MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brown & Brown Attorneys-at-Law, P.C.,

Appellant-Plaintiff,

v.

Timothy S. Schafer, Schafer & Schafer, and Schafer & Schafer, LLP,

Appellee-Defendants.

November 17, 2021

Court of Appeals Case No. 21A-CT-812

Appeal from the Porter Superior Court

The Honorable Jeffrey L. Thode, Judge

Trial Court Cause No. 64D01-1907-CT-6478

Mathias, Judge.

[1] Brown & Brown Attorneys-at-Law, P.C. ("Brown & Brown"), appeals the trial court's denial of its motion for partial summary judgment with respect to a division-of-fees agreement Brown & Brown had with Schafer & Schafer, LLP ("Schafer & Schafer"). We address the following dispositive issue: whether the designated evidence shows that the parties had a meeting of the minds that their division-of-fees agreement would apply to an award of prejudgment interest.

[2] We affirm.

Facts and Procedural History

[3] In January of 2006, Terry Brown was driving a semi tractor-trailer for his employer, J.B. Hunt Transport, Inc. ("J.B. Hunt"). While traveling on I-65 in snowy conditions, he lost control of the semi, which ended up jackknifed and disabled in the median. An hour later, a vehicle in which Kristen Zak was a passenger slid off the same part of I-65 and crashed into the semi. As a result of the accident, Zak suffered permanent, serious brain damage.

[4] Zak, through her guardian, hired Brown & Brown as counsel on a contingency-fee basis to represent Zak against J.B. Hunt. The contingency-fee agreement entitled Brown & Brown to "40% of whatever sum may be recovered after suit is filed." Appellant's App. Vol. 2 p. 72. In October of 2006, Brown & Brown filed Zak's complaint for negligence. After several years of discovery and pretrial proceedings, in January of 2011 Brown & Brown made a written offer of settlement to J.B. Hunt. However, J.B. Hunt declined the offer, and, in

February of 2011, the court held a jury trial on Zak's complaint. The trial ended in a mistrial.

[5] In May of 2011, Zak hired Schafer & Schafer to represent her with Brown & Brown. The two firms initially had an oral agreement "to divide the [attorney] fees 50-50." Appellees' App. Vol. 2 p. 72. The court held a second jury trial in October of 2014. That trial also ended in a mistrial.

[6] In March of 2015, Schafer & Schafer asserted to Brown & Brown that the services being performed by the two firms were no longer evenly divided. Brown & Brown then drafted a new, written agreement on the division of attorney fees, which Schafer & Schafer accepted. The written division-of-fees agreement stated, in relevant part, as follows:

> 1. The client retained and . . . employed [Brown & Brown] as her attorneys . . . pursuant to the parties' contingent fee agreement . . . .
>
> 2. Pursuant to the Rules of Professional Conduct, Rule 1.5, the attorneys have agreed to a division of the contingent fee between lawyers who are not in the same firm.
>
> 3. The attorneys agree to divide *any and all fees* up to a recovery of four (4) million dollars *through settlement, trial[,] or appeal* to be shared fifty percent (50%) to [Brown & Brown] and fifty percent (50%) to [Schafer & Schafer] from the recovery. Expenses of litigation shall be deducted after the contingent fee is calculated.
>
> 4. The attorneys agree to divide *any and all fees* from a recovery of all amounts greater than four (4) million dollars *through settlement,*

> *trial[,] or appeal* to be shared forty percent (40%) to [Brown & Brown] and sixty percent (60%) to [Schafer & Schafer] from the recovery. Expenses of litigation shall be deducted after the contingent fee is calculated.

Appellant's App. Vol. 2 p. 73 (emphases added). And Indiana Professional Conduct Rule 1.5(e) states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

Zak's guardian also executed the division-of-fees agreement.

[7] In May of 2015, the trial court held a third jury trial. That jury returned a verdict for Zak and awarded her damages from J.B. Hunt in the amount of $19.5 million.[1] J.B. Hunt appealed, and, in July of 2016, we affirmed the jury's verdict. *J.B. Hunt Transp., Inc. v. Guardianship of Zak*, 58 N.E.3d 956, 974 (Ind.

[1] The jury found damages to be $32.5 million but allocated 60% fault against J.B. Hunt.

Ct. App. 2016), *trans. denied* ("*J.B. Hunt I*"). A few months later, Brown & Brown received a payment of $3,710,449 under the contingency-fee and division-of-fees agreements, which "represent[ed] payment in full . . . for the jury trial and appeal of the verdict." Appellees' App. Vol. 2 p. 25.

[8] In March of 2016, after the jury's verdict but while the appeal from that verdict was pending, Zak moved, for the first time, for an award of prejudgment interest. Indiana's Tort Prejudgment Interest Statute provides that a party is not entitled to prejudgment interest if, "within one (1) year after a claim is filed in the court, or any longer period determined by the court to be necessary upon a showing of good cause, the party who filed the claim fails to make a written offer of settlement . . . ." Ind. Code § 34-51-4-6 (2021). Because Brown & Brown had first made a written offer of settlement to J.B. Hunt in 2011, well past one year after the claim was filed, Schafer & Schafer argued in support of the motion for prejudgment interest that Brown & Brown's delay was with good cause. Brown & Brown provided Schafer & Schafer with discovery materials from the first several years of the proceedings, which Schafer & Schafer relied on in the motion. Schafer & Schafer, and not Brown & Brown, prosecuted the motion for prejudgment interest in the trial court.

[9] In September of 2017, the trial court granted Zak's motion and awarded her $4.81 million in prejudgment interest. J.B. Hunt again appealed and argued, among other things, that Zak's motion was not timely under the statute because there was no good cause to extend the period for filing the written offer of settlement beyond one year. Schafer & Schafer, and not Brown & Brown,

defended the trial court's judgment on appeal. In a memorandum decision, we affirmed the trial court's award of prejudgment interest. *J.B. Hunt Transp., Inc. v. Guardianship of Zak*, No. 45A03-1710-CT-2429, 2018 WL 3450523, at *1–3 (Ind. Ct. App. July 18, 2018), *trans. denied* ("*J.B. Hunt II*").

[10] After our decision in *J.B. Hunt II*, Schafer & Schafer received full payment of the prejudgment interest from J.B. Hunt. Brown & Brown then asserted to Schafer & Schafer that Brown & Brown was entitled to a share of the fees for the prejudgment interest as provided for under the division-of-fees agreement. Schafer & Schafer disagreed and asserted that, when they executed the division-of-fees agreement, the parties had not contemplated that it would include a division of fees for an award of prejudgment interest. Schafer & Schafer further argued that Professional Conduct Rule 1.5(e) applied to those fees and limited Brown & Brown's share in accordance with the proportion of services performed by Brown & Brown in obtaining that award. Schafer & Schafer estimated that Brown & Brown had rendered about three hours of work toward the prejudgment interest award; Brown & Brown estimated that it had put in "thousands of hours" toward "putting all the documents together" that were filed in support of the motion for prejudgment interest. Appellees' App. Vol. 2 p. 140.

[11] Brown & Brown filed suit against Schafer & Schafer. Thereafter, Brown & Brown moved for partial summary judgment and argued that Schafer & Schafer was in breach of the plain language of the division-of-fees agreement. In response, Schafer & Schafer asserted that neither firm "contemplated or

considered prejudgment interest at the time the [division-of-fees agreement] was signed," and, thus, there was no meeting of the minds between the parties to have that agreement apply to the prejudgment interest. Appellant's App. Vol. 3 p. 74. In support of that argument, Schafer & Schafer designated the affidavit of one of its partners, Timothy S. Schafer. In his affidavit, Timothy stated:

> 8. . . . [A]t no time prior to entering the [division-of-fees agreement] did I discuss or contemplate a claim or action for prejudgment interest nor did [Brown & Brown partner] Greg Brown ever discuss prejudgment interest.
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> 9. Peggy Skaggs, [Zak's guardian], when she signed the contract with Greg Brown and myself[,] did not discuss or contemplate an action for prejudgment interest but retained the attorneys to assist in a jury trial and an appeal if necessary.
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> * * *
>
> 11. Greg Brown was not aware of the prejudgment interest statute and admitted he has never filed a claim for prejudgment interest in his entire legal career.

Appellees' App. Vol. 2 p. 25. Schafer & Schafer further argued that Professional Conduct Rule 1.5(e) applied to determine Brown & Brown's share of fees for the award of prejudgment interest.[2] After a hearing, the trial court denied

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[2] In its brief on appeal, Schafer & Schafer argues for the first time that Brown & Brown "breached the contract first" and, thus, "cannot seek to enforce" the contract. Appellees' Br. p. 23 (cleaned up). "It is well-established that we generally will not address an argument that was not raised in the trial court and is raised for the first time on appeal." *Leatherman v. State*, 101 N.E.3d 879, 885 (Ind. Ct. App. 2018). Accordingly, we

Brown & Brown's motion for partial summary judgment. The court then certified its order for interlocutory appeal, which we accepted.

Standard of Review

[12] Brown & Brown appeals the trial court's denial of its motion for partial summary judgment. Our standard of review in summary judgment appeals is well established. As our Supreme Court has made clear, "[w]e review summary judgment *de novo*, applying the same standard as the trial court." *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021).

[13] "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). We draw all reasonable inferences in favor of the non-moving party and affirm summary judgment only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting Ind. Trial Rule 56(C)). And we "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Id.* (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)).

[14] As an initial matter, we emphasize that, Brown & Brown's arguments on appeal notwithstanding, Schafer & Schafer does not dispute that the division-of-

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will not consider Schafer & Schafer's argument that Brown & Brown first breached the division-of-fees agreement.

fees agreement was a valid contract between the parties as to all fees collected in the underlying proceedings apart from fees for the prejudgment interest. Schafer & Schafer further does not dispute that Brown & Brown is entitled to some share of the fees for the prejudgment interest.[3] And there is no dispute that Brown & Brown has in fact collected all fees owed to it other than its share of the fees for the prejudgment interest. Thus, this appeal turns on whether the designated evidence demonstrates that the parties intended the division-of-fees agreement to apply to fees for the prejudgment interest.[4]

The Designated Evidence Demonstrates a Genuine Issue of Material Fact Regarding Whether the Parties Had a Meeting of the Minds on Applying the Division-of-Fees Agreement to Fees for the Prejudgment Interest.

[15] We conclude that the designated evidence establishes a genuine issue of material fact with respect to whether the parties intended the division-of-fees agreement to apply to the fees for the prejudgment interest. "A meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract." *Jernas v. Gumz*, 53 N.E.3d 434, 445 (Ind. Ct. App.

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[3] As we conclude that a genuine issue of material fact exists regarding whether the parties intended for the division-of-fees agreement to apply to the fees for the prejudgment interest, we do not reach the parties' further arguments regarding how those fees will be shared if the agreement does or does not apply.

[4] Schafer & Schafer asserts in its brief on appeal that we should direct the entry of summary judgment for Schafer & Schafer. But Schafer & Schafer did not file a motion for summary judgment in the trial court. Thus, we limit our review on appeal to whether the trial court properly denied Brown & Brown's motion for partial summary judgment. Also, Brown & Brown's arguments on appeal that the law-of-the-case doctrine and issue preclusion applied here are not supported by cogent reasoning, and we do not consider them. *See* Ind. Appellate Rule 46(A)(8)(a).

2016), *trans. denied*. "There must be . . . a meeting of the minds on all essential elements or terms in order to form a binding contract." *Id.* "The intention of the parties to a contract is a factual matter that must be determined from all the circumstances." *Jetz Serv. Co. v. Ventures*, 165 N.E.3d 990, 994 (Ind. Ct. App. 2021).

[16] Here, the designated evidence demonstrates that the parties originally had an oral agreement to split the contingency fee evenly between them. However, after the second mistrial, the parties agreed that Schafer & Schafer should receive a higher percentage of the contingency fee after Schafer & Schafer asserted that the services being performed were no longer evenly divided between the two firms. Brown & Brown drafted the division-of-fees agreement to reflect that intent. Thus, the designated evidence supports the conclusion that the parties intended the division-of-fees agreement to split their fees in proportion to their expected services to be performed.

[17] Further, the division-of-fees agreement provided in relevant part that the parties would divide "any and all fees . . . through settlement, trial[,] or appeal . . . ." Appellant's App. Vol. 2 p. 73. That language is ambiguous. It could mean the fees due on a recovery obtained "by way of" a settlement, a trial, or an appeal. Alternatively, it could mean the fees due by "the conclusion of" a settlement, a trial, or an appeal. The latter reading would support a finding that the parties intended for division-of-fees agreement to apply only through the verdict against J.B. Hunt and the appeal of that verdict. As Brown & Brown drafted the division-of-fees agreement, any ambiguities must be construed against Brown &

Brown. *See, e.g.*, *MPACT Constr. Grp., LLC v. Sup. Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004).

[18] The designated evidence also includes Timothy Schafer's affidavit. In his affidavit, he stated that Schafer & Schafer did not contemplate prejudgment interest at the time the parties executed the division-of-fees agreement. He further stated, and it is not disputed, that Brown & Brown "was not aware of the prejudgment interest statute and admitted [it] has never filed a claim for prejudgment interest . . . ." Appellees' App. Vol. 2 p. 25. And he stated that Zak's guardian, whose consent to the division of fees was required under Professional Conduct Rule 1.5(e), was not informed that the division-of-fees agreement might apply to the allocation of fees from a later award of prejudgment interest.

[19] Indeed, the designated evidence shows that the first time prejudgment interest was considered by the parties here was when Schafer & Schafer determined that a motion might be feasible while the appeal in *J.B. Hunt I* was pending. Schafer & Schafer, and not Brown & Brown, prosecuted that motion in the trial court, which required Schafer & Schafer to show good cause as to why Brown & Brown had not followed the one-year timeframe of Indiana's Tort Prejudgment Interest Statute. Further, Schafer & Schafer, and not Brown & Brown, defended the trial court's judgment on appeal in *J.B. Hunt II*. Brown & Brown does not dispute that its contribution to the post-verdict proceedings on prejudgment interest consisted only of providing discovery materials to Schafer & Schafer that Brown & Brown had obtained prior to the first trial.

[20] In other words, the designated evidence supports the conclusion that the parties entered into the division-of-fees agreement to better allocate fees in proportion to the expected legal services to be performed through a verdict and appeal of that verdict. The designated evidence further supports the conclusion that neither Brown & Brown nor Schafer & Schafer had considered, nor had they informed their client of, an award of prejudgment interest at the time they executed the division-of-fees agreement. And, further, the designated evidence supports the conclusion that, having already allocated fees between them through the verdict and appeal of that verdict, Schafer & Schafer performed nearly all the services for Zak in the trial and appellate proceedings on the motion for prejudgment interest. We hold that a reasonable fact-finder could conclude from all of those circumstances that the parties did not intend to have the division-of-fees agreement apply to the fees for the prejudgment interest.

[21] Still, Brown & Brown argues on appeal that the contingency-fee agreement applied to "whatever sum may be recovered after suit is filed" and the division-of-fees agreement applied to "any and all fees." Appellant's App. Vol. 2 p. 72–73. That is, Brown & Brown asserts that the fee agreements are unambiguous and must also apply to fees for the prejudgment interest. But Brown & Brown disregards the ambiguous language in the division-of-fees agreement that, when viewed most favorably to Schafer & Schafer, would have restricted the division of fees to only those fees that had been obtained through the verdict and appeal of that verdict. *Id.* at 73. Brown & Brown also disregards the circumstances that led to the formation of the division-of-fees agreement. In particular, Brown &

Brown ignores the fact that the parties entered into the agreement to better allocate fees in proportion to the services each firm was expected to perform. And that allocation was not consistent with the proportion of the services Brown & Brown provided in support of the motion for an award of prejudgment interest. Therefore, we cannot say that the language of the agreements alone establishes that the parties intended to apply those agreements to the fees for the prejudgment interest.

[22] In sum, a reasonable fact-finder could conclude from all of the circumstances that the intention of the parties at the time they executed the division-of-fees agreement was to have that agreement apply only to the fees for the verdict and the ensuing appeal from that verdict in *J.B. Hunt I*. That is, a reasonable fact-finder could conclude that the parties did not intend to have the division-of-fees agreement apply to the fees for later award of prejudgment interest. Therefore, a genuine issue of material fact precludes the entry of summary judgment on Brown & Brown's claim that Schafer & Schafer breached the division-of-fees agreement when it did not apply that agreement to the fees for the prejudgment interest, and the trial court properly denied Brown & Brown's motion for partial summary judgment. We affirm the trial court's judgment.

[23] Affirmed.

Tavitas, J., and Weissmann, J., concur.