

IN THE SUPREME COURT OF OHIO

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

Supreme Court Case No. 2007-1304

Appellants,

-vs-

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

**MARLINGTON SCHOOL DISTRICT,
et al.**

Court of Appeals
Case No. 00102

Appellees.

**BRIEF OF AMICI CURIAE
OHIO COALITION FOR THE EDUCATION OF CHILDREN WITH DISABILITIES
CHILDREN'S DEFENSE FUND
EQUAL JUSTICE FOUNDATION
OHIO ASSOCIATION FOR JUSTICE**

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III. INTRODUCTION

This Amici Curiae brief is submitted in support of Appellants Jane and John Doe, on behalf of Holly Roe, in an effort to urge this Court to reverse the Fifth District Court of Appeals.

The Fifth District Court of Appeals erred when it held that a negligence action cannot be maintained against a school district pursuant to R.C. Chapter 2744 when that district abdicates its statutory and common law duties by failing to prevent the sexual assault of a child. Monitoring and supervising children while driving a school bus constitutes "operation of a motor vehicle," within the meaning of R.C. §2744.02(B)(1). Therefore, an exception to the Political Subdivision Act applies to this case. However, if monitoring and supervising children while on a school bus does not constitute "operation," then the Amici represented herein respectfully urge this Court to declare R.C. Chapter 2744 unconstitutional as applied to the facts of this case.

IV. INTERESTS OF AMICI CURIAE

Each of the non-profit groups represented by this Amici Curiae brief have a significant interest in ensuring that school districts who take custody and control of our children fulfill their duties to protect them. The Ohio Coalition for the Education of Children with Disabilities is a statewide, non-profit organization dedicated to advancing the educational interests of children with disabilities. The Ohio Coalition gives a voice to parents and families of children dealing with the challenges of disabilities, and strives to generate support for the professionals who work with them. Founded in 1972, The Ohio Coalition is devoted to improving the quality and accessibility of educational services to children with disabilities in Ohio. The organization is composed primarily of parents of children with special educational needs and special education professionals in Ohio.

The Children's Defense Fund's "Leave No Child Behind" mission stands to "ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start*, and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities." In an effort to meet this objective, the Children's Defense Fund strives to provide a strong, effective voice for children who cannot vote, lobby, or speak for themselves; especially those who are poor, minority, or disabled. The Children's Defense Fund began in 1973 and is a private, nonprofit organization supported by foundation and corporate grants and individual donations.

The Equal Justice Foundation is a statewide, Columbus-based nonprofit organization established in 1996 to represent disadvantaged individuals and groups who otherwise would not have access to the legal system. The Equal Justice Foundation's mission is to defend and advocate the rights of indigent, minority, and other disadvantaged Ohioans through a program of pro-active litigation in state and federal courts. The Equal Justice Foundation receives no government funding and relies on private contributions, grants and attorney fees for operating support.

Finally, the Ohio Association of Justice is the state's largest victims' rights advocacy association. The Ohio Association of Justice is comprised of approximately 2,000 attorneys dedicated to strengthening the civil justice system so that individuals have free access to Ohio's courts and wrongdoers are held accountable. The Association further strives to promote the public good through efforts to secure safe products, a safe workplace, a clean and safe environment and quality health care.

Each of these organizations firmly believes that any statutory framework which shields a school district from liability for failing to prevent a sexual assault committed upon a 10 year-old developmentally-disabled girl is fundamentally flawed. These organizations appear

in this action to urge this Honorable Court to protect those who are most vulnerable, and hold those who abdicate their duties to our children accountable. If this Court holds that failing to maintain order on a school bus is not “negligent operation” of a motor vehicle within the meaning of within the meaning of R.C. Chapter 2744, then Chapter 2744 must be declared unconstitutional as applied to this case.

V. BRIEF STATEMENT OF FACTS

Appellant Holly Roe was a 10 year-old, 4th grade developmentally disabled student. Appellant Jane and John Doe are her custodial parents. Marlinton Local School District transported Holly to and from her classes at her elementary school.¹ While riding the bus operated by Marlinton, a 15 year-old, developmentally disabled eighth grade boy committed various sexual assaults upon Holly.² These sexual assaults happened repeatedly in the presence of the Marlinton School District bus driver, but the bus driver never intervened to protect Holly. Moreover, the boy who committed the sexual assaults upon Holly was of a seriously violent temperament, and this was known to the Marlinton School District.³ The failure of the Marlinton bus driver to stop these assaults was in violation of not only the common law duties owed by Marlinton School District to Holly, but also several state laws.⁴

Jane and John Doe commenced this action on September 21, 2005, by filing a complaint against the Marlinton Local School District Board of Education. Jane and John

¹ See Deposition of David Behner. Ed.D. (“Behner depo”) at 9-11, previously filed with the trial court on 2/23/2006.

² See Deposition of JoAnn Sweitzer (“Sweitzer depo”) at 42-44 and Exhibit 1 thereto, previously filed with the trial court on 2/23/2006; See Deposition of Joan Bolyard (“Bolyard depo”) at 43-45; and Exhibit 1 thereto, previously filed with the trial court on 2/23/2006; See Deposition of Robin Tener, Ph.D. (“Tener depo”) at 52-53 and Exhibit B thereto, previously filed with the trial court on 3/27/2006.

³ Behner depo at 18, 22-40, and Exhibits 1-5 thereto.

⁴ Ohio Administrative Code §§3301-83-08 and 3301-83-10.

Doe allege that Marlinton acted negligently and/or recklessly in permitting a 15 year-old developmentally disabled student, with a history of violent behavioral problems, to repeatedly sexually assault Holly Roe on a Marlinton school bus. On February 8, 2006, Marlinton moved for summary judgment, asserting that it could not be liable because of the immunity granted by R.C. Chapter 2744. On April 11, 2006, the trial court overruled Marlinton's motion for summary judgment. The Fifth District Court of Appeals reversed the decision of the trial court, finding both that monitoring and supervising children was not "operation of a motor vehicle," within the meaning of R.C. §2744.01(B)(1), and that R.C. Chapter 2744 was constitutional as applied to the facts before it.

On December 26, 2007, this Court granted discretionary review.

VI. ARGUMENT: R.C. Chapter 2744 is unconstitutional as applied to provide immunity to a school district who fails to prevent sexual assaults committed upon a child in its custody.

If this Court finds that failing to supervise children while on a school bus is not "negligent operation" of a motor vehicle within the meaning of Political Subdivision Immunity Act, then this Court must hold that shielding a school district from liability pursuant to R.C. Chapter 2744 is unconstitutional as applied to children who are harmed by the negligent supervision school of officials.

A. Brief Background of Political Subdivision Immunity in Ohio.

It is undisputed in this case that the Marlinton School District is a political subdivision, and therefore within the purview of the Political Subdivision Immunity Act. In order to place the constitutional analysis of R.C. Chapter 2744 in its appropriate context, it is helpful to briefly consider the history of political subdivision immunity in Ohio.

The doctrine of political subdivision immunity, as distinct from the sovereign immunity enjoyed by the states, first made its appearance in this country in 1812. *Mower v. Inhabitants of Leicester* (1812), 9 Mass. 247, 1812 WL 927. The doctrine itself was derived from a misinterpretation of the English common law. See, *Butler v. Jordan*, 92 Ohio St.3d 354, 2001-Ohio-204, 750 N.E.2d 554, quoting, *Haas v. Hayslip* (1977), 51 Ohio St.2d 135, 140, 364 N.E.2d 1376 (William B. Brown, J., dissenting). Notwithstanding this confusion, the rule of local government immunity became the majority rule in the American common law. *Id.*, citing, Borchard, *Government Liability in Tort* (1924), 34 Yale L.J. 1, 41-42.

The common law doctrine of sovereign immunity was adopted by Ohio in 1840, when this Court applied sovereign immunity to shield the State of Ohio from a claim brought by a Columbus bank. *State v. Franklin Bank of Columbus* (1840), 10 Ohio 91, 1840 WL 18. However, in the early portion of the nineteenth century, this Court did not follow the prevailing view by extending this immunity to political subdivisions. Rather, as recognized by one commentator:

During the period immediately following *Mower* and, indeed, throughout the early 1800's, Ohio courts favored imposition of liability on local government units. Concerned primarily with establishing a rule that promoted 'substantial justice,' Ohio courts considered municipal corporations and individuals equally responsible in tort. Justice was considered served only by spreading the losses inflicted upon private individuals through the execution of governmental activity upon everyone who had shared a benefit from such activity.

Note, *Municipal Immunity in Ohio-How Much Wrong Can a Municipality Do?* (1984), 15 U.Tol.L.Rev. 1559, 1566 [Footnotes omitted]. See also, Comment, *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity* (1986), 55 U.Cin.L.Rev. 501, 502 (the Ohio Supreme Court first introduced the doctrine of municipal sovereign immunity in 1854 and, prior to that time, courts treated Ohio municipalities the same as private individuals when imposing liability for

wrongful acts or injuries); Comment, *Can Municipal Immunity in Ohio be Resurrected from the Sewers after Haverlack v. Portage Homes, Inc.?* (1983), 13 Cap.U.L.Rev. 41, 42 (“The early Ohio cases which dealt with municipal tort liability did not recognize immunity”); Celebrezze & Hull, *The Rise and Fall of Sovereign Immunity in Ohio* (1984), 32 Cleve.St.L.Rev. 367, 367-368 (“Municipal corporations have not always been protected by sovereign immunity in Ohio. Instead, early cases held municipalities subject to action in tort as a matter of basic justice”).

Indeed, this Court has considered several cases that expressly held political subdivisions accountable for their negligent acts. *Goodloe v. Cincinnati* (1831), 4 Ohio 500, 1831 W.L. 35; *Smith v. Cincinnati* (1831), 4 Ohio 514, 1831 W.L. 36; *Rhodes v. Cleveland* (1840), 10 Ohio 159, 1840 W.L. 31; *McCombs v. Town Council of Akron* (1846), 15 Ohio 474, 1846 W.L. 120; *Town Council of Akron v. McCombs* (1849), 18 Ohio 229, 1849 W.L. 105.

In 1854, this Court changed its course. In *Dayton v. Pease* (1854), 4 Ohio St. 80, 1854 W.L. 63, this Court extended immunity to political subdivisions when it considered the liability of the City of Dayton for the collapse of a bridge. This holding appears to be in stark contradiction to its earlier decisions, wherein this Court held that “corporations are liable like individuals, for injuries done, although the act was not beyond their lawful powers.” *Rhodes*, 10 Ohio at 161. See, *Butler*, 92 Ohio St.3d at 365.

Over one hundred years after it decided *Pease*, this Court recognized that the common law doctrine of political subdivision immunity created by *Pease* could be judicially abolished. *Schenkolewski v. Cleveland Metroparks Systems* (1981), 67 Ohio St.2d 31, 426 N.E.2d 784, paragraph one of the syllabus. The following term, this Court removed the blanket of immunity that had been supplied to municipalities. *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St.3d 26, 30, 442 N.E.2d 749. This Court reasoned:

[T]he judicially created doctrine of sovereign immunity is a legal anachronism which denies recovery to injured individuals without regard to the municipality's culpability or the individual's need for compensation. Because Ohio's sovereign immunity for municipalities was judicially created it can be judicially abolished. ... *Stare decisis* alone is not a sufficient reason to retain the doctrine which serves no purpose and produces such harsh results.

Id. [citations omitted].

Although the *Haverlack* court found no justification for sovereign immunity for municipalities, this Court went on to hold:

We hold that the defense of sovereign immunity is not available, *in the absence of a statute providing immunity*, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant. A municipal corporation, *unless immune by statute*, is liable for its negligence in the performance or nonperformance of its acts.

Id. at 30, paragraph two of the syllabus [emphasis added]. In response to this statement, the General Assembly enacted the current Political Subdivision Immunity Act in 1985, R.C. Chapter 2744. 141 Ohio Laws, Part I, 1699. The Act resurrected all of the "governmental" and "proprietary" distinctions for determining immunity – distinctions that this Court previously characterized as "bramble bush." *Id.*

The statement made by this Court in *Haverlack* concerning the General Assembly's ability to provide statutory immunity to municipal corporations was not made in the context of a constitutional analysis. As recognized by Justice Douglas, "[t]hese statements, however, were made without citation to any authority and without consideration of Section 5, Article I of the Ohio Constitution." *Butler*, 92 Ohio St.3d at 367. As such, several members of this Court began questioning whether R.C. Chapter 2744 passes constitutional muster. *Garrett v. Sandusky*, 68 Ohio St.3d 139, 141-144, 1994-Ohio-485, 624 N.E.2d 704 (Pfeifer, J., concurring) (maintaining that R.C. Chapter 2744 violates the second sentence of the Ohio Constitution, Article 1, §16); *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio

St.3d 312, 331-344, 1996-Ohio-137, 662 N.E.2d 287 (Douglas, J., dissenting) (maintaining that R.C. Chapter 2744 violates the Right to Jury Trial Provision of the Ohio Constitution, Article 1, §5); *Community Ins. Co. v. Ohio Dept. of Transp.*, 92 Ohio St.3d 376, 387-388, 2001-Ohio-208, 750 N.E.2d 573 (Douglas, J., dissenting) (maintaining that R.C. Chapter 2744 violates the Right to Remedy Provision of the Ohio Constitution, Article 1, §16); *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, ¶145 (Douglas, J., concurring) (maintaining that R.C. Chapter 2744 violates both the Right to Remedy Provision of the Ohio Constitution, Article 1, §16, and the Right to Jury Trial Provision of the Ohio Constitution, Article 1, §5).

In three instances upon varying facts, this Court has considered and upheld the constitutionality of R.C. Chapter 2744. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 550 N.E.2d 181; *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 639 N.E.2d 31; *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186. However, none of these cases considered constitutional challenges brought pursuant to the Right to Jury Trial provision (Ohio Constitution Article 1, §5) or the Right to Remedy provision (Ohio Constitution, Article 1, §16) of the Ohio Constitution. Nor have any of these cases considered or whether the statutory framework of R.C. Chapter 2744 is “unreasonable or arbitrary” within the meaning of Ohio’s Due Course of Law Provision (Ohio Constitution, Article 1, §1). Finally, and perhaps most importantly, this Court has never considered whether R.C. Chapter 2477 can be constitutionally applied to children.

Perhaps the most comprehensive constitutional analysis of R.C. Chapter 2477 came from this Court in *Butler*. After a thorough discussion of the history of political subdivision immunity and the right to trial by jury in Ohio, the three justices of the *Butler* Court concluded that R.C. Chapter 2477 violated the Right to Jury Trial (Ohio Constitution Article 1,

§5) provision of the Ohio Constitution. *Butler*, 92 Ohio St.3d at 373-74. However, unlike here, the constitutionality of R.C. Chapter 2477 was not properly raised before the Court. *Id.* at 358. Thus, although very well reasoned, the plurality's pronouncement in *Butler* is dictum. *Id.* at 375 (Cook, J. concurring).

Judge Spiegel of the United States District Court of the Southern District of Ohio has read this Court's decision in *Butler* to be a clear indication that this Court will hold that R.C. Chapter 2477 is in stark contravention to the Ohio Constitution. *Kammeyer v. Sharonville* (S.D. Ohio 2003), 311 F.Supp.2d 653, 662; *Estate of Owensby v. City of Cincinnati* (S.D. Ohio 2004), 385 F.Supp.2d 619, 623; *Estate of Owensby v. City of Cincinnati* (S.D. Ohio 2004), 385 F.Supp.2d 626, 630-31. However, in the absence of a clear pronouncement from this Court, Ohio's appellate courts have been reluctant to follow Judge Spiegel's lead. *See, e.g., Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300, ¶7. This Court has not had the opportunity to consider whether R.C. Chapter 2744 violates the Right to Remedy Provision, the Right to Jury Trial Provision, or the Due Course of Law Provision of the Ohio Constitution – until now.

B. Children are unable to protect themselves from the tortious acts of others; therefore it is necessary to appreciate the special protection provided to them under the law.

Before any constitutional analysis can be undertaken regarding the rights of children in Ohio relative to political subdivision immunity, it is important to note the special protection provided for children under our laws.

It can hardly be disputed that our children are “the most vulnerable of our society[.]” *State v. Tooley*, 114 Ohio St.3d 366, 872 N.E.2d 894, 2007-Ohio-3698, ¶64 (Lundberg Stratton, J., concurring). Often, children of tender years are unable to protect themselves from harm. *Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864

N.E.2d 638, ¶¶8-9 (O'Connor, J., dissenting). Because our children cannot otherwise protect themselves, the duties that our laws place upon others provide the protection that our children require to be safe. *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, 39, 748 N.E.2d 41 (“This court has consistently held that children have a special status in tort law and that duties of care owed to children are different from duties owed to adults”); *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125, 127, 247 N.E.2d 732 (“the amount of care required to discharge a duty owed to a child of tender years is necessarily greater than that required to discharge a duty owed to an adult under the same circumstances”).

It is the law of torts that enforces the duties that keep our children from harm. “[T]ort causes of action [are] designed to provide compensation for injuries arising from the violation of legal duties, ... and thereby, of course, to deter future violations.” *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999), 526 U.S. 687, 727, 119 S.Ct. 1624, citing, *Carey v. Phipus* (1978), 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 [emphasis added]. By its deterrent effect, the law of torts provides much needed protection to our children – it compels those who owe these duties to ensure their fulfillment. Without it, in many circumstances, our children have no protection at all.

With these principles in mind, it is appropriate to scrutinize the political subdivision immunity laws that strip our children the protection they need to be safe.

C. The Fifth District Court of Appeals applied R.C. Chapter 2744 to deprive Holly Roe of her right to a trial; therefore, the “as applied” standard of review governs the disposition of this case.

The Fifth District Court of Appeals held that the application of R.C. Chapter 2744 deprives Jane and John Doe the ability to try Holly Roe’s claim before a jury. Therefore, the “as applied” standard of review governs this Court’s analysis. “Where statutes are challenged

on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts.” *Groch v. Gen. Motors Corp.*, ___ Ohio St.3d ___, 2008-Ohio-546, ___ N.E.2d ___, ¶181, quoting, *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶38. In this case, the Fifth District Court of Appeals applied R.C. §2744.02(A)(1) to prohibit a 10 year-old developmentally disabled girl from prosecuting a negligence action against a school district for injuries resulting from the failure of a bus driver to prevent a sexual assault that was committed upon her while under the supervision of the bus driver. As applied to these facts, R.C. §2744.02(A)(1) is unconstitutional.

D. Applying R.C. §2744.02(A)(1) so as to prohibit a 10 year-old girl who has been victimized by sexual assault from seeking a trial by jury against the school district who failed to stop the sexual assault violates the Right to Jury Trial Provision of the Ohio Constitution, Section 5, Article I.

It is widely recognized that political subdivision immunity is derived from the English common law principle that “the King can do no wrong.” *State, Dept. of Transp. v. Sullivan* (1988), 38 Ohio St.3d 137, 140, 527 N.E.2d 798; *Haas*, 51 Ohio St.2d at 140 (Brown, J., dissenting). In theory, the king was considered the fount of justice and equity in the English common law, and it was his personal royal prerogative not to be subjected to suit in his own courts. *Butler*, 92 Ohio St.3d 354, 358-59, citing, Borchard, *Government Liability in Tort*, 34 Yale L.J. at 4. Generally speaking, this was the exact evil the Right to the Jury Trial Provision of the Ohio Constitution was intended to preclude – it is “perceived as a means to ensure the administration of impartial justice free from imperial interference.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶120 (Cupp, J., concurring).

Section 5, Article I, of the Ohio Constitution guarantees citizens that:

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

[Emphasis added]. “This right serves as one of the most fundamental and long-standing rights in our legal system, having derived originally from the Magna Carta.” *Arbino*, 116 Ohio St.3d 460 at ¶31, *citing, Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1. “It was ‘designed to prevent government oppression and to promote the fair resolution of factual issues.’” *Id.*, *quoting, Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, ¶21. “As Thomas Jefferson stated, the right to trial by jury is ‘the only anchor, ever yet imagined by man, by which a government can be held to the principles of it’s [sic] constitution.’” *Id.*, *citing, Letter from Thomas Jefferson to Thomas Paine* (July 11, 1789), reprinted in 15 *The Papers of Thomas Jefferson* (Boyd Ed.1958) 269 [emphasis added]. When an act by the General Assembly contravenes this fundamental right, the act must fall. *Id.* at ¶¶160-61 (O’Donnell, J., dissenting in part), *quoting, Gibbs v. Girard* (1913), 88 Ohio St. 34, 43, 102 N.E. 299, paragraph two of the syllabus.

The right to a jury trial is not without its limitations – “Section 5, Article I guarantees a right to a jury trial only for those causes of action in which the right existed in the common law when Section 5 was adopted.” *Id.* at ¶32, *citing, Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, paragraph one of the syllabus. However, once the right attaches, “the right to trial by jury protects a plaintiff’s right to have a jury determine all issues of fact in his or her case.” *Id.* at ¶34, *citing, Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 1994-Ohio-38, 633 N.E.2d 504. In other words, “[a]ny law that prevents the jury from completing this task or allows another entity to substitute its own findings of fact is unconstitutional.” *Id.* at ¶35.

In this case, Jane and John Doe have asserted a negligence claim on behalf of themselves and Holly Roe against the Marlinton School District, a political subdivision. The lawsuit seeks to recover damages that have been incurred as a result of Marlinton's employee's failure to fulfill its common law and statutory duties that it owed to Holly Roe. Specifically, the Marlinton School District employee had a duty to prevent the numerous sexual assaults committed upon Holly by another student while riding in a school bus operated by the District. As explained above, and as meticulously examined in *Butler*, "a right to trial by jury in a negligence action against a *political subdivision* existed at the time the Ohio Constitution was adopted[.]" *Butler*, 92 Ohio St.3d at 372 [emphasis in original]. See, also, *Goodloe*, 4 Ohio 500; *Smith*, 4 Ohio 514; *Rhodes*, 10 Ohio 159; *McCombs I*, 15 Ohio 474; *McCombs II*, 18 Ohio 229. Thus, Jane and John Doe have a constitutionally-protected right to try their negligence action against the Marlinton School District before a jury of their peers. Applying R.C. Chapter 2744 so as to deprive Jane and John Doe this right contravenes Section 5, Article I, of the Ohio Constitution.

Clearly, R.C. Chapter 2744 does not abolish the negligence cause of action completely. Instead, R.C. Chapter 2744 precludes Holly from having a jury determination as to whether the Marlinton School District's negligence caused her harm. Section 5, Article I, of the Ohio Constitution prohibits this denial of access to a jury – "As long as the cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does." *Arbino*, 116 Ohio St.3d 468 at ¶153 (O'Donnell, J., dissenting in part), quoting, *Sofie v. Fibreboard Corp.* (1989), 112 Wash.2d 636, 652, 771 P.2d 711. The negligence cause of action continues to exist, and at the time our Constitution was adopted, it existed against a political subdivision. Thus, Section 5, Article I, of the Ohio Constitution guarantees a right to a jury trial in such a case today.

