STATE OF MICHIGAN

COURT OF APPEALS

QUINTON J. KETNER,

Plaintiff-Appellant,

v

SPECIALTY INDUSTRIES, INC.,

Defendant-Appellee,

and

ZEELAND FARM SERVICES, INC.,

Defendant.

UNPUBLISHED
June 4, 1999

No. 209940
Ottawa Circuit Court
LC No. 96-025140 NO

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

Plaintiff, an employee of defendant Specialty Industries, Inc., sustained serious injuries during the construction of a soybean receiving plant for Zeeland Farm Services, Inc., when he fell nineteen feet through an unguarded ladder/floor opening, landed on steel mesh floor, then continued his fall twelve more feet to the next level. Plaintiff alleged that his employer was liable under the intentional tort exception to the Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, because he and other workers had told their supervisor, Raymond Stambaugh, of the windy conditions at the upper levels of the plant under construction. The trial court granted summary disposition in favor of defendant because it believed that the conditions fell short of an intentional injury.

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it to determine whether a genuine issue of material fact exists to warrant a trial. *Spiek v Dep't of*

Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant is entitled to summary disposition as a matter of law under MCR 2.116(C)(10) if there is no genuine issue of material fact and an intentional tort did not occur. MCL 418.131(1); MSA 17.237(101)(1); *James v Commercial Carriers, Inc*, 230 Mich App 533, 536; 583 NW2d 913 (1998). On appeal, we review de novo a trial court's grant of summary disposition. *Spiek, supra*, 337.

Plaintiff argues that the trial court erred in granting summary disposition under MCR 2.116(C)(10) in favor of defendant when it found that plaintiff's injury was not intended by defendant because the evidence presented, when viewed in a light most favorable to plaintiff, creates a genuine issue of material fact as to whether defendant deliberately acted or failed to act with the intent to inflict injury upon plaintiff. We disagree.

The Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, provides the exclusive remedy for injuries sustained by an employee arising out of and in the course of employment by an employer. An intentional tort is the only exception to this exclusive remedy. The WDCA 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. [MCL 418.131(1); MSA 17.237(101)(1).]

Whether the facts alleged by the plaintiff are true is a question for the trier of fact; however, whether the facts alleged are sufficient to constitute an intentional tort within the meaning of the WDCA is a question of law for the court. MCL 418.131(1); MSA 17.237(101)(1); *James, supra*, 536; *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 146-147; 565 NW2d 868 (1997).

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), the Michigan Supreme Court looked to the legislative intent behind the intentional tort exclusion from the WDCA and interpreted the meaning of the statutory language quoted above. The *Travis* Court concluded that a deliberate act encompasses both commissions and omissions, such as when an employer consciously fails to act. *Id.*, 169-170. The Court interpreted the phrase "specifically intended an injury" to mean that "in acting or failing to act, the employer must have determined to injure the employee; in other words, he must have had the particular purpose of inflicting an injury upon his employee." *Id.*, 172. Where there is no direct evidence of intent to injure, an employer's intent to injure may be inferred from the surrounding circumstances, *id.*, 172-173, where an employer has actual knowledge that an injury is certain to occur and wilfully disregards such knowledge, *id.*, 180.

Actual knowledge means that constructive, implied, or imputed knowledge is not enough. *Id.*, 173. A plaintiff can establish a corporate employer's actual knowledge by demonstrating that a supervisor or manager had actual knowledge that an injury would result from the employer's deliberate acts or omissions. *Id.*, 173-174.

Next, based on legislative history, the *Travis* Court determined that "certain to occur" sets forth an extremely high standard, such that no doubt exists with regard to whether an injury will occur. *Id.*, 174. The Court continued:

> Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. Consequently, scientific proof that, for example, one out of ten persons will be injured if exposed to a particular risk, is insufficient to prove certainty. Along similar lines, just because something has happened before on occasion does not mean that it is certain to occur again. Likewise, just because something has never happened before is not proof that it is not certain to occur. [*Id.*]

It is not enough that the employer know of the existence of a dangerous condition; the employer must be aware that injury is certain to occur from the employee's actions. *Id.*, 176. The Court provided an example of certain injury:

> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur. [*Id.*, 178.]

Finally, the *Travis* Court addressed the phrase "willfully disregards," stating:

> Because the purpose of the entire second sentence is to establish the employer's intent, we find that the use of the term "willfully" in the second sentence 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. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur. [*Id.*, 178-179.]

Summarizing its analysis of the construction of the statutory language regarding the intentional tort exception to the exclusive remedy provided in the WDCA, the *Travis* Court explained:

> If we read both sentences of the intentional tort exception together, it becomes evident that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id.*, 180; see *Palazzola, supra*, 148.]

Applying the Michigan Supreme Court's construction of the intentional tort exception of the WDCA in *Travis* to the facts of this case, we conclude that plaintiff failed to establish that Stambaugh's actions constitute an intentional tort.

Plaintiff argues under the *Travis* Court's analysis of the first sentence of the intentional tort exception that plaintiff's employer consciously acted or failed to act to remedy the continuously operative dangerous conditions because Stambaugh knew they existed but failed to correct them. Even if the facts as alleged establish a deliberate act as defined in *Travis, supra*, 173, the evidence does not support an inference that Stambaugh acted with an intent to injure. No direct evidence of intent to injure was presented. Thus, the question becomes: did the plaintiff establish that defendant, through Stambaugh, had "actual knowledge" of an injury that is "certain to occur" and "willfully disregarded" such knowledge?

Here, viewing the evidence in a light most favorable to plaintiff, we are unable to conclude that Stambaugh disregarded actual knowledge that an injury was certain to occur when he asked plaintiff and other workers to hang one more sheet of metal siding, despite the workers' reports of the windy conditions. Even if Stambaugh had actual knowledge of the dangerous conditions, the element that an injury was "certain to occur" is lacking. Although not factually analogous to either *Travis* or its companion case, *Golec v Metal Exchange Corp,* the principles applied in those cases are applicable here. We cannot say that no doubt existed with regard to whether an injury would occur. Although the high winds may have created difficulty for the workers, plaintiff himself testified that he did not know why or how he fell through the opening.

Plaintiff also asserts that Stambaugh knew injury was certain to occur because he created the continuously operative dangerous conditions and that due to the wind, he was going to stop work after one more sheet was put up. Unlike *Golec, supra*, 149, where the employer knew aerosol cans were being loaded into a furnace (even though cans were not contained in every load), here it was not inevitable that an employee would fall through an opening because of wind conditions. Employees had been working under the same conditions for weeks. Falling through an opening is a hazard that was encountered daily just by one's presence by the unguarded openings. See also *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App __; __ NW2d __ (Docket No. 202787, issued 2/5/99), in which the decedent drowned when the cargo pulling tractor he was driving over the ice across the Straits of Mackinac broke through the ice and sank. *Id.*, slip op at 1. The Court determined that the plaintiff failed to establish that the employer had actual knowledge that injury would occur where the decedent drove across the ice for a week without incident. *Id.*, slip on at 6. This Court stated that "[m]erely showing a likelihood of accident is not sufficient. The frozen straits did not present a continuously operative dangerous condition, but rather a *potential* hazard." *Id.*, slip op at 6 (emphasis in original). Here, as in *Bazinau*, the conditions—the unguarded floor openings in combination with the wind—constitute a potential hazard. The workers had been working in the same conditions that week, and with the wind earlier that morning before the incident. Although plaintiff's evidence may show a likelihood of accident, such is insufficient. *Id.* Regardless, the *Travis* Court stated that a factfinder may conclude that the employer had knowledge that an injury is certain to occur where the employer subjects the employee to a continuously operative dangerous condition that it knows will cause injury without informing the employee so the employee may take steps to prevent injury. *Travis, supra*, 178. Here, the employee knew of the obvious danger and testified that he was watching the opening when walking by it.

In *Oaks v Twin City Foods, Inc*, 198 Mich App 296; 497 NW2d 196 (1992), a case prior to the *Travis* case, the decedent fell to his death after the defendant directed him to work while standing on an unguarded catwalk. *Id.*, 298. Although the defendant had been told this situation posed a certain risk of serious injury, this Court determined that such allegations did not rise to the level of an intentional tort because the allegations failed to establish that the defendant had actual knowledge that an injury was certain to occur and wilfully disregarded it. *Id.* This Court stated:

> The intentional tort exception is not triggered simply because the employer had actual knowledge that an injury was likely to occur at some point during the performance of a given task. See *Benson v Callahan Mining Corp*, 191 Mich App 443, 446-447; 479 NW2d 12 (1991). Similarly, it is not enough that the employer acted recklessly and even envisioned the type of accident that did in fact occur. *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 139-140; 475 NW2d 423 (1991). [*Oaks, supra*, 298.]

Although *Oaks* was decided before *Travis*, the Court utilized a similar analysis with regard to actual knowledge that an injury was certain to occur. See *Travis, supra*, 173. The allegedly dangerous condition in *Oaks* that resulted in the worker's death is a condition similar to that in the present case. Viewing the facts in a light most favorable to plaintiff, even if the workers had apprised Stambaugh of the windy conditions, such does not rise to the level of an intentional tort.

Plaintiff also argues that defendant wilfully disregarded its knowledge of the dangerous condition. In addition to the previously stated evidence, plaintiff presented expert testimony from George Bowden, both a professional engineer and a consultant, that based on the number of MIOSHA citations issued after the incident, defendant wilfully disregarded its knowledge about the dangerous conditions. Mere conclusory statements of experts are insufficient to allege certainty that an injury will occur. *Id.*, 174. Although it was foreseeable that an employee could fall through an unguarded opening, the employer's act or failure to act must be more than mere negligence. *Id.*, 178-179. Based on the evidence presented, we cannot conclude that the employer deliberately acted or failed to act in furtherance of its conscious choice to injure an employee. *Id.*, 180. Therefore, the trial court properly granted summary disposition where the evidence presented, when viewed in a light most favorable to plaintiff, failed to establish an intentional tort under the WDCA, as interpreted by the Michigan Supreme Court. MCL 418.101 *et seq.*; MSA 17.237(101); *Travis, supra*, 149.

Because we conclude that defendant was entitled to summary disposition as a matter of law because an intentional tort did not occur, we decline to address plaintiff's second issue on appeal.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot