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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1261**

Michael D. Jones,
Appellant,

vs.

Walgreens Co., et al.,
Respondents.

**Filed May 14, 2012
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-10-14070

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Minnesota (for appellant)

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Peterson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Hudson,
Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Michael Jones challenges the district court's grant of summary judgment on four intentional-tort claims in favor of respondents Walgreens Co. and Dennis Voigt. Because there are no genuine issues of material fact in dispute and the district court did not err by granting summary judgment to respondents, we affirm.

FACTS

Appellant suffers from several medical conditions, including type-2 diabetes, hypertension, gout, allergies, vitamin D deficiency, and sleep apnea. Some of his conditions require prescription medication, which he has filled at Walgreens pharmacy for the past 20 years. Appellant has health insurance through UCare, a nonprofit health plan. Appellant asserts that the terms of the plan are as follows: he has a \$7 copayment each month for his medications; after he pays the \$7 for the month, all subsequent prescriptions are filled at no charge; and if he cannot afford \$7, the pharmacy waives the copayment. On at least four occasions in the past six years, various Walgreens pharmacies objected to filling of appellant's prescriptions without a copay. The pharmacy staff at the West Broadway, Minneapolis store also began to challenge appellant on this issue. They knew appellant by his name and face because they had told him several times that they could not continue to waive his copay.

On January 15, 2010, appellant anticipated that he might have a problem getting his prescriptions filled by the West Broadway Walgreens. He set up a three-way phone call between himself, UCare, and a Walgreens staff member, at which time the

Walgreens representative said that the copay would not be waived. Appellant nevertheless went to the store immediately after the phone call to get his prescriptions. The pharmacy technician and the pharmacist both told appellant that they would not waive the copay. When appellant became increasingly upset and snatched the prescriptions from the technician, the pharmacist paged the manager, Dennis Voigt.

At the time, Voigt was dealing with Minneapolis Police Officers Monica Boelter and David Tschida regarding a separate shoplifting incident, but he immediately went back to the pharmacy. Voigt enforced the pharmacist's decision not to waive the copay. Voigt attempted to get the prescription back from appellant. As appellant became more upset, someone alerted Officers Boelter and Tschida of the situation. Officer Tschida tried to calm down appellant. But when appellant did not back down, Officer Tschida became concerned for his safety and placed appellant in handcuffs. Voigt then told Officers Boelter and Tschida that he did not want appellant arrested for disorderly conduct or to do a citizen's arrest. He just wanted the prescriptions back and for appellant to leave the store. Officer Tschida had Voigt sign a trespass form, and Officers Tschida and Boelter drove appellant home.

Appellant subsequently sued Walgreens and Voigt in his capacity as the store manager. Appellant asserted claims of false imprisonment, intentional infliction of emotional distress, assault and battery, and invasion of privacy by intrusion upon seclusion. Respondents moved for summary judgment, and the district court dismissed the complaint with prejudice. This appeal follows.

DECISION

Appellant contends that the district court improperly granted summary judgment because there were several genuine issues of material fact. The district court must grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file “show that there is no genuine issue as to any material fact.” Minn. R. Civ. P. 56.03. A fact is material if it affects the outcome of the case. *Musicland Grp., Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994). When a summary-judgment motion is made, the nonmoving party cannot rely on “mere averments or denials,” but must present “specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05.

On appeal from summary judgment, this court reviews de novo the district court’s application of the law and its conclusion that there are no genuine issues of material fact for trial. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review 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). Summary judgment is proper when “the record is devoid of proof on an essential element of the plaintiff’s claim.” *Cargill, Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006).

I.

Appellant contends that there are several genuine issues of material fact regarding his claim of false imprisonment. The tort of false imprisonment has three elements: “(1) words or acts intended to confine; (2) actual confinement; and (3) awareness by the plaintiff that he is confined.” *Blaz v. Molin Concrete Prods. Co.*, 309 Minn. 382, 385,

244 N.W.2d 277, 279 (1976). Any confinement that is not legally justified constitutes false imprisonment. *Kleidon v. Glascock*, 215 Minn. 417, 425, 10 N.W.2d 394, 397 (1943). But it is not false imprisonment if the claimant “is aware of a reasonable means of escape that does not present a danger of bodily harm or material harm.” *Peterson v. Sorlien*, 299 N.W.2d 123, 128 (Minn. 1980).

Appellant fails to establish that he was confined by respondents. He contends that respondents did not ask him to leave the store. But after carefully reviewing the record, it is clear that respondents did ask appellant to leave multiple times, and it was appellant who refused to leave. Respondents had to go so far as to sign a trespass form to have the police remove appellant from the store. This is significant for two reasons. First, it negates the first element of false imprisonment, as respondents expressed no intention through their words or actions to confine appellant. *Blaz*, 309 Minn. at 385, 244 N.W.2d at 279. Second, the fact that respondents asked appellant to leave establishes that he had a reasonable means of escape.

Second, appellant contends that respondents falsely imprisoned him because they initiated the action that resulted in the police handcuffing him, placing him in the back of the squad car, and driving him home. There is conflicting testimony as to who called the police to the pharmacy. But for the purposes of summary judgment, we examine the facts in favor of appellant and assume that it was someone from Walgreens. Based on the assumption that respondents summoned the police to respond to the altercation with appellant, the issue is whether that action constitutes “instigation” of unprivileged confinement by the police. To impose liability on a party based on the actions of the

police under a claim of false imprisonment requires the party to have instigated an unprivileged confinement, which requires the person to persuade or command the police directly to detain a suspect whom police are not otherwise permitted to detain. *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 558 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995); *see also* Restatement (Second) of Torts § 45A, cmt. c (1965) (“If the confinement is unprivileged, the one who instigates it is subject to liability to the person confined for the false imprisonment.”). But simply conveying information to police about suspected criminal activity does not constitute instigation of unprivileged confinement. *Smits*, 525 N.W.2d at 558.

Respondents’ act of summoning the police to respond to the pharmacy did not constitute instigation of unprivileged confinement. When Officer Tschida placed appellant in handcuffs, Officer Tschida independently perceived appellant to be a threat because of appellant’s physical size. Although Officer Tschida had given appellant the option to leave, appellant became more agitated. As a result of appellant’s actions, Officer Tschida was planning to arrest him for disorderly conduct. Because respondents, at most, only conveyed information to the police and because the confinement was privileged, there was no false confinement.

II.

Appellant contends that there are genuine issues of material fact to support his claim that respondents are liable for assault and battery. “An assault is an unlawful threat to bodily harm to another with present ability to carry the threat into effect.” *Dahlin v. Fraser*, 206 Minn. 476, 478, 288 N.W. 851, 852 (1939). An assault claim must establish

a display of force that caused “reasonable apprehension of immediate bodily harm.” *Id.* Appellant testified in his deposition that he never feared that respondents were going to physically hurt him in any way. The only other possible basis of his claim stems from the conduct of the police placing him in handcuffs and driving him home while he was seated in the back of the squad car. Because the police acted independently of respondents and respondents never threatened appellant, the district court did not err in granting summary judgment on the assault claim.

Appellant also contends that there are genuine issues of material fact to support his claim of battery. A battery is “an intentional unpermitted offensive contact with another.” *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980). The security video shows that the only contact made between appellant and respondents is when appellant reached over the counter and snatched the bag of his prescription drugs from the pharmacy technician. At all times, the pharmacy staff remained behind the counter and never reached over to make contact with appellant. When Voigt came to the pharmacy window after being paged, he immediately entered the pharmacy area and then interacted with appellant from behind the counter. The only individuals to make physical contact with appellant were the police. The district court did not err in granting summary judgment on the battery claim.

III.

Appellant claims that there are genuine issues of material fact precluding summary judgment on his claim of intentional infliction of emotional distress. To recover for intentional infliction of emotional distress, a plaintiff must show that (1) the conduct was

extreme and outrageous; (2) the conduct was intentional or reckless; (3) the conduct caused emotional distress; and (4) the distress was severe. *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 438-39 (Minn. 1983). “Minnesota disfavors tort actions seeking damages for intentional infliction of emotional distress.” *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 813 (Minn. App. 1992), *review denied* (Minn. May 24, 1992).

To satisfy the extreme-and-outrageous element, the conduct must be “so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.” *Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902, 908 (Minn. App. 1987) (quoting *Hubbard*, 330 N.W.2d at 439), *review denied* (Minn. Nov. 13, 1987). Here, the pharmacy staff tried to explain to appellant why they were unwilling to waive the copay and to provide him with information to enroll on straight medical assistance. The security video does not depict any conduct that could be characterized as extreme or outrageous. Because respondents’ conduct was not extreme and outrageous, the district court did not err in granting summary judgment.

Appellant also bears a heavy burden of production to establish severe distress. *Hubbard*, 330 N.W.2d at 439. An individual’s distress must be “so severe that no reasonable man could be expected to endure it.” *Id.* (quoting Restatement (Second) of Torts § 46, cmt. j (1965)). Intentional infliction of emotional distress has a limited scope because there is a strong policy to prevent fictitious and speculative claims. *Id.* Appellant claims that, following this incident, he felt anxious and had repeated and persistent headaches, he had flare-ups of a skin irritation, his gout intensified, his feet

swelled, and he suffered from cramps in his hands, legs, feet, and chest. As a result of not having his medications, appellant contends that he was tired, sleep-deprived, and fearful of going into a coma or having a stroke. But none of these allegations was corroborated by any medical records or reports from physicians. *See, e.g., id.* at 440 (holding that allegations of depression, vomiting, stomach disorders, rash, and high blood pressure without supporting medical evidence were not sufficiently severe as a matter of law); *Bohdan*, 411 N.W.2d at 908 (holding that claim of severe distress failed to withstand summary judgment due to lack of medical evidence linking plaintiff's paranoid disorder to alleged harassment). Because appellant failed to establish severe mental distress, the district court properly granted summary judgment.

IV.

Appellant claims that there are genuine issues of material fact to support his claim of invasion of privacy by intrusion upon seclusion. There are three elements of the tort of intrusion upon seclusion: “(a) an intrusion; (b) that is highly offensive; and (c) into some matter in which a person has a legitimate expectation of privacy.” *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 744 (Minn. App. 2001). An intrusion can be a physical intrusion into a private place or an intrusion made by defendant's senses, such as overhearing plaintiff's private affairs. Restatement (Second) of Torts § 652B, cmt. b (1977).

Appellant's claim fails on the first element because there was no intrusion. Appellant fails to put forth any evidence that respondents either physically invaded a private room, or that respondents used their senses to intrude into appellant's private

affairs. Indeed, respondents already knew appellant's medical and insurance information, as they worked in the pharmacy. The district court properly granted summary judgment on the claim of invasion of privacy by intrusion upon seclusion.

Affirmed.