STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL RAY MULLINS and SUZANNE EVA MULLINS, Plaintiffs-Appellants, v MATTHEW STANFORD and MARK DOYLE, Defendants-Appellees.	UNPUBLISHED December 18, 2007 No. 275340 Washtenaw Circuit Court LC No. 06-000319-NI ON RECONSIDERATION

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On January 11, 2005, plaintiff Michael Ray Mullins and his coemployees, including defendants Stanford and Doyle, were removing snow from the vehicle display lot at their employer, Varsity Ford. At one point, Mullins was standing next to a fence when first Doyle, and then Stanford, drove their snow plows toward him and pushed snow in his direction. Mullins was not struck by the snow plows,[1] but he nevertheless fell to the ground and sustained a serious back injury. Mullins received worker's compensation benefits from Varsity Ford.

Plaintiffs filed suit against Stanford and Doyle, alleging that they acted negligently, with gross negligence, and/or in an intentionally tortious fashion by directing snow at Mullins, and that by so doing, caused Mullins serious and permanent injuries. Plaintiffs contend that Stanford and Doyle committed assault and battery, and they conspired to "accomplish an illegal, unlawful and/or intentionally tortious purpose," by acting to drive snow in Mullins' direction "with the intent to injure [Mullins] and/or with deliberate indifference as to whether [Mullins] would be injured." Suzanne Mullins sought damages for loss of consortium.

[1] Witnesses testified that plaintiff was struck by at least some snow from the plows.

Stanford and Doyle moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that because Mullins' injuries occurred during the course of his employment, the case was controlled by the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., and was therefore barred by the intentional tort provision in MCL 418.131(1). The trial court agreed and granted defendants' motion, finding that defendants' alleged actions were insufficient to constitute an intentional tort.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Generally, the right to recover benefits under the WDCA is an injured employee's exclusive remedy against an employer. MCL 418.131(1). The WDCA also precludes suit against a negligent coemployee. MCL 418.827(1). However, the exclusive remedy provision does not apply to claims arising from intentional torts. MCL 418.131(1) provides:

> 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. This subsection shall not enlarge or reduce rights under the law.

The intentional tort exception applies to claims against coemployees as well as to claims against employers. *Graham v Ford*, 237 Mich App 670, 673; 604 NW2d 713 (1999). Therefore, to avoid the exclusive remedy provision via the intentional tort exception, plaintiffs must show that Stanford and Doyle acted deliberately and with the specific intent that Mullins sustain an injury.

Specific intent exists if the employer or coemployee's purpose was to bring about certain consequences. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 169, 171; 551 NW2d 132 (1996). Specific intent also exists if the employer or coemployee had actual knowledge that an injury was certain to occur, and willfully disregarded that knowledge. An injury was certain to occur if there were no doubt that it would occur. *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004). Knowledge that an injury was certain to occur must be actual knowledge. Constructive, implied, or imputed knowledge is not sufficient. *Id*. at 149. An assault consists of an intentional, unlawful offer of corporal injury to another person by force, or force directed toward another person, under circumstances that create a reasonable apprehension of imminent contact and the ability to make the contact. A battery consists of the willful and harmful or offensive touching of the person of another, resulting from conduct intended to cause the contact. *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004).

Stanford and Doyle submitted affidavits in which they asserted that they did not direct snow toward Mullins, and at no time intended to injure Mullins. Plaintiffs relied on Doyle's deposition testimony to the effect that Stanford knew that coemployees Mark Schankowski and Mike Schubring knew that Stanford and Doyle had aimed their plows at Mullins. However, both

Schankowski and Schubring testified that they had not spoken to Doyle about the incident, and neither of them had any reason to believe that Stanford or Doyle acted with the intent to injure Mullins. Plaintiffs presented no evidence to counter the deposition testimony and defendants' affidavits stating that their actions were not done with the intent to injure Mullins. No evidence showed that defendants' purpose was to bring about an injury or that defendants willfully disregarded some actual knowledge that an injury was certain to occur. The trial court correctly found that defendants' actions, while perhaps foolish, did not rise to the level of an intentional tort, and correctly granted summary disposition for defendants. See *Gray v Morley* (*After Remand*), 460 Mich 738, 744-745; 596 NW2d 922 (1999).

In light of the above, we need not consider defendants' alternative argument, which is not properly before us in any event because defendants did not present it to the trial court. *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991). However, we briefly note that defendants' alternative argument is without merit. Defendants contend that, pursuant to MCL 418.827(1), worker's compensation benefits are not payable under the WDCA for injuries sustained by an intentional tort. Defendants rely for this argument on a misreading of *Kennedy v RWC, Inc*, 359 F Supp 2d 636, 642-643 (ED Mich, 2005). The *Kennedy* court noted that *Travis*, *supra*, read MCL 418.827(1) and MCL 418.131(1) as permitting an injured worker to bring an intentional tort action against coemployees. Contrary to defendants' conclusion, MCL 418.827(1) does not bar the instant suit.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis