

ORIGINAL

IN THE SUPREME COURT OF OHIO

JAMES YOUNG, Administrator of the Estate of Kimberly Young, Deceased	)	CASE NO. 2012-1412
	)	
	)	
Plaintiff-Appellee	)	Appeal From the Cuyahoga County
	)	Court Of Appeals, Eighth Appellate
vs.	)	District
	)	
CUYAHOGA COUNTY BOARD OF MRDD	)	Court of Appeals Case No. 97671
	)	
	)	
Defendant-Appellant	)	

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MEMORANDUM IN RESPONSE OF APPELLEE JAMES YOUNG, ADMINISTRATOR  
OF THE ESATE OF KIMBERLY YOUNG, DECEASED

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NICK C. TOMINO (0021132)  
**TOMINO & LATCHNEY, LLC, LPA**  
 803 East Washington Street, Suite 200  
 Medina, Ohio 44256  
 Phone: (330) 723-4656  
 Fax: (330) 723-5445

*Counsel for Defendant-Appellant,  
 Cuyahoga County Board of  
 Developmental Disabilities*

PETER J. BRODHEAD (006733)  
 STUART E. SCOTT (0064834)  
 NICHOLAS A. DICELLO (0075745)  
**SPANGENBERG SHIBLEY & LIBER LLP**  
 1001 Lakeside Avenue East, Suite 1700  
 Cleveland, Ohio 44114  
 Phone: (216) 696-3232  
 Fax: (216) 696-3924

MARK S. FISHMAN (0005758)  
 853 Leader Building  
 523 Superior Avenue  
 Cleveland, Ohio 44114  
 Phone: (216) 781-4800  
 Fax: (216) 621-4121

*Counsel for Plaintiff-Appellee,  
 James Young*

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**I. STATEMENT OF PLAINTIFF-APPELLEE'S POSITION THAT THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This Court should decline jurisdiction over Defendant-Appellant Cuyahoga County Board of MRDD's ("MRDD") appeal because its assigned error is not one of "public or great general interest" and, therefore, does not warrant the granting of discretionary jurisdiction by this Honorable Court. *See Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). Contrary to MRDD's proposition of law, Plaintiff-Appellee's well-pleaded Complaint plainly alleges an exception to immunity under R.C. 2744. Plaintiff-Appellee's Complaint alleges that Dennis Simpson, MRDD's employee, negligently operated a motor vehicle in the course and scope of his employment. Plaintiff-Appellee's Complaint seeks to hold MRDD liable under two distinct claims stemming from the injuries caused by its employee: (1) secondary (vicarious) liability by imputing Dennis Simpson's negligence to MRDD; and (2) primary (direct) liability for MRDD's reckless personnel decision in retaining and failing to supervise Dennis Simpson, which was a proximate cause of Simpson's negligent operation of the motor vehicle and the injuries sustained by Kimberly Young, Plaintiff's decedent. These are each recognized manners in which to hold an employer liable for the acts of its employee. The plain language of R.C. 2744 permits holding a political subdivision liable where its reckless employment decision directly results in an employee's negligent conduct. Applying well-established law regarding Ohio's Political Subdivision Tort Liability Act, the trial court and the Eighth Appellate District have each denied MRDD's Motion for Judgment on the Pleadings on multiple occasions. In short, there is simply nothing novel, controversial, or of public or great general interest about Plaintiff's claims or the decision of the Eighth Appellate District.

MRDD does not claim, nor can it claim, that the Eighth Appellate District's holding is in conflict with the decision of any Ohio appellate court. MRDD implausibly insists that the facts of this case, which involve MRDD's employee striking a pedestrian while driving a commercial bus in the course and scope of his employment with a political subdivision, do not fall within R.C. 2744.02(B)(1)'s exception to tort immunity. Furthermore, MRDD, without any legitimate legal authority or public policy grounds, argues that under the exceptions to immunity set forth at R.C. 2744.02(B), a political subdivision may be held vicariously liable for the acts of its employee but may not be held primarily liable for its own reckless personnel decision that caused a wrongful death by operation of its motor vehicle. This argument is unpersuasive and contradicted by established law. For these reasons, this case does not present issues of public or great general interest, and this Court should deny jurisdiction to decide this case on the merits.

## **II. STATEMENT OF THE CASE AND FACTS**

Plaintiff-Appellee James Young (hereinafter "Plaintiff") brings this action on behalf of the Estate of Kimberly Young, Deceased, and in his own right. This matter arises from the death of Kimberly Young on March 17, 2008. On that date, Kimberly Young was a pedestrian using a crosswalk to cross Chester Avenue in Cleveland, Ohio, when she was violently struck by a large commercial bus owned and operated by MRDD that was driven by Dennis Simpson, MRDD's employee, who was at all times acting within the course and scope of his employment. Ms. Young died due to severe injuries suffered in the collision. Post-crash testing revealed that Dennis Simpson had large amounts of cocaine in his system. Phone records indicate that Simpson received a call on his cellular phone at the time of the collision. Simpson pled guilty to operating a motor vehicle while intoxicated and aggravated vehicular homicide.

Plaintiff filed this lawsuit on April 8, 2008. In his Complaint, Plaintiff asserted a claim against MRDD alleging Vicarious (Secondary) Liability for the negligence of its employee, Dennis Simpson, who, while acting in the course and scope of his employment with MRDD, caused Ms. Young's death by negligently operating a motor vehicle ("Count I"). That claim is not before this Court as it is undisputed that Simpson's actions constitute the negligent operation of a motor vehicle pursuant to R.C. 2744.02(B)(1). MRDD concedes that if Dennis Simpson negligently operated the bus that killed Ms. Young, it will be vicariously liable for that act.

Plaintiff learned through pre-trial discovery that Simpson had multiple convictions for operating motor vehicles while under the influence of intoxicating substances and that these convictions predated the March 17, 2008 collision that killed Kimberly Young. Simpson was twice convicted of operating a motor vehicle while intoxicated—once in the late 1980s or early 1990s and again on June 20, 2003. One of these incidents involved Simpson causing a motor vehicle collision. Discovery further revealed that both offenses occurred while Simpson was employed by MRDD as a commercial bus driver, that MRDD was aware of those offenses, and that MRDD suspended Simpson from driving its vehicles while Simpson's commercial driver's license was suspended. Despite testimony from a representative of MRDD that operating a motor vehicle while intoxicated is an "intolerable violation," MRDD reinstated Simpson as a driver of its commercial buses without imposing any chemical dependency evaluations or subjecting him to any enhanced random drug or alcohol testing. Other than the periods during which Simpson's driver's license was suspended, MRDD assigned Simpson to drive its commercial buses without limitation or precaution thereby knowingly placing Kimberly Young, the general public, and the developmentally disabled individuals who rely on MRDD's services in peril.

Plaintiff filed a Second Amended Complaint asserting a claim against MRDD for its reckless retention and supervision of Dennis Simpson as a bus driver (“Count II”).<sup>1</sup> Unlike Count I, which alleges that MRDD is secondarily (vicariously) liable for Simpson’s negligence, Count II alleges that MRDD is primarily (directly) liable for its reckless personnel decision in retaining Simpson as a commercial bus driver despite its direct knowledge that he was unfit to drive its buses and its failing to impose any additional testing, evaluation, or supervision of Simpson, even though it knew that he was an unsafe driver with a predilection for operating motor vehicles while intoxicated.

On April 21, 2010, MRDD filed a Civil Rule 12(C) Motion for Judgment on the Pleadings arguing that the Political Subdivision Tort Liability Act, (sometimes hereinafter referred to as the “Act”), entitled MRDD to immunity on Plaintiff’s reckless retention and supervision claim. On November 1, 2010, the trial court denied that motion. On May 12, 2011, the Eighth District Court of Appeals dismissed MRDD’s appeal. On May 31, 2011, MRDD re-filed its Civil Rule 12(C) Motion. On November 16, 2011, the trial court denied that motion. On July 5, 2011, the Eighth District affirmed that denial.

### **III. ARGUMENT AGAINST REVIEW OF APPELLANT’S PROPOSITION OF LAW**

**Appellant’s Proposition of Law No. 1: The exception to immunity in R.C. 2744.02(B)(1) for negligent operation of a motor vehicle 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 District Board of Education*, 122 Ohio St.3d 12, 2009-Ohio-1360 approved and followed.**

The Eighth Appellate District committed no error in affirming the trial court’s denial of MRDD’s Motion for Judgment on the Pleadings.

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<sup>1</sup> MRDD erroneously refers to Count II as one for negligent retention and supervision of Dennis Simpson. The Second Amended Complaint, however, clearly alleges recklessness.

A. **THE EIGHT APPELLATE DISTRICT PROPERLY HELD THAT APPELLANT MRDD IS NOT ENTITLED TO IMMUNITY AS A MATTER OF LAW FOR ITS RECKLESS RETENTION AND SUPERVISION OF DENNIS SIMPSON AS A COMMERCIAL BUS DRIVER WHERE SIMPSON'S NEGLIGENT OPERATION OF A MOTOR VEHICLE CAUSED KIMBERLY YOUNG'S DEATH**

1. *Statutory Framework Of Ohio's Political Subdivision Tort Liability Act*

Pursuant to Ohio's Political Subdivision Tort Liability Act, "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." R.C. 2744.02(A)(1). The Act, however, enumerates five exceptions to the immunity generally bestowed upon political subdivisions. *See* R.C. 2744.02(B). The Act provides that if any of these exceptions exists, "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 any of its employees in connection with a governmental or proprietary function." *Id.* (emphasis added). Accordingly, a political subdivision may be held liable for its own acts when they cause injury or death, so long as the act falls within the one of the statutorily enumerated exceptions.

Under the Act, once a plaintiff demonstrates that any one of the statutory exceptions to immunity in R.C. 2744.02(B)(1)-(5) applies, a political subdivision may restore that immunity by establishing that one of the defenses set forth in R.C. 2744.03(A) applies. Section 2744.03(A), "establish[es] nonliability" where 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(A), (A)(5) (emphasis

added). R.C. 2744.03(A)(5); *See Also Dub v. City of Beachwood*, 191 Ohio App.3d 238, 2010-Ohio-5135, 945 N.E.2d 1065, ¶ 15 (8th Dist.), (citations omitted).

Throughout this litigation, Plaintiff has acknowledged that MRDD is a political subdivision pursuant to R.C. 2744.02(A), and its operation of the bus constitutes a governmental function for purposes of initially determining immunity. With respect to the third and final tier of the analysis, Defendant-Appellant concedes that if an exception to immunity exists under R.C. 2744.02(B), then no defense to immunity under R.C. 2744.03 applies, as MRDD has failed to raise this issue at any point in this litigation. *See Premier Assoc., Ltd. v. Loper*, 149 Ohio App.3d 660, 2002-Ohio-5538, 778 N.E.2d 630, ¶ 33 (2nd Dist.); *Hallowell v. County of Athens*, 4th Dist. No. 03CA29, 2004-Ohio-4257, ¶ 20. Accordingly, the only issue before the Court is whether MRDD can be held liable for its reckless retention of and failure to supervise Dennis Simpson based on his known history of driving while intoxicated where MRDD assigned Simpson to operate its motor vehicles and Simpson negligently struck and killed Kimberly Young while under the influence of cocaine. Because MRDD's conduct caused harm as a result of the operation of a motor vehicle, it has no immunity under R.C. 2744.02(B)(1) and thus can be held liable for its reckless retention of and failure to supervise Simpson.

2. ***MRDD Is Not Immune From Suit Under R.C. 2744.02(B)(1)***

- a. Plaintiff's Claim Of Reckless Retention/Supervision Against MRDD Falls Squarely Within The Exceptions To Immunity Under 2744.02(B)(1) And 2744.03(A)(5) Because This Alleged Misconduct Directly Resulted In Simpson's Negligent Operation Of The Commercial Bus That Killed Kimberly Young

Under well-settled Ohio law, MRDD, a political subdivision, may be held liable for the negligent operation of a motor vehicle by its employees. Indeed, R.C. 2744.02(B) expressly states that "*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” when the act or omission falls within one of the enumerated exceptions set forth in R.C. 2744.02(B)(1)-(5). See R.C. 2744.02(B) (emphasis added). Section 2744.02(B)(1) provides an exception to immunity for the operation of a motor vehicle and states that “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)(1).

Subject to R.C. 2744.02(B), a political subdivision can be held liable for its own misconduct that causes injury or death because of the negligent operation of its motor vehicles by one of its employees. Under Ohio law, there are three principle manners in which an employer may be held liable for its employee’s negligent operation of a motor vehicle: (1) secondary (vicarious) liability under the doctrine of *respondeat superior*; (2) negligent hiring, retention, and/or supervision; or (3) negligent entrustment of a motor vehicle. See, e.g., *Payton v. Receivables Outsourcing, Inc.*, 163 Ohio App.3d 722, 2005-Ohio-4978, 840 N.E.2d 236 (8th Dist.); *Gulla v. Strauss*, 154 Ohio St. 193, 198, 93 N.E.2d 662 (1950).

MRDD does not dispute that it can be held vicariously liable for Simpson’s negligence. Under these circumstances, however, MRDD’s liability for the acts of its employee is not limited to secondary (vicarious) liability. Ohio law provides that an employer may be held primarily (directly) liable for its hiring, retention, or supervision of a negligent employee. To prove a claim for reckless retention or supervision, the plaintiff must demonstrate the following elements: “(1) the existence of an employment relationship; (2) the employee’s incompetence; (3) the employer’s actual or constructive knowledge of such incompetence; (4) the employee’s

act or omission causing the plaintiff's injuries; and (5) the employer's [recklessness] in \*\*\* retaining the employee is the proximate cause of the plaintiff's injuries." *Wagner v. Ohio State Univ. Med. Ctr.*, 188 Ohio App.3d 65, 2010-Ohio-2561, 934 N.E.2d 394 (10th Dist.), ¶ 29 (alteration added) (citation omitted). *See also Payton*. There is no dispute that as alleged in the Complaint, Plaintiff has stated a factually viable claim for reckless retention and supervision of Dennis Simpson as a bus driver. Defendant has not asserted that Plaintiff failed to properly plead facts or circumstances demonstrating a claim for reckless retention/supervision of Simpson. Because Defendant did not raise this issue below, it cannot do so here. *See, e.g., Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993).

The elements of the claim for reckless retention and supervision demonstrate that MRDD's acts were a proximate cause of Simpson's negligent operation of the motor vehicle that struck and killed Kimberly Young. First, it undisputed that there was a valid employment relationship between Simpson and MRDD. Second, Simpson was employed by MRDD as a driver of commercial buses. Simpson, however, had a history of driving while intoxicated and had his license suspended on multiple occasions for driving while under the influence of intoxicating substances. As such, Simpson was incompetent and unfit to drive commercial buses. Third, MRDD had actual knowledge of Simpson's unfitness and incompetence as an operator of motor vehicles. Prior to March 17, 2008, Simpson was convicted twice of operating a motor vehicle while intoxicated. In one instance, Simpson's intoxication caused a motor vehicle collision. These offenses occurred while Simpson was employed by MRDD as a commercial bus driver. MRDD learned of these offenses and was forced to temporarily move Simpson to a position other than driver while his license was suspended. Following both suspensions,

Simpson was reinstated as a driver with no precautions or measures taken to prevent Simpson from operating MRDD's buses while under the influence of drugs or alcohol. Lastly, there is no dispute that Simpson had large amounts of cocaine metabolite in his system or that he was within the course and scope of his employment with MRDD when he struck and killed Kimberly Young while she attempted to cross Chester Avenue within the designated cross-walk.

The fourth and fifth elements of the claim for reckless retention and supervision require that Simpson negligently operated a motor vehicle in the course and scope of his employment and caused injury to Kimberly Young as a result of MRDD's misconduct. That is, the exception to immunity for negligent operation of a motor vehicle is encompassed by and included in the claim for reckless retention and supervision under Ohio law and as set forth in Plaintiff's Complaint. A corporation or political subdivision, such as MRDD, can only act through its employees and the assignments that are given to those employees. Accordingly, by assigning an unfit and incompetent employee with a known history of substance abuse to drive its motor vehicles, MRDD caused the vehicle to be operated and moved by Dennis Simpson in a negligent manner. MRDD's instruction to Simpson to operate its commercial buses falls squarely within the contours of R.C. 2744.02(B)(1)'s exception to immunity which this Court has described as "negligence in driving or otherwise causing the vehicle to be moved." *Doe v. Marlinton Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 26. Consequently, MRDD is not immune from suit because its retention of and failure to supervise Dennis Simpson caused the negligent operation of the motor vehicle that struck and killed Kimberly Young.

R.C. 2744.03(A) also demonstrates that the legislature did not intend to insulate political subdivisions from immunity for reckless supervision and retention decisions.

Section 2744.03(A), “establish[es] nonliability” where 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(A), (A)(5) (emphasis added). If Appellant’s position, that all decisions involving retention and supervision of employees are immune from liability were true, R.C. 2744.03(A)(5) would be rendered superfluous. Fundamental principles of statutory construction prevent such a result. *See Cty. of San Diego v. Elavsky*, 58 Ohio St.2d 81, 388 N.E.2d 1229 (1979).

Indeed, Ohio Courts have determined that this statutory language would be meaningless without a recognized claim for reckless retention or supervision. In *Sharp v. Mr. C's Charter Serv. Co.*, 8th Dist. No. 67738, 1995 WL 739603, \*8-9 (Dec. 14, 1995), the Cleveland Board of Education (“Board”) hired Mr. C’s as a supplemental transportation provider. A motor vehicle operated by Mr. C.’s collided with the plaintiff’s vehicle causing personal injuries. The plaintiffs brought suit against Mr. C’s and the Board arguing that Mr. C’s was the employee of the Board and negligently operated a motor vehicle on the highways creating liability pursuant to R.C. 2744.02(B)(1). Accordingly, the plaintiffs alleged that the Board was vicariously liable for the negligent acts of its employee under the enumerated exception to political subdivision immunity for the negligent operation of an automobile. *Id.* at \*9. The Eighth Appellate District concluded that given the level of control, liability under this exception was appropriate.

The plaintiff’s further argued that Mr. C’s had demonstrated numerous “red flags” about its fitness as a supplemental transportation provider; yet, despite these “red flags,” the Board exhibited a “complete failure to monitor Mr. C’s.” *Id.* at \*8. The court explained that “both the trial court and the jury were correct in concluding the Board’s actions were not protected by the

immunity granted by R.C. 2744.02(A)(1). Indeed, the Board's omissions fit squarely within the exception to immunity set forth in R.C. 2744.03(A)(5) since the evidence proved that its judgment in hiring and overseeing Mr. C's was exercised in a wanton and reckless matter." *Id.* The court held that a claim against the Board for its reckless retention and failure to supervise its employee was appropriate. These are precisely the circumstances in this case.

Given the clarity of the Act, MRDD has been unable to identify any contrary decisions and has been unable to marshal support for its contention that a political subdivision may be held vicariously liable but not directly liable for the same conduct. Tellingly, MRDD is unable to come forward with any authority for the proposition that a political subdivision is immune for its reckless personnel decision when that decision directly results in a violation of one of the exceptions set forth in R.C. 2744.02(B)(1)-(5).

**3. *Plaintiff's Claim Against MRDD For Reckless Supervision/Retention Falls Within A Narrow Exception To Immunity Supported By Law And Policy That Does Not Pose Any Risk To The Fiscal Integrity Of Political Subdivisions***

Plaintiff's claims against MRDD fall within a narrow exception to immunity and to do not increase any burden upon the fiscal integrity of a political subdivision. To be clear, Plaintiff's claims do not expand liability by creating a claim against a political subdivision anytime it recklessly hires, retains, or supervises one of its employees. To the contrary, a political subdivision is only liable where its reckless personnel decision in hiring, retaining, or supervising an employee is a proximate cause of that employee's commission of one of the offenses specified in R.C. 2744.02(B)(1)-(5). Accordingly, in every instance where a political subdivision could be found liable for its reckless personnel decision in retaining or supervising an employee, its employee must have committed an offense specified in R.C. 2744.02(B)(1)-(5). Thus, the political subdivision is already exposed to vicarious liability for the acts of its

employee. While the claim for recklessly retaining or supervising that employee may expand liability, it does not increase the political subdivision's financial exposure. Defendant is incapable of offering any explanation as to how recognizing the claim for reckless retention and supervision would additionally burden the fiscal integrity of the political subdivision where the political subdivision is already exposed to liability for the same injuries. Public policy further promotes holding political subdivisions responsible for their own misconduct. The public is entitled to discover and hold political subdivisions responsible for recklessly placing negligent employees on the roadways.

In this instance, it is conceded that MRDD is exposed to vicarious liability for Dennis Simpson's negligent operation of a motor vehicle. Because Plaintiff has alleged that MRDD's reckless personnel decision was a proximate cause of Dennis Simpson's negligent operation of a motor vehicle, Plaintiff's claim fits precisely within this limited exception to political subdivision immunity.

#### **4. *The Cases Cited By MRDD Have No Application To This Case***

In its Memorandum in Support of Jurisdiction MRDD attempts to argue that it is immune from liability under Count II by relying on cases that fail to represent the factual circumstances of this case, are not analogous to the claims asserted in this case, and in some instances, do not even represent the same immunity provision that forms the basis of this case. In each of the cases cited by MRDD, the court determined that there was no operation of a motor vehicle by anyone. *See, e.g., Doe v. Marlinton Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706 (no liability because a bus driver's failure to supervise occupants of a bus is not the operation of a motor vehicle); *Dub v. City of Beachwood*, 191 Ohio App.3d 238, 2010-Ohio-5135, 945 N.E.2d 1065 (8th Dist.) (no liability because a person slipping and falling

after safely alighting from a bus is not the operation of a motor vehicle); *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129 (9th Dist. 2002). (police chase resulting in auto accident was not the operation of a motor vehicle due to a statutory exclusion set forth at R.C. 2744.02(B)(1)(a)).

In each of these cases, the court determined that there was no operation of a motor vehicle as a matter of law. Therefore, there was no manner in which to hold the political subdivision liable on any claims, either directly or vicariously. That is, even if the employer recklessly hired, retained, or supervised the employee, there could be no liability because the employee had not engaged in any conduct that is excepted from immunity. In this case, however, it is undisputed that Dennis Simpson negligently operated a motor vehicle in the course and scope of his employment with MRDD thereby bringing MRDD within the contours of R.C. 2744.02(B)(1). Accordingly, MRDD's reliance on these cases is simply misplaced.

**5. *Even If There Were Errors In the Eighth District's Analysis, These Errors Were Harmless.***

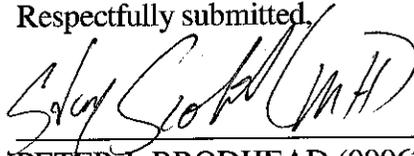
MRDD devotes a significant portion of its Memorandum to a single statement of the Eighth District's opinion stating, "we are not persuaded \* \* \* that R.C. 2744.02(B)(1) "does not apply to negligence outside the actual driving or moving the vehicle'." *Young v. Cuyahoga Bd. of Mental Retardation*, 8th Dist. No. 97671, 2012-Ohio-3082 at ¶ 13. MRDD improperly reads this statement as expanding liability. It did no such thing. Regardless of its choice of language in this specific instance, when read in its entirety, the opinion plainly demonstrates that the Eighth District recognized that there are potentially two manners in which an employer may be held liable for the negligent driving of its employees: vicarious and direct. This statement should be read merely as a recognition of the claim for direct liability where the political subdivision has acted recklessly in assigning driving duties. Even if the Eighth District misstated this Court's

language in *Marlington*, any such error was harmless in that the court applied the appropriate and settled law to these claims and arrived at the correct decision. Granting discretionary jurisdiction to correct an improper phrasing where the proper result was reached is unwarranted.

**IV. CONCLUSION**

For all of the foregoing reasons, Plaintiff-Appellee respectfully requests that this Court refuse jurisdiction over the instant appeal.

Respectfully submitted,



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PETER J. BRODHEAD (0006733)  
STUART E. SCOTT (0064834)  
NICHOLAS A. DICELLO (0075745)  
**SPANGENBERG SHIBLEY & LIBER LLP**  
1001 Lakeside Avenue East, Suite 1700  
Cleveland, Ohio 44114  
(216) 696-3232  
(216) 696-3924 (FAX)  
*pbrodhead@spanglaw.com*  
*sscott@spanglaw.com*  
*ndicello@spanglaw.com*

and

MARK S. FISHMAN (0005758)  
853 Leader Building  
523 Superior Avenue  
Cleveland, OH 44114  
(216) 781-4800  
(216) 621-4121 (FAX)  
*msf1400@aol.com*

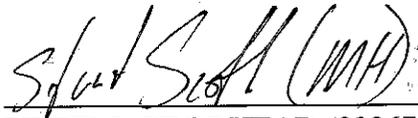
***Counsel for Plaintiff-Appellee***

**CERTIFICATE OF SERVICE**

I hereby certify on this 14th day of September 2012, a true and correct copy of the foregoing was sent via regular U.S. Mail, postage prepaid, to:

NICK C TOMINO, ESQ.  
**TOMINO & LATCHNEY, LLC, LPA**  
803 East Washington Street, Suite 200  
Medina, OH 44256

*Counsel for Defendant-Appellant,  
Cuyahoga County Board  
of Developmental Disabilities*



PETER J. BRODHEAD (0006733)  
STUART E. SCOTT (0064834)  
NICHOLAS A. DICELLO (0075745)  
**SPANGENBERG SHIBLEY & LIBER LLP**  
1001 Lakeside Avenue East, Suite 1700  
Cleveland, Ohio 44114  
(216) 696-3232  
(216) 696-3924 (FAX)  
*pbrodhead@spanglaw.com*  
*sscott@spanglaw.com*  
*ndicello@spanglaw.com*

*Counsel for Plaintiff-Appellee*