STATE OF MICHIGAN

COURT OF APPEALS

VERNON OVERMEYER,

Plaintiff-Appellee,

v

STEVE BOS and WOLOHAN LUMBER COMPANY,

Defendants-Appellants.

UNPUBLISHED
May 13, 2004

No. 247469
Saginaw Circuit Court
LC No. 00-036335-NZ

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In this case arising out of several incidents where plaintiff claimed he was assaulted and battered by his coworkers, defendants appeal as of right the order of judgment entered pursuant to a jury trial verdict in favor of plaintiff. We affirm in part, reverse in part and remand.

Defendants first argue that the trial court erred in denying summary disposition and directed verdict because plaintiff failed to establish the essential elements required to invoke the intentional tort exception of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* We agree in part and disagree in part.

This Court reviews questions regarding the exclusive remedy provision of the WDCA under MCR 2.116(C)(4), and decisions on motions for summary disposition are reviewed de novo. *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000); MCR 2.116(I)(1). This Court must determine whether the pleadings demonstrate that the moving party was entitled to judgment as a matter of law, or whether the proofs show that there was no genuine issue of material fact. *Bock v GMC*, 247 Mich App 705, 710; 637 NW2d 825 (2001); *Herbolsheimer, supra* at 240. Whether the facts alleged in the pleadings are sufficient to constitute an intentional tort is a question of law for the court; whether the facts alleged are in fact true, however, is an issue for the jury. MCL 481.131(1); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 154; 551 NW2d 132 (1996). Furthermore, this Court reviews de novo a court's ruling on a motion for a directed verdict. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). This Court must examine the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the nonmoving party. *Id.* Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted. *Id.*

Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault. *Herbolsheimer*, *supra* at 240; MCL 418.301. However, the trade-off is that the amount of compensation is limited, *id*., and, except in limited circumstances, the employee may not bring a tort action against 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. This subsection shall not enlarge or reduce rights under law. [MCL 418.131(1).]

Negligence or even recklessness is not enough; the statute requires that there be a specific intent to injure. *Travis*, *supra* at 154. Even substantial certainty that injury could occur is not enough; the employer must have had in mind the particular purpose of inflicting an injury on his employee. *Id*. at 171, 172.

In affirming in part and reversing in part, we find that the trial court erred by not first distinguishing between the individually named defendant, Steve Bos, and the corporate entity, Wolohan. See *id*. at 183-187, 189-191. Just as an employer may be sued in tort for an intentional tort, so may a coworker be sued in tort for the commission of an intentional tort. *Id*. at 190-191; *Graham v Ford*, 237 Mich App 670, 673; 604 NW2d 713 (1999).

Looking at Bos's conduct first, plaintiff's allegations were sufficient to constitute the intentional torts of assault and battery for the purpose of invoking the intentional-tort exception. Assault and battery are "true" intentional torts that satisfy the intentional-tort exception. *Travis*, *supra* at 169-170; *Gray v Morley*, 460 Mich 738, 743 n 4; 596 NW2d 922 (1999). In his complaint, plaintiff alleged that Bos shot him with a nail gun and hit him in the face with an ice ball and an extension cord. Moreover, the depositions and trial testimony corroborated plaintiff's claims. Examining the evidence and the reasonable inferences that may be drawn from it in a light most favorable to plaintiff, the trial court properly concluded that the alleged acts constituted intentional torts. See *Graves*, *supra* at 491. Furthermore, the court let the jury determine the truth behind the facts presented. See *Travis*, *supra* at 154.

Looking to the liability of Wolohan, however, plaintiff's allegations were insufficient as a matter of law to invoke the intentional-tort exception. A plaintiff may establish an employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. *Id.* at 173-174. In the absence of authority to hire, fire, discipline, evaluate, or give raises to anyone, Bos, in his capacity as a crew leader, was not a supervisory or managerial employee, and his knowledge or intent could not be attributed to Wolohan. See *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 153 n 5, 153-154; 565 NW2d 868 (1997). Moreover, there are no allegations that any of the other employees who engaged in the conduct were supervisory or managerial employees.

Having determined that the coworkers' conduct itself cannot be imputed to the employer, we next address plaintiff's argument that the management knew about the tortious behavior but failed to stop it. See *Travis*, *supra* at 169, 170 (the phrase "deliberate act" encompasses omissions, where an employer consciously fails to act). Although his managers denied having knowledge of almost all of the incidents, viewing the evidence in a light most favorable to plaintiff, it should be accepted that plaintiff did report all of the incidents to his managers. Even using this presumption, however, no evidence established that Wolohan management acted with the specific intent to injure plaintiff, or that they had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. See *id.* at 174, 179.

Mere knowledge that something has happened before plays no part in determining the certainty of injury; there has to be "no doubt" with regard to whether it will occur. *Id*. at 174-175. Plaintiff complained of at least six separate incidents, but those incidents occurred over a period of over a year and a half and involved various parties and devices. Given the variety of circumstances involved in the incidents, even given the fact that the management knew about the prior incidents, it cannot reasonably be said that the management had no doubt that another injury was going to occur. Thus, the trial court erred in denying summary disposition and later denying directed verdict to defendants with respect to plaintiff's claims against his employer.

Defendants' second issue on appeal is that the trial court erred in awarding plaintiff case evaluation sanctions because this Court has applied MCR 2.405(D)(2) to bar a party from recovering costs where that party fails to respond to an offer of judgment. We disagree. The application and construction of court rules is a question of law that this Court reviews de novo. *Barclay v Crown Bldg & Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

Here, the case evaluation recommendation was $75,000. Plaintiff accepted, but defendants rejected the recommendation. The jury awarded plaintiff $90,000. Under the plain language of MCR 2.403(O)(1), defendant should be required to pay plaintiff's actual costs. Defendants argue, however, that under MCR 2.405(D)(2), plaintiff is not entitled to actual costs because he failed to respond to defendants' $5,000 offer of judgment. See *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 66-67; 454 NW2d 188 (1990).

MCR 2.405(E) states, "Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous." Here, the case evaluation award was unanimous. Thus, in analyzing whether plaintiff is prohibited by MCR 2.405(D)(2) from recovering costs under MCR 2.403, we look to *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 341-342; 602 NW2d 596 (1999), where our Supreme Court explained that in amending MCR 2.405(E), the Supreme Court Mediation Rule Committee "determined that in order to reduce gamesmanship, the offer of judgment costs provision should be used only in conjunction with mediation where a mediation award was not unanimous and thus mediation sanctions were not available under MCR 2.403." See Report of the Supreme Court Mediation Rule Committee, 451 Mich 1205, 1206 (1995). Therefore, plaintiff was entitled to recover costs from defendant occasioned by defendant's rejection of the case evaluation because under MCR 2.405(E), MCR 2.405(D)(2) is not applicable because the mediation award was unanimous; thus, MCR 2.403(O)(1) controls.

We affirm the trial court's denial of summary disposition and directed verdict with regard to plaintiff's claims against defendant Steve Bos and the award of case evaluation sanctions. But

we reverse the denial of summary disposition and directed verdict with regard to plaintiff's claims against defendant Wolohan Lumber Company, and we remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald