STATE OF MICHIGAN

COURT OF APPEALS

ELMER THOMAS VAILLE, JR., CHERYL LYNN VAILLE, Individually and as Next Friend of JODI J. VAILLE and MARCELLE M. VAILLE, Minors,

Plaintiffs-Appellants,

v

FAYGO BEVERAGES, INC.,

Defendant-Appellee.

UNPUBLISHED
February 19, 1999

No. 199526
Wayne Circuit Court
LC No. 95-516639 NO

Before: Gribbs, P.J., and Saad and P.H. Chamberlain*, JJ.

MEMORANDUM.

Plaintiffs appeal by right the trial court's grant of summary disposition for defendant, on the basis of the exclusive remedy provision of the Workers' Disability Compensation Act, in this personal injury action arising out of injuries plaintiff Elmer Thomas Vaille, Jr., sustained in the course of his employment when a hi-lo ran over his foot. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

To avoid the exclusive remedy provision through the intentional tort exception, there must be facts showing that defendant deliberately acted or failed to act with specific intent that there be an injury. MCL 418.131; MSA 17.237(131); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996). Specific intent to injure may be shown if the employer had "actual knowledge" that injury was "certain to occur" and the employer "willfully disregarded" that knowledge. *Id.*, 172-173.

In *Travis*, the Court held that the requirement of "actual knowledge" means that constructive, implied or imputed knowledge is not enough, nor is it sufficient that the employer should have known, or had reason to believe, that injury was certain to occur. *Id*. at 173. The words "certain to occur" also

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* Circuit judge, sitting on the Court of Appeals by assignment.

set an extremely rigorous standard, going beyond mere levels of probability and requiring injury to be so "sure" and "inevitable" that there exists "no doubt" that injury will result from what the employer deliberately does or does not do. It is not enough to show merely that the employer had knowledge that a dangerous condition existed. *Id*. at 174-176. The words "willfully disregard" serve to underscore that the employer's act or failure to act must be more than mere negligence, that is, a mere failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. *Id*. at 178-179. Merely permitting an unsafe work environment to exist does not rise to the level of an intentional tort. *Id*. at 183.

Here, plaintiffs' evidence at most only shows defendant's knowledge of a dangerous condition (crowded aisle ways) that could foreseeably result in injury at some point in time, not actual knowledge that an injury was certain to occur as a result of defendant's failure to immediately eliminate the condition at that time. Only one of the thirteen prior injury reports proffered by plaintiffs actually indicates that a hi-lo collided with a person working on a pallet because of inadequate aisle space, and the relevance of that report is questionable because it did not involve the same area where Mr. Vaille was injured. See *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 156-157; 565 NW2d 868 (1997). Indeed, Mr. Vaille conceded that he was unaware of any prior injuries in that same production line area. Moreover, the relatively long existence of the dangerous aisle way condition, at least seven years by Mr. Vaille's account, with few if any similar aisle way incidents, actually tends to refute any notion that defendant knew that injury was "certain" to occur. See e.g., *Travis, supra* at 177 (quoting *Glockzin v Nortek, Inc*, 815 F Supp 1050, 1053 [WD Mich, 1992]); *Ford v Pivot Mfg Co (On Rehearing)*, 219 Mich App 608; 558 NW2d 1 (1996) (relying on fact that malfunctioning press was operated for six to seven hours without incident).

The affidavit of plaintiffs' expert is also unavailing. Whether the alleged facts are sufficient to constitute an intentional tort for purposes of the exclusive remedy provision is a question of law for the court to decide; it is not to be determined on the basis of the conclusions of experts. *Travis, supra* at 174-175, 188. Furthermore, the exclusive remedy provision not only bars Mr. Vaille's own personal injury claims, but his family's derivative loss of consortium claims as well. E.g., *Bowden v McAndrew*, 173 Mich App 591, 596; 434 NW2d 195 (1988).

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ Paul H. Chamberlain