NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0172

CRAIG J. DANOS

VERSUS

SOUTHERN FAB, INC. AND LEONARD DUET

Judgment Rendered: November 2, 2007

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 102,016

Honorable Walter I. Lanier, III, Judge

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Defendants/Appellees
Southern Fab, Inc. and
Leonard Duet

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The appellant, Craig J. Danos, filed a petition for damages against Southern Fab, Inc., as his employer, and Leonard Duet, as his supervisor and part owner of Southern Fab, Inc. (collectively "defendants"). In his petition, Danos alleged that he injured his back while moving some "work baskets" weighing several hundred pounds at the instruction of Duet. Although Danos sustained his injury in the course and scope of his employment, he alleged that based on the "intentional act" of Duet, his claim was excluded from the exclusive application of the Louisiana Workers' Compensation Act. See La. R.S. 23:1032B. Specifically, Danos alleged that Duet's knowledge "that the OSHA and safety rules and from personal experience that if men are forced to move heavy objects, the result that is substantially certain to follow are inevitably back injuries" and despite this knowledge, Duet's act of instructing him to manually move the "work baskets" instead of using a crane was an intentional act of harm.

After generally denying the claims contained in and excepting to Danos' petition, the defendants filed a motion for summary judgment asserting that Danos would be unable to meet his burden in proving that Duet committed an intentional act that exempted Danos' suit from the exclusive application of the Workers' Compensation Act.

On a motion for summary judgment, the burden of proof is on the mover. If the moving party will not bear the burden of proof at trial on the matter, that party's burden on a motion for summary judgment is to point out an absence of factual support for one or more essential elements of the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact, and the mover is entitled to summary

judgment. La. C.C.P. art. 966C(2); Robles v. ExxonMobile, 02-0854, p. 4 (La. App. 1st Cir. 3/28/03), 844 So.2d 339, 341.

In support of their motion for summary judgment, the defendants submitted evidence in the form of excerpts from the deposition testimony of Duet and Danos to point out the lack of factual support for Danos' claim that Duet acted intentionally to cause Danos harm. Danos, however, presented no evidence to support his allegation.[1] Particularly, there was no evidence presented that Danos protested Duet's instructions or otherwise informed Duet that he was physically incapable of performing the work as instructed. Nor was there any evidence presented by Danos indicating that Duet should have known that the work was beyond Danos' physical capabilities. Rather, the evidence presented by the defendants in the form of excerpts from Danos' deposition testimony undermines such an assertion. Danos testified that Duet, who suffered from back problems, physically performed the labor of moving the first work basket with Danos to show him how to perform the chore, and then instructed Danos to have another co-worker assist him in moving the remaining work baskets he needed to weld.

The nonmoving party who will bear the burden of proof at trial may not rest on the mere allegations or denials of his pleading, but his response, by affidavits, depositions or answers to interrogatories, must set forth specific facts showing that there is a genuine issue for trial. See La. C.C.P. art. 967B. While the portion of Duet's deposition testimony that Danos quotes in his memorandum in opposition to the motion for summary judgment might prove that Duet knew generally that requiring a person "to lift or push more than [he] should" would substantially lead

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[1] In his memorandum in opposition to the defendants' motion for summary judgment, Danos quoted the following exchange from Duet's deposition:

> Q. Okay. In your view as an employer, if men are required to lift or push more than they should do you believe that would substantially lead to an injury?
>
> A. [By Duet] Yes.

to an injury, such knowledge does not equate to proof that Duet knew he was instructing Danos to lift or push more than Danos should. Danos' failure to produce evidence proving that Duet knew or was substantially certain that the work he instructed Danos to perform was beyond Danos' physical ability made the granting of summary judgment in favor of the defendants proper in this case. Therefore, we affirm the trial court's judgment in accordance with Uniform Rules-Courts of Appeal, Rule 2-16.2A(4) and (6). All costs associated with this appeal are assessed against Craig J. Danos.

AFFIRMED.