MEMORANDUM DECISION

ATTORNEYS FOR APPELLANTS

Nathaniel Lee
Nabeela Virjee
Lee, Cossell & Crowley, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Danford R. Due
Christopher J. Appel
Due Doyle Fanning & Alderfer LLP
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Kesia Beavers, Justin Beavers, Individually and on behalf of their Minor Children, Jalen Beavers and Donte Scruggs, Jr.,

Appellants-Plaintiffs,

v.

Heartland Crossing Foundation, Inc.,

Appellee-Defendant.

May 30, 2023

Court of Appeals Case No. 22A-CT-2736

Appeal from the Marion Superior Court

The Honorable Kurt M. Eisgruber, Judge

Trial Court Cause No. 49D06-1701-CT-1705

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

[1] Jalen Beavers, while playing with his brother, Donte Scruggs, and neighborhood friends, was tragically killed after he was struck by a car that was traveling at a high speed. Donte[1] was also struck and injured by the car. Jalen's and Donte's parents filed a negligence claim against Heartland Crossing Foundation ("Heartland"), the homeowners' association of the neighborhood in which they lived, and alleged that Heartland breached a duty to maintain common areas in its subdivision. The trial court granted summary judgment in favor of Heartland. The Plaintiffs appeal and claim that summary judgment was improper. We disagree with the Plaintiffs and, accordingly, affirm.

Issues

[2] The Plaintiffs present three issues for our review, which we restate as:

> I. Whether a genuine issue of material fact exists regarding whether Heartland assumed a duty to implement safety measures in the playground area where Jalen was struck and killed.

[1] The Appellant's brief refers to Donte as Jalen's brother. The Appellee's brief refers to Donte as Jalen's sister. The affidavit of Kesia Beavers, the children's mother, refers to Donte as her son. Accordingly, we refer to Donte as Kesia's son and Jalen's brother.

II. Whether Heartland waived its claim that the City was responsible for the street where the collision occurred by failing to name the City as a nonparty defendant.

III. Whether a genuine issue of material fact exists regarding whether Heartland's failure to implement promised safety measures caused the Plaintiffs' injuries.

Facts

[3] The Plaintiffs moved to the Heartland Crossing subdivision ("Heartland Crossing") in Marion County in 2011. All residents of Heartland Crossing pay homeowners' association dues to Heartland, which uses the dues for upkeep and maintenance of the subdivision, including private streets located in the subdivision. Heartland's Master Declaration of Covenants, Conditions, Easements, and Restrictions (the "Declaration") provides that Heartland is responsible for maintenance of the "common areas" of the subdivision. "Common areas" is defined by the Declaration to include all "Private Streets." Appellant's App. Vol. II p. 133. The term "Streets" is defined in the Declaration as:

> Streets shall mean all driveways, walkways, roadways, streets and similar areas, designated as such on the Plats and Plans, which have been or hereafter are constructed for the purpose of providing common access for Owners, occupants and their guests and invitees, to any or all Lots, **other than those that have been dedicated to the public and accepted for maintenance by the appropriate public agency**.

Id. at 135 (emphasis added).

[4] On May 14, 2014, the residential streets of Heartland Crossing were dedicated to the City of Indianapolis and accepted by the City into its inventory of roadways that the City is responsible to maintain. Pursuant to City ordinance, state laws regulating the speed of motor vehicles are applicable to all streets in the City, except as the City-County Council may declare. Indianapolis-Marion County Ordinance § 441-321. The City Board of Public Works is authorized by ordinance to determine whether to fix greater or lesser speeds in any street. *Id.* § 441-322.

[5] Also in May 2014, a child named Dylan Cox was riding his skateboard in Heartland Crossing when he was struck and killed by a motorist. Following this collision, Heartland Crossing residents voiced concerns to Heartland regarding pedestrian safety and motorists speeding in the subdivision. Heartland assured residents that it was working to increase safety in the subdivision and indicated that it would install speed bumps and a playground sign in the park area where children were frequently present. As of the date of the collision at issue in this case, no speed bumps or signs had been installed.

[6] On November 20, 2016, Jalen and Donte were near the sidewalk at the playground area of Heartland Crossing. A car[2] was traveling at a high speed down Belle Union Drive near the playground. The car ran up onto the curb,

[2] Rachida Aboubacar and Gusseini Gabal were occupants of the vehicle that struck the children. At this stage in the litigation, it is unclear which of these two individuals was driving and which one was the passenger.

and struck Jalen and Donte. Jalen was fatally injured, and Donte suffered nonfatal injuries.

[7] On January 11, 2017, the Plaintiffs filed a complaint naming Aboubacar and Gabal as defendants and alleged negligence and negligent infliction of emotional distress. On November 2, 2018, the Plaintiffs filed an amended complaint that named Heartland as an additional defendant. With regard to Heartland, the amended complaint alleged:

> 39. That [Heartland] had a duty to maintain, preserve, and control the residential lots, common areas, and easement areas in the real estate development called Heartland Crossing, including signage for the protection of families in the subdivision.
>
> 40. That [Heartland] represented to homeowners that it would conduct repairs to all signage in the community in an effort to make the roadways safer for the residents in the community.
>
> 41. That homeowners allocated money for [Heartland] signage repairs and improvements in the community.
>
> 42. That Plaintiffs paid the agreed amount in contribution to the money allocated to execute sign repairs in the community.
>
> 43. That [Heartland] w[as] careless, negligent, and breached their duty in failing to execute sign repairs or placement to warn motorist[s] of children playground, speed zones or other warnings to protect children in the neighborhoods, along with pedestrians.
>
> 44. That [Heartland]'s negligence resulted in the death of Jalen Beavers, minor child.

45. That [Heartland]'s negligence resulted in emotional harm to the family, particularly Donta [sic] Scruggs, a minor, who witnessed the accident and who suffered injuries as a result of the accident.

46. That due to the negligent conduct of the Defendants, and each of them, Plaintiffs have been damaged.

Appellant's App. Vol. II pp. 65-66.

[8] Heartland filed an answer on December 27, 2018, in which it admitted that it "had a duty to exercise reasonable care with respect to the maintenance of common areas of [Heartland Crossing]," but denied the substantive allegations of the complaint. *Id*. at 33. On May 18, 2022, Heartland filed a motion for summary judgment and designated evidence showing that Belle Union Drive, where the collision occurred, had been accepted into the City's inventory of roadways, which the City was responsible for maintaining. The motion also claimed that only the Indianapolis Board of Public Works was responsible for regulating the speed of vehicles on Belle Union Drive and for installing and maintaining speed limit signs. Accordingly, Heartland argued that it was not responsible for Belle Union Drive and that no act or omission on its part proximately caused the collision that killed Jalen and injured Donte, which Heartland argued was solely caused by the driver speeding and failing to maintain control of the car.

[9] The Plaintiffs filed a response in opposition to summary judgment on August 16, 2022, and argued that Heartland: (1) assumed a duty to implement safety controls in the neighborhood (2) waived any ability to name the City as a non-

party defendant; and (3) failed to identify the exact location of the collision, thereby creating a genuine issue of material fact regarding whether the collision occurred in an area controlled by Heartland. The trial court held a summary judgment hearing on October 7, 2022. On October 19, 2022, the trial court entered an order granting summary judgment in favor of Heartland. The Plaintiffs now appeal.

Discussion and Decision

[10] When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court. *Serbon v. City of E. Chicago*, 194 N.E.3d 84, 91 (Ind. Ct. App. 2022) (citing *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021)). "Summary judgment is appropriate 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 a judgment as a matter of law.'" *Id*. (quoting *Minser*, 170 N.E.3d at 1098, citing Ind. Trial Rule 56(C)). The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id*. (citing *Minser*, 170 N.E.3d at 1098). Only if the moving party meets this prima facie burden does the burden then shift to the nonmoving party to show the existence of a genuine issue of material fact. *Id*. (citing *Minser*, 170 N.E.3d at 1098).

I. Heartland Did Not Owe a Duty to the Plaintiffs

[11] The Plaintiffs first argue that the trial court erred in determining that there was no genuine issue of material fact regarding whether Heartland owed a duty of care to the Plaintiffs.

[12] Negligence claims have three elements: "'(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty and (3) injury to the plaintiff proximately caused by the defendant's breach.'" *Albanese Confectionery Grp., Inc. v. Cwik*, 165 N.E.3d 139, 146-47 (Ind. Ct. App. 2021) (quoting *Hayden v. Franciscan All., Inc.*, 131 N.E.3d 685, 693 (Ind. Ct. App. 2019)), *trans. denied*. "'[W]hether a duty exists is a question of law for the court to decide." *Branscomb v. Wal-Mart Stores E., L.P.*, 165 N.E.3d 982, 985 (Ind. 2021) (quoting *Rhodes v. Wright*, 805 N.E.2d 382, 386 (Ind. 2004)).

[13] Although summary judgment is often inappropriate in negligence cases, "it is appropriate when the undisputed facts negate one of the required elements." *Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 379 (Ind. 2022) (citing *Scott v. Retz*, 916 N.E.2d 252, 257 (Ind. Ct. App. 2009)). Accordingly, if the designated evidence establishes, as a matter of law, that defendant owes no duty to a plaintiff, then summary judgment is appropriate. *See Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 783 (Ind. 2004) ("Issues of duty . . . are questions of law for the court and may be appropriate for disposition by summary judgment.") (citing *Holt v. Quality Motor Sales, Inc.*, 776 N.E.2d 361, 365 (Ind. Ct. App. 2002)).

[14] The Plaintiffs do not argue on appeal that Heartland generally owed a duty to them.[3] Instead, the Plaintiffs argue that Heartland assumed such a duty. Our Supreme Court has explained that:

> [A] duty may be imposed upon one who by affirmative conduct . . . assumes to act, even gratuitously, for another to exercise care and skill in what he has undertaken. **It is apparent that the actor must specifically undertake to perform the task he is charged with having performed negligently**, for without actual assumption of the undertaking there can be no correlative legal duty to perform the undertaking carefully.

S. Shore Baseball, LLC v. DeJesus, 11 N.E.3d 903, 910 (Ind. 2014) (emphasis added) (citations and internal quotations omitted); *see also Yost v. Wabash College*, 3 N.E.3d 509, 517 (Ind. 2014) (holding that the assumption of duty requires "affirmative, deliberate conduct such that it is apparent that the actor . . . specifically [undertook] to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative legal duty to perform that undertaking carefully").

[15] The Plaintiffs cite the Restatement (Second) of Torts, Section 324(A), which our courts have previously stated "parallels Indiana's doctrine of assumed duty." *City of Muncie ex. rel. Muncie Fire Dep't v. Weidner*, 831 N.E.2d 206, 212

[3] In response to Heartland's motion for summary judgment, the Plaintiffs did argue that Heartland owed the Plaintiffs a duty. Specifically, the Plaintiffs argued that Heartland admitted that it was responsible for maintaining the common areas of Heartland Crossing. But Heartland's designated evidence established that the common areas of the neighborhood included only private streets, not those dedicated to the public, as was Belle Union Drive. Plaintiffs do not raise this issue on appeal.

(Ind. Ct. App. 2005), *trans. denied*. In *Yost* and *South Shore Baseball*, however, our Supreme Court "adopted the rule laid down in the Restatement (Third) of Torts," which provides in relevant part:

> An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:
>
> (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
>
> (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

Restatement (Third) of Torts: Physical and Emotional Harm § 42 (2012) (quoted in *Yost*, 3 N.E.3d at 517).

[16] Here, the Plaintiffs designated evidence showing that Heartland received complaints from residents regarding speeding motorists in the neighborhood, especially speeding near the playground area. Then, after the death of Dylan Cox, Heartland promised to implement certain safety measures, including repairing signs, installing signs near the playground, and adding speed bumps. Heartland collected HOA dues for maintenance, and Heartland admitted that it was responsible for maintaining the common areas of the addition, which included private streets. This, the Plaintiffs argue, is sufficient to raise a genuine issue of material fact as to whether Heartland assumed a duty. We disagree.

[17] Although the designated evidence shows that Heartland made representations that it would implement certain safety measures, such as installing signs and speed bumps, there is nothing in the record that shows that there was any "affirmative, deliberate conduct" on Heartland's part. To the contrary, the designated evidence shows that Heartland did nothing. Heartland did not engage in any affirmative, deliberate conduct that could give rise to an assumed duty. *See S. Shore Baseball*, 11 N.E.3d at 910; *Yost*, 3 N.E.3d at 517.

[18] The Plaintiffs cite no authority for the proposition that the mere promise to do an action, accompanied by a failure to perform that action, can be considered the assumption of a duty. To the contrary, the general rule in Indiana is that "[f]or an actor to gratuitously assume a duty, the actor must specifically undertake to perform the task he is charged with having performed negligently." *Erwin v. HSBC Mortg. Servs., Inc.*, 983 N.E.2d 174, 182 (Ind. Ct. App. 2013) (citing S*everson v. Bd. of Trs. of Purdue Univ.*, 777 N.E.2d 1181 (Ind. Ct. App. 2002)). "'[A] mere gratuitous promise without more is insufficient to impose a duty of care.'" *Id*. (quoting *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 770 (Ind. Ct. App. 1986)).

[19] Nevertheless, we have held that "where there is a complete omission or failure to act on a gratuitous promise (i.e., nonfeasance), liability 'is confined to situations when the beneficiaries detrimentally relied on performance . . . or when the actor increased the risk of harm.'" *Erwin*, 983 N.E.2d at 182 (quoting *Ember*, 490 N.E.2d at 770). "In other words, 'a promise is sufficient when

coupled with reliance by the injured promisee.'" *Id*. (quoting *Light v. NIPSCO Indus., Inc.*, 747 N.E.2d 73, 75 (Ind. Ct. App. 2001)).

[20] Beavers makes no argument that Heartland increased the risk of harm, and there is nothing in the designated evidence that would suggest that Heartland increased the risk of harm. Thus, Heartland could only have assumed a duty based on its promise if the Plaintiffs detrimentally relied on the promise. The Plaintiffs, however, do not argue on appeal that they detrimentally relied on Heartland's promises.[4] In short, the designated evidence establishes that Heartland did not assume a duty with regard to the safety measures in the neighborhood. For this reason, the trial court did not err by granting summary judgment in favor of Heartland.

II. Plaintiffs Failed to Name the City as a Non-Party Defendant

[21] The Plaintiffs next argue that Heartland cannot shift the blame for the collision to the City because Heartland failed to name the City as a non-party defendant.

---

[4] Beavers stated in her affidavit that she "relied upon Heartland Crossing Foundation, Inc. and we never received the signage and safety improvements promised." Appellant's App. Vol. II p. 183. But her affidavit does not specify in what way either she or her children relied upon Heartland's promises to implement safety improvements on the street in question. That is, there is no indication that, if not for Heartland's statements regarding installing signs and speed bumps, the children would not have been playing at the playground. Indeed, at the time of the collision, Heartland's promises had been unfulfilled for approximately two years. Beavers's conclusory statement in her affidavit that she "relied upon" Heartland is insufficient to create a genuine issue of material fact regarding whether the Plaintiffs detrimentally relied on Heartland's promises regarding the installation of signs and speed bumps. *See E. Point Bus. Park, LLC v. Private Real Estate Holdings, LLC*, 49 N.E.3d 589, 601 (Ind. Ct. App. 2015) (citing *Gast v. Hall*, 858 N.E.2d 154, 162 (Ind. Ct. App. 2006)) (noting that conclusory statements should be disregarded when determining whether to grant or deny summary judgment); *see also Erwin*, 983 N.E.2d at 182 (holding that defendant property management company did not assume a duty to protect child who drowned in an abandoned pool in the neighborhood despite statement from the management company to a resident that it would "take[] care of" the pool issue because there was no evidence that anyone detrimentally relied on the management company's promise).

The Indiana Comparative Fault Act allows a defendant to assert that the plaintiff's damages were caused in full or in part by a nonparty. *Nagel v. N. Ind. Pub. Serv. Co.*, 26 N.E.3d 30, 41 (Ind. Ct. App. 2015) (citing *McDillon v. N. Ind. Pub. Serv. Co.*, 812 N.E.2d 152, 156 (Ind. Ct. App. 2004), *summarily aff'd in relevant part*, 841 N.E.2d 1148, 1152 (Ind. 2006); Ind. Code §§ 34-51-2-14, -15). A defendant wishing to assert such a nonparty defense must affirmatively plead that defense. *Id.* Indiana Trial Rule 8(C) provides that "[a] responsive pleading shall set forth affirmatively and carry the burden of proving: . . . any other matter constituting an avoidance, matter of abatement, or affirmative defense. . . ."

[22] The Plaintiffs correctly observe that Heartland did not present a nonparty defense naming the City as a nonparty defendant in Heartland's answer to the Plaintiffs' complaint. The Plaintiffs also note that, in its motion for summary judgment, Heartland argued that it could not be held liable for the collision because the portion of Belle Union Drive where the collision occurred had been dedicated to the City and incorporated into the streets for which the City is responsible. Accordingly, the Plaintiffs claim that Heartland was required to name the City as a nonparty defendant. We disagree.

[23] Heartland's argument is not that the City was responsible for the injuries. To the contrary, Heartland has consistently argued that Aboubacar and/or Gabal—one of whom was the driver and the other the occupant of the vehicle that struck the children—were wholly at fault. *See* Appellant's App. Vol. II p. 34 (Heartland's Answer claiming that "[t]he damages for which Plaintiff[s] seek

recovery were caused solely by the fault of the Co-Defendants in the operation of their motor vehicle."). Thus, Heartland's argument regarding Belle Union Drive is not that the City was at fault, but that Heartland cannot be held responsible for Belle Union Drive because Heartland had no authority over that street. Because Heartland does not claim that the City is at fault, either wholly or partially, for the collision, it was not required to name the City as a nonparty defendant.

III. Proximate Cause

[24] Lastly, the Plaintiffs argue that whether Heartland's failure to implement the promised safety measures proximately caused the Plaintiffs' injuries is a question of fact that renders summary judgment inappropriate.[5] "'Causation is an essential element of a negligence claim.'" *Bazeley v. Price*, 14 N.E.3d 127, 131 (Ind. Ct. App. 2014) (quoting *Correll v. Ind. Dep't of Transp.*, 783 N.E.2d 706, 707 (Ind. Ct. App. 2002)), *trans. denied*. "'Generally, causation, and proximate cause in particular, is a question of fact for the jury's determination.'" *Id*. (*quoting Correll*, 783 N.E.2d at 707); *see also Kovach v. Caligor Midwest*, 913 N.E.2d 193, 197-98 (Ind. 2009) (noting that causation is ordinarily a factual question reserved for determination by the jury).

---

[5] In their statement of the issues, the plaintiffs identify the third issue as whether Heartland "failed to identify with specificity the location of the subject collision and therefore [] failed to demonstrate that the collision occurred in an area controlled by the City of Indianapolis." Appellant's Br. p. 4. In the table of contents and argument section of their brief, however, the Plaintiffs identify the third issue as "[w]hether [Heartland]'s failure to implement the promised safety measures caused the [Plaintiffs'] injuries is a question of fact to be determined by the jury." *Id*. at 2, 13. The Plaintiffs make no actual argument regarding the location of the collision on appeal.

[25] Here, we need not reach any determination regarding proximate cause, as we have already determined that Heartland has established, as a matter of law, that it owed no duty to the Plaintiffs. Although summary judgment is usually inappropriate in negligence cases, it is appropriate when the undisputed facts negate one of the required elements. *Cmty. Health Network,* 185 N.E.3d at 379. Here, the undisputed facts negate the duty element of the Plaintiffs' negligence claims against Heartland, which renders any question regarding causation irrelevant.

Conclusion

[26] The designated evidence shows that Heartland did not assume a duty to the Plaintiffs. Because Heartland does not argue that the City is at fault for the collision, Heartland was not required to name the City as a nonparty defendant in its answer. Lastly, we need not address the question of causation because Heartland assumed no duty to the Plaintiffs. Accordingly, we affirm the trial court's grant of summary judgment in favor of Heartland.

[27] Affirmed.

Vaidik, J., and Foley, J., concur.