STATE OF MICHIGAN

COURT OF APPEALS

JAMES W. DUBAY,

Plaintiff-Appellant,

v

OSCODA PLASTICS, INC.,

Defendant-Appellee.

UNPUBLISHED
March 19, 1999

No. 205791
Iosco Circuit Court
LC No. 96-000249 NO

Before: O'Connell, P.J., and Jansen and Collins, JJ.

PER CURIAM.

Plaintiff appeals of right from the trial court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff operated a press which had been altered to make a product for which it was not designed. He fed rolls of hot plastic into the machine. Plaintiff's right glove became stuck to the plastic, and he was unable to extract his hand. His hand was crushed, and he lost all four fingers.

Plaintiff filed suit pursuant to MCL 418.131(1); MSA 17.237(131)(1), the intentional tort exception to the Worker's Disability Compensation Act, MCL 418.101 *et seq*.; MSA 17.237(101) *et seq*., alleging that defendant had altered the press and thus had actual knowledge that an injury was certain to occur. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and/or MCR 2.116(C)(10), arguing that no evidence showed that it had actual knowledge that any specific injury would occur. The trial court granted the motion, finding that the facts alleged did not "describe the degree of culpability that would give rise to an actual intent to injure or [create] a situation that would certainly result in an injury."

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

MCL 418.131(1); MSA 17.237(131)(1) provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

To avoid the application of MCL 418.131(1), there must be a deliberate act by the employer and a specific intent that there be an injury. A deliberate act may be one of omission or commission. Specific intent exists if the employer has a purpose to bring about certain consequences. *Travis v Dries & Krump Mfg Co*, 453 Mich 149, 169, 171; 551 NW2d 132 (1996). Specific intent is established if an employer had actual knowledge that an injury was certain to occur, and willfully disregarded that knowledge. An injury is certain to occur if there is no doubt that it will occur. An employer willfully disregards its knowledge of the danger when it disregards actual knowledge that an injury is certain to occur. *Id.* at 174, 179. Actual knowledge is required; constructive, implied, or imputed knowledge is insufficient. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 224; 555 NW2d 217 (1996).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. Even assuming that defendant had knowledge, prior to plaintiff's accident, that other employees had gotten gloves stuck on the rolls of plastic, such knowledge would not trigger the application of MCL 418.131(1). The instant case is distinguishable from a case such as *Golec v Metal Exchange Corp*, 208 Mich App 380; 528 NW2d 756 (1996), aff'd sub nom *Travis*, *supra*. In that case, the defendant required the plaintiff to continue working under the same conditions even after an explosion had occurred and the plaintiff had been splashed with molten metal. Our Supreme Court held that if the facts as alleged by the plaintiff were proven at trial, they would support a finding that the defendant had the required intent to injure. *Travis, supra* at 184. In the instant case, no previous accident involving plaintiff had occurred. The application of MCL 418.131(1) is not triggered simply because an employer has knowledge that an injury is likely to occur at some point. *Oaks v Twin City Foods, Inc*, 198 Mich App 296, 297; 497 NW2d 196 (1992). The laws of probability or the prior occurrence of a similar event does not constitute actual knowledge that an injury is certain to occur. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149; 565 NW2d 868 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Jeffrey G. Collins