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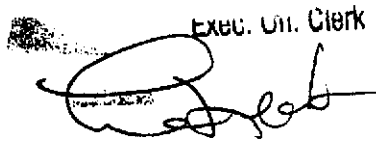
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ORIGINAL  
FILED  
ALAMEDA COUNTY

OCT 19 2006

EXEC. Off. Clerk  


SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

JENNIFER BUENO,

Case No. RG 05210228

Plaintiff,

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO MOTION FOR  
SUMMARY ADJUDICATION OF  
DEFENDANTS SOUTHWEST SPORTS  
GROUP, LLC, DOUG BROCAIL and  
FRANK FRANCISCO**

vs.

SOUTHWEST SPORTS GROUP LLC dba  
TEXAS RANGERS BASEBALL  
COMPANY; FRANK FRANCISCO; DOUG  
BROCAIL; CARLOS ALMANZAR; STAFF  
PRO, INC., a California Corporation; and  
DOES 1-50.

**Date: November 2, 2006  
Time: 9:00 a.m.  
Department: 31**

Defendants.

**TRIAL DATE: JANUARY 12, 2007**

**I. INTRODUCTION**

Defendants move for an order that as a matter of law they are not liable for instigating a riot which led to Francisco throwing a chair into the fan field box, which hit plaintiff causing injuries. Defendants' argument and motion, however, are flawed on numerous grounds. In support of their motion, Defendants submit declarations purporting to testify that they did not "intend" any of injuries they caused. This is clearly improper under CCP §437c(e) and the Court cannot grant Defendants' motion on such ground. Moreover, Defendants, without explanation, cite case law that was long ago overruled on exactly the grounds for which Defendants cite it.

1 The remainder of Defendants' motion also lacks support. There are numerous factual disputes,  
2 not mentioned by defendants, including that the players all charged the stands together,  
3 numerous of them attempting to get into the stands, and Brocail has his fist cocked trying to fight  
4 the fans. For these reasons and as explained in more detail below, Defendants motion must be  
5 DENIED.  
6

## 7 II. STATEMENT OF FACTS

8 On Monday evening, September 13, 2004, the Buenos were in their usual seats in the  
9 second row of a field box next to the visiting team's bullpen. The two teams were engaged in a  
10 pennant race. During the course of the game, Craig Bueno had engaged in what can best be  
11 described as some good natured heckling of the Rangers' bullpen pitchers. According to all  
12 witnesses, including the Rangers' players and coaches, there was no profanity, no racial epithets  
13 and no conduct that even came close to violating the Oakland Coliseum's code of conduct for  
14 fans.

15 During the ninth inning, Rangers pitcher Francisco Cordero and another pitcher were  
16 warming up in the bullpen. Craig Bueno said something to the effect: "So, which one of you is  
17 going to take the loss tonight?" Much to Craig's surprise, Cordero responded, "Your mama."  
18 Bueno retorted with words to the effect, "That's funny, I just saw your mama." Both Craig and  
19 Cordero testified that this exchange was done in a joking manner and both were laughing.

20 Suddenly, another bullpen pitcher, Doug Brocail (6'5", 260), charged toward the field  
21 box where Jennifer Bueno and her husband were seated. Brocail was yelling obscenities,  
22 pointing and, ultimately, clenched his fists and cocked his arm as if he were going to try and  
23 punch someone. The Rangers' dugout emptied and, in a matter of seconds, angry Rangers  
24 players and coaches swarmed to the field box area. As Brocail charged toward the field box,  
25 Jenny Bueno feared for her life. That fear intensified as the Rangers players pushed toward the  
26 field box. Brocail, who had instigated the riot under an allegedly mistaken belief that Craig  
27 Bueno had said something derogatory about his mother, had to be restrained from going into the  
28 stands.

1 In addition to Brocail, both defendants Francisco and Almanzar were in the forefront of  
2 the angry Rangers who were closest to the field box.

3 Francisco, who had been sitting in the dugout approximately 100 feet away, came  
4 charging toward the field box, picked up a folding metal chair and hurled it into the stands. The  
5 chair struck Jennifer Bueno in the face.

6 **III. LEGAL ARGUMENT**

7 **A. Defendants have failed to meet their initial burden of producing sufficient evidence**  
8 **to support their claims for summary adjudication**

9 As the party seeking summary judgment, defendant is obligated to establish evidentiary  
10 facts sufficient to disprove at least one essential element of each particular claim stated against it  
11 in the operative pleading. (C.C.P. § 437c(c), (f); *Vesely v. Sager* (1971) 5 Cal.3d 153, 169.)

12 Only if the moving party establishes the absence of a triable issue of fact as to each claim,  
13 the burden of proof shifts to plaintiffs to prove by specific evidence that, contrary to defendant's  
14 proof, triable questions of fact do exist. (See *Union Bank v. Superior Court* (1995) 31  
15 Cal.App.4<sup>th</sup> 573; C.C.P. § 437c(o)(2).)

16 Because summary judgment is a drastic measure and the law recognizes the importance  
17 of a party's right to a trial, the moving party's affidavits and evidence are strictly construed.  
18 (*Rincon v. Burbank Unified School District* (1986) 178 Cal.App.3d 949, 959; *Molko v. Holy*  
19 *Spirit Assn.* (1988) 46 Cal.3d 1092, 1107; *Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4<sup>th</sup>  
20 1620, 1627.) The plaintiffs' opposition evidence is liberally construed, and all reasonable  
21 inferences are made in support of plaintiffs' case. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868,  
22 874; *Shively, supra*, 29 Cal.App.4<sup>th</sup> at p. 1627.)

23 As will be demonstrated, defendants have failed to meet their initial burden in every  
24 instance by failing to produce competent evidence to support their claims for summary  
25 adjudication.

26 **B. Brocail is liable under a battery theory for instigating the riot that caused the**  
27 **plaintiff's injuries.**

28 Brocail is liable to plaintiff Jennifer Bueno for the battery committed by Francisco under  
two separate and distinct theories: civil conspiracy or, in the alternative, for aiding and abetting.

1 A party who is injured by a battery may recover not only from the actual assailant  
2 (Francisco, here), but from any other person who aids, abets, counsels, or encourages the attack.  
3 (*Ayer v. Robinson* (1958) 163 Cal.App. 2d 424, 428.) The common law definition of aiding and  
4 abetting provides that:

5 "liability may ... be imposed on one who aids and abets the commission of an intentional  
6 tort if the person:

- 7 (a) knows the other's conduct constitutes a breach of duty and gives  
8 substantial assistance or encouragement to the other to so act; or  
9 (b) gives substantial assistance to the other in accomplishing a tortious result  
10 and the person's own conduct, separately considered, constitutes a breach  
of duty to the third person."

11 (*Fiol v. Doellstedt* (1996) 50 Cal.App.4<sup>th</sup> 1318, 1325-6.)

12 Under either test, defendant Brocail is liable to plaintiff for the injuries she sustained as a  
13 result of the chair thrown by co-defendant Francisco. His knowledge of Francisco's conduct is a  
14 question of fact (CCP §437c(e)); the substantial assistance is a question of fact; and his own  
15 conduct of committing an assault (at the very least) was tortious.

16 Brocail claims through declaration that he had no knowledge of Francisco's actions.

17 However, the subjective intent of Brocail is a question of fact. (CCP §437c(e).)

18 Brocail became enraged at the fans, was screaming profane words and charging the area  
19 where the fans were seated. Soon thereafter, a rush of players from the Rangers joined in the riot  
20 Brocail had created. This conduct is substantial assistance. (Statement of Additional Facts 1.)

21 Brocail himself was committing, at the least, an assault against plaintiff. He cocked his  
22 fist as if to throw a punch and he tried to get into the stands, among other things. The end result  
23 was that Francisco accomplished what Brocail set out to do but was restrained by others from  
24 finishing. (Statement of Additional Facts 2, 3.)  
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1           Alternatively, Brocail is liable under a conspiracy theory. The elements of a civil  
2 conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff  
3 from an act done in furtherance of the common design. (*Applied Equipment Corp. v. Litton*  
4 *Saudi Arabia Ltd.* (1994) 7 Cal.4<sup>th</sup> 503, 511.) Here, Brocail and the other players, including  
5 Francisco, formed a conspiracy upon incitement of a riot. The conspiracy was operated by all  
6 defendants when, among other things, the players were charging at the stands, trying to get into  
7 the stands, and otherwise assaulting and battering the fans. Plaintiff was damaged both by the  
8 assault and the battery, including a broken nose when she was hit with a chair thrown by one of  
9 the co-conspirators. (Statement of Additional Facts 3,4, 5.)

11  
12           **C. Both Brocail and Francisco are liable for assault.**

13           Defendants Brocail and Francisco contend that they are not liable for assault because  
14 Brocail lacked the requisite intent and because neither produced an imminent fear of danger  
15 within the plaintiff.

16           The only evidence proffered in support of Brocail's intent is his declaration which must  
17 be disregarded pursuant to the provisions of CCP § 437 c (e) which provides, in pertinent part, as  
18 follows:

19           “(e) ... summary judgment may be denied in the discretion of the court, ... where a  
20 material fact is an individual's state of mind, or lack thereof, and that fact is sought to be  
21 established solely by the individual's affirmation thereof.”

22           CACI No. 1301 sets forth the elements necessary to establish the tort of assault, to wit:

- 23           1. That defendant acted, intending to cause harmful contact;
- 24           2. That plaintiff reasonably believed that she was about to be touched in a harmful  
25 manner;
- 26           3. That plaintiff did not consent to defendant's conduct;
- 27           4. That plaintiff was harmed; and
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5. That defendant's conduct was a substantial factor in causing plaintiff's harm.

In bringing this motion, defendants are required to negate some element of the tort. To that end they have filed a declaration from Brocail stating he had no such intention. In fairness, that evidence must be disregarded since it goes to his state of mind and he is the only witness thereto.

Regardless, "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613, internal citation omitted).

Defendants next claim that Jenny Bueno did not experience a sensation of imminent harm, presumably because of Brocail's location relative to her. Defendants cite no law that there is a yard stick standard that determines whether one is in fear of being harmed from the conduct of another. Jenny Bueno's deposition testimony clearly establishes that she was in fear for her life when this 6'5", 260 pound man was charging in her direction spewing obscenities and cocking his arm and fist as if he were going to inflict harm on anyone in the vicinity. The credible evidence is that it was his teammates and the security guard that kept him out of the stands.

"The tort of assault is complete when the anticipation of harm occurs." (*Kiseskey v. Carpenters' Trust for Southern California* (1983) 144 Cal.App.3d 222, 232 .)

Similarly, defendants contend that Francisco is not liable for assault because the plaintiff testified that she never saw the chair before it hit her. That begs the question. As is shown in Exhibit E, Francisco angrily injected himself into the forefront of this riot. Jenny Bueno testified that she feared for her life when Brocail charged, and, even though she couldn't name the players during her deposition, she testified that her fear was exacerbated when the sea of Rangers surrounded her. Francisco was leading the sea. Jenny Bueno feared for her safety because she believed that these men, with Francisco in the forefront, were going to come into the stands and attack her. Exhibit E clearly shows the rage on Francisco's face which justified the fear that she experienced, even before the chair was thrown.