IN THE SUPREME COURT OF OHIO
CASE NO. 2022-0784

ALLISON HARRIS, Plaintiff-Appellant/Appellee Below, vs. DUSTIN HILDERBRAND, Defendant-Appellee/Appellant Below.	On Appeal from the Jefferson County Court of Appeals, Seventh Appellate District Court of Appeals Case No. 21 JE 0013

BRIEF OF AMICUS CURIAE THE OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Ohio School Boards Association (OSBA) appears respectfully before this Court as Amicus Curiae. OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 711 boards of education representing the city, municipal, local, exempted village, and career technical school districts and educational service centers throughout the State of Ohio are OSBA members. OSBA's activities include extensive informational support, advocacy, and consulting, such as board development and training, legal information, labor relations representation, and policy service and analysis.

The interest of OSBA in this case is strongly associated with the governance and operation of schools seeking to enhance and maintain school security, locate weapons, drugs, and bombs, and planning emergency responses to a school shooting using a trained canine, whether by contracting with a police or sheriff's department for a K9 unit and/or school resource officer, employing their own resource officer with a K9, or purchasing a security dog and employing a handler to house and train with the dog to provide school security. Schools also seek to utilize therapy and service dogs for student and staff well-being and learning methodology. Without immunity for animal handlers working with public schools, the ability of school boards and district staff to consider using dogs actively in a school setting may be compromised because fewer individuals will be willing or able to take on the task of being responsible for the animals and caring for them in their homes.

As noted by fellow amici, the future of K9 programs in Ohio is on trial in this case: we submit that utilizing canines in Ohio's schools for school security, student and staff well-being and more also is at stake.

The Uvalde school shooting in 2022 was a reminder of how deadly school shootings can be, when 21 victims were fatally shot by an 18 -year-old former student, 18 of whom were elementary students between the ages of 9 to 11. Seventeen others were wounded in the mass shooting.

These events and threats of similar events have continued to occur nationwide with terrifying frequency since the Columbine shooting in April of 1999. In 2022 alone, one independent media source reported that there were 51 school shootings which resulted in either injuries or deaths, disrupting or ending the lives of 140 adults and children.[1] Another source reported that there were more school shooting incidents in 2022 than in any other year since 1970, with a total of 302.[2] The prospect that any school district in Ohio could be a mass school shooting target at any time invokes serious concerns for parents, students and educators alike.

As these incidents in schools continue to occur, the State of Ohio's expressed interest in and the necessity of assisting its public schools to enhance and maintain security for the safety of students has been made a top priority. Ohio has issued $112M in school security grants in 2022 alone through the 2022 K-12 School Safety Grant Program, has established and operates the Ohio School Safety Center through the Department of Public Safety, and has enacted ongoing requirements for schools to have safety plans and emergency plans in the event of a school shooting or other disaster.

This case has far-reaching implications for public policy. Interest in using canines to support school security will likely continue to increase, provided public employers and their

[1] *School Shootings This Year: How Many and Where*, Education Week, December 29, 2022, https://www.edweek.org/leadership/school-shootings-this-year-how-many-and-where/2022/01.
[2] Riedman, David (2022). *K-12 School Shooting Database.* https://k12ssdb.org/. The source defines the term "shooting" to include "all incidents in which a gun is brandished, fired, or when a bullet hits school property for any reason, regardless of the number of victims, time, or day of the week."

employees receive sufficient immunity protection to cover the handling, care and use of their canine assets. The use of canines should be an option for school boards to consider and utilize as locally determined. This issue is therefore of critical importance to the development and expansion of their own school security programs, and in partnering with law enforcement to utilize K9 units for school security programs by better enabling schools to purchase highly trained first responder canines for school security without jeopardizing public funds in the process.

At least one school district has purchased a canine used for school security as a first responder. It is reportedly one of the first districts in in Ohio to do so. The dog, a Belgian Malinois, is trained to detect firearms and respond in an attack. The Superintendent went to a conference after the Parkland, Florida school shooting and met a former K9 officer from New Jersey who trains the dogs to perform this specific function. The District then purchased the dog to work at the district to provide this added security measure.

The dog is owned by the District and trains and lives with a school security employee who is not a school resource officer. The team regularly trains at school. A mock exercise might involve the dog being called to the library where there is a report of a school shooter. Because the canine's training is focused on detecting weapons and overpowering a person possessing a weapon, he would be used as a first responder to a school shooting. Certainly, if school employees who are handling school security dogs are not protected with immunity under Chapter R.C. 2744 while training, using and caring for the animal, the district mentioned above and other districts considering this kind of program and any future program of a similar nature might be too legally risky to continue. They also may find that public employees unwilling to act as handlers.

As noted above, the potential for using dogs in the educational environment is by no means limited to school security. Ohio schools with students that range from preschool age through

postsecondary are also increasingly using therapy dogs to support the physical and mental wellbeing and needs of students and staff. Like security dogs, these animals are often trained by a professional trainer and are issued certifications to provide various animal assisted interventions and supports. Therapy animal handlers rather than districts often cover the expenses for training as well as care and maintenance.

Research conducted over the past few decades regularly illustrate that therapy dogs provide numerous services and benefits to students with disabilities as well as their regular education peers. These include increased reading and language skills, social-emotional enrichment and development, de-escalation and overall reduction of negative or destructive behaviors, and improved motor skills just to name a few. (Jerri J. Kropp and Mikaela M. Shupp (2017) *Review of the Research: Are Therapy Dogs in Classrooms Beneficial?*; Kivlen, C. A., Quevillon, A., & Pasquarelli, D. (2022). *Should Dogs Have a Seat in the Classroom? The Effects of Canine Assisted Education on College Student Mental Health,* The Open Journal of Occupational Therapy, Vol 10, Issue 1, 1-14. https://doi.org/10.15453/2168-6408.1816.)

Examples of how these dogs are used in the school setting are numerous. For instance, therapy dogs are used with some students as an intervention method by which to develop reading skills; for instance, having students read to a dog rather than peers. Students with disabilities who demonstrate harmful behaviors towards themselves or others may use service and therapy dogs to de-escalate and calm themselves. Students are incentivized to demonstrate positive behaviors such as kindness and good attendance by earning the opportunity to spend time with the therapy dog.

Staff also benefit from the presence at school of therapy dogs. Schools face an alarming increase in mental health challenges. Staff, like many students, may have experienced significant trauma or may be battling debilitating mental or physical health conditions. Incorporating therapy

dogs into the school environment helps bolster overall staff wellness by reducing tension and student behaviors, which ultimately facilitates better work attendance and therefore more consistent and effective instruction and learning.

Just as with security dogs, therapy animals may not simply be turned "off" at the end of the workday and stored. To be effective, a trained K9 or other service/therapy dog must be conditioned, fed, trained, and live in an environment that facilitates their overall health and bond with their caregiver/partner.

The case before this Court may have far-reaching consequences for schools and their ability to use service and therapy animals to address a multitude of safety and health needs. Political subdivisions may be forced to consider or reconsider decisions about utilizing canines for security and for other beneficial uses. Political subdivisions and municipal entities will have to contend with the possibility that citizens who might be injured by a canine asset may file claims across the state and obtain recovery depending upon whether the animal is working or is being housed, trained, and cared for by its assigned caregiver. It is not an exaggeration to state, as other amici and Appellee have done, that the future use of K9 units and school security dogs purchased by school districts, or other kinds of service dogs in schools, would be rendered unworkable after a decision that school districts may not rely on immunity in the event of an incident.

Application of a standard that expands liability for the employees of political subdivisions, municipalities and other public entities is a precedent that will have implications far beyond this matter, and would represent a significant departure from established precedent over a period of many years, increase litigation exponentially, and present a chilling effect upon Ohio schools if it were adopted. This case is therefore of great public concern.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae OSBA hereby adopts the Statement of Case and Facts set forth in the Brief of Appellee. (Merit Brief of Appellee, Jan. 5, 2023)

At issue in this case is whether a law enforcement public entity may operate using canine officers according to their unique needs with the assurance that the employee handler assigned as the handler of that canine asset, and that will work and care for them, is protected by statutory immunity.

The statutes and established case law supports the application of statutory immunity to the right and responsibility of political subdivisions and municipal entities to operate and maintain their own governmental, proprietary, and discretionary functions in a way that accomplishes their respective duties. The aspect that may need clarification is the acknowledgment and rightful extension of immunity for the unique situation posed by the ownership and use of canines by law enforcement and by extension, public schools.

A department or district-owned canine asset must be viewed differently than other property. A police dog is a police dog twenty-four hours a day, whether they are working using their specialized, trained skills or not. This also applies to a therapy or service dog. They must have their needs met by a human handler, who likewise must live, train, and work with that canine to accomplish the purposes of their employer and the owner of the animal. Employees of city police departments, deputy sheriffs' departments, or school district employees assigned to work with the canine asset are responsible for such supervision and duties at all times, even when the employee is off duty.

If the court were to conclude that immunity does not apply to public employees while they are housing and caring for a canine trained for a specific purpose of the employer during their off

duty hours, school administrators and school districts across Ohio will have to revisit a risk-benefit analysis before continuing to continue to work with K9 units or use canines in schools for security, therapy or services to students given the uncertainty regarding liability for public employees in using such animals. Among the considerations in this analysis will be whether insurers could require additional riders for the use of canines in schools, which will increase the cost of a school district's liability coverage.

ARGUMENTS AGAINST OF APPELLANT'S PROPOSITIONS OF LAW

I. Appellant's Proposition of Law No. 1: An Off-Duty Deputy Sheriff who is a K-9 Handler Should Not Be Entitled to Immunity From a Claim of Common Law Negligence for an Attack by his K-9 of a Third-Party Guest at his Personal Residence Simply Because He Is Required to Harbor and Keep the K-9 at his Home. Rather, Whether Immunity Exists Should Be a Question for the Jury When There Are Disputed Issues of Fact as to Whether the Officer Is Acting Manifestly Outside the Scope of His Employment.

A. Because R.C. 2744.02 and the defenses in R.C. 2744.03 provide immunity for employees of political subdivisions, no common law negligence claim may lie against an employee of a political subdivision. R.C. 2744.03(A)(6) refers to intentional torts of an employee of a political subdivision, and negligence is not included in such definition. The public employee's duties to care for and supervise the canine property of his public employer continue even during off-duty hours and are part of the governmental functions of the sheriff's office such that general immunity applies, and there is no material fact at issue sufficient to bar summary judgment on the claim.

Since its enactment in 1985, the statutory immunity conferred in Revised Code Chapter 2744 now claims a robust body of case law interpreting it, which is replete with examples of when courts are to apply 2744.03(A)(6). Claims against individual employees do not use the three-tier analysis, but instead are determined by applying R.C. 2744.03(A)(6) and its three exceptions. (*Cramer v Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946).

Whether a political subdivision is immune from civil liability is purely a question of law, properly determined prior to trial and preferably on a motion for summary judgment. (*Yonkings v. Piwinski*, 10th Dist. Franklin No. 11AP07, 2011-Ohio-6232, ¶18) It is well-recognized that a

political subdivision acts through its employees. (*Elston v. Howland*, 113 Ohio St.3d 314, 2007-Ohio-2070)

In this case, it is undisputed that Dustin Hilderbrand is an employee of the Belmont County Sherriff's Department. It should be undisputed that the Department's ownership of Xyrem as a K9 paired with Deputy Hilderbrand as his handler, and the deputy's actions as Xyrem's handler, is a governmental function of the Department. [R.C. 2744.02(A)(2)]

Regarding whether the use or possession of canines for governmental purposes is a proprietary or governmental function, *T.B.Y v. Martins Ferry* involved a dog that had been caught and then escaped from City custody, running loose, and biting a child before being recaptured. The appellant argued that the City of Martins Ferry engaged in the activity of rescuing dogs, an activity engaged in by humane societies and alleged it was proprietary function of the City. The Seventh District Court of Appeals disagreed, finding that:

> "Pursuant to R.C. 2744.01(C)(1), a government function is one specified in division (C)(2) or a function that: (a) is imposed on the state as an obligation of sovereignty and performed by a political subdivision voluntarily or pursuant to legislative requirement; or (b) is for the common good of all citizens of the state; or (c) promotes or preserves the public peace, health, safety, or welfare, and involves activities not customarily engaged in by nongovernmental persons, and is not specified in division (G)(2) as a proprietary function." [¶ 25, 2016-Ohio-8482, 78 N.E.3d 242 (7th Dist.)]

The ownership, handling, and supervision should extend to almost every activity and function concerning the care and handling of the Department's asset, Xyrem. Therefore, the general grant of immunity provided by R.C. 2744.02(A)(2) and 2744.03(A)(6) should apply to the governmental function of providing police services as outlined in R.C. 2744.01(C)(2)(a) and (b). Within the ambit of R.C. 2744.03(A)(6), the court must determine whether any of the three exceptions outlined in 2744.03(A)(6)(a), (b), or (c) are met.

While respectfully acknowledging the injuries sustained by Appellant, the question of law is not whether there is an entity that would compensate her should Hilderbrand be found personally liable, but whether Deputy Hilderbrand's responsibility for the supervision of Xyrem renders him as an employee of the Department immune from liability for actions or omissions that were not manifestly outside the scope of his duties, in bad faith or malice, and for which there is no statute expressly imposing liability upon the employee of a political subdivision applicable to that action or omission.

Here, Appellant has not alleged malice or bad faith, but negligence. If the strict liability statute governing dog owners, R.C. 955.28, does not apply to Dustin Hilderbrand in this case, then only the exceptions found in R.C. 2744.03(A)(6)(a), (b), and (c) may be applied to analyze whether there is an exception to the general grant of immunity in the law. The negligence alleged by Appellant is not one of the exceptions enumerated in the statute. Employees of political subdivisions are generally immune from negligence claims (*Lindsey v. Summit County Children's Services,* 9th Dist. Summit No 24352, 2009-Ohio 2457).

Indeed, R.C. 2744.03(A)(6) refers to intentional torts of employees, and Ohio's case law is replete with examples applying it. In the case of *Lackey v. Noble*, an examination of the history how the phrase "wanton misconduct" has been interpreted over the last hundred years (specifically noting the phrase in the 1920's originally included "wanton negligence" which has been abandoned), the definition remaining stable since 1977 and as announced in the case of *Hawkins v. Ivy*, in which the Ohio Supreme Court defined as follows:

> "Clarifying the definition, it held that, if someone "fails to exercise any care whatsoever toward those to whom he owes a duty of care, and his failure occurs under such circumstances in which there is great probability that harm will result, such failure constitutes wanton misconduct." (*Lackey v. Noble*, 9th Dist. Medina, No. 11CA0082-M, 2012-Ohio-2554, citing *Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977).

Had a dog owned by Deputy Hilderbrand, and not owned the Department nor used to perform a governmental function, bitten the Appellant, the strict liability statute would apply to him. Here, it cannot and does not apply.

Appellant's further attempt to demonstrate that Deputy Hilderbrand's conduct fits the R.C. 2744.03(A)(6)(a) exception of acting manifestly outside the scope of his duties by "…using Xyrem for entertainment purposes at a private party" characterizes the conduct inaccurately. Xyrem was supervised by his handler in his own backyard. (*Appellant's Merit Brief*, p.4.) It is undisputed that the injury did not occur during or immediately after the skills demonstration described by Appellant. (*Appellant's Merit Brief*, p. 2) Deputy Hilderbrand's actions or omissions did not show any lack of care towards his guests, nor was there any great probability that harm would result from his actions.

The *Merit Brief of Appellee* contains a thorough case law overview of the R.C. 2744.03(A)(6)(a) "manifestly outside the scope of his duties" exception upon which amicus curiae OSBA need not further expound.

Summary judgment is appropriate on this proposition of law, and the OSBA urges this court to affirm the Jefferson County Court of Appeals below. (*Harris v. Hilderbrand*, 2022-Ohio-1555, 191 N.E.3d 1143 (7th Dist.))

In other words, you cannot get there from here: "there" being negligence amounting to liability, and "here" being R.C. 2744.03(A)(6) and its exceptions.

II. Arguments Against Appellant's Proposition of Law No. 2: An Off-Duty Deputy Sheriff who is a K-9 Handler Should Not Be Entitled to Immunity From a Claim of Strict Liability Under R.C. 955.28(B) for an Attack by his K-9 of a Third-Party Guest at his Personal Residence Simply Because He Is Required to Harbor and Keep the K-9 at his Home.

A. In the absence of an express abrogation of immunity for a political subdivision or its employees in R.C. 955.28, R.C. 2744.02 immunity applies and no exception under R.C. 2744.03(A)(6)(c) may be proved on the facts of this case.

Appellant attempts to evade the application of immunity to this matter by positing that the strict liability statute somehow expressly confers liability upon the employees of political subdivisions without actually expressly conferring liability upon the employees of political subdivisions. The express provision requirement in R.C. 2744.03(A)(6)(c) which applies to statutes that carve out a specific provision of the law as applicable to a public entity or public employee normally subject to 2744.02 immunity and its R.C. 2744.03 defenses and exceptions is affirmative and cannot be inferred. The plain language of R.C. 2744.03(A)(6)(c) states that civil liability is expressly imposed upon a public entity or its employees by a statute in the revised code for the exception in the statute to apply.

Appellant argues that R.C. 955.28 should apply by noting that it does not *exclude* political subdivisions (*Merit Brief of Appellant*, p. 33) and alleging that the factual circumstances (the backyard barbeque, the alcohol, the demonstration occurring well over an hour before the incident at the social gathering) operate to remove immunity. These arguments and allegations do not address the expressly imposed requirement in the statute. . Further, they are not dispositive of the immunity analysis and is in fact inapplicable to it. This principle has been applied to this particular statute in several cases, including *Callaway v. Akron Police Department*, in which the court found that R.C. 955.28(B) is a general liability statute and does not expressly impose civil liability upon employees of a political subdivision. (2021-Ohio-4412, 183 N.E.3d 1, (9th Dist.))

In a case arising out of a dog bite occurring to a volunteer at a county dog pound, the Fifth Appellate District analyzed the interaction of the strict liability dog bite statute, R.C. 955.28 with R.C. 2744.03(A)(6)(c), as is at issue here. In *Jamison v. Bd. of Stark Cty. Commissioners,* found

no conflict between the statutes, noting that with strict liability, it is not necessary to prove negligence. The Court stated:

> "In this case, R.C. 955.28(B) uses the words "keeper, owner, or harborer" without any reference to political subdivisions or their employees as the terms "keeper, owner, or harborer" are not defined anywhere in Revised Code Section 955, entitled "Dogs". There is no indication in the language of Revised Code Section 955.28 that the General Assembly has abrogated the immunity provided to employees of a political subdivision with an express imposition of liability. R.C. 955.28(B) does not unmistakably, explicitly, or definitely state that an employee of a political subdivision is liable. Without any express imposition of liability, the R.C. 2744.03(A)(6)(c) exception is not triggered…" (¶ 23, 2014-Ohio-4906).

Finally, the case of *Alden v. Dorn* in the Summit County Court of Appeals involved a very similar fact pattern to the instant case. During a backyard cookout at the home of the Akron K9 commander, police dog Gunny, after playing fetch with Sergeant Dorn, bit a child after having been commanded by his handler to lie down on the patio. The court determined that reliance on R.C. 955.28 is misplaced to establish liability. (¶ 11, 2016-Ohio-554) The court also found that:

> "Moreover, Appellants have not developed any argument that Appellees' actions in this matter satisfied the other exceptions listed in R.C. 2744.03(A)(6), and we decline to develop an argument on their behalf." (Id., at ¶ 11)

Appellant offers facts extraneous to the determination of how immunity statutes apply to this case. While examination of facts in each particular situation is necessary to determine whether an exception exists under R.C. 2744.03(A)(6), the facts necessary to find an exception to immunity require more than negligence, but wanton and willful misconduct, conduct manifestly outside the scope of duty, or a situation when liability is expressly imposed by statute. Nor are the facts in dispute to such an extent that there is a material issue of fact sufficient to defeat summary judgment on the immunity claim.

Because civil liability is not expressly imposed on public employees in R.C. 955.28 as required by R.C. 2744.03(A)(6)(c) as to political subdivisions or their employees, that statute may

not be applied against Deputy Hilderbrand in this context. Thus, R.C. 955.28 may not operate to meet the requirement set out as an exception to immunity in R.C. 2744.03(A)(6)(c).

CONCLUSION

Amicus curiae OSBA submits that political subdivisions and the employees of political subdivisions require clarity regarding immunity from claims except where expressly included by statute or through application of R.C. 2744.02 and R.C. 2744.03 defenses and exceptions to determine whether liability exists regarding the use of canines in the programs and services provided by those subdivisions, even when incidents occur outside of typical working hours.

The use of canines by law enforcement and school districts for school security, including performing such services as bomb, drug, weapons and ammunition detection as well as therapeutic services remain an important element of current school operations in today's world. A shifting landscape of liability for the use of canines by employees of political subdivisions without such clarity renders one important component of operating Ohio schools less useful, making it more difficult to accomplish the goals of ensuring student and staff health, wellbeing and safety during the school day.

Based on the above, OSBA respectfully urges this Court to conclude that because Appellant can prove no exception to immunity outlined in R.C. 2744.03(A)(6) and because R.C. 955.28 does not contain any express language including employees of a political subdivision and is therefore inapplicable to this matter, Belmont County Sheriff's Department employee Dustin Hilderbrand is immune from liability for the injury Appellant sustained when bitten by the K9 while in Deputy Hilderbrand's back yard.

Amicus Curiae OSBA respectfully requests that this Court to uphold the decision of the 7th District Court of Appeals and find in favor of the Belmont County Sheriff's Department employee Dustin Hilderbrand in this matter for the aforementioned reasons.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Amicus Curiae of the Ohio School Boards Association In Support of Defendant-Appellee, Dustin Hilderbrand*, was filed electronically with the Court and sent via ordinary U.S. mail, postage pre-paid, upon the following parties on this 10th day of January, 2023:

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