STATE OF MICHIGAN

COURT OF APPEALS

LINDA PRILL and KEN PRILL,

Plaintiffs-Appellees,

v

SWANSON COMMERCIAL FOOD EQUIPMENT REPAIR, INC., and LAFLAIR ELECTRIC, INC.,

Defendants,

and

BOB EVANS FARMS, INC., and BOB EVANS RESTAURANTS OF MICHIGAN, INC.,

Defendants-Appellants.

UNPUBLISHED
March 22, 2005

No. 251570
Lenawee Circuit Court
LC No. 02-001051-NO

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendants Bob Evans Farms, Inc. and Bob Evans Restaurants of Michigan, Inc. (hereinafter "defendants"), appeal by leave granted from the trial court's order denying their motion for summary disposition based on the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Linda Prill alleges that she received an electrical shock when she came into contact with a stainless steel counter while working at one of defendants' restaurants. She alleges that the shock was caused by inadequate grounding or some other electrical defect, and that a number of other employees had also previously received electrical shocks when they came into contact with steel fixtures, counters, or devices at the restaurant. Defendants moved for summary disposition, arguing that Prill could not establish an intentional tort to avoid the exclusive remedy provision of the WDCA. The trial court concluded that there was a genuine issue of material fact whether an intentional tort was committed and, therefore, denied defendants' motion.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

At issue is whether defendants' actions rise to the level of an intentional tort under MCL 418.131(1), which 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 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.

Under MCL 418.131(1), the trial court is to decide if the facts alleged by the plaintiff are sufficient to constitute an intentional tort as a matter of law. The jury's role is to decide if the facts are as the plaintiff alleges. *Herman v Detroit*, 261 Mich App 141, 147; 680 NW2d 71 (2004).

In *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 148-150; 565 NW2d 868 (1997), this Court, citing *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), held that a plaintiff must establish the following elements to prove an intentional tort under MCL 418.131(1):

> (1) "Deliberate act"--This includes both acts and omissions and encompasses situations in which the employer "consciously fails to act."
>
> (2) "Specifically intended an injury"—An employer must have had a conscious purpose to bring about specific consequences. When an employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. (Recognizing [sic] that direct evidence of intent is often unavailable, the *Travis* Court explained that the second sentence of the exception provides an alternative means of proving an employer's intent to injure. *Id*. at 172-173. Plaintiff here relies upon this alternative to establish the employer's intent. To paraphrase the *Travis* Court at 173-174, 176, 178-179, a plaintiff alternatively can prove intent to injure by establishing the following elements:
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> (1) "Actual Knowledge"—This element of proof precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established 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."

(2) "Injury certain to occur"—This element establishes an "extremely high standard" of proof that cannot be met by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does.

(3) "Willfully disregard"—This element requires proof that an employer's act or failure to act must be more than mere negligence, e.g., failing to protect someone from a foreseeable harm. Instead, an employer must, in fact, disregard actual knowledge that an injury is *certain* to occur. [Emphasis in original.]

Here, plaintiffs alleged that at least twenty-five other employees suffered shocks in the kitchen or serving area of defendants' restaurant, but only submitted the deposition testimony of one other employee. Although that employee may have suffered an electrical shock under circumstances similar to Linda Prill's accident, that employee did not suffer any injury requiring medical attention. Thus, that employee's experiences do not demonstrate that defendants had knowledge that an injury was certain to occur to Prill. Plaintiffs likewise failed to establish that the other incidents were so closely related to what happened to Prill that defendants had actual knowledge that an injury was certain to occur or that defendants specifically intended an injury. There was simply no evidence that the countertop area was continuously dangerous; instead, it at best showed that there was an intermittent problem. *Travis*, *supra* at 182. Furthermore, defendants submitted evidence demonstrating that they took reasonable steps to protect their employees by arranging for repairs. In Prill's case, no defect was discovered, nor could the shock that Prill received be reproduced. Viewing the facts most favorably to plaintiffs, we conclude that plaintiffs cannot establish an intentional tort as a matter of law. Therefore, the trial court erred in denying defendants' motion for summary disposition.

Reversed and remanded for entry of an order granting defendants' motion for summary disposition. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell