

[Cite as *Spain v. Bentleyville*, 2009-Ohio-3898.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92378

HENRY A. SPAIN, ET AL.

PLAINTIFFS-APPELLEES

vs.

VILLAGE OF BENTLEYVILLE, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-635296

BEFORE: Rocco, J., Cooney, A.J., and Dyke, J.

RELEASED: August 6, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, the Village of Bentleyville, appeals from a common pleas court order overruling its motion for summary judgment on the basis of sovereign immunity. It asserts that its police officer responded to a call to duty by performing routine patrol duties, and thus was responding to an “emergency call,” for which the village was immune from liability under R.C. 2744.02(B)(1)(a). We find that a police officer who operates a motor vehicle in the performance of routine police patrol duties is not responding to an “emergency call,” and therefore the village is not immune from liability. Accordingly, we affirm and remand for further proceedings.

{¶ 2} The amended complaint in this case alleged that plaintiff-appellee, Henry Spain, was walking southbound on Grey Fox Run in the Village of Bentleyville when he was struck by a northbound police vehicle, a 2005 Crown Victoria operated by Bentleyville police sergeant Stephen S. Gessic. The amended complaint asserted that Gessic negligently operated the vehicle by, inter alia, allowing it to travel left-of-center, striking Spain. The amended complaint sought damages against the village¹ for Spain’s injuries and pain and suffering, for emotional distress suffered by Spain’s wife, and for the loss of consortium suffered by Spain’s wife and two children. In addition, plaintiffs

¹The original complaint also asserted claims against Gessic personally. However, the plaintiffs voluntarily dismissed their claims against Gessic, without prejudice, before the amended complaint was filed.

claimed that R.C. 2744.05 denied them their rights to a trial by jury and to due process, and violated the doctrine of separation of powers.

{¶ 3} The village moved for summary judgment on September 3, 2008, arguing that it was immune from liability under R.C. Chapter 2744. The village asserted that Sergeant Gessic was providing police services and therefore was performing a governmental function at the time he allegedly struck Mr. Spain. Furthermore, the village claimed that Sergeant Gessic was responding to an emergency call when Mr. Spain was injured, so the village was not liable for any alleged negligence. The deposition of Sergeant Gessic was attached to the village's motion.

{¶ 4} Plaintiffs responded to this motion and filed a cross-motion for a determination that the village was not entitled to sovereign immunity, relying on the depositions of Sergeant Gessic and the village police chief, Timothy Pitts. Plaintiffs conceded that Sergeant Gessic was performing a governmental function, but denied that he was on an emergency call while he was patrolling the streets.

{¶ 5} The court granted plaintiffs' motion for partial summary judgment and denied the village's, finding that Sergeant Gessic negligently operated the police vehicle by driving left of the center line and causing his vehicle to strike Mr. Spain. The court further found that Sergeant Gessic was acting within the course and scope of his employment at the time, but was on a routine patrol, not

responding to an emergency call or call to duty. Therefore, the court found the village was not immune but was liable for plaintiffs' injuries and ordered that the case would proceed to trial on the issue of damages. The village appeals from this ruling.

{¶ 6} The plaintiffs conceded that Sergeant Gessic was performing a governmental function when he fulfilled his police patrol duties. See R.C. 2744.01(C)(2)(a). Under R.C. 2744.02(A)(1), a political subdivision like the village generally is not civilly liable for injuries caused by the act of an employee in connection with a governmental function.

{¶ 7} However, R.C. 2744.02(B)(1) provides an exception to this immunity. A political subdivision may be held liable when an employee engaged in the scope of his or her employment negligently operates a motor vehicle, causing injury. It is a full defense to this liability if a member of the police department was "operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." R.C. 2744.02(B)(1)(a).

{¶ 8} The issue in this case is whether Sergeant Gessic was responding to an "emergency call" at the time he struck Mr. Spain. The question whether undisputed facts constitute an "emergency call" may be determined as a matter of law. See, e.g., *Longley v. Thailing*, Cuyahoga App. No. 91661, 2009-Ohio-1252, ¶20.

{¶ 9} The material facts are undisputed. Sergeant Gessic testified that he was on basic patrol duty between the hours of 11:00 p.m. and 7:00 a.m. on the night in question. He was driving his police vehicle northbound on Grey Fox Run at approximately 1:20 a.m. As he approached a curve in the road, he looked ahead. He did not see any lights or reflective clothing. He was distracted by a camera case that fell off the car seat. His attention was also diverted to the right by something he saw on Quail Ridge Road. The vehicle traveled left of center. He looked back at the road just before he struck Mr. Spain, who was walking on the road.

{¶ 10} The term “emergency call” is defined by R.C. 2744.01(A): “‘Emergency call’ means 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.” The Ohio Supreme Court has noted that the term “[d]uty’ is defined as ‘obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession.’ Webster's Third New International Dictionary (1986) 705. Thus, a ‘call to duty’ involves a situation to which a response by a peace officer is required by the officer's professional obligation.” *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶13. In *Colbert*, the court found that the police officers were

responding to an “emergency call” when they were following a vehicle they had observed in a potential drug transaction.

{¶ 11} Since *Colbert*, an Ohio appellate court has found that a police officer was on an emergency call when he was transporting a prisoner pursuant to an order received from a police dispatcher. *Rambus v. Toledo*, Lucas App. No. L-07-1378, 2008-Ohio-4283; also see *Rutledge v. O’Toole*, Cuyahoga App. No. 84843, 2005-Ohio-1010. This court has also determined that a police officer investigating a vehicle in a highway breakdown lane was responding to an emergency call, even as he returned to the highway. *Longley*, *supra*.

{¶ 12} However broadly that term is defined, however, we cannot logically construe the term “emergency call” to include the performance of basic patrol duties. To do so would make the exception for police officers on “emergency calls” swallow the general rule that a political subdivision may be held liable for injury caused by its employees’ negligent operation of motor vehicles. 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.

{¶ 13} We agree with the common pleas court that Sergeant Gessic was not responding to an emergency call, so the village was not immune from liability. Therefore, we affirm the common pleas court’s order denying the village’s motion for summary judgment and remand for further proceedings.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, A.J., CONCURS
ANN DYKE, J., CONCURS IN JUDGMENT ONLY