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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1085**

Bethany Good,
Appellant,

vs.

John Doe,
Defendant,

Paul Christy,
Respondent.

**Filed March 6, 2017
Affirmed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CV-15-12027

Katie J. Christiansen, Michael J. Brose, Doar, Drill & Skow, S.C., New Richmond,
Wisconsin (for appellant)

Tania K. Lex, Godfrey & Fox, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Bethany Good appeals from the entry of judgment, arguing that the district court erred by (1) refusing to consider Michael Christy's statement in reaching its

summary-judgment decision, (2) granting summary judgment in favor of respondent Paul Christy, and (3) refusing to permit her to file a motion to reconsider. Because we conclude that the district court did not err, we affirm.

FACTS

On November 22, 2008, Good drove her vehicle near the Mall of America in Bloomington. She slowed for traffic and was rear-ended by a vehicle. On November 21, 2014, Good provided a summons and complaint to the Hennepin County Sheriff for service on Paul Christy. In her complaint, Good alleged that John Doe, a person then unknown to her, drove negligently and rear-ended her vehicle in 2008. She also alleged that Paul Christy was vicariously liable for John Doe's negligence, because he owned the vehicle involved in the collision and permitted John Doe to drive it.

Paul Christy has consistently denied that he owned the vehicle involved in the 2008 collision at the time the accident occurred. In the answer to Good's complaint, Paul Christy denied that he owned the vehicle involved in the collision. In his response to Good's interrogatories, Paul Christy stated that, to the best of his knowledge, he did not own any vehicle involved in the collision and believed that his son, Michael Christy, may have been the driver and owner of the vehicle allegedly involved in the accident.

On January 22, 2016, Paul Christy moved for summary judgment and filed a memorandum supporting his motion. In his memorandum, Paul Christy asserted that, to the best of his knowledge, Michael Christy was potentially involved in the accident and was driving a vehicle that he owned exclusively. Paul Christy argued that Good failed to raise a genuine issue of material fact as to an essential element of her vicarious liability

claim, because she did not produce sufficient evidence to show that Paul Christy owned the vehicle involved in the 2008 collision. In support of his motion, Paul Christy attached a number of exhibits. Among them was a document listing Michael Christy as the owner of a particular white 1993 “Cadi.” However, the document failed to show the date on which Michael Christy gained title to the vehicle.

In February 2016, Paul Christy was deposed and testified as follows. He believed that a white 1993 Cadillac DeVille was involved in the 2008 collision. He owned a green 1994 Cadillac Concours and transferred the 1993 Cadillac to his son, Michael Christy. To the best of his recollection, the 1993 Cadillac was transferred to Michael Christy before November 22, 2008, but he “can’t say for sure.” The 1993 Cadillac was junked shortly after the incident.

On February 16, 2016, Good filed a memorandum in opposition to Paul Christy’s summary-judgment motion, arguing that there remained material fact questions as to which vehicle was involved in the collision and who owned the vehicle. She argued that Paul Christy’s assertion that the white 1993 Cadillac was involved in the collision conflicted with evidence showing that the green 1994 Cadillac was involved. Good attached several exhibits to her memorandum, including a statement that Michael Christy gave to Paul Christy’s insurance company in September 2010 and an InstaVIN report. In his September 2010 statement, Michael Christy stated that a 1994 Cadillac owned by his father was involved in the 2008 accident. The InstaVIN report disclaimed InstaVIN’s responsibility for errors in the report and explained that InstaVIN’s reports rely on third-party data suppliers and other sources. The report showed that a 1993 Cadillac with a VIN matching

that of the Cadillac that Michael Christy purportedly owned was junked on July 10, 2008. Good argued that even if Michael Christy owned the 1993 Cadillac on November 22, 2008, this could not have been the vehicle involved in the collision, because it had earlier been destroyed and was incapable of being driven. Good asserted that summary judgment was inappropriate because disputed issues of material fact remained as to whether the 1994 Cadillac owned by Paul Christy was involved in the accident. Good additionally argued that, even if the 1993 Cadillac was involved in the collision, there remained disputed issues of material fact as to whether Paul Christy owned the 1993 Cadillac at the time of the accident.

On May 9, 2016, the district court granted summary judgment in favor of Paul Christy. Good now argues that the district court erred by refusing to consider Michael Christy's statement in reaching its summary-judgment decision, by granting Paul Christy's motion for summary judgment, and by refusing to allow her to file a motion to reconsider.

D E C I S I O N

I. Admissibility of Statement

The district court concluded that Good could not rely on Michael Christy's unsworn statement to avoid summary judgment because it is inadmissible hearsay. Good argues that the statement is admissible and that the district court erred by refusing to consider it. Paul Christy argues that the district court properly excluded the statement as hearsay not subject to any exception. He also asserts that the statement is inadmissible because it was unsworn and lacked foundation to establish its reliability.

Appellate courts review evidentiary rulings on hearsay statements for clear abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 469 (Minn. 2009); *Citizens for a Safe Grant v. Loan Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 808 (Minn. App. 2001). “Appellant bears the burden of demonstrating that an improper evidentiary ruling caused prejudicial error.” *Citizens for a Safe Grant*, 624 N.W.2d at 808. An evidentiary error is prejudicial if it might reasonably have changed the result of the trial. *Id.*

The rules of evidence provide that the court shall determine preliminary questions concerning the admissibility of evidence. Minn. R. Evid. 104(a). In making its determination, the court “is not bound by the rules of evidence except those with respect to privileges.” *Id.* The Minnesota Supreme Court has held “that the preponderance of the evidence standard applies to preliminary questions concerning the admissibility of evidence.” *In re Source Code Evidentiary Hearings*, 816 N.W.2d 525, 539 (Minn. 2012). This standard requires a court to determine that it is more probable that a fact exists than that the contrary exists, and thereby ensures that a court will have found it more likely than not that the technical issues and policy concerns addressed by the rules of evidence have been afforded due consideration before evidence is admitted. *Id.* at 538-39.

A. *Statement by a Party-opponent*

Good argues that Michael Christy’s statement is admissible as a statement by a party-opponent under Minnesota Rule of Evidence 801(d). Under this rule,

A statement is not hearsay if . . . [it] is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of agency or employment, made during the existence of

the relationship, or (E) a statement by a coconspirator of the party.

Minn. R. Evid. 801(d)(2). Good notes that rule 801(d) excludes from hearsay a statement offered against a party if the statement is by the party's coconspirator or a person authorized to make a statement concerning the subject. However, Good presented little argument or evidence to show that Michael Christy was Paul Christy's coconspirator or was authorized by Paul Christy to make a statement concerning the 2008 collision. The district court did not abuse its discretion by refusing to admit Michael Christy's statement as a statement by a coconspirator or authorized person of a party-opponent.

Good additionally asserts that Michael Christy's statement is admissible, because Michael Christy was Paul Christy's agent. Michael Christy's statement is admissible as a statement by a party-opponent's agent only if: (1) Michael Christy was Paul Christy's agent; (2) Michael Christy's statement concerns a matter within the scope of his agency; and (3) Michael Christy's statement was made during the existence of the agency relationship. Minn. R. Evid. 801(d)(2)(D). Good argues that Michael Christy was Paul Christy's agent under Minn. Stat. § 169.09, subd. 5a (2016), which provides that any person other than the owner of a vehicle will be deemed an agent of the owner in the case of an accident if such person operates the vehicle with the consent of the owner.

Good concedes that "if Paul Christy did not own the vehicle at the time of the accident, the statement may not be admissible against Paul as a party admission." However, she argues that the district court should have considered Michael Christy's statement, because it was required to resolve the fact dispute as to ownership in her favor

at the summary-judgment stage. Good fails to differentiate between the district court's ruling on the admissibility of evidence and its ruling on the summary-judgment motion.

A district court is required to construe the evidence in the light most favorable to the party opposing summary judgment when determining whether there is a genuine issue of material fact. *J.E.B. v. Danks*, 785 N.W.2d 741, 747 (Minn. 2010). However, a district court applies a preponderance of the evidence standard when determining preliminary questions regarding evidence admissibility. *In re Source Code*, 816 N.W.2d at 539. To determine whether Michael Christy's statement was admissible as a statement made by the agent of a party-opponent, the district court was required to determine whether Paul Christy owned the car involved in the 2008 collision at the time of the accident. In doing so, the court was permitted to consider Michael Christy's statement. See Minn. R. Evid. 104(a) (providing that a court is not bound by the rules of evidence except those with respect to privileges when determining preliminary questions concerning evidence admissibility).

When the district court was considering the summary-judgment motion, the record contained the following evidence related to the ownership of the vehicle involved in the collision: (1) Paul Christy's response to interrogatories, stating that Michael Christy may have been the driver and owner of the vehicle allegedly involved in the collision; (2) Paul Christy's deposition testimony, stating that, to the best of his recollection, the 1993 Cadillac was transferred to Michael Christy before November 22, 2008, but he "can't say for sure"; (3) a driver and vehicle services record indicating that the 1993 Cadillac was owned by Michael Christy at some point; (4) Michael Christy's 2010 unsworn statement, in which he stated that the vehicle involved was a 1994 Cadillac owned by Paul Christy;

and (5) an InstaVIN report, stating that the 1993 Cadillac was junked on July 10, 2008, but not identifying the owner.

After reviewing the evidence, we cannot say that the district court abused its discretion by concluding that Good failed to show by a preponderance of the evidence that Paul Christy owned the vehicle involved in the collision when the accident occurred. For this reason, the district court did not commit an abuse of discretion by refusing to admit Michael Christy's statement as a statement by an agent of a party-opponent.

B. Recorded Recollection

Good next argues that Michael Christy's statement is admissible as a recorded recollection. The recorded-recollection exception provides that a record may be read into evidence if it: (1) concerns a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately; (2) was shown to have been made or adopted by the witness when the matter was fresh in the witness's memory; and (3) was shown to reflect that knowledge correctly. Minn. R. Evid. 803(5). Good admits that "a recorded recollection would not be admissible without first obtaining the testimony of Michael Christy," but argues that Michael Christy's deposition testimony authenticates his 2010 statement as a recorded recollection. However, Michael Christy's deposition testimony was obtained after the summary-judgment hearing and only three days before the district court's grant of summary judgment.

Even if we consider Michael Christy's deposition testimony, we cannot say that the district court abused its discretion by refusing to admit his statement as a recorded recollection. Because the statement was made in September 2010, nearly two years after

the collision occurred, the matter discussed was not then fresh in Michael Christy's mind. It is also unclear whether Michael Christy would be unable to testify from his present recollection. Michael Christy testified in his deposition that he could "remember that day of the incident with her clear as day" and that his memory was just as good at his deposition as when he made his 2010 statement. For these reasons, the district court did not abuse its discretion by refusing to admit Michael Christy's statement as a recorded recollection.

C. Record of a Regularly Conducted Business Activity

Good also argues that Michael Christy's statement is admissible as a record of a regularly conducted business activity. A record is not hearsay if: (1) the record is made at or near the time by a person with knowledge or from information transmitted by a person with knowledge; (2) the record is kept in the course of a regularly conducted business activity; and (3) it was the regular practice of that business activity to make the record. Minn. R. Evid. 803(6). Because Michael Christy's statement was made nearly two years after the collision, it was not made at or near the time of the event. For this reason, the district court did not abuse its discretion by refusing to admit the statement as a record of a regularly conducted business activity.

D. Prior Inconsistent Statement

Finally, Good argues that Michael Christy's statement would have been admissible at trial as a prior inconsistent statement. An appellate court need not address issues omitted from an appellant's principal brief. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010). Because Good failed to argue that Michael Christy's statement was admissible as a prior inconsistent statement in her principal brief, we are not compelled to

address the issue. Even if we were to decide this issue on the merits, we would reject Good's argument. "A statement not given under oath is not admissible substantively, but may be admitted under Rule 607 for impeachment purposes." *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999); see Minn. R. Evid. 801(d)(1)(A) (requiring the prior inconsistent statement of a witness to be made under oath to be excluded from the hearsay rule). Because Michael Christy's statement was unsworn, it is clearly inadmissible for substantive purposes.

Good argues that the statement would nonetheless have been admissible at trial. She asserts that Michael Christy would have been called to testify at trial and would have either testified consistently or inconsistently with his 2010 statement. If he testified consistently with his 2010 statement, that testimony would constitute admissible evidence that a 1994 Cadillac owned by his father was involved in the accident. If he testified inconsistently with his 2010 statement, the statement would be admissible for the purpose of impeachment. Using this logic, any unsworn statement by a witness would necessarily be admissible, because the witness could be called at trial and would either testify consistently or inconsistently with his or her prior statement. Because such a result does not accord with our evidentiary rules, we are unpersuaded by Good's argument.

E. Conclusion

The district court did not abuse its discretion by holding that Michael Christy's statement was inadmissible hearsay. "When deciding any summary-judgment motion, the district court must disregard hearsay evidence that would be inadmissible at trial." *In re Trusts A & B of Divine*, 672 N.W.2d 912, 921 (Minn. App. 2004). The court properly held

that Good could not rely on Michael Christy's statement to avoid summary judgment. Because we conclude that the statement was inadmissible hearsay, we do not reach Paul Christy's arguments that the statement is inadmissible because it was unsworn and because it lacked foundation to establish its reliability.

II. Summary Judgment

Appellate courts review a district court's summary-judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In our review, we must "determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). In this review, we "must 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).

A. Genuine Issue of Material Fact

To avoid summary judgment, a party must show more than "some metaphysical doubt as to a factual issue." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Where a "movant has supported the [summary-judgment] motion, . . . the opponent must show that a material issue of fact remains in dispute by presenting specific *admissible facts* giving rise to a factual question." *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985) (emphasis added). The opponent may not rely on general statements contained in the pleadings or upon surmise or speculation as to what could be produced at trial. Minn. R. Civ. P. 56.05; *Bixler*, 376 N.W.2d at 215. Rather, the opponent must point to specific facts from which the factfinder might return a verdict in

that party's favor. Minn. R. Civ. P. 56.05; *Sackett v. Storm*, 480 N.W.2d 377, 379 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992).

The district court determined that Good would ultimately be required to prove that Paul Christy owned the vehicle involved in the 2008 accident as an element of her claim and concluded that Good failed to establish a genuine issue of material fact as to whether Paul Christy owned the vehicle. As a result, the court granted summary judgment in favor of Paul Christy. Good asserts that the grant of summary judgment was erroneous, because there were genuine issues of material fact as to which vehicle was involved in the accident and who owned the vehicle.

“A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Good alleged that Paul Christy, as the owner of the vehicle involved in the 2008 collision, was vicariously liable for the negligent conduct of the person who drove that vehicle. In her memorandum opposing summary judgment, Good supported her claim of vicarious liability by citing Minn. Stat. § 169.09, subd. 5a. This subdivision provides that “[w]hensoever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in operation thereof.” Minn. Stat. § 169.09, subd. 5a. The district court correctly determined that Good was required to prove that Paul Christy owned the vehicle involved in the collision at the time the accident occurred and that summary

judgment was appropriate if the record reflected a complete lack of proof that Paul Christy owned the vehicle at the time of the accident.

The district court properly held that Good could not rely on Michael Christy's statement to defeat the summary-judgment motion. Good argues that even without Michael Christy's statement, issues of material fact were raised by Paul Christy's answers to interrogatories and deposition.

By interrogatory, Good asked Paul Christy to state whether there were any insurance policies that might afford coverage to him with respect to her cause of action. Paul Christy provided a policy number issued by Illinois Farmers Insurance Company. Good argues that this insurance policy covered the green 1994 Cadillac and that Paul Christy impliedly disclosed that the 1994 Cadillac was involved in the 2008 collision. Good's interrogatories did not identify the relevant vehicle, but rather referred to it as "the vehicle involved in the incident." Because it is unclear from the record whether this policy provides coverage for the 1994 Cadillac, Paul Christy's answers to Good's interrogatories do not show that the 1994 Cadillac was involved in the collision or that Paul Christy owned the vehicle involved in the collision.

Good next argues that Paul Christy conceded in his deposition that he could not be sure if he still owned the 1993 Cadillac when the 2008 collision occurred. Good correctly notes that Paul Christy could not recall the exact date on which he transferred title of the 1993 Cadillac to Michael Christy. However, Paul Christy testified that, to the best of his recollection, the title was transferred before November 22, 2008, the date of the collision.

Paul Christy's deposition testimony does not show that Paul Christy owned the vehicle involved in the collision at the time of the accident.

From this record,¹ we conclude that Paul Christy was entitled to summary judgment. Good merely raised a metaphysical doubt as to whether Paul Christy owned the vehicle involved in the collision at the time of the accident. Because a party must show more than some metaphysical doubt as to a factual issue to avoid summary judgment, the district court properly held that Good failed to raise an issue of material fact as to whether Paul Christy owned the vehicle.

B. Application of Law

In its order granting summary judgment, the district court stated that “[n]either side has presented uncontroverted evidence of who owned the car at the time of the accident.” Good argues that this statement shows that the district court applied an erroneous standard. To avoid summary judgment, Good was not required to present uncontroverted evidence that Paul Christy owned the vehicle involved in the collision at the time of the accident. Rather, she was required to present sufficient admissible evidence to raise an issue of material fact as to whether Paul Christy owned the vehicle. *See Bixler*, 376 N.W.2d at 215 (explaining that a party opposing summary judgment must present admissible evidence showing that a material factual dispute remains). Considered in the context of the entire

¹ The record also included an InstaVIN report that purportedly showed that the 1993 Cadillac was junked on July 10, 2008. The district court determined that this report, by its own warning, was questionable and concluded that it was inadmissible. Because Good does not challenge the exclusion of the InstaVIN report, we do not consider it in our summary-judgment analysis. *See Bixler*, 376 N.W.2d at 215 (providing that a party opposing summary judgment must present admissible facts giving rise to a fact question).

order, the district court's statement means only that neither Good nor Paul Christy could conclusively show who owned the vehicle at the relevant time. While the statement might be confusing when taken out of context, the district court's order, as a whole, shows that the district court properly applied the law. The district court determined that Good could not establish Paul Christy's liability if she could not show that he owned the vehicle involved in the collision at the time of the accident. The court correctly stated that the question to be determined was whether there was a genuine issue of material fact related to whether Paul Christy owned the vehicle. We conclude that the district court did not err in its application of the law.

C. Premature Ruling

Good argues that she was forced to respond to the summary-judgment motion without a complete record and that the district court erred by granting summary judgment when outstanding factual issues remained. We construe this argument as an assertion that the district court awarded summary judgment prematurely because Good should have been permitted to conduct additional discovery. We apply an abuse-of-discretion standard to this issue. *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010).

A party against whom a claim is asserted "may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor." Minn. R. Civ. P. 56.02. A party opposing summary judgment may file an affidavit requesting that the district court deny or continue the motion on the grounds that the non-moving party should be permitted to conduct additional discovery. Minn. R. Civ. P. 56.06; *Molde*, 781 N.W.2d. at 45. "An affidavit filed pursuant to rule 56.06 must be specific about the evidence expected, the

source of the discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” *Molde*, 781 N.W.2d at 45 (quotation omitted). “[F]ailure to submit such an affidavit, by itself, justifies the district court’s decision to rule on the motion without granting relief under 56.06.” *Id.* At the summary-judgment hearing, Good’s counsel argued that the motion was premature, because Good had not yet taken Michael Christy’s deposition. However, Good failed to comply with rule 56.06 by filing an affidavit describing how additional discovery would allow her to submit additional evidence to the district court. For this reason, the district court did not abuse its discretion by ruling on Paul Christy’s summary-judgment motion.

D. Conclusion

Here, Good failed to raise a genuine issue as to the ownership of the vehicle, and the district court properly applied the law. For these reasons, the district court did not err by granting summary judgment in favor of Paul Christy.

III. Motion for Reconsideration

Finally, Good argues that the district court erred by refusing to grant her request to file a motion to reconsider. “Motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances.” Minn. R. Gen. Pract. 115.11. Good argues that this court, in an unpublished opinion, upheld a district court’s grant of a motion to reconsider where the requesting party submitted additional documents and where reconsideration caused no prejudice to the other party. *See Finn v. Walworth State Bank*, No. A11-2334, 2013 WL 6389521, at *8-9 (Minn. App. Dec. 9, 2013), *review denied* (Minn. Feb. 18, 2014).

Unpublished opinions are not precedential, but may be persuasive. Minn. Stat. § 480A.08, subd. 3(c) (2016); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). Because Good fails to recognize the difference between challenging a district court’s decision on a request to file a motion to reconsider and challenging a district court’s ultimate decision on such a motion, her citation to our unpublished opinion is not persuasive.

In *Baker v. Amtrak Nat’l R.R. Passenger Corp.*, this court held that the denial of a request to make a motion to reconsider is not appealable. 588 N.W.2d 749, 755-56 (Minn. App. 1999). We explained that “Minn. R. Civ. App. P. 103.03 permits appeals only from specified judgments and orders”² and determined that the only provision in this rule that was not explicitly inapplicable to the denial of a request “is clause (e), which permits an appeal ‘from an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken.’” *Id.* at 755 (quoting Minn. R. Civ. App. P. 103.03(e)). Because the district court’s denial of the request to bring a motion to reconsider neither determined Baker’s action nor prevented a judgment from which Baker could appeal, we concluded that Baker could not appeal the denial of the request. *Id.*

The district court’s denial of Good’s request to file a motion to reconsider is not appealable. Clause (e) is the only provision in Minn. R. Civ. App. P. 103.03 that is potentially applicable to the denial of Good’s request. Here, the denial of the request neither determined the action nor prevented a judgment from which an appeal might be

² In *Baker*, we declined to deny review simply because the district court responded to the request by letter rather than by order. 588 N.W.2d at 755.

taken. Good made the request after the action had been determined and judgment had been entered. No further action by the district court was needed to permit Good to take an appeal. Because no provision of Minn. R. Civ. App. P. 103.03 applies to the denial of Good's request, the denial is not appealable.

Affirmed.