

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN KILLINGHAM,

Plaintiff-Appellant,

v

DEAN TRANSPORTATION, INC., and
TERRANCE HALE,

Defendants-Appellees.

UNPUBLISHED

May 20, 2021

No. 353031

Kent Circuit Court

LC No. 19-011024-CZ

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

Plaintiff, Kathleen Killingham, appeals the trial court’s order granting defendants Dean Transportation, Inc. (Dean Transportation) and Terrance Hale’s (Hale) motion for summary disposition and dismissing her complaint. We affirm.

I. FACTUAL BACKGROUND

Dean Transportation employed plaintiff as a school bus monitor and Hale as a bus driver. On the afternoon of January 24, 2018, after picking up students from a middle school, during transport, an altercation began between two students. Plaintiff observed one student rise and move toward another student with what she interpreted as the intention to assault the other student. Plaintiff responded by standing to intervene and prevent the attack. Hale simultaneously also saw the potential altercation unfolding and engaged the bus’s brakes which caused plaintiff to lose her balance, fall against the dashboard, and incur bodily injuries. Plaintiff filed a two-count complaint alleging that Hale’s conduct constituted an assault and battery and that Dean Transportation, as Hale’s employer, bore common-law vicarious liability for Hale’s conduct because Hale acted within the scope and course of his employment with the express or implied consent of Dean Transportation.

In lieu of answering the complaint, defendants moved for summary disposition under MCR 2.116(C)(8) and (10) on the grounds that plaintiff’s claims were barred by the Worker’s Disability Compensation Act of 1969, MCL 418.101 *et seq.* (WDCA), more specifically MCL 418.131(1) which provides employees an exclusive remedy for personal injuries incurred during employment,

and MCL 418.827(1) which permits the imposition of liability against third parties but not coworkers employed by the same employer. Defendants argued that plaintiff failed to sufficiently plead and could not prove her assault and battery claim against Hale and failed to allege and could not prove that Dean Transportation committed an intentional tort and that the WDCA barred the imposition of common-law vicarious liability against it. Plaintiff opposed their motion but the trial court ruled in favor of defendants and dismissed her complaint. Plaintiff now appeals.

II. STANDARDS OF REVIEW

This Court reviews de novo a circuit court's summary disposition decision. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted." *Id.* (quotation marks and brackets omitted). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Id.* (citation omitted). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Id.* at 304-305. "Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* at 305 (quotation marks and citation omitted). Conclusory allegations unsupported by factual allegations do not suffice to state the elements of a claim upon which relief can be granted. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of claims and the moving party bears the burden of establishing with admissible evidence its entitlement to judgment as a matter of law. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 536; 831 NW2d 255 (2013). If the nonmoving party fails to establish the existence of a genuine issue of material fact, the trial court must enter judgment for the moving party. *Id.* at 537. "A genuine issue of material fact exists when, viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on an issue." *Id.* A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper when the evidence, "viewed in the light most favorable to the nonmoving party, show[s] that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016) (citation omitted). "Questions of statutory interpretation are also reviewed de novo." *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

III. ANALYSIS

Plaintiff argues that her complaint stated sufficient allegations to state a claim of assault and battery against Hale and that Dean Transportation may be held liable for Hale's conduct under common-law vicarious liability. We disagree.

In Michigan, an employee's exclusive remedies for work-related injuries are provided under the WDCA. MCL 418.131(1). In *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000) (quotation marks and citation omitted), this Court explained:

The underlying rationale for limiting an employee's remedies is as follows:

Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault. In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer.

The exclusive remedy provision limits an employee's recovery when the employee "receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury." MCL 418.301(1)[]. It is well settled that the exclusive remedy provision applies when an employee is injured by the negligent acts of his employer or by the negligent acts of a coemployee.

An employee, however, may pursue an intentional tort claim as specified in MCL 418.131(1) which 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 law.

Where an employee is injured on the job by conduct of third persons, even though their injuries are compensable under the WDCA, MCL 418.827(1) permits the employee to bring common-law tort claims against third persons. MCL 418.827(1), however, does not permit such claims against co-employees. See *Harris*, 242 Mich App at 310; see also *Holody v City of Detroit*, 117 Mich App 76, 81-82; 323 NW2d 599 (1982) (explaining that MCL 418.827(1) bars an employee from bringing common-law causes of action against co-employees, i.e., persons who work for the same employer regardless whether they work in the same job or same department). "Injuries received as a result of intentional and willful misconduct of another employee, however, are excluded from [WDCA] compensation coverage." *Johnson v Arby's Inc*, 116 Mich App 425, 433; 323 NW2d 427 (1982) (reversing trial court's dismissal of claim by a plaintiff employee against a co-employee who stabbed and cut the employee at a company sponsored picnic.)

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996), our Supreme Court analyzed the legislative intent articulated in MCL 418.131(1), and concluded that to recover on a claim against an employer under the intentional tort exception, an employee must plead and prove that her employer deliberately acted or failed to act with the purpose of inflicting injury upon the employee. The Court explained that "the employer must engage in a deliberate act (commission or omission) with a specific intent to injure." *Id.* The Court analyzed the specific language of each sentence of MCL 418.131(1) and concluded that to establish an employer's "actual knowledge," a plaintiff must show "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 174. In addition to actual knowledge, the Court explained that another aspect of the intent element requires a plaintiff to plead and prove that the employer knew that injury was “certain to occur” yet “willfully disregarded” the condition, i.e., demonstrated a deliberate state of mind to cause injury and refrained from taking any action to alleviate the known risk. *Id.* at 174-179. The Court instructed that intentional tort liability may be imposed only if a plaintiff establishes that his or her employer

made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer’s intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id.* at 180.]

As part of its analysis, our Supreme Court reaffirmed the principle that a “corporation is vicariously liable only where ‘some employee . . . act[s] with the requisite intent to impute an intentional tort to a corporation.’ ” *Id.* at 171 (quoting *Adams v Nat’l Bank of Detroit*, 444 Mich 329, 343, 368-369; 508 NW2d 464 (1993) (BOYLE, J., concurring in part and dissenting in part, and BRICKLEY, J.)). The Court also instructed that the issue whether the facts alleged by a plaintiff are sufficient to constitute an intentional tort is a question of law for the trial court to decide. *Id.* at 188.

In *Gray v Morley*, 460 Mich 738, 742; 596 NW2d 922 (1999), our Supreme Court further clarified that conclusory allegations of the commission of an intentional tort are insufficient to state a claim. A plaintiff must allege that the defendant specifically intended to injure the plaintiff. *Id.* at 744. Allegations that merely suggest that the defendant acted recklessly or with deliberate indifference “sound in gross negligence and are therefore insufficient to constitute an intentional tort within the meaning of the WDCA.” *Id.*

In this case, plaintiff alleged in her complaint and admitted in her arguments to the trial court, as well as here on appeal, that she sued defendants for damages for personal injuries she suffered during working hours while she performed the usual duties of her employment with Dean Transportation. She also admitted that her injuries occurred while Hale similarly performed the usual duties of his employment with Dean Transportation. The exclusive remedies provision of the WDCA, therefore, barred her suit unless she pleaded and could prove that defendants committed an intentional tort. In an effort to prosecute her claim and not be barred by the exclusive remedies under the WDCA, plaintiff sought to allege that Hale committed an assault and battery.

In *Espinoza v Thomas*, 189 Mich App 110, 119; 427 NW2d 16 (1991) (citations omitted), this Court explained:

An assault is defined as any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact. A battery is the wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact. Protection of the interest in freedom from unintentional and unpermitted contacts with the plaintiff’s person extends to any

part of his body or to anything which is attached to it and practically identified with it.

In *Lakin v Rund*, 318 Mich App 127, 131; 896 NW2d 76 (2016) (quotation marks and citations omitted), this Court clarified that claims for assault and battery in Michigan require pleading and proof of specific intent to injure:

A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person. It is not necessary that the touching cause an injury. Further, because an attempt to commit a battery will establish an assault, every battery necessarily includes an assault because a battery is the very consummation of the assault. While the common law did not require proof of intent, Michigan requires proving the intent to injure in order to establish an assault and battery. The intent of the defendant may be established by circumstantial evidence.

Under *Travis, Gray*, and *Lakin* plaintiff had to plead allegations of facts sufficient to state a claim that Hale committed an intentional tort with specific intent that she be injured. Analysis of plaintiff's complaint establishes that she failed to do so. In her general allegations she alleged that Hale "slammed on the brakes in an attempt to cause all participants to lose their balance and fall." In her allegations against Hale for assault and battery, plaintiff makes the conclusory allegation that Hale generally "acted willfully and intentionally, intending to cause injury or the fear of injury to individuals on the school bus, including Plaintiff." In her vicarious liability claim against Dean Transportation she merely reiterated a similar conclusory allegation. Neither her general allegations nor her specific allegations in her claims against either Hale or Dean Transportation alleged facts beyond conclusory allegations. Plaintiff's complaint makes no allegation that Hale made a deliberative, conscious choice to specifically injure her and then deliberately acted in furtherance of that specific intent. Further, plaintiff's complaint makes no allegation that Hale or Dean Transportation had "actual knowledge" that plaintiff's injury was "certain to occur" yet "willfully disregarded" such knowledge in furtherance of their intent to injure her.

In her arguments in opposition to defendants' motion for summary disposition, plaintiff essentially contended that the trial court could merely focus on the result of Hale's action, that she lost her balance, fell, and became injured, and conclude from the fact that she became injured his intent. The mere allegations of a sequence of events resulting in injury, however, do not suffice to satisfy the requirement that she allege that Hale acted with the requisite deliberate, specific intent to injure her. Without such allegations she failed to plead an intentional tort claim sufficiently to evade the exclusive remedies provided by the WDCA. At most, plaintiff alleged that her co-employee's negligence or recklessness caused her injury. Her sole remedies, therefore, are provided by the WDCA. Further, when faced with defendants' motion for summary disposition under MCR 2.116(C)(10), plaintiff failed to submit admissible evidence establishing the existence of a genuine issue of material fact precluding entry of judgment as a matter of law.

Moreover, under MCL 418.131(1), the trial court was required to determine, as a matter of law, whether Hale's conduct constituted an intentional tort. The record reflects that the trial court considered and analyzed the allegations in plaintiff's complaint, as well as her various arguments

in opposition to defendants' motion. The trial court applied the applicable law to the facts of this case. The record reflects that the trial court discerned the fundamental flaws in her pleading. Accordingly, the trial court did not err by ruling that, as a matter of law, plaintiff failed to sufficiently allege Hale's commission of an intentional tort and failed to establish the existence of a genuine issue of material fact. The trial court, therefore, properly granted defendants summary disposition.

Further, as explained in *Travis*, for Dean Transportation to bear liability, plaintiff had to plead and prove that Dean Transportation engaged in a deliberate act with a specific intent to injure her, *Travis*, 453 Mich at 172, or "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 174. Plaintiff had to plead and prove that Dean Transportation knew that injury was certain to occur yet willfully demonstrated a deliberate state of mind to cause plaintiff injury and refrained from taking any action to alleviate the known risk. *Id.* at 174-179.

In this case, plaintiff's complaint failed as a matter of law to sufficiently plead a cause of action against either Hale or Dean Transportation and when challenged by defendants' motion for summary disposition she failed to establish that a genuine issue of material fact existed. Accordingly, her claims were barred by the exclusive remedy provision under MCL 418.131(1). Dean Transportation could not be held vicariously liable for Hale's conduct because the WDCA governed her remedies. The trial court, therefore, correctly ruled that plaintiff could not hold Dean Transportation vicariously liable under common law for Hale's conduct.

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford