

IN THE COURT OF APPEALS OF IOWA

No. 6-542 / 95-2112

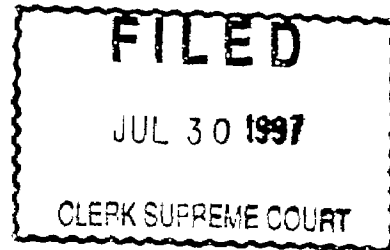
PATRICK NEPTUNE,

Appellant,

vs.

**CITY OF DES MOINES and SERGEANT THOMAS HELLER, Individually
and In His Official Capacity,**

Appellees.



Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Patrick Neptune appeals the district court's order granting the defendants'
motion for summary judgment. **AFFIRMED.**

Patrick A. Neptune, Urbandale, pro se, appellant.

Emily Gould Chafa, Assistant City Attorney, Des Moines, for appellees.

Considered by Cady, P.J., Huitink, J., and Peterson, S.J.*

*Senior judge from the First Judicial District serving on this court by order of the
Iowa Supreme Court.

PETERSON, S.J.

Patrick A. Neptune appeals the district court's order granting the motion for summary judgment filed by the City of Des Moines and Thomas Heller. That motion dismissed the petition Patrick Neptune filed alleging various causes of action based on his arrest by Thomas Heller on January 20, 1995.

I. Background Facts and Proceedings. The summary judgment record includes the following undisputed facts. On January 12, 1989, Judge Strickler granted Kathleen Nebel (then known as Kathleen Shafig) a temporary restraining order which prohibited her former husband, Patrick Neptune:

from having any control [sic] whatsoever with Petitioner including, but not limited to her place of employment, her home, her daughter's day care, or any other place Petitioner is found.

On January 20, 1989, Judge Strickler ruled "Respondent [Neptune] is restrained from contacting petitioner [Nebel] either at her place of employment or her residence." On September 13, 1990, Judge Walters ruled "The prior no-contact Order entered by Judge Strickler on January 20, 1989, remains in full force and effect."

Kathleen Nebel and Patrick Neptune have a daughter, Christina, who was twelve years old when the incident occurred that gave rise to this litigation. On January 20, 1995, Kathleen Nebel and her daughter were living at 704 Wall Avenue in Des Moines, Iowa. At approximately 8:30 a.m. on that day, she began crossing the street to attend morning mass at Christ the King Church, which is located on the corner of Wall Avenue and S.W. 9th Street. At that time, she observed Patrick

Neptune drive his car down the street near her home. She made eye contact with him and then proceeded across the street to the church. At approximately 8:37 a.m. while she was in the church, she heard her daughter scream and cry "he's here, he's here." She then turned and saw Patrick Neptune sitting three or four rows directly behind her.

At that time she believed Patrick Neptune was in violation of a restraining order. She then called 911 and requested police assistance. She had been instructed to do this by an Assistant Polk County Attorney.

Thomas Heller, a police officer employed by the City of Des Moines, Iowa, received a radio transmission on the morning of January 20, 1995, advising him to meet a woman at Christ the King Church. When he arrived at the church, he saw a woman coming from the rectory and he went to meet her. The woman identified herself as Kathleen Nebel and stated she had a no-contact order against her former husband, Patrick Neptune. She stated while she was walking her daughter to school and Friday Mass Neptune drove by twice. She then told Thomas Heller she had gone into the church and sat down and that soon thereafter her daughter came into the church screaming "he's here, he's here." She then advised Thomas Heller that she turned around and observed Patrick Neptune sitting behind her. She said her priest had told her to go to the rectory and call the police.

Andrew Johnson is a police officer also employed by the City of Des Moines. On the morning of January 20, 1995, he was dispatched to Christ the King Church.

Upon arriving, he saw Thomas Heller speaking with a woman who he recognized as Kathleen Nebel. After Sergeant Heller was through speaking with Kathleen Nebel, Patrick Neptune came out of the rear of the church and spoke with Thomas Heller and Andrew Johnson.

Andrew Johnson recognized Patrick Neptune because he had responded to prior incidents at Kathleen Nebel's home concerning violations of a no-contact order. As a result of those incidents, he was aware that a no-contact order was in effect.

Patrick Neptune told the officers he knew a no-contact order was included in the divorce decree, but stated he was at the church to see his child.

After the officers finished talking with Patrick Neptune, Thomas Heller informed him he was under arrest for violating the no-contact order. Patrick Neptune was then taken to Andrew Johnson's patrol car where he remained until another police unit arrived to take him to jail.

While Officer Johnson was in his squad car, he contacted the Law Enforcement Network, Central Iowa region, to determine if there was a no-contact order on file. The operator told him she did not have one on file. However, a subsequent check with the Clerk of the District Court for Polk County revealed that a no-contact order was in effect. Officer Heller was not aware at that time that the most current version of the protective order prevented contact only at Kathleen Nebel's residence or place of employment.

On February 1, 1995, the charge against Patrick Neptune was dismissed. This was because the most current version of the protective order prohibited contact only at Kathleen Nebel's residence or place of employment.

Neptune filed a petition against the City of Des Moines and Thomas Heller in his official capacity for false arrest, abuse of process, malicious prosecution, and violation of his civil rights. The district court granted defendants' motion for summary judgment. Neptune appealed.

II. Standard of Review. Summary judgment is reviewed for errors at law. Iowa R. App. P. 4. Summary judgment is appropriate only if there exists no genuine issue of a material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Id.* The evidence must be viewed in the light most favorable to the nonmoving party. *Thorpe Credit Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). Every legitimate inference that reasonably can be deduced from the evidence should be afforded to the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Id.* If there is a conflict in the record that consists only of legal consequences flowing from the undisputed facts, entry of summary judgment is proper. *Farm Bureau*, 424 N.W.2d at 423.

When a motion for summary judgment is made and supported as provided in Iowa Rule of Civil Procedure 237, an adverse party may not rest upon mere allegations or denials of its pleadings but his response, by affidavits or as otherwise

provided in Iowa Rule of Civil Procedure 237, must show specific facts showing there is a genuine issue for trial. Iowa R. Civ. P. 237(e). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered. *Butts v. University of Osteopathic Medicine*, 561 N.W.2d 838, 841 (Iowa App. 1997). Patrick Neptune did not file any affidavits.¹

III. Immunity. Iowa Code section 236.11 (1995) provides, in material part, that:

A peace officer shall use every reasonable means to enforce an order or court-approved consent agreement entered under this chapter, or temporary or permanent protective order If a peace officer has probable cause to believe that a person has violated an order or approved consent agreement entered under this chapter, a temporary or permanent protective order . . . the peace officer shall take the person into custody

That section further provides that:

A peace officer shall not be held civilly or criminally liable for acting pursuant to this section provided that the peace officer acts in good faith, on probable cause, and the officer's acts do not constitute a willful and wanton disregard for the rights or safety of another.

¹ We note that Patrick Neptune is proceeding on a pro se basis. Courts do not utilize a deferential standard when persons choose to represent themselves. *Metropolitan Jacobson Dev. Venture v. Board of Review*, 476 N.W.2d 726, 729 (Iowa App. 1991). The law does not judge by two standards, one for lawyers and the other for lay persons. *Id.* Rather, all are expected to act with equal competence. *Id.* If a lay person chooses to proceed on a pro se basis, they do so at their own risk. *Id.* Thus, issues are resolved without regard as to whether a party did or did not choose to employ legal counsel. *Id.*

The standard of probable cause for the purpose of civil actions is (1) that the officer in good faith believed that the arrested person had committed a crime, and (2) his belief was reasonable. *Kraft v. City of Bettendorf*, 359 N.W.2d 466, 469 (Iowa 1984). The courts, in considering these two matters, look to the facts within the officer's knowledge at the time of the arrest. *Id.*

If the facts are in dispute, the existence of probable cause is a jury question. *Id.* at 470. Here, however, the facts are not in dispute. In this situation, Sergeant Heller was told by Kathleen Nebel that a no-contact order was in existence. Patrick Neptune, at the time he talked to him, acknowledged that a no-contact order had been issued. Officer Andrew Johnson recognized both Kathleen Nebel and Patrick Neptune because he had been in contact with prior incidents at Kathleen Nebel's home concerning violations of a no-contact order. Although a check at the Law Enforcement Network, Central Iowa region, indicated there was not a no-contact order on file, a subsequent check with the Clerk of the District Court in Polk County revealed that one did exist. Neither one of the officers were aware of the limitation of the no-contact order.

At the time that Patrick Neptune was arrested, Sergeant Heller was acting on the statements of Kathleen Nebel as well as the corroboration provided by Andrew Johnson and Patrick Neptune. We find that Thomas Heller was acting in good faith and based on probable cause and his acts did not constitute a willful and wanton disregard for the rights or safety of Patrick Neptune. Consequently, Iowa Code

section 236.11 provides immunity to the defendants in this case, and the trial court was correct in sustaining the defendants' motion for summary judgment.

AFFIRMED.