STATE OF MICHIGAN

COURT OF APPEALS

TORIBIO FLORES, Personal Representative of the Estate of JOSE A. FLORES-TOSCANO, Deceased,

Plaintiff-Appellee,

v

E. C. KORNEFFEL COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 16, 2004

No. 250042
Monroe Circuit Court
LC No. 01-013043-NO

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition in this case alleging an intentional tort. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent, defendant's employee, was assisting in the moving of concrete barriers on a construction site. The crane boom contacted energized overhead electrical lines, causing electricity to travel down the metal cables to which the barrier was attached. Decedent was holding onto a cable when the contact occurred and was electrocuted as a result.

Plaintiff filed a wrongful death suit alleging that defendant required decedent to work under conditions that defendant knew would result in injury and that defendant's actions directly and proximately caused decedent's death. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff's claim was barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., because its conduct did not constitute an intentional tort. The trial court denied the motion, concluding that the language of a Michigan Occupational Safety and Health Administration (MIOSHA) citation issued to defendant after the incident, coupled with the fact that Timothy Schrieber, a supervisor, was operating the crane, demonstrated that defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

The exclusive remedy provision of the WDCA does not apply to claims arising from intentional torts. MCL 418.131(1). An intentional tort exists only when an employee is injured

by a deliberate act of the employer and the employer specifically intended that the injury occur. *Id.* An employer is deemed to have specifically intended that an injury occur if the employer "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* To avoid the application of MCL 418.131(1), there must be a deliberate act by the employer and a specific intent that there be an injury. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 169; 551 NW2d 132 (1996). A deliberate act may be one of omission or commission. *Id.* Specific intent existed if the employer had a purpose to bring about certain consequences. *Id.* at 171. In addition, specific intent is established if an employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Id.* at 179. An injury was certain to occur if there was no doubt that it would occur. *Id.* at 174. An employer willfully disregards its knowledge of the danger when it disregards actual knowledge that an injury is certain to occur. *Id*. at 179. In order to show that an injury was certain to occur, a plaintiff must show that the employer subjected him to a continuously operative dangerous condition that it knew would cause an injury. *Id.* at 178. The evidence must show that the employer refrained from warning the plaintiff about the dangerous condition. *Id*. Actual knowledge is required. *Id.* at 173. Constructive, implied, or imputed knowledge is insufficient. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 224; 555 NW2d 481 (1996). An employer's knowledge of general risks is insufficient. *Agee v Ford Motor Co*, 208 Mich App 363, 366-367; 528 NW2d 768 (1995). Whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, but whether the facts are as the plaintiff alleges is a question for the jury. *Gray v Morley (After Remand)*, 460 Mich 738, 743; 596 NW2d 922 (1999).

In the instant case, Schrieber and plaintiff's expert testified that injury could not be avoided under circumstances in which a crane contacted a live electrical wire while a person was holding a cable attached to the crane; however, that decedent's fatal injury was certain to occur cannot be established by relying on the laws of probability or the conclusory statements of experts. *Travis*, *supra* at 174-175. No evidence showed, and plaintiff did not allege, that Schrieber deliberately maneuvered the crane in order to cause it to come into contact with the overhead wires for the purpose of causing injury to decedent. Schrieber was manipulating the crane boom in response to signals given by decedent. No evidence showed that Schrieber was certain that injury would occur if he followed decedent's signals. Schrieber knew the risks associated with operating a crane in the vicinity of energized overhead wires; however, knowledge of general risks does not constitute actual knowledge that an injury is certain to occur. *Agee*, *supra*. Moreover, contrary to the trial court's conclusion, the fact that defendant received a MIOSHA citation after the incident occurred does not constitute evidence that defendant had actual knowledge that an injury was certain to occur. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 152; 565 NW2d 868 (1997). The facts alleged by plaintiff were insufficient to constitute an intentional tort within the meaning of MCL 418.131(1). Defendant was entitled to summary disposition. *Gray*, *supra*.

Reversed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly