NOT DESIGNATED FOR PUBLICATION

JACQUELINE R. COOPER	*	**NO. 2000-CA-2395**
VERSUS	*	**COURT OF APPEAL**
KEVIN ANTHONY, HIS INSURANCE COMPANY, XYZ, ALL AMERICA TERMITE & PEST CONTROL, INC., AND SEARS TERMITE & PEST CONTROL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-7805, DIVISION "G"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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AFFIRMED

The plaintiff, Jacqueline R. Cooper, seeks review of a judgment dismissing her claims against defendants Sears Termite & Pest Control, also known as All America Termite & Pest Control ("Sears").

The plaintiff's action arises out of an incident that allegedly occurred on May 2, 1996. On that day, Kevin Anthony, an employee of Sears, allegedly attacked the plaintiff and ran over her, causing severe and permanent injuries to her body. At the time that this incident occurred, Mr. Anthony was allegedly driving a vehicle owned by Sears. As a result of this incident the plaintiff filed a petition for damages against Kevin Anthony, his insurance company XYZ, and Sears. The plaintiff alleged that Sears was liable under a theory of *respondeat superior* because at the time of the incident, Mr. Anthony was in the course and scope and in furtherance of his employment with Sears. The plaintiff also alleged that the accident was caused by the joint negligence of Kevin Anthony and Sears. The plaintiff based her negligence claim against Sears upon its alleged negligence in

failing to adequately supervise and oversee the actions of Mr. Anthony and upon its failure to adequately instruct him on motor vehicle operation procedures.

Following discovery, Sears filed a motion for summary judgment seeking a dismissal of the plaintiff's action. Sears alleged that summary judgment was warranted because Kevin Anthony's actions toward the plaintiff were not undertaken in the course and scope of his employment. Thus, it could not be held liable under the doctrine of *respondeat superior*. Additionally, Sears argued that the plaintiff could not bear her burden of proving legal causation; thus summary judgment on her negligence claim was also warranted.

Attached to the motion for summary judgment was a copy of various portions of a deposition given by the plaintiff. In the deposition, the plaintiff admitted that she and Mr. Anthony had been involved in a personal relationship for approximately ten months prior to the incident. In fact, Mr. Anthony had previously bought her a ring, which she thought of as an engagement ring. However, they never set a wedding date or discussed marriage. In March 1996 the plaintiff was no longer interested in seeing Mr. Anthony. She initiated a break up of the relationship; however, the couple remained friends up until the day of the incident. They saw each

other occasionally, and Mr. Anthony continued to call and/or page her frequently. In fact, the plaintiff had spoken with Mr. Anthony on the telephone three days prior to the incident forming the basis for the lawsuit. Mr. Anthony told her that he missed her, and he asked how she and her son were doing. Three weeks prior to the incident, Mr. Anthony had talked to the plaintiff about reconciling. However, the plaintiff was not interested in reconciling with Mr. Anthony.

On May 2, 1996, the plaintiff, who worked as a home health aide, was working at the home of a patient when Mr. Anthony paged her. She returned the call by telephoning him at Sears, his workplace. Mr. Anthony inquired about her whereabouts and asked if he could stop by to see her. The plaintiff agreed to see Mr. Anthony. When he arrived at the patient's house, the plaintiff stepped outside to talk to him. The plaintiff described the events that transpired as follows:

> Q. What did you talk about?
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> A. It was a friendly conversation at first, then he started talking about . . . he wanted to be back with me and I was telling him that I wasn't ready, and I went to go back inside and he walked to his truck and he called me. He said, "Come here. I want to tell you something."
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> So when I went to the truck, it still was friendly until he asked me was I seeing someone and I told him yes. That's when it got ugly. He grabbed me by my hair, pulled me into the truck, because he had done got into the truck, pulled me

> into the truck and we just went to wrestling and fighting and I was biting trying to get away from him. Then I got out the truck some kind of way and he took my arm, my left arm, and twisted it behind my back and I went to hollering and he turned my arm aloose (sic). He put up like a fighting positing (indicating) and I told him I didn't want to fight him, so he got in his truck.
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> And I was just standing there and I was waiting for him to pull off because he had started his truck up. I was waiting for him to pull off and he just was sitting there. So as I went to walk across in front of the truck, he just pulled off. I went on top of the truck and he slammed on brakes and I rolled off the truck and he backed up and speeded off. And then I hopped inside the house where I was at and I told the patient that was in the bed what had happened and she called for her daughter, which is Fran, and she called 911.

Based primarily upon the above cited deposition testimony, Sears argued that the plaintiff cannot show that Mr. Anthony was acting within the course and scope of his employment as required by La. C.C. art. 2320 for the imposition of vicarious liability. Rather, Sears argued that the plaintiff was injured as a result of an alleged intentional act motivated by purely personal consideration relating to the couple's private relationship. Further, Sears argued that the plaintiff could not prove a cause of action for negligence because no facts exist to support a finding that its supervision or training of Mr. Anthony was the legal cause of the plaintiff's injuries. Following a hearing, the trial court granted Sears' motion for summary judgment and

dismissed the claims against it with prejudice. The plaintiff argues that the trial court erred in rejecting her claims of vicarious liability and negligence and in dismissing her claims against Sears.

Appellate courts review summary judgment rulings de novo, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/2000), 755 So.2d 226, 230. However, the issue of vicarious liability is a mixed question of law and fact; thus, the appellate court should afford great deference to the district court under a manifest error standard of review. Brasseaux v. Town of Mamou, 99-1584 (La. 1/19/2000), 752 So.2d 815, 820-21.

La. C.C. art. 2320, which codifies the law on the doctrine of *respondeat superior* or vicarious liability of employers for tortious conduct of employees, provides in pertinent part: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Pursuant to this codal article an employer is liable for a tort committed by his employee if, at the time, the employee was acting within the course and scope of his employment. Baumeister v. Plunkett, 95-2270, p. 3 (La. 5/21/96), 673 So.2d 994, 996. However, the jurisprudence requires a close connexity between

the tortious conduct and the employment duties. Id. Thus, the tortious conduct of the employee must be so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct instituted by purely personal considerations entirely extraneous to the employer's interest. Baumeister, 673 So.2d at 996.

In the seminal case, LeBrane v. Lewis, 292 So.2d 216 (La.1974), the Louisiana Supreme Court set forth four factors which it utilized in determining whether an employer should be held liable for the tortious acts of its employee: (1) whether the tortious act was primarily employment-rooted; (2) whether the violence was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment. Later, in Miller v. Keating, 349 So.2d 265 (La.1977), the court stated that it did not mean to suggest that all four of the factors set forth in LeBrane must be met before vicarious liability may be found. The court went on to add that each case must be looked at on its own merits. Miller, 349 So.2d at 268-269.

Citing Latullas v State of Louisiana, 94 2049 (La. App 1 Cir. 6/23/95), 658 So.2d 800, the plaintiff argues that the mere fact that Mr. Anthony may

have been motivated by purely personal considerations relating to their private relationship does not mean that his employer cannot be held vicariously liable for his actions. Assuming arguendo that the tort committed by Mr. Anthony was intentional, the plaintiff alleges that the mere fact that Mr. Anthony committed the tort during his employment hours is sufficient to raise a question as to whether he was acting within the course and scope of his employment.

This case is clearly distinguishable from Latullas wherein the State was found vicariously liable for a prison guard's rape of an inmate on prison grounds. The prison guard, who was in charge of the inmate's work crew, told the inmate to go with him to clean out a semi-abandoned mobile home in an isolated area. While there, he raped her. In Latullas, the evidence clearly showed that the prison guard was able to rape the plaintiff inmate because of the authority bestowed upon him by his employer. The court in Latullas articulated two requirements for vicarious liability of an employer: the employee must be acting within the ambit of his assigned duties and in furtherance of the employer's objectives. Neither requirement exists here.

Moreover, it is well settled that "an employer is not vicariously liable merely because his employee commits an intentional tort on the business premises during working hours." Baumeister, 673 So.2d at 996 (citing Scott

v. Commercial Union Insurance Company, 415 So. 2d 327, 329 (La. App. 2nd Cir. 1982)). Vicarious liability will attach only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objectives. Id.

In Baumeister the court held that an employer was not vicariously liable for a sexual attack by one employee on another that occurred during working hours. Similarly, in McClain v. Holmes, 460 So.2d 681, 684 (La. App. 1st Cir. 1984), the First Circuit affirmed the trial court's decision that the employee's altercation with police officers during a delivery for the employer was not employment-related, nor was the employee acting in furtherance of his employer's interest. Rather, the court determined that the employee's violent conduct was motivated by "purely personal considerations entirely extraneous to the employer's interest," even though the conduct occurred while the employee was working. In Scott, the employee mechanic hit a customer while they were discussing a personal matter. The court determined that even though the tort was committed at the workplace during work hours, the dispute was strictly personal and was in no way related to the employment.

The mere fact that Mr. Anthony's actions occurred during his regular work hours while he was driving a company vehicle is not sufficient to show

he was acting within the ambit of his assigned duties. While conceding that Sears hired Mr. Anthony to perform the duties of a termite specialist, the plaintiff argues that the actions he committed were committed while he was carrying out an employee function, i.e., driving to perform his duties as a termite specialist.

This argument is specious because the plaintiff presented no evidence to contradict her own deposition testimony that Mr. Anthony came to her employer's home to talk to her. At no time did she suggest that he drove to her place of employment to perform his duties as a termite specialist. It is fairly obvious that Mr. Anthony's actions were not employment related or incidental to his performance of his duties as a termite inspector. Even assuming arguendo that he was performing his duties, there is no evidence that he was acting in furtherance of his employers' objectives when he attempted to run over the plaintiff. Thus, the mere fact that Mr. Anthony committed the tort upon the plaintiff during his regular business hours is not sufficient to raise a question concerning whether the act was committed within the course and scope of his employment.

Finally, the plaintiff argues that the employer can be found liable for Mr. Anthony's tort because of Sears' negligent supervision and failure to adequately instruct Mr. Anthony concerning the procedures for operating a

motor vehicle.

The plaintiff's allegations of negligence are based on La. C.C. art. 2315 which provides in pertinent part that, "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. " The usual standard negligence analysis employed to determine whether to impose liability under La. C.C. art. 2315 is a duty/risk analysis. Roberts v. Benoit, 605 So.2d 1032, 1057 (La.1991). To prevail on a negligence claim a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and, (5) actual damages (the damages element). Id.

The plaintiff failed to present any evidence to establish that she will be able to prove the fourth element needed to show legal causation, i.e., that the defendants' conduct was the cause of her injuries. The specific conduct upon which the plaintiff bases her negligence claim against Sears is its failure to adequately supervise Mr. Anthony's actions and its failure to

adequately instruct Mr. Anthony on motor vehicle operation procedures. However, the plaintiff's own testimony clearly shows that closer supervision or instruction on motor vehicle safety would not have prevented this incident which was admittedly the result of Mr. Anthony's anger upon being told that the plaintiff was seeing someone else. Accordingly, the plaintiff fails to show that any genuine issues of material fact exist concerning legal causation.

The plaintiff failed to submit any evidence to demonstrate that a genuine issue of material fact exists as to whether Mr. Anthony's actions were not purely personal and not entirely extraneous to the interests of his employer. Further, based upon the plaintiff's own testimony her injuries are clearly and directly related to her personal relationship with Mr. Anthony, not to any lack of supervision or proper training regarding the operation of a vehicle.

Kevin Anthony assaulted and injured the plaintiff, his former girlfriend, while visiting her at the place of her employment. The plaintiff's deposition testimony establishes that she agreed to allow Mr. Anthony to visit her at her workplace and that she left her patient to talk to Mr. Anthony outside. While engaged in a purely personal conversation regarding their relationship, Mr. Anthony committed a battery upon the plaintiff and then

either intentionally or negligently hit her while driving a vehicle owned by his employer. Mr. Anthony's visit had nothing whatsoever to do with his employment or his employer's interest. In fact, it appears that his actions were clearly contrary to his employer's interests in that he was using his employer's vehicle to engage in a purely personal mission unrelated to the employer's business.

We find that the plaintiff will not be able to prevail against Sears at a trial on the merits. For these reasons the trial court correctly granted Sears' motion for summary judgment and dismissed the plaintiff's action with prejudice.

AFFIRMED