STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW ANDERSON,

Plaintiff-Appellant,

v

ARISTO CRAFT, INC.,

Defendant-Appellee,

and

E.W. BLISS COMPANY, individually and as successor in interest to TOLEDO MACHINE AND TOOL COMPANY, D&N BENDING CORP., SIMON SOLOMON, d/b/a MOTORCITY PRESS REPAIR and EAGLE PRESS REPAIR, and ASC, INCORPORATED,

Defendants.

UNPUBLISHED
November 30, 1999

No. 210532
Macomb Circuit Court
LC No. 95-005786 NP

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from orders granting summary disposition in favor of defendant Aristo Craft and denying plaintiff's motion for summary disposition or sanctions. We affirm.

I

Plaintiff lost his hand in an accident that occurred in the course of his employment with defendant Aristo Craft. At the time of the accident, he was part of a two-man team operating a press that had palm button controls only for the frontside operator. Plaintiff was working the backside of the press and had his hand inside the die area when the frontside operator pressed the palm buttons cycling the press. The press cycled, crushing plaintiff's hand. Plaintiff filed this action claiming that defendant Aristo Craft's failure to install safety devices on the backside of the press constituted an intentional tort

outside of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1).

Aristo Craft filed its motion for summary disposition arguing that plaintiff had not proffered any evidence that it had acted in a purposeful or wilful manner and that it had no knowledge that an injury was certain to occur. Plaintiff responded that deposition testimony revealed that an operator was required to place his hands inside the press to properly run the part. Specifically, other employees testified that it was necessary to place one's hands in the press to clear a stuck part or to clean the die of scrap. One employee testified that most employees would shut off the press before trying to free a stuck part.

The trial court granted Aristo Craft's motion, holding that plaintiff had not shown that Aristo Craft had actual knowledge that an injury was certain to occur. Additionally, the court found that it was not necessary for an employee to place his hands inside the press; therefore, an injury was not certain to occur. Because plaintiff failed to demonstrate that Aristo Craft acted intentionally, plaintiff's claims were barred by the exclusive remedy provision of the WDCA.

II

We review de novo a trial court's decision to grant a motion for summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 701, n 3; 597 NW2d 506 (1999).

Whether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the trial court. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 188; 551 NW2d 132 (1996). Questions of law are subject to de novo review. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75,80; 467 NW2d 21 (1991).

The intentional tort exception to the exclusive remedy provision of the WDCA provides as follows:

> (1) 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).]

Construing the first portion of the exception, the Supreme Court in *Travis* 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 his employee." *Travis, supra* at 172. In regard to the second sentence of the intentional tort exception, the *Travis* Court explained:

> . . . [T]he second sentence will be employed when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence. It is a substitute means of proving the intent to injure element of the first sentence. The three phrases in this sentence that we must construe are: "actual knowledge," "certain to occur," and "willfully disregarded."
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> Because the Legislature was careful to use the term "actual knowledge," and not the less specific word "knowledge," we determine that the Legislature meant that constructive, implied, or imputed knowledge is not enough. Nor is it sufficient to allege that the employer should have known, or had reason to believe, that injury was certain to occur. . . . A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do.
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> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur.
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> Because the purpose of the entire second sentence is to establish the employer's intent, we find that the use of the term "willfully" in the second sentence is intended to underscore that the employer's act or failure to act must be more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur. [*Id*. at 173-179.] [citation omitted.]

In this case, the fact that another worker was injured on the same press does not establish that an injury was certain to occur. *Id*. at 174. The prior injury occurred when the brake clutch malfunctioned while the worker was running a totally different part with different operation procedures. Likewise, warning of a potential for injury is insufficient. *Id*. at 177. Plaintiff admitted that he knew the dangers of sticking his hands in the press, so there was no concealment of the danger. *Id*. at 178.

Moreover, although deposition testimony may demonstrate reckless or deliberate indifference that would constitute gross negligence, such allegations are insufficient to constitute an intentional tort within the meaning of the WDCA. *Gray v Morley*, 460 Mich 738, 744-745; 596 NW2d 922 (1999). Plaintiff has not proffered any evidence that defendant "specifically intended" to injure plaintiff, or that defendant had "actual knowledge that an injury was certain to occur." MCL 418.1319(1); MSA 17.237(131)(1); *Gray*, *supra* at 744. The deposition testimony relied on by Aristo Craft establishes that defendant thought the operation was safe, and that the press could be run safely by using tongs or shutting off the machine before clearing a jam. The issue is not whether, in fact, the press was safe, but rather, whether defendant "specifically intended" to injure plaintiff or had "actual knowledge that an injury was certain to occur." Plaintiff has not offered sufficient proof of either condition.

III

Plaintiff also argues that the trial court erred by denying his motion for summary disposition or, in the alternative, sanctions based on Aristo Craft's alleged spoliation of evidence. Approximately eighteen months after the accident, the die, which belonged to defendant ASC, was scrapped at ASC's direction after changes were made to the part. Aristo Craft argued that because plaintiff was injured on the job, it had no reason to suspect that plaintiff would seek damages outside of the scope of the WDCA. This action was filed approximately one year after the die had been destroyed. Regardless, plaintiff argued that the trial court should have imposed sanctions by way of limiting or excluding Aristo Craft's evidence that the operation did not require plaintiff to put his hands inside the press. Absent that testimony, plaintiff argued that it was entitled to summary disposition on the issue of liability. The trial court denied plaintiff's motion.

A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced. *MASB-SEG Property/Casualty Pool v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998); *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). An exercise of the court's inherent power may be disturbed only on a finding that there has been a clear abuse of discretion. *Id.*

Under the circumstances of this case, we conclude that the trial court did not abuse its discretion. Because plaintiff was injured on the job, the likelihood that plaintiff would seek damages outside the scope of the WDCA was too remote to impose a duty on Aristo Craft to preserve the die. Moreover, conclusory statements by an expert are insufficient to allege the certainty of an injury. *Travis*, *supra* at 174. Thus, the fact that plaintiff's expert did not inspect the die is of no consequence because his opinion would not indicate whether defendant was aware than an injury was certain to occur. As a result, the trial court did not err by denying plaintiff's motion for summary disposition because there was no basis for imposing the sanction of limiting or excluding defendant's evidence regarding the die.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin