STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1530

LANA COWART

VERSUS

LAKEWOOD QUARTERS LIMITED PARTNERSHIP
AND TANGI MCKNIGHT

Judgment Rendered: May 4, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 517,379

Honorable Kay Bates, Judge

* * * * *

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McClendon, J. agrees and assigns additional reasons.
Parro, J. dissents and assigns reasons.

GUIDRY, J.

Defendant appeals a summary judgment granted in favor of plaintiff, finding the defendant vicariously liable for the intentional tortious actions of its employee. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In May 2003, plaintiff, Lana Cowart, was employed by defendant, LQRNHC, LLC d/b/a Lakewood Quarters Rehabilitation and Nursing Center (hereinafter "LQRNHC"),[1] as the Certified Nursing Assistant ("CNA") Director. Her duties included the hiring and firing of subordinate employees. One of her subordinates, Tangi McKnight, was employed as a CNA supervisor. Ms. McKnight's position required her to supervise and fill in for or assist her fellow CNAs should it become necessary for any reason.

Various CNAs began to complain to Ms. Cowart that Ms. McKnight was socializing rather than performing her job duties. Ms. Cowart investigated and determined that the complaints were well-founded. The Director of Nursing (Director) advised Ms. Cowart to terminate Ms. McKnight's employment. However, before terminating Ms. McKnight, Ms. Cowart decided she would first offer Ms. McKnight the option of stepping down from her supervisory position to work as a regular CNA. Ms. McKnight refused to do so. According to Ms. Cowart, the following exchange then occurred.

> **Ms. Cowart**: I said "Tangi, what I am to do with you? If you don't...what am I to do" and I said, "What am I to do" – "Or else," you know, "What am I doing?" She just goes, "Or else what?" I said, "Or terminate you" and she goes, "Terminate me? You're going to terminate me" and I looked at [the Director and the Director said], "Terminate her" and I said, "Well I guess so," and she goes, "Oh, so you're firing me" and I said, "Well, I guess so, if you won't step down and take a [demotion]" and I was even going to let her take a breather, you

[1] The record reflects several variations of the defendant's name. Throughout this opinion, we use the name that the defendant contended was the proper designation in its answer to the plaintiff's petition.

> know, cool off, and I had picked up the termination paper and turned to throw it away and that's when she attacked me.

When Ms. Cowart turned her back to Ms. McKnight, Ms. McKnight pounced on Ms. Cowart, smashed a coffee mug over her head and proceeded to beat her with a metal three-hole punch. As a result of the beating, Ms. Cowart sustained serious injuries.

Ms. Cowart subsequently filed suit against Ms. McKnight, as well as LQRNHC, alleging LQRNHC was vicariously liable for Ms. McKnight's intentional tortious actions. Because the facts were essentially undisputed, both Ms. Cowart and LQRNHC sought a summary judgment on the issue of vicarious liability. Following a contradictory hearing, the trial court granted a summary judgment in favor of Ms. Cowart, finding LQRNHC vicariously liable for the intentional tortious conduct of Ms. McKnight. From this judgment, LQRNHC appeals, asserting that it cannot be held vicariously liable for Ms. McKnight's actions because they were not reasonably incidental to her employment duties or, alternatively, because she had been terminated just prior to the attack and, thus, was no longer its employee.

LAW AND ANALYSIS

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. Duplantis v. Dillard's Dept. Store, 2002-0852, p. 5 (La.App. 1 Cir. 5/9/03), 849 So.2d 675, 679, writ denied, 2003-1620 (La. 10/10/03), 855 So.2d 350. A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966B.

The facts in this case are essentially undisputed; accordingly, it must simply be determined whether the plaintiff is entitled to judgment on the issue of liability as a matter of law. Vicarious liability is based on LSA-C.C. art. 2320, which provides in part, "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Under LSA-C.C. art. 2320, an employer can be held liable for an employee's tortious conduct only if the injuring employee is acting within the course and scope of his employment. Spears v. Jones, 2000-2799, p. 4 (La.App. 1 Cir. 2/15/02), 807 So.2d 1182, 1185, writs denied, 2002-0663 and 2002-0767 (La. 5/3/02), 815 So.2d 106 and 826.

Generally, courts consider four factors when assessing vicarious liability, including whether the tortious act: (1) was primarily employment-rooted; (2) was reasonably incidental to performance of employment duties; (3) occurred during working hours; and (4) occurred on the employer's premises. See LeBrane v. Lewis, 292 So.2d 216, 218 (La. 1974). It is not necessary that each factor is present in each case, and each case must be decided on its own merits. Baumeister v. Plunkett, 95-2270, p. 4 (La. 5/21/96) 673 So.2d 994, 997. Further, an employer is not vicariously liable merely because his employee commits an intentional tort on the business premises during working hours. Under the jurisprudence, an employer is responsible for an employee's intentional tort when the conduct is so closely connected in time, place, and causation to the employment that it constitutes a risk of harm attributable to the employer's business. Menson v. Taylor, 2002-1457, pp. 5-6 (La.App. 1 Cir. 6/27/03), 849 So.2d 836, 840.

We conclude that Ms. Cowart's claims against LQRNHC arise out of a single transaction. The entire transaction included Ms. Cowart informing

Ms. McKnight that she had to take a demotion or else be terminated, Ms. McKnight's refusal, Ms. Cowart's attempted termination of Ms. McKnight, equivocal at best, and Ms. McKnight's resultant attack upon Ms. Cowart. We further find that Ms. McKnight was the employee of LQRNHC for the duration of this transaction.

Unquestionably, the attack at issue herein occurred on the employer's premises during working hours. Moreover, it is patent that the attack was employment-rooted and was reasonably incidental to Ms. McKnight's employment duties, since her duties implicitly included being counseled by her superiors regarding complaints about her job performance and the actions to be taken as a result of those complaints. Clearly, there was no appreciable passage of time between the remarks directed toward Ms. McKnight regarding her termination and Ms. McKnight's unprovoked attack on her supervisor. See LeBrane, 292 So.2d at 219.

Accordingly, we conclude that Ms. McKnight's attack upon Ms. Cowart was so closely connected in time, place, and causation to her employment that it constituted a risk of harm attributable to LQRNHC's business, thereby rendering LQRNHC responsible for any damages caused by Ms. McKnight's intentional tortious conduct.[2]

CONCLUSION

For the foregoing reasons, the summary judgment is hereby affirmed. All costs of this appeal are assessed to LQRNHC, LLC d/b/a Lakewood Quarters Rehabilitation and Nursing Center.

AFFIRMED.

[2] Pursuant to LSA-R.S. 23:1032, workers' compensation is the employee's exclusive remedy for injuries sustained in the course and scope of employment, unless the injuries were the result of an intentioanal tort.

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McCLENDON, J., agrees and assigns reasons.

I agree that the defendant in this case is vicariously liable for the intentional tort committed by its employee. The altercation in this case was not only closely connected in time, place and causation to the employment, but also the dispute leading to the altercation arose *directly* from an employment-related activity, i.e., being terminated for poor job performance by her supervisor. These facts put this matter squarely within the ambit of **Menson v. Taylor,** 2002-1457 (La. App. 1 Cir. 6/27/03), 849 So.2d 836, where this court held that an intentional tort in the employment arena can be sufficiently "employment-rooted" to warrant the imposition of vicarious liability on the employer when the foregoing factors have been met.

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PARRO, J., dissenting.

A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to summary judgment as a matter of law. See LSA-C.C.P. art. 966(B). In considering whether a genuine issue of material fact exists, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh the evidence. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Davis v. Specialty Diving, Inc.**, 98-0458, 98-0459 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, 669, writ denied, 99-1852 (La. 10/8/99), 750 So.2d 972.

The premise of vicarious liability is codified in LSA-C.C. art. 2320, which provides that an employer is liable for the tortious acts of its employees "in the exercise of the functions in which they are employed." Accordingly, before the liability of an employer

attaches, it must be demonstrated that an employer-employee relationship existed between the tortfeasor and the employer at the time of the tortious conduct. See **Parmer v. Suse**, 94-2200 (La. App. 1st Cir. 6/23/95), 657 So.2d 666, 668, writ denied, 95-1853 (La. 11/3/95), 662 So.2d 10. The evidence in the record indicates that there is a genuine issue of material fact as to whether Ms. McKnight was still employed by LQRNHC at the time she attacked Ms. Cowart. As this issue is critical to the determination of whether LQRNHC is vicariously liable for Ms. McKnight's intentional tortious actions, I believe that a summary judgment should not have been granted under the circumstances of this case. In my view, the matter should be remanded to the trial court for a full trial on the merits. Accordingly, I respectfully dissent from the majority opinion.