MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Paradigm Speedway Small Shops, LLC, and Daniel Klausner,

Appellants-Plaintiffs,

v.

Crawfordsville Road Partners, LLC, Kennmar Speedway Shops, LLC, and Brent Benge,

Appellees-Defendants,

August 24, 2021

Court of Appeals Case No. 20A-PL-1862

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No. 49D01-1804-PL-16275

Robb, Judge.

Case Summary and Issues

[1] Paradigm Speedway Small Shops, LLC and Daniel Klausner (collectively, "Plaintiffs") appeal the trial court's orders granting summary judgment and awarding attorney fees in favor of Crawfordsville Road Partners, LLC; Kennmar Speedway Shops, LLC; and Brent Benge (collectively, "Defendants"). Plaintiffs raise two issues for our review: (1) whether the trial court properly granted summary judgment in Defendants' favor; and (2) whether the trial court abused its discretion in awarding attorney fees to Defendants. Concluding summary judgment is inappropriate and therefore the question of attorney fees is not yet ripe, we reverse and remand for further proceedings.

Facts and Procedural History

[2] The following persons, entities, and property are involved in this litigation:

- Crawfordsville Road Partners, LLC ("CRP") is a real estate development company with its principal place of business located in Marion County, Indiana. CRP developed the Speedway Marketplace.

- The Speedway Marketplace ("the Development") is a commercial subdivision located in Speedway, Indiana. It is comprised of seven commercial parcels.

- Parcel 5 within the Development contains a building divided into five spaces, designated A through E.

- Conway Communications/The Cellular Connection dba Verizon Wireless Premium Retailer ("Verizon") leases Suite E in the Parcel 5 building.

- Veritas Real Estate, Inc. ("Vertitas") is the exclusive listing agent for the Development and negotiated Verizon's lease on behalf of CRP.

- Paradigm Speedway Small Shops, LLC ("Paradigm") is a limited liability company that was formed in May 2016 for the purpose of purchasing Parcel 5 from CRP; its members at formation included Brent Benge and Daniel Klausner. CRP conveyed Parcel 5 to Paradigm on June 29, 2016.

- Daniel Klausner is a real estate investor and member of Paradigm.

- Brent Benge is a real estate developer, sole member of CRP and Kennmar Speedway Shops, LLC, and former member and manager of Paradigm.

- Kennmar Speedway Shops, LLC ("Kennmar") is a single use limited liability company formed by Benge to purchase Parcel 3 of the Development.

[3] CRP, as Declarant, produced a Declaration of Easements, Covenants and Restrictions (the "Declaration") for the Development, which was signed on June 20, 2016 by Benge on behalf of CRP and recorded with the Marion County Recorder's Office on June 22, 2016. Notable provisions of the Declaration include:

> WHEREAS, Declarant is the owner of a certain tract of land being more particularly described in Exhibit "A" attached hereto (the "Declarant Tract"), and shown on the site plan attached hereto as Exhibit "B" (the "Site Plan");[1]
>
> WHEREAS, Declarant desires for the Declarant Tract [to] be developed, operated and maintained pursuant to a general plan of improvement to form an integrated real estate development to be known as Speedway Marketplace (the "Development"); [and]
>
> WHEREAS, Declarant may lease and/or sell in one or more transactions, all or a portion of the Declarant Tract, to third parties; . . .
>
> NOW THEREFORE, in consideration of the foregoing, Declarant hereby declares that the Declarant Tract is and shall be held, transferred, sold, conveyed, and occupied subject to the [provisions] contained herein, all of which shall be deemed to be covenants running with the Development.

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[1] Exhibit A contains the legal descriptions of six separate parcels. *See* Appendix of Appellants, Volume III at 37-42. Exhibit B is a site plan of the Development showing seven parcels. *Id.* at 44. There is no apparent explanation for the discrepancy.

* * *

[1.](d) "Owner" shall generally mean (i) Declarant or (ii) any other Person or Persons who may own a Parcel in fee simple within the Development, . . . except in those cases where this Declaration specifically excludes, exempts, does not apply to or confers certain rights and responsibilities on Declarant.

* * *

[3.]d. Use Restrictions. *No portion of the Development shall be used for the purposes described in Exhibit "E" attached hereto (the "Exclusive") except for the Parcel for which the Exclusive was provided* . . ., as identified on Exhibit "E". The terms and conditions of Exclusive shall be governed by separate documents between Declarant and the Owner or Occupant of each Parcel.

* * *

13. Assignment.

Any Owner which assigns, transfers or conveys its right, title or interest in its Parcel shall provide that the transferee shall recognize, and regardless of such recognition, such transferee shall be deemed to recognize, the obligations and liabilities of such Owner under this Declaration.

Except as provided in Section 30(d), the rights of Declarant, as the owner of Parcel 5, shall run with Parcel 5 and the Owner of Parcel 5 shall retain and assume all obligations of Declarant under this Declaration.

* * *

29. Amendment.

This Declaration may be amended by Declarant at any time prior to Declarant assigning its rights, liabilities and obligations hereunder as provided in Section [13], and thereafter by recording a written instrument properly executed by the Owners of at least seventy-five percent (75%) of the gross square footage of the buildings substantially complete (but not requiring tenant finish for office space) in the Development, the effect of which shall be to bind all Owners and Occupants of the Development.

30. Owners Association.

* * *

(d) . . . Declarant is expressly granted the right to assign, in whole or in part, its rights, duties and obligations as Declarant under this Declaration, and its interest in all easements granted in this Declaration to any other Owner who accepts such assignment and expressly assumes such obligations in writing, which assignment shall be effective upon the date notice of the same is recorded with the office of the Recorder of Marion County, Indiana.

Appendix of Appellants, Volume III at 14-17, 29, 34-35 (emphasis added).

Exhibit E to the Declaration provides, in relevant part:

4. Exclusive for the benefit of Parcel __ ([Verizon]): There shall be *no other business in the Shopping Center or out-parcels owned or controlled by Landlord* whose Primary Business Use is selling cellular phones, communication devices, cellular accessories, servicing or repairs, products and services and/or satellite television products and services (together the "Exclusive"). . . . Notwithstanding the foregoing, Tenant's exclusive *shall not apply*

> *to any existing tenants operating in the Development* at the time of the Effective Date of this Lease or tenant's [sic] larger than 10,000 [square feet].

Id. at 50 (emphasis added).

[4] CRP, through Veritas, engaged in conversations with cellular providers about leasing space in the Development. Sometime between March and June 20 of 2016, Benge told Klausner that "AT&T and Verizon were both looking at space and that whichever agreed first to lease terms would have an exclusive[.]" *Id.*, Vol. V at 115. On June 20, 2016, CRP and Verizon entered into a lease agreement (the "Lease") whereby Verizon agreed to lease from CRP Suite E in the commercial building on Parcel 5 of the Development. The "Leased Premises" were described as follows:

> Landlord [CRP] hereby leases to Tenant [Verizon], and Tenant hereby rents from Landlord, *the part of the building* in the Landlord's Tract cross-hatched on Exhibit "B" (herein called the "Leased Premises"), *being a part of the center* commonly *known as Speedway Marketplace Shops* (the "Center")[.]

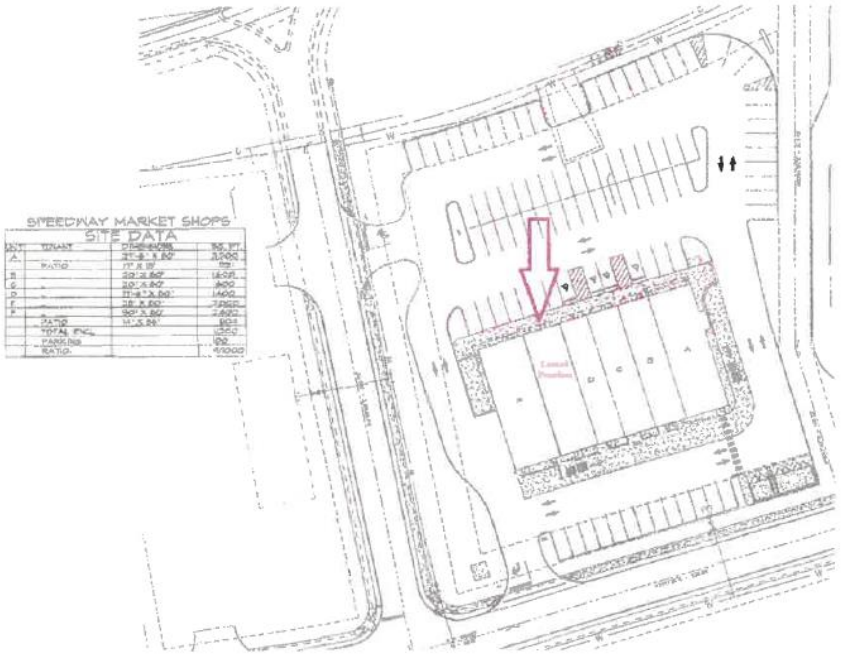
Id., Vol. III at 58, ¶ 2.1 (emphasis added). The "Landlord's Tract" referenced in ¶ 2.1 is defined by Exhibit A-1 to the Lease, the "[l]egal description of the Center real estate owned by Landlord [CRP]." *Id.* at 57. Notably, this legal description is *not* the same as the legal description for Parcel 5 appended to the Declaration, nor is it the same as the legal descriptions of any of the other parcels appended to the Declaration. Exhibit B shows the following:

EXHIBIT "B"

PLOT PLAN

Leased Premises is highlighted below and labeled as "Leased Premises".

It is understood that drawing below is approximate and will not be final until Landlord has an approved design plan from the city for its permitting.

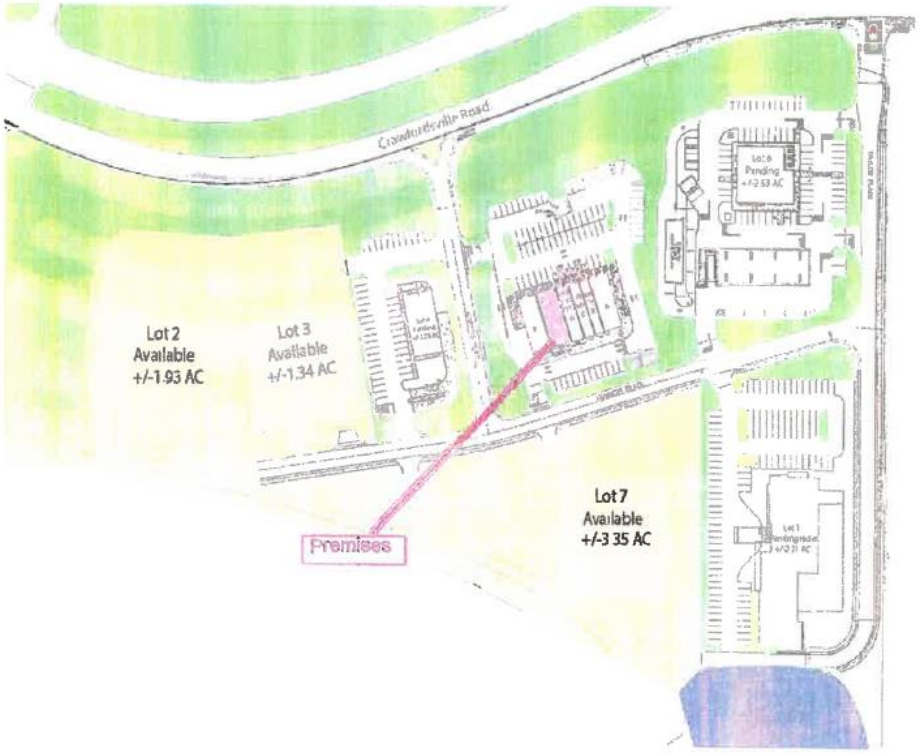


Id. at 92. And Exhibit "B-2" (not referenced independently in the Lease) shows the following:

EXHIBIT "B-2"

Site Plan of overall development

It is understood that such site plan is subject to change at Landlord's sole discretion.



Id. at 93.[2]

[5] The Lease contained the following "Exclusive Use" provision:

[2] This is similar to Exhibit B of the Declaration, but with buildings and parking added to some parcels. *See supra* n.1.

> Subject to the terms of this Article[,] Landlord agrees not to lease any space *in the Center* for the operation of selling cellular phones, communication devices, cellular accessories, servicing or repairing, products and services and/or satellite television products and services[.]

Id. at 81, ¶ 26.1 (emphasis added). The Lease also included an "Exclusive Use Remedy" provision, which states that in the event Landlord rents space in the Center to a competing business for the exclusive use, Verizon's sole and exclusive remedy is a fifty percent reduction in rent from the date Verizon notifies Landlord of the violation until the violation is cured. *See id.* at ¶ 26.2. Verizon is required to give that notice within thirty days after the competing business opens. *Id.* If Verizon fails to give Landlord this notice, the exclusive becomes null and void. *Id.* at ¶ 26.4. But if Verizon gives the required notice and the violation is not cured within twelve months, Verizon has the right to terminate the lease. *Id.* at ¶ 26.2. The term of the lease was ten years with four options to extend the term for three years each. The lease also includes an early termination provision which allows Verizon to terminate after sixty months if a minimum number of average monthly activations have not been achieved. *Id.* at 58, ¶ 2.4.

[6] On June 29, 2016, CRP conveyed Parcel 5 to Paradigm via general warranty deed. *See id.* at 107-10. The legal description attached to the deed matches the legal description for Parcel 5 contained in the Declaration but not the legal description for the "Landlord's Tract" contained in the Lease. The deed is subject to, among other things, the terms and provisions of the Declaration. *See*

id. at 112.[3] The deed was recorded with the Marion County Recorder on July 8.

[7] Between September and December of 2016, Benge told Klausner that AT&T was interested in leasing space in Parcel 3 and Klausner reminded him that "there's a cellular business exclusive that's already in place" and indicated that he did not want to invite litigation. *Id.*, Vol. V at 118 (deposition page 110). Benge asked, "[W]hat if AT&T puts a store in that doesn't sell cellular products?" and Klausner indicated that would be okay because it would not conflict with the Declaration. *Id.*

[8] Business differences between Klausner and Benge arose in late 2016 leading to litigation in Hamilton County, which was resolved by a settlement agreement on February 21, 2017.[4] The agreement provided, in part: "The Klausner Parties and the Companies [including Paradigm] . . . release and forever discharge [Benge and CRP] from any and all claims [and] causes of action . . . in existence as of the date of this Agreement, whether or not now known, suspected, or claimed, which they now have against [Benge]." *Id.*, Vol. III at 118, ¶ 17. Benge and CRP also released Klausner from any and all claims, *id.*

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[3] In general, a lease survives conveyance of the property by the owner-landlord. *See* Ind. Code § 32-31-1-10; *Hammond v. Jones*, 41 Ind. App. 32, 83 N.E. 257, 259 (1908) ("[A] tenant of a grantor of lands becomes the tenant of the grantee, with no greater or less right by reason of the change of ownership[.]"). And pursuant to section 10.2 of the Lease, in the event of a sale or assignment of the Landlord's interest in the Leased Premises, Verizon will recognize the purchaser as the Landlord. App. of Appellants, Vol. III at 69. Thus, Paradigm became the Landlord on June 29, 2016, when Parcel 5 was conveyed to it by CRP.

[4] Klausner and Benge were partners in various real estate projects in addition to the Development and the Settlement Agreement covers them all.

at 119, ¶ 17, and Benge assigned his ownership in Paradigm to Klausner, which left Klausner with full ownership of Paradigm and Parcel 5, *id.* at 126 ("Assignment of Membership Interest"). One of the documents used to implement the Settlement Agreement was a designation of successor declarant under the Declaration between CRP and Paradigm, which stated, in relevant part:

> A. CRP recorded a document entitled [Declaration] [on] June 22, 2016[.]
>
> B. CRP is the Declarant under the Declaration.
>
> C. As of the date of this Agreement, CRP owns two (2) lots which are subject to the Declaration (the "CRP Lots"). . . .
>
> D. [Paradigm] owns certain real estate which is subject to the Declaration.
>
> E. CRP and [Paradigm] desire to agree to the terms and conditions under which [Paradigm] shall assume the position of Declarant under the Declaration[.]
>
> Terms:
>
> * * *
>
> 2. Pursuant to Section 30(d) of the Declaration, and effective as of the Final Transfer Date, CRP assigns to [Paradigm] all of the obligations and duties of CRP under the Declaration (except the obligations and duties of Declarant as Owner). . . . For purposes of this Agreement, the terms "Final Transfer Date" shall mean

> the date on which CRP transfers the last of the CRP Lots to an Owner . . . or an Occupant[.]

Id. at 153-54.

[9] Also beginning in February 2017, Benge and various Veritas employees engaged in several conversations by e-mail about AT&T possibly leasing space in the Development. On February 21, Benge told Veritas, "We have an issue . . . Declaration doesn't allow cell phone sales. . . . Can't do ATT." *Id.*, Vol. VIII at 87. Veritas indicated it had "negotiated this in the [Verizon] lease and removed [the exclusive] to apply only to the 'Center[,]'" the lease "clearly defines the 'Center' as 'Speedway Marketplace Shops[,]'" and "nothing in the lease applies to the 'outlots owned or controlled by landlord[.]'" *Id.* at 86-87. Benge again stated that "we have to pass on ATT" because the "only way to remove the restriction is to get approval from [Verizon] and approval from Parcel 5 owner, which is now Dan Klausner [and] obviously that isn't going to happen." *Id.* at 85. Benge later indicated that he had spoken with his attorney and reiterated, "[T]here's really no way we can do the AT&T deal." *Id.* at 83.

[10] In April 2017, Benge told Veritas that if Verizon would agree to removing the exclusive, "then we have a shot at another cell phone user[.]" *Id.* at 71. Veritas again stated that "there is no exclusive in their lease, we already got them to waive it when we negotiated the lease. . . . I don't know why [Verizon] would care, since legally they have no exclusive per their lease[.]" *Id.* Benge replied that he had spoken with his attorney and "to be safe," they needed to do the following:

> 1. First, get approval from [Verizon] that they share the same understanding of the exclusive as we do . . . it only applies to the 11,200 [square foot] building, which is exactly what the lease reads. Can [you] get [Verizon's] understanding on this topic[?]
>
> 2. Second, once we have [Verizon's] approval/understanding, then we can inform Klausner.
>
> We have a very strong case for doing another cell phone deal because the [D]eclaration exclusive and the [Verizon] lease exclusive don't match up and the lease specifically applies to the 11,200 [square foot building] and not the entire [D]evelopment. [CRP] is the Declarant and has the right to change the [D]eclaration, but we need to play this safe and certain.

Id. at 70. In a follow-up email, Benge stated, "We will need [Verizon] to sign off but maybe we can use the Westfield project as leverage." *Id.*

[11] On April 14, 2017, Verizon signed a letter "acknowledg[ing] and clarif[ying] that the exclusive use provided in Section 26.1 of the Lease pertains only to [Parcel 5] and not to the entire Development." *Id.*, Vol. III at 163. Veritas then informed Benge that it was "able to get [Verizon] to sign the attached [letter], [they] figured another cell user was looking at the site, but signed it in hopes of getting a good deal in Westfield." *Id.*, Vol. VIII at 59 (emphasis omitted).

[12] On October 3, 2017, CRP conveyed Parcel 3 to Kennmar. On October 27, 2017, Benge and CRP unilaterally made an amendment to the Declaration stating that Verizon's "exclusive shall not apply to any tenants of the Development located outside" of Parcel 5 and "[o]ther than the Verizon Parcel

[i.e., Parcel 5] and the operation of a business by [AT&T], there shall be no other business in the Development operating as a [cellular provider]." *Id.*, Vol. III at 165. The amendment was recorded on November 28. Kennmar subsequently agreed to lease a portion of Parcel 3 to AT&T, another cellular business. Sometime in 2018, AT&T opened its store in a portion of Parcel 3; Verizon did not object or exercise its rights under the Exclusive Use Remedy of its lease. Thereafter, Parcel 2, the last outlot, was sold, and CRP recorded an Acknowledgment of Transfer to Successor Declarant acknowledging that Declarant status had been transferred to Paradigm pursuant to the Settlement Agreement. *See id.*, Vol. V at 238-39.

[13] On April 27, 2018, Plaintiffs filed a Complaint and Demand for Jury Trial against Defendants. Together with later amended complaints, the complaint alleged intentional misrepresentation, breach of fiduciary duty, constructive fraud, promissory estoppel, tortious interference with contract, and civil conspiracy. *See id.*, Vol. III at 2-12 (original complaint); *id.*, Vol. IX at 2-14 (first amended complaint); *id.*, Vol. XI at 2-19 (second amended complaint). Plaintiffs also sought a declaratory judgment that CRP lacked the authority to amend the Declaration and therefore, the amendment is void and of no force and effect. Essentially, Plaintiffs claimed that Benge and CRP made material misrepresentations about the scope of the cellular exclusive, improperly amended the Declaration, and caused damage to Klausner and Paradigm because without a Development-wide exclusive, the value of Parcel 5 was diminished and the chances Verizon would exercise its right to early

termination of the lease were increased. Defendants asserted a counterclaim for attorney fees and litigation costs.

[14] On August 28, 2019, Defendants moved for summary judgment on all of Plaintiffs' claims. *See id.,* Vol. IV at 77-123. In support of their motion, Defendants primarily designated the documents referred to herein, and asserted the Verizon Lease "was for space in Speedway Marketplace *Shops* located on Parcel 5 of the Speedway Marketplace *Development*." *Id.* at 81 (emphasis added). Plaintiffs designated their own evidence, including the affidavit of Klausner, who averred that prior to the Verizon Lease being signed, "Benge said both AT&T and Verizon were looking to lease space and 'whichever one signed first would be the exclusive cellular provider of the development.' I understood the development to mean the entirety of the [CRP] Land, not just a parcel, and I relied on this statement from that date forward." *Id.*, Vol. VIII at 4.

[15] Following a hearing, the trial court issued an order granting Defendants' motion for summary judgment. The trial court found that "[u]nder the plain terms of the Lease . . . , the Cellular Exclusion applies only to Parcel 5, not the entire Development." Appealed Order [Granting Defendants' Motion for Summary Judgment] at 11. The trial court also found that during the relevant times, "CRP was the Declarant that could unilaterally alter the Declaration without requiring the consent of any other party." *Id.* at 13. Based on these findings, the trial court determined there were no genuine issues of material fact as to any of Plaintiffs' claims and directed the entry of final judgment for

Defendants. Defendants were ordered to submit a petition for attorney fees, costs, and expenses within fourteen days. On October 8, Plaintiffs filed their notice of appeal as to the entry of final judgment.

[16] Defendants subsequently filed a Petition for Award of Fees, Costs, and Expenses, a supporting brief, and affidavits and exhibits. App. of Appellants, Vol. XII at 2. A hearing on the motion was held on December 10, 2020. On January 11, 2021, the trial court granted the petition and awarded Defendants attorney fees in the amount of $292,745.18. Plaintiffs then appealed the fee award and moved to consolidate their two appeals. On January 25, this court granted the motion to consolidate. Additional facts will be supplied as necessary.

Discussion and Decision

I. Standard of Review

[17] Summary judgment is a tool which allows a trial court to dispose of cases where only legal issues exist. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *Converse v. Elkhart Gen. Hosp., Inc.*, 120 N.E.3d 621, 624 (Ind. Ct. App. 2019). Summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Sedam v. 2JR Pizza Enters., LLC*, 84 N.E.3d 1174, 1176 (Ind. 2017). The

moving party bears the initial burden of showing the absence of any genuine issue of material fact as to a determinative issue. *Hughley*, 15 N.E.3d at 1003.

[18] Once the movant for summary judgment has established that no genuine issue of material fact exists, the nonmovant may not rest on its pleadings but must set forth specific facts that show the existence of a genuine issue for trial. *Perkins v. Fillio*, 119 N.E.3d 1106, 1110 (Ind. Ct. App. 2019). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley*, 15 N.E.3d at 1003. As opposed to the federal standard which permits the moving party to merely show the party carrying the burden of proof lacks evidence on a necessary element, Indiana law requires the moving party to "affirmatively negate an opponent's claim." *Id.* (quotation omitted). Our review is limited to the evidence designated to the trial court, T.R. 56(H), and we construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party, *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013).

[19] Because we review a summary judgment ruling de novo, a trial court's findings and conclusions offer insight into the rationale for the court's judgment and facilitate appellate review but are not binding on this court. *Breece v. Lugo*, 800 N.E.2d 224, 226 (Ind. Ct. App. 2003), *trans. denied*. Additionally, we are not constrained by the claims and arguments presented to the trial court, and we may affirm a summary judgment ruling on any theory supported by the designated evidence. *Denson v. Est. of Dillard*, 116 N.E.3d 535, 539 (Ind. Ct.

App. 2018). Cases involving contract interpretation generally are particularly appropriate for summary judgment. *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 842 (Ind. Ct. App. 2017), *trans. denied*.

II. Scope of Cellular Exclusive

[20] The crux of Plaintiffs' argument is that when they purchased Parcel 5, Parcel 5 had a Development-wide cellular exclusive but after the Settlement, Defendants "stole the cellular business exclusive" by improperly amending the Declaration to limit the cellular exclusive to Parcel 5 and inducing Verizon to agree that had always been the case. App. of Appellants, Vol. V at 109 (deposition page 74). Plaintiffs claim this reduced the value of Parcel 5. *See id.*, Vol. VIII at 94-97 (affidavit of Plaintiffs' expert opining that likely value of Parcel 5 without Development-wide exclusive is $350,000 less than with the exclusive). We therefore begin by examining the scope of the cellular exclusive as described in the Declaration and Lease. If its scope is, as the trial court found, unambiguously limited to Parcel 5, then whether Defendants could amend the Declaration unilaterally is irrelevant, because the amendment only confirmed what was already true and Plaintiffs can show no injury. Summary judgment for Defendants would be appropriate in that case. If the scope of the cellular exclusive unambiguously extended to the entire Development, then the authority of Defendants to amend the Declaration must be examined, because the amendment would have materially altered the terms of the exclusive. But if the scope of the cellular exclusive is not clear from the designated evidence, then summary judgment was inappropriate because that is a threshold issue.

[21] Based on our review of the relevant documents and the designated evidence, we cannot definitively conclude as a matter of law what the scope of the cellular exclusive was when Paradigm purchased Parcel 5 on June 29, 2016. The Declaration applies to "an integrated real estate development to be known as Speedway Marketplace (the 'Development')" and the conditions and restrictions contained therein "run[] with the Development." *Id.*, Vol. III at 14. One of the restrictions is that "*[n]o portion of the Development* shall be used for the purposes described in Exhibit "E" [the "Exclusive"] . . . *except for the Parcel* for which the Exclusive was provided[.]" *Id.* at 17 (emphasis added). Exhibit E describes six exclusives "for the benefit of" a specific parcel. At the time the Declaration was signed, only one exclusive was attached to a particular parcel – the exclusive right to a fuel station and convenience store was provided "for the benefit of Parcel 6." *See id*. at 50. The other five exclusives were not yet provided to a specific parcel. Each exclusive is worded slightly differently, using different terms:

> 2. Exclusive for the benefit of Parcel ___ (Starbucks): Landlord will not sell or permit any party, other than Tenant, to sell on *the Property* [gourmet coffee].
>
> 3. Exclusive for the benefit of Parcel ___ (Chipotle): . . . Landlord shall not permit any other occupant of *the Speedway Marketplace shopping center* . . . to engage in the sale of burritos, fajitas or tacos.
>
> 4. Exclusive for the benefit of Parcel ___ ([Verizon]): There shall be no other business in *the Shopping Center or out-parcels owned or*

> *controlled by Landlord* whose Primary Business Use is selling cellular phones[.]
>
> 5. Exclusive for the benefit of Parcel ___ (Sports Clips): Landlord shall not lease space in *the Shopping Center* to any other . . . discount hair cutting concept or barber shop.
>
> 6. Exclusive for the benefit of Parcel ___ ([Burger King]): Buyer shall be the exclusive "fast-food" hamburger restaurant *in the Development*[.]

Id. at 50-51 (emphasis added). Exhibit E uses the terms "the Property," "the Speedway Marketplace shopping center," "the Shopping Center," and "the Development" in describing the scope of each exclusive, and it is unclear whether those terms are meant to be interchangeable, such that each exclusive is meant to apply to the entire Development and not just a specific parcel, or whether each term has a specific meaning other than the entire Development.[5]

[22] Klausner's deposition testimony and his affidavit about the conversations he had with Benge both before and after the Declaration was signed indicate that he understood the use restriction provision and the cellular exclusive in the Declaration to apply to the entire Development. *See id.*, Vol. V at 116 (deposition page 103) (deposition testimony that Benge told Klausner "that

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[5] Defendants argue that Exhibit E confirms that the cellular exclusive applied only to Parcel 5 because "[a]ll of the Parcel 5 exclusives are specific to the Center, while the convenience store and fast-food hamburger exclusives are specific to the Development." Brief of Appellees at 23 n.3. But because the language in each of the exclusives 2-6 is ambiguous, and because none of the exclusives was yet assigned to a specific parcel, Exhibit E confirms no such thing.

whoever signed on first [as between Verizon and AT&T] would have a cellular business exclusive for the entire development") and Vol. VIII at 4 (affidavit stating that when Benge told Klausner that first cellular provider to sign a lease would be the exclusive cellular provider of the development, it was his understanding that meant "the entirety of the [CRP] Land, not just a parcel[.]"). Further, the email exchanges between Benge and Veritas indicate that it was also Benge's understanding, at least in the beginning, that the use restrictions and exclusives applied to the entire Development. *See, e.g., id.*, Vol. VIII at 87 (Benge to Veritas: "Declaration doesn't allow cell phone sales. . . . Can't do AT&T.").

[23] The Declaration's use restriction paragraph also states that "the terms and conditions of [the] Exclusive shall be governed by separate documents between Declarant and the Owner or Occupant of each Parcel." *Id.*, Vol. III at 17.[6] Thus, we turn to the Verizon Lease – a separate document between the Declarant (CRP) and an Occupant of Parcel 5 (Verizon). The goal of contract interpretation is to determine the intent of the parties when they made the agreement. *Celadon Trucking Servs., Inc.*, 70 N.E.3d at 839. We must examine the plain language of the contract, read it in context, and whenever possible, construe it so every word, phrase, and term is meaningful, unambiguous, and harmonious with the whole. *Id.* Generally, we apply the terms of a contract as

[6] As Klausner explained it, the Declaration conveyed the cellular exclusive to Parcel 5, and the owner/landlord of Parcel 5 in turn granted the exclusive to Verizon as part of the Lease. *See id.*, Vol. V at 113 (deposition page 92).

written and do not rely on extrinsic evidence. *Barker v. Price*, 48 N.E.3d 367, 370-71 (Ind. Ct. App. 2015). However, when a contract is ambiguous, the parties may introduce extrinsic evidence of its meaning. *Panther Brands, LLC v. Indy Racing League, LLC*, 126 N.E.3d 898, 905 (Ind. Ct. App. 2019), *trans. denied*. Extrinsic evidence is evidence relating to the contract but not appearing on its face because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement. *Celadon Trucking Servs., Inc.*, 70 N.E.3d at 839. A contract is not ambiguous solely because the parties disagree about its meaning; it is ambiguous only if reasonable people would differ as to the meaning of its terms. *Panther Brands, LLC*, 126 N.E.3d at 905. Construction of a contract is generally a question of law, but when a contract is ambiguous, the interpretation becomes a question of fact. *Id.* at 904-05.

[24] The exclusive use provision in the Lease provides that Landlord "agrees not to lease any space *in the Center*" to another cellular business. App. of Appellants, Vol. III at 81, ¶ 26.1 (emphasis added). Defendants asserted, and the trial court found, that the term "Center" as used in the Lease unambiguously refers to Parcel 5 only, and therefore, the exclusive use provision provides that no other space in *Parcel 5* would be leased to another cellular company. *See* Appealed Order at 11. On our review of the four corners of the Verizon Lease, however, we cannot say that "the Center" plainly refers only to Parcel 5. Nor can we say as a matter of law that the extrinsic evidence points to only that conclusion.

[25] Exhibit A-1 to the Lease is described in the body of the Lease as the "Legal description of the Center real estate owned by Landlord (hereinafter called the

'Landlord's Tract')." App. of Appellants, Vol. III at 57 (Article I, Exhibits). Exhibit A-1 itself is titled "Legal Description of the Center," thereby equating "Landlord's Tract" with "Center." *Id.* at 84. The legal description in Exhibit A-1 – describing the "Landlord's Tract" – does *not* match the legal description of Parcel 5 attached to the Declaration. *Compare id.* at 40-41 (legal description of Parcel 5 from Declaration) *with id.* at 84 (legal description of "Landlord's Tract"/"Center" from Lease). That the two legal descriptions are different implies that the Landlord's Tract/Center and Parcel 5 are not necessarily co-extensive.

[26] The Lease defines the "Leased Premises" as "the part of the building in the Landlord's Tract cross-hatched on Exhibit 'B' . . . being a part of the center commonly known as Speedway Marketplace Shops (the "Center")[.]" *Id.* at 58, ¶ 2.1. Exhibit B, labeled "Plot Plan," is a depiction of Parcel 5 that shows a building divided into six parts with the leased premises highlighted. *See id.* at 92; *supra* ¶ 4. Exhibit B-2, labeled "Site Plan of overall development," shows the entire seven-parcel Development with the leased premises in the building on Parcel 5 highlighted. *See id.* at 93. Exhibit B-2 also states that "[i]t is understood that such site plan [of the overall development] is subject to change at Landlord's sole discretion." *Id.* This implies the Landlord has control over the entire Development and that the "Landlord's Tract" may be greater than just Parcel 5.

[27] The Declaration states the Development is known as "Speedway Marketplace"; the Lease says the "Center" is known as "Speedway Marketplace Shops."

Veritas, which negotiated the Lease on CRP's behalf, insisted in email exchanges with Benge that because the lease "clearly defines the 'Center' as 'Speedway Marketplace Shops[,]'" the exclusive "only applies to the building [on Parcel 5]." *Id.*, Vol. VIII at 86; *see also id.* at 77. But it is not, in fact, clear from the Lease that Speedway Marketplace Shops – and therefore, "the Center" – refers only to the building on Parcel 5. Plaintiffs alleged in their complaint that the Development is commonly known as "Speedway Marketplace" *and* "Speedway Marketplace Shops." *Id.*, Vol. XI at 3. Defendants specifically denied in their Answer "that the term 'Speedway Marketplace Shops' has ever been used to describe the entire "Development," asserting that the Development is commonly known as "Speedway Marketplace" and that "Speedway Marketplace Shops," "Speedway Small Shops," the "Center," and the "Shopping Center" are "generally accepted reference[s] to Parcel 5 in the Development." *Id.*, Vol. IV at 3. But Exhibit A-2 to the Lease is titled "Overall *Shopping Center* Use Restrictions and Exclusives" and states Verizon, as the tenant, shall not violate the exclusives for Starbucks, Chipotle, Sport Clips, and Burger King. *Id.*, Vol. III at 85. It is unclear if any or all of those businesses are located on Parcel 5, so it is unlikely "Shopping Center" is meant to reference only Parcel 5. And the trial court found as an "undisputed fact" that the Development became commonly known as both Speedway Marketplace and

Speedway Marketplace Shops. Appealed Order at 2.[7] Thus, granting the cellular exclusive to "the Center" and defining the Center in reference to the "Speedway Marketplace *Shops*" does not unambiguously restrict the cellular exclusive to Parcel 5.

[28] Finally, although Verizon "acknowledge[d] and clarifie[d]" that it understood that the exclusive applied only to Parcel 5, App. of Appellants, Vol. III at 163,[8] it did so several months after the fact and, according to the email exchanges between Benge and Veritas, in exchange for favorable treatment by CRP at another development, *see id.*, Vol. VIII at 59, 70.

[29] With that designated evidence in mind, we note that even though we often say that the appellant bears the burden of persuading this court that the trial court's summary judgment ruling was erroneous, "such burden is largely symbolic and nominal." *Beta Steel v. Rust*, 830 N.E.2d 62, 68 (Ind. Ct. App. 2005). All trial court rulings are presumed to be correct, but in the context of summary judgment proceedings, "we view the designated evidence independently and with an eye toward construing it most favorably to the nonmovant." *Id.* We give no deference to the trial court's ability to weigh evidence and judge witness

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[7] Although Defendants denied in their answer to each iteration of Plaintiffs' Complaint that the two terms were interchangeable, they did use them interchangeably in their brief on appeal. *See, e.g.*, Br. of Appellees at 10 ("The Declaration defines Speedway Marketplace and Speedway Marketplace Shops as the 'Development.'").

[8] Defendants argue the cellular exclusive became null and void in 2018 when Verizon did not avail itself of the remedy for a breach of the cellular exclusive after AT&T opened in Parcel 3. Assuming Verizon waived any breach, it could only do so for itself under the Lease. It could not waive a cellular exclusive provided to the owner of Parcel 5 in the Declaration.

credibility because no such weighing or judging is permitted with respect to a summary judgment motion. *Id.* And as our supreme court reiterated in *Hughley*, "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." 15 N.E.3d at 1004.

[30] Neither the Declaration nor the Lease is consistent within itself, and they are not necessarily consistent with each other. Therefore, the documents alone do not answer the question of the scope of the cellular exclusive. In considering the extrinsic evidence, there is evidence supporting the conclusion that the exclusive use provision applies to the entire Development, and there is evidence supporting the conclusion that the exclusive use provision applies only to Parcel 5. One may seem more likely than the other, but the only way to decide that one applies over the other is to weigh the evidence. Our summary judgment standard is very specific: an issue of material fact is genuine if the trier of fact is required to resolve differing accounts of the truth, and summary judgment should not be granted when it is necessary to weigh the evidence. *Hughley*, 15 N.E.3d at 1005. Therefore, summary judgment was inappropriate. One may question what evidence will be available at a trial that has not already been designated in this summary judgment proceeding, but at a minimum, there will be live testimony and cross-examination, and at a trial, the trier of fact will have the ability to judge credibility and weigh the evidence to decide who and what to believe.

III. Award of Attorney Fees

[31] Upon determining Defendants were entitled to summary judgment in their favor, the trial court awarded attorney fees to Defendants based on the fee shifting provisions in the Declaration and the Settlement Agreement. Plaintiffs allege the trial court erred in making this award because Defendants are not entitled to fees under those provisions. Because we have concluded summary judgment was inappropriate, however, the attorney fees award must be vacated, and we need not address the merits of this issue at this time.

Conclusion

[32] Genuine issues of material fact exist that must be resolved at trial. Therefore, Defendants are not entitled to judgment as a matter of law, and the summary judgment order must be reversed and this case remanded to the trial court for further proceedings. In turn, the attorney fees award must be vacated as premature.

[33] Reversed and remanded.

Bailey, J., and May, J., concur.