

IN THE COURT OF APPEALS OF IOWA

No. 8-156 / 07-0864

Filed May 29, 2008

KRISTIAN HARROD,
Plaintiff-Appellant,

vs.

CITY OF COUNCIL BLUFFS, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Appeal from the district court's grant of summary judgment in favor of defendant based on immunity. **AFFIRMED.**

John M. French and Jacob J. Peters of Peters Law Firm, P.C., Council Bluffs, for appellant.

Michael A. Sciortino, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Plaintiff-appellant, Kristian Harrod, was shot and seriously wounded by Council Bluffs police officers who were responding to a reported hijacking of Kristian's automobile. He sued the City of Council Bluffs (the City), contending he was injured as a result of the officers' negligence. The district court granted the city's motion for summary judgment after making a finding the officers were making an emergency response when the shooting occurred, so under Iowa Code section 670.4(11) (2005) the city had immunity and Kristian had no constitutional claims.

Kristian on appeal contends (1) a police officer's emergency response was not granted immunity under section 670.4(11), (2) section 670.4(11) is unconstitutional, and (3) the court erred in dismissing his petition without affording him the opportunity to conduct discovery. We affirm.

I. Scope of Review.

We review a ruling on a motion for summary judgment for correction of errors of law. *Estate of Leonard v. Swift*, 656 N.W.2d 132, 138 (Iowa 2003). "If the record shows no genuine dispute of a material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate." *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). "A fact question does not arise, however, when the only dispute concerns the legal ramifications flowing from undisputed facts." *Estate of Leonard*, 656 N.W.2d at 138. "Where the only dispute concerns legal consequences flowing from undisputed facts, our review is limited to whether the district court correctly

applied the law.” *Cubit v. Mahaska County*, 677 N.W.2d 777, 781 (Iowa 2004); *Kulish v. Ellsworth*, 566 N.W.2d 885, 889 (Iowa 1997).

II. Background.

The following relevant facts are basically without dispute. Kristian, his girlfriend Nicole Williams, and Kristian’s brother, Curtis Harrod, were waiting in Kristian’s Geo Prism in the parking lot of the Council Bluffs Wal-Mart late in the evening of January 1, 2006. The group intended to pick up Curtis’s girlfriend who was getting off work at Wal-Mart. Juan Cedillo walked past the car and looked inside. Curtis got out of the car and Cedillo, holding a .32 caliber handgun, pushed Curtis back inside and forced his way into the car. Cedillo pointed the gun out the car window and shot at a vehicle next to the Prism before pointing the gun at Kristian’s head and ordering him to drive. Cedillo also ordered Kristian, Curtis, and Nicole to empty their pockets. Unhappy with the minimal amount of money the three had, Cedillo said they needed to come up with more or someone would get hurt. Nicole related she could get some money from her father. At Cedillo’s direction Kristian drove the car to Nicole’s parents’ home at 2130 Westside Drive in Council Bluffs. Arriving there he pulled in the driveway. Nicole went inside her parents’ home. Cedillo warned Nicole before she left that he would kill Kristian if she did anything stupid.

Once in the house Nicole called 911 telling the operator that she and her boyfriend and his brother had been carjacked by a man with a gun and while she was in her parents’ house her boyfriend and his brother were still in the car with the carjacker and she was fearful her boyfriend would be shot. The dispatcher called three Council Bluffs police officers moments later relating to them it was a

“priority 1” dispatch and giving the location of Nicole’s family home, noting the caller’s boyfriend was still in the vehicle with the suspect. No mention was made by the dispatcher that there was a third person in the back seat of the car.

Officer Ted Rummel headed to the address, turning off his siren and his lights as he got closer. He spotlighted the Prism and noted a struggle inside the car between Kristian and Cedillo. Officer Greg Casey, in his own police car also without sirens or lights, reached the address just behind Rummel. The officers got out of their police cars and commanded the persons in the Prism to put their hands up. Curtis, who had been in the back seat of the Prism, left the car and ran away from it yelling. The struggle between Kristian and Cedillo inside the car continued and Kristian took the gun from Cedillo. Cedillo opened a rear door in an attempt to flee. Kristian, who at this point had Cedillo’s gun, shot Cedillo in the head. The officers continued repeating their command to put hands up and drop it. The officers then fired their guns nearly twenty times. Kristian, still in the car, was seriously injured by the shots fired by the officers.

Kristian subsequently filed this action claiming the officers were negligent in their response and as a result of their negligence he was seriously injured. He also made constitutional claims. The city filed a motion for summary judgment contending Kristian had failed to state a cause of action and the city was immune because its officers were responding to an emergency.

Kristian resisted the motion contending among other things that the emergency response immunity did not apply to this situation, the statute was unconstitutional, and in shooting him the officers abused their powers in violation of the Fourteenth Amendment. He also contended the officers were negligent in

their response. He supported his allegations of the officers' negligence with affidavits of two persons engaged in police consultation and training who gave the opinion the officers acted contrary to accepted police practices.

The district court in sustaining the city's motion found the situation was an emergency and as such the city had immunity under Iowa Code section 670.4(11), which statute was constitutional. The court further found that even if the allegations of negligence of the police were true, the officers were still immune under the statute.

Section 670.4(11) Immunity. Kristian contends it was not the intent of the legislature to grant immunity under section 670.4(11) to police officers, but rather it was the legislature's intent to limit the immunity to emergency response communication services. While recognizing that the Iowa Supreme Court has applied the immunity to state troopers¹ and municipal firefighters,² Kristian contends that the legislative history reflects the emergency response immunity was limited. He argues in providing for immunity in section 670.4(11) the legislature omitted original language that limited immunity to emergency response communications services. He contends the cases granting immunity to non-emergency-response-communications services under the section are not dispositive because in those cases the court was not invited to trace the legislative history of the section. Kristian contends because he raised consideration of the legislative history here we should construe the statute to limit the immunity. We first consider this argument.

¹ *Cubit v. Mahaska County*, 677 N.W. 2d 777, 781-82 (Iowa 2004).

² *Adams v. City of Des Moines*, 629 N.W.2d 367, 369-70 (Iowa 2001).

Rules of statutory construction were well defined in *Auen v. Alcoholic Beverages Division*, 679 N.W.2d 586, 590 (Iowa 2004), which provides:

The goal of statutory construction is to determine legislative intent. We determine legislative intent from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.

Legislative history also is properly considered in interpreting statutory language found to be ambiguous. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359, 365 (Iowa 2000); *State v. McSorley*, 549 N.W.2d 807, 809 (Iowa 1996). Kristian has not claimed the statute is ambiguous; nor do we find it to be. Consequently, there is no basis for us to explore the legislative history. Nor can we, under the guise of statutory construction, add the requested language to the statute. See *Auen*, 679 N.W.2d at 590. Rather, we look to see if the district court correctly found it encompasses immunity for the police officers employed by the municipality of Council Bluffs.

Iowa Code chapter 670 establishes the parameters of a municipality's liability for the negligent acts or omissions of its officers and employees.³

³ Iowa Code section 670.2 provides that liability is imposed:

Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

For the purposes of this chapter, employee includes a person who performs services for a municipality whether or not the person is compensated for the services, unless the services are performed only as an incident to the person's attendance at a municipality function.

A person who performs services for a municipality or an agency or subdivision of a municipality and who does not receive compensation is not personally liable for a claim based upon an act or omission of the

Keystone Elec. Mfg. v. City of Des Moines, 586 N.W.2d 340, 345-46 (Iowa 1998). Pursuant to chapter 670 every city is subject to liability for the torts of its officers and employees unless such torts fall within one of the exemptions listed in section 670.4. *Kershner v. City of Burlington*, 618 N.W.2d 340, 343 (Iowa 2000); *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997).

At issue here is the “emergency response” exemption found in Iowa Code section 670.4(11).⁴ The language of the statute plainly states that the only relevant inquiry in determining whether the city has immunity under the emergency response provision is whether the plaintiff’s claim is “based upon or arising out of an act or omission in connection with an emergency response” by officers or employees carrying out their official duties. Iowa Code § 670.4(11); *Kershner*, 618 N.W.2d 346. Such clearly is the case here.

Council Bluffs is a municipality subject to liability under chapter 670, therefore fairness dictates that it also benefit from the immunities listed in section 670.4. Plaintiff’s assertion that section 670.4(11) does not apply to police officers

person performed in the discharge of the person’s duties, except for acts or omissions which involve intentional misconduct or knowing violation of the law, or for a transaction from which the person derives an improper personal benefit. For purposes of this section, "compensation" does not include payments to reimburse a person for expenses.

⁴ Iowa Code section 670.4 provides:

The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any such claim, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability.

11. A claim based upon or arising out of an act or omission in connection with an emergency response including but not limited to acts or omissions in connection with emergency response.

fails as a matter of law. See *Kulish*, 566 N.W.2d at 891. The district court correctly decided this issue.

Constitutional Claims. Kristian next argues that section 670.4(11) violates Iowa or federal constitutional due process and the equal protection guarantees of the Iowa Constitution's inalienable rights clause where police conduct under state action involved Kristian's life and liberty interests. The city contends that error was not preserved on this issues now raised. We disagree.

In an amended petition Kristian stated:

the statute [referring to 670.4(11)] is overly broad, and in conflict with the due process and equal protection clauses under either or both the federal or state constitutions either on its face or as applied. United States Constitution Amendment XIV, the Iowa Constitution Article I, Sections 1, 2, 6, and 9.

The district court noted the amendment of Kristian's petition. In addressing the issue and citing *Kulish*, 566 N.W.2d at 890 and *Kershner*, 618 N.W.2d at 343, the court found the Iowa Supreme Court has held emergency response immunity constitutional under both the equal protection clauses of the United States and Iowa Constitutions as reasonably related to a legitimate government interest. The district court further found Kristian had failed to overcome the presumption of constitutionality and Kristian could not prevail on his vaguely worded Fourteenth Amendment substantive-due-process claim, which requires conscience-shocking intentional conduct. The court found the force here was applied in good faith and there was no evidence the officers acted maliciously or sadistically for the purpose of causing harm to plaintiff.

The Supreme Court has recognized that the Fourteenth Amendment's prohibition against depriving any person of life, liberty, or property "without due

process of law,” U.S. Const. amend. XIV, § 1, “guarantees more than fair process,” *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772, 787 (1997), and covers a substantive sphere as well, “barring certain government actions regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662, 668 (1986); *Neal v. St. Louis County Bd. of Police Comm’rs.*, 217 F.3d 955, 957 (8th Cir. 2000). This appears to be the basis for Kristian’s claim. He argues the officers, in shooting him, were abusing powers and this was so clearly unjustified as to be barred by the Fourteenth Amendment.

The question of whether the officers’ actions were an abuse of power turns on whether the actions shock the conscience in such a way as to violate the rights protected by the Fourteenth Amendment. See *County of Sacramento v. Lewis*, 523 U.S. 833, 844-56, 118 S. Ct. 1708, 1716-21, 140 L. Ed. 2d 1043, 1054-1063 (1998). In situations where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed “conscience shocking” if the action was taken with “deliberate indifference.” See *id.* at 850-51, 118 S. Ct. at 1719, 140 L. Ed. 2d at 1059-60.

The undisputed facts are as the district court found: “[t]he officers were confronted with gunfire originating from the plaintiff himself in a dangerous emergency situation. [t]he danger developed and increased in a matter of seconds.” In rapidly evolving, fluid, and dangerous situations that preclude the luxury of calm and reflective deliberation, a state actor’s action will shock the conscience only if the actor intended to cause harm. See *id.* at 853, 118 S. Ct. at

1720, 140 L. Ed. 2d at 1061-62. In the latter situations, as a practical matter, state actors do not have time to engage in actual deliberation. Thus, in these types of situations, liability “turn[s] on whether force was applied in a good faith effort . . . or maliciously and sadistically for the very purpose of causing harm.” *Id.*, 188 S. Ct. at 1720, 140 L. Ed. 2d at 1062.

There is no evidence that the officers intended to harm Kristian and there was no opportunity for deliberation. The officers’ purpose was protecting the victim or victims from the carjacker. It was thwarted by a reasonable misunderstanding by the officers of what was transpiring. There was no reasonable basis to identify Kristian, who held the gun, as the victim rather than the perpetrator. This was a rapidly-evolving and dangerous situation that denied the officers any reflective deliberation. The undisputed facts do not support a finding the policemen’s actions would shock the conscience or that they were done maliciously or sadistically for the purpose of causing harm and in the absence of good faith. We affirm the grant of summary judgment on this issue. *See Lewis*, 523 U.S. at 853, 118 S. Ct. at 1719, 140 L. Ed. 2d at 1061.

Kristian’s last contention is that the district court erred in dismissing his amended petition without affording him an opportunity to conduct discovery. Kristian contends he served interrogatories and a request for production on the city and the city refused to answer questions based on immunity and filed a motion for summary judgment and to dismiss. Kristian does not refer us to where in the record questions asked were not answered.

The city responds that the district court did not absolutely bar Kristian’s discovery and that there were three continuations of hearing at Kristian’s request.

The city further argues Kristian did use discovery and interrogatories and the request for production were answered and items were produced by the city, subject to some objections, and the city furnished considerable information to Kristian. The city argues that Kristian sought information that was properly objectionable and failed to advise the trial court as to how the requested documents were necessary or how they would bear on the issue of immunity. The city further argues in its brief that Kristian does not raise specific instances of how the discovery was necessary or would have helped his case on the issue of immunity, reciting only a cursory statement that it prejudicially deprived him of the opportunity to develop his case and resist the city's motions.

Kristian has failed to point to that place in the record where the issue he now argues was addressed by the district court. Error was not preserved. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

As tragic as this situation was, the only conclusion we can reach is that the officers were faced with an emergency and the legislature has granted them immunity for their actions here. Furthermore, there are no facts to support Kristian's constitutional claims.

AFFIRMED.