# APPENDIX G:

# Memo Example 1

MEMORANDUM

TO: Senior Partner

FROM: Student

DATE: December 16, 2020

RE: Arthur’s potential claim for the intentional tort of battery for his injury that occurred after being hit in the face by a door by Henry.

QUESTIONS PRESENTED

1. In Georgia, a battery occurs when the plaintiff can show that the defendant intentionally touched the plaintiff in an offensive manner with *either* the intent to cause harm *or* to cause insult or offense, or both. Henry threw his door open, the door struck Arthur, Henry laughed, and Arthur was injured. Is this sufficient for Arthur to establish a claim for battery against Henry?
2. Under Georgia caselaw for the intentional tort of battery, does Henry have a viable defense to battery because Arthur consented to the touch by knocking on and standing in front of Henry’s door?

BRIEF ANSWER

1. Likely yes. Under Georgia’s battery case law, a court will likely find that a battery occurred where Henry threw his front door open, hit Arthur in the face with the door, hurt Arthur, and then laughed.
2. Likely no. Under Georgia’s battery case law, a court will likely find that Henry does not have a defense to battery because Arthur did not consent to the touching by standing in front of Henry’s door and knocking on it.

STATEMENT OF FACTS

Arthur, the plaintiff, and Henry, the defendant, are neighbors. Henry struck Arthur in Arthur’s face with Henry’s door, and Arthur is deciding whether to sue Henry for battery.

Arthur and Henry live directly next door to each other. One Sunday morning, Arthur went to Henry’s home and knocked on the door to ask Henry if he could borrow some eggs. Arthur had borrowed eggs before, so he knew that Henry often swung his door open very quickly. Henry’s door does not have any windows, but there are windows on either side of the door. Henry threw open the door and the door hit Arthur in the nose, causing his nose to bleed. When Henry stuck his head out the door, he laughed when he saw Arthur bleeding. After Arthur screamed, “I’m going to go after you for everything you’ve got!” Henry slammed the door in Arthur’s face.

Arthur has not yet taken any legal action, but he is interested in suing Henry for battery and wants to know both if he has a viable claim and also if Henry has any defenses.

DISCUSSION

It is likely that Arthur has a viable battery claim against Henry. It is also likely that Henry does not have a viable consent defense against Arthur’s battery claim. Battery is “any unlawful touching” of a person. Ellison v. Peterson, 294 Ga.App. 1, 2 (2008). The elements of a civil battery are (1) a touching; (2) that is intentional; (3) in an offensive manner; (4) with *either* the intent to cause harm *or* to cause insult or offense, or both. Vasquez v. Smith, 259 Ga.App. 1, 3 (2003). The defendant can argue that the plaintiff consented to the touching as a defense to the battery claim. Harvey v. Speight, 178 Ga.App. 1, 1 (1986). It is undisputed that Arthur was hit by the door, thus meeting the first element of battery.

First, the court will likely find that Henry intentionally touched Arthur. Because battery is an intentional tort, “unauthorized touching alone is not enough” and the defendant must purposefully make contact with another. Kohler v. Van Peteghem, 330 Ga.App. 1, 3 (2014). When the defendant chose to put her hands around the plaintiff’s neck and put the plaintiff in a semi headlock, the court found the touching intentional. Ellison, 294 Ga.App. at 2. Intent can be established when the defendant “acts with the belief that such unauthorized contact is substantially certain to result from his actions.” Kohler, 330 Ga.App. at 3. In Kohler, the defendant spit on the plaintiff while they were having a heated argument, but the defendant contended he did not intend to spit on the plaintiff. 330 Ga.App. at 2. The court found that there was sufficient evidence that the defendant intended for the spit to land on the plaintiff, meaning that a battery could have occurred. Id. at 4. Similarly, in Richardson v. Hennly, 209 Ga. App. 1, 2 (1993), when a plaintiff experienced several severe allergic reactions to a defendant’s pipe smoke while at work, the court determined that if the plaintiff could show the defendant was purposefully smoking in the plaintiff’s direction at work, that would be an intentional touching sufficient to maintain the plaintiff’s claim for battery. Conversely, when defendants set fires on their property to burn waste and the smoke from the fires happened to enter the plaintiff’s home nearby, the court found the defendants did not intentionally touch the plaintiff because the defendants neither caused the smoke to come in contact with the plaintiff, nor did they have “knowledge that their actions were substantially certain to cause such contact.” Rose v. Braciszewski, 220 Ga. App. 1, 1 (2009).

The court will likely find that Henry intended to hit Arthur with the door.  Just like the defendant in Richardson could commit a battery by intentionally blowing smoke at his coworker and the defendant in Kohler could commit a battery by intentionally spitting on his neighbor, Henry could commit a battery by intentionally swinging his door open and hitting Arthur. As the defendant in Richardson was in control of his smoke’s direction, Henry was in control of an object that he knew would touch and likely harm Arthur. Therefore, a court will likely find that there was an intentional touching. These facts are more like those in Richardson, where the defendant knew his coworker was allergic to smoke and was substantially certain that his smoke would come in contact with her, than those in Rose, where the defendants were not substantially certain that their smoke would blow onto their neighbor’s property. Henry was substantially certain he would hit the person standing at his door, and therefore the court will likely find that Henry intentionally touched Arthur.

Henry could argue that he accidentally hit Arthur with the door, thus negating the intentionality of the touching. However, intent can be established if the defendant knew that the contact is substantially certain to result from his actions. Because Henry had windows next to his door and he knew someone was standing at his door because they had knocked, the court will likely find that by throwing his door open, Henry was substantially certain that it could hit the person standing in front of it and therefore committed an intentional touching.

Second, the court will likely find that the touching was both offensive and harmful. An offensive touching is “one which proceeds from anger, rudeness, or lust.” Lawson, 313 Ga. App. at 1. The test for offensive touching is whether it “would be offensive to an ordinary person not unduly sensitive as to his dignity.” Everett v. Goodloe, 268 Ga. App. 1, 3 (2004). In Everett, the plaintiff alleged that she was sexually harassed by her former boss by committing battery. Id. at 1. However, the plaintiff also wrote emails and journal entries such as, “I miss your dear company and hope that you will be comfortable in renewing our friendship on a friendship basis....” that the court viewed as contradicting her contention that she found her boss’s touchings to be offensive. Id. at 3. The court found that, because the plaintiff was inconsistent herself about whether she found the alleged contact to be offensive, she could not prevail on her battery claim. Id. Alternatively, in Lawson, the plaintiff, a student, alleged  he was hit by a chair thrown by his teacher. 313 Ga. App. at 1. Id. at 2. The court found that the that being hit by a chair that was pushed or thrown at the plaintiff would constitute an offensive touching. Id. at 1.

The court will likely find that Henry’s conduct satisfies the offensive element because Arthur’s being hit in the face by a door is a touching that would be offensive to an ordinary person. Both the plaintiff in Lawson and Arthur were hit by an object that the defendant pushed in their direction. As in Lawson, where the court found that being hit by a chair is offensive, the court here will likely determine that being hit by a door is objectively offensive. Unlike the plaintiff in Everett, who was inconsistent about whether the touching was offensive, Arthur immediately responded in pain after being hit in the face and has never suggested that Henry’s actions were innocuous. It is highly unlikely that any court would hold that being hit in the face by a door is not offensive.

Third, the court will likely find that this touching was both harmful and insulting. A court will find that intent to cause harm exists when there is physical violence or harm to the victim and the court will not distinguish between degrees of violence. Greenfield v. Cunard, 110 Ga. App. 1, 2 (1964). When defendants painfully pulled the plaintiff’s arms behind his back because they thought he had stolen from their boss’s store, court held that there was a harmful touching. Id. at 1. Similarly, in Richardson, the court held that there was a harmful touching where the plaintiff suffered from “injurious” allergic reactions from her coworker’s pipe smoke. 209 Ga. App. at 2. Even in the absence of harmful contact, a battery can be established if the defendant had the intent to cause insult or offense. In Lawson, although the plaintiff was not physically injured when he was hit in leg by the chair pushed by his teacher, the court held that battery could be established because the plaintiff suffered from “the emotional pain of humiliation” when his classmates ridiculed him after the incident. Lawson, 313 Ga. App. at 2.

A court will likely find that this touching was harmful. Arthur was physically harmed when the door hit his nose and caused it to bleed. The court found that there was a harmful touching in both Greenfield and Richardson when the plaintiffs were physically hurt. Just like the plaintiff in Greenfield who had his arms painfully twisted behind his back and the plaintiff in Richardson who experienced allergic reactions to her coworker’s smoke, a court will likely find that Arthur’s bloody nose after being hit in the face by a door is sufficient for a harmful touching. Further, once Henry saw that Arthur was injured, Henry actually laughed at Arthur, which is similar to the plaintiff  in Lawson being ridiculed after being hit by a chair. These similar facts will likely support a finding of insult or offense. Similar to the plaintiff in Lawson, who the court found was physically injured or at least suffered from the teacher’s pushing a chair at him, the court will likely find that even if Arthur had not been hurt, he still suffered from insult or offense from Henry’s actions.

Henry will likely argue that he did not intend to make harmful contact, so this element should not be satisfied. However this argument will probably fail because the court will find that harmful touching exists when there is physical violence or harm. In Greenfield, the plaintiff was injured when his arms were twisted behind his back. In Richardson, the plaintiff was injured when she experienced severe allergic reactions. Similarly, Arthur was hit in the face and was injured so badly his nose started to bleed, showing Arthur was harmed by the touching. The court will likely find that Arthur suffered both from a harmful touching and an insulting or offensive touching because he was physically injured and Henry laughed at him.

Finally, a court will likely find that Arthur did not consent to the touching that occurred, meaning that Henry’s defense of consent will not be sufficient to protect Henry from liability. If a touch is invited, Harvey v. Speight, 178 Ga. App. 1, 1 (1986), or contracted for, Houston v. Holley, 208 Ga. App. 1, 3 (1993), there cannot be a battery. In Harvey, the court found that there was consent to touch the plaintiff where the plaintiff asked if the defendant “wanted to see” inside his jacket and then pulled his jacket open; further, the plaintiff admitted to inviting the search. 178 Ga. App. at 1. Similarly, in Houston, the court found that there was consent sufficient to negate a battery claim where a child at daycare was only touched when being put in time out, which fell in the normal course of activities for a childcare center. 208 Ga. App. at 3. The court reasoned that any touching that occurred was contracted for when the child’s parents placed their child in this daycare. Id.

It is unlikely that the court here will find that the touching was invited. Arthur will have to show that Henry’s touching was not invited or contracted for to prevail at trial. Unlike the plaintiff in Harvey, Arthur did not verbally invite the touching. It is also unlikely that the court will find that Arthur contracted for the touch by knocking on Henry’s door. Unlike the parents in Houston, Arthur did not agree to being touched during this transaction; putting a child in timeout while at daycare is a contracted-for touching while being hit in the face by a door by a neighbor is not. By knocking on Henry’s door, Arthur did not contract for nor invite being hit in the face by the door. Therefore, the court will likely find that Arthur did not consent to the touch and Henry does not have a defense to the battery.

The court will likely find that Arthur can sufficiently establish the elements of battery of: (1) a touching; (2) that is intentional; (3) in an offensive manner; (4) with *either* the intent to cause harm *or* to cause insult or offense, or both, Vasquez, 259 Ga. App. at 3, because (1) Arthur was touched by the door; (2) Henry intended to hit Arthur; (3) an ordinary person would find getting hit in the face by a door to be offensive; (4) and Arthur was physically injured and Henry laughed at him. Further, Arthur did not consent to the touching because he did not invite nor contract for the touching, and therefore, Henry’s defense of consent will likely fail.

# Memo Example 2

MEMORANDUM

TO: Assistant District Attorney

FROM: Law Clerk

DATE: November 1, 2022

RE: Charging Rolf Femmio with Aggravated Assault for throwing a snake at Willy Zapka

QUESTIONS PRESENTED

1. In Georgia, a person commits aggravated assault when they commit an assault with *either* a deadly weapon *or* with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury. Rolf Femmio threw a snake into a bathroom stall occupied by Willy Zapka, causing Zapka to run into the bathroom door with such force that he sustained a day-long headache and a bloody nose. Did Rolf Femmio commit aggravated assault?

BRIEF ANSWER

1. Likely yes. Under Georgia’s aggravated assault case law, a court will likely find that an aggravated assault occurred where Rolf Femmio threw a snake into a bathroom stall occupied by Willy Zapka, causing Zapka to run into the bathroom door with such force that he sustained a day-long headache and a swollen bloody nose.

STATEMENT OF FACTS

Rolf Femmio, the defendant, and Willy Zapka, the victim, are long-time rivals. Femmio threw a pillowcase containing a snake into a bathroom stall Zapka occupied, causing Zapka injury. The arresting officer, Martina Cove, is deciding whether to charge Rolf Femmio with aggravated assault.

Femmio and Zapka were set to compete against each other in a local karate tournament at the West Athens Community Center. Before the match, Zapka retreated to a bathroom stall in the men’s locker room to prepare himself for the encounter. Femmio followed Zapka into the locker room a few minutes later carrying a pillowcase. Femmio threw the pillowcase over the side of the bathroom stall, with the pillowcase hitting Zapka in the head before landing in the stall’s sink. A large snake slithered out of the pillowcase. The sight of the snake coiled up only two feet away caused Zapka to panic. Zapka ran smack into the bathroom stall door, causing him to momentarily lose consciousness. Alan Mills, an off-duty paramedic who was changing in the locker room, responded when he heard a loud noise. Mills looked underneath the stall door and saw Zapka sitting on the floor. When Zapka did not respond, Mills climbed underneath the stall to treat Zapka, resuscitating him with smelling salts. As a result of slamming into the stall door, Zapka suffered a bloody nose and developed a “pretty wicked headache” that immobilized him for a full day.

The snake was never positively identified. Zapka believed the snake to be a venomous copperhead. The snake could also be a nonvenomous northern watersnake or a venomous cottonmouth based on descriptions provided by Mills and a Community Center maintenance man who saw the snake coiled up in the basement the next day. Mills described the snake as four feet long and blotchy, consistent with the nonvenomous northern watersnake. However, as the snake Femmio threw did not bite at Zapka, defecate, or release a smelly musk as the northern watersnake does when threatened, and stayed coiled when the maintenance man approached rather than fleeing as is typical of the northern watersnake, the snake was most likely a venomous viper. As the copperhead does not typically grow to four feet long, the snake Femmio threw was most likely a cottonmouth. Like the copperhead, the cottonmouth can strike from as far away as half the length of its body. The cottonmouth is not aggressive but may bite if agitated, stepped on, or picked up. A cottonmouth bite, while rarely fatal, can be extremely painful and can cause gangrene and loss of digits without proper treatment.

Arresting Officer Cove is certain that an assault occurred but wants to know if she should charge Femmio with aggravated assault.

DISCUSSION

Rolf Femmio likely committed aggravated assault against Willy Zapka. Under O.C.G.A. § 16-5-21(a)(2), the elements of criminal aggravated assault are (1) an assault; (2) with *either* a deadly weapon *or* with an object, device, or instrument; (3) which when used offensively against another; (4) is likely to *or* actually does result in serious bodily injury. LaPann v. State, 191 Ga.App. 1, 1 (1989). Femmio’s act placed Zapka in reasonable apprehension of receiving a violent injury, thus meeting the first element of aggravated assault. Although a snake is not an offensive weapon per se, “a weapon primarily meant and adapted for attack and infliction of injury,” Ware v. State, 289 Ga.App. 1, 1 (2008), an animal can be considered an offensive instrument, Braziel v. State, 320 Ga.App. 1, 1 (2013). Therefore, whether Femmio committed aggravated assault will depend on whether he used the snake offensively against Zapka and whether such use was likely to or actually did result in serious bodily injury.

First, a court will likely find that Femmio used the snake offensively against Zapka. Striking with the instrument is neither necessary nor sufficient to establish offensive use—ultimately, what constitutes offensive use “depends not necessarily on the nature of the object itself,” but instead on the capabilities of the instruments as used by the defendant. LaPann, 191 Ga.App. at 1. In Crane v. State, 297 Ga.App. 1, 1 (2009), the defendant held a claw hammer as he approached his ex-wife’s father during a confrontation, provoking the father to defend himself with a baseball bat. The court found that even where the defendant never attempted to strike the father, the father’s reasonable fear of being struck and injured by the claw hammer established aggravated assault. Id. at 2. In Reese v. State, 303 Ga.App. 1, 1 (2010), the court upheld an aggravated assault conviction for a defendant who threw a beer bottle at a police officer entering the defendant’s home. Although the bottle did not strike or injure the officer, the court found that by throwing the 12-ounce glass bottle at the officer from close range with such force that the bottle shattered upon impact, the defendant used the “normally non-offensive nondeadly” beer bottle in an offensive manner. Id. On the other hand, the Ware court found a defendant who struck her husband in the face with the “non-business end” of a box cutter had not used the instrument offensively. 289 Ga.App. at 1. No evidence showed the Ware defendant ever exposed the box cutter blade or threatened her husband with it. Id. at 2. Still, courts normally find offensive use when evidence shows a defendant targets the victim’s head or face. The Talley court held that witness testimony that the defendant hit the victim on the head with a lamp was enough to establish offensive use, even when the state did not introduce the lamp itself or any details about the lamp into evidence. Talley v. State, 137 Ga.App. 1, 1 (1976).

A court will likely find that Femmio used the snake offensively by lobbing it in a pillowcase at Zapka. As with the defendant’s use of the claw hammer in Crane, the fact that the snake did not ultimately strike at Zapka does not preclude a finding of offensive use. On the contrary, Zapka’s “flight” reaction to escape from the bathroom stall mirrored the Crane victim’s “fight” reaction to grab the baseball bat to defend himself— Femmio’s offensive use of the snake triggered Zapka’s reasonable fear of being bitten by a copperhead. Even if the pillowcase containing the snake Femmio used could be considered “normally non-offensive,” Femmio essentially used said pillowcase in the same manner that the Reese defendant used the beer bottle by targeting Zapka at close range with an instrument that could injure if it struck its intended target. And while the pillowcase hitting Zapka in the head is not, without more, sufficient to establish offensive use, it further bolsters the case for offensive use. Since Femmio could see underneath the bathroom stall and tell where Zapka stood, the fact that the pillowcase hit Zapka’s head indicates that Femmio targeted Zapka’s head or face. Therefore, even if the State cannot adduce the snake Femmio used as evidence at trial, evidence that Femmio targeted Zapka’s head may suffice to show offensive use as it was in Talley.

Femmio will likely argue that even if a court finds that he targeted Zapka’s head, his actions cannot constitute offensive use because the snake posed no threat to Zapka inside the pillowcase when it hit him. In that respect, the snake in the pillowcase was more like the unexposed box cutter in Ware than the beer bottle in Reese. However, unlike the blade of the box cutter in Ware that was never exposed or used to threaten the victim, the snake immediately released after the pillowcase landed and menaced Zapka. The factual variations from Reese—that the threat of injury came from what was inside of the pillowcase thrown rather than the pillowcase itself and that Femmio lobbed it over the bathroom stall wall rather than directly at Zapka—should not alter the conclusion the Femmio’s throw constituted offensive use just as the Reese defendant’s throw had.

Second, a court will likely find that Femmio’s offensive use of the snake was likely to result in serious bodily injury. Whether an offensive instrument is likely to produce serious bodily injury depends on “the manner and means of the object’s use, as well as any wounds inflicted and other evidence of the capabilities of the instrument.” Reese, 303 Ga.App. at 1. That an offensive instrument’s use causes a victim to sustain bruises, lacerations, or other visible injuries shows that the defendant used the instrument in a manner likely to cause serious bodily harm. In Hambrick v. State, 174 Ga.App. 1, 1 (1985), the defendant cut the elderly victim’s finger with a pocket knife when the victim tried to stop the defendant from taking cash the victim kept in snuff cans tied around his neck with stockings. The laceration to the victim’s finger showed that the pocket knife, though small, “was arguably capable of inflicting the types of injuries which generally can be produced by knives,” supporting the conclusion that “the knife was used against the elderly victim in a manner likely to produce . . . great bodily injury.” Id. In LaPann v. State, 191 Ga.App. 1, 1 (1989), the defendant used a sixteen inch long by three-quarter inch wide by one and one-half inch thick piece of firewood to strike his adopted daughter multiple times. As the 235-pound defendant drew back and delivered each blow with force, resulting in a bruise each time the woman was struck, the court held the defendant used the firewood in a manner that was likely to result in serious bodily injury. Id. The Tyson v. State court held that a defendant who “beat the tar out of” his pregnant girlfriend used his hands and feet in a way that was likely to result in serious injury based on visible injuries the victim sustained to her face and head along with an injury that caused her to bleed down both legs. 358 Ga.App. 1, 1 (2021). Still, a court can find the “likely to result in serious bodily injury” element met even where the victim does not sustain visible injury if the offensive instrument used could temporarily debilitate the victim. In Weaver v. State, 325 Ga.App. 1, 1 (2013), a man was temporarily blinded after the defendant called him over to the defendant’s car and sprayed him “directly in the face with mace.” The court found the defendant’s offensive use of pepper spray was likely to result in serious bodily injury since pepper spray’s capacity to injure and incapacitate attackers is precisely why it is typically used as a self-defense device. Id. at 2.

The court will likely find that Femmio’s actions were likely to result in serious bodily injury because the snake he threw at Zapka could cause a temporarily debilitating injury. Zapka’s apparent physical injuries alone are not likely sufficient to show Femmio’s actions were likely to result in serious bodily injury. Zapka did not sustain any lacerations like the Hambrick victim, bruises like the LaPann victim, or visible facial injuries like the Tyson victim. His sole visible injury, a nosebleed, was not serious like the pregnant Tyson victim’s injury that caused her to bleed down her legs. However, like the pepper spray used in Weaver, the snake’s capacity to injure and incapacitate Zapka supports finding Femmio’s offensive use of the snake was likely to cause serious injury. The four-foot-long snake was capable of striking Zapka after landing only two feet away and was liable to do so after Femmio agitated it by tossing it around in the pillowcase. The snake’s bite had the capacity to injure and incapacitate Zapka by causing persistent pain and swelling that could temporarily deprive Zapka of the use of a limb, just as pepper spray incapacitated the Weaver victim by temporarily blinding him.

Third, a court will likely find that Femmio’s offensive use of the snake did result in serious bodily injury. Whether an offensive instrument actually does result in serious bodily injury depends on the extent of the injury inflicted with the instrument: minor injuries are insufficient, but injuries requiring professional medical treatment indicate that serious bodily injury resulted. The Ware court held that no serious bodily injury resulted when the defendant hit her husband once with an unexposed box cutter, inflicting only a minor facial cut an and injury to the inside of his mouth. Ware, 289 Ga.App. at 2. Conversely, the Tyson court found serious bodily injury resulted where the pregnant victim sustained injuries that trained medical personnel determined required examination and treatment at a hospital. Tyson, 358 Ga.App at 2. Likewise, the LaPann court found serious bodily injury resulted when one of the defendant’s strikes with a piece of firewood accidentally glanced off his adopted daughter’s arm as she tried to parry the blow, opening a gash in her head that required ten sutures. Additionally, when a victim who was pepper sprayed in the face by a defendant “suffered a burning sensation in his eyes and face, was in a great deal of pain, and was temporarily blinded,” the Weaver court held that serious bodily injury results when offensive use of an instrument produces “extreme physical pain.” Weaver, 325 Ga.App. at 1–2 (citation omitted).

A court will likely find serious bodily injury resulted because Femmio’s offensive use of the snake ultimately inflicted an injury requiring medical treatment along with extreme physical pain upon Zapka. While Zapka’s nosebleed is best categorized as a minor injury akin to the injury to the inside of the Ware victim’s mouth, his head injury—likely a concussion—qualifies as a serious bodily injury. As in Tyson, a trained medical professional determined Zapka’s head injury should have properly been examined and treated at a hospital. That Zapka’s head injury resulted from Zapka’s reaction to the assault does not preclude finding serious bodily injury resulted from the assault—LaPann shows that injuries sustained in defending an assault meet the element when medical attention is required. Additionally, the painful headache Zapka suffered satisfies the element—while the headache may not have been as acutely painful as the burning sensation the Weaver victim experienced to his eyes, it lasted considerably longer and could properly be categorized as “extreme physical pain.”

The court will likely find that Femmio’s actions meet the elements of aggravated assault: (1) an assault; (2) with an object, device, or instrument; (3) which when used offensively against another; (4) is likely to or actually does result in serious bodily injury, LaPann, 191 Ga.App. at 1, because (1) Femmio committed an assault; (2) with a venomous snake; (3) that he threw at Zapka; (4) that both could have caused a temporarily debilitating injury and inflicted an injury requiring medical treatment along with extreme pain upon Zapka.