IN THE SUPREME COURT OF OHIO

ALLISON HARRIS,	:	Case No. 2022-0784
Plaintiff-Appellant,	:	On Appeal from the Jefferson
v.	:	County Court of Appeals, Seventh Appellate District
DUSTIN HILDERBRAND.	:	Court of Appeals
Defendant-Appellee.	:	Case No. 21 JE 0013

MERIT BRIEF OF *AMICUS CURIÆ*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLANT, ALLISON HARRIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

INTRODUCTION

On January 6, 2020, Plaintiff Allison Harris filed suit against Defendant Dustin Hilderbrand for negligence and for strict liability under R.C. § 955.28, after being bitten by his dog, Xyrem, during a cookout. Defendant Hilderbrand moved for summary judgment, not on the basis that he had not been negligent, that he was not the keeper of Xyrem, or that Mr. Harris had committed criminal trespass or another criminal offense that would lift strict liability. Rather, he argued that he was entitled to immunity as an employee of a political subdivision acting in connection with a governmental or proprietary function under R.C. § 2744.03(A), because he was required to keep Xyrem in his home while off duty as a requirement of his position with the Belmont County Sheriff's Office, and that none of the statutory exceptions to immunity applied.

The Jefferson County Court of Common Pleas disagreed, holding that while he may be required "to keep Xyrem in his home, he is not required to entertain house guests." (Trial Dkt. 30, Order, p. 1). However, the court declined to impose strict liability. (*Id.*).

On appeal and cross-appeal, the Seventh District Court of Appeals reversed. The court "dr[ew] all the facts and inferences against the nonmoving party," depriving the jury of its role to resolve factual disputes, and concluded that Defendant Hilderbrand was entitled to immunity as a matter of law, despite the fact that there was evidence in the record on which a jury could find that his negligent actions were self-serving and/or lacked any relation to his employment duties. (Appeal Dkt. 22, Opinion and Judgment Entry, ¶ 36). The court also affirmed the trial court on strict liability, despite the express imposition of liability found in R.C. § 955.28.

Because summary judgment is only properly granted when, construing evidence against the *moving* party, there is no dispute of material facts, and a jury could find that Defendant Hilderbrand was acting manifestly outside of the scope of his employment when he gave

commands to Xyrem at a cookout for the entertainment of his social guests, a jury must decide if his actions were manifestly outside of the scope of his employment under the exception found in R.C. § 2744.03(A)(6)(a), and the decision of the Seventh District should be reversed. Further, because R.C. § 955.28 expressly imposes liability against Defendant Hilderbrand, it lifts his immunity pursuant to the exception found in R.C. § 2744.03(A)(6)(c), and the Seventh District's decision should be reversed for this reason as well.

IDENTIFICATION OF AMICUS CURIÆ

The Ohio Association for Justice ("OAJ") is a statewide association of attorneys whose mission is to preserve the legal rights of all Ohioans by protecting their access to the civil justice system. Members of OAJ seek to preserve access to the courtroom and to promote public confidence in the legal system.

OAJ submits this brief to underscore the importance of the jury system and ensure that the resolution of factual disputes remains in the hands of the jury, and to prevent the expansion of political subdivision immunity beyond its statutory definitions. This case presents the Court with the opportunity to correct an error below and to resolve a split between the lower courts.

STATEMENT OF FACTS

The Ohio Association of Justice adopts the Plaintiff-Appellant's statement of facts.

STATEMENT OF THE CASE

The trial court in this case was asked to determine whether the evidence in the record was sufficient to overcome summary judgment. The trial court reviewed the evidence in the record, determined that there were genuine issues of material fact, and denied summary judgment. (Trial Dkt. 30, Order, p. 1-2). Specifically, the trial court found that Defendant Hilderbrand was not entitled to Ohio statutory immunity under R.C. § 2744.03(A)(6)(a), because there was a dispute of

fact for the jury to resolve as to whether his actions were manifestly outside of the scope of his employment with Belmont County. (*Id*.). As the court explained, both the dog and an officer's service weapon are "for police work" but "neither generate immunity when used for entertainment or amusement." (*Id*. at p. 1). Thus, a dispute as to whether the dog was used for law enforcement purposes or for entertainment purposes precluded summary judgment. As the trial court explained, this "is not a finding that no immunity exists," but is "simply overruling the Motion for Summary Judgment on that issue leaving it for the Jury to decide." (*Id*. at p. 2). However, the trial court held that Defendant Hilderbrand was not subject to strict liability under R.C. § 955.28(B). (*Id*. at p. 1).

Defendant Hilderbrand appealed, and Plaintiff Harris cross-appealed. The Seventh Appellate District upheld the trial court's ruling regarding strict liability, and reversed in regards to whether there was a dispute of fact precluding summary judgment, holding that "reasonable minds can find only one conclusion," that Hilderbrand "is entitled to immunity as a matter of law before there is nothing tending to show that he was acting manifestly outside the scope of his official responsibilities at the time of the incident." (Appeal Dkt. 22, Opinion and Judgment Entry, ¶ 36).

ARGUMENT

On September 13, 2022, this Court agreed to review the following Proposition of Law:

> **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.**

For the reasons stated herein, the Court should adopt this proposition of law, reverse the decision of the Seventh Appellate District, and allow this case to proceed to trial.

R.C. § 2744.03(A)(6) provides an employee of a political subdivision with immunity from tort liability, with three exceptions. At issue here is the exception in R.C. § 2744.03(A)(6)(a), which removes immunity if "[t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities." Whether "an employee is acting within the scope of his employment is a question of fact to be decided by the jury" unless "reasonable minds can come to but one conclusion." *Osborne v. Lyles*, 63 Ohio St.3d 326, 330, 587 N.E.2d 825 (1992).

In fact, the fact-specific nature of scope of employment is so fundamental to its character that the "expression 'scope of the employment' *cannot be accurately defined*, because it is a question of fact to be determined according to the peculiar facts of each case." *Rogers v. Allis-Chambers Mfg*. Co., 153 Ohio St. 513, 526, 92 N.E.2d 677 (1950) (emphasis added). Although this Court has declined to precisely define scope of employment, this Court *has* held that an "employee's duties should define the scope of employment," and that "if an employee's actions are self-serving or have no relationship to the employer's business," then the conduct is "manifestly outside the scope of employment." *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶¶ 15, 28. The general rule has been that an act committed by an employee when he is off duty is not within the scope of employment. *Biddle v. New York Cent. Rd. Co.*, 43 Ohio App. 6, 8-9, 182 N.E. 601 (6th Dist.1930); *Knecht v. Vandalia Med. Ctr., Inc.*, 14 Ohio App.3d 129, 132, 470 N.E.2d 230, 233 (2nd Dist.1984). An exception to this rule is where the employee has a duty to perform in furtherance of the master's business after working hours and performs that duty, causing injury to a third party. *Biddle*, 43 Ohio App. at 8-9.

Under this standard, it is clear that Plaintiff is entitled to have her claims heard by a jury, because accepting the facts in the light most favorable to Plaintiff, and taking all inferences in her

favor, there is a dispute over whether or not Defendant Hilderbrand's actions, while off-duty, were self-serving, and thus manifestly outside of the scope of his employment, when he gave Xyrem commands, not because he had a duty to do so, and not for the purpose of training or to further or promote the business of Belmont County, but for the self-serving purpose of providing entertainment to his friends at a social gathering.

In finding otherwise and granting summary judgment in favor of Defendant Hilderbrand, the Seventh District Court of Appeals erred. The court's opinion explained that "[w]e are not simply deciding a matter of law, but examining the fully developed summary judgment evidence and drawing all the facts and inferences against the *nonmoving party* to determine whether, as a matter of law, no genuine issues of material fact exist for trial." (Appeal Dkt. 22, Opinion and Judgment Entry, ¶ 36). In doing so, the court applied an incorrect standard on summary judgment, because summary judgment "must be awarded with caution, resolving doubts and construing evidence against the *moving* party." *Norris v. Ohio Std. Oil Co*., 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982). *See also AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp*., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990) (summary judgment pursuant to Civ. R. 56 is an "extraordinary" procedure that "represents a shortcut through the normal litigation process"). And in fact, the analysis undertaken by court did in fact draw the inferences *against* Plaintiff, the nonmoving party, and in favor of Defendant Hilderbrand, the moving party. This was in error and as a result, reversal is necessary.

Taking the facts and inferences in the favor of the Plaintiff, Xyrem was a trained narcotics dog. His job as a K-9 officer was to help Defendant Hilderbrand in seizing narcotics by indicating on a vehicle when narcotics are present. (Trial Dkt. 22, Hilderbrand Depo., p. 24). He is also trained to apprehend suspects by biting them and pulling them to the ground. (*Id*. at p. 25). Defendant

Hilderbrand was required to keep and care for Xyrem at home while off duty, to "solidify the bond between [Hilderbrand] and [Xyrem]." (Trial Dkt. 15, Affidavit of James G. Zusack, ¶ 4).

On the date in question, Defendant Hilderbrand was off-duty, hosting a social gathering. Specifically, the evidence shows that Defendant Hilderbrand, and his guests, were drinking alcohol and socializing in his backyard for a cookout. Hilderbrand himself had had three and a half beers. (Trial Dkt. 22, Hilderbrand Depo., p. 46). Prior to dinner, Plaintiff Harris and another guest, Carrie Chesonis, asked Defendant Hilderbrand what commands to use with Xyrem (to drop a toy) so that they could play with him. (Trial Dkt. 21, Harris Depo., p. 31). Defendant Hilderbrand taught them a command and they used it to play with Xyrem. (*Id*. at p. 31-32). Carrie then asked him to show them more and Defendant Hilderbrand gave them a demonstration of multiple commands. (*Id*. at p. 32-33). This demonstration included retrieving narcotics from his cruiser and hiding the drugs in the backyard for Xyrem to find. (*Id*. at p. 33; Trial Dkt. 22, Hilderbrand Depo., p. 48). Hilderbrand also gave Xyrem a command "that gets the dog very aggressive." (Trial Dkt. 21, Harris Depo., p. 33-34; Trial Dkt. 22, Hilderbrand Depo., p. 48).

Construing the evidence in Plaintiff's favor, a jury could find that Defendant Hilderbrand was not performing any duty imposed on him by Belmont County when he gave Xyrem commands. Hilderbrand was not only off-duty, but because he was intoxicated, he could not respond to calls. Nor was Defendant Hilderbrand training Xyrem when he gave the commands, rather the evidence shows that Xyrem's training did not occur at home while off-duty. (Trial Dkt. 22, Hilderbrand Depo., p. 17, 26-27). If the purpose had been training, one imagines that Defendant Hilderbrand would have testified to that, but he did not. He testified that he gave Xyrem commands because his guests asked him to. (Trial Dkt. 22, Hildebrand Depo., p. 47 (guest asked for demonstration). Nor is there evidence that Defendant Hilderbrand gave Xyrem commands for the

purpose of seizing narcotics or apprehending suspects. Rather, the evidence shows that it was to entertain his guests. (Trial Dkt. 21, Harris Depo., p. 30-31 (guests wanted to know commands so that they could play with Xyrem); Trial Dkt. 18, Chesonis Depo., p. 27 (guests asked Hilderbrand to demonstrate "sit," "stay," and "fetch," and asked him to hide narcotics for Xyrem to find because it was "interesting" and "exciting")). Thus, a jury could find that giving Xyrem commands when intoxicated and off-duty, at a social gathering, so that his guests could play with the dog and be entertained, was not performing any duty required by Belmont County, was not training and was not furthering or promoting the business of Belmont County, but rather was self-serving.

In finding otherwise, the Seventh District cited to the affidavit of Chief Deputy Zusack, who testified that Hilderbrand was required to "keep and care for" Xyrem at home while off duty to "solidify the bond between the deputy and dog, so that they will work well together on duty." (Trial Dkt. 15, Affidavit of James G. Zusack, ¶ 4). However, based on this limited evidence, the Seventh District then inferred that having Xyrem at the party gave "the dog a chance to acclimate to people in different situations," to "bond in the family unit," and that this off duty time "ensures Xyrem can be around people and learn how to properly behave in diverse human settings." (Appeal Dkt. 22, Opinion and Judgment Entry, ¶ 35). However, there is no evidence in the record that Belmont County sought for Xyrem to bond with anyone except for Hilderbrand. (Trial Dkt. 15, Affidavit of James G. Zusack, ¶ 4). Further, because Xyrem is trained to locate narcotics and to bite and take down suspects, a jury could infer that bonding with others *impedes* the business of Belmont County, not the other way around. Because these are inferences, not undisputed facts, the Seventh District erred in making these inferences in Defendant Hilderbrand's favor.

In *Hicks v. Allen*, 11th Dist. Ashtabula No. 2005-A-0002, 2007-Ohio-693, the Eleventh District properly applied this highly fact-intensive scope of employment analysis to an off-duty K-

9 officer, denying summary judgment. There, the court found a dispute of fact as to whether the defendant officer was manifestly outside of the scope of his employment because he was at home, off-duty, and merely preparing to leave for work. The dog had knocked over an eighty-five-year-old woman while the off his lead, as the defendant officer went to his patrol car to put water in the dog's cage. The court refused to hold, as a matter of law, that the officer was not manifestly outside of the scope of his employment. Here, however, the facts that support finding that Defendant Hilderbrand was manifestly outside of the scope of his employment are significantly stronger. Unlike the officer in *Hicks*, who was preparing to leave for work and in the process of leaving the house and taking the dog to his patrol car, Hilderbrand was entertaining social guests at a cookout he was hosting.

The lower court also erred by incorrectly focusing on the requirement to keep and care for Xyrem and not on Defendant Hilderbrand's negligent actions. The question before the court was not whether keeping and caring for Xyrem was manifestly outside of the scope of employment with the Belmont County Sheriff's Office, but whether Defendant Hilderbrand's negligent actions were manifestly outside of the scope of his employment. Plaintiff alleged that Defendant Hilderbrand was negligent for removing drugs from his cruiser and commanding Xyrem to find the drugs, and for issuing commands that led the dog to become agitated and aggressive. (Trial Dkt. 1, Complaint, ¶ 13). Even if certain actions in keeping and caring for Xyrem would be within the scope of Defendant Hilderbrand's employment with Belmont County, the fact specific analysis of scope of employment precludes an assumption that Defendant Hilderbrand's actions are *always* within (or not manifestly outside of) the scope of employment merely because he is required to keep Xyrem in his home.

Such a broad interpretation of scope of employment is not supported by Ohio law. It would "stretch" § 2744 "too far" to say that someone acted in the scope of their employment when they "drop[ped] a dumbbell on someone's foot at the gym, or cause[d] someone to fall by carelessly leaving books on the classroom floor" merely because the employer required them to "exercise regularly" or "earn a bachelor's degree." *Newell v. Huepenbecker*, No. 3:18-cv-682 (N.D. Ohio May 30, 2019). Similarly, while "officers have [historically] been required to carry guns while off duty," an officer "simply drawing his weapon [is] not dispositive of the issue of whether or not he was acting within the course of his employment." *Smith v. City of Cleveland*, 8th Dist. Cuyahoga No. 78889, 2001 WL 1612101, *3, 7. Rather he must have been fulfilling his "obligation to preserve the peace and protect the public." *Id.* at *6. *See also Cooper v. Dayton,* 120 Ohio App.3d 34, 696 N.E.2d 640 (2nd Dist.1997) (off duty police officer was acting in the scope of his employment based on evidence that he showed his badge, identified himself as a police officer, and drew his service revolver, while actively and directly attempting to thwart the commission of a felony).

Thus, courts have found it useful to determine whether there are facts that distinguish the off-duty officer from an ordinary citizen. *See Smith*, 2001 WL 1612101, *6 (noting that cases where officers had been found to be in the scope of their employment despite being off-duty involved officers "acting as only officers must act"); *see also Osborne*, 63 Ohio St.3d at 333-334 (finding dispute of fact as to whether off-duty officer had been acting in the scope of his employment after automobile accident based on evidence that he had a duty to assume control of the scene and attempted to effectuate an arrest). Here, Defendant Hilderbrand was not fulfilling any duty to give Xyrem commands during a social event and was not acting as only a law enforcement officer must act. On the contrary, he was acting as any ordinary citizen could act,

using commands on their dog in their own backyard. And in fact, many guests, who were not law enforcement officers, did give Xyrem commands that day, such as to drop a dog toy. But only Defendant Hilderbrand acted negligently.

Here, the question is whether a jury could find that Defendant Hilderbrand's negligent actions were self-serving. Defendant Hilderbrand was not using Xyrem to seize narcotics, was not apprehending a suspect, and was not training Xyrem, he was drinking and socializing with friends. Contrary to the improper inferences of the Seventh District that Hilderbrand was facilitating bonding, there is no evidence that Belmont County imposed on Defendant Hilderbrand a duty to facilitate Xyrem bonding with others, and a jury could find that giving the command to make the dog aggressive actually did the opposite. And while the court noted that "the evidence establishes there was a span of time between the demonstrations and the bite," there is no undisputed evidence as to the impact of that span of time, and as a result, it is for the jury to decide, not the court. (Appeal Dkt. 22, Opinion and Judgment Entry, ¶ 28). Because a jury could find that Hilderbrand's actions were self-serving, summary judgment should not have been granted, and Plaintiff should be allowed to proceed to trial so that a jury can decide whether or not Defendant Hilderbrand was acting manifestly outside of the scope of his employment.

Further, the Seventh District demonstrated an erroneous understanding of the purpose and impact of summary judgment when it explained that "[f]oreclosing immunity in a situation such as this will keep otherwise capable officers from becoming a K-9 officer." (Appeal Dkt. 22, Opinion and Judgment Entry, ¶ 35). Denying summary judgment does not "foreclose" immunity, but rather the opposite. Denying summary judgment merely puts the question of immunity in the hands of the jury, as is required when there are disputes of fact or conflicting inferences that can be taken from the facts. Rather, it is the Seventh District which has foreclosed the jury from

determining whether or not Defendant Hilderbrand was or was not manifestly outside of the scope of his employment when he used a trained K-9 dog as party entertainment. This holding ignores the fact-intensive analysis demanded by the Supreme Court of Ohio and ignores the fact that evidence of self-interest creates a dispute that the act was manifestly outside of the scope of employment. The actions central to this question are not Defendant Hilderbrand's actions in merely keeping the dog or caring for the dog, but his actions in giving commands to his K-9 during a party in which he and his guests were intoxicated, including not only having his dog locate actual narcotics but commands to make the dog aggressive. These actions not only did not facilitate or promote the interests of the Belmont Sheriff's Office, but were entirely self-serving. As a result, this dispute over whether Defendant Hilderbrand's actions were or were not manifestly outside of the scope of his employment must go to a jury and the Seventh District's order granting summary judgment in Hilderbrand's favor must be reversed.

On September 13, 2022, this Court agreed to review the following Proposition of Law:

> **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 for 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.**

For the reasons stated herein, the Court should adopt this proposition of law, reverse the decision of the Seventh Appellate District, and allow this case to proceed to trial.

R.C. § 2744.03(A)(6) provides an employee of a political subdivision with immunity from tort liability, with three exceptions. At issue here is the exception in R.C. § 2744.03(A)(6)(c), which removes immunity if "[c]ivil liability is expressly imposed upon the employee by a section of the Revised Code." This distinguishes between statutes which merely impose a duty or responsibility with those which impose liability. *Id*.

R.C. § 955.28 imposes strict liability upon the "owner, keeper, or harborer" of a dog "for any injury, death, or loss to person or property that is caused by the dog" unless the injured individual was trespassing or committing a criminal offense other than a minor misdemeanor on the property. R.C. § 955.28(B). This statutory cause of action "eliminated the necessity of pleading and proving the keeper's knowledge" of the dog's viciousness. *Beckett v. Warren*, 124 Ohio St.3d 256, 2010-Ohio-4, 921 N.E.2d 624, ¶ 11, citing *Bora v. Kerchelich*, 2 Ohio St.3d 146, 147, 2 OBR 692, 443 N.E.2d 509 (1983). Consequently, in an action for damages under R.C. § 955.28, the plaintiff must prove (1) ownership or keepership or harborship of the dog, (2) that the dog's actions were the proximate cause of the injury, and (3) the damages. *Id*., citing *Hirschauer v. Davis*, 163 Ohio St. 105, 56 O.O. 169, 126 N.E.2d 337 (1955), paragraph three of the syllabus.

The terms 'owner,' 'harborer,' and 'keeper' are not statutorily defined. Thus, the courts have looked to the case law for their definitions. *See e.g. H.W. v. Young*, 2020-Ohio-1384, 153 N.E.3d 807, ¶ 15 (8th Dist.). An owner is the person to whom the dogs belong, and the keeper is the one having physical charge or care of the dogs. *Hilty v. Topaz*, 10th Dist. Franklin No. 04AP-13, 2004-Ohio-4859, 2004 WL 2035324, ¶ 8. To determine whether a person is a "harborer" of a dog, "the focus shifts from possession and control over the dog to possession and control of the premises where the dog lives." *Id*. A harborer is one who is in possession and control of the premises where the dog lives and silently acquiesces in the dog being kept there by the owner. *Id*.

Here, there is evidence that supports that Defendant Hilderbrand was the keeper of the dog, and in fact, this evidence is undisputed. (*See e.g*. Trial Dkt. 15, Affidavit of James G. Zusack, ¶ 4). Because R.C. § 955.28 expressly imposes strict liability on the keeper of the dog, and because Defendant Hilderbrand is the keeper of the dog, he is liable under R.C. § 955.28 for any injury caused by the dog. The question then is whether R.C. § 2744.03 immunizes him from that claim.

Applying the plain language of the exception found in R.C. § 2744.03(A)(6)(c), which removes immunity if "[c]ivil liability is expressly imposed upon the employee by a section of the Revised Code," it is clear that Defendant Hilderbrand is not immune. When "consider[ing] the meaning of a statute, our first step is always to determine whether the statute is "plain and unambiguous." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8, citing *State v. Hurd*, 89 Ohio St.3d 616, 618, 734 N.E.2d 365 (2000). If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

Here, there is no ambiguity. Applying the statute, as written, R.C. § 2744.03(A)(6)(c) removes immunity if "[c]ivil liability is expressly imposed upon the employee by a section of the Revised Code." Here, civil liability is expressly imposed by a section of the Revised Code, R.C. § 955.28, upon the employee, Defendant Hilderbrand, because he is the keeper of Xyrem and the keeper of the dog is strictly liable for any injuries caused by the dog. As a result, there is no ambiguity.

Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. § 1.49 is inappropriate." *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, 28 N.E.3d 81, ¶ 10. The Court does "not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994). To "ignore the unambiguous

language of a statute… would" be to "invade the role of the legislature: to write the laws." *Jacobson*, 149 Ohio St.3d at 400, ¶ 8.

In *Hauser v. Dayton Police Dept*., 140 Ohio St.3d 268, 2014-Ohio-3636, 17 N.E.3d 554, this Court contrasted statutory language to demonstrate the difference between a provision that expressly imposed liability and one which did not. There, the Court compared R.C. § 4112.02(A) and (J) and explained that Provision (A) did not expressly impose liability on employees because it "imposes liability only upon an 'employer'," unlike provision (J), which "expressly imposes liability on employees" because the provision declared it unlawful for "**any person**" to "aid, abet, incite, compel[,] or coerce the doing of… an unlawful discriminatory practice" or to "attempt directly or indirectly to commit any act" constituting "an unlawful discriminatory practice." *Id*. at 271, ¶12. (emphasis added). The Supreme Court of Ohio found that this language created an express imposition of liability. Applying the same straightforward, textual analysis of R.C. § 2744.03 found in *Hauser* to a law enforcement dog bite case, the Eleventh District found that R.C. § 955.28 lifted the immunity of the defendant, because he was the keeper of the dog. *Hicks*, *2005*-A-0002, ¶ 23. This analysis was correct.

To the extent that appellate courts have found that R.C. § 955.28 does not expressly impose liability, they are contrary to the plain language of the statute. The interpretation adopted by the Seventh Appellate District, is that a statute only expressly imposes liability when it expressly imposes liability on employees of political subdivisions as a class. (Appeal Dkt. 22, ¶ 46). In doing so, the court followed the analysis of Judge Grendell's dissent in *Hicks*.[1] *Hicks*, 2007-Ohio-693, ¶

[1] This argument relies on the analysis from *In re T.B.Y. v. Martins Ferry*, 2016-Ohio-8482, 78 N.E.3d 242 (7th Dist.), and others, which ruled that R.C. § 955.28(B) does not lift the immunity of a political subdivision under R.C. § 2744.03(B)(5). These cases reasoned that for the same reasons, the statute did not lift the immunity from employees of political subdivisions under R.C. § 2744.03(A)(6)(c). However, a statute could expressly impose liability against natural persons,

62. However, such an interpretation would require adding language to the statute, changing it from expressly imposed "upon the employee" to expressly imposed "upon employees of political subdivisions" and for that reason this improperly invades the role of the legislature. And in fact, these cases conflict with this Court's decision in *Hauser*. R.C. § 4112.02(J) did not include any language about employees of political subdivisions as a class. Instead, it found that a provision declaring it unlawful for "any person" to "aid, abet, incite, compel[,] or coerce the doing of… an unlawful discriminatory practice" expressly imposed liability against an employee. Thus, limiting the exception found in R.C. § 2744.03(A)(6)(c) to only statutes which impose liability upon political subdivision employees *as a class* not only requires the addition of language not found in the statute, and is contrary to the statute's plain language, but is also contrary to Supreme Court of Ohio precedent.

For these reasons, R.C. § 955.28 expressly imposes liability on the owners, keepers, and harborers of a dog, and because liability is expressly imposed, employees of a political subdivision are not entitled to immunity from a claim under R.C. § 955.28.

CONCLUSION

The Ohio Association for Justice respectfully requests that this Honorable Court reverse the decision of the Seventh District Court of Appeals and allow this case to proceed to trial, where the factual disputes can be properly resolved by a jury.

Respectfully submitted,

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such as Defendant Hilderbrand, without expressly imposing liability on a political subdivision. For this reason, the analysis is distinguishable.

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiæ, The Ohio Association for Justice in Support of Respondent was served by electronic mail pursuant to Civ.R. 5(B)(2)(f) on this November 21, 2022, to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Marcus Newell,	Case No. 3:18 CV 682
Plaintiff,	ORDER GRANTING MOTION
-vs-	RE: DUTY TO DEFEND AND INDEMNIFY
Casey Huepenbecker, et al.,	JUDGE JACK ZOUHARY
Defendants.	

INTRODUCTION

In 2015, Defendant Casey Huepenbecker became a special deputy sheriff of Defendant Henry County, Ohio (Doc. 39-8 at 1). Special deputy sheriffs provide part-time security services at private events, such as festivals and basketball games, and are paid fifteen dollars per hour (Doc. 39-6 at 6–7). To maintain their positions, they must complete a course designed by the Ohio Peace Officers Academy (Docs. 39-4 at 15; 39-8 at 4). Huepenbecker enrolled in one such course, which lasted ten months and was administered by Northwest State Community College (Docs. 39-2 at 6; 39-5 at 3). During the firearm-training portion of the course, he unintentionally shot a student unaffiliated with the County: Plaintiff Marcus Newell (Docs. 39-1 at 16; 39-2 at 18).

Newell brought this lawsuit against Huepenbecker and the County (Doc. 1). The County asks for a declaration that it has no duty to defend or indemnify Huepenbecker (Doc. 40). The matter is fully briefed (Docs. 42, 44, 50), and the parties presented argument during a recent hearing (Non-Doc. Entry 4/18/2019).

ANALYSIS

At issue is Ohio Revised Code Section 2744.07, which the legislature amended after Newell filed his Complaint. This Court need not decide which version applies, however, because the amendment does not affect the Section's meaning as relevant here.

Under RC 2744.07, counties sometimes must defend and indemnify employees accused of causing injury, death, or property damage. OHIO REV. CODE § 2744.07(A)(1),(B)(1). Indemnification is not required if the act in question occurred outside the scope of the employee's county employment. *Id.* § 2744.07(B)(2)(b). Similarly, the duty to defend does not apply if the employee acted "manifestly" outside the scope of that employment. *Id.* § 2744.07(A)(2)(b). *See Whaley v. Franklin Cty. Bd. of Comm'rs*, 92 Ohio St. 3d 574, 578 (2001) (defining "manifestly" as "plainly, obviously") (citation omitted).

"[S]cope of employment is an elusive concept that has never been accurately defined because [it] is a question of fact to be determined according to the peculiar facts of each case." *Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, ¶ 10 (2007) (citation, ellipses, brackets, and internal quotation marks omitted). *See also Whaley*, 92 Ohio St. 3d at 580 ("[W]hether a political subdivision owes a duty to defend an employee is a fact-sensitive issue."). Determination of whether an act occurred within the scope of employment "necessarily turns upon a multitude of considerations." *Auer v. Paliath*, 140 Ohio St. 3d 276, ¶ 20 (2014). The inquiry's focus is the relationship between the act and the employer's business. *See Ries v. Ohio State Univ. Med. Cent.*, 137 Ohio St. 3d 151, ¶ 21 (2013). Courts may resolve scope-of-employment questions as a matter of law if "reasonable minds can come to but one conclusion." *Harrison*, 115 Ohio St. 3d 241, ¶ 16 (quoting *Osborne v. Lyles*, 63 Ohio St. 3d 326, 330 (1992)).

The relationship between the County and the Northwest State Community College course is tenuous. The County neither designed nor administered the course, whose enrollment was not limited to County affiliates (Doc. 39-5 at 6–7). The County did not staff the course, either, so Huepenbecker was not subject to its supervision when he shot Newell (Doc. 39-2 at 26–27). *See Rogers v. Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513, 527 (1950) (holding that employer is liable for act of employee only if employee commits act while subject to employer's supervision). The County did not compensate Huepenbecker for time spent taking the course (Doc. 39-2 at 24). *See Santho v. Boy Scouts of Am.*, 168 Ohio App. 3d 27, ¶ 28 (2006) (holding that employer was not liable for employee act, in part because employer did not pay employee for time spent overseeing event where accident occurred). He was not wearing a uniform at the time of the shooting, and his gun was not County-issued (Doc. 39-2 at 24, 35). Completion of the course would have strengthened Huepenbecker's employability in law enforcement generally, not only with the County (*id.* at 27). And the parties cite no evidence that the County paid Huepenbecker's enrollment fee, directed Huepenbecker to take this particular course at this particular time, or hosted any part of the course on its property.

To be sure, the course had some connection with Huepenbecker's position as special deputy sheriff. County policy required Huepenbecker to complete it. Had he done so, the County would have benefitted from his increased skill. Without more, however, these two factors are insufficient to trigger duties to defend and indemnify. A contrary holding would stretch RC 2744.07 too far. For example, suppose the County required that, to maintain their employment, special deputies exercise regularly and earn a bachelor's degree. It would be plainly unreasonable to obligate the County to insure these employees if they accidentally drop a dumbbell on someone's foot at the gym, or cause someone to fall by carelessly leaving books on the classroom floor. Similarly, the County should not have to insure against liabilities arising from the ten-month course at issue here.

The parties cite only one case with similar facts: *Weller v. Salasek*, 2015-Ohio-5192 (Ohio Ct. App. 2015). In *Weller*, a law-enforcement officer accidentally injured an instructor during a bike-patrol training. *Id.* at ¶¶ 2–3, 7–8. The officer claimed governmental immunity under Ohio law. *Id.* at ¶ 18. In an unreported opinion, the Ohio Court of Appeals ruled the officer was immune, in part because his injury-inducing tackle occurred within the scope of his employment. *Id.* at ¶¶ 20, 27. But the court did not explain why the training itself fell within the scope of the officer's employment. *Id.* at ¶ 26. The parties did not ask the court to answer that question. *See Brief of Appellant* at 9, *Weller*, 2015-Ohio-5192 (No. 15 CAE 04 0033) (conceding that officer "was within the scope of his employment while he was attending the training"). Moreover, the court's recitation of facts leaves unclear whether the circumstances mirrored those of the shooting here.

CONCLUSION

Under Ohio law, whether an act occurs within the scope of employment depends on the totality of the circumstances. The circumstances of this case reasonably lead to only one conclusion: Huepenbecker's shooting of Newell occurred manifestly outside the scope of Huepenbecker's County employment. Consequently, the County need not defend or indemnify him. The Motion (Doc. 40) is granted.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

May 30, 2019