STATE OF MICHIGAN

COURT OF APPEALS

JUANITA MARTINEZ,

Plaintiff-Appellant,

v

L & G INDUSTRIAL PRODUCTS, INC., and SHIRLEY THOMAS,

Defendants-Appellees.

UNPUBLISHED
June 4, 2002

No. 228818
Kent Circuit Court
LC No. 00-000041-NO

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed suit alleging that she was employed at defendant L & G when defendant Thomas, the plant manager, verbally abused and assaulted her. Plaintiff alleged that Thomas's actions constituted an intentional tort within the meaning of § 131(1), MCL 418.131(1), of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the intentional tort exception was inapplicable. Defendants asserted that no evidence established that L & G ordered or authorized the assault, that Thomas was the alter ego of L & G, or that Thomas specifically intended to injure plaintiff. The trial court granted defendants' motion, concluding both that plaintiff's claims against L & G were barred by the intentional tort exception, and that because plaintiff sought damages for injuries for which compensation was payable only under the WDCA, she could not maintain an action against a co-employee. MCL 418.827(1); *Beauchamp v Dow Chemical Co*, 427 Mich 1, 15; 398 NW2d 882 (1986).

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) 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 § 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 Dreis & 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. In order to show that an injury was certain to occur, a plaintiff must establish that the employer subjected him to a continuously operative dangerous condition that it knew would cause an injury. The evidence must show that the employer refrained from warning the plaintiff about the dangerous condition. *Id*. at 178. 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 481 (1996). The intentional tort exception applies to claims against both employers and co-employees. *Travis*, *supra* at 190-191; *Graham v Ford*, 237 Mich App 670, 673; 604 NW2d 713 (1999).

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition. We agree in regard to plaintiff's claim against Thomas, but disagree in regard to plaintiff's claim against L & G. Plaintiff and Thomas engaged in a physical altercation in the workplace. No evidence established that L & G acted with the specific intent to injure plaintiff, or that L & G had actual knowledge that an injury was certain to occur, and willfully disregarded that knowledge. *Travis*, *supra* at 174, 179. Thomas's knowledge cannot automatically be imputed to L & G. *McNees*, *supra* at 224. The intentional tort exception applied to plaintiff's claims against L & G. MCL 418.131(1); *Travis*, *supra*.

However, the trial court erroneously concluded that because of the intentional tort exception applied to the claims against L & G, suit could not be maintained against Thomas. The intentional tort exception applies to the intentional torts of a co-employee. *Travis*, *supra* at 190-191; *Graham*, *supra*. The allegations in plaintiff's complaint and affidavit, viewed in a light most favorable to plaintiff, created an issue of fact as to whether Thomas committed the intentional torts of assault and battery. *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998). Therefore, plaintiff was entitled to proceed in circuit court with her claims against Thomas. *Travis*, *supra*; *Graham*, *supra*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff