[Cite as *Jones v. Schramm*, 2016-Ohio-7403.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104135

SARAH JONES

PLAINTIFF-APPELLEE

vs.

DAVID SCHRAMM, ET AL.

DEFENDANTS

[Appeal by City of Cleveland, Defendant-Appellant]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2015CVE006059

BEFORE: Boyle, J., McCormack, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 20, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, the city of Cleveland, appeals the trial court's denial of its motion for summary judgment based on political subdivision immunity. The city raises one assignment of error for our review:

> The trial court erred when it denied the city of Cleveland's motion for summary judgment because, under R.C. Chapter 2744, the city is immune from liability for the provision of police services.

{¶2} Finding no merit to the city's appeal, we affirm.

I. Procedural History and Factual Background

{¶3} According to a complaint filed by plaintiff-appellee, Sarah Jones, Cleveland police officer David Schramm negligently drove into her vehicle in October 2014. Jones further alleged in her complaint that as a result of Officer Schramm's negligence, she suffered economic damages, injuries, and expenses related to her injuries.

{¶4} The city moved for summary judgment in December 2015, asserting that it was immune from liability as a political subdivision under R.C. Chapter 2744. Officer Schramm averred in an affidavit attached to the city's summary judgment motion that on the day of the accident, he was in an unmarked police car traveling on West 3rd Street, responding to a subpoena to attend a hearing at Cleveland Municipal Court. While en route to the Justice Center, Officer Schramm stated that Jones was traveling in an adjacent lane next to his vehicle on West 3rd Street and collided with his vehicle when she attempted to change lanes. Officer Schramm specifically averred that Jones "made an abrupt turn into my lane of travel and contacted the right front bumper of my vehicle."

Officer Schramm further stated that his vehicle received a minor scratch on the right front corner, and Jones's vehicle sustained a small puncture on the left corner of the rear bumper. According to Officer Schramm, both he and Jones drove their cars away from the accident, and he attended the hearing. The city also attached the subpoena and proof of Officer Schramm's attendance at the hearing to its summary judgment motion.

{¶5} Jones responded to the city's summary judgment motion. In her affidavit attached to her response, she stated that she did not pull in front of Officer Schramm and that the "accident [was] not her fault because Officer Schramm hit [her] in the back with his vehicle." Jones further averred that Officer Schramm "failed to keep a safe distance," and said that she was "going straight. The accident was his fault."

{¶6} The trial court denied the city's motion for summary judgment. It is from this judgment that the city appeals.

II. Summary Judgment Standard

{¶7} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays*, 140 Ohio App.3d 1, 10, 746 N.E.2d 618 (8th Dist.2000). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 192, 699 N.E.2d 534 (8th Dist.1997).

{¶8} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears

from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 672 N.E.2d 654 (1996).

{¶9} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant fails to meet this burden, then summary judgment is not appropriate. *Id*. at 293. But if the movant does meet this burden, then summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. *Id*.

III. Political Subdivision Immunity

{¶10} The Ohio Supreme Court set forth a three-tiered analysis to determine whether a political subdivision is immune from tort liability: the first tier is to establish immunity under R.C. 2744.02(A)(1); the second tier is to analyze whether any of the exceptions to immunity under R.C. 2744.02(B) apply; if so, then under the third tier, the political subdivision has the burden of showing that one of the defenses of R.C. 2744.03 applies. *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998); *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 10-12. If a defense applies, then immunity is reinstated. *Id.*

{¶11} R.C. 2744.02(A)(1) provides a general grant of immunity, stating that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to

person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." A governmental function includes "provision or nonprovision of police." R.C. 2744.01(C)(2)(a).

{¶12} In this case, there is no question that the city is a political subdivision entitled to immunity and that the operation of a police department is a "governmental function." R.C. 2744.01(C)(2)(a). Thus, the city is entitled to the general grant of immunity under the first tier of the analysis.

{¶13} R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *See Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. The subsection relevant to this case, R.C. 2744.02(B)(1), subjects political subdivisions to liability for "negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." Here, Jones argues that the city is liable under this subsection because Officer Schramm was negligent when his vehicle collided with hers.

{¶14} The city contends, however, that even if Officer Schramm was negligent (which it is not conceding), it is entitled to a full defense from liability as a matter of law under R.C. 2744.02(B)(1)(a). This subsection provides that a political subdivision is entitled to a "full defense" against liability for an employee's negligent operation of a motor vehicle if (1) a "member of a municipal corporation police department" was

operating a motor vehicle while responding to an emergency call, and (2) the operation of the vehicle did not constitute willful or wanton misconduct. The city argues that Officer Schramm was on an "emergency call" and was not driving "willfully or wantonly" when he responded to a subpoena at the time of the collision.

{¶15} Because Jones does not allege any facts in her complaint or affidavit that Officer Schramm acted willfully or wantonly, the only issue in this appeal is whether Officer Schramm was responding to an "emergency call." If we determine that Officer Schramm was responding to an "emergency call," then the city of Cleveland would be entitled to a full defense from liability as a matter of law for Officer Schramm's alleged negligent operation of the unmarked police vehicle.

IV. "Emergency Call"

{¶16} Whether a police officer was responding to an "emergency call" is generally a question of law. *See Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781. We point out that there are genuine issues of material fact in this case as to whether Officer Schramm was negligent. But a fact question as to whether Officer Schramm was negligent does not create questions of fact as to the city's immunity. If we determine, as a matter of law, that Officer Schramm was not on an "emergency call," then Jones's claims survive summary judgment. Jones, however, would still have the burden to prove at trial that Officer Schramm was negligent when his vehicle collided with hers to establish that the city is liable for her injuries.[1]

[1]Jones would have to prove the basic elements of negligence: existence of a duty, a breach of

{¶17} R.C. 2744.01(A) defines "emergency call" 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."

{¶18} In *Colbert*, the Ohio Supreme Court defined "call to duty" to mean "obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession." *Id.* at ¶ 13, citing *Webster's Third New International Dictionary* 705 (1986). Thus, the Supreme Court did not limit "calls to duty" to "inherently dangerous" situations. *Id*. at ¶ 13-14. Instead, it adopted a broad interpretation of "call to duty" and stated that it included situations "to which a response by a peace officer is required by the officer's professional obligation." *Id*. The Supreme Court found in *Colbert* that the police officers were responding to an "emergency call" when they followed a vehicle they had observed in a potential drug transaction, stating that "[t]he need to investigate this possible criminal act was a call to duty." *Id*. at ¶ 15.

{¶19} Since *Colbert*, courts have interpreted "emergency call" broadly. This court has found that a police officer was on an emergency call when he was transporting a prisoner pursuant to an order received from his supervisor. *Rutledge v. O'Toole*, 8th Dist. Cuyahoga No. 84843, 2005-Ohio-1010, ¶ 25; *see also Rambus v. Toledo*, 6th Dist.

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that duty, proximate cause, and damages. *Hartings v. Natl. Mut. Ins. Co.*, 3d Dist. Mercer No. 10-13-11, 2014-Ohio-1794, ¶ 72.

Lucas No. L-071378, 2008-Ohio-4283 (police officer was on an emergency call when he was transporting a prisoner pursuant to an order received from a police dispatcher), and *Fogle v. Bentleyville*, 8th Dist. Cuyahoga No. 88375, 2008-Ohio-3660 (police officer was on an emergency call when he was en route to pick up a prisoner to transport him). This court has also determined that a police officer who was investigating a vehicle in a "breakdown lane" on a highway was responding to an emergency call, even though the officer was "reentering" the highway when the accident occurred. *Longley v. Thailing*, 8th Dist. Cuyahoga No. 91661, 2009-Ohio-1252, ¶ 20.

{¶20} In *Spain v. Bentleyville*, 8th Dist. Cuyahoga No. 92378, 2009-Ohio-3898, however, this court refused to extend the holding in *Colbert* to a situation where a police officer was on basic routine patrol when he struck a pedestrian walking on the street. We explained that no matter how broadly "emergency call" had been defined, we could not "logically construe the term * * * to include the performance of basic patrol duties." *Id.* at ¶ 12. We further explained:

> 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.

Id.

{¶21} Applying the above case law to the facts here, we find that this case is more analogous to the facts in *Spain*. Responding to a subpoena to appear in court to testify is more akin to a basic duty that does not rise to the level of an "emergency call." If the

General Assembly had intended "emergency call" to include *any situation* where a police officer was responding to a professional obligation, then it would have stated as much. Indeed, if we extended "emergency call" to the facts in this case, we cannot imagine any set of facts that would not amount to an "emergency call" — rendering the exception in R.C. 2744.02(B)(1)(a) meaningless.

{¶22} Our holding here is in line with the Twelfth District's decision in *Burnell v. Dulle*, 169 Ohio App.3d 792, 2006-Ohio-7044, 865 N.E.2d 86 (12th Dist.). In *Burnell*, the court held that a police officer who was in an accident while driving to court to testify in response to a subpoena was not on an "emergency call." *Id.* at ¶ 16. The court explained that the police officer's "professional obligations were not engaged while he was driving to the courthouse." *Id.* We agree with this sound reasoning.

{¶23} Accordingly, the city's sole assignment of error is overruled.

{¶24} Judgment affirmed.

It is ordered that appellee 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.

MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and
SEAN C. GALLAGHER, J., CONCUR