ORIGINAL

IN THE SUPREME COURT OF OHIO

Lea D. Smith,	:	
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	Case No. 2010-0809
Vashawn L. McBride, et al.,	:	Court of Appeals Case No. 09APE-06-0571
Appellees.	:	
	:	

MERIT BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE

Brian G. Miller (0063241)
(Counsel of Record)
BRIAN G. MILLER CO., L.P.A.
326 South High Street, Suite 500
Columbus, Ohio 43215
Telephone: (614) 221-4035
Facsimile: (614) 222-1899

COUNSEL FOR APPELLANT,
LEA D. SMITH

Boyd W. Gentry (0071057)
(Counsel of Record)
Joshua R. Schierloh (0078325)
SURDYK DOWD & TURNER CO., L.P.A.
1 Prestige Place, Suite 700
Miamisburg, Ohio 45342
Telephone: (937) 222-2333
Facsimile: (937) 222-1970

COUNSEL FOR APPELLEES, CLINTON TOWNSHIP POLICE DEPARTMENT AND SGT. TRAVIS D. CARPENTER

Margaret M. Murray (0066633)
(Counsel of Record)
Michael Stewart (0082257)
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, Ohio 44870
Telephone: (419) 624-3000
Facsimile: (419) 624-0707

COUNSEL FOR AMICUS CURIAE
THE OHIO ASSOCIATION FOR JUSTICE

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I. INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This Amicus Curiae represents the interests of the Ohio Association for Justice ("OAJ"), formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately fifteen hundred (1,500) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

Amicus Curiae is concerned that the limited statutory immunity to liability granted to police officers operating motor vehicles is growing to include virtually all collisions involving police officers. This result was clearly not intended by the legislature when it granted an affirmative defense to immunity only to officers responding to an "emergency call," as specifically defined by statute. This Court has previously adopted a fairly expansive view of an "emergency call," including any call to which the officer's response is required by a professional obligation or duty. If allowed to stand, the Tenth District's decision uncouples the immunity determination from even this loose standard, immunizing officers without regard to whether they were duty-bound to respond to a particular situation.

As set forth in the opinion below, Sergeant Travis Carpenter, a police officer employed by Clinton Township, negligently[1] caused a traffic accident while en route to a general radio call in another jurisdiction. Sergeant Carpenter was on duty at police headquarters when he overheard a radio call involving a Franklin County Sherriff's deputy who was chasing a suspect fleeing on foot following a routine traffic stop. On his own initiative, Sergeant Carpenter immediately responded to a call outside of his home jurisdiction, without activating his lights

[1] At the trial court and at the Tenth District, Appellant Lea D. Smith argued that Sergeant Carpenter's conduct rose to the level of wanton and willful misconduct. This issue is not part of the instant appeal and Amicus Curiae takes no position on this fact-specific inquiry.

and in excess of the speed limit. The decision to grant immunity to Sergeant Carpenter and Clinton Township is troubling for two reasons. First, Sergeant Carpenter had no duty to respond to a general call outside of his jurisdiction and no clear authority to act as a police officer when he arrived. Second, the courts below granted summary judgment to Sergeant Carpenter and his employer on the basis of immunity, an affirmative defense to liability, based solely on his vague testimony that he was responding pursuant to an unspecified "mutual aid" arrangement with the neighboring jurisdiction.

"Mutual aid" means more than an officer's individualized, spur-of-the-moment decision to respond to a call outside of his/her jurisdiction. The formation of a mutual aid agreement between law enforcement agencies is specifically governed by statute and an officer or political subdivision that wishes to claim immunity based on mutual aid must show that its officers were acting according to an agreement that complies with the relevant statutory requirements. Absent such an agreement, Sergeant Carpenter was without authority to respond to a neighboring jurisdiction and authority to act as a police officer.

Under these circumstances, the lower courts erred by concluding that Sergeant Carpenter was answering a "call to duty" and was therefore on an "emergency call" at the time he caused the collision with Appellant. The lower courts' grant of summary judgment in their favor must therefore be reversed.

II. LAW AND ARGUMENT

Proposition of Law No. 1: Absent a "Mutual Aid Pact" or an equivalent legislative resolution, a police officer who is not engaged in "hot pursuit" has no professional obligation to respond to a call outside of his/her jurisdiction, and thus cannot be deemed to be on an "emergency call" for the purposes of R.C. § 2744 immunity when responding to such a call.

A. A police officer enjoys sovereign immunity only when responding "emergency calls" as defined by statute.

The General Assembly adopted a well-settled three-tiered scheme for determining whether a political subdivision is entitled to immunity for a particular tort claim. *Cramer v. Auglaize Acres,* 113 Ohio St.3d 266, 2007-Ohio-1946, at ¶ 14; *Colbert v. City of Cleveland,* 99 Ohio St.3d 215, 2003-Ohio-3319, at ¶ 7. This Court described the standard in *Greene Cty. Agr. Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, as follows: "First, R.C. § 2744.02(A)(1) sets out a general rule that political subdivisions are not liable in damages. In setting out this rule, R.C. § 2744.02(A)(1) classifies the functions of political subdivisions into governmental and proprietary functions and states that the general rule of immunity is not absolute, but is limited by the provisions of R.C. §2744.02(B), which details when a political subdivision is not immune. Thus, the relevant point of analysis (the second tier) then becomes whether any of the exclusions in R.C. §2744.02(B) apply. Furthermore, if any of R.C. § 2744.02(B)'s exceptions are found to apply, a consideration of the application of R.C. § 2744.03 becomes relevant, as the third tier of analysis." [citations omitted].

Here, the parties do not dispute that Sergeant Carpenter was performing a "governmental function" at the time of the accident. With respect to the second prong of the test for immunity, R.C. § 2744.02(B)(1) provides the following exception to immunity: "Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to personal property caused by the negligent operation of any motor vehicle by their employees

when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability: (a) a member of a municipal corporation police department or any other police agency while operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct***" [emphasis added].

For purposes of this dispute, the statutory scheme to determine whether Sergeant Carpenter and Clinton Township are entitled to immunity can be summarized as follows: 1) as a political subdivision, Clinton Township is generally immune from liability, unless, 2) that liability arises from its employee's negligent operation of a motor vehicle, except when, 3) that vehicle is driven by a police officer responding to an "emergency call." This case turns largely on the lower courts' mistaken conclusion that Sergeant Carpenter's response to a general radio call in a neighboring jurisdiction constitutes an "emergency call." This issue will be addressed in some detail below.

The general structure of Ohio's immunity statute, however, clearly indicates intent by the General Assembly to immunize police officers involved only in some traffic accidents. From the structure of Revised Code Chapter 2744, it is clear that there are times when an officer is on duty and driving a police car, but has no immunity from liability when the officer negligently causes a traffic accident. The legislature could have drafted the chapter to exclude liability for "all police officers while on duty" or for "all police officers operating a motor vehicle," but the General Assembly did not do so. The legislature's adoption of current three-tiered approach manifests a deliberate policy choice not to grant blanket immunity to on-duty police officers.

The Eighth Appellate District recently recognized that there must be some distinction between "emergency" and "non-emergency" calls when it refused to extend immunity to officers

on "routine patrol" at the time they were involved in a collision. "If the legislature had intended this result, it would have provided an exception for the operation of a motor vehicle by a police officer in the performance of any of his or her duties. It did not go so far." *Spain v. Village of Bentleyville,* 8th Dist. No. 92378, 2009-Ohio-3898, at ¶ 12.

For immunity purposes, the legislature drew a line between officers who responding to an emergency call and officers who were not. At its core, this case is about which side of that line Sergeant Carpenter's voluntary response to a general radio call in a neighboring jurisdiction falls.

B. Under this Court's precedent, an "emergency call" means a response required by an officer's professional obligation.

The term "emergency call" is a statutory term of art, defined as "a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." R.C. § 2744.01(A)(1). The definition adopted by the General Assembly contains a certain tension, depending on the phase actually emphasized. Not every "call to duty" involves an emergency. A police officer is not duty-bound to respond to any "emergency" or "inherently dangerous situation," no matter how remote from his/her jurisdiction or duties as a police officer.

In interpreting the General Assembly's enactment, this Court has put the emphasis squarely on the words "call to duty." *Colbert,* 99 Ohio St. 3d 215, 2003-Ohio-3319. Any situation to which a response is required by an officer's professional obligation qualifies as an "emergency call." Id, at Syllabus. Specifically, this Court relied on a dictionary definition of the word "duty" to include "obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession." Id, at ¶ 13.

By focusing on the phase "call to duty" in *Colbert,* this Court determined that the activity of an officer need not involve an "emergency" (as the word is commonly understood) or an "inherently dangerous situation" in order to enjoy the protection of immunity. As Justice Pfiefer observed when dissenting in *Colbert,* the distinction between emergency and non-emergency "calls to duty" has been effectively dissolved. Id, at ¶ 20.

Predictably, in the years since the *Colbert* decision, Ohio appellate courts have extended the cloak of immunity granted by the "emergency call" exception to officers in distinctly ordinary situations. See, by way of example: *Rambus v. City of Toledo,* 6th Dist. No. L-04-1348, 2008-Ohio-4283, at ¶ 2 (officer involved in traffic accident while transporting prisoner was on an "emergency call"); *Rutledge v. O'Toole,* 8th Dist. No. 84843, 2005-Ohio-1010, at ¶¶ 2-5 (officer transporting following orders to transport a prisoner to a neighboring jurisdiction); *Martin v. City of Ironton,* 4th Dist. No. 07CA37, 2008-Ohio-2842, at ¶ 5 (officer en route to assist a sheriff's deputy in locating a residence); *Longley v. Thailing,* 8th Dist. No.91661, 2009-Ohio-1252, at ¶¶ 5-7 (officer pulling into traffic after speaking to a motorist stopped on the side of an expressway).

As this Court directed in *Colbert,* the immunity analysis in each of these cases focused on whether the officer was responding to a specific direction to perform a police duty. In other words, two Ohio appellate courts determined that an officer was on an "emergency call" when transporting a prisoner because he was duty-bound to do so. Under *Colbert,* a court cannot inquire into whether the prisoner was particularly dangerous or whether getting the prisoner to the destination was particularly urgent. The converse is also necessarily true. No matter how

urgent the situation, an officer cannot be entitled to immunity if not required by his/her job responsibilities to act.[2]

In this case, the appropriate inquiry under *Colbert* is whether Sergeant Carpenter was duty-bound to respond to a general radio call in a neighboring jurisdiction, not whether the radio call that prompted Sergeant Carpenter's response was an "emergency" or involved an "inherently dangerous situation." Doing so would undermine one of the central policy rationales behind the broad construction of "emergency call" adopted in *Colbert:* eliminating the need for an officer in the first instance, and a court after the fact, to determine whether a particular call rises to the level of an "emergency."

The facts presented here illustrate the pitfalls of such an inquiry. According to the facts recited by the Tenth District, Sergeant Carpenter was responding to a call involving a "fleeing suspect." *Smith v. McBride,* 10th Dist. No. 09AP-571. 2010-Ohio-1222, at ¶ 3. An officer responding to this call could find virtually anything. The suspect could have briefly slipped away from custody, only to be recaptured later. On the other hand, the responding officer could be confronted with a life-or-death situation. The same could be said of an officer responding to any domestic dispute or report of a disorderly person. Until the officer arrives on the scene, he/she simply does not know. The issue of whether a particular call rises to the level of an "emergency," in the commonly understood sense, depends on a case-specific inquiry into the information available to the officer before responding to the call, the officer's state of mind on the way and the facts as they actually exist at his/her intended destination.

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[2] Consider a hypothetical officer on duty at a police station in Ohio when learning of a major disaster in a distant state and, on the officer's own initiative, sets out to respond. Whatever moral duty the officer may feel to respond, that officer certainly has no professional obligation to respond and would not have immunity en route.

Resolving whether a particular call requires a response by an officers' "professional obligation" or "duty" is somewhat more clear-cut and objective. The officers' job responsibilities either command a response or they do not. Although this test requires leaves room for debate around the edges and necessarily vests the responding officer with discretion regarding whether and how to respond to a particular call, its crux is clear: if an officer is responding to a particular location to perform his/her duties as a police officer, he/she is entitled to immunity under the "emergency call" exception.

There are sound policy reasons for linking the immunity determination to an officer's duty to respond, as opposed to whether the situation to which the officer is responding rises to the level of an emergency. However, having already taken an expansive view of the definition of "emergency call" in *Colbert,* this Court should not take an equally expansive view of an officer's professional obligation or a "call to duty." Doing so runs the very real risk of effectively immunizing any police officer operating a motor vehicle. Even under existing precedent, officers on "routine patrol" and en route to testify in court have attempted to claim immunity. *Spain,* 2009-Ohio-3898, at ¶ 1; *Burnell v. Dulle,* 169 Ohio App.3d 792, 2006-Ohio-7044, at ¶ 2. Although courts rejected both claims, they illustrate the outer limits of litigation over immunity for police officers. With few exceptions, the scope of immunity available to police officers under the "emergency call" exception is already sufficiently broad to encompass a great deal of police activity.

This Court should clearly and unambiguously reaffirm its decision in *Colbert* to limit immunity to those calls to which an officer's professional obligation requires a response. At absolute minimum, immunity should be available only for those situations to which an officer is

specifically and individually "called" (as the term is defined by statute) to exercise his/her authority as a police officer.

Sergeant Carpenter had no professional duty to respond to a call outside of Clinton Township and no clear authority to act as a police officer when he arrived. He should not be entitled to statutory immunity.

Proposition of Law No. 2: Ohio law requires that the existence of a "Mutual Aid Pact" between political subdivisions be substantiated by a written contractual agreement or resolution in order to provide a police officer with the authority to act outside of his/her jurisdiction.

The trial court granted, and the Tenth District affirmed, summary judgment to Sergeant Carpenter and Clinton Township on their affirmative defense: a claim of immunity based upon Revised Code Chapter 2744. The lower courts did so based on little more than Sergeant Carpenter's vague testimony that his response was related to "mutual aide" to the Franklin County Sheriff's Office. The record is entirely devoid of the sort of formal agreement between Clinton Township and that Office specifically required by statute. Absent such an agreement, Sergeant Carpenter lacked authority to arrest the fleeing suspect or to act outside of Clinton Township.

Statutory immunity is an affirmative defense to liability. *Hawk v. Ketterer,* 3rd Dist. No. 1-03-53, 2003-Ohio-6389, at ¶ 5; *Sparks v. Edingfield,* 2nd Dist. No. 94-CA-78, 1995 Ohio App. LEXIS 1367 at * 1. Like all affirmative defenses, the party asserting immunity bears the burden of proof.

Factual disputes over whether an exception to immunity is available may be resolved only by the trier of fact. *See, Groves v. Dayton Pub. Schs.* (1999), 132 Ohio App.3d 566, 570-571; *Vinicky v. Pristas,* 163 Ohio App.3d 508, 511-512, 2005-Ohio-5196; *Trader v. Cleveland,* 8th Dist. No. 86277, 2006-Ohio-295, at ¶ 23.

As an initial matter, the issue of whether an officer has a "duty" to respond to the type of general radio call at issue here is a close question, even when the response does not cross jurisdictional lines. At least one appellate court determined that an officer responding to such a call was not entitled to summary judgment. *Brown v. City of Cuyahoga Falls*, 9th Dist. No. 24914, 2010-Ohio-4330. In *Brown,* the officer overheard a call dispatching other officers from his department to a fight at a housing complex. On his own initiative, the officer also responded. Id, at ¶ 15. In the Ninth District's view, an issue of material fact remained as to whether the officer had a duty to respond given that several officers were specifically directed to respond and the officer claiming immunity was not.

Already questionable, the fact that Sergeant Carpenter crossed jurisdictional lines should be fatal to his claim of statutory immunity.

In this case, the lower court apparently accepted nothing more than Sergeant Carpenter's vague testimony that he was responding in "mutual aid" of a sheriff's deputy as sufficient evidence that he was acting pursuant to a formal mutual aid pact. *Smith,* 2010-Ohio-1222, at ¶¶ 16-17. Despite being asked, Appellees were apparently unable to produce any more concrete evidence of a formal mutual aid agreement. At the summary judgment stage, when viewed in the manner most favorable to the non-moving party, the evidence in the record in this case does not demonstrate that Sergeant Carpenter was acting pursuant to a valid mutual aid agreement. Instead, a reasonable jury could conclude that Sergeant Carpenter simply crossed jurisdictional lines based on his own spur-of-the moment decision to attempt to lend assistance. However laudable Sergeant Carpenter's intentions may have been, he was not acting within the scope of his authority and duties as a Clinton Township police officer.

Pursuant to R.C. § 2935.03(A) a police officer has authority to make an arrest within the territorial jurisdiction in which he/she is employed. Over two decades ago, this Court held that "police officers had no arrest powers, as police officers, when acting outside the boundaries of their political subdivisions, subject to narrowly tailored *** exceptions." *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 22, 226. The *Sawicki* court determined that an officer was without authority to respond to a call involving a robbery, attempted rape and ultimately murder which occurred mere yards from his police station, but outside of his territorial jurisdiction. Id, at 222.

Although various provisions of the Revised Code have been amended since the *Sawicki* decision, an officer's authority to make and arrest or pursue a suspect outside of his/her home jurisdiction is still governed by R.C. § 2935.03. The section provides various exceptions to the general rule that an officer has authority to act as a police officer only within his/her jurisdiction. See, R.C. § 2935.03(D) (the authority to pursue a suspect across jurisdictional lines under some circumstances); R.C. § 2935.03(E) (the authority to take certain actions on the street or highway immediately adjacent to the jurisdiction).

The Tenth District determined that Sergeant Carpenter was entitled to immunity based solely upon his testimony that he was acting pursuant to an unspecified mutual aid arrangement. *Smith,* 2010-Ohio-1222, at ¶¶ 16-17. As set forth in detail in Appellant's Merit Brief, Mutual Aid Pacts are governed in some detail by the Revised Code. Relevant to this case, R.C. § 505.431[3] allows townships to provide additional police support to a county, among others. The section explicitly requires a resolution of the township's board of trustees and approval by a designated member of the township's police department. R.C. § 505.431 provides: "The police department of any township * * * may provide police protection to any county * * * without a

[3] The Tenth District erroneously referred to R.C. § 737.04, which governs municipal corporations. *Smith,* 2010-Ohio-1222, at ¶ 16.

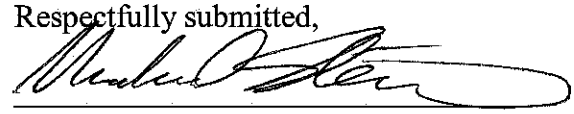
contract to provide police protection, upon the approval, by resolution, of the board of township trustees of the township in which the department is located and upon authorization by an officer or employee of the police department providing the police protection who is designated by title of office or position, pursuant to the resolution of the board of township trustees, to give such authorization." Further, R.C. § 505.431 provides that the immunity granted by Chapter 2744 of the revised code shall apply when the township police officer is rendering aide "pursuant to this section."

In short, the General Assembly provided immunity to officers acting pursuant to a properly executed Mutual Aid Pact, including authorization by the specifically identified officials. Because Sergeant Carpenter and Clinton Township failed to meet his burden of showing that he was entitled to immunity under a Mutual Aid Pact, or any other statutory provision authorizing extra-jurisdictional action, he cannot be said to have been responding to a "call to duty." For this reason, Sergeant Carpenter and Clinton Township are not entitled to immunity.

III. CONCLUSION

Amicus Curiae respectfully requests that the Court reaffirm the standard set forth in the *Colbert* decision. A police officer is not duty-bound to respond to another jurisdiction without specific statutory authority to do so. Without such a duty, the officer cannot claim immunity pursuant to the "emergency call" provision of R.C. § 2744.02.

Respectfully submitted,



Margaret M. Murray (0066633)
(Counsel of Record)
Direct Dial (419) 624-3128
mmm@murrayandmurray.com
Michael Stewart (0082257)
Direct Dial: (419) 626-7008
mjs@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, Ohio 44870
Telephone: (419) 624-3000
Facsimile: (419) 624-0707

COUNSEL FOR AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served on the following by ordinary U.S. Mail, first class postage prepaid, addressed as:

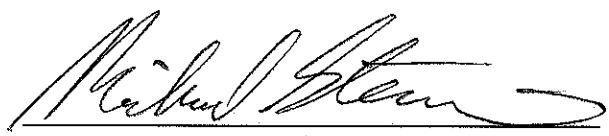
Brian G. Miller (0063241)
(Counsel of Record)
BRIAN G. MILLER CO., L.P.A.
326 South High Street, Suite 500
Columbus, Ohio 43215
Telephone: (614) 221-4035
Facsimile: (614) 222-1899

COUNSEL FOR APPELLANT,
LEA D. SMITH

Boyd W. Gentry (0071057)
(Counsel of Record)
Joshua R. Schierloh (0078325)
SURDYK DOWD & TURNER CO., L.P.A.
1 Prestige Place, Suite 700
Miamisburg, Ohio 45342
Telephone: (937) 222-2333
Facsimile: (937) 222-1970

COUNSEL FOR APPELLEES, CLINTON TOWNSHIP POLICE DEPARTMENT AND SGT. TRAVIS D. CARPENTER

This 1st day of November, 2010.



Margaret M. Murray (0066633)
Michael Stewart (0082257)
MURRAY & MURRAY CO., L.P.A.

COUNSEL FOR AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE