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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2013-1834

DISTRICT COURT CASE NO. 4D11-3004

PALM BEACH COUNTY SCHOOL BOARD a/k/a SCHOOL DISTRICT OF PALM BEACH COUNTY,

Petitioner,

v.

JANIE DOE 1, a minor child, by and through SILVANIA MIRANDA, her Parent and Natural Guardian, et al.,

Respondents.

Discretionary Review of a Decision
of the District Court of Appeal, Fourth District

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Palm Beach County School Board ("School Board") premises its appeal on a misstatement of well-settled Florida law, as enunciated by this Court and *all* the District Courts of Appeal. The School Board effectively suggests that this Court retreat from its most recent holdings and ignore the 1967 amendments to the Florida Code of Civil Procedure 1.190(c) that long ago fundamentally changed the standard for the relation back of amendments to pleadings.

In Respondents/Plaintiffs' original complaint, Janie Does 1 through 4 ("Janie Does") sought redress from the School Board because their teacher, Blake Sinrod, molested them after Sinrod was allowed to remain in his position although the School Board knew or should have known that he had engaged in similar behavior with previous students. R.1-26; A.Exh.A.[1] Plaintiffs' claims against the School Board under 20 U.S.C. §§1681, *et seq.* ("Title IX") are no different as they also arise out of the School Board's failure to take appropriate action in response to reports that Sinrod had molested a student. R.626-383; A.Exh.D. This failure to act led to the subsequent molestation of the Janie Does. Since the filing of Plaintiffs' original complaint, the School Board has had – without any doubt – fair notice that *all* the Janie Does' claims arise out of this very same conduct and occurrence.

In arguing that the Title IX claims arising out of these same facts do not

[1] "R" means Record on Appeal, and "A" means Respondents' Appendix, which includes Respondents' Original Complaint and all of its amendments.

relate back to the girls' negligence claims, the School Board's Initial Brief ("IB") reflects a fundamental misunderstanding of the relation-back doctrine. Although *historically* such amendments only related back if they did not create a "distinct cause of action," since the 1967 Amendments, new claims relate back to an original complaint, and are not barred by the statute of limitations "[w]hen the claim or defense asserted in the amended pleading *arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading*." Rule 1.190(c). This is the consistent position of this Court *and* all of the District Courts of Appeal. *See, e.g., Caduceus Properties, LLC v. Graney*, 137 So. 3d 987, 989 (Fla. 2014); *Mainlands Constr. Co. v. Wen-Dic Constr. Co*., 482 So. 2d 1369, 1370 (Fla. 1986); *Board of Trustees v. Walton County*, 121 So. 3d 1166, 1169-70 (Fla. 1st DCA 2013) ("*Walton County*"); *Fabbiano v. Demmings*, 91 So. 3d 893, 895 (Fla. 5th DCA 2012); *Armiger v. Associated Outdoor Clubs, Inc*., 48 So. 3d 864, 870 (Fla. 2d DCA 2010); *Flores v. Riscomp Indus., Inc.*, 35 So. 3d 146, 148 (Fla. 3d DCA 2010)(the relation doctrine is to be liberally applied with "the test to be whether 'the original pleading gives fair notice of the *general fact situation* out of which the claim or defense arises.'")(emphasis added); *Steinberg v. Kearns*, 907 So. 2d 691, 693 (Fla. 4th DCA 2005)(new claims are permissible when based on the same "the same general factual situation."). [2]

The authorities cited by the School Board do *not* lead to a contrary conclusion. Instead, they confirm that the Fourth District Court of Appeals' opinion in this matter, *Janie Doe 1 v. Sinrod and Palm Beach Cnty. School Bd.*, 117 So. 3d. 786 (Fla. 4th DCA 2013)(the "Opinion"), was decided correctly and consistently with uniform and well-settled Florida precedent.

STATEMENT OF FACTS AND THE CASE

A. SUMMARY OF RELEVANT FACTS.

During the 2004-2005 school year the Janie Does attended Coral Sunset Elementary School, operated by the School Board. *E.g.*, R.3, ¶¶12-13; R.557, ¶¶1-2. The School Board employed Blake Sinrod as the teacher assigned to the Janie Does' third-grade class. Unbeknownst to the girls and their parents, Sinrod had a history of inappropriately touching girls in his classroom. *E.g.*, R.6, ¶21; R.557, ¶4 and 561, ¶21. While he was their teacher, Sinrod sexually assaulted the Janie Does by touching their breasts and vaginal areas both on and under their clothes. *E.g.*, R.3, ¶13; R.557, ¶3; R.559, ¶13.

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[2] The only arguable exception has been the recent decision of the Third District Court of Appeal in *Kopel v. Kopel*, 117 So. 3d 1147 (Fla. 3d DCA 2013), review of which is concurrently pending before this Court. However, to the extent that the Third DCA's decision suggests that a claim does not "relate back" simply if it is a "new and distinct cause of action," *Kopel* is at odds with the holdings of all other courts in this state. Moreover, the School Board's counsel has already argued in *Kopel*, in the 3rd DCA and before this Court, that *Kopel* is contrary to the Opinion, as well as the holdings of this Court and the other DCAs that it now claims are contrary to the Opinion.

Plaintiffs allege that Sinrod had engaged in other similar conduct with students during the past years when he taught for the School Board. *E.g.*, R.6, ¶21; R.557, ¶4; R.561-62, ¶21. Although the School Board was on notice of Sinrod's improper conduct, it failed and refused to investigate other incidents and, as a result, failed to take action such as the dismissal of Sinrod which would have protected the Janie Does from being sexually assaulted by him. *E.g.*, R.6-7, ¶¶21-23; R. 561-62, ¶21.

As a result of Sinrod's sexual assaults, and the School Board's negligence and deliberate indifference to prior reports of Sinrod's sexual assaults, including its failure to investigate, the Janie Does have suffered, and continue to suffer, severe emotional damage. *See, generally*, Plaintiffs' Complaints at R.1-26, 56-75, 95-120, 556-612, and 626-683,[3] and Respondents' Appendix.

B. PROCEDURAL HISTORY

The instant appeal relates to the addition of claims under 20 U.S.C. §§1681, *et seq.* ("Title IX") against the School Board in the Janie Does' Third Amended Complaint. Like the negligence claims in their original complaint, these claims against the School Board arise out the exact same facts, *i.e.*, the School Board's failure to take appropriate measures to protect the Janie Does from Sinrod despite

[3] Plaintiffs' Third Amended Complaint appears at R.556-612, R.626-683 and A.Exh.D.

knowledge, and reason to know, that he had previously acted inappropriately with other girls in his classes.

The Janie Does filed their original complaint against the School Board on July 26, 2006. R.1. The original, and subsequent first and second amended complaints, alleged causes of action for negligence against the School Board. *See* A.Exhs.A-C. They asserted that the School Board knew or should have known of Sinrod's propensities, kept him as a teacher, and assigned the girls to his classroom. *E.g.*, R.6, ¶21; R.59, ¶20; R100, ¶21; 561, ¶21.

In 2011 the Janie Does retained the undersigned, and amended their complaint to allege separate claims for negligent supervision, negligent retention, negligent infliction of emotional distress, and violation of Title IX. R.662-683. Like their negligence claims, the Janie Does' Title IX claims assert that the School Board's failure to address prior reports concerning Sinrod amounted to deliberate indifference, resulted in him remaining employed, and lead to him being in a position to sexually assault the Does. R.604-611. These allegations concerning prior reports and failure to act are also incorporated in the Does' negligent supervision, negligent retention, and negligent infliction of emotional distress. *E.g.*, R. 557, ¶¶1-4; R. 592, ¶¶124-125; R.595-96, ¶¶136-141; ¶¶160-67. The School Board does *not* challenge the addition of the new claims – other than the Title IX claims – or the inclusion of the more specific allegations in those claims.

The girls' Title IX claims are based on the *same conduct, transaction, and occurrence* as their original negligence claims, and add only Federal statutory grounds for relief. Their original complaint and its amendments alleged that the School Board had been previously notified of Sinrod's sexual misconduct toward minors, failed to investigate such conduct, and failed to take any corrective action or otherwise protect the Janie Does' despite such notice. *See, e.g.*, R.1-26 at ¶¶18-24 (original Complaint); R-56-82 at ¶¶24-32 (Amended Complaint); R.95-120 ¶¶18-24 (Second Amended Complaint). They base their Title IX claims on these same core facts. *See, e.g.*, R.626-683, ¶¶1-4 & 192-200 (Title IX allegations in Third Amended Complaint).

The School Board moved to dismiss the Janie Does' Title IX claims on the grounds, *inter alia*, that the claims were barred under the applicable statute of limitations. R.525-529. It argued the statute of limitations was not tolled by the filing of the initial complaint because the Title IX claims did not "relate back" to that original complaint. R.525-529. The Janie Does countered that the Title IX claims *did* relate back to their original complaint, because they arose out of the same "conduct, transaction, or occurrence" as the negligence claims, the standard set forth in Rule 1.190(c). *See* R.952-954.

On July 11, 2011, the trial court dismissed the Janie Does' Title IX claims. *See* R.1184-1190. It concluded, *inter alia*, that the Janie Does' Title IX claims

were time-barred by the four-year statute of limitations under Florida Statute section 95.11(3) because these claims were "new causes of action" that, accordingly, did not relate back to the original filing of their complaint on July 26, 2006 that plead causes of action sounding in negligence. R.1187-1189.

The Janie Does appealed the trial court's dismissal of their Title IX claims. The Fourth DCA considered the ruling *de novo* and held that the trial court had improperly dismissed the Title IX claims because the Title IX claims related back to the original negligence claims and are not time-barred. *Janie Doe 1,* 117 So. 3d at 790. In rejecting the School Board's suggestion that the claims could not proceed because the Title IX claims were "different causes of action" from negligence, the Fourth DCA concluded that "a new cause of action—and even a new legal theory—can relate back to the original pleading so long as the new claim is not based on different facts, such that the defendant would not have 'fair notice of the general factual situation.'" *Id.* at 789 (citation omitted).

The School Board's Petition for Review to this Court followed.

SUMMARY OF ARGUMENT

The Janie Does' Title IX claims are not time-barred because they arise out of "the same general factual situation" as their timely negligence claims and, accordingly, "relate back" to the filing of their original lawsuit. The Janie Does' Title IX claims add a new legal theory for relief that arises out of the very same conduct and occurrence pled in their original complaint, that teacher Sinrod sexually assaulted them as a result of the School Board's failure to take appropriate action in their supervision and retention of Sinrod. *All* of the claims allege that the School Board was on notice that Sinrod had touched other female students in his classroom inappropriately, but had failed to take any – let alone any appropriate – action in response to this information.

The girls' negligent supervision and negligent retention claims – the addition of which the School Board does not challenge – assert that this inaction was negligent. The Title IX claims plead that this *same inaction* amounted to a violation of the School Board's obligations under Title IX.

Rule 1.190(c) provides that a new claim relates back to an earlier complaint where, as here, the new claim arises out of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Therefore, because the Title IX claims in the Third Amended Complaint arise out of "the same general factual situation" as that set forth in their earlier complaints,

the fact that the legal theories are not identical does not affect the application of the relation-back doctrine. This conclusion is wholly consistent with the holdings of this Court, and all of the District Courts of Appeal.

The sole exception, arguably, is the decision of the Third District Court of Appeals in *Kopel*, which also is pending review before this Court. To the extent that *Kopel* applied the pre-1967 "new cause of action test," that decision must be rejected because *it* is wholly inconsistent with the holdings of this Court and all remaining Districts.

ARGUMENT

Plaintiffs' Third Amended Complaint added new counts against the School Board for Violation of Title IX, as well as for negligent supervision, negligent retention, and negligent infliction of emotional distress. These new claims, like all of the prior claims, were alleged by the Janie Does against the School Board. Like the negligence claims in all of their prior complaints, all of the new claims, including but not limited to the Title IX claims, are based on the *same* core of underlying facts of which the School Board as long been aware, *i.e.* that School Board failed to act following prior complaints that Sinrod molested girls in his classroom, did not protect the Janie Does, and allowed Sinrod to molest them.

The Janie Does' Title IX claims are not time-barred because, as the Fourth DCA held in the Opinion, they arise out of the same general factual situation as

their negligence claims. Florida Rule of Civil Procedure 1.190(c)("Rule 1.190(c)") provides that "an amended pleading relates back to the date of the original pleading when it arises 'out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .'" *Fabbiano v. Demings*, 91 So. 3d at 894; *accord Caduceus*, 137 So. 3d at 989. As required by Rule 1.190(c), the Title IX Claims are based on the identical "conduct, transaction, or occurrence" set forth in the Janie Does' original and subsequent pleadings. For this reason, the School Board has been on fair notice of the basis of the Janie Does' Title IX claims since the filing of their original complaint and, therefore, they relate back.

I. THE FOURTH DCA'S OPINION FOLLOWS THE RULE THAT NEW CLAIMS "RELATE BACK" TO AN EARLIER COMPLAINT WHEN BASED ON THE SAME "CONDUCT, TRANSACTION OR OCCURRENCE."

The Fourth DCA agreed with the Janie Does that "the trial court erred in dismissing their Title IX claims because the claims were not time-barred." 117 So. 3d at 789. It explained that "a new cause of action – and even a new legal theory – can relate back to the original pleading so long as the new claim is not based on different facts, such that the defendant would not have 'fair notice of the general factual situation.'" *Id.* at 7 (*quoting Dailey v. Leshin*, 792 So. 2d 527, 532 (Fla. 4th DCA 2001)).

Relying on the Fifth DCA's decision in *Fabbiano*, the Fourth DCA explained that amendments based on the same general factual situation relate back even where there is a change in the precise legal theory asserted. 117 So. 3d at 789-90 (citing *Fabbiano*, which held that a newly-pleaded battery claim related back to the plaintiff's original negligence claim). It noted that *Fabbiano* had quoted from the Fourth DCA's earlier decision in *Associated Television & Comm., Inc. v. Dutch Village Mobile Homes of Melbourne, Ltd*., 347 So. 2d 746, 748 (Fla. 4th DCA 1977), which explained that:

> "[i]f the amendment shows the *same* ***general*** *factual situation as that alleged in the original pleading*, then the amendment relates back *even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory* upon which the action is brought."

Id. at 790 (emphasis added)). The Fourth DCA concluded that "the trial court erred in finding that the children's Title IX statutory claims did not relate back to the negligence claims alleged in the original pleading. *Both claims arose from the same conduct and resulted in the same injury*." *Id.* at 790.

The Fourth DCA's Opinion is wholly consistent with recent decisions of *all* of the other District Courts of Appeal in Florida. *Without exception*, Florida's DCAs allow amendments that add legal theories where, as here, the claims "arose from the same conduct and resulted in the same injury" and the defendant had "fair notice of the general factual situation." The Opinion properly concluded that

the Does' Title IX claims are based on the *identical* operative factual allegations that Petitioner's actions put Sinrod in a position that allowed him to molest them although Petitioner knew, or should have known, that he would do so.

II. PLAINTIFFS' TITLE IX CLAIMS ARE BASED ON THE SAME CONDUCT, TRANSACTION AND OCCURRENCE AS PLAINTIFFS' ORIGINAL CLAIMS.

