STATE OF MICHIGAN

COURT OF APPEALS

NATHANIEL PATRICK,

Plaintiff-Appellant,

v

EDMAR MANUFACTURING, INC.,

Defendant-Appellee.

UNPUBLISHED
June 18, 2020

No. 348209
Allegan Circuit Court
LC No. 18-059495-NI

Before: K. F. KELLY, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

In this personal-injury action under the intentional-tort exception to the exclusive-remedy provision of the Worker's Compensation Disability Act (WDCA), MCL 418.131(1), plaintiff Nathaniel Patrick appeals by right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendant Edmar Manufacturing, Inc. In dismissing the case, the trial court found no evidence that defendant knew that injury was certain to occur and intended to harm plaintiff. We affirm.

I. BACKGROUND

Defendant, a manufacturer specializing in custom-metal stamping for construction and automotive products, hired plaintiff as a machine operator in March 2016. Plaintiff's role was to operate a variety of industrial machines to produce steel parts. Plaintiff did not configure the presses; a "die setter" would change or fix the dies used to create parts. As a general matter, machine operators were told not to change or fix dies, never to put their hands in a press's die-pinch point (where the die meets the steel with great force), and always to use a swipe stick to remove any material that became stuck in that area.

On August 23, 2016, die-setter Paul Biller set up Press 159 for the production of steel cylinders. Defendant had never equipped Press 159 with a "light curtain," which is a sensor that stops the machine from cycling if a person's hand is in the die. Defendant did, however, equip Press 159 with a "barrier guard," which is a guard held up by pins that operates manually to prevent objects from entering the stamping area. From the time that defendant procured the press in 1998 to the date of the accident, defendant's employees had operated the press using either dual-palm-

press buttons or a foot pedal, either of which would cycle the machine, without a light curtain and sometimes without an automatic feeder. During that period, no employee suffered injury from Press 159. Before the date of the accident, plaintiff had operated this machine several times without incident using the dual-palm-press buttons and an automatic feeder.

The specifications for the cylinder job on the day in question were such that the automatic feeder could not be used because the steel was too wide. Consequently, the operator had to push the steel into the machine with both hands, meaning that the dual-palm-press buttons could not be used. Biller therefore set up the machine with a foot pedal. For safety, Biller also set up the barrier guard in a closed position.[1] With the press set up in this manner, the job required the operator to push the steel with both hands until it hit a stop, and press the foot pedal to cycle the press and stamp-out the product, at which point the steel would "slap back" and the part would drop into a bin. If an operator tried to perform this task too quickly, the steel being fed into the press could trap the just-stamped part that was supposed to drop into the bin, making the steel stick and jamming the machine.

Once Biller set up Press 159 for the job, he operated it in the above-described manner for 10 to 20 cycles, without incident. Plaintiff, who had never operated Press 159 with a foot pedal and without an automatic feeder, was then assigned to the job. Biller instructed plaintiff how to operate the press, making plaintiff aware that there was no automatic feeder and informing plaintiff that he would be using the foot pedal. Biller then had plaintiff perform several cycles under his supervision. During set up and the supervised-test runs, plaintiff told Biller that he was unable to get his foot in and out of the pedal because his foot was too big. Biller adjusted the pedal so that plaintiff would not have to put his foot inside the pedal; instead, he could just kick or tap it to activate the press. As plaintiff was performing the test cycles, Biller noticed the material was sticking and not sliding straight into the chute. Biller stopped plaintiff and made further adjustments.

Plaintiff then began to operate the press independently, but continued to experience difficulties with material getting stuck in the press. As he would push the new material in, he would have to push the old piece out using the new material, which would sometimes slide under or over the old piece, causing the press to stick. Biller again observed plaintiff struggling with the material and attempted to help plaintiff. Biller testified that he showed plaintiff a smooth way of feeding the material, but plaintiff testified that Biller tried to adjust the machine.

Ultimately, plaintiff made both Biller and defendant's production supervisor, Jeffrey Hoffman, aware that the material was sticking in the machine, but he was told to "do the best he could." According to plaintiff, Biller agreed that the material was not high quality and that it would keep sticking. Plaintiff continued operating the press for several cycles with the guard up, but the material continued to stick. Ultimately, plaintiff pulled the material back and again

[1] A factual dispute exists regarding the position of the barrier guard. Plaintiff testified in his deposition that the guard was left open when he started the job. Ultimately, this dispute is not material.

attempted to push the material to the stop when his hand slid into the machine, resulting in the amputation of four fingers.

Plaintiff subsequently filed a complaint seeking damages under the intentional-tort exception to the WDCA, alleging that defendant knew that Press 159, as configured on the day of the accident, exposed plaintiff to a "continuously dangerous condition" that defendant knew would cause injury. Defendant moved for summary disposition, in part under MCR 2.116(C)(10), arguing that plaintiff had failed to establish the requisite elements of the claim. In particular, defendant argued that plaintiff had failed to establish "actual knowledge" that an injury was "certain" to follow from defendant's alleged acts or omissions, given that Press 159 had never previously caused injury. According to defendant, because such knowledge was lacking and Biller had operated the press immediately before plaintiff used it, plaintiff could not establish that the injury was certain to occur or that defendant had acted with willful disregard.

Plaintiff argued that a jury could reasonably infer that defendant had actual knowledge that injury would follow from operation of the unguarded press, where defendant's supervisors knew that certain safety measures were not in place. Plaintiff also argued that questions of fact existed regarding whether defendant willfully disregarded an unsafe condition that would cause injury, given that the supervisors required plaintiff to keep working on the machine despite plaintiff's complaints.

The trial court granted defendant's motion, concluding that certainty of injury was lacking when the evidence was viewed most favorably to plaintiff, and that plaintiff therefore could not establish the requisite elements for the intentional-tort exception to the WDCA.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712-713; 777 NW2d 205 (2009) (cleaned up). In reviewing a motion under MCR 2.116(C)(10), this Court considers the evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Johnson v Detroit Edison Co*, 288 Mich App 688, 695; 795 NW2d 161 (2010) (cleaned up). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The intentional-tort exception to the WDCA's exclusive-remedy provision states:

> 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. [MCL 418.131(1).]

The Michigan Supreme Court has held that the first-emphasized sentence requires a plaintiff to establish that the employer deliberately acted or failed to act "with the purpose of inflicting an injury upon the employee." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996). The Court has construed the second-emphasized sentence to apply "when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence." *Id* at 173.

In this case, plaintiff has not relied on direct evidence. Thus, our focus must be on whether the evidence was sufficient to establish that defendant "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1). Interpreting this sentence, the Supreme Court has focused on three key phrases: "actual knowledge," "certain to occur," and "willfully disregarded." *Travis*, 453 Mich at 173. The Court interpreted the phrase "actual knowledge" to exclude constructive, implied, or imputed knowledge, as well as allegations that an employer should have known or had reason to believe that an injury was certain to occur. *Id*. at 173-174. In other words, the knowledge must be actual.

In interpreting the phrase "certain to occur," the Court held that "an injury is 'certain' to occur, [when] *no doubt* exists with regard to whether it will occur." *Id*. at 174 (emphasis added). Probability of injury and scientific proof, e.g., that 1 in 10 people will be injured, plays no role in this inquiry, and the fact that something has or has not occurred before is not dispositive. *Id*. "Further, an employer's awareness that a dangerous condition exists is not enough." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 150; 565 NW2d 868 (1997). Instead, the employer must know that injury is certain to occur from what the actor does. *Id*. This very high threshold may be met "[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 condition so that he is unable to take steps to keep from being injured." *Travis*, 453 Mich at 178 (cleaned up).

The final inquiry is whether the employer "willfully disregards" that the injury is certain to occur. In construing this phrase, the Court recognized that the term "willful" denotes a state of mind that is more than mere negligence. *Id*. at 178-179. An employer possesses this state of mind when it disregards actual knowledge that injury is certain to occur or fails to act to protect a person who is certain to be injured. *Id*.

Viewing the evidence most favorably to plaintiff, we first conclude that defendant had actual knowledge of the hazardous condition. Biller and Hoffman knew that Press 159 was set up without a light curtain, knew that the barrier guard was in an open position, and knew that plaintiff would have to use a modified foot pedal while manually feeding the steel into the machine, thereby creating the possibility that plaintiff's hands could enter the die-pinch point. Defendant's supervisors also knew that the material was sticking in the machine. Plaintiff, thus, produced sufficient factual proofs to establish that defendant's supervisors had actual knowledge of the unsafe manner in which Press 159 was configured.

Plaintiff, however, has failed to produce evidence to establish that defendant's supervisory employees knew that injury was certain to occur. When viewed in the light most favorable to

plaintiff, the evidence showed that defendant's supervisory employees knew the material was sticking, that plaintiff was having difficulty operating the machine, and that the press was not configured with particular safety mechanisms, such as the dual-palm-press buttons, the automatic feeder, a barrier guard, or a light curtain. As configured for the job, however, the press only cycled when the operator engaged the foot pedal and operators had been told to keep their hands out of the press's die-pinch point. Additionally, Biller had set up the press and willingly operated it safely for 10 to 20 cycles before plaintiff used it. And Biller also had plaintiff initially operate the press under his supervision without any safety incident. Under these circumstances, it cannot be said that defendant knew that injury was certain to occur.

Plaintiff argues that the lack of safety mechanisms supports the existence of a "continually operating dangerous condition," but plaintiff misses that the certainty inquiry requires more than just the existence of a hazard: the employer must know that this condition will cause an injury and yet refrain from informing the employee of the danger. See *Travis*, 453 Mich at 143; *Palazzola*, 223 Mich App at 150. Plaintiff does not point to any factual indicia that defendant's supervisory employees knew *with certainty* that the lack of safety measures would cause injury. This is especially so given that the press had been configured to operate with a foot pedal previously, without the light curtain, automatic feeder, or dual-palm-press buttons, and all prior operators had been able to keep their hands out of the die-pinch point. Defendant's knowledge of the lack of safety measures and the possibility that an injury would therefore result are not facts from which a jury could infer that defendant had knowledge that injury was certain. Moreover, plaintiff's deposition testimony establishes that he was made aware of the manner in which Press 159 was configured and its lack of safety mechanisms. In short, we are constrained to conclude that plaintiff failed to produce evidence that injury was certain to occur.

In disagreeing with this conclusion, plaintiff analogizes this case to *Fries*, 285 Mich App at 706, where this Court affirmed denial of summary disposition for the defendant employer on the employee's intentional-tort claim. There, the employee's arms were amputated when a stamping press accidentally cycled when the employee's loose clothing triggered its light sensors. *Id*. at 708. The employer knew the machine would inadvertently cycle if loose clothing tripped the sensors, but did not equip the machine with the appropriate safety mechanisms and did not warn the employee that the press would cycle if triggered by loose clothing. *Id*. at 708-709. This Court found that those facts would allow a reasonable jury to conclude that injury was certain to occur because

> every encounter here between a worker's loose clothing and the OBI-11's finger control buttons inherently embodied the potential for inadvertent, unexpected cycling of the machine. Abundant and unrefuted evidence established that [the defendant] made no effort to prevent another clothing-initiated cycling event by installing available safety equipment, and failed to warn [the plaintiff], a new user of the OBI-11, that loose clothing would actuate the press. [*Id*. at 717.]

This case is plainly distinguishable from *Fries*. Plaintiff produced no evidence of any potential for "inadvertent, unexpected cycling of the machine." Plaintiff admitted that he understood he had to cycle the press by using a foot pedal and that Biller had modified the pedal for the size of his foot, so that plaintiff could kick the foot pedal to initiate the press. But, even more significantly, unlike in *Fries* where the employer failed to warn the employee that the press

would accidentally cycle, defendant's supervisors did not fail to warn plaintiff of the lack of safety mechanisms on the machine. Again, plaintiff's own deposition testimony establishes that he understood how to operate the press as configured and knew that the machine lacked certain safety mechanisms. Defendant did not assign plaintiff to Press 159 knowing it was unsafe without warning plaintiff of its shortcomings.

Plaintiff's also relies on *Golec v Metal Exchange Corp*, 453 Mich at 149 (the companion case to *Travis*), and *Johnson*, 288 Mich App at 688, for the proposition that injury was certain to occur in this case. Plaintiff's argument misses, however, that in those cases, the employer knew the employee or employees, to complete the job, were required to confront an implement that had either just caused injury (or regularly caused injury in the past) and would continue to do so absent use of any necessary safety mechanisms to guard against the certain danger. See *Golec*, 453 Mich at 185-186; *Johnson*, 288 Mich App at 700-701. The nature of the danger here—a stamping press not equipped with certain safety measures, the hazard of which could be avoided by the operator—differs from that of the dangers in *Golec* and *Johnson* where the employees could do nothing to avoid the danger. Moreover, unlike the employers in those cases, defendant, when it assigned plaintiff to Press 159, had no knowledge that injury had just occurred or was regularly occurring when operators used the press with a foot pedal. In sum, *Fries*, *Golec*, and *Johnson* do not compel a conclusion in the present case that injury was certain to occur.

As to willful disregard, plaintiff also failed to produce evidence from which a jury could infer that defendant knew injury was certain, but purposely sent plaintiff to complete the task regardless of the injury that plaintiff would suffer. Here, defendant wanted to get the job out on an expedited basis, but contrary to plaintiff's argument, this evidence does not show or create an inference, under the circumstances, that defendant ignored a continuously operative dangerous condition that was certain to cause injury. Defendant did not, for example, conceal any danger from plaintiff. Instead, when the supervisors assigned plaintiff to the job, Biller showed plaintiff how to use the machine as configured, Biller was comfortable using the press himself, and when plaintiff informed Biller that the material was sticking, Biller acknowledged that the material would do that and told plaintiff to do the best he could. These facts fall short of establishing that defendant disregarded actual knowledge that injury was certain. Mere knowledge of a risk of harm may establish negligence, but it does not establish a desire or purpose to cause a plaintiff harm. We thus conclude that plaintiff also failed to produce the requisite evidence of willful disregard.

Finally, plaintiff argues that reversal is required because the trial court applied an incorrect standard to the MCR 2.116(C)(10) motion. Plaintiff points out that the court improperly assessed the credibility of the witnesses, finding plaintiff's testimony lacking in credibility. Our review of the record shows that the trial court did, indeed, improperly weigh the evidence and consider the credibility of the witnesses. The trial court nonetheless reached the right result, rendering this error harmless. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Plaintiff failed to produce evidence that would allow a jury to infer that defendant committed an intentional tort under the WDCA. Absent such evidence, there is no genuine issue of material fact regarding whether defendant committed an intentional tort. The trial court, therefore, properly granted summary disposition for defendant under MCR 2.116(C)(10). Given our conclusion, we need not address defendant's alternative argument for affirming the trial court.

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle