

*This opinion is nonprecedential except as provided by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
A24-0550**

Rebecca L Bersch,
Appellant,

vs.

Sharon K Hills,
Respondent.

**Filed January 13, 2025
Affirmed; motion granted in part, denied in part
Halbrooks, Judge***

Dakota County District Court
File No. 19AV-CV-23-262

Elizabeth M. Porter, Elizabeth M. Porter, LLC, Apple Valley, Minnesota (for appellant)

Mylene A. Landry, Susan A. Daudelin, Ben M. Henschel, Henschel Moberg, P.A.,
Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Bjorkman, Judge; and
Halbrooks, Judge.

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant Rebecca L. Bersch challenges the summary-judgment dismissal of
several of her claims against respondent Sharon K. Hills, arguing that the district court

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

erred in determining that Minn. Stat. §§ 513.075, .076 (2022) (the anti-palimony statutes) bar her claims as a matter of law. Because we conclude that the district court’s analysis of the merits of Bersch’s claims under the summary-judgment standard serves as an unchallenged independent ground for affirmance, we affirm on that basis without reaching the statutory argument. We grant Hills’s motion to strike portions of Bersch’s principal brief referencing information outside of the record and deny Hills’s motion to strike the majority of Bersch’s reply brief as moot.

FACTS

Bersch and Hills were in a romantic relationship for approximately 30 years.¹ In 1994, they purchased a home in Burnsville as joint tenants and lived there until they separated in June 2022. They split the down payment for the home and shared the monthly mortgage equally. In 1996, Hills purchased a wedding ring for Bersch and proposed marriage. The parties were unable to get married because same-sex marriage was not legal in Minnesota at the time, but Bersch accepted Hills’s proposal. The parties exchanged wedding rings and often used the term “wife” to refer to each other. When same-sex marriage became legal in Minnesota in 2013,² Bersch wanted to move forward with a formal, legal marriage, but Hills did not. Consequently, the parties never entered into a legal marriage.

¹ The facts are described in the light most favorable to Bersch as the nonmoving party in the summary-judgment motion. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020) (stating that facts must be viewed in the light most favorable to nonmoving party in reviewing summary judgment).

² 2013 Minn. Laws ch. 74, § 4, at 405-06.

Bersch has an associate degree in criminal justice. She has been fully disabled due to health issues since 1996 and has relied on Social Security for income since that time. Hills is a licensed attorney who has practiced primarily in the area of family law since 1989.

For nearly the entirety of their relationship, Bersch was financially dependent on Hills, and Hills assisted Bersch with personal expenses. The parties never had a joint checking or savings account and generally did not commingle finances. Bersch paid her share of the mortgage and some of her own basic living expenses, but Hills's income afforded the parties their standard of living. Hills paid for the majority of the household expenses, repairs, and improvements. Bersch contributed by doing some of the physical labor, coordinating with contractors on their house and on a property that Hills owned individually in Wisconsin, and taking on the majority of the household management, which allowed Hills to spend more time on her career.

In 2021, the parties' relationship was deteriorating, and they began discussing separation. Hills made several statements to Bersch that Bersch later claimed were binding promises of ongoing support after separation. Those statements included Hills telling Bersch that she was "not going to leave [Bersch] penniless" and that she would "take care of [Bersch] if [the two separated], and [would] help [Bersch] with the bills." Hills also indicated to Bersch that she would allow Bersch to remain in the Burnsville home, telling her, "[I]f you want to stay in the house, I . . . would help . . . I'd pay the taxes, I'd pay the insurance . . . I will help you . . . if there's something you need on a monthly basis." Hills moved out of the home in June 2022, while Bersch continued living there. Hills continued

to pay the property taxes, insurance, and costs of various repairs and upkeep of the home through at least June of 2023. The parties had previously paid off the mortgage on the home in 2021. The only then-remaining encumbrance on the home was a home-equity line of credit (HELOC), for which both parties were joint obligors.

In January 2023, Bersch filed a complaint against Hills asserting the following causes of action relevant to this appeal: (1) breach of contract (express and implied), (2) unjust enrichment, (3) promissory estoppel, and (4) intentional infliction of emotional distress (IIED). In support of these claims, Bersch asserted that Hills had made various promises to support her financially after their relationship ended but had not provided the funds necessary to maintain the home or meet her living expenses and that Hills had been unjustly enriched by way of Bersch's "monetary and non-monetary contributions to their joint property." Bersch further alleged the existence of a contract "to jointly build their partnership assets" and "jointly build [the parties'] estate." Bersch's IIED claim was based on Hills's alleged failure to support her after their separation, which caused Bersch to suffer from "severe, debilitating anxiety."

Hills denied all of Bersch's claims. Although she did not deny making the statements that Bersch attributed to her, Hills disputed Bersch's characterization of them as enforceable promises, the bases for any binding contracts, or otherwise affording Bersch any legal relief. Hills filed a counterclaim requesting partition by sale of the parties' home, among other claims. Hills subsequently moved for summary judgment, arguing that all of

Bersch's claims are barred by the anti-palimony statutes³ and that even if not, the claims fail on their merits under the summary-judgment standard. Bersch argued that, because section 513.075 uses the gendered terms "man" and "woman," the anti-palimony statutes do not apply to a case involving two women.

The district court granted Hills's motion for summary judgment on Bersch's promissory-estoppel and IIED claims in their entirety and on her unjust-enrichment and breach-of-contract claims with respect to any property except the shared home and HELOC. The district court based its decision on two independent grounds. First, it held that the anti-palimony statutes apply because a canon of construction in Minn. Stat. § 645.08 (2022) provides that "words of one gender include the other gender." Minn. Stat. § 645.08(2). The district court determined that the anti-palimony statutes bar Bersch's claims with respect to all property other than the parties' shared home or HELOC because

³ The anti-palimony statutes "prevent an unmarried couple living together in contemplation of sexual relations from receiving the legal rights conferred upon married couples." *In re Est. of Palmen*, 588 N.W.2d 493, 496 (Minn. 1999) (quotation omitted). Section 513.075 provides that,

[i]f sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock . . . is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties; and (2) enforcement is sought after termination of the relationship.

Minn. Stat. § 513.075. Section 513.076 divests courts of jurisdiction to hear any claim involving property distribution between nonmarried cohabitating couples when an agreement conforming to section 513.075 does not exist. Minn. Stat. § 513.076.

Bersch did not provide evidence of a contract that conforms with the requirements of section 513.075.

Second, the district court determined that, even if the anti-palimony statutes do not bar the claims, the claims cannot survive summary judgment because there is no dispute as to any material fact, and the undisputed facts are insufficient to afford Bersch any relief as a matter of law. The following claims proceeded to trial: Hills's partition, unjust-enrichment and replevin claims with respect to the HELOC and various personal property, Bersch's unjust-enrichment and breach-of-contract claims with respect to the home and HELOC, and both parties' conversion claims with respect to the HELOC. The district court partitioned the parties' home by sale and denied any other relief.

DECISION

I. The district court's substantive summary-judgment analysis serves as an independent ground for affirmance on appeal because Bersch failed to challenge it as a ground for reversal.

In her principal brief, Bersch argues only that the district court erred in granting summary judgment on the ground that the anti-palimony statutes bar all of Bersch's claims pertaining to property other than the home and the HELOC. She does not argue that the district court erred on the other ground on which it based its decision—that Bersch's claims fail under the summary-judgment standard regardless of the application of the anti-palimony statutes. Hills asserts that Bersch has therefore forfeited any challenge to that basis for the district court's decision and that it serves as an unchallenged independent ground for affirmance.

In her reply brief, Bersch includes a challenge to the district court's substantive summary-judgment analysis on the merits, arguing that the district court erred in determining that there is no genuine dispute as to any material fact and that Bersch's claims fail as a matter of law. She does not address Hills's argument that she forfeited such a challenge by not including it in her principal brief.

"[A]n argument for reversal that is not raised in an appellant's principal brief is forfeited." *Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 17 (Minn. App. 2013), *rev. denied* (Minn. Mar. 18, 2014). Such forfeited arguments "cannot be revived" via a reply brief. *Zimmerman v. Safeco Ins. Co. of Am.*, 593 N.W.2d 248, 251 (Minn. App. 1999), *aff'd*, 605 N.W.2d 727 (Minn. 2000). Moreover, a "reply brief must be confined to new matter raised in the brief of the respondent." Minn. R. Civ. App. P. 128.02, subd. 3.

Although Hills mentioned the district court's substantive summary-judgment analysis in her brief, she did so only to point out that Bersch had not challenged that analysis or offered it as a ground for reversal, and to argue that it, therefore, serves as an unchallenged independent ground for affirmance. Hills does not fully argue the merits of the district court's substantive summary-judgment analysis; she instead describes the district court's merits-based analyses with respect to each of Bersch's claims and reiterates that Bersch did not challenge those analyses. Because Bersch's reply brief impermissibly raises the summary-judgment analysis as a ground for reversal for the first time, we conclude that she forfeited that argument.

This case is analogous to *Hunter*, where we held that the appellant forfeited her argument when the district court granted a motion for summary judgment on two

independent grounds. The appellant challenged just one basis in her principal brief and only challenged the other in her reply brief. *Hunter*, 842 N.W.2d at 17. As in *Hunter*, the district court here granted summary judgment on two independent grounds—the anti-palimony statutes and the merits of Bersch’s claims under the summary-judgment standard—and Bersch challenged only one of those grounds in her principal brief. As such, the district court’s substantive summary-judgment analysis serves as an independent, unchallenged ground for affirmance. And we affirm the district court’s decision on that ground.

But even assuming arguendo that Bersch did not forfeit a challenge to the district court’s substantive summary-judgment analysis, such a challenge fails on its merits. Summary judgment is proper if the moving party shows that “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. “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[s].” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

The district court determined that the undisputed facts do not entitle Bersch to relief on any of her claims with respect to property other than the parties’ shared home and HELOC. We agree.

Regarding Bersch’s breach-of-contract claims, the promises that Hills made to Bersch about supporting her during and following the end of their romantic relationship were not “specific and definite” enough to be binding offers. *Com. Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006) (stating that offers must be

“specific and definite”). Regarding her unjust enrichment claim, Bersch produced no evidence regarding any financial contributions she made to any property other than the home or the HELOC or in support of her argument that Hills was unjustly enriched by any physical labor that Bersch may have put into any of that property. Regarding Bersch’s promissory estoppel claim, the district court granted summary judgment to Hills with respect to all property, including the home and HELOC, and was correct in doing so because Bersch provided no evidence that she relied on any of Hills’s promises to her detriment. Finally, the undisputed facts pertaining to Hills’s conduct are insufficient to support Bersch’s IIED claim because her conduct was not “so atrocious that it passe[d] the boundaries of decency,” and IIED claims are “sharply limited to cases involving particularly egregious facts” that are not present here. *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983) (quotation omitted).

Because the district court’s grant of summary judgment was based on two independent grounds and Bersch challenged only one of them, the unchallenged ground—the district court’s analysis of Bersch’s claims under the summary-judgment standard—is a sufficient ground for affirmance. We therefore decline to address Bersch’s argument surrounding the district court’s determination that the anti-palimony statutes in this circumstance bar Bersch’s claims with respect to any property other than the home or HELOC.

II. Hills’s motion to strike portions of Bersch’s principal brief is granted; her motion to strike portions of Bersch’s reply brief is denied as moot.

Hills moves to strike Bersch’s reply brief in nearly its entirety on the ground that it raises arguments that were not included in her principal brief. She also moves to strike the portions of Bersch’s principal brief that address Bersch’s current living situation, which arose after the district court’s summary-judgment decision on the ground that it included information outside the record. With respect to the information outside the record referenced in Bersch’s principal brief, “[a]n appellate court may not . . . consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988); *see also* Minn. R. Civ. App. P. 110.01 (limiting the record on appeal to documents and exhibits filed in the trial court and transcripts of the proceedings). Because the challenged portions of Bersch’s principal brief include information that is outside of the record for purposes of this appeal, we grant Hills’s motion to strike those portions. Because we deem the arguments in the challenged portion of Bersch’s reply brief forfeited and decline to address them, we deny Hills’s motion to strike the majority of Bersch’s reply brief as moot.

Affirmed; motion granted in part, denied in part.