STATE OF MICHIGAN

COURT OF APPEALS

ANDREW ROBERT LUCE, Plaintiff-Appellant,	UNPUBLISHED May 17, 2016
v	No. 327978 Montcalm Circuit Court
KENT FOUNDRY COMPANY, Defendant-Appellee.	LC No. 2014-018509-NO

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Pursuant to MCR 2.116(C)(10), the trial court summarily dismissed plaintiff's personal injury suit against defendant, his employer, to recover damages incurred at his workplace under the "intentional tort" exception in MCL 418.131(1). Plaintiff appeals the order of the trial court, and for the reasons provided below, we affirm.

Michigan's worker's compensation laws' objective is to promote prompt and sure compensation for workplace injuries regardless of fault. In exchange for this benefit, the Legislature eliminated tortious civil suits for such injuries, with the very limited exception of intentional torts. To ensure that this exception would be applied very narrowly, the Legislature defined "intentional tort" in this context to require that the employer actually intend to injure its employee. Here, plaintiff attempts to fit his tort claim within this narrow exception and, accordingly, the sole issue before us is whether defendant actually intended plaintiff's injury, which if true, would constitute an exception to the act's exclusive remedy provision. The record shows that the hazardous condition in the machinery that caused plaintiff's injury persisted (periodically) for a long time and never caused an injury to any employee who operated the machine during these hazardous periods. Therefore, it is clear that, as a matter of law, defendant did not intend to injure plaintiff, and plaintiff's suit is barred.

I. BASIC FACTS

During his employment, plaintiff was trained to work on a large machine called a wheelabrator.[1] The wheelabrator is used continuously, five to seven days per week, by operators with the exception of a two-hour maintenance period between 4:30 a.m. and 6:30 a.m. While plaintiff was not a main operator on the wheelabrator, he nonetheless operated the machine at least two hours each day he worked.

Testimony showed that the doorstops on the wheelabrator's west door regularly would break off. Steve Miller, the main wheelabrator operator during plaintiff's shift, estimated that these breakages occurred every month or so. Importantly, although these breakages occurred frequently, until plaintiff's injury, no one had ever gotten caught between the door and the I-beam and been injured while operating the machine without the doorstops.

In early August 2012, Miller noticed that one of the doorstops had broken off and notified defendant's maintenance personnel, and plaintiff also noticed that the doorstop was missing and brought it to the attention of David Leary, the maintenance supervisor. However, approximately two weeks elapsed and the doorstops had yet to be repaired. On August 17, 2012, as plaintiff worked on the wheelabrator, his hand was crushed between the door and the I-beam, which caused extensive damage and resulted in the amputation of a portion of a finger.

Plaintiff filed the instant suit and alleged that he was entitled to the recovery of damages under the intentional tort exception to the exclusive remedy rule of the Worker's Disability Compensation Act. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) and argued that there was insufficient evidence to prove that defendant specifically intended to cause plaintiff's injury. The trial court agreed with defendant and granted its motion.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant. We disagree.

A. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). Summary disposition under MCR 2.116(C)(10) is appropriate if, "[e]xcept as to the amount of

[1] A wheelabrator is a machine that cleans and surface-treats industrial parts by blasting steel pellets at the parts placed inside the wheelabrator cabinet. The wheelabrator in this case is very large, with its two doors being over 11 feet tall and weighing over 10,000 pounds each. The two doors are referred to as the "east" door and the "west" door. When the west door is opened, it swings and travels approximately 180 degrees until it strikes a steel I-beam vertical column, which creates a "pinch point." To alleviate this, defendant installed doorstops on the door, which are located along the door's hinges. When the doorstops are in place and functional, the door's range of movement is limited and when it opens, it stops before striking the I-beam, thereby eliminating any pinch point.

damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In deciding a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. Further, issues of statutory interpretation and whether an act was an "intentional tort" under the Worker's Disability Compensation Act (WDCA) are questions of law that we review de novo. *Gray v Morley*, 460 Mich 738, 742-743; 596 NW2d 922 (1999); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396; 605 NW2d 685 (1999).

B. DISCUSSION

The pertinent section of the WDCA is MCL 418.131(1), which provides as follows:

> 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 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.

Thus, ordinarily, an employee's sole remedy against an employer for a personal injury is provided by the WDCA. *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014). In essence, the WDCA "may be viewed as providing 'immunity' from suit." *Harris v Vernier*, 242 Mich App 306, 314; 617 NW2d 764 (2000); see also *Eversman v Concrete Cutting & Breaking*, 463 Mich 86, 92-93; 614 NW2d (2000). In *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000), we described the rationale for limiting an employee's remedies thusly:

> Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault. In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer. [Quotation marks and citations omitted.]

Consequently, "[t]he only exception to [the exclusive remedy] rule is when the employee can show that the employer committed an intentional tort." *Bagby*, 308 Mich App at 491. And "to recover under the intentional tort exception of the WDCA, a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury." *Bagby*, 308 Mich App at 491, citing *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996). A plaintiff can prove that a defendant had an intent to injure through circumstantial evidence if he establishes that (1) the employer has

actual knowledge (2) that an injury is certain to occur, (3) yet disregards that knowledge. *Bagby*, 308 Mich App at 491, citing *Travis*, 453 Mich at 173.

Because it is undisputed that defendant was aware that the doorstops were missing at the time of plaintiff's injury and had not made any attempts to repair the doorstops, the key to the resolution of this motion is the element regarding the certainty of the injury, i.e., was there evidence that operating the west door without the functional doorstops made plaintiff's 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." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997). We hold that there is no question of fact regarding whether defendant knew that plaintiff's injury was certain to occur. The undisputed evidence is that the doorstops routinely broke and became ineffectual, and during these times when there were no functioning doorstops, the wheelabrator nonetheless operated, without any injury to any employee. Clearly, there was nothing to inform defendant that an injury was "certain" to occur. As this Court has explained, "The existence of a dangerous condition does not mean that an injury is certain to occur. An employer's awareness of a dangerous condition, or knowledge that an accident is likely, does not constitute actual knowledge that an injury is certain to occur." *Bagby*, 308 Mich App at 492-493 (citation omitted); see also *Herman v City of Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004) ("An injury is certain to occur if there is no doubt that it will occur . . . ."); *Palazzola*, 223 Mich App at 150. Here, the evidence merely demonstrates that defendant was aware of a dangerous condition—it was not aware that injury was certain to occur.

Plaintiff's reliance on the testimony of Leary to prove this element, where Leary avers that an injury was just "a matter of time" is misplaced. Plaintiff posits that because Leary does not mention any "probability, chance, or doubt," then his statement should be viewed as one of certainty, i.e., he believed that someone definitely would be injured. We disagree.

First, Leary later explained that, in his opinion, one would only get injured "if you were doing it and not paying attention." The introduction of such a condition negates any concept of certainty. Second, assuming no such qualification existed, this is precisely the type of evidence that this Court has cautioned would be insufficient to prove this "extremely high standard." *Palazzola*, 223 Mich App at 149. Leary's failure to mention any explicit chance or probability does not transform his opinion into one of certainty. Notably, Leary's statement did not provide that when someone next used the wheelabrator with the doorstops missing that the person was *certain* to get injured. Instead, his statement clearly reflects his reasoned view that the condition was indeed dangerous and that common sense dictates that, due to the laws of probability, *eventually* someone will get hurt. But these types of dangerous conditions fall well short of establishing a condition that is *certain* to cause injury when the condition is encountered. See *Johnson v Detroit Edison Co*, 288 Mich App 688, 698; 795 NW2d 161 (2010) (stating that an employer's knowledge that an accident was likely is insufficient); *Oaks v Twin City Foods, Inc*, 198 Mich App 296, 298; 497 NW2d 196 (1992) ("[I]t is not enough that the employer acted recklessly and even envisioned the type of accident that did in fact occur.").

Plaintiff alternatively relies on the principle that a "continuously operative dangerous condition" may form the basis for a claim under the intentional tort exception. However, it is not enough that such a dangerous condition merely exists. Moreover, the employer must have knowledge of the condition *and refrain from informing the employee about it*. *Johnson*, 288 Mich App at 698, citing *Travis*, 453 Mich at 178. The key is that the employee is left in the dark about the danger he is to encounter and therefore "unable to take steps to keep from being injured." *Travis*, 453 Mich at 178. But here, there was no need for defendant to notify plaintiff of the dangerous condition or the nature of the danger because it was plaintiff who brought the danger to defendant's attention a week or two before the accident. Indeed, what prompted plaintiff to notify defendant was that plaintiff got part of his glove caught between the door and the I-beam in that very same pinch point. At the time of his accident, plaintiff was clearly aware of the danger and the potential for severe injury. For starters, with the 11-foot high, 10,000-pound door slamming into the steel I-beam every time the doorstops were missing, the realization of the potential for serious harm to plaintiff was obvious. Moreover, assuming arguendo plaintiff was somehow unaware of the dangers he faced, any doubt was erased when he had his close call with his glove getting caught in the pinch point, which prompted him to notify management of the dangerous condition. He acknowledged that, at the time, he was lucky that no part of his hand was caught between the door and the I-beam in that instance. Therefore, the record is clear that plaintiff's situation is distinguishable from the hypothetical employee described in *Travis* who is unaware of the danger and unable to take steps to protect himself. As a result, plaintiff cannot establish the presence of an intentional tort through the use of the "continuously operative dangerous condition" doctrine.

As the trial court correctly held, plaintiff failed to present any evidence that defendant specifically intended to harm him under MCL 418.131(1). As a result, the court did not err when it granted defendant's motion for summary disposition.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey