

STATE OF MICHIGAN
COURT OF APPEALS

ERNEST STALLINGS,
Plaintiff-Appellee,

UNPUBLISHED
May 28, 2009

v

GENERAL MOTORS CORPORATION and
POWERTRAIN DIVISION,

No. 284973
Wayne Circuit Court
LC No. 06-621829-NO

Defendants-Appellants.

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant¹ appeals on leave granted the trial court's order denying its motion for summary disposition, which was predicated on the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured at the Romulus Engine Plant when he was struck by a load of V-8 cranks being carried on a hi-lo driven by a driver with a reputation for driving such equipment too fast or otherwise carelessly. According to plaintiff, the accident occurred at an intersection known to be a dangerous one, where collisions had occurred in the past. Plaintiff filed suit, alleging that defendant had actual knowledge that the obstructed view and lack of stop signs would cause motor vehicles and pedestrians to enter the intersection at the same time, and that injury to employees was certain to occur, and that defendant willfully disregarded that knowledge.

Defendant moved for summary disposition on the ground that plaintiff's exclusive remedy was benefits under the WDCA. The trial court held that there existed "a question of fact as to whether or not GM had actual knowledge that an injury was certain to occur." The court added:

¹ There being no need to distinguish between the two closely related corporate defendants, for convenience we will use the singular "defendant" to refer to them collectively in this opinion.

If the trier of fact believes the plaintiff's version of the events, that there were a number of occurrences that GM was aware of, that these were documented, that these were dangerous conditions, that [the hi-lo driver] himself admitted in so many words that he did speed from time to time, although it was at the behest of his supervisors, and if they believe that this was a dangerous intersection because of either the alleged obstructions to one's view or because of the width of the hi-lo path, if you will, the jury could infer from those facts, if they find them to be true, that GM had actual knowledge that an injury was certain to occur and that they disregarded that knowledge.

This appeal followed.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Generally, disability or death benefits under the WDCA are an injured employee's exclusive remedy against an employer who has complied with the act. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 510; 563 NW2d 214 (1997), overruled in part on other grounds *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). The statute, however, provides for an exception where the employer has committed an intentional tort:

The only exception to this exclusive remedy is an intentional tort. 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. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1).]

Under this legislation, an employee may pursue a tort action against an employer if the employee can establish that the employer acted, or failed to act, with the specific intent to cause injury. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149; 565 NW2d 868 (1997). This requirement can be satisfied where the employer had actual knowledge that an injury was certain to occur as the result of the employer's action or inaction, and wilfully disregarded such actual knowledge. *Palazzola, supra* at 149-150.

Mere negligence in failing to protect an employee from foreseeable harm does not satisfy the intentional tort exception to the WDCA. *Id.* at 150. The requirement that injury was certain to occur "establishes 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." *Id.* at 149-150. Where an employer is a corporation, a particular employee must act with the requisite state of mind in order to render the corporation liable for an intentional tort. *Id.* at 149. "[D]isconnected facts possessed by various employees or agents of that corporation"

are not sufficient to establish an intentional tort. *Id.* at n 4 (internal quotation marks and citation omitted).

In this case, plaintiff himself admitted on deposition that he did not allege that defendant intentionally harmed him, and so must rely on the theory that one or more of defendant's agents had actual knowledge that an injury was certain to occur as the result of the employer's action or inaction, and wilfully disregarded such actual knowledge. *Id.* at 149-150.

But plaintiff's theory of the case falls short of the extremely high standard of proof required. Plaintiff nowhere has suggested that any employee specifically expected his accident to occur as it did. The driver of the hi-lo was, at worst, driving negligently. By the time he spotted plaintiff, he stopped quickly, which in turn caused part of the load inadvertently to fall on plaintiff. Plaintiff complains that there was a history of similar collisions at that intersection, but admitted on deposition that he had entered it without incidents on earlier occasions. Plaintiff thus tries to build a case of wilful failure to avoid an accident certain to happen from mere history or probabilities. See *Id.* at 149-150. What plaintiff alleges is ordinary negligence, in the form of defendant's failure to protect him from foreseeable harm, which is not enough to avoid the exclusive-remedy provision of the WDCA. *Id.* at 150.

On appeal, plaintiff specifies his supervisor as an agent of defendant who committed an intentional tort, for his having wilfully "disregarded actual knowledge that an injury was certain to occur by ordering Plaintiff to sort crank shafts for hours in a highly dangerous intersection frequented by a disgruntled employee recklessly operating a hi-lo."² However, plaintiff's framing of that argument belies that plaintiff is characterizing mere probability as actual knowledge of something certain to occur. Plaintiff merely describes a foreseeably dangerous state of affairs. Failure to take precautions in the face of an accident hazard alone, whether over the course of a few hours or several years, does not itself transform an eventual accident into an intentional tort. Plaintiff does not assert that the supervisor ordered him to position himself in a vulnerable place, then somehow became aware of a collision course with the hi-lo but wilfully failed to act.

For these reasons, plaintiff can establish neither that his employer specifically intended to injure him, nor that the employer engaged in a deliberate act or omission that was certain to bring about that result. Accordingly, the trial court erred in denying defendant's motion for summary disposition.

Reversed. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

² Defendant protests that plaintiff presented no such honed theory below. However, defendant, as an appellee, is free to argue alternative bases for affirmance. See *Kosmyna v Botsford Comm Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).