STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2058

Aaron Goings,
Plaintiff,

Korey Sufka,
Appellant,

vs.

R. C. of St. Cloud, Inc. d/b/a The Red Carpet Nightclub,
Respondent,

Rick Gaetz, as Owner of the Red Carpet Nightclub,
Respondent.

Filed May 31, 2011
Affirmed and remanded
Connolly, Judge

Stearns County District Court
File No. 73-CV-09-11371

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

Michael T. Feichtinger, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondent R.C. of St. Cloud, Inc.)

Frank J. Rajkowski, Jessie L. Becker, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondents)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the summary judgment granted to respondents, a bar and the bar's owner, in this personal-injury action, arguing that genuine issues of material fact exist as to whether, at the time of an altercation, the bartender was acting within the scope of his employment and that the district court erred by failing to address whether the bouncers were acting within the scope of their employment. Because appellant does not identify any issues of material fact or argue that the district court erred in determining that the bartender was acting outside the scope of his employment as a matter of law, we affirm in part. But, because the record reflects that respondents did not move for summary judgment on appellant's claims regarding the bouncers, we remand in part.

FACTS

Respondent Rick Gaetz is the sole shareholder and CEO of respondent R. C. of St. Cloud, Inc. d/b/a The Red Carpet Nightclub (The Red Carpet). This appeal arises out of a suit brought by appellant Korey Sufka and plaintiff Aaron Goings[1] who, on different occasions, allegedly suffered injuries following altercations at The Red Carpet.

On April 13, 2003, appellant and some friends visited local bars in downtown St. Cloud. At The Red Carpet, they decided to stay on the main floor. Appellant sat on a bar stool at a tall round table near the front door. Two bouncers were working at that door and periodically engaged appellant in conversation. While watching his friends dance, appellant was approached by Michael Illig, an off-duty bartender at The Red

[1] Goings does not participate in this appeal.

Carpet. Illig screamed at appellant, picked him up, and slammed his head into the front door with enough force to open the door. Appellant could feel the bouncers and Illig pushing him out the door. Appellant received two cuts on his face, causing his face to bleed. He approached a nearby police officer working on an unrelated case and told the officer that he had just been assaulted by a man at The Red Carpet. The officer called an ambulance but, when it arrived, appellant refused medical treatment and transported himself to the hospital. A year or so later, Illig apologized to appellant and said that, at the time of the altercation, he believed appellant was having sexual relations with Illig's ex-girlfriend.

Appellant subsequently sued respondents on theories of negligence and vicarious liability, alleging, among other things, that (1) respondents "employed various 'security' personnel, bouncers, and others to maintain order at [The Red Carpet]"; (2) respondents "owed a special duty to their patrons and employees to exercise reasonable care to protect them from assault by other patrons or other employees whom [respondents] permitted to frequent [The Red Carpet]; (3) appellant "had a right to rely on the belief that [he was] in an orderly house, and that its operator, personally or by delegated employees, would exercise reasonable care to ensure the house [would] be orderly"; (4) respondents "had an adequate opportunity to protect [appellant] from being harmed by the bouncers premised on the fact that they were employees"; and (5) respondents "negligently failed to take reasonable steps to protect . . . [appellant] from the foreseeable harm of injuries from the actions of [The Red Carpet's] bouncers." Respondents moved for summary judgment, arguing that Illig was not acting within the scope of his employment at the time of the

assault.[2] The district court granted respondents' motion, concluding that no genuine issue of material fact exists as to whether Illig was acting within the scope of his employment, that Illig was acting outside the scope of his employment as a matter of law, and that respondents were not vicariously liable for appellant's injuries. Appellant challenges the summary judgment; respondents challenge the adequacy of the record on appeal.

D E C I S I O N

A party is entitled to summary judgment "if 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 the entry of summary judgment, we review de novo whether a genuine issue of material fact exists 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, 76-77 (Minn. 2002). In doing so, we "view 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).

Appellant argues that (1) genuine issues of material fact exist as to whether Illig was acting within the scope of his employment and (2) the district court erred by failing to consider whether genuine issues of material fact exist regarding the participation of respondents' bouncers in the altercation. We address each argument in turn.

[2] Respondents moved to dismiss respondent Gaetz and sever the claims of appellant and plaintiff. The district court granted the motion to dismiss and denied the motion to sever as moot. These rulings are not challenged on appeal.

