2016 IL App (4th) 160016-U

NO. 4-16-0016

FILED
October 31, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JAMES O. HURLBERT,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
JEFFREY D. FREDERICK,	)	No. 14L207
Defendant-Appellee.	)	
	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: In this legal-malpractice case, the defendant-attorney came forward with sworn evidence affirmatively disproving the element of damages, and in the absence of a specific rebuttal to this evidence, he is entitled to summary judgment, as the trial court correctly ruled.

¶ 2 This is an action for legal malpractice. Plaintiff, James O. Hurlbert, is the disgruntled client, and defendant, Jeffrey D. Frederick, is the attorney he is suing.

¶ 3 Then there is the case within this case: the malicious-prosecution case in which Frederick represented Hurlbert and (Hurlbert claims) committed the legal malpractice.

¶ 4 Let us begin with the underlying case, the action for malicious prosecution. Hurlbert sued the city of Urbana, Illinois, and an Urbana police officer, Andrew Charles, alleging they had maliciously prosecuted him for driving under the influence of alcohol (DUI). The defendants in that case won by summary judgment, and Hurlbert's attorney, Frederick, sent him

a letter telling him he had until January 10, 2013, to file a notice of appeal. The actual deadline was January 2, 2013, and because of this inaccurate information in Frederick's letter, Hurlbert filed a late notice of appeal in the malicious-prosecution case, and we dismissed his appeal.

¶ 5 So, Hurlbert turned around and, in the present case, sued Frederick for legal malpractice. Frederick moved for summary judgment, and the trial court granted his motion. Afterward, the court denied Hurlbert's motion to vacate the summary judgment. Hurlbert appeals.

¶ 6 In our *de novo* review (*Rotzoll v. Overhead Door Corp.*, 289 Ill. App. 3d 410, 413 (1997)),we affirm the summary judgment in Frederick's favor. Our reason is this. To recover damages against Frederick for legal malpractice, Hurlbert must prove that, more likely than not, he would have prevailed in the underlying malicious-prosecution case against Urbana and Charles. The lack of probable cause is an essential element of a cause of action for malicious prosecution. The summary-judgment materials in this legal-malpractice case raise no genuine issue as to whether Charles had probable cause to cite Hurlbert for DUI. He had probable cause to do so. Because probable cause would have defeated the malicious-prosecution case, anyway, regardless of any negligence by Frederick in misadvising Hurlbert of the deadline for appeal, such negligence inflicted no pecuniary injury on Hurlbert. Absent damages proximately resulting from Frederick's negligence in the underlying malicious-prosecution case, Frederick is entitled to summary judgment in this legal-malpractice case. Therefore, we affirm the trial court's judgment.

¶ 7 I. BACKGROUND

¶ 8 A. Discovery Depositions
From the Underlying Malicious-Prosecution Case,

Attached as Exhibits to
Frederick's Motion for Summary Judgment
in This Legal-Malpractice Case

¶ 9 Frederick attached several exhibits to his motion for summary judgment in this legal-malpractice case, including the discovery depositions of Charles and Hurlbert from the underlying malicious-prosecution case. Hurlbert's deposition was taken on May 2, 2008, and Charles's deposition was taken on February 29, 2012.

¶ 10 1. *The Deposition of Andrew Charles*

¶ 11 Late at night on Saturday, October 19, 2003, Charles was on patrol in Urbana, when he heard on the radio that a white and purple pickup truck had been stolen. Afterward, around 2 a.m., as he was driving his squad car south on Cunningham Avenue, he saw a pickup truck go by, heading north. In the dim light, the truck appeared to be white and purple. Charles did a U-turn and caught up with the truck, which was traveling in the far left lane, the passing lane.

¶ 12 As he followed the pickup truck, Charles watched it drift over to the right and cross the lane-dividing line until the front and back passenger wheels were completely in the right lane, and then the truck drifted back into the left lane. After watching this slow weaving, Charles turned on the video camera inside his squad car and continued to follow the truck as it turned left, onto the entrance ramp to Interstate Highway 74.

¶ 13 Charles activated the emergency lights and siren of his squad car to pull the truck over for improper lane usage. Although the truck immediately pulled over, it kept going forward on the shoulder instead of immediately stopping. This increased Charles's suspicion that the driver possibly was under the influence. According to training he had received from the National

Highway Traffic Safety Administration, weaving in and out of one's lane and failing to make a proper stop were both signs of possible intoxication. At last, the truck came to a stop.

¶ 14 Charles was unacquainted with the driver. When asking him for his driver's license and proof of insurance, he smelled a strong odor as of an alcoholic beverage. The driver, Hurlbert, handed Charles his credit card instead of his driver's license and insurance card. His speech was slow, hesitant, and slurred. In response to Charles's inquiry, he said he had consumed three mixed drinks that night. Charles grew more suspicious.

¶ 15 He told Hurlbert to remain in the car, and he went back to the squad car. He confirmed Hurlbert's identity through the state system, wrote a citation for improper lane usage, and called another police officer to assist with the traffic stop.

¶ 16 In five minutes, another police officer, named Bain, arrived. Charles told Bain he intended to ask Hurlbert to undergo some field sobriety tests, and he wanted Bain to videotape the testing. Bain turned on his camera. At Charles's request, Hurlbert got out of the truck.

¶ 17 As Charles explained in his deposition, the National Highway Traffic Safety Administration recommended three field sobriety tests: (1) the one-leg stand, (2) the walk and turn, and (3) the horizontal-gaze nystagmus test. These three tests were the "standardized" field sobriety tests, so called because the National Highway Traffic Safety Administration had developed and recommended them. A driver over 60 years of age, however, or more than 50 pounds overweight was ineligible to take the first two standardized tests. Not only was Hurlbert more than 60 years old and overweight, but he told Charles he had a leg injury that incapacitated him from standing with his feet together. Therefore, Charles decided it would be unsafe for Hurlbert, there on the side of the interstate highway, to attempt the one-leg stand or the walk and turn.

¶ 18 Hurlbert was eligible, however, to take the remaining standardized test, the horizontal-gaze nystagmus test. After ascertaining that Hurlbert was educationally equipped to understand instructions (Hurlbert told him he had five years of college), Charles administered the horizontal-gaze nystagmus test, as the National Highway Traffic Safety Administration had trained him to do and as he in turn had trained others to do. This was a test he had administered to hundreds of drivers—sober drivers and intoxicated drivers—and in this test, the telltale sign of intoxication was a rapid darting movement of the eyeballs as the subject tried to keep his or her gaze fixed on a horizontally moving object.

¶ 19 "Nystagmus" is "[r]apid involuntary movements of the eyes." The New Oxford American Dictionary 1178 (2001). The test consists of having the subject gaze straight ahead and then follow, with his or her eyes, the tip of, say, a pencil as the police officer moves it horizontally, in front of the subject's eyes, from one side to the other. An intoxicated person will have trouble keeping his or her gaze fixed on the tip of the pencil as it is moved to the side. The person's eyes will display nystagmus: they will have an involuntary tendency to jerk into the forward position and then back to the side, where the tip of the pencil is. There is a three-point system for each eye, based on the ability to steadfastly follow the tip of the pencil, and six is the worst possible score.

¶ 20 Charles gave Hurlbert a score of six. He testified:

> "[T]he one thing that isn't part of the standardized test but it seems to be and this is subjective is that when he was told to keep his head still, he continued to move his head.

But beyond that, the tracking of each eye and it was hard to see the tracking [in the video recording] because of the hand going in front. But the tracking was from point to point, not smooth.

There is a very clear nystagmus at maximum deviation that you could see in both eyes. That was the involuntary jerking of the eye at maximum deviation.

Again, these tests I have done on literally hundreds of people that are under the influence and hundreds that aren't. And done them on people where there was a known level of alcohol in their system and watched what the reaction is. And this is an involuntary reaction.

And so in his left and right eye, he had a very noticeable nystagmus at maximum deviation. You can also see the onset of 45 degrees in both of his eyes."

¶ 21 Hurlbert's attorney, Howard Small, asked Charles:

"Q. Now it was during the hearing that you had on this that the judge wouldn't allow [the results of the horizontal-gaze nystagmus test] into evidence. Do you know why?

A. No."

¶ 22 In addition to the horizontal-gaze nystagmus test, which was a standardized test, Charles administered other, non-standardized tests to Hurlbert, tests that either the Urbana police department or Charles had devised: the alphabet test, the countdown test, the finger count, and the finger-to-nose test. Charles testified these other tests really were not pass/fail tests but instead were just additional opportunities for him to observe how Hurlbert was functioning. That way,

Charles could accumulate as much information as possible when deciding whether to arrest him for DUI.

¶ 23 Charles explained to Hurlbert how to do each of the tests. Hurlbert had a tendency to ask the same questions over and over again, questions that Charles already had answered, and Hurlbert did not always follow the instructions. He did poorly on the tests. When counting forward and backward (1, 2, 3, 4, 4, 3, 2, 1), he sometimes missed the tips of his fingers, which he was supposed to touch with his thumb as he counted, and he was hesitant with each touch. When asked to recite the alphabet beginning with the letter D, he had to mouth the letters preceding D, before beginning audibly with D. He paused at one point in his recitation of the alphabet, mouthed the letters leading up to where he had left off, and then audibly finished the alphabet. He swayed back and forth when his eyes were closed for the finger-to-nose test, and he raised his arms to shoulder height but did not touch the tip of his nose as he had been instructed to do.

¶ 24 After the finger-to-nose test, which was the final test, Charles told Hurlbert he was placing him under arrest for DUI. Hurlbert's attorney asked Charles:

> "Q. What would it have taken for you to have decided that Mr. Hurlbert was not legally impaired, not under the influence of alcohol?
>
> ***
>
> A. That is, there are so many different pieces of input that came into this decision making process. One thing that certainly would have changed, been an immediate changer would have been seeing no signs of impairment on the horizontal gaze nystagmus test.

If I would have seen nothing, no signs of impairment on the gaze nystagmus test, I would have been looking for other reasons that I was seeing the results I was seeing on the other tests.

I would have gone into more detail with Mr. Hurlbert about some sort of if he had had a stroke, if he had had previous other head injuries.

You know, if gaze nystagmus would not have been present, it would have made me explore a lot of other possibilities for why the things I was seeing were appearing.

Beyond that, if you take the totality of it and start taking out bits and pieces, I guess there is a tipping point in there but without going through the thousands of different combinations of bits and pieces coming and going, it is hard to explain where that tipping point is for any one thing."

¶ 25 At some point, Hurlbert requested to be taken to the hospital for a blood test. Charles testified he declined that request for three reasons: (1) a breath test at the jail would be just as accurate; (2) a blood test would entail needless expense for the city; and (3) in Charles's experience, no DUI arrestee who had requested a blood test at the hospital in lieu of a breath test at the jail ever consented to a blood test after arriving at the hospital.

¶ 26 In the police station, Charles read to Hurlbert the *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), and when Charles read the second warning, Hurlbert said "he just didn't understand that." Hurlbert's attorney asked Charles: "What was your response when he told you that?" Charles answered: "I know I read it twice to him and beyond that, I can't tell you."

¶ 27 Hurlbert also seemingly had difficulty understanding how to blow into the Breathalyzer machine. Charles testified:

"[H]e continued to ask the same questions over and over, that when I asked him to blow into the Breathalyzer, he told me he didn't understand what I meant. ***

* * *

Q. Did you try to explain it to him?

A. Yes.

Q. And what was his response?

A. He said he was not refusing to blow into the machine but that he didn't blow into the machine.

Q. Was he sitting at it? How does it work?

A. Yes. When I asked him if he would submit to a breath test, he didn't understand what I meant. He said he didn't.

And I showed him the breath test machine. Hurlbert still said he didn't understand. I had him step to the Breathalyzer room. Reached the machine, put a mouthpiece in the machine which is part of the process of getting it ready to go.

And asked him to blow into the machine and he didn't. He was seated directly in front of the machine. I explained to him, you know, I showed him the mouthpiece, demonstrated how he would have to take a breath and blow into the machine with a long continuous breath.

And I told him that if he didn't blow into the machine, that it would time out and be marked as a refusal."

He never blew into the machine, and his failure to do so was construed as a refusal. These difficulties with the *Miranda* warnings and the Breathalyzer test bolstered Charles's impression that Hurlbert was intoxicated. He issued a citation to Hulbert not only for improper lane usage but also for DUI.

¶ 28 By Charles's understanding, the trial court dismissed the DUI citation with prejudice because Charles was out of the state, on vacation, and hence was unavailable to testify when the scheduled day of trial arrived. He had telephoned the State's Attorney's office to explain the problem, "[a]nd they said not to worry about it, they would ask for a continuance." As it turned out, the court was unwilling to grant the State a continuance.

¶ 29 2. *The Deposition of James O. Hurlbert*

¶ 30 Hurlbert testified he was 66 years old and that on October 18, 2003, around 11:35 p.m., he arrived at Rose Bowl Tavern in Urbana, where, over the course of several hours, he drank three single shots of vodka mixed with tonic. He then got in his truck and set out for a restaurant to get something to eat.

¶ 31 Howard W. Small, the attorney representing Charles and the city of Urbana, asked Hurlbert:

> "Q. Do you think that those three mixed drinks substantially diminished your ability to think and act with ordinary care?
>
> A. They did not diminish my thinking or care one fraction of one percent as far as driving or operating a motor vehicle. I did not do anything wrong in driving or operating a motor vehicle.

Q. Did you feel just as sober with those three drinks in you as you felt without them in you?

A. I—I—I didn't feel any effects. If I felt effects, I thought it would—would be—other than be able to properly drive, I would not drive."

¶ 32 When arresting Hurlbert, Charles told him "he didn't think that [Hurlbert] had properly performed some of the sobriety tests," but Hurlbert "thought [he] had performed *** every test satisfactor[il]y." "So you didn't agree with [Charles's] assessment?" Small asked him. "Absolutely correct," Hurlbert answered.

¶ 33 Hurlbert denied knowing Charles before the traffic stop. He also denied that Charles had handled him roughly, lost his temper with him, put the handcuffs on too tight, yelled at him, or verbally abused him. Even so, Hurlbert considered himself to have been mistreated in that Charles never gave him legitimate reasons for denying the two requests he made over and over again. The first request was to take him to the hospital to get a blood test. The second request was to videotape all interactions between himself and the police in the police station.

¶ 34 Small asked Hurlbert:

"Q. Now, at some point, were you put in front of a breathalyzer machine and asked if you wanted to take a breathalyzer test?

A. I never ever refused a breathalyzer.

Q. I didn't ask you that. I didn't ask you that. I just said, were you physically placed in front of one and offered the opportunity to take a breathalyzer?

A. I won't say I was placed in front of one. Officer Charles and I went into a room which I again requested that someone else be there and/or mainly—I don't

care if someone else was there[;] I requested a video for anything—video and/or a tape recorder so everyone could see and/or hear any and all conversations.

Q. That didn't happen.

A. That did not happen.

Q. Now, the breathalyzer machine, though, which is my question, were you put in the proximity of a breathalyzer machine?

A. The report says that that's what was there. Was there a breathalyzer machine? I don't know what a breathalyzer machine is. But the report states that we was in a room where there was a breathalyzer.

Q. Are you saying as a matter of fact that there was no breathalyzer machine in the room?

A. I am not saying that at all.

Q. Did Officer Charles explain to you the procedure in taking a breathalyzer test if you wanted to do so?

A. I repeatedly requested to go have a blood test.

Q. I understand that, Mr. Hurlbert. But my question—

A. And I repeatedly asked for it to be videotaped.

Q. And that didn't happen?

A. And I didn't refuse a breathalyzer. And as far as the exact terminology of what Officer Charles says because the conversation was not real good, so I can't say exactly what his conversation was.

Q. So you don't know either way, yes or no, whether Officer Charles went through a protocol in the taking of a breathalyzer test, is that it?

A. I don't know if it went through a protocol. Again, I did not refuse. I continued to ask for a blood test and/or everything to be videotaped.

* * *

Q. I'm just asking you physically what happened. Did he go through a protocol for taking a breathalyzer, and after he went through the protocol, he gave you the opportunity to take the breathalyzer, but you failed to avail yourself of that opportunity. Is that what happened?

A. That's not what happened. I made it very clear that if I would be given a blood test, I would explain all of the reasons why, how much more accurate a blood test is.

* * *

Q. Now you're at the police detention facility and they're giving you the opportunity to take a breathalyzer, and you say what?

A. I would like to have a blood test for the reasons that we just so stated and I would like for this conversation and this happening to be videotaped and/or recorded.

Q. And they didn't video it. And they didn't give you the blood test. And as a result, you didn't take the breathalyzer, correct?

A. I'm not saying as a result. I'm saying I was—I was denied—did not get what I requested as far as a blood test and/or it being videotaped.

Q. And therefore, you did not take the breathalyzer?

A. I'm not saying therefore. A breathalyzer was—was not an option to me at that point.

Q. When you say it wasn't an option, that means it wasn't an option in your mind. But physically and mechanically, you were given the opportunity to take the breathalyzer, is that correct?

A. Maybe I was. Maybe I wasn't.

Q. You don't know?

A. No, no, I don't know. When I'm talking with someone that the communication is total breakdown, and I'm—I'm being denied what I'm asked. No, I can't say that I was ever given anything, no."

¶ 35 B. The Summary Judgment in This Legal-Malpractice Case

¶ 36 In its order of September 2, 2015, which granted Frederick's motion for summary judgment in this legal-malpractice case, the trial court reasoned that even if Hurlbert proved that Frederick had been negligent in his representation of him in the underlying malicious-prosecution case, he still could not recover against Frederick unless he additionally proved that Frederick's negligent performance had proximately caused him to suffer pecuniary harm. To prove that Frederick's negligent performance had proximately caused him to suffer pecuniary harm, Hurlbert would have had to prove that, but for Frederick's negligence, he would have prevailed in the underlying malicious-prosecution case. To prevail in the underlying malicious-prosecution case, Hurlbert would have had to prove, in that case, that Charles acted out of malice when citing him for DUI. As to malice, the court found no genuine issue: Charles, in his interaction with Hurlbert on October 19, 2003, was "[o]nly a police officer doing his job." Because the underlying malicious-prosecution case appeared to be an unmeritorious case that Hurlbert probably would have lost in any event if it had gone to trial, there was no evidence that

Frederick's negligent performance in that case proximately caused any actual damages to Hurlbert. Since the element of proximately caused damages was devoid of evidentiary support, the court granted Frederick's motion for summary judgment in this legal-malpractice case.

¶ 37 C. Hurlbert's Motion To Vacate the Summary Judgment

¶ 38 On October 1, 2015, Hurlbert filed a postjudgment motion to vacate the summary judgment and to grant a trial on the merits. In his postjudgment motion, Hurlbert contended that the trial court had "erred in considering all the exhibits submitted by [Frederick] to the Court in support of his motion for summary judgment as said exhibits were not certified, verified[,] or properly authenticated as true and accurate copies of the originals," and that when these exhibits were disregarded, "the only documents remaining for the Court to consider in deciding the motion for summary judgment [were] the Complaint *** and the Answer ***, which clearly show[ed] 'genuine issues of material facts' and compel[led] a denial of said summary judgment motion."

¶ 39 In the event that the trial court disagreed with Hurlbert's argument that the exhibits should have been disregarded, he argued that when they were regarded in the light most favorable to him, they created genuine issues of material fact.

¶ 40 On December 7, 2015, in its order denying Hurlbert's postjudgment motion, the trial court noted that Hurlbert "did not object to the transcripts, depositions[,] or any of the material" when responding to Frederick's motion for summary judgment and that raising this objection now was outside the scope of a postjudgment motion. Unless the law had changed since the original hearing, it was too late for new arguments. (Besides, the court was unconvinced it had considered any inadmissible materials.)

¶ 41 Other than the forfeited argument regarding the certification and authenticity of the exhibits, Hurlbert made the same arguments as before, and in the trial court's view, he failed to show how the court had erred in its previous discussion of malice and probable cause. Therefore, the court denied his postjudgment motion.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 A. The Asserted Lack of Certification of the Summary-Judgment Materials

¶ 45 On appeal, Hurlbert says that Frederick filed no affidavits in support of his motion for summary judgment but instead "opted to file a group of exhibits from prior litigation without any certification or verification of their authenticity." He argues "the exhibits should not have been considered by the court without proper certification."

¶ 46 The first time Hurlbert made this argument was in his postjudgment motion. His *pro se* "Reply to Defendant's Motion for Summary Judgment," filed on August 31, 2015, says nothing about uncertified exhibits. We also note that, in the "Table of Contents of the Record," included in the appendix of Hurlbert's brief, a motion to strike exhibits does not appear to be listed. So, the trial court appears to be correct that Hurlbert waited until his postjudgment motion to complain that the exhibits of Frederick's summary-judgment motion were uncertified.

¶ 47 As the trial court also correctly said, "[a]rguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. Hurlbert has forfeited his argument that the exhibits to Frederick's summary-judgment motion were inadequately authenticated.

¶ 48 B. Probable Cause

¶ 49 In an action for legal malpractice, the plaintiff must prove three elements: (1) the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship, (2) the defendant breached that duty, and (3) the plaintiff suffered injury as a proximate result of the breach of duty. *Sexton v. Smith*, 112 Ill. 2d 187, 193 (1986).

¶ 50 The injury in a legal malpractice case is not the attorney's negligence in itself. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006). "Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client." *Id.* In other words, negligence and damages proximately resulting from the negligence are two separate elements of a cause of action for legal malpractice.

¶ 51 If the defendant-attorney was negligent while representing the plaintiff in litigation, which, because of the negligence, never reached trial, the plaintiff incurred damages only if, but for the negligence, the plaintiff would have won the underlying litigation. *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169, 174 (2004). The supreme court has explained:

> "The theory underlying a cause of action for legal malpractice is that the plaintiff client would have been compensated for an injury caused by a third party, absent negligence on the part of the client's attorney. Where the alleged legal malpractice involves litigation, no actionable claim exists unless the attorney's negligence resulted in the loss of an underlying cause of action. If the underlying action never reached trial because of the attorney's negligence, the plaintiff is required to prove that but for the attorney's negligence, the plaintiff would have been successful in that underlying action. A legal malpractice plaintiff

must therefore litigate a case within a case." (Internal quotation marks omitted.) *Tri-G*, 222 Ill. 2d at 226.

¶ 52 Thus, the summary-judgment proceeding in this legal-malpractice case scrutinized not only the elements of legal malpractice. For purposes of the injury element of legal malpractice, it also scrutinized the elements of the case within the case: the elements of malicious prosecution.

¶ 53 The elements of malicious prosecution are "(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant, (2) the termination of the proceeding in favor of the plaintiff, (3) the absence of probable cause for such proceeding, (4) malice, and (5) damages." *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 70.

¶ 54 Frederick presented Charles's sworn deposition as evidence that Charles had probable cause to cite Hurlbert for DUI—the significance being that if Charles had probable cause, Hurlbert would have lost the underlying action for malicious prosecution anyway and Frederick's negligence in misadvising Hurlbert of the deadline for filing an appeal in the malicious-prosecution case ultimately caused Hurlbert no actual damages.

¶ 55 A horizontal-gaze nystagmus test, by itself, can establish probable cause to believe that the driver has committed DUI. *People v. Furness*, 172 Ill. App. 3d 845, 849 (1988) ("The results of the horizontal gaze nystagmus were sufficient to establish probable cause that an offense had been committed."). Charles testified in his deposition that when administering the horizontal-gaze nystagmus test to Hurlbert—a test which the National Highway Traffic Safety Administration had trained Charles to administer and which he was experienced in administering—he observed nystagmus in both of Hurlbert's eyes and that Hurlbert scored the maximum failing score of six points. (A commentator explains: "[T]he [National Highway

Traffic Safety Administration] manual instructs officers to look for three signs of intoxication in each eye. These signs are: (1) onset of alcohol gaze nystagmus in right eye occurs before forty-five degrees; (2) nystagmus in the right eye, when moved as far as possible to the right, is moderate or distinct; (3) right eye cannot follow a moving object smoothly; (4) onset of alcohol gaze nystagmus in left eye occurs before forty-five degrees; (5) nystagmus in the left eye, when moved as far as possible to the left, is moderate or distinct; (6) left eye cannot follow a moving object smoothly. The officer administering the test gives one point for each sign of intoxication for a maximum (failing) score of six points. If the suspect scores four or more points, his [blood alcohol content] is classified as 0.10% or higher." Stephanie E. Busloff, *Can Your Eyes Be Used Against You? The Use of the Horizontal Gaze Nystagmus Test in the Courtroom*, 84 J. Crim. L. & Criminology 203, 208 (1993).)

¶ 56 Granted, Charles also testified that, in a hearing, the trial court had rejected the results of the horizontal-gaze nystagmus test. But he did not know why the court had done so. See *People v. McKown*, 226 Ill. 2d 245, 276 (2007) (for a horizontal-gaze nystagmus test to be admissible in evidence, a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is required to determine whether such testing has been generally accepted as a reliable indicator of alcohol impairment). It is unclear how the court's rejection of the horizontal-gaze nystagmus test as evidence deprives the test of its validity for purposes of probable cause, considering that, under binding case law, "[t]he results of [a] horizontal gaze nystagmus [are] sufficient to establish probable cause that an offense had been committed." *Furness*, 172 Ill. App. 3d at 849.

¶ 57 "If a defendant supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a plaintiff may not rest on [his or] her pleadings to create a genuine

issue of material fact." *Rotzoll*, 289 Ill. App. 3d at 418. Unless the plaintiff responds with a counteraffidavit (or a deposition) contradicting the defendant's sworn facts, the defendant's sworn facts will be taken as true. *Fooden v. Board of Governors of State Colleges & Universities of Illinois*, 48 Ill. 2d 580, 587 (1971).

¶ 58 The record appears to contain no affidavit or deposition contradicting Charles's deposition testimony that he observed the six points of nystagmus in Hurlbert's eyes. Although Hurlbert testified in his deposition (attached as an exhibit to Frederick's motion for summary judgment) that he "thought [he] had performed *** every test satisfactor[il]y," that testimony is insufficient because deposition testimony must meet the standards for affidavits set forth in Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) (*Stando v. Grossinger Motor Sales, Inc.*, 89 Ill. App. 3d 898, 901 (1980)). Rule 191(a) provides, in part, that "[a]ffidavits in support of and in opposition to a motion for summary judgment *** shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). That Hurlbert "performed *** every test satisfactor[il]y" is a conclusion, not a fact.

¶ 59 Hurlbert also testified in his deposition that the three mixed drinks he had consumed before the traffic stop "did not diminish [his] thinking or care one fraction of one percent as far as driving or operating a motor vehicle." That proposition, however, really does not meet head-on the proposition that he displayed nystagmus in his eyes. Even if Hurlbert was completely sober and the nystagmus resulted from, let us say, severe anxiety, the uncontradicted fact remains that he displayed nystagmus in both eyes, and therefore, according to case law in force at the time (*Furness*, 172 Ill. App. 3d at 849), Charles had probable cause to believe he was intoxicated—regardless of whether, as a matter of objective fact, he was intoxicated.

¶ 60 In summary, then, we reason as follows in our *de novo* review (*Rotzoll*, 289 Ill. App. 3d at 413). Frederick presented a sworn fact: that Charles, during the traffic stop, observed the six points of nystagmus in Hurlbert's eyes. Under Illinois law, that observation, in and of itself, gave Charles probable cause to cite Hurlbert for DUI (*Furness*, 172 Ill. App. 3d at 849); the other observations and tests were overkill. Because Hurlbert came forward with no counteraffidavit, deposition, or other evidence specifically contradicting Charles's testimony that he observed the six points of nystagmus in Hurlbert's eyes, we accept this portion of Charles's testimony to be true. Given that accepted truth, probable cause would have defeated Hurlbert's action for malicious prosecution, regardless of Frederick's negligence. Hence, his negligence caused Hurlbert no actual damages, an essential element of a cause of action for legal malpractice. With the element of damages affirmatively disproved, Frederick is entitled to judgment as a matter of law in this legal-malpractice case.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm the trial court's judgment.

¶ 63 Affirmed.