STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL JAMES FRASURE,

Plaintiff-Appellant,

v

DAKO INDUSTRIES, INC.,

Defendant-Appellee,

and

E.W. BLISS, INC.,

Defendant.

UNPUBLISHED
January 30, 1998

No. 205272
Oakland Circuit Court
LC No. 90-385021-NP

ON REMAND

Before: Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff brought this action against his employer, defendant Dako Industries, Inc., seeking to avoid the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA)by alleging the commission of an intentional tort, MCL 418.131(1); MSA 17.237(131)(1). In a previous appeal (Docket No. 138913), this Court found that plaintiff's complaint did not allege sufficient facts to prevail under the intentional tort exception and therefore, it reversed the trial court's denial of defendant's motion for summary disposition. However, it remanded the matter to allow plaintiff to amend his complaint "to clearly state his cause of action." On remand after plaintiff filed his amended complaint, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) on the basis that the amended complaint did not allege sufficient facts to support his claim. Plaintiff appealed as of right from that decision (Docket No. 180749), and this Court affirmed by an order dated February 28, 1996. Plaintiff then sought leave to appeal in our Supreme Court, which vacated this Court's judgment and remanded for plenary consideration by this Court. We affirm.

To allege a sufficient claim of intentional tort to avoid the exclusive remedy provision of the WDCA, the plaintiff must allege facts showing that the employer deliberately acted or failed to act with the purpose of inflicting injury upon the employee. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149,

172; 551 NW2d 132 (1996). In order to prove intent, the plaintiff must demonstrate that the employer had "actual knowledge" that injury was "certain to occur" and that the employer "wilfully disregarded" that knowledge. *Id.*, 172-173. In *Travis,* the Court ruled that actual knowledge did not mean constructive, implied or imputed knowledge. *Id*. at 173-174. Further, it found that an injury is certain when there is no doubt that it will occur. *Id.* at 174.

In his first amended complaint, plaintiff alleged that defendant's agent had intentionally tied down the left palm button on the machine and that the machine had "repeated" or cycled without operator input once or twice a year during the twenty years the press had been in the shop. He also alleged that it was foreseeable that the press would be activated while an operator's hand was in the danger zone. Further, he alleged that MIOSHA requirements were wilfully violated. These allegations do not suffice because they do not comply with the stringent *Travis* test and do not support an intentional tort. There are no allegations that defendant had actual knowledge that an injury would occur. Specifically, the fact that the machine recycled or double cycled once or twice a year does not support that an injury was "certain to occur". Moreover, that allegation also does not support that defendant had actual knowledge, as opposed to implied knowledge, that an employee would be undoubtedly be injured when working on the press. There was no continuous malfunction in this case and there was no warning that the machine was going to "repeat" or double cycle. There were also no allegations of any specific prior injuries or close calls occurring during the twenty year history of the press, which allegations, although not necessary under *Travis, supra* at 174, may have supported the "actual knowledge" requirement. Plaintiff's only statement in that regard was the following general, conclusory language:

> [A]ny one of such incidents would have caused severe and maiming injuries to an operator whose hand was in the "danger zone" or "point of operation" when such a "repeat" or "unintended cycle" occurred, the said multiple prior incidents having come close to injuring other employees.

Finally, the simple fact that one of the buttons was tied down is not tantamount to an allegation that defendant had actual knowledge that an injury was going to occur. Even with one of the palm buttons tied down, the press at issue was not a known-defective press that was going to cause an injury.

Because there were no factual allegations to support that defendant had "actual knowledge" that injury was "certain to occur", we affirm the grant of summary disposition. Moreover, we note that in this case, there was less certainty of injury than that found wanting by the Court in *Travis, supra*. In particular, there was no warning to the supervisor that the press that plaintiff was working on had recently malfunctioned and there was no showing that the supervisor deliberately ignored a warning about a recent malfunction.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs