

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Vosetat, LLC,
Appellant,

v.

Swati Singh and Samuel H.
Bullard,
Appellees.

February 28, 2023

Court of Appeals Case No.
21A-PL-888

Appeal from the Boone Superior
Court

The Honorable Matthew C.
Kincaid, Judge

Trial Court Cause No.
06D01-2001-PL-174

Memorandum Decision by Judge Pyle

Judges May and Brown concur.

Pyle, Judge.

Statement of the Case

[1] Vosetat, LLC (“Vosetat”) appeals the trial court’s orders ruling on: (1) cross-motions for summary judgment filed by Vosetat, as plaintiff/counterclaim-defendant, and Swati Singh (“Singh”) and Samuel Bullard (“Bullard”) (collectively, “Singh and Bullard”), as defendants/counterclaim-plaintiffs; and (2) the parties’ motions to strike portions of the other party’s designated evidence used in support of the respective party’s summary judgment motion. Vosetat argues that the trial court erred in ruling on the parties’ cross-motions for summary judgment and their motions to strike. Specifically, Vosetat contends that the trial court: (1) abused its discretion by denying Vosetat’s motion to strike and granting Singh and Bullard’s motion to strike; and (2) erred by granting summary judgment to Singh and Bullard and denying summary judgment to Vosetat on all six claims of Vosetat’s complaint and on claim two of Singh and Bullard’s counterclaim. Concluding that the trial court did not abuse its discretion when ruling on the parties’ motions to strike or err in its summary judgment rulings, we affirm the trial court’s judgment.

[2] We affirm.

Issues

1. Whether the trial court abused its discretion when ruling on the parties’ motions to strike designated evidence.
2. Whether the trial court erred in its rulings on the parties’ cross-motions for summary judgment.

Facts¹

[3] This appeal involves neighboring property owners who have been engaged in a contentious dispute relating to the easement property used by both parties and a gate that is on that easement property.

[4] Vosetat is an Indiana limited liability company that was formed by Marylinda Gossweiler (“Gossweiler”) in February 2019. Gossweiler formed Vosetat as a real estate holding company, and she is the manager of Vosetat. Vosetat owns property located at 3511 Willow Road in Zionsville, Indiana (“the Vosetat Property”). The Vosetat Property consists of two parcels of land that, in total, measure approximately twenty-four acres. One parcel contains a residence (“the Vosetat residential parcel”), and the other parcel, which is the larger of the two parcels, is undeveloped and dense with trees and vegetation (“the Vosetat undeveloped parcel”). The Vosetat residential parcel measures 5.60 acres, and the Vosetat undeveloped parcel measures 18.44 acres. The Vosetat Property was previously owned by Gossweiler. After Gossweiler formed Vosetat as a real estate holding company, she transferred the Vosetat Property to Vosetat on February 27, 2019. Gossweiler lived in the residence on the Vosetat Property from 1995 until she moved to Colorado in 2013. When Gossweiler moved to

¹ Initially, we note that Vosetat’s Statement of Facts contains references to designated evidence that had been struck by the trial court. Vosetat’s failure to present facts that accurately represent the designated evidence considered by the trial court in this summary judgment proceeding impeded our consideration of the issues presented. Additionally, we remind counsel for both parties of their professional obligations to present a Statement of Facts that is free from argument or contentious statements, that describes the facts relevant to the issues presented for review, and that is in accordance with the standard of review appropriate to the judgment being appealed. *See* Ind. Appellate Rule 46(A)(6).

the Vosetat Property in 1995, there was a metal, wire-type fence (“the wire fence”) on the Vosetat Property. The fence consists of wire strung between wooden and metal posts. Gossweiler never did any maintenance on the wire fence when she lived on the Vosetat Property or thereafter.

[5] Singh and Bullard, who are both dentists, own property located at 3680 Willow Road in Zionsville, Indiana (“the Singh/Bullard Property”). The Singh/Bullard Property consists of six acres, which includes a residence and wooded land. Singh and Bullard purchased this property from Leah Pingel (“Pingel”) and Adam Pingel (collectively, “the Pingels”) on August 31, 2018. The Pingels had purchased the property from R. Thomas Schmidt (“Schmidt”) and Laura S. Schmidt (collectively, “the Schmidts”) in 2016. The western edge of the Singh/Bullard Property is bordered by Little Eagle Creek, and the eastern edge of the Singh/Bullard Property abuts the Vosetat Property.

[6] There is a private road (“the Private Road”), which was formerly North Willow Road, that runs between and on the Vosetat Property and the Singh/Bullard Property. The Private Road is ten feet wide. The Singh/Bullard Property and the Vosetat undeveloped parcel are landlocked and accessible only via the Private Road. The northern end of the Private Road commences near the intersection of 141st Street and Little Eagle Creek Avenue. The Vosetat residential parcel is accessible from 141st Street. The southern end of the Private Road extends past Singh and Bullard’s driveway and along the southern part of the Singh/Bullard Property. The Private Road is asphalt from the northern end of the road and until it reaches the residence on the Singh/Bullard

Property. Thereafter, the Private Road is stone and then dirt for the remainder of the road, and this part of the Private Road is not accessible by car.

[7] When the Private Road was the public road of North Willow Road, it continued over a bridge² that traversed Little Eagle Creek and connected North Willow Road to Michigan Road. Members of the public frequently traveled on North Willow Road. The bridge was decommissioned and removed in 1991. Thereafter, Gossweiler led an effort to petition to have North Willow Road privatized. Specifically, she sought to have the road privatized and “vacate[d] . . . from Little Eagle Creek (where the bridge once stood) up to the corner of Little Eagle Creek Avenue and 141st Street[.]” (App. Vol. 3 at 187). The Boone County Board of Commissioners enacted an ordinance to vacate and privatize North Willow Road in April 2001.

[8] In March 2002, when the Vosetat Property was owned by Gossweiler and the Singh/Bullard Property was owned by the Schmidts, Gossweiler and the Schmidts entered into a “Joint and Reciprocal Driveway Agreement” (“the Driveway Agreement”). The Driveway Agreement contained an exhibit that contained the legal description of the “Easement Property”³ and noted that it was “adjacent” to and “abutting” the Vosetat Property and the Singh/Bullard

² The bridge was colloquially referred to as “Screaming Bridge” and was a “frequent attraction” to “young adults . . . for the purpose of frightening each other.” (App. Vol. 3 at 193).

³ In February 2016, the attorney who had filed the Driveway Agreement filed an affidavit of scrivener’s error to correct the incorrect legal description exhibit for the Easement Property that had been inadvertently attached to the original Driveway Agreement.

Property. (App. Vol. 4 at 113). The Easement Property included the Private Road, and the easement is located on both the Vosetat Property and the Singh/Bullard Property. Additionally, the Driveway Agreement provided, in relevant part, as follows:

WHEREAS, the Easement Property is used by the parties as a common drive for the purposes of accessing their respective properties and homes, and that the Parties hereto jointly and reciprocally use the Access Property.^[4]

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENCE [sic], that for and in consideration of the mutual covenants and agreements herein contained and set forth, the Parties hereto now enter into this Joint and Reciprocal Driveway Agreement.

1.) [Gossweiler] and [the Schmidts] do hereby covenant and agree that the Easement Property shall be used for the benefit of the Parties herein and their successors, assigns, personal representatives, heirs, mortgagees, agents, invitees, licensees, and contractors (collectively, the “Benefited Parties”), to provide a non-exclusive, perpetual right of access on, over, through and across the Easement Property for the purpose of providing ingress and egress by pedestrian and vehicular traffic to and from the Properties held by the parties herein.

2.) All present and future owners, mortgagees, tenants and occupants of The Parties shall be subject to and shall comply with the provisions this Access Agreement. The acceptance of a deed or conveyance or the act of occupancy of any property benefited by this Access Agreement shall constitute an agreement

⁴ The Driveway Agreement did not define the Access Property. However, from context, it appears that the Access Property is synonymous with the Easement Property.

that the provisions of this Agreement are accepted and ratified by such owner, tenant or occupant and all such provisions shall be covenants running with the land currently held by each party and shall be binding on any person having at any time any interest or estate in any portion of [Gossweiler] or [the Schmidts] as though such provisions were recited and stipulated at length in each and every deed, conveyance, mortgage or lease thereof. All persons, corporations, partnerships, trusts, associations or any other legal entity who may occupy, use, enjoy or control the property of [Gossweiler] or [the Schmidts], in any manner shall be subject to this Joint and Reciprocal Driveway Agreement.

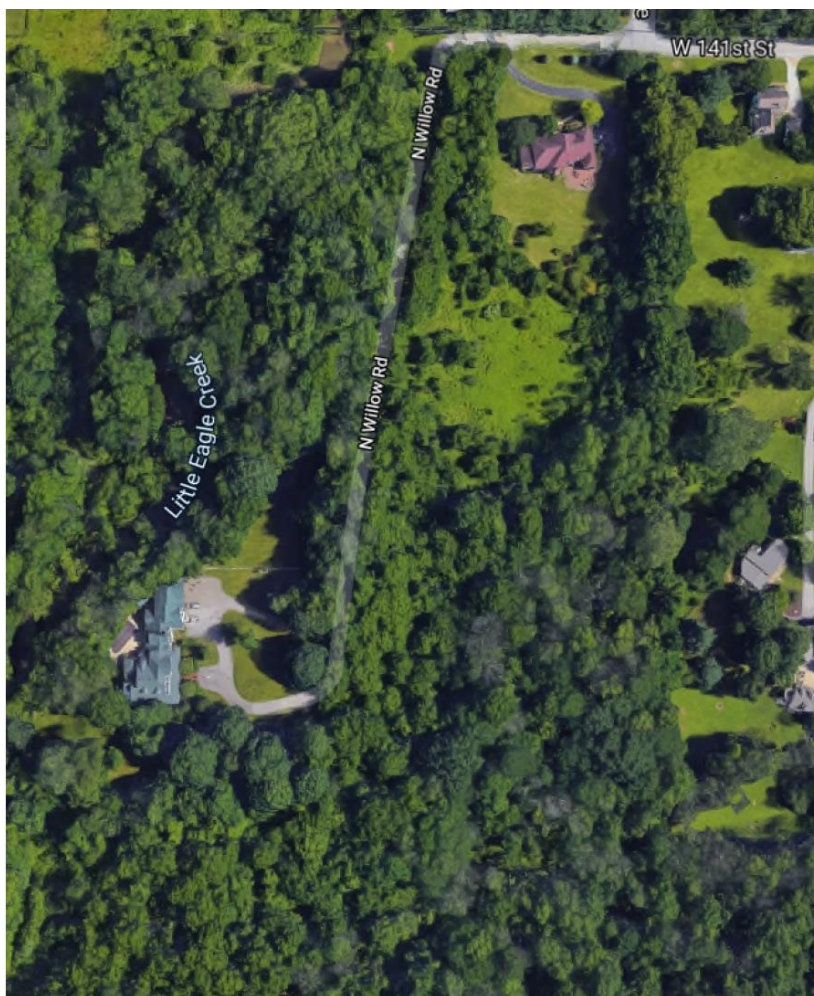
3.) The Parties Hereto their successor's and assigns agree to maintain said driveway on the Easement Property[.]

4.) This Joint and Reciprocal Driveway Agreement shall not be amended, modified nor terminated by Either Party in any way without the prior written consent of all of the other parties hereto or their respective successors or assigns. Neither party shall grant any rights to any party that does not currently have interest in land abutting to this Easement Property; either party may sell a portion of their land to a third party for a private residence, which party would have rights of ingress and egress over the Easement Property for their private residence.

(App. Vol. 4 at 113). The Easement Property is fifteen feet wide, and the ten-foot wide Private Road runs down the center of the Easement Property.

Additionally, the wire fence, which is located on the Vosetat Property and runs parallel to the Private Road, sits outside the bounds of the Easement Property.

[9] The Vosetat Property and the Singh/Bullard Property can be visualized by the following arial photograph, which shows the Singh/Bullard Property on the left of the Private Road and the Vosetat Property on the right of that road:



(App. Vol. 4 at 209).

[10] After the bridge had been removed and the Private Road had been privatized, members of the public continued to drive on the Private Road. Because the bridge had been removed, these drivers were required to turn around at the southern end of the Private Road and return to 141st Street.

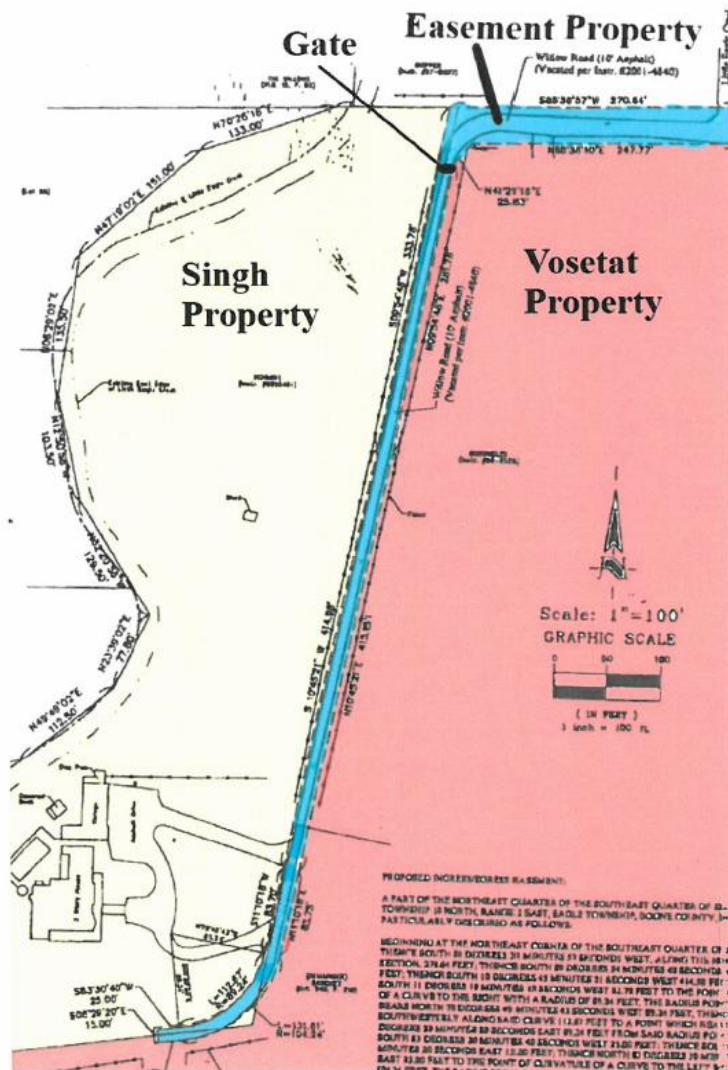
[11] In 2003, the Schmidts approached Gossweiler to discuss the idea of erecting a gate over the Private Road. Gossweiler agreed to the gate, and the Schmidts paid the cost to erect the gate on the Easement Property. The gate is located on

both the Singh/Bullard Property and the Vosetat Property. The gate contains a keypad and requires the entry of a code to open it. Gossweiler and the Schmidts had joint access to the gate code. The gate is depicted in the following photograph:



(App. Vol. 6 at 13).

[12] The location of the Easement Property and the gate are depicted in the following drawing:



(App. Vol. 4 at 92).

- [13] In 2016, after the Pingels had moved to the Singh/Bullard Property, they changed the gate code (“the Pingel gate code”) and then gave it to Gossweiler. When the Pingels sold the property to Singh and Bullard in August 2018, the Pingels also transmitted the Pingel gate code to Singh and Bullard. Singh and Bullard did not immediately move into the residence. They had remodeling done on the residence from 2018 to July 2019, and they provided the Pingel

gate code to any contractors who were performing work on the residence. One of the contractors that Singh and Bullard hired was John Caffero (“Caffero”), who owned Mac Remodeling.

[14] Sometime after Gossweiler had formed Vosetat and transferred the Vosetat Property to Vosetat in late February 2019, Vosetat decided to sell the Vosetat Property. Gossweiler gave Vosetat’s real estate agent the gate code. At that time, the operable gate code was the Pingel gate code. Vosetat’s real estate agent was unable to open the gate. Thereafter, Gossweiler and Vosetat’s real estate agent tried to contact Singh and Bullard’s real estate agent.

