STATE OF MICHIGAN

COURT OF APPEALS

JOHN NELLESSEN,

Plaintiff-Appellant,

v

O'DOVERO CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 7, 1998

No. 201486
Marquette Circuit Court
LC No. 95-000662 NO

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(10) based on the trial court's determination that no genuine issue of material fact existed as to whether defendant, plaintiff's former employer, had committed an intentional tort. Given this determination, the trial court held that the exclusive remedy provision, MCL 418.131(1); MSA 17.237(131)(1), of the Worker's Disability Compensation Act (the "WDCA"), MCL 418.101 *et seq*.; MSA 17.237(101) *et seq*., barred plaintiff's claim against defendant. We affirm.

I. Factual Background

At the time of the unfortunate incident underlying this case, plaintiff was working for defendant. Essentially, he was assigned to enter a dug out ditch as part of laying a "cookie," the base of a manhole. While plaintiff testified that he and a coworker requested a "ditch box," evidently a safety device intended to prevent the sides of a ditch from collapsing, their foreman apparently encouraged them to begin working in the ditch without a ditch box, and they did so. Eventually, part of the outer perimeter of the ditch caved in and a large amount of dirt collapsed on plaintiff, injuring him.

II. Intentional Tort Exception

A motion for summary disposition under MCR 2.116(C)(10) tests the existence of factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The adverse party may not rest upon mere allegations

or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial." *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

The plain language of the WDCA provides the exclusive remedy for employees against their employers for a work-related injuries except in the case of an "intentional tort":

> 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. This subsection shall not enlarge or reduce rights under law. [MCL 418.131(1); MSA 17.237(131)(1).]

Plaintiff argues that the trial court erred in finding no genuine issue of material fact on the intentional tort issue, claiming that there was evidence – in the form of comments by his foreman and common sense observations of witnesses – to show that defendant had actual knowledge of the certainty of the injury. In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172-173 (Boyle, J., joined by Mallett, J.), 191-192 (Riley, J., joined by Brickley, C.J., and Weaver, J.)[1]; 551 NW2d 132 (1996), the Court set forth the elements that a plaintiff needed to prove in order to establish that his employer committed an intentional tort: (1) a deliberate act or omission resulting in injury; and (2) that the employer specifically intended the injury or had actual knowledge that an injury was certain to occur and willfully disregarded this knowledge.

Under this test, plaintiff failed to present a genuine issue of material fact regarding defendant's intent to commit an intentional tort. Even if plaintiff could have established a deliberate failure to act when defendant did not provide a ditch box before plaintiff began working in the ditch, plaintiff cannot establish the second prong of the *Travis* test. The evidence presented would not reasonably support a finding of "a conscious purpose to bring about [an injury]." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149; 565 NW2d 868 (1997), or that defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Travis*, *supra*.

Plaintiff testified in his deposition that his foreman had stated that the workers should get in and out of the ditch and that if they "had a picnic, they would get hurt." Plaintiff also testified that every time he worked in a ditch without a ditch box, a cave-in occurred. However, plaintiff also stated that he had never seen anyone *injured* in a cave-in where a ditch box was not used. Taking the facts in the light most favorable to the plaintiff, plaintiff has failed to provide evidence that could give rise to a finding of "actual knowledge" under *Travis*. "Actual knowledge" in this context requires that "a supervisory or managerial employee had 'actual knowledge that an injury would follow from what the employer deliberately did or did not do.'" *Palazzola*, *supra* at 149, quoting *Travis*, *supra* at 174.

Although this evidence might have given rise to a finding that defendant knew or should have known that a cave-in would likely occur if a ditch box were not used, it would not give rise to a finding that defendant knew that an injury was certain to occur. Establishing an "intentional tort" to avoid the exclusivity of the workers' compensation remedy requires a plaintiff to meet a very high standard of proof. Probabilities play no part in determining the certainty of injury. *Travis*, *supra* at 174. There was no evidence to establish that the foreman, as an agent of defendant, knew that the injury caused by the cave-in was "certain to occur." The Court in *Travis*, *supra* at 176, determined that for an "intentional tort" to exist an employer must be aware that injury is certain to occur. The foreman's comments indicate that he thought plaintiff and his coworker could do their job without being hurt and definitely do not establish such certainty. Even if these comments could be construed as establishing that the foreman thought a cave-in might occur, they do not establish that he knew the *injury* was certain to occur.

Finally, plaintiff did not create a question of fact as to whether defendant "willfully disregarded" the *certainty* of injury. Mere failure to protect someone from foreseeable harm does not rise to the level of "willful disregard." *Palazzola*, *supra* at 150. In this case, it may well have been negligent of defendant to attempt to construct a ten-by-ten foot ditch, nine feet in depth, without the use of a ditch box. Such alleged negligence did not, however, rise to the level of willful disregard of actual knowledge that an injury was certain to occur.

Affirmed. Defendant, being the prevailing party, may tax costs under MCR 7.219.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] Justice Riley agreed with the test established by Justice Boyle's lead opinion for finding an intentional tort but disagreed with the application of that test to the facts of one of the two consolidated cases at issue. *Travis*, *supra* at 191-192 (Riley, J., joined by Brickley, C.J., and Weaver, J.). All subsequent citations in this opinion to *Travis* are to portions of Justice Boyle's lead opinion that we regard as part of setting forth the test endorsed in Justice Riley's opinion and, thus, as constituting the opinion of a majority of the Michigan Supreme Court.