

**INTRO TO LAW**

**TORTS**

**FALL 2011**

**Associate Professor  
Priscilla Harris**

**SUPPLEMENT TO INTRO TO LAW-TORTS**

SCHEDULE

SYLLABUS

ASSIGNMENT SHEET

HANDOUT 1: BATTERY

HANDOUT 2: ASSAULT; FALSE IMPRISONMENT

HANDOUT 3: IIED

HANDOUT 4: DEFENSES: Consent; Self-Defense

HANDOUT 5: DEFENSES: Defense of Others, Defense of Dwelling

HANDOUT 6: DEFENSES: Shopkeeper's Privilege; Illegal Acts; Statute of Limitations

**INTRODUCTION TO LAW  
(8/15/2011 – 8/20/2011)**

<b>Monday</b>	<b>Tuesday</b>	<b>Wednesday</b>	<b>Thursday</b>	<b>Friday</b>	<b>Saturday</b>
Registration Appellate Courtroom Foyer 8:00 – 9:00					Exam Appellate Courtroom 8:30 – 12:00
Introductory Session Appellate Courtroom 9:00 – 10:00	Professionalism / Character (Dean Wes Shinn) Appellate Courtroom 9:00 – 10:00	Torts Class (Prof. P. Harris) Appellate Courtroom 9:00 – 11:30	Student Bar Association (Lance McFadden) Appellate Courtroom 9:00 – 9:45	Torts Class (Prof. P. Harris) Appellate Courtroom 9:00 – 11:30	
Torts Class (Prof. P. Harris) Appellate Courtroom 10:00 – 12:00	Torts Class (Prof. P. Harris) Appellate Courtroom 10:00 – 12:00	Lunch (On your own) 11:30 – 1:00	Torts Class (Prof. P. Harris) Appellate Courtroom 10:00 – 12:00	Professionalism / Oath Ceremony (George W. Shanks, Esq., 73 <sup>rd</sup> President of the Virginia State Bar) Appellate Courtroom 11:30 – 12:30	
Lunch (Provided) 12:00 – 1:15	Lunch (On your own) 12:00 – 1:30	Torts Class (Prof. P. Harris) Appellate Courtroom 1:00 – 2:00	Lunch (On your own) 12:00 – 1:30	Reception Lion's Lounge 12:30 – 1:30	
Preparation for Success (Dean Tommy Sangchompuphen) Appellate Courtroom 1:30 – 3:30	Student Services Session (Nancy Pruitt) Appellate Courtroom 1:30 – 2:30	Library Orientation #2 Appellate Courtroom 2:15 – 3:30	Torts Class (Prof. P. Harris) Appellate Courtroom 1:30 – 2:30		
Library Orientation #1 1 <sup>st</sup> Floor of Library 3:30 – 5:30	Preparation for Success (Dean Tommy Sangchompuphen) Appellate Courtroom 2:45 – 4:30	Ice Cream Social Lion's Lounge 3:30 – 5:00	Internet Access Registration & Business Fair Lower Level 3:00 – 5:00		

**INTRO TO LAW**  
**TORTS SECTION SYLLABUS - Fall 2011**  
**Welcome to Law School!**

Associate Professor Priscilla N. Harris

This one-credit class meets the week of August 15, 2010, Monday, Tuesday, Wednesday, Thursday, and Friday at various times in the Appellate Courtroom. The final exam will be on Saturday morning, August 20, 2010 at **8:30am**.

The study of Torts consists of four main areas: (1) intentional torts, also called dignitary and property torts; (2) negligence; (3) strict liability; and (4) products liability. The study of Torts in Intro to Law will focus on the intentional torts. The study of Torts is important for the practice of law as well as for the multi-state bar examination (MBE) which is part of every state's bar exam. (The MBE consists of 200 multiple-choice questions of which approximately 34 are in the area of Torts. Approximately one-half of those 34 questions are in the area of negligence which we will cover later in the semester in Torts.)

**Required Text: Weaver, Bauman, Cross, Klein, Martin, Zweier, *Tort Cases, Problems, and Exercises* (LexisNexis, 2009) ISBN 978-1-4224-7220-0. One copy of the casebook will be placed on reserve in the library.** In addition, I will assign cases found in a supplement. I will also post additional readings on the TWEN site for Torts after Intro is over.

**Recommended Text: Weaver, Martin, Klein, Zwier, Eades, and Bauman, *Mastering Tort Law* (Carolina Academic Press, 2009).**

**Attendance:** I follow the mandatory attendance policy of ASL. I cannot excuse an absence and I cannot give a make-up class. I will take roll every class. Generally, students who attend class score higher not only on their final examinations, but also on their bar examinations.

**Exam:** I will give one exam on the morning of Saturday, August 14th. The exam will be closed-book. It will cover the assigned reading as well as material covered in class. **You MUST obtain your student grading number (SGN) from Student Services PRIOR to the exam.** This class will utilize anonymous grading. Thus, you cannot put your name on your exam but must use your SGN.

**Class Preparation & Participation:** Be prepared to spend several hours a night this week reading and preparing for class. Students should read the assigned material and be prepared to discuss the material in class. I may award some form of points for outstanding class participation and may also deduct some form of points for disruptive behavior and/or lack of preparation. I expect students to be on time and to stay in class unless there are extraordinary circumstances. Coming in late and leaving during class is disruptive to the rest of the class and may affect participation points and may result in the student coming in late "volunteering" to answer questions in class.

**Use of Laptops and other Electronic Devices:** For Intro to Law I will allow the use of laptops. For Torts class I will NOT allow the use of computers or other electronic devices in the classroom. Cell phones must be turned OFF. If your cell phone rings during class or if you use an electronic device, you have just "volunteered" to answer a question and you may have points subtracted from your grade.

**TWEN Site:** I will have a Torts TWEN site established by Thursday. (We will also be using this same site the rest of the semester.) The password will be Atticus. On TWEN, I will post handouts, notices, and assignment sheets. For the Intro to Law week you will have hard copies of any Handouts and the Syllabus. You will need to check DAILY for announcements or changes once it is up and running.

**Intro to Law: Torts – Fall 2011**  
**Assignment Sheet 1**

<b>DATE</b>	<b>TOPIC</b>	<b>READING ASSIGNMENT</b>	<b>OTHER ASSIGNMENT</b>
Mon., Aug 15 (10-12)	Introduction to Torts; Personal Torts: Intent and Battery	<i>Torts Cases</i> , pp.1-9, 13- 23 (skip <i>Brown v. Kendall</i> )	
Tues., Aug 16 (10-12)	Finish Battery; Assault; Transferred Intent	Handout 1*; <i>Tort Cases</i> , pp 23-27	
Wed., Aug. 17 (9-11:30)	Finish Assault and Transferred Intent; False Imprisonment; Intentional Infliction of Emotional Distress ("IIED")	<i>Tort Cases</i> , pp 27-33; 53-62 (skip pp 34-52); Handout 2*	
Wed., Aug. 17 (1:00-2:00)	Finish IIED	Handout 3*	
Thurs., Aug. 18 (10-12)	Defenses: Consent and Self Defense	<i>Tort Cases</i> , pp 63-75; Handout 4*	
Thurs., Aug. 18 (1:30-2:30)	Defenses: Defense of Others; Defense of Property; Defense of Dwelling; Necessity	<i>Tort Cases</i> , pp 75-89; Handout 5*	
Fri., Aug. 19 (9-11:30)	Defenses: Shopkeeper's Privilege; Illegal Act; Statute of Limitations	Handout 6*	
<b>SAT., Aug. 20, 8:30am EXAM</b>	<b>TEST: PERSONAL TORTS</b>		

\* All Handouts are located in the Intro to Torts Supplement.

## **HANDOUT 1**

### **BATTERY**

Single Intent or Dual Intent?

#### ***Wagner v. State, 122 P.3d 599 (Utah 2005)***

WILKINS, Associate Chief Justice:

Tracy and Robert Wagner seek review of the court of appeals' ruling that the trial court properly granted a rule 12(b)(6) motion dismissing their suit against the State. The Wagners' suit, which sought recovery for injuries Mrs. Wagner sustained when a mentally handicapped man attacked her while he was in the custody of state employees, was dismissed at the trial court, and affirmed at the court of appeals, on the ground that the attack constituted a battery, a tort for which the State has retained immunity from suit. The Wagners then petitioned this court for certiorari, which we granted. We now affirm.

### **BACKGROUND**

When reviewing a 12(b)(6) motion, we recite the facts in a light most favorable to the non-moving party, though there is no dispute in this case as to the facts. ....

Tracy Wagner was standing in a customer service line at a K-Mart store in American Fork, Utah, when she was suddenly and inexplicably attacked from behind. The Wagners' alleged that Sam Giese, a mentally disabled patient of the Utah State Development Center ("USDC"), "became violent, took [Mrs. Wagner] by the head and hair, threw her to the ground, and otherwise acted in such a way as to cause serious bodily injury to her."

USDC employees had accompanied Mr. Giese to K-Mart as part of his treatment program and had remained in K-Mart to supervise him. While this particular episode of violence was sudden, it was not altogether unpredictable. Mr. Giese had a history of violent conduct and presented a potential danger to the public if not properly supervised.

Mrs. Wagner and her husband subsequently filed a complaint against USDC and the Utah Department of Human Services, the state agency under which USDC operates, for failing to "properly supervise the activity of" Mr. Giese while he was in its care. Because the defendants to this matter are all governmental entities, they moved to dismiss the complaint under Utah Rule of Civil Procedure 12(b)(6) for failure to state a claim, arguing that Mrs. Wagner's injuries arose out of a battery, a tort for which the government is immune from suit. Thus, under the Governmental Immunity Act, Utah Code Ann. § 63-30-10(2) (Utah 1997) (repealed 2004), the defendants could not be held liable for injuries arising out of the battery here. The district court agreed with the government and dismissed the Wagners' complaint, holding that because Giese initiated a contact with "deliberate" intent, his attack constituted a battery and the government was immune under the statute.

The Wagners appealed the decision to the court of appeals, arguing that the intentional tort of battery requires proof of both an intent to make a contact and an intent to cause harm thereby, and because Mr. Giese was mentally incompetent to formulate the intent to cause harm, his attack could not constitute a battery as a matter of law. The defendants, on the other hand, maintained that a person need only intend to make a harmful or offensive contact in order for that contact to constitute a battery upon another. A person need not intend to cause harm or appreciate that his contact will cause harm so long as he intends to make a contact, and that contact is harmful.

Both parties filed briefs with the court of appeals, but oral argument was not heard on the matter. Instead, the court issued a memorandum opinion affirming the district court's order of dismissal. [Citation

omitted.] The court of appeals reasoned that Mr. Giese's attack on Mrs. Wagner constituted a battery under Utah jurisprudence interpreting the Governmental Immunity Act. [Citation omitted.] The court distinguished the case at bar from the case the Wagners cited in support of their argument, finding that Mr. Giese's attack, unlike the incident involved in the cited case, "creat[ed] a substantial certainty [that] harm" would arise out of the contact. ....

Looking to outside case law as well, the court of appeals found that the decisions reached in other jurisdictions supported its conclusion that the resolution of the issue turned not on whether the perpetrator of the attack intended to cause harm, but rather upon " whether the injury was perpetrated deliberately or accidentally.' " [Citation omitted.] The court of appeals joined the courts of other jurisdictions, both state and federal, in declining to incorporate a requirement that the perpetrator have a certain mental state at the moment of the attack in order for that attack to constitute a battery. The Wagners appealed to this court, and we have jurisdiction pursuant to Utah Code section 78-2-2(3)(a) (2002).

## **STANDARD OF REVIEW**

When reviewing a court of appeals decision affirming a grant of a rule 12(b)(6) motion to dismiss, "we review the decisions of the court of appeals rather than that of the trial court ... for correctness." [Citation omitted.] Because we are reviewing a rule 12(b)(6) motion, we must "accept the material allegations in the complaint as true and interpret those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the non-moving party." [Citation omitted.] We will affirm the court of appeals' dismissal of the case only if, after granting such deference to the Wagners' factual presentation, we still find that they have failed to state a claim upon which relief can be granted. Utah R. Civ. P. 12(b)(6).

[Defendant argued that it was immune from suit under the Utah Governmental Immunity Omitted. The court focused on whether the actions of Mr. Giese constituted a battery.] The State ... argue[s], however, that the third inquiry requires that the suit against the State be dismissed under the Governmental Immunity Act because Mr. Giese's attack constituted a battery, an exception to the waiver of immunity under former section 63-30-10(2).

The Wagners argue that Mr. Giese's attack could not legally constitute a battery because that intentional tort requires the actor to intend harm or offense through his deliberate contact, an intent Mr. Giese was mentally incompetent to form. The State, on the other hand, argues that the only intent required under the statute is simply the intent to make a contact. The contact must be harmful or offensive by law, but the actor need not intend harm so long as he intended contact.

The outcome of this case, then, turns upon which interpretation of the definition of battery is correct. Accordingly, we turn our attention now to the law of battery as defined in the Restatement.

## **II. THE RESTATEMENT DEFINITION OF BATTERY**

While there is some variation among the definitions of the tort of battery, *Prosser and Keeton on the Law of Torts* § 8, at 33-34 (W. Page Keeton et al. eds., 5th ed.1984) (hereinafter Prosser ), Utah has adopted the Second Restatement of Torts to define the elements of this intentional tort, including the element of intent. [Citation omitted.] The Restatement represents a "concept [of the law] consistent with the most common usage in judicial opinions in tort cases." *Prosser, supra*, § 8, at 34. The Restatement reads:

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 or a third person, or an imminent apprehension of such a contact, and

(b) a harmful contact with the person of the other directly or indirectly results.  
Restatement (Second) of Torts § 13 (1965).

The only point of dispute in this case is whether the language of the Restatement requires Mr. Giese to have intended not only to make physical contact with Mrs. Wagner, which the Wagners concede he did, but also to have intended the contact to be harmful or offensive. In other words, is a battery committed only when the actor intends for his contact to harm or offend, or is it sufficient that the actor deliberately make physical contact, which contact is harmful or offensive by law? Determining the answer requires a careful dissection of the elements of battery and the meaning of intent.

We conclude that the plain language of the Restatement, the comments to the Restatement, Prosser and Keeton's exhaustive explanation of the meaning of intent as described in the Restatement, and the majority of case law on the subject in all jurisdictions including Utah, compels us to agree with the State that only intent to make contact is necessary.

In order for a contact to constitute a battery at civil law, two elements must be satisfied. First, the contact must have been deliberate. Second, the contact must have been harmful or offensive at law. We hold that the actor need not intend that his contact be harmful or offensive in order to commit a battery so long as he deliberately made the contact and so long as that contact satisfies our legal test for what is harmful or offensive.

We first address the intent element of battery to explain our holding. Next, we discuss how the limited legal nature of harmful or offensive contact restricts the types of contacts for which actors may be potentially liable.

#### A. *Legal Intent to Commit a Battery*

Prosser described intent as "one of the most often misunderstood legal concepts." *Prosser, supra*, § 8, at 33. Because intent is also "one of the most basic, organizing concepts of legal thinking," *id.*, it is crucial that the term is properly defined and understood. We begin our analysis with the language in the Restatement itself.

The Restatement defines a battery as having occurred where "[an actor] acts intending to cause a harmful or offensive contact." Restatement (Second) of Torts § 13. The comments to the definition of battery refer the reader to the definition of intent in section 8A. *Id.* § 13 cmt. c. Section 8A reads:

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause the *consequences of his act*, or that he believes that the consequences are substantially certain to result from it. *Id.* § 8A (emphasis added).

Although this language might not immediately seem to further inform our analysis, the comments to this section do illustrate the difference between an intentional act and an unintentional one: the existence of intent as to the contact that results from the act. Because much of the confusion surrounding the intent element required in an intentional tort arises from erroneously conflating the act with the consequence intended, we must clarify these basic terms as they are used in our law before we analyze the legal significance of intent as to an act versus intent as to the consequences of that act.

Section 2 of the Restatement (Second) of Torts defines the term "act" as "an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended." *Id.* § 2. To illustrate this point, the comments clarify that when an actor points a pistol at another person and pulls the trigger, the act is the pulling of the trigger. *Id.* at cmt. c. The consequence of that act is the "impingement of the bullet upon the other's person." *Id.* It would be improper to describe the act as "the shooting," since the shooting is actually the conflation of the act with the consequence. For another example, the act that has taken place when one intentionally strikes another with his fist "is only the movement of the actor's hand and not the contact with the other's body immediately established." *Id.* Thus, presuming that the movement was voluntary rather than spastic, whether an actor has committed an intentional or negligent contact with another, and thus a tort sounding in battery or negligence, depends not upon whether he intended to move his hand, but upon whether he intended to make contact thereby.

The example the Restatement sets forth to illustrate this point is that of an actor firing a gun into the Mojave Desert. Restatement (Second of Torts) § 8A cmt. a. In both accidental and intentional shootings, the actor intended to pull the trigger. *Id.* Battery liability, rather than liability sounding in negligence, will attach only when the actor pulled the trigger in order to shoot another person, or knowing that it was substantially likely that pulling the trigger would lead to that result. *Id.* § 8A cmts. a & b. An actor who intentionally fires a bullet, but who does not realize that the bullet would make contact with another person, as when "the bullet hits a person who is present in the desert without the actor's knowledge," is not liable for an intentional tort. *Id.*

A hunter, for example, may intentionally fire his gun in an attempt to shoot a bird, but may accidentally shoot a person whom he had no reason to know was in the vicinity. He intended his act, pulling the trigger, but not the contact between his bullet and the body of another that resulted from that act. Thus, he intended the act but not the consequence. It is the consequential contact with the other person that the actor must either intend or be substantially certain would result, not the act--pulling the trigger--itself. He is therefore not liable for an intentional tort because his intentional act resulted in an unintended contact. On the other hand, the actor is liable for an intentional tort if he pulled the trigger intending that the bullet released thereby would strike someone, or knowing that it was substantially likely to strike someone as a result of his act. *Id.* at cmts. a & b.

Can an actor who acknowledges that he intentionally pulled the trigger, and did so with the intent that the bullet make contact with the person of another, defeat a battery charge if he can show that he did so only as a joke, or did not intend that the contact between the bullet and the body of the person would cause harm or offense to that person? The Wagners argue that such a showing would provide a full defense to a battery charge because the actor lacked the necessary intent to harm.

We agree with the Wagners that not all intentional contacts are actionable as batteries, and that the contact must be harmful or offensive in order to be actionable. We do not agree, however, that, under our civil law, the actor must appreciate that his act is harmful or offensive in order for his contact to constitute a battery. Before we resort to case law to interpret the language and application of our battery law, we can simply turn first to the plain language of the law itself for a clear refutation of the Wagners' theory.

The plain language of the comments makes clear that the only intent required to commit a battery is the intent to make a contact, not an intent to harm, injure, or offend through that contact. Restatement (Second) of Torts § 13. So long as the actor intended the contact, "it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him." *Id.* § 13 cmt. c. The actor will be liable for battery even if he honestly but "erroneously believe[d] that ... the other has, in fact, consented to [the contact]." *Id.* In fact, even a healing contact motivated by a helpful intent, as in an act of medical assistance, is actionable as a battery if the actor did not in fact have permission to make the contact. *Id.*

The linchpin to liability for battery is not a guilty mind, but rather an intent to make a contact the law forbids. The actor need not appreciate that his contact is forbidden; he need only intend the contact, and the contact must, in fact, be forbidden.

The Restatement comments illustrate this principle using two examples. In the first, an actor playing a good-natured practical joke, under the mistaken belief that he has his victim's consent to make the contact, has committed a battery. *Id.* In the second example, the healing contact of a physician, acting with helpful intent but against the patient's wishes, constituted a battery. *Id.* The fact that the procedure preserved the patient's life does not change the result. *Id.*; see, e.g., *Meyers v. Epstein*, 232 F.Supp.2d 192, 198 (S.D.N.Y.2002) (holding that "the only intent necessary to support a claim of battery is simply the intent to make contact" and a physician who did not have specific permission to do so has committed a battery); *Mohr v. Williams*, ...104 N.W. 12, 16 (Minn.1905), overruled *on other grounds by Genzel v. Halvorsen*, ... 80 N.W.2d 854 (Minn.1957) (holding that a physician committed a battery even though he acted with helpful intent because he did not have the patient's consent to perform surgery on her right ear instead of her left); *Mink v. Univ. of Chicago*, 460 F.Supp. 713, 718 (N.D.Ill.1978) (holding for plaintiffs in their negligence action against physicians because "[t]he requisite element of intent is ... met, since the plaintiffs need show only an intent to bring about the contact; an intent to do harm is not essential to the action.").

If a physician who has performed a life-saving act of assistance upon an unconsenting patient with the hope of making that patient whole is liable for battery under the express terms of the Restatement, and a practical joker who makes a contact which he thinks will be taken as a joke or to which he thinks his victim has actually given consent is likewise liable, we cannot then say that other actors must intend harm through their deliberate contact in order to perfect a battery. It is beyond argument that the Restatement itself requires neither a "desire to injure" nor a realization that the contact is injurious or offensive. Restatement (Second) of Torts § 13. Instead, the actor need only intend the contact itself, and that contact must fit the legal definition of harmful or offensive.

Prosser echoed the Restatement when he clarified that "[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do harm. Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." *Prosser, supra*, § 8, at 36. While it may be argued that this statement means that the actor must intend that the contact be forbidden, all ambiguity on the point is eviscerated by Prosser's next comment, in which he lists as one type of intentional tort the act of "intentionally invading the rights of another under a mistaken belief of committing no wrong." *Id.* § 8, at 37.

Though Prosser recognizes that the plaintiff will often recover to the greatest extent "where the [defendant's] motive is a malevolent desire to do harm," he nonetheless ascribes the malevolence to motive, not intent, and labels the less culpable act of innocent invasion of another's rights as an *intentional* invasion. *Id.* These comments only underscore the point repeated throughout both the Restatement and Prosser's analysis that the only intent required is the intent to make a contact to which the recipient has not consented, and the actor need not appreciate that the victim has not consented.

In Prosser's analysis of battery itself, he states that, in order for the contact to constitute a battery, "[t]he act must cause, and must be intended to cause, an unpermitted contact." *Id.* § 9, at 41. In discussing the difference between battery and mere negligence, he focused upon "the risk that contact will result" from the act, not the risk that harm would result from the contact. *Id.* Yet, if battery required an intent to harm or offend, or to realize that the contact was harmful or offensive or otherwise unpermitted, the proper focus of a discussion distinguishing between negligent and intentional conduct would be upon the risk that harm or offense would result from the contact. Instead, the focus was upon whether the contact itself, not the harm resulting therefrom, was intended or resulted from mere inadvertence.

The Wagners' argument that an actor lacks intent to commit a battery where he deliberately makes physical contact that is harmful or offensive so long as he does not realize his contact is harmful or offensive is simply in direct conflict with the commentaries in the Restatement itself and other commentaries on the law. As Prosser states, "a defendant may be liable [for battery] when intending only a joke, or even a compliment, as where an unappreciated kiss is bestowed without consent, or a misguided effort is made to render assistance." *Id.* § 9, 41-42.

The Wagners' theory is also in conflict with the majority of case law on the subject in both federal and state courts, including Utah. [Citations omitted.]. While there is a dearth of case law on this precise subject from Utah state courts, our cases that do touch upon the intent element of battery generally support the majority rule to which we subscribe in this decision.

...

We have also implicitly held that mental capacity is not relevant to a liability determination in other cases involving civil battery. In *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993), the plaintiffs sued Salt Lake County for negligently supervising a mental patient who attacked and repeatedly stabbed their ten-year-old daughter. Though the Higginses did not raise the argument that the attacker's insanity adjudication meant that her attack could not constitute a battery, we found that the battery exception applied. *Id.* at 240. The patient's schizophrenia and marginal intelligence did not persuade us that her actions could not amount to a battery for lack of requisite intent. *Id.* at 241.

... [In the instant case,] we ratify the position taken by the majority of federal and state courts in rejecting the argument that the actor must intend harm or offense through his contact in order for that contact to constitute a battery.

The discussion in *Miele v. United States*, 800 F.2d 50 (2d Cir.1986), is informative on this point. There, the Second Circuit held that the family of a child blinded and disfigured when an insane AWOL soldier attacked him with sulphuric acid was barred by the immunity doctrine from recovering against the government, despite the family's argument that the insane soldier could not form the requisite intent to commit a battery. The court held that the attacker's mental capacity was irrelevant to the question of whether the actor committed a battery for two reasons.

First, the government's fault in the attack "does not change depending upon whether the aggressor was sane or insane at the time." *Id.* at 52. "While an insane employee may or may not be less culpable personally for such attacks, the question of whether the injury was perpetrated deliberately or accidentally does not depend upon the employee's sanity." *Id.* Second, under the common law, "one who suffers from deficient mental capacity is not immune from tort liability solely for that reason." *Id.* at 53, (citing W.L. Prosser, *The Law of Torts* § 135 (4th ed.1971)). The linchpin of an action for battery, then, is simply "the intent to make contact." *Id.* Thus, the Miele's cause of action against the government arose out of a battery, despite the attacker's mental incompetency.

Though the majority rule is not without its critics, "the fact remains that 'courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts.'" .... Individuals such as Mr. Giese are included in this category of liable actors because " 'mental deficiency does not relieve [them] from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.' " .... Indeed, the Restatement provides that, for the sane but mentally deficient, "no allowance is made, and the actor is held to the standard of conduct of a reasonable man who is not mentally deficient, even though it is in fact beyond his capacity to conform to it." Restatement (Second) of Torts § 283B cmt. c.

Otherwise, the law would err on the side of protecting actors who voluntarily make physical contacts with other people, producing injury or offense, from liability for their deliberate action. The result would be that the victims who were subjected to a harmful or offensive physical contact are at the mercy of those who deliberately come into contact with them, and must bear the costs of the injuries inflicted thereby. The practical consequences of such an interpretation would turn the law of our civil liability on its head.

For example, a man who decides to flatter a woman he spots in a crowd with an unpetitioned-for kiss, one of the examples of battery Prosser provides, *Prosser, supra*, § 9, at 41-42, would find no objection under the Wagners' proposed rule so long as his intentional contact was initiated with no intent to injure or offend. He would be held civilly liable for his conduct only if he intended to harm or offend her through his kiss. A woman in such circumstances would not enjoy the presumption of the law in favor of preserving her bodily integrity; instead, her right to be free from physical contact with strangers would depend upon whether she could prove that the stranger hoped to harm or offend her through his contact. So long as he could show that he meant only flattery and the communication of positive feelings towards her in stroking her, kissing her, or hugging her, she must be subjected to it and will find no protection for her bodily integrity in our civil law.

The law would serve to insulate perpetrators of deliberate contact from the consequences their contact inflicts upon their victims. Bodily integrity would be secondary to protecting a perpetrator's right to deliberately touch another person's body without being accountable for the consequences that contact occasioned. The "harmful or offensive" element would, in essence, be viewed from the perspective of the actor, not the objective eye of the law. Under this rule, so long as the actor does not deem his deliberate contact to be harmful or offensive, he may touch others however he wishes without liability under our law of battery. It is clear that the purpose of our civil law on battery was designed to create the opposite incentive. *See, e.g.*, Restatement (Second) of Torts § 283B cmts. b & c.

The objection can be raised that such a theory of liability as we posit today expands liability beyond all reasonable bounds. Perhaps a handshake or other similar gesture will now expose a person to a lawsuit for battery if he happens to unknowingly shake the hand of an unwilling individual. The Restatement, however, and Prosser's analysis thereof, yields this objection wholly without basis.

We must bear in mind that not all physical contacts deliberately initiated constitute batteries, only harmful or offensive ones. Though it is true that the actor need not appreciate that his contact is, nor need he intend it to be, harmful or offensive in order for it to be so and for him to be accountable for the injuries he inflicted by his intentional contact, the contact must in fact be harmful or offensive in order to constitute a battery.

We now explain that the legal test for harmful or offensive contact preserves the Restatement's purpose of protecting the bodily integrity of individuals from invasion while still recognizing the practical realities of our physical world and the inevitable contacts therein. Because "harmful or offensive contact" is determined objectively by the law, only those deliberate contacts that meet the legal test for harmful or offensive will constitute batteries.

## B. Harmful or Offensive Contact at Law

A harmful or offensive contact is simply one to which the recipient of the contact has not consented either directly or by implication. *Prosser, supra*, § 9, at 41-42. Under this definition, harmful or offensive contact is not limited to that which is medically injurious or perpetrated with the intent to cause some form of psychological or physical injury. Instead, it includes all physical contacts that the individual

either expressly communicates are unwanted, or those contacts to which no reasonable person would consent.

What is not included in this definition are the uncommunicated idiosyncratic preferences of individuals not to be touched in ways considered normal and customary in our culture. Instead, the law assumes consent to contacts "according to the usages of decent society," and unless an individual expressly states that he does not want to shake hands, for example, someone who shakes his hand against his silent wishes has not committed a harmful or offensive contact. *Id.* § 9, at 42.

As Prosser notes in his analysis on the subject, "in a crowded world, a certain amount of personal contact is inevitable, and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life." *Id.* Among the contacts Prosser noted as part of this common intercourse were: "a tap on the shoulder," "a friendly grasp of the arm," and "a casual jostling to make a passage." *Id.* Thus, the tort of battery seeks to strike a balance between preserving the bodily integrity of others and recognizing and accommodating the realities of our physical world.

Because the law defines "harmful and offensive" with reference to the mores of polite society, and protects against invasions of bodily integrity perpetrated outside those bounds, whether consent is assumed also depends upon who is making the contact. For example, it seems clear that "the usages of a decent society" and "polite manners" are in nowise offended when a baby reaches out to perform the non-medically injurious act of stroking the hair of a nearby stranger. Such encounters with babies are "customary ... in the course of life." *Id.* § 9, at 42.

Thus, we can include this type of contact from babies in the category of contacts for which we are assumed to have consented. A grown man, on the other hand, perpetrating the same act for equally complimentary reasons, would not enjoy the same privilege, for his behavior would not be considered by reasonable people to be a customary contact in decent society to which members consent.

The Wagners argue that Mr. Giese has the mental age of a small infant, and should be held no more accountable for his acts than a child of his mental age would. We disagree with the Wagners' legal conclusion.

As already explained, the law of torts, and battery in particular, was designed to protect people from unacceptable invasions of bodily integrity. Taking into account the realities of our physical world, and the physical contacts that are not only inevitable, but are part of our cultural customs, there are limits to the physical contacts from which the law will protect us. The law assumes consent as to all regular and culturally acceptable contacts. Certain contacts from very young children fall into this category primarily because most contacts from very young children are not medically injurious given their relative physical weakness and their standing in our society.

Not so with mentally handicapped adults. Even if the adult had the mental capacity of a small child, the difference in size and strength would make any attempt at an analogy between societal consent to a baby's contact and societal consent to attacks at the hand of such an adult wholly unreasonable. Clearly, society has not simply consented to violent contacts from the mentally handicapped. Under the Restatement, as long as a person, mentally handicapped or not, intended to touch the person of another, and the touch was a harmful or offensive one at law, he has committed a battery, and the price of the injuries he inflicted must be paid out of his, or his caretaker's, pockets.

...

It does not matter that Mr. Giese may not have understood that Mrs. Wagner had not consented to the contact because it is not an element of the tort that the actor appreciate that the contact is unwanted. His mental incompetence may insulate him from criminal liability because the mental handicap may negate the mens rea requirement, but the same level of intent is not required for civil liability to attach.

...

The policy behind the Restatement definition of battery is to allow plaintiffs to recover from individuals who have caused them legal harm or injury, and to lay at the feet of the perpetrators the expense of their own conduct. Lawmakers have specifically declined to exempt mentally handicapped or insane individuals from the list of possible perpetrators of this tort for the express reason that they would prefer that the caretakers of such individuals feel heightened responsibility to ensure that their charges do not attack or otherwise injure members of the public.

We recognize that, in this instance, the retained immunity doctrine bars the caretakers of such a handicapped person from taking responsibility for the conduct of their charge. It is unfortunate, and perhaps it is improvident of the State to retain immunity in this area. But it is not our role as a judiciary to override the legislature in this matter; it is for us only to interpret and apply the law as it is. We will not limit the recoveries of all other plaintiffs similarly injured by defining the tort of battery in such a way as to make it far more burdensome for plaintiffs to satisfy its elements and recover, nor will we distort the plain language of the Restatement so as to elevate an actor's "right" to deliberately touch others at will over an individual's right to the preservation of her bodily integrity.

## **CONCLUSION**

Applying the rule we have laid out today to the facts of this case, it is clear that Mr. Giese's attack constituted a battery upon Mrs. Wagner. There is no allegation that his action was the result of an involuntary muscular movement or spasm. Further, the Wagners concede that Mr. Giese affirmatively attacked her; they do not argue that he made muscular movements that inadvertently or accidentally brought him into contact with her.

The fact that the Wagners allege that Mr. Giese could not have intended to harm her, or understood that his attack would inflict injury or offense, is not relevant to the analysis of whether a battery occurred. So long as he intended to make that contact, and so long as that contact was one to which Mrs. Wagner had not given her consent, either expressly or by implication, he committed a battery. Because battery is a tort for which the State has retained immunity, we affirm the court of appeals' decision to dismiss the case for failure to state a claim.

## **HANDOUT 2**

### **ASSAULT, TRANSFERRED INTENT; FALSE IMPRISONMENT**

#### **Assault**

#### ***Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008)**

DICKSON, Justice.

This is an appeal by defendant Daniel Raess, M.D., a cardiovascular surgeon, challenging a \$325,000 jury verdict and judgment on a claim for assault brought by plaintiff Joseph Doescher, a hospital operating room perfusionist (the person who operates the heart/lung machine during open heart surgeries). The Court of Appeals reversed and remanded for a new trial. .... We granted transfer and now affirm the judgment of the trial court. [Footnote omitted.]

Appealing the verdict and judgment, the defendant challenges the trial court's denials of (a) his motion for judgment on the evidence challenging the sufficiency of evidence to support the jury's finding of assault, (b) his request to set aside or reduce the award of compensatory damages as excessive, (c) his objections to testimony from the plaintiff's expert witness, (d) his objections to the plaintiff's testimony regarding the doctor's prior offensive conduct, and (e) his tendered instruction on workplace bullying.

In his action against the defendant surgeon, the plaintiff perfusionist sought compensatory and punitive damages for assault, intentional infliction of emotional distress, and tortious interference with employment following a verbal altercation adjacent to the open-heart surgery area at St. Francis Hospital in Beech Grove, Indiana. The trial court granted the defendant's motion for partial summary judgment as to the claims for tortious interference. The jury thereafter returned a verdict in favor of the defendant on the claim for intentional infliction of emotional distress but found for the plaintiff on his assault claim and awarded compensatory but not punitive damages.

#### **1. Denial of Judgment on the Evidence**

The defendant challenges the trial court's denial of his motion for judgment on the evidence incorporated in his motion to correct errors. He alternatively argues (a) that there was no evidence to support liability for assault and seeks entry of judgment in his favor, and (b) that the \$325,000 verdict was unsupported or excessive.

A motion for judgment on the evidence should be granted “only when there is a complete failure of proof because there is no substantial evidence or reasonable inference supporting an essential element of the claim.” .... Upon appellate review of a trial court ruling on such a motion, the reviewing court “must consider only the evidence and reasonable inferences most favorable to the nonmoving party.” ....

The defendant first argues that there was no evidence to establish the following: (a) that an assault occurred, (b) that he acted with the requisite intent, or (c) that the plaintiff's reaction was reasonable. The elements of assault were explained to the jury in Instruction 10C, to which neither party objected.

To establish assault, Mr. Doescher [the plaintiff] must prove, by a preponderance of the evidence, that Dr. Raess acted in such a manner that Mr. Doescher was in reasonable fear of imminent harm at the time when Dr. Raess had the ability to inflict harm. No physical contact had to occur so long as Mr. Doescher was reasonably afraid that such contact would occur. If you find from the evidence that Dr. Raess committed an assault upon Mr. Doescher, then Dr. Raess is liable for damages caused by the assault.

Appellant's App'x at 515. Assault is effectuated when one acts intending to cause an imminent apprehension of a harmful or offensive contact with another person. *Cullison v. Medley*, 570 N.E.2d 27,

30 (Ind.1991). As we have explained, “Any act of such a nature as to excite an apprehension of a battery may constitute an assault. It is an assault to shake a fist under another’s nose, ....” *Id.*, quoting W. Prosser & J. Keaton, *Prosser and Keaton on Torts* § 10 (5th ed.1984).

Considering, as we must, only the evidence and inferences favorable to the non-moving party, we find testimony from the plaintiff that the defendant, angry at the plaintiff about reports to the hospital administration about the defendant’s treatment of other perfusionists, aggressively and rapidly advanced on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him. The plaintiff backed up against a wall and put his hands up, believing that the defendant was going to hit him, “[t]hat he was going to smack the s\* \*t out of me or do something.” Tr. at 484. Then the defendant suddenly stopped, turned, and stormed past the plaintiff and left the room, momentarily stopping to declare to the plaintiff “you’re finished, you’re history.” *Id.* at 485. In light of this evidence, there has not been a complete failure of proof. To the contrary, there is substantial evidence or reasonable inferences to support the jury’s conclusions that an assault occurred, that the defendant acted with the requisite intent, and that the plaintiff’s reaction was reasonable.

## 2. Claim of Excessive Damages

The defendant next contends that the trial court erred in failing either to set aside the jury’s award of \$325,000 in compensatory damages or to grant a remittitur dramatically reducing the award to a nominal amount. He argues that compensatory damages for the assault are precluded because the jury found him not liable on the plaintiff’s count for intentional infliction of emotional distress, and because the trial court granted him summary judgment on the plaintiff’s claim for intentional interference with his employment arrangement with the hospital. The defendant also asserts a claim of insufficient evidence of damages resulting from the assault. The defendant argues that the plaintiff could have returned to work the Monday following the parties’ confrontation, that he was already suffering from psychological problems at the time, and that his failure to return to work was due to “his own stubborn pride” and not “because he was afraid” of the defendant.

Jury damage awards are entitled to great deference from appellate courts. .... A damage award will not be reversed if it “falls within the bounds of the evidence.” .... We “look only to the evidence and inferences therefrom which support the jury’s verdict,” and will affirm it “if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting ....” ....

We first disagree with the defendant’s claims that compensatory damages for the assault are precluded due to the defeat of the plaintiff’s counts for intentional infliction of emotional distress and intentional interference with the employment relationship. The defendant sought partial summary judgment asserting the absence of genuine issues of fact that would show the defendant intended to interfere with the relationship or that would show the plaintiff’s hospital employment was impaired as a result of the alleged interference. The trial court’s grant of the motion did not identify the grounds for its decision, but if granted for either of the reasons espoused by the defendant, it would not foreclose the plaintiff from recovering damages resulting from the defendant’s assault. Nor are compensatory damages for the assault precluded by the fact that the jury returned a verdict for the defendant on the plaintiff’s claim for intentional infliction of emotional distress. The jury’s general verdict on this count does not establish that it was based on the absence of damages but could have resulted from the failure of proof of the requisite elements of the separate tort of intentional infliction of emotional distress.

As to the defendant’s claim of insufficient evidence to support the jury’s damage award, the evidence is conflicting. In contrast with the evidence emphasized by the defendant to support this claim, the plaintiff testified that the assault detrimentally affected his life in a variety of ways, including his career and earning capacity and his ability to interact with his wife, his family, and people in general. Evidence was presented that, as of the time of the trial, the plaintiff could not return to his work as a

perfusionist because of the resulting emotional response, lack of focus, lack of confidence, and inability to make split-second decisions. The plaintiff presented psychiatric testimony that his confrontation with the defendant was the cause of the plaintiff's resulting "major depressive disorder with anxiety and panic disorder," because of which he was unable to return to his previous employment. Tr. at 771-73, 775. While the defendant points to other evidence to dispute these claims, in reviewing a jury verdict, our duty is clear: "[I]f there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed."..... We decline to disturb the jury's award of damages in this case.

[Discussion of challenges to expert testimony and jury instructions omitted.]

#### Conclusion

The trial court judgment entered on the jury verdict is affirmed.

## Reasonable Apprehension

*Bassi v. Patten*, 2008 WL 4876326 (D.D.C., Nov. 12, 2008)

JOHN D. BATES, District Judge.

This case arises from a physical altercation at a bar known as Smith Point where plaintiff Neill Bassi worked as a doorman. Before the Court is defendant Casey Patten's motion for summary judgment as to Bassi's two claims against him—assault (Count Five) and battery (Count Six). The issues presented are whether Bassi has, at this stage, presented sufficient evidence to proceed to trial on his claims that Casey Patten assaulted him, based on a theory of transferred intent, and aided and abetted the subsequent physical attack on Bassi by Jarrod Patten.

Casey Patten contends that he is entitled to summary judgment on the assault claim because the evidence establishes that Bassi was five or six feet away when Casey Patten allegedly threw punches at another doorman, Michael Hill—too far away to put Bassi in apprehension of an imminent harmful or offensive contact. See Def.'s Mem. at 3-4 & Bassi Depo. at 55 (Feb. 27, 2008). Upon review of the evidence submitted, the Court concludes that a reasonable trier of fact could conclude that Casey Patten's attack on Hill placed Bassi in “apprehension of an imminent harmful or offensive contact,” thus supporting Bassi's claim of assault. See *Person v. Children's Hosp. Nat'l Med. Ctr.*, 562 A.2d 648, 650 (D.C.1989). Bassi has presented evidence that Casey Patten was “increasingly hostile” towards Bassi for refusing him and his brother admittance to Smith Point, that Casey Patten punched Hill five or six feet from Bassi moments thereafter, and that a woman standing nearby was struck by Casey Patten's second punch at Hill. See Bassi Depo. at 8-9 (Mar. 18, 2008). Whether Bassi's distance from Casey Patten should, under these circumstances, undermine Bassi's contention that he felt apprehension of imminent harm presents a factual issue to be decided by the jury. ....

[Discussion of aiding and abetting omitted.]

For the foregoing reasons, it is hereby

ORDERED that defendant Casey Patten's motion for summary judgment is DENIED.

## More on Transferred Intent

### *Baska v. Scherzer*, 156 P.3d 617 (Kan. 2007) Syllabus by the Court

1. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.
2. Where the facts are undisputed, appellate review of an order granting summary judgment is de novo.
3. K.S.A. 60-514(b) provides that civil actions for assault and battery must be initiated within 1 year of the date of the incident giving rise to the action. Under K.S.A. 60-513(a)(4), negligence claims must be brought within 2 years.
4. The Restatement explains that the term “intent,” as it is used in the law of torts, “denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Restatement (Second) of Torts § 8A (1964).
5. It is not necessary, to constitute an assault and battery, that there be a specific intention of striking or otherwise injuring the plaintiff. If a defendant unlawfully aims at one person and hits another, under the doctrine of transferred intent the defendant is guilty of assault and battery on the person hit, the injury being the direct, natural, and probable consequence of the wrongful act. Thus, if one of two persons fighting unintentionally strikes a third, the person so striking is liable in an action by the third person for an assault and battery.
6. The record is reviewed and in this case where the plaintiff intervened by stepping between two defendants fighting one another and was “unintentionally” struck by punches intended for the defendants, the doctrine of transferred intent, which has long been recognized in this State, applies. The fact that the defendants unintentionally struck the plaintiff does not change the fact that their actions (punching) were intentional. Moreover, the fact that plaintiff’s petition describes her claims against the defendants as actions for negligence does not alter the nature of the plaintiff’s claims, which the law recognizes as claims for intentional torts of assault and battery.

....

Celesta Baska brought an action for personal injuries sustained when she attempted to stop a fight by stepping between the defendants, Harry Scherzer, Jr., and Calvin Madrigal. Her action was brought after the expiration of a year from her injury but within 2 years from the date of her injury. After some discovery, the trial court granted the defendants’ motions for summary judgment and dismissed Baska’s action based upon its conclusion that her action was governed by the 1-year statute of limitations for assault and battery, K.S.A. 60-514(b). The Court of Appeals reversed, holding that Baska’s action sounded in negligence, and thus was subject to the 2-year statute of limitations under K.S.A. 60-513(a)(4), primarily because she was unintentionally struck by defendants. We granted the defendants’ petitions for review, and now we reverse the decision of the Court of Appeals and affirm the district court.

## Facts

Baska had given her daughter Ashley, a high school senior, permission to organize a “scavenger hunt” with some friends. The scavenger hunt began at the Baskas' house around 8:30 p.m. and was to end with the participants returning to the house by midnight. When people returned, a number of them remained at the Baskas' home for a “party.”

Scherzer and Madrigal were both at the party. Madrigal had participated in the scavenger hunt; Scherzer remained at the house while the hunt ensued, playing cards with Baska. He then went outside as people began to return to the house.

Around midnight, an altercation broke out between Scherzer and Madrigal. Madrigal approached Scherzer from behind, and the two boys began to push each other and throw punches at one another. Upon being informed of the fight by one of her daughter's friends, Baska yelled at the boys to stop in order to break up the fight. When they continued to fight, Baska placed herself between the boys and was punched in the face, losing several teeth and receiving injuries to her neck and jaw. Baska is certain that Scherzer hit her in the face; she also believes that Madrigal punched her in the back of the head.

On April 8, 2004, just short of 2 years after the incident, Baska filed suit against Madrigal and Scherzer, alleging that she was injured by the defendants' negligence. In her petition she alleged:

“5. That the defendants, in their excitement and totally unintentionally, struck the plaintiff with powerful blows intended for the other participant in the fight.

“6. That the sole and proximate cause of plaintiff's injuries was the negligence and carelessness of the defendants.”

Both defendants filed motions to dismiss based on the statute of limitations, alleging that the suit was barred by the 1-year statute of limitations for assault and battery, K.S.A. 60-514(b). The district court originally granted the motions; however, the court later granted Baska's motion to reconsider and allowed the parties to pursue additional discovery.

Depositions were taken of Baska, Madrigal, and Scherzer. Both Madrigal and Scherzer testified in their depositions that they did not intend to strike or injure Baska in any way. Instead, each defendant testified that it was his intention in throwing the punches to strike and injure the other defendant. In her deposition, Baska's counsel asked her whether she “would anticipate that the intended recipient of [Scherzer's] blow was Mr. Madrigal and not [herself].” Baska answered, “Yes, sir.”

After depositions, Madrigal and Scherzer filed motions for summary judgment again based on the 1-year statute of limitations for assault and battery. In its decision after conducting a hearing, the court concluded that the doctrine of transferred intent applied and that Baska's cause of action was an action for assault and battery, not negligence. The court explained:

“Well, the plaintiff's theory, as I understand it, is that in trying to break up this altercation that she was injured by the negligent acts of the two participants who were defending themselves, each of them claiming self defense, and in a negligent manner.

“The depositions of both of the combatants having been taken now, it appears to me that they were striking at each other. Those are intentional acts. The doctrine of transferred intent has been the law in Kansas probably since this place became a state because I think it came straight out of the common law, and it's certainly been the law since I was in law school 30 years ago.

“I don't see anything in [the plaintiff's] citations ... that the State of Kansas has gone away from that. So I think that in each of these two cases, each-as to each defendant, motion for summary judgment must be granted on the basis that these are intentional acts and the doctrine transferred intent would apply, and they should have been filed within the one year of statute of limitations.”

#### Court of Appeals

The Court of Appeals reversed in an unpublished opinion, *Baska v. Scherzer*, Case No. 94,879, 2006 WL 2265106, filed August 4, 2006. Although the court did not dispute the district court's statement of the facts, it disagreed with the district court's conclusion. The Court of Appeals noted that “[t]he key distinction between assault and battery on one hand, and negligence on the other, is that assault and battery are both intentional torts and negligence is unintentional. [Citation omitted.]” Slip op. at 5. The court ultimately held that the plaintiff's action in this case sounded in negligence, because the plaintiff was “unintentionally struck” by the defendants. Slip op. at 14.

The Court of Appeals reviewed a number of Kansas decisions as well as a number of cases from other jurisdictions concluding that “the law on this issue is unclear.” .... The court noted that “*Laurent, Byrum, and Hackenberger* tend to suggest that Baska's only cause of action is assault and battery because Madrigal and Scherzer acted intentionally.” .... Nevertheless, it noted that “[a]lthough these cases have not been overruled, they appear inconsistent with *Vetter* and the dicta in *Harris*.” .... In light of these inconsistencies, the court explained its synthesis of these decisions as follows:

“The law on this issue appears to have shifted from the earlier position that an intentional act of violence, which has an unintentional effect on a third party, must be viewed as assault and battery for purposes of application of the statute of limitations....

....

“If we can take guidance from these cases, it appears that a specific intent to perform a certain act, such as shooting someone, even if there is a mistaken identity, will generally lead to a finding that the 1-year limitation on assault and battery is applied.

“However, threatening actions which lead to unanticipated results may well be viewed as negligence as long as the plaintiff is not purposefully and intentionally struck by the defendant.

“We have a blending in this case, where Baska was probably unintentionally struck during a fight between Scherzer and Madrigal. Although the law may not be clear, we find the rationale in *Vetter* should be used. We, therefore, reverse the district court's finding that the 1-year statute of limitations applied and remand for further proceedings.” Slip op. at 13-15.

Both defendants, Madrigal and Scherzer, filed petitions for review, claiming that the Court of Appeals misstated the applicable law. In particular, the defendants argue that the Court of Appeals, without any discussion thereof, eviscerated the doctrine of transferred intent by holding a negligence tort action lies for an assault and battery when the injured party is not the intended victim.

The sole issue we must resolve is whether plaintiff's action is governed by the 1-year statute of limitations for assault and battery under K.S.A. 60-514(b) or by the 2-year statute of limitations for negligence under K.S.A. 60-513(a)(4). The facts are not in dispute, and the answer to this question is one of law.

## Standard of Review

Baska appeals from the district court's grant of summary judgment on the basis that she filed her claim after the 1-year statute of limitations for assault and battery had run.

“Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.” ....

Where the facts are undisputed, appellate review of an order granting summary judgment is de novo. ....

## Discussion and Analysis

While the plaintiff alleges negligence in her petition, calling for the application of a 2-year statute of limitations, this court is not bound by the claims as set forth in the petition. Instead, “ [t]he law of this state is realistic. Substance prevails over form.” .... The determinative question is whether the substance of plaintiff's claims against the defendants sounds in assault and battery or negligence.

K.S.A. 60-514(b) provides that civil actions for assault and battery must be initiated within 1 year of the date of the incident giving rise to the action. Under K.S.A. 60-513(a)(4), negligence claims must be brought within 2 years. The fight between defendants that resulted in the plaintiff's injuries occurred on April 13, 2002. Baska filed her action on April 8, 2004. The outcome of this case depends upon whether Baska's claims are in substance based upon intentional or negligent actions of the defendants. If intentional, Baska's claims are barred by the 1-year statute of limitations; if negligent, her claims are not barred and are governed by the 2-year statute of limitations.

Assault is defined in this state as “an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm. No bodily contact is necessary.” .... Battery is defined as “the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact or an apprehension of contact, that is harmful or offensive.” .... The gravamen of a civil assault and battery is grounded upon the actor's intention to inflict injury. ....

In order to state a claim for negligence, a plaintiff must show “ ‘(1) [t]he existence of a duty on the part of defendant to protect plaintiff from the injury; (2) failure of defendant to perform that duty; and (3) injury to plaintiff from such failure of defendant.’ .... Put another way, “ ‘ “[n]egligence is an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred.’ ” ’ ” ....

As these definitions make clear, “the fundamental distinction between assault and battery, on the one hand, and negligence, on the other, is that the former is intentional and the latter is unintentional. .... The district court held that Baska's cause of action was truly one for assault and battery because the defendants intended to strike one another when they were fighting. The Court of Appeals, however, found that where Baska was “unintentionally struck” by the defendants, her cause of action sounded in negligence. Baska, slip op. at 15. The defendants intended to harm each other, but as Baska claims in her

petition, “the defendants, in their excitement and totally unintentionally, struck the plaintiff with powerful blows intended for the other participant in the fight.” ....

The above situation is not unfamiliar in the law of intentional torts. The Restatement (Second) of Torts and this court's decisions discuss this situation as being contemplated by the long-standing doctrine of transferred intent. The Restatement explains that the term “intent,” as it is used in the law of torts, “denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Restatement (Second) of Torts § 8A (1964). The comments to this section state that

“[a]ll consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness.... As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence....” Restatement (Second) of Torts § 8A, comment b.

This court has similarly explained that an actor will be held liable for an intentional tort if the plaintiff's injuries were the “natural and probable consequence of [the defendant's] intended actions.” .... However, an action need not be directed at the plaintiff in order to give rise to liability for intentional torts (such as assault or battery). Rather, the doctrine of transferred intent states that “[t]he tort of battery or of assault and battery may be committed, although the person struck or hit by the defendant is not the one whom he intended to strike or hit.” ....

The comments to the Restatement (Second) of Torts, in describing the intent necessary for battery, explain:

“The intention which is necessary to make the actor liable [for civil battery] is not necessarily an intention to cause a harmful or offensive contact or an apprehension of such contact to the plaintiff himself or otherwise to cause him bodily harm. It is enough that the actor intends to produce such an effect upon some other person and that his act so intended is the legal cause of a harmful contact to the other. It is not necessary that the actor know or have reason even to suspect that the other is in the vicinity of the third person whom the actor intends to affect and, therefore, that he should recognize that his act, though directed against the third person, involves a risk of causing bodily harm to the other so that the act would be negligent toward him.” (Emphasis added.) Restatement (Second) of Torts § 16, comment b (1964).

Similarly, the comments to the section describing the intent required to state an action for assault state that “[i]n order to become liable [for civil assault], it is necessary that the actor intend to inflict a harmful or offensive bodily contact upon the other or a third person or put him [her] in apprehension of such contact.” .... Restatement (Second) of Torts § 21 comment f (1964).

This court's recognition of the transferred intent principle dates to *Laurent*, ... which was decided during the Civil War. In that case, the plaintiff sued the defendant in negligence, alleging that he had been injured when the defendant negligently shot him. This court determined that the plaintiff's claim was barred by the 1-year statute of limitations for battery, because the action described (shooting someone) was a battery. .... The court cited a New York decision in *Bullock v. Babcock*, 3 Wend. 391 (1829), and referred to “several English authorities” that supported its conclusion that “the wounding charged in the

case under consideration may properly be described as a battery, and the case, therefore, comes within the provisions ... limiting the time for commencing action to one year.” ....

This conclusion was reiterated in *Byrum*, 66 Kan. 96, 71 P. 250. There, both the plaintiff and an undersheriff were searching for the perpetrator of a robbery in Oswego. When the two searchers met, each mistakenly thought the other was the robber. Both fired shots, and the undersheriff's shot hit the plaintiff. The plaintiff then sued the sheriff “to recover damages for the injuries sustained because of the negligent shooting of him by his under-sheriff.” .... In a very short opinion, this court cited *Laurent* and held that the action was barred by the 1-year statute of limitations. .... This court later summarized its opinion in *Byrum* as follows: “It is well to note the shooting in the *Byrum* case was in fact intentional. The undersheriff intended to shoot and he did shoot. True, the injured party was not the robber as the undersheriff thought, but the act of shooting was nevertheless intentional.” ....

These two early opinions were discussed in detail by this court in *Hackenberger*, wherein the plaintiff was a passenger in the back of a truck and was sitting with his legs over the side. A cattle truck coming the other direction was passing another car as it was speeding around a curve; the cattle truck crowded the plaintiff's truck off of the highway and came into contact with the plaintiff's legs, causing him injury. The plaintiff filed suit in negligence. The defendant, however, claimed that the petition actually stated an action for battery and thus was barred by the 1-year statute of limitations. Citing *Laurent* and *Byrum*, this court clarified that had the driver of the cattle truck intended to hit the truck on which the plaintiff was riding, the action should have been dismissed. .... However, because “[t]he petition is not susceptible of an interpretation that [the driver of the cattle truck] intentionally inflicted the injury,” the court held that the 2-year limitations period for negligence should be applied. ....

Although the court did not explicitly state that it was applying the doctrine of transferred intent in these early decisions, the outcome of the cases is consistent with the present understanding of transferred intent in tort cases. In *Byrum*, the officer intended to shoot the robber and mistakenly shot and injured the plaintiff. The court found that the officer's action was intentional and that the 1-year statute of limitations for assault and battery applied. In *Hackenberger*, the driver of the cattle truck never intended to drive the truck carrying the plaintiff off of the road or to hit anyone. When the truck hit the plaintiff's legs, the plaintiff's action sounded in negligence, and the 2-year statute of limitations was proper.

The Court of Appeals correctly concluded that *Laurent*, *Byrum*, and *Hackenberger* suggested that Baska's only cause of action was for assault and battery based upon defendants' intentional acts. Slip op. at 12. However, the Court of Appeals concluded that it was not bound to follow these earlier decisions in light of “dicta” in *Harris* and the decision of the Kansas Court of Appeals in *Vetter*. These two decisions are discussed below, but it must be noted that the Court of Appeals did not discuss the doctrine of transfer in its opinion, a doctrine implicitly applied in Kansas civil law and explicitly applied in criminal law....

[Discussion of language in *Harris* omitted.]

.... Defendants Madrigal and Scherzer engaged in a fight, intending to harm one another. As the comment to the Restatement explains: “All consequences which the actor desires to bring about are intended.” Restatement (Second) of Torts § 8A, comment b. .... Defendants Madrigal and Scherzer intended to punch someone (the other defendant) and did punch someone (the plaintiff). Although their actions were not specifically directed at the plaintiff, their punches were intentional acts and did injure Baska.

The exact scenario presented in this case was described in the *Corpus Juris Secundum* as a “text book” example of transferred intent:

“It is not necessary, to constitute an assault and battery, that there be a specific intention of striking or otherwise injuring plaintiff. If defendant unlawfully aims at one person and hits another, [under the doctrine of transferred intent] he is guilty of assault and battery on the person hit, the injury being the direct, natural, and probable consequence of the wrongful act. So, if one of two persons fighting unintentionally strikes a third, the person so striking is liable in an action by the third person for an assault and battery.’ ”....

The decision of the Court of Appeals in this case holds that for a tort to be considered intentional, it must cause injury to the person at whom it was directed. In other words, a defendant must have a specific intent to commit the battery on the plaintiff to be liable to the plaintiff for battery; otherwise the defendant may be liable to the plaintiff in negligence. Its decision is contrary to the law of Kansas expressed in *Laurent, Byrum, and Hackenberger*, and to the provisions regarding transferred intent included in the Restatement (Second) of Torts and other authorities.

The defendants' acts of throwing punches in this case were intentional actions. Each defendant intended to strike at the other in order to cause harm. The defendants intended to punch, and they did punch. The fact that the punches in question hit the plaintiff rather than the defendants is immaterial to the analysis. Because the defendants' actions were intentional, the “substance” of Baska's action is one for assault and battery. Failure to initiate her action within 1 year of the fight bars her action by reason of the 1-year statute of limitations in K.S.A. 60-514(b).

....

A similar pleading question was considered by the Ohio Supreme Court in *Love v. Port Clinton*, 37 Ohio St.3d 98, 524 N.E.2d 166 (1988). There, Love was arrested and handcuffed by Hickman, a Port Clinton police officer. Love later sued the city, claiming that Hickman used improper police procedures and injured him. The trial court granted Hickman's motion to dismiss based on the fact that Ohio's 1-year statute of limitations for assault and battery had run. The Ohio Court of Appeals reversed, finding that “further development of the facts could show that Hickman acted negligently in handcuffing Love. If such could be shown, ... plaintiff should have received the benefit of the two-year statute of limitations for personal injury.” ....

The Ohio Supreme Court reversed, holding that “‘courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial.’” .... The court found that “the specific acts of Officer Hickman-‘subduing’ and ‘handcuffing’-are acts of intentional contact which, unless privileged, constitute a battery.” .... “Love's complaint against Hickman alleges, in substance, an action in battery and is barred by the one-year statute of limitations.” .... The court explained:

“Where the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence. To hold otherwise would defeat the assault and battery statute of limitations. Nearly any assault and battery can be pled as a claim in negligence.... ‘[T]hrough clever pleading or by utilizing another theory of law, the assault and battery cannot be [transformed] into another type of action subject to a longer statute of limitations as it would circumvent the statute of limitations for assault and battery to allow that to be done.’ ” ....

## Conclusion

The undisputed facts in this case show that the defendants intended to strike and cause harm to one another. When Baska intervened and stepped between the two boys, she was “unintentionally” struck by punches intended for the defendants. Had the defendants struck each other and brought suit, they

would be liable to one another for assault and battery. Under the doctrine of transferred intent, which has long been recognized in this state, the fact that the defendants struck the plaintiff does not change the fact that their actions (punching) were intentional. Moreover, the fact that Baska's petition describes her claims against the defendants as actions for negligence does not alter the nature of those claims, which the law recognizes as claims for intentional torts of assault and battery. The trial court correctly granted defendant's motion for summary judgment.

The Court of Appeals' decision reversing the district court is reversed, and the decision of the district court is affirmed.

## **FALSE IMPRISONMENT**

### **Second Restatement**

*McCann v. Wal-Mart Stores, Inc.*, 210 F.3d 51 (1st Cir. 2000)

Split, Circuit Judge.

This case involves a claim for false imprisonment. On December 11, 1996, Debra McCann and two of her children--Jillian, then 16, and Jonathan, then 12--were shopping at the Wal-Mart store in Bangor, Maine. After they returned a Christmas tree and exchanged a CD player, Jonathan went to the toy section and Jillian and Debra McCann went to shop in other areas of the store. After approximately an hour and a half, the McCanns went to a register and paid for their purchases. One of their receipts was time stamped at 10:10 p.m.

As the McCanns were leaving the store, two Wal-Mart employees, Jean Taylor and Karla Hughes, stepped out in front of the McCanns' shopping cart, blocking their path to the exit. Taylor may have actually put her hand on the cart. The employees told Debra McCann that the children were not allowed in the store because they had been caught stealing on a prior occasion. In fact, the employees were mistaken; the son of a different family had been caught shoplifting in the store about two weeks before, and Taylor and Hughes confused the two families.

Despite Debra McCann's protestations, Taylor said that they had the records, that the police were being called, and that the McCanns "had to go with her." Debra McCann testified that she did not resist Taylor's direction because she believed that she had to go with Taylor and that the police were coming. Taylor and Hughes then brought the McCanns past the registers in the store to an area near the store exit. Taylor stood near the McCanns while Hughes purportedly went to call the police. During this time, Debra McCann tried to show Taylor her identification, but Taylor refused to look at it.

After a few minutes, Hughes returned and switched places with Taylor. Debra McCann told Hughes that she had proof of her identity and that there must be some proof about the identity of the children who had been caught stealing. Hughes then went up to Jonathan, pointed her finger at him, and said that he had been caught stealing two weeks earlier. Jonathan began to cry and denied the accusation. At some point around this time Jonathan said that he needed to use the bathroom and Hughes told him he could not go. At no time during this initial hour or so did the Wal-Mart employees tell the McCanns that they could leave.

Although Wal-Mart's employees had said they were calling the police, they actually called a store security officer who would be able to identify the earlier shoplifter. Eventually, the security officer, Rhonda Bickmore, arrived at the store and informed Hughes that the McCanns were not the family whose son had been caught shoplifting. Hughes then acknowledged her mistake to the McCanns, and the McCanns left the store at approximately 11:15 p.m. In due course, the McCanns brought suit against Wal-Mart for false imprisonment (a defamation claim was also made but was rejected by the jury).

The jury awarded the McCanns \$20,000 in compensatory damages on their claim that they were falsely imprisoned in the Wal-Mart store by Wal-Mart employees. Wal-Mart has now appealed the district court's denial of its post-judgment motions for judgment as a matter of law and for a new trial pursuant to Fed.R.Civ.P. 50(b) and 59, respectively, arguing that the McCanns did not prove false imprisonment under Maine law and that the court's jury instructions on false imprisonment were in error. The McCanns have cross-appealed from the district court's pre-trial dismissal of their claim for punitive damages.

Both of Wal-Mart's claims of error depend on the proper elements of the tort of false imprisonment. though nuances vary from state to state, the gist of the common law tort is conduct by the actor which is intended to, and does in fact, "confine" another "within boundaries fixed by the actor"

where, in addition, the victim is either "conscious of the confinement or is harmed by it." Restatement (Second), Torts § 35 (1965). The few Maine cases on point contain no comprehensive definition, ..., and the district court's instructions (to which we will return) seem to have been drawn from the Restatement.

While "confinement" can be imposed by physical barriers or physical force, much less will do--although how much less becomes cloudy at the margins. It is generally settled that mere threats of physical force can suffice, Restatement, supra, § 40; and it is also settled--although there is no Maine case on point--that the threats may be implicit as well as explicit, see *id.* cmt. a; 32 Am.Jur.2d False Imprisonment § 18 (1995) (collecting cases), and that confinement can also be based on a false assertion of legal authority to confine. Restatement, supra, § 41. Indeed, the Restatement provides that confinement may occur by other unspecified means of "duress." *Id.* § 40A.

Against this background, we examine Wal-Mart's claim that the evidence was insufficient, taking the facts in the light most favorable to the McCanns, drawing reasonable inferences in their favor, and assuming that the jury resolved credibility issues consistent with the verdict. .... Using this standard, we think that a reasonable jury could conclude that Wal-Mart's employees intended to "confine" the McCanns "within boundaries fixed by" Wal-Mart, that the employees' acts did result in such a confinement, and that the McCanns were conscious of the confinement.

The evidence, taken favorably to the McCanns, showed that Wal-Mart employees stopped the McCanns as they were seeking to exit the store, said that the children were not allowed in the store, told the McCanns that they had to come with the Wal-Mart employees and that Wal-Mart was calling the police, and then stood guard over the McCanns while waiting for a security guard to arrive. The direction to the McCanns, the reference to the police, and the continued presence of the Wal-Mart employees (who at one point told Jonathan McCann that he could not leave to go to the bathroom) were enough to induce reasonable people to believe either that they would be restrained physically if they sought to leave, or that the store was claiming lawful authority to confine them until the police arrived, or both.

Wal-Mart asserts that under Maine law, the jury had to find "actual, physical restraint," a phrase it takes from *Knowlton* .... While there is no complete definition of false imprisonment by Maine's highest court, this is a good example of taking language out of context. In *Knowlton*, the wife of a man who owed a hotel for past bills entered the hotel office and was allegedly told that she would go to jail if she did not pay the bill; after discussion, she gave the hotel a diamond ring as security for the bill. She later won a verdict for false imprisonment against the hotel, which the Maine Supreme Judicial Court then overturned on the ground that the evidence was insufficient.

While a police officer was in the room and Mrs. Knowlton said she thought that the door was locked, the SJC found that the plaintiff had not been confined by the defendants. The court noted that the defendants did not ask Mrs. Knowlton into the room (another guest had sent for her), did not touch her, and did not tell her she could not leave. The court also said that any threat of jail to Mrs. Knowlton was only "evidence of an intention to imprison at some future time." .... [FN1] In context, the reference to the necessity of "actual, physical restraint" is best understood as a reminder that a plaintiff must be actually confined--which Mrs. Knowlton was not.

FN1. Although the distinction may seem a fine one, it is well settled that a threat to confine at a future time, even if done to extract payment, is not itself false imprisonment. See Restatement, supra, § 41 cmt. e.

Taking too literally the phrase "actual, physical restraint" would put Maine law broadly at odds with not only the Restatement but with a practically uniform body of common law in other states that accepts the mere threat of physical force, or a claim of lawful authority to restrain, as enough to satisfy the confinement requirement for false imprisonment (assuming always that the victim submits). It is true

that in a diversity case, we are bound by Maine law, as Wal-Mart reminds us; but we are not required to treat a descriptive phrase as a general rule or attribute to elderly Maine cases an entirely improbable breadth.

More interesting is Wal-Mart's claim that the instructions were inadequate. The district court largely borrowed the Restatement formulation by telling the jury that it must find the following:

One, that the defendant acted intending to confine the plaintiffs within boundaries fixed by the defendant; two, that the acts of the defendant directly or indirectly resulted in such a confinement of the plaintiffs; and third, the plaintiffs were conscious of the confinement or were harmed by it.

The court added that the jury could find for the McCanns if it found that "the plaintiffs reasonably believed they were not permitted to leave the store," and that the plaintiffs did not have to prove that "such restraint was accomplished through actual physical force against their bodies."

In assailing the instructions, Wal-Mart repeats its claim, which we have already rejected, that the district court should have charged that "actual, physical restraint" is required to make out confinement. A somewhat different claim by Wal-Mart ... is that the district court's instruction was defective because it did not tell the jury that the restraint must be a physical and not merely a moral influence, and that influencing or convincing another to stay is not actual physical restraint. In substance, Wal-Mart wanted a description of what was not confinement.

We think it is at least arguable that, if a proper instruction were tendered, it might be appropriate or even obligatory (the latter is a nice point that we do not decide) to make clear to the jury that there are outer boundaries to the confinement concept and that a personal plea by the defendant to remain or the defendant's invocation of "moral obligation" alone would not be sufficient to inflict a "confinement." There might be special justification for such a clarification in a case in which the evidence was open to that interpretation.

However, in this case, Wal-Mart did not offer a proper instruction: in arguing for a different instruction, it said to the district court that the restraint "must be physical and not merely a moral influence," implicating Wal-Mart's incorrect view that actual physical restraint was required; and its further statement that "[i]nfluencing or convincing another to remain in place is not actual physical restraint" has the same fault and is also open to the criticism that "[i]nfluencing or convincing" is itself a misleading phrase, at least as presented by Wal-Mart, because one could influence or convince by threats of force or assertions of lawful authority, which do or can constitute false imprisonment. In short, Wal-Mart did not offer a proper instruction.

It is well-settled that a district court is not required to rewrite an improper instruction to capture a kernel that may have some validity; it is counsel's job to present an unimpeachable instruction. .... Wal-Mart was not faced with an all-or-nothing choice: it could have pressed for its actual physical restraint instruction and also tendered an alternative instruction framed so as to make clear that, for example, mere moral suasion is not sufficient. Since it did not do the latter, we are freed from the chore of deciding in the abstract whether and when such a limiting instruction would be appropriate.

[Discussion of Plaintiffs' claim for punitive damages omitted.]

Affirmed.

**Traditional Common Law**

*Avallon v. St. Luke's-Roosevelt Hosp. Center*, 2005 WL 3115254  
(N.Y. Sup. App. Term, November 21, 2005)

PER CURIAM.

This action for civil assault and battery, false imprisonment, and negligence stems from allegations that defendants administered general anesthesia instead of the local anesthesia agreed to by plaintiff, rendering him unconscious for approximately two hours while undergoing a hernia operation. More precisely, plaintiff claims that he remained unconscious for 23 minutes longer than the surgery took, and that this “prolongation of unconsciousness” resulted in “delay and sickness of recovery.”

As to the battery claim, plaintiff was required to show that the intended contact was “‘offensive’, i.e. wrongful under all the circumstances.” .... Fatal to that claim was plaintiff’s execution of various surgical consent forms, including a “Consent For Anesthesia” expressly authorizing defendant to administer such anesthetic agents as they “may consider necessary,” and plaintiff’s failure to adduce competent evidence that the type of anesthesia administered by defendants was not “necessary.” Nor did plaintiff raise a triable issue with respect to his civil assault claim, which required proof that defendants placed plaintiff in imminent apprehension of harmful contact. ....

Plaintiff's cause of action for false imprisonment must also fail, since he failed to establish the essential elements that he was conscious of his “confinement” or that it was not consented to .... Summary dismissal of the negligence claim was also warranted for lack of proof that defendants were negligent in administering general instead of local anesthesia, resulting in physical or psychological injury.

Finally, a fair reading of the complaint as amplified by the bill of particulars, as well as counsel's affirmation, raises no triable issue of fact as to any claim of medical malpractice. .... Indeed, plaintiff offered no medical evidence as to any injury from the ambulatory surgery itself or the type of anesthesia administered.

This constitutes the decision and order of the Court.

### **HANDOUT 3**

#### **IIED**

#### **Poor Poco and P.J.**

#### ***Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001)***

SCHRODER, Judge.

This appeal questions whether the tort of intentional infliction of emotional distress can apply to the conversion and slaughter of pet horses. We opine that the conduct of the offender rather than the subject of the conduct determines whether the conduct was outrageous. Hence, we affirm.

Judy Taylor ("Taylor") was the owner of two registered Appaloosa horses, nicknamed Poco and P.J. Taylor had owned Poco for 14 years (since he was a foal) and P.J. for 13 years (since her birth). Taylor loved Poco and P.J. as if they were her "children." Taylor and others testified that the horses were gentle and affectionate, and, having spent their entire lives together, were inseparable. After Taylor and her husband separated in 1994, Taylor remained at the marital residence where the horses lived, and she assumed sole responsibility for their care.

Due to a variety of medical problems, including myasthenia gravis, it was difficult for Taylor to perform some of the physical tasks necessary to properly care for her horses by herself. Taylor did not want to sell or separate Poco and P.J. Therefore, she decided to try to find someone with a farm who would like to care for both of them in exchange for the enjoyment of having them—a common arrangement in the horse world sometimes referred to as a "free-lease agreement." Taylor's brother suggested that his friends, Lisa and Jeff Burgess, who had a small farm with horses of their own, might be interested in such an arrangement. Taylor subsequently spoke to the Burgesses, explained her situation and the arrangement she was looking for. Taylor testified that she explained to Lisa that she never wanted to lose contact with or control of Poco and P.J., that she wanted to be able to visit them, and if the Burgesses ever didn't want to keep them anymore, Taylor would take them back or find another place for them to live. Lisa agreed, assuring Taylor that she loved and was knowledgeable about horses, that she had a nice pasture for them to live in together, that she liked helping people, and that Taylor could come and visit the horses any time she wanted. Believing that she had found a good place for her horses, Taylor agreed to let Poco and P.J. go live with the Burgesses. Taylor did not transfer ownership of the horses, nor ever indicate to the Burgesses that she no longer wanted them. On August 31, 1994, the Burgesses came to Taylor's residence to pick up Poco and P.J. Later that evening, Lisa called Taylor to tell her that they had led them around their new pasture and that the horses were doing fine.

Within the next few days, Lisa Burgess called Eugene Jackson, a known slaughter-buyer, to say she had two horses for sale. On September 6, 1994, Jackson purchased Poco and P.J. from the Burgesses for a total of \$1,000.00.

Taylor waited a week before planning her first visit in order to give Poco and P.J. time to adjust to their new surroundings. She bought some film and treats for the horses and called Lisa to say that she would like to come and see Poco and P.J. and take some pictures. Lisa told Taylor "they're gone," that she had given them to a man she had met on a trail ride, but she did not know his name. Upset and frightened, Taylor said she needed to know who he was and where her horses were so she would know they were okay and could bring them back to her home. Lisa said she would find out and let Taylor know. The Burgesses then asked their friend, Kenny Randolph, to cover for them by lying and telling Taylor that he had the horses. Randolph never had possession of Poco and P.J. at any time and admitted his role in the events when questioned by a Harrison County, Indiana police detective.

Not hearing from Lisa, and after learning about the dangers of the slaughter market at a humane event over the weekend, Taylor called back and begged Lisa to tell her where Poco and P.J. were. At first, Lisa refused to tell her. Eventually, she lied and said that they were with a Kenny Randolph in the

Corydon area of Indiana. Taylor called Randolph and told him she wanted to see her horses. Randolph, lying, told Taylor that he had them, but was not going to let her see them or tell her where they were. Taylor pleaded with him to tell her, and he eventually gave her vague directions to a fictitious location in the Frenchtown, Indiana area where he said they were in a pasture. He refused to give her specific directions or the name of the "gravel road" the pasture was supposedly on. Frantic, Taylor drove to the area and tried to find the gravel road Randolph spoke of. Taylor tried every road she found, stopping and asking people along the way if they had seen the horses, but was, of course, unsuccessful. Finally, it became dark, and a distraught Taylor had to return home.

With the aid of Victoria Coomber, a humane investigator, and Sharon Mayes, president of a local humane organization, in early October 1994, Taylor learned that Poco and P.J. had been purchased from the Burgesses by Eugene Jackson, a known slaughter-buyer, and then sold to Jason Ryan of the Ryan Horse Company, a business which supplies horses to slaughterhouses. Ryan Horse Company sold them to the Beltex Corporation in Texas where they were slaughtered in late September.

On August 23, 1995, Taylor filed an action in Jefferson Circuit Court, naming as defendants, Lisa and Jeff Burgess, Kenny Randolph, and Eugene Jackson. Taylor filed an amended complaint including Jason Ryan, James Ryan, and Ryan Horse Company (hereinafter, the Ryans) as defendants. Randolph was dismissed for lack of jurisdiction. Jackson and the Ryans were dismissed on grounds of improper venue. A jury trial was held on April 13-19, 1999. The jury returned a verdict against the Burgesses, finding that they had breached their agreement with Taylor and that they had intentionally inflicted emotional distress on Judy Taylor.

The jury awarded Taylor \$1,000.00, representing the fair market value of the horses for the breach of the free-lease agreement; \$50,000.00 in compensatory damages for outrageous conduct; and \$75,000.00 in punitive damages, for a total of \$126,000.00. The Burgesses filed a motion to alter, amend, or vacate/motion for judgment notwithstanding the verdict/motion for new trial which was denied by the trial court on September 1, 1999. This appeal by the Burgesses followed.

The Burgesses first argue that the trial court erred in denying their motion for a directed verdict, contending that the evidence does not support a recovery under the tort of outrage. In ruling on a motion for a directed verdict, the trial court must accept the evidence of the party opposing the motion as true and draw all inferences from the evidence in that party's favor. A verdict should not be directed unless the evidence is insufficient to sustain the verdict. ....

The Kentucky Supreme Court recognized the tort of outrage or the intentional infliction of emotional distress in *Craft v. Rice*, Ky., 671 S.W.2d 247 (1984),<sup>2</sup> adopting Section 46 of the Restatement (Second) of Torts (1965), which provides:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

... In order to recover under the tort of outrage, a plaintiff must prove:

- 1) the wrongdoer's conduct must be intentional or reckless;
- 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
- 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
- 4) the emotional distress must be severe.

....We opine that Taylor presented sufficient evidence of each of these required elements and the trial court properly submitted the claim to the jury.

First, it is clear that the Burgesses' conduct was reckless in that they intended their specific conduct and either knew or should have known that emotional distress would result. .... Lisa Burgess admitted that she never had any intentions of keeping Poco and P.J. She sold P.J. and Poco to Eugene Jackson, a known-slaughter buyer, shortly after she acquired them. Further, the jury heard testimony from Kenny Randolph that the Burgesses told him that they had sold the horses to Eugene Jackson to go to slaughter, and that the Burgesses had asked him to lie for them so Taylor would not find out what they had done. There was significant evidence that the Burgesses were aware of Taylor's feelings for Poco and P.J., and hence, knew or should have known that emotional distress would result from their selling them to a slaughter-buyer.

Second, the Burgesses' conduct clearly rises to the level of being outrageous and intolerable in that it offends generally accepted standards of decency and morality, certainly a situation "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Restatement (Second) of Torts, § 46, cmt. d (1965) .... Comment f of § 46 states:

The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.

.... Compelling evidence was presented at trial establishing Taylor's love for her horses and concern that they were in a good place. Recognizing that love, Lisa Burgess called Judy Taylor the evening she picked up the horses to tell her that she led them around their new pasture and the horses were doing fine. The jury heard evidence of subsequent phone calls by a distraught and frightened Taylor to Lisa Burgess and Kenny Randolph, *begging* to know where her horses were. Restatement (Second) of Torts, § 46, cmt. f (1965). The Burgesses knew that Poco and P.J. were heading to slaughter, and that Taylor was, in reality, pleading for their lives. Yet, in the face of Taylor's pleas for the horses she loved like children, the Burgesses continued to lie and refuse to tell her where they were. This Court cannot characterize this emotional torment inflicted by the Burgesses upon Taylor as anything other than "heartless, flagrant, and outrageous." *Id.*

Third, the sale of Poco and P.J. by the Burgesses to a known slaughter-buyer satisfies the requirement of a causal connection between the Burgesses' conduct and the emotional distress. Further, the Burgesses' subsequent lies precluded Taylor from locating and saving her horses before they were slaughtered. Additionally, contrary to the Burgesses' assertions, we conclude sufficient evidence was presented from which the jury could properly infer that Poco and P.J. were, in fact, slaughtered.

Finally, the evidence indicates that Taylor suffered severe emotional distress. Taylor testified that when she learned what had happened to Poco and P.J., she broke down, knowing that "my babies were dead." Since then she has suffered from many panic attacks, and has had major problems with high blood pressure for which she must receive medical care. She suffers from anxiety and depression, for which she takes medication, and has had many thoughts of suicide. She described overwhelming feelings of loss and failure. She testified she has trouble sleeping and has recurring nightmares in which she hears Poco's scream in her head. Taylor testified that she has sought help from her doctor and social workers but cannot get over what happened.

Having reviewed the record, we opine that Taylor offered sufficient evidence to establish the elements of the tort of outrage, and the trial court properly submitted the claim to the jury. .... On appeal, we give deference to the jury's determination of conflicting facts and the reasonable inferences drawn from the facts. .... Having reviewed the evidence in the light most favorable to Taylor, we believe that the jury verdict was supported by sufficient evidence.

Next, the Burgesses contend that, under Kentucky law, "the proper award of damages for the loss or damage to an animal is the value of that animal, not emotional damages for that loss". We disagree. *Faulkner Drilling Co., Inc. v. Gross*, Ky.App., 943 S.W.2d 634 (1997) established that an action for tort may be combined with a breach of contract and that punitive damages may also be asserted. *Cincinnati, N.O. & T.P. Ry. Co. v. Rankin*, 153 Ky. 730, 156 S.W. 400 (1913), cited by the Burgesses to support their argument for fair market value, did not involve a claim for emotional damages and did not hold that there cannot be a claim for intentional infliction of emotional distress. ...*Cincinnati, N.O. & T.P. Ry. Co.* involved the liability of a common carrier transporting livestock under a tariff contract and is not relevant to this case. There was no allegation that pets were involved and the case was before *Craft*. There are no cases in Kentucky holding that a finding of intentional infliction of emotional distress or punitive damages is precluded simply because the facts giving rise to the claim involve an animal. Indeed, we conclude that the second element in application of the tort of the intentional infliction of emotional distress depends on the facts of the case as to the offender's conduct and not to the subject of said conduct.

The Burgesses next argument is that the jury's award of \$50,000.00 of compensatory and \$75,000.00 of punitive damages for emotional distress was excessive, contending that under the "first blush" rule, it had to have been given under the influence of passion or prejudice. .... The "first blush" rule, however, is not the proper appellate standard for review of an award of damages. .... Rather, when confronted with the issue of reviewing an award of damages for excessiveness or inadequacy, the trial court and appellate court perform different functions. .... As stated in *Davis* at 932:

[T]he trial court and appellate court have different functions ... the trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses first-hand and viewed their demeanor and who has observed the jury throughout the trial.

... The proper appellate function is articulated in *Prater v. Arnett*, Ky. App., 648 S.W.2d 82, 86 (1983):

[T]he appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge ... to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous.

... "Once the issue [excessive or inadequate damages] is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals, substitute our judgment on excessiveness [or inadequacy] for his unless clearly erroneous." ....

Whether an award is excessive, appearing to have been given under the influence of passion or prejudice, is a question dependent on the nature of the underlying evidence. .... The trial court considered this issue, presented in the Burgesses' motion to alter, amend, or vacate/motion for judgment notwithstanding the verdict/motion for new trial, and found that when viewed in relation to all of the evidence submitted to the jury, the jury's award was not excessive and based only on sympathy, passion,

and prejudice. Having reviewed the record and testimony, we conclude the trial court did not abuse its discretion in so finding.

...

The Burgesses next argue that the award of punitive damages for intentional infliction of emotional distress results in double recovery for Taylor. We disagree. The \$50,000.00 award for compensatory damages for the tort of outrageous conduct is calculated to make whole, or compensate, Judy Taylor for her actual or consequential loss. .... This includes damages for emotional distress for intentional acts regardless of whether accompanied by physical injury. ... Punitive or exemplary damages, on the other hand, are not intended to compensate a victim for his or her loss, but are designed to punish or deter a person, and others, from committing such acts in the future. KRS 411.184(1)(f) .... Therefore, a victim of outrageous conduct can recover both compensatory and punitive damages. ....

....

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

**Tough school attendance policy or how many torts can one teacher commit?**  
***Banks v. Fritsch*, 39 S.W.3d 474 (Ky. App. 2001)**

KNOPF, Judge.

The appellant, Wade Banks, brought this complaint against the appellee, John Fritsch, alleging false imprisonment, assault and battery, and outrageous conduct. A jury trial was conducted on July 21, 1999. At the close of Banks's case, the trial court directed a verdict in favor of Fritsch, finding that Banks had failed to present evidence that he had been damaged by Fritsch's conduct. We find that the trial court erred in dismissing the claims for false imprisonment and assault and battery as there was sufficient evidence of emotional damages to warrant submitting the issue to the jury. However, we also conclude that the tort of outrageous conduct is not available under the facts presented in this case. Hence, we reverse the trial court in part, affirm in part, and remand this action for a new trial.

Since the trial court dismissed this action on a motion for a directed verdict, we shall view the evidence in the light most favorable to the appellant. In June 1996, Banks was 17 years old and was a Junior at Bourbon County High School. His last class of the school day was Agriculture Wood Construction, taught by Fritsch. By his own admission, Banks had either skipped the class or left the class early on a number of occasions during that semester.FN1 Banks testified that, while he was walking to the class on June 4, another student told him that Fritsch had a chain, and was planning to chain Banks up to keep him from skipping class. Nevertheless, Banks proceeded to the class.

FN1. Fritsch's records show that Banks had missed class seven or eight times from January through April, and an additional ten days during May. However, the school's attendance records only show Banks absent from the class on three days. In his testimony, Banks admitted that he had skipped the class at least eight times. Fritsch's records also show that several other students skipped the class more often than Banks. According to Banks, the other students were in his work group, and he was often left to complete projects alone. Fritsch testified that he was aware of this problem, and gave Banks the painting assignments so that Banks might be able to complete his class work.

Banks testified that when Fritsch walked into the classroom, he had a large log chain over his shoulder and had several key locks on his belt loop. Fritsch then told Banks that he was going to keep him from leaving the class early. After taking roll, Fritsch directed Banks to put his leg up on a chair so he could put the chain around Banks's ankle. Banks states that he initially protested, and then went along after Fritsch repeated the instruction. Fritsch secured the chain around Banks's ankle, and led him outside to an area where the class was painting feed troughs. Fritsch then put the chain around a tree, locked it, and told Banks not to go anywhere.

The entire class followed Fritsch and Banks from the classroom to the tree. After Banks was secured to the tree, Fritsch returned to the classroom and the other students went on with their projects. Banks sat down under the tree, removed his shoe and began trying to work the chain loose. After several minutes, Banks was able to remove the chain from his ankle, and he then attempted to leave the school premises. Several of his classmates chased Banks down, tackled him, and then carried Banks back to the tree. Fritsch returned, placed another chain around Banks's neck, and then secured it to the chain around the tree.

Banks testified that he initially stood up and held the chain to keep its weight off of his neck. After about fifteen minutes, he got tired of holding the chain, so he sat down and began crying. Banks told another student that the chain was bothering him, and the student went to tell Fritsch. Several minutes later, Fritsch came and removed the chain from Banks's neck. However, Fritsch then secured the other chain tightly around Banks's ankle.

Thereafter, Fritsch and Banks began discussing his grades in the class and what it would take from him to pass. Fritsch returned to the classroom to check his records to see if Banks was in a position to pass the class. Upon returning five minutes later, Fritsch told Banks that he could pass the class if he painted the three remaining eeder and mineral troughs. Banks agreed and Fritsch removed the chain. Banks subsequently finished the painting assignments, and he received a passing grade in Fritsch's class. Banks testified that the chaining incident took place over a period of about an hour and a half.

Fritsch's account of the incident differs only slightly in the details, but markedly in tone. Fritsch testified that the idea of chaining Banks started as a joke between him and the other students in the class. Several days prior to the incident, Fritsch made an off-hand comment in front of the class to the effect that perhaps he should chain the truant boys to keep them from skipping class. On June 4, as Banks was arriving for class, the other students reminded Fritsch of this statement. After some prodding from the class, Fritsch decided to go forward with the plan.

Fritsch further testified that Banks never objected to the chaining, and in fact, he went along with the joke and appeared to enjoy the attention. Fritsch did not recall placing the chain on Banks's leg in the classroom and leading him outside. This testimony was contradicted somewhat by another teacher, Ralph Speakes, who saw Banks leaving Fritsch's classroom with the chain around his ankle. However, Speakes also testified that everyone (including Banks) seemed to be laughing about it. In addition, Fritsch states that after Banks managed to remove the chain the first time, he called it to the attention of the other students and dared them to catch him. Several students informed Fritsch about Banks's escape, and they asked Fritsch what they should do about it. Fritsch told them that Banks should come back and finish the project, but he stated that he did not tell any of the students to bring Banks back. Speakes testified that Banks appeared to be leading the chase, and after the students caught up with Banks, they merely led him back to the class area. Fritsch denied that Banks ever showed that he was upset about the chaining or that he ever asked for the joke to stop, except for when Banks complained about the chain around his neck. Fritsch steadfastly denies that the chaining was intended as a punishment, or that he ever intended to hurt or humiliate Banks. Rather, Fritsch merely intended it as a light-hearted prank to impress on Banks the importance of staying in class and finishing his assignments. Fritsch further stated that the entire incident took place over 25 to 30 minutes. [Footnote omitted.]

Banks testified that he was deeply upset by the chaining and thought about it often. After the incident was publicized, he states that other students gave him a hard time about it on several occasions. He also received a lot of unwelcome and negative media attention over the incident. In response, he decided that he could not return to Bourbon County High School in the fall. Instead, he went to live with his father and attended his senior year of high school in Columbia, Missouri. Banks testified that the move was traumatic for him, and it was difficult for him to fit in at his new school.

Banks saw a psychologist to discuss his feelings once prior to the move to Missouri. Banks further testified that sometimes he has flashbacks and sometimes starts to cry over memories of the chaining. His family members stated that Banks had a hard time dealing with the incident and often seemed withdrawn. However, there was no expert testimony describing Banks's emotional state following the chaining.

At the close of Banks's case, the trial court granted Fritsch's motion for a directed verdict. The court determined that there was enough evidence to establish that a false imprisonment and an assault and battery occurred. However, the court concluded that there was no evidence that Banks had been damaged by Fritsch's conduct. The trial court stated on the record:

I mean, this strikes me as being exactly what it's characterized as, a prank, and perhaps one that was not appreciated by Mr. Banks and I can understand that, but I don't see that there's been any harm

done here. Clearly, Mr. Fritsch should not have done this. He's been told that by a number of people, I think he realizes that. The fact is it happened, and basically there seems to be no harm, no foul here. And I haven't been proved-it hasn't been proven to me, and therefore I don't think the jury can find that there are damages here that Mr. Banks has suffered. There's evidence of that, I don't think that that is significant at this point. I think on the basis of the damages issue, that I am going to direct a verdict here in favor of Mr. Fritsch on all of these counts. I just don't think the jury has enough evidence to decide that Mr. Banks has been damaged by the incidence [sic], that it has been proven to then happen.

The trial court's written order granted the directed verdict for Fritsch based upon the oral findings in the record. Banks now appeals, arguing that there was sufficient evidence of damages to warrant submitting the issue to the jury. He further argues that he was also entitled to an instruction on punitive damages.

Fritsch responds that the trial court properly granted his motion for a directed verdict because Banks failed to establish the elements of false imprisonment, assault and battery, and outrageous conduct. However, the trial court specifically granted the directed verdict based upon lack of evidence to establish that Banks was damaged by Fritsch's actions. Moreover, the trial court found that Banks had presented sufficient evidence to create a jury issue on his claims alleging false imprisonment and assault and battery. Since Fritsch did not file a cross-appeal contesting this finding, this appeal is limited to the question of whether Banks presented sufficient evidence of damages to overcome Fritsch's motion for a directed verdict.

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. [Footnote omitted.] Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. [Footnote omitted.] However, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. [Footnote omitted.]

In order to consider the propriety of the trial court's decision to grant the motion for a directed verdict, we must first consider the nature of the claims asserted by Banks. The action for the tort of false imprisonment, sometimes called false arrest, is a lineal descendant of the old action of trespass to person. It protects the personal interest in freedom from physical restraint.<sup>FN6</sup> The interest involved is "in a sense a mental one," and false imprisonment may be maintained without proof of actual damages.<sup>FN7</sup> The tort is complete after "even a brief restraint on the plaintiff's freedom," and the plaintiff may recover nominal damages.<sup>FN8</sup> The plaintiff is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, the plaintiff is also entitled to damages for mental suffering, humiliation and the like.<sup>FN9</sup>

FN6. Prosser & Keeton on Torts § 11, at 47 (5th ed.1984) (hereafter Prosser & Keeton).

FN7. Id. at 47.

FN8. Id. at 48.

FN9. Id.

Kentucky cases define false imprisonment as being any deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise. [Footnote omitted.] Furthermore, false

imprisonment requires that the restraint be wrongful, improper, or without a claim of reasonable justification, authority or privilege. [Footnote omitted.] Fritsch's potential liability does not arise out of his efforts to keep Banks from leaving the class, and there is no contention that Fritsch was acting within the scope of his authority as a teacher. Rather, Fritsch's primary defense is that there was no imprisonment because Banks consented to being chained.

There are no Kentucky cases which directly discuss what evidence is necessary to prove damages from false imprisonment. However, a number of cases are instructive insofar as they address evidentiary issues relating to submission of the issue of damages to the jury. In *Butcher v. Adams*, [footnote omitted] the plaintiff's testimony that he was humiliated by his false arrest on charges relating to the operation of his tavern was mitigated by evidence that he had previously been arrested on similar charges. The court noted that this evidence was sufficient for the jury to consider whether the plaintiff had actually been embarrassed by the false imprisonment.

In *Bradshaw v. Steiden Stores, Inc.*, [footnote omitted] a store patron was detained for an hour while the store owner checked on the validity of her check. The store owner then told her to go to a back room, where briefly the patron was questioned by two policemen. Once the validity of the check was established, the patron was allowed to go. The former Court of Appeals acknowledged that the patron had established a "borderline" case of false imprisonment. However, the Court noted that there was no evidence that the patron had been unnecessarily humiliated or embarrassed by the incident. Since at most the evidence would have justified an award of nominal damages, the Court concluded that the directed verdict in favor of the store owner was not reversible error. Similarly, in *SuperX Drugs of Kentucky, Inc. v. Rice*, [footnote omitted] this Court held that, in an action for false imprisonment where the person is subsequently and properly charged with the commission of a felony, she can recover damages only for that mental suffering and embarrassment which she endured during the period prior to her arrest. Under these circumstances, this Court concluded that the plaintiff was entitled to no more than nominal damages, and the jury's award of \$75,000.00 in compensatory damages was clearly excessive.

The common thread among all these cases is that a plaintiff may be entitled to at least nominal damages arising from the humiliation, emotional distress or damage to reputation caused by the false imprisonment. "Humiliation and embarrassment are, by their nature, not easily quantified..." [Footnote omitted.] Nevertheless, the degree of humiliation or embarrassment actually suffered by the plaintiff is a factual matter for the jury to decide.

There was clearly a factual issue concerning whether Fritsch's conduct constituted an unlawful imprisonment of Banks. Furthermore, Banks testified that he suffered humiliation, embarrassment, emotional distress and he was held up to the ridicule of his peers by being publicly chained. There was contrary evidence that Banks did not express any distress during the chaining. Nevertheless, we are satisfied from the record that the jury could have returned a verdict for Banks for an amount greater than nominal damages. Consequently, we find that the trial court's decision to dismiss this claim was erroneous.

Banks's second claim is that Fritsch's conduct amounted to an assault and battery. Assault is a tort which merely requires the threat of unwanted touching of the victim, while battery requires an actual unwanted touching. [Footnote omitted.] Since intent is an essential element of assault and battery, the trial court properly left to the jury the issue of Banks's consent to the chaining. [Footnote omitted.] However, a plaintiff need not prove actual damages in a claim for battery because a showing of actual damages is not an element of assault or battery and, when no actual damages are shown for a battery, nominal damages may be awarded. [Footnote omitted.] Furthermore, a recovery for emotional distress caused by the assault or battery is allowable as an element of damages in an action based upon those torts.

[Footnote omitted.] Consequently, we find that the trial court's dismissal of Banks's claims for assault and battery also was erroneous.

Banks's third claim was that Fritsch's conduct amounted to the tort of outrageous conduct. The trial court did not address this claim, but presumably the court's finding that Banks failed to prove damages applies to this claim also. The tort of intentional infliction of emotional distress, or outrage, was first recognized in Kentucky in *Craft v. Rice*. [Footnote omitted.] In that case, the Kentucky Supreme Court adopted the following portion of Section 46 of the Restatement (Second) of Torts:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.FN21

FN21. Restatement (Second) of Torts, § 46(1) (1965).

In order to recover, the plaintiff must show that defendant's conduct was intentional or reckless, that the conduct was so outrageous and intolerable as to offend generally accepted standards of morality and decency, that a causal connection exists between the conduct complained of and the distress suffered, and that the resulting emotional stress was severe. [Footnote omitted.] An action for outrage will not lie for “petty insults, unkind words and minor indignities”; the action only lies for conduct which is truly “outrageous and intolerable.” [Footnote omitted.]

In addition, the tort of outrage is intended as a “gap-filler”, providing redress for extreme emotional distress where traditional common law actions do not. Where an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action. [Footnote omitted.]

We have previously held that Banks may be able to recover emotional damages arising from false imprisonment, assault or battery. Hence, Banks must show that Fritsch's actions were intended only to cause him extreme emotional distress, rather than to merely touch or to deprive him of his liberty. We find no evidence in the record which would support such a finding by the jury. As a result, Banks's claim of outrageous conduct would not be appropriate in this case, and the trial court properly granted a directed verdict on this cause of action.

Lastly, Banks argues that he was entitled to an instruction on punitive damages. The trial court did not address this issue because it dismissed the action based upon lack of evidence of compensatory damages. Since we are remanding this action for a new trial, the trial court must consider the propriety of an instruction on punitive damages based upon the evidence presented at that time. However, we shall briefly address the standards for an award of punitive damages on these claims.

In false imprisonment cases, punitive damages are not justified absent “a showing that the acts were either willful or malicious or that they were performed in such a way as would indicate a gross neglect or disregard for the rights of the person wronged.” [Footnote omitted.] With regard to Banks's claim for punitive damages arising from the alleged assault and battery, we find the following discussion from *Fowler v. Mantoath*, [footnote omitted] to be relevant in this case:

It is a rule of longstanding in this Commonwealth that exemplary or punitive damages may be recovered in an assault and battery case ... where the assault is willful, malicious and without justification. .... This is true even when no serious bodily harm results. ....

The threshold for the award of punitive damages is misconduct involving something more than merely commission of the tort. The “something more” necessary in the present case was defined in the instructions as a finding “that the assault was willful, malicious, and without justification.” Malice may be implied from outrageous conduct, and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing. *Hensley v. Paul Miller Ford, Inc., Ky.*, 508 S.W.2d 759 (1974). *Hensley* cites Prosser, Law of Torts § 2 (4th Ed.1971), stating that punitive damages are “permitted” “[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage.” *Id.* at 762.

The mere fact that the act is intentional and a tort does not justify punitive damages absent this additional element of implied malice, meaning conscious wrongdoing. .... Fowler's evidence in the present case, if accepted by the jury (as it was), substantiated the element of conscious wrongdoing. The distinction is best illustrated by *Harrod v. Fraley*, supra at 205, where instructions permitting an award of punitive damages if the jury “found that the alleged assault was committed ‘wrongfully’ [i.e., tortiously],” were held erroneous because they did not further “require the jury to find that the assault was maliciously, wantonly or wilfully committed” before awarding punitive damages. The instructions in the present case required such a finding. [Footnote omitted.]

In conclusion, we find that the trial court erred in granting a directed verdict in favor of Fritsch on the issue of proof of damages regarding Banks's claims for false imprisonment and assault and battery. Neither of these intentional torts requires proof of damages for at least a nominal award, and there was sufficient proof of emotional damages which would justify submitting the issue to the jury. However, Banks's ability to obtain emotional damages for these claims precludes any recovery based upon the tort of outrageous conduct. Furthermore, an instruction on the outrage claim is not justified based upon the lack of evidence that Fritsch's conduct in chaining Banks only was intended to cause severe emotional distress. Lastly, the trial court should consider the propriety of an instruction on punitive damages based upon the evidence presented at trial.

Accordingly, the judgment of the Bourbon Circuit Court is reversed in part, affirmed in part, and remanded for a new trial in accord with this opinion.

**HANDOUT 4**  
**DEFENSES: CONSENT; SELF-DEFENSE**

**Consent**

*Koffman v. Garnett*, 574 S.E.2d 258 (Va. 2003)

Opinion by Justice ELIZABETH B. LACY

In this case we consider whether the trial court properly dismissed the plaintiffs' second amended motion for judgment for failure to state causes of action for gross negligence, assault, and battery.

Because this case was decided on demurrer, we take as true all material facts properly pleaded in the motion for judgment and all inferences properly drawn from those facts. [Citation omitted.]

In the fall of 2000, Andrew W. Koffman, a 13-year old middle school student at a public school in Botetourt County, began participating on the school's football team. It was Andy's first season playing organized football, and he was positioned as a third-string defensive player. James Garnett was employed by the Botetourt County School Board as an assistant coach for the football team and was responsible for the supervision, training, and instruction of the team's defensive players.

The team lost its first game of the season. Garnett was upset by the defensive players' inadequate tackling in that game and became further displeased by what he perceived as inadequate tackling during the first practice following the loss. Garnett ordered Andy to hold a football and “stand upright and motionless” so that Garnett could explain the proper tackling technique to the defensive players. Then Garnett, without further warning, thrust his arms around Andy's body, lifted him “off his feet by two feet or more,” and “slamm [ed]” him to the ground. Andy weighed 144 pounds, while Garnett weighed approximately 260 pounds. The force of the tackle broke the humerus bone in Andy's left arm. During prior practices, no coach had used physical force to instruct players on rules or techniques of playing football.

In his second amended [complaint], Andy, by his father and next friend, Richard Koffman, and Andy's parents, Richard and Rebecca Koffman, individually, (collectively “the Koffmans”) alleged that Andy was injured as a result of Garnett's simple and gross negligence and intentional acts of assault and battery. Garnett filed a demurrer and plea of sovereign immunity, asserting that the second amended motion for judgment did not allege sufficient facts to support a lack of consent to the tackling demonstration and, therefore, did not plead causes of action for either gross negligence, assault, or battery. The trial court dismissed the action, finding that Garnett, as a school board employee, was entitled to sovereign immunity for acts of simple negligence and that the facts alleged were insufficient to state causes of action for gross negligence, assault, or battery because the instruction and playing of football are “inherently dangerous and always potentially violent.”

In this appeal, the Koffmans do not challenge the trial court's ruling on Garnett's plea of sovereign immunity but do assert that they pled sufficient facts in their second amended motion for judgment to sustain their claims of gross negligence, assault, and battery.

I.

In *Ferguson v. Ferguson*, ... this Court defined gross negligence as “that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of [another]. It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness.” Whether certain actions constitute gross

negligence is generally a factual matter for resolution by the jury and becomes a question of law only when reasonable people cannot differ. ....

The disparity in size between Garnett and Andy was obvious to Garnett. Because of his authority as a coach, Garnett must have anticipated that Andy would comply with his instructions to stand in a non-defensive, upright, and motionless position. Under these circumstances, Garnett proceeded to aggressively tackle the much smaller, inexperienced student football player, by lifting him more than two feet from the ground and slamming him into the turf. According to the Koffmans' allegations, no coach had tackled any player previously so there was no reason for Andy to expect to be tackled by Garnett, nor was Andy warned of the impending tackle or of the force Garnett would use.

As the trial court observed, receiving an injury while participating in a tackling demonstration may be part of the sport. The facts alleged in this case, however, go beyond the circumstances of simply being tackled in the course of participating in organized football. Here Garnett's knowledge of his greater size and experience, his instruction implying that Andy was not to take any action to defend himself from the force of a tackle, the force he used during the tackle, and Garnett's previous practice of not personally using force to demonstrate or teach football technique could lead a reasonable person to conclude that, in this instance, Garnett's actions were imprudent and were taken in utter disregard for the safety of the player involved. Because reasonable persons could disagree on this issue, a jury issue was presented, and the trial court erred in holding that, as a matter of law, the second amended motion for judgment was inadequate to state a claim for gross negligence.

## II.

The trial court held that the second amended [complaint] was insufficient as a matter of law to establish causes of action for the torts of assault and battery. We begin by identifying the elements of these two independent torts. .... The tort of assault consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery. Restatement (Second) of Torts § 21 (1965) ....

The tort of battery is an unwanted touching which is neither consented to, excused, nor justified. .... Although these two torts “go together like ham and eggs,” the difference between them is “that between physical contact and the mere apprehension of it. One may exist without the other.” W. Page Keeton, Prosser and Keeton on Torts § 10 at 46; *see also* Friend § 6.3.

The Koffmans' second amended [complaint] does not include an allegation that Andy had any apprehension of an immediate battery. This allegation cannot be supplied by inference because any inference of Andy's apprehension is discredited by the affirmative allegations that Andy had no warning of an imminent forceful tackle by Garnett. The Koffmans argue that a reasonable inference of apprehension can be found “in the very short period of time that it took the coach to lift Andy into the air and throw him violently to the ground.” At this point, however, the battery alleged by the Koffmans was in progress. Accordingly, we find that the pleadings were insufficient as a matter of law to establish a cause of action for civil assault.

The second amended [complaint] is sufficient, however, to establish a cause of action for the tort of battery. The Koffmans pled that Andy consented to physical contact with players “of like age and experience” and that neither Andy nor his parents expected or consented to his “participation in aggressive contact tackling by the adult coaches.” Further, the Koffmans pled that, in the past, coaches had not tackled players as a method of instruction. Garnett asserts that, by consenting to play football, Andy consented to be tackled, by either other football players or by the coaches.

Whether Andy consented to be tackled by Garnett in the manner alleged was a matter of fact. Based on the allegations in the Koffmans' second amended [complaint], reasonable persons could disagree on whether Andy gave such consent. Thus, we find that the trial court erred in holding that the Koffmans' second amended [complaint] was insufficient as a matter of law to establish a claim for battery.

For the above reasons, we will reverse the trial court's judgment that the Koffmans' second amended [complaint] was insufficient as a matter of law to establish the causes of actions for gross negligence and battery and remand the case for further proceedings consistent with this opinion. FN\*

FN\* Because we have concluded that a cause of action for an intentional tort was sufficiently pled, on remand, the Koffmans may pursue their claim for punitive damages.

*Reversed and remanded.*

Justice KINSER, concurring in part and dissenting in part.

I agree with the majority opinion except with regard to the issue of consent as it pertains to the intentional tort of battery. In my view, the second amended motion for judgment filed by the plaintiffs, Andrew W. Koffman, by his father and next friend, and Richard Koffman and Rebecca Koffman, individually, was insufficient as a matter of law to state a claim for battery. ....

Absent fraud, consent is generally a defense to an alleged battery. .... In the context of this case, “[t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages.” Restatement (Second) of Torts § 50, cmt. b (1965) .... However, participating in a particular sport “does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill.” Restatement (Second) of Torts § 50, cmt. b (1965). ....

The thrust of the plaintiffs' allegations is that they did not consent to “Andy's participation in aggressive contact tackling by the adult coaches” but that they consented only to Andy's engaging “in a contact sport with other children of like age and experience.” They further alleged that the coaches had not previously tackled the players when instructing them about the rules and techniques of football.

It is notable, in my opinion, that the plaintiffs admitted in their pleading that Andy's coach was “responsible ... for the supervision, training and instruction of the defensive players.” It cannot be disputed that one responsibility of a football coach is to minimize the possibility that players will sustain “something more than slight injury” while playing the sport. .... A football coach cannot be expected “to extract from the game the body clashes that cause bruises, jolts and hard falls.” *Id.* Instead, a coach should ensure that players are able to “withstand the shocks, blows and other rough treatment with which they would meet in actual play” by making certain that players are in “sound physical condition,” are issued proper protective equipment, and are “taught and shown how to handle [themselves] while in play.” *Id.* The instruction on how to handle themselves during a game should include demonstrations of proper tackling techniques. *Id.* By voluntarily participating in football, Andy and his parents necessarily consented to instruction by the coach on such techniques. The alleged battery occurred during that instruction.

The plaintiffs alleged that they were not aware that Andy's coach would use physical force to instruct on the rules and techniques of football since neither he nor the other coaches had done so in the past. Surely,

the plaintiffs are not claiming that the scope of their consent changed from day to day depending on the coaches' instruction methods during prior practices. Moreover, they did not allege that they were told that the coaches would not use physical demonstrations to instruct the players.

Additionally, the plaintiffs did not allege that the tackle itself violated any rule or usage of the sport of football. Nor did they plead that Andy could not have been tackled by a larger, physically stronger, and more experienced player either during a game or practice. Tackling and instruction on proper tackling techniques are aspects of the sport of football to which a player consents when making a decision to participate in the sport.

In sum, I conclude that the plaintiffs did not sufficiently plead a claim for battery. We must remember that acts that might give rise to a battery on a city street will not do so in the context of the sport of football. .... We must also not blur the lines between gross negligence and battery because the latter is an intentional tort. I agree fully that the plaintiffs alleged sufficient facts to proceed with their claim for gross negligence.

For these reasons, I respectfully concur, in part, and dissent, in part, and would affirm the judgment of the circuit court sustaining the demurrer with regard to the claim for battery.

## SELF DEFENSE

### *Commonwealth of Northern Mariana Islands v. Demapan* 2008 WL 3982060 (N. Mariana Islands, Aug. 15, 2008)

MANGLONA, J.:

¶ 1 Defendant Francisco R. Demapan appeals his convictions of assault with a dangerous weapon, assault and battery, and disturbing the peace arguing (1) the trial court erroneously instructed the jury on the law of self-defense .... We find that the trial court misinstructed the jury on the law of self-defense when it failed to state that a person threatened with an attack of either non-deadly or deadly force that justifies the right of self-defense has no duty to retreat. Additionally, we find that the trial court erred in presuming that Demapan used deadly force in self-defense rather than allowing the jury to determine whether he used non-deadly or deadly force. In misinstructing the jury, the trial court imposed a retreat requirement that we decline to adopt, which, in turn, adversely affected its ability to accurately rule on the assault and battery and disturbing the peace charges. .... Accordingly, Demapan's convictions for assault with a dangerous weapon, assault and battery, and disturbing the peace are VACATED, and this case is REMANDED to the trial court for proceedings consistent with this opinion.

I

¶ 2 On July 27, 2002, Joann A. Cabrera hosted a barbeque at her parents' residence on Capital Hill. She invited a number of people to attend, including her cousin, Allen B. Aldan, and his friend, Demapan. After arriving, Demapan and Aldan got into an argument with another guest, Daniel Johnny. During the argument, Johnny's friends, Anthony J. Benavente, Jr. and Jonathan J. Benavente (collectively, "Benaventes"), arrived at the barbeque and the dispute quickly escalated into a physical confrontation.

¶ 3 Meanwhile, Joann Cabrera's father, Juan S. Cabrera, was sleeping inside. As a result of the ongoing fracas, Juan Cabrera's wife, Juliana Cabrera, woke him up and told him that their daughter's barbeque was quickly becoming a brawl. Juan Cabrera went outside and found the Benaventes fighting Aldan. After stopping the fight, the Cabrerias told Johnny and the Benaventes to go home and Aldan to go inside. Johnny and the Benaventes began walking to their vehicle, while Aldan went into the Cabrera's kitchen and got two knives. Aldan then returned to the barbeque and gave one of the knives to Demapan, who put it in his pocket.

¶ 4 Rather than leaving, Johnny charged both Aldan and Demapan, which resulted in another melee. Anthony Benavente removed his belt and wrapped one end around his hand. He then swung the belt buckle at Demapan, striking him in the face. Demapan turned away from Anthony Benavente and began walking away. However, Anthony Benavente swung his belt again and struck Demapan in the back of the head. Demapan turned to face Anthony Benavente, who swung his belt a third time and struck Demapan in the face before the belt buckle flew off the belt. Demapan took the knife out of his pocket, and allegedly told Anthony Benavente in Chamorro, "Bi puno," which means, "I am going to kill you." Appellant's Excerpts of Record ("ER") at 13. Demapan swung his knife at Anthony Benavente, cutting his lower abdomen. Demapan then turned around and walked toward Aldan and Jonathan Benavente, who were still fighting. As Demapan approached them, the two stopped fighting and Jonathan Benavente ran to his vehicle, where Anthony Benavente and Johnny were waiting for him.

¶ 5 Johnny and the Benaventes got into their vehicle and drove away. Thereafter, Anthony Benavente noticed he was bleeding around his lower abdomen. However, he did not seek medical treatment until after driving home and returning to the Cabrera residence to briefly meet with police. When Anthony Benavente went to the hospital, a nurse determined he had a "superficial" laceration on his lower abdomen that was about two inches in length. ER at 148- 49.

¶ 6 In December 2003, the Commonwealth charged Demapan [several counts, including assault.] [Footnote omitted.]

¶ 7 Prior to jury deliberation, [footnote omitted] the trial court instructed the jury on the elements of assault with a dangerous weapon, but provided a separate instruction on self-defense. The trial court provided the following self-defense instruction:

The defendant has offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm. It is never reasonable to use deadly force against a non-deadly attack.

....

The government must prove beyond a reasonable doubt that the defendant did not act in self-defense.

.... [Footnote omitted.] Demapan objected to the instruction, arguing it presumed he used deadly force in fighting Johnny and the Benaventes. Demapan asserted that the jury should be instructed on both non-deadly and deadly force, and that the instruction should clearly indicate that the jury must determine whether Demapan used non-deadly or deadly force. The trial court rejected his arguments and did not specifically instruct the jury on the use of non-deadly force.

¶ 8 Demapan also requested a jury instruction indicating that he did not have a duty to retreat before defending himself. [FN4] The trial court, however, rejected the request and instead provided the following instruction: "A person threatened with an attack of deadly force that justifies the right of self-defense need not retreat." ER at 295. Demapan objected to this instruction, arguing it implies that a person threatened with non-deadly force must retreat before acting in self-defense. This implication was made explicit when the prosecution specifically asked the jury to make such an inference. [Footnote omitted.] However, the trial court overruled Demapan's objection.

FN4. Demapan proposed the following jury instruction:

A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with a similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

ER at 298 (citing 1 Cal. Jury Instr., Crim. 5.50 (7th ed.2003)).

¶ 9 Demapan was convicted of one count of assault with a dangerous weapon, one count of assault and battery, and one count of disturbing the peace. The jury found Demapan guilty of assault with a dangerous weapon against Anthony Benavente, but acquitted Demapan of assault with a dangerous weapon against Jonathan Benavente and Johnny. The trial court convicted Demapan of assault and battery against Anthony Benavente, but acquitted him of assault and battery against Jonathan Benavente and Johnny. Additionally, the trial court convicted Demapan of disturbing the peace of Juan Cabrera, but acquitted him of disturbing the peace of Joann and Juliana Cabrera. Finally, the trial court acquitted Demapan of rioting.

¶ 10 In March 2004, the trial court ... sentenced Demapan in accordance with the mandatory minimum sentencing provisions set forth in 6 CMC § 4102(a). .... [Footnote omitted.]

¶ 11 Demapan appealed, [footnote omitted] arguing: (1) the trial court erroneously instructed the jury on the law of self-defense; ....

## II

### Self-Defense Jury Instruction

¶ 12 The trial court has a duty to instruct the jury "in all essential questions of law whether requested or not." .... In reviewing the sufficiency of a jury instruction, this Court must "consider whether the instructions as a whole were misleading or inadequate to guide the jury's determination." .... Whether the trial court erroneously instructed the jury on the law of self-defense is a question of law reviewed de novo. ....

¶ 13 In the Commonwealth, criminal defendants are entitled to a jury finding of guilt beyond a reasonable doubt when charged with "a felony punishable by more than five years imprisonment or by more than \$2,000 fine, or both...." 7 CMC § 3101(a). To convict a defendant of assault with a dangerous weapon in the Commonwealth, the prosecution must prove that the defendant (1) threatened to cause, attempted to cause, or purposely caused, (2) bodily injury to another, (3) with a dangerous weapon. 6 CMC § 1204(a). Additionally, when evidence of self-defense is presented to the jury, the prosecution has the burden of proving, beyond a reasonable doubt, that the defendant did not act in self-defense. 6 CMC § 251(b).

¶ 14 Demapan acknowledges that the trial court instructed the jury on the elements of assault with a dangerous weapon as well the law of self-defense, but argues that the instructions were flawed. First, Demapan maintains that the jury instructions erroneously implied that a person attacked with non-deadly force has a duty to retreat before acting in self-defense. Additionally, Demapan argues that there was insufficient evidence to support the trial court's instruction on the use of deadly force. Finally, Demapan asserts that even if there was sufficient evidence to warrant the deadly force instruction, the trial court erred in failing to have the jury, as fact-finder, determine whether Demapan's use of force constituted deadly or non-deadly force.

## A

### Self-Defense and the Duty to Retreat

¶ 15 Whether a person has a duty to retreat before acting in self-defense is an issue of first impression in the Commonwealth, as both our statutory law and case law are silent on the issue. In order to determine whether the trial court erroneously instructed the jury on the law of self-defense, we review the law of self-defense in other United States jurisdictions. [FN8] ....

FN8. In defining the duty to retreat in the Commonwealth, the prosecution suggests that this Court the standards set forth in the Restatement (Second) of Torts. See Appellee's Response Br. at 10-11 (citing Restatement (Second) of Torts § 65 cmt. g, § 63 cmt. m (1965)). Although we look to the restatements in the absence of local statutory and customary law, we find it inappropriate to base Commonwealth criminal law solely on common law tort principles.

¶ 16 Individuals are generally allowed to use force to protect themselves, or others, from the use of force by a third party. The doctrine of self-defense arose to prevent punishment for actions that are necessary under the circumstances. .... Statutes and case law from other United States jurisdictions reveal significant commonality among the states regarding self-defense. Among the most universal and longstanding requirements of justified self-defense are the following: (1) the defendant must have a reasonable fear of imminent danger; (2) the defendant may only use force against an unlawful aggressor; (3) the defendant's use of force must be necessary; and (4) the defendant's use of force must be proportional to the aggressor's use of force.

¶ 17 Most states have enacted statutes requiring a defendant to have a reasonable fear of imminent danger in order to successfully claim self-defense. Colorado's statute concerning self-defense typifies this principle: "A person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force

by that other person..." Colo.Rev.Stat. § 18-1-704(1) (2006). Implicit in the principle of reasonable fear of imminent danger is the assumption that those acting in self-defense are engaged in a legal activity in a place where they are legally authorized to be. See, e.g., Ind.Code § 35-41-3-2 (2006) (stating that for self-defense to be justified, the person has to be "in a place she has the right to be").

¶ 18 Another commonly-held principle of self-defense dictates that a person may only use force against an unlawful aggressor. See, e.g., *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn.1986) (noting that an aggressor "has no right to a claim of self-defense"). As such, initial aggressors generally may not claim self-defense. *Id.* Additionally, if undisputed evidence establishes that the defendant was the initial aggressor, a court may properly deny a self-defense instruction. See, e.g., *Gray v. State*, 463 P.2d 897, 908 (Alaska 1970). Initial aggressors do not have a self-defense claim unless they abandon the attack and give the initial victim reasonable notice of their intention to withdraw from the conflict. See, e.g., *Commonwealth v. Naylor*, 407 Mass. 333, 335 (1990); see also *Castillo v. State*, 614 P.2d 756, 766 (Alaska 1980) (stating it is a "well-established rule of law" that initial aggressors cannot claim self-defense unless they began an encounter with non-deadly force but are met with deadly force, or if they effectively withdraw from the encounter and the initial victim continues the assault).

¶ 19 Another principle of self-defense requires the use of force to be necessary. One common formulation of the necessity requirement gives a person the right to act when "such force is necessary to defend himself." {Citations to state statutes omitted.} Thus, a person acting in self-defense is not permitted to use force when such force would be equally effective at a later time and the person would suffer no harm or risk by waiting. See, e.g., *Commonwealth v. Jones*, 332 A.2d 464 (Pa.Super.Ct.1974) (where defendant previously called the police and then left the safety of his home to confront trespassers on his porch, defendant's act is not considered necessary for the purpose of self-defense). As such, once a victim reasonably believes an original attack has ceased, the victim's use of force must also cease. Additionally, a person acting in self-defense is not permitted to use more force than is necessary to defend themselves. See, e.g., *People v. Seiber*, 394 N.E.2d 1044 (Ill.App.Ct.1979) (force must be of the amount and kind necessary to avoid the harm); *People v. Glenn*, 68 A.D.2d 626 (N.Y.App.Div.1979) (jury properly rejected self-defense claim where attacker was shot three times and the force was more than reasonably necessary), *rev'd on other grounds*, 52 N.Y.2d 880. In evaluating the necessity of a defendant's force, physical characteristics, such as special skills and attributes or special handicaps, are typically considered. See, e.g., *State v. Wanrow*, 559 P.2d 548, 558 (Wash.1977).

¶ 20 Self-defense also requires proportionality. Once a reasonable justification for the use of force is established, a person "may use a degree of force which he reasonably believes to be necessary for such purpose." N.H.Rev.Stat. § 627:4 (2007). Thus, the amount of force exerted in self-defense must be proportional to the force being threatened. See, e.g., *People v. Robertson*, 34 Cal.4th 156, 167 (2004) ("One is entitled to use such force as is reasonable under the circumstances to repel what is honestly and reasonably perceived to be a threat of imminent harm.").

¶ 21 Much of the discussion surrounding the theory of self-defense focuses upon the necessity and reasonableness of a person's actions. Although the definition of both necessity and reasonableness vary according to the jurisdiction, the terms are often shaped by a jurisdiction's stance on the duty to retreat. In general terms, duty to retreat laws impose an obligation to retreat before exercising physical force in self-defense, so long as retreating would not impose a reasonable risk of harm.

¶ 22 Jurisdictions typically apply duty to retreat laws differently depending on whether the defendant used non-deadly or deadly force in exercising the right of self-defense. Due to the less serious consequences associated with non-deadly encounters, nearly all jurisdictions allow defendants to use non-deadly force without imposing a duty to retreat. [Footnote omitted.] Even states that require defendants to retreat before exercising deadly force typically do not require them to retreat before using non-deadly force.

[Footnote omitted] In fact, "[i]t seems everywhere agreed that one who can safely retreat need not do so before using non-deadly force." ....

¶ 23 Conversely, there is a split of authority regarding the duty to retreat before using deadly force. Under the English common law, before defendants could claim that their use of deadly force was justified, they had to show (1) they retreated "to the wall," and (2) they were threatened with death or serious bodily injury. [Footnote omitted] This English duty to retreat rule has survived among a minority of United States jurisdictions. Today, twenty jurisdictions impose a retreat requirement before a defendant may justifiably use deadly force in self-defense. [FN12] These duty to retreat jurisdictions are supported by the Model Penal Code, which also requires defendants to prove that they could not have safely retreated before using deadly force against an aggressor. Model Penal Code § 3.04(2)(b)(ii) (1985).

FN12. These twenty states are: Alaska, Alaska. Stat. § 11.81.335 (2008); Arkansas, Ark.Code § 5-2-607 (2008); Connecticut, Conn. Gen.Stat. § 53a-19 (2007); Delaware, Del.Code tit. 11, § 464; Idaho, State v. Carter, 655 P.2d 434, 436 (Idaho 1981); Iowa, State v. Sedig, 16 N.W.2d 247, 250 (Iowa 1944); Maine, Me.Rev.Stat. tit. 17-A, § 108 (2007); Maryland, Dawson v. State, 395 A.2d 160, 163 (Md.Ct.Spec.App.1978); Massachusetts, Commonwealth v. Toon, 773 N.E.2d 993, 1004 (Mass.App.Ct.2002); Minnesota, State v. Edwards, 717 N.W.2d 405, 413 (Minn.2006); Nebraska, Neb.Rev.Stat. § 28-1409(4)(b) (2007); New Hampshire, N.H.Rev.Stat. § 627:4 (2007); New Jersey, State v. Rodriguez, 920 A.2d 101, 114 (N.J.Super.Ct.App.Div.2007); New York, People v. Chung, 835 N.Y.S.2d 223, 224 (N.Y.App.Div.2007); North Dakota, N.D. Cent.Code § 12.1-05-07 (2007); Ohio, Ohio Rev.Code Ann. § 2901.09 (West 2008); Pennsylvania, Commonwealth v. Serge, 837 A.2d 1255, 1266-67 (Pa.Super.Ct.2003); Rhode Island, State v. Silvia, 836 A.2d 197, 199-200 (R.I.2003); Vermont, State v. Albano, 102 A.333, 334-35 (Vt.1917); and Wyoming, Small v. State, 689 P.2d 420, 424 (Wyo.1984).

¶ 24 Duty to retreat jurisdictions espouse the idea that "[a]ll human life, even that of an aggressor, should be preserved if at all possible," and that lethal self-defense should only be allowed as a non-aggressor's last resort. [Footnote omitted] Nonetheless, even in jurisdictions that impose a duty to retreat, the retreat requirement is typically tempered with conditions. For instance, retreat is usually required only where non-aggressors can attempt escape without increasing their own risk of harm. .... This subjective standard focuses on what a person knew at the time of the attack, rather than whether a person, with the benefit of hindsight, "could have retreated with complete safety." .... Additionally, fleeing is rarely, if ever, required when a person is threatened with a firearm. Laney v. United States, 294 F. 412, 414-15 (D.C. Cir.1923) ("Indeed, to retreat [from a firearm] would be to invite almost certain death."). Furthermore, nearly all jurisdictions follow the "castle doctrine" exception, which allows a person in his or her own home to use deadly force in self-defense without first retreating, even if a reasonably safe means of escape exists. See, e.g., People v. Toler, 9 P.3d 341, 347 (Colo.2000).

¶ 25 Although the duty to retreat rule found root in a number of jurisdictions, many jurisdictions began rejecting it in the late nineteenth and early twentieth century. .... This rejection was hastened after the doctrine fell out of favor with the United States Supreme Court. The earliest United States Supreme Court case addressing the duty to retreat is *Beard v. United States*. 158 U.S. 550 (1895). In *Beard*, the defendant was convicted of murdering a trespasser after the trial court instructed the jury that the defendant had a duty to retreat, even when on his own property, before using deadly force. *Id.* at 555. However, the United States Supreme Court reversed the conviction on appeal, holding that the trial court improperly instructed the jury on self-defense. *Id.* at 563. In so holding, the Court refused to recognize any common law duty to retreat when defendants are in their homes or on the land surrounding their homes. *Id.* at 563-64.

¶ 26 Decades later, the Court expanded the no duty to retreat rule in *Brown v. United States*. 256 U.S. 335 (1921). The case involved a long-standing dispute between Brown and his coworker. *Id.* at 342. Due to their troubled history, Brown brought a gun to work for protection. *Id.* Shortly thereafter, Brown and his co-worker got into an altercation. *Id.* The co-worker attacked Brown and began punching him. *Id.* In response, Brown ran to his gun, which was in his coat pocket approximately twenty feet away, and fired

four shots at his co-worker, killing him. *Id.* At trial, Brown was convicted of second-degree murder after the trial court instructed the jury that "in considering the question of self defense ... the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." *Id.* On appeal, the United States Supreme Court reversed Brown's conviction, holding that defendants have no duty to retreat when they face a reasonable fear of imminent death or severe bodily harm. *Id.* at 343-44.

¶ 27 Today, a majority of jurisdictions embrace the Supreme Court's holding in *Brown*, which serves as the basis of the modern-day "no duty to retreat" or "stand your ground" doctrine. Twenty-nine states employ versions of the stand your ground doctrine and do not require defendants to retreat before exercising deadly force, so long as they reasonably believe their use of force is necessary to prevent death or serious bodily harm. [FN14] These jurisdictions espouse the idea that "victims need not yield their rights, surrender their dignity, or reveal their weak side to aggressive wrongdoers." [Footnote omitted.]

FN14. These twenty-nine states are: Alabama, Ala Code § 13A-3-23 (1975); Arizona, Ariz.Rev.Stat. § 13-411 (2008); California, Cal.Penal Code § 197 (2008); Colorado, *Cassels v. People*, 92 P.3d 951, 958 (Colo.2004); Florida, Fla. Stat. § 776.013 (2005); Georgia, *McClendon v. State*, 651 S.E.2d 165, 170 (Ga.Ct.App.2007); Hawaii, Haw.Rev.Stat. § 703-304 (2008); Illinois, *People v. McGraw*, 149 N.E.2d 100, 103 (Ill.1958); Indiana, Ind.Code § 35-41-3-2(a) (2006); Kansas, Kan. Stat. § 21-3211 (2006); Kentucky, Ky.Rev.Stat. § 503.050 (2008); Louisiana, La.Rev.Stat. § 14:20 (2008); Michigan, Mich. Comp. Laws § 780.972 (2008); Mississippi, Miss.Code § 97-3-15 (2008); Missouri, Mo.Rev.Stat. § 563.031 (2008); Montana, *State v. Merk*, 164 P. 655, 657-58 (Mont.1917); Nevada, *Culverson v. State*, 797 P.2d 238, 240 (Nev.1990); New Mexico, *State v. Horton*, 258 P.2d 371, 372-74 (N.M.1953); North Carolina, *State v. Davis*, 627 S.E.2d 474, 477- 78 (N.C.Ct.App.2006); Oklahoma, *Bechtel v. State*, 840 P.2d 1, 13 (Okla.Crim.App.1992); Oregon, *State v. Sandoval*, 156 P.3d 60, 64 (Or.2007); South Carolina, S.C.Code § 16-11-440(c) (2007); South Dakota, S.D. Codified Laws §§ 22-16-34, 22-16-35 (2008); Tennessee, Tenn.Code § 39-11-611 (2008); Texas, Tex. Penal Code § 9.31 (2008); Utah, Utah Code § 76-2-402 (2008); Virginia, *Foote v. Commonwealth*, 396 S.E.2d 851, 855-56 (Va.Ct.App.1990); Washington, *State v. Redmond*, 78 P.3d 1001, 1004 (Wash.2003); and West Virginia, *Feliciano v. 7- Eleven, Inc.*, 559 S.E.2d 713, 722 (W.Va .2001).

....

¶ 29 In light of our review of the law of self-defense within other United States jurisdictions, we adopt the majority view that defendants are not required to retreat before using reasonable deadly or non-deadly force to defend against unlawful aggressors. However, in order to justifiably claim self-defense in exercising physical force, the following factors must be satisfied: (1) the defendant must have a reasonable fear of imminent danger; (2) the defendant may only use force against an unlawful aggressor; (3) the defendant's use of force must be necessary; and (4) the defendant's use of force must be proportional to the aggressor's use of force. In so holding, we bring Commonwealth law into conformity with the United States Supreme Court's decision in *Brown v. United States*, which reasoned that "[d]etached reflection cannot be demanded in the presence of an uplifted knife." 256 U.S. at 343. Victims need not yield their rights to unlawful aggressors, for "[i]f a defender is obligated to retreat, he is obligated to give way to the forces of ... the Wrong." [Footnote omitted.]

¶ 30 Having reviewed the applicable law of self-defense, we now address Demapan's specific claims. .... The trial court ... provided the jury with the following instruction: "A person threatened with an attack of deadly force that justifies the right of self-defense need not retreat." ER at 295. Demapan argues that the jury instruction, combined with the prosecutor's statement during closing arguments, erroneously implied that a person attacked with non-deadly force has a duty to retreat before acting in self-defense. He claims that the trial court erred in refusing to instruct the jury in accordance with his proposed instruction, which stated that "[a] person threatened with an attack that justifies the right of self-defense need not retreat." ER at 298 (citing 1 Cal. Jury Instr., Crim. 5.50 (7th ed.2003)). As noted above, Commonwealth residents have no duty to retreat before using reasonable force in defending against unlawful aggressors. We

therefore must determine whether the jury instructions were "misleading or inadequate to guide the jury's determination" when they failed to state that Demapan had no duty to retreat before using non-deadly force in self-defense. Esteves, 3 NMI at 454.

¶ 31 In *State v. Redmond*, the Washington Supreme Court held that a defendant is entitled to a no duty to retreat instruction when the jury might objectively conclude that retreat is a reasonable alternative to the use of force in self-defense. 78 P.3d 1001, 1003-04 (Wash.2003). Redmond involved a fight in a high school parking lot between the defendant, a former student, and a current student. Id. at 1002. During the fight, the defendant punched the other student and fractured his jaw. Id. As a result, the defendant was charged with second-degree assault. Id. At trial, each party alleged that the other was the initial aggressor and provided witnesses to support their allegations. Id. There was also evidence that the defendant could have easily retreated, but did not attempt to do so. Id. The defendant requested a no duty to retreat instruction as part of his theory of self-defense. Id. The trial court, however, refused to give the instruction, stating the case did not legitimately raise the issue of retreat. Id.

¶ 32 On appeal, the Washington Supreme Court reversed, holding that the defendant was entitled to a no duty to retreat instruction because without it, the jury may speculate whether or not the defendant should have retreated. Id. at 1004. The court noted that "[t]he law is well-settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be. An instruction should be given to this effect when sufficient evidence is presented to support it." Id. at 1003. The court further noted that where there is a possibility that the jury may speculate regarding a defendant's opportunity to retreat, the jury should be instructed that "the law does not require a person to retreat." Id. at 1004.

¶ 33 In the instant case, we find that the trial court should have instructed the jury that Demapan had no duty to retreat before using either deadly or non-deadly force. Although the trial court instructed the jury that there is no duty to retreat when threatened with a deadly attack, the instructions were silent as to the duty to retreat when threatened with a non-deadly attack. Like Redmond, this silence created a possibility that the jury may have speculated as to whether Demapan should have retreated before fighting Anthony Benavente. This possibility was enhanced exponentially when the prosecutor told the jury that if "you're threatened with non deadly force, you must retreat." ER at 320. The trial court's incomplete jury instructions, combined with the prosecutor's erroneous statement, not only invited jury speculation--if not seriously misled the jury--but it also denied Demapan the right to have the jury instructed on his theory of the case. ....

....

#### IV

¶ 53 For the foregoing reasons, we hold that the trial court erroneously instructed the jury on the law of self-defense when it: (1) refused to state that a person threatened with an attack of either non-deadly or deadly force that justifies the right of self-defense has no duty to retreat; and .... Accordingly, Demapan's convictions for assault with a dangerous weapon, assault and battery, and disturbing the peace are VACATED, and this case is REMANDED to the trial court for proceedings consistent with this opinion. [Footnote omitted.]

**Smith v. Com., 435 S.E.2d 414 (Va. App. 1993)**

COLEMAN, Judge.

In a bench trial, Jermaine Jerome Smith was found guilty of voluntary manslaughter. We must decide whether the evidence proved as a matter of law that Smith acted in self-defense when he intentionally killed Donnell Skinner. The question is whether the killing was an excusable homicide.

Based on familiar principles, we review the evidence in the light most favorable to the Commonwealth and grant to it all reasonable inferences fairly deducible therefrom. The undisputed evidence proved that Smith retreated as far as possible and killed Skinner only to avoid being killed himself. Accordingly, we hold that the facts establish excusable self-defense as a matter of law. Therefore, we reverse the manslaughter conviction and dismiss the charges against Smith.

On October 31, 1991, at approximately 2:00 a.m., Smith shot Donnell Skinner in the apartment of Crystal White, Smith's girlfriend. Donnell Skinner and James Thompson came to White's apartment to continue a discussion with Smith regarding some missing drugs. Earlier that night, Smith had been confronted by Skinner and Thompson on the street after Smith had taken several packets of cocaine that he "found" hidden near White's apartment building. When Skinner and Thompson accused Smith of stealing their cocaine and demanded its return, Smith gave them one of the packets. He kept the others, however, and went to White's apartment. Soon thereafter, Skinner and Thompson arrived, spoke briefly with Smith about their missing drugs and, after getting no satisfaction, they left. Fifteen minutes later, they returned and accused Smith and White of stealing their drugs. Both Skinner and Thompson displayed firearms during the confrontation. Unbeknownst to Skinner and Thompson, Smith was armed with a pistol in his back pocket.

Skinner grabbed White and put his gun to her face. Smith, who knew that Skinner had a reputation "for robbing and shooting people," urged White to tell Skinner anything that she knew about the missing cocaine. Skinner took White into the bathroom and informed her that he was not going to hurt her. However, when he returned to the living room, he told Smith that he was going to kill White. Attempting to placate Skinner, Smith and another friend, Lamont, who was in the apartment, gave Skinner approximately \$200 for the missing drugs. Despite this attempt to forestall violence, Skinner continued to make threats, saying, "[W]hy don't we just go ahead and do what we said we were going to do.... [T]hey gonna tell on us.... [W]e gotta do what we gotta do."

Smith, who at this time had backed from the living room into the kitchen, saw Thompson cock his gun. Skinner, with his gun in hand, began to turn toward Smith. As Skinner did so, Smith drew his pistol and fired at Skinner, hitting him in the head. Thompson returned fire, and Smith continued shooting randomly until all his ammunition had been fired. He then peered into the living room, at which time Thompson, who was lying on the floor, shot Smith in the arm. Smith fled out the door to a neighbor's apartment. From there, he went by taxi to the hospital. Smith, Thompson, and Skinner had all been shot. Skinner, who was shot twice, died from a gunshot wound to the head.

At the hospital, Smith first told a detective that he had been shot in public by a stray bullet and knew no details about the shooting. Later, on November 5, 1991, Smith told the detective in a videotaped interview about the shooting in White's apartment. At trial, Smith claimed that he killed Skinner in self-defense. The trial judge found, however, that by taking the drugs, Smith had instigated a conflict with Skinner and Thompson and, therefore, that the killing had been during mutual combat.

Self-defense is an affirmative defense which the accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt. .... Whether an accused proves circumstances sufficient to create a reasonable doubt that he acted in self-defense is a question of fact. .... A trial

judge's factual findings will not be disturbed on appeal unless plainly wrong or without evidence to support them. ....

Killing in self-defense may be either justifiable or excusable. If it is either, the accused is entitled to an acquittal. ....

“Justifiable homicide in self-defense occurs [when] a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself.” .... If an accused “is even slightly at fault” in creating the difficulty leading to the necessity to kill, “the killing is not justifiable homicide.” .... Any form of conduct by the accused from which the fact finder may reasonably infer that the accused contributed to the affray constitutes “fault.” ....

Excusable homicide in self-defense occurs where the accused, although in some fault in the first instance in provoking or bringing on the difficulty, when attacked retreats as far as possible, announces his desire for peace, and kills his adversary from a reasonably apparent necessity to preserve his own life or [to] save himself from great bodily harm.

.... Whether the danger facing the accused is “reasonably apparent” is determined from the viewpoint of the accused at the time that he shot the victim. .... However, his fear alone does not excuse the killing; there must be an overt act indicating the victim's imminent intention to kill or seriously harm the accused. ....

Arguably, Smith may have provoked the initial confrontation with Skinner and Thompson by taking their cocaine. However, he attempted to withdraw from the conflict several times, and he shot Skinner and Thompson only when it became necessary to do so in order to save his life or prevent serious bodily injury to him. The danger confronting Smith was real and immediate, and he had no other course available to him. He literally was looking down the barrel of a loaded gun with another assailant standing nearby armed with a cocked pistol. It is difficult to conceive a situation more life threatening than that confronting Smith with all avenues of safety cut off. Smith was entitled to an acquittal, as a matter of law, on a finding of excusable homicide in self-defense.

Under those circumstances, the only reasonable belief that Smith could have had was that Skinner and Thompson intended to carry out their threats to kill him and that he was in imminent danger of death or serious bodily injury. Both Skinner and Thompson arrived at White's apartment making death threats and brandishing firearms. They blocked the front door, making it apparent that no one would be able to leave. Skinner took White into another room and threatened to kill her. Smith knew of Skinner's reputation for violence and attempted to forestall any violence by offering him money. Despite Smith's gesture to end the conflict, Skinner continued to make threats.

Smith retreated as far as possible before shooting. He went into the kitchen area and did not shoot until he saw Thompson cock his gun and Skinner turn toward him with his gun after threatening to “do what they had to.” Although the kitchen had a back door, it offered him no avenue to escape. Skinner and Thompson were within easy striking distance with their guns poised. The law does not require a person to suffer the last lethal blow before being able to take up his weapon to defend his life. ....

No credible evidence supports the trial judge's finding that Smith shot Skinner while they were engaged in mutual combat. In order for combat to have been “mutual it must have been voluntarily and mutually entered into.” .... “One who is assaulted may and usually does defend himself, but the ensuing struggle cannot be accurately described as a mutual combat.” .... Otherwise, “every fight would be a mutual combat.” Id. Smith did not voluntarily enter into the shootout with Skinner and Thompson.

Although Smith arguably brought about the difficulty that eventually led to the shootout, he attempted several times to prevent the violence that ultimately ensued. Having no other reasonable avenue of escape, Smith took the only action available to prevent his death or serious bodily injury.

For these reasons, we reverse the conviction of voluntary manslaughter.

Reversed.

## Self Defense: Aggressor

*Knott v. Com.*, 1998 WL 157072 (Va. App., April 7, 1998)

BRAY, Judge.

A jury convicted Robert Knott (defendant) of voluntary manslaughter. At trial, defendant relied upon the theory of self-defense and argues on appeal that the evidence was insufficient to support the verdict. We agree and reverse the conviction. [Footnote omitted.]

Upon familiar principles, we view the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. .... We, therefore, “discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom.” ....

The parties are fully conversant with the record and this memorandum opinion recites only those facts necessary to disposition on appeal.

On January 9, 1996, defendant and the victim, Timothy Moore, resided in a homeless shelter located in the City of Fredericksburg. At approximately 11:30 p.m., a dispute arose between defendant and Moore's friend, Joe Chase, and Moore encouraged Chase to fight defendant, offering to ally with him and “kick [defendant's] ass.” Moments later, Moore, alone, accosted defendant, “put his hands in front of [defendant's] face” and repeatedly insulted and threatened him. Initially, defendant “just stood there,” but “swung” at Moore after Moore spit on both defendant and another resident, Randy Kaufman. Moore, intoxicated FN2 and much larger and more muscular than defendant, “swang back,” but Kaufman deflected the blows. Moore continued to taunt and challenge defendant, but defendant moved into an adjoining common area, ending the confrontation.

FN2. Moore's blood alcohol content tested at 0.22%.

Moore, still enraged, returned to his bed and “beat[ ] his fists” on the mattress while Chase attempted “to calm him down.” Meanwhile, defendant armed himself with a knife from the shelter kitchen, returned to the sleeping area, “went to his bed” and “lay[ ] down.” Within seconds, a shirtless Moore approached, cornered defendant, “pulled [him] up” from the bed, and declared, “chicken s---'s back; I'm going to kill him.” Defendant resisted, and a struggle ensued, during which defendant stabbed or cut Moore in the chest area. Moore, however, persisted, wrestling defendant to the floor, holding him “down with his left arm, and ... punch[ing] him with his other arm.” Defendant then stabbed Moore, but Moore rose to his feet, again declaring to defendant his intention “to kill your ass.” Kaufman intervened, pushed Moore against the lockers, and Moore collapsed, dying shortly thereafter from the several knife wounds inflicted by defendant during the affray.

Defendant testified that he “was losing consciousness” as the fight progressed and “was afraid for [his] life at this point.” Realizing that he “couldn't get out of the situation” or “break the grip of Tim Moore,” he “grabbed the knife ... and ... poked it at [Moore] hoping that he would release his grip.” Moore, however, “started choking [defendant] ..., cutting off [his] airway, so [defendant] stabbed him.”

Self-defense is an affirmative defense which the accused must prove by introducing sufficient evidence to raise a reasonable doubt about his guilt.” .... “Killing in self-defense may be either justifiable or excusable homicide. ‘Justifiable homicide in self-defense occurs where a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself.’”....

“The law of self-defense is the law of necessity, and the necessity relied upon must not arise out of defendant's own misconduct. Accordingly, a defendant must reasonably fear death or serious bodily

harm to himself at the hands of his victim.” .... “[W]hether the danger is reasonably apparent is always to be determined from the viewpoint of the defendant at the time he acted.” .... “The law does not require a person to suffer the last lethal blow before being able to take up his weapon to defend his life.” .... However, “fear alone” is not sufficient for defendant to act; “there must be an overt act indicating the victim's imminent intention to kill or seriously harm the accused,” ...., and “[a] person only has the privilege to exercise reasonable force to repel the assault.” ....

Here, the Commonwealth's evidence clearly established that Moore was the aggressor, repeatedly provoking and intimidating defendant with both verbal and physical assaults. After defendant and Moore exchanged blows during the initial encounter, defendant withdrew to the common area and, fearful of Moore, armed himself with a knife before returning passively to his bunk. However, unwilling to abandon his torment of defendant, Moore again angrily attacked, grabbing defendant from his bed, assaulting and repeatedly threatening to kill him. Such conduct, together with Moore's demonstrated hostility, greater size, intoxication, and violent rage created a reasonable apprehension in defendant of death or great bodily harm. Under such circumstances, defendant reasonably resorted to deadly force in repelling Moore's attack, resulting in justifiable homicide as a matter of law.

Accordingly, we reverse the conviction.

Reversed and dismissed.

## **Self Defense is Not Revenge**

### *Slaughter v. State*, 608 S.E.2d 227 (Ga. 2005)

A Fulton County jury found Marco Slaughter guilty of the malice murder of his cousin, Tairantae Slaughter. The trial court entered judgment of conviction and sentenced Slaughter to life imprisonment. A motion for new trial was denied on August 11, 2004, and Slaughter appeals, [footnote omitted] enumerating as error only the general grounds.

Slaughter contends that the State failed to disprove the defenses of mistake of fact and self-defense beyond a reasonable doubt. The asserted mistake of fact was not a separate defense since it “concerned whether the victim was armed, and thus, whether [Slaughter] was justified in shooting first in self-defense.” ....

Slaughter relies on the fact that the victim had recently robbed and shot at him, and on his own testimony that he saw the victim pull out a pistol. However, the evidence, construed in support of the verdict, shows that, after the victim robbed Slaughter because of his refusal to return some clothes, Slaughter made repeated threats to kill the victim, recruited family members to help him, and went with them to purchase a box of shotgun shells. According to eyewitness testimony, Slaughter pursued and confronted the unarmed victim in the middle of the street, shot him in the back, stood over him and shot him twice more, struck him in the head with the shotgun, put the gun away, left the scene, and bragged to others about the crime.

“Witness credibility is to be determined by the jury, OCGA § 24-9-80, as is the question of self-defense when there is conflicting evidence on the issue.” .... In considering the evidence regarding self-defense, the jurors were free to accept the eyewitness testimony of the State's witnesses and to reject Slaughter's testimony. .... Thus, the jury was authorized to find that, at the time of the shooting, Slaughter was not in imminent danger from the victim, but rather that he “acted solely out of revenge for prior crimes and assaults allegedly committed against him by [the victim]. ‘“(T)he law will not justify a killing for deliberate revenge however grievous the past wrong may have been(.)”” .... Accordingly, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Slaughter did not act in self-defense when he shot the victim and that he was guilty of malice murder. ....

Judgment affirmed.

**Mistake and Duty to Retreat: Minority View**

*State v. Hamilton*, 2002 WL 1758358 (Ohio Ct. App. July 29, 2002)

YOUNG, J.

{¶ 1} Defendant-appellant, Lavell Hamilton, appeals his conviction for murder and his sentencing in the Butler County Court of Common Pleas. We affirm the trial court's decision.

{¶ 2} On August 8, 2000, Chris Johnson died from a gunshot wound. A police investigation led to the arrest of appellant for Johnson's murder. Appellant was indicted for one count of murder in violation of R.C. 2903.02(A) with a gun specification, and two counts of having weapons under a disability. Before trial, appellant pled guilty to the two counts of having weapons under a disability.

{¶ 3} At trial, the state presented evidence to show that several people, including appellant and Johnson, were at a trailer in Hamilton, Ohio, smoking crack cocaine. At some point in the evening, a fight occurred between Johnson and Nick Brown, a friend of appellant's. Appellant broke up the fight and had additional words with Brown. The state presented eyewitness testimony to establish that appellant shot Johnson. Appellant testified and claimed that the shooting was in self-defense. A jury found appellant guilty of murder in violation of R.C. 2903.02(A) with a gun specification. The trial court sentenced appellant to 15 years to life on the murder conviction, consecutive to a three-year term for the gun specification. The trial court merged the two convictions for possessing weapons under a disability and imposed an 11-month prison term to run consecutively with the other prison terms.

{¶ 4} Appellant now appeals his conviction for murder and the trial court's sentencing decision, raising the following two assignments of error:

Assignment of Error No. 1

{¶ 5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO PROPERLY INSTRUCT THE JURY REGARDING SELF-DEFENSE."

....

{¶ 7} In his first assignment of error, appellant argues that the trial court erred by failing to instruct the jury that a defendant who has a mistaken belief as to the existence of danger is justified in killing his assailant in self-defense.

{¶ 8} Jury instructions must contain "all matters of law necessary for the information of the jury in giving its verdict." .... A trial court must give the jury all instructions that are relevant and necessary for the jury to weigh the evidence and fulfill its duty as the fact finder. .... When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. ....

{¶ 9} Appellant testified that Johnson was a part of PIRU, which stands for "People In Red Uniforms" and is part of the Blood gang organization. He testified that Johnson had a reputation for violence and for carrying a gun. Appellant testified that he knew Johnson was looking for him because he had been with another person who robbed "one of his [Johnson's] boys."

{¶ 10} According to appellant, he went to the trailer to sell and smoke drugs and was probably drinking. He stated that he was in the back bedroom when he heard shouting and came out and saw Johnson. Appellant claimed that Johnson had a gun and started saying things like "somebody gonna die here," and "somebody's not leaving here tonight." Appellant claimed that Johnson's hand went out, so he pulled his

own gun out and began shooting before Johnson could shoot him. According to appellant, he shot first because he was afraid Johnson would shoot him. The police only recovered appellant's gun at the scene. In addition, the other witnesses all testified that Johnson did not have a gun.

{¶ 11} The trial court instructed the jury as follows:

{¶ 12} “To establish self-defense the following elements must be shown: (1) the defendant was not at fault in creating the situation giving rise to the confrontation; (2) the defendant had reasonable grounds to believe and an honest belief that he or another was in imminent danger of death or of great bodily harm, and that his only means of escape from such danger was in the use of deadly force; and (3) the defendant must not have violated any duty to retreat to avoid the danger.”

{¶ 13} Appellant claims that while the jury instructions given by the court are correct statements of the law, “they did not go far enough.” Appellant requested that the trial court instruct the jury as follows:

{¶ 14} “If the defendant had a reasonable ground, and honest belief, that he was in imminent danger of death, or great bodily harm, and that the only means of escape from such danger was by injuring or killing his assailant, then he was justified, even though he was mistaken as to the existence of such danger.”

{¶ 15} Appellant claims that it was necessary for the court to specifically instruct the jury that appellant's belief could be mistaken and still be a good-faith belief. We disagree. It is well-established that jury instructions must be reviewed as a whole. .... After reading the above instruction, the trial court further instructed the jury that appellant had a duty to retreat if he was at fault in creating the situation or “did not have reasonable grounds to believe, and an honest belief, that he was in imminent danger of death or great bodily harm \* \* \*.”

{¶ 16} The court further defined the terms “reasonable grounds” and “honest belief” by instructing that “[i]n determining whether the defendant, Lavell Hamilton, had reasonable grounds for an honest belief that he was in imminent danger you must put yourself in the position of this defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time.” The court further instructed the jury that “[y]ou must consider the conduct of Christopher Johnson and determine if his acts and words caused the defendant, Lavell Hamilton, to reasonably and honestly believe that he or another was about to receive great bodily harm.”

{¶ 17} Thus, the court made it clear that the appropriate standard was “reasonable grounds and honest belief” and explained that this standard was to be determined by the jury putting themselves in the same position as the defendant. The phrase “honest belief” “naturally includes the possibility that the defendant may have been mistaken in his belief.” .... Thus, we find the trial court did not err in its instructions to the jury. Appellant's first assignment of error is overruled.

[Discussion of second assignment of error omitted.]

## **HANDOUT 5**

### **DEFENSE OF OTHERS; DEFENSE OF DWELLING**

#### **Defense of Others; Defense of Dwelling**

*State v. Williford, 551 N.E.2d 1279 (Ohio 1990)*

ERBERT R. BROWN, Justice.

In the instant case, we must determine whether the failure to instruct the jury on retreat and defense of family was error, and, if so, whether the errors were preserved for appeal. We answer these questions in the affirmative and affirm the decision by the court of appeals.

I

Under Ohio law, self-defense is an affirmative defense. .... To establish self-defense, the defendant must show “ \* \* \* (1) \* \* \* [he] was not at fault in creating the situation giving rise to the affray; (2) \* \* \* [he] has [ sic ] a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of \* \* \* force; and (3) \* \* \* [he] must not have violated any duty to retreat or avoid the danger. \* \* \*”.... The defendant is privileged to use that force which is reasonably necessary to repel the attack. .... “If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.” ....

The jury instruction in the instant case correctly explained this basic standard. Appellee agrees, but argues that there should have been a further instruction that he was privileged to defend the members of his family, and that he was under no duty to retreat from his home.

#### Defense of Family

Ohio law has long recognized a privilege to defend the members of one's family. .... (“It is conceded that parent and child, husband and wife, master and servant would be excused, should they even kill an assailant in the necessary defense of each other.”) .... As the court of appeals stated, if appellee, “in the careful and proper use of his faculties, in good faith and upon reasonable ground believed that his wife and family were in imminent danger of death or serious bodily harm \* \* \* [appellee] was entitled to use such reasonably necessary force, even to the taking of life, to defend his wife and family as he would be entitled to use in defense of himself.”

Appellee presented testimony that Carter was threatening Mrs. Williford with physical harm from the beginning of the altercation. A properly instructed jury, if it believed this testimony, could have found that appellee was acting in defense of his wife throughout the altercation. Further, appellant has never contended that Mrs. Williford would not have been privileged to use force in her own defense. The failure to instruct on defense of family was error.

#### No Duty to Retreat

In most circumstances, a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation. .... However, “[w]here one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life.” .... Implicit in this statement of law is the rule that there is no duty to retreat from one's home. ....

In the instant case, there was testimony that the confrontation took place inside appellee's house and on appellee's porch. Because the jury was not instructed on the Peacock rule, it might have believed that appellee was under a duty to retreat from his home. It was therefore error for the court to fail to give this instruction.

[Rest of case omitted.]

## **Mistake and Defense of Others**

**State v. Smith, 2008 WL 5147440 (Ohio App. Ct., Dec. 8, 2008)**

SKOW, J.

{¶ 1} Appellant, Marissa Smith, appeals the judgment of the Lucas County Court of Common Pleas, which convicted her of assaulting a police officer, a violation of R.C. 2903.13(A) and (C)(3), a felony of the fourth degree. For the reasons that follow, we affirm.

{¶ 2} Toledo police detectives Kelli Nicely and Steven Harrison were working undercover in an unmarked police car, monitoring a gas station, when they saw and heard a crowd of 20 to 30 people yelling and screaming. When they saw pushing and shoving and the beginnings of a fight, the detectives, wearing civilian clothes, decided to intervene. They yelled that they were police, to stop fighting, and pulled out their badges. Approximately six to seven people were fighting; Detective Nicely tried to restrain a fight between two females, one of whom was Alyssa Bunde. Bunde responded by trying to strike Nicely. Detective Harrison managed to get a handcuff on Bunde. Not seeing the handcuff, Nicely attempted to take Bunde down to the ground to get a better handcuffing position. Harrison yelled to Nicely that he had the handcuff on. Nicely then started to bring Bunde's other arm back so Harrison could cuff it. Smith, admittedly intoxicated, perceived that Bundy was being attacked and struck Nicely; she testified insistently that she did not know that Nicely was a police officer. Harrison hit Smith, and Smith backed off. Nicely then apprehended Smith. Following a bench trial, Smith was convicted of assault on a police officer, in violation of R.C. 2903.13(A) and (C)(3), a felony of the fourth degree, and was sentenced to a term of community control.

{¶ 3} Smith raises two assignments of error for review:

{¶ 4} “The trial court committed error prejudicial to the appellant by finding the appellant guilty of disorderly conduct in violation of O.R.C. § 2903.13(A) & (C)(3).” FN1

FN1. Appellant was, in fact, convicted of assault, not disorderly conduct.

{¶ 5} “Appellant's conviction was against the manifest weight of the evidence whereby the court did not properly consider the defense of others.”

[Discussion of sufficiency of evidence omitted.]

{¶ 9} In her second assigned error, Smith contends the court did not properly consider her “defense of others” defense, arguing that she was reasonable in using force to defend Bunde.

{¶ 10} A conviction is against the manifest weight of the evidence when a greater amount of credible evidence supports acquittal. .... Challenges to the weight of the evidence attack the credibility of the evidence presented. *Id.* To overturn a verdict as being against the manifest weight of the evidence, the jury must have “clearly lost its way and created such a miscarriage of justice” that the verdict must be reversed. .... Reversals occur “only in the exceptional case in which the evidence weighs heavily against the conviction.” ....

{¶ 11} A person who uses force in defense of others, “stands in the shoes” of the person he or she is defending. .... This rule means that the intervenor “acts at his own peril if the person assisted was in the wrong.” .... If the person being defended had no right to self-defense, the intervenor is not entitled to use force to defend that person, and cannot prevail on a “defense of others” defense. The intervenor asserting a “defense of others” defense has the burden of proving the affirmative defense of self-defense. .... The intervenor must prove that the person being rescued was not at fault in creating the situation. .... Even if

the intervenor stands in the shoes of a person with a right to self-defense, the intervenor must have a reasonable, good faith belief, that the person being aided was in imminent danger of death or bodily harm. ....

{¶ 12} In this case, Smith failed to prove that Bunde had a right to self-defense. The evidence indicates that Bunde was at fault in creating the situation. Both detectives testified that Bunde was resisting arrest. .... (arrestee not justified in using force to resist lawful arrest, unless the officer uses unnecessary or excessive force) .... Smith does not assert that the detectives used unlawful force. Since Bunde was in the wrong, Smith acted at her own peril in defending Bunde. Notably, the Ohio Supreme Court in *Wegner* supported the “stands in the shoes” rule, stating, “one who in good faith aggressively intervenes in a struggle between another person and a police officer in civilian dress attempting to effect the lawful arrest of the third person may be guilty of assault.” .... The instant case warrants the same application of the “stands in the shoes” rule. Officer Nicely was attempting to lawfully arrest Bunde, and therefore, absent an improper use of force, Smith had no justification to intervene.

\*3 {¶ 13} Further, the weight of the evidence demonstrates that Smith's asserted belief that she did not know that Nicely was a detective was unreasonable. The detectives testified that they entered the gas station with badges around their necks, screaming that they were police and to stop fighting. The detectives appeared successful in communicating to others that they were officers, because people began to leave the scene; several people in the crowd tried to calm Bunde, telling her to comply with Nicely's orders. Smith admitted that she had consumed six to seven shots of cognac prior to her arrival at the gas station and admitted that she was intoxicated. She also admitted that, as soon as she struck Nicely, people in the crowd began telling her that she struck a police officer. The trial court may have given her perceptions less credence as a result. Given the evidence, we defer to the trial court's finding that the detective's testimony was more credible and that Smith had no right to defend Bundy from a lawful arrest. Smith's second assignment of error is not well-taken.

{¶ 14} The judgment of the Lucas County Court of Common Pleas is affirmed. ....

JUDGMENT AFFIRMED.

## Transferred Intent

### *Smith v. State*, 419 S.E.2d 74 (Ga. App. 1992)

Clarence Thomas was attempting to restrain his brother, Leonard Thomas, who was charging at appellant Danny Smith in retaliation for a remark made several weeks earlier which tended to impugn his character. Smith, who thought Leonard might be armed with a gun, fired one round of birdshot from a 20 gauge shotgun at him. Pellets hit both brothers. Smith was indicted on two counts of aggravated assault. Smith's sole defense at trial was justification. A jury found Smith not guilty of aggravated assault on Leonard Thomas, the intended victim, but guilty of aggravated assault on Clarence Thomas. Smith appeals his conviction.

1. Smith contends that since intent was not shown with respect to the assault upon Clarence Thomas, the evidence was insufficient to support the verdict. Smith argues that since the jury found that the assault on Leonard Thomas was lawful, it necessarily follows that he did not possess the requisite intent to commit an aggravated assault on the bystander.

The theory of transferred intent in criminal law has a long history from *Reg. v. Saunders*, 2 Plowd. 473, 75 Eng.Reprint 706 (1576), (18 ALR 923) in which it was pointed out that if a man maliciously shoots an arrow at another with intent to kill him and a person to whom he bore no malice is killed by it, this would be murder for the person who shot the arrow with intent to kill, and is the same offense as to such person as if he had killed the person he aimed at. More recently, this court has held: "When an unintended victim is struck down as a result of an unlawful act actually directed against someone else, the law prevents the actor from taking advantage of his own wrong and transfers the original intent from the one against whom it was directed to the one who actually suffered from it. 'In legal contemplation, the intent follows the act through to its legitimate results.' [Cit.]" .....

Can the principle of transferred intent be applied in a case, however, in which the jury finds that the firing of the shot was justified and therefore lawful? "If, in consequence of an assault upon himself which he did not provoke, the accused shot at his assailant, but missed him and the shot killed a bystander, no guilt would attach to him if the assault upon him was such as would have justified him in killing his assailant." .... This principle has been followed in *Turner v. State*, 209 Ga. 532(3), 74 S.E.2d 459 (1953) and *Olds v. State*, 84 Ga.App. 397(5), 66 S.E.2d 396 (1951).

In our case, the jury did find the defendant's actions to be justified. There was no evidence in the record from which one could divine any intent to injure Clarence. Intent being a requisite element of the aggravated assault charge, and no lesser offense (such as reckless conduct) having been charged, we find that there was insufficient evidence upon which to base a conviction as to that offense. Consequently, defendant's conviction must be reversed.

2. Smith also contends that the trial court erred in allowing the State to introduce evidence of criminal charges brought against him in Florida but would not allow him to introduce evidence of his acquittal. In light of our holding in Division 1 above, we need not reach this issue.

Judgment reversed.

## **HANDOUT 6**

### **SHOPKEEPER'S PRIVILEGE; ILLEGAL ACT; and STATUTE OF LIMITATIONS**

#### **Shopkeeper's Privilege Statutes for KY, NC, TN, and VA.**

##### **1. KENTUCKY – KY Revised Statute**

###### **§433.236 Detention and arrest of shoplifting suspect**

(1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person may take the person into custody and detain him in a reasonable manner for a reasonable length of time, on the premises of the mercantile establishment or off the premises of the mercantile establishment, if the persons enumerated in this section are in fresh pursuit, for any or all of the following purposes:

(a) To request identification;

(b) To verify such identification;

(c) To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise, and to make reasonable investigation of the ownership of such merchandise;

(d) To recover or attempt to recover goods taken from the mercantile establishment by such person, or by others accompanying him;

(e) To inform a peace officer or law enforcement agency of the detention of the person and to surrender the person to the custody of a peace officer, and in the case of a minor, to inform the parents, guardian, or other person having custody of that minor of his detention, in addition to surrendering the minor to the custody of a peace officer.

(2) The recovery of goods taken from the mercantile establishment by the person detained or by others shall not limit the right of the persons named in subsection (1) of this section to detain such person for peace officers or otherwise accomplish the purposes of subsection (1).

(3) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments.

##### **2. NORTH CAROLINA – NC Gen. Stat. Ann.**

###### **§14-72.1. Concealment of merchandise in mercantile establishments**

...

(c) A merchant, or the merchant's agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, or the merchant's agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or the merchant's agent or employee, is a minor under the age of 18 years, the merchant or the merchant's agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, or the merchant's agent or employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor.

**3. TENNESSEE – TN Code Ann.  
§40-7-116. Shoplifting; detention of suspect**

(a) A merchant or a merchant's employee or agent or a peace officer who has probable cause to believe that a person has committed or is attempting to commit the offense of theft, as defined in § 39-14-103, may detain such person on or off the premises of the mercantile establishment if such detention is done for any or all of the following purposes:

- (1) To question the person, investigate the surrounding circumstances, obtain a statement, or any combination thereof;
- (2) To request or verify identification, or both;
- (3) To inform a peace officer of the detention of such person, or surrender that person to the custody of a peace officer, or both;
- (4) To inform a peace officer, the parent or parents, guardian or other private person interested in the welfare of a minor of the detention and to surrender the minor to the custody of such person; or
- (5) To institute criminal proceedings against the person.

(b) Probable cause to suspect that a person has committed or is attempting to commit the offense of theft may be based on, but not limited to:

- (1) Personal observation, including observation via closed circuit television or other visual device;
- (2) Report of such personal observation from another merchant;
- (3) Activation of an electronic or other type of mechanical device designed to detect theft; or
- (4) Personal observation of dressing rooms, including observation via closed circuit television, two-way mirrors, or other visual devices shall be limited to observation by a person of the same sex as the person being observed. No such observation shall be lawful unless notices are posted in such dressing rooms that such monitoring may occur.

(c) A merchant or a merchant's employee or agent or a peace officer who detains, questions or causes the arrest of any person suspected of theft shall not be criminally or civilly liable for any legal action relating to such detention, questioning or arrest if the merchant or merchant's employee or agent or peace officer:

- (1) Has reasonable grounds to suspect that the person has committed or is attempting to commit theft;
- (2) Acts in a reasonable manner under the circumstances; and
- (3) Detains the suspected person for a reasonable period of time.

(d) The merchant may use a reasonable amount of force necessary to protect such merchant, to prevent escape of the person detained, or to prevent the loss or destruction of property.

(e) A reasonable period of time, for the purposes of this section, is a period of time long enough to accomplish the purpose set forth in this section, and shall include any time spent awaiting the arrival of a law enforcement officer or the parents or guardian of a juvenile suspect, if the merchant or the merchant's employee or agent has summoned such law enforcement officer, parents or guardian.

**VIRGINIA - VA Ann. Code**

**§8.01-226.9. Exemption from civil liability in connection with arrest or detention of person suspected of shoplifting**

A merchant, agent or employee of the merchant, who causes the arrest or detention of any person pursuant to the provisions of §§ 18.2-95, 18.2-96 or § 18.2-103, shall not be held civilly liable for unlawful detention, if such detention does not exceed one hour, slander, malicious prosecution, false imprisonment, false arrest, or assault and battery of the person so arrested or detained, whether such arrest or detention takes place on the premises of the merchant, or after close pursuit from such premises by such merchant, his agent or employee, provided that, in causing the arrest or detention of such person, the merchant, agent or employee of the merchant, had at the time of such arrest or detention probable cause to believe that the person had shoplifted or committed willful concealment of goods or merchandise. The activation of an electronic article surveillance device as a result of a person exiting the premises or an area within the premises of a merchant where an electronic article surveillance device is located shall constitute probable cause for the detention of such person by such merchant, his agent or employee, provided such person is detained only in a reasonable manner and only for such time as is necessary for an inquiry into the circumstances surrounding the activation of the device, and provided that clear and visible notice is posted at each exit and location within the premises where such a device is located indicating the presence of an antishoplifting or inventory control device. For purposes of this section, "electronic article surveillance device" means an electronic device designed and operated for the purpose of detecting the removal from the premises, or a protected area within such premises, of specially marked or tagged merchandise.

### **Shopkeeper's Privilege**

*Birdsong v. Wal-Mart Stores, Inc.*, 74 S.W.3d 754 (Ky. App. 2001)

JOHNSON, Judge:

Wanda Birdsong appeals from an order of the Christian Circuit Court entered on June 26, 2000, which granted summary judgment in favor of Wal-Mart Stores, Inc. Birdsong had alleged that Wal-Mart committed the torts of false imprisonment and the intentional infliction of emotional distress. In addition to seeking compensatory damages, Birdsong claimed that she was entitled to punitive damages because Wal-Mart's actions constituted gross negligence and recklessness. Having concluded that there are genuine issues of material fact which preclude summary judgment on Birdsong's claim of false imprisonment, we reverse in part and remand for further proceedings on that issue. We affirm the summary judgment on Birdsong's claims of intentional infliction of emotional distress, gross negligence and recklessness and her claim for punitive damages. [Footnote omitted.]

In reviewing the summary judgment, we must view the facts in a light most favorable to Birdsong, who has alleged and testified as follows: On May 8, 1998, at approximately 9:15 p.m., Birdsong went to the Wal-Mart store in Hopkinsville, Kentucky. She picked up a greeting card and some pet food and went to the checkout counter to pay for the items. The cash register receipt indicated that she checked out at approximately 9:47 p.m. As Birdsong began to exit the store along with several other customers, a Sensormatic inventory and theft control device set off a sensor alarm.

JaVonnie McWilliams, a Wal-Mart employee, approached the customers and instructed them to re-enter the store. McWilliams inspected each of the customers' bags; and when she did not notice anything suspicious, she asked each customer to individually exit the store. The only customer who triggered the sensor alarm a second time was Birdsong. McWilliams told the other customers that they were free to go, but she told Birdsong to stay. McWilliams then checked Birdsong's shopping bags a second time, and she checked Birdsong's receipt against the items in the shopping bags. McWilliams \*756 then asked Birdsong to exit the store a third time, and the sensor alarm was activated again. Birdsong concedes that the initial inquiry, inspection and detention by Wal-Mart were all reasonable.

Birdsong testified that McWilliams then led her to an area near the front door entrance and told her to sit down. Birdsong claims that when she sat down McWilliams pushed the shopping cart she had been using for her shopping in front of her to block her from leaving. Birdsong claims that she asked McWilliams if she "had to stay," and McWilliams said "yes."

McWilliams then called Virginia Brown, a Wal-Mart supervisor, to the scene. Brown told McWilliams that the sensor alarm had "been doing crazy things [that] night" and that it had previously been activated "for no reason." Brown then took Birdsong's purse through the exit door, and the sensor alarm was activated for a fourth time. At this point, it was clear to everyone involved that Birdsong's purse was activating the sensor alarm. In an attempt to dispel the employees' suspicions, Birdsong asked both McWilliams and Brown to search her purse. They told her that they were not allowed to do so. Brown then used a walkie-talkie to contact Bobby Dallas, the store's assistant manager. Dallas was asked to come to the front of the store, but he was not told that Birdsong was being detained on suspicion of shoplifting.

As Dallas was walking to the front of the store, he stopped to assist another Wal-Mart customer. The length of time that Dallas stopped is disputed; but Birdsong claims that after Dallas was contacted by Brown, it took him 15 minutes to arrive at the front of the store. When Birdsong was informed of Dallas' delay, she became very upset that he had stopped to help another customer instead of immediately attending to her problem. Birdsong told one of the employees [Footnote omitted.] that she did not like "being detained," and that with all of the other customers passing by her, she felt "humiliated." The employee responded by saying, "you be sure and mention that to him first when he gets up here."

When Dallas arrived, Birdsong suggested that he search her purse. He declined and told her that she was free to leave. Birdsong immediately left Wal-Mart and went back to her motel room. She remembers entering the room and noticing that the clock read 10:31 p.m.

Birdsong filed a complaint against Wal-Mart alleging false imprisonment and the intentional infliction of emotional distress. In an amended complaint, she alleged gross negligence and recklessness and sought punitive damages. The trial court granted Wal-Mart's motion for summary judgment. This appeal followed.

Summary judgment is only proper “where the movant shows that the adverse party could not prevail under any circumstances.” [Footnote omitted.] However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” [Footnote omitted.] The circuit court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” [Footnote omitted.] “The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” [Footnote omitted.]

This Court has stated that the standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law” [citations omitted]. [Footnote omitted.] “There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.” [Footnote omitted.]

Pursuant to Kentucky Rules of Civil Procedure (CR) 56.03, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” To prevail on its motion for summary judgment, Wal-Mart was required to demonstrate that “it would be impossible for [Birdsong] to produce evidence at trial warranting a judgment in [her] favor.” [Footnote omitted.]

The tort of false imprisonment requires the plaintiff to establish that she was detained unlawfully. [Footnote omitted.] In *Great Atlantic & Pacific Tea Co. v. Smith*, FN11 the Court stated:

Any exercise of force, by which in fact the other person is deprived of his liberty and compelled to remain where he does not wish to remain or to go where he does not wish to go, is an imprisonment. Or, as the offense is defined in *Great Atlantic & Pacific Tea Co. v. Billups*, 253 Ky. 126, 69 S.W.2d 5, “any deprivation of liberty of one person by another or detention for however short a time without such person's consent and against his will, whether by actual violence, threats, or otherwise, constitutes ‘arrest’ ”, or false imprisonment [citations omitted].

While Wal-Mart contends that Birdsong was not detained, it was not granted summary judgment on that issue. Rather, the issue that must be decided on appeal is whether it was appropriate for the trial court to rule by summary judgment that her detention was not unlawful. Wal-Mart argues, as a matter of law, that the detention was lawful because its employees acted in accordance with KRS FN12 433.236, the shopkeeper's privilege:

FN12. Kentucky Revised Statutes.

(1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person may take the person into custody and detain him in a reasonable manner for a reasonable length of time, on the premises of the mercantile establishment or off the premises of the mercantile establishment, if the persons enumerated in this section are in fresh pursuit, for any or all of the following purposes:

(a) To request identification;

(b) To verify such identification;

(c) To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise, and to make reasonable investigation of the ownership of such merchandise;

(d) To recover or attempt to recover goods taken from the mercantile establishment by such person, or by others accompanying him ...[.]

In reviewing this statute, this Court in Mitchell, stated:

Ultimately, the question of whether a detention was lawful is one of fact to be resolved by a jury under proper instructions from the trial court. As in all cases involving questions of fact, the weight to be given to conflicting evidence and the credibility to be afforded each witness remains within the province of the jury. It is entitled to accept the plaintiff's version of the incident and reject the defendant's version or vice versa. On appeal, we view the evidence in the light most favorable to the prevailing party. If viewed in that light it supports the judgment, we must affirm. [Footnote omitted.]

In the case at bar, we believe the different versions of the events as claimed by Birdsong and Wal-Mart lead to the obvious conclusion that there are genuine issues of material fact to be determined by a jury. Birdsong claims she was detained by store employees for approximately 45 minutes and that she was subjected to humiliation. She claims that one of the employees told her to sit on a bench near the front of the store and that the employee then pushed a shopping cart in front of her to prevent her from leaving. She also claims Dallas was dilatory in responding to her detention. She insists her situation could have been dealt with more effectively, efficiently and reasonably, if Wal-Mart had only fulfilled her persistent request to inspect her purse. On the other hand, Wal-Mart claims the entire episode lasted no more than 30 minutes. It claims that its employees acted reasonably in the manner and in the length of time they detained Birdsong; and that the inquiries they made of her were reasonable under the circumstances. From this discussion, we believe it is clear that there are factual issues to be resolved as to whether Birdsong was detained under KRS 433.236 "in a reasonable manner for a reasonable length of time" for the purpose of "mak[ing][a] reasonable inquiry as to whether [she] ha[d] in [her] possession unpurchased merchandise." Accordingly, it was error for the trial court to resolve these issues by summary judgment. FN14

FN14. Cases from other jurisdictions which have addressed the question of summary judgment in relation to a claim of false imprisonment and the shopkeeper's privilege include *Lindsey v. Sears*, 389 So.2d 902 (La.App.1980) and *Meadows v. F.W. Woolworth Co.*, 254 F.Supp. 907 (D.Fla.1966). In *Lindsey*, the plaintiff was asked to go to the back of the store after she activated the alarm while exiting the store. It was determined by store employees in approximately five to ten minutes that a clerk had failed to remove a tag from the plaintiff's merchandise and the plaintiff was allowed to leave. Unlike Birdsong's allegations, the plaintiff was only detained for a minimal amount of time and she did not claim that the store was dilatory in dealing with her. In *Meadows*, two girls brought a claim of false imprisonment against a store after they were asked to re-enter the store as suspected shoplifters. The store had been warned by police to watch out for a group of girls suspected of shoplifting and the two girls met the

description. The store was granted summary judgment based on Florida's shopkeeper's privilege statute because the girls were detained for no more than ten minutes and were not coerced or threatened in any manner.

The cases that Wal-Mart relies upon to support its argument in favor of summary judgment are distinguishable. In *Taylor Drugstores, Inc. v. Story*, [footnote omitted] store employees, who had observed Story placing items inside her purse, approached her as she was leaving the store and told her to step to the back of the store. Story then removed two items from her purse and claimed that she had intended to pay for them. The store manager detained Story until the police arrived and she was arrested.

In *Taylor*, this Court held that Story's placing of the items in her purse constituted probable cause for the store to detain her. This Court also stated that concealing merchandise, even if the goods are only partially hidden from view, is sufficient to allow store personnel to act pursuant to KRS 433.236. The issue in *Taylor*, was whether the store had probable cause to detain Story, not the reasonableness of her detention.

In its brief Wal-Mart states, “[m]ost importantly, the evidence establishes that the conduct of the Wal-Mart employees was based upon probable cause due to the Appellant's possessions activating the shoplifting deterrent control system and the detention was in a reasonable manner for a reasonable period of time.” The fact that Wal-Mart had probable cause to initially detain Birdsong is not in dispute. However, we hold that reasonable minds could differ as to whether her detention was “in a reasonable manner for a reasonable amount of time” and whether the purpose was “[t]o make reasonable inquiry as to whether [she] ha[d] in her possession unpurchased merchandise.” Accordingly, summary judgment should not have been entered on Birdsong's false imprisonment claim.

Having concluded that there are genuine issues of material fact which preclude summary judgment on Birdsong's claim of false imprisonment, the summary judgment of the Christian Circuit Court is reversed in part and this matter is remanded for further proceedings consistent with this Opinion. However, the summary judgment dismissing Birdsong's claims of intentional infliction of emotional distress, gross negligence and recklessness and her claim for punitive damages is affirmed.

**Plaintiff Committed an Illegal Act**

*Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005)

OPINION BY Justice ELIZABETH B. LACY.

In this appeal we consider whether *Zysk v. Zysk*, ... 404 S.E.2d 721 ([Va.] 1990), which disallows tort recovery for injuries suffered while participating in an illegal activity, precludes Muguet S. Martin from maintaining a tort action against Kristopher Joseph Zihlerl for injuries allegedly inflicted during sexual intercourse, a criminal act of fornication proscribed by Code § 18.2-344, in light of the decision of the Supreme Court of the United States in *Lawrence v. Texas*, 539 U.S. 558 ... (2003), holding unconstitutional a Texas penal statute prohibiting certain sexual acts.

**FACTS**

Because the case was decided on demurrer, we recite the facts contained in the pleadings and all reasonable inferences therefrom in the light most favorable to the plaintiff. .... Martin and Zihlerl were unmarried adults in a sexually active relationship from approximately October 31, 2001 through November 3, 2003. Martin experienced a vaginal outbreak in June 2003, which her physician diagnosed as herpes. Martin filed a motion for judgment against Zihlerl alleging that he knew he was infected with the sexually transmitted herpes virus when he and Martin were engaged in unprotected sexual conduct, knew that the virus was contagious, and failed to inform Martin of his condition. In the two-count motion for judgment, Martin asserted claims of negligence, intentional battery and intentional infliction of emotional distress and sought compensatory and punitive damages.

Zihlerl filed a demurrer asserting that Martin's injuries were caused by her participation in an illegal act and therefore, under *Zysk*, the motion for judgment did not state a claim upon which relief could be granted. Following a hearing, the trial court applied *Zysk* and sustained Zihlerl's demurrer holding that *Lawrence* did not “strike down” Code § 18.2-344 and that valid reasons such as the protection of public health and encouraging marriage for the procreation of children are “rationally related to achieve the objective of the statute.” We awarded Martin an appeal.

**DISCUSSION**

Before turning to the merits of Martin's appeal, we consider Zihlerl's assertion that Martin lacks “standing” to challenge the constitutionality of Code § 18.2-344. In making his “standing” argument, Zihlerl refers to the lack of real or threatened prosecution of Martin under Code § 18.2-344 and states that invalidation of the statute would not impact her liberty interest but, instead, would only allow her to maintain her action for damages. Regardless of the approach, well established law precludes us from considering Zihlerl's “standing” challenge.

[Part of the “standing” discussion omitted.]

While we will not entertain a standing challenge made for the first time on appeal, the Court will consider, *sua sponte*, whether a decision would be an advisory opinion because the Court does not have the power to render a judgment that is only advisory. .... In the case at bar, the Court's decision on the constitutionality of Code § 18.2-344 will determine Martin's right to pursue her tort claim for damages. Thus, we find that this case presents a justiciable issue and a decision by this Court will not be an advisory opinion.

Martin asserts that the reasoning of the Supreme Court of the *United States in Lawrence* renders Virginia's statute criminalizing the sexual intercourse between two unmarried persons, Code § 18.2-344, unconstitutional. ...

[Discussion of United States Supreme Court cases omitted.]

We find no relevant distinction between the circumstances in *Lawrence* and the circumstances in the present case. FN\* As described in Justice Stevens' rationale adopted by the Court in *Lawrence*, decisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationships that are entitled to due process protection. Using this rationale, the Supreme Court found that the Texas statute criminalizing a specific sexual act between two persons of the same sex violated the Due Process Clause of the Fourteenth Amendment because such statute improperly abridged a personal relationship that was within the liberty interest of persons to choose. *Id.* at 578-79, 123 S.Ct. 2472. We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose. Because Code § 18.2-334, like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest which is exercised in making these personal decisions, it violates the Due Process Clause of the Fourteenth Amendment.

FN\* Indeed, but for the nature of the sexual act, the provisions of Code § 18.2-344 are identical to those of the Texas statute which *Lawrence* determined to be unconstitutional.

Ziherl argues, and the trial court held, that Code § 18.2-344 withstands constitutional scrutiny because “[v]alid public reasons for the law exist,” including protection of public health and “encouraging that children be born into a family consisting of a married couple.” Regardless of the merit of the policies referred to by the trial court, the Supreme Court in *Lawrence* indicated that such policies are insufficient to sustain the statute's constitutionality. *Id.* at 578, 123 S.Ct. 2472.

The Supreme Court did not consider the liberty right vindicated in *Lawrence* as a fundamental constitutional right which could be infringed only if the statute in question satisfied the strict scrutiny test. Rather, the Court applied a rational basis test, but held that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.* This statement is not limited to state interests offered by the state of Texas in support of its statute, but sweeps within it all manner of states' interests and finds them insufficient when measured against the intrusion upon a person's liberty interest when that interest is exercised in the form of private, consensual sexual conduct between adults. As we have said, this same liberty interest is invoked in this case when two unmarried adults make the choice to engage in the intimate sexual conduct proscribed by Code § 18.2-344. Thus, as in *Lawrence*, the Commonwealth's interests do not warrant such encroachment on personal liberty.

Therefore, applying the reasoning of *Lawrence* as Martin asks us to do, leads us to conclude that Code § 18.2-344 is unconstitutional because by subjecting certain private sexual conduct between two consenting adults to criminal penalties it infringes on the rights of adults to “engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” *Id.* at 564, 123 S.Ct. 2472.

It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity. The *Lawrence* court indicated that state regulation of that type of activity might support a different result. Our holding, like that of the Supreme Court in *Lawrence*, addresses only

private, consensual conduct between adults and the respective statutes' impact on such conduct. Our holding does not affect the Commonwealth's police power regarding regulation of public fornication, prostitution, or other such crimes.

We now turn to the application of *Zysk* to this case. The rule applied in *Zysk* was that “a party who consents to and participates in an immoral and illegal act cannot recover damages from other participants for the consequence of that act.” .... We adhere to that rule. However, in light of our determination regarding the constitutionality of Code § 18.2-344, the sexual activity between Martin and Zihlerl was not illegal and “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Lawrence*, 539 U.S. at 577, 123 S.Ct. 2472. Therefore, *Zysk* is no longer controlling precedent to the extent that its holding applies to private, consensual sexual intercourse.

For the reasons stated above, we will reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

Chief Justice HASSELL, concurring.

I concur in the judgment of the majority

## Statute of Limitations

### *Dickens v. Puryear*, 276 S.E.2d 325 (N.C. 1981)

Plaintiff's complaint is cast as a claim for intentional infliction of mental distress. It was filed more than one year but less than three years after the incidents complained of occurred. Defendants moved for summary judgment before answer was due or filed. Much of the factual showing at the hearing on summary judgment related to assaults and batteries committed against plaintiff by defendants. Defendants' motions for summary judgment were allowed on the ground that plaintiff's claim was for assault and battery; therefore it was barred by the one-year statute of limitations applicable to assault and battery. G.S. 1-54(3).

Thus this appeal raises two questions. First, whether defendants, by filing motions for summary judgment before answer was due or filed, properly raised the affirmative defense of the statute of limitations. Second, whether plaintiff's claim is barred by the one-year statute of limitations applicable to assault and battery. We hold that defendants properly raised the limitations defense but that on its merits plaintiff's claim is not altogether barred by the one-year statute because plaintiff's factual showing indicates plaintiff may be able to prove a claim for intentional infliction of mental distress a claim which is governed by the three-year statute of limitations. G.S. 1-52(5). We further hold that summary judgment was, nevertheless, appropriately entered as to the femme defendant inasmuch as plaintiff has made no showing sufficient to indicate he will be able to prove a claim against her.

The facts brought out at the hearing on summary judgment may be briefly summarized: For a time preceding the incidents in question plaintiff Dickens, a thirty-one year old man, shared sex, alcohol and marijuana with defendants' daughter, a seventeen year old high school student. On 2 April 1975 defendants, husband and wife, lured plaintiff into rural Johnston County, North Carolina. Upon plaintiff's arrival defendant Earl Puryear, after identifying himself, called out to defendant Ann Puryear who emerged from beside a nearby building and, crying, stated that she "didn't want to see that SOB." Ann Puryear then left the scene.

Thereafter Earl Puryear pointed a pistol between plaintiff's eyes and shouted "Ya'll come on out." Four men wearing ski masks and armed with nightsticks then approached from behind plaintiff and beat him into semi-consciousness. They handcuffed plaintiff to a piece of farm machinery and resumed striking him with nightsticks. Defendant Earl Puryear, while brandishing a knife and cutting plaintiff's hair, threatened plaintiff with castration. During four or five interruptions of the beatings defendant Earl Puryear and the others, within plaintiff's hearing, discussed and took votes on whether plaintiff should be killed or castrated. Finally, after some two hours and the conclusion of a final conference, the beatings ceased. Defendant Earl Puryear told plaintiff to go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina; otherwise he would be killed. Plaintiff was then set free. [Footnote omitted.]

Plaintiff filed his complaint on 31 March 1978. It alleges that defendants on the occasion just described intentionally inflicted mental distress upon him. He further alleges that as a result of defendants' acts plaintiff has suffered "severe and permanent mental and emotional distress, and physical injury to his nerves and nervous system." He alleges that he is unable to sleep, afraid to go out in the dark, afraid to meet strangers, afraid he may be killed, suffering from chronic diarrhea and a gum disorder, unable effectively to perform his job, and that he has lost \$1000 per month income.

... On 7 September and 15 November 1978 defendants filed, respectively, motions for summary judgment. .... Judge Braswell ... concluded that plaintiff's claim was barred by G.S. 1-54(3), the one-

year statute of limitations applicable to assault and battery. On 29 March 1979 he granted summary judgment in favor of both defendants.

I

....

II

We turn now to the merits of defendants' motions for summary judgment. Defendants contend, and the Court of Appeals agreed, that this is an action grounded in assault and battery. Although plaintiff pleads the tort of intentional infliction of mental distress, the Court of Appeals concluded that the complaint's factual allegations and the factual showing at the hearing on summary judgment support only a claim for assault and battery. The claim was, therefore, barred by the one-year period of limitations applicable to assault and battery. Plaintiff, on the other hand, argues that the factual showing on the motion supports a claim for intentional infliction of mental distress a claim which is governed by the three-year period of limitations.<sup>[FN8]</sup> At least, plaintiff argues, his factual showing is such that it cannot be said as a matter of law that he will be unable to prove such a claim at trial. We agree with plaintiff's position.

<sup>FN8</sup>. Although defendants argue that even the tort of intentional infliction of mental distress is governed by the one-year statute of limitations, we are satisfied that it is not. The one-year statute, G.S. 1-54(3), applies to "libel, slander, assault, battery, or false imprisonment." As we go to some length in the opinion to demonstrate, the tort of intentional infliction of mental distress is none of these things. Thus the rule of statutory construction embodied in the maxim, *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another, applies. See *Appeal of Blue Bird Taxi Co.*, 237 N.C. 373, 75 S.E.2d 156 (1953). No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, G.S. 1-52(5), which applies to "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." Even if we had substantial doubt about which statute of limitations applies, and we do not, the rule would be that the longer statute is to be selected. ....

To resolve the question whether defendants are entitled to summary judgment on the ground of the statute of limitations we must examine both the law applicable to the entry of summary judgment and the law applicable to the torts of assault and battery and intentional infliction of mental distress. We think it better to begin with a discussion of applicable tort law.

A

North Carolina follows common law principles governing assault and battery. An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow. .... The interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person; the interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person. .... The apprehension created must be one of an immediate harmful or offensive contact, as distinguished from contact in the future. As noted in *State v. Ingram*, ... in order to constitute an assault there must be:

"(A)n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another ....

....

"The display of force or menace of violence must be such to cause the reasonable apprehension of immediate bodily harm. ....

A mere threat, unaccompanied by an offer or attempt to show violence, is not an assault. .... The damages recoverable for assault and battery include those for plaintiff's mental disturbance as well as for plaintiff's physical injury. ....

Common law principles of assault and battery as enunciated in North Carolina law are also found in the Restatement (Second) of Torts (1965) (hereinafter "the Restatement"). As noted in s 29(1) of the Restatement, "(t)o make the actor liable for an assault he must put the other in apprehension of an imminent contact." (Emphasis supplied.) The comment to s 29(1) states: "The apprehension created must be one of imminent contact, as distinguished from any contact in the future. 'Imminent' does not mean immediate, in the sense of instantaneous contact .... It means rather that there will be no significant delay." Similarly, s 31 of the Restatement provides that "(w)ords do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person." .... The comment to s 31 provides, in pertinent part:

"a. Ordinarily mere words, unaccompanied by some act apparently intended to carry the threat into execution, do not put the other in apprehension of an imminent bodily contact, and so cannot make the actor liable for an assault under the rule stated in s 21 (the section which defines an assault). For this reason it is commonly said in the decisions that mere words do not constitute an assault, or that some overt act is required. This is true even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults. Any remedy for words which are abusive or insulting, or which create emotional distress by threats for the future, is to be found under ss 46 and 47 (those sections dealing with the interest in freedom from emotional distress).

Illustration:

1. A, known to be a resolute and desperate character, threatens to waylay B on his way home on a lonely road on a dark night. A is not liable to B for an assault under the rule stated in s 21. A may, however, be liable to B for the infliction of severe emotional distress by extreme and outrageous conduct, under the rule stated in s 46." ....

Again, as noted by Prosser, s 10, p. 40, "(t)hreats for the future ... are simply not present breaches of the peace, and so never have fallen within the narrow boundaries of (assault)." Thus threats for the future are actionable, if at all, not as assaults but as intentional inflictions of mental distress.

The tort of intentional infliction of mental distress is recognized in North Carolina. .... "(L)iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" .... In *Stanback* plaintiff alleged that defendant breached a separation agreement between the parties. She further alleged, according to our opinion in *Stanback*, "that defendant's conduct in breaching the contract was 'wilful, malicious, calculated, deliberate and purposeful' .... (and) that 'she has suffered great mental anguish and anxiety ...' as a result of defendant's conduct in breaching the agreement .... (and) that defendant acted recklessly and irresponsibly and 'with full knowledge of the consequences which would result ....' " .... We held in *Stanback* that these allegations were "sufficient to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress. Plaintiff has alleged that defendant intentionally inflicted mental distress." ....

The tort alluded to in *Stanback* is defined in the Restatement s 46 as follows:

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

The holding in *Stanback* was in accord with the Restatement definition of the tort of intentional infliction of mental distress. We now reaffirm this holding.

....

If "physical injury" means something more than emotional distress or damage to the nervous system, it is simply not an element of the tort of intentional infliction of mental distress. As noted, plaintiff in *Stanback* never alleged that she had suffered any physical injury, yet we held that she had stated a claim for intentional infliction of mental distress. In *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930), defendants came to the home of the plaintiff at night and accused him of stealing hogs. They told him that if he did not leave their community within 10 days they "would put a rope around his neck." Defendants' threats caused the plaintiff to remove his family from the area. Plaintiff testified that he was afraid they would kill him if he did not leave and that he suffered great mental agony and humiliation because he had been accused of something of which he was not guilty. In sustaining a jury verdict in favor of plaintiff, the Arkansas Supreme Court rejected defendants' contention that plaintiff was required to show some physical injury before he could recover. ....

....

Similarly, the question of foreseeability does not arise in the tort of intentional infliction of mental distress. This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he "desires to inflict severe emotional distress ... (or) knows that such distress is certain, or substantially certain, to result from his conduct.... (or) where he acts recklessly ... in deliberate disregard of a high degree of probability that the emotional distress will follow" and the mental distress does in fact result. Restatement s 46, Comment i, p. 77. "The authorities seem to agree that if the tort is wilful and not merely negligent, the wrong-doer is liable for such physical injuries as may proximately result, whether he could have foreseen them or not." ....

*Stanback*, in effect, was the first formal recognition by this Court of the relatively recent tort of intentional infliction of mental distress. This tort, under the authorities already cited, consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

B

We now turn to some principles governing the entry of summary judgment. The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law. .... The record is considered in the light most favorable to the party opposing the motion. .... "(A)ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." ....

In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. .... An issue is material "if the facts alleged are such as to constitute a legal defense or are of such nature as to effect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." .... Thus a defending

party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim, ..., or cannot surmount an affirmative defense which would bar the claim.

....

The question, then, is whether in light of the principles applicable to motions for summary judgment and those applicable to the torts of assault and battery and intentional infliction of mental distress, the evidentiary showing on defendants' motions for summary judgment demonstrates as a matter of law the non-existence of a claim for intentional infliction of mental distress. Stated another way, the question is whether the evidentiary showing demonstrates as a matter of law that plaintiff's only claim, if any, is for assault and battery. If plaintiff, as a matter of law, has no claim for intentional infliction of mental distress but has a claim, if at all, only for assault and battery, then plaintiff cannot surmount the affirmative defense of the one-year statute of limitations and defendants are entitled to summary judgment on the ground of the statute.

Although plaintiff labels his claim one for intentional infliction of mental distress, we agree with the Court of Appeals that "(t)he nature of the action is not determined by what either party calls it ...." .... The nature of the action is determined "by the issues arising on the pleading and by the relief sought," *id.*, and by the facts which, at trial, are proved or which, on motion for summary judgment, are forecast by the evidentiary showing.

Here much of the factual showing at the hearing related to assaults and batteries committed by defendants against plaintiff. The physical beatings and the cutting of plaintiff's hair constituted batteries. The threats of castration and death, being threats which created apprehension of immediate harmful or offensive contact, were assaults. Plaintiff's recovery for injuries, mental or physical, caused by these actions would be barred by the one-year statute of limitations.

The evidentiary showing on the summary judgment motion does, however, indicate that defendant Earl Puryear threatened plaintiff with death in the future unless plaintiff went home, pulled his telephone off the wall, packed his clothes, and left the state. The Court of Appeals characterized this threat as being "an immediate threat of harmful and offensive contact. It was a present threat of harm to plaintiff ...." ....The Court of Appeals thus concluded that this threat was also an assault barred by the one-year statute of limitations.

We disagree with the Court of Appeals' characterization of this threat. The threat was not one of imminent, or immediate, harm. It was a threat for the future apparently intended to and which allegedly did inflict serious mental distress; therefore it is actionable, if at all, as an intentional infliction of mental distress. ....

The threat, of course, cannot be considered separately from the entire episode of which it was only a part. The assaults and batteries, construing the record in the light most favorable to the plaintiff, were apparently designed to give added impetus to the ultimate conditional threat of future harm. Although plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries is barred by the statute of limitations, these assaults and batteries may be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it.<sup>[FN11]</sup>

<sup>[FN11]</sup> We note in this regard plaintiff's statement in his deposition that "(i) t is not entirely (the future threat) which caused me all of my emotional upset and disturbance that I have complained about. It was the ordeal from beginning to end." If plaintiff is able to prove a claim for intentional infliction of mental distress it will then be the difficult, but necessary, task of the trier of fact to ascertain the damages flowing from the conditional threat of future harm.

Although the assaults and batteries serve to color and give impetus to the future threat and its impact on plaintiff's emotional condition, plaintiff may not recover damages flowing directly from the assaults and batteries themselves.

Having concluded, therefore, that the factual showing on the motions for summary judgment was sufficient to indicate that plaintiff may be able to prove at trial a claim for intentional infliction of mental distress, we hold that summary judgment for defendants based upon the one-year statute of limitations was error and we remand the matter for further proceedings against defendant Earl Puryear not inconsistent with this opinion.

....