STATE OF MICHIGAN

COURT OF APPEALS

DAVID ALLARD, Bankruptcy Trustee on behalf of KEITH VALINSKI and NANCY VALINSKI,

Plaintiff-Appellant,

v

DETROIT EDISON and DTE ENERGY COMPANY,

Defendants-Appellees.[1]

UNPUBLISHED
April 14, 2009

No. 281061
Wayne Circuit Court
LC No. 01-134584-NI

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition for Detroit Edison under MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In October 1998, Keith Valinski was severely injured in the course of his employment as an electrician with Detroit Edison. Valinski and his wife filed a complaint against Detroit Edison, asserting the applicability of the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. This action was removed to the United States District Court for the Eastern District of Michigan, which granted summary judgment for Detroit Edison based on its determination that the intentional tort exception is inapplicable. The Sixth Circuit Court of Appeals vacated the district court's order, holding that the district court did not have jurisdiction to decide the state law claim. *Valinski v Detroit Edison*, 197 Fed Appx 403 (CA 6, 2006). Thereafter, this case was remanded to the Wayne Circuit Court, which granted summary disposition for Detroit Edison, adopting as its own the federal district court's order granting summary judgment.[2]

[1] Although Keith and Nancy Valinski asserted theories of negligence against DTE Energy Company (DTE) in their complaint, DTE was dismissed from this action in 2002 and is not a party to this appeal.

[2] In its order of dismissal, the circuit court granted the parties' stipulated motion to amend the (continued…)

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). It appears that the circuit court granted summary disposition under MCR 2.116(C)(10). A motion under subrule (C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. Further, "whether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the trial court, while the issue whether the facts are as plaintiff alleges is a jury question." *Gray v Morley (After Remand)*, 460 Mich 738, 742-743; 596 NW2d 922 (1999).

Plaintiff argues that the trial court erred by determining that the intentional tort exception to the exclusive remedy provision of the WDCA is inapplicable. The intentional tort exception applies when there exists "a deliberate act by the employer and a specific intent that there be an injury." *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004). MCL 418.131(1) provides, in relevant part:

> 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. [Emphasis added.]

Our Supreme Court has interpreted the first italicized sentence to mean that in order "to state a claim against an employer for an intentional tort, the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996). In addition, our Supreme Court has interpreted the second italicized sentence to apply "when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence." *Id.* at 173. In other words, "[i]t is a substitute means of proving the intent to injure element of the first sentence." *Id.* Under the second sentence, "the employer's intent to injure [may] be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Id*. at 180. Because there exists no direct evidence of an intent to injure in this case, plaintiff must establish that the second sentence applies.

Plaintiff has failed to present evidence that a Detroit Edison supervisory or managerial employee had actual knowledge that an injury was certain to occur. See *Travis*, *supra* at 173-174, 180. The facts of this case show that Valinski was assigned to work on electrical "buckets"

(…continued)

caption to name David Allard, the Valinskis' bankruptcy trustee, as the plaintiff in this action in lieu of the Valinskis.

along with Mike O'Dell, a fellow electrician. They were to inspect and lubricate the bucket disconnect switches. O'Dell considered the assignment to be a routine task that required little prior instruction, and he and Valinski had previously worked on the same type of job. O'Dell gathered the tools necessary for the job from his toolbox and he and Valinski began their work. While working on the seventh bucket, Valinski removed a piece of string that was hanging from a fuse clip with an uninsulated metal screwdriver that O'Dell had given him. The fuse clip was energized, causing an explosion when the screwdriver grounded against the clip. After the explosion, O'Dell realized that the on/off switch to the bucket that Valinski was working on was in the "on" position. Valinski was under the impression that the equipment that he was working on was deenergized.

Plaintiff argues that Detroit Edison's failure to comply with Michigan Occupational Safety and Health Administration (MIOSHA) requirements, including applicable lock-out/tag-out regulations and regulations requiring insulated tools and other safety equipment, demonstrated that its supervisors were aware that employees were working within inches of components that could injure or kill them. Plaintiff relies on the deposition testimony of Kenneth Precord, a Detroit Edison supervisor, admitting that mandatory MIOSHA regulations were not followed with respect to Valinski's accident and that performing repetitive work on energized equipment without following mandatory safety requirements was "an accident waiting to happen." This evidence, however, fails to establish that a Detroit Edison supervisory or managerial employee had actual knowledge that an injury was certain to occur. *Travis, supra* at 173-174, 180; *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 152; 565 NW2d 868 (1997). At most, this evidence shows that an injury was foreseeable. An employer's negligence in failing to "protect a person who might foreseeably be injured from an appreciable risk of harm" is insufficient to satisfy the requisites of MCL 418.131(1).

Plaintiff likens this case to *Golec v Metal Exch Corp*, the companion case to *Travis, supra*. In *Golec*, the plaintiff worked as a furnace loader and was ordered to load scrap metal into a furnace. The tractor normally used for such a job was equipped with a splash guard, but because that vehicle was out of service, the plaintiff used a tractor without a splash guard. *Travis, supra* at 157-158. The plaintiff suffered minor burns when he was splashed with molten aluminum following a minor explosion. *Id.* at 158. He complained to his shift leader, but was ordered to resume loading the scrap metal. *Id.* at 158-159. Thereafter, he was severely injured when a large explosion showered him with molten aluminum. *Id.* at 159. On these facts, our Supreme Court determined that the plaintiff established genuine issues of material fact regarding whether the employer had actual knowledge of the condition, whether the injury was certain to occur, and whether the employer disregarded knowledge of a certain injury. *Id.* at 185-187.

This case is distinguishable from *Golec* in that Detroit Edison did not order Valinski to return to work after he was injured while performing the same work. This case is more in line with *Herman, supra* at 149, which involved an electrician who was killed when he took his foot off of a fiberglass ladder and placed it on a grounded transformer within two feet of a 24,000-volt line. When the decedent flicked dust from a rag he was holding, electricity arced from the line to the decedent, electrocuting him. *Id.* This Court held that the decedent's death was the result of his "momentary and tragic lapse in judgment" by placing his foot on the grounded transformer, and "not the result of an intentional act by [the] defendant." *Id.* at 150. Likewise, the injury in this case resulted from Valinski's failure to deenergize the bucket by turning the

control switch to the "off" position and his decision to remove the piece of string from the fuse clip. The facts of this case simply do not show that Detroit Edison's managerial or supervisory personnel had actual knowledge that an injury was certain to occur. *Travis, supra* at 180.

Finally, plaintiff argues that the rules of statutory construction compelled the denial of Detroit Edison's motion for summary disposition. Plaintiff contends that, by promulgating MCL 418.131(1), our Legislature did not intend to eliminate all common-law tort claims brought by an employee against an employer. Plaintiff also cites Justice Boyle's acknowledgement that, although the standard is rigorous, the threshold is not "so rigorous as to preclude all claims of intentional torts." *Travis, supra* at 180. Plaintiff asserts that appellate courts have interpreted MCL 418.131(1) and *Travis* so narrowly that common-law causes of action have effectively been obliterated. In fact, MCL 418.131 provides the exclusive remedy against an employer for workplace injuries. The intentional tort exception to the exclusive remedy provision is explicitly delineated in MCL 418.131(1). Accordingly, contrary to plaintiff's argument, there exists no common-law exception to the exclusive remedy provision. Further, although the intentional tort exception is narrow, the language of MCL 418.131(1) compels such an interpretation.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra