STATE OF MICHIGAN

COURT OF APPEALS

MARC ELDER and KIMBERLY ELDER,

Plaintiffs-Appellants,

v

ARTHUR MCGEE,

Defendant,

and

GENERAL MOTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
December 17, 2020

No. 351112
Genesee Circuit Court
LC No. 18-111668-NI

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

In this personal-injury action, plaintiffs appeal by right an order granting defendant-appellee's (defendant's) motion for summary disposition and denying plaintiffs leave to amend their complaint. We affirm.

I. BACKGROUND

On August 1, 2018, plaintiff Marc Elder, an employee of defendant General Motors, LLC (GM), was walking through the south parking lot at GM's Flint Assembly Plant on his way to work when another GM employee, Arthur McGee,[1] struck him with his truck. Plaintiffs alleged that Marc's view of the truck was obstructed by a large SUV in a corner parking spot, that McGee was not looking through his front windshield at the time, and that McGee accidentally stepped on the accelerator instead of the brake when he saw Marc. Marc and his wife, Kimberly Elder, filed

[1] McGee was named as a defendant, but was dismissed by stipulation and is not a party to this appeal.

a complaint seeking to recover for Marc's injuries and Kimberly's loss of consortium. The complaint alleged that GM had knowledge of the dangerous interplay of pedestrians and vehicles in its parking lot but failed to take measures to warn employees of the dangers or prevent accidents. Defendant moved for summary disposition under MCR 2.116(C)(4), and in a written order, the trial court granted defendant's motion, holding that the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq*., provided the exclusive remedy for plaintiffs' claim. In the same order, the court denied plaintiffs leave to amend their complaint, reasoning that any amendment would be futile. The trial court later denied plaintiffs' motion for reconsideration.

II. ANALYSIS

A. INTENTIONAL TORT EXCEPTION TO THE WDCA

Plaintiffs first argue that the trial court erred by holding that the WDCA was their exclusive remedy. We disagree.

We review de novo both a trial court's grant of summary disposition and its ruling on jurisdictional questions. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002). When reviewing a motion for summary disposition, courts must view the evidence in the light most favorable to the nonmoving party. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The WDCA provides that it is the exclusive remedy for an employee seeking to recover benefits from an employer for a workplace injury or occupational disease. MCL 418.131(1). The only exception to this exclusive remedy is if the employer commits an intentional tort against the employee. MCL 418.131(1). MCL 418.131(1) states in relevant part:

> 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.

Our Supreme Court has explained that MCL 418.131(1) provides a "rigorous threshold for a claim of intentional tort." *Travis v Dries and Krump Mgf Co*, 453 Mich 149, 172, 180; 551 NW2d 132 (1996). A plaintiff must provide direct evidence of an employer's intent to injure, or if "there is no direct evidence of intent to injure," then "intent must be proved with circumstantial evidence." *Id*. at 173. Doing this requires a plaintiff to establish (1) "actual knowledge" of (2) an injury that was "certain to occur" (3) that the employer "willfully disregarded." *Id*.

The requirement that the injury is "certain to occur" is "an extremely high standard," and requires that "no doubt exist[] with regard to whether it will occur." *Id*. at 174. "[J]ust because something has happened before on occasion does not mean that it is certain to occur again," and "the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury." *Id*. Knowledge that an injury is certain to occur may be inferred "[w]hen 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 conditions so that he is unable to take steps to keep from being injured." *Id*. at 178. However, "an employer's awareness that a dangerous condition exists is not enough," and "[i]nstead, an employer must be aware that injury is certain to result from what the actor does." *Palazzola v Karmazin Prod Corp*, 223 Mich App 141, 150; 565 NW2d 868 (1997).

Plaintiffs argue that the intentional tort exception in MCL 418.131(1) applies to their claim, so the trial court erred by holding that the WDCA was plaintiffs' exclusive remedy. We disagree.

The intentional tort exception in MCL 418.131(1) does not apply in this case because plaintiffs have presented nothing to establish that defendant had actual knowledge that injury "was certain to occur" due to pedestrian-vehicle interaction in the south parking lot. As explained, "an employer's awareness that a dangerous condition exists is not enough," and "[i]nstead, an employer must be aware that injury is certain to result from what the actor does." *Palazzola*, 223 Mich App at 150. While the facts as alleged by plaintiffs could establish that defendant was aware that its parking lot was dangerous, defendant could not be certain that a person would be injured walking through the parking lot. As alleged by plaintiffs, Marc's injuries resulted from circumstances such as McGee's distracted driving and the presence of an oversized SUV that obstructed sight lines. These outside factors made it impossible for defendant to have known with certainty that Marc's injury would occur.

Plaintiffs argue that the parking lot was a continuously operative dangerous condition that defendant was aware of, and so it can be inferred that defendant had actual knowledge that injury was certain to occur. The interplay of pedestrians and drivers in the south parking lot was intermittent, however, and was therefore not a continuously operative dangerous condition. See *Travis*, 435 Mich at 182 (holding that an intermittently malfunctioning machine was not a continuously operative dangerous condition). Because neither the facts alleged by plaintiffs nor the evidence that they presented tended to establish that defendant had actual knowledge that Marc's injury in its south parking lot was "certain to occur," the trial court did not err by concluding that the intentional tort exception did not apply.[2]

Plaintiffs argue that reversal is nevertheless required because the trial court "ignored" certain evidence presented by plaintiffs. It does not appear that the trial court ignored any evidence, but even if it did, reversal would only be required if the trial court's failure to consider the evidence appears "inconsistent with substantial justice." See MCR 2.613(A). On appeal, we have considered the evidence highlighted by plaintiffs and reach the same result as the trial court, so reversal is not required.

Plaintiffs also argue that the trial court erred by failing to consider and articulate an analysis on the "second prong" of the test for the intentional tort exception. Plaintiffs misstate MCL

[2] While some statements by plaintiffs' expert could be construed as the expert opining that defendant had actual knowledge that injury in the south parking lot was "certain to occur," "conclusory statements by experts are insufficient to allege the certainty of injury contemplated by the Legislature" in MCL 418.131(1). *Travis*, 453 Mich at 174.

418.131(1). The second sentence provides an alternative to proving specific intent by showing actual knowledge and willful disregard of an injury certain to occur. See *Travis*, 453 Mich at 172-173. Moreover, contrary to plaintiffs' assertions, the trial court addressed this alternative path to showing intent at length in both its order granting summary disposition and its order denying reconsideration. Therefore, plaintiffs' argument is without merit, and the trial court did not err by concluding that the intentional tort exception did not apply.

B. OUTSTANDING DISCOVERY

Plaintiffs next argue that the trial court erred by granting defendant's motion for summary disposition while plaintiffs had outstanding discovery requests. We disagree.

Because plaintiffs raise this issue for the first time on appeal, this issue is unpreserved. We review unpreserved issues for plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

While a motion for summary disposition is generally premature if granted before discovery is complete, "summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003).

Plaintiffs sent a series of interrogatories to defendant requesting information as to whether there were previous accidents in the south parking lot. The trial court granted defendant's motion for summary disposition before defendant replied to the interrogatories. This was not error. At most, the additional discovery would have shown that there had been previous pedestrian-vehicle collisions in the south parking lot. But as previously explained, "just because something has happened before on occasion does not mean that it is certain to occur again," *Travis*, 453 Mich at 174. It follows that evidence of previous accidents in the south parking lot would not have created a dispute about whether defendants had actual knowledge that injury was "certain to occur." Accordingly, the trial court did not err by granting defendant's motion for summary disposition while plaintiffs had discovery requests outstanding because further discovery did "not stand a reasonable chance of uncovering factual support for [plaintiffs'] position." *Peterson Novelties, Inc*, 259 Mich App at 24-25.

C. AMENDED COMPLAINT

Finally, plaintiffs argue that the trial court erred by denying leave to amend their complaint. We disagree.

We review for abuse of discretion a trial court's denial of leave to file an amended complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

In its opinion granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(4), the trial court stated that an amendment to plaintiffs' complaint would be futile, "as the affidavits and other proofs show that there is no genuine issue of material fact." While

plaintiffs correctly point out that the trial court cited the wrong rule in its opinion [the court cited MCR 2.116(I)(1) when the applicable rule was MCR 2.118(A)(2)] plaintiffs are not entitled to relief. Under either rule, a motion to amend is properly denied if amendment would be futile, *PT Today, Inc v Comm'r of Office of Fin & Ins Serv*s, 270 Mich App 110, 143; 715 NW2d 398 (2006), which was the basis for the trial court's ruling. Plaintiffs do not articulate how they could amend their complaint to allege sufficient facts such that amendment would not be futile, and therefore have not established that the trial court's ruling requires reversal. See MCR 2.613(A).

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford