STATE OF MICHIGAN
IN THE SUPREME COURT

JOHN DOE, and JANE DOE,

Plaintiffs – Appellants,

v.

General Motors, LLC.,
A foreign profit corporation authorized to do business in the State of Michigan,

Defendant – Appellee.

Supreme Court Case No. 163775

Court of Appeals Case No. 355097

Lower Court Case No. 20-114107-NO

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APPELLANTS' APPENDIX OF EXHIBITS

APPELLANTS' APPENDIX OF EXHIBITS
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EXHIBIT 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v

General Motors, LLC.,
a foreign profit corporation authorized to do business in the State of Michigan,

Defendant.

Case No: 20-114107- NO

JUDGE: F. KAY BEHM, P51902

STIPULATION AND ORDER TO ALLOW ALL PARTIES TO REFER TO PLAINTIFFS AS "JOHN DOE" AND "JANE DOE" IN ALL PLEADINGS

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STIPULATION AGREEING TO REFER TO PLAINTIFFS AS "JOHN DOE AND JANE DOE" IN ALL PLEADINGS

Plaintiffs and Defendant, by and through their respective counsel, hereby stipulate and agree as follows:

1. Plaintiffs filed their complaint referring to the Plaintiffs as "JOHN DOE" and "JANE DOE."
2. Defendant, General Motors LLC, through its counsel has been advised of the actual names of the plaintiffs.
3. The parties agree to protect the privacy of the Plaintiffs due to the nature of the injuries alleged in this case, during this stage of the proceedings, that any time the name of either Plaintiff should be, or is expected to be included in any pleading, and other matters that are to be filed in the court file by the Genesee County Clerk, they shall be identified as "JOHN DOE" and "JANE DOE."
4. Nothing in this stipulation and order prohibits any party from seeking to lift the restrictions of this Order in future.
5. The parties respectfully request that this Court enter an order consistent with the foregoing stipulation.

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Dated: April 20, 2020

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v

General Motors, LLC.,
a foreign profit corporation authorized to do business in the State of Michigan,

Defendant.

Case No: 20-114107- NO

JUDGE: F. KAY BEHM, P51902

STIPULATION AND ORDER TO ALLOW ALL PARTIES TO REFER TO PLAINTIFFS AS "JOHN DOE" AND "JANE DOE" IN ALL PLEADINGS

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ORDER ALLOWING THE PARTIES TO REFER TO PLAINTIFFS AS "JOHN DOE AND JANE DOE" IN ALL PLEADINGS

At a session of Said Court
Held at the Courthouse
In the City of Flint, Genesee County
On the ___day of April 2020

PRESENT: THE HONORABLE F. KAY BEHM, CIRCUIT COURT JUDGE

This matter having come on to be heard by the Stipulation of the parties, the Court having read the same, and being otherwise duly advised in the premises;

IT IS THEREFORE ORDERED AND ADJUDGED THAT, from this point forward, in this litigation and all other types of litigation related to the facts herein, the Plaintiffs shall be referred to as "JOHN DOE" and "JANE DOE" in all pleadings, and other matters that are to be filed in the court file by the Genesee County Clerk.

This is ***not*** a final order, and does not dispose of all issues in the case.

IT IS SO ORDERED

F. KAY BEHM
P-51902

F. Kay Behm, P 51902
Circuit Court Judge
DATED: April 27, 2020

Prepared by:

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EXHIBIT 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v.

General Motors, LLC.,
a foreign profit corporation authorized to do business in the State of Michigan,

Defendant.

20 - 114107 - NO

Case No: 20-

JUDGE: F. KAY BEHM P-51902

COMPLAINT AND DEMAND FOR TRIAL BY JURY

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There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint.

NOW COME the above-named Plaintiffs, John Doe and Jane Doe, by and through their Attorneys of record, Washington Legal, by Valdemar L. Washington, and the Law Office of Henry M. Hanflik, P.C., by Kurtis L.V. Brown, and state by way of complaint against Defendant as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs, JOHN DOE and JANE DOE are residents of Genesee County.
2. Defendant, General Motors, LLC (GM) is a foreign profit corporation authorized to do business in the state of Michigan.
3. The original injury and all or part of the cause of action arose in the City of Flint, Genesee County, Michigan.
4. The amount in controversy exceeds $25,000.00 and is otherwise within the jurisdiction of this court.

FACTUAL ALLEGATIONS

5. Plaintiffs incorporate by reference all previous paragraphs and make them a part hereof as though each and every paragraph was repeated and set forth herein.
6. On or about September 21, 2018 Plaintiff, JOHN DOE, was employed as a Skilled Support Operator (SSO) working first-shift for General Motors, LLC at its North American Engineering and Tooling Center (NAETC) located at 425 Stevenson Street, Flint, MI 48504.
7. John Doe was part of a team consisting of one Journeyman, Mike, and three (3) SSOs, JOHN DOE, Ken, and Chris.
8. Towards the end of the first shift on September 21, 2018, JOHN DOE's team was tasked with working a dye press that was being used to make roof panels for the 2021 Suburban which was to be produced by GM.
9. Earlier in the day on September 21, 2018 the press was not operating properly and a repair order was placed on the press, however, the technicians called in response to the repair order

could not locate the source of the malfunction and the press was then cleared for continued service.

10. Ken and Chris were on the east side of the press and using a walkie truck to help lift the sheet metal into the press.

11. Ken and Chris loaded the metal into the press that would be formed into the roof panel, then Ken backed the walkie truck away from the press.

12. Ken was struggling with the body side rack when JOHN DOE noticed that the safety was still engaged.

13. JOHN DOE walked around the bottom perimeter of the press on his way to assist Ken with the body side rack..

14. Ken had previously given the all clear signal for his side of the press, as Mike and JOHN DOE were already locked out, on their side of the press.

15. JOHN DOE was bent over, taking the safety chains off the body side rack and stood up with his hands on his hips as the top of the press (shoe) began its descent.

16. Unbeknownst to JOHN DOE, Chris and Ken had left two storage blocks (steel cylinders six (6) inches tall with a hole drilled through their middle weighing approximately twelve (12) pounds each) on the bottom portion of the press (shoe).

17. When the top shoe of the press came into contact with the two storage blocks it did not stop its downward descent, as there was no operational fail-safe mechanism on the press to stop the downward movement of the top shoe when it detected any object other than the metal to be formed.

18. As the top shoe of the press continued its downward movement it broke off both corners of the cast iron dye.

19. The top shoe continuing its downward movement crushed the two storage blocks between the upper and lower shoe of the press by exerting approximately five hundred thousand (500,000) pounds of pressure on both storage blocks.

20. One of the two steel storage blocks was compressed to approximately two and three quarters (2 ¾") inches and was expelled/ejected from the press with violent explosive force.

21. The expulsion force of the compressed storage block was like that of a cannonball being shot from a cannon.

22. The compressed storage block struck JOHN DOE in his groin area causing him the following injuries:

a. Blunt trauma to his abdomen, and hips resulting in injury and pain to his lower back;

b. Traumatic Amputation of both of his testicles;

c. Second Degree Burns to his right leg;

d. A two (2) inch indent tear to his left hip;

e. Injuries to his cervical spine discs;

f. Physical pain and suffering;

g. Mental anguish;

h. Fright and shock;

i. Denial of social pleasure and enjoyments;

j. Embarrassment, humiliation, and mortification;

k. Disability and disfigurement;

l. Reasonable expenses of necessary medical care, treatment and services;

m. Loss of income and earning capacity; as well as

n. Other miscellaneous expenses and the reasonable value of services incurred or lost.

EMPLOYER'S DELIBERATE ACT(S)

23. Plaintiffs incorporate by reference all previous paragraphs and make them a part hereof as though each and every paragraph was repeated and set forth herein.

24. JOHN DOE was injured as a result of deliberate act(s) of the employer. The employer's deliberate act(s) include, without limitation:

a. Failure to stop using the steel storage blocks until the day after JOHN DOE was injured.

b. Failure to stop using the steel storage blocks even though there had been five (5) to ten (10) similar incidents, before JOHN DOE was injured, when the steel storage blocks were caught between the upper and lower shoes of a press causing them to be ejected from between the two shoes like cannonballs being shot from a cannon.

c. Failure to stop using the steel storage blocks when a compressed steel storage block was ejected from a press narrowly missing the head of GM employee Mike Parker's head, before JOHN DOE was injured.

d. Failure to have the presses installed in a proper manner. These presses were moved in 2009 from the Pontiac factory and not reinstalled by the manufacturer of the press but instead installed by GM employees at the NAETC.

e. Ignoring the warnings of the head of the Safety Committee for the NAETC, Thomas Parker, before September 21, 2018, who repeatedly warned plant management, including the Plant Manager, Jim Scrimiger, that the continued use of the steel storage blocks was a safety hazard that was going to seriously injure or kill a GM employee.

EMPLOYER'S SPECIFIC INTENT TO INJURE JOHN DOE – ACTUAL KNOWLEDGE THAT INJURY WAS CERTAIN TO OCCUR

25. Plaintiffs incorporate by reference all previous paragraphs and make them a part hereof as though each and every paragraph was repeated and set forth herein.

26. Defendant employer specifically intended an injury to Plaintiff and had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge by the following actions:

a. Jim Scrimiger, the NAETC Plant Manager, insisted on using the safety blocks, who stated, "it was his plant, his dies, and his call," even though Mr. Scrimiger was personally aware that there had been several incidents where compressed storage blocks were expelled/ejected from the press with explosive violent force and velocity, before September 21, 2018, where the use of safety blocks inside die presses resulted in extensive damage to the presses and potential physical injury to employees using them and others who were in the vicinity of those die presses.

b. Mr. Scrimiger was personally aware of the dangers posed by the use of the safety blocks as Thomas Parker, the Safety Committee Chairperson, personally advised him on numerous occasions, before September 21, 2018, about the very safety issue, which injured JOHN DOE, the continued use of the safety blocks inside of the die presses, which resulted in compressed safety blocks being ejected out of the presses with explosive force and velocity.

c. Thomas Parker, former UAW Chairman of the North American Engineering and Tooling Center, and Head of the Safety Committee for the NAETC, went to a Plant Safety Review Meeting between the months of January 2017 and June 2017 and told Plant Manager Scrimiger, ""Something has to be done. We're going to be sitting here talking about killing somebody someday," in reference to the continued use of the storage blocks at the NAETC plant.

d. Plant Manager Scrimiger ignored Chairman Parker, continued to require the use of the steel storage blocks until September 22, 2018, the day after JOHN DOE was injured.

e. Life as JOHN DOE and JANE DOE had known it, died on September 21, 2018.

27. As a direct and proximate result of Defendant employers' intentional tort, Plaintiff, JOHN DOE has suffered and will continue to suffer from his injuries.

28. As a direct and proximate result of GM's intentional tort Plaintiff, JANE DOE has suffered loss of consortium due to the injuries sustained by JOHN DOE on September 21, 2018.

29. The injuries to Plaintiffs JOHN DOE and JANE DOE are severe and permanent.

30. The particulars of JOHN DOE's injuries are outlined in paragraph 22, *supra*.

WHEREFORE, Plaintiffs, JOHN DOE and JANE DOE, request a judgment in an amount the jury deems fair and just under the circumstances. Plaintiffs assert that this amount is within the jurisdiction of this court (i.e., an amount in excess of $25,000.00). Plaintiffs also request all costs, interest, and attorney fees allowable under the law.

Date: March 26, 2020

Respectfully Submitted,

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JURY DEMAND

NOW COME, JOHN DOE and JANE DOE and herewith make Demand for Trial by Jury in this matter pursuant to Michigan Statutes, Court Rules, and Constitution of the State of Michigan.

Date: March 26, 2020

Respectfully Submitted,

WASHINGTON LEGAL

By: _____

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AFFIDAVIT OF
THOMAS PARKER

STATE OF FLORIDA)
) SS.
COUNTY OF LEE)

Thomas Parker, being first duly sworn deposes and says as follows:

1. I am over 18 years of age.

2. I am making this affidavit based upon my personal knowledge.

3. If sworn as a witness I will testify competently and truthfully about the facts set forth in this affidavit.

4. I was employed by General Motors Corporation from March 21, 1977 through May 1, 2018.

5. In that employment with General Motors between July 2014 through July 2017, I held the position of Chairman of North American Engineering and Tooling Center, and as a part of my duties, I was Head of the Safety Committee for the General Motors Plant, called NAETC, located at 425 Stevenson Street in the City of Flint, Genesee County, Michigan.

6. As a direct result of this position, I was made aware of all work related accidents and incidents that either resulted in or could have resulted in injury to personnel and plant property that occurred at the General Motors facility referenced in paragraph 5, above.

7. I either was a witness to these accidents/incidents or was made aware of them due to my attendance at facility wide Plant Safety Review Board (PSRB) meetings where they were discussed.

8. I am familiar with the fact there were between five (5) and ten (10) similar incidents at the plant identified in paragraph 5, above, where the safety blocks were not properly removed before use of the die machines, including an incident where a safety block shot out of a die narrowly missing my brother's head before striking a die several rows over causing property damage to the die.

9. Extensive minutes of these meetings were taken by both General Motors supervisory employees, including, but not limited to Bill Dau, and members of the UAW who attended the meetings.

10. I am personally aware that the tool and die machine that was used in the incident that injured [redacted] and other machines, had previously been installed at the General Motors Plant in Pontiac, Michigan. There were other die machines moved from the Pontiac plant to the Flint plant as well.

11. The machine that injured [redacted] was moved to the Flint plant referred to in paragraph 5, above, after 2009.
12. Questions were raised with plant management, at Plant Safety Review Board (PSRB) meetings regarding the installation of the die presses and the inadequate safety features on them.

13. Jim Scrimiger, the Plaint Manager, insisted on using the safety blocks, who stated, "it was his plant, his dies, and his call," even though Mr. Scrimiger was personally aware that there had been several incidents where the use of safety blocks inside dies resulted in extensive damage to the presses and potential physical injury to employees using them and others who were in the vicinity of those die presses, as a result of their use, and the use of storage blocks in them.

14. I know that Mr. Scrimiger was personally aware of the dangers posed by the use of the safety blocks as I personally advised him on numerous occasions about the very safety issue associated with the continued use of the safety blocks inside of the dies.

15. General Motors engaged in disciplinary action against employees who improperly left safety blocks inside the die machines while operating them.

16. I specifically stated to Plant Manager Scrimiger, at a Safety Review Meeting that occurred between the months of January 2017 and June of 2017, before the incident and injury to [redacted] the following "Something has to be done. We're going to be sitting here talking about killing somebody someday." They did nothing about it.

Further your Affiant sayeth not.

Dated: 2/10, 2020

Thomas Parker, Affiant

Subscribed and sworn to before me on this 10 day of February, 2020.

, Notary Public
Notary Public, State of Florida
Lee, County, Florida
My Commission Expires: 10/3/21

KRISTEN HUBLER
Commission # GG 147951
Expires October 3, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

EXHIBIT 3

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN DOE and JANE DOE,

Plaintiffs,

v

GENERAL MOTORS, LLC, a foreign profit corporation authorized to do business in the State of Michigan,,

Defendant.

Case No. 20-114107-NO

Hon. F. Kay Behm

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ORDER GRANTING DEFENDANT GENERAL MOTORS, LLC'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse
In the City of Flint, in said County,
on the third day of August, 2020.

PRESENT: HON. F. KAY BEHM, ASSIGNED CIRCUIT COURT JUDGE

I. Factual History

On September 21, 2018, Plaintiff, John Doe (hereinafter referred to as "Plaintiff"), was employed as a Skilled Support Operator (SSO) with Defendant General Motors, LLC at its North American Engineering and Tooling Center ("NAETC"). On that day, Plaintiff was working with a team of co-workers, Mike, Ken and Chris. Plaintiff and his team were working on a die press that had been inspected by technicians that day and cleared for continued service. Chris and Ken mistakenly left two steel storage blocks in the press when they gave the all clear for the press to be engaged. Plaintiff had walked around the press to take the safety chains off the body side rack as the top of the press began its descent. When the top of the press came into contact with the storage blocks, the blocks were ejected from the press and struck Plaintiff in his groin area. Plaintiff suffered severe trauma and injuries to his abdomen, left hip, testicles, right leg and cervical spine.

Plaintiff filed a complaint alleging that his injuries were the direct result of Defendant's deliberate acts. Plaintiff alleges that: Defendant failed to stop using the steel storage blocks until after Plaintiff's injury; failed to stop using the steel storage blocks after five to ten similar incidents where the blocks were ejected from the press; failed to install the press properly; and, ignored warnings from the head of the safety committee, Thomas Parker, that the continued use of the steel storage blocks was a safety hazard. Plaintiff alleges that Defendant had actual knowledge that an injury was certain to occur, and therefore, had the specific intent to injure Plaintiff. Plaintiff Jane Doe alleged loss of consortium due to the injuries sustained by Plaintiff.

Defendant moves for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). In its motion for summary disposition, GM argues that Plaintiffs' complaint must be dismissed because their claims are precluded by the Worker's Disability Compensation Act ("WDCA"), and therefore, this Court does not have subject matter jurisdiction over the claims. Defendant cites MCL 418.131(1) in support of its motion:

> 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.

Defendant asserts that Plaintiff Jane Doe's claims must also be dismissed because they are derivative of and dependent upon Plaintiff's claimed workplace injury.

In response, Plaintiffs argue that they have pled claims that fall under the intentional tort exemption of the WDCA, MCL 418.131(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 injury 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 the law.

Plaintiffs allege that Defendant's plant manager, Jim Scrimiger, was personally aware of the danger associated with the continued use of the metal storage blocks. Plaintiffs argue that the steel blocks produced a continuously operative dangerous condition; that Defendant had direct knowledge of that condition, and that Defendant never warned Plaintiff of the danger. Plaintiffs allege that these allegations demonstrate "actual knowledge, that an injury was certain to occur, and Plant Manager Scrimiger's willful disregard of that knowledge." Plaintiffs also argue that because Defendant has refused Plaintiffs' requests for discovery, a motion for summary disposition is premature. Plaintiffs ask the Court to deny Defendant's motion for summary disposition.

II. Standard of Review

The Court reviews questions regarding the exclusive remedy provision of the WDCA pursuant to MCR 2.116(C)(4) to determine whether it lacks subject-matter jurisdiction because the plaintiff's claim is barred by the provision. *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 240; 608 NW2d 487 (2000). The Court's review of motions for summary disposition under MCR 2.116(C)(4) determines if the moving party is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. MCR 2.116(I)(1); *Herbolsheimer*, 239 Mich App at 240.

Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are " 'barred because of immunity granted by law....' " *Odom v Wayne Cty*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence," the substance of which would be admissible at trial.

Odom, 482 Mich at 466. "The contents of the complaint are accepted as true unless contradicted" by the evidence provided. *Odom*, 482 Mich at 466.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999); *Stopera v DiMarco,* 218 Mich App 565, 567; 554 NW2d 379 (1996). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden,* 461 Mich at 119. "A motion under MCR 2.116(C)(8) 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." *Id.* (citation and internal quotations omitted).

III. Law and Analysis

Ordinarily, an employee's sole remedy against an employer for a workplace-related injury is provided by the WDCA. *Luce v Kent Foundry Co*, 316 Mich App 27, 32; 890 NW2d 908 (2016). The only exception to the exclusive remedy rule occurs when an employee can establish that an employer committed an intentional tort. *Id.* When a claim is brought under this provision, it is for the court to determine as a matter of law whether the plaintiff has alleged sufficient facts to sustain the intentional tort claim. *Id.* An employee can prove that an employer had an intent to injure through circumstantial evidence if he can establish that the employer had actual knowledge that an injury was certain to occur, yet disregarded that knowledge. *Id.* The issue whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, while the issue whether the facts are as the plaintiff alleges is a question of fact for the jury. *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 139; 475 NW2d 423 (1991).

When a plaintiff does not have direct evidence, a plaintiff must establish that his employer possessed the requisite knowledge. *Johnson v Detroit Edison Co*, 288 Mich App 688, 697; 795 NW2d 161 (2010). "Under the statute, 'actual knowledge' cannot be constructive implied or imputed; rather, a plaintiff must show that the employer had actual knowledge that an injury would follow from the employer's act or omission." *Johnson*, 288 Mich App at 697. A plaintiff must demonstrate that "a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Johnson*, 288 Mich App at 697 quoting *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 714: 777 NW2d 205 (2009).

Next, a plaintiff must show that an injury is "certain to occur." *Johnson*, 288 Mich App at 697. "Certain to occur" is "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." *Luce*, 316 Mich App at 32.

> As this Court has explained, "The existence of a dangerous condition does not mean an injury is certain to occur. An employer's awareness of a dangerous condition, or knowledge that an accident is likely, does not constitute actual knowledge that an injury is certain to occur." *Bagby*, 308 Mich App at 492–493 (citation omitted); see also *Herman v Detroit*, 261 Mich App 141, 148, 680 NW2d 71 (2004) ("An injury is certain to occur if there is no doubt that it will occur...."); *Palazzola*, 223 Mich App at 150. [*Luce*, 316 Mich App at 34.]

Third, a plaintiff must demonstrate that the employer disregarded the actual knowledge that an injury was certain to occur. *Johnson*, 288 Mich App at 698. The employer's disregard must have been willful, which is a state of mind more than negligence. *Id.*

In this case, Plaintiffs allege that Defendant had actual knowledge "of the danger associated with the continued use of the antiquated metal storage blocks, which when they were accidentally left in a die when it began operation would be compressed and ejected like cannon balls from a cannon into the area surrounding the press." Plaintiffs allege that there had been five to ten similar incidents where the metal storage blocks were caught in the press and ejected. Plaintiffs allege that Defendant disciplined employees who left the blocks in the die presses because of the damage the ejected blocks caused to the presses and/or the surrounding equipment. Plaintiffs also allege that, in the past, an ejected block narrowly missed injuring an employee, Mike Parker. Plaintiffs further allege that Scrimiger was personally aware of the dangers posed by the use of storage blocks and refused to discontinue using them. In support of these allegations, Plaintiff has presented affidavits from Thomas Parker, the head of the safety committee for NAETC, and Mike Parker, an NAETC employee, who very narrowly avoided injury from an ejected steel block. Thomas Parker's affidavit also indicates that he said during a safety review meeting with Scrimiger that "Something has to be done. We're going to be sitting here talking about killing somebody someday."

Plaintiffs have alleged sufficient facts to establish that Defendant had knowledge that if its employees failed to remove the blocks before operating the press, the press would eject the blocks at a high rate of speed causing damage to the press and the surrounding area, However, Plaintiffs do not allege or establish that Defendant "had actual knowledge that an injury was certain to occur."

Plaintiffs allege that Thomas Parker warned Scrimiger that something had to be done about the storage blocks stating that "[s]omething has to be done. We're going to be sitting her talking about killing somebody someday." However, the Court in *Bagby*, 308 Mich App at 495, stated that "to the extent that plaintiff relies on witnesses' statements that someone was going to get killed or injured and defendant did not prioritize safety, we must again conclude that these statements are insufficient to establish actual knowledge."

However, plaintiff may satisfy the "certain to occur" prong with circumstantial evidence. *Johnson*, 288 Mich App at 698.

> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury [was] certain to occur. [*Johnson*, 288 Mich App at 698, quoting *Travis*, 453 Mich at 178; 551 NW2d 132 (opinion by Boyle, J.).]

In this case, Plaintiff has not pled sufficient facts to establish that he was required to confront a continuously operative dangerous condition. Plaintiff alleged that there had been five to ten similar incidents from the time the machines were installed in the factory in 2009 through 2018 when the instant incident occurred. In his motion for summary disposition, Plaintiff stated that he had not witnessed any storage blocks being ejected from the press and that no such incidents had occurred during his shift since he started on March 5, 2018. These facts do not present the type of situation that the Michigan Supreme Court in *Travis* considered a continuously operative dangerous condition. *Travis*, 453 Mich at 178, 182.

In *Travis*, the Supreme Court concluded that although the employer had actual knowledge that the press was malfunctioning, it did not have the knowledge that an injury was certain to occur. *Id.* at 182. The plaintiff argued that because she was new and not informed that the press was double cycling, an injury was certain to occur from the malfunctioning press. *Id.* However, the *Travis* Court concluded that the plaintiff was not required to confront a continually operating dangerous condition because the press only double cycled intermittently. *Id.* The Court concluded that an injury was not certain to occur because the plaintiff was not required to confront a continuously operative dangerous condition. *Id.* The instant case presents a similar situation. If Defendant's employees removed the blocks from the press before they operated it, neither the blocks nor the press posed any danger. The storage blocks were only ejected if Defendant's

employees neglected to remove them from the press before operating it, a situation that had only occurred five to ten times in nine years.

In *Bagby*, the Court of Appeals stated:

> Finally, plaintiff cannot show that defendant had actual knowledge that an injury was certain to occur because Bagby had many opportunities to exercise his own discretion. "To be 'known' and 'certain,' an injury must spring directly from the employee's duties and the employee cannot have had to chance to exercise individual volition." *House*, 248 Fed Appx at 648. An employer cannot know that an injury is certain to occur when "the employee makes a decision to act or not act in the presence of a known risk" because the employer cannot know in advance what the employee's reaction will be and what steps he will take. *Id.* [*Bagby*, 308 Mich App at 495.]

The *Bagby* Court goes on to discuss the numerous decisions that the plaintiff and other employees made that led to the plaintiff's death. *Id.* In this case, the other workers on Plaintiff's team failed to take the blocks out of the press before they began to operate it. At the same time, Plaintiff realized that they had not taken off the safety chains before they began to operate the press and he moved to the other side of the press to take them off. There were many decisions that Plaintiff and his team made that negate the requirements of "known" and "certain." *Id.*

Plaintiff has failed to allege sufficient facts to sustain the intentional tort claim. This Court finds as a matter of law that Plaintiff failed to establish that Defendant had actual knowledge that an injury was certain to occur from its act or omission, yet disregarded that knowledge. *Luce*, 316 Mich App at 32.

In response to Defendant's motion, Plaintiff also argued that the motion is premature and the Court cannot rule on it at this time because the parties have not conducted discovery. The Court disagrees. First, because MCR 2.116(D)(3) allows for a motion filed pursuant to MCR 2.116(C)(4) to be raised at any time, it can certainly be filed and ruled upon before discovery has been conducted. Next, MCR 2.116(G)(2) states that "Except as to a motion based on subrule (C)(8) or (9), affidavits, depositions, admissions, or other documentary evidence *may* be submitted by a party to support or oppose the grounds asserted in the motion." Under the plain-meaning rule of statutory interpretation, courts must give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may" unless to do so would frustrate the legislative

intent as evidenced by other statutory language or by reading the statute as a whole. *Atchison v Atchison*, 256 Mich App 531, 535; 664 NW2d 249 (2003). Therefore, submission of affidavits, depositions, admission or other documentary evidence is allowed for Defendant's motion pursuant to MCR 2.116(C)(4) and (7), but not required. MCR 2.116(G)(3)(a) requires that affidavits, depositions, admissions or other documentary evidence be submitted if the grounds asserted do not appear on the face of the pleadings, which is not the circumstance here. Finally, while MCR 2.116(G)(5) requires that a court must consider the affidavits, pleadings, depositions admissions and documentary evidence if the parties submit them with a motion based on MCR 2.116(C)(4) and (7), it does not require that the parties submit them. Accordingly, Defendant's motion for summary disposition and the Court's ruling on the motion are not premature.

WHEREFORE, IT IS HEREBY ORDERED THAT Defendant General Motor's Motion for Summary Disposition is **GRANTED** pursuant to MCR 2.116(C)(4), (7) and (8). This is a final order that closes the case.

Dated: October 1, 2020

Hon. F. Kay Behm (P51902)
Assigned Circuit Court Judge

EXHIBIT 4

STATE OF MICHIGAN

SEVENTH JUDICIAL CIRCUIT COURT (GENESEE COUNTY)

JOHN DOE and JANE DOE,

Plaintiffs,

v File No. 20-114107-NO

GENERAL MOTORS, LLC,

Defendant.
_____/

PLAINTIFFS' MOTION TO COMPEL DEFENDANT, GENERAL MOTORS, LLC TO ANSWER DISCOVERY SERVED WITH SUMMONS AND COMPLAINT

AND

DEFENDANT GENERAL MOTORS, LLC'S MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE F. KAY BEHM, ASSIGNED CIRCUIT JUDGE

Flint, Michigan - Monday, August 3, 2020

APPEARANCES VIA ZOOM:

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Flint, Michigan

Monday, August 3, 2020 - 9:33 a.m.

THE COURT: Okay, so we have the matter of John and Jane Doe versus General Motors, the case number is 20-114107-NO. I have Mr. Washington here on behalf of the Plaintiffs and I have Mr. Ellis here on behalf of the Defendant, General Motors. I would note that the matter is being streamed on U-Tube to ensure that the matter continues to be a public hearing. So this is General Motors, Mr. Ellis' motion to dismiss for lack of jurisdiction, I think it's a C(4), C(8), and C(10), is how it was identified. So--

MR. WASHINGTON: Judge--Judge, if I may, it was (C)(4), (C)(7), and (C)(8).

THE COURT: Thank you. (C)(4), (C)(7), and (C)(8), okay, 4, 7, and 8. Thank you. And, Mr. Ellis, your arguments please.

MR. ELLIS: Sure, your Honor. So as you mentioned this is our motion for summary disposition under (C)(4) for lack of subject matter jurisdiction, (C)(8) for failure to state a claim, and (7) for immunity. (4) and (7) go hand in hand in this particular instances. What we have here, your Honor, is a claim that should be proceeding in front of the Worker's Compensation Agency. It concerns a workplace injury, by statute those are not supposed to proceed in court, there's a whole separate regulatory administrative framework to deal

with those sorts of issues. There is a small, extremely small, exception to the exclusive jurisdiction of the Worker's Compensation Agency and that's if you are dealing with an intentional tort. Intentional tort is defined a little differently under the Worker's Compensation Act than it is, you know, in typical tort stats but there you're dealing with their intentional act or you're dealing with a situation in which a managerial employee or managerial person of the employer has actual knowledge that an injury will follow from what the employer does or doesn't do, that this injury is 100 percent certain to occur not probable, and that the employer through, again, a managerial person has disregarded--willfully disregarded the knowledge that it will occur. And, again, would certain to occur and this is all in the--the briefing but, you know, that's something that isn't established based on the laws of probability an injury is certain to occur if it is pure and inevitable.

What we have in this particular case is allegations concerning a workplace injury which does not come close to satisfying the--the threshold as far as what the Plaintiff alleges. Here, they allege that Plaintiff was working at a GM factory, that there were storage blocks that were kept in this particular press when it was not in use, that GM's rules and protocols for its employees was that the storage blocks were supposed to be removed before the press was used, that several

other employees failed to do so for whatever reason, and that as a result of those employees failing to remove the storage blocks the press was lowered, the storage blocks were ejected, and the Plaintiff was injured. At best, that's a negligence issue and that, again, should proceed in front of the Worker's Compensation Agency. The Plaintiffs try to squeeze it into the intentional tort exception by suggesting that the plant manager had prior knowledge that this particular type of accident was possible. Again, that's negligence as alleged, that is not an intentional tort for the purposes of the act, that's a known potential hazard and, as set forth in our briefing in the *Bazinau v. Mackinac Island Carriage* case, a known potential hazard by itself is not a continuously operative dangerous condition. They're alleging that a few years prior something similar happened, that's all well and good, that's not a continuously operative dangerous condition and we have a couple examples in the briefing of situations where we do have a continuously operative dangerous condition that meets the threshold. One of them was in the *Adams v Shepherd Products* case. There you had a situation where the employer through the managerial employee was instructing the employees to work at a table where beneath it there was a circular saw that they could not see and as part of their jobs they had to continually shove their hands under the table next to the circular saw, that's a situation where you have a

continuously operating dangerous condition that is certain to hurt somebody, their hands are right there, no protection. *Golec v Metal Exchange*, there you have a situation where the employer, again, through a managerial employee had a furnace that was full of molten aluminum that was exploding and as this molten aluminum was ongoing and exploding the employer sent the employee into the furnace where he was injured. That's the sort of thing you need to have to cross to get the intentional tort threshold. We don't have anything like that here, we have knowledge of a situation that is potentially dangerous and as a matter of law that doesn't do it. Now, in--

THE COURT: Can I--can I--I apologize, can I--are there--those are two examples and that was really--it seems like the law is so bad for the Plaintiffs' side here in just that they--they don't--the exception seems so incredibly narrow, are there any other cases or are those basically it? Are you aware of any other cases? It seems like you have a really good grasp on the cases in this area. Are--are there any other cases or are *Adams* and *Golec* are those--those it for my framework of what--what does get Mr. Washington where he needs to be?

MR. ELLIS: Those are my--those are the two I can think of (inaudible). I'm sure there are others but it--it's--it is--it is specifically designed to be narrow because it's

not--it's not supposed to be bad for the Plaintiffs, they have an avenue for relief. If you dismiss this case and it doesn't impact anything, they just do it in the appropriate forum which is--

THE COURT: No, it--I mean, it--

MR. ELLIS: --worker's compensation--

THE COURT: --it does because it significantly limits their recovery and it limits--

MR. ELLIS: Correct.

THE COURT: --the ability for, for example, you know, Mrs., I guess we're just going to refer to her as Jane Doe in this case, from bringing her claims so there--there are consequences--

MR. ELLIS: Well--oh, sorry.

THE COURT: --but--like I said, whether--whether I like it or not the law is pretty clear and it seems like a really, really narrow path for any plaintiff to bring a claim outside worker's comp.

MR. ELLIS: Right, and that--and that's by design, your Honor, and with respect to Mrs.--Mrs. Doe, I'm trying not to mess that up too, with respect to Mrs. Doe, she doesn't lose her claim, her claim also proceeds in the worker's compensation, it can be brought by the employee and any family members claiming through that so her claim doesn't go anywhere other than to the appropriate forum. But, you're right, it's

a very narrow exception and that's by design because if we--if we broaden it to what we have here where it's, again, allegations of at best negligence, every negligence action is now in court. It completely takes the teeth out of the statute, it renders the exception meaningless. If all you have to say is there's this thing over here and a year ago something bad happened and you knew it was dangerous, that's an intentional tort, then everything proceeds in this forum there's nothing that--except for the most egregious where an employer goes up to someone and punches him in the face, other than that everything would proceed in court. So I understand it's very narrow but, again, that's--that's the statute and that's the system that we have.

THE COURT: Okay. So you're not aware--those are the two cases that you're aware of at least as--as far as this goes? Are--are there any others?

MR. ELLIS: I don't know the answer to that question. I'd have to imagine there would be. Those were the two best I found and I know I was limiting it to published whenever possible but if you'd like me to go back and catalog--

THE COURT: No, that's okay. No, I just recall on another matter you--you seemed to--I recall you had probably four or five cases as different examples but those were--those were the other way, the ones that said--you had a number of

cases, both in this case and the other one--

MR. ELLIS: Right.

THE COURT: --that we could have a longer list of cases of where it's insufficient to trigger the intentional tort exception.

MR. ELLIS: Right.

THE COURT: And then you list three cases there--here and I know that there--there are others of those. There seems to be a lot more of those and I didn't know if there were many published or unpublished cases that went the other way but that's okay.

MR. ELLIS: I can--

THE COURT: This is--I understand your point so if you want to go ahead with your arguments that's fine.

MR. ELLIS: I mean, I've--I'm happy to answer any questions, I think this is pretty clear from the--the briefing but, you know, I'm certainly--

THE COURT: What--so--so if--if jurisdiction--this is--you know, if I don't have jurisdiction then it's not my case. I just--I can't hear anything, is that your position with respect to the motion to compel that--that if Mr. Washington wants to pursue discovery he has to--and I don't have jurisdiction that he has to pursue that in front of the worker's comp board?

MR. ELLIS: Right. With respect to the motion--

THE COURT: (Inaudible)

MR. ELLIS: Sorry, your Honor. With respect to the motion to compel, obviously if you don't have jurisdiction the case goes away so there's no case in which to--to conduct discovery. And then I suppose this segways into something that's in their response as to whether or not they need discovery and, again, it's not--it's not relevant to the claims that they have alleged. If it was a situation where there was something they had in their complaint where we just said we disagree that's not how the facts went and then we had the fact issue where we need to investigate what the--the actual background is and whether this falls under the exception then maybe there you could get some discovery but here if you take every single allegation in their complaint as true and every single allegation in this affidavits they've attached as true, even if they're right about all of it, we still don't get there so discovery just isn't--isn't relevant to it which is why this is a (7) and also an (8). I think if you just look at the pleadings, accept what they say as true, on its face we don't get there.

THE COURT: Okay, thank you. Mr. Washington?

MR. WASHINGTON: My plant, my press, my call, that is the statement attributed directly to Mr. Scrimiger, the plant manager. And for the first point, Judge, I want to make clear even though they're casting, you know, they're

presenting this as a (C)(8) motion, (C)(7), and (C)(4), the case that they cited to you *Bazinau v Mackinac Island Carriage Tours* is a (C)(10) case and in that case discovery was had and that's the point that we want to make here is that you can't have it both ways. Either it's a (C)(8) motion or it's a (C)(10) motion, it can't be a hybrid, it can't be one and then--at times and then when it's convenient to switch to the other one, so it's a--if it's (C)(10) motion then I think when the Court goes outside of the pleading it becomes a (C)(10) motion. So factually we are entitled to develop the record and this is extremely premature. The reason we submitted the discovery with the complaint was so that we could get additional information in addition to the affidavits that we had. I mean, understand we didn't just file this with allegations about--general allegations, this was very specific.

In lis--in listening to Mr. Ellis, this is actually very similar to the *Golec* case, the manager knew that the aluminum was exploding inside of the furnace and the employee was put in a position where he was burned by the exploding molten aluminum. This--this circumstance is where Mr. Doe was hired into the plant, he was not educated about any of these storage blocks and their propensity for being compressed and ejected, and he was in a position where he could not protect himself and he was injured. He was doing his job, he wasn't

doing anything (inaudible) but I want to go to the *Bazinau* case, Judge, because it gives, I think, a fairly comprehensive and it won't be too long here, I went and made some notes on it. But they say the pivotal question in this genre and remember, Judge, we're talking about an exception to the worker's comp exclusive remedy. We're not saying it doesn't exist and even though it may be narrow, it should be foreclosed upon and that's what I'm feeling it relates to the--the argument that General Motors is making is that there's no set of circumstances absent a punch in the face where an employer can be held responsible for an intentional tort, that's not what the law provides for. In fact, the--the--the *Bazinau* case says the pivotal question in this genre of work related tort cases is what the legislature intended. In other words, actual knowledge that an injury was certain to occur and then it goes on to talk about how the Supreme Court in the *Travis* decision interpreted it and they interpreted it,

> "An employer shall be deemed to have intended to injury if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge," that's at page 752 and page 753 of the NW2d. Then it goes on to say, "The court stated initially that this sentence should read as a legislative recognition of the limited classifications in which liability is possible

despite the absent of a classic intentional tort and as a means of inferring an employer's intent to injure from the surrounding circumstances in those cases. In construing the phrase 'actual knowledge' the court stated that constructive, implied, or impeded knowledge is not enough nor it is sufficient to allege that the employer should have known or had reason to believe that injury was certain. A plaintiff may establish a corporate employer's actual knowledge by showing that the supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do."

Here, you have the only guy in the plant who can make the decision about whether or not those storage blocks are used. Mr. Scrimiger, his comment, my plant, my guys, my call, that is what he deliberately did not do which was to remove those metal storage blocks from use inside of the presses, that is what he did not do, he deliberately didn't do that and we've alleged that.

The other point the court says, the court explained when a dangerous condition rises to--to the level of certain to occur stating that when an injury is certain to occur no doubt exists with regard to whether it will occur it was just a matter of time, that's the problem here. What more do you

need then when they had the incident with Mr. Hugh Parker, they shut the plant down, they went into safety mode and they went into meetings and they took people in small groups and explained what happens and the poor guy who left the block in was fired. That is not people who had a thought that something might--they knew that if you didn't do these things carefully it was going to kill somebody or it was going to severally hurt somebody. The court then goes on to say, "Along similar lines just because something has happened before on occasion does not mean that it certain to occur again. Likewise, just because something has never happened before is not proof that it is not certain to occur," and that's 17--page 174 in the--in the *Travis* decision. According to the *Travis* court the following conditions are indicative of an injury certain to occur, "When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury yet refrains from informing the employer about the dangerous condition so that he is unable to take steps to keep from being injured. A fact finder may conclude that the employer had knowledge that an injury is certain to occur," and that's 453 Mich at 178. The court--the court construed the term willfully disregards to "Underscore that the employer's act or failure to act must be more than mere negligence, that is a failure to act to protect a person who might foreseeably be injured from an appreciable risk of

harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur," and that's *Id* at 179.

And the--and--and the thing that was important in that *Bazinau* case is that factually it had the decedent as well as the owners of the company measuring the ice. They did it on numerous occasions, they did it in numerous different locations, and the decedent had actually transported the hay from the mainland to the island the week before he was killed. So he was actively involved in the process of determining whether or not there was a risk, he had actually done the procedure before, there was nothing that in that case happened in my view that shouldn't have happened because under those facts there should have been an inclusive remedy to workmen's compensation. You don't have that in this case. What you have is a guy who's new to the plant, he's doing what he's told under the operation of the journeyman, and the--you know, mistakes happen but the mistake had happened numerous times before. The plant manager was specifically asked to stop using these metal blocks and he refused. That is not--

THE COURT: Why is--when--how is his refusal--how does that go from just a difference in opinion of how things should be run to an intentional act of--of injury? That he's certain--he--he's looking to injure somebody. I mean, that almost is--that's how high the standard appears, he is looking

to purposely cause an injury versus when you say my plant, my guys, my decision. If he's just saying I disagree with Tom whomever--I can't think of his name--the other guy that retired, Tom Parker--Tom Parker says it's dangerous, Jim Scrimiger says I don't agree it's--you know, no one's ever gotten hurt before, I--I'm going to use the metal blocks instead of wood blocks and that's my--that's my call, I mean, how does that go--

MR. WASHINGTON: You know--

THE COURT: --from being a decision on how to operate this plant to being some--to a point where they're saying I'm trying to hurt somebody?

MR. WASHINGTON: Well, because I think you're miss--you're--you're mixing the two standards, Judge. For it to be the intentional first portion of the exception you have to intend to hurt, in other words pushing someone in--into a mixer for example or having them put their hand underneath or even guiding a hand underneath a table where they can see the open-faced saw, that's the first portion. But the courts have said that to allow a continuously operative dangerous condition continue when you know that it is going to cause injury, that gets you to that intentional tort hurdle it is not both of those things, it's one or the other. One--

THE COURT: Right, and that's--and that's your *Bagby* case. So, you know, there was an error because you had sent

it back the court only said that you didn't specifically intend to injure and you're not--you're not even alleging that here, you're going under the second standard--

MR. WASHINGTON: Yes.

THE COURT: --that the employer disregarded actual knowledge of an injury. Now, even if there's a continuous operative--there's a condition there, it has to--you still have to go with the rest of that case of an injury--actual knowledge of an injury being certain to occur. So how do you get to an injury being certain to occur by Scrimiger saying I disagree with Parker?

MR. WASHINGTON: Because, Judge--

THE COURT: How do you get there?

MR. WASHINGTON: Because, Judge, if you take and you look at the facts as they've been alleged that this injury--that this--that these guys when they shoot out like cannon balls out of a cannon and they cause tremendous damage to big metal presses and if a person is in place there and that hits that person what's going to happen to that person and that's the point. You--you're asking me to say that he has to know today at 10:00 Mr. Doe is going to be standing there and we're going to push that press down and it's going to eject and it's going to hit him, we'll never be able to make the standard under those circumstances, Judge, and I don't think that's the standard that's required. The injury--an injury not the

injury but an injury is certain to occur and we don't know at this point, Judge, that's part of the problem. This is not something where we've had discovery, it's not the *Bazinau* case, we've not been able to take depositions, we don't know what the documents show and that's the part that I hope that you would get and that is, wait a minute, what's the urgency here. Let's get--let's dismiss--let's deny this motion. I just--I get that if you don't have jurisdiction you don't want to involve a whole lot but that--that's why the discovery was very narrow, very limited, and we want the opportunity and I think we're entitled to the opportunity to see what the records show. We've al--we heard that these records exist, we haven't seen them. I mean, we had to actually file suit in order to get the unredacted MI OSHA report. So at this point we don't know what we don't know and the Court isn't hurting anything to allow a limited period for discovery and deny this motion without prejudice today and if they want to bring it back after we've had every opportunity to take Mr. Scrimiger's deposition to find out what he knew because right now you're saying it was a difference of opinion. We don't know what it was and that the Court's interpretation of the statement and we don't have more than that at this point. So what I'm suggesting to the Court is that the appropriate step to take would be to allow us to take some limited discovery, make them answer the--we didn't send, you know, a shot gun approach, it

was very narrowly focused because of what we knew at the time we filed.

THE COURT: Do I have the authority if--if Mr. Ellis--

MR. WASHINGTON: Yes.

THE COURT: --is right--if Mr. Ellis is right and--and if I look just at your complaint and I take everything as true and I find that it doesn't get to that level then I don't have the authority to do anything, do I? I mean, I--don't I have to decide his (C)(7) motion first or (C)(4) motion first and then--if I don't have jurisdiction that's it.

MR. WASHINGTON: But, Judge--

THE COURT: I--I don't have the authority, I don't have the ability to order GM to do anything if I don't have jurisdiction.

MR. WASHINGTON: Judge--Judge, you have--

THE COURT: Yes?

MR. WASHINGTON: --jurisdiction when the case is filed in front of you until you say you don't have jurisdiction and that's why they brought the motion that they brought because until you sign the order that says I, Circuit Court Judge F. Kay Behm, do not feel as though I have jurisdiction, I'm granting the motion under this section, that's when you lose jurisdiction. But when the case is assigned to you, you have jurisdiction, and that's why I'm

suggesting a limited period, doesn't hurt them, and if they think you're wrong, Judge--

THE COURT: But don't--don't I--don't I have to--don't I have to make the finding that I have jurisdiction in order to grant yours?

MR. WASHINGTON: We're going to defer--we're going to defer on that--answering that question until the limited discovery is--is--is completed because otherwise what you're saying is Plaintiffs, you have this extremely high burden to meet with respect to any claim related to the--the intentional tort exemption workmen's compensation but we're not going to give you the opportunity yet when they cite their case authority that said they should get there it's a (C)(10) motion that was denied.

THE COURT: So what I'm--what I'm struggling with on that is this, is that you're basically saying even if I think I don't have jurisdiction that I hold the case and make orders even though I might not have jurisdiction?

MR. WASHINGTON: Judge, there's nothing in the court rules or the constitution that says you don't have jurisdiction right now. If there was, Mr. Ellis would have brought it to your attention. There's nothing that says you can't deny this motion without prejudice, allow limited discovery, and then have it brought again if at the end of discovery it shows exactly (inaudible) you what, I know that

Parker, I heard what he had to say, and I disagree with what he had to say. If that's the--if those are facts, you know, it may be a closer call but right now we don't know what went on in those safety meetings, we don't know what minutes were taken, and we would like the opportunity to proceed. There's nothing that said--because otherwise, Judge, you would be flipping--if you flip it around you would be saying, well, if a case comes in front of me, I don't have jurisdiction to do anything if someone challenges at a later point. They're challenging right up front and I'm saying to you when that case was assigned to you, you assumed jurisdiction and until--

THE COURT: So is this something--so--so is this--is this the type of information that you could get in your worker's comp case regardless? I mean, could you get this and then if you found it bring it back?

MR. WASHINGTON: Why do we have that burden, Judge? We're here in front of you now. This is--that's the problem with always putting things onto the--the Plaintiff is that General Motors has all--I don't know, I don't do comp so, first of all, I don't know the answer to that question. I don't know what discovery is permitted in the workmen's comp but then you're--then you're--then you are stuck with *res judicata*, you know, you're talking to me about dismissing a case, they'll say it was dismissed on the merits, Judge Behm signed our order of dismissal, you can't come back.

THE COURT: Yeah, okay.

MR. WASHINGTON: I'm asking you to--instead of erring on the side of pushing the Plaintiff out, give us a limited period of discovery and if it--believe me, if it doesn't meet the hurdle we won't--we--we won't--I mean, we won't be back here because Mr. Ellis and I have dealt with one another before as you commented about on the other case and if there's nothing there we're not going to waste the Court's time and we're not going to waste our time for that--

THE COURT: So, Mr.--I have the same question for you then, Mr. Washington, that I started out with Mr. Ellis. I mean, he identified two examples, I mean, I'm--I'm looking for other examples of when the exception does apply. When--when d--when does the Plaintiff get an opportunity--do you have any other examples that would be like this case other than the two that defense counsel cites? He cites *Adams* and *Golec*. Are there any other examples for me to look to for a situation where the exception was found to apply?

MR. WASHINGTON: I would like the opportunity to provide you with that information, Judge. Obviously, I couldn't know what you were going to ask this morning--

THE COURT: Right.

MR. WASHINGTON: --and on the top of my head I don't have that information and I would like the opportunity to provide that for you.

THE COURT: Okay.

MR. WASHINGTON: So how much time will I have?

THE COURT: How much time would you need to give me some--

MR. WASHINGTON: Well, this has--this has been, you know, a rather hectic July and I would like a couple weeks but I could--

THE COURT: Okay, that's fine. Yeah, I mean, I'm fine if you guys would like to provide additional authority or additional arguments. I mean, those are really--this is so--like I said, the nar--whether I like it or not, the--the law is--is very, very narrow, it doesn't--it doesn't give a lot of--it doesn't seem to give a lot of leeway for me to assume jurisdiction, it seems like it's pretty clear that this falls within the worker's comp arena and so, I guess, I'm looking for a little more guidance as to when--when--when any circuit court would come in and take jurisdiction because, like you said, when I read through the cases and as I listen to this, it--it really does seem like it has to be a punch in the face or a--you know, sending someone into a--into a furnace that you know is firing and someone's face has already been burnt, I mean, they've already been injured and you send them back into the furnace. To me, that is--is close to punching him into the face--in the face as you can get. It's just get--get back in there, I know you're going to get hurt, but I don't

care. The indifference, the intentional tort, the--
indifference is the word I would use.

MR. WASHINGTON: Well, Judge--

THE COURT: And I--I'm struggling with--I'm struggling with this case with the blocks rising to the level of I don't care get in there versus, you know, one guy saying it's--it's a--it's a danger, we've never had anyone injured before, we had this one incident, one guy thinks they were used in the past, one guy thinks they're--they're bad, one guy thinks they're really bad, and another guy says they're fine. You know, to--

MR. WASHINGTON: We don't know--Judge, that's--you just hit on something when you said no one's been injured before, we don't know that. General Motors is saying that, we--that we haven't pled it but we don't know what the records are going to show, that's my point.

THE COURT: But even--even--even if they--even if they had been hurt before that's--the case law says--that's what I'm saying, the case law is so against you--

MR. WASHINGTON: But there is--

THE COURT: It says even if there was--

MR. WASHINGTON: But--

THE COURT: --an injury it doesn't mean that there's certain to be another injury. You have to have an injury being certain to occur and I'm looking for when does that--

when does that arise and right now I have two examples and I would really appreciate more guidance in that area.

MR. WASHINGTON: Well, I can tell you this, Judge, injury certain to occur as I've just read into--read into the record has been defined as willfully disregarding the circumstances and, you know, I need the opportunity, you asked me for more case law, I'm asking for the opportunity to provide it and if two weeks is what you need we can adjourn this for two weeks--

THE COURT: That's fine.

MR. WASHINGTON: --and be back.

THE COURT: I can--that's fine. Mr. Ellis--and, actually, I think I can--I can decide the motion just on additional pleadings. I know--I mean, I certainly can review any additional cases that you provide. Mr. Ellis, anything else that you would like to argue since this is your motion?

MR. ELLIS: Sure. Just--just a couple of things on the (C)(10) and discovery issue. We're--we're not making this a (C)(10) and I'm not trying to go outside the pleadings. The Plaintiffs are trying to take it there. Our position is that we don't need to because, again, if everything as they allege it is true, as you point out, we still don't get there and it's--it's a basic understanding on how these tort things work but you can't avoid summary disposition just by saying I need discovery. We've got one of the cases we cited in our reply

Marilyn Froling Revocable Living Trust, "A party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed and supporting that issue with independent evidence." Here, we haven't identified any dispute. We're saying, you know what, everything you say is true, that's what we'll take it as so you don't need discovery to get into that. Same thing with--because we're talking about the allegations in the pleadings, *In Re Estate of Lett* we have in our reply, and then we have many motion challenges with efficient--efficiency of allegations in pleading, the Plaintiff's argument that discovery is incomplete is unveiling, it doesn't matter, we conceding for purposes of this motion, fine, your--your view of the facts is right even if everything you hope to prove is proven and you're right you still don't get there and that's why we don't need discovery, that's why we don't have to go do any of this, because everything they've alleged to be true already shows they don't get there.

The only other thing that I wanted to add is, again, we're still--they're still conflating prior knowledge with a continuously operating dangerous condition and those are as a matter of law not the same thing. You know, we've got this *Stallings* case that we referenced in the--the reply brief and our motion where it says, "Failure to take precautions in the face of an accident hazard alone, whether over the course of a

few hours or several years, does not itself transform an eventual accident into an intentional tort," and the arguments keep going back to well maybe they shouldn't have done this a couple years ago, that's not throwing somebody into a furnace or telling someone to go into a furnace. The situation here because we're struggling with how to get it to an intentional tort, if the allegations were that the manger, plant manager, was standing next to John Doe saw the blocks in the press and said, you know what, go ahead and turn the press on then maybe they'd get there because you've got someone right there, he's watching what's happening, knows there's a danger, he tells them to do the thing anyway in spite of the danger then maybe you get there but the fact that there's some debate about whether or not they should be there in the first place over the course of--course of several years not--it's not close enough. I think--yeah, that--that's it unless--I don't know what we want to do with the motion to compel part. If you want to hold on to that until you finish this but I--

THE COURT: Yeah. I think I--

MR. ELLIS: --(inaudible)

THE COURT: I think I have to decide the jurisdictional issue before I decide--

MR. ELLIS: Okay.

THE COURT: --and I think that--that's the--the key. Either I have jurisdiction or I don't. So I--is 2--3--let me

look at my calendar really quick. I don't mind giving you guys two or three weeks to come up with any additional cases. I--I know sometimes that can take some time as you're--as you're looking but I certainly would appreciate some additional information in this area. So today is the 3rd, why don't you--why don't you--why don't you get me any additional information by August 24th, that gives you three weeks to get me whatever additional pleadings that you want to get to me and then I will look at your pleadings and your cases and, of course, if there's anything--any cases that are out of state or out of jurisdiction, you believe will provide relevant guidance be sure to give me a copy of those so we don't have to go digging and finding some obscure case. I'm sure my law clerk, Lisa, could find anything but it's helpful if we just have it. So I'll look for it by the 24th. Anything else that we can address today?

MR. ELLIS: Nothing from General Motors, your Honor.

MR. WASHINGTON: Not from the Plaintiffs, Judge.

THE COURT: All right, thank you.

MR. WASHINGTON: Now, that additional pleading, I'm assuming that all you want are cases or are you expecting something--argument to go with it?

THE COURT: I would love arguments and summaries and how you interpret those cases. So any additional pleadings as far as--you know, don't just send me a pile of cases and say

good luck. I'd love for you to tell me why--why you--why you like those cases and what they mean to you and how they support your position.

MR. WASHINGTON: Will do, Judge.

MR. ELLIS: (Inaudible)

THE COURT: (Inaudible)

MR. WASHINGTON: I'm assuming that the--the unreported, you just want those attached as exhibits but the reported cases we don't need to, is that right?

THE COURT: As long as they're--

MR. WASHINGTON: Or do you want--do you want them both?

THE COURT: You know what, just give me both, just attach--

MR. WASHINGTON: Okay.

THE COURT: Just give me both.

MR. WASHINGTON: Okay.

MR. ELLIS: Okay.

MR. WASHINGTON: Will do. Thank you, Judge.

THE COURT: You know what, at least on judge's copies, I don't know that the clerk needs all those filed copies so maybe just attach them to the judge's--so your cases just attach to the judge's copies--

MR. WASHINGTON: Okay.

THE COURT: --that you deliver to my office.

MR. ELLIS: Perfect.

THE COURT: Otherwise--otherwise the plead--the court--the clerk's office doesn't need to keep copies of, you know, how many other cases in their files.

MR. WASHINGTON: Okay.

THE COURT: Wonderful. Thank you all. Have a good day.

MR. ELLIS: Thank you, your Honor.

MR. WASHINGTON: Thank you, Judge.

THE COURT: Thank you.

(At 10:09 a.m., proceedings concluded)

STATE OF MICHIGAN)
)
COUNTY OF GENESEE)

I certify that that this transcript, consisting of 32 pages, is a complete, true, and correct record of the videotape of the proceedings and testimony taken in this case as recorded on Monday, August 3, 2020.

Date: August 5, 2020

Denise Churchill

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EXHIBIT 5

STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE and JANE DOE,

Plaintiffs-Appellants,

v

GENERAL MOTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
October 28, 2021

No. 355097
Genesee Circuit Court
LC No. 20-114107-NO

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

In this personal injury action, plaintiffs appeal by right the trial court's decision granting defendant's motion for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8). We affirm.

I. BACKGROUND

For purposes of this appeal, the facts are not in dispute. Plaintiff John Doe[1] worked for defendant and was injured while on the job. Plaintiff John Doe and his team were operating a die press used in making vehicle parts at defendant's manufacturing plant. As part of this process, two metal storage blocks were mistakenly left inside the press. The press was activated and, as the press descended, the press came into contact with these blocks, compressed them, and caused one to be ejected from the press at a high rate of speed. This block struck plaintiff John Doe in his groin and caused extensive injuries. Plaintiffs brought this action against defendant and attempted to overcome the requirements of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq.*, which governs nearly all aspects of compensation for an injury sustained during the course of employment. Specifically, plaintiffs alleged that defendant committed an "intentional tort" for the purposes of MCL 418.131(1) of the WDCA, so that act did not provide the exclusive remedy for their injuries. Plaintiff John Doe sought damages for his personal injuries, and plaintiff Jane Doe sought damages for the loss of consortium. Defendant moved for

[1] The actual names of plaintiffs have been replaced with John Doe and Jane Doe, respectively.

summary disposition, contending that, even taking plaintiffs' allegations as true and viewed in a light most favorable to them, the allegations failed as a matter of law to meet the requirements for the intentional-tort exception to the WDCA. The trial court agreed and dismissed the action. Plaintiffs now appeal, contending that the trial court erred by granting summary disposition both because discovery had not yet occurred and because their allegations met the requirements for the intentional-tort exception to the WDCA.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted pursuant to MCR 2.116(C)(4) when the trial court "lacks jurisdiction of the subject matter." For such motions, "this Court determines whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138-139; 796 NW2d 94 (2010) (cleaned up).

Relevant to this appeal, a motion is properly granted pursuant to MCR 2.116(C)(7) when one party is entitled to "immunity granted by law."

> In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. We must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. [*Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000) (citation omitted).]

A motion is properly granted pursuant to MCR 2.116(C)(8) when "[t]he opposing party has failed to state a claim on which relief can be granted." Such a motion "tests the legal sufficiency of the claim on the basis of the pleadings alone . . . ." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When reviewing the motion, "the court must accept as true all factual allegations contained in the complaint." *Id.* The court must grant the motion "if no factual development could justify the plaintiff's claim for relief." *Id.* (quotation marks and citation omitted).

B. WDCA

MCL 418.131(1) of the WDCA provides as follows:

> 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.

Under MCL 418.131(1), "employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault." *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000) (citation omitted). "In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer." *Id.* (quotation marks and citation omitted). "It is well settled that the exclusive remedy provision applies when an employee is injured by the negligent acts of his employer or by the negligent acts of a coemployee." *Id.* "The only exception to this rule is when the employee can show that the employer committed an intentional tort." *Bagby v Detroit Edison Co*, 308 Mich App 488, 491; 865 NW2d 59 (2014). "The issue whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, while the issue whether the facts are as the plaintiff alleges is a question of fact for the jury." *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 139; 475 NW2d 423 (1991).

"[T]o recover under the intentional tort exception of the WDCA, a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury." *Bagby*, 308 Mich App at 491. In other words, "an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996) (opinion by BOYLE, J.). "There are two ways for a plaintiff to show that an employer specifically intended an injury." *Bagby*, 308 Mich App at 491. First, "the plaintiff can provide direct evidence that the employer had the particular purpose of inflicting an injury upon his employee." *Id.* (quotation marks and citation omitted). Second, "an employer's intent can be proven by circumstantial evidence, i.e., that the employer has actual knowledge that an injury is certain to occur, yet disregards that knowledge." *Id.* (quotation marks and citation omitted). To be precise, the employer must "willfully disregard" such knowledge. See *Travis*, 453 Mich at 178-179 (opinion by BOYLE, J.).

Plaintiffs do not allege direct evidence of a "particular purpose" by defendant to injure plaintiff John Doe. Thus, for plaintiffs to invoke the intentional-tort exception to the WDCA, they must show that defendant "had an intent to injure through circumstantial evidence" by establishing that "(1) [defendant had] actual knowledge (2) that an injury [was] certain to occur (3) yet disregard[ed] that knowledge." *Luce*, 316 Mich App at 33. The knowledge of a supervisory or managerial employee in this regard is imputed to defendant itself. See *Bagby*, 308 Mich App at 492. For the reasons that follow, even assuming that plaintiffs met the "actual knowledge" requirement, we conclude that they failed to meet "certain to occur" and "willfully disregards" requirements.

Plaintiffs alleged that, over the course of nine years, there had been 5 to 10 incidents in which the storage blocks were left in the press and were ejected; however, no injuries occurred from these incidents. Plaintiffs also alleged a specific incident in which the ejected blocks narrowly missed the head of another employee. Additionally, plaintiffs alleged that Thomas Parker, the former head of the Safety Committee for the manufacturing plant, warned the plant

supervisor, Jim Scrimiger, that "the steel storage blocks was [sic] a safety hazard that was going to seriously injure or kill a GM employee." These allegations failed to meet the "extremely high standard" set forth by Michigan law. See *Travis*, 453 Mich at 174 (opinion by BOYLE, J.). The ejection of the blocks was not a *continuous* occurrence; rather, ejection occurred less than a dozen times over nine years with no injuries. See *id.* at 178 (opinion by BOYLE, J.) ("When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur.") (citation omitted). Indeed, by his own concession, plaintiff John Doe had never witnessed the ejection of these blocks before, which indicates that this was not a *continuous* dangerous condition. Accordingly, there was not a *certainty* that injury would occur to plaintiff John Doe. Merely showing that something has happened before is insufficient to invoke the intentional-tort exception. See *id.* at 174 (opinion by BOYLE, J.).

Plaintiffs focus on the fact that Scrimiger allegedly did not inform plaintiff John Doe of the dangerous condition. However, even assuming that Scrimiger failed to inform plaintiff John Doe about the possibility of the blocks being ejected, this was insufficient to overcome defendant's motion for summary disposition. Plaintiffs were required to show that defendant had actual knowledge that an injury was *certain* to occur, which they failed to do. Injury was not certain, as evidenced by the fact that, in the 5 to 10 prior incidents during the preceding nine years, no injuries occurred. Additionally, although Thomas Parker informed Scrimiger of the dangerous condition and said that "someday" someone would be injured or killed, this is best understood as speculation, not *certainty*. In other words, it involved the "laws of probability," and it is therefore insufficient to meet the "certain to occur" requirement. *Id.* at 174 (opinion by BOYLE, J.).

Further, for essentially the same reasons, plaintiffs failed to meet the "willfully disregards" requirement as well. The "willfully disregard[]" language in MCL 418.131(1) requires "more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur." *Id.* at 179 (opinion by Boyle, J.). The actions of Scrimiger were arguably negligent because he knew of the risk and yet continued to do nothing about it, stating that it was "his plant, his call" to make. However, knowledge of the *risk*, or *probability*, that an injury *could* occur is not the same as knowledge that the injury *will* follow from a course of action. There was no certainty that the storage blocks would be left in the press, would be ejected, and would cause injury to an employee. There was only the *probability* that it could happen, which suggests negligence on the part of Scrimiger for his alleged failure to warn plaintiff John Doe but fails to rise to the level of culpability required under the intentional-tort exception to the WDCA.

Finally, we reject plaintiffs' contention that the trial court was required to permit discovery prior to ruling on defendant's motion. MCR 2.116(G)(5) merely requires that, *if* documentary evidence is filed with the motion, the trial court *must* consider the evidence when the motion is

based on the listed subrules.[2] Nothing within this subrule suggests that discovery must occur *prior* to a motion for summary disposition. Moreover, plaintiffs do not clearly explain on appeal how discovery was likely to advance their case. At most, plaintiffs briefly suggest that if they had been allowed to depose Scrimiger, he might have testified as to facts indicating that defendant "intended to injure him." See MCL 418.131(1). However, as previously explained, plaintiffs have failed to sufficiently allege or otherwise show that Scrimiger "had actual knowledge that an injury was certain to occur," given the extreme rarity of the hazard at issue actually occurring. See *id.* Thus, discovery did "not stand a reasonable chance of uncovering factual support" for plaintiffs' position, and the trial court did not err by refusing to allow it. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).[3]

III. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant because plaintiffs failed to show that the intentional-tort exception to the exclusive-remedy provision of MCL 418.131(1) applies in this case. Therefore, we affirm.

/s/ Christopher M. Murray
/s/ Michael J. Riordan

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[2] MCR 2.116(G)(5) provides, in relevant part, that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)."

[3] Plaintiffs argue in their reply brief that the trial court should have permitted them the opportunity to amend their complaint. However, plaintiffs provide no substantive argument on appeal regarding what allegations would be added such that their claims would meet the intentional-tort exception of the WDCA. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (quotation marks and citation omitted). Plaintiffs have therefore abandoned this argument.

We also note that we granted plaintiffs' motion to expand the record before oral argument. *John Doe v Gen Motors, LLC*, unpublished order of the Court of Appeals, entered September 28, 2021 (Docket No. 355097). After reviewing the expanded record, which generally concerns medical examination and treatment of plaintiff John Doe after the workplace injury, our ultimate conclusion in this case remains unchanged. The expanded record does not address the underlying question of whether defendant committed an intentional tort for the purposes of MCL 418.131(1).

EXHIBIT 6

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE and JANE DOE,

Plaintiffs-Appellants,

v

GENERAL MOTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
October 28, 2021

No. 355097
Genesee Circuit Court
LC No. 20-114107-NO

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

JANSEN, J. (*dissenting*)

For the reasons that follow, I respectfully dissent.

The trial court erred in granting summary disposition in favor of defendant because genuine issues of material fact exist regarding plaintiffs' claim that the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq.*, applies, and summary disposition before discovery was completed was premature. Therefore, I would vacate the trial court order granting defendant summary disposition, and remand to the trial court for further proceedings, including discovery.

I adopt the standard of review for a motion for summary disposition under MCR 2.116(C)(7) as provided by the majority. Summary disposition is premature if granted before discovery is completed on a disputed issue. *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 253; 964 NW2d 50 (2020). "[A] party may not simply allege that summary disposition is premature. The party must clearly identify the disputed issue for which it asserts discovery must be conducted and support the issue with independent evidence." *Id.* "The dispositive inquiry is whether further discovery presents a fair likelihood of uncovering factual support for the party's position." *Id.* (quotation marks and citation omitted).

The benefits that the WDCA provides are an employee's exclusive remedy against an employer for work-related personal injuries. MCL 418.131(1); *Johnson v Detroit Edison Co*, 288 Mich App 688, 695-696; 795 NW2d 161 (2010). "The only exception to this exclusive remedy is an intentional tort." MCL 418.131(1). "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." *Id.* The second sentence applies here, and "allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996). Questions of fact exist regarding this requirement.

Employees were using the storage blocks in the die presses even though they were instructed by defendant not to, and disciplined when they did. It is human nature that employees will not always follow protocol. However, given the lack of discovery, it is not clear what the blocks were used for, how often they were used, and under what circumstances they were used.[1] The evidence provided by plaintiffs established that such storage blocks were ejected in a similar manner 5 to 10 times over a period of years, but these are only the times that plaintiffs were aware of. Without discovery, the frequency with which the blocks were ejected is unclear. It is incredibly fortunate that no one else was seriously injured by an ejected storage block given the extremely dangerous risk posed by an ejection. However, just because no other employee was injured does not mean that defendant lacked knowledge that an injury was certain to occur, given the dangerous nature of an ejection. In fact, plant manager Jim Scrimiger insisted on using the safety blocks, stating, "it was his plant, his dies, and his call," even though the Safety Committee Chairperson, Thomas Parker, urged him not to.

Thus, genuine issues of material fact exist regarding whether defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge, MCL 418.131(1), and further discovery presents a fair likelihood of uncovering factual support for plaintiffs' claim, *Powell-Murphy*, 333 Mich App at 253. Without opining as to whether plaintiffs would prevail on a future motion for summary disposition, I would conclude that plaintiffs are entitled to further discovery, *id.* at 255-256, vacate the trial court order granting defendant summary disposition, and remand for further proceedings.

/s/ Kathleen Jansen

[1] At oral argument, under questioning by the Court, defense counsel failed to provide any clarification as to these questions of fact regarding why, how often, and under what circumstances the blocks were used by employees of defendant.

EXHIBIT 7

AFFIDAVIT OF
HUGH MICHAEL (MIKE) PARKER

STATE OF MICHIGAN)
) ss
COUNTY OF GENESEE)

Hugh Michael (Mike) Parker, being first duly sworn deposes and says as follows:

1. I am over 18 years of age.

2. I am making this affidavit based upon my personal knowledge.

3. If sworn as a witness I will testify competently and truthfully about the facts set forth in this affidavit.

4. I was employed by General Motors Corporation from March 21, 1977, until my retirement in 2017.

5. In that employment with General Motors I was a Tool and Die maker. Initially I hired into what was known as the Fisher Body Grand Blanc facility. I then transferred to Plant 38, located at 425 Stevenson Street, Flint, MI, in approximately 2009.

6. While employed as a tool and die maker at the Grand Blanc facility, wooden storage blocks were used in the die presses instead of metal storage blocks. Wooden storage blocks were used because if they were accidentally left inside a press, the wood blocks would be crushed, and they could not become projectiles. They also caused less damage to the die press.

7. While employed as a tool and die maker at Plant 38, there were racks with sets of metal storage blocks adjacent to each try out press.

8. While employed as a tool and die maker at Plant 38, I am personally aware of several instances where the metal storage blocks were left in the die presses as they began to cycle. This caused damages to the dies.

9. I am personally aware that General Motors engaged in disciplinary action against employees who improperly left the metal safety blocks inside the die machines while operating them.

10. For approximately three years my brother Thomas Parker was Chairman of North American Engineering and Tooling Center, and as a part of his duties, he was Head of the Safety Committee for the General Motors Plant 38, called NAETC, located at 425 Stevenson Street in the City of Flint, Genesee County, Michigan.

11. As a direct result of this position, I know he was made aware of all work-related accidents and incidents that either resulted in or could have resulted in injury to personnel and plant property that occurred at the General Motors facility referenced in the above paragraphs.

12. Thomas Parker was either a witness to these accidents/incidents or was made aware of them due to his attendance at facility wide Plant Safety Review Board (PSRB) meetings where they were discussed.

13. In approximately 2015, while working at Plant 38, during the time my brother was Head of the Safety Committee for General Motors Plant 38, my partner and I prepared a die. My partner was running the controls and I was walking away for the immediate press area and had my back to the press. I heard a loud noise, and saw a metal storage block narrowly miss my head before coming to rest in the isle. Photographs of this were taken by plant staff.

14. My partner accidently left a metal storage block in the back corner of the die. When the press was cycling, the metal storage block was compressed and ejected from the press where it went through the die and traveled an additional 50-60' from the die.

15. When this ejection of the compressed metal storage block happened, the area around the die press immediately went into a "Safety Stand Down." This means all work stopped. The next morning, all of the employees were divided into small groups and then taken into a conference room to discuss what happened and the safety issue involved.

16. I am aware my partner was "walked out the door" – or disciplined with time off work as a result of this incident.

17. Jim Scrimiger was the Plaint Manager at Plant 38 when the incident involving the metal storage block shooting past my head occurred.

Further your Affiant sayeth not.

Dated: July 20, 2020

Hugh Michael Parker, Affiant

Subscribed and sworn to before me on this 20th day of July, 2020.

Lindsey Norris
Notary Public, State of Michigan
Shiawassee County, Michigan
Acting in the County of Genesee
My Commission Expires: January 30, 2026

EXHIBIT 8

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v.

Case No.: 20-114107-NO

Hon. F. Kay Behm

GENERAL MOTORS LLC,
a foreign profit corporation authorized to do business in the State of Michigan,

Defendant.

/

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/

DEFENDANT GENERAL MOTORS LLC'S RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSIONS

Defendant General Motors LLC ("GM") by its attorneys submits the following Responses to Plaintiffs' Requests for Admissions:

GENERAL OBJECTIONS

GM asserts the following General Objections with respect to each of Plaintiffs' Requests

for Admission (the "Discovery Requests"). GM's specific objections and responses below are subject to and without waiver of the following General Objections:

1. GM objects generally to the Discovery Requests to the extent they purport to impose burdens greater than and/or inconsistent with those imposed by the Michigan Court Rules. In particular, GM objects to the Discovery Requests to the extent they are improper, harassing, overly broad, unduly burdensome, premature, vague or ambiguous, or seek discovery outside the scope allowed by the Michigan Court Rules.

2. GM objects to the Discovery Requests to the extent they seek information or documents that are equally available to Plaintiffs as they are to GM, are in the public domain, are in the possession, custody, or control of third-parties, or otherwise are not within GM's possession, custody, or control.

3. GM objects to the Discovery Requests to the extent they seek documents or information protected by the attorney-client privilege, work-product doctrine, or other applicable privileges. To the extent any such information inadvertently is produced, such production is not intended as a waiver of any applicable privilege and GM expressly reserves the right to seek the return of such inadvertently-produced information.

4. GM objects to the Discovery Requests to the extent they call for the production of documents or information that contain trade secrets or confidential commercial information in the absence of an appropriate protective order or confidentiality agreement.

5. GM objects to the factual characterizations and legal conclusions in the Discovery Requests. By responding to a request, GM does not admit or accept the factual characterizations or legal conclusions contained in any request; nor does GM concede the relevance or admissibility of any information or documents requested or provided.

6. GM objects to the Discovery Requests as being, in many instances, overly broad and too encompassing to permit literal compliance, which would be unduly burdensome. GM disclaims any obligation to respond to those requests that demand that it produce "all" documents or information relating to any subject.

7. By submitting these responses, GM does not in any way adopt Plaintiffs' purported definitions of words and phrases contained in the Discovery Requests. GM objects to those definitions to the extent that they are inconsistent with (a) the ordinary and customary meaning of such words and phrases, (b) the rules governing the permissible scope of discovery, or (c) the definitions set forth by GM in its responses.

8. Objections and responses are not to be construed as a representation that responsive documents exist, nor are they to be construed as a representation as to the nature and extent of any responsive documents in existence.

9. GM has not yet completed its investigation of the facts related to this litigation. Consequently, all of the responses contained herein are based only on such information and documentation that is presently available to GM. Further investigation, research, and analysis may supply additional facts, add meaning to known facts, and perhaps establish entirely new factual conclusions, all of which may in turn lead to additions or changes to these responses. Accordingly, GM reserves the right to amend these responses, and to offer related evidence, as additional facts are ascertained, analyses are made, research is completed, and contentions become apparent.

10. GM does not concede that any of the information or documents it may produce are or will be admissible evidence at trial or any evidentiary hearing. Furthermore, GM does not waive any objection, whether or not asserted herein, to the use of any such documents at trial.

11. GM objects to the Discovery Requests to the extent they purport to require GM to

respond on behalf of other persons, or to provide information that is not in the possession, custody or control of GM.

12. These General Objections are incorporated into GM' specific responses set forth below. Subject to and without waiving their objections, GM responds as follows.

RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that the events set forth in paragraphs 6 through 22 of Plaintiffs' complaint occurred at the NAETC located at 425 Stevenson Street, Flint, MI 48504.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request is not a proper Request for Admission; instead it appears to seek an Answer to Plaintiffs' Complaint through a request for admission, rather than through GM's answer to the complaint. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and was propounded in violation of MCR 2.312(A), which requires that "[e]ach matter of which an admission is requested must be stated separately." Here, Plaintiffs seek to have GM admit no fewer than 17 distinct allegations through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules. Notwithstanding and subject to these objections, GM admits only that its records indicate that an employee was involved in an incident involving a press and storage blocks on September 21, 2018 at GMNA US – North American Engineering and Tooling Center in Flint. The referenced records speak for themselves, and GM otherwise denies this Request to the extent it is inconsistent with the referenced records.

REQUEST FOR ADMISSION NO. 2: Please admit that in the three years before the events set forth in Plaintiffs' complaint there were multiple similar incidents where the storage blocks were ejected from the press causing property damage inside of the NAETC located at 425 Stevenson Street, Flint, MI 48504.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and has been propounded in violation of MCR 2.312(A), which requires that "[e]ach matter of which an admission is requested must be stated separately." Here, Plaintiffs seek admissions concerning numerous unidentified incidents purportedly occurring at different times through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules. GM also objects because the request is vague and ambiguous. The phrase "multiple similar incidents" is undefined, and the Request for Admission is nonsensical in that it requires "similar incidents" in which there was "property damage," yet there are no allegations of property damage here, nor is GM aware of any previous injuries.

REQUEST FOR ADMISSION NO. 3: Please admit that between January 1, 2017 and July 17, 2017 there were regularly scheduled Plant Safety Review Meetings, during which minutes were kept, and Plant Manager Jim Scrimiger attended, along with other members of the plant management team, and the subject of storage blocks being ejected from the presses were discussed between plant management and the United Auto Workers (UAW), Plant Safety Committee Chairman, Thomas Parker for the NAETC located at 425 Stevenson Street, Flint, MI 48504.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, but purported meetings taking place over two years before the alleged incident are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and has been propounded in violation of MCR 2.312(A), which requires that "[e]ach matter of which an admission is requested must be stated separately." Here, Plaintiffs seek binding admissions concerning an unidentified number of meetings, with the majority of the purported participants left unidentified, which occurred at different times, and which different things were discussed – all through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules.

REQUEST FOR ADMISSION NO. 4: Please admit that the press located inside of the NAETC located at 425 Stevenson Street, Flint, MI 48504 that is identified in Plaintiffs' complaint as having been involved with the incident described therein as causing injuries to JOHN DOE had a service call made on it, and was cleared for use on September 21, 2018, before the incident which resulted in the injuries to JOHN DOE.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence, and is overly broad and unduly burdensome. Plaintiffs seek an admission about the service history of the press at issue, but there are no allegations in the Complaint that the press malfunctioned. Instead, Plaintiffs allege that coworkers inadvertently did not remove storage blocks.

REQUEST FOR ADMISSION NO. 5: Please admit that the press located inside of the NAETC located at 425 Stevenson Street, Flint, MI 48504 that is identified in Plaintiffs' complaint as having been involved with the incident described therein as causing injuries to JOHN DOE was moved to the NAETC at some point after the closing of the GM plant in Pontiac, Michigan and was installed by GM employees inside of the NAETC.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law,

proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence, and is overly broad and unduly burdensome. Plaintiffs seek an admission about the installation history of the press at issue, but there are no allegations in the Complaint that the press was installed improperly. Instead, Plaintiffs allege that coworkers inadvertently did not remove storage blocks.

REQUEST FOR ADMISSION NO. 6: Please admit that Jim Scrimiger, the NAETC Plant Manager, insisted on using the safety blocks, who stated, "it was his plant, his dies, and his call," even though Mr. Scrimiger was personally aware that there had been several incidents where compressed storage blocks were expelled/ejected from the press with explosive violent force and velocity, before September 21, 2018, where the use of safety blocks inside die presses resulted in extensive damage to the presses and potential physical injury to employees using them and others who were in the vicinity of those die presses.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents or "potential physical injury" are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition

– must proceed before the Workers Compensation Agency, and not in this Court. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and has been propounded in violation of MCR 2.312(A), which requires that "[e]ach matter of which an admission is requested must be stated separately." Here, the Request seeks an admission that quoted language was stated at an unidentified time to an unidentified person or persons, without any context or explanation of when the identified language was spoken or written, and further seeks an admission regarding the awareness and mental state of a non-party, and otherwise uses undefined descriptive terms such as "explosive violent force and velocity" – all through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules.

REQUEST FOR ADMISSION NO. 7: Please admit that Mr. Scrimiger was personally aware of the dangers posed by the use of the safety blocks as Thomas Parker, the Safety Committee Chairperson, personally advised him on numerous occasions, before September 21, 2018, about the very safety issue, which injured JOHN DOE, the continued use of the safety blocks inside of the die presses, which resulted in compressed safety blocks being ejected out of the presses with explosive force and velocity.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents are not relevant to the application of the intentional tort

exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and has been propounded in violation of MCR 2.312(A), which requires that "[e]ach matter of which an admission is requested must be stated separately." The Request seeks admissions regarding the awareness and mental state of a non-party, and otherwise seeks admissions regarding "various occasions" that a non-party was purportedly "advised" of "dangers," without providing any further details, including the date, time, or specific contents of this purported advice – all through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules. GM also objects because the Request, as written, appears to have apparent typographical errors in it and is nonsensical.

REQUEST FOR ADMISSION NO. 8: Please admit that Thomas Parker, former UAW Chairman of the North American Engineering and Tooling Center, and Head of the Safety Committee for the NAETC, went to a Plant Safety Review Meeting between the months of January 2017 and June 2017 and told Plant Manager Scrimiger, "Something has to be done. We're going to be sitting here talking about killing somebody someday," in reference to the continued use of the storage blocks at the NAETC plant.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to

admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and has been propounded in violation of MCR 2.312(A), which requires that "[e] ach matter of which an admission is requested must be stated separately." The Request seeks admissions regarding exact quoted language purportedly stated by an non-party at an unidentified time, without any context or explanation of when or how the identified language was spoken or written, and further seeks admissions by GM as to that third party's mental state by requiring GM to hypothesize regarding what he purportedly was speaking "in reference to," and further demands admissions as to that non-party's job titles – all through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules.

REQUEST FOR ADMISSION NO. 9: Please admit that Plant Manager Scrimiger ignored Chairman Parker, continued to require the use of the steel storage blocks until September 22, 2018, the day after JOHN DOE was injured.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Admissions are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers

Compensation Act, yet prior incidents are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court. Similarly, information concerning if and when storage blocks were ceased to be used after the alleged incident would be a subsequent remedial measure that also is not relevant to Plaintiffs' claims. GM also objects because the Request is overly broad, unduly burdensome, imprecise, and has been propounded in violation of MCR 2.312(A), which requires that "[e]ach matter of which an admission is requested must be stated separately." The Request seeks an admission regarding another third party being "ignored" without any explanation of what "ignored" is intended to mean in this context, and further seeks additional admission regarding the use of storage blocks on September 22, 2018 – all through one single, compound request for admission. Such an action is not permitted under the Michigan Court Rules.

Dated: July 20, 2020

DYKEMA GOSSETT PLLC

By:_____

Brian T. Smith (P56174)
Robert Hugh Ellis (P72320)
Attorneys for General Motors LLC
400 Renaissance Center
Detroit, MI 48243
(313) 568-6723
rellis@dykema.com

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was efiled with the Court and served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the 20th day of July 2020, by:

☒ U.S. Mail	☐ Hand Delivery
☐ Overnight Courier	☐ Facsimile
☐ Court efiling system	☒ Email

Signature: */s/ Denice A. Broderson*

EXHIBIT 9

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v.

Case No.: 20-114107-NO

Hon. F. Kay Behm

GENERAL MOTORS LLC,
a foreign profit corporation authorized to do business in the State of Michigan,

Defendant.

/

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Gladys Christopherson (P37476)
Zena R. Fares (P81554)
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/

DEFENDANT GENERAL MOTORS LLC'S ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

Defendant General Motors LLC ("GM") by its attorneys submits the following Answers to Plaintiffs' Interrogatories:

GENERAL OBJECTIONS

GM asserts the following General Objections with respect to each of Plaintiffs'

Interrogatories (the "Discovery Requests"). GM's specific objections and responses below are subject to and without waiver of the following General Objections:

1. GM objects generally to the Discovery Requests to the extent they purport to impose burdens greater than and/or inconsistent with those imposed by the Michigan Court Rules. In particular, GM objects to the Discovery Requests to the extent they are improper, harassing, overly broad, unduly burdensome, premature, vague or ambiguous, or seek discovery outside the scope allowed by the Michigan Court Rules.

2. GM objects to the Discovery Requests to the extent they seek information or documents that are equally available to Plaintiffs as they are to GM, are in the public domain, are in the possession, custody, or control of third-parties, or otherwise are not within GM's possession, custody, or control.

3. GM objects to the Discovery Requests to the extent they seek documents or information protected by the attorney-client privilege, work-product doctrine, or other applicable privileges. To the extent any such information inadvertently is produced, such production is not intended as a waiver of any applicable privilege and GM expressly reserves the right to seek the return of such inadvertently-produced information.

4. GM objects to the Discovery Requests to the extent they call for the production of documents or information that contain trade secrets or confidential commercial information in the absence of an appropriate protective order or confidentiality agreement.

5. GM objects to the factual characterizations and legal conclusions in the Discovery Requests. By responding to a request, GM does not admit or accept the factual characterizations or legal conclusions contained in any request; nor does GM concede the relevance or admissibility of any information or documents requested or provided.

6. GM objects to the Discovery Requests as being, in many instances, overly broad and too encompassing to permit literal compliance, which would be unduly burdensome. GM disclaims any obligation to respond to those requests that demand that it produce "all" documents or information relating to any subject.

7. By submitting these responses, GM does not in any way adopt Plaintiffs' purported definitions of words and phrases contained in the Discovery Requests. GM objects to those definitions to the extent that they are inconsistent with (a) the ordinary and customary meaning of such words and phrases, (b) the rules governing the permissible scope of discovery, or (c) the definitions set forth by GM in its responses.

8. Objections and responses are not to be construed as a representation that responsive documents exist, nor are they to be construed as a representation as to the nature and extent of any responsive documents in existence.

9. GM has not yet completed its investigation of the facts related to this litigation. Consequently, all of the responses contained herein are based only on such information and documentation that is presently available to GM. Further investigation, research, and analysis may supply additional facts, add meaning to known facts, and perhaps establish entirely new factual conclusions, all of which may in turn lead to additions or changes to these responses. Accordingly, GM reserves the right to amend these responses, and to offer related evidence, as additional facts are ascertained, analyses are made, research is completed, and contentions become apparent.

10. GM does not concede that any of the information or documents it may produce are or will be admissible evidence at trial or any evidentiary hearing. Furthermore, GM does not waive any objection, whether or not asserted herein, to the use of any such documents at trial.

11. GM objects to the Discovery Requests to the extent they purport to require GM to

respond on behalf of other persons, or to provide information that is not in the possession, custody or control of GM.

12. These General Objections are incorporated into GM' specific Answers set forth below. Subject to and without waiving their objections, GM responds as follows.

INTERROGATORIES

REQUEST NO. 1. Please identify each and every person(s), by name, job duties, current or last known address, work location or station, current, or last known telephone number, and current or last known email address, of each current and/or former employee of GM, who has/have/or had the most knowledge regarding the number, facts, seriousness, and dates of occurrences for any and all incidents before September 21, 2018 when storage blocks were compressed between the top and bottom shoes of the die presses and expelled from between the two shoes causing property damage, personal injury, or near miss personal injuries within the NAETC plant located at 425 Stevenson Street, Flint, MI 48504.

ANSWER: GM objects to this Interrogatory because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Interrogatories are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Interrogatory seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court.

REQUEST NO. 2. Please identify each and every person(s), by name, job duties, current or last known address, work location or station, current, or last known telephone number, and current or last known email address, of each current and/or former employee of GM, who were in attendance at Plant Safety Review Meetings conducted at the NAETC plant located at 425 Stevenson Street, Flint, MI 48504 between January 1, 2017, and July 17, 2017. Please include in your answer the date of each such meeting as you identify the persons requested herein.

ANSWER: GM objects to this Interrogatory because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Interrogatories are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Interrogatory seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court.

REQUEST NO. 3. Please identify each and every person(s), by name, job duties, current or last known address, work location or station, current, or last known telephone number, and current or last known email address, of each current and/or former employee of GM, who investigated on behalf of GM at the NAETC plant located at 425 Stevenson Street, Flint, MI 48504, the incident referred to in the complaint herein which occurred on September 21, 2018 and resulted in the injuries to GM employee JOHN DOE.

ANSWER: GM objects to this Interrogatory because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Interrogatories are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. Notwithstanding and subject to these objections, the referenced incident concerning Patrick Neph on September 21, 2018 was investigated by Daniel Stuk. Pursuant to MCR 2.309(E), answers to this Interrogatory may be found in the documents to be produced by GM in this matter, should the Court allow the matter to proceed in this forum and subject to an agreed-upon protective order, and the burden of deriving the answer is substantially the same for Plaintiffs as it is for GM.

REQUEST NO. 4. Please identify each and every person(s), by name, job duties, current or last known address, work location or station, current, or last known telephone number, and current or last known email address, of each current, former employee, or outside contractor working on behalf of GM, who participated in the installation of the press involved in the incident referred to in the complaint herein, at the NAETC plant located at 425 Stevenson Street, Flint, MI 48504, which occurred on September 21, 2018 and resulted in the injuries to GM employee JOHN DOE.

ANSWER: GM objects to this Interrogatory because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Interrogatories an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence, and is overly broad and unduly burdensome. This Interrogatory seeks information about the installation of the press at issue, but there are no allegations in the Complaint

that the press was installed improperly. Instead, Plaintiffs allege that coworkers inadvertently did not remove storage blocks.

Dated: July 20, 2020

As to objections,

DYKEMA GOSSETT PLLC

By:_____

Brian T. Smith (P56174)
Robert Hugh Ellis (P72320)
Attorneys for General Motors LLC
400 Renaissance Center
Detroit, MI 48243
(313) 568-6723
rellis@dykema.com

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the 20th day of July 2020, by:

☒ U.S. Mail ☐ Hand Delivery
☐ Overnight Courier ☐ Facsimile
☐ Court efiling system ☒ Email

Signature: */s/ Denice A. Broderson*

VERIFICATION

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

SUSAN TYPINSKI, being first duly sworn, deposes and says that she is authorized pursuant to applicable law and rules to verify, on behalf of General Motors LLC, the foregoing:

DEFENDANT GENERAL MOTORS LLC'S ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

and that the same are hereby verified on behalf of General Motors LLC.

Susan Typinski

SUSAN TYPINSKI
Authorized Agent

Sworn to and subscribed before me
this 17th day of **July, 2020.**

Notary Public

KRISTIN LEIRSTEIN
Notary Public, State of Michigan
County of Oakland
My Commission Expires 10-11-2024
Acting in the County of oakland
e-notarize

Re: John Doe and Jane Doe v. General Motors LLC

EXHIBIT 10

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v.

Case No.: 20-114107-NO

Hon. F. Kay Behm

GENERAL MOTORS LLC,
a foreign profit corporation authorized to do business in the State of Michigan,

Defendant.

/

Valdemar L. Washington (P27165)
Gladys Christopherson (P37476)
Zena R. Fares (P81554)
WASHINGTON LEGAL
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/

DEFENDANT GENERAL MOTORS LLC'S ANSWERS TO PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS

Defendant General Motors LLC ("GM") by its attorneys submits the following Responses to Plaintiffs' Requests for Production of Documents:

GENERAL OBJECTIONS

GM asserts the following General Objections with respect to each of Plaintiffs' Requests

for Production (the "Discovery Requests"). GM's specific objections and responses below are subject to and without waiver of the following General Objections:

1. GM objects generally to the Discovery Requests to the extent they purport to impose burdens greater than and/or inconsistent with those imposed by the Michigan Court Rules. In particular, GM objects to the Discovery Requests to the extent they are improper, harassing, overly broad, unduly burdensome, premature, vague or ambiguous, or seek discovery outside the scope allowed by the Michigan Court Rules.

2. GM objects to the Discovery Requests to the extent they seek information or documents that are equally available to Plaintiffs as they are to GM, are in the public domain, are in the possession, custody, or control of third-parties, or otherwise are not within GM's possession, custody, or control.

3. GM objects to the Discovery Requests to the extent they seek documents or information protected by the attorney-client privilege, work-product doctrine, or other applicable privileges. To the extent any such information inadvertently is produced, such production is not intended as a waiver of any applicable privilege and GM expressly reserves the right to seek the return of such inadvertently-produced information.

4. GM objects to the Discovery Requests to the extent they call for the production of documents or information that contain trade secrets or confidential commercial information in the absence of an appropriate protective order or confidentiality agreement.

5. GM objects to the factual characterizations and legal conclusions in the Discovery Requests. By responding to a request, GM does not admit or accept the factual characterizations or legal conclusions contained in any request; nor does GM concede the relevance or admissibility of any information or documents requested or provided.

6. GM objects to the Discovery Requests as being, in many instances, overly broad and too encompassing to permit literal compliance, which would be unduly burdensome. GM disclaims any obligation to respond to those requests that demand that it produce "all" documents or information relating to any subject.

7. By submitting these responses, GM does not in any way adopt Plaintiffs' purported definitions of words and phrases contained in the Discovery Requests. GM objects to those definitions to the extent that they are inconsistent with (a) the ordinary and customary meaning of such words and phrases, (b) the rules governing the permissible scope of discovery, or (c) the definitions set forth by GM in its responses.

8. Objections and responses are not to be construed as a representation that responsive documents exist, nor are they to be construed as a representation as to the nature and extent of any responsive documents in existence.

9. GM has not yet completed its investigation of the facts related to this litigation. Consequently, all of the responses contained herein are based only on such information and documentation that is presently available to GM. Further investigation, research, and analysis may supply additional facts, add meaning to known facts, and perhaps establish entirely new factual conclusions, all of which may in turn lead to additions or changes to these responses. Accordingly, GM reserves the right to amend these responses, and to offer related evidence, as additional facts are ascertained, analyses are made, research is completed, and contentions become apparent.

10. GM does not concede that any of the information or documents it may produce are or will be admissible evidence at trial or any evidentiary hearing. Furthermore, GM does not waive any objection, whether or not asserted herein, to the use of any such documents at trial.

11. GM objects to the Discovery Requests to the extent they purport to require GM to

respond on behalf of other persons, or to provide information that is not in the possession, custody or control of GM.

12. These General Objections are incorporated into GM' specific responses set forth below. Subject to and without waiving their objections, GM responds as follows.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1. Please produce each and every document, including, but not limited to letters, emails, memoranda/memorandum, photographs, video, or other electronic recordings, writings both traditional or electronic, incident/accident reports, prepared by GM personnel, or sub-contractors, related to your answers to interrogatories above.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Requests for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects to this Request because it is overly broad and unduly burdensome. GM also objects to this Request to the extent it seeks information protected by the attorney-client privilege and the work product doctrine. Notwithstanding and subject to these objections, should the Court allow the matter to proceed in this forum and subject to an agreed-upon protective order, GM will search and produce, if located, documents concerning the subject incident.

REQUEST NO. 2. Please produce the GM investigation report related to the incident on September 21, 2018 which injured GM employee JOHN DOE at the NAETC plant located at 425 Stevenson Street, Flint, MI 48504.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Requests for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects to this Request because it is overly broad and unduly burdensome. GM also objects to this Request to the extent it seeks information protected by the attorney-client privilege and the work product doctrine. Notwithstanding and subject to these objections, should the Court allow the matter to proceed in this forum and subject to an agreed-upon protective order, GM will search and produce, if located, the referenced report.

REQUEST NO. 3. Please produce your unredacted copy of the MIOSHA Severe Injury Report for incident #2268 report dated September 24, 2018.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Requests for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects to this Request because it is overly broad and unduly burdensome. GM also objects to this Request to the extent it seeks information protected by the attorney-client privilege and the work product doctrine. Notwithstanding and subject to these objections, should the Court allow the matter to proceed in this forum and subject to an agreed-upon protective order, GM will search and produce, if located, the referenced report.

REQUEST NO. 4. Please produce copies of the minutes of each and every Plant Safety Review Meeting conducted at, or which discussed the use of storage blocks at NAETC plant located at 425 Stevenson Street, Flint, MI 48504 between January 1, 2017, and July 17, 2017.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. Plaintiffs seek to invoke the intentional tort exception to the Workers Compensation Act, yet prior incidents are not relevant to the application of the intentional tort exception. To the extent Plaintiffs attempt to proceed on a negligence theory, then this matter – as noted in GM's pending Motion for Summary Disposition – must proceed before the Workers Compensation Agency, and not in this Court.

REQUEST NO. 5. Please produce copies of any and all documents relating to the Skilled Support Operator program that was in effect on September 21, 2018 at the NAETC plant located at 425 Stevenson Street, Flint, MI 48504.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Request for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to

admissible evidence. The allegations in the Complaint do not concern a Skilled Support Operator program.

REQUEST NO. 6. Please produce copies of any and all documents relating to the service call made on September 21, 2018 before the incident, as described in the complaint herein occurred at the NAETC plant located at 425 Stevenson Street, Flint, MI 48504.

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Requests for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects to this Request because it is overly broad and unduly burdensome. GM also objects to this Request to the extent it seeks information protected by the attorney-client privilege and the work product doctrine. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. There are no allegations in the Complaint that the press malfunctioned. Instead, Plaintiffs allege that coworkers inadvertently did not remove storage blocks. Notwithstanding and subject to these objections, should the Court allow the matter to proceed in this forum and subject to an agreed-upon protective order, GM will search and produce, if located, documents concerning any service of the press on September 21, 2018.

REQUEST NO. 7. Please produce each and every document, including, but not limited to letters, emails, memoranda/memorandum, photographs, video, or other electronic records, writings both traditional or electronic, incident/accident reports, prepared by GM personnel, or

sub-contractors, related to the installation of the press that was involved in the incident set forth in the complaint herein, which resulted in the injuries to JOHN DOE on September 21, 2018

RESPONSE: GM objects to this Request because it is premature, and because the Court lacks subject matter jurisdiction over this dispute. Plaintiffs' Requests for Production are an improper attempt to use the Civil Discovery process to gather information for a matter that must, by law, proceed before the Workers Compensation Agency. GM also objects to this Request because it is overly broad and unduly burdensome. GM also objects to this Request to the extent it seeks information protected by the attorney-client privilege and the work product doctrine. GM also objects because this Request seeks information neither relevant to the claims and defenses in this litigation, nor likely to lead to admissible evidence. This Request seeks information about the installation of the press at issue, but there are no allegations in the Complaint that the press was installed improperly. Instead, Plaintiffs allege that coworkers inadvertently did not remove storage blocks.

Dated: July 20, 2020

As to objections,

DYKEMA GOSSETT PLLC

By:_____

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the 20th day of July 2020, by:

☒ U.S. Mail	☐ Hand Delivery
☐ Overnight Courier	☐ Facsimile
☐ Court efiling system	☒ Email

Signature: */s/ Denice A. Broderson*

DYKEMA GOSSETT•A PROFESSIONAL LIMITED LIABILITY COMPANY•400 RENAISSANCE CENTER•DETROIT, MICHIGAN 48243

EXHIBIT 11

Order

March 18, 2022

163602

RICKIE D. OUSLEY, as Personal Representative of the ESTATE OF OSCAR OUSLEY,
Plaintiff-Appellant,

v

SC: 163602
COA: 351378
Jackson CC: 18-001246-NI

PHELPS TOWING, INC.,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the August 26, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. The Jackson Circuit Court erred by granting the defendant's motion for summary disposition under MCR 2.116(C)(10) before the close of discovery because the driver of the tow truck had not yet been deposed. Therefore, under the facts of this case, there remains a " 'fair likelihood that further discovery will yield support for the nonmoving party's position.' " *Kern v Kern-Koskela*, 320 Mich App 212, 227 (2017), quoting *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34 (2009). We REMAND this case to the Jackson Circuit Court for entry of an order denying the defendant's motion for summary disposition and for further proceedings not inconsistent with this order.

s0315

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 18, 2022

Clerk

EXHIBIT 12

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v.

General Motors, LLC.,
A foreign profit corporation authorized to do business in the State of Michigan

Defendant.

Case No: 20-114107-NO

Honorable F. Kay Beam (P51902)

PLAINTIFFS' MOTION TO COMPEL DEFENDANT, GENERAL MOTORS LLC, TO ANSWER DISCOVERY SERVED WITH SUMMONS AND COMPLAINT, BRIEF IN SUPPORT, AND PROOF OF SERVICE

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NOW COME THE PLAINTIFFS, by and through their attorneys, Washington Legal, and The Law office of Henry Hanflik, P.C. pursuant to MCR 2.302(B)(1) and 2.313(A), and move this court for entry of an order compelling the Defendant, General Motors, LLC, to properly respond or produce all of the items requested in the Interrogatories, Request for Production of

Documents, and Request for Admissions that were served on it with the Summons and Complaint in this case for the following reasons:

1. On April 2, 2020, Plaintiff served defendant with a Summons and Complaint, Interrogatories, Requests for the Production of Documents and Requests for Admissions.
2. Due to the Covid-19 pandemic, the parties agreed that Defendant was entitled to an extension of time to answer or otherwise respond to all of these pleadings.
3. Defendant was required to answer or otherwise respond to the Complaint by June 30, 2020. Defendant chose to not answer the complaint and filed a Motion for Summary Disposition, alleging this court lacks subject matter jurisdiction in this case.
4. Defendant filed an inaccurate and incomplete response to the discovery requests on July 20, 2020, primarily alleging this court lacks subject matter jurisdiction, the documents can be obtained in the public domain
5. Defendant simply stated boiler-plate language that does not apply to the facts of this case in their discovery responses.
6. Pursuant to Local Court Rule 119 Concurrence was requested for the Relief sought by this motion, however, an automatic reply was generated indicating that opposing counsel was out of the office with limited access to email, and would return on Monday July 27, 2020.

WHEREFORE, the Plaintiffs respectfully move this Court to enter an order compelling defendant to produce all of the documents and other information requested in the Request for Production, Answer the Interrogatories propounded, and Respond to the Request for Admissions within 14 days of the date of the order and to award the Plaintiffs' their reasonable attorney fees and costs under MCR 2.313(A)(5) for having to bring the instant motion.

Date: July 24, 2020

Respectfully Submitted,

WASHINGTON LEGAL

By: _____

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BRIEF IN SUPPORT OF MOTION TO COMPEL ANSWERS TO DISCOVERY

INTRODUCTION

Plaintiffs served very limited Interrogatories, Request for Production of Documents, and Requests for Admissions on GM contemporaneously with the filing of their Complaint. The filing date was April 2, 2020. Due to the Covid-19 crisis additional time to respond to both the Complaint and the Discovery was agreed upon between the parties. GM filed its Motion to Dismiss on July 1, 2020 and its Responses to the Discovery on July 20, 2020 in line with the parties' agreement. Plaintiffs have provided three (3) pieces of admissible evidence in support of their Response to GM's Motion to Dismiss, however, GM has refused to Answer/Respond to Plaintiffs' Discovery requests under a general objection that this Court lacks subject matter jurisdiction. Plaintiffs have filed a Motion to Compel said Discover to be heard on August 3, 2020.

STATEMENT OF FACTS

Plaintiffs re-allege and incorporate by reference paragraphs 1 – 6 above set forth in the above motion as the factual basis for this brief in support of their Motion to Compel GM to Answer the limited Discovery served upon it on April 2, 2020.

ARGUMENT

In each of the answers to the Plaintiff's discovery requests, General Motors has made the same faulty claim – this court lacks subject matter jurisdiction. While they reference the clear statutory exception to the Worker's Compensation remedy, they claim past knowledge and behavior of the employer through their employees is irrelevant and cannot establish an exception. Such a position is at odds with well-established Michigan case law, as is evident from the following quotes:

> On the other hand, "[a] continuously operative dangerous condition may form the basis of a claim under the intentional tort exception only if the employer *knows* the condition will cause an injury and refrains from

> informing the employee about it." *Alexander v Demmer Corp.*, 468 Mich 896, 896–897; 660 NW2d 67 (2003).

Bagby v Detroit Edison Co, 865 NW2d at 62.

> There are two ways for a plaintiff to show that an employer specifically intended an injury. The plaintiff can provide direct evidence that the employer "had the particular purpose of inflicting an injury upon his employee." *Id.* at 172, 551 NW2d 132. In the alternative, an employer's intent can be proven by circumstantial evidence, i.e., that the employer "has actual knowledge that an injury is certain to occur, yet disregards that knowledge." *Id.* at 173, 180, 551 NW2d 132.

Bagby v Detroit Edison Co., 865 NW2d 59, 61-62 (2014).

Plaintiff has plead facts that establish "...In the alternative, an employer's intent can be proven by circumstantial evidence, i.e., that the employer "has actual knowledge that an injury is certain to occur, yet disregards that knowledge." Thus, the discovery requests directed to Defendant are appropriate.

INTERROGATORIES

MCR 2.309(A)(2) provides that interrogatories may be served on a defendant "with or after the service of the summons and complaint on that defendant." Plaintiff chose to serve the defendant interrogatories with the summons and complaint.

In these interrogatories, Plaintiff asked FOUR (4) questions that requested information that is in the sole possession of Defendant. Plaintiff asked for the names, job duties and contact information of the General Motors employees who knew about the die press and incident detailed in the complaint.

MCR 2.309 provides in pertinent part:

> (B)(1) Each interrogatory must be answered separately and fully in writing under oath. The answers must include such information as is available to the party served or that the party could obtain from his or her employees, agents, representatives, sureties, or indemnitors. If the answering party objects to an interrogatory, the reasons for the objection must be stated in lieu of an answer.

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(D) (1) An interrogatory may relate to matters that can be inquired into under MCR 2.302(B).

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

MCR 302(B) provides:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Clearly, asking the four questions as plaintiffs did in this case complies with these court rules. Asking about the facts surrounding this incident and the history of accidents within this plant involving die presses and the use of metal storage blocks in them "is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery...."

MCR 2.309(C) permits a party to ask the court to compel answers. It provides:

The party submitting the interrogatories may move for an order under MCR 2.313(A) with respect to an objection to or other failure to answer an interrogatory.

Defendant General Motors should be compelled to answer these four questions.

REQUEST FOR THE PRODUCTION OF DOCUMENTS

MCR 2.310 permits any party to request the production of documents believed to be in the possession of another party. Subsection (C)(1) permits the plaintiff to serve these "...on the

defendant with or after the service of the summons and complaint on that defendant." Plaintiffs chose to serve their requests for production of documents with the summons and complaint in this case.

Plaintiffs sought production of any and all documents related to:

The installation and servicing of the die press involved in this case;

The Safety Committee minutes where the dangerous condition of the use of metal storage blocks was discussed;

The notes of discussions about potential and actual injuries/damage to people and property by the ejection of the metal storage blocks;

The reports/documents that were generated regarding the incident referenced in the complaint;

The training involved for employees, including Plaintiff, A SKILLED SUPPORT OPERATOR, (SSO) who operated or assisted with the operation of the die press involved in this case, and;

Any document related to GM's answers to the Requests for Admissions.

Regarding an answer, MCR 2.310(C)(2) states:

> ... With respect to each item or category, the response must state that inspection and related activities will be permitted as requested or that the request is objected to, in which event the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified...

Defendant claims it would be burdensome or irrelevant to have to produce these documents. Such a response is clearly evasive and non-compliant as Plaintiffs have clearly plead facts that establish an intentional tort. The information requested is directly relevant as the request for production seeks documentation of events that:

Lead up to the incident in this case;

Concern the actual incident involved in this case;

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> Relate to or document the investigation into the incident involved in this case; and, Identify the training provided to the employees on the use of the machine involved in this case.

The information requested to be produced is relevant and discoverable. Defendant has not sought a protective order under MCR 2.302(C), but states it may in the future. However, it fails to identify the basis for seeking one.

MCR 2.310(3) provides:

> The party submitting the request may move for an order under MCR 2.313(A) with respect to an objection to or a failure to respond to the request or a part of it, or failure to permit inspection as requested. . . . The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

Here, concurrence was requested via email on Friday July 24, 2020 at 1:28 pm. An automatic response was generated advising that Attorney Ellis was out of the office with limited access to email and that he would return to the office on Monday July 27, 2020.

REQUESTS FOR ADMISSIONS

MCR 2.312(A) permits a party to serve Requests for Admissions on another party "within the time for completion of discovery." Once served, the responding party must comply with the applicable court rule.

MCR 2.312(B)(2) and (4) provide:

> (2) The answer must **specifically** deny the matter or **state in detail** the reasons why the answering party cannot truthfully admit or deny it. **A denial must fairly meet the substance of the request**, and when good faith requires that a party qualify an answer or deny only part of the matter of which an admission is requested, the party must specify the parts that are admitted and denied.
>
> (4) If an objection is made, the reasons must be stated. A party who considers that a matter of which an admission has been requested presents a

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> genuine issue for trial may not, on that ground alone, object to the request. The party may, subject to the provisions of MCR 2.313(C), deny the matter or **state reasons** why he or she cannot admit or deny it. (emphasis added)

Defendant has technically submitted answers or objections to the Requests for Admissions, however, there are no specific reasons – related to this case – and they fail to "fairly meet the substance of the request."

Plaintiff has asked specific, pointed questions seeking to obtain information in the sole possession of Defendant. These requests are the proper subject of discovery in this case, the answers will reveal the names of additional witnesses and lead to additional discoverable evidence.

Defendant incorrectly asserts that prior acts and knowledge of its employees is irrelevant to this case. As quoted above, prior knowledge, action or inaction on the part of the employer or its employees is a valid way of demonstrating an exception to the exclusive workers' compensation remedy.

In one answer, defendant admits an incident occurred involving an employee on the date in the complaint, at the location in the complaint and then says "the reports speaks for themselves." Yet, it refuses to provide the report. Such gamesmanship is not contemplated by the Michigan Court Rules, nor should it be countenanced by this Court.

Clearly, asking about prior work incidents and for the notes that were taken at meetings that discussed these incidents, and who was present and their position in the meeting is permissible, relevant and discoverable.

MCR 2.312(C) provides:

> The party who has requested the admission may move to determine the sufficiency of the answer or objection. The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not

comply with the requirements of the rule, it may order either that the matter is admitted, or that an amended answer be served.

CONCLUSION

Plaintiffs have plead facts which establish this case as one which should proceed in Circuit Court, falling within the intentional tort exception to MCL § 413.131(1). The modest Discovery served upon GM with the summons and complaint seeks relevant and discoverable information and ought be compelled.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully move this Court to enter an order compelling defendant to produce all of the documents and other information requested in the Request for Production, Answer the Interrogatories propounded, and Respond to the Request for Admissions within 14 days of the date of the order and to award the Plaintiffs' their reasonable attorney fees and costs under MCR 2.313(A)(5) for having to bring the instant motion.

Date: July 24, 2020

Respectfully Submitted,

WASHINGTON LEGAL

By: _____

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PROOF OF SERVICE

Valdemar L. Washington states that on Friday July 24, 2020, he served a copy of the foregoing document upon all counsel of record electronically.

Valdemar L. Washington

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

JOHN DOE, and JANE DOE,

Plaintiffs,

v.

General Motors, LLC.,
A foreign profit corporation authorized to do business in the State of Michigan

Defendant.

Case No: 20-114107-NO

Honorable F. Kay Beam (P51902)

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL GENERAL MOTORS, LLC TO ANSWER DISCOVERY REQUESTS WITHIN 14 DAYS OF THIS ORDER

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At a Session of Said Court
Held in the Courthouse
In the City of Flint
On the 3rd Day of August, 2020.

PRESENT: HONORABLE F. KAYE BEHM, CIRCUIT COURT JUDGE

This matter having come on to be heard, by Plaintiffs' Motion TO COMPEL GENERAL MOTORS, LLC TO ANSWER DISCOVERY REQUESTS, Defendant having Responded, , the court having read the same, conducted oral argument, and being duly advised in the premises;

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiffs Motion TO COMPEL GENERAL MOTORS, LLC, TO RESPOND TO DISCOVERY REQUESTS be and the same is hereby **GRANTED** for the reasons stated on the record.

IT IS FURTHER ORDERED AND ADJUDGED that GENERAL MOTORS, LLC, shall have fourteen (14) days from the date of entry of this order to comply.

____ Attorney fees in the amount of $_____, are granted. Defendant shall pay these to plaintiff within the fourteen (14) day time period available to answer the discovery requests.

____ Attorney fees are denied.

This is ***not*** a final Order and does not dispose of the last issue in this case.

IT IS SO ORDERED

F. KAYE BEHM,
CIRCUIT COURT JUDGE
Dated: August 3, 2020

Prepared By:

WASHINGTON LEGAL

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Register of Action

Enter New Search | Nxt Action

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CLOSED     DMO              CASE REGISTER OF ACTIONS         10/12/20  PAGE   1
20-114107-NO JUDGE BEHM          FILE 03/27/20  ADJ DT 10/02/20 CLOSE  10/02/20
             GENESEE COUNTY                   JDF            SCAO:SEC C LINE 03

 P 001 DOE,JOHN,                      VS D 001 GENERAL MOTORS,LLC,
                                           RES-CSC LAWYERS INCORP SERVICE,,
                                               601 ABBOT RD
                                               EAST LANSING MI 48823
       ATY:WASHINGTON,VALD                     ATY:ELLIS,ROBERT HU
       P-27165     810-407-6868                P-72320     313-568-6723
                                               DISPOSITION 10/02/20  SMD  MAJ
                                               SERVICE/ANS 04/02/20  ROS

 P 002 DOE,JANE,
       ATY:WASHINGTON,VALD
       P-27165     810-407-6868

                        Actions, Judgments, Case Notes
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 Num   Date   Judge      Chg/Pty  Event Description/Comments
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   1 03/27/20 BEHM                SUMMONS AND COMPLAINT FILED
                                  RECEIPT#  00485918  AMT     $260.00
   2                       P 001  JURY DEMAND FILED
                                  COMPLAINT & DEMAND FOR TRIAL
                                  BY JURY FILED
   3                       P 002  JURY DEMAND FILED
   4                              PTLFS' FIRST REQUESTS FOR
                                  ADMISSIONS, TO DEFT GENERAL
                                  MOTORS, DATED 3/26/20 FILED
   5 04/02/20              D 001  RETURN OF SERVICE
                                  FILED ON 4-13-20 (CERTIFIED/
                                  RETURN RECEIPT ATTACHED)
   6 04/22/20                     STIPULATION AGREEING TO REFER
                                  TO PLAINTIFFS AS "JOHN DOE AND
                                  JANE DOE" IN ALL PLEADINGS
                                  FILED
   7 04/27/20                     ORDER ALLOWING THE PARTIES TO
                                  REFER TO PLAINTIFFS AS "JOHN
                                  DOE AND JANE DOE" IN ALL
                                  PLEADINGS FILED
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8	06/30/20		MOTION FEE PAID RECEIPT# 00487538 AMT $20.00
9		D 001	ATTORNEY: P-72320 ELLIS SET NEXT DATE FOR: 08/03/20 9:30 AM SUMMARY DISPOSITION MOTION D
			NOTICE OF HEARING FILED
10			DEFENDANT GENERAL MOTORS LLC'S MOTION FOR SUMMARY DISPOSITION FILED
11			BRIEF IN SUPPORT OF DEFENDANT GENERAL MOTORS LLC'S MOTION FOR SUMMARY DISPOSITION FILED
12	07/20/20		DEFENDANT GENERAL MOTORS LLC'S RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSIONS & PROOF OF SERVICE FILED
14	07/24/20		SET NEXT DATE FOR: 08/03/20 8:30 AM MOTION HEARING P'S-COMPEL DEFT TO ANSWER DISCOVERY NOTICE OF HEARING AND PROOF OF SERVICE FILED
13	07/27/20		MOTION FEE PAID RECEIPT# 00488148 AMT $20.00
15			NOTICE OF HEARING AND PROOF OF SERVICE FILED (SET FOR 8-3-20 @ 8:30. NOTE THIS WAS PREVIOUSLY FILED ON 7-24-20)
16			PLAINTIFFS' MOTION TO COMPEL DEFENDANT, GENERAL MOTORS LLC, TO ANSWER DISCOVERY SERVED WITH SUMMONS AND COMPLAINT, BRIEF IN SUPPORT AND PROOF OF SERVICE FILED
17			PLAINTIFFS' RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANT GENERAL MOTORS MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4), MCR 2.116 (C)(7), MCR 2.116 (C)(8), AND PROOF OF SERVICE FILED
18	07/29/20		GENERAL MOTORS LLC'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL & PROOF OF SERVICE FILED
19			REPLY IN SUPPORT OF DEFENDANT GENERAL MOTORS LLC'S MOTION FOR SUMMARY DISPOSITION & PROOF OF SERVICE FILED
20	08/03/20		MOTION HEARING ATTYS VAL WASHINGTON & ROBERT ELLIS PRESENT VIA ZOOM *COVID 19*. PLNTF'S MOTION TO COMPEL DEFT TO ANSWER DISCOVERY & DEFT'S MOTION FOR SUMMARY DISPOSITION HEARD. ATTY KURT BROWN APPEARED VIA

			ZOOM WHILE MOTION BEING HEARD. COURT TO REVIEW JURISDICTIONAL ISSUE BEFORE MOTIONS ARE DECIDED UPON. COURT REQUESTED ADD'L INFORMATION BE PROVIDED BY 8-24-20.
21	08/05/20		TRANSCRIPT OF PROCEEDINGS FILED PLAINTIFF'S MOTION TO COMPEL DEFENDANT, GENERAL MOTORS LLC, TO ANSWER DISCOVERY SERVED WITH SUMMONS AND COMPLAINT & DEFENDANT GENERAL MOTORS LLC'S MOTION FOR SUMMARY DISPOSITION 8-3-20
22			REPORTER/RECORDER CERTIFICATE OF ORDERING TRANSCRIPT ON APPEAL FILED
23	08/24/20		PLTFS' SUPPLEMENTAL BRIEF IN RESPONSE TO DISMISS AND PLTFS' MOTION TO COMPEL DEFT, GENERAL MOTORS LLC, TO ANSWER DISCOVERY SERVED WITH SUMMONS AND COMPLAINT AND PROOF OF SERVICE OF THE SAME FILED
24			DEFT GENERAL MOTORS LLC'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF GENERAL MOTORS LLC'S MOTION FOR SUMMARY DISPOSITION AND PROOF OF SERVICE OF THE SAME UPON ATTY'S OF RECORD ON 8/24/20 FILED
25	10/02/20	D 001	MISCELLANEOUS ACTION BY JUDGE SUMMARY DISPOSITION
26			ORDER OF DISMISSAL ORDER GRANTING DEFENDANT GENERAL MOTORS LLC'S MOTION FOR SUMMARY DISPOSITION FILED

..... END OF SUMMARY .....

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