

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1062

**JONATHAN DRUMMOND, RODNEY DRUMMOND
AND NORMA LYNNE DRUMMOND**

VERSUS

**ELIAS JACOB FAKOURI, JERRY FAKOURI,
ADAM FAKOURI, AND SAFECO NATIONAL
INSURANCE COMPANY**



Judgment Rendered: December 23, 2009

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 555,353

Honorable Timothy E. Kelley, Judge Presiding

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* * * * *

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

In this appeal, the plaintiffs and a defendant/homeowner's insurer appeal from the trial court's grant of summary judgment in favor of a corporate defendant's commercial general liability (CGL) insurer, sued for the allegedly tortious actions of an employee; the summary judgment dismissed with prejudice all claims against the CGL insurer. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 19, 2006, while Jonathan Drummond was visiting Adam Fakouri, both of whom were seventeen years old, Adam accidentally shot Jonathan in the chest and stomach with a Colt .38 caliber handgun. As a result of the gunshot, Jonathan sustained severe and disabling injuries, including paralysis below the chest.

On May 16, 2007, Jonathan Drummond, Rodney Drummond, and Norma Lynne Drummond filed a petition for damages against: Adam Fakouri; Adam's parents, Elias Jacob Fakouri and Jerry Fakouri; and the Fakouris' homeowner's insurer, Safeco Insurance Company of America (Safeco).¹ Thereafter, plaintiffs filed a first supplemental and amended petition, naming as additional defendants: E. Jacob Construction, Inc. d/b/a Fakouri Construction, Inc. (E. Jacob Construction) and J.J.C.D.A. Family, LLC (J.J.C.D.A. Family), companies owned by the Fakouris; and Clarendon America Insurance Company (Clarendon), the commercial general liability insurer of E. Jacob Construction and J.J.C.D.A. Family. In the supplemental and amended petition, plaintiffs alleged that the gun at issue was used "as a tool of business by Mr. Elias Jacob Fakouri for protection when traveling to

¹ Safeco was originally named in the plaintiffs' petition as "Safeco National Insurance Company;" however, in its answer Safeco named itself "Safeco Insurance Company of America" and stated that it had been erroneously named in the petition.

and from his rental properties, offices, and/or warehouse.” Mr. Fakouri is a building contractor, and E. Jacob Construction is his construction business. J.J.C.D.A. Family is another family business, which owns rental property.

According to the petition, the gun was normally kept in Mr. Fakouri’s work truck, which was used for his work with E. Jacob Construction and for J.J.C.D.A. Family. Plaintiffs further alleged that, because Mr. Fakouri was having work performed on the truck, he had removed the gun from his work truck and brought it into his home, where he sometimes performed business activities for E. Jacob Construction and J.J.C.D.A. Family. Thus, plaintiffs contended that Mr. Fakouri was acting in the course and scope of his employment with E. Jacob Construction and J.J.C.D.A. Family, when he removed the loaded gun from his work truck and negligently left the gun in an unsafe place, where it was accessible to minors, thereby rendering defendants E. Jacob Construction, J.J.C.D.A. Family, and Clarendon liable for Jonathan Drummond’s injuries.

Clarendon filed a motion for summary judgment, contending that it was entitled to judgment in its favor, dismissing all claims against it because: (1) at the time of the accidental shooting, Mr. Fakouri was not acting in the course and scope of his employment with E. Jacob Construction or J.J.C.D.A. Family, LLC; (2) Mr. Fakouri was not an insured under the Clarendon policy; and (3) Mr. Fakouri, E. Jacob Construction and J.J.C.D.A. Family, LLC did not at any time act negligently or breach any duty owed to plaintiffs.²

² E. Jacob Construction also filed a motion for summary judgment, contending that it was entitled to judgment in its favor dismissing the claims against it because Mr. Fakouri, who was shopping at Wal-Mart at the time of the shooting, was not conducting any business for E. Jacob Construction at the time Jonathan was shot. The trial court granted E. Jacob Construction’s motion for summary judgment, and that judgment is the subject of the related appeal of **Drummond v. Fakouri**, 2009 CA 1069, also decided by this court on this date.

Following a hearing, the trial court granted the motion and rendered judgment, dismissing with prejudice plaintiffs' claims against Clarendon. From this judgment, plaintiffs and Safeco appeal.³ Through four assignments of error, plaintiffs challenge: (1) the trial court's finding that Mr. Fakouri's actions were not committed in the course and scope of his employment with E. Jacob Construction; (2) any finding by the trial court that the acts and omissions of Mr. Fakouri were not negligent; and (3) the trial court's alleged determination that the Clarendon policy does not cover Mr. Fakouri individually. While Safeco listed only a single assignment of error, averring that the trial court erred in granting summary judgment in favor of Clarendon, its arguments in brief mirror the arguments or issues raised by plaintiffs in their assignments of error.

DISCUSSION

Clarendon contended in its motion for summary judgment that Mr. Fakouri did not meet the relevant definition of insured as contained in its insurance policy, which provided:

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your **“executive officers”** and directors are insureds, but **only with respect to their duties as your officers or directors**. Your stockholders are also insureds, but only with respect to their liability as stockholders.

* * *

2. Each of the following is also an insured:

- a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your **“employees”, other than either your “executive officers”** (if you are an organization other than a

³ While defendants Elias Jacob Fakouri, Jerry Fakouri, and Adam Fakouri were listed along with Safeco as appellants in the motion for appeal, the appellate briefs filed with this court list only defendant Safeco as appellant.

partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but **only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.**

(Emphasis added.)

With respect to Mr. Fakouri's status as an insured "employee" under the Clarendon policy, for the reasons stated in the companion case of **Drummond v. Fakouri**, 2009 CA 1069, which we also decide this date, our *de novo* review, herein, reveals from the particular facts and circumstances of this case, it cannot reasonably be said that Mr. Fakouri's allegedly 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. We conclude that the storage of Mr. Fakouri's personally owned gun in his home several days after cessation of any work-related activities involving that property was clearly unconnected to his employer's interest on that particular date.

Clarendon further points to an absence of factual support for any coverage under its policy's "executive officer" provision, quoted hereinabove.

When the moving party in a motion for summary judgment will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. LSA-C.C.P. art. 966(C)(2).

Thus, under LSA-C.C.P. art. 966(C)(2), the burden shifted to plaintiffs to establish they would be able to satisfy their evidentiary burden of proof at trial that Mr. Fakouri was an “executive officer” of E. Jacob Construction (Clarendon’s insured) and that as such he was acting within the scope of his employment or performing duties related to the conduct of E. Jacob Construction’s business, pursuant to the policy language. Nevertheless, plaintiffs failed to show that Mr. Fakouri was in fact an executive officer of E. Jacob Construction. Although Mr. Fakouri testified that he was “owner” of and a construction supervisor for the company, there was no evidence presented of the corporate structure of E. Jacob Construction or as to who the legal officers of the corporation were.

Consequently, we find the trial court did not err in granting summary judgment in favor of Clarendon, and dismissing plaintiffs’ case against this insurer.

CONCLUSION

For the reasons stated herein, the January 15, 2009 judgment dismissing with prejudice the claims against Clarendon America Insurance Company is affirmed; each party is to bear his own costs of this appeal.

AFFIRMED.

**JONTHAN DRUMMOND, RODNEY
DRUMMOND & NORMA LYNNE
DRUMMOND**

**STATE OF LOUISIANA
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SAFECO NATIONAL INSURANCE
COMPANY**

NUMBER 2009 CA 1062

WHIPPLE, J., dissenting.

I respectfully disagree with the majority's conclusion that Clarendon America Insurance Company was entitled to summary judgment in its favor, dismissing plaintiffs' claims against it. Clarendon averred that it was entitled to summary judgment on three bases: (1) at the time of the accidental shooting, Mr. Fakouri was not acting in the course and scope of his employment with E. Jacob Construction or J.J.C.D.A. Family, LLC; (2) Mr. Fakouri was not an insured under the Clarendon policy; and (3) Mr. Fakouri, E. Jacob Construction and J.J.C.D.A. Family, LLC did not at any time act negligently or breach any duty owed to plaintiffs.

For the same reasons set forth in my dissent in the companion case of Drummond v. Fakouri, 2009 CA 1069 (La. App. 1st Cir. 12/23/09), I find that a question of fact remains precluding summary judgment.

