2018 IL App (4th) 170442-U

NO. 4-17-0442

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WILLIAM A. ZOMBRO and BRENDA F. ZOMBRO, Plaintiffs, v. VICKY J. JONES, Defendant and VICKY J. JONES, Third-Party Plaintiff-Appellant, v. KEVIN HAMMER, Third-Party Defendant-Appellee.	)	Appeal from Circuit Court of De Witt County No. 15MR45 Honorable Brian L. McPheters, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justice Holder White concurred in the judgment.
Presiding Justice Harris specially concurred in the judgment.

ORDER

¶ 1 *Held*: Absent any admissible evidence of harm resulting to the third-party plaintiff from the third-party defendant's alleged legal malpractice, the trial court was correct to grant the third-party defendant's motion for a summary judgment.

¶ 2 The third-party plaintiff, Vicky J. Jones, sued the third-party defendant, Kevin Hammer, for legal malpractice. The trial court granted a motion by Hammer for a summary judgment in his favor and against Jones. She appeals. We affirm the summary judgment because, in our *de novo* review of the summary-judgment materials, we find no admissible evidence of pecuniary harm resulting to Jones from Hammer's alleged legal malpractice.

¶ 3 I. BACKGROUND

¶ 4 A. The Zombros' Action Against Jones for Specific Performance

¶ 5 This case began with a complaint seeking specific performance. William A. Zombro and Brenda F. Zombro alleged as follows in their complaint. On April 17, 2015, they and Vicky J. Jones signed a contract, exhibit A of the complaint, in which Jones agreed to sell to them, for a total of $5000, nine acres of unimproved land in De Witt County. Although the Zombros were ready and willing to pay Jones the purchase price of $5000, Jones refused to convey the land to them. Consequently, the Zombros sought specific performance of the contract, along with contractual attorney fees.

¶ 6 B. Jones's Third-Party Complaint Against Hammer

¶ 7 Jones in turn filed a verified third-party complaint against an attorney, Kevin Hammer. See 735 ILCS 5/1-109 (West 2014). She alleged as follows in her third-party complaint.

¶ 8 In October 2014, Jones and the Zombros entered into an oral agreement, whereby Jones promised to sell them "approximately 9 3/4 acres of flood ground" in De Witt County "for the sum of $5,500.00 per acre." This oral agreement was partly reduced to writing (defendant's exhibit No. 1 of the third-party complaint), but the writing was not signed. Later in October 2014, Jones and the Zombros modified their oral agreement so as to reduce the purchase price to $5000 per acre.

¶ 9 After the oral negotiations between herself and the Zombros, Jones hired Hammer "to prepare the necessary legal documents to affect and finalize the previously agreed upon sale of said flood ground by her to [the Zombros]." Hammer "agreed to represent [Jones] as her attorney in the sale of this flood ground," and he thereby took upon himself the following duties:

> "(a) having a thorough knowledge of current flood ground values located near Clinton, Illinois; (b) correctly advising [Jones] of the fair market value of flood

> ground near Clinton, Illinois; (c) to represent [Jones] with the utmost undivided fidelity and loyalty; (d) to maximize the amount of money that [Jones] was to receive for the sale of her flood ground to [the Zombros];(e) not advancing legal and economic positions that were derogatory, deleterious, and contrary to [Jones's] best legal and economic interests in the sale of her flood ground; (f) to promote the best legal and economic interests of [Jones] in order to maximize her profits in the sale of her flood ground to the [Zombros]; and (g) not to disclose confidential and sensitive information to [William A. Zombro] regarding the fair market value of [Jones's] flood ground that was derogatory, harmful, negative, and contrary to [Jones's] best legal and economic interests."

¶ 10 In violation of those duties, Hammer drafted a "Contract for Sale of Real Estate" (defendant's exhibit No. 4) which provided, erroneously, that the agreed-upon purchase price for the "9 acres" was a total of $5000 instead of $5000 per acre. When Jones and William A. Zombro met in Hammer's office to close on the deal, Hammer "literally threw" the contract he had drafted at Jones, telling her the nine acres were untillable, unimprovable "scrub land" worth no more than $5000. Hearing this opinion by Hammer, William A. Zombro backed out of his oral agreement to buy the land for $5000 an acre. Thus, the closing did not occur in Hammer's office.

¶ 11 Later, Jones, physically decrepit and lacking in self-confidence, acquiesced to Hammer's opinion and signed the contract he had drafted, agreeing to sell the land to the Zombros for a total of $5000, even though, according to a comparative market analysis (defendant's exhibit No. 3) she afterward obtained from Jessica Devore, the land was worth $40,000 to $43,400.

¶ 12 Even though Hammer knew Jones was so "ill, sickly, vulnerable, [and] susceptible" that she lacked the mental capacity even to enter into a contract, he "coerc[ed], manipulat[ed], [and] cajol[ed]" her into selling the land for substantially less than it was worth, thereby breaching his duty to "represent [her] with undivided fidelity, integrity, and loyalty." Instead of advancing her economic interests, he advanced the economic interests of the Zombros, his "*de facto*" clients, enabling them to "reap a great economic windfall *vis-à-vis* and over his sickly, ill, and mentally incapable client who reasonably relied upon her attorney's legal advice to sign the [']Contract for Sale of Real Estate.['] "

¶ 13 C. Hammer's Motion for a Summary Judgment

¶ 14 In support of his motion for a summary judgment, Hammer submitted his own affidavit, a transcript of Jones's deposition, and the Zombros' verified responses to his request for an admission of facts.

¶ 15 1. *Hammer's Affidavit*

¶ 16 Hammer gave the following account in his affidavit.

¶ 17 In the fall of 2014, Jones came to his law office and retained him to perform two tasks: (1) clear the title to the land and (2) draft a contract for the previously agreed-upon sale of the land to the Zombros. Jones told him the terms of the agreement were as follows: the land consisted of nine acres, all of which were unimproved; the Zombros would buy the nine acres for a total of $4500 in cash, with no money down; and the closing was to occur as soon as possible.

¶ 18 On approximately April 10, 2015, Jones and the Zombros came to Hammer's office to review and sign the contract, which he had drafted in accordance with Jones's instructions. He reviewed the terms of the contract with Jones and the Zombros, and when he came to the purchase price of $4500, "Jones hesitated and expressed for the first time concern

that the price was not enough." At that point, Hammer "informed Jones there was no longer an agreement, [he] stopped the contract process, and [he] instructed her not to sign any contract." In his affidavit, Hammer denies stating, in the meeting, that the land was worth no more than $5000 for the entire acreage, and, in fact, he denies saying anything at all about the purchase price other than reciting the purchase price in the contract he had drafted, $4500. Prior to the meeting, he never met the Zombros, let alone agreed to represent them.

¶ 19 On approximately April 13, 2015, Jones telephoned Hammer and stated she had talked with the Zombros and had agreed to sell the land to them for a total of $5000. Hammer revised the contract accordingly, changing the purchase price from $4500 to $5000.

¶ 20 On approximately April 17, 2015, Jones came to Hammer's office, without an appointment, to sign the revised contract. Hammer states in his affidavit: "We stood in the foyer of my office while she read the contract and asked me questions. Jones then signed the contract."

¶ 21 On April 19, 2015 (Hammer continues in his affidavit), Jones posted the following message on his "office Facebook profile":

> "I sure hope you are the attorney Kevin Hammer[.] I'm Vicky Jones[,] a new client of yours[.] Selling some land. I am in such a mess here[.] Just found out this evening there [are] only 7 3/4 acres in the land I am selling instead of [nine acres.] The extra [two] acres are attached to this place where my house is at[.] I do hope the buyers [have] not c[o]me to sign the papers yet[.] I signed them Friday[,] not knowing there [were] only 7 3/4 acres[.] If they have not signed yet[,] please hold the contract[.] I am so sorry. As I said[,] such a mess[.] Family is upset over the sale of this property. And now the paper I signed has the wrong

amount of acreage[,] too[.] Please get back with me before going any further with this[.] I have an appointment at your office tomorrow, Monday at 1 p.m[.]"

¶ 22 2. *The Zombros' Responses to Hammer's Request for an Admission of Facts*

¶ 23 The Zombros made the following verified admissions in response to Hammer's request for an admission of facts. In the fall of 2014, the Zombros agreed to buy the land from Jones for a total of $4500, not for $4500 per acre or $5000 per acre. The Zombros never agreed to, and could not have afforded to, buy the land for $4500 per acre or $5000 per acre. During the meeting in his office, "Hammer never stated 'that the land was not worth $5,000 per acre and that it was only worth a total of $5,000 for the entire acreage.' " Nor did Hammer throw any papers at Jones. Prior to the meeting, Jones never expressed any concern about the purchase price of $4500; she did so for the first time in the meeting. Once she expressed concern over the purchase price of $4500, Hammer "stated to her there was no agreement, he stopped reviewing the contract, and [he] instructed her not to sign any contract." In the days after the meeting, Jones telephoned the Zombros and offered to sell them the land for a total of $5000. The Zombros never hired Hammer—for purposes of the sale or for any other purpose.

¶ 24 3. *Jones's Deposition*

¶ 25 Hammer's attorney asked Jones in her discovery deposition:

"Q. *** So when you sat down with [Hammer], that's when you talked with him about drawing up the contract with you for the terms agreed upon, true?

A. Yes.

Q. And when you first sat down with [Hammer], that's when you also discussed with him clearing the titles so you could close your property. Yes?

A. That was the main thing, yes.

Q. Okay. So that was the two things you were asking him to do when you hired him, when you met with him, correct?

A. Yes."

¶ 26 D. Jones's Affidavit in Opposition to Hammer's Motion for Summary Judgment

¶ 27 In opposition to Hammer's motion for summary judgment, Jones presented her own affidavit, in which she stated, among other things:

"9. It was no [nine] acres being sold, but it was 7 3/4 acres. The sale was for $4,500 per acre that we agreed upon during the first meeting with Bill Zombro at my home. My home sits on [three] acres[,] not 1.25 acres. I did not inform Hammer about anything concerning my home, but it was never my intention to sell my home to William A. Zombro. That was a terrible misunderstanding by all of us.

* * *

25. After the deal went sour, I hired Jessica Devore to do a fair market value at the cost of $100 I paid to her, which she in fact did for me. She gave me a comparative market analysis with several comparatives relating to my property. Her report is attached to my pleadings in the instant case. She prepared this [comparative market analysis] on June of 2015, and it indicates that the fair market value of my land was approximately $43,400 and not $5,000 as falsely claimed by Attorney Hammer."

¶ 28 E. The Summary Judgment in Hammer's Favor

¶ 29 For essentially three reasons, the trial court granted Hammer's motion for a summary judgment.

¶ 30 First, the trial court found no genuine issue of material fact as to the scope of Jones's retention of Hammer. Because it was undisputed that she retained him to do only two things, namely, (1) clear the title to the land and (2) draft a contract containing the previously agreed-upon terms of sale, the court concluded he owed her no duty to correctly estimate the value of the land; advance her economic interests in the sale of the land; or refrain from opining, in the presence of the potential buyer, that the land was worth substantially less than what the potential buyer allegedly had orally agreed to pay for it.

¶ 31 Second, the trial court found no genuine issue of material fact as to whether Hammer had breached a duty of undivided fidelity and loyalty to Jones, considering that the Zombros had never retained Hammer for any purpose.

¶ 32 Third, the trial court rejected Jones's "unsupported assertion" that the agreed-upon purchase price for the land was by the acre, an assertion the court deemed to be "against the evidence in this case," including "Hammer's handwritten notes from his initial meeting with Jones, the Zombros' Responses to Hammer's Requests for Admission, and Hammer's affidavit." Citing *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 495 (1998), the court declared this "unsupported assertion" by Jones to be "inadmissible in considering summary judgment."

¶ 33 II. ANALYSIS

¶ 34 A. The Inadequacy of Jones's "Statement of Facts"

¶ 35 Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017) requires that the appellant's brief "contain the facts necessary to an understanding of the case[.]" In order for us to understand this case, Jones, in the "Statement of Facts" of her brief, must provide us the material facts as disclosed in Hammer's summary-judgment materials and the material facts as disclosed

in her counteraffidavits. We need these competing versions of fact so we can discern whether there is a material issue of fact precluding a summary judgment in Hammer's favor. See 735 ILCS 5/2-1005(c) (West 2016); *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986) ("[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion."); *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380-81 (1974) ("If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact. *** [I]f the defendants' affidavits are uncontested, the material facts therein must be accepted as true."). Jones has not provided us these competing versions of fact. Instead, in her "Statement of Facts," she merely recites a bare-bones procedural history, *e.g.*, she filed her third-party complaint on this date, Hammer filed his answer on that date, Hammer filed his motion for summary judgment on this date, and she filed her response on that date. Because her "Statement of Facts" fails to reveal the substance of any of these filings, it is useless to us.

¶ 36 Hammer argues that, as a consequence, we should dismiss this appeal, since supreme court rules are rules rather than advisory suggestions. See *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. In her reply brief, Jones responds: "[A]ny long-winded recitation of extraneous and unnecessary facts is unwarranted and tends to make the [a]ppellant's brief hard to understand and follow." We agree. It is unwise to bewilder and annoy the reader with facts that have no apparent relevance to the argument. That is why Rule 341(h)(6) requires "the facts necessary to an understanding of the case" as opposed to "extraneous and unnecessary facts." Jones argues in her reply brief: "[T]he pleadings and motions for summary judgment

contained in the common[-]law record more than amply state and recite the alleged facts of the respective parties[,] including their legal arguments and positions." That is true, but by such reasoning, Jones's "Statement of Facts" could have consisted of a single sentence: "See the 'Table of Contents of the Record on Appeal.' " By relying on us to glean the important facts from the common-law record, Jones's attorney in effect expects us to do his work for him. We have our work cut out for us because the vacuity of Jones's statement of facts makes her brief "hard to understand and follow." The argument lacks a factual context.

¶ 37 We may, in our discretion, dismiss an appeal on the ground of the appellant's egregious noncompliance with Illinois Supreme Court Rule 341(h) (eff. Nov. 1, 2017), which governs the form and contents of briefs. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12. We choose not to do so this time, since the undisputed facts in this case are relatively straightforward. We will say this, though: if we happen to overlook a fact that Jones regards as important, she is in no position to complain.

¶ 38 B. Duty and the Breach of Duty

¶ 39 We review summary judgments *de novo*, meaning we perform the same analysis a trial court would perform. *Turner v. Orthopedic & Shoulder Center, S.C.*, 2017 IL App (4th) 160552, ¶ 43. Under section 2-1005(c) of the Code of Civil Procedure (735 ILCS 5/2-1005(c) (West 2016)), the moving party is entitled to a summary judgment if (1) "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact"; and (2) "the moving party is entitled to a judgment as a matter of law." In ruling on a motion for a summary judgment, the court should not choose the winners and the losers among competing versions of fact; rather, the court should decide, from the admissible summary-judgment materials, whether there are competing versions of material

fact or, in other words, whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002).

¶ 40 With those basic principles in mind, let us consider the trial court's rationale for granting Hammer's motion for a summary judgment. The court reasoned, first of all, that because Jones hired Hammer only to clear the title to the land and to draft a contract reflecting the terms of her oral argument with the Zombros, Hammer owed Jones no duty to refrain from opining to William A. Zombro that the land was worth substantially less than what he allegedly, in preliminary oral negotiations, had agreed with Jones to pay for it. This is what Hammer argued to the trial court in his motion for a summary judgment, and he makes the same argument to us. In support of his argument, Hammer cites *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 270 (1995), in which the appellate court stated: "[B]ecause the duty owed by the attorney arises out of a contractual relationship, it is necessarily limited by the scope of the contract of engagement."

¶ 41 The argument is unconvincing because Jones and Hammer entered into an attorney-client relationship and, "[i]n general, the law of principal and agent applies to an attorney-client relationship." *Lydon v. Eagle Food Centers, Inc.*, 297 Ill. App. 3d 90, 93 (1998). As Jones's attorney, Hammer owed her a fiduciary duty. " 'A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith—in fact to treat the principal as well as the agent would treat himself.' " *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21 (1995) (quoting *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992)). Although it is true that the principal in this case, Jones, never hired Hammer to provide his own independent opinion of what the land was worth, she hired him to draft a contract containing a certain purchase price for the land, and Hammer's fiduciary duties extended not only to that

particular task but also to all matters connected with that task. " 'Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal *in all matters connected with his agency*.' " (Emphasis added.) *United States Fidelity & Guaranty Co. v. Old Orchard Plaza Limited Partnership*, 284 Ill. App. 3d 765, 774 (1996) (quoting Restatement (Second) of Agency § 387 (1958)). If, without fraud or any other illegality, the principal negotiates a real-estate sale agreement with a potential buyer on terms favorable to the principal and then hires an agent to draft a contract reflecting those terms, the agent's duty of undivided loyalty to the principal should prevent the agent from denigrating the land to the potential buyer so as to dissuade the potential buyer from signing the very contract the principal had hired the agent to draft. The principal hired the agent to draft a contract containing a certain purchase price, and by talking the potential buyer out of his or her agreement to pay so high a purchase price, the agent would act in a matter connected with the agency. See *id.* Presumably, if the agent had negotiated a deal, fair and square, on terms favorable to himself, he would not have sabotaged the deal in this manner. He was obliged to treat the principal as well as he would have treated himself. See *Lagen*, 274 Ill. App. 3d at 21. So, we disagree with the trial court's first rationale for the summary judgment, the scope-of-engagement rationale.

¶ 42 Second, the trial court observed there was no evidence that the Zombros ever hired Hammer for any purpose. The agent's fiduciary duty to the principal, however, is "to act solely for the benefit of the principal in all matters connected with his agency." (Internal quotation marks omitted.) *United States Fidelity*, 284 Ill. App. 3d at 774. Formulated that way, an agent's duty of loyalty is broader than refraining from entering into other contractual relationships that create a conflict of interest with his agency.

¶ 43 Third, the trial court held that when Jones testified, in her deposition, that she and the Zombros entered into an oral agreement whereby she would sell the land to them for $4500 per acre, she merely made an "unsupported assertion," contradicted by other evidence, and that such an "unsupported assertion" was "inadmissible in considering summary judgment." The court cited *Davis*, 297 Ill. App. 3d at 495, in which the appellate court stated: "[U]nsupported assertions, opinions, and self-serving or conclusory statements made in deposition testimony are not admissible evidence upon review of a summary judgment motion." (Internal quotation marks omitted.) We do not see how the citation is apposite. That the Zombros orally agreed to pay $4500 an acre is not (if Jones is to be believed) an opinion, conclusion, or unsupported assertion. They *told* her they were willing to pay $4500 an acre, or so she states in her affidavit and deposition. This is a sworn assertion of fact by her, and her support for this assertion is what she allegedly heard the Zombros tell her. Again, the purpose of a summary-judgment proceeding is not to choose among competing versions of fact but merely to determine whether there are competing versions of material fact. *Robidoux*, 201 Ill. 2d at 335.

¶ 44 Although, for the reasons we have explained, we disagree with the trial court's reasoning, we may affirm the summary judgment for any reason that has a basis in the record, regardless of whether the trial court relied on that reason. *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 30. Because the summary-judgment materials—or, more precisely, those that are admissible—reveal no genuine issue of material fact as to proximately resulting harm, we conclude the court was correct to grant Hammer's motion for a summary judgment. Without harm, without damages, there is no case, as we now will explain.

¶ 45 C. The Lack of Any Admissible Evidence of Damages

¶ 46 Jones seeks damages from Hammer for legal malpractice. The elements of a cause of action for legal malpractice are as follows: "(1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney, (2) a negligent act or omission constituting a breach of that duty, (3) proximate cause of injury, and (4) actual damages." *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 33 n.1. Jones alleges that Hammer, as her attorney in the real-estate transaction, owed her a duty to refrain from making derogatory and untrue statements in the presence of herself and a potential buyer, William A. Zombro, about the value of the land she was selling. She further alleges that by breaching that duty, Hammer caused her to incur actual damages by (1) dissuading William A. Zombro from buying the land for the originally agreed-upon price of $4500 per acre and (2) "bullying" her, a physically ailing, mentally incompetent client, to sell the land to the Zombros for $5000, a fraction of what the land really was worth.

¶ 47 The easiest and most straightforward way of disposing of this appeal is to focus on the element of proximately resulting injury. See *id.* This element is problematic for several reasons.

¶ 48 The first problem is this: after the alleged oral agreement, upon coming to the alarming realization that her house sat on a portion of the 9 3/4 acres (whether that portion was two acres or three acres is unclear), Jones herself, on second thought, was unwilling to sell all 9 3/4 acres to the Zombros, even at $4500 per acre. She wanted to keep her house. (In her counteraffidavit in opposition to Hammer's motion for a summary judgment, Jones tries to backpedal from her original story that the oral agreement was for the sale of all 9 3/4 acres, but because that is the story she told in her verified third-party complaint, to which she swore, she is stuck with it. See *Charter Bank & Trust of Illinois v. Edward Hines Lumber Co.*, 233 Ill. App. 3d 574, 578 (1992).) Although Jones was willing to sell the Zombros the remaining acreage—7 3/4

acres or whatever it was—at $4500 per acre, there appears to be no evidence that the Zombros ever orally agreed to *that*. To be precise, they agreed to buy "nine (9) and three quarters (3/4) acres total" from Jones "for the amount of $5,500 per acre," to quote from the memorandum of the oral agreement, attached as an exhibit to Jones's verified third-party complaint. So, if, as Jones alleges, Hammer breached his duty by sabotaging an oral agreement by the Zombros to buy the 9 3/4 acres from Jones for $4500 per acre, it is difficult to see how Jones suffered any harm, considering that this was an agreement from which she desperately wanted to withdraw.

¶ 49 Here is another problem. Even if we assumed that, in the alleged oral agreement, Jones and the Zombros were under a mutual mistake of fact and they really meant 7 3/4 acres, instead of 9 3/4 acres, at $4500 per acre, the Zombros could not have afforded that rate anyway. It is difficult to see how Hammer could have harmed Jones by sabotaging an oral agreement that the Zombros were financially incapable of performing. In support of his motion for a summary judgment, Hammer provided the Zombros' sworn statement that they could not have afforded to pay Jones $4500 per acre.

¶ 50 Granted, Jones states in her counteraffidavit: "While telling me he had the cash, I was very impressed with William A. Zombro. He told me that they had inherited a very large amount of money left to him by his father not too long before this mess and misunderstandings with [the land]." The trouble is, if this case went to trial and Jones attempted to testify to what William A. Zombro allegedly had told her, *i.e.*, that he had received a large inheritance of cash from his father, she would elicit a hearsay objection. His statement, recounted by Jones in the witness stand, would be "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" namely, that he had in fact received a large amount of cash from his father's estate (and, thus, he had enough

money to pay Jones $4500 per acre). Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). Affidavits in opposition to a motion for a summary judgment must "consist *** of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Absent an applicable exception (we are aware of none in this case), hearsay is not a fact admissible in evidence (see Ill. R. Evid. 802 (eff. Jan. 1, 2011)) and is not legitimate material for an affidavit (see Ill. S. Ct. R. 191(a); *Cebertowicz v. Baldwin*, 2017 IL App (4th) 160535, ¶ 52).

¶ 51 Therefore, despite the alleged oral agreement by the Zombros to buy the land from Jones for $4500 per acre, it is effectively admitted that the Zombros would have been unable to fulfill the oral agreement. See *Purtill*, 111 Ill. 2d at 241; *Carruthers*, 57 Ill. 2d at 380. It follows that even if Hammer denigrated the land as "scrub land" worth no more than $5000 in total and even if, after hearing him do so, William A. Zombro backed out of the oral agreement, Jones suffered no resulting harm, because the Zombros were financially unable to perform the oral agreement, anyway.

¶ 52 If the oral agreement was unaffordable to the Zombros, that would be a compelling reason for them to back out of it. To assert that William A. Zombro backed out of the oral agreement because of Hammer's alleged denigration of the land as opposed to his own more practically relevant inability to pay $4500 per acre would be mere speculation. "Although a plaintiff may rely on reasonable inferences which may be drawn from the facts considered on a motion for summary judgment, an inference cannot be established on mere speculation, guess or conjecture." *Salinas v. Werton*, 161 Ill. App. 3d 510, 515 (1987). As a practical matter, it was beside the point whether Hammer thought the land was worth $4500 per acre if, in any event, the Zombros could not pay $4500 per acre. Unless the Zombros were completely irresponsible, they

would have in any event declined to sign a contract binding them to pay what they could not afford to pay.

¶ 53 As the Zombros state under oath in their responses to Hammer's request for admission, Jones ultimately signed a contract, in which she agreed to sell the land to them for a total of $5000, which was considerably less than $4500 per acre. "The purchase price for land set in the course of an arm's length transaction, if not proved to be forced or fraudulent, is evidence of the highest rank to determine the true value of property." (Internal quotation marks omitted.) *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 16. "Arm's length" means "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power." (Internal quotation marks omitted.) *Gillespie Community Unit School District No. 7, Macoupin County v. Union Pacific R.R. Co.*, 2015 IL App (4th) 140877, ¶ 167. The record is devoid of evidence that the Zombros were related to Jones or that they had more bargaining power than she. See *id.* The record likewise is devoid of evidence that anyone forced Jones to sign the contract with the Zombros or that she was defrauded into doing so. See *Feinerman*, 2013 IL App (1st) 121191, ¶ 16.

¶ 54 It is true that, in her affidavit, Jones cites a comparative market analysis by Devore to the effect that the land is worth $40,000 to $43,400. Again, this is inadmissible hearsay: Jones's statement of what Devore said was offered to prove the truth of the statement. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015); Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *Cebertowicz*, 2017 IL App (4th) 160535, ¶ 52. Thus, we are left with the sale figure of $5000 as the only evidence of the land's fair market value.

¶ 55 This brings us to the final problem with the element of proximately caused injury. Assuming, for the sake of argument, that Hammer did indeed "bully" Jones into selling the land

for only $5000, it appears she suffered no resulting harm, because (1) in opposition to the Zombros' sworn statement that Jones agreed, in writing, to sell the land to them for $5000, Jones presented no admissible evidence that the land was worth more, and (2) the arm's-length transaction between the Zombros and Jones is "evidence of the highest rank to determine the true value of property" (internal quotation marks omitted) *Feinerman*, 2013 IL App (1st) 121191, ¶ 16). There appears to be no admissible evidence that, in the sale, Jones financially took a hit.

¶ 56 In sum, we find no genuine issue of material fact as to the essential element of proximately caused damages. See *Snyder*, 2011 IL 111052, ¶ 33 n.1. Assuming, for the sake of argument, that Hammer breached a duty to Jones by denigrating the worth of the land, it is effectively undisputed that she suffered no resulting harm. See *Carruthers*, 57 Ill. 2d at 380. Although Jones was not required to prove her case in the summary-judgment proceeding, she was required to present some admissible evidence to support the elements of her cause of action. See *Rogers v. Matanda, Inc.*, 393 Ill. App. 3d 521, 526 (2009). "Summary judgment in favor of a defendant is appropriate where the plaintiff has failed to establish an essential element of his cause of action"—in this case, the element of proximately caused harm. *Id.*

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, we affirm the trial court's judgment.

¶ 59 Affirmed.

¶ 60 PRESIDING JUSTICE HARRIS, specially concurring.

¶ 61 I agree with the majority's finding that Jones failed to establish an injury proximately caused by Hammer. However, I have a different take on why that is so. In her third-party complaint, Jones essentially identifies two separate injuries caused by Hammer's alleged malpractice. First, she claims his negligence caused Zombro to "rescind the oral sales

contract of $5,000 per acre." Second, she claims that because of Hammer's negligence, she entered into a contract with Zombro to sell the property for a total sum of $5000, when the land was actually worth much more. As set forth below, neither of these constitutes an injury.

¶ 62 Regarding Jones's claim that she was injured due to Zombro backing out of the deal to buy her land at $5000 per acre, she fails to explain how she was harmed. According to Jones, the deal simply fell through which means she ended up still owning the land. She does not claim the value of the land was somehow diminished as a result of the failed transaction. Nor does she assert she would have received a windfall due to Zombro agreeing to pay more for the land than it was worth. In fact, Jones went to great lengths in her submissions in the circuit court to establish that the price per acre Zombro agreed to pay was actually what the land was worth. In other words, Jones identified no harm suffered as a result of Zombro backing out of the deal.

¶ 63 As for Jones's second claimed injury—that she entered into a written contract with Zombro to sell the land for "the paltry sum of $5,000"—at this point, her alleged injury is only speculative. She is a direct defendant in the case where Zombro, as plaintiff, is attempting to obtain specific performance of this very same contract. Zombro's lawsuit remains pending which means Jones has not been, and potentially may never be, ordered to consummate the transaction. As it stands, Jones remains the owner of the land and has suffered no identifiable injury as a result of Hammer's alleged malpractice.

¶ 64 Because Jones has failed to establish a genuine issue of material fact as to a proximately caused injury, I agree we should affirm the grant of summary judgment against her in her third-party action.