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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-0283**

Fr. William Graham,  
Respondent,

vs.

Terrance Jerome Davis, Jr.,  
Appellant.

**Filed August 26, 2019  
Affirmed; motion granted  
Reilly, Judge**

St. Louis County District Court  
File No. 69DU-CV-16-1636

Patrick J. Neaton, Michael L. Puklich, Neaton & Puklich, P.L.L.P., Chanhassen, Minnesota  
(for respondent)

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Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Slieter, Judge.

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

**REILLY**, Judge

On appeal from judgment following a jury trial on respondent-plaintiff's claims for intentional interference with contract and prospective contract and intentional infliction of emotional distress, appellant-defendant argues that the district court erred by denying his pretrial motion for summary judgment, motion for a directed verdict, and posttrial motion for judgment as a matter of law or a new trial, and abused its discretion by excluding

evidence of an investigation by respondent's employer into allegations of sexual abuse. Respondent filed a motion to strike materials submitted by appellant. We affirm the district court's decisions and grant respondent's motion to strike.

## **FACTS**

In May 2016, appellant Terrance Jerome Davis Jr. initiated a civil lawsuit against St. John's Church, St. Benedict's Church, and Duluth Cathedral High School, alleging that respondent Fr. William Graham, who worked at these three institutions, "engaged in unpermitted sexual conduct" with Davis from 1977 to 1978, when Davis was a minor. After Davis initiated the lawsuit, Graham's diocese placed him on administrative leave and forbade him from returning to serve as a priest in St. Michael's parish or from performing priestly functions at any other location. Davis's 2016 lawsuit is still pending and has yet to be adjudicated on the merits.

In July 2016, Graham filed a complaint against Davis, asserting causes of action for (1) tortious interference with existing contractual relations, (2) tortious interference with prospective contractual relations, and (3) intentional infliction of emotional distress. Davis moved for summary judgment on Graham's claims. The district court denied the motion, determining that there were disputed factual issues that required a trial.

Graham's claims were tried to a jury in August 2018. Following the close of Graham's case-in-chief, Davis moved for a directed verdict on each of Graham's claims. The district court denied Davis's directed-verdict motion. The jury found that Davis tortiously interfered with Graham's current employment relationship and that Davis's interference was unjustified. The jury awarded Graham monetary damages for the

interference with his current contractual relations. The jury also found that Davis interfered with Graham's prospective future employment relationships and that interference was unjustified, but the jury did not award monetary damages for that interference. The jury also found that Graham was not entitled to relief on his claim for intentional infliction of emotional distress. Davis moved for judgment as a matter of law or, in the alternative, for a new trial. The district court denied the motion.

Davis now challenges the district court's denial of his pretrial motion for summary judgment, the exclusion at trial of the investigative report of respondent's employer, his motion for a directed verdict, and his posttrial motion for judgment as a matter of law or a new trial. Graham moved this court to strike references by Davis to depositions, affidavits, and documents that were not presented at trial.

During oral argument before this court, Davis's counsel agreed that Davis prevailed on Graham's claims for intentional interference with prospective contractual relations and intentional infliction of emotional distress. Accordingly, we limit our review to the district court's orders related to Graham's claim for intentional interference with existing contractual relations.

## **D E C I S I O N**

### **I. Role of an Appellate Court**

The purpose of appellate review is to determine whether a trial court has made a reversible error and not to try the case de novo. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979). Our function "is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). As an error-

correcting court, we cannot consider issues that are raised for the first time on appeal. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.” (quotation omitted)). Additionally, we cannot base our decision on matters outside the record. *Holtberg v. Bommersbach*, 51 N.W.2d 586, 587 (Minn. 1952); *Turner*, 276 N.W.2d at 68 n.2 (limiting appellate court review to those issues decided by lower court).

Minnesota recognizes the long-established principle that the appealing party “has the burden of providing an adequate record for appeal.” *Custom Farm Servs., Inc. v. Collins*, 238 N.W.2d 608, 609 (Minn. 1976) (declining to consider allegation of error in the absence of transcript bearing on issue presented); see also *State v. Carlson*, 161 N.W.2d 38, 40 (Minn. 1968) (“It is elementary that a party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented.”). “[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it.” *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted). With this as a background, we now turn to Davis’s arguments on appeal.

## **II. Summary-Judgment Motion**

Davis argues that the district court erred by denying his summary-judgment motion. Generally, denial of a summary-judgment motion is outside the scope of appellate review of a judgment entered *after* a jury verdict. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910,

918-19 (Minn. 2009) (adopting federal rule that denial of summary-judgment motion is not properly within scope of review on appeal from judgment). This rule exists because “the district court’s conclusion at the summary-judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue.” *Id.* Nevertheless, an appellate court has the authority to review denial of a summary-judgment motion when the denial was based on a legal conclusion on an issue that was not presented to the jury. *See Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 744 (Minn. App. 2010) (distinguishing *Bahr* and holding that district court’s denial of summary-judgment motion is within appellate court’s scope of review where denial is based on question of law rather than presence of material disputed facts), *review denied* (Minn. Sept. 21, 2010).

Davis argues that we may consider the denial of his summary-judgment motion because his case rests on resolution of a purely legal question: his constitutional right to bring a nonfrivolous lawsuit. *See Swanson v. Swanson*, 856 N.W.2d 705, 707 (Minn. App. 2014) (noting that “[a] denial of summary judgment based on a legal determination is reviewable on appeal from a final judgment”). We acknowledge that Davis has a right to bring a nonfrivolous lawsuit. *See Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 867 (Minn. 2003) (recognizing an individual’s right to bring a nonfrivolous lawsuit under Minnesota’s constitution). And the record reflects that Davis *did* bring a lawsuit, which is still ongoing and has yet to be adjudicated on the merits. The issue presented in this lawsuit, however, was whether Davis intentionally interfered with Graham’s contractual relationships without justification.

In a thoroughly-analyzed written order the district court declined to grant summary judgment on the ground that there were disputed factual issues that could not be resolved without a trial. The district court correctly noted that a tortious-interference claim requires a showing that an actor intentionally interfered in another's contractual relationship without justification. *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998) (articulating five elements of tortious-interference claim). Whether interference is justified is an issue of fact, and the relevant inquiry is what conduct is reasonable under the circumstances.<sup>1</sup> *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994). The jury heard the evidence presented at trial and answered special-verdict questions, finding that Davis interfered with Graham's current employment relationship, and that Davis's interference was not justified. The district court's order denying Davis's motion for summary judgment became moot after the jury rendered a verdict on this issue. *See Bahr*, 766 N.W.2d at 918-19. The district court's denial of Davis's summary-judgment motion is therefore not properly within the scope of our review on appeal from final judgment. *See id.* at 919.

### **III. Evidentiary Ruling**

Prior to trial, Graham filed a motion in limine to preclude Davis from introducing evidence related to the diocese's internal investigation into Davis's sexual-abuse claims against Graham arising from the May 2016 lawsuit. Graham included with his motion an email communication dated September 5, 2017, from the diocese's attorney. That email stated in part:

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<sup>1</sup> Davis's counsel recognized that these were questions of fact both in his brief and at oral argument.

After Bishop met with Father Graham, and in accordance with the Diocese's Sexual Abuse Policy, I advised Mike Finnegan as attorney for Mr. Davis of the Review Board's assessment and advice to Bishop as follows: "The members of the Review Board believe the accusations of T.J. Davis to be credible and that Father not be returned to ministry." Bishop Sirba is considering the assessment and advice of the Review Board and will contact the Congregation For The Doctrine Of The Faith for its guidance and direction. *As I believe you are aware, the Review Board's standard in determining credibility is much lower than the civil or criminal standards of proof.* The assessment may be based upon the existence of a reasonable amount of what appears to be credible evidence indicating the allegations are probably credible.

(Emphasis added.)

The district court stated during a pretrial hearing that it granted Graham's limine motion on the ground that the probative value of evidence related to the church's internal investigation did not outweigh its prejudicial effect. And in a short written order following that hearing, the district court granted Graham's motion "to preclude [Davis] from introducing evidence relating to the Catholic Church's internal investigation." The record on appeal does not include any written order or transcribed explanation of the district court's reasoning. On appeal, Davis argues that the district court abused its discretion by excluding this evidence.

Generally, all relevant evidence is admissible. Minn. R. Evid. 402. However, a district court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. A district court has "broad discretion over the admission and exclusion of evidence and the [district] court's rulings should not be disturbed by a reviewing court unless the rulings constitute a clear

abuse of discretion or are based on an erroneous view of the law.” *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997). To grant a new trial as a result of an erroneous evidentiary ruling requires the complaining party to demonstrate that the error resulted in prejudice. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997).

Davis argues that the district court abused its discretion because this ruling prevented the jury from properly and fairly evaluating whether Davis’s conduct was justified. Davis made no offer of proof showing how evidence concerning the diocese’s internal investigation would support his defense, and the record on appeal does not include a copy of the investigative report. On the limited record provided to this court, and, “[i]n the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result.” *Id.* Davis has not demonstrated prejudicial error here. In light of the broad discretion afforded the district court in evidentiary matters and the limited record before us, we cannot discern any abuse of discretion.

#### **IV. Judgment as a Matter of Law, Motion for a New Trial, and Motion to Strike**

At the close of Graham’s case, Davis argued for judgment as a matter of law (JMOL). After the jury returned its verdict, Davis moved for a new trial. The district court denied both motions.

A party may move for JMOL (formerly known as a motion for directed verdict) during a trial and must show that “there is no legally sufficient evidentiary basis for a reasonable jury to find” against the party on an issue. Minn. R. Civ. P. 50.01(a). A party

may also move for JMOL after the trial. Minn. R. Civ. P. 50.02. We apply a de novo standard of review on appeal from the district court's ruling on a motion for JMOL. *Bahr*, 766 N.W.2d at 919. "When the district court has denied a motion for [JMOL], [a reviewing court] must affirm if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 220 (Minn. 2014) (quotation omitted). A new trial may be granted for "[e]rrors of law occurring at trial" or when "[t]he verdict, decision, or report is not justified by the evidence or is contrary to law." Minn. R. Civ. P. 59.01(f), (g). "We review a district court's decision to grant or deny a new trial for an abuse of discretion." *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

Davis argues that the district court erred by denying his motions for JMOL or for a new trial. Davis's brief on these issues relies primarily on pretrial deposition transcripts and affidavits. Graham moved to strike "references to all depositions, affidavits and documents that were not admitted into evidence at trial." The record on appeal consists of "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele*, 425 N.W.2d at 582-83. A reviewing court "will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993).

Here, the record "facts" that Davis relies on to challenge the district court's denial of his motion for JMOL and for a new trial include pretrial deposition testimony and

affidavits, the trial transcript for the direct- and cross-examination of Graham, certain trial exhibits, and his attorney's opening statement and closing argument. We cannot consider pretrial deposition testimony and affidavits; they were not received into evidence at trial and were not part of the evidence the jury considered when it rendered a verdict. See *Thiele*, 425 N.W.2d at 582. And we cannot consider Davis's opening statement and closing argument, because statements and arguments presented by counsel are not evidence. *Shandorf v. Shandorf*, 401 N.W.2d 439, 443 (Minn. App. 1987). For these reasons, we grant Graham's motion to strike and do not consider "references to all depositions, affidavits and documents" outside the evidentiary record developed at trial.<sup>2</sup>

Interference with an employment relationship must be both intentional and unjustified. *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241 (Minn. App. 2000). Whether interference is justified is a question of fact. *Kjesbo*, 517 N.W.2d at 588. The jury found that Graham suffered adverse employment action as a result of Davis's interference with Graham's employment relationship, that such interference was unjustified, and that Graham suffered monetary damages as a result of Davis's actions. A district court should grant JMOL only in "unequivocal cases" where the verdict is "manifestly against the entire evidence" or is "contrary to the law applicable to the case." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816

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<sup>2</sup> We also decline to consider any citations in Davis's post-oral argument submissions to documents not admitted into evidence at trial. Davis's counsel appears to believe that since he is appealing the denial of the summary-judgment motion, he can rely on the materials he submitted to support that motion. Because there was a trial on the merits, he needed to provide evidence received at that trial, including any witness testimony.

(Minn. 2006) (quotation omitted). On appeal, Davis provided a transcript of Graham's testimony, in which Graham denied having inappropriate sexual contact with Davis. Davis failed to provide a complete transcript of the three-day jury trial, which precludes this court from concluding that the jury findings are "manifestly against the entire evidence." *Id.* Instead, the findings are consistent with Graham's testimony, and that is the only testimony that Davis provided on appeal. In light of the limited record before this court, Davis failed to establish that the district court erred by denying JMOL.

We also affirm the district court's denial of Davis's motion for a new trial. The district court denied Davis's new-trial motion on the ground that Davis failed to support his motion, and Davis's dissatisfaction with the district court's ruling did not entitle him to a new trial. "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." *In re Estate of Rutt*, 824 N.W.2d 641, 648 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Jan. 29, 2013). As stated above, the record Davis presented to this court supports the jury's verdict. Therefore, we discern no abuse of the district court's discretion in denying Davis's motion for a new trial.

In summary, we stress that appellate courts *want* to reach the merits of the issues on appeal. However, the party seeking relief bears the burden of providing the appellate court with an adequate record. The lack of an adequate record in this case prevents this court from addressing appellant's arguments in full.

**Affirmed; motion granted.**