IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

SUSAN BERNECKER, et al,	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION FILE NO.**
	)	**18-C-00435-1**
STALWART FILMS, LLC, et al,	)	
Defendants.	)	
	)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE AFFIRMATIVE DEFENSE OF ASSUMPTION OF THE RISK AND PLAINTIFFS' PUNITIVE DAMAGES CLAIM AND MOTION TO EXCLUDE TESTIMONY OF STUNT EXPERT CONRAD PALMISANO

This above-styled matter came before this Court on Defendants' Motions for Summary Judgment on Assumption of the Risk, Punitive Damages and Daubert Motion to Exclude Testimony of Conrad Palmisano. The Court held a hearing on these motions on October 8, 2019 and counsel for all parties were present. After hearing argument, reviewing the entire record, deposition transcripts, exhibits and applicable Georgia law, the Court hereby **FINDS** and **ORDERS** as follows:

FACTUAL OVERVIEW

As previously recited by this Court, this action arises out of a death on the set of The Walking Dead television show in July of 2017. According to the Complaint and the motions, on July 12, 2017, John Bernecker ("Bernecker") was working on set as a stunt man for the filming of Episode 807 (Season 8). He was doing a fall stunt from a balcony approximately 20 feet above the ground and missed the air bag. He died several days later due to the injuries sustained in the fall. This action is being brought by his surviving parents, Susan Bernecker and Hagen Bernecker, as well as the Estate of the decedent.

SUMMARY JUDGMENT AND DAUBERT STANDARDS

In order to prevail on a motion for summary judgment under O.C.G.A. § 9-11-56, the moving party must show that there exists no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, demand judgment as a matter of law. Benton v. Benton, 280 Ga. 468, 470 (2006). The movant has this burden even as to issues upon which the opposing party would have the trial burden. Williams v. Chick-fil-A, Inc., 274 Ga. App. 169, 169 (2005). The moving party must demonstrate by reference to evidence in the record that there is an absence of evidence to support at least one essential element of the non-moving party's case. BBB Serv. Co., Inc. v. Glass, 228 Ga. App. 423, 436 (1997). In other words, summary judgment is appropriate when the court, viewing all the facts and reasonable inferences from those facts in a light most favorable to the non-moving party, concludes that the evidence does not create a triable issue as to each essential element of the case. Id. Thus, it is well established that [s]ummary judgments should only be granted where, construing all inferences against the movant, it yet appears without dispute that the case can have but a single outcome. Chatmon v. Church's Fried Chicken, 133 Ga. App. 326, 327 (1974).

When a court considers a motion for summary judgment, it must view the pleadings and evidence in the light most favorable to the nonmoving party, it must accept the credibility of the evidence upon which the nonmoving party relies, it must afford that evidence as much weight as it reasonably can bear, and to the extent that the moving party points to conflicting evidence, it must discredit that evidence for purposes of the motion. Johnson v. Omondi, 294 Ga. 74, 84-85 (2013) (Blackwell, J., concurring). Moreover, the pleadings of the opposing party must be taken as true, unless by the admissions, depositions or other material introduced it appears beyond controversy otherwise. There is a duty on the party opposing a motion for summary judgment to

present relevant evidence in rebuttal of the movant's evidence but there is no duty upon an opposite party to produce evidence unless the movant successfully pierces the allegations of the petition by competent evidence to show that no fact issue exists. Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 155 (1979). When the evidence of the moving party suffers from internal inconsistencies, these conflicts must be resolved against that party unless a reasonable explanation is offered; and even then, "[t]he reasonable explanation does not act to exclude the existence of an issue of fact, if such is raised by the party's contradictory statements themselves, or by other evidence presented by the opposite party." Gentile v. Miller, Stevenson & Steinichen, 257 Ga. 583 (1987).

With regard to the usual standard for the admissibility of expert testimony in Georgia, O.C.G.A. § 24-7-702(b) states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

O.C.G.A. § 24–7–702(b).

This standard is based upon Federal Rule of Evidence 702, see Mason v. Home Depot USA, 283 Ga. 271, 279(5) (2008), and it requires a trial court to sit "as a gatekeeper and assess the reliability of proposed expert testimony," An v. Active Pest Control South, 313 Ga.App. 110, 115 (2011) (citations omitted), applying the principles identified in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and its progeny. See O.C.G.A. § 24–7–702(f). See also HNTB Ga. v. Hamilton–King, 287 Ga. 641, 642–643(1) (2010).

ASSUMPTION OF THE RISK AND PLAINTIFFS' PUNITIVE DAMAGES CLAIM

Viewing the pleadings and evidence in the light most favorable to the nonmoving party, Defendants argue that Bernecker was an experienced stunt man and that he knew what he was doing and had been hurt on stunts many times before. In other words, Bernecker knew the risk of his profession and voluntarily engaged in this act – even assuming the risk that another actor's negligence in touching him and possibly affecting the trajectory of his fall could occur. The Court does not agree.

Based on the summary judgment standard detailed above, the Court cannot definitively state that Bernecker assumed the risk by attempting to perform this stunt. On the one hand, Defendants have argued that Bernecker was under the control of Defendant Stalwart exclusively; then on the other hand, they argue that Bernecker was solely responsible for the subject stunt and was in control of all issues related to safety and execution.

In Georgia, the affirmative defense of assumption of the risk bars recovery when it is established that a plaintiff, "'**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. Pleasent, 266 Ga. 862, 864 (1996) (quoting Beringause v. Fogleman Truck Lines, 200 Ga.App. 822, 823 (1991)(emphasis supplied)). A defendant asserting an assumption of the risk defense must establish that the plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks. Vaughn, supra; Turner v. Sumter Self Storage Co., 215 Ga.App. 92, 94 (1994). "'Knowledge of the risk is the watchword of assumption of the risk,'" and means both actual and subjective knowledge on the plaintiff's part. The knowledge that a plaintiff who assumes

a risk must subjectively possess is that of the specific, particular risk of harm associated with the activity or condition that proximately causes injury. As recently stated by our Supreme Court:

> **In its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.**
>
> **As stated by the Court of Appeals, the standard to be applied in assessing an assumption of the risk defense is "a subjective one, geared to the particular plaintiff and his situation, rather than that of a reasonable person of ordinary prudence who appears in [the completely separate defense of] contributory negligence."**

Muldovan v. McEachern, 271 Ga. 805, 807 (1999)

Here, it is patently obvious to the Court that Defendants cannot meet the elements of this affirmative defense. Simply put, it remains a material question of fact as to (1) whether Bernecker had actual knowledge of the danger (including that the other actor would actually grab/touch him and distract him from performing the stunt correctly, if the jury determines that that disputed fact occurred) and (2) if Bernecker actually understood and appreciated the risks and voluntarily exposed himself to same. The jury must decide these issues as a matter of law. Accordingly, Defendants' motion for summary judgment based on the affirmative defense of assumption of the risk must be and hereby is **DENIED**.

As far a punitive damages, O.C.G.A. § 51-12-5.1 (b) provides:

> Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

OCGA § 51-12-5.1 (d) further provides:

> (1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the ***trier of fact*** shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an

> appropriate form of verdict, along with the other required findings. (2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable. (Punctuation omitted; emphasis supplied.)

By this plain language, this Code section provides that a determination of punitive damages must be made by the trier of fact, and thus "[t]he issue of punitive damages is ordinarily for the jury[.]" Morales v. Webb, 200 Ga. App. 788, 790 (1991); accord Associated Health Systems v. Jones, 185 Ga. App. 798, 802 (2) (1988); see also Beal v. Braunecker, 185 Ga. App. 429, 430 (1) (1987) (whether the facts of a case shall constitute aggravating circumstances supporting an award of punitive damages is a question for the jury and not the court). Clearly, the issue of punitive damages must be decided by a jury or a court sitting as the trier of fact. Caldwell v. Church, 341 Ga.App. 852, 860 (2017). Nonetheless, the parties mutually agree and the Court concurs that Defendants did not act or fail to act with specific intent to cause harm and that a punitive damages award, if any, should be capped at $250,000.00 post-verdict. O.C.G.A. § 51-12-5.1 (g). The Court, however, **RESERVES** its ruling thereon until such time as the punitive damages issue becomes ripe.

In conclusion, this Court is simply not in a position to find that there can be but one single outcome that Bernecker assumed the risk and that no punitive damages are warranted. As such, both motions for summary judgment on assumption of the risk and on Plaintiffs' punitive damages claim are hereby **DENIED**.

TESTIMONY OF STUNT EXPERT CONRAD PALMISANO

Defendants' motion to exclude portions of Plaintiffs' expert stunt performer and stunt coordinator, Conrad Palmisano's, opinions as "speculation" does not appear to the Court to be

warranted. Mr. Palmisano's testimony is based on sufficient evidence and his extensive experience regarding how a stunt performer interacts with his or her environment, and how physical interference can impact the performance of a stunt is relevant and would help the jury in this case. In the stunt in question, Defendant Amelio was supposed to "'shoot' [John] in the back and then make it appear that he 'grabbed' [John] by the belt and 'threw' him over the balcony railing while not actually doing so." (Def. Mot. to Exclude Palmisano Testimony ("Def. Mot.") at 2). John was then supposed to perform a 21-foot stunt fall over a balcony onto the pads, or "catcher system," below. (Id. at 1-2). While Defendant Austin Amelio ("Amelio") denies making physical contact with Bernecker during performance of the stunt, there is video footage of the performance of the stunt which could lead to the opposite conclusion. In fact, Plaintiffs' expert, Mr. Palmisano, testified that the footage depicts Defendant Amelio grabbing or touching Bernecker. (Palmisano Dep. 104:15-21). Plaintiffs' expert reconstructionist, Kelly Kennett, also testified that, based on review of the footage, he believes Defendant Amelio made contact with Bernecker. (Kennett Dep. 37:13-25).

Moreover, according to his deposition testimony, Mr. Palmisano's experience goes back to 1970, when he began his training as a stunt performer and then became a stunt coordinator 6 or 7 years after that. (Palmisano Dep. 9:3-6; 52:23-25). Mr. Palmisano is highly and extensively trained in performing and coordinating "high falls," like the subject stunt. (Id. 35:23-25). Mr. Palmisano also chaired and served on the National Stunt and Safety Committee for the Screen Actors Guild. (Id. 133:3-7). With roughly 240 stunt credits to his name, based on his curriculum vitae, Mr. Palmisano is obviously qualified to give his opinions on this stunt. In fact, it does not appear that Defendants question Mr. Palmisano's qualifications as an expert at all, based on the motion before the Court. On even a cursory review of the transcript, it is clear that Mr. Palmisano

states that he cannot know positively what Bernecker was thinking, but that based on his experience and expertise, he offers his opinion on the stunt. The Court finds this testimony acceptable for consideration by the jury, as he is an expert in the field; his conclusions go to weight but not admissibility. His opinions are subject to cross-examination and the jury can accept or reject them out of hand.

"Whether a witness is qualified to give an expert opinion is a legal determination for the trial court, which will not be disturbed absent a manifest abuse of discretion." See Perry v. Gilotra-Mallik, 314 Ga. App. 764, 768 (2012) (quotation omitted). In that connection and as detailed above, Georgia's standard for admitting expert testimony is contained in O.C.G.A. § 24-7-702 (b).

The statute also provides that, "in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court" stated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), its progeny, and "other cases in federal courts applying the standards announced by the United States Supreme Court in these cases." O.C.G.A. § 24-7-702(f). Importantly as the Supreme Court of Georgia noted about the same language in the previous O.C.G.A. § 24-9-67.1, it is a "permissive suggestion" for a trial court to consider Daubert and its progeny, and the statute "contains no words of command and . . . does not seek to enforce on the courts a particular construction of the statute." Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 277 (2008).

As a result, it is well-settled in Georgia that in determining the admissibility of expert testimony, the trial court acts as a gatekeeper, assessing both the witness's qualifications to testify in a particular area of expertise and the relevancy and reliability of the proffered testimony. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 642 (2010). The Court finds that Mr. Palmisano is highly qualified to testify regarding the effect that unscripted and unplanned physical contact would have

had on the performance of a high fall stunt, and his testimony is sufficiently supported and reliable to be admissible to assist the jury in its deliberations on issues that they may not ordinarily be familiar with or understand. Again, Defendants have not challenged Mr. Palmisano's expert qualifications and his extensive experience in the performance of stunts, **both as a performer and a stunt coordinator,** is highly relevant. This expert meets the factors set forth in O.C.G.A. § 24-7-702(b) and therefore his opinions will not be excluded on that basis. Therefore, Defendants' Motion to Exclude Testimony of Stunt Expert Conrad Palmisano is hereby **DENIED**.

CONCLUSION

THEREFORE, for the above and forgoing reasons, Defendants' Motion for Summary Judgment Based on the Affirmative Defense of Assumption of the Risk and Plaintiffs' Punitive Damages Claim and Motion to Exclude Testimony of Stunt Expert Conrad Palmisano are both **DENIED**. The Court **RESERVES** its ruling on limiting any punitive damages award under O.C.G.A. § 51-12-5.1 (g).

SO ORDERED, this 8th day of October, 2019.

Judge Emily J. Brantley
State Court of Gwinnett County

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