
IN THE SUPREME COURT OF OHIO

**APPEAL FROM THE JUDGMENT ENTERED
IN THE STARK COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT
CASE NO. 00102**

07-1304

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

Appellant

vs.

MARLINGTON LOCAL SCHOOL DISTRICT

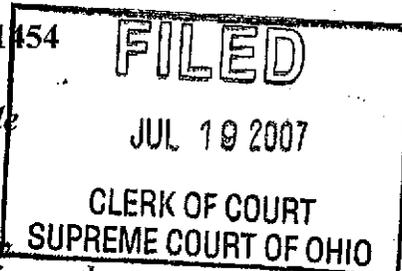
Appellees

**MEMORANDUM OF AMICI CURIAE EQUAL JUSTICE
FOUNDATION, CHILDREN'S DEFENSE FUND AND
OHIO COALITION FOR THE EDUCATION
OF CHILDREN WITH DISABILITIES
IN SUPPORT OF APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

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I. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio Coalition for the Education of Children with Disabilities is a statewide, non-profit organization dedicated to advancing the educational interests of children with disabilities. Notably, it is the only federally funded (under IDEIA), parent training and information center for the State of Ohio.

The Children's Defense Fund is a private, non-profit organization that provides a strong, effective voice for all the children of America who cannot vote, lobby or speak for themselves. CDF pays particular attention to the needs of children with disabilities.

The Equal Justice Foundation is a non-profit organization that represents the poor and disadvantaged who may not otherwise have access to the legal system. It undertakes class action and other impact litigation on behalf of individuals with disabilities, minorities, immigrants, children, the aging, victims of predatory lending and consumer fraud, tenants denied their rights and institutionalized persons.

All three groups have an interest in ensuring the safety and well-being of Ohio's school children, particularly those with disabilities – the most vulnerable in our society.

Every day, 440,000 school buses ferry 18 million children to and from schools and activities across the United States.¹ Sexual assaults on school buses are now one of the fastest

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)

growing forms of school violence.²

Last year, a Cincinnati school student claimed he was raped on the school bus by two other classmates.³ This assault occurred despite the mother's report a week earlier of a school bus fight.⁴ The school bus driver reported witnessing a scuffle but "was not able to get to the back of the bus in time to identify anyone."⁵

Students with "special needs" are in even more danger. A recent case out of Columbus involved a special needs student who was sexually assaulted by a group of boys in her school auditorium, while others looked on.⁶ And consider the case of *Jane Doe v. Jackson School District*, wherein a special needs student was repeatedly sexually assaulted by a high school student in a school district mini-van that transported them to school.⁷

And Ohio is not alone. *Doe ex rel Ortega-Piron v. Chicago Bd. of Edn.*,⁸ *Doe v.*

² *Id.*

³ "District targets bullying after allegations of rape on school bus," 4/8/2006, <http://www.freerepublic.com/focus/f-news/1611789/posts>; See also www.ohio.com/mlid/ohio/news/state/14281796.htm

⁴ *Id.*

⁵ *Id.*

⁶ "Ohio school officials accused of cover-up in sexual assault of girl," 4/17/2005, Associated Press, http://www.sptimes.com/2005/04/17/Worldandnation/Ohio_school_officials.shtml

⁷ 5th Dist. No. 2006CA00212, 2007-Ohio-3258. See also *Doe v. Dayton City School Dist. Bd. of Ed.* (1999), 137 Ohio App.3d 166

⁸ (Ill. 2004), 213 Ill.2d 19, 820 N.E.2d, 418

Fairfield,⁹ and *Brian VV v. Chenango Forks Cent. School District*¹⁰ are three cases in which students were physically and sexually assaulted on the school bus. At least one of these cases involved a special needs student. All occurred in the presence of the school bus driver.

Additionally, in 2005, the Lucia Mar, California School District faced a similar incident. In that case, a 13-year old special education student was sexually assaulted on her school bus by another, older special education student.¹¹ She was forced to orally copulate the boy, and was then fondled and physically injured.¹² Again, amazingly, all of this occurred in the presence of the school bus driver.¹³

The General Assembly, in enacting the Political Subdivision Tort Liability Act, R.C. Chapter 2744, has created a scheme for political subdivision immunity and liability. R.C. 2744.02(A)(1) provides immunity to political subdivisions, such as Marlinton, and their employees for torts caused by any act or omission of a political subdivision or its employee. This immunity effectively insulates our school boards and school districts from liability in certain circumstances, even when they involve the most egregious cases of neglect.

⁹ (Conn Super., 2006), Not Reported in A.2d, 2006 WL 3200433

¹⁰ (N.Y. A.D. 3 Dept. 2002), 299 A.D. 2d 803751 N.Y.S.2d 59

¹¹ "Lawsuit alleges sexual assault on school bus," 12/13/2006, Leslie Parilla, San Luis Obispo Tribune; <http://www.mywire.com/pubs/SanLuisObispoTribune/2006/12/13/2279972>; See also <http://murrayandwhitehead.com/2006/12/13/lucia-mar-school-district-sexual-assault-case/>

¹² *Id.*

¹³ *Id.*

This immunity also permits our school districts to ignore their other legal obligations to safely transport our students and provide training for the supervision of students on a school bus – particularly those with special needs. Ohio requires school districts to develop and implement certain transportation policies, which “shall include” policies about “*the school bus driver’s authority and/or responsibility to maintain control of the pupils.*”¹⁴ That same regulation requires school districts to develop “*pupil management and safety instruction policies.*”¹⁵

Further, state regulations require school bus drivers to receive certain minimum training, which includes information about “*transporting...special needs children, including a practical overview of the characteristics and needs of those individuals.*”¹⁶ This state mandated training required Marlinton’s drivers to do things such as “use a seating chart” and “keep the children with disabilities within your sight.”¹⁷ And Ohio law also requires additional training for drivers and bus aides who transport special needs students.¹⁸ The record in this case is clear that Marlinton’s special needs bus drivers (including the one involved here) never received such training.¹⁹

¹⁴ Ohio Administrative Code (“OAC”) §3301-83-08

¹⁵ *Id.*

¹⁶ OAC §3301-83-10.

¹⁷ Wright depo at Exhibit 3 thereto.

¹⁸ OAC §3301-83-10(3)(a).

¹⁹ Middleton depo at 50-51

Despite this obvious neglect in their state mandated duties, the Fifth District held Marlinton immune from liability.²⁰ The court held that the school bus driver's negligence in failing to properly supervise and manage the students on her bus does not fall within the statutory motor vehicle exception to immunity.²¹ In rendering this decision, the court found immunity, despite Marlinton's failure to follow its other state regulated duties.

This Court has already acknowledged the contradiction presented by sovereign immunity in these situations:²²

The tragedy of this case is that appellant is able to chuck its clear duties and responsibilities, as are other political subdivisions, on the sole basis of the doctrine of sovereign immunity. What is this doctrine that permits the government to injure its citizens with impunity? How can a government be immune from liability for an act for which that same government would impose liability on one of its citizens? The answer is that the 'government,' whoever that may be, has accorded itself the right to negligently injure its citizens with immunity, all in disregard of constitutional protections reserved by its citizens to themselves.

* * *

[G]iven the allegations of this case, . . . it does seem that serious questions arise. This is especially true given the allegation that even though the political subdivision entirely failed to carry out its statutorily mandated duties, the political subdivision is found not to be liable, on the basis that it pleads that it is immune, pursuant to the doctrine of sovereign immunity. It does, indeed, seem fair to ask, 'How can this be the law?'

²⁰ 5th Dist. No. 2006CA00102, 2007-Ohio-2815.

²¹ *Id.*

²² *Butler v. Jordan* (2000), 92 Ohio St.3d 354, 357-58, 750 N.E.2d 554

R.C. §2744.02(B) sets forth exceptions to that grant of immunity - one of which is certainly applicable here: negligence in operating a motor vehicle. In this case, Appellants argue to the Court that a bus driver's negligent failure to effectively supervise and manage pupils on her bus falls within that exception. We agree.

Ohio law should reflect that negligent "operation" of a school bus means more than simply negligent "driving."

II. STATEMENT OF THE CASE AND FACTS

Appellant's Memorandum in Support of Jurisdiction sets forth a detailed fact pattern which is adopted herein. In summary, Appellant Holly Roe was a 10 year-old, 4th grade "special needs" student during the 2004-2005 school year. Holly had learning, communication and emotional disabilities attributable to mild mental retardation.

While being transported home from school by a Marlinton school bus, with other special needs students, Holly was repeatedly sexually assaulted by a 15-year-old, eighth grade boy identified as "Mr. Boe."²³ It is unnecessary to graphically recount the incidents described in Appellant's Memorandum in Support. It is enough to state that this 10 year-old disabled child was sexually assaulted on her school bus on dozens of separate occasions, in the presence of the school bus driver.

The driver testified that she sometimes noticed the children crawling under the seats of

²³ Upon a motion by this boy's parents, the trial court ordered that he be identified only by this fictional name.

the bus. But she thought the children were “playing” (she thought the children “liked to play tag and [Holly] would like try to crawl under the seat...”) ²⁴ Her negligence in failing to notice and detect this behavior is astounding.

It is important to note that the perpetrator, Mr. Boe, had a serious history of misconduct, known to Marlinton to require special supervision. ²⁵ Further, the district had previously been requested to separate these two children on the bus but failed to act on the request. ²⁶

Holly Roe and her parents filed suit in Stark County Common Pleas Court on September 21, 2005. On February 8, 2006, Defendant-Appellee moved for summary judgment, which was denied by the trial court. ²⁷ Marlinton appealed to the 5th District, and on June 4, 2007, that court reversed the trial court and found in favor of Marlinton’s immunity defense. Appellant timely appealed to this Court on July 19, 2007.

²⁴ Wright depo at 44.

²⁵ Behner depo at 18, 22-40, and Exhibits 1-5 thereto.

²⁶ Behner depo at 68, and Exhibit 6 thereto.

²⁷ See 3/31/2006 Trial Court Order, attached to Appellant’s Memorandum in Support of Jurisdiction.

II. 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).

R.C. §2744.02(B)(1) is an exception to the general immunity in R.C. §2744.02(A)(1). It imposes liability on political subdivisions for "injury or loss caused by the negligent operation of any motor vehicle by their employees."²⁸ Ohio law is clear that "operation" encompasses more than just "driving" a vehicle. The control, supervision and management of students on a school bus are integral parts of its operation. Any negligence associated with those duties should be actionable under Ohio law.

The Second District has addressed this issue twice.²⁹ Both times, the court found that the term "operation" in Chapter 2744 encompasses more than the mere act of driving the vehicle involved.³⁰

In *Groves*, a disabled student was injured due to the bus driver's negligence in assisting the student off the vehicle.³¹ Importantly, that district had previously implemented policies

²⁸ 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.

²⁹ *Groves v. Dayton Public Schools, et al* (1999), 132 Ohio App.3d 566 and *Doe v. Dayton City School Dist. Bd. of Edn.* (1999), 137 Ohio App.3d 166.

³⁰ *Id.*

³¹ *Groves*, 132 Ohio App.3d at ____; See also, *Sonnenberg v. Erie Metro Transit Auth* (1991) 137 Pa Cmwlth. 533, 586 A.2d 1026 (plaintiff injured when exiting school bus

regarding “safe boarding, transportation and disembarking,” particularly as they relate to disabled students. The court noted the obvious: these duties are part of “operating” the school bus.³²

In *Doe*, a first grade student was sexually assaulted on a school bus by a group of eighth grade students. The plaintiffs claimed that negligence on the part of the school bus driver caused or contributed to the child’s injury.³³ Again, the court defined “operation” broadly, to include more than simply traveling along a street or highway.³⁴

Notably, this Court has also addressed the term “operating” a vehicle, albeit in a different context (driving under the influence). In *State v. Cleary*,³⁵ this Court addressed the terms “driving” and “operating,” and found that they are not synonymous. “The term ‘operating’ encompasses a broader category of activities involving motor vehicles than does ‘driving.’”³⁶ “[A] person may operate a vehicle even though the vehicle is not moving.”³⁷ This Court held

and doors closed on her. Court held that “operating” bus involves more than driving for purposes of imposing liability on governmental entity).

³² *Id.* at 570.

³³ *Id.* at 172.

³⁴ *Id.* at 171. (In *Doe*, the court found for the school district on a causation issue. Importantly, that case involved a single, isolated incident. The case herein involves repeated sexual assaults over a period of time – an important distinction. Additionally, and equally as important, *Doe* did not deal with special education students, for whom additional training is mandated by the Ohio Administrative Code)

³⁵ (1986), 22 Ohio St.3d 198

³⁶ *Id.* at 199.

³⁷ *Id.*

that because the General Assembly continues to adhere to the term “operating,” it must intend to include duties broader than propelling the vehicle along the road. The same analysis applies here, given the legislature’s choice of words.

Indeed, the General Assembly’s intent is also demonstrated in R.C. §2744.02(B)(1)(a)-(c). Certainly, if the legislature had intended to exempt school bus drivers from immunity as it relates to their duties, it would have carved out an exception similar to that for police officers, firefighters and emergency medical services.³⁸ It did not do so.³⁹

As noted by the *Groves* court⁴⁰, the school district and driver’s failure to follow internal and State transportation regulations and policies is important in this analysis. Ohio requires districts to implement policies regarding school bus driver authority and responsibility as it relates to pupil management.⁴¹ Ohio regulations also include training requirements on the safe transportation of “special needs” children.⁴²

The record in this underlying case demonstrates that Marlinton school district had in place such transportation policies. These policies vested in the school bus driver authority for the students’ activities, and outlined the driver’s duties in securing pupil safety and well-being.⁴³

³⁸ R.C. 2744.02(B)(1)(a)-(c).

³⁹ See *Pylypiv v. Parma*, 8th Dist. No. 85995, 2005-Ohio-6364 .

⁴⁰ *Groves*, 132 Ohio App.3d at 570

⁴¹ OAC §3301-83-08.

⁴² *Id.*

⁴³ Middleton depo at Exhibit 1 thereto.

Further, the policies are clear that the student is the responsibility of the school district once he boards the school bus.⁴⁴ In fact, the Marlinton Transportation Director testified that pupil management is part of the school bus driver's job.⁴⁵

There is no question that Ohio law has repeatedly allowed "operation" of a vehicle to include more than simply "driving." Indeed, this Court has already defined these terms in a different context.

Furthermore, Ohio Revised Code section 1.47(C) explicitly states that when the General Assembly enacts a statute that just and reasonable results are intended. In no way can immunizing a school district, which permits its most vulnerable children to be serially sexually molested, be construed as a reasonable and just result. Thus, the Appellate Court was in direct violation of this statutory mandate when it held that Marlinton was immune from liability when it permitted a 10-year old, mentally retarded girl to be repeatedly sexually attacked by another student, literally right under its nose. See, *Slagle v. White Castle Systems, Inc. (1992)*, 79 Ohio App.3d 210, 217. ("When a person accepts custody of a child, that person stands *in loco parentis* to the child, accepting all the rights and responsibilities that go with that status."). The only reasonable and just result would be to permit the child and her family to have their day in court.

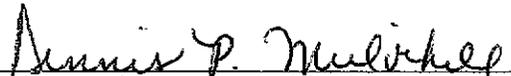
⁴⁴ *Id.*

⁴⁵ Middleton depo at 65.

IV. CONCLUSION

For the reasons stated herein, Amici Curiae respectfully request this Court grant jurisdiction in this matter.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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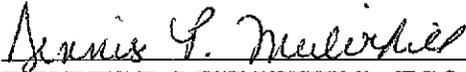
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