

STATE OF MICHIGAN
COURT OF APPEALS

RICKIE HARGIS,

Plaintiff-Appellant,

v

SUNSET TRANSPORT, L.L.C.,

Defendant-Appellee,

and

SUNSET EXCAVATING, INC.,

Defendant.

UNPUBLISHED

April 27, 2006

No. 267424

Wayne Circuit Court

LC No. 04-425347-NI

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant Sunset Transport, L.L.C.'s motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that plaintiff's claim was barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was employed by defendant as a truck driver. He was injured when a dump truck he was operating tipped over as he attempted to raise the bed. He alleged that the dump truck was "known by Defendant to have been defective, dangerous and prone to roll over when the bed was raised[, and that] despite knowledge on behalf of the Defendants of the dangerous propensity of the dump truck, Plaintiff was instructed to operate said truck in order to do his job . . ." In his deposition, plaintiff testified that a week before the accident he informed defendant's dispatcher "that somebody was going to get hurt" because "the trailer had a tendency to lean even when you were on level ground." A former employee averred that he "refused to pull the trailer box because when unloading dirt it would lean to one side even on flat concrete" and that he told a Sunset Excavating foreman before the incident that the trailer was not safe to be on the road.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of

law.” This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In cases involving the intentional tort exception to the exclusive remedy provision, the issue whether the facts are as plaintiff alleges is a jury question, but whether the facts as alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the trial court. *Gray v Morley*, 460 Mich 738, 743; 596 NW2d 922 (1999).

Plaintiff does not claim that there is any direct evidence that defendant specifically intended an injury. However, one may infer an employer’s intent to injure by showing that the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. MCL 418.131(1); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173, 191; 551 NW2d 132 (1996). An injury is certain to occur if there is “no doubt” that it will occur. *Id.*, p 174. It must be “sure and inevitable.” *Id.*; *Alexander v Demmer Corp*, 468 Mich 896; 660 NW2d 67 (2003). The element of an “injury certain to occur” is an “extremely high standard” of proof that “cannot be met by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts.” *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997). “[A]n employer’s awareness that a dangerous condition exists is not enough.” *Id.*, p 150. “Merely showing a likelihood of an accident is not sufficient.” *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 756; 593 NW2d 219 (1999). An employer’s knowledge of general risks is also insufficient. *Agee v Ford Motor Co*, 208 Mich App 363, 366-367; 528 NW2d 768 (1995). “A continuously operative dangerous condition may form the basis of a claim under the intentional tort exception only if the employer *knows* the condition will cause an injury and refrains from informing the employee about it.” *Alexander, supra*. But a mere potential hazard is not a continuously operative dangerous condition. *Bazinau, supra*.

Viewed in the light most favorable to plaintiff, the evidence showed that plaintiff informed a dispatcher that the trailer or “box” “had a tendency to lean even when you were on level ground.” Knowledge of a “tendency to lean” does not establish defendant’s knowledge that the trailer was *certain* to tip over or that its tipping was inevitable. Even if one were to conclude that it was substantially certain that the trailer would tip over eventually, that is insufficient to meet the “extremely high standard” established by the Legislature. *Travis, supra*, p 174. Therefore, the trial court properly granted defendant’s motion for summary disposition.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot