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on remand. We need not address these three assignments of error.

(d) Sufficiency of Evidence

[16] Having found reversible error, we must determine whether the totality of the evidence admitted by the trial court was sufficient to sustain Merchant's conviction. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.[34]

The evidence admitted showed that Merchant purchased and sold vehicles with NAA on June 1, 2011. The evidence established that Merchant did so without a valid motor vehicle dealer's license. Furthermore, there was sufficient evidence demonstrating that Merchant was a not a bona fide consumer when he purchased and sold the vehicles. Thus, all the evidence, whether properly admitted or not, was sufficient to sustain a guilty verdict on the crime charged and the Double Jeopardy Clause does not bar retrial.

## VI. CONCLUSION

The trial court erred in admitting Jackson's testimony interpreting § 60-1416 to apply to the "wholesale" transactions conducted by Merchant. We remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[34] *State v. Payne-McCoy, supra* note 4.

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SUSAN C. WULF, APPELLANT, V.
SHARAD KUNNATH, M.D., APPELLEE.
827 N.W.2d 248

Filed March 8, 2013. No. S-12-307.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an

admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

3. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
4. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
5. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
6. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable.
7. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
8. **Torts: Battery: Words and Phrases.** In Nebraska, the intentional tort of battery is defined as an actual infliction of an unconsented injury upon or unconsented contact with another.
9. ____: ____: ____. Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
10. **Torts: Intent: Words and Phrases.** Apparent consent—words or conduct reasonably understood by another to be intended as consent—is as effective as consent in fact.
11. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.
12. **Torts: Battery.** The time and place, and the circumstances under which an act is done, will necessarily affect its unpermitted character, and so will the relations between the parties.
13. ____: ____. Silence and inaction may manifest consent where a reasonable person would speak if he or she objected.
14. ____: ____. It is only when notice is given that certain conduct will no longer be tolerated that the defendant is no longer free to assume consent.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Terrence J. Salerno for appellant.

Christopher J. Tjaden, of Gross & Welch, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

CASSEL, J.

## INTRODUCTION

While in a lighthearted work setting, a doctor used his hand to tap or strike the back of a nurse's neck. The nurse claimed that the contact caused serious injuries, and she sued the doctor for battery, among other things. After the district court denied the nurse's motions for summary judgment and directed verdict on the issue of battery, a jury returned a verdict in the doctor's favor. Because we conclude the evidence, viewed in the light most favorable to the doctor, would support a finding either that the nurse consented to the contact or that the contact did not cause the nurse's injuries, we affirm.

## BACKGROUND

During the noon hour on October 23, 2007, nurses Susan C. Wulf, Paula Kehm, and Chelsea Crocker were seated at their desks in the nurse's workroom, when Sharad Kunnath, M.D., and Crystal Knight, M.D., joined them. They joked around, and the atmosphere was lighthearted. The group discussed upcoming snow removal that might occur while Kunnath was out of the country, and Wulf commented that it would be funny to see Kunnath using a snowblower. According to Kunnath, he said, "Hey, [Wulf], don't make fun of me," and tapped Wulf on the nape of her neck. He intended to make the contact at issue, but he did not intend to hurt Wulf. Wulf described the contact as "a strike on the back of [her] neck." Knight testified that Kunnath touched Wulf in the middle of the back of the head with the palm of his hand in "a playful, joking manner . . . something that you would do to a friend or a relative if they are making fun of you." Crocker testified that Kunnath "playfully tapped [Wulf] on the back of the neck." The laughing and joking in the workroom continued for a few more minutes.

Wulf's reaction to the contact is in dispute. She testified that her head moved forward rapidly a significant distance, that she dropped the telephone she was holding, and that she

said, "Oh, my God, that hurt." She immediately felt pain in the back of her head and neck and suffered nausea, dizziness, and blurred vision. Kehm also recalled Wulf saying, "Ow, that hurt." But Knight did not recall Wulf's making any comments after the contact, nor did she see any movement of Wulf's head or conduct to suggest Wulf was experiencing any discomfort. However, Knight testified that Wulf "got a dirty look on her face"—which Knight described as an angry look. Kunnath testified that Wulf's head did not move, that he did not recall her making any comments to him, and that he did not observe anything to lead him to believe that there had been an injury or that Wulf had any complaints. Crocker similarly did not notice any reaction by Wulf and did not recall Wulf's dropping the telephone or making any comments. Crocker testified that Wulf's head moved forward very little, if at all. Crocker did not notice anything different about Wulf after the contact.

Within minutes of the incident, Wulf began an initial assessment on a patient, but she began to feel dizzy and nauseated. As she left the patient's room, she encountered nurse Kathy Krussel, who saw Wulf crying and rubbing her neck. Wulf told Krussel that Kunnath hit her in the neck. Krussel took Wulf into a treatment room, and Wulf reported that her neck hurt, that she had pain going down her arm, that she was nauseated, and that she was seeing spots. Kehm brought Wulf some ice, which Wulf placed on the back of her neck. Wulf was later moved out of the treatment room to a nurse practitioner's office, where she remained for the rest of the day. As Wulf walked to her car, she got more nauseated and felt as if she were going to pass out. Wulf drove herself to an emergency room.

Wulf, who was 58 years old at the time of trial, testified that in her career, she had never been struck in a similar manner. In her 30 years as a nurse, she had never seen a doctor "swat" somebody in the back of the head, never felt that she needed to announce to doctors that she did not want to be swatted in the back of the head, and never believed that she had consented to a doctor's swatting her on the back of the head by not saying anything. Although Krussel did not recall seeing anybody "thump" or "tap" others at the office, she testified that she

would "[p]robably not" find it strange if that occurred. The office atmosphere was that of a close-knit group, who joked and teased one another. Wulf testified that the group had a familial-like relationship. Kunnath testified that he and Wulf had a very collegial and close relationship, that Wulf was like a mother to him, and that they would joke and tease. Wulf testified that prior to the incident, Kunnath had "[t]hump[ed]" her on two or three occasions while walking in the hallway. She said that they were "good-natured" thumps, as a brother would do to a sister. Wulf never complained about the thumping, never asked Kunnath not to do it again, and did not find it to be offensive conduct.

Wulf saw her physician, Anthony L. Hatcher, M.D., approximately 1 week after the incident. At that time, Wulf complained of neck pain and pain radiating down her right arm. Wulf told Hatcher that she was struck in the back of the head, but she did not say how hard she was hit. Based on the history that Wulf provided Hatcher, he opined that "her pain was related to the injury that occurred." Upon Hatcher's referral, Wulf saw Michael C.H. Longley, M.D., an orthopedic spine surgeon, on May 8, 2008, for her complaints of neck and right arm pain. Wulf informed Longley that she received a "substantial blow" to the back of the head. Longley testified that Wulf had "a tendency to magnify symptoms and exaggerate complaints." Ultimately, Wulf underwent two surgeries. When Longley was asked whether he believed it was more likely true that Wulf's pain was a result of being struck in October 2007, he answered that precise etiology for Wulf's ongoing symptoms was unclear. But he testified that the condition of the disk degeneration and spinal stenosis was clearly preexistent, so the condition itself was not caused by the October 2007 incident.

Wulf had prior neck issues, including falls in 1984, 1988, and 1994 or 1995. But according to the history given to Longley by Wulf, she denied any preexisting neck problems. Records obtained by Hatcher's office showed that Wulf had degenerative disk disease in 1994 and that Wulf was being treated for a complaint to her neck at that time. Kehm and Crocker each testified that prior to the incident, Wulf sat very

erect and would turn her body to talk to someone, rather than just turning her neck. But Krussel never noticed Wulf to have problems with turning her head or neck, and another witness who worked with Wulf until April 2007 never saw Wulf appear limited because of neck or arm pain.

At the close of all evidence, Wulf moved for a directed verdict on the issues of battery and injury. The district court overruled the motion. The jury subsequently returned a verdict for Kunnath, and the court entered judgment accordingly. Wulf timely appeals.

## ASSIGNMENTS OF ERROR

Wulf assigns that the district court erred in (1) failing to grant her motion for summary judgment, (2) failing to direct a verdict for her on the issue of battery, and (3) submitting jury instructions that allowed the jury to determine whether a battery occurred or whether an injury resulted from the action. Wulf also assigns that the verdict was contrary to the law and to the evidence.

[1] Wulf further assigns that the court erred in misapplying the law to the specific facts of the incident, but her brief does not contain an argument on this error separate from the arguments touching on the other assigned errors. To be considered by this court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error.[1]

## STANDARD OF REVIEW

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[2]

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[1] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

[2] *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012).

[3] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[3]

[4,5] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.[4] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.[5]

## ANALYSIS

*Denial of Summary Judgment.*

[6] Wulf first assigns that the district court erred in failing to grant her motion for summary judgment. The denial of a summary judgment motion is neither appealable nor reviewable.[6] Because a trial has been held in this case and whether a motion for summary judgment should have been granted generally becomes moot after trial,[7] we need not consider whether the district court erred in denying Wulf's motion.

*Motion for Directed Verdict, Court's Jury Instructions, and Jury's Verdict.*

It is undisputed that Kunnath touched Wulf and that he intended to do so. Thus, Wulf contends that the district court should have directed a verdict in her favor on the issue of battery and that the court should have instructed the jury that a battery occurred, rather than allowing the jury to determine the issue. We disagree.

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[3] *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[4] *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[5] *Id.*

[6] *Lesiak v. Central Valley Ag Co-op*, *supra* note 2.

[7] See *id.*

[7] Both Wulf's argument regarding a directed verdict and her argument on the jury instructions require an examination of the evidence, and we consider them together. Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[8] At oral argument, Wulf conceded that the instructions correctly stated the law and that her argument on the instructions turned upon the evidence. And although Wulf assigned that the jury's verdict was contrary to the law and the evidence, she advanced no argument regarding a conflict with the law and barely mentioned the verdict in connection with the court's denial of a directed verdict. However, because the sufficiency of the evidence to support the verdict dovetails our analysis of her primary arguments, we discuss the evidence with all three issues in mind.

[8-10] In Nebraska, the intentional tort of "battery" is defined as an actual infliction of an unconsented injury upon or unconsented contact with another.[9] Consent ordinarily bars recovery, because it "goes to negative the existence of any tort in the first instance."[10] It does so by destroying the wrongfulness of the conduct between the consenting parties.[11] Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.[12] Apparent consent—words or conduct reasonably understood by another to be intended as consent—is as effective as consent in fact.[13] For a battery to occur, there must be either a nonconsensual contact or a nonconsensual injury.

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[8] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[9] *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

[10] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 112 (5th ed. 1984).

[11] See *id.*

[12] *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008) (quoting Restatement (Second) of Torts § 892 (1979)).

[13] See *id.*

[11] The general verdict rule controls our examination of both definitions of a battery. The jury returned a general verdict in favor of Kunnath. A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.[14] Thus, we must treat the jury's verdict as having decided in favor of Kunnath and against Wulf on both the contact and the injury grounds. We consider each in turn.

[12-14] Viewed in the light most favorable to Kunnath, the record contains evidence to demonstrate that Wulf consented to the contact by Kunnath. "The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties."[15] Evidence established that the contact occurred over the noon hour while doctors and nurses were joking around. Further, Kunnath and Wulf had a familial-like relationship. Such evidence tends to weaken Wulf's claim that the contact was nonconsensual. Moreover, "[s]ilence and inaction may manifest consent where a reasonable person would speak if he objected."[16] Evidence showed that Kunnath had "thumped" Wulf on prior occasions at work—contact which Wulf testified was not offensive to her—and that Wulf never objected to the thumps by Kunnath. Further, Wulf never asked Kunnath not to thump her. "It is only when notice is given that all such conduct will no longer be tolerated that the defendant is no longer free to assume consent."[17] Based upon this evidence, reasonable minds could conclude that Wulf consented to Kunnath's contact and, thus, that no battery occurred. Accordingly, the district court did not err by denying Wulf's motion for directed verdict or by submitting the issue of battery to the jury, and the jury's verdict was not clearly wrong.

Evidence would also support a finding that Kunnath did not actually inflict an injury upon Wulf or that any injury suffered

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[14] *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997). See Neb. Rev. Stat. § 25-1122 (Reissue 2008).

[15] Keeton et al., *supra* note 10, § 9 at 42.

[16] *Id.*, § 18 at 113.

[17] *Id.* at 114.

by Wulf was not caused by the contact at issue. Although disputed, evidence was adduced that witnesses observed no reaction by Wulf following the contact and had no reason to believe she had been injured. Wulf obtained medical treatment following the incident, but evidence established that she suffered from neck problems prior to the incident. And coworkers testified about Wulf's erect posture and tendency to turn her chair around in order to face a coworker when communicating with that person rather than merely turning her neck. Longley testified that Wulf had a "tendency to magnify symptoms and exaggerate complaints." Further, Longley opined that Wulf's condition of disk degeneration and spinal stenosis was preexisting. The court instructed the jury that Kunnath "takes [Wulf] as he finds her." More specifically, the jury was instructed that although Wulf had degenerative changes in her neck prior to the incident, Kunnath was liable only for damages caused by his act, and that if the jury could not separate damages caused by the preexisting degenerative changes from damages caused by Kunnath's act, then Kunnath was liable for all damages. But the jury found in favor of Kunnath, and there is evidence to support its finding that Wulf was not injured by the contact. Accordingly, we find no error by the court in allowing the jury to determine whether a battery occurred based upon a nonconsensual injury as a result of the contact. For the same reason, we cannot conclude that the jury's verdict was clearly wrong.

## CONCLUSION

We conclude that the district court did not err by denying Wulf's motion for directed verdict or by submitting the issue of battery to the jury, because reasonable minds could conclude that Wulf consented to the contact by Kunnath or that the contact did not cause Wulf's injuries. Because there was competent evidence presented to the jury upon which it could find for Kunnath, the verdict was not clearly wrong. Accordingly, we affirm.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.