

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0944**

Daniel Brehmer,
Appellant,

vs.

Knife River Materials,
Respondent,

Nebish Township,
Defendant,

Beltrami County,
Respondent.

**Filed March 10, 2025
Affirmed; motion denied
Slieter, Judge**

Beltrami County District Court
File No. 04-CV-22-2870

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(for appellant)

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Considered and decided by Bentley, Presiding Judge; Slieter, Judge; and Florey, Judge.*

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this negligence suit arising from a motorcycle accident and following the district court's grant of summary judgment to respondents, appellant argues that the district court erred by failing to allow him to redepose a witness or, alternatively, by declining to consider an unsworn audio recording involving this same witness. Because appellant did not preserve for our review the failure to allow a redeposition of a witness, and the district court acted within its discretion to decline to consider the unsworn audio recording when it granted respondents summary judgment, we affirm.

FACTS

The following summarizes the undisputed facts viewed in a light favorable to appellant Daniel Brehmer as the nonmoving party.

The accident and investigation

Brehmer's negligence lawsuit against respondents Knife River Materials and Beltrami County stems from a motorcycle accident. In September 2020, Brehmer was driving a motorcycle headed northeast on a paved county road. He turned left onto a gravel road managed by a township. Once he turned onto the gravel road, Brehmer encountered

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

large bumps and dips, leading him to take a wider than normal turn. Brehmer lost control of his motorcycle, it tipped over, he was caught underneath it, and he sustained injuries.

Shortly after the accident, K.S., who lived nearby, came to help Brehmer out from under the motorcycle. The next day, Brehmer went to K.S.'s residence to discuss the accident with him. Brehmer recorded their conversation without informing K.S. During the conversation, K.S. told Brehmer that the gravel road where the accident occurred was damaged due to the large construction equipment that Knife River had parked there while completing a road-improvement project for Beltrami County.

Legal proceedings

Brehmer commenced this negligence action against Knife River and Beltrami County, alleging that Knife River negligently maintained the township road where the accident occurred and that Beltrami County was vicariously liable for Knife River's negligence.

During his deposition, K.S. denied telling Brehmer that Knife River damaged the road by parking equipment near the crash site and stated that he would not have said that because he did not observe Knife River's equipment parked on that gravel road. It was after Brehmer's attorney sent Brehmer a copy of the transcript of K.S.'s deposition testimony that Brehmer first disclosed to his attorney the audio recording of his earlier discussion with K.S.

One month after the discovery period closed, Knife River and Beltrami County each moved for the summary-judgment dismissal of Brehmer's claims. The key evidence submitted in support of the summary-judgment motions included Brehmer's answers to

interrogatories, a transcript of Brehmer's deposition, a transcript of K.S.'s deposition, an affidavit from Beltrami County's public-works director describing the intersection, and an affidavit from a Knife River employee attesting that the company did not use the gravel road where Brehmer's accident occurred for parking construction equipment. Brehmer submitted a transcript of the audio-recorded conversation with K.S. though the district court did not include the audio-recorded statement as evidence when it determined respondents' summary-judgment motions.

In Brehmer's memoranda of law in opposition to the summary-judgment motions, he asked the district court to deny summary judgment and stated that "a better solution to this problem would be to retake [K.S.'s] deposition" and "a second deposition of [K.S.] should be allowed so that he can be questioned about the audio recording and the discrepancies between his deposition and the recording." During the summary-judgment hearing, counsel for Brehmer stated that "[K.S.'s] depo should be retaken so we can figure out why he said these things and now is saying something different" and added that "arguably there's the issue concerning this person's, [K.S.'s] depo." The district court granted respondents summary-judgment dismissal of Brehmer's complaint.

This appeal follows.

DECISION

Appellate courts review a district court's "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) (quotation omitted).

Brehmer does not argue that the evidence before the district court demonstrates the existence of genuine issues of material fact. Instead, Brehmer's primary argument is that the district court abused its discretion by not allowing him to redepose K.S. before considering the respondents' summary-judgment motions.

However, we do not address the merits of Brehmer's argument because he never properly asked the district court for a redeposition of K.S. Generally, a party may not seek appellate review on an issue that was not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Put differently, appellate courts can only consider "those issues which the record shows were, or had to be, presented and considered by the trial court in deciding the matter before it." *Thompson v. Barnes*, 200 N.W.2d 921, 927 (Minn. 1972).

Brehmer asserts that he did preserve the issue for our review because he asked for a second deposition in his memoranda in opposition to summary judgment and in his statements during oral argument during the summary-judgment hearing. In his memoranda of law, Brehmer stated that "a second deposition of [K.S.] should be allowed" and that retaking the deposition would be a "better solution." And during the summary-judgment hearing, counsel for Brehmer stated that "[K.S.'s] depo should be retaken so we can figure out why he said these things and now is saying something different" and made another reference to the "issue concerning this person's, [K.S.'s] depo" at the conclusion of the hearing.

We conclude that Brehmer failed to properly present this issue before the district court in order to afford it the opportunity to rule upon it. At no time did Brehmer bring a

motion before the district court seeking to be permitted to conduct a redeposition of K.S. Counsel for Brehmer became aware of the audio recording on September 20, 2023, nearly two months before the discovery period was to close on November 15, 2023.

Moreover, Minnesota Rule of General Practice 115.04(a) ordinarily requires a party bringing a nondispositive motion, which includes discovery motions pursuant to rule 115.01(a)(2), to file: (1) a notice of motion and motion; (2) a proposed order; and (3) if applicable, affidavits, exhibits, and a memorandum of law. As we have noted, Brehmer brought no such motion before the district court.

Brehmer's comments in his summary-judgment memoranda and his oral comments during the summary-judgment hearing do not equate to a formal motion to the district court asking for such relief. And notably, Minnesota Rule of Civil Procedure 56.04 authorizes the district court to "allow time to obtain affidavits or take discovery," provided that the nonmovant shows "by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition." Brehmer made no such motion for additional discovery before the summary-judgment hearing.¹

Because Brehmer failed to properly seek relief in the form of a redeposition of K.S. before the district court, we conclude that he has forfeited appellate review of this issue.

¹ Had Brehmer brought a motion before the district court to extend discovery for the purpose of a redeposition in response to the summary-judgment motions, it would have been within the district court's discretion to deny this request. Brehmer's response to the summary-judgment motions was well after the close of discovery. Because we will only reverse a district court's discovery decision upon "a clear abuse of discretion," the district court would have acted within its discretion by denying a discovery request made after discovery closed. *Smith v. Kessen*, 996 N.W.2d 581, 590 (Minn. 2023) (quoting *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987)).

Brehmer alternatively argues that, even if the issue of a redeposition of K.S. has not been preserved for appellate review, we may reverse summary judgment because the district court abused its discretion by declining to consider the unsworn audio recording of K.S. Appellate courts review a district court’s decision to disregard certain statements in deciding a summary-judgment motion for an abuse of discretion. *Metro. Transp. Network, Inc. v. Collaborative Student Transp. of Minn., LLC*, 6 N.W.3d 771, 779 (Minn. App. 2024), *rev. denied* (Minn. July 23, 2024).

“Evidence offered to support or defeat a motion for summary judgment must be such evidence as would be admissible at trial.” *Id.* (quotation omitted). The Minnesota Rules of Evidence generally exclude hearsay, defined as an out-of-court statement offered to prove the truth of the matter asserted, unless otherwise provided. Minn. R. Evid. 801, 802.

The district court determined that the unsworn audio recording was hearsay and that no exceptions to the hearsay rule apply. More specifically, the district court determined that the recording was not admissible as an excited utterance or a recorded recollection. On appeal, Brehmer does not dispute that the recording is hearsay but argues that the recording would be admissible as an excited utterance, recorded recollection, or as impeachment evidence. We are not persuaded.

Excited utterance

Brehmer first argues that the excited-utterance exception applies. An excited-utterance exception applies to statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or

condition.” Minn. R. Evid. 803(2). Because the record does not indicate that K.S. witnessed the actual crash and the record reveals that he made the audio-recorded statement the day following the crash, there exists no evidence that he was under the “stress of excitement” during the audio-recorded discussion with Brehmer. The district court acted within its discretion by determining that this hearsay exception does not apply.

Recorded recollection

The recorded-recollection exception applies to records “concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately,” provided that the record was “made or adopted by the witness when the matter was fresh in the witness’ memory.” Minn. R. Evid. 803(5). If admitted, the “record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” *Id.*

The record indicates that, during his deposition, K.S. had sufficient knowledge and recollection to testify about this topic. Additionally, K.S. did not make or adopt the recording, which is additionally required for this exception to apply. *See* Minn. R. Evid. 803(5). The district court acted within its discretion by determining that this hearsay exception does not apply.

Impeachment evidence

Brehmer finally argues that the recording would be admissible to impeach K.S. To be admissible as substantive evidence as a prior inconsistent statement, K.S. must have made the statements in the recordings while under oath. *Moore v. State*, 945 N.W.2d 421, 431 (Minn. App. 2020), *rev. denied* (Minn. Aug. 11, 2020); *see also* Minn. R. Evid.

801(d)(1). Because K.S. did not make these statements while under oath, the recording is only admissible for impeachment purposes rather than as substantive proof of the truth of the allegations in the recording. *See id.*; *see also* Minn. R. Evid. 607. The potential admissibility of this recording as impeachment evidence would therefore not create a genuine issue of material fact because the admissible facts do not demonstrate that Knife River parked its equipment on the road at which the accident occurred. The district court acted within its discretion by determining that this hearsay exception does not apply.

We therefore conclude that the district court, in granting respondents summary judgment, properly excluded consideration of the unsworn audio-recorded statement of K.S.

For these reasons, the district court did not err by granting summary judgment to Knife River. And because vicarious liability is the only basis for holding Beltrami County liable, which counsel for Brehmer confirmed during oral argument, the district court properly granted the county summary judgment. *See Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc.*, 825 N.W.2d 695, 708 (Minn. 2013) (requiring “actionable conduct of another” to impose vicarious liability).²

Affirmed; motion denied.

² Knife River moves this court to strike portions of appellant’s brief as unsupported by the record. Although we will “not consider matters outside the record on appeal and will strike references to such matters from the parties’ briefs,” *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005), we deny Knife River’s motion to strike as unnecessary because the statements that Knife River challenges are not material to our decision.