STATE OF MICHIGAN

COURT OF APPEALS

RANDALL BURROW,

Plaintiff–Appellant,

v

WILLIAM OVERTON,[1] JOSEPH WEINBERG, and RICHARD STOCK,

Defendants–Appellees.

UNPUBLISHED
December 3, 1996

No. 177111
LC No. 93-6024-NO

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

In this action involving the intentional tort exception to the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1), plaintiff appeals by right the order granting summary disposition to defendants and granting defendants' motion for attorney fees under MCR 2.401(G). We affirm.

In 1992, plaintiff Randall Burrow was employed as a corrections officer at the Adrian Temporary Correctional Facility in Lenawee County. Defendants were plaintiff's supervisors -- defendant William Overton was the facility's warden, defendant Joseph Weinberg was the deputy warden, and defendant Richard Stock was the assistant deputy warden of custody at the facility. On January 3, 1992, when the inmates' prison store opened, four inmates ran into plaintiff, injuring his neck and upper back area. Plaintiff filed for and received worker's compensation benefits.

Plaintiff later brought a claim of intentional tort under the exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA). Plaintiff asserted that he and fellow correctional officers had notified defendants in January 1990 that a dangerous or unsafe condition existed at the correctional facility because inmates regularly stampeded the inmates' store when it opened. The stampedes caused a substantial certainty of injury to inmates and/or correctional officers. The guards were concerned that an insufficient number of employees was present to enforce the prison rule[2] that prisoners were not allowed to run to the store when it opened. Defendants moved for summary disposition under MCR 2.116(C)(3), (4), (7), (8) and (10); the circuit court granted the motion. Plaintiff moved for reconsideration, which the court denied. Plaintiff appeals.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff first contends that the circuit court erred in granting defendants' motion for summary disposition. This Court reviews de novo a lower court's ruling on a motion for summary disposition. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993). A motion for summary disposition under MCR 2.116(C)(7) asserts that the cause of action is statutorily barred. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994). When reviewing a motion under MCR 2.117(C)(7), this Court must accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. If the facts are not in dispute, whether the statute bars the claim is a question of law for the court. *Id.* Likewise, whether the facts alleged in a plaintiff's complaint constitute an intentional tort is a question of law for the court. *Travis v Dreis*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 101028, 102147, issued July 31, 1996).[3] We review questions of law under the de novo standard. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994).

Plaintiff argues that defendants' actions fell within the intentional tort exception to the WDCA. Under the WDCA, MCL 418.131(1); MSA 17.237(131)(1), employees have an exclusive remedy against an employer for a personal injury or occupational disease: the right to recover benefits provided under the act.[4] The exclusive remedy provision of the WDCA has one exception, however. An injured plaintiff has the right to recover additional benefits to those under the WDCA provided the injury arose from an intentional tort. Subsection 131(1) provides:

> The right to 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 law. [MCL 418.131(1); MSA 17.237(131)(1).][5]

In *Travis, supra,* our Supreme Court examined the intentional tort exception and concluded that liability rested on an employer's specific intent to injure. The Court interpreted the phrase "specifically intended an injury" to mean that the employer had in mind a purpose to cause given consequences. *Travis, supra.* The Court analyzed the sentences (emphasized above) of the intentional tort exception, examining the Legislature's intent. The Court determined that the first sentence required that an employer must deliberately act or fail to act with the purpose of inflicting injury on the employee. The Court decided that the second sentence would be used where there is no direct evidence of the employer's intent to injure and intent must be proved with circumstantial evidence.[6] Our Supreme Court stated:

> [A]n employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. . . . [T]he employer's intent to injure [may] be inferred if the employer had actual knowledge that an injury

was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id.*]

Defendants' actions do not rise to the level of an intentional tort. Plaintiff argued that because the guards could not control the stampeding prisoners, the guards were concerned that the prisoners' behavior would result in an accident or general discord of the prisoner population, resulting in a fight or assault. The record does not reveal that defendants made a conscious choice to injure plaintiff and took deliberate actions to that end. The record does not show that defendants had the particular purpose to injure plaintiff. No evidence shows that defendants knew that an injury was certain to occur. While defendants may have acted recklessly, that does not rise to the level of willfully disregarding the knowledge that injury was certain to occur. *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 140; 475 NW2d 423 (1991).

Additionally, proof of actual intent to perpetrate tortious injury is a prerequisite to liability. *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 339; 535 NW2d 583 (1995). The intentional tort exception is not triggered merely because an employer had actual knowledge that an injury was likely to occur at some point. *Oaks v Twin City Foods*, 198 Mich App 296, 297; 497 NW2d 196 (1993). Therefore, plaintiff's claim did not meet the exception to the exclusive remedy of the WDCA, and defendants were entitled to summary disposition.

Additionally, defendants assert that their actions are protected by public employee immunity under MCL 691.1407(2); MSA 3.996(107)(2). Given our conclusion that plaintiff did not show that defendants committed an intentional tort, we decline to review this issue.

Next, plaintiff asserts that the lower court erred in granting defendants' motion for summary disposition on the ground that the statute of limitations had expired on the claim. We agree. The period of limitations for claims of assault and battery is two years from the date of the injury. MCL 600.5805(2); MSA 27A.5805(2). Although defendants were not served within the two year period, plaintiff filed his complaint within the statutory period. Tolling only occurs when an action is not commenced -- by filing the complaint -- within the statutory period. *Neilson v Barnett*, 440 Mich 1, 11-12; 485 NW2d 666 (1992); *Buscaino v Rhodes*, 385 Mich 474, 481; 189 NW2d 202 (1971).

Additionally, plaintiff argues that the lower court should not have granted summary disposition to defendant Overton on the ground that he had not been properly served. Plaintiff admits that Overton was never properly served, but argues that Overton had constructive notice of the suit. A review of summary disposition under MCR 2.116(C)(3) calls for this Court to consider the requirements of MCR 2.105 concerning the manner of service of process. MCR 2.105(J)(3). Service of process is designed to give a defendant actual notice of the proceedings and an opportunity to be heard. MCR 2.105(I)(1). A court shall not dismiss an action for improper service unless the service failed to inform the defendant of the action within the allotted time frame. MCR 2.105(J)(3). Plaintiff concedes that Overton was improperly served.

Plaintiff contends, however, that Overton had constructive notice of the claim. The court rule, however, calls for a defendant to have *actual* notice. MCR 2.105(I)(1). Although the court rule allows for some defects in process, it does not permit a complete failure of service of process. *Holliday v*

Townley, 189 Mich App 424, 425: 473 NW2d 733 (1991). Accordingly, the court did not err in granting summary disposition in Overton's favor.

Plaintiff next contends that the circuit court should not have sanctioned his attorney under MCR 2.401(G) for his failure to attend a scheduled pretrial conference, because he had no notice of the scheduled conference. Plaintiff's attorney alleges that plaintiff's prior counsel refused to release plaintiff's records; thus, plaintiff's attorney was not informed of the pretrial conference. Plaintiff's attorney later admitted, however, that notice was attached to the summons and complaint but that he had forgotten about the conference.[7] A lower court's decision to impose sanctions under the court rules will not be overturned on appeal absent an abuse of discretion. *Barlow v Crane-Houdaille, Inc*, 191 Mich App 244, 251; 477 NW2d 133 (1991). Court rules MCR 2.401(G)[8] and MCR 2.313(B)(2)[9] allow a court to excuse the failure of a party or the party's attorney to attend a scheduled conference when an order of default or dismissal would cause manifest injustice, but to require the party or the attorney advising the party to pay the reasonable expenses, including attorney fees, caused by the failure. Therefore, the circuit court did not abuse its discretion in excusing counsel's failure to appear at the scheduled conference but requiring him to pay defendants' attorney's fees due to his nonattendance.

Additionally, defendants contend that plaintiff failed to furnish this Court with a transcript of proceedings of May 16, 1994, the date of the scheduled conference. The lower court record and docket reveal no proceedings occurred on May 16, 1994; rather, when neither plaintiff or his attorney appeared, the court continued the conference to a later date. Defendants' argument that review without the benefit of the complete transcript would be inappropriate is thus devoid of merit.

Plaintiff also alleges that the trial judge's demeanor towards counsel during prior proceedings was an abuse of discretion and demonstrated that the judge was biased such that he should have recused himself. Plaintiff alleges that the court's insistence that he file a motion for immediate consideration before the court would hear the motion shows bias. When a judge is personally biased against a party or an attorney, the judge should be disqualified. MCR 2.003(B)(1). A trial judge's erroneous ruling, even when vigorously expressed, however, is not grounds for disqualification. *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995). Plaintiff has not shown proof of actual bias or prejudice. That a judge commits legal error is not grounds for bias. *Cain v Dept of Corrections*, 451 Mich 470, 520-521; 548 NW2d 210 (1996) (Brickley, CJ, concurring). Plaintiff thus has no basis to insist that the court's bias constituted an abuse of discretion with regard to the award of attorney fees.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

[1] Although William Overton was never properly served, see *infra*, he is included with the named defendants.

[2] The specific prison rule at issue was Yard Rule Seven – "No running during mass movement."

[3] This case was consolidated with *Golec v Metal Exchange*, 208 Mich App 380; 528 NW2d 756 (1995).

[4] Section 827(1) of the act also bars a suit against one's fellow employees for job-related injuries. *Jones v General Motors Corp*, 136 Mich App 251, 258; 355 NW2d 646 (1984). When considered together, the exclusive remedy and coemployee provisions of the act bar suits against fellow employees for job-related injuries. *Jones v Bouza*, 381 Mich 299, 302; 160 NW2d 881 (1968).

[5] This right applies to actions against employers as well as coemployees. *Whaley v McClain*, 158 Mich App 533, 535; 405 NW2d 187 (1987).

[6] "[T]he Legislature has permitted the employer's state of mind to be inferred from its action when there is no direct evidence of the employer's intent to injure." *Travis, supra*.

[7] Indeed, plaintiff's counsel himself admitted that attorney fees should be awarded, but argued that plaintiff's prior counsel should pay them.

[8] MCR 2.401(G)(2) provides:

"(2) The court shall excuse the failure of a party or the party's attorney to attend a conference, and enter an order other than one of default or dismissal, if the court finds that

(a) entry of an order of default or dismissal would cause manifest injustice; or

(b) the failure to attend was not due to the culpable negligence of the party or the attorney.

The court may condition the order on the payment by the offending party or attorney or reasonable expenses as provided in MCR 2.313(B)(2)."

[9] MCR 2.313(B)(2) provides in pertinent part: "In lieu of or in addition to the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."