ORIGINAL

IN THE SUPREME COURT OF OHIO

AMBER SALLEE (Minor), et al.	:	Case No. 14-0727
Plaintiffs-Appellants	:	On Appeal from the Hamilton County Court of Appeals,
vs.	:	First Appellate District of Ohio
STEPHANIE WATTS, et al	:	Court of Appeals Case No. C 1300122
Defendant-Appellee	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEE THREE RIVERS LOCAL SCHOOL DISTRICT

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

This case presents three critical issues affecting all school districts in the State of Ohio: (1) whether school districts are liable for students who are injured after they exit the bus when the bus is no longer present; (2) whether a bus driver violates R.C. 4511.75(E) when he/she starts a bus after a child runs off without permission and without first reaching a place of safety on the child's residential side of a road; and (3) whether a violation of R.C. 4511.75 (E) involves the negligent supervision of a child and not the negligent operation of a motor vehicle.

In this case, a Three Rivers Local School District's (hereinafter "Three Rivers") bus driver dropped off plaintiff/appellant at her assigned bus stop, which was the first on the bus route. After exiting the bus, the plaintiff/appellant, without permission, ran down the sidewalk out of the scope of the driver's supervision and ignored the bus driver honking her horn instead of crossing the street to her residential side. After being ignored and seeing the plaintiff/appellant was safe at a neighbor's house, the driver started the bus and continued the route. The Court of Appeals found that Three Rivers's bus driver violated R.C. 4511.75(E) when she started the bus. Further the Court found the violation of R.C. 4511.75(E) was negligence per se. Yet, the Court stated, "it is hard to imagine what more [the bus driver] could have done in this situation. *Sallee v. Watts*, 2st Dist. Hamilton No. C-130122, 2014-Ohio 717 ¶12. The Court went on to explain the ruling, "as illogical." *Id.* at ¶13.

The Court of Appeals holding: (1) creates legal uncertainty; (2) increases costs for school districts and parents; and (3) is contrary to public policy. Pursuant to these reasons, the Ohio Supreme Court should accept this appeal.

<u>Explanation No. 1:</u> The Court of Appeals decision creates legal uncertainty.

The Court of Appeals decision makes it impossible for school districts and parents to plan and execute bus routes. The Second and Twelfth Districts rule requiring a bus be present for a school district to be liable when a student who exits the bus is injured is no longer instructive. The Supreme Court has not clarified the issue which allows lower courts to arrive at contrary conclusions even when presented with similar facts. See *Sallee v. Watts*, 1st Dist. Hamilton No. C-130122, 2014-Ohio 717, *but see Glover v Dayton Public Schools, et al.*, 2nd Dist. Montgomery, 1999 WL 958492, *1 (Aug. 13, 1999) and . *Day v. Middletown-Monroe City School District,* 12th Dist. Butler, No. CA99-11-186, 2000 WL 979141 8* (July 17, 2000).

In absence of a clear rule, courts evaluating substantially similar facts can choose from multiple legal standards. For example, if the court does not want to apply the standard requiring the bus be present, they can choose to apply the requirement that the bus stay, regardless of time, until a student crosses to his/her residential side of the road. Therefore the bus driver will not know if they must wait at a bus stop indefinitely or if he/she can proceed because the student is no longer abiding by the driver's supervision. Clarification by the Ohio Supreme Court in this area is desperately needed.

<u>Explanation No. 2:</u> The Court of Appeals decision increases costs for political subdivisions and parents.

Busing is an essential element of school districts. Countless parents rely on buses to timely transport children to and from school. A school district also relies on busing and routes to determine and set schedules for different schools. The Court of Appeals, however, forces districts to re-evaluate busing practices, which could have unintended economic consequences for schools and parents.

Following the Court of Appeals opinion, school districts have limited options. First a school district can simply stop busing students all together to avoid situations such as the one that occurred with plaintiff/appellant. The Court stated, "it is difficult to imagine that such situations are exceedingly rare." *Sallee* at ¶13. Second, the school district could re-route buses so that children only exit buses on the residential side of the street. However, this could increase the cost of busing, the length of routes and the schedule of schools. Third, school districts could force parents to be present at the bus stop for a child to be dropped off. But this could have a significant impact for parents who are unavailable to be present at the designated scheduled drop off.

No matter which option the outcome is the same, increased costs. The Court of Appeals opinion will not only impact schools, but also parents. Thousands of parents rely on busing to take children to and from school. Therefore, there is no doubt that this case is one of public or great general interest.

Explanation No. 3: The Court of Appeals decision is against public policy.

The Court of Appeals opinion puts school districts in a position of liability in a multitude of situations no matter how much time has passed since the student exited the bus. This ruling, which the Court of Appeals called "illogical," goes against the public purpose of sovereign immunity, which is codified in Chapter 2744 of the Ohio Code. "The manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." *Wilson v. Stark Cty. Dept. of Human Serv.,* 70 Ohio St. 3d 450 (1994). Maintaining fiscal integrity is essential to the public. Due to the Court of Appeals effect on immunity and fiscal integrity, this issue is one of great public concern.

STATEMENT OF THE CASE AND FACTS

On February 26, 2009 Plaintiff/Appellant Amber Sallee (then age 6) was a first grade student at Miami Heights School in the Three Rivers Local School District. T.d. 58 at 14. After school plaintiff/appellant was dropped off at her designated stop, the corner of Laird and North Miami Street, in Cleves by a Three Rivers bus. T.d. 58 at 40. Lisa Krimmer, while in the course and scope of her employment with Defendant/Appellee Three Rivers, was operating the school bus in which plaintiff/appellant was a passenger. Id.

Plaintiff/Appellant's stop was the first stop. T.d. 57, at 16. Instead of crossing the street and going home as she always did, plaintiff/appellant stayed on the same side of the street and ran down the block with another student named C.J. T.d. 57 at 14, 15, & 25. Ms. Krimmer tried to get her attention by honking the horn but was unsuccessful, so she continued on with her route to drop off the remaining students. T.d. 57 at 13. Ms. Krimmer called Base 2 and let them know that if plaintiff/appellant's mother called looking for her that she was at C.J.'s house. T.d. 57 at 16. After the bus was several blocks down North Miami Street at its third stop, plaintiff/appellant attempted to cross the street and was struck by Ms. Stephanie Watts causing personal injury. T.d. 58 at 39 & 40.

Following the accident, Ms. Janet Cox, an eye witness, stated she had a clear view of the incident and saw plaintiff/appellant enter the street near parked cars and Ms. Watts approaching vehicle, but did not see a school bus. T.d. 64 at 12, 19, 25. Similarly plaintiff/appellant's mother testified upon leaving her house she did not know the location of the bus. T.d. 58 at 41. In fact not until she was informed of the bus's location did she see it several blocks away. T.d. 58 at 40.

Plaintiff/Appellant filed suit in the Court of Common Pleas, Hamilton County Ohio on February 27, 2012. T.d. 2 The complaint alleged personal injuries as a result of Stephanie Watts'

negligence. T.d. 2 ¶¶ 1-3. Additionally, plaintiff/appellant alleged Ms. Krimmer negligently dropped her off at her assigned bus stop without following the correct procedures for a child of tender years and that as a direct and proximate result of Ms. Krimmer's negligence she sustained personal injury. T.d.2 ¶¶ 5-8. Plaintiff/Appellant sued Three Rivers imputing the alleged negligence of Ms. Krimmer. T.d. ¶¶ 10&11.

On April 9, 2012, a Motion to Dismiss Lisa Krimmer was filed. T.d.23. After it went unopposed, the Court granted the motion on May 14, 2012. T.d.32. On December 19, 2012 Three Rivers filed its Motion for Summary Judgment. T.d.50. Plaintiff/Appellant's Response to Defendant's motion was filed on January 8, 2013. T.d.51. On January 10, 2013, Three Rivers filed a Reply. T.d.52. The Trial Court, by Judgment Entry of January 31, 2013, granted the Motion for Summary Judgment, and the Judgment Entry was filed that day. T.d.60

On February 4, 2013 Defendant Stephanie Watts filed a Motion for Summary Judgment. T.d.61. The Trial Court granted the motion by Judgment Entry on February 13, 2013. T.d.68. Plaintiff/Appellant dismissed Defendant Allstate on February 8, 2013. T.d. 67.

On February 25, 2013, plaintiff/appellant filed a Notice of Appeal of the trial court's decision granting Three Rivers' Motion for Summary Judgment. T.d.69.

The First District Court of Appeals overruled the lower court's grant of summary judgment in favor of Three Rivers. Three Rivers Local School District now appeals to the Supreme Court of Ohio to correct the First District Court's errors.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Claims against School Districts involving students who exit from buses and are subsequently injured when the bus is no longer present, do not involve the operation of a motor vehicle.

A school district is entitled to immunity under R.C. 2744. The motor vehicle exception found in R.C. 2744.02(B)(1) does not apply when the bus is not present and cannot strip away a school district's immunity.

The Ohio Supreme Court has set forth a three-tiered analysis to determine whether a political subdivision is immune from tort liability. First, the political subdivision must qualify for immunity set forth under R.C. 2744.02(A)(1). *Cater v. City of Cleveland*, 83 Ohio St. 3d 24, 28, 697 N.E.2d 610 (1998). Second, if the political subdivision qualifies for immunity, courts must determine whether any of the exceptions for immunity apply. *Id.* Finally if an exception applies, under the third tier, the immunity can be reinstated by a political subdivision through the defenses or further immunities of R.C. 2744.03. *Id.*

A political subdivision is defined as a school district or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. R.C. 2744.01(F). Three Rivers, like any other school district, is a "political subdivision" under Ohio Law.

A political subdivision is not liable for 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). Providing transportation for students to and from school is a governmental function. *See Vargas v. Columbus Pub. Schools*, 10th Dist. Franklin No. 05AP-658, 2006-Ohio-7108, ¶16, citing *Doe v. Dayton City School Dist. Bd of Edn.*, 137 Ohio App.3d 166, 170, 738 N.E.2d 390(2nd Dist. 1999). Therefore, a school district, such as Three Rivers, and its employees may raise the shield

of sovereign immunity in claims that arise out of busing of students to and from school.

The shield is subject to five basic exceptions. R.C. 2744.02 (B)(1) –(5). Exception (2) does not apply because courts have held that the transportation of students is a governmental function and not a proprietary function. *Day v. Middletown-Monroe City School District,* 12th Dist. Butler, No. CA99-11-186, 2000 WL 979141 8* (July 17, 2000).

The trial court correctly found none of the exceptions applied in the case at issue. The First District Court of Appeals ruled the exception listed in R.C. 2744.02(B)(1) abrogates a school district's immunity even when a bus is not present at the time of injury. The exception states 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 to their employment and authority. R.C. 2744.02(B)(1).

The immunity exception found in R.C. 2744.02(B)(1) is not applicable. Proceeding on a bus route after the student safely arrives at a friend's residence instead of crossing to the student's residence side of the street does not equate to the "negligent operation of any motor vehicle." Ohio Courts have previously ruled a violation of R.C. 4511.75(E) does not establish the "negligent operation of any motor vehicle" without the bus present when the injury occurs. *Day v. Middletown-Monroe* at *4 (July 17, 2000).

Previously, the Twelfth District and Second District Courts of Appeals held in similar cases that the operation of a motor vehicle immunity exception does not apply since the students' injuries did not result from the operation of any motor vehicle. *Day*, supra and *Glover v Dayton Public Schools, et al.*, 2nd Dist. Montgomery, 1999 WL 958492, *1 (Aug. 13, 1999).

In *Glover*, a kindergarten student in the Dayton Public Schools and was transported to and from school by a Dayton Public School's bus. *Glover v Dayton Public Schools, et al.*, at *1.

In the afternoon of September 20, 1996 the bus driver dropped Dericka and her brother Nicholas off at their designated spot. *Id.* The bus driver then proceeded down the road to his next stop. *Id.* At that point Dericka attempted to cross the street and was struck by a motor vehicle driven by Yvette Reed. *Id.* Dericka Glover and her mother Billie Webb filed suit against the Dayton Public Schools. *Id.* Dayton Public Schools filed a motion for summary judgment arguing that they were entitled to immunity and summary judgment was granted. *Id.* Dericka Glover and her mother appealed. *Id.*

The Second District Court of Appeals stated: "The fact is that the injury in the present case did not occur during Dericka Glover's physical discharge from the bus, or even when the bus was present. In fact, the bus was two stops away when the accident occurred." *Id* at *6. "In our opinion, the facts of the present case do not fit within the 'operation of any motor vehicle,' as that term has been interpreted." *Id.*

> We believe that the interpretation of this exception must be reasonably restricted, particularly in view of the Supreme Court's observation that 'the manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.'

Id, citing *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St. 3d 450 (1994). The Court held that because none of the five exceptions to R.C. 2744.02(B) applied, Dayton Public Schools was immune from liability.

The Twelfth District has also ruled the immunity exception listed in R.C. 2744.02(B)(1) does not apply when a school bus was not present at the time of the injury. *Day v. Middletown-Monroe*, 12th Dist. Butler, No. CA99-11-186, 2000 WL 979141, *4 (May 1, 2000). Nichole Day was a 16-year-old student at Garfield School located in the Middletown-Monroe City School District. *Id* at *1. On March 17, 1997 Nichole was transported by bus from school to home *Id.* Walking home, Nichole crossed a set of railroad tracks. *Id.* While crossing the tracks, she was

struck by a freight train and suffered serious injuries. *Id.* Nichole's mother Linda Day filed suit against the Middletown-Monroe City School District. *Id.*

The Twelfth District Court of Appeals stated: "Although operation of a motor vehicle may encompass more than simply driving a vehicle, the term primarily concerns the physical discharge from the bus of the child." *Id* at *4. Since Nichole Day's mother made no allegation in her complaint that the bus was present when Nichole Day was struck by the freight train "there is no legal basis for asserting that Nichole's injuries resulted from the 'operation of any motor vehicle.'" *Id.* The Twelfth district held R.C. 2744.02(B)(1) did not remove Middletown-Monroe City School District's immunity shield. Further, the court ruled, a violation of R.C. 4511.75(E) does not establish a legal basis for asserting that the proximate cause of a child's injuries result from the operation of any motor vehicle without an allegation that the bus was present when the child was struck. *Id.* at *7.

Plaintiff/Appellant's injury did not arise out of the "operation" of the bus. The injury in the present case did not occur during the physical discharge from the bus or even when the bus was present. When a bus is not present, the operation of a motor vehicle exception of R.C. 2744.02(B)(1) does not apply.

<u>Proposition of Law No. 2:</u> A school bus driver does not violate R.C. 4511.75 (E) when he/she starts a bus after a child runs off without permission and without first reaching a place of safety on the child's residence side of the road

A bus driver does not violate R.C. 4511.75(E) when he/she starts the bus after a student exits the bus and runs off to another student's house instead of crossing to his/her residential side of the road. When students do not listen to a bus driver, act without the permission of a bus driver, or fail to follow protocols of riding the school bus, it is impossible for the driver to follow R.C. 4511.75(E). Therefore, the statute must be applied logically to the facts of a case.

Therefore, a violation can only occur when a school bus is in the nexus of the student's location.

The First District Court of Appeals held when a bus driver leaves a bus stop before a student crosses to his residence side of the street the driver violates R.C. 4511.75(E). *Sallee v. Watts*, 1st Dist. Hamilton No. C-130122, 2014-Ohio 717 ¶8. When Plaintiff/Appellant exited the Three Rivers school bus, she ran down the street with another student. T.d. 54 at 14, 15 & 25. The driver, Ms. Krimmer, tried to get her attention by honking the horn but was unsuccessful. T.d. 57 at 13. The First District Court of Appeals stated, "it is hard to imagine what more Krimmer could have done in this situation." *Id.* at ¶12. However, the court interpreted R.C. 4511.75(E) to require that a bus driver remain stopped when a student runs down the street, proceeds into another student's house or otherwise fails to cross the street while moving outside the area of supervision of the bus driver. *Id.* Therefore, based on the First District Court of Appeals holding a school district must require a bus driver to indefinitely stay stopped with a bus full of students or face liability under R.C. 4511.75(E).

In reaching the conclusion, the court stated, "as illogical as that result may be, it is not within the authority of this court to continence any other." *Sallee* at ¶13.

The Supreme Court of Ohio has long held the principle of law, "in construing a statute, a construction which results in a ridiculous or absurd situation must be avoided if reasonably possible." *State ex rel Haines v. Rhodes*, 168 Ohio St. 165,170, 151 N.E.2d 716 (1958). The Supreme Court stated,

> "The General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences. It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result."

State ex rel Cooler v. Savord, 153 Ohio St. 67, 92 N.E.2d 390, paragraph one of the syllabus (1950).

An illogical result, as the First District Court of Appeals called it, is exactly what the principle laid out by the Supreme Court is designed to avoid. Based on the First District's ruling a multitude of absurd or unreasonable consequences would equate to a violation of R.C. 4511.75(E).

For example, if a student leaves the bus and instead of crossing the street to the residential side enters a friend's house and spends the night, this result would force the bus to close the street for the night as it indefinitely must wait for the student to cross to his or her residential side of the street. The decision would also require a bus driver to wait indefinitely if a student exits the bus and enters a vehicle before crossing to the residential side and drives away to ensure upon the vehicle's return the student crosses to his or her residential side of the street. This court's reading of the statute would always require the bus driver to indefinitely wait with a bus full of children, no matter the length of time after the student exits the bus, until the student crosses the street to his or her residential side. These absurd, unreasonable and illogical results are not what the legislature intended in writing R.C. 4511.75(E).

The purpose of R.C. 4511.75(E) is to protect children who are boarding and leaving buses, who are at risk when crossing in front of a school bus and other vehicles on the road. *Middletown v. Campbell*, 69 Ohio App 3d 411, 416, 590 N.E.2d 1301 (12th Dist.1990). The purpose, therefore, is tied to the nexus of the bus and student. When a student leaves the supervision of the bus driver, it is impossible for a school district's bus driver to protect the child. Once a student is outside the scope of a bus driver's supervision, the driver's act or omission by starting a bus is not within the nexus of injury. Therefore, a school district's bus driver does not violate R.C. 4511.75(E) when he/she starts a bus after the child runs off without permission and without first reaching a place of safety on the child's residence side of the road.

<u>Proposition of Law No. 3</u>: A violation of R.C. 4511.75 (E) involves negligent supervision of a child and not the negligent operation of a motor vehicle

While R.C. 4511.75(E) is found under the chapter of the Ohio Code involving motor vehicles, it does not follow that a violation of the statute must equate to a violation involving the operation of a motor vehicle. Not every duty assigned to a bus driver by statute or administrative code constitutes the operation of a motor vehicle. *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 18, 907 N.E.2d 706 (2009).

The First District Court of Appeals ruled starting a bus before a student crosses to his/her residential side of the road involves the operation of a motor vehicle. *Sallee v. Watts*, 2st Dist. Hamilton No. C-130122, 2014-Ohio 717 ¶14. The court based the opinion on the Supreme Court of Ohio's extended definition of operation found in *Doe v. Marlington Local School Dist. Bd. of Edn.*. *Id.* at ¶7.

In *Doe*, the Supreme Court of Ohio went through detailed analysis to define the word operation within the immunity exception found in R.C. 2744.02(B)(1). *See Doe v. Marlington.* The analysis was required because the legislature did not define the term. *Doe* at 16. The court ruled the immunity exception in R.C. 2744.02(B)(1) "pertains only to negligence in driving or otherwise causing the vehicle to be moved." *Id.* at 18. In the analysis, this Court stated it did not find persuasive the argument that "the operation of a motor vehicle under Michigan governmental immunity statute 'encompasses activities that are directly associated with the driving of a motor vehicle'" and did not apply that standard to Ohio's immunity statute. *Id.* at 19.

The Court explained supervision of students may be a part of bus drivers' duties, however, not every duty required of a bus driver constitutes the operation of a motor vehicle within in the immunity exception found in R.C. 2744.02(B)(1). *Id.* at 18.

The First District Court of Appeals equated a bus driver's duty to supervise a child across

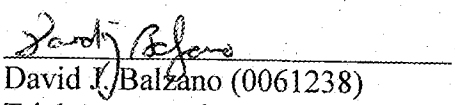
the road to his/her residential side to the operation of a motor vehicle. While a duty to supervise children crossing the street before starting the bus may encompass an activity associated with driving a motor vehicle, the Supreme Court of Ohio previously found not all activities associated with driving constitute the operation of a school bus. *Id.* at 19.

As was the case in *Doe*, the plain language of R.C. 2744.02(B)(1)'s exception to a school district's immunity does not include within its scope the negligent supervision of the conduct of students who exit the bus and leave or ignore the bus driver as the plaintiff/appellant did by running down the street to another student's house. R.C. 4511.75(E) involves a bus driver's supervision of students after they have exited the bus, not the operation of a motor vehicle.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellee 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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CERTIFICATION

I hereby certify that a copy of the foregoing has been served by ordinary U.S. Mail upon the following this 8th day of May, 2014.

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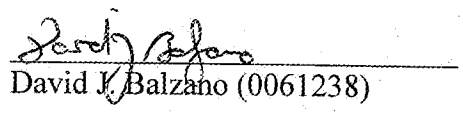

David J. Balzano (0061238)

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(February 28, 2014)

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(March 26, 2014)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
FEB 28 2014

AMBER SALLEE, a minor, by her parent and next friend, Pamela Petti,	:	APPEAL NO. C-130122 TRIAL NO. A-1201528
Plaintiff-Appellant,	:	*OPINION.*
and	:	
PAMELA PETTI,	:	
Plaintiff,	:	
vs.	:	
STEPHANIE WATTS,	:	
LISA KRIMMER,	:	
and	:	
ALLSTATE INSURANCE COMPANY,	:	
Defendants,	:	
and	:	
THREE RIVERS LOCAL SCHOOL DISTRICT,	:	
Defendant-Appellee.	:	

PRESENTED TO THE CLERK
OF COURTS FOR FILING

FEB 28 2014

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: February 28, 2014

O'Connor, Acciani & Levy LPA and *Dennis C. Mahoney*, for Plaintiff-Appellant,

David J. Balzano, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

ENTERED
FEB 28 2014

DINKELACKER, Judge.

{¶1} In one assignment of error, plaintiff-appellant Amber Sallee, a minor, appeals the decision of the trial court that defendant-appellee Three Rivers Local School District was entitled to immunity in this personal-injury case. Because the trial court erred in determining that this case did not involve the negligent operation of a motor vehicle, we reverse the judgment of the trial court.

{¶2} Sallee was in the first grade, attending classes in the Three Rivers Local School District ("Three Rivers") when the accident at issue occurred. At the end of the school day, defendant Lisa Krimmer, the driver of the bus that Sallee regularly rode home, dropped Sallee off at her designated stop. Instead of crossing the street to her residence, Sallee lingered at the stop with another student. Sallee and the other student then ran down the street. Krimmer attempted to get Sallee's attention by honking the horn, but was unsuccessful. Unable to get Sallee to proceed home, Krimmer called in to inform school officials that Sallee had left with the other student. Krimmer then continued with her route. When the bus was a few blocks away, Sallee attempted to cross the street and was struck by a car driven by defendant Stephanie Watts.

{¶3} Through her mother, plaintiff Pamela Petti, Sallee filed suit seeking damages for personal injuries she sustained as a result of the accident. Petti also asserted a loss-of-consortium claim. Three Rivers filed a motion for summary judgment, claiming that it was entitled to immunity for the claims made by Sallee and Petti. The trial court granted Three Rivers's motion.

ENTERED
FEB 28 2014

Movement of School Bus as Operation of a Motor Vehicle

{¶4} R.C. 2744.02(A)(1) confers immunity upon political subdivisions for "injury * * * 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" unless one of the exceptions listed in R.C. 2744.02(B) applies. *Evans v. Cincinnati*, 1st Dist. Hamilton No. C-120726, 2013-Ohio-2063, ¶ 5. Neither party in this case contests that Three Rivers was engaged in a governmental function while providing transportation for its students to and from school. *See Vargas v. Columbus Pub. Schools*, 10th Dist. Franklin No. 05AP-658, 2006-Ohio-7108, ¶ 16, citing *Doe v. Dayton City School Dist. Bd. of Edn.* 137 Ohio App.3d 166, 170, 738 N.E.2d 390 (2d Dist.1999). Therefore, the question is whether there is some exception among those listed in R.C. 2744.02(B) that applies.

{¶5} There are several exceptions to sovereign immunity listed in R.C. 2744.02(B). The one at issue in this case, R.C. 2744.02(B)(1), states that:

> political subdivisions are liable for injury * * * 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.

{¶6} In its analysis of the issue, the trial court relied on two decisions that appeared to settle the matter, *Glover v. Dayton Pub. Schools*, 2d Dist. Montgomery No. 17601, 1999 Ohio App. LEXIS 3706 (Aug. 13, 1999), and *Day v. Middletown-Monroe City School Dist.*, 12th Dist. Butler No. CA99-11-186, 2000 Ohio App. LEXIS 1868 (May 1, 2000). In those cases, the Second and Twelfth Appellate Districts determined that claims against school districts involving students who had exited from buses did not involve the operation of a motor vehicle where the bus was no longer present at the time the child was injured. As the Twelfth Appellate District

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concluded, "Without [alleging that the bus was present when the injury occurred], there can be no legal basis for asserting that [the child's] injuries resulted from the 'operation of any motor vehicle.' " *Day* at *10. Applying these cases, the trial court concluded that the issue was the driver's "conduct in not supervising the child by insuring that she crossed the street before the bus proceeded to his next stop," because the injury was not "related to [the driver's] actual driving of the motor vehicle."

{¶7} The problem with the trial court's analysis is that it fails to consider the Ohio Supreme Court's more recent decision that defined the "operation of any motor vehicle" in the context of R.C. 2744.02(B)(1). In 2009, the court determined that the negligent operation of a school bus pertains "to negligence in driving or otherwise causing the vehicle to be moved." *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 26. Sallee argues that Krimmer "operated a motor vehicle" when she drove away from Sallee's bus stop. She further argues that this operation was negligent per se because it constituted a violation of R.C. 4511.75(E). R.C. 4511.75(E) provides that "[n]o school bus driver shall start the driver's bus until after any child * * * who may have alighted therefrom has reached a place of safety on the child's * * * residence side of the road."

{¶8} There is no dispute that Krimmer drove away from Sallee's bus stop before Sallee had safely crossed to her residence side of the street. Therefore, it is clear from the record that Krimmer violated R.C. 4511.75(E). But the question remains whether Krimmer's violation of the statute constituted negligence per se.

{¶9} Negligence per se requires a legislative enactment that imposes a specific duty for the protection of others, and a person's failure to observe that duty.

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Robinson v. Bates, 160 Ohio App.3d 668, 2005-Ohio-1879, 828 N.E.2d 657, ¶ 5 (1st Dist.), citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998). But the statute must leave no room for a range of conduct that meets its purpose. The only fact for the jury to determine must be the commission or omission of the specific act. *Chambers* at 565. Where "a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence per se." *Id.*, quoting *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 374-375, 119 N.E.2d 440 (1954).

{¶10} The violation of R.C. 4511.75(E) is negligence per se. The statute sets forth a specific requirement that a school bus driver shall not start his or her bus until the child "has reached a place of safety on the child's * * * residence side of the street." It leaves no room for considering what a reasonable person would do under a given set of circumstances. The analysis is simple and binary—either the child had crossed to her residence side of the street before the driver started the bus or she had not. Since Krimmer drove away before Sallee crossed to her residence side of the street, she was negligent per se in the operation of a motor vehicle.

{¶11} While the trial court addressed the application of R.C. 4511.75(E) to this case, it did so in the context of a different exception to immunity. This exception, contained in R.C. 2744.02(B)(5), provides for liability if a statute expressly imposes it. The trial court reasoned that since R.C. 4511.75(E) did not expressly impose liability, it did not meet the requirements of R.C. 2744.05(B)(5). But the trial court did not analyze whether a violation of R.C. 4511.75(E) constituted the negligent operation of a motor vehicle under R.C. 2744.02(B)(1). Since the trial

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court improperly determined that this case did not involve the negligent operation of a motor vehicle, it erred.

Poorly Drafted Legislation Leaves Responsible Bus Drivers at Risk

{¶12} We are mindful that this is a delicate area. This court recognizes that the General Assembly has enacted R.C. 4511.75(E) to protect children as they cross the street to go home from school. At the same time, however, it is hard to imagine what more Krimmer could have done in this situation. Sallee left the bus stop with another child and proceeded down the street. Sallee's stop was the first stop on Krimmer's route, and she had other children to take home. Krimmer honked at Sallee and tried to get her to cross the street to her home. Krimmer notified school officials that Sallee had not crossed as she was supposed to. Under R.C. 4511.75(E), however, Krimmer could proceed no further. She had to remain in that spot. If a child runs down the street, or proceeds into a friend's home, or otherwise fails to cross the street while at the same time moving outside the area of control of the bus driver, the statute leaves no recourse for the driver. So a responsible driver in this situation is placed in a dilemma: either remain parked indefinitely with all the other children on the bus, or proceed to take the other children home and violate the statute.

{¶13} As illogical as that result may be, it is not within the authority of this court to continence any other. The legislature has enacted a statute that is plain. This court can only apply it as the General Assembly has written it. As this case demonstrates, the statute—however well-meaning—does not allow for situations such as the one presented in this case; and it is difficult to imagine that such situations are exceedingly rare. We encourage the legislature to reconsider this

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provision and to revise it to allow a bus driver to do something that would protect the child who alights from the bus, the children who remain on the bus, and the driver whose only goal is to protect and serve them all.

Conclusion

{¶14} Krimmer's driving away from the bus stop before Sallee had safely crossed to her residence side of the street constituted the negligent operation of a motor vehicle, and the trial court erred in holding otherwise.

{¶15} It is important to note, however, that this does not complete the analysis. The trial court could still conclude that the exception denoted in R.C. 2744.02(B)(1) does not apply if it determines that Krimmer's conduct did not cause Sallee's injuries. *See Dayton City School Dist. Bd. of Edn.* 137 Ohio App.2d at 171-172, 738 N.E.2d 390 (exception to immunity requires proof that the injury is a direct consequence of the employee's negligent operation of the motor vehicle). But, since the trial court did not engage in that analysis in the first instance, we must remand this cause for that determination.

{¶16} We sustain Sallee's sole assignment of error, reverse the judgment of the trial court, and remand the cause for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., and FISCHER, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

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FEB 28 2014

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

AMBER SALLEE, a minor, by her parent and next friend, Pamela Petti,	:	APPEAL NO. C-130122 TRIAL NO. A-1201528
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
and	:	
PAMELA PETTI,	:	
Plaintiff,	:	
vs.	:	
STEPHANIE WATTS,	:	
LISA KRIMMER,	:	
and	:	
ALLSTATE INSURANCE COMPANY,	:	
Defendants,	:	
and	:	
THREE RIVERS LOCAL SCHOOL DISTRICT,	:	
Defendant-Appellee.	:	

D105394739

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

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The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on February 28, 2014 per order of the court.

By: _____
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
MAR 26 2014

AMBER SALEE (MINOR), et al.,

Appellants,

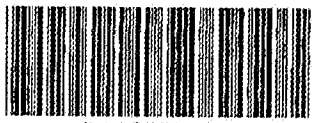
vs.

STEPHANIE WATTS, et al.,

Appellees.

APPEAL NO. C-130122

ENTRY OVERRULING APPLICATION FOR RECONSIDERATION


D105673023

This cause came on to be considered upon the application for reconsideration filed by appellee, Three Rivers Local School District.

The Court finds that the application is not well taken and is overruled.

To the clerk:

Enter upon the journal of the court on MAR 26 2014 **per order of the court.**

By: _____ **(Copies sent to all counsel)**
Presiding Judge