

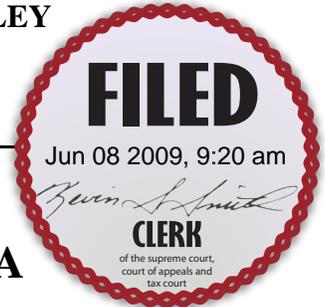
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

TERRY REILLY and PAULA MITCHELL,)
parents and natural guardians of)
JOSEPH M. REILLY, a minor,)
)
Appellants-Plaintiffs,)
)
vs.)
)
CITY OF INDIANAPOLIS, GRADY)
BROTHERS, INC. and JOHN RUTLEDGE,)
)
Appellees-Defendants.¹)

No. 49A02-0812-CV-1058

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
Cause No. 49D12-0704-CT-13545

June 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

¹ The City of Indianapolis (“City”) and John Rutledge (“Rutledge”) are not seeking relief on appeal and have not filed briefs in this appeal. However, pursuant to Indiana Appellate Rule 17(A), a party of record in the trial court is a party on appeal.

Terry Reilly and Paula Mitchell (“Parents”), the parents and natural guardians of Joseph M. Reilly (“Mitch”), their minor son, appeal from the trial court’s order granting Grady Brothers, Inc.’s (“Grady”) motion for summary judgment in an action for damages sustained by Mitch, a sixteen-year-old pedestrian, who was struck by a vehicle in the middle of a paving project being completed by Grady pursuant to a contract with the City. Parents present the following issue for our review: whether the trial court erred by granting Grady’s motion for summary judgment where there are material issues of fact as to breach of duty and proximate causation.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On July 17, 2006, Mitch was a pedestrian on Kessler Boulevard Drive North near its crossing with 42nd Street in Indianapolis, Indiana. The City had undertaken certain road improvements in that area and had contracted with Grady for the construction of those improvements, which were in progress on that date. Rutledge was driving his vehicle on Kessler Boulevard near 42nd Street and struck Mitch as he was attempting to cross Kessler Boulevard.

Parents filed a complaint alleging that Grady negligently performed its work on certain road improvements in violation of contractual provisions with the City and common law duties owed to Mitch. *Appellants’ App.* at 10. Grady filed an answer to the complaint, and later filed a motion for summary judgment. The trial court granted Parents’ motion to strike certain materials designated by Grady in support of its motion

for summary judgment. After a hearing on the motion, the trial court granted summary judgment in favor of Grady. Parents now appeal.

DISCUSSION AND DECISION

Our standard of review for summary judgment is the same as that 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.*

Parents' complaint alleged 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. *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915, 922 (Ind. Ct. App. 2007). In negligence cases, summary judgment is rarely appropriate because they are particularly fact sensitive and are governed by a standard of the objective reasonable person, one best applied by a jury after hearing all of the evidence. *Schoop's Rest. v. Hardy*, 863 N.E.2d 451, 454 (Ind. Ct. App. 2007). Whether a defendant owes a duty of care to a plaintiff is generally a question of law for the court to decide. *Id.* *Chandradat*

v. Ind. Dep't of Transp., 830 N.E.2d 904, 908 (Ind. Ct. App. 2005). However, whether a particular act or omission is a breach of duty is generally a question of fact for the jury. *Id.* Issues of negligence, contributory negligence, causation, and reasonable care are more appropriately left for the determination of a trier of fact. *Florio v. Tilley*, 875 N.E.2d 253, 256 (Ind. Ct. App. 2007). The issue of proximate cause becomes a question of law where only a single conclusion can be drawn from the facts. *Id.*

Although a trial court's grant of summary judgment is clothed with a presumption of validity on appeal, we carefully review the court's decision to ensure that a party is not denied its day in court. *Chandradat*, 830 N.E.2d at 908. "Indeed, summary judgment should not be used as an abbreviated trial." *Id.* Furthermore, the mere improbability of recovery by a plaintiff does not justify the granting of a motion for summary judgment against him. *Id.*

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.* Under Rule 56(c) of the Federal Rules of Civil Procedure, the party seeking summary judgment is not required to negate an opponent's claim, but need only identify the relevant portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *See Celotex Corp. v.*

Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265, 272 (1986). The party bearing the burden of proof must come forward with some evidence on each of the elements of its claim. *Id.* As our Supreme Court stated in *Jarboe*, “Indiana does not adhere to *Celotex* and the federal methodology.” 644 N.E.2d at 123.

Here, Grady’s designated evidence fails to establish: 1) that it did not breach its duty to Mitch; and 2) that its alleged breach was not the proximate cause of Mitch’s injuries. In paragraphs five through eight of Mitch’s affidavit, he states that there were obstructions blocking the roadway, including a work truck and a pile of rocks and debris blocking sightlines; and that affidavit was not designated by Grady in its motion for summary judgment.

While Grady argues that it is undisputed that it did not own the truck or place the pile of rocks and debris in the roadway, both of which Mitch claimed obstructed his vision, the designated materials do not establish this fact. Mitch’s deposition testimony establishes that he did not know if the pile of rocks was placed there by Grady or if the truck obstructing his view was owned by Grady. *Appellee’s App.* at 9-25. Grady bore the burden under *Jarboe* to demonstrate that Mitch, the party bearing the burden of proof at trial, cannot prevail as to a determinative issue. This Grady has failed to do. The trial court erred in granting Grady’s motion for summary judgment.

Reversed and remanded for further proceedings.

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