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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1937**

James Thomas Miller,
Appellant,

vs.

Tarja L Lewis on Behalf of the Estate of Mark Thomas Pavelich, Deceased,
Respondent.

**Filed September 16, 2024
Reversed and remanded
Bratvold, Judge**

Cook County District Court
File No. 16-CV-22-140

Rhett A. McSweeney, McSweeney Langevin, LLC, Minneapolis, Minnesota (for
appellant)

Scott A. Witty, Holly E. Haller, Hanft Fride, A Professional Association, Duluth,
Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Reilly,
Judge.*

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges the summary-judgment dismissal of his civil assault and
battery claims against respondent estate, arguing that the district court erred by determining

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

as a matter of law that the tortfeasor, who is now deceased, lacked mental capacity to form the intent necessary to support an intentional-tort claim. We conclude that the district court erred by granting summary judgment because it applied inapposite caselaw and the record evidence raises genuine issues of material fact about the tortfeasor's intent. Because we conclude that respondent was not entitled to judgment as a matter of law, we reverse and remand for further proceedings.

FACTS

Appellant James Thomas Miller sued respondent Tarja L. Lewis on behalf of the estate of Mark Thomas Pavelich (the estate), alleging that he was injured by Pavelich, who is now deceased. For the purposes of summary judgment, the estate accepted the facts alleged in Miller's complaint as evidence and the district court viewed the evidence in the light most favorable to Miller, the nonmoving party.

On August 15, 2019, Miller and Pavelich went canoeing and fishing on Brule Lake. Later that day, they left the lake to return to Pavelich's home. Miller and Pavelich each drank one beer on the way. Pavelich "took one sip out of a second beer and then went silent" for the rest of the drive. When they arrived at Pavelich's home, Miller took his belongings out of the truck, and as he was doing this, Pavelich struck Miller with a heavy metal pipe and accused Miller of "spiking" his beer. Pavelich hit Miller with the metal pipe "at least eight times." Miller left, called 911, and was taken to a nearby hospital. Miller had significant injuries, including fractured ribs, contusions, and a "chronic L1 compression fracture."

Pavelich was arrested at his home, and the State of Minnesota charged him with second- and third-degree assault under Minnesota Statutes sections 609.222 and 609.223 (2018).

In the criminal case,¹ the district court ordered a psychological evaluation to determine Pavelich's competency to stand trial, his competency at the time of the offense, and the need for civil commitment. *See* Minn. R. Crim. P. 20.01 (addressing a defendant's competency to participate in criminal proceedings), .02 (providing for the defense of mental illness or cognitive impairment at the time of the offense), .04 (allowing for simultaneous examination for civil commitment). After receiving the psychologist's evaluation, the district court found Pavelich was not competent to stand trial for the criminal charges. In later proceedings, the district court deemed Pavelich to be mentally ill and dangerous and committed him to a state facility.

On March 3, 2021, Pavelich was found dead.

In August 2021, Miller served Pavelich's estate with a personal-injury complaint and filed the complaint nearly a year later. Miller asserted claims of assault and battery arising from the August 2019 incident and sought damages for his physical injuries. The estate filed an answer denying the allegations in the complaint and raising affirmative defenses. Among other things, the estate asserted that Pavelich could not form the requisite intent for assault or battery because he was mentally ill at the time of the incident. The

¹ The civil complaint alleged facts about the criminal proceeding, including its outcome, which the estate accepted as true for the purposes of summary judgment. Other than the psychological evaluation, none of the criminal record was in the district court record for this civil case.

estate also raised an affirmative defense that Pavelich was acting in self-defense when he struck Miller.

In May 2023, the estate moved for summary judgment. It argued that Pavelich lacked the mental capacity to form intent for the intentional torts alleged in the complaint. The estate also contended that Pavelich acted in self-defense because, “due to the stronghold of his delusions, he felt his life was imminently in danger at the hands of” Miller. In support of both arguments, the estate filed the rule 20 evaluation completed in the criminal case. Miller opposed the motion and argued that Pavelich’s intent was a question of fact for the jury to resolve, that Pavelich possessed sufficient mental capacity to intend civil assault and battery, and that self-defense “is not a legitimate defense to assault and/or battery” under these facts. Miller did not submit any evidence in response to the summary-judgment motion and relied on the rule 20 evaluation submitted by the estate.

