

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW ZILLIOX and CANDI ZILLIOX,

Plaintiffs-Appellants,

v

WOODSIDE BUILDERS, INC.,

Defendant-Appellee.

UNPUBLISHED

March 13, 2003

No. 238954

Genesee Circuit Court

LC No. 00-069002-NO

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Matthew Zilliox, defendant's employee, was injured while laying sewer pipe in a trench; he was struck by a large piece of clay that fell from the trench wall. The trial court ruled that the evidence did not establish an intentional tort under MCL 418.131(1). The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). This Court must determine whether the pleadings demonstrate that defendant was entitled to judgment as a matter of law or whether documentary evidence showed there was no genuine issue of material fact. *Bock v General Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001).

Worker's compensation benefits are "the exclusive remedy for a personal injury, except for an injury resulting from an intentional tort." *Id.*

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. This issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1).]

Section 131(1) permits recovery for both true intentional torts and torts in which an intent to injure is deemed to exist. *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 336 n 4; 535 NW2d 583 (1995). Plaintiffs rely on the latter theory.

If direct evidence of an intent to injure is lacking, an employee may establish a faux intentional tort, one in which an intent to injure is deemed to exist when in fact no such intent actually exists. *Id.* An intent to injure is deemed to exist when the plaintiff proves the following elements:

(1) “Actual Knowledge”—This element of proof precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established by showing that a supervisory or managerial employee had “actual knowledge that an injury would follow from what the employer deliberately did or did not do.”

(2) “Injury certain to occur”—This element 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. Further, an employer’s awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does.

(3) “Willfully disregard”—This element requires proof that an employer’s act or failure to act must be more than mere negligence, e.g., failing to protect someone from a foreseeable harm. Instead, an employer must, in fact, disregard actual knowledge that an injury is *certain* to occur. [*Palazzola v Karmazin Prods Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997) (emphasis in original).]

Plaintiffs contend that defendant had actual knowledge of the dangerous condition which was certain to cause injury because defendant, who was cited for MIOSHA violations in connection with Matthew Zilliox’s injury, had received a similar citation the previous year. However, defendant is a corporation and thus plaintiffs are required to prove that a specific supervisory or managerial employee had the requisite knowledge of a specific danger. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173-174; 551 NW2d 132 (1996); *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 221; 555 NW2d 481 (1996). Here, the evidence showed that the foreman was the same foreman on the job when defendant received the previous citation. However, plaintiffs have not shown that the foreman was made aware of the previous citation or the reason for its issuance. Thus, plaintiffs have not shown that a particular supervisory employee had actual knowledge of a specific hazard.

Even if the foreman had been aware of the previous citation, the evidence does not show that he knew that injury was certain to occur. There is no evidence that the previous violation resulted in collapse of the trench or injury to any person. While the previous citation gave reason to believe that defendant’s trenching methods may have presented a risk of harm, knowledge of a general risk is not the equivalent of certainty of injury. *Travis, supra* at 174; *Agee v Ford Motor Co*, 208 Mich App 363, 367-368; 528 NW2d 768 (1995). Although plaintiffs’ expert opined that defendant had actual knowledge that an injury was certain to occur, “conclusory statements by

experts are insufficient to allege the certainty of injury contemplated by the Legislature.” *Travis, supra*. The trial court did not err in granting defendant’s motion.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Joel P. Hoekstra