

MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Jackie Clowers
Applegate Fifer Pulliam LLC
Jeffersonville, Indiana

ATTORNEY FOR APPELLEE

Mark A. Holloway
Knight Hoppe Kurnik & Knight,
Ltd.
Carmel, Indiana

IN THE COURT OF APPEALS OF INDIANA

New Hope Services, Inc., M.
Fine on Spring, L.P., MFOS
Apartments, LLC,

Appellant-Plaintiffs,

v.

City of Jeffersonville,

Appellee-Defendant

May 18, 2023

Court of Appeals Case No.
22A-CT-2870

Appeal from the Clark Circuit
Court

The Honorable Marsha O.
Howser, Special Judge

Trial Court Cause No.
10C01-1905-CT-89

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

- [1] New Hope Services, Inc. is the owner of MFOS Apartments, LLC, which, in turn, is the general partner of M. Fine on Spring, L.P. In the summer and early fall of 2018, a building owned by M. Fine on Spring in the City of Jeffersonville suffered flood-related damages following three different heavy rainfall events. The three businesses (which we will refer to collectively as “New Hope”) filed suit against the City and alleged that the City had negligently failed to keep a swale and accompanying storm drain clear of debris, which, New Hope alleged, proximately caused the damage to the building.
- [2] The trial court entered summary judgment for the City on multiple grounds, and, on appeal, New Hope raises three issues for our review. However, we need only consider the following dispositive issue: whether the designated evidence negated the element of proximation causation of New Hope’s negligence claim.¹ The City’s designated evidence established that the flooding occurred only because the City’s drainage infrastructure was overwhelmed by each of the rainfall events and, further, that the water elevation levels at New Hope’s building would have been exactly the same regardless of whether the swale and storm drain in question had been cleared of debris. In response, New Hope relied on the testimony of its own expert, but his conclusion was only that the

¹ For purposes of this appeal, we assume only for the sake of argument that the City is not entitled to discretionary function immunity under [Indiana Code § 34-13-3-3\(7\) \(2018\)](#). We also need not consider New Hope’s argument that the trial court erred when it excluded the affidavit and report of New Hope’s expert, which New Hope acknowledges was cumulative to the expert’s admitted deposition testimony. *See* Appellant’s Br. at 32; *see also, e.g., Cooley v. State*, 682 N.E.2d 1277, 1282 (Ind. 1997).

debris in the swale and at the drain “could” have or “may have” contributed to an increase in the water elevation levels at the building. Appellant’s App. Vol. 5, p. 9; Appellee’s App. Vol. 6, pp. 180-81.

- [3] We hold that the City’s designated evidence negated the element of proximate causation, and New Hope’s response was insufficient to establish the existence of a genuine issue of material fact on that element. We therefore affirm the trial court’s entry of summary judgment for the City.

Facts and Procedural History

- [4] In October 2014, New Hope purchased the building in question, which was located northeast of the intersection of 8th Street and Ohio Street in the City. That area was known for being a low-lying area that frequently flooded, but the building did not lie in a flood plain and itself did not have a history of flooding. After purchasing the building, New Hope engaged in a multi-million dollar renovation project. That renovation included lowering above-ground-level doors and windows to ground level, such that no steps up were now required to enter through the doors, and windows were now located at street level.
- [5] On July 31, the City received several inches of rain over the course of a few hours. The downpour resulted in flooding near 8th Street and Ohio Street, and water entered the building through its street-level windows and under the street-level doors. Less than one month later, while New Hope was still in the process of repairing the building from the July flood, the City again experienced a

heavy rainfall event that again resulted in flooding inside the building. And a few weeks after the second event, the City experienced a third heavy rainfall, which, yet again, caused flooding inside the building. New Hope suffered damages in excess of \$100,000 from the three rainfall events.

[6] Four days after the third event, New Hope contacted Harold Hart, a local engineer, “to perform an evaluation of the drainage infrastructure” surrounding the building. Appellant’s App. Vol. 4, p. 40. Over the course of about the next six weeks, Hart did “a reconnaissance of the area” to see if there was “anything that would . . . cause . . . the flooding levels [to be] as significant as they were” at the building. Appellant’s App. Vol. 5, p. 9.

[7] There is no dispute that the City’s streets around the building include approximately eight storm inlets. *See* Appellee’s App. Vol. 2, p. 137. Those inlets allow rainwater to enter into the City’s underground storm drains. From the southwest corner of the building, at the intersection of 8th Street and Ohio Street, the City’s storm drains carry rainwater west one city block to Indiana Avenue, and then an approximately equal distance south before turning west again for about one-half city block. There, the storm drain empties into a northwest-to-north flowing swale that is about one-and-one-half city blocks north-to-south and another city block east-to-west. At the northern end of that swale is another storm inlet that allows water to enter into it both through an upper, horizontal grate and a lower, vertical grate.

[8] In inspecting the conditions of the City’s drainage infrastructure, Hart observed debris in the swale and on the grates of the storm inlet at the northern end of the swale. Hart concluded that that debris during the rainfall events “could be the culprit that may have caused the significant flooding” at the building. Appellant’s App. Vol. 5, p. 9. However, when Hart was later asked to clarify if his assessment was that the debris caused flooding at the building “to a reasonable degree of engineering certainty,” he responded:

I’ll put it this way, I believe [the debris] affected the water surface elevation Now, to the—what’s the word I want to use—to the amount, I did not do an analysis nor was I asked to do that.

Q Okay. So it could have been one inch?

A Could have been.

Q A half inch?

A Could have been. I don’t know, I can’t quantify it.

Q So, again, you can’t state to a reasonable degree of engineering certainty that the debris caused flooding in the building during these flooding events in 2018?

A I’ve not been asked to do an analysis to determine any quantitative value.

Q Okay. Your opinion is that it *may* have been a contributing factor that affected the level of flooding at 8th Street?

A Yes.

Appellee's App. Vol. 6, pp. 180-81 (emphasis added).

[9] The City did its own expert analysis of the three flooding events. Andy Crouch, the City Engineer, concluded that, "[w]hen the 2018 flooding events occurred[,] there was too much water trying to get into the storm[]water drainage system," which "did not have the capacity to accept all of the extra water caused by the rainfall." Appellee's App. Vol. 2, p. 132. Crouch continued:

If a problem is reported involving the storm[]water system[,] we generate a work order. The work orders for maintenance of storm water structures are prioritized based on the severity of the problem, public safety, and the number of people affected by the problem. If a storm[]water system blockage or obstruction affecting the [building] had been reported[,] we would have removed it[;] *however, that was not the case when the flooding events occurred in 2018 My department did not have to clear a blockage or obstruction to get the storm[]water moving through the system that took water from the [building] to the open channel [of the swale] west of Indiana Avenue. Once the storm water system was no longer overwhelmed, the storm[]water drained, and the flooding receded within hours after the rainfall. The [C]ity's storm[]water pipes servicing the [building] were not clogged or obstructed with debris or materials when the flooding events occurred in 2018.*

Id. at 133 (emphasis added). Crouch further concluded that, "[d]uring the flooding events in 2018[,] the storm[]water did not reach the overbank area of the [swale]. That is, the water stayed in the [swale's] channel and there was no flooding at that location." *Id.*

[10] The City also hired Siavash Biek as an outside engineer to assess the 2018 flooding events. Biek determined that the three rainfall events “included intensities as high as a 25-year return interval event. Such high intensity rainfall events are well beyond the design capacity of most urban street systems, including [the City’s].” Appellee’s App. Vol. 6, p. 27. Specifically, Biek noted that the three rainfall events resulted in three inches of rain in eight hours; 3.3 inches of rain in fifteen hours; and 3.9 inches of rain in seven hours.

[11] Based on those values, Biek conducted “[a] computer flood model of the storm[]water system around the [building]” and along the storm drains leading from it. *Id.* at 27. Biek’s model “assumed all pipes and inlets were operating at their full capacity and were not reduced, blocked, or obstructed by debris or anything else.” *Id.* Biek then compared his model’s predicted water elevation levels at 8th Street and Ohio Street to the water elevation levels actually measured during the three rainfall events.

[12] Each of the three modeled scenarios demonstrated that “there was no difference” in the water elevation levels at the building when compared to the actual water elevation levels. *Id.* at 29. That is, Biek’s model of the unobstructed drainage system precisely predicted the actual water elevation levels that were observed during the three 2018 rainfall events. Biek therefore concluded that “the condition of the [swale] and/or its [northern inlet] at the time of the rainfall events had no impact on the 2018 flooding events experienced” at the building. *Id.* at 30. When the City’s attorneys later asked Hart if he disagreed

with Biek’s analysis, Hart did not dispute or take issue with the analysis and stated instead that he had been asked to do a different analysis.

[13] After filing a tort claims notice with the City, in May 2019, New Hope filed its complaint for damages. In its complaint, New Hope alleged damages based only on the City’s alleged “fail[ure] to properly inspect, service, clean[,] and/or maintain” the swale and the swale’s northern storm inlet. Appellant’s App. Vol. 2, p. 26. Thereafter, the City moved for summary judgment and designated Crouch’s affidavit, Biek’s affidavit, and related documents as evidence. In response, New Hope attempted to designate Hart’s affidavit and a report he had prepared. The trial court struck Hart’s affidavit and report but admitted his deposition testimony, in which he stated his conclusions and his reasons for them. The court then entered summary judgment for the City, and this appeal ensued.

Standard of Review

[14] New Hope appeals the trial court’s entry of summary judgment. Our standard of review is well settled:

We review summary judgment de novo, applying the same standard as the trial court: “Drawing all reasonable inferences in favor of . . . the non-moving parties, 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.’” *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting 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.” *Id.* (internal citations omitted).

The initial burden is on the summary-judgment movant to “demonstrate [] the absence of any genuine issue of fact as to a determinative issue,” at which point the burden shifts to the non-movant to “come forward with contrary evidence” showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to *Hughley*).

[15] Further, here the trial court entered findings and conclusions to support its summary judgment order. While those findings and conclusions aid our review by providing us with the reasons for the trial court’s decision, we are not bound by them. *Global Caravan Techs., Inc. v. Cincinnati Ins. Co.*, 135 N.E.3d 584, 588 (Ind. Ct. App. 2019), *trans. denied*. And “we may affirm a grant of summary judgment upon any theory supported by the evidence.” *Miller v. Danz*, 36 N.E.3d 455, 456 (Ind. 2015).

The Designated Evidence Demonstrates that the City’s Alleged Failure to Keep the Swale and its Northern Storm Inlet Clear of Debris Did Not Cause New Hope’s Damages.

[16] New Hope’s complaint against the City alleged that the City’s negligence had caused New Hope’s damages. To prevail on its negligence claim, New Hope

must show that the City owed New Hope a duty, that the City breached that duty, and that the New Hope suffered a compensable injury proximately caused by the City's breach of duty. *See, e.g., Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). In support of its motion for summary judgment, the City designated evidence that it did not proximately cause New Hope's damages. In particular, the City's designated evidence included Crouch's affidavit, Biek's affidavit, and related documents.

[17] We agree with the City that its designated evidence negated the element of proximate causation. Crouch testified that there was no flooding at all in the swale during the three rainfall events and that there was no blockage in the drainage system servicing the building during those events. Crouch further testified that the reason for the flooding at the building was that the inlets around it, which service a known low-lying area, had become overwhelmed during the downpours, and they could not drain the water away fast enough to prevent the rise in water elevation levels around the building.

[18] Crouch's testimony was confirmed by Biek's models, which precisely predicted the observed water elevation levels at the building on the assumption that the inlets and drains servicing it were clear of debris. In other words, Biek's models demonstrated that the alleged failure of the City to keep the swale and its northern inlet clear of debris was irrelevant to the water elevation levels at the building during the downpours. Thus, the City's designated evidence affirmatively negated the element of proximate causation of New Hope's claim.

[19] In light of the City’s showing, the burden on summary judgment shifted to New Hope to establish a genuine issue of material fact on the element of proximate causation. In its summary judgment response, New Hope relied in relevant part on the deposition testimony of Hart. In that testimony, Hart stated that, sometime after the third rainfall event, he observed debris in the swale and on the grates at the swale’s northern storm inlet. He then concluded that that debris “could” have or “may have” contributed to the flooding at the building. Appellant’s App. Vol. 5, p. 9; Appellee’s App. Vol. 6, pp. 180-81.

[20] Hart’s testimony that the debris in the swale and on the grates “could” have or “may have” caused the flooding at the building is insufficient to establish a genuine issue of material fact on the element of proximate causation. First, Hart’s conclusion that the debris “could” have or “may have” caused the flooding is not an assertion of a likelihood or a probability. Indeed, when pressed, Hart was unwilling to assert within “a reasonable degree of engineering certainty” that the debris likely caused the flooding at the building. Appellee’s App. Vol. 6, pp. 180-81. Second, Hart was unable to quantify a likely change in water elevation levels at the building based on the debris. Third, Hart presented no testimony to challenge Crouch’s conclusion that there had been no flooding in the swale during the three rainfall events, and he provided no explanation for how water could back up from the swale’s northern storm drain to the building without flooding at least part of the swale. Fourth, Hart took no issue with

Biek's assessments and conclusions, stating only that Hart had been asked to do a different analysis.

[21] A trier of fact hearing Hart's testimony would only be able to speculate from his conclusion that the debris "could" or "may have" caused New Hope's damages to the conclusion that they in fact did or within a reasonable degree of likelihood probably did.² "Mere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment." *Schon v. Frantz*, 156 N.E.3d 692, 698 (Ind. Ct. App. 2020) (quoting *Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079, 1089 (Ind. Ct. App. 2018), *trans. denied*); *see also Cox v. Paul*, 828 N.E.2d 907, 913-14 (Ind. 2005). Accordingly, we conclude that the City affirmatively negated the element of causation, and New Hope is unable to establish a genuine issue of material fact on that element. We therefore affirm the trial court's entry of summary judgment for the City.

[22] Affirmed.

May, J., and Bradford, J., concur.

² Hart's testimony does not even cross the low threshold of a "self-serving affidavit" that might preclude the entry of summary judgment. *Hughley*, 15 N.E.3d at 1003.