

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DAN SULLIVAN,	:	APPEAL NO. C-170238
Plaintiff-Appellee,	:	TRIAL NO. A-1600118
vs.	:	<i>JUDGMENT ENTRY.</i>
DAVID L. DAVIS JR.,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant David L. Davis appeals the judgment from the court of common pleas in favor of plaintiff-appellee Dan Sullivan. Davis and Sullivan were coworkers at a company who engaged in a workplace altercation. After a heated email exchange about a problem with a long-time customer, Davis went to Sullivan's work area, grabbed Sullivan by the neck and shoulders, and pushed him during a confrontation. Sullivan fell and hit his desk. He sustained an injury to his ear and his left knee. Sullivan received workers' compensation for his injuries. He filed suit against Davis for assault and for injuries to his knee, neck, face, and ear. He sought both medical expenses and lost wages. Sullivan's wife filed a claim for loss of consortium.

Following a bench trial, judgment was rendered in Sullivan's favor for \$29,927.27. His wife's claim was dismissed due to insufficient evidence. Davis

assigns as error the trial court's judgment in favor of Sullivan alleging it was against the manifest weight of the evidence, that there was insufficient evidence to support it, and that the judgment put Sullivan in a better position than he originally found himself.

In Ohio, civil assault is defined as:

the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact.

Smith v. John Deere Co., 83 Ohio App.3d 398, 406, 614 N.E.2d 1148 (10th Dist.1993).

The record shows that after Sullivan's last email to Davis, Davis "came steaming" into Sullivan's work area and started "verbally assaulting" him. Davis admitted to cussing at him, and Sullivan eventually stood up. Davis continued to "verbally assault" Sullivan and then lunged at him. Davis's testimony was "I lunged toward him, gave him a fake. And, you know, I – you know, it was just a provoked move." Sullivan told Davis he was "acting like a jackass" or said "you jackass." The situation escalated and Davis grabbed Sullivan by the throat and shoved Sullivan. Sullivan fell backward onto his desk. At that point, another employee intervened and separated the two.

As for Davis's weight and sufficiency arguments, when reviewing for sufficiency, it is a test of adequacy. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-

Ohio-2179, 972 N.E.2d 517, ¶ 11. To review whether the judgment is against the manifest weight of the evidence, we weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Id.* at ¶ 20; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). In weighing the evidence, we are mindful that the presumption is in favor of the trier of fact. *Eastley* at ¶ 21. Here, the record demonstrates sufficient evidence for the trier of fact to have found that Davis's actions constituted an assault. The first and second assignments of error are overruled.

Davis's third assignment of error argues that the trial court erred in rendering the damages award because it placed Sullivan in a better position than he originally found himself.

Davis alleges that he was not responsible for all of the damage to Sullivan's knee as Sullivan had two conditions, chondromalacia and a lateral meniscus tear, that existed prior to the medial meniscus tear that resulted from the fight. The surgery Sullivan had repaired his other knee issues. Davis argues that he should not be responsible for the full amount of the damages to repair Sullivan's preexisting conditions. Sullivan argues that he may never have needed surgery for the preexisting conditions as, before the incident, he was asymptomatic.

The assessment of damages is within the province of the trier of fact, and a reviewing court is not at liberty to disturb the trier of fact's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive. *Moskowitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655, 635 N.E.2d 331

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(1994); *Champ v. Wal-Mart Stores, Inc.*, 1st Dist. Hamilton No. C-010283, 2002 WL 440751, *4 (Mar. 22, 2002). Here, we find the trial court's assessment of damages to be appropriate and overrule Davis's third assignment of error.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

MOCK, P.J., CUNNINGHAM and ZAYAS, JJ.

To the clerk:

Enter upon the journal of the court on June 1, 2018

per order of the court _____.
Presiding Judge