NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 0875

EDWIN E. MYERS AND MARJORIE R. MYERS

VERSUS

DONALD DEROSIN AND LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

***DATE OF JUDGMENT*:** AUG 2 3 2006

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT (NUMBER 491,197), PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

HONORABLE JANICE CLARK, JUDGE

* * * * * *

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BEFORE: KUHN, GUIDRY, PETTIGREW, DOWNING, AND McCLENDON, JJ.

Disposition: AFFIRMED.

McClendon, J. concurs and assigns reasons.
Pettigrew, J. Dissents and assigns Reasons
Guidry, J. Dissents.

Kuhn, J.

In this case, plaintiffs challenge the trial court's judgment that granted defendants' motion for summary judgment and dismissed plaintiffs' claims with prejudice. We affirm.

I. PROCEDURAL AND FACTUAL HISTORY

On January 8, 2002, plaintiffs, Edwin E. Myers and Marjorie R. Myers, filed suit against defendants, the Department of Public Safety and Corrections ("Department") and Donald Derosin ("Sergeant Derosin") in his capacity as a corrections officer employed by the Department. Mr. Myers sought to recover damages from defendants under Louisiana Civil Code article 2315 for the intentional infliction of bodily harm and intentional infliction of severe emotional distress. Mrs. Myers sought recovery of damages for loss of consortium, service, and society, and for mental anguish and emotional distress she suffered as a result of the injuries to her husband.

Plaintiffs' petition alleged that Mr. Myers was hired by the Department in January 2001 to train for a position as a correctional officer at the Department's Fort Wade Correctional facility ("Fort Wade"). As part of his training, Mr. Myers was required to attend two weeks of classes at David C. Knapps Correctional Officer Training Academy ("Knapps Training Academy") at Angola. Mr. Myers and four other trainees from Fort Wade were transported by van from Fort Wade to Knapps Training Academy on January 21, 2001. Sergeant Derosin was working as a duty officer at Knapps Training Academy at the time. On January 24, 2001, Mr. Myers became ill after eating lunch. Later that afternoon, Mr. Myers advised Sergeant Derosin he was ill and wanted medical attention or to be returned home. Plaintiffs' petition further alleged that Sergeant Derosin drove Mr. Myers to the front gate of

Angola at approximately 5:00 p.m. that day and left him there. Mr. Myers contends that Sergeant Derosin intentionally refused to assist him when he became ill and deceived him "into believing that he would provide assistance."

Mr. Myers further alleged that after hitchhiking several rides, he arrived at the Greyhound Bus station in Opelousas, Louisiana, and that because the station was closed, he waited outside in the cold for over two hours before boarding a bus that was headed to Shreveport. He allegedly arrived in Shreveport the next morning at 3:15 a.m. One day later, Mr. Myers sought medical treatment, and his physician admitted him to the hospital. Mr. Myers was treated for food poisoning, pneumonia, and dehydration before being discharged on January 29, 2001.

In response to plaintiffs' petition, defendants filed an answer, denying most of plaintiffs' allegations, but admitting that: 1) Mr. Myers had informed Sergeant Derosin that he was ill and needed to return home, and that 2) Sergeant Derosin had indicated he would personally take Mr. Myers where he wanted to go. Defendants also alleged that Mr. Myers' negligence caused his alleged accident. Thereafter, defendants filed a motion for summary judgment seeking the dismissal of plaintiffs' claims. Defendants argued that because Mr. Myers and Sergeant Derosin were both employed by the Department at the time of the alleged incident, they were entitled to protection from tort liability pursuant to the exclusivity provisions of the Louisiana Workers' Compensation Act (the "Act").[1]

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[1] Louisiana Revised Statutes 23:1032 provides, in pertinent part, as follows:

> A. (1)(a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages....
>
> B. Nothing in this Chapter shall affect the liability of the employer ... or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

Plaintiffs opposed defendants' motion for summary judgment by submitting Mr. Myers' affidavit.[2] Therein, Mr. Myers asserted, "By leaving Myers on the road at night in the cold in January, [Sergeant] Derosin must have known to a virtual certainty that Myers would suffer injury as a result."

Thereafter, the trial court heard defendants' motion for summary judgment on July 12, 2004. During the hearing, defendants offered the deposition testimony of Sergeant Derosin and Mr. Myers.[3] According to Sergeant Derosin's deposition testimony, upon learning that Mr. Myers was sick, he offered Mr. Myers medical attention at the prison infirmary, but Mr. Myers refused the offer. Sergeant Derosin testified that Mr. Myers seemed angry, was in a rage, and replied that he wanted to leave the facility. Sergeant Derosin offered to call the Fort Wade facility to arrange return transportation for Mr. Myers, but Mr. Myers also refused that offer, insisting that he wanted to immediately leave the facility and go home. Sergeant Derosin

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[2] Plaintiffs' opposition memorandum and Mr. Myers' affidavit was filed into the record on July 7, 2004, only five days before the hearing on the motion. Based on the appellate record, it is unclear whether the trial court considered Mr. Myers' late-filed affidavit. *See* Louisiana Code of Civil Procedure article 966(B) and Rule 9.9(b) of the Louisiana District Court Rules, requiring a party opposing a motion to serve opposing affidavits and memorandum at least eight calendar days before the scheduled hearing." The untimely filing of plaintiffs' affidavits did not make it inadmissible; it was within the trial court's discretion to decide whether to admit it. ***See Peoples State Bank v. Hwy One Crawfish, Inc.***, 99-1393, p. 7-8 (La. App. 3d Cir.5/24/00), 771 So.2d 101, 107, ***writ denied***, 00-2842 (La. 12/8/00), 776 So.2d 469. Only if there is evidence that the opposing party will be prejudiced by the late introduction of the affidavits is it reversible error for a trial court to allow the affidavits to be filed. ***Id.*** We are not aware of any prejudice caused by the late-filed affidavit, and thus, we assume that the trial court considered Mr. Myers' affidavit.

[3] According to the record, the court "allowed until close of business [that] date for the filing of depositions on behalf of mover and any response by respondent." Although there is a note in the record indicating that no evidence had been filed in this suit as of April 11, 2005, the parties filed a "Joint Motion To Supplement Appellate Record" on May 27, 2005, asking that the record be supplemented with copies of the depositions of Mr. Myers and Sergeant Derosin and a copy of a July 12, 2004 letter from plaintiffs' counsel to the trial court in response to the submission of the depositions by defendants. The motion indicates that the depositions in question were offered as evidence during the hearing on the motion for summary judgment and that the trial court had reviewed the depositions and referred to them in her July 12, 2004 oral reasons for judgment. The trial court signed an order on May 31, 2005, ordering that the record be supplemented with the depositions in question. With regard to the letter from plaintiffs' counsel, the trial court noted in its order that the letter "was not received or considered."

explained that Mr. Myers did not have his own vehicle at the facility because he had been transported to the training facility in a van, along with the other trainees. Sergeant Derosin stated that because Mr. Myers wanted to leave the facility and because he had no basis to detain him, he transported Mr. Myers and his bags to the front gate of the facility. Sergeant Derosin testified that he let Mr. Myers out at the front gate upon his own request at about 5:30 p.m. Sergeant Derosin acknowledged being concerned for Mr. Myers' safety after leaving him at the gate, but he testified he had no further contact with him.

In his own deposition testimony, Mr. Myers stated that when he became ill, he informed Sergeant Derosin that he needed to return home. He admitted that he did not ask to go to the infirmary or to receive any other medical treatment; he only wanted to return home to Shreveport. Mr. Myers indicated that he became enraged when Sergeant Derosin initially did not want to discuss the matter. He testified that when he again told Sergeant Derosin that he wanted to go home, Sergeant Derosin told him, "Okay, come on, I'll take you where you need to go." Mr. Myers stated that some of the other trainees loaded his luggage into Sergeant Derosin's vehicle, and upon reaching the front gate, Sergeant Derosin told him, "This is as far as I'm going." According to Mr. Myers, when he inquired as to how he should get home, Sergeant Derosin told him, "That's up to you." At that point, Mr. Myers exited the vehicle with his luggage.

After reviewing the depositions and pleadings, the court rendered judgment in favor of defendants, finding no genuine issues of material fact and finding that Mr. Myers' exclusive remedy was under workers' compensation law. The court signed a judgment in accordance with its findings on August 19, 2004. It is from this

judgment[4] that plaintiffs have appealed, assigning the following specifications of error:

> 1. [The trial court erred in] granting summary judgment although there is a genuine dispute as to whether the plaintiffs' injuries were the result of intentional behavior by the defendant, Derosin; and
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> 2. [The trial court erred in] considering, and relying upon, evidence in the form of the two entire depositions offered by the defendants at the hearing upon the defendant's motion for summary judgment where the plaintiffs had no notice that the defendants relied on the evidence, and the defendants have not yet identified what testimony supports their contention that there is no dispute as to the fact that the injuries to the plaintiffs were not intentional.

II. ANALYSIS

In determining whether summary judgment is appropriate, appellate courts conduct a *de novo* review of the evidence, employing the same criteria that govern the trial court's determination of whether summary judgment is appropriate. ***Henderson v. Kingpin Development Co.***, 01-2115, p. 4 (La. App. 1st Cir. 8/6/03), 859 So.2d 122, 126. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in the light of the substantive law applicable to the case. ***Davis v. Specialty Diving, Inc.***, 98-0458, 98-0459, p. 5 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, 669, ***writ denied***, 99-1852 (La. 10/8/99), 750 So.2d 972.

[4] By "Show Cause Order" dated May 27, 2005, this court ordered the parties to show cause why the instant appeal should not be dismissed because of a defect in the August 19, 2004 judgment. We subsequently remanded the appeal for the trial court to sign a valid judgment with the appropriate decretal language as required by La Code Civ. P. arts. 1911 and 1918. The trial court signed an amended final judgment on August 24, 2005.

On a motion for summary judgment, the initial burden of proof remains with the mover. If, however, the moving party will not bear the burden of proof at trial on the matter before the court on the motion, the moving party must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. If the adverse party then 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 summary judgment must be granted. La. C.C.P. art. 966(C)(2); ***Boland v. West Feliciana Parish Police Jury***, 03-1297, p. 4 (La. App. 1st Cir. 6/25/04), 878 So.2d 808, 813, ***writ denied***, 04-2286 (La. 11/24/04), 888 So.2d 231.

A. Deposition Testimony

Plaintiffs argue the trial court erred in considering the depositions offered by defendants at the hearing on the motion for summary judgment. Noting that the depositions in question were not introduced until the day of the hearing, plaintiffs assert they did not receive timely notice of the actual grounds on which defendants sought summary judgment and were not given the opportunity to defend the motion. We find no merit to this argument.

Pursuant to Article 966(B), a "motion for summary judgment and supporting affidavits shall be served at least fifteen days before the time specified for the hearing." Defendants properly served plaintiffs with the motion and supporting affidavit more than fifteen days before the summary judgment hearing. Only the motion itself and the supporting affidavits to the motion are required by Article 966(B) to be served fifteen days before the hearing. There is no such requirement that every supporting document must also be filed and served on opposing counsel fifteen days before the summary judgment hearing. As long as depositions are filed

in the record in connection with a motion for summary judgment, they are admissible and may be considered by the trial court and this court. ***See Boland***, 03-1297 at p. 7, 878 So.2d at 814; ***see also Jones v. Jones***, 385 So.2d 880, 881 (La. App. 2d Cir. 1980). Thus, in the instant case, the trial court properly considered the depositions that defendants submitted to the trial court on the date of the hearing. Since plaintiffs' counsel was aware of the content of the deposition testimony due to his appearance at each deposition, plaintiffs cannot establish any prejudice resulting from the court's consideration of these depositions.

B. Intentional Act

It is undisputed that Mr. Myers and Sergeant Derosin were both employed by the Department at the time of the incident in question. Pursuant to La. R.S. 23:1032(A), workers' compensation is the exclusive remedy of an employee against his employer or co-employees. However, plaintiffs allege that their claims fall within the intentional tort exception to the workers' compensation law set forth in Louisiana Revised Statutes 23:1032(B). Plaintiffs assert that defendants have failed to establish the absence of factual support for the elements essential to their claims. Further, plaintiffs submit that they have raised issues regarding intent and/or motive that are not appropriately decided pursuant to a motion for summary judgment.

The jurisprudence of our state recognizes, however, that summary judgment is a proper procedural method to consider an employee's allegation that his injury resulted from an intentional act of his employer or co-employee. ***See King v. Schuylkill Metals Corp.***, 581 So.2d 300, 302 (La. App. 1st Cir.), ***writ denied***, 584 So.2d 1163 (La. 1991), and cases cited therein. Thus, where the plaintiff has alleged his injury resulted from an intentional act of his employer, if the facts set forth in the pleadings, depositions, answers to interrogatories, and affidavits, if any, show there

is no genuine issue as to the employer's lack of intent, notwithstanding conclusory allegations to the contrary, the employer is entitled to judgment dismissing the plaintiff's suit. ***Id.***, La. C.C.P. art. 966.

The question of whether an employer's conduct falls under the intentional act exception to the Act was addressed by the Louisiana Supreme Court in ***Reeves v. Structural Preservation Systems***, 98-1795 (La.3/12/99), 731 So.2d 208. In that case, the employer directed an employee to move a sandblasting pot manually, a procedure that was prohibited by Occupational Safety and Health Administration ("OSHA") and that the employee's supervisor feared would eventually lead to injury. The court held that the conduct at issue did not amount to an intentional act and that plaintiff's remedy was limited to workers' compensation benefits.

The ***Reeves*** court outlined the history of workers' compensation in Louisiana. From 1914 until 1976, employees were allowed to pursue tort remedies for work-related injuries against executive officers and co-employees. In 1976, the legislature amended the Act in two important respects. It provided that workers' compensation shall be the exclusive remedy against not only the employer, but also against any principal, officer, director, stockholder, partner or employee of the employer or principal who was engaged at the time of the injury in the normal course and scope of his employment. La. R.S. 23:1032(A)(1)(a). It also provided that when the employee's injury results from an intentional act, the employee is not limited to workers' compensation and may pursue other remedies. La. R.S. 23:1032(B); ***Reeves***, 98-1795 at 3, 731 So.2d at 210. As amended in 1976, La. R.S. 23:1032(B) reads: "Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such

employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act."

The ***Reeves*** court noted that the legislature, in considering the 1976 amendment, used the words "intentional act" and rejected the following terminology offered for inclusion in the proposed legislation: "employer's violation of a recognized safety rule or regulation, his failure to provide a safety device required by a recognized safety rule or regulation or by a statute, or by gross negligence on the part of a supervisory employee" and "gross negligence." ***Reeves***, 98-1795 at p. 4, 731 So.2d at 210. The court explained that the meaning of "intent" in the context of the amended statute was that the employer or other person identified in the Act must either (1) consciously desire the physical result of his act, whatever the likelihood of the result happening from his conduct, or (2) know that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result. ***Reeves***, 98-1795 at p. 6, 731 So.2d at 211.

Louisiana courts have narrowly interpreted the intentional act exception according to the legislative intent. ***Thomas v. Fina Oil and Chemical Co.***, 02-0338, p. 7 (La. App. 1st Cir. 2/14/03), 845 So.2d 498, 503. The term "substantially certain" has been interpreted to mean "nearly inevitable," "virtually sure," and "incapable of failing." Mere knowledge and appreciation of risk does not constitute intent. ***Landry v. Uniroyal Chemical Co.***, 94-1274, pp. 7-8 (La. App. 1st Cir. 3/3/95), 653 So.2d 1199, 1203, ***writ denied***, 95-1381 (La. 9/15/95), 660 So.2d 461. It requires more than a reasonable probability, even more than a high probability, that an accident or injury will occur. ***Id.*** The exception is designed for acts that are intentional, not for acts that are wanton or reckless or grossly negligent. ***Thomas***, 02-0338 at p. 7, 845 So.2d at 503.

Pursuant to Louisiana Code of Civil Procedure article 966(B) and (C), we address whether defendants, as movants, carried their burden of proof by pointing out to the court that there was an absence of factual support for one or more elements essential to plaintiffs' claims. Considering the deposition testimony of both Mr. Myers and Sergeant Derosin, along with the other pleadings and affidavits, we find an absence of factual support for plaintiffs' claim that Sergeant Derosin intentionally injured Mr. Myers within the meaning of Louisiana Revised Statutes 23:1032. Even accepting Mr. Myers' version of the accident as set forth in his deposition testimony, the evidence does not establish that plaintiff's injury was virtually certain to result from Sergeant Derosin's action of leaving him at the gates of the facility. While these facts may establish a reasonable probability, there was not such a substantial certainty that an injury would occur as to impute intent to Sergeant Derosin.

Upon defendants making this showing, the burden shifted to plaintiffs to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden at trial. La. C.C.P. art. 966(C)(2). Plaintiffs failed to meet this burden. Mr. Myers' explanation of the events does not establish that Sergeant Derosin consciously desired that he would suffer injury or that Sergeant Derosin knew that injury was substantially certain to follow from his conduct of dropping Mr. Myers off at the front gates of the facility. The conclusory statement set forth in Mr. Myers' affidavit that, "By leaving Myers on the road at night in the cold in January, [Sergeant] Derosin must have known to a virtual certainty that Myers would suffer injury as a result" is insufficient to satisfy plaintiffs' evidentiary burden of proof at trial. Even though Sergeant Derosin acknowledged that he was concerned for Mr. Myers' safety, the mere knowledge and appreciation of a risk

does not constitute intent, nor does reckless or wanton conduct by an employer constitute intentional wrongdoing. ***Reeves***, 98-1795 at p. 10, 731 So.2d at 213, citing ***Armstead v. Schwegmann Giant Super Markets, Inc.***, 618 So.2d 1140-42 (La. App. 4th Cir. 1993), ***writ denied***, 629 So.2d 347 (La. 1993).

Accordingly, we agree with the trial court that defendants established they were entitled to summary judgment as a matter of law and that there are no genuine issues of material fact.

III. CONCLUSION

For these reasons, we affirm the trial court's judgment. We assess all appeal costs against plaintiffs-appellants.

AFFIRMED.

EDWIN E. MYERS AND MARJORIE R. MYERS

VERSUS

DONALD DEROSIN AND LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

NUMBER 2005 CA 0875

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BEFORE: KUHN, GUIDRY, PETTIGREW, DOWNING, AND McCLENDON, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

PETTIGREW, J., dissenting.

I must respectfully dissent from the majority. I am of the opinion that there are material issues of fact in dispute as to the subjective intent of Sergeant Derosin and that the Judgment should be reversed and this case remanded to the trial court for further proceedings.

The question of Sergeant Derosin's subjective intent is obviously determinative of the outcome of this litigation. We note that in paragraphs seventeen and eighteen of plaintiffs' petition for damages, plaintiffs made the following allegations regarding Sergeant Derosin's actions:

> 17.
>
> When Derosin inquired about what the problem was, Myers said that he was ill and needed to return home.
>
> 18.
>
> Derosin then indicated that he **personally would take Myers wherever he wanted to go**. (Emphasis added.)

In answering plaintiffs' petition, defendants admitted the allegations contained in both of these paragraphs. Moreover, the depositions of Mr. Myers and Sergeant Derosin contain conflicting statements regarding the facts at issue and establish genuine issues of material fact concerning Sergeant Derosin's subjective intent or expectation when he drove Mr. Myers to the front gate of Angola and left him there to presumably find his own way home. Without making credibility determinations, we are unable to resolve these issues. Given the evidence herein and the principles that govern our *de novo* review, we simply cannot say, as a matter of law, that plaintiffs are not entitled to present their case to a fact finder at a trial. Although the standard for granting a

motion for summary judgment no longer encompasses a presumption in favor of a trial on the merits, a trial is designed to evaluate the facts when, as is the case here, credibility is at issue.

As noted, unless plaintiffs can prove that Sergeant Derosin either desired to bring about the physical results of his act or believed they were substantially certain to follow from what he did, they will be precluded from recovering in tort against defendants pursuant to the exclusivity provisions of the Act. This being said, however, one cannot make credibility determinations in a motion for summary judgment as the trial court in my opinion clearly did in this case.

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McCLENDON, J., concurs.

Based on the facts presented herein, I agree with the result reached by the majority.