Finally, it must also be noted that applying R.C. Chapter 2477 to this case leaves Holly, a developmentally disabled child who is unable to protect herself, with no protection whatsoever. Under such a construction, the duties that our society has created for her safety cannot be enforced, stripping the most vulnerable in our society of the only protection they have. The only way to enforce these duties, and to ensure Holly is protected, is to honor her right to trial by jury. “[T]he right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege.” *Arbino*, 116 Ohio St.3d 468 at ¶139 (O’Donnell, dissenting in part), *quoting*, *Sorrell*, 69 Ohio St.3d at 421. Accordingly, R.C. Chapter 2744 is unconstitutional as applied in this case.

E. Applying R.C. §2744.02(A)(1) so as to prohibit a 10 year-old girl who has been victimized by sexual assault from seeking a trial by jury against the school district that failed to stop the sexual assault violates the Right to Remedy Provision of the Ohio Constitution, Section 16, Article I.

Application of R.C. Chapter 2744 to Jane and John Doe’s cause of action against the Marlinton School District violates the Right to Remedy Provision of the Ohio Constitution. Section 16, Article I, of the Ohio Constitution guarantees that the Ohio courts shall be open to all people, and that every person shall have a remedy for the harm inflicted upon them. Section 16, Article I, of the Ohio Constitution states:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Emphasis added].

“When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner.” *Arbino*, 116 Ohio St.3d 468 at ¶44, *quoting*, *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 47, 512 N.E.2d 626. This Court has “interpreted this provision to prohibit statutes

that effectively prevent individuals from pursuing relief for their injuries.” *Id.* “Any enactment that eliminates an individual’s right to a judgment or to a verdict properly rendered in a suit will also be unconstitutional.” *Id.*

“The right-to-a-remedy provision of Section 16, Article I does not require the analysis of rational-basis that is used to decide due process or equal protection arguments against the constitutionality of legislation.” *Hardy*, 32 Ohio St.3d at 48. Moreover, “[a] statute need not ‘completely abolish the right to open courts’ to run afoul of this section.” *Arbino*, 116 Ohio St.3d 468 at ¶145, quoting, *Sorrell*, 69 Ohio St.3d at 426, 633 N.E.2d 504. However, as with the right to a jury trial, the right to remedy embodied by Section 16, Article I is also subject to limitations – “The right-to-a-remedy provision of Section 16, Article I applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available.” *Groch*, 2008-Ohio-546, ¶15, quoting, *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 202, 551 N.E.2d 938.

As applied to this case, R.C. Chapter 2744 allows Jane and John Doe to prosecute their claims against the Marlinton School District. However, they will only be entitled to a judgment if they can successfully characterize the actions of the District within one of the exceptions set forth in R.C. §2744.02(B). More specifically, if this Court holds that failing to supervise and monitor children on a school bus is not “operation of a motor vehicle” within the meaning of R.C. §2744.02(B)(1), then the courthouse doors are forever closed, and no remedy may be had against the Marlinton School District. Thus, R.C. Chapter 2477 effectively prevents Jane and John Doe from pursuing relief for Holly’s injuries, thereby eliminating her right to judgment. Such an application of Chapter 2477 statute violates the Right to Remedy Provision of Section 16, Article I.

It must be noted that this case is unlike *Groch*, where this Court recently upheld a statute of repose in the face of a constitutional challenge based upon the Right to Remedy Provision. *Groch*, 2008-Ohio-546. In *Groch*, the claimant's cause of action failed to accrue before the statute of repose operated to bar the claim. *Id.* at ¶149. In other words, the claim was never "vested." *Id.* As discussed above, Jane and John Doe's cause of action against the Marlington Local School District *did* accrue. Because the actions of the school district's agent could not be manipulated into one of the exceptions provided for R.C. §2744.02(B), the Marlington Local School District is immune from prosecution. Thus, unlike the statute of repose in *Groch*, Jane and John Doe's claims have fully vested. Accordingly, applying R.C. Chapter 2744 to deprive Jane and John Doe's remedy against the Marlington School District fails to pass constitutional scrutiny.

Similarly, as an additional reason supporting the constitutionality of the statute of repose in *Groch*, this Court recognized that the claimant may have had other available avenues of redress, aside from the defendant which the statute of repose operated to protect. *Id.* at ¶152. *See, also, Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 468, 639 N.E.2d 425 (Moyer, C.J., concurring in part and dissenting in part) (former R.C. 2305.131 did not violate Section 16, Article I because plaintiffs had recourse through other avenues of redress). However, in this case, R.C. Chapter 2744 may leave no other defendants from whom Holly Roe can obtain redress. If it is found that the bus driver was acting in the course and scope of her employment, and did not act maliciously, R.C. § 2744.03(A)(6) acts as a bar to recovery against her as well. *See, e.g., Doe v. Jackson Local School*, 5th Dist. No. 2006CA00212, 2007-Ohio-3258, ¶¶21-48 (holding that R.C. §2744.03(A)(6) bars claim against school district employees alleging negligence in failing to prevent sexual assault during school transportation). Thus, unlike the statute at issue in *Groch*, R.C. Chapter 2744 does not apply

just to extinguish claims against certain defendants -- it extinguishes claims against *all* defendants. In other words, Holly Roe may not have "recourse through other avenues of redress." *Brennaman*, 70 Ohio St.3d at 468 (Moyer, C.J., concurring in part and dissenting in part). Thus, application of R.C. Chapter 2744 to the facts of this case violates the Right to Remedy Provision of Section 16, Article I, of the Ohio Constitution.

F. Applying R.C. §2744.02(A)(1) so as to prohibit a 10 year-old girl who has been victimized by sexual assault from seeking relief against the school district who failed to stop the sexual assault is unreasonable and arbitrary, and therefore unconstitutional as in violation of the Due Course of Law Provision of the Ohio Constitution, Article 1, Section 16.

Application of R.C. Chapter 2744 to Jane and John Doe's cause of action against the Marlinton School District violates the Due Course of Law Provision of the Ohio Constitution. Section 16, Article I of the Ohio Constitution guarantees due process of law, which requires that all legislation bear "a real and substantial relation to the public health, safety, morals, or general welfare" and not be "unreasonable or arbitrary." *Arbino*, 116 Ohio St.3d 468 at ¶149; *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, 110, 146 N.E.2d 854; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274, 503 N.E.2d 717; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 59, 514 N.E.2d 709. These substantive due process rights are essentially the same as those afforded under the Fourteenth Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 544, 38 N.E.2d 70.

As applied to the facts of this case, R.C. Chapter 2744 fails to satisfy the Due Course of Law Provision of Section 16, Article I, even under the deferential "rational basis" standard of review. Under the rational basis standard of review, a statute will be upheld only "(1) if it bears a real and substantial relation to the public health, safety, morals or general welfare of

the public[;] and (2) if it is not unreasonable or arbitrary.” *Arbino*, 116 Ohio St.3d 468 at ¶49, quoting, *Mominee*, 28 Ohio St.3d at 274. R.C. Chapter 2477 fails both of these requirements; therefore, it must be held unconstitutional.

1. Application of R.C. Chapter 2744 to this case does not bear a real and substantial relation to the public health, safety, morals or general welfare of the public.

Applying R.C. Chapter 2744 so as to provide the Marlinton Local School District immunity in this case does not bear a “real and substantial relation” to the health or safety of Ohioans, therefore it fails the first prong of the rational basis test. In order to determine whether a legislative act bears a “real and substantial relation to the public health, safety, morals or general welfare of the public,” this Court must “examine the record to determine whether there is evidence to support such a relationship.” *Arbino*, 116 Ohio St.3d 468 at ¶49, citing, *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 690, 576 N.E.2d 765. *See also, Groch*, 2008-Ohio-546, ¶157 (“In conducting this review, we must consider whether the General Assembly’s purposes in acting the legislation at issue provide adequate support to justify the statute’s effects.”)

Though the history of political subdivision immunity finds its roots in the legal maxim that “the king can do no wrong,” the General Assembly’s reason for applying R.C. Chapter 2744 to school districts is likely out of concerns for the “financial soundness” of the districts. *See, Fahnbulleh*, 73 Ohio St.3d at 668. However, while the General Assembly may have considered anecdotal evidence regarding the financial impact of R.C. Chapter 2744 on cities and towns, nowhere in the record of the proceedings surrounding the passage of R.C. Chapter 2744 is any there evidence suggesting that *school districts* require immunity in order to maintain “financial soundness.” To the contrary, it appears that there are no studies or data available suggesting that school districts will face financial ruin if they are held accountable

for negligence of their employees and agents. See, *Morris*, 61 Ohio St.3d at 690 (“We are unable to find, either in the *amici* briefs or elsewhere, any evidence to buttress the proposition that there is a rational connection”). Moreover, there is every reason to believe that insurance coverage can be secured to protect against such financial ruin. See, *Haverlack*, 2 Ohio St.3d at 30 (“A municipality is able to obtain liability insurance and is able to spread the cost among the taxpayers.”) Accordingly, as there is no evidence that demonstrates applying immunity to school districts has a connection to protecting the financial soundness of school districts, applying Chapter 2744 to give the Marlington School District immunity in this case fails the first prong of the rational basis inquiry.

2. Application of R.C. Chapter 2744 to this case is unreasonable and arbitrary.

Application of R.C. Chapter 2744 to the facts of this case also fails the second prong of the rational basis analysis, in that it is “unreasonable and arbitrary.” As a threshold matter, it is unreasonable for the General Assembly to force developmentally disabled children, who cannot protect themselves and who have been harmed by the negligent acts of a school district, to bear the burdens of their injury at the expense of the district’s “pocket book.” This Court stated:

[I]t is not competent for the Legislature to give one class of citizens legal exemption for wrongs not granted to others; and *it* is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong.

Byers v. Meridian Printing Co. (1911), 84 Ohio St. 408, 423, 95 N.E. 917, quoting *Park v. Free Press Co.* (1888), 72 Mich. 560, 40 N.W. 731 [Italics original]. “[C]onserving funds is not a viable basis for denying compensation to those entitled to it.” *State ex rel. Nyitray v. Industrial Commn. of Ohio* (1983), 2 Ohio St.3d 173, 177, 443 N.E.2d 962. Clearly, the school district is “better able to bear the cost of an injury it causes than the individual victim.”

Haverlack, 2 Ohio St.3d at 30. This is particularly true considering the persons who are denied compensation are children who are most susceptible to serious injury because of their inability to protect themselves. See, *Morris*, 61 Ohio St.3d at 691 (“it is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured[.]”) Accordingly, applying R.C. Chapter 2477 so as to deprive Holly Roe compensation for the negligent acts of the Marlinton School District is unreasonable, and therefore fails the second prong of the rational test.

R.C. Chapter 2744 fails the second prong of the rational basis test for an additional reason – its application is completely arbitrary. As discussed *supra*, political subdivision immunity was governed by the common law in this state before the enactment of R.C. Chapter 2744. Whether immunity was granted often hinged upon whether the act the political subdivision was performing could be characterized as a “proprietary” or “governmental” function. See, e.g., *Broughton v. Cleveland* (1957), 167 Ohio St. 29, 146 N.E.2d 301; *Sears v. Cincinnati* (1972), 31 Ohio St.2d 157, 285 N.E.2d 732. However, because these distinctions were completely unworkable, this Court abolished political subdivision immunity in 1982. This Court stated:

Attempts to classify municipal functions into these two categories have caused confusion and unpredictability in the law. “[T]he classification of particular functions of municipalities has been difficult and frequently leads to absurd and unjust consequences.” *Hack v. Salem* (1963), 174 Ohio St. 383, 391, 189 N.E.2d 857. Furthermore, “it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions in relation to a municipality.” *Eversole v. Columbus* (1959), 169 Ohio St. 205, 208, 158 N.E.2d 515.

Haverlack, 2 Ohio St.3d at 30. Thus, because of the arbitrariness and irreconcilability with the proprietary and governmental distinctions, common law political subdivision immunity was abolished. *Id.*

Remarkably, with the passage of the Political Subdivision Immunity Act, the General Assembly codified the “proprietary” and “governmental” functions that this Court admonished the previous term. Unsurprisingly, the unworkability of these distinctions remains, and the irreconcilability of the decisions applying them have only increased. *See, Butler*, 92 Ohio St.3d at 367-70 [cases cited therein]. This case is a prime example – how could negligently helping a developmentally disabled student from a school bus be exempted from immunity, but failing to monitor the students when they inside the school bus be shielded? *See, e.g., Groves v. Dayton Pub. Schools* (1999), 132 Ohio App.3d 566, 725 N.E.2d 724. Accordingly, as the Ohio General Assembly has failed to follow this Court’s admonishment of the governmental and propriety distinctions when it enacted R.C. Chapter 2744, the Legislature’s enactment must be declared unreasonable. Thus, R.C. Chapter 2744 violates the Due Course of Law Provision of the Ohio Constitution, Section 16, Article I.

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VII. CONCLUSION

Nearly one hundred years ago, this Court stated:

Manifestly, when the Constitution of the state declares and defines certain public policies, such public policies must be paramount, though a score of statutes conflict and a multitude of judicial decisions be to the contrary. No General Assembly is above the plain potential provisions of the Constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes and nullifies the rights declared in the Constitution.

Kentz v. Harriger (1919), 99 Ohio St. 240, 247, 124 N.E. 168, *reversed on other grounds*, *Stephenson v. McCurdy* (1931), 124 Ohio St. 117, 177 N.E. 204. Based upon the forgoing, if this Court holds that monitoring and supervising children while on a school bus does not constitute "operation of a motor vehicle" within the meaning of R.C. §2744.02(B)(1), then the Amici represented herein respectfully urge this Court to declare R.C. Chapter 2744 unconstitutional as applied to the facts of this case.

DATED: March 17, 2008

Respectfully submitted,

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A copy of the foregoing was sent by regular U.S. Mail this 17th day of March, 2008 to:

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