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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 REPLY BRIEF ON THE MERITS

Respectfully submitted by,
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ARGUMENT[1]

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.

In support of the Fourth District's decision below, the Respondents incorrectly interpret and apply the term "same general factual situation" as allowing the relation back of the Janie Does' amended Title IX claims because they shared some facts in common with the original negligence complaint. The Respondents also incorrectly reject this Court's early relation-back decisions.

Since this Court first began to apply the relation back doctrine more than 100 years ago, it has recognized that the liberality accorded to pleadings does not extend to claims that constitute a new, different and **factually distinct** cause of action; thus, such amended claims do not relate back to the filing of the original claims. *See e.g. La Floridienne v. Atlantic Coast Line R. Co.*, 58 So. 186 (Fla. 1912); *Livingston v. Malever*, 137 So. 113 (Fla. 1931). Contrastingly, when the essential elements of the controversy remain the same and the amended claims arise from the same conduct, transaction and occurrence set forth in the original claim, the amended claims relate back to the filing of the original claim. *See e.g.*

[1] In this Reply Brief, 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.

Caduceus Properties, LLC v. Graney, 137 So. 3d 987 (Fla. 2014) (citing *James v. Dr. P. Phillips Co.*, 155 So. 661, 663 (Fla. 1934); *Gibbs v. McCoy*, 70 So. 86 (Fla. 1915)). This Court has repeatedly and consistently applied these above standards in determining whether an amended claim relates back.

Over the last forty or more years, however, the District Courts of Appeal have almost exclusively addressed issues regarding the relation back doctrine and its application. During that time, confusion has arisen between and within the District Courts of Appeal regarding the interpretation and use of the terms "same general fact situation;" "common core of operative facts;" and "same conduct, transaction, or occurrence" leading to the utilization of different tests for and applications of the relation back doctrine. This confusion is evident between the Fourth District's decision below—which allows the relation back of an amended claim **so long as it arises from the same general fact situation** as the original claim—and the Third District's decision in *Kopel v. Kopel*, 117 So. 3d 1147 (Fla. 3d DCA 2013) *rev. granted* SC 13-992 (June 11, 2014)[2]—which holds that an amended claim does not relate back if it sets forth a new, different and distinct

[2] In their Answer Brief, the Respondents argue that the School Board's law firm advocated, on behalf of Leon Kopel in his appeal before the Third District and his petition for review before this Court, a position opposite of that taken on behalf of the School Board in this Court. (AB. 3, 35-37). These allegations are misleading and lack any purpose other than to improperly impugn the integrity of the undersigned law firm and the School Board's position on appeal. *See* School Board's Motion to Strike (requesting the striking of similar misleading allegations from the Respondent's jurisdictional answer brief).

cause of action. In contrast to *Kopel*, the Fourth District's "same general fact" standard improperly only requires a truncated determination of whether the original and amended claims share some facts in common. It does not require any additional analysis to determine whether the originally alleged facts give fair notice of the amended claim—a consideration required by the statute of limitations.

The same general fact standard has been cited often within decisions; but it has never been concretely defined. Additionally, and problematically, it is also often used interchangeably with the terms "common core of operative facts" and "same transaction, occurrence, and conduct." Consequently, its use has resulted in the misapplication of the relation back doctrine, as it did below, by permitting the relation back of the amended Title IX claims because they shared some common facts with their originally pled negligence claims, even though the facts alleged in the original negligence claims did not give the School Board fair notice of the amended Title IX claims. The incorrect use of the "same general fact" standard results in a diluted application of Rule 1.190(c)'s "conduct, transaction or occurrence" requirement. (Indeed, the Rule's "conduct, transaction or occurrence" requirement is rendered virtually meaningless when a court applies the same general fact standard as only requiring **some** factual overlap between a party's original and amended claims.) It also undermines the protections of the statute of limitations. In practice, this standard is un-workable because it utilizes a one-size-

fits-all rule that is not flexible enough to account for varying considerations under the relation back doctrine depending upon whether a new legal theory is set forth.

For example, if both set of claims are based on the same legal theory, then it is more likely that the same general fact standard can appropriately determine whether the amended claims relate back to the original claims. This is so because the original claims have already put the opposing party on notice of the legal theory of the amended claims, which means that the commonality between the facts as originally alleged and as amended is the primary factor in determining whether the amended claims relate back. On the other hand, when the amended claims are based on a different legal theory, the mere commonality of some facts between the amended and original claims is insufficient to determine whether the relation back doctrine applies. In this situation, additional analysis is required to determine if the facts pled in the original claim put the opposing party on notice of the amended claim's factual and legal basis. If the facts do not do so, then the amended claim does not relate back to the original claim. Applying a same general fact standard—meaning that the claims share some common facts—to this situation may result in the misapplication of the relation back doctrine because it forgoes any determination regarding whether the facts alleged in the original claim provide fair notice of the amended claim.

This is exactly what happened below when the Fourth District allowed the

relation back of the Janie Does' amended Title IX claims just because there were some common facts between the amended claims and the original negligence claims. This determination was incorrect because an examination of the facts pled in the original complaint clearly shows that the School Board was not put on any notice of the operative facts/essential elements of the Title IX claims. Accordingly, under this Court's long-standing precedent, the amended claims were time-barred as they raised a new, different and factually distinct claim.

The Respondent's argument that the amended Title IX claims relate back to the original negligence claims because the claims share some facts in common illustrates the inherent problems with the use and application of the "same general fact" standard. For example, throughout their brief, the Respondents use the term "same general fact situation" as meaning that there are some facts in common between the original and amended claims, mainly that the School Board failed to take appropriate measures to protect the Janie Does from Sinrod despite knowledge, and reason to know, that he had previously acted inappropriately with other girls in his classes. They also use the term "same general fact situation" interchangeably with the terms "same core operative facts" and "same conduct, transaction, or occurrence." But as discussed above, the use of the term "same general fact situation" as referring to some undefined measure of factual overlap does not appropriately reflect the requirements of the relation back doctrine. This

problem is compounded when the Respondents use this diluted definition as being equivalent to the terms "same common operative facts" and "same conduct, transaction, or occurrence." Based on a diluted definition of "same general facts" and an incorrect determination that this definition is equivalent to other terms of art used in relation-back decisions, the Respondents' argument must fail.

The Respondents' argument is also contradicted by the decisions of this Court and the District Courts of Appeal which clearly hold that an amended claim that raises a new, different and factually distinct claim does not relate back. As discussed more fully in the School Board's Initial Brief, this Court's decisions set forth the following guidelines for the application of the relation-back doctrine. 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. *James*, 155 So. at 663; *La Floridienne*, 58 So. at 187-188. If the amended claim is based on a **different** legal theory though, 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. *Caduceus*, 137 So. 3d at 987; *James*, 155 So. at 663; *Gibbs*, 70 So. at 86. 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 factually distinct cause of action.

Merchants & Bankers Guaranty Co. v. Downs, 175 So. 704, 711 (Fla. 1937); *Falk v. Sario*, 146 So. 192, 195 (Fla. 1933); *La Floridienne*, 58 So. at 186. An amended claim constitutes a new, different and factually 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. *Lopez v. Avery* , 66 So. 2d at 689, 691 (Fla. 1953); *Gerstel v. William Curry's Sons Co.*, 20 So. 2d 802, 804, 810 (Fla. 1945); *Livingstone*, 137 So. at 117.

The Respondents also incorrectly argue that this Court's early relation back decisions are no longer good law. The Respondents do not even address the substance of this Court's early decisions. Instead, they dismiss this entire body of case law solely because "these antiquated decisions have no bearing on current Florida law concerning the relation back of amendments." (AB. 17). In doing so, the Respondent's have ignored this Court's recent *Caduceus* decision holding that an amended complaint naming a third-party defendant as a party defendant related back because the third-party defendant was on notice of the "conduct, transaction, or occurrence" from which the plaintiff's claims arose. In so holding, this Court emphasized that its conclusion was "also **consistent with this Court's long-standing precedent** that an amended pleading does not actually introduces a new

defendant when it merely adjusts that status of an existing party." *Id.* (citing *I. Epstein & Bro. v. First Nat'l Bank of Tampa*, 110 So. 354, 355-356 (Fla. 1926); *James*, 155 So. at 663; *Gibbs*, 70 So. at 86.).

The Respondents' erroneous dismissal of this Court's long-standing precedent is also clearly evidenced by the indisputable fact that the relation back doctrine 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). The flaw in the Respondents argument lies in their selective reading of Rule 1.190's commentary:[3]

> 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, Author's Comment 1967, Relation Back (emphasis added). In their Answer Brief, the Respondents rely on the italicized portion above to support their argument that this Court's pre-1967 jurisprudence is no longer good law. But they then omit any consideration of the bolded portion which clearly

[3] The same infirmities lie with the Fifth District's conclusion that this Court's *Livingston* decision is no longer good law. *Fabbiano v. Demings*, 91 So. 3d 893 (Fla. 5th DCA 2012).

indicates (1) that the harshness of the prior rule was modified by a liberal construction of "cause of action" and (2) that Rule 1.190's conduct, transaction, or occurrence requirements are **in accord with this Court's liberal construction of "cause of action."** Thus, the "modern rule" is fully supported by, and is clearly based on, this Court's early relation-back jurisprudence. The School Board's interpretation of these comments is bolstered by the fact that this Court's early decisions specifically applied a liberal interpretation to amendments and eschewed technicalities. *Twyman v. Livingston*, 58 So. 2d 518 (Fla. 1952); *Marks v. Fields*, 36 So. 2d 612 (Fla. 1948). Moreover, under then-existing statutes, amendments in both law and equity were liberally permitted. *See* § 2629, Rev. Gen. St., Section 4295 Comp. Gen. Laws; § 26, 1931 Chancer Act, Acts 1931 c. 14658.

The Respondents' improper rejection of this Court's pre-1967 relation-back decisions is further evidenced by the fact that in 1950 and in 1954, many years before the 1967 adoption of the "modern rule," this Court adopted identical versions of Rule 1.190(c). *See* Rule 15, Fla. Common Law Rules (1950); Rule 1.15, Fla. R. Civ. P. (1954). Rule 15, Rule 1.15(c), and Rule 1.190(c) all contain the following language: when "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." In their Answer Brief, the Respondents have not made any attempts to distinguish the foregoing authorities.

Also contrary to the Respondents' argument, numerous decisions of the District Courts of Appeal are in accord with this Court's relation-back decisions. These decisions, which are discussed more fully in the Initial Brief, include the following: *Kopel*, 117 So. 3d at 1147 (amended breach of oral contract claim did not relate back to original complaint which alleged plaintiff loaned but did not repay money to the defendants); *Daniels v. Weiss*, 385 So. 2d 661 (Fla. 3d DCA 1980) (amended loss of consortium claim did not relate back to malpractice claim); *Page v. McMullan*, 849 So. 2d 15, 16 (Fla. 1st DCA 2003) (applying Rule 1.190(c) in context of non-claim statute and finding that amended claim denying homestead exemption for 2001 did not relate back to claim for denial of 2000); *Estate of Shearer v. Agency for Health Care Admin*., 737 So. 2d 1229 (Fla. 5th DCA 1999) (applying Rule 1.190(c) in context of probate claim and disallowing amendment because additional facts had to be proven to support the amended claim); and *West Volusia Hospital Authority v. Jones*, 668 So. 2d 635 (Fla. 5th DCA 1996) (finding loss of filial consortium amendment did not relate back to negligence claim).

In contrast to the above cases, the Respondents rely on language in several other cases, including *Caduceus*, *Fabbiano*, and *Mender v. Kauderer*, 143 So.3d 1011 (Fla. 3d DCA 2014) to support their argument that the "same general fact"

standard is an appropriate standard for determining whether an amended claim relates back. The difference between those cases and the Fourth District's decision below, however, is that the facts alleged in the original claims in those cases put the opposing parties on fair notice of the amended claim. This was the case in *Caduceus* where the parties did not dispute that the plaintiff's amended complaint arose out of the same conduct, transaction or occurrence of the third-party claim. *Caduceus*, 137 So. 3d at 994. *See also Mender*, 143 So. 3d at 1014 (legal theories and underlying facts and circumstances of amended claims were the same as the original claims). Moreover, since the parties in *Caduceus* did not dispute that the amended claims arose out of the same "conduct, transaction or occurrence," this Court was **not asked to** determine and **did not** determine the contours of Rule 1.190(c) that are at issue in this case.

In *Fabbiano*, the Fifth District also clearly indicated that the identical **operative facts** where alleged in the original negligence claims and the amended battery claims where the original complaint alleged that an off-duty deputy, employed by the defendant, "without provocation or justification, threw [the plaintiff] to the ground and twisted his arm[.]" *Fabbiano*, 91 So. 3d at 894. *Fabbiano* correctly applied the relation-back doctrine finding that the amended battery claim related back because the facts alleged in the original negligence claim supported the **operative facts**, or the essential elements, of the battery claim.

The Respondents argue that *Fabbiano* confirms that an amended claim based on entirely different legal theory than that of the original claim **always** relates back. But *Fabbiano* did not so hold; rather, it only held that an amended claim based that changes the legal theory relates back when the amended and original claims contain identical **operative facts**. This distinction is essential to a proper application of the relation-back doctrine. Because when the **originally pled facts** do not support the operative facts of the amended claim, the opposing party does not have fair notice of the amended claim. As such, this new, different and **factually distinct** claim should not benefit from the legal fiction of relation back, thereby, depriving the defendant the protections of the statute of limitations.

This is exactly the scenario that is presented by the Janie Does' amended Title IX claims. Thus, the Title IX claims should not relate back because 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. This analysis also explains why the School Board never argued that the amended negligent supervision and retention claims did not related back—because the **originally** pled facts set forth the operative facts of the **amended** negligence claims.

Throughout their Answer Brief, the Respondents argue that facts alleged in their original negligence claims—that the School Board failed to take appropriate measures to protect the Janie Does from Sinrod despite its knowledge and/or

reason to know that he had previously acted inappropriately with other girls in his classes—provide fair notice of their Title IX claim. While these originally pled facts overlap with some of the facts alleged in the amended Title IX claims, they are wholly insufficient to provide fair notice of the Title IX claims because they do not include any allegations regarding the **operative facts** of those claims. The Respondents attempt to diminish the significance of the fair notice requirement by arguing that the operative facts of a Title IX claim are nothing more than "adjectives and legally-descriptive terms and conclusions." As such, the Respondents incorrectly conclude that the Janie Does' allegations regarding the School Board's duty and constructive notice and Sinrod's inappropriate conduct provided sufficient notice of the Title IX claims.

This argument is directly contravened by Title IX jurisprudence which unequivocally holds that a school may not be held liable under Title IX based on theories of *respondeat superior* or mere constructive notice. *Gebser v. Lago Vista Independent School District*, 524 US. 274, 285 (1998). Moreover, a Title IX claims is not based on a breach of duty; it is grounded on a federal constitutional violation—a distinctly different type of conduct than that typically alleged in a negligence claim. *See Collin v. Harker Heights*, 503 U.S. 115, 128 (1992). Additionally, and importantly, Title IX's requirements—receipt of federal funding; 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 the policymaker made an "official decision" not to remedy the violation, that is clearly unreasonable in light of the circumstances—are essential elements of a Title IX action. *Gebser*, 524 U.S. at 285. The above decisions clearly show that these requirements are **essential elements** of a Title IX claim, not mere adjectives, legal descriptors and/or legal conclusions as the Respondents' argue. As discussed in the Initial Brief, while all of these operative facts were alleged in the amended Title IX claims; **none** of them were alleged in their original negligence claims. Thus, even though the Title IX and negligence claims share some common factual allegations—that a teacher sexually abused students and injuries—this factual overlap alone is insufficient to support the relation back of the Title IX claims.

Federal law also supports a finding that the Janie Does' Amended Title IX Claims do not relate back to their original negligence complaint. Under Federal Rule of Civil Procedure 15(c), the critical issue is whether the original complaint put the opposing party on **notice 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. *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993). This is true even if the amended claim and the original claim share some facts in common. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013).

In their Answer Brief, the Respondents argued that nothing in the federal decisions, discussed in the Initial Brief, and "the application of their 'common core of operative facts' and 'allegations of both difference in both time and type' standards" would suggest a different result below. (AB. 44). The Respondents though completely ignored and failed to even address the test established by the federal courts to determine whether amended claims relate back when the amended and original claims share some facts in common. Importantly, in so doing, the Respondents did not make any showing that the Title IX claims satisfied this test—that is whether the facts originally pled in their negligence complaint put the School Board on notice of the potential filing of Title IX claims. If they had undertaken such an analysis, it would be clear that the Title IX claims cannot relate back because a school's duty and constructive notice is inapplicable to a Title IX claim and common allegations of a teacher's sexual abuse and the Janie Does' injuries are wholly insufficient to put the School Board on notice of such a claim.

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.

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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 14th day of November, 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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