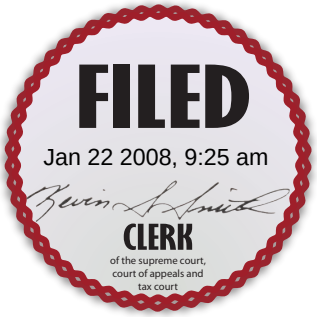

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IN THE
COURT OF APPEALS OF INDIANA

JAMES TOMLINSON and FRANCES TOMLINSON,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 48A04-0611-CV-654
JERRY R. HOWARD, INDIANA DEPARTMENT OF TRANSPORTATION (INDOT) and STATE OF INDIANA,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis Carroll, Judge
Cause No. 48D01-0407-PL-681

January 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MAY, Judge

James and Frances Tomlinson appeal summary judgment for Jerry R. Howard, the Indiana Department of Transportation ("INDOT"), and the State of Indiana.[1] The Tomlinsons[2] raise three issues on appeal, which we consolidate and restate as whether the trial court erred when it granted Howard's motion to strike Exhibit Four of Plaintiffs' designated items and whether genuine issues of material fact preclude summary judgment for INDOT and Howard. We affirm.

FACTS AND PROCEDURAL HISTORY

The Tomlinsons' son was killed in a two-car collision at the intersection of County Road 50 West and State Road 38 in Madison County, Indiana. Rachel Ellis was driving a vehicle in which the Tomlinsons' son was a passenger. Howard was driving on State Road 38 at the posted speed limit. Ellis and her passengers had used marijuana prior to the accident. Ellis, driving on County Road 50 West, disregarded a stop sign before crossing State Road 38, and Howard's vehicle struck Ellis. The State did not charge Howard with any moving violation. Ellis later pled guilty to causing death while operating a motor vehicle with a Schedule I or II controlled substance in her body.[3]

The Tomlinsons sued Howard and INDOT for negligence. The trial court granted summary judgment for all defendants.

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[1] The State of Indiana and INDOT are treated as one entity (INDOT) for this case.
[2] We direct the Tomlinsons' Counsel to Ind. Appellate Rule 22, which governs case citations, because no authority cited in the Tomlinsons' brief conforms to that rule.
[3] Ind. Code § 9-30-5-5.

DISCUSSION AND DECISION

1. Motion to Strike

The Tomlinsons contend the court should not have stricken as hearsay their Exhibit Four. That exhibit contained testimony from Frances Tomlinson to the effect that a few days after the accident, Howard's wife told her Howard stated immediately before the accident, "Well, I hope they are going to stop," and "Oh, God." (App. at 50.) Presumably the Tomlinsons offered this evidence to prove Howard could have slowed before the accident.

We review evidence rulings for an abuse of discretion. *Ross v. Olsen*, 825 N.E.2d 890, 894 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 181 (Ind. 2005). "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." *Id*.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(C). Unless otherwise provided by law or our evidence rules, "[h]earsay is not admissible." Evid. R. 802. *See also* Evid. R. 801 (defining some statements as "not hearsay"); Evid. R. 803 (providing exceptions when declarant is available); Evid. R. 804 (providing exceptions when declarant is unavailable).

Tomlinson's proposed testimony was that Howard's wife told Tomlinson about statements Howard made. Thus, as Howard argued, the proposed testimony is hearsay within hearsay – Tomlinson heard Howard's wife and Howard's wife heard Howard. *See* Ind. Evid. R. 805. "Double hearsay, also known as hearsay included within hearsay, or

multiple hearsay, 'is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.'" *City of Indianapolis v. Taylor*, 707 N.E.2d 1047, 1055-1056 (Ind. Ct. App. 1999) (quoting Evid. R. 805), *trans. denied* 726 N.E.2d 309 (Ind. 1999). Therefore, Tomlinsons had the burden to demonstrate the admissibility of both Howard's statement and his wife's statement. *Id.* at 1056 ("If hearsay was present, we analyze whether each piece of hearsay conforms with an exception to the hearsay rule.").

The Tomlinsons assert Howard's statement to his wife was excluded from the hearsay rule because it was an excited utterance. *See* Evid. R. 803(2) (defining excited utterance). Be that as it may, the Tomlinsons are not attempting to admit testimony from Howard's wife that she heard Howard's statements. Rather, the Tomlinsons are attempting to submit testimony from Frances Tomlinson regarding Howard's wife's reiteration of Howard's excited utterance. The Tomlinsons' appellate brief provides no argument to demonstrate the admissibility of the hearsay statement by Howard's wife to Tomlinson. Accordingly, we conclude the court did not err in striking that testimony from the record. *See Taylor*, 707 N.E.2d at 1056.

2. Summary Judgment

Summary judgment is granted only when the designated evidence shows there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Denison Parking, Inc. v. Davis*, 861 N.E.2d 1276, 1279 (Ind. Ct. App. 2007), *trans. denied* 869 N.E.2d 462 (Ind. 2007). We resolve any question of fact and draw all inferences in favor of the nonmoving party. *Id.*

> On appeal from summary judgment, the reviewing court faces the same issues that were before the trial court and analyzes them the same way, although the trial court's decision is "clothed with a presumption of validity." While the non-movant bears the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the non-movant was not wrongly denied his or her day in court.

Kennedy v. Guess, Inc., 806 N.E.2d 776, 779 (Ind. 2004) (internal citations omitted), *reh'g denied*. When the defendant is the moving party, the defendant must show the undisputed facts negate at least one element of the plaintiff's cause of action or the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claim. *Anderson v. Four Seasons Equestrian Center, Inc*., 852 N.E.2d 576, 580 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 599 (Ind. 2006). In reviewing a trial court's ruling on a motion for summary judgment, we may affirm on any ground supported by the designated evidence. *Id*.

To demonstrate actionable negligence by a defendant, a plaintiff must establish three elements: 1) a duty owed by the defendant to conform his conduct to a standard of care arising from his relationship with the plaintiff; 2) a breach of that duty; and 3) an injury proximately caused by the breach of that duty. *Wilkerson v. Harvey*, 814 N.E.2d 686, 689-690 (Ind. Ct. App 2004), *trans. denied* 831 N.E.2d 738 (Ind. 2005).

A. Howard

We affirm summary judgment for Howard because there is no genuine issue of material fact regarding proximate cause. Proximate cause requires "at a minimum, causation in fact – that is, that the harm would not have occurred 'but for' the defendants' conduct. The 'but for' analysis presupposes that, absent the tortious conduct, a plaintiff

would have been spared suffering the claimed harm." *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (citations omitted). "The proximate cause of an injury is not merely the direct or close cause, rather it is the negligent act which resulted in an injury which was the act's natural and probable consequence in light of the circumstances and should reasonably have been foreseen and anticipated." *Id*.

No designated evidence suggests Howard would have avoided the accident if he slowed his vehicle below the posted speed limit as he approached the intersection.[4] Howard testified he could not have avoided the vehicle once he saw it cross the highway without stopping. Ellis testified Howard did not have sufficient time to avoid her vehicle once he saw it. Thus, there is no evidence a negligent act by Howard was the proximate cause of Tomlinsons' injury. Summary judgment for Howard was therefore appropriate.

B. INDOT

The Tomlinsons allege INDOT failed to maintain proper warning signage at the intersection where the fatal accident occurred. The trial court found INDOT breached no duty owed to Tomlinson.

"Whether a particular act or omission is a breach of a duty is generally a question of fact. It can be a question of law, however, when the facts are undisputed and only a

[4] Therefore, we do not address whether Howard breached a duty to the Tomlinsons by not reducing his speed when approaching an intersection. Ind. Code § 9-21-5-4(1) provides:

> The driver of each vehicle shall, consistent with section 1 of this chapter, drive at an appropriate reduced speed as follows:
>
> (1) When approaching and crossing an intersection or railway grade crossing.

See, e.g,. Wilkerson, 814 N.E.2d 686 (expert testimony that a reduction of speed would have unequivocally prevented the accident created question of breach of duty for jury).

single inference can be drawn from the facts." *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1372 (Ind. 1992).

The State "has a general duty to the traveling public to exercise reasonable care in the design, construction, and maintenance of its highways for the safety of public users." *Chandradat v. Indiana Dep't of Transp.*, 830 N.E.2d 904, 909 (Ind. Ct. App. 2005) (citations omitted), *trans. denied* 841 N.E.2d 187 (Ind. 2005). "The duty of a governmental entity to maintain and repair roads within its control 'does not attach unless the governmental entity has actual or constructive notice of a dangerous situation.'" *Harkness v. Hall*, 684 N.E.2d 1156, 1161 (Ind. Ct. App. 1997) (citations omitted), *trans. denied* 735 N.E.2d 222 (Ind. 2000). The State has constructive notice when a defect "might have been discovered by the exercise of ordinary care and diligence." *Id*.

The designated evidence does not demonstrate INDOT had actual or constructive notice of any deficiencies at this intersection. There were no complaints regarding the intersection, and an extensive study after the accident found no changes should be made to the intersection. (INDOT App. at 26.) The Tomlinsons note a white cross in a crash scene photograph and contend State employees should have seen the cross. From that, and deposition testimony of previous deaths at the intersection, they infer the State should have been on notice there was a deficiency at the intersection. In support, the Tomlinsons rely on decisions where a defect was apparent and the jury had to decide whether the defendant had constructive notice of the defect.

The Tomlinsons allege only that a "stop ahead" sign or flashing light may have prevented the accident. However, the Tomlinsons' offered no testimony or evidence that

a sign or flashing light would have prevented the accident. The study INDOT conducted after the accident found no additional warnings were needed. The trial court found the white cross was "only symbolic in nature and makes no representation of time, place, cause, similarity, or circumstance of prior accidents, if any." (Appellant's App. at 82.) Therefore, the Tomlinsons have not designated evidence demonstrating INDOT breached a duty.

CONCLUSION

The trial court properly struck Tomlinsons' Exhibit Four from the designated materials and properly granted summary judgment for Howard and INDOT. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

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