STATE OF MICHIGAN

COURT OF APPEALS

KENNETH FELIKS,

Plaintiff-Appellant,

v

DAN MAJOWSKI and HARTMAN AND TYNER, INC., a Michigan corporation, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
April 18, 1997

No. 184246
Oakland Circuit Court
LC No. 94-477685 NI

Before: Marilyn Kelly, P.J., and MacKenzie and J.R. Ernst,* JJ.

PER CURIAM.

Plaintiff, Kenneth Feliks, appeals as of right from a circuit court order granting defendants' motion for summary disposition and denying plaintiff's motion for leave to file a second amended complaint in this personal injury action. We affirm in part and reverse in part.

On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. He asserts that his negligence claims against defendants were not barred by the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1), because, pursuant to the dual capacity doctrine, he was not suing defendants in their capacities as his employer and coemployee, but in their capacities as the negligent owner and negligent driver of a motor vehicle. We disagree.

I

Michigan's dual capacity doctrine recognizes that a plaintiff can bring a negligence action against an employer or coemployee if, at the time of the injury, they occupied a status other than that of plaintiff's employer and coemployee. *Bitar v Wakim,* 211 Mich App 617, 623; 536 NW2d 583 (1995), lv gtd 453 Mich 925; 554 NW2d 915 (1996). (*citing Wells v Firestone Co,* 421 Mich 641; 364 NW2d 670 (1984); *Miller v Massullo,* 172 Mich App 752; 432 NW2d 429 (1988). In applying

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

the dual capacity doctrine to employers, the critical question is whether "the employee-employer relationship is entirely unrelated or only incidentally involved with the cause of action." *Handley v Wyandotte Chemicals Corp*, 118 Mich App 423, 429; 325 NW2d 447 (1982).

In this case, the evidence presented demonstrated that, at the time plaintiff was injured, he was acting in the course of his employment. He was adjusting the blades on a grass edger near a maintenance crew truck while in the course of his employment with defendant Hartman and Tyner, Inc. We find that Hartman and Tyner, Inc.'s identity as the owner of the truck was not completely distinct and removed from its status as plaintiff's employer. *See Handley, supra; Bitar, supra*. Therefore, there was no evidence to support plaintiff's contention that the dual capacity doctrine applies to his negligence claim against Hartman and Tyner, Inc.

Similarly, we also find that there was no evidence to support plaintiff's contention that the dual capacity doctrine applied to his negligence claim against Dan Majowski. In applying the doctrine to a coemployee, the critical question is whether the coemployee's actions were "independent of and not related to the common employment of both [plaintiff and his co-employee]." *Miller, supra* at 760.

The evidence presented in this case established that Majowski was plaintiff's work foreman and that, on the day in question, Majowski and plaintiff were working together. Moreover, the vehicle Majowski was driving was the maintenance truck which Hartman and Tyner, Inc. entrusted to Majowski to carry out his job duties. Thus, none of the evidence presented creates a question as to whether Majowski's act of driving the maintenance truck when plaintiff was injured was independent of and not related to the common employment of Majowski and plaintiff.

II

Next, plaintiff argues that the trial court erred in granting summary disposition as to his intentional tort claims. Plaintiff claims that he presented sufficient evidence to create a question of fact as to whether defendants acted with the intent to injure him. We agree in part. The Michigan's Workers' Disability Compensation Act expressly creates an intentional tort exception to its exclusive remedy provision. MCL 418.131(1); MSA 17.237(131)(1). In order to establish an intentional tort against a coemployee sufficient to create an exception to the exclusive remedy provision, plaintiff must demonstrate that defendant acted with the intent to injure him. *Whaley v McClain*, 158 Mich App 533, 537; 405 NW2d 187 (1987).

Plaintiff presented evidence which established that Majowski did not like plaintiff and had made derogatory comments about plaintiff on numerous occasions. It also established that, although Majowski knew that plaintiff was behind the truck, he backed the truck up rapidly and struck plaintiff. In light of this evidence, we find that plaintiff presented sufficient evidence to create a question as to whether defendant Majowski acted with the intent to injure him. Thus, the trial court erred in granting defendants' motion for summary disposition as to plaintiff's intentional tort claim against Majowski.

The trial court, however, did not err in granting defendants' motion for summary disposition as to plaintiff's intentional tort claim against his employer. Plaintiff must show that his employer was aware of a specific danger which was certain to result in injury to plaintiff and that the employer disregarded the risk and required plaintiff to work in the face of the danger. *Smith v Mirror Lite Co*, 196 Mich App 190, 192-193; 492 NW2d 744 (1992); *LaDuke v Ziebart Corp*, 211 Mich App 169, 172-173; 535 NW2d 201 (1995). It is not enough to show that a risk of injury existed or that someone, but not necessarily the plaintiff, was certain to suffer an injury. *LaDuke, supra* at 173.

Plaintiff's first amended complaint contains no allegation that defendant Hartman and Tyner, Inc. required plaintiff to work in the face of a known danger certain to result in injury. Plaintiff argues that the allegations in his proposed second amended complaint along with the affidavit of Edward Banko establish an intentional tort against his employer.

Reviewing the allegations in the second amended complaint along with the evidence presented, we find that plaintiff has failed to provide sufficient evidence to create a question as to whether Hartman and Tyner, Inc. intended to injure plaintiff. While plaintiff alleged that Majowski was intoxicated, plaintiff presented no evidence which established that Hartman and Tyner, Inc. was aware of this. Plaintiff argues that Majowski's knowledge that he was intoxicated could be imputed to Hartman and Tyner, Inc. This argument lacks merit given this Court's recent holding that "[t]he secret intentions and thoughts of an employee may not be imputed to the employer for purposes of the intentional tort exception to the exclusive remedy provision of the WDCA." *LaDuke, supra* at 174.

Moreover, even assuming that plaintiff could establish Majowski's intoxication and Hartman and Tyner, Inc.'s knowledge of it, he cannot show that his employer knew that the drunk driving was certain to result in an injury to plaintiff. An intoxicated driver poses a general risk that an injury may occur to somebody, somewhere, at sometime as a result of the drivers' erratic operation of the vehicle. However, it is insufficient to establish an intentional tort. *See Agee v Ford Motor Co*, 208 Mich App 363, 367; 528 NW2d 768 (1995); *Pawalak v Redox Corp*, 182 Mich App 758, 453 NW2d 304 (1990). Therefore, we find that plaintiff failed to present sufficient evidence to create a question as to whether his employer intended to injure him. Summary disposition as to plaintiff's intentional tort claim against his employer was properly granted.

III

Lastly, plaintiff argues that the trial court erred in denying defendant's motion for filing a second amended complaint. We disagree. A motion for leave to amend may be denied for a particularized reason including undue delay, bad faith, dilatory motive, repeated failures to cure deficiencies, and futility. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Pursuant to Michigan law, futility of amendment exists where the allegations which the party seeks to add would fail to state a claim. *Early Detection Center, PC v NY Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986).

The allegations contained in plaintiff's proposed second amended complaint, stating that Majowski was intoxicated and that Hartman and Tyner, Inc. knew about it, are insufficient to establish that Hartman and Tyner, Inc. knew that an injury was certain to occur to plaintiff. As previously discussed, an intoxicated driver poses a general risk that an injury may occur to somebody, somewhere, at sometime as a result of the drivers' erratic operation of the vehicle, and it is insufficient to establish an intentional tort. *See Agee, supra; Pawlak, supra*. Thus, we find that the trial court did not abuse its discretion in denying plaintiff's motion for leave to file a second amended complaint, because allowing the amendment would have been futile.

We affirm the trial court's grant of summary disposition as to plaintiff's negligence claim against both defendants and plaintiff's intentional tort claim against defendant Hartman and Tyner, Inc. We reverse as to plaintiff's intentional tort claim against Majowski.

Affirmed in part and reversed in part.

/s/ Marilyn Kelly
/s/ Barbara B. MacKenzie
/s/ J. Richard Ernst