FILED
Sep 24 2021, 8:35 am
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

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IN THE COURT OF APPEALS OF INDIANA

Steak N Shake Operations, Inc.,
Appellant-Plaintiff/Counter-Defendant,

v.

National Waste Associates, LLC and Simon Waste Consulting, LLC,
Appellees-Defendants/Counterclaimants.

September 24, 2021

Court of Appeals Case No. 21A-CP-213

Appeal from the Marion Superior Court

The Honorable John M.T. Chavis, II, Judge

Trial Court Cause No. 49D05-1307-PL-28522

Najam, Judge.

Statement of the Case

[1] In 2004, Steak N Shake Operations, Inc. ("Steak 'n Shake"), an Indiana company, entered into a nationwide contract with Ohio-based Simon Waste Consulting, LLC ("Simon") for the management of solid waste disposal and recycling from Steak 'n Shake's numerous restaurant locations. Simon then

entered into a three-year subcontract with Aspen Waste Systems of Missouri, Inc. ("Aspen") for the removal of waste from Steak 'n Shake's St. Louis-area locations, which contract contained an automatic renewal provision. In 2007, Steak 'n Shake terminated its contract with Simon and retained National Waste Associates, LLC ("National"), a Connecticut company, for the same work, and, while Simon failed to terminate its subcontract with Aspen, National engaged Aspen in its own subcontract. In 2011, National removed Aspen's equipment from Steak 'n Shake's St. Louis-area locations, and Aspen responded by filing a complaint against Steak 'n Shake, National, and Simon in a Missouri federal court ("the Missouri litigation"). The parties eventually settled the Missouri litigation for $4,100.

[2] Following the settlement, Steak 'n Shake filed suit against National in the Marion Superior Court and alleged that National had failed to indemnify Steak 'n Shake in the Missouri litigation as provided under an indemnification clause in the Steak 'n Shake-National contract. National filed a counterclaim against Steak 'n Shake for indemnification under the same clause. In its counterclaim, National alleged that Aspen's claim arose out of an act or omission of Steak 'n Shake and/or its agent, Simon, and, therefore, that Steak 'n Shake owed National a duty to defend and indemnify National from any costs National incurred in connection with the Missouri litigation and the subsequent Indiana suit.

[3] The trial court held, in a daisy-chain of attribution and liability, that Simon was responsible for Aspen's conduct arising out of the Simon-Aspen contract,

including Aspen's decision to commence the Missouri litigation, that it was Simon's failure to terminate its subcontract with Aspen that caused the Missouri litigation, that Simon was Steak 'n Shake's agent, that Simon's failure to cancel the Simon-Aspen contract was "the factual basis" of the Missouri litigation, and that the Missouri litigation was, therefore, attributable to Steak 'n Shake. And the court concluded that National was entitled to summary judgment on Steak 'n Shake's complaint for indemnification because "the undisputed evidence" is that the Missouri litigation was not caused by any act or omission attributable to National or its agents, officers, employees, or subcontractors. Thus, on the parties' cross-motions for summary judgment, the trial court granted National's motion and denied Steak 'n Shake's motion.

[4] On appeal, Steak 'n Shake raises two issues, which we restate as the following three issues for our review:

1. Whether there is a genuine issue of material fact which precludes summary judgment for National on Steak 'n Shake's complaint and National's counterclaim;

2. Whether Simon was Steak 'n Shake's agent; and

3. Whether Steak 'n Shake is entitled to summary judgment as a matter of law on its complaint.

[5] We hold that there are genuine issues of material fact concerning the terms and conditions under which National employed Aspen as its subcontractor, which preclude summary judgment for National on Steak 'n Shake's complaint and National's counterclaim. We also hold that Simon, Steak 'n Shake's former

contractor, was not Steak 'n Shake's agent, and that the Missouri litigation is not attributable to Steak 'n Shake, which had no duty to indemnify National from that litigation. Finally, we hold that National had a duty to indemnify Steak 'n Shake from the Missouri litigation initiated by Aspen, its subcontractor, and that Steak 'n Shake is entitled to summary judgment on its complaint. Thus, we reverse the trial court's entry of summary judgment for National and remand with instructions that the court enter summary judgment for Steak 'n Shake and determine Steak 'n Shake's damages.

Facts and Procedural History

[6] In 2004, Steak 'n Shake and Simon entered into a contract for the removal of waste from Steak 'n Shake's numerous restaurant locations throughout the United States.[1] The contract described Simon's obligations as follows:

> SERVICES: [Simon] will serve as [Steak 'n Shake's] exclusive agent for the management of solid waste disposal and recycling for all locations listed . . . . Locations may be added or removed . . . with both parties' written approval. [Simon] will contact current haulers to verify service, price, and [not legible] status of each location and will submit [a] report of findings to [Steak 'n Shake]. [Simon] will receive a copy of contract[s,] and in order to eliminate automatic renewals, will file for cancellation of any existing contracts. If [Steak 'n Shake] has any existing contracts with haulers they will be excluded from the [not legible] until they expire[;] however, [Simon] will, to its best ability, negotiate these contracts into new [Simon] contracts. [Simon] will send written request[s] to haulers for competitive bids for

[1] The Steak 'n Shake-Simon contract states that it is governed by Indiana law. Appellant's App. Vol. 3 at 76.

> waste removal and recycling. [Simon] will negotiate all contracts with hauler[s] to obtain the best value through the bidding process. [Simon] will provide [Steak 'n Shake] with a 1-800 # for all locations to provide assistance and services related to waste and recycling (including extra pick-ups and temporary services). [Simon] will monitor and pay all hauler invoices and provide any reporting requested by [Steak 'n Shake].

Appellant's App. Vol. 3 at 78. The contract further stated in another paragraph that "[Steak 'n Shake] reserves the right at any time to direct changes[] or cause [Simon] to make changes in the Services *or to otherwise change the scope of the work* covered by this Agreement, and [Simon] agrees to promptly make such changes." *Id.* at 73 (emphasis added).

[7] Elsewhere, the contract stated as follows:

> TERMINATION: Upon termination of [this] agreement [Simon] will send notification letter[s] to each waste hauler to inform them of the change in status and will provide [Steak 'n Shake] with all information pertaining to their account[s].

Id. at 79. If Simon failed to perform any of its obligations under the contract, Steak 'n Shake also reserved the remedial right to "deduct any amounts due or to become due from [Simon] to Steak 'n Shake from any sums due or to become due from Steak 'n Shake to [Simon]." *Id.* at 75.

[8] And, although the contract described Simon as Steak 'n Shake's "exclusive agent" for solid waste-removal and recycling services, the contract also provided:

> [Simon] and [Steak 'n Shake] are independent contracting parties and not agents, employees, partners, joint venturers[,] or associates of one another, and *nothing in this Agreement shall make either party the agent or legal representative of the other* for any purpose whatsoever, nor does it grant either party any authority to assume or to create any obligation on behalf of or in the name of the other. . . .

Id. at 75-76 (emphasis added.)

[9] Pursuant to its contract with Steak 'n Shake, in July of 2004 Simon contracted with Aspen for Aspen to remove waste from Steak 'n Shake's St. Louis-area locations.[2] The Simon-Aspen contract provided for a three-year term of service with automatic renewals if not canceled in writing at least sixty days prior to the renewal. The Simon-Aspen contract first renewed in July of 2007.

[10] In August of 2007, Steak 'n Shake terminated its contract with Simon and reminded Simon, pursuant to the terms of their contract, of Simon's obligation to inform its subcontractors "of the change in status" and to send copies of those letters to Steak 'n Shake. *Id.* at 79. Then, effective November 1, 2007, Steak 'n Shake and National entered into a Service Agreement (the "Steak 'n Shake-National contract") for National to "manage the solid waste and recyclable services" at Steak 'n Shake's locations.[3] *Id.* at 41. National's

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[2] The Simon-Aspen contract appears not to have a choice-of-law clause. *See id.* at 168. However, Aspen's complaint in the Missouri litigation attempted to enforce the Simon-Aspen contract under Missouri law. *See id.* at 165.

[3] Although the Steak 'n Shake-National contract contained a choice-of-venue clause for disputes to be resolved in an Indiana federal or state court, the contract appears not to have a choice-of-law clause. *See id.*

obligations under that contract included identifying and hiring subcontractors to remove waste from Steak 'n Shake's locations, and there is no dispute that the Steak 'n Shake-National contract included the same St. Louis-area locations as the Steak 'n Shake-Simon contract. *Id.* The Steak 'n Shake-National contract also provided that National was "responsible for paying its subcontractors directly and auditing its subcontractors' invoices."[4] *Id.*

[11] The Steak 'n Shake-National contract included the following indemnification clause:

> [National] and [Steak 'n Shake] further agree to indemnify, defend[,] and hold harmless each other and each other's agents, officers, directors[,] and employees from all claims and suits of whatever type, including damages, court costs, attorneys' fees, and other expenses, *caused by any act or omission of themselves or their respective agents, officers, employees[,] and subcontractors*.

Id. at 46 (emphasis added).

[12] Aspen learned that Steak 'n Shake had replaced Simon with National one month later, and, on December 12, 2007, Aspen forwarded the Simon-Aspen contract to National. At National's request, Aspen forwarded the Simon-Aspen contract to National two more times in 2008. There is no dispute that National

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at 48. Nonetheless, the parties on appeal proceed as if the Steak 'n Shake-National contract is governed by Indiana law, and we accept their representations. *See* Appellant's Br. at 21-22; Appellee's Br. at 23-24.

[4] Notably, unlike the Steak 'n Shake-Simon contract, the Steak 'n Shake-National contract did not include language requiring National to "contact current haulers," "file for cancellation" of their contracts, and renegotiate "all contracts" with them. *See* Appellant's App. Vol. 3 at 78. The inclusion of that language in the Steak 'n Shake-National contract may have prevented the problems that later arose between National and Aspen.

and Aspen entered into their own subcontract for Aspen to provide the same services to National that Aspen had provided to Simon, to provide those services at the same Steak 'n Shake locations, and that Aspen billed and National paid for those services.[5]

[13] But National and Aspen did not reduce their subcontract to writing. In the ensuing Missouri litigation, Aspen would allege that the terms of the National-Aspen contract were identical to the written terms of the Simon-Aspen contract, which National had "assumed and ratified" through National's course of conduct. *Id.* at 102. Aspen would further allege that National had given Aspen National's "clear and unambiguous promises and representations" that it "would comply with [the Simon-Aspen contract's] terms and obligations." *Id.* at 106.

[14] However, according to a subsequent affidavit by Carmine Esposito, the managing member of National, National did not agree to be bound by the terms of the Simon-Aspen contract and had instead entered into a separate contract with Aspen for each St. Louis-area Steak 'n Shake location. The Esposito affidavit states that "each such contract contained a set of identical commercial terms and conditions" as shown by a document entitled "Additional Terms & Conditions" attached to the affidavit. That document, however, was never

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[5] In the ensuing Missouri litigation, Aspen alleged that National had agreed that "Aspen would provide waste hauling services at the agreed upon rates" in the Simon-Aspen contract. *Id.* at 104. Further, Aspen's stated damages in the Missouri litigation began not from the date of the Steak 'n Shake-National contract but from the date, more than four years later, when National removed Aspen's equipment from the relevant locations.

executed, and the Esposito affidavit does not state that the document was ever presented to Aspen.[6] *Id.* at 88-89.

[15] No dispute arose between National and Aspen with respect to services rendered or payment for more than four years. In its Missouri complaint, Aspen alleged that, during that period, neither Simon, National, nor Steak 'n Shake "provided Aspen with the requisite written notice" canceling the Simon-Aspen contract, and Aspen continued to provide the same "waste hauling services" under that contract "as assumed and ratified by [National], and for the direct benefit of" Steak 'n Shake. *Id.* at 100. The Simon-Aspen contract renewed for the second time in July of 2010, and Aspen continued hauling waste from Steak 'n Shake's St. Louis-area locations without objection from either National or Steak 'n Shake for another year and one-half.

[16] Nonetheless, on December 22, 2011, National wrote Aspen that National declared it was not bound by the Simon-Aspen contract, and National demanded that Aspen remove its equipment from the relevant Steak 'n Shake locations no later than January 6, 2012 (the "December 2011 letter"). In particular, National wrote that it had "never validated nor honored" the Simon-Aspen contract. *Id.* at 180. National further stated that Aspen and National "have operated on a verbal agreement . . . for the last 4 years" under which "Aspen has billed and received payment for services from [National]." *Id.* And

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[6] According to National, the National-Aspen location-specific oral contracts are governed by Connecticut law. Appellee's Br. at 27.

National stated that it had "in good faith . . . attempted to negotiate with Aspen without resolution on several points." *Id.* Aspen did not comply with National's demands and instead asserted that National was bound by the terms of the Simon-Aspen contract. Aspen further warned National that, if National breached the terms of their contract by removing Aspen's equipment, Aspen would file a complaint against National.

[17] Following Aspen's response, National removed Aspen's equipment from the relevant Steak 'n Shake locations, causing Aspen to incur about $4,700 in impound and storage fees. Aspen then initiated the Missouri litigation against Simon, National, and Steak 'n Shake and alleged, under Missouri law, a breach of the Simon-Aspen contract, promissory estoppel, breach of the covenant of good faith and fair dealing,[7] and conversion. National and Aspen eventually settled the Missouri litigation for $4,100.[8] The other terms of that settlement, if any, are not in the record on appeal.

[18] Following the settlement, Steak 'n Shake filed a complaint against National in the Marion Superior Court alleging that National had failed to indemnify Steak 'n Shake in the Missouri litigation, as required by the Steak 'n Shake-National contract. National counterclaimed against Steak 'n Shake and asserted that Steak 'n Shake had failed to indemnify National. The parties both moved for

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[7] Unlike Indiana, "[u]nder Missouri law[] a duty of good faith and fair dealing is implied in every contract." *Arbors at Sugar Creek Homeowner's Ass'n v. Jefferson Bank & Trust Co.*, 464 S.W.3d 177, 185 (Mo. 2015).

[8] Aspen's complaint sought damages in excess of $144,000. There is no suggestion in this appeal that Simon or Steak 'n Shake paid any sums to Aspen or that Aspen continued to pursue any claims against them following the payment from National.

summary judgment on their respective claims and against the other's claims. In support of their motions, the parties designated the several contracts, affidavits, and the complaint, answer, and exhibits submitted to the federal court in the Missouri litigation.

[19] The trial court granted National's summary judgment motion and denied Steak 'n Shake's motion.[9] The court later amended its judgment to clarify that, as a matter of law, Simon's failure to terminate the Simon-Aspen contract had caused the Missouri litigation. The court further concluded that, under the Steak 'n Shake-Simon contract, Simon was Steak 'n Shake's agent and that Simon's acts and omissions were attributable to Steak 'n Shake. Thus, the court concluded that Simon's failure to terminate the Simon-Aspen contract was attributable to Steak 'n Shake and required Steak 'n Shake to indemnify National in the Missouri litigation. The court further concluded that, notwithstanding the designated evidence from the Missouri litigation and Esposito's disclaimer that his affidavit was not nor intended to be a total recitation of all the relevant facts, the Esposito affidavit was conclusive. Specifically, in its amended May 2020 order, the court stated that, "there is no evidence designated here that refutes Mr. Esposito's attestation that these Additional Terms [&] Conditions governed the relationship between [National] and Aspen." Appellant's App. Vol. 2 at 37. And, in January of 2021, some

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[9] At the summary judgment hearing in December of 2017, the court ordered the parties to submit proposed findings and conclusions. The court's subsequent February 2018 order appears to have simply adopted verbatim the findings and conclusions submitted by National.

nine years after Aspen had filed its complaint in the Missouri litigation, the court ordered Steak 'n Shake to pay National more than $146,000 for National's damages, attorney's fees, and costs incurred in both the Missouri litigation and these proceedings and directed the clerk to enter final judgment on that order and its previous summary judgment orders. This appeal ensued.

Discussion and Decision

Standard of Review

[20] Steak 'n Shake appeals from the trial court's grant of National's motion for summary judgment and the denial of Steak 'n Shake's motion. Our standard of review in summary judgment appeals is well established. As our Supreme Court has made clear, "[w]e review summary judgment *de novo*, applying the same standard as the trial court." *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). We draw all reasonable inferences in favor of the non-moving party and affirm summary judgment only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting Ind. Trial Rule 56(C)). And we "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Id.* (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)).

[21] Here, the parties filed cross-motions for summary judgment, and the trial court's orders on those motions include detailed findings. "Parties filing cross-

motions for summary judgment neither alters" our standard of review "nor changes our analysis-we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *G&G Oil Co.*, 165 N.E.3d at 86 (quoting *Erie Indem. Co. v. Estate of Harris*, 99 N.E.3d 625, 629 (Ind. 2018)). Further, "[a]lthough [the trial court's] specific findings aid our review of a summary judgment ruling[,] they are not binding on this Court," and they do not alter our standard of review. *Knighten v. E. Chicago Hous. Auth.*, 45 N.E.3d 788, 791 (Ind. 2015) (quoting *City of Gary v. Ind. Bell Tel. Co.*, 732 N.E.2d 149, 152 (Ind. 2000)).

National is not entitled to summary judgment.

[22] We first consider whether National is entitled to summary judgment on both Steak 'n Shake's complaint for indemnification and on National's counterclaim for indemnification. According to National, the trial court's grant of summary judgment to National on both claims is correct because the designated evidence shows that National had location-specific contracts with Aspen and, thus, the Missouri litigation could have been caused only by Simon's failure to terminate the Simon-Aspen contract, which failure is attributable as a matter of law to Steak 'n Shake. The trial court agreed with National, most notably in accepting the Esposito affidavit as dispositive.

[23] We conclude that the trial court's reliance on the Esposito affidavit was misplaced. In his affidavit, Esposito asserts that "there was a separate contract for each Steak 'n Shake location" and that "each such contract contained a set of identical commercial terms and conditions." Appellant's App. Vol. 3 at 88-

89. The Esposito affidavit alludes to a separate, identical contract for each location as if there were written contracts, but there is no contract attached to the affidavit, as would be required by Trial Rule 56(E) if there were written contracts. Thus, there are no separate, identical contracts for each location in evidence. Instead, the affidavit does not use the term "oral agreement" but implies that there was an oral agreement that the unsigned "Additional Terms & Conditions" exhibit attached to the affidavit "governed the relationship between National and Aspen." *Id.* We conclude that the exhibit attached to the Esposito affidavit is not a contract but merely a specimen document.

[24] The exhibit entitled, "Additional Terms & Conditions," refers to "other terms and conditions set out in the body of this agreement." *Id.* at 92-93. On its face the exhibit is an incomplete, unsigned, and undated boilerplate form document, which contains no location-specific information or other essential terms. It is printed in a barely discernable, tiny font. It begins on "Page 2 of [not legible]," indicating that it is part of a larger agreement containing "other terms and conditions" not attached to the affidavit. *Id.* The exhibit also states that "[t]his Agreement supersedes all contracts previously in place" between the "Contractor," purportedly Aspen, and National's "Customer," Steak 'n Shake, and between the "Contractor" and National, but notably says nothing about the Simon-Aspen contract, the very point of contention between National and Aspen which gave rise to the Missouri litigation. *Id.* at 92. In any event, the fact that the "Additional Terms & Conditions" exhibit attached to the Esposito affidavit is unsigned supports a significant and reasonable inference that Aspen did not agree to it.

[25] In addition, the statement in the Esposito affidavit that the "Additional Terms & Conditions" attached to the affidavit "governed the relationship" between National and Aspen and, in effect, amounted to a "contract" is an inadmissible legal conclusion, which is prohibited under Indiana Evidence Rule 704(b). *Price v. Freeland*, 832 N.E.2d 1036, 1042 (Ind. Ct. App. 2005). The affidavit purports to state an opinion or conclusion of law on a material issue in this case. Mere assertions in an affidavit of conclusions of law or opinions are not sufficient on summary judgment. *Dedelow v. Rudd Equip. Corp.*, 469 N.E.2d 1206, 1209 (Ind. Ct. App. 1984). It is inappropriate for a court to entertain evidence concerning a witness's interpretation of the law. *Walker v. Lawson*, 526 N.E.2d 968, 970 (Ind. 1988). Under Trial Rule 56(E), a court considering a motion for summary judgment should disregard inadmissible information contained in supporting or opposing affidavits. *See Price*, 832 N.E.2d at 1042.

[26] Finally, the Esposito affidavit states that the "Additional Terms & Conditions" governed the relationship between National and Aspen for four years, from November 2007 to November 2011. But that statement is contrary to National's own December 2011 letter to Aspen, which stated that:

> Neither [National] nor Aspen signed a contract for services provided to the Steak 'n Shake locations. *Both organizations have operated on a verbal agreement* regarding the services for these locations for the last 4 years. Aspen Waste has billed and received payment for services from [National].
>
> [National] in good faith *has attempted to negotiate with Aspen without resolution* on several points. . . .

Appellant's App. Vol. 3 at 180 (emphases added). This letter does not mention the "Additional Terms & Conditions" attached to the Esposito affidavit. Instead, National's letter, written just prior to the onset of the Missouri litigation, demonstrates that, after four years, National and Aspen were still operating under a verbal agreement and negotiating the terms and conditions of their agreement.

[27] When the designated evidence is considered in its entirety, including National's December 2011 letter, National cannot prevail on its motion for summary judgment or counterclaim. The Esposito affidavit contains an impermissible opinion and conclusion of law that there were contracts based upon the "Additional Terms & Conditions" exhibit, an unsigned, undated, incomplete document lacking essential terms. And the December 2011 letter and the affidavit are incompatible and create genuine issues of material fact. In National's own words, "[n]either [National] nor Aspen signed a contract," they "operated on a verbal agreement regarding the services," Aspen billed and National paid for the services, and National "attempted to negotiate with Aspen *without resolution*." *Id.* (emphasis added). These material facts indicate that over a period of four years National and Aspen only agreed on the services to be provided and the payment for those services and that there was no other meeting of the minds.

[28] The designated evidence also includes the complaint,[10] answer, and exhibits from the Missouri litigation. *See* Ind. Trial Rule 56(C). As we have noted, the gravamen of Aspen's complaint against National in that litigation was that National had, through its course of conduct as well as through its promises and representations, ratified and assumed the terms and conditions of the Simon-Aspen contract as the same terms and conditions that governed the National-Aspen relationship.[11] Although National and Aspen settled the Missouri litigation, Aspen's allegations, if true, would have placed the burden of canceling the Simon-Aspen contract on National, which National did not do before it removed Aspen's equipment from the relevant Steak 'n Shake locations.

[29] In other words, the designated evidence from the Missouri litigation also counters the Esposito affidavit. And, if a fact-finder were to agree with Aspen's allegations, it would follow that the Missouri litigation arose out of National's acts and omissions, which, in turn, would have obliged National to indemnify Steak 'n Shake under the Steak 'n Shake-National contract. Accordingly,

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[10] Both parties designated Aspen's complaint as evidence in support of their respective summary judgment motions, and the trial court also considered Aspen's complaint in its summary judgment order. Of course, a party may not rely on its own pleadings to avoid summary judgment. *See Shand Min., Inc. v. Clay Cnty. Bd. of Comm'rs*, 671 N.E.2d 477, 482 (Ind. Ct. App. 1996), *trans. denied*. However, Aspen's complaint in the Missouri litigation is not a pleading in the instant case. It is an exhibit. And it is only part of the designated evidence from the Missouri litigation at that. Moreover, neither Steak 'n Shake nor National suggests Aspen's complaint would be inadmissible evidence at a later trial for the purpose of establishing Aspen's allegations in the Missouri litigation.

[11] In its brief, National disputes certain terms of art used by Aspen in its complaint. But National's contentions are neither here nor there. It is clear from Aspen's complaint that Aspen's claim against National was that National had agreed to be bound by the Simon-Aspen contract.

National is not entitled to judgment as a matter of law either on Steak 'n Shake's complaint or National's counterclaim.

Simon was not Steak 'n Shake's agent.

[30] We next turn to Steak 'n Shake's motion for summary judgment, which the trial court denied, and we first consider Steak 'n Shake's motion with respect to National's counterclaim. The trial court found and National contends on appeal that the Missouri litigation was caused by Simon's failure to cancel the Simon-Aspen contract, which would be attributable under agency law to Steak 'n Shake. But, in its motion for summary judgment and on appeal, Steak 'n Shake asserts that the designated evidence—namely, the Steak 'n Shake-Simon contract—shows as a matter of Indiana law that Simon was not Steak 'n Shake's agent.[12] We agree with Steak 'n Shake.

[31] In general, "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that *the agent shall act on the principal's behalf and subject to the principal's control*, and the agent manifests assent or otherwise consents so to act." *Yost v. Wabash Coll.*, 3 N.E.3d 509, 518-19 (Ind. 2014) (quoting Restatement (Third) of Agency § 1.01 (2006)) (emphasis added). Two traditional rationales for holding the principal accountable for the acts or omissions of an agent are "first, because the [agent] acts upon an implied command from [the principal] and, second, because the [principal] is presumed

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[12] As noted above, unlike many of the other contracts in this record, the Steak 'n Shake-Simon contract does have a choice-of-law clause specifying that it is governed by Indiana law. *See* Appellant's App. Vol. 3 at 76.

to exercise control over the behavior of [the agent]." *Id.* at 519 (quotation marks omitted). "Whether an agency relationship exists is generally a question of fact, but if the evidence is undisputed, summary judgment may be appropriate." *Kramer v. Catholic Charities of Diocese of Ft. Wayne-S. Bend, Inc.*, 32 N.E.3d 227, 233 n.4 (Ind. 2015) (quotation marks omitted).

[32] The United States Court of Appeals for the Seventh Circuit has accurately summarized Indiana law on determining whether an agency relationship exists as follows:

> Under Indiana law, an agency exists if the principal manifests consent to the agency, the agent acquiesces, *and the principal exerts control over the agent*. *See Leon v. Caterpillar Indus., Inc.*, 69 F.3d 1326, 1333 (7th Cir. 1995). *The principal's control over the purported agent's day-to-day operations is of paramount importance. Id.* Day-to-day operations could include such things as personnel decisions, bookkeeping and financial matters, and buying and selling inventory and supplies. *See Id.* at 1333-34; *cf. Salingue v. Overturf*, 269 Ill. App. 3d 1102, 1104, 207 Ill. Dec. 575, 576, 647 N.E.2d 1068, 1069 (1995) (noting that the existence of an agency relationship "depends on a number of facts, including the manner of hiring, the right to discharge, the manner and direction of the work of the parties, the right to terminate the relationship, and the character of the supervision of the work done").

Carlisle v. Deere & Co., 576 F.3d 649, 656-57 (7th Cir. 2009) (emphases added).

[33] The Indiana Supreme Court has further articulated what it means for a principal to exercise "control" over an agent. In *Smith v. Delta Tau Delta*, 9 N.E.3d 154 (Ind. 2014), a fraternity pledge at Wabash College died from acute

alcohol ingestion. The pledge's parents brought a wrongful death suit in relevant part against the fraternity's national organization, asserting that the local chapter of the fraternity was an agent of the national fraternity. The national fraternity moved for summary judgment on the ground that it did not exercise the necessary control over the local chapter with respect to pledges to establish an agency relationship.

[34] Our Supreme Court agreed with the national fraternity. The Court first noted that the "'right to control' does not require the [principal] actually exercising control over the actions of the agent, but merely having the right to do so." *Id.* at 164 (quotation marks omitted). But the Court then explained:

> The plaintiffs contend that the designated facts show that the national fraternity, through its broad enforcement powers, had the right to control local fraternity pledge activities and alcohol use. It is significant, however, that *these alleged enforcement powers are remedial only. The national fraternity has no right to direct or control a local fraternity member's personal actions and behavioral choices. The national fraternity's role in imposing post-conduct sanctions does not establish the right to control for purposes of creating an agency relationship*.
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> The relationship between the national fraternity and the local fraternity involves the national fraternity offering informational resources, organizational guidance, common traditions, and its brand to the local fraternity. Additionally, the national fraternity furthers joint aspirational goals by encouraging individual members' good behavior and by investigating complaints and reports that affect the health, reputation, and stability of local chapters. The national fraternity has the right to discipline, suspend, or revoke its affiliation with the local fraternity or its members. *The local fraternity's everyday management and supervision*

> *of activities and conduct of its resident members, however, is not undertaken at the direction and control of the national fraternity*. The local fraternity is responsible for electing its own officers without the consent or oversight of the national fraternity. Local officers are expected to abide by the aspirational goals promulgated by the national fraternity, but are never given the authority to act on behalf of the national fraternity.
>
> Considering the undisputed evidentiary material and resolving any disputed factual issues in favor of the plaintiffs as the non-moving party, we conclude as a matter of law that an agency relationship does not exist between the national fraternity and the local fraternity or its members. Although subject to remedial sanctions, in their choice of conduct and behavior, the local fraternity and its members were not acting on behalf of the national fraternity and were not subject to its control. This is not a matter upon which there is any dispositive issue of material fact but rather an issue of law. The national fraternity is not subject to vicarious liability for the actions of the local fraternity, its officers, or its members.

Id. at 164-65 (emphases added).

[35] We conclude that our Supreme Court's holding in *Delta Tau Delta* applies here and is dispositive of the parties' arguments regarding whether Simon was an agent of Steak 'n Shake and whether Simon's failure to cancel the Simon-Aspen contract is attributable to Steak 'n Shake. First, we note that the Steak 'n Shake-Simon contract says both that Simon was Steak 'n Shake's "exclusive agent" and also that Simon and Steak 'n Shake were "independent contracting

parties and not agents."[13] Appellant's App. Vol. 3 at 75, 78. Despite the parties' respective arguments on appeal, this contractual double-speak is ambiguous and is not helpful in determining the parties' intent. *See, e.g., Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161 N.E.3d 1218, 1223 (Ind. 2021) (noting that we look to the contract to determine the parties' intent). Further, "the mere express denial of the existence of an agency relationship is not in itself determinative of the matter." *Dutton v. Int'l Harvester Co.*, 504 N.E.2d 313, 317 n.2 (Ind. Ct. App. 1987), *trans. denied*. Thus, the contract's statements both that Simon was an "exclusive agent" and also "not an agent" cannot be reconciled and do not resolve the agency question.

[36] The "true test" in determining whether an agency relationship exists is "how much control the [alleged] principal has over the alleged agent . . . ." *Id.* Here, in its February 2018 order, the trial court found that Steak 'n Shake reserved the right to direct changes or cause Simon to make changes in "how Simon provided such services" and, further, that Steak 'n Shake retained control over Simon's "means and methods." Appellant's App. Vol. 2 at 28 (emphasis removed). But the text of the "Services" provision in the Steak 'n Shake-Simon contract does not support those findings. *See* Appellant's App. Vol. 3 at 78.

[37] The text of the "Services" provision contains a description of the work to be performed but does not address the manner in which the work is to be

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[13] One can be both an independent contractor and also an agent. *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 148 n.5 (Ind. 1999).

performed. And, as we have noted, another paragraph in the Steak 'n Shake-Simon contract states that, "[Steak 'n Shake] reserves the right at any time to direct changes[] or cause [Simon] to make changes in the Services or to otherwise change the scope of the work covered by this Agreement, and [Simon] agrees to promptly make such changes." *Id.* at 73 (emphasis added). Here, the word "otherwise" means "anything else" concerning a change in the scope of the work and, thus, the word "otherwise" limits the reach of this provision to the scope of the work. *Otherwise*, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/otherwise. In sum, this language demonstrates that Steak 'n Shake's right to direct or cause Simon to make "changes" was only a right to change the description and scope of the work to be performed by Simon and not a right to direct or change how the work was to be performed.

[38] Thus, contrary to the trial court's findings, there are no words in this provision indicating that Steak 'n Shake reserved the right to direct or make changes "in ***how*** Simon provided such services" or that Steak 'n Shake "retained control" over Simon's "means and methods." Appellant's App. Vol. 2 at 28 (bold and italicized emphasis in original). Neither these words nor this meaning can be found in the plain text of the Steak 'n Shake-National contract. The text is the lodestar of a written contract. *Claire's Boutiques, Inc. v. Brownsburg Station Partners, LLC*, 997 N.E.2d 1093, 1098 (Ind. Ct. App. 2013). A court may not write a new contract for the parties or supply missing terms under the guise of construing a contract. *Id.*

[39] As we have noted, the standard of review in an appeal from a summary judgment is *de novo*, and if a trial court has entered findings and conclusions, they are gratuitous. Thus, we owe no deference to the trial court's findings and conclusions. In addition, here, we are asked to interpret a contract, which presents a pure question of law. Cases involving contract interpretation are particularly appropriate for summary judgment, and because the interpretation of a contract presents a question of law, it is reviewed *de novo* by this court. *B&R Oil Co. v. Stoler*, 77 N.E.3d 823, 827 (Ind. Ct. App. 2017), *trans. denied*.

[40] We conclude that the findings and conclusions in the trial court's February 2018 order concerning the question of agency are erroneous when measured against the plain meaning of the Steak 'n Shake-Simon contract. The only contract provision concerning the manner in which the work is to be performed is the general prescription that Simon shall "execute its responsibilities hereunder by following and applying at all times the highest professional guidelines and standards." Appellant's App. Vol. 3 at 73. This language is equivalent to the common contract term stating that the contractor shall perform the work "in a good and workmanlike manner," a standard-of-care provision that does not convert the contractor into an agent.

[41] The designated evidence is clear that Steak 'n Shake did not reserve the right to control Simon in the performance of its contractual obligations to Steak 'n Shake. Rather, the Steak 'n Shake-Simon contract described the work to be performed and reserved to Steak 'n Shake the right to alter or amend the description and scope of that work. The contract further gave Steak 'n Shake

post-conduct remedial measures against Simon in the event of Simon's breach or failure to perform. But the Steak 'n Shake-Simon contract did not reserve to Steak 'n Shake a right to control the "everyday management and supervision" of Simon's "activities and conduct" in performing the services described under the contract. *See Delta Tau Delta*, 9 N.E.3d at 164-65. The contract did not give Steak 'n Shake control over how Simon was to go about conducting its day-to-day operations or its means and methods. *See id.* And the trial court also erred when it found that Steak 'n Shake "claimed and attempted to exert . . . control" over Simon when it merely reminded Simon of its specific contractual obligation to notify its subcontractors that the Steak 'n Shake-Simon contract had been terminated and of its contractual right to set-off any monies due to Simon against any damages incurred by Steak 'n Shake as a result of Simon's failure to so notify its subcontractors. *See* Appellant's App. Vol. 2 at 27.

[42] And while not determinative, the designated evidence does not indicate that Steak 'n Shake attempted to exercise any such control over Simon. Indeed, the text of the Steak 'n Shake-Simon contract demonstrates that it was the parties' intent to make Simon responsible for management of solid waste disposal and recycling without Steak 'n Shake's involvement. And National admitted as much when, in its December 2011 letter, it stated that Simon's vice-president "did *not* sign" the Simon-Aspen contract "as the agent for Steak 'n Shake." Appellant's App. Vol. 3 at 180 (emphasis added).

[43] Therefore, we conclude as a matter of law that the Steak 'n Shake-Simon contract did not establish an agency relationship between Steak 'n Shake and

Simon. And, thus, Simon's failure to cancel the Simon-Aspen contract is not attributable to Steak 'n Shake. As National advances no other theory under which Steak 'n Shake would have been required to indemnify National in the Missouri litigation, Steak 'n Shake is entitled to summary judgment on National's counterclaim.

National was required to indemnify Steak 'n Shake in the Missouri litigation.

[44] Finally, we turn to Steak 'n Shake's motion for summary judgment on its claim against National. Steak 'n Shake's claim against National is premised on the following language from the Steak 'n Shake-National contract:

> [National] and [Steak 'n Shake] . . . agree to indemnify, defend[,] and hold harmless each other and each other's agents, officers, directors[,] and employees *from all claims and suits of whatever type*, including damages, court costs, attorneys' fees, and other expenses, *caused by any act or omission of themselves or their respective agents, officers, employees[,] and subcontractors*.

Appellant's App. Vol. 3 at 46 (emphases added).

[45] Under the Steak 'n Shake-National contract, National was responsible for "contracting for the removal of [Steak 'n Shake's] solid waste and recyclable materials." *Id.* at 41. To that end National contracted with Aspen, and Aspen was National's subcontractor.

[46] When Aspen named Steak 'n Shake as a defendant in the Missouri litigation, it triggered the Steak 'n Shake-National indemnification clause. The designated evidence shows that the immediate cause of the Missouri litigation was

National's act of removing Aspen's equipment from various St. Louis-area Steak 'n Shake locations. But it was also National's omission that caused Aspen to file suit over its contract rights when, after four years, National had failed to reach a definitive agreement on the terms of its subcontract with Aspen. In other words, the Missouri litigation was unmistakably a breach-of-contract dispute between National and its subcontractor, which National caused both by its act in removing Aspen's equipment and its omission in having not resolved the terms of its contract with Aspen.

[47] And it does not matter whether National or Aspen, or both, caused the Missouri litigation or whether National or Aspen would have prevailed if their contract dispute had not been settled and had been litigated to a final judgment. The Steak 'n Shake-National contract required National to indemnify Steak 'n Shake from "all claims and suits of whatever type . . . caused by" National's act or omission or that of its subcontractors. Therefore, National had a duty to indemnify Steak 'n Shake from the Missouri litigation, and we conclude that Steak 'n Shake is entitled to judgment as a matter of law on its complaint for indemnification against National.

Conclusion

[48] In sum, we reverse the trial court's grant of National's motion for summary judgment and its denial of Steak 'n Shake's motion for summary judgment. We hold that National is not entitled to judgment as a matter of law, but Steak 'n Shake is entitled to judgment as a matter of law on both its complaint and on National's counterclaim. Accordingly, we reverse the trial court's judgment

and remand with instructions for the court to enter summary judgment for Steak 'n Shake and to determine Steak 'n Shake's damages.

[49] Reversed and remanded with instructions.

Pyle, J., and Tavitas, J., concur.