IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S19G0499

DALE P. DALY, M.D. and
SAVANNAH CARDIOLOGY, P.C.,

Petitioners,

v.

SHANE H. BERRYHILL and **PAMELA S. BERRYHILL**,

Respondents.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

Prepared by:

Martin A. Levinson
Georgia Bar No. 141791
HAWKINS PARNELL & YOUNG, LLP
303 Peachtree Street, N.E.
Suite 4000
Atlanta, Georgia 30308-3243
(404) 614-7400
mlevinson@hpylaw.com

David N. Nelson
President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Vice Chair
Philip Thompson, Vice Chair
Amicus Curiae Brief Committee
GEORGIA DEFENSE LAWYERS ASSOCIATION
P.O. Box 60967
Savannah, GA 31420
(912) 349-3169

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COMES NOW the Georgia Defense Lawyers Association ("GDLA") and files this Brief as *amicus curiae* in the above-styled appeal, showing this honorable Court as follows:

I. INTRODUCTION

The question before this Court is whether the Court of Appeals erred in nullifying the jury's verdict and holding there was insufficient evidence to support the trial court's jury instruction on assumption of the risk. The record reflects that at least "slight" evidence was presented at trial from which a reasonable jury could have found that the Appellant assumed the risk of his injuries, which is all that is needed under Georgia law to require the trial court to give the requested jury charge.

The jury charge on assumption of the risk was appropriate because Shane Berryhill's injury occurred when he engaged in the inherently dangerous, risky activity of hiking through rough terrain and climbing atop a deer stand some 18 feet above ground just five days after undergoing heart surgery and cardiac stent placement. There was evidence that Berryhill was instructed repeatedly not to engage in "strenuous activity" or "strenuous exertion." Even if Berryhill had no subjective understanding that the medication prescribed by his cardiologist might cause dizziness or fainting, it was still appropriate for the trial court to instruct the jury on assumption of the risk. Certainly, a jury could find Berryhill understood and assumed the risks of making this climb this just five days post-surgery:

(T-749.)

Importantly, the question to be answered by this Court is not whether the evidence presented at trial demanded, or even should have resulted in, a finding that Berryhill assumed the risk of his injuries. This case was not decided at the summary judgment stage, but rather by jury verdict, so the proper inquiry is whether there was at least "slight" evidence to support the giving of a particular jury charge. Appellate courts are not permitted to pass on the credibility of witnesses or the weight of evidence in making such determinations, as that would amount to supplanting the role of the jury as ultimate factfinder.

Viewed through that lens, it seems obvious that the trial court did not err in giving jury charges in the case below on both assumption of the risk and avoidance of consequences. Appellees recognize that "[t]he record is in conflict as to the post-surgical instructions provided once the stent was placed" and that Dr. Daly testified that he told both Berryhill and his wife that Berryhill "should have no strenuous exertion for a week, there should be no lifting, no bending over, no stooping over, and that the patient needed to be careful because he was on blood thinning medication." (Brief of Appellees at 7; R-3839.) **That is where the inquiry of the Court of Appeals should have ended**—and where this Court's inquiry should end as well—because it provides a sufficient evidentiary basis from which the jury reasonably could have found that Berryhill assumed the risk of his injuries by climbing up to the deer stand just five days after his surgery.

There was at least "slight" evidence that Berryhill knew of a risk of injury when he decided to climb 18 feet onto a deer stand just five days after open heart surgery—regardless of whether Berryhill understood the nature or extent of the specific risks associated rarely with medication he was taking. In addition, there was evidence that Dr. Daly specifically instructed Berryhill and his wife that Berryhill should avoid "strenuous exertion for a week." While the jury ultimately could have disregarded Dr. Daly's testimony or other evidence as to the substance of Dr. Daly's warnings to the Appellees, that evidence was sufficient to support the jury charges in question.

Furthermore, the jury could have determined simply that Berryhill assumed the risk of falling from a height of 18 feet, which under well-established Georgia law is a risk inherently understood even by young children. The risk of falling and injuring oneself under these circumstances is so objectively obvious that Appellant is charged with knowledge of that risk. Dr. Daly's testimony that he instructed Berryhill and his wife on three separate occasions not to engage in strenuous or risky activity provides additional <u>evidence</u> of assumption of the risk but would not be essential to such a finding under the facts of this case.

Indeed, a reasonable jury could find that when a patient undergoes heart surgery and his cardiologist tells him not to engage in any "strenuous" or "risky" activity for at least a week, the patient's decision to then climb 18 feet up to a deer

stand is an assumption of the risk of serious injury. Any reasonable person certainly would understand that the risk of not listening to his cardiologist's instructions immediately following heart surgery could result in serious injury. At the very least, a reasonable factfinder could find that Berryhill understood that failing to follow his cardiologist's instructions might have grave consequences. The fact that Berryhill allegedly fainted instead of experiencing some more serious heart-related problem or death does not change anything. It is undisputed that had Berryhill not gone hunting and climbed high onto a deer stand five days after surgery, he would not have been injured.

In other words, a reasonable jury could find either that (1) Berryhill subjectively knew he was not supposed to be engaging in "strenuous" activity and did so anyway at the time he was injured, or (2) that it is objectively obvious that a person runs the risk of injury by climbing an 18-foot tower less than a week after open-heart surgery. The jury then reasonably could have found that Plaintiff's conduct proximately caused his own injuries. At the very least, a jury could have found that the facts as presented would have caused a reasonable person in Berryhill's position to seek clarification or advice—from Dr. Daly or otherwise—as to whether he should be engaging in such activities on the date in question.[1]

[1] Under the same or similar reasoning, as outlined below, the jury reasonably could have found that Berryhill failed to exercise ordinary care to avoid the consequences of any alleged negligence by the Appellants.

Accordingly, the Court of Appeals erred in reversing the trial court's judgment, and this Court should reverse the Court of Appeals' holding and reinstate the trial court's judgment on the jury's verdict.

II. STATEMENT OF INTEREST

The GDLA is an association of more than 950 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. The GDLA's members include numerous attorneys who represent medical doctors and other professionals.

The GDLA and its members hope to ensure that basic principles of Georgia tort law are clearly defined and uniformly applied. In addition, the GDLA, its members, and their clients have an interest in ensuring that jury verdicts are not disturbed due to erroneous interpretations of Georgia law. Although the case below involved allegations of professional negligence against a medical doctor, the issues raised by the Court of Appeals' opinion also implicate much more basic and universal principles of tort law. Specifically, in reversing the jury's verdict in

this case, the GDLA respectfully submits that the Court of Appeals misinterpreted and misapplied Georgia law on the affirmative defense of assumption of the risk.

III. STATEMENT OF PERTINENT FACTS

Shane Berryhill underwent a surgical procedure performed by cardiologist Dr. Dale P. Daly to address a blocked artery. (R-3832, 3835-36.) After the procedure, Dr. Daly and a nurse told both Berryhill and his wife that he should not return to work for a week and should not engage in any strenuous or risky activity, including lifting, bending, or stooping over. (R-3839-40, 3548-49.) Berryhill was also provided a discharge packet that included those and other instructions. (R-3516.)[2] Instead of following Dr. Daly's instructions, Berryhill elected to go deer hunting just five days after the surgery. (R-3519-20.) While hunting, Berryhill carried a rifle across rough terrain and climbed atop a deer stand roughly 18 feet above the ground. (R-3523, 3527, 3551.) After climbing the deer stand, Berryhill allegedly fainted and fell, injuring himself. (R-3524-25.)

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[2] While Appellees repeatedly contend that the information and instructions provided by Dr. Daly, his practice, and others was "confusing" (Brief of Appellees at 8-10), there is no indication in the record that the Appellees ever expressed that confusion or sought clarification on Dr. Daly's instructions or Berryhill's limitations. Berryhill again had the opportunity to raise any such questions when he spoke with a cardiac nurse the day after the procedure but he did not do so. (R-3844-45, 3549.) These, of course, are additional facts the jury was authorized to consider in determining whether Berryhill knew of the risks involved in his activities on the date in question. Likewise, these facts could have been considered in determining whether Berryhill knew or should have known of the alleged negligence of the Appellants and, thus, failed to avoid the consequences thereof.

By Berryhill's own admission, he knew, prior to this incident, of the obvious risk of falling from a deer stand such as the one in question. (R-3552-53.) He also knew that he could be seriously injured if he fell from such a deer stand. (Id.) And Berryhill admitted in his testimony that a person must make himself secure in such a deer stand while using it. (Id.) Berryhill also agreed that a person should not climb or use a deer stand while "suffering from a medical condition that affects [his] ability to do so." (Id.)

Berryhill sued Dr. Daly and his medical practice, Savannah Cardiology, P.C., contending Dr. Daly prescribed too much blood pressure medication, causing Berryhill to faint and fall from the deer stand. The case was tried and the jury returned a verdict in favor of Dr. Daly and his practice. Berryhill appealed, arguing among other things that the trial court erred in charging the jury on assumption of the risk. The Court of Appeals reversed the trial court's judgment, holding that the jury instruction on assumption of the risk was not appropriate. Dr. Daly and his practice petitioned this Court for *certiorari*, and this Court granted the petition to consider the specific question of whether the trial court erred in charging the jury on assumption of the risk and avoidance of consequences.

IV. ARGUMENT AND CITATION OF AUTHORITY

The GDLA respectfully submits that the Court of Appeals' reversal of the jury verdict below represents a significant, concerning, and unwarranted

departure from well-established Georgia law on assumption of the risk. The Court of Appeals erred in reversing the jury's verdict in this case because there was sufficient evidence from which the jury could have found that Berryhill subjectively appreciated the risk inherent in his activities at the time he was injured. Furthermore, the jury was authorized to find that the danger of hiking through rough terrain and climbing 18 feet up to a deer stand just five days after undergoing heart surgery was so obvious that he is charged with knowledge of the risks involved even if he claims not to have understood them.

Most importantly, the jury's verdict below should be reinstated because Georgia law is clear that a trial court must give a jury instruction as long as there is at least "slight" evidence to support it. Teems v. Bates, 300 Ga. App. 70, 72 (2009). Certainly there was at least "slight" evidence to support the jury charges at issue here. Put simply, when a patient fails to follow his doctor's orders, he assumes the risk of injuries naturally flowing from that decision, and there is evidence in this case from which the jury could have found that occurred. The objective component of the test for determining whether a plaintiff assumed the risk of his injuries certainly plays a central role in this case: where a plaintiff knowingly engages in conduct which he knows or should have known carried a risk of substantial injury, he cannot defeat an assumption of the risk defense by parsing out specific features or elements of risk the plaintiff claims not to have

appreciated. Likewise, there was evidence from which a reasonable factfinder could have determined that that Berryhill could have avoided the consequences of any alleged negligence of the Appellants through the exercise of ordinary care.

Of key importance also is the fact that **the specific reason for Berryhill's fall was very much disputed at trial**. Indeed, the Appellants presented substantial evidence and expert testimony from which a jury certainly could have rejected Berryhill's contention that he fell due to dizziness caused by the medications prescribed by Dr. Daly. (T-3234, 3249, 3444, 3448, 3488-89, 3775, 3783, 3789-90.) The jury's verdict is silent as to whether the jury found that Berryhill fell due to becoming dizzy from his medication as opposed to simple carelessness or any number of other possible reasons. (R-1233-34.)

A. The trial court properly charged the jury on assumption of the risk, and the Court of Appeals erred in reversing the jury's verdict, because the jury reasonably could have found that Berryhill assumed the risk of his injuries by engaging in "strenuous" or "risky" activities five days after undergoing heart surgery against the instructions of his cardiologist.

1. Georgia law on assumption of the risk and the subjective/objective standard applied to plaintiffs.

Assumption of the risk is a longstanding principle of Georgia law first recognized by this Court as an absolute bar to a plaintiff's recovery well over a

century ago. *See*, *e.g.*, Griffith v. Lexington Term. R. Co., 124 Ga. 553 (1905). Under Georgia law, a plaintiff assumes the risk of his injuries where the plaintiff knew of a danger, understood and appreciated the risks associated with that danger, and voluntarily exposed himself to those risks. *See*, *e.g.*, Rayburn v. Ga. Power Co., 284 Ga. App. 131, 134 (2007); Liles v. Innerwork, Inc., 279 Ga. App. 352, 354 (2006). Put differently, the defense "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 free choice as to whether to engage in the act or not." Rayburn, 284 Ga. App. at 134-35. When a person assumes the risk of his injuries or otherwise fails to exercise ordinary care, it serves as a complete bar to his claims against the defendant even if there is evidence that the defendant was negligent. *See*, *e.g.*, City of Winder v. Girone, 265 Ga. 723, 724 (2) (1995); Downes v. Oglethorpe Univ., Inc., 342 Ga. App. 250, 254 (2017); Rice v. Oaks Investors II, 292 Ga. App. 692, 693-94 (1) (2008); Riley, 210 Ga. App. at 868 (2).[3]

"Assumption of risk in its simplest and primary sense means that the plaintiff has given his express consent to relieve the defendant of an obligation of conduct toward him and to take his chance of injury from a known risk." Hackel

[3] *See also* Landings Ass'n, Inc. v. Williams, 291 Ga. 397 (2012) (reversing trial court's order denying defendant premises owner's motion for summary judgment because decedent's decision to walk in a community in which she knew wild alligators were present "indisputably shows that [the decedent] either knowingly assumed the risks…or failed to exercise ordinary care").

v. Bartell, 207 Ga. App. 563, 564 (1993); Lundy v. Stuhr, 185 Ga. App. 72, 75, *citing* Prosser, LAW OF TORTS at 303 (2nd ed.). "The result is that the defendant is simply under no legal duty to protect the plaintiff." Id. To prevail on a defense of assumption of the risk, a defendant must show that the plaintiff (i) had actual knowledge of the danger, (ii) understood and appreciated the risks associated with the danger, and (iii) voluntarily exposed himself to those risks. Liles v. Innerwork, Inc., 279 Ga. App. 352 (2006). Successful proof of assumption of the risk bars a plaintiff's claims even where the defendant acted willfully and wantonly or was grossly negligent. Id.; Muldovan v. McEachern, 271 Ga. 805 (1999).

Assumption of the risk differs from the affirmative defense of contributory negligence in that courts generally must apply a subjective standard in considering assumption of the risk, looking to the particular plaintiff and his situation in order to determine whether "the plaintiff subjectively comprehended the specific hazard posed, and affirmatively or impliedly assumed the risk of harm that could be inflicted therefrom." Muldovan, 271 Ga. at 808 (2); Garner v. Rite Aid of Ga., Inc., 265 Ga. App. 737, 739-40 (2004) (phys. precedent only). **There are some cases, however, where the plaintiff's assumption of the risk is so "plain and palpable," and the relevant danger so obvious, that an objective standard applies:**

> Every adult is presumed to be endowed with normal faculties, both mental and physical. No person should conduct [himself] in an irresponsible manner when even ordinary prudence would protect [him] from the likelihood of possible injury. **At some point the**

> **danger and likelihood of injury becomes so obvious that actual knowledge by the plaintiff is unnecessary.**

Hackel, 207 Ga. App. at 564 (emphasis supplied); Lundy, 185 Ga. App. at 75.

Georgia appellate courts have applied this reasoning to hold that a plaintiff assumed the risk of injury in several contexts, perhaps the most obvious of which involves the potential of falling from a significant height. For example, in Liles v. Innerwork, Inc., the Court of Appeals affirmed the grant of summary judgment to the defendant where the plaintiff "had actual knowledge of the danger associated with the activity and appreciated the risk involved, as any reasonable person would understand the danger inherent in allowing oneself to be dropped from a height of eight to ten feet." 279 Ga. App. at 354 (2). Indeed, Georgia's appellate courts have repeatedly held that "**[n]o danger is more commonly realized or risk appreciated, even by children, than that of falling; consciousness of the force of gravity results almost from animal instinct**." Kane v. Landscape Structures, Inc., 309 Ga. App. 14, 18 (2011) (*en banc*) (internal brackets omitted), *quoting* Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 757 (1956) (emphasis supplied). This risk is deemed so obvious that children as young as six years old are charged with knowledge, as a matter of law, that they may fall and injure themselves when they engage in an activity that involves the risk of falling.[4]

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[4] Kane, 309 Ga. App. at 18 ("Certainly a normal child nearly seven years of age—indeed any child old enough to be allowed at large—knows that if it steps or slips

The objective standard applies to the doctrine of assumption of the risk in other contexts as well. For example, in White v. Georgia Power Co., 265 Ga. App. 664, 666 (1) (2004), the Court of Appeals held that "the danger of drowning in a body of water is an apparent, open danger, the knowledge of which is common to all," and affirmed the trial court's grant of summary judgment to the defendant. In Abee v. Stone Mountain Memorial Association, 252 Ga. 465, 465-66 (1984), this Court held that the risk of flipping over and hitting one's mouth on a waterslide "was a danger which was patent and obvious to anyone familiar with the ride" and that the plaintiff had assumed the risk of his injury by choosing to ride the waterslide. In Muldovan v. McEachern, 271 Ga. 805 (1999), this Court held that the decedent assumed the risk of death as a matter of law by loading a single bullet into a handgun, giving the gun to another person, and instructing him to point the gun at the decedent's head and pull the trigger.

In Hackel v. Bartel, 207 Ga. App. 563 (1993), the Court of Appeals reversed the trial court's denial of summary judgment in favor of a defendant where the plaintiff was struck by a car after she reached into its open door, while it was parked on a slope, and released the emergency brake without checking to see

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from a tree, a fence, or other elevated structure, it will fall to the ground and be hurt. It may be that some children, while realizing the danger, will disregard it out of a spirit of bravado, or because…of their 'immature recklessness,' but [a defendant] is not to be visited with responsibility for accidents due to this trait of children of the more venturesome type.").

whether the car was in gear. And in Lundy v. Stuhr, 185 Ga. App. 72 (1987) (*en banc*), a full Court of Appeals held that a part-time kennel attendant assumed the risk of being bitten when he entered the kennel of an Akita breed dog weighing over 100 pounds that he had been warned was an "escape artist" and "will bite," failed to exit the dog's kennel when it began to walk toward him, and, instead, suddenly stood and extended his arm to the dog as it approached him.

In each of those cases, the plaintiffs sought to avoid a finding of assumption of the risk by contending they did not subjectively appreciate the risks attendant to their conduct. This Court and the Court of Appeals rejected those arguments, however, instead imposing the objective standard that applies where the risks associated with a person's conduct are so obvious that the plaintiff is charged with knowledge of those risks.

2. This Court's reaffirmance of general principles of assumption of the risk in Landings Association, Inc. v. Williams in 2012.

In Landings Association, Inc. v. Williams, 291 Ga. 397 (2012), this Court reaffirmed that where a particular hazard and its attendant risks are obvious, an objective standard is applied to determine that the plaintiff assumed the risk of injury. In Williams, the plaintiffs sued the owner and manager of a planned residential and golf community on Skidaway Island after one of the plaintiffs' 83-year-old mother, Gwyneth Williams, allegedly died from an alligator attack in the

community. The evidence showed that alligators moved into and out of the community through a series of lagoons installed by the defendants while developing the property. Williams apparently went for a walk one evening and her body was found the next morning floating in a lagoon with signs she had been bitten by an alligator. An eight-foot long alligator was later caught and killed, and parts of the decedent's body allegedly were extracted from its stomach.

The defendants moved for summary judgment, contending the decedent assumed the risk of an alligator attack by going for a walk in the community with knowledge that there were alligators around. The plaintiffs argued essentially that since the decedent knew only of the presence of smaller alligators and did not know precisely where on the property they were, she could not have assumed the risk associated with larger alligators located in the area of the community where she had elected to go for a walk. The trial court denied the motion for summary judgment, and the Court of Appeals affirmed. The defendants petitioned this court for *certiorari*, and this Court reversed, holding that summary judgment should have been entered for the defendants because the decedent "had equal knowledge of the threat of alligators within the community." Id. at 397.

This Court went on to hold in Williams that since the decedent knew that wild alligators were dangerous, by choosing "to go for a walk at night near a lagoon in a community in which she knew wild alligators were present . . .

Williams either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so." Id. at 399. This Court's decision in Williams clearly demonstrates that a plaintiff cannot avoid the defense of assumption of the risk simply by contending that he did not subjectively appreciate the obvious risks involved in an activity.

3. In this case, Appellees incorrectly attempt to shift the inquiry away from Berryhill's own knowledge and conduct.

One of Appellees' primary arguments on appeal is fundamentally flawed—Appellees contend Berryhill could not have assumed the risk of his injuries because he did not know of Dr. Daly's alleged negligence.[5] In other words, they contend that whether Berryhill knew of the risks inherent in the actual hazard or in his own actions is completely irrelevant and cannot form the basis for a finding that Berryhill assumed the risk. Appellees do not identify any specific instance where this Court rejected such a defense, although the plaintiff assumed the risk of his own conduct and an obvious hazard, because the plaintiff may have lacked specific knowledge of the defendant's specific alleged negligence.

A cursory examination of case law regarding assumption of the risk exposes the incorrectness of Appellees' argument. It is well established, for example, that

[5] Notably, there was evidence at trial from which the jury could have found that Berryhill did, in fact, know of a potential problem with his medication before he decided to climb up to the deer stand. (T-3912-13.)

a person can assume the risk of drowning in a lake without regard to the nature or extent of anyone else's alleged negligence. The risk assumed is drowning, and that risk exists by virtue of the mere presence and physical characteristics of the lake, regardless of any contributing negligence by the defendant. The plaintiff assumes the risk posed by "the danger of drowning in a body of water," not necessarily the risk of any specific act or omission by the defendant on its own. *See*, *e.g.*, White v. Ga. Power Co., 265 Ga. App. 664, 666 (1) (2004). While often there will be a more precise confluence of the risk itself and the defendant's alleged negligence, that is not and need not always be so.

4. In the case below, a reasonable factfinder could have found that Berryhill assumed the risk of his injuries by exposing himself to known or obvious risk of injury.[6]

In reversing the jury verdict below, the Court of Appeals erroneously focused on the specific mechanism of injury and ignored the more general and

[6] The question of whether the jury reasonably could have found that Berryhill assumed the risk of his injuries is not properly before this Court since it is impossible to tell the factual basis of the jury's verdict from the record. Appellees could have sought to have the verdict form expressly state whether the jury found that Berryhill assumed the risk of his injuries or failed to avoid the consequences of the alleged negligence of another, but it does not appear Appellees did so. (R-1233-34.) Nevertheless, the GDLA presents this argument to show that there was, in fact, sufficient evidence presented below from which a reasonable factfinder could have determined that Berryhill assumed the risk of his injuries—which would also mean, of course, that there was certainly more than the "slight" evidence required to authorize such a jury charge.

obvious risk of serious injury by engaging in the very activities Berryhill was advised by his cardiologist to avoid. It can hardly be argued that a person who has just undergone life-saving heart surgery does not appreciate the severity of his condition and the risks involved in not following doctor's orders immediately following the surgery. A jury would be authorized to charge Berryhill with the general knowledge that by disregarding Dr. Daly's instructions, Berryhill was assuming the risk of serious injury. While Appellees contend they received different instructions than Dr. Daly testified he gave them, that was, of course, an issue of credibility for the sole determination of the jury.

Whether Berryhill perceived the specific mechanism of injury (i.e., alleged fainting) is irrelevant to whether he can be found to have assumed the risk of his injuries. The Petitioners were not required to show that Berryhill knew of the specific risk of fainting to authorize a jury charge on assumption of the risk in this case. The Court of Appeals' holding to the contrary is an incorrect application of Georgia law regarding assumption of the risk and is precisely the type of reasoning rejected by this Court in Williams.

Here, there certainly was at least "slight" evidence from which the jury could have found that by way of his actions on the date in question, Berryhill assumed the risk of his injuries. The jury would have been authorized to find that Berryhill's act of climbing 18 feet into the air onto the deer stand, by itself, was an

assumption of the risk of falling. In other words, the jury could have found that Berryhill assumed the risk of his injuries because he is charged with knowledge of the risk of falling without regard to whether he believed he might become dizzy or faint due to his medication. This is particularly true given that there was evidence from which the jury could have found that any dizziness Berryhill allegedly felt was not caused by any medication prescribed by Dr. Daly.

In addition, or in the alternative, the jury could have found that Berryhill assumed the risk of his injuries by failing to heed his cardiologist's instructions—or simply by choosing to go deer hunting and climbing 18 feet above ground onto a deer stand just five days after undergoing life-saving heart surgery, without regard to what post-surgery instructions he was given. As outlined above, in establishing the defense of assumption of the risk, "[a]t some point the danger and likelihood of injury becomes so obvious that actual knowledge by the plaintiff is unnecessary." Hackel, 207 Ga. App. at 564; Lundy, 185 Ga. App. at 75. In this case, the GDLA respectfully submits that a reasonable jury certainly could have found that it is objectively obvious that hiking across rough terrain while carrying a rifle and then climbing up to a deer stand 18 feet above the ground five days after undergoing heart surgery carried a risk of falling and injuring oneself.

Much like the risk of being attacked by an alligator when alligators are known to live in the vicinity, drowning in a body of water, or being killed by

someone pointing a loaded gun at one's head and pulling the trigger, the risk presented by Berryhill's actions in this case is plain, palpable, and obvious. The jury certainly was authorized to find that Berryhill "either knowingly assumed the risks" of hiking through rough terrain and climbing 18 feet into a deer stand just five days after surgery "or failed to exercise ordinary care by doing so." Williams, 291 Ga. at 399.

If there is some question whether Berryhill knew or should be charged with knowledge that the specific activities were "strenuous" or "risky," that would be a question of fact to be resolved by the jury upon proper instruction from the judge on the applicable law. That is what occurred at the trial below, and the Court of Appeals erred in substituting its own opinion for that of the jury in deciding whether Berryhill understood or should have understood the risks inherent in hiking through rough terrain and climbing 18 feet into the air just five days after undergoing heart surgery. This Court should reaffirm that an objective standard applies to the defense of assumption of the risk where, as here, the facts known to the plaintiff are sufficient to put any reasonable person on notice of the risk at hand. And where such a case is tried, an assumption of the risk charge must be given if any evidence is presented from which the jury could reasonably find that the plaintiff assumed the risk of his injuries.

B. <u>The trial court properly charged the jury on avoidance of consequences</u>.

In granting the petition for *certiorari* of Dr. Daly and his practice, this Court also sought briefing and argument on whether the trial court properly charged the jury on avoidance of consequences. Appellees did not properly raise any issue regarding the "avoidance of consequences" charge in this Court, though the Court of Appeals held the trial court did not err in giving that charge at the trial. *See* <u>Berryhill v. Daly</u>, 348 Ga. App. 221, 223-25 (2018). Furthermore, a review of the trial transcript renders it at least questionable whether Appellees preserved any exception in the trial court. (T-3912-13.)[7]

Even if the Court were to consider the issue, however, it would not change the proper outcome of this case since it was appropriate for the trial court to instruct the jury on avoidance of consequences. As a threshold matter, it is clear that the charge given was a correct statement of Georgia law, if not most artfully

[7] While discussing the avoidance of consequences charge during the charge conference, Appellees' counsel questioned whether the avoidance of consequences charge was "a proper charge in this case." (T-3912.) After the parties' counsel discussed the different witnesses' testimony on the issue of whether Berryhill knew before the incident that there was a problem regarding his medication, Appellees' co-counsel then stated, on the record, "Well, I agree with you, that's disputed. But is this assumption of the risk?" (T-3912-13.) It is unclear to the undersigned whether Appellees' counsel was conceding that there was an issue of fact to be decided by the jury as to avoidance of consequences or assumption of the risk—but it seems clear that such a concession was made by Appellees' counsel as to one of the two charges.

stated. *See* McCray v. FedEx Ground Package Sys., 291 Ga. App. 317, 320-21 (1) (2008); Atl. Coast Line R. Co. v. Coxwell, 93 Ga. App. 159, 164-65 (1955).[8]

The charge in question also was reasonably adjusted to the facts of this case as the jury was authorized to find them. If, as Berryhill now claims, he was "confused" by the allegedly conflicting instructions he and his wife received from Dr. Daly and other sources, the jury could have found Berryhill should have sought clarification from Dr. Daly, or from the cardiac nurse with whom Berryhill spoke the day after the procedure, or from someone else at the facility or Dr. Daly's practice. The jury could have determined that the "confusing" instructions given by Dr. Daly and others—or their failure to more carefully ensure that Berryhill and his wife understood the nature and extent of the restrictions placed upon him following the surgery—amounted to negligence by the Appellants. Following that line of reasoning, however, there certainly was evidence from which the jury could have found Berryhill failed to exercise ordinary care either by not seeking clarification or by failing to be more cautious about his activities until he had confirmed the full nature of his restrictions.

Furthermore, even if the avoidance of consequences charge was improperly given in this case, it was harmless error and would not require reversal of the jury's

[8] After the trial judge charged the jury, Appellees did not except to the form of the avoidance of consequences charge as it was read to the jury. (T-4036.)

verdict. "An inapplicable jury instruction is not grounds for reversal where it does not appear that the inapplicable part was calculated to mislead the jury, erroneously affected the verdict or was prejudicial to the rights of the complaining party, because it did not inject issues outside the pleadings or evidence." Bennett v. Moore, 312 Ga. App. 445, 455 (1) (2011); Ga. Dept. of Transp. v. Miller, 300 Ga. App. 857, 868 (5) (2009). That is particularly true where, as here, the questioned instruction "could not have improperly benefited" the other party. Bennett, 312 Ga. App. at 456.[9] Accordingly, the charge on avoidance of consequences given by the trial court in this case provides no basis for reversing the jury's verdict.

III. CONCLUSION

The trial court correctly charged the jury in the case below, and the Court of Appeals erred in substituting its own judgment in place of the jury's verdict and in contradiction to longstanding Georgia law. A jury reasonably could have found that Berryhill assumed the risk of his injuries, or that he failed to exercise ordinary care to avoid any alleged negligence of the Appellants, or both. Furthermore, any claimed error in the charge of the jury was not properly preserved in the trial court, was not properly raised in this Court, or was harmless. This Court should reverse

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[9] When read as a whole, it is difficult to understand how the avoidance of consequences charge that was actually given in the case below possibly could have benefited the Appellants. (T-4023-24.)

the judgment of the Court of Appeals and should reinstate the trial court's judgment on the jury's verdict.

Respectfully submitted this 30th day of October, 2019.

GEORGIA DEFENSE LAWYERS ASSOCIATION

David N. Nelson
President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Vice Chair
Philip Thompson, Vice Chair
Amicus Curiae Brief Committee
P.O. Box 60967
Savannah, GA 31420
(912) 349-3169

HAWKINS PARNELL & YOUNG, LLP

/s/ *Martin A. Levinson*

Martin A. Levinson
Georgia Bar No. 141791
303 Peachtree Street, N.E.
Suite 4000
Atlanta, Georgia 30308-3243
(404) 614-7400
(404) 614-7500 (fax)
mlevinson@hpylaw.com

On Behalf of the Georgia Defense Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all parties by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

Wiley A. Wasden, III
Brennan Wasden & Painter, LLC
P.O. Box 8047
Savannah, GA 31412

Brent J. Savage
Kathryn Hughes Pinckney
Savage & Turner, P.C.
102 E. Liberty St., 8th Floor
Savannah, GA 31401

This 30th day of October, 2019.

HAWKINS PARNELL & YOUNG, LLP

/s/ *Martin A. Levinson*

Martin A. Levinson
Georgia Bar No. 141791

On Behalf of the Georgia Defense Lawyers Association

303 Peachtree Street, N.E.
Suite 4000
Atlanta, Georgia 30308-3243
(404) 614-7400
(404) 614-7500 (fax)
mlevinson@hpylaw.com