

STATE OF MICHIGAN  
COURT OF APPEALS

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FRANK JOHNSON,

Plaintiff-Appellee,

v

PEERLESS METAL POWDERS, INC., a/k/a  
IRON & METAL PRODUCTS COMPANY,

Defendant-Appellant.

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UNPUBLISHED

December 16, 2004

No. 249491

Wayne Circuit Court

LC No. 01-119344-NO

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

MEMORANDUM.

Defendant appeals by leave granted from an order denying its motion for summary disposition. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant moved for summary disposition under MCR 2.116(C)(4), arguing that the exclusive remedy provision of the Worker's Disability Compensation Act ("WDCA"), MCL 418.131(1), precluded plaintiff's action. Plaintiff argued that his action fell within the intentional tort exception to the exclusive remedy provision. The trial court agreed and denied defendant's motion. We review the trial court's decision de novo to determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact. MCR 2.116(I)(1); *Bock v General Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001).

To avoid the exclusive remedy provision on the basis that defendant committed an intentional tort, plaintiff must show that defendant "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173-174; 551 NW2d 132 (1996). Plaintiff cannot satisfy the "actual knowledge" requirement with evidence of constructive, implied, or imputed knowledge. *Id.* at 173. Additionally, it is not enough to show that defendant was aware that a dangerous condition existed; defendant must be aware that injury was certain to occur. *Id.* at 176. This entails "an extremely high standard," which is not satisfied with evidence that an injury was probable. *Id.* at 174.

Here, plaintiff's evidence established only that defendant was aware that its employees were in a position to inhale of metallic particles. The evidence did not show that defendant had

knowledge that an injury was certain to result from this exposure. The evidence regarding a prior lawsuit and environmental violations arising from the discharge of particles outside the plant did not establish that an injury was certain to occur. Nor did plaintiff's expert establish anything other than a likelihood of injury to long-time employees. The MIOSHA inspections did not raise any concerns regarding employees' exposure to the particles or defendant's failure to supply respirators. Evidence that defendant was aware of the exposure and that the exposure posed a risk to some employees, was insufficient to establish an intentional tort under MCL 418.131(1). *Travis, supra* at 174-176; *Agee v Ford Motor Co*, 208 Mich App 363, 366-367; 528 NW2d 768 (1995).

The trial court erred in denying defendant's motion for summary disposition. We therefore reverse the trial court's order and remand for entry of judgment in defendant's favor.

We reverse and remand. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens