

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2008 CA 0906**

**ROBERT G. PIERCE**

**VERSUS**

**FOSTER WHEELER CONSTRUCTORS INC., DANIEL BOOTHE,  
JOHNNY COWART AND WILLIAM COWART**

**Judgment Rendered: December 23, 2008**

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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 502,420**

**The Honorable Timothy E. Kelley, Judge Presiding**

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**BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.**

**WHIPPLE, J.**

This matter is before us on appeal by plaintiff, Robert G. Pierce, from a judgment of the trial court granting a motion for summary judgment filed by defendant, Foster Wheeler Constructors, Inc. (“Foster Wheeler”). For the following reasons, we reverse the trial court’s grant of summary judgment and remand this matter for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

On February 4, 2002, Pierce, an employee of Foster Wheeler, filed a disputed claim for workers' compensation benefits in the Office of Workers' Compensation (“OWC”), alleging that he had been injured on May 6, 2001, while working for Foster Wheeler at the Georgia-Pacific Corporation Port Hudson Division Plant, and seeking benefits. Foster Wheeler answered the claim, admitting that Pierce had been injured in the course and scope of his employment with Foster Wheeler, but denying his entitlement to any further benefits. Prior to trial of the matter, the parties settled the dispute and jointly filed a motion to dismiss the petition before the OWC. Accordingly, by order dated October 28, 2002, the OWC ordered that Pierce's workers' compensation claim be dismissed without prejudice.

Thereafter, on December 13, 2002, Pierce instituted the present suit in the district court for damages allegedly sustained as a result of the alleged work-related injury.<sup>1</sup> Therein, Pierce named as defendants Foster Wheeler and its employees, Daniel Boothe, Johnny Cowart, and William Cowart. In his petition, Pierce, a boilermaker, contended that on May 7, 2001, he was standing on a two-inch beam of a scaffold on the second floor of a recovery boiler, rigging a chain fall to a four-inch beam, when his co-employees, Boothe and the

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<sup>1</sup>We note that Pierce’s Petition for Damages lists the date of the alleged injury as May 7, 2001, while the disputed form for compensation lists the date of injury as May 6, 2001.

Cowarts, who were standing approximately eight to ten feet below him on the first floor, filled a four-inch pipe with acetylene and ignited the fuel with an oxygen lance, causing a loud explosion with concussion waves. Pierce contended that the explosion startled him and caused him to lose his balance and fall from the beam. Pierce was wearing a safety lanyard which broke his fall, but jerked his body abruptly, causing severe injuries and residual disabilities. Pierce averred that due to the intentional and deliberate acts of his co-employees, Foster Wheeler was liable for the actions of his co-employees under the theory of *respondeat superior* and that these intentional acts further exempted his claim from the exclusivity provisions of the Workers' Compensation Act pursuant to LSA-R.S. 23:1032(B).<sup>2</sup>

On June 7, 2007, Foster Wheeler filed a motion for summary judgment, resulting in the judgment at issue in this appeal. Therein, Foster Wheeler contended that Pierce had no evidence to show that an intentional tort had occurred (to avoid the workers' compensation bar), and secondly, that if such evidence did exist, Foster Wheeler was not liable for the acts of these employees,

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<sup>2</sup>Thereafter, Foster Wheeler filed two peremptory exceptions, which were both subsequently appealed to this court. Foster Wheeler filed a peremptory exception raising the objection of prescription, contending that although Pierce had filed a claim for compensation benefits on February 4, 2002, because the previously filed workers' compensation claim had been voluntarily dismissed pursuant to LSA-C.C. art. 3463, prescription was never interrupted. Accordingly, Foster Wheeler contended that the civil suit, filed more than one year after the accident, was untimely. Following a hearing on the matter, the trial court maintained the exception of prescription and dismissed Pierce's claims against Foster Wheeler with prejudice. Pierce appealed to this court. On appeal, we reversed the judgment of the trial court, finding that the judgment of dismissal on the basis of transaction or compromise between the parties did not constitute a "voluntary dismissal" within the meaning of LSA-C.C. art. 3463 for purposes of determining whether prescription had tolled. See Pierce v. Foster Wheeler Constructors, Inc., 2004-0333 (La. App. 1<sup>st</sup> Cir. 2/16/05), 906 So. 2d 605, 610, writ denied, 2005-0567 (La. 4/29/05), 901 So. 2d 1071.

