

**SUPREME COURT  
STATE OF FLORIDA**

**Case No. SC10-2459**

**JULIE WINSLOW,**

**Petitioner,**

**vs.**

**SCHOOL BOARD OF ALACHUA COUNTY,**

**Respondent.**

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**INITIAL BRIEF OF PETITIONER WINSLOW**

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

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## **INTRODUCTORY STATEMENT**

The following references are used in this Initial Brief:

Petitioner/Plaintiff, Julie Winslow, is referred to as “Winslow,” “Plaintiff” or “Petitioner,” but usually as “Winslow.” Winslow’s minor daughter, Tiffany Chancey, is referred to as “Miss Chancey” or “Chancey.”

Respondent/Defendant, School Board of Alachua County, is referred to as “SBAC,” “Respondent,” or “Defendant,” but usually as “SBAC.”

References to Petitioner’s Appendix, which accompanies this Initial Brief and includes the key papers from the Record on Appeal already assembled and considered by the First District Court of Appeal as well as the subsequent rulings and motions filed in the First District, will be by the symbol “A\_\_” followed by the tab and page number (for example: A 1, 1).

All emphasis in this Initial Brief is that of the scrivener, except as otherwise indicated.

## **STATEMENT OF CASE & FACTS**

This appeal arises from a dismissal, with prejudice, of Winslow's Second Amended Complaint (A 7), which alleged that Respondent SBAC had breached an operational level duty owed to Plaintiff's minor daughter. The facts as discussed below are taken from Winslow's Second Amended Complaint (A 5).

Winslow's daughter, Tiffany Chancey (Chancey), aged 14, was severely injured when she was struck by a motor vehicle, while she was awaiting the arrival of the school bus at her designated Gainesville school bus stop (A5, 2). The bus stop designed by SBAC consisted of two separate gathering areas for students (referred to as the south and north gathering areas), which were located on opposite sides of SW 20<sup>th</sup> Avenue, a heavily traveled main municipal artery (A 5, 2-3).

Winslow alleged that SBAC designed the bus stop and enacted a rule (along with enforcement procedures) implementing its design, which required students living on the south side of the road to wait until the westbound bus stopped and deployed its stop signs and flashing lights (thereby stopping all road traffic) and the driver gave the "all clear sign" before leaving the south gathering area and crossing the roadway to board the bus from the north gathering area (A5, 3-4). Without the stopped school bus (which operates as a mobile traffic control device), school children could not safely cross the roadway, because there was no crosswalk or

signal, and the children were required to cross SW 20<sup>th</sup> Avenue in mid-block (A 5, 2).

Tragically, and as alleged by Winslow, the bus driver (Ms. Jones) never effectively communicated this workable and safe method of boarding the bus to the students (A 5, 6). Nor did the driver monitor or enforce the SBAC crossing/boarding rule, and the bus driver knew that virtually every day the students living on the south side were crossing the roadway from the south to the north gathering area before the school bus arrived (A 5, 3-6; 18-19). Miss Chancey was unaware of the crossing/boarding rule (A 5, 4). On the day she was injured, Miss Chancey had crossed from the south to the north gathering area and was struck when she stepped into the roadway (apparently to see a student who was not yet at the stop) (A 5, 2-3).

Like virtually all school bus stops, this bus stop was not supervised or monitored by any SBAC employee. Nonetheless, SBAC exercised control over the students by enacting its crossing/boarding rule; that procedure prohibited students from crossing the roadway and boarding until the bus came to a stop (and stopped all other traffic by activating its lights and deploying its stop signs), and the driver gave the “all clear” signal (A 5, 4-6).

SBAC’s design required ongoing monitoring by the school bus driver, who knew which students lived on either side of the road, to ensure student compliance

(A 5, 6). While enforcement was initially the responsibility of the school bus driver, if the driver was unsuccessful in enforcing the rule, it was the responsibility of the school principal, and ultimately the superintendent (A 5, 6; 21-22).

In her Second Amended Complaint, Winslow specifically alleged that SBAC had control over Miss Chancey at the time she was struck by a motorist, because it had the authority to control (or regulate through the boarding/crossing rule) the manner by which she crossed the street and boarded the bus (A 5, 5-6 at ¶ 13). Winslow further alleged that SBAC had the authority to implement its bus stop design by enacting its crossing/boarding rule, and through its bus driver it was able to communicate, monitor, and enforce the rule, on a daily basis (A 5, 4-6 at ¶¶ 12-15). Winslow also specifically pled that Miss Chancey was injured while she was at the bus stop (A 5, 3).

Winslow's pleadings never challenged the selection of the site, or the design of the bus stop (A 5, 1-12). Nor did she allege that the School Board failed to warn her of the danger of crossing a street mid-block. (Id.) Rather, she alleged the School Board was negligent for failing to operate the bus stop as it was designed, and for failing to communicate, monitor and enforce its own school bus boarding rule, which was a breach of its operational duty (A 5, 7-8).

After Winslow filed her initial Complaint (A 1, 1-5), the SBAC moved to dismiss (A 1A). By agreement, Winslow thereafter filed an Amended Complaint (A 2). The SBAC again moved to dismiss (A 3). Following a hearing on SBAC's renewed motion to dismiss, the trial court dismissed Winslow's Amended Complaint, with leave to amend (A 4, 1-2).

As discussed above, Winslow filed a Second Amended Complaint (A 5), and SBAC again moved to dismiss (A 6). After a hearing, the trial court dismissed Winslow's Second Amended Complaint with prejudice, stating "for the reasons stated in the Court's Order dismissing Plaintiff's Amended Complaint and for the reasons stated by the Court at the conclusion of the hearing on Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint"... "Plaintiff's Second Amended Complaint is dismissed with prejudice" (A 7, 1-2).

The trial court's previous order dismissing Winslow's Amended Complaint had stated that: "1) a school board's duty of care begins when the school board has physical custody of its students; and 2) designation of school bus stops is a planning level decision which is immune from tort liability under the doctrine of sovereign immunity" (A 4, 1-2).

Winslow filed a timely Notice of Appeal (A 8), seeking review of the trial court's dismissal with prejudice . The First District Court of Appeal affirmed in a two sentence per curiam opinion (A 9), stating:

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 (emphasis added). 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. (emphasis added; citations omitted) (A9, 1-2).

Winslow timely filed a motion for rehearing/clarification, certification and rehearing en banc (A 10). Winslow sought clarification about whether the First District's phrase "did not have control over the student" was a finding based on the facts as pled, or was a legal holding solely based on the fact that Chancey was injured at a bus stop before the school bus arrived, at a time when no school board employees or agents were present (A 10, 2-3). Winslow's motion also stated that generally "control" is an issue of fact to be determined by the jury, based on the evidence and inferences from the evidence (A 10, 2). Alternatively, Winslow requested that the First District certify to this Court as a question of great public importance the following: "Does a school board owe a legal duty to students waiting to board the school bus, at the designated bus stop, when the school bus is not physically present?" (A 10, 4).

The First District denied all relief sought in Winslow's motion without comment (A 11).

Winslow then petitioned this Court to exercise its discretionary certiorari jurisdiction, because the First District's decision expressly and directly conflicted with this Court's decisions in *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1983); *Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010 (Fla. 1979); and *Harrison v. Escambia County School Board*, 434 So. 2d 316 (Fla. 1983); and with the decision of the Fourth District Court of Appeal in *School Board of Broward County v. Surette*, 394 So.2d 147 (Fla. 4<sup>th</sup> DCA), *rev. dismissed*, 399 So.2d 1146 (Fla. 1981). This Court accepted jurisdiction by order entered June 27, 2011.

### **SUMMARY OF ARGUMENT**

SBAC owes a duty to transport its students with maximum regard for their safety. That duty begins the moment a student arrives at a designated bus stop and is therefore subject to the authority and control of SBAC. Petitioner recognized that a school board is not an insurer of its students' safety and is immune from liability for selecting and designing a bus stop. However, once it has selected and designed a bus stop, and has enacted procedures (including monitoring and enforcement procedures) to implement its design, a school board is not immune when it fails to

operate its bus stop as designed, by failing to monitor and enforce compliance with its procedures.

Additionally, the school board has the authority, and a duty, to control student behavior. Even if the students are not on school grounds and no school board representative is present at the bus stop to supervise the students' actions, SBAC had the authority to enact its crossing/boarding rule to control student behavior and implement the design of the bus stop. Therefore, SBAC owed a duty to Miss Chancey, who was injured while she was at a designated school bus stop and under SBAC's custody, and subject to its authority and control.

While SBAC enjoys immunity for selecting the location and design of the Lyons bus stop, it has no immunity for its failure to operate the bus stop as designed. SBAC selected a bus stop location and design which required students living on the south side of the roadway to wait until the school bus arrived and stopped all other traffic before crossing to the north side to board a westbound bus. The crossing/boarding rule and enforcement procedures implemented that design. SBAC is not immune from liability for its failure to communicate, monitor or enforce its own crossing/boarding rule, which it had the continuous capacity to do by and through its school bus driver who was fully aware that the rule was being violated every day, but who took no steps to communicate the existence of the rule or enforce

its compliance. SBAC is not immune from this failure, because under Florida law the implementation of a pre-existing policy, plan or design is an operational function, and is not protected by sovereign immunity.

### **STANDARD OF REVIEW**

Winslow is seeking this Court's review of the dismissal of her Second Amended Complaint with prejudice. The standard of review for the dismissal of a complaint for failure to state a cause of action is *de novo*. *Wallace v. Dean*, 3 So.2d 1035, 1045 (Fla. 2009). The reviewing court must accept the allegations of the complaint as true and need not defer to the trial court's legal conclusions regarding the efficacy of the allegations. *Jimenez v. Community Asphalt Corp.*, 968 So.2d 668, 670 (Fla. 4<sup>th</sup> DCA 2007). A dismissal should only be granted when it has been conclusively demonstrated that the pleader can prove no set of facts whatsoever in support of a recognized cause of action. *Id.* The *de novo* standard applies to all issues.

## ARGUMENT

### **I. THE SCHOOL BOARD OF ALACHUA COUNTY (SBAC) OWED A DUTY TO TRANSPORT ITS STUDENTS WITH MAXIMUM REGARD FOR THEIR SAFETY, SAID DUTY BEGINNING THE MOMENT A STUDENT ARRIVES AT A DESIGNATED BUS STOP AND IS SUBJECT TO THE AUTHORITY AND CONTROL OF SBAC.**

A school board owes a duty to transport students with maximum regard for their safety. *Dixon v. Whitfield*, 654 So.2d 1230, 1232 (Fla. 1<sup>st</sup> DCA 1995); *School Board of Broward County v. Surette*, *supra*, 394 So.2d at 152-153. In *Dixon*, the First District held that a school board has a statutory duty to “provide” student transportation, citing previous Sections 230.23(8) and 234.01(1)(a) Fla. Stat. (1987) (the current statutes are Sections 1001.42(10) and 1006.21). *Dixon* further held that school boards shall have “maximum regard for safety,” pursuant to Section 234.02, Fla. Stat. (1987) (currently Section 1006.22). *Id* at 1232.

The school board’s duty begins once the student arrives at the bus stop and is subject to the authority and control of the school board. *Harrison v. Escambia County*, 434 So.2d 316, 319 (Fla. 1983); *Duval County School Board v. Dutko*, 483 So.2d 492, 495 (Fla. 1<sup>st</sup> DCA 1986); *Surette*, 394 So.2d at 153; *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1983).

A key fact which differentiates the instant case from the cases cited and relied on below by SBAC is that Winslow's daughter, Miss Chancey, was injured while she was **at the Lyons bus stop**<sup>1</sup>. Had Miss Chancey been informed about the SBAC crossing/boarding procedures (which were specifically adopted to implement the design of the Lyons bus stop), and remained at the south gathering area and not crossed SW 20<sup>th</sup> Avenue until the school bus arrived and stopped, she never would have been injured.

Contrary to the contentions of SBAC, the opinions in *Harrison, Dutko, Surette and Francis v. School Board of Palm Beach County*, 29 So.3d 441 (Fla. 4<sup>th</sup> DCA 2010) all contain language either holding or acknowledging that while a school board does not owe a duty to students who are en route to a bus stop, its **duty to students arises once they arrive at the bus stop**, because they are then subject to the authority and control of the school board.

For instance, *Harrison* found no duty existed, because "the accident did not happen at the school bus stop." 434 So.2d at 319. The opinion further stated, "When

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<sup>1</sup> This allegation was clearly made in Plaintiff's Second Amended Complaint (A 5, 2 at ¶ 6). Additionally, SBAC representatives testified that the Lyons bus stop was designed with both south and north gathering areas, as shown by deposition transcript excerpts which were exhibits to the Second Amended Complaint (A 5, 28).

a student is injured before reaching a designated bus stop ... that student is outside the Board's duty of care." *Id.* (emphasis added).

The First District stated in *Dutko* (where the court held a duty was owed):

Appellant's 12 year old son, Oscar, was struck and killed by an automobile **at a school bus stop** in Jacksonville. The driver of the passing automobile lost control of his vehicle, left the roadway, and angled toward the bus stop where the decedent and another child were waiting for the approaching bus. 483 So.2d at 494 (emphasis added).

*Surette* found that a duty was owed to the student. The Fourth District stated that "Diane Surette, age 13, was struck by an automobile" "while she was waiting for a school bus." The opinion specifically stated that "At the time of the accident, Diane was standing approximately three feet in the roadway in front of a designated school bus stop at a vacant lot." 394 So.2d at 149, 152.

While *Francis* found no duty existed, those facts are distinguishable from the case at bar:

The tragic accident in this case, however, did not occur while Kodijah was ... waiting at her bus stop. **It occurred while she was walking to her bus stop**....The school board does not have custody or control over students while they are *en route* to their school bus stops; the control rests solely with the student's parents or guardians. Thus, the school board does not have any duty to its students during this period of time. 29 So.3d at 444 (emphasis added).

Contrary to SBAC's contentions, Florida courts have consistently drawn a bright and clear line which recognizes that school boards owe a duty to their students

once they arrive at the school bus stop, and are subject to its authority and control. While the school board owes no duty while a student is en route to or walking towards the school bus stop, those are not the facts as set forth in the instant Second Amended Complaint.

This Court's analysis in *Harrison* begins with the phrase, "**(t)o start, we note that the accident did not happen at the school bus stop** (emphasis added)."<sup>2</sup> 434 So.2d at 319. Later in the same paragraph, this Court stated, "(w)hen 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 of care stems from the fact of the school board's physical custody of its students (emphasis added)." *Id.*

In context, this subsequent statement in *Harrison* must reasonably be read to mean that a school board's custody, and hence its duty, begins the moment a student arrives at the bus stop, when he or she is subject to the board's authority and control. Thus, *Harrison* used the term physical "custody" to mean "the legal right or duty to care for someone ... especially a child ..." (See Cambridge Dictionary Online) or the "care or ... authority over ... someone" (See FindLaw Online Dictionary).

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<sup>2</sup> In *Harrison*, this Court ultimately held that the school board owed no duty to a student who was hit and killed while traveling on his way to a bus stop.

So as to provide full context to the *Harrison* holding, which supports Petitioner's analysis, the complete quote is as follows:

To start, we note that the accident did not happen at the school bus stop. As a general rule, if a public school entity provides transportation for its pupils, it owes a duty of care with regard to that transportation. Annot., 34 A.L.R.3d 1210 (1970). School 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. 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. 434 So.2d at 319.

Not surprisingly, SBAC focused on the phrases in *Harrison* that "a school board's control over its students extends from when a school bus picks up a student ..." and "the board's duty stems from the fact of the school board's physical custody of its students" (emphasis added). However, SBAC purposefully ignores the other phrases, such as "we note that the accident did not happen at the bus stop" and "(w)hen a student is injured before reaching a designated bus stop ... that student is outside the board's duty of care." *Id.*

Although the language in the above paragraph might be seen as less than clear, *Harrison* and the other cases quoted above hold that a school board owes the student a duty from the moment he or she arrives at a designated bus stop, which is when that student comes under the authority and control (i.e., custody) of the school board.

This conclusion is further confirmed by the fact that in *Harrison* this Court distinguished but did not overrule *Surette*. In distinguishing *Surette*, this Court stressed that the student’s injury “occurred at a designated bus stop” (although before the bus arrived, when no school board representative was physically present). Furthermore, *because* the student in *Harrison* was injured before arriving at the bus stop, *Harrison* stressed the fact that the student was injured “while walking toward a school bus stop.” *Id.*<sup>3</sup>. Finally, *Harrison* stated, “(o)ur research has turned up few cases concerned with liability for negligent location of a bus stop **or for injuries occurring away from bus stops** (emphasis added).” *Id.*, at 320, n.5.

In *Dutko*, the First District held that the Duval County School Board owed a duty to students waiting at a bus stop, and did not have sovereign immunity protection for the death of a child at a school bus stop, where a vehicle lost control, left the roadway and struck the child. The court, in part, relied on the evidence of complaints that the bus stop was dangerous and the evidence of prior “near misses” at that stop. 483 So.2d at 495. Although the school board was immune from suit for the location of the bus stop, it owed an operational duty to students to warn them of a known dangerous condition it had created, which was not readily apparent.

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<sup>3</sup> In *Harrison* the plaintiff alleged the school board was negligent in selecting the location of the bus stop and failing to post warning signs, which are planning-level decisions. In the case at bar, Petitioner Winslow has not made either allegation.

*Dutko* supports Petitioner's position that her Second Amended Complaint stated a cause of action against SBAC, and it should be reinstated.

**II. SBAC HAD CUSTODY OF, AND CONTROL OVER, STUDENTS AT ITS DESIGNATED LYONS BUS STOP BECAUSE IT HAD THE AUTHORITY AND CAPABILITY TO ENACT, MONITOR AND ENFORCE BOARDING PROCEDURES TO CONTROL STUDENT BEHAVIOR.**

A school board owes a duty to students to the extent it has the authority to control the behavior of its students. *Rupp, supra*. This is true even if the students are not on school grounds and no school board representative is present to directly or personally supervise the students' actions. 417 So.2d at 667.

In *Rupp*, the school board was sued for injuries sustained by a student at an initiation ceremony for a school club. The injury occurred off school premises and outside school hours, and no school employee was present. The student alleged that: (a) the school sanctioned club had a known reputation for conducting activities which violated school board regulations; (b) the club was required to obtain the principal's approval for extracurricular outings; (c) the club was prohibited by existing school regulations from hazing; (d) a teacher was assigned as the club's faculty advisor; and (e) the faculty advisor's presence was required at all club activities.

This Court found that the school board owed a duty to the student because it had the authority to control the behavior of the students. The fact that the ceremony was not held on school premises, and was outside the presence of any school board representatives, did not affect or negate the school board's authority and correlative duty to control the meeting. *Id.* at 667. Thus, the First District's opinion in *Winslow* directly conflicts with this Court's decision in *Rupp*. The First District's finding that SBAC had no "control" over Miss Chancey while she was at the designated bus stop, despite the fact that it had the authority to implement crossing/boarding procedures (and the capability to monitor and enforce compliance with those procedures) erroneously analyzed the applicable legal tests announced by this Court.

*Winslow* acknowledges there is language in both *Harrison* and *Francis* which some might argue suggests that a school board's duty begins only when a school board representative is present to directly supervise its students. However, if SBAC's interpretation were to be adopted, it would directly conflict with *Rupp* and other language in *Harrison* and *Francis* (as well as the holdings in several other cases cited above), which holds or acknowledges that a school board's duty begins once a student arrives at the bus stop. This is because at that time, the student has

come under the authority and control of the school board, regardless of whether the bus driver has arrived or another school representative is present.

SBAC's argument that a duty is not owed until the school board has "custody" of the student is circular, because as discussed above, custody is properly defined to mean the duty to care for someone, especially a child or having "authority over someone." See FindLaw Online Dictionary, and Cambridge Dictionary Online<sup>4</sup>.

Regardless of how one chooses to define "custody" or "control," under Florida law Winslow sufficiently alleged the existence of an operational duty which SBAC owed to her daughter.

On the issue of "control", Winslow actually pled ultimate facts clearly demonstrating that SBAC had the authority to, and in fact did, exercise the required control over its students. It did this through the enactment of operational rules which could be easily monitored, communicated and enforced by the school bus driver (and by others, if necessary).

Winslow alleged that SBAC had enacted a crossing/boarding rule (and enforcement procedures) to implement its design of the bus stop. That rule required that students not cross the street until the school bus had stopped and was controlling

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<sup>4</sup> In *Green v. State*, 604 So.2d 471, 472 (Fla. 1992), this Court held that the plain and ordinary meaning of a word "can be ascertained by reference to a dictionary."

all vehicular traffic in the area. Winslow alleged the school bus driver knew that Miss Chancey and other students were routinely (i.e., virtually always) boarding the bus contrary to SBAC's design and the procedures adopted to implement its design (i.e., they were not crossing SW 20<sup>th</sup> Avenue only after the arrival of the school bus and the "all clear" signal of the bus driver was given).

Winslow alleged that the SBAC had put in place a policy (and implementing procedures), to monitor and assure proper use of bus stops and compliance with school bus boarding procedures. Those procedures included: first, a reminder from the school bus driver; second, a "write-up" (a written report to the student's principal or vice principal); third, a meeting involving SBAC transportation staff, the student and his or her parents and a school administrator; and finally, should all else fail, termination of a student's bus riding privileges.

Winslow further alleged that SBAC's enforcement procedures failed at the outset because the driver (Ms. Jones) never advised the students who lived on the south side of SW 20<sup>th</sup> Avenue to wait to cross the street until the school bus arrived, came to a stop with its lights flashing and stop signs deployed and the driver gave the "all clear" signal.

SBAC clearly had the authority to enact these crossing/boarding procedures, and it was fully capable of monitoring and enforcing compliance with the school bus

stop design and school bus boarding procedures<sup>5</sup>. On the other hand, it is clear the school board would have no way of monitoring or enforcing the actions of students en route to a school bus stop. That is the policy rationale for the holdings in *Harrison* and the other cases already discussed. That distinction is understandable, but not applicable here.

It is expected that as part of its “control” argument, SBAC will again contend that the facts in *Francis* (where relief was denied), were even more compelling than those present here. However, in *Francis* the essential fact which determines whether the school board owes a duty was missing. In *Francis* the student was *en route* to the school bus stop at the time she was struck and killed, and was not subject to the school board’s authority and control. 29 So.3d at 443. In the instant case, Miss Chancey was at the designated school bus stop, where she was supposed to be, and she was subject to the school board’s authority and control when she was struck and severely injured<sup>6</sup>.

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<sup>5</sup> Moreover, David Deas (SBAC Manager of Operations) and Steven Davis (Route Coordinator) acknowledged during their depositions that SBAC had “control” over Tiffany Chancey once she arrived at the bus stop, because SBAC (via the bus driver) had the ability to monitor her compliance with the school bus boarding procedures and had a procedure in place to assure compliance. Portions of those depositions were exhibits to Winslow’s Second Amended Complaint (A 5, 17-19; 21; 27; 29-31).

<sup>6</sup> The analysis in *Francis* did not state whether the student/decedent had to cross the

SBAC is also expected to again argue that it was the obligation of Miss Chancey's parents to assure she arrived safely at the school bus stop. This argument is not controlling or dispositive to the issue presented. SBAC overlooks the fact that Miss Chancey did arrive safely at the designated school bus stop. It was only after she arrived safely at the bus stop that she was seriously injured. Plaintiff alleged that she left the south gathering area, in violation of procedures, only because she was not made aware of them by SBAC. The school bus driver never took any steps to inform the students or to require compliance. Reversal is required, so Plaintiff will be given the opportunity to prove her case.

**III. IT WAS CLEARLY FORESEEABLE TO SBAC THAT STUDENTS CROSSING SW 20<sup>TH</sup> AVENUE AT THE LYONS BUS STOP LOCATION (WHERE NO CROSSWALK OR TRAFFIC SIGNALS WERE PRESENT), WITHOUT THE PROTECTION OFFERED BY A STOPPED SCHOOL BUS DISPLAYING ITS FLASHING LIGHTS AND STOP SIGNS, AND THE GUIDANCE OF THE BUS DRIVER, MIGHT BE STRUCK BY A MOTORIST.**

In a negligence cause of action, a plaintiff must allege the existence of a duty or obligation imposed or recognized by law, requiring a charged party to conform to

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street mid-block while unprotected by signals, a crosswalk, or both. There is absolutely no mention of a school bus stop design or school bus boarding procedures which required the student in *Francis* to wait to cross the street until the school bus had stopped. Indeed, had such procedures been in place and been enforced, the tragedy described in *Francis* would not have occurred.

a certain standard of conduct for the protection of others against unreasonable risks. Such a duty may arise from the general facts of the case. *Clay Electric Cooperative Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla. 2003). Specifically “(w)henever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service – i.e., the ‘undertaker’ – thereby assumes a duty to act carefully and not to put others at an undue risk of harm.” *Id.* at 1186.

This Court has made “foreseeability” the pole star for finding the existence of a legal duty, and its scope. *McCain v. Florida Power Corp.*, 593 So.2d 500, 503 (Fla. 1992); *Clay Electric*, 873 So.2d at 1185. In determining the existence of a legal duty (which is a question of law), a court allocates risk by balancing the foreseeability of harm in light of all of the circumstances, against the burden to be imposed. *Levy v. Florida Power and Light Company*, 798 So.2d 778, 780 (Fla. 4<sup>th</sup> DCA 2001), quoting *Vaughn v. E. Edison Company*, 48 Mass. App. Ct. 225, 719 N.E.2d, 520, 523 (1999).

In *Clay Electric*, a minor pedestrian was struck by a truck and killed in an area where a streetlight was inoperative. This Court held that the issue of whether the streetlight maintenance company owed a legal duty to the pedestrian precluded summary judgment. In so holding, this Court observed that a decision had

obviously been made that the road needed lighting; thus, Clay Electric (the “undertaker”) should have reasonably foreseen that proper maintenance was necessary for the protection of the decedent, and this was an operational duty which did not trigger sovereign immunity protection. 873 So.2d at 1187.

In *McCain*, the operator of an electric trencher was injured when the trencher blade struck an underground electrical cable. This Court held that the utility’s maintenance of the underground electrical cable created a foreseeable “zone of risk,” and the evidence supported the jury’s conclusion that the operator’s injury was proximately caused by the utility’s breach of its duty to indicate where the cable was. 593 So. 2d at 504, 505.

Based on these holdings, SBAC had both a statutorily imposed duty (see Issue I, above) and a common law duty to safely transport Miss Chancey from the bus stop to school, and back. SBAC selected the Lyons bus stop, and adopted a design which required that students living on the south side of SW 20<sup>th</sup> Avenue had to cross at a mid-block location which was not protected by a crosswalk or any permanent traffic control devices. By doing so, just as in *Dutko*, the SBAC created a foreseeable zone of risk (of injury or death) for students required to cross the roadway at that location.

Recognizing that it had created a zone of risk (and acknowledging its duty to transport Miss Chancey with maximum regard for her safety), SBAC designed the

school bus stop with two gathering points. It also established a school bus boarding procedure to implement its design, which required that students wait on the south side of SW 20<sup>th</sup> Avenue and not cross until the school bus stopped (and deployed its stop signs and flashing red lights) and the driver gave the “all clear” signal.

Winslow did not challenge either the SBAC’s discretionary selection of the Lyons bus stop, nor its design (which required south side students to cross SW 20<sup>th</sup> Avenue to board the bus – but only after the bus stopped). However, after making its discretionary “planning level” decisions, SBAC clearly owed a separate “operational” duty to use ordinary reasonable care to implement its design. SBAC also owed an operational duty to effectively inform students, their parents and its bus drivers about the boarding procedure, and to take reasonable and available steps (which impose essentially no burden) to monitor and enforce proper usage of the bus stop and student compliance with the established boarding procedures.

This Court long ago recognized that a special duty is owed to children.

Children are necessarily lacking in the knowledge of physical causes and effects which is usually acquired only through experience. They must be expected to act upon childish instincts and impulses and must be presumed to have less ability to take care of themselves than adults have. Therefore, in cases where their safety is involved, more care is demanded than towards adults and all persons who are chargeable with a duty of care and caution toward them must consider this and take precautions accordingly.

*Bagdad Land & Lumber Co. v. Boyette*, 104 Fla. 699, 704; 140 So. 798, 800 (1932). This holding was then reaffirmed in a case which confirmed the duty to safely transport students. *Burnett v. Allen*, 114 Fla. 489, 154 So. 515 (1934)<sup>7</sup>.

**IV. SBAC HAS NO SOVEREIGN IMMUNITY PROTECTION FOR ITS FAILURE TO MONITOR, COMMUNICATE AND ENFORCE CROSSING/BOARDING PROCEDURES WHICH MERELY IMPLEMENTED ITS DESIGN OF THE LYONS BUS STOP.**

Pursuant to Section 768.28 Fla. Stat., Florida and its political subdivisions, including SBAC, waived sovereign immunity for all operational level activities. In *Commercial Carrier Corp. v. Indian River County*, *supra*, this Court held that Section 768.28 waived sovereign immunity on a broad basis, but that certain “discretionary governmental functions remained immune from tort.” 371 So.2d at 1022. In order to identify the governmental functions which remained immune from tort liability, *Commercial Carrier* adopted an analysis which distinguishes between “planning” and “operational” levels of decision making by government agencies.

The claim in *Commercial Carrier* arose out of a collision at an unmarked intersection where there had previously been a stop sign and pavement markings.

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<sup>7</sup> These observations remain valid and are consistent with the observations and holdings which support Fla. Std. Jury Instr. (Civ.) 4.12.

The complaint alleged that Indian River County negligently failed to maintain the stop sign at the intersection and that the Florida DOT negligently failed to repaint or replace the word “STOP.”

This Court examined the holdings of several foreign courts, including *Evangelical United Brethren Church v. State*, 407 P.2d 440 (Wash. 1965) and *Johnson v. State*, 447 P.2d 352 (Cal. 1968), and adopted the distinction between “planning level” and “operational level” decisions. “Planning level” decisions are generally interpreted to be those requiring basic policy considerations, while “operational level” decisions are those that merely implement policy. *Id* at 1021. This Court held that the initial governmental decision to install traffic control devices is a “planning level” decision; however, the duty to maintain the devices is “operational.”

In the instant case, the decision to locate a bus stop to be serviced by a westbound bus only, thereby requiring students on the south side of the street to cross to the north side before boarding the bus, was a “planning level” decision. Furthermore, the design implemented by the SBAC (which included two gathering areas which required that students living on the south side remain at the south gathering area until the school bus stopped) arguably involved at least some policy considerations. On the other hand, SBAC’s duty to effectively communicate,

monitor, and enforce its own crossing/boarding rule is indisputably “operational.” Its failure to effectively communicate, monitor, and enforce a rule it adopted to implement the bus stop design, and control the manner by which the students boarded the bus, is undeniably an “operational” failure, and is actionable at law, as set out in Winslow’s Second Amended Complaint.

Under Florida law, the implementation of a pre-existing policy or plan (such as SBAC’s bus boarding procedure) is an operational function. *Wallace v. Dean, supra*, 3 So.3d at 1046; *Wilson v. Miami Dade County*, 370. F. Supp.2d 1250, 1255 (S.D Fla. 2005) (applying Florida law); *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989).

In *Wallace*, sheriff’s deputies had responded to a 9-1-1 emergency call and performed a “safety check” of the decedent, but did not summon an ambulance, which was alleged to have been the proximate cause of the decedent’s later death. This Court held that the deputies owed the decedent a duty and that sovereign immunity did not bar her survivor’s negligence action against the sheriff. This Court noted that subjecting the sheriff to tort responsibility for the manner in which the previous “safety check” was conducted did not involve judicial scrutiny of any discretionary, quasi-legislative policy making or planning decision. Instead, the trier of fact simply had to determine – consistent with judicial principles of Florida tort

law – whether the deputies should have acted in a manner more consistent with the decedent’s safety, which was an operational duty only. *Wallace*, 3 So.2d at 1054.

In *Wilson*, a female police officer was shot and killed by an unstable fellow officer, with whom she had ended a romantic relationship. Her estate brought a federal civil rights and state negligence suit against Miami-Dade County for its failure to protect her from the unstable officer. The court held that the County was immune from tort liability to the extent the suit challenged the County’s failure to adopt or create an early warning system for identifying unstable officers. This was because such an inquiry went to the reasonableness of a basic policy decision. However, the County was not immune from liability to the extent the officer alleged the County’s failure to implement or effectively implement an early warning system, which had been adopted by the county. 370 F.Supp.2d at 1255.

In *Kaisner*, a motorist sued the sheriff’s department for injuries received when he was struck by a deputy’s vehicle after deputies had pulled him over for a suspected traffic violation. The deputies had parked their car one vehicle length behind the motorist’s vehicle. The motorist got out of his vehicle and placed himself between the two vehicles, where he stayed after a deputy told him not to approach any closer. The deputy’s vehicle was then struck from behind and knocked into the motorist’s vehicle, crushing the motorist between the two vehicles.

This Court held that the deputy's actions in placing the motorist between the two vehicles were operational and not subject to sovereign immunity. Once the officers made the discretionary decision to pull the motorist over, their actions in conducting the traffic stop were operational, and not immune.

SBAC has previously, and erroneously, argued that Winslow framed her claims in an attempt to circumvent Florida law and create a legally cognizable action where none exists. At its essence, Respondent is again expected to contend that Winslow is simply claiming that SBAC decided to place a bus stop in a dangerous location and then failed to warn parents and students about the obvious danger of crossing a street mid-block. However, it is SBAC, not Winslow, that is ignoring several inconvenient truths.

Actually, SBAC had already recognized that requiring students to cross a main municipal artery, mid-block, where there was no crosswalks or signal, created a foreseeable zone of risk under Dutko. The SBAC's bus boarding procedure whereby students living on the south side were not to cross SW 20<sup>th</sup> Avenue until the bus stopped, deployed its safety signals and the school bus driver gave the "all clear" sign is direct evidence of SBAC's recognition that it had created a zone of risk.

Winslow does not question the SBAC's right to select a location for the bus stop, or its right to design the bus to have two student collection areas. Winslow

simply pled that having exercised its planning level discretion to locate and design the bus stop, SBAC had a duty to manage and operate the bus stop according to its design. This is an operational function for which the SBAC has no sovereign immunity. In *Hollis v. School Board of Leon Co.*, 384 So.2d 661, 666 (Fla. 1<sup>st</sup> DCA 1980) the First District held the school board owed an operational duty to inspect bus mirrors to ensure proper placement and to instruct drivers to report blind spots. Having undertaken to transport students, the school board had to perform that duty in a non-negligent manner.

Winslow specifically alleged that neither she nor Miss Chancey were aware of the crossing/boarding procedures, and had they been aware of the established boarding procedures, Miss Chancey would have used the bus stop as designed, and followed any established procedures. Had Miss Chancey waited at the south gathering point for the arrival of the bus, this accident would never have happened.

Moreover, Winslow did not allege that SBAC was negligent for failing to warn about the dangers of crossing a street mid-block where there is no crosswalk or traffic signals. Rather, Winslow alleged that knowing the danger posed by locating the Lyons bus stop, and having adopted a design to ameliorate those dangers, SBAC owed a duty to clearly communicate its intended boarding procedures to students, parents and bus drivers and (if necessary) to take reasonable and available steps to

enforce its boarding proceedings and assure use of the bus stop as designed. Winslow should be given the opportunity to prove that SBAC breached that operational duty.

**V. SBAC HAD AN OPERATIONAL DUTY TO TRAIN AND SUPERVISE BUS DRIVERS WHEN IT HAD ACTUAL KNOWLEDGE THAT THE BUS STOP, AS OPERATED, WAS UNSAFE.**

Regarding Winslow's count for negligent training and supervision, SBAC took the position below that since it had no duty, no claim for negligent training or supervision could be sustained. As set forth above, SBAC clearly owed an operational duty to transport Miss Chancey with maximum regard for her safety. *Dixon*, 654 So.2d at 1232. This duty commences the moment she arrives at the school bus stop, because SBAC has the authority to control her behavior at that time. *Harrison*, 434 So.2d at 319; *Surette*, at 149, 152; *Dutko*, 483 So.2d at 494; *Rupp*, 417 So.2d at 667.

SBAC also argued below that Winslow did not allege that SBAC knew or should have known of the bus driver's alleged failure to enforce its on safety rules. However, at the hearing on SBAC's motion to dismiss, Winslow acknowledged that Count II had mistakenly failed to reallege Paragraph 16 (which specifically stated that "the SBAC received complaints ... that the Lyons bus stop was not safe as operated"). In response, the trial court amended Count II, by hand, to correct this

scriveners error. In any event, this was not a proper basis upon which Winslow's Second Amended Complaint could be dismissed with prejudice.

Had SBAC undertaken even a cursory investigation of these complaints about its bus stop, it would have determined that Ms. Jones, the school bus driver, knew students were not using the school bus stop as designed, and were not following the bus boarding procedures. Despite that knowledge, the bus driver did nothing to implement the design or require operational compliance with boarding procedures.

The only remaining ground asserted below by SBAC in support of its motion to dismiss Count II was the same it had asserted concerning Count I; i.e., that Winslow's negligence action was barred by sovereign immunity, which has already been addressed above.

### **CONCLUSION**

SBAC owed an operational duty to this middle school student to transport her with maximum regard for her safety. That duty began as soon as she arrived at the designated bus stop and she was subject to SBAC's authority and control. Having designated a bus stop which created a foreseeable zone of risk for students like Miss Chancey, and having designed a plan and policy to ameliorate the zone of risk it created, SBAC is not immune for negligently failing to implement its plan, or negligently failing to operate its bus stop as designed, because of its failure to communicate, monitor and enforce established boarding procedures.

Wherefore, Petitioner respectfully requests that this Court reverse the ruling of the trial court and the First District Court of Appeal, reinstate her Second Amended Complaint, remand this case for further proceedings consistent with the Court's ruling, and for such further relief as may be appropriate under the existing facts and applicable law.

Respectfully submitted this 4<sup>th</sup> day of August, 2011.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to **David M. Delaney, Esq.** and **Elizabeth S. McKillop, Esq.**, Dell Graham, P.O. Box 850, Gainesville, FL 32601, attorneys for Respondent School Board of Alachua County, this 4<sup>th</sup> day of August, 2011.

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Attorney

**CERTIFICATE OF COMPLIANCE**

In accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, Plaintiff/Appellant has used 14 point times New Roman throughout this Initial Brief.

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Attorney