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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1388

Aaron Olson,
Appellant,

vs.

Randall LaBrie,
Respondent.

Filed April 29, 2013
Affirmed
Hooten, Judge

Anoka County District Court
File No. 02-CV-12-1561

Aaron Olson, Hudson, Wisconsin (pro se appellant)

Thomas P. Malone, B. Joseph M. Wearmouth, Barna, Guzy & Steffen, Ltd. Minneapolis, Minnesota (for respondent)

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

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

HOOTEN, Judge

Appellant asserts that the district court erred by dismissing his complaint against respondent for failure to state a claim and by dismissing some of his claims with prejudice, rather than without prejudice. We affirm.

FACTS

Appellant Aaron Olson's complaint alleges that respondent Randall LaBrie posted childhood images of appellant on a social-media website without appellant's consent.[1] According to the complaint, appellant requested that respondent remove the images, and respondent not only refused to remove the images, but posted defamatory and threatening comments about appellant on the website.

Appellant's complaint against respondent alleges (1) a violation of his religious rights under the state and federal constitution; (2) civil assault; (3) conversion and trespass; (4) a violation of his intellectual-property rights; (5) defamation; and (6) invasion of privacy. Respondent did not file an answer, but moved to dismiss for "failure to state a claim upon which relief can be granted" pursuant to Minn. R. Civ. P. 12.02(e) and insufficiency of service of process. The district court granted respondent's motion to dismiss for failure to state a claim, dismissing some of the claims with prejudice. This appeal follows.

D E C I S I O N

I.

Appellant challenges the district court's dismissal of his complaint for failure to state a claim upon which relief may be granted.[2] A complaint must "contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for

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[1] Another discussion of the facts of this case can be found in *Olson v. LaBrie*, No. A11-558, 2012 WL 426585 (Minn. App. Feb. 13, 2012), *review denied* (Minn. Apr. 17, 2012).

[2] Appellant does not challenge the district court's dismissal of his defamation claim without prejudice.

judgment for the relief sought." Minn. R. Civ. P. 8.01. A complaint may be dismissed under Minn. R. Civ. P. 12.02(e) if it appears that no facts, consistent with the pleading, exist to support granting the relief demanded. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Although the plaintiff need make only a minimal showing in order to survive a rule 12.02(e) motion, his complaint must contain sufficient facts to state a claim. *Noske v. Friedberg*, 670 N.W.2d 740, 742–43 (Minn. 2003). Failure to establish an element "defeats the entire claim." *Id.* at 743. When conducting its review, this court "must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). But legal conclusions in the complaint are neither binding on this court's review nor sufficient to survive a rule 12.02(e) motion. *See Bahr*, 788 N.W.2d at 80. This court reviews the legal sufficiency of the dismissed claims de novo. *Id.*

A. Religious rights under the state and federal constitutions

Appellant alleges in his complaint that respondent, in posting his childhood pictures and the defamatory and threatening comments on the website, violated his religious rights. Both the United States and Minnesota Constitutions protect individuals' religious freedoms. *See* U.S. Const. amends. I, XIV, §1; Minn. Const. art. I, § 16. But both constitutions protect those freedoms only from abridgement by the state or federal government. *See Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 203 (Minn. App. 2008) (noting that the Minnesota Constitution protects individuals from government infringement on or interference with religious freedom and the United States Constitution

limits government action which prohibits the exercise of religion), *review denied* (Minn. Apr. 29, 2008); *see also State v. Beecroft*, 813 N.W.2d 814, 837 (Minn. 2012) (holding that "constitutional restrictions on conduct may be applied against private conduct if the conduct is sufficiently entwined with governmental character" (quotation omitted)).

Appellant's complaint alleged that respondent's motive in posting the images and the objectionable comments about appellant on the social-media website was to pressure him into converting to respondent's religion. However, there is no allegation that respondent is a government actor, that respondent's conduct constituted state action, or that respondent's actions had a governmental character.

Appellant argues that the district court's dismissal of his constitutional claim should be vacated on the basis that he did not actually plead a First Amendment violation and did not expect the district court to assume jurisdiction over it. But appellant's complaint necessarily included a First Amendment violation when it stated that respondent's conduct violated his "state and federal constitutional rights to religious freedom." The district court did not err by construing this as a First Amendment claim and dismissing it.

Appellant also requests that we "sua sponte" vacate the district court's decision on this matter. Because appellant cites no legal authority that would allow us to take such action, we decline to do so. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (noting that this court declines to address allegations unsupported by legal analysis or citation).

B. Intellectual-property rights/copyright infringement

Appellant's complaint also alleges that respondent violated his intellectual-property rights. But appellant does not specify what intellectual-property rights were violated. *See Black's Law Dictionary* 881 (9th ed. 2009) (defining "intellectual property" as the category of rights that includes trademark, copyright, patent, trade-secret, publicity, and moral rights and rights against unfair competition). This failure, alone, violates the pleading requirements of Minn. R. Civ. P. 8.01. *See Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006) ("The complaint should put the defendant on notice of the claims against him.").

In his motion opposing dismissal of his claims, however, appellant indicated that he was actually making a copyright-infringement claim. Federal-copyright law provides that

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights. . . . No state court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to . . . copyrights.

28 U.S.C. § 1338(a) (Supp. V 2011). Generally, a case arises under federal law when the law creates the cause of action asserted. *See Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013).

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Minn. R. Civ. P. 12.08(c). Appellant's "intellectual property/copyright infringement claim" is based upon his assertion that he owns the rights to his photographic images. Because appellant's

claim arises under federal-copyright law, the district court was without subject-matter jurisdiction to hear the claim and did not err by dismissing it.

C. Conversion

Appellant alleges in his complaint that respondent engaged in conversion. "Conversion occurs where one willfully interferes with the personal property of another 'without lawful justification,' depriving the lawful possessor of 'use and possession.'" *Williamson v. Prasciunas*, 661 N.W.2d 645, 649 (Minn. App. 2003) (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)). At common law, there are two elements for conversion: "(1) plaintiff holds a property interest; and (2) defendant deprives plaintiff of that interest." *Id.*

The first element requires the pleader to show that he had a right to use, possess, or own the property converted. *Gen. Cas. Co. of Wis. v. Mid-Continent Agencies, Inc.*, 485 N.W.2d 147, 149 (Minn. App. 1992), *review denied* (Minn. July 16, 2012). Appellant alleges that respondent posted his "private childhood images" online without his consent or authorization. It is unclear whether these statements indicate that respondent held a property interest in the images. And, as the district court noted, appellant's description of respondent's conduct as "unauthorized" is merely a label or legal conclusion that fails to clarify whether he has a property interest in the images. *See Bahr*, 788 N.W.2d at 80. Instead, the question remains as to who holds the authority to permit use of the images, and appellant does not indicate that he has that authority.

But even if we assume that appellant has a property interest in the images, appellant is unable to satisfy the second element of conversion, which requires "serious"

interference or deprivation of the property interest. *See Herrmann v. Fossum*, 270 N.W.2d 18, 21 (Minn. 1978) (relying on Restatement (Second) of Torts § 222A(1) (1965) for the definition of conversion). Appellant states in his complaint that respondent "posted [appellant's] private childhood images online" and that respondent's "unauthorized use" of such images constitute conversion. But these statements do not indicate that respondent deprived appellant of his property right in the images, or that his interference was serious. We are unable to reasonably infer the same. Thus, the district court did not err by dismissing appellant's conversion claim.

D. Trespass

Appellant alleges that respondent committed trespass.[3] "A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 217 (1965). Dispossessing includes taking the chattel from the person in possession without his consent, obtaining possession of the chattel by fraud or duress, "barring the possessor's access to the chattel," or destroying the chattel while it is in another's possession. *Id.* § 221 (1965). "Intermeddling" means intentionally coming into physical contact with the chattel. *Id.* § 217 cmt. e (1965). Liability arises if the defendant dispossesses the possessor of the chattel, impairs its condition, quality, or value, or deprives the possessor of the chattel's use for a substantial period of time. *Id.*

[3] While this claim is referred to as a "trespass to property" in appellant's complaint, we assume that appellant meant to claim a trespass to chattels, rather than any interference with real property.

§ 218 (1965); *see also Herrmann*, 270 N.W.2d at 20–21 (relying on Restatement (Second) of Torts § 222 (1965) to define liability for dispossession).

For the same reasons that appellant's complaint is deficient in pleading a cause of action for conversion, appellant's trespass claim fails. Again, it is unclear from the face of the complaint whether appellant had a right to possess the photographic images. Nothing in the complaint indicates that respondent took the images without appellant's consent, obtained them by fraud or duress, barred appellant's access to his images, or physically had contact with the images. And nothing in the complaint indicates that respondent dispossessed appellant of the images, impaired their condition, or deprived him of their use. The district court did not err by dismissing appellant's trespass claim.

E. Invasion of privacy

Appellant alleges in his complaint that respondent's conduct constituted an unlawful invasion of privacy. But appellant does not specify which of his privacy rights were violated. *See Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (noting that Minnesota recognizes three theories of invasion of privacy: intrusion upon seclusion, appropriation, and publication of private facts). Again, this failure, alone, violates the pleading requirements of Minn. R. Civ. P. 8.01. *See Mumm*, 708 N.W.2d at 481. But even if he did plead invasion of privacy under any of the recognized theories, appellant's complaint is deficient.

1. Intrusion upon seclusion

Intrusion upon seclusion has "three elements: (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, 744–45 (Minn. App. 2001). An intrusion is an "intentional interference with [a person's] interest in solitude or seclusion." Restatement (Second) of Torts § 652B cmt. a (1977). An intrusion may be accomplished in a variety of ways, including by "physical intrusion" into a physical space; through a "defendant's senses, with or without mechanical aids, to oversee or overhear [a person's] private affairs"; or by investigating a person's private affairs, such as "opening [a person's] private and personal mail, searching [a] safe or [a] wallet, [or] examining a private bank account." *Id.* § 625B cmt. b (1977).

The facts in the complaint fail to indicate any semblance of an intrusion—be it physical, sensory, or investigatory—by respondent into appellant's affairs. Thus, it is impossible to examine the remaining elements of the tort. The district court did not err by determining that this theory did not apply.

2. Appropriation

An appropriation occurs "when one 'appropriates to his own use or benefit the name or likeness of another.'" *Lake*, 582 N.W.2d at 233 (quoting Restatement (Second) of Torts § 652C (1977)). Liability exists if the defendant "appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness." Restatement (Second) of Torts § 652C cmt. c (1977). But the Restatement carefully limits the application of the tort:

> The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or

> other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.

Id. 652C cmt. d (1977). Appellant claims that respondent's appropriation of his image caused appellant to experience a "decreased quality of . . . life" and other unspecified "injuries." But nothing in appellant's complaint indicates that respondent was conferred a benefit, either commercially or otherwise, by doing so. The district court did not err by dismissing this claim.

3. Publication of private facts

A claim for publication of private facts requires the plaintiff to demonstrate that the defendant gave "publicity to a matter concerning the private life of another if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Bodah*, 663 N.W.2d at 553 (quotation and alteration omitted). To prove "publicity" for purposes of this tort, the defendant must have either made "a single communication to the public" or communicated information to so many individuals "that the information is deemed to have been communicated to the public." *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 42 (Minn. App. 2009).

In his complaint, appellant alleges that respondent posted his "private childhood images online for public viewing," identified appellant with "public tags," maintained appellant's name on the website, and made "many false statements" against appellant.

Even though appellant fails to identify the website on which respondent posted his images, and neglects to indicate that individuals actually visit respondent's website, we can reasonably infer that respondent made at least a single communication to the public of appellant's photographic image.

But nothing in the complaint indicates that the publicity was highly offensive to a reasonable person. The Restatement instructs that "[i]t is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it that the cause of action arises." Restatement (Second) of Torts § 652D cmt. c (1977). "Reasonable" means fair, proper, or moderate. *Black's Law Dictionary* 1379 (9th ed. 2009); *id.* at 1380 (including in the definition of "reasonable person" one "whose notions and standards of behavior and responsibility correspond with those generally obtained among ordinary people in our society at the present time" (quotation omitted)). The only description of the images is that they were "private," involved appellant's "childhood," and publicized in an "offensive manner." These statements are merely labels and legal conclusions and are not binding on our analysis. *See Bahr*, 788 N.W.2d at 80. We are unable to reasonably infer from the face of the complaint that a reasonable, fair, proper, or moderate person in our society would be offended by the disclosure of the images. We do not have a description or copy of the images. And nothing in the complaint indicates that respondent intruded into a private place where appellant maintains his private affairs. Moreover, nothing in the complaint indicates that the images are not of legitimate concern to the public.

Appellant argues that the district court erred by requiring him to plead that publication of the images was "offensive" to a reasonable person. Instead, he claims that the complaint "strongly infer[s]" that publication was offensive. It is evident that respondent's conduct was highly offensive to appellant. But the tort requires that publication be "highly offensive to a *reasonable* person." *Bodah*, 663 N.W.2d at 553 (emphasis added). This court's function on appeal is to identify and correct errors. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). It is not within this court's authority to change the law. *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). That authority falls to the legislature or the Minnesota Supreme Court. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). For all of these reasons, the district court did not err by dismissing this claim.

F. Civil assault

Appellant's complaint alleges that respondent's online conduct constituted civil assault. A civil assault is an (1) unlawful threat of bodily harm to another (2) with the present ability to effectuate the threat. *Dahlin v. Fraser*, 206 Minn. 476, 478, 288 N.W. 851, 852 (1939). "Mere words or threats alone do not constitute assault[,]" rather, "[w]hen the words or threats are accompanied by a threat of physical violence under conditions indicating present ability to carry out the threat, they cease to be mere words or threats." *Id.*; *see also Elwood v. Cnty. of Rice*, 423 N.W.2d 671, 679 (Minn. 1988) ("[W]ords alone do not constitute [civil] assault."). Instead, a civil-assault claim requires

a display of force causing "reasonable apprehension of immediate bodily harm." *Dahlin*, 206 Minn. at 478, 288 N.W. at 852.

Appellant's complaint states that respondent "began an obscene and threatening tirade online against [him] that spanned roughly six months." Appellant further states that this tirade constituted civil assault. Nothing in appellant's complaint indicates a threat of bodily harm, immediate harm, or respondent's present capability to commit harm. And because the complaint does not contain the threats, it is impossible to examine whether appellant's apprehension is reasonable.

Appellant argues that the district court erred by requiring "imminence" to relate to physical proximity in his civil-assault claim. But this is an essential element of the tort. Because appellant has not pled such facts as would satisfy this requirement, appellant's complaint cannot survive a rule 12 motion. *See Elwood*, 423 N.W.2d at 679; *Dahlin*, 206 Minn. at 478, 288 N.W. at 852. The district court did not err by dismissing appellant's civil-assault claim.

II.

Appellant also challenges the district court's decision to dismiss his copyright-infringement, conversion, trespass, and invasion-of-privacy claims with prejudice.[4] A district court has discretion to dismiss a complaint for failure to state a claim upon which relief may be granted with or without prejudice. *See Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999) (holding that district court's dismissal for failure to state a

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[4] The district court also dismissed appellant's constitutional and civil-assault claims with prejudice, but appellant does not challenge those aspects of the order.

claim without prejudice was not an abuse of discretion). We will sustain a district court's determination to dismiss with prejudice absent a showing of clear abuse viewing the record in the light most favorable to the district court's order. *Zuleski v. Pipella*, 309 Minn. 585, 586, 245 N.W.2d 586, 587 (1976). Thus, we evaluate a district court's dismissal with prejudice under an abuse-of-discretion standard. *Wessin*, 592 N.W.2d at 467; *Minn. Humane Soc'y v. Minn. Federated Humane Soc'ys*, 611 N.W.2d 587, 590 (Minn. App. 2000).

A. Copyright infringement

Appellant requests this court to overturn the decision to dismiss his intellectual-property or copyright-infringement claim with prejudice. But the order indicates that the copyright-infringement claim was dismissed *without* prejudice. And the district court explicitly stated that "[a] dismissal for lack of subject matter jurisdiction does not operate as an adjudication on the merits of the claim." *See* Minn. R. Civ. P. 41.02(c) (specifying that a dismissal does not operate as an adjudication on the merits if the district court dismisses for lack of jurisdiction). Thus, no adjudication of appellant's copyright claims occurred that would preclude appellant from litigating those claims in federal court if he desires.

B. Other claims

Appellant argues that the district court overstepped its authority by dismissing his conversion, trespass, and invasion-of-privacy claims with prejudice. Dismissals of claims with prejudice pursuant to a rule 12 motion have been specifically directed by our supreme court for claims that fell "far short of the established [pleading] requirements."

Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 748 (Minn. 2000). In *Martens*, the supreme court held that "respondents' complaint should be dismissed with prejudice and on the merits pursuant to appellant's Rule 12.02(e) motion for failure to state a claim upon which relief can be granted" and remanded "to the district court for entry of an order of dismissal as to all counts of the complaint, with prejudice." *Id.* In this case, because appellant failed to state a conversion, trespass, and invasion-of-privacy claim upon which relief could be granted, the district court did not err in concluding that the dismissal of such claims was with prejudice. Moreover, the Minnesota Rules of Civil Procedure provide that dismissals not included in rules 41.01 and 41.02 operate as adjudications upon the merits unless the court specifies otherwise. Minn. R. Civ. P. 41.02(c). Because a dismissal for failure to state a claim is not a dismissal included in rules 41.01 or 41.02, such dismissal is with prejudice unless otherwise stated. *Royal Realty Co. v. Levin*, 243 Minn. 30, 31–32, 66 N.W.2d 5, 6 (1954); *see also Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967) (stating that a dismissal with prejudice operates as an adjudication upon the merits).

Appellant next contends that the dismissal of his claims with prejudice violates his constitutional due-process rights. The United States and Minnesota Constitutions protect an individual's right to due process of law. U.S. Const. amends. V, XIV, § 1; Minn. Const. art. I, § 7. The due-process protections under both constitutions are the same. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). It is unclear whether appellant asserts a procedural or substantive due-process violation, but an argument under either theory fails.

Substantive due process protects an individual from arbitrary and wrongful government action regardless of the fairness of the procedures for implementation. *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999). Appellant does not allege that the judge, Anoka County, or any other government entity acted arbitrarily or wrongfully during the litigation of his case, and nothing in the record indicates anything but fair treatment of appellant by the state. The district court issued a thoughtful analysis of appellant's claims prior to dismissing them with prejudice.

Procedural due process requires notice and a meaningful opportunity to be heard before a fair and impartial decision-maker. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950); *Sisson v. Triplett*, 428 N.W.2d 565, 568 (Minn. 1988). The district court provided appellant with an opportunity to submit a brief in opposition to respondent's motion to dismiss and held a hearing on the motion, which appellant attended. Thus, appellant has been afforded constitutionally required notice and an opportunity to be heard.

Appellant finally argues that the conversion, trespass, and invasion-of-privacy claims should be litigated in federal court. Appellant cites no legal authority that this court may overturn the district court's ruling on this basis. *See Ganguli*, 512 N.W.2d at 919 n.1.

In sum, the district court did not err by dismissing appellant's complaint pursuant to Minn. R. Civ. P. 12.02(e). Appellant failed to plead sufficient facts for any of his claims such that he would be entitled to relief. The district court also properly exercised its discretion by dismissing appellant's conversion, trespass, and invasion-of-privacy

claims with prejudice. After our thorough review of the record, we find no error by the district court in this matter.

Affirmed.