NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2582

JANET HERNANDEZ MILLER
VERSUS
ST. TAMMANY PARISH SCHOOL BOARD

CONSOLIDATED WITH

NUMBER 2008 CA 2583

JANET HERNANDEZ MILLER
VERSUS
ABC INSURANCE COMPANY, ET AL.

Judgment Rendered: September 11, 2009

* * * * * * *

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2002-10363 c/w 2002-10365

Honorable Donald M. Fendlason, Judge

* * * * * * *

Arthur W. Landry
Jerald N. Andry
New Orleans, LA

Attorneys for
Plaintiff – Appellant
Janet Hernandez Miller

Harry P. Pastuszek, Jr.
David S. Pittman
Covington, LA

Attorneys for
Defendant – Appellee
St. Tammany Parish School Bd.

Donald F. deBoisblanc
Donald F. deBoisblanc, Jr.
J. Rand Smith, Jr.
Charles M. Ponder, III
Steven M. Lozes
New Orleans, LA

Attorneys for
Defendants – Appellees
P.D. Slocum and Metropolitan
Property & Casualty Ins. Co.

* * * * * *

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

The plaintiff, Janet Hernandez Miller, appeals a summary judgment granted in favor of the St. Tammany Parish School Board ("school board") that dismissed her claim against the school board for benefits pursuant to La. R.S. 17:1201(C)(1)(a). Also before this court is a second motion to supplement the record on appeal filed by Ms. Miller. For reasons that follow, we reverse the judgment of the trial court and deny the motion to supplement as moot.

I. FACTUAL AND PROCEDURAL HISTORY

Ms. Miller was employed by the school board as a full-time special education teacher and was assigned to Clearwood Junior High School (Clearwood) in Slidell, Louisiana. One of Ms. Miller's two students was D.S., an autistic child. On January 23, 2001, D.S. began engaging in self-injurious behavior—a symptom of his autism—when Ms. Miller and others intervened to prevent him from injuring himself. For approximately 50 minutes, Ms. Miller and others struggled with D.S., who at the time, was 14 years old, over 5 feet 5 inches, and weighed approximately 185 pounds. As a result of this struggle, Ms. Miller allegedly sustained injuries which have rendered her disabled.

On January 24, 2002, Ms. Miller filed a petition against the school board, asserting that because she was injured as a result of an "assault or battery" by a student, she was entitled to sick leave without reduction in pay for the duration of her disability pursuant to the provisions of La. R.S. 17:1201(C)(1)(a).[1] By separate petition, Ms. Miller also filed suit on the same date against P.D. Slocum, as the administrator of the estate of his minor child and ABC Insurance Company, for damages arising from the incident. Metropolitan Property & Casualty Insurance Company ("Metropolitan") was later substituted for ABC Insurance Company, and the two suits were subsequently consolidated. Prior to consolidation of the suits,

---

[1] The plaintiff was receiving workers' compensation benefits.

Mr. Slocum and Metropolitan filed a motion for summary judgment seeking to dismiss Ms. Miller's claims against them. Both Ms. Miller and the school board opposed the motion, and after a hearing, the trial court denied the motion.

Thereafter, the school board filed a motion for summary judgment seeking to have Ms. Miller's claim against it dismissed. The trial court initially denied the motion; however, a few months later, the school board re-urged the motion. Around the same time the school board re-urged its motion, Mr. Slocum and Metropolitan filed another motion for summary judgment, contending that Mr. Slocum could not be liable to Ms. Miller for the actions of D.S. because there was no underlying tort upon which strict liability could be imposed on Mr. Slocum.

After hearing both motions, on May 14, 2008, the trial court granted the motion for summary judgment filed by the school board, but denied the motion for summary judgment filed by Mr. Slocum and Metropolitan. In granting the school board's motion, the trial court found that Ms. Miller was injured while she was providing assistance to a special needs child and not as the result of an assault or battery as contemplated by La. R.S. 17:1201(C)(1)(a) and the jurisprudence interpreting that statute.

A written judgment in accordance with the trial court's ruling was signed on June 16, 2008, and it is from this judgment that Ms. Miller has appealed.[2] On appeal, Ms. Miller asserts that the trial court erred in granting summary judgment in favor of the school board and dismissing her claim against the school board pursuant to La. R.S. 17:1201(C)(1)(a).

II. MOTION TO SUPPLEMENT

Ms. Miller has filed, for the second time, a motion to supplement the record

---

[2] Mr. Slocum and Metropolitan filed a supervisory writ application with this court as to the denial of their motion for summary judgment, which this court denied. See **Miller v. Slocum and Metropolitan Property & Casualty Insurance Co.** c/w **Miller v. St. Tammany Parish School Board**, 2008-1415 (La. App. 1st Cir. 11/10/08) (*unpublished writ action*).

on appeal with a condensed copy of her deposition transcript.[3] In her motion, Ms. Miller contends that a condensed copy of her deposition transcript was submitted to the trial court as an attachment to the motion for summary judgment filed by Mr. Slocum and Metropolitan; however, the clerk of court for the trial court removed the condensed transcript when preparing the record. Ms. Miller contends that because she relied on her deposition testimony on several occasions in opposing the several motions for summary judgment, she requests that she be allowed to supplement the record with a condensed copy of her deposition testimony.

There does not appear to be an issue as to whether Ms. Miller's deposition was filed with the motion for summary judgment. Rather, it appears that the clerk of court for the trial court removed the deposition because a *condensed* copy of the deposition was filed. Uniform Rules—Courts of Appeal Rule 2-1.16 provides, in pertinent part that

> [i]n preparing the record for a Court of Appeal, the clerk of the trial court shall insure that depositions included as an exhibit consist of one page of deposition testimony per physical page and do not contain reduced images of multiple pages placed on one page. If any deposition introduced into evidence in the case does not meet this standard, the party who introduced the deposition shall provide a certified true copy of the substandard document in the required format.

In this case, when the clerk of court of the trial court removed the condensed copy of Ms. Miller's deposition transcript, it was ensuring compliance with the above referenced rule, *i.e,*. that a non-condensed copy of the deposition be substituted. However, for the second time, the appellant seeks to submit a condensed copy of the deposition. This is not permissible under the Uniform Rules—Courts of Appeal.

Nevertheless, we note that in the supervisory writ application filed by Mr.

---

[3] Ms. Miller previously filed a motion to supplement the record on appeal with a condensed copy of her deposition transcript. Citing Uniform Rules—Courts of Appeal Rule 2-1.16, this court denied the motion to supplement. However, this court indicated that the appellant could re-file a motion to supplement the record with a copy of her deposition in the proper format.

Slocum and Metropolitan with this court concerning the denial of their motion for summary judgment, they attached the majority and relevant portions of Ms. Miller's deposition testimony in the proper format. Notably, Mr. Slocum and Metropolitan also filed a copy of that writ application into the trial court record of these proceedings. Therefore, since a copy of Ms. Miller's deposition testimony in the proper format is already contained in the record in this matter, we deny Ms. Miller's motion to supplement as moot.

III. LAW AND DISCUSSION

A. Summary Judgment Law

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Granda v. State Farm Mutual Insurance Company**, 2004-2012, p. 4 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show 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).

On a motion for summary judgment, the initial burden of proof is on the moving party. However, if the moving party will not bear the burden of proof at trial on the matter before the court, the moving party's burden of proof on the motion is satisfied by pointing 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. Thereafter, the non-moving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Accordingly, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion.

Babin v. Winn-Dixie Louisiana, Inc., 2000-0078, p. 4 (La. 6/30/00), 764 So.2d 37, 40; see also La. C.C.P. art. 967(B).

Summary judgments are reviewed on appeal *de novo*. **Granda**, 2004-2012 at p. 4, 935 So.2d at 701. Thus, this court uses the same criteria as the trial court in determining whether summary judgment is appropriate—whether there is a genuine issue of material fact and whether mover is entitled to judgment as a matter of law. **Jones v. Estate of Santiago**, 2003-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006. A "genuine issue" is a "triable issue," that is, an issue on which reasonable persons could disagree. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. **Jones**, 2003-1424 at p. 6, 870 So.2d at 1006.

B. La. R.S. 17:1201(C)

Louisiana Revised Statutes 17:1201(C) provides for two different sick leave pay provisions for public school teachers who are injured in the course and scope of employment, depending on the cause of the injury. **Stoshak v. East Baton Rouge Parish School Board**, 2006-0852, p. 2 (La. App. 1st Cir. 2/21/07), 959 So.2d 996, 997, writ denied, 2007-0633 (La. 5/11/07), 955 So.2d 1281. Specifically, La. R.S. 17:1201(C)(1)(a), commonly referred to as the "assault pay" provision, provides, in pertinent part:

> Any member of the teaching staff of the public schools who is injured or disabled while acting in his official capacity as a result of assault or battery by any student or person shall receive sick leave without reduction in pay and without reduction in accrued sick leave days while disabled as a result of such assault or battery.

Louisiana Revised Statutes 17:1201(C)(1)(b)(i), commonly referred to as the "physical contact" provision, states, in pertinent part:

> Any member of the teaching staff of the public schools who while acting in his official capacity is injured or disabled as a result of physical contact with a student while providing physical assistance to a student to prevent danger or risk of injury to the student shall receive sick leave for a period up to one calendar year without

reduction in pay and without reduction in accrued sick leave days while injured or disabled as a result of rendering such assistance.

Essentially, the school board does not challenge the fact that Ms. Miller, while acting in her official capacity as a teacher, was injured or disabled as a result of physical contact with D.S. that would entitle her to benefits under La. R.S. 17:1201(C)(1)(b)(i). However, in order to recover benefits pursuant to La. R.S. 17:1201(C)(1)(a), Ms. Miller bears the burden of proving that she was injured or disabled as the result of an assault or battery by D.S.

The term assault is defined in the criminal law as "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La. R.S. 14:36. The term "battery" is defined in the criminal law as the "intentional use of force or violence upon the person of another." La. R.S. 14:33. Under tort law, a battery has been defined as a "harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer contact." **Caudle v. Betts**, 512 So.2d 389, 391 (La. 1987). Additionally, we note that summary judgment is seldom appropriate for determinations based on subjective facts of motive, *intent*, good faith, knowledge or malice, and should only be granted on such subjective issues when no issue of material fact exists concerning that issue. **Rager v. Bourgeois**, 2006-0322, p. 6 (La. App. 1st Cir. 12/28/06), 951 So.2d 330, 333, writ denied, 2007-0189 (La. 3/23/07), 951 So.2d 1105; see also **Jones**, 2003-1424 at p. 6, 870 So.2d at 1006.

In the school board's motion for summary judgment, it contends that there is an absence of factual support to establish that Ms. Miller was injured or disabled as the result of an assault or battery—an element essential to her claim—and therefore, it was entitled to summary judgment dismissing Ms. Miller's claim. Specifically, the school board points to Ms. Miller's deposition testimony wherein she acknowledged that she was never knocked down, struck, or bitten by D.S., and

thus, she was not injured as a result of a battery. Additionally, the school board contends that given D.S.'s mental condition, *i.e.*, his autism, his conduct on the date in question could not rise to the level of an assault or battery, and therefore, Ms. Miller is not entitled to benefits under La. R.S. 17:1201(C)(1)(a).

In opposition to the motion for summary judgment, Ms. Miller contends that the evidence establishes that she not only attempted to restrain the minor from injuring himself, but that she was also protecting herself against D.S.'s repeated attempts to injure her—behavior that would constitute an assault. According to Ms. Miller's deposition testimony, the incident in question took place sometime between 9:30 and 10:30 in the morning in the main hall, outside of the gym, the office, and the cafeteria. D.S. was participating in P.E. class, and Ms. Miller had gone into the cafeteria to let the coach know that they were right outside in the hallway. As she re-entered the hallway, Ms. Miller said that she could hear D.S. making "the sound" that he made when his self-injurious episodes began, and she saw him start to hit himself in the head.

Ms. Miller stated that he began to walk toward some of the para-professionals who were there to assist her in supervising the students. According to Ms. Miller, she needed to distract D.S. in order to get him away from the para-professionals so that they could get out the pads and other gear that they used whenever it was necessary to place one of the students in a therapeutic hold.[4] Ms. Miller further testified that D.S. came towards her with his arms out "with the claws extended," and his mouth was open. She claimed that it was "kind of like a motion where he could bite if he got ... close enough to you." As this occurred, Ms. Miller backed away, entered the cafeteria, and called for the coach to come

[4] According to Ms. Miller, the teachers and para-professionals supervising the students carried a black duffel bag that contained arm guards that the para-professionals would wear to protect themselves, as well as a small foam mat that would be used to protect the student's face as he was lowered to the ground. There were also items in the bag that would be placed in the student's hand that he could squeeze to prevent damage to his hands. In addition, there were walkie-talkies in the bag so that the teachers could call for assistance.

help. She then used the walkie-talkie she carried to call the principal for more help. As she had entered the cafeteria to notify the coach, she had pulled the door shut, and D.S. had turned and headed away from her.

According to Ms. Miller, everyone had responded to the calls for help in a matter of seconds, and they began the process of placing D.S. in a therapeutic hold. There were at least five people involved in the hold in addition to Ms. Miller. The school principal, the coach, and two of the para-professionals had each grabbed an arm or a leg and had lowered D.S. to the ground. The remaining para-professional had apparently sat on D.S.'s buttocks/leg area to help hold him down. Ms. Miller stated that she had then placed the small foam mat under his face. She then contended that she had helped the others hold D.S.'s right arm back as he continued to struggle. She acknowledged that she did not participate in the hold to any greater extent than that.

According to Ms. Miller, this episode continued for approximately 45 to 50 minutes, and D.S. continued to struggle, fight, cry, urinate on himself, and kick his feet the entire time. She stated that this struggling caused him and the people holding him to push towards her and push her into the wall, as she was the only one in front of D.S. near his head trying to keep the mat under his face. She testified that she was twisting and sliding the entire time, even though she conceded that D.S. did not actually knock her down, hit her, or bite her during the episode. However, Ms. Miller insisted that D.S. came close to biting her because her hand was on the mat that was close to his face. As a result of this incident, Ms. Miller stated that she suffered an injury to her left hand right above the index finger and an injury to her right buttocks area that wraps around to the front pelvic region. She also stated that she suffered from a scratch on her hand and a sprained right knee, both of which had healed as of the time of her deposition.

In this case, there is no dispute that D.S.'s behavior on the day in question

resulted in an injury to Ms. Miller. However, the issue is not whether Ms. Miller's injuries were caused by an assault or battery, as opposed to a physical contact, but whether her disability or injury was caused by a physical contact that was also an assault or battery. See **Stoshak**, 2006-0852 at p. 5, 959 So.2d at 999. After considering Ms. Miller's deposition testimony, we find that her testimony established that there is a genuine issue of material fact as to whether her injuries or disabilities were the result of an assault by D.S. because she was protecting herself against the attempted attacks and bites from D.S. Thus, the school board was not entitled to summary judgment dismissing Ms. Miller's claim for benefits under La. R.S. 17:1201(C)(1)(a). Accordingly, we reverse the summary judgment granted in favor of the school board dismissing Ms. Miller's claim against it.

IV. CONCLUSION

For all of the above and foregoing reasons, the second motion to supplement the record on appeal is denied as moot and the June 16, 2008 judgment of the trial court is reversed insofar as it granted summary judgment in favor of the St. Tammany Parish School Board and dismissed Ms. Miller's claim against it.

All costs of these proceedings in the amount of $2,155.03 are assessed to the defendant/appellee, the St. Tammany Parish School Board.

MOTION TO SUPPLEMENT RECORD DENIED AS MOOT; JUDGMENT REVERSED.