STATE OF MICHIGAN

COURT OF APPEALS

ALFRED REEVES and CINDY REEVES,

Plaintiffs-Appellants/
Cross-Appellees,

v

MUELLER BRASS,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED
May 29, 1998

No. 197417
St. Clair Circuit Court
LC No. 94-00222 NO

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). Defendant cross-appeals the trial court's order denying its motion for sanctions pursuant to MCR 600.2591; MSA 27A.2591. We affirm.

Plaintiff Alfred Reeves (plaintiff) was injured in the course of his employment with defendant when, while assisting in the loading of an open trailer, one of the bows used to support a tarpaulin covering some loaded cargo snapped, striking him in the head. He sued defendant for negligence. The trial court, in lieu of dismissing the case, allowed plaintiff to amend his complaint. Plaintiff's amended complaint alleged four alternative causes of action, and the trial court eventually granted summary disposition as to each. The trial court subsequently awarded defendant post-mediation attorney fees, see MCR 2.403(O), but denied defendant's request for sanctions pursuant to MCL 600.2591; MSA 27A.2591.

On appeal, plaintiff challenges only the dismissal of his products liability claim. Specifically, he contends that the trial court erred in concluding that the claim was barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1), that provides that the right to recover worker's compensation benefits "shall be the employee's exclusive remedy against the employer for a personal injury." According to plaintiff, his products liability claim was viable under the dual capacity doctrine because the claim was brought against defendant in

defendant's capacity as manufacturer of the trailer or its bow-type tarpaulin support system, and not in defendant's capacity as plaintiff's employer.

Although the dual capacity doctrine recognizes that an employer can, under certain circumstances, occupy a status other than that of an employer with respect to an employee, e.g., as a product manufacturer or designer, the doctrine is applicable only in situations where the employer has a second identity that is completely distinct and removed from the employer status. See *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 653; 364 NW2d 670 (1984), *Isom v Limitorque Corp*, 193 Mich App 518, 523; 484 NW2d 716 (1992), *Bourassa v ATO Corp*, 113 Mich App 517; 317 NW2d 669 (1982), *Peoples v Chrysler Corp*, 98 Mich App 277, 284; 296 NW2d 237 (1980). Here, assuming that defendant was the manufacturer of the trailer or its tarpaulin support system, plaintiff's exposure to the trailer and support system arose out of his employment relationship with defendant, making the dual capacity doctrine inapplicable. The trial court therefore properly found that plaintiff's claim was barred by the exclusive remedy provision. *Wells*, *supra*. We also reject plaintiff's reliance on MCL 600.2945; MSA 27A.2945. That statute does not create a substantive cause of action for products liability; it provides a definition of "products liability action" to be applied in other sections of the Revised Judicature Act. Under these circumstances, the trial court did not err in granting defendant's motion for summary disposition.

We note that plaintiff Cindy Reeves brought a derivative claim for loss of consortium. Because we conclude that the husband's claim is barred by the exclusive remedy provision of the Worker's Disability Compensation Act, the wife's derivative claim is also barred. *Bowden v McAndrew*, 173 Mich App 591, 595-596; 434 NW2d 195 (1988).

We next turn to defendant's claim that it was entitled to sanctions under MCL 600.2591; MSA 27A.2591. MCR 2.625(A)(2) states that a court shall award costs, as provided by MCL 600.2591; MSA 27A.2591, to reimburse a prevailing party for its costs incurred during the course of frivolous litigation. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). Sanctions are permitted under MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii), where a party's legal position is "devoid of arguable legal merit." A trial court's finding with regard to whether a claim was frivolous will not be disturbed on appeal unless the finding is clearly erroneous. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1990).

We find no clear error in the trial court's decision not to award sanctions in this case. As noted by the trial court, there were complex issues presented, some of which were part of the developing case law of this State. The scope of the intentional tort exception, for example, was in flux when the amended complaint was filed; the Supreme Court had granted leave to appeal in two cases cited by plaintiff in the trial court and that eventually resulted in a decision in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996). Although it is now clear that, under *Travis*, plaintiff's intentional tort claim is without merit, there was sufficient uncertainty in this area of the law that the trial court's finding that plaintiff's claim was not frivolous in this respect is not clearly erroneous. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 203; 534 NW2d 491 (1995). Additionally, courts should be reluctant to impose sanctions for arguments even where the intermediate appellate court decisions are all consistent with one another (which was not the case here) until the Michigan Supreme Court has spoken

on the issue; a good faith argument can always be made that the decisions of this Court ought to be reexamined. See *McKnight v General Motors Corp*, 511 US 659; 114 S Ct 1826; 128 L Ed 2d 655 (1994).

Accordingly, the trial court did not clearly err in this respect in denying additional sanctions beyond mediation sanctions.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy