No. 19-7064

In The
Supreme Court of the United States

Johanna Beanblossom,

Petitioner,

v.

Bay District Schools,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Florida

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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Florida Supreme Court Proceedings

First District Court of Appeal Proceedings

Trial Court Proceedings

Supreme Court of Florida

WEDNESDAY, JULY 10, 2019

CASE NO.: SC19-455
Lower Tribunal No(s).:
1D17-980;
032013CA002015CAXXXX

JOHANNA BEANBLOSSOM vs. BAY DISTRICT SCHOOLS, ETC.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, LAWSON, LUCK, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

db
Served:

HEATHER K. HUDSON
D. ROSS MCCLOY JR.
CASEY J. KING
CECILE M. SCOON
HON. JAMES BALL FENSOM, JUDGE
HON. BILL KINSAUL, CLERK
HON. KRISTINA SAMUELS, CLERK

IN THE SUPREME COURT OF FLORIDA

Case No. SC19-455
LT Case No. 1D17-0980

JOHANNA BEANBLOSSOM,
Petitioner,

v.

THE SCHOOL BOARD OF
BAY COUNTY, FLORIDA,
Respondent.

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

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Johanna Beanblossom initiated this litigation against her former employer, the School Board of Bay County, Florida[1] (the "School Board"), in December 2013. *Beanblossom v. Bay Dist. Sch.*, 265 So. 3d 657, 658 (Fla. 1st DCA 2019), *reh'g denied* (Feb. 15, 2019). Beanblossom filed a two-count complaint alleging a whistle-blower claim under § 112.3187, Fla. Stat. and a negligent retention claim. *Id.* The School Board obtained summary judgment against both counts—despite Beanblossom's response filed "on the morning of the hearing" regarding Count I, her "plainly meritless arguments" filed in the days leading up to the summary judgment hearing on Count II, and her 11:34 p.m. motion for leave to amend filed the night before the hearing on the School Board's motion as to Count II. *Id.*

The trial court also denied Beanblossom's motion for leave to amend her complaint and introduce "an additional defendant and assert four counts, including another negligence claim based on a different factual theory and a claim asserting a First Amendment violation." *Id.* The trial court viewed the motion to amend as "an attempt to circumvent summary judgment and escape the effects of failing to comply

[1] Beanblossom uses "Bay District Schools" and "The School Board of Bay County, Florida" interchangeably in this litigation and changed the style of this case on appeal. *Compare*, e.g., "Notice of Discretionary Jurisdiction" filed March 18, 2019 and Petitioner's Amended Brief on Jurisdiction filed April 23, 2019. Respondent continues its consistent use of the proper legal name pursuant to § 1001.40, Fla. Stat.

with section 768.28 despite being aware of the statute and having time to cure well within the statutory period." *Id.*

Beanblossom appealed the summary judgment against the negligent retention claim and the denial of her motion to amend. The First District Court of Appeal found no error in the order granting summary judgment. *Id.* at 658 n.1. Nor did the First District find any abuse of discretion in the denial of Beanblossom's belated motion to amend—the First District found the claims in the proposed amended complaint futile. *Id.* at 659.

The First District noted that Beanblossom's new theory of negligence against the School Board "suffers the same notice defect as her prior claim" and that "her First Amendment claim—that she was retaliated against for speaking as a citizen when making complaints to various school district personnel—is futile because she did not speak as a citizen." *Id.* Accordingly, the court held that there was no abuse of discretion in denying proposed amendments that would have been futile and, based upon that finding, there was no need to address whether the amendment would have caused prejudice or constituted abuse. *Id.* at 659 n.2.

SUMMARY OF THE ARGUMENT

There is no basis for review by this Court because there is no conflict. No Florida court has held that the right to amend is so unlimited that a plaintiff who

injects new, futile, causes of action on the eve of summary judgment is entitled to amend and left no discretion to the trial court. Review should be denied.

ARGUMENT AND CITATIONS TO AUTHORITY

Beanblossom seeks review of the First District's opinion by asserting that it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. Such a conflict "must be express and direct" and "appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

I. Holding that litigants are not entitled to futile amendments is not in conflict with Florida law.

There is no disputing the policy of liberality in allowing litigants to amend pleadings under the Florida Rules of Civil Procedure. *See* Fla. R. Civ. P. 1.190 ("Leave of court shall be given freely when justice so requires."). However, upon finding one of three bases for denial, it is within a trial court's discretion to deny a motion to amend. *Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016). A motion to amend may be denied when: (1) "allowing the amendment would prejudice the opposing party," (2) "the privilege to amend has been abused," or (3) "amendment would be futile." *Id.* (internal citations and quotation marks omitted).

In the face of a First District order finding no abuse of discretion solely because Beanblossom's proposed amended complaint was futile, Beanblossom

seeks review from this Court by arguing the fundamental tenets of liberal amendment and largely ignores the issue of futility.

The First District's order based on the futility of Beanblossom's proposed amendment is perfectly in harmony with the jurisprudence of this state. Beanblossom points to no opinion from any Florida court with which the First District is in direct conflict.[2] Perhaps that is because every Florida District Court of Appeal has promulgated opinions stating the well-known standard that a motion to amend may be denied if any of the three bases are demonstrated. *See, e.g.*, *Sorenson v. Bank of New York Mellon as Tr. for Certificate Holders CWALT, Inc.*, 261 So. 3d 660, 663 (Fla. 2d DCA 2018), *reh'g denied* (Jan. 8, 2019) (stating same standard and allowing amendment based, in part, on finding no indication that amendment would be futile); *Kay's Custom Drapes, Inc. v. Garrote*, 920 So. 2d 1168, 1171 (Fla. 3d DCA 2006) (stating same standard and noting no argument was raised that

[2] Although Beanblossom devotes an entire page of her Amended Brief on Jurisdiction (p. 8) to quoting this Court's opinion in *Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005), *as revised on denial of reh'g* (Sept. 29, 2005), that opinion has absolutely no application. Beanblossom fails to acknowledge that there are two distinct avenues of amendment laid out in Rule 1.190(a). "[B]y its terms the rule provides for amendment as of right (first sentence) and amendment by agreement or leave of court (second sentence)." *Boca Burger, Inc.* 912 So. 2d at 567. The *Boca Burger* opinion focused entirely on the first sentence—amended prior to a responsive pleading. *Id.* at 563. Beanblossom's motion was not filed prior to the School Board's answer. In fact, it was filed years later—at 11:54 p.m. the night before the hearing on the School Board's motion for summary judgment—and was therefore subject to the second sentence of the rule, which requires either "leave of court" or "written consent of the adverse party." *See* Fla. R. Civ. P. 1.190(a).

amendment would be futile); *Thompson v. Bank of New York*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003) (stating same standard and affirming denial of motion to amend based on finding proposed amendment was futile as insufficiently pled); *Sonny Boy, L.L.C. v. Asnani*, 879 So. 2d 25, 29 (Fla. 5th DCA 2004) (stating same standard and affirming denial of motion to amend where proposed amendment would not have cured deficiencies).

This Court has also endorsed this statewide standard. In *Bryant v. State*, 901 So. 2d 810 (Fla. 2010), while reviewing the handling of a postconviction motion in the criminal arena, the Court noted that "[i]n the civil context, dismissing a complaint without granting at least one opportunity to amend is considered an abuse of discretion *unless the complaint is not amendable*." *Id.* at 818 (emphasis added).[3]

This Court went on to quote with approval a Fifth District opinion which laid out the same standard for denying a motion to amend when "allowing the amendment would prejudice the opposing party; the privilege to amend has been

[3] The School Board's research suggests that the genesis of the District Courts' creation of the futility rule may be traceable back to this Court's opinion in *Matson v. Tip Top Grocery Co.*, 9 So. 2d 366, 368 (Fla. 1942), which concluded:

> If the plaintiff could have made a stronger case by amending she could have proffered such amendment by appropriate motion. Failing to do so, we will not hold the lower court in error for not allowing further amendment to the declaration. Furthermore, it appears to us as it did to the lower court that plaintiff had fully stated the ultimate facts of her case and further amendments could have disclosed no other or different facts.

abused; or amendment would be futile." *Id*. (quoting *Sonny Boy, L.L.C. v. Asnani*, 879 So. 2d 25, 27–28 (Fla. 5th DCA 2004)). In *Sonny Boy, L.L.C.*, the Fifth District upheld the trial court's denial of an *ore tenus* motion to amend because the requested amendment would not have cured the fatal defect. *See* 879 So. 2d at 29.

Furthermore, every opinion Beanblossom relies upon is either entirely inapplicable or provides an exception for complaints that are futile. *See, e.g, Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005), *as revised on denial of reh'g* (Sept. 29, 2005) (entirely inapplicable, as discussed in footnote 2 above); *Dausman v. Hillsborough Area Reg'l Transit*, 898 So. 2d 213 (Fla. 2d DCA 2005) (allowing amendment where plaintiff merely amended to change from private to public whistle-blower claim under same facts and futility not questioned); *Yun Enterprises, Ltd. v. Graziani*, 840 So. 2d 420, 423 (Fla. 5th DCA 2003) (noting that denial of leave to amend would be permissible if amendment was futile, but finding that proposed amendment "resolve[d] the discrepancies" at issue); *Dimick v. Ray*, 774 So. 2d 830, 835 (Fla. 4th DCA 2000) (holding that amendment was not futile—not that a futile amendment would have been allowed); *Gate Lands Co. v. Old Ponte Vedra Beach Condo.*, 715 So. 2d 1132, 1135 (Fla. 5th DCA 1998) (noting exception to general rule if amendment would be futile); *Kohn v. City of Miami Beach*, 611 So. 2d 538 (Fla. 3d DCA 1992) (ruling on entirely inapplicable issues); *Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Co-op. Bank*, 592 So. 2d 302, 305

(Fla. 1st DCA 1991) (stating exception for futile amendments and finding proposed amendment not futile); *Bouldin v. Okaloosa County*, 580 So. 2d 205, 207 (Fla. 1st DCA 1991) (noting that denying leave to amend would have been warranted if complaint was "clearly not amendable" but finding complaint could have been further amended to cure deficiencies); *Adams v. Knabb Turpentine Co., Inc.*, 435 So. 2d 944, 946 (Fla. 1st DCA 1983) (stating exception to general rule for complaints which are "clearly not amendable" and noting complaint appeared curable by amendment); and, *Highlands County Sch. Bd. v. K. D. Hedin Const., Inc.*, 382 So. 2d 90, 91 (Fla. 2d DCA 1980) (noting exception when "complaint is clearly not amendable" and explaining how plaintiff's complaint was amendable). And finally, Beanblossom's citation to *Florida National Organization for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) demonstrates that the instant opinion is not unique or conflicting. In *Florida National*, the First District held that "leave to amend may be denied 'where the proposed amendment would be futile'" and affirmed the trial court's denial of leave to amend because the plaintiffs "cannot amend the count to state a viable claim." *Id.*

II. Holding that Beanblossom's proposed amendment was futile is not in conflict with Florida law.

Beanblossom points to no opinion of a Florida Court which conflicts with the First District's holding that Beanblossom's proposed amendment was futile. The two sentences Beanblossom spent attempting to refute the First District's finding of

futility are incomprehensible and entirely devoid of citation to authority. (Petitioner's Amended Brief, p. 7). Nevertheless, the School Board addresses the issue of futility herein to further demonstrate that the District Court's opinion is not in conflict.

The First District held that Beanblossom's new theory of negligence against the School Board was futile because the claim suffered the "same notice defect" as her prior negligence claim that was defeated for her counsel's refusal to cure the failure to serve § 768.28, Fla. Stat. pre-suit notice despite being put on notice well within the statutory period. *Beanblossom v. Bay Dist. Sch.*, 265 So. 3d at 658, 659. To hold that a claimant's right to bring an action is forfeited when the claimant fails to timely comply with this pre-suit notice requirement is entirely consistent with Florida law. *See Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 213 (Fla. 1983).

Lastly, the First District held that Beanblossom's "First Amendment claim—that she was retaliated against for speaking as a citizen when making complaints to various school district personnel—is futile because she did not speak as a citizen." *Beanblossom v. Bay Dist. Sch.*, 265 So. 3d at 659 (internal citations omitted). Beanblossom points to no opinions in this state which conflict with this conclusion.

As a government employee, Beanblossom did not enjoy an absolute right to freedom of speech; instead, Beanblossom's speech would only be constitutionally protected if it satisfied the "*Pickering–Connick* test," which, as a threshold matter

requires that "the speech must be fairly characterized as constituting speech on a matter of public concern." *Maggio v. Sipple*, 211 F.3d 1346, 1351 (11th Cir. 2000) (internal quotation marks omitted) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

It is well-settled that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *see also, Slay v. Hess*, 621 Fed. Appx. 573, 575 (11th Cir. 2015) (quoting *Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) ("In complaining to her superiors at work about how time was allotted, she was speaking as an employee, and when a government employee speaks as an employee 'there can be no First Amendment issue, and the constitutional inquiry ends.'"). The First District's holding that Beanblossom's statements made pursuant to her official duties were not speech on a matter of public concern, and were therefore not constitutionally protected, does not conflict with existing law.

CONCLUSION

No Florida court has ever concluded that it is an abuse of discretion to deny a motion to amend when amendment would be futile. There is no conflict warranting review by this Court and the School Board asks that review be declined.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Cecile Scoon, Esq., Peters and Scoon, at cmscoon1@knology.net; cmscoon2@knology.net, this 22nd day of May, 2019.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Respondent's Brief on Jurisdiction was prepared using Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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IN THE SUPREME COURT OF APPEAL
STATE OF FLORIDA

Case No. SC19-455

1DCA- 1D17-0980

Lower Tribunal No. 13002015

JOHANNA BEANBLOSSOM
Petitioner,

vs.
BAY DISTRICT SCHOOLS.
RESPONDENT

APPEALED FROM

THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S AMENDED BRIEF ON

JURISDICTION

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RULES

STATEMENT OF THE FACTS AND THE CASE

1. The Appellant began her teaching for Bay District Schools on or about 1985. App. R. 241. (1rst Aff Beanblossom Nov ’15)

2. There were several students in Ms Beanblossom’s classes that would bully the other students. App. R. 563 (2d Aff Beanblossom May ’16)

3. In April 2013, Ms. Beanblossom wrote to the Principal and sent a computer generated report about the bullying to the District office responsible for stopping and monitoring bullying. App. R. 563-564. (2d Aff Beanblossom May ’16)

4. Within about a month after submitting her last report about students being bullied and lack of administration help to stop the bullying, Ms Beanblossom was summarily called into her principal’s office and told to sign her resignation papers. App. R. App. R. 257 (Aff Sheffield).

5. Ms. Beanblossom was terminated the same day that she was told to resign her position. App. R 346 (Dep Michalik p 28 line 7 - p 29 line 19).

6. On the day she was terminated , Ms Beanblossom contacted the School District’s Human Resources Office and applied for a substitute teacher position. App. R. 242 (1rst Aff Beanblossom para 10)

7. Ms. Beanblossom was ready to be hired to be a substitute teacher and that all paperwork was in place for her to start doing substitute teacher work immediately. App. R. 242 (1rst Aff Beanblossom para 10)

7. . Beanblossom filed a lawsuit complaining that she was wrongfully terminated in retaliation in violation of FS 112.3187. App. R. 011-031. Respondent's Human Resources Manager stated in depositions that Ms Beanblossom's chances for employment at the school board would improve if she dismissed her lawsuit. App. R. 355 (Dep Michlaik p 78 line 21-25).

9. Ms. Beanblossom has applied numerous times for School District employment for positions that she is qualified for that are difficult to fill because there is a critical shortage of teachers that are qualified to fill the positions. App. R. 243 (1rst Aff Beanblossom para 12-13)

10. Ms. Beanblossom has applied for over sixty jobs with Bay District Schools that she was qualified for but she did not receive the position. App. R. 243 (1rst Aff Beanblossom para 12-13)

11. The School District also filed a complaint with the Department of Education against Ms. Beanblossom alleging that she treated children differently based on race, but this determined to be unfounded. App. R. 243 (1rst Aff Beanblossom para 14)

12. Petitioner filed a motion to Compel discovery Responses from Respondent who failed to provide the responses for about a year.

13. In her Response to the Motion for Summary Judgment Petitioner also sought leave to amend her initial whistleblower retaliation and negligent supervision complaint to add a claim for First Amendment retaliation violation under color of state law, 42 USC 1983. App. R. 68- 690. Plaintiff described the additional counts to be added.

14. On November 7, 2016, Appellant filed a separate Motion for Leave to Amend attaching the proposed complaint. App. R. 698-739

15. On January 5 2017, the court denied the motion to amend and granted the motion for summary judgment. App. R. 763

16. On January 20, 2017, Appellant filed a Motion for Rehearing. App. R. 782- 792.

17. On February 7, 2017, The Court denied the motion for rehearing. App. R. 797.

18. Appellant filed her Notice for of Appeal on March 8, 2017, App. R. 837-847.

19. Order Affirming Trial Court Order dated 14 Jan 2019

20. Motion for Rehearing Denied

21. Notice of Conflict Jurisdiction filed and dated 18 February 2019

SUMMARY OF THE ARGUMENT

It is well established that amendments are to be liberally granted. In fact, it is the norm that plaintiffs are almost always given multiple opportunities to amend, even on the eve of trial, and even after a motion for summary judgment has been granted. Dimick v Ray, 774 So. 2d 830, (4 DCA 2000).

Therefore, Petitioner contends that the trial court's denial of motion to amend was in direct conflict of well established precedent as set forth in the First District Court of Appeals and The Supreme court. Petitioner contends that the trial court's ruling expressly and directly conflicts with a decision of other district courts of appeal and of the Supreme Court on the same question of law pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv). The law states a first request for an amendment must be granted if the amendment is based upon the same set of facts and thus there is no prejudice and the amendment is not futile. Gate Lands Co. v Old Ponte Vedra Beach . Condominium, 715 So 2d 1132 (5 DCA 1998).

FACTS AND EVIDENCE IN LIGHT MOST FAVORABLE TO PLAINTIFF SEEKING TO AMEND

The cornerstone of American jurisprudence is the right to be heard before a jury or a judge. This fundamental right is enshrined in our American and Floridian concepts of judicial norms. It is reflected in the rule that all facts and law are to be construed in

favor of the non-moving party with regards to motions to dismiss and motions for summary judgment. A person or party's opportunity to be heard is well protected. This protection of a party's right to be heard is present with motions to amend also. It is well established that Plaintiffs are usually given several opportunities to amend their pleadings. In fact, the actual rule of civil procedure FRCP 1.190 (c) states that amendments should be liberally granted.

> FRCP 1.190 states: If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires.

FRCP 1.190 (c) provides that amendments should be liberally allowed. Case law has established that all doubts should be resolved in favor of the party moving for leave to amend. In a case where the new count in an amended complaint is entirely based upon the same facts as a count in the initial complaint, no prejudice or surprise can be claimed. In a case where there is only one motion for leave to amend a complaint, there is no abuse of the process. Therefore, in cases such as those, the motion for leave to amend should always be granted or amendment would be futile. Dimick v Ray, 774 So. 2d 830, (4 DCA 2000).

In the case at bar, the initial complaint contained almost all of the same elements of a pattern and practice complaint against the state for deprivation of First Amendment rights under color of law. The initial negligence claim stated that the School district had a pattern and practice of depriving teachers and students of their rights by refusal to provide a safe learning environment. App. R. 011-031 (Initial Complaint para 17-20 and 59). In addition, in her initial complaint, Appellant stated that he practice of failing to provide a safe learning environment was well known and a common practice. App. R 011- 031.

In addition, a First Amendment claim of retaliation for filing a lawsuit is very much based on the same facts that supported the whistle blower claim. Again, the Defendant could not logically claim surprise and prejudice by the addition of a 1rst Amendment whistleblower claim. Under these circumstances, the school board was well placed on notice of the alleged retaliation by its agents and the request to amend the complaint to more specifically name a closely related retaliation action cause of action should have been authorized. Dausman v Hillsborough Area Reg'l Transit, 898 So. 2d 213 (2 DCA 2005) (leave to amend should be freely given in general and even more so when the amendments is based

upon the same conduct or transactions as the original complaint).

II. ARE PLAINTIFFS ENTITLED TO AT LEAST ONE AMENDMENT OF THE COMPLAINT WHEN UNDERLYING FACTS ARE THE SAME

Review of the Florida rules of Civil Procedure, indicates that the trial court's order denying an amendment, was an express and direct conflict with other circuits and the Florida Supreme Court Yun Enters., Ltd v Grazani, 840 So. 2d 420 (5 DCA 2003) (holding a party may with leave of court amend a pleading after hearing and ruling on a motion for summary judgment) .

The Courts are essentially stating that all motions to amend should be granted absent repeated misuse of the motion, the facts and legal theory relied upon in the new count are similar to the first claims. In the case at bar there was only one proposed amended complaint proffered and the amended complaint was not futile as Plaintiff had no obligation to file a lawsuit as part of her official duties and thus her 1rst Amendment claim was viable. In addition, Petitioner had filed a notice on some later _____ claims indicating an intent to sue and exhausting her administrative remedies.

The Florida S. Ct. held in Boca Burger, Inc. vs Forum, 912 So 2d 561 (Fl S Ct 2005):

> Although *Volpicella* implied that a trial court may deny leave to amend where the complaint is clearly not amendable, a court only has such discretion under the second sentence of the rule, not under the first. The cases that have recognized a court's discretion to deny amendment in those circumstances concerned either a plaintiff's second (or subsequent) amendment or an amendment requested after the answer was filed. *See, e.g.*, *Florida National Organization for Women, Inc. v. State of Florida*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) [**17] (holding that where **[*568]** the plaintiff had amended once before a responsive pleading had been served and once again after the defendant filed an answer, the trial court abused discretion in refusing leave to amend the second amended complaint); *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992) (holding that the trial court did not abuse its discretion where the plaintiff failed in four attempts to cure the defects in the complaint); *Bouldin v. Okaloosa County*, 580 So. 2d 205, 207 (Fla. 1st DCA 1991) (stating that when a party seeks to amend a complaint after a responsive pleading has been served, leave should be granted unless the court finds a clear abuse of the privilege to amend or the complaint is clearly not amendable); *see also* ***Dimick v. Ray*, 774 So. 2d 830, 835 (Fla. 4th DCA 2000)** (holding that the trial court abused its discretion in denying motion for leave to amend plaintiff's first amended complaint); *Adams v. Knabb Turpentine Co.*, 435 So. 2d 944, 946 (Fla. 1st DCA 1983) (same); *Highlands County Sch. Bd. v. K.D. Hedin Constr., Inc.*, 382 So. 2d 90, 91 (Fla. 2d DCA 1980) (same).

18] As the Fourth District held, a court has no discretion to deny an amendment under the first sentence of the rule. A defendant may contest the legal viability of a first amended complaint by moving to dismiss the amended complaint, not by contesting the plaintiff's right to amend. We disapprove Volpicella to the extent it holds that a trial court retains any discretion to deny an amendment under such circumstances--regardless of whether the plaintiff simply files an amended complaint or requests leave of court to file one. Id at 568.

Thus Noble vs Martin.Mem'l Hosp' Ass'n, Inc. 710 so 2d 567 (4 DCA 2016) (holding that numerous amendments should not be allowed), Brown v Montgomery Ward & Co. 252 So 2d 817 (1DCA 1971) (holding that when a trial date is set and numerous leaves to amend granted, summary judgment may be warranted) that can be easily distinguished from the case at bar. In the case at bar, there was no trial date set and the Respondent had contributed to the three years of discovery by failing to provide requested discovery for about a year which forced Petitioner to file a motion to compel. (App R. 668-676)

In essence, the trial court construed all matters in the light least favorable to Plaintiff in conflict with the vast majority of Circuit court decisions and the expressly stated directive of the Florida Supreme Court. Boca. at 568.

> "all doubts should be resolved in favor of allowing amendment. It is the public policy of this state to freely allow amendments to pleadings so that cases may be discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile. Bill Williams at 305.
>
> Gatelands at 1135

The trial court's ruling below is in conflict with established precedent from other circuits and the Florida Supreme Court and represents an express conflict. This gives the court jurisdiction and Petitioner humbly asks for the court to accept jurisdiction over this matter pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

V. CONCLUSION

WHEREFORE, Petitioner, contends that this Honorable Court should assert jurisdiction over this appeal as the first District Court of Appeal order is in direct conflict with another District case and in conflict with the Florida Supreme Court.

Respectfully submitted, this 23rd day of April 2019.

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CERTIFICATE OF SERVICE

Comes now, the attorney for the Petitioner and states that she has filed this pleading electronically and thereby served opposing counsel of record and also served it by email to opposing counsel of record.

23 April 2019.
ls/Cecile M Scoon, Esq.
Cecile M. Scoon, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this Appellant's Amended Brief is submitted in Times New Roman 14point font in compliance with the requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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February 15, 2019

CASE NO.: **1D17-0980**
L.T. No.: 13-002015CA

Johanna Beanblossom	v.	Bay District Schools, Bay County, Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed January 29, 2019, for rehearing is denied.

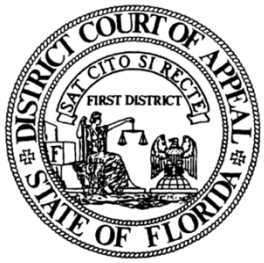
I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Dixon Ross Mccloy Jr.
Heather K. Hudson
Cecile M. Scoon

th

KRISTINA SAMUELS, CLERK



DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

March 20, 2019

CASE NO.: **1D17-1827**
L.T. No.: 13-2015-CA

Johanna Beanblossom	v.	The School Board of Bay County, Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Motion for rehearing en banc and written opinion filed by the appellant on January 29, 2019, is denied.

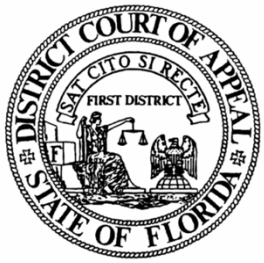
I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Dixon Ross McCloy Jr.
Heather K. Hudson
Cecile M. Scoon
Casey J. King

th

KRISTINA SAMUELS, CLERK



FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-0980

JOHANNA BEANBLOSSOM,

Appellant,

v.

BAY DISTRICT SCHOOLS, BAY COUNTY, FLORIDA,

Appellee.

On appeal from the Circuit Court for Bay County.
James B. Fensom, Judge.

January 14, 2019

PER CURIAM.

Johanna Beanblossom appeals the denial of her motion for leave to amend her complaint. Beanblossom argues that the trial court abused its discretion because she had never previously sought to amend her complaint, the case was still in the summary judgment stage, and the amendments were based upon similar facts. We find no abuse of discretion and affirm.

I.

Beanblossom filed a two-count complaint against Bay District Schools in December 2013, alleging in Count I a whistle-blower claim under section 112.3187, Florida Statutes, and in Count II a negligent retention claim. The complaint alleged that

Bay District Schools did not properly investigate her complaints, fired her for making these complaints, and failed to fire the employee she complained about.

Over a year later, Bay District Schools filed a motion for summary judgment on Count I and, despite the response Beanblossom filed on the morning of the hearing almost a year later, the trial court granted the motion. Beanblossom does not assert any error as to Count I in this appeal.

Bay District Schools' answer to Beanblossom's complaint alleged as to Count II that Beanblossom failed to comply with section 768.28(6)(a), Florida Statutes, which requires notice to be provided to the State prior to bringing an action. Over two years later, Bay District Schools filed a motion for summary judgment on Count II on this basis. Beanblossom responded with plainly meritless arguments as the November 8, 2016, hearing date drew closer until November 7, at 11:34 p.m., when she filed a motion for leave to amend her complaint. This proposed amended complaint would add an additional defendant and assert four counts, including another negligence claim based on a different factual theory and a claim asserting a First Amendment violation. Bay District Schools objected.

After the November 8 hearing, the trial court entered an order granting Bay District Schools' motion for summary judgment as to Count II. The order also denied Beanblossom's motion for leave to amend the complaint, finding the following:

> Plaintiff's motion to amend comes three years into this litigation, after extensive discovery, and on the eve of a hearing for final summary judgment. This last minute request appears to be an attempt to circumvent summary judgment and escape the effects of failing to comply with section 768.28 despite being aware of the statute and having time to cure well within the statutory period. Moreover, the addition of a new defendant and the [Federal section] 1983 claim introduces new issues into the litigation. . . . Under these circumstances, the Court finds it appropriate to deny Plaintiff's motion to amend.

After the trial court denied Beanblossom's motion for rehearing, she filed this appeal.[1]

II.

"The Florida Rules of Civil Procedure encourage a policy of liberality in allowing litigants to amend their pleadings, especially prior to trial; this policy exists so that cases will be tried on their merits." *Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016). Although permitting pleading amendments is encouraged, when making this determination, trial courts should consider prejudice to the opposing party, abuse by the moving party, and whether the proposed amendments would be futile. *Id.* (quoting *Cedar Mountain Estates, LLC v. Loan One, LLC*, 4 So. 3d 15, 16 (Fla. 5th DCA 2009)). We review this ruling for abuse of discretion. *Id.*

Taking the last of these considerations first, we note that Beanblossom asserts that the additional claims she raised in the proposed amended complaint are not futile. We disagree. She asserted a new theory of negligence against Bay District Schools, but it suffers the same notice defect as her prior claim. And her First Amendment claim—that she was retaliated against for speaking as a citizen when making complaints to various school district personnel—is futile because she did not speak as a citizen. *See Slay v. Hess*, 621 Fed. Appx. 573, 576 (11th Cir. 2015) (quoting *Boyce v. Andrew*, 510 F. 3d 1333, 1343 (11th Cir. 2007)) ("In complaining to her superiors at work about how time was allotted, she was speaking as an employee, and when a government employee speaks as an employee 'there can be no First Amendment issue, and the constitutional inquiry ends.'"). Because the proposed amendments would have been futile, the

[1] Beanblossom also appeals the order granting summary judgment in favor of Bay District Schools on Count II. We find no error in this order.

trial court did not abuse its discretion in disallowing the amendments.[2]

III.

Trial courts are encouraged to allow amendments to pleadings, but the right to amend is not unlimited. Because we find no abuse of discretion in the trial court's determination that the amendments were unwarranted, we AFFIRM.

MAKAR, WINOKUR, and WINSOR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Cecile M. Scoon of Peters & Scoon, Panama City, for Appellant.

Heather K. Hudson and Dixon Ross McCloy, Jr., of Harrison, Sale, and McCloy, Panama City, for Appellee.

[2] Because we find that the proposed amendments would have been futile, we need not address whether they would have caused prejudice to the opposing party or whether they constituted abuse.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

January 14, 2019

CASE NO.: **1D17-0980**
L.T. No.: 13-002015CA

Johanna Beanblossom	v.	Bay District Schools, Bay County, Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

The motion for sanctions pursuant to Florida Statute §57.105, filed July 13, 2017, is denied. The motion for the award of appellate attorneys' fees based on section 768.79 filed on July 13, 2017, is remanded to the trial court for further proceedings. If the trial court finds that appellee is entitled to appellate attorneys' fees under section 768.79, it shall award them after considering the appropriate amount.

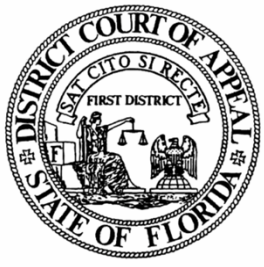
I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Dixon Ross Mccloy Jr.
Heather K. Hudson
Hon. Bill Kinsaul, Clerk
Cecile M. Scoon

co

KRISTINA SAMUELS, CLERK



DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

January 14, 2019

CASE NO.: **1D17-1827**
L.T. No.: 13-2015-CA

Johanna Beanblossom	v.	The School Board of Bay County, Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellee's motion filed June 19, 2018, for attorney's fees is granted. The cause is remanded to the trial court to assess the amount.

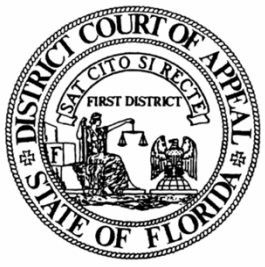
I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Dixon Ross Mccloy Jr.
Heather K. Hudson
Cecile M. Scoon
Casey J. King
Hon. Bill Kinsaul, Clerk

co

KRISTINA SAMUELS, CLERK



IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA

L.T. No. 13-002015CA

Court of Appeals Case No. 1D17-0980

Appellant,
JOHANNA BEANBLOSSOM

Vs.

Appellee,
BAY DISTRICT SCHOOLS, BAY COUNTY, FLORIDA

APPEALED FROM

THE CIRCUIT COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

REPLY BRIEF OF APPELLANT,

Cecile M. Scoon, Esq.
Attorney for Appellant
FL Bar # 834556
Peters & Scoon
Attorneys at Law
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ARGUMENT

Comes now the Appellant and presents argument in response and rebuttal to argument presented in the Answer Brief. Appellant states Appellee makes much of the fact that the litigation had been on going for almost three years, but Appellee fails to mention that a substantial part of the delay was due to Appellant's refusal to provide responses to discovery in a timely fashion, causing Appellant to file a Motion to Compel on or about 19 August 2016. (App.R. 668-676) Appellant's discovery requests were served on November 2014, but Appellee only responded on or about August 2015, asserting numerous objections and withholding a lot of documents. (App. R 234-238). The deposition of the last witness was taken May 11, 2016, reviewing documents provided just before that deposition. (App. R. 571-585) Appellant was harmed by these delays which made it more difficult for her to fully understand the parameters of her claim and delayed the determination that a motion to amend should be filed. In addition, Appellee chose to file two separate motions for summary judgment. Therefore, Appellant contends that the denial of the Motion to Amend was improper. Gate Lands Co. v. Old Ponte Vedra Beach Condominium, 715 so. 2d 1132 (5DCA 1998)

Review of the record indicates that Appellant took over ten depositions and reviewed numerous documents that were eventually provided by Defendant, after almost a year and a half delay. This case was worked on intensely. Under these circumstances, it is not an accurate presentation of the case for the Appellee to lay blame on the time taken on the case, solely at the feet of the Appellant. The Appellee contributed significantly to the delays and prevented Appellant from fully comprehending the full parameters of this case by these discovery delays. Denying access to pertinent discovery for almost one a half years removes Appellee's ability to say that the motion to amend should have been filed sooner in the case.

Under these circumstances, the first request to amend the complaint should not have been denied and appears to be an abuse of discretion. Dimick v. Ray, 774 So. 2d 830 (4DCA 2000).[1]

In addition, the proposed amended complaint does not appear to be futile. In the proposed Amended Complaint, Appellant stated that she had given notice as required by the statute and the matters complained of were within the three-day window as required by the notice statute.

2.

[1] The first mention of Appellant's intent to bring additional claims was made in the Response to Motion for Summary judgment filed on October 21, 2016, but the fully fleshed out proposed amended complaint was not attached. (App. R. 683-690).

Moreover, the First Amendment claims in the proposed Amended Complaint, were not just about Appellant, Ms. Beanblossom, speaking up for herself, she was clearly primarily speaking up on behalf of the students in her class that were being bullied with no protection offered by the School Board. Ms. Beanblossom was speaking out against the School Board's refusing to follow its written Anti-bullying policies and knowingly ignoring and tearing up disciplinary reports made about beatings and bullying of vulnerable children in school and that is a matter of great public concern. (App. R.462-482, 560, 563,). Ms Beanblossom was punished for these complaints and thus the proposed first Amendment retaliation complaint should have been allowed. (App. R. 563-564)

Finally, the matters complained of in the proposed amended complaint were not planning functions as stated by Appellee, but were alleged to be negligent discretionary decisions of the principal, the assistant principal, school board designee, and human resources manager, who all made discretionary decisions that subjected school children to harm and then retaliated against Ms. Beanblossom for complaining about this which is a basis for liability. Appellant alleged actions on the part of Appellee, in her proposed amended complaint, that amounted to deliberate indifference. Thus Doe vs. Miami Dade County, 797 F. Supp. 2d 1296, (S.D. Fl 2011) is not on point.

WHERFORE Appellant prayerfully requests that the appeal be granted and the case remanded for trial.

Cecile M. Scoon /s/
Cecile M. Scoon, Esq.
Attorney for Appellant
Johanna Beanblossom
Peters & Scoon
FL Bar # 834556
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Panama City, FL 32401
Tel: (850) 769-7825
Fax: (850) 215-0963

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been filed electronically and thereby electronically served by the court system and by email on Appellee's attorneys Dixon Ross McCloy, Jr. rmccloy@hsmclaw.com, Casey King, cking@hsmclaw.com, Heather K. Hudson, hhudson@hsmclaw.com, and their assistants Lori Benjamin lbenjamin@hsmclaw.com and Blanca Holland, bholland@hsmclaw.com, 304 Magnolia Ave. P.O. Drawer 1579, Panama City, Florida 32402, attorney for Appellee, Bay District Schools on this 10th day of October, 2017.

Cecile M. Scoon /s/
Cecile M. Scoon, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned Counsel hereby certifies that this Initial Appellant's Brief has been submitted in Times New Roman 14-Point font in Compliance with the Requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

Cecile M. Scoon, /s/
Cecile M. Scoon, Esq.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D17-0980

JOHANNA BEANBLOSSOM,

Plaintiff/Appellant,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Defendant/Appellee.

ON APPEAL FROM THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

LOWER TRIBUNAL NO.: 13-002015-CA

ANSWER BRIEF OF APPELLEE

HEATHER K. HUDSON
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DIXON ROSS MCCLOY, JR.
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Attorneys for Defendant/Appellee

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Cases

Other Authorities

PRELIMINARY STATEMENT

Appellee, The School Board of Bay County, Florida, will be referred to herein as the "School Board." Appellant, Johanna Beanblossom, will be referred to herein as "Plaintiff." References to the record on appeal will be made in parentheses with an "R." followed by the page number, e.g. (R. 62). For references to a line number within a deposition transcript, the line numbers will follow a colon after the page number, e.g., (R. 52:15).

STATEMENT OF THE CASE AND OF THE FACTS

A. Course of Proceedings and Disposition Below

1. Plaintiff initiated this lawsuit with the filing of a two-count Complaint on December 12, 2013. (R. 11.)

2. Plaintiff's Complaint alleged a statutory cause of action under Florida's Whistle-Blower's Act § 112.3187, Florida Statutes and a negligent retention claim. (R. 11-20.)

3. Many months of discovery ensued. (R. 38-94, 98-99, 233-238.)

4. The School Board filed a Motion for Summary Final Judgment as to Count I of Plaintiff's Complaint — the whistle-blower claim — on January 15, 2015. (R. 100.)

5. The Circuit Court had the benefit of written arguments from both parties as well as oral arguments by counsel for both parties. (R. 100-133, 364-381, 385.)

6. The Circuit Court granted the Defendant's Motion for Summary Final Judgment as to Count I of Plaintiff's Complaint, ending Plaintiff's claim under the Act, on December 10, 2015. (R. 384-386.)

7. Plaintiff thereafter filed a Motion for Rehearing that was denied. (R. 397-404, 421.)

8. The School Board filed a Motion for Summary Final Judgment as to Count II of Plaintiff's complaint — the negligent retention claim — on February 15, 2016 and later filed an Amended Motion for Summary Final Judgment as to that count on July 22, 2016. (R. 441-449, 632-644.)

9. Plaintiff filed a Motion to Amend Complaint at 11:34 P.M. on November 7, 2016, on the eve of the November 8, 2016 hearing on the School Board's Motion for Summary Final Judgment on Plaintiff's only remaining cause of action. (R. 698-739.)

10. The Circuit Court again had the benefit of both written and oral argument from counsel for both parties prior to ruling on the motions. (R. 632-667, 677-761.)

11. The Circuit Court granted the School Board's Motion for Summary Final Judgment, this time as to Count II of Plaintiff's complaint, on January 5, 2017. The Circuit Court's order also denied Plaintiff's Motion to Amend. (R. 761-763.)

12. The Circuit Court's order below made specific findings as to why Plaintiff's request to amend her complaint was denied, stating:

> Plaintiff's motion to amend comes three years into this litigation, after extensive discovery, and on the eve of summary judgment. This last minute request appears to be an attempt to circumvent summary judgment and escape the effects of failing to comply with section 768.28 despite being aware of the statute and having time to cure well within the statutory period. Moreover, the addition of a new defendant and the 1983 claim introduces new issues into the litigation. For the first time Plaintiff alleges that the school board has a practice or policy of failing to properly investigate allegations of bullying. Under these circumstances, the Court finds it appropriate to deny Plaintiff's motion to amend.

(R. 762.)

13. Plaintiff again sought further review below via a Motion for Rehearing, which was denied. (R. 782-792, 797.)

14. Plaintiff's Notice of Appeal to this Court was filed March 8, 2017, and stated the Plaintiff sought review of each of the Circuit Court's orders entering summary final judgments in favor of the School Board and denying Plaintiff's motions for rehearing. Plaintiff also sought review of the Circuit Court's denial of her prayer for leave to amend her Complaint. (R. 837-847.)

15. Plaintiff filed a Second[1] Amended Notice of Appeal on April 3, 2017, effectively withdrawing her appeal of the School Board's summary final judgment as to Plaintiff's whistle-blower claim.[2]

16. In accordance with Plaintiff's Second Amended Notice of Appeal, the only orders currently on review are the Circuit Court's January 4, 2017 Order Granting Defendant's Motion for Summary Final Judgment as to Count II of Plaintiff's Complaint [Negligent Retention] and Denying Plaintiff's Motion to Amend Complaint and the Circuit Court's February 6, 2017 Order Denying Plaintiff's Motion for Rehearing.

17. By the time Plaintiff filed her Motion to Amend, the suit had been pending for just under three years and the School Board's final dispositive motion was set to be heard just hours later. The parties had exchanged interrogatories and requests for production of documents to one another, and there had been significant responses to the same. Thirteen depositions had been taken in the case—one by the School Board (of the Plaintiff, Johanna Beanblossom) and twelve by the Plaintiff. Plaintiff's original Complaint contained 64 paragraphs and two causes of action (whistle-blower and negligent retention). Plaintiff's proposed Amended Complaint

[1] A first Amended Notice of Appeal had been filed March 10, 2017 to correct an error in the certificate of service.
[2] Plaintiff's amended notices do not appear in the record below, but are available in the docket before this Court.

contains 104 paragraphs and four causes of action (whistle-blower, negligent retention, negligence, and retaliation in violation of First Amendment rights under 42 U.S.C. § 1983). (R. 741, 11-31, 38-94, 96-99, 233-238, 387-388, 700-722.)

B. Statement of Relevant Facts

Plaintiff's Employment

18. Plaintiff, Johanna Beanblossom, was hired by the School Board to teach at Mowat Middle School on a probationary contract basis with an employment term of January 7, 2013 to June 7, 2013. (R. 148:13.)

19. Plaintiff taught at Mowat Middle School until May 23, 2013, which was her last day of employment with the School Board. (R. 149:20-23, 428:10-13.)

20. While Plaintiff worked at Mowat Middle School, Ed Sheffield was the principal of that school. (R. 427:23-25.)

Proceedings Below Related to Plaintiff's Negligent Retention Claim

21. Count II of Plaintiff's Complaint alleged that the School Board was negligent in retaining Sheffield as principal at Mowat Middle School. (R. 16-19.)

22. There are no allegations within the Plaintiff's Complaint that she has complied with the written notice requirements set forth in Florida Statute §768.28. Specifically, there are no allegations that she has ever presented her claim in writing to the political subdivision, the School Board of Bay County, Florida, or to the Department of Financial Services within three years after her claim accrued. There

are also no allegations that this condition precedent has been met or was waived. (R. 11-31.)

23. The School Board asserted defenses in its Answer filed March 3, 2014 that it is immune to suit for lack of no subject matter jurisdiction "because the Plaintiff has failed to comply with the notice requirements of Florida Statute §768.28" and that the Plaintiff failed to state a cause of action. (R. 36-37.) Plaintiff at no time attempted to avoid any affirmative defenses.

24. The School Board served a Request for Production of Documents upon Plaintiff on March 6, 2014 requesting "Any and all notices you produced to The School Board of Bay County, Florida with regard to your claim of negligent retention of Ed Sheffield as Principal of Mowat Middle School pursuant to Florida Statute §768.28(6)." (R. 44-45, RFP #2.) No documents were produced in response to this request when Plaintiff responded on April 17, 2014. (R. 59.) Instead, Plaintiff responded: "None were produced as not needed per statute and division of Risk management." (R. 60.)

25. Interrogatories were also furnished to the Plaintiff by the School Board on this particular point on March 6, 2014. (R. 654, 658.) Interrogatory #14, and the response by Plaintiff on April 17, 2014, were as follows:

> 14. State when you first notified the Defendant, The School Board of Bay County, Florida, of the negligence claim you have set forth in Count II of your complaint pursuant to the requirements of F.S. §768.28. Please state

> the manner of your notice, to whom the notice was delivered and who has custody of the proof of the written notification.
>
> ANSWER: No notice was provided as per law and the Florida Risk Department.

(R. 658, 666.)

26. In opposition to the School Board's final summary judgment motion, Plaintiff attempted to introduce correspondence she received from a state agency, the Department of Economic Opportunity, dated September 4, 2014, as evidence of a lawsuit against her. (R.694-697.)

27. The Circuit Court specifically found that the letters from the Department of Economic Opportunity relied upon by Plaintiff "were not authenticated and they do not evidence a suit by the state to recover damages in tort where Plaintiff filed a counterclaim. As such, section 768.14 is inapplicable." (R. 762.) Plaintiff later filed an affidavit attempting to authenticate the documents, but this was filed with Plaintiff's Motion for Rehearing after summary judgment had been entered. (R. 789.)

New Negligence Allegations

28. In Plaintiff's proposed Amended Complaint, she alleged that the School Board owed her a myriad of duties, including:

a. "… the duty of providing her a safe environment in which to work…" (R. 715, ¶ 66.)

b. "… a duty to prevent its managers from making false statements against Plaintiff…" (R. 715, ¶ 67.)

c. "… a duty to not knowingly use false statements by one of its managers against Plaintiff…" (R. 715, ¶ 68.)

d. "… a duty to protect Plaintiff from false statements made by one of its managers." (R. 716, ¶ 71.)

e. "… a special duty of care not to knowingly use false statements against her by a managing agent or principal." (R. 716, ¶ 72.)

f. "… a duty to hear Plaintiff's side of the story before any determination was made to affect her employment." (R. 718, ¶ 86.)

g. "… a duty to do a full investigation and to disregard Mr. Sheffield's statement when they saw that Mr. Sheffield had been untruthful…" (R. 718, ¶ 87.)

h. "… a duty to not retaliate against Plaintiff after she made statements that [a] student was being bullied…" (R. 719, ¶ 88.)

29. Plaintiff's allegations regarding "false statements" made by a manager stem from Principal Sheffield's statements regarding when he obtained written statements from students, parents, and paraprofessionals against Plaintiff at or near the time of her termination in May 2013. Although he at one point stated he had

them prior to Plaintiff's termination, he later stated that the statements were not reduced to writing until one to two weeks later. (R. 716-717, ¶ 74, 76.)

Alleged Protected Activities

30. Plaintiff's proposed § 1983 claim, which begins at paragraph 93 of her proposed Amended Complaint, begins by incorporating all 92 of the preceding paragraphs of the complaint, including all four of the substantive counts that came before it. (R. 719, ¶93.)

31. Plaintiff does not allege within the § 1983 count what exactly her constitutionally protected activity was, stating only that she engaged "in protected speech and expression as related in part above." (R. 720, ¶ 98.)

32. Otherwise, Plaintiff makes only conclusory allegations that "she made statements as a citizen on matters of public concern." (R. 720, ¶ 97.)

33. Plaintiff's factual allegations that could be construed as her alleged protected activities are her allegations that, in her role as a teacher, she complained to her supervisors regarding how students' discipline referrals were handled, how another teacher handled a student's classwork in accordance with his Individual Education Plan ("IEP"), and Plaintiff's concerns that flowed from those issues. (R. 704-705, 707, 725-729.)

34. Plaintiff further alleges that she has not been re-hired because she filed this lawsuit. (R. 707, ¶ 38.)

SUMMARY OF THE ARGUMENT

Plaintiff herein has had every opportunity to plead and prove whatever viable causes of action she believed she had against the School Board arising from her brief employment in the spring semester of 2013. That she has fallen prey to her own refusal to comply with the very clear statutory notice requirements is no fault but her own. No one hid that fact from Plaintiff or her counsel. In fact, more than two years before the time to cure expired, the School Board itself put Plaintiff on notice of the deficiency in three ways—in its affirmative defenses, interrogatories, and requests for production. But Plaintiff's counsel adamantly refused to comply with the law. Now, years later, Plaintiff still not only maintains that the law does not apply to her, but asks this Court to believe that a letter she received was not only a lawsuit, but that it also transformed her suit, filed more than eight months earlier, into a counterclaim. Plaintiff's arguments are disingenuous, at best.

The law in this state is clear. Before a plaintiff can lodge a complaint for negligence against a sovereign subdivision of the state, she simply must meet the notice requirements of § 768.28(6)(a), Fla. Stat. within three years of the accrual of the cause of action. That, Plaintiff herein failed to do. Such a failure is fatal to a claim and cannot be cured once the time to comply with the statute has passed. Accordingly, the Circuit Court's order granting summary judgment as to Plaintiff's negligent retention claim was proper and the School Board asks this Court to affirm.

The record on appeal also supports the School Board's position, and the Circuit Court's finding, that Plaintiff's motive in filing her Motion to Amend was simply to avoid summary judgment. Years into this litigation, after much discovery, and long after the Circuit Court had disposed of Plaintiff's whistle-blower complaint on summary judgment, the School Board set a hearing on its final dispositive motion in this matter, seeking summary judgment against Plaintiff's final count. That the School Board's motion was coming up for hearing came as no surprise to Plaintiff or her counsel—a motion had been pending for many months before the hearing. Nonetheless, it was not until 11:34 P.M. on the eve of the hearing that Plaintiff's counsel filed and served a motion and proposed amended pleading that sought to upend the entire proceeding.

The Circuit Court did not abuse its discretion in denying Plaintiff's request. Allowing the Plaintiff to amend, and reopening the flood gates of discovery, three years into this proceeding would have been highly prejudicial to the School Board. The belated amendment would have delayed the action and adversely affected the School Board from a financial and procedural point of view, reopening discovery on completely new grounds and completely new claims of damages. Plaintiff's counsel was not diligent in seeking leave to amend and the proposed amendment created new causes of action requiring a different character of evidence than those outlined in the original Complaint. The amendment would have served no purpose other than to

delay the final disposition of this litigation avoid the effects of Plaintiff's failure to comply with § 768.28(6)(a), Fla. Stat.

Furthermore, even if Plaintiff had been given leave to amend, the claims she attempted to allege in her amendment were futile. Plaintiff first attempted to re-allege claims that suffer the same fatal defects that have already been disposed of by the Circuit Court. She next attempted to state a negligence claim that is fraught with issues that render it futile on its face—not the least of which being that it again suffers Plaintiff's failure to comply with § 768.28(6)(a), Fla. Stat. within three years of her employment and that Plaintiff seeks to impose liability against the School Board under a negligence theory as to planning functions, for which the School Board is immune from suit.

Plaintiff's proposed cause of action for retaliation under the First Amendment likewise fails to state a claim. When looking only to Plaintiff's proposed Amended Complaint, as one must, it is apparent that Plaintiff's alleged protected activities do not rise to the level of constitutionally protected speech. Plaintiff's statements to her supervisors on matters pursuant to her official duties were not constitutionally protected. And when she complained in court of her own perceived mistreatments, Plaintiff sought only to further her own private interests, so she again was not speaking on issues of public concern. Accordingly, Plaintiff's Amended Complaint for retaliation is futile. The futility of Plaintiff's proposed amendment further

demonstrates that the Circuit Court acted well within its discretion to deny the belated motion for leave to amend.

For the foregoing reasons, and based upon the authorities cited below, the School Board requests that this Court affirm the ruling below by holding that the Circuit Court properly exercised its discretion to grant the School Board's Motion for Summary Final Judgment and deny Plaintiff's Motion to Amend her Complaint.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Standards of Review

A. Summary Judgment — De Novo

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). Summary judgment is proper if a party "has admitted facts which preclude him ever obtaining a judgment, or is without evidence to support a fact which he must establish to succeed, or, in the face of substantial evidence by his opponent, is without evidence to rebut a fact established by his opponent's evidence which, if true, precludes a judgment in his favor. . . ." *Connolly v. Sebeco, Inc.*, 89 So. 2d 482, 484 (Fla. 1956).

Orders granting summary judgment are reviewed *de novo*. *Kuria v. BMLRW, LLLP*, 101 So. 3d 425, 426 (Fla. 1st DCA 2012). Nonetheless, the decision of the trial court is presumed to be correct unless an appellant carries his burden of demonstrating that the trial court committed reversible error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Klette v. Klette*, 785 So. 2d 562, 563 (Fla. 1st DCA 2001).

B. Motion to Amend — Abuse of Discretion

Where no abuse of discretion is made to appear, a trial court's ruling on a motion to amend should not be disturbed. *Randle v. Randle*, 274 So. 2d 557 (Fla. 3d DCA 1973). The abuse of discretion standard was summarized by the Supreme Court in the often-cited *Canakaris* opinion as follows:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

II. Scope of Review

An order may be affirmed on appeal if it is correct for any reason that is supported in the record. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d

638, 644 (Fla. 1999). This principle is often referred to as the "tipsy coachman" doctrine, and means that "an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court." *Dade County Sch. Bd.*, 731 So. at 645. *See also Applegate*, 377 So. 2d at 1152 ("Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it.").

The same rule does not apply to an appellant. A lower tribunal cannot be *reversed* because of an unpreserved basis or a basis that was not argued below. *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So. 3d 866, 869 (Fla. 4th DCA 2012).

III. The Circuit Court Properly Granted the School Board's Motion for Summary Judgment.

The Circuit Court's issuance of summary final judgment for the School Board was proper and due to be affirmed. Plaintiff failed to carry her burden of demonstrating that the Circuit Court committed reversible error. Even if the Court determines Plaintiff carried that burden, the Circuit Court's order was proper as supported by law.

A. Plaintiff failed to present sufficient argument to demonstrate reversible error in the Circuit Court's order granting summary judgment in the School Board's favor for Plaintiff's failure to comply with the § 768.28(6), Fla. Stat. pre-suit notice requirements.

Plaintiff's argument as to why the Circuit Court erred in granting the School Board's Motion for Summary Final Judgment on Plaintiff's negligent retention claim is, notably, entirely devoid of citation to caselaw.[3] Plaintiff points to no law of this state that supports the contrived argument that an unauthenticated letter from the Florida Department of Economic Opportunity—a state agency—requiring Plaintiff to repay unemployment benefits that Plaintiff improperly obtained, transformed her civil complaint against an entirely different entity—the School Board of Bay County, Florida—into a counterclaim contemplated by the § 768.14, Fla. Stat. Plaintiff provides only conclusory statements that are unsupported by a plain reading of the statutes or any citation to caselaw. Plaintiff further fails to articulate any error in the Circuit Court's finding that the letters from the Department of Economic Opportunity relied upon by Plaintiff "were not authenticated and they do not evidence a suit by the state to recover damages in tort where Plaintiff filed a counterclaim. As such, section 768.14 is inapplicable."[4]

This Court previously espoused the "well-established maxim of appellate practice that '[c]laims for which an appellant … provides only conclusory argument,

[3] Initial Brief, 11-13.
[4] (R. 762.)

are insufficiently presented for review and are waived.'" *Stanton v. Florida Dept. of Health*, 129 So. 3d 1083, 1085 (Fla. 1st DCA 2013) (quoting *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010)).

Having failed to state any basis upon which this Court could find reversible error in the Circuit Court's ruling below, Plaintiff has not properly put this question before the Court for review:

> It is elementary that when a decree of the trial court is brought here on appeal the duty rests upon the appealing party to make error clearly appear. … An appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision. Under such circumstances it must be held, as we now hold here, that we are under no duty to answer the question.

Lynn v. City of Fort Lauderdale, 81 So. 2d 511, 513 (Fla. 1955) (internal citation omitted). Nonetheless, even assuming *arguendo* that Plaintiff's brief is sufficient to warrant review of this issue, Plaintiff's argument is without merit.

Even if reality could be suspended long enough for the Court to believe that a piece of correspondence Plaintiff received in September 2014[5] converted her lawsuit filed over eight months earlier[6] into a counterclaim, a plain reading of § 768.14, Fla. Stat. demonstrates that the statute simply does not apply. In full, the section reads:

[5] The correspondence is dated September 4, 2014. (R. 696.)
[6] Plaintiff's Initial Complaint was filed December 12, 2013. (R. 11.)

> Suit by the state or any of its agencies or subdivisions to recover damages in tort shall constitute a waiver of sovereign immunity from liability and suit for damages in tort to the extent of permitting the defendant to counterclaim for damages resulting from the same transaction or occurrence.

§ 768.14, Fla. Stat. The Florida Rules of Civil Procedure speak to a compulsory counterclaim, which is the type contemplated by the statute here, as follows:

> A pleading must state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. …

Fla. R. Civ. P. 1.170(a). Plaintiff's claim against the School Board was not stated in such a manner, as there was neither a pleading for Plaintiff to respond to, nor a singular transaction or occurrence. Furthermore, the plain language definitions of "suit"[7] and "tort"[8] belie Plaintiff's meritless theory that the letter she received, let alone that it was not from the School Board, was a suit for tort damages that she could file a "counterclaim" to without complying with § 768.28(6)(a), Fla. Stat.

[7] "Any proceeding by a party or parties against another in a court of law." SUIT, Black's Law Dictionary (10th ed. 2014).

[8] "A civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages." TORT, Black's Law Dictionary (10th ed. 2014).

Having demonstrated that § 768.14, Fla. Stat. is inapplicable, the School Board presents the following additional bases demonstrating the sound reasoning behind the Circuit Court's ruling, which is due to be affirmed.

B. The Circuit Court's order granting the School Board's motion for summary final judgment as to Plaintiff's negligent retention claim for Plaintiff's failure to comply with § 768.28, Fla. Stat. pre-suit notice requirement is supported by law.

Count II of the Plaintiff's Complaint is for the negligent retention of Ed Sheffield as the Principal of Mowat Middle School. A negligent retention claim based upon a tort against a governmental subdivision such as the School Board is subject to the sovereign immunity derived from the doctrine of separation of powers. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009). Sovereign immunity protections are absolute, absent a statutory or constitutional waiver. *Klonis v. State of Florida, Department of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000). Florida Statute §768.28 provides such a waiver, but only to the extent provided therein. § 768.28 (1), Fla. Stat.

Sovereign immunity in this state is the rule, not the exception. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4, 5 (Fla. 1984); *Windham v. Florida Department of Transportation*, 476 So. 2d 735, 739 (1st DCA 1985). "The legislative purpose in enacting a sovereign immunity statute such as the one at issue in this matter is to protect the public from profligate encroachments on the public

treasury." *Andrew v. Shands at Lake Shore, Inc.*, 970 So. 2d 887, 890 (1st DCA 2007).

Florida Statute §768.28 is strictly construed in favor of a governmental entity in order to effectuate the purpose for which it was designed. *City of Gainesville v. State Dept. of Transp.*, 920 So. 2d 53 (Fla. 1st DCA 2005). As such, there are certain terms and conditions that must be met by a claimant before waiver occurs. This includes the pre-suit notice requirement, which reads as follows:

> An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also … presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing….

§ 768.28(6)(a), Fla. Stat. Further, the notice and denial requirements from paragraph (6)(a) are "conditions precedent to maintaining an action…" § 768.28(6)(b), Fla. Stat. To state a cause of action, a complaint must contain an allegation that the notice requirement has been complied with. *Menendez v. N. Broward Hosp. Dist.*, 537 So. 2d 89, 91 (Fla. 1988); *Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 213 (Fla. 1983).

There also can be no doubt that these requirements are entirely applicable to suits against school boards. *Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 212-

13 (Fla. 1983) (holding that even though the Department of Insurance[9] did not manage claims against school boards, strict construction of the waiver statute necessitated dismissal with prejudice where no notice was given); *see also Hazel v. Sch. Bd. of Dade County, Fla.*, 7 F. Supp. 2d 1349 (S.D. Fla. 1998) (dismissing a school board employee's claim for negligent supervision and retention for employee's failure to give notice of suit to the Department of Insurance within three years, as required by § 768.28, Fla. Stat.).

Despite being put on notice of her failure to comply with § 768.28(6)(a), Fla. Stat. via the School Board's Answer filed March 3, 2014 and discovery requests filed March 6, 2014, Plaintiff failed to cure this deficiency in the more than two years that followed before the fatal defect became incurable on May 23, 2016. Just as the Supreme Court determined in *Menendez*, the Plaintiff here fell prey to her own failure to comply with the statute and her claim cannot be cured at this point. *See Menendez v. N. Broward Hosp. Dist.*, 537 So. 2d 89, 91 (Fla. 1988). ("The time for filing a proper claim having expired, the Menendezes' failure to notify the Department is fatal to their complaint. Because this failure was present from the

[9] Until § 768.28 was amended in 2003 due to a government reorganization that renamed the department, notice was previously required to be served upon the Department of Insurance rather than the present Department of Financial Services. *See* 2003 Fla. Sess. Law Serv. Ch. 2003-261 (C.S.C.S.S.B. 1712).

beginning and cannot be attributed to the hospital's conduct, the doctrine of estoppel is inapplicable.").

When a claimant fails to timely comply with the pre-suit notice requirement, the claimant's right to bring an action is forfeited. *Levine*, 442 So. 2d at 213. Importantly, where the time for such notice has expired so that it is apparent that the plaintiff cannot possibly fulfill that requirement, the trial court has no alternative but to dismiss the complaint with prejudice. *Id.*[10]

Plaintiff admittedly failed to provide written notice to the School Board and the Department of Financial Services within three years and, therefore, the Circuit Court lacked subject matter jurisdiction over the claim for negligent retention. Plaintiff did not even take steps to amend or supplement her claim when specifically put on notice of these deficiencies by the School Board's affirmative defenses and through discovery requests. In fact, the Plaintiff chose not to comply, instead maintaining that the law does not apply to her.

Plaintiff's cause of action for negligent retention or supervision accrued, at the very latest, on May 23, 2013, her last day of employment. At no point thereafter

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[10] *See also Broward County Sch. Bd. v. Joseph*, 756 So. 2d 1077, 1078 (Fla. 4th DCA 2000); *Burkett v. Calhoun County*, 441 So. 2d 1108 (Fla. 1st DCA 1983); *Motor v. Citrus County Sch. Bd.*, 856 So. 2d 1054 (Fla. 5th DCA 2003); *Maynard v. State Department of Corrections*, 864 So. 2d 1232 (Fla. 1st DCA 2004); *Hamide v. State Department of Corrections*, 584 So. 2d 136 (Fla. 1st DCA 1991); *Dukanauskas v. Metropolitan Dade County*, 378 So. 2d 74 (Fla. 5th DCA 1979); *Menendez*, 537 So. 2d 89.

could Plaintiff have suffered any damages as a School Board employee as a result of any negligence on the part of the School Board and its continued retention of Ed Sheffield as a principal. Three years from the date of the accrual of the action was May 23, 2016. Plaintiff admits that no notice of any claim in writing was received by the School Board or the Department of Financial Services before that date, and Plaintiff's Complaint for negligent retention therefore fails to state a cause of action and failed to provide subject matter jurisdiction to the Circuit Court.

Plaintiff's continued reliance upon a phantom statement by the "Division of risk management"[11] that Plaintiff claims to have relied upon to her detriment continues to be absent from the record and is due to be ignored just as the Circuit Court did below.[12] The School Board's Amended Motion for Summary Final Judgment was filed on July 22, 2016 and not heard by the Circuit Court until November 8, 2016.[13] If Plaintiff's counsel wished to rely upon her own testimony that she received some sort of assurance from a state agency, counsel had ample time to execute an affidavit to that effect and provide evidence of the claimed assurance she relied upon. That counsel failed to do so, and the record remains devoid of such evidence, is noteworthy. As such, Plaintiff's arguments with regard to the alleged

[11] Initial Brief, 13.
[12] (*See* R. 762 (noting "Finally, Plaintiff argues that the Department of Financial Services told her that notice was not required. However, there is no evidence in the record to support this assertion.")
[13] (R. 632, 761.)

assurance from a state agency, without any record evidence or law to support any such reliance, do not excuse Plaintiff's failure to comply with the law and provide pre-suit notices.

IV. The Circuit Court's Denial of Plaintiff's Belated Motion to Amend was not an Abuse of Discretion.

Florida Rule of Civil Procedure 1.190(a) provides that a party may amend a pleading once, as a matter of course, under certain circumstances.[14] Those circumstances do not appear in this instance. Beyond that, a party may amend a pleading "only by leave of court or by written consent of the adverse party." Fla. R. Civ. P. 1.190(a). To amend a pleading, a party is required to file a motion to amend a pleading and to attach the proposed amended pleading to the motion. *Id.*

The Circuit Court's order below made specific findings regarding why Plaintiff's belated request was denied, stating:

> Plaintiff's motion to amend comes three years into this litigation, after extensive discovery, and on the eve of summary judgment. This last minute request appears to be an attempt to circumvent summary judgment and escape the effects of failing to comply with section 768.28 despite being aware of the statute and having time to cure well within the statutory period. Moreover, the addition of a new defendant and the 1983 claim introduces new issues

[14] "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served." Fla. R. Civ. P. 1.190(a).

> into the litigation. For the first time Plaintiff alleges that the school board has a practice or policy of failing to properly investigate allegations of bullying. Under these circumstances, the Court finds it appropriate to deny Plaintiff's motion to amend.[15]

These findings, which are supported by the record below, demonstrate that the Circuit Court did not abuse its discretion in denying Plaintiff's prayer for leave to amend.

A. The Circuit Court properly denied Plaintiff's request for leave to amend her complaint more than three years into the litigation.

Trial courts have broad discretion to permit amendments to pleadings, but that discretion decreases as the case progresses. *See Warfield v. Drawdy*, 41 So. 2d 877, 879 (Fla. 1949) (noting that the plaintiff "offered no amendment until all testimony in the case had been taken; so, … by the time she got around to submitting the amended bill the liberality in allowing such amendments had diminished to the point where her request was entitled to very little consideration on the part of the chancellor."). As this Court previously opined, "[a]lthough it is highly desirable that amendments to pleadings be liberally allowed so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached." *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817, 819 (Fla. 1st DCA 1971).

[15] (R. 762.)

In *Cox v. Seaboard Coastline Railroad Co.*, an action for wrongful death had been pending for three years when the movant sought to amend a complaint to assert a new cause of action. 360 So. 2d 8 (Fla. 2d DCA 1978). The Second District noted that while an amended pleading will be allowed to relate 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" and that such an amendment would not be allowed if it would "change an issue, introduce new issues, or materially vary the grounds of relief." *Id.* at 9. *See also Int'l Patrol & Detective Agency, Inc. v. Aetna Cas. & Sur. Co.*, 396 So. 2d 774 (Fla. 1st DCA 1981), *approved sub nom. Int'l Patrol & Detective Agency Co., Inc. v. Aetna Cas. & Sur. Co.*, 419 So. 2d 323 (Fla. 1982) (no error in denying leave to amend complaint two years after action was commenced and after discovery was substantially completed, as such an amendment would interfere with the timely resolution of the already pending issues in the case).

Plaintiff's belated motion was not due the same level of deference it may have been had she been diligent in seeking leave to amend much sooner in this process or when she first became aware of her need or desire to plead new claims. At this stage, however, the School Board is entitled to finally see the end of this litigation, having successfully pursued its motions for summary judgment.

B. The Circuit Court properly denied Plaintiff's request for leave to amend her complaint that would have belatedly introduced new issues, materially altered the grounds for relief, and delayed the suit to the School Board's prejudice.

Indeed, a "court may, in its discretion, deny any party the right to amend his pleadings if the proposed amendments will change or introduce new issues or materially vary the grounds for relief, or where the filing of such pleadings will delay the suit by necessarily requiring a continuance under circumstances which would be unduly prejudicial to the opposing party." *Brown v. Montgomery Ward*, 252 So. 2d at 819 (footnotes omitted).

In *Dunn v. Campbell*, the Second District Court of Appeals affirmed the trial court's denial of the plaintiff's motion to amend the complaint to add three counts raising issues of assault and battery, *res ipsa loquitur*, and misinformation as to hospital charges four days prior to the hearing on the defendant's motion for summary judgment. 166 So. 2d 217, 218-19 (Fla. 2d DCA 1964). There, the defendant argued several points in his well-received opposition to the proposed amendments:

> (1) that the granting of the motion at this particular point of the litigation would be highly prejudicial to the defendnat; (2) that the granting of the motion would unduly delay the action and would adversely affect the defendant from a financial and procedural point of view; (3) that counsel for petitioner was not diligent in attempting to file the amendment; (4) that the amendment creates new causes of action requiring a different character of evidence than those required under the complaint; (5)

> that the granting of the motion would cause the litigation to be unnecessarily lengthy and expensive to the respondent; and (6) that the motions serve no purpose other than to delay defendant's motion for summary judgment.

Id. at 219. The Second District noted the numerous depositions, previous court orders, and the fact that the plaintiff waited until only four days prior to a pretrial conference and summary judgment hearing to file the motion for leave to amend. *Id.* In ultimately concluding that the trial court's denial of the request for leave to amend was not an abuse of discretion, the Second District looked to Supreme Court opinions regarding a trial court's discretion to disallow amendment where the amendment would change the issues, introduce new issues, or materially vary the grounds for relief. *Id.* (citing *Warfield v. Drawdy*, 41 So. 2d 877 (Fla. 1949) ("…if the issues were changed or new ones introduced or the grounds of relief materially varied, the matter could not be introduced in an amendment."); (*McCullough v. McCullough*, 23 So. 2d 139, 140 (Fla. 1945) (an amendment to meet the proof is generally not allowable if it would change the theory of the case or the cause of action)).

Plaintiff's reliance upon cited caselaw to the contrary is misplaced.[16] The cases cited by Plaintiff dealt primarily with parties who sought leave to amend to

[16] Initial Brief, p. 14, 17.

cure a defect and re-state the exact, or nearly exact, same claim. *See Yun Enterprises, Ltd. v. Graziani*, 840 So. 2d 420 (Fla. 5th DCA 2003)[17] (allowing plaintiff to re-allege identical contract claim with appropriate documents attached as exhibits to cure prior defect); *Gate Lands Co. v. Old Ponte Vedra Beach Condo.*, 715 So. 2d 1132 (Fla. 5th DCA 1998) (allowing amendment of common law indemnity claim to re-state identical claim to cure defect); *Dausman v. Hillsborough Area Reg'l Transit*, 898 So. 2d 213 (Fla. 2d DCA 2005) (allowing amendment to re-state the same cause of action under a different statute where plaintiff brought whistle-blower claim under private sector whistle-blower act, § 448.102, Fla. Stat., instead of public section whistle-blower act, § 112.3187, Fla. Stat.). Unlike the movants in the cases relied upon by Plaintiff, Plaintiff here cannot simply re-plead her cause of action and cure a defect. Instead, she is trying to resuscitate a lawsuit that suffers from an incurable fatal defect by stating an entirely new cause of action many years into this litigation. The case at bar is much more similar to *Dunn*[18] and *Noble*[19] than the opinions relied upon by Plaintiff.

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[17] The opinion in *Yun* is further distinguishable in that the parties there were not dealing with prolonged litigation like the parties in the case at bar. It appears the complaint was filed in 2000 and the plaintiff sought leave to amend in 2001. *See Yun Enterprises, Ltd. v. Graziani*, 840 So. 2d at 421-22 (noting that complaint was filed two years after June 1998 contract and summary judgment was entered in December 2001).

[18] 166 So. 2d 217 (Fla. 2d DCA 1964).

[19] *See*, *Noble v. Martin Memorial Hospital Association, Inc.*, 710 So. 2d 567 (Fla. 4th DCA 1997), discussed below.

Plaintiff's belated Motion to Amend came three years after the case was filed, after significant discovery was completed, sought new damages that are different from the damages sought in the original Complaint, and added a new party defendant to the action. Plaintiff's new allegation that the School Board had a policy or practice of failing to properly investigate allegations of bullying would require an entirely new line of discovery for both parties. Plaintiff's lack of diligence in timely filing for leave to amend until mere hours before the School Board's final dispositive motion was to be heard smacks of an attempt to frustrate, rather than further, the judicial process.

The section 1983 action Plaintiff seeks to add to this litigation would introduce a new cause of action, a new party defendant, new damages with no statutory cap, and would require extensive discovery beyond that which has already been conducted over the course of three years. Allowing the amendment would reopen discovery and test the recall of all witnesses, now up to nearly four years after the events. Much like the purpose of a statute of limitations, timely parameters to a claim are necessary to insure fairness to all parties. Furthermore, the basis for the new causes of action Plaintiff sought to introduce on the eve of summary judgment had been known for many months. Any lack of diligence in filing the Motion to Amend was not the fault of the School Board, and all parties to litigation are entitled to receive a timely end to issues in dispute.

C. The Circuit Court properly denied Plaintiff's request for leave to amend her complaint that was filed in an effort to avoid impending summary judgment and the effects of Plaintiff's failure to comply with § 768.28(6)(a), Fla. Stat.

A motion to amend pleadings is further weakened when filed on the eve of or in the face of a hearing on a motion for summary judgment. *Randle v. Randle*, 274 So. 2d 557 (Fla. 3d DCA 1973) (affirming trial court's ruling denying appellant's motion to amend answer to add a counterclaim filed two and one half years after the original answer, and just prior to a hearing on a motion for summary judgment); *Inman v. Club on Sailboat Key, Inc.*, 342 So. 2d 1069 (Fla. 3d DCA 1977) (confirming that a party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings in order to defeat a summary judgment where party attempted to raise new issues for the first time in motion for rehearing and for leave to amend after summary judgment had been entered); *Daytona Beach Racing & Recreational Facilities Dist. v. Volusia County*, 355 So. 2d 175 (Fla. 1st DCA 1978), *aff'd*, 372 So. 2d 419 (Fla. 1979) (affirming denial of amendment to the complaint, proposed belatedly at the hearing on the opponent's motion for summary judgment, because the tendered amendment injected new issues foreign to the original complaint);[20] *Isaac v. Deutsche Bank Nat. Tr. Co.*, 74 So. 3d

[20] Plaintiff's reliance upon *Dimick v. Ray*, 774 So. 2d 830 (Fla. 4th DCA 2000) is misplaced. This Court's opinion in *Daytona Beach Racing*, which the Fourth

495 (Fla. 4th DCA 2011) (no abuse of discretion in denying motion to amend where the motion was made for the first time at the summary judgment hearing without attaching a copy of the proposed amended pleading). The only difference between *Isaac* and the present case is that the Plaintiff filed a Motion to Amend and attached a proposed amended pleading approximately ten hours before the summary judgment hearing.

Similar to the case at bar, in both the length of time it has taken to file the motion to amend and the purpose being to avoid summary judgment, the court in *Noble v. Martin Memorial Hospital Association, Inc.* held that the trial court properly denied the plaintiff's motion to amend his complaint to add a claim for injunctive relief where the motion was filed shortly after the defendant's motion for summary judgment was filed, and then no action was taken to set the motion for hearing, no amended complaint was attached, and it appeared the plaintiff only wanted injunctive relief if his request for monetary relief (which was the subject of

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District distinguished in *Dimick*, is the more similar case. In *Dimick*, plaintiff's counsel was diligent in filing the proposed amendment just ten days after the filing of the motion for summary judgment, and the parties would only be required to update their legal research in order to accommodate the amendment. *Dimick*, 774 So. 2d at 832, 834. Additionally, the Fourth District specifically distinguished cases like the one at hand by pointing to this Court's opinion in *Daytona Beach Racing* "where the appellate court approved the trial court's denial of a motion to amend appellants' complaint, which was 'belatedly' made at the hearing on appellees' motion for summary judgment and which injected 'foreign' issues into the litigation." *Id*. at 834 n.2 (citing *Daytona Beach Racing*, 355 So. 2d at 177).

the motion for summary judgment) was to be denied. 710 So. 2d 567, 568-69 (Fla. 4th DCA 1997). The Fourth District concluded that "a party should not be permitted to amend its pleading for the sole purpose of defeating a motion for summary judgment." *Id.* at 568. The court further noted that this was not a case where the plaintiff "needed an opportunity to reallege a cause of action that he had overlooked during the early part of the litigation. Rather, it is a case where [the plaintiff] did not want injunctive relief until it appeared that his quest for monetary damages had come to an end." *Id.*

Plaintiff's attempt to distinguish the Fourth District's opinion in *Noble*[21] simply because Plaintiff here has not sought multiple amendments overlooks the fact that the Fourth District did not decide *Noble* based upon that fact alone—the party seeking amendment there was also clearly seeking new relief because it appeared that the relief he had sought for over four years of litigation was about to be denied via the impending summary judgment hearing. *Id.* at 568. The factual similarities in *Noble* and the case at bar are strong—Plaintiff pursued an action in negligence for nearly three years until the eve of the final dispositive motion against her complaint when a new cause of action suddenly arose. Much like the trial court in *Noble*, the Circuit Court here did not abuse its discretion and its order is due to be affirmed.

[21] Initial Brief, p. 14-15.

In the case at bar, Plaintiff's motion with her proposed Amended Complaint attached was not filed until the eve of the Motion for Summary Judgment hearing on November 8, 2016—as indicated by the time stamp at the top of Plaintiff's motion showing it was filed at 11:34 P.M. on November 7, 2016.[22] The Defendant's Motion for Summary Final Judgment on the negligent retention claim was pending for almost nine months before its hearing date.[23] Plaintiff's formal Motion to Amend, with the attached proposed Amended Complaint, was pending only a matter of hours before the summary judgment hearing took place. Such a delayed filing is the equivalent of moving to amend at the conclusion of trial.

If Plaintiff's amendment had been allowed, and the parties had been required to resume discovery, the School Board would have continued to be prejudiced by Plaintiff's pursuit of this years-long litigation without end due to Plaintiff's lack of diligence in pleading, noticing, and filing any and all claims she wished to pursue in a timely manner.

[22] (R. 698; *see also* R. 761 noting that the Circuit Court heard arguments on November 8, 2016.)

[23] The School Board filed a Motion for Summary Final Judgment as to the negligent retention claim on February 15, 2016 and later filed an Amended Motion for Summary Final Judgment as to that count on July 22, 2016. (R. 441-449, 632-644.)

D. Plaintiff's proposed amended complaint, even if allowed, would have been futile.

When a party's proposed amendment is insufficiently pled, and allowing the amendment would therefore be futile, leave to amend should not be granted. *Thompson v. Bank of New York*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003). Plaintiff's proposed amendment presents four counts, all of which are futile and need not be allowed to proceed.

1. Plaintiff's restated claims remain futile.

The first is Plaintiff's previous whistle-blower count that the Circuit Court entered summary judgment against nearly two years ago.[24] Plaintiff is not pursuing an appeal of that decision[25] and cannot cure the fatal defects that claim suffered from now any better than she could have then.

Next, the proposed Amended Complaint attempts to re-allege Plaintiff's negligent retention claim. For the same reasons discussed at length above, Plaintiff cannot state a claim against the School Board for negligent retention where she has refused to comply with the pre-suit notice requirements of § 768.28(6)(a), Fla. Stat.

[24] (R. 384-386, dated December 10, 2015.)
[25] See footnote 1 of Plaintiff's Second Amended Notice of Appeal, filed April 3, 2017.

2. Plaintiff's new proposed negligence claim is futile.

The third count in Plaintiff's proposed Amended Complaint appears to be a conglomeration of all of the wrongs Plaintiff claims to have suffered at the hands of the School Board. Of all the duties she alleges the School Board owed her, though, none could have been breached in a manner that would give rise to liability against the School Board under a theory of negligence at this juncture.

First, Plaintiff alleges that the School Board owed her a duty to provide a safe work environment. If Plaintiff could demonstrate that the School Board breached such a duty, that breach could have occurred no later than Plaintiff's last day of employment—May 23, 2013. Accordingly, any claim reliant upon such a breach was barred if not duly noticed under § 768.28(6)(a), Fla. Stat. on or before May 23, 2016. The same analysis is true as to Plaintiff's allegations that the School Board owed her duties with regard to any false statements made by a manager and her allegation that the School Board had a duty to "hear Plaintiff's side of the story"[26] before terminating her employment. Any such duty owed to Plaintiff could only have been owed during her tenure as an employee of the School Board, which ended on May 23, 2013. For the same reasons discussed at length above, Plaintiff cannot state a claim against the School Board for negligence where she refused to comply

[26] (R. 718, ¶ 86.)

with the pre-suit notice requirements of § 768.28(6)(a), Fla. Stat. and her time to do so has expired.

Additionally, Plaintiff's allegations that the School Board owed her duties not to "knowingly use false statements"[27] against her are nonsensical in the context of a negligence claim. One cannot negligently knowingly use a false statement. Furthermore, if anyone purporting to act on behalf of the School Board "knowingly used a false statement" against Plaintiff, that act would not be subject to the sovereign immunity waiver, and the School Board is immune from suit. *See* § 768.28 (9)(a), Fla. Stat.

Next Plaintiff dips her toe into setting personnel policies and procedures on behalf of a sovereign agency by alleging that the School Board owed her duties with regard to how and when it investigates claims made against employees when making personnel decisions.[28] The School Board's adoption of procedures for handling employment issues is a planning function, for which the School Board is immune from suit. The Supreme Court opined that "the Florida Constitution requires that certain quasi-legislative policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Wallace v. Dean*, 3 So. 3d 1035, 1053 (Fla. 2009) (internal quotation marks and citations omitted).

[27] (R. 715, 716, ¶ 68, 72.)
[28] (R. 718, ¶ 86, 87.)

This was demonstrated in the case of *Doe v. Miami-Dade County*, 797 F. Supp. 2d 1296 (S.D. Fla. 2011). In *Doe v. Miami*, the court held that under Florida law, the county did not breach its policies and procedures in hiring a police officer who later used his position to commit sexual crimes against minors, and thus the county was entitled to sovereign immunity from the minor's negligent hiring claim. *Id.* at 1304. Specifically, the court stated that the county "cannot be held liable in a negligence action concerning the content of its hiring policies, no matter how ineffective the policies are alleged to be." *Id.*

How the School Board handles personnel matters, what level of deference it affords to principals in investigating claims against school employees, and when it requires the human resources department to carry out a full investigation of statements made by a principal when an employment decision is made, are all planning level functions for which the School Board is immune not only from liability, but from suit. *See Furtado v. Yun Chung Law*, 51 So. 3d 1269, 1277 (Fla. 4th DCA 2011) ("Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability *and* an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial.").

Lastly, Plaintiff's Amended Complaint alleges that the School Board had a duty not to retaliate against her. Negligent retaliation also appears to be a

contradiction that caselaw cannot account for, as employment retaliation claims are creatures of statute, not common law torts sounding in negligence. Plaintiff's counsel cannot escape her failure to comply with the statutory requirements of the whistle-blower act, which resulted in summary judgment against that claim, by re-painting it as a negligence claim. *See State, Dept. of Elder Affairs v. Caldwell*, 199 So. 3d 1107, 1110 (Fla. 1st DCA 2016) (holding that the statutory waiver of sovereign immunity applies only to tort claims, not statutory claims such as retaliatory discharge). Thus, there is no waiver and the School Board is immune from suit on that theory.

Additionally, there can be no waiver of sovereign immunity for such a claim even if the School Board had somehow negligently retaliated against the Plaintiff, as surely retaliation is not an action within the course or scope of anyone's duties. *See* § 768.28 (9)(a), Fla. Stat.

Plaintiff's amended negligence claim suffers many of the same fatal defects as her negligent retention claim, and for the additional reasons stated above, is futile on the face of the Amended Complaint.

3. Plaintiff's new proposed First Amendment claim is futile.

Lastly, for the first time in this years-long saga, Plaintiff attempts to allege a federal claim against the School Board for retaliation in violation of Plaintiff's First

Amendment[29] rights pursuant to 42 U.S.C. § 1983. In assessing the futility of Plaintiff's § 1983 action, the School Board would first urge this Court to look carefully at the proposed amended pleading[30] rather than what Plaintiff now argues in her Initial Brief. Plaintiff seeks to argue on appeal about a myriad of issues that are not pled in her proposed Amended Complaint.[31]

Plaintiff's proposed § 1983 claim, which begins at paragraph 93 of her proposed Amended Complaint, begins by incorporating all 92 of the preceding paragraphs of the complaint, including all four of the substantive counts that came before it.[32] Plaintiff does not allege within the § 1983 count what exactly her constitutionally protected activity was, stating only that she engaged "in protected speech and expression as related in part above,"[33] so the School Board and this Court must guess at that from a reading of the previous 92 paragraphs. Otherwise, Plaintiff makes only conclusory allegations that "she made statements as a citizen on matters of public concern."[34]

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[29] U.S. Const. amend. I (hereinafter the "First Amendment").
[30] (R. 700-722.)
[31] *See, e.g.*, Initial Brief, at 15-16 (referencing anything to do with Nancy Montague; referencing a copy of a lawsuit inadvertently placed in a personnel file; referencing who the decision maker is for substitute teaching positions). None of these issues are addressed in Plaintiff's proposed amendment.
[32] (R. 719, ¶93.)
[33] (R. 720, ¶ 98.)
[34] (R. 720, ¶ 97.)

Despite conclusory allegations to the contrary, the factual allegations in Plaintiff's complaint do not support a cause of action for First Amendment retaliation. Plaintiff simply reports that, in her role as a teacher, she complained to her supervisors regarding how students' discipline referrals were handled, how another teacher handled a student's classwork in accordance with his IEP, and Plaintiff's concerns that flowed from those issues.[35]

To state a claim of retaliation for protected speech under the First Amendment, the employee must show:

> (1) the employee's speech is on a matter of public concern; (2) the employee's First Amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech to promote the efficiency of the public services it performs through its employees; and (3) the employee's speech played a "substantial part" in the employer's decision to demote or discharge the employee.

Anderson v. Burke County, Ga., 239 F.3d 1216, 1219 (11th Cir. 2001). When a "public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the employee's speech is not protected. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

When, as here, an employee makes statements pursuant to her official duties, such statements are not constitutionally protected speech. *Slay v. Hess*, 621 Fed. Appx. 573, 575 (11th Cir. 2015) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421

[35] (R. 704-705, 707, 725-729.)

(2006)). The employee plaintiff in *Slay* alleged that she was retaliated against for complaining that she was being asked to falsify her timesheets. *Id*. In affirming the dismissal of her complaint, the United States Court of Appeals, Eleventh Circuit, stated:

> In complaining to her superiors at work about how time was allotted, she was speaking as an employee, and when a government employee speaks as an employee "there can be no First Amendment issue, and the constitutional inquiry ends." *Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir.2007); *see also Abdur–Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir.2009) (holding that "the reports of the inspectors to their supervisors about sewer overflows they were required to investigate are not protected under the First Amendment").

Id. at 576. Plaintiff here is not entitled to constitutional protection for speaking on issues that pertained to her duties as a school teacher. Instead, her statements are due to be viewed in the same manner as the Eleventh Circuit viewed the plaintiff's in *Slay*:

> When Slay complained to her superiors that she was being required to falsely allot her time on her time sheets, she was performing her official duties as an employee and was speaking as an employee and not as a citizen. "Speech that owes its existence to the official duties of public employees is not citizen speech even if those duties can be described so narrowly as not to mandate the act of speaking." *Abdur–Rahman*, 567 F.3d at 1285. Slay's amended complaint fails to state a First Amendment retaliation claim.

Slay, 621 Fed. Appx. at 576.

Plaintiff's only other allegation contained in her complaint, that she has not been re-hired because of this litigation,[36] does not resuscitate her First Amendment claim. The threshold analysis is again whether the filing of her lawsuit constituted protected speech on a matter of public concern. *Badia v. City of Miami*, 133 F.3d 1443, 1445 (11th Cir. 1998) ("If only of purely personal concern, the speech is not protected by the First Amendment."). Although there is no bright line rule in the Eleventh Circuit, the following has been gleaned from the circuit's opinions:

> Nonetheless, taking guidance from the Eleventh Circuit's decisions in cases involving similar issues, this court is convinced that when—in the context of a single-plaintiff EEOC charge or court complaint—an employee complains that he was the victim of discrimination and/or retaliation and does so for personal benefit, the main thrust of such speech will rarely, if ever, qualify as speech on a matter of "public concern."

Henry v. City of Tallahassee, 149 F. Supp. 2d 1324, 1328 (N.D. Fla. 2001). Plaintiff in this matter complains only of her own perceived mistreatments and seeks, just as the plaintiff in *Henry* did, to "further [her] own private interests rather than to raise issues of public concern." *See id*. at 1330. Accordingly, Plaintiff's proposed Amended Complaint for retaliation failed to state a cause of action. Allowing Plaintiff to amend her complaint and proceed under that theory of liability would

[36] (R. 707, ¶ 38.)

have, therefore, been futile. As such, her request for leave to amend was properly denied. *See Thompson*, 862 So. 2d at 770.

Under the foregoing authorities, the School Board maintains that was not an abuse of discretion for the Circuit Court to deny Plaintiff's Motion to Amend and the order below is due to be affirmed.

CONCLUSION

The record on appeal supports the Circuit Court's well-reasoned orders both granting the School Board's summary judgment and denying Plaintiff's belated prayer for leave to amend. The School Board asks that this Court simply affirm the orders below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Cecile Scoon, Esq., Peters and Scoon, at cmscoon1@knology.net; cmscoon2@knology.net, this 20th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief of Appellee was prepared using Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

L.T. No. 13-002015CA

Court of Appeals Case No. 1D17-0980

Appellant,
JOHANNA BEANBLOSSOM

Vs.

Appellee,
BAY DISTRICT SCHOOLS, BAY COUNTY, FLORIDA

APPEALED FROM

THE CIRCUIT COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

INITIAL BRIEF OF APPELLANT,

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TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

1. The Appellant began her teaching for Bay District Schools on or about 1985. App. R. 241. (1rst Aff Beanblossom Nov '15)

2. After a hiatus from work she applied for and was hired for a special needs teaching position at Mowat Middle school by the Bay District Schools in 2013. App. R. 563. (2d Aff Beanblossom May '16)

3. There were several students in Ms Beanblossom's classes that would bully the other students. App. R. 563 (2d Aff Beanblossom May '16)

4. Ms. Beanblossom would write the students up and seek assistance from the principal and assistant principal. App. R. 563.

5. The principal and assistant principal failed to give appropriate support to Ms. Beanblossom in providing discipline to the students and communicating with the parents about the discipline problems. App. R. 563-564. (2d Aff Beanblossom May '16)

6. In April 2013, Ms. Beanblossom wrote to the Principal and sent a computer generated report about the bullying to the District office responsible for stopping and monitoring bullying. App. R. 563-564. (2d Aff Beanblossom May '16)

7. In April 2013, Ms. Beanblossom wrote to her principal complaining about another teacher essentially doing the school work for another student

who had special needs. App. R. 75-79. (Beanblossom's texts and emails to principal)

8. On numerous occasions throughout the spring 2013, the parent of the student that was bullied went to the Mowat principal and administration and asked for assistance in stopping her child from being bullied. App. R. 560 (Aff Faircloth)

9. The Mowat principal and administration failed to provide proper support to the parents and the teacher (Ms. Beanblossom) to avoid bullying. App. R. 560 (Aff Faircloth), 563-564. (2d Aff Beanblossom Nov '16)

10. Throughout the spring 2013, the parent of the student that was bullied went to the School District Office set up to handle bullying and asked for assistance in stopping her child from being bullied. App. R. 560 (Aff Faircloth)

11. The School District Office set up to handle bullying failed to provide proper support to the parents and the teacher (Ms. Beanblossom) to avoid bullying. App. R. 560. (Aff Faircloth)

12. The School District office had a written set of guidelines directing the principals and the Bay district School Office to prevent bullying and physical threats to both students and teachers. App. R. 462-482. (Anti Bullying Manual)

13. The Mowat administrators regularly tore disciplinary reports that Ms Beanblossom and other parents wrote up. App. R. 563. (2d Aff Beanblossom May '16)

14. The School District Office did not abide by its own written guidelines and principals on many occasions. App. R. 560 (Aff Faircloth)

15. The superintendent was informed about many of the complaints about bullying and he failed to take appropriate corrective action leaving students and teachers vulnerable to physical and emotional threats. App. R. 560. (Aff. Faircloth)

16. Within about a month after submitting her last report about students being bullied and lack of administration help to stop the bullying, Ms Beanblossom was summarily called into her principal's office and told to sign her resignation papers. App. R. App. R. 257 (Aff Sheffield).

17. On or about May 23 2013, Mr Sheffield called the District Schools human Resources Officer told her that he wanted to terminate provisional teacher because several parents had come in and complained that she was seating the students in her class according to their race and that she preferred white students over black students. App. R. 347 (Dep Michelin p 23- line 1 - 13).

18. No one in the school administration or at the Bay District Office asked Ms. Beanblossom her side of the story before the decision to terminate was made. App. R. p 341 (Dep Michelin p 23 line 14- 23).

19. The human Resources Officer, Sharon Michelin, stated in deposition that the Bay District Schools never looks into the veracity of a principal's complaints against a teacher if they are provisional or terminated within the 180 days of hire. App. R. 341 (Dep Michelin p 23 line 16- p 26 line 20.

20. Ms. Michalik stated that looking into the allegations to be sure there is no discrimination or retaliation was "irrelevant." Her job was to fire anyone that the principal asked her to fire. App. R. 341 (Dep. Michelin p 23 line 16- p 26 line 20).

21. Ms. Michalik testified that Mr. Sheffield had not told her that Ms. Beanblossom had filed several complaints that Sheffield and his administrators were failing to protect students and teachers from physical and emotional bullying, shortly prior to his decision to terminate her. App. R. 344 (Dep Michelin p 26 line 21- p 27 line 10).

22. Ms. Michalik testified that she was aware that not looking into a principals allegations of wrong doing against a teacher could allow discrimination and retaliation. App. R. 342 (Dep Michalik p 24 line 25- p 26 line 12).

23. Ms. Michalik testified that even if she had known that Ms. Beanblossom had recently complained about the principal failing to protect her and students from bullying , shortly prior Mr Sheffield's decision to terminate Ms Beanblossom, it would not have made any difference. App. R. 347 (dip Michelin p 27- 25- p 28 line 21)

24. Ms Michalik testified that she had not read any statements against Ms Beanblossom and had questioned no one about the allegations against her and that was customary practice to meet an employee who is recommended for termination and then fire them within five minutes without a prior investigation. App. R. (346 Dep Michelin p 28 line 7 - p 29 line 19)

25. Ms. Beanblossom was terminated the same day that she was told to resign her position. App. R 346 (Dep Michalik p 28 line 7 - p 29 line 19).

26. On the day she was terminated , Ms Beanblossom contacted the School District's Human Resources Office and applied for a substitute teacher position. App. R. 242 (1rst Aff Beanblossom para 10)

27. Ms. Beanblossom was ready to be hired to be a substitute teacher and that all paperwork was in place for her to start doing substitute teacher work immediately. App. R. 242 (1rst Aff Beanblossom para 10)

28. A short time later Ms. Beanblossom was called and told that the District Office Human Resources Director, Sharon Michalik personally

told the Substitute Teacher Office that Ms. Beanblossom could not work as a substitute and her substitute button was turned off. App. R. 242 (1rst Aff Beanblossom para 10)

29. In deposition, Ms Michalik stated that she alone can turn off an employee's substitute employee button that will disallow them from working. App R 350 (Dep Michalik p 75 line 15- 18)

30. Ms. Beanblossom filed a lawsuit complaining that she was wrongfully terminated in retaliation in violation of FS 112.3187. App. R. 011-031.

31. Sharon Michalik stated in depositions that Ms Beanblossom's chances for employment at the school board would improve if she dismissed her case. App. R. 355 (Dep Michlaik p 78 line 21-25).

32. Ms. Beanblossom has applied numerous times for School District employment for positions that she is qualified for that are difficult to fill because there is a critical shortage of teachers that are qualified to fill the positions. App. R. 243 (1rst Aff Beanblossom para 12-13)

33. Ms. Beanblossom has had great interviews with the teachers but then she does not get the job and the positions has been readvertised after her interviews. App. R. 243 (1rst Aff Beanblossom para 12-13)

34. Ms. Beanblossom has applied for over sixty jobs with Bay District Schools that she was qualified for but she did not receive the position. App. R. 243 (1rst Aff Beanblossom para 12-13)

35. The School District also filed a complaint with the Department of Education against Ms. Beanblossom alleging that she treated children differently based on race, but this determined to be unfounded. App. R. 243 (1rst Aff Beanblossom para 14)

36. Bay District Schools placed a copy of Ms Beanblossom's lawsuit in her personnel records which was inappropriate according to ms Michalik App. R. 243 (1rst Aff Beanblossom para 13) App. R. 284 Dep Michalik p 20 line 4-25)

37. The principal, Mr Sheffield, signed a letter and several sworn affidavits stating that several black parents had come to him and given him statements complained about disparate treatment of the students based on race. App. R.

38. Through discovery and depositions, it was proven that no parents had made complaints about Ms Beanblossom treating students differently based upon race. App. R.

39. The District School Office stated in response to discovery requests that Mr. sheffield was incorrect when he said he had statements from parents and students that he based his decision to terminate Ms Beanblossom on. App. R.

40. Mr. Sheffield had no statements whatsoever when he fired Ms Beanblossom although he signed an affidavit stating that the reason why

he fired Ms Beanblossom was because of the written statements made by the parents and the children. App. R.

41. Bay District Schools continued the falsehood against Ms. Beanblossom and filed another false statement against her in court, January 2015, well knowing that the statements were false.

42. Bay District Schools also caused the State of Florida's Department of Economic Opportunity to demand repayment of 275.00 alleged overpayment of unemployment benefits and stated that failure to pay would cause a judgment in court. App. R. 696-697.

43. The District Office was also aware that Mr. Sheffield used bullying tactics against his employees if they spoke out as this was witnessed by Human Resources Manager, Sharon Michalik. App. R. 499 (Dep Montague p 16 line 3 - p 20 line 8)

44. A teacher also complained about the bullying tactics of Mr. Sheffield and sent that complaint to the superintendent of base district schools. App. R. 549-552 (email complaints from Montague to Superintendent Sheffield)

45. Appellant was told by agent of Division of Risk Management that there was no need to file notice with the Division of Risk Management because it did not take any action on behalf of school boards and Appellant did not file such a notice. App. R. 057, Response 14.

46. On July 22, 2016, the Bay District School Office filed a Motion for Summary Judgment on the case. App. R 441-449.

47. On August 19, 2016, Appellant filed a motion to compel responses to discovery responses that had been outstanding for over a year. App. R. 668-676.

48. On October 21, 2016, Appellant filed a Response to the Motion for Summary Judgment and also sought leave to amend its negligent supervision complaint to a claim for 1983 violation under color of state law. App. R. 68- 690,

49. On November 7, 2016, Appellant filed a separate Motion for Leave to Amend attaching the proposed complaint. App. R. 698-739

50. On January 5 2017, the court denied the motion to amend and granted the motion for summary judgment. App. R. 763

51. On January 20, 2017, Appellant filed a Motion for Rehearing. App. R. 782- 792.

52. On February 7, 2017, The Court denied the motion for rehearing. App. R. 797.

53. Appellant filed her Notice for of Appeal on March 8, 2017, App. R. 837-847.

54. Appellant filed an Amended Notice of Appeal on April 4, 2017.

SUMMARY OF THE ARGUMENT

Appellant contends that the Notice of Disqualification sent to her claiming a 275.00 unemployment benefits overpayment and stating that it could result in a civil judgment against her, triggered the exception to the requirement of her having to give prior notice to the Dept of Financial Services pursuant to FS 768.14. In addition, the state indicated that such notice was unnecessary and thus it should be waived pursuant to estoppel.

Furthermore, , since there were not numerous amendments, no trial date was set, and the proposed amendment was based upon significant violations of the law that were based on the same acts and transactions as the original complaint, denial of leave to amend was an abuse of discretion. Dimick v Ray, 774 so. 2d 830 (4 DCA 2000).

ARGUMENT

I. STATE'S UNEMPLOYMENT RECOUPMENT DETERMINATION NOTICE AND STATEMENTS RELIED UPON BY APPELLANT NEGATES NEED TO FILE NOTICE UNDER FS 768.28

The Standard of Review of Order on Motion for Summary Judgment is de Novo.

The Appellant contends that Notice of Disqualification that she received from the State of Florida through its Agency, Florida Department of Economic Opportunity, stating that Bay District Schools required her to repay unemployment compensation that she had been paid, met the statutory elements listed in Florida Statute 768.14 so that no Notice to the Dept. of Financial Services was required before Appellant filed suit. App. R. 696-697.

The purpose of F.S.768.14 is to prevent the state of Florida from being surprised that there is litigation against the state. The requirement to provide Notice to the State financial officer is so that the state is able to construct a defense and to have an opportunity for an early resolution of a dispute.
When the government itself initiates the claim against an employee then the law allows a suit to be filed without the normal FS 768.28 notice.

In the case at bar, the Notice of Disqualification and demand for recoupment stated that failure to pay would result in a civil court judgment against Appellant. In essence, this notice was like the Summons for a a lawsuit that also required a response within twenty days or a final judgment would be had against the person who was disqualified. The Notice stated:

> FAILURE TO PAY THIS OVERPAYMENT COULD RESULT INA CIVIL COURT JUDGMENT. RECORDING THIS JUDGMENT COULD HAVE AN ADVERSE AFFECT ON YOUR FUTURE CREDIT. App. R. 696

The notice was issued by the State of Florida asserting a claim of 275.00 which is over the 200.00 minimum required in order to trigger the exception. App. R. 696-697.It stated that the Appellant had twenty days to respond to the claim or action would be taken to recoup the monies.The notice also said that the determination had been made and that she had twenty days to file an appeal. Again, this is strikingly similar to the civil procedure used in legal action taken in the State of Florida.The Notice was also like an order determining fault and liability as the only way to change it was to appeal. See FRAP 9.110.

Appellant contends that this quasi-judicial determination of the state about a disputed amount of unemployment is essentially the equivalent of the state having filed suit and made a determination that would result in actual deprivation of

property in the form of money from the Appellant. Appellant did not receive a notice of an intent to assert a claim. This was an actual determination that the state had made that it could proceed on and the only way that the Appellant could stop it was to file an appeal. the determination was made pursuant to F.S. 443 which gives many judicial powers to the Dept. Of Economic Opportunity.

This is essentially what is contemplated by FS 768 .14, when it talks about the ability of the putative plaintiff to be able to sue without first filing a notice with the Division of finance.

In addition, Appellant contends Dept of Financial Services. Appellant contends that the office of the Division of risk management directed the Appellant to not file her Notice of Intent to file a claim because the division took no action on cases filed against school boards. Given that misleading statement of the law by the agency of the state, Appellant reasonably relied to her detriment upon the statements of the agency and the requirement to file a notice of intent to sue should be waived under these circumstances. App. R. 057, Response 14.

Therefore, the trial court erred when it determined that the Notice of Disqualification and the promissory estoppel was not sufficient to trigger the exception to the need to file a notice with the Division of Financial Services.

II. AMENDMENT SHOULD BE ALLOWED WHEN AMENDMENTS SIMILAR TO INITIAL COMPLAINT

The Standard of Review of Order on denying a motion to amend is an abuse of discretion. In addition, as a general rule, refusal to allow an amendment will be considered an abuse of discretion. Gate Lands Co. v Old Ponte Vedra Beach Condominium, 715 So 2d 1132 (5 DCA 1998).

FRCP 1.1.190 (c) provides that amendments should bet liberally allowed. Case law has established that all doubts should be resolved in favor of the party moving for leave to amend. Furthermore, it is well settled that the appellate courts will find an abuse of discretion if in the denial of a motion for leave to amend absent these factors: 1. Prejudice to opposing party, the privilege to amend has been abused, or amendment would be futile. Dimick v Ray, 774 So. 2d 830, (4 DCA 2000).

In the case at bar there was only one proposed amended complaint proferred,[1] thus there was no abuse of this pleading and thus Noble vs Martin Mem'l Hosp' Ass'n, Inc. 710 so 2d 567 (4 DCA 2016) (holding that numerous amendments should not be allowed), Brown v Montgomery Ward & Co. 252 so 2d

[1] Appellant did alert that the parties that he would be filing a motion for leave to amend with a proposed amended complaint prior to filing the motion for leaver to amend with the proposed amended complaint.

817 (1DCA 1971) (holding that when a trial date is set and numerous leaves to amend granted, summary judgment may be warranted) that can be easily distinguished.

The amended complaint was not simply filed to frustrate summary judgment but because the Appellant had a legitimate claim of retaliation pursuant to policy and practice of the Bay District Schools of not ever investigating the veracity of claims agent provisional teachers as the Human Resources Manger testified that she was unconcerned about such things as her job was only to follow the contract and it gave her the right to fire without just cause and she did so every time. She testified that it was customary to never investigate any claims made against a provisional teacher because the contract does not require it even though a principal could be retaliating or discriminating unlawfully. App. R. 341-344 (Dep Michalik p 23 line 10- p 29 line 22.

The record was also replete with Bay District Schools ignoring its own anti-bullying rules and regulations in that it allowed a principals known for screaming in the face of female teachers and calling them liars too remain employed. App. R. 499 (Dep. Montague p 16 line 3- p20 line8), App. R. 549-552)It also had a pattern and policy of failing to protect its students and teachers by throwing away disciplinary reports written by teachers and punishing teachers for speaking up and

complaining in violation of the First Amendment rights to free speech. App. R. 243 (Aff Beanblossom para 13) App. R. 284 (Dep Michalik p 20 line 4-25)

The record of retaliation was clear with regards to Appellant and to others who spoke up like another teacher, Ms Montague who was screamed at by the same principal Mr. Sheffield. App. R. 499 (Dep. Montague p 16 line 3- p20 line8), App. R. 549-552). In addition, with regards to Appellant, the Human Resources officer stated outright that Appellant's chances of getting employment as a substitute teacher would improve via she dropped her legal case. App. R. 355 (dep Michalik p 78 line 21-25) Ms Michalik also stated that there was a copy of Appellant's lawsuit in her personnel files where it did not belong. App. R. 243 1rst Aff. Appellant).

Finally Ms McHlaik stated that she is the decision maker who determines that an applicant will not be allowed to be a substitute teacher and Appellant was told by the HR clerk that Ms Michalik told the clerk that Appellant could not be a substitute teacher although she was qualified too do so. App. R. 242 (1rst Off Beanblossom), App. R. 350 (Dep Michalik p 75 line 15-18).

Furthermore, the initial complaint contained almost all elements of a pattern and practice complaint against the state for deprivation of First Amendment rights under color of law. It stated that the School district had a pattern and practice of depriving teachers and students of their rights by refusal to provide a safe learning environment. App. R. 011-031 (Initial Complaint para 17-20 and 59).

In her initial complaint Appellant stated that he practice of failing to provide a safe learning environment was well known and a common practice . App. R 011- 031.

The initial complaint also stated that many teachers and students shad endured the same treatment and that the failure to provide a safe learning environment was well known but administrators systemically threw away disciplinary reports or failed to taker corrective action with the students and their parents. App. R. 011-031. Appellant also stated that the failure to provide a safe learning environment was brought to the attention of Bay District Schools but no corrective action was taken.

Under these circumstances, the school board was well placed on notice of the alleged wrongs of its agents and the request to amend the complaint to more specifically name a closely related action cause of action should have been authorized. Dausman v Hillsborough Area Reg'l Transit, 898 So. 2d 213 (2 DCA 2005) (leave to amend should be freely given in general and even more so when the amendments is based upon the same conduct or transactions as the original complaint).

Under these circumstances, it was error for the court to grant summary judgment. Yup Enters., Ltd v Grazani , 840 So.2d 420)5 DCA 2003) (holding a

party may with leave of court amend a pleading after hearing and ruling on a motion for summary judgment)

CONCLUSION

WHEREFORE for the foregoing reasons, Appellant contends that the Order granting summary Judgment and denyingAppellant's motion for Leave to Amend should be reversed.

Cecile M. Scoon /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing Appellant's Initial Brief has been filed electronically and thereby electronically served by email on Appellee's attorney Dixon Ross McCloy, Jr. Esq. at rmccloy@hsmclaw.com and Heather Hudson , Esq. at hhudson@hsmclaw.comand

Casey King , Esq. at Harrison Sale & McCloy, 304 Magnolia Ave., PanamaCity, Florida 32402-1579, Attorneys for the Defendant, Bay District schools located at 1311 Balboia Avenue, Panama City, Fl 32401 on the 28th day of August 2017.

Cecile M. Scoon /s/

Cecile M. Scoon, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned Counsel hereby certifies that this Initial Appellant's Brief has been submitted in Times New Roman 14-Point font in Compliance with the Requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

Cecile M. Scoon, /s/

Cecile M. Scoon, Esq.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

JOHANNA BEANBLOSSOM,

Plaintiff,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Defendant.

Case No.: 13-2015-CA

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

THIS MATTER is before the Court on Defendant's Motion For Award of Attorney's Fees and Costs, filed on January 9, 2017, and heard on March 7, 2017. Having considered the motion, Plaintiff's response, the court file and records, and being otherwise fully advised, the Court finds as follows:

Defendant is entitled to recover costs pursuant to section 57.014, Florida Statutes. Defendant is also entitled to recover attorney's fees incurred from the date the first offer of judgment on Count II was served on Plaintiff pursuant to section 768.79. However, Defendant is not entitled to recover attorney's fees on Count I pursuant to section 112.3187(9)(d). To recover under this statute, the employee must have "filed a frivolous action in bad faith." Summary judgment was entered against Plaintiff for failure to exhaust her administrative remedies. Although a separate circuit court judge previously rejected counsel's arguments that the school board's employee grievance procedure does not qualify as an administrative remedy under the Whistleblower statute, without a binding appellate decision, counsel was entitled to make such arguments again. Moreover, the exact date of Plaintiff's termination was debated by the parties. Although this Court ruled against Plaintiff on Count I, the Court finds that the circumstances to not justify an award of fees under section 112.3187(9)(d).

Therefore, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion For Award of Attorney's Fees and Costs is **GRANTED IN PART**. Defendant is entitled to recover costs and recover attorney's fees incurred from the date the first offer of judgment on Count II was served on Plaintiff.

2. The remainder of the motion is **DENIED.**

3. The parties shall confer as to the amount of reasonable attorney's fees and costs. If the parties are unable to agree, the issue may be set for hearing before the Court.

DONE AND ORDERED in chambers, Bay County, Florida, this 6 day of April, 2017.

JAMES B. FENSOM
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and exact copy of the forgoing has been sent by electronic delivery to Dixon Ross McCloy, Jr., Esq. at rmccloy@hsmclaw.com, bholland@hsmclaw.com and lbenjamin@hsmclaw.com, and Cecile Scoon, Esq. at cmscoon1@knology.net and cmscoon2@knology.net, on this 6th day of February, 2017.

Ann Nelson, Judicial Assistant

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

JOHANNA BEANBLOSSOM,

Plaintiff,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Defendant. **Case No.: 13-2015-CA**

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING

THIS MATTER is before the Court on Plaintiff's Motion For Rehearing, filed on January 20, 2017. Having considered the motion, Defendant's response, the court file and records, and being otherwise fully advised, the Court finds that the motion is due to be denied. The purpose of a motion for rehearing or reconsideration is not to reargue the merits of the case. Rather, it is "to give the trial court an opportunity to consider matters which it overlooked or failed to consider." *Carollo v. Carollo*, 920 So. 2d 16, 19 (Fla. 3d DCA 2004). The Court has considered the case law, arguments, and evidence submitted by both parties in making its determination. Plaintiff raises no new issues for consideration.

Therefore, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion For Rehearing is **DENIED.**

DONE AND ORDERED in chambers, Bay County, Florida, this 6 day of February, 2017.

JAMES B. FENSOM
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and exact copy of the forgoing has been sent by electronic delivery to Dixon Ross McCloy, Jr., Esq. at rmccloy@hsmclaw.com, bholland@hsmclaw.com and lbenjamin@hsmclaw.com, and Cecile Scoon, Esq. at cmscoon1@knology.net and cmscoon2@knology.net, on this 6th day of February, 2017.

Ann Nelson, Judicial Assistant

ARGUMENT

Comes now the Appellant and presents argument in response and rebuttal to argument presented in the Answer Brief. Appellant states Appellee makes much of the fact that the litigation had been on going for almost three years, but Appellee fails to mention that a substantial part of the delay was due to Appellant's refusal to provide responses to discovery in a timely fashion, causing Appellant to file a Motion to Compel on or about 19 August 2016. (App.R. 668-676) Appellant's discovery requests were served on November 2014, but Appellee only responded on or about August 2015, asserting numerous objections and withholding a lot of documents. (App. R 234-238). The deposition of the last witness was taken May 11, 2016, reviewing documents provided just before that deposition. (App. R. 571-585) Appellant was harmed by these delays which made it more difficult for her to fully understand the parameters of her claim and delayed the determination that a motion to amend should be filed. In addition, Appellee chose to file two separate motions for summary judgment. Therefore, Appellant contends that the denial of the Motion to Amend was improper. Gate Lands Co. v. Old Ponte Vedra Beach Condominium, 715 so. 2d 1132 (5DCA 1998)

Review of the record indicates that Appellant took over ten depositions and reviewed numerous documents that were eventually provided by Defendant, after almost a year and a half delay. This case was worked on intensely. Under these circumstances, it is not an accurate presentation of the case for the Appellee to lay blame on the time taken on the case, solely at the feet of the Appellant. The Appellee contributed significantly to the delays and prevented Appellant from fully comprehending the full parameters of this case by these discovery delays. Denying access to pertinent discovery for almost one a half years removes Appellee's ability to say that the motion to amend should have been filed sooner in the case.

Under these circumstances, the first request to amend the complaint should not have been denied and appears to be an abuse of discretion. Dimick v. Ray, 774 So. 2d 830 (4DCA 2000).[1]

In addition, the proposed amended complaint does not appear to be futile. In the proposed Amended Complaint, Appellant stated that she had given notice as required by the statute and the matters complained of were within the three-day window as required by the notice statute.

2.

[1] The first mention of Appellant's intent to bring additional claims was made in the Response to Motion for Summary judgment filed on October 21, 2016, but the fully fleshed out proposed amended complaint was not attached. (App. R. 683-690).

Moreover, the First Amendment claims in the proposed Amended Complaint, were not just about Appellant, Ms. Beanblossom, speaking up for herself, she was clearly primarily speaking up on behalf of the students in her class that were being bullied with no protection offered by the School Board. Ms. Beanblossom was speaking out against the School Board's refusing to follow its written Anti-bullying policies and knowingly ignoring and tearing up disciplinary reports made about beatings and bullying of vulnerable children in school and that is a matter of great public concern. (App. R.462-482, 560, 563,). Ms Beanblossom was punished for these complaints and thus the proposed first Amendment retaliation complaint should have been allowed. (App. R. 563-564)

Finally, the matters complained of in the proposed amended complaint were not planning functions as stated by Appellee, but were alleged to be negligent discretionary decisions of the principal, the assistant principal, school board designee, and human resources manager, who all made discretionary decisions that subjected school children to harm and then retaliated against Ms. Beanblossom for complaining about this which is a basis for liability. Appellant alleged actions on the part of Appellee, in her proposed amended complaint, that amounted to deliberate indifference. Thus Doe vs. Miami Dade County, 797 F. Supp. 2d 1296, (S.D. Fl 2011) is not on point.

WHERFORE Appellant prayerfully requests that the appeal be granted and the case remanded for trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been filed electronically and thereby electronically served by the court system and by email on Appellee's attorneys Dixon Ross McCloy, Jr. rmccloy@hsmclaw.com, Casey King, cking@hsmclaw.com, Heather K. Hudson, hhudson@hsmclaw.com, and their assistants Lori Benjamin lbenjamin@hsmclaw.com and Blanca Holland, bholland@hsmclaw.com, 304 Magnolia Ave. P.O. Drawer 1579, Panama City, Florida 32402, attorney for Appellee, Bay District Schools on this 10th day of October, 2017.

Cecile M. Scoon /s/
Cecile M. Scoon, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned Counsel hereby certifies that this Initial Appellant's Brief has been submitted in Times New Roman 14-Point font in Compliance with the Requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

Cecile M. Scoon, /s/
Cecile M. Scoon, Esq.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

JOHANNA BEANBLOSSOM,

Plaintiff,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Defendant. **Case No.: 13-2015-CA**

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR SUMMARY FINAL JUDGMENT AS TO COUNT II OF PLAINTIFF'S COMPLAINT AND DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS MATTER is before the Court on Defendant's Amended Motion For Summary Final Judgment As To Count II Of Plaintiff's Complaint, filed on July 22, 2016, and Plaintiff's Motion To Amend Complaint, filed on November 7, 2016. The motions were heard on November 8, 2016. Having considered the motions, summary judgment evidence, argument and memoranda of counsel, the court file and records, and being otherwise fully advised, the Court finds as follows:

Count II of Plaintiff's Complaint is for negligent retention of a middle school principal. Defendant filed for summary judgment as to this claim. The scope of the hearing was limited to whether Plaintiff complied with the pre-suit notice requirements in section 768.28, Florida Statutes. This section provides that a tort action "may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also . . . presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing."

Plaintiff does not dispute that she failed to provide pre-suit notice to the school board and the Department of Financial Services; instead she raises several grounds to excuse her noncompliance. She argues that claims for negligent retention are not subject to immunity protections, citing *Slonin v. City Of W. Palm Beach, Fla.*, 896 So. 2d 882 (Fla. 4th DCA 2005). While Plaintiff is correct that torts are not absolutely barred by the doctrine of sovereign immunity in Florida, this does not excuse Plaintiff's failure to comply with statutorily mandated conditions precedent. She argues that notice was excused by section 768.14, which provides that "[s]uit by the state or any of its agencies or subdivisions to recover damages in tort shall constitute a waiver of sovereign immunity from liability and suit for damages in tort to the extent of permitting the defendant to counterclaim for damages resulting from the same transaction or occurrence." Plaintiff received two letters from the Florida Department of

Economic Opportunity Reemployment Assistance Program demanding repayment of overpaid benefits. Plaintiff argues that her need for reemployment assistance stems from her termination at the middle school and thus results from the same transaction or occurrence as her claim for negligent retention. However, these letters were not authenticated and they do not evidence a suit by the state to recover damages in tort where Plaintiff filed a counterclaim. As such, section 768.14 is inapplicable. Finally, Plaintiff argues that the Department of Financial Services told her that notice was not required. However, there is no evidence in the record to support this assertion.

If the Court finds that Count II is barred for failure to comply with pre-suit notice requirements, Plaintiff asks to amend her complaint. This general request was first raised in her response to Defendant's motion for summary judgment, filed on October 21, 2016, but no amended pleading was attached. It was not until nearly midnight on November 7, the night before the summary judgment hearing, that a proposed complaint was filed. It contains counts for negligence and violation of 42 U.S.C. 1983 and adds the superintendent of the Bay County School Board as a defendant. Defendant objects to Plaintiff's request.

> The court may, in its discretion, deny any party the right to amend his pleadings if the proposed amendments will change or introduce new issues or materially vary the grounds for relief, or where the filing of such pleadings will delay the suit by necessarily requiring a continuance under circumstances which would be unduly prejudicial to the opposing party. Although it is highly desirable that amendments to pleadings be liberally allowed so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached.

Brown v. Montgomery Ward & Co., 252 So. 2d 817, 819 (Fla. 1st DCA 1971). Moreover, "[a] party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment." *Noble v. Martin Mem'l Hosp' Ass'n, Inc.*, 710 So. 2d 567, 568 (Fla. 4th DCA 1997).

Plaintiff's motion to amend comes three years into this litigation, after extensive discovery, and on the eve of a hearing for final summary judgment. This last minute request appears to be an attempt to circumvent summary judgment and escape the effects of failing to comply with section 768.28 despite being aware of the statute and having time to cure well within the statutory period. Moreover, the addition of a new defendant and the 1983 claim introduces new issues into the litigation. For the first time Plaintiff alleges that the school board has a practice or policy of failing to properly investigate allegations of bullying. Under these circumstances, the Court finds it appropriate to deny Plaintiff's motion to amend. *See Randle v. Randle*, 274 So. 2d 557 (Fla. 3d DCA 1973) (Affirming denial of motion to amend filed just prior to hearing on motion for summary judgment and 2 ½ years after original answer); *Brown*, 252 So. 2d 817 (Affirming denial of motion to amend filed two weeks before trial after case pending for several years); *Title & Trust Co. of Florida v. Parker*, 468 So. 2d

520, 522 (Fla. 1st DCA 1985) (Affirming denial of motion to amend filed shortly before trial where amendment would change issues to be tried).

Therefore, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Amended Motion For Summary Final Judgment As To Count II Of Plaintiff's Complaint is **GRANTED**.
2. Plaintiff's Motion To Amend Complaint is **DENIED**.
3. Final judgment is entered in favor of Defendant, the School Board of Bay County, Florida, and against Plaintiff, Johanna Beanblossom, on Count II of Plaintiff's Complaint. Plaintiff shall take nothing by this action and Defendant shall go hence without day.
4. The Court reserves jurisdiction to consider requests for attorney's fees and costs.

DONE AND ORDERED in chambers, Bay County, Florida, this 4 day of January, 2017.

JAMES B. FENSOM
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and exact copy of the forgoing has been sent by electronic delivery to Dixon Ross McCloy, Jr., Esq. at rmccloy@hsmclaw.com, bholland@hsmclaw.com and lbenjamin@hsmclaw.com, and Cecile Scoon, Esq. at cmscoon1@knology.net and cmscoon2@knology.net, on this 4th day of January, 2017.

Ann Nelson, Judicial Assistant

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOHANNA BEANBLOSSOM,

Appellant,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D16-1009

Opinion filed May 20, 2016.

An appeal from an order of the Circuit Court for Bay County.
James B. Fensom, Judge.

Cecile M. Scoon, Panama City, for Appellant.

Dixon Ross McCloy, Jr. and Casey Jernigan King, of Harrison Sale McCloy, Panama City, for Appellee.

PER CURIAM.

Having considered appellant's response to the Court's March 29, 2016, order, the Court has determined that the order on appeal does not "dispose[] of a separate and distinct cause of action that is not interdependent with other pleaded claims." Fla. R. App. P. 9.110(k). The order is therefore not now appealable under Rule 9.110(k), and we dismiss the appeal as premature.

OSTERHAUS, WINOKUR, and WINSOR, JJ., CONCUR.

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

JOHANNA BEANBLOSSOM,

Plaintiff,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Defendant. Case No.: 13-2015-CA

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING

THIS MATTER is before the Court on the Plaintiff's Motion For Rehearing, filed on December 25, 2015. Having considered the motion, the Defendant's response, the court file and records, and being otherwise fully advised, the Court finds that the motion is due to be denied.

An order granting partial summary judgment is an interlocutory, non-final order subject to reconsideration, not rehearing. *Dixon v. Allstate Ins. Co.*, 609 So. 2d 71, 72 (Fla. 1st DCA 1992). Even if the Court construes the Plaintiff's Motion For Rehearing as a Motion For Reconsideration, the purpose of a motion for rehearing or reconsideration is not to reargue the merits of the case. Rather, it is "to give the trial court an opportunity to consider matters which it overlooked or failed to consider." *Carollo v. Carollo*, 920 So. 2d 16, 19 (Fla. 3d DCA 2004). The Court previously considered the case law and arguments proffered by the Plaintiff.

Therefore, it is hereby ORDERED AND ADJUDGED that the Plaintiff's Motion For Rehearing is DENIED.

DONE AND ORDERED in chambers, Bay County, Florida, this 5 day of February, 2016.

JAMES B. FENSOM
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and exact copy of the forgoing has been sent by electronic delivery to Dixon Ross McCloy, Jr., Esq., rmccloy@hsmclaw.com, bholland@hsmclaw.com, lbenjamin@hsmclaw.com, and Cecile Scoon, Esq., cmscoon1@knology.net, cmscoon2@knology.net, on this 5th day of February, 2016.

Ann Nelson, Judicial Assistant

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

JOHANNA BEANBLOSSOM,

Plaintiff,

v.

THE SCHOOL BOARD OF BAY COUNTY, FLORIDA,

Defendant. Case No.: 13-2015-CA

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT AS TO COUNT I OF PLAINTIFF'S COMPLAINT

THIS MATTER is before the Court on the Defendant's Motion For Summary Final Judgment As To Count I Of Plaintiff's Complaint, filed on January 1, 2015, and heard on November 17, 2015. Having considered the motion, the Plaintiff's response, the evidence and argument proffered by counsel, the court file and records, and being otherwise fully advised, the Court finds as follows:

The Plaintiff was hired to teach at Mowat Middle School from January 7, 2013, through June 7, 2013. On April 30, 2013, the Plaintiff was informed that her contract would not be renewed for the next year. On May 23, 2013, the Plaintiff was informed that her employment was terminated, effective immediately. She did not return to school after that date. A termination form was signed by the Executive Director of Human Resources & Employee Support Services on May 23, 2013, by the school principal on May 24, 2013, and by the superintendent of schools on May 28, 2013. The School Board ratified the termination on June 25, 2013. The Plaintiff did not pursue any administrative remedies, instead choosing to file this civil suit on December 12, 2013.

Count one of the Plaintiff's complaint is a claim for retaliatory termination in violation of the Whistleblower Act ("the Act"). *See* § 112.3187-112.31895, Fla. Stat. If a local governmental authority has established an administrative procedure by ordinance, the Act requires an employee to first file an administrative complaint within 60 days of the prohibited action. § 112.3187(8)(b), Fla. Stat.

> The administrative procedure created by ordinance must provide for the complaint to be heard by a panel of impartial persons appointed by the appropriate local governmental authority. Upon hearing the complaint, the panel must make findings of fact and conclusions of law for a final decision by the local governmental authority.

Id. After a final decision is issued, the employee may file a civil suit within 180 days. *Id.*

The Bay County School Board requires collective bargaining employees to follow the grievance procedures in their collective bargaining agreements. *See* Bay District Schools School Board Policy Manual § 3.104. The School Board's collective bargaining agreement with the Association of Bay County Educators details a multi-step grievance procedure, which ends with binding arbitration.

The Act requires that an administrative procedure be created by ordinance. In determining whether the School Board's grievance procedure satisfies this requirement, the Court finds persuasive the opinion of Circuit Judge Michael C. Overstreet:

> The statute does not define the word "ordinance".... When a statute is silent on the definition of a particular word, the courts must utilize the word's "plain and ordinary meaning." *Southeastern Fisheries Ass'n Inc., v. DNR*, 453 So. 2d 1351 (Fla. 1984); *Metro Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 214 (Fla. 2009) ("When considering the meaning of terms used in a statute, this Court looks first to the terms' ordinary definitions . . . [which] may be derived from dictionaries.").
>
> The plain and ordinary definition of "ordinance" is not limited to only municipal or county ordinances, but more broadly includes authoritative rules or laws enacted by any local governmental entity. Applying the word's definition in a materially similar circumstance, the Attorney General confirmed that "a district school board has the authority to adopt an 'ordinance,' that is, [to] take official legislative action of a general and permanent nature[.]" *Fla. Att. Gen. Op.* 93-43.
>
> School boards are constitutionally created subdivisions of the State and their officially adopted rules are undeniably "authoritative" on issues within their jurisdiction. . . . Indeed, the provisions at issue expressly apply to "any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing." § 112.3187(8)(b), *Fla. Stat.*

Julian v. District School Board of Bay County, No. 11-2080 (Fla. 14th Cir. Ct. 2014). The Court finds that the School Board's grievance procedure was enacted by "ordinance" as required by the Act.

The Act also requires that the local governmental authority appoint a panel of impartial persons to make findings of fact and law to assist the local authority in making a final decision. The rules of arbitration utilized by the School Board allow the parties to demand a panel of arbitrators and select those arbitrators. The panel makes findings of fact and law. At the conclusion of the arbitration proceedings, the School Board adopts the findings of the panel. The Court finds that the administrative procedure adopted by the School Board satisfies the requirements of the Act. *See Dinehart v. Town of Palm Beach*, 728 So. 2d 360, 361 (Fla. 4th DCA 1999) (finding that "[t]he Whistle-blower's Act gives very little guidance regarding the structure of the required administrative procedure . . . [and] [t]his lack of explicit direction in the act

suggests the legislature intended to leave the details of the procedure up to individual government entities so long as the adopted procedure provides for employee complaints to be heard by a panel of impartial persons and otherwise affords due process."). Because the Plaintiff failed to exhaust her administrative remedies, the Court lacks jurisdiction and the School Board is entitled to judgment as a matter of law. *See, e.g., Dinehart*, 728 So. 2d 360.

Even if the Court determined that the School Board's administrative procedure did not meet the requirements of the Act, the Court would still find that the complaint was untimely. "If the local governmental authority has not established an administrative procedure by ordinance or contract," the employee may file a civil suit "within 180 days after the action prohibited by this section . . . ." § 112.3187(8)(b), Fla. Stat. The Plaintiff's employment was terminated effective May 23, 2013. A timely complaint must have been filed by November 19, 2013.

Therefore, it is hereby ORDERED AND ADJUDGED that:

1. The Defendant's Motion For Summary Final Judgment As To Count I Of Plaintiff's Complaint is GRANTED.
2. Final judgment is entered in favor of the Defendant and against the Plaintiff on count one of the Plaintiff's complaint.
3. The Court reserves jurisdiction to consider requests for attorney's fees and costs as to count one.

DONE AND ORDERED in chambers, Bay County, Florida, this 10 day of December, 2015.

JAMES B. FENSOM
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and exact copy of the forgoing has been sent by electronic delivery to Dixon Ross McCloy, Jr., Esq., rmccloy@hsmclaw.com, bholland@hsmclaw.com, lbenjamin@hsmclaw.com, and Cecile Scoon, Esq., cmscoon1@knology.net, cmscoon2@knology.net, on this 10th day of December, 2015.

Ann Nelson, Judicial Assistant