STATE OF MICHIGAN

COURT OF APPEALS

ROSEMARY BURTON, Personal Representative of the Estate of LAWRENCE SMITH, Deceased,

Plaintiff-Appellee,

v

EDWARD C. LEVY COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 31, 1998

No. 200142
Wayne Circuit Court
LC No. 93-335202 NO

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals by leave granted from that portion of the trial court order denying its motion for summary disposition pursuant to MCR 2.116(C)(10).[1] We previously reversed the trial court's denial of defendant's motion for summary disposition. See *Burton v Edward C Levy Co*, unpublished order of the Court of Appeals, entered May 19, 1995 (Docket No. 185088). The Supreme Court then remanded this case to this Court for reconsideration in light of its decision in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996). *Burton v Edward C Levy Co*, 453 Mich 962 (1996). We again reverse.

Defendant argues on appeal that the trial court erred in denying its motion for summary disposition in its entirety because plaintiff failed to establish a cause of action for intentional tort in avoidance of the exclusive remedy of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). 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. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

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 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. *Travis*, *supra* at 173-174. Mere knowledge that a dangerous condition exists is not sufficient; rather, the employer must have actual knowledge that injury is certain to result. *Id*. at 179. 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 has not presented evidence that defendant engaged in a deliberate act that caused, or consciously failed to act to prevent, a known and certain injury. No managerial employee was aware that the decedent had entered the hopper in violation of standing instructions. Plaintiff claims that employees regularly did enter the hopper, and that no one was ever disciplined for violating the rule. However, evidence that employees climbed into hoppers to free slag plugs on a regular basis, without any identification of injuries consistently occurring thereby, merely contradicts plaintiff's claim that the injuries sustained by the decedent were certain to occur. Cf. *id*. at 182.

Plaintiff also argues that an intentional tort is established by defendant's failure to timely implement safety regulations regarding the hopper. However, such evidence at most establishes that defendant was negligent. Mere negligence in failing to protect a person from an appreciable risk of harm is not sufficient to satisfy the intentional tort exception. *Id*. at 179; *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 157; 565 NW2d 868 (1997). Because plaintiff has not established that defendant had actual knowledge of an injury certain to occur and that defendant disregarded that knowledge, we conclude that the trial court erred in denying defendant's motion for summary disposition.

Finally, plaintiff claims that further discovery is needed. Because the trial court did not address this issue, it is not preserved for appellate review, and we decline to review it. See *McCready v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997). In any case, plaintiff has made no showing that there is a fair chance of uncovering factual support for opposing the motion for summary disposition. See *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996).

Reversed and remanded for proceedings consistent with this opinion. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad

[1] Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court did not indicate under which subrule it granted defendants' motion. However, because the trial court appears to have considered documentary evidence in addition to the pleadings, we presume that the trial court's

decision was made pursuant to MCR 2.116(C)(10). See MCR 2.116(G)(5); *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995).