STATE OF MICHIGAN

COURT OF APPEALS

KEVIN LAMONT BELLINGER,

Plaintiff-Appellant/Cross-Appellee,

v

INTERNATIONAL PRECAST SOLUTIONS, LLC,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
October 21, 2021

No. 354666
Wayne Circuit Court
LC No. 19-014988-NZ

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition under MCR 2.116(C)(7) and (C)(8), and defendant cross-appeals the same order denying defendant summary disposition under MCR 2.116(C)(4), in this action involving the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. We conclude that the trial court properly granted defendant's motion for summary disposition; however, the court should have determined that it lacked subject-matter jurisdiction, and dismissed the case under MCR 2.116(C)(4). Because the trial court reached the right result, however, we affirm. See *Lewis v Farmers Ins Exch*, 315 Mich App 202, 216; 888 NW2d 916 (2016) (this Court will not reverse when the trial court reaches the correct result for an incorrect reason).

I. BACKGROUND

Plaintiff was severely injured while working for defendant. Plaintiff alleged that he had been cleaning a "cement machine," which had an auger that rotated to keep the cement from coagulating. A lever on the machine controlled the motion of the auger. Unless the lever was pulled, the auger would remain motionless. Plaintiff alleged that defendant had instructed its employees to wrap a wire around the lever to keep it in the "on" position, thus keeping the auger turning while employees cleaned the machine. Plaintiff followed this instruction. While he was cleaning the machine, his clothes became entangled in the auger, and plaintiff was dragged into the machine, which amputated his legs.

Plaintiff alleged that defendant "took the position that [plaintiff] was engaged in 'misconduct,' " under MCL 418.305 to avoid paying plaintiff worker's compensation benefits,

even though defendant knew it had instructed plaintiff to keep the auger turning while he cleaned the machine. According to plaintiff, defendant lied to police and state inspectors investigating the accident. Defendant allegedly "hid" the wires used to hold the auger levers, and told inspectors that plaintiff had been in violation of company policy when cleaning the machine. By trying to avoid paying plaintiff workers' compensation benefits in this way, plaintiff opined that defendant committed intentional infliction of emotional distress, and filed a complaint. Specifically, because of defendant's alleged extreme and outrageous conduct, plaintiff contended that he suffered psychological trauma from fear that he would have no income, and from defendant's betrayal of trust.

Plaintiff amended his original complaint to add another allegation of putatively outrageous conduct on the part of defendant. Plaintiff alleged that a supervisor, Mark Miller, had issued a "Notice of Discipline" to plaintiff, under which plaintiff was suspended for three days. The notice "accused the plaintiff of bypassing 'a safety system by using tie wire to engage the auger lever in the on position and then accessing the tucker chute (5'-6" off the ground) while the auger was running and one chute cover was open exposing the running auger.' "

Defendant moved for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8). First, defendant argued the trial court lacked subject-matter jurisdiction. Citing MCL 418.841, defendant contended that only the Michigan Workers' Compensation Agency (WCA) had jurisdiction over plaintiff's claim because both wrongful acts alleged by plaintiff, the manner in which defendant defended against plaintiff's worker's compensation claim and defendant's Notice of Discipline, occurred in the context of plaintiff's employment with defendant. Second, defendant argued that it was immune to suit, reasoning that worker's compensation benefits were plaintiff's exclusive remedy under MCL 418.131. Both wrongful acts alleged by plaintiff occurred in the scope of judicial proceedings, so defendant was shielded by the judicial proceedings privilege. Third, defendant argued that plaintiff failed to state a claim upon which relief could be granted because defendant's assertion of a legal defense could not be considered outrageous or extreme conduct.

Plaintiff answered that the trial court had subject-matter jurisdiction because the intentional tort exception to the WDCA applied. Plaintiff argued that he stated a claim upon which relief could be granted because defendant lying about plaintiff being injured through his own misconduct would be so extreme or outrageous as to form the basis for a claim of intentional infliction of emotional distress. Lastly, the judicial proceedings privilege was inapplicable because plaintiff was suing defendant for defendant's statements. He was not suing defendant's lawyer.

Defendant filed a reply to plaintiff's response, raising no new arguments. Instead, defendant submitted twelve exhibits purportedly refuting many of the allegations in plaintiff's complaint. Notably, defendant submitted plaintiff's deposition in which plaintiff testified: (1) he was *oiling* the cement machine, not cleaning it, when he was injured; (2) defendant never instructed him to run the auger while oiling the machine; (3) he could not remember if anyone told him that defendant tried to hide the wires from state inspectors after the accident; and (4) defendant had trained plaintiff on company "lockout tagout" procedures, which required employees to shut down machines when servicing them. Defendant attached an acknowledgment signed by plaintiff which stated, "I have been trained on the correct procedure required for [lockout tagout]. I understand I

am to follow the [lockout tagout] procedures every time I am working on any equipment which has energy and can potentially start up."

Defendant also submitted an affidavit from Joseph Clifford, the primary administrator of the Associated Builders and Contractors Self Insured Workers' Compensation Fund (ABC Fund). Clifford attested that defendant was a member of the ABC Fund. Whenever anyone asserted a workers' compensation claim against one of the ABC Fund's members, ABC would assign a third-party administrator to manage the claim. These third-party administrators "are professional service companies that specialize in the evaluation and management of workers' compensation claims, and are not affiliated with any Fund Member." The third-party administrators retained complete control over whether to pay or deny worker's compensation claims. Defendant had no discretion over whether a worker's compensation claim should be paid or denied: "[i]ndividual members of the Fund, such as International Precast Solutions, LLC, are not allowed or permitted to . . . direct or control decisions relative to how workers' compensation claims against Fund members are managed, adjusted, paid or denied and defended."

Defendant also attached excerpts from the depositions of defendant's employees, Mark Miller and Don Little. In his deposition, Miller acknowledged that he issued the Notice of Discipline and three-day suspension to plaintiff, but he did so at the behest of the third-party administrator tasked with managing plaintiff's worker's compensation claim. He had no choice in the matter. Similarly, Little testified that defendant had no discretion over whether to grant or deny plaintiff's worker's compensation claim.

Ultimately, the trial court denied defendant's motion under MCR 2.116(C)(4), but granted defendant summary disposition under MCR 2.116(C)(7) and (C)(8). The trial court first determined that it had subject-matter jurisdiction to consider plaintiff's claim. Citing *Broaddus v Ferndale Fastner Div*, 84 Mich App 593; 269 NW2d 689 (1978), the trial court reasoned that "[s]uch allegedly nonphysical injury and damages do not arise out of and in the course of employment[,]" and so it could consider plaintiff's claim for emotional injuries resulting from intentional infliction of emotional distress. Finding it had subject-matter jurisdiction, the trial court ruled that defendant was entitled to summary disposition under MCR 2.116(C)(7) and (C)(8). Defendant was entitled to summary disposition under MCR 2.116(C)(7) because defendant's conduct was shielded by the judicial proceedings privilege. The trial court reasoned that the judicial proceedings privilege extends to every step in a judicial proceeding, and was broad enough to cover anything said in relation to the worker's compensation proceeding, including defendant arguing that plaintiff had engaged in misconduct and defendant issuing the Notice of Discipline. And, even if defendant was not protected by the judicial proceedings privilege, the trial court determined that defendant was entitled to summary disposition under MCR 2.116(C)(8) because defendant's alleged conduct could not be considered so outrageous and extreme as to form the basis for a claim of intentional infliction of emotional distress. Plaintiff appealed, and defendant cross-appealed.

II. ANALYSIS

A. EVIDENTIARY ISSUE

As an initial matter, plaintiff contends that the trial court erred by considering the evidence attached to defendant's reply brief in answer to plaintiff's response to summary disposition. He argues that the trial court's consideration of this evidence violated his right to due process because he did not have an opportunity to respond to the evidence. Therefore, he asks this Court to strike this evidence from the record and vacate the trial court's order. Seeing no error, we decline.

This Court reviews de novo questions involving the interpretation of court rules. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007). Likewise, "[w]hether due process has been afforded is a constitutional issue that is reviewed de novo." *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). This Court also reviews de novo questions of subject-matter jurisdiction. *Winkler by Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id*. (quotation marks and citation omitted).

This Court's review is limited to the record developed by the trial court. *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994) (citation omitted); MCR 7.210(A)(1) ("Appeals to the Court of Appeals are heard on the original record."). For that reason, this Court will not consider on appeal evidence not a part of the original record. *Harkins*, 206 Mich App at 323. In this case, plaintiff argues that the evidence attached to defendant's reply at summary disposition was not a part of the record, and the trial court should not have considered this evidence in granting defendant's motion.

There is nothing to suggest that the trial court relied on the evidence attached to defendant's reply in granting summary disposition. In its written opinion and order, the trial court mentioned the documentary evidence in defendant's reply brief only twice, in footnote 1 and footnote 4, merely to provide background information. We see no indication that the trial court relied on these facts in applying the law. Plaintiff argues that the trial court must have looked beyond the complaint, for the only way the trial court could have known that defendant's alleged conduct took place during a worker's compensation proceeding was if it looked at defendant's documentary evidence attached to the reply. Despite plaintiff's assertion, the trial court could have easily gleaned this information from plaintiff's complaint or amended complaint. In both his complaint and amended complaint, plaintiff repeatedly stated that defendant had "taken the position" that plaintiff had engaged in "misconduct" under MCL 418.305, in an effort to deprive plaintiff of "benefits that [defendant] was required to pay under the Michigan Workers' Compensation law . . . ." Although plaintiff did not explicitly state that defendant raised this as a defense in a worker's compensation proceeding, the implication was clear.

Still, even if the trial court did consider the evidence provided with defendant's reply, this was not error. While it is true that "[r]eply briefs must be confined to rebuttal[,]" *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007), this does not suggest that a party may not submit documentary evidence with its reply brief to support its rebuttal. After all, MCR 2.116(G)(2) states that "[e]xcept as to a motion based on subrule (C)(8) or (9), affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion." Therefore, a court must consider materials outside the pleadings when deciding a motion under MCR 2.116(C)(7), *Trowell v Providence Hosp &*

Med Ctrs, Inc, 502 Mich 509, 518-519; 918 NW2d 645 (2018), and when deciding a motion under MCR 2.116(C)(4), *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 714; 909 NW2d 890 (2017), quoting MCR 2.116(G)(5) ("When affidavits, depositions, admissions, or other documentary evidence are submitted with a motion under MCR 2.116(C)(4), they 'must be considered by the court.' "). This requirement is laid out in MCR 2.116(G)(5):

> The affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed in the action or submitted by the parties*, must be considered by the court when the motion is based on subrule (C)(1)–(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9). [(Emphasis added).]

Plaintiff seems to acknowledge that MCR 2.116(G)(5) requires the trial court to look beyond the pleadings when deciding a motion under MCR 2.116(C)(4) or (C)(7). But citing the italicized language of MCR 2.116(G)(5) above, plaintiff argues that MCR 2.116(G)(5) limits a trial court to considering only the evidence attached to, or submitted with, the moving party's motion. Thus, plaintiff argues, the trial court should have been limited to considering only the evidence attached to defendant's motion for summary disposition.

"[W]hen construing court rules, this Court applies the same legal principles that govern the construction and application of statutes." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 376; 775 NW2d 618 (2009). "The mission of a court engaged in statutory construction is to interpret and apply the statute in accordance with the intent of the drafter, which, in the first instance, must be determined from the plain meaning of the language used." *Wardell v Hincka*, 297 Mich App 127, 132; 822 NW2d 278 (2012) (quotation marks and citation omitted). "To ascertain the plain meaning of a term that is not defined by statute or court rule, . . . this Court may consult a dictionary to determine the plain meaning of the term." *Id*. "When consulting a dictionary, this Court should be cognizant of the context in which the term is used." *Id*.

The participle phrase "then filed in the action or submitted by the parties" modifies the nouns that precede it: "[t]he affidavits . . . pleadings, depositions, admissions, and documentary evidence . . . ." MCR 2.116(G)(5). And the adverb "then" plainly modifies "filed" and "submitted." The adverb "then" has multiple meanings depending on what context it is used in; it can mean "at that time," "immediately or soon afterward," "next in order of time or place," "at the same time," "in addition," "in that case, as a consequence; in those circumstances," or "since that it so; as it appears; therefore." *Random House Webster's Collegiate Dictionary* (2d ed), p 1356. In the context of MCR 2.116(G)(5), the only definitions of "then" that make sense would be "at that time" or "at the same time." Yet, even with "then" defined this way, MCR 2.116(G)(5) may still leave room for ambiguity, as the subrule does not specify to what time it is referring.

But two contextual clues resolve any ambiguity. First, MCR 2.116(G)(5) refers to the "affidavits . . . pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the part*ies*," not "the party." MCR 2.116(G)(5) (emphasis added). This indicates that the trial court must consider all evidence submitted by each party, and not just the evidence submitted in a party's original motion. Second, plaintiff's interpretation would not make sense when read in context with the other subrules in MCR 2.116. "[I]t is well-settled that statutes—and accordingly court rules—that relate to the same person or thing, or the same class of

persons or things, or which have a common purpose, should be read together as though constituting one law." *Barnard Mfg Co, Inc*, 285 Mich at 376. Courts "must give effect to every word of a statute if at all possible so as not to render any part of the statute surplusage or nugatory." *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 143; 892 NW2d 33 (2016). For that reason, MCR 2.116(G)(5) must be construed in the context of all the other subrules in MCR 2.116, and must be construed so as not to render any part of MCR 2.116 surplusage or nugatory. See *Barnard Mfg Co, Inc*, 285 Mich App at 376. If MCR 2.116(G)(5) were interpreted to prohibit a court from considering any evidence beyond that attached to, or submitted with, the moving party's motion, then MCR 2.116(G)(4) would be rendered nugatory. When a party files a motion under MCR 2.116(C)(10), MCR 2.116(G)(4) requires the nonmoving party to respond with documentary evidence showing there is a genuine issue of material fact; a party cannot rest upon the allegations or denials in his or her pleading. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). But, under plaintiff's interpretation of MCR 2.116(G)(5), the trial court would not be able to consider documentary evidence in the nonmoving party's response. In effect, the nonmoving party would have no choice but to rest on the allegations or denials in his or her pleadings.

Accordingly, when considering defendant's motion for summary disposition under MCR 2.116(C)(4) and (C)(7), MCR 2.116(G)(5) required the trial court to consider all the documentary evidence submitted to it at the time. The evidence submitted with defendant's reply is a part of the original record before the trial court. See *Harkins*, 206 Mich App at 323; MCR 7.210(A)(1).[1]

Finally, plaintiff argues that allowing the trial court to consider all the documentary evidence would deprive him of due process. Because defendant did not submit this documentary evidence until it filed its reply to plaintiff's response, plaintiff argues he was unable to respond to defendant's proffered evidence.

"Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 28-29; 703 NW2d 822 (2005), citing US Const, Am XIV; Const 1963, art 1, § 17. In civil cases, due process generally requires "notice of the nature of the proceeding, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker." *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480 NW2d 596 (1991) (citations omitted). "Due process is a flexible concept, however, and determining what process is due in a particular case depends on the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected." *By Lo Oil Co*, 267 Mich App at 29.

Plaintiff was afforded all the dictates of due process. Plaintiff's suggestion that he was denied a meaningful opportunity to be heard, because he was unable to respond to defendant's

[1] Of course, this would not be the case when considering defendant's motion through the lens of MCR 2.116(C)(8). See *Maiden*, 461 Mich at 119. Our Supreme Court has declined to answer whether a trial court is limited to a plaintiff's complaint when a defendant moves for summary disposition under both MCR 2.116(C)(7) and (C)(8) in one motion. See *Trowell*, 502 Mich at 518-519.

proffered evidence, is inaccurate. Plaintiff could have sought leave from the trial court to file a supplemental brief. See MCR 2.119(A)(2)(b) ("*Except as permitted by the court* or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.") (emphasis added). Plaintiff could have offered evidence in response at the motion hearing. Had plaintiff done either of the foregoing, the trial court could have entered an order sua sponte granting summary disposition in favor of plaintiff under MCR 2.116(I)(1). Plaintiff fails to explain why the foregoing procedures would have been inadequate. Besides, both below and on appeal, plaintiff has failed to identify what additional evidence he hoped to discover to contest defendant's evidence. Plaintiff merely speculates that he would have found something. Cf. *Maiden*, 461 Mich at 121 ("A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)."). And while summary disposition may be premature if granted before discovery on a disputed issue is complete, a party claiming that summary disposition is premature must "identify[] a disputed issue and support[] that issue with independent evidence." *Meisner Law Group PC*, 321 Mich App at 724 (quotation marks and citation omitted).

To the extent the trial court relied on the evidence attached to defendant's reply in considering defendant's motion under MCR 2.116(C)(4) and (C)(7), it did not err. In fact, MCR 2.116(G)(5) required the trial court to do so. Given that the trial court should have considered defendant's proffered evidence, we consider it when analyzing plaintiff's and defendant's arguments as to the trial court's subject-matter jurisdiction over plaintiff's claim.

B. SUBJECT-MATTER JURISDICTION

On cross-appeal, defendant argues the trial court erred in concluding that it had subject-matter jurisdiction over plaintiff's claim. Defendant argues that plaintiff's claim is barred under the WDCA's exclusive remedy provision, MCL 418.131(1), and thus the trial court should have granted its motion under MCR 2.116(C)(4). We agree.

Jurisdictional questions presented under MCR 2.116(C)(4) are questions of law that this Court reviews de novo. *Meisner Law Group PC*, 321 Mich App at 713. "A motion under Subrule (C)(4) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence." *Id.*, citing MCR 2.116(G)(2). "When affidavits, depositions, admissions, or other documentary evidence are submitted with a motion under MCR 2.116(C)(4), they 'must be considered by the court.' " *Meisner Law Group PC*, 321 Mich App at 714, quoting MCR 2.116(G)(5).

> So, when reviewing a motion for summary disposition brought under MCR 2.116(C)(4) that asserts the court lacks subject-matter jurisdiction, the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. [*Meisner Law Group PC*, 321 Mich App at 714.]

Further, "[w]hen a claim is brought under [MCL 418.131(1)], it is for the court to determine as a matter of law whether the plaintiff has alleged sufficient facts to sustain the intentional tort claim." *Johnson v Detroit Edison Co*, 288 Mich App 688, 696; 795 NW2d 161 (2010). "If sufficient facts

are alleged, then whether the facts are true, and other questions of credibility and the weight of the evidence, become questions for the jury to decide." *Id*.

Under the WDCA, employers provide compensation to employees for personal injuries suffered in the course of employment, regardless of fault. *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000); MCL 418.301. "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." *Clark v United Technologies Auto Inc*, 459 Mich 681, 687; 594 NW2d 447 (1999). "This rule is embodied in the [WDCA's] exclusive remedy provision, MCL 418.131(1)," which this Court looks to when determining whether a trial court has subject-matter jurisdiction over a tort claim arising from a plaintiff's employment. *Herbolsheimer*, 239 Mich App at 240-241. The exclusive remedy provision states:

> 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)].

Hence, the right to recover benefits for personal injury or occupational disease under the WDCA is the exclusive remedy of an employee against an employer who has complied with the act. MCL 418.131(1); *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 63; 658 NW2d 460 (2003); *Johnson*, 288 Mich App at 695-696; *State Farm Mut Auto Ins v Roe (On Rehearing)*, 226 Mich App 258, 265; 573 NW2d 628 (1997). The only exception to this rule is if an employee can prove the employer committed an intentional tort. *Johnson*, 288 Mich App at 696.

The trial court denied defendant summary disposition under MCR 2.116(C)(4), stating that it did not lack subject-matter jurisdiction over plaintiff's claim for intentional infliction of emotional distress. The trial court relied on *Broaddus*, 84 Mich App at 600, which held that the exclusive remedy provision, a former version of MCL 418.131[2], did not bar an action for an

[2] Before May 14, 1987, MCL 418.131 stated as follows:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer. As used in this section and section 827 "employee" includes the person injured, his personal representatives and any other person to whom a claim accrues by reason of the injury to or death of the employee, and "employer" includes his insurer, a service agent to a self-insured employer, and

intentional tort, where the plaintiffs alleged intentional infliction of emotional distress. The Court reasoned that the plaintiffs were not seeking as damages compensation benefits, but rather, separate damages for emotional distress caused by the intentional wrongful denial of compensation benefits. *Id*. at 599. "The essence of the tort alleged, and the damage alleged, is nonphysical." *Id*. at 600.

Defendant argues that the trial court failed to recognize *Cowan v Federal Mogul Corp*, 86 Mich App 619, 621; 273 NW2d 487 (1977), which affirmed summary disposition of the plaintiff's claim for intentional infliction of emotional distress because "[j]urisdiction to determine the compensability of injuries arising out of and in the course of employment is reposed initially in the Workmen's Compensation Bureau." See also *McKinley v Holiday Inn*, 115 Mich App 160, 164-165; 320 NW2d 329 (1982) (distinguishing *Broaddus*, and stating that the nature of the tort alleged was the determining factor in whether the exclusive remedy provision applied; where the claim sounded in negligence, no intentional misconduct was alleged).

Indeed, before the exception for intentional torts was added to the exclusive remedy provision by amendment of the statute in 1987, 1987 PA 28, there was a split in authority on this issue. The Supreme Court recognized this split in *Beauchamp v Dow Chemical Co*, 427 Mich 1, 11; 398 NW2d 882 (1986). The *Beauchamp* Court concluded that actions for intentional torts were not barred by the exclusive remedy provision, and adopted the "substantial certainty" standard for the meaning of "intentional." See *id*. at 20 ("when the employer intended the act that caused the injury and knew that the injury was substantially certain to occur from the act, the employer has committed an intentional tort."). Less than five months after the *Beauchamp* opinion was issued, the exclusive remedy provision was amended to add the intentional tort exception in a "legislative reaction" to the opinion. *Travis v Dreis and Krump Mfg Co*, 453 Mich 149, 164-165; 551 NW2d 132 (1996) (providing an in-depth explanation of the legislative history of MCL 418.131). The trial court relied on *Broaddus*, which was decided before the statute was amended. It is the language of the statute itself that now controls.

Intentional infliction of emotional distress is clearly an intentional tort. This, however, does not end our inquiry. "For purposes of the WDCA, an 'intentional tort' is not a true intentional tort." *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014). Rather, the statute creates a "rigorous threshold for a claim of intentional tort." *Travis*, 453 Mich at 180. To meet the exception, the claim must meet the further criteria in the statute: "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

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> the accident fund insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing workmen's compensation insurance or incident to a self-insured employer's liability servicing contract. [MCL 418.131, as enacted by 1969 PA 317; see also *Olkowski v Aetna Cas & Surety Co*, 53 Mich App 497, 502 n 1; 220 NW2d 97 (1974), aff'd 393 Mich 758 (1974) (quotation marks omitted).]

that knowledge." MCL 418.131(1). Applying this language, the trial court should have concluded that plaintiff's claim was barred under the exclusive remedy provision of the WDCA because there was no genuine issue of fact whether defendant acted intentionally.

To establish that his or her employer committed an "intentional tort," under MCL 418.131(1), "a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury." *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014); MCL 418.131(1). "[W]hen the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. The intent requirement will not be fulfilled by presenting 'disconnected facts possessed by various employees or agents of that corporation . . . .' " *Travis*, 453 Mich at 171-172 (citation omitted). To have acted deliberately, an employer must have acted intentionally and voluntarily. See *id*. at 169 n 7 ("For example, if an employer punches his employee, the punch could be considered deliberate; yet if the employer suffers an involuntary muscle spasm that causes his arm to make contact with his employee, the spasm cannot be considered deliberate."). To prove specific intent, the plaintiff must show (1) the employer acted with the purpose or goal of inflicting an injury; or (2) the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Johnson*, 288 Mich App at 697.

The uncontradicted evidence shows that defendant did not act deliberately. As discussed previously, MCR 2.116(G)(5) required the trial court to consider all the documentary evidence before it in considering whether it had subject-matter jurisdiction. That said, defendant's uncontested evidence—Joseph Clifford's affidavit, Miller's deposition testimony, and Little's deposition testimony—established that defendant's third-party administrator had complete control over whether to defend against or pay out a worker's compensation claim. Defendant did not have any discretion. Even as to the Notice of Discipline, Miller said that he issued this only at the behest of the third-party administrator. Plaintiff offered nothing beyond his pleadings to contradict this evidence. Given that the third-party administrator retained complete control over the handling of the worker's compensation claim against defendant, defendant cannot be said to have acted intentionally or voluntarily. Even if defendant were certain that its defending against plaintiff's worker's compensation claim would injure plaintiff, defendant cannot be said to have willfully disregarded this, for defendant had no agency to try and prevent it.

In sum, plaintiff failed to establish a genuine issue of fact as to whether the intentional tort exception applied. The uncontradicted evidence established that defendant did not act intentionally, so the trial court lacked subject-matter jurisdiction over plaintiff's claim. "A trial court is duty-bound to recognize the limits of its subject-matter jurisdiction, and it must dismiss an action when subject-matter jurisdiction is not present." *Meisner Law Group PC*, 321 Mich App at 714. Subject-matter jurisdiction cannot be waived. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001). Finding that plaintiff's claim is beyond the subject-matter jurisdiction of the trial court, we need not address plaintiff's other claims of error regarding summary disposition under MCR 2.116(C)(7) and (C)(8).

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Michael J. Riordan