

IN THE SUPREME COURT OF OHIO

JANE DOE, et al.,

APPELLANTS,

v.

MASSILLON CITY SCHOOL
DISTRICT BOARD OF EDUCATION,
et al.,

APELLEES.

Case No. 2007-1311

On Appeal from the Stark County
Court of Appeals, Fifth Appellate
District

Case No. 2006 CA 00227

MERIT BRIEF OF AMICUS CURIAE THE OHIO SCHOOL BOARDS
ASSOCIATION IN SUPPORT OF APPELLEE
MASSILLON CITY SCHOOL DISTRICT BOARD OF EDUCATION

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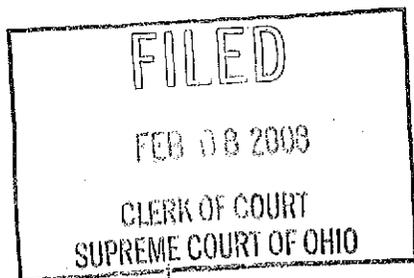


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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Ohio School Boards Association (hereinafter referred to as "OSBA") respectfully comes before this Court as an Amicus Curiae.

OSBA is private, not-for-profit, state wide organization comprised of public school district boards of education in which 99.9% of Ohio public schools are members. OSBA's purpose is to encourage and advance public education through local citizen responsibility.

The plain meaning of the applicable statute, relevant legislative history, and rulings of this Court clearly establish that a school district board of education is immune from liability for acts of negligence resulting in harm that occurs off school grounds. A contrary finding could subject districts to a significant threat of litigation and liability that is unwarranted by the law. Additionally, a school district does not act in a wanton or reckless manner when it grants an individual access to students absent knowledge that the individual poses a risk of harm to students. Further, Ohio school districts are not required by law to conduct criminal background checks on school volunteers or facility users, and do not act in a wanton or reckless manner by electing not to run the background checks. Ohio districts would face an overwhelming burden if this Court finds that districts have a responsibility to conduct criminal background checks on all individuals who either volunteer in a school district or who use school facilities. For these reasons, and the reasons set forth herein, the Ohio School Boards Association respectfully urges this Court to uphold the decisions of the Trial and Appeals Courts.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts the Statement of Case and Facts set forth in the Brief of Appellee.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Under former R.C. § 2744.02(B)(4), a political subdivision may only be liable for injuries, death, or loss to persons caused by negligence when the injury, death, or loss occurs on the grounds of a building used in connection with a government function.

Ohio law gives broad immunity to political subdivisions, subject only to specific statutory exceptions. R.C. § 2744.02. At issue here is the exception under the former R.C. § 2744.02(B)(4) which states:

Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

As Plaintiff has observed, R.C. § 2744.02 as a whole has been the subject of much litigation and statutory revision in an effort to clarify this sometimes ambiguous law. Plaintiff's Brief, pg. 14. This confusion notwithstanding, the paramount rule of statutory interpretation is that "where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard v. Canton City School Bd. of Edn.* (2002), 97 Ohio St.3d 451, 454, 2002-Ohio-6718.

At the crux of the present matter is the question of whether the immunity exception under the former R.C. § 2744.02(B)(4) requires that the actual injury, death, or loss resulting from the negligence of a political subdivision's employee occur on the grounds of buildings that are used in connection with the performance of a governmental function. In other words, can the Plaintiffs get around the immunity law and hold Massillon liable when the assaults by the Chess

Federation coach did not occur on school grounds, but instead occurred in the personal automobile of the Chess Federation coach, at the residence of the Chess Federation Coach, and at a gas station unconnected and unrelated to the school?

Despite Plaintiff's assertions to the contrary, a plain reading of the former R.C. § 2744.02(B)(4) reveals little ambiguity on the issue of where the injury must occur. The key phrase of this exception is "and that." R.C. § 2744.02(B)(4)(former version). This phrase, one that distinguishes this exception from the others in the former R.C. § 2744.02, indicates that there are two distinct requirements for the exception to apply. The first requirement is that the injury be "caused by the negligence of [the political subdivision's] employee[]." *Id.* The second requirement is that the injury "occur within or on" the property of the political subdivision. When taken on the whole, or by its constituent parts, the exception in the former R.C. § 2744.02(B)(4) plainly has two distinct requirements – one regarding the cause of the injury and the other regarding the situs of the injury.

Without the conjunction "and" separating the two distinct requirements of former R.C. § 2744.02(B)(4) the statute would have a very different meaning, the meaning championed by Plaintiff. By taking out "and" the statute would read "political subdivisions are liable for injury . . . that is caused by the negligence of their employees ~~and~~ that occurs within or on the grounds of buildings that are used in connection with . . . a government function." R.C. § 2744.02(B)(4) (former version, strike-through added). Without "and" separating the cause of injury and situs of injury requirements an argument could be made that there would be only one requirement for the exception to apply: that a government employee acted negligently on government property to cause the injury. Because the General Assembly included the conjunction "and" the plain

meaning of the former R.C. § 2744.02(B)(4) is that the injury must be caused by a government employee “and” the injury must occur on government property.

This Court recognized the distinct situs requirement of the former R.C. § 2744.02(B)(4) in *Sherwin-Williams Company v. Dayton Freight Lines, Inc.* (2006), 112 Ohio St.3d 52, 2006-Ohio-6498. In *Sherwin-Williams* the plaintiffs were people injured in a car accident on an interstate highway. The plaintiffs alleged that the poor visibility that caused the wreck was the result of a scrap fire set by village employees. They sued the village citing R.C. § 2744.02(B)(3), the immunity exception for nuisances. The village claimed the exception was inapplicable because the injury did not occur on village property. This Court was asked if there was a situs of injury requirement in R.C. § 2744.02(B)(3), and it held that there was not. *Id.* at 55. Thus, the village could be held liable for the car accidents.

By way of explanation the Court distinguished the exception in (B)(3) from that in (B)(4): “Former R.C. 2744.02(B)(4) demonstrates that the General Assembly is perfectly capable of limiting the reach of a political subdivision’s liability to injuries or losses that occur on property within the political subdivision.” *Id.* at 55. The (B)(3) exception by its plain language only required that the nuisance causing the injury occur on government property: “[P]olitical subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep . . . public grounds within the political subdivisions . . . free from nuisance.” *Id.* at 54-55 (quoting R.C. § 2744.02(B)(3)). In contrast, according to this Court, the language of the exception in the former (B)(4) “limit[s] the reach of a political subdivision’s liability to injuries or losses that occur on property within the political subdivision.” *Id.* at 55.

Plaintiff argues that it is “bizarre” and “arbitrary” to understand this Court’s *Sherwin-Williams* decision to mean that the exception in the former (B)(4) only applies to injuries that

occur on government property. Plaintiff's Brief, pg. 19. Plaintiff suggests that despite the clear language of this Court's decision perhaps it was not referring to the situs of the injury but rather to the situs of the *cause* of the injury. *Id.* Respectfully, if anything is bizarre, it is Plaintiff's suggested interpretation of the distinction between (B)(3) and the former (B)(4) made in *Sherwin-Williams*. Surely this Court was not citing the language of the former R.C. § 2744.02(B)(4) to show an example of an exception to immunity in situations where the situs of the cause of the injury is on government property; the language of (B)(3) clearly does this and it was the language directly at issue in *Sherwin-Williams*. Rather, this Court cited to the former (B)(4) to show how it was different from (B)(3): (B)(4) is an exception to immunity that only applies to situations where the situs of the injury itself is on government property.

Plaintiff also posits several arguments to the effect that to read *Sherwin-Williams* as clarifying that the former R.C. § 2744.02(B)(4) only applies when the situs of the injury is on government property is to reject substantial legislative history and case law that indicates otherwise. As for the legislative history preceding and subsequent to *Sherwin-Williams*, it is clear that the General Assembly did not intend for the R.C. § 2744.02(B)(4) exception to apply at all to facts such as those at issue in the present matter. In 1996 the General Assembly clarified (B)(4) by adding that for the exception to apply the harm must be "due to physical defects within or on the grounds of" government property. 1996 Ohio Laws File 244 (H.B. 350). The act that made this amendment was declared unconstitutional in 1999, and the physical defects language was removed. *Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 1999-Ohio-123. The General Assembly subsequently reinserted the physical defects requirement in 2001 in S.B. 108, and again in 2002 in S.B. 106. 2001 Ohio Laws File 26 (S.B. 108); 2002 Ohio Laws File 239 (S.B. 106). The physical defects requirement remains to this day. R.C. §

2744.02(B)(4) (current version). Far from indicating, as Plaintiff asserts, that this Court was mistaken in finding a situs of injury requirement in the former R.C. § 2744.02(B)(4), the legislative history of the statute clearly indicates that the General Assembly always intended for the exception to only apply when the injury was suffered on government property.

Along these lines, the current language of R.C. § 2744.02(B)(4) is instructive insofar as it clarifies the significance of parallel language in the prior version which is at issue in the present matter. The current (B)(4) states that:

[P]olitical subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, *and is due to physical defects within or on the grounds of*, buildings that are used in connection with the performance of a governmental function . . . [.] R.C. § 2744.02(B)(4) (current version, emphasis added).

Only the italicized language is different from that in the former (B)(4). The key phrase “and that,” discussed above, has been retained to divide the cause of injury requirement from the situs requirement. The question, then, is to what does the situs requirement refer?

The new language in R.C. § 2744.02(B)(4) makes it abundantly clear that the situs requirement refers to the injury itself, not the negligence that causes the injury. The new language serves to clarify the prior language that surrounds it. It answers the question of what must occur within or on the grounds of government property. The injury must occur within or on the grounds, because only the injury could be “due to physical defects within or on the grounds of government property.” The part of (B)(4) after “and that” cannot refer to the cause of the injury because it makes no sense to say that an employee’s negligence is “due to physical defects within or on the grounds of government property.”

If the legislature wished for the immunity exception to apply regardless of the situs of an injury, surely it would have changed the law to indicate this during its “numerous modifications

and clarifications over the years.” Plaintiff’s Brief, pg. 15. Instead, recent revisions make it even clearer that for the (B)(4) exception to apply the injury must occur on government property. Thus, legislative history indicates that the situs requirement refers to the injury itself, not the cause of the injury.

Plaintiff also wrongly argues that substantial case law indicates that the situs requirement of the former R.C. § 2744.02(B)(4) refers to the negligence that caused the injury. Plaintiff cites *Hubbard v. Canton City School Board of Education* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, as standing for the proposition that the only requirement to impose liability under the former (B)(4) exception is that the government employee’s negligence must occur on government property. Plaintiff’s Brief, pg. 17. In *Hubbard* the plaintiffs were students who had been sexually assaulted by a school employee on school grounds. *Hubbard*, 97 Ohio St.3d at 451-452. The plaintiffs argued that the district was liable for negligent retention and supervision. *Id.* at 452. The Court remanded the case, concluding that plaintiffs had met the requirements of the former R.C. § 2744.02(B)(4). *Id.* at 455.

The *Hubbard* court never suggested that the location of the injuries was irrelevant to the application of the former R.C. § 2744.02(B)(4). This Court was very clear in delimiting the issue in *Hubbard*: “The issue presented for review is whether [R.C. § 2744.02(B)(4)] should be limited to negligence in connection with physical defects within or on the grounds of governmental buildings.” *Id.* at 452. To emphasize this point, the syllabus paragraph concludes by stating that the former (B)(4) “is not confined to injury resulting from physical defects or negligent use of grounds or buildings.” The fact that the injuries occurred on government property was important, but it was not in dispute. After noting that the injuries occurred on school property in the second paragraph of its opinion the Court went on to analyze the real issue, whether the cause

of the injury had to be related to physical defects for the former (B)(4) exception to apply. *Id.* at 451-452. The Court concluded that the former R.C. § 2744.02(B)(4) did not require that an injury be related to physical defects. As a result, both prongs of the former (B)(4) were met: the injury was caused by the negligence of a school employee and the injury occurred on school grounds.

Plaintiff also cites *Beck v. Adam Wholesalers of Toledo, Inc.* (Sept. 28, 2001), 2001 WL 1155820, in support of its contention that the situs of the injury is irrelevant. In *Beck* the plaintiff was the parent of a child who wandered off the school playground onto a U.S. highway. *Id.* at * 1. The child was literally inches off of school property when he was struck by traffic and killed. *Id.* At trial the school district successfully argued that the former R.C. § 2744.02(B)(4) required the injury to occur on school property. *Id.* at * 5. The appellate court observed that “[u]nder the *specific facts* of this case, *particularly focusing* on the continuous chain of events” that led to the accident the court would not apply a “*narrow* interpretation” of the former (B)(4) to “this *particular case*” because the child was only off property by “a matter of inches.” *Id.* (emphasis added).

With due respect to the Sixth District Court of Appeals, its holding in *Beck* is a textbook illustration of the old adage that “bad facts make bad law.” Nobody can deny the horrifying nature of the child’s death. However, in reversing summary judgment against the child’s parent the court apparently felt that it was stretching the bounds of the law, as illustrated by its emphasis on the “specific” and “particular” facts of this case. *Id.* The court also apparently recognized that the situs of the injury is important for the former R.C. § 2744.02(B)(4) analysis, or else it would not have been so careful to point out that the child was off of school property by only “a matter of inches.” *Id.*

Despite its hesitance to apply the former (B)(4) exception in this situation (and the trial court's refusal to do so), the appellate court found liability to avoid the appearance of doing nothing in the face of such a terrible tragedy. Unfortunately, in so doing the court ignored the plain language of the statute regarding the situs of the injury, and the ruling stands out as being in conflict with this Court's jurisprudence. While this slight reformulation of the former (B)(4) is problematic, if *Beck* were to be applied in the present situation where the harm was not inches off of school property, but rather many miles away in areas over which the school had absolutely no control, it would constitute a major judicial revision of existing law.

In fairness to the Sixth District, its decision in *Beck* was rendered during a tumultuous time for R.C. § 2744.02. One legislative revision of the law had already been rejected as unconstitutional by this Court. *Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 1999-Ohio-123. This Court had also accepted the *Hubbard* case interpreting (B)(4), but subsequently dismissed it as improvidently allowed (the case was later accepted again and decided). *Hubbard v. Canton City School Bd. of Edn.* (2000), 88 Ohio St.3d 14, 2000-Ohio-260. It was not until after the Sixth Circuit's *Beck* decision that this Court provided much needed clarity on (B)(4) in *Hubbard* in 2002 and *Sherwin-Williams* in 2006. The *Beck* court rendered its decision without the benefit of guidance from these important subsequent decisions by this Court. Because the *Beck* decision was rendered before Ohio Supreme Court decisions and subsequent legislative revisions clarified the meaning of R.C. § 2744.02(B)(4), it is of no value in analyzing the present matter.

In summary, the plain meaning, the case law, and the legislative history support a reading of the former R.C. § 2744.02(B)(4) that includes two requirements: 1) a negligent act by a government employee and 2) an injury on government grounds. In this case at least the second

of these requirements is not met. Because the injury to the children occurred away from school grounds Massillon is protected by Ohio's broad immunity law and no exception applies.

Proposition of Law No. 2: Pursuant to R.C. 2744.03(A)(5), a political subdivision is immune from liability if the injury complained of resulted from an employee's exercise of judgment and discretion unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner. Appellee did not have a duty to conduct criminal background checks on volunteers or school facility users, and therefore did not act in a wanton or reckless manner by not obtaining a background check on Smith.

Even if the Court determines that an exception to grant of immunity applied to these facts, this Court must conclude that Appellee did not act in a wanton and reckless manner by failing to conduct a criminal background check on Smith, and must therefore uphold the Trial Court and Court of Appeals' decisions that ruled Appellee met the standard in R.C. 2744.03(A)(5) to bar liability.

Former R.C. 2744.03(A)(5) states:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(5) A political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

In *Tighe v. Diamond* (1948), 149 Ohio St. 520, the Court defined wanton misconduct as behavior that "comprehends an entire absence of all care for the safety of others and an indifference to consequences." The Court further stated that wanton misconduct involved a

failure to exercise any care toward individuals to whom a duty of care is owed when the chance for injury is great and the actor is aware of such danger. *Id.* Finally, the Tighe Court ruled that it is not necessary that an injury be intended or that there be any ill will on the part of the actor or toward the person injured as a result of such conduct. *Id.*, see also *Robertson v. Dept. of Public Safety* (Ohio Ct. Cl. 2005) 2005 WL 2364817, 2005-Ohio-5069.

Appellants readily concede that Appellee did not act with malicious purpose or in bad faith to permit Smith access to school facilities and students. Plaintiff's Brief, pg. 29. However, Appellants do claim that Appellee acted in a wanton or reckless manner, in large part by failing to conduct a criminal background check on Smith. Plaintiff's Brief, pg. 29. Appellant's claim fails for three reasons. First, Appellee had no knowledge of the risk that Smith might harm students, and therefore did not fulfill a critical requirement in the definition of wanton or reckless behavior. Second, Ohio law clearly establishes a board of education such as Appellee has no duty to conduct a criminal background check on a school facility user that enters school property after hours to use the school facilities. Third, Ohio law places no mandatory duty on school districts to obtain a criminal background check of a school volunteer, especially absent any knowledge of concrete facts that would indicate the individual in any way poses a threat to students.

In this case, Appellees had no prior knowledge that Smith presented a danger to students, and therefore did not act in a wanton or reckless manner. The Tighe Court explicitly stated wanton misconduct requires awareness of danger in addition to a failure to exercise any care towards individuals to whom a duty is owed. *Tighe v. Diamond* (1948), 149 Ohio St. 520. Appellee had no reason to suspect Smith might harm students at the time Appellee permitted Smith to coach the chess club. Without this key knowledge of danger, Appellee could not

possibly have acted wantonly or recklessly in its decision to permit Smith to have access to students, and to not conduct a criminal background check prior to access. A contrary decision would completely disregard the necessary and vital element of knowledge in the definition of wanton behavior.

Further, it is patently clear that Smith was not a volunteer at the district, but was instead merely a facility user. The chess organization that appointed Smith as a coach had requested use of facilities after school hours to provide chess instruction. Students voluntarily remained after school to participate. Additionally, the organization, not the school district, provided all necessary supplies, guidance and support for the activities. This Court must easily reach the conclusion that Smith was a facility user and not a volunteer.

Appellants postulate that Appellee had a general duty to oversee all activities of a facility user conducted on school property even if the activities occurred after school hours and were unrelated to instruction. Appellants also argue that Appellee acted in a wanton or reckless manner in failing to conduct a background check on Smith. Plaintiff's Brief, pg. 30. In essence, Appellants would like to expand a district's duty to include the requirement that a school district run a background check on all facility users that utilize the availability of district property. An overview of the law regarding school facility use illustrates that such a finding would place an incredible strain on school districts and the community, and would subject districts to a significant threat of liability.

A board of education is required by law to permit responsible organizations and members of the community to use school facilities for entertainment and education purposes by community members. R.C. §3313.76. A school district board of education has the discretion to determine whether a group is responsible, as stated in *State ex. rel Greisinger v. Grand Rapids*

Bd. of Ed. (Ohio App. 6th Dist. 1949) 88 Ohio App. 364, 372-373, but must generally ascertain only if the group is financially accountable and capable of rational thought. Further, RC §3313.77 dictates that a board of education “upon request and payment of a reasonable fee, shall permit the use of any schoolhouse and rooms and the grounds and other property under its control for any branch of education, learning, or the arts. . . .” Additionally, Ohio law requires a board of education to permit facility use for political meetings and polling places. See, R.C. §3313.78 and R.C. §3501.29. These provisions require a board of education to provide access to school facilities for an extensive list of uses, including but not limited to: educational instruction of any type, religious practice, arts, civic, social or recreational meetings, entertainment, polling places, voter registration, political meetings and campaigning, public library purposes, etc.

In summation, a board of education has a very limited ability to refuse a facility user the opportunity to use school property when school is not in session. Despite this fact, Appellants seek to extend the duty for school districts to conduct background checks on all facilities users. A finding in favor of Appellants would do just that. If this Court determines a school district is liable in tort law for its failure to conduct a background check on a facility user that enters school property, even absent any knowledge of danger as occurred in this instance, Ohio districts would face a staggering administrative and financial strain, as well as the potential for significant liability. Such a broad finding would encompass background checks to members of the Boy or Girl Scouts, church staff and members that hold church services after school hours, each and every voter that enters a school building to vote, and a virtually limitless number of other community members that walk through the schoolhouse door. School districts would be expected to obtain and monitor each and every background check required by such an interpretation, and

would be forced to absorb the administrative costs of this monumental task. The time and finances necessary for such a task would be significant to say the least.

This conclusion would ultimately dissuade or even prohibit the community at large from utilizing school facilities. Community members would be forced to absorb a portion of the increased financial costs of administering background checks to all participants. A further question would arise as to what districts must do if facility users fail the criminal background check. A strict interpretation of such finding would require a district to deny access even when school is no longer in session and such individuals pose no threat to students. A school district is in no position to refuse access of community members to participate in daily activities such as voting and attending church services. In this case, school district facilities would no longer function as a vital community center and discussion forum. Neither the school district nor community would benefit from such a preposterous conclusion.

Lastly, if this Court determines Smith was a school volunteer and not just a facility user, the Court must conclude Appellee did not act in a wanton or reckless manner by permitting Smith to volunteer at the school without first conducting a criminal background check. Appellants repeatedly cite R.C. §3319.39 in an attempt to establish that Appellee had a duty to run background checks on all volunteers who provided services to the district. Plaintiff's Brief, pgs 11, 19. The legislative history of school criminal background checks verify that Appellees' reliance on R.C. §3319.39 to prove wanton and reckless behavior is erroneous and misplaced.

The former RC §3319.39, as applicable at the time Smith served as a district volunteer, required school districts to run criminal background checks for district applicants seeking employment that would be responsible for the care, custody or control of students (emphasis added). R.C. §3319.39 stated in part:

Except as provided in division (F)(2)(b) of section 109.57 of the Revised Code and division (I) of this section, the appointing or hiring officer of the board of education of a school district, the governing board of an educational service center, or of a chartered nonpublic school shall request the superintendent of the bureau of criminal identification and investigation to conduct a criminal records check with respect to any applicant who has applied to the school district, educational service center, or school for employment in any position as a person responsible for the care, custody or control of a child.

The law further defined "applicant" as:

A person who is under final consideration for appointment or employment in a position with a board of education, governing board of an educational service center, or a chartered nonpublic school as a person responsible for the care, custody and control of a child, except that "applicant" does not include a person already employed by a board or chartered nonpublic school in a position of care, custody or control of a child who is under consideration for a different position with such board or school.

As a volunteer, Smith was not appointed or paid by Appellee, nor did Appellee formally consider Smith for district employment. Further, Appellee repeatedly established the district had no control over Smith's work and maintained only limited supervision of his acts as a facility user. Clearly, a volunteer in a position such as Smith's cannot be included under the RC 3319.39 definition of applicant. Therefore, the statute cannot be cited by Appellants for the proposition that school districts have a duty by law to conduct background checks for volunteers, and that by failing to do so, a district acts in a wanton or reckless manner.

Further, Appellants have conveniently overlooked the fact that the legislature has passed separate statutes to regulate the requirements of criminal background checks for school volunteers, and that statutory law unequivocally states that the requirement to run a criminal background check on a school volunteer is permissive and not mandatory. R.C. § 4117.103 permits a school district to accept volunteers in any position that does not require state licensure

or certification. Although not in place at the time Smith served as a chess coach in 1997, R.C. §109.575 establishes a district must provide notice to all volunteers who will have unsupervised access to students on a regular basis that the volunteers may be subject to a criminal background check at the school's discretion. If the General Assembly intended for a background check to be a mandatory duty of school districts with regards to volunteers, it could have most certainly made it a requirement. It did not do so. Therefore, a school district does not act in a wanton or reckless manner and with complete disregard for the safety of students when it decides not to conduct a background check on school volunteers, especially when the district has no knowledge of facts that indicate a particular volunteer may pose a threat to students.

The legislative history of §109.575 further demonstrates that the legislature intended a school district's duty to provide background checks for school volunteers to remain discretionary. The General Assembly passed R.C. §109.575 under Senate Bill 187, 2000 Ohio Laws File 292 (SB 187). The bill as introduced required school districts and other government agencies to conduct background checks on volunteers that had unsupervised access to students if requested to do so by a parent. 2000 Ohio Laws File 292 (SB 187, introduced). However, the version of the bill as enrolled and adopted by the legislature specifically removed this provision and mandated instead that school districts could at their discretion conduct background checks on volunteers. Most importantly, a blanket duty to conduct background checks for all volunteers was never required in any versions of the bill.

Additionally, the bill as initially introduced by the Senate required a district to terminate all services or remove a volunteer from a position that allows unsupervised access to students immediately if a volunteer was found to have committed any of the listed disqualifying offenses. 2000 Ohio Laws File 292 (SB 187, enacted). However, the adopted version of the bill authorized

a district, again at its discretion, to retain a volunteer with unsupervised access to children in the same position whose background check revealed any listed offenses, provided the district sent a notice to parents. The legislature unequivocally established through Senate Bill 187 that it intended school districts to be empowered to exercise a great amount of discretion with regards to school volunteers. As a result, the law ensured that districts remained flexible and able to obtain a breadth of volunteer services to fulfill district objectives.

It is important to note that the legislature has subsequently amended the statutes that require mandatory background checks for employees who work in school districts through Substitute House Bill 190. 2007 Ohio Laws File 30 (Sub. H.B. 190). Specifically, the bill expanded the requirement for districts to conduct criminal background checks to include all employees, regardless of whether the employees are responsible for the care, custody or control of children. However, the legislature once again excluded volunteers in the mandatory requirement, and further chose not to amend the statutes governing volunteer background checks in accordance with Substitute House Bill 190 changes.

The legislature demonstrated by its refusal to extend the new requirements of Substitute House Bill 190 to volunteers that it never intended, and still does not intend, background checks for volunteers to be mandatory. 2007 Ohio Laws File 30 (Sub H.B. 190). Therefore, this Court must conclude that the Board had no duty to run a background check on Smith, and did not act in a wanton and reckless manner by choosing in its discretion not to obtain a background check on Smith or any other volunteers. A determination of liability would contradict the very intent of the legislature as illustrated by the history of criminal background checks in school districts, and would significantly overextend the requirements for school districts regarding volunteers.

Finally from a practical standpoint, if this Court determined Appellee had a duty to run background checks on volunteers to avoid negligence liability, the Court would significantly deter use of volunteers in Ohio school districts. Under this scenario, a board of education would be unable to accept volunteer services unless it conducted a criminal background check on each and every volunteer. A district would be forced either to incur the cost of these checks or to place the burden of the cost on volunteers themselves.

The consequences of such a requirement are apparent. A school district would be much less inclined to accept volunteer services if it were required to incur significant additional administrative costs, as well as the looming threat of potential negligence liability. Further, volunteers would be less likely to provide their skills and labor if they were required to pay a fee for the services. This conclusion could detrimentally impact the value of education a district could provide, and would ultimately interfere with the district's ability to obtain necessary services in a cost effective manner. Financially constrained districts that rely on volunteers to provide a substantial amount of otherwise unobtainable services would be most harmed by such a ruling. Finally, districts would lose the intrinsic value added by community involvement if volunteers were deterred from providing their services. This Court could not intend such a costly and harmful consequence to Ohio school districts.

The situation presented in this case is unfortunate and disheartening. However, Appellee fully complied with duties imposed by Ohio law regarding background checks for facility users and volunteers, and cannot be found to have acted in a willful or wanton manner in deciding not to conduct a background check on Smith in accordance with the law. If this Court rules that Appellee failed its duty because it chose not to run a criminal background check on Smith as Appellants postulate, the Court would place a significant burden on districts and community

members in the future. Ultimately, this burden would decrease the effectiveness of the education system in Ohio and would cause a repercussion of unfortunate consequences to the great detriment of all school districts in the state.

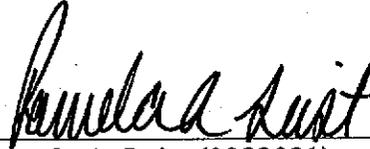
CONCLUSION

Amicus Curiae respectfully requests that this Court find in favor of Appellee, Massillon City School District Board of Education for the aforementioned reasons.

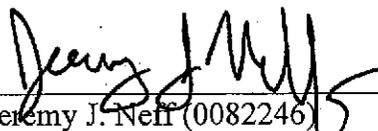
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Amicus Curiae the Ohio School Boards Association In Support of Appellee Massillon City School District Board of Education was sent via ordinary U.S. mail, postage pre-paid, upon the following parties on this 8th day of February, 2008:

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APPENDIX

Exhibit 1 Notice of AppealAppx-1

Exhibit 2 Judgment Entry of Court of Appeals (June 4, 2007) Appx-4

Exhibit 3 Opinion of Court of Appeals Appx-5

Exhibit 4 Judgment Entry of Court of Convnon Pleas (July 26, 2006) Appx-17

Exhibit 5 R.C. 2744.01Appx-31

Exhibit 6 R.C. 2744.02 Appx-33

Exhibit 7 R.C. 2744.03 Appx-35

Exhibit 8 R.C. 3319.39 Appx-38

Not Reported in N.E.2d, 2001 WL 1155820 (Ohio App. 6 Dist.)

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Sixth District, Sandusky County.
Antoinette Marie BECK, Adm., et al., Appellant,
v.
ADAM WHOLESALERS OF TOLEDO, Inc., et al.
No. S-00-038.
Sept. 28, 2001.

Steven P. Collier and Anthony E. Turley, for appellant.

Daniel D. Mason, for appellees.

DECISION AND JUDGMENT ENTRY

PIETRYKOWSKI, P.J.

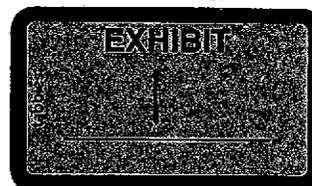
*1 This is an appeal from the Sandusky County Court of Common Pleas, which granted summary judgment in favor of appellee, Bellevue City Schools Board of Education, against appellant, Antoinette Marie Beck, Administratrix of the estate of Christian Anthony Beck, deceased. For the reasons that follow, we reverse the decision of the trial court.

This matter arose as a result of the tragic death of Christian Anthony Beck, six years old, on February 26, 1998. On that date, Christian was struck by a semi tractor trailer, operated by an employee of Adam Wholesalers, Inc., during an outdoor recess at York Elementary School, in Bellevue, Ohio.

On appeal, appellant sets forth the following four assignments of error:

"I. The trial court erred in finding that the nuisance exception to immunity in R.C. 2744.02(B)(3) is not applicable.

"II. The trial court erred in interpreting R.C. 2744.02(B)(4) as requiring that injury, death, or loss occur on the grounds of the school.



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"III. The trial court erred in finding that defendant Bellevue City Schools Board of Education is afforded immunity for an alleged 'exercise of discretion' pursuant to R.C. 2744.03(A)(5).

"IV. The trial court erred in finding no genuine issue of material fact with regard to defendant Bellevue City Schools Board of Education's recklessness, so as to satisfy the exception to immunity in R.C. 2744.03(A)(5).

"V. The trial court erred in refusing to find R.C. Chapter 2744 unconstitutional."

The relevant facts of this case are as follows. On February 26, 1998, Christian Beck was in pre-first grade at York Elementary School which is located in Bellevue, Sandusky County, Ohio, along U.S. Route 20. Weather permitting, Christian received two fifteen minute recess periods daily. On the date of the accident, Christian's recess periods were from 11:30 to 11:45 a.m. and 1:00 to 1:15 p.m. At the 1:00 p.m. recess there were approximately one hundred fifty children on the playground supervised by Rebecca Cotterill, a first grade teacher, and Laura Thompson, a teacher's aide in the severe behavioral disability class ("SBH").

In her deposition Beverly DeBlase, principal at York School, described the playground schematics. To the west of the school, students were not to go past the busses. The boundary to the north was the school building and playground equipment. The students were not to go behind the building. The eastern boundary was the main or original part of the building. Finally, the southern boundary, which was in front of the school and adjacent to U.S. Route 20, was even with some playground equipment. There was a yellow line on the blacktop to indicate the boundary. Several feet beyond this line were orange cones which were to prevent vehicular traffic from entering the playground.

Thompson testified that during recess she was primarily responsible for her SBH students. She testified that she was not aware of the yellow line and that it served as part of the southern playground boundary. She did testify that the students generally were not to go beyond the playground equipment south of the building.

*2 On the date of the accident, Thompson was supervising her children at the merry-go-round, south of the building. She left the children but as she looked back to make certain they were following her instructions, she spotted Christian trying to pick up a ball and running toward the cones. Once she realized he was not stopping, she began "screaming" at him to try and get him to stop. Thompson testified that Christian kept kicking the ball

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further toward the road each time he attempted to pick it up. She then saw him get hit by the semi truck.

During her deposition, Cotterill testified that at the start of the 1:00 p.m. recess on the date of the accident, she was busy making certain that the children who had gotten in trouble during the prior recess were sitting along a wall where they were to stay as punishment. Cotterill next noticed Thompson running toward her and saying that someone had been hit. Cotterill went to Christian and immediately ascertained that he was dead.

Regarding playground rules, Cotterill testified that each teacher reviewed them with their students. She indicated that she felt that a verbal warning about playground safety and boundaries was sufficient to inform the younger students. Cotterill further testified that playground balls had crossed the yellow line on several occasions and, on each occasion, the student would inform a teacher and the teacher would retrieve it.

Appellant commenced the instant action on April 27, 1998, naming as defendants appellee Bellevue City Schools Board of Education, which operates York School, semi truck driver Floyd D. DeCair and his employer Adam Wholesalers, Inc. On March 8, 1999, appellant filed her first amended complaint. As to appellee, the complaint alleged negligence in its failure to erect a fence, failure to activate the school zone flashing lights during recess, and failure to maintain an effective barrier or boundary. Appellant further alleged that appellee failed to provide adequate supervision of the children during recess.

Appellee filed a motion for summary judgment arguing that it was entitled to immunity pursuant to R.C. Chapter 2744. The trial court granted appellee's motion for summary judgment on April 22, 1999. On appeal, this court remanded the case finding that the trial court improperly relied on the amended version of R.C. Chapter 2744 found unconstitutional in State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451. See Beck v. Adam Wholesalers of Toledo, Inc. (June 2, 2000), Sandusky App. No. S-99-018, unreported. We did, however, consider and find not well-taken appellant's eighth assignment of error which argued that R.C. Chapter 2744 was unconstitutional.

On remand, on June 27, 2000, appellee filed its motion for summary judgment again arguing that it was immune from liability pursuant to R.C. Chapter 2744. The trial court again granted appellee's motion for summary judgment based upon R.C. Chapter 2744 immunity, and this appeal followed.

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***3** At the outset we note that when reviewing a motion for summary judgment, this court must apply the same standard as the trial court. Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App.3d 127, 129. Civ.R. 56(C) provides that summary judgment can be granted only if (1) no genuine issue of material fact remains to be litigated, (2) viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to summary judgment as a matter of law. Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, paragraph three of the syllabus. The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact on the essential elements of the nonmoving party's claim. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. If the moving party satisfies this burden, the nonmoving party has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts demonstrating a genuine issue exists for trial. *Id.*

In determining whether appellee is entitled to sovereign immunity pursuant to R.C. Chapter 2744, we must answer four questions. We must first determine (1) whether or not appellee is a political subdivision, (2) whether appellee was engaged in a governmental or proprietary function, (3) if any of the exceptions to the general grant of immunity under R.C. 2744.02(B) apply, and (4) whether appellee is entitled to a defense or qualified immunity under R.C. 2744.03(A).

Appellant, in her assignments of error, argues that appellee is not immune from liability based upon the nuisance exception, R.C. 2744.02(B)(3). Appellant also argues that, under R.C. 2744.02(B)(4), the death or injury need not have occurred on school property and, further, that there were physical defects on the property. Further, appellant contends that appellee is not entitled to the exercise of discretion defense under R.C. 2744.03(A)(5) in that appellee was reckless. Finally, appellant claims that R.C. Chapter 2744, *in toto*, is unconstitutional. We shall address each assignment of error in order.

In her first assignment of error, appellant argues that the trial court erred when it rejected her argument that the condition of the playground at York Elementary School created a nuisance. Specifically, appellant contends that appellee improperly maintained the yellow line and failed to install fencing and activate the "school zone" flashing lights.

R.C. 2744.02(A)(1) creates a general grant of immunity to governmental entities. It provides:

" * * *. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss

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to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

*4 It is undisputed that a school district is a political subdivision. R.C. 2744.01(F); Hall v. Bd. of Edn. (1972), 32 Ohio App.2d 297. Further, the parties do not dispute that appellee was engaged in a governmental function. Thus, pursuant to R.C. Chapter 2744, appellee is entitled to immunity from civil liability. We must now address whether the nuisance exception to immunity is applicable.

R.C. 2744.02(B)(3) requires that a political subdivision "keep [its] public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, * * *." Such failure may result in civil liability.

In support of her argument that the nuisance exception applies under the facts of this case, appellant cites Franks v. Lopez (1994), 69 Ohio St.3d 345; Cater v. Cleveland (1998), 83 Ohio St. 3d 24; and Siebenaler v. Montpelier (1996), 113 Ohio App.3d 120.

In Franks, the Ohio Supreme Court found that a question of fact remained regarding whether the township created a nuisance by failing to maintain an existing sign's ability to reflect. The court, however, rejected the argument that defective design or construction or *lack* of signage constitutes a nuisance. *Id.* at 349-350.

Cater and Siebenaler involve injuries associated with municipality-owned swimming pools. In Cater, the Ohio Supreme Court held that the trial court erred in directing a verdict in favor of the city, where the trier of fact should have determined whether the glare from the reflection off the glass panels which obstructed visibility into the pool "created an unreasonable risk of harm[.]" Cater at 31. In Siebenaler, this court examined whether the alleged slippery condition on a diving board ladder amounted to a failure to keep the grounds in repair and free from nuisance under R.C. 2744.02(B)(3). We ultimately found that appellants failed to demonstrate that the ladder was poorly maintained or a nuisance. Siebenaler at 124.

Upon review of the above cases and the body of case law interpreting R.C. 2744.03(B)(3), we are reluctant to stretch the nuisance exception to include the absence of a fence or flashers involved in this case. The cases we have reviewed finding issues of fact as to nuisance address conditions *existing* on the property, not the lack of a condition. Unlike Franks, we can find no legal duty requiring appellee to erect a fence or activate the flashers. ^{FN1} Franks stands for the proposition that once the fence or flashers had been erected

or activated, appellee would be charged with the responsibility of proper maintenance.

FN1. In fact, R.C. 4511.21(B)(1)(a) provides, in part:

"Nothing in this section or in the manual and specifications for a uniform system of traffic control devices shall be construed to require school zones to be indicated by signs equipped with flashing or other lights, or giving other special notice of the hours in which the school zone speed limit is in effect."

In *Cater*, the court found the glare emanating from the wall of glass panels was an obstruction to visibility. In this case, appellant argues that the faded yellow line may not have been visible to Christian and may have been a cause of the accident.

***5** Actual or constructive notice is a prerequisite under R.C. 2744.02(B)(3). *Harp v. City of Cleveland Heights* (2000), 87 Ohio St.3d 506, 513. There is evidence that appellee had, at minimum, constructive notice of the faded condition of the yellow line. Beverly DeBlase, principal at York School, testified that the yellow line was the partial southern playground boundary and, when asked if the line was faded stated "probably, yes." Rebecca Cotterill, one of the playground supervisors on the date of the accident, stated that she did not know how bright or faded the line was but that it had been there for years.

Based on the foregoing, as a matter of law we find that civil liability may be imposed under R.C. 2744.02(B)(3). Accordingly, appellant's first assignment of error is well-taken.

In appellant's second assignment of error, she argues that the trial court erroneously interpreted R.C. 2744.02(B)(4) as requiring that the injury, death or loss complained of must have occurred on school grounds. The statute reads:

"[P]olitical subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, * * *."

In its September 27, 2000 judgment entry, the trial court engaged in a lengthy discussion regarding the statutory construction of the above statute. The court reviewed the grammatical construction as well as legislative intent and concluded that the injury, death or loss had to occur on school property. The court then concluded that because Christian was struck while in the

roadway, the exception did not apply. Under the specific facts of this case, particularly focusing on the continuous chain of events which culminated in the accident, we reject such a narrow interpretation of the statute. We agree with appellant that the foreseeability and proximity aspects in this particular case cannot be ignored. Denying review under R.C. 2744.02(B)(4) based upon a matter of inches leads to an absurd result.

We must now address whether, as a matter of law, potential liability exists under R.C. 2744.02(B)(4). Appellee correctly asserts that this court, in Tijerina v. Bd. of Edn. of Fremont (Sept. 30, 1998), Sandusky App. No. S-98-010, unreported, adopted the principle that "R.C. 2744.02(B)(4) applies only to negligence which occurs in connection with the maintenance of school property." In Tijerina, a junior high school student with a known heart condition died of a heart arrhythmia after attending gym class. We found that the exception to immunity provided in R.C. 2744.02(B)(4) was not available because appellant alleged only the negligence of the school officials, not a physical defect in the school building or grounds or improper maintenance relative thereto.^{FN2}

FN2. Acknowledging a split among the districts, the Supreme Court of Ohio, in Hubbard v. Canton City School Bd. of Edn. (1999), 84 Ohio St.3d 1486, accepted the Fifth Appellate District's proposed issue for certification in its December 7, 1998 judgment entry which set forth: " 'Is the exception to the political subdivision immunity found in R.C. 2744.02(B)(4), effective 7/1/89, applicable only to negligence occurring in connection with the maintenance of school property or equipment, or to physical defects within or on the grounds of school property?' " The action, however, was subsequently dismissed as being improvidently allowed. See Hubbard v. Canton City School Bd. of Edn. (2000), 88 Ohio St.3d 14.

Noteworthy though not the current law, H.B. 350 amended R.C. 2744.02(B)(4) to read: " * * * political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, *and is due to physical defects within or on the grounds of*, buildings that are used in connection with the performance of a governmental function * * *." (Emphasis added.)

***6** In the instant case, we find that no genuine issue of fact exists as to any actual physical defects on school grounds. Appellant has set forth no evidence that the absence of flashers during recess or a fence around the playground constitutes a "physical defect" as contemplated by the statute. Further, there is no evidence that a fence or flashers were required by law.

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With regard to the actual maintenance of the property, appellant contends that the yellow line, or the "border" which the children were not permitted to cross, was faded and thus improperly maintained. As set forth in our analysis of appellant's first assignment of error, appellee admitted that the yellow line was faded.

Based on the foregoing, we find as a matter of law that civil liability under R.C. 2744.02(B)(4) may be imposed. Appellant's second assignment of error is well-taken.

Appellant's third and fourth assignments of error relate directly to the availability of the defenses and immunities under R.C. 2744.03(A). In her third assignment of error, appellant contends that the maintenance of the line was not a discretionary act and, thus, appellee is not entitled to immunity under R.C. 2744.03(A). In her fourth assignment of error, appellant, arguing alternatively, asserts that even assuming that the maintenance of the line was discretionary, issues of material fact exist as to whether appellant acted recklessly.

R.C. 2744.03(A) provides a mechanism by which a defendant may "regain" its immunity status when the activity at issue falls within one of the exceptions under R.C. 2744.02(B). Relevant to the instant case, R.C. 2744.03(A) provides:

"(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

" * * *

"(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

" * * *

"(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the

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judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

In interpreting the above provisions, the Supreme Court of Ohio has held that the nonliability provisions under R.C. 2744.03 must be read more narrowly than the exceptions to immunity under R.C. 2744.02(B), "or the structure of R.C. Chapter 2744 makes no sense at all." Greene Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 561.

*7 As to appellee's potential liability under R.C. 2744.02(B)(3), the Fifth Appellate District has held that where an alleged negligent act of a political subdivision constitutes a nuisance, the "discretionary" defenses under R.C. 2744.03(A)(3) and (5) do not apply. Jones v. Shelly Co. (1995), 106 Ohio App.3d 440, 445, citing Scheck v. Licking Cty. Comm'rs. (July 18, 1991), Licking App. No. CA-3573, unreported.

The Supreme Court of Ohio has also suggested that the maintenance of a nuisance does not involve the type of discretion contemplated in R.C. 2744.03(A)(3) and (5). Franks v. Lopez, 69 Ohio St.3d at 349. Specifically, the Franks court, addressing a township's failure to maintain existing signage, stated:

"Overhanging branches and foliage which obscure traffic signs, malfunctioning traffic signals, signs which have lost their capacity to reflect, or even physical impediments such as potholes, are easily discoverable, and the elimination of such hazards involves no discretion, policy-making or engineering judgment. The political subdivision has the responsibility to abate them and it will not be immune from liability for its failure to do so." *Id.*

See, also, Cater v. Cleveland, 83 Ohio St.3d 24, 30-31, where the court found that R.C. 2744.02(B)(3) was applicable and that it was for the trier of fact to determine whether the city created an unreasonable risk of harm.

Regarding the liability provision under R.C. 2744.02(B)(4), the Supreme Court of Ohio, in Perkins v. Norwood City Schools (1999), 85 Ohio St.3d 191, found that:

"the decision of whom to employ to repair a leaking drinking fountain is not the type of decision involving the exercise of judgment or discretion contemplated in R.C. 2744.03(A)(5). Such a decision, under the facts of this case, is a routine maintenance decision requiring little judgment or discretion." *Id.* at 193

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In Hall v. Ft. Frye Loc. School Dist. Bd. of Edn. (1996), 111 Ohio App.3d 690, the appellant was injured when he stepped on an exposed sprinkler head during football practice on his high school practice field. Id. at 693. Finding that the R.C. 2744.03(B)(5) defense to liability was not available, the court distinguished the board's decision to purchase and install the sprinkler system from maintenance of the system. Id. at 699-700. The court noted that the installation of the sprinkler system was a discretionary act which was immunized from liability. Id. at 700. As to maintenance, however, the court stated:

"[T]he maintenance of the school's irrigation system by appellee's employees is a totally separate matter that does not involve the exercise of such judgment or discretion. The decision to allocate resources, *i.e.*, 'how to use, equipment * * * or facilities,' has been made and is immunized. However, once that policy is put into effect, appellee's maintenance procedures must be performed in a reasonably safe manner. If the evidence establishes that appellee negligently maintained the irrigation system through arbitrary and random attempts to cover the sprinkler heads, liability may be imposed pursuant to R.C. 2744.02(B)(4)." Id.

*8 Appellee, in response to appellant's arguments relative to R.C. 2744.03(B)(5), cites this court's decision captioned Banchich v. Port Clinton Pub. School Dist. (1989), 64 Ohio App.3d 376. In Banchich, we determined that R.C. 2744.03(A)(5) was available as a defense to the manner in which a teacher instructed and supervised his students and his maintenance and inspection of a power jointer used in carpentry class. Id. at 378.

Upon review, we agree with appellant that the more recent pronouncement of law in Perkins, supra, is applicable in this case. The decision to place the yellow line on the playground for the purpose of using it as a portion of the southern boundary falls within the defenses to liability as a "discretionary" act. However, once the line was in place and the children were instructed to stay north of the line, the maintenance of the line *cannot* be considered a discretionary act. Accordingly, the defenses and immunities set forth in R.C. 2744.03(A)(3) and (5) are not applicable in this case and appellee may be exposed to civil liability under R.C. 2744.02(B)(3) and (4).

Accordingly, appellant's third assignment of error is well-taken. Based upon our disposition of appellant's third assignment of error, we find appellant's fourth assignment of error moot.

In appellant's fifth and final assignment of error she claims that the trial court erred when it failed to find R.C. Chapter 2744 unconstitutional. This claim was rejected in appellant's prior appeal in this matter and we find that it is barred by the doctrine of *res judicata*. See Beck v. Adam Wholesalers of

Toledo, Inc. (June 2, 2000), Sandusky App. No. S-99-018, unreported.
Appellant's fifth assignment of error is not well-taken.

On consideration whereof, we find that substantial justice has not been done the party complaining, and the judgment of the Sandusky County Court of Common Pleas is reversed and the case is remanded for further proceedings consistent with this decision. Court costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

RESNICK and KNEPPER, JJ., PIETRYKOWSKI, P.J., concur.

Ohio App. 6 Dist., 2001.

Beck ex rel. Estate of Beck v. Adam Wholesalers of Toledo, Inc.
Not Reported in N.E.2d, 2001 WL 1155820 (Ohio App. 6 Dist.)

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Not Reported in N.E.2d, 2005 WL 2364817 (Ohio Ct.Cl.), 2005 -Ohio- 5069

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

Court of Claims of Ohio.
John D. ROBERTSON, Individ., etc. Plaintiff
v.
DEPARTMENT OF PUBLIC SAFETY, etc., et al. Defendants
No. 2001-09214.
Sept. 12, 2005.

Background: Decedent's estate brought action against Department of Public Safety as result of fatal accident that occurred when decedent's vehicle was struck by vehicle being operated by highway patrol trooper during high speed chase.

Holding: The Court of Claims, Bettis, J., held that trooper engaged in both willful and wanton misconduct for which Department could be held liable. Claim granted.

Robert F. Linton, Jr., Stephen T. Keefe, Jr., Cleveland, Ohio, Janet McCamley, Beachwood, Ohio, for Plaintiff.

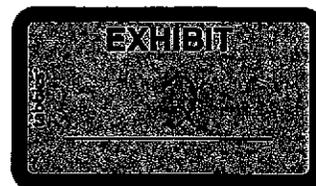
Peter E. DeMarco, James P. Dinsmore, Assistant Attorneys General, Columbus, Ohio, for Defendants.

DECISION

BETTIS, J.

*1 {¶ 1} Plaintiff brought this action asserting survivorship and wrongful death claims on behalf of the heirs and next of kin of decedent. Joseph Robertson. The claims arise as result of a fatal accident that occurred when Robertson's vehicle was struck by a vehicle being operated by Trooper Lee Sredniawa, an employee of defendant, the Ohio State Highway Patrol (OSHP). At the time, Sredniawa was responding to an emergency call. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} At issue is OSHP's liability under the provision that creates an exception to governmental immunity, as set forth in R.C. 2744.02(B)(1) which provides in pertinent part:



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{¶ 3} " * * * political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority."

{¶ 4} The statute provides a defense to such liability where: "[a] member of a municipal corporation police department *or any other police agency* was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct [.]" (Emphasis added.) R.C. 2744.02(B)(1)(a).

{¶ 5} In *Baum v. Ohio State Highway Patrol*, 72 Ohio St.3d 469, 472, 650 N.E.2d 1347, 1995-Ohio-155, the Supreme Court of Ohio held that, while OSHP is clearly an agency of the state and not a political subdivision, "[i]t would be illogical and unfair to subject state troopers to greater liability than all other officers in the state performing the same duties in the public interest. * * * Accordingly, public policy dictates that a trooper responding to an emergency call be cloaked with the same level of immunity as every other peace officer who might also be responding to that call."

{¶ 6} The court therefore concluded that, in the absence of willful or wanton misconduct, OSHP is immune from liability for injuries caused by patrol officers in the operation of their vehicles while responding to an emergency call. *Id.* at the syllabus.

{¶ 7} There is no dispute that Sredniawa was involved in an emergency call at the time of the accident. The gravamen of this case is whether Sredniawa's conduct was willful or wanton.^{FN1}

FN1. Subsequent to trial, plaintiff withdrew his claim of negligence against OSHP dispatcher Darlene Jones.

{¶ 8} The incident in question occurred on January 11, 2001, in Howland Township, Ohio. It was a Wednesday morning, traffic was light, and the roads were clear and dry. Shortly after 2:00 a.m., Sredniawa observed a vehicle running a red light. He began to follow the vehicle and when he was close enough to signal the driver to make a stop, he activated his overhead lights. The driver slowed down and pulled his vehicle into a nearby parking lot. As Sredniawa followed, he notified his post that he was making the stop and called in the vehicle's license number. However, the driver suddenly accelerated out of the parking lot. Sredniawa then informed his post that the driver was fleeing. Within approximately one minute after calling in the license number, Sredniawa was advised of the address of the individual to whom the vehicle was registered and the probable identity of the driver. It was suspected, and ultimately confirmed, that the driver was Colin Roberts.

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*2 {¶ 9} When Roberts accelerated out of the parking lot, he crossed two lanes of traffic, drove into a ditch, and went through a yard before heading northbound on State Route (S.R.) 46. Sredniawa suspected that Roberts was intoxicated. He then activated his siren and gave chase; his overhead lights were already operating. He called his dispatcher to give his location and the direction he was heading. The call put other law enforcement authorities who were monitoring their radios on notice that a pursuit was in progress. Roberts' vehicle was clocked at speeds of 80 to 85 miles per hour (mph) and Sredniawa observed that it was "all over the road" and nearly crashed several times.

{¶ 10} Roberts' vehicle then turned west onto North River Road. By this time, both Roberts and Sredniawa were driving at speeds in excess of 100 mph. Roberts' vehicle was weaving across the roadway and, at one point, drove left-of-center over the crest of a hill. As the chase continued along North River Road, the surroundings became less rural/residential and more commercial. There were two intersections ahead of the drivers. Roberts sped through the first intersection, at North River and North Roads, still traveling at speeds of approximately 100 mph. Sredniawa noted a Howland police officer at the intersection, slowed somewhat to check for traffic, then continued his pursuit. As he accelerated through the intersection, Roberts gained almost 100 yards on Sredniawa.

{¶ 11} The vehicles then quickly approached the next intersection, at North River and Elm Roads. Joseph Robertson was in his vehicle, stopped for a red light, headed southbound, at that intersection. Also at the intersection was a Bazetta Township police cruiser, driven by Officer Nick Papalas. Papalas was stopped at Joseph's left, with his overhead lights and siren activated. Although he had proceeded to the intersection after hearing of the pursuit on his radio, he and Sredniawa had no means of direct radio communication. As Sredniawa approached the intersection, he noted Papalas' vehicle positioned beside plaintiff's, then went through the intersection against the red light to continue the pursuit. However, as the light turned green for the east and westbound lanes, Joseph drove his vehicle into the intersection where it was struck broadside by Sredniawa's. The two vehicles then struck another vehicle, driven by Bree Masaitas, that had been headed eastbound and was stopped west of the intersection. Joseph Robertson was killed, his passenger, Paul Ottum, was injured and Bree Masaitas was slightly injured.^{FN2} The entire chase lasted two minutes and 27 seconds and covered an area of 3.1 miles.

FN2. A collateral action was filed against Bazetta Township, et al., in the Trumbull County Court of Common Pleas on August 29, 2001. The trial court granted summary judgment in favor of defendants. The stay of proceedings

was then set aside in this court and the case proceeded to trial. Subsequent to this court's liability trial, the Eleventh District Court of Appeals issued an opinion reversing the common pleas court's entry of judgment in favor of defendants. Thereafter, OSHP filed a "notice of change of status of connected case" in this court. As a result of a status conference conducted with the parties on July 27, 2005, this court elected to issue its liability decision notwithstanding R.C. 2743.02(D) and the change of status of the connected case.

{¶ 12} Plaintiff contends that Sredniawa deliberately ignored mandatory duties imposed under OSHP policy and Ohio law and that his conduct was both willful and wanton.

{¶ 13} Defendants argue that Sredniawa had the authority to engage in each and every act that he undertook. Defendants also contend that, after the pursuit began, Sredniawa had the authority to continue the pursuit, to exceed the speed limit, and to go through red lights in the process; thus, he did not purposefully or willfully engage in any wrongful conduct. Further, defendants maintain that the applicable policies and state law do not contain specific limitations of authority but, rather, they encompass some reliance upon experience, judgment, and discretion in the course of a pursuit. It is defendants' position that Sredniawa was an experienced trooper and that he at all times exercised his judgment and discretion in a reasonable manner. Thus, defendants deny liability.

*3 {¶ 14} Both parties presented expert witness testimony in addition to their fact witnesses. Plaintiff called two experts: Michael M. Cosgrove, Ph.D., and Michael J. Hunter. Defendants' expert was Sergeant Charles Jones of OSHP. ^{FN3} The parties also submitted numerous exhibits, including the videotape of the pursuit taken from Sredniawa's vehicle. Upon review of the evidence, the testimony, and post-trial briefs of the parties, the court makes the following determination.

FN3. All three experts were highly qualified and their credentials are well-documented in the record. Briefly, however, Dr. Cosgrove is a nationally recognized authority in police pursuit cases with more than 20 years experience in law enforcement. Michael Hunter is a retired, former OSHP trooper with 28 years of experience, including ten years as a post commander where he was a member of the internal review board for his district. Sergeant Jones received an appointment to OSHP Training Academy and served as course director for the division's Emergency Vehicle Operations course. He is also certified driving instructor for the Ohio Peace Officer Training Academy.

{¶ 15} The parties do not dispute that there is a distinction between "willful" and "wanton" misconduct as those terms are used under R.C. 2744.02(B)(1)(a) and that there is no immunity if an officer's operation of his vehicle in response to an emergency call is either willful or wanton.

{¶ 16} The Supreme Court of Ohio addressed these distinctions in Tighe v. Diamond (1948), 149 Ohio St. 520, 80 N.E.2d 122. With respect to willful misconduct the court stated that it " * * * imports a more positive mental condition prompting an act than does the term 'wanton misconduct.' 'Willful misconduct' implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." (Citations omitted.) Id. at 527, 80 N.E.2d 122.

{¶ 17} Further, the court stated that "[i]n order that one may be guilty of 'willful misconduct,' an actual intention to injure need not be shown." Id. Rather, the intention underlying such misconduct relates to the intent to commit misconduct, not the result. Id.

{¶ 18} With respect to wanton misconduct, the court stated that it "comprehends an entire absence of all care for the safety of others and an indifference to consequences. It implies a failure to exercise any care toward those to whom a duty of care is owing when the probability that harm will result from such failure is great, and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct. Wanton misconduct is positive in nature while mere negligence is naturally negative in character." (Internal citations omitted.) Id. at 526, 80 N.E.2d 122.

{¶ 19} The duty of care owed by Sredniawa is set forth in both OSHP policies and Ohio law. The evidence is clear that he knew, understood, and was trained to follow the same. OSHP Procedure No. 200.06-01, concerning motor vehicle pursuits and roadblocks, states in pertinent part, at section B, that:

{¶ 20} "1. A primary goal of the Division is the protection of life and property while enforcing the traffic and criminal laws of the state.

{¶ 21} "2. Officers of this Division will pursue violators within the limits of safety, while using other methods to identify or arrest the individual.

{¶ 22} "3. A pursuit is only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit.

*4 {¶ 23} "4. The following information must be taken into consideration prior to initiating or continuing a pursuit:

"a. Seriousness of the offense;

"b. Possibility of apprehension;

"c. Area the pursuit will take place in (e.g., business, residential, rural, etc.);

"d. Current traffic volume;

"e. Current road and weather conditions;

"f. What, if any, assistance is available to the officer;

" * * *

"g. Knowledge of the identify of the driver and/or occupants.

{¶ 24} " * * *

{¶ 25} "6. * * * the intent [of the policy] is to provide general guidelines for pursuit that will help ensure apprehensions within the limit of safety."

{¶ 26} In addition, R.C. 4511.03, "Emergency vehicles to proceed cautiously past red or stop signal," provides that:

{¶ 27} "The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign *shall slow down as necessary* for safety to traffic, but *may proceed cautiously* past such red or stop sign or signal *with due regard* for the safety of all persons using the street or highway." (Emphasis added .)

{¶ 28} A review of the language of the above provisions of OSHP policy and Ohio law generally reveals that safety is the paramount concern during a police pursuit. Indeed, Procedure No. 200 .06-01, section H.1., states that: "Pursuit at high speeds is extremely dangerous. Any tactic contemplated at high speed must take into consideration all of the factors surrounding the incident. Safety is always the foremost factor to be considered." Moreover, the evidence shows that OSHP trains its troopers that there are no exceptions to their mandatory duties during a high-speed pursuit and that adherence or non-adherence to these safety statutes may also impact whether an officer's conduct during a pursuit is deemed willful or wanton.

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{¶ 29} In this case, the speed at which Sredniawa was driving when he entered the North River and Elm Road intersection is the conduct of most concern. While there were no hazardous or adverse road or weather conditions, and other officers had heard of the pursuit on their radios and were available to assist, other factors warranted caution. Applying the criteria set forth in Procedure No. 200.06-01, Section B 4(a)-(g), Sredniawa's own testimony establishes that, by the time he reached this last intersection, he knew: 1) that he had been pursuing an offender who had committed only a minor traffic violation; that the offender might be driving under the influence; 2) that the offender had gained ground and that the possibility of apprehension had diminished; 3) that the area of the pursuit had changed from rural to a commercial; 4) that there was likely to be increased traffic in the area because of several 24-hour businesses located near the intersection; 5) that a well-known feature of the road was a hill approximately 200-300 feet from the intersection that limited the view of drivers approaching or waiting at the intersection; 6) that he did not know whether Papalas "was there" to join in the pursuit or whether he actually had the intersection secured; and 7) that he had been provided with identifying information concerning the registered owner of the vehicle which he was pursuing.

*5 {¶ 30} Additionally, as Sredniawa approached the North River and Elm Road intersection, he knew that he had a mandatory duty under R.C. 4511.03 to slow down as necessary, proceed cautiously, and to act with due regard for the safety of the public. According to the testimony of both of plaintiff's experts, adherence to these mandates requires that an officer slow his vehicle to a speed which would permit him to stop if traffic came into the intersection.

{¶ 31} The testimony of plaintiff's expert Michael Hunter was particularly persuasive regarding the question of Sredniawa's speed as he approached and drove through the North River and Elm Road intersection. Hunter noted that Sredniawa's vehicle was traveling at 71 mph, or 105 feet per second as it entered the intersection. According to his calculations, if Sredniawa had slowed to within the speed limit of 35 mph, or approximately 51 feet per second, it would have doubled his time to view and ascertain whether the intersection could be entered safely. Hunter opined that if Joseph Robertson had continued into the intersection at the speed he was traveling (about 10 mph), and Sredniawa had braked to the speed limit (but still traveled through the red light), no collision would have occurred, even if Sredniawa did not brake any further in reaction to the presence of Joseph's vehicle. Instead, however, the evidence shows that Sredniawa's vehicle actually accelerated two seconds prior to the collision, just as Joseph Robertson's vehicle was moving into the intersection.

{¶ 32} The testimony of plaintiff's expert Dr. Cosgrove was particularly persuasive on the question of whether Sredniawa complied with OSHP policies. For example, Cosgrove emphasized that Sredniawa knew and was trained to follow Procedure No. 200.06-01, section B(3), which clearly states that a pursuit is "only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit." In Cosgrove's opinion, there was a low need to apprehend in this case compared with the high risk of danger to the public that Sredniawa's pursuit of Roberts involved. He stated with conviction that: "the only thing more dangerous than a drunk driver on the roads is an officer chasing a drunk driver." He also stated that once a pursuit is terminated, the recklessness of fleeing drivers typically decreases from the level generated by the pursuit. Cosgrove was critical of Sredniawa's conduct and lack of adherence to OSHP policy and Ohio law at several points, not just at the North River and Elm Road intersection. He opined that the pursuit should have ended when Roberts turned left off S.R. 46 and on to North River Road because of the commercial area ahead.

{¶ 33} In contrast, defendants' expert, Sergeant Jones, opined that Sredniawa's conduct throughout the pursuit was reasonable, appropriate, and well within OSHP policy. He noted that Sredniawa had a duty under R.C. 5503.02 to enforce Ohio's criminal and traffic laws. In Jones' view, Sredniawa's decision to initiate the pursuit of Roberts was in accordance with that duty and was justified by probable cause. Jones maintained that, as the pursuit continued and Roberts' driving became increasingly reckless, it became more necessary to apprehend him. Jones opined that Sredniawa acted in accordance with his duty and in the public interest by continuing his efforts to apprehend Roberts. He also noted that knowledge of the registered owner of a vehicle was not enough for Sredniawa to make a positive identification because it was possible that the vehicle was stolen or illegally acquired. With respect to Sredniawa's conduct at the North River and Elm Road intersection, Jones noted that Roberts had sped through the intersection at more than 100 mph whereas Sredniawa's speed was calculated at about 70 mph at that point; he opined that the 30 mph speed difference demonstrated that Sredniawa did, in fact, reduce his speed before entering the intersection.

*6 {¶ 34} As noted previously, all three experts were highly qualified, competent witnesses. However, the court finds that the testimony of plaintiff's experts was more consistent with the totality of the evidence and more credible than that of Sergeant Jones. Based upon the totality of the evidence, the court finds that Sredniawa engaged in willful misconduct as he approached and entered the North River and Elm Road intersection. Until that point, the court finds that he acted reasonably and within his authority.

{¶ 35} The approach to the North River and Elm Road intersection is significant for several reasons. Foremost, there was the hill on North River Road of which Sredniawa was well aware. He was also well aware that the hill obstructed his view of vehicles at the intersection and limited those drivers' view of his approaching vehicle. Roberts had shown no sign of slowing down and was continuing to drive extremely dangerously. Sredniawa had already lost ground when he braked at the previous intersection. Sredniawa also knew that, unlike the previous intersections, there were 24-hour business establishments in the area where there was likely to be traffic. The evidence of record amply demonstrates that if Sredniawa was going to slow down significantly prior to entering the intersection, he needed to begin to do so very close to the time that he crested the North River Road hill.

{¶ 36} It is also significant that Sredniawa did not know for sure that Papalas had secured the intersection and that plaintiff was not going to proceed into the intersection when his light turned green. He had no direct communication with Papalas. He acknowledged that he had a duty to slow down as necessary for safety to other motorists and to proceed with due regard whether or not there was an officer present at the intersection. He acknowledged that he could not assume anything when engaged in a high-speed pursuit.

{¶ 37} Lastly, it is significant that Sredniawa was an experienced trooper with an exemplary record for identifying and apprehending drunk drivers. He was deservedly proud of his record. However, the evidence is clear that he knew and understood that a high-speed pursuit is justified only when the necessity of the apprehension outweighs the level of danger created by the pursuit. When asked whether the pursuit in question had been worth it, Sredniawa replied that the question was unfair; that he had arrested a lot of drunk drivers, had probably saved some lives as a result, that he would not do anything different in retrospect, and that he was doing his job.

{¶ 38} Based upon these factors, and considering all of the evidence and testimony presented, the court finds that Sredniawa did not simply make a bad judgment call at this point in the pursuit but, rather, that he had determined before he even crested the hill that he was going to continue to pursue Roberts instead of discharging the duties he knew that he was required to perform for the safety of motorists at the intersection. Instead of slowing down as necessary for safety to other motorists, the evidence establishes that Sredniawa chose to accelerate through the intersection in order to keep pace with the fleeing suspect. Accordingly, the court concludes that Sredniawa intentionally deviated from a clear duty, that he acted with a deliberate purpose not to discharge his mandatory safety duties, and that he purposefully engaged in wrongful conduct with full knowledge that high-

speed pursuits are extremely dangerous and that the likelihood of injury was high if another motorist entered the intersection as he sped through it. As such, his conduct was willful. See Tighe v. Diamond, supra, at 527, 80 N.E.2d 122.

*7 {¶ 39} As noted previously, the court must also examine the question whether Sredniawa engaged in wanton misconduct. In order to reach that conclusion, the court must find an entire absence of all care for the safety of others and an indifference to consequences. Defendants argue that the fact that Sredniawa had on his overhead lights and siren, and that he slowed to some degree before entering the intersection, demonstrates that he exercised some care. The court disagrees.

{¶ 40} In Hunter v. City of Columbus (2000), 139 Ohio App.3d 962, 746 N.E.2d 246, the Tenth District Court of Appeals rejected that same argument, stating that it was "a simplistic analysis." While recognizing that the fact that the lights and siren were on is a matter that can be considered, the court noted that "[u]nder that criteria, you could drive an emergency vehicle in any manner that you please and not be guilty of wanton or reckless misconduct simply because you activated your siren and lights. Even looking where you are going or applying one's brakes meets the literalistic, but not legal, definition of 'any care.' If 'any care' is construed in that fashion, the exception becomes virtually meaningless." Id. at 970, 746 N.E.2d 246. Thus, the court concluded that "the driver's conduct must be evaluated based upon all of the circumstances at the time." Id. at 971, 746 N.E.2d 246.

{¶ 41} While the standard for wanton misconduct is different than that for willful misconduct, many of the same facts are relevant to the analysis. For example, even though Sredniawa had on his lights and sirens, he knew that his view of the intersection was obstructed by the hill leading up to it. As such, the effectiveness of his lights and sirens as warning devices was at a minimum. Moreover, as in Hunter, supra, at 968, 746 N.E.2d 246, the conduct occurred in the winter season; thus, "an operator of an emergency vehicle can reasonably assume that drivers have more difficulty hearing sirens because of the car windows being closed and radios and heaters being operated." The testimony shows that, as Sredniawa was approaching the intersection, he could not hear Papalas' siren because it was masked by his own; thus, it is reasonable that Joseph Robertson's ability to hear Sredniawa's siren would have been masked by the sound of Papalas'.

{¶ 42} Again, as discussed in connection with the analysis of willful misconduct, Sredniawa knew that he was required, without exception, to approach the intersection with caution and to slow down to a speed that would permit him to stop if traffic came into the intersection. He knew that

there are no exceptions to the duties imposed on him under OSHP policy and Ohio law, and that R.C. 4511.03 prohibited heedlessly running a red light in the course of a high-speed pursuit. Nevertheless, Sredniawa acknowledged that, upon noticing Joseph Robertson's vehicle at the intersection, he could not make eye contact with the driver, or see that there was a passenger in the vehicle, because his view was blocked by Papalas' vehicle. He had no idea what Papalas' intentions were, and no idea what Joseph Robertson could or could not see.

*8 {¶ 43} In light of this evidence, and considering all of the surrounding circumstances, the court concludes that Sredniawa also engaged in wanton misconduct in that he failed to exercise any care for the safety of others and his actions demonstrate an indifference to the consequences.

{¶ 44} In summary, the court concludes that Sredniawa engaged in both willful and wanton misconduct for which defendants can be held liable. Judgment shall, therefore, be entered in plaintiff's favor.

{¶ 45} Finally, at the close of the proceedings, plaintiff asserted a claim of spoliation concerning the destruction of OSHP's internal investigation documents of Sredniawa's conduct.

{¶ 46} The elements of a claim for spoliation of evidence, are as follows: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]" Smith v. Howard Johnson Co., Inc., 67 Ohio St.3d 28, 29, 615 N.E.2d 1037, 1993-Ohio-229.

{¶ 47} Here, in light of the abundance of other evidence that plaintiff received and presented, it cannot be said that plaintiff was prejudiced or that his case was disrupted. Further, the court is not convinced that the destruction of the documents was "willful" in the sense that there was "an intentional and wrongful commission of the act." See White v. Ford Motor Co. (2001), 142 Ohio App.3d 384, 387, 755 N.E.2d 954. Accordingly, the spoliation claim is DENIED.

JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages phase of the trial. The court

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shall issue a separate entry scheduling a date for the trial on the issue of damages.

Ohio Ct.Cl., 2005.

Robertson v. Dept. of Public Safety

Not Reported in N.E.2d, 2005 WL 2364817 (Ohio Ct.Cl.), 2005 -Ohio- 5069

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXVII. COURTS--GENERAL PROVISIONS--SPECIAL REMEDIES
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

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2744.02 POLITICAL SUBDIVISION NOT LIABLE FOR INJURY, DEATH, OR LOSS; EXCEPTIONS (PRE 1996 H 350 VERSION)

<Note: See also following versions, note under Notes of Decisions, and casenote for Ohio Academy of Trial Lawyers v Sheward.>

(A) (1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

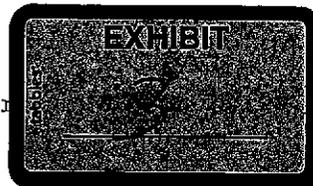
(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental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

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

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

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license



issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

CREDIT(S)

(1994 S 221, eff. 9-28-94; 1989 H 381, eff. 7-1-89; 1985 H 176)

<Note: See also following versions, note under Notes of Decisions, and casenote for Ohio Academy of Trial Lawyers v Sheward.>

R.C. § 2744.02

OH ST § 2744.02

END OF DOCUMENT

R.C. § 3319.39

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXXIII. EDUCATION--LIBRARIES
CHAPTER 3319. SCHOOLS--SUPERINTENDENT; TEACHERS; EMPLOYEES
RECORDS AND REPORTS

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**3319.39 CRIMINAL RECORDS CHECK; DISQUALIFICATION FROM
EMPLOYMENT**

(A)(1) Except as provided in division (F)(2)(b) of section 109.57 of the Revised Code and division (I) of this section, the appointing or hiring officer of the board of education of a school district, the governing board of an educational service center, or of a chartered nonpublic school shall request the superintendent of the bureau of criminal identification and investigation to conduct a criminal records check with respect to any applicant who has applied to the school district, educational service center, or school for employment in any position as a person responsible for the care, custody, or control of a child. If the applicant does not present proof that the applicant has been a resident of this state for the five-year period immediately prior to the date upon which the criminal records check is requested or does not provide evidence that within that five-year period the superintendent has requested information about the applicant from the federal bureau of investigation in a criminal records check, the appointing or hiring officer shall request that the superintendent obtain information from the federal bureau of investigation as a part of the criminal records check for the applicant. If the applicant presents proof that the applicant has been a resident of this state for that five-year period, the appointing or hiring officer may request that the superintendent include information from the federal bureau of investigation in the criminal records check.

(2) A person required by division (A)(1) of this section to request a criminal records check shall provide to each applicant a copy of the form prescribed pursuant to division (C)(2) of section 109.572 of the Revised Code, provide to each applicant a standard impression sheet to obtain fingerprint impressions prescribed pursuant to division (C)(2) of section 109.572 of the



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Revised Code, obtain the completed form and impression sheet from each applicant, and forward the completed form and impression sheet to the superintendent of the bureau of criminal identification and investigation at the time the person requests a criminal records check pursuant to division (A)(1) of this section.

(3) An applicant who receives pursuant to division (A)(2) of this section a copy of the form prescribed pursuant to division (C)(1) of section 109.572 of the Revised Code and a copy of an impression sheet prescribed pursuant to division (C)(2) of that section and who is requested to complete the form and provide a set of fingerprint impressions shall complete the form or provide all the information necessary to complete the form and shall provide the impression sheet with the impressions of the applicant's fingerprints. If an applicant, upon request, fails to provide the information necessary to complete the form or fails to provide impressions of the applicant's fingerprints, the board of education of a school district, governing board of an educational service center, or governing authority of a chartered nonpublic school shall not employ that applicant for any position for which a criminal records check is required pursuant to division (A)(1) of this section.

(B)(1) Except as provided in rules adopted by the department of education in accordance with division (E) of this section and as provided in division (B)(3) of this section, no board of education of a school district, no governing board of an educational service center, and no governing authority of a chartered nonpublic school shall employ a person as a person responsible for the care, custody, or control of a child if the person previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, or a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense, or felonious sexual penetration in violation of former

section 2907.12 of the Revised Code;

(b) A violation of an existing or former law of this state, another state, or the United States that is substantially equivalent to any of the offenses or violations described in division (B)(1)(a) of this section.

(2) A board, governing board of an educational service center, or a governing authority of a chartered nonpublic school may employ an applicant conditionally until the criminal records check required by this section is completed and the board or governing authority receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to division (B)(1) of this section, the applicant does not qualify for employment, the board or governing authority shall release the applicant from employment.

(3) No board and no governing authority of a chartered nonpublic school shall employ a teacher who previously has been convicted of or pleaded guilty to any of the offenses listed in section 3319.31 of the Revised Code.

(C)(1) Each board and each governing authority of a chartered nonpublic school shall pay to the bureau of criminal identification and investigation the fee prescribed pursuant to division (C)(3) of section 109.572 of the Revised Code for each criminal records check conducted in accordance with that section upon the request pursuant to division (A)(1) of this section of the appointing or hiring officer of the board or governing authority.

(2) A board and the governing authority of a chartered nonpublic school may charge an applicant a fee for the costs it incurs in obtaining a criminal records check under this section. A fee charged under this division shall not exceed the amount of fees the board or governing authority pays under division (C)(1) of this section. If a fee is charged under this division, the board or governing authority shall notify the applicant at the time of the applicant's initial application for employment of the amount of the fee and that, unless the fee is paid, the board or governing authority will not consider the applicant for employment.

(D) The report of any criminal records check conducted by the bureau of criminal identification and investigation in accordance with section 109.572 of the Revised Code and pursuant to a request under division (A)(1) of this section is not a public record for the purposes of section 149.43 of the Revised Code and shall not be made available to any person other than the applicant who is the subject of the criminal records check or the applicant's representative, the board or governing authority requesting the criminal records check or its representative, and any court, hearing officer, or other

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necessary individual involved in a case dealing with the denial of employment to the applicant.

(E) The department of education shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this section, including rules specifying circumstances under which the board or governing authority may hire a person who has been convicted of an offense listed in division (B)(1) of this section but who meets standards in regard to rehabilitation set by the department.

(F) Any person required by division (A)(1) of this section to request a criminal records check shall inform each person, at the time of the person's initial application for employment, of the requirement to provide a set of fingerprint impressions and that a criminal records check is required to be conducted and satisfactorily completed in accordance with section 109.572 of the Revised Code if the person comes under final consideration for appointment or employment as a precondition to employment for the school district, educational service center, or school for that position.

(G) As used in this section:

(1) "Applicant" means a person who is under final consideration for appointment or employment in a position with a board of education, governing board of an educational service center, or a chartered nonpublic school as a person responsible for the care, custody, or control of a child, except that "applicant" does not include a person already employed by a board or chartered nonpublic school in a position of care, custody, or control of a child who is under consideration for a different position with such board or school.

(2) "Teacher" means a person holding an educator license, internship certificate, or permit issued under section 3319.22, 3319.28, or 3319.301 of the Revised Code and teachers in a chartered nonpublic school.

(3) "Criminal records check" has the same meaning as in section 109.572 of the Revised Code.

(4) "Minor drug possession offense" has the same meaning as in section 2925.01 of the Revised Code.

(H) If the board of education of a local school district adopts a resolution requesting the assistance of the educational service center in which the local district has territory in conducting criminal records checks of substitute teachers under this section, the appointing or hiring officer of such educational service center shall serve for purposes of this section as the appointing or hiring officer of the local board in the case of hiring substitute

teachers for employment in the local district.

(I) The requirements of this section shall not apply to a person holding a certificate of the type described in section 3319.281 of the Revised Code who applies to a school district or school for employment in an adult instruction position under which that person is not responsible for the care, custody, or control of a child.

As Introduced

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123rd General Assembly

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Regular Session

S. B. No. 187

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1999-2000

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SENATORS JOHNSON-WHITE-CUPP-WATTS

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A B I L L

To amend sections 109.57 and 109.572 and to enact
 section 109.574 of the Revised Code to provide,
 upon the request of a child's parent or guardian,
 for BCII criminal records checks regarding any
 person who is an employee or volunteer of a
 specified type of institution, organization, or
 local government entity that provides specified
 services to children and who regularly has
 unsupervised access to a child.

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BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

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Section 1. That sections 109.57 and 109.572 be amended and
 section 109.574 of the Revised Code be enacted to read as
 follows:

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Sec. 109.57. (A) (1) The superintendent of the bureau of
 criminal identification and investigation shall procure from
 wherever procurable and file for record photographs, pictures,
 descriptions, fingerprints, measurements, and other information
 that may be pertinent of all persons who have been convicted of
 committing within this state a felony, any crime constituting a
 misdemeanor on the first offense and a felony on subsequent
 offenses, or any misdemeanor described in division (A) (1) (a) of

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section 109.572 of the Revised Code, of all children under 43
eighteen years of age who have been adjudicated delinquent 44
children for committing within this state an act that would be a 45
felony or an offense of violence if committed by an adult or who 46
have been convicted of or pleaded guilty to committing within 48

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this state a felony or an offense of violence, and of all 49
well-known and habitual criminals. The person in charge of any 51
county, multicounty, municipal, municipal-county, or 52
multicounty-municipal jail or workhouse, community-based 53
correctional facility, halfway house, alternative residential 54
facility, or state correctional institution and the person in 55
charge of any state institution having custody of a person 56
suspected of having committed a felony, any crime constituting a 58
misdemeanor on the first offense and a felony on subsequent
offenses, or any misdemeanor described in division (A)(1)(a) of 60
section 109.572 of the Revised Code or having custody of a child
under eighteen years of age with respect to whom there is 61
probable cause to believe that the child may have committed an 63
act that would be a felony or an offense of violence if committed 65
by an adult shall furnish such material to the superintendent of 67
the bureau. Fingerprints, photographs, or other descriptive 69
information of a child who is under eighteen years of age, has 70
not been arrested or otherwise taken into custody for committing
an act that would be a felony or an offense of violence if 72
committed by an adult, has not been adjudicated a delinquent 73
child for committing an act that would be a felony or an offense 74
of violence if committed by an adult, has not been convicted of 75
or pleaded guilty to committing a felony or an offense of 78

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violence, and is not a child with respect to whom there is
probable cause to believe that the child may have committed an
act that would be a felony or an offense of violence if committed
by an adult shall not be procured by the superintendent or
furnished by any person in charge of any county, multicounty,
municipal, municipal-county, or multicounty-municipal jail or
workhouse, community-based correctional facility, halfway house,
alternative residential facility, or state correctional
institution, except as authorized in section 2151.313 of the
Revised Code.

(2) Every clerk of a court of record in this state, other

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than the supreme court or a court of appeals, shall send to the
superintendent of the bureau a weekly report containing a summary
of each case involving a felony, involving any crime constituting
a misdemeanor on the first offense and a felony on subsequent
offenses, involving a misdemeanor described in division (A)(1)(a)
of section 109.572 of the Revised Code, or involving an
adjudication that a child under eighteen years of age is a
delinquent child for committing an act that would be a felony or
an offense of violence if committed by an adult. The clerk of
the court of common pleas shall include in the report and summary
the clerk sends under this division all information described in
divisions (A)(2)(a) to (f) of this section regarding a case
before the court of appeals that is served by that clerk. The
summary shall be written on the standard forms furnished by the
superintendent pursuant to division (B) of this section and shall
include the following information:

(a) The incident tracking number contained on the standard

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forms furnished by the superintendent pursuant to division (B) of 116
this section; 117

(b) The style and number of the case; 119

(c) The date of arrest; 121

(d) The date that the person was convicted of or pleaded 123
guilty to the offense, adjudicated a delinquent child for 124
committing the act that would be a felony or an offense of 127
violence if committed by an adult, found not guilty of the
offense, or found not to be a delinquent child for committing an 128
act that would be a felony or an offense of violence if committed 131
by an adult, the date of an entry dismissing the charge, an entry 133
declaring a mistrial of the offense in which the person is 134
discharged, an entry finding that the person or child is not
competent to stand trial, or an entry of a nolle prosequi, or the 135
date of any other determination that constitutes final resolution 136
of the case;

(e) A statement of the original charge with the section of 138

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the Revised Code that was alleged to be violated; 139

(f) If the person or child was convicted, pleaded guilty, 141
or was adjudicated a delinquent child, the sentence or terms of 143
probation imposed or any other disposition of the offender or the 144
delinquent child.

If the offense involved the disarming of a law enforcement 146
officer or an attempt to disarm a law enforcement officer, the 147
clerk shall clearly state that fact in the summary, and the 148
superintendent shall ensure that a clear statement of that fact 149
is placed in the bureau's records.

(3) The superintendent shall cooperate with and assist 151

sheriffs, chiefs of police, and other law enforcement officers in 153
 the establishment of a complete system of criminal identification 154
 and in obtaining fingerprints and other means of identification 155
 of all persons arrested on a charge of a felony, any crime 156
 constituting a misdemeanor on the first offense and a felony on 157
 subsequent offenses, or a misdemeanor described in division 158
 (A)(1)(a) of section 109.572 of the Revised Code and of all 159
 children under eighteen years of age arrested or otherwise taken 161
 into custody for committing an act that would be a felony or an 163
 offense of violence if committed by an adult. The superintendent 165
 also shall file for record the fingerprint impressions of all 166
 persons confined in a county, multicounty, municipal, 167
 municipal-county, or multicounty-municipal jail or workhouse,
 community-based correctional facility, halfway house, alternative 169
 residential facility, or state correctional institution for the 170
 violation of state laws and of all children under eighteen years 172
 of age who are confined in a county, multicounty, municipal, 173
 municipal-county, or multicounty-municipal jail or workhouse, 174
 community-based correctional facility, halfway house, alternative 175
 residential facility, or state correctional institution or in any 177
 facility for delinquent children for committing an act that would 179
 be a felony or an offense of violence if committed by an adult, 180
 and any other information that the superintendent may receive 182

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from law enforcement officials of the state and its political 183
 subdivisions.

(4) The superintendent shall carry out Chapter 2950. of 185
 the Revised Code with respect to the registration of persons who 188
 are convicted of or plead guilty to a sexually oriented offense 189

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and with respect to all other duties imposed on the bureau under 190
that chapter.

(B) The superintendent shall prepare and furnish to every 192
county, multicounty, municipal, municipal-county, or 193
multicounty-municipal jail or workhouse, community-based 194
correctional facility, halfway house, alternative residential 195
facility, or state correctional institution and to every clerk of 196
a court in this state specified in division (A) (2) of this 197
section standard forms for reporting the information required 198
under division (A) of this section. The standard forms that the 200
superintendent prepares pursuant to this division may be in a 201
tangible format, in an electronic format, or in both tangible 202
formats and electronic formats.

(C) The superintendent may operate a center for 204
electronic, automated, or other data processing for the storage 205
and retrieval of information, data, and statistics pertaining to 206
criminals and to children under eighteen years of age who are 207
adjudicated delinquent children for committing an act that would 209
be a felony or an offense of violence if committed by an adult, 210
criminal activity, crime prevention, law enforcement, and 213
criminal justice, and may establish and operate a statewide
communications network to gather and disseminate information, 214
data, and statistics for the use of law enforcement agencies. 215
The superintendent may gather, store, retrieve, and disseminate 217
information, data, and statistics that pertain to children who
are under eighteen years of age and that are gathered pursuant to 218
sections 109.57 to 109.61 of the Revised Code together with 219
information, data, and statistics that pertain to adults and that 220
are gathered pursuant to those sections. 221

(D) The information and materials furnished to the 223
 superintendent pursuant to division (A) of this section and 224
 information and materials furnished to any board or person under 225
 division (F) or (G) of this section are not public records under 226
 section 149.43 of the Revised Code. 227

(E) The attorney general shall adopt rules, in accordance 229
 with Chapter 119. of the Revised Code, setting forth the 230
 procedure by which a person may receive or release information 231
 gathered by the superintendent pursuant to division (A) of this 233
 section. A reasonable fee may be charged for this service. If a 234
 temporary employment service submits a request for a 235
 determination of whether a person the service plans to refer to 236
 an employment position has been convicted of or pleaded guilty to 237
 an offense listed in division (A) (1), (3), (4), or (5) of section 238
 109.572 of the Revised Code, the request shall be treated as a 239
 single request and only one fee shall be charged. 240

(F) (1) As used in division (F) (2) of this section, "head 242
 start agency" means an entity in this state that has been 243
 approved to be an agency for purposes of subchapter II of the 244
 "Community Economic Development Act," 95 Stat. 489 (1981), 42 245
 U.S.C.A. 9831, as amended. 246

(2) (a) In addition to or in conjunction with any request 248
 that is required to be made under section 109.572, 2151.86, 249
 3301.32, 3301.541, 3319.39, 3701.881, 5104.012, 5104.013, 250
 5126.28, 5126.281, or 5153.111 of the Revised Code, the board of 251
 education of any school district; any county board of mental 252
 retardation and developmental disabilities; any entity under 253
 contract with a county board of mental retardation and 254
 developmental disabilities; the chief administrator of any 255

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chartered nonpublic school; the chief administrator of any home 256
 health agency; the chief administrator of or person operating any 257
 child day-care center, type A family day-care home, or type B 258
 family day-care home licensed or certified under Chapter 5104. of 259
 the Revised Code; the administrator of any type C family day-care 260

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home certified pursuant to Section 1 of Sub. H.B. 62 of the 121st 261
 general assembly or Section 5 of Am. Sub. S.B. 160 of the 121st 262
 general assembly; the chief administrator of any head start 263
 agency; or the executive director of a public children services 264
 agency may request that the superintendent of the bureau 265
 investigate and determine, with respect to any individual who has 266
 applied for employment in any position after October 2, 1989, or 267
 any individual wishing to apply for employment with a board of 268
 education may request, with regard to the individual, whether the 270
 bureau has any information gathered under division (A) of this 271
 section that pertains to that individual. On receipt of the 272
 request, the superintendent shall determine whether that 273
 information exists and, upon request of the person, board, or 274
 entity requesting information, also shall request from the 275
 federal bureau of investigation any criminal records it has 276
 pertaining to that individual. Within thirty days of the date 277
 that the superintendent receives a request, the superintendent 279
 shall send to the board, entity, or person a report of any 280
 information that the superintendent determines exists, including 282
 information contained in records that have been sealed under 283
 section 2953.32 of the Revised Code, and, within thirty days of 284
 its receipt, shall send the board, entity, or person a report of 285
 any information received from the federal bureau of 286

investigation, other than information the dissemination of which 287
is prohibited by federal law.

(b) When a board of education is required to receive 289
information under this section as a prerequisite to employment of 290
an individual pursuant to section 3319.39 of the Revised Code, it 291
may accept a certified copy of records that were issued by the 293
bureau of criminal identification and investigation and that are
presented by an individual applying for employment with the 294
district in lieu of requesting that information itself. In such 295
a case, the board shall accept the certified copy issued by the 296
bureau in order to make a photocopy of it for that individual's 297

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employment application documents and shall return the certified 298
copy to the individual. In a case of that nature, a district 299
only shall accept a certified copy of records of that nature 300
within one year after the date of their issuance by the bureau. 302

(3) The state board of education may request, with respect 304
to any individual who has applied for employment after October 2, 305
1989, in any position with the state board or the department of 306
education, any information that a school district board of 307
education is authorized to request under division (F)(2) of this 309
section, and the superintendent of the bureau shall proceed as if 310
the request has been received from a school district board of 311
education under division (F)(2) of this section. 312

(4) When the superintendent of the bureau receives a 314
request for information that is authorized under section 3319.291 315
of the Revised Code, the superintendent shall proceed as if the 316
request has been received from a school district board of 317
education under division (F)(2) of this section. 318

(5) When a recipient of an OhioReads classroom or 321
community reading grant paid under section 3301.86 or 3301.87 of 323
the Revised Code or an entity approved by the OhioReads council 325
requests, with respect to any individual who applies to 326
participate in providing any program or service through an entity 328
approved by the OhioReads council or funded in whole or in part 331
by the grant, the information that a school district board of
education is authorized to request under division (F)(2)(a) of 333
this section, the superintendent of the bureau shall proceed as 334
if the request ~~has~~ HAD been received from a school district board 336
of education under division (F)(2)(a) of this section. 337

(6) WHEN A RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 339
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 340
GOVERNMENT ENTITY REQUESTS, PURSUANT TO SECTION 109.574 OF THE 341
REVISED CODE AND WITH RESPECT TO ANY CURRENT EMPLOYEE OR 342
VOLUNTEER OF THE INSTITUTION, ORGANIZATION, OR ENTITY AS
DESCRIBED IN THAT SECTION, THE INFORMATION THAT A SCHOOL DISTRICT 343

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BOARD OF EDUCATION IS AUTHORIZED TO REQUEST UNDER DIVISION 344
(F)(2)(a) OF THIS SECTION, THE SUPERINTENDENT OF THE BUREAU SHALL 345
PROCEED AS IF THE REQUEST HAD BEEN RECEIVED FROM A SCHOOL 346
DISTRICT BOARD OF EDUCATION UNDER DIVISION (F)(2)(a) OF THIS 347
SECTION, EXCEPT AS SPECIFICALLY PROVIDED OTHERWISE BY SECTION 348
109.574 OF THE REVISED CODE.

(G) In addition to or in conjunction with any request that 351
is required to be made under section 173.41, 3701.881, 3712.09, 352
3721.121, or 3722.151 of the Revised Code with respect to an 354
individual who has applied for employment in a position that 355
involves providing direct care to an older adult, the chief

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administrator of a *PASSPORT* agency that provides services through 356
the *PASSPORT* program created under section 173.40 of the Revised 357
Code, home health agency, hospice care program, home licensed 359
under Chapter 3721. of the Revised Code, adult day-care program 360
operated pursuant to rules adopted under section 3721.04 of the 361
Revised Code, or adult care facility may request that the 363
superintendent of the bureau investigate and determine, with 364
respect to any individual who has applied after January 27, 1997, 366
for employment in a position that does not involve providing 367
direct care to an older adult, whether the bureau has any 368
information gathered under division (A) of this section that 369
pertains to that individual. On receipt of the request, the 370
superintendent shall determine whether that information exists 371
and, on request of the administrator requesting information, 372
shall also request from the federal bureau of investigation any 373
criminal records it has pertaining to that individual. Within 374
thirty days of the date a request is received, the superintendent 375
shall send to the administrator a report of any information 377
determined to exist, including information contained in records 378
that have been sealed under section 2953.32 of the Revised Code, 379
and, within thirty days of its receipt, shall send the 380
administrator a report of any information received from the 381
federal bureau of investigation, other than information the 382

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dissemination of which is prohibited by federal law. 383

(H) Information obtained by a board, administrator, or 386
other person under this section is confidential and shall not be 387
released or disseminated.

(I) The superintendent may charge a reasonable fee for 389

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providing information or criminal records under division (F) (2) 390
or (G) of this section. 391

Sec. 109.572. (A) (1) Upon receipt of a request pursuant 400
to section 2151.86, 3301.32, 3301.541, 3319.39, 5104.012, 401
5104.013, or 5153.111 of the Revised Code, a completed form 403
prescribed pursuant to division (C) (1) of this section, and a set 404
of fingerprint impressions obtained in the manner described in 405
division (C) (2) of this section, the superintendent of the bureau 406
of criminal identification and investigation shall conduct a 407
criminal records check in the manner described in division (B) of 408
this section to determine whether any information exists that 409
indicates that the person who is the subject of the request 410
previously has been convicted of or pleaded guilty to any of the 411
following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 413
2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 414
2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 416
2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 417
2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 418
2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 419
2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 420
2925.06, or 3716.11 of the Revised Code, felonious sexual
penetration in violation of former section 2907.12 of the Revised 421
Code, a violation of section 2905.04 of the Revised Code as it 422
existed prior to July 1, 1996, a violation of section 2919.23 of 423
the Revised Code that would have been a violation of section 425
2905.04 of the Revised Code as it existed prior to July 1, 1996,
had the violation been committed prior to that date, or a 426
violation of section 2925.11 of the Revised Code that is not a 427

minor drug possession offense; 428

(b) A violation of an existing or former law of this 430
state, any other state, or the United States that is 431
substantially equivalent to any of the offenses listed in 432
division (A)(1)(a) of this section.

(2) On receipt of a request pursuant to section 5126.28 of 435
the Revised Code with respect to an applicant for employment in 437
any position with a county board of mental retardation and 438
developmental disabilities or pursuant to section 5126.281 of the 439
Revised Code with respect to an applicant for employment in a 441
position with an entity contracting with a county board for 442
employment in a position that involves providing service directly 443
to individuals with mental retardation and developmental 444
disabilities, a completed form prescribed pursuant to division 445
(C)(1) of this section, and a set of fingerprint impressions 447
obtained in the manner described in division (C)(2) of this 448
section, the superintendent of the bureau of criminal 449
identification and investigation shall conduct a criminal records 451
check. The superintendent shall conduct the criminal records 452
check in the manner described in division (B) of this section to 453
determine whether any information exists that indicates that the 454
person who is the subject of the request has been convicted of or 456
pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 459
2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 460
2905.01, 2905.02, 2905.04, 2905.05, 2907.02, 2907.03, 2907.04, 461
2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.12, 2907.21, 462
2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 463
2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 464

2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 465
or 3716.11 of the Revised Code; 466

(b) An existing or former law of this state, any other 469
state, or the United States that is substantially equivalent to 470
any of the offenses listed in division (A)(2)(a) of this section. 471

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(3) On receipt of a request pursuant to section 173.41, 473
3712.09, 3721.121, or 3722.151 of the Revised Code, a completed 475
form prescribed pursuant to division (C)(1) of this section, and 476
a set of fingerprint impressions obtained in the manner described 477
in division (C)(2) of this section, the superintendent of the 479
bureau of criminal identification and investigation shall conduct 480
a criminal records check with respect to any person who has 481
applied for employment in a position that involves providing 482
direct care to an older adult. The superintendent shall conduct 483
the criminal records check in the manner described in division 484
(B) of this section to determine whether any information exists 486
that indicates that the person who is the subject of the request 487
previously has been convicted of or pleaded guilty to any of the 488
following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 491
2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 492
2905.01, 2905.02, 2905.11, 2905.12, 2907.02, 2907.03, 2907.05,
2907.06, 2907.07, 2907.08, 2907.09, 2907.12, 2907.25, 2907.31, 493
2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 495
2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21,
2913.31, 2913.40, 2913.43, 2913.47, 2913.51, 2919.25, 2921.36, 496
2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.11, 2925.13, 498
2925.22, 2925.23, or 3716.11 of the Revised Code; 499

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(b) An existing or former law of this state, any other 502
state, or the United States that is substantially equivalent to 503
any of the offenses listed in division (A)(3)(a) of this section. 504

(4) On receipt of a request pursuant to section 3701.881 506
of the Revised Code with respect to an applicant for employment 508
with a home health agency as a person responsible for the care, 509
custody, or control of a child, a completed form prescribed 510
pursuant to division (C)(1) of this section, and a set of 511
fingerprint impressions obtained in the manner described in 512
division (C)(2) of this section, the superintendent of the bureau 513
of criminal identification and investigation shall conduct a 514

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criminal records check. The superintendent shall conduct the
criminal records check in the manner described in division (B) of 516
this section to determine whether any information exists that 517
indicates that the person who is the subject of the request 518
previously has been convicted of or pleaded guilty to any of the
following: 519

(a) A violation of section 2903.01, 2903.02, 2903.03, 521
2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 522
2905.01, 2905.02, 2905.04, 2905.05, 2907.02, 2907.03, 2907.04, 523
2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.12, 2907.21, 524
2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 525
2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 526
2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 527
2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code or a 529
violation of section 2925.11 of the Revised Code that is not a 530
minor drug possession offense; 531

(b) An existing or former law of this state, any other 533

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state, or the United States that is substantially equivalent to 534
any of the offenses listed in division (A)(4)(a) of this section. 535

(5) On receipt of a request pursuant to section 3701.881 537
of the Revised Code with respect to an applicant for employment 538
with a home health agency in a position that involves providing 540
direct care to an older adult, a completed form prescribed 541
pursuant to division (C)(1) of this section, and a set of 542
fingerprint impressions obtained in the manner described in 543
division (C)(2) of this section, the superintendent of the bureau 544
of criminal identification and investigation shall conduct a 545
criminal records check. The superintendent shall conduct the
criminal records check in the manner described in division (B) of 547
this section to determine whether any information exists that 548
indicates that the person who is the subject of the request 549
previously has been convicted of or pleaded guilty to any of the
following: 550

(a) A violation of section 2903.01, 2903.02, 2903.03, 553

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2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 554
2905.01, 2905.02, 2905.11, 2905.12, 2907.02, 2907.03, 2907.05,
2907.06, 2907.07, 2907.08, 2907.09, 2907.12, 2907.25, 2907.31, 555
2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 557
2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21,
2913.31, 2913.40, 2913.43, 2913.47, 2913.51, 2919.25, 2921.36, 558
2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.11, 2925.13, 560
2925.22, 2925.23, or 3716.11 of the Revised Code; 561

(b) An existing or former law of this state, any other 563
state, or the United States that is substantially equivalent to 564
any of the offenses listed in division (A)(5)(a) of this section. 565

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(6) When conducting a criminal records check upon a request pursuant to section 3319.39 of the Revised Code for an applicant who is a teacher, the superintendent shall determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any offense specified, in section 3319.31 of the Revised Code.

(7) Not later than thirty days after the date the superintendent receives the request, completed form, and fingerprint impressions, the superintendent shall send the person who made the request any information, other than information the dissemination of which is prohibited by federal law, the superintendent determines exists with respect to the person who is the subject of the request that indicates that the person previously has been convicted of or pleaded guilty to any offense listed or described in division (A) (1), (2), (3), (4), or (5) of this section. The superintendent shall send the person who made the request a copy of the list of offenses specified in division (A) (1), (2), (3), (4), or (5) of this section. If the request was made under section 3701.881 of the Revised Code with regard to an applicant who may be both responsible for the care, custody, or control of a child and involved in providing direct care to an older adult, the superintendent shall provide a list

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of the offenses specified in divisions (A) (4) and (5) of this section.

(B) The superintendent shall conduct any criminal records check requested under section 173.41, 2151.86, 3301.32, 3301.541, 3319.39, 3701.881, 3712.09, 3721.121, 3722.151, 5104.012,

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5104.013, 5126.28, 5126.281, or 5153.111 of the Revised Code as follows:

(1) The superintendent shall review or cause to be reviewed any relevant information gathered and compiled by the bureau under division (A) of section 109.57 of the Revised Code that relates to the person who is the subject of the request, including any relevant information contained in records that have been sealed under section 2953.32 of the Revised Code;

(2) If the request received by the superintendent asks for information from the federal bureau of investigation, the superintendent shall request from the federal bureau of investigation any information it has with respect to the person who is the subject of the request and shall review or cause to be reviewed any information the superintendent receives from that bureau.

(C)(1) The superintendent shall prescribe a form to obtain the information necessary to conduct a criminal records check from any person for whom a criminal records check is required by section 173.41, 2151.86, 3301.32, 3301.541, 3319.39, 3701.881, 3712.09, 3721.121, 3722.151, 5104.012, 5104.013, 5126.28, 5126.281, or 5153.111 of the Revised Code. THE FORM THAT THE SUPERINTENDENT PRESCRIBES PURSUANT TO THIS DIVISION MAY BE IN A TANGIBLE FORMAT, IN AN ELECTRONIC FORMAT, OR IN BOTH TANGIBLE AND ELECTRONIC FORMATS.

(2) The superintendent shall prescribe standard impression sheets to obtain the fingerprint impressions of any person for whom a criminal records check is required by section 173.41, 2151.86, 3301.32, 3301.541, 3319.39, 3701.881, 3712.09, 3721.121, 3722.151, 5104.012, 5104.013, 5126.28, 5126.281, or 5153.111 of

the Revised Code. Any person for whom a records check is 629
required by any of those sections shall obtain the fingerprint 630
impressions at a county sheriff's office, municipal police
department, or any other entity with the ability to make 632
fingerprint impressions on the standard impression sheets
prescribed by the superintendent. The office, department, or 633
entity may charge the person a reasonable fee for making the 634
impressions. THE STANDARD IMPRESSION SHEETS THAT THE 635
SUPERINTENDENT PRESCRIBES PURSUANT TO THIS DIVISION MAY BE IN A 637
TANGIBLE FORMAT, IN AN ELECTRONIC FORMAT, OR IN BOTH TANGIBLE AND 638
ELECTRONIC FORMATS.

(3) Subject to division (D) of this section, the 640
superintendent shall prescribe and charge a reasonable fee for 641
providing a criminal records check requested under section 642
173.41, 2151.86, 3301.32, 3301.541, 3319.39, 3701.881, 3712.09, 644
3721.121, 3722.151, 5104.012, 5104.013, 5126.28, 5126.281, or 645
5153.111 of the Revised Code. The person making a criminal 646
records request under section 173.41, 2151.86, 3301.32, 3301.541, 647
3319.39, 3701.881, 3712.09, 3721.121, 3722.151, 5104.012, 648
5104.013, 5126.28, 5126.281, or 5153.111 of the Revised Code 650
shall pay the fee prescribed pursuant to this division. A person 651
making a request under section 3701.881 of the Revised Code for a 652
criminal records check for an applicant who may be both
responsible for the care, custody, or control of a child and 653
involved in providing direct care to an older adult shall pay one 654
fee for the request.

(D) A determination whether any information exists that 656
indicates that a person previously has been convicted of or 657
pleaded guilty to any offense listed or described in division. 658

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(A) (1) (a) or (b), (A) (2) (a) or (b), (A) (3) (a) or (b), (A) (4) (a) 659
or (b), or (A) (5) (a) or (b) of this section that is made by the 660
superintendent with respect to information considered in a 661
criminal records check in accordance with this section is valid 662
for the person who is the subject of the criminal records check 663

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for a period of one year from the date upon which the 664
superintendent makes the determination. During the period in 665
which the determination in regard to a person is valid, if 666
another request under this section is made for a criminal records 667
check for that person, the superintendent shall provide the 668
information that is the basis for the superintendent's initial 669
determination at a lower fee than the fee prescribed for the 670
initial criminal records check.

(E) As used in this section: 672

(1) "Criminal records check" means any criminal records 674
check conducted by the superintendent of the bureau of criminal 676
identification and investigation in accordance with division (B) 677
of this section.

(2) "Minor drug possession offense" has the same meaning 679
as in section 2925.01 of the Revised Code. 680

(3) "Older adult" means a person age sixty or older. 682

Sec. 109.574. (A) AS USED IN THIS SECTION: 684

(1) "CURRENT EMPLOYEE OR VOLUNTEER" MEANS ANY PERSON WHO, 686
AT THE TIME IN QUESTION AND REGARDLESS OF WHETHER THE PERSON 687
COMMENCED THE PERSON'S EMPLOYMENT OR VOLUNTEER STATUS PRIOR TO, 688
ON, OR AFTER THE EFFECTIVE DATE OF THIS SECTION, IS EMPLOYED ON A 690
FULL-TIME OR PART-TIME BASIS, OR IS A VOLUNTEER ON A FULL-TIME OR 691
PART-TIME BASIS, IN ANY POSITION THAT ENABLES THE PERSON ON A 692

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REGULAR BASIS TO HAVE UNSUPERVISED ACCESS TO A CHILD.

(2) "CRIMINAL RECORDS CHECK" HAS THE SAME MEANING AS IN 695
SECTION 109.572 OF THE REVISED CODE.

(3) "UNSUPERVISED ACCESS TO A CHILD" MEANS THAT THE PERSON 698
IN QUESTION HAS ACCESS TO A CHILD AND THAT EITHER OR BOTH OF THE 699
FOLLOWING APPLY:

(a) NO OTHER PERSON OVER EIGHTEEN YEARS OF AGE IS PRESENT 702
IN THE SAME ROOM WITH THE CHILD, OR, IF OUTDOORS, NO OTHER PERSON 703
IS WITHIN A THIRTY-YARD RADIUS OF THE CHILD. 704

(b) THE PERSON IN QUESTION ESTABLISHES OR ATTEMPTS TO 706
ESTABLISH A RELATIONSHIP OF TRUST WITH THE CHILD. 707

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(B) (1) (a) SUBJECT TO DIVISION (G) OF THIS SECTION, A 710
RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR
SERVICE INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY 711
THAT PROVIDES CARE, TREATMENT, EDUCATION, TRAINING, INSTRUCTION, 712
SUPERVISION, OR RECREATION TO CHILDREN SHALL REQUEST THE 713
SUPERINTENDENT OF THE BUREAU OF CRIMINAL IDENTIFICATION AND 714
INVESTIGATION TO CONDUCT, IN ACCORDANCE WITH DIVISION (F) (6) OF 715
SECTION 109.57 OF THE REVISED CODE, A CRIMINAL RECORDS CHECK WITH 716
RESPECT TO ANY CURRENT EMPLOYEE OR VOLUNTEER OF THE INSTITUTION, 717
ORGANIZATION, OR ENTITY WHO ON A REGULAR BASIS HAS UNSUPERVISED 719
ACCESS TO A CHILD IF BOTH OF THE FOLLOWING APPLY:

(i) A PARENT OR GUARDIAN OF A CHILD FOR WHOM THE 721
INSTITUTION, ORGANIZATION, OR LOCAL GOVERNMENT ENTITY PROVIDES 722
SERVICES MAKES A WRITTEN REQUEST TO THE INSTITUTION, 723
ORGANIZATION, OR ENTITY THAT A CRIMINAL RECORDS CHECK BE 724
CONDUCTED WITH RESPECT TO THAT EMPLOYEE OR VOLUNTEER. 725

(ii) THE PARENT OR GUARDIAN PAYS THE FEE IDENTIFIED IN 727

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DIVISION (D) OF THIS SECTION. 728

(b) THE REQUEST FOR A CRIMINAL RECORDS CHECK THAT A 730
RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR 731
SERVICE INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY IS 732
REQUIRED TO MAKE UNDER DIVISION (B) (1) (a) OF THIS SECTION SHALL 733
CONSIST OF A REQUEST FOR THE INFORMATION A SCHOOL DISTRICT BOARD 735
OF EDUCATION MAY REQUEST UNDER DIVISION (F) (2) (a) OF SECTION 736
109.57 OF THE REVISED CODE AND SHALL BE ACCOMPANIED BY THE FORM 737
AND STANDARD IMPRESSION SHEET PRESCRIBED BY THE BUREAU OF 738
IDENTIFICATION AND INVESTIGATION UNDER DIVISION (C) OF SECTION 739
109.572 OF THE REVISED CODE.

(c) IF THE CURRENT EMPLOYEE OR VOLUNTEER IN RELATION TO 741
WHOM A REQUEST IS TO BE MADE UNDER DIVISION (B) (1) OF THIS 743
SECTION DOES NOT PRESENT PROOF THAT THE CURRENT EMPLOYEE OR 744
VOLUNTEER HAS BEEN A RESIDENT OF THIS STATE FOR THE FIVE-YEAR 746
PERIOD IMMEDIATELY PRIOR TO THE DATE UPON WHICH THE CRIMINAL
RECORDS CHECK IS REQUESTED OR DOES NOT PROVIDE EVIDENCE THAT 748

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WITHIN THAT FIVE-YEAR PERIOD THE SUPERINTENDENT HAS REQUESTED 749
INFORMATION ABOUT THE CURRENT EMPLOYEE OR VOLUNTEER FROM THE 750
FEDERAL BUREAU OF INVESTIGATION IN A CRIMINAL RECORDS CHECK, THE 751
RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR 752
SERVICE INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY 753
MAKING THE REQUEST SHALL REQUEST THAT THE SUPERINTENDENT OBTAIN 754
INFORMATION FROM THE FEDERAL BUREAU OF INVESTIGATION AS PART OF
THE CRIMINAL RECORDS CHECK FOR THE CURRENT EMPLOYEE OR VOLUNTEER. 755
IF THE CURRENT EMPLOYEE OR VOLUNTEER PRESENTS PROOF THAT THE 756
CURRENT EMPLOYEE OR VOLUNTEER HAS BEEN A RESIDENT OF THIS STATE 757
FOR THAT FIVE-YEAR PERIOD, THE RELIGIOUS, CHARITABLE, SCIENTIFIC, 758

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EDUCATIONAL, ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR 759
LOCAL GOVERNMENT ENTITY MAY REQUEST THAT THE SUPERINTENDENT 760
OBTAIN INFORMATION FROM THE FEDERAL BUREAU OF INVESTIGATION AS 761
PART OF THE CRIMINAL RECORDS CHECK. 762

(d) THE SUPERINTENDENT OF THE BUREAU OF CRIMINAL 764
IDENTIFICATION AND INVESTIGATION SHALL PERFORM A CRIMINAL RECORDS 765
CHECK REQUESTED UNDER DIVISION (B) (1) (a) OF THIS SECTION IN 766
ACCORDANCE WITH DIVISION (E) (6) OF SECTION 109.57 OF THE REVISED 767
CODE.

(2) A RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 769
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 770
GOVERNMENT ENTITY REQUIRED BY DIVISION (B) (1) (a) OF THIS SECTION 771
TO REQUEST A CRIMINAL RECORDS CHECK SHALL PROVIDE TO EACH CURRENT 773
EMPLOYEE OR VOLUNTEER IN RELATION TO WHOM A REQUEST IS MADE UNDER 775
DIVISION (B) (1) (a) OF THIS SECTION FOR A CRIMINAL RECORDS CHECK A 776
COPY OF THE FORM PRESCRIBED PURSUANT TO DIVISION (C) (1) OF 778
SECTION 109.572 OF THE REVISED CODE, PROVIDE TO THAT CURRENT 779
EMPLOYEE OR VOLUNTEER A STANDARD IMPRESSION SHEET TO OBTAIN 781
FINGERPRINT IMPRESSIONS PRESCRIBED PURSUANT TO DIVISION (C) (2) OF 782
THAT SECTION, OBTAIN THE COMPLETED FORM AND IMPRESSION SHEET FROM 783
THAT CURRENT EMPLOYEE OR VOLUNTEER, AND FORWARD THE COMPLETED 785
FORM AND IMPRESSION SHEET TO THE SUPERINTENDENT OF THE BUREAU OF 786
CRIMINAL IDENTIFICATION AND INVESTIGATION AT THE TIME THE 787

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INSTITUTION, ORGANIZATION, OR ENTITY REQUESTS A CRIMINAL RECORDS 788
CHECK PURSUANT TO DIVISION (B) (1) (a) OF THIS SECTION WITH RESPECT 790
TO THAT CURRENT EMPLOYEE OR VOLUNTEER.

(3) ANY CURRENT EMPLOYEE OR VOLUNTEER WHO RECEIVES 792
PURSUANT TO DIVISION (B) (2) OF THIS SECTION A COPY OF THE FORM 794

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PRESCRIBED PURSUANT TO DIVISION (C) (1) OF SECTION 109.572 OF THE 796
REVISED CODE AND A COPY OF AN IMPRESSION SHEET PRESCRIBED 797
PURSUANT TO DIVISION (C) (2) OF THAT SECTION AND WHO IS REQUESTED 799
TO COMPLETE THE FORM AND PROVIDE A SET OF FINGERPRINT IMPRESSIONS 800
SHALL COMPLETE THE FORM OR PROVIDE ALL OF THE INFORMATION 801
NECESSARY TO COMPLETE THE FORM AND SHALL PROVIDE THE IMPRESSION 802
SHEET WITH THE IMPRESSIONS OF THE CURRENT EMPLOYEE'S OR 803
VOLUNTEER'S FINGERPRINTS. IF A CURRENT EMPLOYEE OR VOLUNTEER, 804
UPON REQUEST, FAILS TO PROVIDE THE INFORMATION NECESSARY TO 805
COMPLETE THE FORM OR FAILS TO PROVIDE IMPRESSIONS OF THE CURRENT 806
EMPLOYEE'S OR VOLUNTEER'S FINGERPRINTS, THE RELIGIOUS, 807
CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR SERVICE 808
INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY PROMPTLY 809
SHALL REMOVE THE CURRENT EMPLOYEE OR VOLUNTEER FROM ANY POSITION 810
THAT ENABLES THE CURRENT EMPLOYEE OR VOLUNTEER ON A REGULAR BASIS 811
TO HAVE UNSUPERVISED ACCESS TO A CHILD.

(C) (1) EXCEPT AS PROVIDED IN DIVISION (C) (3) OF THIS 813
SECTION, A RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 815
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 816
GOVERNMENT ENTITY THAT REQUESTS A CRIMINAL RECORDS CHECK PURSUANT 817
TO DIVISION (B) OF THIS SECTION PROMPTLY SHALL REMOVE THE CURRENT 818
EMPLOYEE OR VOLUNTEER IDENTIFIED IN THE REQUEST FROM ANY POSITION 819
THAT ENABLES THE CURRENT EMPLOYEE OR VOLUNTEER ON A REGULAR BASIS 820
TO HAVE UNSUPERVISED ACCESS TO A CHILD IF THE INFORMATION 821
REQUESTED UNDER THIS SECTION FROM THE BUREAU OF CRIMINAL
IDENTIFICATION AND INVESTIGATION INDICATES THAT THE CURRENT 822
EMPLOYEE OR VOLUNTEER PREVIOUSLY HAS BEEN CONVICTED OF OR PLEADED 823
GUILTY TO ANY OF THE FOLLOWING OFFENSES: 824

(a) ANY OFFENSE UNDER THE LAW OF THIS STATE THAT IS A 827

FELONY OR ANY OFFENSE UNDER A FORMER LAW OF THIS STATE THAT WAS A 828
FELONY AT THE TIME IT WAS COMMITTED;

(b) ANY OFFENSE COMMITTED UNDER THE LAW OF A STATE OTHER 831
THAN THIS STATE OR UNDER THE LAW OF THE UNITED STATES THAT, IF 832
COMMITTED IN THIS STATE, WOULD BE A FELONY UNDER THE LAW OF THIS 833
STATE;

(c) ANY SEXUALLY ORIENTED OFFENSE, AS DEFINED IN SECTION 836
2950.01 OF THE REVISED CODE, OTHER THAN A VIOLATION OF SECTION 837
2905.03 OF THE REVISED CODE, COMMITTED UNDER THE LAW OF THIS 839
STATE, ANOTHER STATE, OR THE UNITED STATES. 840

(2) UPON RECEIPT OF A NOTIFICATION OF THE RESULTS OF A 842
CRIMINAL RECORDS CHECK FROM THE BUREAU OF CRIMINAL IDENTIFICATION 843
AND INVESTIGATION THAT WAS REQUESTED PURSUANT TO DIVISION (B) OF 844
THIS SECTION, THE RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 845
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 846
GOVERNMENT ENTITY THAT RECEIVES THE NOTIFICATION PROMPTLY SHALL 847
NOTIFY THE PARENT OR GUARDIAN WHO REQUESTED THE CHECK WHETHER THE 849
CHECK SHOWED, OR DID NOT SHOW, THAT THE CURRENT EMPLOYEE OR 850
VOLUNTEER WHO IS THE SUBJECT OF THE CHECK PREVIOUSLY HAS BEEN 851
CONVICTED OF OR PLEADED GUILTY TO ANY OF THE OFFENSES LISTED IN
DIVISION (C) (1) OF THIS SECTION. IF THE CHECK SHOWED THAT THE 853
CURRENT EMPLOYEE OR VOLUNTEER PREVIOUSLY HAS BEEN CONVICTED OF OR 854
PLEADED GUILTY TO ONE OR MORE OF THOSE OFFENSES, THE NOTIFICATION 855
TO THE PARENT OR GUARDIAN SHALL STATE THE FACT OF THE CONVICTION 856
OR GUILTY PLEA BUT SHALL NOT IDENTIFY THE OFFENSE OR OFFENSES. 857
IF THE CURRENT EMPLOYEE OR VOLUNTEER WAS HIRED OR ACCEPTED AS A 858
VOLUNTEER TO THE POSITION THAT ENABLES THE CURRENT EMPLOYEE OR 859
VOLUNTEER ON A REGULAR BASIS TO HAVE UNSUPERVISED ACCESS TO A 860
CHILD AS A RESULT OF THE CURRENT EMPLOYEE OR VOLUNTEER SATISFYING 861

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APPLICABLE REHABILITATION STANDARDS OR PERSONAL CHARACTER 862
STANDARDS ADOPTED BY THE APPROPRIATE REGULATORY ENTITY AS 863
DESCRIBED IN DIVISION (C) (3) OF THIS SECTION, THE NOTIFICATION 864
ALSO SHALL STATE THAT FACT AND THAT THE LAW DOES NOT REQUIRE THE 865
REMOVAL OF THE CURRENT OFFICER OR EMPLOYEE FROM THE POSITION THAT 867

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ENABLES THE CURRENT OFFICER OR EMPLOYEE ON A REGULAR BASIS TO 868
HAVE UNSUPERVISED ACCESS TO A CHILD. IF THE PARENT OR GUARDIAN
OF MORE THAN ONE CHILD REQUESTED A CHECK REGARDING THE SAME 869
CURRENT EMPLOYEE OR VOLUNTEER, THE INSTITUTION, ORGANIZATION, OR 870
ENTITY SHALL PROVIDE THE NOTIFICATION UNDER THIS DIVISION TO EACH 871
REQUESTING PARENT OR GUARDIAN. THIS SECTION DOES NOT REQUIRE THE 873
INSTITUTION, ORGANIZATION, OR ENTITY TO TRANSFER, TERMINATE THE 874
EMPLOYMENT OR VOLUNTEER STATUS, OR IMPOSE ANY OTHER SANCTION,
OTHER THAN THE SANCTION DESCRIBED IN DIVISION (C) (1) OF THIS 875
SECTION, AGAINST A CURRENT EMPLOYEE OR VOLUNTEER WHO IS THE 876
SUBJECT OF A CRIMINAL RECORDS CHECK IF THE CHECK SHOWED THAT THE 877
CURRENT EMPLOYEE OR VOLUNTEER PREVIOUSLY HAS BEEN CONVICTED OF OR 878
PLEADED GUILTY TO ONE OR MORE OF THE OFFENSES LISTED IN DIVISION 879
(C) (1) OF THIS SECTION. 880

(3) A RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 882
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 883
GOVERNMENT ENTITY THAT REQUESTS A CRIMINAL RECORDS CHECK PURSUANT 884
TO DIVISION (B) OF THIS SECTION AND THAT RECEIVES INFORMATION 885
FROM THE BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION 886
PURSUANT TO THE REQUEST THAT INDICATES THAT THE CURRENT EMPLOYEE 887
OR VOLUNTEER IDENTIFIED IN THE REQUEST PREVIOUSLY HAS BEEN 888
CONVICTED OF OR PLEADED GUILTY TO ANY OFFENSE IDENTIFIED IN 889
DIVISION (C) (1) OF THIS SECTION IS NOT REQUIRED TO REMOVE THE 890

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CURRENT EMPLOYEE OR VOLUNTEER FROM A POSITION THAT ENABLES THE 891
CURRENT EMPLOYEE OR VOLUNTEER ON A REGULAR BASIS TO HAVE 892
UNSUPERVISED ACCESS TO A CHILD IF THE CURRENT EMPLOYEE OR 894
VOLUNTEER WAS HIRED OR ACCEPTED AS A VOLUNTEER FOR THAT POSITION 895
AS A RESULT OF THE CURRENT OFFICER OR EMPLOYEE SATISFYING 896
APPLICABLE REHABILITATION STANDARDS OR PERSONAL CHARACTER 897
STANDARDS ADOPTED BY THE APPROPRIATE REGULATORY ENTITY PURSUANT 898
TO DIVISION (E) OF SECTION 2151.86, 3301.32, 3301.541, 3319.39, 899
5104.012, OR 5153.111 OF THE REVISED CODE, DIVISION (E) OF 900
SECTION 173.41, 3701.881, 3712.09, 3721.121, OR 3722.151 OF THE
REVISED CODE, DIVISION (G) OF SECTION 5104.013 OF THE REVISED 901

CODE, OR DIVISION (M) OF SECTION 5126.28 OF THE REVISED CODE. 902

(D) (1) A WRITTEN REQUEST FOR A CRIMINAL RECORDS CHECK 905
SUBMITTED BY A PARENT OR GUARDIAN UNDER DIVISION (B) OF THIS 906
SECTION MAY IDENTIFY MORE THAN ONE CURRENT EMPLOYEE OR VOLUNTEER 907
FOR WHOM THE CHECK IS REQUESTED. 908

(2) IF A PARENT OR GUARDIAN OF A CHILD SUBMITS A WRITTEN 910
REQUEST UNDER DIVISION (B) OF THIS SECTION FOR A CRIMINAL RECORDS 912
CHECK OF ANY CURRENT EMPLOYEE OR VOLUNTEER, THE PARENT OR 913
GUARDIAN, AT THE TIME OF SUBMITTING THE REQUEST, SHALL PAY TO THE 914
RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR 915
SERVICE INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY TO 916
WHICH THE REQUEST WAS SUBMITTED THE FEE, IF ANY, PRESCRIBED 917
PURSUANT TO DIVISION (I) OF SECTION 109.57 OF THE REVISED CODE. 919
THE PARENT OR GUARDIAN SHALL PAY A SEPARATE FEE FOR EACH WRITTEN 920
REQUEST SO SUBMITTED OR, IF MORE THAN ONE CURRENT EMPLOYEE OR 921
VOLUNTEER IS IDENTIFIED ON A WRITTEN REQUEST SO SUBMITTED, FOR 922
EACH CURRENT EMPLOYEE OR VOLUNTEER SO IDENTIFIED ON THE WRITTEN. 923

REQUEST. THE RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 924
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 925
GOVERNMENT ENTITY TO WHICH THE REQUEST WAS SUBMITTED SHALL 926
FORWARD EACH FEE PAID IN RELATION TO THE REQUEST TO THE BUREAU OF 927
CRIMINAL IDENTIFICATION AND INVESTIGATION AT THE SAME TIME THAT 928
THE INSTITUTION, ORGANIZATION, OR ENTITY REQUESTS THE 929
SUPERINTENDENT OF THE BUREAU, PURSUANT TO DIVISION (B) OF THIS 930
SECTION, TO CONDUCT A CRIMINAL RECORDS CHECK OF THE CURRENT 931
EMPLOYEES OR VOLUNTEERS IDENTIFIED IN THE REQUEST. 932

(E) THE REPORT OF ANY CRIMINAL RECORDS CHECK CONDUCTED BY 935
THE BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION PURSUANT 937
TO A REQUEST MADE UNDER DIVISION (B) OF THIS SECTION IS NOT A 938
PUBLIC RECORD FOR THE PURPOSES OF SECTION 149.43 OF THE REVISED 940
CODE AND SHALL NOT BE MADE AVAILABLE TO ANY PERSON OTHER THAN THE 941
CURRENT EMPLOYEE OR VOLUNTEER TO WHOM IT PERTAINS, THE RELIGIOUS, 942
CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR SERVICE 943
INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY REQUESTING 944

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THE CRIMINAL RECORDS CHECK, AND ANY COURT, HEARING OFFICER, OR 945
OTHER NECESSARY INDIVIDUAL INVOLVED IN A CASE DEALING WITH THE 946
CURRENT EMPLOYEE OR VOLUNTEER. THIS DIVISION DOES NOT LIMIT OR 947
RESTRICT THE PROVISION OF INFORMATION PURSUANT TO DIVISION (C) (2) 948
OR (G) (2) OF THIS SECTION TO A PARENT OR GUARDIAN WHO MADE A 950
REQUEST FOR A CRIMINAL RECORDS CHECK OF THE CURRENT EMPLOYEE OR 951
VOLUNTEER.

(F) AT THE TIME OF A PERSON'S INITIAL APPLICATION TO ANY 953
RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR 955
SERVICE INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY 956
FOR APPOINTMENT OR EMPLOYMENT ON A FULL-TIME OR PART-TIME BASIS, 957

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OR AS A VOLUNTEER ON A FULL-TIME OR PART-TIME BASIS, IN ANY 958
POSITION THAT WILL ENABLE THE PERSON ON A REGULAR BASIS TO HAVE 959
UNSUPERVISED ACCESS TO A CHILD, THE INSTITUTION, ORGANIZATION, OR 960
ENTITY SHALL INFORM THE PERSON THAT, IF THE PERSON IS APPOINTED 961
OR EMPLOYED TO OR ACCEPTED AS A VOLUNTEER IN THE POSITION, THE 962
PERSON SUBSEQUENTLY MIGHT BE REQUIRED TO PROVIDE A SET OF 963
IMPRESSIONS OF THE PERSON'S FINGERPRINTS AND A CRIMINAL RECORDS 964
CHECK SUBSEQUENTLY MIGHT BE CONDUCTED WITH RESPECT TO THE PERSON
IN ACCORDANCE WITH DIVISION (B) OF THIS SECTION. NOT LATER THAN 966
THIRTY DAYS AFTER THE EFFECTIVE DATE OF THIS SECTION, EACH 967
RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR 968
SERVICE INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY 969
THAT PROVIDES CARE, TREATMENT, EDUCATION, TRAINING, INSTRUCTION, 970
SUPERVISION, OR RECREATION TO CHILDREN SHALL NOTIFY EACH CURRENT 971
EMPLOYEE OR VOLUNTEER THAT THE CURRENT EMPLOYEE OR VOLUNTEER 972
SUBSEQUENTLY MIGHT BE REQUIRED TO PROVIDE A SET OF IMPRESSIONS OF 973
THE CURRENT EMPLOYEE'S OR VOLUNTEER'S FINGERPRINTS AND THAT A 975
CRIMINAL RECORDS CHECK SUBSEQUENTLY MIGHT BE CONDUCTED WITH
RESPECT TO THE CURRENT EMPLOYEE OR VOLUNTEER IN ACCORDANCE WITH 976
DIVISION (B) OF THIS SECTION. 977

(G) (1) DIVISIONS (B) AND (C) OF THIS SECTION DO NOT APPLY 981
REGARDING ANY CURRENT EMPLOYEE OR VOLUNTEER OF A RELIGIOUS, 982
CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR SERVICE 983

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INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY THAT 984
PROVIDES CARE, TREATMENT, EDUCATION, TRAINING, INSTRUCTION,
SUPERVISION, OR RECREATION TO CHILDREN IF, WITHIN THE 985
TWELVE-MONTH PERIOD PRECEDING THE MAKING OF A REQUEST BY A PARENT 986
OR GUARDIAN FOR A CRIMINAL RECORDS CHECK OF THE CURRENT EMPLOYEE 987

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OR VOLUNTEER PURSUANT TO DIVISION (B) OF THIS SECTION, EITHER OF 988
THE FOLLOWING OCCURRED: 989

(a) THE RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 992
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 993
GOVERNMENT ENTITY REQUESTED A CRIMINAL RECORDS CHECK REGARDING 994
THE CURRENT EMPLOYEE OR VOLUNTEER UNDER SECTION 2151.86, 3301.32, 995
3301.541, 3319.39, 3701.881, 5104.012, 5104.013, OR 5153.111 OF 996
THE REVISED CODE, AND THE CRIMINAL RECORDS CHECK DID NOT REVEAL 998
ANY PRIOR CONVICTION OF OR PLEA OF GUILTY TO AN OFFENSE LISTED IN 999
DIVISION (C) (1) OF THIS SECTION. 1,000

(b) THE RELIGIOUS, CHARITABLE, SCIENTIFIC, EDUCATIONAL, 1,003
ATHLETIC, OR SERVICE INSTITUTION OR ORGANIZATION OR LOCAL 1,004
GOVERNMENT ENTITY REQUESTED A CRIMINAL RECORDS CHECK REGARDING 1,005
THE CURRENT EMPLOYEE OR VOLUNTEER UNDER DIVISION (B) OF THIS 1,006
SECTION, AND THE CRIMINAL RECORDS CHECK DID NOT REVEAL ANY PRIOR 1,007
CONVICTION OF OR PLEA OF GUILTY TO AN OFFENSE LISTED IN DIVISION 1,008
(C) (1) OF THIS SECTION. 1,009

(2) IF A PARENT OR GUARDIAN OF A CHILD MAKES A WRITTEN 1,011
REQUEST PURSUANT TO DIVISION (B) OF THIS SECTION FOR A CRIMINAL 1,013
RECORDS CHECK OF A CURRENT EMPLOYEE OR VOLUNTEER OF A RELIGIOUS, 1,014
CHARITABLE, SCIENTIFIC, EDUCATIONAL, ATHLETIC, OR SERVICE 1,015
INSTITUTION OR ORGANIZATION OR LOCAL GOVERNMENT ENTITY THAT 1,016
PROVIDES CARE, TREATMENT, EDUCATION, TRAINING, INSTRUCTION,
SUPERVISION, OR RECREATION TO CHILDREN, AND IF, PURSUANT TO 1,017
DIVISION (G) (1) OF THIS SECTION, DIVISIONS (B) AND (C) OF THIS 1,019
SECTION DO NOT APPLY REGARDING THE CURRENT EMPLOYEE OR VOLUNTEER, 1,020
THE INSTITUTION, ORGANIZATION, OR ENTITY IS NOT REQUIRED TO 1,021
REQUEST THE SUPERINTENDENT OF THE BUREAU OF CRIMINAL 1,022
IDENTIFICATION AND INVESTIGATION TO CONDUCT A CRIMINAL RECORDS 1,023

CHECK WITH RESPECT TO THAT CURRENT EMPLOYEE OR VOLUNTEER, BUT THE 1,024
INSTITUTION, ORGANIZATION, OR ENTITY PROMPTLY SHALL NOTIFY THE 1,025
PARENT OR GUARDIAN WHO REQUESTED THE CHECK THAT A PRIOR CHECK 1,026
CONDUCTED WITHIN THE PRECEDING TWELVE MONTHS DID NOT SHOW THAT 1,027
THE CURRENT EMPLOYEE OR VOLUNTEER PREVIOUSLY HAS BEEN CONVICTED 1,028
OF OR PLEADED GUILTY TO ANY OFFENSE LISTED IN DIVISION (C) (1) OF 1,030
THIS SECTION.

Section 2. That existing sections 109.57 and 109.572 of 1,032
the Revised Code are hereby repealed. 1,033

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