STATE OF MICHIGAN

COURT OF APPEALS

GREIG RAMBEAU and SANDRA RAMBEAU

Plaintiffs-Appellants,

v

NIAGARA MACHINE & TOOL COMPANY,

Defendant,

and

MANUFACTURERS PRODUCTS COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
December 6, 1996

No. 183515
LC No. 93-002379

Before: Saad, P.J., and Holbrook, Jr., and G.S. Buth,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant Manufacturers Products Company in this case involving plaintiff Greig Rambeau's on-the-job injury. We affirm.

Manufacturers Products Company (MPC) is a Michigan corporation that does stamping and assemblies for automobile makers. On September 11, 1992, MPC employee Greig Rambeau was operating an "S-7" press when it double-cycled, severing all or part of three fingers and smashing the little finger on his left hand. Plaintiffs brought this action in which they asserted a claim of intentional tort against MPC, based on its alleged knowledge of the S-7's defects. Plaintiffs further alleged that MPC willfully disregarded this knowledge notwithstanding the fact that injury was certain to occur to operators of the S-7. The trial court agreed with MPC that plaintiffs had failed to plead or submit facts to establish its liability for intentional tort in avoidance of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131; MSA 17.237(131), and, accordingly, granted MPC's motion for summary disposition.[1]

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

Following oral argument before this Court, our Supreme Court issued its decision in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; ___ NW2d ___ (1996). Although both parties have filed supplemental briefs stating that *Travis* is on point and dispositive of this case, they disagree on the proper application of the holdings in *Travis* to our facts.

Under MCL 418.131(1); MSA 17.237(1), an employer is deemed to have intended to injure if it had "actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." In *Travis, supra*, our Supreme Court separately analyzed the "actual knowledge," "certain to occur," and "willfully disregard" components of the statute. First, the employer's knowledge must be actual, not merely constructive, implied, or imputed. *Travis, supra*, at 173-174. Second, a "very high threshold" is required before an employer can be deemed to have actual knowledge that an injury was "certain to occur." *Id.* at 177. A factfinder may properly conclude that an injury was "certain to occur" when the 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." *Id.* at 178. Third, "willfully disregard" underscores that the employer's act or failure to act must be more than mere negligence. *Id.* at 178-179.

Viewing the evidence in a light most favorable to plaintiffs, we find that, while plaintiffs have established that defendant had actual knowledge of a potentially dangerous condition, they have not established the existence of an issue of fact whether defendant had actual knowledge that an injury was certain to occur. Our Supreme Court's analysis of the facts in *Travis, supra* at 182, is particularly enlightening:

> Plaintiff argues that because she was a novice press operator and was not informed that the press was double cycling an injury was certain to result from the malfunctioning press. It is true that concealing a known danger from an employee who has no independent knowledge of the danger may be evidence of an intent to injure. However, in this case, . . . plaintiff was not required to confront a continually operating dangerous condition. The press double cycled only intermittently. . . . Additionally, [the supervisory employee] had adjusted the machine just before assigning plaintiff to it. In the past, such adjustments would allow the press to run for at least one or two days without double cycling. Moreover, the press cycled so slowly that no one had ever been injured when the press double cycled previously. All prior operators were able to withdraw their hands in time. We find that an injury was not certain to occur because plaintiff was not required to confront a continuously operating dangerous condition.

Here, plaintiffs' evidence indicates that a plant meeting was held the day before plaintiff's accident at which defendant's owner and plant manager were informed that the S-7 press had double cycled on occasion. Plaintiff testified at deposition that he had not previously experienced a double cycle on the S-7, and that on the day of the accident he had been operating the press for approximately one and one-quarter hours before it double cycled, causing his injury. Contrary to plaintiffs' argument, the fact that another employee experienced a double cycle on the S-7 approximately two weeks before

plaintiff's accident is of no avail given that there is no evidence that defendant was made aware of the malfunction. Plaintiff also relies heavily on the following deposition testimony of Gary Hentschel, defendant's plant manager:

> *Q [By plaintiffs' counsel]:* If an operator were inserting a part barehanded into the die space while using tongs to discharge a finished part into the output tray and the press were to repeat without the palm buttons being actuated, would you agree with me that it would be an absolute certainty that the operator's hand would be severely injured?
>
> *A [By Mr. Hentschel]:* In most cases—yeah. If they inserted with their hand? I'm sorry.
>
> *Q:* Yes.
>
> *A:* Yes, I would say yes. I would imagine.

Read carefully, counsel's question inquired of Hentschel whether an injury would be certain to occur *if* the press did in fact double cycle. The testimony does not obviate the need for plaintiff to establish that at the time of the accident plaintiff was required "to confront a continuously operating dangerous condition." *Travis, supra* at 182. To the contrary, plaintiffs' evidence merely establishes that the S-7 double cycled intermittently. Viewing the evidence in a light most favorable to plaintiff, we conclude that it is insufficient to create a genuine issue of fact whether defendant had actual knowledge that an injury was certain to occur.[2] Accordingly, summary disposition was properly granted.

Affirmed.

/s/ Henry W. Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth

[1] Although MPC brought its motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), the proper subrule for reviewing questions regarding the exclusive remedy provision of the WDCA is MCR 2.116(C)(4) (lack of subject matter jurisdiction). *Bitar v Wakim*, 211 Mich App 617, 619; 536 NW2d 583 (1995). The court's order does not delineate under which subrule summary disposition was granted. Given that our review is de novo, see *id.*, we will analyze this issue under MCR 2.116(C)(4). *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 646 n 1; 364 NW2d 670 (1984).

[2] Given this finding, we need not reach the issue of whether defendant acted with willful disregard. However, even assuming that defendant had actual knowledge that an injury was certain to occur, plaintiffs have failed to present any evidence that defendant "willfully disregarded" that knowledge. Rather, at best, the evidence rises to the level of mere negligence.