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Discretion to Follow the Law: The Collision of Ohio's Nursing Home Bill of Rights with Ohio's Political Subdivision Tort Liability Act

Peter Traska Elk & Elk Co., Ltd.

Katherine Knouff

DISCRETION TO FOLLOW THE LAW: THE COLLISION OF OHIO'S NURSING HOME BILL OF RIGHTS WITH OHIO'S POLITICAL SUBDIVISION TORT LIABILITY ACT

PETER TRASKA*
KATHERINE KNOUFF*

* Katherine Knouff is a student at Cleveland Marshall College of Law, J.D.expected May 2009. *Peter Traska is an adjunct professor at the Cleveland-Marshall College of Law. He has taught a section of the appellate practice course for six years. Mr. Traska is also an associate at the law firm of Elk & Elk Co., Ltd., where his practice includes most of the firm's appellate work.

Frank Cramer was a handicapped resident at Auglaize Acres Nursing Home. Auglaize Acres is a county operated nursing home. Mr. Cramer was completely dependent upon Auglaize Acres for his care. In January 2002, Mr. Cramer fell while being assisted to bed by a Hoyer lift operated by two nurses employed by the home. Despite the fall policy not to move Mr. Cramer, the two employees moved him to his bed. Mr. Cramer's condition was not assessed until five hours after he fell despite obvious swelling and bruising and his complaints of pain. During surgery to repair his leg, Mr. Cramer died. Mr. Cramer's estate sued Auglaize Acres for the nurses' alleged negligent acts. Under the Nursing Home Bill of Rights every resident of a nursing home may recover damages upon a showing that the home or any person has violated the patient's rights. Mr. Cramer's codified right to adequate medical care was violated.

The Ohio Supreme Court held that the Nursing Home Bill of Rights allowed a cause of action against the home itself, but not against the home's employees. Further, the Court found that the Ohio Political Subdivision Act might re-immunize

the home for those acts of its employees that were discretionary. Residents of a county home thus do not have the same protections as residents of other nursing homes when the home happens to be owned by the county—a political subdivision.[1]

I. INTRODUCTION

Cramer v. Auglaize Acres curtails the protections of Ohio's Nursing Home Bill of Rights for nursing home[2] residents residing in county owned nursing homes.[3] Generally, all nursing home residents are protected by codified rights.[4] However, the Ohio Supreme Court has interpreted the Ohio Political Subdivision Tort Liability Act to redefine these rights for approximately ten percent of Ohio's nursing home residents. Currently, those residents living in government owned nursing homes are substantially less protected from the tortious acts or omissions of the nursing home's employees.

Since the enactment of Medicare and Medicaid in 1965, there has been dramatic growth in the need for nursing homes. The American population aged sixty five and older is projected to double within the next thirty years.[5] In view of this projected population growth, it is imperative that immediate action be taken to protect residents of county owned nursing homes.

The first baby boomer will turn sixty five in 2011. According to U.S. Census Bureau projections, the population of Americans aged sixty five and older will grow from 35 million to 72 million by 2030.[6] This escalation will result in the dramatic need for and growth of nursing homes. Nationally there are approximately 1,750,000 nursing home residents residing in 16,000 nursing homes.[7] In Ohio, there are approximately 1,400,000 citizens aged sixty five years or older.[8] Eighty thousand of these citizens currently reside in Ohio nursing homes. Of the 989

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[1] Cramer v. Auglaize Acres, 865 N.E.2d 9 (Ohio 2007).

[2] 24 AM. JUR. 3D *Proof of Facts* § 73 (2006). Nursing Homes are defined as "a private institution that furnishes shelter, feeding, and care for sick, aged, or infirm persons." *Id.*

[3] *Cramer*, 865 N.E.2d at 17.

[4] *Id.* at 268-69. OHIO REV. CODE ANN.§ 3721.13 (West 2006) sets out the rights of nursing homes residents. *See infra* note 63.

[5] WAN HE ET AL., NATIONAL INSTITUTE ON AGING, CURRENT POPULATION REPORTS SPECIAL STUDIES: 65+ IN THE UNITED STATES: 2005, (2005) http://www.census.gov/prod/2006pubs/p23-209.pdf. Currently, persons sixty five and older represent twelve percent of the population. *Id.* Persons sixty five and older are projected to represent 20 percent of the population by 2030. *Id.*

[6] *Id.*

[7] National Center for Health Statistics Health, United States, 2006, with Chartbook on Trends in the Health of americans 384 (2006) http://www. cdc.gov/nchs/data/hus/hus06.pdf.

[8] UNITED STATES CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY DATA PROFILE HIGHLIGHTS: OHIO, (2005), http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=&geo_id=04000US39&_geoContext=01000US%7C04000US39&_street=&_county=&_cityTown=&_state=04000US39&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=040&_submenuId=factsheet_1&ds_name=DEC_2000_SAFF&_ci_nbr=null&qr_name=null&reg=null%3Anull&_keyword=&_industry=. The American Community Survey provides yearly detailed data. *Id*

nursing homes within Ohio, two-thirds are privately owned, with the remainder owned by the government and nonprofit organizations.[9] This dramatic growth in

[9] Ohio currently has 54 nursing homes operated by the government. The number of beds per facility follows the name of the home. Ashtabula County Nursing Home (177), 5740 Dibble Road, Kingsville, OH 44048; Auglaize Acres (142), 13093 Infirmary Road , Wapakoneta, OH 45895; Auglaize County Board of MR/DD, 20 E. First Street, New Bremen, OH 45869; Belmont Metropolitan Housing Authority(78), PO Box 398 100 South Third Street, Martins Ferry, OH 43935; Butler County Care Facility (121), 1800 Princeton Road , Hamilton, OH 45011; Carroll County Home (45), 2202 Kensington Road P.O. Box 365, Carrollton, OH 44615; Colonial Manor (83), 441 University Drive NE, New Philadelphia, OH 44663; Coshocton County Memorial Hospital Care Facility (61), 1460 Orange Street, Coshocton, OH 43812; Country Garden Manor (16); Country View Acres (65), 601 Infirmary Road, Dayton, OH 45427; Country View Haven (40), R858 County Road 15 P.O. Box 525, Napoleon, OH 43545; Crawford County Home (Fairview Manor) (90), 1630 East Southern Avenue , Bucyrus, OH 44820; Cuyahoga County Nursing Home (177), 3305 Franklin Boulevard , Cleveland, OH 44113; Darke County Home (78), 5105 County Home Road, Greenville, OH 45331; Dayspring Assisted Living and Care Facility (60), 3220 Olivesburg Rd., Mansfield, OH 44903; Drake Center (256), 151 West Galbraith Road, Cincinnati, OH 45216; East Lawn Manor - Marion County Home (126), 1422 Mt. Vernon Avenue, Marion, OH 43302; Elisabeth Severance Prentiss Center (150), 3525 Scranton Road , Cleveland, OH 44109; Erie County Care Facility (160), 3916 East Perkins Avenue, Huron, OH 44839; Fair Haven Shelby County Home (145), 2901 Fair Road , Sidney, OH 45365; Gables at Green Pastures (112), 390 Gables Drive, Marysville, OH 43040; Geauga County Home-Pleasant Hill (36), 13211 Aquilla Road , Chardon, OH 44024; Golden Acres Lorain County Nursing Home (82), 45999 North Ridge Rd, PO Box 190, Amherst, OH 44001; Greenewood Manor (117), 711 Dayton-Xenia Road , Xenia, OH 45385; Guernsey County Home (40), Country View Assisted Living 62825 County Home Rd., Lore City, OH 43755; Hardin Hills Health Center (78), 1211 W. Lima Street , Kenton, OH 43326; Holmes County Home (60), 7260 State Route 83, Holmesville, OH 44630; The Liberty (140), 12350 Bass Lake Road , Chardon, OH 44024; Lincoln Way Home (50), 17872 Lincoln Hwy., Middle Point, OH 45863; Logan Acres Care Center (95), 2739 County Road 91, Bellefontaine, OH 43311; Medina County Home (65), 6144 Wedgewood Road , Medina, OH 44256; Mercer County Home (42), 4871 State Route 29 , Celina, OH 45822; MetroHealth Center for Skilled Nursing Center (320), 4310 Richmond Road, Cleveland, OH 44122; MetroHealth Center for Skilled Nursing Care (29), 2500 Metro Health Drive, Cleveland, OH 44109; Monroe County Care Center (60), 47045 Moore Ridge Rd, PO Box 352, Woodsfield, OH 43793; Morrow County Hosp. Long Term Care Facility (38), 651 West Marion Road, Mt. Gilead, OH 43338; Muskingum County Home (80), 1400 Newark Road , Zanesville, OH 43701; Ohio Veterans Home (427), 3416 Columbus Ave. , Sandusky, OH 44870; Ohio Veterans Home Georgetown (168), 2003 Veterans Blvd., Georgetown, OH 45121; Ohio Veterans Home-Veterans Hall (300), 3416 Columbus Avenue, Sandusky, OH 44870; Ottawa County Riverview Nursing Home (190), 8180 W. State Route 163 , Oak Harbor, OH 43449; Park Health Center (100), 100 Pine Ave , St Clairsville, OH 43950; Perry County Home (50), 5550 State Route 37 West , New Lexington, OH 43764; Putnam Acres Care Center (95), 10170 Road 5-H, R.R. 1, Ottawa, OH 45875; Ridge House (4), 7061 Ridge Rd., Parma, OH 44129; Walter House (4), 4058 Walter Rd., North Olmstead, OH 44070; Washington County Home (100), 845 County House Lane , Marietta, OH 45750; Wayne County Care Center (50), 876 Geyer Chapel Road , Wooster, OH 44691; Wellington Nursing and Rehabilitation Center (99), 2380 State Route 68, PO Box 160 , Urbana, OH 43078; Williams County Hillside Country Living (71), 09-876 County Road 16, Bryan, OH 43506-1012; Wood Haven Health Care Senior Living (108), 11080 East Gypsy Lane Road , Bowling Green, OH 43402; Woodlands at Robinson (99), 6831 N. Chestnut St. , Ravenna, OH 44266; Wyandot County Nursing Home (100), 7830 North State Highway 199, Upper Sandusky, OH 43351; York House (4), 7283 York Rd., Parma, OH 44130.

population and need of quality care requires uniformity in the law so all nursing home residents are equally protected.

Nursing home residents "are almost entirely dependent upon nursing homes to ensure the[ir] safety"[10] Despite the growing need for nursing homes, studies show that many nursing homes are understaffed and unable to provide even basic care to their residents.[11] One in every twenty elderly residents in a nursing home suffers from neglect or abuse.[12] Annually there are more than 500,000 incidents.[13] The most common negligence violation is the failure to prevent accidents to residents, "such as falls that cause broken or fractured bones or skin lacerations."[14] For example, one resident with dementia and poor vision fell four times within a ten month period.[15] The fourth fall was reported as causing no injury.[16] However, the resident had fractured her femur which contributed to her death nine days later.[17]

However, neglect is only one concern. In a recent study over a two year period, it was found that one out of every three nursing homes was cited for an abuse violation.[18] These nursing homes were cited for approximately 9,000 violations. Of these violations, over 2,500 caused harm or serious injury, even placing the resident in "immediate jeopardy of death."[19] These citations included instances of employees ignoring signs of or being a participant in "appalling physical, sexual, and verbal abuse."[20]

In an attempt to protect our aging population, the Ohio General Assembly enacted the Nursing Home Bill of Rights.[21] The Act states that "any resident whose rights under this [act] are violated has a cause of action against any person or home

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[10] Minority Staff of Special Investigations Division Committee on Government Reform, 107th Cong., Abuse of Residents Is a Major Problem in U.S. Nursing Homes, (2001)[hereinafter Abuse of Residents] (prepared for Rep. Henry Waxman), available at http://reform.democrats.house.gov/Documents/20040830113750-34049.pdf.

[11] Christopher Newton, 90% of Nursing Homes Providing Substandard Care—Federal Report, SEATTLE TIMES, Feb. 20, 2002, at A1.

[12] Martin Ramey, Comment, Putting the Cart Before the Horse: The Need to Reexamine Damage Caps in California's Elder Abuse Act, 39 SAN DIEGO L. REVIEW. 599, 602 (2002).

[13] *Id.*

[14] Minority Staff of Special Investigations Division Committee on Government Reform, 107th Cong., Many Homes Fail to Meet Federal Standards for Adequate Care, , (2001), available at http://oversight.house.gov/Documents/20040830114240-99423.pdf. Examples of negligent care include: bed sores and/or infections, choking because resident was given the incorrect diet, incorrect medicine administered to a resident and negligent supervision of a nursing home resident that results in a fall with severe injury or death.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] ABUSE OF RESIDENTS, *supra* note 10.

[19] *Id.*

[20] *Id.*

[21] OHIO REV. CODE ANN. § 3721.10-17 (West 2006).

committing the violation."[22] However, complete enforcement of the Nursing Home Bill of Rights is prevented by political subdivision immunity.[23]

The Ohio Political Subdivision Tort Liability Act confers general immunity on political subdivisions. Therefore, government owned homes seek to avoid liability by raising the defenses provided by the Ohio Political Subdivision Tort Liability Act, despite the resident's rights under the Nursing Home Bill of Rights. The result is that residents of government owned nursing homes have inferior remedies for the tortious acts of a county home's employees.

II. CRAMER V. AUGLAIZE ACRES: HOW THE OHIO SUPREME COURT APPLIED THE POLITICAL SUBDIVISION TORT LIABILTY ACT TO THE NURSING HOME BILL OF RIGHTS

In Cramer v. Auglaize,[24]the Third District's holding removed all of the protections of Ohio's Nursing Home Bill of Rights from every nursing home resident who lives in a county owned nursing home. The Appellate court held that operating a nursing home was a proprietary function.[25] Therefore, the county was statutorily immune from any liability under the Ohio Political Subdivision Tort Liability Act because (1) the way in which an employee of a nursing home provides medical care is a discretionary function, and (2) the Nursing Home Bill of Rights does not expressly impose liability on the employees of the nursing home.[26]

On appeal,[27] the Supreme Court held that the Political Subdivision Act contains exceptions to immunity that would make the home liable for the negligent or

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[22] § 3721.17(I)(1)(a).

[23] *See generally* Adams v. Gables at Green Pastures Nursing Home, No. 14-06-33, 2006 Ohio App. LEXIS 6757 (Ohio Ct. App. Dec. 26, 2006) (Court affirmed denial of summary judgment on the basis of section 2744 without considering the Nursing Home Bill of Rights); Cramer v. Auglaize Acres, 865 N.E.2d 9 (Ohio 2007) (defining how a claim made under the Nursing Home Bill of Rights can proceed in light of the Political Subdivision Tort Liability Act).

[24] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609; *see supra* text accompanying note 1. The trial court held (1) operation of a county home is a proprietary function, (2) the nursing home bill of rights expressly imposes liability on the two nurses and (3) the Ohio Political Subdivision Tort Liability Act does not provide the nurses any immunity under 2744.03(A)(6)(b). The Third District Court of Appeals held that (1) the nursing home bill of rights did not expressly impose liability on the nurses, and (2) the decision on how to administer medical was a discretionary function providing immunity to the employee.

[25] *See infra* text accompanying note 55.

[26] *Cramer* at ¶¶ 40, 51-53.

[27] Cramer v. Auglaize Acres, 865 N.E.2d 9 (Ohio 2007); *see also* Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609. The trial court held (1) operation of a county home is a proprietary function, (2) the nursing home bill of rights expressly imposes liability on the two nurses and (3) the Ohio Political Subdivision Tort Liability Act does not provide the nurses any immunity under 2744.03(A)(6)(b). The Third District Court of Appeals held that (1) the nursing home bill of rights did not expressly impose liability on the nurses, and thus did not create an exception to immunity under R.C. 2744.02(B)(5), and (2) the decision on how to administer medical was a discretionary function providing immunity to the employee, under R.C. 2744.03(A)(5).

intentionally tortious acts of its employees, but the way in which an employee of a nursing home provides medical care is a discretionary function.[28] The end result is that regardless of Ohio's Nursing Home Bill of Rights, causes of action brought against a county owned nursing home cannot proceed on a theory of ordinary negligence, so long as some discretionary action on the part of the employees involved is found.[29]

A. The Doctrine of Sovereign Immunity in Ohio

Sovereign immunity for political subdivisions was judicially created. Accordingly, the Supreme Court has noted in the past that it can be judicially abolished.[30] Sovereign immunity is based on the English concept that the "King can do no wrong." [31] "Sovereign immunity is a legal anachronism which denies recovery to injured individuals without regard to the municipality's culpability or the individual's need for compensation."[32] The framers of our Constitution guaranteed that America would have no King. It is therefore anomalous that political subdivisions are given the same benefit of immunity:

> It is something of an anomaly that the common-law doctrine of sovereign immunity which is based on the concept that 'the king can do no wrong' was ever adopted by the American courts." (Footnote omitted.) Further, the United States Supreme Court has also indicated that there is no rational justification in American jurisprudence for the English legal maxim "the King can do no wrong." Specifically, in Langford v. United States, the court stated, "We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim has an existence in this country." [33]

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[28] *Cramer*, 865 N.E.2d at 17-18.

[29] The *Cramer* decision also takes an expansive view of when an employee's actions may be said to be discretionary.

[30] Butler v. Jordan, 750 N.E.2d 554, 565 (Ohio 2001).

[31] *Id.* (stating "in the English feudal system, the lord of the manor was not subject to suit in his own courts. The king, as highest feudal lord, enjoyed this protection on the theory that no court was above him. Further, the king was considered the supreme power and was, thus, infallible. His person was considered sacred, and the law ascribed to him the attribute of sovereignty. Therefore, it was his personal royal prerogative not to be subjected to suit in his own courts. Accordingly, the king could do no wrong.")

[32] Haas v. Hayslip, 364 N.E.2d 1376, 1382 (Ohio 1977) (Brown, J., dissenting).

[33] *Id.* at 369; *see also Butler*, 750 N.E.2d at 559 "Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the [royal] prerogative is unknown, is one of the mysteries of legal evolution. Admitting its application to the sovereign and its illogical ascription as an attribute of sovereignty generally, it is not easy to appreciate its application to the United States, where the location of sovereignty--undivided sovereignty, as orthodox theory demands--is a difficult undertaking. It is beyond doubt that the Executive in the United States is not historically the sovereign, and the legislature, which is perhaps the depository of the widest powers, is restrained by constitutional limitations. The federal government is one of delegated powers and the states are not sovereign, according to the

The United States Supreme Court has stated that:

> the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offence.[34]

Prior to the introduction of sovereign immunity in Ohio, municipalities were held to the same standards for wrongful acts as private individuals.[35] In 1854 in City of Dayton v. Peas, the Ohio Supreme Court judicially created sovereign immunity.[36] As the Ohio courts struggled to set standards, the Ohio Supreme Court introduced the governmental-proprietary distinction.[37] However, the Ohio courts' attempts to place the functions of municipalities into these two categories caused "confusion and unpredictability in the law."[38] "[T]he classification of the specific functions of municipalities has been difficult and frequently lead to absurd and unjust consequences."[39] Furthermore, "it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions in relation to a municipality."[40] This struggle led to the judicial abolishment of sovereign immunity in Ohio in 1982.[41]

In 1982, the Ohio Supreme Court in Haverlack v. Portage Homes Inc. abolished the doctrine of sovereign immunity.[42] The Court held that a "municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts."[43] Nonetheless, less than a year later, the Ohio Supreme

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Constitution, as demonstrated forcibly by the Civil War and the resulting Amendments. That brings us to the only remaining alternative, that sovereignty resides in the American electorate or the people."

[34] Langford v. U.S., 101 U.S. 341, 343 (1879).

[35] John A. Gleason & Kenneth Van Winkle, Jr., *The Ohio Political Subdivision Tort Liability Act: A Legislative Response To The Judicial Abolishment of Sovereign Immunity*, U. CIN. L. REV. 501, 503 (1986). Prior to 1854, Ohio courts treated municipalities the same as private individuals when imposing liability. *See* Hack v. Salem, 189 N.E.2d 857, 862 (Ohio 1963) ("In the early reported American cases it apparently was assumed, without argument and as a matter of basic justice, that municipal corporations were subject to actions for torts.")

[36] City of Dayton v. Pease, 4 Ohio St. 80, 99-100 (1854).

[37] Gleason & Van Winkle, *supra* note 35, at 506-07.

[38] Haverlack v. Portage Homes, Inc., 442 N.E.2d 749,752 (Ohio 1982).

[39] *Id.*

[40] *Id.*

[41] Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 375, 377-78 (1861) (municipality is liable for wrongful acts while performing a proprietary function and immune when involved with governmental acts); *See, e.g.*, City of Cincinnati v. Cameron, 33 Ohio St. 336, 367-368 (1878).

[42] *Haverlack*, 442 N.E.2d at 752.

[43] *Id.*

Court in Enghauser Manufacturing Co. v. Eriksson Engineering Ltd. reintroduced municipal immunity.[44] The Ohio General Assembly quickly followed the Ohio Courts and passed the Ohio Political Subdivision Tort Liability Act on November 20, 1985.[45] This Act confers immunity from civil lawsuits on political subdivisions of the state.[46]

B. OHIO POLITICAL SUBDIVISION TORT LIABILITY ACT

Section 2744 of the Ohio Revised Code grants immunity from civil lawsuits to political subdivisions of the state, subject to a complicated system of rules and exceptions.[47] As set forth below, the Political Subdivision Act sets forth separate immunities, exceptions, and defenses applicable to the political subdivision itself, and also distinctly to the employees of the political subdivision.

Since the enactment of the Ohio Political Subdivision Tort Liability Act, the Ohio Supreme Court and "courts all across the state have been called upon, time and time again, to unravel what that law provides as applied to a myriad of fact patterns."[48] Courts, "one after another, have found it necessary, when interpreting various sections of Ohio Revised Code Chapter 2744, to stretch the statute beyond its parameters."[49] This occurs because courts have to make "equitable decisions in an inherently inequitable system."[50]

A three tiered system is used to determine whether the political subdivision is entitled to immunity.[51] Under the first tier, it must be determined whether the entity seeking immunity is a political subdivision, and whether the alleged harm occurred in connection with a governmental or proprietary function.[52] If tier one is satisfied then the entity is presumed to be immune.[53] However, the political subdivision's

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[44] Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 451 N.E.2d 228, 232 (Ohio 1983) ("[N]o tort action will lie against a municipal corporation for those acts or omissions involving the exercise of a legislative or judicial function, or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.")

[45] OHIO REV. CODE ANN. § 2744.01-09 (West 2006).

[46] § 2744.01-09.

[47] § 2744.01-09.

[48] Butler v. Jordan, 750 N.E.2d 554, 566 (Ohio 2001).

[49] *Id.*

[50] *Id.* "Courts of appeals all across this state continue to confront fact patterns presenting claims of sovereign immunity when the results of so finding would be inequitable at best and disastrous at worst." *Id.* "The issue presented, however, is "[w]hat are governmental agencies, the general public, and now the courts to make of a section of the Ohio Revised Code that first says 'you're not liable,' then says 'you are liable' and then says 'you're not.'" Hallett v. Stow Bd. of Educ., 624 N.E.2d 272, 274 (quoting Stuckey v. Trustees of Lawrence Twp. No. CA-8806, 1992 WL 214485 (5th Dist. Ohio Ct. App. Aug. 24, 1992) (Milligan, J., dissenting).

[51] *Cramer*, 865 N.E.2d 9,13 (Ohio 2007).

[52] *Id.*

[53] OHIO REV. CODE ANN. § 2744.02(A)(1) (West 2006).

immunity may be removed in the second tier. In the second tier the entity will lose its immunity if any of the exceptions to liability listed in section 2744.02(B) apply.[54] If an exception applies, the political subdivision will be liable unless it can reinstate its immunity in the third tier. The third tier will reinstate immunity if the political subdivision can show that a defense listed in section 2744.03 applies.[55]

Under the Act, a political subdivision means "a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state."[56] An employee of a political subdivision is defined as an "officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision."[57] The Act defines a governmental function as a "function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement; a function that is for the common good of all citizens of the state."[58] The function must be one that "promotes or preserves the public peace, health, safety, or welfare...[and] involves activities that are not engaged in or not customarily engaged in by nongovernmental persons."[59] In contrast, a proprietary function is any non-governmental function involving activities that are customarily engaged in by nongovernmental persons.[60]

The Act sets out five specific exceptions to the general immunity granted to political subdivisions.[61] In sum, the political subdivision itself is liable for injuries: (1) when they are caused by the negligent operation of a motor vehicle, (2) when they occur in the performance of a proprietary function, (3) when the political subdivision fails to keep public streets or highways in repair, (4) when the injuries result from negligent acts occurring in buildings used to perform government functions, and (5) when liability is expressly imposed by another section of the Ohio Revised Code.[62] Where county owned nursing homes are concerned, it is the second and fifth of these exceptions that the Cramer court found applicable.

Finally, the political subdivision can reinstate immunity by asserting one of the defenses set out in the Act.[63] Notwithstanding an exception under section 2744.02(B), the political subdivision will be re-immunized if (1) the employee was

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[54] § 2744.02(B). *See supra* text accompanying notes 55-56.

[55] OHIO REV. CODE ANN. § 2744.03 (West 2006). *See supra* text accompanying notes 57-58.

[56] OHIO REV. CODE ANN. § 2744.01(F) (West 2006).

[57] § 2744.01(B).

[58] § 2744.01(C)(1)(a)-(b).

[59] § 2744.01(C)(1)(c). The statute provides a nonexclusive list of governmental functions at § 2744.01(C)(2)(a)-(u).

[60] § 2744.01(G)(1)(b).

[61] § 2744.02(B)(1)-(5).

[62] § 2744.02(B)(1)-(5).

[63] § 2744.03.

involved in a judicial or legislative function, (2) the employees conduct was required by law, (3) the injury occurred "within the discretion of the [political subdivision's] employee with respect to policy-making or planning," (4) the injury occurred while performing community service, or (5) the injury was the result of the exercise of judgment or discretion in how to use "equipment, supplies, materials, personnel, facilities" unless this discretion was made in bad faith, or a reckless manner.[64]

Where the liability of the individual employees themselves is concerned, the analysis is different. The three tiered analysis applicable to the political subdivision itself does not apply.[65] When a plaintiff sues an individual employee of a political subdivision, the analysis begins with R.C. 2744.03(A)(6).[66] Ohio law states that an employee of a political subdivision is liable if (a) his or her acts were "manifestly outside the scope of the employee's employment or official responsibilities" (b) "made with malicious purpose, in bad faith, or in a wanton or reckless manner," or (c) liability is expressly imposed by another section of the revised code.[67] Therefore, regardless of any defense to liability, an employee of the political subdivision is liable if his "acts or omissions were [committed] with malicious purpose, in bad faith, or in a wanton or reckless manner."[68]

C. Nursing Home Bill of Rights

In 1979, the Ohio General Assembly passed the Nursing Home Bill of Rights to protect the aging population that resides in nursing homes. This statute sets out thirty two rights for all nursing home residents.[69] All potential nursing home

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[64] *Id.*; *see* Kiep v. City of Hamilton, No. CA96-08-158, 1997 WL 264236 (Ohio Ct. App. May 19, 1997) ("R.C. 2744.03(A)(5) immunity extends only to the 'exercise of judgment or discretion' of a political subdivision as defined by R.C. 2744.01(F) and not to the actions of employees of the political subdivision... If R.C. 2744.03(A)(5) immunity was extended in a broad manner to include subdivision employees, the liability provisions of R.C. 2744.02(B) would have no force."); McVey v. City of Cincinnatti, 671 N.E.2d 1288, 1290 (Ohio Ct. App. 1995) (stating immunity under §2744.03(A)(5) does not apply to the negligence of employees in "the details of carrying out the activity even though there is discretion in making choices.").

[65] *Cramer*, 865 N.E.2d 9, 13 (Ohio 2007).

[66] *Id.*; Section 2744.03(6) provides: In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies: (a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; (c) civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

[67] § 2744.03(A)(6)(b); *Cramer*, 865 N.E.2d at 13.

[68] *Cramer*, 865 N.E.2d at 13. The three tiered analysis used to determine the political subdivision's immunity remains independent of whether an individual employee is immune from liability

[69] Section 3721.13 sets out the residents rights. The statute provides:

(A) The rights of residents of a home shall include, but are not limited to, the following:

(1) The right to a safe and clean living environment…

(2) The right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality;

(3) Upon admission and thereafter, the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted. This care shall be provided without regard to considerations such as race, color, religion, national origin, age, or source of payment for care.

(4) The right to have all reasonable requests and inquiries responded to promptly;

(5) The right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation;

(6) The right to obtain from the home, upon request, the name and any specialty of any physician or other person responsible for the resident's care or for the coordination of care;

(7) The right, upon request, to be assigned, within the capacity of the home to make the assignment, to the staff physician of the resident's choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home. If the cost of a physician's services is to be met under a federally supported program, the physician shall meet the federal laws and regulations governing such services.

(8) The right to participate in decisions that affect the resident's life…

(9) The right to withhold payment for physician visitation if the physician did not visit the resident;

(10) The right to confidential treatment of personal and medical records…

(11) The right to privacy during medical examination or treatment and in the care of personal or bodily needs;

(12) The right to refuse to serve as a medical research subject;

(13) The right to be free from physical or chemical restraints or prolonged isolation except to the minimum extent necessary to protect the resident from injury to self, others, or to property…

(14) The right to the pharmacist of the resident's choice and the right to receive pharmaceutical supplies and services at reasonable prices…

(15) The right to exercise all civil rights, unless the resident has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code and has not been restored to legal capacity, as well as the right to the cooperation of the home's administrator in making arrangements for the exercise of the right to vote;

(16) The right of access to opportunities that enable the resident, at the resident's own expense or at the expense of a third-party payer, to achieve the resident's fullest potential, including educational, vocational, social, recreational, and habilitation programs;

(17) The right to consume a reasonable amount of alcoholic beverages at the resident's own expense…

(18) The right to use tobacco at the resident's own expense under the home's safety rules…

(19) The right to retire and rise in accordance with the resident's reasonable requests, if the resident does not disturb others or the posted meal schedules…

(20) The right to observe religious obligations and participate in religious activities; the right to maintain individual and cultural identity; and the right to meet with and participate in activities of social and community groups at the resident's or the group's initiative;

(21) The right upon reasonable request to private and unrestricted communications with the resident's family, social worker, and any other person…

(22) The right to assured privacy for visits by the spouse…

(23) The right upon reasonable request to have room doors closed and to have them not opened without knocking…

residents are given a copy of these rights and a document explaining the provisions of the act before entering the home.[70] Rights protecting the residents physical health and safety include: (1) The right to a safe and clean living environment; (2) the right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality; (3) the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care; and (4) the right to have all reasonable requests and inquiries responded to promptly.[71]

The Act begins by listing definitions necessary to interpret its meaning.[72] The Act then specifies additional definitions relevant to the specific civil cause of action and other remedies provided.[73] A home is defined as a facility that provides housing to three or more unrelated individuals, who are dependent upon the services of others, including a nursing home, residential care facility, home for the aging, and a county home facility.[74] This definition was meant to include county owned nursing homes, whether licensed or not, within the protections of the Nursing Home Bill of Rights.[75]

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(24) The right to retain and use personal clothing and a reasonable amount of possessions…
(25) The right to be fully informed, prior to or at the time of admission and during the resident's stay, in writing, of the basic rate charged by the home, of services available in the home, and of any additional charges related to such services…

(26) The right of the resident and person paying for the care to examine and receive a bill at least monthly for the resident's care from the home that itemizes charges not included in the basic rates;

(27)(a) The right to be free from financial exploitation;(b) The right to manage the resident's own personal financial affairs, or, if the resident has delegated this responsibility in writing to the home, to receive upon written request at least a quarterly accounting statement of financial transactions made on the resident's behalf...

(28) The right of the resident to be allowed unrestricted access to the resident's property on deposit at reasonable hours, unless requests for access to property on deposit are so persistent, continuous, and unreasonable that they constitute a nuisance;

(29) The right to receive reasonable notice before the resident's room or roommate is changed…

(30) The right not to be transferred or discharged from the home unless the transfer is necessary…

(31) The right to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home…

(32) The right to have any significant change in the resident's health status reported to the resident's sponsor.

[70] OHIO REV. CODE ANN. § 3721.12(A)(1)(3)(a)-(c) (West 2006).

[71] OHIO REV. CODE ANN. § 3721.13(A)(1)-(4) (West 2006).

[72] OHIO REV. CODE ANN. § 3721.01 (West 2006).

[73] § 3721.01(A)(3).

[74] § 3721.01(A).

[75] *Cramer*, 865 N.E.2d 9, 15-16.

The Bill of Rights provides the resident a remedy for the violation of his or her enumerated rights. It provides that "any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation.[76] The patient may obtain injunctive relief against the violation of his or her rights. Most importantly, the resident may receive compensatory damages for an injury negligently inflicted by the owner of the home, or any other person who caused the injury, if the patient demonstrates the elements of negligence.[77]

Thus the Ohio Nursing Home Bill of Rights sets forth a cause of action under which the patient can recover for ordinary negligence.[78] The language of the Act, at section 3721.17(I)(1)(a), makes it clear that this remedy applies equally to the employees themselves, and to the home that employs them. However, according to the Cramer court, the Ohio Political Subdivision Tort Liability Act greatly curtails the legal remedies available to residents of government owned nursing homes. Currently, a resident of a county owned home can seek relief against the home itself, but subject to the "discretionary acts" defense set forth at R.C. 2744.03(A)(5). If any exercise of discretion is found, the aggrieved resident must prove that this discretion was exercised maliciously, in bad faith, wantonly, or recklessly. [79]

The Ohio Supreme Court defines recklessness as:

> [t]he actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[80]

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[76] OHIO REV. CODE ANN. § 3721.17(I)(2)(a)-(b) (West 2006).

[77] § 3721.17(I)(2)(a)-(b). "The plaintiff in an action filed under division (I)(1) of this section may obtain injunctive relief against the violation of the resident's rights. The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property. If compensatory damages are awarded for a violation of the resident's rights, section 2315.21 of the Revised Code shall apply to an award of punitive or exemplary damages for the violation. Elements of negligence include (1) Defendant owed a duty of care to the Plaintiff, (2) the Defendant breached the duty, (3) the Plaintiff sustained an injury, and (4) there is a causal connection between the Defendant's action and the Plaintiff's injury.

[78] OHIO REV. CODE ANN. § 3721.17(I)(1)(a) provides: Any resident whose rights under section 3721.13 of the Revised Code are violated has a cause of action against any person or home committing the violation; *see* footnote 59 for a list of rights under section 3721.13; Thompson v. McNeill, 559 N.E.2d 705, 708 (Ohio 1990) (stating an act is negligent when "the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will).

[79] OHIO REV. CODE ANN. § 2744.03(A)(5) (West 2006).

[80] *Thompson*, 559 N.E.2d at 708 (Ohio 1990) (stating an act is negligent when "the actor does not desire to bring about the consequences which follow, nor does he know that they are

Wherever applicable, this heightened requirement is a marked departure from the protections provided by the Nursing Home Bill of Rights. Moreover, the question of where "discretion" is found within the meaning of R.C. 2744.03(A)(5) now decides whether the home itself can be held liable in ordinary negligence. Where there is discretion, the county owned home will only be liable for its employees' conduct that rises to the level of being reckless, or worse.

D. County Nursing Homes

1. What is a County Home?

A county home is a facility owned and operated by the county commissioner.[81] County commissioners appoint an administrator, who is responsible for the nursing home's operation.[82] There are two types of county homes: (1) traditional county homes and (2) Medicaid/Medicare certified county nursing homes.[83] A traditional county home provides custodial, rest home type care and is not certified to receive Medicaid or Medicare payments.[84] A Medicaid certified county nursing home provides nursing care and is operated on Medicaid funds.[85] A Medicare certified county home is not subject to licensure, but must meet all state and federal standards to be certified for Medicaid/Medicare. The differences between a private nursing home and a county home are: (1) the county home is not licensed, (2) the county home must comply with Chapter 5155 of the Revised Code, (3) the county home must be operated by a superintendent appointed by and under the supervision of the county commissioners, (4) the county home must follow state laws in regard to payments and benefits of its employees, and (5) the county home may charge private pay patients less than it charges Medicaid for the same services.[86]

The Nursing Home Bill of Rights mandates that administrators of "homes"[87] furnish every resident with a copy of the rights established under the Nursing Home Bill of Rights, including a written explanation of the provisions of the act and a copy

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substantially certain to occur, or believe that they will); Fabrey v. McDonald Vill. Police Dep't, 639 N.E.2d 31(Ohio 1994)(adopting the *Thompson* reckless definition as the standard for the Ohio Political Subdivision Tort Liability Act).

[81] OHIO REV. CODE ANN. § 5155 (West 2006). The Board of County Commissioners shall make all contracts for new buildings and for additions to existing buildings necessary for the county home, and shall prescribe rules for the management and good government of the home."

[82] Ohio County Commissioners Handbook. Available at http://www.ccao.org/Handbook/hdbkchap048.htm (last visited Feb. 2, 2007.)

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*; *see generally supra* note 75 and accompanying text.

[87] OHIO REV. CODE ANN. § 3721.01(a)(1)(a)-(b)(ii) (West 2006). A home is defined as a facility that provides housing to three or more unrelated individuals who are dependent upon the services of others, including a nursing home, residential care facility, home for the aging, and a county home facility; *see also* § 3721.10(A).

of the individual nursing home's policies and procedures.[88] Therefore, before residents are admitted into a county home, the home is required to provide the potential resident with a copy of the rights established under the Nursing Home Bill of Rights.[89] Additionally, a copy of the Nursing Home Bill of Rights must be posted in every county home.[90] The requirements to give residents a copy of the Nursing Home Bill of Rights as well as post them for everyday reading allows one to reasonably infer that they are protected by these rights.

2. County Homes Acting as Market Participants

In general, when the state enters the market as a participant, the state's actions are treated like those of a private party.[91] According to the second tier of the Political Subdivision Tort Liability Act, when a political subdivision acts like a market participant it is subject to suit for negligence just as non government market actor would be.[92] In Nice v. Maryland, the court held that when a political subdivision is exercising a proprietary function they are liable "in the same manner and to the same extent as a private person under the same circumstances."[93] In Ryll v. Columbus Fireworks Display, the Ohio Supreme Court held, "the law regarding political subdivisions is different when the political subdivision is engaged in a proprietary function."[94] Ohio Revised Code 2744.02(B)(2) states, "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions."[95] Political subdivisions engaged in proprietary functions acting as market participants should be liable as any private company would be:

> The municipal corporation is no more a legal concept than a private corporation. Both arise by operation of law, both necessarily act through agents, and both necessarily are going to have agents who at times are negligent in the performance of their duties. The ordinary rules of liability

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[88] OHIO REV. CODE ANN. § 3721.12(A)(1)(3)(a)-(c) (West 2006).

[89] Ohio County Commissioners Handbook, *supra* note 76.

[90] *Id.*

[91] *See* Owen v. Independence, 445 U.S. 622, 645-646 (1980)(while in the exercise of proprietary functions, "the city was held to the same standards of [tort] liability as any private corporation"); Nice v. Marysville, 82 Ohio App. 3d 109, 117 (Union Ct. App. 1992)(the rule for tort liability for a municipality engaged in a proprietary function under Ohio's Political Subdivision Act is merely a recitation of the common law rule: "the municipality becomes liable for damages caused by its negligence in this regard in the same manner and to the same extent as a private person under the same circumstances,"), quoting Doud v. Cincinnati, 87 N.E.2d 243, 246 (Ohio 1949).

[92] OHIO REV. CODE ANN. § 2744.02(B)(2) (West 2006).

[93] Nice v. Maryland, 611 N.E.2d 468, 473 (Ohio App 3d Dist. 1992), See Ryll v. Columbus Fireworks Display Co., Inc., 769 N.E.2d 372 (Ohio 2002) (holding that "the law regarding political subdivision liability is different when the political subdivision is engaged in a proprietary function.")

[94] *Ryll*, 769 N.E.2d at 376.

[95] OHIO REV. CODE ANN. § 2744.02(B)(2) (West 2006).

> applicable to private corporations should give municipalities all the protection they require against unreasonable claims.[96]

There are 989 nursing homes in Ohio. Almost ten percent of these homes are owned and operated by the government. Operating a nursing home is not imposed upon the State as an obligation of sovereignty. Moreover, operation of a nursing home is not done for the common good of all the citizens of Ohio. Finally, the operation of a nursing home is customarily engaged in by private persons. Profit is a driving force behind the operation of nursing homes.[97] Nursing homes do almost 90 billion dollars of business every year.[98] Currently, the majority of the revenue that a nursing home receives comes from the government and private insurance companies, not the resident. However, when Ohio counties operate nursing homes, their residents are without many of the protections of the Nursing Home Bill of Rights. For example, they cannot receive punitive damages for any injury. It is time to examine whether counties participating in the nursing home market should be liable in the same manner, and to the same extent as the other ninety percent of the nursing home market.

3. The Nursing Home Bill of Rights Expressly Imposes Liability

Section 2744.02(B)(5) of the Ohio Political Subdivision Tort Liability Act states that "political subdivisions [are] liable for injury, death, or loss to a person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code."[99] The Nursing Home Bill of Rights states if a resident's rights are violated, the resident has a cause of action "against any person or home committing the violation."[100] Furthermore, the Act includes a county home within its definition of a home. Accordingly, if subsection 2744.02(B)(5) applies to county owned nursing homes, under the three tiered analysis, county owned homes can be held liable as provided by the Bill of Rights. But, then the analysis would proceed to the third tier: county homes are re-immunized if they can prove that the harm was caused by the exercise of discretion.[101]

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[96] Hack v. City of Salem, 189 N.E.2d 857, 868 (Ohio 1963); *See* Greene Cty. Agricultural Soc. v. Liming, 733 N.E.2d 1141, 1148(Ohio 2000) ("when a political subdivision's acts go beyond governmental functions (and when it acts in a proprietary nature) there is little justification for affording immunity to that political subdivision. Having entered into activities ordinarily reserved to the field of private enterprise, a [political subdivision] should be held to the same responsibilities and liabilities as are private citizens.")(quoting Schenkolewski v. Cleveland Metroparks Sys., 426 N.E.2d 784, 788 (Ohio 1981).

[97] Eric Bates, *The Shame of our Nursing Homes*, THE NATION, Mar. 29, 1999, available at 1999 WL 9306974. Medicare and Medicaid funds provide almost 75% of every dollar.

[98] *Id.*

[99] OHIO REV. CODE ANN. § 2744.02 (West 2006).

[100] OHIO REV. CODE ANN. § 3721.17(I)(1)(a) (West 2006).

[101] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609, at ¶¶ 33-35; OHIO REV. CODE ANN. § 2744.03(A)(3) (West 2006). The political subdivision is immune if the "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 officer or position of the employee"; R.C. 2744.03(A)(5) the

Therefore, in both the intermediate court of appeals and the Ohio Supreme Court, a central issue of the Cramer case was whether, and to what extent, the Nursing Home Bill of Rights expressly imposes liability on county homes, and on their employees.

E. Cramer's Application of the Ohio Political Subdivision Tort Liability Act to Claims Arising Under Ohio's Nursing Home Bill of Rights.

1. Running a Nursing Home is a Proprietary Function

The Ohio Political Subdivision Tort Liability Act codified certain situations where a political subdivision will be liable in simple negligence, absent a valid defense.[102] The Act states that a political subdivision is liable for negligence when the actor is carrying out a proprietary function.[103]

A proprietary function is one that "promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons."[104] In Starling v. Metrohealth Ctr. Skilled Nursing, the court held that running a nursing home was a proprietary function.[105] After Starling, the nursing home in Cramer was the first to argue on appeal that running a county home was a governmental function, and this argument was rejected.

Furthermore, there has been only one case outside Ohio where a government owned nursing home argued its activities were in connection with a governmental function.[106] In Everett v. County of Saginaw, the court unanimously held that "a county hospital's operation of a skilled nursing care unit did not constitute the performance of a governmental function."[107] The intermediate court of appeals in Cramer held that the injury that occurred in the county home was connected with a proprietary function.[108]

A governmental function is a function that is "imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement."[109] Additionally, it is a function that is for the

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political subdivision will be immune if the injury 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."

[102] OHIO REV. CODE ANN. § 2744.02 (West 2006).

[103] OHIO REV. CODE ANN. § 2744.02(B)(2) (West 2006); *See* Gleason, *supra* note 30.

[104] OHIO REV. CODE ANN. § 2744.01(G)(1)(b) (West 2006); *Ryll*,769 N.E.2d at 376.

[105] Starling v. Metrohealth Ctr. Skilled Nursing, No. 75554, 1999 WL 685641, at *2 (Ohio Ct. App. Sept. 2, 1999)(holding that the operation of a nursing home was not considered when the Ohio Political Subdivision Tort Liability Act was enacted.)

[106] Everett, v. County of Saginaw, 333 N.W.2d 301 (Mich Ct. App. 1983).

[107] *Id.* at 302-303 (stating "In determining whether a particular activity constitutes a governmental function, the focus is on the precise activity giving rise to plaintiff's claim rather than on the entity's overall or principal operation.")

[108] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609, at ¶ 34.

[109] OHIO REV. CODE ANN. § 2744.01(C)(1)(a) (West 2006).

"common good of all citizens of the state...that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons."[110] "If the function does not meet…[these requirements] and is not specified [as a government] function in R.C. 2744.01(C)(2), it is a proprietary function.[111]

a. Operating a Nursing Home is Not Imposed Upon the State as an Obligation of Sovereignty

R.C. 2744.01(C)(1)(a) states a function is governmental "if it is imposed upon the state as an obligation of sovereignty."[112] Operation of a nursing home is not a duty imposed on a county by the Department of Human Services.[113] In other words, the government is not required to operate nursing homes by any legislation. Rather, the operation of county homes is controlled by the board of county commissioners.[114] The Starling court stated, "the Revised Code does not indicate that operation of a nursing home is a duty to the Department of Human Services."[115] When the legislature enacted R.C. 2744.01(C)(2)(m),[116] it did not contemplate immunity for the operation of a nursing home.[117] Accordingly, operating a home is not an obligation of sovereignty.

b. Running a Nursing Home is Not Done For the Common Good of All Citizens

The nursing home confers a benefit on a small "segment of the population, not the state as a whole."[118] R.C. 2744.01(C)(1)(b) states a function is governmental if it is "carried out for the common good of all of the citizens of the State."[119] A nursing

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[110] § 2744.01(C)(1)(a)-(c) (West 2006).

[111] Starling, No. 75554, 1999 WL 685641, at *1 (Ohio Ct. App. Sept. 2, 1999).

[112] § 2744.01(C)(1)(a) (West 2006).

[113] *Starling*, 1999 WL 685641, at *2. "The county home is controlled by the Board of County Commissioners, not the Department of Human Services. The operation of a county home is not within the categories of R.C. 329.04 and 329.05, which statutes list the duties of the Department of Human Services." *Id.* (Citation omitted.) In other words, the operation of a county nursing home is not listed as a duty of the department of human services. *Id.*

[114] *Id.* "A courthouse, jail, public comfort station, offices for county officers, and a county home shall be provided by the board of county commissioners when, in its judgment, any of them are needed." OHIO REV CODE ANN. § 307.01(A)(West 2006): *See also Cramer*, 865 N.E.2d at 15.

[115] *Starling*, 1999 WL 685641, at *2.

[116] Section 2744.01(C)(2)(m) provides: "A governmental function includes, the operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent." *See, e.g.*, OHIO REV. CODE ANN. § 329.04-05 (West 2006).

[117] *Starling*, 1999 WL 685641, at * 2.

[118] *Id.* at *1; *See generally* Blakenship v. Enright, 586 N.E.2d 1176, 1181 (Ohio Ct. App. 1990) (stating proprietary acts are "performed solely for the benefit of the political subdivision's own citizens, not the citizens of the entire state").

[119] § 2744.01(C)(1)(b).

home provides care to those who otherwise cannot take care of themselves. Out of Ohio's approximately 11 million residents only a small segment—80,000—reside in nursing homes.[120] Therefore, since running a nursing home provides services to less than 1% of the population, it is not operated for the common good of all citizens.

c. Operation of a Nursing Home is Customarily Engaged in by Private Persons

It has been argued that the operation of a county home cannot be done by nongovernmental persons.[121] This argument requires one to look at the formal title of a county home. Even though nongovernmental persons cannot own a county home, they can operate a nursing home.[122] The Political Subdivision Tort Liability Act "does not define a function as governmental based on the type of entity engaged in the activities. Rather, the statute looks to the nature of the activities...to determine whether a function is governmental."[123] Furthermore, because 90% of nursing homes are privately owned, this is an activity customarily operated by private persons.

In sum, under Ohio law, the operation of a county-owned nursing home is a proprietary function. Under tier one, political subdivisions are generally immune for both governmental and proprietary functions, except as set forth at R.C. 2744.02(B).[124] Under tier two, set forth specifically at subsection 2744.02(B)(2), political subdivisions are liable in ordinary negligence for acts committed while carrying out proprietary functions. The Ohio Third Appellate District in Cramer found that running a county-owned home is a proprietary function, and therefore the exception applies.

2. The Bill of Rights Expressly Imposes Liability on County Homes, Within the Meaning of R.C. 2744.05(B)(5)

Section 2744.02(B)(5) of the Ohio Political Subdivision Tort Liability Act states that "political subdivisions [are] liable for injury, death, or loss to a person or property when civil liability is expressly imposed upon the political subdivision by a

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[120] United States Census Bureau, *supra* note 8.

[121] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609, at ¶ 31.The county unsuccessfully argued that § 2744.01(C)(1)(c) applied to unlicensed county homes. *Id.* It argued that nongovernmental persons could not operate a county home. *See also* Everett v. County of Saginaw, 333 N.W.2d 301, 302-03 (Mich. Ct. App. 1983) ("In determining whether a particular activity constitutes a governmental function, the focus is on the precise activity giving rise to plaintiff's claim rather than on the entity's overall or principal operation.")

[122] *Cramer*, at ¶ 25; *see* Greene City Agriculture Soc. v. Liming, 733 N.E.2d 1141, 1149 (Ohio). "A central consideration within the structure of R.C. Chapter 2744 is the premise that some activities of a political subdivision may be governmental functions, while some other activities are not. Thus, the issue here is not whether holding a county fair is a governmental function; rather, it is the more specific question of whether conducting the hog show at the county fair and conducting the investigation into the allegations of irregularity surrounding the entry of Big Fat in that hog show are governmental functions." *Id.* The activity of "conducting a livestock competition *is* an activity customarily engaged in by nongovernmental persons." *Id.*

[123] *Cramer*, at ¶ 29.

[124] OHIO REV. CODE ANN.§ 2744.02(A)(West 2006).

section of the Revised Code."[125] In Cramer, the Supreme Court rejected the lower court's reasoning considering the applicability of R.C. 2744.02(B)(5).[126]

The Supreme Court clarified that R.C. 2744.02(B)(5) is available as a remedy for nursing home torts sounding in both negligence and intentional tort.[127] This distinction is important because intentionally tortious conduct on the part of the employee could not be actionable against the political subdivision in the absence of liability expressly created by statute. It is also important for the obvious purpose of clarifying when a statute expressly imposes liability within the meaning of the Political Subdivision Act.

3. A County Owned Nursing Home Employee's Decision on How to Provide Medical Care in a Nursing Home as a Discretionary Function

Under the third tier of the analysis applicable to political subdivisions, the Political Subdivision Act re-immunizes political subdivisions for negligent discretionary acts.[128] Once an act is found to be discretionary, the governmental-proprietary function is irrelevant.[129] Accordingly, a political subdivision is immune if it is determined that an "act is both proprietary and discretionary."[130] The Act states,

> the political subdivision is immune from liability if the injury, death, or loss to person 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.[131]

It is well established that in order to determine legislative intent the court must look examine the language of the statute.[132] Courts cannot ignore the plain and unambiguous language of a statute under the "guise of statutory interpretation, but

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[125] OHIO REV. CODE ANN. § 2744.02 (West 2006).

[126] Cramer v. Auglaize Acres, 865 N.E.2d 9, 14 (Ohio 2007). Cramer also argued that the exception to political subdivision immunity under R.C. 2744.02(B)(5) applied to the county appellees because Warder's and Green's actions violated R.C. 3721.17(I)(1). The Third District characterized this exception as moot and declined to consider it because the county appellees were already subject to liability under R.C. 2744.02(B)(2) for any negligent acts.

[127] *Id.* (stating, "we do not agree. Unlike sections R.C. 2744.02(B)(1) through (4), R.C. 2744.02(B)(5) is not limited to negligent actions. Therefore, we must also examine whether the exception to immunity pursuant to R.C. 2744.02(B)(5) applies.")

[128] OHIO REV. CODE ANN. § 2744.03(A)(5)(West 2006); Gleason & Van Winkle, *supra* note 30. Black's law dictionary defines a discretionary act as "a deed involving an exercise of personal judgment and conscience."

[129] Gleason & Van Winkle, *supra* note 35.

[130] *Id.*

[131] OHIO REV. CODE ANN.§ 2744.03(A)(5)(West 2006).

[132] Provident Bank v. Wood, 304 N.E.2d 378, 381 (Ohio 1973).

must give effect to the words used."[133] Therefore, prior to Cramer, Ohio courts held that the exercise of judgment or discretion is a defense available to the political subdivision and "not to the actions of employees of the political subdivision."[134] "Immunity does not apply to the negligence of employees in 'the details of carrying out the activity even though there is discretion in making choices.'"[135]

The intermediate court of appeals in Cramer concluded that a political subdivision's employee provision of medical care in a nursing home is a discretionary function.[136] The court of appeals applied the 2744.03(A)(5) defenses directly to the employees themselves, in addition to the home.[137]

The Court applied the discretion defense by building on its own prior decision in Thompson v. Bagley.[138] In Thompson, the court held that a gym teacher providing medical care to a drowning student was a discretionary decision and subject to the discretionary defense.[139] In Thompson, the plaintiffs' decedent was a fourth grade student who drowned during an unstructured portion of his swimming class.[140] When his teacher saw Christopher Thompson lying motionless on the floor of the pool, he initially thought Christopher was only pretending.[141] The teacher sent three children into the pool to try to bring Christopher up, with the third one succeeding.[142] Even with these facts, the Ohio Third District Court of Appeals reached the conclusion that the discretionary defense of R.C. 2744.03(A)(5) might apply to the

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[133] Marcum v. Adkins, No. 93CA17, 1994 WL 116233, at *3 (Ohio Ct. App. Mar. 28, 2004); Erb v. Erb, 747 N.E.2d 230 (Ohio 2001).

[134] Kiep v. City of Hamilton, No. CA96-08-158, 1997 WL 264236 (Ohio Ct. App. May 19, 1997) (stating "R.C. 2744.03(A)(5) immunity extends only to the 'exercise of judgment or discretion' of a political subdivision as defined by 2744.01(F) and not to the actions of employees of the political subdivision. … If R.C. 2744.03(A)(5) immunity was extended in a broad manner to include subdivision employees, the liability provisions of R.C. 2744.03(B) would have no force.); *see* McVey v. City of Cincinnati, 671 N.E.2d 1288, 1290 (Ohio Ct. App. 1995) (stating that immunity under R.C. 2744.03(A)(5) does not apply to the negligence of employees in "the details of carrying out the activity even though there is discretion in making choices"); Hallett v. Stow Bd. of Edn., 624 N.E.2d 272, 274 (Ohio Ct. App. 9 Dist. 1993)(stating the "exceptions to liability found in R.C. 2744.03 must be read more narrowly than the exceptions to non-liability found in R.C. 2744.02(B) in order for the structure chosen by the legislature to make sense.")

[135] *McVey*, 671 N.E.2d at 1290.

[136] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609, at ¶ 40. (Nurses' "decision regarding how to move Mr. Cramer into bed and their reaction to his subsequent fall are examples of...discretionary actions.")

[137] *Id.*

[138] Thompson v. Bagley, No. 11-04-12, 2005 WL 940872(Ohio Ct. App. April 25, 2005).

[139] *Id.* at *11.

[140] *Id.* at *1.

[141] *Id.*

[142] *Id.*

Thompsons' claims against the school, because the teacher has some discretion as to how to attend to his drowning student.[143]

By contrast, the school was not entitled to invoke the same provision, R.C. 2744.03(A)(5), as a defense to the Thompsons' claims based on the school's negligent maintenance or operation of the pool.[144] The Third District reasoned that a provision of the Ohio Administrative Code defined the school's maintenance and operational requirements.[145] Thompson v. Bagley was one of the principal cases relied upon by the same appellate district one year later, when the Third District court decided Cramer.[146] However, the fact that the Nursing Home Bill of Rights enumerates and guarantees more than 30 specific rights, statutorily, did not enter into the court's analysis in Cramer.

The purpose of a nursing home is to provide medical care. Nursing home residents are statutorily guaranteed the right to "adequate and appropriate medical treatment and nursing care...consistent with the program." [147] If a political subdivision employee does not have the discretion to disregard the directives of the Ohio Administrative Code, it is not clear that political subdivision employees have the discretion to disregard the directives of the Ohio Revised Code. Courts should not recognize any "discretion" to deviate from the requirements of statutory law.

In Cramer, the employees followed policy by using a Hoyer lift[148] to attempt to transfer Frank Cramer into his bed. Two employees used the lift.[149] The appellant's position was that Frank Cramer was dropped because of the nurses' careless transfer of the patient. Nothing in the record of the case suggested that the nurses were, at the moment they dropped Mr. Cramer, making any choice about which way to use the Hoyer lift.

In the Supreme Court, the appellant, Mr. Cramer's administrator, argued that the employees' discretion ended when they decided to use the Hoyer lift.[150] After that point, contended the appellant, the use of the lift was merely the execution of a decision already taken, with no act of discretion remaining in the carrying out of this work. This argument was also advanced in the lower court. The Third District court

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[143] *Id.* at *11.

[144] Thompson, at *10.

[145] *Id.* at *9-10, citing OHIO ADMIN. CODE ANN. § 3701-31 (2003).

[146] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609.

[147] OHIO REV. CODE ANN. § 3721.13(A)(3)(West 2006).

[148] A Hoyer lift is a lift-sling apparatus used to transfer patients. *See* Cramer v. Auglaize Acres, 865 N.E.2d 9.

[149] Brief of Amicus Curiae, Ohio Academy of Trial Lawyers Urging Affirmance on behalf of Plaintiff, Appellant, Cramer v. Auglaize Acres, 865 N.E.2d 9 (Ohio 2007) (hereinafter Merit Brief for Apppelant); *but see* Merit Brief of Appellees Auglaize Acres, et al. at 6, Cramer v. Auglaize Acres, 865 N.E.2d 9 (Ohio 2007) (No. 2005-1629) stating only that Mr. Cramer "fell forward" in the lift. The Merit Brief of Appellant details the nurses' notes initially stating that Mr. Cramer "leaned" forward. A nursing supervisor changed the word "leaned" to "lunged," despite not having witnessed the fall. Merit Brief for Appellant, *supra* note 149, at 2-3.

[150] Merit Brief for Appellant, *supra* note 149, at 11.

seemed to differentiate the choice of how to move Mr. Cramer and how to treat his injury after the fall, from the act of dropping him once the choice was made to use the Hoyer lift.[151] Nonetheless, that court held that the choice to use the lift, their act of moving him after the fall, and the lack of attention to him after the incident involved "discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources."[152] Thus, by considering the employees' actions before and after the moment of the drop, discretionary actions were found in a case that appears to arise from a simple drop from a lift.

The Supreme Court held similarly:

> R.C. 2744.03(A)(5) restores a political subdivision's immunity if "the injury, death, or loss to person 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." Cramer argues that as a matter of law, the defense in R.C. 2744.03(A)(5) is not available to the county appellees. He concedes that Green and Warder had discretion to decide whether to use the Hoyer lift to put Frank in bed. But once the nurses decided to use the lift, Cramer maintains, there was no discretion left because there is only one method for using it. Cramer also contends that after Frank fell, the nurses failed to follow Auglaize Acre's policy regarding falls.
>
> We do not agree that the decision to use the Hoyer lift is the only discretionary act involved, for the nurses' treatment decisions concerning Frank are also discretionary. Furthermore, the proper method for using the Hoyer lift and the issue of whether the nurses properly followed the home's policy concerning patient falls are also disputed. Because there are material issues of fact as to whether the nurses acted maliciously, in bad faith, wantonly, or recklessly, we cannot say as a matter of law that R.C. 2744.03(A)(5) is inapplicable in this case. Resolution of these questions will be for the fact finder to decide.[153]

The decision to use the Hoyer lift and the subsequent decisions regarding how to respond to Mr. Cramer's fall are distinct from the moment that Mr. Cramer was dropped. Further, it is not clear from the parties' briefs in what way the "proper method for using the Hoyer lift" was disputed.[154] Put simply, if a discretionary act is

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[151] Cramer, at ¶ 40. "[The [nurses'] decision regarding how to move Frank into bed and their reaction to his subsequent fall are examples of...discretionary actions." *Id. See* OHIO REV. CODE ANN.§ 2744.03(A)(5)(West 2006).

[152] *Id.* at ¶ 42.

[153] Cramer v. Auglaize Acres, 865 N.E.2d 9, 17 (Ohio 2007).

[154] *Id. See, supra* note 144, at *17 ("The decision of Appellees' … regarding how to move Appellant's decedent into bed and their reaction to his subsequent fall are clear examples of a discretionary exercise of judgment.")

found among these facts, it is difficult to imagine a set of facts where there is no employee discretion involved.

Under the Nursing Home Bill of Rights, the fact remains that the statute is designed to make all negligent acts actionable, not solely those acts that rise to the level of being reckless or wanton.[155] By recognizing that the Nursing Home Bill of Rights falls within the meaning of R.C. 2744.02(B)(5), the Ohio Supreme Court corrected an error that was important to rectify. But by then holding that the discretionary defenses under 2744.03(A)(5) might apply to these facts, the same court raised the bar for nursing home patients residing in county homes from ordinary negligence to recklessness. While residents of every other home may hold providers accountable for negligence, residents of county homes will only be able to take action for reckless acts, so long as some act of discretion is identified.

To say discretion might be found either in the act of dropping a patient, or in the failure to determine that the patient had suffered a broken leg until five hours after his fall, is a strained construction of R.C. 2744.03(A)(5). If Ohio's Nursing Home Bill of Rights is intended to ensure anything, it is intended to ensure that medical care is provided in nursing homes. By finding the possibility of some exercise of discretion in the employees' actions, the Ohio Supreme Court took a long step away from the protections of the Nursing Home Bill of Rights, in regards to nursing home residents who happen to live in county homes.

4. The Nursing Home Bill of Rights Expressly Imposes Liability On Persons, But Not Employees

In both the Third Appellate District and the Supreme Court, the Cramer courts found a distinction between the word "employee" as it appears in Chapter 27, and "person" as it appears in Chapter 37 of the Revised Code. Under the Supreme Court's ruling, this distinction absolves the employees of county homes from all liability, regardless of the cause of action created in the Bill of Rights against any "person or home."[156]

In the court of appeals, the Third District court reversed the trial court, stating the Nursing Home Bill of Rights statute does not expressly impose liability upon employees of political subdivisions.[157] The court held that a "statute imposing general sanctions on everyone rather than a group of specific individuals… is not a statute that expressly imposes liability upon employees of a political subdivision."[158]

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[155] OHIO REV. CODE ANN. § 3721.17(I)(2)(a)(West 2006). ("The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property.").

[156] OHIO REV. CODE ANN. § 3721.17(I)(1)(a)(West 2006).

[157] *Cramer*, at ¶ 52(stating that the NHBOR imposes liability upon 'homes and all persons in general, but not employees").

[158] *Id.*; *see also* OHIO REV. CODE ANN. § 2744.01(B)(West 2006) (defining an employee as an "officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision").

The court relied on its own earlier holding in Thompson.[159] In this way, the Cramer court of appeals distinguished the Ohio Supreme Court's holding in Campbell v. Burton, in which the Supreme Court recognized that Ohio's statute requiring school personnel to report abuse expressly implied liability under the Political Subdivision act.[160] By contrast, the court of appeals stated the Nursing Home Bill of Rights imposed liability on all persons in general, but not specifically employees.[161] Therefore, the court held that a statute that imposed general sanctions on everyone rather than a group of specific individuals does not expressly impose liability on political subdivision employees.[162]

The Nursing Home Bill of Rights expressly states, "any resident whose rights...are violated has a cause of action against any person or home committing the violation."[163] This act sets out thirty five rights of the nursing home resident. Only persons working for or owning the home are capable of violating these rights. However, the Ohio Supreme Court holds that Ohio's Nursing Home Bill of Rights does not expressly impose liability on the employees of the county nursing home.[164]

The Nursing Home Bill of Rights is not a general sanction on all persons in general; it is only applicable to the people who are capable of violating a nursing home resident's rights while within the home.[165] For instance, Frank Cramer, a nursing home resident, fell while being assisted into bed by nurses employed by the

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[159] *Cramer*, at ¶ 52 (citing Ratcliff v. Darby, No. 02CA2832, 2002 WL 31721942 (Ohio Ct. App. Dec. 2, 2002) (distinguishing Campbell v. Burton, 750 N.E.2d 539 (2001) as a "unique and narrow" decision)).

[160] Campbell v. Burton, 750 N.E.2d 539 (2001). In this case, parent of a student brought an action against a peer mediator and the city school board for not reporting known or suspected abuse as mandated by statute. *Id.* The Ohio Supreme Court held the statute mandating the reporting of known or suspected child abuse expressly imposes liability within meaning of Political Subdivision Tort Liability Act. *Id.*

[161] *Cramer*, at ¶ 52.

[162] *Id.*

[163] OHIO REV. CODE ANN. § 3721.17(I)(1)(a)(West 2006).

[164] Cramer v. Auglaize Acres, 865 N.E.2d 9, 14, 16-17 (Ohio 2007). "Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation." Appellees argue that R.C. 3721.17(I)(1) does not satisfy the requirements of R.C. 2744.02(B)(5) or 2744.03(A)(6)(c) by expressly imposing liability on either the county appellees or their employees . . . Appellees contend that R.C. 3721.17(I)(1) is a statute that imposes general sanctions against everyone rather than against a political subdivision or its employees. The court of appeals determined that the use of the term "person" in R.C. 3721.17(I)(1) was too general to expressly impose liability on an employee of a political subdivision. Unlike the term "home," the term "person" is not defined in the Patients' Bill of Rights. Under R.C. 3721.13 , certain patients' rights--such as the right to adequate and appropriate medical treatment and nursing care and the right to communicate with the home's physician and employees in planning treatment or care--involve the conduct of nursing home employees, but there is no express statement that the employees of a county nursing home will be liable individually for violations of the Patients' Bill of Rights.

[165] OHIO REV. CODE ANN. §§ 3721.10-3721.19.

home.[166] Despite being in pain, he was put to bed and not checked upon until five hours later by another nurse employed by the home. These acts clearly denied Mr. Cramer adequate medical care as protected by §§ 3721.10-3721.19. The only persons who could violate Frank Cramer's right to adequate care were the nurses assigned to him.

In Campbell, the Ohio Supreme Court held that a statute did expressly impose liability on persons for the failure to report suspected child abuse.[167] The statute at issue here stated, "No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect abuse or neglect of the child shall fail to immediately report that knowledge." Division (A)(1)(b) of this section sets out almost fifty different persons ranging from an attorney to a dentist.[168] This list was required because children come into contact with a wide variety of treatment providers, other caregivers, and educators. The intent of the statute was to make all persons who shared a special relationship with the child accountable for the child's well-being. The Supreme Court stated that the Ohio General Assembly enacted this statute to "safeguard children from abuse."[169] The Court stated only the state and its political subdivisions can protect children from abuse.

In the same way, nursing home residents "are almost entirely dependent upon nursing homes to ensure the[ir] safety."[170] In Cramer, the Ohio Supreme Court even

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[166] *Id.* at 10.

[167] *Campbell*, 750 N.E.2d at 544.

[168] OHIO REV. CODE ANN. § 2151.42(A)(1)(b)(West 2006). "[A]ny person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; superintendent, board member, or employee of a county board of mental retardation; investigative agent contracted with by a county board of mental retardation; employee of the department of mental retardation and developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107 or 5103 of the Revised Code; or third party employed by a public children services agency to assist in providing child or family related services."

[169] *Campbell*, 750 N.E.2d at 544 (stating the concern in enacting the statute was for the protection of children from abuse, not political subdivisions and their employees). "In many instances, only the state and its political subdivisions can protect children from abuse. Additionally, we have found that children services agencies must protect children from abuse and eliminate the source of any such abuse. Thus, it is clear that the concern of the General Assembly in enacting R.C. 2151.421 was not political subdivisions or their employees, but the protection of children from abuse and neglect." *Id.*

[170] ABUSE OF RESIDENTS, *supra* note 10, at 1.

cited Campbell as part of its support for finding that R.C. 2744.02(B)(5) applied to county owned nursing homes.[171] However the same reasoning did not apply to R.C. 2744.03(A)(6)(c), which would impose liability on the individual employees.

Later in the very same term, the Ohio Supreme Court repeated the long-standing and obvious fact that political subdivisions can only act through their employees:

> We have held and it is well recognized that a political subdivision acts through its employees. In Spires v. Lancaster (1986), 28 Ohio St.3d 76, 28 OBR 173 502 N.E.2d 614, we stated, "'It is undeniable that the state can only act through its employees and officers.'" . . . Because a school district can act only through its employees, R.C. 2744.03(A)(5) affords a defense to liability. In this instance, Elston's injury resulted from the judgment or discretion of the coach in determining how to use equipment or facilities. No claim is presented suggesting reckless conduct. Thus, the school district successfully asserted this defense in this instance.[172]

The Nursing Home Bill of Rights does not place liability on persons in general.[173] The rights guaranteed under the act strictly apply to a resident confined within a nursing home. Therefore, the specific rights by themselves expressly limit who can be liable. For example, residents have the right to a safe and clean living environment.[174] The responsibility to keep a nursing home safe and clean is limited to the staff employed there. The resident has the right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation.[175] Individuals in general are not responsible for this. Employees of the home whose job description mandates personal care of residents are responsible for this. Residents also have the right to adequate and appropriate medical treatment and nursing care.[176] Again, the only persons who can violate this right are the medical personal hired by the home to care for and treat residents within the home. These rights expressly limit the group of persons that can be held responsible for violations of a resident's rights.

The Nursing Home Bill of Rights defines certain rights. It provides that if any of these rights are violated the resident has a cause of action against the person or home violating the right.[177] In Cramer, both nurses were employees of the county owned nursing home. Furthermore, prior to this fall, the home had implemented a fall policy for Mr. Cramer, stating he should not be moved if he fell.[178] Mr. Cramer's right to "adequate and appropriate" medical treatment was violated when the nurses dropped

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[171] Cramer v. Auglaize Acres, 865 N.E.2d 9, 16 (Ohio 2007).

[172] Elston v. Howland Local Sch., 865 N.E.2d 845, 849-50 (Ohio 2007).

[173] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609, at ¶ 52.

[174] OHIO REV. CODE ANN. § 3721.13(A)(1)(West 2006).

[175] § 3721.13(A)(5).

[176] § 3721.13(A)(3).

[177] OHIO REV. CODE ANN. § 3721.17(I)(1)(a)(West 2006).

[178] Merit Brief for Appellant, *supra* note 149. "The defendant county home, prior to Frank Cramer's fall from the Hoyer lift, adopted a "Fall Policy" that was introduced into evidence as Plaintiffs Exhibit 17. It provided that when Frank's fall and injury occurred that the attending nurses not move him." *Id.*

him.[179] The nurses then moved him, thereby violating his right to adequate and appropriate care again.

As the same court later recognized in Elston v. Howland Local Schools, a political subdivision cannot act at all except through its employees.[180] When a political subdivision runs a home, its employees carry out the work. The Ohio Supreme Court's conclusion that Mr. Cramer's nurses, as political subdivision employees, are not "persons" within the meaning of the Nursing Home Bill of Rights is unsupportable.

5. Employees of a Political Subdivision Are Liable Under 2744.03(A)(6)(b) for Reckless Actions

The immunities and liabilities of political subdivisions and their employees are specified in different sections of the Political Subdivision Act. Section 2744.03(A)(6)(b) sets out specific situations where an employee's immunity will be assessed, without regard to the three-tiered analysis applicable to the subdivision itself.[181] Ultimately an employee will be liable if his actions were undertaken with malicious purpose, in bad faith, or in a wanton or reckless manner.[182] Malicious purpose is defined as a willful and intentional act designed to cause injury.[183] Bad faith means "a dishonest purpose, moral obliquity, [and] conscious wrongdoing."[184] In other words, this means "breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. Wanton misconduct is established where a person fails to exercise any care whatsoever."[185] Recklessness exists where a person "knowingly and unreasonably opt[s] for a course of conduct that entail[s] a substantially greater…risk than the available alternatives"[186] Because these levels of scienter are set forth in the disjunctive, recklessness is the lowest standard to demonstrate liability. Thus as a general rule, political subdivision employees are liable in their individual capacities so long as their conduct is adjudged to be, at a minimum, reckless.

However, the Supreme Court apparently disregarded this aspect of the Third District's holding entirely, when the Court stated categorically, "[t]hus, Cramer has no cause of action against the nurses under the Patients' Bill of Rights."[187] The court made this statement concerning only R.C. 2744.03(A)(6)(c), which is the section imposing liability directly on employees when another section of the Revised Code prescribes it. Based on the person/employee distinction described above, the Supreme Court agreed with the Third District Court, and found that subsection

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[179] OHIO REV. CODE ANN. § 3721.13(A)(3)(West 2006).

[180] Elston v. Howland Local Sch., 865 N.E.2d 845, 849-50 (Ohio 2007).

[181] OHIO REV. CODE ANN. § 2744.03(A)(6)(b)(West 2006).

[182] Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609, at ¶ 41.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] Ewolski v. City of Brunswick, 287 F.3d 492, 515 (6th Cir. 2002).

[187] Cramer v. Auglaize Acres, 865 N.E.2d 9, 17 (Ohio 2007).

(A)(6)(c) does not apply.[188] The Supreme Court's opinion made no reference at all to the (A)(6)(b) subsection, which separately imposes liability on employees for any conduct arising to the level of recklessness, or worse. The Supreme Court's categorical statement that "Cramer has no cause of action against the nurses under the Patients' Bill of Rights," is contrary to the plain language of the Bill of Rights, the Political Subdivision Act, and the lower court's holding in Cramer.

Employees' immunity is only assessed under section 2744.03(A)(6).[189] Whether the nurses were acting within any discretion is not at issue under this portion of the Political Subdivision act. Section 2744.03 clearly states that a political subdivision—not the employee-- will be immune from a liability arising out of discretionary act.

The Supreme Court in Cramer correctly concluded that there was a genuine issue of material fact as to whether the nurses "acted maliciously, in bad faith, wantonly, or recklessly" within the meaning of R.C. 2744.03(A)(5).[190] But, as set forth above, the only reason this standard was applied was to set the parameters for the "discretionary acts" defense available to the political subdivision. The Ohio Supreme Court had facts before it suggesting liability under R.C. 2744.03(A)(6)(b), but simply overlooked this portion of the statute. The Ohio Supreme Court's ruling will likely breed confusion now that it has stated categorically that there is no cause of action against employees of a county home.

6. Adams v. Gables: the Cramer Court Retreats From the Broad Application of the Discretionary Defense

Only a year prior to Adams, the Cramer court was quick to apply § 2744.03(A)(5) to the employees of the political subdivision without mentioning any policy governing how patients were to be transferred.[191] However in Adams, with Cramer pending in the Ohio Supreme Court, the Third District court appeared more cautious. The court first set out the conflicting arguments for the applicability of the discretionary defense:

> The Gables claims that the defense in R.C. 2744.03(A)(5) applies, which provides: The political subdivision is immune from liability if the injury,

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[188] *Id.* Note that the Supreme Court erroneously cited only subsection 2744.03(A)(6)(a), which imposes liability on employees for tortious acts that are manifestly outside the scope of their employment. It is otherwise clear from the context of paragraph 32 that the Court was speaking of the (c) subsection, governing liability imposed by other sections of the revised code.

[189] *Id.* at 13; *see also* Cramer v. Auglaize Acres, 3d Dist. No. 2-04-39, 2005-Ohio-3609.

[190] *Id.* at 17; "After reviewing the entire record, we find that there is a material issue of fact concerning whether Green and Warder acted maliciously, in bad faith, wantonly, or recklessly. Cramer's complaint and the affidavit of at least one expert allege that Green and Warder purposefully concealed Frank's injury and falsified his medical records in an effort to cover up their negligence. The affidavit also alleges that Green and Warder's intentional actions caused Frank to suffer undue pain for approximately five hours. Moreover, there is at least some circumstantial evidence supporting these allegations. Thus, a material issue of fact remains concerning whether Green and Warder's actions rose to the level of malice, bad faith, wantonness, or recklessness."

[191] *Cramer*, at ¶ 41.

> 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. Adams responds that, under R.C. 2744.03(A)(5), immunity for discretionary decisions only applies to political subdivisions themselves and not to individual employees. Thus, Adams argues that The Gables' employees were required to implement an acute fall care plan pursuant to The Gables' own discretionary policy, and failure by The Gables' employees to do so does not fit within the discretion encompassed by the section R.C. 2744.03(A)(5) defense.[192]

The court then avoided the issue of whether an employee has any discretion to go against her employer's policies by stating, "the record provides little evidence that a [fall care plan] policy existed.[193] From this statement the court held that a decision "regarding an exercise of discretion is… premature."[194] However, documentation of Nannie Martin's fall assessment was admitted into evidence and stated an acute fall care plan was to be implemented.[195] For now, it is an open question whether and to what extent providing medical care in a nursing home remains a discretionary function.

In the Supreme Court's opinion in Cramer, the court was willing to entertain the possibility of discretion being found in the acts of dropping a patient, and failing to diagnose his broken leg for five hours. By contrast, in Adams, decided December 26, 2006, the same appellate court that decided Cramer sidestepped its own earlier holding.[196] In Adams, Nannie Martin was determined to be at high risk for falling.[197] This determination required that an "Acute Fall Care Plan" be initiated.[198] The court affirmed the denial of summary judgment to the county nursing home because the home had not produced any evidence about its policies or procedures while seeking summary judgment. Therefore in Adams, the Third Appellate District needed to see more about the policies applicable to employee discretion. This attention to the home's specific procedures may indicate a retreat from the same court's willingness to find discretion in Cramer.

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[192] Adams v. Gables at Green Pastures Nursing Home, No. 14-06-33, 2006 Ohio App. LEXIS 6757, at *10 (Ohio Ct. App. Dec. 26, 2006).

[193] *Id.* at *10-11.

[194] *Id.* at *11.

[195] *Id.* at 4; based on the patient's "Fall Risk/Alarm Assessment," the plaintiff's nursing expert averred that the nursing home failed to implement Nannie Martin's acute fall care plan.

[196] *Adams*, 2006 Ohio App. LEXIS 6757.

[197] *Id.* at *3-4.

[198] *Id.* at *4.

III. CAN THE GOVERNMENT OPERATE A NURSING HOME WITHOUT CREATING A CONFLICT OF POLICY?

A. The Nursing Home Bill of Rights Allows Punitive Damages, the Ohio Political Subdivision Tort Liability Act Does Not

Under the Nursing Home Bill of Rights, if compensatory damages are awarded for a violation of the resident's rights, section 2315.21 of the Revised Code applies to award plaintiff punitive damages.[199] The Bill of Rights specifically provides for punitive damages as a means of enforcing the protections enacted in the Bill. But under the Political Subdivision Tort Liability Act, the plaintiff may only recover his or her actual losses incurred through compensatory damages.[200] The Political Subdivision Act does not allow an injured plaintiff to recover any punitive damages.[201] The Act also caps the damages available for "non-actual" loss, except for wrongful death claimants.[202]

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[199] OHIO REV. CODE ANN. § 3721.17(I)(2)(b)(West 2006).

