

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

VICTORIA BALENTINE, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF EDWIN OMAR
MEDINA-FLORES, DECEASED,
Appellant

vs.

CHESTER WATER AUTHORITY, WYATT A. ROLAND,
MICHAEL W. ROLAND AND CHARLES MATTHEWS
Appellees

**BRIEF OF AMICUS CURIAE
PENNSYLVANIA ASSOCIATION FOR JUSTICE**

NO. 119 MAP 2016

On Petition for Allowance of Appeal from the Order of the Commonwealth
Court dated June 3, 2016 at No. 1859 CD 2015 Affirming the Order of the
Delaware County Court of Common Pleas, Civil Division, dated
September 2, 2015 at No. 13-11179

GEORGE G. RASSIAS, ESQUIRE
SCHMIDT, KIRIFIDES & RASSIAS, P.C.
CO-COUNSEL FOR AMICUS CURIAE
PENNSYLVANIA ASSOCIATION FOR JUSTICE
44 E. FRONT STREET
MEDIA, PENNSYLVANIA 19063
(610) 892-9300 • FAX: (610) 892-9333
Email: grassias@skr.legal

DANIEL J. SIEGEL, ESQUIRE
LAW OFFICES OF DANIEL J. SIEGEL, LLC
CO-COUNSEL FOR AMICUS CURIAE
PENNSYLVANIA ASSOCIATION FOR JUSTICE
66 WEST EAGLE ROAD, SUITE 1
HAVERTOWN, PA 19083-1425
(610) 446-3457 • FAX (484) 636-3993
Email: dan@danieljsiegel.com

TABLE OF CONTENTS

Table Of Citations ii

Amended Statement Of Interest Of Amicus Curiae, Pennsylvania Association
For Justice1

 PAJ’s Interest in This Matter.....1

Statement Of The Question Involved3

Statement Of The Case4

Summary Of Argument.....5

Argument7

 I. This Court should clarify the definition of “operation” for purposes
 of imposing liability against a Commonwealth agency or political
 subdivision7

 II. Pennsylvania’s appellate courts have expanded the definition of
 “operation” of a motor vehicle beyond the parameters in *Love*.8

 A. Supreme Court decisions on the issue of “operation” 8

 B. Commonwealth Court decisions on the issue of “operation” 14

 III. This Pennsylvania’s appellate courts have expanded the definition of
 “operation” of a motor vehicle beyond the parameters in *Love*.18

Conclusion30

Certificate Of Word Count Compliance.....32

TABLE OF CITATIONS

Cases

| | |
|--|-----------|
| <i>Balentine v. Chester Water Auth.</i> , 140 A.3d 69 (Pa. Cmwlth. 2016)..... | 4, 19 |
| <i>Cacchione v. Wieczorek</i> , 674 A.2d 773 (Pa. Cmwlth. 1996)..... | 18, 19 |
| <i>City of Philadelphia v. Melendez</i> , 627 A.2d 234 (Pa. Cmwlth. 1993) | 17, 18 |
| <i>Commonwealth of Pennsylvania State Police v. Robinson</i> , 554 A.2d 172 (Pa. Cmwlth. 1989) | 14 |
| <i>Commonwealth v. Wilson</i> , 660 A.2d 105 (Pa. Super. 1995) | 27 |
| <i>First National Bank of Pennsylvania v. Commonwealth Department of Transportation</i> , 609 A.2d 911 (Pa. Cmwlth. 1992)..... | 16, 17 |
| <i>Love v. Philadelphia</i> , 543 A.2d 531 (Pa. 1988) | passim |
| <i>Sonnenberg v. Erie Metropolitan Transit Authority</i> , 586 A.2d 1026 (Pa. Cmwlth. 1991) | 15, 16 |
| <i>Warrick v. Pro Cor Ambulance</i> , 709 A.2d 422 (Pa. Cmwlth. 1997) | 20 |
| <i>Warrick v. Pro Cor Ambulance</i> , 739 A.2d 127 (Pa. 1999) | 5, 11, 14 |
| <i>White by Pearsall v. School District of Philadelphia</i> , 718 A.2d 778 (Pa. 1998) | 11 |

Statutes

| | |
|--------------------------------|------|
| 42 Pa.C.S. § 8522(b)(1) | 8 |
| 42 Pa.C.S. § 8541 | 7 |
| 42 Pa.C.S. § 8542 | 8 |
| 42 Pa.C.S. § 8542(b)(1) | 1, 4 |
| 75 Pa.C.S. § 3731(a) | 24 |
| 75 Pa.C.S.A. § 3112(a)(3)..... | 20 |

Miscellaneous

| | |
|--------------------|--------|
| 93 A.L.R.3d 7..... | 24, 25 |
|--------------------|--------|

**AMENDED STATEMENT OF INTEREST OF AMICUS CURIAE,
PENNSYLVANIA ASSOCIATION FOR JUSTICE**

The Pennsylvania Association for Justice, *formerly Pennsylvania Trial Lawyers Association*, is a non-profit organization with a membership of over 2,300 men and women of the trial bar of the Commonwealth of Pennsylvania. Since 1968, the Association has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual, group or entity. Through its *Amicus Curiae* Committee, the Pennsylvania Association for Justice strives to maintain a high profile in the Commonwealth and Federal Courts by promoting, through advocacy, the rights of individuals and the goals of its membership.

No person, other than the amicus curiae, its members, or counsel, paid in whole or in part for the preparation of this brief.

PAJ's Interest in This Matter

PAJ urges this Court to reverse the decision of the Commonwealth Court because:

- The Court's conclusion that the involuntary movement of a vehicle does not constitute operation of a motor vehicle for purposes of the

motor vehicle liability exception to governmental immunity under 42 Pa.C.S. § 8542(b)(1) is contrary to this Court's holding in *Love v. Philadelphia*, 543 A.2d 531 (Pa. 1988);

- The continued expansion of the motor vehicle liability exception to governmental immunity by the Commonwealth Court is inconsistent (1) with Pennsylvania law, (2) with public policy, and (3) creates an inconsistent fact-specific standard for imposing liability.

STATEMENT OF THE QUESTION INVOLVED

Whether the Commonwealth Court erred in holding that the involuntary movement of a vehicle does not constitute operation of a motor vehicle for purposes of the vehicle liability exception to governmental immunity under 42 Pa.C.S. § 8542(b)(1).

STATEMENT OF THE CASE

Edwin Omar Medina-Flores was killed when Charles Matthews' vehicle struck and pinned him, eventually leading to his death. At the time of the accident, Matthews was employed by the Chester Water Authority, a local agency for purposes of sovereign immunity. Matthews acknowledged that he had unlawfully parked his vehicle in a lane of travel approximately 10 to 15 feet in front of the hole where Mr. Medina-Flores was working based upon the mistaken belief that his employer's "no parking rule" did not apply to him. (R. 41-42a). Witness testimony confirms that Matthews' truck was parked and idling when Wyatt Roland lost control of his vehicle, which struck Matthews' vehicle and propelled it into Mr. Medina-Flores.

The trial court concluded that the Chester Water Authority vehicle was not in operation at the time of the accident and granted summary judgment in favor of the Authority. The Commonwealth Court affirmed, *Balentine v. Chester Water Auth.*, 140 A.3d 69 (Pa. Cmwlth. 2016), holding the action was barred because the vehicle was not in operation, as required under Section 8542(b)(1). This Court granted Mr. Medina-Flores' Petition for Allowance of Appeal.

SUMMARY OF ARGUMENT

In her dissenting statement in *Warrick v. Pro Cor Ambulance*, 739 A.2d 127 (Pa. 1999), Justice Newman outlined why this Court should better define what constitutes the “operation” of a vehicle for purposes of determining whether a Commonwealth or local agency is immune from liability under the applicable Tort Claims Act:

The determination that the motor vehicle exception is limited to an injury that results from “the movement of the bus or by any moving part of the bus” is much too narrowly drawn. ... When a person “operates” a vehicle, he makes a series of decisions and actions, taken together, which transport the individual from one place to another. The decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, are all part of the “operation” of a vehicle. ...

The term “operation” reflects a continuum of activity, the boundaries of which this Court should define. “Operation” does not mean simply moving forward or backwards, but instead includes the decision making process that is attendant to moving the vehicle.

Warrick v. Pro Cor Ambulance, 739 A.2d 127, 128-29.

Since *Warwick*, which affirmed the Commonwealth Court’s decision without a precedential Opinion, Pennsylvania courts have issued opinions inconsistent with Pennsylvania law, and inconsistent with common usage. Consequently, this Court should rule, consistent with *Love v. Philadelphia*, that

a vehicle is in operation from the time it begins its journey until it reaches its destination.

ARGUMENT

I. This Court should clarify the definition of “operation” for purposes of imposing liability against a Commonwealth agency or political subdivision

This matter presents an opportunity for this Court to clarify the definition of “operation” of a motor vehicle under the Sovereign Immunity Act and the Political Subdivision Tort Claims Act, the provisions of which are virtually identical. In doing so, this Court will determine which acts impose liability, and which acts preclude the imposition of liability, consistent with the longstanding rule that exceptions to governmental immunity should be narrowly construed.

Pursuant to the Political Subdivision Tort Claims Act, local governmental agencies are immune immunity from tort liability (42 Pa.C.S. § 8541) unless the claim falls within one of the statutorily-prescribed exceptions, including the motor vehicle exception, which states:

(a) Liability imposed. – A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b): ...

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, ‘negligent acts’ shall

not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

(b) Acts which may impose liability. – The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

(1) Vehicle liability. -- The operation of any motor vehicle in the possession or control of the local agency ... as used in this paragraph, “motor vehicle” means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

42 Pa.C.S. § 8542. The identical language and vehicle exception apply to claims against the Commonwealth and Commonwealth agencies under Section 8522(b)(1) of the Sovereign Immunity Act, 42 Pa.C.S. § 8522(b)(1).

This Brief seeks clarification of both provisions.

II. Pennsylvania’s appellate courts have expanded the definition of “operation” of a motor vehicle beyond the parameters in *Love*.

A. Supreme Court decisions on the issue of “operation”

This Court first addressed the definition of the “operation” of a motor vehicle for purposes of imposing liability against a governmental body in *Love v. City of Philadelphia*, 543 A.2d 531 (Pa.1988). In *Love*, the plaintiff was stepping down to exit a van parked near the curb in front of her home when she was injured:

In approximately August of 1979, Catherine Love, then age 73, began attending the Mann Adult Center which was administered by the City of Philadelphia, Department of Public Health. Mrs. Love was transported to and from the Mann Center in a city owned

van driven by Mr. Robert Kitchen. Mrs. Love was blind in one eye and had impaired vision in the other, and therefore required assistance boarding and alighting from the van. Mr. Kitchen usually parked the van at the curb in front of Mrs. Love's home. He would place a portable step at the doors to the van and would assist Mrs. Love in and out of the van.

On the afternoon of February 15, 1980, Mr. Kitchen transported Mrs. Love, the last occupant of the van that day, from the Mann Center to her home. Mrs. Love fell while alighting from the van, landing in the street with her feet approximately three feet from the curb line and her back approximately two feet from the portable step which had been placed next to the van.

Mr. Kitchen became aware that Mrs. Love had fallen and summoned the help of Mrs. Love's daughter-in-law and granddaughter. The Philadelphia Police were called and Mrs. Love was transported to Episcopal Hospital for treatment of her injuries. Mrs. Love suffered multiple injuries and was subsequently placed in a nursing home.

Catherine Love filed an action against the City of Philadelphia alleging that the city's negligence caused her injuries. The case was heard non-jury. At the conclusion of the trial the judge entered a verdict for Catherine Love against the city in the amount of \$375,000.00. The court held that Mrs. Love's injuries were caused by the negligence of an employee of the City of Philadelphia who was acting within the scope of his employment, and that Mrs. Love's cause of action came within the "motor vehicle" exception to the Political Subdivision Tort Claims Act.

Love, 543 A.2d at 531-32. Faced with these fact, this Court conclude that plaintiff's conduct was not part of the "operation" of the vehicle, but noted that "operation of a vehicle" encompassed all actions that occur between the time a vehicle is placed into motion until it ceases operation. In other words, this Court concluded that the "operation" of a vehicle occurs from the time a vehicle is

turned on and begins to drive on a highway until it reaches its destination and parks or otherwise ceasing its movement on the highway.

In 1998, this Court addressed the vehicle exception in two cases. In the first, *Mickle v. City of Philadelphia*, 707 A.2d 1124 (Pa. 1998), the plaintiff was injured when the wheels of a City-owned fire rescue van became dislodged while she was being transported to a local hospital. The parties stipulated that the cause of the wheels coming off was the negligent maintenance and repair of the vehicle by City employees. This Court agreed with the trial court and imposed liability against the City, concluding that the injury occurred while the vehicle was in operation, and that the City's negligent maintenance and repair was the cause of the wheels coming off the vehicle. *Mickle*, 707 A.2d 1124, 1126.

Shortly after *Mickle*, this Court declined to extend the definition of "operation" to include hand signals by a driver in *White by Pearsall v. School District of Philadelphia*, 718 A.2d 778 (Pa. 1998). This Court specifically noted that it was constrained by *Love* to define "to operate" something as to "actually put it in motion". *White*, 718 A.2d at 779.

The Court revisited the issue in *Warrick*, 739 A.2d 127 (Pa. 1999). In *Warrick*, a five-year old child was killed while trying to cross the street after exiting a SEPTA bus on his way home from school. Just before the accident, the

bus driver had dropped the child at a “dangerous intersection” that was not the regular bus stop. The trial court granted summary judgment in favor of SEPTA, and the Commonwealth Court affirmed.

On appeal to the Supreme Court, this Court issued a *Per Curiam* Order affirming the Commonwealth Court. *Warrick*, 739 A.2d 127. Justice Newman issued a Dissenting Statement in which she addressed the conflicting and confusing definitions of “operation” in cases interpreting the motor vehicle exception to sovereign immunity:

I believe that it is impossible to look at the term “operation” of a motor vehicle in a vacuum and ignore the purpose for which the vehicle is operated, particularly where, as here, the sovereign is acting as a common carrier in the operation of its vehicle. In this case, SEPTA serviced a specific bus route, which regularly transported school children to and from school. The public, especially children, put their trust in the driver of a common carrier to stop at the designated stop, and not at a dangerous location. They assume that the driver will not let them off the bus in a place where approaching traffic can not see them.

The determination that the motor vehicle exception is limited to an injury that results from “the movement of the bus or by any moving part of the bus” is much too narrowly drawn. The process of operating a vehicle encompasses more than simply moving the vehicle. When a person “operates” a vehicle, he makes a series of decisions and actions, taken together, which transport the individual from one place to another. The decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, are all part of the “operation” of a vehicle.

I further do not believe that any of our previous decisions control this case. In *White v. School District Of Philadelphia*, 553 Pa. 214, 718 A.2d 778 (Pa. 1998), the Majority of this Court determined that a school bus driver who motions a child across the street, after the driver has discharged the child, was not “operating” the bus at the time. While I disagree with this conclusion (see dissent in *White*), I believe that there is a great distinction between a driver motioning a child across the street and the driver’s decision of where to stop the vehicle in order to discharge passengers. In *White*, the driver’s action, while necessary to carry out safely the duty of the school bus for safe transit, is ancillary to the physical act of operating the school bus. Without a doubt, the bus could transport students from one place to another without the driver motioning the children across the street. Here, however, the Septa bus could not function without the bus stopping and starting. Its very function is to pick up passengers in one designated location and drop them off at another. Thus, the decisions of where to stop the bus and where to discharge passengers are not ancillary to the function and purpose of the bus. Indeed, the bus could not carry out its function if it could not discharge a passenger. The bus must stop so the passengers can get off! Because the driver is carrying out a necessary function to the operation of the bus when, along his route, he stops to let his passengers off, he must therefore have the corresponding duty to stop in a safe location.

The term “operation” reflects a continuum of activity, the boundaries of which this Court should define. “Operation” does not mean simply moving forward or backwards, but instead includes the decision making process that is attendant to moving the vehicle. Had the legislature intended that recovery was permissible only when the vehicle was actually in motion, the legislature would not have used a word that implies a process, such as the term “operation.” Moreover, the term “operation” of a motor vehicle occurs in other statutory provisions and in those cases, we have not required that the term “operation” means that the automobile actually be in motion. For example, in the context of the offense of driving under the influence (DUI) 75 Pa. C.S.A. § 3731, to find that a motor vehicle is in operation requires evidence that the driver was

in actual physical control of the vehicle, but not that the vehicle was actually “in motion”. *Commonwealth v. Wilson*, 442 Pa. Super. 521, 660 A.2d 105, 107 (1995). *See also Commonwealth v. Wolen*, 546 Pa. 448, 685 A.2d 1384 (1996)(recognizing that a finding of “actual physical control” does not require that car actually is moving).

Indeed, what if a bus driver, while intoxicated, decides to stop the SEPTA bus in the middle of a railroad track in order to discharge passengers? Should a train come along and hit the bus, injuring those on the bus and those who got off the bus, I believe that we would be hard pressed to say that the sovereign was immune for any of those injuries. Moreover, the bus driver could be charged with the offense of driving under the influence while operating a motor vehicle. Other than degree, I see no difference between that drastic example and the case here. In both, the decision and act of stopping the bus are incident to the operation of the bus, and caused injury to this child. The sovereign should not be immune for injuries that result.

The term “operation” should encompass more than the mere “movement” of a bus to determine whether a Plaintiff’s injury resulted from the “operation” of a motor vehicle. Here, I believe that the act and the decision of where to discharge the passengers, including this small child, constitute an integral component to the “operation” of the SEPTA bus. Thus, I find that the Commonwealth Court incorrectly affirmed the entry of summary judgment of the trial court because SEPTA is immune from suit pursuant to Section 8521 of the Code. In reaching this conclusion, I find persuasive the Third Circuit’s statement in *Toombs v. Manning*, 835 F.2d 453, 468 (3rd Cir. 1987)(en banc) that, “the operation of a SEPTA vehicle cannot be divorced from the purposes of the vehicle’s operation.” The *Toombs* court rejected the rigid analysis that a vehicle is operated only where it is in motion and determined that, when applied to a common carrier, the term “operation” covered the discharge of passengers from a subway car. I would adopt a similar analysis as set forth above. This result is also consistent with a recent decision of this Court recognizing that the plain language of the motor vehicle exception encompasses negligent acts related to the operation of a vehicle. *See Mickle v. City*

of Philadelphia, 550 Pa. 539, 707 A.2d 1124 (1998) (City not immune where plaintiff was injured while riding in a City-owned vehicle due to negligent maintenance of the vehicle).

Warrick, 739 A.2d at 128-29.

B. Commonwealth Court decisions on the issue of “operation”

The Commonwealth Court has issued numerous opinions addressing the vehicle exception in an often tortured attempt to define “operation” for the purpose of imposing liability. In *Commonwealth of Pennsylvania State Police v. Robinson*, 554 A.2d 172 (Pa. Cmwlth. 1989), a state trooper secured an accident scene while stopped in lanes of traffic. Plaintiff asked the officer for road flares and was directed to the trooper’s trunk to retrieve them when he was struck and killed by another passing motorist. The trial court denied the motion for summary judgment. The Commonwealth Court reversed, dismissing the claim against the trooper/state police, noting that the trooper’s vehicle was parked and not in operation at the time of the accident.

The Commonwealth Court revisited the issue in *Sonnenberg v. Erie Metropolitan Transit Authority*, 586 A.2d 1026 (Pa. Cmwlth. 1991). In *Sonnenberg*, the plaintiff was injured while attempting to exit the defendant’s vehicle when she was struck by the door of the bus as it closed. The trial court entered summary judgment in favor of the defendants, holding that the vehicle

exception to liability was inapplicable because the bus was not in operation at the time of the incident. *Sonnenberg*, 586 A.2d at 1027. On appeal, the Commonwealth Court reversed, concluding that plaintiff's injuries were directly caused by a moving part of the defendants' vehicle. *Sonnenberg*, 586 A.2d at 1028. The Court concluded that the "movement of parts of a vehicle, or an attachment to the vehicle, is sufficient to constitute 'operation'." *Sonnenberg*, 586 A.2d at 1028. As a result, the focus in future cases shifted to analyzing movement of a part of the vehicle at the time of an accident.

In 1992, the Commonwealth Court revisited issues concerning a parked vehicle when the plaintiff's decedent crashed into a PennDOT truck on the side of the road. *First National Bank of Pennsylvania v. Commonwealth Department of Transportation*, 609 A.2d 911 (Pa. Cmwlth. 1992). The defendant filed a motion for summary judgment, asserting immunity under the motor vehicle exception. The trial court granted the motion and the Commonwealth Court affirmed. Distinguishing *Sonnenberg*, the Commonwealth Court stated that although the *Sonnenberg* vehicle was temporarily stopped, because the plaintiff's injuries were directly caused by a moving part of the vehicle in question, the exception applied. *First National Bank*, 609 A.2d at 914. The Commonwealth Court went on to draw comparisons with *Love* and *Robinson*, noting that those cases were

analogous to *First National Bank's* fact pattern because operation under *Love* required “actual motion” and the PennDOT vehicle was not in motion at the time of the accident. The Commonwealth Court added that the PennDOT vehicle was not temporarily stopped in traffic and that decedent’s injuries were not caused by any moving part of the PennDOT vehicle. *First National Bank*, 609 A.2d at 914.

In *City of Philadelphia v. Melendez*, 627 A.2d 234 (Pa. Cmwlth. 1993), the courts examined an action in which an unlawfully parked City vehicle impeded the plaintiff’s ability to view the intersection and led to a collision with a third vehicle. The trial court denied the City’s Motion for Summary Judgment, ruling that the parking of the vehicle constitutes “operation.” On appeal, the Commonwealth Court reversed, concluding that it was clear that “[the plaintiff] never asserted that the vehicle was **being parked** at the time of the collision.” *Melendez*, 627 A.2d at 236 (*emphasis supplied*). Therefore, following *Melendez*’ logic, because the vehicle was “already parked” at the time of the accident, it was no longer in operation and the exception could not apply.

The Commonwealth Court revisited the vehicle exception when an unoccupied and parked City of Erie truck rolled downhill and crashed into a home in *Cacchione v. Wieczorek*, 674 A.2d 773 (Pa. Cmwlth. 1996). An occupant

of the home was injured and brought a claim against the City of Erie. The defendants argued that the parked vehicle could not be considered in operation under the vehicle exception. The Commonwealth Court disagreed, holding that because the injury was caused by the movement of the entire Erie truck, the truck was “in operation” at the time of the incident for purposes of the Act. The *Cacchione* court also stated:

Moreover, parking is unquestionably an act normally related to the operation of a vehicle. The movement of the vehicle ceases, and the operation of the vehicle terminates, at the moment the vehicle is **properly** parked. In this matter, however, the [plaintiffs’ claims are based upon the negligent act of parking, i.e., the failure to properly engage the handbrake and block the wheels against the curb, causing the subsequent movement of the truck and the injuries. Thus, the negligent act alleged in this matter is directly related to the operation of the vehicle itself, not to ‘acts taken at the cessation of operating’ the vehicle.

Cacchione, 674 A.2d at 775 (citing *Love v. City of Philadelphia*, 543 A.2d 531, 533 (1988)(*emphasis in original*). Clearly, the *Cacchione* court considered acts related to “proper parking” integral to the “operation” and, moreover, because the movement of the Erie truck caused the injury to the plaintiff, the claim was deemed within the exception to liability.

Similarly, in this case, there is no doubt that the fatal injuries sustained by the Decedent were the result of the movement of the Appellees’ truck after it

was not properly parked. In an effort to distinguish its findings from the obvious parallels to *Cacchione*, the Commonwealth Court deemed the movement of Appellees' truck "involuntary" and therefore incapable of being in operation for purposes of the immunity exception. *Balentine v. Chester Water Authority*, 140 A.3d 69, 75 (Pa. Cmwlth 2016). However, as the *Cacchione* truck was unoccupied when it crashed into the plaintiff's home, then its movement was most assuredly "involuntary" as well and yet *Cacchione* still deemed the movement of the vehicle operation for purposes of exception and permitted the claims to proceed.

III. This Pennsylvania's appellate courts have expanded the definition of "operation" of a motor vehicle beyond the parameters in *Love*.

At issue is whether (1) a vehicle on a public highway, which must comply with the "rules of the road," is in "operation" and (2) the Commonwealth Court's Opinions improperly expand this Court's holding in *Love*. In particular, the expansion of the holding in *Love* has created confusion for litigants and Pennsylvania Common Pleas and intermediate appellate courts. This confusion is highlighted by this Court's action in *Warrick*, in which it affirmed the Commonwealth Court's holding in *Warrick v. Pro Cor Ambulance*, 709 A.2d 422 (Pa. Cmwlth. 1997) that "a temporary stop connected to the discharge of

passengers is not part and parcel of the operation of a vehicle.” *Warrick*, 709 A.2d 422.

As noted above, in *Warrick*, Justice Newman outlined why Pennsylvania courts need to better define what constitutes the “operation” of a vehicle for purposes of determining whether a Commonwealth or local agency is immune from liability under the applicable Tort Claims Act.

In *Love*, this Court distinguished between “preparing to operate a vehicle,” “operating a vehicle,” and the “acts taken at the cessation of operating a vehicle,” ruling that the legislature abrogated sovereign immunity only for claims that occur while “operating a vehicle.” *Wright* eliminated these distinctions for all practical intents and purposes by replacing the requirement for “operation” with a requirement that a vehicle be in “motion,” the same analysis the Commonwealth Court has repeatedly used in its decisions. A close reading of *Love* demonstrates that this Court believed that “operation” included those actions that occurred after *preparing* to operate a vehicle, but did not include the *cessation* of operating a vehicle. Stopping at a traffic signal or stopping to pick up a student going to school is not equivalent of parking a bus at a school so that all of the students can get out and go to class.

Wright also ignored the significant difference between a vehicle that has reached its final destination and a vehicle that remain on highways that stop momentarily. *Wright* also barred claims, for example, if a vehicle was in an accident while stopped for a stop sign, but permitted claims if a vehicle was traveling five miles per hour and the driver is slowly braking for a stop sign or traffic light.

Consequently, this case provides an opportunity for this Court to provide clarity about the definition of “operation,” and this Court should do so consistent with *Love*’s holding that, for purposes of determining whether a local agency is liable under the Tort Claims Act:

- Operation of a vehicle encompasses all actions from the time a vehicle is put into motion until the cessation of the operation;
- Operation of a motor vehicle does not include getting into or out of a vehicle; and,
- Operation of a motor vehicle does not include “maintenance and use.”

Nowhere in *Love* did this Court state, as the Commonwealth Court has repeatedly ruled, that “operation” of a vehicle was limited to actual physical motion. Nowhere in *Love* did this Court state or imply that a vehicle is not in

“operation” when it is stopped at a traffic light, or stopped to allow passengers to get on or off of it.

To the contrary, this Court explained why its definition of “operation” encompassed the continuum between when a vehicle begins operation and the time it ceases operation, *i.e.*, when it arrives at its final destination:

As we have illustrated, to operate something means to actually put it in motion. Merely preparing to operate a vehicle, or acts taken at the cessation of operating a vehicle are not the same as actually operating that vehicle. Thus, according to the common and approved usage of the word “operation”, the van was not in operation at the time of Mrs. Love’s accident. Getting into or alighting from a vehicle are merely acts ancillary to the actual operation of that vehicle.

Love, 543 A.2d at 533.

Since the *Love* decision, the Commonwealth Court has consistently and impermissibly narrowed the definition of “operation” to also require that a vehicle be moving/in motion in order to impose liability, *i.e.*, a jury or judge must now differentiate between a vehicle’s movement (or lack of movement) at any given moment in order to determine whether liability attaches. *Wright* has therefore created distinctions that are (1) impractical, (2) inconsistent with the unquestionable fact that the operation of any vehicle involves driving and

stopping as mandated by the “Rules of the Road,” and (3) inconsistent with numerous statutes and cases interpreting what it means to “operate” a vehicle.

Wright also ignores, for example, the significant difference between (1) a van that had reached its destination and is stopped to allow a passenger to exit, and (2) a van that is traveling to various locations to pick up passengers and stops momentarily to pick up a student. *Wright* also bars claims, for example, (1) if a vehicle is in an accident while stopped for a stop sign, but permits claims (2) if a vehicle is traveling five miles per hour and the driver is slowly braking for a stop sign or traffic light.

Wright is also inconsistent with the Statutory Construction Act, through which Pennsylvania has codified statutory interpretation. Moreover, when this Court addressed the issue of “operation” in *Warrick*, citing *White*, it declined to extend the definition of “operation” to include hand signals by a driver.

In addition, there is ample guidance in other Pennsylvania laws about what constitutes “operation” of a vehicle. For example, Part III of the Motor Vehicle Code, 75 Pa.C.S.A., is entitled “Operation of Vehicles,” and governs a wide range of activities. Section 3112(a)(3) of the Motor Vehicle Code requires vehicle operators “facing a steady red signal alone [to] stop at a clearly marked stop line, or if none, before entering the crosswalk on the near side of the

intersection, or if none, then before entering the intersection and shall remain standing until an indication to proceed is shown...” 75 Pa.C.S.A. § 3112(a)(3).

Interestingly, in order for a violation of this section to occur, the bus must be stopped with its signals flashing. Clearly, this action by the bus driver constitutes the operation of the school bus, even if its wheels are not moving. The main function and operation of a bus is to transport students from their homes to their schools. While driving students to school, a school bus stops many times to pick up children at various points along the bus route.

Section 3345 is not the only portion of the Vehicle Code that requires vehicles to stop their vehicles in order to comply with the “Rules of the Road.” Below is a partial list of provisions on the Motor Vehicle Code, 75 Pa.C.S., relating to the “operation” of motor vehicles that relate to stopping or other actions of drivers on public roads:

- § 3111. Obedience to traffic-control devices.
- § 3111.1. Obedience to traffic control devices warning of hazardous conditions.
- § 3112. Traffic-control signals.
- § 3113. Pedestrian-control signals.
- § 3114. Flashing signals.
- § 3115. Lane-direction-control signals.
- § 3301. Driving on right side of roadway.
- § 3302. Meeting vehicle proceeding in opposite direction.
- § 3303. Overtaking vehicle on the left.
- § 3304. Overtaking vehicle on the right.

§ 3305. Limitations on overtaking on the left.
§ 3306. Limitations on driving on left side of roadway.
§ 3307. No-passing zones.
§ 3308. One-way roadways and rotary traffic islands.
§ 3309. Driving on roadways laned for traffic.
§ 3310. Following too closely.
§ 3311. Driving on divided highways.
§ 3312. Limited access highway entrances and exits.
§ 3313. Restrictions on use of limited access highways.
§ 3314. Prohibiting use of hearing impairment devices.
§ 3315. Passing and overtaking streetcars.
§ 3316. Prohibiting text-based communications.
§ 3321. Vehicle approaching or entering intersection.
§ 3322. Vehicle turning left.
§ 3323. Stop signs and yield signs.
§ 3324. Vehicle entering or crossing roadway.
§ 3325. Duty of driver on approach of emergency vehicle.
§ 3326. Duty of driver in construction and maintenance areas or on highway safety corridors.
§ 3327. Duty of driver in emergency response areas.
§ 3328. Unmarked police vehicles.
§ 3331. Required position and method of turning.
§ 3332. Limitations on turning around.
§ 3333. Moving stopped or parked vehicle.
§ 3334. Turning movements and required signals.
§ 3335. Signals by hand and arm or signal lamps.
§ 3336. Method of giving hand and arm signals.

§ 3341. Obedience to signal indicating approach of train.
§ 3342. Vehicles required to stop at railroad crossings.
§ 3343. Moving heavy equipment at railroad grade crossings.
§ 3344. Emerging from alley, driveway or building.
§ 3345. Meeting or overtaking school bus.
§ 3346. Emergency vehicles entering or leaving official garage.
§ 3351. Stopping, standing and parking outside business and residence districts.
§ 3361. Driving vehicle at safe speed.
§ 3362. Maximum speed limits.
§ 3363. Alteration of maximum limits.
§ 3364. Minimum speed regulation.
§ 3365. Special speed limitations.
§ 3366. Charging speed violations.
§ 3367. Racing on highways.
§ 3801. Definitions.
§ 3802. Driving under influence of alcohol or controlled substance.
§ 3808. Illegally operating a motor vehicle not equipped with ignition interlock.

It is therefore without question that the Motor Vehicle Code contemplates that the operation of a vehicle includes more than pressing the gas pedal. It includes every action from the time a vehicle begins its journey until it reaches its destination. This Court should therefore clarify that “operation” of a vehicle, and consistent with the Statutory Construction Act, has the same meaning.

Pennsylvania’s courts have also and repeatedly affirmed, for purposes of imposing criminal liability, that the “operation” of a vehicle can occur even when a person is in a car that is parked in a driveway. As Justice Newman noted, in *Warrick*, in *Commonwealth v. Wilson*, 660 A.2d 105 (Pa. Super. 1995), the Superior Court affirmed that a vehicle does not have to be in motion to be in operation for purposes of establishing a violation of 75 Pa.C.S. § 3731(a) (“Driving under influence of alcohol or controlled substance”). If mere physical control of a vehicle, or being slumped over the steering wheel, constitutes “operation” of the vehicle, so too should other actions, including those of the defendants in this case.¹

¹ In the context of statutes prohibiting individuals from operating their vehicles while under the influence of alcohol, the definition of “operation” is consistently more expansive than the definition under the Tort Claims Act. James O. Pearson, J.D., explained the differences in “What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 A.L.R.3d 7:

It seems clearly established that the term “operating,” as used in statutes prohibiting the operation of a vehicle while intoxicated, is broader than the term “driving.” Accordingly, some courts have specifically recognized that a person may operate a vehicle without driving it.

The reason that the term “operating” is broader than driving is that, as defined in nearly all of the cases, operating does not require that the vehicle be in motion. Thus, it has been held that the term “operate” is not limited to moving a vehicle from one place to another, that a person may be convicted of operating a motor vehicle without it necessarily being shown that the automobile was

Finally, the Pennsylvania Department of Transportation has issued the *Pennsylvania School Bus Driver's Manual* to emphasize "fundamental concepts of

actually in motion or even had the engine going, and that "to operate" is not limited to a state of motion, but also includes, under the management theory, stops and parking on the highway as they are to be fairly regarded as a necessary incident to the operation.

The term "operate," it has been held, includes merely controlling the vehicle and is intended to forbid persons from doing anything with regard to the mechanism of a motor vehicle, whether it has any effect on the engine or not. Similarly, it has been held that a person begins to operate the instant he begins to manipulate the machinery of the vehicle for the purpose of putting the car in motion, and that "operates" refers to the actual physical handling of the controls of a vehicle.

Three definitions of "operate" that have appeared in a significant number of cases are the following: (1) "operate" includes not only the motion of the vehicle but also acts which engage the machinery of the vehicle that, alone or in sequence, will set in motion the motive power of the vehicle; (2) a person operates a motor vehicle when he intentionally does any act that makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle; and (3) to be "operating" a vehicle, it is not necessary that the car actually be in motion, it being sufficient that the operator is in actual physical control of either the movements of the machinery of the motor vehicle or the management of the movement of the vehicle itself.

Conversely, some courts have pointed out that an automobile is not being operated where it remains stationary and no attempt is made to put it in motion. In addition, some courts have declared that to constitute operation the vehicle must at least be operable.

In a few instances, the courts have held that to establish operation it must be shown that the driver had the intent to move the vehicle.

school bus operation for the new driver and recertification (experienced) levels.”

Pa. School Bus Driver’s Manual, Foreword. Of relevance here are the chapters entitled “Safe Driving” and “Fundamentals of Driving a School Bus,” which explain that “When you drive a bus, you control the vehicle: slowing down, speeding up, and turning; anticipating what other road users might do; and deciding whether evasive actions are necessary.”

In addition, the *Manual* explains a bus driver’s responsibilities when stopping a bus:

Regulated Intersection: Stop Control

Drivers’ responsibilities at stop-controlled intersections are stated in Section 3323(b) of Title 75, The Pennsylvania Vehicle Code. This section states “Duties at stop signs -- Except when directed to proceed by a police officer or appropriately attired persons authorized to direct, control or regulate traffic, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line or, if no stop line is present, before entering a crosswalk on the near side of the intersection or, if no crosswalk is present, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering. If, after stopping at a crosswalk or clearly marked stop line, a driver does not have a clear view of approaching traffic, the driver shall, after yielding the right-of-way to any pedestrian in the crosswalk, slowly pull forward from the stopped position to a point where the driver has a clear view of approaching traffic. The driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute a hazard during the time when the driver is moving across or within the intersection or junction of roadways, and enter the intersection when it is safe to do so.”

Simply put, you must completely stop at every intersection where there is a stop sign for your lane of traffic. Stop at the stop line or four feet in advance of the crosswalk. If neither are there, stop at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. Enter only when you have the best line of sight and can move the bus without interfering with the movement of another vehicle. Before proceeding you should look in all directions at least twice to check for approaching traffic. If the intersection is clear, proceed to move ahead or turn with caution.

Regulated Intersection: Traffic Signals

Approach each traffic signal expecting it could change color at any moment. Always obey the color of the traffic signal:

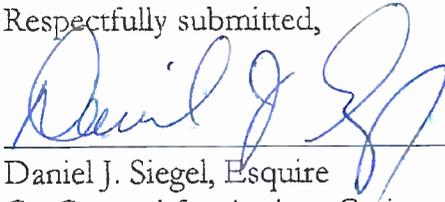
- **Red light** – Stop completely at the stop line and wait for the green light before proceeding. Consult your district guidelines and procedures regarding making the “right on red”. This is a legal maneuver in Pennsylvania, but it might not be the safest to make in a school bus.
- **Yellow light** – Prepare to stop for the red light that will follow.
- **Green light** – Check to be sure approaching traffic is stopped and proceed with caution.
- **Flashing yellow light** – Slowly proceed with caution.
- **Flashing red light** – Stop completely, check for approaching traffic and proceed with caution when it’s safe to move (same as stop sign).

Thus, the *School Bus Driver’s Manual* also includes instructions about how to stop a vehicle while it is in operation. Clearly, in light of this ample precedent, this Court should clarify the definition of “operation” for purposes of sovereign immunity that a vehicle is in operation from the time it begins its journey until it reaches its destination.

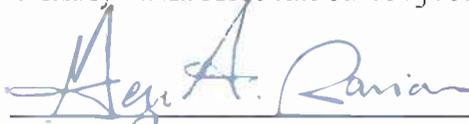
CONCLUSION

Pennsylvania law limits liability against a local or Commonwealth entity to those situations in which a vehicle is in “operation.” Recent case law addressing the definition of “operation” of a vehicle has created confusion among Pennsylvania’s trial and appellate courts. Thus, this Court should reverse the Commonwealth Court and conclude that a vehicle is in “operation” from the time it begins its journey until it reaches its final destination.

Respectfully submitted,



Daniel J. Siegel, Esquire
Co-Counsel for Amicus Curiae
Pennsylvania Association for Justice



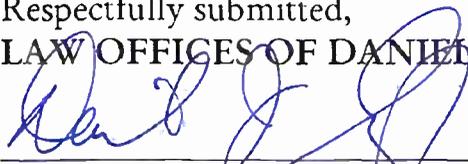
George G. Rassias, Esquire
Co-Counsel for Amicus Curiae
Pennsylvania Association for Justice

Date: February 3, 2017

CERTIFICATE OF WORD COUNT COMPLIANCE

I, DANIEL J. SIEGEL, ESQUIRE, hereby certify that this Brief complies with the word limitation of Pa. R.A.P. 531. Excluding the cover page, tables, certifications, and footnotes, this application contains 6,944 words as calculated by Microsoft Word.

Respectfully submitted,
LAW OFFICES OF DANIEL J. SIEGEL, LLC



DANIEL J. SIEGEL, ESQUIRE
Attorney for Amicus Curiae,
Pennsylvania Association for Justice

Date: February 3, 2017