MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

William Anderson, et al.,
Appellants-Plaintiffs,

v.

Charles Headdy and Headdy & Sons Tree Service,
Appellees-Defendants.

May 12, 2022

Court of Appeals Case No. 22A-CT-40

Appeal from the Monroe Circuit Court

The Honorable Holly M. Harvey, Judge

Trial Court Cause No. 53C06-2005-CT-835

Altice, Judge.

Case Summary

[1] William, Kathy, Kenneth, and Teresa Anderson (collectively, the Andersons) appeal the grant of summary judgment in favor of Charles Headdy (Charles) and Headdy & Sons Tree Service (Headdy & Sons) (collectively, Headdy) on the Andersons' complaint for negligence after Charles crashed his vehicle into the Andersons' commercial building. The Andersons claim that the trial court improperly granted summary judgment for Headdy because a genuine issue of material fact remained as to whether Charles should be held liable for damages, notwithstanding his claim of a "sudden emergency not of his own making." *Appellants' Appendix Vol. II* at 16.

[2] We reverse and remand for further proceedings.

Facts and Procedural History

[3] Charles owns Headdy & Sons, a tree trimming business in Ellettsville. On May 21, 2018, Charles, with almost forty years of experience, was working with his son. Charles had been pruning the trees for about two hours before descending a sixty-foot-tall tree to "go get lunch." *Appellants' Appendix Vol. II* at 34.

[4] When Charles reached the ground, he felt a bit lightheaded or dizzy, like he had gotten up too quickly. While Charles did not know the source of his dizziness, he immediately sat or laid down for approximately fifteen minutes. When Charles got up, he claimed that he "felt fine and able to drive." *Id.* at 27. He experienced no other symptoms, and his balance was not affected.

[5] Charles got into his truck with his son and began driving through Ellettsville for lunch. At some point, Charles lost control of the vehicle and crashed into the Stop N' Go Muffler Center that the Andersons owned. The building was destroyed as a result of the collision. Charles also struck some other vehicles in the parking lot.

[6] On May 19, 2020, the Andersons filed an amended complaint against Headdy for negligence, seeking damages for the destroyed building. Headdy denied liability, claiming that Charles was faced with a "sudden emergency . . . immediately prior to the accident. . . ." *Id.* at 16.

[7] Thereafter, on March 3, 2021, Headdy filed a motion for summary judgment because the designated evidence purportedly established that Charles had not breached any duty to the Andersons. Headdy alleged that because Charles "suffered a sudden and unexpected loss of consciousness just prior to the accident," such "sudden incapacitation" relieved them of liability for damages.[1] *Appellants' Appendix Vol. II* at 20, 24.

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[1] We note that the parties appear to use the terms "medical emergency" and "sudden emergency" interchangeably throughout this case. The sudden emergency doctrine is distinct from the sudden loss of consciousness/medical emergency doctrine. As we noted in *Denson v. Estate of Dillard,* 116 N.E.3d 535, 540 n.2 (Ind. Ct. App. 2018), our Supreme Court has observed:

> In a negligence cause of action, the sudden emergency doctrine is an application of the general requirement that one's conduct conform to the standard of a reasonable person. . . . The basis of the doctrine is that the actor is left no time for adequate thought or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess. Under such conditions, the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could

[8] The sole evidence that Headdy designated in support of the motion for summary judgment was Charles's affidavit and portions of his deposition testimony. Charles averred the following in his affidavit:

> 3. On May 21, 2018, I was performing tree trimming with my son. After I climbed down from the trimming onto the ground *I felt a bit light-headed. I laid down for 10 to 15 minutes. After that period of time, I felt fine and able to drive.*
>
> 4. As I was driving the truck after the tree trimming, I suddenly lost consciousness, causing the truck to collide into a building.

> possibly have made after due deliberation. In Indiana, a defendant seeking a sudden emergency instruction must show that three factual prerequisites have been satisfied: 1) the defendant must not have created or brought about the emergency through his own negligence; 2) the danger or peril confronting the defendant must appear to be so imminent as to leave no time for deliberation; and 3) the defendant's apprehension of the peril must itself be reasonable.

Willis v. Westerfield, 839 N.E.2d 1179, 1184-85 (Ind. 2006). The *Denson* Court explained:

> The sudden emergency doctrine is not an affirmative defense. Rather, it defines the conduct to be expected of a prudent person in an emergency situation. Unlike the sudden emergency doctrine, the issue with sudden medical emergency is not whether the defendant responded reasonably to an emergency situation, but whether a reasonable person in the defendant's position would have altered his conduct before the medical emergency occurred based on knowledge of peril.

116 N.E.3d at 540 n.2 (cleaned up).

> 5. By the time I felt any potential issue with my ability to remain conscious, it was too late to safely stop the vehicle. The loss of consciousness happened too suddenly for me to respond.
>
> 6. I had never fainted before and I have not fainted since. I have not been diagnosed with any medical condition that causes fainting.
>
> 7. My son was a passenger in the truck with me when the fainting incident occurred. If I had any inkling that any condition would have prevented me from operating the truck safely, I would not have done so, in order to avoid risking harm to my son, myself, and others.

Id. at 27-28 (emphasis added).

[9] Charles acknowledged in his deposition that he was accurately quoted in a newspaper article where he stated that "he felt lightheaded before driving and thinks he got overheated." *Id.* at 31. Charles testified during his deposition that he had never experienced lightheadedness prior to the day of the accident and to his knowledge, he had never experienced dehydration, and had never "passed out" prior to this episode. *Id.* at 34. Charles assumed that he had experienced dehydration and testified that he "needed to pull over, and the next thing [he] remembered was [waking] up" in the Andersons' building. *Id.* at 69.

[10] On April 1, 2021, the trial court granted the Andersons' request for an extension of time to respond to Headdy's summary judgment motion until May 6, 2021. The Andersons did not file a response to the motion for summary

judgment prior to the deadline. On May 12, 2021, the trial court summarily granted Headdy's motion for summary judgment.

[11] The following day, the parties filed a stipulation to the following facts:

> 1. On March 3, 2021, defendants filed their Motion for Summary Judgment, with designation of evidence and accompanying Memorandum.
>
> 2. On April 1, 2021, counsel for plaintiffs filed a request for an extension of the summary judgment deadline. This Court granted that extension the same day, and required that any response to the Motion for Summary Judgment be submitted on or before May 6, 2021.
>
> 3. On May 4, 2021, counsel for plaintiffs prepared a proposed Stipulation for Extension of Time for review by counsel for the defendant. That proposed Stipulation was hand delivered to the office of defendants' counsel, who has been working from home since April, 2020 as a result of the COVID-19 global pandemic.
>
> 4. On May 5, 2021, the proposed Stipulation was emailed to counsel for the defendant by his legal assistant for review. A true and accurate copy of the email is attached as Exhibit A.
>
> 5. On May 6, 2021, counsel for plaintiff emailed counsel for defendant to confirm that the Stipulation was signed and filed. The next day, May 7, counsel for the defendant informed counsel for plaintiff that the proposed Stipulation was not acceptable as drafted. A true and accurate copy of the e-mail exchange is attached as Exhibit B.
>
> 6. Later on May 7, the attorneys for the parties spoke by telephone. At that time, the attorneys agreed to a 60-day

> extension of time for plaintiffs to tender a response to the Motion for Summary Judgment. Counsel for the defendant offered to prepare and circulate a stipulation to the effect.
>
> 7. Prior to the filing of such a stipulation, on May 12, 2021, this Court granted the Motion for Summary Judgment.
>
> 8. Although the attorneys did not discuss an extension prior to May 7, the only objection counsel for the defendant had to the proposed Stipulation prepared by counsel for the plaintiffs was the lack of a firm response date. There was no objection in principle to an extension of time to respond. Presumably, had the attorneys spoken at any point prior to May 7, they would have reached the same agreement that they did on May 7.
>
> 9. On May 13, 2021, the attorneys for the parties conferred by telephone and agreed to prepare and file this Stipulation of Fact, with counsel for the defendant observing that the effect of any such stipulation is unclear in light of the Court of Appeals holding in *Booher v. Sheeram*, 937 N.E.2d 392 (Ind. App. 2010).

Id. at 37-39.

[12] After reviewing the above stipulations, the trial court vacated the summary judgment order and granted the Andersons an extension of time to respond to Headdy's summary judgment motion until July 3, 2021.

[13] On July 2, 2021, the Andersons filed their response, and the trial court set the matter for hearing on August 5, 2021. The Andersons claimed in their response that genuine issues of material fact existed in this circumstance because Charles's statements that he "felt fine and able to drive" after resting for fifteen

minutes, coupled with his testimony that he felt "real lightheaded and needed to pull over," placed his credibility at issue that is necessarily a matter for the factfinder to resolve at trial. *Id.* at 69.

[14] The Andersons' response also included the affidavit of Melissa Etter, a senior subrogation specialist with Erie Insurance, and that of William Anderson. Their affidavits averred that Headdy's insurer—Progressive Insurance (Progressive)—accepted liability and issued a reimbursement check to the Andersons' insurer, Erie Insurance, for $224,966.19 on April 24, 2019. William pointed out in his affidavit that Progressive immediately paid for damages to the other vehicles in the parking lot. As a result, the Andersons alleged that their designated evidence defeated Headdy's summary judgment claim because the "facts give rise to conflicting inferences," and a jury could reach "different conclusions from the undisputed facts." *Id.* at 53.

[15] On August 3, 2021, Headdy filed a reply in support of the motion for summary judgment and moved to strike the Andersons' response as untimely. In that motion, Headdy asserted that the trial court abused its discretion in granting the Andersons' extension of time "after the applicable response deadline ha[d] passed." *Id.* at 109. Thus, Headdy claimed that by operation of law, "[the Andersons] should have been precluded from filing materials opposing summary judgment." *Appellants' Appendix Vol. II* at 110. Headdy asserted that "the fact that attorneys agreed to an extension of time after the expiration of a prior extension does nothing to change this bright line rule," as was held in *Indiana Univ. Med. Ctr. v. Logan,* 728 N.E.2d 855, 858 (Ind. 2000). *Id.* Headdy

further noted that there was no agreement by counsel to extend the time for the response prior to the expiration of the summary judgment deadline. Thus, Headdy claimed that the trial court was obligated to strike all of the Andersons' designated evidence opposing summary judgment "because it lack[ed] the discretion to accept and consider it." *Id.* at 111.

[16] Headdy also asserted that even if the trial court decided not to strike the Andersons' opposition to summary judgment, it should not consider the designated evidence that related to negotiations and the results reached between the insurance companies because such evidence is inadmissible under Indiana law. Finally, Headdy claimed that trial courts must decide summary judgment motions based on the pleadings and the designated evidence "without deciding weight or credibility." *Id.* at 112.

[17] The trial court conducted the summary judgment hearing as scheduled on August 5, 2021, and took the matter under advisement. Four days later, the Andersons filed a response to Headdy's motion to strike, noting that Headdy "has suddenly decided to claim less than 2 days before the scheduled hearing that the response of [the Andersons] is untimely." *Id.* at 115. The Andersons likened Headdy's conduct to "pull[ing] a rabbit out of the hat at the last minute." *Id.* Thus, the Andersons maintained that the trial court should deny Headdy's motion to strike.

[18] The trial court granted Headdy's motion for summary judgment on October 28, 2021, concluding that

> The undisputed facts of this case do not establish that the Defendant breached his duty in deciding to drive. It is reasonable for the Court to infer that Headdy passed out in the vehicle without warning, and thus was not negligent in driving erratically after he passed out. There is no fact in evidence that establishes that Headdy had a health condition that would have given him notice that he was likely to pass out while driving, prior to driving the truck. He had never passed out before. He had not experienced dizziness as a result of overheating. The bout of lightheadedness that he experienced after getting out of the tree was resolved. There is no evidence that would create an inference that he knew that he was likely to become lightheaded and pass out while driving.

Id. at 8.

[19] The trial court also declined to rule on Headdy's motion to strike, commenting that

> Because the Court has determined, as a matter of law, that the Defendant is entitled to summary judgment, the Court declines to rule on the Motion to Strike. However, the Plaintiff has not supplied the Court with adequate facts that the parties actually had a discussion with Defense counsel about an enlargement of time prior to Plaintiffs' counsel requesting, by stipulation, an enlargement. It does not appear that there was an agreement to an enlargement. The Court allowed Plaintiff to proceed, but concludes that the Defendant is entitled to summary judgment despite the late filing of Plaintiffs' brief.

Id.

[20] The Andersons now appeal following the trial court's denial of their motion to correct error.

Discussion and Decision

I. Standard of Review

[21] We review a summary judgment order de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Summary judgment is proper "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." Ind. T.R. 56(C). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley,* 15 N.E.3d at 1003. Summary judgment should not be granted when it is necessary to weigh the evidence. *Id.* at 1005 (quoting *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n,* 571 N.E.2d 282, 285 (Ind. 1991)). Our summary judgment standard "consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risking short-circuiting meritorious claims." *Id.* at 1004.

[22] The party moving for summary judgment bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Sargent v. State,* 27 N.E.3d 729, 731 (Ind. 2015). Upon this showing, the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley,* 15 N.E.3d at 1003. The party moving for summary judgment must

affirmatively negate an opponent's claim. *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.,* 644 N.E.2d 118, 124 (Ind. 1994). Only then does the burden shift to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley,* 15 N.E.3d at 1003. We view the designated evidence in a light most favorable to the non-movant and resolve all doubts as to the existence of a material issue against the moving party. *Manley v. Sherer,* 992 N.E.2d 670, 673 (Ind. 2013).

[23] Finally, we note that our review of a summary judgment motion is limited to those materials properly designated to the trial court. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). Summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact. *Aberdeen Apartments II, LLC v. Miller,* 179 N.E.3d 494, 498 (Ind. Ct. App. 2021). Negligence cases are particularly fact-sensitive and are governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all the evidence. *Henderson v. New Wineskin Ministries Corp.,* 160 N.E.3d 582, 585 (Ind. Ct. App. 2020).

II. The Andersons' Contentions

[24] The Andersons argue that summary judgment for Headdy cannot stand because Charles's credibility is at issue and that issue must be resolved by the factfinder at trial. More particularly, the Andersons claim that it was for the jury to

decide whether Charles's opinion that he was fit to drive after his initial period of dizziness or lightheadedness was credible.

[25] We initially observe that to prevail on their negligence claim, the Andersons must demonstrate that Headdy owed them a duty, that Headdy breached that duty because Headdy's conduct fell below the applicable standard of care, and that they were injured by Headdy's breach of duty. *See Goodwin v. Yeakle's Sports Bar & Grill, Inc.,* 62 N.E.3d 384, 386 (Ind. 2016). The parties do not dispute that Headdy owed the Andersons a duty or that the Andersons sustained damages as a result of the collision. Rather, they dispute whether Headdy breached that duty.

[26] In this case, Headdy presented Charles's affidavit and self-serving deposition testimony as designated evidence to support their motion for summary judgment. Headdy asserts that such designated evidence defeats the breach of duty element in the Andersons' negligence claim against them because Charles had suffered an unforeseen emergency immediately prior to the collision.

[27] Headdy's argument aside, it is error to base summary judgment solely on a party's self-serving affidavit when evidence before the court raises a genuine issue as to the affiant's credibility. *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008), *trans. denied.* When factual resolution depends on the credibility of a witness, summary judgment must be denied if the resolution hinges upon state of mind, credibility, or the weight of the testimony. *Frye v. American Painting Co.*, 642 N.E.2d 995, 998 (Ind. Ct. App. 1994). In other

words, summary judgment is inappropriate if a reasonable trier of fact could choose to disbelieve the movant's account of the facts. *McCullough v. Allen,* 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983). When facts are particularly within the knowledge of the movant's witness, there should be an opportunity to impeach the witness at trial. *Alicea v. Brown,* 121 N.E.3d 621, 623 (Ind. Ct. App. 2019); *Insuremax*, 879 N.E.2d at 1190.

[28] In this case, the trial court based its grant of summary judgment on Charles's self-serving statements as to how he felt when he started driving. Charles stated in his deposition that he felt "real lightheaded and . . . needed to pull over," and the next thing he remembered was "[waking] up in the building." *Appellants' Appendix Vol. II* at 69. Headdy designated no additional evidence regarding Charles's medical history or whether he had contacted a physician after this incident. Although Charles was unsure as to what caused his unconsciousness, he thought it was due to "overheating or dehydration." *Id.* at 70.

Headdy ignores the undisputed designated evidence that calls Charles's credibility into question. More particularly, a jury would not be required to blindly accept Charles's self-serving assertions, as they are "peculiarly" within his knowledge, and there should be an opportunity to cross-examine and impeach him. *See Alicea,* 121 N.E.3d at 623. It is up to the jury to decide if Charles's statement is credible regarding whether he had time to stop his vehicle before losing consciousness or whether he was well enough to drive in the first place. *See id.* Indeed, in accordance with Charles's deposition testimony and the averments set forth in his affidavit, a jury could find that Charles's sudden

physical incapacity was reasonably foreseeable such that a reasonably prudent person in his position would not have risked driving.

[29] In sum, there is doubt as to the reasonable conclusions that a jury could reach in this case. Headdy has not sustained the burden to affirmatively negate an element, i.e., a breach of duty, of the Andersons' negligence claim. Thus, we conclude that the trial court erred in granting Headdy's motion for summary judgment.[2]

[30] Reversed and remanded for further proceedings.

Vaidik, J. and Crone, J., concur.

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[2] Because we reverse the trial court's grant of summary judgment for the reason that Headdy's own designated evidence established a genuine issue of material fact, we need not address the trial court's decision to not rule on Headdy's motion to strike or the trial court's alleged failure to consider the Andersons' designated evidence that they submitted in opposition to the summary judgment motion. Nonetheless, we note that when a party fails to respond to a motion for summary judgment within the response deadline, our Supreme Court has held that a trial court *may not* consider materials filed thereafter. *Indiana Univ. Med. Ctr.,* 728 N.E.2d at 858. A panel of this court recognized this "bright line rule" in *Desai v. Croy,* 805 N.E.2d 844, 850 (Ind. Ct. App. 2004), *trans. denied,* where it was determined that the trial court lacks discretion to accept designated evidence that is submitted after the allotted timeframe. The strict application of the rule could very well yield a harsh result, particularly where—as here—the parties *and* the trial court seemingly agreed to permit the Andersons to file an opposition to Headdy's motion for summary judgment after the response deadline had expired.