[Cite as *Swain v. Cleveland Metro. School Dist.*, 2010-Ohio-4498.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94553

ANGELA SWAIN, ET AL.

PLAINTIFFS-APPELLEES

vs.

CLEVELAND METROPOLITAN SCHOOL DIST.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-707749

BEFORE: Jones, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: September 23, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendants-appellants, Cleveland Metropolitan School District, et al. ("District"), appeals the decision of the trial court denying the District's motion to dismiss. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE AND FACTS

{¶ 2} Plaintiffs-appellees, Angela Swain, et al. ("Swain"), commenced an action in the Cuyahoga County Court of Common Pleas for damages against the District on October 26, 2009. On December 17, 2009, the District filed a motion to dismiss based on the doctrine of sovereign immunity. The trial court denied the District's motion to dismiss on December 28, 2009. On January 21, 2010, the District appealed the lower court's order.

{¶ 3} According to the facts, the District is a public school system that transports some of its students by District-owned and -operated school buses. Stesia Swain was, at the time of the incident, a five-year-old kindergarten student in the District. Angela Swain is Stesia's mother. Swain's complaint asserts that the District is liable for the actions of a bus driver who failed to discover that Stesia had fallen asleep in her seat on the bus on the way home from her first day of school and failed to drop her off at her bus stop.

ASSIGNMENTS OF ERROR

{¶ 4} Appellant assigns one assignment of error on appeal:

{¶ 5} "The trial court erred in dismissing [sic] the school district's motion to dismiss based on the doctrine of sovereign immunity when the alleged injury to plaintiff did not occur as a result of the operation of a school bus as defined by the Ohio Supreme Court in *Doe v. Marlington Local School District Bd. Of Ed*. (2009)[,] 121 Ohio St.3d 12."

LEGAL ANALYSIS

{¶ 6} The District argues that its motion to dismiss should have been granted by the trial court. The District bases its argument upon the Ohio Supreme Court's recent ruling in *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-3601, 907 N.E.2d 706, arguing that *Marlington* applies in this case and the exception to sovereign immunity in R.C. 2744.02(B)(1) should not apply.

{¶ 7} We find the District's argument to be misplaced. Review of the evidence in the record demonstrates that the lower court did not err in failing to grant the District's motion to dismiss.

{¶ 8} Appellate review of a ruling on a motion to dismiss for failure to state a claim presents a question of law that the Court of Appeals determines de novo and independently of the trial court's decision. Civ.R. 12(B)(6). *Bell v. Horton* (1995), 107 Ohio App.3d 824, 669 N.E.2d 546; *Hughes v. Miller,* 181 Ohio App.3d 440, 2009-Ohio-963, 909 N.E.2d 642.

{¶ 9} The Political Subdivision Tort Liability Act requires a three-tiered analysis to determine whether a political subdivision should be allocated immunity from civil liability: first, as a general rule, political subdivisions are not liable in damages; second, the court determines whether any of the enumerated exceptions to immunity apply; third, if immunity does not apply, the court determines whether political subdivisions qualify for any of the listed statutory

defenses. R.C. 2744.02 and 2744.03. *Hubbard v. Canton City School Bd. of Edn.* 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543.

{¶ 10} If an entity is a political subdivision, the court must then determine whether any of the R.C. 2744.02(B) exceptions to immunity apply. Specifically, R.C. 2744.02, Political subdivision not liable for injury, death, or loss; exceptions, subsection (B)(2) provides the following: "(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions."

{¶ 11} The District argues that *Marlington* applies; however, *Marlington* is easily distinguishable from the case at bar. *Marlington* involved the sexual assault between different students.[1] The case at bar involves the negligent operation of a motor vehicle in driving or otherwise causing the vehicle to be

[1]According to the facts in *Marlington*, Holly Roe lived within the Marlington Local School District, but she was enrolled as a fourth-grade student at Fairhope Elementary School in the Louisville City School District, where she received special-education services during the 2004-2005 school year. On March 16, 2005, a bus aide saw Bob Boe slumped in his seat next to Holly and discovered that Boe had his hand up Holly's dress. The bus aide learned that Boe had sexually molested Holly on the bus that morning. Holly also told the aide that Boe had done similar things "every day on Sabrina Wright's" afternoon school bus. The afternoon of March 16, 2005, employees of the district notified Holly's guardian what occurred that day. The parties later learned that on Wright's bus, Holly was sometimes seen on the floor of the bus; Wright thought the students were "playing tag." Boe later pleaded "true" to a delinquency charge of gross sexual imposition in violation of R.C. 2907.05 based on sexual assault.

moved in relation to the conduct of the bus driver and her duties.

{¶ 12} In contrast to the sexual assault between a special needs student in *Marlington*, the conduct in the case at bar involves an entirely different situation. The bus driver in the case at bar, *while sitting in the driver's seat and while the engine was running, declined to inspect the bus and then drove the bus away from the proper bus stop.*

{¶ 13} The bus driver never bothered to check to see if the kindergarten student was still on the bus. The bus driver, in direct opposition to the parent waiting at the stop and looking for her child, proceeded to drive off and go back to the school bus garage. Meanwhile, the waiting parent became hysterical wondering where her five-year-old daughter was. The bus driver also failed to inspect the bus at the conclusion of her bus route. Thereby leaving the young girl on the bus, alone, so that when she awoke, she was alone in a dark school bus garage on her first day of school.

{¶ 14} In addition to being distinguishable from the facts in *Marlington*, the case at bar involves different conduct. Specifically, the conduct of the bus driver in the case at bar takes place in relation to her operation of the bus and the student, not the supervision of the *conduct* of the students on the bus as occurred in the sexual assault in *Marlington*. Accordingly, *Marlington* is distinguishable from the case at bar.

{¶ 15} Assuming, arguendo, that *Marlington* was not distinguishable from the

case at bar, the District's assertion that *Marlington* undermines Swain's argument is still misplaced. *Marlington* provides that the exception to political subdivision immunity for the negligent *operation of a motor vehicle* pertains *only 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-3601, 907 N.E.2d 706. (Emphasis added.)

{¶ 16} In *Groves v. Dayton Pub. Schools* (1999), 132 Ohio App.3d 566, 569-570, 725 N.E.2d 734, a disabled student sued the school district for injuries she suffered as a result of the bus driver's alleged negligence in failing to secure her in her wheelchair when assisting her off the bus, resulting in her right hand being wedged in the wheel of her chair. In *Groves*, the court stated that R.C. 2744 contains no definition of the term "operation of any motor vehicle." The court found the term to be capable of encompassing more than the mere act of driving the vehicle involved. The court went on to provide the following:

> "[c]ourts that have had the opportunity to address the meaning of 'operation of a motor vehicle' in that context have found that the taking on and letting off of students falls within the meaning of the term. See *Baker & Co. v. Lagaly* (C.A.10, 1944), 144 F.2d 344, 345 (holding that 'operation of the bus * * * included the receiving of the children into the bus and their exit from it. * * * Opening the door of the bus and allowing children to alight was an integral part in the operation of the bus) and *Nolan v. Bronson* (1990), 185 Mich.App. 163, 177, 460 N.W.2d 284, 290, 291 (defining 'operation of a motor vehicle' as 'being used or employed in some specific function or to produce some desired work or effect' and concluding that discharging of students falls within that definition)."

Groves, 736 – 737.

{¶ 17} *Napier v. Centerville City Schools*, 157 Ohio App.3d 503, 2004-Ohio-3089, 812 N.E.2d 311, provides additional guidance as well. In *Napier,* the school district's decision to terminate the school bus driver's employment for neglect of duty was supported by evidence; the driver parked the bus in the garage after the morning route but failed to inspect the bus for any children who had not exited the bus. The child was found to have been left on bus, the driver had been a bus driver for 26 years and was aware of the need to visually inspect the bus for children. The child was left on the bus on an extremely hot day and was exposed to significant risk of harm from high temperature; and the fact that the child did not suffer physical harm did not negate the seriousness of the driver's conduct.

{¶ 18} As stated, review of the evidence demonstrates that the school bus driver in this case never checked to see if the little girl was still on the bus. The driver, in direct opposition to the parent, drove away from the mother at the bus stop and proceeded to go back to the school bus garage. Moreover, the driver also failed to inspect the bus at the conclusion of her bus route. Review of the evidence in this case also demonstrates that the bus driver was sitting in the driver's seat, and while the engine was running, then caused the vehicle to be moved.

{¶ 19} Moreover, the record further demonstrates that the bus driver caused the motor vehicle to be moved. Accordingly, we find that the evidence in the

record supports the lower court's decision denying the District's motion to dismiss. We find no error on the part of the lower court.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR