MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert K. Whipple, as Personal Representative of the Estate of Joseph C. Schaub, III, and Sharon Schaub,

Appellants-Plaintiffs,

v.

Butler Toyota and Bob Butler,

Appellees-Defendants

October 19, 2022

Court of Appeals Case No. 22A-PL-1557

Appeal from the Marion Superior Court

The Honorable John M.T. Chavis, II, Judge

Trial Court Cause No. 49D05-1810-PL-41153

Crone, Judge.

Case Summary

[1] Robert K. Whipple, as personal representative of the Estate of Joseph C. Schaub, III, and Sharon Schaub appeal the trial court's striking of Joseph's affidavit that was designated in response to the motion for summary judgment filed by Butler Toyota and its owner, Bob Butler (collectively Butler), as well as the court's granting of Butler's summary judgment motion on the Schaubs' negligence complaint. We conclude that Butler failed to affirmatively negate the element of causation as required by Indiana's summary judgment standard, so we reverse and remand for further proceedings.

Facts and Procedural History

[2] In October 2016, Joseph drove to the Butler Toyota dealership in Indianapolis to drop off his vehicle for service. His wife Sharon followed him in another vehicle to pick him up. Sharon parked and entered the dealership's service area through an open garage door. She saw Joseph "chatting" with Butler employee Brian Jenkins as the men were walking between two cars. Appellees' App. Vol. 2 at 16. Sharon was "at the tail end" of one of the cars, and "they were at the hood." *Id*. She saw Joseph's "head go down[,]" and she "practically caught him as he went down. He hit his chin on the hood of the car, dented the car[,]" and landed on the "concrete floor[.]" *Id*. Sharon did not see Joseph's feet before he fell. An ambulance was summoned. As Sharon was waiting, she noticed metal drainage grates in the floor where Joseph was lying. Sharon and Joseph's son later returned to the dealership to take photos of the grates, which were raised slightly above the level of the concrete floor.

[3] In October 2018, the Schaubs filed a complaint against Butler alleging that Butler was negligent in "failing to maintain its property in a reasonably safe condition, allowing a hazard to exist in a location frequented by invitees of the premises, failing to inspect and discover the hazardous condition and failing to warn invitees of the hazardous condition." Appellants' App. Vol. 2 at 15. Joseph died in May 2021, and Whipple replaced him as a party. For simplicity's sake, we refer to Whipple and Sharon collectively as the Schaubs.

[4] In February 2022, pursuant to Indiana Trial Rule 56, Butler filed a motion for summary judgment asserting that the Schaubs could not prove that Butler caused Joseph's fall because Sharon did not actually see Joseph's "feet and lower legs" when he fell. *Id*. at 26. In response, the Schaubs designated the photos of the drainage grates and an affidavit from Joseph dated January 29, 2019, that states in pertinent part,

> While at Butler Toyota, I tripped over a metal grate in the floor that was raised and not level with the floor. The metal grate created a dangerous condition that caused me to trip and fall. If the metal grate was not raised off the floor, I would not have tripped and fallen and hurt myself.

Id. at 45. Butler moved to strike Joseph's affidavit on the grounds that Butler could not cross-examine him about its contents and that his counsel had stated on October 11, 2019, "that Joseph's dementia precluded him from providing competent deposition testimony." *Id*. at 50. In June 2022, after a hearing, the trial court granted Butler's motion to strike and motion for summary judgment. The Schaubs now appeal both rulings.

Discussion and Decision

[5] "Summary judgment is a tool which allows a trial court to dispose of cases where only legal issues exist." *Rossner v. Take Care Health Sys., LLC*, 172 N.E.3d 1248, 1254 (Ind. Ct. App. 2021), *trans. denied*. "Summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. (citing, inter alia, Ind. Trial Rule 56(C)). Our supreme court has stated, "Even though Indiana Trial Rule 56 is nearly identical to Federal Rule of Civil Procedure 56, we have long recognized that 'Indiana's summary judgment procedure … diverges from federal summary judgment practice.'" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (alteration in *Hughley*) (quoting *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). "In particular, while federal practice permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, we impose a more onerous burden: to affirmatively 'negate an opponent's claim.'" *Id*. (quoting *Jarboe*, 644 N.E.2d at 123). "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id*. at 1004. "Summary judgment is not the same thing as a summary trial, and summary judgment is not appropriate simply because it appears the non-movant is unlikely to succeed at trial." *Nagel v. N. Ind. Pub. Serv. Co.*, 26 N.E.3d 30, 42 (Ind. Ct. App. 2015) (citing *Hughley*, 15 N.E.3d at 1004), *trans. denied*.

[6] For the trial court to properly grant summary judgment, the moving party must have made a prima facie showing that its designated evidence negated an element of the non-moving party's claim, and, in response, the non-moving party must have failed to designate evidence to establish a genuine issue of material fact. *Cox v. Mayerstein-Burnell Co.*, 19 N.E.3d 799, 804 (Ind. Ct. App. 2014). "Only after the moving party carries its burden is the non-moving party … required to present evidence establishing the existence of a genuine issue of material fact." *Morris v. Crain*, 71 N.E.3d 871, 879 (Ind. Ct. App. 2017); *see also Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 51 N.E.3d 1163, 1167 (Ind. 2016) ("[T]o prevail on summary judgment under Indiana procedural law, it was [the defendant's] burden to affirmatively negate the plaintiff's claim, not the plaintiff's burden to make a prima facie case ….") (italics omitted). "In deciding whether summary judgment is proper, we consider only the evidence the parties specifically designated to the trial court." *Bertucci v. Bertucci*, 177 N.E.3d 1211, 1221 (Ind. Ct. App. 2021) (citing Ind. Trial Rule 56(C), -(H)). "We construe all factual inferences in favor of the nonmoving party and resolve all doubts regarding the existence of a material issue against the moving party." *Id*. We review a trial court's summary judgment ruling de novo. *Mann v. Arnos*, 186 N.E.3d 105, 114 (Ind. Ct. App. 2022), *trans. denied*.

[7] "To prevail on a negligence claim, the plaintiff must demonstrate '(1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty.'" *Aberdeen Apts. II LLC v. Miller*, 179

N.E.3d 494, 498 (Ind. Ct. App. 2021) (quoting *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016)). "Because issues of reasonable care, causation, and comparative fault are more appropriately left for determination by the trier of fact, summary judgment is rarely appropriate in negligence cases." *Daisy v. Roach*, 811 N.E.2d 862, 864 (Ind. Ct. App. 2004). "Nonetheless, summary judgment is appropriate when the undisputed material evidence negates one element of a negligence claim." *Aberdeen Apts.*, 179 N.E.3d at 498.

[8] As mentioned above, Butler moved for summary judgment on the basis that the Schaubs could not prove that Butler caused Joseph's fall. But this did not affirmatively negate the element of causation, as is required under Indiana's "onerous" summary judgment standard. *Hughley*, 15 N.E.3d at 1003. In other words, Butler did not designate evidence that establishes, prima facie, that it did not cause Joseph's fall. In arguing that it is entitled to summary judgment, Butler relies on federal cases, Indiana cases involving (or reciting a plaintiff's evidentiary burden in) a jury trial, and Indiana cases predating *Jarboe*, all of which are inapposite in this context. Accordingly, we reverse and remand for further proceedings.[1]

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[1] We need not address the trial court's ruling on the admissibility of Joseph's affidavit for summary judgment purposes because Butler failed to satisfy its prima facie burden, but we note that although the substance of the affidavit (i.e., that Joseph tripped over the metal floor grate) might be admissible in another form at trial (such as Butler employee Jenkins's testimony if it is favorable to the Schaubs), the affidavit itself would not be admissible at trial because of Joseph's unavailability due to his death. *See* Ind. Evidence Rules 803 and 804 (listing exceptions to hearsay rule, none of which apply here).

[9] Reversed and remanded.

May, J., and Weissmann, J., concur.