STATE OF MICHIGAN

COURT OF APPEALS

LINDA PRICE,

Plaintiff-Appellant,

v

VLASIC FOODS, INC.,

Defendant-Appellee,

and

MAC EQUIPMENT, INC., f/k/a SYSTEMS ENGINEERING AND MANUFACTURING,

Defendant.

UNPUBLISHED
July 16, 1999

No. 209404
Saginaw Circuit Court
LC No. 96-010285 NO

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court held that plaintiff, an employee whose arm was amputated by a cabbage processing machine, failed to present facts sufficient to implicate the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131; MSA 17.237(131). We affirm.

The WDCA provides, in relevant part:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for 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 the injury. *An employer shall*

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

> *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. [MCL 418(131)(1); MSA 17.237(131)(1). Emphasis added.]

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173; 551 NW2d 132 (1996), our Supreme Court explained that the "actual knowledge" requirement is not satisfied by a showing of constructive, implied, or imputed knowledge, or an allegation that the employer should have known, or had reason to believe, that injury was certain to occur. Rather, the injured employee 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." *Id*. at 174. The Court explained further that an injury is "certain to occur" when "no doubt exists with regard to whether it will occur," and "the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury." *Id*.

Here, viewing the evidence in a light most favorable to plaintiff, she has demonstrated only that, in the eyes of her employer, injury was a mere possibility. Deposition testimony established that the plant manager, Al Ochadolus, thought the rotary blade in the machine moved too slowly to cause harm. Furthermore, defendant's safety inspector, Colleen Davin, testified that she told Ochadolus that an interlock device was needed, but she did not testify that she warned him that failure to heed her advice would result in certain injury. Plaintiff testified that she had never heard of anyone being injured using the machine prior to her accident, and she had never heard anyone state their belief that the machine was unsafe. Plaintiff further testified that, while employed at defendant's plant, she never believed her job duties were dangerous, and she never complained to her supervisors about unsafe working conditions. Although the evidence demonstrated that defendant might have been aware of a potential danger, no evidence was presented that, at the time of plaintiff's injury, defendant was presently aware of a malfunction that would necessitate the exposure of an employee to the dangerous condition. No evidence demonstrated that Ochadolus knew that the machine was clogged, that it ever clogged, or that employees were actually placing their hands into the machine in an area near the rotary blades. Accordingly, because plaintiff has failed to demonstrate that a genuine issue of material fact exists concerning defendant's knowledge and intent under the intentional tort exception of the WDCA, *id.*; *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 151; 565 NW2d 868 (1997), summary disposition was properly granted in favor of defendant.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald