

IN THE SUPREME COURT OF OHIO

JAMES YOUNG, Administrator of the
Estate of Kimberly Young, Deceased

Plaintiff-Appellee

vs.

CUYAHOGA COUNTY BOARD OF
MRDD

Defendant-Appellant

) CASE NO. 2012-1412
)
)
) Appeal From the Cuyahoga County
) Court Of Appeals, Eighth Appellate
) District
)
) Court of Appeals Case No. 97671
)
)
)

**PLAINTIFF-APPELLEE JAMES YOUNG, ADMINISTRATOR OF THE ESTATE OF
KIMBERLY YOUNG, DECEASED, MEMORANDUM IN OPPOSITION TO THE
MOTION FOR RECONSIDERATION**

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FILED
NOV 26 2012
CLERK OF COURT
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TABLE OF CONTENTS

I. STATEMENT OF PLAINTIFF-APPELLEE’S POSITION THAT THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST 1

II. STATEMENT OF THE CASE AND FACTS 2

III. ARGUMENT AGAINST DEFENDANT-APPELLANT’S PROPOSITION OF LAW ... 4

A. AS THE INSTANT CASE IS ABOUT RECKLESS RETENTION, *N.A.D. V. CLEVELAND METROPOLITAN SCHOOL DISTRICT* HAS NO APPLICATION. 6

B. DEFENDANT-APPELLANT HAS NOT DEMONSTRATED THAT A STAY PENDING THE OUTCOME OF *N.A.D. V. CLEVELAND METROPOLITAN SCHOOL DISTRICT* IS WARRANTED..... 8

IV. CONCLUSION..... 9

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases

Doe v. Marlinton Local School Dist. Bd. of Ed., 122 Ohio St.3d 12, 2009-Ohio-1360, 907

N.E.2d 706..... passim

N.A.D. v. Cleveland Metro. Sch. Dist., 8th Dist. No. 97195, 2012-Ohio-4929 6, 7, 8, 9

Williamson v. Rubich, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960)..... 1

Statutes

R.C. 2744 1

R.C. 2744.02 passim

R.C. 2744.03 9

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

Plaintiff-Appellee, James Young ("Plaintiff"), pursuant to S. Ct. P. R. 11.3, submits his Memorandum in Opposition to the Motion for Reconsideration of Entry Declining Jurisdiction to Hear Discretionary Appeal filed by Defendant-Appellant Cuyahoga County Board of Mental Retardation and Developmental Disabilities (hereinafter "MRDD").

This Court appropriately declined jurisdiction over MRDD's 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 permits holding a political subdivision liable where its reckless employment decision directly results in an employee's negligent conduct that falls within one of the exceptions enumerated at R.C. 2744.02(B)(1)-(5). 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. This Court declined jurisdiction on November 17, 2012. In short, MRDD has failed to identify anything novel, controversial, or of great public interest that should give this Court reason to reconsider its decision to decline jurisdiction to hear this matter on the merits.

II. STATEMENT OF THE CASE AND FACTS

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) 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 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”). 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, 2012, the Eighth District affirmed that denial. On November 7, 2012, this Court declined jurisdiction to hear this case on the merits. MRDD asks the Court to reconsider that decision.

III. ARGUMENT AGAINST DEFENDANT-APPELLANT’S PROPOSITION OF LAW

On August 17, 2012, MRDD filed with this Court its Notice of Appeal and Memorandum in Support of Jurisdiction submitting the following proposition of law:

Appellant’s Proposition of Law No. 1: The exception to immunity in R.C. 2744.02(B) 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.

MRDD’s Memorandum in Support of Jurisdiction relied exclusively 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 represent the same immunity provision that forms the basis of this case. Indeed, in its Memorandum in Support of jurisdiction, MRDD invariably cited to cases in which the courts determined a driver was not operating a motor vehicle for purposes of creating an exception to immunity under R.C. 2744.02(B)(1). In this case, however, it is undisputed that MRDD’s employee, Dennis Simpson, was operating a motor vehicle in the course and scope of his employment when he struck and killed Kimberly Young, Plaintiff’s daughter. Indeed, this is the very basis for Count I, the legal sufficiency of which MRDD has never challenged.

The issue reviewed by the Eighth Appellate District, rather, was whether MRDD was entitled to immunity under Count II, which alleges reckless, retention, and supervision of Dennis Simpson as a bus driver. The Complaint plainly alleges that MRDD knew that Dennis Simpson was at all times an unfit and unsafe driver with a predilection and history of convictions for driving while under the influence of drugs and alcohol. Despite having actual knowledge of this incompetence, MRDD assigned Dennis Simpson to operate its buses without limitation or precaution. The result was highly predictable. Dennis Simpson operated the MRDD bus while under the influence of cocaine and struck and killed Kimberly Young, a pedestrian attempting to use the crosswalk. Under well-settled law, MRDD may be held directly liable for its reckless personnel decision in hiring, retaining, and supervising Dennis Simpson when this personnel decision was the moving force behind Simpson's negligent operation of the motor vehicle that killed Kimberly Young.

Given the clarity of R.C. 2744.02 and the case law interpreting it, MRDD has been wholly unable to produce any legal support for its argument that a political subdivision is immune from liability for reckless personnel decisions when those decisions are affirmatively linked to an act falling under the immunity exceptions set forth at R.C. 2744.02(B)(1)-(5). Oddly, MRDD has resorted to relying on cases in which the courts have determined that a bus driver's failure to supervise the occupants of his bus is not the operation of a motor vehicle for purposes of R.C. 2744.02(B)(1). As articulated above, that is not what this case is about. Consequently, MRDD's reliance on *Doe v. Marlinton Local School Dist. Bd. of Ed.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, in which this Court held that a bus driver's failure to supervise his passengers and prevent sexual molestation does not constitute operating a motor vehicle, is misguided. There is no inconsistency between the Eighth District's decision in this

case and *Marlington*. No matter how reckless the school district in *Marlington* was in hiring, retaining, or supervising the bus driver, it would never be liable for this personnel decision because there was no operation of the bus. Indeed, if Simpson had not been operating the bus at the time of the collision and did not have a pattern of incompetence involving the operation of motor vehicles, there could be no direct claim against MRDD. There is simply no inconsistency between the Eighth District's decision in this case and *Marlington*. Because there is no inconsistency between the Eighth District's decision in this case and this Court's decision in *Marlington* and further because MRDD has been unable to identify any law conflicting with this case, this Court appropriately declined jurisdiction.

MRDD now asks the Court to reconsider its decision on the sole basis of the Eighth District Court of Appeals decision in *N.A.D. v. Cleveland Metropolitan School District*, 8th Dist. No. 97195, 2012-Ohio-4929. MRDD advises this Court that in *N.A.D.* the Eighth District intentionally misstated the holding in *Marlington*, and that “the issue in *N.A.D.* is identical to the issue in the within appeal.” (Def.’s Motion at 5.) Aside from the general statement that *N.A.D.* is “identical” to this case, MRDD has offered no coherent explanation as to how the Eighth District’s recent decision will impact this case. As stated below, *N.A.D.* concerns whether a bus driver’s failure to supervise his passengers constitutes operating a motor vehicle under R.C. 2744.02(B). That is not what is at issue in this case as all parties agree that Simpson was operating the motor vehicle during the relevant period. Accordingly, whether *N.A.D.* was rightly or wrongly decided is of no consequence to this appeal.

A. AS THE INSTANT CASE IS ABOUT RECKLESS RETENTION, N.A.D. V. CLEVELAND METROPOLITAN SCHOOL DISTRICT HAS NO APPLICATION.

The Eighth District’s decision in *N.A.D.* has no bearing on this case. *N.A.D.* involved a special education student who was sexually molested by two other students while on a Cleveland

Metropolitan School District bus. *See N.A.D. v. Cleveland Metro. Sch. Dist.*, 8th Dist. No. 97195, 2012-Ohio-4929, ¶ 2. The plaintiffs asserted claims against the assailants, as well as against the Cleveland Metropolitan School District alleging that the conduct of the driver in failing to inspect the occupants during the course of the bus's operation fell within the exception for immunity set forth in R.C. 2744.02(B)(1). *Id.* Accordingly, the issue in *N.A.D.*, as was the case in *Marlington*, was whether the acts or omissions of the driver in failing to supervise its occupants can be considered "operation of any motor vehicle" as provided in R.C. 2744.02(B)(1). The plaintiffs in *N.A.D.* did not allege that the Cleveland Municipal School District was reckless in hiring, retaining, or supervising the driver, that this reckless retention and supervision was the moving force behind the negligent operation of the motor vehicle, or that this reckless personnel decision precludes immunity under the Political Subdivision Tort Liability Act. Indeed, the only issue in *N.A.D.* is one that is uncontested in this appeal, which is whether the driver was operating the bus.

Whether *N.A.D.* was rightly or wrongly decided is of no consequence to the within appeal. It is undisputed that Dennis Simpson, MRDD's employee, was operating the bus when it struck and killed Kimberly Young, and that a finding of negligence against Simpson will be imputed to MRDD. That is, even if *N.A.D.* was wrongly decided, it will still be the case that Dennis Simpson was operating the bus, as that issue is not on appeal. This appeal is about Plaintiff's direct claim against MRDD for its reckless hiring, retention, and supervision of Dennis Simpson who was at all times unfit and incompetent to perform his duties as a driver. Even if this Court accepted jurisdiction and reversed *N.A.D.*, it would have no impact on the outcome of this litigation as the chief allegations and issues are different. Indeed, this Court has already decided in *Marlington* that a bus driver's negligent supervision of his passengers does

not fall within the exception to immunity at R.C. 2744.02(B)(1). This, however, is not what Plaintiff-Appellee alleges in his Complaint.

B. DEFENDANT-APPELLANT HAS NOT DEMONSTRATED THAT A STAY PENDING THE OUTCOME OF *N.A.D. V. CLEVELAND METROPOLITAN SCHOOL DISTRICT* IS WARRANTED.

MRDD “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 issues.” (Def.’s Motion at 5.) MRDD’s characterization of these appeals as “identical” is misguided. Whether the Eighth District did or did not misrepresent the holding in *Marlington* when deciding *N.A.D.* is immaterial because the within appeal is not inconsistent *Marlington*.

If this Court accepted jurisdiction in *N.A.D.* and reversed the Eighth District’s decision, it would not impact the within appeal. There are no allegations that Dennis Simpson failed to inspect or supervise his occupants resulting in the sexual molestation of a passenger. MRDD concedes, rather, that Simpson was operating the bus when he struck and killed Kimberly Young. There is no dispute that this act falls within the exception to immunity in R.C. 2744.02(B)(1). This case is about whether MRDD’s reckless personnel decision in granting or continuing driving privileges to an employee that MRDD knew had a predilection for driving while intoxicated, was an unfit and unsafe driver, and posed a danger to Kimberly Young, the general public, and the developmentally disabled individuals who rely on MRDD’s services by failing to impose any additional testing, evaluation, or supervision was reckless pursuant to R.C. 2744.03(A)(5).

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellee, James Young, Administrator of the Estate of Kimberly Young, Deceased, respectfully requests that this Court refuse jurisdiction over the instant appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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