STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE BEDELL, Plaintiff-Appellant,	UNPUBLISHED September 5, 2000
v	No. 212519 Macomb Circuit Court
CHRYSLER CORPORATION, Defendant-Appellee.	LC No. 97-000707-NO

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10), and denying plaintiff's motion for summary disposition, in this action involving the applicability of the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*.; MSA 17.237(101) *et seq*. We affirm.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Section 131(1) of the WDCA, 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.

The primary element at issue in this case is the requirement that the employer have "actual knowledge that an injury was certain to occur." In *Palazzola v Karmazin Products Corp*, 223 Mich App 141; 565 NW2d 868 (1997), this Court discussed this element as follows:

(1) "Actual Knowledge"—This element of proof precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established by showing 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 149, quoting *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 174; 551 NW2d 132 (1996).]

After reviewing the evidence submitted by the parties, we conclude that the trial court correctly found that plaintiff was unable to show that defendant had actual knowledge of the dangerous condition of the roll coater before plaintiff was injured. In particular, none of the witnesses testified that they were aware of the width of the gap on the machine before plaintiff's injury. At best, the testimony might be construed to show that defendant should have known or had some reason to believe that an injury would follow. Such level of knowledge, however, is not sufficient. *Id*. at 173. Therefore, we conclude that the grant of summary disposition to defendant was proper.

We also disagree with plaintiff that summary disposition was improper because defendant failed to produce evidence within its control, thus entitling plaintiff to a presumption that such evidence was adverse to defendant. This issue involves plaintiff's request for evidence regarding when modifications were made to the guarding on the roll coaters and the reasons for the modifications. Defendant did not produce the requested evidence, claiming that it did not exist.

Where a party fails to produce evidence within its control, a presumption arises that, if the evidence were produced, it would be adverse to that party's interest. *Barringer v Arnold*, 358 Mich 594, 601; 101 NW2d 365 (1960); *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 519-520; 592 NW2d 786 (1999).

Here, the trial court ruled that plaintiff was not entitled to a presumption under this rule because there was no indication that defendant possessed evidence that it failed to produce. According to the deposition testimony, records were not kept with regard to machine repairs and none of the deponents were aware of any modifications to the roll coaters. Plaintiff has not offered any evidence suggesting that other information exists that was not produced. Under these

circumstances, we hold that the trial court did not err in concluding that plaintiff was not entitled to a presumption that defendant possessed evidence adverse to its interests.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins