STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA GILES,

Plaintiff-Appellee,

v

AMERITECH, a Joint Venture Between MICHIGAN BELL TELEPHONE COMPANY, a Michigan Corporation, AMERITECH PUBLISHING, INC., a Delaware Corporation, AMERITECH MOBILE COMMUNICATIONS, INC., a Delaware Corporation, AMERITECH NEW MEDIA, INC., a Delaware Corporation, and AMERITECH CORPORATION, INC., a Delaware Corporation, and CURT SIMMONS,

Defendants-Appellants,

and

R. BARNES AND COMPANY, INC.,

Defendant.

UNPUBLISHED
June 21, 2002

No. 231672
Wayne Circuit Court
LC No. 00-025490-NO

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

In this interlocutory appeal, defendants-appellants ("defendants") appeal by leave granted from an order denying in part their motion for summary disposition. We affirm.

Plaintiff, an Ameritech employee, filed a complaint alleging that she suffered an injury in October 1998 while splicing a telephone line in an excavation in Clarkston, Michigan. A natural gas service line was present in the excavation, and while plaintiff was using a propane torch to seal her splice, an explosion and fire occurred. Plaintiff suffered burns. As well as suing

Ameritech, plaintiff sued Curt Simmons, her supervisor, and R. Barnes and Company, the company that dug the excavation.[1]

Defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), alleging that plaintiff's claims were barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1), because she did not allege and could not establish the existence of an intentional tort.

The summary disposition hearing occurred before the completion of discovery and before plaintiff was able to take the depositions she desired to take. The trial court granted defendants' motion with respect to "any claim not based on the intentional tort exception set forth in the [WDCA]." It denied without prejudice defendants' motion with respect to the remaining claims, stating with regard to MCR 2.116(C)(8):[2]

> the Court finds for this motion that sufficient allegations do exist that defendants intended to injure plaintiff, specifically those cited in the paragraphs [of the complaint] that I cited during oral argument. The Court finds those as a basis for intentional tort.

With regard to MCR 2.116(C)(10), the court stated:

> While . . . the plaintiff [must] rebut Ameritech's evidence with actual admissible proof of specific facts showing a genuine issue of material facts exists, . . . the Court observes that any deficiency in plaintiff's response is due to the lack of discovery.
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> this Court finds it is generally considered premature to grant a motion for summary disposition before discovery on a disputed issue is completed.
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> * * *
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> Once discovery closes, Ameritech may refile this motion if it finds it necessary to do so.

Defendants filed an application for interlocutory appeal, and this Court granted the application. The trial court subsequently stayed the proceedings below pending the outcome of this appeal.

Defendants contend that the trial court erroneously denied them a complete grant of summary disposition because plaintiff did not establish a genuine issue of material fact regarding

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[1] Barnes did not move for summary disposition and is not a party to this appeal; it remains a defendant in the trial court.

[2] We note that defendants do not appeal the court's ruling with regard to MCR 2.116(C)(8).

the existence of an intentional tort and did not counter defendants' evidence in support of summary disposition with any relevant affidavits or evidence of her own.

We review de novo a trial court's decision with respect to a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Here, defendants appeal that portion of the trial court's ruling dealing with MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Because of the exclusive remedy provision of the WDCA, MCL 418.131(1), plaintiff cannot recover against defendants unless the alleged wrongful conduct constituted an intentional tort. Subsection 131(1) defines an intentional tort as follows:

> 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.

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180 (Boyle, J.), 191 (Riley, J.); 551 NW2d 132 (1996), the Supreme Court noted that it was evident from the above quoted statutory language

> that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [footnote omitted.]

In construing the phrase "actual knowledge," the Court stated 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. [*Id.* at 173-174 (Boyle, J.), 191 (Riley, J.); citations omitted.]

Thus, the exception encompasses those cases in which an employer acts with a specific and deliberate purpose to injure an employee or cases in which the employer had actual knowledge that injury was certain to occur. *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 754-756; 593 NW2d 219 (1999); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 148-150; 565 NW2d 868 (1997).

In *Travis*, the Court stated:

> 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. [*Travis, supra* at 178 (Boyle, J.), 191 (Riley, J.).]

At this point in the proceedings, it is not clear that plaintiff has established a genuine issue of material fact with regard to the above standards. Were discovery complete, summary disposition for defendants certainly might have been warranted. The pertinent question, however, is whether summary disposition was appropriate even though discovery was incomplete. "Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed." *Colista v Thomas,* 241 Mich App 529, 537; 616 NW2d 254 (2000). "However, summary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista, supra* at 537-538. Moreover, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corporation*, 206 Mich App 555, 561; 522 NW2d 707 (1994); *Pauley v Hall,* 124 Mich App 255, 263; 335 NW2d 197 (1983).

As noted in *Pauley, supra* at 263:

> If the party opposing a motion for summary judgment cannot present competent evidence of a disputed fact because his or her discovery is incomplete, the party must at least assert that such a dispute does indeed exist and support the allegation by some independent evidence, even if hearsay. An unsupported allegation which amounts solely to conjecture does not entitle a party to an extension of time for discovery, since under such circumstances discovery is nothing more than a fishing expedition to discover if any disputed material fact exists between the parties. Here, Pauley alleged only that the Halls *may* have known about his leasehold interest and that he needed time to depose the parties to find out *if* anyone had told the Halls about the lease. This amounts to an insufficient showing of a disputed fact, and the court did not err in refusing Pauley's request for additional time for discovery. [Emphasis in original.]

Here, plaintiff alleged in her complaint that defendants "disregarded actual knowledge that an injury was certain to occur." She then filed a brief in response to defendants' summary disposition motion, arguing that a grant of summary disposition before the completion of discovery would be premature. She stated, "[p]laintiff has properly pled, and intends to further establish in the course of discovery, that Defendants disregarded actual knowledge that an injury was certain to occur. . . ." She attached to her brief MIOSHA[3] citations indicating that with respect to the accident, Ameritech violated a policy recommending against the use of a torch in

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[3] This acronym refers to the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq.*

an excavation containing a natural gas line. The citations also noted that (1) management failed to identify a hazardous condition, (2) plaintiff was not wearing the proper clothing, (3) the excavation had a dangerous boulder along the edge, and (4) no fire extinguisher was present at the work site. Plaintiff also attached to her brief a letter from an accident investigator in which the investigator stated that the accident was "foreseeable and preventable." He noted that "[t]here are numerous OSHA and MIOSHA standards and regulations [that] would have prevented the accident or significantly protected [plaintiff] from . . . sever[e] injuries."

We conclude that this evidence[4] satisfied the *Pauley* burden of "some independent evidence" supporting plaintiff's claim such that the trial court properly denied summary disposition at this point in the proceedings. See *Pauley, supra* at 263. Indeed, this evidence amounted to more than *just* conjecture. By submitting the citations and the accident investigator's report,[5] plaintiff offered evidence suggesting that defendants subjected plaintiff to a dangerous condition, potentially knowing that it would cause injury but failing to inform her about the danger. See *Travis, supra* at 178 (Boyle, J.), 191 (Riley, J.). In light of plaintiff's evidence, we conclude that there is a reasonable chance that "further discovery will result in factual support for the nonmoving party." *Colista, supra* at 537-538. Accordingly, the trial court properly denied in part defendants' motion for summary disposition.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter

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[4] We agree with plaintiff that she was not required to counter defendant's motion solely with affidavits; other types of documentary evidence sufficed. See MCR 2.116(G)(2) and (4). Defendants appear to concede this point in their reply brief on appeal.

[5] We acknowledge that evidence of MIOSHA citations and conclusory statements by experts are generally insufficient to create a genuine issue of material fact warranting a trial. See *Palazzola, supra* at 151-152. However, the relevant question for us is not whether plaintiff's evidence established a genuine issue of material fact warranting trial but rather whether it satisfied the *Pauley* standard for allowing discovery to proceed. We conclude that it did.