IN THE COURT OF APPEALS OF IOWA

No. 1-094 / 10-1227
Filed April 27, 2011

ADEL AL-JURF, M.D.,
Plaintiff-Appellant/Cross-Appellee,

vs.

CAROL SCOTT-CONNER, M.D.
and SUSAN JOHNSON, M.D.,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Johnson County, Fae Hoover-Grinde (summary judgment) and Douglas S. Russell (trial), Judges.

A plaintiff appeals and the defendants cross-appeal from a jury verdict in favor of the defendants. **AFFIRMED.**

Martin Diaz and Elizabeth Craig of Martin Diaz Law Firm, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and George A. Carroll, Assistant Attorney General, for appellees.

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

In this action for damages based on 42 U.S.C. § 1983, Dr. Adel S. Al-Jurf claimed that Dr. Susan Johnson and Dr. Carol Scott-Conner violated his constitutionally-protected property interest in his tenured employment at the University of Iowa Hospitals and Clinics (UIHC) by seeking his termination for arbitrary and capricious reasons. Following a trial and jury verdict in favor of the defendants, Dr. Al-Jurf appeals and Dr. Johnson and Dr. Scott-Conner cross-appeal. Because we find the jury was properly instructed regarding Dr. Al-Jurf's due process claim and there was no error in the introduction of evidence, we affirm. Consequently, we do not need to reach the issues raised by the defendants on cross-appeal.

I. Background Facts and Proceedings.

In the 1970's, Dr. Al-Jurf became a surgeon and professor of surgery at the UIHC. He was granted tenure by the University of Iowa in 1981. In 2003, formal complaints regarding Dr. Al-Jurf's conduct toward colleagues and students were filed and hearings were held, ultimately resulting in Dr. Al-Jurf's termination on January 20, 2005. Dr. Al-Jurf's termination was upheld through the administrative and judicial review process. *See Adel Al-Jurf, M.D. v. Bd. of Regents*, No. 7-409 (Iowa Ct. App. July 12, 2007).

On January 18, 2007, Dr. Al-Jurf filed a petition naming employees of UIHC as defendants—Susan Johnson, M.D., and Carol Scott-Conner, M.D.[1] He alleged the defendants sought out and documented incidents that are normally

[1] The petition also named David Brown, M.D., as a defendant, who was dismissed without prejudice on July 20, 2009.

overlooked and encouraged others to file complaints against him, which ultimately led to his termination. He claimed the defendants' conduct violated his rights under § 1983 by depriving him of his liberty and property interests guaranteed by the federal and state constitutions. On February 5, 2007, the defendants filed their answer, denying Dr. Al-Jurf's claim and raising several affirmative defenses, including failure to state a claim upon which relief can be granted, failure to mitigate damages, qualified immunity, res judicata, and statute of limitations.

On July 22, 2009, the defendants moved for summary judgment. Dr. Al-Jurf resisted, and asserted a § 1983 claim based upon a violation of his First Amendment rights. On September 20, 2009, the district court issued its ruling. As to the First Amendment claim, the court found Dr. Al-Jurf did not plead this theory in his petition, did not move to amend his petition, and should not be permitted to assert this claim at this stage of litigation. Additionally, the district court found that the First Amendment claim was barred by the statute of limitations. Consequently, any alleged First Amendment violation could not serve as a basis for Dr. Al-Jurf's § 1983 action. As to the substantive due process claim, the court found there were genuine issues of material fact regarding this claim and the claim was not barred by res judicata or the statute of limitations. Finally, the court found there were genuine issues of material fact regarding whether the defendants were entitled to qualified immunity. Therefore, the district court granted the motion as to the First Amendment theory and denied the defendants' motion as to the Due Process theory.

A jury trial was held May 17 to 25, 2010. At the close of the evidence, the defendants moved for a directed verdict, asserting Dr. Al-Jurf's claims were barred by res judicata and the statute of limitations, the defendants were entitled to qualified immunity, and Dr. Al-Jurf did not present substantial evidence to support his claim. The district court reserved ruling and the case was submitted to the jury. The jury found that Dr. Johnson and Dr. Scott-Conner did not violate Dr. Al-Jurf's constitutional rights and rendered a verdict in favor of the defendants.

On June 3, 2010, Dr. Al-Jurf moved for a new trial, asserting the court erred by: (1) admitting evidence of the administrative proceedings; (2) admitting Jan Waterhouse's testimony that she recommended that Dr. Al-Jurf be terminated; and (3) instructing the jury as to substantive due process in instructions numbered 8, 9, and 10. On June 7, 2010, the defendants renewed their motion for a directed verdict and requested the court enter judgment as a matter of law. On July 2, 2010, the district court ruled on the parties' motions, denying both. Dr. Al-Jurf appeals and the defendants cross-appeal.

II. Analysis.

Dr. Al-Jurf brought his claim under the civil rights statute commonly referred to as § 1983. It provides in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983; *see also Christenson v. Ramaeker*, 366 N.W.2d 905, 907 (Iowa 1985). Section 1983 does not create independent substantive rights, but provides a vehicle by which a plaintiff may bring suit against an individual acting under color of state authority that has deprived him of a constitutional or statutory right. 42 U.S.C. § 1983.

> A plaintiff in a § 1983 action must establish (1) that the defendants deprived the plaintiff of a right secured by the Constitution and laws of the United States, (2) that the defendant acted under color of state law, (3) that the conduct was a proximate cause of the plaintiff's damage, and (4) the amount of damages.

Dickerson v. Mertz, 547 N.W.2d 208, 214 (Iowa 1996). The first element is the only element of Dr. Al-Jurf's § 1983 claim implicated on appeal.

A. Summary Judgment—First Amendment Claim.

Dr. Al-Jurf first asserts the district court erred in granting the defendants' motion for summary judgment on his § 1983 claim based upon the First Amendment. We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907. Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

In January 2007, Dr. Al-Jurf initiated this suit and pled his § 1983 claim based upon a violation of due process. He did not plead his § 1983 claim based upon a violation of freedom of speech, nor did he move to amend his pleadings at any time during the proceedings.

He argues the defendants were aware of his claim. In 2007, the parties had a dispute about discovery, during which Dr. Al-Jurf sought a large number of

documents and ultimately filed a motion to compel. In a December 19, 2007 filing in support of his motion to compel, he explained that he believed these documents would support a § 1983 claim based upon a First Amendment violation. On January 23, 2008, the district court granted his motion, with the documents subject to a protective order and Dr. Al-Jurf bearing responsibility for the costs. After discovery was complete, Dr. Al-Jurf did not move to amend his petition to allege a § 1983 claim based upon a violation of his First Amendment rights and did not pursue this claim.

In September 2009, the district court ruled on the defendants' motion for summary judgment. Dr. Al-Jurf was effectively requesting that he be permitted to amend his petition, although he had not actually moved to do so. *See* Iowa R. Civ. P. 1.402(4); *Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996) ("A trial court has considerable discretion in ruling on a motion for leave to amend, and we reverse only on a clear abuse of discretion."). In light of the fact that Dr. Al-Jurf did not move to amend his pleadings, we find the district court did not err in granting the defendants' summary judgment motion as to Dr. Al-Jurf's § 1983 claim based upon the First Amendment.[2]

B. Motion for a New Trial—Evidence and Jury Instructions.

Dr. Al-Jurf next asserts the district court erred in denying his motion for a new trial. *See* Iowa R. Civ. P. 1.1004. During trial, he timely objected to the complained of evidence and jury instructions, and then also moved for a new trial based upon those grounds. On appeal, he again claims a new trial should have

[2] The district court also found Dr. Al-Jurf's First Amendment claim was barred by the statute of limitations. Because we find the court did not err in granting the motion on the basis of a failure to amend the pleadings, we do not need to reach this issue.

been granted because (1) the district court abused its discretion in admitting evidence of the administrative hearings process; (2) erroneously admitted Jan Waterhouse's testimony that she recommended his employment be terminated; and (3) erred instructing the jury as to substantive due process in instructions numbered 8, 9, and 10.

