NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2007 CA 2192

KATHLEEN CLEMENT AND RANDALL P. CLEMENT

VERSUS

R. HARLAN STRUBLE, M.D.

Judgment rendered: MAY - 2 2008

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Case Number2002-11745; Division H
The Honorable Donald M. Fendlason, Jr., Judge Presiding

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

DOWNING, J.

Plaintiffs/appellants, Kathleen and Randall P. Clement, appeal the grant of a summary judgment that dismissed their personal injury claim against St. Tammany Parish Hospital, one of the defendants in this suit. The pertinent issue in this case is whether the "intentional act" exception to an employer's tort immunity for work-related injuries to an employee is applicable. Concluding that the "intentional act" exception does not apply, we affirm the trial court judgment.

The Clements originally instituted this lawsuit on April 11, 2002 against Dr. R. Harlan Struble[1] for "recklessly and negligently" piercing Mrs. Clement's finger with a needle and potentially exposing her to the AIDS and hepatitis viruses. On May 17, 2003, the Clements filed an amending petition adding St. Tammany Parish Hospital where Mrs. Clement was employed. The amending petition alleges that the hospital is liable to the Clements in tort for wrongfully credentialing Dr. Struble, when it was substantially certain that his conduct would result in serious injury to an employee, a nurse, or a patient at the hospital.

The hospital filed a motion for summary judgment asserting that since Mrs. Clement was an employee of St. Tammany Parish Hospital, her exclusive remedy was pursuant to the Workers' Compensation Act. After the matter was heard, the trial court granted the hospital's motion. The Clements appealed, alleging that the trial court erred and/or abused its discretion in dismissing their claims against the hospital, because it was a substantial certainty that injury would occur to Mrs. Clement by their negligent, reckless and/or intentional continued credentialing of Dr. Struble to practice medicine at their facility. The Clements also allege that the trial court erred in denying their original motion for reconsideration and their second motion for reconsideration based on newly discovered evidence.[2]

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[1] Plaintiffs voluntarily dismissed all claims against Dr. Struble on April 10, 2006. According to plaintiff's brief, their claims against him were discharged in Dr. Struble's bankruptcy.

[2] The recently acquired evidence was a new lawsuit filed against Dr. Struble in the 22nd Judicial District Court.

The Clements do not contend that the hospital consciously desired to injure Mrs. Clement. They instead allege that the hospital's conduct regarding Dr. Struble's credentialing rises to the level of an "intentional act" for purposes of the exception to the exclusive remedy provision found in La. R.S. 23:1032(B), since it was a certainty, considering Dr. Struble's conduct and history, that he would seriously harm someone. The Clements cite numerous instances where Dr. Struble was alleged to have been negligent in his medical practices. Mrs. Clement also claims that she and other employees were reluctant to work with Dr. Struble because of his abusive and potentially harmful conduct. The Clements claim that the hospital had a "reckless indifference" to Mrs. Clement's safety, because they were well aware of Dr. Struble's "failure to follow protocol" and "prior shocking lawsuit history." The Clements aver that the hospital "knowingly made a management decision" to allow the doctor to continue to practice medicine to advance its financial goals, despite the numerous complaints against him made by both employees and patients. They contend that the hospital's conscious and well considered decision to continue to re-credential Dr. Struble to practice in its facility made Mrs. Clement's injury a substantial certainty.

This suit against the hospital is based in tort. In order to avoid the general rule that an employee's exclusive remedy against the employer for a work-related injury is workers' compensation, the employee must establish that the injury was the result of an "intentional act." See La. R.S. 23:1032. The Louisiana Supreme Court has held that "intent" within the context of La. R.S. 23:1032 means either that the defendant consciously desired to bring about the physical result of his act or knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result. **Reeves v. Structural Preservation System**, 98-1795, p. 6 (La. 3/12/99), 731 So.2d 208, 211; **Bazley v. Tortorich**, 397 So.2d 475, 481 (La. 1981). The language "substantially certain to follow"

requires more than a reasonable probability that an injury will occur; certain has been defined to mean "inevitable" or "incapable of failing." **Hood v. South Louisiana Medical Center**, 517 So.2d 469 (La.App. 1 Cir. 1987). Believing that someone may, or even probably will, eventually get hurt if a workplace practice is continued does not rise to the level of an intentional act, but instead falls within the range of negligent222 acts that are covered by workers' compensation. **Robinson v. North American Salt Company**, 02-1869, p. 6 (La.App. 1 Cir. 6/27/03), 865 So.2d 98, 104, *citing* **Reeves**, 98-1795, p. 9, 731 So.2d at 212.

In support of the motion for summary judgment, St. Tammany Parish Hospital submitted the affidavit of Judy Gracia, its Human Resource Vice President. She stated that (1) Mrs. Clement was in the scope of her employment when the injury occurred; (2) she received workers' compensation benefits; (3) prior to the accident, no surgical technician or other employee had filed a claim against Dr. Struble; and (4) prior to the accident, no nurse or other staff had reported any injury while working with Dr. Struble. The hospital submitted that the plaintiffs will be unable to satisfy the burden of proof required for an employee to recover in tort against her employer for an intentional act. In opposition to the motion, Mrs. Clement's affidavit stated that (1) she originally refused to operate with Dr. Struble due to his propensity for recklessness and her concern for her safety; (2) she has personal knowledge of other staff who were concerned about their safety while working with him; (3) Dr. Struble had slapped her and other nurses' hands during surgical procedures; (4) Dr. Struble was known to throw instruments during surgery; and (5) other nurses had reported Dr. Struble's unsafe conduct to the hospital.

In **Samaha v. Rau, M.D.**, 07-1726, p. 2 (La. 2/26/08), ___ So.2d ___, the court reiterated the parameters for granting a summary judgment by quoting LSA-C.C.P. article 966C(2), as follows:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to 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. 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.
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> This amendment, which closely parallels the language of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), first places the burden of producing evidence at the hearing on the motion for summary judgment on the mover (normally the defendant), who can ordinarily meet that burden by submitting affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. At that point, the party who bears the burden of persuasion at trial (usually the plaintiff) must come forth with evidence (affidavits or discovery responses) which demonstrates he or she will be able to meet the burden at trial. ... 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. (Emphasis omitted.) **Id.** at 07-1726, p. 2, ___ So.2d ___.

Plaintiffs' countervailing affidavit, stating that St. Tammany Parish Hospital was aware of the danger Dr. Struble presented and failed to remedy the situation by allowing him to continue practicing in its hospital to "advance its financial goals," is insufficient to establish an intentional act under the law. The term "substantially certain" has been interpreted to mean "nearly inevitable," "virtually sure," and "incapable of failing." **Manor v. Abbeville General Hospital**, 06-0500, p. 3 (La.App. 3 Cir. 9/27/06), 940 So.2d 888, 891. The conduct requires more than a reasonable probability, even more than a high probability, that an accident or injury will occur. **Id.** Mere knowledge and appreciation of risk does not constitute intent, nor does reckless or wanton conduct or gross negligence. **Id.** Under the circumstances, and in view of the foregoing discussion, we conclude that the trial

court did not err in granting St. Tammany Parish Hospital's motion for summary judgment.[3]

Accordingly, we affirm the trial court judgment. The cost of this appeal is assessed to Kathleen Clement and Randall P. Clement. This memorandum opinion is issued in accordance with Uniform Rules-Courts of Appeal, Rule 2-16.1B.

AFFIRMED

[3] In her second assignment of error regarding the denial for new trial and reconsideration of that denial, LSA-C.C.P. article 1973 provides that a new trial may be granted if there is a good ground therefor; article 1972 provides that a new trial shall be granted (2) when the party has discovered, since the trial, evidence important to the cause which he could not, with due diligence, have obtained before or during the trial. Appellant contends that the court erred in denying her motion upon submission of newly discovered evidence which included Dr. Struble's personnel file used in another lawsuit. We disagree. The unauthenticated evidence of misconduct in another lawsuit does not, as discussed above, translate to "intent" or "reckless and wanton conduct." Since the evidence proposed is not important to the cause of proving intent or reckless or wanton conduct, we conclude that trial court did not err in denying the motion and pretermitting that discussion.