SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1702-21

ALVERSE CANNON,

Plaintiff-Appellant,

v.

BRAVO PACK, INC.,

Defendant/Third-Party Plaintiff-Respondent,

and

KRAFT MACHINES INC. and MALEX PLASTIC COMPANY,

Defendants,

v.

EMPLOYERS PREFERRED INSURANCE,

Third-Party Defendant-Respondent.

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Argued September 18, 2023 – Decided October 31, 2023

Before Judges Gilson, DeAlmeida, and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3393-19.

Eric G. Kahn argued the cause for appellant (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC, attorneys; Eric G. Kahn, on the brief).

William J. Martin argued the cause for respondent Bravo Pack, Inc. (Martin Gunn & Martin, PA, attorneys; William J. Martin and Michael A. Mascino, on the brief).

PER CURIAM

Plaintiff Alverse Cannon was injured at work and received benefits under the Workers' Compensation Act (Compensation Act), N.J.S.A. 34:15-1 to -147. He appeals from an order granting summary judgment to his employer, defendant Bravo Pack, Inc. (Bravo or the employer), and dismissing with prejudice all claims, crossclaims, and third-party claims against Bravo. In a written opinion, Judge Mark K. Chase analyzed the well-established law governing the narrow intentional-wrong exception to the exclusive remedy provided by the Compensation Act and ruled that there was no evidence from which a reasonable jury could find that Bravo had engaged in an intentional wrong. We agree with Judge Chase's analysis and affirm.

I.

We discern the material facts from the summary-judgment record, viewing them in the light most favorable to plaintiff, the non-moving party. See Memudu v. Gonzalez, 475 N.J. Super. 15, 18-19 (App. Div. 2023). Bravo manufactures shipping supplies including bubble wrap and bubble mailer envelopes. In March 2019, plaintiff applied for a position with and was hired by Bravo as a machine operator.

Plaintiff began work on March 18, 2019. When plaintiff arrived, Bravo's plant manager, Aleksandr Kononenkov, directed another employee, Alexander Gongora, to train plaintiff. Gongora had previously trained five or six employees for Bravo, but he had received no formal instructions on how to train a fellow employee and he had not been given any operating manuals for the machines he worked on.

On March 18, 2019, Gongora was working on a Kraft bubble mailer machine, which Bravo had purchased approximately three months earlier. The machine created individual padded bags and had various components. On the discharge end of the machine, there was a cut-off station where rolls of bubble pack material and paper were folded, sealed, and cut to form individual padded bags that were then discharged onto a conveyor belt. Inside the cut-off station

mechanism was a pneumatically-powered blade that performed the cutting process. The blade was covered by a clear plastic safety guard held in place by four screws. In the event of a jam, the guard could be lifted, and the pneumatic blade area could be accessed.

Based on employees' experiences operating the machine, Bravo was aware that it routinely jammed approximately ten to fifteen times per day. Kononenkov testified that employees were instructed to stop the machine, lift the guard, and use a piece of wood to clear jammed material. Kononenkov also acknowledged, however, that Gongora had previously removed the plastic guard covering the pneumatic blade to clear jams more quickly. Although Kononenkov had instructed Gongora not to remove the guard, he was aware that Gongora did not always follow his instructions.

Plaintiff testified that Gongora provided him minimal instruction on his first day of employment. He explained that Gongora did not teach him how to turn the machine on or off or where he should stand. Plaintiff also stated that he was not given any instructions or safety material regarding the use of the machine.

On the morning of March 18, 2019, the machine jammed several times. According to plaintiff, Gongora cleared those jams. At approximately midday,

the machine jammed for the first time at the discharge end. Gongora was not with plaintiff at the time of that jam. Instead, Gongora had left plaintiff and had told him: "Go ahead, you got it. You can do it." The accident occurred when plaintiff attempted to remove the jam and the pneumatic blade caught plaintiff's left hand, partially amputating three of his fingers. Plaintiff testified that before the accident he was not even aware that the machine had blades in the discharge area and that there was no warning sign on the machine.

Following the accident, the Occupational Safety and Health Administration (OSHA) performed an investigation. Thereafter, OSHA issued a report and cited Bravo for several violations of OSHA safety standards. Specifically, the OSHA report cited Bravo for a serious violation of 29 C.F.R. § 1910.147(c)(1), relating to Bravo's failure to train employees to ensure they perform maintenance on the machine only when the equipment is isolated from an energy source; for a serious violation of 29 C.F.R. § 1910.212(a)(1), relating to Bravo's failure to guard nip points and rotating parts of the bubble mailer machine; and for a serious violation of 20 C.F.R. § 1910.212(a)(3), relating to Bravo's failure to have a guard at the point of operation on the bubble mailer machine to protect the operator from injury. After receiving the OSHA report,

Bravo purchased and installed new, orange-colored metal guards for the bubble mailer machine.

In August 2019, plaintiff sued Bravo, alleging that the accident and his injuries were caused by Bravo's intentional conduct and, therefore, his remedies should not be confined to Compensation Act benefits. In support of his claims, plaintiff submitted an expert report prepared by Thomas J. Cocchiola, a professional engineer. Cocchiola opined that the unguarded cut-off station of the bubble mailer machine exposed Bravo workers to a "high risk level" of imminent major injury. The expert also opined that the removal of the guard created a substantial certainty of an accident. In offering that opinion, the expert used a risk assessment program known as Designsafe to calculate risk based on the severity of injuries, the frequency of hazardous exposure, and the probability of an accident.

Bravo filed an answer, and later amended its answer and asserted a third-party complaint against its insurer, Employers Preferred Insurance Company. The parties then engaged in discovery. Gongora was not deposed during discovery because he had left Bravo's employment and his whereabouts were not known.

In August 2021, Bravo moved for summary judgment, contending that the exclusive remedy provision of the Compensation Act barred plaintiff's claims. Judge Chase heard arguments and, on November 19, 2021, issued an order and written opinion granting summary judgment in favor of Bravo and dismissing all claims, crossclaims, and third-party claims against Bravo with prejudice.

In his written opinion, Judge Chase analyzed the exclusive remedy provided by the Compensation Act and the Supreme Court caselaw defining the narrow exception for injuries caused by intentional wrong by the employer. Judge Chase determined that plaintiff did not have evidence that would support a finding that there was a substantial certainty of injury. The judge also determined that plaintiff did not have evidence that this accident was outside the ambit of the conditions the Legislature immunized under the Compensation Act. Plaintiff now appeals from the summary judgment order.

II.

On appeal, plaintiff makes three primary arguments. First, he contends that he provided sufficient evidence of an intentional wrong. Second, he argues Judge Chase erred in determining that no reasonable juror could conclude that plaintiff's accident was substantially certain to result from Bravo's actions.

Finally, plaintiff asserts that Judge Chase erred in finding that his proofs did not satisfy the context prong to prove an intentional wrong.

We review a grant of summary judgment de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). That standard requires us to "determine whether 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)). "Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). We do not defer to the trial court's legal analysis or statutory interpretation. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018); Perez v. Zagami, LLC, 218 N.J. 202, 209 (2014).

The Compensation Act reflects "a historic trade-off whereby employees relinquish[] their rights to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced, benefits whenever they suffer[]

injuries by an accident arising out of and in the course of employment." Caraballo v. City of Jersey City Police Dep't, 237 N.J. 255, 264 (2019) (alterations in original) (quoting Stancil v. ACE USA, 211 N.J. 276, 285 (2012)). In exchange for guaranteed benefits under the Compensation Act, "the employee agrees to forsake a tort action against the employer." Ibid. (quoting Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 183 (1986)). Consequently, in most cases, the Compensation Act provides the exclusive remedy against an employer for employees injured in work-related incidents. See Kibler v. Roxbury Bd. of Educ., 392 N.J. Super. 45, 47 (App. Div. 2007).

There is, however, an exception to the Compensation Act's exclusivity remedy for an injury caused by an employer's intentional wrong. Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 459 (2012). The Compensation Act provides that an employer will be liable for the injury or death of its employees occurring during employment from an intentional wrong. N.J.S.A. 34:15-8. In a series of cases, our Supreme Court has set forth a test for determining an intentional wrong under the Compensation Act. See Van Dunk, 210 N.J. at 470; Laidlow v. Hariton Mach. Co., 170 N.J. 602, 611 (2002); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 177-79 (1985); see also Tomeo v. Thomas Whitesell Constr. Co., 176 N.J. 366 (2003); Mull v. Zeta

Consumer Prods., 176 N.J. 385 (2003); Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397 (2003).

In Millison, the Court noted "if 'intentional wrong' is interpreted too broadly, this single exception would swallow up the entire 'exclusivity' provision of the Act." 101 N.J. at 177. To address that concern, the Court used an "intent" analysis to determine what constitutes "intentional wrong" within the meaning of the Compensation Act. Ibid. In that regard, the Court explained:

> [T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.
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> [Ibid. (quoting W. Prosser & W. Keeton, The Law of Torts § 8, at 36 (5th ed. 1984)).]

In Laidlow, the Court explained that "an intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm." 170 N.J. at 613. The Court reasoned:

> [I]n order for an employer's act to lose the cloak of immunity of N.J.S.A. 34:15-8, two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the

> circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.
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> [Id. at 617.]

Consequently, an employee seeking to prove his employer committed an intentional wrong must demonstrate either (1) that the employer had a subjective desire to injure, or (2) that "based on all the facts and circumstances of the case . . . the employer knew an injury was substantially certain to result." Id. at 614.

The Court has made it clear that substantial certainty is an extraordinarily high bar. In that regard, the Court has explained that "probability, or knowledge that such injury or death 'could' result, is insufficient." Van Dunk, 210 N.J. at 470. Moreover, "[e]ven an injury 'caused by either gross negligence or an abysmal lack of concern for the safety of employees' is insufficient to satisfy the 'intentional wrong' exception." Kaczorowska v. Nat'l Envelope Corp., 342 N.J. Super. 580, 587 (App. Div. 2001) (quoting Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 72 (App. Div. 1997)).

In his written opinion granting summary judgment to Bravo, Judge Chase correctly analyzed and summarized the well-established law governing the intentional-wrong exception to the Compensation Act's exclusive remedy. He then identified the material facts, viewing them in the light most favorable to

plaintiff. Finally, he correctly determined that plaintiff did not have evidence that would allow a jury to conclude that Bravo engaged in an intentional wrong.

Addressing the conduct prong of the test for overcoming the exclusivity remedy, Judge Chase determined that Bravo could arguably be found to have been grossly negligent in entrusting plaintiff's training to an employee who had previously removed the safety guard. We agree with Judge Chase that, even if that conduct could be found to be grossly negligent, it does not rise to the standard of an intentional wrong or a substantial certainty of injury. Kononenkov had instructed Gongora to train plaintiff without having him operate the machine. Kononenkov had no basis to know that Gongora would deliberately disregard those instructions even though he knew that Gongora had an attitude and did not always follow instructions.

We also agree with Judge Chase's analysis concerning the second prong. Although plaintiff's accident is tragic, it is the type of industrial accident that the Legislature contemplated when it created the Compensation Act. As Judge Chase noted, there is no evidence that Bravo intentionally disabled the safety guard on the bubble mailer machine to improve productivity. There is also no evidence that Bravo attempted to deceive OSHA. To the contrary, the record reflects that there had not been any injuries involving the Kraft machine prior to

plaintiff's injury and the OSHA violations were issued after the investigation of plaintiff's injury.

In summary, we agree with Judge Chase's analysis that a reasonable jury could not find that Bravo knew there was a substantial certainty of injury based on the totality of the circumstances of this case. In addition, the facts concerning the accident in this case are not outside the conditions the Legislature intended to limit to the Compensation Act's exclusive remedy. We, therefore, affirm the summary judgment order.

Affirmed.