STATE OF MICHIGAN

COURT OF APPEALS

SCOTT WALLACE,

Plaintiff,

v

GLAZER'S LUMBER,

Defendant/Cross-Plaintiff,

and

IVACO, INC., and SNW QUEBEC,

Defendants/Cross-Defendants/
Third-Party Plaintiffs-Appellants,

and

KURT HANSON and KURCO CONSTRUCTION,

Third-Party Defendants-Appellees,

and

EYDE BUILDERS, INC.,

Third-Party Defendant.

UNPUBLISHED
June 18, 1999

No. 209712
Ingham Circuit Court
LC No. 96-083186 NP

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Third-party plaintiffs, distributors of nails who sought contribution from an injured worker's employer after paying the worker damages pursuant to a settlement agreement, appeal as of right from an order granting the employer's motion for summary disposition.[1] The trial court held that the employer had not committed an intentional tort and that third-party plaintiffs' action was therefore barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). We affirm.

I

Third-party plaintiffs argue that third-party defendants Kurt Hanson and Kurco Construction (Hanson) were not employers within the meaning of the WDCA and were therefore not entitled to invoke the exclusive remedy provision of the WDCA.[2] We disagree.

The question of whether Hanson was the employer of Scott Wallace, the injured worker, turns on the economic reality test. *James v Commercial Carriers Inc*, 230 Mich App 533, 536; 583 NW2d 913 (1998).

> The test involves four basic factors: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal. In applying these factors, the totality of the circumstances surrounding the work must be examined, with no single factor controlling. [*Id*., citation omitted.]

In the present case, Hanson hired, and could presumably fire, Wallace, and wholly controlled his duties on the jobsite. We further note that Hanson maintained the policy of worker's compensation insurance under which Wallace recovered in connection with his injuries. In sum, the economic reality leads inescapably to the conclusion that Hanson was Wallace's employer, as that term is used in the WDCA.

II

Third-party plaintiffs next argue that Hanson committed an intentional tort against Wallace such that this case is not governed by the exclusive remedy provision of the WDCA, which provides as follows:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. *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) emphasis added.]

Simply stated, third-party plaintiffs have failed to demonstrate that Wallace's injury was the result of an intentional tort. At best, third-party plaintiffs' proofs established only that Hanson was aware that some of the nails were defective, and thus should have known that the defective nails could have caused an injury to someone. The evidence did not demonstrate that Hanson knew that nail heads were flying off and hitting people; but rather, only that the nail heads sometimes fell off. No evidence suggested that Hanson knew that the particular nail that injured Wallace was broken or that any of the nails were certain to break. Indeed, no one had been injured by the nails before Wallace's accident. Moreover, the fact that Hanson was on the construction site and used the nails himself further suggests that he did not know that an injury was certain to occur. *Travis v Dreis & Krump Mfg Co,* 453 Mich 149, 182; 551 NW2d 132 (1996).

Third-party plaintiffs were required to show more than mere knowledge by Hanson that an injury was substantially certain to occur to someone, somewhere, sometime. *Agee v Ford Motor Co,* 208 Mich App 363, 367 n 3 (1995). Viewing the evidence in a light most favorable to third-party plaintiffs, we cannot find that Hanson disregarded actual knowledge that an injury was certain to occur. Accordingly, we conclude, as did the trial court, that third-party plaintiffs' action is barred by MCL 418.131(1)l MSA 17.237(131)(1), and that Hanson was entitled to judgment as a matter of law.

III

In their brief on appeal, third-party defendants allege that third-party plaintiffs failed to comply with Michigan's contribution statute, MCL 600.2925a(3); MSA 27A.2925(1)(3). Insofar as no cross-appeal has been filed, this issue is not properly before us. *Bhama v Bhama*, 169 Mich App 73, 83; 425 NW2d 733 (1988). Furthermore, our decision to affirm the trial court's decision to grant third-party defendants' motion for summary disposition renders this issue moot.

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1] Although third-party defendants Kurt Hansen and Kurco Construction brought their motion pursuant to MCR 2.116(C)(8) and (10), we will treat the motion as being brought under the proper rule, MCR 2.116(C)(4) (lack of subject matter jurisdiction), because there is no indication that any of the parties were prejudiced by the mislabeling of the motion. *Bitar v Wakim*, 211 Mich App 617, 619; 536 NW2d 583 (1995), rev'd on other grounds 456 Mich 428 NW2d 572 (1998).

[2] We note that, prior to this appeal, third-party plaintiffs did not seriously contend that Hanson did not employ Scott Wallace, the injured worker. Indeed, throughout these proceedings, third-party plaintiffs referred to Hanson as Wallace's employer.