IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA

GREG AND TAMI DUNN, individually and on behalf of their natural son, JOHN DOE, a minor, and their natural daughter, SUSAN DOE, a minor,

CASE NO.: 2016 CA 000469

Plaintiffs,

v.

FLAGLER COUNTY BOARD OF EDUCATION, JACOB OLIVA, Superintendent, BEN OSYPIAN, Principal, ROBIN DUPONT, Principal, and CARMEN HERNANDEZ, teacher,

Defendants.

_____/

DEFENDANT, THE SCHOOL BOARD OF FLAGLER COUNTY, FLORIDA'S MOTION TO DISIMSS COUNTS II through VI. WITH PREJUDICE and MEMORANDUM OF LAW IN SUPPORT THEREOF

COMES NOW, Defendant, THE SCHOOL BOARD OF FLAGLER COUNTY, FLORIDA (hereinafter "School Board"), by and through its undersigned counsel, and, pursuant to Rule 1.420, Fla. R. Civ. P., hereby moves for dismissal with prejudice as to Counts II through VI of Plaintiffs' Complaint and would state:

1. Defendant School Board was served with process on August 8, 2016.

2. Pursuant to Rule 1.140(2)(b), Fla. R. Civ. P., Defendant School Board is entitled to thirty (30) days to serve its response to the Complaint.

3. Defendant School Board filed its Answer and Affirmative Defenses to Count 1 of Plaintiffs' Complaint, and a Motion to Sever, contemporaneously herewith.

4. Counts II through VI of Plaintiffs' Complaint allege:

- Count II: Reckless / Intentional Infliction of Emotional Distress - JOHN DOE, a minor;
- Count III: Reckless / Intentional Infliction of Emotional Distress - SUSAN DOE, a minor;
- Count IV: Reckless / Intentional Infliction of Emotional Distress - GREG DUNN;
- Count V: Reckless / Intentional Infliction of Emotional Distress - TAMI DUNN; and,
- Count VI: Consequential Damages for Relocation.

5. As to Counts II, III, IV and V, Defendant School Board, cannot be liable for Reckless or Intentional Acts of its officers, employees or agents. (See Section 768.28(9)(a), Fla. Stats. and *infra*). Accordingly, Counts II through V are subject to dismissal, with prejudice, as to Defendant, The School Board of Flagler County, Florida.

6. As to Count VI, there is no cause of action for "Consequential Damages for Relocation". By its own title, it is a damages claim that belongs in the claim for damages within the Complaint, by the Plaintiff or Plaintiffs who actually incurred such "consequential damages". Accordingly, Count VI is subject to dismissal, with prejudice, as to Defendant, The School Board of Flagler County, Florida.

MEMORANDUM OF LAW

A. Failure to State a Claim Upon Which Relief Can Be Granted

1. Legal Standard

Rule 1.140(b), Florida Rules of Civil Procedure reads, in pertinent part:

...

> Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader:
> (1) lack of jurisdiction over the subject matter;
> ...
> (6) failure to state a cause of action...
> ...
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion....

"A motion to dismiss tests whether a plaintiff has alleged a good cause of action in the complaint." Gladstone v. Smith, 729 So. 2d 1002, 1003 (Fla. 4th DCA 1999), see Alexander Hamilton Corp. v. Leeson, 508 So. 2d 513 (Fla. 4th DCA 1987). When a court considers the merits of a motion to dismiss, its review is limited to the four corners of the complaint. Id., see, e.g., Alevizos v. The John D. and Catherine T. MacArthur Found., 764 So. 2d 8 (Fla. 4th DCA 1999).

B. COUNTS II through V of the COMPLAINT

Florida law is clear that "wanton" and "reckless" allegations against a public entity are not actionable.

> ...The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith

> or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.
>
> Section 768.28(9)(a), Fla. Stat.

In *Williams v. City of Minneola, 619 So. 2d 983, Fla. 5th DCA 1993,* the named Defendants were: The City of Minneola and the Minneola Police Department. (*Williams* at 984). The appellate court in *Williams* received the case after a Summary Judgment was entered in favor of both City and the Police Department. The underlying case involved allegations of outrageous infliction of emotional distress by reckless conduct in connection with the taking of still photographs and a video of an autopsy performed on a deceased 14 year old child, Glenn Williams. The *Williams* case was brought by the mother and brother of the decedent. The trial court entered summary judgment for The City of Minneola and the Minneola Police Department based upon the fact that The City of Minneola and the Minneola Police Department, as entities of the State of Florida or its subdivisions, could not, pursuant to the specific text of Section 768.28(9)(a), "be liable in tort for the acts or omissions of an officer, employee or agent committed outside the courts and scope of his employment or in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property. The *Williams* appellate court noted:

> In *Bryant v. School Board of Duval County, 399 So.2d 417 (Fla. 1st DCA 1981), rev'd on other grounds, Rupp v. Bryant, 417 So.2d 658 (Fla.1982)*, the plaintiffs sued the school board, the school principal, and a student club faculty adviser for injuries received by the student-plaintiff during a hazing incident. Count IV of the complaint, directed against the principal and the adviser, alleged that the employees' conduct was "gross and reckless." *Bryant,* 399 So.2d at 423. Observing that courts in other states apparently support the view that the terms "reckless" and "wanton" are interchangeable, *see Bryant,* 399 So.2d at 423 n. 4, the court construed the phrase "gross and reckless" to come within the ambit of the phrase "wanton and willful" misconduct as used in *section 768.28(9)*, the sovereign immunity statute. *Id.* at 423. Thus, the court concluded that

> Count IV was actionable only against the employees in their individual capacities and not against them as agents of the school board. *Id.*
>
> *Williams at 986* (underlined Emphasis added).

The Court in *Williams* found that "reckless conduct" was the equivalent of "willful and wanton" conduct. " []… reckless conduct is the equivalent of willful and wanton conduct." *Id.* Accordingly, the doctrine of sovereign immunity barred the mother and brother of Glenn Williams from recovering on their claim for outrageous infliction of emotional distress. *Williams at 985).*

In the case at bar, Counts II through V assert liability as to all of the Defendants (including the Defendant School Board), for "Reckless/Intentional Infliction of Emotional Distress" as follows:

> …
>
> 18. Following the sexual battery on May 27, 2015, all named Defendants herein intentionally caused or acted with reckless disregard in ……
>
> 19. The following actions of the named Defendants herein went beyond all bounds of decency and was shocking, atrocious, odious and utterly intolerable in a civilized community general and Flagler County specifically: …
>
> 20. As a direct and proximate result of all named Defendants' herein intentional or reckless infliction of emotional distress, ….
> …
>
> (Emphasis added). [1]

The allegations of "intentional" and "reckless disregard", as set forth in Counts II through V are equivalent to willful and wanton conduct. As such, Counts II through V are barred by the

[1] The allegations in paragraphs 25 (as to SUSAN DOE) and 26 (as to SUSAN DOE) are duplications of paragraphs 19 and 20, respectively; the allegations in paragraph 30 (as to Gregg Dunn) and 31 (as to Gregg Dunn) are duplications of paragraphs 19 and 20, respectively; and, the allegations in paragraphs 35 (as to Tami Dunn) and 36 (as to Tami Dunn) are duplications of paragraphs 19 and 20, respectively.

specific dictates of Section 768.28(9)(a), Florida Statutes; and Counts II through V must be dismissed, with prejudice, as to Defendant, The School Board of Flagler County, Florida.

The allegations in Counts II through V, which include the claims that all of the named Defendants actions went "beyond all bounds of decency and was shocking, atrocious, odious and utterly intolerable in a civilized community general and Flagler County specifically", even if true, must be also dismissed with prejudice as to Defendant The School Board of Flagler County, Florida, as they are simply conclusory statements and the acts behind them, no matter how pointed the conclusory statements, are descriptions of intentional acts. "In any given situation either the agency can be held liable under Florida law, or the employee, but not both." *Johnson v. HRS, 695 So. 2d 927 (Fla. 2d DCA 1997) citing McGhee v. Volusia County, 679 So. 2d 729, 733 (Fla. 1996).*

> Both *Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277 (Fla.1985)*, and *Food Fair, Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980)*, adopted comment *d* to *section 46*, *Restatement (Second) of Torts* (1965). In *Metropolitan Life,* the Florida Supreme Court stated:
>
> The Fourth District joined with the First and Fifth in adopting *Section 46,* Restatement (Second) of Torts (1965) as the appropriate definition of the tort. Nonetheless, the Fourth District did not conform its findings to the comments explaining the application of this definition:
>
> d. *Extreme and outrageous conduct*
>
> ..... It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Metropolitan Life, 467 So.2d at 278-279 cited by *Williams* at ft.n.1. (underline Emphasis added).

Based upon the foregoing, Defendant School Board is entitled to dismissal, with prejudice as to Counts II through V in Plaintiff's Complaint.

C. COUNT VI of the COMPLAINT

Plaintiffs Complaint must set forth both the elements of the claim and the specific facts that can support the elements so that Defendant, as well as this Court, can determine what is being alleged. Barrett v. City of Margate, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999), citing Messana v. Maule Indus., 50 So. 2d 874, 876 (Fla. 1951)(a complainant must "plead [a] factual matter sufficient to apprise his adversary of what he is called upon to answer so that the court may, upon proper challenge, determine its legal effect.")

Seeking "consequential damages" is not its own cause of action. "Consequential damages" are instead, exactly as the title includes, "damages". Accordingly, Count VI must be dismissed with prejudice. If any of the Plaintiffs are entitled to re-plead, those Plaintiff's that actually incurred damages can assert their claim for "consequential damages".

> [] we agree with Chase's second argument that consequential damages, or "special damages," were erroneously awarded, as they were not pled. "Special damages are those that do not *necessarily* result from the wrong or breach of contract complained of, or which the law does not imply as a result of that injury, even though they might naturally and proximately result from the injury." *Land Title of Cent. Fla., LLC v. Jimenez,* 946 So.2d 90, 93 (Fla. 5th DCA 2006) (emphasis in original). In *Jimenez,* the Fifth District explained the nature of special damages and that they must be specifically pled:
>
> > [S]pecial damages are damages that do not follow by implication of law merely upon proof of the breach. *See DeMello v. Buckman,* 916 So.2d 882 (Fla. 4th DCA 2005). General damages, on the other hand, are damages that the law presumes actually and necessarily result from the alleged wrong or breach. *See Augustine v. S. Bell Tel. & Tel. Co.,* 91 So.2d 320, 323 (Fla.1956).

> The purpose of the special damages rule is to prevent surprise at trial. *See* Fla. R. Civ. P. 1.120(g); *Bialkowicz [v. Pan Am. Condo. No. 3, Inc.,* 215 So.2d 767, 770 (Fla. 3d DCA 1968)]. Special damages *must, therefore, be particularly specified in a complaint* in order to apprise the opposing party of the nature of the special damages claimed. If special damages are not specifically pled, then evidence of them is inadmissible. *See Precision Tune Auto Care, Inc. v. Radcliffe,* 804 So.2d 1287 (Fla. 4th DCA 2002).
> *Id.* (emphasis added); *see also* Fla. R. Civ. P. 1.120(g) ("When items of special damage are claimed, they shall be specifically stated.").
>
> *J.P. Morgan Chase Bank Nat. Assoc. v. Colletti Investments, LLC, 2016 WL 4381258 *3 (Fla. 4th DCA August 17, 2016).*

The allegations of consequential damages are conclusory only and too general to form a response. Should "consequential damages" be re-pled in the form of a damages claim associated with a valid cause of action, the exact amount of said alleged consequential damages incurred by the Plaintiffs must be set-forth. At best, such "consequential damages" as stated in the Complaint are speculative, at best.

WHEREFORE, Defendant, THE SCHOOL BOARD OF FLAGLER COUNTY, FLORIDA, respectfully requests that this Honorable Court enter an order dismissing, with prejudice, Counts II through VI of Plaintiff's Complaint, and for any other relief this Court deems necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September, 2016, a true and correct copy of the foregoing Defendant, The School Board of Flagler County, Florida's Motion To Dismiss Counts II through VI, with Prejudice, and Memorandum of Law in Support Thereof, was electronically filed with the Flagler County Clerk of the Courts by being transmitted through the E-Portal filing system and sent by e-mail delivery to: Howard G. Butler, Esq.

hgb@butlerlawgroup.net and Drew Baskin, Esq., dwb@butlerlawgroup.net; and paralegal@butlerlawgroup.net, Butler Law Group.

s/ Lisa J. Augspurger
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