No. 07-1630

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 88454

JOE WOLANIN,
Plaintiff-Appellee,

v.

ROBERT L. HOLMES, et al.
Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS BOARD OF PARK COMMISSIONERS FOR CLEVELAND METROPOLITAN PARK DISTRICT AND ROBERT L. HOLMES

ROBERT M. WEBER
LAW OFFICES OF LYNN A. LAZZARO
2645 Wooster Road
Rocky River, OH 44116
Tel: (440) 333-1445
Fax: (440) 333-1767

Attorney for Appellee Joe Wolanin

SUSAN M. AUDEY (0062818)
(COUNSEL OF RECORD)
ROBERT J. HANNA (0037230)
TARIQ M. NAEEM (0072808)
TUCKER ELLIS & WEST LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414
Telephone: 216.592.5000
Telefax: 216.592.5009
E-mail: susan.audey@tuckerellis.com
robert.hanna@tuckerellis.com
tariq.naeem@tuckerellis.com

Attorneys for Appellants Board of Park Commissioners for Cleveland Metropolitan Park District and Robert L. Holmes

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

The General Assembly enacted the Rules of Construction to provide an orderly reasoning process for courts to employ when interpreting statutes. The first rule of statutory construction, however, is that if a statute is clear it is to be *applied*, not *construed*. "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *Vought Indus., Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265, quoting *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, paragraph eight of the syllabus. When a court violates this well-established rule by adding or expanding upon provisions of a statute, the plain meaning of statute is lost and disorder in statutory interpretation is created, confounded, and perpetuated.

The Eighth Appellate District – in a split decision – did just that when it *construed* R.C. 4511.01(A) – the statute defining "vehicle." At issue in the appellate court was whether a tram used to transport Zoo patrons in and around Zoo property is a "motor vehicle" for purposes of the negligent-operation-of-a-motor-vehicle exception to political subdivision tort immunity under R.C. 2744.02(B)(1). The definition of "vehicle," subsumed within the definition of "motor vehicle," is statutorily defined at R.C. 4511.01(A) as "every device *** in, upon, or by which any person or property *may be* transported or drawn upon a highway *** ." (Emphasis added.) Refusing to *apply* the plain meaning of the words "may be transported," the appellate court instead expanded upon the statute by inserting the words "capable of being transported" as an alternative definition. According to the Eighth District, the tram satisfied the definition of "motor vehicle" because the tram is "capable of" transporting persons or property on a highway, even if it cannot legally do so. Apx. at 10, 2007-Ohio-3410, at ¶23. By rewriting the statute, the appellate court defined "vehicle" in a manner not statutorily provided. In doing so, the Eighth

District eviscerated the orderly reasoning process contemplated by the Rules of Construction and created disorder for courts applying the definition of "vehicle" not only as applies to R.C. 2744.02(B)(1), but the myriad of other statutes that rely upon this same statutory definition in circumscribing conduct. See, e.g., R.C. 2909.09(A)(2), 2919.22(C)(2)(b), 2930.01(U), 3937.41(A)(2)(a), 4301.62(A)(2), and 4521.01(B).

The impact of the appellate court's judgment, however, has far greater implications than its definition of the term "vehicle" as that term is relied upon by R.C. Chapter 2744 or any other statutes within the Ohio Revised Code. By inserting the words "capable of" for the permissive terms "may be," the appellate court essentially broadened the sphere of categories, things, or conduct that would not otherwise fall within the plain meaning of "may." The term "capable" is a term of *potential*, while the term "may" is a term of *permission*. To be sure, someone or something may have the *potential* to act or be, but that does not necessarily mean that the same individual or thing *can* do so. Thus, whether someone or something is "capable of" doing or being a certain thing unnecessarily broadens the scope of *permissive* conduct contemplated by a statute's use of "may." As applied to the facts of this case, the fact that a Zoo tram has the *potential* to transport persons or property on a highway – even it legally (and safely) cannot do so – does not mean that it *may* do so. Indeed, it *may not* do so. As noted by the dissent:

> Moreover, this particular tram was not used for transporting people of property on a highway. It was used for transporting zoo patrons in and around zoo property. Zoo patrons are not transported between different Cleveland Metroparks by riding this tram on public highways.
>
> The tram involved in this case is not licensed or registered for use on a highway and is an open-air vehicle that has neither windows, doors, nor seat belts. Accordingly, based on the evidence in this case, I believe this particular tram is not a "motor vehicle" *for purposes of qualifying for the exception to immunity under R.C. 2744.2(B)(1).* (Emphasis sic.)

Apx. at 12, 2007-Ohio-3410, at ¶28-29 (Calabrese, J., dissenting). "May" is simply not synonymous or interchangeable with "capable." Instead, the appellate court – violating well-established rules of statutory construction – expanded upon the definition of "vehicle" by inserting the words "capable of" rather than merely apply the plain meaning of the words "may be" as used by the General Assembly.

The broad reach of the Eighth District's decision makes this case one of public and great general interest. It not only affects the interpretation of "vehicle" as that term is relied upon in circumscribing conduct in R.C. Chapter 2744 and other chapters, but it impacts the construction of statutes using the permissive term "may." To allow the Eighth District's decision to stand would permit a construction of statutes using this term that is not within the plain meaning of the respective statutes. For these reasons, this appeal should be accepted for review and reversed.

II. STATEMENT OF CASE AND FACTS

A. Cleveland Metroparks operates a "tram" transportation system to transport patrons in and around the Zoo.

Cleveland Metroparks Zoo is a two-hundred acre plus property located in the city of Cleveland. In order to transport Zoo patrons from one area of the Zoo to another, the Zoo operates a "tram" transportation system. The tram transportation system consists of either two- or three-unit systems, with a driver at the front of the first unit operating the tram. Apx. at 2, 2007-Ohio-3410, at ¶3. The trams, which carry passengers at slow speeds within the Zoo, contain bench-like seating and are "open-air" trams, meaning the trams have no doors, window glass, or seat belts. Id. at 2, 8, 2007-Ohio-3410, at ¶3, 19. The trams are used solely for transporting persons on Cleveland Metroparks' property – be it Cleveland Metroparks Zoo or any of the other Cleveland Metroparks' properties. Id. The trams are not licensed or registered for use on any highway. Although they have been escorted by Cleveland Metroparks Rangers to

other Cleveland Metroparks' properties for use in transporting Cleveland Metroparks' patrons within other Cleveland Metroparks properties, no person was or could be transported on a highway between properties. Apx. at 2, 8, 2007-Ohio-3410, at ¶3, 19.

B. Wolanin visits the Zoo, collides with a tram, and brings suit.

Plaintiff-Appellee Joe Wolanin was visiting the Zoo in July 2004 with some friends. At some point during his visit, he collided with the second unit of a two-unit tram and now alleges personal injury. He eventually brought suit against Cleveland Metroparks and the tram driver – Robert L. Holmes – alleging that Holmes acted negligently in operating the tram.

Cleveland Metroparks moved for summary judgment, premising its motion on the lack of any evidence that Cleveland Metroparks acted negligently in operating the tram and, therefore, the negligent-operation-of-a-motor-vehicle exception to political subdivision immunity did not apply. Wolanin opposed the motion and cross-moved for summary judgment. Contending that Cleveland Metroparks "conceded" that the tram was a motor vehicle (it did not), he argued that the tram satisfied the definition of motor vehicle under both R.C. 4511.01(A) and (B).[1]

C. The trial court grants summary judgment to Cleveland Metroparks and the appellate court reverses.

The trial court ultimately granted summary judgment to Cleveland Metroparks and Holmes and denied Wolanin's motion.[2] Apx. at 1, 2007-Ohio-3410, at ¶2. In a split decision, however, the Eighth Appellate District reversed. Although concluding that the definition of

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[1] Wolanin also argued that an issue of fact existed as to whether Holmes acted negligently – an issue that is not before the Court in this appeal.

[2] Wolanin did not oppose summary judgment as to Holmes in his opposition brief before the trial court. Nor did he challenge the grant of summary judgment as to Holmes in the appellate court. For all practical purposes then, the appeal – and the entire case – pertains to Cleveland Metroparks only.

"vehicle" was subsumed within the definition of "motor vehicle," the appellate court nonetheless held that the tram was a motor vehicle because the may-be-transported-on-a-highway language contained with the definition of "vehicle" included vehicles that were *capable* of transporting persons or property on a highway. The appellate court rationalized:

> The tram does not lose its character as a motor vehicle merely because it was used only to transport people on zoo property. The statutory language does not require actual use on a public highway. The statute requires only that a person or property "may be" transported on a public highway or that the motor vehicle be "capable" of transporting people of property upon a highway. Here, the tram satisfies either requirement.

Apx. at 9, 2007-Ohio-3410, at ¶21.

The appellate court essentially held that the may-be-transported language is merely another way of saying that the tram need only be *capable* of transporting persons or property on a highway. Because Cleveland Metroparks acknowledged that the tram had been driven on public roads under ranger escort – even though without passengers – it found that it satisfied the definition of "vehicle" because it "may be" or is "capable of" transporting passengers or property on a highway.

