MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Maria Vazquez,

Appellant,

v.

German Township Trustee,

Appellee.

June 9, 2021

Court of Appeals Case No. 20A-CT-2302

Appeal from the St. Joseph Superior Court

The Honorable Steven L. Hostetler, Judge

Trial Court Cause No. 71D07-1907-CT-296

Brown, Judge.

[1] Maria Vazquez appeals the trial court's entry of summary judgment in favor of the German Township Trustee ("German Township") and the denial of her motion to correct error. We affirm.

Facts and Procedural History

[2] At approximately 5:00 p.m. on Saturday, January 19, 2019, Vazquez exited her parked car in the upper-level parking lot of German Township's office, walked down the drive toward the building to attend a social gathering, and fell before she reached the concrete walkway to enter the office. On July 31, 2019, Vazquez filed a complaint against German Township alleging that, while she was walking through the parking lot, she slipped and fell due to "ice and snow" which had not been cleared or salted.[1] Appellee's Appendix Volume II at 3. She also alleged that German Township owed her a duty of reasonable care at all times relevant to the complaint and that it and its employees maintained the parking lot in a negligent and careless manner.

[3] On May 26, 2020, German Township filed a motion for summary judgment together with designated evidence and a brief. In its motion, German Township argued in part that it owed no duty to Vazquez and that she was contributorily negligent. It designated an affidavit by Thomas McClanahan, which stated: he was the trustee; Jim Pepple was hired to perform snow removal from the parking lot and sloped drive surfaces and apply salt as needed

[1] Vazquez was later granted leave to amend her complaint to add defendant Jim Pepple, who did not file an answer and was defaulted.

during the 2018-2019 winter season; the agreement was oral; Pepple was instructed to plow the premises when accumulation reached two inches and to apply salt as needed; and Pepple had been to the premises on the afternoon of January 19, 2020, and performed plowing services. Vazquez filed a response together with designated evidence and argued that she was a business invitee to whom German Township owed the highest duty of care, including exercising reasonable care to discover unreasonable risks of harm that posed a danger; and that, at a minimum, there were genuine issues of fact regarding whether German Township adequately provided snow removal and whether it accepted Pepple's snow removal, shifting the duty to maintain back to German Township. Vazquez also filed a motion to strike portions of McClanahan's affidavit arguing that the statement that German Township had an oral contract with Pepple for snow removal was a legal conclusion and impermissible in an affidavit. German Township filed a reply in support of its motion for summary judgment and a response to the motion to strike, in which it argued that McClanahan was personally aware of the decision related to snow removal and that the submission of affidavits containing legal conclusions did not create a genuine issue of material fact precluding summary judgment.

[4] On September 15, 2020, following a hearing, the trial court issued an order which granted summary judgment to German Township on the basis that it had no duty to do more than it did until it had stopped snowing, did not address Vazquez's contributory negligence, and denied her motion to strike. Appellant's Appendix Volume II at 19.

[5] Vazquez filed a motion to correct error, and German Township filed a response. Following a hearing, the court issued an order denying Vazquez's motion to correct error and providing that whether the contractor cleared snow and ice prior to Vazquez's fall was not in any way relevant to the duty analysis, assumed for purposes of its duty analysis that the snow had not been plowed prior to the fall, and found German Township owed no duty to Vazquez.

Discussion

[6] The issue is whether the trial court erred in entering summary judgment in favor of German Township or abused its discretion in denying Vazquez's motion to correct error. When reviewing a grant or denial of a motion for summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Once these requirements are met, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id.* Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. *Id.* A trial court's grant of summary judgment is clothed with a presumption of validity, and the party who lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous.

Henderson v. Reid Hosp. & Healthcare Servs., 17 N.E.3d 311, 315 (Ind. Ct. App. 2014), *trans. denied*. We may affirm a trial court's grant of summary judgment upon any theory or basis supported by the designated materials. *Id.* We generally review rulings on motions to correct error for an abuse of discretion. *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1270 (Ind. 2008), *reh'g denied*.

[7] Vazquez contends that German Township had the entire day to realize it was snowing and remedy the situation, and the trial court's ruling disincentivizes businesses from expending funds to clear parking lots. She argues German Township owed her a duty of reasonable care and whether it breached that duty is a question of fact that should be presented to the jury. She asserts she took precautions to exercise reasonable care and that German Township did not present evidence that plowing services were conducted at a specific time that afternoon. German Township maintains it owed no duty and that the court, while it explicitly indicated it was not making any findings of fact, resolved the disputed issues of fact in Vazquez's favor. German Township also argues the snowy drive on which Vazquez fell was known and obvious to her.

[8] To prevail on a claim of negligence the plaintiff must show: (1) a duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty. *Goodwin*, 62 N.E.3d at 386. Whether a duty exists is a question of law for the court to decide. *Id.* at 386-387. "Absent a duty, there can be no breach, and therefore, no recovery for the plaintiff in

negligence." *Pfenning v. Lineman*, 947 N.E.2d 392, 398 (Ind. 2011) (quoting *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133, 1143 (Ind. 2006), *reh'g denied*). A defendant may obtain summary judgment in a negligence action when the undisputed facts negate at least one element of the plaintiff's claim. *Pelak v. Ind. Indus. Servs., Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. Negligence cannot be inferred from the mere fact of an accident. *Id.* Rather, all the elements of negligence must be supported by specific facts designated to the trial court or reasonable inferences that might be drawn from those facts. *Id.* An inference is not reasonable when it rests on no more than speculation or conjecture. *Id.*

[9] Indiana has adopted the formulation of landowners' liability to invitees expressed in the Restatement (Second) of Torts. *See Countrymark Coop., Inc. v. Hammes*, 892 N.E.2d 683, 688 (Ind. Ct. App. 2008) (citing *Douglass v. Irvin*, 549 N.E.2d 368, 370 (Ind. 1990)), *trans. denied*; *see also Smith v. Baxter*, 796 N.E.2d 242, 244 (Ind. 2003). The Restatement provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.

Burrell v. Meads, 569 N.E.2d 637, 639-640 (Ind. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 343 (1965)), *reh'g denied*. In addition, Restatement (Second) of Torts § 343A(1), which addresses known and obvious dangers and is meant to be read in conjunction with § 343, provides: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves, and thus the condition or activity must not only be known to exist, it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. RESTATEMENT (SECOND) OF TORTS § 343A, cmt. b. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable person, in the position of the visitor, exercising ordinary perception, intelligence, and judgment. *Id.*

[10] The designated evidence reveals that, in her deposition, Vazquez indicated she had lived in the South Bend area for approximately the prior twenty years, she had been to German Township's building at least three times prior to the day of her fall, and on those occasions she had parked in the lower area of the lot. She testified it was snowing while she and her husband drove to the office, and she described the snow boots she was wearing as warm and "good for snow." Appellant's Appendix Volume II at 71-72. She testified that, when she and her husband drove into the lot, they parked in the upper-level part of the lot,

"noticed that there was snow and ice" conditions, exited the car, and "were just walking slowly and carefully." *Id.* at 73-74. She indicated that she was carrying a gift and purse, she and her husband were not holding onto each other as they walked, and she did not have any trouble seeing where she was going. When asked how deep the snow was, she stated there was "[l]ike 2 inches," and when asked how far down the drive she walked before falling, she responded, "[w]e were almost already getting ready to get to the door." *Id.* She described the condition of the location where she fell as "all covered in snow" and stated, "[s]now was falling at that time." *Id.* at 79-80. She described the area of the parking lot where she fell as "slightly slanted" but "then it was going to end when you go down." *Id.* at 80. She answered in the negative when asked if she had seen any indication the area had been cleared, salted, or shoveled, or had seen any snow piled up in areas around the lot. She described her actions preceding the fall and stated: "I was walking slowly because there was a lot of snow." *Id.*

[11] The designated evidence establishes that the condition presented by the walkway leading to the office was known and obvious to Vazquez. At the time of her fall, Vazquez had lived in the South Bend area for approximately twenty years and had been to the office building on several previous occasions. That afternoon, she wore snow boots, it was still snowing, and she noticed the parking lot's snow and ice conditions as she entered. She did not see any indication the area had been cleared, salted, or shoveled or that any snow had been piled up around the lot, and preceding the fall she "walk[ed] slowly and

carefully." *Id.* We cannot say that German Township should have expected that Vazquez would not discover or fail to protect herself against the condition presented by the walkway. *See* RESTATEMENT (SECOND) OF TORTS § 343 ("A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he [. . .] should expect that they will not discover or realize the danger, or will fail to protect themselves against it . . . .").

[12] For the foregoing reasons, we affirm the trial court's entry of summary judgment and denial of the motion to correct error.[2]

[13] Affirmed.

Bradford, C.J., and Vaidik, J., concur.

[2] Because we conclude that German Township was entitled to summary judgment without reliance upon the portion of the affidavit challenged by Vazquez, we need not address whether the court erred on ruling on the motion to strike.