

IN THE SUPREME COURT OF OHIO

JANE DOE, INDIVIDUALLY AND AS	:	Supreme Court Case No. 2007-1304
NEXT FRIEND OF HOLLY ROE, A	:	
MINOR, et al.	:	
	:	
Appellants,	:	
	:	On Appeal from the Judgment
	:	Entered in the Stark County Court
v.	:	of Appeals, Fifth Appellate District
	:	
MARLINGTON SCHOOL DISTRICT,	:	Court of Appeals
et al.	:	Case No. 00102
	:	
Appellees.	:	

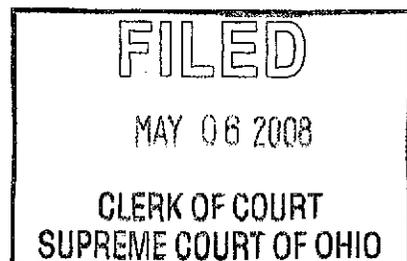
**REPLY BRIEF OF APPELLANTS JANE DOE,
INDIVIDUALLY AND AS NEXT FRIEND OF HOLLY ROE, A MINOR, ET AL.**

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Proposition of Law I

A school bus driver's negligent failure to supervise and control obvious misbehavior by students on the school bus constitutes "negligent operation" of the school bus, for purposes of R.C. 2744.02(B)(1)

A. Introduction

In this case, the Court must interpret "operation" of a motor vehicle, an undefined term in R.C. 2744.02(B)(1). The term is very broad and ubiquitous in society. Courts across the state and country have struggled to define it in this context. While Appellees' brief pointedly demonstrates these challenges, it offers little to solve them.

Appellees decry Appellants' proposed definition of the term as "overly broad" and contrary to case law (criticisms rebutted below). But they offer no workable or reasonable definition of their own. Marlinton urges that "operation" of a motor vehicle means "driving," but not other critical things an operator is trained to do while driving. And if political subdivisions owned and operated only snow plows and fork lifts, such a definition might suffice. But "operation" of a *school bus* must account for the care of its living and moving cargo.

To that end, Appellants have proposed a rule of law that satisfies legal and practical requirements. "Operation" of a motor vehicle must account for the type of vehicle and the essential duties of its operator. "Operation" of a school bus includes performance (or omission) of any of the essential functions the driver is trained and authorized to perform while transporting students.

B. Ohio case law

Groves v. Dayton Public Schools (1999), 132 Ohio App.3d 566, is worthy precedent on this point, contrary to Appellees' numerous arguments about the decision.

Groves is not “distinguishable” from this case in any meaningful or rational matter. By its own terms, it is a case “construing the term [“operation” of a motor vehicle] ...with regard to a driver’s assisting a disabled passenger.” *Id.* at 569. Because the school bus at issue was equipped with a wheel chair ramp *and the driver had been trained to assist wheelchair-bound students to disembark the bus*, assisting the disembarking student “was part of the driver’s duties and an integral part of his operation of the school bus.” *Id.* at 570.

Here, Marlinton’s school bus was designated to transport special needs students and the bus driver was (supposedly) trained to manage their behavior. Why would assisting a wheelchair-bound student to disembark be considered “operating” the bus, yet assisting a student who is being raped in the driver’s presence not be considered “operating” the bus? Why is the driver’s training to unload students from the bus meaningfully different than training to require students to observe rules of conduct while the bus is moving?

Groves did not “inextricably” link “operation” of a school bus to “the equipment on the bus and the physical movement of the bus.”¹ The opinion says nothing of the sort. The opinion clearly focused on the school district’s “rules and regulations” and the “bus driver’s duties”—*including non-driving duties* that were “an integral part of operating the school bus.” *Id.*

Groves was not based entirely on the rationale of one (later abrogated) Michigan case. *Groves* also cited a federal case construing Oklahoma law (and that case cited cases from other jurisdictions). And other cases still support the specific holding in *Groves* (that a bus driver’s efforts in helping passengers disembark from a bus are part of his “operation” of the vehicle) See, e.g. *Harris v. Regional Transportation District* (Colo. 2000), 15 P.3d 782; *Johnson v. Regional Transportation District* (Colo. 1995), 916 P.2d 619.

¹ Appellees’ brief at 5.

It is true that, three years after *Groves* cited the Michigan case of *Nolan v. Bronson* (1990), 185 Mich. App. 163, Michigan's Supreme Court announced a new definition of "operation" of a motor vehicle under its governmental immunity statute, in *Chandler v. County of Muskegon* (2002), 467 Mich. 315. But *Chandler* is unworthy precedent here. It did not involve a school bus, or the question of supervising passenger behavior.² It did not even mention the *Nolan* decision cited in *Groves*. And, while it redefined the term "operation" of a motor vehicle under Michigan law, it did so in a poorly reasoned, 4-3 decision, "without the benefit of full briefing or oral argument." *Chandler*, supra, at 323.³ And, as noted by the dissent, *Chandler's* hasty ruling rejected the definition (relied upon by Ohio's Second District in *Groves*) that was "accepted by most other jurisdictions." *Id.* As in most other matters, Ohio should not follow Michigan here.

Finally, *Groves'* definition of "operation" of a motor vehicle was not altered by the subsequent decisions in *Glover v. Dayton Public Schools* (Aug. 13, 1999), 2nd Dist. No. 17601, 1999 WL 958492, or *Doe v. Dayton City School District* (1999), 137 Ohio App.3d 166. In *Glover*, the court stood by its conclusion in *Groves* that "'operation' can encompass more than simply driving a vehicle." *Glover*, supra at *6. It declined to apply the definition to an injury that "did not occur during [the student's] physical discharge from the bus, or even when the bus was present." *Id.* In *Doe*, the court attempted awkwardly to reconcile its two prior decisions, by announcing a rule of proximate cause. The *Doe* decision did not discuss whether assisting a passenger or preventing a sexual assault was part of "operating" the school bus. Indeed, the decision *assumed* that the driver's "operation" of the school bus included the duty to "keep her

² The case involved an injury that occurred while a city bus was sitting in a barn, being cleaned.

³ In redefining the statutory term, the Michigan Supreme Court also applied a rule of statutory construction to construe the term narrowly. Ohio law requires the opposite construction.

safe from harm inflicted by other students.” It simply held that the Plaintiff in that case could not prove proximate cause.⁴

Appellees wisely do not argue that *Doe v. Dayton* comprises Ohio’s test for “operation” of a motor vehicle. Nor do they (or can they) argue that *Doe v. Dayton*’s unusual proximate cause ruling governs this case. Proximate cause arguments were not presented or addressed by the appellate court here. And the proximate cause evidence here (where a known violent student committed *repeated* assaults on a student) presents drastically different questions of foreseeability and causation.

C. Case law from other jurisdictions

In commenting on case law from other states, Appellees argue that “[n]ot one case cited by Appellants supports the expansion of the definition of ‘operate’ they seek.” That badly overstates the matter.

Colorado cases define “operation” of a motor vehicle in this context to include “both the physical defects of a motor vehicle and its movement, as well as *other actions fairly incidental to those defects or movements.*” *Harris v. Regional Transportation District* (Colo. 2000), 15 P.3d 782; *Johnson v. Regional Transportation District* (Colo. 1995), 916 P.2d 619. That is consistent with the definition proffered here (wherein “operation” includes all essential functions a driver is trained and authorized to perform while transporting students).

Missouri does not limit the term “operation” to mere driving, but rather includes “all acts necessary to be performed” in causing the vehicle to be moved from one place to another.

⁴ The *Doe* court stated: “Here, the injuries that Jane Doe suffered were a product of the school bus driver’s alleged failure to keep her safe from harm inflicted by other students. That failure was a breach of the duty imposed on him by his employment as an operator and the authority which that employment involves. However, the harm itself resulted from the intervention of an external factor, the conduct of the older students [who committed the sexual assault].” *Id.* at 172.

Johnson v. Carthell (Mo. 1982), 631 S.W.2d 923, 925. Pennsylvania does not limit the term “operation” to mere driving but includes other acts “normally related to the operation” of the vehicle. *Sonnenberg v. Erie Metropolitan Trans. Auth.* (1990), 137 Pa.Cmwlth. 533, 586 A.2d 1026, 1028.

These states have not directly addressed the facts before this Court. But they have a broad definition of the statutory term, “operation” of a motor vehicle. And Appellees cite only one state, Michigan, which defines the term as narrowly as they urge here. The Michigan decision is not worthy precedent for this Court to follow.

D. Principles of statutory construction

Appellees repeatedly protest that Appellants’ proposed definition of “operation” of a motor vehicle is “overly broad.” But the law demands that the exception to governmental immunity being construed here should broadly be construed. The statutory political subdivision immunity derogates Ohio’s common law and should therefore narrowly be construed. *Sabol v. Pekoc* (1947), 148 Ohio St. 545. Its exceptions are consequently broadly construed.

Notably, Appellees’ brief says nothing to challenge this important legal assertion.

E. Conclusion to Proposition of Law I

Marlington urges this Court to adopt the restrictively narrow definition of “operation” of a motor vehicle enunciated by Michigan’s Supreme Court in *Chandler v. County of Muskegon* (2002), 467 Mich. 315. As discussed above, *Chandler* was decided without the benefit of full briefing or argument; it rejected the interpretation of “negligent operation” that was “accepted by

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most other jurisdictions” and it is not worthy or helpful precedent in this case involving the operation of a school bus.⁵

Marlington frets that a broader definition of “operation” of a motor vehicle would expose political subdivisions to liability for any negligence occurring “on or even near a motor vehicle.”⁶ That is not so. Appellants do not claim that everything that occurs in or around a vehicle is “operating” the vehicle. But there are certain essential functions, distinct from driving, that bus drivers are trained and authorized to perform and that are properly considered a part of “operating” the vehicle. That includes enforcing state laws for student safety on a school bus.

Parents who daily place their students on school buses certainly believe that the “plain and ordinary” meaning of “operating” the bus includes enforcing safety rules. Because enforcing those rules to protect passengers from injury is such an essential part of the school bus driver’s job, it should be found to be part of “operating” the bus, within the meaning of R.C. 2744(B)(1).

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.

Appellees’ arguments on this proposition of law essentially embrace the holding in *George Shima Buick, Inc. v. Ferencak* (2001), 91 Ohio St.3d 1211. But this Court overruled

⁵ Arguably, even if this Court adopted the definition advanced by Appellees, the conduct at issue here could be considered “operation” of the bus. Because enforcing state safety rules to protect passengers from injury is an essential part of the school bus driver’s job, it is “directly associated” with driving a school bus.

⁶ Appellees’ brief at 23.

Ferencak, in *Cleveland Bar Assn. v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio-3995. Just as in *Ferencak*, this case is not a declaratory judgment action. The statutory requirements of R.C. 2721.12 simply do not apply.

Appellees cannot transform the case into a declaratory judgment action. Appellees claim that this action presents a “facial challenge” to R.C. Chapter 2744, which transforms the action into a *de facto* declaratory judgment action. But Appellants challenge R.C. 2744.02(B)(1) as interpreted by the appellate court and “as applied” to them. See Appellants’ merit brief at p. 22.

It is ironic that, having spent so much of its time urging the Court not to “rewrite [the political subdivision immunity statute] to produce a different result than the words of the statute [allegedly] require,” Appellees’ brief would then urge the Court to rewrite the declaratory judgment statute in such a manner.

There is no reason, legal or equitable, to impose the pleading and service requirements of the declaratory judgment statute on this claim.

Proposition of Law No. III:

R.C. Chapter 2744 is unconstitutional under Ohio Constitution Article 1, Sections 1, 2, 5 and 16 and the 5th, 7th and 14th Amendments of the United States Constitution because it violates equal protection, due process, the right to trial by jury and the right to a remedy

A. Appellants present an “as applied” constitutional challenge

Appellees’ brief incorrectly describes Appellants’ constitutional arguments as a “facial challenge” to Chapter 2744. Appellants challenge R.C. 2744.02(B)(1) as interpreted by the appellate court and “as applied” to them. See Appellants’ merit brief at p. 22.



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B. Section 5, Article I – Right to Jury Trial

This Court has consistently stated that this section of Ohio’s constitution “guarantees a right to jury trial only for those causes of action in which the right existed in the common law when Section 5 was adopted.” *Arbino* at paragraph 32. Section 5, Article I was adopted in 1851. And there is cumulative evidence that, prior to that date, Ohio law permitted a jury trial in a negligence action against a political subdivision. See Appellants’ Merit Brief at Proposition of Law III, Section A, citing *Goodloe v. Cincinnati* (1831), 4 Ohio 500; *Rhodes v. Cleveland* (1840), 10 Ohio 159; *McCombs v. Town Council of Akron* (1846), 15 Ohio 474; *Hack v. Salem* (1963), 174 Ohio St. 383, 392 (Gibson, J., concurring) and other authorities.

Appellees suggest that the Court should examine whether the right to a jury trial in a negligence action against a political subdivision existed prior to the year 1802, when Ohio’s first state constitution was adopted. This argument must fail, for several reasons.

First, in addressing this constitutional argument, this Court has always looked to the state of the law “when Section 5 was adopted”—not when the 1802 Constitution was adopted. See *Arbino*, supra, at ¶32. See also *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393 at syllabus (“Section 5 of Article I of the Constitution of Ohio only guarantees the right of trial by jury in those cases where it existed previous to its adoption”). Even when acknowledging other documentary predecessors to the Ohio constitution, such as the Northwest Ordinance of 1787, or the 1802 Constitution, this Court has looked to the state of the law in 1851, when “our state Constitution” was adopted. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356.

Furthermore, Appellees present no citation or other evidence that the law was different before 1802, than it was before 1854, when sovereign immunity for a political subdivision was first recognized, in *Dayton v. Pease* (1854), 4 Ohio St. 80. Ohio courts have acknowledged that,

prior to 1851, Ohio law recognized no impediments to recovery against a corporate political subdivision of the state. See *Hack v. Salem* (1963), 174 Ohio St. 383, 392 (Gibson, J., concurring). Do Appellees here claim that the law was different before the year 1802? It defies logic and common sense to believe so. And they have presented no citation or evidence in that regard.

C. Section 16, Article I

1.) Due process

Appellees' brief offers little substantive authority or analysis to support R.C. 2744(B)(1) under due process law. Even assuming, arguendo, that rational-basis review is appropriate here, Appellees leave unanswered the critical questions before the Court.

Chapter 2744 includes no stated statutory purpose. This Court has previously remedied that omission by *assuming* the statute was intended to conserve political subdivisions' fiscal resources by limiting liability. But that is not enough. There must be *evidence* in the record to demonstrate that the statute's restrictions on liability rationally relate to the goal of conserving fiscal integrity. *Arbino*, supra. This Court has made it clear that where the record lacks evidence of a rational connection between the legislative action taken and the public good to be achieved, a statute fail the first prong of the rational-basis review. *Arbino*, supra, citing *Morris v. Savoy* (1991), 61 Ohio St.3d 684 and *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415.

Appellees' brief does not even attempt to describe any such evidence. Nor does it attempt to offer any explanation why the outdated (and "irrational")⁷ concept of immunity should survive in an era of liability insurance and risk management techniques that render the immunity needless. What empirical evidence demonstrates that this statute rationally relates to its assumed

⁷ *Schenkolewski v. Cleveland Metroparks System* (1981), 67 Ohio St. 2d 31

purpose? How can an “irrational” scheme of immunity rationally relate to any legitimate governmental goal? Appellees’ brief offers nothing to answer these questions. Its silence on such important questions speaks loudly.

Appellees apparently believe citing *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 35, should suffice. But, as Appellants previously noted, *Fabrey* addressed the constitutionality of R.C. 2744(B)(4)--not the particular section of the immunity scheme at issue here. And it did so in a single paragraph, wherein it relied on citation to the United States Supreme Court decision in *Martinez v. California* (1980), 444 U.S. 277. The analogy to the statute in *Martinez* is unsuitable. And *Fabrey*’s conclusions should be revisited in light of the last 14 years’ experience with this statutory immunity.

2.) Open courts/right to remedy

Appellees’ brief misunderstands Appellants’ right-to-remedy argument. The argument is not made “under the 1912 amendment to Section 16, Article I.” Appellees’ brief at p. 23. In fact, Appellants’ brief clearly stated that the 1912 amendment is “irrelevant” to their right-to-remedy argument. Appellants’ brief at p. 34.

Upon its enactment, the Political Tort Subdivision Liability Act deprived Ohioans of vested legal rights to sue political subdivisions for negligence. That is contrary to the original language of Section 16, Article I. How can the next sentence of that constitutional provision--an amendment which entitled citizens to sue “the state”-- reasonably be construed to bless a statute that says citizens *cannot* sue a *subdivision* of the state? And how can that amendment be construed to bless a statute enacting sovereign immunity, in the face of evidence (described in the concurring opinion in *Garrett v. City of Sandusky* (1994), 68 Ohio St.3d 139, but not

addressed by this Court in *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 35, or *Fahnbulleh v. Straham* (1995), 73 Ohio St.3d 666) that “the true intent of the amendment ...was to abolish sovereign immunity in its entirety”?

This Court should revisit the right-to-remedy conclusions discussed in *Fabrey* and *Fahnbulleh*. It should hold that R.C. 2744(B)(1) unconstitutionally deprives Appellants of their constitutional rights to a remedy against Marlinton.

CONCLUSION

This Court should hold that “negligent operation” of a motor vehicle, under R.C. 2744.02(B)(1), must consider the type of vehicle and the essential duties of its operator. It should hold that “negligent operation” of a school bus can encompass performance (or omission) of any of the essential functions a bus driver is trained and authorized to perform while transporting students, including behavior management of special needs students.

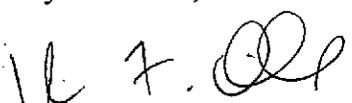
If this Court interprets the statute in the narrow fashion that Marlinton requests, it should hold that the school bus driver’s failure in this case to supervise and control obvious misbehavior on her bus, was negligent operation (or issues of material fact exist in that regard), because such a failure was “directly associated” with driving the school bus at issue here.

Alternatively, this Court should hold that R.C. 2744.02(B)(1) is unconstitutional as interpreted by the Fifth District Court of Appeals and as applied to Appellants’ case.

In any event, the Court should reverse the decision of the Court of Appeals and remand this case for trial.

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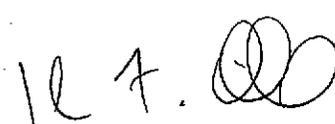
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