

How to read these pages

Two work products for Katie Miller: a persuasive demand letter to Trapp's lawyer, and an objective damages memo to the partner. Every operative phrase is highlighted in the color of the claim, element, or damage category it serves, and the red arrow says what it does. Two intentional-tort claims (assault + battery) drive two damage buckets (compensatory + punitive).

- ASSAULT intend apprehension + well-founded fear (Brown v. Orr; Holmes)
- BATTERY intend the contact, harmful/offensive result; object-contact (Horton; Polk)
- intent / evil motive intend the CONTACT, not the harm; the rampage + threat
- consent Miller did not consent to a forceful phone-grab
- Leffler's defenses accidental / consent to jostling / no intent to harm
- compensatory medical \$5,000 + wages \$100 + phone \$500 + pain and suffering
- punitive outrageous conduct, wealth, and the Campbell single-digit cap
- comparator cases Cook, Alma, Little (jury verdicts) to size the amounts

Bottom line: Trapp committed both an assault (the threat + raised arm) and a battery (grabbing the phone and dislocating her shoulder); Leffler's three defenses all fail. Miller recovers about \$25,600 in compensatory damages and about \$200,000 in punitive damages, near Cook and within the Campbell 9x ceiling.

Stuart, Parks & Howard LLC
Attorneys at Law
1500 Clark Street
Franklin City, Franklin 33007

MEMORANDUM

To: Examinee
From: Timothy Howard, Partner
Date: February 23, 2016
Re: Katie Miller

We have been retained by Katie Miller to pursue civil assault and battery claims against Steve Trapp, guitarist and lead vocalist for the band the Revengers, for an incident that occurred at a concert two weeks ago. I have met with Miller and reviewed the evidence. Our firm has agreed to take the case because Miller has meritorious claims for assault and battery, and because her uncle is a valued client of the firm.

Yesterday, I called Trapp’s lawyer, Saul Leffler, and told him that we are preparing to sue Trapp for his assault and battery of Miller. I asked Leffler if his client would be interested in resolving the matter short of litigation. Leffler was dismissive and said that Miller does not have a case. I have attached a memo summarizing our phone conversation.

Please draft both of the following:

(1) A demand letter addressed to Attorney Leffler, written for my signature

Your letter should persuasively state the basis for Miller’s assault and battery claims against Trapp and argue that Miller will be able to recover compensatory and punitive damages. Follow our firm’s guidelines on drafting demand letters (attached). Leave blank the specific amounts that we will request for each category of damages. I will fill in the amounts later.

(2) A brief memo to me

Your memo should set forth your recommendation of the specific amounts along with the rationale for these amounts for each category of damages that we could reasonably expect to recover at trial. Use the attached cases and summaries of recent Franklin civil jury verdicts as guidance on what a jury might award for Miller’s damages. Refer to these jury verdicts in your memo to me, but do not cite them in the demand letter. I will fill in the amounts in the demand letter after I have reviewed your memo.

- ☐ ← **Two work products follow:**
a demand letter AND a damages memo.
- ☐ ← **Doc 1:**
a persuasive demand letter to Leffler, for the partner's signature.
- ☐ ← The letter must persuasively establish both claims and the damages.
- ☐ ← Leave the dollar amounts blank; the partner fills them in later.
- ☐ ← **Doc 2:**
a brief memo recommending specific damage amounts + rationale.

MPT-2 File

Stuart, Parks & Howard LLC

OFFICE MEMORANDUM

To: All Attorneys
From: Managing Partner
Date: September 5, 2013
Re: Guidelines for Drafting Demand Letters

A demand letter states our client’s legal claims and demands that the opposing party pay damages and/or take or cease taking a certain action. A demand letter is designed to advocate a position and to persuade the recipient.

A demand letter typically includes (1) a brief statement indicating that we represent our client in this matter; (2) a brief statement of the purpose of the letter; (3) a succinct but persuasive statement of facts; (4) a thorough analysis of the bases for our client’s claims; (5) a blank space for a specific settlement demand or amount, to be filled in by the supervising partner; (6) a deadline by which the opposing party must comply (usually one or two weeks); and (7) the consequences for failing to comply by the deadline, including the risks of litigation for the opposing party.

When discussing the bases for our client’s claims, you should thoroughly analyze and integrate both the facts and the applicable law and respond to arguments that have been made against the claims.

A well-written demand letter can promote a favorable settlement. It should set forth the strongest credible arguments on behalf of our client so that there is room for negotiation.

- Part 1: state that we represent Miller.
- Part 3: the persuasive statement of facts.
- Part 4: analyze the claims (assault, battery, damages).
- Part 6: a compliance deadline, usually one to two weeks.
- Part 7: the consequences of not complying (litigation risk).

RockNation, a blog by Katie Miller

Commentary on Rock and Roll

February 3, 2016

Rock fans, I have some exciting news. Through my gig reporting for my college newspaper, I got a press pass for the Revengers concert next week at the Franklin City Arena. I am going to find Revengers guitarist and lead vocalist Steve Trapp backstage after the show and interview him. I promise I will provide the details of that interview here. Wish me luck!! I'm really psyched to talk to Steve Trapp. He's super hot and famous.

RockNation, a blog by Katie Miller

Commentary on Rock and Roll

February 16, 2016

Readers, I am very disappointed to tell you that I can't provide an account of an interview with Steve Trapp of the Revengers as promised. I had planned to interview him after the Revengers concert at the Franklin City Arena last week. Instead of giving me an interview, Steve gave me a dislocated shoulder!

After the concert, I was eagerly waiting offstage to speak to Steve. It was a long wait, rock fans, because the Revengers played two encores, which were awesome. After the final song, the band walked offstage. I was hoping to stop Steve for a quick impromptu interview. I had my smartphone out, set to record. A bunch of other photographers and journalists were waiting too. I was about half of the way back in the group. Nina Pender, a photographer from *Celebrity* magazine, was in the very front. When Steve walked offstage, Nina moved in to take a picture of him. Steve punched her in the nose, wrested the camera out of her hands, and smashed it on the ground. I stood there frozen, mouth agape. Steve continued toward us. He looked at me and yelled, "Get out of my way, you little punk, or I'll beat the hell out of you." He raised his arm as if to hit me. I was freaking out. Instead of hitting me, he grabbed my phone out of my hand and smashed it on the ground. I was holding the phone tightly because of the crowd. When he

← **Miller's anchor:**
a credentialed journalist, backstage for an interview.

← **She watched Trapp attack Pender:**
this builds her well-founded fear.

← **The threat to Miller:**
intent to cause an imminent apprehension (assault).

← **The overt act:**
raising his arm made the fear well-founded.

← **The battery:**
intentional contact with the phone in her hand (Polk).

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grabbed my phone, he pulled so hard that he dislocated my shoulder, and I had to go to the hospital.

I have been a wreck since this happened. The pain was unbelievable for almost four hours until the doctor popped my shoulder back in place. I have \$5,000 in medical bills; I had my arm in a sling for three days; I missed a week of my part-time work in the school cafeteria, which cost me \$100; and I had to pay \$500 to replace my phone.

This is all devastating. Steve has been my idol since he started playing with the Revengers. I have everything the Revengers ever recorded, and I have followed every piece of news about Steve’s music and personal life. I think Steve should have to pay for what he did, don’t you? My blog will no longer celebrate the Revengers as the best rock-and-roll band. I now rate Palindrome as the top living rock-and-roll band!

- ← **The harmful result:**
a dislocated shoulder (battery + pain and suffering).
- ← **Mental suffering:**
she has been 'a wreck' (pain and suffering).
- ← **Compensatory:**
\$5,000 in medical expenses.
- ← **Compensatory:**
\$100 in lost wages.
- ← **Compensatory:**
\$500 for the destroyed phone.

MPT-2 File

Reeling Rock
The Online Magazine about Rock and Roll
Steve Trapp Allegedly Punches Photographer in Post-concert Melee

February 13, 2016

FRANKLIN CITY — Musician Steve Trapp, lead vocalist and guitarist for the Revengers, was involved in an alleged assault on a photographer last Tuesday, February 9, as he left the stage after a Revengers concert. The Franklin City Police Department is conducting a criminal investigation into the incident, which occurred at approximately 11:00 p.m.

Trapp became upset at *Celebrity* magazine photographer Nina Pender as she was trying to take his photograph. Trapp asked Pender to stop shooting. He then walked over to Pender, punched her in the face, and slammed her camera on the ground. Other photographers at the scene captured the incident. Paramedics were called, and Pender was taken to a hospital where she was treated for serious injuries.

The day after the incident, Trapp left Franklin City to stay at his 15-bedroom vacation home in Xanadu, the exclusive Franklin beach resort. Trapp could not be reached for comment.

Pender has filed a criminal complaint against the musician, and Franklin City Police Department Detective Kevin Park said that an investigation is ongoing. He said that the case will be presented to the District Attorney’s office as early as today. “With the photographs and videos, it’s pretty solid evidence,” reported Park.

Pender’s lawyer, Russ Smalls, told *Reeling Rock* that Pender intends to file a civil lawsuit against Trapp seeking \$5 million in damages.

Others were injured during the incident. After Trapp assaulted Pender, the musician stormed through the crowd of dozens of paparazzi and journalists. Witnesses report that Trapp yelled obscenities and pushed individuals out of his way. One newspaper reporter was taken to the hospital with a shoulder injury.

Trapp has had previous run-ins with the law. In 2009, he was charged with possession of illegal drugs, but the charges were later dropped. In 2012, Trapp pleaded guilty to misdemeanor assault and battery after attacking his then bodyguard, Alex Peel.

The Revengers’ latest album, *Jab*, has received universal acclaim. *Reeling Rock* awarded *Jab* four out of five stars. *Jab* was also named 2015 Album of the Year at the Franklin City Music Awards.

[Photographs of Trapp punching Pender and a link to amateur YouTube video of the encounter, both of which were included with the article, are omitted.]

← Corroborates the Pender attack Miller witnessed (well-founded fear).

← **Trapp's wealth:** supports a larger punitive award (Polk factor c).

← **The rampage:** yelling and shoving = evil motive (punitive).

← **His record (misdemeanor assault of his bodyguard Peel):** supports Miller's fear.

MPT-2 File

Stuart, Parks & Howard LLC

MEMORANDUM TO FILE

From: Timothy Howard
Date: February 22, 2016
Re: Katie Miller matter; phone conversation with Saul Leffler

Today I spoke with Saul Leffler, Steve Trapp’s lawyer. We discussed Katie Miller’s claims for assault and battery against Trapp. Leffler was dismissive and said that we would be “crazy” to pursue them.

Leffler denied that Trapp had committed a battery. According to Leffler, Trapp had just finished performing a two-and-a-half-hour high-energy rock concert, and he was exhausted from the performance and eager to get to his dressing room. According to Leffler, Trapp does not recall even touching Katie Miller as he passed the crowd of journalists. Leffler also claimed that even if Trapp had made any contact with Miller, it would have been accidental. Assuming that there was some contact, Leffler said that Miller had consented to a certain amount of jostling by attending the concert and going backstage. Leffler said that Trapp did not intend to harm her, and therefore did not have the requisite intent for battery.

Leffler also said that Miller lacks a meritorious claim for assault. In response to my statement that Trapp’s conduct caused Miller to have an imminent apprehension of a battery, he said, “Baloney.” Leffler conceded that Trapp was annoyed that so many journalists were crowded in his path; however, Leffler stated that Trapp did nothing that would cause Miller to fear that he would harm her. Leffler denied that Trapp singled out Miller or attempted to frighten her in any way.

Leffler got very upset when I mentioned punitive damages, and he accused Miller of attempting to capitalize on Trapp’s fame and fortune. Leffler insisted that a jury will never find that Trapp had any injurious intent toward Miller. He emphasized that Trapp is a famous, well-respected musician, who generously donates to a wide variety of charities, including shelters for homeless women. Leffler said that Trapp does not even know Miller, and he has no evil motives toward young women generally or Miller in particular. I responded that the last thing Trapp needed now was more bad publicity. Leffler had no comment.

Leffler concluded by saying that if our firm pursues Miller’s claims, we will lose.

- ← **Defense 1 (no recollection):**
rebut, he grabbed the phone on purpose.
- ← **Defense 2 (accidental):**
rebut, the grab was deliberate.
- ← **Defense 3 (consent to jostling):**
rebut, not consent to a phone-grab.
- ← **Defense 4 (no intent to harm):**
rebut, Horton needs intent to the CONTACT only.

FRANKLIN JURY VERDICT SUMMARIES

\$360,000—Cook v. Matthews Garage (March 2015)

Plaintiff went into defendant’s automobile repair shop to complain about the way his wife, a customer, had been treated by one of defendant’s employees. That employee then pushed plaintiff to the floor and screamed and cursed at him. Plaintiff’s arm was broken. Defendant knew that the employee had been terminated from prior jobs because of his tendency to use violence to settle work-related disputes.

Medical expenses—\$10,000
Pain and suffering—\$50,000
Punitive damages—\$300,000

\$1,500,000—Alma v. Burgess (April 2015)

Defendant attacked plaintiff, a 35-year-old teacher, when plaintiff was leaving her house at night. Defendant stabbed plaintiff in the torso and upper leg. Plaintiff was taken by ambulance to the hospital, where she received treatment and remained for four days.

Medical expenses—\$100,000
Pain and suffering—\$400,000
Punitive damages—\$1,000,000

\$52,000—Little v. Franklin Chargers, Inc. (October 2015)

Plaintiff attended a professional basketball game as a spectator. During halftime, defendant’s team mascot grabbed plaintiff hard and attempted to pull him onto the floor to participate in an entertainment routine. The mascot pulled plaintiff’s arm with such force that plaintiff fell down, dislocating his left shoulder. Plaintiff felt that he had been humiliated in front of his fiancée and a stadium full of onlookers.

Medical expenses—\$12,000
Pain and suffering—\$40,000
Punitive damages of \$200,000 requested but denied.

-  ← **Cook:**
yelling + a push breaking an arm; \$50k P&S, \$300k punitive (closest comparator).
-  ← **Alma:**
a stabbing; \$400k P&S, \$1M punitive (the upper bound).
-  ← **Little:**
a dislocated shoulder + public humiliation; \$40k P&S (closest facts).
-  ← **Little's punitive request was DENIED:**
distinguish it.

Horton v. Suzuki
Franklin Court of Appeal (2009)

This is an appeal from a judgment for the plaintiff following a bench trial of a civil battery case. The defendant argues that 1) the lower court’s finding of lack of consent was clearly erroneous; 2) the lower court’s finding on intent was clearly erroneous; and 3) even if there was a battery, the damages award was excessive.

Plaintiff John Horton sued defendant Rikuo Suzuki, his karate instructor, for injuries suffered as a result of an alleged battery committed by Suzuki.

It is undisputed that Horton was a student in a karate class conducted by Suzuki. Horton testified that he knew he would be subjected to rough physical contact by classmates and the instructor as a necessary part of the class. A classmate testified that Horton was speaking in the locker room to another student after class when Suzuki apparently misunderstood what Horton said and struck Horton on the cheek. The classmate further testified that Suzuki appeared angry and yelled at Horton.

Suzuki argues that Horton consented to the contact by enrolling in the karate class. Several witnesses for Suzuki testified that a student of karate must expect rough treatment from his instructor and that the instructor often physically disciplines the students during class. Suzuki testified that he was attempting to discipline Horton when he struck him. However, there is no evidence that the blow had any connection with the karate instruction, and the evidence indicates that Suzuki struck Horton for some personal reason.

An actor is subject to liability to another for the tort of battery if he or she **acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact,** and a harmful or offensive contact results. To prevail on a civil battery claim, **the plaintiff must show that he or she did not consent** to (or give apparent consent to) the defendant’s contact. Consent and apparent consent are relevant to whether there was in fact a harmful or offensive contact.

Here Horton may have consented to a certain amount of harmful or offensive contact during his karate instruction. Nothing in the record, however, indicates that Horton consented to being struck on the cheek by his instructor after class had been dismissed.

Suzuki also argues that he is not liable for battery because he did not intend to harm or offend Horton. In Franklin, for a plaintiff to prevail on a battery claim, it is sufficient that the

- ← **Battery rule:**
intend a harmful/offensive contact OR apprehension, and contact results.
- ← **Consent:**
the plaintiff must show she did not consent to the contact.

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defendant intended to cause a contact that turned out to be harmful or offensive. The defendant does not have to have intended that the contact result in harm or offense.

Thus, it is irrelevant whether Suzuki intended that Horton be harmed or offended. Suzuki intended to strike Horton on the cheek, and in doing so engaged in intentional harmful and offensive contact.

Finally, Suzuki argues that even if there was a battery, the trial court erred by awarding Horton excessive damages of \$7,500. For intentional torts like assault or battery, a plaintiff may seek two kinds of damages: compensatory and punitive. Compensatory damages may include medical expenses, lost wages, and pain and suffering. Pain and suffering includes physical pain as well as mental suffering such as insult and indignity, hurt feelings, and fright caused by the battery. Moreover, mental suffering may be inferred from proof of fright caused by a sudden, unprovoked, and unjustifiable battery. There is no mathematical formula for assessing the value of pain and suffering; that determination is left to the sound discretion of the trier of fact.

Horton suffered a cut on the inside of his mouth which became infected, and for which he incurred only \$1,500 in medical expenses. The court properly found that Suzuki committed battery and awarded Horton \$7,500 in compensatory damages: \$1,500 for medical expenses and \$6,000 for pain and suffering.

Although punitive damages are also available in civil assault and battery cases, the trial court denied Horton’s request for punitive damages and that denial was not appealed.

We find the total award of \$7,500 to be adequate and in conformity with awards in battery cases in which the injuries incurred were minimal.

Our review of the record persuades us that there is sufficient evidence to support the lower court’s findings. We therefore conclude that the lower court’s findings were not clearly erroneous.

Affirmed.

- ◻ ← **Intent:** intend the CONTACT, not the harm. This defeats Leffler's defense.
- ◻ ← Both compensatory and punitive damages are available.
- ◻ ← **The compensatory categories:** medical, wages, pain and suffering.
- ◻ ← Pain and suffering includes mental suffering and fright.

Polk v. Eugene
Franklin Supreme Court (2004)

This is a suit for compensatory and punitive damages growing out of an alleged battery. The plaintiff, Barrington Polk, is a physician. The defendant, John Eugene, is a member of the private Hills Club. After a jury trial, the court rendered judgment for the plaintiff, including an award of punitive damages. The Franklin Court of Appeal reversed. The questions before this Court are whether a battery was committed and, if so, whether the trial court abused its discretion in entering judgment for \$3,000 in punitive damages.

Polk had been invited to a one-day medical conference at the Hills Club. The invitation included a luncheon. The luncheon was buffet style, and Polk stood in line with others. As Polk was about to be served, Eugene approached him, snatched the plate from Polk’s hand, and shouted that Polk could not be served in the club because of his race. Polk was not actually touched during the incident. Polk testified that he did not fear or apprehend physical injury but that he was highly embarrassed by Eugene’s conduct in the presence of his associates.

The jury found that Eugene “forcibly dispossessed plaintiff of his dinner plate” and “shouted in a loud and offensive manner” that Polk could not be served there, thus subjecting Polk to humiliation and indignity. The jury found that Eugene acted maliciously and awarded Polk \$1,000 in compensatory damages for pain and suffering due to his humiliation and indignity and \$3,000 in punitive damages. Eugene appealed, arguing that there was no battery but even if there was a battery, the evidence did not support an award of punitive damages.

The court of appeal held that there was no battery because there was no physical contact and therefore did not reach the issue of punitive damages. However, it has long been settled that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of Polk’s plate constituted a battery. We held that the snatching of an object from one’s hand constituted a battery in *Riley v. Adams* (Franklin Sup. Ct. 1960). In *Riley*, the plaintiff bought some articles of intimate apparel from a store at which the defendant was the manager. The defendant claimed that he suspected that the plaintiff had not paid for all the articles in her shopping bag. Rather than confronting the young woman at the cash register or in the store, the defendant waited until she had walked several blocks and crossed the square to confront her. He

← **Polk's facts:**
the plate was grabbed; he was never touched, yet it was a battery.

← No direct body contact is required...
← ...contact with an object identified with the body suffices (the phone).

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ran up and took the plaintiff’s bag from her by force. He proceeded to search it and take the articles out and hold them up to the public view. The court held that the defendant’s acts constituted a battery, explaining that “to constitute a battery, it is not necessary to touch the plaintiff’s body or even his clothing. **Knocking or snatching anything from plaintiff’s hand or touching anything connected with his person,** when done in an offensive manner, is sufficient to constitute an offensive touching.” *Riley*.

Since the essence of the plaintiff’s grievance consists in the offense to his dignity involved in the unpermitted and intentional invasion of his person and not in any physical harm done to his body, it is not necessary that the plaintiff’s actual body be disturbed. Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of another’s person is actionable as an offensive contact with his person. We hold, therefore, that the forceful dispossession of Polk’s plate in an offensive manner was sufficient to constitute a battery.

Damages for mental suffering are recoverable without a showing of actual physical injury in a civil action for battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff’s person and not the actual harm done to the plaintiff’s body. Personal indignity is the essence of an action for battery; consequently, the defendant is liable not only for contacts that do actual physical harm but also for those that are offensive. We hold, therefore, that Polk was entitled to compensatory damages for mental suffering due to the battery, even in the absence of any physical injury.

We now turn to the question of punitive damages. The jury verdict concluded with a finding that \$3,000 would “reasonably compensate plaintiff for Eugene’s evil act and reckless disregard of plaintiff’s feelings and rights.”

It has long been established in Franklin that **punitive damages may be awarded for conduct that is outrageous,** because of the defendant’s evil motive or his reckless indifference to the rights of others. This common law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury’s discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor’s conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. In assessing punitive damages, the trier of fact can properly consider (a) the character of the defendant’s act, namely whether it is of the sort that calls for deterrence and punishment; (b) the nature and

← **Riley rule:**
snatching from the hand = an offensive touching (the phone).

← Mental suffering is recoverable even without physical injury.

← **Punitive standard:**
outrageous conduct (evil motive / reckless disregard).

extent of the harm to the plaintiff that the defendant caused or intended to cause; and (c) the wealth of the defendant.

Punitive damages are never awarded as a matter of right, no matter how egregious the defendant’s conduct. Compensatory damages, by contrast, are mandatory. Once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

Eugene argues that the award of punitive damages is not supported by substantial evidence. However, the standard of review for an award of punitive damages is whether the trial court abused its discretion. The amount of punitive damages is left to the discretion of the trier of fact, based on the circumstances of each case, but should not be so unrelated to the injury and compensatory damages proven as to plainly manifest passion and prejudice rather than reason and justice. The United States Supreme Court has instructed that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003).

An appellate court should disturb a determination of punitive damages only in extreme cases. Here, the jury awarded \$1,000 in compensatory damages and \$3,000 in punitive damages. The punitive damages awarded were only three times the amount of compensatory damages and within the *State Farm v. Campbell* guideline.

The jury found that Eugene acted with an evil motive and a reckless disregard of Polk’s rights and feelings. The record contains sufficient evidence to support this finding.

The court of appeal’s holding that there was no battery is reversed, and the judgment of the trial court is reinstated in favor of the plaintiff.

- ← Punitive factor (c): the defendant's wealth (Trapp's Xanadu home + album).
- ← The amount is discretionary, reviewed for abuse of discretion.
- ← Campbell: punitive should not exceed ~9x compensatory.
- ← The single-digit-ratio due-process authority.

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Brown v. Orr

Franklin Court of Appeal (2000)

The plaintiff, Lydia Brown, appeals from a summary judgment for the defendant, Richard Orr, in which the trial court found that his actions did not constitute assault. For the reasons set forth below, we reverse.

Brown and Orr were both employed at Hotel Livingston in Franklin City and were members of the same labor union. During a conversation concerning the proper method of filing a grievance against the hotel with the union, Orr allegedly shook his finger in Brown’s face. Brown told Orr that the last man who pointed his finger at her “was sorry that he did it.” Orr then allegedly stated that he would “take [her] down anytime, anywhere.” The conversation then ended, and Brown returned to work. The next day she and Orr had a second confrontation, during which Orr allegedly repeated his earlier threat. Following that second incident, Brown became “agitated and upset” and reported Orr’s threats to her supervisor. Brown commenced this civil suit against Orr for assault. Orr moved for summary judgment, claiming that his conduct did not create a reasonable apprehension of physical harm in Brown. The trial court granted Orr’s motion. Brown appeals. We reverse.

An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of an imminent battery. The trial court found that Orr’s conduct could not have put Brown in apprehension of an imminent battery.

On appeal, Brown cites *Holmes v. Nash* (Fr. Sup. Ct. 1990) in arguing that Orr’s threats, when combined with the fact that he shook his finger in her face during their first conversation, created a question for the jury on the issue of assault. She contends that Orr’s actions were similar to those of the defendant in *Holmes*.

In *Holmes*, defendant Tom Nash repeatedly threatened to kill plaintiff Jenny Holmes if she sued him. When Holmes filed a legal action, Nash came to her home, beat on the door, and attempted to pry it open, while repeating his threats to kill her. There was also evidence that Nash made harassing telephone calls to Holmes. Those acts so unnerved Holmes that she changed the locks on her door, nailed her windows closed, and had friends spend the night at her home. In *Holmes*, the court held, “Words standing alone cannot constitute an assault. However, they may give meaning to an act, and when taken together, they may create a well-founded fear of a

- ← **Brown's facts:**
a finger-shake + this threat made a jury question (analogy).
- ← **Assault rule:**
intend a battery/apprehension + a well-founded apprehension results.
- ← **The second element:**
a well-founded apprehension of an imminent battery.

battery in the mind of the person at whom they are directed, thereby constituting an assault.” The court concluded that it could not say that Nash’s actions were sufficient to give rise to a well-founded apprehension of an imminent harmful or offensive contact but that it was a question for the jury.

Although the facts in this case are not as strong as those in *Holmes*, we cannot say that, as a matter of law, Orr’s acts and threats could not create a reasonable or well-founded apprehension of imminent physical harm. There was evidence that after Orr’s first alleged threat, Brown walked away. That evidence is not conclusive, however, as to whether she discounted the threat or whether she left to avoid the threatened harm. Brown also testified that after the second alleged assault the next day, she had to leave work because she was so frightened and upset.

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. After reviewing the evidence before the trial court in a light most favorable to the non-movant, as this court must do when reviewing a summary judgment, we conclude that Brown presented sufficient evidence that Orr’s alleged threats created a well-founded fear of imminent harm and created a jury question on her claim of assault. Therefore, the summary judgment on Brown’s assault claim is reversed.

Reversed and remanded.

- Words plus acts can constitute an assault (Holmes, quoted in Brown).
- Holding:** the threats + conduct made a jury question on assault.