

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2009 CA 0859**

**CHARLENE BROOKS AND THOMAS BROOKS**

**VERSUS**

**ST. TAMMANY HOSPITAL FOUNDATION AND/OR ST.  
TAMMANY PARISH HOSPITAL, ST. TAMMANY HOSPITAL  
FOUNDATION D/B/A ST. TAMMANY REHABILITATION  
SERVICES AND DON PERKINS, P.T.**

**Judgment Rendered: December 23, 2009**

**Appealed from the  
Twenty-second Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Docket Number 2004-12785**

**Honorable Allison H. Penzato, Judge Presiding**

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**BEFORE: WHIPPLE, HUGHES AND WELCH, JJ.**

*Handwritten initials: YBW, JW, and a circled symbol.*

## **WHIPPLE, J.**

In this appeal, third-party defendant, Scottsdale Insurance Company (Scottsdale), challenges the trial court's grant of summary judgment in favor of defendants, finding that Scottsdale has a duty to defend its insured and that the commercial general liability (CGL) policy issued by Scottsdale provided coverage herein. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

On June 9, 2004, Charlene and Thomas Brooks filed a petition for damages, naming as defendants St. Tammany Hospital Foundation and/or St. Tammany Parish Hospital; St. Tammany Hospital Foundation and/or St. Tammany Parish Hospital d/b/a St. Tammany Parish Hospital Rehabilitation Services (at times collectively referred to as "St. Tammany Parish Hospital"); and Don Perkins, P.T. In their petition, the Brookses alleged that on June 25, 2003, Charlene Brooks began experiencing back pain as the result of activities she was told to perform during a pre-employment physical examination, under the instruction of Don Perkins, a physical therapist who was employed by St. Tammany Parish Hospital and who was acting within the course and scope of his employment at the time. The Brookses contended that defendants were liable to them based on Perkins's negligence in: (1) allowing Charlene Brooks to lift a box from the floor while wearing high heel sandals; (2) not taking into consideration Charlene Brooks's prior history of back pain; and (3) not properly evaluating and assessing Charlene Brooks's capabilities after she complained that the box was too heavy.

After answering the petition, St. Tammany Parish Hospital filed a third-party demand against Scottsdale, alleging that, pursuant to a CGL policy issued by Scottsdale to St. Tammany Parish Hospital, Scottsdale was obligated to provide coverage for the Brookses' claims against St. Tammany

Parish Hospital and, further, that Scottsdale had a duty to defend the hospital in this proceeding.<sup>1</sup> In answering the third-party demand, Scottsdale denied that the CGL policy it issued to St. Tammany Parish Hospital provided coverage for the claims asserted by the Brookses herein.

Thereafter, defendants<sup>2</sup> and Scottsdale filed cross motions for summary judgment on the issues of coverage and Scottsdale's duty to defend. Scottsdale argued that coverage was not afforded under the CGL policy on the basis of two exclusions, the "professional services" exclusion and the "health care provider" exclusion. Defendants, on the other hand, averred that the "undisputed circumstances" surrounding this case did not fit the definition of "professional services" and that, because the performance of the pre-employment screening did not involve the rendering of medical, surgical, dental, x-ray, nursing, health, or therapeutic service, treatment, advice, or instruction, the "health care provider" exclusion likewise did not apply. Following a December 10, 2008 hearing on the motions, the trial court rendered judgment, granting the defendants' motion for summary judgment asserting coverage and a duty to defend under the CGL policy issued to it by Scottsdale and denying Scottsdale's motion.

From this judgment, Scottsdale appeals, contending that the trial court erred in: (1) ruling that the rendering of a professional opinion by a licensed occupational therapist does not constitute a "professional service," and (2)

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<sup>1</sup>The named insureds under the Scottsdale policy are St. Tammany Parish Hospital, St. Tammany Parish Hospital Service District #1 d/b/a St. Tammany Parish Hospital, St. Tammany Medical Services, St. Tammany Physicians Network, and St. Tammany Parish Hospital Foundation. Additionally, the section of the policy setting forth who is an insured defines an "insured" to include "[y]our '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."

<sup>2</sup>Although Perkins was not named as a third-party plaintiff in the third-party demand against Scottsdale, he was named as a movant, together with St. Tammany Parish Hospital, in the motion for summary judgment on the issue of coverage.

ruling that the rendering of a professional opinion by a licensed occupational therapist does not constitute “advice” or “instruction” under the “health care provider” exclusion.

## **APPLICABLE LAW**

### **Summary Judgment and Interpretation of Insurance Contracts**

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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. LSA-C.C.P. art. 966(B). Interpretation of an insurance contract is usually a legal question that can be properly resolved in the framework of a motion for summary judgment. North American Treatment Systems, Inc. v. Scottsdale Insurance Company, 2005-0081 (La. App. 1<sup>st</sup> Cir. 8/23/06), 943 So. 2d 429, 443, writs denied, 2006-2918, 2006-2803 (La. 2/16/07), 949 So. 2d 423, 424.

An insurance policy is a contract between the parties and should be construed employing the general rules of interpretation of contracts. North American Treatment Systems, Inc., 943 So. 2d at 443. Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent. LSA-C.C. art. 2046. The court should not strain to find ambiguity where none exists. However, if there is any doubt or ambiguity as to the meaning of a provision in an insurance policy, it must be construed in favor of the insured and against the insurer. Arnette v. NPC Services, Inc., 2000-1776 (La. App. 1<sup>st</sup> Cir. 2/15/02), 808 So. 2d 798, 802.

## Duty to Defend

With regard to the duty to defend, the obligation of a liability insurer to defend suits against its insured is generally broader than its obligation to provide coverage for damages claims. Thus, even if a plaintiff's claim against an insured probably lacks merit, the insurer must defend its insured, if the claim might conceivably fall within its coverage. North American Treatment Systems, Inc., 943 So. 2d at 443.

The issue of whether a liability insurer has the duty to defend a civil action against its insured is determined by application of the "eight-corners rule," under which an insurer must look to the "four corners" of the plaintiff's petition and the "four corners" of its policy to determine whether it owes that duty. North American Treatment Systems, Inc., 943 So. 2d at 443-444. Under this analysis, the factual allegations of the plaintiff's petition must be liberally interpreted to determine whether they set forth grounds that raise even the possibility of liability under the policy. In other words, the test is not whether the allegations unambiguously assert coverage, but, rather, whether they do not unambiguously exclude coverage. North American Treatment Systems, Inc., 943 So. 2d at 444. Moreover, even though a plaintiff's petition may allege numerous claims for which coverage is excluded under an insurer's policy, a duty to defend may nonetheless exist if there is at least a single allegation in the petition under which coverage is not unambiguously excluded. North American Treatment Systems, Inc., 943 So. 2d at 444.

Moreover, an insurer should not be allowed to escape its responsibility to defend on a mere technicality based on the type of relief prayed for by a plaintiff, where the insured can be held liable for other damages under the petition. Motorola, Inc. v. Associated Indemnity

Corporation, 2002-0716 (La. App. 1<sup>st</sup> Cir. 6/25/04), 878 So. 2d 824, 837, writs denied, 2004-2314, 2004-2323, 2004-2326, 2004-2327 (La. 11/19/04), 888 So. 2d 207, 211, & 212.

### **Coverage**

With regard to the issue of coverage, an insurer seeking to avoid coverage through summary judgment must prove that some exclusion applies to preclude coverage. Arnette, 808 So. 2d at 802. Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless 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 afforded. Arnette, 808 So. 2d at 802.

### **DISCUSSION**

Through its assignments of error, Scottsdale essentially avers that the trial court erred in concluding that Scottsdale had a duty to defend defendants and that coverage was provided under the policy it issued, where coverage was clearly precluded by the “designated professional services” exclusion and the “health care providers” exclusion. Because a liability insurer’s duty to defend and the scope of its coverage are separate and distinct issues, we will address Scottsdale’s arguments separately as they relate to these two issues.

Turning first to the issue of Scottsdale’s duty to defend, we look to the four corners of the petition and note that the Brookses alleged that Charlene Brooks presented to St. Tammany Parish Hospital Rehabilitation Services for a pre-employment physical examination, which was administered by Don Perkins, a physical therapist employed by St. Tammany Parish Hospital. According to the petition, during the strength test of the physical

examination, Perkins told Charlene Brooks to lift a box weighing approximately thirty to forty pounds and carry it across the floor. The Brookses further alleged that, although Charlene Brooks was wearing high heel sandals at the time, she was not told to remove her shoes prior to lifting and moving the box, despite the fact that she had inquired about whether removing her shoes “would make a difference” because she had suffered from some prior back pain.

