APPENDIX B: Reading Cases

Modified for Educational Use

294 Ga. App. 1

Customer v. Manager

ELLISON
v.
PETERSON

Court of Appeals of Georgia.
November 13, 2008.

BLACKBURN, Presiding Judge.

In a tort suit based on allegedly violent behavior by a manager at a Burger King restaurant, Sharon Ellison, pro se, appeals the grant of summary judgment to Janet Peterson, the restaurant manager, contending that material issues of fact precluded summary judgment. Because Ellison's verified complaint and deposition testimony created genuine issues of material fact as to the potential liability of the manager, summary judgment as to her was not proper on all claims. Accordingly, we reverse.

Rule #1: Summary Judgment

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56(c). A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. Matjoulis v. Integon Gen. Ins. Corp.[1]

Rule #1.1: for summary judgment, evidence interpreted most favorable to E

Fact #1: E walks into restaurant and waits

So viewed, the record shows that in January 2007, Ellison entered a neighborhood Burger King restaurant and waited by a cash register to order. After a period of time passed without her order being taken, Ellison said, "Hi, is anybody going to welcome me to Burger King? Somebody going to please take my order?" An employee turned and explained that the staff was busy with other customers' orders and offered to take her order. According to Ellison's deposition and verified complaint, the manager on duty then walked out from behind the counter and asked, "Why is it every time you come into the restaurant, you have to make a noise?" Ellison averred that the manager "put her hands around my neck in a semi head lock position ... and start[ed] shaking like three times or whatever. Then [the manager] turned loose and said, `Are you all right now?'" The employees asked if Ellison was ready to order, and Ellison uneventfully ordered a grilled chicken salad, which she was served.

Fact #2: E got impatient and requested assistance

Fact #3: P heard request and came out from back

Fact #4: P headlocks E and shakes her

Based on this exchange, Ellison filed a verified complaint against the manager, seeking damages for battery. This defendant successfully moved for summary judgment, giving rise to this appeal.

Summary judgment as to the restaurant manager.

Ellison's complaint essentially makes claims against the manager for battery. In a generic order, the trial court granted summary judgment to the manager. However, as Ellison has presented evidence supporting her allegation of battery, and as the manager has not

shown why she should prevail as a matter of law, we must reverse the trial court's judgment as to the battery claim against the manager.

Battery. Ellison's verified complaint and deposition testimony allege that the manager "placed [Ellison] in a semi head lock position[,] and began shaking ... while still locked around the neck and head area approx[imately] [t]hree times while asking, `Is everything ok now?'" As this case arises on appeal from a grant of summary judgment, we must view this evidence and all reasonable inferences and conclusions drawn from it in the light most favorable to the nonmovant, Ellison. See Matjoulis v. Integon Gen. Ins. Corp., supra, 226 Ga.App. at 459(1), 486 S.E.2d 684. Ellison "is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. The evidence must be construed most favorably to [her], and the trial court must give [her] the benefit of all favorable inferences that may be drawn from the evidence." Smith v. Sandersville Production Credit Assn.[3] Further, our role as an appellate court prohibits us from evaluating the credibility of factual allegations contained in Ellison's verified complaint and deposition testimony, even in light of an affidavit by the manager which directly contradicts Ellison's account. See Miller v. Douglas[4] ("[i]n motions for summary judgment, this court cannot consider the credibility of witnesses or their affidavits and a jury must resolve the question and the conflicts in the evidence which it produces").

When properly viewed in this light, Ellison's allegations give rise to a genuine issue as to whether the manager committed a battery.

Issue #1: Was a battery committed (when the evidence is construed most favorable to the nonmovant)

> In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable. Generally speaking, an "unlawful" touching is one which is "offensive," and an "offensive" touching is one which proceeds from anger, rudeness, or lust. The test... is what would be offensive to an ordinary person not unduly sensitive as to his dignity.

(Citations and punctuation omitted.) Newsome v. Cooper-Wiss, Inc.[5] "A cause of action for ... battery can be supported by even minimal touching." Darnell v. Houston County Bd. of Ed.[6]

"This Court has repeatedly held in battery cases that the unwanted touching itself constitutes the injury to the plaintiff." Vasquez v. Smith.[7] Given the relatively low threshold required to prove battery, we must conclude that Ellison has created a factual issue as to whether a battery occurred. To hold otherwise here would run contrary to this precedent and to our mandate to view all evidence in the light most favorable to Ellison as the nonmoving party. Accordingly, the trial court erred in

Rule #2: Battery

Court final holding: Reversed the grant of summary judgment to P.

granting summary judgment to the manager.

In sum, we reverse the grant of summary judgment to Peterson as to battery.

Judgment affirmed in part and reversed in part, and case remanded.

[1] Matjoulis v. Integon Gen. Ins. Corp., 226 Ga. App. 459(1), 486 S.E.2d 684 (1997).

[2] Todd v. Byrd, 283 Ga.App. 37, 38(1), 640 S.E.2d 652 (2006) (whole court).

[3] Smith v. Sandersville Production Credit Assn., 229 Ga. 65, 66, 189 S.E.2d 432 (1972).

[4] Miller v. Douglas, 235 Ga. 222, 223, 219 S.E.2d 144 (1975).

[5] Newsome v. Cooper-Wiss, Inc., 179 Ga.App. 670, 672(1), 347 S.E.2d 619 (1986).

[6] Darnell v. Houston County Bd. of Ed., 234 Ga.App. 488, 490(1), 506 S.E.2d 385 (1998).

[7] Vasquez v. Smith, 259 Ga.App. 1, 576 S.E.2d 59 (2003).

Modified for Educational Use

268 Ga. App. 1

Plaintiff **EVERETT**

v.

Defendant **GOODLOE**

Court Court of Appeals of Georgia.
July 15, 2004.

MIKELL, Judge.

Donna Everett appeals the trial court's grant of summary judgment to her former employer, John D. Goodloe, Jr., on her claim of battery. We affirm.

Summary Judgment Rule

> On appeal of the grant of summary judgment, this court applies a de novo review of the evidence to determine whether any question of material fact exists. Summary judgment is appropriate where the moving party can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. OCGA § 9–11–56(c). A defendant meets this burden by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case.... All of the other disputes of fact are rendered immaterial.[1]

Background Facts

The record in this case shows that from 1989 to 2000, Goodloe, a licensed real estate broker, owned a hotel in the Bahamas called the Abaco Inn. Appellant was employed as Goodloe's part-time personal secretary from January 1998, to October 1999. Prior to becoming Goodloe's employee, Everett dated Goodloe during the summer and fall of 1997. In October 1997, Goodloe ended the relationship and asked Everett not to call him. He asserted that he loved Everett, but, because they shared no intimacy, he could not continue the relationship. Goodloe did request that Everett keep him abreast of the progress of her book, in which he had invested $25,000. On December 3, 1997, Everett e-mailed Goodloe that she was searching for a part-time job, and he hired her as a personal secretary.

Claim - Battery

During Everett's employment with Goodloe, she maintains that she was sexually harassed, both mentally and physically, after refusing Goodloe's sexual advances. Also during that time, Everett maintains that she found a buyer for the Abaco Inn and that Goodloe agreed to pay her a fee for her assistance, which he failed to do in retaliation for her refusal to have a more intimate relationship with him. Everett filed this action, alleging battery. Conversely, appellees contend that this lawsuit arose because Everett was not paid a commission from the sale of Noble Island, and not because Goodloe sexually harassed Everett. Goodloe filed a motion for summary judgment as to Everett's

claim, which was granted. Everett appeals the grant of Goodloe's motion.

Everett contends that the trial court erred by granting Goodloe summary judgment on her claim for battery.

First Alleged Battery

Everett deposed that the first assault occurred in early 1998, when Goodloe grabbed her breasts, pressed up against her, and smashed his face and teeth into her mouth, causing it to bleed. Everett thought that the battery occurred because Goodloe was angry that Everett treated him like a friend, as opposed to a boyfriend, while they were out with friends on January 31, 1998, but she was not certain that this particular event preceded the assault. When shown an e-mail message that she sent to Goodloe the next day in which she indicated that she had a "good time last night," Everett again stated that the attack followed the January dinner date and explained that she ignored most of Goodloe's conduct because she needed her job.

Other Alleged Batteries

Everett deposed that there were two batteries in May 1998, and that she began to fear Goodloe's anger, which typically followed her rejection of his sexual advances. She stated that the last incident occurred in September 1998 when Goodloe lunged at her and grabbed her legs. She deposed that she rejected him and that he fired her, only to rehire her the next morning.

In addition to Everett's deposition testimony, also considered on summary judgment were several other e-mail messages between Goodloe and Everett and excerpts from Everett's journal, which she called the "Morning Pages."[15] Everett deposed that the Morning Pages was not a diary per se, but simply notations of "whatever crept into my mind at the moment" and that she did not lie about events in the Morning Pages.

Procedural Posture

On April 6, 1998, Everett e-mailed Goodloe that he had offended her with his sarcasm about her work experience, that she expected him to treat her with the same courtesy and respect that she afforded him, and that she "did not see any room at all [in their relationship] for that sort of thing." On July 8 and 21, 1998, she signs other e-mail messages, "Love, Donna." On September 18, 1998, she writes in her journal,

> I've sought this situation—used my "power" to ingratiate myself to John so that I could survive.... Should I borrow the money from John today? Yes ... I can use the money.... He comes out in those shorts like he did in that bathrobe-here I am looking gorgeous.... At least I've gotten rid of that sucking on my lip kiss. I hated it. Why do I want them totally under my spell? It's the only way I feel safe.... The weight is heavy as shown by this relationship with John. He even said now that this has happened again (he blames it

Plaintiff Journal Entry

> on both [sic] our drinking) and maybe it is, I lose my inhibitions and he sees my distaste.... I release my emotional attachment to John.

In an e-mail to Goodloe dated November 23, 1998, Everett writes,

Plaintiff Email to Defendant

> Just a short note to tell you what's been on my mind. I'm not angry anymore, John. The day all the boxes of Rena's things were moved,[16] I thought about you and your life and her life and the anger just went away.... And to make a long story short ... it just completed the whole healing process. I forgave you entirely for what I considered your wrongs toward me.... What all this means is that I am your friend, and I know you're mine. I miss your dear company and hope that you will be comfortable in renewing our friendship on a friendship basis. If you can do that, then you and Linda or whomever, and I and whomever (have been trying to go on some dates) can actually go to dinner and enjoy one another's company. But either way, the main thing I wanted you to know ... is that I'm not angry at you anymore.... With love, Donna Jean.

Testimony Rule

Under *Prophecy Corp. v. Charles Rossignol, Inc.*,[17] a party/witness' testimony "is to be construed ... against him when ... self-contradictory."[18] On summary judgment, the trial judge decides whether the testimony is contradictory, and if so, whether the witness has offered a reasonable explanation for the contradiction.[19]

Battery Rule

"[T]he act of intentionally causing actual physical harm to another is civilly actionable as a battery.... It is the intent to make either harmful *or* insulting or provoking contact with another which renders one civilly liable for a battery."[21] The test as to whether a battery has occurred " ' "is what would be offensive to an ordinary person not unduly sensitive as to his dignity." ' "[22]

Reasoning

In her brief, Everett explains that she did not mention the attacks in her e-mail messages or other writings because she feared losing her job. It does not appear, however, that Everett was so fearful of losing her job that she refrained from chastising Goodloe for other conduct that she felt was inappropriate. For example, she e-mailed him that she would not tolerate his insulting comments. Since Everett's deposition testimony about her contact with Goodloe contradicts her writings to Goodloe and in her journal, under *Prophecy,* we construe her testimony against her and affirm the grant of summary judgment to Goodloe on her claims for assault and battery.[23]

Holding

Judgment affirmed.

Modified for Educational Use

110 Ga. App. 1

Greenfield (P) v. Cunard (D)

Wesley GREENFIELD

v.

T.L. CUNARD

Oct. 16, 1964.

Syllabus by the Court

Definition of assault and battery—may function as the rule

Any act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery.

Parties, remedy sought

Wesley Greenfield sued Colonial Stores, Inc., seeking to recover damages allegedly inflicted upon him by the defendant's servants. The petition shows the following facts:

Relevant facts-substance

The plaintiff entered the defendant's store, purchased several articles, and paid for them. He then departed from the premises, proceeding immediately to a Jacobs Drug Store located adjacent to defendant's store. 'After plaintiff had stepped a few feet into the said Jacobs Drug Store the doors through which the plaintiff had just entered burst open, two men in green jackets and later identified as T. L. Cunard and H. L. Speights, managers and acting as agents and employees of defendant, acting within the scope of their duties and about the business of said defendant *grabbed the plaintiff by his arms and pulled them behind his back in a swift and pain producing manner*. One of the managers, namely T. L. Cunard, the manager of the meat department of the defendant, shouted in a loud boisterous manner, 'I want our meat that you have in your coat." This demand was repeated. There were present and within hearing distance a number of customers and employees of the drug store. 'Plaintiff informed said managers that he had paid for all the merchandise which he had with him; nevertheless, said managers contended, in the presence of the other persons present, that plaintiff had hidden some meat under his coat and was endeavoring to conceal and avoid making payment for it, which contention conveyed and was intended to convey the meaning that your plaintiff was a cheat, swindler, and thief and was endeavoring to cheat, swindle, steal and defraud defendant, in violation of the criminal statutes and laws of the State of Georgia. * * * Whereupon plaintiff proceeded to unbutton his overcoat and sport coat and showed the managers of the defendant that he had nothing on him which belonged to the defendant.'

Facts relating to agency of employees and defendant

Plaintiff claimed he paid

Unsure how this is important to a battery claim

Also unsure how this is relevant to the issue

Procedural Posture: the plaintiff is appealing the dismissal of the battery claim

The trial judge entered a judgment sustaining the motion to dismiss. The plaintiff excepts to these judgments striking the amendment and dismissing his petition.

BELL, Presiding Judge.

Holding—

There are allegations which are sufficient to keep him in court, for he has alleged a cause of action for battery. See the

Plaintiff alleged sufficient facts to support a COA for battery

preceding factual summation for the allegations which obviously are sufficient to state a cause of action for assault and battery within the following rules: '* * * where all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another, there is an assault.' Quaker City Life Ins. Co. v. Sutson, 102 Ga.App. 53, 56(1), 115 S.E.2d 699, 702. 'Any act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery.' Brown v. State, 57 Ga.App. 864, 867, 197 S.E. 82, 84.

Binding precedent

The judgment dismissing the petition is reversed.

Disposition: the claim will not be dismissed and the case will proceed

The judgment below is reversed

Rule: an act of violence inflicted on another person that constitutes harmful or offensive contact also constitutes an assault and battery

Modified for Educational Use

178 Ga. App. 1

π **HARVEY**
v.
Δ **SPEIGHT.**

Court of Appeals of Georgia.
April 9, 1986.

BANKE, Chief Judge.

Procedural Posture

The appellee sued the appellant, Harvey, to recover damages for battery. A jury awarded him $2,500 in compensatory damages and $30,000 in punitive damages. In this appeal, the appellant enumerates as error the denial of its motion for a directed verdict with regard to battery.

Facts – Plaintiff opened jacket

Acting upon information that someone had just stolen several cartons of cigarettes from the store, the appellant stepped outside and approached the appellee, who had himself walked out of the store only moments earlier. The appellant was followed by several other persons whom the appellee testified he assumed were also store employees. Upon being asked by the appellant if he had anything that did not belong to him, the appellee answered, "No, ... do you want to see ..." He then briefly held the sides of his jacket open and let them close, at which point the manager parted the jacket with his hands to see if anything was concealed there. Simultaneously, the appellee pointed to another person in the immediate vicinity and said, "I think that is the man you are looking for." The appellant then left the appellee to pursue this other person.

Facts – Plaintiff invited search

The appellee testified that the appellant had not been rude to him but stated that he did not consider the appellant's conduct in looking inside his jacket as courteous. He admitted that he had invited this search and that the manager had not cursed him nor spoken loudly to him; however, he testified that he felt the manager was angry because of the look in his eyes and the fact that several people had followed the manager out of the store. At trial, the appellee testified that the entire encounter had lasted about 45 seconds, whereas during an earlier deposition he had testified that the encounter lasted between 15 and 30 seconds.

Rule: No battery if search is invited

The appellee admitted that any touching of his person had been invited by him; and such invitation is inconsistent with the tort of assault and battery. See *Crowley v. Ford Motor Credit Co.,* 168 Ga.App. 162(1), 308 S.E.2d 417 (1983); OCGA § 51–11–2. The evidence was consequently insufficient to support any recovery, and it follows that the trial court erred in denying the appellant's motion for directed verdict.

Judgment reversed. Holding

Modified for Educational Use

193 Ga. App. 1

Caption

HENDRICKS et al.
v.
HARPER

Court of Appeals of Georgia.
Decided October 23, 1989.

CARLEY, Chief Judge.

Appellant-plaintiffs Mr. and Mrs. Bobby Hendricks filed suit against appellee-defendant Mr. Raymond Harper, a Southern Bell employee. The complaint alleged the commission of a battery against Mr. Hendricks, in that Mr. Harper had "wrongfully, willfully, and intentionally tricked and induced [Mr. Hendricks] to place a telephone receiver to his right ear which [receiver] had, at the time, a high frequency/high intensity tone being transmitted over the line at the direction and under the control of [Southern Bell], acting by and through its agent and employee [Mr. Harper]." For this alleged battery, appellant Mr. Hendricks sought compensatory and punitive damages and Mrs. Hendricks sought compensatory damages for loss of consortium.

Key facts on issue of battery

Procedural History: lower court ruled in favor of Harper-Hendricks appealed

The case was tried before a jury and a verdict in favor of appellee was returned. Appellants appeal from the judgment that was entered by the trial court on the jury's verdict.

In its charge to the jury, the trial court gave several of appellee's requested instructions which were to the effect that his liability for the alleged battery would be dependent upon an actual intent on the part of Mr. Harper to hurt or to cause physical harm to Mr. Hendricks. The trial court consequently refused to give appellants' requested instruction which was to the effect that a battery could have been committed by Mr. Harper either by his intentionally making physical contact of an insulting or provoking nature with the person of Mr. Hendricks or by his intentionally causing physical harm to Mr. Hendricks. The giving of appellee's requested instructions and the refusal to give appellants' requested instruction are enumerated as error.

Procedural History: jury instructed to decide based on whether Harper intended to harm Hendricks

Substantive facts of the case on appeal

Clearly, the act of intentionally causing actual physical harm to another is civilly actionable as a battery. See generally Security Life Ins. Co. v. Newsome, 122 Ga. App. 137 (1) (176 SE2d 463) (1970). However, the intent to cause actual physical harm to another is not absolutely essential to the viability of a civil action for battery. "In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable." (Emphasis supplied.) Mims v. Boland, 110 Ga. App. 477-478 (1) (a) (4) (138 SE2d 902) (1964). See also Newsome v. Cooper-Wiss, Inc., 179 Ga. App. 670, 672 (1) (347 SE2d 619) (1986); F. W. Woolworth Co. v. Loggins, 115 Ga. App. 557 (1) (155 SE2d 462) (1967). Greenfield v. Colonial Stores, 110 Ga. App. 572, 574 (1) (139 SE2d 403) (1964);

Rule based on precedent

Intent to cause actual physical harm is not dispositive

Interstate Life &c. Co. v. Brewer, 56 Ga. App. 599, 605 (1) (193 SE 458) (1937). "Any unlawful touching of a person's body, although no actual physical hurt may ensue therefrom, yet, since it violates a personal right, constitutes a physical injury to that person. [Cits.] The unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance." (Emphasis supplied.) Christy Bros. Circus v. Turnage, 38 Ga. App. 581 (2) (144 SE 680) (1928). "Any act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery. If the circumstances of the occasion be not such as the law would permit an inference that the battery proceeded from anger, the jury may nevertheless be authorized to conclude, considering its nature and the circumstances, that it resulted from a lack of proper respect for the person on whom the contact was made. Contact proceeding from rudeness is as offensive and harmful as that which proceeds from anger or lust, and in law constitutes an assault and battery." (Emphasis supplied.) Brown v. State, 57 Ga. App. 864, 867-868 (2) (197 SE 82) (1938).

An actionable battery may be accomplished by an unauthorized caress as well as by an unauthorized blow. See generally Yarbrough v. State, 17 Ga. App. 828 (88 SE 710) (1916). It is the intent to make either harmful or insulting or provoking contact with another which renders one civilly liable for a battery. Interstate Life &c. Co. v. Brewer, supra at 606-607 (1). Accordingly, appellees' liability was not dependent upon Mr. Harper's intent to cause actual physical harm to Mr. Hendricks. Appellees' liability could equally be premised upon Mr. Harper's mere intent to make contact of an insulting or provoking nature with Mr. Hendricks. The question of whether Mr. Harper acted with any other intent — whether wantonly, willfully or maliciously — goes to the issue of the damages that are recoverable by appellants and not to the issue of appellees' liability for the act itself. "A physical injury done to another shall give a right of action to the injured party, whatever may be the intention of the person causing the injury, unless he is justified under some rule of law. However, intention shall be considered in the assessment of damages." OCGA § 51-1-13. Thus, if in addition to intending to make contact of either a harmful or an insulting or provoking nature with Mr. Hendricks, Mr. Harper also acted wantonly, willfully or maliciously, appellees may be liable for punitive as well as compensatory damages. See OCGA § 51-12-5. It follows that the trial court erred in giving appellees' requested charges and erred in failing to give appellants' requested charge.

The judgment is reversed and a new trial must be held.

Reasoning: liability for battery does not rest on intent to cause actual harm (physical). Intent to make contact that is offensive satisfies the burden of proof for a battery claim.

Conclusion: trial court erred in giving Harper's requested charges and erred by failing to follow Hendrick's requested instruction

-Disposition: lower court ruling is undone and case must be retried by lower court.

Modified for Educational Use

Citation: Houston v. Holley, 208 Ga. App. 1 (Ga. Ct. App. 1993).

208 Ga.App. 1

HOUSTON et al.
v.
HOLLEY

Caption: Houston et al. v. Holley

Court of Appeals of Georgia.
Feb. 23, 1993.

ANDREWS, Judge.

procedural history

John Houston, Jr., a minor, through his parents and guardians, appeals the judgment entered on a jury verdict for defendant Holley, John's teacher when he was two years old.

procedural history

Viewed in favor of the jury's verdict, the evidence was that John was a low birth weight baby whose mother suffered from toxemia during the last month of her pregnancy. At the age of six weeks, John was enrolled in the infant program at Kinder–Care.

particularly relevant fact

Defendant Holley had worked for Kinder–Care since 1979, starting as a teacher's aide and becoming the teacher for the toddlers. In early 1986, John was in her toddler class for a month or two until she was transferred to teach the two-year-old class. At the age of two, John joined this class. John was a very demanding child who became aggressive with other children, sometimes spitting and hitting them. He also was extremely active and disruptive of class and was difficult to calm. The policy of Kinder–Care was that spanking was not allowed, but the use of "time-out" was. The child could be separated from the other children, usually by being placed in a chair in a corner. The child was always to be within the sight of the teacher and able to see the other children.

Facts: particular conduct of D at issue in the case

As John became more aggressive and demanding, he was being placed in time-out. Holley attempted to use the standard time-out procedure of a chair in a corner, but John's actions made this unfeasible. In one corner, he played in the water fountain and in another he ran outside through the nearby door. When Holley attempted to talk to him concerning his behavior as he sat in the chair, he would kick, hit, spit, and scream at her, which caused the remaining ten or eleven two-year-olds to gather to see what was happening. In an effort to control John and cause as little disruption as possible to the rest of the children, in late January 1988 Holley began to use the bathroom between the two-year-old room and the infants' room for time-out. She would place John in a chair immediately inside the bathroom door. Then, she would lean against the water fountain outside the door to the bathroom, hold the door open with her foot so that John could not pinch his fingers in it and could see and listen to her, and attempt to calm him down. She did not completely close the door and the lights remained on. From this position, she could both talk to John and observe the remainder of the class. Occasionally, when Mrs. Houston would come to pick John up, he would be in the bathroom and she did not question Holley about this.

Relevant facts: shows accordance with childcare policy of how to carry out time-outs

Because of the layout of the center, Moore, the director, could hear any disruptions. She was aware of Holley's use of time-out with John and had heard him crying once when he was placed in time-out. In three months, she may have seen this on three occasions. She was not concerned about the procedure because John was safe and being observed and

was in view of other teachers in the center.

John sometimes suffered nightmares during his naps and was afraid of loud noises and strangers. Mr. Houston disciplined John with a belt and, according to John, had spanked him with a book before.

In May 1988, John was placed in the three-year-old class with another teacher with the hope that placing him in a larger room with older children would help his behavior. He was improving when his parents removed him from Kinder–Care.

Mrs. Houston said she was aware of this use of the bathroom because she had been contacted by Campbell and Leverette, two former employees of the center. Campbell worked there in 1987 and was terminated for leaving her class in the middle of the day. Leverette was hired in January 1988 and terminated in July 1988 because she asked another teacher to spank a child for her. Campbell's testimony concerning John being shut in the bathroom was, at best, equivocal and she acknowledged that she never reported any alleged misconduct by Holley to anyone at the center. While Leverette did testify that John would be placed in the bathroom and Holley would turn off the light and shut the door, placing her foot against it, she acknowledged that, from her vantage point in another classroom, she could not see into the bathroom and that the door may have been open.

After leaving Kinder–Care, John was placed in La Petite, another day care center, which refused to continue to keep him after 30 days. His parents took him to see a counselor who referred them to Dr. Hazard, a clinical psychologist. She evaluated John, including administering psychological tests, in December 1988. She also spoke to his teacher at Children's World which he was then attending. They reported a very short attention span and need for extra attention. Dr. Hazard diagnosed John as suffering from Attention Deficit Hyperactivity Disorder and attributed his behavior problems to that. She recommended medication, which the parents rejected.

John has a well-established history of bad behavior – court makes no mention of this in actual reasoning, but it does go to the original justification for the escalation of the time-outs

While John was attending public kindergarten in Georgia, his parents refused referral to the school support team for evaluation. After moving to Texas and entering first grade, John was suspended because he attempted to poke another child in the eye with a pencil.

John received no counseling or treatment for a year and then was seen by another clinical psychologist, Dr. Ude, beginning in the fall of 1990 and continuing through April 1991. Dr. Ude was aware of the incidents at Kinder–Care but was not advised by the parents of the other day care problems. He did not conduct any testing, but concluded after interviewing John once in October 1990 that the child suffered from Post-Traumatic Stress Disorder which he attributed to the trauma suffered from the time-out procedure.

John, who was seven at the time of the trial in February 1992, testified that he could not presently remember being shut in the bathroom.

Issue: family alleges battery by D Holley (a childcare worker) on their child from D's conduct in placing the child in time-out at daycare

Suit was filed in July 1990 alleging battery. The Houstons complain of the granting of defendants' motion for directed verdict on their count alleging assault and battery.

Legal rule regarding battery: Unlawful touchings of another person qualifies as physical injury and thus can fall within the battery tort.

" ' "In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable (as a battery)." (Cits.)' *Newsome v. Cooper–Wiss, Inc.,* 179 Ga.App. 670, 672(1), 347 S.E.2d 619 (1986)." *Haile v. Pittman,* 194 Ga.App. 105, 106(3), 389 S.E.2d 564 (1989).

The touchings in this case were lawful – they were part of the established childcare the Houstons contracted for, and thus there was no battery from D on the child, and the trial court was correct to grant the directed verdict against plaintiffs.

There was no evidence here of any touching other than that which had been contracted for when the Houstons placed their infant in the care of Kinder–Care. The use of time-out as a disciplinary tool was within the guidelines of Kinder–Care and was so used with John. There was no error in the grant of the directed verdict on this count.

Judgment affirmed. Disposition: Affirmed.

Modified for Educational Use

330 Ga. App. 1

KOHLER et al.
v.
VAN PETEGHEM et al.

Court of Appeals of Georgia.
November 6, 2014.

BARNES, Presiding Judge.

This case involves a dispute between next-door neighbors that began with a drainage dispute but escalated to allegations of battery including an allegation that the plaintiff husband intentionally spat on the face of the defendant wife during an argument. During the ensuing jury trial, the trial court directed a verdict in favor of the defendant wife on her battery counterclaim based on the spitting incident. The jury subsequently returned a verdict in favor of the defendants on all of the remaining claims and counterclaims, and the trial court entered judgment accordingly.

Procedural Posture

On appeal from the denial of their motion for a new trial, the plaintiffs argue that the trial court erred by directing a verdict in favor of the defendant wife on her battery counterclaim and in its charge to the jury on that counterclaim because the evidence was in dispute as to whether the spitting incident was intentional.

Issues

Because the evidence did not demand a finding that the spitting incident was intentional, we conclude that the trial court erred by directing a verdict to the defendant wife on her battery counterclaim. Consequently, we reverse the trial court's grant of the defendant wife's motion for a directed verdict on her battery counterclaim and remand for a new trial solely on that counterclaim. We affirm the judgment in all other respects.

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Holding

The record reflects that Steven and Elizabeth Kohler live next door to Dirk and Mia Francesca Van Peteghem in the Grand Cascades Subdivision in Forsyth County. Both properties extend all the way to the Chattahoochee River, although the finished backyards do not extend that far. When it rains, culverts along the street carry water from several homes in the subdivision into a large drainage pipe that runs underground along the property line between the Kohlers' and Van Peteghems' properties. The drainage pipe ends in the woods behind the two properties and empties water there whenever it rains. The Van Peteghems' property is at a higher elevation than the Kohlers' property; indeed, the Kohlers' property is at the lowest point in that area of the neighborhood. It is undisputed that there is a serious drainage problem in the back portion of the Kohlers' property; the dispute between the parties concerns the cause of that problem.

Facts

On August 9, 2010, the Kohlers filed their complaint in the present action against the Van Peteghems, alleging that the Van Peteghems had performed backyard landscaping work that redirected the

flow of water from their property onto the Kohlers' property whenever it rained. According to the Kohlers, the redirected flow of water had caused extensive erosion and siltation problems.

On September 13, 2010, the Van Peteghems filed their answer, denying that their backyard landscaping work caused any redirection in the flow of water onto the Kohlers' property. According to the Van Peteghems, the erosion and siltation problems on the Kohlers' property preexisted the landscaping work and were the result of runoff from the drainage pipe and from the fact that the Kohlers' property is downhill from the other properties in that area of the neighborhood. The Van Peteghems also asserted battery.

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On December 10, 2012, the parties proceeded with the trial, which lasted several days. Mrs. Kohler was the sole witness to testify on behalf of the Kohlers during their case-in-chief. After the Kohlers rested their case, the Van Peteghems moved for a directed verdict on the MRPA claim. The trial court granted the Van Peteghems' motion and dismissed the Kohlers' MRPA claim.

Facts

The Van Peteghems then presented their case-in-chief. Among other things, Mrs. Van Peteghem testified regarding an incident in her front yard in which Mr. Kohler stood in her face screaming at her and his spit landed on her face.

After the Van Peteghems presented their case-in-chief, they moved for a directed verdict on Mrs. Van Peteghem's battery counterclaim against Mr. Kohler. The trial court granted the Van Peteghems' motion for a directed verdict and later instructed the jury that Mr. "Kohler's action of spitting on Mrs.... Van Peteghem constituted a battery under the laws of Georgia," but that it was up to the jury to determine any harm she had suffered and the amount of damages that should be awarded to her, if any.

Following its deliberations on the remaining claims and counterclaims, the jury returned a verdict in favor of the Van Peteghems on the Kohlers' nuisance claim and in favor of the Van Peteghems on all of their counterclaims. The jury awarded $250,500 in damages to the Van Peteghems, with the damages broken down by claim in a special verdict form. The trial court thereafter entered final judgment and denied the Kohlers' motion for a new trial, resulting in this appeal.

Procedural History

The Kohlers contend that the trial court erred by directing a verdict in favor of the Van Peteghems on the battery counterclaim. According to the Kohlers, the jury would have been authorized to find from the testimony that errant spittle landed on Mrs. Van Peteghem when Mr. Kohler was screaming at her and that he did not actually intend to spit on her. The Kohlers thus contend that the evidence did not demand a finding that Mr. Kohler committed the intentional tort of battery when his spit landed on Mrs. Van Peteghem. We agree.

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Rule

The touching of another without her consent, even if minimal, constitutes a battery. See Lawson v. Bloodsworth, 313 Ga.App. 616, 618, 722 S.E.2d 358 (2012); King v. Dodge County Hosp. Auth., 274 Ga. App. 44, 45, 616 S.E.2d 835 (2005). Moreover, the "unlawful touching of a person's body is actionable even if the unlawful touching is indirect, as by throwing an object or substance at the person." (Citation omitted.) Lawson, 313 Ga.App. at 618, 722 S.E.2d 358. Nevertheless, unauthorized touching alone is not enough; battery is an intentional tort, and "[i]t is the intent to make either harmful or insulting or provoking contact with another which renders one civilly liable for a battery." (Emphasis omitted.) Hendricks v. Southern Bell Tel. & Tel. Co., 193 Ga.App. 264, 265(1), 387 S.E.2d 593 (1989). If the tortfeasor acts with the belief that such unauthorized contact is substantially certain to result from his actions, that too can constitute the requisite intent to prove battery. See generally Reeves v. Bridges, 248 Ga. 600, 603, 284 S.E.2d 416 (1981) (discussing intent necessary to prove an intentional tort); Charles R. Adams III, Ga. Law of Torts § 2:1 (2013-2014 ed.) (same). "Intent is a question of fact for jury resolution and may be proven by circumstantial evidence, by conduct, demeanor, motive, and all other circumstances." (Citation and punctuation omitted.) Stack-Thorpe v. State, 270 Ga.App. 796, 805(7), 608 S.E.2d 289 (2004). See Regents of Univ. Sys. of Ga. v. Blanton, 49 Ga.App. 602(1)(a), 176 S.E. 673 (1934) (noting that "the question of intent is peculiarly within the province of the jury").

In the present case, Mr. Kohler did not testify regarding the spitting incident. In contrast, Mrs. Van Peteghem testified that on the day in question, she was standing outside with a county inspector and the president of the neighborhood homeowners' association when Mr. Kohler approached and began yelling at all of them about the landscaping work and how it was damaging his property. Mrs. Van Peteghem testified that Mr. Kohler "just kept going on and on and on in my face." She then testified as follows:

Facts

COUNSEL: Did he spit on you in the process?

MRS. VAN PETEGHEM: Not the first time he was doing it. And I asked him to step back at least three times. And I kept saying—literally my belly was touching his belly. And I said, please, step back. I'm pregnant, please step back. I don't know where any of this is coming from. I really want to try to work—I don't know what you are talking about....

COUNSEL: Did spit land on you in this process?

MRS. VAN PETEGHEM: The third time... when he didn't step back. And then he spit on me.

COUNSEL: Where did it land?

MRS. VAN PETEGHEM: On my face....

COUNSEL: Okay. Had you asked him more than once to back up?

MRS. VAN PETEGHEM: I asked him three separate times, please, back up.

COUNSEL: Did he on any of those occasions backup when you asked him?

MRS. VAN PETEGHEM: The first time he step[ped] once, but then as soon as he started talking it was right back in my face.

COUNSEL: Were you scared?

MRS. VAN PETEGHEM: I—yes, I was scared....

COUNSEL: Was he raising his voice when he did it? ...

MRS. VAN PETEGHEM: He was shouting, veins bulging, red in the face. I could feel his breath on my face. And just enraged.... And he's a big guy and in my face just frothing at the mouth and spitting on me. His hot breath on my face. Shouting that I destroyed the forest....

The individual who was the president of the neighborhood homeowners' association at the time the landscaping work was performed in the Van Peteghems' backyard, and who was present at the time and location of the alleged spitting incident, also testified at trial. He testified that on that day, Mr. Kohler "was very agitated" over the landscaping work and walked into a circle of people standing outside that included himself, the county inspector, and Mrs. Van Peteghem. The former president further testified that while standing in the circle of people, Mr. Kohler was "expressing his point of view" and pointed his finger at Mrs. Van Peteghem. However, the former president testified that "there [were] a number of people there during this discussion" and "[i]t wasn't like Mr. Kohler was one-on-one against [Mrs.] Van Peteghem."

Based on this record, the trial court erred in granting a directed verdict to the Van Peteghems on the battery counterclaim. To "spit" on someone simply means to eject saliva from the mouth, see http://www.merriam-webster.com/dictionary/spit, and it can be intentional or unintentional. See Sutton v. Tacoma Sch. Dist. No. 10, 180 Wash. App. 859, 324 P.3d 763, 767 (2014) (noting that "saliva may accidentally escape the mouth when someone is yelling in the face of another person"); Engle v. Bosco, No. CV054006996S, 2006 WL 2773603, at *4, 2006 Conn. Super. LEXIS 2792, at *10 (no action for battery where "errant spittle landed on plaintiff" as the defendant was yelling at the plaintiff). Based on the entirety of Mrs. Van Peteghem's testimony about her encounter with Mr. Kohler, it is somewhat ambiguous whether Mr. Kohler intended to spit in her face during the heated encounter, or whether errant spit accidentally landed on her face as he yelled at her. Either inference could have

been drawn by the jury. Furthermore, the testimony of the former president of the homeowners' association, construed in the light most favorable to the Kohlers, could have led the jury to find that Mr. Kohler was not "one-on-one against" Mrs. Van Peteghem but instead was heatedly "expressing his point of view" among a circle of people standing in the street, which would call into question whether the spitting was intentional. Accordingly, because the evidence and all reasonable inferences drawn from it did not demand a finding that Mr. Kohler intentionally spat on Mrs. Van Peteghem and thus committed a battery, the trial court erred in granting the motion. See Continental Maritime Svcs., 275 Ga.App. at 534, 621 S.E.2d 775.

Holding

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The Van Peteghems argue, however, that the trial court's grant of the motion for directed verdict on the battery counterclaim should be affirmed under the "right for any reason" rule because there was other uncontroverted evidence to support the court's determination that a battery had occurred. See generally Sims v. G.T. Architecture Contractors Corp., 292 Ga.App. 94, 96(1), n. 6, 663 S.E.2d 797 (2008) ("If a judgment entered pursuant to the granting of a directed verdict is right for any reason, it will be affirmed.") (citation and punctuation omitted). Specifically, the Van Peteghems contend that the evidence undisputedly showed that Mr. Kohler physically touched Mrs. Van Peteghem with his body during the spitting incident. It is certainly true that Mrs. Van Peteghem's testimony would support such a conclusion. But, as previously noted, the former president of the homeowners' association testified that "there [were] a number of people there during this discussion" and "[i]t wasn't like Mr. Kohler was one-on-one against [Mrs.] Van Peteghem," which, when construed in favor of the Kohlers, could have been construed by the jury as a denial that any one-on-one physical contact occurred between Mr. Kohler and Mrs. Van Peteghem during the incident.

Rule

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For these reasons, we conclude that there was at least some evidence in the record from which the jury could have found that Mr. Kohler accidentally spat on Mrs. Van Peteghem and never physically touched her during the encounter. A trial court should grant a motion for directed verdict "only where the evidence is truly clear, palpable and undisputed." Service Merchandise v. Jackson, 221 Ga.App. 897, 898-899(1), 473 S.E.2d 209 (1996). Hence, "if there is any evidence to support the case of the non-moving party, a directed verdict must be reversed." (Footnote omitted.) Franklin v. Augusta Dodge, 287 Ga.App. 818, 652 S.E.2d 862 (2007). We therefore must reverse the trial court's grant of the Van Peteghems' motion for a directed verdict on the battery counterclaim against Mr. Kohler and remand for a new trial on that specific claim.

The Kohlers also argue that the trial court erred in charging the jury that Mr. "Kohler's action of spitting on Mrs.... Van Peteghem constituted a battery under the laws of Georgia."

We agree with the Kohlers that the trial court's jury charge was erroneous and that they are entitled to a new trial on the Van Peteghems' battery counterclaim for the reasons we articulated supra in Division 1.

Judgment affirmed in part and reversed in part, and case remanded with instruction.

Modified for Educational Use

313 Ga. App. 1

LAWSON
v.
BLOODSWORTH.

Court of Appeals of Georgia.
January 18, 2012.

ELLINGTON, Chief Judge.

Rakeen Lawson brought this action in the Superior Court of Wilcox County for assault and battery against Clint Bloodsworth, alleging that Bloodsworth, who was his high school history teacher, deliberately and maliciously threw a chair at him. Following a hearing, the trial court granted Bloodsworth's motion for summary judgment, and Lawson appeals. For the reasons explained below, we reverse.

π argument

Viewed in this light, the record shows the following. During class on May 11, 2010, Bloodsworth became suspicious that Lawson had copied an assignment from a student in an earlier class and directed Lawson to go out into the hallway. As Lawson walked away from Bloodsworth and toward the door, Bloodsworth threw or pushed a chair toward Lawson, saying, "You're going to need this," or words to that effect. Lawson deposed that the chair hit him in the back of the leg, although he was not physically injured. According to Lawson, Bloodsworth then screamed in his face, "acting furious."

π's story: Δ pushes chair at π; π hit; π ridiculed

Lawson was embarrassed by this incident and afterward felt he was the object of other students' ridicule because a teacher had thrown a chair at him. Bloodsworth deposed that, as Lawson was leaving the classroom, he tried to make the chair slide toward Lawson and unintentionally made it take "a bad bounce" in his direction and that the chair "just barely nicked him, if [it touched him] at all."

Δ's story: it was an accident, no harm

The trial court determined that it was undisputed that Bloodsworth did not intentionally try to hit Lawson and that Lawson was not physically injured. The trial court ruled that, "[s]ince there was no physical injury, [Lawson] has no cause of action." On appeal, Lawson contends that there is evidence in the record that Bloodsworth committed an intentional tort and, therefore, he is not precluded in his recovery of damages for his resulting mental pain and suffering. We agree.

Trial Court

π argument

A cause of action for battery will lie for any unlawful touching, that is, a touching of the plaintiff's person, even if minimal, which is offensive. Ellison v. Burger King Corp., 294 Ga.App. 814, 816-817(2)(a), 670 S.E.2d 469 (2008). "[A]n offensive touching is one which proceeds from anger, rudeness, or lust. The test is what would be offensive to an ordinary person not unduly sensitive as to his dignity." (Citation and punctuation omitted.) Id. See also Interstate Life, etc., Co. v. Brewer, 56 Ga.App. 599, 607, 193 S.E. 458 (1937) (An unlawful touching of a person's body is actionable even if the unlawful touching is indirect, as by

Battery Defined

Offensive Test

Thrown Object = Touch

throwing an object or substance at the person.).

In this case, Lawson's deposition testimony provides evidence that a furious Bloodsworth intentionally threw the chair at him, that the chair hit his leg, and that Bloodsworth's conduct caused him to suffer the emotional pain of humiliation. Thus, the facts are disputed regarding whether the chair physically touched Lawson and whether Bloodsworth pushed the chair toward him with a tortious, rather than an innocent, intent.

Factual Dispute, no summary judgment

> Given the relatively low threshold required to prove battery, we must conclude that [Lawson] has created a factual issue as to whether a battery occurred. To hold otherwise here would run contrary to [controlling] precedent and to our mandate to view all evidence in the light most favorable to [Lawson] as the nonmoving party.

Standard of review for appeals of summary judgment

Ellison v. Burger King Corp., 294 Ga.App. at 817(2)(a), 670 S.E.2d 469.

For the foregoing reasons, the trial court erred in granting summary judgment to Bloodsworth.

Judgment reversed.

Modified for Educational Use

209 Ga. App. 1

RICHARDSON
v.
HENNLY

Court of Appeals of Georgia.
July 15, 1993.

SMITH, Judge.

Procedural History

Bonnie Richardson filed suit in three counts against her former co-worker, J.R. Hennly, Jr., against whom she alleged claims of battery. Henley moved for summary judgment, and Hennly's motion was granted as to the claim of battery. Richardson appeals from the grant of partial summary judgment to Hennly.

Background Facts

The record reveals that Richardson had been working as a receptionist at First Federal for a number of years when Hennly, an administrative officer, began working at her branch. Richardson's work station was in the lobby of First Federal, and Hennly worked in an office approximately 30 feet from her desk. Hennly had been a pipe smoker for a number of years, and continued to smoke his pipe at work. Richardson immediately began to have difficulty with Hennly's pipe smoke, to which she apparently had an allergic reaction that caused nausea, stomach pain, loss of appetite, loss of weight, headaches, and anxiety. She discussed this problem with her superiors, and several air cleaners were purchased, which were placed in the interior of Hennly's office and adjacent to his door. For a time Hennly switched to cigarettes, which did not bother Richardson as much, but he resumed smoking his pipe, stating that he wished to avoid becoming addicted to cigarettes. Richardson was twice hospitalized because of her adverse reactions. Shortly after Richardson returned to work from her second hospitalization her employment was terminated, primarily for excessive absenteeism.

Undisputed Facts

In opposition to the motion for summary judgment Richardson presented medical evidence attributing her adverse reactions to the pipe smoke. This evidence was not rebutted. It is uncontroverted that Hennly was aware of Richardson's adverse reactions to his pipe smoke and that she was twice hospitalized.

Disputed Facts

The evidence is in conflict regarding whether Hennly ever smoked anywhere at work other than in his office; whether he intentionally smoked around Richardson to annoy her; and whether he made teasing or offensive remarks regarding his smoking.

Hennly moved for summary judgment as to Richardson's claim of battery on the ground that pipe smoke is an immaterial substance incapable of battering another. Richardson maintains the trial court erred by granting partial summary judgment to Hennly on this claim.

Our courts have recognized an interest in the inviolability of one's person and, along with most other jurisdictions, have followed the common law rule that any unlawful touching is actionable as a battery. *Haile v. Pittman,* 194 Ga.App. 105, 106(3), 389 S.E.2d 564 (1989). In Georgia, a civil battery claim may be brought pursuant to OCGA § 51–1–13 or § 51–1–14. See generally *Joiner v. Lee,* 197 Ga.App. 754, 756(1), 399 S.E.2d 516 (1990). Such a cause of action will lie even in the absence of direct physical

contact between the actor and the injured party: " 'The unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance.'... [Cit.]"[1] *Hendricks v. Harper,* 193 Ga.App. 264, 265, 387 S.E.2d 593 (1989).

"It is no longer important that the contact is not brought about by a direct application of force such as a blow, and (if other elements of the cause of action ... are satisfied) it is enough that the defendant sets a force in motion which ultimately produces the result." Prosser & Keeton, The Law of Torts § 9, p. 40 (5th ed. 1984).

We note that Richardson has not alleged that *any* or *all* smoke with which she came into contact would constitute battery. Instead, she has alleged that Hennly, knowing it would cause her to suffer an injurious reaction, intentionally and deliberately directed his pipe smoke at her *in order* to injure her or with conscious disregard of the knowledge that it would do so. We decline to hold that this allegation must fail as a matter of law. We are not prepared to accept Hennly's argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly. Pipe smoke is visible; it is detectable through the senses and may be ingested or inhaled. It is capable of "touching" or making contact with one's person in a number of ways. Since no other element of the tort has been conclusively negated, Hennly has not shown as a matter of law that he is entitled to judgment. We conclude, therefore, that the trial court erred in granting summary judgment in favor of Hennly on the battery claim.

Judgment reversed.

There is not enough evidence to determine *as a matter of law* that Hennly is entitled to SJ.

Smoke *is* material enough to "touch" within the meaning of battery.

Modified for Educational Use

220 Ga. App. 1

Parties

ROSE
v.
BRACISZEWSKI

Court of Appeals of Georgia.
October 13, 2009.

Procedural History

TALBOT, presiding judge

Holding

In this battery suit, plaintiff Helga Rose appeals the trial court's order granting defendants' motions for summary judgment and denying Rose's motion to amend her complaint. Because we conclude that the trial court properly dismissed Rose's claim for battery and properly denied her motion to amend, we affirm.

I. Basic Facts and Procedural History

Facts: Parties are neighbors

The parties in this case are all neighbors within Hamburg Township. Rose moved into the neighborhood in 2001 and her home sits to the immediate north of a lot owned by defendants Terry and Katherine Braciszewski. Terry and Katherine built a pole barn on this lot, but their home sits on a second lot directly west and across the street from the lot with their pole barn. In September of 2005, defendants Michael Sinacola and Theresa Brawdy moved into their home, which sits on a lot directly south of the lot with the Braciszewskis' pole barn.

Facts: local law permits burning waste

Before moving into her home, Rose was unaware that Hamburg Township permitted property owners to burn leaves and other yard waste. The township amended Ordinance No. 40 in 2003 to limit the burning of leaf and yard waste to the months of April and November. Under Ordinance No. 38, the township also prohibited the "keeping, maintaining, accumulating or storage of ... [r]emnants of wood, ... accumulations of ... branches, leaves or yard clippings ... with the exception of managed compost piles."

Facts: plaintiff asked defendant to stop burning waste and plaintiff reported smoke in her home

In September of 2001, Rose approached Terry Braciszewski and asked him to stop burning leaves and yard waste because the smoke was entering her dining room. Thereafter, Rose reported several leaf fires started by defendants to the township fire department: three in November 2005, two in April 2006, and one in April 2007. On some of these occasions, Rose reported smoke in her house. Rose indicated that she reported other incidents, but there were apparently no incident reports for these complaints.

Rose also stated that, starting in 2004, the Braciszewskis began running the cars in their pole barn for one to two hours at a time about two to three times per year. Rose claimed that the exhaust emissions from these cars entered her property.

In January 2005 or 2006, Rose attended a township board meeting and complained about the leaf burning. The township supervisor investigated with the fire department and told Rose that

Plaintiff's claim

burnings were "neighborly burning[s]." Rose understood that to mean that the township would permit the burnings.

Rose sued defendants in June 2007. In her complaint, Rose alleged that defendants' open burnings caused smoke, fumes and debris to envelope her home and damage her property and her health and that Terry Braciszewski's running of his old cars for long periods of time caused emissions of smoke and fumes to drift upon her property damaging her property and her health. Rose alleged that these actions constituted assault and battery. Rose requested a preliminary injunction prohibiting defendants from conducting open burnings and from running their cars for long periods of time until the case was heard, a permanent injunction to enjoin defendants from conducting open burnings and from running their cars for long periods of time, and damages.

The trial court heard argument on Rose's motion for a preliminary injunction in August 2007. At the hearing, Rose informed the trial court that the burnings occur in April and November. The trial court noted that Ordinance No. 40D allows such burning. Rose argued that defendants' burnings were not in compliance with the ordinance and that the smoke was permanently damaging her health. Defendants argued that Rose's motion for injunctive relief should be denied because she could not prove the elements of battery. They also noted that there was no proof that their burnings caused Rose's health problems and that they must burn their leaves and debris two times each year in order to comply with Ordinance No. 38. The trial court denied Rose's motion because it was "very skeptical about the likelihood of the success on the merits" and it did not "see the irreparable harm." The trial court also determined that the balancing of factors favored defendants.

Trial court dismissed plaintiff's claim

In December 2007, the Braciszewskis moved for dismissal of Rose's claims. In January 2008, Sinacola and Brawdy also moved for summary judgment.

After a hearing on defendants' motions for summary judgment, the trial court dismissed Rose's battery claim because Rose failed to prove the requisite intent. The trial court also denied Rose's motion to amend the complaint as futile.

Rose moved for reconsideration, but the trial court denied the motion. This appeal followed.

II. Summary Judgment

Summary Judgment Rule

Rose also argues that the trial court erred in granting defendants' motions for summary disposition. We review de novo a trial court's ruling on a motion for summary disposition. *Waltz v Wyse*, 469 Ga. 642, 647, 677 S.E.2d 813 (2004). Summary judgment may be granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co.*, 451 Ga. 358, 362, 547 S.E.2d 314 (1996). A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing all the evidence in the light most favorable to the nonmovant. *Allison v AEW Capital*

Mgt. LLP, 481 Ga. 419, 424, 751 S.E.2d 8 (2008).

III. Battery Claim

Rose also argues that summary disposition should not have been granted on her battery claim.

Battery Rule

In order to establish claims of battery, a plaintiff must demonstrate that the defendant had the requisite intent. *Mitchell v Daly*, 133 Ga.App. 414, 426–427, 350 S.E.2d 772 (1984); *Espinoza v Thomas*, 189 G.App. 110, 119; 472 S.E.2d 16 (1991). The intent necessary to make out a battery is the intent to cause a harmful or offensive contact with another person, or knowing, with substantial certainty, *Boumelhem v BIC Corp*, 211 Ga.App. 175, 184, 535 S.E.2d 574 (1995). "[T]he intent necessary to make out a tortious assault is either an intent to commit a battery or an intent to create in the victim a reasonable fear or apprehension of an immediate battery." *Mitchell*, 133 Ga.App. at 427.

Reasoning: no intent

Viewing the evidence in the light most favorable to Rose, there was insufficient evidence to show that defendants acted with the requisite intent. Although it is clear that defendants intended to set the fires and start the automobiles allegedly giving rise to Rose's health complaints, there is no evidence that the defendants took those actions with the intent to cause the smoke or fumes to come into contact with Rose or with the knowledge that their actions were substantially certain to cause such contact. *Boumelhem*, 211 Ga.App. at 184. Specifically, there was no evidence that defendants took steps to increase the likelihood that the smoke and fumes would come into contact with Rose or that the conditions prevalent on the properties was such that defendants had to know that the smoke and fumes were substantially certain to come into contact with her. Further, given the vagaries of wind and weather, defendants' actions in starting the fires and automobiles alone cannot be said to be proof of the requisite intent. Even when the prevailing winds might have given notice that the smoke and fumes would travel in the general direction of Rose's property, there is no evidence that defendants were substantially certain that the smoke and fumes would not pass over Rose—assuming defendants knew of her presence—or that Rose would not otherwise be safe from the smoke and fumes. Likewise, for the same reason, any apprehension that Rose might have had concerning the potential for contact as a result of these activities cannot be said to be reasonable. *Mitchell*, 133 Ga.App. at 427.

Holding

Rose failed to present evidence from which the trier-of-fact could find the requisite intent to support either an assault or a battery claim. The trial court did not err in dismissing Rose's battery claim on this basis.

Modified for Educational Use

259 Ga. App. 1

Case name and citation

VASQUEZ
v.
SMITH.

Court of Appeals of Georgia.
January 3, 2003.

MIKELL, Judge.

Edna M. Vasquez filed the underlying action for battery against her co-worker, Jacqueline Elaine Smith. The trial court granted summary judgment in favor of Smith, and Vasquez appeals. For reasons explained below, we reverse the judgment of the trial court.

To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the non-moving party, warrant judgment as a matter of law. OCGA § 9-11-56(c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case.... Our review of an appeal from summary judgment is de novo.

So viewed, the record shows that Vasquez and Smith were employed by Intermedia Communications, Inc. According to Vasquez, in March 2000, Smith became upset when she discovered that Vasquez held the title of senior customer service manager. Smith deposed that she spoke with a supervisor, a human resources representative, and the vice president of Intermedia to inquire why she had not been considered for the position. Vasquez testified that she and Smith saw each other once or twice a week in the course of their employment and that they had a contentious relationship. Vasquez described hostile behavior by Smith, including an incident in June 2000, when Smith drove a car within four inches of Vasquez while she was walking through the parking deck.

Vasquez alleged that Smith battered her on five different occasions. First, according to Vasquez, on October 17, 2000, she and Smith happened to be in the mail room at the same time. Vasquez deposed that when she attempted to leave, Smith blocked her path and "quickly and forcefully slammed her body into mine." Vasquez was thrown off balance and struck a countertop. She testified that the incident caused "a great deal of pain" to her feet and her right hip and that she took pain medication as a result. Smith gave a different account and deposed that their arms "brushed up against each other" as the two women were exiting the mail room and that they exchanged words. Smith described the exchange as follows: "[Vasquez] said watch it and I said you watch it. And she said you're so rude. And I said your momma. That's it."

According to Vasquez, the second incident occurred on October 31, 2000, when a number of employees were gathered in a conference room for a staff meeting. Vasquez was talking to a co-worker, Amy O'Connor, at the entrance to the conference room when Smith slammed into her from behind. Vasquez testified that she lost her balance and was thrown forward, causing foot pain for which she took medication.[1] O'Connor

deposed that she was facing Smith at the time and witnessed her forcefully slam into Vasquez from behind. O'Connor further testified that there was sufficient room in the doorway for Smith to walk through without touching Vasquez; that Vasquez was thrown forward by the blow; that Smith kept walking and did not acknowledge running into her co-worker; and that Smith's conduct appeared to be intentional. Contrary to Vasquez's and O'Connor's testimony, Smith deposed that she unintentionally "brushed up against [Vasquez's] arm" as she passed through the doorway.

Vasquez alleged that the third battery took place on November 14, 2000, before the weekly staff meeting. Vasquez was seated at the conference table when Smith walked by and slammed her body against the back of Vasquez's chair. According to Vasquez, Smith also made contact with her right shoulder. Vasquez deposed that the force of the blow caused her chest to hit the table, resulting in skin discoloration. She took ibuprofen for the pain. Other people were able to walk by without touching her chair, Vasquez testified. Smith testified that she merely touched Vasquez's chair as she walked through the room. According to Vasquez, the fourth and fifth batteries took place at the November 21 and 28 staff meetings when Smith engaged in conduct nearly identical to her behavior on November 14. Vasquez testified that she suffered from a "constant nervous stomach" as a result of the five batteries and that stress caused by Smith's behavior had affected her job performance.

Smith was given a written warning by her supervisor on November 29, 2000. In a section entitled "Professional Behavior," the warning stated that "[y]our conflicts with peers and management have evolved to outbursts and physical confrontation." Smith was informed that "[b]ehaving in a threatening and insubordinate manner towards ... co-workers ... will not be tolerated."

The record reveals that Smith was arrested for the simple battery of Vasquez and that she pleaded nolo contendere to the charge. There is no documentation of the criminal action in the record; however, Smith's deposition testimony indicates that it was disposed of after November 2000.

After Vasquez filed the underlying civil action, Smith moved for summary judgment on the grounds that there was no evidence that she intentionally touched Vasquez or that Vasquez was injured by her conduct. The trial court granted the motion. On appeal, Vasquez argues that the court erred in finding that no genuine issues of material fact exist. We agree.

Procedural Facts

Issue

This Court has repeatedly held in battery cases that the unwanted touching itself constitutes the injury to the plaintiff. Darnell v. Houston County Bd. of Ed., 234 Ga.App. 488, 490(1), 506 S.E.2d 385 (1998) ("[a] cause of action for assault and battery can be supported by even minimal touching"); Jarrett v. Butts, 190 Ga.App. 703, 705(4), 379 S.E.2d 583 (1989) (evidence that the defendant touched the plaintiff's wrists and hair was sufficient to withstand a motion for summary judgment). In Brown v. Super Discount Markets, supra at 176, 477 S.E.2d 839, we held that "any unlawful touching of a person's body, even though no physical injury ensues, violates a personal right and constitutes a physical injury to that person." (Citation omitted.) In that case, we reversed a grant of summary judgment on an assault and

Precedent, law

battery claim because there was evidence that the defendant, a security employee, grabbed one plaintiff's arm and shoved the other plaintiff while apprehending them for allegedly shoplifting. Id. We reasoned that

> [a]ny act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery. (Cit.) Greenfield v. Colonial Stores, 110 Ga.App. 572, 574-575(1), 139 S.E.2d 403 (1964).

(Punctuation omitted.) Id., citing Kemp v. Rouse-Atlanta, Inc., 207 Ga.App. 876, 880(3), 429 S.E.2d 264 (1993).

In Newsome v. Cooper-Wiss, Inc., 179 Ga. App. 670, 347 S.E.2d 619 (1986), we outlined a test for conduct giving rise to an actionable claim for battery: "In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable." Mims v. Boland, 110 Ga.App. 477[-478](1)(a)(4), 138 S.E.2d 902 (1964). See generally OCGA § 51-1-13. Generally speaking, an "unlawful" touching is one which is "offensive," and an "offensive" touching is one which proceeds from anger, rudeness, or lust. [Cits.] The test, according to Professor Prosser, "is what would be offensive to an ordinary person not unduly sensitive as to his dignity." Prosser, Law of Torts, § 9, p. 37 (4th ed.1971). Accord Restatement of Torts, 2d, § 19.

Id. at 672(1), 347 S.E.2d 619.

Reasoning

Based on the above cited cases, we conclude that a jury question exists as to whether Smith's conduct constituted a battery. At a minimum, the deposition testimony of Vasquez and O'Connor raise factual issues regarding whether Smith's conduct constituted an offensive touching and whether it was intentional. That Smith gave such differing accounts of the events at issue demonstrates that the relevant facts are in dispute.

Smith argues that Vasquez's claim fails because she has not demonstrated actual physical injury; however, such a showing is not required to support a claim for battery, which is an intentional tort. Hendricks v. Southern Bell Tel. &c. Co., 193 Ga.App. 264, 265(1), 387 S.E.2d 593 (1989). See Ketchup v. Howard, 247 Ga.App. 54, 56(1), 543 S.E.2d 371 (2000). The cases cited by Smith in support of her argument that proof of injury was required involve negligence actions and are therefore distinguishable from the case at bar.

Holding

Judgment reversed.