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IN THE
COURT OF APPEALS OF INDIANA

Seth Wiley,
Appellant-Plaintiff,

v.

ESG Security, Inc.,
Appellee-Defendant.

April 14, 2022

Court of Appeals Case No. 21A-CT-2117

Appeal from the Marion Superior Court

The Honorable John M.T. Chavis, II, Judge

Trial Court Cause No. 49D05-1308-CT-31294

Altice, Judge.

Case Summary

[1] Seth Wiley was injured when he fell while engaged in crowd surfing[1] at a music concert. He sued, among others, ESG Security, Inc. (ESG), the security company hired to provide security at the event, alleging negligence. The trial court denied ESG's motion for summary judgment "on the issue of duty" but granted summary judgment in favor of ESG "on the issue of inherent risk." *Appellant's Appendix Vol. II* at 26-27. Finding that genuine issues of material fact exist as to whether ESG assumed a duty that night with regard to patrons who crowd surfed at the concert and that Wiley did not expressly consent to relieve ESG of any such duty, we reverse the entry of summary judgment in favor of ESG.

[2] We reverse and remand.

Facts & Procedural History

[3] On November 28, 2009, two or three "punk rock" or "metalcore" bands, including one called The Devil Wears Prada (TDWP), were performing at a concert event at The Murat Centre Egyptian Room (the Murat) in Indianapolis. *Appellant's Brief* at 7. TDWP was the last to perform that night. Live Nation Worldwide, Inc. (Live Nation)[2] was the show's producer, the responsibilities of

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[1] As described by Wiley in his complaint, crowd surfing is when "persons [are] hoisted above the [other] audience members' heads and moved while in a supine position, being supported by audience members' hands." *Appellant's Appendix Vol. II* at 30.

[2] Live Nation was a former defendant and is now a non-party.

which included booking the bands, selling the tickets, promoting the concert, and controlling the premises. Live Nation hired ESG under a Vendor Services Agreement (the Contract) to provide security for the event. The Contract provided, in part:

> [ESG] will exert reasonable and legal efforts to protect all persons who enter onto the sites of the [Live Nation] Venues from death and personal injury from any causes whatsoever, including the commission by any person of any felony or misdemeanor, provide aid and assistance to all law enforcement agencies as requested, including reporting in accordance with [Live Nation]'s policies and standards, in the enforcement of applicable laws and regulations[.]

Appellant's Appendix Vol. II at 48.

[4] Live Nation posted signs at the Murat – at guest entry points, restrooms, common areas, bars, and concession areas – advising patrons that "moshing/surfing activity is strictly prohibited" and that patrons who participate in those activities "do so at their own risk" and "are subject to ejection from the venue." *Appellant's Appendix Vol. IV* at 161. A similar audio loop message was repeatedly played during the evening advising patrons, in part, "Please Note: Moshing and crowd surfing is strictly prohibited. Due to the nature of moshing/crowd surfing, injuries can occur. Patrons who engage in moshing and/or crowd surfing do so at their own risk and are subject to ejection from the venue." *Appellant's Appendix Vol. II* at 59.

[5] A "bicycle rack" type of barrier was at the front of the audience, on the other side of which was an open space of about six feet, then the stage. Several ESG personnel were positioned in that space between the crowd and the stage. Despite warnings, various attendees engaged in crowd surfing as the bands performed. Once the individual reached the front of the audience, they were passed over the barrier into the open space, and ESG prevented them from moving toward or getting on the stage. Wiley, then a minor, engaged in crowd surfing three or four times that night prior to his fall and injury. On the prior occasions, ESG personnel helped him down to the ground when he reached the front of the audience. On the last occasion, when Wiley reached the front, the crowd kept moving him forward and he fell to the floor, suffering injuries. At the time, ESG personnel were looking at or attending to another patron.

[6] On August 16, 2013, Wiley filed a complaint for damages against ESG, along with the Murat, Live Nation, and TDWP, alleging that (1) Wiley was crowd surfing during the concert and "was allowed to be dropped to the floor causing serious injury," (2) defendants owed him a duty to make the premises reasonably safe to him, a business invitee, or to exercise reasonable care to warn him of the hazards of crowd surfing, (3) defendants failed to observe these duties "by allowing members of the crowd, including [him], to engage in crowd surfing and by failing to warn [him] of the dangers of engaging in crowd surfing," and (4) defendants' negligence was the proximate cause of his

injuries.[3] *Id.* at 30. The complaint alleged that Wiley "did nothing to contribute to the cause of his injuries." *Id.*

[7] On March 11, 2021, ESG filed a motion for summary judgment, arguing that it did not owe Wiley a duty relating to crowd surfing and that Wiley incurred the risk of his injuries. ESG emphasized that it was retained by Live Nation to provide security to the venue and argued that, while the Contract contains language that ESG is to take reasonable efforts to protect patrons, such language serves only to create a contractual agreement between Live Nation and ESG for ESG to use reasonable efforts to protect patrons from those risks of which the patron would not be aware or warned against and did not require ESG to protect Wiley from his own negligent acts.

[8] ESG submitted designated evidence, including deposition testimony from Marcus Henderson, Vice President and General Counsel for ESG and "Venue Supervisor" for this particular event, that the "primary responsibility" of the ESG personnel who were stationed in front of the barricade was "to ensure the safety of the artist and the production, basically preventing patrons from getting onto or towards the stage." *Id.* at 63. In support of its position that it could not foresee that Wiley would suddenly be thrown to the floor, ESG submitted Wiley's response to Interrogatory #24, in which Wiley described that "he was suddenly and without warning dropped onto the floor . . . which caused him to

[3] All other defendants except ESG have been dismissed by agreement or settlement.

sustain serious bodily injury." *Id*. at 77. As to the claim that Wiley incurred the risk, ESG asserted that Wiley was exposed to warning signs and audio which made him aware of the danger of crowd surfing and "whether or not ESG personnel caught other crowd surfers is not relevant to the question of Wiley's knowledge of the inherent risks of crowd surfing." *Id.* at 40.

[9] Wiley responded to the motion, arguing that "even if patrons knew and understood the risks of crowd surfing," "ESG knew . . . that . . . patrons would fail to protect themselves against that risk[,]" which imposed a duty on ESG to take reasonable precautions to protect patrons from that harm. *Id.* at 80 (emphasis in original). Wiley's designated evidence included deposition testimony from Henderson regarding ESG's experience with crowd surfing at previous metalcore concerts, including ones at which TDWP performed, despite warnings to patrons. Wiley also designated ESG's answer to Interrogatory #8 in support of his argument that ESG had procedures to address crowd surfing at these concert events:

> Q: Please describe in detail the operating procedure for crowd surfing at the event in question.
>
> A: As circumstances permit, at least one ESG Security guard in the area of the crowd surfer will step onto a step on back side of the barricade in order to 'catch' the patron as they reached the barricade. A second ESG guard will support the guard on the step by placing his hand on the lower back of the guard on the step. Once the crowd surfing patron reaches the barricade, the guard on the step will make every effort to cradle the patron in his arms, ensuring that the head, neck and back on the patron.

> (sic) Once the guard has the patron secure in his arms, the guard will step down from the step and once firmly on the ground, release the patron and direct him to the nearest barricade exit.

Appellant's Appendix Vol. III at 44. Wiley submitted evidence that Henderson had emailed Live Nation a month before the concert "recommend[ing] two additional guards in the barricade for [TDWP]" based upon ESG's experience with TDWP during a prior event. *Id.* at 35.

[10] Wiley also designated his own deposition testimony that he had engaged in crowd surfing three or four times that night prior to his fall, and each time he was caught by ESG personnel and helped to his feet when he reached the front of the audience. Wiley testified that he relied upon ESG to catch him, as he had observed ESG guards assists others that night, and he did not recognize or understand potential dangers related to that activity.

[11] In reply, ESG argued that although ESG personnel had caught crowd surfers and escorted them out of the protected area, "it was done as part of their duties to keep attendees away from and off the stage." *Appellant's Appendix Vol. IV* at 165. ESG rejected Wiley's attempt "to hold ESG, [] a third party vendor to Live Nation, responsible for his own dangerous conduct . . . in defiance of the posted warnings" and maintained that its duty to exercise reasonable care to patrons did not extend to crowd surfing. *Id.* ESG asserted that "[t]he fact that ESG has procedures in place to catch violators of the crowd surfing policy and escort them from the protected 'front of stage' area does not mean ESG assumed a duty to catch Wiley each and every time he crowd surfed," that

Wiley should have known that crowd surfing was risky, and that by proceeding to do so he "was incurring the risk of his [] injury as a matter of law." *Id*. at 167.

[12] After the matter was fully briefed by the parties, the court held a hearing on August 4, 2021. On August 27, 2021, the trial court entered a summary order denying ESG summary judgment "on the issue of duty" but granting summary judgment in ESG's favor "on the issue of inherent risk[,]" and it entered final judgment pursuant to Ind. Trial Rule 54(B). *Appellant's Appendix Vol. II* at 26-27. Wiley now appeals.

Discussion & Decision

[13] When reviewing a grant or denial of a motion for summary judgment, our standard of review is the same as it is for the trial court:

> A party seeking summary judgment must establish that the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). The party moving for summary judgment bears the initial burden to establish its entitlement to summary judgment. Only then does the burden fall upon the non-moving party to set forth specific facts demonstrating a genuine issue for trial. The reviewing court must "construe the evidence in favor of the non-movant, and resolve all doubts against the moving party.

Pfenning v. Lineman, 947 N.E.2d 392, 396-97 (Ind. 2011) (cleaned up). Indiana's 'heightened summary judgment standard "consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting

meritorious claims." *D.H. by A.M.J. v. Whipple*, 103 N.E.3d 1119, 1125 (Ind. Ct. App. 2018) (quoting *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014)), *trans. denied*. Summary judgment is rarely appropriate in negligence cases because they are particularly fact-sensitive and are governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all the evidence. *Singh v. Singh*, 155 N.E.3d 1197, 1204 (Ind. Ct. App. 2020); *Martin v. Hayduk*, 91 N.E.3d 601, 605 (Ind. Ct. App. 2017).

[14] Generally, in order to recover on a negligence theory, a plaintiff must establish: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant's breach. *Polet v. ESG Sec., Inc.*, 66 N.E.3d 972, 977 (Ind. Ct. App. 2016). "Absent a duty there can be no negligence or liability based upon the breach." *BoJak's Bar & Grille v. Henry*, 170 N.E.3d 264, 265-66 (Ind. Ct. App. 2021).

[15] In this case, Wiley argues that ESG had a duty to exercise reasonable care "to protect everyone at the event from known and expected harm[,]" including injuries sustained while crowd surfing, which Wiley asserts was foreseeable. *Appellant's Brief* at 17, 24. ESG maintains that it did not have a duty to protect Wiley from prohibited conduct, and even if it did, Wiley was aware of the danger of his conduct and assumed the risk such that any duty was negated.

[16] Whether a duty exists is generally a question of law for the court. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386-87 (Ind. 2016). Although foreseeability is most often a component of proximate cause, in some cases, it is

also a component of the duty element of negligence. *BoJak's*, 170 N.E.3d at 266 (quotation omitted). More specifically, foreseeability as an element of duty in a claim that involves allegedly dangerous activities on the premises requires the court to conduct a threshold evaluation of "(1) the broad type of plaintiff and (2) the broad type of harm." *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 838 (Ind. 2020) (citing *Rogers v. Martin*, 63 N.E.3d 316, 325 (Ind. 2016)). That is, the foreseeability analysis focuses on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected, without addressing the specific facts of the occurrence. *BoJak's*, 170 N.E.3d at 266 (quoting *Goodwin* and *Rogers*); *Neal v. IAB Fin. Bank,* 68 N.E.3d 1114, 1121 (Ind. Ct. App. 2017), *trans. denied*.

[17] Wiley urges that the general class of persons to which he belonged was "the 'active' fan base that attends concerts of metalcore music" and the harm suffered, falling to the ground while crowd surfing, was of a kind normally to be expected. *Appellant's Brief* at 23. We find this analysis too narrow as it focuses on the specific activity. The *general* class of persons of which Wiley was a member – the relevant inquiry – was an attendee at a concert. Getting dropped or thrown to the ground from above the heads of other audience members is not the kind of harm normally expected for a concert attendee to suffer. Thus, we decline to find that a hired security company's duty of reasonable care to provide security to those on the premises for a concert required it to protect patrons from injuries related to the prohibited conduct of crowd surfing.

[18] Wiley argues, alternatively, that even if ESG's duty to exercise reasonable care did not encompass attending to crowd surfers, ESG, through its affirmative conduct, "assumed a duty to take reasonable care to protect [Wiley] and others" from falling unaided at the front of the crowd. *Appellant's Brief* at 28. Wiley is correct that

> a duty may be imposed upon one who by affirmative conduct . . . assumes to act, even gratuitously, for another to exercise care and skill in what he has undertaken. It is apparent that the actor must specifically undertake to perform the task he is charged with having performed negligently, for without actual assumption of the undertaking there can be no correlative legal duty to perform the undertaking carefully.

S. Shore Baseball, LLC v. DeJesus, 11 N.E.3d 903, 910 (Ind. 2014); *Yost v. Wabash College*, 3 N.E.3d 509, 517 (Ind. 2014). "[T]he existence and extent of an assumed duty are ordinarily questions for the trier of fact." *Marks v. NIPSCO*, 954 N.E.2d 948, 956 (Ind. Ct. App. 2011). However, if no facts or reasonable inferences in the record create material issues of genuine fact, the question can be determined as a matter of law. *Griffin v Simpson*, 948 N.E.2d 354, 359 (Ind. Ct. App. 2011), *trans. denied*. In other words, we may decide whether ESG assumed a duty toward Wiley only if there are no genuine issues of material fact.

[19] Here, Wiley designated evidence that ESG knew from prior experience with metalcore concerts, including TDWP concerts, that patrons would crowd surf despite the written and audio warnings. Based on its experience with TDWP,

ESG recommended to Live Nation that two additional ESG staff be positioned in the barricaded area in front of the stage that night. ESG had a procedure for security staff to follow regarding the manner of assisting patrons to the ground in front of the barricade. ESG observed crowd surfing occurring at the concert that night and assisted multiple crowd surfers to the ground, including Wiley, prior to his fall. Wiley stated in his deposition that he relied upon ESG to catch him, as he had seen ESG guards do for others and as they had done for him, and that he did not consider crowd surfing to be dangerous. ESG maintains that it did not assume a duty to assist crowd surfers, as its designated evidence showed that its primary responsibility was to provide security for those in attendance and prevent patrons from getting on the stage or near the band.

[20] As this court has observed, "[u]nderlying our decisions in many assumption of duty cases is our reluctance to impute broad definitions of duty that essentially render a party the guarantor of another's safety." *D.H.*, 103 N.E.3d at 1131; *see also Singh*, 155 N.E.3d at 1207 (making observation that our Supreme Court, in *Cavanaugh*, "seems to instruct both narrowing the review of whether a duty is foreseeable and limiting when a duty is found to exist"). With these considerations in mind, we cannot say that the record here establishes, as a matter of law, that ESG assumed a duty to assist crowd surfers. Rather, on the record before us, we find that genuine issues of material fact exist as to whether ESG assumed a duty of reasonable care to Wiley and those who crowd surfed at the concert. *See D.H.*, 103 N.E.3d at 1131 (finding question of fact existed as to whether grandmother had assumed duty of care to child to protect her from

foreseeable criminal attack, namely molestation by grandmother's husband); *Lamb v. Mid Indiana Serv. Co., Inc.*, 19 N.E.3d 792, 796 (Ind. Ct. App. 2014) (issues as to whether general contractor assumed duty to provide safe place for subcontractor's employee to work precluded summary judgment); *Peterson v. Ponda*, 893 N.E.2d 1100, 1106 (Ind. Ct. App. 2008) (finding issue of fact existed as to whether homeowner assumed a duty to provide safe work environment for worker that fell from the roof), *trans. denied*.

[21] ESG argues that, even if it did assume a duty, Wiley – who acknowledged in deposition testimony that he knew he could be dropped by the audience before he reached the barricade – incurred or assumed the risk[4] of his activities such that any duty was negated. We disagree that Wiley's conduct relieved ESG of any duty it may have had.

[22] In *Martin*, a visitor to private property brought a negligence action after he was bitten by the property owners' dogs when he entered the property, which had multiple "beware of dogs" signs. 91 N.E.3d at 604. In reversing summary judgment in favor of the owners, this court addressed the owners' argument that Martin had incurred the risk of injury when he entered the property despite the posted warnings. We acknowledged that, for a time following the adoption of the Comparative Fault Act, questions remained "about whether [the doctrine of

[4] Indiana courts have recognized the terms "incurred risk" and "assumption of risk" as equivalents. *Pfenning*, 947 N.E.2d at 400 (Ind. 2011); *see also Spar v. Cha*, 907 N.E.2d 974, 980 n.1 (Ind. 2009) ("Indiana courts have treated the terms assumption of the risk and incurred risk interchangeably.").

incurred risk] wholly bars a plaintiff's recovery by negating a duty owed to the plaintiff or whether it instead goes to the allocation of fault[,]" but explained that our Supreme Court in *Pfenning* had "provided clarity on this issue." *Martin*, 91 N.E.3d at 609.

[23] Specifically, the *Pfenning* Court explained that, under the Comparative Fault Act – which defines "fault" to include "unreasonable assumption of risk not constituting an enforceable express consent" and "incurred risk," Ind. Code § 35-6-2-45(b) – incurred risk cannot be a basis to find the absence of duty except in the case of a plaintiff's express consent.[5] *See Pfenning*, 947 N.E.2d at 400 (citing to and approving of *Smith v. Baxter*, 796 N.E.2d 242, 245 (Ind. 2003), which held that "[u]nder the Comparative Fault Act, a 'lack of duty' may not arise from a plaintiff's incurred risk, unless by express consent"). Because, here, there is no evidence that Wiley *expressly* consented to take his chances as to injury, Wiley's conduct did not negate any duty that ESG had or may have assumed with regard to those who crowd surfed that night.[6]

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[5] Our Supreme Court has described express consent in the context of assumption of the risk as occurring when "the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care . . . and agrees to take his chances as to injury from a known or possible risk." *Spar*, 907 N.E.2d at 980 (quoting Restatement (Second) of Torts § 496A cmt. c (1965)). This is in contrast to, among other things, "implied primary" consent, where a plaintiff "is deemed to have impliedly agreed to relieve the defendant of responsibility, and to take his own chances." *Id*.

[6] We note that "'[w]hile a plaintiff's conduct constituting incurred risk thus may not support finding a lack of duty, such conduct is not precluded from consideration in determining breach of duty.'" *Pfenning*, 947 N.E.2d at 400 (quoting *Smith*, 796 N.E.2d 242, 245 (Ind. 2003)).

[24] In conclusion, we reverse the trial court's grant of summary judgment in favor of ESG and remand for the trier of fact to determine if and to what extent ESG assumed a duty with regard to crowd surfing, and if so, for resolution of remaining issues including breach, causation, and comparative fault.

[25] Judgment reversed.

Bailey, J. and Mathias, J., concur.