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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1834

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.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

In this Initial Brief on the Merits, the Petitioner, the PALM BEACH COUNTY SCHOOL BOARD, will be referred to as School Board. The Respondents, JANIE DOES 1-4, minor children, will be referred to collectively as Janie Does.

The symbol "R." followed by the page number(s), (R. p-pp), will refer to the original record on appeal.

The symbol "A." followed by the page number(s), (A. p-pp), will refer to the attached Appendix which includes a copy of the Fourth District's decision below.

POINT ON REVIEW

I. THE JANIE DOES' AMENDED TITLE IX CLAIMS ARE NEW, DIFFERENT AND FACTUALLY DISTINCT CAUSES OF ACTION; AS SUCH, THEY DO NOT RELATE BACK TO THE INITIAL COMPLAINT AND THEY ARE TIME-BARRED.

BASIS FOR REVIEW

This Court accepted jurisdiction to review the decision below, *Doe I ex rel. Miranda v. Sinrod and Palm Beach County School Board*, 117 So. 3d 786 (Fla. 4th DCA 2013), based on an express and direct conflict. (A. 1-5). The Fourth District interpreted and applied the relation back doctrine as **only** requiring a determination of whether the amended claims arose from the "same general factual situation." The decisions in conflict, however, uniformly recognize that a determination of whether an amended claim relates back requires consideration of both Rule 1.190(c)—which provides for the relation back of amended claims that arise out of the conduct, transaction or occurrence set forth in the original claim—and the statute of limitations—which prohibits time-barred amended claims that raise a new, different and factually distinct cause of action.

The following decisions expressly and directly conflict with the Fourth District's decision.

- The **Florida Supreme Court's** decisions in:

  United Telephone Co. v. Mayo, 345 So. 2d 648 (Fla. 1977); *Atlantic Coast Line R. Co. v. Edenfield*, 45 So. 2d 204 (Fla. 1950); *Gables Racing Ass'n v. Persky*, 180 So. 24 (Fla. 1938); *Livingston v. Malever*, 137 So. 113 (Fla. 1931) and *La Floridienne v. Atlantic Coast Line R. Co.*, 58 So. 186 (Fla. 1912);

- The **First District Court of Appeal's** decision in:

  Page v. McMullan, 849 So. 2d 15, 16 (Fla. 1st DCA 2003);

- The **Second District Court of Appeal's** decisions in:

  Cox v. Seaboard Coast Line Railroad Company, 360 So. 2d 8 (Fla. 2d DCA 1978) as well as *Arnwine v. Huntington Nat. Bank, N.A.*, 818 So. 2d 621 (Fla. 2d DCA 2002) and *Dunn v. Campbell*, 166 So. 2d 217 (Fla. 2d DCA 1964);

- The **Third District Court of Appeal's** decisions in:

  Kopel v. Kopel, 117 So. 3d 147 (Fla. 3d DCA 2013), *review granted* SC 13-992 (June 11, 2014); *Trumbull Ins. Co. v. Wolentarski*, 2 So. 3d 1050, 1055 (Fla. 3d DCA 2009); *Daniels v. Weiss*, 385 So. 2d 661 (Fla. 3d DCA 1980); and *United States v. State*, 179 So. 2d 890 (Fla. 3d DCA 1965); and

- The **Fifth District Court of Appeal's** decisions in:

  Fabbiano v. Demings, 91 So. 3d 893 (Fla. 5th DCA 2012); *Estate of Shearer v. Agency for Health Care Admin*, 737 So. 2d 1229 (Fla. 5th DCA 1999) and *West Volusia Hospital Authority v. Jones*, 668 So. 2d 635 (Fla. 5th DCA 1996).

This Court has jurisdiction over this conflict. *See* Art. V, § 3(b)(3), Fla. Const.; Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. *See also Aravena v. Miami-Dade County*, 928 So. 2d 1163 (Fla. 2006) (conflict jurisdiction exists over irreconcilable decisions); *Public Health Trust of Dade County v. Menendez*, 584 So. 2d 567 (Fla. 1991) (conflict jurisdiction exists to harmonize apparent conflict between decisions); *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981) (conflict jurisdiction exists so long as the district court's opinion discusses the legal principles applied).

STATEMENT OF THE CASE AND FACTS

Introduction

In July 2006, the Janie Does filed a negligence complaint against the School Board alleging that their teacher sexually molested them during the 2004-2005 school year.[1] In 2011, nearly five years later, after the statute of limitations expired, the Janie Does filed their Third Amended Complaint alleging that the School Board violated 20 U.S.C. § 1681 (Title IX), which prohibits sex discrimination by recipients of federal education funding. The trial court granted the School Board's motion to dismiss the Title IX claims on the basis that they were time-barred by the statute of limitations because they were factually distinct new causes of action that did not relate back to the Janie Does' negligence claims.

At the beginning of its decision below, the Fourth District commented that "[a]llegations of sexual abuse by a teacher lie at the heart of this dispute." *Janie Doe 1*, 117 So.3d at 787. The court then reversed the trial court's dismissal holding that the Janie Does' Title IX claims related back to their original negligence claims because "[b]oth claims arose from the **same conduct** and resulted in the **same injury**." *Id.* at 790 (emphasis added). In so doing, the court applied the relation back doctrine to permit the time-barred Title IX claims so long as they arose from the "**same general factual situation**" as the original negligence claims. In so

[1] The Janie Does also brought negligence claims against their teacher.

doing, the Fourth District never considered whether the amended claims also constituted a new cause of action—a consideration **required** under the relation back doctrine.

Not only is the Fourth District's overly broad application of the relation back doctrine in express and direct conflict with numerous decisions of this Court and the other District Courts of Appeal, but it also significantly undermines the protections of the statute of limitations.

Procedural History

The Janie Does filed their initial complaint in July 2006 alleging that during the 2004-2005 school year their teacher sexually molested them. (R. 1-26). In their initial complaint, the Janie Does set forth negligence claims against their teacher and negligence claims against the School Board. (R. 1-26). In April and July 2008, the Janie Does filed an Amended and a Second Amended Complaint, respectively, again raising only negligence claims against the School Board. (R. 56-82, 95-120, 1187).

In March 2011, nearly five years after they filed their initial complaint and almost six years after the alleged incidents, the Janie Does moved to amend their complaint a third time. (R. 278-279, 282-379). In their Third Amended Complaint, the Janie Does added claims against the School Board for a violation of

20 U.S.C. § 1681 ("Title IX"), which prohibits sex discrimination by recipients of federal education funding.

The School Board opposed the Janie Does' amendment of the complaint with respect to their newly alleged Title IX claims on the ground that these claims were time-barred by the statute of limitations. (R. 380-394). The trial court granted the Janie Does' motion for leave to amend without prejudice to the School Board's filing a motion to dismiss the Third Amended Complaint. (R. 550-552). The School Board moved to dismiss the Janie Does' Title IX claims on the basis that they were time-barred. The trial court granted this motion and dismissed the Title IX claims with prejudice. (R. 384-390; 1184-1190).

In its order dismissing the Title IX claims, the trial court ruled that those claims "constitute a new cause of action as distinguished from a new theory of the original cause of action. Because a Title IX claim relies on an entirely different theory of recovery and separate ultimate facts it is an entirely new cause of action that does not relate back to the time of the filing of the Plaintiff's negligence claims." (R. 1187). The Janie Does timely appealed the trial court's dismissal with prejudice of their Title IX claims to the Fourth District Court of Appeal. (R. 1184-1190; R. 1212-1288).

The Janie Does' Initial Complaint

In the Janie Does' initial complaint, the only facts alleged in support of their negligence claims against the School Board were that (1) on or about the 2004-2005 school year the School Board was the owner and in possession of the real property located at Coral Sunset Elementary School and (2) at that time and place the Janie Does were invitees of the School Board and on their premises when their employee Sinrod sexually battered the Janie Does. (R. 5, 11, 17, 22). The remaining general allegations tracked the requisite elements of negligence: duty, breach, proximate cause, and damages.

With respect to the duty and breach of duty elements, the Janie Does specifically alleged that the School Board had a duty to provide adequate security to its invitees, including the Janie Does, and that it breached its duty by:

> a. Failing to provide adequate security in and around the premises so as to keep its students and invitees safe;
>
> b. By employing individuals with a propensity for sexual violence against children;
>
> c. By failing to perform and adequate background check on its employee, Defendant BLAKE SINROD;
>
> d. Failing to protect Plaintiff, JANIE DOE 1, from harm, including criminal sexual battery; and
>
> e. Failing to provide security on its premises against criminal acts of sexual battery and violence when

it knew or should have known of the inherent risk of same on its premises;

f. By failing to remove employee Defendant BLAKE SINROD from the premises when previously notified of his sexual misconduct toward other students;

g. By not investigating reports of sexual misconduct toward other students; and,

h. By allowing Defendant BLAKE SINROD to remain in close contact with students after being notified of his sexual misconduct.

(R. 5-7).[2] The Janie Does alleged that they were injured by the School Board's negligence and they sought damages, prejudgment interest, and costs. (R. 5-7, 11-13, 17-19, 22-24).

The Janie Does' Third Amended Complaint

In their Third Amended Complaint, the Janie Does added claims against the School Board for a violation of 20 U.S.C. § 1681 ("Title IX"), which prohibits sex discrimination by recipients of federal education funding. Pursuant to their newly set forth Title IX claims, the Janie Does' sought compensatory damages as well as attorneys' fees under 42 U.S.C. § 1988. (R. 282-379, 1187). The Janie Does alleged for the first time that, during the 2002-2003 school year, another father reported to the school's vice-principal that his daughter had been molested by her

[2] Identical allegations were raised by the remaining Janie Does. (R. 11-13, 17-19, 22-24).

teacher, Sinrod, and the vice-principal refused to believe or investigate these allegations.

The Janie Does also alleged for the first time in the litigation the following facts:

> 186. At all relevant times, the educational programs and/or activities at Coral Sunset Elementary School **received federal financial assistance**.
>
> 187. JANIE DOE I had a **right not to be subject to sexual discrimination, harassment or abuse** while she participated in the educational programs and **activities** while a student at Coral Sunset Elementary School.
>
> 188. JANIE DOE 1's sexual assault by Defendant SINROD was **sexual discrimination and/or harassment prohibited by Title IX, 20 U.S.C. § § 1681, et seq**.
>
> 189. An earlier report to the vice-principal and principal by the Father of a student who was sexually assaulted by Defendant SINROD several years prior to JANE DOE 2 were **reports to appropriate persons who had authority to take corrective action** which could have prevented the discrimination from occurring.
>
> 190. Plaintiffs are informed and believe that Defendant SCHOOL BOARD, through its representatives, the vice-principal of Coral Sunset Elementary School, had **actual notice** of Defendant SINROD's violation of rights as a result of prior complaints about his actions involving female students.
>
> 191. Plaintiffs are informed and believe that the principal, vice-principal and Defendant SCHOOL BOARD each had **authority to address** the acts of abuse

> by Defendant SINROD and **institute corrective measures** including, but not limited to, protecting Plaintiff JANIE DOE 1 from having contract with Defendant SINROD.
>
> 192. The decisions of the principal, vice-principal, and Defendant SCHOOL BOARD's decision to refuse to investigate the initial allegations against Defendant SINROD, to retain Defendant SINROD despite the prior complaints and to refuse to institute any corrective measures were **official decisions** to ignore the danger of sexual abuse to the children.
>
> 193. These actions, and inactions, by the principal, vice-principal, and Defendant SCHOOL BOARD amounted to **deliberate indifference** to the reports, and to JANIE DOE 1's right not to be subject to sexual discrimination, harassment or abuse while she participated in the educational programs and activities while a student at Coral Sunset Elementary School.
>
> 194. Defendant SINROD's conduct in detaining JANIE DOE 1, forcing her to massage him, and his touching and molesting of JANIE DOE 1's private areas beneath her clothes, are both threatened and willful acts that caused significant impairment to JANIE DOE 1's physical, mental and emotional health, and which likewise caused her physical, mental and sexual injury.

(R. 341-342) (emphasis added).[3] The Janie Does sought compensatory damages as well as attorneys' fees and costs pursuant to 42 U.S.C. §1988. (R. 341-348).

The Fourth District's Decision

On appeal, the Janie Does sought reversal of the dismissal of their Title IX claims arguing, that the Title IX claims related back to the filing of the original

[3] Identical allegations were raised by the remaining Janie Does. (R. 342-348).

complaint. The School Board argued that the dismissal should be affirmed since the Title IX claims did not relate back because they stated an entirely separate and distinct new cause of action and were predicated on different ultimate facts than those set forth in their initial negligence complaint. The court agreed with the Janie Does' argument.

In its decision, the Fourth District quoted from Florida Rule of Civil Procedure 1.190(c) which provides that an amended claim relates back to the date the original complaint was filed if it arises out of the conduct, transaction, or occurrence set forth in the original complaint. The court acknowledged that "[a]mendments generally do not relate back if they raise a new cause of action[,]" but nevertheless found that even a new cause of action can relate back to the original complaint so long as the amendment shows the "same general factual situation" alleged in the original complaint. *Janie Doe 1*, 117 So. 3d at 789 (citations omitted).

The Fourth District opined:

> [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' . . . [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. (footnote, quotations and citations omitted). The Fourth District also noted that otherwise untimely federal law claims can relate back to common law violations. *Id.* at 789 & n.4 (citing *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 410 (7th Cir. 1989) (finding Title VII claims related back to the original complaint alleging state law violations)). The court concluded that the Janie Does' Title IX claims related back to the date of the filing of the original negligence claims because "[b]oth claims arose from the same conduct and resulted in the same injury." *Janie Doe 1*, 117 So. 3d at 790.

This Court accepted jurisdiction to review this decision based on an express and direct conflict.

STANDARD OF REVIEW

The application of the relation back rule under Rule 1.190(c), Florida Rules of Civil Procedure and the statute of limitations is a question of law subject to de novo review. *Caduceaus Properties, LLC v. Graney*, 137 So. 3d 987 (Fla. 2014).

SUMMARY OF ARGUMENT

Florida courts began to recognize the relation back doctrine more than 100 years ago when this Court pronounced the rule that an amendment to add an otherwise time-barred claim may be permitted when it does not constitute a new, different and distinct cause of action. In so doing, this Court emphasized that while amendments are liberally allowed, the statutes and rules allowing amendments do not give new, different, and distinct causes of action the benefit of the legal fiction of relation back, such that a defendant would be deprived of the bar of the statute of limitations. This Court and other Florida courts have continued to follow this precedent since that time.

In its decision below, the Fourth District permitted the Janie Does' otherwise time-barred amended Title IX claims to relate back to the filing of their initial negligence complaint so long as the claims arose from the "same general factual situation"—the teacher's sexual abuse of the Janie Does. The court did so without any due consideration of whether the new claims constituted a new, different and factually distinct cause of action. The newly added Title IX claims are substantially different from the Janie Does' original negligence claims; they require proof of entirely different material facts and they afford different defenses to the School Board. These newly added claims are not a simple repackaging or amplification of the original negligence claims.

The purpose of Title IX is to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. A Title IX claim is grounded on a federal constitutional violation and its underlying wrong is based on discriminatory conduct, a distinctly different type of conduct than that in a negligence claim. Additionally, Title IX claims, in contrast to negligence, require actual knowledge of likely harm on the part of a policymaker, who is capable of making an "official decision" to take "corrective action," and an "official decision" by the policymaker not to remedy the violation, that is clearly unreasonable in light of the circumstances. The allegations within the Janie Does' amended Title IX claims set forth all of these operative facts, but **none** of these material facts were set forth in the Janie Does' original negligence claims. Thus, the School Board did not have any fair notice that the Janie Does would be raising these additional claims nearly five years after the initiation of their lawsuit. The Janie Does' newly added Title IX claims do not relate back to the date of the filing of their original negligence complaint because they are new, different and factually distinct causes of action.

Federal law, similar to this Court's long-standing precedent, also establishes that the Janie Does' amended Title IX claims do not relate back to their initial negligence claims. This is so because, even though the Title IX and negligence

claims share some common facts, the Title IX claims are based on a new legal theory which is **unsupported** by the facts of the initial negligence claims.

To allow the relation back of the Janie Does' amended Title IX claims simply because they arose out of the "same general fact situation" is wholly inconsistent with both Federal and Florida pronouncements concerning the relation back doctrine. It is also inconsistent with the protections of the statute of limitations. This Court should quash the Fourth District's decision in this case and remand to the court affirm the trial court's dismissal of the Janie Does' Title IX claims.

ARGUMENT

I. THE JANIE DOES' AMENDED TITLE IX CLAIMS ARE NEW, DIFFERENT AND FACTUALLY DISTINCT CAUSES OF ACTION; AS SUCH, THEY DO NOT RELATE BACK TO INITIAL COMPLAINT AND THEY ARE TIME-BARRED.

This case involves a consideration of the contours of the relation back doctrine under Rule 1.190(c), Florida Rule of Civil Procedure, and the statutes of limitation. The relation back doctrine balances the protections of the statutes of limitation with the preference for resolving disputes on the merits and the liberality accorded pleadings. Florida has a long-standing judicial policy of freely permitting amendments so that cases may be resolved on the merits so long as the amendments do not prejudice or disadvantage the opposing party. *Caduceus Properties, LLC v. Graney*, 137 So. 3d 987, 992 (Fla. 2014). Statutes of limitation protect defendants from unusually long delays in the filing of lawsuits and prevent prejudice to defendants from the unexpected enforcement of stale claims. *Id.* (citing *Totura & Co. v. Williams*, 754 So. 2d 671, 681 (Fla. 2000)). Balancing the protections of the statutes of limitation with the preference for resolving disputes on the merits and the liberality accorded pleadings, Florida courts have consistently and repeatedly held that time-barred amendments that raise a new, different and factually distinct cause of action do not relate back to the original complaint.

History of the Relation Back Doctrine

The concept of the relation back of amendments originated before the 1937 promulgation of the Federal Rules of Civil Procedure and the 1967 promulgation of the Florida Rules of Civil Procedure. *See Scarborough v. Principi*, 541 U.S. 401, 418 (2004); *Bermudez v. Florida Power & Light Co.*, 433 So. 2d 565, 567-568 & n.2 (Fla. 3d DCA 1983). Florida courts began to recognize the relation back doctrine more than 100 years ago when determining whether an amended pleading stated a new cause of action or constituted a departure in a pleading. At that time, under then-existing statutes, amendments in both law[4] and equity[5] were liberally allowed. The harsh, technical effects of the common law and "forms of action" were modified by this Court's early decisions which liberally construed the term "cause of action." Fla. R. Civ. P. 1.190, Author's Comment 1967, Relation Back. *See also Twyman v. Livingston*, 58 So. 2d 518 (Fla. 1952) (recognizing liberality in amendments); *Marks v. Fields*, 36 So. 2d 612, 615 (Fla. 1948) (same).

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[4] *See e.g.* § 2629, Rev. Gen. St., Section 4295 Comp. Gen. Laws (providing that court at law may allow amendments "as may be deemed necessary for the purpose of for the purpose of determining in the existing suit the real question in controversy between the parties . . . .") (as quoted in *Fancher v. Rumsey*, 164 So. 688, 697 (Fla. 1935)).

[5] *See e.g.* § 26, 1931 Chancery Act, Acts 1931 c. 14658 (providing that court in equity, at any time, may allow amendments in furtherance of justice and, at every stage of the proceedings, "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.") (as quoted in *Gables Racing Ass'n v. Persky*, 180 So. 24, 25-26 (Fla. 1938)).

The principles underlying this Court's early decisions were incorporated into Florida's "modern" relation back rule, Rule 1.190, Florida Rules of Civil Procedure (1967). Under Rule 1.190(c): "[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, the amendment shall relate back to the date of the original pleading." Fla. R. Civ. P. 1.190(c). Rule 1.190 adopted Rule 15 of the Federal Rules of Civil Procedure, enacted in 1937, almost verbatim. *Fabbiano v. Demings*, 91 So. 3d at 895-896 & n.1. Even before Rule 1.190(c) was adopted, this Court had already adopted virtually identical versions of this rule in Rule 1.15, Florida Rules of Civil Procedure (1954) and Rule 15, Florida Common Law Rules (1950). Rule 1.15, Fla. R. Civ. P. (1954);[6] Rule 15, Fla. Common Law Rules (1950).[7]

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[6] Rule 1.15(c), Florida Rules of Civil Procedure provided: "Relation Back of Amendments. Whenever 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, the amendment shall relate back to the date of the original pleading." Rule 1.15 (c), Fla. R. Civ. P. (1954) (as quoted by *Keel v. Brown*, 162 So. 321, 322-323) (Fla. 2d DCA 1964).

[7] Rule 15, Florida Common Law Rules provided: "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arouse 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." Rule 15, Fla. Common Law Rules (1950).

This Court's Early Decisions

More than 100 years ago, in *La Floridienne v. Atlantic Coast Line R. Co.*, 58 So. 186 (Fla. 1912), this Court pronounced the rule that an amendment to add an otherwise time-barred claim may be permitted when it does not constitute a new, different and distinct cause of action.[8] In *La Floridienne*, this Court addressed whether an otherwise time-barred amended claim related back to the beginning of the action. The original claim[9] was based upon a shipper's statutory right to recover any freight overcharges in excess of the prescribed rates plus any amount incurred in seeking recovery of damages. However, in his amended complaint, the plaintiff added a common law claim for money had and received for freight charges in excess of reasonable rates.

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[8] At that time, the relation back doctrine was applied in the context of whether an amendment stated a new cause of action or whether it constituted a departure in pleading at common law. *See Puleston v. Alderman*, 4 So. 2d 704, 707 (Fla. 1941) (Brown, J. concurring). "A departure in pleading results when a party quits or departs from the case which he has first made and has recourse to another which gives rise to a wholly distinct and different legal obligation against the defendant." *Gerstel v. William Curry's Sons Co.*, 20 So. 2d 802, 804 (Fla. 1945) (citation omitted). A defendant could raise the issue of departure by demurrer. *Id.* (A demurrer is similar to an affirmative defense.)

[9] Before the adoption of the 1950 Florida Common Law Rules which abolished the prior technical forms of pleadings, plaintiffs filed declarations, not complaints. Wigginton, John T., New Florida Common Law Rules 3 U. of Fla. L. Rev. 1 (1950). For ease of reference, in this brief the term complaint, claim and/or pleading will be substituted for the antiquated term declaration.

This Court set forth the following standard to be used by the trial courts in deciding whether an amended claim related back: if the amended claim "is a mere restatement in different form of the same cause of action that was originally pleaded . . ." then it relates back, however, "when a cause of action set forth in an amended pleading in a pending litigation is new, different, and distinct from that originally set up, there is no relation back." *La Floridienne,* 58 So. at 187-188. On the facts before it, this Court found that the amended complaint did not relate back because it stated a new and different right of action. In so doing, this Court emphasized that while amendments are liberally allowed—in order to determine the real controversy between the parties—the statutes and rules allowing amendments "do not give such amendments the benefit of the legal fiction of relation back to the beginning of the action, so as to deprive a defendant of a right to the bar of a statute of limitations." *Id.*

This Court followed *La Floridienne* in *Livingston v. Malever*, 137 So. 113 (Fla. 1931). In *Livingstone*, the plaintiff's original complaint alleged that the defendant employed the real estate broker to find a purchaser for property and the amended complaint alleged that the broker was to sell the property. Recognizing the legal import of the terms "to sell the property," this Court concluded that the amended complaint did not relate back because it could not be proven by the allegations in the original complaint. The *Livingstone* Court explained its reasoning

as follows: "If the matter introduced by way of amendment . . . introduces a new claim or a new cause of action, requiring a different character of evidence for its support, and affording a different defense from that to the cause as originally present, it will not relate back to the commencement of the suit, as to prevent the plea of the statute to the new matter thus introduced." *Livingstone*, 137 So. at 117 (internal quotations and citations omitted). *See also Gables Racing Ass'n v. Persky*, 180 So. 24 (Fla. 1938).

Similarly, in *Falk v. Salario*, 146 So. 193 (Fla. 1933), this Court found that an amended complaint for a failure to pay a debt contracted by 15 or more people did not relate back to the original complaint of failure to pay a promissory note. Emphasizing that the facts essential to maintaining the amended complaint were not essential to the original complaint, the *Falk* Court found that the amended complaint rested upon an entirely different cause of action. As such, it did not relate back to the original complaint.

In contrast to the factual scenarios present in *La Floridienne*, *Livingstone*, and *Falk*, an amendment does not constitute a new cause of action when "the essential elements of the controversy remain the same." *Gibbs v. McCoy*, 70 So. 86 (Fla. 1915) (citations omitted). *See also James v. Dr. P. Phillips Co., Inc.*, 155 So. 661 (Fla. 1934). Under this scenario, an amendment is deemed to be an amplification of the original claim, not a statement of a new, different and distinct

cause of action. *James*, 155 So. at 663. This is so because the amendment does not change the essence of the original action. *Id.*

This Court later applied these same standards in the context of whether an amended pleading resulted in a departure from the original claim, such that any time-barred claim would not relate back. *See e.g. Gerstel v. William Curry's Sons Co.*, 20 So. 2d 802 (Fla. 1945); *Merchants & Bankers Guaranty Co. v. Downs*, 175 So. 704 (Fla. 1937). In *Merchants*, this Court found that an amended complaint seeking payment on a life insurance certificate from a mutual benefit insurance company issued on Dec. 8, 1930 was a departure from the original complaint which sued on a different life insurance certificate dated Feb. 7, 1934. In so doing, this Court indicated that while trial courts have broad discretion in granting or refusing amendments, an amendment "which attempts to set up an entirely distinct wrong or basis of review or relief, or a right arising from a distinct or different contract, from that originally declared on, is regarded as tendering a different cause of action." *Merchant*, 175 So. at 711 (citation omitted).

In *Gerstel*, this Court articulated the test in another way when it held that the test to determine whether there has been a departure in pleading is whether the "matter introduced by way of amendment requires a different character of evidence for its support than would be required for proof of the antecedent pleading and whether proof of additional facts will be needed to sustain the later pleading."

Gerstel, 20 So. 2d at 804. *See also Lopez v. Avery*, 66 So. 2d 689, 691 (Fla. 1953) (finding that a departure takes place "when the amended material requires a different character of evidence for its support than would be required for proof of the antecedent pleading and whether proof of additional facts will be required to sustain the later pleading[ ]") (citation omitted); *Atlantic Coast Line R. Co. v. Edenfield*, 45 So. 2d 204 (Fla. 1950) (applying a similar "same evidence" test).

On the facts of *Gerstel*, the Court found that the new complaint departed from the original complaint because the original complaint regarded a promissory note executed by the defendant. The amended complaint alleged that the promissory note was executed by a long-dissolved company (not the defendant) and that the defendant was liable on the promissory note as a successor in interest to the dissolved company. The *Gerstel* Court reasoned that the amended complaint constituted a departure from the original complaint because it stated a separate, different cause of action and theory of liability which would have required proof of different facts. *Gerstel*, 20 So. 2d at 810.

When substantially the same evidence would support judgments under both the original and amended pleading, however, the amended pleading is deemed to relate back (i.e. there is not a departure in pleading). *See Fancher v. Rumsey*, 164 So. 688 (Fla. 1935). In *Fancher*, this Court considered whether there was a departure in pleading when the plaintiff's theory of their case changed from a suit

on instruments relied on to establish the defendants' joint liability (original complaint) to a suit on the purchase-money indebtedness as evidenced by the instruments (amended complaint). Distinguishing *Livingstone* and *Falk*, the *Fancher* Court found no departure in pleading, even though the plaintiff was proceeding on a different legal theory, because substantially the same evidence would support both claims and all of the essential facts in support of the amended claim were stated in the original claim.

Similarly, in determining whether leave to amend should be granted when the statute of limitations is not implicated, this Court finds that such an amendment should not be allowed if it will change an issue, introduce new issues, materially vary the grounds for relief, or if it requires proof of different essential facts or if it states a new, different and distinct cause of action. *Griffin v. Soceite Anonyme La Floridienne J. Buttengbach & Co.*, 44 So. 342 (Fla. 1907). *See also United Telephone Co. v. Mayo*, 345 So. 2d 648 (Fla. 1977); *Warfield v. Drawdy*, 41 So. 2d 877 (Fla. 1949); *Griffin v. Workman*, 73 So. 2d 844 (Fla. 1934). Indeed, in *Mayo*, this Court confirmed the continued viability of its long-standing interpretation and application of the relation back rule by noting that amendments to pleadings are usually granted liberally, "[h]owever, the right to amend does not authorize a plaintiff to state new and different causes of action." *Id.* at 655 & n.6. This Court explained: "This pragmatic rule is mandated or suit could last in perpetuity." *Id.*

Based on the foregoing cases, the following basic rules are relevant to a determination of whether an otherwise time-barred amended claim relates back to an original claim. On one hand, an amended claim based on the same or similar legal theory will relate back if it merely restates the claim in different form or is an amplification of the original claim. *La Floridienne*, 58 So. at 187-188, *James*, 155 So. at 663. If the amended claim is based on a different legal theory, it will only relate back if the essential elements of the controversy remain the same; the amendment does not change the essence of the action; and all of the essential facts of the amended claim are alleged in the original claim. *Gibbs*, 70 So. at 86; *James*, 155 So. at 663; *Fancher*, 164 So. 695.

On the other hand, even when there are facts in common between the amended claim and the original claim, an amended claim will not relate back if it is a new, different and distinct cause of action. *La Floridienne*, 58 So. at 186; *Falk*, 146 So. at 195; *Merchant*, 175 So. at 711. An amended claim constitutes a new, different and distinct cause of action when it is based on different facts; when it requires a different character of evidence and affords a different defense; when it changes an issue, introduces new issues and materially varies the grounds for relief, or when it requires proof of additional/different essential facts. *Gerstel*, 20 So. 2d at 804, 810; *Livingstone*, 137 So. at 117; *Falk*, 146 So. at 195; *Griffin*, 44 So. 351; *Edenfield*, 45 So. 2d 204; *Lopez*, 66 So. 2d at 691.

More Recent Decisions of Florida's District Courts of Appeal

After the adoption of the Florida Rules of Civil Procedure in 1967, almost all of the Florida case law concerning whether an amended claim relates back has been decided by Florida's District Courts of Appeal.[10] With the notable exception of the Fourth District's decision below, most of these decisions apply the standards enunciated in this Court's earlier decisions. This includes the application of the rule that an otherwise time-barred amended claim does not relate back if it constitutes a new, different and factually distinct cause of action.

Illustrative of this application of the rule is the Third District Court of Appeal's recent decision in *Kopel v. Kopel*, 117 So. 3d 147 (Fla. 3d DCA 2013), *review granted* (June 11, 2014). In *Kopel*, the Third District held that an amended claim which sets forth a new, different and distinct cause of action does not relate back to the original claim, even if both claims arose out of the same general factual situation. Applying this rule of law to the facts before it, the court found that an amended breach of oral contract claim did not relate back to the original pleading which alleged that the plaintiff loaned, but did not repay, money to the defendants. Several earlier decisions of the Third District Court of Appeal are in accord with *Kopel*. *See Daniels v. Weiss*, 385 So. 2d 661 (Fla. 3d DCA 1980) (finding amended loss of consortium claim did not relate back to the original malpractice

[10] This is most likely due to the Florida Legislature's creation of the District Courts of Appeal in 1957.

negligence complaint because it stated a new cause of action); *Trumbull Ins. Co. v. Wolentarski*, 2 So. 3d 1050, 1055 (Fla. 3d DCA 2009) (finding an amended personal injury protection claim did not relate back to the original negligence claim against the school board and the uninsured/underinsured claim against the insurer).

Similarly, in *Cox v. Seaboard Coast Line Railroad Company*, 360 So. 2d 8 (Fla. 2d DCA 1978), the Second District found that a minor's amended claim for personal injury did not relate back to the wrongful death action for his parent's death, even though both the minor and the parents were involved in the same collision between a train and a car, because the minor's personal injury claim constituted a new cause of action as it required proof of essential, different facts. In so holding, the Second District reiterated the rule of law that while it is well-established that an amended pleading that arises out of the conduct, transaction or occurrence set forth in the original pleading relates back to the original pleading, it is equally well-established that this does not authorize a plaintiff, under the guise of an amendment, to state a new and different cause of action—one which changes an issue, introduces new issues, or materially varies the grounds for relief.

Notably, in its decision, the Second District specifically acknowledged its awareness of the liberality to be accorded to amended pleadings and the construction of "cause of action" to permit the relation back of amendments; but the court opined that such a rule should not be so liberally applied to allow a

plaintiff to circumvent the statute of limitations. *Id. Cox'* holding is in accord with the Second District's more recent decision in *Arnwine v. Huntington Nat. Bank, N.A.*, 818 So. 2d 621 (Fla. 2d DCA 2002) (applying the above rule of law to the facts and finding that amended claim did not state a new cause of action because it did not add a new theory of recovery or change the facts) and its earlier decision in *Dunn v. Campbell*, 166 So. 2d 217 (Fla. 2d DCA 1964) (finding amendment to conform to the pleadings is not allowable if it changes the issue, introduces new issues or materially varies the grounds for relief).

Consistent with the Second and Third Districts, the First and Fifth Districts also have recognized that an amendment may not be used to avoid the statute of limitations if it sets forth a new and distinct cause of action. *Page v. McMullan*, 849 So. 2d 15, 16 (Fla. 1st DCA 2003) (applying Rule 1.190(c) to statute of non-claim and finding that amended claim regarding denial of homestead exemption for 2001 did not relate back to original claim for denial of homestead exemption for 2000); *Fabbiano v. Demings*, 91 So. 3d 893 (Fla. 5th DCA 2012) (recognizing that amendment does not relate back when "the proposed amendment, although emanating from the same set of operative facts, involved a factually distinct claim[]" but holding that amended battery claim related back to original negligence claim because both claims were based upon the identical operative facts); *Estate of Shearer v. Agency for Health Care Admin*, 737 So. 2d 1229 (Fla. 5th DCA 1999)

(disallowing amendment to probate claim because additional facts had to be proven to support the amended claim); *West Volusia Hospital Authority v. Jones*, 668 So. 2d 635 (Fla. 5th DCA 1996) (finding loss of filial consortium amendment does not relate back after statute of limitations has run because it states a new and distinct cause of action).

The Janie Does' Amended Title IX Claims Do Not Relate Back

In its decision below, the Fourth District permitted the Janie Does' otherwise time-barred amended Title IX claims to relate back to the filing of their initial negligence complaint because the claims arose from the "**same general factual situation**"—the teacher's sexual abuse of the Janie Does. The court did so without regard to the fact that the new claims constituted a new, different and distinct cause of action, with substantially different issues than those raised by the Janie Does' negligence claims. These new issues require proof of entirely different operative facts and afford different defenses to the School Board. Additionally, and most importantly, none of the material facts of a Title IX claim were set forth in the Janie Does' original negligence claims. Thus, the School Board did not have any fair notice that the Janie Does would be raising these new claims nearly five years after the initiation of their lawsuit.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (a). The purpose of Title IX is to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. A Title IX claim is grounded on a federal constitutional violation and its underlying wrong is based on discriminatory conduct, a distinctly different type of conduct than that in a negligence claim. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) ("[S]exual harassment' is 'discrimination' in the school context under Title IX."). It is not based on the breach of a duty and it is not analogous to a state law intentional tort.[11] A school district's Title IX liability for teacher-on-student harassment is governed by the Supreme Court's decision in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) in which the Court noted that a Title IX claim is only actionable against a party that receives federal educational funding. *See Gebser*, 524 U.S. at 277 (Title IX conditions an "offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of

[11] *See Collins v. Harker Heights*, 503 U.S. 115, 128 (1992) (emphasizing that it has "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law."); *Owens v. Okure*, 488 U.S. 235, 249 (1989) (federal discrimination claims "bear little if any resemblance to the common-law intentional tort" and specifically rejecting any intentional tort analogy as "particularly inappropriate.").

funds."). It also requires deliberate indifference to discrimination on the part of the funding recipient. *Id.*

Deliberate indifference "is an official decision by the recipient not to remedy the violation." *Id.* For conduct to be deliberately indifferent there must be actual knowledge of likely harm and a failure to act on the part of a policymaker—that is someone capable of making an "official decision" to take "corrective action." *Id.* at 290-291. Deliberate indifference requires a showing that a school district's action must be "clearly unreasonable in light of the circumstances." *Davis*, 526 U.S. at 640-641. Generally, it also requires at least a pattern of similar violations. *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003).

As shown by the foregoing authorities, the operative facts of a Title IX claim include the following: the educational program is receiving federal financial assistance; the student was subjected to discriminatory conduct; actual knowledge of likely harm on the part of a policymaker; the policymaker must be capable of making an "official decision" to take "corrective action;" and an "official decision" not to remedy the violation, that is clearly unreasonable in light of the circumstances. The allegations within the Janie Does' amended Title IX claims set forth all of these operative facts.

Even more importantly, while all of these operative facts were alleged in the Janie Does' amended Title IX claims; **none** of them were alleged in their initial

negligence claims. The Janie Does' initial negligence claims only alleged a breach of the School Board's duty to invitees. They did not allege any discriminatory conduct or constitutional violations on the part of the School Board. The initial complaint did not make any references to federal law, much less any allegations that the School Board received federal education funds. Nor did it include any allegations that a person with authority to institute corrective action actually received notice of Sinrod's behavior. In fact, the Janie Does' original negligence claims simply alleged that the School Board generically knew or should have known about Sinrod's behavior. The Janie Does did not make any claim that a vice-principal, a principal or a School Board member was actually told about Sinrod's behavior. Moreover, the initial complaint did not contain any allegations that the school's vice-principal and/or principal was told about Sinrod's molestation of another child in 2002-2003—two years before the facts alleged in the original complaint.

The Fourth District held that the amended Title IX claims and the initial negligence claims arose out of the same general fact situation—allegations of sexual abuse by a teacher. But this commonality is insufficient to establish the relation back of the amended Title IX claims because the Title IX claims constitute a new, different and distinct cause of action. In support of its decision, the Fourth District cited to *Fabbiano v. Demings*, 91 So. 3d 893, 896 Fla. 5th DCA 2012) and

Associated Television and Communications, Inc. v. Dutch Village Mobile Homes of Melbourne, Ltd., 347 So. 2d 746 (Fla. 4th DCA 1977). In *Fabbiano*, though, the plaintiff's amended battery claim was based on the **identical** conduct as alleged in the original negligence claim. The plaintiff just changed the underlying legal theory. Similarly, in *Associated Television*, the pleadings of the amended claim were virtually identical to the original pleadings and the substance of the claims were exactly the same. All that changed was the nomenclature of the parties. In contrast to *Fabbiano* and *Associated Television*, in this case, the Janie Does' amended Title IX claim was based on different, distinct conduct as well as a substantively different legal theory of recovery.

In its opinion below, the Fourth District also cited to *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 410 (7th Cir. 1989) to show that claims for federal law violations can relate back to pleadings which previously alleged only violations of the common law. But, in *Donnelly*, unlike this case, the plaintiff's amended Title VII claims were based on the same facts and alleged the same type of conduct—discrimination—as had been alleged in their original complaint for discrimination under the state's discrimination statute and common law.

If the Janie Does had alleged in their initial negligence claims facts supporting their later added Title IX claims, then their Title IX claims would have related back to their negligence claims, as in *Donnelly*. But, the Janie Does' initial

negligence claims did not contain any allegations such as the following that the School Board, which receives federal funds, discriminated against the Janie Does; that the school's vice-principal or principal had been previously told about Sinrod's sexual abuse but failed to take any action; or that the vice-principal or principal's failure to act by removing Sinrod was clearly unreasonable in light of the circumstances.

The Janie Does' amended Title IX claims constituted a new, different and factually distinct cause of action. These claims changed the essence of the original negligence action and materially varied the grounds for relief. *James*, 155 So. at 663. The essential elements of the controversy did not remain the same and none of the essential facts were alleged in the original claim. *Gibbs*, 70 So. 86; *James*, 155 So. at 663; *Fancher*, 164 So. 695; *Gerstel*, 20 So. 2d at 810. They also afford different defenses—those based on Title IX's statutory requirements. *Livingstone*, 137 So. at 117. Additionally, the Title IX claims require substantially different proof of essential facts. *Lopez*, 66 So. 2d at 691; *Gerstel*, 20 So. 2d at 804. These amended allegations are not a simple repackaging or amplification of the original negligence claims.

The Fourth District's overly broad application of the relation back doctrine—allowing the Janie Does' time-barred Title IX claims so long as they arose from the "same general factual situation" as their initial negligence claims,

without any due consideration of whether the amended claims also constituted a new cause of action—significantly undermines and devalues the protections of the statute of limitations. As this Court recently recognized in *Caduceaus Properties, LLC v. Graney*, 137 So. 3d 987 (Fla. 2014), statutes of limitations are designed to protect defendants from unusually long delays in the filing of lawsuits and to prevent prejudice to defendants from the unexpected enforcement of stale claims. This Court should quash the Fourth District's decision and remand this cause to the appellate court for dismissal of the Title IX claims with prejudice.

Similar to this Court's Precedent, Federal Law Also Supports a Finding that the Janie Does' Amended Title IX Claims Do Not Relate Back

Federal law, similar to this Court's long-standing precedent, establishes that the Janie Does' amended Title IX claims do not relate back to their initial negligence claims. This is so because the Title IX claims are based on a new legal theory which is unsupported by the facts of the initial negligence claims, even though the Title IX claims and the negligence claims share some common facts—allegations of sexual abuse by a teacher and injuries to the Janie Does. Federal cases provide persuasive authority when interpreting Florida's relation-back rule. *Savage v. Rowell Dist. Corp.*, 95 So. 2d 415 (Fla. 1957); *Fabbiano*, 91 So. 3d at 895-896 & n.1 (federal rule construction should be considered when interpreting Florida relation-back rule).

Under Federal Rule of Civil Procedure 15(c), "[a]n amendment of a pleading

relates back to the date of the original pleading when . . . the claim . . . 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." Fed. Rule Civ. Proc. 15(c)(2). Generally, an amended pleading relates back if it states "claims that are tied to a common core of **operative** facts." *Mayle v. Felix*, 545 U.S. 644, 646 (2005) (emphasis added). While Rule 15(c) relaxes the statute of limitations it does not obliterate it. *Id.* As cautioned by the United States Supreme Court, Rule 15(c)'s "conduct, transaction, or occurrence" test should not be defined "at too high a level of generality." *Mayle v. Felix*, 545 U.S. 644, 661-662 (2005). Accordingly, amended pleadings do not relate back unless their claims arise from the same conduct as the original pleading "in both time and type." *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000); *Moore v. Baker*, 989 F.2d 1129, 1132 (11th Cir. 1993).

As explained by the Eleventh Circuit Court of Appeals, while Rule 15(c) "contemplates that parties may correct technical deficiencies or expand facts alleged in the original pleading, it does not permit an entirely different transaction to be alleged by amendment." *Dean v. United States*, 278 F.3d 1218, 1221 (11th Cir. 2002). "When new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed." *Moore*, 989 F.2d at

1131. The critical issue, rather, is whether the original complaint gave notice to the defendant of the claim now being asserted. *Moore*, 989 F.2d at 1131.

The opposing party must have been put on notice by the original complaint of the claim alleged in the amended pleading; absent such notice, an amended complaint that attempts to introduce a new legal theory based on facts different from those underlying the timely claims will not relate back. *Meijer, Inc. v. Biovail Corp*., 533 F.3d 857 (D.C. Cir. 2008). Importantly, an amended claim "cannot relate back if the effect of the new pleading 'is to fault [the defendants] for conduct different from that identified in the original complaint,' **even if the new pleading 'shares some elements and some facts in common with the original claim**.'" *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013) (citations and internal quotations omitted) (emphasis added). *See also Jones v. Bernanke*, 557 F.3d 670 (D.C. Cir. 2009).

In *Jones*, the plaintiff filed a complaint alleging that that his employer retaliated against him for his complaints of gender and age discrimination under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). The plaintiff then sought to amend his complaint to include the Title VII and ADEA discrimination claims, after the statute of limitations had passed.

In determining whether the amended discrimination claims related back, the District of Columbia Circuit Court reviewed the plaintiff's original complaint to determine if it adequately notified his employer about the basis for liability under the discrimination claims. The court found that the complaint only alluded to his discrimination claims; it did not set forth any facts that would support them. Accordingly, the court held that the amended discrimination claims could not relate back under Rule 15(c) because they faulted his employer for conduct that was not identified anywhere in his original complaint, which asserted retaliation claims only. In its decision, the court specifically emphasized that such an amendment cannot relate back even if it shares "some elements and some facts in common" with the original claim. *Jones*, 557 F.3d at 674.

As explained by the Tenth Circuit in *Glover v. F.D.I.C.*, 698 F.3d 139, 145 (3d Cir. 2012), "factual overlap is not enough, because the original complaint must have given fair notice of the amended claim to qualify for relation back under Rule 15(c)." *Glover*, 698 F.3d at 147 (citing *Mayle*, 545 U.S. at 658-659 (listing cases in which amended claim did not relate back for lack of fair notice despite presence of overlapping facts) (additional citation omitted). Rule 15(c) "endeavors to preserve the important policies served by the statute of limitations . . . by requiring 'that the **already commenced action** sufficiently embraces the amended claims. *Glover*, 698 F.3d at 145 (emphasis added). Absent fair notice to the defendant of

what the plaintiff's amended claim is and the grounds upon which it rests, the purpose of the statue of limitations has not been satisfied. *Id.*

In this case, under Federal law, the Janie Does' amended Title IX claims would not relate back because they are based on a different legal theory than their original negligence claims and they fault the School Board for conduct different than that alleged in the initial complaint. *Moore*, 989 F. 2d at 1132; *Jones*, 557 F.3d at 674; *Full Life*, 709 F.3d at 1018; *Glover*, 698 F.3d at 145. This remains so even though there is some factual overlap between the claims or they share some common elements or some common facts.

The key factor in determining whether an amended claim relates back, under Federal law, is whether the operative facts of the amended claim are supported by the initial claim. When an original claim does not allege the facts necessary to support the amended claim, then the amended claim does not relate back. *See Michael Linet, Inc. v. Village of Wellington, Florida*, 408 F.3d 757 (11th Cir. 2005) (amended state law due process claims do not relate back to original complaint alleging violation of Section 1983 and the Telecommunications Act because the original complaint makes no mention of Florida procedure or any state law claim.); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850 (5th Cir 1993) (amended due process claims do not relate back to original claim alleging discrimination under Section 504 of Rehabilitation Act because the

original complaint does not plead that the defendant's decision making process was inadequate under the Fourteenth Amendment Due Process Clause—mere allegations that the defendant refused to accommodate the plaintiff are inadequate to put the defendant on notice of due process violations). *See also Merker v. Miami-Dade County Florida*, 485 F.Supp.2d 1349 (S.D. Fla. 2007).

In *Merker*, the plaintiff brought a wrongful death action against the county for the death of a woman who was thrown from her wheelchair while riding a county bus. The original complaint alleged that the county was negligent in not equipping the bus with proper restraints. The plaintiff then filed an amended complaint, outside the statute of limitations, adding a claim under the Americans with Disabilities Act (ADA) which requires a showing that the county discriminated against the decedent based on her disability.

The court found that the critical issue under *Moore* was whether the original complaint gave notice of the amended ADA claim. Comparing the amended discrimination claim and the original wrongful death negligence complaint, the court found that the ADA claim required a showing that the county knew about the need for a special accommodation and refused to provide it to the plaintiff, which is not the same duty of care owed to a rider on a bus. As such, the court found that even though the background facts overlap somewhat, the amended ADA claim did not relate back because it required unique facts which are distinct and different

from those that would have been required to recover on the negligence claim in the original complaint.

To allow the relation back of the Janie Does' amended Title IX claims because they arose out of the "same general fact situation"—allegations of sexual abuse by a teacher and injuries to the Janie Does—is wholly inconsistent with both Federal and Florida pronouncements concerning the relation back doctrine, as well as being inconsistent with the protections of the statute of limitations. As the Eleventh Circuit emphasized: "Limits to relation back are necessary to protect defendants from prejudice not just from lost and destroyed evidence, but from an unexpected increase in liability and an inherently more complex defensive strategy long after the statute of limitations had run." *Bloom v. Alvereze*, 498 Fed. Appx. 867 (11th Cir. 2012) (citations and quotations omitted).

Defending Title IX claims involves a significantly more complex defense strategy than that of defending a common law negligence claim under state law. Additionally, and importantly, the School Board may be exposed to a significantly greater and an unexpected increase in liability since a successful Title IX plaintiff is entitled to seek attorneys' fees pursuant to 42 U.S.C. 1988. Such fees are not available in a negligence suit. Moreover, the Janie Does have argued that the School Board has waived its sovereign immunity with respect to Title IX claims. Any such waiver of sovereign immunity exposes the School board to an

exponentially increased liability, as the Janie Does' damages would no longer be subject to the statutory cap of $100,000. § 768.28(5), Fla. Stat. (2006). Yet, as the Title IX claims were not timely raised, the School Board was wholly unable to appropriately evaluate its potential risk under the Janie Does' claims.

This Court should quash the Fourth District's decision below because the Janie Does' newly added Title IX claims are new, different and factual distinct causes of action. As such, they do not relate back to the filing of the initial complaint and they are time-barred.

CONCLUSION

The Janie Does' time-barred amended Title IX claims do not relate back to the filing of their initial negligence complaint because they raise a new, different and factually distinct cause of action. This Court should quash the Fourth District's decision in this case and remand to the court to affirm the trial court's dismissal of the Janie Does' Title IX claims.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

Shannon P. McKenna, Counsel for Petitioner SCHOOL BOARD, HEREBY CERTIFIES that a fully executed copy hereof has been furnished to Marc A. Wites, Esq., Attorney for Appellants, Janie Doe I, etc., mwites@wklawyers.com by electronic mail on this 7th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Civil Procedure. The brief is presented in Times New Roman, 14-point font.

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