AFFIRMED in part; REVERSED in Part; SUGGEST REMITTITUR in part; and REMAND and Opinion Filed August 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00433-CV

LSC TOWERS, LLC AND LOVELL FAMILY LIMITED PARTNERSHIP, Appellants
V.
LG PRESTON CAMPBELL, LLC, LEON CAPITAL GROUP, LLC, AND LG ACQUISITIONS, LLC, Appellees

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-07734

MEMORANDUM OPINION

Before Justices Myers, Molberg, and Garcia
Opinion by Justice Garcia

Appellants LSC Towers, LLC ("LSC Towers") and Lovell Family Limited Partnership ("Lovell FLP") sued appellees LG Preston Campbell, LLC ("LG Preston"), Leon Capital Group, LLC ("Leon Capital"), and LG Acquisitions, LLC ("LG Acquisitions") for declaratory judgment, breach of contract, tortious interference with contract, and conspiracy, among other claims. Appellees obtained a take-nothing summary judgment on all of appellants' claims and recovered their

attorney's fees under the Uniform Declaratory Judgments Act ("UDJA") after a bench trial. After considering appellants' arguments on appeal, we affirm in part, reverse in part, suggest a remittitur, and remand.

I. BACKGROUND

The gist of the case is that appellants owned commercial real estate in north Dallas and at least one appellee owned the commercial real estate immediately to the south of appellants' land. Appellants sued appellees for building an enclosure for trash storage, which allegedly breached contractual and other legal duties.

A. Factual Allegations

Unless otherwise noted, the following facts are allegations in appellants' first amended petition, which was their live pleading at the time of judgment.

This controversy concerns a piece of real property located at the intersection of Preston Road and McCallum Boulevard in Dallas. Summary-judgment evidence further indicated that the property was bounded by McCallum Boulevard on the north, Preston Road on the west, and Campbell Road on the south.

In January 1981, part of the real property, known as Tract A, was owned by Richard Strauss, and the rest, known as Tract B, was owned by a partnership called Hansam Ventures. Appellants assert in their brief, and appellees do not dispute, that Tract A was generally the northern part of the property and Tract B was generally the southern part of the property. On or about January 23, 1981, Strauss and Hansam Ventures executed a Mutual Development Agreement ("MDA") so that they could

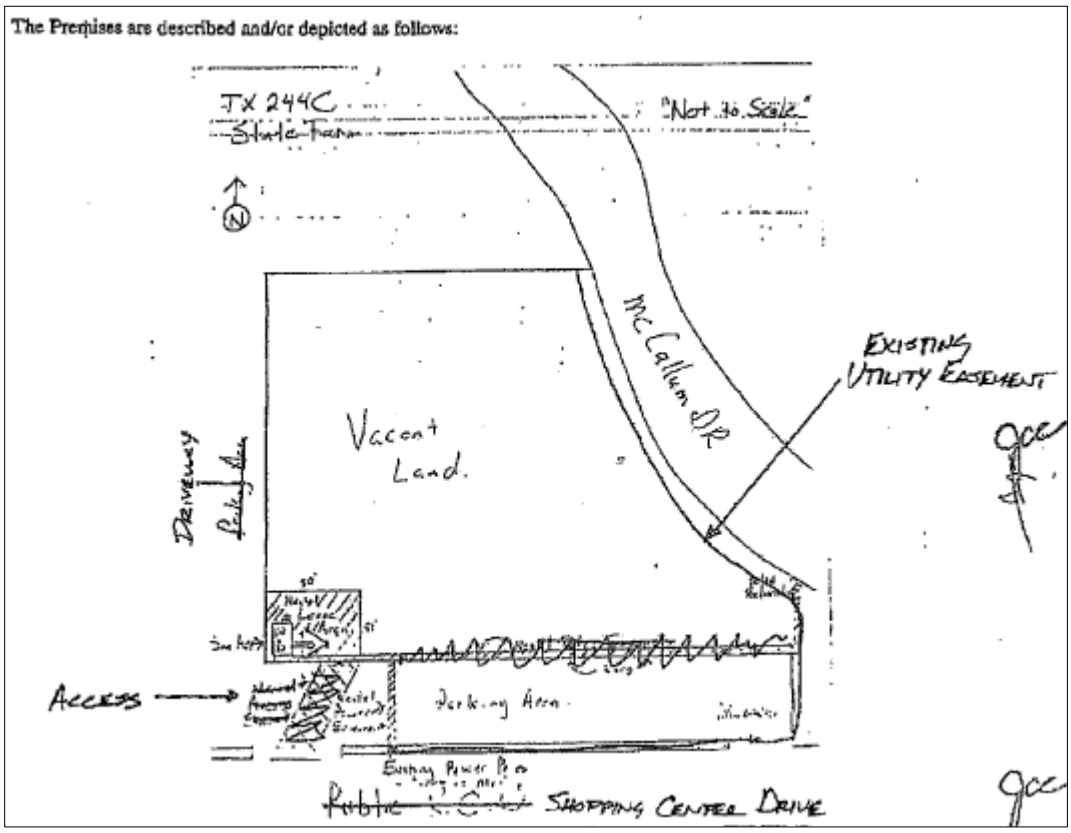
develop their respective tracts together. The MDA recited that the rights created and duties imposed would run with the land. At the same time, Strauss and Hansam Ventures executed a Perpetual Reciprocal Ingress and Egress Easement Agreement ("Perpetual Easement Agreement") that created easements to facilitate movement between the tracts. The Perpetual Easement Agreement also provided that the rights granted and duties created would run with the land and bind all subsequent owners of any part of Tracts A and B.

By June 28, 1994, both Tract A and Tract B were owned by new owners. Around that date, the new owners executed a Memorandum of Agreement with Respect to Perpetual Reciprocal Ingress and Egress Easement Agreement ("1994 Memorandum of Agreement"). The 1994 Memorandum of Agreement is part of the summary-judgment evidence and shows that the new owners were Landor I Grundstucks GmbH ("Landor") and Equitable Bank. It contains a recital that Equitable Bank desired to reconfigure certain access drives and that Landor agreed. It also provides that its terms run with the land and bind all successors and assigns.

Next, appellants' live pleading alleges that in the 1990s Landor acquired both Tract A and Tract B. In October 1995, the two tracts were replatted as a single parcel of real property designated as Lot 1A, Block 8206 Preston Trails Village Addition.

In 1999, Landor entered a Communication Site Lease Agreement ("1999 Ground Lease") with Nextel of Texas Inc. ("Nextel"). The 1999 Ground Lease granted Nextel a lease on part of Lot 1A for installation of a cell tower, along with

an easement across Lot 1A for pedestrian and vehicular access to the cell-tower site. The summary-judgment evidence includes a copy of the 1999 Ground Lease, which includes this map in its Exhibit B:



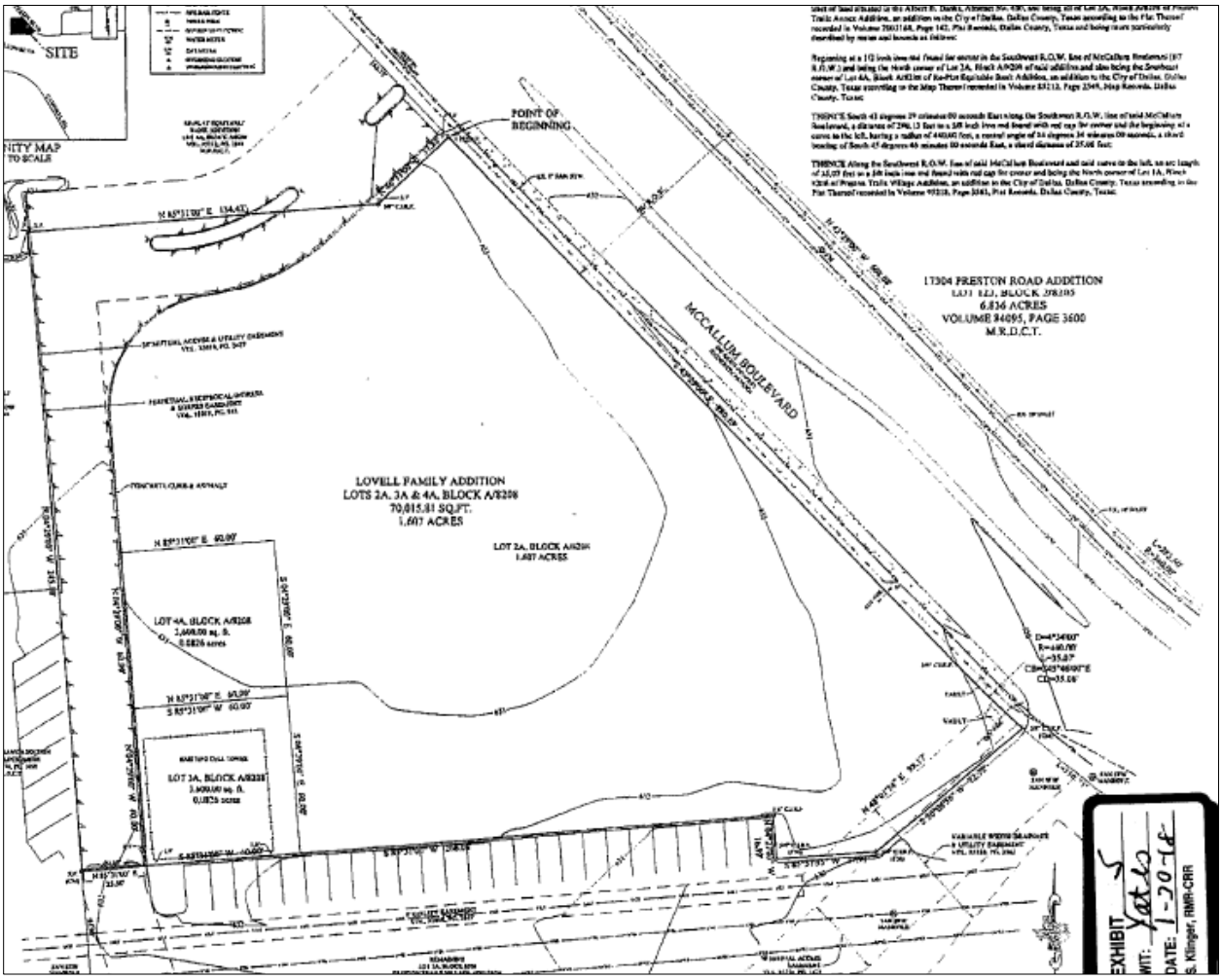
In May 2003, Lot 1A was conveyed to Landor Limited Partnership.

In August 2003, Lot 1A was subdivided, again creating a northern and a southern tract. The southern tract remained Lot 1A, and the northern tract was designated Lot 2A. The cell-tower site was within Lot 2A, but the easement granted in the 1999 Ground Lease crossed from Lot 2A to Lot 1A.

In or about November 2005, Landor Limited Partnership conveyed both Lot 1A and Lot 2A to Lincoln PTV, Ltd.

In or about April 2007, Lincoln PTV, Ltd. conveyed the northern tract, Lot 2A, to appellant Lovell FLP. Shortly thereafter, Lovell FLP had Lot 2A replatted by deed to create three lots or tracts, which were designated Lot 2A, 3A, and 4A. The cell tower and related equipment were located on Lot 3A. In or about September 2008, an Assignment and Assumption of Ground Lease was filed in the deed records of Dallas County, and that document identified the 1999 Ground Lease and included a map showing the leased premises and the easement granted therein.

The following map appears in appellees' summary-judgment evidence and depicts Lots 2A, 3A, and 4A described in the previous paragraph:



Lot 3A, which contains the fenced-in cell tower, is near the lower left corner of the map, just north of the row of parking spaces. Lot 4A is immediately to the north of Lot 3A.

In or about February 2012, Lovell FLP conveyed Lot 3A and Lot 4A to appellant LSC Towers.

In or about November 2013, appellees acquired the southern tract, Lot 1A. (Appellees contend, and filed summary-judgment evidence to prove, that appellees Leon Capital and LG Acquisitions never owned the southern tract.)

In or about July 2014, LSC Towers and Nextel's successor in interest, SBA 2012 TC Assets ("SBA"), executed a document (the "2014 Ground Lease Extension") that ratified and affirmed the 1999 Ground Lease and provided for two additional five-year terms that would automatically go into effect unless SBA notified appellants of its intent not to renew.

From 2013 through early 2015, appellees sought to buy appellants' tracts, but no deal was reached. In or around March 2014, appellees were provided with copies of the 1999 Ground Lease and the 2014 Ground Lease Extension.

In or about the summer of 2016, appellees built a concrete-block structure across the easement that gave access to the cell tower. The structure, which was used to hold garbage, was within 18 inches of the cell-tower access gate. Summary-judgment evidence indicates that the garbage enclosure was built along and just to

the south of the southern border of Lot 3A, covering some of the parking spaces shown on the map reproduced above.

SBA notified appellants that the garbage enclosure blocked SBA's access to its cell tower and equipment on Lot 3A. SBA further stated that it would terminate the lease within 60 days if its access to Lot 3A was not restored. Appellants notified appellees of the encroachment or trespass on Lot 3A and the easement, and they requested that appellees remove the structure. Appellees did not do so.

In or about November 2016, SBA terminated its lease with appellants because of appellees' failure to remove the structure.

Appellees filed a summary-judgment affidavit in which the affiant averred that (1) neither Leon Capital nor LG Acquisitions ever owned any of the property in question and (2) on or about August 28, 2018, LG Preston sold most of its property involved in this case, including all of its property abutting appellants' property, to EREP Preston Trail II, LLC.

B. Procedural History

In June 2018, appellants sued appellees. Appellees answered.

Appellants later filed a first amended petition, which remained their live pleading at the time of judgment. They asserted the following claims against appellees:

- declaratory judgment regarding the parties' rights and duties both under the various instruments concerning the property and under the general law relating to easements;

- tortious interference with contract;
- tortious interference with prospective business relations;
- interference with easement (intentional nuisance);
- civil conspiracy to commit interference with easement or contract; and
- breach of contract.

Appellees filed a traditional motion for partial summary judgment under Texas Rule of Civil Procedure 166a(c). They sought judgment as to every issue in the case except their entitlement to attorney's fees under the UDJA. The trial judge granted appellees' motion "in its entirety," without stating any specific reasons. Then the trial judge held a bench trial on attorney's fees and signed a final judgment awarding appellees attorney's fees of roughly $86,000, plus conditional attorney's fees in the event of an appeal.

Appellants filed a motion for new trial that was apparently overruled by operation of law. They timely appealed.

II. ISSUES PRESENTED

Appellants raise two issues on appeal, each with sub-issues.

Their first issue challenges most of the summary-judgment order. However, appellants do not challenge the order as to their claims for tortious interference with prospective business relations or interference with easement (intentional nuisance). Appellants also do not challenge the order as to the part of their declaratory-judgment claims seeking declarations that various common-law easements exist.

Their second issue challenges the award of attorney's fees to appellees.

III. ISSUE ONE: SUMMARY JUDGMENT

A. Standard of Review

We review an order granting summary judgment de novo. *See Trial v. Dragon*, 593 S.W.3d 313, 316 (Tex. 2019).

When we review a traditional summary judgment in favor of a defendant, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Alexander v. Wilmington Sav. Fund Soc'y, FSB*, 555 S.W.3d 297, 299 (Tex. App.—Dallas 2018, no pet.). We take evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve every doubt in the nonmovant's favor. *Id*. A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Id*.

Summary judgments must stand on their own merits, so the nonmovant may always argue on appeal that the summary-judgment proof is insufficient as a matter of law to support summary judgment. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam).

B. Issues 1(a), 1(b), and 1(c): Did the trial judge err by granting summary judgment on appellants' breach-of-contract claims?

Appellants address their breach-of-contract claims first, so we do likewise. We begin by summarizing appellants' claims, appellees' summary-judgment grounds, and appellants' arguments on appeal.

1. Summary of the Parties' Positions

Appellants' live pleading in the trial court contained no details about their breach-of-contract claims; it asserted only that the facts pleaded supported a judgment for "actual damages resulting from Defendants[']breach of contract."

As to breach of contract, appellees asserted four general summary-judgment grounds:

1. Appellees Leon Capital and LG Acquisitions were not parties to any of the agreements involved in this case.
2. Appellee LG Preston did not breach any contract or, alternatively, any breach was excused by appellants' prior material breach.
3. Appellants could not establish any damages.
4. Appellants could not recover attorney's fees under Texas Civil Practice and Remedies Code Chapter 38 because appellees are limited liability companies.

On appeal, appellants do not contest the first and fourth grounds. Because they do not contest the first ground, we will analyze the summary judgment on their breach-of-contract claims only as to appellee LG Preston and affirm the judgment on those claims as to appellees Leon Capital and LG Acquisitions. *See Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007) (per curiam) (court of appeals must affirm summary judgment on claims as to which appellant does not assert error).

As to the second and third grounds, appellants argue that the trial court erred by granting summary judgment on (1) both appellants' contract claims against LG Preston for breach of the MDA, (2) LSC Towers' contract claim against LG Preston

for breach of an easement created in the Perpetual Easement Agreement, and (3) LSC Towers' contract claim against LG Preston for breach of an easement created in the 1999 Ground Lease and the 2014 Ground Lease Extension.

2. Applicable Law

The elements of breach of contract are (i) a valid contract, (ii) performance or tendered performance by the plaintiff, (iii) breach by the defendant, and (iv) damages sustained by the plaintiff as a result of that breach. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019). "A breach of contract occurs when a party fails to perform an act it has explicitly or impliedly promised to perform." *Gaspar v. Lawnpro, Inc.*, 372 S.W.3d 754, 757 (Tex. App.—Dallas 2012, no pet.).

Prior material breach by the claimant is an affirmative defense to a breach-of-contract claim. *See Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 852 (Tex. App.—Dallas 2005, pet. denied); *see also Bartush-Schnitzius Foods Co. v. Cimco Refrig., Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (per curiam) (one party's material breach of contract discharges or excuses the other party from further performance). Whether a breach is material is generally a fact question. *See Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436. Several factors are relevant to the materiality question, such as (1) the extent to which the injured party will be deprived of its reasonably expected benefit; (2) the extent to which the injured party can be adequately compensated for the part of the benefit it will be deprived of; (3) the

extent to which the breaching party will suffer forfeiture; (4) the likelihood that the breaching party will cure its breach, taking account of the circumstances including any reasonable assurances; and (5) the extent to which the breaching party's behavior comports with standards of good faith and fair dealing. *See id*. at 436–37.

3. Issue 1(a): Appellants' Breach-of-Contract Claims Based on the MDA

Appellees' summary-judgment motion asserted the following grounds specific to appellants' contract claims based on the MDA:

1. Building the garbage enclosure did not breach the MDA because the MDA did not create any easement rights barring construction of the enclosure.

2. To the extent appellants claim that building the enclosure breached the MDA's requirement that appellees obtain prior approval from appellants, appellants committed a prior material breach of the MDA by allowing the cell tower and fence to be built where they were.

3. Appellants had no damages from the construction of the garbage enclosure.

Appellants raise several arguments in opposition to these three summary-judgment grounds, and we address appellants' arguments in the order presented.

a. Did LG Preston conclusively prove that building the garbage enclosure did not breach the MDA?

Appellants first argue that appellees' summary-judgment motion failed to conclusively negate that LG Preston breached the MDA by building the garbage enclosure. Appellants contend that the enclosure breached the MDA in two ways: (1) it was built on a spot outside the only areas where the MDA allowed trash to be

stored and (2) it was built in an area that the MDA designated a "Plaza" without appellants' consent.

As to the MDA's trash-location provisions, appellees state in their appellate brief that they "do not dispute the Garbage Enclosure was not located at the 'Trash Location' in the MDA." Nor do they appear to contest appellants' contention that there is a genuine fact issue as to whether building the garbage enclosure breached the MDA's Plaza provisions. Rather, appellees assert that they were entitled to summary judgment on any claim for breach of the MDA based on the defense of prior material breach and on appellants' lack of damages.

Having reviewed the record, we agree with appellants' argument that (1) the MDA can reasonably be read to limit the permitted locations of trash storage to certain specific areas and (2) some evidence shows that LG Preston built the garbage enclosure on a spot outside of those permitted locations. We also agree with appellants that (1) the MDA can reasonably be read to require the owner of the southern tract to obtain consent from the owner of the northern tract before building an improvement in the Plaza area, (2) there is a genuine fact issue as to whether LG Preston built the garbage enclosure in the Plaza area, and (3) there is no evidence that either appellant gave prior consent to the garbage enclosure. Thus, there is a genuine fact issue as to whether LG Preston breached the MDA by building the garbage enclosure. We conclude that the take-nothing summary judgment on

appellants' breach-of-the-MDA claims cannot be upheld on the theory that LG Preston conclusively proved it did not breach the MDA.

b. Did LG Preston conclusively prove its affirmative defense of prior material breach?

Next, we consider LG Preston's summary-judgment ground that appellants' claims for breach of the MDA are barred because appellants (or their predecessors in interest) committed a prior material breach of the MDA by (1) building the cell tower and the fence around it, or allowing them to be built, or (2) executing the 2014 Ground Lease Extension without LG Preston's approval. According to LG Preston, the MDA defined a "contemplated development" in the area now occupied by Lot 3A and the cell tower, the contemplated development included a "Plaza," and any deviation from the contemplated development required approval from the other tract owner. LG Preston argued that the cell tower and surrounding fence were "incongruous" with a "Plaza" and defeated the purposes of the MDA.

On appeal, appellants argue that LG Preston did not conclusively prove that appellants committed any breach of the MDA or that any breach was material. Assuming without deciding that LG Preston conclusively proved that appellants (or their predecessors in interest) breached the MDA, we agree with appellants that LG Preston did not conclusively prove that any such breach was material.

As noted above, whether a breach is material is generally a question of fact. *Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436. In its appellate brief, LG Preston argues that it proved the materiality of appellants' breach solely by reference to the

terms of the MDA itself. The MDA provides that an area designated as the "Plaza," which was situated on both Tract A and Tract B (as the tracts were known when the MDA was executed in 1981), would "be landscaped or otherwise improved in a first class manner which shall include being equipped with an underground water sprinkler system adequate to sprinkle water on all plantings included within the Plaza." The MDA goes on to detail each tract owner's rights and duties in making any contract "for landscaping and improvements to the Plaza."

We cannot conclude that the MDA, standing alone, conclusively establishes that construction of the cell tower and surrounding fence was a material breach of the MDA. Regarding the first two materiality factors, the MDA itself does not show the extent to which appellants' conduct deprived LG Preston of the benefit it reasonably expected from the MDA, nor does it show the extent to which LG Preston could be adequately compensated for the part of the benefit of the MDA that the breach deprived LG Preston of. *See id*. at 436–37. The maps attached to the MDA as exhibits suggest that the Plaza was a relatively small portion of the two tracts in question. Photographs filed as summary-judgment evidence appear to show that the area designated as the Plaza was left an open field without any special landscaping, aside from the cell tower and the fenced-in area around it. We see no evidence showing that the cell tower or its enclosure harmed LG Preston's enjoyment of its land in any way.

Nor does LG Preston point to any evidence regarding the remaining materiality factors: the extent to which appellants would suffer forfeiture if the breaches were considered material, the likelihood that appellants would cure the breaches, and the extent to which appellants' behavior comported with standards of good faith and fair dealing. *See id*. at 437. We conclude that LG Preston did not conclusively prove that the construction of the cell tower and surrounding fence was a material breach of the MDA.

We reach the same conclusion as to LG Preston's summary-judgment ground that appellants committed a prior material breach of the MDA by executing the 2014 Ground Lease Extension without LG Preston's approval. That alleged breach merely continued the existing state of affairs, i.e., the existence of a cell tower in Lot 3A. For the same reasons stated above, LG Preston did not conclusively prove that this alleged breach was material.

We conclude that the take-nothing summary judgment on appellants' MDA-based breach-of-contract claims cannot be upheld on the theory that LG Preston conclusively proved the affirmative defense of prior material breach.

c. Did LG Preston conclusively prove that its breach of the MDA did not cause any damages to appellants?

Finally, we consider LG Preston's summary-judgment ground that the construction of the garbage enclosure did not cause any damages to appellants.

Appellants' first argument on appeal is that this summary-judgment argument was an improper attempt to raise a no-evidence-summary-judgment point within a

traditional motion for summary judgment. In their appellate brief, appellees disavow that they made any no-evidence arguments and insist that they successfully negated appellants' claims for damages. Having reviewed appellees' summary-judgment motion, we can understand appellants' concern that it might assert a no-evidence ground as to damages. However, the motion can also be interpreted as a traditional attack on damages. We accept appellees' disavowal of a no-evidence ground and accordingly review their attack on the damages element under the standards applicable to traditional summary judgments under Rule 166a(c).

Next, appellants argue that they adduced some evidence of damages in the form of lost rents under the extended 1999 Ground Lease. For support, they rely on an affidavit by Ryan Cluck, who was an in-house counsel for both appellants. Cluck testified that the lessee of the cell-tower lot terminated the lease 91 months early because of the garbage enclosure. He also testified that appellants received "a final $1,500.00 rental payment" in December 2016, which supports a reasonable inference that the monthly rent on the lease was $1,500.

Appellees respond that appellants' argument fails because LSC Towers had no right to grant the cell-tower lessee, SBA, access to Lot 3A (the cell-tower lot) across LG Preston's land in the first place. We reject appellees' argument, however, because LSC Towers' argument that LG Preston breached the MDA's provisions that limit where trash may be stored does not rely on the existence of easements.

Next appellees argue that LSC Towers' evidence about lost rent is insufficient to raise a genuine fact issue because appellees produced evidence that (1) SBA gave LSC Towers the option of giving SBA alternative access to Lot 3A and (2) SBA could have accessed Lot 3A from the west, north, or east. Appellants reply that creating new access to Lot 3A would itself have caused expense to LSC Towers, such as for the removal of vegetation and the construction of a new gate. These are reasonable inferences from the summary-judgment evidence, which includes photographs of the site and an email from SBA setting forth the steps that would have had to be undertaken, at LSC Towers' expense, to create new access through the east side of Lot 3A. Thus, the evidence that SBA would have been satisfied with alternative access to Lot 3A did not conclusively negate the element of damages.

Appellees' summary-judgment motion also asserted that any damages from the garbage enclosure were not foreseeable because the enclosure did not frustrate "the purposes of building a Plaza." Appellants argue that the damages were foreseeable because the MDA's provisions limiting the locations where trash could be stored show that the parties were concerned about harmful effects from storing trash elsewhere on the property.

We agree with appellants. Under Texas law, consequential damages for breach of contract are recoverable only if they were foreseeable, i.e., at the time of contracting the parties contemplated that such damages would be a probable result of the breach. *See Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179,

186, 187 (Tex. 2022). As movants, appellees bore the burden to prove conclusively that appellants' damages were not within the reasonable contemplation of appellees (or their predecessors in interest) at the time of contracting. We conclude that they did not carry this burden. The damages in question here stem either from the loss of a tenant caused by impermissible placement of a garbage-storage site or expenses to the north-tract owner to remedy the consequences of impermissible placement of such a site. A reasonable factfinder, considering the MDA and its provisions limiting the location of garbage storage, could conclude that appellees did not prove these kinds of damages were outside the contracting parties' reasonable contemplation.

Last, we consider appellees' contention that appellant Lovell FLP has not shown that there is any fact issue as to whether it sustained any breach-of-contract damages. On this point, we agree with appellees. Appellees argued in their summary-judgment motion that they had negated damages by proving that the garbage enclosure did not cause Lovell FLP to lose a potential sale of its property. On appeal, appellants' damages argument is limited to the loss of the cell-tower lease—which would have been damages suffered by LSC Towers, the lessor, rather than Lovell FLP. Accordingly, we conclude that the summary judgment on Lovell FLP's MDA-breach claim should be affirmed.

d. Conclusion

We sustain issue 1(a) in part, holding that the trial judge erred by granting summary judgment against LSC Towers on its breach-of-contract claim against LG

Preston based on the MDA. The trial judge did not err by granting summary judgment against Lovell FLP on that claim.

4. Issue 1(b): LSC Towers' Breach-of-Contract Claims Based on the Perpetual Easement Agreement

Appellees' summary-judgment motion raised two grounds applicable to appellants' breach-of-contract claims based on the Perpetual Easement Agreement:

1. Appellees did not breach any contract because the Perpetual Easement Agreement did not create easement rights south of the cell-tower lot.

2. Appellants had no damages.

Only LSC Towers challenges these grounds on appeal.

a. Did LG Preston conclusively prove that building the garbage enclosure did not breach the Perpetual Easement Agreement?

In their summary-judgment motion, appellees argued that building the garbage enclosure did not breach the Perpetual Easement Agreement because that agreement did not create an easement south of Lot 3A, the cell-tower lot. LSC Towers argues that appellees did not conclusively negate the existence of such an access easement under the Perpetual Easement Agreement.

First, LSC Towers argues that we should not consider as summary-judgment evidence a certain "top down" photograph of the relevant area that appears in the body of appellees' summary-judgment motion and that includes certain enhancements added by counsel to show where, in appellees' view, certain lots, certain rights-of-way, and the garbage enclosure are located. Appellees respond that

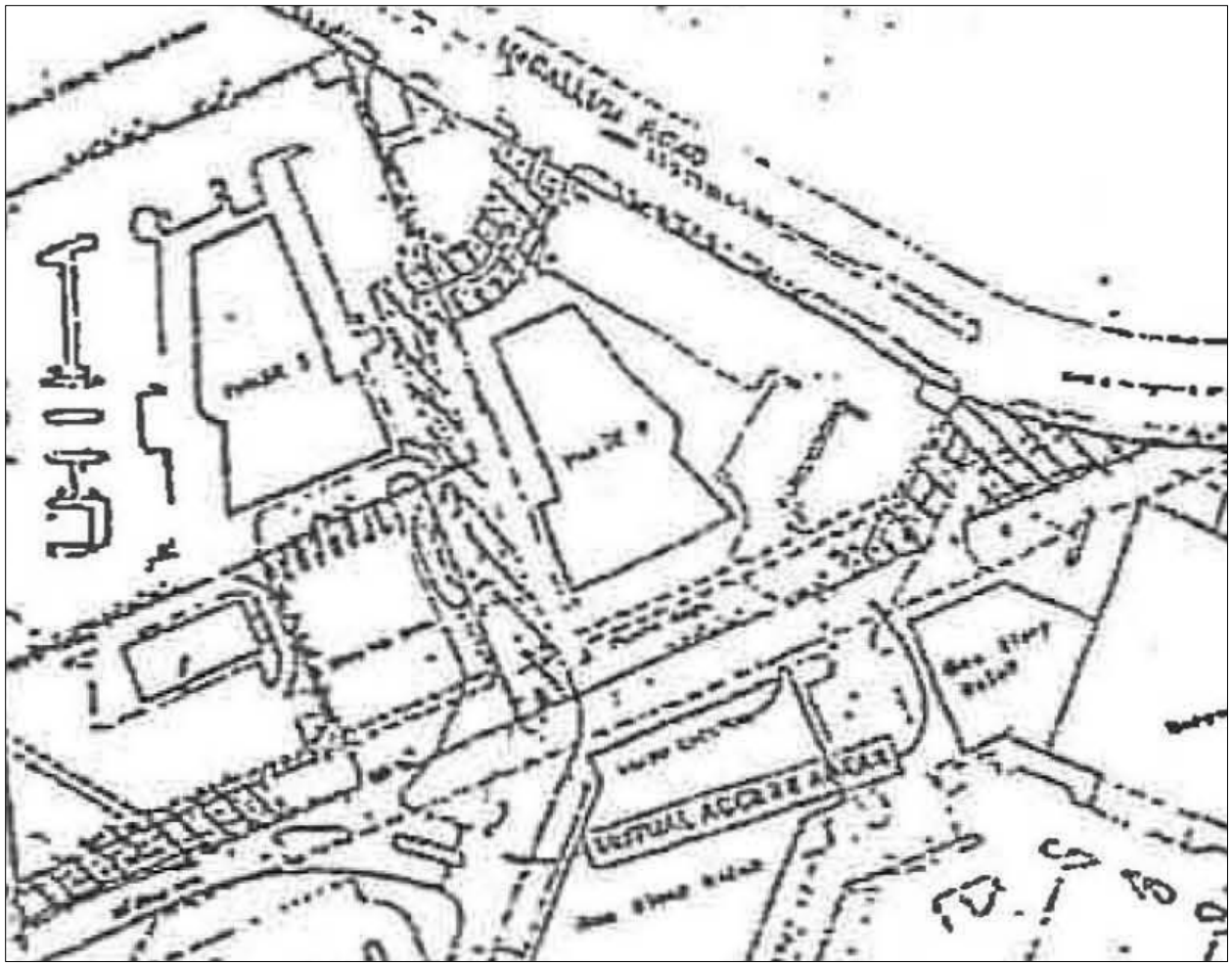
LSC Towers failed to object to the photograph in the trial court. But "the motion for summary judgment is not summary judgment evidence," *Thomas v. Omar Invs., Inc.*, 156 S.W.3d 681, 684 (Tex. App.—Dallas 2005, no pet.), so LSC Towers had no duty to object to photographs appearing in the motion but not the summary-judgment evidence. We agree with LSC Towers regarding the photograph and limit ourselves to the summary-judgment evidence filed with the motion and the response.

Next, LSC Towers argues that the Perpetual Easement Agreement, which is part of the summary-judgment evidence, appears to show that a driveway and easement runs along the southern border of Lot 3A, the cell-tower lot, in the area where the garbage enclosure was built. Thus, we examine the Perpetual Easement Agreement's terms.

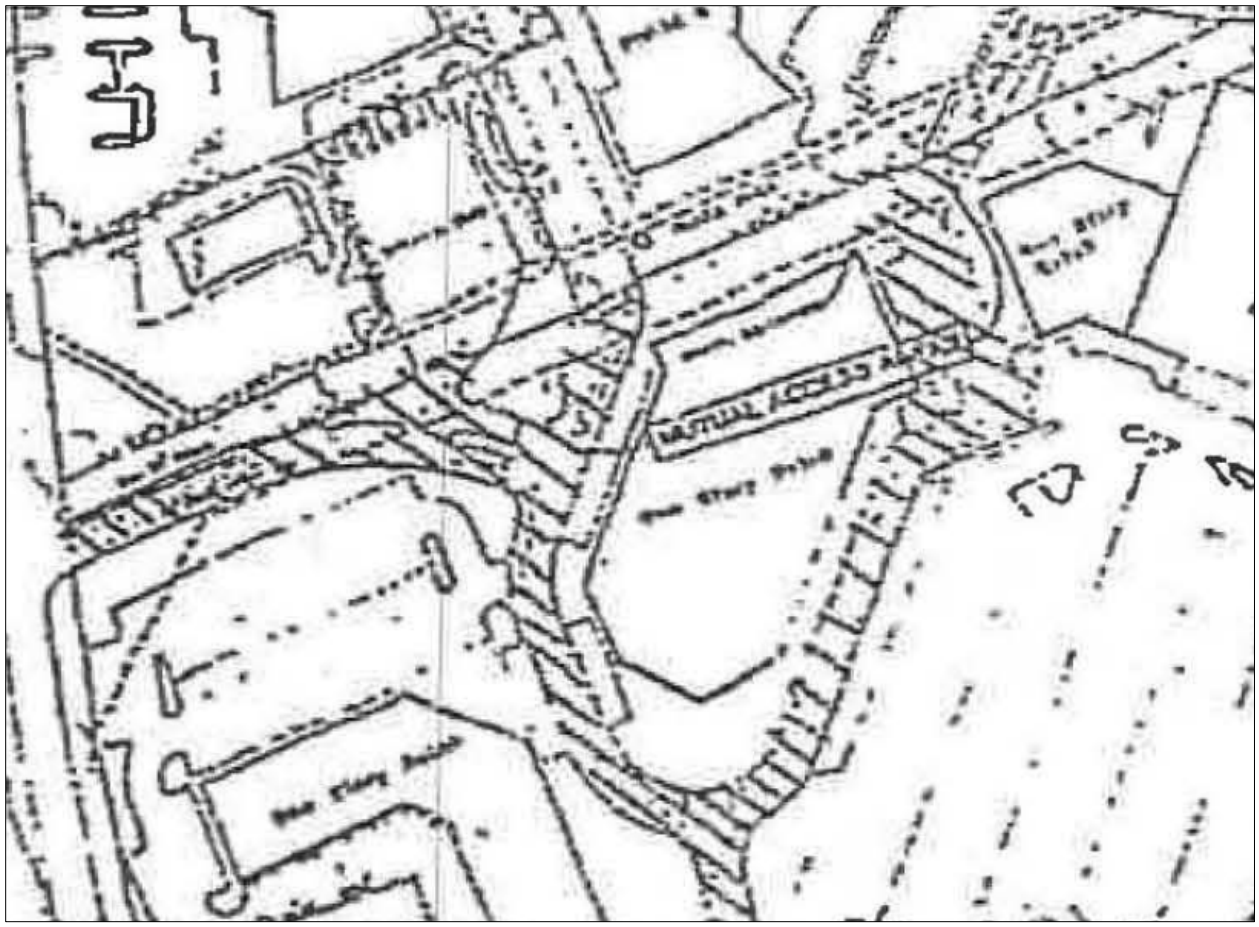
The Perpetual Easement Agreement was executed in 1981 by the then-owners of the north and south tracts, and it recites that the parties would be mutually benefited by granting easements to facilitate "ingress and egress to and from" the two tracts. In § 1 of the agreement, the northern tract's owner grants to the southern tract's owner and its tenants and licensees "easements for ingress and egress to and from [the southern tract] on and along the designated driveways located [on the northern tract] and more fully described on Exhibit C attached hereto." Section 1 also grants the northern tract's owner and its tenants and licensees "easements for ingress and egress to and from [the northern tract] on and along the designated driveways [on the southern tract] and more fully described on Exhibit D attached

hereto." According to LSC Towers, Exhibit C shows, or at least supports the conclusion, that Lot 3A was entitled to direct access to a driveway running along Lot 3A's southern side.

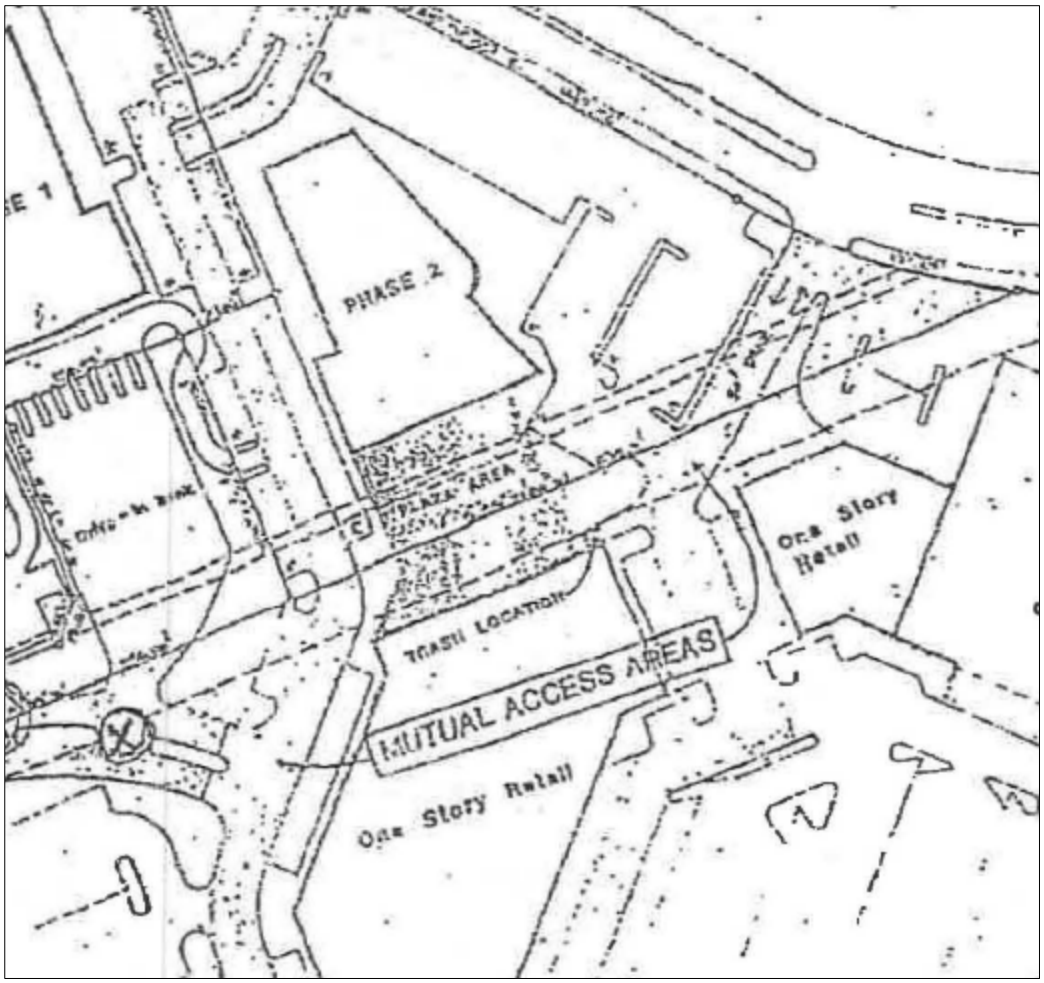
We disagree with LSC Towers' argument. Although the copies of Exhibits C and D in the record are of poor quality, they are clear enough to show that they did not establish an east–west driveway or easement along or near the southern border of Lot 3A. We include copies of the relevant parts of those exhibits below, noting and accepting the assertion in appellants' brief that the driveways are marked on these maps with cross-hatching. First, this is an excerpt from Exhibit C, showing driveways on the northern tract:



And this is an excerpt from Exhibit D, showing driveways on the southern tract:



Contrary to LSC Towers' position, neither Exhibit C nor Exhibit D shows any east–west cross-hatching or driveway in the area where the garbage enclosure was built. Rather, the other maps and the photos in the summary-judgment evidence show that the garbage enclosure was built somewhere in what is marked as "PLAZA AREA" on Exhibit E to the Perpetual Easement Agreement. The Plaza Area is shown near the center of the following excerpt from Exhibit E:



Because neither Exhibit C nor Exhibit D shows cross-hatching in the area where the garbage enclosure was built, we reject LSC Towers' argument that the Perpetual Easement Agreement created an easement that the garbage enclosure obstructed.

Next, LSC Towers argues that LG Preston "did not conclusively prove its ownership of the driveway in question." That is, LSC Towers argues that the evidence leaves open the possibility that the garbage enclosure is on an easement on land that actually belongs to appellants rather than to LG Preston. LSC Towers further argues that the 1994 Memorandum of Agreement, which modified the

Perpetual Easement Agreement, provides additional evidence that the garbage enclosure was actually built on appellants' land rather than on LG Preston's land. However, we do not read appellants' brief to argue that the 1994 Memorandum of Agreement itself created an easement that the garbage enclosure obstructed. Appellees respond that appellants judicially admitted LG Preston's ownership of that land in their live pleading. LSC Towers denies that appellants' live pleading contained such an admission.

Having reviewed appellants' live pleading, we reject appellees' contention that appellants judicially admitted that appellees own the garbage-enclosure site. Nevertheless, even if there is a fact question regarding who owned the land on which the garbage enclosure was built, LSC Towers' Perpetual Easement Agreement claim still depends on the premise that the Perpetual Easement Agreement created an access easement to the south of the cell-tower lot that the garbage enclosure obstructed. As explained above, we disagree that the Perpetual Easement Agreement created such an easement.

Finally, LSC Towers asserts that the MDA and the Perpetual Easement Agreement should be read together because they were signed on the same day and deal with the same tracts and similar topics. Although we do not disagree, we do not see how the MDA changes our analysis of the Perpetual Easement Agreement.

Because appellees conclusively showed that the garbage enclosure was not built on an easement in violation of the Perpetual Easement Agreement, the trial

judge did not err by granting summary judgment on LSC Towers' claims that appellees breached that agreement. Accordingly, we need not discuss any other summary-judgment grounds attacking those claims.

b. Conclusion

We overrule appellants' issue 1(b).

5. Issue 1(c): LSC Towers' Breach-of-Contract Claims Based on the 1999 Ground Lease and the 2014 Ground Lease Extension

Appellees' summary-judgment motion raised four grounds applicable to appellants' breach-of-contract claims based on the 1999 Ground Lease and its 2014 extension:

1. Appellees did not breach these agreements because the 1999 Ground Lease did not create an easement that prohibited the building of the garbage enclosure.
2. Appellees did not breach these agreements because the 1999 Ground Lease terminated in 2014 and LG Preston did not accede to the 2014 Ground Lease Extension.
3. Under the 1999 Ground Lease and the 2014 Ground Lease Extension, only the cell-tower lot's tenant, SBA, had the right to enforce the easement.
4. Appellants had no damages.

Only appellant LSC Towers challenges these grounds on appeal.

a. Did LG Preston conclusively negate LSC Towers' claim for breach of the 1999 Ground Lease and the 2014 Ground Lease Extension?

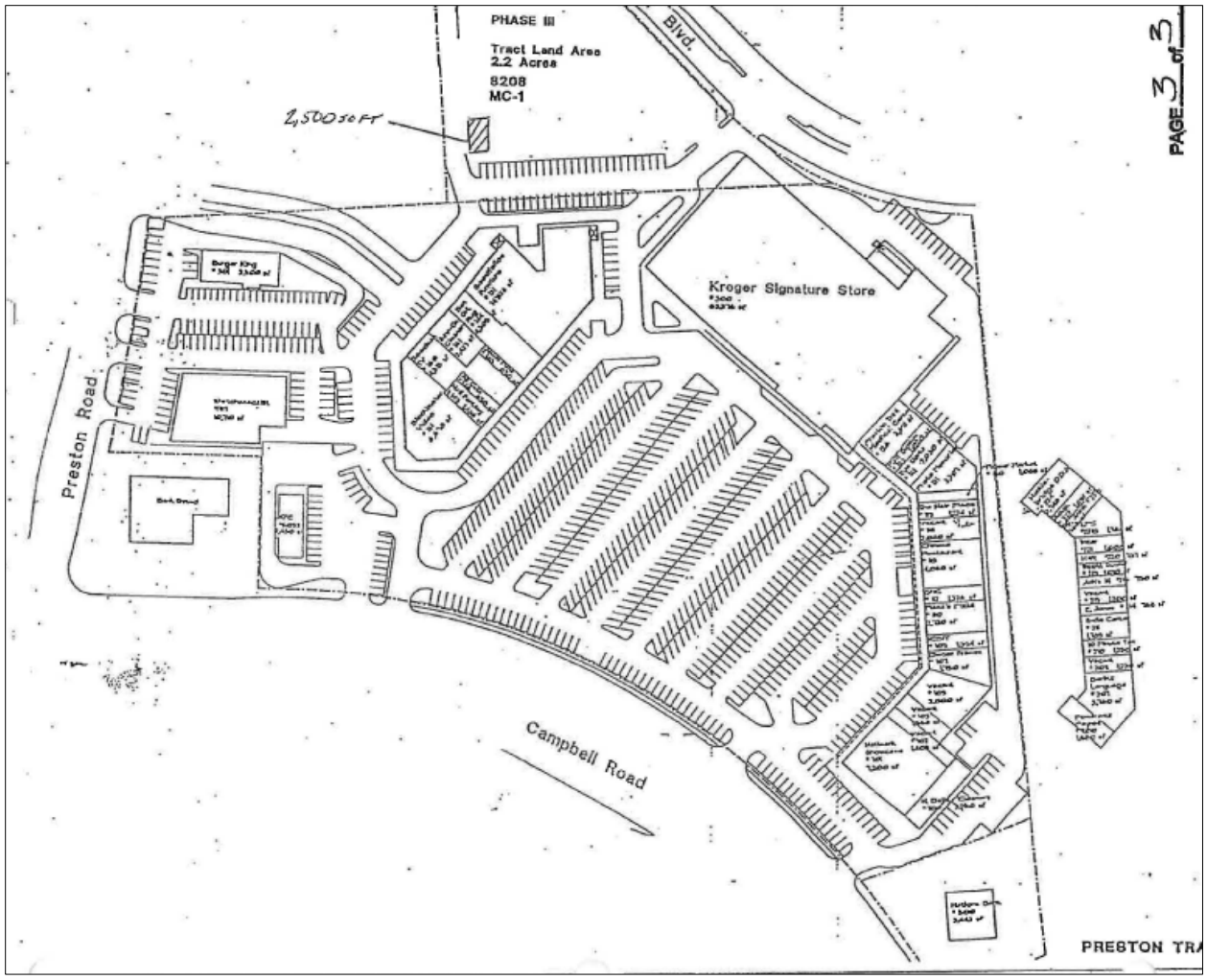
LSC Towers argues that the evidence raised genuine fact issues as to whether (1) the 1999 Ground Lease created an easement south of the cell-tower lot, (2) the

2014 Ground Lease Extension effectively extended the duration of that easement as against LG Preston such that the 2016 construction of the garbage enclosure obstructed an existing easement, and (3) LSC Towers, and not just SBA, has the right to enforce the easement.

(1) Is there a genuine fact issue as to whether the 1999 Ground Lease created an access easement to the south of the cell-tower lot?

First, we conclude that there is a genuine fact issue as to whether the 1999 Ground Lease created an access easement to the cell-tower lot from the south.

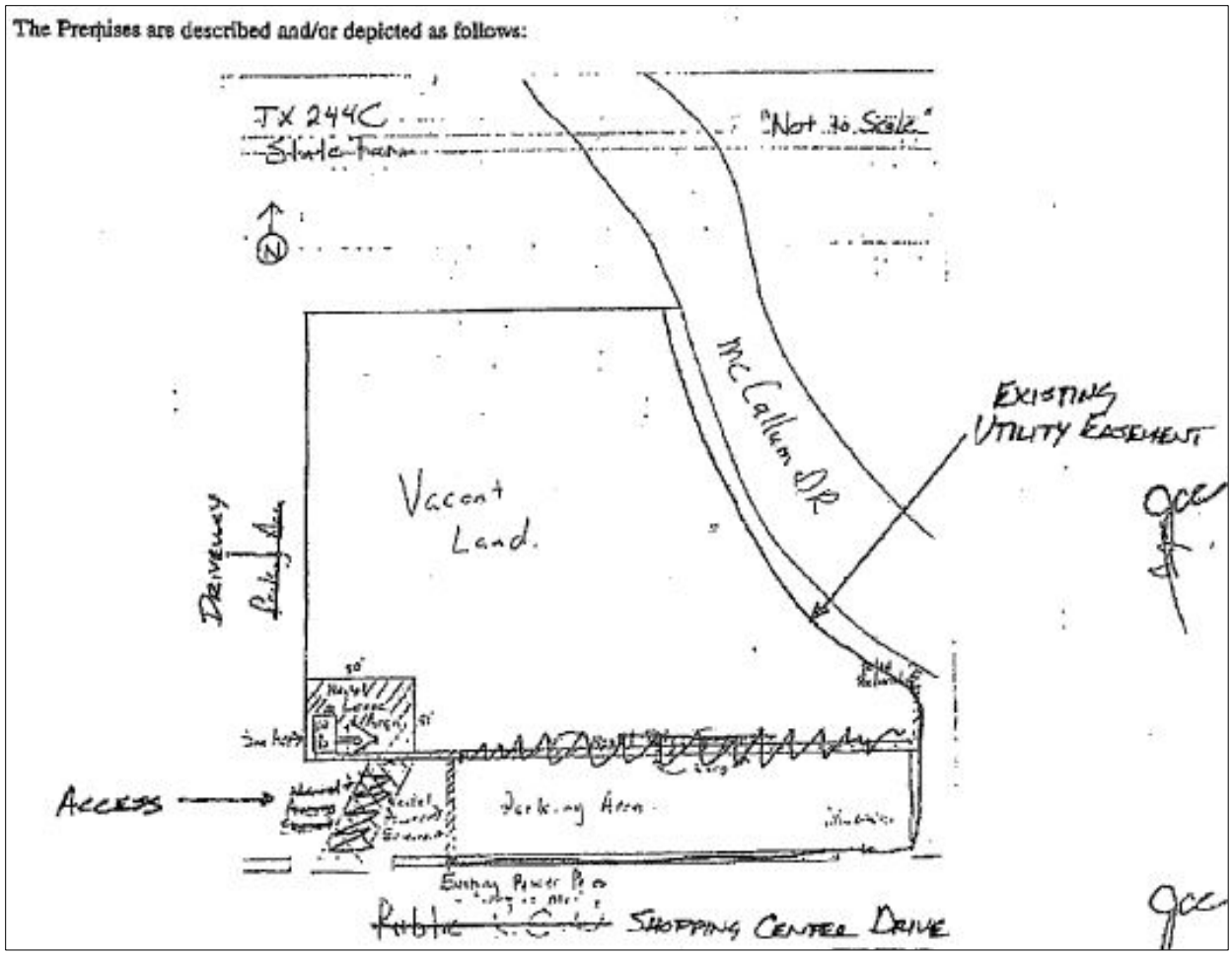
Evidence showed that Landor and Nextel entered the 1999 Ground Lease on August 10, 1999. The 1999 Ground Lease states that Landor owned the land commonly known as Preston Trail Shopping Center and was leasing approximately 2,500 square feet of that land to Nextel. Exhibit A to the lease includes the following map of the shopping center, which appears to show the location of the leased lot near the top center of the map, just north of a row of parking spaces:



Section 6(c) of the 1999 Ground Lease gives Nextel easement and access rights across Landor's land so that Nextel can reach the leased premises:

> [Nextel] shall have access to the Premises without notice to Lessor twenty-four (24) hours a day, seven (7) days a week, at no charge. Lessor grants to [Nextel] a non-exclusive right and easement for pedestrian and vehicular ingress and egress across the Land. Lessor reserves the right to maintain on the Land driveways, drive [a]isles and the like. So long as access is provided to the Premises, access shall be across such drive [a]isles, driveways and the like as may be located on the Land from time to time.

Moreover, Exhibit B to the 1999 Ground Lease can reasonably be construed to give Nextel access to the cell-tower lot specifically from the south:



Although what might be a drawn pathway leading to the cell-tower lot from the south is scratched out, the word "Access" with an arrow pointing to that same area is not scratched out. This leads us to conclude that the map is at least ambiguous as to whether the 1999 Ground Lease created an access easement to the south of the cell-tower lot. And "[w]hen a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue." *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983); *see also id*. (a contract is ambiguous if its meaning is uncertain and doubtful or if it is reasonably susceptible to more than one meaning); *Wunderlick v. Wilson*, 406

S.W.3d 212, 214 (Tex. App.—Dallas 2013, no pet.) (court may conclude that contract is ambiguous even if neither party pleads ambiguity).

(2) Is there a genuine fact issue as to whether the 2014 Ground Lease Extension extended the existence of the easement as against LG Preston?

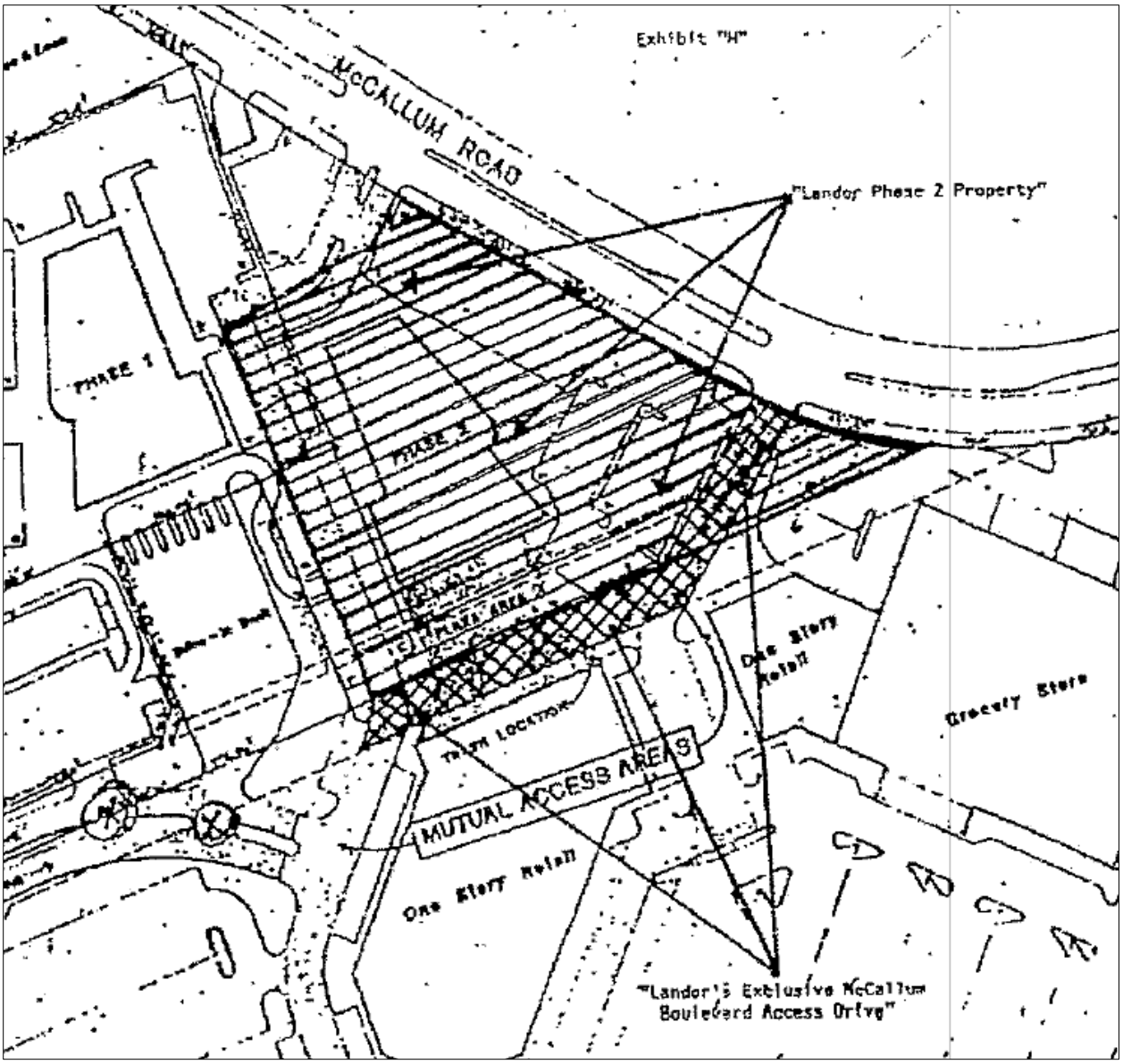
Next, we conclude that there is a genuine fact issue as to whether the 2014 Ground Lease Extension, which purported to extend the 1999 Ground Lease for at least five years beyond its expiration date of July 31, 2014, extended the existence of the access easement as against LG Preston.

LSC Towers presents three arguments as to why there is a genuine fact issue regarding the continued existence and enforceability of the easement after the execution of the 2014 Ground Lease Extension. We agree with its first argument and do not address the others.

LSC Towers argues that LG Preston did not conclusively prove that LG Preston, rather than LSC Towers, owned the land where the garbage enclosure was built. And if LSC Towers owned that land, it had the right to extend the duration of the easement that the 1999 Ground Lease arguably created. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) ("A landowner may choose to relinquish a portion of the right to exclude by granting an easement . . . ."). In appellees' brief, LG Preston responds that appellants judicially admitted in their live pleading that LG Preston owns the garbage-enclosure site. In appellants' reply brief, LSC Towers denies the judicial admission.

As mentioned above, we conclude that appellants' live pleading does not judicially admit that LG Preston owns the land on which the garbage enclosure was built. A judicial admission must be a clear, deliberate, and unequivocal statement. *City of Dallas v. Hillis*, 308 S.W.3d 526, 531 (Tex. App.—Dallas 2010, pet. denied). Appellees point to no such statement, instead offering a general reference to six pages of appellants' live petition. We see no clear statement that appellees owned the land on which the garbage enclosure sits. To the contrary, the live petition contains allegations that are consistent with a claim that appellants own all or part of the land that the garbage enclosure occupies, such as an allegation that the enclosure comes within 18 inches of the cell-tower access gate and an allegation that appellants notified appellees "of the encroachment and/or trespass on Lot 3A . . . and the Easement caused by the Garbage Enclosure."

Moreover, we conclude that there is evidence raising a fact issue as to whether appellants own the land on which the garbage enclosure sits. Specifically, the summary-judgment evidence includes the 1994 Memorandum of Agreement, which modified the Perpetual Easement Agreement regarding easements, and that document includes the following map as an exhibit:



The 1994 Memorandum of Agreement states that Landor owns both the Landor Phase 2 Property shown above and "Tract B," and the other party to the agreement, Equitable Bank, agrees that it has no rights regarding the area designated "Landor's Exclusive McCallum Boulevard Access Drive." The 1994 Memorandum of Agreement further states that if the Landor Phase 2 Property and Tract B ever come to have different owners, then Landor's Exclusive McCallum Boulevard Access Drive shall be for the sole benefit of Tract B, with Tract B as the dominant land and

Landor Phase 2 Property as the servient land. Because the Landor Phase 2 Property is made the servient land with respect to the Landor's Exclusive McCallum Boulevard Access Drive, this implies, as LSC Towers argues, that Landor's Exclusive McCallum Boulevard Access Drive is actually on the Landor Phase 2 Property. Considering these portions of the 1994 Memorandum of Agreement along with the other maps and photographs in the record, we conclude that there is a genuine fact issue as to whether appellants' land and, more particularly, the cell-tower lot extend south far enough to include some or all of the arguable easement under the 1999 Ground Lease and the garbage-enclosure site.

Because there is a genuine fact issue as to whether LSC Towers owns all or part of the arguable easement and the garbage-enclosure site, there is also a genuine fact issue as to whether LSC Towers possessed the right to unilaterally extend the existence of the easement by means of the 2014 Ground Lease Extension.

(3) Is there a genuine fact issue as to whether LSC Towers had the right to enforce the easement?

Next, LSC Towers addresses appellees' third summary-judgment ground: that only SBA, the successor cell-tower-lot tenant, had the right to enforce any easement created by the 1999 Ground Lease. LSC Towers proffers two reasons that this ground is invalid: (1) if the easement was on LG Preston's property, then LSC Towers had the dominant estate and had the right to sue to enforce the dominant estate's rights, and (2) under the 1999 Ground Lease, the owner of the cell-tower lot owed the tenant a duty to provide access to that lot, so the ability to enforce the

easement came with that duty. We conclude that LSC Towers has not established the correctness of either of its arguments.

First, LSC Towers asserts that "[a]s the owner of the dominant estate, LSC has the right to bring suit to enforce the rights of the dominant estate." Assuming without deciding that this is a correct statement of the law regarding the rights of a dominant-estate owner, we conclude that LSC Towers does not demonstrate that it is, or was during the lease's effective period, the owner of the dominant estate. To the contrary, the 1999 Ground Lease grants to "Lessee," i.e., Nextel and, later, SBA, "a non-exclusive right and easement for pedestrian and vehicular ingress and egress" across the surrounding land. This makes the cell-tower-lot tenant the holder of the dominant estate and makes the owner(s) of the surrounding land the holder(s) of the servient estate. *See Severance v. Patterson*, 370 S.W.3d 705, 721 (Tex. 2012) ("*[T]he easement holder is the dominant estate owner*[,] and the land burdened by the easement is the servient estate . . . .") (emphasis added). And the 1999 Ground Lease provides that it "shall run with the property and shall be binding upon and inure to the benefit of the parties, their respective successors, . . . and assigns." Thus, it appears that LSC Towers and LG Preston are, or were during the lease's effective period, both servient-estate owners. Although LSC Towers cites cases for general principles of easement law and the law of standing to sue, it cites no cases or evidence to show that it, as lessor, was the dominant-estate holder of any easement

created by the 1999 Ground Lease. Accordingly, we reject LSC Towers' argument. *See* TEX. R. APP. P. 38.1(i).

In LSC Towers' second argument, it acknowledges that the owner of the cell-tower lot (i.e., LSC Towers itself) owed a duty to provide the tenant with access to that lot. Then it asserts that "[a]long with that duty came the ability to enforce the easement. And the two concepts are paired—a duty to provide access and the ability to take legal steps to ensure that the duty is fulfilled." But LSC Towers cites no legal authority in support of these assertions, and they are not self-evidently true. Accordingly, we reject LSC Towers' argument. *See* TEX. R. APP. P. 38.1(i).

b. Conclusion

We overrule appellants' issue 1(c).

C. Issue 1(d): Did the trial judge err by granting summary judgment against appellants on their claims for tortious interference with existing contracts?

Appellees sought summary judgment on appellants' claims for tortious interference with existing contracts on three grounds:

1. statute of limitations;
2. lack of interference or causation with regard to one particular offer to buy appellants' property; and
3. LG Preston's acts were justified.

Appellants challenge the summary judgment on their tortious-interference claims. For the reasons that follow, we reject appellants' arguments as to the statute-of-limitations ground and need not address the others.

1. Applicable Law and Established Facts

A defendant moving for summary judgment based on limitations must conclusively establish the elements of that defense, including when the cause of action accrued. *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019). "The defendant must also conclusively negate . . . any tolling doctrines pleaded as an exception to limitations." *Id*. (footnote omitted).

Appellees argued in the trial court, and appellants do not dispute on appeal, that a two-year statute of limitations applies to appellants' tortious-interference claims. *See First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986) (two-year statute applies to "suits for tortious interference with business relations").

Additionally, appellees argued in the trial court, and appellants do not dispute on appeal, that the evidence established that the garbage enclosure was substantially complete and blocked the cell-tower-lot access gate on June 25, 2015. Appellants do not dispute that their tortious-interference claims accrued on that date. The record further establishes that appellants filed this lawsuit on June 14, 2018, which was more than two years later.

Finally, the record contains evidence regarding a similar prior lawsuit that appellants filed against appellees in federal court. Appellants filed an affidavit stating that they sued appellees in federal court on January 31, 2017, and that the federal case was later dismissed for lack of subject-matter jurisdiction. Appellees

filed a copy of appellants' first amended federal complaint, filemarked April 18, 2017, which shows that appellants' federal lawsuit was based on the same facts as the instant case and that appellants asserted some of the same legal theories of liability against appellees in both cases.

2. The Filing of the Federal Lawsuit

Appellants first argue that their filing of the federal lawsuit within two years after their tortious-interference claims accrued interrupted the running of limitations. We reject this argument.

The evidence shows that the federal lawsuit was dismissed. When a case is refiled after a dismissal, the date of refiling is the controlling date for determining whether limitations has run. *See Rodriguez v. Crutchfield*, 301 S.W.3d 772, 775 (Tex. App.—Dallas 2009, no pet.) ("When a case is refiled following dismissal, the statute of limitations is calculated at the date of refiling."). Appellants do not dispute that they filed this suit more than two years after their tortious-interference claims accrued. We conclude that evidence of the filing of the federal lawsuit, standing alone, does not defeat appellees' limitations defense.

3. Section 16.064

Appellants' only other statute-of-limitations argument is that appellees failed to conclusively negate the possibility that limitations was tolled under Texas Civil Practice and Remedies Code § 16.064. That statute provides that, under certain circumstances, the running of limitations is suspended for the period between the

date an action is filed in one trial court and the date of a second filing of the same action in a different court. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064.

The threshold question for this argument is whether it was preserved in the trial court. Appellants did not plead § 16.064 or any other tolling doctrine in their live petition. Nor did they invoke § 16.064 or any other tolling doctrine in their summary-judgment response. Appellants' only limitations argument in their summary-judgment response was that their claims did not accrue until SBA terminated the lease in December 2016. They do not raise that argument on appeal, so we do not consider it. *See Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015) (holding that a court of appeals may not raise grounds for reversal that were not briefed or argued in the appeal).

Appellants argue that their § 16.064 argument was preserved in the trial court via trial by consent. The trial-by-consent doctrine applies to summary-judgment practice. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991). For example, an unpleaded affirmative defense is tried by consent if the movant asserts the defense as a summary-judgment ground and the nonmovant does not object. *See id*. Similarly, a limitations tolling doctrine like the discovery rule can be tried by consent if the nonmovant raises it for the first time in its summary-judgment response and the movant does not object. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam).

Appellants rely on the following facts in support of their trial-by-consent argument:

- appellees filed appellants' amended federal complaint as summary-judgment evidence;
- appellees referred to the federal case repeatedly in their summary-judgment motion; and
- appellants filed a summary-judgment affidavit that recited that the federal action was dismissed for lack of jurisdiction.

However, appellees did not rely on the amended federal complaint for any limitations-related purpose, but rather for the admissions it contained and the many pertinent documents that appellants had attached to it as exhibits. And appellants did not argue in their summary-judgment response that the federal action tolled limitations; rather, they mentioned the federal action (and its dismissal for lack of subject-matter jurisdiction) only to rebut appellees' alleged insinuation that the federal dismissal showed that the instant action was frivolous. In sum, neither the summary-judgment motion nor the response argued that the federal action had anything to do with limitations.

We conclude that appellants forfeited their § 16.064 argument by not raising it in their summary-judgment response. Under the summary-judgment rule, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). This means that the nonmovant's written answer or response to the motion must fairly apprise the movant and the trial judge of the issues that the nonmovant

contends should defeat the summary-judgment motion. *Burruss v. Citibank (S.D.), N.A.*, 392 S.W.3d 759, 761 (Tex. App.—Dallas 2012, pet. denied). Appellants' summary-judgment response did not fairly apprise appellees or the trial judge that § 16.064 defeated appellees' limitations argument. *See Purser v. Coralli*, No. 05-15-00359-CV, 2016 WL 6087675, at *2–3 (Tex. App.—Dallas Oct. 18, 2016, no pet.) (mem. op.) (nonmovant's summary-judgment response did not expressly present fraudulent-concealment defense to limitations, even though response mentioned fraudulent concealment in support of request for continuance); *see also Drake v. Consumers Cty. Mut. Ins.*, No. 05-13-00170-CV, 2015 WL 2182682, at *8 (Tex. App.—Dallas May 8, 2015, pet. denied) (mem. op.) (plaintiff raised § 16.064 too late by asserting it for the first time in an amended motion for new trial).

Appellants cite an Amarillo case for the proposition that a summary-judgment nonmovant can raise and preserve an unpleaded limitations tolling doctrine merely by filing summary-judgment evidence regarding that doctrine. *See Godwin v. Ties*, No. 07-96-0361-CV, 1997 WL 460726, at *4 (Tex. App.—Amarillo Aug. 13, 1997, no pet.) (not designated for publication). Because the nonmovants in *Godwin* invoked the relevant tolling statute in their summary-judgment response, *see id*. at *5, the proposition appellants rely on is dicta, and the *Godwin* opinion has "no precedential value" in any event, *see* TEX. R. APP. P. 47.7(b). Moreover, even assuming that summary-judgment evidence can, by itself, satisfy the express-presentment requirement of Rule 166a(c), the evidence in question would have to

fairly apprise the movant and trial judge of the new issue being injected into the proceedings. *See Burruss*, 392 S.W.3d at 761. In this case, the parties referenced the evidence about the federal lawsuit for specific purposes unrelated to limitations or tolling, and the evidence itself did not expressly present tolling issues. We conclude that § 16.064 was not tried by consent and was not preserved for appeal.

4. Conclusion

Because appellants have not shown that the summary judgment on their tortious-interference claims was erroneous on limitations grounds, we need not address appellees' other grounds. We overrule appellants' issue 1(d).

D. Issue 1(e): Did the trial judge err by granting summary judgment against appellants on their claims for civil conspiracy?

Appellees sought summary judgment on appellants' claims for civil conspiracy on two grounds:

1. statute of limitations, and
2. appellants' inability to establish any underlying tort claim.

As to limitations, appellants rely solely on the arguments they present in opposition to the summary judgment on their tortious-interference claims. We have rejected those arguments above and need not repeat our analysis here. We conclude that appellants have not shown that the limitations ground for summary judgment was an incorrect basis for summary judgment on their civil-conspiracy claims. Accordingly, we overrule appellants' issue 1(e).

E. Issue 1(f): Did the trial judge err by granting summary judgment against appellants on their declaratory-judgment claims?

1. Summary of the Parties' Positions and *Malooly* Analysis

In appellants' live petition, they sought declaratory judgments on the following issues:

- the parties' rights and obligations under the MDA;
- the parties' rights and obligations under the Perpetual Easement Agreement and the 1994 Memorandum of Agreement;
- the parties' rights and obligations "under the easement as shown above," apparently meaning under the various written instruments affecting the land in question;
- whether appellants are entitled to a declaration that an easement by dedication or prescription existed across appellees' property to allow appellants' lessee to access the cell-tower site; and
- whether appellant (which one is unspecified) is entitled to a declaration that an easement by necessity, prescription, or dedication exists across a tract of land allegedly owned by appellees to allow appellant to access its real property.

Appellees presented five grounds for summary judgment as to appellants' declaratory-judgment claims, which we quote:

> (1) None of the Defendants own any of the land relevant to the dispute; thus, there is no justiciable controversy for the Court to decide;
>
> (2) Plaintiffs' tort and contract based claims negate a declaratory judgment claim as a matter of law;
>
> (3) Interpretation of the plain language of the "Agreements" confirms no easement exists in the area of dispute;
>
> (4) No basis for declarations of "alternative easements" exist[s] because:

(i) Lovell has no basis to ask for "Cell Tower Access;"
(ii) LSC has no basis to ask for access to the area in dispute; and
(iii) There is no factual basis to ask for easements by prescription, necessity, or dedication.

(5) Defendants should be awarded discretionary attorneys' fees.

(Footnotes omitted.)

In their opening appellate brief, appellants expressly address grounds (1) and (2) under their issue 1(f), and they address ground (5) in issue 2.

In their brief, appellees argue that appellants have forfeited their declaratory-judgment claims by failing to address summary-judgment grounds (3) and (4). *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (affirming general summary judgment because appellant did not challenge every independent ground that could support it); *see also Rosetta Res. Operating, LP v. Martin*, 645 S.W.3d 212, 226 (Tex. 2022) ("When a trial court's order granting summary judgment does not specify the grounds on which its order is based, the appealing party must negate each ground upon which the judgment could have been based.").

In their reply brief, appellants argue that they sufficiently challenged appellees' third ground because (1) appellants' opening brief broadly stated issue 1 as "Did the trial court err in granting a take-nothing summary judgment for Appellees?" and (2) appellants' breach-of-contract briefing, which is devoted to proving that the various agreements concerning these tracts of land created certain rights and duties, applies equally to appellees' third summary-judgment ground

attacking appellants' declaratory-judgment claims. They do not contest appellees' contention that appellants' opening brief did not address summary-judgment ground (4), which concerned non-contract-based easements. Indeed, appellants abandoned those theories in footnote three of their opening brief.

We reject appellees' *Malooly* argument. The supreme court has made it clear that the courts of appeals should construe briefs liberally, so as to reach the merits of an appeal whenever reasonably possible. *See, e.g.*, *St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020) (per curiam). We must look not only at the wording of the parties' issues but also at the parties' arguments, evidence, and citations "to determine which issues the parties intended to and actually briefed." *Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, 614 S.W.3d 729, 733 (Tex. 2020) (per curiam).

Here, appellants thoroughly briefed, in connection with their breach-of-contract claims, their contention that the various agreements concerning this land created duties that the garbage enclosure violated. Their opening brief also included a statement that appellants intended to attack every possible ground for summary judgment as to the causes of action they addressed in that brief. And they presented other arguments seeking reversal of the summary judgment on their declaratory-judgment claims, so plainly they intended to attack that judgment. Under these circumstances, we conclude that appellants' breach-of-contract arguments should be considered as equally directed to appellees' summary-judgment ground (3) attacking

appellants' claims for a declaratory judgment that the garbage enclosure violated contractual duties. Accordingly, we reject appellees' *Malooly* argument as to appellants' contract-based declaratory-judgment claims.[1]

2. The Merits of Appellants' Contract-Based Declaratory-Judgment Claims

We will address appellees' third summary-judgment ground first.

We concluded in our analyses of issues 1(a), 1(b), and 1(c), that there is a genuine issue of material fact as to whether LSC Towers has a viable contract claim against LG Preston for breach of the MDA. For the same reasons given in that analysis, we conclude that there is a genuine issue of material fact as to whether LSC Towers is entitled to a declaratory judgment in its favor regarding its and LG Preston's rights and duties under the MDA.

However, we are affirming summary judgment as to Lovell FLP's breach-of-contract claim based on the MDA, on the ground that Lovell FLP had no damages from any breach of the MDA. Although the absence of damages, standing alone, might not be a valid reason to deny a declaratory-judgment claim, *see* CIV. PRAC. & REM. § 37.004(b) (court can construe a contract even before there is a breach), we conclude in our discussion of mootness below that Lovell FLP's declaratory-judgment claim regarding the MDA is moot. Accordingly, we conclude that

[1] Appellants filed a motion for leave to supplement their opening brief if we agree with appellees' *Malooly* argument. Having rejected appellees' *Malooly* argument, we deny by separate order appellants' motion for leave to supplement their opening brief.

appellants have not shown that the trial judge erred by granting summary judgment as to Lovell FLP's MDA-based declaratory-judgment claim.

We further concluded above that appellants have not shown error in the granting of summary judgment on their breach-of-contract claims based on other agreements. Accordingly, we conclude that the trial judge did not err by granting summary judgment as to the remainder of appellants' contract-based declaratory-judgment claims.

We proceed to address appellees' other summary-judgment grounds.

3. Is LSC Towers' declaratory-judgment claim regarding the MDA barred because it is duplicative of its breach-of-contract claim?

LSC Towers first addresses appellees' summary-judgment ground that declaratory relief is improper as a matter of law if a breach-of-contract claim is also available.[2] LSC Towers contends that this is simply not the law in Texas, relying on cases such as *MBM Financial Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660 (Tex. 2009).

Appellees repeat their trial-court argument that LSC Towers' declaratory-judgment claims were properly dismissed as duplicative of its contract claims. For support, they cite, as they did in the trial court, *Etan Industries, Inc. v. Lehmann*, 359 S.W.3d 620 (Tex. 2011) (per curiam).

[2] We do not address this ground as to Lovell FLP because we conclude below that its MDA-based declaratory-judgments claim is moot.

We agree with LSC Towers that its declaratory-judgment claim regarding the MDA is not barred by the fact that it simultaneously sued for breach of the MDA. The following passage from *MBM Financial* is closely on the point:

> . . . MBM argues that declaratory judgments are available only if there is no adequate alternative cause of action. But this has never been the rule in Texas. . . . [P]rohibiting declaratory judgments whenever a breach of contract claim is available would negate the [UDJA's] explicit terms covering such claims.

292 S.W.3d at 669 (footnote omitted). Moreover, the supreme court recently discussed *MBM Financial* and stated specifically that the UDJA "authoriz[es] the joinder of claims for breach of contract and declaratory relief in the same suit." *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 268 (Tex. 2021).

Although there is language in *Etan Industries* that supports LG Preston's position, that opinion does not purport to overrule *MBM Financial*. It is the supreme court's prerogative to overrule its own decisions if it determines that another line of decisions has rejected its prior reasoning. *In re Fort Apache Energy, Inc.*, 482 S.W.3d 667, 669 (Tex. App.—Dallas 2015, orig. proceeding). In any event, the supreme court's clear statement of law contrary to appellees' position in last year's *Allstate* opinion confirms that appellants' argument is correct.

We conclude that LSC Towers' assertion of contract claims did not bar it from also asserting declaratory-judgment claims regarding the rights and duties created by the same contracts.

4. Are appellants' declaratory-judgment claims regarding the MDA barred because they are moot?

Finally we consider appellees' summary-judgment ground that there is no justiciable controversy between appellants and LG Preston because LG Preston has sold all of the land bordering on appellants' land. *See Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523, 527 (Tex. 2019) (case becomes moot if there ceases to be a justiciable controversy between the parties).

Appellants argue that LG Preston's mootness argument fails for three reasons:

1. the UDJA expressly authorizes a suit for declaratory relief regarding contract construction "either before or after there has been a breach," CIV. PRAC. & REM. § 37.004(b);

2. declaratory relief is available even after the parties' relationship has ended; and

3. even if appellants' claims for declaratory relief are moot, their claims for attorney's fees under the UDJA are not moot.

LG Preston insists that its sale of the property adjacent to appellants' property destroyed any justiciable controversy between it and appellants. It cites, among other authorities, the supreme court's statement that "'[t]here is no basis for declaratory relief when a party is seeking in the same action a different, enforceable remedy, and a judicial declaration would add nothing to what would be implicit or express in a final judgment for the enforceable remedy.'" *Kyle v. Strasburger*, 522 S.W.3d 461, 467 n.10 (Tex. 2017) (per curiam) (quoting *Universal Printing Co. v. Premier Victorian Homes, Inc.*, 73 S.W.3d 283, 296 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)).

As to LSC Towers, we agree that its claim against LG Preston for declaratory relief relating to the MDA is not moot. Under the UDJA, "[a] contract may be construed either before or after there has been a breach." CIV. PRAC. & REM. § 37.004(b). And, as discussed above, the UDJA "authoriz[es] the joinder of claims for breach of contract and declaratory relief in the same suit." *Allstate Ins. Co.*, 627 S.W.3d at 268; *see also MBM Fin.*, 292 S.W.3d at 667–71 (award of declaratory relief was proper even though duplicative of contract and fraud claims; however, attorney's fees could not be recovered under UDJA). Finally, although the *Kyle* case does contain the passage quoted in the foregoing paragraph, the same case held that the plaintiff's "declaratory-judgment claims are not moot to the extent they underlie other pending claims." 522 S.W.3d at 467 (footnote omitted); *see id*. at 467 n.10 (reaffirming that declaratory-judgment claims were not moot and expressing no opinion whether the plaintiff might be precluded from pursuing them alongside other claims for relief). Here, LSC Towers' claim for declaratory relief regarding the parties' rights and duties under the MDA underlies its pending breach-of-contract claim based on that same agreement. Accordingly, LSC Towers' declaratory-judgment claim against LG Preston regarding the MDA is not moot.

LG Preston also argues that "[p]ast exposure to illegal conduct does not in itself amount to a present controversy for declaratory relief if unaccompanied by any continuing, present, adverse effects." *Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 327 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). But, as LSC Towers

points out, it has adduced evidence of a continuing, present, adverse effect—loss of rental income from its lot. Thus, the principle stated in *Robinson* does not apply to this case.

We conclude that, as to LSC Towers, the proper construction of the MDA remains a live controversy in this case, so LSC Towers' declaratory-judgment claim against LG Preston regarding the MDA is not moot.

As to Lovell FLP, however, we cannot see any basis for concluding that its declaratory-judgment claim regarding the MDA is not moot. We have affirmed the summary judgment on Lovell FLP's MDA-based breach-of-contract claims, and we cannot see how a declaratory judgment about the MDA in Lovell FLP's favor would have any practical effect on the parties at this point. Accordingly, we conclude that the trial judge did not err by granting summary judgment against Lovell FLP on its MDA-based declaratory-judgment claim.

F. Conclusion

The trial judge erred by granting summary judgment against LSC Towers on its breach-of-contract claim and its declaratory-judgment claim against LG Preston to the extent those claims are based on the MDA. Appellants have not otherwise shown error in the summary-judgment order.

IV. Issue Two: Attorney's Fees

After granting summary judgment against appellants on their claims, the trial judge conducted a nonjury trial on appellees' claim for fees under the UDJA. The

trial judge later signed a final judgment awarding appellees $86,622.25 in attorney's fees, plus additional amounts in conditional appellate attorney's fees. The judgment made appellants jointly and severally liable for the fee awards, and it awarded the fees to "Defendants" collectively.

In their second issue on appeal, appellants challenge the awards of attorney's fees. They raise four arguments:

- the fee awards must be reversed if the summary judgment on appellants' declaratory-judgment claims is reversed in whole or in part;
- the trial judge erred by awarding attorney's fees that appellees incurred litigating the prior federal case;
- the trial judge erred by making the awards without sufficient evidence segregating the fees between appellants and among appellees; and
- related to the previous argument, appellees' segregation evidence was conclusory and otherwise did not meet the legal standard required for segregation.

We conclude that the fee award against LSC Towers must be reversed and that this fee issue must be addressed again on remand. We further conclude that the fee award against Lovell FLP exceeds the amount recoverable under the evidence and that a suggestion of remittitur is appropriate as to that award.

A. Effect of Partial Reversal of Summary Judgment

We are reversing in part the summary judgment against LSC Towers on its breach-of-contract and its declaratory-judgment claims. We conclude that we should

also reverse the award of attorney's fees against LSC Towers for the trial court to reconsider during the further proceedings on remand.

The UDJA authorizes the trial judge to award "reasonable and necessary attorney's fees as are equitable and just." CIV. PRAC. & REM. § 37.009. When an appellate court reverses a declaratory judgment, it may reverse an associated attorney's fee award, but it is not required to. *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 455 (Tex. 2015). If the extent to which a party prevailed changes on appeal, the supreme court's practice is to remand the fee issue to the trial court for reconsideration of what is equitable and just. *Farmers Grp., Inc. v. Geter*, 620 S.W.3d 702, 712 (Tex. 2021). We conclude that we should follow that practice in this case. Accordingly, we sustain issue 2 as to LSC Towers. We next consider appellants' other arguments as they relate to the fee award against Lovell FLP.

B. Recovery of Fees in Separate Federal Lawsuit

Lovell FLP argues that the trial judge erred by awarding appellees some of the attorney's fees that they incurred in defending appellants' prior federal lawsuit based on the same facts. Lovell FLP contends that the UDJA does not authorize the recovery of fees incurred in a lawsuit other than the lawsuit containing the UDJA claims. Appellees respond that we should construe the UDJA to permit the award of

fees incurred in connection with another lawsuit involving the same issues. We agree with Lovell FLP.[3]

The UDJA's fee-shifting provision does not expressly answer the question presented. It says, "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." CIV. PRAC. & REM. § 37.009. Appellees point out that § 37.009 does not expressly limit recoverable fees to those incurred in the particular lawsuit itself, unlike some other fee-shifting statutes. *See, e.g.*, *id*. § 27.009(a)(1) (shifting fees "incurred in defending against the legal action"). However, neither does § 37.009 expressly authorize shifting fees incurred in other lawsuits, which would be an unusual version of fee-shifting that we would expect the legislature to authorize specifically if it were intended.

We find no binding case authority construing the statute to permit or forbid the recovery of attorney's fees incurred in a separate lawsuit that ended before the UDJA lawsuit in which the fees are awarded commenced. However, an opinion from the Texarkana Court of Appeals squarely holds that "'[a]ttorney's fees incurred in defending a separate lawsuit cannot be recovered under section 37.009 of the [UDJA], notwithstanding that the separate lawsuit concerned the same issues as

[3] To the extent Lovell FLP was required to preserve this argument in the trial court, we note that it did so in its timely filed motion for new trial by complaining that the fee award included fees incurred in the federal lawsuit.

those in the declaratory judgment suit.'" *In re Estate of Bean*, 206 S.W.3d 749, 765 (Tex. App.—Texarkana 2006, pet. denied) (quoting dicta in *Dalisa, Inc. v. Bradford*, 81 S.W.3d 876, 880 n.2 (Tex. App.—Austin 2002, no pet.), *overruled on other grounds by Bertucci v. Watkins*, No. 03-20-00058-CV, 2022 WL 3328986 (Tex. App.—Austin Aug. 12, 2022, order) (en banc)). Also, a recent opinion from this Court holds that obtaining a favorable judgment in a UDJA case does not authorize fee-shifting in a separate subsequent case. *In re Estate of Buchanan*, No. 05-19-01473-CV, 2020 WL 6791524, at *8 (Tex. App.—Dallas Nov. 19, 2020, no pet.) (mem. op.). Although the instant case involves a UDJA case that follows rather than precedes a separate case, *Estate of Buchanan* suggests that § 37.009 fee-shifting should be limited to fees incurred in the UDJA action itself.

We conclude that the trial judge erred by including in the fee award attorney's fees that appellees incurred in the separate federal lawsuit between the parties.

C. Failure to Segregate Attorney's Fees by Party

Next, Lovell FLP argues that the trial judge erred by awarding appellees their attorney's fees even though appellees failed to segregate them (1) between the two appellants and (2) among the three appellees. *See DMC Valley Ranch, L.L.C. v. HPSC, Inc.*, 315 S.W.3d 898, 906 (Tex. App.—Dallas 2010, no pet.) (party seeking attorney's fees must segregate the fees owed by different parties). Appellees respond that they were not required to segregate their fees because both appellants joined in all of their pleaded requests for declaratory judgment against all three appellees. The

extent to which claims can or cannot be segregated is a mixed question of law and fact for the factfinder. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006) (stating that this question is for the jury). We reject appellants' arguments.

First, we consider whether segregation between the two appellants was required. We note the following salient facts:

- as pleaded, appellants' claims for declaratory relief made no distinctions between the two appellants;
- both appellants sought declaratory relief relating to the parties' rights and obligations under all the agreements involved in this case, regardless of who the parties to any particular agreement were;
- both appellants also sought a declaration of an easement by dedication or prescription, and one appellant, identified only as "Plaintiff," sought a declaration of an easement by necessity, prescription, or dedication; and
- appellees' summary-judgment grounds attacking appellants' declaratory-judgment claims were, for the most part, equally applicable to both appellants.

Additionally, appellants assert in their brief that they both had claims based on the MDA, and they further state that "LSC (but perhaps not Lovell FLP)" had claims regarding the Perpetual Easement Agreement, the 1999 Ground Lease, and the 2014 Ground Lease Extension—leaving open the possibility that both appellants had claims based on all of those agreements as well. Appellants point to no evidence showing that any of appellees' declaratory-judgment attorney's fees would not have been incurred if only one appellant had sued appellees. In sum, this case is

distinguishable from cases like *DMC Valley Ranch*, in which the claimant sued different defendants for breach of different agreements and therefore had to prove different facts against them. 315 S.W.3d at 906. We conclude that the trial judge did not err by concluding that segregation of appellees' attorney's fees between the two appellants was not required.

Next, we consider whether segregation among the three appellees was required. Appellants argue the three appellees were not similarly situated vis-à-vis appellants' declaratory-judgment claims because two appellees (Leon Capital and LG Acquisitions) claimed that they never owned any of the land in question. Although this distinction gave those appellees an additional ground of defense not available to LG Preston, (1) appellants pleaded all of their declaratory-judgment claims against all three appellees, and (2) appellees' summary-judgment grounds regarding declaratory relief were virtually the same for all three appellees. Under these circumstances, we conclude that the trial judge did not err by concluding that segregation of fees among appellees was not required.

D. Failure to Segregate Declaratory-Judgment Fees from Other Fees

Finally, Lovell FLP argues that appellees did not adequately segregate their attorney's fees attributable to appellants' declaratory-judgment claims, which were recoverable, from their attorney's fees attributable to appellants' other claims, which were not. *See Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015) (UDJA fees are subject to segregation requirements). Lovell FLP argues that

appellees' evidence was conclusory and criticizes the methodology that appellees' witness used to justify the amount of fees sought. Appellees contend that their evidence satisfied the segregation standard set forth in *Tony Gullo Motors*.

We reject appellants' argument. Under *Tony Gullo Motors*, the party seeking fees must segregate out fees for legal services that relate solely to a claim for which fees are not recoverable. 212 S.W.3d at 313. If legal services advance both recoverable and unrecoverable claims, the fees for those services are recoverable, and segregation is not required. *Id*. at 313–14. The supreme court explained that a claimant would adequately segregate its fees with testimony that, for example, 95% of certain services would have been required even if no unrecoverable claims had been asserted. *Id*. at 314. Thus, we have observed that "segregation evidence need not be extensive to be sufficient." *Kelly v. Isaac*, No. 05-19-00813-CV, 2020 WL 4746589, at *8 (Tex. App.—Dallas Aug. 17, 2020, pet. denied) (mem. op.); *see also id*. at *9 (attorney testimony that 15% of total fees billed were attributable to specific claim was sufficient to segregate fees).

In this case, one of appellees' attorneys testified about appellees' attorney's fees in this case, and redacted invoices were admitted into evidence. The witness testified that the total amount billed (including the defense of the federal case) was roughly $220,000, and the reasonable and necessary amount of fees after segregation and other deductions was about $84,500, up to just before the bench trial on attorney's fees. He also explained that he and one other attorney went through every

billing entry to deduct time not attributable to the declaratory-judgment claims. The trial judge also admitted into evidence an exhibit showing only the billing entries that appellees were seeking payment for. We have approved the use of a segregation methodology virtually identical to appellees' methodology. *See Anderton v. Green*, No. 05-19-01294-CV, 2021 WL 1115549, at *4 (Tex. App.—Dallas Mar. 24, 2021, no pet.) (mem. op.). We approve it again in this case.

Lovell FLP also complains that appellees' methodology is fatally flawed because of the witness's answer when asked what "metric" he used when deciding, for example, that 2.7 hours of a 3.8-hour entry was attributable to the declaratory-judgment claims. The witness answered:

> Primarily the metric is what is the focus of the lawsuit in terms of risk. And here the metric was what did those easements and contracts actually say and what do they do as opposed to these tortious interference claims that we weren't worried about. So I just know because I was part of the program that was putting the strategy together.

Appellants argue that this passage shows that appellees used an improper "risk-assessment" method of segregating fees instead of the method mandated by *Tony Gullo Motors*. We disagree. Appellants read too much into this short passage of testimony and ignore the rest of the witness's testimony about how the attorneys calculated the reduced, segregated fee. Even the quoted passage supports the proposition that the witness and the other attorney who helped with the segregation analysis were properly looking for work relating to the declaratory-judgment claims—such as analysis of "what did those easements and contracts actually say."

The witness's testimony can reasonably be read to explain that appellees' legal team considered appellants' tort claims to have less merit than their contract and declaratory-judgment claims, which were largely indivisible, and thus spent less time on the tort claims than on the others.

We conclude that the trial judge did not err by concluding that appellees adequately segregated their attorney's fees according to whether they related to appellants' declaratory-judgment claims or not.

E. Relief

Based on the foregoing, we reverse the entire attorney's fee award against LSC Towers.

As to Lovell FLP, we conclude that the inclusion of federal-court fees in the fee award was error. Anticipating this possibility, appellees argue that we can correct the error by suggesting a remittitur that would reduce the fee award from $86,622.25 to $52,583.75, which they contend the evidence shows is the amount appellees incurred litigating declaratory-judgment issues in the current state-court lawsuit. Appellants object to this proposal, arguing that no testimony quantified the exact amount incurred for federal-court fees and that the fees should be reassessed in any event if there is a full or partial reversal of the summary judgment.

We agree with appellees that a suggestion of remittitur is permissible and appropriate on this record. We therefore suggest a remittitur in the amount of

$34,038.50 with respect to the attorney's fees judgment against Lovell FLP. *See* TEX. R. APP. P. 46.3.

V. DISPOSITION

We reverse the trial court's judgment to the extent it orders LSC Towers to take nothing on its claims against LG Preston for breach of contract and declaratory judgment specifically relating to the MDA, and we reverse all of the judgment's awards of attorney's fees against LSC Towers.

Additionally, having concluded that the trial court's award of $86,622.25 as reasonable and necessary attorney's fees against Lovell FLP is excessive by $34,038.50, we suggest a remittitur of the latter amount. If within fifteen days of the date of this opinion, appellees file in this Court a remittitur of $34,038.50 of attorney's fees, we will reform the judgment accordingly and affirm that part of the judgment against Lovell FLP as reformed. If appellees do not timely file such a remittitur, we will reverse the judgment's award of attorney's fees against Lovell FLP and remand for a new trial of that issue.

We affirm the judgment in all other respects.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

200433F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LSC TOWERS, LLC AND LOVELL FAMILY LIMITED PARTNERSHIP, Appellants

No. 05-20-00433-CV V.

LG PRESTON CAMPBELL, LLC, LEON CAPITAL GROUP, LLC, AND LG ACQUISITIONS, LLC, Appellees

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-18-07734.
Opinion delivered by Justice Garcia.
Justices Myers and Molberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part, and we **SUGGEST REMITTITUR** in part.

We **REVERSE** the trial court's judgment to the extent it grants summary judgment against appellant LSC Towers, LLC on its claims against appellee LG Preston Campbell, LLC, for breach of contract and for declaratory judgment to the extent those claims are based on the Master Development Agreement. We also **REVERSE** the judgment to the extent it awards attorney's fees against appellant LSC Towers, LLC. We **REMAND** the case for further proceedings on (1) appellant LSC Towers, LLC's claims against appellee LG Preston Campbell, LLC, for breach of contract and for declaratory judgment to the extent those claims are based on the Master Development Agreement, (2) appellant LSC Towers, LLC's claims against appellee LG Preston Campbell, LLC for attorney's fees under the Uniform Declaratory Judgments Act, and (3) appellees LG Preston Campbell, LLC's, Leon Capital Group, LLC's, and LG Acquisitions, LLC's claims against appellant LSC Towers, LLC for attorney's fees under the Uniform Declaratory Judgments Act.

We **SUGGEST A REMITTITUR** as to that portion of the trial court's judgment awarding appellees LG Preston Campbell, LLC, Leon Capital Group, LLC, and LG Acquisitions, LLC attorney's fees of $86,622.25 against appellant Lovell Family Limited Partnership. If within fifteen days of the date of this Court's opinion, appellees LG Preston Campbell, LLC, Leon Capital Group, LLC, and LG Acquisitions, LLC file in this Court a remittitur with respect to those attorney's fees in the amount of $34,038.50, we will **MODIFY** the trial court's judgment accordingly and **AFFIRM AS MODIFIED** that portion of the trial court's judgment. If appellees LG Preston Campbell, LLC, Leon Capital Group, LLC, and LG Acquisitions, LLC do not timely file such a remittitur, we will **REVERSE** the trial court's judgment with respect to appellees LG Preston Campbell, LLC, Leon Capital Group, LLC, and LG Acquisitions, LLC's attorney's fees assessed against appellant Lovell Family Limited Partnership and **REMAND** the case for further proceedings on appellees LG Preston Campbell, LLC's, Leon Capital Group, LLC's, and LG Acquisitions, LLC's claims for attorney's fees against appellant Lovell Family Limited Partnership.

We **AFFIRM** the trial court's judgment in all other respects.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 30th day of August 2022.