[15] Additionally, Gossweiler, who had not met Singh and Bullard, searched online for their contact information. On June 11, 2019, Gossweiler called Singh and Bullard’s two dental offices several times and left messages for them to call her back about an important matter. That evening, Singh called Gossweiler and left a threatening voicemail on Gossweiler’s phone. Singh stated that prior owners and neighbors had warned Singh and Bullard about Gossweiler, and Singh told Gossweiler to stop calling Singh and Bullard’s offices. Singh also told Gossweiler to stay away from them or she would shoot. Shortly thereafter, Gossweiler, who was living in Colorado, contacted the Zionsville Police Department to report the voicemail. The police department wrote an incident report.

[16] Vosetat then retained counsel, who sent a demand letter on June 21, 2019 (“June 2019 demand letter”) to Singh and Bullard at their residence. In the

letter, Vosetat stated that it had “discover[ed] that [Singh and Bullard] had erected a gate” on the Easement Property and had prevented Vosetat from accessing the undeveloped parcel on the Vosetat Property. (App. Vol. 4 at 135). Vosetat asserted that the gate was not permitted by the Driveway Agreement, and it demanded that Singh and Bullard immediately remove the gate. On July 16, 2019, Vosetat’s counsel sent another copy of the demand letter (“July 2019 demand letter”) to Singh and Bullard at their employment addresses.

[17] Upon the completion of Singh and Bullard’s house renovations, Singh and Bullard changed the gate code (“the Singh/Bullard gate code”) on July 29, 2019. They then gave the updated Singh/Bullard gate code to Gossweiler within twenty-four hours of changing it.

[18] On August 1, 2019, Caffero performed some landscaping on the Singh/Bullard Property west of the Easement Property. Specifically, Caffero had informed Singh and Bullard that there was pooling of water along their property along the west of the Private Road, and he recommended to them that he could trim some tree branches and overgrowth of vegetation on the Singh/Bullard Property to allow more sunlight through and help to avoid the pooling along the Private Road. Singh and Bullard “authorized Caffero to perform whatever services he deemed necessary along the west side of the Private Road on the [Singh/Bullard] Property to address these concerns.” (App. Vol. 3 at 175). On August 1, Caffero “trimmed overgrowth of vegetation, including tree limbs and branches, . . . on the west side of the [P]rivate [R]oad on the Singh[/Bullard] Property.” (App. Vol. 3 at 222). While Caffero was performing his work, he

“noticed overgrowth of grass and some vegetation on the east side of the [P]rivate [R]oad[,]” which was the Vasetat Property. (App. Vol. 3 at 222). Caffero trimmed some of that grass and vegetation overgrowth but did not cut or remove any trees along the east side of the Private Road. Caffero then “temporarily staged the trimmed overgrowth on the far southern end of the [P]rivate [R]oad on the Singh[/Bullard] Property.” (App. Vol. 3 at 223). Caffero moved the piles of trimmed overgrowth onto “the west side of the [P]rivate [R]oad on the Singh[/Bullard] Property” on August 4, 2019 and then mulched the vegetation the following day. During his landscaping work, Caffero did not touch or tamper with the wire fence on the Vasetat Property.

[19] On August 2, 2019, Gossweiler used the Singh/Bullard gate code and drove on the Private Road back to the undeveloped Vasetat parcel. Gossweiler saw the pile of trimmed overgrowth and then contacted the Zionsville Police Department and alleged that Singh and Bullard had engaged in criminal mischief and had damaged and vandalized her vegetation and fence. The police department wrote an incident report. In that August 2019 report, a police officer wrote that some of Vasetat’s vegetation “approximately 850ft in length, [had been] cut down to the wire fence.” (App. Vol. 4 at 180).

[20] In August 2019, Singh and Bullard’s attorney sent a letter to Vasetat’s attorney. In the letter, Singh and Bullard’s attorney pointed out that Singh and Bullard were not the individuals who had erected the gate and that the gate had existed prior to the date they had purchased the Singh/Bullard Property. Their attorney also stated that the installation of the gate was part of the parties’

obligations to maintain the Easement Property and that the removal of brush from the Easement Property was part of the required maintenance obligation in the Driveway Agreement. Additionally, the attorney's letter stated that some of the brush may have been cut back by prior owners. The letter also demanded that Voetat reimburse Singh and Bullard for half of the expenses that they had incurred to maintain the Private Road and Easement Property. Singh and Bullard sought reimbursement from Voetat for \$2,495.50, which was half of the \$4,991.00 that Singh and Bullard had spent on maintenance of the Easement Property. Voetat refused to pay the requested amount.

[21] Also in August 2019, Gossweiler filed a petition for a protective order against Singh, alleging that Singh had engaged in acts of harassment against Gossweiler by, among other things, leaving the voicemail on Gossweiler's phone, removing vegetation on the Voetat Property along the Easement Property, and delaying the transmission of the gate code to Gossweiler. The following month, Singh filed a petition for a protective order against Gossweiler. The trial court held a hearing on the cross-petitions and denied both petitions in October 2019. Gossweiler appealed the trial court's denial of her petition. Our Court determined that the trial court had not abused its discretion by finding that Singh had not engaged in acts of harassment, and we affirmed the trial court's judgment. *See Gossweiler v. Singh*, No. 19A-PO-2524, 2020 WL 1873241, at *5 (Apr. 15, 2020), *trans. denied*.

[22] In January 2020, Voetat filed a complaint, which is the complaint at issue in this appeal, against Singh and Bullard and raised the following six claims: (1)

breach of contract; (2) trespass; (3) criminal mischief; (4) criminal trespass; (5) declaratory judgment; and (6) injunctive relief. Specifically, in Vosetat's breach of contract claim, it alleged that Singh and Bullard had breached the Driveway Agreement by preventing Vosetat from accessing the Easement Property.

Vosetat alleged that Singh and Bullard had prevented access to the Easement Property by: (1) refusing to provide Vosetat with the gate access code; and (2) preventing Vosetat from accessing the southern acreage of the Vosetat Property or the undeveloped Vosetat parcel when Singh and Bullard had vegetation destroyed on Vosetat's Property and had it gathered in a large pile on the Private Road. For the trespass claim, Vosetat alleged that Singh and Bullard or their agent had entered upon Vosetat's Property without authority and destroyed vegetation and a fence on Vosetat's Property. Vosetat alleged that the destroyed vegetation had a value of over \$22,000 and that the replacement value of the fence was over \$12,000. In regard to the criminal mischief claim, Vosetat generally alleged that Singh and Bullard had damaged Vosetat's Property. Vosetat alleged that Singh and Bullard had engaged in criminal trespass by intentionally interfering with Vosetat's use of the Vosetat Property between February 2019 and July 2019 when they withheld the gate code and maintained a gate on the Easement Property. Vosetat also alleged that Singh and Bullard or their agent had engaged in criminal trespass in August 2019 by intentionally interfering with Vosetat's use of the Vosetat Property when they destroyed Vosetat's vegetation and a fence on the Vosetat Property. For the declaratory judgment claim, Vosetat asked the trial court to declare that the Driveway Agreement did not permit a gate to be erected on the Private Road

and that Singh and Bullard do not have a right to maintain a gate on the Easement Property. Lastly, for the injunctive relief claim, Voseat sought a mandatory permanent injunction compelling Singh and Bullard to immediately remove the gate from the Easement Property.

[23] Thereafter, in March 2020, Singh and Bullard filed a counterclaim complaint against Voseat and raised the following three claims: (1) breach of contract; (2) declaratory judgment; and (3) frivolous litigation. Specifically, in Singh and Bullard's breach of contract claim, they alleged that Voseat had breached the Driveway Agreement by failing and refusing to fulfill its joint obligation to maintain the Private Road along the Easement Property. Singh and Bullard alleged that they had spent \$4,991.00 to maintain the driveway and that Voseat had refused to reimburse them \$2,495.50 for their joint maintenance obligation. For the declaratory judgment claim, Singh and Bullard asked the trial court to declare that Voseat had a contractual obligation to pay half of the expenses of maintaining the Private Road and Easement Property. In their final claim, Singh and Bullard alleged that Voseat's claims were frivolous, unreasonable, or groundless and that they were therefore entitled to an award of attorney fees under INDIANA CODE § 34-52-1-1.

[24] In July 2020, Singh and Bullard filed a motion for partial summary judgment, seeking summary judgment on all six claims in Voseat's complaint and on claim two, the declaratory judgment claim, in their counterclaim complaint. Singh and Bullard argued that they were entitled to summary judgment on the two assertions in Voseat's breach of contract claim because they had never

refused to provide Vosetat with the operational gate code and had never destroyed vegetation on the Vosetat Property. They also argued that, to the extent that Caffero had trimmed some of the vegetation on the Vosetat Property, Caffero was a contractor and not their agent. Additionally, Singh and Bullard argued and designated evidence to negate elements of Vosetat's other claims in its complaint. Singh and Bullard also argued that the gate helped to fulfill their obligation, under the Driveway Agreement, to maintain the Private Road on the Easement Property.

[25] Singh and Bullard's designated evidence included portions of Gossweiler's June 2020 deposition on behalf of Vosetat and affidavits from: Singh and Bullard; Schmidt and Pingel, former owners of the Singh/Bullard Property; neighbors, Hilary Gaudreau ("Gaudreau") and Bret Skipper ("Skipper"); land surveyor, Richard O'Brian ("O'Brian"); and landscaper Caffero. All these affiants stated that their affidavits were based on their personal knowledge.

[26] In Gossweiler's deposition on behalf of Vosetat, she stated that she had never seen Singh, Bullard, or any agent destroy vegetation or the fence on the Vosetat Property. Gossweiler also stated that she had never seen Singh, Bullard, or any agent place piles of vegetation on the Private Road or the Vosetat Property. Additionally, Gossweiler also stated that she had never seen Singh, Bullard, or any agent otherwise damage the Vosetat Property. Gossweiler also stated that Singh and Bullard maintained the gate by paying for the electricity to operate the gate.

[27] In Singh’s and Bullard’s affidavits, they both averred that they had “never withheld any gate code” from Vosetat or Gossweiler and that Gossweiler had been in possession of the relevant Pingel gate code from the time that Singh and Bullard purchased their property in 2018 until the time that Singh and Bullard had changed the code to the Singh/Bullard gate code on July 29, 2019. (App. Vol. 3 at 168, 175). Singh and Bullard also averred that they had never cut trees or destroyed vegetation on the Vosetat Property, never damaged the wire fence, never gone onto the Vosetat Property other than on the Easement Property, never gathered piles of vegetation on the Private Road or on the Vosetat Property, and had never otherwise damaged the Vosetat Property. Singh and Bullard also averred that they had never instructed anyone to engage in those same acts. Additionally, Singh and Bullard averred that Caffero was not their employee. Bullard also averred that he and Singh had authorized Caffero to trim trees and vegetation “along the west side of the Private Road on the [Singh/Bullard] Property[.]” (App. Vol. 3 at 175).

[28] In Schmidt’s affidavit, he averred that after he and Gossweiler had entered into the Driveway Agreement, members of the public had continued to drive on the Private Road to visit the now non-existent bridge, hunt in the area, engage in illegal activity, or use it for recreational purposes. Schmidt further averred that the installation and maintenance of the gate on the Easement Property was necessary for the safety of his household and to maintain the Private Road consistent with the Driveway Agreement. Specifically, Schmidt stated that the gate had “eliminated trespassers from accessing the driveway, resulting in

improved safety and security, and it contributed to the maintenance of the driveway by reducing excess and abusive use.” (App. Vol. 3 at 194). Schmidt stated that, despite the gate’s installation and maintenance being required by the Driveway Agreement’s obligation to maintain the Private Road on the Easement Property, he had discussed the gate installation with Gossweiler “out of an abundance of caution[.]” (App. Vol. 3 at 194). Additionally, Schmidt explained that after Gossweiler had agreed to the installation of the gate, he had paid for the gate’s installation and had given the gate code to Gossweiler. Schmidt also averred that from the time the gate was installed in 2003 until the time he sold the Singh/Bullard Property in 2016, Gossweiler “never protested the gate nor did she ever assert that the Driveway Agreement prohibited its construction or maintenance.” (App. Vol. 3 at 195).

[29] In Pingel’s affidavit, she stated that when she had lived on the Singh/Bullard Property between 2016 and 2018, the “vegetation and tree overgrowth on Gossweiler’s side of the [P]rivate [R]oad” impeded the fire department’s ability to drive its fire engine back to the residence on the Singh/Bullard Property. (App. Vol. 3 at 207). Pingel also stated that the Boone County REMC had to trim the vegetation overgrowth on the Private Road and remove trees on Gossweiler’s side of the Private Road when the Pingels had lived there and that Gossweiler had been displeased. Pingel also discussed an unpleasant incident that she had had with Gossweiler in the past.

[30] In the affidavits of neighbors, Gaudreau and Skipper, they both stated that there was no signage on 141st Street to indicate that 141st Street ends at the Private

Road and confirmed that there is a regular stream of vehicles that drive west on 141st Street to where it intersects with the Private Road. Additionally, in their affidavits, Gaudreau and Skipper discussed unpleasant incidents that they had had with Gossweiler in the past. In O’Brian’s affidavit, he stated that he had conducted a survey of the Easement Property in April 2020, and he attached the survey to his affidavit. O’Brian also averred that the Easement Property is located on both the Singh/Bullard Property and the Vosetat Property.

[31] In Caffero’s affidavit, he averred that he was not an employee of Singh and Bullard. Caffero averred that, while he had performed landscaping work on the Singh/Bullard Property, he “noticed overgrowth of grass and some vegetation on the east side of the [P]rivate [R]oad[,]” which would have been on the Vosetat Property. (App. Vol. 3 at 222). Caffero stated that he had trimmed some of that grass and vegetation overgrowth but did not cut or remove any trees along the east side of the Private Road. Specifically, he stated that he had trimmed a width of vegetation that started from the Private Road and went about three feet eastward and a length that started from the gate and went about 500 feet southward. Additionally, Caffero stated that he had staged piles of the trimmed overgrowth at the southern end of the Private Road on the Singh/Bullard Property and then removed it a couple of days later. Caffero also averred that he had not touched or tampered with the wire fence on the Vosetat Property.

[32] In December 2020, Vosetat filed a cross-motion for summary judgment on all six claims in its complaint and all three claims in Singh and Bullard’s

counterclaim. As it did in its complaint, Voetat argued that Singh and Bullard had breached the Driveway Agreement by refusing to provide Voetat with the gate access code and by destroying vegetation on Voetat's Property and gathering it in a pile on the Private Road. Voetat also asserted an additional breach of contract allegation not raised in its complaint by arguing that Singh and Bullard had also breached the Driveway Agreement by refusing to remove the gate. When arguing that Singh and Bullard had breached the Driveway Agreement by refusing to remove the gate, Voetat argued that the Driveway Agreement did not provide for the installation and continued existence of the gate on the Easement Property because the Driveway Agreement did not explicitly refer to the gate. Voetat argued that, instead, Gossweiler had granted Schmidt a revocable license to erect the gate and that Voetat had revoked the license when it had sent the June 2019 demand letter and July 2019 demand letter to Singh and Bullard and had demanded that Singh and Bullard remove the gate.

[33] Voetat argued that it was entitled to summary judgment on its trespass, criminal mischief, and criminal trespass claims because Singh and Bullard or their agent had, without permission, come onto the Voetat Property that was outside of the Easement Property and had destroyed vegetation and the fence or had refused to give Voetat the gate code between March 2019 and July 29, 2019. For its declaratory judgment claim, Voetat acknowledged that the Driveway Agreement imposed an obligation on the parties to maintain the Private Road on the Easement Property. However, Voetat argued that the trial

court should declare that the Driveway Agreement did not permit Singh and Bullard to maintain a gate on the Easement Property because the Driveway Agreement did not contain any express language about having a gate and because the gate had been installed pursuant to a revocable license granted by Gossweiler and that had been revoked by Vosetat. Vosetat also argued that it was entitled to summary judgment on the three claims in Singh and Bullard's counterclaim.