Unable to identify any new allegations in Plaintiffs' Third Amended Complaint, the School Board resorts to parsing out individual descriptors in the Title IX claim to deflect from the fact that the Title IX claims all arise out of the identical conduct, transaction and occurrence alleged against the School Board in all of Plaintiffs' prior complaints.[4]

It is abundantly clear that, even as summarized by Petitioner, the *factual underpinnings* for Appellants' Title IX claims are *identical* to those which provide the basis for their negligence claims because they arise from the *identical*

[4] The School Board even goes so far as to suggest that *non time-barred* amendments are disallowed if they "will change an issue, vary the grounds for relief, or if [they] require proof of different essential facts or if they state a new, different or distinct cause of action." IB at 26 (citations omitted). Again, it relies only on cases from 1949 and earlier, other than the *United Telephone*'s inapposite *dicta*. This is *not* a correct statement of the law over 60 years later. *Cf.* Fla. R. Civ. Proc. 1.190(a)(containing *no* such limitations but explicitly stating that "[l]eave of court shall be given freely when justice so requires"); *Trotter v. Ford Motor Credit Corp.*, 868 So. 2d 593, 595 (Fla. 2d DCA 2004)("A court should not dismiss a complaint without leave to amend unless the privilege of amendment has been abused or it is clear that the complaint cannot be amended to state a cause of action."; citation omitted); *Florida Nat'l Org. of Women, Inc. v. State*, 832 So.2d 911, 915 (Fla. 1st DCA 2001)(same).

"conduct" and "occurrences" described in their original negligence claims. *Cf.* IB 10-11 *with* IB 8-9. Other than adjectives and legally-descriptive terms and conclusions, each of the factual allegations which the School Board claims is distinct, can be found in the Does' initial, July 2006 complaint, and all its subsequent amendments. Their original complaint and all of its amendments alleged that the School Board had been previously notified of Sinrod's sexual misconduct toward minors, failed to investigate such conduct, and failed to take any corrective action or otherwise protect the Janie Does' despite such notice. *See* R.1-26, ¶¶18-24 (original Complaint); R.56-82, ¶¶24-32 (Amended Complaint); R.95-120, ¶¶18-24 (Second Amended Complaint). They base their Title IX claims on these same core facts. *See, e.g.*, R.626-683, ¶¶4 & 192-200 (Title IX allegations in Third Amended Complaint).

The School Board's attempt to distinguish the factual basis of the Title IX claims from the original negligence claims fails because the additional allegations are legal conclusions and descriptions of their rights under Title IX. For example, the School Board identifies the allegation that the girls' school received Federal financial assistance. This indisputable fact does not vary the basis for the claims, but only explains the legal basis for the applicability of Title IX. *See* 20 U.S.C.A. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded

from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance*").

Similarly, that the girls had "a right not to be subject to sexual discrimination, harassment or abuse" is a statement of law based on the application of Title IX (*Gebser v. Lago Vista Independent School Dist*., 524 U.S. 274, 287-88 (1998)), just as the allegation that Sinrod's sexual assault of the girls was "sexual discrimination and/or harassment prohibited by Title IX, 20 U.S.C. §§ 1681, *et seq*" is a legal conclusion based the same facts as the negligence claims, *i.e.* that Sinrod sexually assaulted the girls. *Doe v. School Board of Broward County,* Florida, 604 F.3d 1248, 1254 (11th Cir. 2010)("a teacher's sexual harassment of a student constitutes actionable discrimination under Title IX")(citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)).

The allegation that prior reports to the vice-principal and principal were "reports to appropriate persons who had authority to take corrective action" is a self-obvious descriptive term applied to the principal and vice-principal identified in the original Complaint, using legal terminology applicable to Title IX cases. *Gebser*, 524 U.S. at 290 ("a damages remedy will not lie under Title IX unless an official who at a minimum has *authority to address* the alleged discrimination and to *institute corrective measures* on the recipient's behalf has *actual kno*wledge of discrimination in the recipient's programs and *fails adequately to*

respond")(emphasis added); *Doe v. School Board of Broward County*, 604 F.3d at 1255 (principal was "an 'appropriate person' to receive actual notice under Title IX"). That the School Board, through these senior administrators, had actual notice, and that the principal and vice-principal had authority to address the abuse and could institute corrective measures, are legal conclusions under Title IX based on their inherent authority of the legal criteria required for imposing liability under Title IX. *Gebser*, 524 U.S. at 290. Moreover, all of these allegations are akin to the same allegations in the Janie Does' original complaint and prior amendments that previous reports of Sinrod's abuse of young girls had been made to the school and were ignored.

Likewise, the allegation that the actions, and inactions, by the vice-principal, principal, and School Board were "official decisions" is not a new fact but, again, a legal conclusion based on the original facts that form a requirement for liability under Title IX. *Id.* ("The premise, in other words, is an *official decision by the recipient not to remedy the violation*.")(emphasis added). In fact, the School Board's duty and ability to act, by definition, are an essential element of the girls' negligence claims. *See, e.g., Collins v. School Board of Broward County*, 471 So. 2d 560, 563-64 (Fla. 4th DCA 1985)(discussing duty of school board in claim of negligent supervision resulting in sexual assault of student); *accord School Board of Orange County v. Coffey*, 524 So. 2d 1052, 1053 (Fla. 5th

DCA 1988), *rev. den.* 534 So. 2d 401 (Fla. 1988)("The school board has a common law duty to protect others from the result of negligent hiring, supervision, or retention").

Finally, that the School Board's inaction amounted to "deliberate indifference" is a legal conclusion descriptive of the underlying facts that forms an element of a Title IX claim. *See Gebser*, 524 U.S. at 290 ("the response must amount to *deliberate indifference* to discrimination")(emphasis added).

In short, each of the items are merely descriptive terms applied to the same conduct and occurrences, and legal conclusions derived from the same pattern of facts, as that asserted in the original complaint. The School Board's argument that these new terms somehow suggest that the Title IX claims do not "relate back" is based on a fundamentally flawed assumption that *additional descriptive* facts preclude the conclusion that the Title IX claim arises out of the same "conduct, transaction, or occurrence" as the Does' earlier claims. The School Board cites no authority for this theory, which would be contrary to the law as expressed by this Court and all other DCAs.

Ultimately, the Title IX claims amplify the negligence claims by explaining that, *as a matter of law*, the school's administrators, as the School Board's designees, had duties under Federal law to assure that the Janie Does would receive an education in a safe, and harassment-free, environment. The School

Board was required to protect the girls from sexual assault by their teachers, and should have addressed earlier reports of inappropriate behavior by Sinrod. This duty is akin to the School Board's duty of care to protect the Janie Does from reasonably foreseeable harm that gives rise to their negligence claims.

Tellingly, the School Board did **not** argue in the trial court or before the Fourth DCA that the Janie Does' negligent supervision and retention claims did not relate back to their original complaint, even though these claims – like the Title IX claims – are also based on the fact that a person with the ability to supervise Sinrod and determine whether or not he should be retained as a teacher, was aware of the prior allegations that he had molested students, but did nothing about it. As the Fourth DCA properly concluded, the Does' Title IX claims – like their negligent supervision and retention claims – "arose from the same conduct and resulted in the same injury" and, therefore, relate back. 117 So.3d at 788, 790.

III. THE OPINION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND ALL OTHER DCAS APPLYING THE CURRENT RULE 1.190(C) STANDARD.

The School Board relies on antiquated decisions that have no bearing on current Florida law concerning the relation back of amendments. It simultaneously ignores the very recent holdings by this Court and the District Courts of Appeal. Accordingly, a brief history of the applicable standards, and the wholesale revision of the law since 1967, is appropriate.

In Florida, prior to 1967, amendments to complaints that added new claims did not "relate back" to the filing of the original complaint, and were barred when filed after the expiration of the statute of limitations if they set forth "new causes of action." *See, e.g., Dunn v. Campbell,* 166 So. 2d 217, 218 (Fla. 2d DCA 1964)(following the now-defunct rule that "'if the issues were changed or new ones introduced or the grounds of relief materially varied, the matter could not be introduced in an amendment.'"). In 1967 the Legislature amended Rule 1.190(c) to provide as follows:

> **Relation Back of Amendments.** *When the cla*im or defense asserted in the amended pleading *arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back* to the date of the original pleading.

Fla. R. Civ. Proc. 1.190(c)(emphasis added). Notably absent from the current version of Rule 1.190(c) is *any* mention of the term "new cause of action," or the suggestion that its language is circumscribed by the precision of the facts pleaded or any differences in the nature of the claims. To the contrary, it focuses solely on whether the new claim "*arose out of the conduct, transaction, or occurrence.*"

In fact, the commentary to Rule 1.190(c) states unequivocally that the current rule rejects the prior "new cause of action" standard:

> The principle of relation back of amended pleadings existed *in prior law, but it was limited to an amendment which did not state a new cause of action.* The harshness of the rule was modified by a liberal construction of a "cause of action." In accord with this liberal

> application of the principle, *the rule requires only that the amendment arise out of the "conduct, transaction, or occurrence" set forth in the original pleading*.

Fla. R. Civ. P. 1.190 cmt. Relation Back (1967) (emphasis added); *see Fabbiano*, 91 So. 3d at 895 ("the rule's intent was to alter the 'cause of action' test, embodied in the prior law, in favor of a more liberal rule based upon 'conduct, transaction, or occurrence.'").

Accordingly, the School Board's citation to, and reliance on, cases applying the older standard is misplaced.

A. This Court's Decisions Under the 1967 Amendments to the Rule 1.190(c) Are Consistent with the Opinion.

Contrary to the School Board's suggestion in its Opening Brief, this Court *has* discussed the relation back standard since the 1967 Amendments. Earlier this year this Court applied the relation back doctrine and held "that an amended complaint filed after the statute of limitations has expired, naming a party who had previously been made a third-party defendant as a party defendant, relates back under rule 1.190(c) to the filing of the third-party complaint." *Caduceus Properties, LLC v. Graney*, 137 So. 3d 987, 989 (Fla. 2014). In doing so, this Court endorsed the Fifth DCA'S decision in *Gatins v. Sebastian Inlet Tax District*, 453 So. 2d 871 (Fla. 5th DCA 1984), which held that:

> an amended complaint naming the third-party defendant as a party defendant to the original action was not barred by the statute of limitations, as long as the third-party defendant had been brought into the lawsuit within the limitations period, and "the plaintiff's claim concerns the same issues as are raised in the third party complaint." . . . In so holding, the Fifth District reasoned that this was "*consistent with the principles governing limitations of actions in our state and with the philosophy behind our rules of civil procedure*."

137 So. 3d at 991 (emphasis added; citation omitted). This Court cited with approval cases from the First, Third, and Fifth Circuits, including *Flores*, 35 So. 3d 148, which "explain[ed] that the relation-back doctrine is to be liberally applied and articulating 'the test to be whether "the original pleading gives fair notice of the *general fact situation* out of which the claim or defense arises."'" 137 So. 3d at 992 (emphasis in original). This Court concluded that:

> the purpose underlying statutes of limitations — namely, preventing lack of notice and prejudice to the defendant — is not implicated where the plaintiff's amended complaint relates back to the filing of the third-party complaint, as long as the third party was brought into the suit prior to the expiration of the statute of limitations and the plaintiff's claims *concern the same conduct, transaction, or occurrence* at issue in the third-party complaint.

Id. (emphasis added). The same principle applies here, where the School Board has always been a party to this action. The gravamen of the Janie Does' claims has always been that their molestation at Sinrod's hands resulted from the School Board's failure to take appropriate actions in response to reports of similar conduct with other students.

Despite this clear pronouncement, the School Board cites *footnoted dicta* in its *only* referenced post-1967 decision of this Court, *United Telephone Co. v. Mayo*, 345 So. 2d 648 (Fla.1977). *Mayo*, however, is not a case decided under Rule 1.190(c), let alone does it even mention the Rule. *Mayo* involved a plaintiff's proposed post hearing attempt in a proceeding before the Florida PUC to amend his claim after he had introduced all of his evidence. There, this Court observed – without citation to, or discussion of, Rule 1.190(c), and clearly with regard only to the specific facts and procedural posture of *Mayo* – that "the right to amend does not authorize plaintiff to state new and different causes of action." *Id.* at 655 n.6 (citing decisions from 1926, 1938 and 1939). This Court reasoned that:

> we cannot say that the Commission acted unlawfully because it *refused petitioner the opportunity to alter its theory of the case after petitioner's initial hypothesis was unsuccessful*. *Judicial and administrative economy will not permit the amendment* of a declaration in such a manner as to *allege entirely new items* on which recovery is claimed ***after all the evidence has been introduced.***

Id. at 655 (emphasis added). In this case the Janie Does are not alleging "entirely new items" and are not doing so "after all the evidence has been introduced." At bottom, *Mayo* was *not* a general pronouncement of Florida law concerning the relation back of amendments of complaints, did *not* address Rule 1.190(c), let alone the 1967 Amendments, and is a completely inapposite matter.

All of the other cases from this Court cited by the School Board pre-date 1967 and have no bearing on the current standard for the relation back of

amendments. For example, despite the School Board's heavy reliance on it, there is no plausible relevance to this Court's 1912 decision in *La Floridienne Atlantic Coast Line R. Co.*, 58 So. 186 (Fla. 1912), or *Livingston v. Malever*, 137 So. 113 (Fla. 1931). As explained recently by the Fifth DCA in *Fabbiano*,

> reliance on [*Livingston*], for the proposition that any new 'cause of action' does not relate back to the original filing, is likewise misplaced. *Livingston* was decided before the modern rule was adopted. As the commentary to rule 1.190 makes clear, *the rule's intent was to alter the "cause of action" test, embodied in the prior law, in favor of a more liberal rule based upon "conduct, transaction, or occurrence*."

91 So. 3d at 895 (emphasis added).

The balance of the School Board's pre-1967 cases support the Fourth DCA's Opinion. In *Atlantic Coast Line R. Co. v. Edenfield*, 45 So. 2d 204, 205 (Fla. 1950) this Court did *not* state that the evidence to support a new claim had to be identical. Instead, it concluded that, the trial court did not abuse its discretion in allowing an amendment where new allegations "*did no more than amplify the allegations of the original declaration*." (Emphasis added.) Similarly, the Janie Does' Title IX claims "amplify" their negligence claims.

Gables Racing Ass'n v. Persky, 180 So. 24 (Fla. 1938) was *not* a "relation back" decision, but addressed the ability of a party to amend to "conform to proof." *Id.* at 26. Nevertheless, this Court opined that, where, "[a]fter all the

evidence and testimony had been introduced, it appeared to the plaintiff that the note and mortgage . . . might not be strictly enforceable,"

> *changing the bill so that the court might enforce it as an equitable mortgage or lien and a prayer to that effect is not a new and different cause of action* and the chancellor correctly allowed such an amendment in view of the fact that he allowed further pleadings on the part of the defendant.

Id. (emphasis added).

Accordingly, the Opinion is fully consistent with, and applied the same standards as, the current, relevant holdings of this Court.

B. The Fifth DCA's Decision are Consistent With the Opinion.

Despite the School Board's attempt to characterize the 2012 decision of *Fabbiano* as inconsistent with the Opinion (IB, pp. 3-4 & 34-35), it would be difficult to identify a case more in line with it. The Opinion relied on, and quoted from, *Fabbiano*, in reaching its conclusion that the trial court had erred because the Janie Does' Title IX and negligence "claims arose from the same conduct and resulted in the same injury." *Janie Doe 1*, 117 So. 3d at 789-90.

Confirming that *Fabbiano* sets forth an accurate statement of the current law concerning the relation back doctrine, this Court also cited *Fabbiano* in support of its holding in *Caduceus*. 137 So. 3d at 922. In *Fabbiano*, the Fifth DCA held that a newly-pleaded, and otherwise untimely, battery claim related back to the plaintiff's original negligence claim. 91 So. 3d at 894. The *Fabbiano* court

reached this conclusion although "battery," unlike negligence, requires evidence of *intent* to harm, as opposed to an accidental injury due to a breach of duty. *See, e.g., Copeland v. Albertson's, Inc.*, 947 So. 2d 664, 665 (Fla. 2d DCA 2007)(noting that civil battery is an intentional tort). In addition, a battery claim may give rise to damages greater than those available for a negligence claim because a plaintiff may obtain punitive damages. *See, e.g., Canseco v. Cheeks*, 939 So. 2d 1122, 1123 (Fla. 3d DCA 2006)("intentional battery supplies the requisite proof of malice, justifying a punitive damages award")(citation omitted); *Brown v. Ford*, 900 So. 2d 646, 648 (Fla. 1st DCA 2005)("In order to be entitled to an award of punitive damages, a complaining party must show that the defendant acted with malice, moral turpitude, wantonness, willfulness, or reckless indifference to the rights of others.")(citation omitted).

The Fifth DCA concluded that, despite the slightly different facts required, the different legal conclusions necessary for liability, and the possibility of a greater damages award, the "battery" claim related back to the plaintiff's "negligence" claim because it arose under "*identical operative facts*" as "the amended complaint was based upon the *same conduct, transaction, or occurrence*." 91 So. 3d at 893-94 (emphasis added).

As *Fabbiano* explains, the "rationale" for Rule 1.190(c)'s expression of the relation back doctrine "is *grounded in the notion of fair notice*. When the original

complaint gives fair notice of the factual underpinning for the claim, an amendment to state a *new legal theory should relate back*." 91 So. 3d at 895 (emphasis added). In contrast, the rule proposed by the School Board would have required that the battery claim *not* relate back to the plaintiff's negligence claim because of the differences in proving a negligent, as opposed to an intentional, injury, and the potentially different remedies, even though "[b]oth claims arose from the same conduct and resulted in the same injury." *Fabbiano,* however, confirms that the rule of liberal amendment "*applies even when the new theory of action is of a different ilk altogether*" including a change of "*a common-law claim to a statutory claim or vice-versa*." *Id.* at 896 (emphasis added)(citing with approval *Armiger*, 48 So. 3d at 870).

In contrast, the School Board's reliance on *Estate of Shearer v. Agency for Health Care Admin*, 737 So. 2d 1229 (Fla. 5th DCA 1999) is wholly misplaced as it involves *neither* the relation back doctrine in Rule 1.190(c) *nor* amendments to complaints. To the contrary it concerns the ability to amend a *probate claim* after the expiration of the claims period under Fla. Stat. § 733.702(1) which bars claims against an estate unless they are filed within three months of the Notice of Administration. 737 So. 2d at 1230. Accordingly, the School Board's citation to this decision as evidence of "conflict" among the Appellate Districts is elusive.

Finally, *West Volusia Hosp. Auth. v. Jones,* 668 So. 2d 635 (Fla. 5th DCA 1996), addresses Rule 1.190(c) but is not inconsistent with the Opinion. There, the court held that an amendment to add a father's claim for loss of filial consortium was distinct from that of the mother. 668 So. 2d at 636. As later clarified by the Fifth DCA in *Fabbiano*, in *West Volusia Hospital* "[t]he cause of action was 'distinct' because it sought recovery for *distinct injuries and damages* involving a *different plaintiff*." *Fabbiano*, 91 So. 3d at 894-95 (emphasis added). *Fabbiano* stressed that *West Volusia Hospital* and other decisions like it "pertain to a *narrow set of circumstances* wherein the proposed amendment, although emanating from the same set of operative facts, involved a *factually distinct claim*." *Id*. (emphasis added).[5]

The Opinion, consistent with *Fabbiano*, concluded that the Janie Does' Title IX claims do *not* fall within the "narrow set of circumstances" where the same operative facts created a "factually distinct claim," let alone ones asserted by a new party or parties. 117 So. 3d at 789-90 (citing *Fabbiano*). Here, the same parties asserted the same facts, based on the same conduct, transaction, and

[5] This Court similarly discussed this narrow set of cases in *Caduceus*. There, this Court allowed a plaintiff to add a new time-barred party where the new party already was a third-party defendant and was aware that liability was sought from him over the same conduct, transaction, or occurrence. 137 So. 3d at 991. This Court, however, distinguished this situation from one where the time-barred party had not previously been a party to the action. *Id.* at 993-94.

occurrence, against the same defendant, adding only a new legal theory and prayer for relief.

C. **The Third DCA's Decisions are Consistent with the Opinion.**

Earlier this year, in a case not cited by the School Board, the Third DCA followed this Court's *Caduceus* decision, and other District Court cases upon which the Janie Does rely, in *Mender v. Kauderer*, 143 So.3d 1011 (Fla. 3d DCA July 23, 2014). The *Mender* court explained that "as long as the claims alleged in an amended pleading arise from the same 'conduct, transaction, or occurrence' alleged in an earlier pleading that was timely filed, the expiration of the statute of limitation in the interim will not bar the claims asserted in the amended pleading." *Id. Mender* concluded that amendments that changed the complaint from one for individual damages by a shareholder to ones asserted in a derivative capacity related back. *Id.* "Mender has stated viable causes of action and the characterization of the complaint as individual or derivative did not alter the underlying facts, circumstances, or parties, and gave fair notice to all parties of the general fact situation out of which the claims arose." *Id.*

In reaching its conclusion, the *Mender* court relied, in part, on its earlier decision in *Flores v. Riscomp Indus., Inc.*, 35 So. 3d 146 (Fla. 3d DCA 2010), another decision that the School Board does not cite. There, the Third DCA explained: "We have articulated the test to be whether '*the original pleading gives*

fair notice of the general fact situation *out of which the claim or defense arises,*'" and that "[t]he [relation back] doctrine is to be applied liberally to achieve its salutary ends." 35 So. 3d at 148 (emphasis added)(quoting *Kiehl v. Brown*, 546 So. 2d 18, 19 (Fla. 3d DCA 1989)). Although the School Board did not discuss *Flores* or *Kiehl*, this Court cited them with approval in *Caduceus* in support of the statement that "[p]ermitting relation back in this context is also consistent with Florida case law holding that rule 1.190(c) is to be liberally construed and applied". *Caduceus*, 137 So. 3d at 992.

In contrast, the decisions that the School Board asserts are inconsistent with the Opinion are wholly inapposite. For example, despite the School Board's assertion to the contrary (IB at 29) *Trumbull Ins. Co. v. Wolentarski*, 2 So. 3d 1050 (Fla. 3d DCA 2009) does *not* address the relation back of an amendment under Rule 1.190(c). Instead it addressed an *attorneys' fee award* that included time spent litigating issues *prior to* the plaintiff's addition of a PIP claim against his insurer, fees the plaintiff was not entitled to recover. *Id.* at 1053.

While *Daniels v. Weiss*, 385 So. 2d 661 (Fla. 3d DCA 1980) mentioned the term "new cause of action" while holding that a claim did not relate back to the original complaint, a review of its facts confirms that the court did not rely on this language in reaching its conclusion. *Id.* at 663. In *Daniels*, the amendment sought to add a **new plaintiff** to the lawsuit, the original plaintiff's wife. *Id.* ("An

amendment to the pleadings does not relate back to the date the original complaint was filed if the amendment states a new cause of action or adds a new party.").[6] To interpret the case as endorsing the pre-1967 standard for the relation back of amendments is not well-taken and, in any case, inconsistent with the more recent *Mender* and *Flores* decisions.

Finally, the School Board's reliance on *United States v. State*, 179 So. 2d 890 (Fla. 3d DCA 1965) is misplaced because that case was decided under the then-applicable Florida Rule of Civil Procedure 15.1, not Rule 1.190(c) as amended in 1967. There, the Third DCA based its decision on this Court's 1949 decision in *Warfield v. Drawdy*, 41 So. 2d 877 (Fla. 1949), a decision that has no arguable bearing on the interpretation of today's Rule 1.190(c).[7] Thus, the cases in the Third District also are wholly consistent with the Opinion.[8]

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[6] *And see Peters v. Mitchell*, 423 So. 983, 983-84 (Fla. 3d DCA 1982) and cases cited therein (rejecting the analysis in *Daniels*, addressing Rule 1.190(c), and concluding that a trial court abused its discretion in refusing to add the decedent's son to the wrongful death action filed by the decedent's personal representative where "the claim asserted in the amended complaint arises "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading" so as to relate back to the date of the original complaint as provided in Florida Rule of Civil Procedure 1.190(c).").

[7] *Warfield*, in turn, relied on three decisions by this Court dated 1907, 1936, and 1939, all decided under the antiquated and no longer applicable rule that is wholly inconsistent both with Rule 1.190(c) and the subsequent cases discussing, interpreting, and applying it, as discussed herein.

[8] *See infra* at p.35 for a discussion concerning *Kopel v. Kopel*.

D. The Second DCA's Decisions are Consistent With the Opinion.

The School Board's Opening Brief ignores the most recent decisions by the Second DCA on the relation back of claims, which are fully consistent with the Opinion. In 2010, in *Armiger v. Associated Outdoor Clubs, Inc*., 48 So. 3d 864 (Fla. 2d DCA 2010), the Second DCA quoted and followed the Third DCA in *Flores*, 35 So. 3d 146, in reiterating that "'the test [is] whether "the original pleading gives *fair notice of the general fact situation out of which the claim* or defense *arises*."'" (emphasis added; additional citations omitted). *Armiger* held that the plaintiff's new claims for breach of a non-delegable statutory duty related back to his direct negligence claims against the defendant, despite the different theories of liability, because the claims arose out of the same facts, *i.e.* his injuries from a slip and fall on the defendant's premises. 48 So. 3d at 866-67.

Similarly, *Dausman v. Hillsborough Area Reg'l Transit*, 898 So. 2d 213 (Fla. 2d DCA 2005), another case omitted by the School Board, held that the trial court "abused its discretion in denying [the] request to amend his complaint because [it was] . . . based on the same conduct upon which the original claim was brought; *it merely changed the legal theory of the action*." *Id.* at 215 (emphasis added).

Even the Second DCA's pre-1967 in *Keel v. Brown*, 162 So. 321 (Fla. 2d DCA 1964), *overruled on other grounds by Broward Builders Exch., Inc. v. Goehring*, 231 So. 2d 513 (Fla. 1970), articulated a standard under the *1954*

amendments to the Rules of Civil Procedure similar to that expressed in the Opinion.[9] There, after noting that the then-applicable rule was identical to the then-current Federal Rule of Civil Procedure 15(c), the court quoted from 3 Moore's *Federal Practice*, 2d ed., p. 852: "If the original pleading gives *fair notice of the general fact situation* out of which the claim or defense arises, an amendment which *merely makes more specific what has already been alleged generally, or which changes the legal theory of the action, will relate back* even though the statute of limitations has run in the interim." 162 So. at 323 (emphasis added).

The additional cases on which the School Board relies are either inapposite or consistent with the Opinion. *Cox v. Seaboard Coast Line*, 360 So. 2d 8, 9 (Fla. 2d DCA 1978), which predates both *Armiger* and *Dausman*, involves different claims *by different parties.* As a fundamental matter, *Cox* erroneously cited to the antiquated and irrelevant 1938 *Gables Racing Ass'n* and the 1965 *United States v. State*, 179 So. 2d 890 (Fla. 3d DCA 1965) cases in support of its statements that amendments would not relate back if they stated "new cause of actions." *See Cox*, 269 So. 2d at 9.

In *Cox*, the Second DCA ruled that a suit for a *father*'s wrongful death could not be amended to add claims for the *minor's* personal injuries since it

[9] *Kiehl* also notes that decisions pre-dating the *1954* amendments "are not now controlling." 162 So. 2d at 323.

involved different damages to a *different* plaintiff. *Id.* at 9. Thus, the Second DCA concluded that the damages to the plaintiff arising out of the wrongful death *of another person* are distinct from the damages *the plaintiff, himself,* may recover for his own injuries. In contrast, the Janie Does' Title IX claims, like all of their prior claims, seek to recover for their own, identical injuries, against the same defendant, as those raised in their original negligence claims.

In contrast to *Cox*, the Second DCA's more recent decision in *Arnwine v. Huntington National Bank, N.A.*, 818 So. 2d 621 (Fla. 2d DCA 2002) is completely consistent with the Opinion. *Arnwine* notes that Rule 1.190(c) generally "does not allow for the addition of a *new party*, and the *general rule* is that the addition of a *new party* will not relate back to the date of the original pleading." 818 So. 2d at 624 (emphasis added)(but holding that "the addition of a new party *will relate back* when the new party is sufficiently related to the original party that the addition will not prejudice the new party")(emphasis added)(citation omitted). Here, the Janie Does do *not* seek to add new parties and, accordingly, *Arnwine's* analysis of what is, and what is not, a "sufficiently related" party is irrelevant.

Moreover, prior to addressing the "new party" issue, *Arnwine* articulated the exact language of the relation back doctrine followed in the Opinion. 818 So. 2d at 625. It explicitly states that "if the amended complaint *simply changes the legal*

description of the rights to be enforced *or the legal theory* upon which to enforce the rights, the causes of action in the amended complaint will relate back." *Id.* (emphasis added).

Finally, the pre-1967 decision of *Dunn v. Campbell*, 166 So. 2d 217 (Fla. 2d DCA 1964) followed the now-defunct rule that "'if the issues were changed or new ones introduced or the grounds of relief materially varied, the matter could not be introduced in an amendment.'" *Id.* at 218 (relying on *Warfield v. Drawdy*, 41 So. 2d 877 (Fla. 1949)). This is neither controlling nor persuasive authority, even in the Second DCA.

E. <u>The First DCA's Decisions are Consistent With the Opinion</u>.

Although the School Board does not reference it, the First DCA recently confirmed that it, too, follows the same analysis as that expressed in the Opinion to determine whether a new claim relates back to an initial filing. *See Board of Trustees v. Walton County*, 121 So. 3d 1166 (Fla. 1st DCA 2013)("*Walton County*"). There, the First DCA affirmed the trial court's conclusion that, under *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010), and other decisions, the plaintiffs' claims in their third amended complaint related

back to those asserted in their earlier complaint because they arise out of the '*same general factual situation*'". 121 So. 3d at 1170 (emphasis added).[10]

The *Walton County* court also relied on *Ron's Quality Towing v. Southeast Bank*, 765 So. 2d 134, 136 (Fla. 1st DCA 2000), where it referred to Rule 1.190(c) and allowed an amendment to change a party "because the claims 'asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" *See also Holley v. Innovative Technology of Destin, Inc.*, 803 So. 2d 749, 750-51 (Fla. 1st DCA 2001)(holding that "'an amendment which *merely makes more specific* what has already been alleged generally, *or which changes the legal theory of the action*, will relate back even though the statute of limitations has run in the interim.'")(emphasis added).

The School Board incorrectly claims that *Page v. McMullan*, 849 So. 2d 15 (Fla. 1st DCA 2003) is contrary to the Opinion. *Page* does *not* address amendments to add new theories for relief based on "the same conduct, transaction, or occurrence." Rather, it narrowly holds that a request for an exemption privilege under Fla. Stat. 194.171(2) for Year 2 does not relate back to

[10] In addition to *Ron's Quality Towing*, the First DCA also quoted from *Turner v. Trade-Mor, Inc.*, 252 So. 2d 383, 384 (Fla. 4th DCA 1971). *See Walton*, 121 So. 3d at 1169-70. These cases also are wholly consistent with the Janie Does' position here. In fact, *Flores* also cites to *Ron's Quality Towing*. 35 So. 3d at 148. Similarly, both *Armiger* (2d DCA) and *Ron's Quality Towing* cite to *Turner*, further exemplifying the interrelatedness of these decisions and the consistency of their analyses. *See Armiger*, 48 So. 3d at 872; *Ron's Quality Towing*, 765 So. 2d at 136.

exemption privilege for Year 1 because the *waiver* language in the applicable statute states "that '[f]ailure to make application, when required, on or before March 1 of any year shall constitute a waiver of the exemption privilege for that year." 849 So. 2d at 16.

IV. THE SCHOOL BOARD'S COUNSEL PREVIOUSLY ACKNOWLEDGED THAT THE OPINION IS CONSISTENT WITH THIS COURT'S DECISIONS AND THOSE OF THE FIRST, SECOND, AND FIFTH DCAS, WHILE ARUGING THAT THE THIRD DCA'S DECISION IN *KOPEL V. KOPEL*, IS INCONSISTENT WITH THE OPINION AND ALL OF THOSE DECISIONS.

The School Board argues that the Opinion is inconsistent with the Third DCA's *Kopel* decision that is currently under review by this Court, and that *Kopel* is fully consistent with the holdings of this Court and the First, Second, and Fifth DCA's. IB at 4, 28. However, the School Board's counsel[11] recently expressed a diametrically opposite position in connection with its representation of Leon Kopel in his appeal while it was pending before the Third DCA, and in his Petition for Review before this Court.

As explained in the Janie Does' October 13, 2013 Answer Brief Regarding Jurisdiction in the instant proceeding ("ABRJ"), previously the School Board's counsel ***relied on*** *the Fourth District's Opinion* ***in this case*** to argue **to this Court**

[11] For purposes of clarity, "School Board's counsel" does not refer to the specific signatory to the School Board's appellate brief, but to the law firm that represents it. *See* Respondents' October 28, 2013 Opposition to Motion to Strike ("OMTS") at p. 2, ¶4.

that the Third District erred in *Kopel* when it held that "[t]o relate back, the pleading must not state a new cause of action." ABRJ at 1-3; *see also* OMTS at p. 3, ¶7 and pp. 5-6, ¶13.

In Mr. Kopel's Petition for Certiorari, the School Board's counsel argued that the Third DCA's

> **holding expressly and directly conflicts with decisions of this Court and of the First, Second, Fourth, and Fifth District Courts of Appeal**. Indeed, the Opinion stands alone in applying a rule that was eliminated by the Florida Rules of Civil Procedure. In sharp contrast, this Court, as well as every other district court of appeal, have adopted the modern rule that, *when a complaint is amended to state a new claim or legal theory, the new claim relates back to an earlier complaint if it is based on the same conduct, transaction or occurrence alleged in the earlier pleading*.

Kopel Petit. at p.1 (emphasis added). The School Board's counsel concluded by arguing that "[t]his Court should accept jurisdiction to clarify that the Third DCA's 'cause of action' test is not good law…." *Id.* at p.9.

Although the School Board's counsel now states that it does not represent Leon Kopel in his appeal *before this Court*, the firm's name appears on Mr. Kopel's Petition for Certiorari.[12] The firm moved this Court to withdraw as counsel of record in his appeal for Mr. Kopel on July 19, 2013, approximately one month *after* it appeared on his jurisdictional brief.

[12] The School Board's counsel continues to decline to respond to inquiries regarding its status as counsel for Mr. Kopel in the *Kopel v. Kopel* proceeding, stating only that it no longer represents him *before this Court*.

Moreover, the School Board's counsel advanced the **very same** position in *Kopel* one year earlier, when it argued before the Third DCA that the amendment was proper because "an amendment *which merely makes more specific* what has already been alleged generally, *or which changes the legal theory of the action*, will relate back even though the statute of limitations has run in the interim." ABRJ, p. 3, n. 1.

To the extent the Third DCA's opinion in *Kopel* applied the now-defunct "cause of action" standard instead of the modern rule that a new claim relates back to an earlier complaint if it is based on the same conduct, transaction or occurrence alleged in the earlier pleading, that decision is the one that is inconsistent with decisions of this Court, the other DCAs, and, in fact, the leading decisions in the Third DCA cited herein.

V. THE SCHOOL BOARD'S ATTEMPT TO BREATHE LIFE INTO THIS COURT'S PRE-1967 HISTORICAL DECISIONS IS FUTILE.

The School Board falsely asserts that "[t]he principles underlying this Court's early decisions were incorporated into Florida's 'modern' relation back rule, Rule 1.1.90(c)." IB at 20. To the contrary, as discussed above, the comments to the 1967 Amendments to Rule 1.190(c) expressly *rejected* the pre-existing, narrow "new cause of action" standard. Rule 1.190(c) does *not* incorporate the "new cause of action" standard expressly or implicitly, contrary to the School

Board's assertion; although that term *was* used consistently in a narrow legal sense prior to these amendments, it is noticeably absent from Rule 1.190(c). Accordingly, the School Board's citation to, analysis of, and reliance on, historical decisions is irrelevant, and merely endeavors to distract with the post-1967 body of law.

In any case, the School Board acknowledges that even these early decisions allowed amendments where the "essential elements of the controversy" remained the same and did not "change the essence" of the original action. IB at 23-24. What has changed dramatically, however, since the first half of the Twentieth Century is what is considered similar enough to avoid the bar of the statute of limitations. *See, e.g.*, Rule 1.190(c)(requiring only that the new claim arise out of the same "*conduct, transaction, or occurrence*"). As discussed above, Rule 1.190(c) and the decisions interpreting it no longer require that the precise nature of the action and the remedies remain exactly the same.

The School Board also cites to these obsolete cases, and this Court's *Caduceus* decision, for the goal behind statutes of limitations, *i.e.* the protection of defendants from stale claims. IB at 18. While that general principle is correct, the *reason* for this protection is obviated precisely in situations such as that here.

This Court confirmed that "the purpose underlying statutes of limitations – namely, preventing lack of notice and prejudice to the defendant – *is not*

implicated where the plaintiff's amended complaint [names a defendant who] was brought into the suit prior to the expiration of the statute of limitations and *the plaintiff's claims concern the same conduct, transaction, or occurrence at issue* in the third-party complaint." *Caduceus*, 137 So. 3d at 992 (emphasis added). The Court relied in part on *Totura & Co. v. Williams*, 754 So. 2d 671, 681 (Fla. 2000) which "explain[ed] that the purpose of statutes of limitations is 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" (Emphasis added.) Such surprise is non-existent here as the *same* witnesses and the *same* evidence are involved, and concerning claims against the same party based on the same conduct and occurrence; there is no suggestion that any lost evidence or disappeared witness related to the Title IX claims.

VI. THE SCHOOL BOARD'S DISCUSSION OF FEDERAL DECISIONS DOES NOT SUPPORT ITS POSITION.

In a final attempt to have this Court retreat from its own rulings and the body of law established by the District Courts of Appeal, and rewrite the 1967 Amendment, the School Board refers the Court to Federal decisions concerning Federal Rule of Civil Procedure 15 ("Rule 15") which parallels Rule 1.190(c). IB at 37. Although Florida courts usually do not resort to that practice where, as here, there is a wealth of applicable state law decisions (*see, e.g., Caduceus*, 237 So. 3d 987, *passim* (no citation to or discussion of Federal authorities concerning the

relation back of amendments); *cf. Casteel v. Maddalena,* 109 So. 3d 1252, 1256 (Fla. 2d DCA 2013)(looking to Federal law on related statute where it identified no Florida cases addressing the rule)), the slightly different standards under Federal law would still lead to the conclusion that the Janie Does' Title IX claims relate back.

In fact, the *Fabbiano* court concluded that Federal cases discussing Rule 15 wholly supported its application of the relation back doctrine. 91 So. 3d at 895-96. It noted that "[u]nquestionably, these [Federal] authorities permit an amendment setting forth a new legal theory to relate back after a statute of limitations has expired, provided that the amended complaint arises from '*a common core of operative facts*.'" *Id.* at 896 (emphasis added)(*quoting Mayle v. Felix*, 545 U.S. 644, 659-60 (2005)). *Fabbiano* excerpted Wright's Federal Practice and Procedure as follows:

> "Applying this standard, courts have ruled that an amendment may set forth a *different statute* as the basis of the claim, or *change a common-law claim* to a statutory claim or vice-versa, or it may *shift from a contract theory* to a tort theory, or delete a negligence count and *add or substitute* a claim based on warranty, or *change an allegation* of negligence in manufacture to continuing negligence in advertising. Indeed, **an amendment that states an entirely new claim for relief will relate back** as long as it satisfies the test embodied in Rule 15(c)(1)(B)."

91 So. 3d at 896 (*quoting* 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1497 (3d ed. 2011))(emphasis added). This is consistent with the

Federal cases that consistently hold that where the essential facts are pled in the earlier complaint, a change in legal theory relates back. *See, e.g., Maegdlin v. International Ass'n of Machinists and Aerospace Workers, Dist. 949*, 309 F.3d 1051, 1053 (8th Cir. 2002)(plaintiff's amended complaint adding a Title VII discrimination claim related back to his original 29 U.S.C. § 185 "failure to adequately represent" claim against his union; cited with approval in *Fabbiano*, 91 So. 3d at 896).

The School Board leads with *Mayle v. Felix*, 545 U.S. 644 (2005), a case also cited by *Fabbiano*, which involved the stringent pleading requirements of *habeas corpus* petitions[13] and whether an amendment to add an entirely new ground for the petition relates back. 545 U.S. at 649-50. The Supreme Court noted that, under Rule 15, "relation back depends on the existence of a *common 'core of operative facts'* uniting the original and newly asserted claims." *Id.* at 659. Applying this standard, which is similar to that adopted by Florida courts, it held that "[a]n amended habeas petition, . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a *new ground for relief* supported by *facts that differ in* ***both*** *time* ***and*** *type from those the original pleading*." *Id.* at

[13] The Supreme Court contrasted the pleading requirements for civil complaints that need only provide "fair notice" of the claims and those for *habeas* petitions that "must 'specify all the grounds for relief available to the petitioner' and 'state the facts supporting each ground.'" *Id.* at 655.

650 (emphasis added).[14] This "separate in both time and type" standard would *not* bar the Janie Does' Title IX claims; their claims are supported by facts that are *identical* in "*both* time *and* type" to those that support their negligence claims; there are *no* separate incidents that form the basis for the Title IX claims.

The other modern Federal cases cited by the School Board are not inconsistent with the Opinion or modern Florida law as discussed herein. *See Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1019 (10th Cir. 2013)(later claims did not relate back where "the new claim was *premised on a fact not available at the time of the filing of the original complaint*")(emphasis added); *Glover v. FDIC*, 698 F.3d 139, 146-47 (3d Cir. 2012)(no relation back where the amended complaint alleged conduct by the defendants that was not pleaded in, and was completely different than, that pleaded in the original complaint); *Jones v. Bernanke*, 557 F.3d 670, 675 (D.C. Cir. 2009)(no relation back where claims for discrimination and retaliation were *not based on the same incidents* and the amendment's "effect is 'to fault [the defendants] for *conduct different from that identified in the original complaint*'")(emphasis added); *Meijer, Inc., v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008)(allegations for the first time of

[14] Other cases cited by the School Board pre-date *Mayle* but similarly deal with motions in criminal cases where courts held that post-conviction motions challenging specific evidentiary rulings do not provide the basis for future amendments challenging completely different issues. *E.g., Davenport v. U.S.*, 217 F.3d 1341, 1345-46 (11th Cir. 2000); *Dean v. U.S.*, 278 F.3d 1218, 1221 (11th Cir. 2002)(addressing relation back of amendments to *habeas corpus* petitions).

conspiracy to "preemptively to manufacture and distribute [a] generic version of [of a drug while] patent litigation precluded competitors from entering the market" did not relate back to original claim that the corporate "defendants' decision not to sell their own generic [drug] violated the antitrust laws"); *McGregor v. Louisiana State Univ. Bd. Of Supervisors*, 3 F.3d 850, 863-64 (5th Cir. 1993)(new claims did not relate back because they "assert[ed] new or distinct conduct, transactions, or occurrences as the basis for relief" where they were based "new legal theory *unsupported by factual claims raised in the original complaint*")(emphasis added); *Moore v. Baker*, 989 F.2d 1129, 1132 (11th Cir. 1993)(claim for medical malpractice did not relate back to claim for failure to obtain informed consent as the latter provided *no* notice to the doctor that he would be accused of operative and post-operative negligence); *Bloom v. Alvereze*, 498 Fed. Appx. 867, 873 (11th Cir. 2012)(claims against *entirely new defendants* would not relate back to the original complaint where their identity was known to the plaintiffs, and there was no reason for the defendants to believe the plaintiffs would seek to hold them liable).[15]

[15] Although cited by the School Board, *Michael Linet, Inc. v. Village of Wellington, Florida*, 408 F.3d 757 (11th Cir. 2005) does not even address the relation back of amendments under Rule 15. There the Eleventh Circuit merely pointed out that the original complaint did not contain state law claims and that the trial court properly dismissed these claims "the district court could decline to exercise supplemental jurisdiction over this claim once the [Federal] claim was dismissed." *Id.* at 763.

Therefore, nothing in these Federal decisions, and the application of their "common core of operative facts" and "allegations of both difference in both time and type" standards, would suggest a result different from that in the Opinion, or any of the other modern decisions discussed herein.

CONCLUSION

The Janie Does' Title IX claims are based on the exact same factual allegations as the negligence claims set out in their original complaint. The Title IX claims add only descriptive terms and legal conclusions relating to the pleading requirements of those claims. There is nothing new or surprising about the factual scenario on which the Janie Does base *all* their claims in their Third Amended Complaint.

The Opinion is fully consistent with the holdings of this Court and the other District Courts of Appeal in its conclusion that, because the Title IX claims "arose from the same conduct and resulted in the same injury" as the negligence claims, they relate back to the original complaint and are not time-barred.

Based on the foregoing, the Janie Does respectfully suggest that the Court affirm the holding of the Fourth District Court of Appeals in the Opinion.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail on October 1, 2014, upon attorney for Petitioner, Shannon P. McKenna, Esq., (smckenna@conroysimberg.com and eservicehwdappl@conroysimberg.com) Conroy Simberg, et. al., 3440 Hollywood Blvd., Second Floor, Hollywood, FL 33021.

By:/s/ Marc A. Wites
Marc A. Wites

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

By:/s/Marc A. Wites
Marc A. Wites