

IN THE SUPREME COURT OF OHIO

JANE DOE, INDIVIDUALLY AND AS
NEXT FRIEND OF HOLLY ROE, A
MINOR, et al.

Appellant,

v.

MARLINGTON SCHOOL DISTRICT,
et al.

Appellees.

Supreme Court Case No.

07-1304

On Appeal from the Judgment
Entered in the Stark County Court
of Appeals, Fifth Appellate District

Court of Appeals
Case No. 00102

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JANE DOE,
INDIVIDUALLY AND AS NEXT FRIEND OF HOLLY ROE, A MINOR, ET AL.**

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I. EXPLANATION OF THE SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED AND WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

A. Summary Introduction.

This case originated because a 10 year-old “special needs” student was repeatedly sexually assaulted on a public school bus—a disturbingly common problem in Ohio schools. The school district claims immunity from liability for its misconduct. But its legal position rests on a misinterpretation of a fundamentally flawed law.

Ohio’s statutory sovereign immunity for political subdivisions includes an exception for the “negligent operation of any motor vehicle.” This exception holds a school district liable in tort if its employee negligently operated a school bus. Here, a bus driver transporting only *four* students repeatedly saw two of them (the victim and the perpetrator) engaged in suspicious conduct that should have been stopped. Violating her basic training, the driver assumed her passengers were merely “playing,” thus permitting a 15 year-old boy repeatedly to perform lewd sexual acts on a vulnerable young girl.

The employee’s negligent operation of the bus is evident. Ohio school bus drivers are not merely “drivers,” oblivious to the student activity on their bus. The law requires them to be trained in “pupil management,” so they can supervise and control their student passengers. Bus drivers (and their aides) are taught, empowered and required to maintain “classroom-like” behavior by students on their buses. “Operating” a school bus properly entails more than simply “driving.”

The school district asserts that only roadway collisions can support a claim of “negligent operation” of a school bus. But, in this and other contexts, Ohio’s common law says otherwise.

The legislative term "operating" encompasses a broader category of activities than the term "driving."

B. Public or great general interest: A common problem and an unsettled legal question.

A Washington Post article from 2005 identified "sexual assaults on school buses [as] one of the fastest-growing forms of school violence."¹ That appears to be true in Ohio. In fact, only weeks after deciding this case, Ohio's Fifth District Court of Appeals decided *Jane Doe v. Jackson Local School Dist.*² That case involved repeated sexual assaults on a young special education student by a high school student who was bused to school in a school district mini-van. The allegations are shockingly similar to those at issue here. The legal issues are virtually identical.

Similarly, *Doe v. Dayton City School Dist. Bd. of Edn.*,³ involved two first graders who were forced to perform oral sex on older students on their school bus. And in 2005, a Licking county kindergarten student was sexually abused on a Heath City School District bus by a 17 year old boy with a history of sexual behavior problems.⁴

Of related concern is the increase in reported incidents of sexual abuse of or amongst mentally retarded or developmentally disabled students. A well-publicized 2005 Cleveland case involved three special education students who raped another special education student in school.⁵ A pending lawsuit in Franklin County involves allegations that Mifflin High School authorities

¹ "As School Bus Sexual Assaults Rise, Danger Often Overlooked," 6/14/2005, Elizabeth Williamson and Lori Aratani, [washingtonpost.com; http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301642_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301642_pf.html)

² 5th Dist. No. 2006CA00212, 2007-Ohio-3258.

³ (1999), 137 Ohio App.3d 166.

⁴ "Wotman: Offical failed to report assault," 5/8/2005, Erik Johns, Advocate Reporter; http://nl.newsbank.com/nl-search/we/Archives?p_action=print&p_docid=10A087AC704DD048

⁵ See "Teens Charged with Raping Classmate at East Tech," 4/29/2005, www.newsnet5.com/print/4429988/detail.html.

improperly reported and investigated an incident where several male students forced a 16 year-old special needs student to perform oral sex on them.⁶

The prevalence of such incidents is significant here. School districts must be aware of this risk, as they train their employees to safely transport our children. And courts must fairly and sensibly interpret legislative intent and public policy when deciding cases related to a district's tort liability. Eliminating this statutory exception to school district liability will decrease accountability and student safety.

This court should decree that negligent "operation" of a school bus means more than simply negligent "driving." As discussed below, one Ohio appellate court already acknowledged this, in *Groves v. Dayton Public Schools*.⁷ But here, the Fifth Appellate District below proffered a hazy distinction between *Groves* and this case (preventing a certifiable conflict on the issue). While the two decisions thus do not *technically* conflict, their disparate results add intolerable and unnecessary uncertainty to this area of law.

The question of what constitutes "negligent operation" of a school bus has repeatedly been litigated in Ohio courts. It is unsettled between appellate districts. The question will repeatedly arise in Ohio courts, against the backdrop of heart-wrenching experiences of our most vulnerable students. This is unquestionably a case of public and great general interest.

C. Substantial Constitutional Question - the constitutionality of R.C. Chapter 2744

If this Court does not interpret R.C. 2744.02(B)(2) in the manner requested, this and other school districts will be immunized from liability when their misconduct permits unspeakable acts of

⁶ See Kevin Barnes v. Bd. of Edn. Columbus Public Schools, Franklin County Case No. 05CV606082; See also www.newswithviews.com/guest_opinion/guest57.htm; See also "Ohio school officials accused of cover-up in sexual assault of girl," 4/17/2005, AP, http://www.sptimes.com/2005/04/17/Worldandnation/Ohio_school_officials.shtml.

⁷ (1999), 132 Ohio App.3d 566.

violence against children on Ohio school buses. This result permits Ohio schools to ignore duties required in other Ohio statutes and regulations. It permits them to ignore their own internal policies. And it denies victims their rights to a remedy and a jury, and places them in a category distinct from victims who have suffered the same tragedy by a different hand. Ohio law should not permit that result and should find this legislative sovereign immunity unconstitutional.

II. STATEMENT OF THE CASE AND FACTS

In 2004, Appellant Holly Roe was a 10 year-old, fourth grade “special needs” student, with learning and emotional disabilities and mild mental retardation. She lived within the Marlinton Local School District (“Marlinton”), so Marlinton school buses provided her transportation to and from school.

For the first twelve weeks of the 2004-05 school year, Holly rode home from school in the afternoons on a bus driven by Marlinton’s employee, Sabrina Wright. Only four students (Holly, and three teenaged boys) rode that bus. All were “special needs” students.

One of the boys on the bus was a 15 year-old boy identified in this case as “Mr. Boe.”⁸ During the bus rides home, Boe repeatedly committed various sexual assaults on Holly Roe. He inserted his fingers in her vagina and anus; forced her to hold his penis and ejaculated into her hand; and, attempted sexual intercourse. He threatened Holly that, if she told anyone about the assaults, he would harm her.

Disturbingly, these sexual assaults happened repeatedly in the presence of the bus driver but were never stopped by her. Holly reported that Mr. Boe had assaulted her “on the floor” and “under the seat” of the school bus. And the driver admits she sometimes noticed the children

⁸ Upon a motion by this boy’s parents, the trial court ordered that he be identified only by this fictional name.

crawling under the seats of the bus. But she thought the children were “playing” (she testified that the two “liked to play tag and [Holly] would like try to crawl under the seat...”)

Prudent and properly trained school bus drivers devote extra attention to any “special needs” students. Mr. Boe required even more scrutiny. He had demonstrated a serious history of misconduct, known to Marlinton. During the immediately preceding year, he had twice faced criminal charges in juvenile court for, amongst several other things, punching his father; attacking his school teacher and biting her classroom aide. He had been placed on criminal probation for such events..

Marlinton’s special education personnel knew this history and knew that Boe *required close and careful supervision*. Marlinton’s Director of Special Education participated in team meetings which described “challenges/concerns” about Boe, including that Boe “cannot be unsupervised in group activities;” and “must have adult supervision especially when around other youths.” There is further evidence the district had previously been asked to separate these two children on the bus but failed to act on the request. The bus driver claims that she was unaware of the details of Boe’s history.

Mr. Boe’s sexual assaults were interrupted, and later discovered, by happenstance. Holly was reassigned to a different afternoon bus in late November 2004 (not because of Boe’s assaults but so she could stay at school longer before boarding her afternoon bus home).

However, one day later in the school year Holly boarded the morning bus at an earlier time and different route than usual. Mr. Boe was on the bus when she boarded and immediately sought to resume his sexual assaults (which had been interrupted since the Fall). Very shortly after Holly boarded the bus, a bus aide looked back to discover Mr. Boe slumped down next to Holly “with his hand up her dress.”

After separating the two students, the aide and bus driver spoke with Holly. Distressed and “crying when she was telling us,” Holly recounted in graphic detail the things that had previously “happened every day on Sabrina Wright’s bus.” She later consistently reported the same things to law enforcement, to a social worker and to a psychologist who evaluated her for the county. Boe later admitted some of his misconduct to school officials and others. He pleaded “true” to gross sexual imposition, in juvenile court proceedings.

Marlington and Sabrina Wright starkly violated basic Ohio student transportation requirements.⁹ Ohio regulations required Marlington to develop and implement transportation policies regarding the school bus driver’s authority and responsibility for control of the students, pupil management and safety instruction.¹⁰ These regulations mandate bus drivers to enforce requirements that student passengers remain seated, keep aisles clear and observe classroom conduct.¹¹

Yet, Wright did not assign seats to the four special needs students on her bus. And she admitted she did not strictly or firmly enforce the legal requirement that students remain seated while she drove the bus.

Wright’s passengers (including Holly and Mr. Boe) routinely behaved in ways that violated state safety laws.

They liked to play tag, and she [Holly] would like try to crawl under the seat, and then she would want Mr. Boe or [another student] to tap her, and then they would like jump across the aisle from seat to seat.

⁹ See Ohio Administrative Code 3301-51-10, 3301-83-08, and 3301-83-10.

¹⁰ OAC 3301-83-08

¹¹ Id.

Boe was not "playing tag" He was sexually assaulting Holly "on the floor" and "under the seats" of Wright's bus. Wright's violation of basic safety rules permitted the repeated sexual assaults.

And evidence pointedly shows that following the most basic rules would have prevented these problems. The year before Mr. Boe assaulted Holly, another driver drove him on the same afternoon route.

Q. Was Mr. Boe any sort of a behavior or discipline problem for you that year?

A. No.***I didn't let him. I made them two right here, and there was two right here on the other side where I knew where they were. I made them sit right here.

* * *

Q. You made them sit basically in assigned seats?

A. Exactly.

Q. Directly behind you?

A. Two right behind me and two the other side where I could look across the aisle and look at them.

Q. And that worked?

A. Yes.

Notably, Ohio law also requires that drivers and bus aides who transport special needs students must receive "*additional training*" (above and beyond the minimal standard bus driver training required by law).¹² This additional training includes "*appropriate behavior management*" for such students.¹³ Marlington's special needs bus drivers (including Sabrina Wright) never received such training. Indeed, Marlington's Transportation Director did not even know about the law requiring additional training. This top-to-bottom reckless state of affairs at Marlington created and permitted the circumstances leading to Holly Roe's unspeakable experiences and injuries. No immunity should endorse or protect it.

¹² OAC §3301-83-10(3)(a).

¹³ Id.

On September 21, 2005, Plaintiff-Appellants filed suit in Stark County Common Pleas Court. Defendant-Appellee moved for summary judgment on February 8, 2006. The trial court denied the motion.¹⁴ Marlinton appealed to the Fifth District, and on June 4, 2007, that court, by a 2-1 vote, reversed the trial court.¹⁵

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

A school bus driver's negligent failure to supervise and control obvious misbehavior by students on the school bus constitutes "negligent operation" of the school bus, for purposes of R.C. 2744.02(B)(1).

In Ohio, a political subdivision is not liable in damages for injury caused by any act or omission of the subdivision or an employee of the political subdivision in connection with either governmental or proprietary functions.¹⁶ There are five enumerated exceptions to that default rule of immunity.¹⁷ One exception applies here.

R.C. 2744.02(B)(1) imposes liability on political subdivisions for injury or loss caused by the negligent operation of any motor vehicle by their employees.¹⁸ A school bus driver's negligence in performing her duties of pupil management and supervision is "negligent operation" of the vehicle.

Pupil management (the supervision and control of student passengers) is an integral part of the operation of a school bus. A bus driver's operation of the bus involves more than simply putting the key in the ignition and propelling it without collision on the public roads. School bus

¹⁴ See 3/31/2006 Trial Court Order, attached hereto as Appendix C.

¹⁵ See 6/4/2007 5th District Judgment Entry and Opinion, attached hereto as Appendix A & B.

¹⁶ R.C. §2744.02(A)(1).

¹⁷ R.C. §2744.02(B)(1)-(5).

¹⁸ R.C. §2744.02(B)(1)(a) – (c) provides full defenses to any liability imposed by this motor vehicle exception to immunity. These defenses relate to police, fire and EMS calls and are inapplicable to this case.

drivers are paid, trained and responsible to control and supervise their student riders while the bus is moving. This is especially true with “special needs” students.

In *Groves v. Dayton Public Schools*,¹⁹ the school district’s bus driver negligently assisted a disabled, wheelchair-bound student who was disembarking a school bus. The driver failed to follow district rules and regulations about securing the student’s wheelchair during disembarking. The student was injured and her parents sued under R.C. 2744.02(B)(1), claiming that the bus driver’s negligence arose out of the operation of the motor vehicle. As here, the school district argued that the “negligent operation” exception to immunity applied only to the driver’s conduct in maneuvering the vehicle on the roads. The appellate court properly disagreed, holding that R.C. Chapter 2744’s term, ‘operation of any motor vehicle’ is “**capable of encompassing more than the mere act of driving the vehicle involved.**”²⁰

Notably, because the school district “had established rules and regulations pertaining to the safe boarding, transportation, and disembarking of handicapped students,” the court found performance of these functions “was part of the bus driver’s duties and an integral part of his operation of the school bus.”²¹

The same analysis applies here. State regulations expressly require a school district to develop and implement transportation safety policies regarding “**the school bus driver’s authority and/or responsibility to maintain control of the pupils.**”²² This legally mandated training for school bus drivers includes “pupil management.”²³ It also includes basic training on

¹⁹ (1999), 132 Ohio App.3d 566.

²⁰ Id.

²¹ Id. at 570.

²² OAC §3301-83-08.

²³ Id.

transporting “special needs” children, including these “basic rules” of transporting special needs children:

“prepare and use a seating chart”
“keep the children with disabilities within your sight.”²⁴

Bus drivers are also trained to recognize that special needs students can present “discipline problems” and require “firm but fair discipline which is appropriate and immediate.”²⁵ Clearly, Ohio requires such training because pupil management is “an integral part of [the driver’s] operation of the school bus.”²⁶

Marlington’s own policies demonstrate that a school bus driver’s integral responsibilities include pupil management.²⁷ Indeed, Marlington’s Transportation Director conceded the issue, in her deposition, when she admitted that pupil management is part of the bus driver’s job. It is clear that the term “operation” encompasses more than just “driving.”

The Fifth District’s majority opinion below does not fairly or logically address this important question. The majority opinion below stated that, because the legislature did not define the term “operation” in R.C. Chapter 2744, it would give the term its “plain and ordinary meaning.”²⁸ The Fifth District majority would not embrace the Second District’s holding in *Groves* that “the operation of a motor vehicle entails more than simply the act of driving.” But it

²⁴ Id.

²⁵ Id.

²⁶ *Groves*, supra, at 570.

²⁷ The district’s transportation policies state that “**the driver alone is responsible for the safety of the participants while they are riding a school bus** and, therefore, is the final authority as to the compliance of the bus and activity regulations.” The policies also state that “[o]nce a child boards the bus...he become[s] the responsibility of the school district...students on a bus are under the authority of and directly responsible to the bus driver. **The driver has the authority to enforce the established regulations for bus conduct.** Students will conduct themselves on the school bus as they would in a classroom, except that reasonable visiting and conversation are permissible. (Emphasis added).

²⁸ See Appendix A, *Doe v. Marlington*, 2007-Ohio-2815 at ¶19, citing *Howard v. Miami Twp. Fire Dept.*, Montgomery App. No. 21478, 2007-Ohio-1508.

did not simply announce a holding in conflict with *Groves*. It manufactured a baffling and ethereal distinction between the cases, by suggesting that “the act of assisting students in getting on and off a bus” (at issue in *Groves*) is “distinctly different” than supervising children’s behavior on the bus (at issue here).²⁹

Of course, the two duties are different—but the distinction is *utterly meaningless* in this legal context. The relevant question is whether non-driving responsibilities like assisting passengers to disembark, or supervising children’s obvious misbehavior, are a part of “operating” a school bus. The majority below offered no rationale about why one could be a part of “operating” the bus and the other could not. On the other hand, the *Groves* court offered a sensible rationale: if the employee bus driver is trained to do the act and the act is a part of their normal duties, it is an “integral part” of “operating” the bus.

In the end, the Fifth District majority held that a bus driver’s responsibility to supervise students is “separate and distinct” from the responsibility to operate the motor vehicle. In other words --although it was unwilling to say so--it believes that “operating” means only “driving.”

In similar circumstances, this Court has ruled otherwise, construing the statutory term “operation” of a motor vehicle to be broader than merely “driving” the vehicle. In *State v. Cleary*,³⁰ this Court held that “*operation of a motor vehicle within the meaning of R.C. 4511.19(A) is a broader term than driving.*”³¹ This court expounded by stating that the terms “operating” a motor vehicle and “driving” a motor vehicle “are not synonymous....[t]he term ‘operating’ encompasses a broader category of activities involving motor vehicles than does

²⁹ Id.

³⁰ (1986), 22 Ohio St.3d 198.

³¹ Id. at 199

'driving.'"³² In this critical respect, the Fifth District's decision completely contradicts Ohio case law.³³

Proposition of Law No II:

In a civil action for damages that does not seek declaratory or injunctive relief, the service requirements in R.C. 2721.12(A) do not apply, even when the constitutionality of a statute is later challenged in motion practice during the pendency of the case.

R.C. 2721.12 addresses service requirements for declaratory judgment actions. This Court has addressed the duty imposed by R.C. 2721.12(A) to notify the Attorney General, and has limited its applicability to those cases in which a party challenges the constitutionality of a statute in a declaratory judgment action. In *Cleveland Bar Assn. v. Picklo*,³⁴ this Court addressed the constitutionality of the "unlawful detainer" and "landlord-tenant" statutes, despite that the plaintiff failed to serve the Attorney General with a copy of the complaint.³⁵ This Court reasoned that service on the Attorney General was unnecessary because the underlying action did not begin as a declaratory judgment action.³⁶

The same is true here. Appellants pleaded a civil claim for damages, with no request for declaratory relief or allegation of unconstitutionality. In responding to Marlinton's motion for

³² Id.

³³ See also *Sonnenberg v. Erie Metro Transit Auth.* (1991) 137 Pa Cmwlth. 533, 586 A.2d 1026 (Pennsylvania court held that 'operation' of a bus, for purposes of interpreting governmental immunity statute, includes more than simply 'driving.');

Baker & Co v. Lagaly (10th Cir. 1944), 144 F.2d 344, 345 (operation of the bus * * * included the receiving of the children into the bus and their exit from it * * * opening the door of the bus and allowing children to alight was an integral part in the operation of the bus).

³⁴ *Cleveland Bar Assn. v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio-3995, 772 N.E.2d 1187; see, also, *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, at ¶ 6, fn. 1.

³⁵ Id. at ¶¶5-7.

³⁶ Id.

summary judgment Appellants alleged the unconstitutionality of the political subdivision immunity statutes. R.C. 2721.12 does not apply to such motion practice³⁷

While the appellate court below went on to address the constitutional arguments, it still endorsed a rule of law regarding service that cannot be permitted to stand.³⁸ Appellants should not be prohibited from raising the issue of constitutionality in response to a defense motion for summary judgment. Further, the court's holding requires all plaintiffs to anticipate all defense arguments and request declaratory relief regarding all anticipated statutes. No plaintiff can reasonably be expected to meet this demand.

Proposition of Law No III:

R.C. Chapter 2744 is unconstitutional under Ohio Constitution Article 1, Sections 1, 2, 5 and 16 and the 5th, 7th and 14th Amendments of the United States Constitution because it violates equal protection, due process, the right to trial by jury and the right to a remedy.

The constitutionality of the Political Subdivision Tort Liability Act has been previously questioned by this Court.³⁹ And rightfully so.

R.C. Chapter 2744 violates the guarantees of equal protection and due process, found in both our federal and state Constitutions. This is true regardless of what constitutional test is used to examine the law.

It violates Ohio's long cherished and protected right to a remedy.

It violates Appellants' fundamental and "inviolable" right to a jury trial under both the federal and state Constitutions.

³⁷ See also *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶29; *Ruble v. Ream*, Washington App. No. 03CA14, 2003-Ohio-5969, ¶ 11-15; *Tonti v. Tonti*, Franklin App. Nos. 03AP-494 and 03AP-728, 2004-Ohio-2529, ¶ 136; *In re Cameron*, 153 Ohio App.3d 687, 2003-Ohio-4304, 795 N.E.2d 707, ¶ 15-17.

³⁸ The Fifth District reiterated this erroneous holding in *Doe v. Jackson Local School Dist.*, 5th Dist. No. 2006CA00212, 2006-Ohio-3258.

³⁹ *Butler v. Jordan* (2000), 92 Ohio St.3d 354, 750 N.E.2d 554

As interpreted by Appellee and applied by the appellate court, R.C. Chapter 2744.02 completely denies Appellants their right to hold Marlinton, and its employees, liable for their misconduct. It should be found unconstitutional.

Public policy supports this finding. In *Haverlack v. Portage Homes, Inc.*,⁴⁰ in which this Court abolished the defense of sovereign immunity, it was noted that in cases involving injuries caused by misconduct of political subdivisions “*the municipality is better able to bear the cost of an injury it causes than the individual victim.*” The municipality should be run with the same care and circumspection as a business, protecting itself in the same manner from liability incurred by its servants. A municipality is able to obtain liability insurance and is able to spread the cost among tax payers.”⁴¹

“Any institution that has so long stood the trying tests of time and experience, that has so long been guarded with scrupulous care, and commanded the admiration of so many of the wise and good, justifiably *demands our jealous scrutiny when induration are attempted to be made upon it.*”⁴² This Court should consider these issues.

CONCLUSION

There are three separate and independent legal reasons on which this Court may base jurisdiction and consider this case. One involves a substantial constitutional question. All are of great public and general interest. This Court should not immunize such egregious misconduct, especially when it comes at the expense of Ohio’s school children.

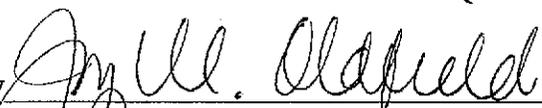
Appellants respectfully request jurisdiction.

⁴⁰ (1982), 2 Ohio St.3d 26

⁴¹ Id. at 30 (emphasis added).

⁴² Id. at 304 (emphasis added).

Respectfully submitted,

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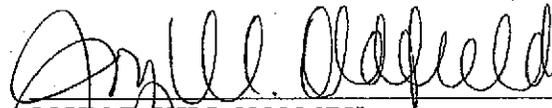
A copy of the foregoing has been served by regular U.S. Mail to the following counsel of record this 19th day of July, 2007:

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JANE DOE, INDIVIDUALLY AND AS
NEXT FRIEND OF HOLLY ROE,
A MINOR, et al.

Appellees

-vs-

MARLINGTON LOCAL SCHOOL
DISTRICT BOARD OF EDUCATION,
et al.

Appellants

JUDGES:

John W. Wise, P.J.
William B. Hoffman, J.
Julie A. Edwards, J.

Case No. 2006CA00102

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal From Stark County Court Of
Common Pleas Case No. 2005 CV 03180

JUDGMENT:

Reversed

(S)

DATE OF JUDGMENT ENTRY:

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APPENDIX A

A TRUE COPY TESTE:
PHIL G. GIAYASIS, CLERK OF COURT OF APPEALS
By: *[Signature]*
Date: 6-5-07

7

Edwards, J.

{¶1} Defendant-appellant Marlinton Local School District Board of Education appeals the judgment of the trial court that denied its motion for summary judgment. Plaintiffs-appellees are Jane and John Doe, the custodial parents of Holly Roe, a minor.

STATEMENT OF FACTS AND LAW

{¶2} Appellant provided transportation to and from school to Holly Roe, a ten (10) year old minor with special needs, and Billy Boe, a fifteen (15) year old minor with special needs.¹ For the first twelve (12) weeks of the 2004-2005 school year, Holly and Billy rode the same bus home from school. The bus that transported Holly and Billy home from school was driven by appellant's employee, Sabrina Wright. Only two other special needs students rode said bus.

{¶3} In late November of 2004, Holly was reassigned to another bus so that she could stay at school longer. Thereafter, she did not ride the bus with Billy. However, later in the school year Holly's morning bus routine changed for one day, and she rode a bus to school that was driven by JoAnn Sweitzer and on which Billy was a passenger. Billy was on the bus when Holly boarded, and Billy asked if he could sit with Holly. The aide refused to allow Billy to sit with Holly, but told him he could sit in the seat next to Holly. Minutes later, the aide looked back and noticed Billy's head was not in sight. When she went to investigate, she discovered Billy slumped down next to Holly with his hand up her dress.

{¶4} After separating Holly and Billy, both the aide and the bus driver spoke with Holly. Holly recounted in graphic detail things that had happened

¹ The parties involved herein have been identified by fictional names.

"every day on Sabrina Wright's bus", which are as follows. During the time period during which Holly rode Wright's bus with Billy, Billy committed various sexual assaults on Holly. He inserted his fingers in her vagina and anus. He forced her to hold his penis and ejaculated into her hand. He attempted sexual intercourse. Holly reported that Billy assaulted her on the floor under the seat of the bus, and reported further that Billy threatened to harm her if she told anyone about the assaults. Ms. Wright, the bus driver, testified on deposition that she sometimes noticed the children crawling under the seats of the bus, but that she thought that the children were playing a game, such as tag.

{¶5} Plaintiffs-appellees filed a complaint against appellant on September 21, 2005.² Appellant moved for summary judgment on February 8, 2006, on the basis of political subdivision immunity pursuant to R.C. 2744. et seq. On March 27, 2006, appellees opposed appellant's motion for summary judgment, and on March 31, 2006, the trial court denied appellant's motion without opinion. The appellant appeals the denial of summary judgment based upon R.C. 2744.02(C), which provides that "an order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order," and sets forth the following assignment of error:

{¶6} "THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF THE MARLINGTON LOCAL SCHOOL DISTRICT BOARD

² Appellees later moved for, and were granted, leave to amend their complaint to assert claims against individual Marlinton employees. The causes of action against said individuals have been stayed pending the outcome of the within appeal.

OF EDUCATION, IN NOT DISMISSING ALL CLAIMS AGAINST IT ON THE GROUNDS OF OHIO REVISED CODE CHAPTER 2744, IMMUNITY.”

{¶7} This matter reaches us upon a denial of summary judgment. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such we must refer to Civ.R. 56(C), which provides in pertinent part: “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . A summary judgment shall not be rendered unless it appears from such evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.”

{¶8} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. Further, trial courts should award summary judgment with caution. “Doubts must be resolved in favor of the non-moving party.” *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 604 N.E.2d 138, 1992-Ohio-95.

{¶9} It is pursuant to this standard that we review appellant's assignment of error.

{¶10} Appellant, in its sole assignment of error, argues that the trial court erred in denying its motion for summary judgment. We agree.

{¶11} At issue in the case sub judice is whether appellant Marlington Local School District is entitled to statutory immunity under R.C. Chapter 2744. The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610, 1998-Ohio-421.

{¶12} The first tier of the analysis involves the application of R.C. 2744.02(A)(1), which states in pertinent part: "Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." The parties do not dispute that appellant Marlington Local School District is a political subdivision. Further, the transportation of children is a governmental function for purposes of analysis under R.C. 2744. See, *Day v. Middletown-Monroe City School District* (July 17, 2000), Butler App. No. CA99-11-186, 2000 WL 979141, at 4-5.

{¶13} However, the immunity afforded by R.C. 2744.02(A)(1) to a political subdivision such as appellant is not absolute, but is, by its express

terms, subject to five exceptions as set forth in R.C. 2744.02(B). See, *Hill v. Urbana*, 79 Ohio St.3d 130, 679 N.E.2d 1109, 1997-Ohio-400. Thus, the second tier of the immunity analysis involves the application of R.C. 2744.02(B), which states, in pertinent part, as follows:

{¶14} “(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

{¶15} “(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. . . .” (Emphasis added).

{¶16} The third tier of the immunity analysis involves reinstatement of the immunity if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies. *Cater*, supra, at 28.

{¶17} As noted by the court in *Doe v. Dayton* (1999), 137 Ohio App.3d 166, 738 N.E.2d 390:

{¶18} “The General Assembly’s enactment of R.C. 2744.02(A)(1) reflects a policy choice on the part of the state of Ohio to extend to its political subdivisions the full benefits of sovereign immunity from tort claims. Likewise, the exceptions to immunity in R.C. 2744.02(B) and the exceptions and defenses in

R.C. 2744.03 reflect policy choices on the state's part to submit itself to judicial relief on tort claims only with respect to the particular circumstances identified therein. Because those exceptions and defenses are in derogation of a general grant of immunity, they must be construed narrowly if the balances which have been struck by the state's policy choices are to be maintained." *Id.* at 169.

{¶19} Appellees argue that the trial court correctly denied appellant's motion for summary judgment because the supervision and control of student passengers is an integral part of the operation of the school bus. According to appellees, Ms. Wright was negligent in her supervision and control of the student passengers, therefore she was negligent in her operation of the bus. Appellant argues that the supervision and control of student passengers falls outside the scope of "operation of a motor vehicle" as that term is used in R.C. 2744.02(B)(1). We note that since the term "operation" is not defined in R.C. Chapter 2744, it must be given its plain and ordinary meaning unless the legislative intent indicates otherwise. See *Howard v. Miami Twp. Fire Dept.*, Montgomery App. No. 21478, 2007-Ohio-1508.

{¶20} Appellees cite the case of *Groves v. Dayton Public Schools*, et al. (1999), 132 Ohio App.3d 566, 725 N.E.2d 734, for the proposition that the term "operation of a motor vehicle" encompasses more than the mere act of driving the vehicle. In *Groves*, the school district's bus driver negligently assisted a disabled, wheelchair bound student to disembark from the school bus. The driver failed to secure the child properly before disembarking. The student's

hand became wedged in the wheel of her wheelchair and she suffered injuries.

The *Groves* court stated:

{¶21} “R.C. Chapter 2744 contains no definition of the term ‘operation of any motor vehicle.’ We find the term capable of encompassing more than the mere act of driving the vehicle involved. Neither of the parties to this appeal refers us to any authority construing the term in question with regard to a driver’s assisting a disabled passenger and our research in Ohio law has failed to reveal any cases on point. . . .

{¶22} “Here, *Groves* was a passenger on a school bus equipped to transport children confined to wheelchairs, which suggests to us that it was equipped with a ramp with which to lift and lower the students in their wheelchairs as they boarded and disembarked from the bus. In addition, Dayton Public Schools had established rules and regulations pertaining to the safe boarding, transportation, and disembarking of handicapped students that required bus drivers to, *inter alia*, secure passengers in their wheelchairs when assisting them on or off the school bus. Thus, it can reasonably be inferred that doing so was part of the bus driver’s duties and an integral part of his operation of the school bus. Furthermore, we do not exclude the possibility that the driver’s operation of the ramp itself would be considered operation of the motor vehicle under the circumstances of this case.” *Id.* at 569–570.

{¶23} Whether or not we agree with the *Groves* court that the operation of a motor vehicle entails more than simply the act of driving, we find the *Groves* case to be distinguishable from the within case. In *Groves*, the bus

driver was assisting the disabled student in disembarking from the bus. Thus, according to *Groves*, the affirmative act of stopping the bus and assisting the student in disembarking from the bus constituted operation of the motor vehicle for purposes of the tort immunity exception. The *Groves* court relied on California and Michigan case law for the proposition that stopping a school bus for the purposes of discharging passengers along with the bus drivers' duties attendant to the stopping of the bus unquestionably constitutes operation of a motor vehicle. *Id.* at 569 – 570.

{¶24} The case sub judice is, however, distinguishable from the *Groves* case. In the within case, the act or omission in question involves supervision of the children while passengers on the bus. This act is distinctly different from the act of assisting students in getting on and off a bus. While supervision of students who are passengers on a bus may very well be one of the bus driver's responsibilities, it is a responsibility that is separate and distinct from that of the operation of the motor vehicle. We therefore hold that the alleged failure of the bus driver to supervise the students herein does not fall within the plain and ordinary meaning of "operation of a motor vehicle" for purposes of the tort immunity exception.

{¶25} Our holding is supported by the policies underlying R.C. 2744. As set forth by the Ohio Supreme Court in *Wilson v. Stark County Department of Human Services*, 70 Ohio St.3d 450, 639 N.E.2d 105, 1994-Ohio-394, "The policies underlying R.C. Chapter 2744 support this interpretation. R.C. Chapter 2744 was the General Assembly's response to the judicial abrogation of

common-law sovereign immunity. *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 347, 632 N.E.2d 502, 504. The manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 550 N.E.2d 181.” *Wilson* at 453.

{¶26} Because we find that none of the exceptions to immunity set forth in R.C. 2944.02(B) apply, we need not address whether any of the defenses contained in R.C. 2744.03 applies.

{¶27} We note that appellees raised the issue of the constitutionality of the sovereign immunity statute in their brief in opposition to appellant’s motion for summary judgment.³ In addition, the appellees raised the constitutionality issue in their appellate brief. This argument is not well taken, as the appellees failed to comply with the procedures set forth by R.C. 2721.12 necessary to attack the constitutionality of a statute. First, appellees did not assert that R.C. 2744 was unconstitutional in their complaint or their amended complaint as required by the statute. Second, appellees did not serve the attorney general with a copy of the complaint as required by the statute. Even if these procedural requirements had been met, the appellees’ constitutional argument still must fail. As set forth by this Court in *Eischen v. Stark County Board of Commissioners*, Stark App. No. 2002CA00090, 2002-Ohio-7005, appeal not allowed by 98 Ohio St.3d 1539, 2003-Ohio-1946, 786 N.E.2d 901: “[d]espite the provocative language used by Justice Douglas in *Butler* [*v. Jordan*, 92 Ohio St.3d 354], the law of Ohio remains that R.C. Chapter 2744 is constitutional. The Supreme Court of Ohio addressed this issue in *Fabrey v. McDonald Police Department*, 70

³ The trial court did not address the constitutionality issue in its March 31, 2006, judgment entry.

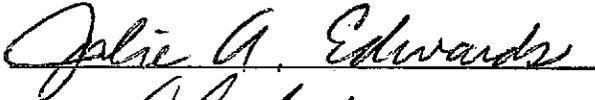
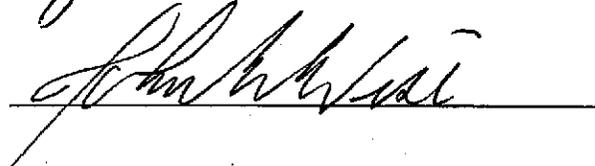
Ohio St.3d 351, 639 N.E.2d 31, 1994-Ohio-368, and *Fahnbulleh v. Straham*, 73 Ohio St.3d 666, 653 N.E.2d 1186, 1995-Ohio-295." *Eischen* ¶ 20.

{¶28} The appellant's sole assignment of error is sustained, and the judgment of the trial court is hereby reversed.

By: Edwards, J.

Wise, P.J. concur

Hoffman, J. dissents

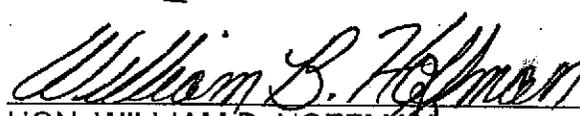



JUDGES

JAE/0122

Hoffman, J., dissenting

{129} I respectfully dissent. Because the exceptions found in R.C. 2744.02(B) are remedial in nature; therefore, to be liberally construed, I would find the alleged failure of the bus driver to supervise student passengers with special needs does fall within the plain and ordinary meaning of "operation of a motor vehicle" for purpose of the tort immunity exception. Accordingly, I would affirm the judgment of the trial court.


HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PHIL G. CHAVASIS
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
07 JUN -4 PM 2:50

MARLINGTON LOCAL SCHOOL
DISTRICT, et al.

Appellants

-vs-

JANE DOE, INDIVIDUALLY AND AS
NEXT FRIEND OF HOLLY ROE; A
MINOR, et al.

Appellees

JUDGMENT ENTRY

CASE NO. 2006CA00102

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is reversed. Costs assessed to appellee.

John A. Edwards

[Signature]

JUDGES

APPENDIX B

STATE OF OHIO:
SS:
STARK COUNTY:

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

JANE DOE, ET AL

Plaintiff(s)

-VS-

MARLINGTON LOCAL SCHOOL, ET AL

Defendant(s)

) CASE NO. 2005-CV-03180

) JUDGE LEE SINCLAIR

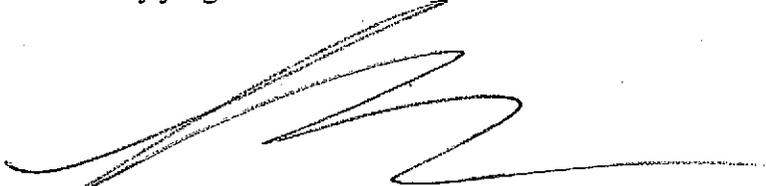
) JUDGMENT ENTRY

FILED

MAR 31 2006

PHIL G. GIAVASIS
STARK COUNTY OHIO
CLERK OF COURTS

The Court has reviewed the defendants' motion for summary judgment and the response of the plaintiff. The Court finds that the motion for summary judgment should be denied. This matter shall remain set for trial.



JUDGE LEE SINCLAIR

COPY TO: JOHN HILL, ESQ./JOY OLDFIELD, ESQ.
DAVID SMITH, ESQ./JOS. BOATWRIGHT, ESQ.
MARY JO SHANNON SLICK, ESQ.
RODNEY BACA, ESQ.

APPENDIX C