 (Fla. 2004) (holding that the court should first consider whether any duty is owed before determining whether sovereign immunity applies as a bar to governmental liability). If the school board owes no duty to the student then the judicial labor ends. *See Francis*, 29 So. 3d at 443 (citing *Wallace v. Dean*, 3 So. 3d 1035, 1044 (Fla. 2009)). Accordingly, before

addressing the issue of sovereign immunity in this case, it is appropriate to consider whether the trial court's decision must be affirmed because Petitioner failed to state a legally cognizable duty.

I. A SCHOOL BOARD HAS A DUTY TO SAFELY TRANSPORT A STUDENT ON THE SCHOOL BUS, BUT THAT DUTY SPRINGS FROM THE SCHOOL BOARD'S PHYSICAL CUSTODY OF THE STUDENT.

For more than a quarter of a century, Florida law has been well-established that school boards are generally not liable for accidents that occur near school bus stops prior to arrival of the school bus. *Harrison v. Escambia County Sch. Bd.*, 434 So. 2d 316, 320 (Fla. 1983). After a school bus arrives at a bus stop, a school board takes custody of the students. *See id.* at 319; *Francis*, 29 So. 3d at 445. The school board's custody extends until the bus drops the students at the school door. *See Harrison*, 434 So. 2d at 319; *Francis*, 29 So. 3d at 445. Until then, parents or guardians are responsible for the students' safety and supervision. *See Francis*, 29 So. 3d at 444-45; §1006.10(3), Fla. Stat.; Fla. Admin. Code R. 6A-3.0121(2)(c).

A school board's duty to safely transport its students springs from its custody and control of those students. This Court has held that a school owes a duty of general supervision to students within its care if the school exercises authority over the students' activities and parents can reasonably assume students will be supervised. *See Rupp v. Bryant*, 417 So. 2d 658, 666-67 (Fla. 1982) (explaining

that the “genesis of this supervisory duty is based on the school employee standing partially in place of the student's parents” because “[m]andatory schooling has forced parents into relying on teachers to protect children during school activity.”). As a result, a school board generally has no duty to its students for safe transportation until the school bus arrives at the school bus stop and a school board employee is present to take custody of the students.

A. A school board gains physical custody of the student after the school bus arrives at the bus stop.

Contrary to Petitioner's arguments, a school board generally owes no duty to a student prior to the arrival of the school bus. For example, in *Harrison*, this Court held that the school board did not owe a duty to a student outside of its care and en route to a bus stop when the student was struck and killed by a passing car. *Harrison*, 434 So. 2d at 317, 319. As this Court explained, “a school board's control over its students regarding transportation extends from when a school bus picks up a student at a bus stop to the school door.” *Id.* at 319. “When a student is injured before reaching a designated bus stop, or after leaving one, that student is outside the board's duty of care because the board's duty stems from the fact of the school board's physical custody of its students.” *Id.*

A recent decision from the Fourth District Court of Appeal applied this Court's *Harrison* holding to a factual situation similar to the instant case. *See*

Francis v. School Bd. of Palm Beach County, 29 So. 3d 441 (Fla. 4th DCA 2010). In *Francis*, a school employee instructed a student to cross a busy road to wait at the bus stop on the other side of the street. *Id.* at 443. The student encountered problems with other students at her assigned bus stop which led to the affirmative instruction from the school employee for her to cross the road. *Id.* While crossing the road as instructed, the student (Kodijah) was struck by a car and killed. *Id.* The school board filed a motion to dismiss. *Id.* at 442. As in the instant case, the trial court granted the motion to dismiss and entered a final order dismissing the second amended complaint with prejudice. *Id.*¹

The *Francis* plaintiff set forth allegations against the school board which were similar to, but more compelling than, the allegations in the instant case.² Specifically, the plaintiff alleged that:

¹ In *Francis*, although the trial court did not clearly separate the duty analysis from the sovereign immunity analysis in reaching its conclusion, the Fourth DCA affirmed the dismissal of the plaintiff's case because the school board owed no duty to a student who was struck and killed while crossing a street to get to a school bus stop. *Id.* at 445. Likewise, under the "tipsy coachman" rule, this Court must affirm the trial court's order, if the trial court's decision is supported by *any* theory that is sustainable by the record, regardless of whether the trial court relied on that basis. *See, e.g., Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (citations omitted).

² The allegations pled to support a duty in *Francis* were even more compelling than the facts of the instant case because the plaintiff alleged that a school board employee directed her daughter to cross the road to use the east side bus stop, *i.e.* there was an affirmative action by the school board which caused

the school board's negligent failure to control the students on Kodijah's original school bus, negligent instruction that Kodijah cross the road to another bus stop, and negligent failure to warn Kodijah of the dangers of crossing the road were operational-level actions which are not protected by sovereign immunity. She further alleges that the school board was aware of hazardous conditions at or near Kodijah's newly-designated bus stop and failed to take any precautions to warn parents, students, and other motorists. She asserts that these allegations constitute a prima facie case for negligence for which the school board was not entitled to sovereign immunity.

Id. In response, the school board argued that: 1) it did not owe a duty of care to the student while she was en route to her bus stop; 2) the school board's acts were not the proximate cause of Kodijah's death; and 3) the school board was sovereignly immune from suit because its acts constituted planning-level decisions. *See id.*

The Fourth District Court of Appeal began its analysis with the issue of duty before addressing sovereign immunity. *Id.* The court rejected the argument that the school board owed the general public a duty to exercise due care in carrying out all of its operations. *Id.* at 443-44 (citation omitted). The *Francis* court also addressed the plaintiff's allegations that the school board acted negligently in training Kodijah's bus driver and in directing Kodijah to cross the road to another

Kodijah to cross the roadway. In this case, Petitioner never alleged (nor are there any ultimate facts to support an allegation) that the School Board or one of its employees directed Chancey to cross the roadway. To the contrary, Petitioner alleged that the School Board's policy was that students were not supposed to cross the road unless the stopped school bus was present and displaying its lights and stop sign.

bus stop. *Id.* at 444. The court considered the school board’s duties to provide transportation for students and to employ maximum regard for the safety of its students when routing buses, appointing bus drivers, and providing operating equipment. *Id.* (citing §§1006.21(3)(a); 1006.22, Fla. Stat.).

However, the court observed that Kodijah’s accident did not happen while she was riding her school bus or waiting at her bus stop. *Francis*, 29 So. 3d at 444. Instead, it occurred while she was walking to her bus stop. *Id.* The court explained that “[s]tudents are under the school board’s control during the time they are being transported to or from school at public expense.” *Id.* (citing § 1003.31(1)(a), Fla. Stat. (2008)). The court explained that the “school board does not have custody or control over students while they are *en route* to their bus stops; that control rests solely with the students’ parents or guardians. Thus, the school board does not have any duty to its students during this period of time.” *Francis*, 29 So. 3d at 444-45 (citing *Pratt v. Robinson*, 349 N.E.2d 849 (N.Y. 1976) (noting that a school board’s duty to its students stems from its physical custody over them, and is limited to the time in which the board has control over the students)).

Significantly, just as in the instant case, Kodijah left the bus stop on the east side of the road and was crossing to arrive at the bus stop on the west side of the road. *Francis*, 29 So. 3d at 444-45. Yet no one suggested, as the Petitioner does in this case, that Kodijah was “at” her bus stop when the accident occurred in the

roadway. Instead, she was still en route because she was crossing the roadway and approaching the alternate bus stop. This is more logical than Petitioner's strained interpretation.

The *Francis* court, like the trial court in the instant case, properly relied on *Harrison v. Escambia County School Board*, where this Court reasoned that “[s]chool boards, however, are not insurers of students’ safety, and a school board’s control over its students regarding transportation extends from when a school bus picks up a student at a bus stop to the school door.” *Francis*, 29 So. 3d at 445 (quoting *Harrison*, 434 So. 2d at 319). “When a student is injured before reaching a designated bus stop, or after leaving one, that student is outside the board’s duty of care because the board’s duty stems from the fact of the school board’s physical custody of its students.” *Id.*

In the instant case, Chancey was not under the School Board’s control when the accident occurred. The school bus had not yet arrived, and the School Board’s control over Chancey had not begun because this control springs from the Board’s physical custody of the student and “extends from when a school bus picks up a student at a bus stop to the school door.” *See Francis*, 29 So. 3d at 445; *Harrison*, 434 So. 2d at 319. Without this custody, there is no duty. As the *Francis* court concluded, “[r]egardless of the circumstances that led to her using the alternate bus stop, [the student] was under the exclusive control of her parents or guardians [and

not under the control of the school board] during the time she was walking to the bus stop.” *Francis*, 29 So. 3d at 445.

On the other hand, Petitioner argues that a school board's duty begins the moment a student arrives at a bus stop. (Pet. Brief at 9.) No Florida authority supports this position. Petitioner cites to *Duval County School Board v. Dutko*, but a review of *Dutko* reveals no such holding. (Pet. Brief at 9); *see Dutko*, 483 So. 2d 492 (Fla. 1st DCA 1986) (holding that the school board had a duty to warn students of the dangerous conditions at their bus stop because the conditions were created by the school board and were not readily apparent). Petitioner also cites *Harrison* for this principle (Pet. Brief at 9), but *Harrison* does not reach this conclusion. *See Harrison*, 434 So. 2d at 319 (holding that “a school board’s control over its students regarding transportation extends from when a school bus picks up a student”).

Likewise, in *School Board of Broward County v. Surette*, the Fourth DCA found that a duty existed because the court relied on an old statutory waiver of sovereign immunity. 394 So. 2d 147 (Fla. 4th DCA 1981), review dismissed, 399 So. 2d 1146 (Fla. 1981). The school board in *Surette* did not have sovereign immunity pursuant to the waiver provision of § 234.03(4), Florida Statutes, which has since been repealed. (R.1 at 73-74.) Additionally, the *Surette* bus stop was so

strewn with debris that students waiting for their buses were physically displaced and forced to stand in the roadway. *Surette*, 394 So. 2d at 153.

Petitioner also cites *Rupp v. Bryant*, but that case is factually distinguishable. 417 So. 2d 658 (Fla. 1982). In that case, a student was injured during an unsupervised hazing for a school-sponsored club. *Id.* at 660. A faculty advisor's presence was required at any meetings of this club, which was known for violating school regulations, but he did not attend the meeting in question or a previous one. *Id.* This Court held that the school owed a duty of general supervision to students within its care, including those who participated in school-sponsored activities held off school premises, if the school exercises authority over the students' activities and parents can reasonably assume students will be supervised. *Id.* at 666-67. This Court explained that the "genesis of this supervisory duty is based on the school employee standing partially in place of the student's parents" because "[m]andatory schooling has forced parents into relying on teachers to protect children during school activity." *Id.* at 666.

Rupp is inapplicable to the instant case because Chancey was not involved in a school-sponsored activity that required faculty supervision. Petitioner had no reasonable expectation that the School Board was providing supervision at the bus stop. To the contrary, Chancey was waiting to be picked up by the bus and was completely unsupervised until the school bus arrived. When the bus arrived, the

School Board would have obtained physical custody of Chancey and its duty would have begun. But, as the First DCA stated, “the School Board did not have control over this student at the time of the accident” and therefore “had no duty to the student.” *Winslow*, 48 So. 3d at 81.

Petitioner also argues for the first time in this proceeding that the School Board had “custody” or “control” of Chancey because it had the “authority and capability to enact, monitor and enforce boarding procedures to control student behavior.” (Pet. Brief at 14-19.) This is not the type of physical custody mentioned by this Court in *Harrison* or described in *Francis*. Furthermore, the accident at issue did not occur while Chancey was boarding the bus. It is this lack of School Board personnel presence to “monitor and enforce” boarding procedures that fails to give rise to the duty. As described *infra* Section I.B., it is parents and guardians who must supervise their children prior to the arrival of the school bus and its driver. It is the responsibility of parents or guardians to ensure that the student is safely handed over to the School Board after arrival of the bus.

In addition, Petitioner concedes that a school board has no duty to students who are en route to a bus stop. (Pet. Brief at 9.) However, she then argues that since there is no duty while en route, this must mean that the duty begins the “moment” the student arrives at the bus stop. (Pet. Brief at 9-10.) This argument is logically flawed. While there exists no duty before the student arrives at the bus

stop, this lack of duty does not create a duty because the student arrives. To the contrary, the duty cannot commence until after the student arrives at the stop because that is where the school bus and its driver will eventually arrive to take physical custody. This does not mean that during the time the student is waiting for the arrival of the driver she is in the custody of the school board. This Court's note in *Harrison* (that an accident did not occur at the bus stop) does not mean that if the accident had occurred at the bus stop, this Court's holding would have been different. *See Harrison*, 434 So. 2d at 319.

A school board's duty to provide its students with safe transportation requires its physical custody of the students. For that reason, until the bus arrives at a bus stop to take physical control, the responsibility for the safety of students rests solely with the students and their parents or guardians.

B. Before the school bus arrives, parents, guardians, and students are responsible for the students' safety because they are outside of the school board's physical custody.

The Legislature has determined that it is a parent or guardian's responsibility to supervise students at the school bus stop before the bus arrives. Florida's state agencies agree. In addition, the First and Fourth District Courts of Appeal have so held, and this Court's prior precedent linked a school board's duty to physical

custody of the student. Physical custody requires the presence of the school bus. Thus, the school board's duty only begins after arrival of the bus.

For example, in *Francis*, the Fourth DCA observed that a school board's duty is limited by Florida Administrative Code Rule 6A-3.0121(2)(c) (2008), which states, in relevant part, that parents, guardians, and students are responsible:

1. To ensure the safe travel of their students during the portions of each trip to and from school and home when the students are not under the custody and control of the school district, including during each trip to and from home and the assigned bus stop when the school district provides bus transportation,
2. To ensure that students ride only in their assigned school buses and get off only at assigned bus stops, except when the district has approved alternative buses or arrangements,
3. To ensure students are aware of and follow the district's adopted code of student conduct while the students are at school bus stops and to provide necessary supervision during times when the bus is not present, . . .

Fla. Admin. Code R. 6A-3.0121(2)(c) (2008); *see Francis*, 29 So. 3d at 445.

Similarly, the Legislature has limited the duty of the State's school boards. Section 1003.31, Florida Statutes, states that students are under the control and direction of the principal, teacher, or member of the instructional staff or of the bus driver to whom such responsibility may be assigned by the principal:

- (a) During the time she or he is being transported to or from school at public expense;

- (b) During the time she or he is attending school;
- (c) During the time she or he is on the school premises participating with authorization in a school-sponsored activity; and
- (d) During a reasonable time before and after the student is on the premises for attendance at school or for authorized participation in a school-sponsored activity, and only when on the premises, . . .

§ 1003.31, Fla. Stat. Thus, in each circumstance where the school board has a statutory duty to control and ensure the safety of students, the board also has physical custody of the students. Otherwise, the responsibility for the safety of students rests solely with the students and their parents or guardians.

Nonetheless, and directly contrary to this clear authority, Petitioner argues that “physical custody” does not mean “physical custody,” but instead means that constructive custody commences the moment a student arrives at the bus stop. (Pet. Brief at 11, 12.) Apparently, Petitioner would have this Court believe that the moment a student’s foot touches the invisible boundaries of a school bus stop she falls within the “physical custody” of the school board, whether or not any school board personnel are present or are expected to be present. Further, Petitioner implicitly argues that even if a student leaves the safety of her bus stop, steps into traffic to cross the road, arrives safely at another bus stop, and then again returns into traffic, that student falls within the invisible boundaries of the school bus stop and within the school board’s custody.

This argument is fundamentally flawed. As succinctly stated by the Court of Appeals of New York, which is cited favorably by the *Francis* court, the “duty owed by a school to its students, however, stems from the fact of its physical custody over them. As the Restatement puts it, by taking custody of the child, the school has ‘deprived (the child) of the protection of his parents or guardian.’” *Pratt v. Robinson*, 349 N.E. 2d 849, 852 (N.Y. Ct. App. 1976) (cited in *Francis*, 29 So. 3d at 444-45). For that reason, “‘the actor who takes custody of . . . a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.’” *Pratt*, 349 N.E.2d at 852 (citing Restatement (Second) of Torts § 320 cmt. b). “The school’s duty is thus coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child’s protection, the school’s custodial duty also ceases[.]” *Pratt*, 349 N.E.2d at 852 (citations omitted); *see also Norton v Canandaigua City Sch. Dist.*, 624 NYS 2d 695 (N.Y. Ct. App. 1995) (holding that the school district did not have control over a student who was struck by a car and injured because the bus had not yet arrived and stating that “whether a student should cross the street to wait for the school bus to arrive at the bus stop or wait to cross the street until the school bus arrives is a decision for a student or parent to make, not a school district.”).

Stated differently, until a school board takes physical custody of a student, it has not “deprived” the student of the protection of a parent or guardian, and, therefore, the school board owes no duty of protection. For these reasons, the *Francis* court concluded that it did not need to address the question of whether the school board was sovereignly immune from suit “because, without a duty, there can be no action in negligence.” *Francis*, 29 So. 3d at 444.

In the instant case, Chancey was not under the School Board’s control when the accident occurred. She was under the exclusive control of her parents or guardians. *See id.* at 444-45 (“Regardless of the circumstances that led to her using the alternate bus stop, she was under the exclusive control of her parents or guardians during the time she was walking to the bus stop.”); Fla. Admin. Code R. 6A-3.0121(2)(c). Petitioner apparently did not believe that supervision of her 14-year-old student at a school bus stop was necessary, and it was Petitioner’s responsibility to make that determination. It is a parent or guardian who best knows their child, and it is up to that person to determine whether they should wait with their student at the school bus stop and then “hand off” the physical custody of the student to the school bus driver when she arrives. Similarly, it is up to the parent or guardian to make sure that their child knows about the open and obvious danger involved in crossing a street mid-block. As this Court has held, the School

Board owes no duty to a student to be the insurer of her safety at all times and especially prior to the Board's physical custody of the student.

In addition, Petitioner's argument that a school board's duty begins the moment a student arrives at a bus stop lacks practical applicability. If this Court imposes this new and incredible burden on Florida's school boards, their complete compliance would require the boards to post school personnel at each and every bus stop throughout the State. This would be impossible and it is contrary to the Legislature's plain meaning. Instead, it is much more practical and feasible for this Court to continue to draw the line at "physical custody," when the parent physically places the student into the care of the school board.

A school board's duty to provide its students with safe transportation requires its physical custody of the students and corresponds to the arrival of the school bus. Because the school bus had not arrived, the School Board here did not have custody of Chancey. As a result, the Board owed her no duty.

C. Where no physical custody exists, there is no duty, and without a duty, there is no claim for negligent training or supervision.

Just as Count I of Petitioner's Second Amended Complaint fails for lack of duty, her claim for negligent training/supervision of bus driver, Ms. Jones, also fails. Negligent supervision occurs when during the course of employment, the employer becomes aware or should have become aware of problems with an

employee that indicated his unfitness, and the employer fails to take further actions such as investigation, discharge, or reassignment. *Dep't of Envtl. Prot. v. Hardy*, 907 So. 2d 655, 660 (Fla. 5th DCA 2005). A plaintiff must allege facts sufficient to show that once an employer received actual or constructive notice of problems with an employee's fitness, it was unreasonable for the employer not to investigate or take corrective action. *Id.* Furthermore, the employer's liability for negligent supervision is limited. Not only must the employer owe a duty to the plaintiff, but the breach of that duty must be the proximate cause of the plaintiff's harm. *Watson v. City of Hialeah*, 552 So. 2d 1146, 1149 (Fla. 3d DCA 1989).

In this case, Petitioner failed to allege that the School Board knew or should have known of Ms. Jones' alleged failure to enforce safety rules. (R.1 at 76-87.) Petitioner did not allege that the School Board had constructive or actual notice that Ms. Jones was unfit to work as a school bus driver or that the School Board failed to take further action such as investigation, discharge, or reassignment after it became necessary. (R.1 at 76-87.) Additionally, Petitioner failed to allege any ultimate facts to establish that the School Board's failure to take corrective action proximately caused Chancey's harm.

Finally, without the existence of an actual duty, negligent training or supervision regarding the nonexistent duty is irrelevant. As set forth above, Florida law explicitly states that bus drivers have no authority over students when the

students are waiting at the bus stop or when they are *en route* unless the bus is present at the bus stop. §1006.10(3), Fla. Stat. Petitioner alleges that the students repeatedly broke the safety rules established by the School Board and crossed the road prior to the arrival of Ms. Jones in the school bus. (R.1 at 76-87). Under Florida law, Ms. Jones is not responsible for the behavior of the students prior to her arrival at the school bus stop. Since Petitioner fails to set forth a legally cognizable duty to Chancey, this alternate theory of negligence also fails.

Thus, Petitioner has not pled and will not be able to plead a legally cognizable cause of action. Under the facts of this case, any attempts at further amendment would be futile. Count II of Plaintiff's Second Amended Complaint fails as a matter of law and was properly dismissed.

II. A SCHOOL BOARD DOES NOT HAVE A DUTY TO WARN OF THE OPEN AND OBVIOUS DANGER OF CROSSING A STREET MID-BLOCK.

The *Francis* court also addressed the allegations in the complaint that the school board negligently failed to warn Kodijah of the dangers at the bus stop or to take other safety precautions. *Francis*, 29 So. 3d at 444. The plaintiff asserted that “the school board had a duty to provide lights, warnings, or some other indicia that the location was being used as a school bus stop, and to warn her and her children of the dangerous conditions at the bus stop.” *Id.* She further claimed that the school board had notice that the bus stop was dangerous because of citizens’

reports. *Id.* The Fourth DCA disagreed, holding that the school board owed no such duty to warn of an open and obvious danger such as a busy roadway. *Id.* The similar allegations in this case should also fail to give rise to a duty.

A. The danger of crossing a street mid-block does not constitute a virtual trap and thus does not give rise to a duty to warn.

In *Francis*, the Fourth District Court of Appeal also considered the general principle regarding open and obvious danger as articulated by this Court in *Harrison v. Escambia County School Board*. 434 So. 2d 316, 320 (Fla. 1983). Under the “hidden trap” doctrine, when a governmental entity creates a known, dangerous condition which is not readily apparent, then the government has a duty to avert the danger or properly warn those who might be injured. *Francis*, 29 So. 3d at 444 (also citing *Duval County Sch. Bd. v. Dutko*, 483 So. 2d 492, 495 (Fla. 1st DCA 1986) (holding that the school board had a duty to warn students of the dangerous conditions at their bus stop because the conditions were created by the school board and were not readily apparent)). However, the duty to warn is limited and arises only where the dangerous condition is “so serious and so inconspicuous ... that it virtually constitutes a trap.” *Francis*, 29 So. 3d at 444 (citations omitted). The Fourth DCA concluded that the school board did not have a duty to warn because it did not create the busy roadway that constituted the danger, reasoning that the danger was open, obvious, and apparent rather than inconspicuous. *Id.*

The *Francis* court built upon the foundation previously laid in cases like *Orlando v. Broward County, Florida*, where the plaintiffs attempted to create a duty to withstand sovereign immunity and argued that a school board's decision regarding the location of the school bus stop created a hidden trap or dangerous condition for which there was no proper warning. 920 So. 2d 54 (Fla. 4th DCA 2005). In *Orlando*, a 13 year-old eighth grader was walking home from middle school when he was struck and killed by a motor vehicle. *Id.* at 56. The accident occurred on a busy street with a posted speed limit of 45 mph. *Id.* at 57. The plaintiff alleged that school board was aware of the hazardous walking routes around the middle school and this student was the fourth child in a seven-year period to die in transit to or from the school. *Id.* The plaintiff sought to establish that the school board owed an operational-level duty, and avoid the application of sovereign immunity as discussed *infra* Section III, by arguing that the school board created "a hidden trap or dangerous condition for which there was no proper warning." *Id.* at 58. The court found, however, that a "dangerous condition that is readily apparent to the public does not fit within this exception to the doctrine of sovereign immunity. The danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard." *Id.* at 58 (internal citations omitted). Moreover, according to this Court, a "governmental entity has no duty to warn

pedestrians of the routine danger of crossing the street midblock.” *Payne v. Broward County*, 461 So. 2d 63, 66 (Fla. 1984).

The Fourth DCA in *Orlando* further found that the school board had knowledge of the traffic conditions on the busy street “but it did not create the dangerous condition” and, moreover, the traffic on the street was “readily apparent.” *Orlando*, 920 So. 2d at 59. This was not a situation presenting an operational duty to warn of known dangerous condition that constituted a “trap for the unwary,” since the “the dangerous condition here was open and obvious, no ‘greater than that existing anywhere it is possible to cross a road midblock.’” *Id.* at 59-60 (quoting *Payne*, 461 So. 2d at 65) (additional citation omitted).

In reaching its decision, the *Orlando* court relied on this Court’s decision in *Payne v. Broward County*. 461 So. 2d 63 (Fla. 1984). In *Payne*, a high school student was walking home from school when she was struck by traffic as she attempted to cross the street at midblock. *Id.* at 64. This Court recognized that the county both created and knew of the dangerous conditions surrounding area where the student was killed, but concluded those conditions did not create a hidden trap and that “whatever danger there was in crossing the street midblock was open and obvious.” *Id.* at 66. This Court reasoned that implementing safety rules “can neither create a danger nor transform a patent danger into a latent hazard.” *Id.* “[T]he danger created was no greater than that existing anywhere it is possible to

cross a road in midblock. A governmental entity has no duty to warn pedestrians of the routine danger of crossing the street in midblock.” *Id.*

Thus, the law in Florida is clear. A school board has no duty to warn a student of the open and obvious dangers of crossing a street midblock, and there is no exception to the doctrine of sovereign immunity for such a danger. Yet, this is exactly what Chancey was doing at the time of the accident. Petitioner’s Second Amended Complaint is based upon the argument that the School Board had a duty to warn Chancey about the dangers of crossing mid-block, and that the Board breached its duty by failing to so instruct her. However, these allegations fail to state a claim for which relief can be granted because a school board has no duty to warn students or parents of the routine dangers of crossing the street midblock.

The facts of cases like *Orlando, Payne*, and the instant case are clearly distinguishable from the situation in *Duval County Sch. Bd. v. Dutko*, 483 So. 2d 492 (Fla. 1st DCA 1986), where the First District Court of Appeal recognized a narrow exception to the general rule of no liability when a plaintiff seeks to recover “for negligence for the breach of an operational level duty to warn of a known dangerous condition created by the public entity not readily apparent, constituting a trap for the unwary.” *Dutko*, 483 So. 2d at 495. None of these three conditions exists in the instant case.

In *Dutko*, the court upheld the inapplicability of sovereign immunity when the school board created a “trap for the unwary.” *Id.* Waiting children were exposed to dangers that were not readily apparent. *Id.* The court observed that there was evidence “of prior ‘near-misses’ occurring at this location when vehicles left the roadway and drove upon the grassy shoulder, requiring waiting children to scurry out of the way of wayward vehicles.” *Id.* There was “evidence of tire scuff marks and gouges on and off the pavement at this location” in addition to “the dangerous conditions created by the heavy traffic and absence of any traffic signals, signs, markers or barriers designating this area as a school bus stop.” *Id.* In sum, it constituted a virtual trap due to its inconspicuous danger.

In the instant case, while Petitioner (like the *Francis* plaintiff) claims there were complaints from parents and/or concerned citizens regarding safety (R.1 at 81), Petitioner does not allege (nor are there any ultimate facts to support any allegations) that there were “near misses” involving erratic drivers leaving the roadway, erratic drivers almost striking waiting children, or tire scuff marks and gouges evidencing such “near misses.” In *Dutko*, the First DCA specifically contrasted the facts in *Dutko* to the allegations in *Anthony v. Jacksonville Transportation Authority*, 383 So. 2d 650 (Fla. 1st DCA 1980), where the court held that a complaint was properly dismissed because it failed to allege that a bus stop waiting area which was located near “busy vehicular traffic” was “more than

ordinarily vulnerable” to runaway automobiles. *Dutko*, 483 So. 2d at 495-96. Likewise, in the instant case, Petitioner's allegations mention nothing more than ordinary vehicular traffic and the dangers inherent at almost any bus stop. *See Harrison*, 419 So. 2d at 644 (observing that “[i]t is obvious that some potential for injury to a child would exist at any location where motor vehicle traffic exists”).

As the court observed in *Francis*, the duty to warn is limited and arises only where the dangerous condition is “so serious and so inconspicuous . . . that it virtually constitutes a trap.” *Francis*, 29 So. 3d at 444 (quoting *Dep’t of Transp. v. Konney*, 587 So. 2d 1292, 1299 (Fla. 1991) (Kogan, J., concurring) and citing *Kaweblum v. Thornhill Estates Homeowners Ass’n*, 801 So. 2d 1015, 1017 (Fla. 4th DCA 2001)). The allegations of the instant case do not establish a “trap for the unwary” as in *Dutko*. Instead the allegations are far more closely aligned with the “open and obvious” dangers of crossing a road midblock and the ordinary traffic conditions described in cases like *Francis*, *Orlando*, and *Payne*. The facts of those cases, as here, did not give rise to a duty to warn students.

B. Even assuming, *arguendo*, that the school board owed a duty, its alleged failure to warn did not proximately cause the student’s injuries here.

Even if this Court were to determine that a school board, not parents, must provide supervision at every bus stop across the State, or that a school board owes a duty to warn students of the open and obvious danger of crossing a street mid-

block, Petitioner's claim still fails. The alleged breach of this non-existent duty to warn was not the proximate cause of Chancey's injuries as described in Petitioner's Second Amended Complaint.

Florida law is well-established that in order to state a cause of action in negligence, the plaintiff must demonstrate that “the defendant owed the plaintiff a duty, the defendant breached that duty, the breach was a proximate cause of the plaintiff’s injuries, and the plaintiff suffered damages as a result of those injuries.” *Vincent v. C.R. Bard, Inc.*, 944 So. 2d 1083, 1085 (Fla. 2d DCA 2007). While Petitioner has failed to establish duty, as described above, she also failed to establish proximate cause even assuming, arguendo, that such a duty or breach existed. Chancey's injuries did not occur when she crossed to reach the north side of the street (where the school bus stopped every morning).

After Chancey arrived safely at her designated bus stop on the south side of the street, she crossed the street to the twin bus stop – a different bus stop – on the north side. If Chancey had been injured during this crossing, Petitioner may have sufficiently alleged proximate cause.³ But she was not. Once again, Chancey arrived safely to this second bus stop. This is where the analysis must end, cutting off proximate causation.

³ Her claim would still fail for the reasons stated above, including failure to allege the other necessary elements to state a claim, such as a cognizable duty, and also due to the application of sovereign immunity as discussed *infra* Section III.

All of Petitioner's arguments are based upon the premise that an appropriate direction or warning from the School Board would have prevented Chancey from crossing the street early, before the bus arrived, to stand at the north side bus stop. However, Chancey's early crossing to the north side was not the cause of her injuries. Fourteen-year-old Chancey was injured when, a second time, she left the safety of a bus stop (on the north side where the bus stopped every morning) and ran into the open and obvious danger posed by the street traffic. She was not running to the bus stop where the bus would pick up the students – she was running away from it.

At its core, this case is about a student who chose to leave the safety of a school bus stop before the bus arrived. It is not about a school board failing to provide sufficient instructions regarding the operation of twin bus stops across the street and failing to warn of the open and obvious danger of running into traffic. Assuming that the injuries occurred because Chancey tried to make it to the correct side of the street for the bus to pick her up, as Petitioner implies, the argument must fail. In fact, Chancey did arrive to the “correct” side of the street for pick up.

A school board has no duty to warn of an open and obvious danger, such as the one posed by traffic. Similarly, a school board has no duty to warn students not to leave the safety of a bus stop and not to run into the street. Petitioner asks, in reality, for this Court to determine that every school board in the state of Florida

has a duty to monitor the activities of school children, including those about to enter high school such as Petitioner's student, at every bus stop throughout the state. The only way to accomplish the "exercise of authority and control" Petitioner requests is to place school personnel at each of these thousands of bus stops every morning to monitor students who arrive and to prevent them from leaving the safety of the bus stop. The legislature has determined that this duty belongs to parents who best know the supervisory needs of their children, and this Court has determined that the school board's duty begins only after students are within the school board's physical control.

III. SOVEREIGN IMMUNITY BARS A CLAIM FOUNDED UPON A PLANNING-LEVEL DECISION SUCH AS THE PLACEMENT OF TWIN BUS STOPS ON BOTH SIDES OF THE STREET.

Under well-established Florida law, a school board is immune from liability under the doctrine of sovereign immunity for planning-level decisions, such as the placement of school bus stops on both sides of the street. Not surprisingly, Petitioner attempts to reframe her arguments under the guise of "operational" failures to circumvent the School Board's immunity. In reality, however, Petitioner's basic argument is that the design of the twin bus stops, on either side of the street, was unsafe. Such a determination is a planning-level decision and the School Board is immune from liability.

A. A school board is immune from liability for planning-level decisions.

Article X, section 13 of the Florida Constitution provides “absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment.” *Cir. Ct. of the Twelfth Jud. Cir. v. Dep’t of Natural Resources*, 339 So. 2d 1113, 1114 (Fla. 1976). However, section 768.28, Florida Statutes, “constitutes a limited waiver of the state’s sovereign immunity.” *Id.* at 1116.

“Even though the statute creates a limited waiver of sovereign immunity, certain discretionary, planning-level governmental functions remain immune from tort liability.” *Orlando v. Broward County, Florida*, 920 So. 2d 54, 57 (Fla. 4th DCA 2005). The test for determining whether a governmental function is a discretionary one, and therefore immune from tort liability, was set forth by this Court in *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979). The *Commercial Carrier* decision was applied to a school bus stop liability case in *Harrison*.

In *Harrison*, an eleven-year old child was struck by an automobile while en route to catch a school bus at an allegedly negligently located school bus stop. *Harrison v. Escambia County School Board*, 419 So. 2d 640 (Fla. 1st DCA 1982). The plaintiff alleged, among other things, that the school board had a duty to

designate and operate safe school bus routes and bus stops, that unusual traffic hazards existed at the bus stop location at issue, and that the school board knew or should have known that the bus stop created a dangerous condition for children and failed to arrange for a safer location for the bus stop. *Id.* at 642.

However, the trial court dismissed the plaintiff's claim and ruled that the claim was barred by sovereign immunity. *Id.* at 641. The First DCA affirmed, holding that a school board's decision regarding the location of a school bus stop is a planning-level decision and, therefore, the school board is immune from liability. *Id.* at 641, 643-49. The court explained that "to require the school board to decide on school bus stop locations under the threat of tort liability in the event a judge or jury at some later date might determine that the chosen location constituted a safety hazard to an individual child injured enroute to it, would present some difficulties." *Id.* at 644. "It is obvious that some potential for injury to a child would exist at any location where motor vehicle traffic exists, yet it would be totally impracticable and indeed impossible to locate a bus stop at any place where this would not be true." *Id.* (foreshadowing the instant situation by stating that "a location deemed 'most reasonably safe' for some could pose safety problems different both in kind and degree for other pupils, given the fact that they very likely approach the bus stop from different directions, and by different routes."). Finally, the court concluded that "the school board's function in selecting school

bus stop sites is not one that should be subject to scrutiny by judge or jury as to the wisdom of their performance.” *Id.* at 645 (citations omitted).

This Court accepted review after the First DCA certified the question and affirmed the decision below based on the “thoughtful and well-reasoned majority opinion.” *Harrison v. Escambia County School Board*, 434 So. 2d 316, 319 (Fla. 1983). As a result, Florida law is well-settled that selection of bus stop locations is a planning-level decision for which a school board is sovereignly immune.

B. There exists no applicable waiver of sovereign immunity.

On Petitioner's third attempt to state a cause of action in her Second Amended Complaint, Petitioner included a string citation to five Florida Statutes in support of the argument that the School Board had waived sovereign immunity, *i.e.* sections 1001.42(10), 1006.21, 1006.22, 1006.09 and 1006.10, Florida Statutes. (R.1 at 76.) However, Petitioner failed to allege how any of these statutes operated to waive the sovereign immunity of the School Board in this matter. (R.1 at 76-87.) Petitioner fails to cite any Florida case that has found that these statutes waive sovereign immunity. Finally, some of these statutes directly refute Petitioner's argument.

As set forth in the School Board's motion to dismiss (R.1 at 125-35), section 1001.42(10), Florida Statutes, provides the authority for the district school

superintendent to provide for student transportation and authorize the bus routes. Sections 1006.21 and 1006.22, Florida Statutes, set forth the school board's authority to make discretionary, planning-level decisions concerning the location of bus stop routes, which, under *Harrison v. Escambia County School Board*, 434 So. 2d 316 (Fla. 1983), are immune from tort liability. *Id.* at 320.

Similarly, section 1006.09, Florida Statutes, states that “[e]ach school principal shall fully support the authority of his or her teachers and school bus drivers to remove disobedient, disrespectful, violent, abusive, uncontrollable, or disruptive students from the classroom and the school bus and, when appropriate and available, place such students in an alternative educational setting.” (R.1 at 125-35.) Section 1006.10(3), Florida Statutes, states that the school bus driver “shall control students during the time students are on the school bus, but shall not have such authority when students are waiting at the school bus stop or when students are en route to or from the school bus stop except when the bus is present at the bus stop.” § 1006.10(3), Fla. Stat.

Pursuant to the allegations of the Second Amended Complaint, Chancey was not on a school bus or in a classroom when she was struck by an automobile, a point which Petitioner conceded. (R.1 at 76-87, 137.) The school bus was not present when this accident occurred. (R.1 at 76-87, 137.) Chancey was not even actually at her bus stop or at the twin bus stop across the street. (R.1 at 76-87.)

Even assuming, *arguendo*, that this Court were to hold for the first time that these statutes created operational level duties for which the school board is not immune, nothing in these statutes suggests that the duties imposed operate to waive the sovereign immunity applicable to this claim. This claim, in Petitioner's own words, is that, “[the School Board] failed to safely transport [Chancey], specifically by failing to safely operate and manage the school bus stop as it was designed to be operated and managed by [the School Board].” (R.1 at 54).

Thus, Petitioner has not pled and will not be able to plead a claim that would overcome the doctrine of sovereign immunity. Thus, on this alternative basis, the trial court’s order dismissing Petitioner's Second Amended Complaint with prejudice must be affirmed.

C. Designing twin bus stops on opposite sides of the street is a planning-level decision and the design does not give rise to an operational duty.

As set forth above, the School Board is statutorily immune from planning-level decisions. Petitioner recognizes that she is unable to state a legally cognizable action based on the decision regarding the placement of the twin bus stops and an alleged failure of a duty to warn. (Pet. Brief at 24.) Therefore, Petitioner is forced to recast her claims and contend that she is not seeking recovery under either of these theories. However, reviewing the substance of her Second Amended Complaint, rather than the labels she tries to give her allegations,

reveals the true crux of her argument. Framing Petitioner’s claims more simply, Petitioner asserts that the School Board made a decision to place the twin bus stops alongside a busy street and then failed to warn parents and students of that danger.

Petitioner's Second Amended Complaint, especially paragraphs 7, 9, 10, and 12, demonstrate that she seeks to hold the School Board liable for its planning-level decision regarding location of the bus stop and its inherent design. Petitioner asserts that the School Board failed to clearly communicate the design to students, which in reality would have been a warning not to cross the street mid-block. Notably, Appellant has not cited a single Florida case that has ever held that a school board may be held liable for an alleged failure to communicate, particularly when the warning concerns an open and obvious danger.

Instead, Petitioner’s allegations are centered on the notion that the School Board failed to warn of the dangers in crossing SW 20th Avenue when the school bus was not present. (R.1 at 5, 82-83.) The “policy” at issue is that students should not cross the roadway unprotected by traffic control signals. (R.1 at 80, 82-83.) Implementing safety rules “can neither create a danger nor transform a patent danger into a latent hazard.” *Payne v. Broward County*, 461 So. 2d 63, 66 (Fla. 1984) (internal citations omitted). “The danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard.” *Id.* at 58 (internal

citations omitted). Thus, implementing a rule that students should not jaywalk and cross the roadway unprotected by traffic control signals does not transform the condition from being open and obvious to being a hidden trap and, thus, does not impose a duty to warn upon the School Board.

Simply put, Petitioner engages in a game of semantics by trying to recast her allegations to survive dismissal. Her allegations speak to a failure to warn of the open and obvious danger in crossing a street midblock, but she predictably reframes the allegations as the failure to instruct regarding proper crossing rules and procedures in an attempt to circumvent the well-established principle that a duty to warn does not arise unless the School Board created a known, dangerous, and hidden trap. As with previous attempts to wordsmith claims to avoid the application of long established precedent relating to sovereign immunity, Petitioner's attempts (as well as any further attempts) should be rejected and the trial court's order dismissing the Second Amended Complaint should be affirmed.

CONCLUSION

Petitioner asks this Court to expand liability for Florida's school boards. She seeks relief not previously provided by any Florida court and contrary to authority from the Legislature, State agencies, the First District Court of Appeal, the Fourth District Court of Appeal, and this Court's own precedent. No Florida court has held that a school board has a duty to prevent a student from leaving the

safety of her bus stop before her school bus arrives. No court has held that a school board owes a duty to a student from the “moment” she arrives at a bus stop. Consistent with long-standing authority, precedent, practical considerations, and policy this Court should reject Petitioner's arguments.

To require schools to add supervisory personnel at bus stops for students fourteen years old (or older) would create an extreme burden. Florida’s school boards cannot afford to provide supervision for students at every bus stop across the State on every school morning. Further, it would open a Pandora’s Box of liability for schools. School boards could be liable for off-campus tragedies whether or not school personnel are present or expected to be present.

As held by the First DCA below, a Florida school board is not liable for injuries sustained by students outside of its custody. A school board’s control over its students is tied to its physical custody of them, and its corresponding duty arises from the same physical custody. Until the school bus arrives, there are no school personnel present to take physical custody of the students. Without physical custody, a school board has no duty to prevent a student from running into the open and obvious danger of a busy road while waiting for her school bus to arrive in the morning like Chancey did here. For these reasons, this Court should affirm.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

by: _____
David M. Delaney
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Terence J. Kann, Terence J. Kann, P.A., 2790 N.W. 43rd Street, Suite 100, Gainesville, Florida, 32606, and Michael J. Korn, Korn & Zehmer, P.A., 800 W. Monroe Street, Jacksonville, Florida, 32202, by mail on the 9th day of September, 2011.

DELL GRAHAM, PA

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