STATE OF MICHIGAN

COURT OF APPEALS

FLOYD R. JOLIFF and MELISSA JOLIFF,

Plaintiffs-Appellees,

v

DETROIT CITY DAIRY, INC.,

Defendant-Appellant.

UNPUBLISHED
September 6, 2002

No. 232530
Wayne Circuit Court
LC No. 99-932905-NP

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition. We affirm.

Plaintiff Floyd Joliff[1] was hired to work the night shift as a picker of goods in defendant's shipping department. This position required plaintiff to use electric powered Crown pallet jacks to transport merchandise from the warehouse to the loading dock. Pursuant to an operator's manual regarding the use of pallet jacks provided during discovery, a pallet jack can be operated by standing on it or walking beside it. The brakes of the pallet jack are activated by a control handle that can be pushed forward or down.[2] The manual further indicates that a pallet jack can weigh more than three automobiles once loaded and that it can not be slowed down or stopped by putting a foot down.

Plaintiff testified during his deposition that defendant required its pickers to meet a quota of approximately 120 orders per hour and that a warehouse employee could not pick without a pallet jack. According to plaintiff, the newer pallet jacks were assigned to senior employees. The less senior or probationary employees, like plaintiff, were not assigned specific pallet jacks

[1] While both plaintiff Floyd Joliff and plaintiff Melissa Joliff appeal the trial court's decision, any references to "plaintiff" in this opinion, unless otherwise indicated, refer to plaintiff Floyd.

[2] The operator's manual provided during discovery was for a newer Crown pallet jack than the model used in the instant case. However, Leonard Sturgeon, plaintiff's supervisor, testified that both models operated in the exact same manner.

but were required to choose from those that remained.[3] Plaintiff indicated that if a pallet jack needed maintenance, a supervisor would mark it with a red tag and remove it from service. If there was no functional pallet jack available in a given shift, plaintiff testified that his supervisor would assign him to another job for the night. It was uncontested that defendant used an outside company to perform the maintenance on its pallet jacks.

On October 27, 1996, plaintiff arrived for work and discovered that the only remaining pallet jacks were marked with red tags. Plaintiff testified that he went to see his supervisor, Leonard Sturgeon, to inform him of the situation. After notifying Sturgeon, plaintiff claimed that Sturgeon drove one of the red-tagged pallet jacks over to plaintiff and ordered him to use it. Plaintiff maintained in his deposition that he informed Sturgeon that the red tag on the pallet jack said "no brakes." He alleged Sturgeon told him to use it or go home. Plaintiff interpreted this to mean that he would be fired if he did not use the pallet jack. During his deposition, plaintiff admitted that Sturgeon did not appear to have a problem stopping the pallet jack when he brought it to plaintiff. Plaintiff further testified that a pallet jack could be slowed down by putting it in reverse.

Sturgeon could not recall plaintiff's accident when he was deposed, but maintained that he would never instruct an employee to use equipment that was red-tagged for repairs. Sturgeon acknowledged that the rationale behind this policy was to prevent injury. He also acknowledged that brake failure would be one reason to red-tag a pallet jack. According to Sturgeon, although reversing the pallet jack or changing its direction with the twist grip would eventually slow the pallet jack down, these actions will not stop the machine.

Plaintiff alleged that on the night of the accident he took additional precautions and drove the pallet jack at a lower speed. However, plaintiff claimed that he was still forced to jump off the pallet jack when it failed to stop. According to plaintiff, the brakes on the pallet jack worked sporadically. Plaintiff further testified that after running into several objects, he repeated his safety concerns about the pallet jack to Sturgeon and Gordon Johnston, a senior employee, but was required to continue using it. Plaintiff stated that he used the pallet jack for approximately four more hours before running run into a pole and falling off the pallet jack due to brake failure. Plaintiff suffered injury to his left leg and has been unable to work since the accident. He was diagnosed as having Reflex Sympathetic Dystrophy, which is a permanent condition.

On October 18, 1999, plaintiffs filed a complaint alleging that defendant committed an intentional tort because it knew that the brakes on the pallet jack were not operational and yet directed plaintiff to use it. Plaintiff maintained that defendant specifically intended to injure him and knew that an injury was certain to occur, given defendant's insistence that plaintiff use the red-tagged pallet jack. Plaintiff Melissa Joliff claimed a loss of consortium due to defendant's negligence.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff's exclusive remedy was provided through the Worker's Disability

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[3] At the time of his injury plaintiff worked for defendant for approximately ninety days and was not yet a member of a union.

Compensation Act, MCL 418.131. Defendant claimed that plaintiffs could not meet their burden of establishing that defendant had actual knowledge that an injury was certain to occur and that it willfully disregarded that knowledge. Even if plaintiff's supervisor instructed him to use a red-tagged pallet jack with malfunctioning brakes, defendant alleged that these facts failed to indicate that injury was certain to occur.

In their response to defendant's motion for summary disposition, plaintiffs compared a pallet jack without reliable brakes to an automobile without reliable brakes. Plaintiffs pointed out that Gordon Johnston, a senior employee, agreed that someone using such a machine would be injured. Plaintiffs further noted the pallet jack's operating manual lists the lack of reliable brakes as a known hazard. It specifically states that "[i]f at any time the stopping distance is too long for you to stop safely, don't drive the truck." According to plaintiffs, both Sturgeon and Johnston knew that plaintiff was having difficulty keeping the pallet jack under control because he informed them of his problems. He alleged that they could actually see him crashing into things. The lack of brakes on the pallet jack created a potential for a crash each time it was used. Plaintiffs argued that summary disposition was inappropriate because the evidence established that defendant willfully disregarded actual knowledge that an injury was certain to occur.

The trial court held a hearing and denied defendant's motion. During the hearing, the trial court noted that "[t]he employer is deemed to have intended to injure when the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." The trial court reasoned that a chronic history of a dangerous condition was unnecessary and that the fact there was a sign saying "no brakes" attached to the pallet jack, as opposed to "needs oil change," created a situation where there was more than a mere potential for injury.

On appeal, defendant claims that the trial court erroneously denied its motion for summary disposition. We disagree. A trial court's decision on a motion for summary disposition is subject to review de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

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[4] We note that defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not specify which subsection of MCL 2.116 it relied upon to deny defendant's motion. However, because the trial court considered the pleadings and deposition testimony to make its decision, we conclude that the trial court's ruling was based on MCR 2.116(C)(10).

An employee's remedies against an employer for work-related injuries are normally limited to the exclusive provisions of the Worker's Disability Compensation Act.

> 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. This subsection shall not enlarge or reduce rights under law. [MCL 418.131(1) (emphasis added).]

The intentional tort exception applies only when an employer consciously chooses to injure an employee and deliberately acts or fails to act in furtherance of that intent. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 148; 565 NW2d 868 (1997). An employer's intent to injure may be inferred from actual knowledge that an injury was certain to occur and a deliberate disregard of that knowledge. *Id*.

In *Travis v Dreis & Krump Mfg Co,* 453 Mich 149, 173-174; 551 NW2d 132 (1996), our Supreme Court concluded that a plaintiff must show that a supervisor or managerial employee had actual knowledge that an injury would follow from the employer's deliberate actions. The *Travis-Golec* Court further held that an injury was certain to occur when "no doubt exists with regard to whether it will occur." *Id* at 174. The mere likelihood or high probability of an injury is not sufficient. See *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 755-756; 593 NW2d 219 (1999). However, as recognized by the Court in *Travis-Golec, supra* at 178:

> 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.

The employer's act must be more than mere negligence or a failure to protect the employee from a significant risk of harm; rather, it must amount to total disregard of actual knowledge that an injury is certain to occur. *Id*. at 179.

In *Golec v Metal Exchange Corp*, the companion case in *Travis-Golec*, *supra*, the plaintiff was severely burned while loading scrap containing aerosol cans into a furnace. The plaintiff in *Golec* testified that after a minor explosion occurred a supervisor told him to continue loading the scrap. *Id*. at 158-159. A few hours later another explosion occurred, causing plaintiff to be burned over thirty percent of his body with molten aluminum. *Id*. at 159. Our Supreme Court concluded that this case presented a question of fact regarding whether the plaintiff's employer disregarded actual knowledge that an injury was certain to occur. *Id*. at 186. This was based on plaintiff's theory that "every load of scrap had the potential to explode because each load could have contained a closed aerosol can or water." *Id*. The Court further found that the defendant's failure to remedy the condition that caused the initial explosion before

ordering the plaintiff back to work indicated a willful disregard of actual knowledge that an injury was certain to occur. *Id*. at 186-187.

Accepting the facts as alleged by plaintiffs in the case at bar, we conclude that plaintiffs have established a genuine issue of material fact concerning whether defendant committed an intentional tort. Plaintiff testified that Sturgeon saw the red tag on the pallet jack and was aware that it stated "no brakes." Further, plaintiff maintained that Sturgeon implied that if plaintiff did not use the pallet jack he would be fired. Additionally, plaintiff claimed that during his shift he repeated his concerns about the brakes to Sturgeon and told him that he was continually running into things. Sturgeon does not remember these events and steadfastly denies that he would ever require an employee to use a red-tagged pallet jack. Accordingly, a question of fact exists whether defendant ordered plaintiff to use the pallet jack knowing that the brakes malfunctioned.

Likewise, viewing the evidence in the light most favorable to plaintiff, we find that a question of fact remains regarding defendant's actual knowledge that an injury was certain to occur. Defendant claims that injury was not certain to occur because it never concealed the danger and plaintiff was able to take precautionary steps by traveling slower and stepping off the machine. However, the hazard section in the pallet jack manual states as follows:

> While riding, keep your feet on the platform at all times. This truck weighs about 3000 pounds unloaded. *You cannot stop or even slow it down with your foot, or any part of your body, no matter how slow the truck is moving*. A foot or hand caught between the truck and a wall, or any fixed object, *will* be crushed or even cut off. [Emphasis added.]

Despite the fact that plaintiff traveled slower the night of the accident, there was still no way for him to avoid running into something when the brakes failed. We further note that while plaintiff acknowledges that he was aware of the situation, he was forced to use the pallet jack or lose his job. Similarly, the plaintiff in *Golec* knew about the potential for injury, especially after he was burned the first time, but he continued to work because of his employer's orders. *Id*. at 158-159.

Moreover, the fact that Sturgeon drove the pallet jack is not automatically dispositive of whether Sturgeon was aware that an injury was certain to occur. While the Court in *Travis* found the supervisor's willingness to operate a malfunctioning press indicative of the fact that injury was not certain to occur, the facts in the instant case are distinguishable. *Id*. at 182. In *Travis*, the supervisor personally adjusted the press and knew that such adjustments had previously allowed the machine to function properly for at least one or two days. *Id*. Moreover, the supervisor in *Travis* knew that other workers had been able to remove their hands safely because the press cycled slowly. *Id*. In the instant case, however, Sturgeon merely drove the pallet jack a short distance and was not using it to fill orders in the warehouse or meet mandatory quotas. Sturgeon expected plaintiff to use a 3,000 pound pallet jack, with malfunctioning brakes, in a job that required plaintiff to make frequent stops in a relatively congested area. Even if Sturgeon was unaware of the certainty for injury when he first ordered plaintiff to use the pallet jack, the fact that Sturgeon required plaintiff to continue using the pallet jack after plaintiff told him that he was running into objects, evidences an actual awareness that injury was certain to occur and a willful disregard for that knowledge.

After a careful review of the record and assessing the facts in the light most favorable to plaintiffs, we conclude that genuine issues of material fact remain such that summary disposition would be inappropriate. Thus, we agree with the trial court's decision to deny defendant's motion for summary disposition.

Affirmed.

/s/ Jane E. Markey
/s/ Jessica R. Cooper