STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY DUBS, Personal Representative of the Estate of BRADLEY THOMAS TALASKI, Deceased,

Plaintiff-Appellant,

v

CLASSIC STONE, LLC, d/b/a CLASSIC GRINDSTONE, and DANIEL DAVID MUSLOFF,

Defendants-Appellees.

UNPUBLISHED
July 10, 2007

No. 275127
Huron Circuit Court
LC No. 05-002801-NO

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition. We affirm.

Plaintiff's decedent was killed in a tragic accident that occurred on October 30, 2003. The decedent was employed by defendant Classic Stone, LLC, and was the supervisor of defendant Daniel David Musloff ("Musloff"), an employee of the company.[1] The company operated a rock quarry, and Musloff estimated that the size of the quarry was approximately eighty acres. Musloff was hired to work as a mechanic, but ultimately found that he operated the equipment seventy percent of the time, and only acted as a mechanic for the other thirty percent.

Approximately a week and a half before the accident, Musloff learned that the decedent and a friend had set two fox traps "on the facility," but he did not know why the two men were attempting to trap foxes. Musloff had never seen foxes on the work premises. Nonetheless, Musloff was told by decedent to check the traps. The traps were located on "either side of the

[1] In his deposition testimony, Musloff identified the date of the accident as October 30, 2002. However, the investigation and other documents indicate that the accident occurred on October 30, 2003.

quarry." Thus, if Musloff went to the east or west side of the quarry to "perform a job," he was instructed to check the traps.

On the day of the accident, Musloff reported to work at 6:55 a.m., and sat in the trailer located on the premises near the heater. After twenty minutes, he got in the pay loader[2] and drove to the west side of the property to load a truck with gravel for driver Doug Plester. It took Musloff approximately five minutes to load Plester's truck. After he finished, Musloff left the trail where the pile of gravel was and traveled a different trail to check the fox trap. It only took thirty seconds to arrive at the trap because the trail was only two hundred feet in length. Musloff was familiar with the pay loader because he had driven it before. The machine was equipped with brakes, back up alarm, and four mirrors. He testified that all of the equipment was functioning properly that day.

Musloff testified that the loader involved in the accident was manufactured by Kawasaki, was one of three loaders on the premises, and estimated that it arrived approximately one month before the accident in used condition. However, he did not have to perform any maintenance on the loader with possibly the exception of an oil change. The loader was only used approximately two hours a day.

On the day of the accident, Musloff filled the truck with rock and saw Plester travel toward the quarry exit. He did not see Plester actually leave the yard because of hills in the quarry. He saw the truck as it went behind a hill. Then, Musloff traveled two hundred feet up a different trail to check the fox trap. He did not need to exit the loader because the fox trap was visible to him from the loader. The fox trap was located to the left of the loader near the side of a small hill. Upon seeing that the trap was empty, Musloff placed the loader in reverse. Although he could not specifically recall looking in the mirror before he backed up the loader, it was something that he had "done ever since [he] drove loaders." Prior to working for defendant company, Musloff was employed at a farm, and he was required to operate loaders at the farm. Although there were four mirrors on the loader, he testified that a vehicle parked behind the loader would not be visible if it was parked close. He noted that loaders contained warning stickers advising to stay fifty feet behind the loader because of visibility issues. After examining the fox trap, Musloff began to back up the loader. He traveled approximately ten feet at a speed of two miles per hour when he felt the end of the loader raise up. He never heard the sound of an impact nor did he hear a vehicle honking a horn. Unbeknownst to Musloff, the decedent had driven his personal vehicle to the locale of the fox trap, parked it behind the loader, and was in his own vehicle when the loader backed up. Musloff pulled the loader forward, realized what had happened, and called for emergency services. The decedent did not survive his injuries from the impact with the loader.

There was an investigation into the accident by the United States Department of Labor Mine Safety and Health Administration (MSHA). A report was prepared and MSHA concluded as follows:

---

[2] In the record, the equipment at issue is also identified as an end loader.

Location of the Accident

The accident occurred on a dead end, single lane, dirt mine road located in a field at the northwest corner of the pit. The road was approximately 20-30 feet wide and 100 yards long. The weather conditions at the time of the accident were clear and dry.

Front-end Loader

The 1988 Kawasaki wheel loader, Model 110Z2, had an articulated frame and was powered by a six-cylinder, 425 horsepower, Cummins, Model KT19C, turbocharged diesel engine. The operating weight of the loader was approximately 94,000 pounds. The transmission had three forward and three reverse speeds, and a neutral position. No defects were found with the headlights, horn, and front and rear wipers. The throttle system was evaluated and no defects were found.

Brakes

The loader was equipped with air-over-hydraulic, caliper-disc service brakes on all four wheels. The service brake could be applied using either of two pedals, one on each side of the steering column. Pushing the left side pedal also engaged the transmission in neutral. The parking brake consisted of a spring applied, pneumatically released, driveline drum brake. All the service brake discs were clean.

Service brake and parking brake tests were conducted on a grade with a fully loaded machine. The service brake stopped and held the loader when either the brake pedal or brake/neutralizer pedal was pushed. The parking brake also held the loader.

Back-up Alarm – The audible back-up alarm functioned when the gear selector was placed in reverse.

Steering – The steering wheel was mechanically linked to a steering valve. The steering valve controlled the hydraulic oil flow to the steering cylinders. No steering defects were found.

Mirrors – The operator's compartment was equipped with four convex rearview mirrors. Two were inside the compartment and two were outside. The two inside mirrors were 8 inches by 5 inches in size, and were located near the top of the windshield to the left and right of the operator. The two outside mirrors were 11-1/2 inches high and 8 inches wide, and were located on the left and right sides of the operator's compartment. The mirrors and window glass were clean.

Visibility Survey – Four figures showing the results of a visibility survey are included in Appendix C. Figures 1 and 2 show the blind spot area for a loader operator looking at the left outside mirror. Figures 3 and 4 show the area that can

not be seen using any of the four mirrors. The right rear tire of the loader ran over the front left side of the pickup truck, indicating that the truck was behind the right side of the loader. This created a blind area for the loader operator who stated he was looking over his left shoulder.

***

ROOT CAUSE ANALYSIS

A root cause analysis was conducted and the following causal factor was identified:

Causal Factor – The loader operator was unaware that a pick-up truck was located directly behind him when he backed up.

Corrective Action – Establish procedures that require smaller vehicles to maintain a safe distance from large mobile equipment until eye contact is made or approval obtained from the equipment operator. The procedures should also require that the equipment operators check all mirrors prior to moving equipment and ensure that all persons are clear. They should sound the horn to warn unseen persons that the equipment is going to move. All employees should be trained and knowledgeable regarding these procedures.

CONCLUSION

The accident occurred because the loader operator was unaware that the pick-up truck was located directly behind the loader. The loader operator did not use the rearview mirrors of the loader prior to backing up. He looked over his left shoulder, placing the pick-up truck in a blind area.

The personal representative of the estate of the decedent filed a complaint alleging negligence against defendant company and employee Musloff. In the complaint, it was asserted that Musloff breached his duty to obey safety practices and procedures and drove in a reckless and careless manner. With regard to defendant company, it was asserted that it had a duty to prevent the illegal trapping of animals, to supervise employee activities, and to ensure that equipment was used for business purposes. Defendants moved for summary disposition, asserting that the complaint was precluded by the Worker's Disability Compensation Act (WDCA), specifically MCL 418.131. The trial court granted the defense motions for summary disposition, holding:

> And the undisputed facts as I understand them to be is that Mr. Musloff went between loading trucks with stone, after having loaded one, on his way to load another, took a trail off from the pathway that he should have been following to load the other truck to check a fox trap.
>
> And that he stopped his machine, his front loader, in a position where he could see the trap from the cab, and without getting out of the cab determined that there was no fox in the trap, and then kicked the machine into reverse and backed

> up, not knowing that Mr. Talaski had pulled up behind him with a pickup truck under – basically behind his rear right.
>
> And as I – from these photographs it appears that the right wheel of the – of the – right wheels of the front loader rolled over the pickup, right over the – basically right where the driver was seated, and apparently Mr. Talaski was killed as a result of that injury.
>
> Now, if – if Mr. Talaski was injured by the fox trap or if they were down there dealing with the fox or trying to retrieve one and somehow slipped and fell, then we'd be talking about I think a question of fact as to whether or not this arose out of the course of his employment.
>
> But in this case the only evidence we have is that the driver of this machine, true, he had stopped to look at a fox trap, but that was done, whatever – whatever he did was completed, he was on his way to load another truck and he backed his – his loader up, and that was his testimony, over the top of this other truck, of this pickup, killing Mr. Talaski.
>
> I don't think there's any question that anyone could argue that this arose out of and in the course of his employment and for that reason I'm gonna grant the motion for summary disposition.

Plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition.

Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Questions regarding the application of the exclusive remedy provision of the WDCA are reviewed pursuant to MCR 2.116(C)(4) to determine whether the circuit court lacks subject-matter jurisdiction because the plaintiff's claim is barred by the provision. *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000).

MCL 418.131(1) is the exclusive remedy provision of the WDCA and provides:

> 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. This subsection shall not enlarge or reduce rights under law.

The primary purpose of the worker's compensation act is to provide benefits to the victims of work-related injuries by allocating the burden of the payments to the employer and ultimately the consumer. *Bock v GMC*, 247 Mich App 705, 710; 637 NW2d 825 (2001). Regardless of fault, an employee who suffers an injury arising out of and in the course of employment is eligible for compensation. *Id*. MCL 418.131 provides for employee compensation for injury except when an injury results from an intentional tort. Therefore, the employer is immunized from tort liability unless the employee can meet the intentional tort exception. *Bock, supra*. The standard as set forth by the Legislature and as interpreted by the appellate courts is not a gross negligence standard. *Id*. at 712.

In *Gray v Morley*, 460 Mich 738, 739; 596 NW2d 922 (1999), the plaintiff was working for the defendant, a sole proprietor in the concrete business. The plaintiff completed his work for the day and was waiting for the defendant to drive him home. The plaintiff was riding in the back open bed of the defendant's truck when he was thrown from the bed of the truck and suffered closed head injuries. The plaintiff filed suit alleging that the defendant committed an intentional tort by driving erratically with the intention of injuring the plaintiff. To support the intentional tort theory, the plaintiff alleged that the defendant had driven erratically on prior occasions when he was in the truck. *Id*. at 743.

The Supreme Court rejected the assertion that prior driving misconduct could satisfy the proofs regarding intentional injury particularly in light of the standard that the question of an intentional tort presented a question of law for the trial court. The Supreme Court held:

> Accepting the facts as pleaded by plaintiff as true, we find that this case does not come within the intentional tort exception to worker's compensation as a matter of law. Plaintiff has not brought to our attention any evidence that [the defendant] "specifically intended" to injure plaintiff, nor has he demonstrated that [the defendant] had "actual knowledge that an injury was certain to occur." MCL 418.131(1); MSA 17.237(131)(1).
>
> Although plaintiff's allegations suggest conduct on the part of defendant that was reckless or deliberately indifferent, such allegations sound in gross negligence and are therefore insufficient to constitute an intentional tort within the meaning of the WDCA. While we do find the defendant's conduct, as alleged by plaintiff, to be reprehensible, § 131(1) expressly recognizes a distinct difference between gross or criminal negligence and an actual intent to injure. … § 131(1) requires that plaintiff present evidence that the employer specifically intended an injury, or, in lieu of such evidence, sufficient proof that the employer had *actual* knowledge that injury was *certain* to occur. [*Id*. at 744-745 (emphasis in original).]

In the present case, plaintiff asserted a claim of ordinary negligence against defendants and failed to allege an intentional tort. Moreover, there is no indication that the death was more than a

horribly tragic accident. Another individual present in the quarry that was behind the loader and the decedent's pickup truck saw the loader drive over the truck. There was no indication that the loader was traveling at a high rate of speed or could travel at a high rate of speed in light of its weight of 94,000 pounds. There was no indication that the decedent attempted to start his vehicle to drive away or signaled to Musloff. The MSHA investigation concluded that the windows and glass on the loader were clear and that the backup alarm was functioning.[3]

Plaintiff asserts that the trial court erred in holding that the decedent was injured in the course of his employment because fox trapping was not a task assigned by defendant company and Musloff deviated from the work site. However, review of the deposition testimony of Musloff and the MSHA report reveals that the quarry was of a substantial size and Musloff merely went from one trail on the property to another. Musloff[4] was directed to check the fox traps by the decedent, his supervisor, who had placed the traps on the property with a friend. The decedent was able to place traps on the premises and was driving his pickup truck on the premises because of his employment. There was no indication that any member of the public could drive on the property and set traps. Moreover, in *Gray, supra*, the plaintiff had completed his work for the day and was injured because the defendant provided transportation home for the plaintiff. Despite the fact that the work had been completed, the exclusive remedy provision of the worker's compensation act applied. Therefore, we cannot conclude that the trial court erred

---

[3] Plaintiff submits that a factual issue was created by the deposition testimony of Patrick McArdle who had worked for defendant company in the past and was asked to work there after the accident. McArdle testified that he had "called Lansing" and was told that the loader had passed inspection. However, McArdle opined that there were defects in the loader that would not pass inspection. McArdle did not testify if he had personal knowledge of whether the loader was in substantially the same condition after the accident. For example, he testified that the horn had been removed and a different one attached. However, he did not opine when that occurred. Moreover, even we accept McArdle's testimony as true, it fails to meet the burden set forth in MCL 418.131(1) of establishing an intentional tort, but rather, establishes careless or reckless conduct for the safety of employees, which we do not condone. Thus, plaintiff's contention that this issue creates a question of fact is without merit.

[4] Plaintiff asserts that it was error by the trial court to rely on the testimony of Musloff because it was self-serving and contrary to MCL 600.2166(1), which prohibits admission of testimony against a person incapable of testifying. The parties dispute whether MCL 600.2166(1) can be applied in light of possible abrogation by MRE 601. This issue is not preserved for appellate review because it was not raised, addressed, or decided by the trial court and is given cursory treatment. See *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). The provision precluding admission does not apply where a material portion of the testimony is supported by other material evidence. MCL 600.2166(1). The pickup truck was preserved in its location, and the accident was observed by another individual. Moreover, there was an investigation into the accident by MSHA, which examined the working condition of the loader and the blind spots in connection with the truck. Thus, we need not address this unpreserved issue.

in granting defendants' motions for summary disposition when the accident occurred on the quarry premises during employment hours between tasks.[5]

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

[5] We note that plaintiff's brief on appeal asserts that the trial court erred in granting summary disposition to defendants because factual issues exist. Plaintiff fails to distinguish between the employer and employee and assert that a different standard should be applied. Therefore, we do not address it.