

IN THE SUPREME COURT OF OHIO

MARLINGTON LOCAL SCHOOL
DISTRICT, et al.

Appellants,

v.

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

Appellees.

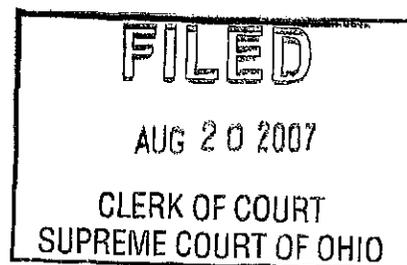
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: Case No. 07-1304
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: On Appeal from the Judgment Entered in the
: Stark County Court of Appeals, Fifth
: Appellate District
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: Court of Appeals Case No. 00102
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MEMORANDUM IN OPPOSITION OF
JURISDICTION OF APPELLEE
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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC
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Appellants Jane and John Doe (“Appellants”) are the custodial parents of Holly Roe (“Holly”) a special education student transported by the Marlinton Local School District Board of Education (“Appellee” or “Board”) during the 2004 - 2005 school year. Appellants wrongly allege that the Board should be held liable for a sexual assault another special education student identified with the fictitious name, Boe, allegedly committed upon Holly. In support of their position, Appellants assert the Board’s immunity claim rests on a misinterpretation of a fundamentally flawed law. While the conduct attributed to Boe’s alleged behavior is beyond inappropriate and unfortunate, it simply does not incur liability on the part of Appellee. The Court’s decision rests on a proper interpretation of an established principle.

Indeed, in addition to the Fifth District Court of Appeals (which rendered a decision in a case involving similar allegations just weeks later), another appellate court has reviewed the issue of whether a board of education should be held liable for a sexual assault committed upon a student on a school bus and determined that the board was immune from liability under R.C. Chapter 2744. See, *Jane Doe, et al. v. Jackson Local School District Board of Education, et al.*, Case No. 2006 CA 00212 (5th Dist. June 26, 2007); *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio App.3d 166, 170, 738 N.E.2d 390. This Court has reviewed the issue of the constitutionality of R.C. Chapter 2744, and the law of this Court has remained unchanged – Ohio’s Political Subdivision Tort Liability Act is constitutional. Thus, while increased reports of student-on-student assaults, in any context, are serious matters and would be of concern to anyone who is a parent, community member, employee of a school district or Board member, this case is not of great general interest and does not involve a substantial constitutional question.

As a political subdivision, the Board is entitled to statutory immunity, pursuant to Ohio Revised Code Chapter 2744, unless one of the specific statutorily created exceptions applies. Appellants allege that the Board is not immune from liability because Holly's injuries resulted from the "negligent operation of a motor vehicle." R.C. §2744.02(B)(1). Specifically, Appellants assert that the bus driver negligently operated the motor vehicle by failing to properly supervise the students riding on her bus.¹ To support their allegations, Appellants rely on *Groves v. Dayton Public Schools* for the proposition that the "operation" of a motor vehicle encompasses more than "driving."² In fact, Appellants request that this Court decree that negligent "operation" of a motor vehicle entails more than negligent "driving." However, Holly was not injured as a result of the negligent operation of a bus. Further, Appellants reliance on *Groves* is misplaced as the case is distinguishable from this case – factually and legally. Thus, this Court should decline Appellants' invitation make such a broad and sweeping decree. To do otherwise would expose school boards and other political subdivisions to potential liability in contravention of what the General Assembly intended and threaten the entire structure of political subdivision immunity in Ohio.

¹ While Appellants attempt to liken a school bus to a classroom on wheels, supervision of students in a classroom setting is quite different from supervising students on a school bus. Unlike a school bus, the primary activities in a classroom involve teaching and supervision of children. To that end, a board would be immune from such action as the provision of system of public education is a public function and no exception to immunity would apply. Indeed, the (B)(4) exception applies only to "negligence causing injury that occurs within or on the grounds of and **is due to physical defects within or on the grounds of buildings** that are used in connection with the performance of a governmental function." O.R.C. §2744.02(B)(4) (emphasis added). Moreover, boards of education have been found to be immune from liability for student-on-student assaults in the classroom. See, *Aratari v. Leetonia Exempt Village School District* (March 26, 2007) Columbiana County App. No. 06 CO 11, 2007 WL 969402; *Roberts v. Warner* (December 24, 1998), Tuscarawas App. No. 98AP030070, 1998 WL 4509; *Hayes v. Westfall Local School Board of Education* (August 27, 1986), Pickaway App. No. 85 CA 30, 1986 WL 9643.

² In *Groves v. Dayton Public Schools* (1999), 132 Ohio App.3d 566, 725 N.E.2d 734, a wheelchair-bound student was injured while the bus driver was assisting the student in disembarking from the bus.

Indeed, in both this case and *Doe v. Jackson*, the Fifth District Court of Appeals declined to make such a decree, finding that assisting students getting on and off a bus was distinguishable from the alleged act or omission in supervising students while passengers on. While Appellants claim that the Fifth District Court of Appeals offered a hazy distinction between this case and *Groves* preventing a certifiable conflict, a careful reading of the opinion demonstrates that the Court gave thorough consideration to *Groves*, and appropriately determined that it did not apply to the facts in this case. In fact, when recently asked to certify a conflict between *Groves* and its decision in *Doe v. Jackson*, the Fifth District Court of Appeals found no conflict between the two cases.

Also, after rendering its decision in *Groves*, the Second District Court of Appeals issued a decision in *Doe v. Dayton City School District Board of Education* (which involved allegations similar to this case where a student was sexually assaulted on a bus by other students), finding that R.C. §2744.02(B)(1) was not applicable as the injuries suffered by the student were not caused by the negligence of the board's employee in the operation of a motor vehicle. See, *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio App.3d 166, 170, 738 N.E.2d 290. After deciding *Groves* the Second District also found that R.C. §2744.02(B)(1) did not apply where a student suffered injuries after alighting from a bus. See, *Glover v. Dayton Public Schools* (August 13, 1999) Montgomery App. No. 17601, 1999 WL 958492. Obviously, the Second District found *Groves* to be distinguishable from the subsequent decisions it rendered. Thus, despite Appellants' claims, the issue of what constitutes "negligent operation" of a school bus is not unsettled within or between appellate districts. Therefore, this case is not of public or great general interest.

Finally, this case does not present a substantial constitutional question. The constitutionality of R.C. Chapter 2744 has been challenged and it has not been deemed unconstitutional. While Appellant alleges that victims will be denied a right to a remedy, and that R.C. Chapter 2744 places victims in a different category, such claims are without merit. Individuals will always have the right

to file a civil action against the person(s) who directly engaged in the tortious behavior and/or participate in the criminal process in order to ensure that such person(s) will be prevented from harming others. Also, individuals have been and will continue to have the right of remedy under the Political Subdivision Tort Liability Act. However, in order to preserve the financial soundness and integrity of political subdivisions, the General Assembly appropriately determined to limit recovery in certain circumstances in order to maintain such soundness and integrity. Therefore, this Court should decline to accept jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

During the 2004 - 2005 school year, the Board provided transportation to and from school for Boe and Holly, two special education students, who were transported with other special education students. On March 16, 2005, a bus aide, Joan Bolyard ("Bolyard"), saw Boe with his hand up Holly's dress. See, Deposition of Joan Bolyard ("Depo. of Bolyard"), p. 50. Boe's conduct came as a shock to the bus driver. See, Deposition of Sabrina Wright ("Depo. of Wright") p. 68. While Boe had some issues with his temper in the past, he did not have a history of sexual misconduct. *Id.* at p. 38. In fact, Boe was described as a nice, helpful student. Depo. of Bolyard, p. 35.

Shortly after the March 16, 2005 incident, Holly told Bolyard that Boe engaged in this type of behavior on a bus driven by Sabrina Wright ("Wright"). Depo. of Bolyard, pp. 44-45. Holly stated that, on Wright's bus, Boe put his finger inside her rectum and vagina and also placed his penis on her hand and white stuff came out. *Id.*

Even assuming this happened, nobody witnessed it. Depo. of Wright, pp. 69-70. Also, Holly never told anyone about it until March 16, 2005. See, Deposition of Jane Doe ("Depo. of Doe"), at p. 21.

There was a limited opportunity for this conduct to have happened. Wright only transported Holly during the third week of September, 2004 until mid-November, 2004. Depo. of Wright, pp.

7 and 36. Moreover, Holly only rode Wright's bus during the afternoon run during that time. *Id.* at p. 36; Depo. of Bolyard, p. 29. Holly and Boe were on the bus together for a total of just 12 minutes each day. Depo. of Wright, p. 47. There were only four students, including Boe and Holly, on that bus. *Id.* at p. 38. In addition to the rear-view mirror that enables a bus driver to view other cars on the roadway, Wright's bus was equipped with a special rear-view mirror that is designed to enable her to view the students inside the bus even while the vehicle is in motion. *Id.* at p. 70. Using this rear-view mirror, Wright constantly viewed the students inside the bus and never witnessed any misconduct between Boe and Holly. *Id.* at pp. 69-70.

Holly and Boe usually sat across the aisle from one another. Depo. of Wright, p. 59. However, three of the students on the bus, including Holly and Boe, occasionally played tag. *Id.* at pp. 43-45. During this game, Holly sometimes crawled under the seat and wanted Boe or another student to tap her. *Id.* However, Boe was never on the floor with Holly. *Id.* at p. 60. Also, during this game, Holly sometimes jumped over the seat. *Id.* at pp. 43-45. Whenever she did this, Wright told the students to separate and move to another seat at the next intersection. *Id.* Further, if Boe and Holly ever sat together, it was short-lived because Wright separated them. *Id.* at 59.

Despite this lawsuit, Holly continues to be transported to and from school by the Board. Depo. of Doe, p. 23. Jane Doe feels that Holly is safe and properly supervised when transported on the Board's bus. *Id.*

On September 21, 2005, Appellants, the custodial parents of Holly, filed a Complaint against the Board wrongly alleging that it should be held liable for another special education student's (i.e., Boe) alleged sexual assault of Holly. The Board moved for summary judgment on February 8, 2006. One day prior to the date Appellants' response to the motion for summary judgment was due, Appellants filed a motion for leave to amend the complaint. On March 7, 2006, the Trial Court granted Appellants' request for leave to amend the complaint. The Amended Complaint added two

Board employees as new defendants. The Board remained a defendant. On March 31, 2006, the Trial Court denied the Board's motion for summary judgment. (App. A) On April 11, 2006, the Board appealed that decision. The Board employees' portion of this case in the Trial Court was stayed until the Appellate Court resolved the claims against the Board.

On June 7, 2007, the Court of Appeals issued its *Judgment Entry and Opinion* reversing the decision of the Trial Court. The *Judgment Entry and Opinion* was filed and journalized on the same day (i.e., June 7, 2007).

ARGUMENTS IN SUPPORT OF APPELLEE'S POSITION
REGARDING PROPOSITIONS OF LAW RAISED IN
APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

Proposition of Law No. I: The alleged failure of a school bus driver to supervise and control misbehavior by students does not constitute "negligent operation" of a school bus, for purposes of R.C. 2744.02(B)(1).

Appellants argue that while a political subdivision is not liable for injury caused by any act or omission of the subdivision or a subdivision employee in connection with either governmental or proprietary functions, one of the exceptions to such immunity applies in this matter. Specifically, Appellants contend that a school bus driver's alleged negligence in performing her duties of pupil management and supervision is "negligent operation" of a motor vehicle and that Appellee should be held liable for injury or loss caused by that "negligent operation" of a motor vehicle in accordance with R.C. §2744.02(B)(1). To further support their claims, Appellants allege that the Court of Appeals' majority opinion does not fairly or logically address the issue of whether the term "operation" of motor encompasses more than just "driving." However, the Court of Appeals not only gave due consideration to this issue, but it appropriately determined that the Board was immune from liability in this case.

The issue of a political subdivision's immunity from civil suit is purely a question of law and is accordingly addressed by the court. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d

862. Once a trial court reaches its conclusion on the applicability of immunity, a review by the appellate court is performed *de novo* with no deference to the trial court's decision. *Hall v. Ft. Frye Local Sch. Dist. Bd. of Educ.* (1996), 111 Ohio App.3d 690, 694, 676 N.E.2d 1241. The appellate court must independently review the record and draw its own conclusion. *Id.* Indeed, the Court of Appeals independently reviewed the record in this matter and reached its own conclusion 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."

In their *Memorandum in Support*, Appellants rely on *Groves v. Dayton Public Schools* (1999), 132 Ohio App.3d 566, 725 N.E.2d 73, to support their position that the Board negligently permitted Boe's conduct towards Holly on the Board's bus. In *Groves*, a disabled student confined to a wheelchair was injured while she was disembarking from a school bus. Specifically, it was alleged that the student suffered injuries as a result of the bus drivers' failure to secure the student in her wheelchair. In determining whether the bus driver's conduct fell within the ambit of "operating a motor vehicle on the public roads within the scope of his employment," the Second District determined at the outset that the term "operation of any motor vehicle" was "capable of encompassing more than the mere act of driving the vehicle involved." *Groves v. Dayton Public Schools*, 132 Ohio App.3d 566, 569. The Court went on to note it could find no cases in Ohio law "on point" construing the term in question with regard to a driver assisting a disabled passenger to alight from a bus and looked to cases in other jurisdictions. In reviewing this limited issue, the Court referred to cases that found the "operation of a school 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." *Groves v. Dayton Public Schools*, 132 Ohio App.3d 566, 570. As such, the court found that a bus driver was "operating" a motor vehicle when helping a disabled, wheelchair-bound student disembark from a school bus. *Id.* While the Court determined

that the term “operate” referred to more than the act of “driving,” the term was still inextricably linked to the equipment on the bus and the physical movement of the bus.

Based on the allegations contained in *Groves*’ Complaint, the Second District reasoned that because the bus was equipped to transport students confined to wheelchairs and the School District had established specific rules that essentially required bus drivers to secure passengers in their wheelchairs assisting them on or off the school bus, it could be inferred that doing so was a part of the bus driver’s duties and an integral part of the operation of the school bus. The Court also reasoned that because the bus was equipped with a ramp in order to lift and lower students as they boarded and disembarked from the bus, it would not exclude the possibility that the driver’s operation of the ramp would fall within the ambit of operating the school bus.

Thus, a careful reading of *Groves* demonstrates that it is factually and legally distinguishable from this case as the Court specifically reviewed the issue of a driver assisting passengers board and alight from a school bus, and determined “that R.C. §2744.02(B)(1) *could be applicable*” to a bus driver’s negligent acts or omissions in operating equipment in assisting a student get off the bus. *Groves v. Dayton Public Schools*, 132 Ohio App.3d 566, 571 (emphasis added); See also, *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio App.3d 166, 170, 738 N.E.2d 290 (where the Second District, in a decision rendered eight months after *Groves*, determined that R.C.§2744.02(B)(1) was not applicable and held “that reasonable minds could not find that the injuries [a student suffered when she was sexually assaulted on the school bus by other students] were caused by the negligence of Board’s employee in the operation of a motor vehicle”); *Glover v. Dayton Public Schools* (where the Second District Court of Appeals, in a decision rendered five months after *Groves*, held that “operation” of a motor vehicle did not embrace the infliction of injuries that a student suffered after alighting from a bus, when she darted into a street and was

struck by a car).³ As such, despite Appellants' assertions, the same analysis set forth in *Groves* does not apply here.

Indeed, the Court of Appeals appropriately determined that *Groves* was factually and legally distinguishable from the this case. Specifically, the Court of Appeals reasoned that since the term "operation" is not defined in R.C. §2744.02(B)(1), it must be given its plain and ordinary meaning unless legislative intent indicated otherwise. *Doe v. Marlinton Local School District*, 2007-Ohio 2815 at ¶19. The Court of Appeals then carefully analyzed *Groves* and found that an act or omission in assisting students getting on and off a bus, as alleged in *Groves*, was distinctly different from an alleged act or omission in supervising children while passengers on a bus. *Id.* at ¶24. The Court of Appeals further found that although the supervision of students who are on a bus may be one of the bus driver's responsibilities, it is a responsibility that is separate and distinct from such bus driver's "operation of a motor vehicle." *Id.* at ¶24. Although Appellants claim this distinction is "baffling and ethereal," it not only comports with common sense, but it is not at odds with the holding in *Groves* or the plain and ordinary meaning of "operation of motor vehicle" for purposes of the tort immunity exception.⁴ Clearly, an injury resulting from assisting a wheelchair-bound student disembark from the bus is significantly different from a student-on-student assault that occurs on a

³ The Court in *Glover* also stated that while it agreed with its prior decision in *Groves*, "that 'operation' can encompass more than simply driving a vehicle, we also believe that the interpretation of this exception must be reasonably restricted, particularly in view of the Ohio Supreme Court's observation that '[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of fiscal integrity of political subdivisions'" *Glover v. Dayton Public Schools* ___ (internal citations omitted).

⁴ Furthermore, on June 26, 2007, the Fifth District Court of Appeals also ruled on a case factually similar (i.e., allegations against a school district based upon student-on-students sexual assaults on a school bus) to this case. *Jane Doe, et al. v. Jackson Local School District Board of Education, et al.*, Case No. 2006 CA 00212 (5th Dist. June 26, 2007). The *Jackson* Court also distinguished its decision from *Groves* by holding that supervision of students on a bus may be a part of the driver's responsibility, but it is a responsibility that is separate and distinct from that of the operation of a motor vehicle. *Id.*

bus.⁵ While a bus driver may have certain non-driving responsibilities including the supervision of students on the bus, such duties are not an integral part of “operating” a school bus for purposes of the tort immunity exception, and the holding in *Groves* should not be applied to this case.

Further, while Appellants cite *State v. Cleary* (1986) 22 Ohio St. 3d 198, for the proposition that the statutory term of “operation” of a motor vehicle is broader than merely “driving” the vehicle, such reliance is misplaced. In *State v. Cleary*, this Court had to determine whether Cleary’s conduct was sufficient to sustain a conviction of operating a motor vehicle while under the influence of alcohol or any drug of abuse. Cleary was found by a police officer passed out in the driver’s seat of his car, with his motor running at high speed and his foot on the accelerator. The car was not in gear and the emergency brake was engaged. This Court found that “operation of a motor vehicle within the contemplation of [R.C. §4511.19] is a broader term than mere driving and a person in the driver’s position in the front seat *with the ignition key in his possession indicating either his actual or potential movement of the vehicle* while under the influence of alcohol or any drug of abuse can be found in violation of R.C. 4511.19(A)(1).” *Id.* at 199 (emphasis added). This Court’s holding in *State v. Cleary* is not remotely applicable to this case as R.C. §4511.19 is a criminal statute designed to punish offenders for “operating” a vehicle while under the influence of alcohol or drugs. Given the nature of this criminal offense, this Court reasoned that “[a] person under the influence of alcohol or any drug of abuse behind the wheel of a motor vehicle is the obvious hazard at which the statute is directed whether the vehicle is stationary or in motion.” *Id.* at 201.

⁵ Appellants attempts to mischaracterize the holding of the Court of Appeals by stating that it believes that “operate” means only “driving” should not be countenanced by this Court. The Court of Appeals appropriately determined that whether or not it agreed with the interpretation of “operate” as set forth in *Groves*, it did not find that the injury alleged in this case fell within the ambit of negligent operation of a motor vehicle.

While *State v. Cleary* is distinguishable from this case, it demonstrates that even if the term “operate” is construed to mean more than “driving,” such meaning is still inextricably tied to the equipment on the vehicle and the vehicle’s movement. After this Court’s holding in *State v. Cleary*, the General Assembly amended R.C. 4511.01, effective January 1, 2004, to include the term “operate,” which means “to cause or have caused movement of a vehicle, streetcar, or trackless trolley on any public or private property used by the public for purposes of vehicular travel or parking.” R.C. §4511.01(HHH); See also, *State v. Wallace*, (May 19, 2006) Hamilton App. Nos. 050530, 050531 (where the Court discussed the rationale behind Substitute Senate Bill 123 and the enactment of R.C. §4511.01(HHH)). Thus, based on the above-referenced definition of “operate,” the alleged failure of the bus driver to supervise the students in this case does not fall within either the statutory definition or the plain and ordinary meaning of “operation” of a motor vehicle for purposes of the tort immunity exception.

Thus, the Court of Appeals properly determined that the Board was immune from liability and was entitled to summary judgment as a matter of law and appropriately reversed the decision of the Trial Court. Therefore, this Court must find Appellants’ first proposition of law to be without merit.

Proposition of Law No. II: The service requirements in R.C. 2721.12(A) apply when the constitutionality of a statute is later challenged in motion practice during the pendency of the case, even when declaratory or injunctive relief is not sought in a civil action for damages.

Appellants never alleged that Ohio Revised Code Chapter 2744 was unconstitutional in their *Complaint* or *Amended Complaint*. Also, Plaintiffs did not serve the Attorney General with notice of their intention to challenge the constitutionality of Ohio Revised Code Chapter 2744.⁶ R.C. §

⁶ Appellants attempted to serve the Attorney General with their intention to challenge the constitutionality of O.R.C. § 2744 in their *Brief in Opposition* to the Board’s *Motion for Summary Judgment*. However, it is unknown if service has been obtained.

2721.12. It has previously been held that a party who challenges the constitutionality of a statute must assert that claim in the complaint or initial pleading, and serve the Attorney General in accordance with the requirements set forth in the Ohio Rules of Civil Procedure. *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 108-09, 728 N.E.2d 1066; *Rutan v. State Farm & Casualty Co.* (July 12, 2000) Summit App. No. 19879 (App. F); *Poinar v. Richfield Township* (August 22, 2001), Summit App. Nos. 20383, 20384 (App. G). Further, it has been held that if a party fails to meet these two requirements, the trial court lacks jurisdiction to decide the constitutional question. *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 108-09, 728 N.E.2d 1066.

Appellants assert that they did not have a duty to comply with the service requirements of R.C. § 2721.12, as they pleaded a civil claim for damages without a request for declaratory relief or allegation of unconstitutionality. In support of this allegation, Appellants rely on *Cleveland Bar Assn. v. Picklo* (2002), 96 Ohio St. 3d 195, 772 N.E. 2d. 1187, for the proposition that because their underlying action did not begin as a declaratory action, service on the Attorney General was unnecessary. Appellee acknowledges that in *Cleveland Bar Assn. v. Picklo* this Court found that it had applied *Cicco v. Stockmaster* too zealously in dismissing an appeal where a defendant challenged the constitutionality of a statute in a civil action without providing the Attorney General with notice of the constitutional attack. *Cleveland Bar Assn. v. Picklo*, 96 Ohio St. 3d 195, 197. While the Court of Appeals found that Appellants did not comply with statutory requirements, it nevertheless addressed Appellants' constitutional claims and found them to be without merit.⁷

Thus, while *Cicco v. Stockmaster* may have limited application, Appellants cannot escape the undeniable fact that the Court of Appeals ultimately considered the constitutional claims raised

⁷ Appellants even acknowledged that the Court of Appeals addressed their constitutional claims; however, they argue that the Court endorsed a rule of law regarding service that could not be permitted to stand.

by Appellants. Therefore, this Court must find Appellants' second proposition of law to be without merit.

Proposition of Law No. III: R.C. Chapter 2744 is constitutional under the Ohio Constitution Article 1, Sections 1, 2, 5, and 16 and the 5th, 7th and 14th Amendments of the United States Constitution as it does not violate equal protection, due process, the right to a trial by jury or the right to a remedy.

Even if this Court were to determine that the Court of Appeals' holding relative to the service requirements is faulty, R.C. Chapter 2744 is constitutional. Acts of the general assembly are presumed valid. *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45, 48, 512 N.E.2d 626. Ohio Revised Code Section 2744.02 does not involve a fundamental right or a suspect class, and therefore is constitutional, if it is reasonably calculated to advance a legitimate government interest. *Adamsky v. Buckeye Local School District* (1995), 73 Ohio St.3d 360, 362, 653 N.E.2d 212; *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 353, 639 N.E.2d 31. States have a legitimate government interest in preserving their financial soundness and integrity. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. A state may make a rational determination to limit recovery in certain circumstances in order to advance that legitimate state interest. *Id.*, *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 353, 639 N.E.2d 31. Chapter 2744 of the Ohio Revised Code is valid because it is reasonably calculated to advance a legitimate government interest.

