STATE OF MICHIGAN

COURT OF APPEALS

KENNETH PODOLAN,

Plaintiff-Appellant,

v

NEW HAVEN FOUNDRY, INC.,

Defendant-Appellee.

UNPUBLISHED
June 19, 1998

No. 202196
Macomb Circuit Court
LC No. 96-004735 NO

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

This case arises from an incident that occurred during the course of plaintiff's employment with defendant as an iron pourer. Duties attendant to that job included putting pieces of scrap metal, called "chills," into ladles of molten iron in order to cool the iron. It is common knowledge in the industry that chills that are rusty or damp are prone to explode when placed in molten iron, the likelihood of explosion depending on the amount of rust. Two hours before the incident in question, an employee looked through the chills at hand and noticed that many were rusty. The employee promptly informed his foreman, who verified that some of the chills were rusty. However, because the foreman had had only a few months of experience in this job, it was not obvious to him whether the chills were dangerous, and so he referred the matter to his supervisor.

The supervisor, a veteran of twenty years in the business, looked through the chills and said that they appeared to be all right. After the supervisor left, the foreman threw some chills into the ladles without incident. Shortly thereafter, the supervisor returned to examine the chills a second time, upon doing which he told the foreman that the employees should continue using the chills. About one-half hour later, an experienced employee beginning a shift in relief of another worker, threw a chill into the ladle and it exploded. Plaintiff, who was standing nearby, was struck with flying molten iron, sustaining severe burns.

Plaintiff filed suit against defendant under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.131(1); MSA

17.237(131)(1). Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff failed to allege facts sufficient to sustain a cause of action under the intentional tort exception. After a hearing, the trial court granted defendant's motion.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). Although the trial court did not indicate whether it granted the motion under MCR 2.116(C)(8) or (10), we find that analysis under the latter is dispositive and avoids the necessity of considering the question under the former.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Summary disposition under MCR 2.116(C)(10) is proper only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* If the reviewing court, upon examination of all relevant evidence of record in the light most favorable to the nonmoving party, determines that a genuine issue of material fact exists on which reasonable minds could differ, summary disposition is inappropriate. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

Generally, disability or death benefits under the WDCA are an injured employee's exclusive remedy against an employer who has complied with the act. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 510; 563 NW2d 214 (1997). The statute, however, provides for an exception where the employer has committed an intentional tort:

> 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. [MCL 418.131(1); MSA 17.237(131)(1).]

Under this legislation, an employee may pursue a tort action against an employer if the employee can establish that the employer acted, or failed to act, with a specific intent cause injury. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149; 565 NW2d 868 (1997), citing *Travis v Dreis & Krump Manufacturing Co*, 453 Mich 149, 169; 551 NW2d 132 (1996) (Boyle, J). Where an employer is a corporation, a particular employee must act with the requisite state of mind in order to render the corporation liable for an intentional tort. *Id.* "[D]isconnected facts possessed by various employees or agents of that corporation" are not sufficient to establish an intentional tort. *Id.* at n 4.

Plaintiff asserts that a genuine issue of material fact exists regarding whether defendant, through its supervisor, specifically intended to cause injury. Plaintiff points to evidence that the supervisor, after being informed that the chills were rusty, brusquely dismissed that concern, stating, "There ain't nothing wrong with them chills and they ain't got no more. Use them." Plaintiff maintains that this evidence of the supervisor's attitude at the time of the incident could reasonably lead a juror to conclude that the

employer intended plaintiff's injury. We disagree. The supervisor's alleged statement, standing alone, is insufficient to establish that defendant acted with the particular purpose of inflicting injury. On the contrary, the supervisor spoke after inspecting the chills twice, and after the foreman had tested some chills without mishap. This factual context reveals that after scrutinizing the chills the supervisor believed them to be suitable for use. It is simply not reasonable to conclude from this evidence that the supervisor actually determined that an explosion was certain to occur and ordered the use of the chills expecting to bring about that result. Accordingly, we find that the evidence considered in the light most favorable to plaintiff is insufficient to support a conclusion that the supervisor specifically intended to injure plaintiff.

Invoking the statutory alternative for establishing an intentional tort, plaintiff argues that the alleged facts create a genuine issue of material fact regarding whether defendant, through the supervisor, had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. We disagree. Where, as here, there is no direct evidence of an intent to injure, plaintiff may establish specific intent by showing that the employer had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. *Palazzolla*, *supra* at 149-150. "Knowledge must be actual; constructive, implied, or imputed knowledge is insufficient." *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 224; 555 NW2d 481 (1996), citing *Travis, supra* at 173 (Boyle, J).

That slightly rusty chills do not ordinarily explode, the degree of danger depending on the degree of rust, is not a matter of dispute. In the instant case, the experienced supervisor, at the foreman's request, examined the chills and adjudged them suitable for use. The foreman then verified the supervisor's evaluation by throwing some chills into the ladles without incident. After this, the supervisor again examined the chills and again determined that, despite some rust, the chills were safe for their intended purpose. Especially because the foreman had already tested the chills, the supervisor's repeat inspection of them cannot reasonably be harmonized with a conclusion that the supervisor wilfully disregarded their potential danger. Accordingly, we find that plaintiff has failed to allege facts sufficient to establish that defendant had actual knowledge that an injury was certain to occur.

Finally, plaintiff characterizes defendant's supervisor's order that the rusty chills be used despite the rust as a "deliberate act" in furtherance of the specific intent to injure plaintiff. However, having determined that the supervisor did not possess the specific intent to injure plaintiff, we conclude that his conduct did not constitute a deliberate act within the meaning of the statute. At best, the evidence presented in this case supports a conclusion that it was foreseeable that the rust on the chills might be dangerous to plaintiff. However, mere negligence in failing to protect an employee from foreseeable harm does not satisfy the intentional tort exception to the WDCA. *Palazzola*, *supra* at 150.

Thus, plaintiff can establish neither that his employer specifically intended to injure him, nor that the employer engaged in a deliberate act or omission that was certain to bring about that result. For these reasons, the trial court properly granted summary disposition for defendant. Plaintiff's sole remedy for his work-related injuries falls under the general provisions of the WDCA.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Peter D. O'Connell