IN THE COURT OF APPEALS OF IOWA

No. 6-241 / 05-1075
Filed May 24, 2006

LAURA J. PERKINS,
by DAVID M. PERKINS,
her parent and next friend,
Plaintiff-Appellant,

vs.

DALLAS CENTER-GRIMES
COMMUNITY SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Plaintiff appeals from the district court's ruling granting summary judgment in favor of defendant. **AFFIRMED.**

Randy V. Hefner and Matthew J. Hemphill of Hefner & Bergkamp, P.C., Adel, for appellant.

Karin A. Stramel and Jason T. Madden of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

I. Background Facts and Proceedings

The facts are undisputed. Dallas Center-Grimes Community School District, a school district organized and existing under the laws of the State of Iowa, is a "municipality" as that term is defined in Iowa Code section 670.1(2) (2003). On February 27, 2001, Laura Perkins, a minor, injured herself after putting her hand and wrist through a glass panel door at the Dallas Center-Grimes high school located in Dallas Center, Iowa.

On April 19, 2002, Perkins's counsel sent a letter to the school district's insurance adjuster. In the letter, counsel explained he had been retained by Perkins's family "to pursue her claim for injuries sustained in an accident occurring at the Dallas Center-Grimes High School in February of 2001." Counsel requested the adjuster contact him "at your earliest convenience so that we might discuss resolution of this claim."

On August 12, 2004, Perkins[1] filed an action seeking judgment against the school district for injuries suffered in the February 2001 incident. The school district filed a motion for summary judgment, claiming Perkins's claim was barred under Iowa Code section 670.5. Perkins resisted. The district court granted the motion and dismissed Perkins's petition. Perkins appeals.

II. Standard of Review

We review a ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.4; *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d

[1] David Perkins, as parent and next friend, brought the suit on behalf of his daughter. *See* Iowa R. Civ. P. 1.210. Nevertheless, we will refer to Laura Perkins as plaintiff in this opinion.

836, 840-41 (Iowa 2005). Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Where the facts are undisputed and the only dispute concerns the legal consequences flowing from those facts, we must determine whether the district court correctly applied the law. *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996).

III. Discussion

Perkins argues the district court erred in holding that her claim was time barred under Iowa Code section 670.5. Specifically, she contends the district court erroneously interpreted the applicable statute and case law.

Section 670.5 provides as follows:

> Every person who claims damages from any municipality . . . shall commence an action therefor within six months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. . . . No action therefor shall be maintained unless such notice has been given and unless the action is commenced within two years after such notice. The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by the injury from giving such notice.

The statute, previously codified at section 613A.5, has not been amended since 1974.

In *Miller v. Boone County Hospital*, 394 N.W.2d 776, 780 (Iowa 1986), the supreme court declared section 670.5 unconstitutional because "[f]ailure to

commence an action within six months unless a notice is given within 60 days arbitrarily bars victims of governmental torts while victims of private torts suffer no such bar." The court concluded, "[B]ecause section [670.5] is unconstitutional, we hold that Iowa Code chapter 614 is the applicable statute of limitations for all actions arising under chapter [670]." *Miller*, 394 N.W.2d at 781.

In *Clark v. Miller*, 503 N.W.2d 422, 425 (Iowa 1993), the supreme court noted its previous holding in *Miller*, but went on to determine "the provisions of section [670.5] can be severed to exclude the unconstitutional portion of the statute while retaining the remaining portion."[2] In doing so, the court held, "Allowing the statute of limitations to be extended so as to permit a filing of an action within two years after timely notice of the claim has been given does not violate equal protection guarantees." *Id.* The *Clark* court did not define "timely notice," although the plaintiff in *Clark* had given notice to the local government within the statutory sixty-day period. *Id.* at 424.

The district court in the case before us concluded that based on the holding in *Clark*,

> the only portion of section 670.5 that is unconstitutional is the six-month statute of limitations and the rest of the section is still valid. Therefore, [Perkins] had two years to file suit after providing notice.
>
> [Perkins] gave notice on April 19, 2002. Without considering whether such notice was "timely," plaintiff was to file suit within two years of providing such notice.[3]

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[2] The *Clark* court noted "the issue of severability was not presented or discussed" in *Miller*. *Clark*, 503 N.W.2d at 424.

[3] In district court, Perkins argued counsel's letter did not constitute sufficient notice under section 670.5. The district court concluded notice was sufficient. Perkins does not dispute the district court's conclusion on appeal.

Perkins argues the district court erred in determining "the rest of the section," including the sixty-day notice provision, survived constitutional muster in light of *Miller*. However, neither *Clark* nor the district court's ruling specifically conclude the sixty-day notice provision of section 670.5 passes constitutional muster; nor was such a conclusion required in this case. The district court assumed, without deciding, that Perkins's notice was timely, and concluded that she failed to file an action within two years of providing notice, as required by the statute.

Based on our reading of the supreme court's decision in *Miller* and its subsequent decision in *Clark*, we conclude the district court correctly applied the law in this case. As the district court did, we assume without deciding that Perkins's notice was "timely." Therefore, we need not address the issue of whether the sixty-day notice provision of section 670.5 remains intact after the *Clark* decision. Perkins failed to file suit within two years of the notice, as required by the portion of section 670.5 that remains intact following the *Clark* decision.

The district court went on to determine section 614.8 (extending the statute of limitations "in this chapter" so that minors have "one year from and after attainment of majority within which to commence an action") did not apply to toll the statute of limitations. The district court relied on *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989), which held "the tolling provisions of section 614.8 do not apply to statutes of limitation outside of chapter 614."[4]

[4] The *Harden* court noted:

> We specifically made this interpretation of section 614.8 in *Shearer v. Perry Community School Dist*., 236 N.W.2d 688, 694 (Iowa 1975). *Shearer* was overruled on other grounds in *Miller v. Boone County*

After considering Perkins's arguments to the contrary, we conclude the district court reached the correct conclusion. The holding in *Harden* could not be clearer: section 614.8 does not apply to statutes of limitation outside chapter 614. The *Clark* decision held that the provisions of section 670.5 could be severed to "save" the provision permitting the filing of an action within two years after timely notice of the claim has been given. Because section 670.5 remains a valid statute of limitations, section 614.8 does not apply to toll the two-year statute of limitations in section 670.5.

We affirm the district court's ruling granting summary judgment in favor of the school district and dismissing the case.

AFFIRMED.

Eisenhauer, J., concurs; Hecht, J., dissents.

Hospital, 394 N.W.2d 776, 781 (Iowa 1986), however, the statutory interpretation of section 614.8 in *Shearer* is still persuasive.
Harden, 434 N.W.2d at 884.

HECHT, J. (dissenting)

I respectfully dissent. As the majority noted, *Miller* court held Iowa Code section 670.5 is unconstitutional because it treats persons injured by municipal tortfeasors differently from those injured by private tortfeasors without a rational basis for doing so. *Miller*, 394 N.W.2d at 780. *Miller* declared that chapter 614 shall supply all applicable limitation periods under the Municipal Torts Claim Act (MTCA). *Id*. at 781. I find no case law suggesting our supreme court has disavowed its holding in *Miller* and therefore conclude section 614.8 tolled the applicable limitation period during Perkins's minority.

Although our supreme court has interpreted section 670.5 to extend the statute of limitations period supplied by chapter 614, *Clark*, 503 N.W.2d at 425, that decision did not in my view signal a reversal of the *Miller* holding requiring application of chapter 614 to MTCA claims as a means of avoiding the statute's equal protection infirmity. While I must concede that our supreme court has concluded "the tolling provisions of section 614.8 do not apply to statutes of limitation outside of chapter 614," *Harden*, 434 N.W.2d at 884, that conclusion was reached with reference to the State Torts Claim Act, a statute that is distinguishable from the MTCA insofar as its limitation period is concerned. Furthermore, *Miller* teaches that the limitation period applicable to Perkins's case *is* controlled by chapter 614, so the conclusion reached in *Harden* is of no consequence to our holding in any event. Because I conclude the tolling provisions of section 614.8 continue to apply to all statutes of limitations under chapter 614, including claims arising under the MTCA, *Miller*, 394 N.W.2d at 781, I would reverse the summary judgment and remand for trial.