Interpretation of an insurance policy is usually a legal question that can be properly resolved by means of a motion for summary judgment. Sanchez v. Callegan, 99-0137 22(La. App. 1st Cir. 2/18/00), 753 So. 2d 403, 405. Regarding the issue of whether a policy affords coverage for an incident, the plaintiff bears the burden of proving the existence of the policy and coverage. Tunstall v. Stierwald, 2001-1765 (La. 2/26/02), 809 So. 2d 916, 921. However, summary judgment declaring a lack of coverage under an insurance policy may be rendered **only if there is no reasonable**

interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be supported. Miller v. Superior Shipyard and Fabrication, Inc., 2001-2907 (La. App. 1st Cir. 8/20/03), 859 So. 2d 159, 162. (Emphasis added).

In the instant case, Clarendon, in support of its motion for summary judgment, had the obligation to point out the absence of factual support for one or more elements essential to plaintiffs' claim. Upon Clarendon fulfilling this requirement, the opponents of the motion, plaintiffs and Safeco herein, would then be obliged to produce factual support sufficient to establish that plaintiffs would be able to satisfy their evidentiary burden of proof at trial. LSA-C.C.P. art. 966(C)(2); Keller v. Case, 99-0424 (La. App. 1st Cir. 3/31/00), 757 So. 2d 920, 922, writ denied, 2000-1874 (La. 9/29/00), 770 So. 2d 354. In such situations, the opposing parties cannot rest on the mere allegations or denials in their pleadings, but must present evidence which will establish that material facts are still at issue. Hunter v. Tensas Nursing Home, 32,217 (La. App. 2nd Cir. 10/27/99), 743 So. 2d 839, 841, writ denied, 99-3334 (La. 2/4/00), 754 So. 2d 228. In my view, Clarendon has failed to do so.

Clarendon sought in its motion for summary judgment to avoid coverage on the basis that coverage under its policy for executive officers is limited to situations where the officer is performing his duties as an executive officer and that Mr. Fakouri, as an executive officer of E. Jacob Construction, was not performing such duties in regard to the accident in question.¹

¹As to this issue, the parties herein focus on Mr. Fakouri's duties as owner of and construction supervisor for E. Jacob Construction. They do not address any duties he

The commercial general liability (CGL) policy issued by Clarendon lists “E Jacob Construction Inc” as the named insured on the declarations page. (R. 314). Additionally, the policy defines an “insured” in pertinent part as follows:

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

* * *

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your **“executive officers”** and directors are insureds, but **only with respect to their duties as your officers or directors**. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your **“employees”, other than either your “executive officers”** (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but **only for acts within the scope of their employment by you or while performing duties related to the conduct of your business**.

(Emphasis added). (R. 408-409)

Under the language of subsection 1(d), an executive officer is only an insured if he is performing his duties as an executive officer.² See Creel v. Louisiana Pest Control Insurance, Inc., 98-146 (La. App. 3rd Cir. 8/5/98), 723 So. 2d 440, 443, writ granted, 98-2601 (La. 12/18/98), 731 So. 2d 272.³ Thus, the initial question presented herein is whether Clarendon pointed out an absence of support for the finding that Mr. Fakouri was performing duties as an executive officer of E. Jacob Construction when he allegedly

may have had as an executive officer of J.J.C.D.A. Family, LLC. Accordingly, I have also limited my analysis of this issue to the arguments presented by the parties.

²An “[e]xecutive officer” is defined in the policy as “a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.”

³While the Supreme Court granted the application for writ of certiorari filed by Louisiana Pest Control Insurance, Inc., no further reported action was taken on this case, suggesting that the matter may have thereafter been settled by the parties.

negligently acted in removing the gun from his company truck and storing it in his home.

In Creel, the Third Circuit Court of Appeal addressed the issue of whether the owner and president of a pest control company was an “insured” under the CGL policy issued to the company with regard to an accident that occurred when the president was en route to spray a house for insects and pests. The CGL policy at issue in Creel, similar to the policy in the instant case, provided that the company’s executive officers and directors were “insureds,” but only with respect to their duties as officers or directors. The president of the pest control company testified that his duties as president included attending and participating in corporate meetings, the hiring and firing of personnel, handling financial dealings, and making corporate decisions. Thus, based on the president’s own testimony, the appellate court reversed the trial court’s finding that the president was an “insured,” concluding that the president’s negligent actions while driving to a home to spray it for insects were not part of his executive duties.⁴ Creel, 723 So. 2d at 443-444.

In the instant case, I note initially that Clarendon did not offer any evidence in support of its motion for summary judgment to establish that Mr. Fakouri, although “owner” of E. Jacob Construction, held “any of the officer positions created by [E. Jacob Construction’s] charter, constitution, by-laws or any other similar governing document,” as an “executive officer” is defined in its policy, or what Mr. Fakouri’s duties were as an executive

⁴In Creel, the trial court had concluded that because the president was an insured under the CGL policy, the automobile use exclusion in the policy, which provided that the policy did not apply to damages arising out of the use of an automobile **by an insured**, precluded coverage therein. In reversing the trial court’s finding that the president was an insured, the appellate court consequently concluded that the automobile use exclusion did not preclude coverage for the accident. Creel, 723 So. 2d at 443-444.

officer of E. Jacob Construction.⁵ Rather, it filed excerpts of Mr. Fakouri's deposition testimony establishing that Mr. Fakouri personally owned various other guns and that he carried a gun for protection on personal trips, such as vacations.

Even assuming, however, that this testimony was sufficient to point out an absence of support for the finding that Mr. Fakouri, at the time of his allegedly negligent conduct, was either an employee of E. Jacob Construction performing duties related to the conduct of the business or, as an executive officer of E. Jacob Construction, was performing his executive duties, I would find that the evidence presented in opposition to the motion clearly precludes the grant of summary judgment in favor of Clarendon on the basis that Mr. Fakouri was not insured under the policy for his allegedly negligent actions at issue.

The evidence presented in opposition to the motion for summary judgment clearly establishes that Mr. Fakouri was the construction supervisor for E. Jacob Construction, his family-owned business. As construction supervisor, his job duties included traveling to existing job sites, supervising all E. Jacob Construction jobs, and bidding on construction jobs. According to Mr. Fakouri, because of his job duties, he would spend ninety percent of his work day traveling in his company truck, which he considered to be his "mobile office" and where he kept files on all E. Jacob Construction jobs.

⁵If Mr. Fakouri is not an **executive officer** as defined in the Clarendon policy, the question presented would be whether Clarendon pointed to the absence of factual support for the finding that Mr. Fakouri, as an **employee** of E. Jacob Construction, was acting within the scope of his employment or was performing duties related to the conduct of E. Jacob Construction's business. For the reasons set forth above and in my dissent in the companion case of Drummond v. Fakouri, 2009 CA 1069 (La. App. 1st Cir. 12/23/09), I would conclude that summary judgment finding that Mr. Fakouri was not an insured under the Clarendon policy was not warranted on that basis.

Regarding the gun at issue, Mr. Fakouri further testified that he normally kept the gun in his work truck for protection and would personally carry the gun with him when he visited the company warehouse, which he described to be in a “less desirable” or “rougher” area. Moreover, regarding the specific acts of Mr. Fakouri that plaintiffs contend were negligent and a cause in fact of the injuries suffered by Jonathan Drummond, the evidence shows Mr. Fakouri removed the gun and his other work items from his company truck in order to have the company truck, which he used to perform his daily job duties as construction supervisor, serviced and that he placed the loaded gun on a china cabinet in the breakfast area of his home. In this sense, how does a gun differ from a carelessly stored nail gun? Without question, either would be a tool of his trade, possessed for use in connection with work-related issues.

Based on the evidence, I must conclude that the trial court erred in finding that Clarendon was entitled to summary judgment in its favor as a matter of law on the basis that, for purposes of the alleged negligent acts in question, Mr. Fakouri was not an insured under the CGL policy it issued to E. Jacob Construction. The facts presented herein are readily distinguishable from those presented in Creel, and, at a minimum, raise a question of fact as to whether Mr. Fakouri, as an employee of E. Jacob Construction, was performing duties related to or in furtherance of the conduct of business or, as an executive officer of E. Jacob Construction, was performing his executive duties. Accordingly, I would conclude summary judgment was not warranted on this basis either.

For these reasons, I respectfully dissent.