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ATTORNEY FOR APPELLANT:

ALAN D. WILSON
Kokomo, Indiana

ATTORNEY FOR APPELLEE:

ROBERT J. PALMER
May Oberfell Lorber
Mishawaka, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DAVID RAMOS,

Appellant-Plaintiff,

vs.

ROBERT W. JAMES[1] and
DAVID HOOVER,

Appellees-Defendants.

No. 34A05-1005-CT-301

APPEAL FROM THE HOWARD SUPERIOR COURT II
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0605-CT-463

October 5, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

[1] Robert W. James is not a party to this appeal. However, pursuant to Indiana Appellate Rule 17 (A), a party of record in the trial court is a party on appeal.

STATEMENT OF THE CASE

Appellant-Defendant, David Ramos (Ramos), appeals the trial court's grant of summary judgment in favor of David Hoover (Hoover), when the trial court decided that Ramos incurred the risk of his injury.

We affirm.

ISSUE

Ramos raises one issue for our review, which we restate as: Whether the trial court erred when it determined that Ramos incurred the risk of being shot as a matter of law.

FACTS AND PROCEDURAL HISTORY

On July 17, 2005, Hoover picked up Ramos at his house and together they attended a wedding in Marion, Indiana. After the wedding, they drove to the wedding reception in Gas City, Indiana. Once they arrived at the wedding reception, Ramos started drinking. At some point in the evening, Robert James (James) arrived at the reception with a woman whom Ramos presumed to be James' ex-wife. Ramos saw James become intoxicated, smoke marijuana, and take seizure medication pills. Ramos also noticed that James had a gun in the waistband of his pants and saw him flashing the gun around by pulling up his shirt and showing the gun handle to everyone at the reception. The fact that James had a gun concerned Ramos, because he stated that "[James] was intoxicated, [and] people do stupid things when they're intoxicated." (Appellant's App. p. 55). Ramos had also heard during the evening that James was mad at somebody his ex-wife used to work with and witnessed James get into an argument with his ex-wife at the reception. (Appellant's App. p. 54).

At some point before Hoover and Ramos left the reception, James asked Hoover for a ride home. Ramos was aware that James would be riding in the car with them. Hoover, Ramos, James and another passenger, John Manton (Manton), were driving back to Marion, Indiana, and James sat in the back seat behind Ramos. Ramos heard Manton say to James "What are you doing?" and then heard the gun cock. (Appellant's App. pp. 113-14). After that noise, James' gun discharged and the bullet grazed the side of Ramos' head.

On May 18, 2006, Ramos filed a complaint for damages against James, alleging that James negligently, recklessly, and accidentally shot him in the head causing severe damages. On January 3, 2007, Ramos filed a motion for default judgment against James, and it was granted the next day. The trial court's Order stated that with respect to the issue of damages, "A hearing [] shall be set at the request of either party herein." (Appellant's App. p. 23).

On March 12, 2007, Ramos filed an amended complaint for damages, and added Hoover as a defendant, claiming that he negligently allowed James to ride in the car. On March 3, 2008, Hoover filed a motion for summary judgment asserting that he had no duty to Ramos and that Ramos incurred the risk of his injuries. Ramos filed a response to Hoover's motion for summary judgment on April 3, 2008. The trial court heard argument on December 1, 2008, and issued an Order on June 10, 2009, ruling that "there are a number of questions of fact which [might] be considered by a jury in concluding that Hoover did, or did not, owe a duty to Ramos." (Appellant's App. p. 125). However, the trial court found that

Ramos incurred the risk of his injuries as a matter of a law; thus, a determination of the existence of a duty was unnecessary.

Ramos now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Summary Judgment*

This cause comes before this court as an appeal from a grant of summary judgment. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008). Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* at 608. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claims. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id.*

II. *Incurred Risk*

Ramos argues that the trial court erred when it ruled that Hoover was entitled to summary judgment based on the finding that Ramos incurred the risk of his injury as a matter of law. Specifically, Ramos argues that he did not possess the requisite knowledge or state of mind to bar recovery.

The Indiana Comparative Fault Act defines "fault" as including assumption of risk and incurred risk, which are affirmative defenses. Indiana Code section 34-6-2-45(b). In *Heck v. Robey*, 659 N.E.2d 498, 504 (Ind. 1995), *abrogated on other grounds by Control Techniques, Inc. v. Johnson,* 762 N.E.2d 104 (Ind. 2002), our supreme court held that the defense of incurred risk as a complete defense "no longer exists; it is subsumed by the concept of fault in our comparative fault scheme." *Id*. at 504. Further, the court stated that "[a]ny rule that purports to effect an absolute defense based upon incurred risk is contrary to our comparative fault scheme." *Id*. at 505. *See also Smith v. Baxter*, 796 N.E.2d 242-244-45 (Ind. 2003).

Despite our supreme court's directive, here, the trial court treated incurred risk as a complete defense, stating, "It is the [c]ourt's opinion that Ramos incurred the risk to the degree that, as a matter of law, he may not recover from Hoover in negligence. (Appellant's App. p. 125). When construing the designated evidence most favorable to the non-moving party, material questions of fact make the trial court's entry of summary judgment erroneous on the issue of incurred risk. The interpretation of the evidence and assessments of weight

and credibility of the witnesses should be left to the sound judgment of the trier of fact at a trial on the merits, not determined at the summary judgment stage.

Notwithstanding our determination that summary judgment was inappropriate, Hoover, as Appellee, has brought a cross-appeal, contending that he owed no duty to Ramos and that the trial court erred in denying summary judgment on this ground. We agree. In *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991), our supreme court set out three factors that the courts must balance to determine the issue of duty in a negligence action: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. In *Wagner v. Spurlock*, 803 N.E.2d 1174, 1182 (Ind. Ct. App. 2004), we applied these factors with respect to the claimed duty of a private citizen to control the conduct of another. We held that as a general rule there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relationship exists between the actor and other which gives to the other a right to protection. *Id*. at 1182-83 (citing *Bowling v. Popp*, 536 N.E.2d 511, 515 (Ind. Ct. App. 1989)).

Here, we find that there was no special relationship between Hoover and Ramos giving Ramos a right of protection or between Hoover and James giving Hoover a right of

control. In the absence of such a relationship, there is no duty owed by Hoover to Ramos, and summary judgment should have been entered on this basis.

CONCLUSION

Based on the foregoing, we find that the trial court erred when it granted Hoover's summary judgment when it decided that Ramos had incurred the risk, however, there was no duty between Hoover and Ramos.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.