STATE OF MICHIGAN

COURT OF APPEALS

IRIS DIAZ, Personal Representative of the ESTATE OF JAMES ISOM, a/k/a JAMES ISOM DIAZ, Deceased,

Plaintiff-Appellant,

v

COMERICA BANK and GUARDSMARK, INC.,

Defendants-Appellees,

and

VIRENE BROWN,

Defendant.

UNPUBLISHED
February 1, 2002

No. 221601
Wayne Circuit Court
LC No. 97-720818-CZ

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

The decedent, James Isom, while employed by defendant Comerica Bank at one of its branches in Detroit, was shot to death by a gunman who entered the bank. Defendant Guardsmark, Inc., provided security for defendant bank and defendant Virene Brown was the security guard assigned to the branch.[1] Plaintiff commenced this action, alleging an intentional tort against defendant Comerica in order to avoid the exclusive remedy provision of the Worker's Disability Compensation Act ("WDCA"), MCL 418.131(1). The circuit court granted defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff appeals as of right, and we affirm.

The decedent was shot by a gunman, Allen Griffin, Jr., when Griffin entered defendant's branch with a shotgun. Stanley Pijanowski, defendant's branch manager, was also killed during the armed assault. After the incident, information was discovered indicating that the shooting may have been related to a "sex for cash" relationship between Griffin and Pijanowski. It was

[1] Guardsmark and Brown are not involved in this appeal. Brown was dismissed and Guardsmark resolved the matter with plaintiff.

plaintiff's theory that Griffin entered the bank to shoot Pijanowski as a result of that relationship and that Pijanowski, a supervisory or managerial employee of defendant, had actual knowledge of the risk of danger posed by Griffin such that defendant was liable for an intentional tort under MCL 418.131(1). We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

In *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 148-150; 565 NW2d 868 (1997), this Court, interpreting *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), held that a plaintiff must establish the following elements in order to prove an intentional tort under MCL 418.131(1):

> (1) "Deliberate act"--This includes both acts and omissions and encompasses situations in which the employer "consciously fails to act."
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> (2) "Specifically intended an injury"--An employer must have had a conscious purpose to bring about specific consequences. When an employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. (Recognizing [sic] that direct evidence of intent is often unavailable, the *Travis* Court explained that the second sentence of the exception provides an alternative means of proving an employer's intent to injure. *Id*. at 172-173. Plaintiff here relies upon this alternative to establish the employer's intent. To paraphrase the *Travis* Court at 173-174, 176, 178-179, a plaintiff alternatively can prove intent to injure by establishing the following elements:
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> (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."
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> (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.
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> (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. [Footnote omitted; emphasis in original.]

The level of proof required to show that an injury is certain to occur must be that there is "no doubt . . . with regard to whether it will occur." *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 752; 593 NW2d 219 (1999), quoting *Travis, supra* at 174. Even gross negligence is insufficient to constitute an intentional tort. *Gray v Morley (After Remand)*, 460 Mich 738, 744; 596 NW2d 922 (1999).

While defendant argues that not all of the evidence submitted by plaintiff would be admissible at trial, we are satisfied that, even if the proposed evidence were admissible, it falls short of establishing an intentional tort.

Plaintiff submitted evidence showing that Pijanowski and Griffin were involved in a "sex for cash" relationship that Pijanowski wanted to end after Griffin began to cause problems. There was also evidence that Griffin had threatened Pijanowski. However, the substance of the threats was never explained, although Pijanowski did apparently fear for his safety. Despite this evidence, it was not enough to show that Pijanowski had actual knowledge that Griffin would shoot bank employees at the workplace. At best, the evidence showed that Pijanowski was aware of a dangerous condition in relation to Griffin. Knowledge of a general risk of danger is insufficient to establish an intentional tort. *Palazzola, supra* at 154. Under *Travis, supra*, this is not enough to show that defendant specifically intended an injury. *Palazzola, supra* at 148-150.

Additionally, that defendant did not have bulletproof glass in the bank to protect plaintiff's decedent and other employees, including Pijanowski, is also insufficient to show that defendant was aware, through Pijanowski, that a dangerous condition existed and that injury was certain to result because of Griffin's threats. From the evidence produced, it is not reasonable to conclude that Pijanowski must have anticipated that Griffin would walk into the bank and go on a shooting rampage. At the point when Pijanowski presumably saw Griffin enter the branch with a shotgun, there was not enough time for Pijanowski to react. Accordingly, defendant did not willfully disregard actual knowledge that injury was certain to occur when it was not foreseeable that Griffin would react in the way that he did. The same is true for plaintiff's theory that injury was certain to occur because the branch did not have a remote control for the main door or other security devices, such as a "man trap."

Further, the fact that this branch may have been in a high-crime area or was robbed in the past is not relevant to establishing the danger posed in this case. Griffin, according to plaintiff's theory, did not enter the bank to rob it, but to exact revenge against Pijanowski for ending their relationship. The fact that the bank had been robbed in the past, or was in a high-crime area, was not relevant to establishing the danger posed by Griffin.

Plaintiff's theory relative to Pijanowski is dependent upon evidence that Pijanowski knew that Griffin would carry out his threat by staging a shooting rampage at the bank branch where Pijanowski worked. Plaintiff's evidence failed to factually support this theory, but showed only that Griffin was dangerous and had made general or vague threats. Because plaintiff failed to show that Pijanowski had actual knowledge that Griffin would show up at his place of employment and act in the manner that he did, plaintiff cannot establish an intentional tort based on Pijanowski's knowledge.

Plaintiff also argues that the security guard assigned to defendant's branch, Brown, had actual knowledge that Griffin was certain to cause injury and failed to properly respond in the face of that knowledge. It is questionable whether Brown can be considered a supervisory or managerial employee. Regardless, plaintiff failed to show that Brown had actual knowledge that Griffin was certain to cause injury when he entered the bank. When Griffin entered, the customers thought that he was there to rob the bank. While this involved a risk of danger to defendant's employees, the evidence offered did not show that it was apparent to Brown, or others, that injury was certain to occur. Brown's failure to lock the front door to keep Griffin out, or failure to follow other security procedures, while perhaps amounting to negligence on her part, did not rise to the level of an intentional tort.

Finally, plaintiff argues that the circuit court should have granted her motion for reconsideration based upon newly discovered evidence, MCR 2.119(F)(3). We review a trial court's decision on a motion for reconsideration under MCR 2.119(F)(3) for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). The information contained in Wayne Bullen's affidavit concerning Griffin's background and prior criminal record was available to plaintiff before the circuit court made its original ruling. A motion for reconsideration is properly denied where evidence offered in support of the motion could have been produced at the time the court made its original decision. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

The other two affidavits offered by plaintiff, even if constituting newly discovered evidence, do not provide support for plaintiff ’s theory because they do not show that Pijanowski, or any of defendant's other managerial employees, were aware of the extent of Griffin's hate or violent tendencies. The proffered evidence does not support plaintiff ’s theory that Pijanowski had actual knowledge of the extent of the threat posed by Griffin.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.