

STATE OF MICHIGAN
COURT OF APPEALS

LUDEITH ANN PERKINS,

Plaintiff-Appellant,

v

DAVID PIKE,

Defendant-Appellee.

UNPUBLISHED

October 6, 2000

No. 215741

Livingston Circuit Court

LC No. 96-015378 NO

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a post bench trial order of judgment for defendant. We affirm.

Both plaintiff and defendant, a certified self defense instructor, were Michigan Department of Corrections (MDOC) employees. Plaintiff alleged that during a self defense training session, defendant “with tremendous force brought his hands down at the base of [plaintiff’s] neck on both sides,” causing serious injuries. Plaintiff filed a complaint alleging that in demonstrating a technique sometimes called the “trapezius strike”, defendant “either deliberately, intentionally, negligently, or grossly negligently, in violation of [MDOC] rules and/or guidelines, assaulted, battered, intentionally and/or negligently inflicted emotional distress upon” her. Subsequent to filing the instant case, plaintiff sought and received worker’s compensation benefits.¹ The trial court ultimately determined that plaintiff failed to avoid the worker’s compensation exclusive remedy provision by proving an intentional tort, MCL 418.131(1); MSA 17.237(131)(1), because she did not show that defendant intended to injure her.

Plaintiff contends that the trial court erroneously concluded that defendant’s execution of the trapezius strike did not constitute an intentional tort.

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 The only exception to this exclusive remedy is an intentional tort. *An intentional tort shall exist*

¹ In December 1997, the Worker’s Compensation Board of Magistrates awarded plaintiff benefits for the period July 7, 1994 to December 3, 1996. The MDOC appealed, though from the available record the final outcome remains unclear.

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); MSA 17.237(131)(1) (emphasis added).]

This section also applies to a coemployee's alleged intentional torts. *Graham v Ford*, 237 Mich App 670, 673; 604 NW2d 713 (1999).

Defendant testified that beginning in 1993 MDOC employees' mandatory self defense training included instruction regarding the trapezius strike, a nondeadly force pressure point control tactic (PPCT) that intends to stun and temporarily immobilize an attacker. According to defendant, at the training classes' commencement he informed the students that the class involved some physical contact, and inquired whether any students possessed medical restrictions about which he should know. Defendant did not recall plaintiff advising him of some reason why she could not participate. Defendant explained that instruction of the trapezius strike technique began in static mode, during which students merely went through the motions of performing the technique with contact limited to mere touching, then advanced to the fluid training mode, which represented a stimulus-response practice incorporating actual striking when performing the technique.²

Defendant stated that when the students advanced to the fluid training stage, he instructed them to apply only twenty to thirty percent of the force they normally would employ in executing the strike. While a third training mode, dynamic, existed that involved near full force contact and required protective equipment, MDOC self defense classes never utilized the dynamic mode. Defendant believed that while full force application of the trapezius strike could cause bruising, pain, a loss of balance, and a tingling sensation or "charley horse," he did not recall that during the entirety of his training any student or trainer ever experienced from the strike more than a "numbing sensation for a short period of time." Defendant opined that these results should not occur during fluid mode training. Defendant averred that he never during a class delivered to another trainer or student a full force trapezius strike. In teaching students PCCT's, defendant first verbalized the technique, then at "normal speed," which "to a trainer is 50 percent speed and power," demonstrated the strike. Defendant, who estimated that around the time of plaintiff's injury he taught over one hundred classes per year, did not specifically recall plaintiff's participation in class, striking her or her injury, and denied that he ever intended to injure anyone. Defendant intended only through training "to help the students not get injured."

We find the trial court properly determined that in striking plaintiff defendant did not intend any harmful or offensive contact or to injure plaintiff, but intended to teach plaintiff the trapezius strike. Defendant undisputedly struck plaintiff, but uncontradicted evidence showed that the trapezius strike was taught by practicing the strike's execution, although at a reduced speed. Students were informed of

² One student apparently would grab his partner around the neck, which contact would signal the grabbed partner to then perform the strike.

the contact at the beginning of the self defense class, and therefore proceeded in consent with the class' inherent contact. See *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 87-89; 597 NW2d 517 (1999); *Higgins v Pfeiffer*, 215 Mich App 423, 426; 546 NW2d 645 (1996); *Overall v Kadella*, 138 Mich App 351, 357; 361 NW2d 352 (1984). Defendant testified that he utilized contact only intending to teach the students and denied ever striking anyone with full force, and plaintiff did not establish that defendant exceeded the force ordinarily permissible in teaching the technique.

Furthermore, the trial testimony did not demonstrate defendant's disregard of actual knowledge that striking plaintiff certainly would injure her. Defendant testified that during the many classes he taught no one ever before suffered injuries after experiencing the trapezius strike, but may have experienced temporary and minor effects. The testimony of Andrew George, another experienced police self defense trainer, indicated that George had no knowledge of any one other than plaintiff ever experiencing injuries from the trapezius strike. To the extent that the trial court's findings inherently credited defendant's and George's testimony, we observe that "appellate courts should give special deference to the trial court's findings when they are based upon its assessment of the witnesses' credibility." *Schultes Real Estate Co, Inc v Curis*, 169 Mich App 378, 385-386; 425 NW2d 559 (1988).

In light of the available record, we cannot characterize the trial court's findings as clearly erroneous. *Gray v Morley (After Remand)*, 460 Mich 738, 743; 596 NW2d 922 (1999) ("[W]hether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the . . . court, while the issue whether the facts are as plaintiff alleges" represents a determination for the fact finder.); *Schultes, supra* at 385 (Findings are clearly erroneous when although evidence exists to support them, the reviewing court possesses a definite and firm conviction that the trial court made a mistake.). We conclude that because defendant did not intend to injure plaintiff in demonstrating the trapezius strike, the exclusive remedy provision precludes the instant action.³ MCL 418.131(1); MSA 17.237(131)(1).

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage

³ To the extent that plaintiff also challenges the trial court's allegedly erroneous denials of her motions for summary disposition and directed verdict, we decline to consider these arguments because plaintiff failed to raise them in her statement of questions presented and failed to sufficiently brief them. *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998); *Brookshire-Big Tree Ass'n v Onieda Twp*, 225 Mich App 196, 201; 570 NW2d 294 (1997).