The rule 20 evaluation was prepared by Dr. Bowerman, Ph.D., L.P., as an independent forensic examiner. He determined that Pavelich suffered from delusions and paranoia, including that he was the target of poisoning.² Dr. Bowerman diagnosed Pavelich with post-traumatic stress disorder with delayed expression and secondary psychotic feature as well as an unspecified neurocognitive disorder. Dr. Bowerman determined that Pavelich believed Miller had intentionally spiked his drink or poisoned him and that Pavelich “reacted out of a genuine fear for his life.” He concluded that, “at the time of

² We are mindful of our obligation under Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(b)(2), to protect the confidentiality of nonpublic information and include in this opinion only information that is presented in the briefs and other evidentiary materials in the record. We have reviewed the entire record in making our decision.

committing the alleged criminal act,” Pavelich “was laboring under such a defect of reason as not to know the nature of the act or that it was wrong.” Dr. Bowerman opined that the assault on Miller was “a direct result of [Pavelich’s] delusional belief system which he could not independently control due to defects in mental and cognitive health.”

In opposing summary judgment, Miller pointed out that the rule 20 evaluation also stated that Pavelich told Dr. Bowerman that he would respond with violence when he believed his life to be in danger but knew that doing so was wrong. Also, Dr. Bowerman opined that Pavelich was mentally ill and dangerous to the public and reasoned that Pavelich “deliberately assaulted” Miller and “engaged in an unprovoked yet intentional assault” while experiencing delusions.

Following a hearing, the district court granted the estate’s summary-judgment motion. The district court determined that there were no genuine issues of material fact related to Pavelich’s intent to assault and batter Miller. The district court did not discuss or decide the estate’s self-defense argument.

Miller now appeals.

DECISION

Summary judgment is appropriate if “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. “A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party.” *Leeco, Inc. v. Cornerstone Bank*, 898 N.W.2d 653, 657 (Minn. App. 2017), *rev. denied* (Minn. Sept. 27, 2017). A court considering a motion for summary judgment “must not weigh facts.” *Senogles v. Carlson*, 902 N.W.2d

38, 42 (Minn. 2017) (quotation omitted). An appellate court reviews a grant of summary judgment de novo, viewing “the evidence in the light most favorable to the nonmoving party and resolv[ing] all doubts and factual inferences against the moving part[y].” *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019) (quotation omitted). The district court’s application of law is also reviewed de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017).

The district court granted summary judgment for the estate based on its determination that Miller could not show that Pavelich intentionally assaulted and battered Miller. On appeal, Miller argues, first, that the district court erred in its legal conclusions by relying on insurance caselaw about the intentional-act exclusion and should have relied on the common law for assault and battery and its definition of intent. Second, Miller contends that, based on the record, a genuine dispute of material fact remains for trial and that the district court erred by weighing the evaluator’s rule 20 report.³ The estate urges

³ On appeal, Miller’s brief to this court argues two other issues. First, he argues that “using psychiatric evidence to determine intent is appropriate only in the very narrow context of an intentional-act-exclusion insurance contract questions and is inappropriate to determine intent in other contexts.” Second, in Miller’s reply brief, he specifically urges this court to “bifurcate the inquiries into intent and capacity by allowing the jury to consider the factual findings within the Bowerman report when evaluating intent and relegating the psychiatric determination of incompetence to the question of capacity.” The estate contends that these are new arguments on appeal, and we agree that they were not presented to or considered by the district court.

Generally, we do not consider issues raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). While Miller urges us to make an exception here and for these issues, he does so in his reply brief. We generally decline to consider matters raised for the first time in reply. *George v. Est. of Baker*, 724 N.W.2d 1, 7 (Minn. 2006). Thus, we decline to consider either of the two new issues that Miller raises for the first time on appeal. Miller, however, may raise these issues on remand for consideration by the district court.

this court to affirm the district court’s summary-judgment decision but argues that, if the decision is overturned, the case should be remanded for the district court to consider the estate’s self-defense claim. We consider each argument in turn.

A. The district court erred by relying on inapposite caselaw.

Miller challenges the district court’s legal analysis and argues that the district court erred by relying on distinguishable caselaw and by failing to apply well-established common law for assault and battery.

Under Minnesota law, “[b]attery is an intentional, unpermitted offensive contact with another. Its two operative elements are intent and offensive contact.” *Johnson v. Morris*, 453 N.W.2d 31, 40 (Minn. 1990) (citation omitted). Civil assault “requires an unlawful threat to do bodily harm to another with present ability to effect that threat.” *Elwood v. County of Rice*, 423 N.W.2d 671, 679 (Minn. 1988) (citing *Dahlin v. Fraser*, 288 N.W. 851, 852 (Minn. 1939)). To establish a civil-assault claim, the plaintiff must show, among other things, that the assailant acted with the intent to cause apprehension or fear of imminent harm. *See Dahlin*, 288 N.W. at 853 (“Intent may be inferred from all the facts and circumstances, such as exhibitions of anger, threats, gestures and other conduct.”); *see also* 4A *Minnesota Practice*, CIVJIG 60.20 (2014) (setting out elements of civil assault); *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *rev. denied* (Minn. Sept. 18, 2007) (“[J]ury instruction guides merely provide guidelines and are not mandatory rules; jury instruction guides are instructive, but not precedential or binding on this court.”). Thus, intent is a central element for both assault and battery. *Dahlin*, 288 N.W. at 852-53 (assault); *Johnson*, 453 N.W.2d at 40 (battery).

No Minnesota caselaw directly addresses how a person's mental illness bears on their civil liability for injuries arising from an intentional tort. Some legal authority provides that a person with a mental illness may be liable for their torts, including assault and battery. The Minnesota Supreme Court, in a related context, has relied on the Restatement (Second) of Torts § 895J (Am. L. Inst. 1979). *State Farm Fire & Cas. v. Wicks*, 474 N.W.2d 324, 329 (Minn. 1991) (citing section 895J, comment c, as authority for reasoning that "it is axiomatic" that a mentally ill insured may be held liable for an intentional tort if they "have been able to entertain the proscribed intent to cause bodily injury and . . . have done so"); see *Williamson v. Guentzel*, 584 N.W.2d 20, 24-25 (Minn. App. 1998) (recognizing that restatements of law are persuasive authority), *rev. denied* (Minn. Nov. 24, 1998).

Section 895J of this restatement provides that "[o]ne who has deficient mental capacity is not immune from tort liability solely for that reason." Restatement (Second) of Torts § 895J (Am. L. Inst. 1979). The rationale is that "where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." W. Prosser & W. Page Keeton, *Prosser and Keeton on Torts* § 135, at 1073 (5th ed. 1984). As a result, a person's mental condition may "be taken into account" because

[a person with a mental illness] may have an *intent to invade the interests of another*, even though his reasons and motives for forming that intention may be entirely irrational. Thus he may be capable of having the intent to do harm to another that is necessary for torts such as battery On the other hand his mental condition *may deprive him of the capacity to have the necessary intent* [for liability].

Restatement (Second) of Torts § 895J, cmt. c (Am. L. Inst. 1979) (emphasis added).

The restatement's discussion of intent adheres to caselaw addressing other intentional torts, although without reference to mental illness. In *Victor v. Sell*, Victor fell from his roof and landed on dismantled radiator parts on the ground in his yard, sustaining fractures and requiring surgery. 222 N.W.2d 337, 338 (Minn. 1974). Victor sued his neighbor Sell on a theory of trespass, contending that Sell threw the radiator parts on Victor's property, which worsened his injuries when he fell. *Id.* at 338-39. The jury determined that Sell did not commit trespass. *Id.* at 339.

On appeal, Victor argued, among other things, that the district court did not sufficiently define "trespass." *Id.* The supreme court affirmed the decision after determining that the district court's instructions were sufficient. *Id.* at 339-40. It noted that the jury instructions defined "intent" or "intentionally" to mean that "the actor desires to cause consequences of his act or that he believes that the consequences are substantially certain to result from it." *Id.* The supreme court recognized that this definition of intent was taken directly from the Restatement (Second) of Torts, which provides, "The word 'intent' is used throughout the Restatement to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* at 340 n.4 (quoting Restatement (Second) of Torts § 8A (Am. L. Inst. 1979)).

The district court here, however, relied on *Wicka*—without referring to section 895J of the restatement—and reasoned that "a person excused from criminal liability due to mental illness, within the meaning of the criminal law, lack[s] the cognitive ability to form the intent to injure another." And because assault and battery both include an element of intent and the "only evidence" was Dr. Bowerman's rule 20 report, the district court

concluded that “no reasonable juror could draw a conclusion that the decedent had the necessary intent for assault or battery under Minnesota law.” We disagree.

Wicka’s analysis of intent turned on a context that is materially different from this appeal. The supreme court considered “whether an intentional act exclusion of a homeowner’s liability policy applies to the conduct of an insured who, because of mental illness, may lack the capacity to form the intent to injure.” 474 N.W.2d at 325. The supreme court first noted that “an intentional act exclusion applies only where the insured acts with the specific intent to cause bodily injury.” *Id.* at 329. It held that an insured’s acts are “unintentional” under the policy if the insured’s mental illness or defect prevented them from “know[ing] the nature or wrongfulness of an act” or deprived the insured “of the ability to control [their] conduct.” *Id.* at 331.

Thus, *Wicka* involved the interpretation of an exclusion to an insurance contract, not civil liability for an intentional tort. Exclusions in an insurance policy are strictly interpreted against the insurer. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 883 (Minn. 2002). In *Wicka*, the supreme court expressly stated that its conclusion was “for the purposes of applying an intentional act exclusion contained in a homeowner’s insurance policy.” 474 N.W.2d at 331. Because *Wicka* used “unintentional” in a different context, its holding does not apply to the issue on appeal.⁴

⁴ For similar reasons, we are not persuaded by other cases both parties cite that do not involve civil intent or civil liability for torts. *See, e.g., Profit v. HRT Holdings*, 987 N.W.2d 575, 582 (Minn. 2023) (stating that *Wicka*’s holding was not controlling in a workers’-compensation action because cases “regarding intentional-act-exclusion provisions in insurance policies are grounded in contract” while a workers’-compensation case was “a creature of statute”); *Silberstein v. Cordie*, 474 N.W.2d 850, 854 (Minn. App.

We conclude that the district court erred in applying *Wicka* and concluding as a matter of law that Pavelich lacked the intent to commit assault and battery against Miller because of his mental illness. *Victor*'s reasoning, coupled with section 895J of the restatement, persuades us that intent may be established for assault if the person intended to threaten harm to another while having the ability to effect that threat, *Dahlin*, 288 N.W. at 852-53, and for battery if the person intended to cause bodily injury and did so, *Johnson*, 453 N.W.2d at 40. Given that summary judgment can be affirmed on any ground, we next address whether there is a genuine issue of material fact regarding intent under the legal standard articulated here.

B. A genuine issue of material fact about Pavelich's intent at the time of the assault and battery precludes summary judgment.

Miller contends that the district court erred in granting summary judgment because a genuine issue of material fact exists as to Pavelich's intent to harm him. Miller asserts that the district court improperly weighed the evidence in the rule 20 report, a task normally reserved for the jury, when granting the summary-judgment motion. In response, the estate argues that Miller presented no evidence to establish a genuine issue of material fact on intent.

1991) (discussing issues of intent and mental capacity and determining that the exception to the three-year wrongful-death statute of limitations for intentional acts of murder does not bar a claim when a defendant has been found not guilty of murder by reason of mental illness); *see also Silberstein v. Cordie*, No. C7-91-279, 1992 WL 31362, at *2 (Minn. App. Feb. 25, 1992) (upon remand after *Wicka*, recognizing that the term "intent" had "different connotations in *Wicka* and *Silberstein*"), *rev. denied* (Minn. May 15, 1992).

A “genuine issue” of material fact for trial “must be established by substantial evidence.” *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). A party seeking summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact. Minn. R. Civ. P. 56.03(a) (stating that the party claiming no genuine fact issue “must support the assertion” with admissible evidence); *Citizens State Bank Norwood Young Am. v. Brown*, 849 N.W.2d 55, 62 (Minn. 2014). When the moving party makes that showing, “the burden of establishing that the facts raise a genuine issue falls to the opposing party.” *Citizens State Bank*, 849 N.W.2d at 62 (citation omitted). To meet its burden, the nonmoving party may not “rely upon speculation.” *Limberg v. Mitchell*, 834 N.W.2d 211, 219 (Minn. App. 2013) (quotation omitted); *see also Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (“Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.”). Rather, the nonmoving party must produce competent, admissible evidence that creates a genuine issue for trial. *Twin Cities Metro-Certified Dev. Co. v. Stewart Title Guar. Co.*, 868 N.W.2d 713, 720 (Minn. App. 2015).

As the moving party, the estate needed to make a prima facie showing that there was no genuine issue of material fact. To that end, the estate presented evidence in the form of the rule 20 report that Pavelich was excused from criminal liability because of mental illness. As the district court noted, this was the “only evidence in the record.” As to Pavelich’s competency at the time of the incident, Dr. Bowerman concluded that Pavelich was “laboring under such a defect of reason due to mental illness and cognitive impairment as to not know the nature of [his] act or that it was wrong.”

Miller does not dispute the conclusion in the rule 20 report. But he notes that the report, when viewed in the light most favorable to him, includes evidence that raises genuine issues of material fact precluding summary judgment on his intentional-tort claims. For instance, Miller highlights portions of the rule 20 report, some of which quote statements by Pavelich, that (1) Pavelich understood that assaulting another person was immoral and illegal, (2) Pavelich “deliberately assaulted” Miller with a lethal weapon, (3) Pavelich engaged in an “unprovoked yet intentional assault,” (4) Pavelich’s actions escalated from property damage to physical harm of another person, and (5) Pavelich was capable of “actively and deliberately physically harm[ing]” someone if he felt fearful enough.⁵ The district court acknowledged that Miller had identified portions of the report containing statements by Pavelich that “indicat[ed] his desire to harm his neighbors.” Even so, the district court determined that these statements were “not sufficient to create a genuine dispute regarding the elements of intent for assault or battery.” We do not agree.

The rule 20 report, when viewed in the light most favorable to Miller, creates a genuine dispute of fact. The Restatement (Second) of Torts is again instructive on this point. It offers two illustrations showing how different kinds of mental illness or capacity might lead to different legal results:

1. A, who is [mentally ill], believes that he is Napoleon Bonaparte, and that B, his nurse, who confines him in his room, is an agent of the Duke of Wellington, who is endeavoring to prevent his arrival on the field of Waterloo in time to win the battle. Seeking to escape, he breaks off the leg

⁵ These statements come from Miller’s brief and do not rely on nonpublic information. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(b)(2).

of a chair, attacks B with it and fractures her skull. A is subject to liability to B for battery.

2. A, suffering from epilepsy, goes into a cataleptic state in which he is unconscious of his acts and unable to control them. In this state he strikes B, who is bending over him. A is not liable to B.

Restatement (Second) of Torts § 895J, cmt. c (Am. L. Inst. 1979).

There is evidence that Pavelich intended to hit—and, indeed, to harm—Miller. Pavelich struck Miller with a heavy metal pipe eight times because he believed Miller had poisoned his drink. This situation is analogous to the first example in comment c, suggesting that a jury could find that Pavelich had the required intent for assault and battery.

Wicka also helps explain this point. The district court granted summary judgment for the insurer after determining that the intentional-act exclusion applied when, “because of mental illness, the insured is unable to control his or her conduct in accordance with reason.” *Wicka*, 474 N.W.2d at 326. We reversed and remanded for trial because a genuine issue of material fact existed based on psychiatric testimony. *Id.* at 327. The supreme court affirmed as modified, revising our interpretation of the intentional-act exclusion, but agreeing that a genuine issue of material fact existed for trial based on the psychiatric testimony. *Id.* at 331, 333.

Here, too, the psychiatric evidence does not support entering judgment as a matter of law for the estate. *See Warren v. Dinter*, 926 N.W.2d 370, 375 (Minn. 2019) (stating that “summary judgment is inappropriate when reasonable persons might draw different

conclusions from the evidence presented” (quotation omitted)). Thus, we reverse and remand for further proceedings.

C. The district court should consider the estate’s self-defense claim on remand.

The estate raised an affirmative defense of self-defense in its answer and, in its summary-judgment memorandum, argued that Miller’s assault and battery claims failed because Pavelich was acting in self-defense when he struck Miller. Because the district court granted summary judgment in the estate’s favor on the ground that no reasonable juror could conclude that Pavelich intended to assault or batter Miller, it did not consider the merits of this alternative argument. The estate does not argue for affirmance because Pavelich acted in self-defense. On remand, then, the district court should address the estate’s self-defense argument.

Reversed and remanded.