

STATE OF MICHIGAN
COURT OF APPEALS

JOHN MARTIN,

Plaintiff-Appellant,

v

VAC-ALL, INC.,

Defendant-Appellee,

and

FORD MOTOR COMPANY and KORD
INDUSTRIAL, INC.,

Defendants.

UNPUBLISHED

March 23, 2006

No. 265589

Wayne Circuit Court

LC No. 04-414515-NO

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant. The trial court held that plaintiff had failed to establish a genuine issue of material fact as to whether the intentional tort exception to the exclusive remedy of the Workers' Disability Compensation Act (WDCA), MCL 418.131(1), applied to this case. We affirm.

I. Facts

Plaintiff's claim arises from injuries he sustained while vacuuming shot material (metallic dust) from a baghouse¹ unit in the Ford Livonia Treatment Plant (Ford Plant). Since beginning work with defendant, an industrial cleaning company, plaintiff had operated a vacuuming hose approximately three to four times per week. On the day he was injured, plaintiff was at the Ford Plant with fellow crewmembers, Ralph Adkins and John Nadeau, and Leonard

¹ A baghouse is a container that holds dust removed from air filtration.

Zwolinski, the crew coordinator, to vacuum the baghouse,² a process that consists of connecting pieces of hose to a vacuum truck. To avoid getting dirty, plaintiff had put on a Tyvek suit. He then stepped onto a man lift, inserted a hose into the baghouse, and began vacuuming with Adkins and Nadeau on the ground controlling the truck for safety purposes. Several minutes after plaintiff started vacuuming, the dust ignited at the tip of the vacuuming hose that he had inserted into the baghouse, creating a fireball that burned plaintiff. Zwolinski was not present when plaintiff was injured.

Although a MIOSHA investigation did not reveal what caused the dust to ignite, MIOSHA noted that the creation of static electricity is a “recognized hazard” associated with vacuuming metal dust. In addition, MIOSHA issued a citation to defendant for not using a conductive hose as recommended by the National Fire Protection Association (NFPA), and for not obtaining a copy of the Material Safety Data Sheet (MSDA). Moreover, MIOSHA noted that the boxes containing the Tyvek suits had a warning that the suits may create static electricity and that they should not be used around sparks or potentially flammable or explosive environments.

Approximately twenty minutes prior to this incident, Atkins and Nadeau had informed Zwolinski that a section of the hose they were using “had started on fire.”³ Zwolinski, Atkins, Nadeau, plaintiff, and a Ford employee stopped work to determine what caused the problem. Figuring the problem “was kind of a freak [thing] [sic],” Zwolinski decided work could be resumed and, before leaving for the office, instructed the men to stop vacuuming “if something freaky happens.” Zwolinski affirmed that he believed it was safe for work to resume, especially in light of the fact that he had never in the past seen anyone burned using the type of hose with which plaintiff would vacuum.

Zwolinski also testified that he had personally vacuumed a baghouse on prior occasions and had never experienced any fire or explosion from vacuuming. Although Zwolinski knew metal dust would be vacuumed the day of the incident, he noted that prior to the incident, he had “never thought of it [metal dust] igniting” In addition, Zwolinski stated that he was unaware, prior to the incident, that Tyvek suits could produce static electricity or were flammable, although he knew that metal dust could produce static electricity.

After reviewing the submitted testimony and evidence, the trial court issued a written opinion and order granting defendant’s motion, concluding that plaintiff had failed to establish a genuine issue of material fact on whether the intentional tort exception applied.

² Plaintiff noted that he had performed the same vacuuming procedure the day before and explained that prior to the incident, he had never experienced a fire, explosion, or a hose melting as the result of vacuuming.

³ Zwolinski was not present for this prior incident. Zwolinski testified that he noticed that part of the hose looked “smashed or collapsed,” but not burnt, and that Atkins and Nadeau had already replaced the damaged section before he arrived on the scene. Zwolinski also testified that he did not know if the replacement section was made of the same material as the damaged section.

II. Analysis

On appeal, plaintiff continues to maintain that his claim falls within the intentional tort exception to the exclusive remedy provision of the WDCA. We disagree. We review de novo an order granting summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing this motion, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

An employee's right to recover benefits under the WDCA is generally an employee's exclusive remedy for a work-related injury. MCL 418.131(1); *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 63; 658 NW2d 460 (2003). However, the WDCA provides an exception for injuries resulting from intentional torts:

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).]

The intentional tort exception requires that the employer commit a deliberate act and specifically intend that act to result in injury to the employee. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 169, 171 (Boyle, J.), 191 (Riley, J.); 551 NW2d 132 (1996). An omission or commission may constitute a deliberate act. *Id.* To determine whether the employer had the requisite specific intent, the Court must decide whether the employer had "actual knowledge that an injury was certain to occur," and whether the employer "willfully disregarded that knowledge." MCL 418.131(1); *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004).

First, for actual knowledge to exist there must in fact be actual knowledge. *Herman, supra* at 149. Mere "constructive, implied or imputed" knowledge or knowledge of general risks is insufficient to satisfy the actual knowledge requirement. *Id.* (citation omitted). Second, for an injury to be certain to occur there must be "no doubt . . . with regard to whether it will occur." *Travis, supra* at 170, 174 (Boyle, J.); *Bock v General Motors Corp*, 247 Mich App 705, 711; 637 NW2d 825 (2001). Further, it is insufficient to allege that the employer "should have known" or "had reason to believe" an injury would occur. *Travis, supra* at 173 (Boyle, J.). Third, an employer willfully disregards knowledge of the danger when it disregards actual knowledge that an injury is certain to occur. *Id.* at 174, 179 (Boyle, J.).

There is no evidence that defendant, through Zwolinski, possessed actual knowledge that an injury was certain to occur to plaintiff. Although Zwolinski mentioned that he knew plaintiff would be vacuuming metal dust, which he was aware could produce static electricity, he testified that prior to the incident he was unaware that metal dust could ignite. Zwolinski was also

unaware that the Tyvek suit, which plaintiff wore voluntarily, could potentially conduct static electricity. Therefore, given that prior to plaintiff's injury Zwolinski was not even aware that metallic dust was flammable or that the suit plaintiff was wearing could react with the dust, defendant lacked knowledge that danger even existed. See *Herman, supra* at 149.⁴

Regarding the prior occurrence with the repaired hose, Zwolinski was not present for that event and only learned of it second hand. Zwolinski even stopped work to investigate the cause of the prior occurrence and it was only after he could not determine the cause that he ordered work to resume. Thus, even if the prior occurrence were identical to plaintiff's accident, knowledge that there was a risk cannot be "imputed" to Zwolinski because the cause of the prior occurrence was unknown. See *Herman, supra* at 149.

Further, the evidence does not indicate that the circumstances as Zwolinski knew at the time would make plaintiff's injury certain to occur. First, Zwolinski had never experienced fire or an explosion when he had personally vacuumed baghouses on prior occasions. Second, Zwolinski testified that he did not know if the hose plaintiff was using, which was repaired by Atkins and Nadeau, was even made of the same material that was damaged in the prior occurrence. Third, two other crewmembers remained with plaintiff while he was vacuuming for safety purposes. In light of these facts, it can hardly be said that there was "no doubt" that injury would occur. *Travis, supra* at 170, 174 (Boyle, J.). It is irrelevant in determining defendant's actual knowledge at the time of the incident that Zwolinski learned after plaintiff's injury that metal dust is flammable, that Tyvek suits conduct static electricity, or that plaintiff was not using the NFPA recommended hose. Thus, the trial court did not err in granting defendant's motion for summary disposition.

⁴ We do not agree with plaintiff's assertion that this case is identical to *Golec v Metal Exchange Corp*, 453 Mich 149; 551 NW2d 132 (1996), the companion case to *Travis, supra*. Unlike this case, in *Golec* the plaintiff was initially injured by a small explosion, and reported the cause of the explosion to his supervisor, who in turn reported it to his supervisor. Despite knowledge of how the explosion occurred, the higher level supervisor ordered plaintiff to go back and continue the same work without any remedial efforts or investigation. *Golec, supra* at 157-158. Moreover, defendant's employees testified that they knew aerosol cans and wet metal could explode, and that these metals were being shoveled by plaintiff. *Id.* at 184-185. Defendant failed to remedy this problem that had caused the earlier explosion. *Id.* at 186. In the instant case, the undisputed evidence shows that defendant investigated the initial fire, could not determine the cause, and thus, resumed plaintiff's work, but under closer scrutiny. There was also no pre-existing knowledge on defendant's (or plaintiff's) part as to the combustible element of the dust, or the flammable nature of the protective suite voluntarily worn by plaintiff. In other words, in *Golec* the defendant made the plaintiff work despite knowing what caused the explosion (and doing nothing about it), while in this case defendant did investigate the initial incident, but could not determine the cause, and thus had plaintiff (and others) proceed, but cautiously so.

Affirmed.

/s/ Bill Schuette

/s/ Christopher M. Murray

/s/ Pat M. Donofrio