STATE OF MICHIGAN

COURT OF APPEALS

KEVIN FALCONER, Plaintiff-Appellant,	UNPUBLISHED March 14, 2013
v	No. 308335 Oakland Circuit Court
HAVENWYCK HOSPITAL, INC., Defendant-Appellee.	LC No. 2011-122171-NO

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). The trial court concluded that plaintiff's complaint did not allege sufficient facts to state a claim under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1). We affirm.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id.* at 119-120. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008). The motion may be granted "only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119 (citation and internal quotation marks omitted).

MCL 418.131(1) states:

> The right to the recovery of benefits as provided in this act [the WDCA] 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. This subsection shall not enlarge or reduce rights under law.

In evaluating an intentional tort claim, "whether the facts alleged by plaintiff are sufficient to constitute an intentional tort is a question of law for the trial court, while the issue whether the facts are as plaintiff alleges is a jury question." *Gray v Morley (After Remand)*, 460 Mich 738, 743; 596 NW2d 922 (1999).

In this case, the facts alleged by plaintiff were insufficient to state a claim for intentional tort under the exception to the exclusive remedy provision in MCL 418.131(1). Intentional conduct by the employer is required to trigger the exception. *Gray*, 460 Mich at 742. Where, as here, a plaintiff seeks to establish the employer's intent to injure by circumstantial evidence, as provided in the second sentence of § 131(1), he must show that the employer had actual knowledge that injury was certain to occur. *Id*. at 745. Plaintiff alleges that defendant understaffed the adult unit of its psychiatric hospital and that he had complained about the understaffing on numerous prior occasions. However, plaintiff's complaint does not allege any facts to support a conclusion that defendant knew that injury was certain to occur or even that injury had resulted from understaffing on any prior occasions. Plaintiff alleges that he was injured during an altercation with a particular patient with a violent history and asserts that the patient's presence in an understaffed unit of the hospital "created a continuously operating dangerous condition in the unit on the basis of which a trier of fact could conclude that an injury was certain to occur." Plaintiff has not cited any authority supporting the view that a human being, even one with a history of violence, may present a continuously operative dangerous condition comparable to a malfunctioning or poorly guarded press,[1] loads of scrap that may contain closed aerosol cans or water,[2] or a boiler in a state of disrepair.[3] Moreover, plaintiff's complaint alleges that the patient was admitted to the hospital on the same date as plaintiff's injury. Cases in which a "continuously operative dangerous condition" have been found involve conditions that are present over an extended period of time. A condition that is present for a short period (less than 24 hours in the present case) lacks the continuousness of the risk that is necessary to establish an intent to injure using circumstantial evidence. Although plaintiff's allegations included the requisite terminology for triggering the exception to the exclusive remedy provision, i.e., "actual knowledge that an injury was certain to occur" and "willfully disregarded that knowledge," the substantive factual allegations are insufficient to state a claim for intentional tort under the exception to the exclusive remedy provision in MCL 418.131(1). Accordingly, summary disposition pursuant to MCR 2.116(C)(8) was appropriate. *Smith v Mirror Lite Co*, 196 Mich App 190, 193-194; 492 NW2d 744 (1992).

Plaintiff also argues that the trial court erred by not affording him the opportunity to amend his complaint. The issue is unpreserved because plaintiff did not request an opportunity

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[1] See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), and *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 714; 777 NW2d 205 (2009).

[2] See *Golec v Metal Exch Corp*, the companion case to *Travis*, 453 Mich 149.

[3] See *Johnson v Detroit Edison Co*, 288 Mich App 688, 690-691; 795 NW2d 161 (2010).

to amend in the trial court. Therefore, appellate relief is foreclosed unless plaintiff can show that "(1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

MCR 2.116(I)(5) provides that if the trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." An amendment is not justified if it would be futile. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003) (citation omitted). The court rule does not require the court to order an amendment or to suggest the possibility. Plaintiff did not request an opportunity to amend his complaint in the trial court, either in response to defendant's motion or at the hearing on the motion. Even on appeal, plaintiff does explain how his complaint could be amended to properly allege an intentional tort. Under the circumstances, plaintiff has not established a plain error or shown that his substantial rights were affected. Thus, plaintiff is not entitled to appellate relief.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood