STATE OF MICHIGAN

COURT OF APPEALS

KENNETH D. HESSE, Individually, and as Personal Representative of the Estate of JASON L. HESSE, Deceased, and as Next Friend for AMY R. HESSE, a Minor, and CYNTHIA R. HESSE,

Plaintiffs-Appellants,

v

CHIPPEWA VALLEY SCHOOLS, JAMES J. RIVARD, JAMES P. MURPHY, RUTH ANN BOOMS, and ASHLAND OIL, INC., f/k/a ASHLAND, INC., d/b/a VALVOLINE INSTANT OIL CHANGE and THE VALVOLINE COMPANY,

Defendants-Appellees.

UNPUBLISHED
May 25, 2004

No. 244153
Macomb Circuit Court
LC No. 95-004893-NO

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from an order granting defendant Ashland Oil, Inc., summary disposition on plaintiffs' claims of intentional infliction of emotional distress and misrepresentation. We find that the trial court correctly determined that defendant was entitled to summary disposition on these claims, and therefore, affirm.

I. Facts and Procedural History

The circumstances surrounding this case arose from the tragic death of sixteen-year-old Jason Hesse in a fire at defendant's oil change facility. Jason was employed by defendant through a school work study program. The facts surrounding Jason's death were summarized by this Court in a previous appeal, as follows:

> In 1995, Ashland accepted used oil products from the general public at its automobile service center. When customers dropped off used motor oil, they would identify the substance on a pre-printed form, record the amount they were leaving at the service center, provide their address and sign their name. The used motor oil was poured into a 1,000-gallon storage tank located in the basement of the service center.

> On June 2, 1995, seventeen-year-old Bradley Dryer was working at Ashland's Valvoline service center along with Jason and others. [Steven] Schneider had left Dryer in charge of the business while he was away from the service center. That day, Dryer accepted approximately five gallons of a black liquid in a paint bucket from an unknown man. As Dryer explained, when Ashland's employees accepted waste products from people, they "would look at them a little bit," but generally would not smell them unless they noticed "a certain smell." Dryer did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil. However, when he poured the liquid into the storage tank, he noticed that there had been a paintbrush and some industrial plastic wrap in the paint can, along with the black liquid. A fire investigator concluded later that the substance Dryer accepted from the unknown person actually was gasoline, not motor oil.
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> At closing on June 2, 1995, it was Dryer's responsibility to check the level of the storage tank located in the basement. Dryer opened the top of the tank to look inside and determine its level. However, according to the fire investigator, he used the flame from his Bic lighter in order see inside the storage tank. This caused an explosion and fire, which killed Jason, who had been standing nearby when Dryer checked the storage tank.[1]

In the prior appeal, defendant challenged the trial court's denial of its motion for summary disposition of plaintiffs' claims for intentional tort, breach of contract, and negligent infliction of emotional distress. This Court held that defendant was entitled to summary disposition with respect to plaintiffs' claims for breach of contract and intentional tort under the Worker's Disability Compensation Act (WDCA),[2] but that summary disposition was not warranted with respect to plaintiffs' claim for negligent infliction of emotional distress.[3] Our Supreme Court subsequently reversed this Court's decision in part, concluding that summary disposition was also proper as to plaintiffs' claim for negligent infliction of emotional distress, because that claim was also barred by the exclusive remedy provision of the WDCA.[4]

II. Legal Analysis

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.[5] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's

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[1] *Hesse v Ashland*, unpublished opinion per curiam, issued January 12, 2001 (Docket No. 209075), slip op, p 2 (*Hess I*).

[2] MCL 418.131(1).

[3] *Hesse I, supra*.

[4] *Hesse v Ashland Oil, Inc*, 466 Mich 21, 22; 642 NW2d 330 (2002) (*Hess II*), citing MCL 418.131(2).

[5] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

claim.[6] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[7] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[8]

A. Intentional Infliction of Emotional Distress

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition of their claim for intentional infliction of emotional distress. We disagree.

"Generally, the exclusive remedy available to an employee for a claim of work-related injury is provided by the WDCA."[9] However, an employer may be held liable for its intentional torts wherein "an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury."[10] Plaintiffs again attempted to avoid the exclusive remedy provision by now claiming intentional infliction of emotional distress.

A claim of intentional infliction of emotional distress requires a showing of "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) 'severe emotional distress.'"[11] The plaintiff must demonstrate that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[12]

> The test to determine whether a person's conduct was extreme and outrageous is whether recitation of the facts of the case to an average member of the community 'would arouse his resentment against the actor, and lead him to exclaim, "Outrageous." In reviewing claims of intentional or reckless infliction of emotional distress, it is generally the trial court's duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable minds may differ, whether a defendant's

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[6] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[7] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[8] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[9] *Graham v Ford*, 237 Mich App 670, 673; 604 NW2d 713 (1999).

[10] MCL 418.131(1); see also *Palazzola v Karmazin Prods, Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997).

[11] *Graha, supra* at 674, citing *Haverbush v Powelson*, 217 Mich Ap 228; 551 NW2d 206 (1996).

[12] *Id.*, citing *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995).

conduct is so extreme and outrageous as to impose liability is a question for the jury.[13]

As support for this claim, plaintiffs rely on evidence that defendant failed to send Jason home at 7:00 p.m.; failed to adequately train employees regarding workplace safety; and failed to adhere to requirements of the Chippewa Valley Schools' work study program. As the trial court observed, however, "it is the conduct, rather than the consequences of the conduct, that must be 'extreme and outrageous'" for a plaintiff's action to succeed. Here, we agree that defendant's alleged conduct cannot reasonably be regarded as so reckless that any reasonable person would know emotional distress would result. As there is no genuine issue of material fact regarding plaintiffs' claim for intentional infliction of emotional distress, the trial court properly granted defendant's motion for summary disposition.

B. Misrepresentation

Plaintiffs also argue that the trial court erred in granting defendant's motion with regard to their claim for misrepresentation. We disagree.

As a general rule, to establish a claim of misrepresentation, a plaintiff must show all of the following elements: (1) that the defendant made a material representation; (2) that it was false; (3) that the defendant knew that it was false, or made it recklessly, without any knowledge of the truth and as a positive assertion; (4) that the defendant intended the plaintiff to act upon the representation; (5) that the plaintiff did act in reliance upon it; and (6) that the plaintiff thereby suffered injury.[14] Moreover, broken promises of future action generally are not actionable in tort.[15] There is an exception, however, "where, although no proof of the promisor's intent exists, the facts of the case compel the inference that the promise was but a device to perpetrate a fraud."[16]

Plaintiffs contend that defendant made false representations regarding Jason's work permit and work-study plan, and used them "as a device" to secure plaintiffs' consent for Jason's employment at the oil change facility. The alleged representations, which were made before Jason began working for defendant, included: (1) that a full-time adult supervisory staff would be provided; (2) that employees would be released from work at 7:00 p.m.; and (3) that the working conditions would comply with all applicable laws and regulations. These representations relate to promises of future action, and the facts of this case do not compel an

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[13] *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003) (internal citations omitted).

[14] *Hi-Way v Internat'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).

[15] *Id*.

[16] *Id.* at 339 (discussing the "false token" doctrine).

inference that defendant made these alleged promises as a device to perpetrate a fraud. Accordingly, the trial court did not err in granting summary disposition of this claim.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper