

IN THE COURT OF APPEALS OF IOWA

No. 7-087 / 06-0978

Filed April 25, 2007

**TOM HAMILTON, as Special Administrator
of the Estate of JODI E. MUNN, Deceased,**
Plaintiff-Appellant,

vs.

**DAVID ANDREW JOHANNSEN, JERI LEE
JOHANNSEN, and the CITY OF SUTHERLAND,
an Iowa Municipality,**
Defendants-Appellees.

**GARY S. TUNINK, JR., Individually and as
Parent and Next Friend of TASHA and TYLER TUNINK,**
Plaintiffs-Appellants,

vs.

**DAVID ANDREW JOHANNSEN and the CITY OF
SUTHERLAND, an Iowa Municipality,**
Defendants-Appellants-Appellees.

Appeal from the Iowa District Court for O'Brien County, David A. Lester,
Judge.

The plaintiffs appeal from the district court's grant of summary judgment in
favor of the City of Sutherland. **AFFIRMED.**

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer for appellant
Tom Hamilton.

Mary C. Hamilton, Storm Lake, for appellant Gary Tunink, Jr.

René Charles Lapierre of Klass Law Firm, L.L.P., Sioux City, for appellee
City of Sutherland.

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

EISENHAUER, J.

The plaintiffs appeal from the district court's grant of summary judgment in favor of the City of Sutherland (City). Because the trial court correctly concluded David Johannsen was not acting within the scope of his employment, we affirm the district court's grant of summary judgment in favor of the City and its dismissal of the plaintiffs' actions against the City with prejudice.

I. Background Facts and Proceedings. The City of Sutherland employs a chief of police and one reserve officer. When each is "on duty" is determined by a monthly schedule. When not "on duty," these positions are considered to be "on call," meaning the chief of police is "on call" twenty-four hours per day.

On the night of December 3, 2004, Johannsen was "on call" watching television at home. Because it was the night before the deer-hunting season began, known as "strategy night" in Sutherland, Johannsen was aware there would be an influx of people from outside Sutherland and that alcohol would be consumed.

Some time between 10:30 and 11:00 p.m. that night, Johannsen began patrolling Sutherland in his patrol car and in uniform. At approximately midnight, Johannsen entered the Main Street Lounge where he socialized for between ten and thirty minutes. Johannsen's best friend, Gary (Bud) Tunink, Jr. was there along with Tunink's girlfriend, Jodi Munn.

After leaving the lounge, Johannsen continued his patrol and stopped at Bedsaul's Bar at approximately 1:00 a.m. He left approximately thirty minutes later and again resumed his patrol. Just before 2:00 a.m., Johannsen noticed a crowd gathering in front of Bedsaul's Bar. He saw Tunink and several men

having an argument, and Tunink struck one of the men. Johannsen moved Tunink away from the men and Tunink left with Munn. Johannsen asked the man struck by Tunink to sit in his patrol car, where Johannsen gave him his business card and told him to call in the morning if he wanted to file charges against Tunink.

Johannsen continued his patrol until approximately 2:30 a.m., when he saw his niece, Amber Carlson, walking home. He stopped and offered to give her a ride. Before he reached Carlson's home, Johannsen received a call from Munn on his personal cell phone. She told him Tunink was talking about returning downtown to find the men from the earlier confrontation. Johannsen then drove directly to Tunink and Munn's residence where he convinced Tunink not to go downtown. He assured Tunink he would return after dropping Carlson off at home. Johannsen then drove downtown, found the men in question, and instructed them to go home. Johannsen then dropped Carlson off at approximately 2:45 a.m.

Johannsen was again heading through downtown when he saw Erica Wheeler in her car. Wheeler was a friend of both Tunink and Johannsen and knew about the fight that had occurred earlier. She told Johannsen she wanted to visit with Tunink at his home. Johannsen told her he was heading home but then would pick her up at her house before heading to Tunink and Munn's home.

When Johannsen arrived home, he took off his uniform jacket and kevlar vest, and put on his University of Iowa Hawkeye coat. He left his duty belt and gun in the house, got in his personal pickup truck, and drove to Wheeler's home. During the drive, Johannsen spoke with Tunink on his personal cell phone.

Johannsen and Wheeler arrived at Tunink and Munn's residence at approximately 3:00 a.m. The group decided to go for a drive, with Johannsen driving his truck, Wheeler in the passenger seat, and Tunink and Munn sharing the back seat. The group had beer in the vehicle.

Johannsen drove through town. As they left town, Tunink and Munn began having sex in the back seat of the truck. Johannsen continued driving three miles north of Sutherland and turned on to a gravel road. He drove about another mile before stopping so that Wheeler could relieve herself. Johannsen then continued driving, playing music loudly as Tunink and Munn continued having sex. However, Johannsen became distracted by Tunink and Munn's activity and turned slightly to see what was going on. As he did so, the truck crossed the center line and when Johannsen attempted to correct his course of travel, he lost control of the vehicle. The truck went into the ditch and rolled several times before coming to rest in a field. Johannsen and Wheeler were both wearing their seatbelts at the time of the crash and survived. However, Tunink and Munn were thrown from the vehicle.

Johannsen attempted to use his cell phone to call emergency services but could not get a signal. He ran approximately two-hundred yards up a hill and eventually was able to make a call. He began to descend the hill when he realized he was wearing the mock-turtleneck shirt with the letters "SPD" embroidered on the collar. Because he did not want to be associated with his position as police chief, Johannsen discarded his shirt into a culvert.

Johannsen administered CPR to Munn until emergency services arrived. She later died at the hospital as a result of her injuries. Tunink's injuries resulted in permanent paralysis.

Johannsen was transported to the hospital where he discussed the evening's events with a state patrol officer. A preliminary breath test was administered and Johannsen registered a blood alcohol level of .000. Johannsen was released from the hospital and returned to the scene of the accident. He later returned on two occasions with his brother-in-law, but upon finding the investigation was ongoing each time, left without stopping. On a third visit to the scene, the investigation had concluded and Johannsen retrieved his shirt from the culvert. Johannsen later admitted discarding and retrieving his turtleneck shirt.

On May 9, 2005, Tunink filed a petition on behalf of himself and as the parent of his minor children. Johannsen and the City were named as defendants. He alleged Johannsen's negligence caused him to suffer serious and permanent injuries, and deprived his daughters of his companionship, affection, and support. He alleged Johannsen was acting in the scope of his employment, and therefore the City was liable for his damages.

On September 6, 2005, Tom Hamilton, as Special Administrator of the Estate of Jodi Munn, filed a petition naming Johannsen, his wife, and the City as defendants. The petition alleged Johannsen negligently operated his vehicle while acting within the scope of his employment with the City, and proximately caused Munn's death.

On October 14, 2005, the City filed a motion to consolidate the actions, which was granted on December 5, 2005. On February 2, 2006, the City filed a motion for summary judgment, arguing it was not liable because Johannsen was not acting in a manner consistent with his duties and obligations as chief of police at the time the accident occurred. Following a hearing, the district court entered its May 18, 2006 order granting summary judgment in favor of the City and dismissing it as a defendant.

II. Scope and Standard of Review. We review a summary judgment ruling for the correction of errors at law. *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2001).

In reviewing the grant of summary judgment . . . the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. An issue of fact is ‘material’ only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law. The requirement of a ‘genuine’ issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. We examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden.

Bill Grunder’s Sons Constr. v. Ganzer, 686 N.W.2d 193, 196 (Iowa 2004).

III. Analysis. The plaintiffs contend the district court erred in concluding, as a matter of law, that Johannsen was not acting within the scope of his employment at the time the accident occurred. They argue Johannsen was acting in his role as police chief when he picked up Tunink and gave him a “cool down” ride to prevent him from returning downtown and fighting with the men he encountered earlier. Although the plaintiffs also argue there are material issues

of fact in dispute, their basic argument is that the undisputed facts create issues that should be decided by a jury. We restrict our assessment to facts conceded to be undisputed by the plaintiffs.

Under the doctrine of respondeat superior, an employer is liable for the negligence of an employee committed while the employee is acting within the scope of his or her employment. *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999). “A claim of vicarious liability under the doctrine of respondeat superior rests on two elements: proof of an employer/employee relationship, and proof that the injury occurred within the scope of that employment.” *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994).

For an act to be within the scope of employment the conduct complained of “must be of the same general nature as that authorized or incidental to the conduct authorized.” *Sandman v. Hagan*, 261 Iowa 560, 567, 154 N.W.2d 113, 117 (1967). Thus, an act is deemed to be within the scope of one's employment “where such act is necessary to accomplish the purpose of the employment and is intended for such purpose.” *Id.* at 566-67, 154 N.W.2d at 117. The question, therefore, is whether the employee's conduct “is so unlike that authorized that it is ‘substantially different.’” *Id.* at 567, 154 N.W.2d at 117. Said another way, “a deviation from the employer's business or interest to pursue the employee's own business or interest must be *substantial in nature* to relieve the employer from liability.” *Id.* at 568, 154 N.W.2d at 118.

Although the question of whether an act is within the scope of employment is ordinarily a jury question, depending on the surrounding facts and circumstances, the question as to whether the act which departs markedly from the employer's business is still within the scope of employment may well be for the court.

Id. at 569, 154 N.W.2d at 118.

In concluding Johannsen was not acting within the scope of his employment at the time the accident occurred, the district court found as follows:

The court finds no basis . . . for concluding that a reasonable jury would find that Johannsen, acting as Chief of Police, would conduct a “cool down” ride using his personal vehicle outside of the of the city limits. Nor would there be a reasonable basis for the jury to find that the City would expect the Chief of Police to include Wheeler and Munn in a “cool-down” ride where alcohol was consumed, and Tunink and Munn were allowed to have sexual relations in the back seat while the Chief of Police drove them around the countryside. This behavior, the court concludes, went way beyond the boundaries of what a reasonable jury could find constituted expected conduct from the City’s Chief of Police.

We concur with this reasoning. Johannsen was engaging in social behavior at the time the accident occurred, not as the city’s police chief. This is shown by going home, changing out of his uniform jacket, leaving his duty belt and gun, and switching from his patrol car to his personal vehicle before going to his friends’ house. Furthermore, it stretches the boundaries of credulity to believe a police chief, in the course of fulfilling his duties, would drive around beyond the city limits with three friends in his personal vehicle with the type of behavior going on in the back seat. Because the undisputed evidence shows Johannsen was not acting in the scope of his employment at the time of the accident, the district court properly granted summary judgment to the City and dismissed it from the lawsuits. We affirm.

AFFIRMED.