STATE OF MICHIGAN

COURT OF APPEALS

RICHARD SARCHENKO,

Plaintiff-Appellant,

v

J. SLAGTER & SON CONSTRUCTION COMPANY and WWA, INC.,

Defendants-Appellees,

and

WALTER TOEBE CONSTRUCTION CO., C.A. HULL CO., INC., POSEN CONSTRUCTION CO. and FLOCKNER CONSTRUCTION COMPANY,

Defendants.

UNPUBLISHED
April 9, 1999

No. 201183
Washtenaw Circuit Court
LC No. 94-1352 NO

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff presented evidence that defendant J. Slagter & Son Construction Company ("Slagter") contracted with the Michigan Department of Transportation ("DOT") to perform certain highway projects and subcontracted with defendant WWA, Inc. ("WWA") to perform portions of the projects. Plaintiff presented evidence that defendant WWA employed him to sandblast lead paint from highway bridges during the spring and summer of 1992, during which time he was diagnosed as suffering from "lead toxicity" and placed under a doctor's order to avoid lead. Plaintiff presented further evidence that

after receiving the doctor's order, defendant WWA assigned him to work cleaning up an area containing lead dust. Plaintiff testified that he consulted his doctor who advised him not to return to work.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). The courts are liberal in finding a genuine issue of material fact, with all inferences drawn in favor of the nonmovant. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

First, plaintiff argues that defendant Slagter owed him a duty under its contract with DOT to protect him from physical harm and failed to exercise reasonable care in the performance of the contract, the terms of which required Slagter to comply with all applicable laws governing safety. We disagree. Defendant Slagter does not owe any duty to plaintiff, because he is not the party intended to be benefited by Slagter's contract with DOT. See 2 Restatement Torts, 2d, § 324A; *Courtright v Design Irrigation, Inc*, 210 Mich App 528, 529-531 (1995). Rather, plaintiff received only an incidental benefit from defendant Slagter's contract with DOT. See *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 427-428; 543 NW2d 31 (1995). Accordingly, we affirm the trial court's order granting summary disposition to defendant Slagter, even though that court did not address the threshold issue of whether Slagter's contract with DOT created a duty. This Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Second, plaintiff argues that his employer, defendant WWA, is liable for committing an intentional tort under the Worker's Disability Compensation Act, MCL 418.131; MSA 17.237(131) ("§ 131"). We disagree.

Although the disability benefits provided under § 131 are the exclusive remedy for work-related injuries, the exclusive remedy provision does not apply to claims arising from intentional torts. *Palazzola v Karmazin Products*, 223 Mich App 141, 147; 565 NW2d 868 (1997); MCL 418.131; MSA 17.237(131). MCL 418.131; MSA 17.237(131) provides:

> 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.

In order to prevail, plaintiff must show that defendant WWA committed a deliberate act, specifically intended an injury or, alternatively, willfully disregarded actual knowledge that an injury was certain to occur. *Id.* at 149-150. In the absence of direct evidence of intent to injure, as an alternative, plaintiff can establish specific intent to injure by circumstantial evidence. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173 (Boyle, J), 192 (Riley, J); 551 NW2d 132 (1996). Under this alternative method of proof, plaintiff must show that a supervisory or managerial employee of defendant WWA had actual knowledge that an injury would follow from the action, that the injury was certain to occur as a result of the action and that said employee disregarded actual knowledge that injury was certain to occur. *Palazzola, supra,* 149-150.

In the present case, neither party disputes that defendant WWA committed a deliberate act when its employees ordered plaintiff to sandblast lead paint from highway bridges and perform cleanup duties which related to the sandblasting. Plaintiff established that defendant WWA was aware of the dangers of lead exposure, through the knowledge of its principal and project manager. See *Travis, supra*, 173-174. However, the parties disagree on whether defendant WWA knew that plaintiff's injury was "certain to occur" as required in §131. The phrase "certain to occur" 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. 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, plaintiff must also establish that defendant WWA willfully disregarded the actual knowledge that injury was certain to occur. *Palazzola, supra*, 150. The term "willfully disregard[s]" which appears in § 131 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." *Travis, supra,* 178-179.

In the instant case, we believe the linchpin of plaintiff's claim that defendant WWA committed an intentional tort is the actual level of lead in plaintiff's blood throughout this case. In 1990 plaintiff had a blood lead level of 74 MUg/dl.[1] At that time, plaintiff was placed on disability and discontinued working around hazardous lead-based contaminants. In March of 1992, plaintiff began working for defendant, again sandblasting lead paint. In July of 1992, plaintiff had a blood test performed which indicated a blood lead level of 48 MUg/dl. Plaintiff's doctor restricted his work by requiring lead avoidance and the use of proper protective equipment. Thereafter, plaintiff was placed on permanent disability by his doctor.

In determining whether defendant WWA had actual knowledge that injury was certain to occur to plaintiff if he continued to be exposed to lead, we look to the Code of Federal Regulations for guidance. Accordingly, an employer shall test each employee exposed to lead above the action level[2] for more than 30 days per year every two months for the first six months of exposure. Once an employee's blood lead level reaches 40 MUg/dl, the testing shall increase to at least every two months until two consecutive tests indicate a level below 40 MUg/dl. 29 CFR § 1926.62 (j)(2)(i)(A)&(B).

The employer shall remove an employee from work involving lead exposure above the action level if the employee's blood lead level is tested at or above 50 MUg/dl. 29 CFR § 1926.62(k)(1)(i). The reasons for such restrictions have been stated as follows:

> Excessive lead absorption subjects [an employee] to increased risk of disease. Medical removal protection (MRP) is a means of protecting [an employee] when, for whatever reasons, other methods, such as engineering controls, work practices, and respirators, have failed to provide the protection [an employee] needs. . . The purpose of this program is to cease further lead absorption and allow [an employee's] body to naturally excrete lead which has previously been absorbed. [29 CFR § 1926.62, App B.]

The record indicates that defendant WWA removed plaintiff from the hazardous work site once it was informed of plaintiff's elevated blood lead level in 1992. While plaintiff's new assignment involved the sweeping up of lead paint dust, the record shows that this new work environment was a considerable improvement from the sand blasting job in relation to lead exposure. Further, the record does not show that at any time during 1992 plaintiff had a blood lead level in excess of 50 MUg/dl. While 29 CFR § 1926.62 was not put into effect until June 3, 1993, we use this standard to highlight that these facts do not lend themselves to favor "the rigorous threshold for a claim of intentional tort" as outlined in MCL 418.131; MSA 17.237(131). *Travis, supra,* 453 Mich at 180. We are not convinced that defendant WWA had actual knowledge that injury was certain to occur to plaintiff and willfully disregarded that knowledge. As such, the trial court did not err in granting defendant WWA's motion for summary disposition.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] In layman's terms, this equates to 74 micrograms per 100 grams of whole blood.

[2] The action level is 30 micrograms per cubic meter of air (30 MUg/m super3) based on an 8-hour workday. 29 CFR § 1926.62(b).