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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0882**

Robert P. Ivers,
Appellant,

vs.

Cub Foods,
Respondent.

**Filed January 16, 2018
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CV-16-9643

Robert P. Ivers, Hopkins, Minnesota (pro se appellant)

John C. Syverson, Law Offices of Thomas P. Stilp, Golden Valley, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this civil action, appellant challenges the district court's grant of summary judgment in favor of respondent grocery store, arguing that: (1) respondent's employees made false allegations about him and defamed his character; (2) an employee of respondent

assaulted him; and (3) the district court erred when it relied on what it deemed to be admissions by appellant in granting respondent summary judgment. We affirm.

FACTS

On May 30, 2014, pro se appellant Robert P. Ivers reported to law enforcement that a male employee of respondent Cub Foods had assaulted him in the restroom of a Cub Foods store on May 26. Ivers alleged that the employee pushed him up against a sink and said, “I don’t want your kind here,” and told Ivers that if he returned to the store, he would have to deal with the employee. Ivers said that when he returned to the store on May 30, he encountered the same employee in the parking lot. Ivers alleged that the employee charged at him, grabbed him, and said, “You don’t know who you are dealing with.”

The police officer who took Ivers’s report went to the Cub Foods store to investigate. The officer interviewed two employees, M.B. and J.K. The officer learned from the employees that Ivers had been residing in his car and parked it in the Cub Foods parking lot over the past month, and that he had been acting suspiciously in and around the store. M.B. told the officer that he first encountered Ivers in the parking lot two to three weeks earlier, when he saw Ivers hanging his clothes over his car and asked if he was okay. M.B. reported that Ivers was using the store’s restroom to bathe and relieve himself, and that Ivers was eating the store’s free cookies.

M.B. said that on May 26, he followed Ivers into the store’s restroom and that he thought he saw Ivers masturbating. Shortly thereafter, M.B. asked Ivers to leave the store. The officer spoke to another employee at the store, C.P., who said that he also thought he saw Ivers masturbating in the store’s restroom on another date. M.B. reported that on May

30, Ivers approached him in the Cub Foods parking lot and demanded to know his name. M.B. directed Ivers to the store's management. M.B. said that there was no physical contact between him and Ivers on May 26 or on May 30. The police officer advised the employees to call 911 if Ivers returned and engaged in similar behavior.

Ivers contacted law enforcement on September 23, 2014, to supplement his statement. Ivers again described his version of the May 26 encounter with the Cub Foods employee in the store's restroom, and said that the employee grabbed him and threw him against the towel dispenser, stating something like, "We don't want your kind around here." Ivers stated that he encountered that same employee, whom he identified by a name starting with M., in the store's parking lot on what he now reported was May 31. Ivers alleged that M. grabbed his shirt and said, "I'm going to tell these people that I caught you masturbating and I'm going to fuck you up."

In speaking to law enforcement, Ivers admitted that he was living in his car in May 2014, that he had cleaned himself in the store's restroom, and that he ate the store's free cookies. Ivers denied masturbating in the store's restroom. On July 6, 2016, Ivers filed a complaint against Cub Foods alleging that Cub Foods employees engaged in: (1) stalking; (2) assault; (3) making a false police report; (4) defamation; and (5) making terroristic threats. Appellant sought one million dollars in punitive damages.

On October 6, 2016, Cub Foods served Ivers with discovery requests, including a request for admissions. On October 12, Cub Foods received Ivers's unsigned hand-written responses, dated October 10. A copy of these responses are included in the district court record. On October 13 and November 15, Cub Foods sent letters to Ivers informing him

that his responses to requests for admissions 3, 8-11, and 16-18 were incomplete and asking him to supplement his answers. On December 13, after receiving no further response from Ivers, Cub Foods filed a motion to compel discovery and asked the district court to determine the sufficiency of Ivers's responses to Cub Foods' request for admissions. A hearing was held at which both parties appeared, and on January 19, 2017, the district court granted Cub Foods' motion, finding that requests 3, 8-11, and 16-18 "are deemed admitted."

On March 1, Cub Foods moved for summary judgment. Ivers submitted an untimely responsive memorandum, which the district court accepted and considered. A hearing was held, at which both parties appeared, and the district court granted Cub Foods summary judgment and dismissed all of Ivers's claims on the record. The court filed a written order on March 30, and judgment was entered on April 3. Ivers now appeals.

D E C I S I O N

I. We consider Ivers's appellate brief under Minn. R. Civ. App. P. 128.01, subd. 2, and elect to reach the merits of his appeal in the interest of justice.

Ivers indicated in his statement of the case that he would file a formal brief in this appeal, but he actually filed a 1.5 page letter brief in which he refers to and relies upon district court memoranda and police reports to supplement his argument. In his appellate brief, Ivers defers to the facts outlined in the police reports, incomplete copies of which Ivers included in his addendum. Ivers also refers to "a simple, well-outlined response to defendant's motion for summary judgment" that "can be found in [his] appeal to the appellate court." This appears to refer to Ivers's responsive memorandum to Cub Foods'

motion for summary judgment. Ivers included this responsive memorandum, and the district court's written March 30 summary-judgment order, in his addendum.

Minn. R. Civ. App. P. 128.01, subd. 2, provides: "If counsel elects, in the statement of the case, to rely upon memoranda submitted to the trial court supplemented by a short letter argument, . . . [t]he trial court submissions and decision shall be included in the addendum." Unlike an informal appellate brief, this court need not grant explicit permission to file a letter brief. See Minn. R. Civ. App. P. 128.01, subds. 1, 2. Although Ivers did not indicate an intent to file a letter brief here, our review of his appellate brief and addendum reveal that it is appropriate for us to consider it as such. Thus, we consider the arguments made in Ivers's brief, as well as the arguments that he made in the attached documents.

On appeal, Ivers asserts that the district court's summary-judgment order should be reversed because Cub Foods employees falsified charges of lewd behavior against him and defamed his character, and because a Cub Foods employee assaulted him. Ivers cites to no caselaw or legal argument in his brief or addendum and asserts that due process affords him an opportunity to clear his name at a jury trial.

"An assignment of error based on mere assertion and not supported by any argument or authorities . . . is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). But Minn. R. Civ. App. P. 103.04 allows appellate courts "to review any . . . matter as the interest of justice may require." Here, we elect to consider the issues Ivers raises in the interest of justice.

II. The district court did not abuse its discretion in finding that a majority of Ivers's responses to Cub Foods' requests were admissions.

Ivers challenges the district court's order deeming admitted many of his responses to Cub Foods' request for admissions. As a preliminary matter, Cub Foods argues that Ivers forfeited this challenge by failing to raise it at the district court and by failing to properly brief it on appeal. We note that Ivers did not directly appeal the January 19 order, nor did Ivers attach that order in his addendum as required by Minn. R. Civ. App. P. 128.01, subd. 2. However, the district court relied on its ruling that Ivers's responses were admissions in reaching its March 30 summary-judgment ruling, which Ivers does challenge on appeal. Thus, we elect to consider Ivers's challenge to the district court's January 19 order under Minn. R. Civ. App. P. 103.04, which allows for appellate review of "any order involving the merits or affecting the judgment" that is being appealed.

Ivers argues that the district court's decision is wrong because he responded "false" to the relevant Cub Foods' requests. Ivers denies the facts that the district court deemed admitted in the January 19 order, and suggests that by responding to them by writing "false," he effectively denied them. Cub Foods argues that the district court did not abuse its discretion in deeming Ivers's insufficient and incomplete responses admissions.

The district court has broad discretion to issue discovery orders and, absent a clear abuse of that discretion, its discovery orders will not be disturbed. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). "We review a district court's [discovery] order for an abuse of discretion by determining whether the district court made findings

unsupported by the evidence or by improperly applying the law.” *Id.* Minn. R. Civ. P.

36.01 provides that a

matter of which an admission is requested . . . is admitted unless within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party’s attorney.

The plain language of Minn. R. Civ. P. 36.01 requires the responses to be signed. It also requires that “[t]he answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter,” and that “[a] denial shall fairly meet the substance of the requested admission, and, when good faith requires . . . the party shall specify [which part of the request is] true and qualify or deny the remainder.” Minn. R. Civ. P. 36.01. “If a party fails to make a disclosure . . . any other party may move to compel disclosure and for appropriate sanctions[, or] . . . for an order compelling an answer” Minn. R. Civ. P. 37.01(b)(1)-(2). “If the [district] court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.” Minn. R. Civ. P. 36.01.

Here, Cub Foods served Ivers with the request for admissions on October 6, 2016. Although Ivers’s responses were timely received on October 12, they were unsigned and included the answers “false,” “show proof,” “defendants made false allegations,” “see police report,” “I was assaulted, threatened and defamed and stalked,” and “unresolved.”

Ivers did not specifically admit, deny, or qualify the requested admissions, as the rule requires.

Cub Foods notified Ivers that his responses were insufficient, to no avail, prior to properly filing its motion to compel discovery pursuant to Minn. R. Civ. P. 37.01. The district court deemed the challenged responses admitted. In doing so, the district court did not make specific factual findings, but in order for the court to deem Ivers's responses as admissions it necessarily had to determine that his answers did not comply with the requirements of rule 36.01. Based on our review of the record, the district court did not abuse its discretion or misinterpret the law in determining that Ivers's unsigned and incomplete responses, which he did not supplement or amend, were insufficient and, thus, were admissions under rule 36.01.

Further, the record shows that the copy of his responses that Ivers attached in his addendum and relied upon on appeal is not the document that Cub Foods received on October 12. The document in Ivers's addendum was signed and notarized on January 26, 2017, after the district court issued its January 19 order deeming the challenged responses admitted, and more than 30 days after Cub Foods served the request. Thus, even if we were to conclude that Ivers's signed January 26 responses cured the above-mentioned rule 36.01 deficiencies, the January 26 responses were untimely and are irrelevant to our review of the court's January 19 order.

“Any matter admitted pursuant to [rule 36.01] is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” Minn. R. Civ. P. 36.02. Ivers did not file such a motion under rule 36.02. Accordingly, we conclude that

the district court did not abuse its discretion in relying on the admissions as conclusively established facts under rule 36.02 for the purposes of granting Cub Foods summary judgment.

III. The district court did not err in granting Cub Foods summary judgment on all of the claims in Ivers's complaint.

The district court granted Cub Foods summary judgment on all five of Ivers's claims. We review the district court's legal conclusions on summary judgment de novo, viewing the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). "In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

A. Assault

An assault is an unlawful threat to do bodily harm to another with present ability to carry the threat into effect. Mere words or threats alone do not constitute assault. When the words or threats are accompanied by a threat of physical violence under conditions indicating present ability to carry out the threat, they cease to be mere words or threats.

Dahlin v. Fraser, 206 Minn. 476, 478, 288 N.W. 851, 852 (1939). For Ivers to establish his civil-assault claim, he had to show that: (1) a Cub Foods employee acted with intent to cause apprehension or fear of immediate harm to, or offensive contact with, Ivers; (2) a Cub Foods employee had the apparent ability to cause the harm or offensive contact; and (3) Ivers had a reasonable apprehension or fear that the immediate harm or offensive contact would occur. 4A *Minnesota Practice*, CIVJIG 60.20 (2017).

On appeal, Ivers maintains that the Cub Foods employee named M. assaulted him, and that the district court erred in granting summary judgment on his civil-assault claim. Cub Foods asserts that the district court properly granted summary judgment, arguing that Ivers could not establish the element of intent because there was no proof of intent, and because Ivers admitted that intent was lacking. In relevant part, request for admission number 10 stated: “Admit that no physical contact occurred between plaintiff and any Cub Foods employee or representative.” Request number 11 stated: “Admit that neither Cub Foods nor any employee or other person on its behalf acted with the intent to cause apprehension or fear of immediate harm or offensive contact to [p]laintiff.”

By deeming requests 10 and 11 admitted, the district court effectively determined that Ivers admitted that M. or another Cub Foods employee did not act with intent to cause apprehension or fear of immediate bodily harm or contact to Ivers, and that no physical contact occurred between Ivers and a Cub Foods employee. In its March 30 summary-judgment order, the district court held that, as a result of his admissions, Ivers could not successfully argue that physical contact occurred or that Cub Foods or its employees intended to commit an assault of Ivers. We have already concluded that the district court

did not abuse its discretion in relying on Ivers's admissions as conclusively established facts under rule 36.02. Accordingly, because Ivers could not establish all of the essential elements of his civil-assault claim as a result of the admissions, the court properly granted summary judgment on the claim as a matter of law.

B. Defamation

As a matter of public policy, “[d]efamatory statements may be privileged in some circumstances.” *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). In *Smits*, this court concluded that “a qualified privilege may exist when an individual makes a good faith report of suspected criminal activity to law enforcement officials.” 525 N.W.2d at 557. For the privilege to apply, the statement must be “made with probable cause and for a proper purpose and occasion.” *Id.* The existence of a qualified privilege is a question of law for the district court to decide. *Bol. v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997). If a qualified privilege applies, the district court must also find that the statements were not made with malice, which is a question of fact. *Id.* at 150.

On appeal, Ivers argues that the district court erred in granting summary judgment on his defamation claim because Cub Foods and its employees falsified charges against him and defamed him. Ivers contends that the allegations have become “common gossip,” and have damaged his reputation. Ivers denies the masturbation allegation and argues that Cub Foods has no proof or evidence. Cub Foods responds that the reports to law enforcement by Cub Foods employees are protected by qualified privilege.

Here, the record shows, and the district court determined, that the Cub Foods employees only spoke with law enforcement about Ivers and his suspicious behavior at the store because a police officer went to the store to investigate Ivers's initial report of assault. The employees were responding to, and cooperating with, a police investigation when they made the masturbation allegations against Ivers based on their personal observation of Ivers's conduct in the store. The district court found that Ivers's denial of the employees' statements, and his arguments to the contrary, were insufficient to create a question of material fact. Further, by finding that the employees' statements were supported by probable cause and made for a proper purpose, the court effectively found that Ivers failed to raise any genuine issue of material fact regarding malice. Based on this record, we conclude that the district court did not err in determining that the statements were protected under qualified privilege and in granting Cub Foods summary judgment on the defamation claim as a matter of law.

C. Remaining claims

On appeal, Ivers does not directly challenge the district court's grant of summary judgment on his stalking, false statements to a police officer, or terroristic-threats claims. Cub Foods argues that the district court properly dismissed these claims because they are not recognized civil claims. We agree.

Interpretation and construction of a statute are legal questions that appellate courts review de novo. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). "A statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication." *Becker v. Mayo Found.*, 737 N.W.2d 200, 207

(Minn. 2007). “Principles of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute’s express terms or by implication provided for civil tort liability.” *Bruegger v. Faribault Cty. Sheriff’s Dep’t*, 497 N.W.2d 260, 262 (Minn. 1993).

The plain language of 2016 Minnesota statutes sections 609.749, .505, and .714 does not explicitly or implicitly provide for civil causes of action for stalking, false statements to a law enforcement officer, or terroristic threats. Because these claims are not civil causes of action, the district court properly granted summary judgment on them as a matter of law.

Affirmed.