STATE OF MICHIGAN

COURT OF APPEALS

STANISLAW GOLEC,

Plaintiff-Appellant,

V

METAL EXCHANGE CORPORATION, d/b/a CONTINENTAL ALUMINUM COMPANY,

Defendant,

and

TRAVELERS INDEMNITY COMPANY, TRAVELERS INSURANCE COMPANY, and TRAVELERS INSURANCE COMPANIES,

Garnishees-Defendants-Appellees.

UNPUBLISHED
January 11, 2002

No. 220166
Wayne Circuit Court
LC No. 90-019115-NI

STANISLAW GOLEC,

Plaintiff-Appellee,

V

METAL EXCHANGE CORPORATION, d/b/a CONTINENTAL ALUMINUM COMPANY,

Defendant-Appellee,

and

TRAVELERS INSURANCE COMPANY and TRAVELERS INSURANCE COMPANIES,

Garnishees-Defendants-Appellants,

and

No. 220444
Wayne Circuit Court
LC No. 90-019115-NI

TRAVELERS INDEMNITY COMPANY, TRAVELERS INDEMNITY COMPANY OF AMERICA, PHOENIX INSURANCE COMPANY, CHARTER OAK FIRE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, and TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Garnishees-Defendants.

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

These consolidated appeals involve a garnishment action on an underlying workplace injury. In Docket No. 220166, plaintiff Stanislaw Golec appeals as of right the circuit court's grant of partial summary disposition to garnishee-defendant Travelers Indemnity Company on the basis that the catastrophe umbrella policy (CUP) Travelers Indemnity issued to plaintiff's employer, Metal Exchange Corporation (MEC), excluded coverage, and the circuit court's calculation of interest on the consent judgment entered into by plaintiff and MEC. In Docket No. 220444, garnishees-defendants Travelers Insurance Company and Travelers Insurance Companies appeal as of right the circuit court's determination that the settlement agreement between plaintiff and MEC was reasonable. In Docket No. 220166, we reverse the circuit court's grant of partial summary disposition to Travelers, and affirm the circuit court's calculation of interest on the consent judgment. In Docket No. 220444, we reverse, concluding that Travelers should have an opportunity to contest the reasonableness of the settlement.

I

In December 1988, while working as a furnace loader for defendant MEC, an aluminum smelting company, plaintiff was severely burned when an explosion covered him in molten aluminum. Plaintiff sued MEC under the intentional tort exception to the Worker's Disability Compensation Act (WDCA), MCL 418.131(1).[1] Various Travelers entities had issued insurance policies to MEC, and Travelers undertook defense of the case.

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[1] The exception provides:

> 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

(continued…)

The circuit court concluded that plaintiff's exclusive remedy was under the WDCA and granted summary disposition in favor of MEC. On appeal, this Court reversed, concluding that plaintiff's allegations fell within the WDCA's intentional tort exception. *Golec v Metal Exchange Corp*, 208 Mich App 380; 528 NW2d 756 (1995). Travelers then ceased defending the lawsuit.

MEC hired new counsel and appealed to the Supreme Court, which consolidated *Golec*, *supra*, with *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996). A majority of the Supreme Court affirmed in *Golec* with respect to MEC and its supervisory employee, Rziemkowski, holding that plaintiff's complaint alleged facts sufficient to establish a genuine issue of material fact whether supervisory personnel of MEC possessed actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The Supreme Court recognized that the intentional tort exception allowed imposition of liability under two distinct sets of circumstances, the second of which is at issue here: "[a]n employee 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."[2] The *Travis/Golec* Court concluded that plaintiff

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(…continued)

> 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. This subsection shall not enlarge or reduce rights under law. [Emphasis added.]

[2] The Court concluded:

> We read the second sentence as a legislative recognition of a limited class of cases in which **liability is possible despite the absence of a classic intentional tort** and **as a means of inferring an employer's intent to injure from the surrounding circumstances** in those cases. In other words, the second sentence will be employed when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence. It is a substitute means of proving the intent to injure element of the first sentence. The three phrases that we must construe are: "actual knowledge," "certain to occur," and "willfully disregarded."
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> A
>
> ACTUAL KNOWLEDGE
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> Because the Legislature was careful to use the term "actual knowledge," . . . we determine that the Legislature meant that **constructive, implied, or imputed knowledge is not enough**. **Nor is it sufficient to allege that the employer should have known, or had reason to believe**, that injury was certain to occur. . . . A plaintiff may establish a corporate employer's actual knowledge by

(continued…)

(…continued)

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.

B

INJURY CERTAIN TO OCCUR

. . . . The legislative history requires us to interpret "certain to occur" as setting forth an extremely high standard. When 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. 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.

* * *

A further question under the certainty requirement, closely related to the actual-knowledge requirement, is the level of awareness an employer must possess: is it enough that the employer know that a dangerous condition exists, or must the employer be aware that injury is certain to occur from what the actor does? We find the latter interpretation the proper one.

C

WILLFULLY DISREGARDS

. . . . Because the purpose of the entire second sentence is to establish the employer's intent, we find that the use of the "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.

D

INFERENCE OF INTENT

In short, under the second sentence, the Legislature has permitted the employer's state of mind to be inferred from its actions when there is no direct evidence of the employer's intent to injure. . . . .

(continued…)

created a genuine issue of material fact under the second sentence, also known as the legislatively prescribed, "inferred intent," or "faux intent," tort.

> Finally, the facts as alleged by plaintiff create a genuine issue of material fact with respect to whether his employer willfully disregarded that an injury was certain to occur. Defendant argues that while it may have been negligent to require plaintiff to load wet scrap containing aerosol cans, defendant did not willfully disregard a certain injury because no explosion of this magnitude had occurred previously. While this is true, plaintiff has presented evidence that, despite knowledge of the earlier explosion, defendant failed to remedy the condition that caused it. In his deposition, defendant Mazur stated that after the earlier explosion, he contacted his supervisor, defendant Rziemkowski, and informed him of the explosion and that the scrap was wet. In response, Rziemkowski ordered plaintiff back to work. Rziemkowski did not tell Mazur to inspect the furnace, reinstruct plaintiff regarding loading techniques, or make any other investigation. On the other hand, defendant Rziemkowski, in his deposition, testified that he did not remember receiving a telephone call from Mazur on the night of the explosion. At most, this testimony creates a question of fact with regard to whether Rziemkowski ordered plaintiff back to work in the face of a condition that had already led to one, albeit minor, explosion. Consequently, **whether Rziemkowski disregarded knowledge of a certain injury must be resolved by the trier of fact**. . . .
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> CONCLUSION
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> . . . . The facts alleged and supported by deposition testimony in plaintiff Golec's case . . . create the existence of a genuine issue of material fact **with respect to whether his employer may be deemed to have intended to injure plaintiff.** Plaintiff has set forth sufficient facts that, if construed in a light most favorable to him, support a finding that **his employer had actual knowledge that an injury was certain to occur**, **yet disregarded that knowledge.** [*Travis, supra* at 187-188 (Boyle, J., with whom Mallett, J., concurred; Levin, J. concurring in *Golec*, with whom Cavanagh, J., concurred.) Emphasis added.]

1

(…continued)

* * *

> 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**. [*Travis,* 453 Mich at 173-180. Emphasis added.]

Following the Supreme Court's remand, plaintiff and MEC entered into extensive negotiations and ultimately agreed to a consent judgment in the amount of $8,627,323.00, plus interest "[i]n accordance with . . . MCL 600.6013," which was entered by the circuit court following an evidentiary hearing. The consent judgment provided that plaintiff could enforce the judgment only against MEC's insurance providers. Plaintiff then filed writs of garnishment against various Travelers entities and the Home Insurance Company, another insurer of MEC not at issue here, contending that Travelers was obligated to pay the unsatisfied consent judgment under its insurance policies, including a workers compensation/employers liability (WC/EL) policy, with a limit of $500,000, and a catastrophe umbrella policy (CUP), with a $5 million policy limit. The parties filed cross-motions for summary disposition.

The circuit court granted summary disposition in plaintiff's favor on the WC/EL policy, a disposition not challenged here. The circuit court ordered Travelers to pay plaintiff $2,041,729.30, representing the $500,000 WC/EL policy limit, plus prejudgment interest on $500,000 until the consent judgment, and postjudgment interest on the entire consent judgment.[3] We understand from the parties' appellate briefs and exhibits that in or about May 2000 they settled the dispute regarding the WC/EL policy for $1,725,000.

2

The circuit court granted summary disposition in Travelers' favor on the CUP policy, concluding that:

> The coverage exclusion in the CUP is broader than the coverage exclusion in the WC/EL policy. The CUP exclusion will preclude coverage in this case only if this court can find as a matter of law that, from the standpoint of MEC, the bodily injury to Stanislaw Golec was either expected or intended.
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> In this case, the Supreme Court found that plaintiff had presented sufficient evidence to create a "genuine issue of material fact regarding whether his employer had actual knowledge that an injury would occur." 453 Mich at 184. Specifically, the Supreme Court found that Golec had submitted evidence that:
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> > (1) MEC had actual knowledge of the condition that caused plaintiff's injury, 453 Mich at 185;
> >
> > (2) The condition of which MEC had knowledge was a continually operative dangerous condition such that injury was certain to occur, 453 Mich at 186; and

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[3] See *Matich v Modern Research Corp*, 430 Mich 1, 23, 26-27; 420 NW2d 67 (1998), and *Pinto v Buckeye Union Ins Co*, 193 Mich App 304, 307; 484 NW2d 9 (1992) (where insurance policy contains standard interest clause, postjudgment interest is to be computed on entire judgment amount, not limited to policy limit).

> (3) MEC willfully disregarded the fact that an injury was certain to occur, 453 Mich at 186.
>
> Accepting this evidence as true, this court finds that plaintiff's injury is excluded under the CUP. The only way plaintiff can avoid the exclusive remedy provisions of the WDCA is by proving that injury was certain to occur and that MEC willfully disregarded the fact that injury was certain to occur. Because injury can only occur as a consequence of MEC's conduct, MEC's subjective expectation of bodily injury to Golec **should be inferred as a matter of law**. See *DiCicco,* 432 Mich at 719. [Emphasis added.]

II

We review the circuit court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court must consider the entire lower court record, including pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75-76; 597 NW2d 517 (1999). Summary disposition is appropriate if the evidence shows that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Whether Travelers is contractually obligated under the CUP policy to pay the amount of the judgment entered against MEC is a question of law requiring interpretation of the insurance contract. *Auto Owners Ins v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997).

> . . . . An insurance policy is an agreement between parties that a court interprets "much the same as any other contract" to best effectuate the intent of the parties and the clear, unambiguous language of the policy. *Auto Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). To do so the court looks to the contract as a whole and gives meaning to all its terms. *Id.*, citing *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982).
>
> Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage. This Court has held that an insurance policy provision is valid "'as long as it is clear, unambiguous and not in contravention of public policy.'" *Id.*, quoting *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 361-362; 314 NW2d 440 (1982). [*Harrington, supra* at 381-382.]

III

Plaintiff argues that the circuit court erred in concluding that the "faux" intent standard under the WDCA is equivalent to the subjective standard envisioned in the CUP exclusion (bodily injury "expected or intended from the standpoint of the insured"). We agree.

The Supreme Court recognized that the intentional tort exception allowed imposition of liability under two distinct sets of circumstances, the second of which is at issue here: "[a]n 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."

We must determine whether a finding that defendant had actual knowledge that an injury was certain to occur, yet disregarded that knowledge, is the legal equivalent of the injury being "expected or intended from the standpoint of the insured." In *Metropolitan Property & Liability Ins Co v DiCicco* (consolidated with *Allstate v Freeman*), 432 Mich 656; 443 NW2d 734 (1989), a majority of the Court agreed that the exclusion at issue focused on the subjective expectations of the insured. Applying a subjective standard, we conclude it is possible to deliberately disregard actual knowledge that an injury is certain to occur without actually intending or expecting the injury.

Under the "faux" intent provision, intent is inferred under certain circumstances where actual intent cannot be established. In such circumstances, it cannot be said that the injury was intended from the standpoint of the insured. The question then is whether it can be said, as a matter of law, that the injury is expected from the standpoint of the insured. The *Travis* Court reasoned that one could conclude that defendant's employees had knowledge that water and aerosol cans could cause explosions and that both were present in the scrap. This would constitute actual knowledge. The Supreme Court also reasoned that one could conclude that every load of scrap had the potential of containing the wet scrap or aerosol cans and, thus, every load had a potential of exploding making injury certain to occur. Lastly, the Supreme Court reasoned that one could conclude that despite being informed of the earlier explosion and that the scrap was wet, Rziemkowski ordered plaintiff back to work, which would constitute disregarding knowledge of a certain injury. It does not necessary follow, however, that Rziemkowski expected that Golec would be injured. Had he expected the injury, it is unlikely that he would have ordered Golec back to work.

The "faux" intent provision holds an employer responsible for an intentional injury when, although the injury was not truly intended, the circumstances were such that the employer was aware of all the elements leading to certain injury, although for some reason, the employer ignored the obvious and placed the employee in harm's way. Under these circumstances, it may or may not be the case that the employer subjectively expected the injury to occur. The employer may have ignored the obvious, without actually intending injury, but, nevertheless, expecting it and being indifferent to it. Or, the employer may have ignored the obvious because although all the elements leading to certain injury were present and known to the employer, the employer did not bother to put two and two together in its haste to get the job done. The policy exclusion requires consideration of the subjective expectation of the employer. Under this standard, liability under the "faux" intent provision does not preclude coverage as a matter of law. Such is the case here.

IV

Plaintiff further argues that Travelers sold MEC the CUP and WC/EL and other policies "as an integrated insurance plan," and that because the CUP policy is intended to be excess to the WC/EL liability, which provides coverage, the CUP policy should be construed as providing coverage as well. We disagree.

Relying on *Bosco v Bauermeister,* 456 Mich 279; 571 NW2d 509 (1997), plaintiff argues that:

> . . . the *language of the policy* itself must govern our interpretation and that *all* pertinent language must be given effect, if possible. Bosco at 513. Applying this principle to the case at bar, the CUP is clearly applicable. It is entitled "Catastrophe Umbrella Policy," representing its intended purpose to provide excess or umbrella coverage. Furthermore, the declarations page accompanying the policy itself sets forth the underlying policies to which it is expected to provide excess coverage. Listed among others is the underlying policy provided by the Travelers Insurance Companies known as **the WC/EL policy, which the trial court *has* found to be applicable and on which Plaintiff/Appellant has collected. Under the terms of the CUP, the insured was obligated to maintain the primary insurance policy, which amount served as a "deductible" to any sums owed under the excess policy.**
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> * * *
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> . . . . *Acknowledging a valid and collectible judgment on the WC/EL policy, the court's disposition as to the CUP is internally inconsistent.* The reasonable expectations of the parties from the time the insurance was contemplated, underwritten, audited, and paid for was that MEC would have $5,500,000 in liability coverage through the coordinated coverage of primary and umbrella policies. There can be no other *reasonable* conclusion.
>
> It is *unreasonable* to conclude that Travelers collected premiums for coverage that was illusory and fraudulent, as it is *unreasonable* to deny coverage where the CUP's language explicitly provided for its *excess* application "over any other valid and collectible insurance available to the insured," which served as the primary deductible for the umbrella.
>
> Plaintiff's contention that by virtue of Travelers' settlement of plaintiff's claims under the WC/EL policy Travelers becomes obligated under the CUP policy fails. The parties' general release and settlement agreement regarding the WC/EL policy provides that it "shall not be construed as an admission by either Party as to the truth or merit of any contention made in connection with the disputes concerning the subject matter of the Action, but is executed solely as a compromise of disputed liabilities." Further, the CUP exclusion differs from the WC/EL policy's "intentionally caused" exclusion. Thus, the question of coverage under the WC/EL policy has no bearing on the question of coverage under the CUP policy.

That coverage afforded under the CUP policy is not co-extensive with that provided by the primary insurance policy (WC/EL) is made clear by the CUP policy's provisions stating that Travelers "will indemnify the Insured for all sums in excess of the deductible amount which the Insured shall become legally obligated to pay as damages *because of injury to which this policy applies*," and the provision stating "[s]uch insurance *as is afforded by this policy* shall apply as excess insurance over any other valid and collectible insurance available to the Insured." The CUP policy is not a "follow form" excess policy, as plaintiff argued below, nor does it contain a "broad as primary" endorsement, which would expand the umbrella coverage to be as broad as the primary policy's, see e.g., *Housing Group v California Ins Guarantee Ass'n*, 47 Cal App 4th 528, 530-532; 56 Cal Rptr 2d 378 (1996).

Plaintiff has not shown that it is in contravention of public policy for an umbrella policy that on its face does not provide "follow form" coverage to the primary insurance policy to exclude bodily injury expected or intended from the standpoint of the insured. Thus, we do not invalidate the exclusion.

V

Plaintiff's final argument is that the circuit court erred as a matter of law by applying the variable tort rate of judgment interest instead of the rate of interest applicable to written instruments, and requests that this Court apply MCL 600.6013(5) "on any judgment entered against Travelers for coverage under the CUP."[4]

Under the circumstance that interest was awarded from the time of the filing of the underlying complaint, and not from the filing of the writ of garnishment, we conclude that the court did not err in using the variable tort rate of interest.

VI

In Docket No. 220444, Travelers challenges the circuit court's determination that the settlement agreement between plaintiff and MEC was reasonable.

As discussed above, the CUP policy was determined inapplicable to this case and the parties later settled their claims related to the WC/EL policy. To the extent that the reasonableness of the settlement had an impact on the computation of judgment interest on the WC/EL policy, that issue was resolved in plaintiff's and Travelers' partial settlement, and any claim of error was waived.

However, given our determination to reverse regarding the CUP policy, we conclude that Travelers is entitled to challenge the reasonableness of the settlement.

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[4] As mentioned above, plaintiff and Travelers have settled the WC/EL policy dispute. Under the terms of the settlement, plaintiff agreed to release Travelers from all claims related to the WC/EL, including disputes regarding pre- and postjudgment interest. Plaintiff retained the right to pursue claims against the CUP policy only.

Although the original circuit court judge initially determined that the amount of the consent judgment was reasonable in light of the circumstances of the case, he later noted that in fairness Travelers should have the opportunity to attack the reasonableness of the consent judgment, but in light of his determination that plaintiff was limited to recovery under the $500,000 WC/EL policy, an evidentiary hearing regarding the reasonableness of the $8,627,323 settlement was unnecessary.[5] The successor circuit court judge concluded that the settlement was reasonable and that no hearing was necessary. The successor judge went on to compute the judgment interest in this case, requiring Travelers to pay postjudgment interest on the entire $8,627,323 settlement and consent judgment.

We agree with the original circuit court judge that Travelers is entitled to participate in an evidentiary hearing regarding the reasonableness of the settlement. The general rule "that the insurer's unjustified refusal to defend makes it bound to pay the amount of any reasonable, good faith settlement made by the insured in the action brought against him by the injured party," *Elliott v Casualty Ass'n of America,* 254 Mich 282, 287-288; 236 NW 782 (1931); *Detroit Edison v Michigan Mutual Ins Co,* 102 Mich App 136, 144-146; 301 NW2d 832 (1980), permits an inquiry into the reasonableness of the settlement.

In Docket No. 220166, we reverse the circuit court's grant of partial summary disposition to Travelers under the CUP policy, and affirm the circuit court's computation of interest. In Docket No. 220444, we reverse, concluding that Travelers should have an opportunity to contest the reasonableness of the settlement.

/s/ Helene N. White
/s/ Mark J. Cavanagh

[5] The original circuit court judge did not compute the judgment interest in this case.