

STATE OF INDIANA)	IN THE TIPPECANOE SUPERIOR COURT
) SS:	
COUNTY OF TIPPECANOE)	CAUSE NO. 79D01-1509-CT-00075
PATRICIA BATTA,)	
)	
Plaintiff,)	
)	
vs.)	
)	
GMRI, Inc.)	
)	
)	
Defendants.)	

ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant, GMRI, Inc.’s Motion for Summary Judgment against Plaintiff, Patricia Batta. The Court, has reviewed the Defendant’s Motion for Summary Judgment materials, Plaintiff’s Response materials, evidence designated by the parties in support thereof and opposition thereto, subsequent motions filed in this summary judgment proceeding, and heard arguments of counsel at a hearing held on January 31, 2017. The Court took the matter under advisement following the hearing hereon and review of the material submitted, the court now finds:

RELEVANT PROCEDURAL HISTORY

1. On or about August 23, 2016, Defendant filed its Motion for Summary Judgment, Brief and Designation of Evidence in Support of Motion for Summary Judgment.
2. On or about September 6, 2016, Plaintiff filed a Motion for Extension of Time to respond to Defendant’s Motion for Summary Judgment.
3. On September 9, 2016, Defendant filed an Objection to Plaintiff’s Request for a Floating Deadline to Respond to Defendant’s Motion for Summary Judgment.

4. On September 12, 2016, the Court ordered Plaintiff to conduct further discovery within forty-five (45) days and further ordered Plaintiff until thirty (30) days after receipt of the deposition transcript of the 30(B)(6) deposition of Defendant, GMRI, Inc. in which to respond to Defendant's Motion for Summary Judgment.

5. On or about October 31, 2016, Plaintiff filed a Second Motion for Extension of Time in which to respond to Defendant's Motion for Summary Judgment.

6. On November 3, 2016, Defendant filed its objection to Plaintiff's Second Motion for a Floating Deadline to Respond to Defendant's Motion for Summary Judgment.

7. On November 4, 2016, the Court issued an Order that Plaintiff shall have until thirty (30) days after receipt of the deposition transcript of Ryan Pyke, and receipt of the incident report, to respond to Plaintiff's Motion for Summary Judgment.

8. Plaintiff subsequently obtained the incident report and the deposition of Ryan Pyke took place on November 9, 2016.

9. On or about December 9, 2016, Plaintiff filed its Notice of Deadline to Respond to Defendant's Motion for Summary Judgment, informing the Court the deadline for Plaintiff to respond to Defendant's Motion for Summary Judgment was on or before January 2, 2017.

10. Plaintiff failed to respond to Defendant's Motion for Summary Judgment on January 3, 2017.¹

11. On January 4, 2017, Plaintiff filed its Response to Defendant, GMRI, Inc.'s Motion for Summary Judgment, Brief, and Designated Evidence.²

¹ January 2, 2017, was a Court recognized holiday, therefore, Plaintiff's actual response deadline in which to respond to Defendant's Motion for Summary Judgment was January 3, 2017.

² Plaintiff's counsel did not comply with Ind. Trial Rule 5(C) by specifying the date it was served to the Court and Defendant in the Certificate of Service nor was it filed with the Tippecanoe Superior Court pursuant to Ind. T.R. 5(F)(3).

12. Plaintiff did not move the Court for an extension of time pursuant to Trial Rule 56(F) or 56(I) requesting the court to extend the deadline to file her response to January 4, 2017.

13. On or about January 5, 2017, the Court scheduled a Hearing on Motion for Summary Judgment for January 31, 2017 at 2:00 p.m.

14. On January 17, 2017, Defendant filed a Combined Motion to Strike, Reply and Supplemental Designation of Evidence in Support of Motion to Strike and Motion for Summary Judgment.

15. On January 31, 2017, Parties appeared by counsel, and a hearing on the pending motions was conducted.

16. During the January 31, 2017 hearing, Plaintiff filed: (1) Plaintiff's Motion for Leave to File Amended Response in Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Motion to Strike Defendant's Combined Motion to Strike and Reply and Supplemental Designation of Evidence; (2) Plaintiff's Amended Response In Opposition to Defendant GMRI, Inc's Motion for Summary Judgment; (3) Plaintiff's Response in Opposition to Defendant's Motion to Strike; and (4) Plaintiff's Surreply in Opposition to Defendant's Motion for Summary Judgment.

17. During the January 31, 2017 hearing, counsel for Defendant objected and moved to strike (1) Plaintiff's January 4, 2017 untimely filing of her Response in Opposition to Defendant's Motion for Summary Judgment and (2) Plaintiff's January 31, 2017 motions filed in open court. (hereinafter, "Response Materials.").

18. On February 1, 2017, the Court ordered parties to provide post-hearing brief and proposed orders by February 10, 2017.

ORDER STRIKING PLAINTIFF'S RESPONSE MATERIALS

19. Indiana's Trial Rule 56 Summary Judgment deadlines are rigidly applied. The non-movant must respond to summary judgment within 30 days. Ind. R. Trial P. 56(C). Where the non-movant seeks additional time to file a response, the non-movant must move the Court for an extension of time pursuant to Rule 56(F) or 56(I). Ind. R. Trial P. 56. In either case, Indiana law requires the non-movant to file its summary judgment response or extension of time before the existing deadline. *Desai v. Croy*, 805 N.E.2d 844 (Ind. Ct. App. 2004).

20. T.R.56(I) controls the Court's ability to alter time as it relates to the management of deadlines relating to Motions for Summary Judgment and states: "for cause found, the court may alter any time limit set forth in this rule upon motion within the applicable time limit."

21. Indiana law is clear that a trial court lacks discretion to consider any materials filed in opposition to summary judgment where the non-movant fails to file a summary judgment response, or otherwise seeks an extension of time to respond, before the deadline. *Id.*; *Seufert v. RWB Medical Income Properties I Ltd. Partnership*, 649 N.E.2d 1070 (Ind. Ct. App. 1995); *Bursuk v. Town of St. John*, 820 N.E.2d 118, 124 n.5 (Ind. 2005). The Rule 56 deadlines are applied as a bright-line rule. *Life v. F.C. Tucker Co., Inc.*, 948 N.E.2d 346, 351 (Ind. Ct. App. 2011) ("[t]he rule of *Desai* is a bright line rule both for the trial courts and the parties who litigate summary judgment motions[.]"); *DeLage Landen Fin. Services, Inc. v. Cmty Mental Health Ctr., Inc.*, 965 N.E.2d 693, 699 (Ind. Ct. App. 2012) *transfer denied*, 971 N.E.2d 99 (Ind. 2012).

22. In *Thayer v. Gohil*, defendant filed a motion for summary judgment, and plaintiff was granted two consecutive extensions of time to respond. *Thayer*, 740 N.E.2d 1266, 1267 (Ind. Ct. App. 2001). Two (2) days after the extended deadline, plaintiff filed a motion for leave

to file a response, along with the summary judgment response. *Id.* The trial court ordered plaintiff's summary judgment response stricken, and the Court of Appeals affirmed. *Id.* at 1270. With respect to extended summary judgment deadlines, the Court held, "not only must the nonmovant file a response or request for continuance during the initial thirty day period, but she must also file a response, file an affidavit pursuant to T.R.56(F), or show cause for alteration of time pursuant to T.R.56(I) **during any additional period granted by the trial court.**" *Id.* at 1268 (emphasis added). Therefore, plaintiff's "noncompliance in failing to show cause for alteration of time before [the extended deadline] **must result in striking her untimely response.**" *Id.* (emphasis added).

23. In *Desai v. Croy*, 805 N.E.2d 844 (Ind. Ct. App. 2004), the non-moving party neither filed a response nor a request for enlargement of time pursuant to T.R.56(I) during the thirty (30) day period. They also failed within thirty (30) days to file an affidavit under T.R. 56(F). The Court of Appeals reversed and remanded the case to the trial court ordering that summary judgment be entered in Dr. Desai's favor.

24. In the present case, Plaintiff was granted two (2) additional extensions of time to respond to Defendant's Motion for Summary Judgment. On December 9, 2016, Plaintiff filed with the Court a Notice of Deadline to Respond, informing the Court the deadline for Plaintiff to respond to Defendant's Motion for Summary Judgment was January 2, 2017. The Court has considered that January 2, 2017 was a court-recognized holiday, thereby permitting Plaintiff to submit her Response Materials on or before January 3, 2017.

25. It is undisputed, however, that Plaintiff filed her Response Materials on January 4, 2017. It is further undisputed the Response Materials filed on January 4, 2017, did not comply with Indiana Trial Rule 5(C) by specifying the date it was served to the Court, and that the

Response Materials were not mailed to the Clerk by registered, certified, or express mail on or before January 3, 2017 as permitted by Ind. T.R. 5(F)(3).

26. Likewise, it is undisputed that Plaintiff's January 31, 2017 Motion for Leave to file an Amended Response, Designation of Evidence, and Surreply was untimely.

27. During the January 31, 2017 hearing, over objection by Defendant's counsel, Plaintiff's counsel requested the Court retroactively apply an extension of one (1) day so the Court could find Plaintiff's Response Materials were timely filed.

28. The Court finds that Plaintiff failed to request an extension of time to extend the January 3, 2017 deadline prior to filing her Response Materials.

29. The rule of *Desai* is a bright line rule both for the trial courts and the parties who litigation summary judgment deadlines. *Desai v. Croy*, 805 N.E.2d 844 (Ind. Ct. App. 2004); *Life v. F.C. Tucker Co., Inc.*, 948 N.E.2d 346, 351 (Ind. Ct. App. 2011); *DeLage Landen Fin. Services, Inc. v. Cmty Mental Health Ctr., Inc.*, 965 N.E.2d 693, 699 (Ind. Ct. App. 2012) *transfer denied*, 971 N.E.2d 99 (Ind. 2012).

30. Plaintiff's noncompliance in failing to show cause for alteration of time *before the extended deadline* of January 3, 2017 must result in striking her untimely Response Materials. Therefore, no consideration can be given to Plaintiff's Response Materials in these summary judgment proceedings.

31. Defendant's Motion to Strike is HEREBY GRANTED and all of Plaintiff's Response Materials are stricken from the record and cannot be considered in these summary judgment proceedings.

ORDER GRANTING DEFENDANT, GMRI, INC.'S, MOTION FOR SUMMARY JUDGMENT

32. A court need not issue specific findings of fact in ruling upon a motion for summary judgment as such findings are “unnecessary on decisions of motions.” Ind. T.R. 52(A). However, findings and conclusions offer valuable insight into the court’s rationale for its decision and aid appellate review. *SCI Ind. Funeral Service, Inc. v. DO McComb & Sons, Inc.*, 820 N.E. 2d 700, 706 (Ind. Ct. App. 2005).

33. Summary judgment shall be granted when the designated materials to the Court show the moving party is entitled to judgment as a matter of law based upon the uncontroverted facts. Ind. T.R. 56(C); *Christ v. K-Mart Corp.*, 653 N.E.2d 140, 142 (Ind. Ct. App. 1995). In disputing a summary judgment motion, the non-movant’s burden may not be carried with evidence based merely upon supposition or speculation. *Roberts v. Hicks*, 694 N.E.2d 1161, 1163 (Ind. Ct. App. 1998), *trans. denied*. A Defendant’s burden in obtaining summary judgment should not require Defendant to enter into a full-scale trial defense of a claim which is supported solely by speculation of mere possibility. *Brannon v. Wilson*, 733 N.E.2d 1000, 1001 (Ind. Ct. App. 2000).

34. The tort of negligence consists of three element: (1) a duty is owed to the plaintiff by defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach. *Amer. Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532, 534 (Ind. Ct. App. 1999).

35. Negligence should not be inferred; rather, specific factual evidence, or reasonable inferences that might be drawn from that evidence, as to each element must be designated to the trial court. *Hayden v. Paragon Steakhouse*, 731 N.E.2d 456, 458 (Ind. Ct. App. 2000). “An inference is not reasonable when it rest on no more than speculation or conjecture.” *Id.*

36. Speculation or conjecture offered by Plaintiff is not enough to defeat summary judgment and negligence cannot be inferred from the mere fact of a fall. *Taylor v. Cmty. Hosps. of Ind., Inc.*, 949 N.E.2d 361, 364 (Ind. Ct. App. 2011).

37. In the present case, the evidence before the court is that Plaintiff sustained a fall on November 13, 2013 while at the Olive Garden owned by Defendant, GMRI, Inc.

38. Plaintiff testified during her June 20, 2016 deposition that she was walking to the front entrance of the Olive Garden and she believed “something” caught her toe causing her to fall. Plaintiff further testified the cause of her fall was unknown, and that it could have been a curb, uneven pavement, a small unidentifiable object, or a small stone.

39. Plaintiff testified she was glancing down at the area prior to her fall, but didn’t notice anything. After her fall, she testified she could not identify any object that caused her fall.

40. Olive Garden’s manager, Ryan Pyke, had the occasion to observe Plaintiff on the ground and inspect the area immediately after the incident. He testified during deposition that he did not observe any defect or small object in the area, did not observe any tripping hazards or rocks, and testified the sidewalk-parking lot transition was flush.

41. During Plaintiff’s June 20, 2016 deposition, when asked whether Plaintiff could identify what caused her fall, Plaintiff ultimately testified “I don’t know.”

42. The Plaintiff has not satisfied her burden that any negligent action or inaction on behalf of Defendant, GMRI, Inc. caused her alleged injuries

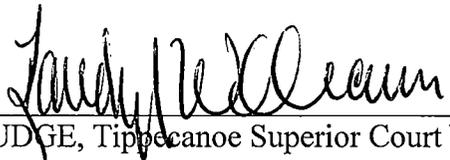
43. The Court finds that Plaintiff can only speculate as to what caused her fall. Plaintiff’s speculation that “something” had to cause her fall, as limited as it is, is not proper to satisfy her burden in overcoming summary judgment. The evidence leaves a fact-finder, to infer

negligence through an inferred chain of events. As a matter of law, inferential speculation alone cannot establish negligence.

44. The designated evidentiary matter establishes that there is no genuine issue as to any material facts concerning Plaintiff's allegations against GRMI, Inc. and GMRI, Inc. is entitled to judgment in its favor as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that GMRI, Inc.'s Motion for Summary Judgment is hereby GRANTED with final judgment being entered in favor of said Defendant and against Plaintiff as a matter of law and there is no just reason for delay.

DATE: 2-28-17



JUDGE, Tippecanoe Superior Court No. 1

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