



Mary Maksimik appeals the trial court's grant of summary judgment in favor of SLB Mobil, Inc., Great Punjab, Inc., and Lakhwinder Singh (collectively referred to as SLB). Maksimik presents the following issue for review: Did the trial court properly grant SLB's motion for summary judgment upon its determination that SLB did not owe a duty to Maksimik?

We affirm.

The facts favorable to Maksimik, the non-moving party, are that at all times relevant to this appeal, Maksimik worked for Washington Inventory Services. On June 30, 2004, she was placing advertising signs at SLB's Mobil gas station in Gary, Indiana. This involved taking down old signs and replacing them with new ones. The sign Maksimik was installing when the incident giving rise to this lawsuit occurred was to be hung from the ceiling inside the gas station. Maksimik asked Singh, an owner of SLB who was in the store at the time, if he had a ladder she could use in order to hang the sign. He replied that he did not have a ladder, but he had milk crates she could stack and stand on in order to reach the ceiling. He informed her that her predecessors had used milk crates for this purpose, so she agreed to use them. Singh retrieved them from a back room and stacked them on the floor at a spot where Maksimik could stand on them to take down the old sign and put up the new one. While Maksimik was standing on the stacked crates with her arms above her head, she fell. Although she was not sure, she believed her fall was caused when the crates "gave out." *Appellant's Appendix* at 49. Maksimik fell to the floor, injuring her lower back.

On June 21, 2006, Maksimik filed her first amended complaint, alleging that SLB

breached its duty of care by supplying her with “a climbing apparatus ... that [SLB] should reasonably have known would collapse and injure [Maksimik].” *Id.* at 40. On January 13, 2010, SLB filed a motion for summary judgment, contending alternately that that it owed no duty to Maksimik or that it did not breach its duty of care. Following a hearing, the trial court granted SLB’s motion and entered summary judgment in favor of SLB, on two grounds. First, the court concluded that SLB’s argument that it was entitled to summary judgment on the theory of premises liability was not opposed by Maksimik in her motion and brief in opposition, and therefore that Maksimik “acquiesce[d]” in SLB’s argument in that respect. *Id.* at 11. Second, the trial court determined that Maksimik’s main theory of recovery was gratuitous assumption of duty, and that she had failed to present a question of fact “regarding whether [SLB] assumed a duty of reasonable care to [Maksimik], the extent of such duty, and whether the duty was breached.” *Id.* at 13. Maksimik appeals.

Our standard of review in appeals from the grant or denial of a motion for summary judgment is well established: when reviewing a ruling on a motion for summary judgment, we apply the same standard as the trial court. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154 (Ind. 2005). A party seeking summary judgment must show “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.” Ind. Trial Rule 56(C); *see also Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. The review of a ruling on a summary judgment motion is limited to those materials designated to the trial court. T.R. 56(H); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. We will accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving

party, and resolve all doubts against the moving party. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. A trial court's grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the grant of summary judgment was erroneous. *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671 (Ind. Ct. App. 2010).

Moreover,

[a] grant of summary judgment may be affirmed upon any theory supported by the designated evidence. While the trial court here entered specific findings of fact and conclusions of law in its order granting summary judgment for the appellees, such findings and conclusions are not required and, while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court's reasons for granting or denying summary judgment.

*Gilbert v. Loogootee Realty, LLC*, 928 N.E.2d 625, 629 (Ind. Ct. App. 2010) (quoting *Van Kirk v. Miller*, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*), *trans. denied*.

In order to prevail on a claim of negligence, a plaintiff must establish 1) a duty owed to the plaintiff by defendant, 2) a breach of that duty by permitting its conduct to fall below the applicable standard of care, and 3) compensable injury that was proximately caused by the defendant's breach of duty. *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120 (Ind. 2010). Without a duty, there can be no negligence or liability based upon the breach. *Id.* Duty in this context has been described as the obligation to conform one's conduct to the requisite standard of care. *See Estate of Mintz v. Connecticut Gen. Life Ins. Co.*, 905 N.E.2d 994 (Ind. 2009). "Generally, whether a duty exists is a question of law for the court to decide. Sometimes, however, the existence of a duty depends upon underlying

facts that require resolution by the trier of fact.” *Rhodes v. Wright*, 805 N.E.2d 382, 386 (Ind. 2004) (citation omitted). In such cases, the determination of the existence of a duty becomes a mixed question of law and fact, which the fact-finder ultimately resolves. *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509 (Ind. Ct. App. 2005), *trans. denied*. “The duty, when found to exist, is the duty to exercise reasonable care under the circumstances. The duty never changes.” *Id.* at 515.

We note here that the trial court determined that SLB was entitled to summary judgment on the theory of premises liability. Maksimik acknowledges, however, that her complaint “did not allege a defect in the defendant’s premises or any other theory postulated by SLB.” *Appellant’s Brief* at 2. Therefore, we need not discuss this aspect of the trial court’s ruling. Maksimik contends that her case rests upon the theory of gratuitous assumption of duty. The trial court decided this question against her as well, so we will focus our analysis on that aspect of the trial court’s ruling.

Indiana recognizes a duty may be imposed upon one who by affirmative conduct or agreement assumes to act, even gratuitously, for another to exercise care and skill in what he has undertaken. *Schlotman v. Taza Café*, 868 N.E.2d 518 (Ind. Ct. App. 2007), *trans. denied*. “The actor must specifically undertake to perform the task he is charged with having performed negligently, for without actual assumption of the undertaking there can be no correlative legal duty to perform the undertaking carefully.” *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 692 (Ind. Ct. App. 2006). The assumption of a duty creates a special relationship between the parties and a corresponding duty to act in a reasonably prudent

manner. *Schlotman v. Taza Café*, 868 N.E.2d 518. The existence and extent of such duty are generally questions for the trier of fact. *Id.*

In this case, the duty upon which Maksimik's lawsuit depends is based upon Singh's acts of providing milk crates for Maksimik to stand on and stacking them. Maksimik aptly states the nature of her burden at trial as follows: "[Maksimik] needed to show that SLB undertook a duty to her when SLB got milk crates and stacked them under her to use specifically for climbing." *Appellant's Brief* at 4. The assumed duty, according to Maksimik, "was to provide a stable means of hanging the advertising." *Id.* Did SLB's provision of the milk crates for Maksimik's use create a special relationship and the attendant duty where, as Maksimik impliedly concedes, none existed before?

In *Robinson v. Kinnick*, 548 N.E.2d 1167 (Ind. Ct. App. 1989), *trans. denied*, a roofing contractor sued homeowners for personal injuries sustained when he fell from the roof of their home. The contractor's theories of liability included a claim of gratuitous assumption of duty. The claim of gratuitous assumption of duty was based upon the homeowners' act of nailing two toeboards on top of the roof and providing certain other safety equipment. Notwithstanding these measures, the contractor fell from the roof and was injured. Noting the foregoing provision of safety equipment and decision to attach toeboards, the court held, the homeowners "did not require that the independent contractors utilize the equipment but rather merely made it available for their use if they so chose. The [homeowners] did not maintain written rules requiring the safety equipment be used or conduct safety meetings advocating the use of the equipment." *Id.* at 1170. The court

concluded that the measures undertaken “[did] not miraculously create a genuine issue of material fact.” *Id.*

In *Schlotman*, a person purchased pizza from a carry-out restaurant. Although the restaurant did not have indoor dining facilities, it had placed a table on a public sidewalk just outside the restaurant for patrons’ use. One evening a patron was sitting on the table eating when he was assaulted by third parties. The patron sued the restaurant on, among other things, the theory of gratuitous assumption of duty. The trial court granted the restaurant’s motion for summary judgment in that regard. We affirmed, stating, “[w]e decline to hold the placement of a table on the sidewalk outside a carryout restaurant, without more, gives rise to a special relationship between a restaurant owner and his patrons that demonstrates the restaurant owner has undertaken to protect its patrons.” *Id.* at 524.

We believe the rationales in *Robinson* and *Schlotman* are applicable here. As did the homeowners in *Robinson*, SLB made the equipment in question available to Maksimik, but did not require that she use the milk crates or use them in a particular way. Maksimik asked if the station had anything she could use to reach the ceiling, and Singh provided an instrumentality seemingly fitted to the task. We stress that Singh did not exercise any supervisory control over Maksimik in doing so. As did the restaurant with respect to the table in *Schlotman*, Singh provided the milk crates and even stacked them on the floor for her use. In so doing, however, he did not thereby create a special relationship between SLB and Maksimik demonstrating that SLB had undertaken to insure Maksimik’s safety with respect to the tasks her job required that she perform in its store.

Therefore, we conclude that SLB did not gratuitously assume a duty to provide a safe workplace or working conditions for Maksimik as she performed her duties in its store. Therefore, we affirm the grant of summary judgment in favor of SLB.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.