

ORIGINAL

No. 2010-0809

**IN THE SUPREME COURT OF OHIO**

ON APPEAL FROM THE COURT OF APPEALS  
TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY, OHIO  
CASE NO. 09APE-06-0571

LEA D. SMITH,  
*Plaintiff-Appellant*

v.

VASHAWN L. McBRIDE, ET AL.  
*Defendants-Appellees*

**BRIEF OF AMICUS CURIAE  
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
URGING AFFIRMANCE ON BEHALF OF DEFENDANTS-APPELLEES**

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## STATEMENT OF THE CASE AND FACTS

### **I. Introduction and Interests of Amicus Curiae**

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization of over 800 attorneys, corporate executives and managers who devote substantial time and resources to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. For nearly half a century, OACTA’s mission has been to provide a forum where such professionals can work together on common problems and promote and improve the administration of justice in Ohio. In furtherance of that mission, OACTA maintains a robust amicus curiae program by which it can provide expert legal services to support suitable litigation efforts of its constituents.

Appellant’s argument, if successful, would unduly limit this Court’s previous decision in *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, which held that the term emergency call means “call to duty,” which includes “obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession.”

¶13. OACTA is concerned that Appellant’s attempt to carve a novel exception to the immunity enjoyed by Ohio political subdivisions and their employees, if successful, will place additional strain on the limited financial resources of Ohio’s political subdivisions and their taxpayers.

### **II. Facts**

This case arises from an incident on March 14, 2006 at approximately 11:45 p.m. when Sergeant Travis D. Carpenter, a 16-year veteran of the Clinton Township Police Department, heard a radio call from a Franklin County Sheriff’s Deputy who was involved in a foot chase with a suspect who had fled the scene of a traffic stop. (Deposition of Sgt. Carpenter at pp. 20, 63). Because Sgt. Carpenter knew the Deputy’s location to be a high crime area, and because he

was within a few miles of that location, he immediately proceeded to the deputy's location. (Id. at pp. 63, 75-77, 132). On his way to assist the Deputy, he collided with the vehicle driven by McBride. OACTA incorporates as if fully restated here the statement of facts set forth in Appellees' Merit Brief.

## ARGUMENT

### Proposition of Law No. 1:

**The Absence or Existence of a "Mutual Aid Pact" or  
Equivalent Legislative Resolution Is Not Determinative of the  
Issue Concerning a Police Officer's Professional Obligation to  
Respond to an "Emergency Call" for Purposes of Being  
Entitled to the Immunity under R.C. §2744.01 *Et Seq***

Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7-9. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. *Id.* The second tier requires the court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. *Id.* At this tier, the court may also need to determine whether specific defenses to liability for negligent operation of a motor vehicle listed in R.C. 2744.02(B)(1)(a) through (c) apply. *Id.*

If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Id.*

The only exception to immunity under R.C. 2744.02(B) relevant to this case states that, “[e]xcept as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or 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.” R.C. 2744.02(B)(1). Although that statutory section generally provides for political subdivision liability arising out of an employee's negligent operation of a motor vehicle within the scope of employment, it goes on to list three complete defenses to that liability. As relevant here, R.C. 2744.02(B)(1)(a) provides a full defense to liability where “[a] member of a municipal corporation police department or any other police agency 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. §2744.01(A) Defines the term “emergency call” as follows:

“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.

(Emphasis added.)

This Court has interpreted the term “emergency call” broadly in accordance with the plain language of the statute. The Court ruled that “emergency call” for purposes of R.C. §2744.01(A) is simply a “call to duty.” *Colbert*, at ¶13. In turn, a “call to duty” involves any situation to which a response by a peace officer is required by the officer's professional obligation. *Id.* at ¶15. The *Colbert* Court ruled that two officers were on an “emergency call” for purposes of Ohio Revised Code §2744.01(A) when they observed two white males in a car make an apparent exchange for money with another male on foot that they suspected was a drug deal. The officers

in *Colbert* started out in their patrol car intending to pursue the suspect's car on a parallel route, but did not activate their emergency lights or siren or call for backup. This Court held the officers were on an "emergency call" pursuant to R.C. §2744.01(A) even though: (1) they had not been "dispatched" on an emergency run, (2) the situation was arguably not inherently dangerous, (3) they did not call for backup, and (4) they did not activate their emergency lights or siren. The officers' professional obligation to investigate a possible violation of the law, the Court said, was a "call to duty" and therefore an "emergency call" under the statute. *Id.* at 218, ¶16.

The incorrect theme permeating Appellant's Brief, and that of Amicus urging reversal, is that a police officer's authority to make an arrest is coextensive with his professional obligation as a police officer pursuant to R.C. 2744.02(B)(1)(a). Appellant cites *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222 for the proposition that absent a formal mutual aid pact, a township police officer has no power to arrest outside the territorial boundary of his township and is not legally required to respond to a call for assistance outside the township. Under Appellant's formulation, the officer therefore has no professional obligation to respond to a request for assistance from outside his territorial jurisdiction, and thus lacks immunity for operation of a motor vehicle on an emergency call under R.C. 2744.02(B)(1)(a). Contrary to Appellant's argument, and consistent with this Court's ruling in *Colbert*, a "call to duty," and thus an "emergency call" under R.C. 2744.02(B)(1)(a), encompasses situations in which an officer has an obligation to respond arising from his profession as a peace officer and is not limited to circumstances where he possesses arrest powers, or is under an affirmative legal requirement to respond.

First, Ohio Revised Code section 2744.02(A)(2) provides that "[t]he defenses and immunities conferred under this chapter apply in connection with all governmental and

proprietary functions performed by a political subdivision and its employees, whether performed on behalf of the political subdivision or on behalf of another political subdivision.”

Ohio courts have long recognized that an officer’s entitlement to immunity is not affected by his physical location with reference to his department’s territorial jurisdiction. See, *Perry v. City of East Cleveland* (Ohio App. 11th Dist., Feb. 16, 1996), No. 95-L-111, 1996 WL 200558; *Shalkhauser v. City of Medina* (Ohio App. 9th Dist., Jan 16, 2002), 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (officer entitled to statutory immunity for auto accident occurring outside his department’s jurisdiction); *Stover v. Hamilton* (Ohio App. 5th Dist., Oct. 15, 1982), No. CA-2056, 1982 WL 3083.

In *Perry*, the court noted that

[n]othing within the statute limits those governmental or proprietary functions to actions which occur within the jurisdictional boundaries of the political subdivision. Furthermore, this court is unable to locate any statutory provision limiting a political subdivision from acting outside its geographic boundaries or requiring them to forego immunity for acts which would be shielded from tort liability if undertaken within its boundaries. \* \*  
\* . . . [A]cts or decisions relating to or occurring in part on extra-territorial property, would be entitled to the same immunity provisions as lands within the borders of the municipality subject to the exceptions enumerated in R.C. 2744 et seq., so long as such function is otherwise within the fulcrum of proper police activity.”

1996 WL 200558 at \*4.

In *Stover v. Hamilton*, officer Stover, of the Village of Plymouth Police Department, was involved in an auto accident while he responded to a call for assistance from another officer who observed a car on fire outside the Village limits. There was no formal mutual aid pact requiring a response by the Village officers outside their territorial jurisdiction. Officer Stover claimed immunity under the former R.C. 701.02 which, like the statute at issue in the present case,

provided officers were immune from damages caused by their operation of a motor vehicle “while responding to an emergency call.” The court ruled that Officer Stover was entitled to immunity despite the fact that no mutual aid pact existed which legally required him to respond. The court determined that R.C. 701.02 was a “full defense to an action for damages for personal injury against a policeman for negligence while engaged in the operation of a motor vehicle while responding to an emergency call.” The court further observed that “[s]uch policeman [responding to an emergency call] is entitled, as a matter of law, to accept the call at face value and has no duty to independently determine whether an actual emergency exists, or to question the judgment of the officer issuing such message.” *Id.* (citing, *Agnew v. Porter* (1970), 23 Ohio St. 2d 18, 52 O.O. 2d 79, syllabus 2).

Second, as this Court observed in *Colbert*, the term “duty” is defined as “obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession.” *Id.* at ¶13 (emphasis added) (citing, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986) 705). It therefore follows that an officer’s “professional obligation” can arise not only from statutory or contractual legal requirements, but also from the order or usage of his profession.

The term “usage” is defined as “habitual or customary practice or use \* \* \* the prevailing mode of procedure (as of a craft, business, liturgical tradition): a principle or method of action or body of these commonly followed within a group” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) 2523. “Usage” has also been defined as a “firmly established and generally accepted practice or procedure.” MERRIAM-WEBSTER ONLINE DICTIONARY <<http://www.merriam-webster.com/dictionary/usage>>. Further, in the legal context, “usage” has been defined as “[a] well known, customary, and uniform practice, usu. in a specific profession or business.”

BLACK'S LAW DICTIONARY (7th ed. 1999) 1539. The *Colbert* Court could have limited the term "call to duty" to situations where officers are legally required to act, but it did not do so. Rather, it included within the scope of calls to duty responses required by the officers' professional obligation. Thus, a call to duty to assist another officer in a potentially dangerous situation does not depend upon a legal or contractual mandate to provide such assistance, or upon the officer's authority to make arrests while assisting another officer outside his geographic jurisdiction. Rather, the obligation can arise from the customary and generally accepted practice of law enforcement officers to provide assistance to other nearby officers in need of that assistance without stopping to evaluate the location of the incident in reference to political boundaries. As the court in *Stover v. Hamilton* observed, officers provide such assistance "by longstanding custom and practice." 1982 WL 3083 at \*1.

In the present case, Sgt. Carpenter was answering a call to duty arising under his professional obligation as a peace officer to go to the aid of a nearby fellow officer in a potentially dangerous situation. Responses of this type by Ohio's first responders should be encouraged as a matter of public policy and the protections provided by R.C. Chapter 2744 should not be removed merely because the situation requiring assistance occurs beyond an arbitrary line on a map.

In fact, one need look no further than *Colbert* to see the fallacy in Appellant's argument. In *Colbert* the officers observed what they believed to be a drug deal and began to pursue the suspects. Those officers were not legally required to pursue and investigate every suspected illegal activity they observed. Rather, like all police officers, they had discretion as to whether to initiate that pursuit. See, e.g., *Cooper v. Dayton* (Ohio App. 2nd Dist., 1997), 120 Ohio App.3d 34, 50, 696 N.E.2d 640, 650; *DeSanto v. Youngstown State Univ.* (Ohio Ct.Cl., July 31, 2002),

2002 -Ohio-4144, ¶8, 2002 WL 31966960, \*2 (officers have the discretion to resolve a tense situation without making an arrest). Nevertheless, the Ohio Supreme Court held the officers in *Colbert* were on an “emergency call.” Thus, the fact that Sgt. Carpenter was not legally required to respond to the Deputy’s call for assistance does not mean his response was outside his professional obligation as a police officer. Contrary to the argument of Appellant and Amicus urging reversal, a ruling in favor of the Appellees in this case would reaffirm the standard set forth in *Colbert* that an officer’s call to duty can arise not only from a legal requirement, but also from a professional obligation arising from a customary practice—a “usage”—within the profession of law enforcement.

Officers are called upon to enforce the laws of the State of Ohio at all times. *State v. Swann* (Ohio App. 9th Dist., Jun. 27, 2007), 2007-Ohio-3235, ¶12, 2007 WL 1827629. Even when an officer is off-duty, he holds office on a continuing basis with a continuing right and obligation to enforce the law. *State v. Horton* (Dec. 26, 2000), 12th Dist. No. CA2000-04-024, 2000 WL 1875803, \*6. See also, *Cleveland v. Floria* (Cle. Mun. Ct., Dec. 5, 2002), 121 Ohio Misc.2d 118, 2002-Ohio-7456 (a police officer, not in uniform, can testify in court about a traffic violation observed while not officially on traffic duty).

In *Martin v. Ironton* (Ohio App. 4th Dist., Jun. 6, 2008), 2008-Ohio-2842, 2008 WL 2381737, the court observed that law enforcement officers have a “a professional obligation to assist another law enforcement officer.” *Id.* at ¶¶17, 18. In *Kintyhht v. City of Barberton* (Ohio App. 9th Dist., Jul. 27, 2005), 2005-Ohio-3799, 2005 WL 1763606, the court recognized that although the officer was not specifically called to the scene of a fire, he was clearly acting within the line of duty and exercising his professional judgment as a trained police officer when he determined that police assistance was needed at the scene. *Id.* at ¶19. The court reasoned that

“[t]o find otherwise would be to thwart police officers from exercising their judgment for fear of reprisal stemming from unforeseen events such as [a] motor vehicle accident . . .” *Id.*

In *VanDyke v. Columbus* (Ohio App. 10th Dist., Jun. 3, 2008), 2008-Ohio-2652, 2008 WL 2252558 a City of Columbus police officer responded to a radio request for assistance from another officer pursuing a suspect who was fleeing on foot. *Id.* at 10. In determining that the city of Columbus was immune, the *VanDyke* court recognized that an available officer had a professional obligation to respond to a fellow officer in need of assistance and was thus responding to an emergency call. In *Jennings v. Grayczyk* (Ohio App. 6th Dist., Jan. 16, 1987), 1987 WL 5483, an officer was involved in an auto accident while driving his cruiser in an adjoining jurisdiction after being dispatched to respond to an emergency alarm. The court concluded that the fact that the accident took place in an adjoining jurisdiction did not remove the officer’s immunity under the former R.C. 701.02. *Id.* at \*2.

Appellant and Amicus urging reversal also err in reading *Colbert* as a limitation on the definition of “emergency call” under R.C.2744.01(A). OAJ argues the appropriate inquiry under *Colbert* should ignore whether the situation involved an “inherently dangerous situation.” (OAJ Amicus Brief at pp. 6-7). The *Colbert* Court merely determined that the phrase “inherently dangerous situations” places no limitation on the term “call to duty.” *Id.* at ¶14. It did not hold that the phrase is irrelevant to the inquiry. In the present case, the Sheriff’s Deputy was involved in a foot pursuit of a fleeing suspect in a known high crime area. Many police officers are injured every year in foot pursuits of fleeing suspects. (See, e.g., LINE OF DUTY INJURIES AND PREVENTION, League of Minnesota Cities, (April 2007) <[www.lmc.org/media/document/1/lineof-dutyinjuriesprevention.pdf](http://www.lmc.org/media/document/1/lineof-dutyinjuriesprevention.pdf)>). The potential danger involved in the situation at hand was part of the reason Sgt. Carpenter made the decision to respond to the Deputy’s call and is relevant to the

determination of whether Sgt. Carpenter was responding to an “emergency call” pursuant to R.C. 2744.02(B)(1)(a).

The Amicus urging reversal argues recognizing an officer’s professional obligation to assist a nearby fellow officer beyond adjacent political boundaries runs the risk of immunizing any police officer operating a motor vehicle. (OAJ Merit Brief at p. 8). That slippery slope argument should not dissuade the Court from adhering to the rule of *Colbert* in this case. Clearly, not all operation of motor vehicles by police officers is immunized pursuant to R.C. 2744.02(B)(1)(a). For example, the Eight District Court of Appeals recently recognized that officers operating a cruiser on routine patrol were not entitled to immunity under that subsection because routine patrol did not constitute an emergency call. However, the immunity does apply when the accident occurs during a response by a peace officer that is required by the officer’s professional obligation.

Finally, public policy dictates that the limitation on immunity urged by Appellant be rejected. First responders such as law enforcement and fire personnel should be encouraged to render assistance to other nearby officers in need of assistance, rather than being discouraged from doing so. As the trial court observed in this case: “Public policy further dictates that, under the facts of this case, where Sgt. Carpenter was in such close proximity to the location of the call, and a fellow officer was chasing a suspect on foot in a known high crime area, that his actions also be protected.” (Decision and Entry Granting Defendants’ Motion for Summary Judgment, p. 31). In *Breslin v. New York City Police Pension Fund Bd. of Trustees* (1981), 111 Misc.2d 184, 187, 444 N.Y.S.2d 347, the court stated that “[p]ublic policy dictates that police officers are to be commended for their duties, assistance, and willingness to confront dangerous and often deadly situations for the protection of the public.” Further, as a matter of public policy, the Court should

not adopt a formulation which would require an available officer who hears a call for assistance from a nearby officer in need of assistance to hesitate in order to question the judgment of the officer seeking assistance, to determine whether an emergency actually exists, or to plot the other officer's precise location in reference to the geographical boundaries of his department's territorial jurisdiction before responding. See, *Stover v. Hamilton*, 1982 WL 3083 at \*3.

This Court recently reiterated the statutory policy rationale of R.C. Chapter 2744: “. . . R.C. Chapter 2744 was the General Assembly's response to the judicial abrogation of common-law sovereign immunity and [] ‘[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.’ ” *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*(2008), 118 Ohio St.3d 392, 397-98, 2008-Ohio-2567, ¶34, 889 N.E.2d 521, 526 (citing, *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105). Removing immunity in situations such as those at issue here would (1) discourage responses by emergency personnel that ought to be encouraged, and (2) have a detrimental effect on the fiscal integrity of political subdivisions and the taxpaying public. The benefit to society from encouraging nearby available first responders to assist fellow officers in need promptly, regardless of intervening political boundaries outweighs the potential harm caused to others from the negligent operation of a motor vehicle by public safety personnel. Accordingly, Appellant's first proposed proposition of law should be rejected and the decision of the court of appeals should be affirmed.

**Proposition of Law No. 2:**

**R.C. 2744.01 Et Seq. Does Not Require the Existence of a "Mutual Aid Pact" Between Political Subdivisions in Order for a Police Officer to Be Protected by Immunity When Acting Outside His or Her Territorial Jurisdiction**

OACTA does not dispute that political subdivision immunity is an affirmative defense and the ultimate burden of proof is on the defendant. However, in the instant case, Appellees did produce evidence indicating the existence of a mutual aid arrangement—Sgt. Carpenter’s testimony. As recognized by the court of appeals, Appellant produced no evidence to the contrary. Assuming for the sake of argument that Appellant were correct and there was no written mutual aid pact evidenced by a contract or a trustees’ resolution, obtaining evidence of that fact would have been as easy as submitting an affidavit or a request for admission. However, Appellant apparently failed to obtain any such evidence to refute Sgt. Carpenter’s testimony. Regardless, the Court of Appeals made it clear that it did not rely upon the existence or non-existence of a formal pact in finding that Sgt. Carpenter was on an emergency call. (Memorandum Decision at p. 2). Appellant’s proposed second proposition of law seeks to change Ohio’s basic summary judgment procedures by reassigning the non-movant’s burden to come forward with evidence establishing the existence of a triable issue of fact to the movant. This Court should decline Appellant’s invitation to do so.

OACTA also does not dispute that under R.C. 2935.03(A), without a written mutual aid pact, Sgt. Carpenter would not have had the legal authority to arrest the suspect who was fleeing from the Sheriff’s Deputy. However, as set forth above, that does not eliminate his professional obligation as a peace officer to respond to the radio call of the Sheriff’s Deputy, who was nearby and in foot pursuit of a fleeing suspect.

Amicus urging reversal cites *Brown v. Cuyahoga Falls* (Ohio App. 9th Dist., Sept. 15, 2010), 2010-Ohio-4330, 2010 WL 3582806, for the proposition that an officer has no duty to respond to a general call for assistance. *Brown* is easily distinguished from the case at bar. In *Brown*, the call for assistance arose from a fight at an apartment complex. Several other officers had already been specifically dispatched to the scene. One of the responding officers “acknowledged that this was not a situation that ‘we would consider an emergency call.’” *Id.* at ¶15. In this case, by contrast, an officer was in an ongoing foot pursuit of a fleeing suspect, there is no evidence the officers did not consider the situation an emergency call, and there is no evidence other officers had been dispatched or were responding.

For the reasons set forth above, Appellant’s proposed second proposition of law should be rejected and the decision of the court of appeals should be affirmed.

### CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be affirmed.

Respectfully submitted,



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I hereby certify that a true and correct copy of the foregoing was served by regular U.S.

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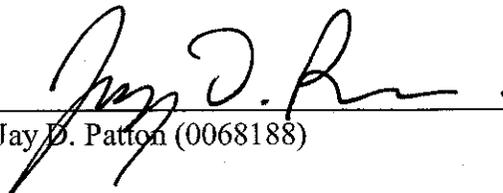
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