STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF A N T R I M

HARRISON PAINT CORPORATION, an Ohio corporation,

Plaintiff,

File No. 93-6039-NZ
HON. PHILIP E. RODGERS

vs

STEEL TANK & FABRICATING COMPANY, a Michigan Corporation,

Defendant.
/

James F. Pagels (P32242)
Attorney for Plaintiff

John Hayes (P14767)
Attorney for Defendant

DECISION AND ORDER

Plaintiff filed a motion for partial summary disposition. Defendant timely filed a response to the motion. This Court heard the parties' oral arguments on February 22, 1994. At the hearing the parties were instructed to file supplemental briefs within fourteen (14) days. Both parties untimely filed supplemental briefs. This Court issued a Pre-Hearing Order on March 29, 1994; there was no response to the Pre-Hearing Order. This Court has reviewed the motion, the briefs and the Court file.

In the instant motion, Plaintiff seeks this Court's findings that,

(a) "Defendant is not entitled to the protection of the exclusive remedy provision of the Workers' Compensation Act; and"

(b) "there is no material fact in dispute concerning the negligence of the Defendant".

Plaintiff did not specify, by number or subsection, the grounds on which the first part of its motion is based as required by MCR

2.116(C). It appears to this Court that Plaintiff seeks judgment under MCR 2.116(C)(9) and (10).

The standard of review for a (C)(9) motion is set forth in City of Hazel Park v Potter, 169 Mich App 714, 718 (1988).

> A motion for summary disposition pursuant to MCR 2.116(C)(9), ...for failure to state a valid defense tests the legal sufficiency of the pleaded defense. Such motion is tested by reference to the pleadings alone, with all well-pled allegations accepted as true. The proper test is whether defendant's defenses are 'so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery.' Hanon v Barber, 99 Mich App 851, 854-855; 298 NW2d 866 (1980). In addition, summary disposition is improper under this rule when a material allegation of the complaint is categorically denied. Pontiac School Dist v Bloomfield Twp, 417 Mich 579, 585; 339 NW2d 465 (1983).

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741; 440 NW2d 101 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
>
> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for

trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

This Court will now review the uncontested facts upon which this motion is based. Mr. Randy Homan sustained serious injuries as a result of an explosion which occurred on June 1, 1987. At the time of the subject accident, Randy Homan was a Steel Tank employee using Steel Tank's facility and equipment after his working hours. Mr. Homan and three other men, acting as volunteers for the Mancelona Fire Department, were refurbishing a Mancelona Fire Department truck on Defendant Steel Tank's premises. Randy Homan was welding on a newly painted truck tank when an explosion propelled him upwards causing him to hit the roof and the power box and then the cement floor below.

In File No. 90-5161-NO, Mr. Randy Homan sued now-Plaintiff Harrison Paint to recover damages suffered as a result of the accident. Then-Plaintiff Homan sued the paint manufacturer on a failure to warn theory.[1] In the instant complaint, Plaintiff Harrison Paint claims that it paid Mr. Homan $30,000.00 to settle that case. Harrison Paint now seeks contribution, pursuant to MCL 600.2925a; MSA 27A.2925(1), from Steel Tank & Fabricating Company.

MCL 600.2925a entitled **Contribution between tort-feasors**, reads, in pertinent part, as follows:

> (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (2) The right of contribution exists only in favor of

---

[1] In the Complaint in File No. 90-5161-NO, Plaintiff Homan alleged that the paint manufacturer failed to warn users of the explosive characteristics of the manufacturer's brown oxide zinc chromate primer. Specifically, Plaintiff Homan claimed, that Harrison failed "to place warnings on the container to alert potential users of conditions which would cause an explosion" and "to adequately instruct and warn of drying time when the paint loses it [sic] flammable characteristics".

a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. ...

(3) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor if any of the following circumstances exist:

(a) The liability of the contributee for the injury or wrongful death is not extinguished by the settlement.

(b) A reasonable effort was not made to notify the contributee of the pendency of the settlement negotiations.

(c) The contributee was not given a reasonable opportunity to participate in the settlement negotiations.

(d) The settlement was not made in good faith.

* * *

(5) A tort-feasor who satisfies all or part of a judgment entered in an action for injury or wrongful death is not entitled to contribution if the alleged contributee was not made a party to the action and if a reasonable effort was not made to notify him of the commencement of the action.

Defendant has asserted that the exclusive remedy provision of the Worker's Disability Compensation Act[2] is a valid defense which

---

[2] MCL 418.131; MSA 17.237(131) **Exclusive remedy; exception for intentional tort; employee and employer, definition.**

Sec.131. (1) 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.

(2) As used in this section and section 827, (Section 418.827), "employee" includes the person injured, his or her personal

bars Plaintiff's claims. MCR 2.116(C)(9). The following facts are undisputed:

> 1) Randy Homan was employed by Defendant when he was injured.
>
> 2) Defendant did not file a Form 100 as required by 1984 AACS, R 408.31, the Department of Labor regulation in effect at the time of the incident.[3]
>
> 3) Plaintiff's Exhibits H and I, correspondence between Bankers Life Nebraska and Defendant's Vice President, James Homan, show that Randy Homan filed a claim with Bankers Life and that the Township of Mancelona (on behalf of its Fire Department) filed a Form 100 with the Department of Labor.
>
> 4) Randy Homan claimed worker's compensation benefits through the Mancelona Fire Department.
>
> 5) Defendant has set forth no plans to nor details of efforts it might (belatedly) make to cure its failure to file the requisite Form 100.

Exhibit I, James Homan's letter to Bankers Life Nebraska dated June 25, 1987, represents Defendant's support of Randy Homan's efforts to procure insurance coverage through Defendant's private

---

representatives and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and "employer" includes the employer's insurer, a service agent to a self-insured employer, and the accident fund insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract.

[3] R 408.31 entitled, **Report of injury; claim for compensation, additional reports; weekly rate of compensation,** reads in pertinent part as follows:

> (1) An employer shall report immediately to the bureau on form 100 all injuries, including diseases, which arise out of and in the course of the employment, or on which a claim is made and result in any of the following:
>
> (a) Disability extending beyond 7 consecutive days, not including the date of injury.
>
> * * *
>
> (3) The employer shall give a copy of the report of injury (form 100) to the injured employee immediately, and in the case of death, to the dependent. Form 100 shall indicate compliance with this requirement. ...

insurance carrier. Now, in its response to Plaintiff's motion, Defendant argues this matter should be addressed by the Worker's Compensation Act Bureau (WCAB) pursuant to MCL 418.841; MSA 17.237(841). MCL 418.841 provides as follows:

> Any controversy concerning compensation shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau. The director shall be deemed to be an interested party in all worker's compensation cases in questions of law.

The Court of Appeals has addressed the interface between the Bureau, the WCAB, and courts of general jurisdiction, e.g. circuit courts. The per curiam opinion in Delke v Scheuren, 185 Mich App 326, 333; 495 NW2d 152 (1990), states as follows:

> Certainly, pursuant to Section 841(1), the bureau and the WCAB may decide insurance coverage questions in cases where jurisdiction of the claimant's petition for compensation has been properly taken. See, e.g. Michigan Property & Casualty Guaranty Ass'n v Checker Cab Co, 138 Mich App 180; 360 NW2d 168 (1984), and St Paul Fire & Marine Co v Littky, 60 Mich App 375; 230 NW2d 440 (1975). However, we believe it is inappropriate for the WCAB to decide the coverage question when jurisdiction over the substantive question of liability is in a court of general jurisdiction. Principles of judicial and administrative economy lead to the conclusion that the issues be resolved in a single forum. (Emphasis added.)

Clearly, in this case the claimant's petition was taken through his work as a township fireman. No petition was ever filed regarding employment with the Defendant. Michigan Property & Casualty Guaranty Ass'n, supra. Further, this Court is the proper forum to determine the substantive question of negligence as it relates to Defendant's liability for contribution. Defendant's amorphous suggestion that this matter be addressed by the WCAB appears to be a shallow subterfuge to avoid determination of its liability for a part of the settlement reached between Defendant's employee and its supplier.

Defendant cannot have it both ways. This Court need not determine whether the after-working-hours activity which led to the accident was recreational, social or a civic endeavor as that activity relates to Worker's Compensation coverage. This Court

finds merit in Plaintiff's argument that "Defendant should not be allowed to take contrary positions concerning whether Randy Homan was in the course of his employment at the time of the accident at its convenience". Defendant not only failed to comply with the injury reporting requirements of the Worker's Disability Compensation Act but denied the injury was work-related. Defendant cannot now argue that it is entitled to the protection of the Act's exclusive remedy provision, MCL 418.131. The Department of Labor's R 408.31 was not satisfied, and Defendant's reliance on the Worker's Compensation Act is "clearly untenable". Hanon, supra. The defense is invalid. MCR 2.116(C)(9).

This Court will now address Plaintiff's (C)(10) motion. In the Complaint, Plaintiff alleges that Defendant's negligence resulted in Randy Homan's injuries and related damages. In the motion, Plaintiff contends that there is no genuine issue of material fact as to Defendant's negligence. Plaintiff bears the burden of proving all the elements of negligence: existence of legal duty, breach of standard of care, proximate cause and damages. Young v Barker, 158 Mich App 714; 405 NW2d 395 (1987). However, before summary disposition may enter the Court must construe the evidence most favorably from the Defendant's perspective and find no issues upon which reasonable minds could disagree. Metropolitan Life Ins Co, supra.

In Bell & Hudson v Buhl Realty, 185 Mich App 714, 717-718; 405 NW2d 391 (1987), the Court of Appeals reviewed a case in which the trial court denied defendant Gerald Harrington's motion for summary disposition, ruling that there was an issue concerning Defendant Harrington's duty which had to be resolved by a jury. Reversing the trial court, the Bell opinion provides the following synopsis of "duty" in a negligence suit and the trial court's obligation to rule upon it:

> The threshold question in any negligence action is whether the defendant owed a legal duty to the plaintiff. Papadimas v Mykonos Lounge, 176 Mich App 40, 45; 439 NW2d 280 (1989), lv den 433 Mich 909 (1989); Cook v Bennett, 94 Mich App 93, 97-98; 288 NW2d 609 (1979). Unless the

> defendant owed a duty to the plaintiff, the negligence analysis cannot proceed further. Id. "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." Moning v Alfono, 400 Mich 425, 438-439; 254 NW2d 759 (1977), reh den 401 Mich 951 (1977). Questions of duty are generally for the court to decide. Moning, supra at 437.
>
> * * *
>
> "Special relationships" recognized under Michigan law include * * * employer-employee, Blake v Consolidated Rail Corp, 129 Mich App 535; 342 NW2d 599 (1983) ...

Bell, supra at 717-718. In the instant matter, the injured person was Defendant's "invitee" and an "employee" using the work premises after hours. Riddle v McLouth Steel Products, 440 Mich 85, 90-96; 485 NW2d 676 (1992). Justice Mallett, author of the landmark Riddle opinion, set forth the following review of premises owner's liability to invitees and reiterated the trial court's obligation to determine "duty" as a question of law:

> It is well-settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury.[4] Beals v Walker, 416 Mich 469, 480; 331 NW2d 700 (1982); Torma v Montgomery Ward & Co, 336 Mich 469, 476; 58 NW2d 149 (1953).
>
> However, a premises owner's duty to warn extends to hidden or latent defects. Samuelson v Cleveland Iron Mining Co, 49 Mich 164; 13 NW 499 (1882). The rationale underlying this rule is that liability for injuries resulting from defectively maintained premises should rest upon the one who is in control or possession of the premises and, thus, is best able to prevent the injury. See Nezworski v Mazanec, 301 Mich 43, 56; 2 NW2d 912 91942); Smith v Peninsular Car Works, 60 Mich 501, 504; 27 NW 662 (1886). This Court has held:
>
> Every man who expressly or by implication

---

[4] [Footnote 4 in the Riddle text] An invitee, and in this case a business invitee, is one who enters a premises to conduct business that concerns the premises owner at the owner's express or implied invitation. See Prosser & Keeton, Torts (5th ed) Section 61, pp 419-424.

> invites others to come upon his premises, assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are not aware. [Samuelson at 170. Emphasis added (in text).]
>
> * * *
>
> The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. Antcliff v State Employees Credit Union, 414 Mich 624; 327 NW2d 814 (1982). In other words, the court determines the circumstances that must exist in order for a defendant's duty to arise. Smith v Allendale Mut Ins Co, 410 Mich 685, 714-715; 303 NW2d 702 (1981). See, generally, Prosser & Keeton, Torts (5th ed), ch 5. Duty may be established "specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." Clark v Dalman, 379 Mich 251, 261; 150 NW2d 2d 755 (1967).
>
> * * *
>
> A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. Beals, supra.
>
> * * *
>
> Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. See Smith v Allendale, supra at 714. The jury must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent.

The Michigan Supreme Court addressed issues of premises liability in Beals v Walker, supra, a slip and fall case. Pertinent to the instant matter, the Beals Court considered whether Defendant Walker had violated certain Michigan Department of Labor

safety regulations. Citing Douglas v Edgewater Park Co, 369 Mich 320, 328; 119 NW2d 567 (1963); and Zeni v Anderson, 397 Mich 117, 142; 243 NW2d 270 (1976), the Beals Court held that, "violations of administrative rules and regulations are evidence of negligence." Beals, supra at 481. The trial court must consider whether the harm suffered by the plaintiff was what the regulation was designed to prevent. Zeni, supra at 138; Beals, supra at 482.

It is undisputed that Defendant, a steel fabricating business, was subject to Michigan Occupational and Health Act (MIOSHA) regulations as well as the Federal and State Right to Know Acts. Defendant's duty, then, is established by regulatory mandate. Clark, supra. Had Defendant complied with its duty to Homan during working hours, one could argue that the accident would not have occurred. The fact that Homan was injured on the premises using company equipment after hours does not relieve Defendant of its duty. The Defendant owed a duty to provide a safe work environment to any person, employee or otherwise, allowed to use its equipment on its premises while performing skilled and potentially dangerous work. The harm which occurred here was precisely that which compliance with safety regulations was intended to avoid.

In support of Plaintiff's argument that Defendant violated certain administrative rules and regulations, Plaintiff attached portions of deposition transcripts of the following individuals: James Homan, Randy Homan's brother, plant manager and vice president of Defendant Steel Tank; Everett Homan, also Randy Homan's brother, foreman of the Steel Tank plant; William Olsen, MIOSHA inspector; and Gerald Medler, an occupational safety consultant employed by MIOSHA.

There is ample evidence in the Court file to convince this Court that Defendant Steel Tank violated certain MIOSHA, Federal and State Right to Know regulations. There is also a sufficient legal nexus between the particular violations and the explosion which resulted in Randy Homan's injuries so as to establish proximate causation. Defendant did not dispute the following review of lack of compliance with safety requirements:

> Employees of the Defendant admitted in their depositions that they failed to conduct safety meetings, post material safety data sheets, familiarize employees with OSHA standards for safe painting and welding or even read the warnings which appeared on the can of Harrison primer involved in this accident.

Plaintiff's brief, p 13. Further, Defendant did not dispute Inspector Olsen's conclusions that Randy Homan had no prior knowledge that the Harrison paint fumes were explosive and that cause of the accident was Randy Homan's welding within 35 feet of flammable (Harrison paint) vapors. Olsen deposition transcript, p 97.

In deposition, Randy Homan testified as follows:

> Q. Tell me what you knew about this paint. First of all, do you know if it was oil based or water based?
>
> A. That I'm not sure. I've painted with that stuff for years down there. All I know about it is we've used it down there. We've never had to take -- you know, never took no precautions for it or nothing. It's been -- I mean, I painted hundreds of gallons of this stuff. And, you know, there's no way -- I didn't think it was -- I didn't think it was even flammable besides explosive. I had no way of knowing that at all.
>
> Q. So you had no idea at all it was flammable?
>
> A. No.

R. Holman transcript, p 56.

> Q. What were you told about exposure of this paint to fire or sparks?
>
> A. Nothing.
>
> Q. Nothing at all?

A. Nothing at all.

Q. What were you told about the explosive characteristics of this paint, if anything?

A. Nothing.

Q. Did you ever inquire about exposure to sparks or fire or explosion, anything of that nature? Did you ever inquire of anybody at the shop?

A. No, not on this Harrison Paint; no.

R. Homan transcript, p 81.

In considering this matter, the Court must balance the societal interests involved, the severity of the risks, the burden upon the Defendant, the likelihood of the occurrence and the relationship between the parties. Swartz v Huffmaster Alarms, 145 Mich App 431; 377 NW2d 393 (1985). Integral to these considerations, is determination of whether the accident was "foreseeable". Foreseeability is a term traditionally associated with the issue of proximate cause--an issue generally decided by the jury. The Moning Court provides the following distinction:

> Duty is essentially a question of whether the relationship [footnote omitted] between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences [footnote omitted]. In the Palsgraf [v Long Island R Co, 248 NY 339; 162 NE 99; 59 ALR 1258 (1920)] case, the New York Court of Appeals combined the questions of duty and proximate cause [footnote omitted] and concluded that no legal duty is owed to an unforeseeable Plaintiff.
>
> > The questions of duty and proximate cause are interrelated because the question of whether there is the requisite relationship, giving rise to a duty, and the question of whether the cause is so significant and important to be regarded as a proximate cause both depend in part on foreseeability -- whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the results of the conduct and intervening causes were foreseeable.

Moning, supra at pp 438-439.

It is the opinion of this Court that, as discussed above, Plaintiff has shown all the elements of negligence. Young, supra. Defendant had a duty, established by regulatory mandate to warn its employees and invitees of the hazards of using its equipment and supplies. Defendant did not comply with the regulatory requirements to warn its employees and invitees of potential hazards associated with its painting supplies and to properly train its employees to safely handle potentially hazardous materials.

Defendant's breach of MIOSHA and Right to Know regulations were a proximate cause of the accident in which Randy Homan was injured. The accident was foreseeable. This Court finds merit in the following remark from p 13 of Plaintiff's brief, "In essence, giving Randy Homan and other fire department employees unsupervised access to the plant, and permission to use flammable paints and welding equipment without proper training was the equivalent of giving them a bomb." Defendant was negligent.

In response to the (C)(10) motion, Defendant rested on mere allegations and denials of the pleadings. This Court finds no merit in Defendant's submission of certain isolated remarks from the depositions of its plant manager and safety supervisor which purport to show that they were not aware of the explosive and flammable characteristics of Plaintiff's brown oxide zinc chromate primer. Whether or not they knew of these risks is irrelevant to the finding of duty and negligence as this is knowledge which the Defendant should reasonably have had. Compliance with federal and state regulations was mandatory. As is so often noted by the Court, ignorance of the law is no excuse.

Defendant failed to set forth specific facts showing that there is a genuine issue regarding Plaintiff's negligence claim. Rizzo, supra. Despite the rigorous standard of review, this Court is persuaded that Plaintiff has prevailed on its motion for summary disposition and established negligence. MCR 2.116(C)(10). For the foregoing reasons, Plaintiff's motion is granted in its entirety.

Defendant has not contested that the $30,000.00 settlement was

made in good faith or that it was fair and reasonable. The issue which remains is what percentage of the settlement is to be paid by Defendant, as joint tort-feasor. The Court well understands that by making its finding of negligence, it does not preclude the parties from offering testimony which will allow the jury to apportion fault; rather, the failure of Defendant to offer evidence in support of its denial of liability will simply preclude a jury finding of no liability.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/23/94