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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DWIGHT AMOS GUENTHER, JR.,	)	Filed February 24, 1982
Plaintiff-Appellee,	)	
vs.	)	1-386 224 2-66498
BUCHANAN COUNTY, IOWA,	)	
Defendant-Appellant.	)	

Appeal from Buchanan District Court, C. W. Antes, Judge.

The defendant-county appeals from a judgment for the plaintiff, a former deputy sheriff, who sued the county to recover attorney fees he paid in successfully defending a manslaughter charge. AFFIRMED.

Philip E. Havens and Allan Vander Hart, Assistant County Attorneys, for defendant-appellant.

Robert L. Rausch of Cutler & Rausch, Waterloo, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

The defendant-county appeals from a judgment for the plaintiff, a former deputy sheriff, who sued the county to recover attorney fees he paid in successfully defending a manslaughter charge. We affirm.

The manslaughter charge arose from an incident which occurred about 1:30 a.m. on April 16, 1976, in rural Buchanan county. Guenther, then a deputy sheriff of Buchanan county, was on duty and in his patrol car, sitting in a parking lot. In another squad car nearby was Winthrop town marshall Phillip Adrean. Guenther saw a truck parked on a gravel road, and saw another vehicle pull up behind it and stop. He decided to investigate and told marshall Adrean he could follow him if he wanted to. Guenther drove to the two vehicles, stopped his squad car ten to fifteen feet from the front of the truck, left his headlights on, opened the door of his car, and walked toward the truck. As he was walking toward the truck, he was walking in its path. The truck, driven by Donald Mayner, suddenly accelerated toward Guenther, who quickly stepped out of the way. He yelled at the driver to stop, but the driver did not. Guenther then shot three times at the truck's gas tank, intending to disable the truck. At the same time, marshall Adrean shot at the driver of the truck and killed him.

Guenther was tried for manslaughter and aquitted by a jury on August 23, 1976. He paid $7794.16 in defending the charge. He filed a claim for the expenses with the Buchanan County Board of Supervisors, but the claim was denied. He then brought this suit, seeking to recover the $7794.16 he paid in defending the charge, and to recover attorney fees incurred in this case. The trial court found for Guenther and entered a judgment of $7794.16 plus interest at 7 percent and costs. The county appealed.

The county argues that the trial court erred (1) in finding that Donald Mayner directed his truck at Guenther, requiring Guenther to jump out of the way in order to avoid being struck and resulting in Guenther being confronted with an emergency situation; (2) in concluding that Guenther was acting within the scope of his employment when he fired at the gas tank of Mayner's truck, and (3) in concluding that Guenther was entitled to indemnification by the county for legal fees he incurred in defending the manslaughter charge.

Since this is an action at law, the trial court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We view the evidence in the light most favorable to the judgment. Sergeant v. Leonard, 312 N.W.2d 541, 543 (Iowa 1981). There is substantial evidence in this case to support the trial court's finding that Mayner drove his truck at Deputy Guenther, requiring him to jump out of the way in order to avoid being struck, and that thereby Guenther was confronted with an emergency situation. We affirm this finding.

The county next argues that the trial court erred in concluding that Guenther was within the scope of his employment when he fired at the truck's gas tank. We disagree. In 1976, the Code stated that "no unnecessary force or violence shall be used in making" an arrest, § 755.2, The Code 1975. Guenther was attempting to arrest Mayner for trying to run over him. He shot at the gas tank of the truck, not at the driver. It was stipulated at the trial that Mayner was killed by a shot fired by marshall Adrean. Guenther testified that he could not have caught Mayner by driving after him, because his squad car was headed in the opposite direction and blocked by two other vehicles. Guenther did not know who Mayner was so he could not have found him later. Expert testimony established that Guenther followed correct police procedure in approaching the truck. Expert

testimony also established that Guenther did not violate accepted police standards for 1976 when he shot at the gas tank of the truck. There were no unwritten or written guidelines in the use of firearms by deputy sheriffs in Buchanan county at the time of the shooting. The expert testified that in 1976 it was common practice among police agencies not having policy and procedure guidelines to leave it up to the officer's discretion whether to shoot at a vehicle in order to stop it. Therefore, we uphold the trial court's conclusion that Guenther was within the scope of his employment when he fired at the gas tank of the truck.

The county next argues that the trial court erred in concluding that Guenther was entitled to indemnification by the county for attorney fees he paid in defending the manslaughter charge. We disagree.

The rule is that attorney fees cannot be awarded unless there is statutory or contractual authority for such an award. Wilson v. Fenton, 312 N.W.2d 524, 529 (Iowa 1981). Section 332.36, The Code 1981, creates a county indemnification fund to be used to indemnify any county officer, deputy, or employee for "all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their errors or omissions in the performance of their official duties," except for the first five hundred dollars. There is no question that Guenther became legally obligated to pay his attorney fees because of the manslaughter charge which arose out of the performance of his official duties. The manslaughter charge was brought because it was believed that Guenther had made an error in the performance of his official duties. Although the acquittal presumably means he did not err, we cannot believe the legislature intended to provide indemnification if he had been found guilty, but not when he was found innocent. Therefore, the county should be required to reimburse Guenther for his attorney fees for defending the manslaughter charge. Guenther also requested reimbursement for attorney fees for legal services rendered in this appeal. He did not raise the issue of right to attorney fees for this action in the trial court. Issues raised for the first time on appeal are not reviewable. State v. Whiteside,

272 N.W.2d 468, 472 (Iowa 1978).

AFFIRMED.