> The tram in question is equipped with a Chrysler 3.3 liter V-6 engine. Its primary purpose is to transport passengers. Again, the fact that [Cleveland Metroparks] acknowledge[s] that the tram has been driven on public roads without passengers under ranger escort reinforces that it "may be" or is "capable" of transporting passengers or property on a public highway. Under the plain language definition of a motor vehicle, there is no requirement that the tram actually be on a public highway transporting passengers for the motor vehicle exception to apply under R.C. 2744.02(B)(1).

Id. at 10, 2007-Ohio-3410, at ¶23.

By interchanging the "may be" language of R.C. 4511.01(A) with "being capable of," the appellate court essentially rewrote the statute. The statute does not define "vehicle" as a device that is *capable* of transporting persons or property on a highway. To the contrary, it defines

"vehicle" as a device upon which persons or property *may be* transported. The testimony was plain in this case: no persons or property were ever – nor could be ever – transported on a Cleveland Metroparks' tram on a highway. The trams have no doors, windows, or seat belts. More importantly, they are not registered for public highway use.

Although the appellate court's decision was premised on its interpretation of "vehicle" under R.C. 4511.01(A), it nonetheless bolstered its opinion with two additional lines of cases interpreting either "motor vehicle" or "vehicle." First, it relied, in part, on uninsured/underinsured ("UM/UIM") cases construing "motor vehicle" for purposes of former R.C. 3937.18 – the UM/UIM statute. The appellate court stated:

> The [Cleveland Metroparks'] view that the tram is not a motor vehicle as outlined under R.C. 4511.01 goes against a significant body of case law from this and other districts that have held that vehicles such as golf carts, snowmobiles, motorized minibikes, forklifts, all-terrain vehicles and the like are all motor vehicles.

Apx. at 8-9, 2007-Ohio-3410, at ¶20. (Citations omitted.)

Next, the appellate court relied on cases construing "vehicle" for purposes of R.C. 4511.19 and 4511.191 – statutes governing operating a vehicle while impaired ("OVI") and implied consent. The court stated:

> Taken to the extreme, a contrary view could result in a zoo tram operator drinking alcohol on the job all day to a level of impairment and then avoiding a charge of operating a vehicle under the influence by Cleveland Metroparks rangers because the tram does not meet the definition of a motor vehicle. Countless cases involving similar or like vehicle on both public and private property have held otherwise.

Id. at 9, 2007-Ohio-3410, at ¶22. (Citation omitted.)

The appellate court's decision is contrary to well-established rules of statutory construction – rules of construction that are not obviated by the court's reliance on either UM/UIM cases or OVI cases. Instead of applying the definitional statute as written, the Eighth

District unnecessarily construed it. Because the Eighth District's judgment has far-reaching consequences, this appeal followed.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law

> **A tram used to transport patrons on park property is not a motor vehicle for purposes of the negligent-operation-of-a-motor-vehicle exception to political subdivision tort immunity under R.C. 2744.02(B)(1).**

Cleveland Metroparks Zoo – governed by the Board of Park Commissioners for the Cleveland Metropolitan Park District – is a political subdivision of the state of Ohio and possesses statutory immunity for tort liability in operating the Zoo. *Willoughby Hills v. Bd. of Park Commrs. of Cleveland Metro. Park Dist.* (1965), 3 Ohio St.2d 49, 51; see, also, R.C. 2744.01(C)(2)(u)(iii). Exceptions to immunity, however, exist. Once such exception is negligent operation of a motor vehicle set forth at R.C. 2744.02(B)(1). This section 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. ***

For this exception to apply, however, the Zoo must have operated a "motor vehicle." For purposes of R.C. Chapter 2744, "motor vehicle" has the same definition as "section 4511.01 of the Revised Code." R.C. 2744.01(E). R.C. 4511.01 defines "motor vehicle" as "every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires *** ." R.C. 4511.01(B). Subsumed within the definition of "motor vehicle" is the term "vehicle," which is also defined by R.C. 4511.01. "Vehicle" is defined as "every device, including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway ***." R.C. 4511.01(A). Conversely, a device that may

not transport persons or property on a highway – for whatever reason – does not satisfy the definition of vehicle.

Ignoring the statute's plain language, however, the appellate court inserted the words "is capable of being transported" in place of "may be transported" to find that the tram satisfies the definition of vehicle. According to the appellate court, merely because the tram has the *capability* to transport persons or property was sufficient to satisfy the definition of "vehicle" – notwithstanding that it "may not" transport because it legally cannot do so. The definition, however, does not contain the words "capable of being transported" and these terms are not interchangeable with "may be transported."

A. The words used to define "vehicle" in R.C. 4511.01 are clear and need only be applied, not construed.

When the terms of a statute are clear, there is no reason for a court to resort to rules of statutory construction. *Vought Indus., Inc. v. Tracy*, 72 Ohio St.3d at 265. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus.

Despite the clear and definite meaning of the may-be-transported language of R.C. 4511.01(A), the Eighth District expanded this language to alternatively provide that the tram need only be *capable* of transporting persons or property on a highway in order to satisfy the definition of "vehicle." Because Cleveland Metroparks acknowledged that the tram had been driven on public roads under ranger escort – even though without passengers – it found that it satisfied the definition of "vehicle" because it is "capable" or transporting passengers or property on a highway. Apx. at 10, 2007-Ohio-3410, at ¶23.

By transforming the "may be" language of R.C. 4511.01(A) into "being capable of," the appellate court essentially rewrote the statute. The statute does not define "vehicle" as a device that is *capable* of transporting persons or property on a highway. To the contrary, it defines "vehicle" as a device upon which persons or property *may be* transported. "May" and "capable," however, are two different terms with two different meanings. The term "may" is a word of *permission*, while the term "capable" is a word of *potential*. Merely because the tram has the *potential* to transport persons or property on a highway – even if it cannot legally do so – is not the same as whether persons or property "may" be transported on a highway. Cleveland Metroparks *may not* transport persons or property on a highway because the trams have no doors, windows, or seat belts and are not registered for highway use.

This Court has made clear that a court violates well-established rules of statutory construction when it inserts words that are not part of a statute to achieve a result not within the plain meaning of the statute. *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, paragraph eight of the syllabus; see, also, *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, at ¶23. The Eighth District's insertion of the terms "capable of" as an alternative to the terms "may be" violates this well-established rule of statutory construction and, in doing so, creates unnecessary chaos in statutory interpretation.

B. UM/UIM cases defining "motor vehicle" are unavailing.

Perhaps recognizing that it was essentially rewriting the definition of "vehicle," the appellate court sought support from several UM/UIM cases interpreting the term "motor vehicle" for purposes of compliance with the former version of the UM/UIM statute – R.C. 3937.18. These cases – cases where individuals were seeking UM/UIM coverage for injuries sustained while using a snowmobile (*Metro. Prop. & Liab. Ins. Co. v. Kott* (June 15, 1979), 6th Dist. No. L-78-309, 1979 WL 207145), a forklift (*Drake-Lassie v. State Farm Ins. Cos.*, 129 Ohio App.3d

781), and a high-lift operator (*Gibboney v. Johnson*, 8th Dist. No. 87190, 2006-Ohio-5240) – do not support the appellate court's position for several reasons.

First, unlike R.C. 2744(E), former R.C. 3937.18 did not define "motor vehicle," leaving it to the courts to wrestle with the term's definition. Second, these cases are of questionable import in light of this Court's recent decision in *State Auto. Ins. Co. v. Pasquale*, 113 Ohio St.3d 11, 2007-Ohio-970. In *Pasquale*, an insured sought UM/UIM coverage for an accident involving an off-highway motocross bike that occurred at an off-highway dirt track. The insurer denied coverage based on an off-highway exclusion contained in the policy. Although the trial court agreed and granted summary judgment to the insurer, the Eleventh Appellate District reversed, finding the exclusion invalid under the applicable version of R.C. 3937.18.

On appeal to this Court, the insurer argued, in part, that the purpose of R.C. 3937.18 is to protect individuals injured by uninsured motorists operating vehicles on a highway. This Court agreed. It found that an insurer can properly exclude off-road vehicles from UM/UIM coverage, in part, because of the "purpose of the UM statute," which this Court construed as protecting those "using the highways." See *Pasquale*, 2006-Ohio-970, at ¶38, 43.

To the extent that the Eighth District relied upon *Kott, Drake-Lassie,* and *Gibboney* as support for the definition of "motor vehicle," those decisions are now suspect after the issuance of *Pasquale.*

C. Criminal cases defining "motor vehicle" likewise provide no support and are otherwise distinguishable.

The appellate court also relied upon criminal cases involving violations of traffic laws. Two of these cases – *Cleveland v. Copley*, 8th Dist. Nos. 48595 & 48596, 1985 WL 9773 (conviction for operating a motor vehicle (Honda ATC three-wheel vehicle) without a license,

etc.) and *State v. Tramonte*, 6th Dist. No. 920T050, 1993 WL 323635 (operating a golf cart while under the influence of alcohol) – can be easily distinguished.

The *Copley* court, relying on an ordinance similar to the statutory definition of "motor vehicle" set forth at R.C. 4511.01(B), merely stated that the Honda "clearly falls within this definition." *Copley*, 1985 WL 9773, at *4. The ordinance at issue, however, defined "motor vehicle" as "every vehicle propelled or drawn by power other than muscular power *** " followed by several exceptions. Id. The *Copley* court made no reference to the definition of "vehicle" that the *Wolanin* appellate court found subsumed within this definition. Nor does the Sixth Appellate District's opinion in *Tramonte* support the Eighth District's decision. In fact, the *Tramonte* court did not even discuss the definition of "vehicle" or "motor vehicle." Instead, the appeal involved procedural issues related to a motion to suppress evidence and constitutional and procedural issues related to administering a breath test.

The Eighth District, however, did rely on *State v. Gottfried* (1993), 86 Ohio App.3d 106, when it stated:

> Taken to the extreme, a contrary view could result in a zoo tram operator drinking alcohol on the job all day to a level of impairment and then avoid a charge of operating a vehicle under the influence by Cleveland Metroparks rangers because the tram does not meet the definition of motor vehicle. Countless cases involving similar or like vehicles on both public and private property have held otherwise.

Apx. at 9, 2007-Ohio-3410, at ¶22.

Gottfried, however, did not turn on the definition of "motor vehicle." In that case, the defendant was challenging an operating-a-vehicle-under-the-influence ("OVI") conviction that resulted when the defendant was stopped while riding an all-terrain vehicle on a railroad-track berm as a trespasser on private property. The defendant did not argue that the all-terrain vehicle

was a *not* a motor vehicle. Instead, he challenged the conviction on the basis that the *place* of the stop – the railroad-track berm – was on private, not public property.

The Sixth District, however, was unpersuaded. Noting that the OVI statute – and its implied-consent counterpart – applies to "virtually any property, public or private, upon which members of the public travel or park," the court found it irrelevant that the defendant's presence on the property was lawful or unlawful "so long as the public was, in fact, traveling over the property." 86 Ohio App.3d at 109. There was no argument or other discussion of what constitutes "vehicle" for purposes of the OVI statute.

The Eighth District's reliance on the OVI and implied-consent statutes provide no support for its conclusion that "capable of" is part of the definition of vehicle under R.C. 4511.01(A) for several reasons. First, there are important distinctions between the OVI/implied-consent statutes and statutes like R.C. Chapter 2744 that rely upon the definition of vehicle in R.C. Chapter 4511. The OVI statute is a "specific" statute that make it a criminal offense for any person to operate a "vehicle *** within this state" while under the influence of a prohibited substance. R.C. 4511.19(A). The similarly-specific implied-consent statute – although civil in nature – applies to persons operating a "vehicle *** upon a highway or any public or private property used by the public for vehicular travel or parking within this state" or those who have "physical control of a vehicle *** " who are arrested for violating certain sections of R.C. 4511.19 or equivalent municipal ordinances. R.C. 4511.191(A)(2).

Unlike the R.C. 4511.01(A) definition of "vehicle" – a "general" statutory provision – the OVI and implied-consent statutes are not limited to vehicles being operated on public highways. Because a "specific" statutory provision ordinarily trumps a "general" statutory provision, the public-highway limitation found in the definition of "vehicle" is not applicable to individuals

being charged with OVI or subject to the implied-consent statute because these statutes specifically apply to vehicles being driven on private or public property anywhere *within the state*. See R.C. 151;[3] *State v. Volpe* (1988), 38 Ohio St.3d 191, 193 ("Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes."). Consequently, the statutes can be reconciled so that a substance-impaired tram operator can still be found culpable under R.C. 4511.19 and 4511.191 and the trams not a "motor vehicle" for purposes of R.C. 2744.02(B)(1).

Second, the OVI and implied-consent statutes promote important public policy interests that are not at stake in other statutes applying the definition of "vehicle." In enacting the OVI and implied-consent statutes the General Assembly intended to protect Ohio citizens from the dangers of operating vehicles while impaired. No similar policy interest is stake in the negligent-operation-of-a-motor vehicle exception to political subdivision tort immunity.

IV. CONCLUSION

Without further review from this Court, the Eighth Appellate District will use the terms "capable of" to expand upon the terms "may be" when construing the definition of vehicle in R.C. 4511.01(A). These terms are not interchangeable, nor is the meaning of "may be" anything but clear and unambiguous. To the contrary, the Eighth District – violating well-established rules of statutory construction – inserted the words "capable of" and then used them alternatively

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[3] R.C. 1.51 provides:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the alter adoption and the manifest intent is that the general provision prevail.

with the terms "may be" in finding that a zoo tram is a motor vehicle for purposes of the negligent-operation-of-a-motor-vehicle exception under R.C. 2744.02(B)(1).

The Eighth District's reasoning, however, is not limited to the definition of "vehicle." To the contrary, the appellate court's unprecedented reasoning has more far-reaching implications. Not only is the definition of "vehicle" at stake as that definition is relied upon by other statutes, but the expansive interpretation of "may" has the potential to give a meaning to that term that is contrary to its plain meaning as used in other statutes.

For all these reasons, Defendants-Appellants Board of Park Commissioners for Cleveland Metropolitan Park District and Robert L. Holmes, request that this Court accept jurisdiction to provide clear and unequivocal guidance to appellate courts confronted with interpreting not only "vehicle" under R.C. 4511.01(A), but statutes using the permissive term "may."

Respectfully submitted,

SUSAN M. AUDEY (0062818)
(COUNSEL OF RECORD)
ROBERT J. HANNA (0037230)
TARIQ M. NAEEM (0072808)
TUCKER ELLIS & WEST LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414
Telephone: 216.592.5000
Telefax: 216.592.5009
E-mail: susan.audey@tuckerellis.com
robert.hanna@tuckerellis.com
tariq.naeem@tuckerellis.com

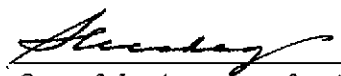
Attorneys for Appellants Board of Park Commissioners for Cleveland Metropolitan Park District and Robert L. Holmes

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Appellants Board of Park Commissioners for Cleveland Metropolitan Park District and Robert L. Holmes* has been served this 29th day of August, 2007, by U.S. Mail, postage prepaid, upon the following:

ROBERT M. WEBER
LAW OFFICES OF LYNN A. LAZZARO
2645 Wooster Road
Rocky River, OH 44116

Attorney for Appellee Joe Wolanin



One of the Attorneys for Appellants Board of Park Commissioners for Cleveland Metropolitan Park District and Robert L. Holmes

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88454

JOE WOLANIN

PLAINTIFF-APPELLANT

vs.

ROBERT L. HOLMES, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-579649

BEFORE: Gallagher, P.J., Calabrese, J., and Rocco, J.

RELEASED: July 5, 2007

JOURNALIZED: JUL 16 2007

ATTORNEYS FOR APPELLANT

Robert M. Weber
Law Offices of Lynn A. Lazzaro
2645 Wooster Road
Rocky River, Ohio 44116-2916

Joan A. Ford
1360 West 9th Street
Suite 400
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEES

Robert J. Hanna
Susan M. Audey
Tariq M. Naeem
Tucker, Ellis & West, LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1475

CA06088454 46303989

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

Plaintiff-appellant, Joe Wolanin, appeals the decisions of the trial court. Having reviewed the arguments of the parties and the pertinent law, we reverse the decisions of the trial court that granted the motion for summary judgment of defendants-appellees, Robert Holmes and the Board of Park Commissioners for the Cleveland Metropolitan Park District (collectively "appellees" or "Cleveland Metroparks"), and denied Wolanin's cross-motion for summary judgment, and we remand the case for further proceedings.

A complaint was filed by Wolanin on December 14, 2005. Appellees filed a motion for summary judgment on May 23, 2006. Wolanin filed a brief in opposition to the appellees' motion, as well as a cross-motion for summary judgment on June 23, 2006. On June 29, 2006, the trial court issued an order granting the appellees' motion for summary judgment and denying Wolanin's cross-motion for summary judgment. It is this order of the trial court that is the subject of this appeal.

The Cleveland Metroparks Zoo encompasses approximately two hundred acres of land within the city of Cleveland. The zoo operates a tram transportation system in order to transport zoo patrons from one end of the zoo to the other. The tram in this case allegedly hit Wolanin when he was at the

northern trek entrance located in a turnaround on the zoo property. The tram at issue in this case consisted of a two-unit system operated by a driver who was located at the front of the first unit. This tram carried passengers at slow speeds within the zoo and contained open-air, bench-like seating, with no doors, window glass, or seat belts. This particular tram was not to transport patrons outside of the zoo.

Wolanin and his friend Karen Smith and her five-year-old daughter visited the zoo in July 2004. After entering at the northern trek entrance gate, Wolanin and his friends proceeded to an information booth and then made their way to the turnaround area to discuss their plans to view the zoo. The tram was also in the turnaround area, having recently loaded patrons for transport. Zoo employee Robert Holmes was the tram operator on that day. As Holmes turned the tram into the turnaround area, the first unit of the tram apparently passed Wolanin without incident. However, the rear of the second unit of the tram came into contact with Wolanin as it negotiated the turnaround.

Wolanin raises two assignments of error, which are interrelated and shall be addressed together.

First assignment of error: "The trial court erred in granting Defendant-Appellee Robert L. Holmes, et al.'s motion for summary judgment."

Second assignment of error: "The trial court erred in denying Plaintiff-Appellant Joe Wolanin's Cross-Motion for Summary Judgment."

Wolanin argues that the court erred when it granted appellees' motion for summary judgment and denied his cross-motion for summary judgment.

This court reviews a trial court's grant of summary judgment de novo. *Ekstrom v. Cuyahoga County Comm. College*, 150 Ohio App.3d 169, 2002-Ohio-6228. Before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Dussell v. Lakewood Police Dept.*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326.

Cleveland Metroparks is a political subdivision of the state of Ohio. *Willoughby Hills v. Bd. of Park Commrs. of Cleveland Metro. Park Dist.* (1965), 3 Ohio St.2d 49. R.C. 2744.02(A)(1) confers on all political subdivisions a blanket immunity, which provides that they are not liable for injury, death or loss to persons or property that occurred in relation to the performance of a

governmental or proprietary function. However, R.C. 2744.02(B) lists five exceptions to this blanket immunity. If one of the exceptions to immunity is found to apply, R.C. 2744.03 lists several defenses or immunities to liability for both the political subdivision and its employees. Nevertheless, the defenses in R.C. 2744.03 do not apply unless liability attaches under one of the exceptions in R.C. 2744.02(B). *Sobiski v. Cuyahoga County Dept. of Children & Family Servs.*, Cuyahoga App. No. 84086, 2004-Ohio-6108.

The "maintenance and operation" of a zoo is a governmental function. R.C. 2744.01(C)(2)(u)(iii). Zoo operations typically include some type of transportation system. Operation of the zoo's transportation system in this case is a governmental function for which there is immunity. The appellees' immunity can only be removed if one of the narrowly defined exceptions set forth in R.C. 2744.02(B)(1) through (B)(5) apply.

R.C. 2744.02(B) contains the exceptions to the general rule of immunity to liability for political subdivisions and states in pertinent part:

> **"(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:**

"(1) *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. The following are full defenses to that liability:

"(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

"(b) A member of a municipal corporation fire department * * *;

"(c) A member of an emergency medical service * * *.

"(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.

"(3) * * *, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair * * *.

"(4) * * * political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, * * *.

"(5) * * *, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision * * *." (Emphasis added.)

Wolanin argues that the tram that struck him qualified as a "motor vehicle" under R.C. 2744.02(B)(1), and Wolanin further argues that the appellees conceded as much. However, appellees state in their brief that they never conceded that the tram was a motor vehicle. In addition, appellees argue that the driver was not negligent.

Wolanin asserted he was standing stationary on a zoo pathway after obtaining a diagram of the park when he was struck by the tram. He claimed his back was toward the tram and he never saw or heard it until it struck him. Wolanin's companion, Smith, and another witness, Sherri Bailey, offered somewhat similar testimony indicating that Wolanin was struck by the second unit of the tram.

The appellees offered the findings of Officers Barrett and Anderson who reenacted the accident scene on three separate occasions. In each instance they found the operation of negotiating the tram around the turnaround required the second unit of the tram to follow the same path that the first unit followed. Therefore, they concluded that since Wolanin was apparently not hit by the first unit of the tram car, this demonstrated that he must have entered the tram's path in-between the first and second units. They concluded that the only way the second car could have struck Wolanin is if he inadvertently moved into the

path of the second car after the first car already passed. Appellees claim that this evidence demonstrates that the driver's actions in this case did not contribute to the accident.

We disagree. The operation of the tram and how Wolanin was hit is a material issue of fact that remains in dispute. Even assuming Wolanin was moving at the time he was struck, this fact alone does not serve to automatically absolve the appellees of responsibility for negligence. For this reason, we reverse the trial court's decision to grant summary judgment in favor of the appellees on the question of negligence.

With respect to the trial court's ruling on the cross-motion for summary judgment, Wolanin argues in his brief and in his cross-motion for summary judgment that the tram is a motor vehicle under the statute. We find merit to Wolanin's argument.

For purposes of R.C. 2744, motor vehicle has the same definition as Section 4511.01 of the Revised Code. See R.C. 2744.01(E). R.C. 4511.01(B) defines "motor vehicle" as "every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires * * *." Encompassed within the definition of motor vehicle is the term vehicle, which is also defined in R.C. 4511.01(A), where "vehicle" is defined as "every device,

including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway * * *." R.C. 2744.01(E) does not limit the definition of motor vehicle to that contained in R.C. 4511.01(B). Instead, it expressly provides that motor vehicle is defined by "section 4511.01," meaning the entire section. Therefore, the definition of vehicle set forth in subsection (A) is included within the definition of motor vehicle in subsection (B) and, thus, requires that the motor vehicle be capable of transporting people or property upon a highway.

The evidence demonstrates that the tram operated by Cleveland Metroparks was used for transporting zoo patrons in and around zoo property. The tram involved in this case was not licensed or registered for use on a highway. It is an open-air vehicle that has neither windows, doors, nor seat belts. While the tram was not used for transporting people or property on a highway, the evidence showed the tram was occasionally driven to other Cleveland Metroparks' properties on public highways, under ranger escort.

The appellees' view that the tram is not a motor vehicle as outlined under R.C. 4511.01 goes against a significant body of case law from this and other districts that have held that vehicles such as golf carts, snowmobiles, motorized minibikes, forklifts, all-terrain vehicles and the like are all motor vehicles. See

State v. Tramonte (Aug. 27, 1993), Ottawa App. No. 920T050; *Metropolitan Property & Liability Insurance Company v. Kott* (June 15, 1979), Lucas App. No. L-78-309; *Drake-Lassie v. State Farm* (1998), 129 Ohio App.3d 781; *Gibboney v. Johnson* (Oct. 5, 2006), Cuyahoga App. No. 87190; *Cleveland v. Copley* (Mar. 14, 1985), Cuyahoga App. Nos. 48595, 48596.

The tram does not lose its character as a motor vehicle merely because it was used only to transport people on zoo property. The statutory language does not require actual use on a public highway. The statute requires only that a person or property "may be" transported on a public highway or that the motor vehicle be "capable" of transporting people of property upon a highway. Here, the tram satisfies either requirement.

Taken to the extreme, a contrary view could result in a zoo tram operator drinking alcohol on the job all day to a level of impairment and then avoiding a charge of operating a vehicle under the influence by Cleveland Metroparks rangers because the tram does not meet the definition of a motor vehicle. Countless cases involving similar or like vehicles on both public and private property have held otherwise. See, e.g., *State v. Gottfried* (1993), 86 Ohio App.3d 106.

The tram in question is equipped with a Chrysler 3.3 liter V-6 engine. Its primary purpose is to transport passengers. Again, the fact that the appellees acknowledge that the tram has been driven on public roads without passengers under ranger escort reinforces that it "may be" or is "capable" of transporting passengers or property on a public highway. Under the plain language definition of a motor vehicle, there is no requirement that the tram actually be on a public highway transporting passengers for the motor vehicle exception to apply under R.C. 2744.02(B)(1).

Accordingly, we find that the tram in this case is a "motor vehicle" and the exception to immunity under R.C. 2744.02(B)(1) does apply. As a result, we find that the evidence in the case does not support the lower court's ruling in either instance.

Accordingly, Wolanin's first and second assignments of error have merit and the decisions of the trial court are reversed.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;
ANTHONY O. CALABRESE, JR., J. DISSENTS (with separate opinion)

ANTHONY O. CALABRESE, JR., J. DISSENTING:

I respectfully dissent from my learned colleagues in the majority. I believe that there is substantial evidence in the record supporting the trial court's decision. Officer Barrett and Officer Anderson re-enacted the accident scene on three separate occasions, and each result was the same. The operation of negotiating the tram around the turnaround required the second unit of the tram to follow the same path that the first unit followed.[1]

The fact that appellant was not hit by the first unit of the tram car demonstrates that he must have entered the tram's path in-between the first and second units. The only way the second car could have struck appellant in this case is if he inadvertently moved into the path of the second car after the

[1]Barrett aff., R. 28 at Ex. B, ¶6; Anderson aff., R. 28 at Ex. C, ¶7.

first car had already passed. Accordingly, the evidence demonstrates that the driver's actions in this case did not contribute to the accident.

Moreover, this particular tram was not used for transporting people or property on a highway. It was used for transporting zoo patrons in and around zoo property. Zoo patrons are not transported between different Cleveland Metroparks by riding this tram on public highways.

The tram involved in this case is not licensed or registered for use on a highway and is an open-air vehicle that has neither windows, doors, nor seat belts. Accordingly, based on the evidence in this case, I believe this particular tram is not a "motor vehicle" *for purposes of qualifying for the exception to immunity under R.C. 2744.02(B)(1).*

Accordingly, I would affirm the lower court.