STATE OF MICHIGAN

COURT OF APPEALS

CONNIE J. PISCHKE, as Personal Representative of the Estate of FREDERICK E. PISCHKE, Deceased,

Plaintiff-Appellant,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 17, 1998

No. 199952
Wayne Circuit Court
LC No. 95-533451 NO

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court concluded that plaintiff had failed to establish that defendant committed an intentional tort that would permit plaintiff to avoid the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). We affirm.

Plaintiff's decedent was an experienced electrician who worked at defendant's power plant as a supervisor of fuel supply maintenance. The power plant utilizes coal as fuel to generate electricity, and substantial amounts of coal are moved around the plant using bulldozers and conveyor belts. The decedent's job responsibilities included acting as a protection leader, meaning that it was his responsibility to ensure that repair work undertaken by independent contractors was safely performed. As protection leader, the decedent was not authorized to actually perform needed protections, but only to approve the method of protection selected by the plant operator, who also performed the protections.

On April 5, 1995, the decedent and Gary Carl, the plant operator, were involved in providing electrical safety protection for a contractor defendant had hired to repair a conveyor belt. Carl and the decedent met in the stacker house electrical room so that the decedent could approve the protection method chosen by Carl, and Carl could actually provide the protection. Carl experienced difficulty in "tagging out" the 4160-volt contactor, a type of electrical switch that controlled the conveyor belt's motor. The decedent then looked inside the contactor cabinet and stated, "I see an open break, let's

pull the fuses." Before Carl could respond, the decedent pulled the fuses and was electrocuted. An investigation report prepared by defendant concluded that when the decedent pulled the fuses, he dislodged coal dust contamination, which resulted in a fault or short circuit that caused the electrocution.

Plaintiff contends that the trial court erred when it ruled that no genuine issue of material fact existed regarding whether defendant committed an intentional tort under the WDCA. We review de novo the trial court's grant of summary disposition. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). In determining the propriety of summary disposition pursuant to MCR 2.116(C)(10), a court must examine whether the kind of record that might be developed will leave open an issue on which reasonable minds might differ. *Id*.

Generally, WDCA benefits are an injured employee's exclusive remedy against an employer who has complied with the act. MCL 418.131(1); MSA 17.237(131)(1). The exclusive remedy provision does not apply, however, to intentional tort claims.

> 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. [MCL 418.131(1); MSA 17.237(131)(1).]

A deliberate act may be one of comission or omission. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 169-170, 191; 551 NW2d 132 (1996). Specific intent to injure exists only when an employer had in mind a conscious purpose to bring about consequences causing the plaintiff injury. *Id*. at 171. When the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. *Id*. at 171-172. Where, as here, there is no direct evidence of the employer's intent to injure, a plaintiff may establish this intent by showing that the employer (1) had actual knowledge (2) an injury was certain to occur, and (3) willfully disregarded that knowledge. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997).

In the instant case, it is undisputed that the decedent was fully aware of plant safety procedure, yet acted outside his authority and company policy regarding his position at the time he was killed in attempting to perform the protection measures recommended by the plant operator. No one directed the decedent to remove the fuses that were involved in his electrocution, and unwritten company policy for tagging out the contactor did not involve removing the fuses. Defendant could not have intended that the decedent be injured performing tasks that it had forbidden him from assuming. Because the undisputed facts fail to establish that defendant intended that plaintiff suffer injury, we conclude that the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

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