STATE OF MICHIGAN

COURT OF APPEALS

GREGORY DWAYNE ALLEN, SR.,

Plaintiff-Appellant,

v

CLEARING-NIAGARA, INC., d/b/a NIAGARA MACHINE & TOOL WORKS,

Defendant,

and

GUELPH TOOL SALES, INC., d/b/a ODF INDUSTRIES,

Defendant-Appellee.

UNPUBLISHED
October 5, 1999

No. 207976
Macomb Circuit Court
LC No. 95-002343 NP

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing defendant, Clearing-Niagara, Inc., d/b/a Niagara Machine & Tool Works. However, the issue on appeal relates to a prior order granting summary disposition in favor of defendant, Guelph Tool Sales, Inc., d/b/a ODF Industries.[1] We affirm.

The sole issue on appeal is whether sufficient facts were alleged by plaintiff to establish an intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). Plaintiff contends that he has alleged sufficient facts. We disagree. Whether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the trial court. *Gray v Morley*, 460 Mich 738, 742-743; 596 NW2d 922 (1999); *Palazzola v Karmazin Products*, 223 Mich App 141, 146-147; 565 NW2d 868 (1997).

Our Supreme Court, in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), construed the intentional tort exception to the WDCA and described the facts and proofs necessary to establish such a claim.[2] The *Travis* Court held that, "to state a claim against an employer for an intentional tort, the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee." *Id*. at 172. The *Travis* Court further noted that, when there was no direct evidence of an intent to injure, i.e., a true, classic intentional tort, the plaintiff may prove such intent with circumstantial evidence. *Id.* at 172-173. A plaintiff may, therefore, properly set forth an intentional tort claim if the plaintiff establishes that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1); MSA 17.237(131)(1); see, also, *Travis*, *supra* 173, 180. It is this provision that is at issue in the present case, i.e., whether plaintiff has alleged sufficient facts to illustrate that defendant had actual knowledge that plaintiff was certain to be injured while he operated the press and willfully disregarded that knowledge.

Plaintiff primarily argues that defendant's intent to injure him can be inferred from the fact that the presses were routinely operated on a continuous cycle with safety guards improperly positioned and, consequently, another employee previously sustained severe injuries. Plaintiff also alleged that defendant engaged in violations of MIOSHA, failed to train its employees in safety, and failed to perform and ensure proper safety inspections.

We agree with the trial court that the facts alleged by plaintiff, even if accepted as true, are insufficient to state a claim upon which relief may be granted. MCR 2.116(C)(8); *Radke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). None of the facts alleged by plaintiff in his amended complaint were sufficient to establish actual knowledge or certainty of occurrence. Plaintiff's argument that the press ran in a continuous cycling phase does not necessarily cause the press to be considered a "continuously operative dangerous condition" within the contemplation of *Travis*, *supra* at 178. The risk associated with running the press without the proper placement of protective guards was obvious to the press operator, including plaintiff, and could have been mitigated by simply moving the protective guards into proper position. Although plaintiff was "allowed" to work without the safety guards being properly placed, plaintiff did not allege that he was *required* to work without properly placed guards.

Plaintiff's reliance on the fact that a similar injury occurred to a press operator months prior to the incident involving plaintiff, even though under allegedly similar circumstances, does not establish the requisite certainty that an injury would occur. *Id.* at 174. Similarly, defendant's alleged failure to provide safety training and perform safety inspections of the presses does not lead to an inference that defendant specifically intended to injure its employees. Defendant's knowledge that the presses were being operated without use of safety guards may be considered negligent because it was foreseeable that, eventually, someone would place their hand in the path of the ram and severe injuries would result. However, mere negligence is insufficient to establish an intentional tort. *Gray*, *supra* at slip op p 7; *Travis*, *supra* at 178-179. Therefore, plaintiff has

failed to state an intentional tort exception to the exclusive remedy provision of the WDCA, and summary disposition pursuant to MCR 2.116(C)(8) was proper.

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[1] Guelph Tool Sales, Inc. will be referred to as "defendant" because plaintiff's claim on appeal relates only to his claims against Guelph.

[2] A majority of the Court concurred in the test established in the lead opinion. See *Travis, supra* at 191-192.