STATE OF MICHIGAN

COURT OF APPEALS

HATTIE PHILLIPS, as guardian of DERRICK PHILLIPS,

Plaintiff–Appellant,

v

GRAND HAVEN BRASS FOUNDRY, a division of JSJ CORPORATION,

Defendant–Appellee.

UNPUBLISHED
April 1, 1997

No. 176645
Ottawa Circuit Court
LC No. 90013283-NO

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Plaintiff, Hattie Phillips, appeals as of right from a grant of summary disposition for defendant, Grand Haven Brass Foundry, in this intentional tort action. As guardian of Derrick Phillips, plaintiff sought to recover for injuries sustained by Derrick in his second day of employment in defendant's foundry after collapsing due to heat stroke and suffering severe and permanent brain damage. Summary disposition was granted pursuant to the exclusive remedy provision of the Worker's Disability Compensation Act [WDCA]. MCL 418.131; MSA 17.237(131). We reverse and remand for further proceedings.

I

Derrick's job in defendant's foundry required him to remove from a conveyor belt newly poured castings made of molten metal. The area where Derrick worked was one of the hottest areas of the foundry, where temperatures averaged 118 to 120 degrees and could reach up to 140 degrees.

Derrick's second day of work began with the 2:00 p.m. shift. Derrick's co-worker, James Karafa, testified at his deposition that when he saw plaintiff at 3:30 p.m. he looked pale. Derrick told

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

Karafa that he had already asked one of the foremen if he could go home, but was told to continue working or lose his job.

Derrick testified that he began to suffer from heat stroke shortly after the dinner break. Co-worker Richard Stoval testified that Derrick was losing his coordination and that, at approximately 8:00 p.m., Stovall advised him to talk to the foreman. Derrick told Fred Chalker, his foreman, that the heat and humidity were bothering him and that he felt ill. Chalker told him he would lose his job unless he got back to work. Shortly after 11:00, Derrick passed out and fell, burning his arm. Derrick was taken to a local hospital where it was determined that his internal temperature was 110 degrees. He suffered a heat stroke which resulted in permanent brain damage.

Plaintiff filed suit against defendant for Derrick's injuries. Defendant asserted that plaintiff's claim was barred by the exclusive remedy provision of the WDCA. MCL 418.131; MSA 17.237(131). Defendant also alleged that plaintiff's action was barred by the doctrines of assumption of risk, res judicata, collateral estoppel, and election of remedies.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) asserting that plaintiff failed to allege that Derrick's injuries fell within the intentional tort exception to the exclusive remedy provision of the WDCA. In response, plaintiff filed a cross-motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that there was no factual question that defendant committed an intentional tort, and the only issue remaining was that of damages.

The trial court denied the cross-motions regarding the intentional tort exception to the exclusive remedy provision of the WDCA, finding that plaintiff's complaint sufficiently pleaded a cause of action and raised a question of fact for the jury. Defendant filed a supplemental motion for summary disposition alleging that plaintiff had not pleaded, nor could he establish, that any single employee acted with the requisite intent to commit an intentional tort, as required by *Adams v NBD*, 444 Mich 329; 508 NW2d 464 (1993). The trial court held that, pursuant to *Adams*, plaintiff must plead and prove that a specific employee acted with the specific intent to commit the alleged intentional tort. Plaintiff was granted twenty-eight days within which to conduct further discovery and file an amended complaint.

Plaintiff filed an amended complaint alleging that two of Derrick's foremen, Chalker and Swain, had the requisite specific knowledge that rises to the level of an intentional tort for purposes of the WDCA. Defendant filed a motion for summary disposition which was granted by the trial court.

II

Plaintiff challenges the trial court's grant of defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If, after looking at the factual allegations and all reasonable inferences to be drawn therefrom, the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery, the court may grant the motion. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, after reviewing the entire record, including pleadings, affidavits, depositions, admissions and any other documentary evidence in a light most favorable to the nonmovant, the trial court determines that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 115; 512 NW2d 13 (1993). We review de novo a trial court's grant of summary disposition. *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 41; 539 NW2d 526 (1995).

A

Plaintiff argues that the trial court erred in determining that, because plaintiff's complaint failed to allege the elements of a common-law tort and failed to demonstrate any genuine issue of material fact regarding the elements of such a tort, defendant was entitled to judgment as a matter of law. We agree.

The trial court based its decision on the plurality decision in *Adams, supra*. In *Adams*, the plaintiff's decedent, an employee of NBD, committed suicide after being erroneously arrested on a charge of making fraudulent withdrawals from the bank. In reversing the jury's award of over $1 million, a majority agreed on only two holdings: (1) that in an intentional tort action against a defendant employer, the injured employee must be able to demonstrate that a particular employee of the defendant acted with the necessary intent to commit an intentional tort as defined in § 131 of the WDCA;[1] and (2) that the case should be remanded for further proceedings regarding the plaintiff's claim of false imprisonment.[2]

Contrary to the trial court's decision in the instant case, the Court in *Adams* did not hold that an injured employee's civil action against his employer under § 131 of the WDCA must specifically allege an intentional tort recognized at common law. Rather, the Court merely discussed the various common-law torts asserted by the plaintiff in his complaint. It was thus error for the trial court to require plaintiff to plead a common-law tort in the present case. *Adams, supra*. This was reemphasized recently by the Michigan Supreme Court in *Travis v Dreis & Krump MFG Co*, 453 Mich 149, 169; 551 NW2d 132 (1996).

B

Although a plaintiff is not required to plead a common-law tort, he still must allege sufficient facts that, if true, would constitute an intentional tort as defined in §131. According to the WDCA:

> (1) 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. [MCL 418.131(1); MSA 17.237(131)(1).]

In *Travis, supra*, the Michigan Supreme Court clarified the meaning of the intentional tort exception to the exclusive remedy provision of the WDCA. Construing the first sentence of § 131(1),

the Court held that, to state a claim against an employer for an intentional tort, the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee.[3] *Id*. at 171-172. Where the employer is a corporation, a particular employee must possess the requisite state of mind. The plaintiff cannot meet his burden by presenting disconnected evidence possessed by various agents of the corporation.

The Court concluded that the second sentence provides strong evidence that the Legislature did not confine liability to those situations that are true intentional torts. The second sentence is employed where there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence. *Travis*, *supra* at 173.

Therefore, where there is no direct evidence, as in this case, a plaintiff must establish that his employer had actual knowledge that the injury was certain to occur and willfully disregarded that knowledge. A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. *Id*. at 173-174. Constructive, implied, or imputed knowledge is not enough. *Id.*

In order to show an injury that was certain to occur, a plaintiff must show that the employer subjected him to a continuously operative dangerous condition that it knows will cause an injury. There must be evidence that the employer refrained from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured. *Id*. at 178. Conclusory statements by experts are insufficient to allege certainty of injury. *Id*. at 174. Moreover, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. *Id*.

The employer's state of mind can be inferred from its actions where there is no direct evidence of its intent to injure. If the employer disregards actual knowledge that an injury is certain to occur, it cannot claim that it did intend to injure. *Id*. at 178-179.

In summarizing its conclusions, the *Travis* Court stated:

> If we read both sentences of the intentional tort exception together, it becomes evident that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id*. at 180.]

C

Next, we must apply the rules established in *Travis* to determine whether the trial court properly granted summary disposition for defendant. We find that plaintiff has presented sufficient

evidence, if believed by the trier of fact, to support a finding that Derrick's employer possessed the requisite intent to injure.

With respect to defendant's actual knowledge, plaintiff presented evidence that Chalker, Derrick's foreman, was aware that the area where Derrick worked was one of the hottest in the foundry. When some of the foundry employees installed a large thermometer in the area, Chalker tried to have it removed. Chalker was aware that it was common for one or two heat-related illnesses to occur at the foundry every summer. Moreover, on the same day as Derrick was injured, another employee suffered a heat-related illness and was taken to the hospital. Although Chalker neither admitted or denied that he was advised of the incident, plaintiff presented evidence that it was standard practice to advise foremen of such matters at shift changes. Therefore, if the jury believes plaintiff's evidence, she has established that a supervisory employee had actual knowledge of the dangerous condition.

Next, it must be determined whether Chalker knew that the injury was "certain to occur." Plaintiff presented evidence that Chalker subjected Derrick to a continuously operative dangerous condition that he knew would cause an injury. Derrick's co-worker, James Karafa, testified that Derrick looked pale at 3:30 p.m. Derrick told Karafa that he had already asked if he could go home, but was told by his foreman to continue working. Another of Derrick's co-workers, Stovall, testified that at the dinner break, he advised Chalker that plaintiff was moving slowly and staggering. At approximately 8:00 p.m., upon Stovall's advice, Derrick advised Chalker that the heat and humidity were bothering him and that he had a headache and stomachache. Chalker responded by threatening to fire Derrick if he did not return to his job.

Finally, plaintiff presented evidence that Chalker willfully disregarded the information. According to evidence presented by plaintiff, Chalker knew that Derrick was suffering from a heat-related illness, yet threatened to fire him unless he got back to work. Chalker allegedly knew that another worker collapsed from a heat-related illness earlier in the day. Knowing the potential dangers of heat-related illnesses and that Derrick was in fact ill, Chalker nevertheless ordered Derrick back to work in the face of the dangerous condition.

In conclusion, the above evidence, if true, is sufficient to establish that Chalker was aware of the specific danger of excessive heat and that, despite this knowledge, Chalker forced Derrick, who was already suffering the effects of heat stress, to continue working in the face of that danger. Indeed, Chalker knew not only that injury was certain to occur but also that such injury was in fact occurring. Chalker's specific intent to injure Derrick may be imputed to defendant. *Adams, supra* at 314.

Because plaintiff's complaint is sufficient to allege an intentional tort as defined in § 131 of the WDCA, the trial court erred in granting defendant's motion for summary disposition.

III

Plaintiff pursued and accepted worker's compensation benefits for the instant work-related injury. In both its answer and its motion to dismiss, defendant insisted that the doctrine of election of

remedies bars the instant action. Although the trial court did not expressly address this question in its order granting defendant's motion for summary disposition, we will address it, because defendant raised it below and pursued it on appeal, and because it involves a question of law. *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Brown v Drake-Willock Internat'l Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

Prior to 1969, a statutory bar to civil actions based on an election of remedies existed for injured employees who filed a claim for or accepted any benefits under the WDCA. MCL 416.1; MSA 17.212 (repealed by 1969 PA 369, § 898, effective December 31). The WDCA no longer requires an injured employee to elect his remedy:

> Neither the payment of compensation or the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act. [MCL 418.831; MSA 17.237(831).]

However, as correctly noted by defendant, the WDCA does not favor double recovery. *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 314; 527 NW2d 5 (1995). Thus, where an injured employee receives benefits under the WDCA, any subsequent amount recovered in an action at law must be reduced by the amount of his prior award. See, e.g., *Allen v Garden Orchards, Inc*, 437 Mich 417, 433; 471 NW2d 352 (1991); *Smeester, supra* at 314.

Plaintiff's tort action is not barred by pursuit and acceptance of worker's compensation benefits. However, if plaintiff prevails in the present action, any award must be reduced by the amount of benefits already received under the WDCA.

IV

Plaintiff next argues that the trial court erred in concluding that plaintiff's claim was barred by the doctrine of assumption of risk. We agree. The common-law defense of assumption of risk, as with nearly all recognized common-law defenses, is inapplicable in a tort action brought by an employee for injuries suffered in the course of his employment. *Smeester, supra* at 313-314.

V

In awarding benefits to Derrick, the worker's compensation magistrate found that he suffered an injury arising out of and in the course of his employment with defendant. Relying on this finding, plaintiff filed a motion for partial summary disposition regarding the issue of proximate cause. Plaintiff contended that she was entitled to partial summary disposition, because the issue of proximate cause was determined by the magistrate, and therefore, defendant was precluded from relitigating it. On appeal, plaintiff insists that the circuit judge's denial of this motion was erroneous. We disagree.

The doctrine of collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceedings culminated in a valid, final judgment and the issues were both actually litigated and necessarily determined. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). "Generally, '[f]or collateral estoppel to apply, a question of

fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel.'" *Nummer v Treasury Dep't*, 448 Mich 534, 542; 533 NW2d 250 (1995), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). Where the prior determination was made by an administrative agency, it must have been adjudicatory in nature and provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal. *Nummer, supra*. In addition, the purposes of the two proceedings must be considered; where these purposes are fundamentally different, collateral estoppel may be inappropriate. *People v Johnson*, 191 Mich App 222, 225-226; 477 NW2d 426 (1991). For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be identical to that involved in the first, not merely similar. *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

The issue of causation in worker's compensation cases and tort cases is quite different. *McAvoy v H B Sherman Co*, 401 Mich 419, 437; 258 NW2d 414 (1977).[4] It is not necessary that a worker's employment be the proximate cause of the disability; on the contrary, all that is required is that the employee's injury arose out of and in the course of his employment. MCL 418.301(1); MSA 17.237(301)(1); *Deziel v Difco Lab, Inc (After Remand)*, 403 Mich 1, 34; 268 NW2d 1 (1978). Because the purposes of Derrick's tort and worker's compensation claims are quite different, as is the issue of proximate cause in each claim, we conclude that application of the doctrine of collateral estoppel would be inappropriate here.

The trial court properly determined that collateral estoppel does not bar litigation of the issue of proximate cause in plaintiff's tort action against defendant.

VI

Plaintiff's final argument is that evidence of a MIOSHA investigation, citation, and resultant penalty should be admissible at trial to demonstrate defendant's knowledge and intent to commit an intentional tort. Defendant filed a motion in limine seeking to prevent the admission of this evidence, but the circuit court did not rule on the issue. We decline plaintiff's request to rule on the admissibility of evidence for the first time on appeal. See *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

We reverse the trial court's order granting defendant's motion for summary disposition and remand this case for further proceedings. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Janet T. Neff
/s/ Jeanne Stempien

[1] *Id*. at 338 (Levin, J.,), 343 (Boyle, J.), 361 (Brickley, Riley, and Griffin, JJ.);

[2] *Id*. at 343 (Levin and Boyle, JJ.), 355 (Cavanagh and Mallett, JJ.).

[3] The Court construed the phrase "deliberate act" to encompass both commissions and omissions. The Court noted that it was more common to have a situation, such as in the instant case, in which an omission leads to injury at the workplace, such as a failure to remedy a dangerous condition. The Court construed the phrase "specifically intended an injury" to mean that the employer must have had in mind a purpose to bring about given consequences.

[4] The primary goal of the WDCA is "the delivery of sustaining benefits to a disabled employee as soon as possible after an injury occurs, regardless of any traditional tort concepts of liability". *McAvoy, supra*.