STATE OF MICHIGAN

COURT OF APPEALS

CINDIE L. PALMER, Personal Representative of the Estate of MICHAEL W. PALMER, Deceased,

Plaintiff-Appellant,

v

WESLEY INTERNATIONAL, INC., f/k/a BUENA VISTA COATINGS, INC., f/k/a FLINT COATINGS, INC., f/k/a IOWA COATINGS, INC., f/k/a PROKOTE HOLDING, INC., f/k/a PROKOTE USA, INC., f/k/a UNIVERSAL APPLICATORS, INC., WESLEY INDUSTRIES, INC., HAROLD AUBERT, and DELPHI AUTOMOTIVE SYSTEMS USA, LLC, f/k/a DELPHI AUTOMOTIVE SYSTEMS, LLC,

Defendants-Appellees.

UNPUBLISHED
November 8, 2005

No. 262873
Saginaw Circuit Court
LC No. 01-040359-NO

Before: Kelly, P.J., and Meter and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from two separate opinions and orders of the circuit court granting defendants' motions for summary disposition.[1] We affirm.

This wrongful death action arose out of fatal injuries suffered by plaintiff's decedent while he was employed by defendant Wesley International, Inc. (Wesley) at its Buena Vista, Michigan, plant. Plaintiff's decedent was fatally injured while he was performing maintenance on a rotor-coating machine that was in operation. The trial court granted Wesley's motion for summary disposition under MCR 2.116(C)(10),[2] concluding that, because plaintiff's claim was

[1] This Court has ordered the instant appeal closed with regard to Delphi Automotive Systems USA, LLC, due to a pending bankruptcy proceeding. This opinion concerns only the remaining defendants.

[2] Wesley's motion was filed under MCR 2.116(C)(7), (8), and (10). Although the trial court did not specifically state under which subsection it was granting the motion, we may assume that it

(continued…)

based on Wesley's negligence, the claim was barred by the exclusive remedy provision of the Workers' Disability Compensation Act (WDCA). See MCL 418.131.

Plaintiff argues that the trial court erred in granting Wesley's motion for summary disposition because she presented sufficient facts to establish that her claim fell within the intentional tort exception to the exclusive remedy provision of the WDCA. Plaintiff contends that she presented the trial court with evidence that Wesley, through its supervisory employee, defendant Harold Aubert, had actual knowledge that injury was certain to occur to plaintiff's decedent and that it willfully disregarded this knowledge. We disagree. We review a trial court's decision with regard to a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

Under the WDCA, the right to recover worker's compensation benefits is an employee's exclusive remedy against an employer for a personal injury or occupational disease arising out of or in the course of employment, unless there has been an intentional tort. MCL 418.131; *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000). MCL 418.131(1) provides, in part:

> 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.

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996), our Supreme Court interpreted the relevant statutory language as follows:

> 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.

Further, in *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997), this Court, paraphrasing *Travis*, explained that when proceeding under the second method for proving an intentional tort – using circumstantial rather than direct evidence to show a defendant's intent to injure – a plaintiff must prove the following:

> (1) "Actual Knowledge" – This element of proof precludes liability based

(…continued)

was granted under subsection (C)(10) because the trial court stated in its opinion and order that it "examin[ed] the evidence in the light most favorable to the Plaintiff," and that evidence included affidavits, deposition testimony, and documentary evidence. *Driver v Hanley*, 226 Mich App 558, 562; 575 NW2d 31 (1997) (construing motion as having been granted under MCR 2.116(C)(10) because the trial court relied on matters outside the pleadings).

> 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, after consideration of the evidence in the light most favorable to plaintiff, we conclude that plaintiff failed to establish that Wesley committed an intentional tort against the decedent.

Plaintiff relies on the following as evidence that Wesley had actual knowledge that an injury was certain to occur: (1) Aubert ordered the decedent to work on the machine while it was in operation; (2) Wesley had lockout procedures in place that it failed to enforce; and (3) Aubert admitted that he was aware that employees were performing maintenance on the machine while it was in operation and that agents of Delphi Automotive Systems USA, LLC, were instructing them to do so, but he failed to take any action to stop the willful violations of the Michigan Occupational Safety and Health Act (MIOSHA), MCL § 408.1001, *et seq.* However, MIOSHA violations by themselves do not prove that a supervisory employee had actual knowledge of the danger of certain injury. *Palazzola*, *supra* at 151-152. Further, Wesley's promulgation of safety procedures does not support an inference that it had actual knowledge that injury was certain to occur to plaintiff's decedent. *Smith v Mirror Lite Co*, 196 Mich App 190, 194; 492 NW2d 744 (1992). Lastly, while reckless disregard for the health, safety, and welfare of employees may be gross negligence, it is insufficient to satisfy the intentional tort exception of the WDCA. *Bock v Gen Motors Corp*, 247 Mich App 705, 712-713; 637 NW2d 825 (2001). Therefore, the evidence was not sufficient to establish that Wesley had actual knowledge that an injury was certain to occur.

Additionally, contrary to plaintiff's assertion, this case is distinguishable from *Adams v Shepherd Products, U.S., Inc.*, 187 Mich App 695, 698; 468 NW2d 332 (1991), in which this Court determined that there was sufficient evidence that the defendant "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." Here, unlike the situation with the maintenance supervisor in *Adams*, Aubert's testimony did not essentially amount to an admission that injury was certain to occur from a person working on the machine while it was in operation. To the contrary, Aubert testified that working on an operating machine was against safety procedures because it was very dangerous. When asked whether injury would be certain to occur under the circumstances encountered by the decedent, Aubert testified that it "could be." Additional support for the proposition that Aubert did not have actual knowledge

that injury was certain to occur is the fact that no other Wesley employees had been injured while working on the machine while it was running. Indeed, there was testimony from Wesley employees that, while it was not easy to do, other employees had been able to successfully time the machine and, without incident, make it across the catwalk where the decedent was injured.

Because plaintiff has not shown that Wesley had the requisite intent for purposes of establishing an intentional tort, her claim is barred by the exclusive remedy provision of the WDCA, and the trial court did not err in granting Wesley's motion for summary disposition.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Alton T. Davis