ATTORNEYS FOR APPELLANT

Raegan M. Gibson
Mackenzie E. Skalski
Joey K. Wright
Paganelli Law Group
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Curtis E. Shirley
Carmel, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael Akin,
Appellant-Plaintiff,

v.

Katherine Simons,
Appellee-Defendant.

December 30, 2021

Court of Appeals Case No. 21A-PL-620

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1405-PL-4937

Najam, Judge.

Statement of the Case

[1] In 2012, Michael Akin transferred $229,227.05 to his former spouse, Katherine Simons, and Simons used the money to purchase a home. Akin claimed that, under an oral agreement, $130,000 of the money he provided to Simons was a loan and that the remaining $100,000 value in the home would be held in trust

for the benefit of the parties' granddaughter ("Granddaughter"). Simons countered that the entire amount was a gift. In 2014, Akin sued, and Simons filed a motion for partial summary judgment, arguing that the alleged agreement was unenforceable under the Statute of Frauds. Following a hearing, the trial court granted Simons's motion. Akin appeals from the trial court's grant of partial summary judgment in favor of Simons and raises the following issues for our review:

1. Whether there are genuine issues of material fact regarding whether the Statute of Frauds applies to the parties' oral agreement.

2. Whether there are genuine issues of material fact regarding whether exceptions to the Statute of Frauds apply.

[2] We affirm.

Facts and Procedural History

[3] Akin and Simons were married but, at some point, they divorced. Their daughter gave birth to Granddaughter, and Akin and Simons became co-guardians of Granddaughter. In 2012, Akin and Simons rekindled their romantic relationship. Eventually, however, their romantic relationship ended, the instant litigation began, and the parties engaged in a separate custody and visitation action over Granddaughter.

[4] Akin filed a complaint against Simons alleging claims of breach of contract and for the imposition of a constructive trust, and he also alleged that Simons "has

been unjustly enriched." Appellant's App. Vol. 2 at 49-50. In particular, the complaint alleged that, in May 2012, Akin "transferred $229,227.05 to [Simons] to use for the benefit of [Granddaughter] . . . to provide her a home in which to live with [Simons]" and that Simons used the money to buy a home in Carmel which she titled in her name only. *Id.* at 49. The complaint further alleged that the parties had agreed that, within thirty days: (1) Simons would repay Akin $130,000 of the money he had provided by obtaining a mortgage on the home; and (2) the remainder of the interest in the home would be held in trust for Granddaughter. The complaint also alleged that Simons had "paid a total of $10,000 on the loan" and that Simons had "refused [Akin's] demand to formally transfer [Granddaughter's] interest in the [home] to [Granddaughter] or to a trust for [Granddaughter's] benefit." *Id.* at 49-50. Akin also filed a Notice of Lis Pendens on the Carmel property.

[5] Simons filed an answer to Akin's complaint in which Simons denied she had agreed to repay Akin $130,000 of the money he had provided by obtaining a mortgage on the home, or that she had agreed to create a trust for Granddaughter, and she alleged counterclaims for malicious prosecution, abuse of process, slander of title, and pursuit of frivolous litigation.

[6] On December 28, 2020, Simons filed a motion for partial summary judgment, contending that the approximately $230,000 was a gift and that there is "no document showing the $230,000 transfer was a loan to be secured by a mortgage." *Id.* at 36. In her brief in support of her motion, Simons argued that Akin's action on the oral agreement is barred by the Statute of Frauds because

Akin's complaint "attempt[ed] to call a gift a loan to be secured by a mortgage[,]" the complaint "did not mention or attach a loan agreement[,]" and the complaint "admit[ed] there is no mortgage." *Id.* at 38. Akin filed a brief and an affidavit in opposition to Simons's motion for partial summary judgment in which he argued that the Statute of Frauds did not apply, he mentioned unjust enrichment, and he argued the doctrine of promissory estoppel as an exception to the Statute of Frauds. *Id.* at 47-48.

[7] After a hearing on Simons's motion, the trial court granted the motion and entered judgment in favor of Simons and against Akin on all of Akin's claims. The court also ordered Akin to release the lis pendens notice within ten days, and the court limited the scope of the upcoming jury trial to Simons's counterclaims.[1] Specifically, the court found as follows in its order:

> Akin filed a complaint asserting he loaned money to Simons. But there is no evidence of any writing signed by Simons to support such a claim. No loan agreement; no mortgage; no Trust; no email or text or letter. Without a document, there is no admissible designated evidence creating a dispute for the Court or Jury to resolve. Akin's testimony alone is not sufficient where there is no writing showing a loan agreement.
>
> Akin argues an exception to the Statute of Frauds because of promissory estoppel. However there is no evidence Akin relied on any promise of Simons independent of the purported loan agreement. *See Brown[v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001)]. Akin has not designated any evidence showing he relied on

[1] Akin filed a release of the Notice of Lis Pendens on March 22, 2021. Appellant's App. Vol. 2 at 173-74.

> anything Simons said, other than wanting the benefit of a purported oral loan agreement.

Id. at 18. The trial court made its order a final judgment, stating: "There being no just reason for delay, the [c]ourt now directs entry of judgment[.]" *See* Ind. Trial Rule 56(C); Appellant's App. Vol. 2 at 18. This appeal ensued.

Discussion and Decision

Standard of Review

[8] Our standard of review on appeal from the entry of summary judgment is well settled:

> [S]ummary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. The review of a summary judgment motion is limited to those materials designated to the trial court. We must carefully review decisions on summary judgment motions to ensure that the parties were not improperly denied their day in court.

Tom-Wat, Inc. v. Fink, 741 N.E.2d 343, 346 (Ind. 2001) (citations omitted).

[9] The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law." *Ebersol v. Mishler*, 775 N.E.2d 373, 378 (Ind. Ct. App. 2002), *trans. denied*. Therefore, "[a] party seeking summary judgment bears the burden of showing the absence of a factual issue and [its] entitlement to judgment as a matter of

law." *Harco, Inc. of Indianapolis v. Plainfield Interstate Fam. Dining Assoc.*, 758 N.E.2d 931, 937 (Ind. Ct. App. 2001). All pleadings, affidavits, and testimony are construed liberally and in the light most favorable to the nonmoving party. *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1139 (Ind. Ct. App. 2003), *trans. denied*. For summary judgment purposes,

> [a] genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. *To be considered genuine . . . , a material issue of fact must be established by sufficient evidence in support of the claimed factual dispute* to require a jury or judge to resolve the parties' differing versions of the truth at trial. A fact is material when its existence facilitates resolution of any of the issues involved.

Id. (citations omitted, emphasis added). "[A]ny doubt as to the existence of an issue of material fact, or an inference to be drawn from the facts, must be resolved in favor of the nonmoving party." *Am. Mgmt., Inc. v. MIF Realty, L.P.*, 666 N.E.2d 424, 428 (Ind. Ct. App. 1996).

[10] "Even if it appears that the non-moving party will not succeed at trial, summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting inferences." *Link v. Breen*, 649 N.E.2d 126, 128 (Ind. Ct. App. 1995), *trans. denied*; *see also Brunner v. Trs. of Purdue Univ.*, 702 N.E.2d 759, 760 (Ind. Ct. App. 1998) ("Summary judgment should not be used as an abbreviated trial."), *trans. denied*. Finally, "[o]ur analysis proceeds from the premise that summary judgment is a lethal weapon and courts must be ever

mindful of its aims and targets and beware of overkill in its use." *Bunch v. Tiwari*, 711 N.E.2d 844, 847 (Ind. Ct. App. 1999).

[11] The trial court made findings and conclusions in support of its entry of partial summary judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal. *AutoXchange.com. Inc. v. Dreyer & Reinbold, Inc.*, 816 N.E.2d 40, 48 (Ind. Ct. App. 2004). However, such findings offer this court valuable insight into the trial court's rationale for its review and facilitate appellate review. *Id.*

Issue One: Statute of Frauds

[12] Akin first contends that the trial court erred when it granted Simons's motion for partial summary judgment because, according to Akin, there are genuine issues of material fact regarding whether the Statute of Frauds applies to the alleged oral agreement. We conclude, for the reasons that follow, that whether the money Akin provided Simons was a loan or a gift, the Statute of Frauds applies to the parties' agreement, and the material facts alleged in Akin's complaint, lis pendens notice, and affidavit support that conclusion. In the simplest of terms, this is a breach of contract case – as alleged in Akin's complaint – and Akin has failed to show with admissible evidence that there was a genuine issue of material fact on the question of whether there was a meeting of the minds of the parties. *See Jernas v. Gumz*, 53 N.E.3d 434, 445 (Ind. Ct. App. 2016) ("There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract."), *trans. denied*.

The Statute of Frauds

[13] The Statute of Frauds states in relevant part:

> A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent:
>
> * * *
>
> (4) An action involving any contract for the sale of land.

Ind. Code § 32-21-1-1(b). The purpose of a statute of frauds is to preclude fraudulent claims which would probably arise when one person's word is pitted against another's so as to open wide those ubiquitous flood-gates of litigation. *Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980). The closer a statute of frauds is adhered to with controlling judicial authority, the better. *Ball v. Cox*, 7 Ind. 453, 459 (1856). Otherwise, the protections afforded by a statute of frauds will be diminished such that the statute is rendered a dead letter. *Id.*

[14] The alleged agreement between Akin and Simons was oral. However, Akin argues that the trial court erred when it determined that the oral agreement between the parties was subject to the Statute of Frauds because, he contends, the oral agreement "was not for the 'sale of land' as that phrase is contemplated under Indiana Code [Section] 32-21-1-1(b)(4)." Appellant's Br. at 13. Akin

maintains that because he provided the money to Simons and Simons then used the money to purchase the home, "[t]his [wa]s not sufficient to bring the [o]ral [a]greement within the 'sale of land' provision of the Statute of Frauds." *Id.* at 14. He asserts that the Statute of Frauds does not apply to the oral agreement between the parties because he "did not have or receive an in rem interest in" the home; "was not 'selling' or 'conveying' property to [Simons]"; and "did not receive title, a mortgage lien, or any other encumbrance on the [p]roperty." *Id.* And, according to Akin, his argument is supported by "a litany of [Indiana] cases demonstrating scenarios in which loans can fall under the 'sale of land' provision of the Statute of Frauds" but that "each of these [case] scenarios involves the plaintiff/lender obtaining an interest in a property." *Id.*

[15] As our Supreme Court explained in *Brown v. Branch*, 758 N.E.2d 48, 51 (Ind. 2001), "our courts have long applied the principle that an agreement to convey land is subject to the Statute of Frauds' writing requirement. And this is so whether there is actually a 'sale' as the term is commonly used." (Citations omitted.) The Court noted that "over three quarters of a century ago, our courts implicitly acknowledged that a gift of land was subject to the operation of the Statute of Frauds." *Id.* (citation omitted). The Court added:

> Requiring a writing for transactions concerning the conveyance of real estate, *regardless of whether a sale has occurred within the dictionary definition of the term*, is consistent with the underlying purposes of the Statute of Frauds, namely: to preclude fraudulent claims that would likely arise when the word of one person is pitted against the word of another and to remove the

> temptation of perjury by preventing the rights of litigants from resting wholly on the precarious foundation of memory.

Id. (internal citations omitted) (emphasis added.) The case before us illustrates this point, as the parties dispute whether the money Akin provided Simons was a loan or a gift, and, ultimately, whether the agreement falls within the Statute of Frauds.

[16] In her motion for partial summary judgment, Simons designated as evidence the warranty deed by which the sellers of the home conveyed the home to her. In her reply to Akin's response to her motion, Simons also designated her deposition as evidence. In her deposition, she testified that Akin paid $230,000 for the home. Simons admitted during the deposition that there was a "verbal agreement that [she] would reimburse [Akin] for $100,000" of the $230,000 purchase price but then testified that Akin later "changed his mind" and told her "he had it covered[,]" and that Simons "did not have to pay him back." Appellant's App. Vol. 2 at 125. She also denied that she and Akin had agreed to create a trust for Granddaughter with the home as a trust asset. *Id.* at 123.

[17] In his response to Simons's motion, Akin designated as evidence his complaint,[2] an affidavit he prepared in opposition to the motion, and portions

---

[2] Simons asks that this Court not consider Akin's complaint because it was unverified. We decline Simons's request. First, per Indiana Trial Rule 11, "pleadings or motions need not be verified or accompanied by affidavit" except when specifically required by rule. Second, Rule 56(C) provides in relevant part that "[a]t the time of filing the [summary judgment] motion or response, a party shall designate to the court all parts of pleadings . . . and any other matters on which it relies for purposes of the motion." But the rule does not require that the pleadings be verified before the trial court may consider them. *See id.*

of Simons's deposition.[3] In his affidavit, Akin states that "in or around March 2012," he received an inheritance from his mother's estate; he was planning to use the monetary portion of the inheritance as capital for his business; but, instead, he "entered into a mutual agreement [with Simons] where I would *lend* approximately $230,000 to *pay for her home*, and she would pay me back $130,000 from the full loan amount within 30 days[,]" and the "remaining $100,000 value in the [home] would be assimilated into a trust for our granddaughter" to provide for her post-high school living expenses and educational needs. *Id.* at 54 (emphases added). His affidavit further states that he "understood that [Simons] would take a mortgage on the home to pay [him] back"; but he "did not tell [Simons] that taking a mortgage was the only way to pay [him] back"; and he has "no monetary interest in the home[.]" *Id.* at 54-55. Akin's affidavit also states that he "did not tell [Simons] at any time that [he] was gifting her $230,000[.]" *Id.* at 55.

[18] Despite the parties' differing accounts regarding the terms of their agreement and whether the $230,000 that Akin provided to Simons was a loan or a gift, it is undisputed that Akin provided the money for Simons to purchase a home and that any agreement between them was not in writing. As such, the Statute

---

[3] In his response to Simons's motion for partial summary judgment, Akin also purported to designate as evidence two emails from his brother and a bank deposit receipt in the amount of $10,000. However, the evidence was not designated to the trial court. During the hearing on Simons's motion, Simons's counsel argued that the evidence was "not verified, not notarized" and was hearsay. Tr. Vol. 2 at 4. Akin's counsel told the court, "As far as e-mails, . . .we didn't include them because they're not under oath. They weren't certified." *Id.* at 19.

of Frauds applies to the agreement, and the agreement cannot be enforced, if it involved "any contract which seeks to convey an interest in land[.]" *Brown*, 758 N.E.2d at 51. And there is no requirement that Akin himself have obtained an interest in the land for the Statute of Frauds to apply. The Statute of Frauds applies to an agreement "involving any contract for the sale of land" – and "any" means any. I.C. § 32-21-1-1(b)(4). Here, at bottom, the oral agreement between the parties was inextricably linked to an agreement that Simons would acquire the home. There would have been no agreement but for the purchase of the home. Akin made an oral promise to Simons to provide the money for Simons to purchase the home, which involved a contract for the sale of land even if the money Akin provided was a gift and not a loan. *See Brown*, 758 N.E.2d at 50 (holding that "an oral promise to give another person real property falls within the Statute of Frauds").

The Lis Pendens Notice

[19] Akin filed a Notice of Lis Pendens (the "lis pendens notice"), which shows that the substance of the parties' agreement was to purchase real estate. The notice states, in relevant part, that, "the Parties' agreement required [Simons] to take out a mortgage loan on the property in the amount of $130,000 to repay [Akin.]" Appellant's App. Vol. 2 at 24. As our Supreme Court has explained:

> The doctrine of lis pendens is fundamentally about notice. The term lis pendens itself means "pending suit," and it refers specifically to "the jurisdiction, power, or control which a court acquires over property" involved in a pending real estate action. Any successor in interest to real estate is deemed to take notice of a pending action involving title to that real estate and is subject to

> its outcome. The judgment in the pending lawsuit binds all successors in interest, regardless of whether a successor was a party to the litigation. The doctrine's purpose is to protect the finality of court judgments by discouraging purchases of contested real estate.

JPMorgan Chase Bank, N.A. v. Claybridge Homeowners Ass'n, 39 N.E.3d 666, 670-71 (Ind. 2015) (internal citations omitted).

[20] In his reply brief on appeal, Akin contends for the first time that the lis pendens notice was not designated to the trial court in accordance with Trial Rule 56 and that to the extent the notice is inconsistent with the designated affidavit and deposition testimony of the parties, the notice cannot be considered. Appellant's Reply Br. at 5, 15. We cannot agree for several reasons.

[21] First, Appellate Rule 46(C) provides that, "No new issues shall be raised in the reply brief." And the law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived. *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005). In his initial brief, Akin states that, "on July 24, 2014, Mr. Akin filed a Notice of Lis Pendens on the real estate[.]" Appellant's Br. at 5. Akin and Simons disputed the lis pendens notice during oral argument before the trial court on the motion for partial summary judgment, but Akin did not object that the notice had not been designated. Instead, Akin conceded during oral argument that a lis pendens notice "was filed by prior counsel." Tr. Vol. 2 at 11. And then alleged, incorrectly, that his lis pendens notice "was not

contested" by Simons. Tr. Vol. 2 at 14. Thus, Akin forfeited any objection to consideration of his lis pendens notice.

[22] Not only has Akin forfeited any objection to the court's consideration of his lis pendens notice, but his oral and written statements were judicial admissions. It is well-settled that judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring at any point in a judicial proceeding. *Franciscan ACO, Inc. v. Newman*, 154 N.E.3d 841, 847 (Ind. Ct. App. 2020) (citing *Stewart v. Alunday*, 53 N.E.3d 562, 568 (Ind. Ct. App. 2016)), *trans. denied*. A judicial admission is conclusive and does away with the need for evidence. *Id.* Akin filed the lis pendens notice with the clerk and filed the notice with the trial court. Thus, Akin's admission merely confirmed the chronological case summary showing that his prior counsel had filed the notice with the trial court. The notice is in the trial court record and is admissible. And, in any event, a trial court can take judicial notice of its own records in the same case. *See* Ind. Evidence Rule 201(c)(1).

[23] Thus, it is undisputed as a matter of fact that Akin placed the lis pendens notice on the Carmel property. Akin addressed the notice in his initial brief and during oral argument as if the notice were in evidence, and he admitted that the notice is his document. While the notice was not designated as evidence under Trial Rule 56(C), given Akin's forfeiture and judicial admissions, on this record we decline to ignore the obvious and elevate form over substance. Thus, we conclude that the notice is part of the evidentiary footprint before the trial court for purposes of summary judgment. And the trial court properly ordered Akin

to release the notice. Appellant's App. Vol. 2 at 18. On remand, Simons's counterclaim for slander of title based on the notice remains to be determined.

[24] The text of the notice refers to a mortgage and repeats the allegation in Akin's complaint that he and Simons agreed she would repay $130,000 of the money he had provided to her "by taking out a mortgage loan on the property[.]" *Id.* at 49. As a matter of law, by filing the notice, Akin sought to enforce a lien, right, or interest against the real estate described in the notice. I.C. § 32-30-11-3(b)(4). In sum, the lis pendens notice establishes a direct nexus between Akin's action against Simon to enforce an alleged oral agreement and "an action involving any contract for the sale of the land," which implicates the Statute of Frauds. *See* I.C. § 32-21-1-1(b)(4).

The Affidavit

[25] Akin points out that, while an oral promise to give a mortgage on real estate is within the Statute of Frauds and cannot be enforced, the same is not true for a promise to repay the debt. Reply Brief of Appellant at 5; *Brown v. Stapleton*, 24 N.E.2d 909, 911 (Ind. 1940). As we have noted, in his complaint Akin alleges that Simons had agreed to repay him "by taking out a mortgage loan" on the home, just as he states in his lis pendens notice that, "the Parties' agreement required [Simons] to take out a mortgage loan on the property in the amount of $130,000 to repay [Akin] for his contribution to the purchase of the property." *Id.* at 24, 49. Nevertheless, in his affidavit Akin attempts to avoid the Statute of Frauds by stating that he did not tell Simons that "taking a mortgage was the

only way" to repay him and that he had "no monetary interest in the home" that Simons purchased. Appellant's App. Vol. 2 at 54-55.

[26] Akin's affidavit contradicts his other evidence. But he cannot create a genuine issue of material fact with an affidavit which both impeaches the complaint he designated and disavows the lis pendens notice he filed. He cannot claim in his affidavit that under the alleged agreement Simmons was not required to take out a mortgage when his complaint says that she was, or that he has "no monetary interest in the real estate" when his lis pendens notice states that he does. This principle is derived from our Supreme Court's opinion in *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983) and its progeny in which we have declined to allow the sworn testimony of a nonmovant to defeat a summary judgment where, as here, that testimony contradicts the nonmovant's other evidence. *See Crawfordsville Square, LLC v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 939 (Ind. Ct. App. 2009) (deposition testimony which contradicts the deponent's assertions in an earlier letter cannot be used to show a genuine issue of material fact), *trans. denied*. *See also 5200 Keystone Ltd. Realty, LLC v. Netherlands Ins. Comp.,* 29 N.E.3d 156*,* 162-64 (Ind. Ct. App. 2015) (party opposing summary judgment "cannot have it both ways"). For that reason alone, Akin's affidavit does not create a genuine issue of material fact that would preclude summary judgment.

[27] Akin's affidavit is also notable for what it does not say. His affidavit states that he did not tell Simons he was "gifting" her $230,000, which is a statement of fact, but his affidavit does not state that Simons promised to repay him

$130,000, which would be a factual predicate for his alleged cause of action. Appellant's App. Vol. 2 at 55. Instead, Akin's affidavit asserts that the parties had "entered into a mutual oral agreement," a statement admissible under Evidence Rule 704(a), but only as an expression of Akin's opinion. Evid. R. 704(a) ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable just because it embraces an ultimate issue."); Appellant's App. Vol. 2 at 54. Neither does the affidavit state that Simons promised to take out a mortgage on the home, only that Akin "understood" that Simons would take out a mortgage. *Id.* at 54. As a party to the alleged agreement, Akin may express his opinion based upon his belief or understanding, but a person's belief or understanding is not an objective fact, and objective facts are required to create genuine issues of material fact. Under the objective theory of contracts, the intent relevant in contract matters is not a party's subjective intent but the outward manifestation of it. *Gerdon Auto Sales, Inc. v. John Jones Chrysler Dodge Jeep Ram*, 98 N.E.3d 73, 80 (Ind. Ct. App. 2018), *trans. denied*. Thus, Akin's affidavit is deficient where it merely expresses his belief or understanding, a statement which is admissible but not a statement of objective fact.

[28] And, finally, in ruling on a motion for summary judgment, our courts will only consider evidence which would be admissible at trial. *See Seth v. Midland Funding, LLC*, 997 N.E.2d 1139, 1141 (Ind. Ct. App. 2013). While, as we have noted, Akin's assertion that he and Simons had "entered into a mutual oral agreement" that she would repay him $130,000 is admissible as an expression of his opinion, it is inadmissible as a legal conclusion under Evidence Rule

704(b). Evid. R. 704(b) ("Witnesses may not testify to . . . legal conclusions."); Appellant's App. Vol. 2 at 54, 55. Mere assertions in an affidavit of conclusions of law or opinions are not sufficient on summary judgment. *Steak 'n Shake Operations, Inc. v. National Waste Assoc., LLC*, No. 21A CP-213, 2021 WL 4343642, at *7 (Ind. Ct.App. Sept. 24, 2021). Under Trial Rule 56(E), a court considering a motion for summary judgment should disregard inadmissible information contained in supporting or opposing affidavits. *Id.*[4]

Akin's Breach of Contract Claim

[29] Akin's breach of contract claim is in two parts. First, he claims that he and Simons had an "oral contract for the repayment of money," and, second, that they had an agreement to utilize the home to establish a trust for their granddaughter. Appellant's App. Vol. 2 at 50. These two claims are integral to each other.

Alleged Independent Oral Agreement for the Repayment of Money

[30] As we have determined, the facts establish, and the trial court found, that "Akin transferred $230,000 to Simons for her to purchase a home[.]" *Id.* at 17. Thus, we have concluded that whether the money Akin provided was a loan or a gift,

[4] Likewise, Akin's contention in his complaint that the parties entered into "a valid and enforceable oral contract for the repayment of money," is not evidence but states a legal conclusion, which is not entitled to any consideration. Appellant's App. Vol. 2 at 50.

the alleged agreement was tied to a contract for the sale of land, and the Statute of Frauds applies to the transaction.

[31] As we have discussed, Akin attempts to circumvent the Statute of Frauds by claiming that the parties had entered into a freestanding oral contract for repayment of a loan independent of a mortgage. We have rejected that argument and held that the Statute of Fraud applies. But apart from the Statute of Frauds, the alleged oral contract for the repayment of money is not severable from the alleged oral agreement to take out a mortgage.

[32] As previously noted, the general rule, as stated in *Brown v. Stapleton*, 24 N.E.2d 909, 911 (Ind. 1940), is that while an oral promise to give a mortgage on real estate is within the Statute of Frauds and cannot be enforced, the promise to give the mortgage does not vitiate a promise to repay the money. Here, however, the alleged promise to obtain a mortgage in order to repay some of the money Akin provided are bound together. As we have discussed, Akin claims in his affidavit that Simons simply promised to repay him $130,000 and, in effect, that whether or not she obtained a mortgage to repay that amount was not an essential term of their agreement. But the material facts alleged in Akin's complaint, lis pendens notice, and affidavit are aligned and support only one reasonable inference, namely, that the alleged promise to pay and the alleged promise to obtain a mortgage were indivisible and that if they were enforceable, they would have constituted a single, unitary transaction.

[33] Akin's complaint is explicit when it alleges that, "The parties agreed that [Simons] would repay $130,000 of the transfer by taking out a mortgage loan on the property within 30 days." Appellant's App. Vol. 2 at 19. His lis pendens notice declares succinctly that, "the Parties' agreement required [Simons] to take out a mortgage loan on the property in the amount of $130,000[.]" *Id.* at 24. And while his affidavit disclaims that a mortgage was required, he nevertheless states, in relevant part, that he "understood" that Simons would place a mortgage on the home to repay his alleged loan to her. *Id.* at 54-55.

Alleged Independent Oral Agreement to Establish a Trust

[34] If additional evidence were needed to demonstrate that the alleged loan and the alleged mortgage were linked, the alleged oral agreement to establish a trust also precludes a genuine issue of material fact on the question whether Simon's alleged oral promise to repay Akin was severable and independent of a mortgage loan on the real estate. Akin's complaint alleges that "the remainder of the interest in the real estate," and his affidavit alleges that, the "remaining $100,000 value in the [home]," would be held in trust for their granddaughter. *Id.* at 19, 49, 54. The "remainder of the interest" or "remaining value" in the real estate would be that amount remaining after deducting the $130,000 mortgage described in the complaint, the lis pendens notice, and the affidavit. In other words, according to Akin, the initial trust corpus would consist of the value of the real estate *net* of the mortgage Simons was allegedly required to obtain. Akin attributes $100,000 to the initial trust corpus, which demonstrates that when he provided the money to Simons, he did not contemplate a

freestanding oral promise to repay the money but a promise to repay the money from the proceeds of a mortgage loan, which, according to his complaint, lis pendens notice, and affidavit would leave a net value of $100,000 in the real estate for the trust.

[35] Finally, we consider whether Simons's alleged agreement to establish a trust is otherwise enforceable. Akin asserts broadly that Simons had agreed "to work with me in the creation of a trust for our granddaughter." *Id.* at 55. And Akin asserts in his complaint that Simons breached their contract when she refused to transfer their granddaughter's interest in the home either to Granddaughter or to a trust for Granddaughter's benefit. However, this trust claim must fail because there is no written evidence of an agreement to create a trust, and a trust is enforceable only if there is written evidence of the terms of the trust bearing the signature of the settlor, the settlor's agent, or an authorized person on behalf of the settlor. Ind. Code § 30-4-2-1. There is no such evidence in this case.

Issue Two: Exceptions to the Statute of Frauds

Part Performance and Unjust Enrichment

[36] On appeal Akin contends that, even if the Statute of Frauds were applicable, the part performance, unjust enrichment, and promissory estoppel exceptions to the Statute of Frauds apply here to remove the alleged oral agreement from the Statute. However, Akin must establish genuine issues of material fact sufficient to bring the agreement within at least one of these exceptions. To defeat Simons' motion for partial summary judgment, Akin must show facts

"established by sufficient evidence in support of the claimed factual dispute" to require a factfinder's resolution of "the parties' differing versions of the truth at trial." *Baker*, 799 N.E.2d at 1139.

[37] Akin argued only one of those exceptions, promissory estoppel, to the trial court. We do not consider Akin's part-performance exception argument because he made no reference to the exception in his complaint or brief in response to Simons's motion for partial summary judgment, and he did not argue that exception to the trial court. In his complaint, Akin did assert that Simons "has been unjustly enriched," but he mentioned unjust enrichment once in his brief in response to Simons's motion for partial summary judgment, and he did not designate evidence or present cogent argument to the trial court that the unjust enrichment exception created a genuine issue of material fact to defeat partial summary judgment.

[38] In a footnote in his initial brief on appeal, Akin contends that, "Although Mr. Akin only specifically titled claims for Breach of Contract and Complaint for Constructive Trust, he referenced and/or made allegations to support claims for both promissory estoppel and unjust enrichment in his Complaint." Appellant's Br. at 5. But to survive a motion for summary judgment and demonstrate a genuine issue of material fact, the non-movant must do more than merely mention or allude to a theoretical claim or defense upon which relief could be granted. Thus, we cannot agree with Akin's assertion that he "adequately pled" his claim for unjust enrichment. Reply Br. at 4.

[39] Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived. *Dunaway v. Allstate Ins. Co.*, 813 N.E.2d 376, 387 (Ind. Ct. App. 2004). Therefore, we conclude that Akin has waived for our review the issues of part performance and unjust enrichment as exceptions to the Statute of Frauds. Waiver notwithstanding, on appeal Akin has either failed to designate admissible evidence or to provide an argument supported by cogent reasoning that would support a reasonable inference for a trier of fact to conclude that either the part performance or unjust enrichment exceptions to the Statute of Frauds applies. "To be considered genuine . . . , a material issue of fact must be established by sufficient evidence in support of the claimed factual dispute[.]" *See Baker*, 799 N.E.2d at 1139

Promissory Estoppel

[40] Even when oral agreements fall within the Statute of Frauds, they may still be enforced under the equitable doctrine of promissory estoppel. *Brown*, 758 N.E.2d at 51. The estoppel doctrine is based on the rationale that a person whose conduct has induced another to act in a certain manner should not be permitted to adopt a position inconsistent with such conduct so as to cause injury to the other. *Spring Hill Developers, Inc. v. Arthur*, 879 N.E.2d 1095, 1100 (Ind. Ct. App. 2008) (citing 31 C.J.S. *Estoppel and Waiver* § 2 (1996)). Coupled with the Statute of Frauds, the two represent alternative and sometimes competing means to achieve the same ends of avoiding injustice:

> The statute of frauds was designed as the weapon of the written law to prevent fraud, while the doctrine of estoppel is that of the

> unwritten law to prevent like evil. Each is effective in its appropriate field; both are essential to prevent and redress wrongs, and neither should be allowed to dominate the other.

Id. (quoting *Columbus Trade Exch., Inc. v. AMCA Int'l Corp.*, 763 F. Supp. 946, 952 (S.D. Ohio 1991)). Consistent with these observations, a party seeking to preclude application of the Statute of Frauds based on promissory estoppel must establish the following five elements: (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise. *Id.* (citing *First Nat'l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 954 (Ind. 1991)).

[41] The fifth element creates a high hurdle for the party seeking to establish promissory estoppel. *Id.* at 1101. That is,

> [i]n order to establish an estoppel to remove the case from the operation of the Statute of Frauds, the party must show [ ] that the other party's refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss.

Brown, 758 N.E.2d at 52 (quoting *Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 845 (Ind. Ct. App. 1987), *trans. denied*). Thus, while it is true that the doctrine of promissory estoppel may remove an oral agreement from the operation of the Statute of Frauds, it is also true that the party asserting the doctrine carries a heavy burden of establishing its applicability. *Id.*

[42] In *Brown*, our Supreme Court reversed the trial court's judgment enforcing the defendant's oral promise to convey a house based on a theory of promissory estoppel. Although the plaintiff quit her job, dropped out of college, and moved from Missouri to Indiana in reliance on the defendant's promise to convey a house to her, the Court determined that such injuries merely established that the plaintiff "was inconvenienced as well as denied the benefit that [the defendant's] promise was intended to confer," but not that the defendant's "oral promise resulted in the 'infliction of an unjust and unconscionable injury and loss.'" *See Spring Hill*, 879 N.E.2d at 1102 (quoting *Brown*, 758 N.E.2d at 53).

[43] Likewise, in *Spring Hill*, we concluded that the parties asserting that promissory estoppel applied to remove an agreement from the Statute of Frauds were unable to clear the high hurdle to establish the doctrine. In reaching that conclusion, we noted our Supreme Court's observation in *Coca–Cola Co. v. Babyback's Intern., Inc.*, 841 N.E.2d 557, 569 (Ind. 2006), that the language in *Whiteco* and *Brown* "may be understood to express that . . . the reliance injury must be not only (1) independent from the benefit of the bargain and resulting incidental expenses and inconvenience, but also (2) so substantial as to constitute an unjust and unconscionable injury." *Spring Hill*, 879 N.E.2d at 1103 (quoting *Babyback's*, 841 N.E.2d at 569). And we observed that this two-step "test" set forth in *Babyback*'s "addresse[d] reliance injuries only" and that "expectancy injuries are excluded from the unconscionability analysis." *Id.*

[44] Here, in his promissory estoppel argument, Akin contends that the money he gave to Simons to purchase the home came from his inheritance from his

mother's estate and that he planned to use the money as capital for a business he had recently started. Akin claims that he "lost a large sum of money from [the] inheritance along with the revenue . . . the money . . . would have created[,]" and that he "struggled to supply [his] business properly with inventory, equipment and supplies that the money that was temporarily loaned to [Simons] would have generated." Appellant's App. Vol. 2 at 55. He also claims that he and Granddaughter "have suffered an independent, unjust, or unconscionable injury" because Simons failed to establish the trust for the benefit of Granddaughter. Appellant's Br. at 17.

[45] Simons, on the other hand, argues that Akin's promissory estoppel claim fails because he has failed to show "any reliance on [her] alleged promise, other than wanting the benefit of a purported oral loan agreement and a Trust established for [Granddaughter] with no defined written terms." Appellee's Br. at 17. The trial court found, and we agree, that "there is no evidence Akin relied on any promise of Simons independent of the purported loan agreement." Appellant's App. Vol 2 at 18.

[46] Assuming without deciding that there may exist genuine issues of material fact regarding whether Akin can establish the first four elements of promissory estoppel, we find that Akin's promissory estoppel claim cannot succeed because he cannot clear the high hurdle of establishing the fifth element, that is, a reliance injury that is independent from the benefit of the bargain and so substantial as to constitute an unjust and unconscionable injury and loss. *See Spring Hill*, 879 N.E.2d at 1103. As our Supreme Court explained in *Brown*,

"neither the benefit of the bargain itself, nor mere inconvenience, incidental expenses, etc. short of a reliance injury so substantial and independent as to constitute an unjust and unconscionable injury and loss are sufficient to remove the claim from the operation of the Statute of Frauds." *Brown*, 758 N.E.2d at 52 (quoting *Whiteco*, 514 N.E.2d at 845). Again, in his affidavit Akin alleges that he had planned to use the money he provided Simons "as capital for a business" and that he lost the use of that money "along with the revenue that the money . . . would have generated." Appellant's App. Vol. 2 at 54, 55. But these alleged damages are not independent of Akin's underlying benefit-of-the-bargain claim and amount to nothing more than an opportunity-cost claim for expectancy damages, which are not recoverable.

[47] In sum, as our Supreme Court stated in *Brown*, "If what the party gave up in reliance on an oral promise was no greater than what the party would have given up in any event, then the consideration is deemed insufficient to remove the oral promise from the operation of the Statute of Frauds." 758 N.E.2d at 53. Akin has not provided evidence showing that his reliance on Simons's oral promise to repay him and create a trust for Granddaughter resulted in reliance injuries that are independent from the benefit of the bargain and so substantial as to constitute the "infliction of an unjust and unconscionable injury and loss" that would remove the oral agreement from the operation of the Statute of Frauds. *Whiteco*, 514 N.E.2d at 845. To the contrary, the consequences relied upon by Akin are what Akin had hoped to gain from Simons's alleged promise, and they are the kind of adverse consequences which normally result from

providing money without written documentation that the money provided is a loan and not a gift. *See id.* at 846. While Akin claims his designated evidence establishes a genuine issue of material fact on the question whether he suffered substantial and unjust reliance injuries, his evidence shows only that he suffered routine expectancy injuries. Thus, the trial court did not err when it held that, "Akin has not designated any evidence showing he relied on anything Simons said, other than wanting the benefit of a purported oral loan agreement." Appellant's App. Vol. 2 at 18.

Conclusion

[48] We conclude that Akin's action against Simons is one involving a "contract for the sale of land" as contemplated by the Statute of Frauds. I.C. § 32-21-1-1(b)(4). Thus, we hold that the trial court did not err when it found that the Statute of Frauds applies to the alleged oral agreement between the parties and bars Akin's complaint. We also hold that Akin has failed to show that the alleged oral agreement to create a trust, even if it were proven, would be enforceable as a matter of law. And we hold that Akin has waived his claims that the part performance and unjust enrichment exceptions apply and that he has failed to demonstrate that the promissory estoppel exception applies. Thus, we affirm the trial court's partial summary judgment in favor of Simons.

[49] Affirmed.

Riley, J., and Brown, J., concur.