

IN THE SUPREME COURT OF OHIO

MARLINGTON LOCAL SCHOOL  
DISTRICT, et al.

Appellants,

v.

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

Appellees.

:  
:  
: Case No. 07-1304  
:  
: On Appeal from the Judgment Entered in  
: the Stark County Court of Appeals, Fifth  
: Appellate District  
:  
: Court of Appeals Case No. 00102  
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**APPELLEE'S MERIT BRIEF**  
**MARLINGTON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION**

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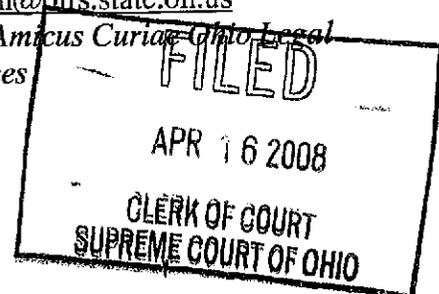
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## STATEMENT OF FACTS

### **A. Introduction**

This case involves an attempt by Appellants to give a rather straightforward statutory term a complicated and far-reaching definition in order to salvage a claim otherwise barred by Ohio's Political Subdivision Tort Liability Act (R.C. Chapter 2744). The Act was designed to protect the fiscal integrity of the state's political subdivisions and its limited exceptions should not be expanded beyond that which the General Assembly intended. Application of Appellants' proposed definition of "operation of a motor vehicle" in R.C. §2744.02(B)(1) will not only yield results that the General Assembly did not intend, but also conflicting outcomes for identical claims depending upon where the acts or omissions physically occurred. This Court should not be persuaded by emotion (as the allegations here are admittedly distressing) to interpret the statutory definition of "operation" beyond its plain and ordinary meaning or revisit its earlier pronouncements concerning the constitutionality of R.C. Chapter 2744.

### **B. Summary of Facts**

In the performance of one of its governmental duties, the Marlington Local School District Board of Education transported special education students "Holly Roe" and "Billy Boe" to and from school during the 2004-2005 school year. Bus driver Sabrina Wright transported the two students together in the afternoon during the third week of September, 2004 until mid-November, 2004, along with two other special needs students. Deposition of Sabrina Wright, pp. 7, 36, 38; Deposition of Joan Bolyard, p. 29. Roe and Boe were on the bus together for a total of just 12 minutes each day. Depo. of Wright, p. 47. In addition to the rear-view mirror that enables a bus driver to view other cars on the roadway, Wright's bus was equipped with a special rear-view mirror that is designed to enable her to view the students inside the bus even while the

vehicle is in motion. *Id.* at p. 70. Using this rear-view mirror, Wright constantly viewed the students inside the bus and never witnessed any misconduct between Boe and Roe. *Id.* at pp. 69-70.

On March 16, 2005, Roe once again rode on a bus with Boe, and this time bus aide Joan Bolyard saw Boe with his hand up Roe's dress. See, Depo. of Bolyard p. 50. Shortly thereafter, Roe told Bolyard that Boe sexually abused her when they rode together earlier in the year on Wright's bus. Depo. of Bolyard, pp. 44-45. Holly made no report of Boe's alleged conduct until March 16, 2005. See, Deposition of Jane Doe, at p. 21. Boe's conduct came as a shock to the bus driver. See, Depo. of Wright p. 68. While Boe had some issues with his temper in the past, he did not have a history of sexual misconduct. *Id.* at p. 38. In fact, Boe was described as a nice, helpful student. Depo. of Bolyard, p. 35.

Assuming Roe's allegations about Boe's horrendous conduct are true and/or that the driver "negligently supervised" the students on her bus, the Board of Education remains immune from liability under the Political Subdivision Tort Liability Act – a law this Court has previously held to be constitutional. On June 7, 2007, the Fifth District Court of Appeals agreed that the Board of Education was immune, and reversed the trial court's decision to deny the Board summary judgment. Its decision should be upheld.

## **ARGUMENT**

**Appellants' Proposition of Law No. I: A school bus driver's negligent failure to supervise and control obvious misbehavior by students on the school bus constitutes "negligent operation" of a school bus, for purposes of R.C. § 2744.02(B)(1).**

Appellants ask this Court to apply an overly-broad definition of the word "operation" contained in R.C. § 2744.02(B)(1) in order to side-step the Board's immunity in this case. Their reasoning would yield inconsistent results not intended by the General Assembly. More

importantly, neither relevant case law nor the legislative history support Appellants' quest to expand the plain and ordinary meaning of "operation" to include the driver's supervision of his or her passengers.

As a political subdivision, the Board is entitled to statutory immunity, pursuant to Revised Code Chapter 2744, unless one of the specific statutorily-created exceptions applies. Revised Code Section 2744.02(A)(1) states in pertinent part:

Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

R.C. §2744.02(A)(1). In most cases, this blanket immunity provides a complete defense to a negligence cause of action. *Turner v. Central Local School District* (1999), 85 Ohio St.3d 95, 98, 706 N.E.2d 1261, 1264. The general immunity, however, is subject to the five exceptions listed in R.C. §2744.02(B). If an exception to immunity under R.C. §2744.02(B) exists, a political subdivision may still assert the defenses and immunities of R.C. §2744.03(A). Such is the statutory framework for the "three-tiered analysis" of political subdivision immunity under R.C. Chapter 2744. *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610, 615 ("[O]nce 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.").

The issue in this case is whether the first of the five statutory exceptions applies:

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a

civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(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.

R.C. §2744.02(B) (emphasis added).

Appellants do not dispute the fact that the Board is a political subdivision providing public education or that it was engaged in a governmental function at all times pertinent to the allegations here. R.C. §2744.01(F); R.C. §2744.01(C)(2)(c). Rather, they present the fatally flawed argument that the exception in R.C. §2744.02(B)(1) should apply here because that the “operation of a motor vehicle” includes the supervision of passengers. While Appellants claim the word “operation” should be accorded its “plain, everyday meaning,” they advance a far-reaching and admittedly “broad” definition of the term that would include the “behavior management of special needs riders.”<sup>1</sup> Appellants’ Merit Brief p. 8.

In support, Appellants rely on anemic and inapplicable case law from other states as well as the Second District Court of Appeals’ decision in *Groves v. Dayton Public Schools* (1999), 132 Ohio App.3d 566, 725 N.E.2d 73 -- a case that the Fifth District Court of Appeals below has already reviewed and determined to be “distinguishable” from this case.

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<sup>1</sup> Appellants obtain this phrase not from the “plain, everyday meaning” of “operation,” or even a dictionary definition of the term. Rather, they look to bus driver training requirements listed O.A.C. § 3301-83-10. “Behavior management” is one area of training. O.A.C. § 3301-83-10(A)(3)(a). In addition, bus drivers are to be trained in the areas of “effective communication” and “public relations,” though neither is even arguably within the plain and ordinary meaning of “operation of a motor vehicle.” See O.A.C. § 3301-83-10(A)(2)(b) and (A)(3)(c).

In *Groves*, a disabled student in a wheelchair was injured while she was disembarking from a school bus. Specifically, the student alleged she was injured as a result of the bus driver's failure to secure her properly in her wheelchair on a lift. In determining whether the bus driver's conduct fell within the ambit of "operating a motor vehicle on the public roads within the scope of his employment," the Second District determined that the term "operation of any motor vehicle" was "capable of encompassing more than the mere act of driving the vehicle involved." *Groves*, 132 Ohio App.3d at 569. As such, the court found that a bus driver was "operating" a motor vehicle when helping a disabled, wheelchair-bound student disembark from a school bus. *Id.* at 570. The court reasoned that because the bus was equipped with a ramp in order to lift and lower students like *Groves*, it would not exclude the possibility that the driver's operation of the ramp could fall within the realm of operating the school bus. The *Groves* court determined that, although the term "operate" referred to more than the act of "driving," the term was still inextricably linked to the equipment on the bus and the physical movement of the bus.

The Fifth District Court below did not expressly disagree with the holding in *Groves*. It held that, regardless of whether the operation of a vehicle could encompass the operation of the vehicle wheelchair lift because it is one of the driver's responsibilities, the supervision of students is clearly a responsibility that is "separate and distinct from the operation of a motor vehicle." *Doe v. Marlinton*, 2007-Ohio-2815 ¶ 24; see also *Doe v. Jackson Local Sch. Dist.*, 2007-Ohio- 3258. While a bus driver may have certain non-driving responsibilities including the supervision of students on the bus, such duties are not an integral part of "operating" a school bus for purposes of the tort immunity exception. The plain and ordinary meaning of "operation of a motor vehicle" does not logically extend to the "behavior management of special needs

students” any more than it extends to the supervision of passengers on public transportation buses.

The *Groves* court’s decision to give a broad meaning to the term “operate” was not based on any Ohio case. Finding no Ohio decisions “on point,” the *Groves* court looked to cases outside of Ohio that found the “operation of a school bus ... [encompassed] more than the mere act of driving the vehicle involved.” *Groves*, 132 Ohio App.3d at 569. Appellants, however, neglect to point out that *Nolan v. Bronson* (1990), 185 Mich. App. 163, 460 N.W.2d 284, the Michigan case relied upon so heavily by the *Groves* court in applying the expansive view of “operation of a motor vehicle,” is no longer good law in that state. The Michigan Supreme Court concluded that the “operation of a motor vehicle encompasses activities that are directly associated with the driving of a motor vehicle,” and specifically rejected the approach used by lower courts like *Nolan*, “because their construction of ‘operation’ would construe the term so broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement.” *Chandler v. County of Muskegon* (2002), 467 Mich. 315, 652 N.W.2d 224; see also *Poppen v. Tovey* (2003), 256 Mich.App. 351, 664 N.W.2d 269 (recognizing the abrogation of *Nolan* by *Chandler*). The *Groves* decision, therefore, must be accorded little weight, given that it was based upon the rationale in *Nolan*, and, also, that the Second District moved toward a more narrow view of the term “operation” in the two cases it decided concerning school busses less than a year after deciding *Groves*: *Glover v. Dayton Public Schools* (Aug. 13. 1999), Montgomery Cty. App. No. 17601, 1999 WL 958492 and *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio. App.3d 166, 170, 738 N.E.2d 390.

In *Glover*, a child darted out in front of and was struck by a car after she had disembarked from her school bus and after the bus driver had proceeded to his next stop. The court held that the alleged improper location of a bus stop and the negligence by the driver in continuing to use a “dangerous drop-off point” did not fit within the definition of “operation of a motor vehicle” under R.C. §2744.02(B)(1). *Glover*, 1999 WL 958492 at \*4, citing *Sears v. Saul* (Feb. 19, 1999), Montgomery App. No. 17102, application for dismissal of discretionary appeal granted, 85 Ohio St.3d 1493, 710 N.E.2d 278 (holding that the act of locating and/or changing the location of the bus stop did not fit within the definition of “operation of a motor vehicle”). The *Glover* court clearly stated that the definition of “operation of a motor vehicle” must be reasonably restricted in light of this Court’s observation that the manifest purpose of R.C. Ch. 2744 is “the preservation of the fiscal integrity of political subdivisions.” *Id.* at \*6.

Likewise, in a case factually similar to this case, *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio. App.3d 166, 170, 738 N.E.2d 390, the Second District Court of Appeals declined to take the opportunity to extend the definition of “operation of a motor vehicle” to include the driver’s supervision of students. In *Doe*, a female first-grader alleged that older students sexually assaulted her on a school bus. *Id.* The *Doe* court dismissed the claims against the school board holding that the harm was caused by the intervention of an external force (i.e., the older students who committed or coerced the sexual assault) and was not caused by any employee’s negligent operation of the motor vehicle. *Id.* Appellants argue that the Second District’s opinion in *Doe* turned on the issue of proximate cause, but they fail to point out that the court used the proximate cause standard to “reconcile” its holdings in *Groves* and *Glover*. Specifically, the *Doe* court determined that the intervention of the external force meant that the harm suffered by the plaintiff was “not directly traceable to the driver’s operation of the

bus....” *Doe v. Dayton*, 137 Ohio App.3d at 172. Just as the acts of the students in *Doe* were an intervening cause of injury not traceable to the driver’s operation of the bus, so is the alleged conduct of Boe an intervening cause of harm not traceable to Wright’s operation of her bus. By comparison, as the *Doe* court held, the injury sustained by the student in *Groves* was directly traceable to the driver’s operation of the wheelchair lift on the bus. *Id.* at 171 (comparing its decision in *Glover* wherein the car that struck the plaintiff after she left the bus was also an intervening external force).

Inexplicably, Appellants mischaracterize the rationale of the Fifth District Court below by comparing its definition of “operation of a motor vehicle” to an abridged definition of “surgery” that would encompass nothing more than the act of cutting flesh and exclude all the procedures that follow. Appellants’ Merit Brief at p. 16. Their argument is illogical. A definition of “operation of a motor vehicle” comparable to that definition of surgery would be the sole act of turning the bus on and would exclude the actual driving, maneuvering, and observance of traffic signs – acts embraced within the Fifth District Court’s opinion, as well as other Ohio courts, and grounded in common sense. See e.g., *Doe v. Marlinton Local School District*, 2007-Ohio-2815 at ¶ 23-24; *Doe v. Jackson Local Sch. Dist.*, 2007-Ohio-3258 ¶ 22-23; *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio. App.3d 166, 170, 738 N.E.2d 390 (holding that the students who assaulted the plaintiff on the bus were intervening external factors, and, therefore, the injury she suffered was not traceable to the driver’s operation of the bus); *Groves v. Dayton Public Schools* (1999), 132 Ohio App.3d 566, 725 N.E.2d 73; *Glover v. Dayton Public Schools* (Aug. 13. 1999), Montgomery Cty. App. No. 17601, 1999 WL 958492 (recognizing that the definition of “operation of a motor vehicle” must be reasonably restricted in light of this Court’s observation that the manifest purpose of R.C. Ch. 2744 is the

preservation of the fiscal integrity of political subdivisions); *Day v. Middletown-Monroe City Sch. Dist.* (July 17, 2000), Butler Cty. App. No. CA99-11-186, 2000 WL 979141 (agreeing with *Glover* that the operation of a motor vehicle may encompass more than simply driving but primarily concerns the physical discharge from the bus); *Perales v. City of Toledo* (April 23, 1999), Lucas App. No. L-98-1397 (stating R.C. §2744.02(B)(1) was meant only to “apply to collisions caused by motor vehicles driven by employees of the political subdivision engaged within the scope of their employment and authority”); *Turner v. Central Local School Dist.* (Sept. 5, 1997), Wyandot App. No. 4-97-13, affirmed in part and reversed in part (1999), 85 Ohio St.3d 95, 706 N.E.2d 1261 (holding that a bus driver’s decision to alter the route taken by the school bus was “not part of the operation of a motor vehicle on the roadways”).

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

vehicle while under the influence of alcohol or drugs. Given the nature of the criminal offense, this Court reasoned that “[a] person under the influence of alcohol or any drug of abuse behind the wheel of a motor vehicle is the obvious hazard at which the statute is directed whether the vehicle is stationary or in motion.” *Id.* at 201.

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

Appellants’ reliance on *Hahn v. Village of Groveport*, 10<sup>th</sup> Dist. App. No. 07AP-27, 2007-Ohio-5559 is likewise misplaced. The *Hahn* court construed the term “operation” as it relates to swimming pools as opposed to motor vehicles, and gave the synonymous terms “operate” and “use” their plain and ordinary meanings. *Hahn* at ¶ 16. The court found that the political subdivision was entitled to immunity because the “use” of the pool for a private, after-hours swimming event constituted the “operation of a swimming pool,” thereby indicating that the village was engaged in a governmental function under R.C. §2744.01(C)(2). *Id.* at ¶ 20.

Appellants' preference for the holding in *Hahn* over the decision in *Perales v. City of Toledo* (April 23, 1999), Lucas App. No. L-98-1397 is somewhat confusing, given that the *Hahn* case involved swimming pools and a different section of R.C. Ch. 2744 whereas *Perales* involved motor vehicles under R.C. §2744.02(B)(1). The *Perales* court held that R.C. §2744.02(B)(1) was meant only to "apply to collisions caused by motor vehicles *driven* by employees of the political subdivision engaged within the scope of their employment and authority." (Emphasis added.) While Appellants contend that the "broad definition" used in *Hahn* "comports with the analysis in *Groves*," it is clear that *Perales* is the more analogous case legally and factually. More importantly, the broad definition used in *Groves* was based on an interpretation of Michigan case law that is no longer even valid in that state; therefore, the fact that *Hahn* comports with *Groves* is of no consequence. See *Chandler v. County of Muskegon* (2002), 467 Mich. 315, 652 NW2d 224; *Poppen v. Tovey* (2003), 256 Mich.App. 351, 664 N.W.2d 269.

In the absence of supportive Ohio case law, Appellants attempt to rely on cases from other states with similar political subdivision immunity laws, but plainly acknowledge that the cases "have not directly addressed the factual scenario presented here." Appellants' Merit Brief p. 12. Not one case cited by Appellants supports the expansion of the definition of "operate" they seek. In fact, the only two cases Appellants present that actually deal with school bus drivers both rejected the idea that the "operation of a motor vehicle encompasses more than, for example, the acts necessary to be performed in the movement of a motor vehicle from one place to another." *Id.* p. 13-14, quoting *Johnson v. Carthell* (Mo. 1982), 631 S.W.2d 923, 925, and citing to *White v. School Dist. of Philadelphia* (1998), 553 Pa. 214, 718 A.2d 778.

Again, notably, Appellants also failed to point out in their discussion of other jurisdictions that the Michigan Supreme Court has announced that it will not give the term

“operation” a broad construction, and, concluded instead that the “operation of a motor vehicle encompasses *activities that are directly associated with the driving of a motor vehicle.*”

*Chandler v. County of Muskegon* (2002), 467 Mich. 315, 652 NW2d 224 (emphasis added).

Thus, even the law of other jurisdictions does not support Appellants’ expansive definition of “operation.”

As the Fifth District Court of Appeals noted, the term “operation,” since it is not defined in R.C. Chapter 2744, “must be given its plain and ordinary meaning unless the legislative intent indicates otherwise.” *Doe v. Marlinton Local School District*, 2007-Ohio 2815 at ¶19. Here, there is no evidence the legislature ever intended to extend the definition of operation beyond its plain and ordinary meaning to include the “behavior management of special needs students.” To the contrary, Appellants’ proposition of law, if upheld, would produce inconsistent results never contemplated or intended by the General Assembly. For instance, there would be conflicting results between injuries occurring on a school bus and in a school classroom, such that a board of education could be liable for a driver’s negligent supervision of students while driving a bus, but not for a teacher’s negligent supervision of students in a classroom. That such a result was never intended by the General Assembly is evident from the evolution of R.C. §2744.02 itself.

For a period of time prior to April 9, 2003, the general exception to a political subdivision’s immunity under R.C. §2744.02(B)(4) did *not* contain the following emphasized language:

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 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....

See 2002 S.B. 106, effective April 9, 2003. Therefore, prior to April 9, 2003, it was possible for a plaintiff to sue a political subdivision for injury caused by an employee's negligence so long as the negligent act or omission and the injury occurred within or on the grounds of governmental buildings. That is, a school board would not necessarily be immune from, for example, a student's claim that she was injured by another student in a classroom because of a teacher's negligent supervision. The exception to immunity under R.C. §2744.02(B)(4) that existed prior to April 9, 2003, would apply, and the board's immunity could only be restored by a defense under R.C. §2744.03(A), if applicable.

For instance, in *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718 ¶ 13-16, this Court, interpreting *former* R.C. §2744.02 (B)(4), effective July 6, 2001, held that political subdivisions are not immune from liability for injuries caused by the negligence of employees within or on the grounds of a building. Specifically, this Court determined that the R.C. §2744.02(B)(4) exception would apply where a student claimed negligent supervision/retention led to assaults by a teacher. This Court was acutely aware of its responsibility to apply the law in effect at the time, stating:

We acknowledge that the General Assembly has attempted to change the language of R.C. 2744.02(B)(4). We are bound to apply the words of the law in effect at the time the alleged negligent acts occurred. The board urges us to add words to R.C. 2744.02(B)(4). We decline to rewrite the subsection to produce a different result than the words of the statute require.

*Hubbard*, at ¶ 17. Subsequently, the General Assembly's *amended* version R.C. §2744.02(B)(4) took effect. It included the restrictive language concerning "physical defects." After April 9, 2003, therefore, the R.C. §2744.02(B)(4) exception no longer applies to a negligent supervision or retention cause of action.

The allegations in this case stem from 2004 and 2005. Had the alleged injury occurred in a classroom rather than a school bus, it is clear that R.C. §2744.02(B)(4) would not apply.<sup>2</sup> At the time the General Assembly reincorporated the physical defect language into R.C. §2744.02(B)(4), the decisions in *Groves*, *Glover*, and, most importantly, *Doe v. Dayton* had already been decided. Had the General Assembly desired a broader definition of “operation of a motor vehicle” that would have included the supervision of passengers, it surely could have added one to the statute via 2002 S.B. 106. It did not. Indeed, it would have been counterintuitive for the General Assembly to expand the exception under R.C. §2744.02(B)(1) while at the same time it contracted the exception under (B)(4). With respect to the definition of “operation of a motor vehicle” in R.C. §2744.02(B)(1), this Court should “decline to rewrite the subsection to produce a different result than the words of the statute require.” *Hubbard*, at ¶ 17.

**Appellants’ Proposition of Law No. II: In a civil action for damages that does not seek declaratory or injunctive relief, the service requirements in R.C. § 2721.12(A) do not apply, even when the constitutionality of a statute is later challenged in motion practice during the pendency of the case.**

This Court has held that, as a jurisdictional requirement, a party who challenges the constitutionality of a statute must assert that claim in the complaint or initial pleading, and serve the Ohio Attorney General in accordance with the requirements set forth in the Ohio Rules of Civil Procedure. *Cicco v. Stockmaster* (2000), 89 Ohio St.3d 95, 108-09, 728 N.E.2d 106. On that basis, this Court held, in *George Shima Buick, Inc. v. Ferenca* (2001), 91 Ohio St.3d 1211, 741 N.E.2d 138, 2001-Ohio-238, that the notice requirement of R.C. §2721.12 applies to every

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<sup>2</sup> It is noteworthy that plaintiffs in Appellants’ shoes have other avenues of recovery aside from the political subdivision. Individual employees are not immune from liability where the plaintiff can show that the employee acted, for instance, outside the scope of his authority or recklessly. A plaintiff may also be able to recover from the individual who committed the battery.

party who challenges the constitutionality of a statute even if the challenge is not framed as an action for a declaratory judgment under R.C. Chapter 2721, since every challenge to the constitutionality of a statute is, in essence, a request for the court to enter a declaratory judgment. *Ferencak*, 91 Ohio St.3d at 1212; see also *In re Cameron*, 153 Ohio App.3d 687, 795 N.E.2d 707, 2003 Ohio 4304 ¶ 16.

Later, in *Cleveland Bar Assn. v. Picklo*, 96 Ohio St.3d 195, 772 N.E.2d 1187, 2002-Ohio-3995, this Court determined it had applied *Cicco* “too zealously” to *Ferencak* (which began as a small claims action to recover damages resulting from a customer’s decision to stop payment on a check for car repairs) in deciding that the trial court lacked jurisdiction to consider the constitutionality of a statute when that issue was first raised in a motion to dismiss in an ordinary civil action. See *Picklo*, at ¶ 6.

If this Court applied its decision in *Cicco* too zealously in *Ferencak*, it should not apply it too casually here. Appellants have sought to have R.C. Chapter 2744 declared facially unconstitutional *in toto*: Appellants’ third proposition of law is that “R.C. Chapter 2744 is unconstitutional under [the Ohio and U.S. Constitutions].”<sup>3</sup> There can be little doubt Appellants seek a declaratory judgment despite the fact they failed to invoke R.C. Ch. 2721 when they filed their complaint.

“A party may challenge a statute as unconstitutional either on its face or as applied to a particular set of facts.” *Oliver v. Feldner* (2002), 149 Ohio App.3d 114, 121, 776 N.E.2d 499, 2002-Ohio-3209, at ¶ 38, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 55 N.E.2d 629, paragraph four of the syllabus. Whether the court strikes the statute on its face or as

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<sup>3</sup> Appellants attempt to re-cast this proposition in the body of their Brief by claiming that only R.C. §2744.02(B)(1) is unconstitutional as applied to Roe, but the language of the proposition of law and the arguments offered in support thereof show that Appellants have challenged the chapter on its face.

applied will yield different effects. *Id.* “If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances.” *Women’s Med. Professional Corp. v. Voinovich* (6<sup>th</sup> Cir. 1997), 130 F.3d 187, 193.

Indisputably, the General Assembly determined that the Attorney General must be served when the constitutionality of a statute is being challenged pursuant to R.C. Ch. 2721. Permitting a party to avoid the service requirement by failing to invoke the declaratory judgment statute flies in the face of the General Assembly’s desire for the Attorney General’s participation in cases where the constitutionality of a statute is challenged. This is particularly true when the statute is challenged not as applied to a party or class of individuals, but on its face, because the effect is to invalidate the statute such that the state can no longer enforce it.<sup>4</sup> See *Women’s Med. Professional Corp.*, 130 F.3d at 193.

Public policy dictates that a sole party – in this case a local school district board of education – should not carry the burden of defending the General Assembly’s enactment of an entire chapter of the Revised Code dedicated to the immunity of all the state’s political subdivisions. See e.g., *Thorp v. Strigari*, 155 Ohio App.3d 245, 250, 800 N.E.2d 392, 2003-

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<sup>4</sup> By contrast, when the constitutionality of a statute is challenged only as applied to a particular party, and, therefore, the continued state-wide enforcement of the statute is not at stake, the participation of the Attorney General is not as crucial. For instance, in *Grover v. Bartsch*, 170 Ohio App.3d 188, 200, 866 N.E.2d 547, 2006 Ohio 6115 ¶ 44, the court held that the application of the tolling provision in R.C. §2305.15 to an out-of-state defendant would cause the defendant to be perpetually subject to liability in Ohio, and, therefore, that the tolling statute was unconstitutional as applied to the defendant. The *Grover* court applied this Court’s ruling in *Picklo* in overruling the plaintiff’s argument that the Attorney General had not been served, and determined that the defendant could raise the constitutionality of the statute as an affirmative defense without first serving the Attorney General. *Grover*, at ¶ 29-30. The court’s holding, however, did not invalidate R.C. §2305.15 on its face such that it could no longer be enforced.

Ohio-5954 ¶12 (recognizing the Court’s holding in *Picklo* while at the same time “*question[ing] the wisdom of adjudicating an issue affecting the financial integrity of political subdivisions without the participation of the Attorney General,*” and, ultimately, determining R.C. Ch. 2744 to be constitutional) (emphasis added). See also, *Hopkins v. Columbus Bd. of Edn.*, 2008-Ohio-1515 at ¶ 34 (holding that the plaintiff was required to raise the issue of constitutionality of R.C. Chapter 2744 in an initial pleading and serve the Attorney General).

**Appellants’ Proposition of Law No. III: R.C. Chapter 2744 is unconstitutional under the Ohio Constitution Article 1, Sections 1, 2, 5, and 16 and the 5<sup>th</sup>, 7<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, because it violates equal protection, due process, the right to a trial by jury and the right to a remedy.**

Even if Appellants’ second proposition of law were sustained, this Court has already determined that R.C. Chapter 2744 is constitutional. *Adamsky v. Buckeye Local School District* (1995), 73 Ohio St.3d 360, 362, 653 N.E.2d 212; *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186; *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 639 N.E.2d 31. Statutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision. *Fabrey*, 70 Ohio St.3d at 352, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus. “This presumption, which can be overcome only in the most extreme cases, works to protect the domain of the legislature from encroachment by the judiciary.” *Cent. Ohio Transit Auth. v. Transport Workers Union Local 208* (1988), 37 Ohio St.3d 56, 62, 524 N.E.2d 151.

In addition, a party raising a facial challenge must demonstrate that there is no set of circumstances in which the statute would be valid. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948 at ¶ 26, citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37, and *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S.Ct.

2095, 95 L.Ed.2d 697. “The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid.” *Arbino* at ¶ 26, quoting *Harrold* at ¶ 37.

Appellants cannot meet their burden here to show beyond a reasonable doubt that R.C. Chapter 2744 is unconstitutional.

**A. Revised Code Chapter 2744 does not violate Section 5, Article I of the Ohio Constitution.**

Section 5, Article I of the Ohio Constitution states that “[t]he 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.” The right, however, is not absolute. *Arbino*, at ¶ 32 (citation omitted). It does not guarantee a jury trial in all cases. *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 396, 169 N.E. 301. Rather, jury trials are guaranteed in those cases in which the right existed at the time the Constitution was adopted. *Id.* at 393, paragraph one of the syllabus; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504.

Appellants refer, in part, to the plurality decision in *Butler v. Jordan*, 92 Ohio St.3d 354, 750 N.E.2d 554 (2001), in which three justices of this Court questioned, in dicta, whether R.C. §2744.02(A) violates the Ohio Constitution. Since *Butler*, that dicta has been questioned by several courts of appeals. For instance, in *Bundy v. Five Rivers Metroparks*, 152 Ohio App.3d 426, 787 N.E.2d 1279, 2003-Ohio-1766, the Second District Court of Appeals (citing the Fourth District Court of Appeals), questioned whether the right to sue a political subdivision existed at the time the Ohio Constitution was adopted<sup>5</sup>:

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<sup>5</sup> Appellants argue that Article 5, Section I of the constitution was adopted in 1851. Section 5, Article I, however:

[I]n *Butler*, ... two reasons [were provided for the] conclusion that the right to a jury trial exists in political subdivision liability cases and should be held inviolate. First, ... five nineteenth century Ohio Supreme Court cases were cited which ‘recognized the right to recover against political subdivisions (municipal corporations) of the state for injuries inflicted on private individuals.’ 92 Ohio St.3d at 372 [750 N.E.2d 554]. Those cases include *Goodloe v. Cincinnati* (1831), 4 Ohio 500 [1831 WL 35], *Smith v. Cincinnati* (1831), 4 Ohio 514 [1831 WL 36]; *Rhodes v. Cleveland* (1840), 10 Ohio 159 [1840 WL 31]; *McCombs v. Town Council of Akron* (1846), 15 Ohio 474 [1846 WL 120]; and *Town Council of Akron v. McComb* (1849), 18 Ohio 229 [1849 WL 105]. However, even the earliest of these five cases (*Goodloe*) was decided in 1831, which is twenty-nine years after our first state constitution was adopted, and provides no discussion as to the state of the law either at time of statehood or during the period when the Ohio territory was governed by the Northwest Ordinance. (The right to jury trial in Section 5, Article I, was set out in Section 8, Article VIII of the 1802 Constitution). Thus, we question whether these cases make a compelling argument for that position. The second reason cited for holding the right to a jury trial inviolate in municipal liability cases is that the action is based on negligence and ‘negligence actions evolved from the common-law action of trespass on the case, and there is no question that the right to trial by jury existed in such actions at the time the Ohio Constitution was adopted.’ (Emphasis added.) 92 Ohio St.3d at 372 [750 N.E.2d 554]. ‘Evolved’ is the key qualifier here. While this sort of action may have evolved from an old common-law action, as did many of the legal proceedings with which we are familiar today, a question arises as to whether that necessarily means that the action existed at the time the 1802 Constitution was adopted. See *Mason v. McCoy* (1898), 58 Ohio St. 30, 55, 50 N.E. 6.

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copied §8, Article VIII, 1802 Ohio Constitution, which clarified a somewhat vague guarantee of the right to a jury trial in the Ordinance of 1787, §14, Article II. A 1912 amendment expanded the section to its present form by permitting non-unanimous verdicts in civil cases. Analogous federal provisions are found in §2, Article III, US Constitution, and the Fifth and Sixth Amendments to the US Constitution. *This section preserves the right to a jury trial in those cases to which it applied at common law at the time the 1802 Constitution was adopted. Belding v State ex rel Heifner*, 121 OS 393, 169 NE 301 (1929).

Ohio Const., § 5, Art. I, at the Editor’s note (emphasis added). Appellants cite to no authorities (other than law review articles) supporting the claim that the right to recover against political subdivisions existed in the early 1800s when the Ohio Constitution was adopted.

*Bundy*, at ¶ 46, quoting *Ratcliff v. Darby*, Scioto App. No. 02CA2832, 2002-Ohio-6626, at fn 9.

Also, in *Thompson v. Bagley*, Paulding Cty. App. No. 11-04-12, 2005-Ohio-1921, the Third

District Court of appeals stated, in its unreported decision:

[W]e disagree with the legal reasoning behind the plurality's decision in *Butler*. The [plaintiffs] fail to establish that their right to a trial by jury is guaranteed by the Ohio Constitution “even in a case where it has been held that [they] have no cause of action.” *Bundy* at ¶ 47, quoting *Winkle v. Toledo* (July 24, 1998), 6th Dist. No. L-97-1335. In ***addressing the issue of whether a statute that abolishes a cause of action violates the right to a trial by jury, the United States Supreme Court has stated that the right to a jury trial is not violated because “the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.”*** *Mountain Timber Co. v. Washington* (1917), 243 U.S. 219, 235, 37 S.Ct. 260, 61 L.Ed. 685; see, also, *Dimond v. District of Columbia* (C.A.D.C.,1986), 792 F.2d 179, 190, 253 U.S.App.D.C. 111. ***Nothing in R.C. 2744 strips a defendant of the right to a trial by jury; rather, a defendant’s entire cause of action is abrogated.”***

*Thompson* at ¶ 20 (emphasis added). Here, Appellants’ cause of action has been abrogated by the operation of one section in R.C. Chapter 2744, and, therefore, “nothing [remains] to be tried by a jury.” *Mountain Timber Co.*, 243 U.S. at 235.

The U.S. Court of Appeals for the Sixth Circuit has also stated that “the dicta in *Butler* is without even persuasive effect,” “given that the Ohio Supreme Court has concluded that § 2744.02(A) does not violate either § 5 or § 16 of Article I of the Ohio Constitution (*Fabrey v. McDonald Village Police Department*, 70 Ohio St.3d 351, 639 N.E.2d 31 (1994)), and, further, since that decision has not been overruled....” *Cabaniss v. City of Riverside* (6<sup>th</sup> Cir. 2006), 497 F.Supp.2d 862, 899. The *Cabaniss* Court went on to point out that:

[A]ll courts, state and federal, to have addressed the question in the post-*Butler* world, have rejected such constitutional challenges to Ohio’s political subdivision statute. See e.g., *Nagel v. Horner*, 162 Ohio App.3d 221, 833 N.E.2d 300 (2005); *Thompson v. Bagley*, 2005 WL 940872 (Ohio App.2005); *Bundy v. Five Rivers Metroparks*, 152 Ohio App.3d 426, 787 N.E.2d 1279 (2003); *Webb v. Greene County*, Case No.

3:04cv190 (S.D.Ohio 2006) (Rice, J.); *Swift v. Hickey*, 2006 WL 293790 (S.D.Ohio 2006) (Sargus, J.); *Samples v. Logan County*, 2006 WL 39265 (S.D.Ohio 2006) (Smith, J.); *Armstrong v. U.S. Bank*, 2005 WL 1705023 (S.D.Ohio 2005) (Dlott, J.); *Grant v. Montgomery County Job and Family Services*, 2005 WL 2211266 (S.D.Ohio 2005) (Beckwith, C.J.).

*Id.* at 899-900. See also, *Walker v. Jefferson Cty. Bd. of Commrs.*, 7th Dist. No. 02 JE 14, 2003-Ohio-3490, at ¶ 20 (noting the “spirited dissent” in *Butler* and stating that “no appellate court in this state has followed the *Butler* plurality’s opinion and found [R.C. 2744 et seq.] unconstitutional”), citing *Bundy*, 152 Ohio App.3d 426, 2003-Ohio-1766, at ¶ 45; *Ratcliff v. Darby*, 4th Dist. No. 02CA2832, 2002-Ohio-6626, at ¶ 25; and *Eischen v. Stark Cty. Bd. of Commrs.*, 5th Dist. No.2002CA00090, 2002-Ohio-7005, at ¶ 20 (other citations omitted). See also, *Shadoan v. Summit County Children Services Bd.*, 9th Dist. No. 21486, 2003-Ohio-5775, at ¶ 7, and *Spencer v. Lakeview Schl. Dist.*, 11th Dist. No.2002-T-0175, 2004-Ohio-5303, at ¶ 12.

**B. Revised Code Chapter 2744 does not violate Section 16, Article I of the Ohio Constitution.**

**1. Revised Code Chapter 2744 does not violate the general due process requirement of Section 16, Article I.**

Appellants contend that R.C. §2744.02(B) violates the Ohio Constitution on due process grounds, but cannot overcome the statute’s presumption of validity beyond a reasonable doubt. See *Fabrey*, 70 Ohio St.3d at 352. When reviewing a statute on due-process grounds, a court “must find it valid under the rational-basis test [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*, at ¶ 49 (internal quotations omitted) (citation omitted).

Appellants essentially claim there is no “rational connection between the statutory immunity and the public good to be achieved.” Appellants’ Merit Brief p. 27. The issue, however, has already been settled by this Court: “A primary purpose of R.C. Chapter 2744 is to

preserve the fiscal resources of political subdivisions.” *Fabrey*, 70 Ohio St.3d at 353, citing *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181, 182. While Appellants’ claim this purpose is not rationally related to the “health, safety, moral or general welfare of the public,” the Supreme Court of the United States “has declared that the preservation of fiscal integrity *is a valid state interest.*” *Id.* (emphasis added), citing *Shapiro v. Thompson* (1969), 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600, 614.

Further, as Appellants point out, this Court has previously upheld statutory immunity on due process grounds under the Ohio and U.S. Constitutions. *Id.* at 354, citing *Martinez v. California* (1980), 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488. Inexplicably, they also claim this Court’s decision in *Fabrey* concerning due process “is not dispositive.” Even if it were not, Appellants fail to show beyond a reasonable doubt that the statute is unconstitutional. They allege R.C. Chapter 2744, generally, and R.C. § 2744.02(B)(1), in particular, are unreasonable and arbitrary essentially because the term “operation” of a motor vehicle is not defined. Once again, they fail to accept the “plain and ordinary meaning” of the term and continue to split hairs about functions the term was clearly not designed to include. They complain the term leads to “unpredictability,” but every court decision the parties cite to on the subject essentially agree that the term “operation” includes driving and other actions related to operating the equipment and physical movement of the bus.<sup>6</sup> Regardless, some manner of

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<sup>6</sup> See, e.g., *Doe v. Marlinton Local School District*, 2007-Ohio-2815 at ¶ 23-24; *Doe v. Jackson Local Sch. Dist.*, 2007-Ohio-3258 ¶ 22-23; *Doe v. Dayton City School District Board of Education* (1999), 137 Ohio App.3d 166, 170, 738 N.E.2d 390; *Groves v. Dayton Public Schools* (1999), 132 Ohio App.3d 566, 725 N.E.2d 73; *Glover v. Dayton Public Schools* (Aug. 13, 1999), Montgomery Cty. App. No. 17601, 1999 WL 958492; *Day v. Middletown-Monroe City Sch. Dist.* (July 17, 2000), Butler Cty. App. No. CA99-11-186, 2000 WL 979141; *Perales v. City of Toledo* (April 23, 1999), Lucas App. No. L-98-1397; *Turner v. Central Local School Dist.* (Sept. 5, 1997), Wyandot App. No. 4-97-13, affirmed in part and reversed in part (1999), 85 Ohio St.3d 95, 706 N.E.2d 1261.

“unpredictability” can be presumed with respect to most lawsuits, or fewer would be filed, but some manner of “unpredictability” does not equal “arbitrariness” for due process purposes.

Appellants’ far-reaching definition of “operation” would expose political subdivisions to liability for any manner of alleged negligence so long as the incident occurred on or even near a motor vehicle. Accord, *Chandler v. County of Muskegon* (2002), 467 Mich. 315, 652 NW2d 224 (stating that the proposed construction of “operation” would “construe the term so broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement”). The General Assembly’s restriction of such exposure to the actual operation of motor vehicles is clearly rationally-related to the preservation of political subdivisions’ fiscal integrity.

**2. Revised Code Chapter 2744 does not violate Appellants’ constitutional right to a remedy or “open courts” right.**

Appellants argue that R.C. Chapter 2744 violates their right to a remedy under the 1912 amendment to Section 16, Article I of the Ohio Constitution, which provides that “[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law.”

Appellants complain that this sentence applies only to the state, not political subdivisions. They announce, without authority, that that clause of Section 16, Article I “was never intended to permit [the enactment of] a statute” such as the Political Subdivision Tort Liability Act.

Appellants’ Merit Brief p. 34. It has long been recognized, however, that a political subdivision is a “mere agent of the State” and subject to the same immunity as the state when performing a governmental function. *Bundy*, at ¶ 38, quoting *Wooster v. Arbenz* (1927), 116 Ohio St. 281, 284-285, 156 N.E. 210. Furthermore, this Court has held on two prior occasions that the provision of Section 16 at issue grants the General Assembly the constitutional authority to pass

legislation granting immunity to political subdivisions. See *Fahnbulleh*, 73 Ohio St.3d at 669; *Fabrey*, 70 Ohio St.3d at 355.

Specifically, in *Fabrey*, this Court stated that the right to sue the state was not fundamental and that the language in Section 16, Article I allowing the state to be sued was not self-executing. *Fabrey*, 70 Ohio St.3d at 354-355 (citations omitted). Further, this Court stated that “the State of Ohio is not subject to suits in tort without the consent of the General Assembly.” *Id.*

Furthermore, “at the time of the passage of the second paragraph of Section 16, Article I, the ability of citizens to sue the State was a proper subject for action by the General Assembly.” *Fabrey*, 70 Ohio St.3d at 355. Accordingly, “R.C. 2744 is an example of the legislature exercising the power given to it by Section 16, Article I to determine the parameters under which a political subdivision can be sued.” *Thompson*, at ¶ 24, citing *Fabrey*, 70 Ohio St.3d at 354-355.

### **CONCLUSION**

The language in R.C. §2744.02(B)(1) must, under general rules of statutory construction, be given its plain and ordinary meaning, such that the definition of “operation of a motor vehicle” encompasses activities directly associated with driving. Appellants fail to present any persuasive or controlling legal precedent or evidence of legislative intent to support their argument that the plain and ordinary meaning of “operation” should be expanded to include the “behavior management of special needs riders.” Appellants offer a piecemeal approach to defining the “operation of a motor vehicle,” based upon the underlying allegations; however, given that R.C. Chapter 2744 was enacted to protect the fiscal integrity of the Ohio’s political subdivisions, its limited exceptions should not be expanded beyond that which the General

Assembly intended. Clearly, the General Assembly did not intend for a broad interpretation of the language in R.C. §2744.02(B)(1) such that it would yield inconsistent results between the application of the exceptions found in R.C. §2744.02(B)(1) and (B)(4). The ordinary meaning of “operation of a motor vehicle” should not be expanded, and this Court’s previous declarations that R.C. Chapter 2744 is not unconstitutional should not be disturbed.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of this foregoing *Merit Brief of Appellee Marlinton Local School District Board of Education* was sent by ordinary U.S. mail, postage prepaid, this 16<sup>th</sup> day of April, 2008, to the following:

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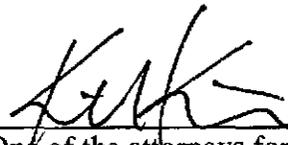
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**C**Glover v. Dayton Public Schools  
Ohio App. 2 Dist., 1999.  
Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Second District,  
Montgomery County.  
Derika GLOVER, et al. Plaintiffs-Appellants,  
v.  
DAYTON PUBLIC SCHOOLS, et al.  
Defendants-Appellees.  
No. 17601.

Aug. 13, 1999.

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OPINION

BROGAN.

\*1 This case is before us on the appeal of Derika Glover and Billie Webb from a summary judgment entered in favor of the Dayton Public Schools and Terry Johnson. The summary judgment decision was based on the Defendants' immunity from liability under R.C. Chapter 2744. According to the largely undisputed facts, Derika Glover was a kindergarten student in the Dayton Public Schools system and was transported to and from school by a Dayton Public Schools bus during the 1996-97 school year. At the time, Derika lived on the north side of McCall Street, close to the intersection of McCall and Chicahominy. This intersection is a "T" intersection, with Chicahominy forming the base of the T. McCall is a busy two-lane street and does not have a traffic signal,

crosswalk, or crossing guard at the intersection. Chicahominy does have a stop sign, for traffic entering McCall from the south.

In the morning, Derika's bus stop was on Chicahominy, at the stop sign, meaning that she had to cross McCall Street to reach the stop. During the afternoon, the bus traveled west on McCall and turned left onto Chicahominy. Derika, her brother, Nicholas, and another child were then dropped off on Chicahominy in front of an office to the Arlington Courts apartment complex. Thus, in order to get home, Derika and Nicholas again had to cross McCall, without benefit of traffic lights, crosswalk, or a crossing guard. There is no dispute that Derika's mother, Billie Webb, routinely walked her children to the bus stop in the mornings and waited for them to return in the afternoons. However, on September 20, 1996, Webb had to use the restroom at the time the bus was due. As a result, she asked her twelve year old son, Michael, to wait in her place and escort the younger children home.

On September 20, 1996, Terry Johnson was the bus driver regularly assigned to Derika's route. On that day, Johnson left school and made several stops before turning onto McCall. Johnson traveled westbound on McCall, making one stop on the north side of McCall, about a block east of Chicahominy. This stop was not at an intersection. Next, Johnson made a left turn onto Chicahominy and stopped immediately after he turned. When Johnson stopped the bus, Derika and Nicholas started to get off. At the time, school policy required kindergarten children to be kept on the bus unless a responsible adult or an older child was present. As a result, Johnson told the two children to wait because he could not see their mother. However, at that point, some girls in the back of the bus told Johnson that Derika's older brother was waiting at the corner. After confirming this with Derika, Johnson let Derika and Nicholas leave the bus. He waited until Derika and her brother reached the curb and started running toward their brother. Then, he proceeded down Chicahominy to his next stop.

At around the same time, Yvette Reed was traveling east on McCall to pick up her son from school. As Reed approached the intersection of Chicahominy and

McCall, she noticed a van parked on McCall, on the southwest corner. She did not see any children. Suddenly, a little girl darted out in front of Reed's car, and Reed was unable to stop. The little girl (Derika) was struck by Reed's front bumper and rolled into the other lane of traffic. Shortly before the accident, Webb finished using the restroom and came to the front door of her house. At that time, Webb saw Derika running into the road and also saw the car hit her daughter.

\*2 In the meantime, Johnson had reached his second stop on Chicahominy. He was then told by some of the students in the bus about the accident and immediately turned the bus around to return to the accident scene. When he arrived, he saw fire trucks coming down the road. Johnson could not see Derika, but did see Webb chasing Derika's older brother down the middle of the street, with a shoe in her hand. After the accident, Derika was taken to the hospital, where surgery was performed on her leg. Derika spent approximately two months in a partial body cast and returned to school in January, 1997. Johnson was a new bus driver who had been hired in the summer of 1996. He indicated that no one had complained to him about the route. However, Webb testified that she had called the school previously to say that she wanted the bus stop changed. Webb's call or calls had occurred from the time Webb's son, Nicholas, had been in school (Nicholas was in the first grade at the time of the accident). Webb had also talked to a bus driver, but was told that the stop was a scheduled one and could not be changed. Apparently, this conversation took place during the preceding school year, as the new bus driver (Johnson) did not recall having any conversations of this sort with anyone, and Webb did not identify Johnson as the individual to whom she had spoken.

At the time of the accident, Dayton Public Schools used a computer system for routing. This system allowed the district to define nodes for bus stops and to also define hazards. However, four lane streets were the only hazards that the district chose to designate. The system could also generate maps as well as information on each student's address, including the side of the street on which the student lived. According to the routing specialist in charge of bus routes for Dayton Public Schools in 1996, if a student lived on the north side of McCall, a stop should have been established on McCall so that the bus could signal and stop traffic on McCall. This specialist

further testified that if a child has to cross the street to get to the residence side of the street, the driver should stay stopped, with lights on, until the child crosses in front of the bus. And finally, the specialist said that dropping Derika off on Chicahominy and requiring her to cross over to the north side of McCall would violate safety regulations and requirements.

As was noted, based on these facts, the trial court granted summary judgment in favor of Johnson and the Dayton Public Schools. First, the court found that liability potentially existed under R.C. 2744.02(B)(1), which allows political subdivisions to be held liable for injury or loss to person or property caused by negligent operation of motor vehicles by employees. Although Johnson had already discharged Derika from the bus, the court concluded that the definition of "operating a motor vehicle" included the task of delivering children to their designated stops. However, despite this finding of potential liability, the court decided that the Defendants were entitled to immunity under R.C. 2744.03(B)(3), which provides certain defenses to civil actions brought against political subdivisions. In this regard, R.C. 2744.03(B)(3) indicates that:

\*3 [t]he political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

In particular, the court focused on the fact that route-planning was a matter of discretion on the part of the bus drivers and other employees. As an additional point, the court found Johnson immune because there was no evidence that he had "purposefully, willfully, or recklessly" attempted to injure Glover. See, R.C. 2444.03(B)(6)(b). Derika and Webb now appeal, raising the following single assignment of error:

I. The trial court erred as a matter of law in granting immunity to the Dayton Public Schools when it violated mandatory state requirements for the operation of buses.

I

Appellants' primary contention in support of the appeal is that establishing and operating bus stops for the school system are not discretionary acts. Appellants claim that instead, R.C. 4511.76(C), Ohio Adm.Code 3301-83-13(B), and Ohio Adm.Code 4501-3-06 (now repealed) create mandatory rules for the operation of buses. Specifically, R.C. 4511.76(C) prohibits operation of buses in violation of the rules of the department of education. Included in these rules at the time of the accident was a provision that if school bus passengers must cross the road at a point "not under the control of a traffic officer or clearly visible electric or mechanical traffic signal," the passengers are to cross the highway ten feet in front of the standing bus. Further, the bus is not to be started until all passengers are on their residence side of the road. Ohio Adm.Code 4501-3-06(E). Because these are not matters of discretion, but are mandatory, Appellants contend that the immunity defense outlined in R.C. 2744.03(B)(3) does not apply.

In response, Dayton Public Schools and Johnson make several points. First, they argue that the trial court erred in initially removing their immunity under R.C. 2444.02(B). Specifically, they claim that since Derika was safely transported to the bus stop and was discharged, her accident did not arise from Johnson's "negligent operation of a motor vehicle." They also argue that even if the trial court's definition of operating a motor vehicle is used, i.e., "the task of delivering students to their designated bus stops," Johnson did not deviate from this task. In fact, he delivered Derika precisely where he was told.

As an additional point, Dayton Public Schools and Johnson contend that statutes allowing for adoption of school bus regulations do not impose civil liability on the board of education for failing to comply with the regulations. They further claim that even if administrative regulations are applicable, the regulations allow discretion in the planning and establishment of bus stop locations. And finally, they argue that Johnson was simply complying with Ohio Adm.Code 4501-6-28, which requires drivers to use established routes and to make stops only at points designated by the school authority.

\*4 We believe the threshold inquiry is not whether the acts were mandatory or discretionary, but is instead whether an exception to immunity even applies. In this regard, we have noted on a number of occasions that

R.C. 2744.02 grants blanket immunity to political subdivisions, including school systems, subject only to the five exceptions listed in subsection (B) of the statute. See, e.g., Farra v. Dayton (1989), 62 Ohio App.3d 487, 576 N.E.2d 807, and Feitshans v. Darke County, Ohio (1996), 116 Ohio App.3d 14, 22, 686 N.E.2d 536. Consequently, R.C. 2744.03 does not provide a separate basis for liability against the school district, and is relevant only if one of the listed exceptions to immunity in R.C. 2744.02(B) has first been found to exist. 62 Ohio App.3d at 496-97, and 116 Ohio App.3d at 22. Accord, Sudnik v. Crimi (1997), 117 Ohio App.3d 394, 398-99, 690 N.E.2d 925. The Ohio Supreme Court also indicated in Wilson v. Stark Cty. Dept. of Human Serv. (1994), 70 Ohio St.3d 450, 452, 639 N.E.2d 105, that "R.C. 2744.02(A)(1) creates a broad immunity, subject to enumerated exceptions." Therefore, unless Dayton Public Schools is potentially liable under one of the exceptions to immunity in R.C. 2744.02(B)(1) through (5), the discretionary or mandatory nature of decisions about bus stop locations is irrelevant.

As we mentioned, the trial court found the school system potentially liable under R.C. 2744.02(B)(1), which states that

[e]xcept 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 upon the public roads when the employees are engaged within the scope of their employment and authority.

Previously, we have rejected an attempt to apply this exception to a school board's location of a bus stop. See, Sears v. Saul (Feb. 19, 1999), Montgomery App. No. 17102, unreported, application for dismissal of discretionary appeal granted, 85 Ohio St.3d 1493, 710 N.E.2d 278. In Sears, a pupil was killed while trying to cross a highway to reach a median strip where he and his classmates ordinarily waited for the school bus. Among the allegations in the suit were that the school board and its employee placed the bus stop at an inherently dangerous location and that they negligently, willfully, and recklessly continued to keep the stop at that location. Id. at p. 2. Because the case was essentially based on the defendants' acts of officially locating, and perhaps unofficially changing the bus stop location, we decided that the situation was

too narrowly confined to fit within liability for “operation” of a motor vehicle” under R.C. 2744.02(B)(1).*Id.* The same reasoning would apply here, as this case is based on the alleged improper location of the bus stop and the negligence or recklessness of Dayton Public Schools and Johnson in continuing to use a dangerous drop-off point.

\*5 Similarly, in Turner v. Central Local School Dist. (Sept. 5, 1997), Wyandot App. No. 4-97-13, unreported, affirmed in part and reversed in part(1999), 85 Ohio St.3d 95, 706 N.E.2d 1261, he Third District held that a bus driver's decision to alter the route taken by the school bus was “not part of the operation of a motor vehicle on the roadways.”*Id.* at p. 3. As in the present case, the driver discharged the student with no immediate problem and proceeded with her route. Based on these facts, the Third District found that the motor vehicle exception in R.C. 2744.02(B)(1) did not apply.

To the extent that Johnson's act of discharging Derika in violation of various administrative provisions and statutes is alleged to have been negligent and within the scope of “operation” of a motor vehicle, Groves v. Dayton Public Schls. (Mar. 31, 1999), Montgomery App. No. 17391, unreported, is also instructive. In Groves, we considered the definition of “operation of any motor vehicle” under Chapter 2744, and found that it could encompass more than the mere act of driving a vehicle. Specifically, we decided that operation of a wheelchair ramp and assisting wheelchair-bound students on and off a bus could be interpreted as part of the driver's operation of the bus. *Id.* at p. 3. Of note is the fact that the injuries received by the student in Groves appeared to have occurred as she was physically leaving the bus. (The reason we say “appeared” is that the case was before the court on a motion to dismiss and the facts were not fully developed.)

Some disagreement exists among various jurisdictions, and even in Ohio, about how “operation of a motor vehicle” should be interpreted for purposes of the motor vehicle exception to immunity. For example, in Perales v. City of Toledo (Apr. 23, 1999), Lucas App. No. L-98-1397, unreported, the Sixth District adopted a more restrictive interpretation than we used in Groves. First, the Sixth District discussed the ordinary meaning of the terms used in R.C. 2744.02(B)(1), and then considered the definition of

“motor vehicle” in the Ohio Revised Code. After evaluating these matters, the Sixth District agreed with the trial court that the exception was “meant to apply to collisions caused by motor vehicles driven by employees of the political subdivision engaged within the scope of their employment and authority.” *Id.* at p. 2. As a result, the court held that police officers who sat in marked cars and failed to clear a crowd by using their vehicles did not fall within the exception for negligent operation of motor vehicles. Notably, the court relied on a definition of “operation” similar to what we cited in Groves, i.e., “to work” and “to perform a function.” *Id.* at p. 3. Compare with Groves, *supra*, at p. 3. However, our approach in Groves was not to look at the ordinary meaning of the terms. Instead, we focused on how the term “operation of a motor vehicle” had been used in other jurisdictions, primarily Michigan.

\*6 Groves is consistent with a more expansive view used in other jurisdictions. See, e.g., Nolan v. Bronson (1990), 185 Mich.App. 163, 460 N.W.2d 284 (under certain circumstances, operation of a motor vehicle can occur even if a bus is not in motion), and Roberts v. Burke Cty. Schl. Dist. (1997), 267 Ga. 665, 482 S.E.2d 283 (“use” of school bus can reach beyond actual physical contact but does not include idea of remoteness). On the other hand, Perales is consistent with the restrictive view adopted by the Pennsylvania Supreme Court in White v. Schl. Dist. Of Philadelphia (1998), 553 Pa. 214, 718 A.2d 778, i.e., that the motor vehicle exception applies only to acts directed toward physically moving a vehicle.

Although Groves and Perales appear to conflict, we need not resolve the conflict for purposes of the present case. Even if we use the broader interpretation of Groves or other cases, the fact is that the injury in the present case did not occur during Derika Glover's physical discharge from the bus, or even when the bus was present. In fact, the bus was two stops away when the accident occurred. By contrast, the injury in Groves arose from the driver's actions in physically operating the lift ramp to the bus or in physically helping the student alight from the bus while the bus was still at the scene. In our opinion, the facts of the present case do not fit within the “operation of any motor vehicle,” as that term has been interpreted. Although we agree with our prior decision in Groves that “operation” can encompass more than simply driving a vehicle, we also believe that the

interpretation of this exception must be reasonably restricted, particularly in view of the Ohio Supreme Court's observation that "[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." *Wilson, supra*, 7 Ohio St.3d 450, at 453.

Furthermore, our interpretation, even when restricted, is still consistent with *Groves* and with decisions in other jurisdictions construing the term "operation of a motor vehicle" in the context of exceptions to sovereign immunity. In *Groves*, we relied on *Nolan, supra*, in which the court had said that "stopping a school bus for the purposes of discharging passengers and the bus drivers' duties attendant to the stopping of the bus unquestionably constitute operation of a motor vehicle." 460 N.W.2d at 291. Read broadly, this holding could encompass virtually any acts related to the discharge of passengers, including those alleged in the present case. However, a close reading of *Nolan* reveals that the court did not intend its holding to be interpreted so expansively. Unlike the current case, *Nolan* involved a situation in which a school child was injured while the school bus was present and was still unloading passengers. Significantly, *Nolan* explicitly relied on this fact to distinguish other Michigan decisions that had rejected the motor vehicle exception. Concerning these other decisions, the *Nolan* court said:

\*7 {they} are unlike this case in that plaintiff has alleged, and there is evidence showing, that the school bus was present at the scene of the accident discharging passengers in violation of duties imposed by statute, ordinance, and rules and regulations. We conclude that these differences bring plaintiff's allegations of negligent discharging of passengers within the motor vehicle exception.

Id.

*Cobb v. Fox* (1982), 113 Mich.App. 249, 317 N.W.2d 583, was one of the cases distinguished in *Nolan*. In *Cobb*, an eight year old child was discharged at a bus stop across from his home and was required to walk across a heavily traveled road to get to his residence. Another bus stop was located on the student's residence side of the road, but was about two blocks farther away from the student's home. Parents had petitioned the school board for a second bus stop on the student's residence side of the road (and nearer to

his house). However, the request was rejected because the superintendent felt the students could walk the extra two blocks if they wished to leave the bus on the side of their own homes. As in the present case, the mother in *Cobb* was normally present to meet her children. Unfortunately, on the day in question, the mother saw her children get off the bus and then stepped momentarily into her house. At that point, her eight year old son darted into the road and was killed by a car. By the time of the accident, the bus was at least two blocks away. 317 N.W.2d at 584-85.

Under these facts, the Michigan Court of Appeals rejected the motor vehicle exception to governmental immunity because the school bus was not present at the time and place of the accident. *Id.* at 589. Likewise, the other case distinguished in *Nolan* (*McNees v. Scholley* (1973), 46 Mich.App. 702, 208 N.W.2d 643), rejected the motor vehicle exception where a student was hit and killed by a car while waiting for the bus to arrive. Again, the concept stressed was that the vehicle must be "in a state of being at work" at the time and place the injury was inflicted before the exception could apply. 208 N.W.2d at 645.

In light of the above discussion, we find that neither the planning and implementation of bus routes nor the bus driver's alleged negligence in discharging Derika fit within the exception to immunity for operation of any motor vehicle. Accordingly, the trial court erred in finding Dayton Public Schools potentially liable under R.C. 2744.02(B)(1). However, the error was harmless because the court did ultimately grant summary judgment in favor of the school system.

The only other potential ground of liability regarding the school district is the exception in R.C. 2744.02(B)(5), which provides that:

\*8 [i]n 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 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. Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because of a general authorization in that section that a political subdivision may sue and be

sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

As we mentioned, Derika and Webb rely on this section, and contend that R.C. 4511.76(C) and various administrative regulations expressly impose liability on school districts. In this regard, R.C. 4511.76(C) provides that: "[n]o person shall operate a school bus within this state in violation of the rules of the department of education or the department of public safety." At the time of Derika's accident, the rules of the department of education included certain requirements for the operation and unloading of buses. Specifically, Ohio Adm.Code 4501-3-06 (now repealed) provided that:

The following procedures shall be adhered to in loading and unloading passengers.

\* \* \*

(D) In receiving and discharging passengers on the highway the bus shall be driven to the extreme right side of the paved or traveled portion of the roadway and brought to a full stop, with the flasher or warning lights in operation the full time that the bus remains stationary except where otherwise regulated by an incorporated municipality.

(E) Whenever a school bus stops to discharge passengers who must cross the road at a point not under the control of a traffic officer or clearly visible electrical or mechanical traffic signal, the passengers shall cross the highway at a point ten feet in front of the standing bus. The bus shall not be started until the passengers are safely on their residence side of the road.

\* \* \*

(G) The bus driver shall be the sole operator of the entrance door and shall not open the door until traffic has cleared the bus in both directions; passengers who must cross the highway to reach their destination shall cross in front of the stopped bus after the driver has verified that the warning lamps are operating and has told them it is safe to cross.

\* \* \*

(H) The door shall not be closed and the bus started

again until such passengers have reached their residence side of the road.

Further, Ohio Adm.Code 3301-83-13(B) states, in pertinent part, that:

(1) School bus stop locations shall provide for the maximum safety of pupils giving consideration to distance from residence, traffic volume, physical characteristics, visibility, and weather conditions.

(2) School bus stops shall be established on the residence side of all four-lane highways and on the residence side of other roadways posing potential hazards to students as determined by school bus owners.

\* \* \* \* \*

5) Each pupil shall be assigned a residence side designated place of safety. Driver must account for each pupil at designated place of safety before leaving. Pupils are not to proceed to their residence until the school bus has departed.

Glover and Webb contend that these provisions impose mandatory duties on the school and on bus drivers. By contrast, Dayton Public Schools and Johnson argue that these requirements do not apply when the bus route sheet instructs a driver to discharge a student onto a non-residential street to the care of a sibling. They also claim that Ohio Adm.Code 3301-83-13(B) does not impose mandatory duties, but instead gives school districts discretion to determine proper drop-off points. And finally, Dayton Public Schools and Johnson point to the fact that Ohio Adm Code 3301-83-20(B) requires bus drivers to "use the established route and make stops only at points designated by the \* \* \* administrator who is authorized to designate such stops." In this regard, they stress that Johnson complied with this regulation by following the route sheet given to him by the school district.

Again, we need not consider if the duties imposed by statute or regulation are discretionary or mandatory unless an exception to immunity applies. In Sargi v. Kent City Bd. of Edn. (6th Cir.1995), 70 F.3d 907, the Sixth Circuit Court of Appeals held that R.C. 4511.76 did not expressly impose liability for purposes of R.C. 2744.02(B)(5). Likewise, in Turner, supra, the Third District found that regulations for the operation of a

school bus did not create an exception to immunity under R.C. 2744.02(B)(5). The regulation in question in *Turner* was Ohio Adm.Code 3301-83-20, which the court interpreted as mandatory on the issue of routes and approximate times at which children could be dropped off at their homes.

Despite concluding that Ohio Adm.Code 3301-83-20 removed discretion as to route times, the Third District rejected the argument that the violation of the regulation created an immunity exception under R.C. 2744.02(B)(5). Specifically, the court reasoned that "in order to be an exception, \* \* \* the statute itself must expressly impose this liability." *Id.* at p. 3 (citation omitted). In this context, the statute the plaintiffs had relied on was R.C. 4511.99, which imposed criminal liability on school boards that did not comply with regulations for operation of school buses in non-discretionary matters. *Id.* Criminal liability, however, is not the same as civil liability for damages resulting from breach of the duty imposed by the statute.

The result in *Turner* is similar to our decision in *Farra, supra*, which rejected a claim that R.C. 163.03 expressly imposed liability for purposes of R.C. 2744.02(B)(5). 62 Ohio App.3d at 496, 576 N.E.2d 807. Notably, even though R.C. 163.03 required restitution for actual damages caused by certain actions of a political subdivision, the statute did not expressly provide for damages for the subject matter of the suit in question, i.e., intentional interference with an individual's business interests. *Id.* Consequently, we found in *Farra* that the immunity exception in R.C. 2744.02(B)(5) would not apply. Likewise, in *Colling v. Franklin Cty. Children Serv.* (1993), 89 Ohio App.3d 245, 624 N.E.2d 230, the Tenth District held that various statutes, including the prohibition against child endangerment and the wrongful death statute, did not expressly impose liability for purposes of R.C. 2744.02(B)(5). *Id.* at 253, 624 N.E.2d 230.

\*10 Most of these cases are based on difficult facts, like injury to an innocent party. For example, *Colling* involved the unfortunate drowning death of a child in the custody of the child services agency. Although the results seem harsh, we believe they are required by the immunity statute, especially when one considers the two sections of the Revised Code (R.C. 2743.02 and R.C. 5591.37), which are listed as examples of

"express imposition of liability" in R.C. 2744.02(B)(5). In this context, R.C. 2743.02 provides that "[t]he State hereby waives its immunity from liability and consents to be sued." Similarly, R.C. 5591.37 states that "[n]egligent failure to comply with section 5591.36 of the Revised Code shall render the county liable for all accidents or damages as a result of that failure." By contrast, R.C. 4511.76(C) prohibits the operation of school buses in violation of department of education rules, but does not impose civil liability for the violation. Accordingly, we conclude that R.C. 4511.76(C) does not expressly impose liability for purposes of the immunity exception in R.C. 2744.02(B)(5). Therefore, because no immunity exception applies, the trial court correctly granted summary judgment to the school district, although it did so for the wrong reasons.

As a final matter, we note that the Third District in *Turner* appears to have decided that R.C. 4511.75(E) expressly imposes liability for purposes of R.C. 2744.02(B)(5), or at least that is the only conclusion we can reach after reading the opinion. The facts in *Turner* were that a bus driver altered the usual bus route and dropped a second grade student at home about thirty minutes earlier than normal. Although the child assured the driver that he had a key to his house, this was not true. Instead, the child tried to enter the house through his bedroom window and was suffocated when the window fell. *Id.* at p. 1. In the trial court, the school district was awarded summary judgment on the basis of sovereign immunity. As we mentioned earlier, when the case was appealed, the Third District rejected the immunity exception for negligent operation of a motor vehicle, as well as the exception for liability expressly imposed by statute (the statute in question being R.C. 4511.99 and mandatory regulations for bus routes). Immediately after rejecting the latter exception, the court commented that:

[h]owever, R.C. 4511.75(E) states that "No school bus driver shall start his bus until after any child \* \* \* has reached a place of safety on his residence side of the road." Here, there is a genuine issue of fact as to whether Andrew [the second grade student] had reached a place of safety before the driver left. \* \* \* Both parties agree that if R.C. 4511.75(E) was violated, Central [the school district] would not be immune from suit. Based on the record before us, we find that a reasonable person could find that Andrew

was not left in a place of safety, thus violating R.C. 4511.75(E). Since a genuine issue of material fact exists as to whether immunity applies, summary judgment was inappropriate in this case.

\*11 *Id.* at p. 3. The court then reversed the summary judgment and remanded the case for further proceedings. Although the court did not further elaborate on its decision, the court's remarks and the result obviously imply that R.C. 4511.75(E) expressly imposes liability for purposes of the immunity exception in R.C. 2744.02(B)(5).

Subsequently, the Ohio Supreme Court reversed the Third District in part and affirmed in part. See, *Turner v. Central Local School Dist.* (1999), 85 Ohio St.3d 95, 706 N.E.2d 1261. The reversal was based on trial court error in allowing the school district to amend its answer to raise the defense of sovereign immunity. This defense was not originally pled, but was asserted only after the case had been appealed on the issue of foreseeability. After the school district lost on foreseeability in the court of appeals, the case was remanded and the school district asked for permission to amend its answer. The trial court allowed the amendment and then granted summary judgment for the school district on the basis of immunity. Another appeal was taken, which resulted in a finding by the Third District that the trial court did not abuse its discretion in allowing the amendment. However, the Ohio Supreme Court disagreed, stating that the attempt to amend was "prejudicial and untimely." *Id.* at 99, 706 N.E.2d 1261.

On the other hand, the Ohio Supreme Court agreed with the Third District that factual issues existed concerning the violation of R.C. 4511.75(E). During the discussion of this point, the court rejected the claim (made by the school district and amicus curiae, Ohio School Boards Association), that the duty imposed by R.C. 4511.75(E) ends when a pupil is discharged from the bus and reaches a place of safety on his residence side of the road. Instead, the court noted that "[a] young child being dropped off thirty minutes earlier than expected without any notification to the parents who are not in the house creates a high potential for danger." *Id.* at 101, 706 N.E.2d 1261. Accordingly, the court remanded the case for trial on the issues of common-law negligence and the relevant statutory and administrative principles that were argued below. *Id.* Although the Third District's finding

on factual issues was affirmed, the Ohio Supreme Court did not mention or consider whether R.C. 4511.75(E) expressly imposes liability for purposes of R.C. 2744.02(B)(5). The reason for the lack of discussion is that the court did not need to consider immunity exceptions. Specifically, the court had already found Chapter 2744 inapplicable due to the school district's waiver of the defense. *Id.* at 100, 706 N.E.2d 1261.

Inexplicably, neither party in our own case has raised the applicability of R.C. 4511.75(E), nor has anyone cited either decision in *Turner*. Nonetheless, we cannot ignore the issue, since it has been disclosed by our own research. After examining R.C. 4511.75(E), we believe the statute is directly relevant. As we noted above, the statute says that "[n]o school bus driver shall start his bus until after any child \* \* \* who may have alighted therefrom has reached a place of safety on his residence side of the road." Clearly, the statute imposes a duty on the driver (and thus, on the school district), to ensure that children reach a place of safety on their residence side of the road. Just as clearly, the duty was violated.

\*12 In this regard, the record indicates that Billie Webb complained both to the school and to a bus driver about the fact that her children were required to cross the highway to reach their home. Nothing was done about the situation; instead, Webb was told the route could not be changed. However, other children were dropped off on the north side of McCall, only one block east of Chicahominy, and the bus did stop in the middle of the block, where no intersection was located. Thus, the school district could possibly have prevented the accident by dropping Drika and her brother off on the north side of McCall, just short of the intersection with Chicahominy. Then, after the children were safely discharged on their residence side of the road, the bus could have made its customary left turn onto Chicahominy. However, despite these facts, R.C. 4511.75(E) cannot be used to trigger the immunity exception in R.C. 2744.02(B)(5). Just like R.C. 4511.76(C), R.C. 4511.75(E) imposes a duty, but does not provide for civil liability if the duty is violated. Therefore, while the result in this case may be unfortunate, we cannot "stretch the language" of the statute to achieve a different outcome. *Farra, supra*, 62 Ohio App.3d 487, 496, 576 N.E.2d 807.

Because none of the five exceptions in R.C.

2744.02(B) apply, Dayton Public Schools is immune from liability for the injury to Drika Glover. Accordingly, the trial court did not err in granting summary judgment in favor of the school district.

A somewhat different analysis applies with regard to Johnson's potential liability, as R.C. 2744.02(A)(2) mentions only the immunity of political subdivisions, not their employees. See, McGuinness v. Hooper (Feb. 6, 1998), Montgomery App. No. 16651, unreported. As a preliminary point, we note that the single assignment of error contained in the Appellant's brief refers only to the school district and not to Johnson, the bus driver. However, because the appeal was taken from the trial court's summary judgment decision and because Johnson's liability was discussed during the argument portion of Appellant's brief, we will consider the issue of Johnson's liability. In this regard, R.C. 2744.03 states, in pertinent part, that:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

\*\*\*

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

\*13\*\*\*

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) 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 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

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

(c) Liability is expressly imposed upon the employee by a section of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

As we mentioned earlier, the trial court found the school district immune under R.C. 2744.02(A)(3) because the district's acts in planning and establishing routes were discretionary. However, we do not reach that issue because we have previously found the district immune under R.C. 2744.02(A). The trial court also found that Johnson was not liable because there was no evidence that Johnson acted outside the scope of his employment or that he acted recklessly or maliciously. Although the court did not specifically cite R.C. 2744.03(A)(6), the court used terms from that section of the statute in rejecting the claims against Johnson. As a result, we believe the court relied on this section. We also believe the trial court's findings were correct. First of all, the immunity exception in R.C. 2744.03(A)(6)(a) is inapplicable because Johnson was clearly acting within the scope of his responsibilities as a bus driver. Second, even if Johnson's conduct may have been negligent, there is no simply no evidence that his actions were done with malicious purpose, were in bad faith, or were wanton or reckless. In particular, Johnson drove the route as assigned by the school district and released Drika into the care of her older brother, as required by school policy. Although the administrative rules and statutes may have required discharge at a different point, the record is devoid of any evidence that Johnson knew of these requirements and disregarded them.

Consequently, the exception to immunity in R.C. 2744.03(A)(6)(b) is inapplicable as well.

Finally, R.C. 2744.03(A)(6)(c) provides an immunity exception virtually identical to the one found in R.C. 2744.02(B)(5), i.e., employees are immune unless liability is expressly imposed by a section of the Revised Code. For the reasons previously mentioned in connection with the school district's liability under R.C. 2744.02(B)(5), we find that neither R.C. 4511.76(C) nor R.C. 4511.75(E) expressly imposes liability on school employees. Accordingly, the immunity exception in R.C. 2744.03(A)(6)(c) is also inapplicable to Johnson.

\*14 Because none of the immunity exceptions in R.C. 2744.03(A)(6) apply, Johnson is not subject to individual liability for the injury to Derika Glover. Therefore, the trial court correctly granted summary judgment in Johnson's favor.

Based on the preceding discussion, the single assignment of error is overruled and the judgment of the trial court is affirmed.

**YOUNG, J., concurs. GRADY, P.J. dissenting and concurring:**

I find no error in the trial court's holding that the school bus driver's alleged negligence in allowing a very young child to alight from the bus under these circumstances is not subject to the R.C. 2744.02(B)(1) exception to liability.

"The negligent operation of any motor vehicle" is not limited by R.C. 2744.02(B)(1) to negligence in the manner in which the vehicle is actually driven. Rather, the negligence involved reasonably includes any act or omission of an employee of a political subdivision that occurs while the employee is using a motor vehicle on the public roads, highways, or streets to perform duties he or she has been assigned and from which the plaintiff's injuries proximately result.

We have previously held that "operating any motor vehicle" includes a school bus driver's alleged negligence in assisting a student passenger off the bus. Groves v. Dayton Public Schools (March 31, 1999), Montgomery App.No. 17391, unreported. The same considerations reasonably apply to a driver's conduct in allowing a very young child off the bus. I am not persuaded that either Sears v. Saul (February 19,

1999), Montgomery App. No. 17102, unreported, which involved a board's designation of a school bus stop, or Turner v. Central Local School Dist. (Sept. 5, 1997), Wyandot App. No. 4-97-13, unreported, which involved a school bus driver's variance from a prescribed route, offer any support for our decision.

Nevertheless, I agree with Judge Brogan that the school district's liability for the driver's alleged negligence is barred by R.C. 2744.03(A)(3). That section states:

The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

There is evidence, which is undisputed, that an adopted policy of the school board permitted drivers to allow very young children to alight from a school bus in these circumstances into the care of either an adult or a responsible older sibling. The driver's decision to allow Derika Glover to alight from the bus into the care of her older brother was an exercise of the discretion reposed in him by the board with respect to his "enforcement" of the board's policy. Therefore, the board is immune from any liability resulting from negligence on the part of the driver in his exercise of that discretion.

\*15 Further, the driver himself is immune from liability for his alleged negligence pursuant to R.C. 2744.03(A)(6). His alleged acts or omissions were within the scope of his official duties. Reasonable minds could not find that his alleged acts or omissions were committed with a malicious purpose, in bad faith, or in a wanton or reckless manner. And, liability is not expressly imposed upon the driver for them by another section of the Revised Code.

I would affirm the judgment of the trial court on the foregoing basis.

Ohio App. 2 Dist., 1999.  
Glover v. Dayton Public Schools  
Not Reported in N.E.2d, 1999 WL 958492 (Ohio App. 2 Dist.)

Not Reported in N.E.2d  
Not Reported in N.E.2d, 1999 WL 958492 (Ohio App. 2 Dist.)  
(Cite as: Not Reported in N.E.2d, 1999 WL 958492)

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**H**Sears v. Saul

Ohio App. 2 Dist., 1999.

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Second District,  
Montgomery County.  
Melinda L. SEARS, et al., Plaintiff-Appellees,  
v.  
Mary SAUL, et al., Defendant-Appellants.  
No. CA17102.

Feb. 19, 1999.

Richard M. Hunt, Hunt, Skilken, Wehner & Replogle,  
Atty. Reg. # 0005486, Dayton, OH, Louis I. Hoffman,  
Flanagan, Lieberman, Hoffman & Swaim, Atty. Reg.  
# 0029039, Dayton, OH, for Plaintiff-Appellees.  
Nicholas E. Subashi, Atty. Reg. # 0033953, and David  
J. Arens, Atty. Reg. # 0066959, Dayton, OH, for  
Defendant-Appellants.

OPINION

KERNS.<sup>FN\*</sup>

<sup>FN\*</sup> Hon. Joseph D. Kerns, Retired from the  
Court of Appeals, Second Appellate District,  
Sitting by Assignment of the Chief Justice of  
the Supreme Court of Ohio.

\*1 This is a wrongful death action. On May 19, 1994,  
at about 8:00 a.m., the decedent, Terry Bell, Jr., who  
was five years old, was being taken to a bus stop by his  
grandmother, Sheila Isaacs, in a Ford Ranger pick-up  
truck. Mrs. Isaacs parked the truck along the west side  
of the southbound lane of Voyager Boulevard, after  
which Terry left the vehicle and attempted to cross the  
southbound traffic lane in order to get to a median  
strip where he and his classmates ordinarily waited for  
the New Lebanon School bus. As Terry walked across  
Voyager, he was fatally struck by a Jefferson  
Township School bus being driven by Betty Rabold.

The plaintiff, Melinda L. Sears, as Administratrix of  
the Estate of Terry J. Bell, commenced this action in  
the Court of Common Pleas of Montgomery County  
against the defendants, Mary Saul, New Lebanon  
School District, and Sheila Isaacs. Thereafter, New  
Lebanon and its bus driver, Mary Saul, filed  
cross-claims against Sheila Isaacs, as well as a  
third-party complaint against Jefferson Township  
Local School District and Betty Rabold.

Subsequently, the plaintiffs settled their claims with  
Isaacs, Rabold, and Jefferson Township, after which  
they moved for summary judgment on the  
cross-claims asserted by Mary Saul and New  
Lebanon. Such motions for summary judgment were  
sustained by the Common Pleas Court, but such  
rulings of the trial court are not at issue in this appeal.

Rather, this appeal is directed to a motion for  
summary judgment filed by Mary Saul and New  
Lebanon, which was based, among other things, upon  
statutory immunity. In a decision entered on February  
25, 1998, the trial court overruled the motion, after  
which Saul and New Lebanon immediately appealed  
to this court under R.C. 2744.02(C).

At that point, this court issued an order to the  
appellants to show cause as to the immediate  
appealability of the order overruling the motion for  
summary judgment, and after considering the  
response of Saul and New Lebanon, this court  
rendered a decision on July 10, 1998 allowing the  
appeal to proceed. However, in recognizing the  
jurisdiction of this court, the decision stated as  
follows:

"As a threshold matter, we must clarify that this  
court's question of whether the amendment to R.C.  
2744.02 applies to the order under appeal only relates  
to the portion of the trial court's order regarding the  
denial of summary judgment based on immunity. The  
portions of the order denying summary judgment  
based on the finding of a question of material fact  
relating to duty and proximate cause are not final  
appealable orders and will not be reviewed by this  
court on appeal until after the final resolution of the  
case."

This being the state of the record, the only issue presently before the court is whether the defendants, Mary Saul and New Lebanon School District, are immune from liability under the facts of this case. And with particular reference to the misconduct alleged by the plaintiffs against these defendants, the complaint filed in the action provides as follows:

\*2 "Plaintiff, Melinda L. Sears, further states that defendant, New Lebanon School District, and defendant, Mary Saul, placed the bus stop, which was located at the intersection of Voyager Road and State Route 35 at the mouth of the intersection, in this innately dangerous position in the roadway. Defendants, New Lebanon School District and Mary Saul, knew of this dangerous bus stop and negligently, recklessly, willfully, and wantonly continued to have the bus stop at this location mandating the minor children to walk in the street in order to enter the bus in violation of the laws of the State of Ohio."

At the outset, we note that the decision of the trial court, as well as the briefs of the parties, raise some question as to the applicability of R.C. 2744.02(B)(1), but nothing appears in either the pleadings or the evidence to suggest that the alleged misconduct of either Ms. Saul or New Lebanon was traceable to "the negligent operation of any motor vehicle." On the contrary, the case against these defendants was based essentially upon the location of the bus stop as officially established by New Lebanon, and/or the possibility that the location of the bus stop was unofficially changed by Mary Saul with the knowledge of her employer. The facts of this case are too narrowly confined, therefore, to embrace the "operation" of a motor vehicle. See, Turner v. Central Local School District (Sept. 5, 1997), Wyandot App. No. 4-97-13, unreported. Hence, this summary judgment proceeding turns entirely upon the applicability of R.C. 2744.03(A)(6)(b), as found by the trial court, which creates liability where "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

In this regard, it is manifest that the acts of the defendants were not prompted by any malicious purpose, bad faith, or wantonness, but the trial court expressly found that "reasonable jurors could conclude that Saul was reckless in choosing where to

pick up students." And while the evidence upon this issue is somewhat sketchy and uncertain, this court, after construing the evidence most favorably to the plaintiffs, is inclined to agree with the observation of the Common Pleas Court. Indeed, under the circumstances of this case, recklessness derives some of its meaning from the unusual care and caution required in choosing a bus stop for children of tender years.

Upon the present record, therefore, the judgment of the trial court upon the issue of immunity is *Affirmed*, and the cause *Remanded* to the Common Pleas Court for an orderly appeal of the entire case.

WOLFF and FAIN, JJ., concur.

Ohio App. 2 Dist., 1999.

Sears v. Saul

Not Reported in N.E.2d, 1999 WL 76705 (Ohio App. 2 Dist.)

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**H**Day v. Middletown-Monroe City School Dist. Bd. of Educ.  
 Ohio App. 12 Dist.,2000.  
 Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Twelfth District, Butler  
 County.  
 Linda O. DAY, et al., Plaintiffs-Appellees,  
 v.  
 MIDDLETOWN-MONROE CITY SCHOOL  
 DISTRICT, et al., Defendants-Appellants.  
 No. CA99-11-186.

July 17, 2000.

Waite, Schneider, Bayless & Chesley Co., L.P.A., D. Arthur Rabourn, Cincinnati, OH, For Plaintiffs-Appellees.  
 Law Offices of Nicholas E. Subashi, Nicholas E. Subashi, David J. Arens, Dayton, OH, For Defendants-Appellants.  
 Frost & Jacobs, Donald L. Crain, Thomas B. Allen, Middletown, OH, For Defendants-Appellants.

*ON RECONSIDERATION OPINION*

YOUNG.

\*1 Defendant-appellant, Middletown-Monroe City School District Board of Education ("Board"), has filed a motion for reconsideration contending that this court erred in concluding that the Board was not immune from suit for injuries sustained by plaintiff-appellee, Linda O. Day's, daughter, Nicole Lynn Day. The Board's motion has merit, and the motion is granted.

Nicole was a sixteen-year-old student at Garfield School, located in the Middletown-Monroe City School District ("District") and operated by the Board. On March 17, 1997, Nicole was transported by bus from school to home. The school bus dropped her off near 550 North University Boulevard in Middletown,

Ohio. Walking home, Nicole crossed a set of railroad tracks. While crossing the tracks, she was struck by a freight train. Nicole suffered serious injuries and is presently in a coma.

Linda filed a complaint against the Board, the District, and a John Doe company, the bus company which transported children on behalf of the Board and District. Linda later filed an amended complaint against the original defendants as well as a John Doe employee, the bus driver who had dropped off Nicole. The Board and District filed an amended answer and a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6),<sup>FN1</sup> asserting immunity from suit pursuant to R.C. Chapter 2744. Linda filed a memorandum in opposition to the motion to dismiss.

FN1.Civ.R. 12(B) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: \*  
 \* \* (6) failure to state a claim upon which relief can be granted[.]

The trial court granted the motion to dismiss as to the District but denied the motion as to the Board. The trial court

found that the District is a territorial area, not a legal entity subject to suit. Presuming that all of the factual allegations in Linda's complaint were true and making all reasonable inferences in her favor, the trial court found that it "must assume that the alleged exceptions to immunity are true as alleged in the Complaint."The Board was precluded from asserting immunity for purposes of the motion to dismiss.

On appeal by the Board, this court found that the Board was immune from suit for its decision as to locating the bus stop, following the rationale of Griner v. Minster Bd. of Edn.(1998), 128 Ohio App.3d 425, 715 N.E.2d 226.Day I at 7. However, we found that

the bus driver, as an employee of the Board, was performing a proprietary function when dropping off Nicole at the assigned bus stop. Day v. Middletown-Monroe City School District (May 1, 2000), Butler App. No. CA99-11-186, unreported, at 7 (“Day I”). This court found an exception to immunity to be applicable because Linda's complaint included sufficient allegations to support a theory of negligence by the bus driver by not assuring Nicole's safety. *Id.* at 11. The trial court's decision was affirmed. In its original appeal, and in its motion for reconsideration, the Board raises a single assignment of error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE BOARD OF EDUCATION BY OVERRULING ITS CIV.R. 12(B)(6) MOTION TO DISMISS PLAINTIFFS-APPELLEES' SECOND AMENDED COMPLAINT.

\*2 A motion for reconsideration may be granted where the motion calls to the court's attention an obvious error in its decision or raises an issue for consideration which was either not previously considered or not fully considered when it should have been. Grabill v. Worthington Industries, Inc. (1993), 91 Ohio App.3d 469, 471, 632 N.E.2d 997. In its motion, the Board contends that this court incorrectly determined that the actions of the bus driver concerned a proprietary function of the board. The Board asserts that all acts of the Board and its employees in transporting students concern a governmental function.

In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6), “it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” O'Brien v. Univ. Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. A complaint should not be dismissed merely because its factual allegations do not support the legal theory on which the plaintiff relies. The court must examine the complaint to determine if the allegations provide for relief on any possible theory. Fahbulleh v. Strahan (1995), 73 Ohio St.3d 666, 667, 653 N.E.2d 1186. The court must presume that all factual allegations in the complaint are true and construe all inferences that may be reasonably drawn therefrom in favor of the nonmoving party. Bridges v. Natl. Eng. & Contracting Co. (1990), 49 Ohio St.3d 108, 112, 551 N.E.2d 163.

When reviewing the complaint, it must be remembered that consistent with notice pleading, Civ.R. 8(A)(1) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Leitchman v. WLW Jacor Communications, Inc. (1994), 92 Ohio App.3d 232, 234, 634 N.E.2d 697. It is easy for the pleader to satisfy the requirements of Civ.R. 8(A), and few complaints are subject to dismissal. *Id.*, citing Slife v. Kundtz Properties, Inc. (1974), 40 Ohio App.2d 179, 182, 318 N.E.2d 557. This is so even where the court doubts that the nonmoving party will prevail at trial. *Id.*

The doctrine of sovereign immunity is preserved for government subdivisions in R.C. 2744.02(A)(1), by which a political subdivision

is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

The Board is a political subdivision subject to R.C. Chapter 2744. R.C. 2744.01(C)(2)(c) and (F).

\*3 Analysis of immunity claims on behalf of political subdivisions requires a specific analysis under R.C. Chapter 2744. It must first be determined whether the action undertaken by the political subdivision is governmental or proprietary in nature, as such functions are respectively defined in R.C. 2744.01(C) and (G). The political subdivision is granted immunity for any injury arising out of its action, unless an exception to immunity, contained in R.C. 2744.02(B), is applicable. R.C. 2744.02(A)(1). Should one of the exceptions to immunity be applicable, the court must then look to R.C. 2744.03, which provides to the political subdivision and its employees certain defenses and immunities to liability. R.C. 2744.03(A).

R.C. 2744.01(C)(2) lists specific governmental functions. Although the provision of a system of public education is a listed governmental function, R.C. 2744.01(C)(2)(c), the transportation of students is not a listed governmental function. General definitions for determining if an unlisted activity constitutes a governmental function are established by R.C. 2744.01(C)(1):

“Governmental function” means a function of a

political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

- (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
- (b) A function that is for the common good of all citizens of the state;
- (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

The decision of the Board to undertake transporting students and assign bus stops is unquestionably a governmental function, as that decision directly relates to the provision of a system of public education. *Day I* at 7, citing *Griner v. Minster Bd. of Edn.* (1998), 128 Ohio App.3d 425, 433-434, 715 N.E.2d 226, discretionary appeal not allowed, 83 Ohio St. 1464. However, as noted by this court, not every activity incidental to operating a school district is a governmental function. *Day I* at 7, fn. 2.

The Board correctly points out that the test distinguishing between discretionary and ministerial functions of political subdivisions set forth in *Tinkham v. Groveport-Madison Local School Dist.* (1991), 77 Ohio App.3d 242, 251-252, 602 N.E.2d 256, jurisdictional motion overruled (1992), 63 Ohio St.3d 1441, 589 N.E.2d 45, as quoted from *Enghauser Mfg. Co. v. Erickson Eng., Ltd.* (1983), 6 Ohio St.3d 31, 451 N.E.2d 228, paragraph two of the syllabus, is no longer the governing test when determining if a political subdivision is immune from civil suit. Although the enactment of R.C. Chapter 2744 abrogated the *Enghauser* test in favor of statutory definitions of governmental and proprietary functions, the former distinction is still be useful under certain circumstances when determining whether certain sections of R.C. Chapter 2744 are applicable. See *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 707 N.E.2d 868, and *Carpenter v. Scherer-Mountain Ins. Agency* (Oct. 19, 1999), Lawrence App. No. 98CA39, unreported, appeal dismissed (2000), 88 Ohio St.3d 1424, 723 N.E.2d

1113. Nonetheless, a full consideration of R.C. 2744.01(C)(1) compels the conclusion that transporting and dropping off students such as Nicole meets the definition of a governmental function.

Transporting students is part of providing a system of public education. R.C. 3327.01 mandates transportation be provided by city, local, and exempted village school districts for all resident students in grades kindergarten through eight who live within a specified distance from their assigned school. R.C. 3327.01 leaves to the discretion of the district board of education whether there will be provided transportation for students in grades nine through twelve. Any nongovernmental entity which seeks to transport students by school bus must first be licensed by the department of public safety. R.C. 4511.763.

\*4 The relationship between the state and school districts is instructive in determining that transporting and dropping off students is a governmental function. Section 2, Article VI, Ohio Constitution requires that the "general assembly shall make such provisions \* \* \* as \* \* \* will secure a thorough and efficient system of common schools throughout the state[.]" The state board of education and superintendent of public instruction are established by the Ohio Constitution, with their respective powers prescribed by law. Section 4, Article VI, Ohio Constitution. The board of education is given the primary authority to generally supervise Ohio's system of public education. R.C. 3301.07. The department of education is "the administrative unit and organization through which the policies, directives, and powers of the state board of education and the duties of the superintendent of public instruction are administered by such superintendent as executive officer of the board." R.C. 3301.13.

The department of education classifies and charters school districts. R.C. 3301.16. The local boards of education manage and control the public schools within their respective districts, R.C. 3313.47, but the district boards' powers are limited to the extent that those powers are clearly and distinctly granted. *State ex rel. Clarke v. Cooke* (1916), 103 Ohio St. 465, 134 N.E. 655, paragraph two of the syllabus. The district boards of education are heavily regulated by the Revised Code, see R.C. Chapter 3313, and by the department of education. See Ohio Adm.Code Chapter 3301.

A state-wide system of public education is an obligation of sovereignty imposed upon the state by the Ohio Constitution. DeRolph v. State (1997), 78 Ohio St.3d 193, 203-204, 677 N.E.2d 733. Transporting students is a necessary part of providing a system of public education, with local school boards having the responsibility to transport students. R.C. 3327.01. The transportation of students is itself heavily regulated. See Ohio Adm.Code Chapter 3301-83. Where a nongovernmental entity seeks to transport students, it may do so only with the state's license. R.C. 4511.763. As a necessary part of a public system of education, the transportation of students is a function imposed upon the state and school districts as an attribute of sovereignty. The Board chose to provide transportation to older students. Under such circumstances, the transportation of students is a governmental function. R.C. 2744.01(C)-(1)(a).

The transportation of students also meets the definition of a governmental function in R.C. 2744.01(C)(1)(b). As outlined above, a district board of education, although the governing body within its respective district, is regulated by and answerable to state authorities. The district boards are local actors within a state-wide scheme of public education.

\*5 In this respect, the observations of the Texas Court of Appeals regarding the structure of the Texas public education system provide parallel insight into the functioning of Ohio's system of public education:

As a general rule, activities which are carried on pursuant to the State's obligation for the general welfare of the public generally, or which are voluntarily assumed for the benefit of the public at large rather than for the primary benefit of its residents, are performed in a governmental function; activities which are performed primarily for the benefit of the inhabitants of the affected entity or agency are proprietary in nature. A school district is an integral part of the statewide public school system, and its activities, even though performed within the territorial limits of the district, do not render the activity local in nature. Such activities are performed for the benefit of all people in the state, and, therefore, are governmental functions. \* \* \* The purpose for which the school district is created is purely governmental, and when carrying out the functions for which it was created, it could only act as an agent of

the state. A school district's supervising and control of its students, school facilities, school activities, and school grounds are governmental functions. (Citations omitted).

Heyer v. North East Indep. School Dist. (1987), 730 S.W.2d 130, 133. The Supreme Court of Ohio recognizes that the provision of an efficient system of public education is "expressly made a purpose, not local, not municipal, but state-wide." DeRolph, 78 Ohio St.3d at 203, 677 N.E.2d 733, quoting Miller v. Korns (1923), 107 Ohio St. 287, 297-298, 140 N.E. 773. The provision of a system of public education and those functions necessarily related to that system of public education are done for the common good and are governmental functions. R.C. 2744.01(C)-(2)(b).

The transportation of students also meets the definition of a governmental function in R.C. 2744.01(C)(1)(c). The transportation of students promotes the health, safety, and welfare of the students, which serves the public health, safety, and welfare. See Heyer, 730 S.W.2d at 133. The transportation of students is not specified in R.C. 2744.01(G)(2) as a proprietary function. It is not an activity normally undertaken by nongovernmental persons. Although parents may transport their own children, and by agreement may transport other children by carpool, these parents are transporting the children for the benefit of those specific children, not the children of the district or the state as a whole.

In Smith v. Cleveland (Apr. 27, 1995), Cuyahoga App. No. CV-243585, unreported, 1995 WL 248405, the plaintiffs contended that the provision of school crossing guards by the city of Cleveland was a proprietary function. The plaintiffs argued in part that the crossing guards performed the same function as parents, because "parents routinely help small children to safely cross the street[.]" *Id.* at \*3. The court disagreed, stating that "parents customarily assist their own children to safely cross the street. They do not normally present themselves at school crosswalks to help any child either safely arrive or leave a school. This is not an activity normally engaged in by nongovernmental persons." *Id.* at \*4. (Emphasis added.) Providing transportation for students is analogous. Only the Board, or an entity acting at the behest of the Board and licensed by the state, provides transportation available for all students. The transportation of students meets all of the

requirements of R.C. 274.01(C)(1)(c).

\*6 Because the transportation of students is a governmental function of the Board, the Board is immune from suit for injuries arising out of this function, unless one of the R.C. 2744.02(B) exceptions to immunity applies. R.C. 2744.02(A)(1). R.C. 2744.02(B) provides, in relevant part:

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

(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 upon the public roads when the employees are engaged within the scope of their employment and authority. \* \* \*

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

\* \* \*

(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 liability is expressly imposed upon the political subdivision by a section of the Revised Code \* \* \*. Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because of a general authorization in that section that a political subdivision may sue or be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision. R.C. 2744.02(B)(2) is inapplicable, because it applies only to proprietary, not governmental, functions. We therefore determine if either R.C. 2744.02(B)(1) or (5)

removes the Board's immunity.

\*7 Whether the action of dropping off a student at a school bus stop constitutes "negligent operation of any motor vehicle" as included in R.C. 2744.02(B)(1) was extensively addressed in Glover v. Dayton Public Schools (Aug. 13, 1999), Montgomery App. No. 17601, unreported, 1999 WL 958492. That case held that the exception was not available where the plaintiff's claim was "based on the alleged improper location of the bus stop and the negligence or recklessness of [the school district] and [the bus driver] in continuing to use a dangerous drop-off point." *Id.* at \*4. Although "operation of any motor vehicle" may encompass more than simply driving the vehicle, the term primarily concerns the "physical discharge from the bus" of the child. *Id.* at \*6. Within this definition is included those situations in which a lift ramp is used to aid children in boarding and leaving the bus, Groves v. Dayton Public Schls. (Mar. 31, 1999), Montgomery App. No. 17391, unreported, or where the school bus remains present and is still unloading other passengers. Glover, citing Nolan v. Bronson (1990), 185 Mich.App. 163, 460 N.W.2d 284.

Linda's complaint contains no allegation that the bus was present when Nicole was struck by the freight train. Without such an allegation, there is no legal basis for asserting that Nicole's injuries resulted from the "operation of any motor vehicle." Neither "the planning and implementation of bus routes nor the bus driver's alleged negligence in discharging [Nicole] fit within the [R.C. 2744.02(B)(1)] exception to immunity for operation of any motor vehicle." Glover at \*7.

We next consider whether the Board is liable pursuant to R.C. 2744.02(B)(5) because the school bus driver allegedly violated a duty imposed by R.C. 4511.75. R.C. 4522.75(E) provides:

No school bus driver shall start the driver's bus until after any child \* \* \* who may have alighted therefrom has reached a place of safety on the child's or person's residence side of the road.

Violation of R.C. 4511.75(E) is a strict liability criminal offense. Middletown v. Campbell (1990), 69 Ohio App.3d 411, 416-417, 590 N.E.2d 1301, appeal dismissed (1991), 58 Ohio St.3d 713, 570 N.E.2d 277.

Violation of this section may be used in establishing liability on common law principles of negligence. See Turner v. Central Local School Dist. (1999), 85 Ohio St.3d 95, 101, 706 N.E.2d 1261 ("Turner I"). Turner II, though, did not discuss whether R.C. 4511.75(E) expressly imposes liability upon a political subdivision for purposes of R.C. 2744.02(B)(5). We again turn to Glover, which discussed this issue in depth. Relying upon the express language of both R.C. 2744.02(B)(5) and 4511.75(E), that court found that "R.C. 4511.75(E) imposes a duty, but does not provide for civil liability if the duty is violated." Glover at \*12.

In this respect, the Second Appellate District disagreed with the Third Appellate District, which had held in Turner v. Central Local School Dist. (Sept. 5, 1997), Defiance App. No. 4-97-13, unreported ("Turner I"), affirmed in part, reversed in part (1999), 85 Ohio St.3d 95, 706 N.E.2d 1261, that R.C. 4511.75(E) did impose liability because the relevant penalty provision, R.C. 4511.99, made a violation of R.C. 4511.75(E) a criminal offense. As noted in Glover, "[c]riminal liability, however, is not the same as civil liability for damages resulting from breach of the duty imposed by the statute." Glover at \*9. Furthermore, the appellate court in Turner I provided no rationale by which its decision could be reconciled with the plain language of R.C. 2744.02(B)(5). Unlike Turner I, the decision in Glover is consistent with R.C. 2744.02(B)(5). We therefore follow the reasoning of Glover. A violation of R.C. 4511.75(E) does not establish the exception to immunity provided by R.C. 2744.02(B)(5).

\*8 No R.C. 2744.02(B) exception to immunity is applicable.<sup>FN2</sup> Thus, we need not consider the defenses and further immunities provided to the Board by R.C. 2744.03.

FN2. We must comment on one unsettling aspect of our decision. It appears that the effect of R.C. Chapter 2744 may be to grant school boards blanket immunity for any injury which a child suffers if dropped off by the school bus in a manner placing the child in danger, i.e., dropping the child off at the wrong stop or not ensuring that the child has reached a point of safety. This court can easily conceive of circumstances in which the school board should not be entitled to

such complete immunity.

The transportation of students is a governmental function of the Board for which it is immune from suit. None of the exceptions to immunity in R.C. 2744.02(B) are available to remove the board's immunity. The trial court erred by not granting the Board's motion to dismiss the complaint. The assignment of error is sustained.

Judgment reversed.

POWELL, P.J., concurs and WALSH, J., dissents.  
Ohio App. 12 Dist., 2000.  
Day v. Middletown-Monroe City School Dist. Bd. of Educ.  
Not Reported in N.E.2d, 2000 WL 979141 (Ohio App. 12 Dist.)

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**HPerales v. City of Toledo**

Ohio App. 6 Dist., 1999.

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Sixth District, Lucas  
County.

Antonio PERALES, et al., Appellants

v.

CITY OF TOLEDO, et al., Appellee.

No. L-98-1397.

April 23, 1999.

Alan L. Mollenkamp and John B. Fisher, for appellant  
Antonio Perales; Samuel Z. Kaplan and Robert Z.  
Kaplan, for appellant Oscar Ellis, Administrator of the  
Estate of Kevin Ellis.

Edward M. Yosses and Geoffrey H. Davis, for  
appellee City of Toledo.

**OPINION AND JUDGMENT ENTRY**

RESNICK, M.L., J.

\*1 This is an appeal from a judgment of the Lucas  
County Court of Common Pleas granting summary  
judgment to appellee, the City of Toledo ("City").  
Appellants, Antonio Perales and Oscar Ellis,  
Administrator of the Estate of Kevin Ellis, assert the  
following assignments of error:

"The trial court erred in granting summary judgment  
as there exist genuine issues of material fact."

"The immunities provided by Ohio Revised Code  
Chapter 2744 violate Article I, Section 16, of the Ohio  
Constitution."

During the early morning hours of June 11, 1995, a  
large group of youths were gathered in a private  
parking lot outside the Club Bourbon Street. Both  
Kevin Ellis and Antonio Perales were in the crowd

outside the club, which, according to Perales, was  
open until 4:00 a.m. or 4:30 a.m. Shortly after 3:00  
a.m., someone suddenly began firing a gun into the  
crowd. Ellis and Perales received severe gunshot  
injuries; Ellis later died as the result of those injuries.

It is undisputed that the Toledo Police Department had  
several officers deployed around the Club Bourbon  
Street just prior to and at the time of the shooting.  
According to Lieutenant Randall L. Pepitone, who  
was in a marked police car concealed behind a store  
across the street from the club, the police were waiting  
to assess the situation before moving in to disperse the  
crowd.

Subsequently, Oscar Ellis, Administrator of the Estate  
of Kevin Ellis, Antonio Perales and the Ohio  
Department of Human Services (seeking repayment of  
expenses incurred for Perales' medical care) brought  
suit against, among others, the owners and lessees of  
the property where the shootings occurred and the  
City. They alleged that the City, through its  
employees, the police, acted wantonly, in bad faith  
and/or recklessly and/or were grossly negligent in  
failing to act to control the crowd prior to the eruption  
of violence.

The City filed an answer, as well as certain  
cross-claims, asserting as a defense that it was  
immune from civil liability under R.C. Chapter 2744,  
Ohio's sovereign immunity statute. The City then filed  
a motion for summary judgment based on its claimed  
statutory immunity from liability. In response,  
appellants argued that the (in)action of the police  
officers on the morning of June 11, 1995 fell within  
one of the exceptions to the broad grant of immunity  
to political subdivisions found in R.C. 2744.02(A).  
Specifically, appellants contended that the exception,  
involving the negligent operation of a motor vehicle,  
set forth in R.C. 2744.02(B)(1) was applicable to this  
case.

Appellants urged that the failure of the police officers,  
especially those in marked police cars, to make their  
presence known to the crowd constituted the negligent  
operation of their motor vehicles, or, at the least,  
created a question of fact on this issue. Appellants also  
argued that R.C. Chapter 2744 is unconstitutional in

violation of Section 16, Article I, Ohio Constitution.

In his Opinion and Judgment entry granting the summary judgment motion, the trial judge analyzed the wording of R.C. 2744.02(B)(1) and the cases interpreting this provision. The court concluded:

\*2 “ \* \* \* R.C. § 2744.02(B)(1) was meant to apply to collisions caused by motor vehicles driven by employees of the political subdivision engaged within the scope of their employment and authority-not a decision by a police officer to conceal the presence of a marked police officer. Thus, the exception relied upon by plaintiff does not suffice to impose liability on the City.”(Italics in the original.)

Quoting a decision of this court, the common pleas court also held that “ ‘the immunities provided by R.C. Chapter 2744 do not violate Section 16, Article I of the [sic ] Ohio Constitution.’ ” See Winkle v. City of Toledo (July 24, 1998), Lucas App. No. L-97-1335, unreported.

In their first assignment of error, appellants contend that the trial court erred in granting summary judgment because the officers' “operation of their vehicles” in not making their presence known to the crowd and in not attempting to clear the crowd using their police vehicles falls within the ambit of the exception provided in R.C. 2744.02(B)(1).

This court engages in a *de novo* review of the lower court's grant of summary judgment. Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Civ.R. 56(C) provides that summary judgment can be granted only if (1) no genuine issue of material fact remains to be litigated; (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to summary judgment as a matter of law. Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment under Civ.R. 56 bears the burden of showing that there is no genuine issue of material fact on the essential elements of the nonmoving party's claim. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the moving party satisfies this burden, the nonmoving party has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine

issue for trial. *Id.* at 293,662 N.E.2d 264.

The substantive law in this case is found in R.C. Chapter 2744, the Ohio Political Subdivision Tort Liability Act, as effective at the time the injuries to Kevin Ellis and Antonio Perales occurred. R.C. 2744.02(A)(1) provided, and still provides, that a political subdivision is generally immune from tort liability for injury, death, or loss to persons or property incurred in connection with the performance of a governmental or proprietary function of the political subdivision. Three expressly enumerated governmental functions were, and are, the provision or nonprovision of police services or protection, see R.C. 2744.01(C)(2)(a), the power to preserve peace, prevent and suppress riots and disorderly assemblages, see R.C. 2744.01(C)(2)(b) and the enforcement or nonperformance of any law, see R.C. 2744.01(C)(2)(i). It is undisputed, therefore, that the police activity on the morning of June 11, 1995 was the performance of a governmental function.

\*3 Nevertheless, R.C. 2744.02(B) lists several exceptions to this general grant of immunity for political subdivisions. R.C. 2744(B)(1), as effective on September 28, 1994, provided that political subdivisions are liable for injury or death to persons caused by the negligent operation of a motor vehicle by an employee upon the public roads, streets or highways during the course and scope of their employment and authority. Despite appellants' arguments to the contrary, we must agree with the trial court in finding that no genuine issue of material fact exists on the issue of whether this particular exception is applicable to the case before us.

A basic rule of statutory construction mandates that clear and unambiguous words be given their plain meaning. Layman v. Ohio Dept. of Human Services (1997), 78 Ohio St.3d 485, 678, 678 N.E.2d 1217, quoting State ex rel. Gareau v. Stillman (1969), 18 Ohio St.2d 63, 247 N.E.2d 461. The verb “operate” means “to work” and “to perform a function.” Merriam Webster's Collegiate Dictionary (10 Ed.1996) 814-815. “Negligence” is defined as “the failure to use care as a reasonably prudent and careful person would use under similar circumstances.” Black's Law Dictionary (Abridged 6 Ed.1991) 716. A “motor vehicle” has the same definition as provided in R.C. 4511.01. See R.C. 2744.01(E). Therefore, a “motor vehicle” is “every

vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires, \* \* \*."R.C. 4511.01(B). Thus, the exception in R.C. 2744.02(B)(1) is applicable in those cases where an employee of a political subdivision works or causes a power propelled vehicle to function without due care upon a public highway, road or street. The facts concerning the conduct of the police officers on the morning in question as offered by appellants in opposition to the motion for summary judgment simply do not bring that conduct within the scope of the definition of this exception. Accordingly, appellants' first assignment of error is found not well-taken.

Perales v. City of Toledo  
Not Reported in N.E.2d, 1999 WL 234566 (Ohio App. 6 Dist.)

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Appellants' second assignment of error challenges the constitutionality of R.C. Chapter 2744. Specifically, appellants argue that the immunities in R.C. Chapter 2744 prevent every person a redress for injury by due course of law thereby violating Section 16, Article I, Ohio Constitution. This issue was recently addressed by this court in *Winkle, supra*, wherein we found that the immunities provided in the statute do not violate Section 16, Article I, Ohio Constitution. Additionally, several other courts, including the Ohio Supreme Court have ruled on this particular constitutional issue. See *Farbuleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186; *Fabrey v. McDonald* (1994), 70 Ohio St.3d 351, 639 N.E.2d 31; *Adams v. City of Willoughby* (1994), 99 Ohio App.3d 367, 650 N.E.2d 932; *Lewis v. City of Cleveland* (1993), 89 Ohio App.3d 136, 623 N.E.2d 1233; *Padilla v. YMCA of Sandusky Cty.* (1992), 78 Ohio App.3d 676, 605 N.E.2d 1268. Therefore, we decline to revisit this issue and follow the precedent set by Ohio case law. Appellants' second assignment of error is found not well-taken.

\*4 The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal.

*JUDGMENT AFFIRMED.*

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

PETER M. HANDWORK, P.J., MELVIN L. RESNICK and JAMES R. SHERCK, JJ., concur.  
Ohio App. 6 Dist., 1999.

▶ **Turner v. Central Local School Dist.**  
Ohio App. 3 Dist., 1997.  
Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Third District, Wyandot  
County.  
Edward **TURNER**, et al., Plaintiffs-Appellants  
v.  
**CENTRAL LOCAL SCHOOL DISTRICT**,  
Defendant-Appellee  
No. 4-97-13.

Sept. 5, 1997.

Civil appeal from Common Pleas Court

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43230 For Appellants.

OPINION

BRYANT, J.

\*1 This appeal is taken by plaintiff-appellant Edward **Turner (Turner)** from a judgment of the Court of Common Pleas of Defiance County granting summary judgment to defendant-appellee **Central Local School District (Central)** dismissing **Turner's** complaint.

On September 11, 1992, nine-year-old Andrew **Turner** was dropped off by the school bus at his home approximately 30 to 40 minutes earlier than normal. The bus driver considered whether to keep Andrew on the bus because no parents appeared to be at the house. However, after Andrew assured her he could get into the house, he was allowed to leave the bus. Andrew attempted to enter the house by climbing through a window. While doing so, the window closed on him

causing him to suffocate. When Andrew's father arrived home at his normal time, he found Andrew trapped in the window and unconscious. Andrew was rushed to the hospital where he remained in a coma until his death on September 16, 1992.

On May 19, 1993, Turner filed a complaint of negligence against Central for leaving Andrew alone at the house so early. Central filed its answer on July 14, 1993, claiming as its third defense, that Turner had failed to state a claim upon which relief could be granted. On October 3, 1994, Central filed a motion for summary judgment on the issue of foreseeability by the bus driver that an accident would occur. The trial court granted the motion on February 25, 1995. Turner appealed the ruling to this court. On July 27, 1995, this court reversed the trial court's ruling and found that a genuine issue of the fact of foreseeability remained in dispute for a jury's decision.

After the case was remanded, on March 19, 1996, Central filed a motion to amend its answer to raise the defense of sovereign immunity. The trial court granted this motion on the same day. Turner filed a motion in opposition to the amendment on March 27, 1996, for the record. On July 8, 1996, Central filed a motion for summary judgment on the grounds that it was immune from liability. The trial court held a hearing on the motion on August 12, 1996. On April 4, 1997, the trial court granted Central's motion for summary judgment finding the suit barred by sovereign immunity. Turner filed his notice of appeal from this judgment on April 29, 1997.

Turner raises the following assignments of error.

The trial court abused its discretion by permitting Central to amend its answer without allowing or hearing Turner's opposition to the motion and without requiring Central to demonstrate a justifiable reason for delaying two years and ten months before seeking leave to amend.

The trial court erred in finding sovereign immunity because the action arose out of the operation of a school bus by Central's employee, a recognized exception to immunity.

The trial court erred in finding sovereign immunity because Central violated statutes and regulations resulting in civil liability, a recognized exception to immunity.

The trial court erred in granting sovereign immunity because R.C. 2744.02 is unconstitutional on its face and as applied by the trial court.

\*2Turner's fourth assignment of error claims that R.C. 2744.02 is unconstitutional. Turner argues in support of this claim that R.C. 2744.02 limits the constitutional right to bring suits against the state. However, the Supreme Court of Ohio has found R.C. 2744.02 to be constitutional in similar circumstances. Fahnbulleh v. Strahan (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186 and Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351, 639 N.E.2d 31. Since the Supreme Court has already determined this issue, Turner's fourth assignment of error is overruled.

Turner's first assignment of error claims that the trial court should not have granted the leave to amend without hearing the arguments against the motion. The trial court has great discretion to grant leave to amend pleadings. Patterson v. V & M Auto Body (1992), 63 Ohio St.3d 573, 589 N.E.2d 1306. Civ.R. 15(A) provides for liberal granting of leave to amend. In order for us to reverse the trial court's ruling, the trial court must be found to have abused its discretion. An abuse of discretion implies an attitude of the trial court that is unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140. "A decision is unreasonable if there is no sound reasoning process that would support that decision." AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601. When the original answer was filed, a claim of sovereign immunity could be deemed raised if the complaint alleged facts from which it appeared that the action was barred by sovereign immunity. Goad v. Cuyahoga Cty. Bd. of Commrs. (1992), 79 Ohio App.3d 521, 607 N.E.2d 878. Later case law suggested that if sovereign immunity was not raised in the answer, then it was deemed waived. Spence v. Liberty Twp. Trustees (1996), 109 Ohio App.3d 357, 672 N.E.2d 213. Thus, the trial court's reasoning in granting the amendment was not without basis. Therefore, the trial court may not be found to have

acted arbitrarily, unreasonably, unconscionably or otherwise abused its discretion by granting Central leave to amend its answer. The first assignment of error is overruled.

The remainder of Turner's assignments of error address the propriety of summary judgment in this case. When reviewing the ruling on a motion for summary judgment, an appellate court reviews the judgment independently. Midwest Specialties, Inc. v. Firestone Tire & Rubber Co. (1988), 42 Ohio App.3d 6, 536 N.E.2d 411. Civ.R. 56(C) sets forth the standard for granting summary judgment. Summary judgment is appropriate when the following have been established: 1) that there is no genuine issue as to any material fact; 2) that the moving party is entitled to judgment as a matter of law; and 3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. Bostic v. Connor (1988), 37 Ohio St.3d 144, 524 N.E.2d 881.

\*3 The second and third assignments of error claim that summary judgment was improper because the claim arose out of recognized exceptions to R.C. 2744.02. R.C. 2744.02 states in pertinent part:

(A) \* \* \*[E]xcept 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.

\* \* \*

(B) \* \* \* [A] political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function as follows:

(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 upon the public roads when the employees are engaged within the scope of their employment and

authority.

\*\*\*

(5) \*\*\* [A] political subdivision is liable for injury, death, or loss to person or property when 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.

In this case, Turner set forth two arguments. The first is that the negligence occurred during the operation of a motor vehicle. In support of this argument, Turner claims that the driver's decision to alter the bus route was directly related to the operation of the motor vehicle. Turner also points out that the regulations prohibiting the alteration of routes or times for dropping off the children are found under the heading of "Ohio Pupil Transportation Operation and Safety Rules," thus implying that the route is a part of the operation. We do not agree. The statute does not expressly include the decision to alter the route taken by a school bus as part of the operation of a motor vehicle upon the roadways. Therefore, Turner's second assignment of error is overruled.

The second argument for an exemption under 2744.02(B) is that liability is imposed upon Central by R.C. 4511.99. This statute imposes criminal liability upon a school board which does not comply with state regulations for the operation of a school bus in non-discretionary matters. R.C. 4511.99. Bus routes and the approximate time at which a child is dropped off at his or her home is not discretionary. Ohio Adm.Code 3301-83-20. By setting a policy which allowed its drivers to alter bus routes and the times at which the children would be dropped off, the school board violated these regulations. R.C. 2744.02(B)(5) states that a political entity is not immune if its acts create the imposition of liability by another statute. In order to be an exception to liability, the statute itself must expressly impose this liability. Zellman v. Kenston Bd. of Edn.(1991), 71 Ohio App.3d 287, 593 N.E.2d 392. Thus, a violation of the regulations regarding the operation of a school bus do not expressly give rise to an exception to the sovereign immunity granted in R.C. 2744.02. Sargi v. Kent City Bd. of Edn.(C.A.6, 1995), 70 F.3d 907. However, R.C. 4511.75(E) states that "No school bus driver shall start his bus until after any child \*\*\* has reached a place of safety on his residence side of the road." Here, there is

a genuine issue of fact as to whether Andrew had reached a place of safety before the driver left. The deposition of the driver stated that she felt uneasy about leaving Andrew because it appeared that nobody was home to supervise him and he could get hurt.<sup>FN1</sup> Both parties agree that if R.C. 4511.75(E) was violated, Central would not be immune from suit. Based upon the record before us, we find that a reasonable person could find that Andrew was not left in a place of safety, thus violating R.C. 4511.75(E). Since a genuine issue of material fact exists as to whether immunity applies, summary judgment was inappropriate in this case. Turner's third assignment of error is sustained.

<sup>FN1</sup>. The driver testified that she was so worried that she missed a stop and had to retrace her route later to take the child home.

\*4 The judgment of the Court of Common Pleas of Defiance County is reversed and the cause remanded for further proceedings in compliance with this opinion.

*Judgment reversed and cause remanded.*

SHAW, J., concurs EVANS, P.J., concurs in judgment only.  
Ohio App. 3 Dist., 1997.  
Turner v. Central Local School Dist.  
Not Reported in N.E.2d, 1997 WL 563297 (Ohio App. 3 Dist.)

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**C**State v. Wallace  
Ohio App. 1 Dist.,2006.

Court of Appeals of Ohio,First District, Hamilton  
County.

The STATE of Ohio, Appellant,

v.

WALLACE, Appellee.

Nos. C-050530, C-050531.

Decided May 19, 2006.

**Background:**State appealed from order of the Court of Common Pleas, Hamilton County, Nos. 04TRC-54014A, 04TRC-54014B, granting defendant's motion to suppress results of blood-alcohol and field sobriety tests, as well as statements related to charges against her for operating a vehicle under the influence of alcohol, and operating a vehicle with a prohibited concentration of alcohol in her blood.

**Holdings:** The Court of Appeals, Gorman, P.J., held that:

(1) defendant's conduct, in causing movement of vehicle and driver's loss of control when she grabbed steering wheel from passenger seat and caused vehicle to crash, fit within statutory definition of "operate," and

(2) officer had probable cause to arrest defendant for offenses of operating a vehicle under the influence of alcohol and with a prohibited concentration of alcohol in her blood.

Reversed and remanded.

Painter, J., concurred separately and filed opinion.

West Headnotes

**[1]** Criminal Law 110 ↪1134(3)

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110k1134 Scope and Extent in General

110k1134(3) k. Questions Considered in

General. Most Cited Cases

Appellate review of a motion to suppress presents a mixed question of law and fact.

**[2]** Criminal Law 110 ↪1134(3)

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110k1134 Scope and Extent in General

110k1134(3) k. Questions Considered in

General. Most Cited Cases

**Criminal Law 110 ↪1158(4)**

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158 In General

110k1158(4) k. Reception of Evidence.

Most Cited Cases

If the trial court's judgment on a motion to suppress is supported by competent, credible evidence, an appellate court must accept the trial court's findings of fact as correct; accepting those facts as true, the court must then independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts meet the applicable legal standard.

**[3]** Automobiles 48A ↪332

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak332 k. Driving While Intoxicated.

Most Cited Cases

Defendant's conduct, in causing movement of vehicle and driver's loss of control when she grabbed steering wheel from passenger seat and caused vehicle to crash, fit within statutory definition of "operate," as would support charges against her for operating a vehicle under the influence of alcohol, and operating a vehicle with a prohibited concentration of alcohol in her blood; plain meaning of statute defining "operate" did not limit state to a single prosecution for each

alcohol-related accident but permitted two or more impaired occupants to be "operating" same vehicle, at same time, when their combined actions caused movement of vehicle. R.C. § 4511.01(HHH).

**[4] Arrest 35 ↪ 63.4(2)**

35 Arrest

35II On Criminal Charges

35k63 Officers and Assistants, Arrest Without Warrant

35k63.4 Probable or Reasonable Cause

35k63.4(2) k. What Constitutes Such

Cause in General. Most Cited Cases

Test for establishing probable cause to arrest without a warrant is whether the facts and circumstances within an officer's knowledge were sufficient to warrant a prudent individual in believing that the defendant had committed or was committing an offense.

**[5] Automobiles 48A ↪ 349(6)**

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit

48Ak349(2) Grounds

48Ak349(6) k. Intoxication. Most

Cited Cases

Officer had probable cause to arrest defendant, who caused movement of vehicle and driver's loss of control when she grabbed steering wheel from passenger seat and caused vehicle to crash, for offenses of operating a vehicle under the influence of alcohol and with a prohibited concentration of alcohol in her blood; a prudent individual would have believed that defendant had committed offense by causing movement of a vehicle while intoxicated.

**[6] Statutes 361 ↪ 190**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Where the words of a statute are free of ambiguity and express plainly and distinctly the sense of the

lawmaking body, courts should look no further in their efforts to interpret the intent of the General Assembly.

**\*\*705** Julia L. McNeil, Cincinnati City Solicitor, Ernest McAdams, and Gertrude Dixon, Assistant City Prosecutors, for appellant.

Louis F. Strigari, Hamilton County Public Defender, and George W. Clark, Assistant Public Defender, for appellee.

GORMAN, Presiding Judge.

**\*847** {¶ 1} The state appeals from the trial court's order granting the motion of the defendant-appellee, Monica Wallace, to suppress the results of blood-alcohol and field sobriety tests, as well as statements related to the charges against her for operating a vehicle under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a), and operating a vehicle with a prohibited concentration of alcohol in her blood, in violation of R.C. 4511.19(A)(1)(b). The single issue is whether the definition of "operate" in R.C. 4511.01(HHH) may apply to an intoxicated passenger who causes the driver to lose control of the vehicle.

{¶ 2} At the hearing on the motion to suppress, Cincinnati Police Officer Charles Beebe testified that on December 11, 2004, he responded to a broadcast of a single-vehicle accident on southbound I-75. When he arrived, Wallace was being placed in an ambulance. He saw that a vehicle had hit a wall on the right side of I-75 before crossing three lanes and hitting the median on the left side. Wallace's husband admitted that he had been the driver.

{¶ 3} During the investigation, Wallace told Officer Beebe that she had been seated in the front passenger seat. Officer Beebe testified that Wallace said that while she and her husband were arguing, she "reached over \* \* \* and grabbed the steering wheel, \* \* \* causing [her husband] to lose control." Officer Beebe later went from the accident scene to the hospital and asked a paramedic to withdraw blood from Wallace. When he interviewed her at the hospital, Wallace told Officer Beebe that "she was drunk, and the crash was her fault." Police cited both Wallace and her husband for alcohol-related violations. Wallace was also cited for interfering with the operation of a vehicle in violation of R.C. 4511.70.

{¶ 4} The trial court accepted the undisputed facts and concluded, as a matter of law, that the police officer

did not have probable cause to arrest Wallace for the offenses of operating a vehicle under the influence of alcohol and with a \*848 prohibited concentration of alcohol in her blood because Wallace "lacked sufficient physical control of [the] vehicle from [the] passenger seat \* \* \*." Therefore, the trial court suppressed all evidence relating to the offenses as the product of an illegal arrest. The state has now taken this interlocutory appeal as provided by Crim.R.12(K) and R.C. 2945.67(A).

[1][2] {¶ 5} Appellate review of a motion to suppress presents a mixed question of law and fact. \*\*706 State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8. If the trial court's judgment is supported by competent, credible evidence, an appellate court must accept the trial court's findings of fact as correct. Accepting those facts as true, the court must then independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts meet the applicable legal standard. *Id.*; see, also, State v. Deters (1998), 128 Ohio App.3d 329, 334-335, 714 N.E.2d 972.

[3][4][5] {¶ 6} The test for establishing probable cause to arrest without a warrant is whether the facts and circumstances within an officer's knowledge were sufficient to warrant a prudent individual in believing that the defendant had committed or was committing an offense. See State v. Deters, 128 Ohio App.3d at 333, 714 N.E.2d 972. The resolution of the state's assignment of error depends upon whether the trial court applied the correct legal standard in concluding that Wallace did not commit an operating offense because she lacked "physical control" of the vehicle.

{¶ 7} R.C. 4511.19(A)(1) states, "No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply: (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them. (b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood."

{¶ 8} Until the General Assembly enacted Sub.S.B. No. 123, effective January 1, 2004, there was no statutory definition of "operate." The meaning of the term "operate" in R.C. 4511.19(A) had been exclusively a matter of judicial interpretation. In State

v. Cleary (1986), 22 Ohio St.3d 198, 199, 22 OBR 351, 490 N.E.2d 574, the Supreme Court said, "Operation of a motor vehicle within contemplation of the statute is a broader term than mere driving and a person in the driver's position in the front seat with the ignition key in his possession indicating either his *actual or potential movement of the vehicle* while under the influence of alcohol or any drug of abuse can be found in violation of R.C. 4511.19(A)(1)." (Emphasis added.) See, also, State v. McGlone (1991), 59 Ohio St.3d 122, 570 N.E.2d 1115.

\*849 {¶ 9} In defining "operation," the court was troubled by those situations in which a person under the influence of alcohol was found asleep behind the steering wheel in the driver's seat of a vehicle, with the key in the ignition and the engine not running. Despite a vigorous dissent by two justices, in State v. Gill (1994), 70 Ohio St.3d 150, 152-153, 637 N.E.2d 897, the court held that "operating" was a broader concept than driving. The effect of Gill was to equate "operate" with a person's capacity for potentially moving a vehicle because of his possession of the ignition key while asleep in the driver's seat. Thus, "operate" and operability of the vehicle became fact-specific issues for the courts to determine on a case-by-case basis depending on such factors as whether the defendant (1) was seated in the driver's seat, (2) had possession of the ignition key, and (3) had the capability of starting the engine and making the vehicle move. See Painter, Ohio Driving Under the Influence Law (2006) 9-10, Section 1.8.

{¶ 10} Before the effective date of Sub.S.B. No. 123, we would have agreed with the trial court that finding a passenger in violation of R.C. 4511.19(A)(1) would be an anomaly under the Supreme Court's definition of "operate." The reported cases dealt exclusively with persons under the influence of alcohol who were seated in the \*\*707 driver's seat or slumped over the steering wheel.

{¶ 11} But in Sub.S.B. No. 123, the General Assembly modified the definition in Gill and its predecessors by specifically defining "operate," as well as by adding the words "at the time of the operation" to R.C. 4511.19(A)(1). Effective January 1, 2004, the term "operate," as used in R.C. Chapter 4511, "means to cause or have caused movement of a vehicle \* \* \*." R.C. 4511.01(HHH).

[6] {¶ 12} “Where the words of a statute are free of ambiguity and express plainly and distinctly the sense of the lawmaking body, the courts should look no further in their efforts to interpret the intent of the General Assembly.” *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672. From the plain meaning of R.C. 4511.01(HHH), there is no suggestion that the General Assembly intended to limit operating offenses to drivers. Rather, the General Assembly’s expansion of the definition of “operate” to include anyone who causes movement of a vehicle is consistent with the Supreme Court’s view that “[a] clear purpose of R.C. 4511.19 is to discourage persons from putting themselves in the position in which they can potentially cause the movement of a motor vehicle while intoxicated or under the influence of any drug of abuse.” *State v. Gill* (1994), 70 Ohio St.3d at 154, 637 N.E.2d 897.

{¶ 13} Arguably, the definition in R.C. 4511.01(HHH) is at odds with the title of R.C. 4511.19: “Driving while under the influence of alcohol or drugs or with certain concentration of alcohol in bodily substances \* \* \*.” (Emphasis added.) But R.C. 1.01 states that in the construction of a statute, statutory titles or \*850 headings are not part of the law. See *Viers v. Dunlap* (1982), 1 Ohio St.3d 173, 175, 1 OBR 203, 438 N.E.2d 881.

{¶ 14} The General Assembly’s intent to address the situation in *Gill*, where the person under the influence of alcohol had the capacity to potentially move the vehicle although the engine was not running, is manifest by the fact that the General Assembly also created in R.C. 4511.194 the new offense of having physical control of a vehicle while under the influence of alcohol or with a prohibited concentration of alcohol in the blood. See Painter, Ohio Driving Under the Influence Law 9-10, Section 1.8. The plain meaning of R.C. 4511.01(HHH) does not limit the state to a single prosecution for each alcohol-related accident but permits two or more impaired occupants to be “operating” the same vehicle, at the same time, when their combined actions caused movement of the vehicle.

{¶ 15} Under the undisputed facts, Wallace’s conduct caused movement of the vehicle and the driver’s loss of control when she grabbed the steering wheel and caused the vehicle to crash. Accordingly, her conduct fit within the unambiguous statutory definition of

“operate” in R.C. 4511.01(HHH). Because a prudent individual would have believed that Wallace had committed an offense by causing movement of a vehicle while intoxicated, Officer Beebe had probable cause to arrest Wallace. The assignment of error is sustained.

{¶ 16} The judgments of the trial court are reversed, and this cause is remanded for trial or further proceedings consistent with the law and this opinion.

Judgments reversed and cause remanded.

SUNDERMANN, J., concurs.

PAINTER, J., concurs separately.

PAINTER, J., concurs separately.

\*\*708PAINTER, Judge, concurring separately.

{¶ 17} I concur. The definition of “operate” in R.C. 4511.01(HHH) [*this is not a typo*] is to “cause or have caused movement.” A drunk passenger who grabs the wheel and steers the car into a wall has caused movement and is operating the vehicle, as is the driver.

Ohio App. 1 Dist., 2006.

State v. Wallace

166 Ohio App.3d 845, 853 N.E.2d 704, 2006 -Ohio- 2477

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**Winkle v. City of Toledo**, Ohio

Ohio App. 6 Dist., 1998.

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Sixth District, Lucas  
 County.

Dennis WINKLE, et al. Appellant

v.

THE CITY OF TOLEDO, OHIO, et al. Appellees  
 No. L-97-1335.

July 24, 1998.

Mr. Steven L. Crossmock, for appellant.

Edward M. Yosses, director of law, and Samuel J.  
 Nugent, for appellees.

*OPINION AND JUDGMENT ENTRY*KNEPPER, J.

\*1 This is an appeal from a judgment of the Lucas County Court of Common Pleas which dismissed the city of Toledo ("appellee") from the complaint filed by appellant Dennis Winkle. For the reasons that follow, this court affirms the judgment of the trial court.

Appellant sets forth the following assignments of error:

*"I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT GRANTED DEFENDANT'S MOTION TO DISMISS BECAUSE THE CASE FITS WITHIN AN EXCEPTION TO THE GENERAL BLANKET IMMUNITY PROVIDED BY R.C. § 2744.02(A)(1).*

*"II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT FAILED TO HOLD THAT THE PERTINENT SECTIONS OF R.C. 2744 ARE*

*UNCONSTITUTIONAL."*

The facts that are relevant to the issues raised on appeal are as follows. On January 24, 1996, a fire broke out at appellant's place of business and a call was placed to the 9-1-1 emergency system. There was a delay of approximately fifteen minutes before a unit could respond to appellant's business because the nearest fire station (Station No. 19) had been taken off-line temporarily and the second-closest station had been sent to another fire. Appellant sustained burns to his body and his business was severely damaged.

On May 29, 1996, appellant filed a complaint in which he alleged that the injuries he suffered were the direct and proximate result of the city's delay in responding to the fire and its negligent, willful, wanton and reckless decision to take the station nearest his business off-line for training during business hours. On July 30, 1996, appellee filed a motion to dismiss appellant's complaint pursuant to Civ.R. 12(B)(6) in which it asserted that appellant failed to state a claim upon which relief could be granted. In support of its motion, appellee asserted that, pursuant to R.C. 2744.02(A)(1), it is immune from liability for its acts and omissions in temporarily shutting down the fire station. Appellee asserted further that none of the exceptions to immunity set forth in R.C. 2744.02(B)(1) through (B)(5) applied in this case. Appellant responded that because this case involves a situation where a political subdivision made a decision regarding the use of resources for a governmental function, R.C. 2744.03(A)(5) should be applied and R.C. 2744.02 should be disregarded in its entirety. Appellant argued in the alternative that R.C. Chapter 2744 is unconstitutional.

On January 7, 1997, the trial court filed its judgment entry in which it granted appellee's motion to dismiss. The trial court found that the five categories listed in R.C. 2744.02(B) provide the only grounds for liability against a political subdivision and that the city's alleged misconduct did not fall within any of those listed exceptions to immunity.

In his first assignment of error, appellant asserts that the trial court erred by dismissing his complaint because the case falls under an exception to immunity

which is set forth in R.C. 2744.03(A)(5). Appellee responds that the grant of governmental immunity is subject only to exceptions outlined in R.C. 2744.02(B)(1) through (B)(5) and that when none of those five exceptions apply, sovereign immunity is preserved intact.

\*2 When ruling on a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the court must presume the truth of all factual allegations in the complaint and must make all reasonable inferences in favor of the nonmoving party. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. In order for a court to grant a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recover. York v. Ohio State Hwy. Patrol (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063; Bridges v. Natl. Eng. & Contracting Co. (1990), 49 Ohio St.3d 108, 112, 551 N.E.2d 163. In resolving a Civ. R. 12(B)(6) motion, a court is confined to the averments set forth in the complaint and cannot consider outside evidentiary materials unless the motion is converted into a motion for summary judgment under Civ.R. 56. Nelson v. Pleasant (1991), 73 Ohio App.3d 479, 481-82, 597 N.E.2d 1137.

When reviewing a judgment granting a Civ.R. 12(B)(6) motion for relief from judgment, an appellate court must independently review the complaint to determine if dismissal was appropriate. "When a court dismisses a complaint pursuant to Civ.R. 12(B)(6), it makes no factual findings beyond its legal conclusion that the complaint fails to state a claim upon which relief can be granted." State ex rel. Drake v. Athens Cty. Bd. of Elections (1988), 39 Ohio St.3d 40, 41, 528 N.E.2d 1253. In Civ.R. 12(B)(6) cases, an appellate court need not defer to the trial court's decision. McGlone v. Grimshaw (1993), 86 Ohio App.3d 279, 285, 620 N.E.2d 935.

R.C. Chapter 2744 provides a three-tiered analysis for determining the availability of sovereign immunity to political subdivisions. R.C. 2744.02(A)(1) provides that a political subdivision is generally not liable for injury, death or loss to persons or property incurred in connection with the performance of a governmental or proprietary function of that political subdivision. This provision is generally referred to as the "blanket immunity" provision.

R.C. 2744.02(B) then lists five exceptions to the blanket immunity provision. R.C. 2744.03 then goes on to enumerate defenses that can be asserted by a political subdivision to avoid liability. R.C. 2744.03(A)(5), the subsection cited by appellant, provides that a political subdivision is immune from liability if the injury "resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03 only becomes relevant as an exception to the immunity exceptions outlined in R.C. 2744.02(B)(1) through (B)(5) if the injury-producing circumstances fit within one of those categories enumerated in paragraphs (B)(1) through (B)(5) of R.C. 2744.02. If there is no liability under R.C. 2744.02(B), the defenses and immunities outlined in R.C. 2744.03 cannot be applied.

\*3 This court has reviewed the complaint in this case as well as the applicable law. Upon consideration thereof, when assuming all of the facts in the complaint to be true and construing them in favor of appellant, we find that appellant can prove no facts that would show that appellee's decision to take Station No. 19 off-line on January 24, 1996 "was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner" and that appellee was therefore liable for appellant's injuries. Accordingly, the trial court did not err by granting appellee's motion to dismiss and appellant's first assignment of error is not well-taken.

Appellant presents three arguments in support of his second assignment of error. Appellant asserts that: 1) R.C. 2744.02 and 2744.03 violate the due process clause of the Ohio Constitution by eliminating an injured citizen's right to recover against a political subdivision of the state; 2) the two statutes violate Section 5 of Article I of the Ohio Constitution because, if sovereign immunity is applied, appellant will be denied his right to a trial by jury; and 3) the two statutes violate appellant's equal protection rights "by treating similarly situated individuals differently based upon an arbitrary criteria without any justifiable reason."

As to appellant's arguments concerning Article I,

Section 16 of the Ohio Constitution, we find that, while both statutes provide defenses to liability in certain situations, appellant has not shown how, by doing so, either statute eliminates an injured person's right to recover, or how the statutes treat similarly situated individuals differently based on an arbitrary criteria. Further, this court has held that the immunities provided by R.C. Chapter 2744 do not violate Section 16, Article I of the Ohio Constitution. Padilla v. YMCA of Sandusky Cty. (1992), 78 Ohio App.3d 676, 680, 605 N.E.2d 1268. See also Fabrey v. McDonald 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. As to appellant's claim that R.C. 2744.02 and 2744.03 violate his right to a trial by jury, appellant has failed to support his claim that the Ohio Constitution guarantees a trial by jury even in a case where it has been held that he has no cause of action.

Accordingly, based on the foregoing, this court finds that the trial court did not err when it failed to hold that R.C. 2744 is unconstitutional and appellant's second assignment of error is not well-taken.

On consideration whereof, this court finds that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Court costs of this appeal are assessed to appellant.

*JUDGMENT AFFIRMED.*

GEORGE M. GLASSER, J., MELVIN L. RESNICK, J., RICHARD W. KNEPPER, J., CONCUR.  
Ohio App. 6 Dist., 1998.  
Winkle v. City of Toledo, Ohio  
Not Reported in N.E.2d, 1998 WL 422275 (Ohio App. 6 Dist.)

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