[34] Vosetat's designated evidence included an affidavit from Gossweiler, in which she acknowledged that she had discussed the installation of the gate with Schmidt and had not objected to it. Gossweiler stated that she had not signed anything to allow Schmidt to erect the gate or for successor owners to maintain the gate, and she stated Schmidt had not paid her to allow him to erect the gate. Gossweiler also acknowledged that Schmidt have given her the gate code, and she stated that she had never had any issues with using the gate code to access the undeveloped Vosetat parcel in the time period before Singh and Bullard had purchased the Singh/Bullard Property. Additionally, she averred that she had learned in March 2019 that she "did not possess the then current gate code" and that she then sought it from Singh and Bullard. (App. Vol. 6 at 4). Gossweiler attached photographs to her affidavit. Among those photographs, she included photos of the gate, Private Road, the wire fence, and piles of vegetation.

[35] Vosetat's designated evidence also included, among other things, portions of Gossweiler's June 2020 deposition on behalf of Vosetat, portions of the transcript of the September 2019 protective order hearing, the August 2019

police report, and Singh’s and Bullard’s responses to requests for production of documents and various documents that Singh and Bullard had attached to their responses. One such attached document was an undated remodeling proposal from “John” of Mac Remodeling to “Swati” (“the undated remodeling proposal”). (App. Vol. 5 at 85, Vol. 7 at 90). This undated remodeling proposal set forth proposed maintenance to be done to a “Driveway/Access Road” and included the clearing, trimming, or cutting of dead trees to clear the road access and help eliminate water run-off. (App. Vol. 5 at 85, Vol. 7 at 90). The undated remodeling proposal contained a signature, which appears to be Caffero’s signature, but it was not signed by Singh or Bullard. Vosetat, however, asserted that the undated remodeling proposal had been “signed and accepted” and showed that Caffero had destroyed the vegetation on the Vosetat Property under instruction from Singh and Bullard. (App. Vol. 4 at 48). Vosetat also cited the undated remodeling proposal to support its argument that Singh and Bullard had breached the Driveway Agreement and had committed trespass and criminal mischief. Additionally, Vosetat cited to various emails—between Singh and Bullard and their realtor Fred Krawczyk (“Krawczyk”) and between Singh and Bullard’s attorney David Guevara and Pingel—that it stated had been attached to Singh’s and Bullard’s responses to requests for production of documents. Vosetat also designated the August 2019 police incident report in which the officer stated that some of Vosetat’s vegetation had been cut down to the wire fence.

[36] Thereafter, Singh and Bullard filed a reply brief in support of their partial summary judgment motion, and Voetat filed a reply brief in support of its summary judgment motion. In Singh and Bullard’s reply, they pointed out that Voetat had raised a new breach of contract claim in its summary judgment motion (the claim that Singh and Bullard had breached the Driveway Agreement by maintaining a gate and that Schmidt had installed the gate under a revocable license granted by Gossweiler). Singh and Bullard argued that, even if Voetat’s allegation that a license related to the Easement Property that was already covered by the Driveway Agreement and if the trial court found that the gate had been erected under a license, any license was irrevocable and tantamount to an easement.

[37] In their reply, Singh and Bullard designated additional evidence, including additional affidavits from Singh and Bullard, portions of the September 2019 protective order hearing transcript, portions of Gossweiler’s June 2020 deposition, and a December 2020 police report.⁵ Singh and Bullard argued that the installation and continued maintenance of the gate was part of the parties’ maintenance obligation under the Driveway Agreement. Singh and Bullard also averred that the gate served a purpose of security for their property and referred to the December 2020 police report in support of such statements. In Singh’s and Bullard’s affidavits, they attached various documents, including the

⁵ The police report related to a December 31, 2020 incident in which a “suspicious person” parked his vehicle by the Gate and then walked past the Gate, down the Private Road, and towards the residence on the Singh/Bullard Property. (App. Vol. 6 at 171).

undated remodeling proposal that Voetat had included in its designated evidence, and they stated that they had not signed or approved of the undated remodeling proposal. Singh and Bullard also included other proposals from Mac Remodeling, one of which was dated and had been signed by Singh and others of which were undated and had been signed by only Caffero.

[38] Thereafter, Voetat filed a motion to strike some affidavit statements and exhibits contained in Singh and Bullard's designated evidence and the references thereto in Singh and Bullard's summary judgment brief. Specifically, Voetat sought to have the trial court strike: (1) fifteen paragraphs from Schmidt's affidavit; (2) a photocopy of a 1984 Indianapolis Star newspaper article about the bridge that had previously crossed the Private Drive when it was a public road; (3) eleven paragraphs from Pingel's affidavit; (4) Gaudreau's affidavit; (5) Skipper's affidavit; (6) two paragraphs from Caffero's affidavit; (7) the December 2020 police report; and (8) portions of Singh and Bullard's summary judgment brief and reply that rely on the challenged designated evidence. Voetat argued that the statements either lacked foundation, were made without personal knowledge, or were hearsay, irrelevant, legal conclusions, or not the best evidence. Voetat argued that the "inadmissible designations" were simply "further attempts to harass Marylinda Gossweiler[.]" (App. Vol. 6 at 44).

[39] Singh and Bullard also filed a motion to strike some of Voetat's designated evidence and portions of Voetat's summary judgment brief. Specifically, Singh and Bullard sought to have the trial court strike: (1) two paragraphs of

Gossweiler's affidavit based on these paragraphs being speculative and not based on personal knowledge; (2) the undated remodeling proposal based on it lacking proper authentication; (3) the emails between Singh and Bullard and their realtor Krawczyk and between Singh and Bullard's attorney and Pingel based on lacking proper authentication and because they were hearsay; and (4) multiple statements and paragraphs included in Vostat's brief that relied upon the challenged designated evidence.

[40] The trial court held a hearing on the parties' pending motions and, thereafter, entered orders on the parties' summary judgment motions and motions to strike. The trial court denied Vostat's motion to strike and granted Singh and Bullard's motion to strike. For the cross-motions for summary judgment on the six claims in Vostat's complaint, the trial court entered a general judgment and granted Singh and Bullard's summary judgment motion and denied Vostat's summary judgment motion on all claims. When ruling on the parties' summary judgment motions on the three claims in Singh and Bullard's counterclaim complaint, the trial court denied Vostat's summary judgment motion on counterclaim one (breach of contract); granted partial summary judgment in favor of Singh and Bullard and denied summary judgment to Vostat on counterclaim two (declaratory judgment); and granted partial summary judgment in favor of Vostat on counterclaim three (frivolous lawsuit). When denying Vostat's summary judgment motion on counterclaim one, the trial court concluded that there was a "genuine issue of material fact as to the amount of the costs and whether the work performed in trimming brush

was necessary to maintain the driveway.” (App. Vol. 2 at 12). When ruling on the declaratory judgment in counterclaim two, the trial court specifically declared that “Vosetat ha[d] a contractual obligation to pay for half of the necessary expenses incurred by [Singh and Bullard] in maintaining the driveway” while the “cost and burden of maintaining a gate [wa]s the sole responsibility” of Singh and Bullard. (App. Vol. 2 at 12). Additionally, the trial court declared that Singh and Bullard were “obliged at all times to assure that updated codes to operate the gate, or future gates, are furnished to [Vosetat]” and that Vosetat could furnish the code to its invitees. (App. Vol. 2 at 12). The trial court entered its judgment as a final judgment.

[41] Vosetat now appeals.

Decision

[42] Vosetat argues that the trial court erred in its rulings on the parties’ cross-motions for summary judgment and in its rulings on the parties’ motions to strike. Specifically, Vosetat contends that the trial court: (1) abused its discretion by denying Vosetat’s motion to strike and granting Singh and Bullard’s motion to strike; and (2) erred by granting summary judgment to Singh and Bullard and denying summary judgment to Vosetat on all six claims of Vosetat’s complaint.⁶

⁶ Vosetat also asserts that the trial court erred by granting partial summary judgment in favor of Singh and Bullard and denying summary judgment to Vosetat on claim two in Singh and Bullard’s counterclaim.

[43] Before addressing these arguments, we note that in Vosetat’s argument section of its brief, Vosetat attempts to have this Court incorporate multiple arguments from its summary judgment briefing. We, however, decline to do so. *See Dave’s Excavating, Inc. v. City of New Castle*, 959 N.E.2d 369, 376 (Ind. Ct. App. 2012) (explaining that an appellant “may not incorporate argument from another source by reference”), *reh’g denied, trans. denied*. Indiana Appellate Rule 46(A)(8)(a) provides that argument contained in an appellant’s brief “shall contain the appellant’s contentions why the trial court . . . committed reversible error[.]” An appellant “may not evade this requirement by referring us to arguments found in a brief filed at some earlier point.” *Dave’s Excavating*, 959 N.E.2d at 376. Accordingly, we will consider only Vosetat’s arguments set out in its appellant’s brief. *See id.* Additionally, we will do the same with Singh and Bullard’s one request to have this Court incorporate an argument from its summary judgment briefing. *See Oxley v. Lenn*, 819 N.E.2d 851, 852-56 (Ind. Ct. App. 2004) (explaining that an appellee may not evade the appellate rule regarding appellate briefing requirements by asking this Court to incorporate argument from its summary judgment motion and considering only the appellee’s argument in its appellee’s brief).

Claim two of Singh and Bullard’s counterclaim is a declaratory judgment claim, in which the trial court declared that, under the Driveway Agreement, “Vosetat ha[d] a contractual obligation to pay for half of the necessary expenses incurred by [Singh and Bullard] in maintaining the driveway[.]” (App. Vol. 2 at 12). Vosetat, however, has not presented any cogent argument regarding the trial court’s declaration or showing why it is erroneous. Accordingly, Vosetat has waived appellate review of this issue. *See Ind. Appellate Rule 46(A)(8)(a); Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002), *reh’g denied, trans. denied*.

1. Motions to Strike

- [44] Vosetat contends that the trial court abused its discretion by denying Vosetat's motion to strike and granting Singh and Bullard's motion to strike. "A trial court has broad discretion in granting or denying a motion to strike." *Auto-Owners Ins. Co. v. Bill Gaddis Chrysler Dodge, Inc.*, 973 N.E.2d 1179, 1182 (Ind. Ct. App. 2012), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Webb v. City of Carmel*, 101 N.E.3d 850, 857 (Ind. Ct. App. 2018). A trial court's ruling on a motion to strike will not be reversed "unless prejudicial error is clearly shown." *Auto-Owners Ins.*, 973 N.E.2d at 1182.
- [45] Vosetat first argues that the trial court abused its discretion by denying Vosetat's motion to strike "certain portions" of Singh and Bullard's designated evidence that it contends was inadmissible extrinsic evidence for interpreting the Driveway Agreement. (Vosetat's Br. 42). Vosetat does not specify the challenged evidence but generally contends that the trial court should have struck "large portions" of Singh and Bullard's designated evidence that may have been used to interpret the meaning of the word "maintain" in the Driveway Agreement. (Vosetat's Br. 42). It is well settled that we will not consider an assertion on appeal when the party has not presented a cogent argument supported by authority and references to the record as required by the rules. *Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). Because Vosetat has failed to provide specificity as to the designated evidence it

challenges along with citations to the record, it has waived its argument challenging the trial court’s ruling denying its motion to strike. *See id.* *See also* App. R. 46(A)(8)(a); *Loomis*, 764 N.E.2d at 668. Waiver notwithstanding, and assuming that Vosetat’s appellate challenge is to the affidavits that Singh and Bullard designated in support of their summary judgment motion, we conclude that the record supports the trial court’s ruling denying Vosetat’s motion. *See Auto-Owners Ins.*, 973 N.E.2d at 1182 (holding that a trial court has broad discretion in ruling on a motion to strike); T.R. 56(E) (providing that “[s]upporting affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein”).

[46] We next address Vosetat’s argument that the trial court abused its discretion by granting Singh and Bullard’s motion to strike some of Vosetat’s designated evidence, including “email communications and contracts[,]” as being “inauthentic” and hearsay. (Vosetat’s Br. 46, 47).⁷ While Vosetat does not set forth which “email communications” it is challenging, it appears likely that it is the emails between Singh and Bullard and their realtor Krawczyk in which Krawczyk provided Singh and Bullard with a summary of his conversations that he had with Gossweiler and her realtor about the easement, the gate, and

⁷ Vosetat makes no argument to challenge the other designated evidence or statements in its brief that the trial court struck in addition to the undated remodeling proposal and emails. Accordingly, it has waived any appellate argument challenging the trial court’s ruling striking that evidence or statements. *See* App. R. 46(A)(8)(a); *Loomis*, 764 N.E.2d at 668.

the sale of the Vosetat Property. Additionally, what Vosetat seems to be referring to as a “contract” was the undated remodeling proposal that set forth proposed maintenance to be done to a driveway, including the clearing, trimming, or cutting of dead trees to clear the road access and help eliminate water run-off. This undated remodeling proposal had not been signed by Singh or Bullard. Moreover, part of the reason that Singh and Bullard wanted the trial court to strike it was because it was not a contract between them and Caffero. Additionally, Singh and Bullard did not argue that the undated remodeling proposal or the emails were “inauthentic.” Singh and Bullard argued that the challenged designated evidence lacked proper authentication (or was unauthenticated) under Evidence Rule 901 and that it constituted hearsay.

[47] In its summary judgment briefing and on appeal, Vosetat cited the emails between Singh and Bullard and their realtor Krawczyk to argue that Singh and Bullard had refused to give Vosetat the gate code, and Vosetat cited the undated remodeling proposal to argue that Singh and Bullard had authorized Caffero to perform the work contained in the proposal and that Caffero had in fact performed that proposed work. We conclude that the record supports the trial court’s discretion and its ruling granting Singh and Bullard’s motion to strike the challenged designated evidence. *See Auto-Owners Ins.*, 973 N.E.2d at 1182 (holding that a trial court has broad discretion in ruling on a motion to strike); Ind. Evidence Rule 801(c)(2) (providing that hearsay is a statement that is offered in evidence to prove the truth of the matter asserted); Evidence Rule 901(a) (providing that “[t]o satisfy the requirement of authenticating or

identifying an item of evidence, the proponent must produce sufficient evidence to support a finding that the item is what the proponent claims it is”).

Moreover, even if the trial court erred by striking this designated evidence, Vosetat has failed to clearly show any prejudicial harm or error. *See Auto-Owners Ins.*, 973 N.E.2d at 1182 (explaining that a trial court’s ruling on a motion to strike will not be reversed unless prejudicial error is clearly shown).

2. Summary Judgment

[48] Turning to Vosetat’s challenge to the trial court’s summary judgment rulings, we note that we review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). A party seeking summary judgment must 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.” Ind. Trial Rule 56(C); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 160 (Ind. 2005). “The initial burden is on the summary-judgment movant to ‘demonstrate [] the absence of any genuine issue of fact as to a determinative issue,’ at which point the burden shifts to the non-movant to ‘come forward with contrary evidence’ showing an issue for the trier of fact.” *Hughley*, 15 N.E.3d at 1003 (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761-62 (Ind. 2009)). In reviewing summary judgment rulings, we consider only the evidentiary matter that the parties have specifically designated to the trial court. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012). “We construe all factual inferences in the non-moving party’s favor and resolve all doubts as to the existence of a material issue against the moving party.” *Id.* Additionally, “we

may affirm the entry of summary judgment on any grounds supported by the designated evidentiary materials.” *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 730 (Ind. Ct. App. 2018). *See also Gerdon Auto Sales, Inc. v. John Jones Chrysler Dodge Jeep Ram*, 98 N.E.3d 73, 79 n.3 (Ind. Ct. App. 2018) (explaining that our Court will “affirm a trial court’s entry of summary judgment if it can be sustained on any theory or basis in the record”), *trans. denied*.

[49] Vosetat argues that the trial court erred by granting summary judgment to Singh and Bullard and denying summary judgment to Vosetat on all six of the following claims in Vosetat’s complaint: (1) breach of contract; (2) trespass; (3) criminal mischief; (4) criminal trespass; (5) declaratory judgment; and (6) injunctive relief. Where, as in this case, the parties have filed cross-motions for summary judgment, our standard of review is the same. *See Knighten v. E. Chicago Hous. Auth.*, 45 N.E.3d 788, 791 (Ind. 2015). “[U]nder most circumstances we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.” *Id.* (cleaned up). Here, however, we will limit our review to the trial court’s ruling granting Singh and Bullard’s summary judgment motion on the six claims in Vosetat’s complaint because we conclude that Singh and Bullard have negated an element in these six claims and is entitled to summary judgment on those claims.

[50] This appeal stems from the parties’ easement under the Driveway Agreement and the interpretation of that Driveway Agreement. “Summary judgment is especially appropriate in the context of contract interpretation because the

construction of a written contract is a question of law.” *TW Gen. Contracting Servs., Inc. v. First Farmers Bank & Trust*, 904 N.E.2d 1285, 1287-88 (Ind. Ct. App. 2009), *reh’g denied*. “The ultimate goal of any contract interpretation is to determine the intent of the parties when they made the agreement.” *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 813 (Ind. 2012), *reh’g denied*. To do so, “we begin with the plain language of the contract, reading it in context and, whenever possible, construing it so as to render each word, phrase, and term meaningful, unambiguous, and harmonious with the whole.” *Id.* A court should construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless. *Hammerstone v. Ind. Ins. Co.*, 986 N.E.2d 841, 846 (Ind. Ct. App. 2013).

[51] We have generally discussed the nature of easements as follows:

It is well established that easements are limited to the purpose for which they are granted. The owner of an easement, known as the dominant estate, possesses all rights necessarily incident to the enjoyment of the easement. The owner of the property over which the easement passes, known as the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use. All rights necessarily incident to the enjoyment of the easement are possessed by the owner of the dominant estate, and it is the duty of the servient owner to permit the dominant owner to enjoy his easement without interference. The servient owner may not so use his land as to obstruct the easement or interfere with the enjoyment thereof by the owner of the dominant estate. Moreover, the owner of the dominant estate cannot subject the servient estate to extra burdens, any more than the holder of the servient estate can

materially impair or unreasonably interfere with the use of the easement.

Rehl v. Billetz, 963 N.E.2d 1, 6-7 (Ind. Ct. App. 2012) (cleaned up).

[52] The contract at issue, the Driveway Agreement, provides, in relevant part:

WHEREAS, the Easement Property is used by the parties as a common drive for the purposes of accessing their respective properties and homes, and that the Parties hereto jointly and reciprocally use the Access Property.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENCE [sic], that for and in consideration of the mutual covenants and agreements herein contained and set forth, the Parties hereto now enter into this Joint and Reciprocal Driveway Agreement.

1.) [Gossweiler] and [the Schmidts] do hereby covenant and agree that the Easement Property shall be used for the benefit of the Parties herein and their successors, assigns, personal representatives, heirs, mortgagees, agents, invitees, licensees, and contractors (collectively, the “Benefited Parties”), to provide a non-exclusive, perpetual right of access on, over, through and across the Easement Property for the purpose of providing ingress and egress by pedestrian and vehicular traffic to and from the Properties held by the parties herein.

2.) All present and future owners, mortgagees, tenants and occupants of The Parties shall be subject to and shall comply with the provisions this Access Agreement. The acceptance of a deed or conveyance or the act of occupancy of any property benefited by this Access Agreement shall constitute an agreement that the provisions of this Agreement are accepted and ratified by such owner, tenant or occupant and all such provisions shall be covenants running with the land currently held by each party and shall be binding on any person having at any time any interest or

estate in any portion of [Gossweiler] or [the Schmidts] as though such provisions were recited and stipulated at length in each and every deed, conveyance, mortgage or lease thereof. All persons, corporations, partnerships, trusts, associations or any other legal entity who may occupy, use, enjoy or control the property of [Gossweiler] or [the Schmidts], in any manner shall be subject to this Joint and Reciprocal Driveway Agreement.

3.) The Parties Hereto their successor's and assigns agree to maintain said driveway on the Easement Property[.]

4.) This Joint and Reciprocal Driveway Agreement shall not be amended, modified nor terminated by Either Party in any way without the prior written consent of all of the other parties hereto or their respective successors or assigns. Neither party shall grant any rights to any party that does not currently have interest in land abutting to this Easement Property; either party may sell a portion of their land to a third party for a private residence, which party would have rights of ingress and egress over the Easement Property for their private residence.

(App. Vol. 4 at 113).

[53] Here, the plain language of the Driveway Agreement reveals, and the parties do not dispute, that it is a joint and reciprocal easement agreement for the use and benefit of both parties and their successors. It is an ingress-egress easement that passes over both parties' property and benefits each party. Under the Driveway Agreement, the parties have a joint obligation to maintain the Private Road on the Easement Property.

[54] The parties do not dispute this maintenance obligation, but they disagree as to what is included as maintenance under the Driveway Agreement. Indeed, the Driveway Agreement does not specify the scope of the maintenance obligation

or what acts are required to fulfill that obligation. In their summary judgment motion, Singh and Bullard argued that the gate had been erected and was continuing to be maintained as a means of fulfilling the maintenance obligation under the Driveway Agreement. On the other hand, Vosetat argued that the Driveway Agreement did not permit a gate to be erected on the Private Road and that Singh and Bullard do not have a right to maintain a gate on the Easement Property because the Driveway Agreement did not contain any express language about having a gate. Vosetat argued that the gate had been installed pursuant to a revocable license that Gossweiler had granted to Schmidt and that Vosetat had revoked when it had sent the June 2019 demand letter and July 2019 demand letter to Singh and Bullard demanding that they remove the gate. In response, Singh and Bullard argued that, even if Vosetat's allegation that there was a license related to the Easement Property that was already covered by the Driveway Agreement and if the trial court found that the gate had been erected under a license, any license was irrevocable and tantamount to an easement. The trial court made no specific finding regarding the parties' license argument, but the trial court did enter a general judgment granting summary judgment to Singh and Bullard and denying summary judgment to Vosetat on Vosetat's declaratory judgment and injunction claims, which relate to Vosetat's argument that the gate was not permitted under the Driveway Agreement.

[55] The parties make the same license arguments about the gate on appeal. We need not, however, address their arguments regarding whether a license exists

because, here, the designated evidence reveals that the Driveway Agreement was orally modified to include the gate at issue. *See Gerdon Auto Sales*, 98 N.E.3d at 79 n.3 (explaining that we will “affirm a trial court’s entry of summary judgment if it can be sustained on any theory or basis in the record” and addressing the question of whether the parties had modified a contract, which was ultimately at the heart of the parties’ dispute, despite the fact that neither party addressed the issue). We recognize that the Driveway Agreement provides that the agreement “shall not be amended, modified nor terminated by Either Party in any way without the prior written consent of all of the other parties hereto or their respective successors or assigns.” (App. Vol. 4 at 113). However, our Indiana Supreme Court has explained that “parties may mutually modify contractual undertakings.” *Sees*, 839 N.E.2d at 161. Indeed, “[e]ven a contract providing that any modification thereof must be in writing, nevertheless may be modified orally.” *Id.* *See also Gerdon Auto Sales*, 98 N.E.3d at 80 (explaining that, aside from an oral modification of an existing contract, the modification of a contract can be implied from the conduct of the parties). The modification of a contract generally requires all the requisite elements of a contract, including consideration. *See AM Gen. LLC v. Armour*, 46 N.E.3d 436, 443 (Ind. 2015). “Consideration consists of either a benefit to the promisor or a detriment to the promisee.” *Id.* (cleaned up). While questions regarding modification of a contract are generally questions of fact, the question of modification may be resolved as a matter of law where there are no genuine issues of material fact. *See Gerdon Auto Sales*, 98 N.E.3d at 80.

[56] Here, the designated evidence reveals that after Gossweiler and Schmidt had entered into the Driveway Agreement, Schmidt approached Gossweiler and asked for her consent to Schmidt erecting the gate, apparently to assist in security and maintenance of the Private Road. Gossweiler agreed, and Schmidt paid the cost to install the gate on the Easement Property in 2003. The gate is located on both the Singh/Bullard Property and the Vosetat Property. For the next thirteen years when Schmidt lived on the Singh/Bullard Property, Gossweiler used the gate without protest. After Schmidt moved, the owners of the Singh/Bullard Property, including the Pingels and Singh and Bullard, paid to maintain the gate, including paying for any repairs and the electricity to operate the gate. Additionally, Gossweiler used the gate without issue until March 2019 when she or her real estate agent were apparently unable to open the gate. The designated evidence reveals that Gossweiler accepted Schmidt's offer to erect a gate on the Easement Property. Gossweiler received the benefit of a gate that protected her property, and Schmidt had the detriment of paying to erect the gate. Accordingly, where the designated evidence reveals the requisite elements of a contract and where the parties' conduct further implies a modification, we conclude that Gossweiler and Schmidt orally modified the Driveway Agreement to allow for the erection and maintenance of the gate on the Easement Property. *See Sees*, 839 N.E.2d at 161 (explaining that parties may orally modify a contract that provides that any modification thereof must be in writing); *Gerdon Auto Sales*, 98 N.E.3d at 80 (holding that as a matter of law that the parties had modified the contract at issue and the modification was implied by the parties' conduct). Because we conclude that the Driveway

Agreement was modified to allow for the erection and maintenance of the gate on the Easement Property, we affirm the trial court’s grant of summary judgment to Singh and Bullard on Vosetat’s declaratory judgment and injunction claims.

[57] We next address Vosetat’s breach of contract claim. To prevail on a breach of contract claim, a plaintiff is required to prove: (1) the existence of a contract; (2) the defendant breached the contract; and (3) damages. *See Gerdon Auto Sales*, 98 N.E.3d at 78. In its complaint, Vosetat alleged that Singh and Bullard had breached the Driveway Agreement by preventing Vosetat from accessing the Easement Property when they: (1) refused to provide Vosetat with the gate access code; and (2) prevented Vosetat from accessing the undeveloped Vosetat parcel when they destroyed vegetation on Vosetat’s Property and had it gathered in a large pile on the Private Road.⁸

⁸ On appeal, Vosetat also argues that Singh and Bullard breached the Driveway Agreement by failing to remove the gate. As we noted above, Vosetat did not raise this additional breach of contract allegation in its complaint. Instead, it first raised this additional breach of contract claim in its memorandum in opposition to Singh and Bullard’s summary judgment motion and asserting its cross-motion for summary judgment. However, “[a] memorandum opposing summary judgment is not a proper place to assert a claim against a defendant.” *Briggs v. Finley*, 631 N.E.2d 959, 964 (Ind. Ct. App. 1994) (explaining that a defendant is not required to anticipate and defend against a claim not raised in the plaintiff’s complaint and raised only in the plaintiff’s memorandum opposing summary judgment), *trans. denied*. Moreover, because this case involves a summary judgment and not a trial, Trial Rule 15(B)—which “provides a vehicle by which the action may be decided upon the evidence that is actually admitted at trial, notwithstanding the initial direction of the pleadings.[.]” *see* 22 Stephen E. Arthur, *Indiana Practice: Civil Trial Practice* § 16.2 (2d ed. 2022)—is not applicable and cannot be used to amend Vosetat’s pleadings to add a claim. Accordingly, we will not address Vosetat’s breach of contract claim that was not raised in its complaint. Moreover, the issue of whether the gate was permitted to be maintained on the Easement Property was ultimately part of Vosetat’s declaratory judgment and injunction claims that we have already addressed and affirmed the trial court’s summary judgment rulings on these claims.

[58] In Singh and Bullard’s summary judgment motion, they argued and negated element two of Vosetat’s breach of contract claim. In other words, Singh and Bullard designated evidence to show that they had not breached the Driveway Agreement as alleged in Vosetat’s complaint. Specifically, in their affidavits, Singh and Bullard averred that they had “never withheld any gate code” from Vosetat or Gossweiler and that Gossweiler had been in possession of the operable gate code, which was the Pingel gate code, from the time that Singh and Bullard purchased their property in 2018 until the time that Singh and Bullard had changed the code to the Singh/Bullard gate code on July 29, 2019. (App. Vol. 3 at 168, 175). Singh and Bullard also averred that they had never cut trees or destroyed vegetation on the Vosetat Property, never gone onto the Vosetat Property other than on the Easement Property, never gathered piles of vegetation on the Private Road or on the Vosetat Property, and never otherwise damaged the Vosetat Property. Singh and Bullard also averred that they had never instructed anyone to engage in those same acts. Additionally, Singh and Bullard averred that Caffero was not their employee, and Bullard averred that he and Singh had authorized Caffero to trim trees and vegetation “along the west side of the Private Road on the [Singh/Bullard] Property[.]” (App. Vol. 3 at 175). Singh and Bullard also designated Gossweiler’s deposition on behalf of Vosetat, in which Gossweiler stated that she had never seen Singh, Bullard, or any agent destroy vegetation or the fence on the Vosetat Property. Gossweiler also stated that she had never seen Singh, Bullard, or any agent place piles of vegetation on the Private Road or the Vosetat Property. Additionally, Gossweiler stated that she had never seen Singh, Bullard, or any agent

otherwise damage the Vosetat Property. Singh and Bullard also designated an affidavit from Caffero, who averred that he was not an employee of Singh and Bullard. Caffero acknowledged that he had trimmed some grass and vegetation overgrowth that was on the east side of the Private Road, but he averred that he had not cut or removed any trees along the east side of the Private Road. Caffero also averred that he had not touched or tampered with the wire fence on the Vosetat Property.

[59] By negating the breach element of Vosetat’s breach of contract claim as alleged in its complaint, Singh and Bullard showed that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. *See* T.R. 56(C). Thus, the burden then shifted to Vosetat to show the existence of a genuine issue by setting forth specifically designated facts. *See Hughley*, 15 N.E.3d at 1003. In an effort to do so, Vosetat designated an affidavit from Gossweiler, who averred that she had learned in March 2019 that she “did not possess the then current gate code” and that she then sought it from Singh and Bullard. (App. Vol. 6 at 4). Gossweiler did not aver that she had never received the operable gate code, which was the Pingel gate code. Nor did she aver that she had forgotten or lost the gate code. Vosetat also designated the undated remodeling proposal, which was later stricken by the trial court, to argue that that the undated remodeling proposal had been “signed and accepted” by Singh and Bullard and showed that Caffero had destroyed the vegetation on the Vosetat under instruction from Singh and Bullard. (App. Vol. 4 at 48). However, Singh and Bullard designated additional affidavits in which

they averred that they had not signed the undated remodeling proposal nor had they authorized for the work proposed in the undated remodeling proposal to be done. Vosetat designated emails between Singh and Bullard and their realtor Krawczyk, which was later stricken by the trial court, to argue that Singh and Bullard had refused to give Vosetat the gate code. In addition, Vosetat designated the August 2019 police incident report in which the officer stated that some of Vosetat's vegetation had been cut down to the wire fence. Vosetat's designated evidence, however, does not show the existence of a genuine issue on the breach element. After reviewing the designated evidence in the light most favorable to Vosetat as the non-movant, we conclude that the trial court properly granted summary judgment to Singh and Bullard on the breach of contract claim as alleged in Vosetat's complaint.

[60] We also conclude that that the trial court properly granted summary judgment to Singh and Bullard on the Vosetat's claims of trespass, criminal mischief, and criminal trespass because Singh and Bullard negated an element of these claims and was entitled to judgment as a matter of law. To prove a claim of trespass, a plaintiff must show that: (1) the plaintiff possessed the land when the alleged trespass occurred; and (2) the alleged trespasser entered the land without a legal right to do so. *See Holland v. Steele*, 961 N.E.2d 516, 525 (Ind. Ct. App. 2012), *trans. denied*. A plaintiff asserting a criminal mischief claim must prove that the defendant recklessly, knowingly, or intentionally damaged or defaced the plaintiff's property without the plaintiff's consent. *See* IND. CODE § 35-43-1-2(a). To prove a claim of criminal trespass, a plaintiff must prove that the

defendant knowingly or intentionally interfered with the possession or use of the plaintiff's property without the plaintiff's consent. *See* I.C. § 35-43-2-2(b)(4).

[61] Vosetat's trespass, criminal mischief, and criminal trespass claims were based on Vosetat's allegations that Singh and Bullard had either entered upon the Vosetat Property without authority, damaged Vosetat's vegetation and wire fence, withheld the gate code, and maintained the gate on the Easement Property. These are the same acts that Vosetat either alleged in its breach of contract claim or were part of its declaratory judgment claim, both of which we have already affirmed the trial court's rulings granting summary judgment in favor of Singh and Bullard based on Singh and Bullard showing that they were entitled to judgment as a matter of law. Accordingly, we need not repeat the designated evidence, and we affirm the trial court's grant of summary judgment to Singh and Bullard on Vosetat's claims of trespass, criminal mischief, and criminal trespass claims.

[62] Affirmed.

May, J., and Brown, J., concur.