STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY D. KUJAWSKI,

Plaintiff-Appellant,

v

MICHIGAN STAMPING CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 8, 1996

No. 185994
LC No. 93-005098-NP

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant on his claim for intentional tort, which was brought pursuant to the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). We affirm.

Plaintiff was injured on October 24, 1990, when his hand was caught and crushed in a die press while he was working. Plaintiff was using a press that he had previously worked on approximately two times. Plaintiff testified that he was aware of how the operation worked and that he needed to be careful. He was using the press with a co-worker, something he had done on other presses numerous times. The press, like others he had operated, only had one set of dual controls. Plaintiff would place a part in his side of the press and then push his button. His co-worker would do the same thing. Only when both buttons were being pushed would the machine operate. Plaintiff was unsure if he was pushing his own button when the press caught his hand.

Plaintiff filed his suit alleging that the exclusive remedy provision of the WDCA, MCL 418.131(1); MSA 17.237(131)(1), did not apply because the employer had committed an intentional tort. Section 131 provides as follows:

> (1) 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

* Circuit judge, sitting on the Court of Appeals by assignment.

> 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.

Plaintiff bases his intentional tort claim on the facts that the die press only had one set of dual controls instead of the required two sets; that the controls were placed at the mouth of the machine instead of further away on a separate control stand; and that defendant had to have known that such an arrangement was dangerous and certain to cause injury. Based on developing case law in the area of intentional tort exceptions, we hold that plaintiff has failed to present a case falling outside of the exclusive remedy provision.

The Supreme Court recently ruled that the three phrases of the statute, "actual knowledge," "certain to occur," and "willfully disregarded," must be met in order to sustain the intentional tort burden. *Travis v Dreis & Krump Mfg,* 453 Mich 149; ___ NW2d ___ (1996). If a supervisory employee had actual knowledge that injury would follow the employer's actions or omissions, the first prong is met. Previous incidents involving the machine at issue may demonstrate actual knowledge. *Id.* Injury is certain to occur if there is no doubt that it will occur. "Certain injury" may be shown by prior injuries caused by the same dangerous instrumentality or, if there was no prior injury, by a continuously operating dangerous condition about which the employee is not informed and is unable to take steps to keep from being injured. *Id.* "Willful disregard" may be demonstrated by failure to "act to protect a person who might foreseeably be injured from an appreciable risk of harm." *Id.* The few cases that have upheld intentional tort claims against the employer have the same common themes. See *McNees v Cedar Springs Stamping Co,* 184 Mich App 101; 457 NW2d 68 (1990); *Adams v Shepard Products, US, Inc,* 187 Mich App 695; 468 NW2d 332 (1991); *Zuke v Fritz Enterprises,* 202 Mich App 572; 509 NW2d 787 (1993); *Golec v Metal Exchange Corp*, 208 Mich App 380; 528 NW2d 75 (1995).

Here, there were no prior injuries or "near misses" caused by the same defect that injured plaintiff. See also *Smith v Mirror Lite Co,* 196 Mich App 190; 492 NW2d 744 (1992). In addition, three of the four cases, the exception being *Adams, supra* at 695, included allegations that specific complaints about the defect had been made to persons who could have prevented injury. There are no such allegations here. Third, in *Adams, supra,* and *McNees, supra,* the plaintiffs were unaware of the dangers that caused the injuries and were not warned even though the defendants knew about them. Here, plaintiff testified that he knew he had to be careful and that he understood the operation. Plaintiff's claims do not fit the pattern of those where intentional torts have been found. There was no evidence of actual injury certain to occur because there were no prior incidents and because plaintiff was not forced to confront a continuously dangerous operation about which he was not informed and was not able to take steps to prevent injury.

Plaintiff's complaint is tantamount to a claim based on unsafe working conditions. Unsafe working conditions do not provide a vehicle for a plaintiff to daim intentional tort outside of the exclusive remedy provision. *Benson v Callahan Mining Corp,* 191 Mich App 443; 479 NW2d 12 (1991); *Tolbert v US Truck Co,* 179 Mich App 471; 446 NW2d 484 (1989); *Smith, supra* at 190. This is true even where the employer could have envisioned that an accident would result because of his reckless disregard for safety, an allegation present in the current case. *Oaks v Twin City Foods, Inc,* 198 Mich App 296, 297-298; 497 NW2d 196 (1993); *Pawlack v Redox Corp,* 182 Mich App 758; 453 NW2d 304 (1990); *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 140; 475 NW2d 423 (1991).

In addition, plaintiff points out that after the accident, a safety violation citation was issued to defendant for each of the reasons about which plaintiff now complains. This does not elevate the failure to provide a safe environment to the level of an intentional tort. *Benson, supra* at 445. See also *Phillips, supra* at 139. Plaintiff also complains that prior to the accident, defendant had received a citation for a substantially similar safety violation. The record does not support this claim and, even if it had, that would not elevate plaintiff's claim to one of intentional tort by itself. See *Phillips, supra* at 139.

Because plaintiff's claim sounds in negligence based on the facts, all of which have previously been determined not to support an intentional tort claim, his claim is barred by the exclusive remedy provision of the WDCA, MCL 418.131; 17.237(131). Therefore, the trial court did not err in granting summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress