PROPOSITION OF LAW NO. I:

Auglaize Acres is not immune from liability for the negligent acts of its employees. O.R.C. 2744.03(A)(5) does not apply to this case.

The Third Appellate District Court of Appeals, held on page 9 of its opinion in the within case that "A reviewing court must engage in a three-tiered analysis to determine whether a political subdivision is entitled to immunity from civil liability pursuant to R.C. 2744. Hubbard v. Canton Cty. Schl. Brd. Of Ed., 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶ 10, citing Cater v. Cleveland, 83 Ohio St.3d 24, 28, 1998-Ohio-421."

The Appellate Court applied that analysis and determined, on page 10 of its opinion, that, "Herein, neither side disputes the fact that the County is a political subdivision under R.C. 2744.01(F) or that the alleged injury occurred in connection with either a governmental or a proprietary function. Therefore, the first tier of the immunity test is satisfied, and the County is presumed to be immune from liability unless one of the exceptions listed in R.C. 2744.02(B) applies."

As to the second tier of the analysis, the Third Appellate District Court of Appeals set out to determine whether any of the exceptions to immunity enumerated in O.R.C. §2744.02(B) applied to the allegations of negligence made by Cramer. On pp. 17 and 18 of its opinion that Appellate Court determined that (emphasis added);

According to R.C. 2744.01(G)(1), a function must satisfy both subsection (a) and (b) in order to be considered a proprietary function. R.C. 2744.01(G)(1)(a) states that the function can not be one as described in R.C. 2744.01(C)(1)(a), (b), or (C)(2). As we have already stated above, the operation of a county home does not fall into any of these definitions of a governmental function, and the first prong of the definition of a proprietary function is satisfied. In the second prong, R.C. 2744.01(G)(1)(b) provides that the function must involve activities customarily engaged in by nongovernmental persons. Again, as we have discussed above, the operation of a county home involves activities which are customarily involved in by nongovernmental persons. Accordingly, the second prong of the definition is also satisfied. As a result, the alleged negligence leading to Frank's injury was caused by employees of the County in connection with a proprietary function, and the trial court did not err in making the same finding. Therefore, the County's first and second assignments of error are overruled, and the exception to immunity listed in R.C. 2744.02(B)(2) is

applicable to the facts of the case before us.

On pp. 19-20 of its opinion the Appellate Court went on to say, “Having found that the County’s political subdivision immunity is subject to the exception in R.C. 2744.02(B)(2), we must proceed to the third tier of the political subdivision immunity analysis and determine whether the County’s immunity can be reinstated via any of the R.C. 2744.03 defenses to liability.”

The County claims that the defenses in O.R.C. §2744.03(A)(3) applies. The Appellate Court rejected that argument.

The County also claimed that the defenses contained in O.R.C. §2744.03(A)(5) applied. O.R.C. §2744.03(A)(5) states as follows:

(5) 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.

The Appellate Court held at page 21 of its opinion, “However, Green and Warder’s allegedly negligent actions did involve ‘discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources.’ ” This is an error.

RN Green and LPN Warder are not liable in the within case because of the way they used their discretion in determining how to use equipment, supplies, personnel, facilities, and other resources. With respect to the choices they made, they did the right thing. They used two people and a Hoyer Lift to transport Frank Cramer from his chair to his bed. This was the proper choice of equipment and personnel. They simply transferred Mr. Cramer negligently. They dropped Frank Cramer because they were negligent. The care that they rendered to Frank Cramer was substandard.

They did not drop him because of their discretion about equipment. A Hoyer Lift was the right piece of equipment to use.

They did not drop him because of their use of personnel. The decision to use two people was the correct decision.

They were simply negligent in transferring Mr. Cramer and that is why they dropped him. O.R.C. 2744.03(A)(5) does not apply at all.

The holding of the this Court in Hubbard v. Canton Cty. Schl. Brd. Of Ed., 97 Ohio St. 3d 451, (2002), one of the main cases relied upon by the Third Appellate District Court of Appeals in its decision in this case, supports a finding of liability for Auglaize Acres. In Hubbard, this Court held,

We therefore hold that the exception to political-subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function. The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings. Since the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government function, R.C. 2744.02(B)(4) applies and the board is not immune from liability.

Hubbard at 454-455 (emphasis added).

In Hubbard a teacher at Hartford Middle School in the City of Canton allegedly assaulted female students on the premises of Hartford Middle School. In the within case, Green and Warder negligently injured Frank Cramer on the premises of the county nursing home. Auglaize Acres is not immune for the negligent actions of its employees in this case.

Neither the Court of Appeals nor Auglaize Acres have cited any cases where a county was found to be immune for the negligent acts of one or more of its employees pursuant to O.R.C. 2744.03(A)(5). The Plaintiff in this case is alleging negligence not the improper exercise of discretion. O.R.C. 2744.03(A)(5) does not apply.

In Perkins v. Norwood City Schools, 85 Ohio St. 3d 191 (1999), Mark C. Perkins was a student at Norwood Middle School. He was walking with crutches. One of his crutches slid on a puddle of water from a leaking drinking fountain in the hallway of the school and he injured his knee. He and his parents sued the Norwood City Schools alleging that the principal was negligent in the way he responded to the leaking drinking fountain. Initially, the school principal instructed the janitorial staff to repair the fountain. After Mark Perkins fell the principal hired a commercial plumbing company to repair the drainage system. The Norwood City Schools filed a Motion for Summary Judgment based on the immunity provided by O.R.C. §2744.03(A)(5). The trial court granted summary judgment in favor of the Norwood City Schools and the Hamilton County Court of Appeals affirmed. This Court reversed that decision holding;

We conclude from the record and the standard created by earlier decisions of this court that the decision of whom to employ to repair a leaking drinking fountain is not the type of decision involving the exercise of judgment or discretion contemplated in R.C. 2744.03(A)(5). Such a decision, under the facts of this case, is a routine maintenance decision requiring little judgment or discretion. We therefore hold that appellee is not entitled to immunity from liability pursuant to R.C. 2744.03(A)(5).
Perkins at 193.

The within case does not involve any use of discretion. The within case simply involves substandard care. O.R.C. §2744.03(A)(5) does not apply. Auglaize Acres is not immune from liability.

PROPOSITION OF LAW NO. II:

Green and Warder are not immune from liability. O.R.C. 3721.17 expressly imposes liability on them for their negligent acts.
As the Third Appellate District Court noted, O.R.C. §2744.02 refers only to immunity granted to political subdivisions in certain circumstances. It does not bestow immunity upon employees of political subdivisions. The analysis of employees liability begins with O.R.C. §2744.03(A)(6). O.R.C. §2744.03(A)(6)(c) applies to the within case. At the time the negligence took place in this case, O.R.C. §2744.03(A)(6)(c) provided that an employee of a political subdivision is immune from individual liability unless, "(c) Liability is expressly imposed upon the employee by a section of the Revised Code." The Appellate Court concluded on page 26 of its opinion that "Furthermore, no section of the Revised Code expressly imposes liability upon either Green or Warder. The only section of the revised code that Cramer contends imposes liability upon either of them is R.C. 3721.17(I)(1)(a), which states 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."

The Appellate Court concluded on page 26 of its opinion that, "The above language does not expressly impose liability upon the employees of a political subdivision or, more specifically, employees of an unlicensed county home.

Rather, it imposes liability upon “homes” and all persons in general, but not employees.” The Appellate Court made an error. O.R.C. §3721(I)(1)(a)clearly and unequivocally imposes liability on employees of nursing homes for providing substandard care to residents and for violating the rights of nursing home residents.

Chapter 3721 is the Chapter of the Ohio Revised Code dealing with nursing homes. O.R.C. §3721.10 is entitled “Resident’s Rights”. It defines the rights that the residents of nursing home have. It applies to residents of nursing homes. O.R.C. §3721.17(I)(1)(a) provides, “Any resident whose rights under 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation.” This section of the Ohio Revised Code gives Nursing Home Residents a specific cause of action against employees of nursing homes.

Green and Warder were employees of Auglaize Acres. They violated Frank Cramer’s rights pursuant to O.R.C. §3721.13 when they dropped him. They violated his right to adequate and appropriate medical treatment and nursing care, pursuant to O.R.C. §3721.13(A)(3) when they dropped him. They provided substandard care to Frank Cramer. As a result, they violated his rights as provided to him by O.R.C. §3721.13(A)(3). Green and Warder were two of the people charged with the duty to provide Frank Cramer with adequate and appropriate nursing care. As a result, he has a cause of action against the home and against them pursuant to O.R.C. §3721.17(I)(1)(a).

One of the main purposes of Chapter 3721 is to protect nursing home residents from negligence and abuse by employees of nursing homes. Neither the Appellate Court nor Auglaize Acres has cited any case that holds that O.R.C. §2744.03(A)(6)(c) requires the section of the Revised Code that expressly imposes liability upon the employee of the political subdivision to actually mention political subdivisions. It is clear that O.R.C. §3721.17(I)(1)(a) imposes liability on Green and Warder.

In Campbell v. Burton, 99 Ohio St. 3d 336 (2001) this Court considered the question of whether O.R.C. §2151.421 expressly imposed liability on political subdivisions and their employees for failure to report child abuse. This Court held as follows;

We answer the certified question in the affirmative. R.C. 2151.421, through its penalty statute, R.C. 2151.99, expressly imposes liability, within the meaning of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c), on political subdivisions and their employees for failure to report suspected child abuse. Accordingly, we

reverse the judgment of the court of appeals and remand this matter to the trial court for further proceedings consistent with this opinion.
Campbell at 339.
O.R.C. §2151.99 states;
(A) Whoever violates division (D)(2) or (3) of section 2151.313 [2151.31.3] or division (A)(1) or (H)(2) of section 2151.421 [2151.42.1] of the Revised Code is guilty of a misdemeanor of the fourth degree.
(B) Whoever violates division (D)(1) of section 2151.313 [2151.31.3] of the Revised Code is guilty of a minor misdemeanor.
O.R.C. §2151.99 states “Whoever violates . . .” and yet this Court found that was sufficient to expressly impose liability on political subdivisions and their employees.

PROPOSITION OF LAW NO. III:
Green and Warder were also negligent for violating the dictates if the “fall policy” of the home. The care that they rendered was in violation of that policy and as such was negligent and substandard. They are liable to Frank Cramer for their substandard care. The Home is liable to Frank Cramer for their substandard care.

The defendant county home, prior to Frank Cramer’s fall from the Hoyer lift, adopted a “Fall Policy” that was introduced into evidence as Plaintiff’s Exhibit 17. It provided that when Frank’s fall and injury occurred that the attending nurses not move him. They did move him. This was negligent. This was also substandard. Further, the act of moving Frank Cramer was a further violation of his right to adequate and appropriate medical treatment and nursing care, pursuant to O.R.C. §3721.13(A)(3). They were required to call a doctor. They did not. This was another act of negligence. This was another example of their substandard care. Violating the home’s own protocols and procedures was not an act of discretion. Green and Warder did not have the discretion to ignore the home’s own policies. Their actions were not the exercise of discretion. Their actions were negligent and as such they are liable for their actions and the home is liable for their actions.