

IN THE SUPREME COURT OF OHIO
CASE NO.: 2014-0727

On Appeal From The Court of Appeals
First Appellate District
Hamilton County, Ohio
Case No. C-1300122

AMBER SALLEE (Minor), et al.
Plaintiffs-Appellees

vs.

STEPHANIE WATTS, et al.,
Defendants-Appellants

**OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS' AMICUS CURIAE MERITS BRIEF IN
SUPPORT OF APPELLANT THREE RIVERS LOCAL SCHOOL DISTRICT**

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I. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

Amicus Curiae Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization comprised of attorneys, corporate executives and managers who devote a substantial amount of time to the defense of civil lawsuits. A primary aspect of OACTA's mission is to promote and improve the administration of justice in Ohio and OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair, consistent, and efficient for all parties.

The question in this case directly affects OACTA and its members. Unless, reversed by this Court, the First District's opinion threatens to impose new liabilities on political subdivisions that contradicts the express purpose and language of the Political Subdivision Tort Liability Act. The “manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.”[citations omitted].” See *Doe, supra* at ¶ 10. The Act provides immunity to all Ohio political subdivisions, including the Defendant/Appellant Three Rivers Local School District, and their employees. OACTA has a pointed interest in the proper interpretation of the Act. This case concerns an exception to that immunity when injury is caused by the negligent "operation of" a motor vehicle under R.C. 2744.02(B)(1). The First District has judicially expanded this narrow exception by effectively adding the terms "supervision of passengers," a phrase that does not exist in the legislative enactment. In doing so, the First District rendered a decision that defies Supreme Court of Ohio precedent, the majority of intermediate appellate courts, and the Legislature's intent under the Tort Liability Act. The First District improperly expanded liability for political subdivisions across Ohio. This Court should follow its prior precedent and the majority of intermediate appellate courts that hold that supervision of passengers does not constitute operation of a motor vehicle for the purposes of

Tort Immunity. OACTA respectfully urges this Court to reverse the First District's opinion and rule in favor of the Appellant Three Rivers Local School District.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae OACTA adopts Appellant Three Rivers Local School District's statement of the case and facts. As noted in that statement, this case arises out of the conduct of Appellant Three Rivers Local School District's bus driver Lisa Krimmer, the driver of the bus that Plaintiff Amber Sallee regularly rode home. Krimmer dropped Sallee off at her designated stop. Instead of crossing the street to her residence, Sallee and another student 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 injured by a car driven by Stephanie Watts.

Despite the bus not being involved in the accident, Sallee sued the school district (among others) because she claimed that Three Rivers was liable for Krimmer negligently operating the bus. In an order granting summary judgment, the trial court found the school district immune without exception under R.C. 2744.02(A). The trial court held that R.C. 2744.02(B)(1) did not apply because the alleged negligence of the school bus driver did not have anything to do with driving the bus, "but rather to her conduct in not supervising the child by insuring that she crossed the street before the bus proceeded to his [sic] next stop." (Trial Court Entry Granting Summ. J. at 4; Apx. 4.) The court also explained that "the accident did not occur while the bus was present." (*Id.*) The First District reversed and in doing so contradicted this Court's precedent as well as the Legislative language and intent of the Tort Liability Act. The First District confounded the issue of immunity and negligence by finding that the driver was negligent per se

and therefore not entitled to immunity. But, whether or not there is an issue of fact about the bus driver's negligence is not pertinent to the determination of immunity under R.C. 2744.02(B)(1).

The question is whether supervising children who are injured after they exit the bus, which is no longer there, constitutes "operation of" a motor vehicle under the exception to immunity. If supervision of the students is not "operation of" a motor vehicle, immunity applies.

III. LAW AND ARGUMENT

PROPOSITION OF LAW: UNDER R.C. 2744.02(B)(1), SUPERVISING STUDENTS AFTER THEY EXIT A SCHOOL BUS THAT IS NO LONGER PRESENT DOES NOT CONSTITUTE "OPERATION OF" A MOTOR VEHICLE THAT WOULD DIVEST A SCHOOL DISTRICT OF IMMUNITY WHEN A STUDENT IS LATER INJURED. (R.C. 2744.02(B)(1); *DOE V. MARLINGTON LOCAL SCHOOL DISTRICT BD. OF EDN.*, 122 OHIO ST.3D 12, 2009-OHIO-1360, INTERPRETED AND APPLIED.)

A. The First District's Opinion is not supported by the plain language of the Tort Liability Act.

Whether a political subdivision is immune is a question of law. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992). As a political subdivision, the Three Rivers Local School District is presumptively immune for acts carried out by its employees. R.C. § 2744.02(A); *see also Cook v. City of Cincinnati*, 103 Ohio App.3d 80, 85-86, 90, 658 N.E.2d 814 (1st Dist. 1995) (observing a presumption of immunity). Plaintiffs bear the burden of demonstrating an exception to immunity applies. When immunity is raised, as here, the "burden lies with the plaintiff to show that one of the recognized exceptions apply" under R.C. § 2744.02(B). *Maggio v. Warren*, 11th Dist. Trumbull No. 2006-T-0028, 2006-Ohio-6880 at ¶ 37.

The exception for the negligent "operation of any motor vehicle" is at issue in this case.

That exception provides:

[P]olitical 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." (Emphasis added.)

R.C. § 2744.02(B)(1).

The First District's ruling contravenes the language of R.C. 2744.02(B)(1), the Legislature's intent, Supreme Court precedent, and analogous intermediate appellate court precedent. The ruling is wrong as a matter of law.

Courts must not "under the guise of construction, [] ignore the plain terms of a statute or [] insert a provision not incorporated by the legislature." *Akron v. Rowland*, 67 Ohio St.3d 374, 380, 618 N.E.2d 138 (1993). Here, despite the Legislature's express use of only the terms "operation of" a motor vehicle, the First District has effectively added the phrase "supervision of" passengers. This is wrong as a matter of law. *Id.* It is impossible to believe that the Legislature when it drafted the limited exception to immunity for "operation of" motor vehicles would have envisioned that it would be applied to a situation where the motor vehicle was not at the site of the injury. This case might be very different, had the bus itself struck the plaintiff. But, this case has nothing to do with the operation of the bus. It has to do with a plaintiff's claim that the bus driver should have supervised students who were let off the bus, even after the bus had left the area.

1. The First District's opinion is contrary to the General Assembly's purpose and intent under the Act.

The First District's opinion is directly contrary to the intent of the Tort Liability Act. This Court has emphasized that when considering R.C. 2744.02(B)(1), courts must be mindful of the legislative purpose of the Act. *Doe*, supra, at ¶ 10. As a natural starting point, the Legislature's purpose was to limit liability of political subdivisions. See *Doe*, supra at ¶ 10 (The "manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." [citations omitted].) Certainly, if the Legislature wanted to embrace the

First District's "interpretation" of the "operation of" motor vehicles exception, it would have unequivocally made that addition to the text of the statute. The purpose of the statute rejects the First District's approach.

B. The First District's opinion conflicts with this Court's precedent and other intermediate appellate courts' precedent.

The First District's decision is contrary to this Court's precedent. This Court has expressly held that "the plain language of R.C. 2744.02(B)(1)'s exception to political subdivision immunity for the negligent operation of a motor vehicle does not include within its scope the negligent supervision of the conduct of students on a school bus as alleged here. It is our duty to apply the statute as the General Assembly has drafted it; it is not our duty to rewrite it." *Doe*, supra at ¶ 29, citations omitted ("Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute. ...") In *Doe*, the supervision that the Court referred to is that of students on the bus. Here, the supervision is even more remote, as the student had left the bus and ran down the street. The bus was not in the area when the plaintiff was injured.

Ohio intermediate appellate courts likewise have held that the exception under R.C. 2744.02(B)(1) for negligent "operation of" a bus does not include alleged negligence in supervising kids after discharging them. See e.g., *Glover v. Dayton Public Schools*, 2nd Dist. Montgomery No. 17601, 1999 WL 958492 (Aug. 13, 1999) at *7(expressly holding that "bus drivers alleged negligence in discharging [a student from the bus does not] fit within the exception to immunity for operation of any motor vehicle"); see further e.g., *Day v. Middletown-Monroe City School District*, 12th Dist. Butler No. CA99-11-186, 2000 WL 979141 (July 17, 2000); see also *Dub v. Beachwood*, 191 Ohio App.3d 238, 2010-Ohio-5135, 945 N.E.2d 1065

(R.C. 2744.02(B)(1) exception to immunity for negligent operation of a motor vehicle did not apply with respect to van operator's failure to assist passenger in exiting van).

Despite the statutory law and case precedent, the First District mistakenly held that "the trial court erred in determining that this case did not involve the negligent operation of a motor vehicle" and reversed. (Sallee Op. at ¶1; Apx. 8.) The First District's holding was also wrong because it: 1) disregarded the analogous precedent 2) misinterpreted binding case law, and 3) misunderstood the primary issue in the case and issued an advisory decision.

First, the First District disregarded two intermediate appellate court cases. There is no question that the *Glover* and *Day* decisions are analogous and held that the exception under R.C. 2744.02(B)(1) for negligent "operation of" a bus does **not** include alleged negligence in supervising passengers after discharging them. See *Glover*, supra; *Day*, supra. The First District's decision, which failed to address those decisions in any meaningful way.

Second, *Doe* held that supervision of students of a bus does not constitute "operation of" the bus, or an exception to immunity under R.C. 2744.02(B)(1). Again, if the failure to supervise a student on the bus is not operation, then failure to supervise a student who exits the bus and who is injured when the bus is no longer there cannot constitute operation of a motor vehicle. See, *Doe*. This Court held that "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. 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." *Doe*, supra at ¶26. Under any reasonable reading of *Doe*, the First District's opinion is improper.

Third, the First District misunderstood the primary issue in the case and improperly issued an advisory decision on negligence per se under R.C. 4511.75(E). This case turns on whether the school district is immune for "operation of" the bus, not on whether common law negligence, or negligence per se could be established. It is axiomatic requiring no citation, that immunity under R.C. 2744.02 and the merits of the claim (e.g., negligence/negligence per se) are two separate matters. Liability under R.C. 4511.75(E) does not govern whether Plaintiffs' injury related to operation of the bus immunity under R.C. 2744.02(A).

Further R.C. 4511.75(E) does not define "operation of" a motor vehicle under R.C. 2744.02(B)(1). Other laws or regulations may provide duties and requirements of bus drivers, but that does not turn supervision of students into operation of a motor vehicle.

[I]t does not follow that every duty required of a school bus driver, or for which the driver is trained, constitutes operation of the school bus within the meaning of R.C. 2744.02(B)(1). **The Ohio regulations also require school bus drivers to be trained in public relations**, Ohio Adm.Code 3301–83–10(A)(2)(b), and the “[u]se of first aid and blood borne pathogens equipment,” Ohio Adm.Code 3301–83–10(A)(2)(h). **No one has yet seriously contended that “public relations” is part of operating a school bus.**

Doe, supra, at ¶ 27(emphasis added).

Simply put, R.C. 4511.75 does not define the liability of a political subdivision under R.C. Chapter 2744. Ohio R.C. 4511.75 provides: "No school bus driver shall start the driver's bus until after any child, person attending programs offered by community boards of mental health and county boards of developmental disabilities, or child attending a program offered by a head start agency who may have alighted therefrom has reached a place of safety on the child's or person's residence side of the road."

Ohio Revised Code R.C. 2744.02(B)(5) makes it clear that it is only when a provision of the Revised Code "expressly impose[s]" civil liability on a political subdivision that an exception could apply.

[A] political subdivision is liable for injury, death, or loss to person or property when civil liability is **expressly imposed upon the political subdivision by a section of the Revised Code**, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. **Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision**, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision [emphasis added].

R.C. § 2744.02(B)(5).

Although claiming otherwise, the First District effectively imposes liability by way of R.C. 4511.75(E). R.C. 4511.75(E) does not expressly impose liability on a political subdivision. And R.C. 4511.75(E) does not define "operation of a motor vehicle" for the purpose of Chapter 2744. Even though the First District recognizes that its interpretation of R.C. 4511.75(E) is reaching an unjust and illogical result, the First District still took the additional and unnecessary action of imposing liability on the City for the purported violation of R.C. 4511.75(E) by way of Chapter 2744 -- an immunity statute that is specifically designed to protect political subdivisions from liability. There is no precedent for this expansion of liability and other statutes cannot be used to impose liability on a political subdivision, except under the express language of R.C. 2744.02(B)(5). The plaintiff and that court cannot create a sixth exception to immunity. See *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521.

IV. CONCLUSION

The First District's ruling contravenes the Legislature's intent, the language of R.C. 2744.02(B)(1), Supreme Court precedent, and analogous intermediate appellate court precedent. The ruling is wrong as a matter of law. Amicus Curiae on behalf of the Ohio Association of Civil Trial Attorneys respectfully asks this Court to reverse the First District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Ohio Association of Civil Trial Attorneys' Amicus Curiae Merits Brief in Support of Appellant Three Rivers Local School District was served November 14, 2014 by depositing same in first-class United States mail, postage prepaid, to the following:

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OACTA-140115\Amicus Merits Brief

APPENDIX

Hamilton County Common Pleas Court Entry dated January 31, 2013 Apx. 1

First District Court of Appeals Opinion dated February 28, 2014 Apx. 7



D100860089

COURT OF COMMON PLEAS
HAMILTON COUNTY

ENTERED
JAN 31 2013

AMBER SALLEE (Minor)	:	Case No. A1201528
Plaintiffs,	:	Judge Pat DeWine
vs.	:	
STEPHANIE WATTS, et al.,	:	ENTRY GRANTING
Defendants.	:	DEFENDANT THREE RIVERS
	:	LOCAL SCHOOL DISTRICT'S
	:	MOTION FOR SUMMARY
	:	JUDGMENT

This matter is presently before the Court on the Motion for Summary Judgment filed by Defendant Three Rivers Local School District ("Three Rivers"). Three Rivers argues that as a political subdivision it is entitled to sovereign immunity under Revised Code 2744.02(A)(1). Plaintiffs argue that immunity is not available because two of the statute's exceptions to immunity, enumerated in R.C. 2744.02(B)(1) and R.C. 2744.02(B)(5), apply. Plaintiffs assert that the exception in (B)(1) is available because the injury was caused by the negligent operation of a motor vehicle by a Three Rivers' employee, the school bus driver, while she was engaged within the scope of her employment. Plaintiffs further contend that because the bus driver violated a specific statutory provision, R.C. 4511.75(E), an exception to immunity is available under R.C. 2744.02(B)(5). Three Rivers responds that neither exception applies and it is entitled to immunity. Based on a review of the relevant case law, the Court grants Three Rivers' motion.

I. Facts

Plaintiff Amber Sallee, a first grade student, was dropped off at her designated stop on North Miami Street by her school bus driver, Lisa Krimmer. Instead of crossing the street and

COURT OF COMMON PLEAS
ENTER

PAT DEWINE, JUDGE
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 WHICH SHALL BE TAXED
AS COSTS HEREIN.

going home, Amber stayed on the side of the street on which she was dropped off with another student. Ms. Krimmer attempted to get the attention of the students by honking the horn, but was unsuccessful. Ms. Krimmer continued with her route. When the bus was a few blocks down the street, Amber attempted to cross the street and was struck by Defendant Stephanie Watts' vehicle causing personal injury.

II. Analysis

Ohio Revised Code 2744.02(A)(1) provides immunity to political subdivisions subject to enumerated exceptions:

“For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, 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.”
Revised Code 2744.02(A)(1)

Three Rivers Local School District is a political subdivision under Ohio law, pursuant to R.C. 2744.01(F).

Revised Code 2744.02(B) provides five exceptions to immunity. The two relevant exceptions are 2744.02(B)(1) and 2744.02(B)(5). Revised Code 2744.02(B)(1) provides:

“Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.” R.C. 2744.02(B)(1)

Revised Code 2744.02(B)(5) provides:

“In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist

under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term “shall” in a provision pertaining to a political subdivision.” R.C. 2744.02(B)(5)

Neither exception applies for the reasons that follow.

A. Revised Code 2744.02(B)(1) Does Not Apply Because the Accident Was Not Caused by the Operation of a Motor Vehicle.

For the exception set forth in R.C. 2744.02(B)(1) to apply, the injury must be caused by the “negligent operation of any motor vehicle.” What constitutes the “operation of any motor vehicle” has been at issue in several cases in which Ohio courts have considered the application of the exception.

In *Doe v. Marlinton Local School District Board of Education*, 122 Ohio St.3d 12, 18, 907 N.E.2d 706 (2009), the Ohio Supreme Court found that the exception did not apply where a first-grade student was sexually molested on a school bus. The Court concluded that “the exception to immunity in R.C. 2744.02(B)(1) for the negligent operation of any motor vehicle “pertains only to negligence in driving or otherwise causing the vehicle to be moved.” *Id.* While the supervision of students may be one of a school bus drivers duties, “it does not follow that every duty required of the bus driver, or for which the driver is trained, constitutes operation of the school bus within the meaning of R.C. 2744.02(B)(1).” *Id.*

The facts of *Glover v. Dayton Public Schools*, 2nd Dist. No. 17601, 1999 WL 958492 (Aug. 13, 1999), are even more similar to the case at bar. In that case, the school bus dropped off a kindergarten student at her designated spot, waited until the student reached the curb and started running toward her waiting older brother, and then proceeded toward the next stop. *Id. at*

*1. The student subsequently attempted to cross the street and was struck by a motor vehicle while the school bus was two stops away. *Id. at *6*. Under these circumstances, the court found that the injury did not occur as the result of the negligent operation of a motor vehicle. Critical to the court's analysis was that the injury did not occur during the student's physical discharge from the bus, or even when the bus was present. *Id.*

Also presenting similar facts is the case of *Day v. Middletown-Monroe City School District*, 12th Dist. No. CA9911186, 2000 WL 525612, *1 (May 1, 2000). In that case, a sixteen year old student was dropped off at her designated stop and was later struck by a freight train while walking home. *Id.* The plaintiff in that case argued that the action of dropping off the student at the bus stop constituted "negligent operation of any motor vehicle." *Id. at *4*. The court noted that the plaintiff made no allegation in her complaint that the bus was present when the student was struck by the by the freight train, and found that "[w]ithout such an allegation, there can be no legal basis for asserting that her injuries resulted from the 'operation of a motor vehicle.'" *Id.*

In the case at bar, the alleged negligence of the school bus driver isn't related to her actual driving of the motor vehicle, but rather to her conduct in not supervising the child by insuring that she crossed the street before the bus proceeded to his next stop. *See Marlinton*, 122 Ohio St.3d at 18. Further, the accident did not occur while the bus was present. *See Glover*, 1999 WL 958492, at *6; *Day*, 2000 WL 525612, at *6. Accordingly, Amber was not injured by the negligent operation of a motor vehicle and the statutory exception to immunity in R.C. 2744.02(B)(1) is not available.

B. Revised Code 2477.02(B)(5) Does Not Apply Because Civil Liability is Not Expressly Imposed for Violation of a Statute.

Plaintiffs argue that the exception to liability provided for in R.C. 2744.02(B)(5) when “civil liability is expressly imposed upon the political subdivision by a section of the Revised Code” is applicable in this action. They assert Three Rivers violated the statutory requirement of R.C. 4511.75(E) that the driver not start the bus until the child has reached a position of safety on the side of the street of her residence. Revised Code 4511.75(E) provides:

“No school bus driver shall start the driver’s bus until after any child, person attending programs offered by community boards of mental health and county boards of developmental disabilities, or child attending a program offered by a head start agency who may have alighted therefrom has reached a place of safety on the child’s or person’s residence side of the road.” R.C. 4511.75(E).

The Court in *Glover* rejected a similar argument. 1999 WL 958492 at *10. In *Glover*, the student was also dropped off on the non-residence side of the street. *Id.* at *1. The plaintiffs argued that the exception was applicable because the driver violated Revised Code 4511.76(C) and provisions of the Ohio Administrative Code that mandate drivers account for students at a designated place of safety before leaving. *Id.* The court rejected this argument on the basis that “R.C. 4511.76(C) does not expressly impose liability for purposes of the immunity exception in R.C. 2744.02(B)(5).” *Id.* at *10. The court further found that even though the plaintiffs did not raise the applicability of R.C. 4511.75(E), the statute was directly relevant under the facts of the case. *Id.* at *11. The court stated: “[j]ust like R.C. 4511.76(C), R.C. 4711.75(E) imposes a duty, but does not provide for civil liability if the duty is violated. Therefore, while the result in this case may be unfortunate, we cannot ‘stretch the language’ of the statute to achieve a different outcome.” *Id.* at *12. *See also Day*, 2000 WL 525612 at *7.

In the case at bar, Revised Code 4511.75(E) imposes a duty but does not expressly provide for liability if the duty is violated. Accordingly, the exception is not available.

III. Conclusion

Three Rivers is entitled to the immunity protections of Revised Code 2744.02(A)(1). Defendant Three Rivers' motion for summary judgment is granted.

IT IS SO ORDERED.

Pat DeWine

Judge Pat DeWine

1-30-13

Date

**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,

Plaintiff-Appellant,

and

PAMELA PETTI,

Plaintiff,

vs.

STEPHANIE WATTS,

LISA KRIMMER,

and

ALLSTATE INSURANCE COMPANY,

Defendants,

and

THREE RIVERS LOCAL SCHOOL
DISTRICT,

Defendant-Appellee.

APPEAL NO. C-130122
TRIAL NO. A-1201528

OPINION.

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.

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.

**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

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. Marlinton 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.

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

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 contenance 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

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.