[200] OHIO REV. CODE ANN. § 2744.05(C)(1)(West 2006) provides: "There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages." §2744.05(c)(2)(a)-(f) provides:

> the actual loss of the person who is awarded the damages includes all of the following:(a) all wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of the person injured; (b) All expenditures of the person injured or another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury; (d) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property that was injured or destroyed; (e) All expenditures of the person injured or of the person whose property was injured or destroyed or of another person on behalf of the person injured or of the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved; (f) Any other expenditures of the person injured or of the person whose property was injured or destroyed or of another person on behalf of the person injured or of the person whose property was injured or destroyed that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

[201] § 2744.05(A). "Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, punitive or exemplary damages shall not be awarded." *Id.*

[202] § 2744.05 (C)(1).

> There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or

B. Punitive Damages Make the County Tax Payers Ultimately Responsible

The policy behind the statutory refusal to permit awards of punitive damages against political subdivisions is well-established. Any award of punitive damages against a county, township, or city is contrary to public policy because the burden of a punitive damages award falls upon the taxpayers of the county.[203] The award of punitive damages against a county would result in the citizens being punished for the acts of public officials.[204] Punitive damages "involve a blending of the interests of society and those of [aggrieved individuals]."[205] The purpose of punitive damages is not to compensate the injured party, but to punish and deter certain conduct.[206]

Compensatory damages do not create the same dilemma. The municipality, which is able to spread the burden of the cost of an injury among its taxpaying residents, "is in a much better position… than the injured individual."[207] In Haas v. Hayslip, the Ohio Supreme Court stated,

> if the burden of damages must be imposed, it is much fairer that it be imposed on a municipality than on the victim… [C]ities and states are active and virile creatures, capable of inflicting real harm and their civil liability should be co-extensive...if the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper cost of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency that the innocent and injured victim.[208]

> County owned nursing homes therefore cannot be subjected to this remedy made available to residents of privately owned homes. The result is that the deterrence created by an award of punitive damages—as well as by the possibility of an award of punitive damages—is not applicable to county owned nursing homes.

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occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

[203] Kline v. Kansas City Fire Dept., 175 F.3d 660, 669-70 (8th Cir. 1999) (stating that because the burden of a punitive damages award against a municipality ultimately falls on the taxpayers, and thus will fail to deter future harmful activity by the municipality itself, punitive damages are not usually recoverable against a municipality.)

[204] *Id*.

[205] 25 C.J.S. *Damages* § 195 (2006).

[206] *Id.*; *see* BMW v. Gore, 517 U.S. 559, 568 (1996) ("[P]unitive damages may properly be imposed to further State's legitimate interests in punishing unlawful conduct and deterring its repetition.")

[207] Hack v. City of Salem, 189 N.E.2d 857, 868 (Ohio 1963).

[208] Haas v. Hayslip, 364 N.E.2d 1376, 1382 (Ohio 1977)(Braum, J., dissenting).

IV. POSSIBLE SOLUTIONS TO PROTECT RESIDENTS OF COUNTY OWNED NURSING HOMES

A. Amend the Nursing Home Bill of Rights to Clearly Impose Liability on Employees

The Nursing Home Bill of Rights expressly imposes liability on any person or home violating a resident's rights. The first section of the Nursing Home Bill of Rights defines the words of the statute.[209] The statute defines home as "an institution, residence, or facility that provides, for a period of more than twenty-four hours accommodations to three or more unrelated individuals who are dependent upon the services of others, including a nursing home, residential care facility, home for the aging, and a veterans' home."[210] Home also means "[a] county home or district home that is or has been licensed as a residential care facility."[211] However, the word person is not defined or limited.[212]

To impose liability on the home's employee's, Ohio's General Assembly could make one of three changes to the statute to impose liability on all employees and nursing homes. First, the legislature could add the term "person" to the list of definitions.[213] Here the General Assembly could specifically name what persons would be liable for violations of the resident's rights. Second, the legislature could replace the word person with "employee of the home." This simple change in words would clearly impose liability on all employees of the nursing home, without changing the apparent intent of the statute. Neither the courts nor the parties to actions against nursing homes or their employees would then be required to distinguish the rights and remedies available against county home and the persons who work in them from those of any other nursing home.

B. Ohio Can Waive its Immunity from Liability of All County Owned Nursing Homes

Section 2743.02(B) of the Ohio revised Code waives political subdivision immunity for all hospitals[214] owned or operated by one or more political subdivisions

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[209] OHIO REV. CODE ANN. § 3721.01(A)(1) (West 2006).

[210] § 3721.01(A)(1)(a).

[211] § 3721.01(A)(1)(a)(b)(ii).

[212] *See e.g.* Campbell v. Burton,750 N.E.2d 539 (Ohio2001)(superseded by statute).

[213] Cramer v. Auglaize Acres, 865 N.E.2d 9, 16 (Ohio 2007) (finding that while the Bill of Rights applied to impose liability on the subdivision because "home" was defined, the same did not hold true for employees because "person" was not defined in the Bill of Rights.

[214] OHIO REV. CODE ANN. § 3727.01(C)(2) (West 2006) provides:
> As used in this chapter, "hospital" means an institution classified as a hospital under section 3701.07 of the Revised Code in which are provided to inpatients diagnostic, medical, surgical, obstetrical, psychiatric, or rehabilitation care for a continuous period longer than twenty-four hours or a hospital operated by a health maintenance organization. "Hospital" does not include a facility licensed under Chapter 3721. of the Revised Code, a health care facility operated by the department of mental health or the department of mental retardation and developmental disabilities, a health maintenance organization that does not operate a hospital, the office of any private licensed health care professional, whether organized for individual or group practice,

and permits them to be sued.[215] This statute allows the political subdivision's liability to be determined by the court. The court will apply the same rules and law that is applicable to a private hospital.

A nursing home is not considered a hospital under Ohio Revised Code § 3727.01(C)(2).[216] However, in the same way the state could easily waive its immunity from all nursing homes. This would allow all resident to sue county owned nursing homes and their employees when their rights were violated. Accordingly, all residents of nursing homes would be protected under the same laws.

C. County Homes Should Disclose the Limited Applicability of the Nursing Home Bill of Rights

The simplest way to move toward the equal protection of all citizens of Ohio living in nursing homes is through disclosure. There are fifty-four government homes in the state of Ohio.[217] These homes offer over five thousand beds for Ohio residents.[218] Only twenty seven of these homes identify themselves as county homes in their name. Many homes such as Wood Haven Health Care Senior Living and Putnam Acres Care Center give no indication that they are operated by the county. Homes that do not identify themselves as county operated must disclose this information to incoming residents.

Currently, the Nursing Home Bill of Rights mandates that administrators of "homes"[219] furnish every resident with a copy of the rights established under the Nursing Home Bill of Rights including a written explanation of the provisions of the act and a copy of the individual nursing home's policies and procedures.[220] When a home provides a resident with a copy of his rights and then an explanation of the

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or a clinic that provides ambulatory patient services and where patients are not regularly admitted as inpatients.

[215] OHIO REV. CODE ANN. § 3743.02(B)(West 2006) provides:
The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

[216] OHIO REV. CODE ANN. § 3727.01(C)(2)(West 2006). "Hospital does not include a facility licensed under Chapter 3721 of the Revised Code."

[217] *See supra* note 9.

[218] State of Ohio, Long Term Care Consumer Guide [hereinafter Consumer Guide]. http://www.ltc.ohio.gov/consumer/compoundsearchresults.asp (last visited Feb. 2, 2007). This comprehensive guide sets out 970 of Ohio's nursing homes. The guide offers up to date information on the homes including the most recent inspection report. *Id.* The guide does not differentiate between government and privately owned homes. *Id.*

[219] OHIO REV. CODE ANN. § 3721.01(a)(1)(a)-(b)(ii)(West 2006). A home is defined "a facility that provides… [housing] to three or more unrelated individuals who are dependent upon the services of others, including a nursing home, residential care facility, home for the aging," and a county home facility.

[220] OHIO REV. CODE ANN. § 3721.12(A)(1)(3)(a)-(c)(West 2006).

provisions of the act, a reasonable person would assume he had these protections. However, where any act of discretion can be found, residents of county homes are not protected from negligent acts or omissions. Until a change is made to protect all nursing home residents, those who are unprotected must be correctly informed.[221] Upon admission, all county home residents would be required to read a statement telling them they give up the protections of the Nursing Home Bill of Rights by residing in the home. Furthermore, they must sign a statement acknowledging that if the county home violates the resident's rights, he or she will only be able to seek compensatory damages, and not the punitive damages available to residents of privately owned homes. Without these disclosures, our aging population has no idea they are not protected to the same extent as those living in homes not owned by a county. Unfortunately, until these changes occur, most residents or their families will only find out the negative effect of Cramer after a violation of their rights has occurred.

The Ohio legislature passed Bill 403 during the 123rd General Assembly session in 2000.[222] This law required that Ohio create an Ohio Long-Term Care Consumer Guide. The Ohio Department of Aging developed the guide. Under Ohio law, nursing homes are not required to participate. However, current 2006 inspection reports are listed for 970 homes.[223] The site offers information on satisfaction, services offered, daily prices, and ownership, to name a few.[224] However, the ownership section does not differentiate between government and privately owned homes. Under the current law, this site could offer a valuable service by adding a government/private ownership section. Additionally, the site should highlight those homes that are shielded by government immunity when violating a resident's rights.

V. CONCLUSION

The application of the Ohio Political Subdivision Tort liability act to the rights defined in the Nursing Home Bill of Rights is a tangled web. The Ohio Supreme Court has opened the door for the "discretion" defense to apply broadly to the provision of medical care in a nursing home. The effect is that if any discretionary action is found, county homes are not liable for ordinary negligence as provided by the Nursing Home Bill of Rights. Instead, county homes could only be liable for their employees' reckless misconduct. The employees might not be liable individually at all.

All nursing homes that violate a resident's codified rights should be held accountable. This will only happen when all nursing home residents can seek damages for abuse and neglect. Unfortunately, under Ohio law, many residents are unprotected because of the simple happenstance that their home is owned and operated by a political subdivision. Residents enter nursing homes with a sense of security regarding certain rights. But ten percent of those residents are living under a

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[221] *See* Consumer Guide available at which could be used to inform potential residents.

[222] GAIL PATRY ET.AL., NURSING HOME RESIDENT SATISFACTION: AN OVERVIEW OF PUBLIC REPORTING (June 2003) (prepared for Rhode Island Department of Health), at http://www.health.state.ri.us/chic/performance/quality/quality16.pdf.

[223] Consumer Guide, *supra* note 210.

[224] *Id.*

false sense of security. Most will only find out they are unprotected when the damage is done and it is too late.

The elderly have become the fastest growing segment of the population. With over one and a half million resident over the age of sixty five, immediate action is required. Ohio enacted the Nursing Home Bill of rights to protect all nursing home residents—not just those fortunate enough to afford the private homes. Ohio's elderly population deserves to be treated fairly.

The disparate treatment meted out to residents of county owned homes opens the Political Subdivision Act to another challenge: equal protection. The law formerly recognized that government actors taking part in the marketplace like any other participant were liable "in the same manner, and to the same extent" as any other participant. Under Cramer, while residents of non-county owned homes can sue for ordinary negligence, county owned homes can be found immune for the same conduct. There is no justification for this disparate treatment.