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# IN THE COURT OF APPEALS OF INDIANA

Diocese of Fort Wayne South Bend, Inc.,
*Appellant-Defendant,*

v.

Gabriella Gallegos,
*Appellee-Plaintiff.*

January 25, 2023

Court of Appeals Case No. 22A-CT-992

Appeal from the St. Joseph Circuit Court

The Honorable John E. Broden, Judge

Trial Court Cause No. 71C01-2001-CT-25

**Tavitas, Judge.**

## Case Summary

[1] Gabriella Gallegos filed a complaint against the Diocese of Fort Wayne-South Bend, Inc. ("the Diocese") and alleged that she hit her head on a diving board during a swim meet and that school staff continued to let her compete despite

knowing that she had a concussion. The Diocese filed a motion for summary judgment, which the trial court denied. The Diocese brings this interlocutory appeal and claims that the trial court erred by denying the Diocese's motion for summary judgment. We agree and, accordingly, reverse and remand.

## Issues

[2] The Diocese presents three issues on appeal, the first of which we find dispositive and restate as whether the trial court erred by determining that Gallegos was not required to designate expert medical evidence to counter the expert medical evidence designated by the Diocese that negated the causation element of Gallegos's negligence claim.

## Facts

[3] At the time relevant to this appeal, Gallegos was a seventeen-year-old junior at Marian High School, which is operated by the Diocese. Gallegos was a diver on the Marian swim team. On January 22, 2018, Gallegos was at a swim meet hosted by Washington High School, which is part of the South Bend Community School Corporation. During warmups, Gallegos hit her head on a diving board. Another diver had to help Gallegos out of the water, and a Washington High School athletic trainer examined Gallegos and asked her a series of questions, which she answered correctly. The Washington athletic trainer gave Gallegos a bag of ice to put on a knot that had formed on Gallegos's head. Gallegos did not indicate that she had a headache at this time. The Washington athletic trainer informed Marian swim team head coach

Micha Niespodziany that Gallegos did not display any signs of a concussion. Based on this assessment, Coach Niespodziany permitted Gallegos to participate in the meet, during which she completed several more dives. When she went home, however, Gallegos felt tired and groggy, and her head hurt. Her mother took her to a local hospital, where Gallegos was diagnosed with a broken nose and a concussion.

[4] On January 20, 2020, Gallegos filed a complaint against the Diocese, claiming that: (1) the Marian coaches and trainers were aware that Gallegos had hit her head on a diving board; (2) the coaches and trainers should have suspected that Gallegos suffered from a concussion and/or head injury as a result; (3) per statute, a student athlete who is suspected of having a concussion or head injury shall be removed from play and not allowed to return unless evaluated by a licensed health-care provider who gives written clearance to return to play and at least twenty-four hours have passed since the student was removed from play, *see* Ind. Code §§ 20-34-7-4, -5; and (4) the Marian coaches and trainers did not remove Gallegos from play nor did they make sure that Gallegos had clearance to be returned to play. Gallegos then alleged that "[a]s a result of the Defendants' carelessness, negligence, and failure to abide by Indiana law, [Gallegos] did not receive the immediate care she needed and her condition was aggravated, resulting in her suffering brain injury and other damages." Appellant's App. Vol. II p. 14. Thus, Gallegos did not allege that the Diocese was at fault for her hitting her head on the diving board; instead, she alleged

that the Diocese was negligent for allowing her to continue to dive after she had suffered a head injury, which she alleged was contrary to statute.

[5] The Diocese filed its answer to the complaint on February 28, 2020, and, on September 23, 2021, filed a motion for summary judgment. In support of its motion, the Diocese designated *inter alia* the report of Dr. E. Andy Akan, a neurologist. Dr. Akan's report noted that Gallegos had a pre-existing history of concussion, having suffered a concussion while ice skating in 2014. She also had a history of attention-deficit disorder and migraine headaches. Dr. Akan's report concluded:

> In my opinion, within a reasonable degree of medical certainty, continuing to dive during the competition on 01/22/2018[,] **did not exacerbate injuries related to a minor concussion Gallegos may have sustained when she hit her head on the diving board**. Diving is a low impact sport and continuing to participate in competition would not have worsened injuries related to a minor concussion, especially as she was asymptomatic following the head trauma.

Appellant's App. Vol. II p. 69 (emphasis added). The Diocese also designated Dr. Akan's affidavit, in which he averred that Gallegos's injuries were not aggravated by her being allowed to continue diving after her head injury.

[6] Gallegos did not submit any medical or other expert opinion evidence to contradict Dr. Akan's conclusion.[1] Gallegos did designate her own affidavit in which she stated, "I believe continuing to dive after my head injury worsened my condition because my physician informed me that repetitive impact to my head aggravated my initial head injury." *Id*. at 105. Gallegos also claimed in a response to the motion for summary judgment that she was "in the process of obtaining a formal expert opinion on this point." *Id*. at 79-80.

[7] The trial court held a hearing on the Diocese's motion for summary judgment on February 1, 2022. The trial court entered an order denying the motion for summary judgment on March 7, 2022. The Diocese subsequently filed a motion asking the trial court to certify its order for interlocutory appeal, which the trial court granted on April 12, 2022. We accepted interlocutory jurisdiction of this case on June 12, 2022, and this appeal ensued.

## Discussion and Decision

[8] 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

[1] Gallegos submitted eight exhibits to the trial court as designated evidence in opposition to the Diocese's motion for summary judgment. The Diocese subsequently filed a motion to strike Gallegos's Exhibits 1 and 8 and portions of Exhibit 7. Exhibit 1 consisted of a "CDC Concussion Fact Sheet," and Exhibit 8 was identified as a transcript titled "Concussion in Sports, Unit 3: Your Responsibilities." Appellant's App. Vol. II p. 87. Exhibit 7 consisted of Gallegos's affidavit. The Diocese sought to strike as hearsay the portion of the affidavit in which Gallegos stated that her "physician informed me that repetitive impact to my head aggravated my initial head injury." *Id*. at 104. The trial court granted the motion to strike Exhibits 1 and 8 but denied the motion to strike the challenged portion of Exhibit 7. Gallegos does not challenge the trial court's ruling on the motion to strike in this discretionary interlocutory appeal.

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).

[9] In the present case, the Diocese argues that the trial court should have granted summary judgment against Gallegos because the evidence designated by the Diocese established, prima facie, that Gallegos's injuries were not caused by any negligence on the part of the Diocese and that Gallegos failed to designate any competent evidence to establish a genuine issue of material fact regarding causation.

[10] "We note that '[n]egligence 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*),

*trans. denied*.[2] Although summary judgment is "rarely appropriate 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)).

[11] The Diocese contends that it negated the causation element of Gallegos's negligence claim by designating the report and affidavit of Dr. Akan, whose medical report concluded that Gallegos's action of continuing to dive "did not exacerbate injuries related to a minor concussion Gallegos may have sustained when she hit her head on the diving board." Appellant's App. Vol. II p. 69. Dr. Akan's affidavit also averred that, "within a reasonable degree of medical certainty, continuing to dive during the competition on January 22, 2018[,] did not exacerbate injuries related to a minor concussion Gallegos may have sustained when she hit her head on the diving board." *Id*. at 130.

[12] Gallegos did not submit any expert opinion to counter Dr. Akan's expert medical opinion. Instead, Gallegos contends that no such medical expert testimony was required and that her affidavit, in which she states she "believe[s] continuing to dive after my head injury worsened my condition because my

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[2] Gallegos also argues that the Diocese's actions were negligence per se because, she alleges, the Diocese failed to comply with the concussion protocols established by statute. *See* Ind. Code Ch. 20-34-7. "The unexcused or unjustified violation of a duty proscribed by a statute or ordinance constitutes negligence *per se* if the statute or ordinance is intended to protect the class of persons in which the plaintiff is included and to protect against the risk of the type of harm which has occurred as a result of its violation." *Am. United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 704 (Ind. Ct. App. 2004), *trans. denied*. Even if a violation of such a statute occurred, "the plaintiff must still prove causation and damages just as in any other negligence claim." *Id*. (citing *City of Gary v. Smith & Wesson, Corp.*, 801 N.E.2d 1222, 1245 (Ind.2003)). Accordingly, if the Diocese negated the causation element of Gallegos's claims, it is immaterial whether her claims are based on traditional negligence or negligence per se.

physician informed me that repetitive impact to my head aggravated my initial head injury," was sufficient to create a genuine issue of material fact regarding causation. *Id*. at 105. We disagree.

[13] First, to the extent that Gallegos's affidavit is based on what her physician told her, it is inadmissible hearsay. It is an out-of-court statement offered to prove the truth of the matter asserted. *See* Ind. Evidence Rule 801 (defining hearsay); Evid. R. 802 (generally prohibiting the admission of hearsay evidence). Gallegos makes no argument on appeal that this statement is not hearsay or that it is admissible under any of the several exceptions to the hearsay rule. Accordingly, the only admissible evidence designated by Gallegos regarding causation is her "belief" that her continued diving aggravated her initial head injury. As explained below, this non-expert opinion is insufficient to establish causation. Moreover, Trial Rule 56(E) requires that affidavits designated in support of or opposition to a motion for summary judgment be "made on personal knowledge," "set forth such facts as would be admissible in evidence," and "show affirmatively that the affiant is competent to testify to the matters stated therein." Gallegos's affidavit is not based on her personal knowledge but rather what she was told by another.

[14] Gallegos is correct that there is no general rule that expert medical testimony is always required in personal injury cases. *Martin v. Ramos*, 120 N.E.3d 244, 249-50 (Ind. Ct. App. 2019). Thus, "[w]hen an injury is objective in nature, the plaintiff is competent to testify as to the injury and such testimony may be sufficient for the jury to render a verdict without expert medical testimony." *Id*.

at 250. "'[A]n injury is objective when it can be discovered through a reproducible physical exam or diagnostic studies that are independent of the patient telling you what they feel or where they feel it." *Foddrill v. Crane*, 894 N.E.2d 1070, 1078 (Ind. Ct. App. 2008) (quoting *Topp v. Leffers*, 838 N.E.2d 1027, 1033 (Ind. Ct. App. 2005)) (internal quotations omitted), *trans. denied*.

[15] If, however, a plaintiffs' injuries are subjective in nature, his or her testimony alone is insufficient to prove causation, and, in such cases, expert medical testimony is required. *Martin*,120 N.E.3d at 250 (citing *Topp*, 838 N.E.2d at 1033); *Harris v. Jones*, 143 N.E.3d 1012, 1017 (Ind. Ct. App. 2020). An injury is subjective if it is "perceived or experienced by a patient and reported to the patient's doctor but is not directly observable by the doctor." *Fodrill*, 894 N.E.2d at 1078 (citing *Topp*, 838 N.E.2d at 1033).

[16] Gallegos claims that she was not required to present medical expert evidence because "it is clearly within the layman's knowledge today that someone suffering a concussion is more likely than not to be vulnerable to additional injury from continued impact." Appellee's Br. p. 12. Given, however, Gallegos's pre-existing conditions and the nature of the injuries she now complains of, i.e., headaches, dizziness, and mental "fogginess," Appellee's App. p. 13, we conclude that her injuries are subjective in nature. *See Harris*, 143 N.E.3d at 1017 (noting that plaintiff's injuries—back pain and radicular numbness—were subjective in nature because she perceived the injuries and reported them to her doctor, but the injuries were not the ones the doctor could observe); *Topp*, 838 N.E.2d at 1033 (concluding that plaintiff's injuries were

subjective in nature because she experienced them but they were not directly observable by any of her doctors); *cf. Martin*, 120 N.E.3d at 250 (concluding that plaintiff's injury—a subarachnoid hemorrhage–was objective in nature because it was directly observable by the physician and discoverable independent of a patient report).

[17] Because Gallegos's injuries were subjective in nature, she was required to prove causation by way of expert medical testimony. *See Topp,* 838 N.E.2d at 1033 (holding that expert medical testimony on the issue of causation was necessary because, given the plaintiff's pre-existing injuries, "the causal connection between the . . . accident [caused by defendant] and Topp's resulting injuries is a complicated medical question that is not within the understanding of a lay person."). Dr. Akan specifically concluded that Gallegos's post-accident diving did not cause any aggravation of any injury Gallegos suffered when she hit her head due to the low-impact nature of diving, and Gallegos failed to submit any expert medical evidence to counter Dr. Akan's conclusions.

[18] We are mindful that this case is before us on a denial of summary judgment. To survive a motion for summary judgment, "evidence sufficient to support a verdict is not required." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1189 (Ind. 2016). "[S]ummary judgment is inappropriate whenever 'a conflict of evidence *may* exist' on a material issue." *Id*. (quoting *Purcell v. Old Nat'l Bank*, 972 N.E.2d 835, 841 (Ind. 2012)) (emphasis added by *Siner*). Accordingly, in *Siner*, our Supreme Court reversed a grant of summary judgment where the defendant's expert testified that the defendant's actions did not cause the

plaintiff's injuries but the medical review panel opinion concluded that the defendant's actions may have been a factor in some of the damages. *Id*. Even if the speculative nature of the medical review panel opinion may have been insufficient to support a verdict in the plaintiff's favor, it was sufficient to survive a motion for summary judgment. *Id*.

[19] Here, however, Gallegos did not designate any such expert medical evidence to contradict Dr. Akan's opinion. Although Gallegos claimed that she was "in the process of obtaining a formal expert opinion on this point," Appellant's App. Vol. II at 79-80, it was her burden to do so once the Diocese's designated evidence (Dr. Akan's expert medical opinion) established prima facie that permitting Gallegos to continue diving did not contribute to her injuries. *See Serbon*, 194 N.E.3d at 91 (noting that, if the moving party makes a prima facie showing that it is entitled to summary judgment, the burden shifts to the nonmoving party to designate evidence showing a genuine issue of material fact). Simply put, Gallegos presented no expert medical evidence to counter the expert opinion designated by the Diocese that negated an element of Gallegos's negligence claim. Accordingly, the trial court should have granted summary judgment in favor of the Diocese.

## Conclusion

[20] The trial court erred by denying the Diocese's motion for summary judgment because the Diocese designated expert opinion evidence that negated an element of Gallegos's negligence claim, and Gallegos failed to designate expert

medical evidence to counter that designated by the Diocese. We, therefore, reverse the judgment of the trial court and remand with instructions that the trial court grant summary judgment in favor of the Diocese.

[21] Reversed and remanded.

Altice, C.J., and Brown, J., concur.