

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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ATTORNEYS FOR APPELLANT  
PANZICA BUILDING CORPORATION

Charles S. Smith  
Jon L. Bucher  
Schultz & Pogue, LLP  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

William E. Kelley, Jr.  
Tyler S. Lemen  
Drewry Simmons Vornehm, LLP  
Carmel, Indiana

ATTORNEYS FOR APPELLANT  
MEMORIAL HOSPITAL OF SOUTH BEND,  
INC. D/B/A BEACON HEALTH AND FITNESS

John M. McCrum  
Louis W. Voelker  
Eichhorn & Eichhorn, LLP  
Hammond, Indiana

ATTORNEYS FOR APPELLANT  
SPEAR CORPORATION

Scott A. Ruksakiati  
Tyson & Mendes, LLP  
Chicago, Illinois

Lyle R. Hardman  
Hunt Suedhoff Kalamaros LLP  
South Bend, Indiana

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IN THE  
COURT OF APPEALS OF INDIANA

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Panzica Building Corporation,  
Spear Corporation, and  
Memorial Hospital of South  
Bend, Inc. d/b/a Beacon Health  
and Fitness,

*Appellants-Defendants,*

Jennifer Pennington and  
Josh Pennington,

*Appellants-Plaintiffs,*

v.

Design Organization, Inc.,

*Appellee-Defendant,*

March 11, 2021

Court of Appeals Case No.  
20A-CT-1694

Appeal from the St. Joseph  
Superior Court

The Honorable Margot F. Reagan,  
Judge

Trial Court Cause No.  
71D04-1804-CT-160

**Robb, Judge.**

## Case Summary and Issue

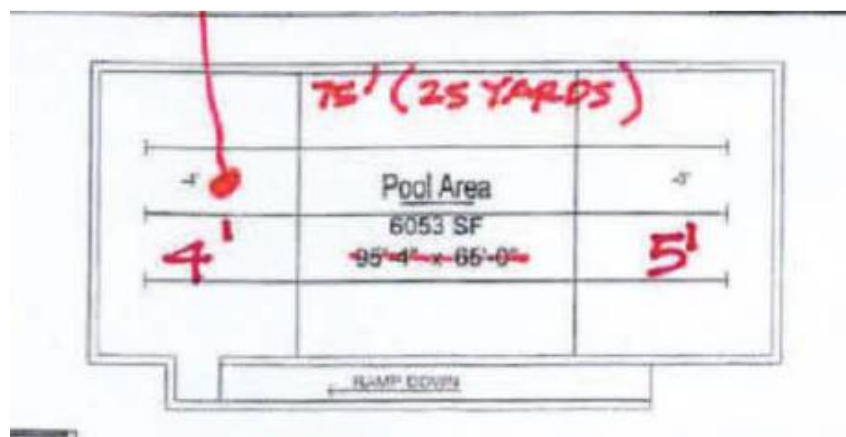
- [1] Panzica Building Corporation (“PBC”), Memorial Hospital of South Bend d/b/a Beacon Health and Fitness (“Beacon”), Spear Corporation (“Spear”), and Josh and Jennifer Pennington appeal the trial court’s grant of summary judgment in favor of Design Organization (“Design Org”) and raise two issues on appeal which we consolidate into one: whether the trial court erred in granting Design Org’s motion for summary judgment. Concluding the trial court did not err, we affirm.

## Facts and Procedural History

- [2] On January 22, 2015, Beacon and PBC entered into a contract in which PBC agreed to be the Design-Builder for a new 55,000 square foot Health and Lifestyle Center, including a sports medicine and physical therapy suite, located at Beacon Health System Campus Site in Mishawaka, Indiana. *See* Appellee's Appendix, Volume IV at 86-105. Part 1 of the contract provided that "[p]reliminary design, budget, and schedule [by PBC] comprise the services required to accomplish the preparation and submission of the Design/Builder's Proposal as well as the preparation and submission of any modifications to the Proposal prior to execution of the Part 2" of the contract. *Id.* at 100, § 1.1.1. PBC was required to submit to Beacon a Proposal, which included the Preliminary Design Documents, a statement of the proposed contract sum, and a proposed schedule for completing the project. "Preliminary Design Documents" were defined as "preliminary design drawings, outline specifications or other documents sufficient to establish the size, quality and character of the entire Project, its architectural, structural, mechanical and electrical systems, and the materials and such other elements of the Project as may be appropriate." *Id.* at § 1.3.5.
- [3] PBC's proposal was to include drawings, schedule, and schematic design estimates dated between October 20, 2014 and January 22, 2015. If the proposal was accepted by Beacon, the parties were to execute Part 2 of the contract. Part 2 required PBC to submit construction documents for review and approval by Beacon, which included "drawings, specifications, and other

documents and electronic data setting forth in detail the requirements for construction of the [w]ork[.]” *Id.* at 89, § 3.2.3. The contract provided that Philip Panzica, principal of PBC, and Design Org, as a consultant to PBC, would provide the architectural services for the project.

- [4] Prior to the date of the contract between Beacon and PBC, in the pre-planning phase, PBC created a preliminary drawing of the facility, dated September 26, 2014, which included the initial layout and orientation of the proposed lap pool. The preliminary drawing depicted an entry ramp into the lap pool with the notation “Ramp down”:



*Id.* at 110.

- [5] On February 6, 2015, Design Org and PBC entered into a contract by which Design Org was to perform certain architectural design services for the project. The relevant provisions of the contract are as follows:

§ 1.3 [Design Org’s] Portion of the Project. [Design Org’s] Portion of the Project consists of the following:

Collaboration of/with Panzica Architecture Group and Design Org[,] to prepare a *Schematic Design* for [the project].

\* \* \*

Upon authorization from [Beacon] and [PBC], Design [Org] continues to develop the design in preparation of refined floor plans, exterior elevations, typical east to west and north to south building sections, typical wall sections, interior elevations of restrooms, locker rooms, main corridors, control counters, *pool and studio rooms*, reflected ceiling plan, material finish plan, door and frame schedule and outline spec with coordination of structural, mechanical, plumbing, electric, *pool and civil design by others*.

\* \* \*

§ 1.5.2 [PBC] will retain the following consultants and contractors:

\* \* \*

*Pool Design – To Be Determined*

\* \* \*

## Article 2 [Design Org's] Responsibilities

§ 2.1 [Design Org] shall provide the professional services as set forth in this Agreement. *Except as set forth herein, [Design Org] shall not have any duties or responsibilities for any other portion of the Project.*

§ 2.2 [Design Org] shall perform its services consistent with the professional skill and care ordinarily provided by architects

practicing in the same or similar locality under the same or similar circumstances. [Design Org] shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

\* \* \*

### Article 3 [Design Org's] Basic Services

\* \* \*

§ 3.1.4 [Design Org] shall coordinate its services with those services provided by the Design-Builder and the Design-Builder's consultants and contractors. *[Design Org] shall be entitled to rely on the accuracy and completeness of services and information furnished by the Design-Builder and the Design-Builder's consultants and contractors.*

. . .

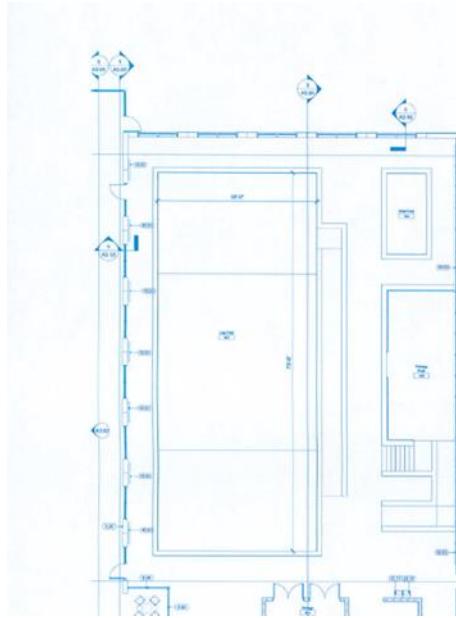
Appellant's Appendix, Volume 2 at 114, 116-19 (emphasis added).

[6] Section 3.2 of the contract also outlined the design services Design Org was to perform, including coordinating services provided by Beacon, its consultants, PBC, and PBC's consultants and contractors as they relate to Design Org's portion of the project; making presentations regarding the design of the project; attending meetings with PBC and Beacon to discuss and review Beacon's criteria; and preparing and submitting preliminary design and construction documents to PBC for its portion of the project. *See id.* at 120-22.

[7] PBC then contracted with Spear, a pool consultant, to design and construct the lap pool. In March 2015, Sam Blake, Vice President of Business Development

at Spear, e-mailed PBC's president, Phil Panzica, an agreement regarding Spear's scope of services. *See* Appellee's App., Vol. II at 65. The agreement provided that Spear "will prepare aquatic drawings and specifications to properly describe and fix the nature and scope of the new pool(s)." *Id.* at 67. Spear agreed to design drawings that included pool layouts and dimensions; pool targets, markings, depth indications, and diving apparatus; pool deck equipment, locations and schedule; anchors, lane, and safety lines; pool lighting locations; and pool details, including gutter, *stairs*, *ramps*, zero depth edge, and equipment anchors. *See id.* PBC agreed to the terms. Appealed Order at 3, ¶ 10.

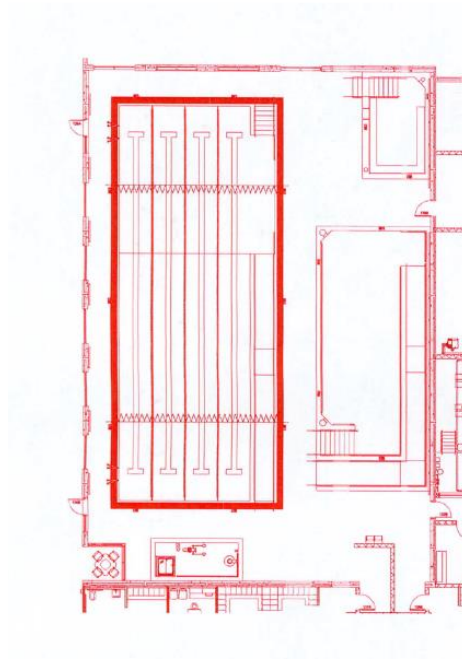
[8] On April 27, 2015, Design Org prepared an architectural/design development drawing of the natatorium "to define the size of the pools located within . . . and ensure adequate room to walk between the pools[.]" Appellee's App., Vol. IV at 26. The schematic drawing of the natatorium included the general layout of the lap pool and ramp on the outside of the pool that Beacon required, which appeared as follows:



*Id.*, Vol. III at 116. The drawing was consistent with PBC’s September 26, 2014 drawing, *supra* ¶ 4, as part of its preliminary design under Part 1 of PBC’s contract with Beacon.

- [9] Design Org’s drawing was issued to Beacon for review and comments and potentially given to PBC. Designated evidence reveals that in July 2015, representatives from PCB, Beacon, Spear, and Design Org met to discuss the pool details. Spear then produced “SP” construction documents dated October 9, 2015 detailing the pool plan, which depicted the ramp on the inside of the pool and walls separating the stairs and ramp:





Appellee's App., Vol. III at 118. The pool plan also contained additional details. Spear hired Robert Coghill, a licensed engineer, and REC Consultants to review its proposed design. Coghill reviewed, approved, and stamped the designs. Spear provided the documents to Design Org. After receiving the detailed construction drawings, Design Org input them into its construction drawings for the natatorium. *See id.* at 117 (first floor dimension plan).

- [10] Stairs into the pool and a zero-entry ramp, which allows individuals with disabilities to easily enter the lap pool, were constructed. The ramp and stairs were separated from the pool's lap lanes by concrete walls. On November 16, 2016, Jennifer Pennington was swimming in the facility's pool when she struck her head on a concrete barrier, which resulted in serious injury. On August 29, 2018, the Penningtons filed their Third Amended Complaint for Damages against Beacon; Spear; PBC; Design Org; Panzica Construction Co.; and

Panzica 2, a Joint Venture.<sup>1</sup> The Penningtons alleged the pool was defective and unreasonably dangerous due to an absence of adequate warnings, defective design, and defective manufacture; Beacon was negligent in maintaining the pool; and Beacon's negligence was the proximate and legal cause of her injuries. They also claimed PBC; Panzica Construction Co.; Panzica 2, A Joint Venture; Spear; and Design Org may have been negligent. Mr. Pennington also alleged loss of consortium due to his wife's injuries.

[11] Later, in June 2019, Spear filed a third-party complaint against Robert Coghill and REC Consultants, LLC alleging breach of contract, common law indemnification, breach of special relationship, and professional negligence. *See Appellee's App.*, Vol. II at 8-16. Specifically, Spear alleged that, on December 14, 2015, Panzica 2, a Joint Venture and Spear entered into a contract to design and build a pool at Beacon's health and fitness center; Spear orally contracted with Coghill and REC Consultants in 2016 to review its proposed design for the pool; and in October 2015 and January 2016, Coghill "approved, stamped, and signed the design" for the pool. *Id.* at 10, ¶ 12. Spear claimed that it "relied upon Mr. Coghill's education, training, expertise and licensure in finalizing and ensuring the safety of the proposed design of the pool, as well as compliance with all applicable codes and standards." *Id.* at 11, ¶ 17.

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<sup>1</sup> The Penningtons filed their initial complaint on April 10, 2018, but a copy of that complaint is not included in the record. Panzica Construction Co. and Panzica 2 were later dismissed as defendants.

- [12] On August 15, 2019, Design Org filed a motion for summary judgment and supporting memorandum. Design Org designated certain evidence, including the February 6, 2015 contract between PBC and Design Org; the agreement between Spear and PBC; selected portions of the Indiana Trial Rule 30(B)(6) deposition of Beacon through designee Mark Bralick; construction drawings listing Design Org as the architect and Spear as the pool consultant and including the pool plans, callouts, layout dimensions, sections, foundation plans, and pool details and notes; and the affidavit of Jeffrey Wolf, Design Org's designee. *See id.* at 31-32.
- [13] In Bralick's deposition, he testified that he had no knowledge Design Org was responsible for designing the lap pool in any way and had no reason to believe that the existence of Design Org's name in the title block of the drawings meant they designed the pool. *See id.* at 75-77. Instead, the stamp on the construction plans indicates that individual has taken responsibility for the design of the drawing and in this case, Coghill, the engineer of record, stamped the pool drawings. Similarly, in Wolf's affidavit, he averred, "While Design [Org's] name appears in the title block of the architectural plans, this only denotes Design [Org's] status as the architect for the project, not that it had any specific involvement in the design of the pool, or that it approved the design of the pool provided by" Spear. *Id.* at 170, ¶ 13. Design Org included Spear's pool design in its architectural plans "simply for scale, dimensions, and illustration purposes." *Id.* at ¶ 14. The construction documents of the pool in the "SP" plans, which refer to the pool design drawings, were stamped by Coghill, who

was not an employee of Design Org and did not contract with them. *See* Appellee's App., Vol. IV at 146, ¶¶ 18-20.

- [14] PBC filed its response to Design Org's motion. Neither Spear nor the Penningtons filed their own substantive response to Design Org's motion. Instead, they each moved to join PBC's response. *See* Appellant's App., Vol. 2 at 77-82. In its response, PBC designated the following evidence: excerpts from the depositions of PBC, Spear, and Design Org through designees Phil Panzica, Samuel Blake, and Wolf, respectively; Design Org's schematic drawing dated April 27, 2015; and the construction documents dated October 9, 2015. *See* Appellee's App., Vol. III at 2-230. Panzica testified in his deposition that Design Org was responsible for the general layout and overall design of the lap pool; Design Org was part of the design and construction process; and Spear engineered and constructed the pool. *Id.* at 27-30. In his deposition, Blake agreed with Panzica – that Design Org designed the overall layout of the pool. He stated, Design Org “gave us the box . . . the schematic drawing of what . . . their intent was on the pools in the natatorium space.” *Id.* at 85-86. And the wall separating the ramp and stairs at issue “was given to us overall; here's the schematic design concepts that they wanted us to do a final design on. So, . . . it was in the preliminary designs, already established. And then we took it and . . . finished out the documents.” *Id.* at 86. Blake also testified, “I would say . . . we [Spear] designed the pool[.]” *Id.*

- [15] On January 28, 2020, Design Org filed its Supplemental Statement of Facts and Supplemental Designation of Evidence in Support of Motion for Summary

Judgment. *See* Appellee's App., Vol. IV at 25-135. Design Org's supplemental designation of evidence included selected portions of Panzica's, Blake's, and Wolf's depositions; the September 26, 2014 preliminary pool design; initial input from Spear regarding the pool attached to a July 22, 2015 email; the "SP" pool plan completed by Spear and stamped by Coghill; and PBC's September 29, 2015 substantive review comments on Spear's lap pool design. *See id.* at 30-31.

[16] In the portions of Blake's deposition designated by Design Org, he testified that Spear received a schematic drawing from Design Org detailing what Beacon wanted and Spear "started [its] designs from" that document. *Id.* at 37-38. He also testified that Spear designed the lap pool, including the layout; Spear and PBC determined the height of the end wall; and Coghill was Spear's consultant, who stamped their documents. With respect to Spear's design services of the pool, Blake testified that Spear designed the overall dimensions, length, and width of the pool; designed the finishes, grab rails, handrails, and backstroke flags; designed the structure and size of the pool's surge tanks; sized the pumps, filters, and chemical treatment systems; and designed the deck and safety equipment, as well as the location of the lane dividers. Regardless of the information given by Design Org or PBC, Spear was responsible for final review and generation of the final plans for the pool. Lastly, Blake testified that Spear did not receive anything through PBC generated by Design Org regarding comments on its plan.

[17] Design Org also designated additional portions of Wolf's testimony. Wolf testified he had no experience designing pools. Although Wolf was present at the July 2015 meeting with PBC, Beacon, and Spear during which they discussed what kind of ramps to use, he was only there listening "because anything that was impacted may impact the overall pool layout room that we were showing on our drawings." *Id.* at 60. Design Org did not provide input into the design of the pool relative to walls separating stairs and ramp; it did provide input regarding exiting the pool room, but not the pool itself. *See id.* at 68, 75.

[18] The trial court held a hearing on the motion for summary judgment and took the matter under advisement. The trial court subsequently granted Design Org's motion, finding, in relevant part:

PBC never argued that any part of the contract was vague or ambiguous. Instead, it merely asserted that [Design Org] contracted to design the pool, offering no evidence to back up that assertion.

The language of the contract is not ambiguous or vague. Instead, it is quite clear. The [Design Org]/PBC contract expressly excludes responsibility for pool design which provides that the pool design would be performed by "others" to be retained by PBC. PBC attempts to show that this provision is contradicted by other language in § 1.3. In that section, [Design Org] was responsible for the development of the design "in preparation of refined floor plans, exterior elevators, *pool and studio rooms . . .*" That clearly does not mean [Design Org] was to design the pool, but instead to develop floor plans, exterior elevations and pool room and studio rooms. As "pool and studio rooms" is part of a

listing, pool room is the room, not the pool. To add to that interpretation as a whole by considering all words in harmony, § 1.5.2 states that “[PBC] will retain the following consultants and contractors . . . Pool Design – To Be Determined.” Further the contract makes clear at § 1.3 and § 1.5.2 that [Design Org] was not independently responsible for the design services of other consultants and had the “right to rely upon the accuracy and completeness of services offered . . . by consultants and contractors.”

Construction projects are necessarily made up of a “chain of contracts” which are intricately entwined. Such contract agreements outline the respective roles, risks and duties of the designers and constructors. . . .

The contract between PBC and [Design Org] details the relationship between [Design Org] and the pool designer and engineer. Just because there are necessary communication to coordinate work doesn’t mean that [Design Org] was the designer of the pool. No evidence was produced in PBC’s response that [Design Org] voluntarily assumed extracontractual duty for design of the lap pool. There is absolutely no evidence that [Design Org] breached that contract. Because [Design Org] had no contractual duty to design the pool, [Design Org] could not have negligently done so, that is, a duty must first exist in order to negligently breach the duty.

Spear was contractually responsible to design the pool which included aquatic drawings and specifications of the pool . . . “ramps” . . . and [Design Org] contractually excluded design of the pools. No evidence has been produced by any of the parties to show that [Design Org] designed the pool and no evidence has been produced to show that Spears did not.

Appealed Order at 7-8 (emphasis in original).<sup>2</sup> PBC, Spear, and Beacon now appeal (collectively, “Appellants”). The Penningtons also appeal separately.

## Discussion and Decision

### I. Standard of Review: Summary Judgment

[19] When reviewing the grant of summary judgment, we apply the same test as the trial court. *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 v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014).

[20] 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 which 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

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<sup>2</sup> The trial court initially issued its order on June 23, 2020, but later entered an amended order on June 30 and a final amended order on August 17. The “Appealed Order” quoted herein references the August 17 final amended order.



the undisputed material facts support conflicting reasonable inferences.” *Hughley*, 15 N.E.3d at 1003 (citation omitted). 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). On appeal, the non-moving party carries the burden of persuading us the grant of summary judgment was erroneous. *Hughley*, 15 N.E.3d at 1003.

[21] 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. *Denson v. Estate of Dillard*, 116 N.E.3d 535, 539 (Ind. Ct. App. 2018). 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. *Id.*

## II. Duty to Design Pool

[22] Appellants argue the trial court erred in granting summary judgment in favor of Design Org because Design Org assumed responsibility for the pool design by contract and its conduct. We disagree.

## A. Assumption of Duty by Contract

[23] “The goal of contract interpretation is to determine the intent of the parties when they made the agreement.” *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017) (citation omitted), *trans. denied*. We review the contract as a whole, attempting to ascertain the parties’ intent and making every attempt to construe the language of the contract “so as not to render any words, phrases, or terms ineffective or meaningless.” *Rusnak v. Brent Wagner Architects*, 55 N.E.3d 834, 840 (Ind. Ct. App. 2016), *trans. denied*. And where a contract’s terms are clear and unambiguous, we give those terms their plain and ordinary meaning. *Id.* If contract language is unambiguous, we may not look to extrinsic evidence to expand, vary, or explain the instrument but must determine the parties’ intent from the four corners of the instrument. *Celadon Trucking Servs., Inc.*, 70 N.E.3d at 839. When the terms of a contract are ambiguous or uncertain, however, and its interpretation requires extrinsic evidence, its construction is left to the factfinder. *Alexander v. Linkmeyer Dev. II, LLC*, 119 N.E.3d 603, 612 (Ind. Ct. App. 2019). A contract is ambiguous if reasonable people would disagree as to the meaning of its terms and we construe any ambiguity against the drafter. *Id.*

[24] Here, Section 1.3 of Design Org and PBC’s contract states that Design Org’s portion of the project consists of developing the design of the *pool and studio rooms* and outlining “spec with coordination of structural, mechanical, plumbing, electric, *pool and civil design by others*.” Appellant’s App., Vol. 2 at 114 (emphasis added). It also explicitly stated that Design Org *shall not* have

any other duties or responsibilities for any other portion of the project except for those provided in the contract. *See id.* at 118 (Section 2.1). And in Section 1.5.2, it provides that PBC will retain certain consultants and contractors, including those for the pool design, which was to be determined. *See id.* at 116-17.

[25] Appellants argue that the term “pool design,” as stated in Section 1.3, is ambiguous and the fact that it “is listed in conjunction with engineering specialties . . . meant . . . this portion of the contract is more about engineering the pool while ‘design’ as applied to Design [Org] . . . encompasses the overall layout of the pool, including the shape, size, depth, and means of ingress or egress.” Amended Brief of Appellants [Panzica, Spear, and Beacon] at 14-15. However, considering the plain language of the contract as a whole, we conclude it is unambiguous. It clearly excludes “pool design” from Design Org’s duties and responsibilities and provides that PBC will retain a consultant or contractor specifically for pool design. Design Org was responsible for designing, among other things, the building and room in which the pool was to be located, not the pool itself. Therefore, Design Org did not assume responsibility for pool design by contract and the trial court properly granted summary judgment in favor of Design Org on this issue.

## **B. Assumption of Duty by Conduct**

[26] Appellants claim Design Org’s “conduct is sufficient to show that it assumed a duty for the design of the pool” and that the trial court incorrectly found that

PBC failed to provide any evidence that Design Org voluntarily assumed extracontractual duties to design the pool. Amended Br. of Appellants at 15-16.

[27] A duty of care may arise where a party gratuitously or voluntarily assumes a duty by conduct. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1270 (Ind. Ct. App. 2002), *trans. denied*. “The assumption of such a duty requires affirmative, deliberate conduct such that it is apparent that the actor . . . specifically [undertook] to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative legal duty to perform that undertaking carefully.” *Yost v. Wabash Coll.*, 3 N.E.3d 509, 517 (Ind. 2014) (internal quotations omitted). “Where the record contains insufficient evidence to establish such a duty, the court will decide the issue as a matter of law.” *Id.* (internal quotation omitted). Therefore, “it is essential to identify and focus on the specific services undertaken.” *Id.*

[28] Appellants point to the following designated evidence to show that Design Org assumed responsibility for the pool design by its conduct, creating a genuine issue of material fact precluding summary judgment:

- PBC retained Design Org because of its experience designing pools.
- Design Org stamped the construction drawings showing the layout of the pool, which included the ramp.

- Spear did not lay out the location, the depth, or ingress and egress of the pool. Instead, Spear received a layout from Design Org and then confirmed that the ramp/steps complied with the Americans with Disabilities Act.
- PBC had a preliminary design which showed a ramp that Design Org prepared, as well as an entrance to the pool and a wall; “Design [Org] . . . prepared that design before Spear had done any work on the project with designs showing the ramp.” Amended Br. of Appellants at 16.
- Panzica and Blake testified that Design Org designed the layout of the pool with the overall shape and perimeter. Spear then used the layout and determined how the shape and perimeter would best be built.
- There are construction documents stamped by Wolf, Design Org’s designee, that show the final design of pool with a ramp and walls.

[29] The issue we must address is whether this designated evidence is enough to create a genuine issue of material fact as to whether Design Org engaged in *affirmative, deliberate conduct* such that it was apparent that it specifically undertook to design the lap pool. We conclude it is not.

[30] Here, the designated evidence reveals that in September 2014, PBC created a preliminary pool layout that included the ramp. Once PBC and Design Org entered into a contract, Design Org used the same preliminary drawing to create an architectural drawing of the natatorium to illustrate the size of the

pools and to ensure there was enough space between the pools. This schematic/spatial drawing was given to Spear, the pool specialist, which it used to design and engineer the lap pool. Coghill later approved Spear's final drawings. The fact that Design Org utilized and incorporated PBC's preliminary design and later, Spear's final drawings, into its plans is not evidence that it designed the pool. There is no evidence that Design Org affirmatively and deliberately undertook the task of designing the pool. Therefore, we conclude no genuine issue of material fact exists as to whether Design Org assumed a duty to design the pool through its conduct. The trial court did not err in granting summary judgment in favor of Design Org on this issue.<sup>3</sup>

## Conclusion

[31] For the reasons set forth above, we conclude no genuine issues of material fact exist and Design Org is entitled to judgment as a matter of law. Therefore, the trial court properly granted summary judgment in Design Org's favor. Accordingly, we affirm.

[32] Affirmed.

Bailey, J., and Tavitas, J., concur.

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<sup>3</sup> For purposes of this appeal, we need not determine who designed the pool. We only conclude there is no genuine issue of material fact as to whether *Design Organization* designed the pool.