# STATE OF MICHIGAN

# COURT OF APPEALS

---

DIANE McMULLEN, BEVERLY HENEGAR, JODY McMULLEN, SHIRLEY M. MONDAY, CASPER C. MONDAY, CASPER W. MONDAY, JR., TINA MARIE DEATON MONDAY, and JAMES C. DEATON,

Plaintiffs-Appellants,

v

CLASSIC CONTAINER CORPORATION, RIVER RAISIN SPECIALTIES, DON BEEBE, ALAN MENTAL, LARRY DORAZIO, and HARRY DZIERBICKI,

Defendants-Appellees.

UNPUBLISHED
July 15, 1997

No. 181339
Monroe Circuit Court
LC No. 93-001558-CZ

---

Before: Young, P.J., and Corrigan and M. J. Callahan*, J.

PER CURIAM.

Plaintiffs appeal from the circuit court's order dismissing their tort claims against defendants arising from exposure to asbestos in the workplace. Plaintiffs Diane McMullen and Shirley M. Monday (McMullen and Monday) are employees of defendant River Raisin. The remaining plaintiffs are family members of McMullen and Monday who reside with them. Defendant Classic Container Corporation and the remaining defendants[1] participated in the removal of asbestos from River Raisin's building. According to plaintiffs' complaint, the improper removal work performed by defendants resulted in all plaintiffs being exposed to asbestos fibers.

Plaintiffs sued defendants for 5 counts of negligence per se for violating various legal requirements regarding asbestos removal,[2] in addition to counts alleging simple negligence, strict liability for abnormally dangerous activities, and respondeat superior liability for the negligence of their employees. The trial judge granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) and (8), finding that plaintiffs' complaint had not alleged facts which would avoid the exclusive remedy provision of §131(1) of the Workers' Disability Compensation Act, MCL

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

418.131(1); MSA 17.237(131)(1), that the family-member plaintiffs were not members of the class which the statutes were designed to protect, and that asbestos removal was not an abnormally dangerous activity for which defendants could be found strictly liable. Plaintiffs moved to amend their complaint and for reconsideration, which the trial judge denied. We now reverse in part and affirm in part.

I.

Plaintiffs argue that the trial court erred by finding McMullen's and Monday's claims barred by the exclusive remedy provision of §131(1). We affirm the trial court's dismissal of McMullen's and Monday's claims against defendant River Raisin. We reverse the trial court's dismissal of McMullen's and Monday's claims against defendants Classic Container, Beebe, Dorazio, Mental, and Dzierbicki.

Plaintiffs assert that their complaint and affidavits alleged sufficient facts to bring their claims within the intentional tort exception to §131(1), claiming that the facts showed that River Raisin had actual knowledge that injury was certain to occur and willfully disregarded that knowledge. We disagree. Plaintiffs allege only that defendant River Raisin knew that asbestos posed health hazards and that its removal work exposed McMullen and Monday to asbestos. There is no indication that River Raisin had actual knowledge that an injury was certain to occur under circumstances indicating a deliberate disregard of that knowledge. *Travis v Dreis & Krump Mfg*, 453 Mich 149, 180; 551 NW2d 132 (1996); *Palazzola v Karmazin Prods Corp*, __ Mich App __; __ NW2d __ (No. 180033, rel'd 4/22/97). The fact that River Raisin may have known of the general risks posed by asbestos removal is not sufficient to establish actual knowledge of certain injury. *Agee v Ford Motor Co*, 208 Mich App 363, 366-367; 528 NW2d 768 (1995).

However, our review of the record reveals nothing which would indicate that the remaining defendants were either McMullen's and Monday's employer or co-employees under the exclusive remedy provisions of MCL 418.131(1); MSA 17.237(131)(1) and MCL 418.827(1); MSA 17.237(131)(827)(1). We therefore reverse the trial court's dismissal of McMullen's and Monday's claims against the remaining defendants. On remand the trial court must determine whether Classic Container is plaintiffs' employer under the "economic reality" test and therefore protected by the exclusive remedy provision of §131(1). *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 646-650; 364 NW2d 670 (1984); *Isom v Limitorque Corp*, 193 Mich App 518, 521-523; 484 NW2d 716 (1992). The trial court should also determine whether defendants Mental, Beebe, Dorazio, and Dzierbicki are co-employees of McMullen and Monday and therefore immune from suit under §131(1) and MCL 418.827(1); MSA 17.237(131)(827)(1). *Holody v City of Detroit*, 117 Mich App 76, 80-82; 323 NW2d 599 (1982).

II.

Plaintiffs argue that the trial judge erred by dismissing the family-member plaintiffs' claims for negligence per se and ordinary negligence. We affirm the trial court.

Plaintiffs assert that the trial court erred by finding that the family-member plaintiffs were not members of the class which MIOSHA and OSHA[3] were designed to protect. We disagree. The express language of OSHA and MIOSHA states that they are designed to protect employees

by reducing safety and health hazards at places of employment. 29 USC 651(a), (b)(1); MCL 408.1011(1)(a); MSA 17.50(11)(1)(a); *Swartz v Dow Chemical Co*, 414 Mich 433, 438 n 3; 326 NW2d 804 (1982). The family-member plaintiffs were not in the class intended to be protected by MIOSHA and OSHA, and so cannot rely upon violations of those statutes to establish negligence. *Klanseck v Anderson Sales*, 426 Mich 78, 87; 393 NW2d 356 (1986); *Zeni v Anderson*, 397 Mich 117, 138; 243 NW2d 270 (1976).

Plaintiffs further argue that the trial judge erred by dismissing the family-member plaintiffs' count of ordinary negligence. We find no error. Plaintiffs' negligence claim was based upon the aforementioned statutory violations and the fact that defendants' asbestos removal activities exposed them to asbestos dust brought home by McMullen and Monday. Under the facts asserted we find that defendants owed no duty to the family-member plaintiffs. *Rogalski v Tavernier*, 208 Mich App 302, 305-306; 527 NW2d 73 (1995); *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 133-135; 517 NW2d 289 (1994).

III.

Plaintiffs claim that the trial court erred by dismissing their strict liability claim. We disagree. The facts asserted by plaintiffs do not show that defendants were engaged in an abnormally or inherently dangerous activity which would subject them to strict liability. *Williams v Detroit Edison Co*, 63 Mich App 559, 571-572; 234 NW2d 702 (1975); 3 Restatement Torts, 2d, §520, p 36.

IV.

Plaintiffs argue that the trial court erred by denying their motion to amend their complaint and by entering an order submitted under the 7-day rule over plaintiffs' objection. Reversal is not required. Plaintiffs did not offer any additional facts or theories which would cure the deficiencies in their complaint, so amendment would be futile. The trial court properly denied plaintiffs' motion to amend. MCR 2.118(A)(2); *Formall v Community Nat'l Bank*, 166 Mich App 772, 783; 421 NW2d 289 (1988). Although plaintiffs objected that the proposed order did not comply with the court's decision, they provided no explanation of the manner in which the order did not comply. Any error in entering the proposed order without a hearing was harmless. MCR 2.613(A).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

[1] Although plaintiff's complaint originally alleged that Mental was employed by River Raisin and that Beebe, Dorazio, and Dzierbicki were employed by Classic Container, subsequent discovery revealed that they were employed by a third entity, First Street Rentals.

[2] MCL 408.1059a; MSA 17.50(59a), MCL 408.1060a; MSA 17.50(60a); MCL 408.1060d; MSA 17.50(60d); MCL 408.1011; MSA 17.50(11); and 29 CFR 1926.58(f)(1).

[3] Michigan Occupational Safety and Health Act, MCL 408.1001 et seq; MSA 17.50(1) et seq; and the federal Occupational Safety and Health Act, 29 USC §651 et seq, respectively.