IN THE SUPREME COURT OF OHIO

RANDY J. EPPLEY, ETC.,	)	SUPREME COURT CASE NO.
	)	08-0366
Appellee,	)	
	)	ON APPEAL FROM THE JUDGMENT
v.	)	ENTERED IN THE MUSKINGUM
	)	COUNTY COURT OF APPEALS,
TRI-VALLEY LOCAL SCHOOL DISTRICT, *et al.*,	)	FIFTH APPELLATE DISTRICT
	)	COURT OF APPEALS
	)	CASE NO. 2007-CT-0022
Appellant.	)	

APPELLANT TRI-VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION'S MEMORANDUM IN SUPPORT OF JURISDICTION

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"Wrongful Death Lawsuit Headed for Trial", Zanesville Times Recorder, January 13, 2008

"Wrongful Death Lawsuit Headed for Trial", Injuryboard.com

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

This case involves a substantial constitutional question: whether R.C. §2125.04, given the amendment to the general "savings statute", R.C. §2305.19, violates the equal protection of the law clause of Art. I, Section 2 of the Constitution of the State of Ohio. Appellant respectfully submits that it does not. Revised Code §2125.04 is rationally related to the state's legitimate interest in providing an orderly method for a claimant to make a wrongful death claim, which claim did not exist under the common law. An integral part of any wrongful death claim is that it be made, if at all, within two years of the decedent's death. Appellee's claim was not made within this time period.

The Fifth District Court of Appeals' decision in this case is contrary to the statutory scheme of R.C. Chapter 2744 and the opinion of this Court in *Cater v. City of Cleveland* (1998), 83 Ohio St. 3d 24, 697 N.E.2d 610. Jurisdiction over this appeal is appropriate, therefore, because the proper analysis of R.C. Chapter 2744 to be applied is a matter of public and great general interest. This Court has explicitly stated that the purpose of political subdivision immunity is to protect and conserve public funds. *Wilson v. Stark Cty. Dept. of Human* Services (1994), 70 Ohio St. 3d 450, 453, 639 N.E.2d 105. As a political subdivision, Appellant has limited financial resources. Appellant should not have to expend precious time and any of its limited financial resources defending against a claim for which it cannot be held liable pursuant to R.C. Chapter 2744. Where, as here, the allegations of a complaint against a political subdivision do not fall under one of the enumerated exceptions to immunity in R.C.

§2744.02(B), the complaint is properly dismissed. This Court should accordingly grant jurisdiction to ensure that R.C. Chapter 2744 and its holding in *Cater* are uniformly applied.[1]

II. STATEMENT OF THE CASE AND FACTS

On November 26, 2003, the motor vehicle driven by Corey W. Jenkins was involved in a one car motor vehicle accident. Joshua M. Eppley, a passenger in the automobile, was killed in the accident. Complaint, at Paragraph 4. Jenkins was not an employee of Appellant (also referred to as the "Board") at the time of the accident or at any time. Both he and Joshua M. Eppley were students within the school district. They were on their way home when the accident occurred.

Appellee filed a wrongful death claim against Appellant, the Tri-Valley Local School District (the "District") and several John Does on August 3, 2005. Appellee's Complaint was given Muskingum County Court of Common Pleas Case No. CH2005-0409. In response to Appellee's Complaint, Appellant filed an Answer and a Motion to Dismiss, or, in the Alternative, Motion for Judgment on the Pleadings, pursuant to Rules 12(B)(6) and 12(C) of the Ohio Rules of Civil Procedure. Rather than respond to the Motion, Appellee voluntarily dismissed Case No. CH2005-0409, pursuant to Rule 41 of the Ohio Rules of Civil Procedure, on September 15, 2005. Complaint, at Paragraph 1.

On September 7, 2006, Appellee refiled his Complaint against Appellant, the District and the John Doe Defendants. Again, Appellant answered the Complaint and filed a Motion for Judgment on the Pleadings. The Motion for Judgment on the Pleadings was filed because (1) Appellee's Complaint was not filed within the time period set forth in R.C. §2125.02 and was not

[1] This case has already generated great general interest. Immediately after the Fifth District Court of Appeals announced its decision, the decision was reported in the Zanesville Times Recorder. See, "Wrongful Death Lawsuit Headed for Trial," by Kelly Thompson, January 13, 2008. The article provoked numerous on-line comments. Also, injuryboard.com, apparently a California organization, posted a summary of the Zanesville Times Recorder article on its webpage. See the attached.

saved by R.C. §2125.04, (2) the District is a non-existent entity that can neither sue nor be sued, and (3) Appellant is immune from liability, pursuant to R.C. §2744.02(A)(1).

The trial court granted Appellant's Motion on March 7, 2007 and Appellee appealed.

The Muskingum County Court of Appeals, Fifth Appellate District overruled the trial court's order granting Appellant's Motion for Judgment on the Pleadings and remanded this matter to the trial court for further proceedings.[2] The Court of Appeals found that there "is no legitimate state interest to which the distinctions in the wrongful death statute are rationally related" and held that the statute, R.C. §2125.04, was "unconstitutional as applied to Appellee's action." Opinion, at ¶38. The Court of Appeals also held that Appellee, based on the allegations in the Complaint, "could prove a set of facts entitling him to recover, but only as to the Board and the John Does." Opinion, at ¶49. The Court of Appeals held that Appellee's Complaint stated a cause of action upon which relief could be granted even though there is no exception to the immunity afforded to the Board:

> The Board did not own the road on which the accident occurred, and the accident did not occur on school grounds. Decedent's death was not caused by a defect on or within the grounds or buildings used by the Board.

Opinion, at ¶48.

Appellant filed an Application for Reconsideration on January 14, 2008. Appellant, in the Application, advised the Court of Appeals that it had erred in ruling that R.C. §2125.04 was unconstitutional, and that it had improperly applied the three-tiered analysis set forth in *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 697 NE.2d 610, 1998-Ohio-421, and, in so doing, had applied the wrong law to the Board. The Court of Appeals denied the Application for Reconsideration on February 1, 2008.

---

[2] The Fifth District agreed that the District cannot sue or be sued. The Court of Appeals ruled that all future proceedings should be against the Board and the John Doe Defendants, only. Opinion, at ¶49.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1:

Revised Code §2125.04 Does Not Deny Wrongful Death Claimants The Equal Protection Of The Law.

Wrongful death claims did not exist under the common law. A wrongful death claim is a statutory claim, and the statutes applicable to a wrongful death claim must be strictly construed and applied. See, *Samonas v. St. Elizabeth Health Center*, 2006-Ohio-671, 2006 Ohio Lexis 604, See, also, *In re Estate of Taylor*, 2004 Ohio 6504, at paragraph 23.

Revised Code Chapter 2125 sets forth the procedures for making a claim for wrongful death. Revised Code §2125.02(D) provides that a civil action for wrongful death shall be commenced within two years after the decedent's death.[3] Revised Code §2125.04 permits a wrongful death action to be dismissed and refiled within one year after the action fails otherwise than upon the merits, if the time to bring the action has expired at the time of the failure. Otherwise, the refiling must occur before the expiration of the two year period provided in R.C. §2125.02(D).[4]

The two-year period set forth in R.C. §2125.02(D) is not a statute of limitations but an integral part of the action:

> The language of R.C. 2125.02 ... expresses an integral element of the right of the action itself and if an action is not brought within two years from the death of the decedent it must fail, not because a statute of limitations provides the time within which it must be brought but because the time limit is the very essence of the action.

---

[3] Revised Code §2125.02 was amended on April 7, 2005. The version in effect at the time of Joshua M. Eppley's death also required a claim for wrongful death to be brought within two years of the date of death.

[4] Revised Code §2125.04 was also amended in April of 2005. The version in effect on November 26, 2003 also permitted a wrongful death claim to be refiled within the same timeframe. See, *Sorrell v. The Estate of Datko* (2001), 147 Ohio App.2d 319, at 321, 2001 Ohio 3d 601, 770 N.E.2d 608.

Grubb v. Hollingsworth, 1992 WL 276547 (Ohio App. 12 Dist.), citing, *Sabol v. Pekoc* (1947), 148 Ohio St. 545, 552.

Appellee originally filed his action within two years of Joshua M. Eppley's death; however, because he dismissed it within the two-year period, he was required, pursuant to R.C. §§2125.02 and 2125.04, to refile it, if at all, by November 26, 2005, which he did not do.

Appellee, in the trial court, argued that R.C. §2125.04 violated Article I, Section 2 of the Constitution of the State of Ohio by denying him the equal protection of the law, and that his cause of action was saved by the general savings statute, R.C. §2305.19, which had been amended to provide for a one-year refiling period regardless of whether the statute of limitations applicable to a claim had expired or not.[5] The Fifth Appellate District Court of Appeals held that there is no rational basis to support the difference in treatment between wrongful death claimants and non-wrongful death claimants. In reaching this decision, the Court of Appeals incorrectly concluded that the unfairness it perceived equates to unconstitutionality.

The Court of Appeals ignored a rational basis to support R.C. §2125.04. There is no need for an extension of time when a complaint is dismissed before the time to bring it expires. The claimant still has the opportunity to refile the claim within the time period applicable to wrongful death claims. See, *McAdow v. Abbott*, 2001 Ohio 2668, 2001 WL 315246 (Ohio App. 4 Dist., Adams, March 27, 2001). See, also, *Boron v. Brooks Beverage Management Company, Inc.* (June 30, 1999), Franklin App. No. 98AP-902.

A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. *Fed. Communications Comm. v. Beach,*

[5] Revised Code §2305.19 was amended on or about May 31, 2004. Up until this date, it contained the same or similar language as R.C. §2125.04. The legislature when it amended R.C. §2305.19 chose not to amend R.C. §2125.04, and when the legislature chose to amend R.C. §2125.04, in 2005, it chose not to amend it as it had amended R.C. §2305.19.

(1993), 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed. *Id.* 211, 221. Courts "are compelled under rational-basis review to accept a legislature's generalization even where there is an imperfect fit between means and ends" [, and a] classification does not fail rational basis review because "it is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams* (1970), 397 U.S. 477, 485, 90 S.Ct. 1153, 1161, 25 L.Ed. 2d 491, 501-502, quoting *Lindsley v. National Carbonic Gas Co.* (1911), 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377. "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Arbino v. Johnson & Johnson*, 2007 WL 4569719, 2007-Ohio-6498, at ¶27.

Since wrongful death claims did not exist under the common law, it is perfectly rational and reasonable for the legislature, the "ultimate arbiter of public policy,"[6] to require a wrongful death claim to be filed within a certain period of time or not at all. Courts should uphold the legislature's statutory scheme, unless, unlike in this case, there is no rational basis to support it.

PROPOSITION OF LAW NO. 2:

A Political Subdivision Is Immune From Liability If There Are No Facts Which Support Any Of The Exceptions Found In Revised Code §§2744.02(B)(1) Through (5).

PROPOSITION OF LAW NO. 3:

Revised Code §§2744.03(A)(1) Through (5) Are Defenses That Restore Immunity And Do Not Provide Claimants With A Basis Of Recovery.

Appellant is a political subdivision. Revised Code §2744.01(F). As a political subdivision, it is generally immune from liability. Revised Code §2744.02(A)(1).

[6] See, *State ex rel Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis*, 98 Ohio St.3d 136, 2002-Ohio-7041, 781 N.E.2d 163, at ¶21.

A political subdivision may, however, be held liable for injury, death or loss to person or property if one of the exceptions set forth in R.C. §§2744.02(B)(1) through (5) applies. A political subdivision can be held liable if:

> 1) the injury, death or loss is caused by an employee's negligent operation of a motor vehicle. Revised Code §2744.02(B)(1);
>
> 2) the injury, death or loss was caused by the negligent performance of a proprietary function. Revised Code §2744.02(B)(2);
>
> 3) the injury, death or loss was caused by the political subdivision's negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads. Revised Code §2744.02(B)(3);
>
> 4) the injury, death or loss was caused by the negligence of an employee, occurred on the grounds of or within buildings used in connection with the performance of a governmental function and is due to a physical defect on or within said grounds or buildings. Revised Code §2744.02(B)(4); and
>
> 5) a section of the Revised Code specifically imposes civil liability on the political subdivision for the injury, death or loss. Revised Code §2744.02(B)(5).

If an exception applies, political subdivision immunity may be restored if one of the defenses set forth in R.C. §§2744.03(A)(1) through (5) applies.

In the case of *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610, 1998-Ohio-421, this Court stated that R.C. Chapter 2744 sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability:

> First, R.C. 2744.02(A) sets forth the general rule of immunity ... Once immunity is established under R.C. 2744.02(A(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply. ... Finally, under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies.

Cater, 83 Ohio St. 3d at 28, 697 N.E.3d at 614, at 615.

Revised Code §§2744.03(A)(1) through (5) set forth the defenses available to political subdivisions. These defenses restore the immunity afforded political subdivisions only after an exception to immunity under R.C. §2744.02(B) has been found to apply. They do not provide an independent basis for imposing liability upon political subdivisions:

> Appellants further contend that R.C. 2744.02(A)(5) provides an independent basis for imposing liability on the city. We reject this contention. In *Hill v. Urbana, supra*, 79 Ohio St.3d 130, 679 N.E.2d 1109, a similar argument was made. However, R.C. 2744.03(A)(5) is a defense to liability; it cannot be used to establish liability. *Id.* At 135, 679 N.E.2d at 1113, fn. 2 (Lundberg, Stratton J., concurring in part and dissenting in part), *Id.* At 138-139, 679 N.E.2d at 1116 (Moyer, C.J., dissenting).

Id, at 32, 697 N.E.2d at 617. Indeed, if none of the exceptions set forth in R.C. §2744.02(B)(1) through (5) applies, then there is no need to engage in the third tier of the analysis. *Id.*

Revised Code §2744.03(A)(6) applies only to employees of political subdivisions. If it applies, an employee of a political subdivision is immune unless the injury, death or loss (1) occurred when the employee was acting manifestly outside the course and scope of employment, (2) occurred when the employee acted maliciously, in bad faith or wantonly or recklessly, or (3) civil liability is expressly imposed upon the employee by a section of the Revised Code.

The Fifth District Court of Appeals found no exception to the immunity afforded Appellant. The Court of Appeals should have ended its analysis and, even if R.C. §2125.04 is unconstitutional, affirmed the trial court's order as to the Board. Instead, the Court of Appeals held that the Board could be held liable for the acts of its employees, pursuant to R.C. §2744.03(A)(6), if Appellee could prove that one of the Board's employees acted willfully, wantonly or recklessly.

The Fifth District Court of Appeals did not have to engage in the third tier of the *Cater* analysis, incorrectly applied the third tier of the *Cater* analysis and in so doing applied the wrong

law to the Board. In essence, the Fifth District Court of Appeals determined that the Board can be held liable solely on a theory of *respondeat superior* – an outcome that R.C. §§2744.02(A) and (B) are specifically designed to prohibit. If its decision is allowed to stand, there will be confusion in the law and conflict within the districts as to what law applies to political subdivisions and their employees. Indeed, there is already a conflict. The Eighth Appellate District in the case of *Lowery v. City of Cleveland*, 2008 WL 151880 (Ohio App. 8 Dist.), 2008-Ohio-132, held that R.C. §2744.03(A)(6) could not be used to impose liability upon the City of Cleveland when there was no exception to the immunity afforded the City of Cleveland:

> The city properly points out that the statute upon which the trial court relied in denying the city's motion – R.C. 2744.03(A)(6)(b) – creates an exception to the statutory immunity afforded to employees of political subdivisions, not an exception to the immunity afforded to political subdivisions themselves. This is apparent from the plain language of this statute:

Lowery, at ¶15. A copy of *Lowery* is attached hereto and incorporated by reference herein.[7] Moreover, the Fifth Appellate District's decision will open political subdivisions to claims not permitted by statute, thus costing them precious time and limited financial resources. This is not the result this Court, or any Court, desires or should desire.

IV. CONCLUSION

There are two separate and legal reasons upon which this Court may base jurisdiction and consider this case. One involves a substantial constitutional question, and both are of great public and general interest. This Court should uphold the constitutionality of R.C. §2125.04, and this Court should, even if R.C. §2125.04 is unconstitutional, require that the law applicable to political subdivisions and their employees be applied properly for the sake of judicial economy

[7] In *Lowery*, the City of Cleveland filed a motion to dismiss. The trial court denied the motion. The Eighth District Court of Appeals reversed the trial court's ruling with respect to the City of Cleveland, but affirmed the trial court's ruling with respect to the John Doe defendants named in the complaint. See, *Lowery*, at Paragraph 8. This result should have been the result in this case, if R.C. §2125.04 is unconstitutional, as pointed out by Appellant in the Motion for Reconsideration.

and the preservation of public funds. Appellant respectfully requests that this Court accept jurisdiction and review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing *Appellant Tri-Valley Local School District Board of Education's Memorandum in Support of Jurisdiction* was sent this 14 day of February, 2008, via regular U.S. mail, postage-prepaid upon the following:

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Wrongful death lawsuit headed for trial

By KATHY THOMPSON
Staff Writer

ZANESVILLE - A wrongful death lawsuit surrounding the death of a 12-year-old Adamsville boy is headed to Muskingum County Common Pleas Court.

Josh Eppley, who was in seventh grade at Tri-Valley Middle School, died the night of Nov. 26, 2003, at Children's Hospital from injuries sustained in an automobile accident on Ohio 208.

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According to reports, the accident occurred about four miles north of Adamsville shortly after school was dismissed that afternoon .

Corey W. Jenkins, who was 17 at the time, was the driver of the 1997 Plymouth Neon, of which Eppley was the rear passenger.

According to Ohio Highway Patrol Trooper J. Jirles, Eppley was ejected from the car after it veered off the left side of the road and hit an embankment.

The lawsuit, which was first filed in August 2005, states that at the time of the accident, employees at the Tri-Valley Local School District allowed Jenkins to remove Eppley from the school grounds without permission from Eppley's parents and subsequently the accident happened causing the boy's death.

"But for the willful, wanton and reckless conduct and breach of duty" of the employees of the school, the child would not have been in the company of Jenkins and would not have been involved in the accident," the suit claims.

The attorney representing the school district, Michael E. Stinn, could not be reached for comment.

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According to the Eppley family attorney, John Gold, the school could have had a policy in place for accountability of which child got on an assigned school bus and which didn't.

Gold said other school districts have policies and head counts that insures the school administrators know which child is arriving at school and which is leaving on the proper transportation.

The Eppley family voluntarily dismissed the lawsuit in July of 2005 and refiled in September of 2006, court records show.

Then the lawsuit was dismissed in a Muskingum County Common Pleas court in February 2007 and the appeal was filed that April.

The Fifth Appellate District determined that the lawsuit can go forward to trial due to the fact that the statute of limitations of when a lawsuit can be refiled after being voluntarily dismissed was extended, according to Gold.

No trial date has yet been set for the case.

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They are wanting to do something about it. Trying to make a change. It is about the kids safety. Some processes take time. Hopefully it will come sooner than later.

Posted: Tue Jan 22, 2008 8:26 am

here is the sad part. Someone lost their child. I could put the blame on any person involved but it doesn't bring the boy back. I assume the family got money from the boy's insurance company after their son's passing. I think it's dumb to drag this out anymore. Bottem line,the 17yr old was a neighbor just giving the kid a ride home. Tragedy struck and boom,that's it. Let the boy rest in peace.
If they want to make a statement go to the board meetings and bring up the concerns for the safety of other's children. Turn this into something positive and leave the rest behind.
I know neither of the boys but I know the family hurts and I would imagine the pain the 17yr old must be going through to had had his buddy die in front of him.
. He is never going to forget it.
Everyone can talk about safety issues but who is gonna do something about it?
That is my 2 cents not trying to stir the pot.

Posted: Tue Jan 22, 2008 7:24 am

That is sad to think that a little one went through all of that when she did not have to.
Thank goodness for that man, which was a good samaritan, to pick her up and get her home safely.
That situation could have gone the other way in a split second.
Thankfully she is ok.

Posted: Mon Jan 21, 2008 9:43 pm

It blows my mind also, I'll be writing about it as soon as I talk to one of the

people "in the know" because obviously I am not. And I'm sure it wasn't picked up by the TR because it wasn't made a big stink of. Which it should have been. In today's society, what would have happened if she were raped and murdered. It would have changed this little town so much!! SOOOO MUCH. It would be the saddest tragedy in history of this town. And I hate to be a pessimist. But I'm glad she is okay. It COULD have happened. There are SICK people in this world as we all too well know and have become desensitized to.

I heard this story through my grandmother from the mother of the guy who picked the little girl up. Could have been his wife for all I know. Anyhow, they have a little girl in the first grade.

This little girl missed the bus, wasn't looked after, and began a long walk miles and miles towards home in the freezing cold through swampy terrain, and not to mention, free to be picked up by whoever and have whatever done to her. Sad. Traffic was all around her, but it took this one guy, who has a girl in the first grade also, to think "what in the hell is this little girl doing walking in the cold/freezing/wet.?" So he coaxed her into his truck (luckily a good samaritan) and explained that his daughter was in the first grade too. He said her name, which kind of broke the ice with the little girl who said that she knew his daughter and was "friends" with her. So he took her to his house, right down the road, to call home/school. The little girl seen a picture of her "friend" on the wall of the mans house, his daughter i remind you, and she realized that everything was going to be okay. She pointed to the picture I guess and kind of lit up a little bit considering she was cold, scared, embarassed, traumatized, etc. She is now safe in the arms of her parents. Tri-Valley, oh man. Get ready. I like TV, and its "sub-elite" status. It produces alot of good kids, its a good system, etc etc etc. But this is the oversight we cannot afford in all our luxuries of having a "great school system." A good system is only as good as it's run good by good people. Thats alot of good to keep in check. Thank the higher authorities that this little girl is safe. I know upon hearing it, i beaded up with sweat intensely. Like WTF, and I wanted to vent my anger. Much like as you read this final sentence I'm sure you are too.

Posted: Mon Jan 21, 2008 8:55 pm

If she missed the bus after school was out and there was not a school offical on the grounds watching them get on the bus, then it is their fault. If she was still in the building and that is why she missed the bus, then that is their fault. It is the schools responsibilty to get them home from school if they are a busser. Someone had to have seen that child or noticed that she was not where she should be.

do you have a link to this story? was this in the news? when was this? sorry for all of the questions, but this just blows my mind.

Posted: Mon Jan 21, 2008 7:39 pm

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Originally published January 13, 2008

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Santa Clarita Personal Injury Lawyer

Wrongful Death Lawsuit Headed for Trial

Editor: Susy Owen
Firm: Owen, Patterson & Owen

Category: Motor Vehicle Accidents

January 18, 2008
By Susy Owen
TrackBack (0)

In November of 2003 Josh Eppley was a seventh grade student at Tri-Valley Middle School in Ohio. According to a lawsuit filed by the parents of Eppley, Tri-Valley Middle School allowed 17-year-old Corey Jenkins to take their son out of school without their permission. Jenkins proceeded to drive with Eppley as a passenger in a car.

According to the police report, Eppley was ejected from the vehicle after it veered off the road hitting an embankment. Sadly, Eppley died as a result of the incident. A lawsuit has now been filed by Eppley's parents against the school due to the willful, wanton and reckless conduct and breach of duty of the employees of the school. At one point the boy's parents voluntarily dropped their suit involving the car crash only to refile at a later date. The attorney representing the school district, Michael E. Stinn, was not available to comment. The trial date has yet to be set.

Additional Information Pertaining to Automobile Accidents

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Lowery v. **Cleveland**
Ohio App. 8 Dist.,2008.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Eighth District, Cuyahoga County.
Ken **LOWERY**, et al., Plaintiffs-Appellees
v.
City of **CLEVELAND**, et al., Defendants-Appellants.
No. 90246.

Decided Jan. 17, 2008.

Civil Appeal from the Cuyahoga County Court of Common Pleas, Case No. CV-621126.

Robert J. Triozzi, Director of Law, by Michael F. Cosgrove, Assistant Director of Law, **Cleveland**, OH, for appellants.
Rufus Sims, **Cleveland**, OH, for appellee.

Before: ROCCO, J., GALLAGHER, P.J., and CALABRESE, J.

KENNETH A. ROCCO, J.

***1** {¶ 1} Defendant-appellant, the City of **Cleveland**, appeals from a common pleas court order overruling its motion to dismiss, which asserted both that the claims against it were barred by sovereign immunity and that plaintiffs' claim of an implied cause of action under the Ohio constitution did not state a claim under Ohio law. We agree that the trial court erred by denying the city's motion to dismiss because plaintiffs' claims against the city were barred by sovereign immunity. This holding renders moot the city's contention that Ohio law does not allow an implied cause of action under the Ohio constitution, which, in any case, the trial court did not address. Accordingly, we reverse and remand for further proceedings against the defendant John Doe police officers.

Procedural History

{¶ 2} The amended complaint filed May 8, 2007, asserted that plaintiffs Ken **Lowery** and Terence Britton were bail bond agents and/or fugitive recovery agents who contacted the **Cleveland** Police Department to advise that they were pursuing Andre Hicks on a felony arrest warrant. They claim they were arrested, their weapons were confiscated, and they were restrained for almost three days "without probable cause, reasonable suspicion or any evidence that they had committed a crime."Further, the police impound unit destroyed **Lowery's** vehicle and the personal property that was inside it, despite a court order not to do so. Second, plaintiffs claim that "as a direct and proximate result of the interference of unknown members of the **Cleveland** Police Department, Fourth District Police, the Plaintiffs were prevented from capturing Andre Hicks, thereby causing them to forfeit their fee to which they were entitled." Third, plaintiffs claim the city's actions were " deliberate, willful, malicious and wanton," "in bad faith," and deliberately indifferent to plaintiff's rights. Finally, plaintiffs claim that the city "caused and encouraged" its officers' unlawful conduct "as a matter of custom, policy and practice, and by failing to properly train, sanction or discipline the ... [o]fficers involved."

{¶ 3} Before filing an answer, the city filed a motion to dismiss urging that it was immune from liability under R.C. 2744.02 and that the fourth cause of action failed to state a claim because Ohio does not recognize implied causes of action under

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the Ohio constitution. Plaintiffs responded. The court denied the city's motion holding that:

PURSUANT TO OHIO REVISED CODE 2744.03(A)(6)(B) IMMUNITY IS NOT APPLICABLE IF THE GOVERNMENT EMPLOYEES OR [sic] OMISSIONS WERE WILLFUL, WANTON OR DELIBERATE WITH MALICIOUS PURPOSE, IN BAD FAITH OR IN A WANTON OR RECKLESS MANNER. PLAINTIFF IN HIS [sic] AMENDED COMPLAINT ALLEGES DEFENDANTS['] BEHAVIOR IN ARRESTING PLAINTIFFS, CONFISCATING PLAINTIFFS['] PERSONAL PROPERTY, AND IMPRISONING PLAINTIFFS WAS DELIBERATE, WILLFUL, MALICIOUS AND WANTON BEHAVIOR AND WAS DONE IN BAD FAITH. THEREFORE PLAINTIFFS['] COMPLAINT, IF TAKEN AS TRUE WITH ALL REASONABLE INFERENCES DRAWN IN FAVOR OF THE NONMOVING PARTY, MANDATES THIS COURT TO DENY DEFENDANT'S MOTION TO DISMISS.

Law and Analysis

*2 {¶ 4} Under R.C. 2744.02(C), "[a]n 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." Thus, the court's order denying the city's motion to dismiss on immunity grounds is a final appealable order. Cf. *Hubbell v. Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839 (denial of summary judgment on immunity grounds was a final appealable order).

{¶ 5} The city properly points out that the statute upon which the trial court relied in denying the city's motion-R.C. 2744.03(A)(6)(b)-creates an exception to the statutory immunity afforded to *employees* of political subdivisions, not an exception to the immunity afforded to political subdivisions themselves. This is apparent from the plain language of this statute:

In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 or 3746.24 of the Revised Code, *the employee* is immune from liability unless one of the following applies: [emphasis added.]

* * * *

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

* * * *

{¶ 6} We find no correlative exception under R.C. 2744.02 or .03 to a political wantonly, and in bad faith did not negate the city's immunity from suit. *Wilson v. Stark Cty. Dept. of Human Servs.,* 70 Ohio St.3d 450, 1994-Ohio-394.

{¶ 7} Where a municipality is engaged in a governmental function such as the provision of police services, see R.C. 2744.01(C)(2)(a), it is immune from liability for its employees' negligent, reckless or intentional acts except as specifically provided in R.C. 2744.02(B)(1), (3), (4) and (5), which state:

(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. The following are full defenses to that liability:

* * * *

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds

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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, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

***3** (5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code.* * * *

{¶ 8} None of these exceptions is even arguably applicable here. Therefore, the city is immune from liability. Accordingly, we reverse and remand with instructions to dismiss all claims against the defendant city. This disposition does not affect any claims plaintiffs may have against the defendant John Doe police officers.

{¶ 9} The trial court did not address the city's argument that Ohio law does not recognize an implied cause of action for violation of the Ohio constitution. In light of our holding here, this issue is now moot.

{¶ 10} This cause is reversed and remanded to the common pleas court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, P.J., and ANTHONY O. CALABRESE, JR., J., concur.
Ohio App. 8 Dist.,2008.
Lowery v. Cleveland
Slip Copy, 2008 WL 151880 (Ohio App. 8 Dist.), 2008 -Ohio- 132

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

FEB - 1 2008

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

RANDY J. EPPLEY, ET AL Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TRI VALLEY LOCAL SCHOOL DISTRICT, ET AL Defendant-Appellee	:	CASE NO. CT2007-0022

This cause comes before us on Appellants' Motion to amend our Decision in the within, entered January 3, 2008 Nunc Pro Tunc. Appellants raise two admittedly non-substantive issues.

An entry may be amended when it appears it was incorrect or incomplete when it was entered, and the amended entry speaks nunc pro tunc, now for then.

It appears to this court our decision was correct on January 3, based upon information appellants supplied this court, and appellants seek to update the information rather than correct it. Accordingly the motion is overruled.

IT IS SO ORDERED.

W. Scott Gwin

HON. W. SCOTT GWIN

William B. Hoffman

HON. WILLIAM B. HOFFMAN

Patricia A. Delaney

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

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FEB - 1 2008

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

RANDY J. EPPLEY, ET AL

Plaintiff-Appellant

-vs-

TRI VALLEY LOCAL
SCHOOL DISTRICT, ET AL

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. CT2007-0022

This cause comes before us on Appellee Tri-Valley Local School District Board of Education's application to reconsider our opinion in the within, filed January 3, 2008.

"App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, 678 N.E.2d 956, dismissed, appeal not allowed, 77 Ohio St.3d 1487, 673 N.E.2d 146.

However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *Owens*, at 336. Furthermore, "App. R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified." *Id.* at 335. See, also, *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143, 450

In *Matthews,* the court stated, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Id.* at 143.

The application for reconsideration does not call to our attention an obvious error or omission, but argues our decision was incorrect. Upon review, we adhere to our previously announced decision.

The application to reconsider is denied.

IT IS SO ORDERED.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

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FIFTH DISTRICT
COURT OF APPEALS
JAN - 3 2008
MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RANDY J. EPPLEY, ET AL	:	JUDGES: Hon: W. Scott Gwin, P.J. Hon: William B. Hoffman, J. Hon: Patricia A. Delaney, J.
Plaintiffs-Appellants	:	
-vs-	:	
	:	Case No. CT2007-0022
TRI-VALLEY LOCAL SCHOOL DISTRICT, ET AL	:	
	:	OPINION
Defendants-Appellees		

CHARACTER OF PROCEEDING: Civil appeal from the Muskingum County Court of Common Pleas, Case No. CH2006-0529

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Cleveland, OH 44131-2582

Gwin, P.J.

{¶1} Plaintiff Randy J. Eppley, individually and as the Administrator for the Estate of Joshua M. Eppley, deceased, appeals a judgment of the Court of Common Pleas of Muskingum County, Ohio, which dismissed his complaint pursuant to Civ. R. 12. Appellees are the Tri-Valley Local School District, Tri-Valley Local School Board, and John Does one through five. Appellant assigns four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT ON THE PLEADINGS BECAUSE THE SAVINGS PROVISIONS OF OHIO REVISED CODE SECTION 2305.19 APPLY TO ALL CAUSES OF ACTION FILED IN OHIO COURTS.

{¶3} "II. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT ON THE PLEADINGS BECAUSE IT FAILED TO LIMIT THE EFFECT OF OHIO REVISED CODE SECTION 2125.04 TO THE SUBSTANTIVE REVISIONS CONTAINED IN THE 2004 AMENDMENT SO AS TO AVOID A CONSTITUTIONAL ISSUE.

{¶4} "III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS BECAUSE THE SAVINGS PROVISION OF R.C. 2125.04 CREATES A CONSTITUTIONALLY IMPERMISSIBLE DISTINCTION BETWEEN CLASSES OF PLAINTIFFS AND MUST BE STRICKEN ON EQUAL PROTECTION GROUNDS.

{¶5} "IV. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT ON THE PLEADINGS ON THE BASIS OF STATUTORY IMMUNITY BECAUSE THE RECORD IN INCOMPLETE."

{¶6} On August 3, 2005, appellant filed a complaint for wrongful death against appellees. Appellant dismissed the case without prejudice pursuant to Civ. R. 41 on

September 15, 2005. Thereafter, appellant re-filed his complaint on September 7, 2006.

{¶7} Appellant's re-filed complaint alleges on or about November 26, 2003, decedent Joshua M. Eppley was in the care of Tri-County Local School District when its employees recklessly, wantonly, and willfully engaged in conduct which caused harm to decedent. Appellant alleged the employees, John Does one through five, allowed Corey W. Jenkins to remove decedent from the premises without authority from decedent's parents. Subsequently, while decedent was with him, Corey W. Jenkins crashed his vehicle, killing the decedent. The re-filed complaint alleges but for the willful, wanton and reckless conduct and breach of duty of the appellants, decedent would not have been in the company of Corey W. Jenkins, and would not have been involved in the accident. Appellant's re-filed complaint alleges as a direct and proximate cause of appellees' negligence, the decedent suffered great pain and suffering of body and mind, loss of the enjoyment of life, mental anguish, and died.

{¶8} On September 25, 2006, appellees filed their answer to the complaint. The answer contained a general denial or denial for want of sufficient knowledge except that appellees admitted Joshua is deceased.

{¶9} The answer also raises fourteen affirmative defenses, including: statute of limitations; failure to state a claim upon which relief may be granted; failure to name indispensable parties; assumption of the risk; contributory negligence; statutory immunity pursuant to R.C. Chapter 2744; all the immunities and defenses available under R.C. Chapter 2744; insufficiency of process and service of process; lack of subject matter jurisdiction and personal jurisdiction; failure of commencement; plaintiff's

inability to sue on behalf of the estate; plaintiff's inability to sue in an individual capacity; and right to set off. Appellee's eighth affirmative defense states "Defendants state that Tri-Valley Local School District an entity susceptible to suit." Appellees' motion for a judgment on the pleadings argues Tri-Valley School District is not sui juris, which is apparently what their eighth affirmative defense was intended to raise.

{¶10} Appellees' motion for judgment on the pleadings argued the statute of limitations had run on appellant's complaint before he re-filed the lawsuit. The motion also argued Tri-Valley is immune from liability. Additionally, the motion for judgment on the pleadings argued appellant cannot bring the action in his individual capacity, but only in his representative capacity on behalf of the estate.

{¶11} Appellant's response to the motion for judgment on the pleadings argued the general savings statute, R.C. 2305.19 applies to this action, not R.C. 2125.04, the wrongful death savings statute. In the alternative, appellant argued to enforce R.C.2125.04 violates the appellant's right to equal protection as guaranteed by the Fourteen Amendment to the United States Constitution and the Ohio State Constitution. Appellant's response to the motion for judgment on the pleadings also argued appellees' claim of statutory immunity is premature because the record is incomplete.

{¶12} The trial court dismissed the complaint with prejudice pursuant to Civ. R. 12, but did not make any finding regarding whether its judgment is based on the running of the statute of limitations, or statutory immunity grounds.

{¶13} COMPARISON OF THE TWO STATUTES

{¶14} R.C. 2305.19 provides: "(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff

fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant."

{¶15} R.C.2125.04 provides: "In every civil action for wrongful death commenced or attempted to be commenced within the time specified by division (D)(1) or (D)(2)(c), (d), (e), (f), or (g) of section 2125.02 of the Revised Code, if a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and if the time limited by any of those divisions for the commencement of the action has expired at the date of the reversal or failure, the plaintiff or, if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff may commence a new civil action for wrongful death within one year after that date."

{¶16} Prior to 2000, R.C. 2305.19, the general savings statute was similar to R.C. 2125.04, the wrongful death savings statute. It granted a plaintiff an additional year in which to re-file an action dismissed without prejudice, only if the dismissal occurred after the original statute of limitations had run. Known to the bar as the "malpractice trap", the effect of the statute was that a plaintiff whose case was dismissed without prejudice prior to the running of the original statute of limitations had to re-file the action before the applicable statute of limitations had run, regardless of how much time was left. This version of R.C.2305.19 was challenged on equal protection grounds, but courts generally found there was a rational basis underlying the savings statute's

requirement that the original dismissal occur after the limitations period had run in order to take advantage of the one year extension of time. In *Boron v. Brooks Beverage Management Company, Inc.* (June 30, 1999), Franklin App. No. 98AP-902, for example, the Twelfth District Court of Appeals found the distinction between plaintiffs whose cases are dismissed before the statute of limitations ran and those whose cases are dismissed after is not arbitrary nor capricious, because it merely distinguishes between those whose actions need saving and those who do not, and because the statute encourages litigants to re-file within the original statute of limitations if possible. The Ohio Supreme Court ultimately dismissed the *Boron* case sua sponte, citing no substantial constitutional question, *Boron v. Brooks Beverage Management, Inc.* (1999), 87 Ohio St. 3d 1440, 719 N.E. 2d 4.

{¶17} In 2004, the general savings statute was amended to its present language, which closed the "malpractice trap" and permits a plaintiff to re-file the action within a year after dismissal, or the time left under the statute of limitations, whichever is longer. Thus, the general saving statute no longer distinguishes between cases dismissed before the statute of limitations has run and those dismissed after.

{¶18} Although it subsequently amended the wrongful death savings statue, the Legislature did not close the "malpractice trap" in wrongful death actions.

{¶19} STANDARD OF REVIEW

{¶20} We review a decision made pursuant to Civ. R. 12 de novo, *Greely v. Miami Valley Maintenance Construction, Inc.* (1990), 49 Ohio St. 3d 228, 551 N.E. 2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Civ. R. 12 (B)(6) is procedural, and tests the sufficiency of the complaint,

State ex rel. Hanson v. Guernsey County Board of Commissioners, 65 Ohio St. 3d 545, 1992-Ohio-73, 605 N.E. 2d 378. In conducting a de novo analysis, this court must assume all factual allegations in the complaint are true and we must draw all reasonable inferences in favor of the non-moving party, *Byrd v. Faber* (1991), 57 Ohio St. 3d 56, 565 N.E. 2d 584.

I.

{¶21} In its first assignment of error, appellant argues the trial court erred in granting judgment on the pleadings because the savings provisions of R.C. 2305.19 applies to all causes of action. Appellant is correct in stating the statute does contain the language "any action that is commenced or attempted to be commenced", and does not provide any exceptions. However, while R.C. 2305.19 is a general statute, R.C.2125.04 is a specific statute applicable expressly only to wrongful death claims. Appellees argue a specific statute takes precedence over a general statute, citing *State v. Volpe* (1988), 38 Ohio St. 3d 191, 527 N.E. 2d 818, and R.C. 1.51. Appellees also direct our attention to R.C. 1.52, which provides a statute enacted later prevails over an earlier one. R.C. 2125.04 was effective April 7, 2005, later than the amended version of R.C. 2305.19, which was effective May 31, 2004.

{¶22} We find although R.C.2305.19 provides it applies to all actions, R.C.2125.04, the specific statute, controls over actions for wrongful death. Accordingly, the first assignment of error is overruled.

II.

{¶23} In the second assignment of error appellant argues the trial court should not have granted judgment on the pleadings because in so doing it created a conflict of

constitutional magnitude between the two savings statutes. Appellant argues the difference in the two statutes may be attributable to a scrivener's error or inadvertent oversight, because the purpose in amending the wrongful death statues in 2005 was to modify the list of persons for whom compensatory damages may be awarded. Appellant argues the General Assembly may have overlooked the "malpractice trap" in R.C. 2125.04, and intended to amend the statute to mirror R.C. 2305.19,

{¶24} In construing a statute, this court's paramount concern must be to enforce the legislative intent underlying the statute, *State v. S. R.* (1992), 63 Ohio St. 3d 590, 594, 589 N.E. 2d 1319. A cardinal rule of construction requires us to look first to the language of the statute itself to determine the legislative intent, *Shover v. Cordis* (1991), 61 Ohio St. 3d 213, 218, 574 N.E. 2d 457. Words and phrases in the statute must be read in context and construed according to rules of grammar and common usage, *Independent Insurance Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St. 3d 310, 314, 587 N.E. 2d 814; and R.C. 1.42. We may not ignore plain and unambiguous language in a statue, but must give effect to the words the legislature chose, *State ex rel. Fenley v. Ohio Historical Society* (1992), 64 Ohio St. 3d 509, 511, 597 N.E. 2d 120. We may not delete or insert words, *Cline v. Bureau of Motor Vehicles* (1991), 61 Ohio St. 3d 93, 97, 573 N.E. 2d 77.

{¶25} This court will not assume the Legislature intended for R.C. 2125.04 to be read other than as it is written, and we will not revise it to mirror the general savings statute. The second assignment of error is overruled.

III.

{¶26} In his third assignment of error, appellant argues R.C. 2125.04 creates a constitutionally impermissible distinction between classes of plaintiffs and must be stricken on equal protection grounds.

{¶27} The equal protection clause of the Fourteenth Amendment requires a state to govern impartially, *New York Transit Authority v. Beazer* (1979), 440 U.S. 568, 99 S.Ct. 1355. The equal protection clause requires all persons in similar circumstances to be treated alike, *Plyler v. Doe* (1982), 457 U.S. 202, 102 S.Ct. 2382. An analysis pursuant to the equal protection clause is necessary when a state adopts a rule that has a special impact on fewer than all persons in its jurisdiction, *Beazer* at 587-588.

{¶28} As appellant correctly sets forth, the U.S. Supreme Court has fashioned three levels of scrutiny: strict, intermediate, and rational basis. Laws are subject to strict scrutiny when they discriminate against certain suspect classes, *Grutter v. Bollinger* (2003), 539 U.S. 306, 326, 123 S. Ct. 2325. Courts also apply the strict scrutiny review if a law abridges the exercise of fundamental rights, *Reynolds v. Sims* (1964), 377 U.S. 533, 562, 84 Sup. Ct. 1362.

{¶29} Courts have defined fundamental rights as those enumerated in the Bill of Rights, or identified as fundamental rights by the United States Supreme Court, *Washington v. Glucksberg* (1997), 521 U.S. 702, 721, 117 S. Ct. 2258.

{¶30} Courts apply the intermediate scrutiny standard when laws discriminate based on certain other suspect classifications, as determined by the United States Supreme Court, *Mississippi University For Women v. Hogan* (1982), 458 U.S. 718, 723, 102 S. Ct. 3331.

{¶31} All other laws are subject to review under the rational basis test. A law will survive the rational basis test so long as it bears a rational relation to some legitimate state interest, *Roamer v. Evans* (1996), 517 U.S. 620, 631, 116 Sup. Ct. 1620.

{¶32} Appellant argues the right of parents to recover for the wrongful death of the child is a fundamental right, because it is based the fundamental right of parents to enjoy a loving relationship with their child. While we recognize the right to parent one's children is a fundamental right, see *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054, the right to pursue a wrongful death action is not a fundamental right, and is not among the rights found in our nation's history and traditions, see *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 97 S. Ct. 1932.

{¶33} In the alternative, appellant argues R.C.2125.04 cannot withstand even the rational basis test. The statute creates a distinction between wrongful death plaintiffs who voluntarily dismiss their claim prior to the lapse of the statute of limitations as opposed to any other plaintiff who voluntarily dismisses his or her claim prior to the lapse of the applicable statute of limitations. Thus, our inquiry must be whether wrongful death actions are different from all other actions, and if so, whether treating a wrongful death action differently is rationally related to a legitimate state interest.

{¶34} Appellees list a number of ways in which wrongful death actions are unique. First, the statute of limitations in a wrongful death action is not a statute of repose, but rather is an element of the action itself, *Fish v. Ohio Casualty Insurance Company*, Stark App. No. 2003CA00030, 2003-Ohio-4380, at paragraph 30, citing *Sabol v. Pekoc* (1947), 148 Ohio St. 545, 76 N.E. 2d 84. However, this distinction does not explain why a plaintiff who dismisses his action prior to the running of the statute of

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limitations should not have one year to re-file, while a plaintiff who dismisses an identical action after the running of the statute of limitations is "saved" by the statute.

{¶35} Appellees argue a wrongful death claim is a statutory claim, unlike most claims for personal injury, which are based on common law. However, the Ohio Supreme Court has applied R.C.2305.19 to statutory claims such as will contest actions, see *Allen v. McBride*, 105 Ohio St. 3d 21, 2004-Ohio-7112, 821 N.E. 2d 1001 and *Vitantonio, Inc. v. Baxter*, slip opinion 2007-Ohio-6052. R.C. 2305.19 is applicable to suits against the State in the Court of Claims, *Reese v. Ohio State University Hospital* (1983), 6 Ohio St. 3d 162, 451 N.E. 2d 1196. The Supreme Court made R.C. 2305.19 applicable to Workers' Compensation cases in *Lewis v. Connor* (1985), 21 Ohio St. 3d 1, 487 N.E. 2d 285. R.C. 2305.19 applies to age discrimination actions, see *Osborne v. AK Steel/Armco Steel Company*, 96 Ohio St. 3d 368, 2002-Ohio-4846, 775 N.E. 2d 483.

{¶36} Appellees also argue personal injury claims are direct claims, while wrongful death claims are derivative in nature, and are brought by the decedent's estate's representative on behalf of the next of kin as defined by the statute. Additionally, the Ohio Constitution provides damages recoverable in wrongful death claims cannot be limited by law, although damages for personal injury can and have been limited. Again, while appellees' arguments are correct, appellees do not take the final step of the analysis and explain what rational relationship to a legitimate state interest exists because of the disparate treatment of wrongful death plaintiffs from other plaintiffs, and the disparate treatment of wrongful death plaintiffs who dismiss their cases too early from those who wait until after the statue of limitations has run.

{¶37} Finally, appellees argue R.C. 2125.04 was enacted to further the State's rational and legitimate interest in insuring Ohio has a fair, predicable system of civil justice, preserving the rights of those who have been harmed by negligent behavior while curbing frivolous lawsuits. Certainly this is a legitimate state interest, but appellees have not demonstrated how this interest is rationally related to treating wrongful death claimants differently than other plaintiffs. To close the malpractice gap in wrongful death actions would not impair a fair and predictable system of civil justice preserving the rights of those who have been harmed by negligent behavior while curbing frivolous lawsuits. Preserving our justice system has not required any other claim be subject to the malpractice gap.

{¶38} We find there is no legitimate state interest to which the distinctions in the wrongful death statute are rationally related. Accordingly, we find the statute is unconstitutional as applied to appellant's action.

{¶39} The third assignment of error is sustained.

IV.

{¶40} In his fourth assignment of error, appellant argues the issue of statutory immunity has not been fully developed on the record, and thus, the court had no basis to dismiss his action.

{¶41} R.C. 2744.02(A)(1) provides:

{¶42} "For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. 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."

{¶43} In the majority of cases, the broad immunity of R.C. Chapter 2744 provides a complete defense to a negligence cause of action, *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 98, 706 N.E.2d 1261, 1999-Ohio-207; However, "[t]he immunity afforded a political subdivision in R.C. 2744.02(A)(1) is not absolute." *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610, 1998-Ohio-421, citing *Hill v. Urbana*, 79 Ohio St.3d 130, 679 N.E.2d 1109, 1997-Ohio-400.

{¶44} The statute and the Ohio Supreme Court set forth a three-tiered analysis to determine whether a political subdivision is immune from tort liability: The first tier is to establish immunity under R.C. 2744.02(A)(1); the second tier is to analyze whether any of the exceptions to immunity under R.C. 2744.02(B) apply; if so, then under the third tier, the political subdivision has the burden of showing that one of the defenses of R.C. 2744.03 applies. If it establishes one of the defenses, then immunity is reinstated. *Cater*, 83 Ohio St.3d at 28, 697 N.E.2d 610; *Hubbard v. Canton City School Bd. of Education.*, 97 Ohio St.3d 451, 780 N.E.2d 543, 2002-Ohio-6718, paragraphs 11-12.

{¶45} For the purposes of the immunity statute, the Board qualifies for general immunity since a public school district is a "political subdivision" pursuant to R.C. 2744.01(F), and providing a system of public education is considered a "governmental function" under 2744.01(C)(2)(c). Appellees meet the first prong of the *Cater* test.

{¶46} Next we must determine whether any of the exceptions under R.C. 2744.02(B) apply. R.C. 2744.02 removes the general statutory presumption of immunity for political subdivisions only under the following express conditions: (1) the negligent

operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744 .02(B)(3); (4) the negligence of employees occurring within or on the grounds of certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5). *Sabulsky,* 2002-Ohio-7275, at paragraph 13, citation deleted.

{¶47} Pursuant to R.C. 2744.03 (A)(6), an employee of a political subdivision is immune from liability unless (1) the employee's acts or omissions were manifestly outside the scope of the employment or official responsibilities, (2) the employee's acts or omissions were with a malicious purpose, and in bad faith, or in a wanton or reckless manner; or (3) when the Revised Code expressly imposes civil liability.

{¶48} Appellees argue Joshua's death was caused by the negligent operation of a motor vehicle, but the operator of the motor vehicle was not one of the Board's employees. The Board did not own the road on which the accident occurred, and the accident did not occur on school grounds. Decedent's death was not caused by a defect on or within the grounds or buildings used by the Board.

{¶49} Appellant's complaint alleges the employees of Tri-County Local School District acted recklessly, wantonly or willfully when they allowed an unauthorized person to remove decedent from school premises. We find construing the allegations of the complaint to be true, appellant could prove a set of facts entitling him to recover, but only as to the Board and the John Does. Tri-Valley Local School District is not sui juris. We further find appellees are correct in that appellant can only prosecute the claim for

wrongful death as the personal representative of the decedent, and not on his individual capacity.

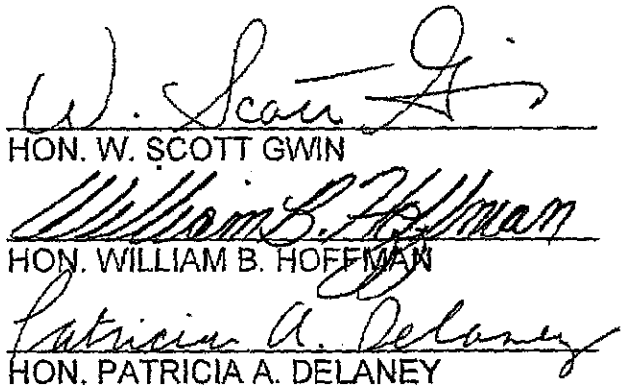
{¶50} The fourth assignment of error is sustained.

{¶51} For the foregoing reasons, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur



HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

WSG:clw 1210

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

JAN - 3 2008

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

RANDY J. EPPLEY, ET AL	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TRI-VALLEY LOCAL SCHOOL DISTRICT, ET AL	:	
Defendants-Appellees	:	CASE NO. CT2007-0022

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion. Costs to appellees.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY