

IN THE SUPREME COURT OF OHIO

07-0740

DONALD THOMAS KRAYNAK, etc.)

Appellees)

vs.)

YOUNGSTOWN CITY SCHOOL)

DISTRICT BOARD OF EDUCATION,)

et al.)

Appellants)

On Appeal from the Mahoning County Court
of Appeals, Seventh Appellate District

Court of Appeals Case No. 2005-MA-200

MERIT BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
ARGUMENT	4
<u>Proposition of Law No. I: R.C. 2151.421 requires a subjective standard for determining whether a person suspected child abuse, thereby triggering a duty to report.</u>	4
CONCLUSION	8
PROOF OF SERVICE	9
APPENDIX	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court (April 25, 2007)	1
Opinion of the Mahoning County Court of Appeals (March 12, 2007)	4
Journal Entry of the Mahoning County Court of Appeals (March 12, 2007)	38
Judgment Entry of the Court of the Mahoning County Court of Common Pleas (August 16, 2005)	39
<u>UNREPORTED CASES:</u>	
<i>State v. Johnson</i> (2002), Franklin App. No. 02AP-373, unreported	40
<u>STATUTES:</u>	
R.C. 2151.421	48
<u>OTHER AUTHORITIES:</u>	
Am. Sub. S.B. 17 (Final Analysis)	52

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Doe v. Dimovski</i> , 336 Ill. App.3d 292, 297, 783 N.E.2d 193, 198 (2003)	7
<i>O'Heron v. Blaney</i> , 276 Ga.871, 873, 583 S.E.2d 834, 836 (2003)	7
<i>State v. Daws</i> (1994), 1004 Ohio App.3d 448	8
<i>State v. Denis L. R.</i> , 283 Wis.2d 358, 699 N.W.2d 154(2005)	7
<i>State v. Johnson</i> (Dec. 17, 2002), Franklin App. No. 02AP-373, unreported	8
<i>State v. Robbins</i> (1979), 58 Ohio St.2d 74	8
<i>State v. Smith</i> (1983), 10 Ohio App.3d 99	8
<i>Surdel v. Metrohealth Med. Ctr.</i> (1999), 135 Ohio App.3d 141	4-5, 6, 8
<i>Yates v. Mansfield Bd. Of Edn.</i> (2004), 102 Ohio St.3d 205	6
 <u>STATUTES:</u>	
OCGA §19-7-5(c)(1)	7
R.C. 2151.421 (former)	4, 6
 <u>OTHER AUTHORITIES:</u>	
Am. Sub. S.B. 17 (Final Analysis)	6-7

STATEMENT OF THE FACTS

This case arises out of the level of information that the Appellee's teacher, Helen Marino, knew about her student, Derek Kraynak, from daily interaction with him which did not reach a level of her knowing or suspecting that Derek was abused by his mother. The jury properly weighed the evidence and decided this issue of fact in favor of the Youngstown Schools, i.e. Helen Marino did not know or suspect that child abuse of Derek Kraynak occurred at home or anywhere. Appellee Kraynak not only had the opportunity to have the jury decide whether or not there was a violation of the reporting statute, R.C. 2151.421, but also whether there was common law negligence. The jury decided favorably for Appellant on both causes of action and awarded a verdict and judgment sustained by the evidence.

Derek Kraynak testified that he had been abused by his mother, Melissa Kraynak, since he was less than 3-years-old. (Tr. p. 119) He further testified that since that time, from approximately 1992, up until his father, Appellee Donald T. Kraynak, took custody of him in 2000, he had continuously been abused by his mother. (Tr. p. 120) During this time period, Derek's parents were divorced and had joint custody of him. (Tr. p. 84)

Initially, Derek spent one month with his father and then one month with his mother. (Tr. p. 84) Once Derek reached school age, he spent Monday morning through Friday afternoon with his mother and Friday afternoon through Monday morning with his father, Donald Kraynak. (Tr. p. 84)

Donald Kraynak and/or his parents spent those weekends with Derek, throughout the approximate seven years during which Derek claims he was abused, and continuing through the time he started in Helen Marino's gifted class at West Elementary School. (Tr. p. 84) During the approximate seven years of joint custody and visitation, neither Donald Kraynak nor his parents ever suspected any abuse of Derek. (Tr. pp. 85-86)

Helen Marino was dismissed as a Defendant during the course of the trial. Mrs. Marino has been a teacher for over 22 years with Appellant Youngstown City School District. (Tr. p. 416) Mrs. Marino has a masters degree in teaching gifted and talented children, has pursued a supervisor's certificate, and has a masters degree plus 30 hours of post-degree study. (Tr. p. 416) Mrs. Marino enjoyed teaching

gifted children. (Tr. p. 417)

Mrs. Marino had received training and was aware of her obligations to report known or suspected child abuse. (Tr. pp. 423-424) Mrs. Marino had been in situations before where she had suspected child abuse and did make the call reporting it to the appropriate agency. (Tr. p. 425)

Helen Marino had approximately 70 students during the 1999-2000 school year which started on September 4, 1999. (Tr. pp. 418 & 427) Mrs. Marino had Derek Kraynak in a language arts class that met four days per week for one hour and fifteen minutes per day. (Tr. pp. 417 & 418) As part of the class, she used a creative writing journal for the children to write once or twice a week creatively about no particular topic. (Tr. pp. 420-421) This creative writing journal was not graded and was only spot read by her since it was not used to teach the various aspects of the course but only to practice writing. (Tr. pp. 431-432, 470-471)

Helen Marino indicates that she would have read a portion of the creative writing journal of Derek Kraynak sometime in late September of 1999. (Tr. p. 434) In the approximate three weeks before she read a portion of the journal, she had observed Derek to be a happy-go-lucky, healthy and clean 4th grader who loved to talk, had a lot of energy, loved to read and had no physical or emotional signs of abuse. (Tr. pp. 434-435) The journal was a creative writing journal in which Derek testified that he wrote fictional stories. (Tr. p. 124) Mrs. Marino looked at all of the circumstances she knew about Derek at that point, having him in class five hours per week for three weeks or so and not observing any signs of physical or emotional abuse. Looking at all of the circumstances she had before her, she did not suspect or know of any child abuse in Derek's case. (Tr. p. 435)

Mrs. Marino testified that given her observations of Derek Kraynak, he did not have any of the signs of abuse or neglect. (Tr. pp. 429-430)

Helen Marino did not read additional excerpts concerning any alleged abuse in the creative writing journal. Mrs. Marino did not learn from any of Derek Kraynak's other teachers during weekly sessions that there were any concerns about Derek. (Tr. pp. 439-440) Mrs. Marino certainly took time with Derek and even wrote a letter to Derek's grandmother about how well he was doing in school.

(Defendant's Exhibit 1)

Helen Marino complied with the child abuse reporting statute, R.C. 2151.421, and was not negligent in failing to report Derek Kraynak to the authorities based upon the evidence at trial. Mrs. Marino viewed the creative writing journal in a perspective different from anyone else who testified. She is the only witness who observed Derek Kraynak in class for in excess of three weeks before reading excerpts from the journal. All others who testified had the benefit of 20/20 hindsight. She assessed during those three weeks how he acted and how he appeared, all of which led her to not suspect child abuse and not to report. She had reported suspected child abuse of other students in the past and knew all she had to do was to make a call if she had a suspicion. She did not have a suspicion of child abuse in Derek Kraynak's case. Even after September of 1999, Mrs. Marino observed Derek to continue to do well in class. (Tr. p. 438)

The only evidence at trial of any direct abuse came through Derek Kraynak's testimony about his mother which could certainly be interpreted to be a mother having a difficult time and using some corporal punishment in disciplining her child. There was evidence at trial from Derek Kraynak, supported by his father, Donald Kraynak, that Derek was concerned at the end of the 1999-2000 school year that his mother was going to take him from Youngstown to Columbus and that is when he told his grandmother about his mother abusing him. (Tr. p. 81) Derek had wanted to live with his father and was greatly upset by the thought of being taken out of the area.

After a jury verdict in favor of the school district, the Appellees appealed to the Seventh District Court of Appeals. The Appellate Court found that the trial court erred in determining that R.C. 2151.421 contains a subjective standard and in allowing Appellant's expert to testify as to the subjective nature of the statute. The Appellate Court also overruled Appellant's cross-appeal and held that the public-duty rule was still viable in this context. The matter was remanded to the trial court for a new trial.

Appellant filed its notice of appeal to the Supreme Court of Ohio on April 25, 2007. On August 29, 2007, the Supreme Court granted jurisdiction to hear the case and allowed the appeal on the first and

third propositions of law. Briefing was permitted on Proposition of Law No. 1, but stayed on Proposition of Law No. 3 for a decision in 2007-0306, *Rankin v. Cuyahoga County DCFS*.

ARGUMENT

Proposition of Law No. 1: Former R.C. 2151.421 requires a subjective standard for determining whether a person suspected child abuse, thereby triggering a duty to report.

The applicable version of R.C. 2151.421 (A)(1)(a) states as follows:

No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and **knows or suspects** that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.(Emphasis added).

The Appellate Court erroneously held that the trial court should have applied an objective standard to R.C. 2151.421 which would hold Ms. Marino to a standard of what an objective, reasonable teacher would have thought while reading the journal. The trial court had properly focused the inquiry on what Ms. Marino actually knew or suspected regarding whether Derek Kraynak was abused.

It is noteworthy that Kraynak's counsel did not object on the record at trial to instructing the jury on a subjective standard, but expressed other concerns not relevant to this issue. (Tr.:Instructions of Law pp. 29-35).

In support of its decision, the Appellate Court cites to *Surdel v. Metrohealth Med. Ctr.* (1999), 135 Ohio App.3d 141. One of the issues in *Surdel* was whether immunity could only be provided under R.C. 2151.421 if the reporter's suspicions were "reasonable." *Id.* at 150. The Court's full analysis of this issue is as follows:

Surdel further argues that immunity will only be provided under R.C. 2151.421(G)(1)(a) only if the reporter's suspicions are "reasonable." Surdel bases this argument on the text of R.C. 2151.421(A)(1)(a), which

requires that any knowledge or suspicion be immediately reported when there is “any physical or mental wound, injury, disability, or *condition of a nature that reasonably indicates* abuse or neglect of the child.” (Emphasis added [by the *Surdel* court].) R.C. 2151.421(A)(1). We think *Surdel* misconstrues the statute.

The statute describes the kinds of indicators on which the reporter may rely. The qualifying language clarifies that the duty to report does not require absolute proof but rather is triggered when the condition reasonably indicates abuse or neglect. The statute’s focus is on the condition not the reporter. And to the extent *Surdel* contends that R.C. 2151.421(G)(1)(a) does not confer immunity where the report results from the reporter’s alleged unreasonable misdiagnosis, we rejected the same argument in *Criswell v. Brentwood Hosp., supra*.

Id.

Like the Plaintiff in *Surdel*, the Appellate Court in the instant case misconstrues both the statute and the *Surdel* opinion. *Surdel* does not state that the fact finder must evaluate a non-reporting teacher under the standard of what an objective reasonable teacher would suspect. *Surdel* simply states that one who does report abuse need not have a “reasonable” suspicion in order to have immunity, so long as the condition which forms the basis of the suspicion “reasonably indicates abuse.” In other words, *Surdel* held that immunity extends to reporters who may have unreasonable suspicions. Accordingly, if a reporter’s suspicions can be unreasonable, then it is nonsensical to apply an objective standard to what a reasonable teacher would have suspected.

As the *Surdel* Court points out, the only applicable requirement of reasonableness is that the condition (which the teacher actually knows or suspects) be of a nature that “reasonably indicates abuse.” Reasonableness applies to the condition, not to the suspicion.

This does not mean that the mere existence of a condition that reasonably indicates abuse automatically creates or should create knowledge or a suspicion in the teacher that the child is abused. Here, the only condition was the creative writing journal. It alone did not create a suspicion in Mrs. Marino under the circumstances. One cannot and should not be expected to report a suspicion one does not have.

Consider as an example a child who comes to school with a bruise around his eye. A bruise can be a reasonable indicator of abuse. It can also indicate that the child was hurt by some accidental means.

Different teachers could draw different conclusions from looking at the same bruise. Under the statute, if a teacher suspects, reasonably or unreasonably, that the bruise is a sign of abuse, that teacher has a duty to report it. Yet if another teacher sees the bruise and never suspects abuse, there is no statutory duty to report. Even “a student’s report of sexual abuse may or may not trigger the duty to report, depending upon the circumstances of a particular case.” *Yates v. Mansfield Bd. Of Edn.* (2004), 102 Ohio St.3d 205 at ¶ 50.

A reasonableness standard in the statute only comes into play when evaluating whether the condition is a reasonable indicator of abuse. *Surdel* at 150. To further illustrate, consider if a teacher reported a suspicion of abuse simply because a student wore a blue shirt to school. Wearing a blue shirt is not a reasonable indicator of abuse. Thus, reporting a suspicion of abuse in this example would be inappropriate. In other words, those teachers who hold a suspicion of abuse must suspect the child suffers from a condition that reasonably indicates abuse.

The Appellate Court indicates that courts should not look to future versions of a statute to determine legislative intent though it goes on to suggest that the amendment to R.C. 2151.421, makes it apparent the reporting duty is based on an objective reasonable person standard. This Appellate Court position is not supported by a reading of the version of the statute in effect in the present case. In the present case, the statute in effect requires that the specific person in question know or suspect child abuse. The statute does not read “know or should have known” or “suspect or should have suspected.” Nor does the applicable statute read, as amended, “know or have reasonable cause to suspect.” The applicable statutory version asks whether the school employee knows of child abuse or suspects child abuse. The inquiry is a subjective one, and the trial court’s charge to that effect was appropriate.

The legislative intent, as referenced by the Appellate Court, is actually gleaned from the legislative history of the bill amending this statute and establishes that a subjective intent applies to the former version of the statute applicable in the present case. The legislative history states:

Operation of the act

Change of “suspicion” basis for making a mandatory or discretionary report. The act changes the “suspicion” basis for the

making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. Under the act, that basis is changed from requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question “suspects” that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect to, instead, requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question “has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position (for mandatory reporting) or in similar circumstances (for discretionary reporting) to suspect” that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect. The act does not change the existing “knowledge” basis for the making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. (R.C.2151.421(A)(1)(a) and (B).)

(Am. Sub. S.B. 17 (Final Analysis)). The subjective standard is applied based on the language of the statute that was in effect as applicable in this case. Otherwise, there would have been no need to “change” to an objective, reasonable cause standard as noted in the legislative history.

The changes to Ohio’s statute reflect similar language in other statutes of other states. Those states that require the use of an objective standard have statutes that employ language such as “reasonable cause to believe” or “reasonable cause to suspect.” No such language is contained in the statute applicable to this case.

In Georgia, OCGA §19-7-5(c)(1) provides that specified persons “having reasonable cause to believe that a child has been abused shall report or cause reports of that abuse to be made as provided in this Code section.” In *O’Heron v. Blaney*, 276 Ga.871, 873, 583 S.E.2d 834, 836 (2003), the Supreme Court of Georgia held, “The trigger for the duty to report is ‘reasonable cause to believe,’ which requires an objective analysis. The relevant question is whether the information available at the time would lead a reasonable person in the position of the reporter to suspect abuse.” See also *Doe v. Dimovski*, 336 Ill. App.3d 292, 297, 783 N.E.2d 193, 198 (2003) (interpreting “reasonable cause to believe” to require an objective standard); *State v. Denis L. R.*, 283 Wis.2d 358, 699 N.W.2d 154, ¶50 (2005) (interpreting “reasonable cause to suspect” as a determination of “whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of

circumstances as that acquired and viewed by the defendant”).

The applicable prior version of R.C. 2151.421 does not attach a “reasonableness” requirement to one who has cause to believe or suspect abuse. As held in *Surdel*, a suspicion under this statute can be unreasonable. The prior Ohio statute only required that the teacher report if she actually suspected abuse. This was a subjective standard.

With the reporting statute, the trier of fact is called upon to determine whether the reporter suspected or knew of child abuse. A similar standard is found in a case involving self-defense, in which the trier of fact is called upon to determine whether an accused had an honest belief that she was in imminent danger of death or great bodily harm and that the use of force was the only means of escape. See *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of syllabus. “Ohio law employs a subjective test in self-defense cases; accordingly, the reasonableness of the accused’s beliefs and actions are determined on a case-by-case basis, and there are no objective ‘thresholds’ or ‘reasonable person’ standard.” *State v. Daws* (1994), 1004 Ohio App.3d 448, 470. See *State v. Johnson* 2002 WL 31819643 (Ohio App. 10 Dist). The test is a subjective one and a jury must consider the circumstances and determine whether the actions of the accused, or reporter in our case, were reasonable given those circumstances. *State v. Smith* (1983), 10 Ohio App.3d 99, 100.

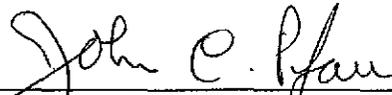
In the instant case, the mere existence of one condition (e.g. creative writing journal) that could reasonably indicate abuse does not automatically charge a teacher with knowing or suspecting that the child was abused. A fact-finder must view all the evidence through the subjective eyes of the individual teacher to determine whether that teacher knew of or suspected abuse. That was done in the trial court in this case and the verdict should have been affirmed. Accordingly, the Court of Appeals’ decision was in error.

CONCLUSION

The decision of the Seventh District Court of Appeals grossly misinterprets former R.C. 2151.421 by holding statutory reporters to an objective standard not contemplated or authorized by the legislature. The proper interpretation requires a subjective evaluation of what the reporter

actually suspected to determine whether a duty to report existed. The Court of Appeals wrongfully applied an objective standard. Accordingly, the lower court's decision must be overruled and this Honorable Court must find that former R.C. 2151.421 requires a subjective standard.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing brief has been forwarded by regular mail this 1st th day of October, 2007, to JOEL LEVIN, The Tower at Erieview, 1301 East Ninth Street, Cleveland, Ohio 44114, attorney for Plaintiff.



PFAU, PFAU & MARANDO
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APPENDIX

IN THE SUPREME COURT OF OHIO

DONALD T. KRAYNAK)
)
 Appellee)
)
 vs.)
)
 YOUNGSTOWN CITY SCHOOL)
 DISTRICT BOARD OF EDUCATION,)
 et al.)
)
 Appellants)

07-0740

On Appeal from the Mahoning County Court
of Appeals, Seventh Appellate District

Court of Appeals Case No. 05 MA 200

NOTICE OF APPEAL
OF APPELLANT YOUNGSTOWN CITY SCHOOL
DISTRICT BOARD OF EDUCATION

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FILED
APR 25 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Notice of Appeal of Appellant
Youngstown City School District Board of Education

Appellant Youngstown City School District Board of Education hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Mahoning County Court of Appeals, Seventh Appellate District, entered in Court of Appeals Case No. 05 MA 200 on March 12, 2007.

This case raises a substantial constitutional question and is one of public or great general interest..

Respectfully submitted,



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EDUCATION

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CERTIFICATE OF SERVICE

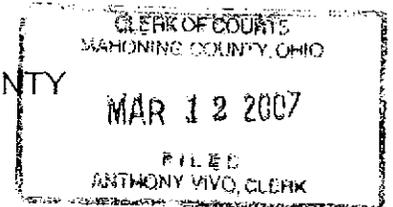
A copy of the foregoing notice of appeal has been forwarded by regular mail this 24th day of April, 2007, to JOEL LEVIN, The Tower at Erieview, 1301 East Ninth Street, Cleveland, Ohio 44114, attorney for Appellee.



PFAU, PFAU & MARANDU
JOHN C. PFAU

00003

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT



DONALD T. KRAYNAK)
)
 PLAINTIFF-APPELLANT)
 CROSS-APPELLEE)
)
 VS.)
)
 YOUNGSTOWN CITY SCHOOL)
 DISTRICT BOARD OF EDUCATION,)
 et al.)
)
 DEFENDANTS-APPELLEES)
 CROSS-APPELLANTS)

CASE NO. 05 MA 200

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 01CV1349

JUDGMENT:

Reversed and Remanded.

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. W. Don Reader, Retired of the Fifth District Court of Appeals, sitting by
assignment.

Dated: March 12, 2007

00004

WAITE, J.

{¶1} Appellant, Donald T. Kraynak, individually, and as the parent and guardian of D.K., a minor, filed suit against Appellee, Youngstown City School Board of Education, and D.K.'s former teacher, Helen Marino, for their failure to report his abuse during the 1999-2000 school year. D.K. advised Marino in his journal that his mother abused him. Marino read at least one journal entry to this effect, but did not report the alleged abuse.

{¶2} Appellant dismissed the count against Marino personally, and the case proceeded to jury trial against the Youngstown City School District Board of Education based on Marino's agency with the school. Appellant presented two theories of liability: negligence based on the special relationship between teachers and students; and negligence per se based on a teacher's statutory duty to report suspected abuse. He also asserted a claim for loss of consortium.

{¶3} The jury returned a defense verdict; six of the eight jurors found in favor of Appellee. The jury specifically found that the preponderance of the evidence did not establish that Marino knew or suspected that D.K. suffered or faced abuse, thus she had no duty to report. The jury also concluded that Appellee was not negligent and that D.K.'s injuries were not directly and proximately caused by Marino's negligence or her failure to comply with the reporting statute. (Jury Interrogatories Nos. 1, 2, and 3.)

00005

{¶14} Appellant filed a motion for judgment notwithstanding the verdict ("JNOV") or in the alternative, a new trial. The trial court overruled his requests on October 6, 2005, and Appellant timely appealed to this Court.

{¶15} Appellant raises four assignments of error on appeal. He alleges that the trial court erroneously denied his motion for JNOV; that the jury's verdict was against the manifest weight of the evidence; that the trial court erred in determining that R.C. §2151.421 is a subjective standard and in allowing Appellee's expert to testify as to the subjective nature of the statute.

{¶16} In its cross-appeal, Appellee argues that the trial court erred in presenting Appellant's negligence claim to the jury since this claim was abrogated by sovereign immunity.

{¶17} For the following reasons, we hereby sustain Appellant's third and fourth assignments of error and grant Appellant a new trial. We overrule Appellee's sole cross-assignment of error.

{¶18} We will address Appellant's third assignment of error first, since it concerns the law as provided to the jury. In this assignment of error, Appellant claims:

{¶19} "The Trial Court Committed Reversible Error When It Determined that R.C. 2151.421 Utilizes A Subjective, Rather Than Objective, Standard."

{¶10} R.C. §2151.421 places a duty on a school teacher, school employee, and school authority to report known or suspected child abuse. Further, a teacher's failure to report known or suspected abuse is imputed to the teacher's employer

pursuant to the doctrine of respondeat superior. *Grimm v. Summit Cty. Children Servs. Bd.*, 9th Dist. No. 22702, 2006-Ohio-2411, ¶30.

{¶11} A political subdivision is generally not liable for a plaintiff's injury, death, or loss pursuant to R.C. §2744.02. However, R.C. §2744.02(B) sets forth exceptions to the general rule. The applicable version of R.C. §2744.02(B)(5) in the instant case would allow a political subdivision to be found liable when liability is expressly imposed by a section of the Revised Code.

{¶12} The Ohio Supreme Court has also held that pursuant to this version of R.C. §2744.02(B)(5), a political subdivision may be held liable for a teacher's failure to perform a duty expressly imposed by R.C. §2151.421. *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539, paragraph two of the syllabus. *Campbell* applied at the time the alleged failure to report occurred in the instant matter. Hence, Appellant sued the school district. Since *Campbell*, however, the legislature has amended R.C. §2744.02(B)(5) to permit a political subdivision to be sued under that statute only when the liability expressly imposed by a section of the Revised Code is civil. *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, fn. 3.

{¶13} This claimed error concerns whether the duty to report a suspicion of abuse pursuant to R.C. §2151.421 is viewed subjectively or by using the objective person standard. Appellant submitted proposed jury instructions in which he sought to have the trial court submit the statute itself to the jury. Despite Appellant's request, the trial court did not provide the actual statutory language to the jury. In addition,

the trial court judge advised the jury that R.C. §2151.421 employs a subjective standard, and thus it was to determine whether Marino, herself, suspected abuse and was not left to determine merely whether a "reasonable person" would so suspect.

{¶14} A party is usually entitled to the inclusion of his requested jury instruction if it is a correct statement of the law applicable to the case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828. This assignment of error concerns whether the jury instructions, as provided, correctly and completely stated the applicable law. Thus, appellate review of the trial court's refusal to provide Appellant's requested instruction is conducted de novo because this is purely a legal question. *Wood v. U.S. Bank*, 160 Ohio App.3d 831, 2005-Ohio-2341, 828 N.E.2d 1072, ¶20, citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 668 N.E.2d 889.

{¶15} R.C. §2151.421(A)(1)(a) states in pertinent part,

{¶16} "No * * * [school teacher; school employee; school authority] who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age * * * has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion[.]"

{¶17} There is no definitive case on point as to whether a teacher's suspicion is viewed using an entirely subjective standard or if it is based on an objective, reasonable person standard. Nonetheless it has been held that, "[w]here a jury

instruction is given in accordance with statutory language, a court should generally limit its instruction to such language." *Sheeler v. Ohio Bur. of Workers' Comp.* (1994), 99 Ohio App.3d 443, 451, 651 N.E.2d 7, citing *State v. Shue* (1994), 97 Ohio App.3d 459, 471, 646 N.E.2d 1156. Thus, the trial court judge should have simply presented the text of the statute in this case. He did not. Instead, the trial court judge advised the jury of the following in his instructions,

{¶18} "A teacher has a duty to report child abuse to the proper authorities when the teacher knows or suspects that a child under 18 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child.

{¶19} "The statute sets forth a subjective standard and you must determine whether defendant, Helen Marino, in her mind, knew or suspected [D.K.] suffered or faced a threat of suffering any physical or mental wound, injury, or disability, or condition of a nature that reasonably indicates abuse or neglect of [D.K.]" (Instructions of Law Tr., pp. 9-10.)

{¶20} Appellant directs this Court's attention to *Surdel v. Metrohealth Med. Ctr.* (1999), 135 Ohio App.3d 141, 733 N.E.2d 281, *appeal not allowed by* 87 Ohio St.3d 1491, 722 N.E.2d 525, in support of his argument that R.C. §2151.421 employs an objective person standard. *Surdel* held in part that R.C. §2151.421 grants immunity to those who report abuse even if their suspicion as to the abuse is unreasonable.

{¶21} The facts in *Surdel* are as follows: John and Laurie Surdel were separated, and Laurie suspected that John had been abusing their children. She contacted the county children's services agency, and John was eventually prosecuted for multiple counts of felonious sexual penetration. He was later acquitted of all charges. John subsequently filed tort claims against the investigating county agencies and the medical center that examined his children for physical signs of abuse. *Id.* at 143. The defendants sought and were granted summary judgment on the basis that they were immune from liability. John appealed claiming that immunity was inapplicable to any subsequent reporters of child abuse and that their diagnoses and opinions were not given in good faith or within an objective standard of reasonableness. *Id.* at 145.

{¶22} On appeal, the Eighth District Court of Appeals stressed the importance of encouraging reporting child abuse, and stated that mandatory reporters are entitled to immunity, "regardless of whether the report was made in good faith." *Id.* at 147. In addressing Surdel's claims that the reports of abuse in his case were not reasonable, the court stated,

{¶23} "Surdel further argues that immunity will be provided under R.C. 2151.421(G)(1)(a) only if the reporter's suspicions are 'reasonable.' Surdel bases this argument on the text of R.C. 2151.421 (A)(1)(a), which requires that any knowledge or suspicion be immediately reported when there is 'any physical or mental wound, injury, disability, or *condition of a nature that reasonably indicates*

abuse or neglect of the child.’ (Emphasis added [by *Surdel* Court.]) * * * We think *Surdel* misconstrues the statute.

{¶24} “The statute describes the kinds of indicators on which the reporter may rely. The qualifying language clarifies that *the duty to report* does not require absolute proof but rather *is triggered when the condition reasonably indicates abuse or neglect*. The statute’s focus is on the condition, not the reporter.” (Emphasis added.) *Id.* at 150.

{¶25} The fact that the legislature provides that any and all reporters of suspected abuse are entitled to immunity, even if the report was not made in good faith, appears to support Appellant’s argument here.

{¶26} Appellant presented his argument based on *Surdel* to the trial court in his motion in limine, but the court rejected his objective suspicion argument. The trial court then instructed the jury to use the subjective standard.

{¶27} In *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, the Ohio Supreme Court concluded that a board of education may be held liable when its failure to report the abuse of a student results in the abuse of another student. During the 1996-1997 school year, Amanda, a ninth grade student at Mansfield Senior High School, advised certain school officials, including the principal, that on three separate occasions her coach and teacher inappropriately touched her and made sexual comments to her. The principal investigated the claims and concluded that Amanda was lying. Her allegations were never reported and she was suspended for harassing her teacher. *Id.* at ¶2-3.

{¶28} Three years later, the same teacher sexually abused another student named Ashley. Ashley's parents filed suit claiming that the school failed to report Amanda's allegations of abuse and that Ashley was injured as a result. Ashley's parents also made a claim based on the negligent retention of the teacher. Id. at ¶5.

{¶29} In considering the applicability of the reporting requirement found in R.C. §2151.421, the Ohio Supreme Court stressed that the legislature designed the statute to promote the early identification of child abuse, stating that it, "clearly encouraged reporting and specifically discouraged the failure to report by imposing a criminal penalty * * * ." Id. at ¶23-24. It further stated that,

{¶30} "Because abused and neglected children lack the ability to ameliorate their own plight, R.C. 2151.421 imposes mandatory reporting duties on 'those with special relationships with children, such as doctors and teachers.' * * * These persons, when acting in their official or professional capacity, hold unique positions in our society." Id. at ¶30.

{¶31} The *Yates* Court concluded that when school officials, "are informed that one of their schoolchildren has been sexually abused by one of their teachers, they should readily appreciate that all of their schoolchildren are in danger." Id. at ¶45. Thus, it concluded that a board of education can be held responsible for its failure to report abuse of a student that results in the subsequent abuse of another student by the same teacher. Id.

{¶32} Although it was not specified in *Yates*' holding, it is clear that the majority of the Supreme Court found that Amanda's statement to her principal that

she was being abused warranted reporting pursuant to R.C. §2151.421. (Justice O'Donnell stressed in his concurrence that whether the reporting statute was violated remained a question of fact for the jury to consider on remand. *Id.* at ¶50-51.)

{¶33} The Second District Court of Appeals, in considering the dismissal of a claim against a school official for her reporting of alleged child abuse, noted that, "a school employee, is required to report any reasonable suspicion of child abuse." *Tracy v. Tinnerman*, 2nd Dist. No. 2003-CA-21, 2003-Ohio-6675, ¶11.

{¶34} Appellee argues in response that the legislature has since amended R.C. §2151.421(A)(1)(a), making it clear that the duty to report suspected abuse is an objective person standard. Appellee argues that this amendment clarifying that the duty is objective can only be interpreted to mean the prior version must be viewed subjectively. While courts generally should not look to future versions of a statute in determining legislative intent, the fact that language was added to R.C. §2151.421 making it apparent that the reporting duty is based on an objectively reasonable person standard only bolsters Appellant's argument that the standard was always intended to be objective.

{¶35} Based on the foregoing, the trial court judge in Appellant's case erred in elaborating on the nature of the reporting duty found in R.C. §2151.421. There is absolutely no support, either in the statute itself or in caselaw, for such an interpretation. The trial court should have presented the text of the statute as written for the jury to consider in light of the evidence. Instead, he construed the standard as

subjective without authority to do so and added a layer of interpretation to the jury's deliberations not warranted by law.

{¶36} As will be seen in Appellant's additional assignments of error, the trial court's elaboration was pivotal and appears to have predetermined an outcome at trial prejudicial to Appellant. Thus, this assignment has merit and we hold that the trial court erred in his jury instruction in this matter.

{¶37} Appellant's fourth assignment of error is related to his third. In it, he claims:

{¶38} "The Trial Court Committed Reversible Error When It Allowed Defendant-Appellee/Cross-Appellant's Expert, Kathryn Mercer, Ph.D., JD, MSSA, To Testify As To The Subjective Nature of R.C. 2151.421."

{¶39} In this assignment Appellant takes issue with the trial court's decision to allow Appellee's expert witness, Kathryn Mercer, professor of law at Case Western Reserve Law School, to testify. Appellant filed a motion in limine in an effort to preclude Mercer from testifying, but was overruled.

{¶40} At trial, Mercer testified that she has taught public child welfare workers for approximately 15-20 days annually for 17 years. Her classes cover compliance with the Ohio abuse reporting law. Although she does not actually instruct teachers, Mercer explained that as far as reporting abuse, her training sessions would also apply to a teacher's duty to report, since both teachers and welfare workers are mandated reporters under the same statute. (Tr., pp. 490-491.)

{¶41} Mercer testified that, in her view, a mandatory reporter's knowledge or suspicion of abuse, "is a personal judgment that each person must reach based - - * * * based upon their training, education, their knowledge of the abuse, neglect, and dependency statute, the knowledge of the information they're receiving, and the accuracy, the determination whether that information is accurate." (Tr., p. 498.)

{¶42} Mercer also explained that in determining whether knowledge or suspicion of abuse is present, a mandatory reporter should examine the totality of the circumstances including, "the child's demeanor, the child's behavior, whether there are visible signs of abuse, whether or not the child is truthful[.]" (Tr., p. 500.)

{¶43} Halfway through her testimony, Appellant again objected to Mercer's testimony, arguing that she was invading the province of the judge by explaining the law and that she was invading the province of the jury in reaching ultimate conclusions in weighing the evidence. Out of the presence of the jury, Mercer explained that she spends about one and one-half hours teaching the reporting statute to social workers. During that time, her students read the statute, talk about the statute, and then she allows them to ask questions about their duty to report. In her discussions, she has explained that the duty to report does not necessarily arise just because a child says they have been abused. For instance, she explained that a child may say he is abused because his mother did not allow him to watch television. Accordingly, she advises her social workers in training that they need to look at the situation in its entirety based on their beliefs and any indicators of abuse. (Tr., p. 507.) Thereafter, the judge decided that Mercer was allowed to continue to testify

before the jury about what she teaches, but that she could not give her opinion as to what Marino believed or suspected.

{¶44} Thereafter, and without reading the statute to the jury, Mercer actually told the jury what the mandatory reporting law "says," but her explanation of its content appears incorrect. Mercer stated that the reporting law,

{¶45} "says look at all the circumstances. So if a child - - I teach that if a child would say my parent has hit me with a ruler, the social worker must then assess all the circumstances; what's the age of the child, was it appropriately placed, where was that hit, did it cause a - - a serious disfigurement. The law actually requires, again, child endangering to be not just a bruise, but a serious disfigurement which is either temporary or permanent, and so we, you know, discuss what does that bruise look like, where was it placed, what was the context for which the child was being disciplined, is the child's report accurate, does the person believe the child. So all of that has to be taken into consideration rather than an automatic response upon hearing a particular fact." (Tr., pp. 520-521.)

{¶46} While the first half of Mercer's testimony may have been relevant since she explained her opinion and what she taught her students (although it is not at all clear on what basis she has formed these opinions and abundantly apparent she reads nonexistent conditions into the statute), her testimony went too far when she told the jury what the statute allegedly "says." Contrary to her testimony, R.C. §2151.421 does not state that a person must review the totality of the circumstances. Mercer claimed that "child endangering" requires "serious disfigurement" and "not just

a bruise.” However, R.C. §2151.421 does not once make mention of child endangering and certainly does not require the presence of serious disfigurement. The statute simply requires reporting of any known or suspected, actual or threatened, “physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child[.]” R.C. §2151.421.

{¶47} Thus, Mercer's testimony wherein she claims to tell the jury, incorrectly, the requirements of statute was erroneous. Although she may have been allowed to testify as to what she teaches regarding the mandatory duty to report, with clarification that she describe on what basis her opinions are formed, she should have been prevented from editorializing about the alleged contents of the statute and testifying as to its contents. The statutory language in R.C. §2151.421 speaks for itself. Thus, Mercer's testimony should have been strictly and severely limited.

{¶48} Based on the foregoing, the trial court abused its discretion in allowing Mercer to testify to this extent. This error combined with the trial court's elaboration on the contents of the statute necessitate reversal of the jury's verdict.

{¶49} Returning to Appellant's first and second assignments of error, these state:

{¶50} “The Trial Court Committed Reversible Error When It Denied Plaintiff-Appellant/Cross-Appellee's Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, A New Trial, Under Civ. R. 50 and Civ. R. 59.

{¶51} “The Jury Committed Reversible Error When It Rendered A Verdict Against The Manifest Weight Of the Evidence.”

{¶52} Appellate courts review motions for judgment notwithstanding the verdict (“JNOV”) de novo. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257, 741 N.E.2d 155. When considering a motion for JNOV, a trial court employs the same standard used in granting a motion for a directed verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679, 693 N.E.2d 271. The evidence is construed most strongly in favor of the nonmovant, who is given the benefit of all reasonable inferences from the evidence. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, 430 N.E.2d 935. A court must not weigh the credibility of the witnesses when reviewing such a motion. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 504 N.E.2d 19, syllabus.

{¶53} If the court finds that reasonable minds could not differ as to any determinative issue in the case, then the court must sustain the motion. *Id.* However, a motion for JNOV should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. Civ.R. 50(A)(4); *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334.

{¶54} Appellant argues that when considering all of the evidence, especially the defense representative’s admissions, reasonable minds could only have found in favor of Appellant on both counts—negligence and negligence per se. This is true, Appellant argues, especially when we consider that Marino testified she read D.K.’s journal describing his abuse, and as a result, she altered her behavior toward him, deciding she needed to keep a closer eye on him.

{¶55} Appellant also relies on Superintendent McGee's and Principal Mastronarde's testimony in which they agreed that a child who reports abuse in his or her journal is enough to trigger a suspicion of abuse. Thus, Appellant believes he was entitled to JNOV.

{¶56} Appellant also argues that Appellee's totality of the circumstances argument was a red herring. He claims that a teacher would only need to consider the totality of the circumstances in looking at possible abuse if suspicion is present in the first place. Appellant claims that Marino would have had no need to discuss D.K. with his other teachers or to keep a closer eye on him if no suspicion existed.

{¶57} Civ.R. 59(A) lists the grounds on which a new trial may be granted. Appellant argued both at trial and on appeal that he is entitled a new trial pursuant to Civ.R. 59(A)(6). It states in part,

{¶58} "(A) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶59} " * * *

{¶60} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;"

{¶61} A trial court has discretion when ruling on a motion for a new trial, and a reviewing court should not disturb its decision absent an abuse of discretion. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321, 744 N.E.2d 759; *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350, 612 N.E.2d 1227. "The term 'abuse of

discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶62} When considering a motion for new trial on weight of the evidence grounds, the trial court must review the evidence presented at trial and consider the credibility of the witnesses and the evidence. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 92, 262 N.E.2d 685. A trial court may grant a new trial only if there is no substantial, credible evidence upon which the jury could have arrived at its verdict. *Sims v. Rosenblatt* (July 31, 2000), 5th Dist. No.1999CA00332.

{¶63} As discussed, a teacher, school board, or other employee of a political subdivision may be held civilly responsible for his or her failure to report known or suspected child abuse in compliance with R.C. §2151.421. *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539, syllabus. *Campbell* was governed by a former version of R.C. §2744.02 but applies in the instant case since the alleged failure to report D.K.'s abuse occurred in the 1999-2000 school year.

{¶64} Again, R.C. §2151.421(A)(1)(a) states in pertinent part,

{¶65} "No * * * [school teacher; school employee; school authority] who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age * * * has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion[.]"

{¶66} The evidence presented at Appellant's trial reveals the following: D.K.'s fourth grade language arts teacher, Mrs. Marino, testified in Appellant's case-in-chief as if on cross-examination. She testified that before having D.K. in class, Marino was advised that his parents were going through a divorce and that he was very intelligent. Marino assigned journals as filler for her class. She allowed her students to write about whatever they chose, and she sometimes suggested topics. She told her students that she would read their journals, yet she testified that she only spot checked them. (Tr., pp. 14-16.)

{¶67} Marino did not recall what portions of D.K.'s journal that she actually read during his fourth grade year. She explained that she would leaf through a student's journal and read a few entries and make comments on them. However, the fact that she made comments on a certain entry did not mean that she had read all the prior entries in that particular journal. (Tr., pp. 21-22.)

{¶68} In one of D.K.'s early journal entries he asked: "Dear Mrs. Marino. I just wanted to know, do you read what we write everyday right exactly right [sic] after we write it?" She responded in writing, "[n]ot exactly after." (Tr., p. 23.)

{¶69} Marino confirmed that she did read D.K.'s September 20, 1999, entry in which he stated,

{¶70} "Dear Mrs. Marino. I have a problem at my mom's apartment. My mom abuses me for little things, like, once when we had to go to Mother Goose (which is my baby sister's school), my school clothes were in back and [F.] (which is also my half sister) got in back and I started to pound light on the window. My Mom told me

to get in the front and I did. The door was open and she hit me and said, shut the door cause other grown ups were talking outside, and I shut the door. Then she started hitting me and punching me, screaming at me, saying what she was going to do with your stuff? Then she grabbed the bag of my school supplies and threw them up to me and grabbed my school clothes and threw the school clothes with her hand behind them, and since her hand was behind the clothes and purposely punched me in the gut." (Tr., p. 24.)

{¶71} After the foregoing entry D.K. wrote in capital letters, "WARNING! BUT WHATEVER YOU DO, DON'T TELL MY MOM!!!" (Tr., p. 27.) Marino admitted to reading the foregoing entry, but she could not recall whether she talked with D.K. about it. She then stated that she thought she talked with him about it because she recalled that he, "didn't take this journal entry very seriously. He wasn't crying. He wasn't upset. He wasn't scared. * * * He wasn't emotionally upset about it." (Tr., pp. 25-26.)

{¶72} Notwithstanding, Marino said that she talked with D.K.'s other teachers about him, but she never contacted children services and she never reported his alleged abuse. Instead, she responded in writing to D.K.'s entry stating, "[o]kay. Sometimes adults have personal problems that they need to talk to someone about. They sometimes lash out * * * at innocent people without meaning to." (Tr., p. 28.)

{¶73} Thereafter, Marino admitted on cross-examination that D.K.'s use of capital letters indicated a, "possible fear of his mother." (Tr., p. 29.) Marino also

agreed that fear of a parent, screaming at a child, throwing things at a child, and punching a child in the stomach are also possible signs of abuse. (Tr., p. 29.)

{¶74} The Youngstown City School's child abuse policy and child abuse pamphlet from the school Assistant Superintendent were introduced during Marino's testimony. (Pl's Exh. 6 and 7.) She was fully aware of the school's policy. The policy was read in part to the jury,

{¶75} " 'When considering the reporting of suspected child abuse or neglect, it is important to remember these facts: First, the law protects those authorities who report what they in good faith believe to be child abuse or neglect. The person who reports the abuse is in no way responsible for the final decision concerning the child.

{¶76} "Number two, it is far better to report a suspected abuse and make an error in judgment than to let an actual case of abuse go undetected and unreported.'

{¶77} " * * *

{¶78} "Now, number three. 'Any ability to help the abused or neglected child by the proper agencies usually will correlate directly with the timeliness of the reporting.'" (Tr., p. 33.)

{¶79} Marino had reported suspected child abuse twice before during her teaching career. She was incorrect about the abuse both times. She stated that she did not believe that D.K. was being truthful in his September 20th journal entry about his abuse. (Tr., pp. 34-36.)

{¶80} Further, it was brought out at trial that Marino stated in her discovery deposition that she did not believe that a child could be a victim of child abuse

without showing signs of physical abuse. Notwithstanding, after reading D.K.'s September 20, 1999, journal entry she decided to keep a closer eye on him. Yet Marino's idea of keeping a closer eye on D.K. did not involve reading his journal on a more regular basis. (Tr., pp. 37-38.)

{¶81} Marino wholly denied reading D.K.'s next journal entry, which stated, "[d]ear Mrs. Marino: In the letter about my mother, what you wrote back was not true. My mother has no problems about anything. She lies, says the 'f' word a lot in front of kids, calls us assholes. She beats me for anything. I say, and I'm scared to do anything or say anything. She also says I act like a girl." (Tr., pp. 38-39.)

{¶82} At trial Marino also denied reading another entry written in March, which stated,

{¶83} "Mrs. Marino. Happy birthday. I hope you have a nice birthday today. I hope nothing bugs you, gets on your nerves or upsets you. I want to tell you something. My mom really does abuse me. She beat me with the leather belt and left a big purple mark on my butt for almost a week. What should I do? [D.K.]" (Tr., pp. 41-42.)

{¶84} Marino also denied reading D.K.'s May 1, 2000, journal entry, which stated, "[d]ear Mrs. Marino. How come you don't answer my letters anymore? Can you start answering some of my letters or write comments about them? How come you answered my questions before and not now? [D.K.]" (Tr., p. 42.)

{¶85} Benjamin McGee was Superintendent of the Youngstown City Schools during the 1999-2000 school year. He testified at trial that if a student or child

advised him or a city teacher of abuse, that would be a reason to be concerned and suspicious. He also confirmed that the Youngstown City School policy was to err on the side of reporting if there was ever a doubt regarding abuse. (Tr., pp. 49-50.)

{¶186} McGee also established the school policy provided that a teacher has, "a moral responsibility and a legal obligation to conscientiously observe and report possible abuse and neglect that is encountered in the performance of professional duties." (Tr., p. 50.)

{¶187} Marilyn Mastronarde was the principal of West Elementary during D.K.'s fourth grade school year in 1999-2000. Mastronarde agreed that if a student reports they have been abused, hit, or punched, then a teacher would have a case of suspected child abuse. She also stated that teachers have an absolute duty to report suspected child abuse. (Tr., p. 63.)

{¶188} D.K.'s father Donald also testified. He explained that he was divorced from D.K.'s mother, Melissa, and they initially had shared parenting. Once he started school, D.K. lived with Melissa during the school week through his fourth grade year. D.K. stayed with Donald and his parents from Friday evenings through Monday mornings until Donald remarried.

{¶189} At the end of D.K.'s fourth grade year, he told his grandmother about his journal. Following the disclosure of his abuse, D.K. required professional help. He was given medication for depression and post-traumatic stress disorder. D.K. also suffered from terrible nightmares. Donald was given full custody of D.K. as a

result of the reports of abuse, and D.K.'s mother had limited supervised visitation with him. (Tr., pp. 68-70, 78, 79, 85.)

{¶90} Prior to reading D.K.'s journal, Donald had no suspicions that his son was being abused. He never saw physical signs of abuse. Donald also revealed that Melissa had been threatening to move D.K. to Columbus at the end of his fourth grade school year. (Tr., pp. 81, 90.)

{¶91} D.K. also testified at trial. He explained that his mother mistreated him by beating him with various objects and calling him names. He recalled abuse by his mother from the time he was about two or three years old. (Tr., p. 119.) He testified that he told his fourth grade teacher, Mrs. Marino, at West Elementary about the abuse in his journal, but that he never directly talked to her about it. When he tried to talk with her, she told him that she was busy. (Tr., p. 105.) D.K. said he wrote about the abuse in his journal because he did not think his mother would find out. Had he told his father or grandparents, he knew they would have confronted his mother. (Tr., p. 107.)

{¶92} D.K. explained that he trusted Marino and that she told his class that she would read their journals. He said that his mother would often threaten him not to tell anyone about the abuse. On one occasion, D.K. clogged the toilet, and in response, his mother punched him, pushed him to the ground and started punching and slapping him. As a result, D.K. had continual problems going to the bathroom because he did not want to get in trouble. (Tr., pp. 107, 110, 111.)

{¶193} At the end of D.K.'s fourth grade year, his mother began packing boxes for their move to Columbus. He said he was afraid that she would read his journal, so he told his grandmother about it. (Tr., p. 113.)

{¶194} Donald's mother, (D.K.'s grandmother) Sandra Kraynak, also testified. After Donald and Melissa's divorce, D.K. and Donald lived with her for quite some time. She and her husband helped take care of D.K. even after Donald remarried and moved out with his new wife. Toward the end of D.K.'s fourth grade year, Sandra noticed Franklin County plates on D.K.'s mother's car. Sandra mentioned it to her husband and D.K. became hysterical. He then told her about his mother's abuse and the journal, stating that he thought he would get help. (Tr., pp. 132-133.)

{¶195} The next day Sandra sent a note to school with D.K. asking Marino not to give D.K.'s journal to his mother. She also called the principal and went to pick up the journal. The next day, she and Donald pulled D.K. out of school early. He has lived with his father ever since. (Tr., pp. 134-135.)

{¶196} Sandra explained that she had seen bruises on D.K.'s arms and legs over the years, but he always explained them away. (Tr., p. 144.)

{¶197} Dr. Battista, D.K.'s main treating physician, died prior to trial. His discovery deposition was read into evidence. Battista was a certified educational school psychologist and had his doctorate as a counseling psychologist. He was also a school guidance counselor and had his master's degree in education. (Tr., pp. 174-175, 178.)

{¶98} Battista was contacted by Appellant's counsel to evaluate D.K. for purposes of this litigation. He was also contacted by D.K.'s father for help in dealing with the abuse. (Tr., p. 191.) Battista concluded in his report that D.K. was hoping that Mrs. Marino would help him. Contrary to D.K.'s testimony, Battista concluded that D.K. was unable to really verbalize his abuse until after his counseling. (Tr., pp. 221-224, 241.)

{¶99} Battista also testified that even if a teacher has no evidence of abuse, a teacher must report any abuse reported to them by a student so the allegation can be investigated by the proper authority. He explained,

{¶100} "Q So if somebody comes in and says, so and so's being abused, whether she believes it's credible or not, she's got to report it, is that your belief?

{¶101} "Yes, must. Not just my belief, it's a must." (Tr., p. 228.)

{¶102} Battista concluded that Marino was neglectful and she had an absolute duty to report D.K.'s alleged abuse when she read his first journal entry in September of 1999. (Tr., pp. 241, 242, 255-256.)

{¶103} Professor Paul Zions also testified on Appellant's behalf. He has a master's degree in elementary education and a doctorate in educational psychology. (Tr., pp. 274-275.) Zions has published several books, including one on how to teach disturbed and abused students and one on how to deal with children with emotional problems. (Tr., pp. 277-278, 280.)

{¶104} In reviewing D.K.'s journal, Zions testified that the fact that D.K. wrote, "[m]y mom abuses me * * *" was enough to trigger a suspicion of abuse

requiring a teacher to report. (Tr., p. 293.) Zionts also concluded that the fact that D.K. wrote in all caps, "WARNING! BUT WHATEVER YOU DO DON'T TELL MY MOM" presented a suspicion of abuse because it shows a fear of his mother. (Tr., p. 294.) Zionts felt that Marino's response that sometimes adults have problems was inadequate since it explained away her behavior. He opined that Marino failed her statutory duty to report. (Tr., pp. 294-296.)

{¶105} Zionts was unaware that Marino had assigned this journal as a creative writing journal. Nonetheless, even in the creative writing context, he felt that D.K.'s journal necessitated the reporting of suspected abuse. (Tr., pp. 303, 307.) Zionts stated on redirect,

{¶106} "A It doesn't matter to me on any level the purpose of the assignment.

{¶107} "Q Why not?

{¶108} "A It - - because of the student's responses. It doesn't matter if he wrote this on the back of a test, it doesn't matter if he wrote this when he was doing a book report on *Of Mice and Men*. It doesn't matter. When a student tells you that these things are happening, you have to report it, especially repeated times.

{¶109} " * * *

{¶110} "A In my opinion, virtually everybody who reads this [D.K.'s journal entries], whether they are teaching or whether they're learning to be teachers, would say that there is a possibility, a possibility of child abuse going on here[.]" (Tr., pp. 321-322.)

{¶111} He further explained that D.K.'s potential motives for writing that he was abused are irrelevant. (Tr., p. 323.)

{¶112} Dr. Stanley Palumbo, a licensed psychologist, testified for the defense. Palumbo has his PhD and is a licensed clinical psychologist in Ohio. (Tr., p. 349.) Palumbo reviewed the materials regarding D.K. and interviewed him along with his father and stepmother. (Tr., pp. 352, 355.)

{¶113} Palumbo testified that the delay caused by Marino's failure to report the alleged abuse did not cause any "lasting effects." (Tr., p. 365.) He further stated that he really did not have an opinion as to whether the delay caused D.K. any permanent damage. In his last appointment with D.K., D.K.'s responses corresponded with those of an average child. (Tr., pp. 367, 408.)

{¶114} Marino testified on direct for the defense. She explained that she actually had D.K. in class for about one hour and fifteen minutes four days a week. She was not D.K.'s homeroom teacher. (Tr., pp. 418-419.) She testified that she assigned the journal for "creative and expressive purposes," and that it was used as filler for about ten minutes one to two times per week. She did not actually grade or make grammar corrections in the journals. (Tr., pp. 420, 422.)

{¶115} Marino explained that in looking for signs of abuse in a child, she generally looked at a student's behavior, physical signs of injury, emotional and physical well being, and a student's cleanliness. (Tr., pp. 423-424.) She explained that D.K. was a very likeable student who had good writing and reading abilities. She stated that throughout the year there were no signs she noticed of abuse by his

mother, indicating, "I would figure he might be crying or depressed and unhappy; in fact, I've watched [D.K.] on occasions with other children joking and laughing. He enjoyed that. He loved to talk to the other kids. High-spirited." (Tr., pp. 427-428)

{¶116} Upon reading D.K.'s September 20, 1999, journal entry, Marino explained that she was not alarmed and did not feel the need to report because she knew D.K. for a few weeks in class, and she did not suspect abuse. (Tr., p. 435.) In going through signs of abuse listed in a school pamphlet, Marino explained that D.K. did not show any outward signs of abuse. (Tr., pp. 431-432.)

{¶117} However, she then stated that she kept his journal entry in mind, and she, "looked at him in a more careful way than I would everybody else to make sure that maybe I didn't over- - overstep my boundaries of is this child abused or not." (Tr., p. 437.)

{¶118} At one point, Marino even asked the other teachers if they had any concerns about D.K. in the classroom. His other teachers felt he was doing well. (Tr., pp. 439-440.) Yet Marino never showed his journal to any other teachers. She said she thereafter saw nothing concerning D.K. that led her to believe that he was being abused. (Tr., pp. 438, 465.)

{¶119} On direct, Youngstown School Superintendent Benjamin McGee explained he believed the school's policy on reporting abuse took a subjective approach. (Tr., p. 475.) Thereafter, however, McGee agreed that if a student told him that he had been abused he, "would be concerned and suspect abuse." (Tr., pp.

481-482.) He also agreed that a teacher has a duty to report any suspicion of abuse, but he then said that a teacher should justify his or her suspicion. (Tr., pp. 482-483.)

{¶120} As addressed previously, Professor Kathryn Mercer from Case Western Reserve Law School also testified at trial. She explained that she teaches the duty to report suspected abuse to social workers in training. She teaches them that the duty to report is triggered by a subjective suspicion of abuse in looking at the totality of the circumstances. (Tr., p. 500.)

{¶121} After reviewing the evidence provided to this Court under the applicable standards for motions for a new trial and JNOV, we find there was evidence upon which reasonable minds could come to different conclusions on Marino's duty to report the abuse in this case. While Marino's admissions are troubling and it is difficult to see how the school officials could believe the district took a subjective belief approach to reporting in reviewing their own materials on the subject, much of this testimony hinges on credibility determinations, exclusively in the province of the trier of fact. Thus, based on the evidence and law provided, the jury's verdict was not clearly against the weight of the evidence. As such, we must hold that Appellant's first and second assignments of error lack merit and are overruled.

{¶122} However, the troubling aspects of the testimony serve to highlight the prejudice to Appellant caused by the erroneous jury instructions and the error in the testimony of Ms. Mercer. Based on our earlier conclusions, it is evident that the trial court erred in presenting the jury's instructions as to the law and in allowing an expert to testify about the contents of the reporting statute. When the record reflects that

this matter became a battle of evidence, both as to expert testimony and credibility, it is readily apparent that an instruction causing the jury to apply an erroneous standard and an expert who testifies incorrectly as to the substance of the law and makes ultimate conclusions as to fact and law can only serve to prejudice Appellant. Accordingly, the errors necessitate a new trial in this matter.

{¶123} Appellee's sole assignment of error in its cross-appeal asserts:

{¶124} "THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE GENERAL NEGLIGENCE CLAIMS AGAINST APPELLEE/CROSS-APPELLANT."

{¶125} Appellee argues that the trial court erred in allowing Appellant to present his claims based on common law negligence to the jury since the public-duty rule/special relationship theory of liability was abrogated by R.C. §2744.02.

{¶126} In *Sawicki v. Village of Ottawa Hills* (1998), 37 Ohio St.3d 222, 525 N.E.2d 468, the Ohio Supreme Court addressed the public duty rule as it relates to political subdivision immunity and its special duty exception. Quoting an earlier source the *Sawicki* Court explained,

{¶127} " * * * [I]f the duty which the * * * [law] imposes upon * * * [a public official] is a duty to the public, [then] a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an

individual wrong, and may support an individual action for damages.' " (Citation omitted.) Id. at 230.

{¶128} The existence of a special relationship merely establishes a duty. Thereafter, a plaintiff must still establish the remaining negligence elements, i.e., breach of that duty, and a resulting injury proximately caused by the breach. Id. at 230. *Sawicki* adopted four elements needed to demonstrate a special duty or relationship:

{¶129} "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." *Sawicki*, at paragraph four of the syllabus.

{¶130} Appellee directs this Court's attention to several decisions in support of its contention that R.C. Chapter 2744 abrogated the special relationship exception. In *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 397, 690 N.E.2d 925, the Eighth District Court of Appeals noted that, "[t]he public duty rule as it applies to municipalities, however, has been superseded by the enactment of the Political Subdivision Tort Liability Act, codified at R.C. Chapter 2744 *et seq.*"

{¶131} The Tenth District Court of Appeals in *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 59-60, 719 N.E. 2d 592, noted that R.C. §2744.01 *et seq.* became effective November 20, 1985, and that it provides its own framework for

analyzing liability of political subdivisions. Thus, “[g]iven the all-encompassing nature of the Act, this court has consistently and repeatedly held that its passage abrogated the common-law public duty rule and its corresponding special duty exception in the context of political subdivision liability.” *Id.* at 59.

{¶132} In *Amborski v. Toledo* (1990), 67 Ohio App.3d 47, 51, 585 N.E.2d 974, the Sixth District Court of Appeals stated, “[o]ur analysis of R.C. 2744.02 indicates that the intent of the statute was to codify the concept of sovereign immunity and, therefore, to abrogate the public duty/special duty theory of municipal liability.”

{¶133} Further, in *Barr v. Freed* (1997), 117 Ohio App.3d 228, 235, 690 N.E.2d 97, this Court concluded that “the adoption of R.C. Chapter 2744 abrogated the special-relationship theory of liability.”

{¶134} Regardless, Appellant directs our attention to the 2004 Ohio Supreme Court decision in *Yates v. Mansfield*, *supra*. In discussing whether the duty to report the abuse of one child can create a duty toward a subsequent victim of abuse by the same individual, *Yates* referenced the public duty doctrine. It concluded that the public duty doctrine cannot be used as a defense for an agency's failure to comply with its statutory obligations. *Id.* at ¶32, citing *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301, paragraph two of the syllabus. In a footnote to that same paragraph, the Supreme Court in *Yates* explained the following,

{¶135} "*Brodie* * * * arose out of events that occurred during that twilight period in the early 1980s when the doctrine of municipal immunity had been judicially abolished, R.C. Chapter 2744 * * * was not yet effective, and the public-duty rule was clearly viable. Since then, we have held that while political subdivisions may be held liable for failure to comply with the reporting requirements of R.C. 2151.421, they are immune from liability for failure to comply with the investigative requirements of R.C. 2151.421. * * * The court has also abolished the public-duty rule with regard to actions against the state brought pursuant to R.C. Chapter 2743, the Court of Claims Act. * * * At present, the public-duty rule remains viable as applied to actions brought against political subdivisions pursuant to Chapter 2744. * * *" *Id.* at fn. 2.

{¶136} Further, the Second District Court of Appeals has recently held that *Yates* confirmed the viability of the public duty rule/special relationship theory of liability in this context. *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 2004-Ohio-3780, 814 N.E.2d 505, ¶63.

{¶137} Based on *Yates*, we can only conclude that the Ohio Supreme Court has confirmed the viability of the public duty rule/special relationship exception as it applies to political subdivisions, at least in regards to R.C. §2151.421. Accordingly, Appellee's cross-assignment of error lacks merit and is overruled. The trial court was correct in allowing Appellant to present his claims based on negligence to the jury.

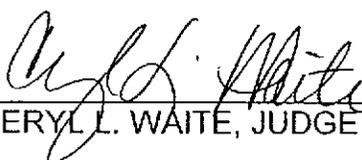
{¶138} In conclusion, we agree that the trial court erred in its subjective interpretation of the teacher's reporting requirement as found in R.C. §2151.421. We also hold that the trial court abused its discretion in allowing Mercer to testify about

the contents and interpretation of the statute. Based on these errors and the evidence before the jury, a new trial is warranted. Accordingly, we hereby reverse the jury's verdict and remand this case to the trial court for a new trial. On remand, the trial court must limit its jury instruction to the statute itself and strictly limit Mercer's testimony should it be offered again.

Vukovich, J., concurs.

Reader, J., concurs.

APPROVED:



CHERYL L. WAITE, JUDGE

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DONALD KRAYNAK, INDIVIDUALLY)
AND AS NATURAL PARENT AND)
GUARDIAN OF DEREK KRAYNAK, ET AL)

PLAINTIFFS)

VS.)

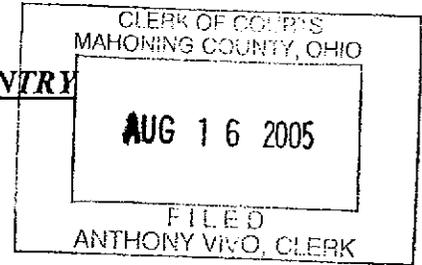
YOUNGSTOWN CITY SCHOOL DIST)
BOARD OF EDUCATION, ET AL)

DEFENDANTS)

CASE NO. 01-CV-1349

JUDGE JOHN M. DURKIN

JUDGMENT ENTRY



The trial of this matter began on Monday, August 8, 2005. Voir dire examination was conducted. Eight (8) jurors and one (1) alternate were duly impaneled and sworn in on August 8, 2005. The trial then continued with opening statements. Testimony was taken on August 8, 2005, August 9, 2005, August 10, 2005 and August 11, 2005.

On August 11, 2005, closing arguments were given and the Jury was charged by the Court. On August 12, 2005, the Jury began its deliberations and returned with a verdict at 5:15 p.m. for the Defendant.

The Jury was discharged and the verdict was ordered filed.

Judgment is entered on the verdict.

8/15/05
DATE:

John M. Durkin
JUDGE JOHN M. DURKIN

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OR UNREPRESENTED PARTY

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Not Reported in N.E.2d
 Not Reported in N.E.2d, 2002 WL 31819643 (Ohio App. 10 Dist.), 2002 -Ohio- 6957
 (Cite as: Not Reported in N.E.2d)

C

State v. Johnson
 Ohio App. 10 Dist.,2002.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Lloyd W. JOHNSON, Defendant-Appellant.

No. 02AP-373.

Decided Dec. 17, 2002.

Defendant was convicted in the Court of Common Pleas, Franklin County, of felonious assault. Defendant appealed. The Court of Appeals, Brown, J., held that: (1) testimony of law enforcement officers as to whether they would have shot at motorist like defendant security guard who claimed that motorist used his vehicle to hit him was not admissible opinion or expert testimony, and (2) admission of that testimony was plain error.

Judgment reversed and cause remanded.

West Headnotes

[1] **Criminal Law 110** ↪452(1)

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k449 Witnesses in General

110k452 Special Knowledge as to

Subject-Matter

110k452(1) k. In General. Most Cited

Cases

To the extent that law enforcement officers were not testifying as experts when they gave an opinion as to whether they would have fired at motorist like defendant security guard did, their opinions were not permissible lay opinions, where they had not actually witnessed the incident, and their opinions did not aid trier of fact in determining the ultimate issue of whether

defendant acted in self-defense. Rules of Evid., Rule 701.

[2] **Criminal Law 110** ↪471

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k468 Subjects of Expert Testimony

110k471 k. Matters of Common

Knowledge or Observation in General. Most Cited Cases

Whether defendant security guard acted reasonably in shooting at motorist who he claimed hit him with his vehicle and, thus, whether he acted in self-defense, was not proper subject of expert testimony, as question of reasonableness was quintessentially a matter of applying common sense and community sense of jury to a particular set of facts and, thus, it represented a community judgment. Rules of Evid., Rule 702.

[3] **Criminal Law 110** ↪338(7)

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k338 Relevancy in General

110k338(7) k. Evidence Calculated to

Create Prejudice Against or Sympathy for Accused. Most Cited Cases

Assuming that testimony of law enforcement officers as to whether they would have fired at motorist who allegedly hit defendant security guard with vehicle was relevant in prosecution for felonious assault, any potential value was outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Rules of Evid., Rule 403.

[4] **Criminal Law 110** ↪471

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k468 Subjects of Expert Testimony

110k471 k. Matters of Common

Knowledge or Observation in General. Most Cited Cases

Testimony of law enforcement officer as to why he sought charges against defendant security guard who shot at motorist whose vehicle allegedly hit him was not proper opinion testimony in prosecution for felonious assault, as evidence surrounding shooting incident involved issues of fact within comprehension of trier of fact, and jurors did not require officer's testimony, in the form of a legal conclusion, to reach their own conclusions regarding defendant's self-defense claim.

[5] Criminal Law 110  1036.6

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1036 Evidence

110k1036.6 k. Opinion Evidence. Most Cited Cases

Admission of improper opinion testimony of law enforcement officers as to whether they would have shot at motorist like defendant security guard who claimed that motorist used vehicle to hit him was plain error in prosecution for felonious assault; effect of testimony was to invade province of jury and lend credibility to the State's case while discrediting defendant's testimony. Rules Crim.Proc., Rule 52(B).

Appeal from the Franklin County Court of Common Pleas.

Ron O'Brien, Prosecuting Attorney, and Jennifer L. Coriell, for appellee.

Yeura R. Venters, Public Defender, and John W. Keeling, for appellant.

BROWN, J.

*1 ¶ 1 This is an appeal by defendant, Lloyd W. Johnson, from a judgment of the Franklin County Court of Common Pleas, following a jury trial in which defendant was found guilty of felonious assault.

¶ 2 On October 20, 1999, defendant was employed as

a security officer for Securities Strategies Unlimited. On that date, defendant was assigned to work at the Laurel Lakes Apartment complex. At approximately 11:30 p.m., defendant and another security officer, Robert Williams, were at the scene of a single vehicle accident, in which a pickup truck had veered off the road and damaged property at the apartment complex.

¶ 3 As they were investigating this accident, defendant heard "some yelling and screaming," and the "peeling of the tires." (Tr. 142.) Defendant observed an individual in a vehicle backing out of the parking lot and squealing his tires. Defendant began walking in the direction of the vehicle to tell the driver to slow down because "we still had people out and about that area." (Tr. 143.) Defendant shined his flashlight at the driver and yelled for him to stop the vehicle.

¶ 4 The driver stopped, and defendant "proceeded across the street." (Tr. 143.) Defendant testified that he was approximately three or four feet into the street, and as he was watching the driver "it was like a blank stare had caught across his face, and I watched him turn his hands and the steering wheel, and I seen the wheels and stuff of the car, and I hear the engine at the same time at which time, before I knew it, this guy was on top of me. And he hit me with his car, and I was on the-it's like the passenger side, the right front fender and the hood of the car." (Tr. 143.) Defendant further stated, "I landed on the curb. And I had drawn my weapon, and I fired two shots." (Tr. 144.) One of the shots entered the passenger side of the vehicle, striking the driver in the right forearm.

¶ 5 Defendant was "nervous and scared" at the time, fearing the driver was going to run over him. (Tr. 144.) When defendant first fired his weapon, the driver was "right beside" him. (Tr. 145.) Defendant fired the second shot when he saw the driver's brake lights; defendant testified that he "did not know if he was going to come back or not." (Tr. 146.) When defendant arrived home after the incident, he realized he had a red mark on his left leg. At trial, defendant introduced a photograph of his leg taken shortly after the incident. Defendant also testified that his pants were ripped as a result of the incident.

{¶ 6} Dana Chaffin, the driver of the vehicle involved in the incident, testified on behalf of the state. On October 20, 1999, Chaffin was at the Laurel Lakes Apartment complex visiting his girlfriend, Brenda Cummings. That evening, Chaffin and Cummings got into an argument. Chaffin, who had consumed two or three beers, was “[a] little bit” mad when he left the apartment complex. (Tr. 21.) He got into his vehicle and backed out of the parking lot, squealing his tires down the driveway. Chaffin turned left out of the driveway onto Roche Drive.

*2 {¶ 7} As Chaffin turned the corner and headed straight down the street, the passenger side door glass of his car shattered, and he saw a flash. Chaffin's right arm was hurt and bleeding, but he did not realize at that time that he had been shot. Chaffin drove to his mother's house, approximately five minutes away from the apartment complex, and was subsequently transported to Riverside Methodist Hospital. Chaffin suffered a single gunshot wound to his right forearm, with the bullet also causing a graze wound to his left forearm.

{¶ 8} During direct examination, Chaffin denied that he observed anyone attempting to stop him as he started down Roche Drive, and he also denied that he was attempting to run down anybody. On cross-examination, Chaffin acknowledged that he was angry when he left his girlfriend's apartment, and “[t]hat's why I squealed my tires out of there.”(Tr. 38.) He also stated that he had no more than four beers that evening.

{¶ 9} Shawn Scholz was called by the state as a witness. On October 20, 1999, at approximately 11:30 p.m., Scholz was at the Laurel Lakes Apartment complex helping a friend install a CD player in an automobile in the parking lot. Scholz observed two security guards in the complex that evening assisting a driver who had struck a telephone pole. Scholz later heard tires squealing and he looked across the parking lot and observed a “dark-colored car with its headlights on facing me.”(Tr. 56.) The car “looked like it was going a little bit fast, but then it started to slow down as if to stop at the intersection to make the turn.”(Tr. 57.) Scholz, who was working in the trunk area of the car,

then heard a gunshot, and when he looked up from the trunk he saw one of the guards fire a second shot toward the car. Scholz did not observe the car come in contact with the guard, but stated, “[m]y head was in the trunk when this might have happened.”(Tr. 61.) Scholz further stated, from “[w]here the security guard was standing * * * the car coming towards that intersection would be heading directly towards the security officer.”(Tr. 62.)

{¶ 10} Columbus Police Detective Michael Higgins investigated the shooting at the Laurel Lake's apartments. Detective Higgins identified photographs taken of Chaffin's vehicle after the shooting. Detective Higgins noted what appeared to be a single bullet hole in the rear taillight of the car. Detective Higgins interviewed defendant shortly after the shooting, and the detective obtained a nine-millimeter pistol from defendant.

{¶ 11} Detective Higgins stated that, in order to fire a bullet into the side window of the car “the shooter would have to be in the approximate area directly in front of the passenger side door pointing the weapon at the window.”(Tr. 81-82.) He stated that there was no evidence that the person firing the weapon would have been in front of the car at any time while firing.

{¶ 12} Detective Higgins testified that the Ohio Peace Officers Training Academy (“OPOTA”) is the certifying body for firearms carried by police officers and/or security guards, and that OPOTA trains individuals in principles regarding the use of deadly force. Detective Higgins was familiar with the statement that “the use of deadly force needs to be logical, reasonable, and necessary.”(Tr. 83.) Detective Higgins stated, “[y]ou can't apply deadly force after the fact. You have to be in immediate fear for your own well-being or of another and use deadly force in an attempt to prevent that action from occurring.”(Tr. 83.) Detective Higgins further stated that there must be intent by the actor to cause death or serious bodily injury.

*3 {¶ 13} During direct examination, the prosecutor asked Detective Higgins why he sought charges against defendant in the instant case. Detective Higgins

responded, "I felt that * * * the first shot-what I am speculating to be the first shot through the window, that the car had already-was in the process of passing the security officer and was-there was no threat of death or serious bodily injury at that point." (Tr. 86.) Further, Detective Higgins stated that "the second shot, which appeared to go into the rear taillight of the vehicle, indicated that the vehicle had already passed the shooter and was-again, I'm speculating-was fired for reasons other than, you know, protection of himself or another." (Tr. 86.)

{¶ 14} The prosecutor also asked Detective Higgins, based upon his review of the evidence, including the layout of the scene and discussions with officers, whether he would have fired his weapon in that situation. Detective Higgins opined that he would not have fired a weapon under those circumstances.

{¶ 15} Columbus Police Officer Isaac J. Moore also testified on behalf of the state. Officer Moore investigated the shooting incident and interviewed defendant shortly after the events. Defendant told the officer that he and another security guard were standing near an earlier accident scene on Roche Drive when he heard squealing tires from a car in the parking lot. Defendant informed the officer that he approached the vehicle to tell the driver to slow down and "at that time he said he was struck by the vehicle and in return fired two shots." (Tr. 107.) Defendant related that, "when he approached the vehicle, the driver hit him with the vehicle and knocked him onto the hood of the car." (Tr. 111.) Officer Moore asked defendant whether or not he actually shot the motorist. Defendant initially did not respond, but then stated, "[w]ell, I would hope so." (Tr. 107.) Defendant then told the officer that he thought he shot the motorist in the chest.

{¶ 16} Officer Moore questioned defendant about where he was standing when he shot at the motorist. Defendant took the officer to "the east side of Roche Drive in the grassy area just east of the street," beyond the curb. (Tr. 110.) Defendant indicated to the officer that the vehicle struck his left leg.

{¶ 17} During direct examination, the prosecutor asked Officer Moore, based upon his review of the physical

evidence and the information defendant related to him, whether he would have fired at the motorist. Officer Moore responded, "[n]o, sir, I don't believe I would have." (Tr. 116.) On cross-examination, Officer Moore acknowledged that he had never been involved in a shooting incident.

{¶ 18} Jim Burcham, part owner of Security Strategies Unlimited, testified on behalf of defendant. Burcham's company conducted a background check of defendant prior to the time he was hired, indicating no prior criminal record; defendant was licensed to carry a firearm pursuant to R.C. 4749.10.

*4 {¶ 19} On the date of the incident, Burcham was at the Laurel Lakes Apartment complex to assist other security personnel, including defendant, following a report of a one-vehicle accident on the apartment property. Burcham was talking with some apartment residents when he heard "a car peeling out and what I perceived to be a single gunshot." (Tr. 186.) Burcham stepped out of the apartment and looked toward the street. He observed defendant "out in the street, and a car was speeding down Roche Drive headed towards the Elephant Bar or towards 161." (Tr. 187.) Burcham called the company's dispatcher, and reported that a car "had possibly just hit one of our officers." (Tr. 187.)

{¶ 20} Burcham then went to where defendant was standing, and defendant told Burcham "that the car attempted to hit him and that he had hit him in the leg but that he was okay." (Tr. 187.) Defendant told Burcham that he shot at the driver because he thought the motorist was attempting to run him over. Burcham then tried to calm down defendant, who was "distraught" and "upset." (Tr. 187.) On cross-examination, Burcham testified that defendant told him at the time that the car scraped him, but defendant did not indicate that he was thrown onto the hood of the car.

{¶ 21} On June 1, 2000, defendant was indicted on one count of felonious assault, in violation of R.C. 2903.11. The indictment also carried a firearm specification. The case was tried before a jury beginning on March 12, 2002. Following the presentation of evidence, the jury returned a verdict finding defendant guilty of felonious

assault, as well as the firearm specification.

{¶ 22} On appeal, defendant sets forth the following three assignments of error for review:

{¶ 23} “[I.] The defendant was deprived of his right to have the jurors apply the correct standard of law to their deliberations when:

{¶ 24} “(1) Police officers were improperly allowed to testify as expert witnesses and they misstated the law regarding the justification for using deadly force and improperly rendered opinions that the defendant was not justified in using such force. This had the legal effect of directing the jurors to return a verdict of guilty.

{¶ 25} “(2) The state improperly misrepresented the law when it argued and presented testimony indicating that the defendant had no authority to approach the vehicle, was therefore at fault for creating the situation, and thus could not claim self-defense.

{¶ 26} “(3) The state improperly argued, and had the court instruct the jurors, that the defendant was not entitled to the same privileges and immunities in the use of deadly force as are police officers.

{¶ 27} “(4) The jurors were instructed that the only justification for the use of deadly force was in self-defense and were never instructed on the justification for using deadly force to halt a dangerous, violent felon.

{¶ 28} “[II.] The defendant was deprived of his right to a fair trial and the effective assistance of counsel as a result of improper questions and assertions that were asked and made by the prosecutor and as a result of the failure of his attorney to object to most of them.

*5 {¶ 29} “[III.] The defendant was denied his right to confront and cross-examine the witnesses against him when the judge refused to allow the defendant to cross-examine an expert witnesses about actual knowledge that he possessed that was inconsistent with his stated opinion.”

{¶ 30} Under defendant's first assignment of error, we will initially address defendant's contention that law enforcement officers were improperly permitted to testify as expert witnesses and express their opinions regarding the validity of defendant's self-defense claim. Defendant further asserts that the officers misstated the law regarding the justification for using deadly force.

{¶ 31} As noted under the facts, during direct examination, the prosecutor questioned both Detective Higgins and Officer Moore, based upon their experience as law enforcement officers, whether they would have fired at the motorist if they had been faced with the same facts and circumstances as shown by the evidence. Both witnesses rendered opinions that they would not have shot at the driver. Also during the trial, the prosecutor elicited testimony from Detective Higgins as to why he pursued charges against defendant, and the detective opined that, at the time defendant fired the shots, there was no threat of death or serious bodily injury to him. Defendant asserts that it was error to allow the officers to render their personal and expert opinions that defendant's use of force was not legally justified, nor were their opinions properly a matter for expert testimony.

{¶ 32} In *State v. Berry* (June 23, 1988), Franklin App. No. 87AP-924, this court discussed the rules governing the use of opinion testimony by both lay witnesses and expert witnesses:

{¶ 33} “Certainly, opinion testimony is not rendered inadmissible *per se* because it pertains to an ultimate issue. Evid.R. 704; *State v. Rohdes* (1986), 23 Ohio St.3d 225, 229, 492 N.E.2d 430. However, such testimony in the form of an opinion must be ‘otherwise admissible.’ Evid.R. 704 per Evid.R. 701 or 702.

{¶ 34} “If the opinion testimony is offered by a lay witness, the opinion must be (a) rationally based on the witness' own perceptions, *and* (b) helpful to a clear understanding ‘of *his* testimony’ or the determination of a factual issue. Evid.R. 701. (Emphasis added.) If the opinion is elicited from an expert witness, he must be ‘qualified’ as such *and* provide ‘scientific, technical, or other specialized knowledge’ which will assist the jury in understanding the evidence or determining a fact.

Evid.R. 702; *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 519 N.E.2d 662.”

[1] {¶ 35} We will first consider the propriety of the opinions rendered by Detective Higgins and Officer Moore that they would not have fired at the motorist based upon the evidence presented. At the outset, we agree with defendant's contention that the practical effect of the questions posed by the prosecutor was to call for an expert opinion from the witnesses, based upon their law enforcement background, going to the ultimate issue in the case, i.e., whether defendant acted in self-defense. At a minimum, the inference to be drawn from the opinions elicited was that defendant's conduct in firing at the motorist was unreasonable under the circumstances.

*6 {¶ 36} To the extent that it could be argued that these witnesses were not testifying as experts, the court finds that the opinions expressed did not constitute permissible lay opinions under Evid.R. 701. We note that neither Detective Higgins nor Officer Moore actually witnessed the incident, nor can it be held that this opinion testimony aided the trier of fact in determining the ultimate issue. It has been stated that, “[a]lthough testimony which embraces an ultimate issue is not objectionable (Fed.R.Evid.704), seldom will be the case when a lay opinion on an ultimate issue will meet the test of being helpful to the trier of fact since the jury's opinion is as good as the witness' and the witness turns into little more than an ‘oath helper.’ “ *Mitroff v. Xomox Corp.* (C.A.6, 1986), 797 F.2d 271, 276. See, also, *Hogan v. American Telephone & Telegraph* (C.A.8, 1987), 812 F.2d 409, 411 (“Opinion testimony is not helpful to the factfinder if it is couched as a legal conclusion,” and the requirement of “helpfulness” under Evid.R. 701 “assures against admitting opinions which would in essence tell the factfinder what result to reach”); *Bensen v. American Ultramar Ltd.* (S.D.N.Y.1996), No. 92 CIV 4420(KMW)(NRB) (while Evid.R. 701 does not limit subject matter of opinions, “it allows a judge to exclude ‘ultimate legal opinion,’ or opinions calculated to instruct the jury as to their verdict”).

[2] {¶ 37} The opinions expressed by the witnesses were also not proper expert testimony under Evid.R.

702. The Ohio Supreme Court has held that “expert testimony is inadmissible if it concerns matters ‘within the ken of the jury[.]’ “ *State v. Sallie* (1998), 81 Ohio St.3d 673, 676, 693 N.E.2d 267. See, also, *State v. Coulter* (1992), 75 Ohio App.3d 219, 228, 598 N.E.2d 1324 (“When an issue of fact is within the experience, knowledge, and comprehension of the trier of fact, expert opinion testimony on that issue is unnecessary and inadmissible since it would not assist the trier of fact in understanding the evidence or determining a fact in issue”).

{¶ 38} In the context of a claim of justification based on self-defense, and whether a defendant acted reasonably under the circumstances, courts have held that “this issue is generally not a proper subject for expert testimony because ‘the question of reasonableness is quintessentially a matter of applying the common sense and the community sense of the jury to a particular set of facts and, thus, it represents a community judgment.’ “ *State v. Salazar* (1995), 182 Ariz. 604, 898 P.2d 982, 988, quoting *Wells v. Smith* (D.Md.1991), 778 F.Supp. 7, 8. Accordingly, “[b]ecause jurors are capable of determining whether the use of force in self-defense is reasonable, expert testimony bearing on that issue is generally inadmissible.” *Salazar*, supra, at 988.

{¶ 39} In the present case, there was no dispute that defendant fired twice at Chaffin's vehicle, and that one of the shots struck the victim in the arm. The critical issue before the jury was whether defendant acted in self-defense in firing at the motorist. The jury had before it testimony concerning the direction of the shots, the position of defendant in relation to the vehicle when he fired the shots, and whether the car came toward defendant as it exited the apartment complex. The state's theory was that defendant was in the grass, beyond the curb, when he fired at the vehicle, and that he was not in imminent danger of serious bodily harm. Defendant testified that he proceeded into the street and approached the driver, that the vehicle came toward him and struck him, and that he fired the shots out of fear that the driver was attempting to run him down. In this case, the physical evidence related to the shooting as well as the credibility of defendant's testimony that the vehicle came toward him and struck

him, and that he acted out of fear for his life, were matters within the comprehension of the average juror. Thus, the opinion testimony introduced, going to the ultimate issue of whether defendant acted reasonably under the circumstances, did not meet the requirements of Evid.R. 702. See, e.g., *Hygh v. Jacobs* (C.A.2, 1992), 961 F.2d 359, 364 (expert's testimony that police officer's conduct "was 'not justified under the circumstances,' not 'warranted under the circumstances' and 'totally improper' " went to ultimate legal conclusion entrusted to the jury and should have been excluded).

*7 [3] {¶ 40} Further, the opinion testimony regarding what these law officers would have done under the circumstances was irrelevant. Ohio law employs a subjective test in self-defense cases; accordingly, "the reasonableness of the accused's beliefs and actions are determined on a case-by-case basis, and there are no objective 'thresholds' or 'reasonable person' standard." *State v. Daws* (1994), 104 Ohio App.3d 448, 470, 662 N.E.2d 805. Moreover, the danger exists that the jury will give opinion testimony of law enforcement officers, based upon their background and experience, such "an aura of trustworthiness and reliability" that the jury will simply adopt the experts' conclusions "rather than making its own decision." *Specht v. Jensen* (C.A.10, 1988), 853 F.2d 805, 809. Thus, even assuming relevancy, the testimony at issue was excludable because any potential value was "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403.

[4] {¶ 41} This court also finds improper opinion testimony by Detective Higgins regarding why he sought charges against defendant, in which the detective stated he "felt that * * * the first shot-what I am speculating to be the first shot through the window, that the car had already-was in the process of passing the security officer and was-there was no threat of death or serious bodily injury at that point." (Tr. 86.) Detective Higgins also testified that the second shot, "which appeared to go into the rear taillight of the vehicle, indicated that the vehicle had already passed the shooter and was-again, I'm speculating-was fired for reasons other than * * * protection of himself or

another." (Tr. 86.) As previously discussed, the evidence surrounding the shooting incident involved issues of fact within the comprehension of the trier of fact, and the jurors did not require the detective's testimony, in the form of a legal conclusion, to reach their own conclusions regarding defendant's self-defense claim.

[5] {¶ 42} Upon review, we agree with defendant's contention that the jury heard improper opinion testimony going to the crucial issue of whether defendant was justified in his actions. Because no objection was made to this testimony, we must still consider whether plain error occurred. Plain error has been defined as "obvious error prejudicial to a defendant, neither objected to nor affirmatively waived by him, which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings." *State v. Craft* (1977), 52 Ohio App.2d 1, 7, 367 N.E.2d 1221. Crim.R. 52(B) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Ohio Supreme Court has interpreted the "substantial rights" aspect of the rule to mean, "the trial court's error must have affected the outcome of the trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240.

*8 {¶ 43} In the instant case, we conclude that the error affected the substantial rights of defendant. As discussed above, the improper opinion testimony of the officers went to the heart of defendant's self-defense claim, and therefore to the issue of his guilt. The effect of the testimony was to invade the province of the jury and lend credibility to the state's case while discrediting defendant's testimony. Further, we agree with defendant's contention that error in the admission of this evidence was compounded by Detective Higgins's testimony as to the applicable law governing the use of force in self-defense situations, including his statements that the person using deadly force must show that his assailant had intent to cause him death or serious bodily harm, and that the accused must show that the assailant had the opportunity, means or the ability to cause the intended harm. This testimony did not comport with the instructions given by the trial court on self-defense, and

Not Reported in N.E.2d
Not Reported in N.E.2d, 2002 WL 31819643 (Ohio App. 10 Dist.), 2002 -Ohio- 6957
(Cite as: Not Reported in N.E.2d)

constituted inadmissible opinion testimony on the applicable legal standard. See *United States v. Scop* (C.A.2, 1988), 846 F.2d 135, 140 (prejudicial error to allow witness to give expert legal testimony “calculated to ‘invade the province of the court to determine the applicable law and to instruct the jury as to that law’”). Here, “[e]ven if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard—explicit or implicit—to the jury.” *Hygh*, supra, at 364. Moreover, while a witness may be uniquely qualified by experience to assist the trier of fact, “he is not qualified to compete with the judge in the function of instructing the jury.” *Id.* See, also, *Marx & Co. v. Diner’s Club, Inc.* (C.A.2, 1977), 550 F.2d 505, 509-510 (“It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge”).

{¶ 44} Upon review of the record, we are unable to conclude that the admission of the opinion testimony at issue did not affect the outcome of the trial. Therefore, finding plain error, defendant’s conviction must be reversed and the matter remanded for a new trial. Accordingly, defendant’s first assignment of error is sustained to the extent provided above.

{¶ 45} In light of the above, the remaining issues raised under defendant’s first assignment of error are moot. Further, defendant’s second and third assignments of error are also rendered moot.

{¶ 46} Accordingly, the judgment of the Franklin County Court of Common Pleas is reversed and this matter is remanded for a new trial in accordance with the above opinion.

Judgment reversed and cause remanded.

TYACK, P.J., and LAZARUS, J., concur.
Ohio App. 10 Dist., 2002.
State v. Johnson
Not Reported in N.E.2d, 2002 WL 31819643 (Ohio App. 10 Dist.), 2002 -Ohio- 6957

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3. (1993) A children services board seeking permanent custody under RC § 2151.41.3 must satisfy the reasonable efforts requirement of RC § 2151.41.9 with respect to a natural parent whenever: (1) the board has not previously satisfied the reasonable efforts requirement with respect to that parent; and (2) the parent has not waived or abandoned his rights as a natural parent: *In re Stevens*, No. 13523 (2nd Dist.), 1993 Ohio App. LEXIS 3526.

§ 2151.42 Consideration of whether return to parents is in best interest of child; certain orders granting legal custody intended to be permanent.

(A) At any hearing in which a court is asked to modify or terminate an order of disposition issued under section 2151.353 [2151.35.3], 2151.415 [2151.41.5], or 2151.417 [2151.41.7] of the Revised Code, the court, in determining whether to return the child to the child's parents, shall consider whether it is in the best interest of the child.

(B) An order of disposition issued under division (A)(3) of section 2151.353 [2151.35.3], division (A)(3) of section 2151.415 [2151.41.5], or section 2151.417 [2151.41.7] of the Revised Code granting legal custody of a child to a person is intended to be permanent in nature. A court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child.

HISTORY: 147 v H 484 (Eff 3-18-99); 148 v H 176. Eff 10-29-99.

Not analogous to former RC § 2151.42 (CC § 1639-46; 117 v 520; 119 v 731; 121 v 557; Bureau of Code Revision, 10-1-53; 130 v 625), repealed 134 v H 511, § 2, eff 1-1-74.

Cross-References to Related Sections

Court review of child's placement or custody arrangement, RC § 2151.41.7.

Disposition of abused, neglected or dependent child, RC § 2151.35.3.

Motion requesting disposition order upon expiration of temporary custody order; extension, RC § 2151.41.5.

[§ 2151.42.1] § 2151.421 Duty to report child abuse or neglect; investigation and followup procedures.

(A)(1)(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace

officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; or a person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion.

(2) An attorney or a physician is not required to make a report pursuant to division (A)(1) of this section concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding, except that the client or patient is deemed to have waived any testimonial privilege under division (A) or (B) of section 2317.02 of the Revised Code with respect to that communication and the attorney or physician shall make a report pursuant to division (A)(1) of this section with respect to that communication, if all of the following apply:

(a) The client or patient, at the time of the communication, is either a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age.

(b) The attorney or physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(c) The attorney-client or physician-patient relationship does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(B) Anyone, who knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child, may report or cause reports to be made of that knowledge or suspicion to the public children services agency or to a municipal or county peace officer.

(C) Any report made pursuant to division (A) or (B)

of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;

(2) The child's age and the nature and extent of the child's known or suspected injuries, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information that might be helpful in establishing the cause of the known or suspected injury, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect.

Any person, who is required by division (A) of this section to report known or suspected child abuse or child neglect, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D)(1) Upon the receipt of a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, the municipal or county peace officer who receives the report shall refer the report to the appropriate public children services agency.

(2) On receipt of a report pursuant to this division or division (A) or (B) of this section, the public children services agency shall comply with section 2151.422 [2151.42.2] of the Revised Code.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, step-parents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 [2151.42.2] of the Revised Code.

(F)(1) Except as provided in section 2151.422 [2151.42.2] of the Revised Code, the public children services agency shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect and of a known or suspected threat of child abuse or child neglect that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or

the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to a central registry which the department of job and family services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G)(1)(a) Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division (B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding.

(b) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(H)(1) Except as provided in divisions (H)(4), (M), and (N) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused

child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the report is made, but before the child attains eighteen years of age, the public children services agency or municipal or county peace officer to which the report was made or referred, on the request of the child fatality review board, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the deceased child resided at the time of death. On the request of the review board, the agency or peace officer may, at its discretion, make the report available to the review board.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

(I) Any report that is required by this section shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 [2151.42.2] of the Revised Code.

(J)(1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

(a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;

(b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;

(c) The county peace officer;

(d) All chief municipal peace officers within the county;

(e) Other law enforcement officers handling child abuse and neglect cases in the county;

(f) The prosecuting attorney of the county;

(g) If the public children services agency is not the county department of job and family services, the county department of job and family services.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children

who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(K)(1) Except as provided in division (K)(4) of this section, a person who is required to make a report pursuant to division (A) of this section may make a reasonable number of requests of the public children services agency that receives or is referred the report to be provided with the following information:

(a) Whether the agency has initiated an investigation of the report;

(b) Whether the agency is continuing to investigate the report;

(c) Whether the agency is otherwise involved with the child who is the subject of the report;

(d) The general status of the health and safety of the child who is the subject of the report;

(e) Whether the report has resulted in the filing of a complaint in juvenile court or of criminal charges in another court.

(2) A person may request the information specified in division (K)(1) of this section only if, at the time the report is made, the person's name, address, and telephone number are provided to the person who receives the report.

When a municipal or county peace officer or employee of a public children services agency receives a report pursuant to division (A) or (B) of this section the recipient of the report shall inform the person of the right to request the information described in division (K)(1) of this section. The recipient of the report shall include in the initial child abuse or child neglect report that the person making the report was so informed and, if provided at the time of the making of the report, shall include the person's name, address, and telephone number in the report.

Each request is subject to verification of the identity of the person making the report. If that person's identity is verified, the agency shall provide the person with the

information described in division (K)(1) of this section a reasonable number of times, except that the agency shall not disclose any confidential information regarding the child who is the subject of the report other than the information described in those divisions.

(3) A request made pursuant to division (K)(1) of this section is not a substitute for any report required to be made pursuant to division (A) of this section.

(4) If an agency other than the agency that received or was referred the report is conducting the investigation of the report pursuant to section 2151.422 [2151.42.2] of the Revised Code, the agency conducting the investigation shall comply with the requirements of division (K) of this section.

(L) The director of job and family services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department of job and family services may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(M) No later than the end of the day following the day on which a public children services agency receives a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall provide written notice of the allegations contained in and the person named as the alleged perpetrator in the report to the administrator, director, or other chief administrative officer of the out-of-home care entity that is the subject of the report unless the administrator, director, or other chief administrative officer is named as an alleged perpetrator in the report. If the administrator, director, or other chief administrative officer of an out-of-home care entity is named as an alleged perpetrator in a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved the out-of-home care entity, the agency shall provide the written notice to the owner or governing board of the out-of-home care entity that is the subject of the report. The agency shall not provide witness statements or police or other investigative reports.

(N) No later than three days after the day on which a public children services agency that conducted the investigation as determined pursuant to section 2151.422 [2151.42.2] of the Revised Code makes a disposition of an investigation involving a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall send written notice of the disposition of the investigation to the administrator, director, or other chief administrative officer and the owner or governing board of the out-of-home care entity. The agency shall not provide witness statements or police or other investigative reports.

HISTORY: 130 v 625 (Eff 10-10-63); 131 v 632 (Eff 11-11-65);

133 v 5 49 (Eff 8-13-69); 133 v H 338 (Eff 11-25-69); 136 v H 85 (Eff 11-28-75); 137 v H 219 (Eff 11-1-77); 140 v S 321 (Eff 4-9-85); 141 v H 349 (Eff 3-6-86); 141 v H 528 (Eff 7-9-86); 141 v H 529 (Eff 3-11-87); 143 v H 257 (Eff 8-3-89); 143 v H 44 (Eff 7-24-90); 143 v S 3 (Eff 4-11-91); 144 v H 154 (Eff 7-31-92); 146 v S 269 (Eff 7-1-96); 146 v H 274 (Eff 8-8-96); 146 v S 223 (Eff 3-18-97); 147 v H 215 (6-30-97); 147 v H 408 (Eff 10-1-97); 147 v S 212 (Eff 9-30-98); 147 v H 606 (Eff 3-9-99); 148 v H 471 (Eff 7-1-2000); 148 v H 448. Eff 10-5-2000.

Cross-References to Related Sections

Penalties, RC § 2151.99.

Child abuse and child neglect prevention programs, RC § 3109.13 et seq.

Child fatality review board access to confidential information, RC § 307.62.7.

Community schools, terms of contract between sponsor and governing authority of school, RC § 3314.03.

Confidentiality of residential addresses of public children services agency or private child placing agency personnel, RC § 2151.14.2.

Confidential mental health outpatient services for minors; duty to report, RC § 5122.04.

Court control of child following commitment to department, RC § 2152.22.

Definitions, RC § 2151.01.1.

Abused child, RC § 2151.03.1.

Child without proper parental care, RC § 2151.05.

Dependent child, RC § 2151.04.

Neglected child, RC § 2151.03.

Domestic violence, filing of proceedings report, RC § 3113.31.

Duration of dispositional order, RC § 2151.38.

Duties to children in need of public care or protective services, RC § 5153.16.

Guardian ad litem for abused child; civil action against person required to file report of known abuse, RC § 2151.28.1.

Information to be disclosed concerning deceased child, RC § 5153.17.2.

Making or causing false report of child abuse or neglect, RC § 2921.14.

Petition for protection order to protect victim of menacing by stalking, RC § 2903.21.4.

Privileged communications, RC § 2317.02.

Procedure where child is living in domestic violence or homeless shelter, RC § 2151.42.2.

Review of report of abuse, neglect or misappropriation by employee, RC § 5123.51.

Summary removal of abused child by humane society agent, RC § 1717.14.

Ohio Rules

Immediate temporary care and medical treatment, JuvR 13(A)-(D).

Notifying physicians of affidavits alleging abuse under RC § 2919.12, SupR 24.

Ohio Administrative Code

Department of job and family services, division of social services—

Alleged child abuse and neglect; those mandated to report. OAC ch. 5101:2-34.

Central registry reports on child abuse and neglect; referral procedures for children's protective services. OAC ch. 5101:2-35.

Children services definition of terms: mandated reporter. OAC 5101:2-1-01.

Documentation of comprehensive health care for children in custody. OAC 5101:2-42-662.

Family and children services information system (FACISIS)



David M. Gold

Final Analysis
Legislative Service Commission

Am. Sub. S.B. 17
126th General Assembly
(As Passed by the General Assembly)

Sens. Spada, Jacobson, Clancy, Mallory, Zurz, Armbruster, Cates, Gardner, Hagan, Harris, Hottinger, Miller, R., Mumper, Padgett, Prentiss, Roberts

Reps. Willamowski, Aslanides, Blessing, Carano, Cassell, Coley, Collier, Evans, C., Evans, D., Hagan, Harwood, Kilbane, McGregor, J., Patton, T., Schaffer, Setzer, Smith, G., Woodard, DeBose

Effective date: *

ACT SUMMARY

- In a provision that sets forth a general testimonial privilege for members of the clergy, rabbis, priests, Christian Science practitioners, and ministers (defined, collectively, as "clerics" under the act) and that provides an exception to the privilege that permits the cleric to testify by express consent of the person making the communication except when the disclosure of the information is in violation of a sacred trust, expands the "exception to the exception" so that the cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust (continuing law) and except that, if the person voluntarily testifies or is deemed under the provisions described in the second next dotpoint to have waived the testimonial privilege, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust (added by the act).
- Defines "sacred trust" for purposes of the provisions described in the preceding dotpoint as a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline

* The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.

enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if the confession or confidential communication was made directly to the cleric and the confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

- In the continuing child abuse and neglect mandatory and discretionary reporting provisions, changes one of the bases for making the report from requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question "suspects" that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect to, instead, requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question "has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position or in similar circumstances to suspect" that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect.
- In provisions that set forth an exception from the continuing child abuse and neglect mandatory reporting provision for attorneys and physicians concerning communications received from a client or patient in an attorney-client or physician-patient relationship if the particular communication is privileged under law and that provide an "exception to the exception" under which the attorney or physician must make a report under the mandatory reporting provisions, changes the criteria for application of the "exception to the exception."
- Enacts a new child abuse and neglect mandatory reporting requirement that, subject to the exception described in the next dotpoint, prohibits any "cleric" or any person, other than a volunteer, designated by any church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith who is acting in an official or professional capacity and who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental

wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, and who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that another cleric or another person, other than a volunteer, designated by a church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith caused, or poses the threat of causing, the wound, injury, disability, or condition that reasonably indicates abuse or neglect, from failing to immediately report that knowledge or reasonable cause to believe to specified governmental authorities.

- Regarding the mandatory reporting provision that the act enacts and that is described in the preceding dotpoint: (1) provides that, except as described in clause (2), "clerics" are not required to make a report under the mandatory reporting provision concerning any communications the cleric receives from a penitent in a cleric-penitent relationship, if, under the Privileged Communications Law provisions described in the first dotpoint, the cleric could not testify with respect to that communication in a civil or criminal proceeding, and (2) provides that the penitent is deemed to have waived any testimonial privilege under that Law with respect to any communication the "cleric" receives from the penitent in the cleric-penitent relationship, and the cleric must make a report under the mandatory reporting provision with respect to that communication, if: (a) the penitent, at the time of the communication, is either a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age, (b) the cleric knows or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, as a result of the communication or any observations made during it, that the penitent has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the penitent, and (c) the abuse or neglect does not arise out of the penitent's attempt to have an abortion performed upon a child or person in either of those categories without the notification of her parents, guardian, or custodian in accordance with existing law's notification requirements.
- Specifies that the mandatory reporting requirement described in the second preceding dotpoint and the "exception to the exception" described in the preceding dotpoint do not apply in a cleric-penitent relationship

when the disclosure of any communication the cleric receives from the penitent is in violation of the "sacred trust" (as defined under the act).

- Provides that the period of limitation for criminal prosecution of a violation of any provision of the Criminal Code that involves a physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of a child under 18 years of age or of a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age does not begin to run until either of the following occurs: (1) the victim of the offense reaches the age of majority, or (2) a public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child, in the county in which the child resides or in which the abuse or neglect is occurring or has occurred has been notified that abuse or neglect is known, suspected, or believed to have occurred.
- Enacts a new period of limitations for a civil action for assault or battery brought by a victim of childhood sexual abuse based on "childhood sexual abuse" (defined in the act) and a civil action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse that requires the action to be brought within 12 years after the cause of action accrues; specifies that those causes of action accrue upon the date on which the victim reaches the age of majority; and tolls the running of the limitations period if the defendant has fraudulently concealed facts that form the basis of the claim.
- Specifies that the new period of limitations described in the preceding dotpoint applies to: (1) all civil actions for assault or battery brought by a victim of childhood sexual abuse based on, and all civil actions brought by a victim of childhood sexual abuse for a claim resulting from, "childhood sexual abuse" that occurs on or after the act's effective date, and (2) all civil actions for assault or battery brought by a victim of childhood sexual abuse based on, and all civil actions brought by a victim of childhood sexual abuse for a claim resulting from, childhood sexual abuse that occurred prior to the act's effective date in relation to which a civil action for assault or battery or for that claim, as applicable, has never been filed and for which the period of limitations applicable to such a civil action prior to the act's effective date has not expired on the act's effective date.

- Expands the offense of "sexual battery" to also prohibit a cleric from engaging in sexual conduct with minor, not the spouse of the offender, who is a member of, or attends, the church or congregation served by the cleric.
- Provides for the issuance of temporary protection orders and civil protection orders for victims of sexually oriented offenses.
- In cases in which a victim of childhood sexual abuse is precluded from bringing a civil action for assault or battery based on the childhood sexual abuse solely because of the statute of limitations, allows the Attorney General or specified prosecuting attorneys or, if the victim notifies the Attorney General and prosecuting attorney and neither brings an action within 90 days, the victim, to bring a declaratory judgment action for childhood sexual abuse; requires the court to order that the defendant be listed on a civil registry established by the Attorney General if it finds by clear and convincing evidence that the defendant committed the childhood sexual abuse; and authorizes the court to remove the defendant from the civil registry after six years if it finds by clear and convincing evidence that the defendant has not again been found liable for childhood sexual abuse, has not been required to register under the SORN Law, and is not likely to commit sexual abuse in the future.
- Requires that a person found liable for childhood sexual abuse in a declaratory judgment action register with the sheriff, authorizes the sheriff to confirm the person's address, and requires the sheriff to provide community notification, all in a manner similar to registration, confirmation, and notification under the SORN Law.
- Requires the Attorney General to maintain on the internet a civil registry of persons found liable for childhood sexual abuse in declaratory judgment actions including names, addresses, and photographs; adopt rules and prescribe forms for the implementation of the registration system; and assist sheriffs who request help in setting up local databases of registrants.
- Provides that registration information pertaining to persons found liable for childhood sexual abuse in declaratory judgment actions and placed on the internet civil registry or in possession of the sheriff is a public record.



- Prohibits as a fifth-degree felony the failure of a person who is required to register after being found liable for childhood sexual abuse in a declaratory judgment action to register, provide required notices, or verify an address and prohibits such persons from living within 1,000 feet of school premises.
- Provides immunity from civil liability to officials and to persons from whom a sheriff seeks confirmation of verification for good-faith actions taken pursuant to the statutes establishing the registration system for persons found liable in a declaratory judgment action for childhood sexual abuse.
- Requires occupational and professional licensing boards to consider a person's listing on the civil registry of persons found liable in declaratory judgment actions for childhood sexual abuse when making occupational licensing decisions.
- Requires a sheriff to notify the executive director of the local public children service agency of the residential address of every sex offender not covered by existing law who registers with the sheriff.
- Provides for the severability of any invalid provisions of the act.

TABLE OF CONTENTS

Privileged communications	7
For members of the clergy, rabbis, priests, Christian Science practitioners, and ministers	7
For persons in other specified categories of professions and relationships	8
Reports of child abuse or neglect	9
Prior law	9
Operation of the act.....	11
Period of limitations for criminal prosecutions	14
Existing law.....	14
Operation of the act.....	15
12-year period of limitations for certain civil actions based on childhood sexual abuse, and resulting claims, brought by a victim.....	16
Prior law	16
Operation of the act.....	17
Offense of "sexual battery"	20
Continuing law	20
Operation of the act.....	21

Protection orders for victims of sexually oriented offenses.....	21
Prior law	21
Operation of the act.....	22
Declaratory judgment action for childhood sexual abuse	22
Registration by a person found liable for childhood sexual abuse in a declaratory judgment action.....	23
Creation of civil registry and other duties of Attorney General	23
Registration information as a public record.....	24
Prohibitions applicable to persons found liable in declaratory judgment actions for childhood sexual abuse.....	24
Immunity for good-faith actions taken under the civil registration law.....	24
Listing on civil registry as a consideration in occupational licensing decisions	25
Amendment to the SORN Law.....	25
Severability and technical matters.....	25

CONTENT AND OPERATION

Privileged communications

For members of the clergy, rabbis, priests, Christian Science practitioners, and ministers

Continuing law. Continuing law, as modified by the act, lists certain categories of professions and relationships and establishes a testimonial privilege regarding persons in them, in certain specified respects. Among the specified categories were *members of the clergy, rabbis, priests, and regularly ordained, accredited, or licensed ministers of an established and legally cognizable church, denomination, or sect* (the other specified categories are described below in "**For persons in other specified categories of professions and relationships**"). Regarding the members of the clergy, rabbis, priests, and ministers, prior law specified that a member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect, when the member of the clergy, rabbi, priest, or minister remained accountable to the authority of that church, denomination, or sect, generally could not testify concerning a confession made, or any information confidentially communicated, to the member of the clergy, rabbi, priest, or minister for a religious counseling purpose in the member of the clergy's, rabbi's, priest's, or minister's professional character. However, the member of the clergy, rabbi, priest, or minister could testify by express consent of the person making the communication, except when the disclosure of the information was in violation of a sacred trust. (R.C. 2317.02(C).)

Operation of the act. The act modifies the testimonial privilege provision applicable to members of the clergy, rabbis, priests, and ministers as follows (R.C. 2317.02(C)):

(1) It retains the provision that sets forth the general testimonial privilege, but replaces the multiple references in the provision to a "member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect" with references to a "cleric," which the act defines as a member of the clergy, rabbi, priest, Christian Science practitioner (added by the act), or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(2) It modifies the exception to the general testimonial privilege that permitted the member of the clergy, rabbi, priest, Christian Science practitioner (added by the act), or minister (the "cleric" under the act) to testify by express consent of the person making the communication, except when the disclosure of the information was in violation of a sacred trust, by adding a new "exception to the exception" for circumstances in which the person voluntarily testifies or is deemed by R.C. 2151.421(A)(4)(c), as described below in "**Reports of child abuse or neglect,**" to have waived the privilege. Under the exception, as modified by the act, a cleric who otherwise would be subject to the general testimonial privilege may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a "sacred trust" (see (3), below) *and except that, if the person voluntarily testifies or is deemed by R.C. 2151.421(A)(4)(c) to have waived any testimonial privilege under this provision, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a "sacred trust" (see (3), below).*

(3) Related to the provisions described above in (2), the act defines "sacred trust" as a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply: (a) the confession or confidential communication was made directly to the cleric, and (b) the confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

For persons in other specified categories of professions and relationships

The act does not change the law regarding testimonial privilege for attorneys, physicians, spouses, or other categories of professions and relationships who cannot testify in specified respects (R.C. 2317.02(A), (B), and (D) to (J)).

Reports of child abuse or neglect

Prior law

Except for the addition of provisions pertaining to clerics and related personnel, the act retains the general scheme of prior law for reporting child abuse or neglect, with modifications noted under "Operation of the act," below.

Mandatory reporting. Prior law listed certain categories of professions, and prohibited a person in any of the specified professions who was acting in an official or professional capacity and *knew or suspected* that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age had suffered or faced a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicated abuse or neglect of the child, from failing to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resided or in which the abuse or neglect was occurring or had occurred, or, if the child was an inmate in the custody of a state correctional institution, to the State Highway Patrol. A violation of the prohibition against failing to make the mandatory report was a misdemeanor of the fourth degree.

The specified professions to which the mandatory reporting provision applied were attorneys; physicians, including hospital interns and residents; dentists; podiatrists; practitioners of a limited branch of medicine as specified in R.C. 4731.15; registered, licensed practical, and visiting nurses; other health care professionals; licensed psychologists; licensed school psychologists; independent marriage and family therapists and marriage and family therapists; speech pathologists and audiologists; coroners; administrators and employees of a child day-care center, residential camp, child day camp, certified child care agency, or other public or private children services agency; school teachers, employees, and authorities; persons engaged in social work or the practice of professional counseling; agents of a county humane society; *persons rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion*; superintendents, board members, and employees of a county board of mental retardation; investigative agents contracted with by a county board of mental retardation; and employees of the Department of Mental Retardation and Developmental Disabilities.

Exception to mandatory reporting for attorneys and physicians; exception to the exception. Attorneys and physicians were provided an exception from the mandatory reporting provision, concerning communications received from a client or patient in an attorney-client or physician-patient relationship, if, under specified provisions of the Privileged Communications Law (see "Privileged



communications," above), the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding. However, the client or patient was deemed to have waived any testimonial privilege under the specified provisions of that Law with respect to any communication the attorney or physician received from the client or patient in the attorney-client or physician-patient relationship, and the attorney or physician had to make a report under the mandatory reporting provisions described above with respect to that communication, if: (1) the client or patient, at the time of the communication, was either a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age, (2) the attorney or physician *knew or suspected*, as a result of the communication or any observations made during it, that the client or patient had suffered or faced a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient, and (3) the attorney-client or physician-patient relationship did not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with the notification requirements of R.C. 2151.85. (R.C. 2151.421(A) and 2151.99(A).)

Discretionary reporting. Independent of the mandatory reporting provision described above, prior law permitted anyone who *knew or suspected* that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age had suffered or faced a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicated abuse or neglect of the child, to report or cause reports to be made of that knowledge or suspicion to the public children services agency or to a municipal or county peace officer or, if the child was an inmate in the custody of a state correctional institution, to the State Highway Patrol (R.C. 2151.421(B)).

Procedures, rules, immunities regarding reporting. Prior law provided that any report made under the mandatory or discretionary reporting provisions had to be made forthwith either by telephone or in person and be followed by a written report, if requested by the receiving agency or officer. The report had to contain specified information, and a person making a mandatory report could take or cause to be taken color photographs of areas of trauma visible on the child and, if medically indicated, x-rays. Prior law provided rules and procedures for peace officers and public children service agencies in making follow-ups and investigations of a report and regarding removal of a child who was the subject of a report from the child's parents, stepparents, guardian, or custodian.

Under prior law, except as described below, any person, hospital, institution, school, health department, or agency that participated in the making of

a report under the mandatory reporting provisions or participated in good faith in the making of a report under the discretionary reporting provisions, and any person that participated in good faith in a judicial proceeding resulting from such a report was immune from any civil or criminal liability for injury, death, or loss to person or property that might be incurred or imposed as a result of the making of the reports of the participation in the judicial proceeding. However, if it was proved in a civil or criminal proceeding that participation in the making of a report under either reporting provision, or in a resulting judicial proceeding, was not in good faith, the court had to award the prevailing party attorney's fees and costs. Also, a person who knowingly made or caused another person to make a false report under the discretionary reporting provisions that alleged that a person had committed an act or omission that resulted in a child being an abused or neglected child was guilty of the offense of "making or causing a false report of child abuse or neglect," under R.C. 2921.14.

Prior law provided that: (1) in general, a report made under the mandatory or discretionary reporting provisions was confidential, (2) the information provided in a report and the name of the person who made it could not be released for use, and could not be used, as evidence in any civil action or proceeding against the person who made it, and (3) in a criminal proceeding the report was admissible in accordance with the Rules of Evidence and was subject to discovery in accordance with the Criminal Rules. Limited exceptions were provided if the subject child died, or if the alleged conduct allegedly occurred in or involved an out-of-home care entity. Prior law provided rules and procedures regarding protective services based on a report. (R.C. 2151.421(C) to (I) and (K) to (M).)

Operation of the act

Change of "suspicion" basis for making a mandatory or discretionary report. The act changes the "suspicion" basis for the making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. Under the act, that basis is changed from requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question "suspects" that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect to, instead, requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question "has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position (for mandatory reporting) or in similar circumstances (for discretionary reporting) to suspect" that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect. The act does not change the existing "knowledge" basis for the making of



a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. (R.C. 2151.421(A)(1)(a) and (B).)

The act changes numerous existing provisions that referred to the "suspicion" basis for the making of a child abuse or neglect report under the prior mandatory reporting provision or the prior discretionary reporting provision, to conform the provisions to the change in that basis described in the preceding paragraph (R.C. 2151.03(B), 2151.281(B)(2), 2151.421(C) and (F), and 5120.173).

Change to the "exception to the exception" from mandatory reporting provision for attorneys and physicians. As stated above under "**Prior law,**" attorneys and physicians generally were provided an exception from the mandatory reporting provision concerning communications received from a client or patient in an attorney-client or physician-patient relationship if the particular communication was privileged under the Privileged Communications Law, but there was an "exception to the exception" if three specified criteria were satisfied and, if the "exception to the exception" applied, the client or patient was deemed to have waived the privilege and the attorney or physician had to make a report under the mandatory reporting provisions with respect to the communication. The act changes the second and third criteria that must be satisfied in order for the "exception to the exception" to apply. Under the act, the second criterion is that the attorney or physician knows, *or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect* (changed from "suspects," under prior law), as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient. Under the act, the third criterion is that *the abuse or neglect* (changed from "the attorney-client or physician-patient relationship" under prior law) does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with R.C. 2151.85. The act does not change the first criterion that must be satisfied under existing law for the "exception to the exception" to apply. (R.C. 2151.421(A)(3).)

Change to mandatory reports who render spiritual treatment through prayer. Under the act, a person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion is a mandatory child abuse and neglect reporter under the general reporting requirement only if the person is not a cleric (R.C. 2151.421(A)(1)(b)).

Clerics and designated religious leaders, officials, and delegates, other than volunteers, as mandatory reporters if another cleric or another designated

religious leader, official, or delegate, other than a volunteer, caused or poses the threat of causing the abuse or neglect. The act requires "clerics" (see "Privileged communications," above, for the act's definition of this term) and designated religious leaders, officials, and delegates, other than volunteers, to make mandatory child abuse or neglect reports in specified circumstances. The new mandatory reporting requirement is separate from and independent of the other mandatory reporting provisions. Subject to the exception described in the next paragraph, the act prohibits any cleric or any person, other than a volunteer, designated by any church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith who is acting in an official or professional capacity and who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, and who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that another cleric or another person, other than a volunteer, designated by a church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith caused, or poses the threat of causing, the wound, injury, disability, or condition that reasonably indicates abuse or neglect, from failing to immediately report that knowledge or reasonable cause to suspect to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred, or, if the child is an inmate in the custody of a state correctional institution, to the State Highway Patrol. A violation of the new prohibition against failing to make the mandatory report is generally a misdemeanor of the fourth degree. However, if the cleric knows that a child has been abused or neglected and that the person who committed the abuse or neglect was a cleric or another person, other than a volunteer, designated by a church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith, a violation is a misdemeanor of the first degree if the person who commits the violation and the person who committed the abuse or neglect belong to the same church, religious society, or faith.

Under the act, a cleric generally is not required to make a report pursuant to the mandatory reporting provision described in the preceding paragraph concerning any communication the cleric receives from a penitent in a cleric-penitent relationship, if, under specified provisions of the Privileged Communications Law (see "Privileged communications," above), the cleric could not testify with respect to that communication in a civil or criminal proceeding. However, the penitent in such a cleric-penitent relationship is deemed to have



waived any testimonial privilege under the specified provisions of that Law with respect to any communication the cleric receives from the penitent in that cleric-penitent relationship, and the cleric must make a report under the mandatory reporting provision described in the preceding paragraph with respect to that communication, if all of the following apply: (1) the penitent, at the time of the communication, is either a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age, (2) the cleric knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, as a result of the communication or any observations made during that communication, that the penitent has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the penitent, and (3) the abuse or neglect does not arise out of the penitent's attempt to have an abortion performed upon a child under 18 years of age or upon a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age without the notification of her parents, guardian, or custodian in accordance with R.C. 2151.85.

The act specifies that the mandatory reporting provisions described in the two preceding paragraphs do not apply in a cleric-penitent relationship when the disclosure of any communication the cleric receives from the penitent is in violation of the "sacred trust" (see "Privileged communications," above, for the act's definition of this term). (R.C. 2151.421(A)(4) and 2151.99(A).)

Period of limitations for criminal prosecutions

Continuing law

Continuing law specifies that, except as described in this paragraph or another paragraph in this part of this analysis, a criminal prosecution is barred unless it is commenced within the following periods after an offense is committed: for a felony, six years; for a misdemeanor other than a minor misdemeanor, two years; and for a minor misdemeanor, six months. Continuing law specifies that there is no period of limitation for the prosecution of a violation of R.C. 2903.01 (aggravated murder) or 2903.02 (murder). Continuing law also provides a special 20-year limitations period for certain offenses--under this provision, except as otherwise described below, a prosecution of any of the following offenses is barred unless it is commenced within 20 years after the offense is committed: (1) a violation of R.C. 2903.03, 2903.04, 2905.01, 2907.02, 2907.03, 2907.04, 2907.05, 2907.21, 2909.02, 2911.01, 2911.02, 2911.11, 2911.12, or 2917.02, a violation of R.C. 2903.11 or 2903.12 if the victim is a peace officer, a felony violation of R.C. 2903.13, or a violation of former R.C. 2907.12, or (2) a conspiracy to commit, attempt to commit, or complicity in committing a violation set forth in clause (1) of this sentence.



If the period of limitation described in the preceding paragraph has expired, prosecution must be commenced for an offense of which an element is fraud or breach of a fiduciary duty within one year after discovery of the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense, and prosecution must be commenced for an offense involving misconduct in office by a public servant at any time while the accused remains a public servant, or within two years thereafter.

For purposes of these provisions, an offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first. A prosecution is commenced on the date an indictment is returned or an information filed, on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment or the filing of an information unless reasonable diligence is exercised to issue and execute process on the same, and is not commenced upon issuance of a warrant, summons, citation, or other process unless reasonable diligence is exercised to execute the same.

Continuing law specifies that the period of limitation does not run during any of the following times: (1) during any time when the *corpus delicti* remains undiscovered, (2) during any time when the accused purposely avoids prosecution (proof that the accused departed Ohio or concealed his or her identity or whereabouts is *prima-facie* evidence of his or her purpose to avoid prosecution), or (3) during any time a prosecution against the accused based on the same conduct is pending in Ohio, even though the indictment, information, or process which commenced the prosecution is quashed or the proceedings thereon are set aside or reversed on appeal. (R.C. 2901.13.)

Operation of the act

The act enacts a provision that specifies an additional circumstance in which the period of limitations for a criminal prosecution of a specified nature does not run. Under the new provision, in addition to the situations specified under existing law, the period of limitation for a violation of any provision of R.C. Title XXIX (the Criminal Code) that involves a physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of a child under 18 years of age or of a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age does not begin to run until either of the following occurs: (1) the victim of the offense reaches the age of majority, or (2) a public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child, in the county in which the child

resides or in which the abuse or neglect is occurring or has occurred has been notified that the abuse or neglect is known, suspected, or believed to have occurred. (R.C. 2901.13(I).)

12-year period of limitations for certain civil actions based on childhood sexual abuse, and resulting claims, brought by a victim

Prior law

R.C. 2305.03, unchanged by the act, specifies that, unless a different limitation is provided by statute, a civil action can be commenced only within the period prescribed in R.C. 2305.03 to 2305.22 and that, when interposed by proper plea by a party to an action mentioned in those sections, lapse of time is a bar to the action. R.C. 2305.03 to 2305.22 provide various periods of limitation for civil actions of various natures. Prior R.C. 2305.111 provided that, except as provided in R.C. 2305.115, an action for assault or battery had to be brought within one year after the cause of the action accrued and that for purposes of the section a cause of action for assault or battery accrued upon the later of the date on which the alleged assault or battery occurred or, if the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the date on which the plaintiff learned that person's identity or the date on which, by the exercise of reasonable diligence, the plaintiff should have learned that person's identity. Existing R.C. 2305.10 provided that an action for bodily injury or injuring personal property had to be brought within two years after the cause of action accrues and that, for purposes of the section, a cause of action accrued when the injury or loss to person or property occurs (special "accrual" rules were provided for causes of action for bodily injury caused by exposure to certain specified chemicals, drugs, devices, or substances). R.C. 2305.115 provided that an action for assault or battery brought against a mental health professional generally had to be brought within two years after the cause of action accrued if the assault or battery claim asserted was that, while the plaintiff was a client or patient of the professional, the professional engaged in sexual conduct with, had sexual contact with, or caused one or more other persons to have sexual contact with the plaintiff and if, at the time of that sexual conduct or contact, the plaintiff was not the professional's spouse (if the mental health relationship between the plaintiff and the professional continued after the date on which the cause of action accrues, the two-year period does not begin to run until the date on which that relationship is terminated by either or both of the parties).

R.C. 2305.16, unchanged by the act, specifies that, unless otherwise provided in R.C. 1302.98, 1304.35, and 2305.04 to 2305.14, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is at the time the cause of action accrues within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections



after the disability is removed. Also, after a cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease that renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined is not computed as any part of the period within which the action must be brought.

R.C. 2305.15, unchanged by the act, specifies that, when a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals himself or herself, the period of limitation for the commencement of the action as provided in R.C. 2305.04 to 2305.14, 1302.98, and 1304.35 does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues, if the person departs from the state, absconds, or conceals himself or herself, the time of the person's absence or concealment is not computed as any part of a period within which the action must be brought. When a person is imprisoned for the commission of any offense, the time of the person's imprisonment is not computed as any part of any period of limitation, as provided in R.C. 2305.09, 2305.10, 2305.11, 2305.113, or 2305.14, within which any person must bring any action against the imprisoned person.

Operation of the act

Enactment of limitations period. The act enacts a new period of limitations for certain civil actions brought by the victim of the childhood sexual abuse and based on, or resulting from, "childhood sexual abuse" (see "**Definitions**," below). Under the act, an action for assault or battery brought by a victim of childhood sexual abuse and based on childhood sexual abuse, or an action brought by a victim of childhood sexual abuse and asserting any claim resulting from childhood sexual abuse, must be brought within 12 years after the cause of action accrues. For purposes of this provision, a cause of action for assault or battery based on childhood sexual abuse, or a cause of action for a claim resulting from childhood sexual abuse, accrues upon the date on which the victim reaches the age of majority. In cases in which the abuse occurred on or after the effective date of the act, if the defendant has fraudulently concealed from the plaintiff facts that form the basis of the claim the running of the limitations period is tolled until the plaintiff discovers or in the exercise of due diligence should have discovered those facts. (R.C. 2305.111(C).)

The act amends the prior provisions that set periods of limitations for civil actions for general assault or battery, civil actions for bodily injury or injuring personal property, and civil actions for assault or battery brought against a mental health professional in specified circumstances to specify that those provisions do not apply to civil actions for assault or battery brought by a victim of childhood



sexual abuse based on childhood sexual abuse or civil actions brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse (R.C. 2305.10(A) and (E), 2305.111(B), and 2305.115(A) and (C)).

Actions to which the new 12-year limitations period applies. The act specifies in uncodified law that the provisions described in the preceding paragraph apply to all civil actions for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse that occurs on or after the act's effective date, to all civil actions brought by a victim of childhood sexual abuse for a claim resulting from childhood sexual abuse that occurs on or after that effective date, to all civil actions for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse that occurred prior to that effective date in relation to which a civil action for assault or battery has never been filed and for which the period of limitations applicable to such a civil action prior to the act's effective date has not expired on the act's effective date, and to all civil actions brought by a victim of childhood sexual abuse for a claim resulting from childhood sexual abuse that occurred prior to that effective date in relation to which a civil action for that claim has never been filed and for which the period of limitations applicable to such a civil action prior to the act's effective date has not expired on the act's effective date (Section 3(B) of the act).

Definitions. The act provides the following definitions that apply to the new limitations period it enacts (R.C. 2305.111(A)):

(1) "Childhood sexual abuse" means any conduct that constitutes any of the violations identified in (1)(a), (b), or (c), below, and would constitute a criminal offense under the specified Revised Code section or division, if the victim of the violation is at the time of the violation a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age. The court need not find that any person has been convicted of or pleaded guilty to the offense under the specified Revised Code section or division in order for the conduct that is the violation constituting the offense to be childhood sexual abuse for purposes of this division. The violations to which this definition applies, in the specified circumstances, are any of the following:

(a) A violation of R.C. 2907.02 (the offense of "rape");

(b) A violation of division (A)(1), (5), (6), (7), (8), (9), (10), (11), or (12) of R.C. 2907.03 (the offense of "sexual battery"), which prohibit a person from engaging in sexual conduct with another, not his or her spouse, in the following circumstances: (i) the offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution, (ii) the offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person *in loco parentis* of the other person, (iii) the other

person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person, (iv) the offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards under R.C. 3301.07(D), the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school, (v) the other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution, (vi) the other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person, (vii) the offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes, (viii) the other person is confined in a detention facility, and the offender is an employee of that detention facility, or (ix) the offender is a cleric and the other person is a member of, or attends, the church or congregation served by the cleric (this clause is added by the act--see "Offense of "sexual battery"," below).

(c) A violation of R.C. 2907.05 (the offense of "gross sexual imposition") or 2907.06 ("sexual imposition") if, at the time of the violation, any of the following apply: (i) the actor is the victim's natural parent, adoptive parent, or stepparent, or the guardian, custodian, or person *in loco parentis* of the victim, (ii) the victim is in custody of law or a patient in a hospital or other institution, and the actor has supervisory or disciplinary authority over the victim, (iii) the actor is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the State Board of Education prescribes minimum standards under R.C. 3301.07(D), the victim is enrolled in or attends that school, and the actor is not enrolled in and does not attend that school, (iv) the actor is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the victim is enrolled in or attends that institution, (v) the actor is the victim's athletic or other type of coach, is the victim's instructor, is the leader of a scouting troop of which the victim is a member, or is a person with temporary or occasional disciplinary control over the victim, (vi) the actor is a mental health professional, the victim is a mental health client or patient of the actor, and the actor induces the victim to submit by falsely representing to the victim that the sexual contact involved in the violation is necessary for mental health treatment purposes, (vii) the victim is confined in a detention facility, and the actor is an employee of that detention facility, or (viii)



the actor is a cleric and the victim is a member of, or attends, the church or congregation served by the cleric.

(2) "Cleric" has the same meaning as in R.C. 2317.02, as amended by the act (see "For members of the clergy, rabbis, priests, Christian Science practitioners, and ministers" under "Privileged communications," above).

(3) "Mental health client or patient" means an individual who is receiving mental health services from a mental health professional or organization (by reference to existing R.C. 2305.51, not in the act).

(4) "Mental health professional" means an individual who is licensed, certified, or registered under the Revised Code, or otherwise authorized in Ohio, to provide mental health services for compensation, remuneration, or other personal gain, and also includes an individual who is not so licensed or authorized but who regularly provides or purports to provide mental health services for compensation or remuneration at an established place of business (by reference to existing R.C. 2305.115).

(5) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person (by reference to existing R.C. 2907.01, not in the act).

(6) "Victim" means a victim of childhood sexual abuse.

Offense of "sexual battery"

Continuing law

Continuing law prohibits a person from engaging in sexual conduct with another, not the spouse of the offender, when any of the following apply: (1) the offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution, (2) the offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired, (3) the offender knows that the other person submits because the other person is unaware that the act is being committed, (4) the offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse, (5) the offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person *in loco parentis* of the other person, (6) the other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person, (7) the offender is a teacher, administrator, coach, or other person in authority employed by or serving



in a school for which the State Board of Education prescribes minimum standards pursuant to R.C. 3301.07(D), the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school, (8) the other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution, (9) the other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person, (10) the offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes, or (11) the other person is confined in a detention facility, and the offender is an employee of that detention facility. A violation of the prohibition is the offense of "sexual battery," a felony of the third degree.

Operation of the act

The act adds a new circumstance in which a person commits the offense of "sexual battery." Under the act, in addition to the conduct currently prohibited under R.C. 2907.03, a person is prohibited from engaging in sexual conduct with another, not the spouse of the offender, when the other person is a minor, the offender is a "cleric" (see below), and the other person is a member of, or attends, the church or congregation served by the cleric. A violation of the new prohibition also will be the offense of "sexual battery," a felony of the third degree.

As used in this provision, "cleric" has the same meaning as is described above in "Privileged communications." (R.C. 2907.03.)

Protection orders for victims of sexually oriented offenses

Prior law

Under continuing law, upon the filing of a criminal complaint that alleged a violation of R.C. 2909.06 (criminal damaging or endangering), 2909.07 (criminal mischief), 2911.12 (burglary), or 2911.211 (aggravated trespass), a violation of a municipal ordinance substantially similar to any of those sections, or any offense of violence, if the alleged victim of the violation or offense was a family or household member at the time of the commission of the offense, the complainant, the alleged victim, or a family or household member of an alleged victim (or, if in an emergency the alleged victim was unable to file, a person who made an arrest for the alleged violation or offense) could request the issuance of a temporary



protection order as a pretrial condition of release of the alleged offender, in addition to any bail set (R.C. 2929.26).

Also under continuing law, a person could seek a civil protection order on the person's own behalf, or a parent or adult household member could seek a civil protection order on behalf of any other family or household member, against a respondent who had allegedly engaged in domestic violence against a family or household member of the respondent (R.C. 3113.31).

Operation of the act

The act adds to the circumstances under which individuals may seek protection orders. Under the act, upon the filing of a criminal complaint that alleges the commission of any sexually oriented offense, not necessarily against a family or household member, the complainant, the alleged victim, or a family or household member of an alleged victim (or, if in an emergency the alleged victim was unable to file, a person who made an arrest for the alleged violation or offense) may request the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set (R.C. 2929.26). The act also allows a person on his or her own behalf, or a parent or adult household member on behalf of any other family or household member, to seek a civil protection order against a respondent who had allegedly committed a sexually oriented offense against the petitioner or another victim (R.C. 3113.31).

The act defines "sexually oriented offense" to have the same meaning as it does under R.C. 2950.01 of the Sex Offender Registration and Notification (SORN) Law (R.C. 2929.26(K)(1) and 3113.31(A)(6)).

Declaratory judgment action for childhood sexual abuse

The act authorizes the Attorney General or the prosecuting attorney for the county in which resides a person who allegedly committed childhood sexual abuse of a victim who is precluded from bringing a civil action based on the abuse solely due to the expiration of the limitations period to bring an action in the Franklin County Court of Common Pleas or the court of common pleas of the county in which the alleged abuser resides for a declaratory judgment against the alleged abuser. If the alleged abuser does not reside in Ohio, the Attorney General or Franklin County Prosecuting Attorney may bring the action in Franklin County. The abuse must allegedly have occurred in Ohio. The act authorizes the victim to serve notice on the Attorney General, the prosecuting attorney, and the alleged abuser of the victim's belief that he or she has a right to bring the declaratory judgment action. If the prosecuting attorney does not commence an action within 45 days, the Attorney General may do so within the next 45 days. If neither the prosecuting attorney nor the Attorney General brings an action, the victim may do

so in the county in which the victim or defendant resides or where the abuse allegedly occurred. If the victim brings the action, the court may award attorney's fees to the prevailing party. If the court finds by a preponderance of the evidence that the defendant would have been liable for childhood sexual abuse but for the expiration of the limitations period for the action, it must order that the defendant be listed in the civil registry established by the Attorney General (see "Creation of civil registry and other duties of Attorney General," below) and notify the defendant of the defendant's obligations under the act (see "Registration by a person found liable for childhood sexual abuse in a declaratory judgment action," below). The court may remove the defendant from the registry after six years if it finds by clear and convincing evidence that the defendant has not again been found liable for childhood sexual abuse, has not been required to register under the SORN Law, and is not likely to commit an act in the future that would require registration under the SORN Law or under the act. (R.C. 2721.21.)

Registration by a person found liable for childhood sexual abuse in a declaratory judgment action

The act creates a registration system for persons found in declaratory judgment actions to have committed childhood sexual abuse similar to the registration system established by the SORN Law. It requires every such person to register with the sheriff of the county where the person lives or works, to notify the sheriff of a change of address or of intent to reside in another county, and to verify the person's current address annually. The act authorizes the sheriff to confirm a verification, and it requires the sheriff to serve notice of the registrant's residential address to persons residing within 1,000 feet of that address, to public children services agencies, schools, day-care centers, and other sheriffs within a specified geographical area designated by the Attorney General, and to specified local law enforcement agencies (R.C. 3797.01 to 3797.06).

Creation of civil registry and other duties of Attorney General

The act requires the Attorney General to do all of the following (R.C. 3797.07 and 3797.08):

(1) Not later than January 1, 2007, establish and operate on the internet a civil registry of persons who register after being found liable in a declaratory judgment action based on childhood sexual abuse and determine the information to be included. The information must include at least the names, current resident and employment addresses, and photographs of the persons, the name of the court that entered the declaratory judgment action, and the date of the judgment. The registry is a public record open to inspection, must be searchable by name, county, zip code, and school district and have a link to the web site of each sheriff.



(2) Adopt rules no later than July 1, 2006, that do the following: establish guidelines for implementation of the registration system; prescribe registration, notice of intent to reside, and verification forms; establish procedures for the forwarding of the forms to the Attorney General by sheriffs; designate geographic areas for community notification; and at the Attorney General's discretion establish additional categories of neighbors to receive notification of a registrant's address;

(3) Make copies of the prescribed forms available to sheriffs and judges;

(4) Assist sheriffs who ask for assistance in setting up local internet databases of registrants.

Registration information as a public record

Under the act, registration information about persons required to register after being found in a declaratory judgment action to have committed childhood sexual abuse that is placed on the internet by the Attorney General or that is in possession of the sheriff is a public record (R.C. 3797.08(C) and 3797.09).

Prohibitions applicable to persons found liable in declaratory judgment actions for childhood sexual abuse

The act prohibits as a fifth-degree felony the failure of a person found liable in a declaratory judgment action based on child sexual abuse to register, give a required notice of a new residence or employment address or of an intent to reside, or verify a current address. It provides as an affirmative defense to a charge of failing to send written notice of a change of address or notice of intent to reside that the registrant did not know on the notice due date of the address change or the new address and that the registrant notified the sheriff not later than the end of the first business day after learning of the address change or new address. (R.C. 3797.10.)

The act also prohibits a person found liable in a declaratory judgment action based on child sexual abuse from living within 1,000 feet of school premises (R.C. 3797.11).

Immunity for good-faith actions taken under the civil registration law

The act provides immunity from civil liability to officials and to persons from whom a sheriff seeks confirmation of verification for good-faith actions taken pursuant to the statutes establishing the registration system for persons found liable in a declaratory judgment action for childhood sexual abuse (R.C. 3797.12).

Listing on civil registry as a consideration in occupational licensing decisions

The act requires occupational and professional licensing boards governed by R.C. Title 47 to consider a person's listing on the Attorney General's civil registry in deciding upon an action with respect to the person's license (R.C. 4701.99).

Amendment to the SORN Law

Continuing law requires the sheriff with whom a sex offender registers under the SORN Law to provide notification of the address where the offender resides or intends to reside to certain persons who live or are otherwise located within a specified geographical notification area if the offender has been adjudicated a sexual predator or child-victim predator or a habitual sex offender or habitual child-victim offender or if the offense was an aggravated sexually oriented offense. The persons to be notified include the executive director of the public children services agency that has jurisdiction within the specified geographical notification area and that is located within the county served by the sheriff. The act additionally requires that the sheriff provide notification of a sex offender's address to the executive director of the public children services agency even if the offender has not been adjudicated a predator or habitual offender or the offense is not an aggravated sexually oriented offense. (R.C. 2950.11(A)(2) and (I).)

Severability and technical matters

In language that tracks R.C. 1.50, the act provides that if any Revised Code provisions amended or enacted by the act are invalid, the invalidity does not affect other provisions of the act and that the invalid provisions are severable from the others. The act also conforms the language of several sections of the Revised Code included in the act to conform to the provisions establishing the mandatory reporting requirements for clerics. (Section 4 of the act; R.C. 2151.03, 2151.281, 2151.421, 2901.13, and 5720.173.)

HISTORY

ACTION	DATE
Introduced	01-25-05
Reported, S. Judiciary on Criminal Justice	03-16-05
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