STATE OF MICHIGAN

COURT OF APPEALS

ALLAN J. SPERLE, Personal Representative of the Estate of TAMMY L. SPERLE,

Plaintiff-Appellant

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
April 21, 2000

No. 211793
Court of Claims
LC No. 98-016877 CM

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff-appellant Allan K. Sperle, the personal representative of the estate of Tammy L. Sperle, appeals as of right from the trial court's order granting defendants-appellees' motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). We affirm.

Plaintiff initiated this wrongful death action against the Michigan Department of Corrections (hereafter MDOC), Director Kenneth L. McGinnis, Warden Andrew Jackson, Deputy Warden Geraldine Williams and Custody and Security Supervisor Donald Prough, after the February 1996 murder of his wife, Tammy L. Sperle, by inmate Clarence Herndon at the Huron Valley Men's Facility (hereafter HVMF). Decedent worked as a civilian employee in the prison supply store. Herndon was a member of the Prisoner Store Committee and, in this capacity, worked directly with the decedent. Plaintiff filed a five-count complaint alleging claims under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (hereafter WDCA), MCL 418.131(1); MSA 17.237(131)(1), and the Public Building provision of the Governmental Liability for Negligence Act, MCL 691.1407; MSA 3.996 (107)(1), as well as claims for gross negligence, intentional infliction of emotional distress, and wrongful death. The gravamen of plaintiff's complaint is that defendant Jackson was warned by another inmate of Herndon's plan to murder the decedent, but refused to discuss the matter with the informant, and that all of the defendants failed to take proper action to protect the decedent, despite knowledge of Herndon's violent background and criminal record.

Defendants moved for summary disposition under MCR 2.116(C)(4), (7) and (8). The trial court first held that defendants Williams and Prough were not subject to Court of Claims' jurisdiction

because they were not "state officials," and dismissed plaintiff's claim against these defendants pursuant to MCR 2.116(C)(4). The trial court then ruled that reading §7(1) of the governmental immunity statute, MCL 691.1407(1); MSA 3.996(107)(1), in pari materia with §131(1) of the WDCA, as it was required to do, plaintiff failed to plead facts sufficient to sustain an intentional tort as a matter of law. Specifically, the trial court found that, under *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), although plaintiff pleaded facts that, if true, would establish that defendants may have had actual knowledge of a dangerous condition (i.e., Herndon's violent propensities), plaintiff's complaint failed to allege facts to support a claim that defendants were aware that injury to the decedent was certain to occur. Accordingly, the trial court ruled that plaintiff's remaining claims were barred by the exclusive remedy provision of the WDCA, and granted summary disposition under MCR 2.116(C)(7) and (8).

On appeal, plaintiff first argues that the trial court erred in granting summary disposition to defendants MDOC, McGinnis and Jackson under MCR 2.116(C)(7) on the basis that they are entitled to governmental immunity from liability. Plaintiff contends that operation of the HVMF prisoner store was a proprietary function because it sold goods and products to the inmates for a pecuniary profit, and thus, governmental immunity did not apply. Plaintiff did not allege in his complaint that operation of the prison store at the time of this incident was a proprietary function; nor did plaintiff raise the argument before the trial court. As such, the trial court neither addressed nor resolved this precise issue below. Issues not raised before and decided by a trial court are not properly preserved for appellate review. *Alford v Polllution Control Indus of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997). Although this Court may, nevertheless, consider an unpreserved issue when it implicates a purely legal question and all the facts necessary to resolve the issue have been presented, *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998), the essential facts necessary for resolving whether defendant was performing a proprietary function at the time of the decedent's death have not been presented.[1] Thus, we decline to address this unpreserved issue.

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) because his complaint pleaded sufficient facts to state a claim under the intentional tort exception to the exclusive remedy provision of the WDCA. Plaintiff contends that, had discovery proceeded, plaintiff would have shown that Warden Jackson actually knew that an injury was certain to result from the decedent's continuous exposure to a dangerous criminal. We disagree.

This Court reviews a trial court's grant of summary disposition de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). Summary disposition under MCR 2.116(C)(8) should be granted where the opposing party has failed to a state a claim for which relief could be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint, and should only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh*, 223 Mich App 559, 561; 567 NW2d 456 (1997). The motion is tested on the pleadings alone, and all factual allegations in support of the claim are accepted as true. *Id.* However, a mere statement of a

pleader's conclusions, unsupported by allegations of facts, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

Generally, the right to recover disability benefits for personal injury under the WDCA is an employee's exclusive remedy against an employer, unless it is shown that the injuries were intentionally inflicted by the employer:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1); MSA 17.237(131)(1).]

See *Gray v Morley*, 460 Mich 738, 741-742; 596 NW2d 922 (1999); *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 224; 555 NW2d 481 (1996). The WDCA is broadly construed to provide coverage as the exclusive remedy for claims brought under the act. *Nardi v American Motors Corp*, 156 Mich App 275, 277-278; 401 NW2d 348 (1986).

In *Travis, supra* at 172, our Supreme Court held that in order for a plaintiff to avoid the exclusive remedy provision of the WDCA, the plaintiff must either show that the employer specifically intended an injury occur to the plaintiff, or show that the employer or managerial employee had actual knowledge that an injury would follow from what the employer or manager deliberately did or did not do, and that the employer or manager willfully disregarded that knowledge. "Actual knowledge" of an injury means

> that constructive, implied, or imputed knowledge is not enough. [It is not] sufficient to allege that the employer should have known, or had reason to believe, that injury was certain to occur. [*Id*. at 173.]

That the injury was "certain to occur" means there must be no doubt that the injury would indeed occur as a result of the employer's conduct.[2] *Id.* Conclusory statements are insufficient to allege certainty of injury, and the laws of probability (i.e. the odds that something will occur) play no part in determining the certainty of injury. *Id.* at 174.

More recently, in *Gray, supra*, the Court explained that when a plaintiff's allegations "suggest conduct on the part of defendant that was reckless or deliberately indifferent, such allegations sound in gross negligence and are therefore insufficient to constitute an intentional tort within the meaning of the WDCA." *Id.* at 744.

In the instant case, it is uncontested that the decedent was murdered during the course of her employment, and that the WDCA would provide plaintiff's exclusive remedy absent a showing that defendants committed an intentional tort within the meaning of the act. However, accepting the facts as pleaded by plaintiff as true, we find that the trial court correctly concluded this case does not plead facts constituting an intentional tort within the meaning of the WDCA as a matter of law. Plaintiff alleged that a prison inmate informed Warden Jackson that Herndon had threatened to kill the decedent, but Jackson refused to speak with the informant or inquire into the matter. Plaintiff also alleged that Jackson knew that Herndon had previously assaulted women, including a female prison guard, that Herndon hated women, and that Herndon had previously killed another woman. Even assuming that plaintiff's alleged facts established that defendants had actual knowledge of Herndon's dangerous propensities toward women, plaintiff has nonetheless failed to allege particular facts to substantiate his claim that Warden Jackson had a specific intent to injure the decedent, or that he had actual knowledge that the decedent would certainly be injured or attacked by Herndon, particularly when the complaint alleges that Herndon was assigned to work with the decedent "on a very frequent basis." *Travis, supra*. Indeed, plaintiff's attorney acknowledged on the record that Warden Jackson was not warned that the planned killing was of Tammy Sperle specifically. A statement of fact conceded by an attorney during a legal proceeding is binding on his client. See *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 440; 581 NW2d 794 (1998); *City of Ferndale v Ealand*, 88 Mich App 107, 111; 276 NW2d 534 (1979). Thus, because these facts are not in dispute, as a matter of law we find that plaintiff's complaint failed to plead facts sufficient to establish that defendants specifically intended to injure the decedent or that they were *certain* that injury to the decedent would occur. *Gray, supra*; *Travis, supra*. See *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 752-753; 593 NW2d 219 (1999) (under the standards set forth in *Travis*, the plaintiff failed to establish that the defendant had actual knowledge that injury was certain to occur).

Plaintiff also argues that the trial court erred in dismissing plaintiff's claims against defendant Prough for lack of jurisdiction.[3] We disagree.

Under MCL 600.6419; MSA 27A.6419, the Court of Claims has exclusive jurisdiction over suits against public officials acting in their official capacity as well as suits against state agencies or departments. *Burnett v Moore*, 111 Mich App 646, 648; 314 NW2d 458 (1981); *Grunow v Sanders*, 84 Mich App 578; 269 NW2d 683 (1978). In determining whether an individual qualifies as a "state officer," the primary focus is on the degree of discretion and independence associated with the position. *Lowery v Dep't of Corrections*, 146 Mich App 342, 348; 380 NW2d 99 (1985). Only the highest ranking officers of a state governmental agency are deemed "state officials" that can be sued in the Court of Claims. *Burnett, supra* at 648-649. We agree with the trial court's finding that Donald Prough, the security supervisor at the prison, was not an "executive officer of a state department and commission," given his limited degree of discretion and independence. *Lowery, supra* at 348. Accordingly, Prough was not a state officer over whom the Court of Claims would have jurisdiction.

In light of our resolution of the above issues, we need not address plaintiff's remaining claims.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] No evidence was presented regarding whether the prison supply store in which the decedent worked was operated primarily for the purpose of making a profit or whether the store existed primarily for the purpose of supplying inmates with personal items without having prisoners leave the prison grounds to secure such goods. Furthermore, no facts were developed on the record regarding where the store's profits, if any, were deposited.

[2] "Although [the] decision in *Travis* generated separate opinions, a majority of the Court agreed that the Legislature intended that actions falling within the intentional tort exception encompassed only those in which an employer acts with a specific purpose to injure an employee." *Gray*, *supra* at 743, n 3, citing *Travis*, *supra* at 191-192.

[3] Both the trial court's opinion and order and plaintiff's claim of appeal address dismissal of the claims against defendant Williams, however, neither plaintiff's statement of questions presented nor his brief claim any error regarding defendant Williams' dismissal. Accordingly, this claim is deemed abandoned on appeal. See *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998); *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).