STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE and JANE DOE,

Plaintiffs-Appellants,

v

GENERAL MOTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
October 28, 2021

No. 355097
Genesee Circuit Court
LC No. 20-114107-NO

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

In this personal injury action, plaintiffs appeal by right the trial court's decision granting defendant's motion for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8). We affirm.

I. BACKGROUND

For purposes of this appeal, the facts are not in dispute. Plaintiff John Doe[1] worked for defendant and was injured while on the job. Plaintiff John Doe and his team were operating a die press used in making vehicle parts at defendant's manufacturing plant. As part of this process, two metal storage blocks were mistakenly left inside the press. The press was activated and, as the press descended, the press came into contact with these blocks, compressed them, and caused one to be ejected from the press at a high rate of speed. This block struck plaintiff John Doe in his groin and caused extensive injuries. Plaintiffs brought this action against defendant and attempted to overcome the requirements of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq.*, which governs nearly all aspects of compensation for an injury sustained during the course of employment. Specifically, plaintiffs alleged that defendant committed an "intentional tort" for the purposes of MCL 418.131(1) of the WDCA, so that act did not provide the exclusive remedy for their injuries. Plaintiff John Doe sought damages for his personal injuries, and plaintiff Jane Doe sought damages for the loss of consortium. Defendant moved for

[1] The actual names of plaintiffs have been replaced with John Doe and Jane Doe, respectively.

summary disposition, contending that, even taking plaintiffs' allegations as true and viewed in a light most favorable to them, the allegations failed as a matter of law to meet the requirements for the intentional-tort exception to the WDCA. The trial court agreed and dismissed the action. Plaintiffs now appeal, contending that the trial court erred by granting summary disposition both because discovery had not yet occurred and because their allegations met the requirements for the intentional-tort exception to the WDCA.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted pursuant to MCR 2.116(C)(4) when the trial court "lacks jurisdiction of the subject matter." For such motions, "this Court determines whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138-139; 796 NW2d 94 (2010) (cleaned up).

Relevant to this appeal, a motion is properly granted pursuant to MCR 2.116(C)(7) when one party is entitled to "immunity granted by law."

> In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. We must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. [*Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000) (citation omitted).]

A motion is properly granted pursuant to MCR 2.116(C)(8) when "[t]he opposing party has failed to state a claim on which relief can be granted." Such a motion "tests the legal sufficiency of the claim on the basis of the pleadings alone . . . ." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When reviewing the motion, "the court must accept as true all factual allegations contained in the complaint." *Id.* The court must grant the motion "if no factual development could justify the plaintiff's claim for relief." *Id.* (quotation marks and citation omitted).

B. WDCA

MCL 418.131(1) of the WDCA provides as follows:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. 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.

Under MCL 418.131(1), "employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault." *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000) (citation omitted). "In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer." *Id*. (quotation marks and citation omitted). "It is well settled that the exclusive remedy provision applies when an employee is injured by the negligent acts of his employer or by the negligent acts of a coemployee." *Id*. "The only exception to this rule is when the employee can show that the employer committed an intentional tort." *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014). "The issue whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, while the issue whether the facts are as the plaintiff alleges is a question of fact for the jury." *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 139; 475 NW2d 423 (1991).

"[T]o recover under the intentional tort exception of the WDCA, a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury." *Bagby*, 308 Mich App at 491. In other words, "an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996) (opinion by BOYLE, J.). "There are two ways for a plaintiff to show that an employer specifically intended an injury." *Bagby*, 308 Mich App at 491. First, "the plaintiff can provide direct evidence that the employer had the particular purpose of inflicting an injury upon his employee." *Id*. (quotation marks and citation omitted). Second, "an employer's intent can be proven by circumstantial evidence, i.e., that the employer has actual knowledge that an injury is certain to occur, yet disregards that knowledge." *Id*. (quotation marks and citation omitted). To be precise, the employer must "willfully disregard" such knowledge. See *Travis*, 453 Mich at 178-179 (opinion by BOYLE, J.).

Plaintiffs do not allege direct evidence of a "particular purpose" by defendant to injure plaintiff John Doe. Thus, for plaintiffs to invoke the intentional-tort exception to the WDCA, they must show that defendant "had an intent to injure through circumstantial evidence" by establishing that "(1) [defendant had] actual knowledge (2) that an injury [was] certain to occur (3) yet disregard[ed] that knowledge." *Luce*, 316 Mich App at 33. The knowledge of a supervisory or managerial employee in this regard is imputed to defendant itself. See *Bagby*, 308 Mich App at 492. For the reasons that follow, even assuming that plaintiffs met the "actual knowledge" requirement, we conclude that they failed to meet "certain to occur" and "willfully disregards" requirements.

Plaintiffs alleged that, over the course of nine years, there had been 5 to 10 incidents in which the storage blocks were left in the press and were ejected; however, no injuries occurred from these incidents. Plaintiffs also alleged a specific incident in which the ejected blocks narrowly missed the head of another employee. Additionally, plaintiffs alleged that Thomas Parker, the former head of the Safety Committee for the manufacturing plant, warned the plant

supervisor, Jim Scrimiger, that "the steel storage blocks was [sic] a safety hazard that was going to seriously injure or kill a GM employee." These allegations failed to meet the "extremely high standard" set forth by Michigan law. See *Travis*, 453 Mich at 174 (opinion by BOYLE, J.). The ejection of the blocks was not a *continuous* occurrence; rather, ejection occurred less than a dozen times over nine years with no injuries. See *id*. at 178 (opinion by BOYLE, J.) ("When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur.") (citation omitted). Indeed, by his own concession, plaintiff John Doe had never witnessed the ejection of these blocks before, which indicates that this was not a *continuous* dangerous condition. Accordingly, there was not a *certainty* that injury would occur to plaintiff John Doe. Merely showing that something has happened before is insufficient to invoke the intentional-tort exception. See *id*. at 174 (opinion by BOYLE, J.).

Plaintiffs focus on the fact that Scrimiger allegedly did not inform plaintiff John Doe of the dangerous condition. However, even assuming that Scrimiger failed to inform plaintiff John Doe about the possibility of the blocks being ejected, this was insufficient to overcome defendant's motion for summary disposition. Plaintiffs were required to show that defendant had actual knowledge that an injury was *certain* to occur, which they failed to do. Injury was not certain, as evidenced by the fact that, in the 5 to 10 prior incidents during the preceding nine years, no injuries occurred. Additionally, although Thomas Parker informed Scrimiger of the dangerous condition and said that "someday" someone would be injured or killed, this is best understood as speculation, not *certainty*. In other words, it involved the "laws of probability," and it is therefore insufficient to meet the "certain to occur" requirement. *Id*. at 174 (opinion by BOYLE, J.).

Further, for essentially the same reasons, plaintiffs failed to meet the "willfully disregards" requirement as well. The "willfully disregard[]" language in MCL 418.131(1) requires "more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur." *Id*. at 179 (opinion by Boyle, J.). The actions of Scrimiger were arguably negligent because he knew of the risk and yet continued to do nothing about it, stating that it was "his plant, his call" to make. However, knowledge of the *risk*, or *probability*, that an injury *could* occur is not the same as knowledge that the injury *will* follow from a course of action. There was no certainty that the storage blocks would be left in the press, would be ejected, and would cause injury to an employee. There was only the *probability* that it could happen, which suggests negligence on the part of Scrimiger for his alleged failure to warn plaintiff John Doe but fails to rise to the level of culpability required under the intentional-tort exception to the WDCA.

Finally, we reject plaintiffs' contention that the trial court was required to permit discovery prior to ruling on defendant's motion. MCR 2.116(G)(5) merely requires that, *if* documentary evidence is filed with the motion, the trial court *must* consider the evidence when the motion is

based on the listed subrules.[2] Nothing within this subrule suggests that discovery must occur *prior* to a motion for summary disposition. Moreover, plaintiffs do not clearly explain on appeal how discovery was likely to advance their case. At most, plaintiffs briefly suggest that if they had been allowed to depose Scrimiger, he might have testified as to facts indicating that defendant "intended to injure him." See MCL 418.131(1). However, as previously explained, plaintiffs have failed to sufficiently allege or otherwise show that Scrimiger "had actual knowledge that an injury was certain to occur," given the extreme rarity of the hazard at issue actually occurring. See *id*. Thus, discovery did "not stand a reasonable chance of uncovering factual support" for plaintiffs' position, and the trial court did not err by refusing to allow it. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).[3]

III. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant because plaintiffs failed to show that the intentional-tort exception to the exclusive-remedy provision of MCL 418.131(1) applies in this case. Therefore, we affirm.

/s/ Christopher M. Murray
/s/ Michael J. Riordan

---

[2] MCR 2.116(G)(5) provides, in relevant part, that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)."

[3] Plaintiffs argue in their reply brief that the trial court should have permitted them the opportunity to amend their complaint. However, plaintiffs provide no substantive argument on appeal regarding what allegations would be added such that their claims would meet the intentional-tort exception of the WDCA. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). Plaintiffs have therefore abandoned this argument.

We also note that we granted plaintiffs' motion to expand the record before oral argument. *John Doe v Gen Motors, LLC*, unpublished order of the Court of Appeals, entered September 28, 2021 (Docket No. 355097). After reviewing the expanded record, which generally concerns medical examination and treatment of plaintiff John Doe after the workplace injury, our ultimate conclusion in this case remains unchanged. The expanded record does not address the underlying question of whether defendant committed an intentional tort for the purposes of MCL 418.131(1).

STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE and JANE DOE,

Plaintiffs-Appellants,

v

GENERAL MOTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
October 28, 2021

No. 355097
Genesee Circuit Court
LC No. 20-114107-NO

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

JANSEN, J. (*dissenting*)

For the reasons that follow, I respectfully dissent.

The trial court erred in granting summary disposition in favor of defendant because genuine issues of material fact exist regarding plaintiffs' claim that the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq*., applies, and summary disposition before discovery was completed was premature. Therefore, I would vacate the trial court order granting defendant summary disposition, and remand to the trial court for further proceedings, including discovery.

I adopt the standard of review for a motion for summary disposition under MCR 2.116(C)(7) as provided by the majority. Summary disposition is premature if granted before discovery is completed on a disputed issue. *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 253; 964 NW2d 50 (2020). "[A] party may not simply allege that summary disposition is premature. The party must clearly identify the disputed issue for which it asserts discovery must be conducted and support the issue with independent evidence." *Id*. "The dispositive inquiry is whether further discovery presents a fair likelihood of uncovering factual support for the party's position." *Id*. (quotation marks and citation omitted).

The benefits that the WDCA provides are an employee's exclusive remedy against an employer for work-related personal injuries. MCL 418.131(1); *Johnson v Detroit Edison Co,* 288 Mich App 688, 695-696; 795 NW2d 161 (2010). "The only exception to this exclusive remedy is an intentional tort." MCL 418.131(1). "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." *Id*. The second sentence applies here, and "allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996). Questions of fact exist regarding this requirement.

Employees were using the storage blocks in the die presses even though they were instructed by defendant not to, and disciplined when they did. It is human nature that employees will not always follow protocol. However, given the lack of discovery, it is not clear what the blocks were used for, how often they were used, and under what circumstances they were used.[1] The evidence provided by plaintiffs established that such storage blocks were ejected in a similar manner 5 to 10 times over a period of years, but these are only the times that plaintiffs were aware of. Without discovery, the frequency with which the blocks were ejected is unclear. It is incredibly fortunate that no one else was seriously injured by an ejected storage block given the extremely dangerous risk posed by an ejection. However, just because no other employee was injured does not mean that defendant lacked knowledge that an injury was certain to occur, given the dangerous nature of an ejection. In fact, plant manager Jim Scrimiger insisted on using the safety blocks, stating, "it was his plant, his dies, and his call," even though the Safety Committee Chairperson, Thomas Parker, urged him not to.

Thus, genuine issues of material fact exist regarding whether defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge, MCL 418.131(1), and further discovery presents a fair likelihood of uncovering factual support for plaintiffs' claim, *Powell-Murphy*, 333 Mich App at 253. Without opining as to whether plaintiffs would prevail on a future motion for summary disposition, I would conclude that plaintiffs are entitled to further discovery, *id*. at 255-256, vacate the trial court order granting defendant summary disposition, and remand for further proceedings.

/s/ Kathleen Jansen

[1] At oral argument, under questioning by the Court, defense counsel failed to provide any clarification as to these questions of fact regarding why, how often, and under what circumstances the blocks were used by employees of defendant.