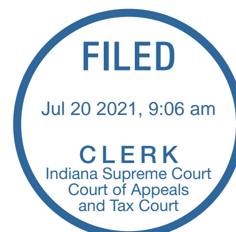
MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE

COURT OF APPEALS OF INDIANA

Catherine Devine,

Appellant/Cross-Appellee-Plaintiff,

v.

Lakeshore Landscaping, Inc.,

Appellee/Cross-Appellant-Defendant

July 20, 2021

Court of Appeals Case No. 21A-CT-204

Appeal from the Lake Superior Court

The Honorable Kristina C. Kantar, Judge

Trial Court Cause No. 45D04-1601-CT-7

Mathias, Judge.

[1] Catherine Devine appeals the Lake Superior Court's entry of summary judgment for Lakeshore Landscaping, Inc. ("Lakeshore"), arguing a genuine issue of material fact precludes the entry of summary judgment. We affirm.

Facts and Procedural History

[2] Around 6:45 a.m. on January 12, 2014, Devine arrived at Franciscan St. Margaret Hospital ("Hospital") in Dyer, Indiana, where she worked. Devine parked in the Hospital parking lot and exited her car. As she was walking toward the Hospital, Devine slipped and fell, sustaining injury to her arm.

[3] In January 2016, Devine sued Lakeshore, alleging she slipped and fell on ice in the parking lot and that Lakeshore was negligent in failing "to take appropriate steps to remove" it. Appellant's App. Vol. II p. 36. When Devine fell, Lakeshore had a contract with the Hospital to provide snow and ice services to the parking lots. The contract stated, "[Lakeshore] will come out to [the Hospital's] site once we're aware that snow has begun to fall in your area or at your request, for variable, localized conditions." *Id.* at 47.

[4] In October 2020, Lakeshore moved for summary judgment and designated business records showing "there was no accumulating snowfall after January 10 and before January 14, 2014" in the Hospital's area and that at no time "on January 11, 2014, or on January 12, 2014, prior to 6:45 [a.m.]" was Lakeshore informed "of a condition at [the Hospital] that required additional service." *Id.* at 43. Therefore, Lakeshore argued its contractual duty had not been triggered when Devine fell. Devine responded and argued Lakeshore's "duty of care was not limited by contract as it had actual notice of a hazardous condition that existed on the premises." Plaintiff's Response to Defendant Lakeshore

Landscaping, Inc's Motion for Summary Judgment, p. 8 (November 30, 2020).[1] To support this assertion, Devine designated her own deposition and her answers to interrogatories, in which she says a security guard at the Hospital told her that he had called Lakeshore to service the property several times the morning before her fall. Devine argued this showed a contractual duty was triggered. The trial court granted summary judgment for Lakeshore.

[5] Devine now appeals.[2]

Standard of Review

[6] Under Indiana Trial Rule 56(C), "[s]ummary judgment is appropriate only where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Missler v. State Farm Ins. Co.*, 41 N.E.3d 297, 301 (Ind. Ct. App. 2015). A genuine issue of material fact exists where facts about an issue that would dispose of the litigation are in dispute or where the undisputed material facts can support conflicting inferences on such an issue. *Devereux v. Love*, 30 N.E.3d 754, 762 (Ind. Ct. App. 2015), *trans. denied*. "If the material facts are not in dispute, our

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[1] Neither party provided certain documents used in our review. We therefore cite to the documents found in the Odyssey Case Management System.

[2] Lakeshore also argued it was entitled to summary judgment due to improper service, as it took Devine two years to properly serve Lakeshore. However, the trial court denied Lakeshore's motion on that ground. Lakeshore filed a cross-appeal, arguing the trial court erred in denying summary judgment on this basis. But because we affirm summary judgment on another issue, we need not decide this.

review is limited to determining whether the trial court correctly applied the law to the undisputed facts." *Id.* We review pure questions of law de novo. *Id.*

Discussion and Decision

I. Summary-Judgment Ruling

[7] Devine first argues the trial court erred by ruling on the summary-judgment motion without affording her "the opportunity to present oral argument in opposition." Appellant's Br. p. 13. We disagree.

[8] Indiana Trial Rule 56(C) governs motions for summary judgment and provides in part,

> An adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits. The court may conduct a hearing on the motion. However, upon motion of any party made no later than ten (10) days after the response was filed or was due, the court shall conduct a hearing on the motion which shall be held not less than ten (10) days after the time for filing the response.

Where no party makes a timely request, a trial court does not have to conduct a summary-judgment hearing. *Mesa v. State*, 5 N.E.3d 488, 494 (Ind. Ct. App. 2014), *trans. denied*; *see also* Ind. Trial Rule 56 ("The trial court **may** conduct a hearing on the motion.") (emphasis added). Here, neither Lakeshore nor Devine requested a summary-judgment hearing. No hearing was required, and the trial court did not err in ruling without one.

[9] Devine then argues the trial court erred by not giving her "a specific deadline within which to file any counter affidavits or other supportive materials." Appellant's Br. p. 13. However, after Lakeshore moved for summary judgment, the trial court issued a "Scheduling Order," which stated, "If [Devine] wishes to Respond to the Summary Judgment Motion, [she] must file a Response to such Motion within the time prescribed by Local [R]ule 45-TR7-4, or the Court will rule on such Motion without further notice or hearing per the Order provided by [Lakeshore]." Scheduling Order (October 26, 2020). Lake County Local Rule 45-TR7-4 states,

> All motions filed pursuant to Trial Rules 12 and 56 shall be accompanied by a separate supporting brief. An adverse party shall have thirty (30) days after service of the initial brief in which to serve and file a response brief, and the moving party shall have ten (10) days after service of the response brief in which to serve and file a reply brief.

Therefore, Devine was given a deadline with which to file her response, and she did so. To the extent Devine wished to designate additional evidence, she was free to make a timely request for an extension to file. *See* T.R. 56(I) ("For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit."). However, she did not do so here.

[10] The trial court did not err in ruling on Lakeshore's summary-judgment motion.

II. Genuine Issue of Material Fact

[11] Devine also argues the trial court erred in granting summary judgment because there existed a genuine issue of material fact as to whether Lakeshore owed her a duty of care. Negligence is composed of three elements: (1) a duty on the part of a defendant in relation to the plaintiff; (2) a breach of this duty, i.e., a failure on the part of the defendant to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff that was proximately caused by the defendant's breach. *Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 875-76 (Ind. Ct. App. 2007) (*citing Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002), *trans. denied*), *trans. denied*. Although generally a negligence action is not appropriate for disposal by summary judgment, a defendant may obtain summary judgment when the undisputed facts negate at least one element of the plaintiff's negligence claim. *Perkins v. Fillio*, 119 N.E.3d 1106, 1111 (Ind. Ct. App. 2019), *trans. denied*.

[12] A duty of care may arise where one party assumes a duty through contract. *Estate of Staggs by and through Coulter v. ADS Logistics Co., LLC*, 102 N.E.3d 319, 323 (Ind. Ct. App. 2018), *trans. denied*. "[I]f a contract affirmatively evinces intent to assume a duty of care, actionable negligence may be predicated upon the contractual duty." *Id.* (citation omitted).

[13] Devine argues there exists a genuine issue of material fact as to whether the contract between Lakeshore and the Hospital imposes a duty owed by Lakeshore to Devine. The contract states Lakeshore would service the Hospital

parking lots in two circumstances: (1) when it was aware snow was falling in the area or (2) when the Hospital requested it. Lakeshore designated evidence showing neither event occurred on the day of Devine's fall. In response, Devine designated evidence a hospital security guard told her he had called Lakeshore several times in the morning before her fall and argues that these calls would trigger a duty. However, as the trial court noted, this is hearsay evidence, which cannot be considered on summary judgment. *Breining v. Harkness*, 872 N.E.2d 155, 158 (Ind. Ct. App. 2007), *trans. denied*.

[14] Devine also points to Lakeshore's records that indicate it had serviced the parking lots the day before Devine fell and immediately after her fall. Devine argues this means Lakeshore had notice of weather conditions. However, this is mere speculation, which cannot be used to demonstrate the existence of a genuine factual issue. *Taylor v. Cmty. Hosps. of Ind., Inc.*, 949 N.E.2d 361, 366 (Ind. Ct. App. 2011).

[15] The trial court did not err in determining Lakeshore owed no duty to Devine.

[16] Affirmed.

Bradford, C.J., and Brown, J., concur.