While Appellants allege the constitutionality of R.C. Chapter 2744 has previously been questioned by this Court and that the statute violates the guarantees of equal protection and due process in our Federal and State Constitutions and violates the right to remedy provisions, no majority of this Court has ever found Chapter 2744 to be unconstitutional. See, *Ellis v. Cleveland Municipal School District* (C.A. 6, 2006), 455 F.3d 690. On the contrary, the law of this Court remains that the statute is constitutional. *Id.* "Furthermore, no appellate court in this state has found R.C. Chapter 2744 unconstitutional or followed the plurality opinion of this Court in *Butler v.*

Jordan (2001), 92 Ohio St. 3d. 354, 750 N.E. 2d 554].” Indeed, in *Fabrey v. McDonald Village Police Dept.*, this Court specifically found that Chapter 2744 does not violate the equal protection, due process, or Article I, Section 16 right to remedy provisions of the Ohio constitution. *Id.*, citing *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351. Further, citing an outdated case, Appellants argue that legislative and judicial sovereign immunity should be overturned based upon public policy. Apparently, Appellants have ignored the cases over the years holding that political subdivisions should be afforded immunity.

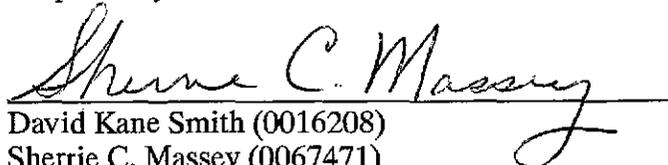
Many courts have held Ohio Revised Code Chapter 2744 is constitutional. *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186 (Ohio Revised Code Chapter 2744 is a constitutional exercise of legislative authority that does not violate the guarantees of equal protection of the Ohio and United States Constitutions); *Padilla v. YMCA of Sandusky County* (1992), 78 Ohio App.3d 676, 605 N.E.2d 1268 (Ohio Revised Code Chapter 2744 does not violate Section 16, Article I of the Ohio Constitution); *Perales v. City of Toledo* (April 23, 1999), Lucas App. No. L. 98-1397 (Ohio Revised Code Chapter 2744 does not violate Ohio Constitution Article 1, Section 16) (App. C); *Lewis v. City of Cleveland* (1993), 89 Ohio App.3d 136, 623 N.E.2d 1233 (Ohio Revised Code Chapter 2744 does not violate the equal protection guarantees of the Ohio and United States Constitutions); *Fabrey v. McDonald Village Police Department* (1994), 70 Ohio St.3d 351, 639 N.E.2d 31 (Ohio Revised Code Chapter 2744 does not violate the due process or equal protection guarantees of the Ohio or United States Constitutions); *Adams v. City of Willoughby* (1994), 99 Ohio App.3d 367, 650 N.E.2d 932 (Ohio Revised Code Chapter 2744 is constitutional under Sections 2, 5, and 16 of Article 1 of the Ohio Constitution); *Ryan v. City of Columbus* (March 7, 2001), Franklin App. No. 00AP-910 (Ohio Revised Code Chapter 2744.02 is constitutional).

Thus, Appellants’ argument that Ohio Revised Code Chapter 2744 is unconstitutional is meritless and must be dismissed.

CONCLUSION

Based upon the foregoing law and argument, this case does not present a matter of great general interest and does not involve a substantial constitutional question. Consequently, Appellee Marlinton Local School District Board of Education respectfully requests that this Court decline to accept jurisdiction of this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this foregoing *Memorandum in Opposition of Jurisdiction of Appellee Marlinton Local School District Board of Education*, was sent by ordinary U.S. mail, postage prepaid, this 17th day of August, to the following:

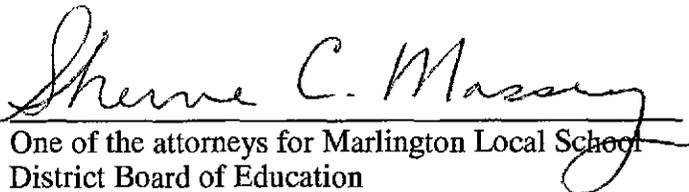
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