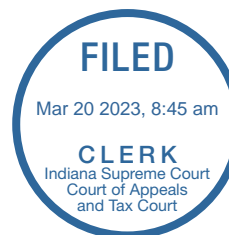


MEMORANDUM DECISION

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Jennifer Diane Lucas by
Diane Zeiss Nevitt, Guardian,
Appellant-Plaintiff,

v.

Rebecca J. Swinford, State of
Indiana, and City of Fishers,
Appellees-Defendants.

March 20, 2023

Court of Appeals Case No.
22A-CT-1739

Appeal from the Hamilton
Superior Court

The Honorable Michael A. Casati,
Judge

Trial Court Cause No.
29D01-1703-CT-2257

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

Weissmann, Judge.

- [1] Jennifer Diane Lucas, a nurse, stopped on Interstate 69 to help a driver who had been in a collision with a car driven by Rebecca J. Swinford. About 10 to 15 minutes later, another vehicle rear-ended Lucas's parked car while Lucas sat inside it on the phone with 911. Lucas was severely and permanently injured in this second collision.
- [2] Lucas, by her Guardian, filed suit against several entities and persons, including Swinford, for their alleged negligence in causing the second collision. The trial court granted summary judgment to Swinford, who maintained that she did not cause the second collision and thus was not liable for Lucas's injuries. Lucas filed this interlocutory appeal, contending that genuine issues of material fact exist as to Swinford's liability. We find Lucas's claims unpersuasive and affirm the summary judgment granted to Swinford.

Facts

- [3] Shortly before dawn, Swinford and Nader Botros were driving southbound on I-69 in Fishers when their cars apparently collided. Botros's vehicle ended up on the left shoulder of the multi-lane highway. Swinford continued southbound and stopped on the nearby exit ramp on the right side of the highway. Swinford ultimately left, drove around the area, and then parked her car at a nearby gas station. Statements from Botros and another witness to the accident conflicted as to whether Botros or Swinford caused the initial collision.

- [4] Lucas, who was traveling behind Botros and Swinford, noticed Botros pull over to the shoulder of the highway and two other cars, including Swinford's, stop on the exit ramp. Lucas parked her car behind Botros's vehicle on the narrow shoulder and turned on her hazard lights. Parts of both cars protruded into the nearest driving lane on the multi-lane highway.
- [5] Lucas exited her car, determined that Botros needed assistance, and called 911. Returning to her car, Lucas continued to speak with the dispatcher. Minutes later, Ashley Culp's vehicle rear-ended Lucas's car. Lucas estimated that this second collision occurred 10 to 15 minutes after the initial collision involving Swinford and Botros and 5 to 10 minutes after Swinford left the scene.
- [6] Fishers Police Officer Tracy Marsh, who investigated the collisions, created two separate accident reports: one that showed Botros hitting Swinford's vehicle and another showing Culp hitting Lucas's car. Officer Marsh found Swinford at her home the next day and ticketed her for driving while her license was suspended and for leaving the scene of a personal injury accident.
- [7] Severely and permanently injured as a result of Culp's collision with her car, Lucas, by her Guardian, sued Swinford and others. Swinford moved for summary judgment, which the trial court granted without specifying its reasons. Lucas then filed a motion to correct error, which the trial court denied.

Discussion and Decision

- [8] In this interlocutory appeal, Lucas argues that summary judgment was improper because there is a genuine question of material fact as to whether

Swinford's negligence proximately caused Lucas's injuries. Swinford responds that Lucas failed to contest proximate cause in her response to Swinford's summary judgment motion. Therefore, she waived her ability to raise that issue in her motion to correct error or on appeal. We agree. And because Lucas failed to rebut Swinford's prima facie showing that no genuine issue of material fact as to proximate cause exists and that Swinford is entitled to a judgment as a matter of law, we conclude summary judgment was proper.

[9] When reviewing a summary judgment ruling, we apply the same standard as the trial court. *Fox v. Barker*, 170 N.E.3d 662, 665 (Ind. Ct. App. 2021). Swinford, as the moving party, bears the burden of showing there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. *Id.* Summary judgment is improper if the moving party fails to meet this burden, or, if it does, the nonmoving party establishes a genuine issue of material fact. *Id.*

[10] In determining whether the summary judgment ruling was correct, we construe all factual inferences in the nonmoving party's favor and all doubts as to the existence of a material fact against the moving party. *Id.* at 665-66. The trial court's grant of summary judgment is clothed in a presumption of validity, however, and the party who lost in the trial court bears the burden on appeal of proving the decision was erroneous. *FLM, LLC v. Cincinnati Ins. Co.*, 973 N.E.2d 1167, 1173 (Ind. Ct. App. 2012).

[11] When reviewing the denial of a motion to correct error, we apply an abuse of discretion standard. *Cleveland v. Clarian Health Partners, Inc.*, 976 N.E.2d 748, 755 (Ind. Ct. App. 2013). An abuse of discretion occurs if the court’s decision is against the logic and effect of the facts and circumstances before it or deviates from law. *Id.*

I. Proximate Cause

[12] Lucas contends the jury, not the trial court, should determine whether Swinford’s alleged negligence in causing the first collision proximately caused Lucas’s injuries in the second. “An indispensable element of an action for negligence is that the act complained of must be the proximate cause of the accident producing the injury.” *Havert v. Caldwell*, 452 N.E.2d 154, 158 (Ind. 1984); see *Hammock v. Red Gold, Inc.*, 784 N.E.2d 495, 498 (Ind. Ct. App. 2003) (“To recover under a theory of negligence, a party must establish: (1) a duty on the part of the defendant owed to the plaintiff; (2) a breach of that duty; and (3) an injury to the plaintiff proximately caused by the breach.”).

[13] “A negligent act or omission is the proximate cause of an injury if the injury is a natural and probable consequence which, in light of the circumstances, should reasonably have been foreseen or anticipated.” *Bridges v. Ky. Stone Co., Inc.*, 425 N.E.2d 125, 127 (Ind. 1981). Proximate cause is typically a question reserved for the jury. *Rhodes v. Wright*, 805 N.E.2d 382, 388 (Ind. 2004).

[14] When the alleged negligent act merely sets in motion the chain of events leading to the injury, however, the Indiana appellate courts have found

summary judgment proper because the event ultimately causing the injury in those cases was not reasonably foreseeable. *See, e.g., Havert*, 452 N.E.2d at 159 (affirming partial summary judgment for first driver who allegedly caused rear-end collision because he did not proximately cause injuries occurring when a second driver rear-ended the first driver's car a few minutes later); *see also Slinkard v. Babb*, 112 N.E.2d 876, 880 (Ind. Ct. App. 1953) (affirming directed verdict for driver who allegedly caused first accident on icy bridge because he did not proximately cause injuries arising from second collision by a separate driver one minute later due to unforeseeability of second collision).

II. Parties' Summary Judgment Arguments

- [15] In her motion for summary judgment, Swinford asserted that there was no issue of material fact as to whether she proximately caused Lucas's injuries. Put another way, Swinford claimed Lucas's injuries in the second collision were not the natural and probable, reasonably foreseeable, consequence of Swinford allegedly causing the first collision.
- [16] Swinford's designated evidence in support of her motion for summary judgment included Lucas's deposition, in which Lucas: estimated that the second collision occurred 10 to 15 minutes after the first collision; described the conditions at the time of the collisions as dark; and noted that her parked car protruded into the travel lane because of the road's narrow shoulder. In her supporting memorandum, Swinford cited appellate decisions finding that the person responsible for an initial collision was not liable as a matter of law for

injuries suffered in a related second collision because the second collision was not foreseeable. Swinford concluded that her alleged negligence during the first collision merely created a condition by which Culp's injury-producing acts during the second collision became possible. *See id.*

[17] Swinford thus met her burden of a prima facie showing no genuine issue of material fact as to whether she proximately caused the second collision. *See Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 (Ind. 2012) (ruling that the summary judgment movant “bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law”). The burden then moved to Lucas “to come forward with evidence establishing the existence of a genuine issue of material fact.” *Sargent v. State*, 27 N.E.3d 729, 732 (Ind. 2015). Lucas failed to do so.

[18] Indiana Trial Rule 56(C) required that Lucas, as the party opposing the summary judgment motion, “designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.” Yet, Lucas's response to Swinford's motion for summary judgment did not address proximate cause. Instead, Lucas focused on the first collision, arguing that a genuine issue of material of fact existed as to whether Swinford or Botros caused it.

[19] That strategy was fatal to Lucas's claim against Swinford. Even if we assume that Swinford caused the first collision, as Lucas has alleged, Lucas cannot

succeed on her claim against Swinford absent proof that Swinford proximately caused the second collision. *See Havert*, 452 N.E.2d at 159. Yet the record before us reveals that during the summary judgment proceedings, Lucas never rebutted Swinford’s claim that proximate cause did not exist.¹ To prevail on summary judgment, Swinford needed to negate only one of the elements essential to Lucas’s claim. *See Severance v. New Castle Comm. School Corp.*, 75 N.E.3d 541, 546 (Ind. Ct. App. 2017).

[20] Swinford established that no genuine issue of material fact existed as to proximate cause and that she was entitled to a judgment as a matter of law. The trial court was thus obligated to enter summary judgment in Swinford’s favor. *See* Trial Rule 56(C) (“The judgment sought shall be rendered forthwith 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.”).

[21] Lucas attempted to resuscitate her claim by alleging in her motion to correct errors that a jury should decide whether an “independent intervening cause” resulted in Swinford’s injuries. Appellant’s App. Vol. II, p. 5. Nothing in the motion compels appellate relief. And the belated attempt to dispute proximate cause for the first time in her motion to correct error was too late. *See O’Bryant v. Adams*, 123 N.E.3d 689, 694 (Ind. 2019) (ruling that issues raised for the first

¹ Lucas did not request a transcript of the summary judgment hearing, and one was never filed in this appeal.

time in a motion to correct error generally are waived on appeal). On appeal, she repeats those belatedly raised claims. But given that those claims were not raised or supported by Lucas's response to Swinford's motion for summary judgment, we cannot consider them. *See id.*; *Hammock*, 784 N.E.2d at 498 (noting that during appellate review of summary judgment ruling, we consider only facts designated to the trial court at the summary judgment stage).²

[22] We conclude that Lucas, in response to Swinford's prima facie showing on summary judgment, did not establish the existence of a genuine issue of material fact as to the essential element of proximate cause. Accordingly, we affirm the trial court's grant of summary judgment to Swinford.

May, J., and Crone, J., concur.

² Lucas argues on appeal that "[i]t is impossible to determine that the [later] collision was so remote as to be an independent intervening cause" without relying on disputed facts. Appellant's Br., p. 13. The only "disputed" facts to which she points are: 1) the relative timing of the two collisions; and 2) whether Officer Marsh's police reports accurately depicted the first collision. But the timing is not in dispute, as Lucas estimated in her deposition that the collisions occurred between 10 to 15 minutes apart. The designated evidence contains no other assessment of the relative timing of the collisions.

Regardless, the alleged defects in the police reports relate only to who was at fault in the first collision. We have assumed for purposes of summary judgment that Swinford's negligence caused the first collision so those alleged defects are not material to the issue before us. *See Havert*, 452 N.E.2d at 157 ("A fact is material for purposes of ruling on a motion for summary judgment when its existence facilitates resolution of any of the issues involved").