MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Daphne Yolanda Wright and the Estate of Kenneth Bracken,

Appellants-Plaintiffs,

v.

Shirley Dobbins,

Appellee-Respondent.

March 15, 2022

Court of Appeals Case No. 21A-CT-1898

Appeal from the Marion Superior Court

The Honorable James A. Joven, Judge

Trial Court Cause No. 49D13-1802-CT-6827

Weissmann, Judge.

[1] In this wrongful death suit, the trial court granted defendant Shirley Dobbins' motion for summary judgment after plaintiff Daphne Wright failed to respond. Wright now appeals. Finding that Dobbins' designated evidence reveals a genuine issue of material fact as to breach and causation, we reverse the trial court's order and remand for further proceedings.

Facts

[2] Kenneth Bracken and Dobbins were involved in a car accident in Indianapolis that ultimately resulted in Bracken's death. At the time of the accident, Dobbins was driving east on 38th Street toward Leland Street in a Chevy Malibu. She was in the left lane. Bracken was walking north on Leland Street toward 38th Street with his moped. There were stop signs on Leland where the two streets intersected, but no stop signs on 38th Street. The traffic on 38th Street had the right-of-way.

[3] After crossing Emerson Avenue, the last street before the accident site, Dobbins saw Bracken enter the right lane of eastbound traffic on 38th Street. Dobbins believed Bracken "was going to stop and wait for [her] to pass." Appellant's App. Vol. II, p. 119. But as Dobbins got closer, Bracken entered Dobbins' lane and she collided with him. The police report states, "All parties on scene stated the same thing, that [Bracken] failed to yield to oncoming traffic." *Id.* at 122. Bracken suffered incapacitating injuries to his leg. Six months later, Bracken died from an infection related to the injuries he sustained in the accident.

[4] Wright—Bracken's widow and personal representative of his estate—filed a wrongful death suit against several defendants, including Dobbins. Wright claimed that Dobbins' negligence caused the accident and Bracken's death. Dobbins never received service of the summons or complaint. In a motion to dismiss for failure to prosecute filed in September 2020, Dobbins notified Wright and the court that she had not been served. The trial court summarily denied this motion.

[5] Dobbins moved for summary judgment under Indiana Trial Rule 56 on April 27, 2021. In support of her motion, Dobbins argued that she did not cause the accident, negating Wright's negligence claim, and that Wright never complied with the requirements of service of process, meaning the trial court lacked personal jurisdiction to hear the case.[1] Wright did not respond within the 30-day deadline, and the trial court granted summary judgment for Dobbins, dismissing Dobbins from the action with prejudice. Wright then filed twin motions to correct error and to set aside summary judgment, which the trial court denied.

[1] Dobbins's memo in support of her motion for summary judgment and her designation of evidence were not in the Appellant's Appendix. Because we find these documents necessary to our evaluation of Bracken's appeal, we take judicial notice of them under Indiana Evidence Rule 201(a)(2)(C); s*ee generally* Ind. Appellate Rule 49(B) ("Any party's failure to include any item in an Appendix shall not waive any issue or argument.").

Discussion and Decision

[6] Wright now appeals, arguing that summary judgment and denial of her post-judgment motions were improper because genuine issues of material fact remain. We find that summary judgment was not based on lack of personal jurisdiction and that a genuine issue of material fact exists in the designated evidence.[2] We therefore reverse summary judgment and remand for further proceedings.

I. Personal Jurisdiction

[7] Dobbins raised lack of personal jurisdiction first in her answer to Wright's complaint, then in her motion to dismiss for failure to prosecute, and finally in her motion for summary judgment. Dobbins alleges that she never received service of process, which deprived the trial court of personal jurisdiction. *Munster v. Groce*, 829 N.E.2d 52, 57 (Ind. Ct. App. 2005). For two reasons, we find that lack of personal jurisdiction was not the basis for summary judgment. We also conclude that Dobbins failed to meet her burden of disproving personal jurisdiction.

[8] First, a summary judgment motion challenging personal jurisdiction is more properly treated as a motion to dismiss under Trial Rule 12(B)(2). *Boyer v. Smith*, 42 N.E.3d 505, 508 (Ind. Ct. App. 2015) ("[A] summary judgment

[2] Because this issue is dispositive, we need not reach Wright's arguments about the Journey's Account Statute or her post-judgment motions.

motion attacking personal jurisdiction should be treated instead as a motion to dismiss under Trial Rule 12(B)(2) . . . .”). The trial court did not issue a 12(B)(2) dismissal.

[9] Second, dismissal for lack of personal jurisdiction is not an adjudication on the merits. *O’Bryant v. Adams*, 123 N.E.3d 689, 695 (Ind. 2019). But a dismissal with prejudice is a dismissal on the merits. *Brodnik v. Cottage Rents LLC*, 165 N.E.3d 126, 128-9 (Ind. Ct. App. 2021). Because Dobbins was dismissed from the cause with prejudice, lack of personal jurisdiction cannot be the grounds on which summary judgment was granted.

[10] Finally, Dobbins did not carry her burden to disprove personal jurisdiction. *See Boyer*, 42 N.E.3d at 508. Indiana Trial Rule 4.15(F) provides that no summons shall be set aside or be adjudged insufficient “when it is reasonably calculated to inform the person that an action has been instituted against him, the name of the court, and the time within which he is required to respond.” *Yoder v. Colonial Nat. Mortg.*, 920 N.E.2d 798, 802 (Ind. Ct. App. 2010). This rule is designed to reduce challenges to service based on technical defects. *Id.*

[11] The record does not reveal how Dobbins learned of Wright’s lawsuit but does show that she learned of it in time to not only respond but prevail below. Though actual notice alone will not cure a total failure to serve, it may be considered in determining whether notice was reasonably calculated to apprise her of the action. *Nw. Nat’l Ins. Co. v. Mapps*, 717 N.E.2d 947, 954 (Ind. Ct.

App. 1999). Dobbins did not present sufficient evidence that Wright's notice was not reasonably calculated to notify Dobbins.

[12] Because summary judgment was not based on lack of personal jurisdiction and Dobbins proved no jurisdictional defect, we consider whether summary judgment was proper on the merits of Wright's wrongful death claim.

II. Wrongful Death

[13] Wright claims that both the breach and causation elements of her negligence claim against Dobbins present genuine issues of material fact, requiring reversal. We agree.

A. Standard of Review

[14] We apply the same standard as the trial court when reviewing summary judgment rulings. *Fox v. Barker*, 170 N.E.3d 662, 665 (Ind. Ct. App. 2021) (citing *McCullough v. CitiMortgage*, 70 N.E.3d 820, 824 (Ind. 2017)). As the moving party, Dobbins bears the burden of showing that there are no genuine issues of material fact and she is entitled to judgment as a matter of law. *Id.* Summary judgment is improper if Dobbins fails to meet this burden or if Wright, as the nonmoving party, establishes a genuine issue of material fact. *Id.* Wright bears the burden of persuading us that summary judgment was granted in error. *McDonald v. Lattire*, 844 N.E.2d 206, 210 (Ind. Ct. App. 2006). We construe all factual inferences in the nonmoving party's favor. *Fox*, 170 N.E.3d at 665. But only those facts alleged by Wright and supported by designated evidence "must be taken as true." *McDonald*, 844 N.E.2d at 212. "No judgment

rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court." Ind. Trial Rule 56(H).

[15] Wright did not respond to Dobbins' motion for summary judgment, and she designated no evidence. Wright argues that the trial court could have taken notice of her pleadings and information "plainly in the Court's record." Appellant's Br., p. 10. This is simply not the law. Trial Rule 56(E) states:

> [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Our review of whether a genuine issue of material fact exists is limited to the evidence specifically designated to the trial court. T.R. 56(H). That said, Wright's failure to respond below does not preclude her argument of the relevant law on appeal. *Murphy v. Curtis*, 930 N.E.2d 1228, 1234 (Ind. Ct. App. 2010).

[16] The dispositive issue here is whether Dobbins' designated evidence showed either that the undisputed facts negate at least one element essential to Wright's claim of negligence or that Wright's claim is barred by an affirmative defense. *McDonald*, 844 N.E.2d at 210 (citing *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004)). The elements of Wright's negligence claim are: (1) Dobbins had a duty to conform her conduct to a standard of care arising

from her relationship with Bracken; (2) Dobbins breached this standard of care; and (3) Bracken was injured, and that injury was proximately caused by Dobbins's breach. *Id.* at 212-13. "Because issues of reasonable care, causation, and comparative fault are more appropriately left for determination by the trier of fact, summary judgment is rarely appropriate in negligence cases." *Id.* (citing *Daisy v. Roach*, 811 N.E.2d 862, 864 (Ind. Ct. App. 2004)). In her memo in support of summary judgment, Dobbins argued that she negated the third element. Wright counters on appeal that there are genuine issues of material fact for both breach and proximate cause, rendering summary judgment improper.

B. Duty

[17] Wright and Dobbins agree that Dobbins had a duty to "use ordinary care to avoid injuries to other motorists." *Romero v. Brady*, 5 N.E.3d 1166, 1168 (Ind. Ct. App. 2014) (citing *Wilkerson v. Harvey*, 814 N.E.2d 686, 693 (Ind. Ct. App. 2004); *Cole v. Gohmann*, 727 N.E.2d 1111, 1115 (Ind. Ct. App. 2000)). This duty did not require Dobbins, as the driver on the preferred road, to be constantly aware of the actions of non-preferred drivers in plain view, like Bracken. *See Wilkerson*, 814 N.E.2d at 691. But she was charged with exercising ordinary care to observe dangers and obstructions. *Gonzalez v. Ritz*, 102 N.E.3d 910, 915 (Ind. Ct. App. 2018) (quoting *Smith v. Beaty*, 639 N.E.2d 1029, 1033 (Ind. Ct. App. 1994)). Without notice to the contrary, Dobbins had "the right to assume others who owe [her] a duty of reasonable care will exercise such care."

McDonald, 844 N.E.2d at 213 (citing *Berg v. Glinos*, 538 N.E.2d 979, 981 (Ind. Ct. App. 1989)).

C. Breach

[18] Wright argues that Dobbins breached her duty of ordinary care when she failed to avoid colliding with Bracken, creating a genuine issue of material fact. Because she did not respond to the motion below, she must rely solely on Dobbins' designated evidence. Wright attempts to advance her argument in several ways, including a list of "permissible inferences," all of which are devoid of required citations to the record and many of which impermissibly rely on undesignated evidence. Appellant's Br., pp. 17-18; Ind. App. R. 46(A)(8)(a); T.R. 56. We need not comb through all of Wright's claims, however, because one of them is preserved, relies on designated evidence, and is dispositive.

[19] Dobbins designated portions of her affidavit where she swears that she saw Bracken begin walking his moped across 38th Street before the collision. Wright believes this statement also supports the inference that Dobbins could have swerved, safely braked, or otherwise maneuvered to avoid Bracken. Wright is correct. Though Dobbins had the right-of-way, she did not have license to neglect her duty to use ordinary care to avoid injury to others. *H.E. McGonigal, Inc. v. Etherington*, 118 Ind. App. 622, 79 N.E.2d 777, 780 (Ind. Ct. App. 1948) ("The fact that a statute or rule of the road gives a motorist a preference does not allow him to abandon reasonable prudence and care for the safety of others, and does not avail himself of such right with complete indifference or disregard to the safety of others."). Additionally, Dobbins' motion relies on statements in

her affidavit which are *not* statements of fact, but opinion. *See Akin v. Simons*, No. 21A-PL-620, slip op. at *6 (Ind. Ct. App. Dec. 30, 2021) ("[A] person's belief or understanding is not an objective fact, and objective facts are required to create genuine issues of material fact."). Dobbins avers, for example, that she "believed" Bracken was going to stop. App. Vol. II, p. 119. It is a question for the trier of fact whether such a belief was reasonable. *McDonald*, 844 N.E.2d at 210. And while Dobbins avers that she was "unable to stop," *id.*, the question remains whether, after having spotted Bracken, Dobbins exercised reasonable care to avoid a collision with him. In other words, the designated evidence can support the inference that Dobbins was negligent.

[20] Dobbins relies heavily on *McDonald*, *supra*, to argue that no such inference may be drawn. She correctly observes that the law does not impose a duty to "proceed overly cautiously into an intersection and to be cognizant of everything in plain view." 844 N.E.2d at 213. But *McDonald* is distinguishable. In that case, plaintiff McDonald sued defendant Lattire when he failed to anticipate that a third driver on the non-preferred road would run a stop sign and hit Lattire, causing Lattire's car to spin into McDonald's. *Id.* at 213-214. We determined that Lattire was not negligent in failing to anticipate the extraordinary hazard of this third driver. *Id.* at 215.

[21] Unlike the driver in *McDonald*, Dobbins saw the potential hazard ahead of time. Yet, there is no evidence in the record that Dobbins did anything to fulfill her duty to avoid Bracken—she does not even assert that she slowed down. These factors allow the inference that Dobbins breached her duty of ordinary care.

D. Causation

[22] Because a genuine issue of material fact exists as to whether Dobbins breached her duty of care, a genuine issue of material fact also exists as to whether her breach proximately caused Bracken's injury. If Dobbins was, indeed, negligent in failing to avoid the crash, she was one of its proximate causes. If the ultimate injury is one that was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the breach, the breach proximately caused the injury. *Romero*, 5 N.E.3d at 1170. Proximate cause is a question usually left to the factfinder. *Id.*

[23] Though Dobbins designated evidence that showed that Bracken was contributorily negligent, contributory negligence is generally a question of fact inappropriate for summary judgment. *Gonzalez*, 102 N.E.3d at 915. This is especially so where the Comparative Fault Act applies, and a showing of contributory negligence alone is not enough to defeat the plaintiff's claim. *See Sparks v. White*, 899 N.E.2d 21, 30 (Ind. Ct. App. 2008) ("The Comparative Fault Act entrusts the allocation of fault to the sound judgment of the fact-finder.") (quoting *Pargon Family Rest v. Bartolini*, 799 N.E.2d 1048, 1056 (Ind. 2003)); Ind. Code § 34-51-2-6. We have no cause to stray from this practice here, where more than one reasonable inference can be drawn from the facts. This issue is more appropriately left for the trier of fact. *McDonald*, 844 N.E.2d at 210.

[24] We reverse the trial court's grant of summary judgment and remand for further proceedings.

Najam, J., and Vaidik, J., concur.