IN THE UTAH COURT OF APPEALS

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Stephen H. Schwartz and Ann Schwartz, Plaintiffs and Appellants, v. Brad Adair; Ray Spencer; and Southern Utah Title Co., Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060275-CA F I L E D (March 8, 2007) 2007 UT App 75

Sixth District, Kanab Department, 020600042
The Honorable David L. Mower

Attorneys: Stephen H. Schwartz, Hatch, for Appellants
Michael D. Hughes, St. George, for Appellees

Before Judges Greenwood, Davis, and Thorne.

THORNE, Judge:

Stephen H. and Ann Schwartz (Plaintiffs) appeal from the district court's order on Brad Adair, Ray Spencer, and Southern Utah Title Company's (Defendants) renewed motion for summary judgment. The district court granted summary judgment to Plaintiffs on both their contract and tort claims, but awarded

them only nominal damages in the amount of one dollar.[1] Thus, the district court effectively granted summary judgment to Defendants as to the actual and punitive damages that Plaintiffs had sought in their complaint. Plaintiffs appeal, and we affirm.

Summary judgment will be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Because a trial court does not resolve issues of fact at summary judgment, we review the grant of summary judgment for correctness, viewing the facts in the light most favorable to the nonmoving party. See Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1162-63 (Utah 1993). Where the moving party supports a motion for summary judgment with affidavits, depositions, or other sworn evidence, the non-moving party must present similar evidence to raise a dispute of fact and may not rely on bare allegations from the pleadings. See Utah R. Civ. P. 56(e).

Here, Plaintiffs retained Defendants to bid on a particular property at a tax sale, in an amount up to $35,000. Defendants stopped bidding at $11,000, resulting in the sale of the property to William Pringle for $11,250. Pringle later sold the property for $75,000. Plaintiffs sued Defendants, alleging that Defendants' failure to bid up to the authorized amount resulted in the Plaintiffs' loss of the property to Pringle.

Defendants' renewed motion for summary judgment argued that Plaintiffs could not demonstrate any nexus between Defendants' admitted conduct and Plaintiffs' failure to acquire the property at auction. Defendants argued that Pringle would have bid in excess of $35,000 for the property regardless of Defendants' actions, and thus would have been the highest bidder even if Defendants had bid up to their authorized limit. Defendants supported their motion with Pringle's affidavit, and later with

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[1]We note that the result in this case would be the same had the district court actually granted summary judgment in favor of Defendants on the grounds that Plaintiffs could not prove actual damages. See, e.g., Eleopulos v. McFarland & Hullinger, L.L.C., 2006 UT App 352,¶9, 145 P.3d 1157 ("In order to preclude the entry of summary judgment on claims for breach of contract and waste, Plaintiffs must raise material issues of fact pertaining to actual damages. Both of Plaintiffs' causes of action require damages as an essential element of proof." (footnote omitted)). Neither party argues that it was improper for the district court to use a nominal award to the Plaintiffs as a means of resolving Defendants' request for summary judgment, and we express no opinion on the issue.

the deposition testimony of Pringle's son Bryan,[2] stating that Pringle would have bid well in excess of $35,000 for the property and had the funds available to do so. In opposition, Plaintiffs submitted an affidavit from Stephen Schwartz asserting that Pringle had told him that he would have stopped bidding at $20,000; a transcript of a telephone conversation in which Pringle allegedly confirms that $20,000 would have been his highest bid; and a compilation of Pringle's bidding history on other tax sale properties.

Plaintiffs argue on appeal that summary judgment was inappropriate because they raised a fact question as to whether Pringle would have bid in excess of $35,000. We disagree. We first note that the telephone transcript is, at most, ambiguous as to Pringle's bidding intentions. But even interpreting the transcript in the light most favorable to Plaintiffs, Pringle's statements in both the transcript and Schwartz's affidavit are hearsay, and Plaintiffs have provided no basis upon which they might be deemed admissible.[3] See Utah R. Evid. 801 (defining hearsay as an out of court statement offered to prove the truth of the matter asserted); id. 802 ("Hearsay is not admissible except as provided by law or by these rules."). As such, Pringle's statements cannot serve to defeat summary judgment.

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[2]At some point after Pringle executed his affidavit, he suffered a serious stroke and became unable to further testify or participate in this matter. Thereafter, Defendants deposed Bryan Pringle regarding the transaction. In his deposition, Bryan testified that he was personally involved in the purchase of the property. Bryan further testified that he and Pringle had formed a joint venture to purchase the property, Pringle was bidding as an agent of the joint venture, and Pringle had approximately $100,000 available on the date of the sale to use toward the purchase of the property. Bryan testified that, prior to the sale, he and Pringle had "discussed how high we were going to go," and that they would have bid more than $35,000 to purchase the property if necessary.

[3]Plaintiffs attempt to characterize Pringle's statements as nonhearsay to the extent that the statements could potentially be used to contradict Pringle's testimony at trial. See Utah R. Evid. 801(d)(1)(A) (excluding statements inconsistent with a witness's trial testimony from the definition of hearsay). However, Defendants presented uncontested evidence below that Pringle suffered a serious stroke in July 2003, and that it was unlikely that he would be available to testify at any eventual trial. The trial court also specifically found that, as of three days prior to the scheduled trial, Plaintiffs did not intend to call Pringle as a witness.

See Wayment v. Clear Channel Broad., Inc., 2005 UT 25,¶41, 116 P.3d 271 ("Summary judgment may . . . not be denied based solely on inadmissible hearsay."); Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983) (holding that statements that are "not . . . admissible in evidence . . . may not be considered on summary judgment under [r]ule 56(e)").

Plaintiffs also argue that a compilation of Pringle's historical bids, showing that he had never bid more than $5250 for a single property and that he had been outbid in six out of seventeen auctions, provides evidence that he would not have bid in excess of $35,000 for this property. We cannot reach the same conclusion. In this case, Pringle's actual bid of $11,250 already more than doubled his previous high bid. Further, without substantial evidence of the circumstances surrounding each individual prior bid, it would be mere speculation to draw conclusions from those bids and use them to predict Pringle's likely bids for other properties. Thus, the bidding history is insufficient to raise a dispute of material fact to defeat summary judgment in this case.

In sum, Defendants properly supported their motion for summary judgment with affidavit[4] and deposition evidence showing that Pringle would have outbid Plaintiffs regardless of Defendants' actions. Plaintiffs' opposition relies on inadmissible hearsay statements and evidence of Pringle's bidding history that is too speculative to raise a fact question precluding summary judgment. Therefore, the district court properly concluded that Plaintiffs would not have outbid Pringle for the property even if Defendants had complied with their duty to bid up to $35,000, and that there was accordingly no nexus between Defendants' conduct and Plaintiffs' claimed damages. Because Plaintiffs' claimed damages all flow from the premise that they would have prevailed at auction if their instructions had been followed, the district court's determination that they would not have prevailed regardless of Defendants' actions renders their damages claims without merit.[5]

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[4]Plaintiffs do not argue that Pringle's incompetence affects the validity of his previously executed affidavit for purposes of summary judgment. However, even if Plaintiffs had successfully pursued this argument, Bryan Pringle's deposition testimony alone is sufficient to support Defendants' motion.

[5]The district court also based its ruling, in part, on the proposition that damages must be proven to a degree of certainty. See, e.g., Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah
(continued...)

Accordingly, the district court's summary judgment order was proper.

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William A. Thorne Jr., Judge

WE CONCUR:

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Pamela T. Greenwood,
Associate Presiding Judge

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James Z. Davis, Judge

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[5](...continued)
1986) ("The fact of damages must be proven with reasonable certainty and the amount by a reasonable though not necessarily precise estimate."). The district court's uncertainty analysis appears to reflect the necessity for speculation as to the price Plaintiffs would have paid for the property had they prevailed at auction, a figure that would need to be determined in order to accurately assess Plaintiffs' damages. However, Plaintiffs failed to present evidence raising a fact question that they would have prevailed at auction, and there is therefore no uncertainty as to their damages--they did not suffer any.