STATE OF MICHIGAN

COURT OF APPEALS

DARNELL FUQUA and SHERRY V. FUQUA, jointly and severally,

Plaintiffs-Appellants,

v

ERWIN ROBINSON COMPANY, a Michigan corporation, and INDUSTRIAL RECYCLING SERVICES, INC., a Michigan corporation,

Defendants-Appellees.

UNPUBLISHED
January 21, 1997

No. 186482
LC No. 94-400915-CZ

Before: Cavanagh, P.J., and Reilly and C.D. Corwin,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

Plaintiff argues that the trial court erred in dismissing his claim under the intentional tort claim exception to the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). The Supreme Court has recently clarified the intentional tort exception in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; ___ NW2d ___ (1996). In *Travis*, the Supreme Court held that in order for the exception to apply, an employer must have had actual knowledge that injury was certain to occur. It is not sufficient to allege that the employer should have known, or had reason to believe, that injury was certain to occur. A plaintiff may establish a corporate

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* Circuit judge, sitting on the Court of Appeals by assignment.

employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employee deliberately did or did not do. *Id*. at 173-174. Permitting an unsafe work environment to exist does not rise to the level of an intentional tort. *Id*. at 183.

In the present case, plaintiff was injured when he fell off a narrow ledge while attempting to fasten a tarp on top of one of defendant's trailers. Plaintiff argues that defendant had actual knowledge that injury was certain to occur and wilfully disregarded that knowledge. We disagree. Plaintiff estimated that tarps were placed on defendant's trailers twenty to forty times per day. Plaintiff conceded that employees frequently utilized the ledge to affix a tarp to the trailer without incident. Although plaintiff stated that "practically all" of the employees had fallen off the ledge at some time, he was able to identify only three other individuals who were injured falling off the ledge. Plaintiff further admitted that one of those individuals had actually fallen off a ladder, not the ledge; and another had not fallen at all, but rather had cut his hand on scrap metal while fastening the tarp. Under these facts, we cannot find that defendant had actual knowledge that injury was certain to occur when plaintiff went on the ledge to secure the tarp. See *id*. at 173-174. Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin