

IN THE SUPREME COURT OF OHIO

12-1412

James Young, Administrator of the Estate of)
 Kimberly Young, Deceased)
)
 Appellee,)
)
 v.)
)
 Cuyahoga County Board of MRDD)
)
 Appellant.)

On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
 Court of Appeals Case No. 97671

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CUYAHOGA COUNTY BOARD OF MRDD

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST**

This case presents an important issue of public or great general interest applicable to all political subdivisions in the state of Ohio. Since enactment of R.C. Chapter 2744 in 1985 by the Ohio General Assembly, Ohio political subdivisions have received limited tort immunity under the statute. This Court has recognized repeatedly the public interest served by R.C. 2744 in conserving the limited financial resources of political subdivisions. *See Fahmbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 668; *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29.

This Court recently reiterated R.C. Chapter 2744's recognized public purpose of "preservation of the fiscal integrity of political subdivisions" in *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009 Ohio 1360. *Id.* at 15. In *Marlinton*, this Court addressed the scope of the exception to political subdivision immunity in R.C. 2744.02(B)(1) for "negligent operation of any motor vehicle by their employees." According to the Court, "[t]he resolution of the issue in this case depends on what 'operation of' a motor vehicle means in R.C. 2744.02(B)(1)." *Id.* at 16. In rejecting the argument that R.C. 2744.02(B)(1) applies to negligence outside the actual driving or moving the vehicle, this Court held:

We conclude that the exception to immunity in R.C. 2744.02(B)(1) for the negligent operation of a motor vehicle pertains only to negligence in driving or otherwise causing the vehicle to be moved.

Id. at 18.

However, the court of appeals below completely ignored this Court's holding in *Marlinton* that R.C. 2744.02(B)(1) applies only to negligence in driving or moving the vehicle. Instead, the appellate court held that Plaintiff could pursue a claim under this statute against Defendant-

Appellant Cuyahoga County Board of Developmental Disabilities for its alleged negligent retention and/or supervision of an employee. In so ruling, the appellate court held:

[W]e are not persuaded...that R.C. 2744.02(B)(1) does not apply to negligence outside the actual driving or moving the vehicle.

Young v. Cuyahoga County Bd. of Mental Retardation, 2012 Ohio 3082 at ¶ 12. This is completely contrary to the clear intent of this Court's decision in *Marlington*.

Thus, the decision by the court of appeals below has greatly expanded the liability of political subdivisions beyond the specific statutory immunity exceptions listed in R.C. 2744. Clearly, this expanded liability will significantly impact the ability of political subdivisions to conserve their limited financial resources. Defendant-Appellant Cuyahoga County Board of Developmental Disabilities strongly urges this Court to accept this appeal in order to correct the misstatement of law by the court below and provide uniform law for all courts.

STATEMENT OF THE CASE AND FACTS

Plaintiff James Young, Administrator of the Estate of Kimberly Young, initiated the within action by filing a Complaint on April 8, 2008. Named as Defendants were the Cuyahoga County Board of Mental Retardation and Developmental Disabilities and Dennis Simpson. The gravamen of Plaintiff's action is a motor vehicle/pedestrian accident occurring on March 17, 2008 at E. 55th Street and Chester Avenue in Cleveland, Ohio. In his Complaint, Plaintiff alleged that Defendant Simpson, while operating a school bus, struck Kimberly Young (age 51), resulting in Young's death. At the time of the accident, Simpson was making a left turn with the green left turn traffic signal and Young was crossing the street against the pedestrian "Don't Walk" signal. In his First Claim, Plaintiff alleged that the collision "was the direct and proximate result of the negligence of Defendant Dennis Simpson." Complaint at para. 6. In his Second Claim, Plaintiff set forth a claim against the Cuyahoga DD Board based upon *respondeat superior*, alleging that Defendant Simpson

“was acting in the course and scope of his employment with Defendant Cuyahoga County Board of Mental Retardation and Developmental Disabilities.” Complaint at para. 13. In his Third Claim, Plaintiff set forth a claim against Defendant Simpson for “wanton, reckless, and malicious conduct.” Complaint at para. 18.

A separate Answer was filed by Defendant Cuyahoga County Board of Mental Retardation and Developmental Disabilities.¹ Defendant Simpson filed a motion to dismiss the Complaint. On June 30, 2009, Plaintiff voluntarily dismissed Defendant Simpson without prejudice.

The case proceeded through discovery. Thereafter, on April 16, 2010, Plaintiff filed his Second Amended Complaint solely against the Cuyahoga DD Board. In Count One of the Second Amended Complaint, Plaintiff again asserted a claim for Vicarious Liability against Defendant Cuyahoga DD Board based upon Dennis Simpson’s alleged negligent operation of the bus owned by Defendant Cuyahoga DD Board while acting within the scope of his employment with the Board. Second Amended Complaint at paras. 4-11. In Count Two, Plaintiff added a new claim against Defendant Cuyahoga DD Board for **Negligent Retention and/or Supervision**. In Count Two, Plaintiff alleged that Defendant Board had knowledge that Simpson had been convicted of driving under the influence on two occasions, first in the late 1980s or early 1990s, and June 20, 2003. Second Amended Complaint at paras. 14-15. Plaintiff further alleged that Defendant Board “failed to either require Simpson to participate in a drug and alcohol program or to perform any evaluation to determine Simpson’s fitness to drive MRDD’s commercial buses following its notice that Simpson received multiple DUIs.” Second Amended Complaint at para. 16. Plaintiff further

¹ Pursuant to statute, the names of county boards of mental retardation and developmental disabilities were recently changed to county boards of developmental disabilities; thus, Defendant’s title is now Cuyahoga County Board of Developmental Disabilities (Cuyahoga DD Board).

alleged that Defendant Board “was negligent and/or reckless in retaining and/or supervising Simpson.” Second Amended Complaint at para. 20.

On June 1, 2011, Defendant Cuyahoga DD Board filed its Motion for Judgment on the Pleadings with respect to Plaintiff’s Negligent Retention/Supervision Claim on the grounds that it was barred by R.C. 2744 immunity. On November 16, 2011, the trial court denied Defendant’s motion without elaboration. On December 8, 2011, Defendant Cuyahoga DD Board filed its Notice of Appeal from this Order denying it the benefit of immunity pursuant to R.C. 2744.02(C). On July 5, 2012, the Cuyahoga County Court of Appeals affirmed the denial of Defendant’s immunity with respect to the negligent retention/supervision claim.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The exception to immunity in R.C. 2744.02(B)(1) for negligent operation of a motor vehicle by an employee of a political subdivision pertains only to the negligence in driving or otherwise causing the motor vehicle to be moved and does not pertain to claims for negligent retention or supervision of an employee by a political subdivision. *Doe v. Marlinton Local School Dist. Bd. Edn.*, 122 Ohio St. 3d, 2009 Ohio 1360, approved and followed.

In Count Two of his Second Amended Complaint, Plaintiff sets forth a claim against the Cuyahoga County Board of Developmental Disabilities for Negligent Retention and/or Supervision. The gravamen for this claim is the Cuyahoga DD Board’s alleged negligence and/or recklessness in its retaining and/or supervising its employee, Dennis Simpson. The law is clear that Defendant has immunity with respect to this claim.

Following the judicial abrogation of sovereign immunity, the Ohio General Assembly enacted Revised Code Chapter 2744 in 1985. *Lambert v. Clancy* (2010), 125 Ohio St.3d 231, 233. R.C. 2744 addresses when political subdivisions, their departments and agencies, and their employees are immune from liability for their actions. *Id.* As stated by the Supreme Court:

R.C. Chapter 2744, the Political Subdivision Tort Liability Act, was enacted in response to the judicial abolishment of the doctrine of sovereign immunity. R.C. 2744.02(A)(1) provides that a political subdivision is generally not liable for damages 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. *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 347.

R.C. 2744.02(A)(1) provides the following rule of immunity:

a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons 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...function.

Thus, "R.C. Chapter 2744, with exceptions, immunizes those...functions which are classified as governmental,'...". *Garrett v. Sandusky* (1994), 68 Ohio St.3d 139, 140. R.C. 2744.01(C)(2) defines "governmental function" to include:

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

Thus, the operation of the Cuyahoga County Board of Developmental Disabilities is a governmental function. This necessarily includes the hiring, retention and supervision of employees. As such, Defendant Cuyahoga County Board of Developmental Disabilities has immunity for its alleged negligence in performing this governmental function.

However, the court of appeals below held that Count Two falls within the exception to immunity under R.C. 2744.02(B)(1) for the "negligent operation of any motor vehicles by their employees when the employees are engaged within the scope of their employment and authority." In so ruling, the court stated: "we are not persuaded...that R.C. 2744.02(B)(1) does not apply to negligence outside the actual driving or moving the vehicle." *Young v. Cuyahoga County Bd. of Mental Retardation*, 2012 Ohio 3082 at ¶ 12. This is directly contrary to this Court's holding in

Doe v. Marlinton Local School Dist. Bd. Edn., 122 Ohio St.3d 12, 2009 Ohio 1360, wherein this Court clearly held that “the exception to immunity in R.C. 2744.02(B)(1) for the negligent operation of a motor vehicle **pertains only to negligence in driving or otherwise causing the motor vehicle to be moved.**” *Id.* at 18 (emphasis added). This immunity exception does not apply to negligence outside the actual driving or moving the vehicle, such as negligent supervision of passengers on a school bus by the driver. *Id.* Likewise, Plaintiff’s negligent retention/supervision claim in Count Two clearly pertains to negligence that is separate from the negligence of the bus driver, Simpson, in driving the bus. Unlike Plaintiff’s claim in Count One, this claim involves Simpson’s prior driving record, the County Board’s alleged knowledge of the record, and the Board’s alleged failure to take action to evaluate and supervise Simpson. See Count Two. This negligence does not pertain to “driving or otherwise causing the motor vehicle to be moved.” As such, Plaintiff’s claim for Negligent Retention and/or Supervision in Count Two is not covered by the immunity exception in R.C. 2744.02(B)(1) for negligent operation of a vehicle. Otherwise, the exception would swallow up the immunity.

Marlington has been consistently followed by other courts. See *Miller v. Van Wert County of Bd. of Mental Retardation and Developmental Disabilities*, 2009 Ohio 5082; *Dub v. City of Beachwood*, 191 Ohio App.3d 238, 2010 Ohio 5135: (R.C. 2744.02(B)(1) “pertains only to negligence **in driving or otherwise causing the vehicle to be moved.**” *Dub* at p. 242-43 (emphasis original)). In *Swain v. Cleveland Metro. Sch. Dist.*, 2010 Ohio 4498, a school bus driver, while driving her route, failed to discover that a five year old kindergarten student had fallen asleep on the bus and failed to drop the student off at her bus stop. In holding that the bus driver’s actions fell within the immunity exception for negligent operation of the bus, the court focused on the fact that the bus driver’s negligence occurred while the driver was driving/moving the bus:

The bus driver in the case at bar, **while sitting in the driver's seat and while the engine was running, declined to inspect the bus and then drove the bus away from the proper bus stop.** The bus driver never bothered to check to see if the kindergarten student was still on the bus. The bus driver, in direct opposition to the parent waiting at the stop and looking for her child, proceeded to drive off and go back to the school bus garage. Meanwhile, the waiting parent became hysterical wondering where her five-year-old daughter was. The bus driver also failed to inspect the bus at the conclusion of her bus route. Thereby leaving the young girl on the bus, alone, so that when she awoke, she was alone in a dark school bus garage on her first day of school.

In addition to being distinguishable to the facts in *Marlington*, the case at bar involves different conduct. Specifically, the conduct of the bus driver in the case at bar takes place in relation to her operation of the bus and the student.

Swain, supra at ¶¶ 12-14 (emphasis original).

Thus, *Swain* supports Defendant Cuyahoga Board of DD's position that in order for the immunity exception under R.C. 2744.02(B)(1) to apply, the alleged negligence must involve the actual driving and moving of the vehicle. The actionable negligence in *Swain* was that of the school bus driver while driving and moving the bus. In the case at bar, however, the alleged negligence in Plaintiff's negligent retention/supervision claim pertains to Defendant Cuyahoga DD Board's negligence regarding its retention and supervision of its employee, Simpson. Since this negligence does not pertain to the actual driving or moving the vehicle, it is not covered by the immunity exception in R.C. 2744.02(B)(1) for negligent operation of a vehicle.

Other courts have held that the exception to immunity set forth in R.C. 2744.02(B)(1) for negligent operation of motor vehicles does not encompass claims based upon negligent conduct apart from the operation of the vehicle. In *Shalkhauser v. Medina* (2002), 148 Ohio App.3d 41, the plaintiff brought suit against the City of Medina and its police arising out of a motor vehicle accident involving the pursuit of a traffic violator by police. The plaintiff attempted to assert a

claim based upon the alleged negligence of the police in initiating and continuing the chase. The *Shalkhauser* court rejected this claim, holding that the claim was beyond the scope of the immunity exception in R.C. 2744.02(B)(1):

The exception to immunity set forth at R.C. 2744.02(B)(1) for negligent operation of motor vehicles by employees of political subdivisions has no application to the decisions of [the police] to initiate and continue the chase. The R.C. 2744.02(B)(1) exception to political subdivision immunity applies only where an employee **negligently operates** a motor vehicle; decisions concerning whether to pursue a suspect and the manner of pursuit are beyond the scope of the exception for negligent operation of a motor vehicle.

Shalkhauser, 148 Ohio App.3d at 48 (emphasis original). Likewise, in the case at bar, decisions by the Cuyahoga DD Board regarding the retention and/or supervision of its employee, Dennis Simpson, are “beyond the scope of the exception for negligent operation of a motor vehicle.”

In *Gould v. Britton*, Cuyahoga App. No. 59791, 1992 Ohio App. LEXIS 368 (Cuy. 1992), the plaintiff was stuck by a police cruiser driven by a police officer who was responding to a shooting. The injured driver filed suit against the police officer alleging negligent operation of the police cruiser, and against the municipality alleging negligent entrustment of the vehicle to the officer. In support of the negligent entrustment claim, the plaintiff submitted testimony that the officer had been involved in two previous automobile accidents and had felony convictions for drug abuse and possession of criminal tools. Summary judgment was granted as to both the negligent operation claim and the negligent entrustment claim, but only the negligent entrustment claim was appealed. In holding that the exception to immunity under R.C. 2744.02(B)(1) for negligent operation of motor vehicles did not apply to the negligent entrustment claim, the court stated:

This subsection [R.C. 2744.02(A)(1)] provides a blanket immunity for municipalities in their performance of governmental functions, subject to specifically delineated exceptions. [citation omitted] Governmental functions include the provision of police services. [citations omitted] **The statutory exceptions to immunity outlined**

in R.C. 2744.02(B) do not provide a cause of action based upon negligent entrustment of a police automobile in the furtherance of providing police services.

Since R.C. 2744.02(A) immunizes a municipality from liability arising from the provision of police protection, and **Gould's negligent entrustment claim does not fall within any of the statutory exceptions to this rule**, we find that the trial court properly entered summary judgment on the second count of her complaint.

Likewise, in the case at bar, the operation of a developmental disabilities facility is a governmental function. See R.C. 2744.01(C)(2)(o). The statutory exception to immunity for negligent operation of a motor vehicle does not provide for a cause of action against the governmental entity based upon its negligent retention and supervision of an employee in the furtherance of providing developmental disability services. *Gould, supra*.

In holding that Plaintiff's negligent retention/supervision claim fell within the exception for negligent vehicle operation under R.C. 2744.02(B)(1), the appellate court below cited this Court's decision in *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002 Ohio 6718. *Young* at ¶¶ 10-13. However, *Young's* reliance on *Hubbard* is completely misplaced. *Hubbard* dealt with the immunity exception under former R.C. 2744.02(B)(4) for any negligence occurring within or on the grounds of governmental buildings. *Hubbard* held that the plain statutory language of this immunity exception encompassed a negligent retention/supervision claim since such claim pertained to "negligence...that occurs within or on the grounds of [governmental] buildings." In *Marlington*, however, this Court specifically held that the immunity exception in R.C. 2744.02(B)(1) **does not** encompass all negligent acts, but rather "**pertains only to negligence in driving or otherwise causing the vehicle to be moved.**" Thus, *Hubbard* is wholly inapplicable to the case at bar.

The *Young* court ignored *Marlington* by claiming that it was “distinguishable” from the instant case. *Young* at ¶ 15. In doing so, however, *Young* conflated the claim in Count One for negligent operation of the vehicle with the claim in Count Two, which set forth a **separate** claim for the Board’s alleged negligence in supervising its employee. While the exception in R.C. 2744.02(B)(1) may be applicable to Count One, under *Marlington* it is clearly not applicable to Count Two. *Young* similarly attempted to distinguish Defendant’s other supporting cases, *Miller*, *Dub*, *Swain*, *Shalkhauser* and *Gould*, again without merit. In each case, the court correctly held that R.C. 2744.02(B)(1) does not apply to claims pertaining to negligence outside the actual driving or moving the vehicle.

The appellate court’s decision below greatly expands liability for political subdivisions beyond the specific exceptions to immunity listed in the statute and severely impacts the fiscal integrity of political subdivisions. Thus, this Court must accept this case.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Defendant-Appellant Cuyahoga County Board of MRDD respectfully requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

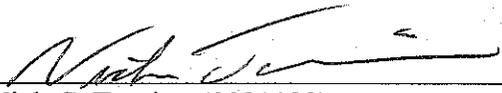
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served via regular U.S. mail on this 16th day of August 2012 to: Attorney for Appellee James Young, Stuart E. Scott, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114.



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APPENDIX

1. Journal Entry and Opinion of the Cuyahoga County Court of Appeals
(July 5, 2012)

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97671

JAMES YOUNG, ADMINISTRATOR

PLAINTIFF-APPELLEE

vs.

**CUYAHOGA COUNTY BOARD
OF MENTAL RETARDATION, ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-656218

BEFORE: Jones, J., Blackmon, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: July 5, 2012

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PER APP.R. 22(C)

JUL 05 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
DEP.

LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, the Cuyahoga County Board of Mental Retardation ("the Board"), appeals the trial court's judgment denying its motion for judgment on the pleadings as to Count 2 of the second amended complaint of plaintiff-appellee, James Young, Administrator of the Estate of Kimberly Young, Deceased. We affirm.

The Amended Complaint

{¶2} In his second amended complaint, Young alleges that on March 17, 2008, the decedent, Kimberly, was walking southbound in the crosswalk at Chester Avenue where it intersects with East 55th Street, when she was struck by a bus driven by Dennis Simpson. According to the complaint, at the time of the accident Simpson was an employee of the Board, acting within the scope of his employment, and operating a bus owned by the Board.

{¶3} Young alleges in the complaint that Simpson negligently operated the bus. The complaint further alleges that Kimberly died that day as a direct and proximate result of Simpson's negligence. According to the complaint, Simpson had cocaine in his system at the time of the crash.

{¶4} Count 1 of the complaint asserts a vicarious liability claim against the Board for Kimberly's injuries, damages, and death. Count 2 of the complaint asserts a negligent or reckless retention and supervision claim against the Board. In that count, Young alleges that, prior to the accident, Simpson had twice been

convicted for driving under the influence and the Board was aware of the convictions. The complaint alleges that despite the convictions, the Board allowed Simpson to continue operating the Board's motor vehicles without requiring him to participate in a drug and alcohol program or evaluating him to determine his fitness as a bus driver.

The Board's Motion for Judgment on the Pleadings

{¶5} The Board's motion for judgment on the pleadings related to Count 2 and was based on immunity under R.C. Chapter 2744. Young opposed the motion, and the trial court denied it without elaboration. The Board's sole assignment of error reads: "The trial court committed reversible error when it denied Defendant's Motion for Judgment on the Pleadings Based Upon R.C. 2744 Immunity as to Count Two of Plaintiff's Second Amended Complaint for Defendant's negligent retention and/or supervision of its employee."

{¶6} Under Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Motions for judgment on the pleadings are "specifically for resolving questions of law," and the court "must construe as true all of the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Thornton v. Cleveland*, 176 Ohio App.3d 122, 2008-Ohio-1709, 890 N.E.2d 353, ¶ 3 (8th Dist.). We review a court's ruling on a motion for judgment on the pleadings under a de novo standard. *Id.*

{¶7} The Ohio Supreme Court has set forth a three-tiered analysis to determine whether a political subdivision is immune from tort liability. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 10. First, is the general rule set forth under R.C. 2744.02(A)(1) that political subdivisions qualify for immunity. *Id.* at ¶ 10-11. Second, courts must determine whether any of the exceptions to immunity under R.C. 2744.02(B) apply. *Id.* at ¶ 12. If one of the immunity exceptions apply, then under the third tier, the political subdivision has the burden of showing that one of the defenses under R.C. 2744.03 applies. *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998).

{¶8} Young acknowledges that the Board is a "political subdivision pursuant to R.C. 2744.02(A) and its operation of the bus constitutes a governmental function for the purposes of initially determining liability." Young contends, however, that an exception to immunity applies. Specifically, according to Young, the exception under R.C. 2744.02(B)(1) applies. That section provides:

[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 when the employees are engaged within the scope of their employment and authority.

{¶9} Young contends that the "circumstances of Kimberly's death fall

squarely within the immunity exception.” The Board, on the other hand, contends that Young’s negligent retention and supervision claim “clearly pertains to negligence that is separate from the negligence of the bus driver * * * in driving the bus.” In other words, according to the Board, alleged negligence in operating a bus is completely separate and distinct from alleged negligence in supervising and retaining a bus driver, and the latter does not give rise to the R.C. 2744.02(B)(1) immunity exception. Although *Hubbard*, supra, addresses a different R.C. 2744.02(B) exception than the one at issue here, we find it instructive.

{¶10} In *Hubbard*, the plaintiffs sought damages for the alleged sexual assault, on school property, of their daughter by a teacher in the Canton City School District. Negligent retention and supervision was one of the claims upon which the plaintiffs sought relief.

{¶11} The exception at issue in *Hubbard* was under R.C. 2744.02(B)(4), which provides “[p]olitical 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 buildings that are used in connection with the performance of a governmental function.” The school board contended that the exception did not apply to all negligent acts occurring within or on the grounds of government buildings. Rather, it was the school board’s position that the exception was limited to negligence in connection with physical defects within or

on the grounds of its buildings.

{¶12} The Ohio Supreme Court disagreed, stating that:

R.C. 2744.02(B)(4) applies to *all cases* where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function. *The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.* Since the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government function, R.C. 2744.02(B)(4) applies and the board is not immune from liability.

(Emphasis added.) *Id.* at ¶ 18. The Court held, therefore, that the school board was not immune from liability under the plaintiffs' negligent retention and supervision claim. *Id.* at ¶ 18-19.

{¶13} Similarly, here, we are not persuaded by the Board's contention that R.C. 2744.02(B)(1) "does not apply to negligence outside the actual driving or moving the vehicle * * *." Moreover, we find the cases cited by the Board for its proposition distinguishable from this case.

{¶14} The Board cites *Doe v. Marlinton Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706. In *Marlinton*, parents sued the school district and several of its employees after their daughter was sexually molested by another child on one of the district's school buses. One of the parents' claims was that the bus driver negligently supervised the children on the bus.

{¶15} The issue in the case was whether a "school bus driver's *supervision*

of the conduct of children on a school bus amounts to operation of a motor vehicle within the statutory exception to political subdivision immunity under R.C. 2744.02(B)(1)." (Emphasis added.) *Id.* at ¶ 9. The Ohio Supreme Court held that it does not. But that is distinguishable from this case, where it is not alleged that the negligent supervision was the operation; rather, Young alleges that the operation itself was negligent, and that the Board was negligent or reckless for allowing Simpson to operate the bus. *Marlington* is therefore distinguishable from this case.

{¶16} In another case relied on by the Board, *Miller v. Van Wert Cty. Bd. of Mental Retardation & Developmental Disabilities*, 3d Dist. No. 15-08-11, 2009-Ohio-5082, a student at a center for individuals with disabilities filed action against the board for negligent supervision after a bus driver allegedly left the student on the bus for approximately five hours. The Third Appellate District found *Marlington* controlling and held that the bus driver's alleged negligence in not getting the student off the bus did not constitute negligent operation of a motor vehicle. Again, those facts, wherein some other action (i.e., getting the children off the bus) was the alleged "operation" are distinguishable from the facts here, where it is alleged that the operation in and of itself was negligent.

{¶17} Another case cited by the Board, *Dub v. Beachwood*, 191 Ohio App.3d 238, 2010-Ohio-5135, 945 N.E.2d 1065 (8th Dist.), is similarly distinguishable from this case. In *Dub*, a city of Beachwood senior citizen utilized a service

offered by the city, whereby it provided a complimentary van service for its elderly residents. A brochure, given to residents who registered for the service, stated that a passenger must bring an escort if she was in need of assistance because the van's driver did not provide assistance.

{¶18} The van transported the plaintiff to a grocery store, where it stopped and parked near the entrance of the store. Upon exiting the van, the plaintiff slipped on a patch of ice on the parking lot, fell, and broke her leg. She sued the city alleging, in part, that its driver was negligent by not assisting her in exiting the van.

{¶19} This court found that the exception to immunity under R.C. 2744.02(B)(1) did not apply. This court reasoned that the driver was *not driving or otherwise causing the vehicle to be moved at the time of the plaintiff's injury*. However, here, according to Young's complaint, the bus driver was driving at the time of Kimberly's accident. Thus, this case and *Dub* are distinguishable.

{¶20} The Board also cites *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist.). In *Shalkhauser*, a Medina police officer stopped a motorist after observing him driving erratically and discovering that he had an outstanding arrest warrant. The stop was effectuated after a high-speed chase that ended when the *motorist's vehicle* collided with a vehicle driven by the plaintiff. The plaintiff sustained severe injuries as a result of the collision and sued the city of Medina and the officer.

{¶21} The plaintiff contended that the city and officer were not immune from liability under the R.C. 2744.02(B)(1) negligent operation of a motor vehicle exception. The Ninth Appellate District held as follows:

The exception to immunity set forth at R.C. 2744.02(B)(1) for negligent operation of motor vehicles by employees of political subdivisions has no application to the decisions of [the officer] to initiate and continue the chase. The R.C. 2744.02(B)(1) exception to political subdivision immunity applies only where an employee *negligently operates* a motor vehicle; decisions concerning whether to pursue a suspect and the manner of pursuit are beyond the scope of the exception for negligent operation of a motor vehicle.

(Emphasis sic.) *Id.* at ¶ 28.

{¶22} The Board contends that *Shalkhauser* is on point with this case because its decisions “regarding the retention and/or supervision of its employee * * * are ‘beyond the scope of the exception for negligent operation of a motor vehicle.’” But the claim here is that Simpson *negligently operated* the bus and that the Board’s negligent or reckless retention and supervision of him allowed him to do so. This case is distinguishable from *Shalkhauser*, where it was not the employee’s negligent operation of his police vehicle that caused the plaintiff’s injuries; rather, it was the fleeing motorist who caused the injuries.

{¶23} In light of the above, we find that the cases relied on by the Board are distinguishable from the factual circumstance of this case.

{¶24} Young cites *Swain v. Cleveland Metro. School Dist.*, 8th Dist. No. 94553, 2010-Ohio-4498, in support of his position that the R.C. 2744.02(B)(1) immunity exception applies. In *Swain*, the mother of a five-year-old girl brought

suit against the school district after one of its bus drivers failed to discover the sleeping child on the bus, and parked the bus in the garage, leaving her alone. This court found the R.C. 2744.02(B)(1) immunity exception applicable, stating that the bus driver's conduct took place in relation to the operation of the bus. *Id.* at ¶ 14.

{¶25} Here, an even stronger case presents itself for the bus driver's conduct taking place in relation to the operation of the bus. Specifically, according to Young's complaint, while driving a bus for the Board, Simpson struck Kimberly as she was crossing the street. We are not persuaded by the Board's contention that *Swain* supports its position because the alleged negligence here pertains to the Board's retention and supervision of Simpson, while the negligence in *Swain* related to the driving or moving of a vehicle.

{¶26} As discussed, the Ohio Supreme Court has held that a negligent retention and supervision claim is actionable if there has been negligence under one of the R.C. 2744.02(B) exceptions to immunity. *Hubbard*, supra, at ¶ 18. We similarly find here that Young's allegation that the Board's negligent or reckless retention and supervision of Simpson allowed him to negligently operate a bus is an actionable claim under R.C. 2744.02(B)(1).

{¶27} In response to Young's citation to *Swain*, the Board cites *Gould v. Britton*, 8th Dist. No. 59791, 1992 WL 14925 (Jan. 30, 1992). In *Gould*, the plaintiff sued the city of Cleveland and one of its police officers for injuries

sustained in an automobile accident with the officer while the officer was on police business. One of the plaintiff's claims was that the city negligently entrusted the officer with a police vehicle. This court's holding was specific: "The statutory exceptions to immunity outlined in R.C. 2744.02(B) do not provide for a cause of action based upon negligent entrustment of a police automobile in the furtherance of providing police services." This court explained that "R.C. 2744.02(B) permits a lawsuit based upon the negligent operation of a police vehicle; however, when such a vehicle is operated in response to an emergency call and the operation is neither willful or wanton, liability is barred." This case does not involve the operation of a police vehicle on an emergency call, which is a defense to a liability exception. The elements of a negligent hiring and retention claim are (1) the existence of an employment relationship, (2) the fellow employee's incompetence, (3) the employer's actual or constructive knowledge of such incompetence, (4) the employee's act or omission that caused the plaintiff's injuries, and (5) the employer's negligence in hiring or retaining the employee as a proximate cause of the injury. *Hull v. J.C. Penney Co.*, 5th Dist. No. 2007CA00183, 2008-Ohio-1073, ¶ 29.

{¶28} Upon review, construing as true all of the material allegations in Young's second amended complaint, with all reasonable inferences to be drawn therefrom, in favor of Young, the trial court did not err in denying the Board's motion for judgment on the pleadings on Young's negligent retention and

supervision claim.

{¶29} Moreover, R.C. 2744.03 provides as follows:

(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 person 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:

* * *

(5) The political subdivision is immune from liability if the injury, death, or loss to person 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.*

(Emphasis added.)

{¶30} Young alleges in his second amended complaint that prior to this accident, Simpson had twice been convicted of driving under the influence and had reported those convictions to the Board. The complaint further alleges that despite its knowledge of Simpson's prior convictions, the Board failed to require him to participate in any drug and alcohol program, and failed to perform evaluations to determine his fitness to operate a bus. In addition to alleging that these acts were negligent, Young alleged that they were reckless.

{¶31} Again, accepting the material allegations as true, as we are required to in reviewing a Civ.R. 12(C) motion for judgment on the pleadings, the facts as pled by Young were sufficient for the purpose of overcoming a motion for

judgment on the pleading.

{¶32} In light of the above, the trial court properly denied the Board's Civ.R. 12(C) motion for judgment on the pleadings. The Board's assignment of error is overruled.

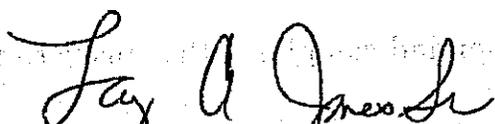
{¶33} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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


LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, A.J., and
JAMES J. SWEENEY, J., CONCUR