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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0176**

Gelle Ali Hussein, et al.,
Appellants,

vs.

City of St. Paul, et al.,
Respondents.

**Filed September 16, 2013
Affirmed
Smith, Judge**

Ramsey County District Court
File No. 62-CV-11-6873

R. Donald Hawkinson, Minneapolis, Minnesota (for appellants)

Sara Grewing, St. Paul City Attorney, Lawrence J. Hayes, Jr., Assistant City Attorney, St. Paul, Minnesota (for respondents)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm the district court’s grant of summary judgment because there are no genuine issues of material fact in dispute and appellants’ claims of negligence, involving a “physical confrontation” between police officers and a misidentified domestic assault suspect, are barred by official immunity and vicarious official immunity.

FACTS

St. Paul Police Officer Ramar Davis was dispatched to investigate an alleged domestic assault at approximately 1:00 a.m. on September 28, 2009. The alleged victim reported that her husband, the suspect, was 25 years old and lived at 510 Cedar Avenue, apartment eight, in Minneapolis, Minnesota. Officer Davis contacted his supervisor, who advised him to attempt to locate and arrest the suspect in collaboration with the Minneapolis Police Department. Officer Davis and two Minneapolis police officers proceeded to 510 Cedar Avenue; however, they were unable to locate apartment eight. Officer Davis requested an address check on the suspect from the St. Paul police department. The search indicated that the suspect lived at 512 Cedar Avenue, apartment five.

The officers proceeded to 512 Cedar Avenue and knocked on the door of apartment five. Appellant Gelle Ali Hussein answered the door. At the time, Hussein's nephew, appellant Ahmed Mohamed Olol, age 21, was sleeping under a blanket on a mattress in the living room. Officer Davis initiated contact with Olol, who failed to comply with various police commands. Olol's noncompliance led to a physical confrontation between the officers and Olol, until Olol was handcuffed.¹ After the officers handcuffed him, Olol produced identification, establishing that he was not the suspect. The officers removed the handcuffs and apologized for the inconvenience of mistaking him for the suspect.

¹ Olol spoke little English, having arrived in the United States from East Africa less than one week before the incident. After the physical confrontation, a neighbor provided language translation for the parties.

Appellants initiated this lawsuit, alleging, in relevant part, that the City of St. Paul and its police officers “were negligent in not adequately checking whether [appellants] were the suspects for whom they were looking” and that the officers “used excessive and inappropriate force.” Respondents moved for summary judgment and appellants opposed the motion. Following a hearing, the district court granted summary judgment in favor of respondents.

D E C I S I O N

Summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. 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. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. Rather, a party opposing summary judgment “must demonstrate that there are specific fact issues in existence which create a genuine issue for trial.” *Sphere Drake Ins. Co. v. Tremco, Inc.*, 513 N.W.2d 473, 477 (Minn. App. 1994), *review denied* (Minn. Apr. 28, 1994). Evidence that “merely creates a metaphysical doubt as to a factual issue” is not sufficient. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Appellants challenge the district court's grant of summary judgment in favor of respondents, arguing that genuine issues of material fact remain in dispute regarding whether (1) Hussein indicated that Olol was the suspect and (2) the police officers acted to ensure their safety. We address each argument in turn.

A.

Appellants first argue that, because Hussein denied identifying Olol as the suspect, the district court erred by granting summary judgment. The district court noted Hussein's denial in its findings, and noted that each officer testified to the fact that, after being asked whether the suspect lived in the apartment, Hussein pointed to Olol, who was covered by a blanket, sleeping on the floor. Appellants contend that this "fact issue . . . needs to be decided by a finder of fact at trial instead of in a summary judgment proceeding."²

In their memorandum of law opposing summary judgment, appellants noted the conflicting testimony as to whether Hussein indicated to the police officers that Olol was the suspect. However, appellants did not argue to the district court that this disputed fact was material. Indeed, in their proposed order, appellants did not include a finding regarding this fact. When a party opposing a summary judgment motion does not present an argument to the district court, the argument may not be considered on appeal. *Woody v. Krueger*, 374 N.W.2d 822, 824 (Minn. App. 1985). On this record, we deem appellants' argument waived.

² Appellants further contend that "whether the individual sleeping on the floor was [the suspect] obviously affects the outcome of this case." But the parties do not dispute that the person sleeping on the floor was Olol, not the suspect.

B.

Appellants next argue that the district court erred by “[giving] to respondents the benefit in weighing the evidence of . . . whether or not the officers had reason to cause injuries to Appellant Olol.” In support of this argument, appellants rely on the district court’s use of the word “assertedly” in its finding that “[t]he evidence is that officers initiated physical contact with the individual under the blanket . . . assertedly to ensure their safety.”

Although the parties dispute the extent of the physical contact between Olol and the police officers, it is undisputed that a “physical confrontation” occurred. It is equally undisputed that Olol failed to comply with various police commands, which included multiple demands that he show his hands. Olol also admitted “struggling” with the police officers. On appeal, appellants conceded that Olol’s noncompliance was the catalyst for the physical confrontation. In light of this concession, we cannot conclude that the evidence is sufficient to establish a genuine factual issue as to whether the officers initiated physical contact with Olol to ensure their safety. *See DLH, Inc.*, 566 N.W.2d at 71.

Moreover, the district court concluded that appellants’ negligence claim is barred and, “[t]o the extent that Mr. Hussein and Mr. Olol are continuing to press civil rights claims (and it is not at all clear that they are), such claims are not adequately pled.” Appellants do not challenge this conclusion on appeal. Therefore, even if appellants had established a genuine factual issue as to whether the police officers initiated physical contact with Olol to ensure officer safety, the resolution of this fact would not affect the

result or outcome of this case because appellants' pleading was inadequate. As a result, the allegedly disputed fact is immaterial and does not preclude summary judgment. See *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 229, 219 N.W.2d 641, 646 (1974).

While we acknowledge that the underlying facts of this case are unfortunate, we conclude that respondents are entitled to a judgment as a matter of law. Therefore, the district court did not err by granting respondent's summary judgment.

Affirmed.