STATE OF MICHIGAN

COURT OF APPEALS

JOLLIE DIXON, Personal Representative of the Estate of LOLITA DIXON, Deceased,

Plaintiff-Appellant,

v

T.T. MANAGEMENT COMPANY, a Michigan corporation, and TACO BELL CORPORATION, a California corporation, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
June 24, 1997

No. 192133
Wayne Circuit Court
LC No. 94-419696-NI

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants T.T. Management Company ("TTM") and Taco Bell Corporation. This action arose when plaintiff's decedent was shot and killed by a robber while she was working at a Taco Bell restaurant franchised to TTM. Plaintiff filed the instant suit alleging intentional tort, negligence, and contract theories of liability essentially centered around the fact that defendants refused to install a plexiglass barrier over the service counter to prevent robbers from getting behind the counter. We affirm.

Unless plaintiff can establish the existence of an intentional tort, worker's compensation benefits are her exclusive remedy against her decedent's employer. See MCL 418.131; MSA 17.237(131). Plaintiff first argues that she presented evidence sufficient to create a genuine issue of fact regarding whether TTM's conduct amounted to an intentional tort. We disagree. When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff argues that agents of TTM had actual knowledge that decedent's injuries were certain to occur because the restaurant was located in an area with a higher than average crime rate, and because there had been several robberies of the restaurant prior to the instant robbery. MCL 418.131(1); MSA 17.237(131)(1) provides that 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. According to the statute, 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. In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 188; 551 NW2d 132 (1996), our Supreme Court recently interpreted the meaning of the phrases, "actual knowledge," "certain to occur," and "willfully disregarded" as used in the WDCA exclusive remedy provision. In discussing the term "injury certain to occur," the Court explained:

> The legislative history requires us to interpret "certain to occur" as setting forth an extremely high standard. When an injury is "certain" to occur, no doubt exists with regard to whether it will occur. Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. Consequently, scientific proof that, for example, one out of ten persons will be injured if exposed to a particular risk, is insufficient to prove certainty. Along similar lines, just because something has never happened before is not proof that it is not certain to occur. *Travis, supra*, p 174.

On this record, it cannot be said that decedent's injury was certain to occur. It does not necessarily follow from the fact that an armed robbery occurred, that another armed robbery is certain to occur. Although the statistics may have strongly suggested that another armed robbery would occur at this Taco Bell restaurant, the human element prevents us from concluding that an armed robbery was certain to occur within the meaning expressed by the *Travis* Court. This is not a case where a machine malfunctioned and no repairs were made, making another malfunction a certainty. Instead, we are dealing with statistics, which our Supreme Court has indicated is not a proper consideration when determining whether an injury is certain to occur. Moreover, while it was not certain that another armed robbery would occur at this Taco Bell restaurant, it was even less certain that decedent would be injured during any possible robbery. Since plaintiff could not show that the injury to her decedent was certain to occur, she failed to establish an intentional tort claim, and the trial court properly granted summary disposition in favor of TTM on that claim.

Because worker's compensation is the exclusive remedy for plaintiff against TTM as her employer, our resolution of that issue renders plaintiff's remaining issues concerning TTM, including her third-party beneficiary contract claim, moot. See *Dagen v Village of Baldwin (On Remand)*, 183 Mich App 484, 485-486; 455 NW2d 318 (1990). Plaintiff's claims against Taco Bell also fail. See *Leonard v All-Pro Equities*, 149 Mich App 1, 7-8; 386 NW2d 159 (1986), and *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey