

Case #2

Colorado Court of Appeals, Div. II.

[Eric HALL](#), Plaintiff–Appellant, v.
Marcus McBRYDE By and Through his parent and next friend
James McBRYDE; Kathleen McBryde, Individually;
and James McBryde, Individually, Defendants–Appellees.

May 2, 1996.

Opinion by Judge [HUME](#).

Plaintiff, Eric Hall, appeals from a judgment entered in favor of defendant, Marcus McBryde (Marcus), on a claim of battery, We affirm in part, reverse in part, and remand with directions.

On January 14, 1993, Marcus was at his parents' home with another youth after school. Although, at that time, Marcus was, pursuant to his parents' wishes, actually living in a different neighborhood with a relative and attending a different high school in the hope of avoiding gang-related problems, he had sought and received permission from his father to come to the McBryde house that day to retrieve some clothing. Prior to that date, Marcus had discovered a loaded gun hidden under the mattress of his parents' bed. James McBryde had purchased the gun sometime earlier.

Soon after midday, Marcus noticed some other youths in a car approaching the McBryde house, and he retrieved the gun from its hiding place. After one of the other youths began shooting towards the McBryde house, Marcus fired four shots toward the car containing the other youths.

During the exchange of gunfire one bullet struck plaintiff, who lived next to the McBryde residence, causing an injury to his abdomen that required extensive medical treatment. Although plaintiff testified that it was Marcus who shot him, the trial court made no finding as to whether plaintiff was struck by a bullet fired by Marcus.

An actor is subject to liability to another for battery if he or she acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and a harmful or offensive contact with the person of the other directly or indirectly results. [Restatement \(Second\) of Torts §§ 13, 18 \(1965\)](#); W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on the Law of*

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Torts § 9 (5th ed.1985); see *Whitley v. Andersen*, 37 Colo.App. 486, 551 P.2d 1083 (1976), *aff'd*, 194 Colo. 87, 570 P.2d 525 (1977); *CJI-Civ.3d* 20:5 (1989).

Here, the trial court found that there was no evidence indicating that Marcus intended to shoot at plaintiff. Furthermore, based upon statements by Marcus that he was not purposely trying to hit the other youths but, instead, was shooting at their car, the trial court also determined that plaintiff had failed to prove Marcus intended to make contact with any person other than plaintiff. Based upon this second finding, and relying on *CJI-Civ.3d* 20:5 and *CJI-Civ.3d* 20:8 (1989), the trial court concluded that the doctrine of transferred intent could not apply to create liability for battery upon plaintiff. We conclude that, in reaching its determination that no battery occurred, the trial court did not properly analyze the intent required for battery or the transferability of such intent.

As set forth above, the intent element for battery is satisfied if the actor either intends to cause a harmful or offensive contact or if the actor intends to cause an imminent apprehension of such contact. Moreover, with respect to the level of intent necessary for a battery and the transferability of such intent, [Restatement \(Second\) of Torts § 16 \(1965\)](#) provides as follows:

(1) If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm.

(2) *If an act is done with the intention of affecting a third person in the manner stated in Subsection (1), but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended so to affect him.* (emphasis added)

See also [Restatement \(Second\) of Torts § 20 \(1965\)](#); *Alteiri v. Colasso*, 168 Conn. 329, 362 A.2d 798 (1975)(when one intends an assault, then, if bodily injury results to someone other than the person whom the actor intended to put in apprehension of harm, it is a battery actionable by the injured person); *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Here, the trial court considered only whether Marcus intended to inflict a contact upon the other youths. It did not consider whether Marcus intended to put the other youths in apprehension of a harmful or offensive bodily contact.

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However, we conclude, as a matter of law, that by aiming and firing a loaded weapon at the automobile for the stated purpose of protecting his house, Marcus did intend to put the youths who occupied the vehicle in apprehension of a harmful or offensive bodily contact. Hence, pursuant to the rule set forth in [Restatement \(Second\) of Torts § 16\(2\) \(1965\)](#), Marcus' intent to place other persons in apprehension of a harmful or offensive contact was sufficient to satisfy the intent requirement for battery against plaintiff.

Accordingly, we conclude that the cause must be remanded for additional findings as to whether the bullet that struck plaintiff was fired by Marcus. If the trial court finds that the bullet was fired by Marcus, it shall find in favor of plaintiff on the battery claim and enter judgment for damages as proven by plaintiff on that claim.

The judgment is affirmed as to plaintiff's negligence and negligent supervision claims against defendants James McBryde and Kathleen McBryde. As to the plaintiff's battery claim against defendant Marcus McBryde, the judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

CRISWELL and JONES, JJ., concur.

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