STATE OF MICHIGAN

COURT OF APPEALS

THOMAS CHANDLER,

Plaintiff-Appellant,

v

COUNTY OF MUSKEGON,

Defendant-Appellee.

UNPUBLISHED
February 23, 2001

No. 220435
Muskegon Circuit Court
LC No. 98-38749-NI

Before: White, P.J., and Talbot and R.J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition in defendant's favor on the basis of governmental immunity, MCR 2.116(C)(7), and the court's denial of his motion for reconsideration. The circuit court concluded that the motor vehicle exception to governmental immunity, MCL 691.1405; MSA 3.996(105), did not apply. We disagree and reverse.

I

On May 21, 1996, plaintiff and several others, who were all performing community service under a district court order, were assigned to clean Muskegon Area Transit System (MATS) buses and trolleys at the Witham Road bus barn. Fredrick Smith, a Muskegon County employee and a supervisor for MATS, was supervising the community service workers' cleaning of the interior of buses and trolleys. The incident in question occurred on bus 440. Smith pulled the bus into the barn, turned off the engine and started to exit through the open bus doors. When he reached the first step, the bus doors closed on his neck. The doors closed in this fashion because Smith had neglected to release the hydraulic air pressure valve.

Plaintiff testified at deposition that he was waiting to clean bus 440 when he observed the incident occur. Plaintiff saw Smith put his arms up in an attempt to stop the doors. Nonetheless, the doors closed around Smith's neck while his body was still inside the bus. Plaintiff attempted to pry open the doors, and tried to hold them open as much as he could, until someone from the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

supervisor's office came and reached through the bus window and released the air valve.[1] Plaintiff injured his right shoulder and required surgery. He was unable to work for about four weeks and once he returned to work, he was restricted to light activity, with no overhead lifting.[2]

II

Defendant's motion for summary disposition argued that the motor vehicle exception to governmental immunity, MCL 691.1405; MSA 3.996(105), did not apply because at the time of the incident, bus 440 was parked in the garage with its engine off, was not being used to transport passengers, and therefore was not being used or employed in some specific function or to produce some desired work or effect.

The circuit court granted summary disposition under MCR 2.116(C)(7),[3] and later denied plaintiff's motion for reconsideration. We review the circuit court's grant of summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). The circuit court must accept as true the contents of the complaint unless contradicted by

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[1] Plaintiff testified at deposition:

> OK. Mr. Smith pulled the bus up. I was outside waiting until he pulled the bus up. I was standing outside the door once he got there – OK? -- and the door was open.
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> So when I seen [sic] him he turned off the key, got up off the bus, started walking out the bus. When he got to the doors the doors started closing. He put his elbows up to try to stop the door, and for some reason, whatever reason, he couldn't stop it and it closed his neck, you know, in the door.
>
> And at first I thought he might have been playing a joke or something until I seen the gum come out his mouth, and then that's when I noticed that he was in trouble – in big trouble, you know, and that's when I attempted to open the door. Well, he couldn't assist hisself [sic], but to open the door, and it wouldn't open, you know.
>
> But I noticed as I pried the door open he could at least breathe, you know, to a point where he could breathe, and I held the door open as much as I can until someone went up to the supervisor's office and got someone, you know, which took a while, you know.

[2] Smith testified that he signed an accident report form plaintiff completed on the date in question, in which plaintiff stated that he injured his right shoulder while "trying to take the pressure of [sic off?] the hydolic [sic] door of the bus."

[3] Defendant also argued under MCR 2.116(C)(10), but the circuit court granted the motion based solely on MCR 2.116(C)(7).

documentation submitted by the movant. *Id.* at 119. A movant under MCR 2.116(C)(7) is not required to file supportive material, nor is the opposing party. If such material is submitted, however, it must be considered. *Id.*

MCL 691.1405; MSA 3.996(105) provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in [the Motor Vehicle Code] sections 257.1 to 257.923 . . .

The motor vehicle exception to governmental immunity statute must be narrowly construed. *Stanton v Battle Creek,* 237 Mich App 366; 603 NW2d 285 (1999).

A

There is no dispute that operation of a municipal bus system is a governmental function and no dispute that defendant owned the bus at issue. The issue is whether plaintiff satisfied the "operation" requirement of the motor vehicle exception to immunity.

Both parties rely on four cases that we address in turn. In *Orlowski v Jackson State Prison,* 36 Mich App 113; 193 NW2d 206 (1971), the plaintiff, an inmate at Jackson State Prison, and other inmates were being transported on a prison truck to help control a fire on the prison's grounds. The plaintiff alleged that an employee of the prison negligently latched the tailgate on the truck and that, as a result, the tailgate opened while the truck was moving and plaintiff fell off the truck and was injured. The Court of Claims granted the defendants' motion for accelerated judgment and the plaintiff appealed. This Court stated that the issue before it was "whether the operation of the truck in question by defendants' agent for the purpose of transporting prisoners to contain a fire on the prison grounds at a time when the latch securing the tailgate was not properly fastened, causing one of the prisoners to fall from the truck and be injured, constitutes negligent operation of a motor vehicle." *Id.* at 115. The defendants argued that the alleged act of negligence, failure to latch the truck's tailgate, was not an act involving "negligent operation" "because operation in this context means a physical working or manipulation of the mechanism of the vehicle." *Id.* at 116. This Court disagreed and reversed, noting:

> In other jurisdictions it has been almost universally held that "negligent operation" may occur even though the vehicle is standing still as long as it is being used or employed in some specific function or to produce some desired work or effect. *Diggins v Theroux* (1943), 314 Mass 735 (51 NE2d 425).
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> In *Chilcote v. San Bernardino County* (1933), 218 Cal 444, 445 (23 P2d 748, 749), the court said, with reference to the meaning of "operation":
>
> > "To be in operation, the vehicle must be in a 'state of being at work' or 'in the active exercise of some specific function' by

> performing work or producing effects at the time and place the injury is inflicted."
>
> At the time and place of the accident the truck was being put to a definite task and was carrying out a desired objective. It is undisputed that the truck was being used for the purpose of transporting the inmates to have them help curtail the fire.
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> The back of the truck was equipped with a tailgate which could have been properly fastened in order to protect the men from falling out or being thrown from the truck while it was in operation.
>
> Plaintiff claims that the operator of the truck had either failed to close the tailgate properly, or failed to determine if it was properly closed. Such failure could be considered by the jury in determining the presence of negligence in the operation of a motor vehicle. *Moore* v. *City of Detroit* (1969), 19 Mich App 636.
>
> Reversed and remanded for a trial on the merits. [*Orlowski, supra* at 116-117.]

Both *Chilcote* and *Theroux, supra,* were decided before Michigan's Motor Vehicle Code was enacted in 1949. See n 7, *infra.*

Both parties also rely on *Wells v Southern Michigan Prison,* 79 Mich App 166; 261 NW2d 245 (1977). The plaintiff in *Wells* alleged that while operating a farm tractor under the defendant's control and direction, her decedent, who was incarcerated at Southern Michigan Prison, became entangled in the tractor's power take-off shield and suffered fatal injuries. The plaintiff's complaint alleged that the decedent was the defendant's agent or employee in operating the tractor, that the defendant had negligently failed to provide adequate protective shielding of moving parts, and that the motor vehicle exception to immunity applied because the decedent's injury resulted from the operation of a motor vehicle of the defendant's. The circuit court granted the defendant's motion for accelerated judgment on grounds of immunity. On the plaintiff's appeal, this Court reversed, rejecting the defendant's claims that it was absolutely immune in its exercise of the governmental function of incarceration and rehabilitation of prisoners, that a farm tractor was not a "motor vehicle" under the statutory exception to immunity, and that the exception applied only when third parties were injured. *Id.* at 168. Regarding operation of the vehicle, the *Wells* Court simply quoted *Orlowski*:

> "Negligent operation" of a motor vehicle may occur even though the vehicle is standing still as long as it is being used or employed in some specific function or to produce some desired work or effect. *Orlowski v Jackson State Prison,* 36 Mich App 113, 116; 193 NW2d 206 (1971). [*Wells, supra* at 169.]

Another case both parties rely on is *Nolan v Bronson,* 185 Mich App 163; 460 NW2d 284 (1990). The plaintiff's decedent in *Nolan,* a fifteen-year-old ninth grader, was struck and killed by a car soon after she got off a school bus. The plaintiff argued that the defendant school bus driver and school district negligently failed to stop the school bus in the roadway and activate its warning flashers so that the bus would be visible to vehicles, negligently failed to require the

decedent to get off the bus from the front exit and walk across the street in front of the bus, and negligently failed to prevent the decedent from getting off the bus and crossing the street where there was no traffic light. *Id.* at 165. The defendant school district argued in pertinent part that it was immune from liability because the alleged negligence did not involve the operation of a motor vehicle. *Id.* at 168. This Court disagreed:

> It is well established that a motor vehicle may be in operation for purposes of § 1405 even though it is not in motion. One test of whether a motor vehicle is in operation is based on a determination of whether it is "being used or employed in some specific function or to produce some desired work or effect." *Wells v Dep't of Corrections*, [*supra* at 169.] A bus which is operated in the manner required by § 682 [of the Motor Vehicle Code, MCL 257.682; MSA 9.2382, which "defines the duties of school bus drivers and motor vehicle drivers with respect to school bus passengers crossing the road"] is clearly employed in a specific function or to produce a desired effect. The stopping of a school bus for the purpose of discharging passengers, and the bus driver's duties attendant to the stopping of the school bus, unquestionably constitute operation of a motor vehicle. Thus plaintiff's claims relating to alleged violations of § 682 and similar local ordinances and school board rules and regulations are within the motor vehicle exception to governmental immunity. Moreover, plaintiff's claims relating to [the bus driver's] alleged negligent failure to control the manner in which the students were discharged from her bus are inextricably intertwined with the alleged violations which clearly constitute operation of a motor vehicle. Therefore, those claims are also within the motor vehicle exception to governmental immunity. [*Nolan, supra* at 177-178.]

Finally, both parties rely on *Kuzinski v Boretti*, 182 Mich App 177; 451 NW2d 859 (1989). In that case, an ambulance owned by the defendant City of Southfield was left running and unlocked outside a fire station. The co-defendant, who was not an employee of the defendant, happened to walk by and drove off in the vehicle. A police chase ensued and the ambulance collided with a vehicle carrying the minor plaintiff and several family members. The plaintiffs' complaint alleged that the defendant had negligently left the ambulance unattended with the motor running. The circuit court granted the defendant's motion for summary disposition on grounds of immunity. This Court affirmed, noting regarding the term "operation" in the motor vehicle exception:

> Plaintiffs ask us to apply a very broad definition to the term "operation," contending that defendant's employees' actions in leaving the ambulance running, unattended and unlocked constitute sufficient control over the vehicle to be considered "operation."
>
> The term "operation" is not defined within the governmental immunity statutes. Therefore, we will look to the Michigan Vehicle Code, MCL 257.1 *et seq.*; MSA

9.1801 *et seq.*, in defining the term.[4] See *Roy v Dep't of Transportation*, 428 Mich 330, 338-340; 408 NW2d 783 (1987). MCL 257.36; MSA 9.1836 defines the term "operator" to mean "every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway." The terms "operate" or "operating" mean "being in actual physical control of a vehicle . . . ." MCL 257.35a; MSA 9.1835(1).[5]

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[4] Defendant does not challenge the propriety of the *Kuzinski* Court having looked to the Motor Vehicle Code's definitions of "operator" and "operating" for assistance in defining the term "operation" as used (but not defined) in the motor vehicle exception to governmental immunity, MCL 691.1405; MSA 3.996(105), or other governmental immunity statutes. In any event, the *Kuzinski* Court's having done so is supported by *Stanton v Battle Creek*, 237 Mich App 366, 369; 603 NW2d 285 (1999), in which this Court noted:

> The rules of statutory construction support the trial court's conclusion that the definition of "motor vehicle" applicable to chapter four of the Vehicle Code should be applied to the motor vehicle exception to governmental immunity. First, *the motor vehicle exception to governmental immunity and the owner's liability statute in chapter four of the Vehicle Code, MCL 257.401; MSA 9.2101, share a common purpose in that they were both enacted for the purpose of imposing liability on the owners of vehicles. Haberl v Rose*, 225 Mich App 254, 263; 570 NW2d 664 (1997). Thus, *the statutes are in pari materia and must be read together*. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Furthermore, the primary rule of statutory construction is that statutes must be construed reasonably, keeping in mind the intent of the Legislature. *Barr v Mt Brighton*[,] *Inc*, 215 Mich App 512, 516; 546 NW2d 273 (1996). Here, the most reasonable construction of the statutes at issue requires that the definition of "motor vehicle" used in chapter four of the Vehicle Code be applied to the motor vehicle exception to governmental immunity. Chapter four of the Vehicle Code deals with licensing and registration of motor vehicles and traffic laws. Because actions brought pursuant to the motor vehicle exception to governmental immunity seek to hold the government civilly liable for injuries caused by motor vehicles that the government owns and operates, we believe the Legislature intended that the definition of "motor vehicle" provided in chapter four of the Vehicle Code, rather than the chapters governing licensing, registration, and traffic laws, should apply to the motor vehicle exception to governmental immunity. [*Stanton, supra* at 371-372. Emphasis added.]

[5] Section 35a was added to the Motor Vehicle Code by 1978 PA No. 139, effective May 1, 1979. As originally enacted, the statute provided that "'operator' or 'operating' means a person who drives or is in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or a chauffeur."

> While the term "negligent operation" is not limited to the actual driving of a vehicle upon a highway, see *Wells v Dep't of Corrections*, 79 Mich App 166, 169; 261 NW2d 245 (1977), we do not believe it can be extended so far as to encompass the acts of defendant's employees in this case. Clearly, defendant's employees were not in "actual physical control" of the ambulance when the accident occurred. Rather, codefendant David Boretti was operating the vehicle. Therefore, the motor vehicle exception to governmental immunity is inapplicable to this case, and the lower court properly granted defendant's motion for summary disposition. [*Kuzinski, supra* at 179-180.]

B

Several additional cases not cited by the parties are also germane. *North v Kolomyjec*, 199 Mich App 724; 502 NW2d 765 (1993), does not involve the motor vehicle exception to governmental immunity but interprets the term "operate" or "operating" as defined in the Motor Vehicle Code, and discusses other cases applying those terms. In *North*, the plaintiff, a mechanic employed at a 10-Minute Lube shop, was injured when a co-employee, Moore, reached through the window of a car during an oil change, turned the key, and the car lurched forward, striking and injuring the plaintiff. The plaintiff brought a personal injury suit against the owner of the vehicle under the owner's liability statute, MCL 257.401(1); MSA 9.2101(1). The circuit court granted summary disposition in the defendant's favor. This Court reversed, rejecting the defendant's argument that because Moore was not driving the vehicle at the time of the injury, he was not "operating" the vehicle:

> The Supreme Court and this Court have dealt with the issue of the liability of an owner for injuries in a repair or service situation on a number of occasions. Each time, it has been held that the owner's liability statute simply means what it says and that the owner is liable for such injuries. In *Dale* [*v Whiteman*, 388 Mich 698; 202 NW2d 797 (1972)], our Supreme Court found owner liability where the owner had delivered his car to a car wash and an employee hit a co-worker while driving the vehicle to the drying area. Similarly, in *Trasti v Citizens Ins Co of America*, 181 Mich App 191; 448 NW2d 773 (1989), we found owner liability where a coemployee drove a truck over a mechanic who had crawled under it for inspection. In each case, as in this case, ownership of the motor vehicle was

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The statute was amended by 1980 PA 515, effective April 1, 1981. The amendment substituted "operate" for "operator" and "being" for "a person who drives or is." The statute has since then provided:

> "Operate" or "operating" means being in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur.

MCL 257.36; MSA 9.1836, which defines "operator" using the language "actual physical control of a motor vehicle" was enacted as part of the Michigan Vehicle Code in 1949.

undisputed and consent was found in the owner's delivery of the vehicle to the facility. . . .

Defendant attempts to distinguish Dale by claiming that Moore was not "operating" the vehicle because he was not driving it at the time of the injury. The meaning of the term "operation" of a motor vehicle is easily determined. Where a statute supplies its own glossary of terms, this Court must apply the meaning as expressly defined. *Mull* [*v Equitable Life Assurance Society of the United States,* 196 Mich App 411, 417; 493 NW2d 447 (1992)]. The Vehicle Code, of which the owner's liability statute is a part, contains the following definitions:

> 'Operate' or 'operating' means being in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur. [MCL 257.35a; MSA 9.1835(1).]
>
> 'Operator' means every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway. [MCL 257.35; MSA 9.1836.]

Clearly, whether starting a car can be considered driving it or not, Moore was the person in actual physical control of the vehicle at the time of the injury and, as such, it was his "operation" of the motor vehicle that resulted in liability under MCL 257.401; MSA 9.2101. Nor does the fact that the operation occurred on private land, as opposed to a public highway, preclude owner liability. *Ladner v Vander Band*, 376 Mich 321; 136 NW2d 916 (1965). [*North, supra* at 727-728. Emphasis added.]

Our research yielded one case involving injury caused by bus doors closing on a person, *Sonnenberg v Erie Metropolitan Transit Authority,* 137 Pa Cmwlth 533; 586 A2d 1026, 1028 (1991). The plaintiff in that case was a passenger riding a bus owned and operated by the defendant EMTA. The bus stopped, the plaintiff went to the rear door of the bus and, as she was leaving, the door suddenly closed and locked her into a position from which she could not free herself. The bus driver heard her cries and released the door. The *Sonnenberg* court held that the motor vehicle exception to immunity applied because the plaintiff passenger's injury was caused by a moving part of the bus, and this movement, i.e., the closing of the bus doors, was part of the normal operation of a bus:

> The movement of parts of a vehicle, or an attachment to a vehicle, is sufficient to constitute "operation." Moreover, the bus driver's closing of the bus doors is an act normally related to the "operation" of a bus. We must conclude, therefore, that EMTA's bus was in "operation" when the bus door struck Sonnenberg and hold that the trial court erred in granting summary judgment. [*Id.*, 586 A2d at 1028.]

See also *Swartz v Hilltown Twp Volunteer Fire Co,* 721 A2d 819 (Pa App, 1998), which, although factually distinguishable from the instant case, contains a helpful discussion of the motor vehicle exception.[6]

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[6] The plaintiff in *Swartz* was a motorist that was injured after another motorist's vehicle, which had hit a valve that had fallen into the road from a fire engine, crossed lanes and struck the plaintiff's car. *Swartz, supra* at 820. In discussing the motor vehicle exception, the court noted:

> The movement of the vehicle or its parts is a critical element. Where there is no movement, the courts have generally held that the motor vehicle exception does not apply. For example, parked or temporarily stopped vehicles have generally been held not to be in operation under the vehicle exception to governmental immunity. [Citations omitted.]
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> *The movement must also be normally related to the operation of the vehicle in order for the vehicle liability exception to apply.* In *Sonnenberg, ...* we held that the vehicle liability exception applied because the plaintiff's injury was caused by a moving part of the bus (the bus doors) and this movement (the closing of the bus doors) was part of the normal operation of a bus.
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> In *Cacchione* [*v Wieczorek,* 674 A2d 773 (Pa Cmwlth 1996)], a city-owned vehicle that was parked on the side of a curb rolled backward, down a hill, and crashed into plaintiffs' home causing both personal injury and property damage. Plaintiffs alleged that their injuries were caused by the driver's failure to properly engage the hand brake and block the wheels against the curb. Upon determining that the movement of the vehicle caused the injury *and that the act of parking is normally related to the operation of the vehicle,* we held that the motor vehicle was in "operation" and allowed the exception to apply. Conversely, *where the movement of a vehicle or its parts is determined to be ancillary to the operation of the vehicle, the vehicle liability exception has not been applicable. Speece v. Borough of North Braddock,* 145 Pa.Cmwlth. 568, 604 A.2d 760 (Pa.Cmwlth.1992). In *Speece,* the plaintiff filed suit after being injured when a hose attached to two fire trucks burst at the scene of a fire. Although the fire hose was physically attached to the fire trucks, we determined that the movement of the hose was not normally related to the "operation" of the fire truck. We concluded that any acts associated with the use of the hose were ancillary to the operation of the fire trucks and therefore, insufficient to justify penetrating the cloak of immunity afforded to governmental agencies.
>
> Applying the above analysis to the case presently before us, we conclude that the vehicle liability exception does not apply. Ruth Swartz's injuries were not caused by the movement of either the fire engine or its parts. . . neither the fire engine nor the valve were in "operation." Once the valve fell from the fire engine, the valve remained a stationary object in the road for an undetermined amount of time

C

We conclude that the circuit court erred in ruling that the motor vehicle exception did not apply in the instant case. It is clear that a bus can be stationary but still be in operation, as long as it is being used or employed in some specific function or to produce some desired work or effect. *Orlowski, supra; Wells, supra.* Here, bus 440 was being used in a specific function or to produce some desired effect when Smith operated the hydraulic doors as a means of egress, and in anticipation of the workers entering the bus. Surely, if a bus driver driving a regular county route failed to release the air pressure and an exiting passenger was caught in the doors and injured as a result, as in *Sonnenberg, supra,* there would be no question regarding the application of the motor vehicle exception. The negligent operation of the hydraulic doors would satisfy the statutory condition that the plaintiff suffer "bodily injury . . . resulting from the *negligent operation* by any . . . employee of the governmental agency, of a motor vehicle." MCL 691.1405; MSA 3.996(105).

Defendant's argument that because the bus was purchased to transport passengers but had been parked for cleaning at the time of the incident, it was not in a state of being at work, or in the active exercise of some function, or employed to produce some desired work or effect, must fail. The statute does not require that the motor vehicle be involved in any particular activity,

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> before being struck by Charles Reich's car. Ruth Swartz was then injured when Reich's vehicle crossed lanes and collided with her vehicle.
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> The Swartzes contend that Hilltown's negligence in failing to adequately secure the valve to the fire engine ultimately caused Ruth Swartz's injuries. In support of their position that the vehicle liability exception applies, the Swartzes rely on *Mickle v. City of Philadelphia*, 550 Pa. 539, 707 A.2d 1124 (1998). In *Mickle*, the plaintiff, while traveling inside a city-owned, fire department rescue van, was injured when the wheels of the rescue van fell off causing the van to suddenly shift and plaintiff to fall. The parties stipulated that the plaintiff's injuries were caused by the wheels falling off the fire van while the van was in operation due to the negligent maintenance and repair of the van. Although the wheels fell off due to the negligent maintenance and repair of the van, and not the manner in which the van was driven or operated, the Supreme Court determined that the vehicle liability exception applied because the plaintiff's injury was caused by a negligent act with respect to the operation of a motor vehicle while the vehicle was in operation.
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> However, this case is readily distinguishable from the case at hand. In *Mickle*, the only issue before the court was whether the city's negligent acts were related to the van's operation as the parties had already stipulated that the van was in operation at the time of the accident. . . . Here, having determined that neither the fire engine nor the valve were in "operation" under the facts as stipulated, we need not examine whether Hilltown's negligent acts were related to the operation of the vehicle. [*Swartz, supra* at 821-822. Emphasis added.]

only that the injury result from the negligent operation of the motor vehicle. Thus, we fail to see why the exception, which would otherwise be applicable to a door-closing injury, should become inapplicable simply because the bus was not on an established route. Also irrelevant is the fact the ultimate object was to clean the bus. The doors of the bus were still being operated for the purpose of exiting the bus (the desired work or effect), an integral part of the use of the bus. Similarly, had Smith backed bus 440 into plaintiff, causing him injury, presumably all would agree that the exception would still be applicable, although the bus had been removed from its regular route to be cleaned. An employee's negligent operation would still be involved. Finally, under *Kuzinski, supra*, and *North, supra,* Smith was in actual physical control of bus 440 when he operated the hydraulic doors and turned off the motor without releasing the air pressure. Thus, we conclude that the motor vehicle exception applies to the facts alleged by plaintiff.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Robert J. Danhof*