STATE OF MICHIGAN

COURT OF APPEALS

KAREN LEONARD, Plaintiff-Appellee,	UNPUBLISHED August 10, 1999
v	No. 210240 Sanilac Circuit Court
DOTT MANUFACTURING, INC., Defendant-Appellant.	LC No. 96-024676 NO

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a bench trial, the trial court entered a judgment for plaintiff in the amount of $25,000 for pain and suffering arising from cataract surgery. The trial court held that defendant employer committed an intentional tort against plaintiff employee and that defendant's liability was therefore not limited to the remedies specified in Michigan's Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.* Defendant appeals as of right. We reverse.

The WDCA provides, in relevant part:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for 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 the 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).]

Plaintiff argues that because defendant possessed a safety manual suggesting that chronic exposure to the laser that plaintiff worked with could cause cataracts, defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. However, in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), our Supreme Court held that

> [w]hen an injury is certain to occur, no doubt exists with regard to whether it will occur. Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. [*Id*. at 174.]

Similarly, the Court held that the WDCA's requirement that actual knowledge be shown means

> that constructive, implied, or imputed knowledge is not enough. [It is not] sufficient to allege that the employer should have known, or had reason to believe, that injury was certain to occur. [*Id*. at 173.]

The warning in the safety manual that plaintiff claims gave rise to defendant's actual knowledge that an injury was certain to occur stated:

> Eye hazards. Corneal and retina burns, or both, depending on laser wave length are possible from acute exposure and corneal or lenticular opacities (cataracts), or retinal injury may be *possible* from chronic exposure to excessive levels. [Emphasis added.]

First, this warning stated that cataracts were a *possible* result of a defect in the machine. The *Travis* Court stated that an employer must be *certain* that an injury will occur. *Travis, supra* at 174. "Certain"[1] and "possible"[2] cannot be considered harmonious in nature, and a warning that an injury is possible cannot be interpreted as meaning that the same is certain to occur. Second, the possibility of cataracts was implicated only when one's exposure to *excessive* levels of emissions is *chronic*. Plaintiff failed to show that any supervisory employee understood that one could be chronically exposed to excessive levels of laser emissions through a small crack in the bottom corner of a protective shield. Further, the record indicates that, at the time of plaintiff's use of the etching machine, no one in a supervisory position was aware of the cracked safety glass. In fact, several years prior to trial, a laser specialist employed by defendant noticed a crack in the safety glass and repaired it by affixing tape to the glass. The specialist was not aware of whether the repair occurred before or after plaintiff began using the machine, but concluded that he performed the repair as soon as he was aware of the crack. Plaintiff did not present evidence that a supervisory employee was aware of the cracked safety glass, was aware of the impending certainty of injury, and failed to remedy the situation. Quoting the *Travis* Court, this Court recently reiterated the point that "[a] plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 751-752; 593 NW2d 219 (1999) (citations omitted). The trial court's conclusion that defendant actually knew that plaintiff was certain to get cataracts can only have been based on knowledge that was constructive, implied, or imputed in violation of the strictures of *Travis, supra* at 173.

Although *Travis* permits an inference that an employer intended to injure when the employer exposed an employee to a continually dangerous condition that it knew was certain to cause injury and intentionally failed to warn the employee of the known danger, *id*. at 178, such is not the case here. The facts adduced at trial did not show that defendant actually knew that plaintiff would get cataracts from working with the laser etching machine. Furthermore, the evidence established that one of defendant's

employees taped over the crack in the shield when he became aware of the defect. Thus, defendant evinced an affirmative intent *not* to injure its employees. *Bazinau, supra,* 233 Mich App at 754.

In light of our decision to reverse the trial court's decision on this basis, we need not address the other issues raised by defendant on appeal.

Reversed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White

[1] "Certain" is defined as:

> Ascertained; precise; identified; definitive; clearly known; unambiguous; or, in law, capable of being identified or made known, without liability to mistake or ambiguity, from data already given. Not specifically named; indeterminate, indefinite; one or some. That which may be made certain. [*Black's Law Dictionary* (1968) (citations omitted).]

[2] "Possible" is defined as:

> Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen of not; contrasted with necessary and impossible. In another sense, the word denotes extreme improbability, without excluding the idea of feasibility. It is also sometimes equivalent to "practicable" or "reasonable," as in some cases where action is required to be taken "as soon as possible." [*Black's Law Dictionary* (1968) (citations omitted).]