MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashlea Dunkerly and Caleb Dunkerly, as Parents and Next Friends of B.D., a Minor,

Appellants-Plaintiffs,

v.

Jamie Bean,

Appellee-Defendant

September 6, 2023

Court of Appeals Case No. 23A-CT-1038

Appeal from the Greene Superior Court

The Honorable Dena A. Martin, Judge

Trial Court Cause No. 28D01-2107-CT-17

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Ashlea Dunkerly and Caleb Dunkerly, as Parents and Next Friends of B.D., a Minor, (collectively, "the Dunkerlys") appeal the Greene Superior Court's entry of summary judgment for Jamie Bean on their complaint alleging negligence in causing personal injuries to B.D. The Dunkerlys present two issues for our review:

> 1. Whether the trial court abused its discretion when it granted Bean's motion to strike three paragraphs from their expert witness's affidavit.
>
> 2. Whether the trial court erred when it entered summary judgment for Bean.

[2] We reverse and remand for further proceedings.

Facts and Procedural History

[3] In October 2020, six-year-old B.D. lived with his parents, Ashlea and Caleb, on Osborn Lane, a dead-end street in Bloomfield. On October 16, 2020, at approximately 5:00 p.m., six-year-old B.D. was riding a non-motorized scooter in his driveway. B.D. was unsupervised at the time.

[4] Bean, who also lived on Osborn Lane near the Dunkerlys, was driving home from work when she heard something strike her car. She stopped and got out to find B.D. lying on the pavement behind her car. B.D.'s scooter was lying on the pavement next to her car. Bean began screaming, and Carrie Drew, a guest at Bean's house, heard her screams and called 9-1-1. B.D. was transported by ambulance to a hospital and later airlifted to Riley Children's Hospital in

Indianapolis. As a result of the collision with Bean's car, B.D. sustained skull fractures, brain bleeds, pelvis fractures, a right foot/ankle sprain, and permanent damage to his right ear, including significant hearing loss.

[5] On July 28, 2021, the Dunkerlys filed a complaint against Bean alleging negligence. During Bean's deposition, she testified that, on October 16, 2020, she was driving home from work when she turned onto Osborn Lane toward her house. She was driving under the twenty-five-miles-per-hour speed limit, she was looking straight ahead down the road, she was not on her phone, and the radio was not on. As she passed the Dunkerlys' driveway, she "heard a metallic sound, where metal had hit [her] vehicle," so she stopped, got out of her car, and found B.D. lying on the pavement. Appellant's App. Vol. 2, p. 89. Bean testified that she agreed with her interrogatory answer stating that her "visibility" with respect to the Dunkerlys' driveway was "impaired . . . by the shrubs and trees along [the] driveway." *Id.* at 93. She clarified that "the trees and shrubs kept [B.D.] from being noticeable[.]" *Id.* She testified that she had previously seen children playing on scooters and bikes in the Dunkerlys' driveway and that she routinely kept "an eye out for children in the road[.]" *Id.* at 94.

[6] On December 8, 2022, Bean filed a motion for summary judgment.[1] In support, Bean designated portions of her deposition and the depositions of Ashlea and Caleb. In opposition to summary judgment, the Dunkerlys designated an affidavit by their expert witness, David Myers; Bean's deposition; and photographs of their driveway. In his affidavit, Myers stated as follows:

> 2. That I am certified in Traffic Crash Reconstruction and a Board-Certified Legal Investigator and Security Consultant.
>
> 3. That on December 13, 2022, I was contacted by Taylor D. Ivy, counsel for the Plaintiffs in this matter regarding a crash reconstruction.
>
> 4. That I reviewed the following documents:
>
> a. Deposition Testimony of Jamie Bean
>
> b. Deposition Testimony of Ashlea Dunkerly
>
> c. Deposition Testimony of Caleb Dunkerly
>
> d. The Indiana Officer's Standard Crash Report
>
> e. The 911 call audio
>
> f. Photos taken by the Bloomfield Police Department

[1] In her brief on summary judgment, Bean alleged that the Dunkerlys were at fault in causing B.D.'s injuries by their failure to supervise him. However, in her brief on appeal, Bean states that she "withdraws this argument for the purpose of this appeal." Appellee's Br. at 26 n.13.

5. That on December 20, 2022, I traveled to 450 Osborn Lane, Bloomfield, Indiana[,] to investigate an incident involving a collision between a child on a scooter and motor vehicle.

6. That the following are my findings in regard to the investigation:

> a. The distance from the start of Osborn Lane to the Dunkerly Driveway is two hundred and four feet.
>
> b. The distance from the tree closest to Osborn Lane on the Dunkerly property to Osborn Lane is forty-nine feet.
>
> c. That there are four trees along the Dunkerly Driveway.
>
> d. From closest to Osborn to the furthest from Osborn Lane, the distances between the trees are as follows:
>
> > i. Tree One (the closest to Osborn Lane) to Tree Two: Sixty-Three Feet.
> >
> > ii. Tree Two to Tree Three: Ninety-Three Feet.
> >
> > iii. Tree Three to Tree Four: Fifty-Five Feet.
>
> e. The above referenced trees would not prevent a motorist traveling south on Osborn Lane from Davis Street from seeing the Dunkerly driveway.

7. That Exhibit A is a photograph I took of the beginning of Osborn Lane near Davis Street of the Dunkerly driveway and home located at 450 Osborn Lane in Bloomfield, Indiana.

> 8. That Exhibit B is a photograph I took on Osborn Lane approximately one hundred feet north of the Dunkerly Driveway.
>
> 9. That Exhibit C is a photograph I took near the beginning of the Dunkerly Driveway and facing the Dunkerly home at 450 Osborn Lane in Bloomfield, Indiana.
>
> 10. That based on my training, experience, review of documents, and investigation it is my opinion, that more likely than not had the Defendant been paying attention, she would have seen [B.D.] long before the collision occurred and had time to stop her vehicle or change her path of travel to avoid the collision.
>
> 11. That my opinion is that the cause of the collision was the Defendant's failure to see [B.D.] and come to a stop or divert the path of her vehicle to avoid the collision.

Id. at 113-14. Bean filed a motion to strike portions of Myers' affidavit, namely, paragraphs 6(e), 10, and 11.[2]

[7] Following a hearing on Bean's motion to strike and summary judgment motion, the trial court granted both motions. This appeal ensued.

Discussion and Decision

Issue One: Motion to Strike

[8] The Dunkerlys first contend that the trial court abused its discretion when it granted Bean's motion to strike. We review for an abuse of discretion a trial

[2] Bean moved to strike paragraph 6(e) during the ensuing hearing on the motion.

court's decision on a motion to strike. *Bunger v. Brooks*, 12 N.E.3d 275, 279 (Ind. Ct. App. 2014). We will reverse only when the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[9] As this Court has explained,

> [t]he admissibility of expert opinions is governed by the Indiana Rules of Evidence. Ind. Evidence Rule 702 provides:
>
> > (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
> >
> > (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.
>
> A commentator on Ind. Evidence Rule 702 has stated that expert testimony, in order to be admissible, must satisfy at least three requirements:
>
> > (1) the witness must have sufficient qualifications to testify under Rule 702(a); (2) the topic of the testimony must be such as to assist the trier of fact in understanding the evidence or in determining a fact in issue; and (3) the court must be satisfied that the testimony rests on reliable scientific principles.
>
> 3 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE 392 (1995) (footnotes omitted). . . .

> [Further,] Ind. Evidence Rule 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Pursuant to this rule, *the admissibility of expert testimony does not hinge on the expert's disclosure of the facts and reasoning that support his opinion. The lack of facts and reasoning, which may be brought out on cross-examination of the expert, goes to the weight to be given the expert's opinion, not its admissibility*.

Dorsett v. R.L. Carter, Inc., 702 N.E.2d 1126, 1128 (Ind. Ct. App. 1998) (emphasis added), *trans. denied*.

[10] Here, again, paragraph 6(e) of Myers' affidavit stated that the locations of the trees along the Dunkerlys' driveway "would not prevent a motorist traveling south on Osborn Lane from Davis Street from seeing the Dunkerly driveway." Appellants' App. Vol. 2, p. 114. The trial court struck that paragraph because it found that whether the driveway was visible to Bean "is a matter well within a lay person's ability to understand." *Id.* at 16. It is well settled that the proponent of expert testimony must "demonstrate that the *subject matter* is related to some field beyond the knowledge of lay persons[.]" *See Fueger v. Case Corp.*, 886 N.E.2d 102, 105 (Ind. Ct. App. 2008) (emphasis added), *trans. denied*. Here, the subject matter of Myers' expert testimony is accident reconstruction, which is beyond the knowledge of laypersons. And paragraph 6(e) merely provides a factual basis for Myers' expert opinion that Bean would have seen B.D. if she had been paying reasonable attention to her surroundings. We hold that the

trial court abused its discretion when it struck paragraph 6(e) of Myers' affidavit.

[11] In paragraphs 10 and 11 of his affidavit, Myers stated:

> 10. That based on my training, experience, review of documents, and investigation it is my opinion, that more likely than not had the Defendant been paying attention, she would have seen [B.D.] long before the collision occurred and had time to stop her vehicle or change her path of travel to avoid the collision.
>
> 11. That my opinion is that the cause of the collision was the Defendant's failure to see [B.D.] and come to a stop or divert the path of her vehicle to avoid the collision.

Appellants' App. Vol. 2, p. 114. The trial court gave the following reasons for granting the motion to strike as to those paragraphs:

> a. Mr. Myers never stated in his affidavit where B.D. was prior to the collision. Necessary for an opinion that an object could have or should have been seen is the location of said object. Because Mr. Myers did not provide an opinion on where B.D. was located prior to the accident, his opinion that B.D. could have been seen lacks appropriate validation or good grounds as required by Indiana case law.
>
> b. Mr. Myers' supposition that Ms. Bean was not paying attention prior to the accident departs from her testimony and the evidence in this case. Ms. Bean, the only witness to the accident, testified that she was looking down the road prior to the accident. [Bean Depo. 10-8-12]. Mr. Myers' opinion is contrary to Ms. Bean's testimony and, aside from a parting reference to reviewing depositions, Mr. Myers did not establish the grounds upon which his conclusions in paragraphs 10 and 11 were based.

> c. Mr. Myers' affidavit generally fails to establish what analysis or calculations he performed to arrive at his opinion that Ms. Bean was not paying attention. As such, the Court has no way of determining how Mr. Myers came to his conclusion or what evidence supports his conclusions in paragraphs 10 and 11. This leads the Court to conclude his opinion lacks evidentiary reliability.
>
> d. Because of the deficiencies with Mr. Myers' affidavit, it appears to the Court that there is no evidence in the record other than Mr. Myers' opinion itself that Ms. Bean was not paying attention. As previously stated, Mr. Myers was required to establish that his opinions had some grounds other than the opinion itself. He has failed to meet this burden.

Id. at 17. In sum, the trial court struck paragraphs 10 and 11 because of the lack of "grounds" or "evidentiary reliability" to support Myers' opinions.

[12] As this Court has explained, Evidence Rule 702 requires that expert testimony "'be supported by appropriate validation—i.e., "good grounds," based on what is known,' and as 'establish[ing] a standard of evidentiary reliability.'" *Bond v. State*, 925 N.E.2d 773, 779 (Ind. Ct. App. 2010) (quoting *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)). Those factors go to "the reliability of the scientific principles involved." *Id.* Here, Bean did not challenge the reliability of the scientific principles underlying accident reconstruction. Rather, Bean moved to strike the three paragraphs of Myers' affidavit because they included facts within a layperson's ability to assess and because his opinions were not "grounded in the evidence of this case." Appellants' App. Vol. 2, p. 129.

[13] In *Dorsett*, this Court addressed a similar challenge to expert testimony designated as evidence in opposition to summary judgment. 702 N.E.2d at 1127-28. In particular, the plaintiff in *Dorsett* presented an affidavit prepared by an accident reconstruction expert, Michael Walters, that included his opinion that a tractor-trailer driven by Roy Wade had crossed the center line of a roadway causing a collision with the plaintiff's vehicle. Wade and the owner of the tractor-trailer, argued that

> Walters' opinion lacks sufficient factual foundation to be admissible. Referring to portions of Walters' deposition, Carter[, the owner of the tractor-trailer] and Wade observe that Walters was unable to adequately explain how he reached his conclusion that the tractor-trailer crossed the center line. Among other things, Carter and Wade note that Walters could not explain why the damage to the tractor-trailer's axle supported his opinion and that Walters could not indicate where the tractor-trailer crossed the center line.

Id. We noted that

> Carter and Wade do not contend that Walters is unqualified to render an expert opinion, nor do they suggest that accident reconstruction testimony could not assist the trier of fact. Too, Carter and Wade do not challenge the scientific principles underlying accident reconstruction. Rather, Carter and Wade argue that Walters' opinion in this particular case is completely unsupported by reasoning and fact, as demonstrated by his inability to adequately explain how he arrived at his opinion.

Id. at 1128. We held that Walters' affidavit was admissible and sufficient to create a genuine issue of material fact precluding summary judgment. *Id.* Again, as we observed,

> the admissibility of expert testimony does not hinge on the expert's disclosure of the facts and reasoning that support his opinion. The lack of facts and reasoning, which may be brought out on cross-examination of the expert, goes to the weight to be given the expert's opinion, not its admissibility.

Id.

[14] Likewise, here, Bean does not challenge Myers' qualifications to render an expert opinion, and she does not "challenge the scientific principles underlying accident reconstruction." *See id.* The lack of facts and reasoning cited by the trial court in striking paragraphs 10 and 11 from Myers' affidavit goes to the weight of the opinion, and not its admissibility. *See id.*; *see also Scott v. City of Seymour*, 659 N.E.2d 585, 592-93 (Ind. Ct. App. 1995) (holding expert witness' "conclusory" opinion regarding cause for plaintiff's fall was admissible in opposition to summary judgment because it was based on deposition testimony of the city's witnesses describing the area, photographs of the area, and his own education and experience).

[15] Myers, who is certified in "Traffic Crash Reconstruction," stated that his opinions were based on the parties' deposition testimony, the crash report, the 9-1-1 call recording, and photographs. Appellants' App. Vol. 2, p. 113. And Myers personally visited the scene of the collision and measured the distances

relevant to Bean's travel path, as well as the distances between the trees along the driveway. We hold that the trial court abused its discretion when it struck paragraphs 10 and 11 of Myers' affidavit.

Issue Two: Summary Judgment

[16] The Dunkerlys next contend that the trial court erred when it entered summary judgment for Bean. Our standard of review is well settled:

> When this Court reviews a grant or denial of a motion for summary judgment, we "stand in the shoes of the trial court." *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate "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." *Campbell Hausfeld/Scott Fetzer Co. v. Johnson*, 109 N.E.3d 953, 955-56 (Ind. 2018) (quoting Ind. Trial Rule 56(C)). We will draw all reasonable inferences in favor of the non-moving party. *Ryan v. TCI Architects/Engineers/Contractors. Inc.*, 72 N.E.3d 908, 912-13 (Ind. 2017). We review summary judgment de novo. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014).

Arrendale v. Am. Imaging & MRI, LLC, 183 N.E.3d 1064, 1067-68 (Ind. 2022). While we are not bound by the trial court's findings and conclusions and give them no deference, they aid our review by providing the reasons for the trial court's decision. *Einhorn v. Johnson*, 996 N.E.2d 823, 828 (Ind. Ct. App. 2013), *trans. denied*.

[17] As this Court has explained,

> [n]egligence is a tort that requires proof of "(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant's breach." *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004). "Negligence will not be inferred; rather, all of the elements of a negligence action must be supported by specific facts designated to the trial court or reasonable inferences that might be drawn from those facts." *Kincade v. MAC Corp.*, 773 N.E.2d 909, 911 (Ind. Ct. App. 2002). "An inference is not reasonable when it rests on no more than speculation or conjecture." *Id.* "A negligence action is generally not appropriate for disposal by summary judgment." *Id.* "However, a defendant may obtain summary judgment in a negligence action when the *undisputed facts* negate at least one element of the plaintiff's claim." Id.

Evansville Auto., LLC v. Labno-Fritchley, 207 N.E.3d 447, 454 (Ind. Ct. App. 2023) (emphasis added), *trans. denied*.

[18] Here, Bean had a duty to "maintain a proper lookout" while driving her car "as a reasonably prudent person would do in the same or similar circumstances." *Cole v. Gohmann*, 727 N.E.2d 1111, 1115 (Ind. Ct. App. 2000). She had a "duty to use due care to avoid a collision and to maintain h[er] automobile under reasonable control." *Id.* "The duty to keep a lookout is imposed upon a motorist so that he may become aware of dangerous situations and conditions to enable him to take appropriate precautionary measures to avoid injury." *Id.*

[19] Bean testified that she had previously seen children riding scooters and bikes in the Dunkerlys' driveway and that she always kept "an eye out" for children as she drove. Appellants' App. Vol. 2, p. 94. She testified that she was driving under the speed limit and was not distracted by her phone or the radio in her

car. And she testified that her ability to see the Dunkerlys' driveway was "impaired" by "shrubs and trees" along the driveway. *Id.* at 93. Thus, Bean satisfied her burden on summary judgment to negate the breach element of the Dunkerlys' negligence claim. *See Siner v. Kindred Hosp. Ltd. Partnership*, 51 N.E.3d 1184, 1188 (Ind. 2016).

[20] On appeal, the Dunkerlys maintain, and we agree, that they designated evidence to establish genuine issues of material fact regarding whether Bean breached her duty of care to B.D. precluding summary judgment. In particular, the Dunkerlys designated Myers' affidavit, which, along with the attached photographs, established a genuine issue of material fact whether Bean would have seen B.D. "long before the collision occurred and had time to stop her vehicle or change her path of travel to avoid the collision" if she had "been paying attention[.]" Appellants' App. Vol. 2, p. 114. Further, Myers' affidavit and attached photographs refuted Bean's testimony regarding the distance between the tree at the end of the driveway and Osborn Lane[3] and the visibility, generally, of the Dunkerlys' driveway from Osborn Lane. We hold that the trial court erred when it entered summary judgment for Bean.

[3] Bean testified that the distance was fifteen to twenty-five feet, but Myers measured the distance at forty-nine feet.

[21] For all these reasons, we reverse the trial court's grant of Bean's motion to strike paragraphs 6(e),10, and 11 of Myers' affidavit, and we reverse the trial court's grant of summary judgment for Bean.

[22] Reversed and remanded for further proceedings.

Vaidik, J., and Pyle, J., concur.