FELICIA HORN	*	**NO. 2004-CA-1024**
VERSUS	*	**COURT OF APPEAL**
LUTHERAN SOCIAL SERVICES OF THE SOUTH, INC., TIG INSURANCE COMPANY AND ALBERTHA RANDOLPH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-6941, DIVISION "C-6"
HONORABLE ROLAND L. BELSOME, JUDGE
* * * * * *

JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay III, Judge Dennis R. Bagneris Sr.)

MILTON OSBORNE, JR.
New Orleans, Louisiana 70127
Counsel for Plaintiff/Appellant

CATHERINE ORWIG HUNTER
ALLEN & GOOCH
Metairie, Louisiana 70002
Counsel for Defendants/Appellees, Lutheran Social Services and Albertha Randolph

AFFIRMED

The plaintiff alleges that while in the course and scope of her employment with the defendant Lutheran Social Services of the South, Inc., she attempted to move a patient from his bed to a wheelchair, twisted her back, and fell to the floor. She filed a claim for worker's compensation. Lutheran paid benefits and settled the claim. She then filed this suit in intentional tort, naming as the defendant Lutheran, its insurer, and Albertha Randolph, a supervising nurse on duty at the time of the alleged accident. The defendants (hereinafter collectively referred to as "Lutheran") moved for summary judgment; the trial court granted it, and this appeal followed. The sole issue is whether plaintiff's injuries fell under the intentional act exception to the exclusivity provisions of the worker's compensation act.

Appellate courts review the grant or denial of a motion for summary judgment *de novo*. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 7 (La. 2/29/00), 755 So.2d 226, 230. A summary judgment shall be rendered forthwith 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. La. C.C.P. art. 966(B). Summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause

of action or defense in favor of one or more parties. La. C.C.P. art. 966(E); *see also* La. C.C.P. art. 1915(B)(1).

A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Hardy v. Bowie*, 98-2821, p. 6 (La. 9/8/99), 744 So.2d 606, 610. Simply put, a material fact "is one that would matter on the trial on the merits." *Smith.* Id. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by La. C.C.P. art. 969. La. C.C.P. art. 966(A)(2). Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish those ends. *Id.* Nevertheless, despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 2000-

2507, p. 2 (La. 12/08/00), 775 So.2d 1049, 1050. A court cannot make credibility determinations on a motion for summary judgment, and must assume that all of the affiants are credible. *See Independent Fire Insurance Co. v. Sunbeam Corp.*, 99-2181, p. 16, 755 So.2d at 236.

Under the worker's compensation scheme, employees have an exclusive remedy against employers for personal injuries arising out of and in the course of their employment. La. R.S. 23:1032. However, there is an exception to the exclusive remedy of worker's compensation when the employee's injury was caused by an "intentional act." La. R.S. 23:1031(B). "Intentional act," as used in the statute, means "intentional tort." "Intent" has been defined by the Louisiana Supreme Court to mean "that the defendant either desired to bring about the physical results of his act or believed they were substantially certain to follow from what he did." *Bazley v. Tortorich,* 397 So.2d 475, 482 (La.1981). Since the inception of the intentional act exception, Louisiana courts have respected the underlying legislative policy, and thus, *narrowly* interpreted the exception.

To meet the criteria of the "substantially certain" prong of the *Bazley* test, jurisprudence requires more than a reasonable probability that an injury will occur; this term has been interpreted as being equivalent to "inevitable," "virtually sure," and "incapable of failing." Additionally, even

where a defendant's conduct is grossly negligent, this fact alone will not allow the imputation of intent. *King v. Schuylkill Metals Corp.,* 581 So.2d 300 (La.App. 1 Cir. 1991).

Under Louisiana jurisprudence, the words "intent and/or intentional" and the allegation that the defendants "knew or should have known" that the plaintiff's "injuries were substantially certain to follow" are not talismans which, by mere recital, convert allegations into creditable claims of true intentional torts against an employer, such that workman's compensation is not the exclusive remedy. *Taylor v. Metropolitan Erection Co.,* 496 So.2d 1184, 1186 (La.App. 5 Cir.1986); *Davis v. Southern Louisiana Insulations,* 539 So.2d 922, 924 (La.App. 4 Cir.1989).

In her petition, plaintiff alleged that she was “ordered by defendant Randolph and/ or other Lutheran supervisors to move a patient from the bed unto a wheel-chair.” However, in her own deposition she could not say that anyone told her to lift the patient, only that Lutheran’s policy was that “you can go to the desk and say this patient is too heavy or I can’t do this”, and that in this situation she did not go to a nurse to tell her the patient was too big or that she could not move him. As such, by her own admission, no employee of Lutheran ordered her to move a patient that was too heavy for her to do so safely. She further stated in her deposition that she did not

believe that Randolph in any way wanted her to be injured and that none of the nurses or supervisors intended for her to hurt herself.

She also alleged in her petition that Lutheran knew or should have known that her accident and resulting injuries were substantially certain to follow because other employees of Lutheran had been injured under like or similar circumstances. However, she stated in deposition that she could provide no specific names, and she presented no other evidence to support this assertion.

In her deposition, the plaintiff basically blamed Lutheran for having inadequate equipment, in particular for not having an operating lift machine.

In response to the motion for summary judgment, the plaintiff filed only her own affidavit in which she stated that Lutheran knew or should have known that injuries would occur when patients were lifted from their beds because employees were required to lift patients manually without the assistance of other employees.

When the above cited principles are applied to this case, the plaintiff's allegations that Lutheran was "substantially certain" that her injuries would result do not transform her assertion into an intentional act for the purpose of precluding summary judgment. Furthermore, her allegations simply amount to the conclusion that Lutheran was negligent in failing to maintain a safe

work place and in failing to correct unsafe conditions. Allegations that Lutheran failed to correct unsafe working conditions are insufficient to prove an intentional act under La. R.S. 23:1032(B). *Gallon v. Vaughan Contractors,Inc.*, 619 So.2d 746 (La. App. 4 Cir. 1993); *Dycus v. Martin Marietta Corp.,* 568 So.2d 592, 594 (La.App. 4 Cir.1990), *citing Hood v. South Louisiana Medical Center,* 517 So.2d 469 (La.App. 1 Cir.1987). *Hood* demonstrates that although an employer's failure to furnish an employee with a safe work place may create a dangerous situation, which could make the occurrence of an accident likely, the circumstances must indicate that injury to the plaintiff was inevitable or substantially certain to occur. Furthermore, this Court has maintained that an employer's failure to provide even specifically requested safety equipment is not an intentional tort for purposes of the exception to the worker's compensation exclusivity rule. *Gallon*, supra*; Jacobsen v. Southeast Distributors, Inc.,* 413 So.2d 995 (La.App. 4 Cir.1982).

The plaintiff's allegations alone do not raise a material issue as to whether Lutheran was guilty of an intentional act within the meaning intended by the exception. For the foregoing reasons, the judgment of the district court granting Lutheran's motion for summary judgment is affirmed.

AFFIRMED