

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-01240-SCT

***IN THE ESTATE OF JOHN BALLARD GORMAN,
BY AND THROUGH THE ADMINISTRATRIX,
SUMMER GORMAN; AND SUMMER GORMAN
ON BEHALF OF ALL WRONGFUL DEATH
HEIRS OF JOHN BALLARD GORMAN***

v.

***STATE OF MISSISSIPPI, MISSISSIPPI GAMING
COMMISSION, TUNICA COUNTY, MISSISSIPPI,
ROBERT SHARP; IN HIS INDIVIDUAL AND
OFFICIAL CAPACITY; PETER T. CLINTON, IN
HIS INDIVIDUAL AND OFFICIAL CAPACITY***

DATE OF JUDGMENT:	07/08/2019
TRIAL JUDGE:	HON. CHARLES E. WEBSTER
TRIAL COURT ATTORNEYS:	ROBERT F. WILKINS ROBERT MOAK PHILIP H. NEILSON ROBERT J. DAMBRINO, III
COURT FROM WHICH APPEALED:	TUNICA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	MATTHEW THOMPSON CHAD KING ROBERT F. WILKINS
ATTORNEY FOR APPELLEES:	ROBERT J. DAMBRINO, III
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
DISPOSITION:	AFFIRMED - 12/17/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., COLEMAN AND CHAMBERLIN, JJ.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. Robert Sharp shot and killed John Gorman during a firearm-training exercise, and Gorman's heirs sued Sharp's employer, the Mississippi Gaming Commission, alleging

battery, wrongful death, and negligence. The circuit court granted summary judgment in favor of Gorman's employer, and Gorman's heirs appeal. We discern no triable issues of material fact in the record and affirm.

FACTUAL BACKGROUND

¶2. The instant appeal began with a tragic killing arising from a multitude of lapses in safety protocols. The following facts are undisputed: Robert Sharp and John Gorman were employees of the Commission and were acting in the course and scope of their employment. For twenty years, Sharp has been a highly trained certified firearms instructor. Recently, the Commission saw a need for its employees to be better equipped at handling threats, so training courses were increased and became mandatory for their employees. In due course, the Commission was conducting multiple, mandatory firearm-training exercises throughout the year for their agents.

¶3. Robert Sharp was touted as the lead instructor, and he agreed that he was bound by the safety rules of the Law Enforcement Division of the National Rifle Association, *verbatim ac litteratim*, which stated in relevant part:

1. Provide a written safety instruction sheet that is given to everyone entering the safety briefing.
2. No live ammunition anywhere in the training area.
3. Live firearms must be deactivated and marked as such. Simulation firearms must be clearly marked and incapable of firing conventional live ammunition.
4. Have a dedicated Safety Officer who monitors the training session,

accounts for all persons in the training site, personally checks all firearms entering the training location to make sure they are unloaded, physically checks all students and instructors to verify they have no live ammunition on their person, in magazines/speedloaders or in any gear bags being brought on-site, inspects any simulation rounds, blanks or dummy rounds being used to make sure no live ammunition has been inadvertently mixed in, and as part of the Triple-Check process re-inspects anyone who leaves the training site prior to them being allowed to re-enter.

5. Triple-Check Safety Rule: Before entering the training site all students, instructors, and observers **must** be triple checked
 - i. Check yourself for unauthorized firearms and other weapons (knives, back-up guns, etc);
 - ii. Have a partner check you;
 - iii. Have the Safety Officer check you;
6. All instructors and students must be present for the safety briefing to take part in training. Persons missing the group safety briefing are not allowed to participate.

....
9. Anyone who sees and unsafe act or safety violation is responsible for calling “Stop Scenario.” Upon hearing Stop Scenario you will immediately stop all activity, loudly yell “Stop Scenario” at least twice and stand by for instructions from an instructor.

....

¶4. After an otherwise uneventful day of training, a drill was overlooked. Sharp and his team decided that they would perform the leftover drill outside of the Commission office the next morning. According to the findings of the Commission’s Shooting Review Board, “[t]here was a sense of urgency on the morning of [the incident] to get through the drill in order to get to the range to start that day’s training on time.” On the schedule, Sharp

described the remaining drill as “Threat, Shooting and Movement Training.” According to the Review Board, Sharp indicated a “lack of preparation” by informing the other instructors late that the drill was the “Tueller drill,”¹ instructing them to watch videos on the internet to acquaint themselves with the drill.

¶5. On the day of the incident, Sharp led training as usual and Director John Gorman and Special Agents Benjamin Harper, Ameshia Gross, and William England assisted. Practically all of the safety considerations were ignored due to “a lot of outside influences that were going on that just caused us to, you know, make a mistake.” Nonetheless, “[a]ll agents except three firearms instructors (Robert Sharp, John Gorman and Benjamin Harper) left their duty weapons and ammunition inside prior to their exit of the building.” As Gorman exited the building, he removed his firearm, placed it on the ground and “got into his role as an aggressor with the training knife while other observers looked on.”

¶6. Patricia Johnson, a trainee, was the first agent to perform the training exercise. Johnson failed the first test, and Sharp stepped in to educate her and to demonstrate the proper form. Sharp told Gorman to reset the drill and initiate, so Gorman rushed toward Sharp with the dummy knife. Sharp “pulled his service weapon from his holster and fired one lethal shot into Gorman’s chest.” Gorman was pronounced dead less than an hour later.

¹ The Tueller drill is a “reality-based training exercise that involves role playing with one person as the aggressor with a rubber knife and an officer who is armed with a firearm training aid, a dummy gun.” The “aggressor moves quickly towards the officer and the officer should step away from the threat. The officer should draw the dummy gun and ‘shoot’ until the threat is neutralized.”

¶7. The Commission investigated and interviewed all agents who were present. The Commission concluded:

The [Shooting Review Board] members have concluded this incident was an accidental discharge of an agency weapon. The most significant contributing factor was the failure of the firearm instructors to follow prescribed policies, procedures and lesson plans. Overall, there appeared to be a lack of focus on safety.

....

[Sharp] failed to follow required safety precautions to ensure his weapon was unloaded and safe. These safety precautions are learned in the NRA training to become a certified firearms instructor.

This was a preventable accident if required safety precautions and procedures had been properly followed.

¶8. Notably, while the Commission Shooting Review Board did conclude that the incident “was an accidental discharge of an agency weapon,” it also concluded that the “failure to follow the prescribed policies, procedures and lesson plans” was the most significant contributing factor. The Review Board concluded:

It should be noted on January 5th, 2015 and on January 21st, 2015; Special Agent Robert Sharp was conducting firearm training with a loaded weapon. On each date, he drew his weapon and discharged one (1) round. In both cases, he failed to follow required safety precautions to ensure his weapon was unloaded and safe. These safety precautions are learned in the NRA training to become a certified firearms instructor.

This was a preventable accident if required safety precautions and procedures had been properly followed.

¶9. In addition, the Mississippi Bureau of Investigation reviewed the incident and issued its findings:

[Peter Clinton] found that Robert “Bob” Sharp failed to follow the required safety precautions and to remove his duty weapon and ammunition from the simulated firearms training exercise; and that he knew or should have known that such failure to remove his firearm and ammunition could result in death or serious injuries to an individual.

I found that the “Deadly Shooting Incident” was avoidable if Robert “Bob” Sharp had exercised the required safety precautions to ensure the safety of his fellow officers and innocent bystander that he learned and trained on as a NRA Certified Firearms Instructor.

....

¶10. Clinton concluded the investigation by characterizing the “shooting death of John D. Gorman by Special Agent Robert Sharp” was “Extremely Negligent Discharge of Firearm” rather than “Accidental.”

¶11. After the incident, Gorman’s heirs began receiving automatic workers’ compensation payments. Each heir brought independent actions against the Commission that were later consolidated. Once consolidated, the Commission filed a joint motion for summary judgment in August 2017, stating the exclusivity of Mississippi Workers’ Compensation law barred further remedy. Gorman’s heirs opposed the motion by way of a pleading, memorandum, and a supplement with affidavits and admissions purportedly deemed admitted.

¶12. After a hearing was held on the motion, the circuit court granted the Commission’s motion to withdraw and amend their responses to the requests for admissions. And the circuit court later granted summary judgment for the Commission. On August 8, 2019, Gorman’s heirs appealed; they raise two issues:

- I. The circuit court erred in determining that the Workers' Compensation Act was the exclusive remedy to recover due to the death of John Gorman; and
- II. The circuit court erred in determining complete immunity applied regarding the Mississippi Tort Claims Act.

¶13. The overarching issue is whether the workers' compensation benefits are the exclusive remedy available to Gorman's heirs. After careful review, because the record lacks credible evidence demonstrating that Sharp possessed an actual intent to injure Gorman, we affirm.

STANDARD OF REVIEW

¶14. "Th[e] Court employs a *de novo* standard of review when considering a trial court's grant or denial of summary judgment." *Hobson v. Chase Home Fin., LLC*, 179 So. 3d 1026, 1033 (¶ 25) (Miss. 2015) (citing *WW, Inc. v. Rainbow Casino–Vicksburg P'ship, L.P.*, 68 So. 3d 1290, 1292 (¶ 6) (Miss. 2011)).

Under Mississippi Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

Banks ex rel. Banks v. Sherwin-Williams Co., 134 So. 3d 706, 709-10 (¶ 8) (Miss. 2014) (quoting Miss. R. Civ. P. 56(c)).

¶15. Further, "th[e] Court views the evidence in the light most favorable to the nonmoving party" *Gibson v. Williams, Williams & Montgomery, P.A.*, 186 So. 3d 836, 844 (¶ 14) (Miss. 2016) (citing *Duckworth v. Warren*, 10 So. 3d 433, 436 (¶ 9) (Miss. 2009)). The nonmoving party, however, "may not rest upon the mere allegations or denials of his

pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Banks ex rel. Banks*, 134 So. 3d at 710 (¶ 9) (internal quotation marks omitted) (quoting Miss. R. Civ. P. 56(e)).

DISCUSSION

¶16. In recent history, the Court analyzed the historical development and reiterated the symbiotic nature between the interests of labor and business, culminating in Mississippi adopting a system for workers’ compensation. See *Franklin Corp. v. Tedford*, 18 So. 3d 215, 219 (Miss. 2009). The *Franklin* Court stated:

[T]he workers’ compensation system lends valuable predictability to both employees and employers. Employees receive guaranteed compensation for covered injuries, bypassing the civil-litigation risks of either no recovery or uncollectible judgments against insolvent employers. Employers receive fixed levels of potential liability which they can anticipate and treat as a general “cost of doing business.”

Id. at 221.

¶17. The relevant statute, Mississippi Code Section 71-3-9 (Rev. 2011), “provides, in part, that ‘[t]he liability of an employer to *pay compensation* shall be *exclusive* and in place of all other liability of such employer to the employee’” *Id.* (emphasis in original) (quoting Miss. Code Ann. § 71-3-9 (Rev. 2000)). To invoke its exclusivity as a remedy under the Act, the statute requires that the injury suffered be “accidental,” and our legislature provided a definition, in relevant part, for guidance:

‘Injury’ means *accidental injury or accidental death* arising out of and in the course of employment without regard to fault which results from an *untoward event or events*, if contributed to or aggravated or accelerated by the

employment in a significant manner. Untoward event includes events causing unexpected results. An untoward event or events shall not be presumed to have arisen out of and in the course of employment, except in the case of an employee found dead in the course of employment. This definition includes injuries to artificial members, and also includes an injury by the willful act of a third person directed against an employee because of his employment while so employed and working on the job

Miss. Code Ann. § 71-3-3(b) (Rev. 2011) (emphasis added).

¶18. Throughout the years, the Court has reiterated that “if the facts alleged or proven point to negligence, gross negligence, or recklessness, despite an allegation of actual intent, th[e] Court will find that workers’ compensation is the sole avenue for relief for the aggrieved party.” *Bowden v. Young*, 120 So. 3d 971, 977 (¶ 15) (Miss. 2013). And few cases have escaped the Act’s “powerful grasp” of exclusivity. *Id.* at (¶ 17).

¶19. The *Bowden* Court provided a succinct summary of the Court’s holding in *Franklin*, which allowed the plaintiff to escape the Act’s powerful grasp:

The facts of *Franklin* demonstrated outrageous actions on the part of an employer who exhibited a profit-motivated disregard for its employees’ safety as well as an actual intent to injure. This Court affirmed the trial court’s decision to deny the defendant’s motion to dismiss because, taking the plaintiffs’ allegations as true, they satisfied the intentional-tort exception to the application of the MWCA. Ultimately, the facts and testimony of the employees showed actual intent to injure on the part of the employers sufficient to overcome the exclusivity provision of the MWCA. However, this Court declined to extend the “actual intent” standard to include behavior engaged in by the employer which was “substantially certain to” injure the employees. Six Justices of this Court agreed that, “absent the employer’s *deliberate intent and design to injure* the employee, the law in Mississippi—as it currently exists—does not allow an injured employee to escape the exclusive-remedy provisions of the Act.”

Id. at (¶ 18) (citations omitted).

¶20. Another example is *Blailock v. O'Bannon*, 795 So. 2d 533, 535 (¶ 1) (Miss. 2001), in which the plaintiff alleged her injury arose from willful and intentional acts of her employer when a coworker grabbed her arm and pulled her to an office for disciplinary action, and the Court agreed. *Id.* at (¶ 6). There, the plaintiff alleged intentional torts not compensable under the Act supported by evidence that her employer injured her with actual intent to injure her. *Id.* at (¶ 3). In the end, the *Blailock* Court reiterated the above standard but found that “[p]art of the damages sought by Blailock . . . are not compensable under the Act because they are alleged to have been caused by willful and intentional acts, not negligent or grossly negligent acts.” *Id.* at (¶ 6).

¶21. In the instant case, Gorman’s heirs submitted a complaint that is similar to those in *Blailock* and *Miller*, alleging an intentional tort that is not compensable under the Act. In rebuttal, the Commission argued that the complaint is an “allegation of gross negligence, carelessness, and/or reckless disregard for the safety of others,” citing *Bowden*. Moreover, the Commission states that “[t]his was a tragic and wholly unintended outcome of the firearms drill they were conducting for the Mississippi Gaming Commission[,]” and the Commission concludes by stating “[a]side from the wholly unsupported allegation that Sharp acted intentionally, there is no evidence of or allegation that Sharp actually intended to harm, injure or kill [Gorman].” Finding no evidence similar to that presented *Blailock* or *Miller*, we agree.

¶22. While Gorman’s heirs supported their claim with a memorandum and an expert-

witness affidavit asserting that Sharp's actions that morning as a firearm-training expert, from arming himself with his loaded firearm and ignoring every safety check to his eventual drawing, aiming, and firing his loaded firearm at Gorman, are all intentional acts, the record lacks any evidence supporting the allegations that Sharp acted with actual intent *to injure* Gorman.

¶23. For example, in the affidavit of Clifford Cargill, an expert witness for Gorman's heirs, Cargill stated:

The position taken by Agent Sharp that he did not know he had a loaded firearm and therefore bears no responsibility violates every known firearm safety rule. Agent Sharp first testified that he did not know the firearm was loaded. Then, Agent Sharp said that he did not know that he even had a firearm in his holster. This conflict makes his testimony unreliable. However, it is known that Agent Sharp put on the holster with the firearm used to kill Agent Gorman the morning of the incident. Agent Sharp claims that he forgot that he had a loaded weapon and simply made a mistake when he shot Agent Gorman. A firearm is a dangerous instrumentality and instructors such as myself and Agent Sharp have a higher duty of responsibility than the general public when handling firearms. *This was not an accidental discharge.* It was intentionally loaded, pointed at Agent Gorman, and the trigger was pulled. Rather, the firearm functioned as designed.

(Emphasis added.)

¶24. Cargill correctly identified that Sharp's actions were intentional, but he infers from Sharp's purported "higher duty of responsibility" that Sharp intended to injure Gorman. The Act contemplates no such inference. As such, the record reveals no genuine dispute of material fact that would allow a finder of fact to conclude that Sharp possessed actual intent to injure him.

¶25. The circuit court did not err by granting summary judgment in the Commission's favor. Because we find that the circuit court correctly granted summary judgment to the Commission under the exclusive remedy provision of the Workers' Compensation Act, we do not reach the MTCA immunity issue or Gorman's heirs's third issue concerning admissions.

CONCLUSION

¶26. We affirm.

¶27. **AFFIRMED.**

**RANDOLPH, C.J., KITCHENS AND KING, P.JJ., MAXWELL, BEAM,
CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.**