STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0200

Samson Longtin,
Appellant,

vs.

Jeffrey Scott Pollard,
Respondent,

Aaron Michael Voges,
Respondent.

Filed September 14, 2020
Affirmed
Bryan, Judge

Itasca County District Court
File No. 31-CV-18-1508

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

Ross Trooien, Grand Rapids, Minnesota (for respondent Pollard)

Aaron M. Voges, Bovey, Minnesota (pro se respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Bryan, Judge.

U N P U B L I S H E D O P I N I O N

BRYAN, Judge

Appellant challenges the district court's entry of summary judgment in favor of respondents on appellant's claims for civil assault and conspiracy to commit civil assault.

We affirm the judgment because the circumstances surrounding the threatening statement at issue do not indicate any contemporaneous ability to carry out the threat and the statement could not have caused a reasonable fear of immediate bodily harm.

FACTS

In May 2018, appellant Samson Longtin filed a civil complaint against respondents Jeffrey Scott Pollard and Aaron Michael Voges. In count one, Longtin alleged that Pollard assaulted Longtin by making a statement over the telephone threatening to drag Longtin behind Pollard's truck. In count two, Longtin alleged that Pollard and Voges conspired to assault Longtin by making statements to each other about dragging Longtin behind Pollard's truck.[1] Voges did not file an answer to the complaint or otherwise appear before the district court. Pollard filed a motion to dismiss Longtin's claims for failure to state a claim, or in the alternative, for summary judgment. The district court granted Pollard's motion for summary judgment on all counts, dismissing Longtin's claims with prejudice. Longtin appeals.

The pertinent facts relate to the following three events: (1) a conversation between Longtin and Pollard in April 2016; (2) direct message conversations between Pollard and Jason Kilduff and between Pollard and Voges in April 2016; and (3) a Facebook post sharing pictures of Longtin shopping at Walmart in September 2016. The facts included

[1] The district court also dismissed Longtin's claims against Pollard and Voges for creating a nuisance in violation of Minnesota Statutes, section 561.01 (2018), conspiracy to commit cyberstalking in violation of a federal statute, and conspiracy to create a nuisance in violation of section 561.01. Longtin does not raise any challenge to the dismissal of these claims on appeal.

below are found in the complaint and in the four exhibits[2] that Longtin submitted to the district court in opposition to Pollard's motions.

A. April 2016 Statements between Pollard and Longtin

According to the testimony of Longtin and Pollard at the evidentiary hearing relating to Longtin's request for a harassment restraining order against Pollard, the conflict began when Pollard posted a racist comment on a public Facebook page. The page included a video about reparations to African Americans. On April 22, 2016, Pollard commented that the post made him want to own slaves. Longtin confronted Pollard by sending Pollard a direct message on Facebook.[3] Longtin attempted to call him on Facebook Messenger and, according to Longtin's testimony, Longtin "said let's meet. [Pollard] said no." Pollard replied to Longtin, stating that he was "at my job right now in Michigan at a work party." The next morning, on April 23, 2016, Pollard called Longtin on Facebook Messenger. During the conversation, Pollard requested Longtin deliver him a sandwich on "white bread with white mayo." Pollard then threatened to hurt Longtin, saying "how 'bout I come get you and drag you behind my truck?" Longtin hung up the phone. Pollard

[2] Two of these exhibits are transcripts from the evidentiary hearings on Longtin's petitions for harassment restraining orders. Two other exhibits are printouts of selected Facebook messages between Pollard, Kilduff, Voges, and others, but not including Longtin.

[3] Both Longtin and Pollard testified regarding their electronic and telephone conversations. However, none of Longtin's submissions in opposition to Pollard's motion included the actual messages between Longtin and Pollard. Those are only found in the exhibits that Pollard submitted to the district court. One of the messages supports this testimony. Longtin asked Pollard where Pollard was: "I can come discuss this further . . . . Where do I go." Pollard responded dismissively and said that he was in Petoskey, Michigan: "I don't give two f-cks, you wanna post sh-t about your opinions with other people then I can do the same . . . I'm in petoskey Michigan, feel free to come discuss anything you'd like."

messaged Longtin via Facebook Messenger and Longtin told him they should end the conversation and that the police would now be involved. Pollard testified that during this encounter and in the months that followed, Pollard resided in Michigan. In his testimony, Longtin acknowledged that Pollard was in Michigan during their encounter in April, and stated that he had no reason to doubt Pollard's testimony regarding his whereabouts.

Longtin ultimately called the police to report Pollard's threat. The county declined to file criminal charges against Pollard, but the investigation uncovered an exchange of direct messages between Pollard and others, including Voges. The record is silent as to when Longtin learned of these statements or when law enforcement officers obtained the records from Facebook.

B. April 2016 Conversations between Pollard and Others

Around the same time that Pollard made the statements noted above to Longtin, and unbeknownst to Longtin, Pollard also made several statements about Longtin to others. Some of the statements that Pollard and Kilduff made were disturbing and racist, and many of Pollard's statements reiterated the threat he made directly to Longtin:

> Pollard: Dude I will drag that Samson longtin[] up and down the road by his feet, f-ck him and f-ck the n-----s
> Kilduff: I call him Samson X. Lol did he say something to you?
> Pollard: Yep, sh-ts gonna blow up real Fast, stay tuned for a facepage[4] war
>
> . . . .
>
> Pollard: F-ckin n-----s, I'll Drive twelve hours to kill a n-----

[4] It is not clear to what Pollard is referring. Presumably he misspoke, and was referring to posting comments on Facebook.

Kilduff: Just a little info, he delivers subs for a living for that new place up by Walmart. He's a huge success, and really hates us white peoples with ou[r] white privileges. Lol he's a loser, and blames the world for it. Lol

Pollard: Yea ill Drag him up and down the road, I'll send you screen shots . . . he decided to Blast my name on facepage just like he did yours . . . :let's meet this f-ck up

Kilduff: Yeah, I know he did, but he blocked me so I couldn't see it. Typical little b-tch.

Pollard: Only blocks he's gonna see are the ones under his feet when I kick the mother f-ckers out

Kilduff: Lol

Pollard: It's on no lie, guys f-cked and let the n----- hatin me games begin

Several hours later, again unbeknownst to Longtin at the time, Voges messaged Pollard about Longtin. After Voges seemingly warned Pollard about Longtin, Pollard again made a comment consistent with the threat he made to Longtin over the phone:

Voges: Hey man, Sam is the last guy you'll ever win with . . . we go round and round weekly over everything issue known to man kind . . . no matter how right you are . . . he won't allow you to be . . . ever . . . he's more stubborn than a rusty bolt . . . you'll rip your hair out before you win with this dude . . . seriously. . . . and his posse are no different than he is . . . [J.] is the only one in the family I even like . . . you know [M.] is his brother.

Pollard: Lol yes I talked to [J.] yesterday actually, I've known him my whole life, his response was the same concept basically that he likes to do this sh-t and he is a dumb f-cking Muslim, that came from [J.] lmao . . . i'll win, I'll Drive twelve hours home to tie the mother f-cker up and drag him behind my truck

Voges: Him and [J.] don't see eye to eye at all . . . me and Kilduff have had some pretty serious talks about him . . . i grew up in [omitted] by the whole family. . . Sam is relentless . . . but I'll be there when you do that . . . I'll video tape it . . . lmao

Pollard: Hahaha I think we all Need to meet this guy all at the same time
Pollard: [posting unknown image]
Pollard: I'm calling jimmy johns
Pollard: That's racist. a because I'm white and b because I Like white bread
Voges: Lmao . . .
Voges: Does he still work there?
Pollard: Idk but we gotta find out where he works
Pollard: [posting unknown image]
Voges: I love the black hand with the peace sign . . . lmfao . . .
Pollard: Hahahahahahahahaha very necessary
Pollard: [posting unknown image]
Pollard: Called the mother f-cker up and put him in his place
Voges: Everything has to go on Facebook . . . he's a baby
Pollard: Yep lol
Voges: At least you didn't text it so there's no proof of what was said . . .
Pollard: Yep haha

C. September 2016 Photographs of Longtin at Walmart

On September 2, 2016, while Longtin was at Walmart, another Facebook user posted a picture of Longtin shopping at Walmart on Voges's Facebook wall with a caption stating "Look who's in Walmart looking at $200 TVs." The comments in the thread beneath the picture suggest that the picture was taken and posted without Longtin's knowledge. The comments also include abhorrent and racist statements. Although none of the statements include an explicit threat of harm, Kilduff posted a picture depicting the face of a dead African American man who had been hanged. Kilduff wrote the following statement: "So precious when they are sleeping . . ." Voges then posted the following comment: "Dude! . . . omg . . . this on . . ."

D E C I S I O N

I. Civil Assault Claim

Longtin argues that the district court erred by granting summary judgment because the conversations that Pollard had with others and the posting of pictures of Longtin shopping at Walmart create material questions of fact. We are not persuaded because this argument conflicts with well-established law defining a civil assault as including a contemporaneous ability to carry out a threat to inflict immediate bodily harm.

"We review the grant of summary judgment de novo to determine 'whether there are genuine issues of material fact and whether the district court erred in its application of the law.'" *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (citations omitted).

The Minnesota Supreme Court defined the elements of a civil assault to include threatening statements in *Dahlin v. Fraser*, 288 N.W. 851, 852 (Minn. 1939). In *Dahlin*, the supreme court held that an assault occurred even though the defendant did not make any physical contact with the plaintiff because the defendant's threatening words were spoken while he was advancing toward plaintiff with clenched fists and while he was close enough to the plaintiff to catch her as she fainted. *Dahlin*, 288 N.W. at 852. The supreme court held that not every threat satisfies the requirements for a civil assault claim: "Mere words or threats alone do not constitute assault." *Id.* It is well established that threatening

words must be accompanied by a "display of force" or made under other contemporaneous conditions "indicating present ability to carry out the threat." *Dahlin*, 288 N.W. at 852; *see also Thomsen v. Ross*, 368 F. Supp. 2d 961, 976-77 (D. Minn. 2005); *Johnson v. Morris*, 453 N.W.2d 31, 41 (Minn. 1990); *Elwood v. County of Rice*, 423 N.W.2d 671, 679 (Minn. 1988). In addition, a civil assault only occurs when a defendant's words cause a plaintiff to have a "reasonable apprehension of immediate bodily harm." *Dahlin*, 288 N.W. at 852. Thus, a plaintiff must show both immediacy of the threatened harm and the defendant's contemporaneous or present display of force or ability to carry out the threat.

These requirements are further reflected in both the model civil jury instructions and the Restatement. The model civil jury instruction requires plaintiffs to prove an immediate temporal connection between the words and the threatened act:

> An assault occurred if:
> 1. (Defendant) acted with the intent to cause apprehension or fear of immediate (harm to) (offensive contact with) (plaintiff), and
> 2. (Defendant) had the apparent ability to cause the (harm) (offensive contact), and
> 3. (Plaintiff) had a reasonable apprehension or fear that the immediate (harm) (offensive contact) would occur.

4A *Minnesota Practice*, CIVJIG 60.20 (2017). The comments also make clear that the second element must be contemporaneous with the utterance of the threatening words: "Assault also requires a showing that the defendant has the apparent present ability to carry out the assault." *Id.* use note (citing *Johnson*, 453 N.W.2d at 41 and *Elwood*, 423 N.W.2d at 679). Likewise, the Restatement defines civil assault as requiring immediate harm: "To make the actor liable for an assault he must put the other in apprehension of an imminent

contact." Restatement (Second) of Torts § 29 (1) (1965). "Imminent" does not mean there is a threat of instantaneous contact, only that there will be no significant delay. Restatement (Second) of Torts § 29 cmt. b (1965).[5]

In this case, Longtin argues that a genuine issue of fact exists because the statements that Pollard made to others and the pictures of Longtin in Walmart could establish the elements of his assault claim. We do not accept this argument for three reasons. First, Pollard's geographic location was too far from Longtin's location at the time of the threat for Longtin to reasonably fear immediate bodily harm. As noted above, the threats in *Dahlin* constituted an assault because the parties were quite close to each other at the time that the threating words were spoken. *Dahlin*, 288 N.W. at 852. Longtin cites to no authority applying *Dahlin* to threats made to someone in a separate location, much less a separate state many hours away. We cannot reconcile Longtin's argument with the immediacy requirement from *Dahlin*.

Second, the conversations between Pollard and Kilduff and between Pollard and Voges cannot establish a genuine fact dispute because Longtin had no knowledge of these conversations at the time they occurred. Longtin only knew that Pollard threatened to drag Longtin behind a truck, that Pollard was in Michigan, and that Pollard had no interest in meeting face-to-face. Since Longtin was not a part of Pollard's conversations, nothing in

[5] The Restatement acknowledges that a threat of future harm or of harm to occur at some indefinite point in time may also cause "mental discomfort" and "may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults." Restatement (Second) of Torts § 31 cmt. a. (1965). The Restatement observes that such circumstances do not support a claim for assault, although they may support a claim for infliction of emotional distress. *Id.*

these conversations can contribute to Longtin's "reasonable apprehension of immediate bodily harm." *See Dahlin*, 288 N.W. at 852.

Third, the pictures of Longtin in Walmart also do not create a genuine dispute of fact. There is no dispute of fact as to when the threat was made to Longtin: April 23, 2016. There is also no dispute of fact as to when the pictures of Longtin were taken and posted on Facebook: September 2, 2016. We cannot aggregate the September conduct and the April statements because claims of civil assault based only on threatening words require that the words be accompanied by a "display of force" or made under other contemporaneous conditions "indicating present ability to carry out the threat." *Dahlin*, 288 N.W. at 852. The actions of Pollard's friends in September cannot establish Pollard's "present ability" to carry out the threat made in April.

Finally, we need not address Longtin's argument that the district court improperly relied on an affidavit that lacked the name of the county in which the affidavit was signed. We affirm the district court based on the allegations in the complaint and on the exhibits submitted by Longtin in opposition to Pollard's motions. In addition, Longtin cites to no authority requiring reversal on the grounds that the district court relied on a similarly deficient affidavit. Last, because Longtin did not move to strike the affidavit before the district court and did not move to strike the affidavit from the appellate record, the issue of whether the evidence was competent is not before this court. *Hoover v. Norwest Private Mortg. Banking, a Div. of Norwest Funding, Inc.*, 605 N.W.2d 757, 763 (Minn. App. 2000) (citing *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn.1985) and *Thiele v. Stich*,

425 N.W.2d 580, 582 (Minn.1988)), *aff'd in part, rev'd in part*, 632 N.W.2d 534 (Minn. 2001).

II. Conspiracy to Commit Assault Claim

Longtin also appeals the dismissal of his conspiracy claim, arguing that if this court reverses summary judgment on the assault claim, then a genuine fact dispute would also exist regarding the conspiracy claim. As Longtin observes, an underlying tort must actually occur to support a civil conspiracy claim. *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997). Because we affirm the district court's decision to grant summary judgment in respondents' favor on the claim for civil assault, we also affirm the decision regarding the conspiracy claim.

Affirmed.