NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0600

DAVID PAUL LINDSAY

VERSUS

PACKAGING CORPORATION OF AMERICA,
KENNETH PENNINGTON, ANDREW SHEETS,
AND ACE USA, INC.

Judgment Rendered: NOV 0 1 2017

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APPEALED FROM THE 19th JUDICIAL DISTRICT COURT
EAST BATON ROUGE PARISH, LOUISIANA
DOCKET NUMBER C637277, SECTION 27

HONORABLE TODD W. HERNANDEZ, JUDGE

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and Kenneth Pennington

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDONALD, J.,

David Lindsay, an employee of Packaging Corporation of America (PCA), was seriously injured when the Hyster fork lift clamp truck (Hyster) he was operating slipped off of a loading dock and his left forearm was caught between the Hyster's safety cage and a railcar. He later filed this tort suit against PCA, Kenneth Pennington (a PCA supervisor), and Ace USA, Inc., (a workers' compensation insurer) (defendants), alleging his injury was due to PCA's intentional act.[1]

Defendants moved for summary judgment, alleging Mr. Lindsay's exclusive remedy was in workers' compensation, as he was unable to show an intentional act by PCA. The district court granted summary judgment to the defendants, and Mr. Lindsay filed this appeal.

To recover in tort under LSA-R.S. 23:1032B, a plaintiff must prove the employer: (1) consciously desired the physical result of its act, whatever the likelihood of that result happening from its conduct, or (2) knew that the result was substantially certain to follow from its conduct, whatever its desire may be as to that result. *Danos v. Boh Bros. Constr. Co., LLC,* 13-2605 (La. 2/7/14), 132 So.3d 958, 959 (per curiam); *Miller v. Sattler Supply Co., Inc.*, 13-2558 (La. 1/27/14) 132 So.3d 386, 387 (per curiam). Here, Mr. Lindsay asserts that PCA knew that his injury was substantially certain to follow, because PCA knew of the persistently wet floor hazard for years and failed to correct it.

In *Danos*, 132 So.3d at 959, the Louisiana Supreme Court repeated the requirements for finding a "substantial certainty," as originally stated in *Reeves v. Structural Preservation Systems*, 98-1795 (La. 3/12/99), 731 So.2d 208, 212-13, as follows:

> Believing that someone may, or even probably will, eventually get hurt if a workplace practice is continued does not rise to the level of an intentional act, but instead falls within the range of negligent acts that are covered by workers' compensation.
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> * * *
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> "Substantially certain to follow" requires more than a reasonable probability that an injury will occur and "certain" has been defined to mean "inevitable" or "incapable of failing." [A]n employer's mere knowledge that a machine is dangerous and that its use creates a high

[1] Mr. Lindsay originally named Andrew Sheets, another PCA employee, as a defendant, but on the record before us, it appears Mr. Sheets was never served with the petition.

> probability that someone will eventually be injured is not sufficient to meet the "substantial certainty" requirement. Further, mere knowledge and appreciation of a risk does not constitute intent, nor does reckless or wanton conduct by an employer constitute intentional wrongdoing. [Some internal quotation marks and citations omitted.]

In this case, PCA presented evidence admitting that it knew the warehouse floor accumulated water, and demonstrating that measures were in place to alleviate the condition, but pointing out that there was no evidence that any PCA employee other than Mr. Lindsay had ever been injured from a Hyster sliding on wet floors in the warehouse.

In opposition, Mr. Lindsay submitted documentation that PCA used a Hazard ID reporting program and a Safety Observation Achieve Results (SOAR) reporting program, showing that numerous wet floor problems had been reported to PCA by employees during the three years immediately preceding his accident. He also submitted testimony by the PCA SOAR manager, Kimberly Maricle, that the wet floor hazard was "well documented" in PCA's records and that she remembered "countless times" when Hysters would slide and fall. However, even accepting PCA's knowledge of a "well documented" slippery floor hazard, such does not establish that Mr. Lindsay's accident was substantially likely to occur. The substantial certainty requirement mandates more than a mere probability of injury; rather, injury must be inevitable. *Miller*, 132 So.3d at 388. Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, or willfully failing to furnish a safe place to work, this still falls short of the kind of actual intention to injure that robs the injury of accidental character. *Reeves*, 731 So.2d at 210, *citing* Larson, 2A *Workmen's Compensation Law,* §68.13 (1989). An employer's actions in knowingly permitting a hazardous work condition to exist might be considered negligent, or even grossly negligent, but are not intentional. *See Batiste v. Bayou Steel Corp.*, 10-1561 (La. 10/1/10), 45 So.3d 167, 169 (per curiam); *Danos*, 132 So.3d at 959.

Moreover, we do not think one witness' testimony that Hysters had slid and fallen "countless times" creates a genuine issue of material fact that PCA knew Mr. Lindsay's injury was substantially certain to follow. Mr. Lindsay did not submit evidence

to substantiate that these "countless" other Hyster incidents were caused by slippery floor conditions. Rather, Mr. Lindsay himself admitted that, during his employ, he knew of no other PCA employee who had been injured from a Hyster slipping on a wet floor. Ms. Maricle also admitted that she did not know if such an injury had occurred before. Further, even assuming for the sake of argument any other accident was factually similar, an employer's awareness of even similar accidents is insufficient to establish an intentional act. *See Batiste,* 45 So.3d at 169 n.2.

Under the facts presented, and the stringent "substantial certainty" requirements necessary to recover in tort under LSA-R.S. 23:1032B, we find Mr. Lindsay is unable to prove PCA knew his accident was substantially certain to occur. We conclude the district court did not err in granting summary judgment to the defendants and in dismissing Mr. Lindsay's claims against them with prejudice. We issue this memorandum opinion in compliance with Uniform Rules – Courts of Appeal, Rule 2-16.1B. We assess appeal costs to David Lindsay.

AFFIRMED.