

**SUPREME COURT OF LOUISIANA**

*No. 98-C-0816*

LESLIE RUSSELL, ET AL.

Versus

CHARLES NOULLET, JR. ET AL.

Consolidated with

JUANITA SLACK MILLER, WIFE OF/AND  
FREDERICK C. MILLER, JR. ET AL.

Versus

CHARLES NOULLET, JR. ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FOURTH CIRCUIT, PARISH OF ORLEANS

**JOHNSON, J., Dissenting**

The facts of this case are closely akin to Cheatham v. City of New Orleans, 378 So. 2d 369 (La. 1979). In Cheatham, two off-duty police officers were walking through the French Quarter in street clothes. They were drinking and socializing when they encountered a young shoe-shine boy. The decedent, Cheatham, protested the way the boy was handled by the officers and was shot by one of them when he intervened on the boy's behalf.

Here, as there, we have an off-duty police officer in street clothes, drinking and socializing with friends when he is involved in an altercation. In Cheatham, there was never any suggestion that the officers were not acting within the course and scope of their employment when Cheatham was shot. In a footnote, this court suggested that, although for procedural reasons it was unnecessary to resolve the issue of course and scope of employment, the evidence in the record established that the officers' conduct

was in the course of scope of employment for the following reasons:

(1) the officers were required, by police regulation, to carry their guns with them even when they were off-duty; (2) police regulations also required off-duty officers to quell any disturbances occurring in their presence; (3) it was considered a breach of duty under police regulations for an off-duty officer not to quell a disturbance; (4) a disturbance of the peace indeed had occurred, with the shoe-shine boy making a nuisance of himself; (5) the officers, although off-duty, were attempting to quell the disturbance created by the shoe-shine boy, as required by police regulations, when Cheatham intervened; (6) the use of excessive force by a policeman while in the course of doing his duty does not put the officer outside the course and scope of his employment.

Cheatham v. City of New Orleans, 378 So. 2d 369, 375, n.7 (La. 1979), citing, Kyle v. City of New Orleans, 353 So. 2d 969 (La. 1977); Taylor v. City of Baton Rouge, 233 So. 2d 325 (La. App. 1<sup>st</sup> Cir. 1970).

In the case *sub judice*, a disturbance of the peace had occurred involving Officer Noullet's brother, Wade Noullet, who made an inappropriate remark to a young woman. The young woman's friends took offense and a fight erupted. Officer Noullet, although off-duty, attempted to quell the disturbance involving his brother as required by New Orleans Police Department Rules. Ms. Miller, another friend of the young woman, wrote down the license plate number of Officer Noullet's car. She apparently was not pleased with the way Officer Noullet handled the fight involving his brother and she intervened in the disturbance. Ms. Miller's act of writing down the license plate number in response to Officer Noullet's handling of the situation is analogous to Mr. Cheatham's protesting the officers' handling of the young shoe-shine boy. Ms. Miller's intervention, albeit, not an illegal or threatening intervention, was an intervention nonetheless. The officers in Cheatham responded to Mr. Cheatham's intervention in an excessively forceful physical manner, just as Officer Noullet responded to Ms. Miller's intervention. Officer Noullet's use of excessive force while in the course of doing his duty does not put him outside the course and scope of employment.

The same crowd Officer Noullet had earlier attempted to disperse in accordance with police rules was gathered around his vehicle and attempting to prevent him from leaving the scene when the shots were fired and plaintiff, Leslie Russell, was injured. Officer Noullet, while not required to, was permitted to carry his gun while off-duty. Permitting an off-duty officer to carry his weapon, as opposed to requiring him to, should not limit the city's vicarious liability.

For the aforementioned reasons, I would affirm the judgments of the Trial Court and the Court of Appeal, and I respectfully dissent.