

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1822

LINDA HONOR

VERSUS

TANGIPAHOA PARISH SCHOOL BOARD

Judgment Rendered: **JUN 10 2011**

**Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2009-001290**

The Honorable Douglas M. Hughes, Judge Presiding

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Lafayette, Louisiana**

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Linda Honor**

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Hammond, Louisiana**

**Counsel for Defendants/Appellees
Tangipahoa Parish School Board,
Mark Kolwe, and Carmen Moore**

BEFORE: CARTER, C.J., WHIPPLE, KUHN, GAIDRY AND WELCH, JJ.

*Carter, CJ dissents and would affirm
the judgment of the trial court
KUH, J DISSENTS + ASSIGNS REASONS*

GAIDRY, J.

In this suit for damages arising from an intentional tort, the plaintiff appeals a summary judgment dismissing her claims against several defendants. We reverse.

FACTS AND PROCEDURAL HISTORY

On May 13, 2008, plaintiff, Linda Honor, was employed by the Tangipahoa Parish School Board as a custodian at Hammond High School. On that date, another custodian at the school, Larry Jackson, approached Ms. Honor and began looking through her custodian cart. When Ms. Honor questioned Jackson about going through her cart, he threw her up against a wall and hit her in the face. After reporting the incident in the school office, the police officer on duty at the school escorted Ms. Honor to the hospital, where she was treated for her injuries.

On April 13, 2009, Ms. Honor filed a petition for damages allegedly sustained in the incident. Named as defendants in Ms. Honor's petition were the Tangipahoa Parish School Board, Larry Jackson, XYZ Insurance Company, Tangipahoa Parish School Board Superintendent Mark Kolwe, and Hammond High School Principal Carmen Moore. The petition alleges that the School Board, Superintendent Kolwe, and Principal Moore are all vicariously liable for Jackson's tortious conduct under the doctrine of *respondeat superior* because prior complaints had been made by employees about Jackson's behavior¹ and Ms. Honor had warned Principal Moore that Jackson was so angry about the complaints that "he was going to 'explode,'" but no action was taken.

The School Board, Superintendent Kolwe, and Principal Moore filed a motion for summary judgment alleging that Superintendent Kolwe and

¹ The petition does not state to whom the complaints were made or whether any complaints were made by Ms. Honor.

Principal Moore were not Jackson's employers and thus could not be liable under *respondeat superior*, and that Honor's exclusive remedy against the School Board, as her employer, is in worker's compensation, since the School Board did not participate in any intentional act which caused Ms. Honor's injuries.

After a hearing, the trial court granted summary judgment, dismissing Ms. Honor's claims against the School Board, Superintendent Kolwe, and Principal Moore. Ms. Honor appealed the summary judgment.

DISCUSSION

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. *Duncan v. U.S.A.A. Ins. Co.*, 06-363, p. 3 (La. 11/29/06), 950 So.2d 544, 546. Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Costello v. Hardy*, 03-1146, p. 8 (La. 1/21/04), 864 So.2d 129, 137. A motion for summary judgment should only be granted 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 movant is entitled to summary judgment as a matter of law. *See* LSA-C.C.P. art. 966(B).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, 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, action, or defense. Thereafter, if the adverse party

fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). 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. *Pugh v. St. Tammany Parish School Board*, 07-1856, p. 2 (La.App. 1 Cir. 8/21/08), 994 So.2d 95, 97 (on rehearing), writ denied, 08-2316 (La. 11/21/08), 996 So. 2d 1113; *see also* LSA-C.C.P. art. 967(B).²

As movants, the defendants had the initial burden of proof for purposes of seeking summary judgment pursuant to La. C.C.P. art. 966(C)(2). However, as defendants in this matter, they would not bear the burden of proof at trial; therefore, the defendants were only required to point out to the court that there was an absence of factual support for one or more elements essential to Ms. Honor's action. The defendants attempted to point out to the court that there was an absence of factual support for an essential element of Ms. Honor's claim by arguing in their memorandum that Ms. Honor was unable to prove that the School Board, Superintendent Kolwe, or Principal Moore committed any intentional act or that Superintendent Kolwe and Principal Moore were Jackson's employer, so as to make them vicariously liable for his intentional act. However, in attempting to meet their burden on summary judgment, the defendants did not support their motion with any affidavits, depositions, or other evidence to "point out" the

² Louisiana Code of Civil Procedure article 967(B) provides:

When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

absence of factual support for an essential element of the claim on motion for summary judgment. *Pugh*, 07-1856 at p. 3, 994 So.2d at 98. Louisiana Code of Civil Procedure articles 966(C)(2) and 967(B) require a defendant to make *and support* a motion for summary judgment before the burden shifts to the non-moving party. To allow a defendant to offer only the self-serving argument of his memorandum to meet his initial burden of proof would negate the requirements of these articles. *Pugh*, 07-1856 at pp. 3-4, 994 So.2d at 98.

Since the defendants did not properly “point out” the absence of factual support for an essential element of Ms. Honor’s claim, they did not carry their initial burden of proof on summary judgment, and therefore summary judgment was not appropriate on those claims.

CONCLUSION

The judgment of the trial court granting summary judgment in favor of defendants is reversed. Costs of this appeal are to be shared equally by defendants, the Tangipahoa Parish School Board, Superintendent Mark Kolwe, and Principal Carmen Moore.

REVERSED.

LINDA HONOR

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

TANGIPAHOA PARISH SCHOOL
BOARD, LARRY JACKSON, XYZ
INSURANCE COMPANY,
SUPERINTENDENT MARK KOWLE
AND PRINCIPAL CARMEN MOORE

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KUHN, J., dissenting.

Movants-defendants, who do not bear the burden of proof at the trial on the matter, duly pointed out to the court that there is an absence of factual support for one of more elements essential to plaintiff's claim. And because plaintiff failed to respond to this pointing out by producing factual support sufficient to establish she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); *see Cyprien v. Bd. of Supervisors*, 2008-1067, p. 5, 5 So.3d 862, 866 (citing *Wright v. Louisiana Power & Light*, 2006-1181 (La. 3/9/07), 951 So.2d 1058 and *Babin v. Winn-Dixie Louisiana*, 2000-0078 (La. 6/30/00), 764 So.2d 37, both of which relied on *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., upon which La. C.C.P. art. 966 is modeled); *see also Samaha v. Rau*, 2007-1726, pp. 12-13 (La. 2/26/08), 977 So.2d 880, 887-88. The Federal standard requires no affidavits to shift the burden of proof. The trial court correctly granted summary judgment and dismissed plaintiff's claims against the school board and her co-employees. Accordingly, I dissent.