STATE OF MICHIGAN

COURT OF APPEALS

ANGELINA WILLIAMS,

Plaintiff-Appellant,

v

JOHN P. RUTHERFORD and AARMCO, INC.,

Defendants-Appellants.

UNPUBLISHED
December 13, 2002

No. 235035
Oakland Circuit Court
LC No. 00-025336-NO

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), based on the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1), and denying her motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was employed by defendant, AARMCO, Inc., as a security guard. In order to be eligible for incentive pay, plaintiff attended a series of training sessions taught by AARMCO's president and sole shareholder, defendant Rutherford. One of the training sessions covered self-defense tactics. Plaintiff was called as a volunteer to assist Rutherford in demonstrating a "sternal thrust." A sternal thrust is performed by placing one's palm on another's sternum and "snapping" the hand against the base of the sternum. This self-defense tactic causes part of the sternum to touch the heart, leading to involuntary exhalation and momentary stunning.

Rutherford had taught the sternal thrust technique to his security guards hundreds of times over a seventeen-year period. Never before had a person been injured when he performed the sternal thrust on a student for demonstration. When Rutherford performed the sternal thrust upon plaintiff, however, plaintiff fell over backwards and hit her head on the wall. Plaintiff broke two vertebrae, requiring surgery, hospitalization, and physical therapy.

Plaintiff pursued claims of assault and battery and intentional infliction of emotional distress against defendants. Upon the close of discovery, defendants moved for summary disposition arguing that plaintiff's claims were barred by the exclusive remedy provision of the WDCA. Plaintiff also filed a motion for summary disposition claiming that her proofs conclusively established that defendants committed assault and battery and intentional infliction

of emotional distress. The circuit court granted defendants' motion for summary disposition and denied plaintiff's motion for summary disposition.

On appeal, a trial court's grant of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "When a motion for summary disposition is premised on MCR 2.116(C)(7), the non-movant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery." *Id.* "If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if affidavits or other documentary evidence show that there is no genuine issue of material fact, the trial court must render judgment without delay." *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992).

The intentional tort exception to the WDCA 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 provision 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).]

The Michigan Supreme Court has ruled that a plaintiff can escape the exclusive remedy provision of the WDCA in two ways. One, a plaintiff's claim can proceed if it becomes evident that an employer "made a conscious choice to injure an employee and . . . deliberately acted or failed to act in furtherance of that intent." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996). Two, a plaintiff can establish an intentional tort by showing that "the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Id.*

The circuit court granted defendants' motion on the basis that plaintiff was unable to offer any evidence that Rutherford specifically intended to injure her. Plaintiff argues that she met the threshold set forth in *Travis*, *supra*, because she established that Rutherford struck her intentionally, and that he did so intending that part of her sternum touch her heart muscle causing stunning and loss of breath, which constitutes an injury.

Plaintiff has not presented evidence that Rutherford specifically intended to injure her while demonstrating the sternal thrust or that Rutherford wilfully disregarded actual knowledge that an injury was certain to occur. Concerning plaintiff's assault and battery claim, the context in which plaintiff's injury occurred makes it clear that the sternal thrust was performed for demonstrative purposes. Plaintiff and the other AARMCO students were there for the purpose of job training in which it was made clear that self-defense techniques were going to be discussed and taught. Rutherford stated that he did not use full force upon plaintiff because the purpose of the demonstration was pedagogical.

Plaintiff has also failed to offer any evidence that Rutherford wilfully disregarded actual knowledge that, by performing the sternal thrust upon her, plaintiff would be injured. "[T]he second sentence [of the WDCA's intentional tort exception] will be employed when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence." *Travis, supra,* 453 Mich 173. Rutherford testified that he has taught self-defense tactics for seventeen years, that he has taught his employees the sternal thrust hundreds of times, and that, in his seventeen years of teaching the sternal thrust, he has never seen anyone get injured. This evidence was not contested. Thus, plaintiff has not offered any circumstantial evidence from which the trial court could have inferred that Rutherford intended to injure plaintiff, or knew that injury was certain to occur. While Rutherford did intend to cause a certain physical response in plaintiff, intending that she lose her breath, he did not intend an "injury" within the meaning of the WDCA. Further, that Rutherford's actions may have satisfied the definition of a battery does not relieve plaintiff of the obligation of showing an intentional tort as defined by the WDCA.[1] Thus, the circuit court's grant of defendants' motion for summary disposition was proper regarding the assault and battery claim.[2]

Plaintiff also sued defendants for intentional infliction of emotional distress. In order to establish intentional infliction of emotional distress,[3] a plaintiff must show "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v Ford,* 237 Mich App 670, 674; 604 NW2d 713 (1999). Liability for this tort attaches only when a plaintiff can demonstrate that the conduct at issue is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Doe v Mills,* 212 Mich App 73, 91; 536 NW2d 824 (1995). A defendant is not liable for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*

Plaintiff offers the following allegations in support of her claim of intentional infliction of emotional distress. After falling over backwards after Rutherford struck her, plaintiff laid on the ground screaming in pain. Rutherford did not offer to help her, but instead, tried to discover where plaintiff felt pain. After asking plaintiff where she was hurt, Rutherford did not ask her if she wanted an ambulance, and an ambulance was not called until an hour and a half later. Rutherford called in two other employees to assist plaintiff into a chair and then gave her a soft drink and some ibuprofen. While plaintiff was sitting in the chair, Rutherford continued to teach

[1] We reject plaintiff's reliance on *Schutt v Lado,* 138 Mich App 433; 360 NW2d 214 (1984), as establishing that there is an exception to the exclusive remedy provision for "true intentional torts" without regard to the language of the WDCA. *Shutt* was decided before section 131 was amended to define the "intentional tort" exception to the exclusive remedy provision.

[2] At oral argument, plaintiff asserted that different standards should be applied when evaluating her claims against the corporate employer defendant and the individual co-employee defendant. However, this assertion was not addressed in plaintiff's brief and we will not search for authority to support the assertion. *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998).

[3] The Michigan Supreme Court has not recognized or adopted this tort. See, e.g., *Smith v Calvary Christian Church,* 462 Mich 679, 690; 614 NW2d 590 (2000) (Weaver, C.J., concurring).

the class. While teaching, Rutherford jokingly stated that plaintiff was faking her injury so that she would not have to take a written test at the end of class. After sitting in the same room where the class was being taught, plaintiff was taken to another, more private room and waited for an ambulance.

These allegations, if true, do not establish that Rutherford's conduct was so extreme and outrageous so as to take it outside all bounds of decency. After realizing that plaintiff was hurt, Rutherford asked her where she was feeling pain. Rutherford then had plaintiff helped into a chair, where she was given a soda and medicine for her pain. While his decision not to call an ambulance right away may have been medically wrong and socially insensitive, this conduct was not so extreme and outrageous as to make it intolerable in a civilized community.

Further, plaintiff failed to present evidence that Rutherford specifically intended to inflict emotional distress upon her. The intent requirement pertains both to the cause of action itself and to the intentional tort exception to the WDCA. *Graham*, *supra*, 237 Mich App 674; MCL 418.131(1). Without a showing that Rutherford intended to inflict severe emotional distress upon her, she cannot assert a claim of intentional infliction of emotional distress. Without a showing that Rutherford specifically intended to injure her or that he wilfully disregarded actual knowledge that an injury was certain to occur, plaintiff cannot escape the exclusive remedy provision of the WDCA. Thus, the circuit court was correct to grant defendants' motion for summary disposition regarding plaintiff's intentional infliction of emotional distress claim.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray