Torts (110-001), Autumn 2022

Professor Ross E. Davies (rdavies@gmu.edu)

Sketch of the course and learning outcomes: In this course, you will not learn everything you need to know about torts. You will learn (or at least have a reasonable opportunity to learn) enough to get started and then continue to learn more through higher-level coursework, independent study, and practical application. That is the purpose of the course – to get you rolling toward expertise in:

(1) the roots of tort law (by spending a lot of time on some cases and other authorities, and a little bit of time on many others);

(2) current tort doctrine (by, again, spending a lot of time on a few cases and authorities, and a little bit of time on a lot of others);

(3) spotting and dealing with issues involving torts (by spending a lot of time issue-spotting); and

(4) generally thinking and acting like a lawyer – critically, constructively, creatively, civilly, ethically, and articulately.

In the classroom, you will engage mostly in two activities: occasionally speaking during discussions of the assigned reading, and often giving other speakers your undivided attention while working, in your own mind, on the same challenges they are working on out loud. Those in-class activities should inspire you to engage in some outside activities, including reading, outlining, thinking about, and discussing the assigned reading, creating and taking your own practice questions in anticipation of the final exam, and so on. We should, by the way, have some fun as well.

Class sessions and calendars: We will meet on Tuesdays and Thursdays from 1:50 p.m. to 4:00 p.m. Our law school's website says class runs to 3:50 p.m., but we will go to 4:00 p.m. because I will be unavailable for two class sessions (Sept. 22 and Oct. 27). Experience teaches that it is good to avoid early-morning, late-night, and weekend make-up sessions, and by banking a few minutes at the end of each class session we can avoid inconvenient make-up sessions.

A note about multiple sections taught by the same instructor: I am teaching two sections of torts this semester. We will cover the same material in both sections, but not with the exact same words and not at the exact same pace. Every group of students-plus-instructor is different, and so every classroom experience is different – especially when the classroom experience consists partly, as ours will, of conversations between students and instructor and between students. So, while you should feel free to chat with (and even study with) students in the other section, you should not waste your time worrying about minor inconsistencies between the classroom experiences of the two sections. Doing so would needlessly confuse and worry you.

Regular office hours: They will be in the classroom right after each Tuesday class session. Attendance will be really, truly optional. I will simply stay in the classroom after the class session formally ends and chat with anyone who hangs around until we run out of topics or I run out of time. I will not take attendance and will not reward people for attending. It is merely a time for you to have access to me, if you want it. You won't hurt my feelings by not coming. Nor will I be offended if you wander in and out, or show up for a few minutes and leave, or come late, or don't show up in August, September, and October, but do show up in November. It's all good. Also, the agenda is loose. We can talk about torts, and we can talk about other topics – life, the universe, and everything else appropriate – if you like. Good nutrition is an important part of a good education, so, you are free to dine during office hours, so long as you are quiet about it and clean up after yourself. In fact, you are also free to eat during class, on the same terms. There are several reasons for conducting office hours this way. Here are a few of the more important ones. First, it preserves a level playing field. No one gets special access to the instructor. Second, it improves the quality of answers to questions, because it is not at all uncommon for students to come up with first-rate answers to office hours questions. Yes, office hours are conversations, not just student-instructor Q&A ping-pong matches. Third, it enables people who are reluctant to speak up (at least at the start) to be a part of office hours. It's perfectly fine to attend office hours and simply listen. Remember: The most useful function of office hours is the challenge of formulating good questions. You don't even need to ask them if you decide not to. Second most useful is participating in developing good answers. Of course, if you need to talk with me about something that is not appropriate for office hours (a personal issue or an ethical concern, or the like), feel free to make an appointment. Finally and very importantly, if you have a concern that you are not comfortable raising with me, you should raise it with Christine Malone (cmalone4@gmu.edu), the impressively knowledgeable, wise, kind, and resourceful Assistant Dean of Student Academic Affairs at our law school. I have worked with Dean Malone for many years and have the highest respect for and trust in her.

Disability accommodations: Disability Services at George Mason University is committed to upholding the letter and spirit of the laws that ensure equal treatment of people with disabilities. Under the administration of University Life, Disability Services implements and coordinates reasonable accommodations and disability-related services that afford equal access to university programs and activities. Students can begin the registration process with Disability Services at any time during their enrollment at George Mason University. If you are seeking accommodations, please visit http://ds.gmu.edu/ for detailed information about the Disability Services registration process. Disability Services is located in Student Union Building I (SUB I), Suite 2500. Email: ods@gmu.edu | Phone: (703) 993-2474.

For each class session:

• Read, take notes, and think about the assigned material before class, and be prepared to listen and speak. Stay an assignment or two ahead of schedule, just in case.

• Look up words you do not know. Use a good dictionary or two (including a recent edition of *Black's Law Dictionary*, edited by Bryan Garner). Important, interesting, or odd words are good candidates for exam questions.

• You may use silent electronics in class. But bear in mind a few points: (1) there is some evidence that pointing your face toward a speaker (or at least turning in their direction a bit) improves your comprehension and recollection of what the speaker says; (2) the instructor believes the first point is true, believes that even if it isn't true it is still polite, believes that politeness is part of good lawyering, and knows beyond a shadow of a doubt that behaving as though you are trying to model good lawyerly behavior factors in the calculation of participation adjustments in grading for this course; and (3) finally and ironically, there is some evidence of an inverse relationship between a person's belief that they can multitask and their ability to multitask.

• Take notes in your own words. There is some evidence that taking notes that way (rather than merely transcribing what is said in class) improves your comprehension and recollection of what you hear and see (which might come in handy for the exam). Besides, if you are worried about catching every word during class, don't. All class sessions and office hours will be recorded and posted online.

• Note and follow in-class instruction. If you miss a class (or miss something said in a class you do attend) get notes from a classmate. Make arrangements in advance as a precaution against unanticipated absences (and missed somethings). There is a strong tradition in law of sharing notes with colleagues in need. Be a part of it.

<u>Texts</u>:

Required: Kenneth S. Abraham, The Forms and Functions of Tort Law (6th ed. 2022) (free on West Academic via our school's website, which you will learn about in orientation; you can buy a hard copy online – cheap compared to most law school textbooks).

Ross E. Davies, Torts Cases (2022 ed.) (free pdf from the instructor; on Blackboard after the first day of class).

Suggested: Bryan A. Garner, Black's Law Dictionary (11th ed. 2019 as a book, or 10th ed. 2014 as an app) (not cheap, but worth it).

A few words about law school textbooks: They go out of date fast, because the law is a living, constantly changing creature, like the society of which it is a part. As we will see during the course, even a relatively recent work, such as the Abraham book, which was written by a first-rate scholar and published just this year, can sometimes benefit from updating. So, do not be surprised if we do some tinkering during our course, and be on the watch for changes in law throughout your career.

<u>Assignments and class schedule:</u>

Entries to the right of a date indicate the reading assignments for that date. Assignments are subject to change based on the pace of the course and the whim of the instructor.

Date	Topic(s)	Abraham reading	Torts Cases
Aug. 23	Introduction, Battery, Assault	ch. 1, pp. 1-24; ch. 2, pp. 25-32	read material attached to this syllabus
Aug. 25	ditto	--	ditto
Aug. 30	False Imprisonment, IIED, Defenses	ch. 2, pp. 32-41	ch. 2, pt. 2
Sept. 1	ditto	--	--
Sept. 6	Trespasses, Conversion, Defenses	ch. 2, pp. 41-50	ch. 2, pt. 3
Sept. 8	ditto	--	--
Sept. 13	Nuisance	ch. 2, pp. 50-59	ch. 2, pt. 4
Sept. 15	ditto	--	--
Sept. 20	practice quiz, Negligence	ch. 3, pp. 61-77	ch. 3, pt. 1
Sept. 22 no class	--	--	--
Sept. 27	More Negligence, Malpractice	ch. 3, pp. 78-99	ch. 3, pt. 2
Sept. 29	ditto	--	--
Oct. 4	Negligence Per Se, Burdens of Proof	ch. 3, pp. 99-108; ch. 4, pp. 109-123	ch. 3, pt. 3; ch. 4, pt. 1
Oct. 6	ditto	--	--
Oct. 11 no class	--	--	--
Oct. 13	Cause-in-Fact	ch. 5, pp. 125-148	ch. 5, pt. 1
Oct. 18	ditto	--	--
Oct. 20	Proximate Cause	ch. 6, pp. 149-172	ch. 6, pt. 1
Oct. 25	ditto, practice quiz	--	--
Oct. 27 no class	--	--	--
Nov. 1	Defenses, Strict Liability	ch. 7, pp. 173-195; ch. 8, pp. 197-214	ch. 7, pt. 1; ch. 8, pt. 1
Nov. 3	ditto	--	--
Nov. 8	Products Liability	ch. 9, pp. 215-240	ch. 9, pt. 1
Nov. 10	ditto	--	--
Nov. 15	Duties	ch. 11, pp. 261-281	ch. 11, pt. 1
Nov. 17	ditto	--	--
Nov. 22	Damages	ch. 10, pp. 241-259	ch. 10, pt. 1
Dec. 5	final exam		

<u>Class sessions:</u> The basic structure of each class session will be as outlined below. The actual times for each element of a class are likely to vary a bit from day to day, and they are subject to the same "pace of the course" and "whim of the instructor" flexibilities as everything else in the course. The first day of class will definitely be a bit looser.

10 minutes: <u>Opening remarks:</u> Instructor makes announcements and deals with administrative matters.

30 minutes: <u>Panel discussion:</u> Instructor interviews a panel of students (usually three or four) about the day's assigned readings and their implications. At the beginning of the semester, I will assign people to panels. Everyone will do it. Once everyone has had one turn on a panel we will switch to a volunteer system, with assignments only if there are not enough volunteers. During the first week of class there will be no assigned panel. I will just ask for volunteers and we will improvise. Very exciting.

10 minutes: Break

10 minutes: <u>More panel discussion:</u> After this, the panelists will be permitted to relax and nap in their seats for the rest of the afternoon.

30 minutes: <u>Instructor-to-student Q&A:</u> Instructor asks questions of many students. This will be short cold-call interactions – partly, of course, to inspire you to do the reading every day and think about it, but also (and more importantly, really) to give you practice expressing your knowledge (and sometimes even your opinions) briefly, coherently, and out loud. Once you get used to this, it will be fun. Our class is big, but even so you should expect to get called every couple of weeks or so. Some of the questions asked during this part of class will be based on questions that will be on the final exam. After this, everyone can breathe a sigh of relief. Except the instructor.

10 minutes: Break

25 minutes: <u>Student-to-instructor Q&A:</u> Students with questions raise a hand and the instructor calls on them. Sometimes the answers will be direct, sometimes they will be indirect, and sometime they will be questions themselves. All will, I hope, be helpfully thought provoking.

5 minutes: <u>Wrap-up:</u> Instructor wraps up and class ends.

Mondays: <u>Office hours:</u> Optional conversation. This part is explained in detail above.

<u>Grades:</u> Your grade will be based on two things – a final exam and class participation. <u>Final exam:</u> The exam will be 100% of your grade, unless you earn an adjustment up or down for class participation. The exam will cover the assigned reading and the instructor's remarks in class. It will be a three-hour, 50-question multiple-choice test. It will be open everything (books, notes, internet, etc.), with one exception: You must not interact in any way (in person, in writing, by signing, electronically, telepathically, etc.) with any human being during the exam (except, of course, for the fine people in our law school's Records Office and IT Department, since you may need their help with administrative and technical aspects of the exam). <u>Class participation:</u> When determining your grade in the course, the instructor may apply a single-increment adjustment to the exam grade, upward or downward (e.g., from B to B+ or from A- to B+), based on class participation (which includes overall good citizenship) in the course. The easiest ways to improve your chances of an upward adjustment are: (1) when the instructor invites you to speak in class, demonstrate that you have done the assigned reading and thought about it and were paying attention to what was going on in the classroom just before the instructor invited you to speak (yes, you can pass on a question, but it won't help you pass the course); (2) make your replies to the instructor and your comments on contributions of classmates short, on-point, and constructive, and pay attention to others' answers and comments (yes, politeness can affect your grades in law school as well as your career after it); and (3) attend class (yes, a school regulation says, "[i]f a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course" and a "student who is not present for at least 75 percent of a session of the course is absent from that session," but those are merely definitions of the lower bounds of certain minimal performances, and minimal performances merit minimal grades). <u>One more tip about participation: Asking the instructor a question that is answered in this syllabus is evidence that you are either not doing the reading or not paying attention.</u>

<u>Academic regulations:</u> They are here: www.law.gmu.edu/academics/regulations. If you have not read them yet, you should!

<u>Intellectual property:</u> The instructor owns all course content, regardless of form. You may share copies of that content with classmates during the course, but other than that you must keep all of it in any format to yourself forever. Copyright 2022 Ross E. Davies.

Reading for the first week of Torts

(in addition to the assigned pages in Abraham)

Orin S. Kerr, How to Read a Legal Opinion
The Know-It-Alls (excerpts from Tony Mauro)
Vosburg v. Putney (Wis. 1891)
Garratt v. Dailey (Wash. 1955)
Fisher v. Carrousel Motor Hotel (Tex. 1967)
Leichtman v. WLW Jacor Comm. (Ohio App. 1994)
Tuberville v. Savage (KB 1669)
Langford v. Shu (N.C. 1962)
Gerber v. Veltri (N.D. Ohio 2016)

How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

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[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

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with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

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ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. COMMON LEGAL TERMS FOUND IN OPINIONS

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

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Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

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ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

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in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

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Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

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interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

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their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

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when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. WHY DO LAW PROFESSORS USE THE CASE METHOD?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

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you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

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need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!

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The Know-It-Alls

All good lawyers are know-it-alls, but not all lawyers who are know-it-alls are good lawyers. What is the difference? First, consider an excerpt from Tony Mauro, *Calling a Bad Day in Court Malpractice?*, Legal Times, July 20, 1998:

> In a California courtroom . . . a novel issue is under heated debate: Can a lawyer's oral argument before the Supreme Court ever be deemed to be so bad that it caused his client to lose the case? . . .
>
> If ever there was an oral argument to raise the Supreme Court malpractice issue, it is the one now before the California court: Thomas Campagne's now legendary argument on Dec. 2, 1996, before the justices in *Glickman v. Wileman Brothers & Elliott Inc.*, 117 S. Ct. 2130.
>
> Campagne represented California fruit ranchers in a First Amendment challenge to federal agricultural marketing orders that essentially forced them to fund generic fruit advertising with which they disagreed. It was cast as an important commercial speech case, raising First Amendment issues about government-compelled speech.
>
> The oral argument was preceded by a shoving match over who would argue the case – Campagne, who had represented the growers in early stages of the litigation, or renowned First Amendment litigator Michael McConnell, special counsel to Chicago's Mayer, Brown & Platt who represented some of the growers. Thirteen of the 16 growers in the case asked Campagne to step aside for the arguments, but he refused. The dispute was decided by an unusual coin toss conducted by Supreme Court Clerk William Suter.
>
> Campagne won the coin toss, and without moot court preparation or consultation with high court litigators, dove into oral argument for a raucous and riotous half-hour. He largely ignored the First Amendment, instead using his time as an opportunity to educate the justices about the relative virtues of different varieties of California plums. At one point, Campagne even veered into the bizarre and personal, advising Justice Antonin Scalia not to buy green plums lest his family get sick.
>
> The justices were clearly upset by the arguments and tried repeatedly to push Campagne back on track. An extraordinary letter to the Court from McConnell after the arguments, disavowing concessions made by Campagne, failed to repair the damage. The Court ended up ruling 5-4 in favor of the marketing program, finding that it posed no significant First Amendment problem.
>
> Daniel Gerawan of Reedley, Calif., one of the growers who had tried repeatedly beforehand to get Campagne to step aside and let McConnell argue, sued Campagne for legal malpractice. Without doubt, Gerawan says, the oral argument led directly to the loss.

Second, consider an excerpt from Tony Mauro, *Ennis Remembered As One of the ACLU's Best*, The Recorder, Aug. 7, 2000:

> But it is as a Supreme Court advocate that [Bruce] Ennis may be best remembered. He won 11 of the 16 cases he argued. His preparation for argument was legendary. No matter how late in the game he took on a case, Ennis wanted to know everything about its background and about his client. . . .
>
> In the commercial speech case, *Rubin v. Coors Brewing Corp.* in 1995, Ennis' meticulous preparation earned him a permanent place in Supreme Court lore. Ennis, arguing on behalf of Coors, challenged a federal restriction on beer labels.
>
> But what Justice Antonin Scalia wanted to know during oral argument seemed like a trivia question: What was the difference between beer and ale? Without missing a beat, Ennis told him that ale resulted from a "top fermentation process," while beer came from the bottom.
>
> Stunned Coors officials in the audience later said they could not have answered the question themselves. But Ennis, it so happened, had come across a technical explanation of the brewing

> process in the transcript of a 1934 congressional hearing that he read in preparation for arguments.
>
> The beer-ale colloquy has been memorialized in a guidebook for counsel arguing before the Supreme Court that is issued by the Court's clerk, under the heading "Know your client's business." Without mentioning the names of Ennis or Scalia, the entry noted that "the justice who posed the question thanked the counsel in a warm and gracious manner." Coors won the case 9-0.
>
> But Ennis was not just prepared for trivia questions. He was also ready strategically, in many instances devising three different answers to questions he expected to be asked. The answer he picked depended on which justice asked the question.
>
> If the query came from a hostile justice, Ennis had a quick reply ready that would enable him to change the subject fast. If it came from a justice he thought he could persuade, he had an answer ready with his best argument. A third answer was reserved for justices he already thought were on his side.
>
> "If he knew he had three justices in his pocket going in, he focused his argument on winning two more," said Ogden. "He had a sense of the whole package."

Third, consider the list of outside counsel (from the Jenner & Block firm) on the cover page of Respondent's merits brief in the *Coors* case: Bruce J. Ennis, Jr. (*Counsel of Record*), Donald B. Verrilli, Jr., Paul M. Smith, and Nory Miller.

And, finally, consider this anecdote from Warner W. Gardner's memoir, *Pebbles From The Paths Behind: The Public Path 1909-1947* at 124-25 (1989):

> May 11, 1942, was a red-letter Supreme Court day for me, in which I "won" a case after a half hour's preparation. I had gone to the Court to move the admission of a capable black attorney named Crockett who was on my staff, and had been pleased to note that the Chief Justice of Texas was a subordinate part of Crockett's group being admitted. I left at the luncheon recess and was caught by the Marshall just as I was going down the marble steps and escorted back to the Court room, where the Justices had remained. The[y] had just discovered that the next case, a prosecution of one McCann, was one where he planned to appear *pro se*. Chief Justice Stone, evidently assuming that one who had left the Solicitor General's Office had left the Government (a sentiment I rather shared), appointed me counsel either to present his case after the luncheon recess or to advise the Court what should be done. I spent the half hour with McCann and then presented the Court with three points, each of which I "won." (a) The issues were serious, and deserved argument. (b) They were also too complex to prepare in half an hour. (c) As I remained a Government attorney, someone else should be appointed to represent McCann. His conviction was affirmed at the next Term, but the vote was 5-4. *Adams v. U.S. ex. rel. McCann*, 317 U.S. 269 (1942).

plaintiff would return and answer the question. This deposition was given May 29, 1885, and it is very apparent that the plaintiff, at that time, had no knowledge that anything had been paid on the note, and that he never received the proceeds of the draft by which the payment of $300 was remitted. The conduct of the plaintiff and of agents of the corporation in respect to the note and draft, after the alleged transfer of the note to plaintiff, raised a strong presumption that such transfer was merely colorable, and that the note remained the property of the corporation during all those transactions. We canot say that the finding of the court in this behalf is not supported by the evidence. The judgment of the circuit court must be affirmed.

(80 Wis. 523)

VOSBURG V. PUTNEY.

(*Supreme Court of Wisconsin.* Nov. 17, 1891.)

ACTION FOR ASSAULT — UNINTENTIONAL INJURY— OPINION EVIDENCE—DAMAGES.

1. Where, in a civil action for assault, it appeared that the parties were in school, and defendant kicked plaintiff on the leg, during school hours, and caused the injury, though defendant may not have intended to injure plaintiff, the act being unlawful, defendant was liable.

2. It is error to admit an answer to a hypothetical question, calling for an opinion in a matter vital to the issue, which excludes from consideration facts already proved by a witness on whose testimony such question is based, when a consideration of such facts is essential in forming an intelligent opinion of the matter.

3. Defendant is liable for such injuries as result directly from his wrongful act, whether or not they could have been foreseen by him.

Appeal from circuit court, Waukesha county; A. SCOTT SLOAN, Judge. Reversed.

Action by Andrew Vosburg against George Putney for personal injuries. From a judgment for plaintiff, defendant appeals.

The other facts fully appear in the following statement by LYON, J.:

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84, 47 N. W. Rep. 99. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice ORTON on the former appeal, and require no repetition. On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for $2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

M. S. Griswold and *T. W. Haight*, (*J. V. Quarles*, of counsel,) for appellant, to sustain the proposition that where there is no evil intent there can be no recovery, cited: 2 Greenl. Ev. §§ 82-85; 2 Add. Torts, § 790; Cooley, Torts, p. 162; Coward v. Baddeley, 4 Hurl. & N. 478; Christopherson v. Bare, 11 Q. B. 473; Hoffman v. Eppers, 41 Wis. 251; Krall v. Lull, 49 Wis. 405, 5 N. W. Rep. 874; Crandall v. Transportation Co., 16 Fed. Rep. 75; Brown v. Kendall, 6 Cush. 292.

Ryan & Merton, for respondent.

LYON, J., (*after stating the facts.*) Several errors are assigned, only three of which will be considered.

I. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of

the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

II. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff, (who was plaintiff's attending physician,) elicited on cross-examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of plaintiff's witnesses, first saw it March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of Andrew Vosburg in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone." It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,—one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to-wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct. Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting the witness to answer the question is material, and necessarily fatal to the judgment.

III. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in Brown v. Railway Co., 54 Wis. 342, 11 N. W. Rep. 356, 911, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case; chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages —the rule here contended for — was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal. The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

(80 Wis. 428)

STACKMAN *v.* CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin.* Nov. 17, 1891.)

INJURY TO EMPLOYE—NEGLIGENCE OF FOREMAN—CONTRIBUTORY NEGLIGENCE.

1. A railroad company's foreman was engaged with a gang of men in pushing a car over

010, Rem.Rev.Stat. § 1254. Both procedures call for authentication by the attestation of the clerk of the court. The state statute requires that the seal of the court be annexed. The Federal statute requires that the seal be annexed, if a seal exists. The Federal statute also requires a certificate of a judge of the court that the attestation is in proper form.

These statutes contemplate that the original certifications will be introduced in evidence. See State v. Johnson, 194 Wash. 438, 78 P.2d 561. This was not done in the instant case. The warden's certification that a specified document is an exact copy of the judgment and sentence as certified by the clerk of the court is insufficient.

The judgment and sentence is reversed, and the cause is remanded for a new trial.

MALLERY, SCHWELLENBACH, HILL, DONWORTH, FINLEY, WEAVER, ROSELLINI, and OTT, JJ., concur.

Ruth GARRATT, Appellant,

v.

Brian DAILEY, a Minor, by George S. Dailey, his Guardian ad Litem, Respondent.

No. 32841.

Supreme Court of Washington.
Department 2.
Feb. 14, 1955.
Rehearing Denied May 3, 1955.

Action against five year old boy for injuries sustained when boy allegedly pulled chair from under plaintiff when she started to sit down. The Superior Court, Pierce County, Frank Hale, J., dismissed action, and plaintiff appealed. The Supreme Court, Hill, J., held that, where trial court had accepted boy's statement that he had moved chair and seated himself therein, but when he discovered that plaintiff was about to sit at place where chair had been, attempted to move chair toward plaintiff, and was unable to get it under plaintiff in time, case would be remanded to obtain finding whether boy, when he moved chair, knew, with substantial certainty, that plaintiff would attempt to sit down where chair had been.

Remanded for clarification.

1. Infants ⟹98

In action against five year old boy for injuries sustained when boy allegedly pulled chair from under plaintiff when she started to sit down, evidence was sufficient to sustain trial court's finding that boy was a visitor and not a trespasser at time he moved chair.

2. Assault and Battery ⟹2

Generally, a "battery" is the intentional infliction of a harmful bodily contact upon another.

3. Assault and Battery ⟹2

Act which is legal cause of harmful contact with another's person makes actor liable if actor intended to bring about harmful or offensive contact or apprehension thereof, provided contact was not consented to or not otherwise privileged.

4. Appeal and Error ⟹1106(4)

Where, in action against five year old boy for injuries sustained when boy allegedly pulled chair from under plaintiff when she started to sit down, trial court accepted boy's statement that he had moved chair and seated himself therein, but, when he discovered that plaintiff was about to sit at place where chair had been, attempted to move chair toward plaintiff, and was unable to get it under plaintiff in time, case would be remanded to obtain finding whether boy, when he moved chair, knew, with substantial certainty, that plaintiff would attempt to sit down where chair had been.

5. Infants ⟹60

Law of battery, which is applicable to adults, would be applicable to child less than six years of age, and child's age would be of consequence only in determining what he knew as based upon his experience, capacity, and understanding.

6. Appeal and Error ⟹1058(2)

In action against five year old boy for injuries sustained when boy allegedly pulled

chair from under plaintiff when she started to sit down, fact that plaintiff was prevented, on cross-examination, from bringing out that boy had had chairs pulled out from under him at kindergarten was not prejudicial error, in view of fact that such information later came into record through boy's testimony.

7. Infants ⚷59, 98

Five year old boy's liability for tort would not depend upon size of his estate or even upon existence of an estate, and, therefore, trial court, in tort action against boy, properly refused to admit liability policy in evidence.

8. New Trial ⚷99

Where case had been tried to court, denial of motion for new trial on ground of newly discovered evidence did not constitute an abuse of discretion.

9. Appeal and Error ⚷1043(6)

In tort action against five year old boy, even if refusal to allow taking of boy's deposition constituted an abuse of trial court's discretion, such refusal would not constitute reversible error in absence of showing of prejudice. Rules of Pleading, Practice and Procedure, rule 30(b).

Kennett, McCutcheon & Soderland, Seattle, James P. Healy, Tacoma, for appellant.

Frederick J. Orth, Rode, Cook, Watkins & Orth, Seattle, for respondent.

HILL, Justice.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

"III. * * * that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

"IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any wilful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.*" (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of

her damage was found to be $11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions, see Bohlen, "Liability in Tort of Infants and Insane Persons," 23 Mich.L.Rev. 9, state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. Paul v. Hummel, 1868, 43 Mo. 119, 97 Am.Dec. 381; Huchting v. Engel, 1863, 17 Wis. 230, 84 Am.Dec. 741; Briese v. Maechtle, 1911, 146 Wis. 89, 130 N.W. 893, 35 L.R.A.,N.S., 574; 1 Cooley on Torts (4th ed.) 194, § 66; Prosser on Torts 1085, § 108; 2 Kent's Commentaries 241; 27 Am.Jur. 812, Infants, § 90.

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

[1] The trial court's finding that Brian was a visitor in the Garratt back yard is supported by the evidence and negatives appellant's assertion that Brian was a trespasser and had no right to touch, move, or sit in any chair in that yard, and that contention will not receive further consideration.

[2, 3] It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:

> "An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if
>
> "(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and
>
> "(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and
>
> "(c) the contact is not otherwise privileged."

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

> "*Character of actor's intention.* In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced."

See, also, Prosser on Torts 41, § 8.

We have here the conceded volitional act of Brian, *i. e.*, the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. Vosburg v. Putney, 1891, 80 Wis. 523, 50 N.W. 403, 14 L.R.A. 226; Briese v. Maechtle, supra.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (*i. e.*, that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from the Restatement heretofore set forth:

> "It is not enough that the act itself is intentionally done and this, even

though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section."

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Mercer v. Corbin, 1889, 117 Ind. 450, 20 N.E. 132, 3 L.R.A. 221. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.

[4] While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. Vosburg v. Putney, supra. If Brian did not have such knowledge, there was no wrongful act by him and the basic premise of liability on the theory of a battery was not established.

[5] It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for $11,000 in her favor on the record now before us.

Nor do we find any error in the record that warrants a new trial.

What we have said concerning intent in relation to batteries caused by the physical contact of a plaintiff with the ground or floor as the result of the removal of a chair by a defendant furnishes the basis for the answer to the contention of the plaintiff that the trial court changed its theory of the applicable law after the trial, and that she was prejudiced thereby.

It is clear to us that there was no change in theory so far as the plaintiff's case was concerned. The trial court consistently from beginning to end recognized that if the plaintiff proved what she alleged and her eyewitness testified, namely, that Brian pulled the chair out from under the plaintiff while she was in the act of sitting down and she fell to the ground in consequence thereof, a battery was established. Had she proved that state of facts, then the trial court's comments about inability to find any intent (from the connotation of motivation) to injure or embarrass the plaintiff, and the italicized portions of his findings as above set forth could have indicated a change of theory. But what must be recognized is that the trial court was trying in those comments and in the italicized findings to express the law applicable, not to the facts as the plaintiff contended they were, but to the facts as the trial court found them to be. The remand for clarification gives the plaintiff an opportunity to secure a judgment even though the trial court did not accept her version of the facts, if from all

the evidence, the trial court can find that Brian knew with substantial certainty that the plaintiff intended to sit down where the chair had been before he moved it, and still without reference to motivation.

[6] The plaintiff-appellant urges as another ground for a new trial that she was refused the right to cross-examine Brian. Some twenty pages of cross-examination indicate that there was no refusal of the right of cross-examination. The only occasion that impressed us as being a restriction on the right of cross-examination occurred when plaintiff was attempting to develop the fact that Brian had had chairs pulled out from under him at kindergarten and had complained about it. Plaintiff's counsel sought to do this by asking questions concerning statements made at Brian's home and in a court reporter's office. When objections were sustained, counsel for plaintiff stated that he was asking about the conversations to refresh the recollection of the child, and made an offer of proof. The fact that plaintiff was seeking to develop came into the record by the very simple method of asking Brian what had happened at kindergarten. Consequently what plaintiff offered to prove by the cross-examination is in the record, and the restriction imposed by the trial court was not prejudicial.

[7] It is argued that some courts predicate an infant's liability for tort upon the basis of the existence of an estate in the infant; hence it was error for the trial court to refuse to admit as an exhibit a policy of liability insurance as evidence that there was a source from which a judgment might be satisfied. In our opinion the liability of an infant for his tort does not depend upon the size of his estate or even upon the existence of one. That is a matter of concern only to the plaintiff who seeks to enforce a judgment against the infant.

[8] The motion for a new trial was also based on newly discovered evidence. The case having been tried to the court, the trial judge was certainly in a position to know whether that evidence would change the result on a new trial. It was not of a character that would make the denial of the motion an abuse of discretion.

[9] The plaintiff complains, and with some justice, that she was not permitted to take a pretrial deposition of the defendant Brian Dailey. While Rule of Pleading, Practice, and Procedure 30(b), 34A Wash. 2d 91, gives the trial court the right "for good cause shown" to prevent the taking of a deposition, it seems to us that though it might well have been taken under the supervision of the court to protect the child from leading, misleading and confusing questions, the deposition should have been allowed, if the child was to be permitted to testify at the trial. If, however, the refusal to allow the taking of the deposition was an abuse of discretion, and that we are not prepared to hold, it has not been established that the refusal constituted prejudicial error. (Parenthetically we would add that the right to a review of the rulings on pretrial procedure or with respect to depositions or discovery or incidental procedural motions preceding the trial seems to be limited to an appeal from a final judgment, 2 Barron and Holtzoff, Federal Practice and Procedure (Rules Ed.), § 803; 3 Id. § 1552, and realistically such a review is illusory for the reasons given by Prof. David W. Louisell. See 36 Minn.L.Rev. 654.)

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

Costs on this appeal will abide the ultimate decision of the superior court. If a judgment is entered for the plaintiff, Ruth Garratt, appellant here, she shall be entitled to her costs on this appeal. If, however, the judgment of dismissal remains unchanged, the respondent will be entitled to recover his costs on this appeal.

Remanded for clarification.

SCHWELLENBACH, DONWORTH, and WEAVER, JJ., concur.

Reynolds, White, Allen & Cook, Grant Cook, William A. Paddock, Houston, for petitioners.

Rachel Johnson, Pasadena, for respondent.

PER CURIAM.

[1, 2] During the pendency of a divorce action, the husband without the wife's knowledge, executed a deed of trust on community property which was later sold at a trustee's sale. The wife sued Fannin Bank, the purchaser, to recover the property because she had no notice of her husband's execution of the deed of trust which she alleged was executed by her husband in fraud of her rights. The trial court rendered judgment for the wife, and on appeal the court of civil appeals affirmed the judgment. 417 S.W.2d 502. The intermediate court based its affirmance upon article 4634, Vernon's Ann.Civ.Stats., holding that the pendency of a divorce action had the force of a lis pendens notice even in the absence of compliance with article 6640, Vernon's Ann.Civ.Stats. The holding was not necessary to the result, since the trial court made findings of fact and concluded that the Fannin Bank, as purchaser, had notice of the wife's interest in the real estate which was in litigation, and therefore knew or should have known that it could not rely upon the acts of the husband as manager of the community property. Petitioner Bank urges that there is no evidence to support the findings about notice, but our examination of the record convinces us that there were facts and inferences from which the bank should have known it could not rely upon the husband's signature. It is therefore unnecessary in this case to determine whether the mere pendency of a divorce action renders compliance with article 6640 unnecessary.

We overrule petitioners' motion for rehearing on our order refusing the application for writ of error, no reversible error.

Emmit E. FISHER, Petitioner,

v.

CARROUSEL MOTOR HOTEL, INC., et al., Respondents.

No. B-342.

Supreme Court of Texas.

Dec. 27, 1967.

Guest brought action for assault and battery by motor hotel's agent. The 61st District Court, Harris County, Ben F. Wilson, J., granted defendant's motion n. o. v. that plaintiff take nothing and plaintiff appealed. The Waco Court of Civil Appeals, Tenth Supreme Judicial District, 414 S.W.2d 774, affirmed and plaintiff brought error. The Supreme Court, Greenhill, J., held where the manager of the motor hotel's club dispossessed plaintiff of his dinner plate in a loud and offensive manner a battery occurred on which damages for mental suffering could be based and the motor hotel was liable for exemplary damages.

Reversed.

1. Assault and Battery ⇐2

Actual physical contact is not necessary to constitute a battery so long as there is contact with clothing or an object closely identified with the body.

2. Assault and Battery ⇐2

An intentional snatching of patron's dinner plate from him by manager of motor hotel's club in a loud and offensive manner was sufficient to constitute a battery.

3. Assault and Battery ⇐2

To constitute assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in offensive manner, is sufficient.

4. Assault and Battery ⟹38

Where there was a forceful dispossession of patron's dinner plate in a loud and offensive manner which constituted a battery, patron was entitled to actual damages for mental suffering, even in absence of physical injury.

5. Damages ⟹48

Mental suffering is compensable for willful torts which are recognized as torts actionable independently and separately from mental suffering or other injury.

6. Assault and Battery ⟹38

Damages for mental suffering are recoverable without necessity for showing actual injury in a case of willful battery.

7. Assault and Battery ⟹2

Personal indignity is essence of action for battery; consequently defendant is liable for contacts which were offensive and insulting.

8. Master and Servant ⟹331

Principal and Agent ⟹159(1)

A principal or master is liable for exemplary or punitive damages because of acts of his agent or servant under some circumstances.

9. Master and Servant ⟹331

Where motor hotel's club manager was acting within scope of his employment, motor hotel was liable for exemplary damages to patron for willful battery by manager.

10. Principal and Agent ⟹159(1)

Finding of jury that motor hotel did not authorize or approve the act of its agent did not absolve it from liability for exemplary damages where agent was acting in a managerial capacity and in scope of his employment.

Ben G. Levy, Houston, for petitioner.

Vinson, Elkins, Weems & Searls, Raybourne Thompson, Jr. and B. Jeff Crane, Jr., Houston, for respondents.

GREENHILL, Justice.

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. 414 S.W.2d 774. The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be

served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn "forceably dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

[1] The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. 1 Harper & James, The Law of Torts 216 (1956); Restatement of Torts 2d, §§ 18 and 19. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

> "The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient; * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it."

[2, 3] Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." Morgan v. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941).

Such holding is not unique to the jurisprudence of this State. In S. H. Kress & Co. v. Brashier, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed "an assault or trespass upon the person" by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant "dispossessed plaintiff of the book" and caused her to suffer "humiliation and indignity."

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d § 18 (Comment p. 31) as follows:

> "Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person."

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

[4-7] In Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953), this Court refused to adopt the "new tort" of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery. This cause of action has long been advocated by respectable writers and legal scholars. See, for example, Prosser, Insult and Outrage, 44 Cal.L.Rev. 40 (1956); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand.L.Rev. 63 (1950); Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich.L.Rev. 874 (1939); 1 Restatement of Torts 2d § 46(1). However, it is not necessary to adopt such a cause of action in order to sustain the verdict of the jury in this case. The *Harned* case recognized the well established rule that mental suffering is compensable in suits for willful torts "which are recognized as torts and actionable independently and separately from mental suffering or other injury." 254 S.W.2d at 85. Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Restatement of Torts 2d § 18. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. Prosser, supra; Wilson v. Orr, 210 Ala. 93, 97 So. 123 (1923). We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

[8] We now turn to the question of the liability of the corporations for exemplary damages. In this regard, the jury found that Flynn was acting within the course and scope of his employment on the occasion in question; that Flynn acted maliciously and with a wanton disregard of the rights and feelings of plaintiff on the occasion in question. There is no attack upon these jury findings. The jury further found that the defendant Carrousel did not authorize or approve the conduct of Flynn. It is argued that there is no evidence to support this finding. The jury verdict concluded with a finding that $500 would "reasonably compensate plaintiff for the malicious act and wanton disregard of plaintiff's feelings and rights. * * *"

The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the employer or a manager of the employer ratified or approved the act.

[9] The above test is set out in the Restatement of Torts § 909 and was adopted in King v. McGuff, 149 Tex. 432, 234 S.W.2d 403 (1950). At the trial of this case, the following stipulation was made in open court:

"It is further stipulated and agreed to by all parties that as an employee of the Carrousel Motor Hotel the said Robert W. Flynn was manager of the Brass Ring Club."

We think this stipulation brings the case squarely within part (c) of the rule an-

nounced in the *King* case as to Flynn's managerial capacity. It is undisputed that Flynn was acting in the scope of employment at the time of the incident; he was attempting to enforce the Club rules by depriving Fisher of service.

[10] The rule of the Restatement of Torts adopted in the *King* case set out above has four separate and disjunctive categories as a basis of liability. They are separated by the word "or." As applicable here, there is liability if (a) the act is authorized, or (d) the act is ratified or approved, *or* (c) the agent was employed in a managerial capacity and was acting in the scope of his employment. Since it was established that the agent was employed in a managerial capacity and was in the scope of his employment, the finding of the jury that the Carrousel did not authorize or approve Flynn's conduct became immaterial.

The *King* case also cited and relied upon Ft. Worth Elevator Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934). In that case, it was held not to be material that the employer did not authorize or ratify the particular conduct of the employee; and the right to exemplary damages was supported under what is section (b) of the Restatement or *King* rule: The agent was unfit, and the principal was reckless in employing [or retaining] him.

After the jury verdict in this case, counsel for the plaintiff moved that the trial court disregard the answer to issue number eight [no authorization or approval of Flynn's conduct on the occasion in question] and for judgment upon the verdict. The trial court erred in overruling that motion and in entering judgment for the defendants notwithstanding the verdict; and the Court of Civil Appeals erred in affirming that judgment.

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

Fred FENNELL, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 40830.

Court of Criminal Appeals of Texas.

March 6, 1968.

The defendant was convicted in the Criminal District Court No. 6, Harris County, Fred M. Hooey, J., of murder without malice, and defendant appealed. The Court of Criminal Appeals, Onion, J., held that charge that was only abstract on law of self-defense and did not apply the law to the facts was reversibly erroneous where testimony of state and defendant clearly and strongly raised issue of self-defense both against unlawful attack giving rise to apprehension or fear of death or serious bodily injury and against milder attack.

Reversed and remanded.

1. Homicide ⚷300(3), 340(1)

Charge that was only abstract on law of self-defense and did not apply the law to the facts was reversibly erroneous in murder prosecution wherein testimony of state and defendant clearly and strongly raised issue of self-defense both against unlawful attack giving rise to apprehension or fear of death or serious bodily injury and against milder attack. Vernon's Ann. P.C. arts. 1221, 1224, 1226.

2. Homicide ⚷300(1), 341

Refusal of timely requested special charge to effect that intoxication or drinking of decedent would not have excused his attack upon defendant nor take from defendant the right of self-defense was reversible error in absence of adequate, comprehensive, complete, and unrestricted instruction on self-defense in murder case wherein testimony for state and defendant clearly and strongly raised issue of self-

92 Ohio App.3d 232

232 LEICHTMAN, Appellant,

v.

WLW JACOR COMMUNICATIONS, INC. et al., Appellees.

No. C–920922.

Court of Appeals of Ohio, Hamilton County.

Decided Jan. 26, 1994.

Radio talk show guest (an antismoking advocate) sued radio talk show hosts and radio station for battery, invasion of privacy, and violation of municipal regulation making it illegal to smoke in designated public places. Guest alleged that he was invited to appear on talk show to discuss full effects of smoking and breathing secondary smoke and that, at host's urging, second host lit cigar and repeatedly blew smoke in guest's face. The Court of Common Pleas, Hamilton County, dismissed action for failure to state claim. Guest appealed. The Court of Appeals held that: (1) guest stated claim for battery; (2) guest failed to state claim for invasion of privacy; and (3) there is no private right of action for violation of municipal regulation.

Affirmed in part, reversed and remanded in part.

1. Pretrial Procedure ⚷679

When construing complaint for failure to state claim, court assumes that factual allegations on face of complaint are true. Rules Civ.Proc., Rule 12(B)(6).

2. Pretrial Procedure ⚷622

Court cannot dismiss complaint for failure to state claim merely because it doubts plaintiff will prevail. Rules Civ.Proc., Rule 12(B)(6).

3. Assault and Battery ⚷24(1)

Antismoking advocate sufficiently alleged that radio talk show host committed "battery" by intentionally blowing cigar smoke in advocate's face when advocate was in studio to discuss harmful effects of smoking and breathing secondary smoke. R.C. §§ 3704.01(B), 5709.20(A).

See publication Words and Phrases for other judicial constructions and definitions.

233 **4. Assault and Battery** ⚷2

Radio talk show guest stated "battery" claim against host by alleging that, at host's urging, second host repeatedly blew cigar smoke in guest's face. R.C. §§ 3704.01(B), 5709.20(A).

5. Master and Servant ⚷302(1)

Employer is not legally responsible for intentional torts of its employees that do not facilitate or promote its business.

6. Master and Servant ⚷332(2)

Whether employer is liable under doctrine of respondent superior because its employee is acting within scope of employment is ordinarily question of fact.

7. Assault and Battery ⚷2

Master and Servant ⚷302(3)

Radio talk show guest stated claim for "battery" against radio station by alleging that he was invited to appear on talk show to discuss full effects of smoking and breathing secondary smoke and that, while in studio, talk show host lit cigar and repeatedly blew smoke in guest's face. R.C. §§ 3704.01(B), 5709.20(A).

8. Torts ⚷8.5(4)

Antismoking advocate failed to state claim against radio talk show hosts and radio station for tortious invasion of privacy by alleging that he appeared on first host's radio talk show to discuss harmful effects of smoking and breathing secondary smoke, and that second host, at first host's prompting, lit cigar and repeatedly blew smoke in guest's face, as there was no substantial intrusion into guest's solicitude, seclusion, habitation, or affairs; guest willingly entered studio to make public radio appearance with first host, who was known for his blowtorch rhetoric.

9. Action ⚖3

Health and Environment ⚖25.15(4.1)

There is no private right of action under municipal regulation that makes it illegal to smoke in designated public places.

Kircher, Robinson, Cook, Newman & Welch and Robert B. Newman, Cincinnati, for appellant.

Strauss & Troy and William K. Flynn, Cincinnati, for appellees WLW Jacor Communications, Inc. and William Cunningham.

Waite, Schneider, Bayless & Chesley, Stanley M. Chesley and Paul M. DeMarco, Cincinnati, for appellee Andy Furman.

|234 PER CURIAM.

The plaintiff-appellant, Ahron Leichtman, appeals from the trial court's order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery, invasion of privacy, and a violation of Cincinnati Bd. of Health Reg. No. 00083. In his single assignment of error, Leichtman contends that his complaint was sufficient to state a claim upon which relief could be granted and, therefore, the trial court was in error when it granted the defendants' Civ.R. 12(B)(6) motion. We agree in part.

In his complaint, Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."

[1, 2] Under the rules of notice pleading, Civ.R. 8(A)(1) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." When construing a complaint for failure to state a claim, under Civ.R. 12(B)(6), the court assumes that the factual allegations on the face of the complaint are true. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. For the court to grant a motion to dismiss, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.* A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail. *Slife v. Kundtz Properties, Inc.* (1974), 40 Ohio App.2d 179, 69 O.O.2d 178, 318 N.E.2d 557. Because it is so easy for the pleader to satisfy the standard of Civ.R. 8(A), few complaints are subject to dismissal. *Id.* at 182, 69 O.O.2d at 180, 318 N.E.2d at 560.

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

"An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other * * *, and

"(b) a harmful contact with the person of the other directly or indirectly results[; or] [1]

|235 "[c] an offensive contact with the person of the other directly or indirectly results."[2] (Footnote added.)

1. Harmful contact: Restatement of the Law 2d, Torts (1965) 25, Section 13, cited with approval in *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167.

2. Offensive contact: Restatement, *supra*, at 30, Section 18. See, generally, *Love* at 99–100, 524 N.E.2d at 167, in which the court: (1) referred to battery as "intentional, offensive touching"; (2) defined offensive contact as that which is "offensive to a reasonable sense of personal dignity"; and (3) commented that if "an arrest is made by a mere touching * * * the touching is offensive and, unless privileged, is a 'battery.'" *Id.*, 37 Ohio St.3d at 99, 524 N.E.2d at 167, fn. 3. See, also, *Schultz v. Elm Beverage Shoppe* (1988), 40 Ohio St.3d 326, 328, 533 N.E.2d 349, 352, fn. 2 (citing Restatement, *supra*, at 22, Chapter 2, Introductory Note), in which the court identified an interest in personality as "freedom from offensive bodily contacts"; *Keister v. Gaker* (Nov. 8, 1978), Warren App. Nos. 219 and 223, unreported (battery is offensive touching).

[3] In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167. It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." *State v. Phipps* (1979), 58 Ohio St.2d 271, 274, 12 O.O.3d 273, 275, 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact. R.C. 3704.01(B) and 5709.20(A); Ohio Adm. Code 3745-17.

[4] As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. *Lacey v. Laird* (1956), 166 Ohio St. 12, 1 O.O.2d 158, 139 N.E.2d 25, paragraph two of the syllabus. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentioned aggressions upon them." Pound, An Introduction to the Philosophy of Law (1922) 169.

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. *Richardson v. Hennly* (1993), 209 Ga.App. 868, 871, 434 S.E.2d 772, 774–775. We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Ezra, Smoker Battery: An Antidote to Second-Hand Smoke (1990), 63 S.Cal.L.Rev. 1061, 1090. Also, whether the "substantial certainty" prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme ⌊236Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act. Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke under the "glass cage" defense of *McCracken v. Sloan* (1979), 40 N.C.App. 214, 217, 252 S.E.2d 250, 252, relied on by the defendants.

Neither Cunningham nor WLW is entitled to judgment on the battery claim under Civ.R. 12(B)(6). Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. *Bell v. Miller* (1831), 5 Ohio 250; 6 Ohio Jurisprudence 3d (1978) 121–122, Assault, Section 20. Leichtman's complaint states, "At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face."

[5–7] With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 329–330, 587 N.E.2d 825, 828–829. However, whether an employer is liable under the doctrine of *respondeat superior* because its employee is acting within the scope of employment is ordinarily a question of fact. *Id.* at 330, 587 N.E.2d at 825. Accordingly, Leichtman's claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under Civ.R. 12(B)(6).

[8] By contrast, the first and third counts of Leichtman's complaint do not state claims upon which relief can be granted. The trial court correctly granted the Civ.R. 12(B)(6) motion as to both counts. In his first count, Leichtman alleged a tortious invasion of his privacy. See, generally, Restatement, *supra,* at 376, Section 652B, as adopted by *Sustin v. Fee* (1982), 69 Ohio St.2d 143, 145, 23 O.O.3d 182, 183–184, 431 N.E.2d 992, 993. A claim for invasion of privacy may involve any one of four distinct torts. Prosser, Privacy (1960), 48 Cal.L.Rev. 383. The tort that is relevant here requires some substantial intrusion into a plaintiff's solitude, seclusion, habitation, or affairs that would be highly

offensive to a reasonable person. See, *e.g.*, Restatement, *supra*, at 378–379, Section 652B, Comments *a* to *d*; *Killilea v. Sears Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166, 27 OBR 196, 198–199, 499 N.E.2d 1291, 1294. Leichtman acknowledges that he willingly entered the WLW radio studio to make a public radio appearance with Cunningham, who is known for his blowtorch rhetoric. Therefore, Leichtman's[237] allegations do not support his assertion that Furman, Cunningham, or WLW intruded into his privacy.

[9] In his third count, Leichtman attempts to create a private right of action for violation of Cincinnati Bd. of Health Reg. No. 00083, which makes it illegal to smoke in designated public places. Even if we are to assume, for argument, that a municipal regulation is tantamount to public policy established by a statute enacted by the General Assembly, the regulation has created rights for nonsmokers that did not exist at common law. Bd. of Health Reg., *supra*, at Sections 00083–7 and 00083–13. Therefore, because sanctions also are provided to enforce the regulation, there is no implied private remedy for its violation. R.C. 3707.99, 3707.48(C); *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 169, 572 N.E.2d 87, 89–90; *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245, 248–250, 75 O.O.2d 291, 293–294, 348 N.E.2d 144, 147 (superseded by statute on other grounds).

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals under App.R. 23, we refuse to limit one's right to sue. Section 16, Article I, Ohio Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.

We affirm the trial court's judgment as to the first and third counts of the complaint, but we reverse that portion of the trial court's order that dismissed the battery claim in the second count of the complaint. This cause is remanded for further proceedings consistent with law on that claim only.

Judgment accordingly.

DOAN, P.J., and HILDEBRANDT and GORMAN, JJ., concur.

92 Ohio App.3d 238

[238]The STATE of Ohio, Appellee,

v.

BOULABEIZ, Appellant.

No. C–930001.

Court of Appeals of Ohio, Hamilton County.

Decided Jan. 26, 1994.

Defendant was convicted in the Court of Common Pleas, Hamilton County, of four counts of felonious assault. Defendant appealed. The Court of Appeals held that: (1) prosecutor's questions to witness and remarks in closing argument concerning culture and beliefs of foreign nation towards women did not prejudicially affect a substan-

moved in arrest of judgment, that the plaintiff alledges indeed that the defendant entered and was possessed the first year, but mentions no entry as to the second.—Twisden, Justice. The jury have found the rent to be due for both years, and we will now intend that he was in possession all the time for which the rent is found to be due.

CASE 11. BATES *against* KENDAL.

Teaching school without licence.—S. C. 1 Vent. 41. S. C. 2 Keb. 538, 544, 2. See the statutes 1 Jac. 1, c. 4, f. 9, and 19 Geo. 3, c. 44. 1 Hawk. 18 and 48.

A prohibition was prayed to the Ecclesiastical Court at Chester to stay proceedings upon a libel against one William Bates, for teaching school without *licence;* but it was denied.

It appears by the report of this case in Keble, that the prohibition was *granted*, because the object of the libel was to *put him out* of the school, when the patronage was not in the *Ordinary*, but in *the founder;* in which case the Ordinary can only *censure*, but not *expel;* nor can he libel for the penalty. Carthew, 484. 2 Lev. 222.—This jurisdiction extends only to *grammar schools.* 1 Peer. Will. 20, 32.—See an argument but no determination upon this subject, Salk. 672. 12 Mod. 192.—And as to the bishop's *duty* in granting the licence, *vide* 2 Bar. 365, 428. 2 Kel. 287, pl. 218, and 367, and Strange, 1023.

CASE 12. REDMAN *against* EDOLFE.

Trinity Term, 21 Car. 2, Roll 799.

The Court will presume an *original* to be perfect until the contrary appears.—S. C. 1 Sid. 423. S. C. 1 Saund. 317. S. C. 2 Keb. 544, 583. Cro. Jac. 108. 4 Mod. 246. Tidd's Pract. 222.

Trespass and ejectment by *original* in this Court.—Saunders moved in arrest of judgment, upon a fault in the original; for a bad original is not helped by verdict. But upon Mr. Livesay's certifying that there was no original at all, the plaintiff had judgment, though in his declaration he recited the original.

See also the statute 18 Eliz. c. 14, by which it is enacted, that no judgment shall, *after verdict*, be stayed or reversed for any default in form, or for the want of any original writ, &c. 5 Co. 37. Barnes Notes, 3d edit. 14, &c. 1 Ld. Raym. 565. 2 Ld. Raym. 1058, 1066. Stra. 1211. 1 Wils. 1. 2 Wils. 147. 2 Burr. 1162. 4 Burr. 2448. Cowp. 841. Dougl. 62, 228. 1 Term Rep. 149.

CASE 13. TUBERVILLE *against* SAVAGE.

If a man lay his hand upon his sword and say, "If it were not assize-time, I would not take such language," this is no assault.—S. C. 2 Keb. 545. S. C. 1 Vent. 256. 2 Ro. Ab. 547. 6 Mod. 149. 10 Mod. 187. 1 Lev. 282. 1 Bac. Ab. 154. Gilb. Law of Evid. 256. 1 Com. Dig. 591. Bull. N. P. 15. 1 Hawk. P. C. 263.

Action of *assault, battery*, and *wounding.* The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "*If it were not assize-time, I would not take such language from you.*"—The question was, If that were an assault?—The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and *the intention* as well as *the act* makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no *intention* to assault; but if one, intending to assault, strike *at* another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault.—In the principal case the plaintiff had judgment.

258 N.C. 135

Athlyn B. LANGFORD

v.

Midgie L. SHU.

No. 242.

Supreme Court of North Carolina.

Nov. 21, 1962.

Personal injury action. The Superior Court, Mecklenburg County, J. W. Pless, Jr., J., rendered judgment of nonsuit at the close of the plaintiff's evidence, and the plaintiff appealed. The Supreme Court, Sharp, J., held that evidence raised jury question whether defendant was liable in that she approved and participated in practical joke played on plaintiff, a neighbor, who jumped with fright and was injured when defendant's child released spring and a furry object which plaintiff believed to be an animal sprang out at plaintiff from a box which defendant had told her contained a mongoose which ate live snakes.

Reversed.

1. Negligence ⇐1

That it is a practical joke which is cause of injury does not excuse perpetrator from liability for injuries sustained.

2. Torts ⇐3

Where voluntary conduct breaches a duty and causes damage it is tortious although without design to injury.

3. Negligence ⇐1

If an act is done with intention of bringing about an apprehension of harmful or offensive conduct on part of another person, it is immaterial that actor is not inspired by any personal hostility or desire to injure the other.

4. Negligence ⇐48

Defendant owed to visiting neighbor the duty not to subject neighbor to a fright which, in exercise of due care or reasonable foresight, defendant should have known was likely to result in some injury to neighbor.

5. Parent and Child ⇐13(2)

Evidence raised jury question whether defendant was liable in that she approved and participated in practical joke and should have reasonably foreseen that plaintiff, a neighbor, was likely to jump with fright and suffer injury when defendant's child released spring and a furry object which plaintiff believed to be an animal sprang out at plaintiff from a box which defendant had told her contained a mongoose which ate live snakes.

6. Parent and Child ⇐13(1)

The mere relation of parent and child imposes on parent no liability for torts of child; the parent is not liable merely because the child lives at home with him and is under his care and control; apart from the parent's own negligence, liability exists only where tortious act is done by child as servant or agent of parent, or where act is consented to or ratified by parent.

7. Parent and Child ⇐13(1)

A parent is liable for act of his child if parent's conduct was such as to render his own negligence a proximate cause of the injury complained of; in such a case the parent's liability is based on the ordinary rules of negligence and not upon the relation of parent and child.

This civil action to recover damages for personal injuries was dismissed by judgment of nonsuit at the close of the plaintiff's evidence. That ruling presents the only question on appeal.

Plaintiff and defendant are next door neighbors. On the afternoon of March 11, 1961, Mrs. Langford, the plaintiff, came to visit Mrs. Shu, the defendant. As was her custom, she came by way of the backyard. Mrs. Shu was busy in the kitchen and plaintiff entered the house through the screened

back porch. As she entered, to her left on the porch was a picnic table with two benches, a chair and a lounge; on her right was a wicker couch. Beside the couch was a doorway into the kitchen. The furniture arrangement did not leave much "walking space" on the porch. When plaintiff entered the porch she saw on the picnic table a wooden box which was labeled "Danger, African Mongoose, Live Snake Eater." Plaintiff walked past the box into the kitchen and said to Mrs. Shu, "What in the world have you got on the back porch?" Defendant told her that it was a mongoose which a man had given to her husband for their children. Mrs. Langford then asked defendant what she was going to feed it and the reply was, "It eats snakes." Plaintiff and defendant had previously "discussed snakes, bugs, and so forth," and plaintiff had told defendant that she was afraid of them. Defendant told plaintiff to look at the box; that it would not hurt her.

The two Shu children, boys aged nine and eleven years respectively, were in the next room. Hearing this conversation between their mother and Mrs. Langford, and realizing that plaintiff had not seen "the box demonstrated," they came eagerly into the kitchen. The mongoose was in reality only a fox tail. Mrs. Shu, who was called as plaintiff's first witness, testified: "In order to show the box to someone, you have them standing at that end of the box, that is, the end of the box with the wire mesh over it. * * * (T)he lever is released with a spring, and it swings open and that is when it comes out."

The defendant's boys urged plaintiff to go out on the porch and look at the mongoose. Plaintiff declined to get near the box because she was afraid of snakes. When she started to go home she stopped in the kitchen door four or five feet from the box, still refusing "to get near that thing." Steve, the older boy, had been poking into the box with a stick which he then held in his hand. Plaintiff cautioned him not to hold that portion of the stick which had been in the box because "it was dirty down in the box where the animals and snakes were." About that time Steve released the spring on the box. With a whoosh and a screech, a furry object, which plaintiff believed to be an animal, sprang out at her. She jumped back and turned to run. There was so little room on the porch that she hit the lounge and stumbled back into a brick wall of the house, tearing a cartilage in her left knee. After extensive and painful treatments were ineffectual, an operation was required to repair the damage. Plaintiff spent sixty-three days in the hospital, endured much suffering and inconvenience, and incurred medical bills in the sum of $2,219.88.

According to the plaintiff, Mrs. Shu had stepped out on the porch at the time Steve released "the mongoose." According to Mrs. Shu, she was still in the kitchen, only a step from the porch, but she could hear the conversation between the children and Mrs. Langford. Defendant stepped out and saw "the mongoose" as it came out of the box in front of plaintiff.

McDougle, Ervin, Horack & Snepp and C. Eugene McCartha, Charlotte, for plaintiff, appellant.

Boyle, Alexander & Wade, Charlotte, for defendant, appellee.

SHARP, Justice.

[1, 2] This case involves a practical joke which caused unintended injury. However, the fact that it is a practical joke which is the cause of an injury does not excuse the perpetrator from liability for the injuries sustained. 52 Am.Jur., Torts, Sec. 90; 86 C.J.S. Torts § 20. Where voluntary conduct breaches a duty and causes damage it is tortious although without design to injury. 62 C.J., Torts, Sec. 22.

[3] If an act is done with the intention of bringing about an apprehension of harmful or offensive conduct on the part of another person, it is immaterial that the actor

is not inspired by any personal hostility or the desire to injure the other. See Annotation, Right of Victim of Practical Joke to Recover Against its Perpetrator, 9 A. L.R. 364.

In Johnston v. Pittard et al., 62 Ga.App. 550, 8 S.E.2d 717, six defendants, as a practical joke, persuaded plaintiff to go with them to a house in the country to see "some wild women." When they arrived at their destination, a vacant farm house, a man yelled from within and two shots were fired in plaintiff's direction. He "ran in desperation and fear of his life and fell into a ditch as a result of which he sustained injuries." The Court of Appeals, in ordering a new trial after verdict for the defendants, held that the defendants would be liable if they should have foreseen that injurious consequences to the plaintiff were the natural and probable result of their conduct and that this was a question for the jury.

In Lewis v. Woodland et al., 101 Ohio App. 442, 140 N.E.2d 322, plaintiff sought damages for a back injury which occurred while she was a guest in the automobile of the defendant Jones when she jumped with fright after defendant Woodland dropped a life-like rubber lizard in her lap. She alleged that the act of Woodland was the result of a preconceived plan of both defendants to frighten her and cause her to react suddenly and violently. The jury returned a verdict in favor of the plaintiff against both defendants. The court ruled that "the question of forseeability of the consequences of the defendants' perpetration of a joke was properly for consideration by the jury * * *." In the syllabus by the court it is said:

"Where a person's conduct is such as to frighten or cause an emotional disturbance to another, which the former should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely from the internal operation of the fright does not protect the former from liability.

"Once it is shown that a person charged with frightening another should have anticipated that some injury would likely result from his conduct, * * * responsibility attaches for all consequences naturally resulting from the former's conduct * * * although it might not have been specifically contemplated or anticipated."

[4] The defendant in the instant case owed to the plaintiff the duty not to subject her to a fright which, in the exercise of due care or reasonable foresight, she should have known was likely to result in some injury to her. Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625. Restatement of Torts, 1177, Sec. 436; Lewis v. Woodland, supra. The purpose of the box labeled "Danger, African Mongoose, Live Snake Eater" was to produce sudden fright and to cause the affrighted person to recoil violently. The degree of fright generated would depend upon the fortitude of the individual victim.

[5] Had the defendant herself demonstrated the box and sprung the trap which released the fake mongoose, there is no doubt that it would be for the jury to say whether or not she should have reasonably foreseen that some injury might result to the plaintiff from the perpetration of her joke. The question now arises whether the defendant is liable for the act of her eleven-year-old boy who released the furry object which frightened plaintiff into precipitous flight and caused her injury.

[6, 7] North Carolina is in full accord with the common-law rule that the mere relation of parent and child imposes on the parent no liability for the torts of the child. The parent is not liable merely because the child lives at home with him and is under his care and control. Apart from the parent's own negligence, liability exists only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. A parent is liable for the act of his child

if the parent's conduct was such as to render his own negligence a proximate cause of the injury complained of. In such a case the parent's liability is based on the ordinary rules of negligence and not upon the relation of parent and child. 39 Am.Jur., Parent and Child, Sec. 55. Furthermore, "a parent may be liable for the consequences of failure to exercise the power of control which he has over his children, where he knows, or in the exercise of due care should have known, that injury to another is a probable consequence * * *. Failure to restrain the child, it is said, amounts to a sanction of or consent to his acts by the parent * * *. (A)s in all negligence cases, the issue in the last analysis is whether the parent exercised reasonable care under all the circumstances * * *." 39 Am.Jur., Parent and Child, Sec. 58; See also 67 C.J.S. Parent and Child, § 68.

In Lane v. Chatham, 251 N.C. 400, 111 S.E.2d 598, this Court in an opinion by Bobbitt, J. fully considered the liability of parents for the torts of their child. In that case the parents had entrusted their nine-year-old son with an air rifle with which he injured the plaintiff. There was evidence that the mother knew the boy had shot at others before; there was no evidence that the father knew this. In sustaining a verdict against the mother the Court said that a parent was negligent, and therefore liable, if under the circumstances he "could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof."

Defendant in this case set the stage for her children's prank; she aided and abetted it by her answers to the plaintiff's questions about the box. Defendant had seen the box demonstrated and she knew as only the mother of boys aged nine and eleven could know, that unless she took positive steps to prevent it, they would not let such a wary and apprehensive prospect as Mrs. Langford escape without a demonstration. To reach any other conclusion would be to ignore the propensities of little boys who, since the memory of a man runneth not to the contrary, have delighted to stampede timorous ladies with snakes, bugs, lizards, mice and other rewarding small creatures which hold no terror for youngsters. It is implicit in this evidence that defendant expected to enjoy the joke on her neighbor as much as the children, and that she participated in the act with them. To say that she should not have expected one of the boys to spring "the mongoose" on plaintiff would strain credulity.

Defendant contends that the plaintiff, when she came visiting, was a mere licensee, Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717, and that defendant owed plaintiff no duty to keep her premises in a safe and suitable condition for callers. Suffice it to say that plaintiff's injuries did not arise from any defect or condition of the premises. They were not due to passive negligence or acts of omission. Pafford v. J. A. Jones Construction Co., 217 N.C. 730, 9 S.E.2d 408. Plaintiff's status as a licensee is immaterial to the decision of this case.

Taken in the light most favorable to the plaintiff the evidence would permit the jury to find that defendant approved and participated in the practical joke her children played on the plaintiff; that defendant knew plaintiff was afraid of snakes and of the contents of the box which defendant had told her contained a mongoose which ate live snakes; that in the exercise of due care defendant could have reasonably foreseen that if a furry object came hurtling from the box toward plaintiff she would become so frightened that she was likely to do herself some bodily harm in headlong flight. In our opinion, and we so hold, the evidence makes out a case for the jury.

The judgment of the court below is reversed.

Reversed.

has established the requisites for collective action certification.

Accordingly, it is **ORDERED** that the hearing on the defendant's renewed motion to stay the action and compel arbitration, and the plaintiff's motion for conditional certification, is **CANCELLED.**

It is further **ORDERED** that the defendant's renewed motion to stay the action and compel arbitration [dkt. # 61] is **DENIED.**

It is further **ORDERED** that the plaintiff's motion for conditional certification of his Fair Labor Standards Act claim as a collective action [dkt. # 7] is **GRANTED.** The collective action class is defined as all current and former hourly home-based customer care agents who worked for Kelly Services, Inc. or its subsidiaries at any time on or after August 24, 2013.

It is further **ORDERED** that the defendants must furnish to counsel for the plaintiffs the last known post office and email addresses of the potential members of the described class **on or before September 7, 2016.**

It is further **ORDERED** that the plaintiff shall deliver notice promptly to putative class members by United States mail, email, or both. The notice shall state that interested persons may opt in to this litigation **on or before November 7, 2016,** but not thereafter.

It is further **ORDERED** that counsel for the parties appear before the Court for a case management conference on **September 8, 2016 at 3:30 p.m.**

Scott D. GERBER, Plaintiff,

v.

Stephen C. VELTRI, Defendant.

Case No. 3:14 CV 2763

United States District Court,
N.D. Ohio, Western Division.

Signed August 24, 2016

Background: Law professor brought action against another law professor for assault and battery, relating to incident in law school hallway. Bench trial was held.

Holding: The District Court, Jack Zouhary, J., held that defendant's conduct, in touching plaintiff's shoulder, was not harmful or offensive.

Case dismissed.

1. Assault and Battery ⚷2

In Ohio, the tort of "assault" is defined as the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact.

See publication Words and Phrases for other judicial constructions and definitions.

2. Assault and Battery ⚷2

For assault, under Ohio law, the threat or attempt to harm or touch another offensively must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching.

3. Assault and Battery ⚷2

An essential element of the tort of assault under Ohio law is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact.

4. Assault and Battery ⚷2

A person is subject to liability for battery under Ohio law when he acts intending to cause a harmful or offensive contact, and when a harmful contact results, and contact which is offensive to a reasonable sense of personal dignity is offensive contact. Restatement (Second) of Torts §§ 19, 25.

5. Assault and Battery ⚷2

In order that a contact be offensive to a reasonable sense of personal dignity, as element for battery under Ohio law, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity; it must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted. Restatement (Second) of Torts § 19.

6. Assault and Battery ⚷3

Liability for assault under Ohio law requires that the actor actually intend to place another in apprehension of a harmful or offensive contact.

7. Assault and Battery ⚷26

Assuming that Ohio law applied a dual-intent theory under which, to be liable for battery, an actor must both intend to cause physical contact with another person and also intend, by that contact, to either offend the other person or cause the other person bodily harm, plaintiff professor's uncommunicated feeling, that plaintiff had felt for years that defendant professor had personally targeted and bullied plaintiff, did not allow an inference that defendant, who touched plaintiff's shoulder in a hallway in law school in order to direct plaintiff to a nearby faculty lounge in which they could talk about an incident between plaintiff and a law librarian, should have been substantially certain that touching plaintiff's shoulder would be harmful or offensive.

8. Assault and Battery ⚷2

Conduct of defendant professor, in touching the shoulder of plaintiff professor, in law school hallway, in order to direct plaintiff to a nearby faculty lounge in which they could talk about an incident between plaintiff and a law librarian, was not harmful or offensive, as would be required for defendant's liability for battery under Ohio law; it was reasonable for defendant to believe that, despite his strained relationship with plaintiff, plaintiff did not object to such minor physical contact.

9. Assault and Battery ⚷2

Plaintiff professor did not establish that the physical contact was physically harmful, as would provide basis under Ohio law for defendant professor's liability for battery, arising from touching the shoulder of plaintiff in law school hallway, in order to direct plaintiff to a nearby faculty lounge in which they could talk about an incident between plaintiff and a law librarian; examining physician's opinion that the contact exacerbated plaintiff's previously diagnosed degenerative partial tear of rotator cuff was based solely on plaintiff's report, which did not attribute the pain to plaintiff's weightlifting.

10. Assault and Battery ⚷2

Plaintiff professor did not establish that the physical contact was offensive to a reasonable sense of personal dignity, as would provide basis under Ohio law for defendant professor's liability for battery, arising from touching the shoulder of plaintiff in law school hallway, in order to direct plaintiff to a nearby faculty lounge in which they could talk about an incident between plaintiff and a law librarian; psychologist who opined that plaintiff was traumatized first met plaintiff after the encounter with defendant, so psychologist had no benchmark for determining the

effect the incident had on plaintiff's preexisting psyche.

11. Assault and Battery ⇨2

Even if plaintiff professor had feared that defendant professor would punch plaintiff after defendant touched plaintiff's shoulder in law school hallway, defendant was not liable under Ohio law for assault, in absence of any evidence that he intended for plaintiff to fear anything of the sort or that defendant knew of plaintiff's heightened state of apprehension.

Scott D. Gerber, Hampton, VA, pro se.

John J. Alastra, Westerville, OH, Thomas D. Pigott, Law Office of Thomas D. Pigott, Toledo, OH, for Plaintiff.

Terrence G. Stolly, Connor W. Kinsey, Melissa A. Marino, Thompson Dunlap & Heydinger, Bellefontaine, OH, for Defendant.

MEMORANDUM OPINION AND ORDER

JACK ZOUHARY, UNITED STATES DISTRICT JUDGE

Introduction

This is a case seemingly ripped from the pages of a first-year torts exam, with the added twist that the parties are, in real life, law school professors: Plaintiff *pro se* Scott Gerber, a law professor at Ohio Northern University School of Law ("ONU"), accuses his colleague, Defendant Stephen Veltri, of an assault and battery in a law school hallway. The charge: grabbing Gerber's shoulder in a "strong and tight fashion." Veltri admits he "touched" Gerber's shoulder, but merely to direct him to the nearby faculty lounge so the two could speak privately about Gerber's recent confrontation with the law school librarian. After a five-day bench trial and post-trial statements (Docs. 145–146), this Court finds Gerber's story simply doesn't add up.

Background

First, a disclaimer. This Court allowed Gerber substantial leeway in the presentation of evidence out of respect for his *pro se* status. As a result, this Court heard considerable testimony and received myriad exhibits that bore little (if any) relation to whether an assault and battery occurred on October 8, 2012. These topics include—but are not limited to—the awarding of an annual honorary chair by a faculty committee, ONU's grievance process, reviews of ONU by the American Bar Association and the Occupational Health and Safety Administration, allegations of faculty members, other than Veltri, bullying Gerber, and ONU's internal investigation of the alleged assault and battery in the weeks following October 8. A retelling of this exhaustive evidence would be unproductive and carry this Court far afield from the main plot. The facts below represent those this Court finds relevant.

Second, a little history. Gerber began working at ONU in 2001 (Doc. 161 at 70–71). No one disputes Gerber is a prolific publisher who has encouraged others on the faculty to write more (Doc. 159 at 45–46). Veltri has worked at ONU since 1986. In 2012, he served as interim dean of the law school (Doc. 132 at 10). Gerber and Veltri had occasional flare-ups over their decade and a half working together. Veltri raised his voice to Gerber during a 2007 faculty meeting, and then apologized (*id.* at 12–13). Veltri also, in his role as associate dean of academic affairs, asked Gerber to teach Remedies. Gerber initially refused and filed a grievance against Veltri that was dismissed (*id.* at 18–24). In short, the parties agree that, in Veltri's words, "over the years [his and Gerber's] relationship has soured" (*id.* at 27). It is equally clear Gerber's relationship with much of the

ONU law faculty has worsened during his tenure (*see, e.g.*, *id.* at 77; Doc. 133 at 2–3, 37; Doc. 160 at 66–67, 87).

And now, the rest of the story. *See* Federal Civil Rule 52(a).

Findings of Fact

Gerber learned in early September 2012 that one of his research assistants, David McGoron, intended to begin working for law librarian Nancy Armstrong after tying up loose ends on the work McGoron was doing for Gerber (Doc. 160 at 51–52; Tr. Ex. 13). Gerber took issue with this, writing to Armstrong that "[a]s apparently the only member of the law faculty doing much research, it makes little sense to make it more difficult for me to do it" (Tr. Ex. 60 at 1). By way of a solution, Armstrong offered to pay for McGoron's services from her funding allotment while he finished his work for Gerber (Doc. 160 at 52–53; Tr. Ex. 60 at 2). This apparent cease-fire fell apart on October 8, 2012.

That morning, around 11:00 a.m., Gerber headed to Armstrong's office to ask her about McGoron, whom Gerber hadn't heard from in some time. Andrea Alexander, a reference librarian whose desk was near Armstrong's office, observed that Gerber "appeared agitated" as he entered Armstrong's office (Doc. 133 at 7). Armstrong describes Gerber as "very agitated, and he quickly became very angry" as the two discussed McGoron's status, with Gerber claiming he never agreed to a sharing arrangement (Doc. 161 at 51–53). Gerber yelled, according to both Armstrong and Alexander (*id.* at 53; Doc. 133 at 9–10). Armstrong attempted to reach Associate Dean Bryan Ward, but Gerber pressed the phone receiver to block her call (Doc. 161 at 55). Gerber left, and a short time later Ward met with both Gerber and Armstrong in his office, advising he would look into the situation (Doc. 159 at 106; Doc. 160 at 55–57; Doc. 161 at 64–65). Gerber returned to his office for a time before heading to the faculty lounge to have lunch (Doc. 160 at 58–59).

Shortly after Gerber and Armstrong left Ward's office, Veltri stopped by to ask Ward why his office door had been closed (Doc. 159 at 107). Ward related details of the spat between Gerber and Armstrong (Doc. 132 at 35). Veltri was "irritated" by the news, and stopped by Armstrong's office to hear her side of the story (*id.* at 28, 38). As she was not in her office, he spoke to Alexander before returning to his office (*id.* at 38). A short time later, Veltri had a chance encounter with Gerber in the hallway near the faculty lounge (*id.* at 39–40; Doc. 160 at 60, 73).

As Veltri's "intention [was] to talk with [Gerber] in the faculty lounge about what happened," Veltri placed his left hand—his non-dominant hand—on Gerber's right shoulder and suggested "Scott, we need to talk," while directing Gerber toward the faculty lounge with his right hand (Doc. 132 at 44; Doc. 161 at 85). Gerber describes Veltri as "grab[bing] [his] shoulder in a strong and tight fashion" (Doc. 160 at 59). Gerber then loudly told Veltri to remove his hand (Doc. 132 at 45; Doc. 160 at 73).

Gerber suggests Veltri was "berating" him during this time, but his testimony on this point was inconsistent. Gerber recalls little Veltri spoke to him beyond something about harassing staff members (Doc. 160 at 59, 61–62). He also recounts telling Veltri to "take [his] hands off me, and [Veltri] did. Then he turns and starts walking to the Dean's suite" (*id.* at 62). Gerber even disputes that Veltri greeted him with "hello," explaining "[i]t happened quick" (*id.* at 73). These later descriptions actually comport with Veltri's recollection: that he briefly suggested "we need to talk" by placing his hand on Gerber's shoulder only for "[a]s long as it is to put your hand on

someone's shoulder and then saying don't touch me" (Doc. 132 at 47).

Veltri describes Gerber as seeming "strangely offended" by the contact (*id.* at 45). Veltri explains that while Gerber did not expressly consent to being touched, he did not think it inappropriate to touch Gerber's shoulder because "it's implicit when people talk and they put their hand on your shoulder, direct you to a seat, that there's consent" (*id.* at 58–59). Veltri did not intend to harm, offend, or place fear in Gerber (Doc. 161 at 86–87).

Gerber's unexpected reaction made Veltri reconsider his plan to speak with him alone in the faculty lounge. Instead, Veltri asked Ward to join them in Veltri's office to have a discussion (Doc. 132 at 47–48). Veltri attempted to talk to Gerber about his exchange with Armstrong, but had difficulty getting him to "focus on that" (*id.* at 48–49). Though Gerber claims Veltri "continue[d] to berate" him in the office, Ward denies that Veltri yelled at any point during the meeting (Doc. 160 at 62; Doc. 159 at 110). Gerber protested that Veltri wasn't "allowed to grab [him]," and Veltri, according to Gerber, responded "I didn't grab you, I just touched your shoulder" (Doc. 160 at 63). The meeting concluded with Veltri offering to look into the research assistant situation (*id.* at 64).

Gerber and Ward continued to talk in Ward's office, where Gerber demonstrated how Veltri had "hit" him (Doc. 159 at 111). At trial, Ward reenacted what Gerber showed him, describing it as "an open-handed hit, I guess, to the shoulder that was certainly not just a tap but it was not something that was painful" (*id.* at 112). Though Gerber disputes Ward's trial demonstration, claiming it to be more "a grab and a squeeze" (Doc. 160 at 67), Gerber's cross-examination of Ward on this point focused on asking if Ward would "like it if [Ward's] boss did that" to him (Doc. 159 at 119). According to Ward, Gerber did not at any point appear to be in physical pain, though he was visibly upset (Doc. 159 at 112–13, 117).

Gerber then reported the incident to ONU campus security officer Eleanor Laubis (Doc. 133 at 15–16; Doc. 160 at 69–70). He gave Laubis a statement and demonstrated for her a "tight ... powerful squeezing" on a door knob (Doc. 133 at 19–20). Laubis examined Gerber's shoulder and found no signs of swelling, bruising, or trauma (*id.* at 31). Laubis suggested Gerber call the campus hotline or the local police, as campus security does not make charging decisions (*id.* at 22–24). He did call, but the county prosecutor declined to pursue criminal charges (Doc. 159 at 155).

Gerber did not seek medical treatment for his shoulder until October 18, 2013—over a year after his run-in with Veltri and ten days after filing an initial suit in state court (Doc. 160 at 80, 103–04). Gerber explained the circumstances to his treating physician, Dr. Michael Muha, who diagnosed Gerber with a degenerative, partially torn rotator cuff (Doc. 55 at 11). Gerber related to Dr. Muha that he experienced regular shoulder pain dating back to his time as a law student (Doc. 160 at 79–81). Gerber was also an active weightlifter, working out four to six times a week and regularly bench-pressing amounts equal to or exceeding his body weight (*id.* at 119–20).

Dr. Muha concluded—and Gerber does not dispute—that Veltri's contact did not cause Gerber's degenerative rotator cuff tear (Doc. 55 at 24; Doc. 160 at 103). Dr. Robert Anderson, an orthopedic surgeon and Rule 35 expert who examines around twenty shoulder injuries per week, concurred that the contact as described and demonstrated to him could not have caused the tear (Doc. 161 at 16–17, 23; Tr. Ex. 121). Still, Dr. Muha testified it was "very plausible and reasonable" that Vel-

tri's touch caused pain by exacerbating the tear, also freely admitting this conclusion was based solely on Gerber's description, without even a demonstration of the alleged grab:

> [W]e didn't really get into the details of the shoulder—[Gerber] never used the—or the whatever happened to his shoulder, the grab. We—basically I never got into the details of exactly how that happened other than he related that is what brought and provoked the symptoms, and so that's—to me there's no reason to suspect that there's any other reason to do that. . . . I didn't really have any reason to look further than that (Doc. 55 at 16, 20).

Dr. Anderson could not recall a circumstance in his twenty-five years as a surgeon in which a shoulder grab like the one Gerber demonstrated caused or exacerbated pain and suffering related to a partially torn rotator cuff, though Dr. Anderson did admit there could be a temporary increase in pain, which is ultimately subjective (Doc. 161 at 24–25, 48).

Gerber claims he suffered mental anguish in addition to aggravation of his shoulder. Shortly after October 8, 2012, Gerber contacted Dr. William O'Brien, a clinical psychologist with whom he had treated in 2007 (Doc. 159 at 7–8). Dr. O'Brien had no availability, so he referred Gerber to Dr. Carissa Wott, who treated Gerber six times between October 26, 2012 and November 27, 2012 (Doc. 133 at 58–59, 64). As this was Gerber's first visit, Dr. Wott had no basis to compare Gerber's mental state before and after October 8 beyond Gerber's own report (*id.* at 71–72). Dr. Wott diagnosed Gerber with adjustment disorder, mixed anxiety, and depression; based on Gerber's account, she found some of his symptoms to be "long standing" (*id.* at 72). She explains that a person suffering from these conditions "would have more difficulties" coping with situations a reasonable person would be able to handle in everyday life (*id.*). Dr. Wott opines that the October 8 incident aggravated Gerber's anxiety and stress (*id.* at 74).

These mental stressors were nothing new: Dr. O'Brien, who treated Gerber prior to October 2012, worked with Gerber back in 2007 on his feelings of isolation and anxiety, and helped Gerber try to establish coping mechanisms for workplace stressors (Doc. 159 at 15). Father David Young, who regularly counseled Gerber before and after October 2012, recounts that Gerber's "spirits" deteriorated over time, but cannot to say the date in question reflected a noticeable change in Gerber's demeanor (*id.* at 167, 170).

Conclusions of Law

Gerber alleges Veltri's shoulder touch amounted to assault and battery under Ohio tort law. Assault and battery are distinct but closely related causes of action.

[1–3] "[T]he tort of assault is defined as the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact." *Smith v. John Deere Co.*, 83 Ohio App.3d 398, 406, 614 N.E.2d 1148 (1993).

[4, 5] "A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results. Contact which is offensive to a reasonable sense of personal dignity is offensive contact." *Love v. City of Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988) (citing *Restate-*

ment (Second) of Torts §§ 19, 25 (1965)). "In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted." *Restatement (Second) of Torts* § 19.

[6] Intent is an essential element of both torts. Liability for assault requires that the actor actually intend to place another in apprehension of a harmful or offensive contact. *See Smith*, 83 Ohio App.3d at 406, 614 N.E.2d 1148; *see also Restatement (Third) of Torts: Intentional Torts to Persons* § 103 cmt. f (Discussion Draft 2014) ("For assault, the actor must intend to cause another to apprehend that a harmful or offensive contact is imminent. Intent merely to cause another to apprehend that a contact is imminent is not enough.").

Yet the kind of intent required for battery is an open question in Ohio. "There are two main possibilities that courts have taken seriously. The first is single intent: the actor must intend to cause a physical contact with the person of the plaintiff. The second possibility is dual intent: the actor must act with that single intent, but also must intend, by that contact, either to offend the other or to cause the other bodily harm." *Restatement (Third) of Torts* § 101 cmt. f. Ohio has adopted the *Restatement (Second)*'s definition of intent, but courts have found that definition capable of supporting either approach. *See id.* ("[M]ost jurisdictions... purport to follow the *Restatement (Second) of Torts* definition of the required intent.... Unfortunately, this definition itself is ambiguous."). Lower appellate courts have split on this issue in the absence of clear guidance from the Ohio Supreme Court. *Compare, e.g., Feeney v. Eshack*, 129 Ohio App.3d 489, 493, 718 N.E.2d 462 (1998) ("[I]t is not necessary to intend the harmful result; it is sufficient to intend the offensive contact that causes the injury."), *with Tarver v. Calex Corp.*, 125 Ohio App.3d 468, 483–84, 708 N.E.2d 1041 (1998) ("To prove assault and battery under Ohio law, a plaintiff must establish that the defendant unlawfully touched him/her with the intent of inflicting injury or at least creating fear of injury."); *see also Restatement (Third) of Torts* § 101 cmt. f (grouping Ohio among "[j]urisdictions that cannot be categorized as favoring either approach").

[7] Yet, "[i]n most circumstances, the choice between the two rules makes no difference as to the actor's liability." *Restatement (Third) of Torts*§ 101 cmt. f. Such is the case here. Under a dual-intent theory, Gerber presented no evidence from which this Court could infer Veltri intended to cause Gerber harm. Gerber devoted considerable time at trial to framing this incident as the culmination of years of bullying by Veltri and others. But the record does not reflect that Gerber's complaints of feeling personally targeted by Veltri were communicated to Veltri such that Veltri would be substantially certain touching Gerber's shoulder would be harmful or offensive. Veltri intended only to direct Gerber nearby to talk further. This Court credits Veltri's account.

[8] Because Veltri admitted he meant to touch Gerber's shoulder, Gerber advances a little further under the single-intent approach. But not much further, because he has not satisfied the remaining element of battery: namely, that the contact be harmful or offensive. While Veltri acknowledged Gerber did not expressly consent to the touch, he explained that "I did not touch [Gerber] in a way that most people in ordinary life would feel offensive. I think it's implicit when people talk and

they put their hand on your shoulder, direct you to a seat, that there's consent" (Doc. 132 at 58–59). The *Restatement (Third)*, which Gerber urges this Court to follow (Doc. 145 at 10), includes an illustration that closely mirrors Veltri's explanation.

Illustration 11 describes the following scenario: "Ellen taps Roberta on the shoulder in a movie theater, asking Roberta to turn off her cell phone. The tap aggravates a preexisting shoulder injury, causing Roberta bodily harm. Ellen is not subject to liability to Roberta for battery." *Restatement (Third)* § 101 cmt. f. The *Restatement* further explains:

> In this case, Ellen satisfies single intent (because she intends to contact Roberta), but does not satisfy dual intent (because she does not intend to cause harm or offense). Nevertheless, the choice of rule is immaterial, because apparent consent precludes liability: it is reasonable for Ellen to believe that Roberta does not object to the ordinary, minor physical contact of a tap on the shoulder to get her attention. The doctrine of apparent consent significantly limits an actor's potential liability for battery. It applies, of course, even in cases where the plaintiff does not actually consent to the contact intended by the actor.

Simply put, even accepting their strained relationship, "it [was] reasonable for [Veltri] to believe that [Gerber did] not object to the ordinary, minor physical contact" of touching Gerber's shoulder to direct his attention to the faculty lounge. *Id.*

[9] Moreover, the facts here present an even clearer case of no liability, because there is no evidence that the contact was either physically harmful or offensive to a reasonable sense of dignity. While Gerber claims his shoulder hurt following the contact, these complaints of pain are belied by the record. First, campus security officer Eleanor Laubis saw no physical evidence of any injury when she examined him almost immediately following the incident. Second, Gerber waited over a year before seeking medical attention (a date which coincided with the filing of the initial state-court lawsuit). Third, Gerber had previously been diagnosed with a degenerative partial tear of his rotator cuff, which corroborates Gerber's reports of chronic shoulder pain dating back to his student days. Gerber makes much ado out of Dr. Muha's conclusion to a reasonable degree of medical certainty that the contact exacerbated Gerber's torn rotator cuff. But Dr. Muha admits he formed this opinion based *solely* on the medical history as relayed by Gerber. Dr. Muha also allows that Gerber's weightlifting could have caused the pain, but he did not consider it because Gerber "didn't relate that that was what it was" (Doc. 55 at 21). In other words, in the absence of any physical evidence of injury, Dr. Muha relied solely on Gerber's word. In light of the other record evidence, this Court finds that Gerber's word fails to carry his burden to show Veltri's touch caused physical injury.

[10] Nor was the contact offensive to a reasonable sense of personal dignity. Gerber points to Dr. Wott's opinion that Gerber was traumatized by the encounter. While this Court does not doubt the sincerity of Gerber's feelings of isolation and frustration at ONU, Dr. Wott first met Gerber after the incident, and had no benchmark for determining the effect the incident had on Gerber's preexisting psyche. Father Young, who knew Gerber from well before, felt Gerber's spirits deteriorated gradually and did not significantly change around October 2012.

Moreover, Dr. Wott also opines that Gerber had difficulty coping with experiences the way a reasonable person would. "In order that a contact be offensive to a reasonable sense of personal dignity, it

must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted." *Restatement (Second) of Torts* § 19. This Court finds Veltri's contact, a hand on the shoulder, was *not* unwarranted by social usages. Such contact is common not only between friends and colleagues, but also between strangers. This is *not* a case involving an intentional, patently offensive gesture, such as blowing cigar smoke in the face of an anti-smoking advocate. *See Leichtman v. WLW Jacor Commc'ns*, 92 Ohio App. 3d 232, 235 (1994). To the extent Gerber suffered psychic harm from the contact, it is because he was "unduly sensitive." *Restatement (Second) of Torts* § 19. And Gerber fails to show Veltri knew (or had reason to know) Gerber would be unreasonably affected by such contact (*see, e.g.,* Doc. 132 at 45) ("[Gerber] seemed strangely offended.").

[11] Though the foregoing discussion focuses principally on Gerber's claim for battery, his assault claim fails for largely the same reasons. Gerber's claim is *not* that he apprehended the oncoming alleged battery, but that once Veltri made contact with his shoulder, he "thought [Veltri] was going to punch [him]" (Doc. 160 at 71). But the record is devoid of evidence that Veltri intended for Gerber to apprehend anything of the sort. *See Restatement (Third)* § 103 cmt. f ("[D]ual intent is the appropriate requirement for assault."). Veltri denied intending to place Gerber in apprehension of anything, and the record corroborates his account. He took no "definitive act" from which this Court could infer he intended Gerber to apprehend a harmful or offensive contact. *Smith*, 83 Ohio App.3d at 406, 614 N.E.2d 1148. He made no sudden movement toward Gerber. He did not bring his free right hand toward Gerber; in fact, he gestured away, toward the faculty lounge. He did not say anything to Gerber suggesting he intended to physically harm Gerber. And Gerber was already in an agitated state from his earlier confrontation with the law librarian.

Finally, Gerber adduced no evidence that Veltri knew of Gerber's heightened state of apprehension such that he would be offended. The record reflects no history that would have led Veltri to believe with substantial certainty that placing his hand on Gerber's shoulder (and making no aggressive movements) would place Gerber in fear of imminent harm. *See Smith*, 83 Ohio App. 3d at 406, 614 N.E.2d 1148.

Conclusion

An observer at trial could be forgiven for assuming this case is about Gerber's decade-long struggle for appreciation from his colleagues and administrators at ONU. But it is not. The Complaint (Doc. 8 at ¶¶ 24–38), and this trial, concerned simply whether Stephen Veltri assaulted and battered Scott Gerber on October 8, 2012. This Court finds Gerber did not prove his claim by a preponderance of the evidence.

This class, and this case, is dismissed.

IT IS SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

Darrell D. MOORE, Defendant.

CASE NO. 5:15-cr-00030-DAP

United States District Court,
N.D. Ohio, Eastern Division.

Signed August 25, 2016

Background: Defendant pleaded guilty to being a felon in possession of a firearm and ammunition.