

No. A23A1450

**In The
Court of Appeals of Georgia**

LYNDA SOUNDARA,

Appellant

v.

CHARLES WALTON KRAVER, JR. and CHARLES WALTON
KRAVER, III,

Appellees.

**BRIEF OF APPELLEES CHARLES WALTON KRAVER, JR. and
CHARLES WALTON KRAVER, III**

Elissa B. Haynes
Georgia Bar No. 804466
Elissa.Haynes@fmglaw.com
Marc H. Bardack
Georgia Bar No. 037126
mbardack@fmglaw.com
Carlos A. Fernández
Georgia Bar No. 769087
Carlos.fernandez@fmglaw.com
P. Michael Freed
Georgia Bar No. 061128
Michael.freed@fmglaw.com
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000

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STATEMENT OF THE CASE

A. Introduction.

Georgia courts have long espoused the general rule that “[t]he affirmative defense of assumption of the risk bars a plaintiff from recovering if it is established that he without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not.” *Vaughn v. Pleasant*, 266 Ga. 862, 864 (1996) (cleaned up).¹ Similarly, our courts have repeatedly held that “when a person is injured in the course of mutual combat, the combatants are deemed to have superior knowledge of the risk of harm, because by their voluntarily participation, [the combatants] have selected the time, date, and place for the altercation.” *Fair v. CV Underground, LLC*, 340 Ga. App. 790, 792-93 (2017). This appeal arises against that legal backdrop.

Lynda Soundara was injured after she voluntarily entered a physical affray while at the September 2, 2017, Chick-fil-A Kickoff football game between Alabama and Florida State. Soundara was attending the game with her then fiancé, Peter Hill, and his family, all of whom were Florida State fans, while the Kravers (Charles Kraver, III and his father, Charles Kraver, Jr.) were at the game with their family to cheer on the Crimson Tide. When a first ranked team plays a third

¹ This Brief uses the ‘(cleaned up)’ parenthetical to indicate that internal question marks, alterations, citations, and punctuation have been omitted. See Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

ranked team in the first college football game of the season, tensions are often high. And this game proved no different.

The Kravers had inadvertently (and unfortunately) purchased seats in the Florida State section for the game and were met with hostility from the outset. After suffering through choice words being yelled at them, being spit on, drinks being thrown at them, and ultimately a physical altercation in the stands, the Kravers decided to leave the game early. Soundara's party made the same decision. While outside the seating bowl and in the concourse of the stadium, a second physical altercation began between Soundara's fiancé and Charles Kraver, III. At this point, Soundara concedes that she was drunk, and her medical records confirm a blood-alcohol content of 0.16 – twice the legal driving limit.

Soundara watched as her fiancé was attacked and put in a chokehold by Kraver, III. But rather than step away to avoid injury, Soundara made the deliberate and voluntary decision to remove her sandal, charge into the physical affray, and repeatedly strike Kraver, III on his head with her sandal with such force that she partially knocked his tooth out. Seeing Soundara repeatedly strike Kraver, III in the head, Kraver III's father, Charles Kraver, Jr., acted in defense of his son by grabbing Soundara and throwing her off Kraver, III. Soundara claims she was injured due to Kraver, Jr. throwing her off Kraver, III and onto the stadium's concrete floor. But Soundara did not just bring an assault and battery claim against Kraver, Jr. Despite conceding, after reviewing the surveillance footage, that Kraver,

III never physically touched her, or threatened to harm her in any way, Soundara also brought an assault and battery claim against Kraver, III.

The events that evening were recorded by the stadium's surveillance cameras. The surveillance footage, as well as Soundara's own testimony, reveals that she voluntarily assumed the risk of injury when she made the conscious and voluntary decision to inject herself into a physical affray between her fiancé and 6'4," 265-pound Kraver, III. It is also undisputed that Kraver, III did not commit an assault and battery on Soundara. After thoroughly reviewing the parties' briefing and hearing oral argument, the trial court properly granted the Kravers' motion for summary judgment.²

B. Factual and procedural background.

Soundara's counsel spills significant ink in the first ten pages of her merits brief detailing facts and allegations which relate only to her companion appeals against the underlying stadium defendants and management company. The facts relevant to Soundara's appeal against the Kravers are as follows.

On September 2, 2017, Soundara attended one of the most anticipated opening games in college football history between number one ranked Alabama and number three ranked Florida State University at the Mercedes-Benz Stadium. (V2-

² Soundara also brought claims of negligence and vicarious liability against S.A.F.E. Management of Georgia, LLC, AMB Sports and Entertainment, LLC, Atlanta Falcons Stadium Company, LLC, and Peach Bowl, Inc. While Peach Bowl, Inc. was ultimately dismissed, Soundara's separate appeals from the trial court's grant of summary judgment to Atlanta Falcons Stadium, LLC and AMB Sports and Entertainment LLC (Appeal No. A23A1449) and S.A.F.E. Management of Georgia, LLC (Appeal No. A23A1451) remain pending before this Court.

26). While Soundara was neither a Florida State fan nor a football fan in general, she attended the game with her then fiancé, Peter Hill, and his family members who were Florida State alumni. (V6-372, 400-401). The Kravers also attended the game to support the University of Alabama. (V6-543– 544). In typical heated kickoff game fashion, tensions among those in attendance were high and there was hostility between Florida State and Alabama fans from the start. (V6-544-545).

During the third quarter of the game, Alabama had taken a significant lead and the hostility towards the Kravers increased which resulted in a physical altercation in the stands between the Kravers and members of Soundara's party (which Soundara did not witness or know about). (*Id.* at 555-560; V5-240).

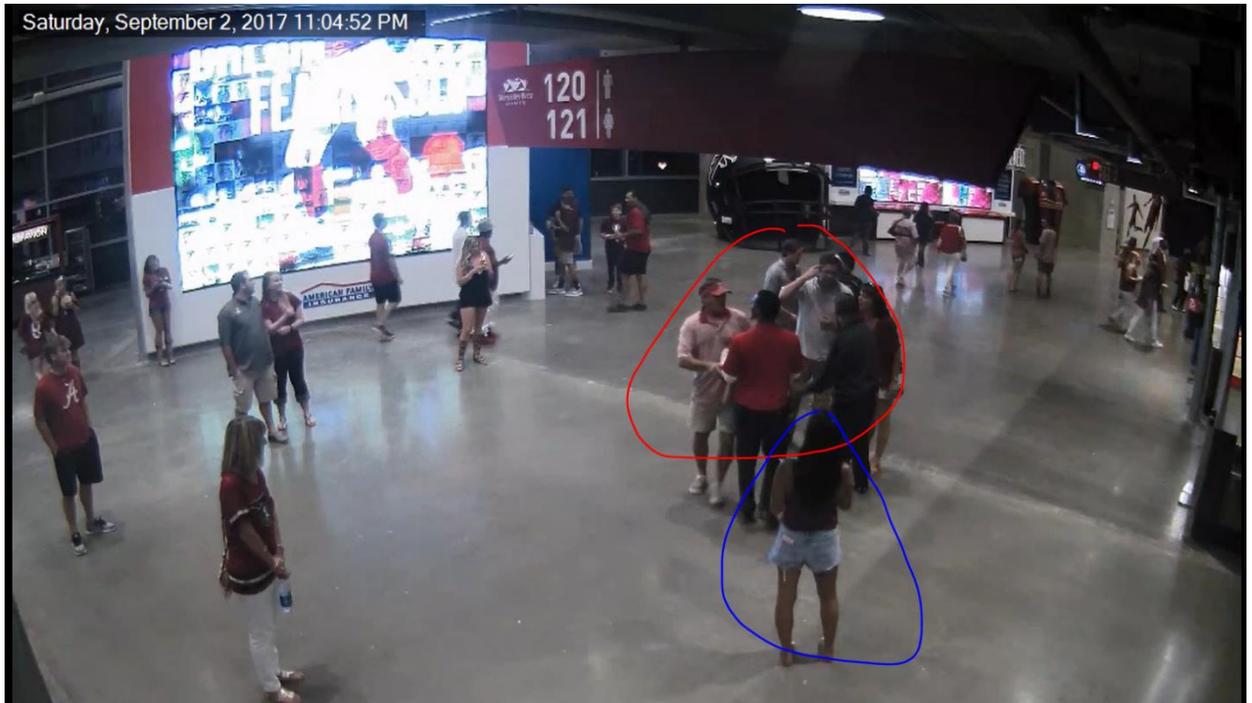
Consequently, the Kravers tried to leave the game early and remove themselves from further altercation. (*Id.* at 565-566). As they were walking into the hallway between the seating bowl and the stadium concourse, the Kravers encountered stadium security. (*Id.* at 566). The Kravers told security about the altercation in the stands and voiced their desire for those involved to leave the stadium as well. (*Id.* at 566). Meanwhile, Soundara was walking back towards the seating bowl when she ran into her fiancé who told her that their group was leaving. (*Id.* at 415-418).

Before leaving the stadium, Soundara's fiancé went to the restroom while Soundara and the other members of her group waited outside. (*Id.* at 418; *see also*

Surveillance Video of Concession Stand labeled as "Flash Drive of Exhibit J" (at V1-21) and in the record at V14-324-334 at 1:00:26).³ Soundara then walked into the

³ Soundara is seen at the top left-hand corner, waiting by the bathroom.

concourse and noticed the Kravers who she knew were the fans sitting behind her and her group inside the seating bowl. (*Id.* at 419-420; *see also* Surveillance Video of Concourse labeled as Plaintiff's Exhibit "N" (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:00:52. Screenshot below for reference with the Kravers' group circled in red and Soundara circled in blue).



Once she observed the Kravers, Soundara followed them into the tunnel as the Kravers were walking towards the seating bowl to point out the others involved in the earlier altercation to security. (*Id.* at 874-875; *see also* Surveillance Video of Concourse labeled as Plaintiff's Exhibit "N" (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:01).

Shortly thereafter, the Kravers and members of Soundara's group intersected at the tunnel between the concourse and seating bowl. (*Id.* at 635-636). While in the tunnel, Soundara's fiancé, Peter Hill, threw his hat to the ground and started

yelling “let’s F-ing go” or “let’s F-ing fight[,]” waiving his hands and motioning with his fists to entice Kraver, III into fighting him. (*Id.* at 571-572, 635-636). This resulted in a fight between Kraver, III and Hill. (*Id.* at 571-572; *see also* Surveillance Video of Concourse labeled as Plaintiff’s Exhibit “N” (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:15-1:01:20).

As Kraver, III and Hill were fighting, the stadium’s surveillance footage shows Soundara briefly fall to the ground and quickly stand back up. *See* Surveillance Video of Concession Stand labeled as “Flash Drive of Exhibit J” (at V1-21) and in the record at V14-324-334 at 1:01:12 at far left upper corner of screen near men’s restroom). She then watched as her fiancé was “getting choked and attacked by two people” and rather than walk into the restroom or walk a few steps away and into the concourse or elsewhere to distance herself from the fight, she voluntarily chose to take one of her sandals off, charge towards the Kravers, and started beating Kraver, III over his head with her sandal with such force that it partially knocked one his teeth out. (Surveillance Video of Concourse labeled as Plaintiff’s Exhibit “N” (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:14 – 1:01:17; V6-421-422, 549-550. Screenshot below of Soundara circled in blue striking Kraver, III who is behind his father, Kraver, Jr. in the red visor).



Kraver, Jr., acting in defense of his son and to prevent Soundara's continued blows, grabbed Soundara and threw her off Kraver, III. (*Id.* at 1:01:18 – 1:01:21; V6-423, 822-823). It was Kraver, Jr. throwing Soundara off his son which caused Soundara's alleged injuries. (Appellant's Opening Br. at 11). Kraver, III never touched or threatened to touch Soundara during the altercation. (*Id.* at 439-440).

ARGUMENT AND CITATION OF AUTHORITIES

At the core of this case is a simple question – did the trial court properly grant the Kravers' motion for summary judgment as to Soundara's assault and battery claims where Soundara assumed the risk of injury by deliberately and voluntarily charging into an ongoing physical affray and where the undisputed evidence shows that Charles Kraver III never touched or threatened to injure Soundara. The answer is a resounding "yes."

A. Standard of review.

Appeals from a grant of summary judgment are reviewed *de novo*. *Newton v. Jacobs*, 385 Ga. App. 180, 181 (2021) (cleaned up). The party moving for summary judgment need not show that there is no issue of fact that remains, “but only that no genuine issue of *material* fact remains; and while there may be some shadowy semblance of an issue, the case may nevertheless be decided as a matter of law where the evidence shows clearly and palpably that the jury could reasonably draw but one conclusion.” *Strickland v. DeKalb Hosp. Auth.*, 197 Ga. App. 63, 68 (1990) (emphasis added).

If a plaintiff fails to produce evidence sufficient to create a genuine issue as to an essential element of his or her claim, “that claim tumbles like a house of cards.” *Lau’s Corp. v. Hankins*, 261 Ga. 491, 491 (1991). Mere allegations, conclusory facts, conclusions of law, and hearsay cannot defeat a motion for summary judgment. *Peterson v. Midas Realty Corp.*, 160 Ga. App. 333, 334 (1981); *Stanton v. Fisher*, 290 Ga. App. 274, 276 (2008) (cleaned up). This is because the purpose behind summary judgment is to quickly dispose of litigation and avoid unnecessary time and expense when there is a lack of specific and admissible facts showing that there is a genuine issue of material fact for trial. *Meade v. Heimanson*, 239 Ga. 177, 180 (1977).

Once a defendant has met its burden of making a “prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the [plaintiff] to come forward with rebuttal evidence.” *Etheredge v. Kersey*, 236 Ga. App. 243, 244 (1998). There must be more than a “scintilla” of circumstances to carry the case to

the jury. *Wood v. Jones*, 175 Ga. App. 534, 534 (1985). While the facts at the summary judgment stage must be viewed in the light most favorable to the nonmoving party, when there is video evidence which contradicts or otherwise undermines a plaintiff's position, the Court should "view the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 380-81 (2007). When a defendant has pled the affirmative defense of assumption of risk, "[t]he issue of a plaintiff's exercise of ordinary care for his own safety may be summarily adjudicated where the plaintiff's knowledge of the risk is clear and palpable." *Richey v. Kroger Co.*, 355 Ga. App. 551, 553 (2020) (cleaned up). This is one of those "plain and palpable" cases.

B. The trial court properly granted the Kravers' summary judgment motion⁴, finding, as a matter of law, that Soundara assumed the risk of injury when she voluntarily chose to charge into an ongoing physical affray.

The affirmative defense of assumption of the risk shields a defendant from liability where, even if the defendant is negligent, "plaintiff himself is negligent in such a way that his own negligence is the sole proximate cause [of his injuries]." *Alexander v. Sportslife, Inc.*, 232 Ga. App. 538, 539 (1998). To establish a viable assumption of the risk defense, "a defendant must prove that the plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger (or that the risk of danger was "sufficiently obvious"); and (3)

⁴ As a threshold matter, Soundara's merits brief lists the sole enumeration of error as the trial court's error "in granting summary judgment to S.A.F.E. Management who is not a party to this appeal. (Appellant's Opening Br. at 14-15).

voluntarily exposed [herself] to those risks.” *Schuessler v. Bennett*, 287 Ga. App. 880, 887 (2007); *Fagan v. Atnalta, Inc.*, 189 Ga. App. 460, 460 (1988).

Similarly, when a plaintiff is injured in the course of mutual combat—which our courts have found occurs “when there is combat between two persons as a result of a sudden quarrel or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight”—she is barred from recovering against her combatant as she is deemed to have superior knowledge of the risk of potential harm. *Fair*, 340 Ga. App. at 792-93; *Venturino v. State*, 306 Ga. 391, 398 (2019) (cleaned up). Even when an individual voluntarily enters a fight to break it up, “the responsibility for any injury lies with the intervenor[.]” *Cornelius v. Morris Brown Coll.*, 299 Ga. App. 83, 86 (2009) (physical precedent only).

Our Court of Appeals has routinely held that the doctrine of assumption of the risk bars a plaintiff’s recovery in cases such as this in which the plaintiff voluntarily inserts herself into a physical affray. In *Alexander v. Sportslife, Inc.*, a fight broke out between Plaintiff and Dieng during an out-of-hand “pickup” basketball game at Defendant’s athletic facility. 232 Ga. App. at 538. Plaintiff admitted to throwing the first punch at Dieng because he thought Dieng had intentionally fouled him. *Id.* Plaintiff also alleged that before he swung at Dieng, Dieng had his fists clenched and Plaintiff thought Dieng would come at him. *Id.* Dieng, on the other hand, admitted that he approached Plaintiff on the sidelines and kicked him in the head a few minutes after the game was over. *Id.* Both Plaintiff and Dieng claimed to have not anticipated the other’s attack. *Id.* Finding

that the proximate cause of both Plaintiff and Dieng's injuries was not Sportlife, but Plaintiff and Dieng's own voluntary and active participation in a fight, the Court of Appeals affirmed the trial court's grant of summary judgment to Sportlife *Id.*

In *Cornelius*, the plaintiff first saw two men attacking one of his friends on campus before several others joined in and escalated the physical altercation. 299 Ga. App. at 83. Plaintiff, having already witnessed the altercation, ran across the street and joined the fight. *Id.* Soon after, Plaintiff was struck on the back of the head with a glass bottle by one of the other assailants and he later died from his injuries. *Id.* The Court of Appeals reversed the trial court's denial of summary judgment to the college, finding that Plaintiff "deliberately interjected himself into the affray" and therefore "assumed the risk of injury by voluntarily confronting those who had begun it." *Id.* at 86. *See also Habersham Venture v. Breedlove*, 244 Ga. App. 407, 409 (2000) (reversing denial of summary judgment when the plaintiff "voluntarily chose to enter into mutual combat with other assailants."); *Rappenecker v. L.S.E., Inc.*, 236 Ga. App. 86, 89 (1999) (finding that plaintiff voluntarily assumed the risk of his injury when he exited his vehicle and voluntarily confronted an assailant).

In *Fagan*, a plaintiff voluntarily chose to assist a server with removing unruly patrons from a bar and in the process, was beaten and severely injured. 189 Ga. App. at 460. The Court found that the plaintiff "had a clear choice of alternative actions, stay out of the business of the management in expelling disorderly customers or voluntarily assist two female employees attempting to remove four

rowdy male patrons from the premises” and despite having seen “the entire situation in front of him[,]” chose to “deliberately enter[] into a volatile confrontation between management and patrons.” *Id.* at 461. Holding that the only permissible conclusion was that Plaintiff “saw and recognized the risk, and deliberately interjected himself into the affray...” thereby assuming the risk of his injury, the Court reasoned that “[i]n the absence of anything to the contrary, every adult is presumed to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate obvious danger.” *Id.* at 461-62.

While *Alexander, Cornelius, Habersham, Rappenecker, and Fagan* involved lawsuits against property owners or managers, the assumption of the risk analysis applied in those cases equally applies in cases like the one before this Court when the plaintiff, after injecting herself into a violent fight, files a lawsuit for injuries caused by the fight. Soundara attempts to distinguish *Alexander, Cornelius, Habersham, Rappenecker, and Fagan* by arguing that in each of those cases, it was undisputed that the plaintiff “observed an ongoing fight from a *position of safety* and then voluntarily and deliberately left the safe location to assume a known risk of the ongoing fight.” (Appellant’s Opening Br. at 17-18) (emphasis added).⁵ Soundara seemingly seeks to add a new element to the assumption of the risk

⁵ Soundara also argues, without any supporting law, that because the cases cited by the Kravers involved property owners “who typically have constructive knowledge of violent criminal actions on their property” versus defendants who she alleges intentionally started a fight and attacked her, the cases simply do not apply here. (Appellant’s Opening Br. at 19). But Soundara’s opinion, without more, about the applicability of a case to another set of facts is irrelevant and unpersuasive.

defense – that the plaintiff must have been in an entirely different and safe location sufficiently apart from the physical affray before voluntarily joining into the affray – while ignoring longstanding precedent which only requires the Kravers meet their burden of establishing that Soundara (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger (or that the risk of danger was “sufficiently obvious”); and (3) voluntarily exposed [herself] to those risks.” *Schuessler*, 287 Ga. App. at 887; *Fagan*, 189 Ga. App. at 460.

Soundara raises three main arguments in opposition of the Kravers’ assumption of the risk defense. First, Soundara argues that “before the melee erupted[,]” she did not observe any violent conduct by the Kravers, nor did she have reason to believe that the Kravers “were about to start a melee” or that she was “at risk of being slammed to the ground by Charles Kraver, Jr.” (Appellant’s Opening Br. at 19-20). Second, Soundara asserts that there is no evidence of her being in a “position of safety” before charging into the ongoing affray. (*Id.* at 20). And third, she asserts that during the time between her getting briefly knocked to the ground and getting up to charge towards Kraver, III with her sandal, she had no opportunity to learn of or appreciate the “risk of being caught in the melee” and therefore did not confront an “observed and clearly-obvious peril.” (*Id.*) Alternatively, she contends that a factual dispute prevents summary judgment because “the defendants have raised contradictory versions of when each set of defendants alleges that Ms. Soundara supposedly entered mutual combat with the Kravers.” (*Id.*) Each of Soundara’s arguments fail.

1. ***Soundara had actual knowledge of the danger posed by a violent physical affray between two men and appreciated the risk associated with such danger.***

It is irrelevant that Soundara did not observe any violent conduct by the Kravers before the violent altercation between her fiancé and Charles Kraver, III. Soundara voluntarily ran towards the fight between her fiancé and Kraver, III. (Surveillance Video of Concourse labeled as Plaintiff's Exhibit "N" (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:14 – 1:01:17). It is undisputed that Soundara witnessed the Kravers attacking her fiancé, *after* her fiancé had instigated the fight just seconds earlier. (*Id.*; V6-420-421, 439). Reasonable minds cannot differ as to whether Soundara knew and appreciated the risk of danger associated with two men fighting when Soundara personally experienced the danger when she briefly fell to the ground during the commotion before getting back up to voluntarily and violently charge towards Kraver, III. (Surveillance Video of Concourse labeled as Plaintiff's Exhibit "N" (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:14 – 1:01:17; Surveillance Video of Concourse labeled as Pl.'s Ex. "J" in record at V14-324-334 at 1:01:12 at far left upper corner of screen near men's restroom).

It is hard to comprehend how Soundara contends she had no reason to anticipate falling or being thrown to the ground and no opportunity to learn of or appreciate the risk of being caught in a melee when she had already been caught in the melee and fallen to the ground. And during Charles Kraver, Jr.'s immunity hearing on his criminal charges, Soundara testified as follows:

A: So they were gathering our things and we were walking out in the corridor, and that's when I saw the son, Mr. Kraver, Charles Kraver, III, hit Kevin Breedlove ... and then when I glanced up, I saw Peter in a chokehold by the son, and the father over there, *and I just ran to render aid ...*

...

Q: And when you state that you were rendering aid to your fiancé, Peter Hill, when you saw that he was in an altercation with Charles Kraver, Jr. and Charles Kraver, III, can you describe for the court what you mean? What did you do to render aid?

A: I just ran over there. *I'm thinking this man is twice my size, 300 pounds ...*

(V5-266-267).

Thus, looking to Soudara's own testimony, the record shows plainly and palpably that Soundara had firsthand knowledge of the danger posed by the violent altercation between her fiancé and Kraver, III and that she appreciated the risks associated with such danger.

2. *Soundara voluntarily exposed herself to the danger posed by charging towards a violent affray and beating one of the assailants with her sandal.*

After she first fell to the ground amid the chaos of the fight between her fiancé and the Kravers—who Soundara acknowledged looked as big as football players (V5-270)—Soundara could have done several reasonable things such as getting up and walking away from the affray or retreating into a bathroom or other safe area. But Soundara did not just make the decision to “render aid” to her fiancé. Rather, she decided to immediately remove her sandal, violently charge towards Kraver, III, and repeatedly strike Kraver, III in the head with her sandal with

forceful blows. (Surveillance Video of Concourse labeled as Plaintiff's Exhibit "N" (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:14 – 1:01:17).

Soundara was drunk at the time these events transpired⁶ but her defense that she does not remember her initial fall or striking Kraver, III is irrelevant when Soundara agreed the video depicted her doing so. *Scott*, 550 U.S. at 380-81.

Q: Okay. Do you - - do you remember looking at the video, and it showed that you fell down?

A: Yes.

Q: Okay. Looking at the video, did you see you taking your sandals off?

A: Looking at - - yes.

...

Q: ... when you looked at the video, did you see on the video that you were running towards [the Kravers] and you started hitting somebody over the head with your sandals?

A: I see it in the video.

...

Q: Okay. And then the video shows you're thrown to the ground?

A: Yes.

(V6-421-423).

⁶ The fact that Soundara was drunk when she voluntarily assumed the risk of her injury by entering a violent affray does not relieve her of her duty to exercise ordinary care for her own safety. *Shuman v. Mashburn*, 137 Ga. App. 231, 233-34 (1976) ("In viewing the conduct of an intoxicated person, for the purpose of determining his negligence or contributory negligence, the state of mind produced by the intoxication may be disregarded; for he will be judged as if the conduct occurred while he was in possession of his normal mental capacity.") (cleaned up).

The sequence of events with Soundara watching her fiancé fight the Kravers, falling in the midst of the chaos surrounding the fight, watching as her fiancé is put into a chokehold, and at that moment, voluntarily deciding to violently charge towards and attack Kraver, III before Kraver, Jr. threw her off him is the textbook definition of assumption of the risk and confronting an “observed and clearly-obvious peril.”

Soundara asserts that this case is more analogous to *Richey v. The Kroger Co.*, the Court’s most recent opinion addressing assumption of the risk and criticizes the Kravers for purportedly failing to cite it.⁷ (Appellant’s Opening Br. at 17-19). Counsel for the Kravers, however, distinguished *Richey* during the parties’ hearing on the Kravers’ summary judgment motion. (Tr. V15-29). The plaintiff in *Richey* was in the Kroger parking lot with his co-worker to clean up debris. 355 Ga. App. 551, 551 (2020). As they were working, a car pulled up and parked next to Plaintiff’s truck. (*Id.*) Plaintiff and his co-worker watched as the man who parked next to Plaintiff exited his car, went into Plaintiff’s truck, and sat in the driver’s seat. (*Id.*) Plaintiff and his co-worker then voluntarily chose to jump from a retaining wall and run towards Plaintiff’s truck. (*Id.*) Once Plaintiff approached his truck with an unknown man inside, he knocked on the driver’s side window and was shot through the window by the man seated in his driver’s seat. (*Id.*)

⁷ Interestingly, despite distinguishing the cases relied upon by the Kravers by arguing each of those cases involved a plaintiff who left a safe area to voluntarily enter a physical affray, *Richey* likewise involved a plaintiff who was in a separate and safe location before running to a potentially dangerous situation. *Richey*, 355 Ga. App. at 551.

In reversing the trial court's grant of summary judgment to Kroger, the Court of Appeals found that it could not be determined that Plaintiff tested "an observed and clearly-obvious peril," such that he lacked ordinary care for his own safety. (*Id.* at 553). To support this finding, the Court noted that Plaintiff "did not inject himself into an *ongoing fight or situation which was violent, combative, or assaultive*, such that he had a *clear and palpable* knowledge of the risk of being physically assaulted." (*Id.* at 553-54) (emphasis added). This is the key distinguishing fact between *Richey* and Ms. Soundara's case as here it is undisputed that when Soundara voluntarily and violently charged towards Kraver, III with her sandal, she injected herself into an "ongoing fight or situation which was violent, combative, or assaultive." Viewing the evidence in a light most favorable to Soundara can lead to only one conclusion – Soundara had actual knowledge of the danger as she personally observed it, understood and appreciated the risks associated with the (sufficiently obvious) danger, and voluntarily exposed herself to those risks when she deliberately charged into an ongoing physical affray. *See Simmons v. Classic City Beverages, Inc.*, 136 Ga. App. 150, 151 (1975) (affirming grant of summary judgment when the plaintiff, "on his own volition, unhurried and under no coercion" consciously chose to over-exert himself at work and injured his back).

3. ***How the defendants involved in Soundara's pending related appeals describe the moment when Soundara assumed the risk of injury has no relevance to the trial court's correct holding that the Kravers were entitled to summary judgment.***

As a final attempt to find the trial court erred in granting summary judgment to the Kravers, Soundara incorrectly alleges that because “the defendants have raised contradictory versions of when each set of defendants alleges that Ms. Soundara supposedly entered mutual combat with the Kravers,” this is not a “plain, palpable, or undisputed” case which warrants summary judgment. (Appellant’s Opening Br. at 20-22). This Court should look only to the surveillance footage which shows the events on that evening, and to the arguments the Kravers’ asserted below and on appeal.

But even if this Court were to consider the version of events as told by the stadium defendants and management company, each defendant’s assumption of the risk argument is the same and is supported by the stadium’s surveillance footage – Soundara voluntarily approached the scene of a violent altercation, fell amid the chaos, and then voluntarily chose to deliberately interject herself into the altercation. (V4-197-198, 223-224, 261-262; *see also* (Surveillance Video of Concourse labeled as Plaintiff’s Exhibit “N” (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:14 – 1:01:17). And despite counsel for the Kravers acknowledging, during the parties’ summary judgment hearing, that this would be a different case had Soundara been a mere innocent bystander who was injured when she fell the first time during the chaos from the altercation, those are not the facts before this Court. This is a case in which Soundara made a full and conscious

decision to pick herself up off the ground and to charge directly into a violent altercation while forcibly striking one of the men involved in it.

C. On top of assuming the risk of her own injury, Soundara’s assault and battery claims against Charles Walton Kraver, III fail as a matter of law as the evidence shows that Kraver, III did not touch or threaten to injure Soundara.

Although Soundara has asserted basic negligence and vicarious liability claims against the stadium defendants and management company, Soundara’s sole claims against the Kravers are for assault and battery. (V2-30). Yet it is undisputed that the surveillance footage does not show Charles Kraver, III touching or otherwise threatening to touch or injure Soundara. (V6-439-440).

In her initial Complaint, Soundara incorrectly asserts that Kraver, III “intentionally assaulted and battered, without legal justification, Plaintiff while she was lawfully walking along the concourse of Mercedes-Benz Stadium on September 2, 2017.” (*Id.*) She also alleges that Kraver, Jr. “acted in concert with his son” and “caused or contributed to the injuries suffered by Plaintiff at the direct hand of Charles Walton Kraver, III.” (*Id.*) Soundara then concludes that as a “direct and proximate result” of the Kravers’ actions, she suffered injuries and damages. (*Id.*)

Soundara’s Amended Complaint does not add any new claims against the Kravers. (V2-272-274). Leaving only her assault and battery claims, Soundara’s Amended Complaint merely adds more “factual allegations” about Kraver, III attacking her fiancé, Soundara “slapping at” Kraver, III, and then Soundara getting thrown off Kraver, III by his father, Kraver, Jr. which she says caused her injuries. (V2-273). Her Amended Complaint contends that while Kraver, Jr. “intentionally

assaulted and battered Plaintiff with unlawful force, and without legal justification,” Kraver, III “acted in concert with his father” and “caused or contributed” to Soundara’s injuries. (*Id.* at 274). Notably, Fulton County Superior Court Judge Shakura Millender found Kraver, Jr. immune from prosecution for his simple and aggravated battery charges. (V5-332-334).

1. ***Summary judgment was proper on Soundara’s assault claim against Charles Kraver, III as there is no evidence that Kraver, III placed Soundara in imminent fear of bodily harm or offensive contact.***

The Restatement (Second) of Torts states that one is subject to liability for assault if: (1) he acts *intending* to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such conduct, and (b) the other is thereby put in such imminent apprehension.” Restatement (Second) of Torts § 21 (1965) (emphasis added). An act is done with the requisite intent of putting someone in apprehension of imminent harm “if it is done for the purpose of causing such an apprehension or with knowledge that, to a substantial certainty, such apprehension will result.” *Id.* § 21(1) cmt. d. When an act is done recklessly or negligently, without the intent to cause the plaintiff contact or imminent apprehension of contact, there is no actionable assault. *Id.* § 21(2) cmt. b.

In *Everett v. Goodloe*, the Court held that an actionable claim for assault arises “when all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another.” 268 Ga. App. 536, 543 (2004) (cleaned up). Here, Soundara has not, and cannot meet her burden of proving Kraver, III acted with an intent to harm her when the

only evidence shows Kraver, III (in the grey striped shirt in the surveillance footage) fighting her fiancé and never once threatening or otherwise touching her. (Surveillance Video of Concourse labeled as Plaintiff's Exhibit "N" (at V1-21, entry no. 224) and in the record at V14-324-334 at 1:01:15 – 1:01:50). If Soundara now contends that she reasonably apprehended violent injury from Kraver, III, then this contention only strengthens the Kravers' assumption of the risk defense as it relates to Soundara appreciating the risk of danger associated with entering a violent affray.

2. *Summary judgment was proper on Soundara's battery claim against Charles Kraver, III as there is no evidence that Kraver, III intentional or offensively touched Soundara.*

"Any act of physical violence, inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery." *Vasquez v. Smith*, 259 Ga. App. 79, 82 (2003) (cleaned up). To have a viable battery claim, it is not enough for a plaintiff to simply put forth evidence of an unauthorized touching. *Kohler v. Van Peteghem*, 330 Ga. App. 230, 234 (2014). This is because "battery is an intentional tort and it is the *intent* to make either harmful or insulting or provoking contact with another which renders one civilly liable for battery." *Id.* (emphasis added) (cleaned up).

Just as Soundara's assault claim against Kraver, III fails, so too does her battery claim. Soundara concedes that the surveillance footage shows no evidence of Kraver, III touching (or otherwise threatening) her. (V6-439-440). This alone make summary judgment as to Kraver, III appropriate. But on appeal, Soundara asserts

that the fact that Kraver, III did not touch Soundara lacks merit, despite a harmful touching being the prevailing element to establish a claim for battery. (Appellant's Opening Br. at 22-23). Soundara once again seeks to add a new element to an assault and battery claim, which would make such claims viable so long as the evidence shows that the Kravers' "acted in concert" or "combined" to produce the assault or battery. (*Id.* at 22). Setting aside the fact that there is no evidence aside from Soundara's pure speculation that Kraver, III "acted jointly" or otherwise in concert with his dad to intentionally cause injury to Soundara, Georgia law does not recognize a "joint act" component to an assault or battery claim and Soundara's claim fail as a matter of law.

CONCLUSION

Taking all facts and inferences in a light most favorable to Ms. Soundara, the surveillance footage indisputably shows that Soundara knowingly and voluntarily inserted herself into a violent physical affray despite having witnessed the dangers associated with same prior to her attacking Kraver, III and that Kraver, III never touched or threatened to harm Soundara. Thus, the Kravers respectfully request that this Court affirm the trial court's grant of summary judgment.

This submission does not exceed the word count limit imposed by Rule 24.

FREEMAN MATHIS & GARY, LLP

/s/ Elissa B. Haynes

Elissa B. Haynes

Georgia Bar No. 804466

Elissa.Haynes@fmglaw.com

Marc H. Bardack

Georgia Bar No. 037126

mbardack@fmglaw.com
Carlos A. Fernández
Georgia Bar No. 769087
Carlos.fernandez@fmglaw.com
P. Michael Freed
Georgia Bar No. 061128
Michael.freed@fmglaw.com

*Counsel for Appellees Charles Walton
Kraver, Jr. and Charles Walton Kraver,
III*

100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000

CERTIFICATE OF SERVICE

I certify that there is a prior agreement with Appellant to allow documents in a PDF format sent via email to suffice for service. Thus, I certify that I served the foregoing **BRIEF OF APPELLEES CHARLES WALTON KRAVER, JR. and CHARLES WALTON KRAVER, III** upon all parties via email to the following:

T. Peyton Bell
BELL INJURY LAW, LLC
1800 Peachtree St., NW, Suite 370
Atlanta, GA 30309
peyton@bellinjurylaw.com
Counsel for Appellant

Alexandria E. Seay
Rishi D. Pattni
BIRD LAW GROUP
1800 Peachtree Street, NE, Suite 370
Atlanta, GA 30309
aes@birdlawgroup.com
rdp@birdlawgroup.com
Counsel for Appellant

Joshua Y. Rahimi II
John A. Hubert
RAHIMI, HUGHES & PADGETT, LLC
33 Bull Street, Suite 590
Savannah, GA 31401
jhubert@rhp-law.com
jrahimi@rhp-law.com
Counsel for S.A.F.E. Management of Georgia, LLC

Ronald B. Gaither, Jr.
Mitchell A. Robinson
Javarus Gresham

BAKER & HOSTETLER, LLP

1170 Peachtree Street, NE, Suite 2400

Atlanta, GA 30309

rgaither@bakerlaw.com

marobinson@bakerlaw.com

jgresham@bakerlaw.com

*Counsel for Atlanta Falcons Stadium Company, LLC and AMB Sports &
Entertainment, LLC*

This 24th day of July, 2023.

/s/ Elissa B. Haynes _____

Elissa B. Haynes

Georgia Bar No. 804466

Elissa.haynes@fmglaw.com

FREEMAN MATHIS & GARY, LLP

100 Galleria Parkway

Suite 1600

Atlanta, GA 30339-5948

(770) 818-0000