ATTORNEYS FOR APPELLANT:

W.F. CONOUR
JOHN P. DALY, JR.
Conour-Daly, Attorneys
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:
Attorneys for McDowell Builders, Inc.:
TERENCE M. AUSTGEN
ELIZABETH M. BEZAK
Singleton, Crist, Austgen & Sears, LLP
Munster, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ALLEN R. LANE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 23A01-0608-CV-369
	)	
McDOWELL BUILDERS, INC., a Foreign Corporation, and C&D TECHNOLOGIES, INC., a Foreign Corporation,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23C01-0307-CT-214

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Allen R. Lane sued McDowell Builders, Inc. and C&D Technologies, Inc. for injuries he sustained when he fell through a skylight while working on the roof of C&D's plant. Lane appeals the summary judgment for McDowell and C&D. Even if McDowell and C&D owed Lane a duty of care, Lane failed to designate specific evidence creating a genuine issue of material fact regarding whether either party breached its duty. Therefore, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

C&D, a power company, hired McDowell to make some improvements to its plant in Attica, Indiana. The project included roofing work, which McDowell subcontracted to Advanced Wayne Cain & Sons. Lane was an employee of Advanced and participated in the work at C&D's plant.

The roof contained six to eight skylights. During the first day on the job, Advanced employees removed four of the skylights and covered the holes with metal. Lane worked on at least three of those skylights. The next day, Advanced employees began moving materials onto the roof while there was still one skylight that had not been covered. Lane was attempting to move a large bundle of insulation across the roof. He was struggling because the insulation was catching on bolts in the roof. When a fellow employee offered to help him, Lane became distracted, stepped onto the uncovered skylight, and fell through.

Lane was a journeyman roofer with several years of experience. He had taken safety training classes and knew he would fall through a skylight if he stepped on one. Lane had removed skylights in the past. Lane acknowledged the skylights were made of

a blue-green plastic or fiberglass that was distinguishable from the rest of the roof. He was aware he was in the vicinity of an uncovered skylight, which he could have seen if he had been looking down. In fact, he had warned some of the younger employees not to step on the skylight.

DISCUSSION AND DECISION

1. Standard of Review

Lane sued McDowell and C&D for his injuries. Both defendants moved successfully for summary judgment. In reviewing a motion for summary judgment, we apply the same standard as the trial court. *Wright v. American States Ins. Co.*, 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "Any doubt as to a fact, or an inference to be drawn, is resolved in favor of the non-moving party." *Sanchez v. Hemara*, 534 N.E.2d 756, 757 (Ind. Ct. App. 1989). The moving party bears the burden of proving there is no genuine issue of material fact; however, once this burden is sustained, the opponent may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. T.R. 56(E); *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992). We will consider only the evidence designated to the trial court. T.R. 56(H); *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). We affirm summary judgment if there is any legal basis supported by the designated evidence. *Bernstein v. Glavin*, 725 N.E.2d 455, 458-59 (Ind. Ct. App. 2000), *trans. denied* 741 N.E.2d 1248 (Ind. 2000). The appellant bears the burden of persuading us the grant of summary

judgment was erroneous. *Bank One Trust No. 386 v. Zem, Inc.*, 809 N.E.2d 873, 878 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 975 (Ind. 2004).

"A negligence action is generally not appropriate for disposal by summary judgment. However, 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. Services, Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005) (citations omitted), *trans. denied* 855 N.E.2d 1001 (Ind. 2006).

2. Lane's Claim against C&D

Generally, a landowner has no duty to provide an independent contractor with a safe place to work. *Id*. The owner does have a duty to maintain the property in a reasonably safe condition for business invitees, including employees of independent contractors. *Id*. Specifically, landowners have a duty to warn independent contractors of latent or concealed dangers on the premises. *Ozinga Transp. Systems v. Mich. Ash Sales, Inc.*, 676 N.E.2d 379, 384 (Ind. Ct. App. 1997), *trans. denied* 690 N.E.2d 1183 (Ind. 1997).

However, a landowner "is not liable to invitees for physical harm caused to them by any activity or condition on the land whose danger is obvious or known to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1265 (Ind. Ct. App. 2002). In *Merrill*, Knauf Fiber Glass hired Ellerman Roofing to repair the roofs on some of its warehouses. Merrill, an employee of Ellerman, was injured when he fell through an uncovered skylight. Merrill was aware of the danger presented by the skylights.

Therefore, Knauf could be liable for his injuries only if it should have anticipated he would fail to protect himself. Because Ellerman was a professional roofing company and controlled the manner by which the roof was repaired, the Court held Knauf could not have anticipated the accident.

The facts of this case are remarkably similar to those in *Merrill*. The undisputed facts, including Lane's own statements, establish Lane was aware a skylight would not support his weight, he knew he was working near an uncovered skylight, and the skylight was clearly visible. Advanced was an experienced roofing business and subcontractor, and it had direct control over the manner in which Lane's work was done. Although C&D had a right to stop the work and make inspections, these are rights usually reserved by principals and are not tantamount to control. *Pelak*, 831 N.E.2d at 770, *citing* Restatement (Second) of Torts § 414, cmt. c (1965). Therefore, C&D could not have anticipated that Lane would fall through a skylight despite his knowledge and his supervision by a company specializing in roofing. *See id*.

Lane claims C&D assumed a greater duty of care through its conduct. He argues C&D had extensive involvement in the safety of the project, which created a question of fact as to C&D's duties to him. The parties dispute the role C&D played in the safety of the project. Even if C&D assumed a greater duty, Lane has not explained the nature of that duty or how it was breached. Because Lane has not designated evidence on all elements of his claim against C&D, summary judgment was appropriate.

3. Lane's Claim against McDowell

Lane's only argument to the trial court was McDowell had assumed a contractual

duty for his safety. His designation of material issues of fact listed four questions:

1. Whether McDowell Builders was, by law or contract, charged with performing the specific duty?
2. Whether the injury was foreseeable if Defendant did not take due precaution?
3. Whether Defendant breached its duty to Plaintiff?
4. Whether any breach of duty by Defendant was a cause of Plaintiff's injuries and damages?

(Appellant's App. at 441.) Lane's designation of materials consisted primarily of entire depositions and affidavits. (*See id*. at 442-43.) Neither his response nor his designation of materials contain citations to specific facts as required by Trial Rule 56. *See Hamilton v. Prewett*, 860 N.E.2d 1234, 1241 (Ind. Ct. App. 2007) ("It is not within a trial court's duties to search the record to construct a claim or defense for a party."), *trans. denied* 869 N.E.2d 459 (Ind. 2007). While his response lists breach of duty as a material issue, it refers to no facts establishing a breach of duty and does not respond to McDowell's argument on that issue. Because we consider only the evidence designated to the trial court, we affirm summary judgment for McDowell.

Affirmed.

DARDEN, J., and CRONE, J., concur.