A. Illig

"An employer is liable for the negligent acts of its employee committed in the course and scope of employment." *Hentges v. Thomford*, 569 N.W.2d 424, 427 (Minn. App. 1997), *review denied* (Minn. Dec. 8, 1997).[3] Whether the employee's negligent conduct was committed within the scope of his employment is generally a fact question for the jury, "but when the evidence is conclusive on all the elements or there is no evidence to support a necessary element, there is no fact issue, and the scope of employment is determined as a matter of law." *Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 745 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000). In determining whether the employee's negligent conduct occurred within the scope of his employment, factors to consider "include whether (1) the conduct was to some degree in furtherance of the employer's interests, (2) the employee was authorized to perform the type of conduct, (3) the conduct occurred substantially within authorized time and space restrictions, and (4) the employer should reasonably have foreseen the conduct." *Id.* The question of whether the negligent conduct furthered the employer's interest is of central importance, and "requires only that the conduct must be brought about at least in part by a desire of the employee to serve the employer or that the conduct is to some degree in

[3] Respondents moved to amend their answer to assert a statute-of-limitations defense, arguing that appellant was actually asserting claims for assault and battery, rather than negligence and vicarious liability, and that these claims were time-barred. The district court denied the motion, concluding that appellant's claims sounded in negligence. This ruling was not appealed. Therefore, we apply the four-part, scope-of-employment test for negligent acts. *See Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 47 (Minn. App. 2009) (distinguishing between the scope-of-employment tests used for negligent acts and for intentional conduct).

furtherance of the interests of the employer." *Hentges*, 569 N.W.2d at 428 (quotation omitted).

The district court concluded that there were no issues of material fact and determined that Illig was acting outside the scope of his employment as a matter of law because (1) the incident in no way furthered the interests of respondents, (2) there was no evidence showing that Illig was authorized to physically confront or remove customers, (3) Illig was not on duty at the time the incident occurred, and (4) there was no evidence showing that it was foreseeable that Illig would have a physical altercation with a customer of his employer at his place of employment while he was off duty.

Appellant does not identify any issues of material fact, challenge the district court's conclusions, or present any argument that the district court erred in concluding that Illig was acting outside the scope of his employment as a matter of law. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted). We therefore affirm the summary judgment as to the alleged negligence of Illig. *See Snilsberg*, 614 N.W.2d at 745 (holding employer was not vicariously liable for employee's acts when acts were personal in nature, there was no credible basis to believe that acts furthered employer's interests, and employee was not then working).

B. The bouncers

We agree with appellant that the district court did not address the alleged participation of respondents' bouncers, but we also note that respondents' motion and memorandum of law addressed only Illig. Although respondents' reply memorandum contained some discussion regarding the bouncers, our review is generally confined to "those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because the claims regarding respondents' bouncers were not squarely before the district court, we remand this case to allow appellant to continue litigating these claims. We express no opinion on their merits.

C. Adequacy of the record

Appellant, who bears the burden of providing an adequate record, did not provide a hearing transcript. *See Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 334 (Minn. App. 2007) (where the absence of a transcript renders the record insufficient for appellant review, the appeal may be dismissed). Respondents argue that the record presented on appeal includes only the documents in appellant's addendum and appendix. They contend that because appellant's argument is purportedly substantiated by his deposition testimony, the police report, and the statements made at the hearing, appellant's failure to provide these documents and a transcript of the hearing makes meaningful appellate review impossible.

"The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ.

App. P. 110.01; *see also* Minn. R. Civ. App. P. 111.01 (stating "the trial court administrator shall transmit the record to the clerk of the appellate courts"). As part of their principal brief, appellants are required to file an addendum containing "(1) a copy of any order, judgment, findings, or trial court memorandum in the action directly relating to or affecting issues on appeal; and (2) short excerpts from the record, other than from the transcript of testimony, that would be helpful in reading the brief without immediate reference to the appendix." Minn. R. Civ. App. P. 128.02, subd. 3(a). Appellants are also required to file an appendix containing relevant pleadings, motions, orders, verdicts, memorandum opinions, transcript excerpts, judgments, and the notice of appeal. Minn. R. Civ. App. P. 130.01, subd. 1. "The record *shall not* be printed" and "[t]he parties shall have regard for the fact that the entire record is always available to the appellate court for reference or examination and shall not engage in unnecessary reproduction." *Id.* (emphasis added). The deposition transcript and police report referred to by respondents are available to this court because they were filed by respondents in the district court. In sum, the record is not inadequate merely because appellant did not duplicate and append the *entire* record to his brief. *See* Minn. R. Civ. App. P. 130.01, subd. 1.

Affirmed and remanded.