

ORIGINAL

IN THE SUPREME COURT OF OHIO

James Young, Administrator of the Estate of)	
Kimberly Young, Deceased -)	CASE NO. 2012-1412
)	
Appellee,)	
)	On Appeal from the Cuyahoga County Court of
v.)	Appeals, Eighth Appellate District
)	
Cuyahoga County Board of MRDD)	Court of Appeals Case No. 97671
)	
Appellant.)	

APPELLANT CUYAHOGA COUNTY BOARD OF MRDD'S MOTION FOR RECONSIDERATION OF ENTRY DECLINING JURISDICTION TO HEAR DISCRETIONARY APPEAL

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I. MOTION

Appellant Cuyahoga County Board of MRDD hereby moves this Honorable Court pursuant to S. Ct. Prac. R. 11.2(B)(1) to reconsider its decision dated November 7, 2012, declining jurisdiction to hear this case (Chief Justice O'Connor and Justice Lundberg Stratton dissenting). Appellant further requests that this Court accept jurisdiction of its Proposition of Law No. I and to hold this appeal pending this Court's decision whether to accept the appeal on the identical issue from the Eighth District Court of Appeals in *N.A.D. v. Cleveland Metro. Sch. Dist.*, 2012 Ohio 4929. The reasons for this motion are more fully explained in the below memorandum.

II. MEMORANDUM IN SUPPORT OF MOTION

On August 17, 2012, Appellant Cuyahoga County Board of MRDD filed with this Court its Notice of Appeal and Memorandum in Support of Jurisdiction. In its Memorandum, Appellant identified the following proposition 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.

Appellant argued that this Court should accept jurisdiction of this case because the Eighth District Court of Appeals had completely ignored this Court's holding in *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009 Ohio 1360. In *Marlington*, 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." In deciding this issue, the Court determined "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. In the case *sub judice*, however, the Eighth District Court of Appeals completely ignored this Court's holding in *Marlington* and stated:

[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. Thus, the Eighth District held that Plaintiff could pursue a claim against Defendant for its alleged negligent/reckless retention and supervision of an employee, even though this alleged conduct was "outside the actual driving or moving the vehicle." *Id.* This is completely contrary to this Court's decision in *Marlington*.

In opposing Defendant Cuyahoga Board's appeal to this Court, Plaintiff acknowledged that the claim at issue (Count II) seeks to impose liability on Defendant "for its reckless personnel decision in retaining Simpson as a commercial bus driver...and its failing to impose any additional testing, evaluation, or supervision of Simpson." Memorandum in Response of Appellee at p. 4. Plaintiff argued that the immunity exception in R.C. 2744.02(B)(1) applied to Defendant's alleged negligent/reckless employment actions even though they clearly did not pertain to "driving or otherwise causing the vehicle to be moved." The Eighth District accepted this argument and held that R.C. 2744.02(B)(1) can apply "to negligence outside the actual driving or moving the vehicle." Recognizing that the Eighth District's holding is contrary to this Court's decision in *Marlington*,

Plaintiff further argued to this Court that “[e]ven if the Eighth District misstated this Court’s language in *Marlington*, any such error was harmless.” Memorandum in Response at pp. 13-14.

However, the Eighth District recently made clear that it did not misstate this Court’s holding in *Marlington* by mistake; rather, the Eighth District has again applied R.C. 2744.02(B)(1) to conduct that is beyond the actual driving or moving the vehicle. In *N.A.D. v. Cleveland Metro. Sch. Dist.*, 2012 Ohio 4929, a minor and her mother brought suit against the Cleveland School District alleging that the minor was sexually assaulted by two other students on a school bus. The plaintiffs alleged *inter alia* that the school bus driver failed to “inspect the students” while operating the bus. Despite the fact that this Court in *Marlington* rejected the argument that a school bus driver’s supervision of student passengers on a school bus fell within the statutory exception to political subdivision immunity under R.C. 2744.02(B)(1), the Eighth District again held that **“the operation of a motor vehicle encompassed more than the mere act of driving the vehicle involved. The operation of a motor vehicle includes the inspection of the bus.”** *N.A.D.*, at ¶ 17. As in the case *sub judice*, the Eighth District once again refused to follow this Court’s decision in *Marlington*.

Undersigned counsel has been advised that Defendant Cleveland Metropolitan School District will appeal the Eighth District’s decision in *N.A.D.* to this Court. Clearly, the issue in *N.A.D.* is identical to the issue in the within appeal. That is, the Eighth District has continued to misapply this Court’s holding in *Marlington*. Appellant respectfully requests that this Court reconsider its decision declining jurisdiction to hear this case. Appellant further requests that this Court hold this appeal pending this Court’s determination whether to accept the appeal from the Eighth District Court of Appeals in *N.A.D. v. Cleveland Metro. Sch. Dist.*, since the appeals will involve the identical issue. If the Court accepts the appeal in *N.A.D.*, it can also choose to keep the

within appeal. If the Court declines to accept the *N.A.D.* appeal, it can dismiss the within appeal as improvidently allowed. In this way, there will be equal application of the law to the parties.

For the reasons stated herein, Appellant Cuyahoga County Board of MRDD respectfully requests that this Honorable Court reconsider its decision declining jurisdiction to hear this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was served via regular U.S. mail on this 15th day of November 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 in *N.A.D. v. Cleveland Metro. Sch. Dist.*, 2012 Ohio 4929 (October 25, 2012)

[Cite as *N.A.D. v. Cleveland Metro. School Dist.*, 2012-Ohio-4929.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97195

N.A.D., ET AL.

PLAINTIFFS-APPELLEES

vs.

**CLEVELAND METROPOLITAN SCHOOL
DISTRICT, ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-743527

BEFORE: Kilbane, J., Jones, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: October 25, 2012

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MARY EILEEN KILBANE, J.:

{¶1} Defendants-appellants, Cleveland Metropolitan School District (“CMSD”) and Mr. Little (“Little”) (collectively referred to as appellants), appeal the trial court’s denial of their motion to dismiss. For the reasons set forth below, we affirm.

{¶2} In December 2010, plaintiffs, N.A.D., a minor, and her mother, N.U.D. (collectively referred to as “plaintiffs”), filed a complaint against CMSD, Little, N.B. II, N.B. and D.H., individually and as parents of N.B. II, A.S. II, and A.S. and E.S., individually and as parents of A.S. II, asserting five causes of action.¹ At the time of the incident, N.A.D. was enrolled in the special education curriculum within the CMSD. Plaintiffs allege in the first cause of action that two other students, N.B. II and A.S. II, sexually assaulted N.A.D. on a CMSD bus driven by Little. In the second cause of action, plaintiffs allege that N.A.D. sustained serious emotional distress as a result of this incident. In the third cause of action, plaintiffs allege that appellants, N.B. II’s parents, and A.S. II’s parents were negligent for failing to supervise N.B. II and A.S. II and allowing the attack to be perpetrated. Plaintiffs also allege that appellants’ acts and omissions constituted wanton misconduct and a reckless disregard to N.A.D.’s safety, within the meaning of R.C. 2744.03(A)(6)(b). Plaintiffs allege that appellants “acted

¹Pursuant to this court’s established policy, the identity of the involved minors is shielded. Therefore, the minors and their family members are referred to only by their initials.

negligently, recklessly, and/or wantonly by proceeding to operate the bus along the route without stopping to inspect the students and protect [N.A.D.] from the abuse which was known, or should have been known to be ongoing.” Plaintiffs further allege that Little “acted negligently and otherwise violated the duties that were owed during the course of his operation of the school bus in the scope of his employment and authority within the meaning of R.C. 2744.02(B)(1).” In the fourth cause of action, plaintiffs allege that they are entitled to parental statutory liability from N.B. II’s parents and A.S. II’s parents. In the fifth cause of action, N.U.D. asserts a loss of consortium claim against each of the defendants.

{¶3} Relevant to this appeal, appellants filed a motion to dismiss pursuant to Civ.R. 12(B)(6) in response to plaintiffs’ complaint. Appellants argued that they are immune from plaintiffs’ claims under R.C. Chapter 2744. Relying on *Doe v. Marlinton Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-3601, 907 N.E.2d 706, appellants argued that the operation of a school bus does not include the supervision of students who are passengers on the bus. Plaintiffs opposed the appellants’ motion, and the trial court denied the motion without explanation.

{¶4} Appellants then appealed to this court in August 2011. We dismissed the appeal in October 2011 for lack of a final appealable order, citing our decision in *Young v. Cuyahoga Cty. Bd. of MRDD*, 8th Dist. No. 95955, 2011-Ohio-2291.² Appellants

²In *Young*, we held that there is no final appealable order when the trial court does not provide an explanation for its decision to deny a motion to dismiss on the issue of immunity. *Id.* at ¶ 16.

appealed from our decision to the Ohio Supreme Court in *Dillard v. Cleveland Metro. School Dist.*, 131 Ohio St.3d 371, 2012-Ohio-1223, 965 N.E.2d 293. The Ohio Supreme Court vacated this court's judgment and remanded the matter for us to apply our en banc decision in *DiGiorgio v. Cleveland*, 196 Ohio App.3d 575, 2011-Ohio-5824, 964 N.E.2d 495 (8th Dist.).³ As a result, appellants' appeal was reinstated, and the matter is now before us for consideration of the following two assignments of error.

ASSIGNMENT OF ERROR ONE

The trial court erred in denying the motion to dismiss of the [appellants] because they have statutory immunity from liability under the decision of the Ohio Supreme Court in [*Marlington*].

ASSIGNMENT OF ERROR TWO

The trial court erred in denying [CMSD's] motion to dismiss [Little] where none of the operative factual allegations in the plaintiffs' complaint described any actionable misconduct that could serve to divest him of statutory immunity or state a claims against him upon which relief can be granted.

Standard of Review

{¶5} We apply a de novo standard of review to the trial court's granting of a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v.*

³In *DiGiorgio*, we overruled our decision in *Young* and found that "the denial of a motion to dismiss is a final, appealable order under R.C. 2744.02(C), even where the trial court does not explain the reasons for its decision." *Id.* at ¶ 15.

Beretta U.S.A. Corp., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Under this standard of review, we must independently review the record and afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. No. 85467, 2005-Ohio-5985, ¶ 13.

{¶6} In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).

{¶7} In resolving a Civ.R. 12(B)(6) motion, a court's factual review is confined to the four corners of the complaint. *Grady v. Lenders Interactive Servs.*, 8th Dist. No. 83966, 2004-Ohio-4239, ¶ 6. Within those confines, a court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the nonmoving party. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 1995-Ohio-295, 653 N.E.2d 1186. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

Political Subdivision Immunity

{¶8} Appellants argue that the trial court erred when it denied their motion to dismiss because they are entitled to political subdivision immunity. To determine whether a political subdivision enjoys immunity under the Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, we employ the three-tiered analysis set forth in *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. [*Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E.2d 1141]; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.

The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. *Id.* at 28, 697 N.E.2d 610. * * *

If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense to that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Colbert* at ¶ 7-9.

{¶9} Here, the parties do not dispute that CMSD is a “political subdivision” as defined in R.C. 2744.01(F). Appellants contend that the operation of a school bus is a “governmental function” as set forth in R.C. 2744.02(A)(1). On the other hand, plaintiffs contend that the operation of a school bus is a proprietary function because CMSD “established a ‘busline’ for students, just like non-governmental entities do for travelers across the country.” However, the Ohio Supreme Court has acknowledged that the transportation of students on a school bus constitutes a governmental function. *Marlington*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 11. The *Marlington*

court noted that: “[g]overnmental functions include ‘[t]he provision of a system of public education.’ See R.C. 2744.01(C)(2)(c).” *Id.* See also *id.* at fn. 2 where the *Marlington* court cited to: (1) *Doe v. Dayton City School Dist. Bd. of Edn.*, 137 Ohio App.3d 166, 170, 738 N.E.2d 390 (2d Dist. 1999), where the Second District Court of Appeals found that “[b]ecause the board was required by law to provide transportation for Doe, the function of providing it was governmental, not proprietary, per R.C. 2744.01(C)(1)”[;] (2) R.C. 3314.09, which provides that “the board of education of each city, local, and exempted village school district shall provide transportation to and from school for its district’s native students”[;] and (3) R.C. 3327.01, which provides that

“[i]n all city, local, and exempted village school districts where resident school pupils in grades kindergarten through eight live more than two miles from the school for which the state board of education prescribes minimum standards * * * and to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community school which they attend the board of education shall provide transportation for such pupils to and from such school * * *.”

{¶10} Seeing that the operation of the school bus constitutes a governmental function, we must next examine tier two of the analysis to determine if one the exceptions in R.C. 2744.02(B)(1)-(5) apply. Appellants contend that *Marlington* is dispositive of plaintiffs’ claims and the trial court erred when it denied their motion to dismiss. Appellants argue that under *Marlington*, the R.C. 2744.02(B)(1) exception to immunity for the negligent operation of a motion vehicle does not encompass the negligent supervision of student passengers by the school bus driver. R.C. 2744.02(B)(1) provides that: “[e]xcept as otherwise provided in this division, political subdivisions are liable for injury,

death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.”

{¶11} By contrast, plaintiffs cite to our decision in *Swain v. Cleveland Metro. School Dist.*, 8th Dist. No. 94553, 2010-Ohio-4498, and argue that liability can be imposed against CMSD because they alleged that Little’s negligence occurred when he failed to inspect the students while he was driving the bus.

{¶12} In *Marlington*, the plaintiffs sued the Marlington Local School District Board of Education and several employees of the school district seeking damages after their daughter was sexually molested by another child on a school bus. The board moved for summary judgment and raised the defense of political subdivision immunity under R.C. Chapter 2744. The trial court denied the board’s motion for summary judgment and the board appealed. The court of appeals reversed, holding that the alleged negligent supervision of the children on the bus did not constitute negligent operation of a motor vehicle within the meaning of R.C. 2744.02(B)(1). The Ohio Supreme Court accepted plaintiffs’ appeal and affirmed the appellate court’s judgment.

{¶13} At issue in *Marlington*, was “whether a school bus driver’s supervision of the conduct of children passengers 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).” *Id.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 9. The *Marlington* court decided this issue at the summary judgment stage of the proceedings,

unlike the instant case, which was decided on a motion to dismiss. We note that a motion for summary judgment allows the court to look beyond the allegations in the pleadings and analyze the evidence to ascertain whether there is a need for a trial. Whereas, with a motion to dismiss, only the pleadings are considered.

{¶14} The *Marlington* court analyzed what “operation of” a motor vehicle meant as set forth in R.C. 2744.02(B)(1) and concluded 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. The language of R.C. 2744.02(B)(1) is not so expansive that it includes supervising the conduct of student passengers, as alleged in this case.”

Id. at ¶ 26.

{¶15} In *Swain*, the plaintiffs sued the CMSD seeking damages after a CMSD bus driver failed to discover that a kindergarten student had fallen asleep in her seat on the way home from her first day of school and failed to drop her off at her bus stop. CMSD moved to dismiss plaintiffs’ complaint on the basis of political subdivision immunity. The trial court denied the CMSD’s motion, and CMSD appealed to this court.

{¶16} In *Swain*, just like in the instant case, the CMSD relied on *Marlington* and argued that its motion to dismiss should have been granted by the trial court. CMSD argued that under *Marlington* the exception to sovereign immunity in R.C. 2744.02(B)(1) does not apply. In affirming the trial court’s decision, we distinguished *Marlington* from the facts in *Swain*, noting that:

Marlington involved the sexual assault between different students. * * *
The case at bar involves the negligent operation of a motor vehicle in driving

or otherwise causing the vehicle to be moved in relation to the conduct of the bus driver and her duties. * * * 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.* (Emphasis in original.) *Swain*, 8th Dist. No. 94553, 2010-Ohio-4498, at ¶ 11-12.

{¶17} Here, plaintiffs' complaint specifically alleges that in addition to failing to supervise the students, appellants were negligent for "proceeding to operate the bus along the route without stopping to *inspect* the students[.]" (Emphasis added.) While we are mindful of the *Marlington* court's findings at the summary judgment stage of the proceedings, we also acknowledge our decision in *Swain*, where we found that at the motion to dismiss stage of the proceedings, the operation of a motor vehicle encompassed more than the mere act of driving the vehicle involved. The operation of a motor vehicle includes the inspection of the bus. *Swain* at ¶ 12-13.

{¶18} We have previously stated that "[w]hether a political subdivision is immune from liability is a question of law that should be resolved by the trial court, preferably on a motion for summary judgment." *Sampson v. Cuyahoga Metro. Housing Auth.*, 188 Ohio App.3d 250, 2010-Ohio-3415, 935 N.E.2d 98, ¶ 22 (8th Dist.), *aff'd*, 131 Ohio St.3d 418, 2012-Ohio-570, 966 N.E.2d 247. At the motion to dismiss stage like in *Swain*, as opposed to the summary judgment stage in *Marlington*, plaintiffs are only required to have a short and plain statement of the claim showing that they are entitled to relief and our review is confined to the four corners of the complaint. *See* Civ.R. 8 and Civ.R. 12(B)(6); *Grady*, 8th Dist. No. 83966, 2004-Ohio-4239, ¶ 6.

{¶19} In the instant case, plaintiffs' complaint alleges additional conduct, specifically the conduct of the bus driver in relation to his operation of the bus and N.A.D. See *Swain* at ¶ 14. Therefore, we find that the facts as pled by plaintiffs were sufficient for the purpose of overcoming appellants' motion to dismiss.

{¶20} In the second assignment of error, appellants argue that Little is entitled to individual immunity as an employee of a political subdivision. With respect to individual immunity, we first presume that employees of a political subdivision are immune from suit. *Sampson*, 188 Ohio App.3d 250, 2010-Ohio-3415, 935 N.E.2d 988, ¶ 41. Here, there is no dispute that Little was employed by the CMSD and that the CMSD is a political subdivision.

{¶21} Next, we must analyze whether any of the exceptions outlined in R.C. 2744.03(A)(6) apply to bar immunity. *Id.* at ¶ 42, citing *State ex rel. Conroy v. Williams*, 185 Ohio App.3d 69, 2009-Ohio-6040, 923 N.E.2d 191 (7th Dist.). Appellants argue that R.C. 2744.03(A)(6)(b) does not apply because plaintiffs' complaint sets forth no operative factual allegations against Little. R.C. 2744.03(A)(6)(b) states that an employee is immune from liability unless "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]"

{¶22} However, as previously stated, plaintiffs were only required to have a short and plain statement of the claim demonstrating that they were entitled to relief. In their complaint, plaintiffs specifically allege that "CMSD and [Little] acted recklessly and/or wantonly * * * within the meaning of R.C. 2744.03(A)(6)(b)." Plaintiffs further allege

CMSD and [Little's] acts and omissions constituted wanton misconduct and a reckless disregard to the student's safety * * * [and] CMSD and [Little] acted negligently, recklessly, and/or wantonly by proceeding to operate the bus along the route without stopping to inspect the students and protect [N.A.D.] from the abuse which was known, or should have been known to be ongoing.

Based on these allegations, we find that plaintiffs complaint was sufficient for the purpose of overcoming appellants' motion to dismiss.

{¶23} Therefore, we find that the trial court properly denied appellants' motion to dismiss.

{¶24} Accordingly, the first and second assignments of error are overruled.

{¶25} Judgment is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., CONCURS
KENNETH A. ROCCO, J., CONCURS IN JUDGMENT

KENNETH A. ROCCO, JUDGE, CONCURRING IN JUDGMENT:

I concur in judgment because it is my preference to review such matters after the summary judgment stage of the proceedings, as was the case in *Marlington*.