"The standard of review of a denial of a motion for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the court." *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). If the motion and ruling were based on a legal question, our review is on error. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). In contrast, if the motion and ruling were based upon a discretionary ground, our review is for an abuse of discretion. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996). Evidentiary rulings are based upon discretionary grounds, whereas hearsay and jury instruction rulings are based upon legal questions. *See State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010) ("We review challenges to jury instructions for correction of errors at law."); *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006) ("We review the defendant's hearsay claims for errors at law."); *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002) ("[T]rial courts are granted broad discretion concerning the admissibility of evidence. Reversal would be warranted only if the trial court clearly abused its discretion to the prejudice of the complaining party.").

1. Evidence.

Dr. Al-Jurf asserts the district court abused its discretion in admitting "evidence of the administrative hearings process." He argues this evidence was

irrelevant and even if it were relevant, it should have been excluded under Iowa Rule of Evidence 5.403. *See* Iowa Rs. Evid. 5.401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); 5.402 ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible."). The defendants respond that the evidence was relevant.

At trial, Dr. Al-Jurf argued that there was an antagonistic relationship between him and the defendants and the defendants retaliated against him by causing complaints to be filed, ultimately leading to his termination. Dr. Johnson and Dr. Scott-Conner argued they had a minimal role in Dr. Al-Jurf's termination and his termination was based upon good cause alone, as well as asserting the defense of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982) (defining qualified immunity as "[g]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); *Herts v. Smith*, 345 F.3d 581, 585 (8th Cir. 2003) ("The issue is not whether the defendant acted wrongly, but whether reasonable persons would know they acted in a manner which deprived another of a known constitutional right."). We find this evidence was relevant to the issues raised at trial—the defendants had a right to establish what exactly their role in Dr. Al-Jurf's termination was and show the complaints were not a pretext for his termination. Additionally, we do not find that the evidence of the administrative review process

should have been excluded under rule 5.403 (providing that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). As discussed above, Dr. Al-Jurf argued the complaints were a pretext for his termination. One of the ways he supported this was by introducing evidence not a part of the administrative hearings. Thus, the danger of unfair prejudice was minimal. We find the district court did not abuse its discretion in admitting evidence of administrative proceedings.

Dr. Al-Jurf next asserts the district court erred in admitting Jan Waterhouse's testimony that she recommended Dr. Al-Jurf be terminated. Waterhouse was employed with the University Office of Affirmative Action from 1999 to 2007. In this position, she received complaints of discrimination and harassment and conducted internal investigations. Waterhouse received a complaint from Dr. Beth Ballinger of a physical and verbal altercation that occurred in January 2003 with Dr. Al-Jurf. Waterhouse then conducted a neutral investigation, which included interviewing the witnesses present at the incident and Dr. Al-Jurf. Waterhouse testified that based upon her conclusions, her "office recommended . . . Dr. Al-Jurf's position at the university be terminated."

Dr. Al-Jurf argues that Waterhouse should not have been permitted to testify that she recommended he be terminated, claiming the evidence was irrelevant and highly prejudicial, and inadmissible hearsay not relevant under the public records exception in Iowa Rule of Evidence 5.803(8)(B)(iv). Yet, in support of his argument he cites to no authority, other than a general cite to Iowa Rule of Evidence 5.803(8)(B)(iv) ("The following are not within this exception to the hearsay rule . . . [f]actual findings resulting from special investigation of a

particular complaint, case, or incident."). The defendants respond that Waterhouse's testimony was not hearsay because she was the declarant and the testimony was relevant to show the defendants were acting on a rational basis when they sought Dr. Al-Jurf's termination. Likewise, in support of their argument the defendants cite to no authority. Consequently, we examine Dr. Al-Jurf's claim under Iowa Rule of Evidence 5.803, but any argument not supported by authority is deemed waived. *See* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) ("To reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume.").

Iowa Rule of Evidence 5.803(8)(A) sets forth the public records exception to the hearsay rule, which is premised on reliability and necessity—it is presumed public officials will perform their duties with accuracy, the potential for public inspection affords reliability, and "if public officials were required to testify personally, it would exact a high cost in time and efficiency of the public office." James A. Adams & Joseph P. Weeg, *Iowa Practice Series*, Evidence § 5.803:8 (2010). Rule 5.803(8)(B) excludes certain records from the public records hearsay exception, including "[f]actual findings resulting from special investigation of a particular complaint." Iowa R. Evid. 5.803(8)(B)(iv). This rule is not applicable here—a public record was not introduced, Waterhouse testified to her role in the investigation, did not give any factual findings resulting from the investigation, and stated her own recommendation. We find no error under rule 5.803(8).

2. Jury Instructions—Substantive Due Process.

Al-Jurf's § 1983 claim rested on a violation of his substantive due process rights. U.S. Const. Amend. 14; Iowa Const. art. I, § 9; *see Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100, 113–14 (1990) (noting that substantive due process violations are actionable under § 1983). The due process clause provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. 14, § 1; *see* Iowa Const. Art. I, § 9; *see also Bailiff v. Adams Cnty. Conference Bd.*, 650 N.W.2d 621, 624 (Iowa 2002) ("We usually deem the federal and state Due Process . . . Clauses to be identical in scope and purpose."). The due process clause covers a procedural and substantive sphere, with the substantive sphere "barring certain government actions regardless of the fairness of the procedures used to implement them." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 1713, 140 L. Ed. 2d 1043, 1053 (1998) (citations and internal quotations omitted).

In this case, Dr. Al-Jurf asserted that Dr. Johnson and Dr. Scott-Conner violated his due process rights by seeking his termination for arbitrary and capricious reasons, which resulted in a deprivation of his constitutionally-protected property interest in his tenured employment at UIHC. *See Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999) ("Public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process." (citing *Gilbert v. Homar*, 520 U.S. 924, 929, 117 S. Ct. 1807, 1811, 138 L. Ed. 2d 120, 126 (1997))). Accordingly, the jury was instructed,

Instruction No. 8

Dr. Adel Al-Jurf claims that Dr. Carol Scott-Conner violated his constitutional right to substantive due process. In order to recover against her, Dr. Al-Jurf must prove all of the following propositions:

1. Dr. Scott-Conner deprived him of a right protected by the Constitution of the United States as explained in Instruction No. 10, by actions taken to cause his termination for an improper motive or for reasons that are pretextual, arbitrary and capricious, or malicious.
2. Dr. Scott-Conner acted under color of state law.
3. Her conduct was a cause of Dr. Al-Jurf's damage.
4. The amount of damage.

If Dr. Al-Jurf has proven all of these propositions, then he is entitled to damages in some amount. If Dr. Al-Jurf has failed to prove any of these propositions, he is not entitled to damages.

Instruction No. 9

Dr. Adel Al-Jurf claims that Dr. Susan Johnson violated his constitutional right to substantive due process. In order to recover against her, Dr. Al-Jurf must prove all of the following propositions:

1. Dr. Johnson deprived him of a right protected by the Constitution of the United States as explained in Instruction No. 10, by actions taken to cause his termination for an improper motive or for reasons that are pretextual, arbitrary and capricious, or malicious.
2. Dr. Johnson acted under color of state law.
3. Her conduct was a cause of Dr. Al-Jurf's damage.
4. The amount of damage.

If Dr. Al-Jurf has proven all of these propositions, then he is entitled to damages in some amount. If Dr. Al-Jurf has failed to prove any of these propositions, he is not entitled to damages.

See Iowa Uniform Jury Instruction 3000.1 (42 USC § 1983 Actions).

Instruction No. 10

The Fourteenth Amendment to the United States Constitution applies to claims of improper action by state officials. Under the Due Process Clause of the Fourteenth Amendment, only official conduct that "shocks the conscience" amounts to a constitutional violation. In this case, Dr. Al-Jurf claims that the Defendants took action to terminate him for improper reasons. Whether or not the actions Defendants took against Dr. Al-Jurf "shock the conscience" is a question to be determined by you in the light of all the evidence.

In order to demonstrate conduct that "shocks the conscience," a plaintiff must do more than show the government

> actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. A plaintiff must show that the actions were inspired by malice or excessive zeal that shocks the conscience, in other words, a high level of outrageousness and a magnitude of actual or potential harm that is conscience-shocking under the circumstances.

On appeal, Dr. Al-Jurf states that instruction number 10 materially misstates the law—he contends that he should only be required to prove the defendants' actions were "arbitrary and capricious" and not that the defendants' actions "shock the conscience." As to instruction number 8 and number 9, he states they set forth a correct statement of a substantive due process violation in the context of the wrongful deprivation of public employment, but they are conflicting and confusing because they refer to instruction number 10.

We first examine whether the shocks-the-conscience test was an accurate statement of law and find that it is. In *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716, 140 L. Ed. 2d 1043, 1057 (1998), the Supreme Court examined a § 1983 claim based upon an alleged violation of substantive due process and clarified the shocks-the-conscience test originally set forth in *Rochin v. California*, 342 U.S. 165, 172–73, 72 S. Ct. 205, 209–210, 96 L. Ed. 183, 190 (1952). The court explained that substantive due process limits what a government may do in its executive or legislative capacities, and the criteria to determine what is fatally arbitrary differs depending on whether it is an act by an executive officer or legislation at issue. *Lewis*, 523 U.S. at 846, 118 S. Ct. at 1716, 140 L. Ed. 2d at 1057. The court held that in claims based on executive action, the shocks-the-conscience test "governs *all* substantive due process claims." *Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) (citing *Lewis*, 523 U.S.

at 845–46, 118 S. Ct. at 1716, 140 L. Ed. 2d at 1057). The court explained that "[t]he touchstone of due process is protection of the individual against arbitrary action of government" and "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"—only conscience-shocking behavior can be sufficiently arbitrary and egregious to be of constitutional significance. *Lewis*, 523 U.S. at 845–46, 118 S. Ct. at 1716, 140 L. Ed. 2d at 1057. This prevents the Fourteenth Amendment from becoming a "font of tort law." *Id.* at 848, 118 S. Ct. at 1718, 140 L. Ed. 2d at 1059. Thus, not only must the plaintiff show the government official violated a right otherwise protected by the substantive due process, but the plaintiff must also show the government official's actions shock the conscience. *Id.* at 848–49, 118 S. Ct. at 1717–18, 140 L. Ed. 2d at 1058–59; *see also, e.g.*, *Martinez*, 608 F.3d at 64–65.

Although this is an executive action case, Dr. Al-Jurf essentially attempts to distinguish a violation based upon a liberty interest from one based upon a property interest.[3] This is directly contrary to case law. *See Lewis*, 523 U.S. at 846, 118 S. Ct. at 1716, 140 L. Ed. 2d at 1057; *see also, e.g.*, *Martinez*, 608 F.3d at 64 ("*Lewis* expressly rejected the notion . . . that rights protected by the substantive Due Process Clause as applied to executive actors are somehow

[3] Dr. Al-Jurf cites many cases where the "shocks the conscious" language was not specifically quoted, but those cases are not on point and many were before *Lewis* was decided. *See, e.g.*, *N. Dakota State Univ. v. United States*, 255 F.3d 599, 605 (8th Cir. 2001) (determining whether payments to an early retirement program to tenured faculty in exchange for release of the faculty's tenure rights were wages subject to Federal Insurance Contributions Act and explaining that tenure is a protected property right). However, he also acknowledges that in cases on point and filed after *Lewis*, the shocks-the-conscience test was applied. *See, e.g.*, *Herts v. Smith*, 345 F.3d 581, 587 (8th Cir. 2003) ("To determine whether a violation of an individual's substantive due process rights has occurred, the question is whether the officials acted in an arbitrary or capricious manner, or so as to shock the conscience.").

separate from the shocks-the-conscience test."); *C.N. v. Willmar Pub. Sch.*, 591 F.3d 624, 634 (8th Cir. 2010) (stating that in determining whether a plaintiff adequately pleaded a substantive due process claim, the plaintiff must allege actions by a government official which "violated one or more fundamental constitutional rights" and were "shocking to the contemporary conscience"); *Herts v. Smith*, 345 F.3d 581, 587 (8th Cir. 2003) ("To determine whether a violation of an individual's substantive due process rights has occurred, the question is whether the officials acted in an arbitrary or capricious manner, or so as to shock the conscience."); *Zaber v. City of Dubuque*, 789 N.W.2d 634, 640 (Iowa 2010) ("[S]ubstantive due process principles preclude the government from engaging in conduct that shocks the conscience."). "The conscience-shocking test is now an essential part of any substantive due process claim against a government actor." *Martinez*, 608 F.3d at 65. Furthermore, Dr. Al-Jurf does not provide any reasons for applying a lesser standard of care to due process violations based upon a tenured property interest. In fact, case law persuades against it. *See Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599, 128 S. Ct. 2146, 2151, 170 L. Ed. 2d 975, 989 (2008) (discussing the crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or acting as an employer—"government offices could not function if every employment decision became a constitutional matter, constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign"); *Bishop v. Wood*, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684, 693 (1976) ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-

advised personnel decisions."). As discussed above, adopting Dr. Al-Jurf's approach would directly contradict the rationale behind the test—the Fourteenth Amendment is simply not for tort claims, as only conscience-shocking behavior can be sufficiently arbitrary and egregious to be of constitutional significance. *See Lewis*, 523 U.S. at 846, 118 S. Ct. at 1716, 140 L. Ed. 2d at 1057.

We find jury instruction number 10 was an accurate statement of the law—the shocks-the-conscience test is an element of a substantive due process claim against a government actor. Further, we find instruction number 8 and number 9 were not conflicting and confusing for referring to instruction number 10.

C. Cross-Appeal.

Finally, on cross-appeal, the defendants assert the district court erred in not granting their motion for a directed verdict.[4] The defendants requested a directed verdict because Dr. Al-Jurf's claims were barred by res judicata and the statute of limitations, the defendants were entitled to qualified immunity, and Dr. Al-Jurf failed to produce substantial evidence in support of his claim. The jury entered a verdict in the defendants' favor and we do not reverse and remand for a new trial. Therefore, we do not need to reach these arguments. Even assuming the district court erred in not directing a verdict in favor of the

[4] On cross-appeal, the defendants assert the district court erred in not granting their motion for summary judgment on their affirmative defenses of failure to state a claim, res judicata, statute of limitations, and qualified immunity. However, similar to a motion in limine, a summary judgment ruling is not a final ruling. *See Ortiz v. Jordan*, ___ U.S. ___, ___, 131 S. Ct. 884, 889, 178 L. Ed. 2d 703, ___ (2011). "Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Id.* For example, the qualified immunity defense remains available to the defendants at trial, and "the defense must then be evaluated in light of the character and quality of evidence received in court." *Id*. Thus, the proper way to preserve these issues is through a motion for a directed verdict, which was made and also challenged on appeal.

defendants, the jury found the defendants did not violate Dr. Al-Jurf's constitutional rights and had no liability. Any error in ruling on the motion for a directed verdict is harmless and the issues on appeal are moot. *See Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826 (Iowa 1994) (indicating that "an erroneous denial of summary judgment [is] rendered harmless by a subsequent judgment" and that the issue of whether a motion for summary judgment was improperly denied is rendered moot where the case has already been tried and verdict entered). Therefore, we affirm.

AFFIRMED.