STATE OF MICHIGAN

COURT OF APPEALS

DEQUILLA LACKEY,

Plaintiff-Appellant,

v

MICHIGAN CARTON INC., d/b/a/ MICHIGAN PAPERBOARD COMPANY,

Defendant-Appellee,

and

CLAWSON BLACK,

Defendant.

UNPUBLISHED
April 17, 2008

No. 277898
Calhoun Circuit Court
LC No. 05-001466-NO

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant.[1] We affirm.

In the course of his employment with defendant, plaintiff's hand was caught in some machinery and was amputated at the wrist. Plaintiff filed suit, asserting the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* Arguing that the evidence could not support the theory that this case involved an intentional tort, defendant sought summary disposition. The trial court agreed and granted the motion.

[1] Defendant Clawson Black and plaintiff stipulated to dismiss this case as between them, having settled. Because Michigan Paperboard is thus the only defendant participating in this appeal, for purposes of this opinion the singular term "defendant" will apply exclusively to it.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

MCL 418.131(1) provides, in pertinent part, 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.

Plaintiff, in his brief on appeal, describes the event resulting in his injury as follows:

> On February 28, 2005, while operating a paper machine on a "cat walk" high platform with loose fitting gloves, a probational period employee of [defendant], [plaintiff's] glove became caught and pulled into the rollers of the paper machine causing an amputation [of] his left hand. The paper machine malfunctioned, as it has consistently and expectedly performed in the past, and the paper became backed up, prompting the operator to cut the tail. [Plaintiff] was cutting the tail, as instructed, when his glove became caught in between the roller pinch point.

Plaintiff additionally asserts that defendant ordered him to operate the machine "with knowledge of its prior malfunctions, with loose fitting gloves, with awareness of [the] machine's hazardous open unguarded pinch and nip points, with notice of [plaintiff's] lack of applicable experience, and without hands on supervisor pursuant to its policy," and asserts that evidence of such facts showed defendant's actual knowledge that a certain injury would occur and its active disregard of said knowledge. However, plaintiff's factual assertions, taken at face value, better indicate negligence than an intentional tort.

In support of his position, plaintiff relies on *Ford v Pivot Mfg Co*, 215 Mich App 310; 544 NW2d 770 (1996), vacated 219 Mich App 608, 610; 558 NW2d 1 (1996)[2], which involved

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[2] Plaintiff calls this case unpublished, and cites it as "Ford v. Picot, Mfg. Co., (Michigan Court of Appeals, No. 23056, 1996)." However, the five-digit docket number given corresponds to a case with no similarity in party names that was decided and closed in 1976. Judging from the year given, plus similar names, facts, and key wording as reported by plaintiff, we believe (continued…)

an employee whose glove was caught in a punch press that had a history of malfunctioning. The majority concluded that awareness of such a potential hazard could satisfy the statutory requirements for avoiding the exclusive-remedy provision of the WDCA. *Id.* at 314. However, the dissenting judge opined that the intentional tort exception requires "more than mere negligence on the part of the employer", and that a plaintiff "must establish that he was subject to unavoidable danger of injury that the exercise of due care could not prevent." *Id.* at 315-316 (O'Connell, J, dissenting). The dissenting judge concluded that, "the trial court properly ruled that plaintiff's allegations fail to establish an intentional tort because they do not establish that defendant had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge." *Id.* at 317.

Subsequently, a motion for rehearing was granted, and, citing new case law from our Supreme Court, this Court set aside the earlier decision "for the reasons stated in the dissenting opinion . . . ." *Ford v Pivot Mfg Co (On Rehearing)*, 219 Mich App 608, 610; 558 NW2d 1 (1996). Accordingly, bearing on the instant case is the *dissent*, not the original majority opinion upon which plaintiff relies.

At his deposition, plaintiff testified that he had complained about his gloves being too large, and of his own lack of experience, but that supervisory personnel, one of whom seemed to dislike him, insisted that he tend to the machine without apparent concern. Plaintiff additionally testified that he was sent to perform a task he had performed on a different machine, but not on the one that injured him, without supervision.

While this testimony arguably would support a possible negligence claim against the defendant, it fails to show that, through a "deliberate act" defendant "specifically intended" to injure plaintiff. MCL 418.131(1). The trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette

(…continued)

plaintiff is referring to the published case, *Ford v Pivot Mfg Co*, 215 Mich App 310; 544 NW2d 770 (1996), vacated 219 Mich App 608, 610; 558 NW2d 1 (1996).