STATE OF MICHIGAN

COURT OF APPEALS

DARL S. WILLIAMS,

Plaintiff-Appellee,

v

ORGANIC CHEMICALS, INC.,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 171299
Kent Circuit Court
LC No. 89-064879-NO

DARL S. WILLIAMS,

Plaintiff-Appellee,

v

AMERISURE INSURANCE COMPANY,

Defendant-Appellant.

No. 176861
Kent Circuit Court
LC No. 93-080231-CZ

DARL S. WILLIAMS,

Plaintiff-Appellee,

v

AMERISURE INSURANCE COMPANY,

Garnishee Defendant-Appellant.

No. 177052
Kent Circuit Court
LC No. 89-064879-NO

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

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

PER CURIAM.

In Docket No. 171299, defendant Organic Chemicals appeals as of right from the trial court's August 4, 1993 judgment in favor of plaintiff in the amount of $588,149.83. In Docket No. 177052, garnishee defendant Amerisure Insurance appeals by right the trial court's July 1, 1994 judgment holding Amerisure liable to plaintiff for the judgment against Organic Chemical, its insured, in the amount of $649,989.66. In Docket No. 176861, defendant Amerisure appeals as of right from a different trial court's June 6, 1994 order dismissing without prejudice plaintiff's declaratory judgment action against Amerisure after the jury rendered a verdict in the underlying case but before Amerisure was found liable to plaintiff on the judgment amount. In these consolidated appeals, we reverse and remand.

Although the appellants raise numerous issues on appeal, we believe that only one issue is dispositive of these consolidated appeals: whether a genuine issue of material fact exists regarding plaintiff's claim that his work-related injuries fall within the intentional tort exception to the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). We find that the trial court erred in denying defendant Organic's motions for summary disposition and directed verdict because as a matter of law under the intentional tort exception plaintiff is not entitled to judgment. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996).

We review de novo the grant of summary disposition pursuant to MCR 2.116(C)(10), examining the entire record, including pleadings, affidavits, depositions, admissions and other documentary evidence, and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire and Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). Once the moving party has shown that no genuine issues of material fact exist, the opposing party has the burden of establishing through evidentiary materials that a genuine issue of disputed fact does exist. *Skinner, supra* at 160. We will uphold the grant of summary disposition if we are satisfied that the claim or defense cannot be proven at trial. *Fitch, supra* at 471.

As our Supreme Court recently observed in *Travis, supra* at 161, "an employee's exclusive remedy for a personal injury or occupational disease is the recovery permitted under the Worker's Disability Compensation Act. The one exception to this recovery scheme is when an employer commits an intentional tort." The intentional tort exception to the WCDA, contained in MCL 418.131(1); MSA 17.237(131)(1), 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.

Defendant Organic contends that there is no evidence that would allow a jury to reasonably infer that it or any of its agents had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge by allowing plaintiff to operate the R-201 modified reactor on September 21, 1988. We agree.

According to §131(1), plaintiff must demonstrate a deliberate act by the employer and a specific intent to injure. *Travis, supra* at 169; *Smith v General Motors Corp,* 192 Mich App 652, 655; 418 NW2d 819 (1992). Specific intent is established if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *McNees v Cedar Springs Stamping Co,* 219 Mich App 217, 224; 555 NW2d 481 (1996), citing *Travis, supra* at 171, 173; Constructive, implied, or imputed knowledge is not sufficient to establish actual knowledge by the employer. *McNees, supra,* citing *Travis, supra* at 173. To support these conclusions, plaintiff must prove a specific danger known to the employer that was certain to result in an injury and must prove that the employer required the plaintiff to work in the face of that danger. *Smith, supra*. Notably, however, a plaintiff's claim of unsafe working conditions does not satisfy the intentional tort exception to the WDCA's exclusive remedy provision because such a claim merely asserts that the employer was negligent. *Benson v Callahan Mining Corp*, 191 Mich App 443, 447-448; 479 NW2d 12 (1991) (Sawyer, J, concurring). It is a question of law for the court whether the facts as alleged in the complaint are sufficient to constitute an intentional tort, while the truth of the facts alleged is a question for the jury. *Travis, supra.* at 154.

Our Supreme Court conducted its most recent review of the intentional tort exception in *Travis, supra*. In the first of two consolidated cases in *Travis*, Sue Travis was injured when the press she was operating "double cycled," i.e., cycled without the plaintiff pressing the palm buttons to activate the machine. As a result, Travis' hands were severely injured and she lost both of her fifth fingers to amputation. *Id.* at 155. Although Travis was unaware, the company knew that the press had been malfunctioning for approximately one month and had made attempts to correct the double-cycling problems. *Id.* at 155-156.

In the companion case, Stanislaw Golec was assigned to load scrap metal into a furnace. Golec testified that he was not instructed to separate out all closed cans from the scrap before loading into the furnace of molten metal, which resulted in an explosion late one evening that slightly burned him with molten aluminum. *Id.* at 157-158. Golec told his supervisor that a closed aerosol can or wet scrap must have caused the explosion, but the supervisor told Golec to keep working. Approximately four hours later, Golec was showered with molten aluminum when the scrap metal furnace exploded, severely burning Golec over 30% of his body. *Id.* at 158-159. In both cases, the trial courts granted the defendants' motions for summary disposition pursuant to MCR 2.116(C)(10) because the plaintiffs failed to establish that the defendants fell within the intentional tort exception to the WDCA. *Id.* at 156, 159-160.

In an opinion by Justice Boyle, joined by Justice Mallett, and in an opinion by Justice Riley, joined by Chief Justice Brickley and Justice Weaver, the Supreme Court held that Travis failed to present sufficient facts to establish an intentional tort, although the Justices were divided as to whether the facts pleaded in *Golec* demonstrated an intentional tort. *Id.* at 180-187, 191-192. In her lead opinion, Justice Boyle stated that the intentional tort exception required (1) actual knowledge by the employer, usually through an agent, (2) proof that an injury was certain to occur, which requires more than a substantial certainty, and (3) willful disregard of the danger, requiring proof of something more than mere negligence:

> Because the purpose of the entire second sentence [of §131] is to establish the employer's intent, we find that the use of the term "willfully" in the second sentence is intended to underscore that the employer's act or failure to act must be more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur. [*Id.* at 178-179.]

Applying these tests, Justice Boyle held that Travis had proven that her employer had "actual knowledge" because a supervisor knew about the malfunctioning press. *Id.* at 181. The supervisor did not, however, know that injury was certain to occur. Indeed, he had worked the press before Travis did, and even when the press double cycled, most operators were able to remove their hands prior to injury. *Id.* at 182. Even assuming that the supervisor knew that injury was certain to occur, Justice Boyle believed that Travis could not prove that the supervisor willfully disregarded that information because he took steps he thought were sufficient to prevent the harm. *Id.* at 182-183.

Regarding Golec, however, Justice Boyle found that he had pleaded sufficient facts to establish a genuine issue of material fact regarding whether his employer committed an intentional tort, so summary disposition was improper. *Id.* at 184. Golec alleged that his supervisor was aware of the danger yet Golec was instructed to keep loading the scrap, even though everyone knew that aerosol cans and wet scrap could explode. *Id.* at 184-186. Justice Boyle also found that Golec had proven the existence of a continually operative dangerous condition justifying the inference that an injury was certain to occur. *Id.* at 186. Golec's allegations further created a genuine issue regarding whether his employer willfully disregarded the certain danger to him because the employer failed to take any steps to remedy the situation that caused the earlier explosion. *Id.* at 186-187.

Justice Riley, along with Chief Justice Brickley and Justice Weaver, agreed with the intentional tort test that Justice Boyle established and concurred that Travis did not meet the test. These Justices believed, however, that Golec failed to allege sufficient facts to satisfy the test because "the employer simply did not have actual knowledge that an injury was certain to occur." *Id.* at 192. Justice Levin, joined by Justice Cavanagh, concurred with Justice Boyle's decision in *Golec* but dissented from the result in *Travis*. *Id.*. at 192. Justice Levin determined that §131(1) does not require a 100% probability that an action will cause injury; rather, the term "certain" in the statute must mean some unacceptably high but not complete risk, higher than substantial certainty but less than absolute certainty. *Id.* at 195.

In the case at bar, we find that plaintiff has failed to satisfy the *Travis* test for establishing the intentional tort exception to the WDCA's exclusive remedy provisions. Plaintiff alleged and presented proof to the jury that the plant manager undisputedly had actual knowledge, based upon plaintiff's annual company-sponsored medical examination, that plaintiff's enzyme levels were elevated indicating possible liver function problems. He also had actual knowledge that plaintiff needed to be protected from exposure to chemical vapors, particularly chlorinated solvents. Nevertheless, plaintiff was allowed to operate the R-201 reactor, even though the reactor was used to distill chlorinated solvents that could potentially expose plaintiff to chlorinated solvent vapors.

Notably, however, there is no evidence that the R-201 reactor or any other similar reactor malfunctioned, or that the discharge of any noxious fumes from the operation of the reactor occurred before plaintiff was exposed to the vapors on September 21. Indeed, plaintiff operated the reactor on September 20 and experienced no vapors or problems. Even viewing the evidence in a light most favorable to plaintiff, we question whether plaintiff's allegations or his evidence at trial support the conclusion that Organic, through the plant manager, had actual knowledge of a dangerous condition, i.e., that plaintiff was being exposed to chlorinated vapors, and that an injury would follow from what the employer deliberately did or did not do. *Travis, supra* at 173-174; *McNee, supra* at 224.

Moreover, the evidence does not justify the conclusion that Organic knew that an injury was certain to occur and willfully disregarded that knowledge. The R-201 reactor had been used from 1979 through approximately 1987 to manufacture chemicals. Between 1987 and a few months prior to September 20, 1988, the reactor was not used until it was converted into a distilling unit and was so used for the first time on September 20, 1988 without incident.[1] There was no evidence that Organic knew that the wind was blowing from the west while plaintiff was operating the reactor and that an injury to plaintiff was certain to occur because he would be exposed to the chlorinated vapors as a result, even if there had been such an occurrence on one prior occasion. *Id.* at 182. Also, as with *Travis*, plaintiff was not required to confront a continually operating dangerous condition because the reactor was operated previously without incident. *Id.* Stated otherwise, plaintiff was not subjected to certain risk of injury every time he operated the reactor.

Additionally, plaintiff argues that Organic knew or should have known that because the R-201's exhaust stack was too short, lacked a carbon filter, and the walls of the building were porous sheet metal, winds, particularly westerly winds, would force vapors exiting the stack back into the building through the walls. We believe that, if true, this evidence might demonstrate at best that Organic was negligent or grossly negligent, not that it specifically intended to cause harm. It does not establish that Organic "willfully disregarded" that information or plaintiff's health situation and ordered plaintiff to operate the reactor because it specifically intended to injure him. *Id.* at 182-183.

In conclusion, plaintiff is unable to establish that his employer willfully disregarded actual knowledge that an injury to plaintiff was certain to occur. Thus, in light of our Supreme Court's decision in *Travis, supra*, the trial court erred in denying Organic's motion for summary disposition and denying its motion for directed verdict. We therefore reverse the judgment against Organic and remand for entry of a judgment of no cause of action in Docket No. 171299.

In light of our analysis regarding Organic's success on the merits regarding the intentional tort exception to the WDCA, we believe it is unnecessary to address the remaining issues raised on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ James C. Kingsley

[1] Although plaintiff's counsel represented to this Court at oral argument that operation of the R-201 on September 19, 1988 resulted in an incident where noxious fumes came back into the facility, we find no reference to this event in any of plaintiff's briefs on appeal or in the record. In fact, it appears that plaintiff was the first person to operate the newly revamped R-201 reactor on September 20, 1988 without incident. If such an accident had occurred, we trust that plaintiff would have cited us to the specific trial transcript pages and other evidence supporting this alleged damaging testimony.