

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0046**

Mark J. Kallenbach,
Appellant,

vs.

Fabrication Station, Inc.,
Defendant,

Affordable Cabinets and Granite of New Hope
and Its Owners, James Lockhart Lang,
Respondent,

Deniayous Caleb Buckner,
Respondent,

John Doe and Mary Roe,
Defendants.

**Filed September 11, 2023
Affirmed
Halbrooks, Judge***

Hennepin County District Court
File No. 27-CV-20-14837

Paul Engh, Paul Engh Law Office, Minneapolis, Minnesota (for appellant)

Michael C. Mahoney, Mahoney Law Firm LLC, Wayzata, Minnesota (for respondent James Lang)

Arthur J. Waldon, Waldon Law, PLLC, Lakeville, Minnesota (for respondent Deniayous Buckner)

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Wheelock, Presiding Judge; Frisch, Judge; and Halbrooks, Judge.

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant challenges the district court's summary-judgment dismissal of his intentional-tort claims against respondents as barred by the two-year statute of limitations in Minn. Stat. § 541.07(1) (2022), arguing that his claims did not accrue until he learned the identities of the alleged tortfeasors. Because appellant did not bring his claims within two years of suffering some damage, we affirm.

FACTS

The facts, based on the record before the district court and taken in the light most favorable to appellant Mark J. Kallenbach as the nonmoving party, are as follows.

On January 26, 2017, an individual attacked Kallenbach outside Kallenbach's home. Kallenbach suffered a broken nose, cheekbone, and jaw because of the attack. At some point, Kallenbach learned that respondent Deniayous Buckner had attacked him, and that respondent James Lang had hired Buckner to do so. The parties dispute when Kallenbach knew the identity of the tortfeasors, but the district court found that by late January or February 2017, Kallenbach knew that Lang was potentially involved.

On November 16, 2020, Kallenbach filed a complaint against Lang and Buckner for, in relevant part, intentional-tort claims of civil assault and battery. Lang moved for summary judgment. The district court granted Lang's motion for summary judgment and sua sponte granted summary judgment to Buckner. The district court concluded that

Kallenbach's intentional-tort claims were barred by the two-year statute of limitations because his claims accrued on January 26, 2017, when he was attacked and suffered injury.

This appeal follows.

DECISION

Summary judgment is appropriate when “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. On appeal from summary judgment, we review de novo “whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006). In doing so, we “view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Kallenbach challenges the district court's grant of summary judgment to respondents, arguing that his claims did not accrue until he knew the identities of the alleged tortfeasors, and therefore his claims are not barred by the two-year statute of limitations codified in Minn. Stat. § 541.07(1). Thus, the issue is whether the district court erred in its determination of when Kallenbach's claims accrued.

As a threshold matter, to the extent that Kallenbach may be arguing that the statute of limitations was equitably tolled because he did not know the identities of the tortfeasors, that argument is forfeited. *See, e.g., Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (stating that equitable tolling “permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence [she] is unable to obtain vital information bearing on the existence of [her] claim” (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 397

(1946))). Kallenbach did not raise the issue of equitable tolling to the district court, and he does not explicitly raise the argument on appeal or cite any authority to suggest that Minnesota has recognized equitable tolling on such a basis. Therefore, Kallenbach has forfeited any argument that the statute of limitations was equitably tolled. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions previously presented to and considered by the district court); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation).

Therefore, we consider the issue of when Kallenbach's claims accrued. "The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo." *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). Minn. Stat. § 541.07(1) provides that the statute of limitations for a civil assault or battery action is two years. An action "can only be commenced . . . after the cause of action accrues." Minn. Stat. § 541.01 (2022). The statute does not define "accrues." Accordingly, how to determine when a claim accrues is derived from caselaw.

There are three types of accrual rules used to determine when a claim accrues: the "occurrence," "discovery," and "some damage" rules. *Antone*, 720 N.W.2d at 335-36. Under the "occurrence" rule, the statute of limitations begins to run[] simultaneously with the performance of the negligent or wrongful act," even if there is no actual damage at that time. *Id.* at 235. Minnesota has rejected the occurrence rule. *Id.* Under the "discovery" rule, "the cause of action accrues and the statute of limitations begins to run only when the

plaintiff knows or should know of the injury.” *Id.* Minnesota has also rejected the discovery rule. *Id.*

Minnesota applies the “some damage” rule to determine when a claim accrues. *Palmer v. Walker Jamar Co.*, 945 N.W.2d 844, 847 (Minn. 2020) (addressing when claim in wrongful-death action accrues); *see also Turner v. IDS Fin. Servs., Inc.*, 471 N.W.2d 105, 108 (Minn. 1991) (addressing accrual of employment-discrimination claim and recognizing that “a tort action accrues when some damages are sustained”); *Antone*, 720 N.W.2d at 336 (addressing accrual of legal-malpractice claim and stating that “a cause of action accrues, and the statute of limitations begins to run, on the occurrence of any compensable damage”); *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968) (addressing accrual of negligence claim and stating that “the alleged negligence . . . coupled with the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues”).

Under the some-damage rule, “the statute of limitations begins to run when some damage has occurred as a result of the alleged [wrongful act].” *Palmer*, 945 N.W.2d at 847 (quotation omitted). For purposes of accrual, “some damage” is “the occurrence of any compensable damage.” *Antone*, 720 N.W.2d at 336, 337-38 (addressing accrual of plaintiff’s legal malpractice claim against attorney for drafting of antenuptial agreement and concluding that some damage had occurred on the date of the marriage because that was the point at which the plaintiff “passed a point of no return” and “lost the legal right to unfettered ownership in his premarital property”).

Kallenbach argues that because *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999), and *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) (quoting *Herrmann*), hold that “[a] cause of action accrues and the statute of limitations begins to run when the cause of action will survive a motion to dismiss for failure to state a claim,” it follows that his claims could not have accrued until he knew the identities of the alleged tortfeasors. He also contends that the fact that the plaintiffs in *Herrmann* and *Noske* knew the identity of their tortfeasors supports the proposition that knowing the identity of the tortfeasor is a requirement for a claim to accrue. But neither civil assault nor battery includes the identity of the tortfeasor as an element of a claim, *see Johnson v. Morris*, 453 N.W.2d 31, 40-41 (Minn. 1990) (describing the elements of civil assault and battery), and a review of the caselaw does not support Kallenbach’s assertion that knowledge of an alleged tortfeasor’s identity is required to trigger the statute of limitations.¹

In *Herrmann*, the supreme court considered whether a plaintiff’s knowledge of the damage was required for a claim to accrue. 590 N.W.2d at 643. The plaintiffs sued their attorneys for legal malpractice, alleging that they were subject to significant federal taxes and interest because the defendant-attorneys had failed to advise them that certain business transactions were prohibited under federal tax law. *Id.* at 642. Stating that “[a] cause of action survives a motion to dismiss so long as ‘some’ damage has occurred,” the supreme

¹ Kallenbach also argues that the Minnesota Rules of Civil Procedure support his assertion that a claim for an intentional tort does not accrue until a plaintiff knows the identity of the alleged tortfeasor. But Kallenbach cites no cases, and we are aware of none, that rely on the rules of civil procedure to determine when a claim accrues.

court concluded that the plaintiffs' action was time-barred because the claim accrued when the first prohibited transaction and failure to advise occurred. *Id.* at 643-44. The supreme court explained that if it were to conclude that the plaintiffs' claim did not accrue until later, when they had knowledge of the illegality of the transactions, it would "in essence adopt[] the discovery rule," which Minnesota has rejected. *Id.* at 643.

Kallenbach also relies on *Noske*, but that case did not address the some-damage rule of accrual. Rather, the supreme court considered when the proximate-cause element of a claim is met and triggers accrual. 670 N.W.2d at 744. In *Noske*, the plaintiff sued his attorney for legal malpractice, alleging that the defendant-attorney had provided ineffective assistance of counsel at the plaintiff's criminal trial. *Id.* at 741. The supreme court explained that under the circumstances, the timeliness of the plaintiff's claim turned on when the element of proximate cause was established. *Id.* at 743 n.1, 744. The supreme court concluded that the plaintiff's claim was not time-barred, explaining that his claim accrued when postconviction relief was granted, not at the time of conviction, because "absent the conviction being overturned, the conviction's presumption of regularity prevented [the plaintiff] from demonstrating that [the defendant-attorney] proximately caused his damages." *Id.* at 744. Thus, Kallenbach's reliance on *Herrmann* and *Noske* for the proposition that an intentional-tort claim does not accrue until a plaintiff knows the identities of the tortfeasors appears misplaced.

Further, the supreme court has addressed whether knowledge of the identity of the tortfeasor is required for a wrongful-death claim to accrue. 945 N.W.2d at 848. In *Palmer*, the plaintiff's husband died from mesothelioma caused by asbestos exposure. *Id.* at 845.

Three years later, the plaintiff was able to identify the manufacturer of the asbestos-containing product, and she brought a wrongful-death claim against the manufacturer. *Id.* at 845-46. Applying the some-damage rule, the supreme court held that the plaintiff's claim was time-barred because her claim had accrued when her husband had learned that asbestos exposure caused his illness. *Id.* at 847, 850. The plaintiff raised a similar argument as Kallenbach, urging the supreme court to conclude that a wrongful-death claim accrues when "all of the elements of the cause of action, including the identity and fault of the tortfeasor, are discoverable or reasonably discoverable by the plaintiff." *Id.* at 848. The supreme court described this argument as advocating for adoption of a discovery rule, and it once again declined to do so. *Id.*

The supreme court also addressed *Frederick v. Wallerich*, in which it had previously stated that "[a]n analysis of when a claim accrues, which turns on whether it can survive a motion to dismiss, necessarily involves consideration of *all* elements of the claim." 907 N.W.2d 167, 173 (Minn. 2018). The supreme court stated that this language "did not create a new requirement that the identity and fault of the tortfeasor must be discoverable to the plaintiff before a court can determine that a claim has accrued." *Palmer*, 945 N.W.2d at 849.

In light of these precedents, we conclude that the some-damage rule determines when Kallenbach's claim accrued and reject the argument that the identity of the alleged tortfeasor is required to trigger accrual. Contrary to Kallenbach's assertions, *Herrmann* and *Noske* do not support the proposition that a plaintiff must know the identity of an

alleged tortfeasor for a claim to accrue. Rather, binding supreme court precedent appears to foreclose that proposition. *See id.* at 848-49.

Applying the some-damage rule here, Kallenbach's claim accrued on January 26, 2017, when he suffered injury from the assault. Accordingly, Kallenbach's intentional-tort claims were barred by the statute of limitations when he brought his claims on November 16, 2020—more than two years after his claims accrued. The district court did not err in granting summary judgment.²

Affirmed.

² In his reply brief on appeal, Kallenbach asserts that Buckner's "entire brief should be stricken" because Buckner did not create a record at the district court for appeal. Even if we were to strike Buckner's brief, Kallenbach, as the appealing party, "bears the burden of demonstrating both error and prejudice." *Palladium Holdings, LLC v. Zuni Mortg. Loan Tr. 2006-OA1*, 775 N.W.2d 168, 178 (Minn. App. 2009), *rev. denied* (Minn. Jan. 27, 2010). The district court's sua sponte grant of summary judgment to Buckner is not erroneous as a matter of law for the reasons discussed above.