STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL WINDOW CLEANING AND MAINTENANCE,	UNPUBLISHED April 25, 1997
Plaintiff-Appellant,	
v	No. 201268 Wayne Circuit Court
MICHIGAN MUTUAL INSURANCE COMPANY,	LC No. 94-407902 CK
Defendant-Appellee.	ON REMAND

Before: MacKenzie, P.J., and Michael J. Kelly and Sawyer, JJ.

PER CURIAM.

After an employee of National Window fell in the course of his employment, his personal representative brought a wrongful death action contending that the fall was the result of an intentional tort outside the ambit of the exclusive remedy provision of the worker's disability compensation act (WDCA). Appellee, National Window's liability insurer, refused to defend on the basis of a policy exclusion for "bodily injury intentionally caused or aggravated by you." This declaratory judgment action followed, and the trial court held in favor of the insurer. In an order, this Court reversed and remanded for further proceedings consistent with *Cavalier Mfg Co v Employers Ins of Wausau,* 211 Mich App 330; 535 NW2d 583 (1995).. Both this case (COA No. 178248) and *Cavalier* were subsequently remanded to this Court for reconsideration in light of *Travis v Dreis & Krump Mfg Co,* 453 Mich 149; 551 NW2d 132 (1996). See 454 Mich 854 (1997); 453 Mich 950 (1996). On remand, we vacate the order of the trial court and remand for further proceedings.

In *Cavalier, supra,* this Court held that an intentional tort, as that term is defined in the WDCA, is *not* identical to "bodily injury intentionally caused," as that term was defined in the parties' insurance contract. *Cavalier, supra,* p 334. Thus, while injured employees must show that their injuries fell within the intentional acts exception in order to bring a tort action against their employers, that is not the issue in a separate declaratory judgment action brought by the employer against its insurer. In the latter instance, the issue is limited to whether the insurer's duty to indemnify and defend is suspended under the terms of the parties' policy of insurance because the employer intentionally caused its employee's injury. See *Cavalier, supra,* pp 342-343. Whether coverage is available is strictly a matter of

contractual interpretation, and not a function of whether an employee in a separate action has alleged an injury within the intentional acts inclusion of the WDCA. It was because the trial court in this case failed to make that distinction that this Court initially reversed.

In *Travis, supra,* the Supreme Court held that, for purposes of the exclusive remedy provision of the WDCA, an intentional tort exists only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. *McNees v Cedar Springs Stamping Co,* 219 Mich App 217, 223-224; 555 NW2d 481 (1996). In *Cavalier Mfg Co v Employers Ins of Wausau (On Remand),* ___ Mich App ___ ; ___ NW2d ___ (No. 199682, issued 2/28/97), this Court held that *Travis* does not affect cases involving interpretation of an insurance policy's exclusion from coverage for "bodily injury intentionally caused:"

> On reconsideration, we hold that the *Travis*. . . decision[] do[es] not alter our resolution of the dispute before us. In its decision in *Travis* . . . the Supreme Court attempted to clarify the standard to determine whether an employee had successfully alleged an "intentional tort" when attempting to avoid the exclusive remedy provision of the WDCA. In contrast, the present action does not *directly* involve an employee's suit against its employer. The present action was brought by an employer against its insurers to determine whether an employee's allegations fell within the coverage provided by the insurance policy. Thus, we must determine not whether an employee's allegations successfully avoid the exclusive remedy provision of the WDCA, as was the case in *Travis* . . . but whether those allegations are comprehended by a particular insurance policy. [*Cavalier (On Remand), supra,* slip op p 2; footnote omitted, emphasis in the original.]

Consistent with *Cavalier (On Remand), supra,* we conclude that *Travis, supra,* does not affect our previous order. Accordingly, we again remand this case for a determination of whether, under the terms of the parties' contract of insurance -- separate from the terms of the exclusive remedy provision of the WDCA -- defendant had a duty to defend in the underlying action.

Vacated and remanded. We do not retain jurisdiction. No costs pursuant to MCR 7.219, a question of public policy involved.

/s/ Barbara B. MacKenzie
/s/ Michael J. Kelly
/s/ David H. Sawyer