DONALD HOLMES	*	**NO. 2004-CA-0784**
VERSUS	*	**COURT OF APPEAL**
CHARLES FOTI, JR., CRIMINAL SHERIFF FOR THE PARISH OF ORLEANS, KEVIN WASHINGTON AND PELICAN ICE AND COLD STORAGE, INC. AND ABC INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-8310, DIVISION "I"
Honorable Piper Griffin, Judge

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CHARLES R. JONES
JUDGE

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris Sr.)

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AFFIRMED

The appellant, Donald Holmes, appeals the judgment of the district court granting a Motion for Summary Judgment in favor of the appellee, Pelican Ice and Cold Storage, Inc. We affirm.

On June 26, 2001, Mr. Holmes was working as a supervisor for Pelican Ice. Kevin Washington, an inmate from Orleans Parish Prison, was also working for Pelican Ice on a work release program implemented by Sheriff Charles Foti, Criminal Sheriff for the Parish of Orleans.

The following pertinent facts, as stated by Mr. Holmes in his deposition, are not in dispute. Mr. Holmes arrived at work on June 26, 2001, at approximately 4:30 a.m., to find that the production of ice had stopped due to the absence of three inmate/workers. Mr. Holmes found the three workers in the break room and requested that they return to work. Two of the workers complied, but Mr. Washington became belligerent and cursed Mr. Holmes. In response, Mr. Holmes punched out Mr. Washington's time card. Approximately forty-five minutes later, when Mr. Washington discovered that his card had been punched out, he confronted Mr. Holmes and a physical altercation ensued. Mr. Holmes sustained injuries and was

taken to the hospital.

Mr. Holmes filed a claim for worker's compensation and has received worker's compensation benefits as a result of his injuries. Additionally, Mr. Holmes filed a Petition for Damages against Sheriff Foti, Mr. Washington, Pelican Ice and ABC Insurance Co. Pelican Ice filed a Motion for Summary Judgment, arguing that there was no genuine issue of material fact regarding the vicarious liability of Pelican Ice because Mr. Washington was acting outside of the scope of his employment in the altercation. On March 5, 2004, the district court granted Pelican Ice's Motion for Summary Judgment. This timely appeal follows.

Appellate courts review the grant or denial of a motion for summary judgment 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 (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). A fact is material when its existence or non-existence 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. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512 (La.7/5/94), 639 So.2d 730, 751. 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. Id.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. 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. La. C.C.P. art. 966(C)(2) provides that where, as in the instant case, the party moving for summary judgment will not bear the burden of proof at trial, his burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he or she will be able to satisfy his or her evidentiary burden of proof at trial, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law.

The sole issue on appeal is whether Pelican Ice is vicariously liable for the alleged intentional acts of Mr. Washington against his supervisor. Mr. Holmes argues that an employer can be vicariously liable for the intentional acts of employees when those acts are within the course and scope of employment. In support of this position, Mr. Holmes relies on LeBrane v. Lewis, 292 So.2d 216 (La. 1974). In LeBrane, a supervisor terminated an employee's job and walked him out of the building where a fight began, resulting in the employee being stabbed by the supervisor. The court held that the fight was employment rooted and that the supervisor's actions were so closely connected to his employment duties that it was a risk of harm attributable to the employer's business.

In response to the appeal, Pelican Ice cites the case of Tampke v. Findley Adhesives, Inc., 489 So.2d 299 (La. App. 4th Cir. 1986). In Tampke, a supervisor informed an employee that his employment was terminated. A fight ensued, and the supervisor was killed. This Court held that the employer was not liable, finding that the assault could not be regarded as a risk of harm fairly attributable to the employer's business. In the present case, Pelican Ice argues that Mr. Washington's actions on the day of the incident did not benefit Pelican Ice's business but rather impeded the production of ice at the plant. Moreover, Pelican Ice submits that because

Mr. Washington was not engaged in an employment activity, it cannot be concluded that the intentional tort committed is regarded as a risk of harm fairly attributable to the employer's business or incidental to his employment duties. We agree.

In Baumeister v. Plunkett, 95-2270 (La. 5/21/96), 673 So.2d 994, 996-997, the Louisiana Supreme Court set out the standards for determining whether an employer will be liable for intentional torts of an employee. As stated in Baumeister*:*

> "An employer is not vicariously liable merely because his employee commits an intentional tort on the business premises during working hours." Scott v. Commercial Union Ins. Co., 415 So.2d 327, 329 (La. App. 2nd Cir.1982) (citing Bradley v. Humble Oil & Refining Co., 163 So.2d 180 (La. App. 4th Cir.1964)). "Vicarious liability will attach in such a case only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objective." Id.
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> More specifically, our LeBrane v. Lewis decision considered the following factors in holding an employer liable for a supervisor's actions in stabbing his fellow 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.
>
> This does not mean that all four of these factors must be met before liability may be found. Miller v. Keating, 349 So.2d 265, 268 (La.1977). But as we noted above in Scott, an employer is not vicariously liable merely because his employee

> commits an intentional tort on the employer's premises during working hours. Scott at 329. See also Tampke v. Findley Adhesives, Inc. 489 So.2d 299 (La. App. 4th Cir. 1986), writ denied, 491 So.2d 24 (La. 1986); McClain v. Holmes, 460 So.2d 681 (La. App. 1st Cir. 1984), writ denied, 463 So.2d 1321 (La.1985). The particular facts of each case must be analyzed to determine whether the employee's tortious conduct was within the course and scope of his employment. Scott, 415 So.2d at 329.

This court has recently addressed an employer's vicarious liability arising out of an altercation between two of its employees. In Cager v. Williams, 03-0212 (La. App. 4th Cir. 11/12/03), 861 So.2d 239, an argument erupted between Williams and Cager, two employees on a Loomis armored truck. Williams initiated the argument by criticizing the way Cager was driving the vehicle. As a result of the argument, Williams shot Cager. Summary Judgment was granted in favor of Loomis, and this court affirmed.

We found in Cager that the altercation between the employees was not primarily employment rooted and was entirely extraneous to the employer's interests. We further held that Williams's duties did not include assaulting his co-employee simply because that employee made driving conditions uncomfortable, and that the assault and battery was adverse to Loomis's interest of safeguarding the currency.

In lieu of our holding in Cager, we agree with the district court that the altercation between Mr. Washington and Mr. Holmes was not primarily employment rooted and was entirely extraneous to Pelican Ice's interests.

Accordingly, we find that Pelican Ice is not vicariously liable for Mr. Washington's assault and battery upon Mr. Holmes.

Decree

For the foregoing reasons, after a *de novo* review of the record, we find no error on the part of the district court in granting the Motion for Summary Judgment in favor of Pelican Ice.

AFFIRMED