Foster Wheeler then filed a peremptory exception raising the objection of *res judicata*. Following a hearing on the matter, the trial court rendered judgment on December 16, 2005, maintaining the exception of *res judicata* and dismissing Pierce's claims against Foster Wheeler, with prejudice. Pierce appealed to this court. On appeal, we reversed the judgment of the trial court, finding that the OWC lacked subject matter jurisdiction to hear and adjudicate Pierce's intentional tort claims against his employer and co-workers. Thus, because the OWC lacked subject matter jurisdiction to adjudicate those claims, we held that Pierce's intentional tort claims were not barred by *res judicata*. See Pierce v. Foster Wheeler Constructors, Inc., 2006-0562 (La. App. 1<sup>st</sup> Cir. 12/28/06) (unpublished opinion).

which it contends were clearly beyond the scope of their employment. The matter was heard before the trial court on November 5, 2007, and on November 26, 2007, the trial court rendered judgment granting summary judgment in favor of Foster Wheeler, dismissing Pierce's claims, and reserving Pierce's claims against the remaining named defendants. In its oral reasons for judgment, the trial court found that the actions of Boothe and the Cowarts were not intentional so as to remove the claim from the workers' compensation arena as they did not know that the result was substantially certain to follow from their conduct. The trial court further found that even if the culprits intended for these results to occur, their actions were not employment related, and, thus, Foster Wheeler bore no vicarious liability.

From this grant of summary judgment, Pierce appeals, contending that the trial court erred: (1) by judging the evidence and chance of success rather than determining whether enough evidence existed for the case to go to the trier of fact; and (2) in determining that Foster Wheeler was not liable for the acts of its employees when the facts of this case are similar to other cases where the First Circuit and Supreme Court have found vicarious liability.

## **DISCUSSION**

A motion for summary judgment is a procedural device used to avoid a full-scale trial where there is no genuine factual dispute. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1<sup>st</sup> Cir. 6/20/97), 696 So. 2d 1031, 1034, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. It should only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, 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. 966.

The initial burden remains with the mover to show that no genuine issue of material fact exists. If the moving party points out that there is an absence of

factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). If the non-moving party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. LSA-C.C.P. arts. 966 and 967; Davis v. Specialty Diving, Inc., 98-0458, 98-0459, (La. App. 1<sup>st</sup> Cir. 4/1/99), 740 So. 2d 666, 669, writ denied, 99-1852 (La. 10/8/99), 750 So. 2d 972. The likelihood a party will prevail on the merits does not constitute a basis for rendition of summary judgment. Smith v. State, through Department of Administration, 96-0432 (La. App. 1<sup>st</sup> Cir. 5/9/97), 694 So. 2d 1184, 1188, writ denied, 97-1493 (La. 11/14/97), 703 So. 2d 1288.

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. Sanders v. Ashland Oil, Inc., 696 So. 2d at 1035. 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., 740 So. 2d at 669.

#### **ASSIGNMENT OF ERROR NUMBER ONE (Intentional Tort)**

Louisiana Revised Statute 23:1032(B) provides an exception to the exclusivity provisions of the Louisiana workers' compensation scheme for acts constituting intentional torts, as follows:

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 Louisiana Supreme Court has determined that an intentional act is one in which the actor either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) 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 Systems, 98-1795 (La. 3/12/99), 731 So. 2d 208, 211.

In support of its motion for summary judgment, Foster Wheeler introduced a statement of undisputed facts and excerpts of Pierce's deposition testimony. In particular, it points to Pierce's deposition testimony that he knew of no reason why the co-employee defendants would want to intentionally harm him. Foster Wheeler contends that this evidence shows that the co-employee defendants did not possess "active intent" to injure Pierce.

In opposition to the motion, Pierce introduced: his deposition testimony; the deposition testimony of James Sudduth, Foster Wheeler's Safety Supervisor; the transcript of a recorded interview of Robert Pierce; a witness statement and an employee statement from Joey Fagan, a boiler maker employed by Foster Wheeler who witnessed the explosion on May 7, 2001; Pierce's injury report; and employee statements from Pierce and Michael Patrick, another Foster Wheeler employee who witnessed the accident. Pierce contends that this evidence shows that the co-employee defendants, did in fact, create and ignite the "pipe bomb," causing it to explode with the intent of frightening their co-employees.

The depositions of record establish undisputed facts that the three co-employee defendants in this case constructed a "pipe bomb" or "acetylene canon" and ignited it, causing it to explode. Further, the explosion was very loud and shook the plant. According to Pierce, the explosion startled him and caused him to lose his balance and fall. Moreover, the evidence introduced herein shows that immediately after the explosion, Boothe and the Cowarts were seen looking at

Pierce and laughing. Boothe and the Cowarts were immediately fired and escorted from the plant premises.

Considering the evidence submitted herein, we find Pierce satisfied his burden of producing factual support sufficient to satisfy his evidentiary burden at trial. Here the evidence shows that the co-employee defendants knew or should have known that co-employees were working in precarious positions on scaffolding beams in the boiler, and knew or should have known that such employees would be startled by the explosion. Thus, we agree with plaintiff that the evidence introduced in support of and opposition to the motion for summary judgment is sufficient to preclude summary judgment, as the evidence, if accepted at trial, shows that this result was substantially certain to follow from the co-employees' conduct of causing an explosion.

Further, we reject Foster Wheeler's argument that the evidence undisputedly shows that the co-employee defendants did not "actively intend" to harm or startle any workers, including Pierce, when, as here, there is countervailing evidence that Pierce was on a two-inch scaffold beam eight to ten feet above the defendants, the explosion occurred when there were at least twelve men working in the vicinity, and the co-employee defendants were seen laughing and giggling and pointing at Pierce after the explosion. We further note that Pierce does not bear the burden of proving that the co-employee defendants intended to specifically frighten or startle him, as opposed to any of the other workers on site at the Port Hudson Georgia Pacific Plant, by their actions. See generally Temple v. J & S Communication Contractors, 35,247, 35,257 (La. App. 2<sup>nd</sup> Cir. 1/25/02), 805 So. 2d 1263; and Walters v. A-Way Tank Service, Inc., 2000-00755 (La. App. 3<sup>rd</sup> Cir. 12/29/00), 802 So. 2d 1. As this court has previously held, cases requiring judicial determination of subjective facts, such as motive, intent or knowledge, are rarely appropriate for summary judgment.

See Neuman v. Mauffray, 99-2297 (La. App. 1<sup>st</sup> Cir. 11/8/00), 771 So. 2d 283, 285-286.

Considering the evidence submitted herein, we find that Foster Wheeler has failed to establish its entitlement to judgment in its favor as a matter of law. Given the record before us, to find in Foster Wheeler's favor would require this court to weigh the evidence and make credibility calls, which is clearly inappropriate for summary judgment. Accordingly, we reverse the trial court's judgment insofar as the court found that Foster Wheeler was entitled to judgment in its favor as a matter of law on the issue of whether the co-employee defendants' actions were intentional within the exclusivity provision of the workers' compensation act pursuant to LSA-R.S. 23:1032(B).

We find merit to this assignment of error.

**ASSIGNMENT OF ERROR NUMBER TWO**  
**(Vicarious Liability)**

When assessing an employer's vicarious liability, courts consider whether the employees' 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. LeBrane v. Lewis, 292 So. 2d 216, 218 (La. 1974). It is not necessary that all four factors be met in order to find liability. Baumeister v. Plunkett, 95-2270 (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. Cowart v. Lakewood Quarters Limited Partnership, 2006-1530 (La App. 1<sup>st</sup> Cir. 5/4/07), 961 So. 2d 1212, 1215.



It is undisputed that the intentional conduct of the co-employee defendants herein occurred during working hours, on the employer's premises, and in the course of work undertaken by virtue of Foster Wheeler's contract with Georgia Pacific to remove and repair piping in the boiler unit at the Georgia Pacific Port Hudson Plant. With reference to the other two factors, the evidence shows that Pierce, as well as the co-employee defendants, were employed as boiler makers for Foster Wheeler. At the time of the explosion, Pierce was assigned the job of tying off piping while it was still connected, prior to pipe being cut from the second floor of the scaffold. On the deck immediately below Pierce, Boothe and the two Cowarts were assigned the job of cutting the piping that Pierce had tied off, using cutting torches, lances, and acetylene and oxygen tanks provided by Foster Wheeler. Using these very materials that they were assigned and were working with, the co-employee defendants filled a piece of four-inch pipe that had been cut with acetylene and ignited it with oxygen to willfully cause an explosion.

Considering that Booth and the Cowarts were in the process of cutting pipe using cutting torches, lances, and acetylene and oxygen tanks, *i.e.*, equipment provided by Foster Wheeler, and proceeded to construct the pipe bomb with these same materials, the question of whether the co-employee defendants' actions herein were so closely connected in time, place, and causation to their employment that it presented a risk of harm attributable to Foster Wheeler is not a matter to be decided on summary judgment and is more appropriately reserved for the trier of fact. See Cowart v. Lakewood Quarters Limited Partnership, 961 So. 2d at 1215. Based on the evidence presented by Foster Wheeler in support of its motion for summary judgment, we are unable to find that Foster Wheeler established its entitlement to judgment as a matter of law on this issue. Thus, we reverse the trial court's judgment to the extent that it granted summary judgment in favor of Foster Wheeler on the issue of vicarious liability.

We find merit to this assignment of error.

### **CONCLUSION**

For the above and foregoing reasons, the November 26, 2007 judgment is reversed and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed against the appellee, Foster Wheeler.

**REVERSED AND REMANDED.**