NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1159

CARL FALCONER

VERSUS

SAFEWAY INSURANCE COMPANY OF LOUISIANA, CARL WAYNE HOOD, S.E.T. ENTERPRISES, INC., B.R.T. ENTERPRISES, INC., RON THOMAS D/B/A SENTINEL SECURITY, DEF INSURANCE COMPANY, ABC INSURANCE CO., AND XYZ INSURANCE CO.

Judgment Rendered: JAN 19 2012

* * * * * * *

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 120,153

Honorable Wayne Ray Chutz, Judge

* * * * * * *

Scott D. Wilson Baton Rouge, LA	Attorney for Plaintiff – Appellant Carl Falconer
David J. Schexnaydre Mary B. Lord Mandeville, LA and Gregory J. Laborde Lafayette, LA	Attorneys for Defendants – Appellees Ron Thomas, B.R.T. Enterprises, Inc., d/b/a Sentinel Security, and Progressive Security Ins. Co.
Keith M. Borne Lafayette, LA	Attorney for Defendants—Appellees Safeway Ins. Co. and Carl Wayne Hood

* * * * * *

BEFORE: WHIPPLE, PETTIGREW, McDONALD, McCLENDON, AND WELCH, JJ.

McDonald, J. dissents.

McClendon, J. dissents and assigns reasons.

WELCH, J.

In this action for damages arising out of a motor vehicle accident, the plaintiff, Carl Falconer, appeals summary judgment granted in favor of the defendants, B.R.T. Enterprises, Inc. ("BRT"), Ron Thomas (d/b/a Sentinel Security), and Progressive Security Insurance Company (collectively referred to as "the Sentinel Security defendants"), that dismissed the plaintiff's claims against those defendants with prejudice. Based on our *de novo* review of the record, we reverse the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On July 16, 2007, Carl Falconer was driving northbound on Interstate-110 in Baton Rouge, when he pulled his vehicle over and stopped on the shoulder to assist a woman whose vehicle had a flat tire. While Mr. Falconer was standing near the trunk of his automobile, an automobile driven by Carl Wayne Hood veered off the road, striking Mr. Falconer and pinning him between the two automobiles. As a result of the accident, Mr. Falconer sustained personal injuries, including the amputation of both of his legs, and other damages.

On June 4, 2008, Mr. Falconer filed a petition for damages, naming as defendants: Mr. Hood and his automobile liability insurer, Safeway Insurance Company of Louisiana; and Mr. Hood's employer, BRT and Ron Thomas d/b/a Sentinel Security, and their liability insurer, Progressive Security Insurance Company. In Mr. Falconer's petition for damages, he alleged that, at the time of the accident, Mr. Hood was in the course and scope of his employment with BRT and/or Ron Thomas (d/b/a Sentinel Security) and therefore, those defendants were liable to him for damages under La. C.C. art. 2320.

In answering the petition for damages, the Sentinel Security defendants denied liability for Mr. Falconer's damages and denied that Mr. Hood was in the course and scope of his employment at the time of the accident. Thereafter, the

Sentinel Security defendants filed a motion for summary judgment on this issue seeking the dismissal of the plaintiff's claims against them. By judgment signed on December 14, 2010, the trial court granted the motion for summary judgment and dismissed the plaintiff's claims against the Sentinel Security defendants. From this judgment, the plaintiff appeals, asserting that the trial court erred because there were genuine issues of material fact precluding summary judgment on the issue of whether Mr. Hood was in the course and scope of his employment with BRT and/or Ron Thomas d/b/a Sentinel Security at the time of the accident.

LAW AND DISCUSSION

A. Summary Judgment Law

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Granda v. State Farm Mutual Insurance Company**, 2004-2012 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

On a motion for summary judgment, the initial burden of proof is on the moving party. However, if the moving party will not bear the burden of proof at trial on the matter before the court, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the non-moving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Accordingly, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to

produce evidence of a material factual dispute mandates the granting of the motion. **Babin v. Winn–Dixie Louisiana, Inc.**, 2000-0078 (La. 6/30/00), 764 So.2d 37, 40; see also La. C.C.P. art. 967(B).

Summary judgments are reviewed on appeal *de novo*. **Granda**, 935 So.2d at 701. Thus, this court uses the same criteria as the trial court in determining whether summary judgment is appropriate—whether there is a genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Jones v. Estate of Santiago**, 2003-1424 (La. 4/14/04), 870 So.2d 1002, 1006. A "genuine issue" is a "triable issue," that is, an issue on which reasonable persons could disagree. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. *Id.* In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. **Fernandez v. Hebert**, 2006-1558 (La. App. 1st Cir. 5/4/07), 961 So.2d 404, 408, writ denied, 2007-1123 (La. 9/21/07), 964 So.2d 333. A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. **Anglin v. Anglin**, 2005-1233 (La. App. 1st Cir. 6/9/06), 938 So.2d 766, 769. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can only be seen in light of the substantive law applicable to the case. **Dickerson v. Piccadilly Restaurants, Inc.**, 99-2633 (La. App. 1st Cir. 12/22/00), 785 So.2d 842, 844.

B. Vicarious Liability

Under Louisiana law, an employer is answerable for the damage occasioned by its servant in the exercise of the functions in which the servant is employed. **Timmons v. Silman**, 99-3264 (La. 5/16/00), 761 So.2d 507, 510. La. C.C. art. 2320. Specifically, an employer is liable for its employee's torts committed if, at

the time, the employee was acting within the course and scope of his employment. *Id.*; **Baumeister v. Plunkett**, 95-2270 (La. 5/21/96), 673 So.2d 994, 996. An employee is acting within the course and scope of his employment when the employee's action is "of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer." **Timmons**, 761 So.2d at 510.

The principle of vicarious liability in this case is derived from La. C.C. art. 2320, which provides in part, "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Under La. C.C. art. 2320, an employer can be held liable for an employee's tortious conduct only if the injuring employee is acting within the course and scope of his employment. **Ellender v. Neff Rental, Inc.**, 2006-2005 (La. App. 1st Cir. 6/15/07), 965 So.2d 898, 901.

Generally, courts consider four factors when assessing vicarious liability, including whether the 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. *Id.*; see also **LeBrane v. Lewis**, 292 So.2d 216, 218 (La. 1974). It is not necessary that each factor is present in each case, and each case must be decided on its own merits. **Ellender**, 965 So.2d at 901; **Baumeister**, 673 So.2d at 997. The determinative question is whether the employee's tortious conduct was 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 motivated by purely personal considerations entirely extraneous to the employer's interest. **Ellender**, 965 So.2d at 901; **Richard v. Hall**, 2003-1488 (La. 4/23/04), 874 So.2d 131, 139. In a negligence case, the court need only determine whether the servant's general activities at the time of the tort were within the scope of

employment. *Id.*

If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act is otherwise within the service. The scope of risk attributable to an employer increases with the amount of authority and freedom of action granted to the servant in performing his assigned tasks. **Ellender**, 965 So.2d at 901-902; **Richard**, 874 So.2d at 138.

In this case, the plaintiff will have the burden of proving that Mr. Hood was in the course and scope of his employment with BRT and/or Ron Thomas d/b/a Sentinel Security. Thus, on the motion for summary judgment, the Sentinel Security defendants bore the burden of pointing out an absence of factual support for the plaintiff's claim that Mr. Hood was in the course and scope of his employment with BRT and/or Ron Thomas d/b/a Sentinel Security at the time of the accident.

The Sentinel Security defendants, in support of its motion for summary judgment, relied on the deposition testimony of Mr. Hood. Mr. Hood testified that he was employed by BRT, a security company that supplies security guards, as a manager and was a salaried employee. Mr. Hood testified that he was in charge of the company and all of its employees (approximately 50), and did not need permission from the president of the company to hire new employees. Although Mr. Hood testified he had an office in Gonzales, Louisiana, he did not have to report to work during certain hours every day, but he did work roughly 60 hours a week and was "on call 24 hours a day." Mr. Hood testified that he spent approximately 70% of his time at work traveling to various job sites in Jackson, Mississippi and New Orleans, Lafayette, and Harvey, Louisiana and that BRT issued him a cell phone and paid for his fuel on a company credit card. According to Mr. Hood, on the day of the accident, he had left his office and was traveling in his own vehicle on Interstate-10 toward Lafayette for an employment-related

appointment, but somewhere between the Dalrymple and Mississippi River bridge exits, he learned that the appointment canceled, so he decided to take "the rest of the day off" because he had been at work since 5:00 a.m. He then proceeded on Interstate-110 and intended to exit the interstate at the Baton Rouge airport, but he got sidetracked and missed the exit, so he decided he would exit at Highway 61. Shortly thereafter, between the Baton Rouge airport and Highway 61 exits, the accident occurred. At the time of the accident, Mr. Hood was wearing his security badge or identification card.

In opposition to the motion for summary judgment, the plaintiff relied on the deposition testimony of Mr. Hood, Monique Thomas, who appeared personally and on behalf of BRT for the corporate deposition, and Ron Thomas. Mrs. Thomas testified that she was the operations manager of BRT and the wife of BRT's president and owner, Ron Thomas. Mrs. Thomas testified that Mr. Hood only spent approximately 10% of his time at work traveling to job sites and that he worked primarily in the office from about 8:00 a.m. until 5:00 p.m. Mrs. Thomas admitted that the company had issued Mr. Hood a cell phone and allowed Mr. Hood to charge fuel on the company credit card a few times a month, but only when it was necessary for him to drop off uniforms or paperwork at a job site. Mrs. Thomas testified that Mr. Hood did not have the authority to hire or fire employees, and that he did not interview prospective employees, although on occasion, he may have been present when she conducted such interviews. Mrs. Thomas testified that on the date of the accident, Mr. Hood could not have reported to work at 5:00 a.m., because he would not have been able to enter the building (because it was locked), and that at the time of the accident, she did not know where Mr. Hood was or where he was going, and he was supposed to be in the office. However, Mrs. Thomas admitted that she spoke on the telephone to Mr. Hood on the morning of the accident and after the accident. After the accident

occurred, Mr. Hood never told Mrs. Thomas that he had taken the day off.

According to Mr. Thomas, he is the president of BRT. He testified that Mr. Hood was hired to assist Mrs. Thomas in handling the business, that Mr. Hood's primary responsibilities were performing office work and supervising the other security officers, and that 75-80% of his time at work would have been at the office. Mr. Thomas testified that Mr. Hood did not have the authority or the right to give himself the day off without his or Mrs. Thomas's knowledge and to Mr. Thomas's knowledge, Mr. Hood had never done so. Mr. Thomas testified that on the day of the accident, if Mr. Hood did not have anything to do, Mr. Hood should have returned to the office, and Mr. Thomas was not aware that Mr. Hood had decided to take the day off.

Based on our *de novo* review of the evidence offered in support of and in opposition to the motion for summary judgment, we find that Mr. Hood, Mrs. Thomas, and Mr. Thomas gave conflicting testimony as to the nature of Mr. Hood's employment with BRT, including his authority, freedom, and duties, as well as what he was doing or supposed to be doing at the time of the accident. Mr. Hood testified that he was on his way to Lafayette for an appointment at a job site, but Mrs. Thomas was not aware of that appointment and did not know where Mr. Hood was. According to Mr. Hood, when the appointment cancelled, he untilaterally decided to take the rest of the day off, but both Mr. Thomas and Mrs. Thomas testified that Mr. Hood did not have the authority to do so, were unaware that he had done so on the afternoon of the accident, and that he should have returned to the office. These disputed factual details are material to a determination of whether Mr. Hood's general activities or actions, around the time of the accident, were primarily employment rooted, incidental to the performance of Mr. Hood's employment duties, and occurred during working hours, and thus, whether Mr. Hood was in the course and scope of his employment with BRT at the time of

the accident. For this reason, we find that genuine issues of material fact exist with regard to the vicarious liability of the Sentinel Security defendants and conclude that the trial court erred in granting the motion for summary judgment and dismissing the plaintiff's claims against the Sentinel Security defendants.

CONCLUSION

For the above and foregoing reasons, we reverse the December 14, 2010 judgment of the trial court granting summary judgment in favor of defendants, B.R.T. Enterprises, Inc., Ron Thomas (d/b/a Sentinel Security), and Progressive Security Insurance Company, and dismissing the plaintiff's claims against them and remand this case for further proceedings.

All costs of this appeal are assessed to the defendants-appellees, B.R.T. Enterprises, Inc., Ron Thomas (d/b/a Sentinel Security), and Progressive Security Insurance Company.

REVERSED AND REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1159

CARL FALCONER

VERSUS

SAFEWAY INSURANCE COMPANY OF LOUISIANA, CARL WAYNE HOOD, S.E.T. ENTERPRISES, INC., B.R.T. ENTERPRISES, INC., RON THOMAS D/B/A SENTINEL SECURITY, DEF INSURANCE COMPANY, ABC INSURANCE CO., AND XYZ INSURANCE CO.

PAE

****

McCLENDON, J., dissents and assigns reasons.

I disagree with the majority's conclusion that genuine issues of material fact remain as to whether Mr. Hood was in the course and scope of his employment with BRT at the time of the accident. A fact is material when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. Simply put, a material fact is one that would matter on the trial of the merits. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La.7/5/94), 639 So.2d 730, 751.

The mover presented evidence showing that Mr. Hood had abandoned his employment at the time of the accident and was not acting in furtherance of his employer's business. At that point, the burden shifted to plaintiff to show that Mr. Hood was within the course and scope of his employment. See LSA-C.C.P. art. 966(C)(2). Plaintiff did not present any evidence to refute the allegation that Mr. Hood was acting outside of the scope of his employment. Under all of the scenarios presented, prior to the accident Mr. Hood had terminated his alleged work-related activity. Accordingly, I would affirm the trial court's judgment.