LANCE STEVEN MELERINE	*	**NO. 2004-CA-1569**
VERSUS	*	**COURT OF APPEAL**
KENNETH SPILLER, COX COMMUNICATIONS LOUISIANA, L.L.C., ENTERPRISE LEASING COMPANY OF NEW ORLEANS AND AIG NATIONAL INSURANCE COMPANY CORPORATION	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-8409, DIVISION "F"
HONORABLE YADA MAGEE, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge Edwin A. Lombard)

JONES, J., DISSENTS WITH REASONS

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AFFIRMED

The appeal before us concerns whether an employee was acting within the course and scope of his employment when he was involved in an automobile accident, thus rendering his employer liable for his negligence. This issue was presented to the trial court on opposing motions for summary judgment. Plaintiff, Lance Melerine (Melerine), appeals the trial court's granting of the motion for summary judgment in favor of defendant, Cox Communications Louisiana, L.L.C. (Cox), and the dismissal of Melerine's motion for summary judgment. For the reasons set forth below, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On June 6, 2001, Melerine and Kenneth Spiller (Spiller) were involved in an automobile accident. Melerine filed a petition for damages against Spiller, Cox and others, alleging that Spiller was acting in the course and scope of his employment with Cox at the time of the accident.

On April 1, 2003, Cox filed a motion for summary judgment, arguing that it was not vicariously liable for the actions of Spiller because Spiller was on his way to work at the time of the accident. Spiller's deposition,

affidavit, and answers to interrogatories were presented to the trial court in connection with the motion. On April 7, 2003, Melerine filed an opposing motion for summary judgment, and both motions were brought before the trial court on April 16, 2004. On April 29, 2004, the trial court ruled in favor of Cox, and provided the following Reasons for Judgment:

> An employer's vicarious liability for acts not its own extends only to the employee's tortuous conduct that is within the course and scope of the employment. Generally, an employee traveling to and from work is not considered as acting within [sic] course and scope of his employment to such an extent as to render his employer liable to third persons for employee's negligent acts. *Fasullo v. Finley* 782 So.2d 76 La. App. 4 Cir. 2001[sic]. In light of the evidence presented, this Court finds that Mr. Spiller was en route to work at the time of the accident.

Melerine appealed, arguing that genuine issues of material fact exist as to whether Spiller was acting in the course and scope of his employment with Cox at the time of the accident.

STANDARD OF REVIEW:

Appellate courts review the granting of summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Reynolds v. Select Properties, Ltd*., 93-1480 (La. 4/11/94), 634 So.2d 1180, 1182. The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. *Two Feathers Enterprises v. First National Bank*

of Commerce, 98-0465 (La. App. 4 Cir. 10/14/98), 720 So.2d 398, 400. This procedure is now favored and shall be construed to accomplish those ends. La. C.C.P. art. 966 A(2).

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 a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art 966. If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. *Oakley v. Thebault*, 96-0937 (La. App. 4 Cir. 11/13/96), 684 So.2d 488, 490. The burden does not shift to the party opposing the summary judgment until the moving party first presents a prima facie case that no genuine issues of material fact exist. *Id*. At that point, the party opposing the motion must "make a showing sufficient to establish existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial." La. C.C.P. art. 966(C).

DISCUSSION:

An employer is answerable for the damage occasioned by his servant in the exercise of the functions in which the servant is employed. La. C.C. art. 2320. In the application of article 2320, an employer's vicarious liability

for conduct not his own extends only to the employee's tortious conduct which is within the course and scope of employment. *Orgeron on Behalf of Orgeron v. McDonald*, 93-1353 (La. 7/5/94), 639 So.2d 224, 226; *Reed v. House of Decor, Inc*., 468 So.2d 1159, 1161 (La. 1985).

The general rule in Louisiana is that "an employee, in going to and from work, is not considered as acting within the course and scope of his employment to such an extent as to render his employer liable to third persons for employee's negligent acts." *Gordon v. Commercial Union Ins. Co*., 503 So.2d 190, 194 (La. App. 4 Cir.1987). The rationale of this principle is that an employee usually does not begin work until he reaches his employer's premises. *Orgeron*, at 227. Therefore, unless the employee has a duty to perform a service or task en route, the employee's commute to and from work is usually considered outside the course and scope of employment. *Id*.

Louisiana jurisprudence, however, has recognized three exceptions to this general rule. An employee's accident has been found to occur within the course and scope of his employment under following circumstances: 1) the employer provides the transportation the employee uses to go to and from work; 2) the employer provides expenses or wages for the time spent traveling in the vehicle; and 3) the operation of the vehicle is incidental to or

is actually the performance of some employment responsibility. *Washington v. Avondale Industries, Inc*., 98-0362 (La. App. 4 Cir. 3/18/98), 708 So.2d 1254; *Vaughan v. Hair*, 94-86 (La. App. 3 Cir. 10/5/94), 645 So.2d 1177.

When the accident occurred in the present case, Spiller was working for Cox as a field collector. His duties involved going out to a customer's home to notify the customer that cable service would be disconnected if the delinquent bill was not paid within 24 hours. Thereafter, Spiller would disconnect the service and retrieve the cable box when possible. He would then return the cable box back to Cox.

Spiller stated in his deposition that he was required to punch in every morning and that he would get fired if he did anything before he was on the clock. He explained that he could punch in at either the Canal Street office or the Elmwood office. Spiller was traveling from his home to punch in at the Canal Street office when the accident occurred. He stated that he usually punched in at Elmwood; but on the day of the accident, he was going to the Canal Street office to punch in because he was running late, it was raining heavily, and he had cable boxes in his truck from the previous day that needed to be turned in to Canal Street office.

It is undisputed that Spiller used his own vehicle to perform his duties at Cox and was paid a $250.00 monthly automobile allowance. He was not,

however, reimbursed for gas or travel time. At the time of the accident, Spiller was operating a truck that he had personally leased because his own truck was damaged in an accident the week before.

Spiller further stated in his deposition that immediately after the accident, he called his supervisor, Mr. Broussard, and asked him to come to the accident scene to pick up the cable boxes that Spiller had with him. Spiller explained that he was being taken to the hospital for his injuries and he knew he would be responsible for the boxes if they got lost. Melerine maintains that because Spiller was in route to turn in the cable boxes, he was performing a work-related task and was, therefore, acting within the course and scope of employment. We disagree.

It is clear from the record that this case comes under the general rule that an employee is not acting within the course and scope of his employment while driving to and from his place of employment. The only exception to the general rule that might apply here is that Spiller was compensated for the use of his vehicle. After a thorough review of the record, however, we conclude that the monthly automobile allowance alone is insufficient to invoke the exception to the general rule and bring the accident within the course and scope of Spiller's employment with Cox. In making this determination, we considered the following: 1) Spiller was

traveling to work and had not yet punched in; 2) Spiller chose to punch in at the Canal Street office on his own accord, not under the directive of his employer; 3) Spiller was not on a mission for his employer or performing any work related tasks; and 4) Spiller was not "on call" with Cox during the time he was not clocked in for work. Accordingly, we find no error on the part of the trial court in granting the motion for summary judgment in favor of Cox.

CONCLUSION:

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED