STATE OF MICHIGAN

COURT OF APPEALS

JAMES C. ADAMS, Individually and as Personal Representative of the Estate of JACQUELINE ADAMS, Deceased,

Plaintiff-Appellant,

v

STAR SCREW PRODUCTS, INC., ERNEST BUFORD PORTER TRUST, KENNETH PORTER, EDITH LAWRENCE and THE ACCIDENT FUND COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 6, 1998

Nos. 201568;201885
Wayne Circuit Court
LC Nos. 94-426739 NO;
96-600954 NO

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Plaintiff James C. Adams appeals as of right from the December 6, 1996, order granting summary disposition for defendant Star Screw Products, Inc., pursuant to MCR 2.116(C)(10). Plaintiff also appeals as of right from the May 22, 1996, order granting summary disposition entered in favor of defendant Accident Fund Company pursuant to MCR 2.116(C)(7). Further, plaintiff appeals as of right from the February 21, 1997, order granting summary disposition entered in favor of defendants Ernest Buford Porter Trust, Kenneth Porter and Edith Lawrence. Pursuant to this Court's own motion, these cases have been consolidated on appeal. We affirm.

Defendant Star Screw Products, Inc. ("Star Screw") is a machine shop that makes screw products for the automotive industry from steel rods of varying diameters. Defendants Porter and Lawrence manage Star Screw and each owns fifty percent of the corporation's stock. Defendant Ernest Buford Porter Trust ("Trust"), through its trustees, defendants Porter and Lawrence, leases the land, building and parking lots to Star Screw. Defendant The Accident Fund Company is Star Screw's worker's compensation insurance carrier.

Plaintiff was employed by Star Screw for thirty-two years as a screw machine operator. On May 6, 1993, a stack of empty steel racks fell on plaintiff while he was working, causing injury to his head, neck, back and arms. The steel racks, purchased by defendant in the 1960s, are used to store bundles of steel weighing 4,000 to 4,500 pounds. The steel racks weigh approximately fifty pounds each and resemble an upside-down four-legged table, with the end of each upward-pointing leg locking into an opening in the rack immediately above it. According to plaintiff, he was assisting the crane operator in moving a bundle of steel rods that was located on a rack adjacent to an unstable stack of empty racks piled against the wall. Plaintiff claims that either he or the bundle of steel rods that was being moved, bumped the pile of empty racks, causing them to tumble down on him. As a result of his injuries, plaintiff brought a claim against defendant under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (the act), MCL 418.131(1); MSA 17.237(131)(1).[1]

Generally, the right to recover benefits for personal injury or occupational disease under the act is the exclusive remedy of an employee against an employer who has complied with the act. MCL 418.131(1); MSA 17.237(131)(1); see also *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 510; 563 NW2d 214 (1997). However, the exclusive remedy provision does not apply to claims arising from intentional torts. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 161 (Boyle, J.), 191-192 (Riley, J.); 551 NW2d 132 (1996). The exclusive remedy provision, MCL 418.131(1); MSA 17.237(131)(1), provides in part:

> An intentional tort shall exist only when a 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.

In *Travis*, *supra* at 169-179, our Supreme Court construed the act's intentional tort exception and outlined the proofs necessary to qualify under the exception. The Court interpreted the words "deliberate act," as used in the first sentence, to include both affirmative acts and omissions in which an employer consciously fails to act. *Id*. at 169-170. The Court interpreted the phrase "specifically intended an injury" as requiring that an employer must have had the particular purpose of inflicting an injury upon his employee. *Id.* at 171-172. When the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. *Id.* Our Supreme Court held that the first sentence of the exception sets forth the general requirements, that the employer acted deliberately or failed to act with a specific intent to injure the employee, while the second sentence presents one method of proving the specific intent requirement of the first sentence. *Id*. at 172-173. The Court stated that the second sentence will be used when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence. *Id*. at 173.

Our Supreme Court further stated in *Travis* that the phrase "actual knowledge," as used in the second sentence of the exception, could not be satisfied by constructive, implied or imputed knowledge. Nor is it sufficient to claim that an employer should have known, or had reason to believe that an injury was certain to occur. *Id*. When the employer is a corporation, a plaintiff may establish actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury

would result from the employer's deliberate act or omission. *Id*. at 173-174. The Court further stated that the phrase "certain to occur" contained in the second sentence sets forth an extremely high standard that cannot be satisfied by the laws of probability, the prior occurrence of a similar event, or the conclusory statements of an expert. *Id*. at 174-175. Furthermore, it is not enough that an employer know that a dangerous condition exists; rather, the employer must be aware that an injury is certain to result from what the actor does. *Id*. at 176. Finally, the Court stated that the phrase "willfully disregards" requires more than negligence on the part of the employer; the employer must disregard actual knowledge that an injury is certain to occur. *Id*. at 178-179.

Considering the above principles of proof, this Court must determine whether the trial court properly granted summary disposition in favor of defendant Star Screw. Whether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the court, but whether the facts are as plaintiff alleges is a question for the jury. *Id*. at 188. The trial court concluded that plaintiff did not meet the actual knowledge requirement and, thus, granted summary disposition in favor of defendant. Review of a motion for summary disposition is de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Id*. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, granting the party the benefit of any reasonable doubt, and determine whether there is a genuine issue of disputed fact. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

On appeal, plaintiff claims that defendant Star Screw's intent can be inferred using the second sentence of the exception. Plaintiff argues that he set forth sufficient facts to establish that defendant's owners, Kenneth Porter and Edith Lawrence, had actual knowledge that the legs of the steel racks were bent and warped, that an injury was certain to occur from the unstable stacks of steel racks, and that they willfully disregarded that knowledge. With regard to the "actual knowledge" element, plaintiff stated in his affidavit that he informed Porter on numerous occasions over a period of at least ten years that the bent racks, and the manner in which they were arranged, created a continuous danger to him and other employees in the plant. According to plaintiff, Porter assured him that he would take care of the problem, but he never did. Plaintiff also argues that because Porter was admittedly familiar with the area of the plant in which the steel was stored, he could observe the problem himself.

Other employees of defendant also testified at deposition that they complained about the unstable steel racks. John Oliver, a screw machine operator at Star from 1984, until he was laid off in September 1993, testified that he believed the racks to be dangerous, and that he mentioned the problem to Porter. Larry Adkins, another former Star employee, testified at deposition that he also complained to Porter several times about the bent racks. Porter told Adkins that he would try to get some new racks, but suggested that they try to correct the old ones by pounding the legs back into place with a hammer. Adkins stated that they were not very successful in manipulating the legs back into locking position; consequently, the racks continued to lean most of the time. Adkins testified that on one occasion in the 1970's, he was unloading steel onto the racks when the rack bent over, causing the load of steel to slide onto his foot. Adkins claimed that the accident occurred because the racks were not locked together properly, that Porter had "actual knowledge" that many of the steel racks had

bent legs and were unstable. Therefore, the trial court erred to the extent that it granted summary disposition on the ground that defendant did not have actual knowledge of the dangerous condition. We believe plaintiff is correct on this claim of error, however it is not dispositive.

Next, plaintiff was required to show that "injury was certain to occur." Plaintiff claims that because the dangerous condition was continuous over many years, and Porter was aware of the potential for injury from the unstable racks, the injury was certain to occur. Plaintiff argues that the certainty of injury was enhanced by the fact that defendant never provided any safety instruction to employees working in the steel storage area and never did anything to repair or replace the bent racks. Defendant Star Screw claims that the lack of a previous similar accident defeats any argument that the injury was certain to occur. Just because something has never happened before is not proof that it is not certain to occur, *Travis, supra* at 174; nevertheless, we do not find that plaintiff met the high standard intended by the Legislature for this element. It is not enough that Porter knew that the bent racks created a dangerous condition; rather, he had to be aware that injury was *certain* to occur from plaintiff's actions. *Id*. at 176. At best, the evidence in this case supports a conclusion that the bent steel racks posed a foreseeable danger to employees working in the steel storage area. Mere negligence by failing "to act to protect a person who might foreseeably be injured by an appreciable risk of harm" does not satisfy the intentional tort exception. *Id.* at 178-179.

Because plaintiff failed to establish that Porter knew that the injury was "certain to occur," the trial court properly granted summary disposition in favor of defendant Star Screw. Although the trial court's reasoning was incorrect, this Court will not reverse when the right result was reached for the wrong reason. *Samuel D Begola Services, Inc v Wild Brothers*, 210 Mich App 636, 640; 534 NW2d 217 (1995).

As to plaintiff's remaining claims against Ernest Buford Porter Trust, Kenneth Porter, Edith Lawrence, and the Accident Fund Company, since we find that plaintiff has failed to meet the intentional tort threshold as outlined in *Travis, supra*, we need not address plaintiff's remaining issues on appeal as was conceded by appellant's counsel at oral argument.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] Plaintiff's wife, Jacqueline Adams, also brought a claim for loss of consortium. Mrs. Adams died in December 1996, and plaintiff has been appointed her personal representative.