IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC19-87
L.T. Nos: 4D17-2840
502012CA004183XXXXMB
502012CA000179XXXXMB

MICHAEL BARNETT, individually, as natural father and guardian of R.B., a minor, and as the Personal Representative of the Estates of David Barnett, Diane Barnett and Bryan Barnett,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF FINANCIAL SERVICES,

Respondent.
_____/

PETITIONER MICHAEL BARNETT'S AMENDED REPLY BRIEF

H. T. Smith, Esquire
2655 Le Jeune Road
Suite 304
Miami, FL 33134
ht@htsmithpa.com

John W. McLuskey, Esquire
Lisa A. Riddle, Esquire
The Barrister Building
8821 S.W. 69th Court
Miami, FL 33134
eservice@mmlawmiami.com

Lauri Waldman Ross, Esquire
Ross & Girten
Two Datran Center, Suite 1701
9130 South Dadeland Boulevard
Miami, FL 33156-7818
RossGirten@Laurilaw.com

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ROSS & GIRTEN

Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

TABLE OF AUTHORITIES

ROSS & GIRTEN
Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

ROSS & GIRTEN

Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

ARGUMENT[1]

SHOOTING OF DIFFERENT VICTIMS, SEPARATED BY TIME AND LOCATION, RESULTING FROM THE NEGLIGENCE OF A STATE ACTOR OR ACTORS (WHICH OWE A DUTY TO EACH VICTIM), CONSTITUTE DIFFERENT "INCIDENTS" OR "OCCURRENCES" FOR PURPOSES OF THE AMOUNT AVAILABLE UNDER §768.28(5), WITHOUT FILING A CLAIMS BILL

The fathers agree that section 768.28(5) contains two distinct limitations on recovery (A.B. 4), and that this appeal turns on the meaning of the phrase "arising out of the same incident or occurrence" set forth in the aggregate limitation. (A.B. 3, 5, 7). The fathers disagree with DFS' interpretation.

A. The "Incident or Occurrence" is the "Act that Causes the Damage"

When section 768.28 was enacted in 1973, it constituted "a legislative declaration of a public policy which held that allowing citizens injured by the tortious acts of state agents to sue for damages resulting from their injuries outweighed that state's interest from being exempt from suit." Vargas v. Glades General Hospital, 566 So. 2d 282, 285 (Fla. 4th DCA 1996). Florida's "Tort Claims Act" required a claim to be presented in writing to the appropriate agency as a condition precedent to initiating an action. See Chapter 73-313(6), Laws of Florida.

[1] References are to the index prepared by the Fourth District clerk for this court (R.), and the records prepared by the circuit court clerk for the separate appeals to the Fourth District in Barnett (R.B.) and Nelson (R.N.). DFS' Answer Brief is denoted (A.B.). The briefs of Amici are denoted by name and page.

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Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 •Tel: (305) 670-8010 • E-mail: rossgirten@laurilaw.com

The state, for itself and its agencies or subdivisions, expressly waived sovereign immunity for liability for torts "but only to the extent specified" in the act. See Chapter 73-313(1), Laws of Florida.

Liability was imposed for tort claims on the state and its agencies and subdivisions "in the same manner and to the same extent as a private individual under like circumstances," but liability did not include punitive damages or interest for the period prior to judgment.[2] Chapter 73-313(5), Laws of Florida.

Liability to any one person could not exceed $50,000. The legislature could have, **but did not**, limit liability to a single claim or occurrence. Instead, it limited recovery to $100,000 when any claim or judgment, or portions thereof, were totaled with all other claims or judgments paid by the state "arising out of the **same** incident or occurrence…" Id. (emphasis added). If the state, or its agencies or subdivisions were insured against liability for damages for a negligent or wrongful act or occurrence, the limitations of the act did not apply to the extent of insurance coverage. See Chapter 73-313(10), Laws of Florida.

The statutory limits in effect **in 2010** were $100,000 per person and $200,000 for all claims or judgment "arising out of the same incident and occurrence," and apply to this appeal. See § 768.28(5), Fla. Stat. (2010). Those limits were

[2] This language is substantially similar to language found in the Federal Tort Claims Act, 28 U.S.C. § 2674 (enacted in 1948).

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Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

subsequently **increased**, an increase in effect at the time of the Parkland shootings, which are the subject of the companion appeal. See Guttenberg v. The School Board of Broward County, SC19-487, 2019 WL 1578798 (Fla. Apr. 12, 2019).

DFS argues that the rephrased certified question "improperly asserts elements of a negligence claim not before the court or adjudicated below." (A.B. 1). To the contrary, that issue was addressed by **both sides** in the trial court, and was part and parcel of the cross-motions for summary judgment. (R.B. 889-99, 910-11). In determining whether the "incidents or occurrences" were the same, the trial court questioned the fathers about the nature of their claims against DCF:

> THE COURT: What's the claim? What was their duty, and what was the breach of that duty?
> [BARNETT'S COUNSEL]: The duty was to properly supervise the children and to properly undertake the obligation under the statutory framework for DCF.
> THE COURT: **And they breached that duty. Am I correct?**
> [BARNETT'S COUNSEL]: **They breached that duty.**
> THE COURT: **That's the claim**.

(R.B. 889) (emphasis added).

The trial court similarly questioned the defense about the fact that there were "five different shootings at five different times . . . [with] five different claims," noting that "DCF had a duty and obligation to each one of the victims. Not in the aggregate, but to each separate one." (R.B. 910). The defense response was that the statutory terms "claim" and "incident" were both equivalent to the cause of action,

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Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

i.e. DCF's negligence. (R.B. 911, 914, 919-20). The trial court pressed the point, reaping the following concessions:

> THE COURT: I can see on a wrongful death case you might have multiple survivors in that case. You may have brothers and sisters and you may have two parents. There is a limit of 200,000 arising out of the death of that child to those multiple people as survivors under the wrongful death statute.
>
> But when you have multiple deaths and there are multiple claims, each one of those, doesn't that constitute a claim in and of itself?
>
> [DEFENSE COUNSEL]: It's a claim, but there is still an aggregate.
>
> [THE COURT]: Arising out of different acts. **Every time a bullet was fired in a different room, isn't that an act or occurrence in and of itself?**[3]
>
> [DEFENSE COUNSEL]: **You know it might be true**. It's certainty by Mr. Dell, and if it was Mr. Dell's insurance policy, that might be the situation. That is not that situation.
>
> **The occurrence is how did – what proximate causation did we proximately cause by the negligence**? **And the independent intervening act, that as to Mr. Dell, I would agree. Those are separate occurrences**.

(R.B. 919-20) (emphasis added).

Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958), the seminal case cited for "strict construction" of sovereign immunity, arose in the context of efforts to imply a waiver from general statutory language authorizing state agencies to "sue or be sued" or to "prosecute or defend." Id. at 423. It is hardly a

[3] This statement was erroneously attributed to counsel, as is apparent in context. (R.B. 919).

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Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

"novel proposition" (Fla. Ass'n of Cnty Attorneys, 2-3) to limit "strict construction" to this context. For over a century, this Court has held that where the language of a statute is clear and unambiguous, there is no occasion for judicial interpretation. See Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992); Van Pelt v. Hilliard, 78 So. 693, 695 (Fla. 1918). Neither the fathers, nor DFS, assert that § 768.28(5) is ambiguous.

Both fathers have separate "claims" for the loss of each child. See Department of Rehabilitative Services v. McDougall, 359 So. 2d 528, 533 (Fla. 1st DCA 1978) (wrongful death judgment was **not** subject to per person limit, because it included the claims for multiple persons entitled to recover). Ryan Barnett has separate "claims" for his own personal injuries and the loss of his mother. See e.g. Youngblood v. Taylor, 89 So. 2d 503 (Fla. 1956) (father and son had separate claims arising out of the same incident); State, Bd. of Regents v. Yant, 360 So. 2d 99 (Fla. 1st DCA 1978) (mother and six-year-old child had separate claims). The issue of "first impression" before this Court is whether these "claims" arose out of "the same incident or occurrence" for purposes of the aggregate cap.

The fathers urge that this case involves multiple "incidents" or "occurrences," i.e. the shooting of different victims at different times and occasions. The "acts that caused the damages" were separate shootings, to which the victims were exposed by the state's negligence. See Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003)

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accord New Hampshire Ins. Co. v. RLI Ins. Co., 807 So. 2d 171 (Fla. 3d DCA 2002). Reliance on insurance law is appropriate because the statutory terms "incident or occurrence" were not defined in section 768.28(5) and these were commonly understood terms of insurance, incorporated into the statute at the time of enactment.[4]

The fathers' interpretation of the statute does not render the $200,000 statutory cap "meaningless." Nor does it "completely strip the legislature of its ability to exercise independent judgment" through the claims bill process. (A.B. 14). The parties **agree** there is a cap on recovery without a claims bill, but differ on the **amount** of such cap, as applied to this case. The fathers' interpretation gives effect to **all** of the words in the statute, which must be read together. See Larimore v. State, 2 So. 3d 101, 111 (Fla. 2008). By virtue of the statutory text, the aggregate limit applies when claims or judgments paid by the state "arise out of the same incident or occurrence." § 768.28(5), Fla. Stat. (2010). The "incidents or occurrences" here were not "the same."

DFS' reliance on Orange County v. Gipson, 539 So. 2d 526 (Fla. 5th DCA 1989) is misplaced and addressed an entirely different issue – the amount to be

[4] Unlike Rumbough v. City of Tampa, 403 So. 2d 1139 (Fla. 2d DCA 1981), this case does not involve one continuing tort, i.e. an "ongoing nuisance" based on pollution, contamination, noise or smell, which by its nature is not readily susceptible to division between claimants.

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Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 •Tel: (305) 670-8010 • E-mail: rossgirten@laurilaw.com

apportioned between public entities in a contribution action (where the underlying claims were settled by **one** of the entities, without participation by the other).

A child was attempting to cross sewer pipes owned by the city, when he fell into a County-owned polluted canal. He and a second child, who attempted to save him, both drowned. The City and its insurer settled the wrongful death claims by paying $100,000 to each child's estate (a total of $200,000), then sued the County for contribution.

At trial on this indemnity claim, the jury apportioned 75% of the fault to the City and only 25% to the County. The County successfully argued that its liability was limited to 25% of $100,000 (the aggregate statutory limit) **not** the $200,000 the City and its insurer paid. None of the parties contended that the children were injured in different incidents (and no court therefore resolved such contention).

Amici argue that the fathers' interpretation will "imperil municipalities." (League of Cities, 2). They point to historical evidence (and case studies) of municipal bankruptcy and receivership. (League of Cities, 9-10). This evidence bears little, if any, correlation to sovereign immunity laws. See Michelle Wilde Anderson, The New Minimal Cities, 123 Yale L.J. 1118, 1142 (2014) (chronicling the insolvency of 28 urban municipalities during the "great recession" from 2007 through 2013, and attributing this to "post-industrial economic restructuring and

ROSS & GIRTEN
Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

deindustrialization," population loss, poverty, racial segregation, slow economic recovery, sagging state revenues, and increased pension and health care costs).

The "examples" of local municipalities pushed to bankruptcy "due to inability to satisfy legal judgments" (League of Cities, 7) are likewise case studies in municipal mismanagement and intransigence, **not** sovereign immunity laws. The Town of Mammoth Lakes breached and undermined a written agreement with a developer (for which it was roundly chastised by an appellate court). See Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 120 Cal. Rptr. 3d 797, 802 (Ct. App. 2010). Similarly, Boise County, Idaho was found to have imposed conditions on a permit to operate a treatment facility in its jurisdiction which were discriminatory, and violated the Federal Housing Act. See In re Boise County, 465 B.R. 156, 161 (Bankr. D. Idaho 2011).

B. No Single Tortious Act

There is a recognized distinction between new issues, which may not be raised on appeal, and new arguments on the **same** issue, which may. See Yee v. City of Escondido, Cal., 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." (citations omitted)); Secretary, U.S. Dept. of Labor v. Preston, 873 F.3d 877, 883, n.5 (11th Cir. 2017) (rejecting claim that the Secretary waived "various . . . arguments raised and authorities cited"

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as a misunderstanding of the law). As the Eleventh Circuit recently observed, "[o]ffering a new argument or case citation in support of a position advanced in the district court is permissible – and often advisable. (Were the rule otherwise, we could never expect the quality and depth of argument to improve on appeal – an unfortunate result)." Id.; accord United States v. Babcock, 2019 WL 2236809 *9, n.5 (11th Cir. 2019); Pugliese v. Pukka Development, Inc., 550 F.3d 1299, 1303, n.3 (11th Cir. 2008) (where issue raised was proper interpretation of federal statute, references to prior regulations and legislative history not presented below were more accurately characterized as new argument, not new issues).

Here, the issue on appeal has at all times remained the same, i.e. what is the meaning of the phrase "arising out of the same incident or occurrence," provided in the language of section 768.28(5). Plaintiffs have simply presented an alternative argument, which is entirely appropriate, when viewed in context.

Procedurally, the fathers **prevailed** on summary judgment in the trial court. When DFS appealed this summary judgment, the fathers were appellees entitled to rely on any evidence or theory supporting affirmance. See Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-45 (Fla. 1999) (party who is content with the judgment below "need not assign error in order to support that judgment and is not limited in the appellate courts to the theories of recovery stated by the trial court." (quoting MacNeill v. O'Neal, 238 So. 2d 614, 615 (Fla. 1970))); Malu v.

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Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

Security Nat. Ins. Co., 898 So. 2d 69, 73 (Fla. 2005) (appellate court could apply tipsy coachman doctrine to affirm even if insurer "did not raise compensability as an issue before the [] trial court").

As an alternative basis to affirm, Barnett's Answer Brief argued in the Fourth District, that this lawsuit "involve[ed] multiple assertions of negligent conduct against DCF for its **numerous** failures to reasonably investigate, supervise and protect five children from clear signs of imminent danger," that DCF should have known "of the dire circumstances existing in the household," and that DCF "had numerous opportunities to investigate and remove the children from [an] incredibly dangerous environment" but failed to do so. (R. 162) (emphasis added). It noted that Plaintiffs "all claim **numerous** acts of negligent behavior by DCF spanning a number of years and by a number of different state employees . . . ." (R. 183) (emphasis added).

The alternative argument presented here is simply a variation on this theme. From "multiple" assertions of negligent conduct, fathers now urge only two – DCF's negligence before **and after** closing its investigation. The legal issue and core argument remains the same – that the limitation of damages found in § 768.28(5) "does not allow multiple recoveries for the same incident or occurrence" but permits "separate individual capped recoveries when presented by different claimants for different incidents or occurrences." (R. 174).

ROSS & GIRTEN
Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

DFS argues that the claimant's potential award from a state actor "has to be viewed through the lens of its conduct" (A.B. 12), but attempts to limit the type of conduct to be considered. At a minimum, DCF was negligent on two separate and distinct occasions: (1) when DCF failed to properly investigate and closed its investigation within 30 days; and (2) when it failed to follow up after its child protection investigator was himself arrested on domestic violence charges, and there were additional police reports emanating from the same home.[5]

In sum, the Fourth District construed the fathers' complaints too narrowly, and the evidence too favorable to DCF, when it determined this case involved "a single tortious act."

CONCLUSION

As rephrased by the fathers, the certified question should be answered affirmatively. The Fourth District's decision should be reversed and the case remanded with directions to reinstate the trial court's order. Alternatively, if viewed solely from the perspective of DCF's negligence, the decision should still be reversed and remanded with directions to treat each claim as arising out of two different "incidents or occurrences."

[5] Since the negligence actions against DCF are active and ongoing, the fathers' complaints may be amended, if clarification is necessary. See Fla. R. Civ. P. 1.190(a) ("Leave of court [to amend] shall be freely given when justice so requires").

ROSS & GIRTEN
Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com

Respectfully submitted,

H.T. Smith, Esquire
Law Offices of H.T. Smith, P.A.
Attorneys for Plaintiff/Petitioner Barnett
2655 LeJeune Road, #304
Miami, FL 33134
Tel: (305) 324-1845
ht@htsmithpa.com

John W. McLuskey, Esquire
Lisa A. Riddle, Esquire
McLuskey, McDonald & Hughes, P.A.
Attorneys for Plaintiff/Petitioner Barnett
The Barrister Building
8821 S.W. 69th Court
Miami, FL 33156
Tel: (305) 662-6160
eservice@mmlawmiami.com
jmcl@mmlawmiami.com
lriddle@mmlawmiami.com
asantamaria@mmlawmiami.com
fhudson@mmlawmiami.com

Lauri Waldman Ross, Esquire
Ross & Girten
Appellate Co-Counsel for
Plaintiff/Petitioner Barnett
Two Datran Center, Suite 1701
9130 S. Dadeland Boulevard
Miami, FL 33156
Tel: (305) 670-8010
RossGirten@Laurilaw.com

By: /s/ Lauri Waldman Ross
Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed via Florida Courts eFiling Portal and served via electronic mail pursuant to Judicial Rule of Administrative Procedure 2.516 on this 1st day of July, 2019 to:

Brittany O. Finkbeiner, Esquire
Daniel R. Russell, Esquire
William D. Hall, Esquire
Marc W. Dunbar, Esquire
Law Firm of Dean Mead & Dunbar
215 S. Monroe St., Suite 815
Tallahassee, FL 32301
bfinkbeiner@deanmead.com
drussell@deanmead.com
whall@deanmead.com
mdunbar@deanmead.com

Vincent E. Miller, Esquire
55 S.E. 2nd Avenue
Delray Beach, FL 33444
Attorney for LeRoy Nelson, Jr.
vincent3miller@att.net
vmiller@vemlaw.com

Karen M. Nissen, Esquire
Vernis & Bowling of Palm Beach, P.A.
884 U.S. Highway One
North Palm Beach, Florida 33408
knissen@florida-law.com
rrumpf@florida-law.com
pbfiling@florida-law.com

By: /s/ Lauri Waldman Ross
Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200

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By: /s/ Lauri Waldman Ross
Lauri Waldman Ross, Esq.

ROSS & GIRTEN
Two Datran Center, Suite 1701, 9130 South Dadeland Boulevard, Miami, Florida 33156 ●Tel: (305) 670-8010 ● E-mail: rossgirten@laurilaw.com