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ATTORNEYS FOR APPELLANT:

**R. JEFFREY LOWE**  
**J. TODD SPURGEON**  
**ERIC JOHNSON**  
**CRYSTAL ROWE**  
Kightlinger & Gray, LLP  
New Albany, Indiana

ATTORNEY FOR APPELLEE:

**PAUL J. WATTS**  
Watts Law Office, P.C.  
Spencer, Indiana



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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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TEMPLE & TEMPLE EXCAVATING )  
& PAVING, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
FARRIS PEACOCK, )  
 )  
Appellee-Plaintiff. )

No. 88A01-0809-CV-459

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APPEAL FROM THE WASHINGTON CIRCUIT COURT  
The Honorable Larry R. Blanton, Special Judge  
Cause No. 88C01-0605-PL-143

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**May 29, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Temple & Temple Excavating & Paving (“Temple”) brings this interlocutory appeal from the trial court’s order denying its motion for summary judgment in an action for damages sustained by Farris Peacock (“Peacock”) when pipes stored by Temple were washed away during a storm and ultimately damaged Peacock’s property. Temple presents the following issue for our review: whether the trial court erred by denying Temple’s motion for summary judgment where Peacock did not designate evidence in opposition to Temple’s motion.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In 2004, Temple worked on a project for the Salem School District in Salem, Indiana. Temple stored materials related to that construction project, including plastic storm drainage pipe, on the blacktopped parking lot of Salem Middle School. Brock Creek flows behind Salem Middle School.

Over the course of two days, a total of 5.55 inches of rain fell in Salem, Indiana. During that storm, approximately six of the pipes Temple had stacked in the school parking lot were washed into Brock Creek where they were entangled with other items, trees and other debris. The items lodged under a railroad bridge and caused a blockage in Brock Creek and the water level to rise, eventually reaching a warehouse in which Peacock had equipment stored.

Peacock filed a complaint against Temple for the damage to his equipment. In his complaint, Peacock alleged that Temple’s negligence in storing the pipes was the proximate

cause of the damage to his equipment. Temple filed a motion for summary judgment along with a designation of evidence. The trial court denied Temple's motion. The trial court certified the order for interlocutory appeal, and this Court accepted jurisdiction of the matter. Temple now appeals.

### **DISCUSSION AND DECISION**

Our standard of review for summary judgment is the same as is used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Bd. of Sch. Comm'rs of City of Indianapolis v. Pettigrew*, 851 N.E.2d 326, 330 (Ind. Ct. App. 2006). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Pettigrew*, 851 N.E.2d at 330. Review of a summary judgment motion is limited to those materials designated to the trial court. *Id.*

Peacock's complaint alleges negligence which is comprised of three elements: (1) a duty on the part of a defendant in relation to the plaintiff; (2) a failure on the part of the defendant to conform its conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff that was proximately caused by the defendant's breach. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002) (citation omitted). Temple moved for summary judgment and relied on two affidavits, supporting documents, and climatological data for the relevant time period. Peacock did not file any materials in opposition to Temple's motion for summary judgment. Even though summary judgment is rarely appropriate in a negligence action, a defendant may obtain

summary judgment by demonstrating that the undisputed facts negate at least one element of the plaintiff's claim. *Id.* (citation omitted).

In *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 123 (Ind. 1994), our Supreme Court noted that the “burden imposed at trial upon the party with the burden of proof on an issue is significantly different from that required of a non-movant in an Indiana summary judgment proceeding.” The moving party bears the burden of demonstrating that the party bearing the burden of proof at trial cannot prevail as to a determinative issue. *Id.* Here, Temple failed to meet this burden. Its designated evidence does not establish the absence of a question of fact on any essential element of Peacock's claim. Instead, Temple argues that it is entitled to summary judgment because Peacock did not designate evidence in opposition to Temple's motion. While that may be the case under the Federal Rules of Civil Procedure, under *Jarboe*, however, Temple is not entitled to summary judgment. Merely alleging that the plaintiff has failed to produce evidence on each element of a cause of action is insufficient to entitle the defendant to summary judgment under Indiana law. *See Deutch v. Fleming*, 746 N.E.2d 993, 997-98 (Ind. Ct. App. 2001) (allegation of lack of evidence of breach of duty and causation insufficient for grant of summary judgment).

Temple argues that the harm suffered by Plaintiff was not reasonably foreseeable, *Appellant's Br.* at 8, and contends that the designated evidence shows that it was not “reasonably foreseeable that a flood would swell the creek to the point where it swept construction materials located on a parking lot sixty feet away downstream, and that the

materials would thereafter get stuck on a bridge and cause the flood waters to back up.” *Id.* at 1. In determining whether an act is a proximate cause of an injury, we consider whether the injury was a natural and probable consequence of the negligent act, which in light of the attending circumstances, could have been reasonably foreseen or anticipated. *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996), *trans. denied*. The question whether the defendant’s conduct is the proximate cause of the plaintiff’s injuries, however, is a question of fact for the jury’s determination. *Nat’l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d 360, 366-367 (Ind. Ct. App. 1995), *trans. denied*.

The trial court did not err in denying Temple’s motion for summary judgment.

Affirmed.

RILEY, J., and MATHIAS, J., concur.