The allegations of the petition further set forth that, doing as she was instructed, Charlene Brooks attempted to lift the box, but put it back down, advising that “it was too heavy.” The Brookses averred that Charlene Brooks was then told to “try again using her legs”; that she then lifted the box, carried it across the room, placed it on a table, and returned it to its original resting place on the floor; and that, upon doing this, she immediately began to feel pain in her back.

As stated above, based on these allegations, the Brookses contended that defendants were liable to them based on Perkins’s negligence in: (1) allowing Charlene Brooks to lift a box from the floor while wearing high heel sandals; (2) not taking into consideration Charlene Brooks’s prior history of back pain; and (3) not properly evaluating and assessing Charlene Brooks’s capabilities after she complained that the box was too heavy. The petition further alleged that defendants may be liable for “[o]ther acts of negligence” which may be shown through discovery or at trial.

Turning to the four corners of the insurance contract, the Scottsdale policy provides as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to

defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

The policy further contains several provisions excluding coverage under specific circumstances. In arguing that there is no coverage, and thus no duty to defend, Scottsdale first relies on the policy endorsement entitled “Exclusion – Designated Professional Services,” which provides that “[w]ith respect to any professional services shown in the Schedule, this insurance does not apply to ‘bodily injury,’ ‘property damage,’ ‘personal injury’ or ‘advertising injury’ due to the rendering or failure to render any professional service.” Under the heading of “Schedule,” the “Description of Professional Services” to be excluded is defined as “all professional services of any insured.”

Notably, with regard to the “professional services” exclusion, Scottsdale’s policy provides no definition of the term “professional services.” “Professional services,” in its usual connotation, means services performed by one in the ordinary course of the practice of his profession, on behalf of another, pursuant to some agreement, express or implied, and for which it could reasonably be expected some compensation would be due. Aker v. Sabatier, 200 So. 2d 94, 97 (La. App. 1<sup>st</sup> Cir.), writs denied, 251 La. 48, 49, 202 So. 2d 657, 658 (1967). In determining whether a particular act is professional in nature, a court should examine the character of the act itself, rather than the title or character of the party performing the act. Factors that should be considered are whether the act involved the exercise of professional judgment or required the exercise of a particular skill or discretion acquired by special training, or whether the act could have been done by an unskilled or untrained person. North American Treatment Systems, Inc., 943 So. 2d at 447.



Scottsdale further argues that coverage and a duty to defend are precluded by the exclusion entitled “Exclusion – Services Furnished by Health Care Providers.” This exclusion provides, in part, as follows:

With respect to any operation shown in the Schedule, this insurance does not apply to “bodily injury”, “property damage”, “personal injury” or “advertising injury” arising out of:

1. The rendering or failure to render:
  - a. Medical, surgical, dental, x-ray or nursing service, treatment, advice or instruction, or the related furnishing of food or beverages;
  - b. Any health or therapeutic service, treatment, advice or instruction; or
  - c. Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming.

With regard to the “health care providers” exclusion, these endorsements envision exclusion of coverage for injuries based on the quality, or lack thereof, of the intended service. Finnie v. LeBlanc, 2003-0457 (La. App. 3<sup>rd</sup> Cir. 10/1/03), 856 So. 2d 208, 212, writ denied, 2003-3333 (La. 3/19/04), 869 So. 2d 849.

Our *de novo* review of the allegations of the petition, considered in light of the Scottsdale policy terms, convinces us that coverage was not unambiguously excluded, even under the exclusions relied upon by Scottsdale. The allegations of the petition were broad enough to encompass acts of negligence that arguably do not involve professional skill or judgment or medical advice or instruction and, therefore, fall outside the scope of the “professional services” and the rendering of “health care” contemplated by the policy exclusions. Directing potential employees to carry out certain predetermined acts as part of a post offer, pre-employment physical and recording the results of those tests could be (and often was) likewise performed by an unskilled or untrained person and without the rendering of medical advice or medical instruction. Thus, because the

allegations of the petition do not unambiguously exclude coverage, we affirm that portion of the trial court's summary judgment finding that Scottsdale has a duty to defend St. Tammany Parish Hospital in this suit. See generally North American Treatment Systems, Inc., 943 So. 2d at 447-448.

Further, regarding the issue of whether coverage is afforded under the policy, based on our *de novo* review, we likewise find that no genuine issue of material fact remains, as the complained-of actions herein clearly did not constitute "professional services" or the rendering of "health care" to Charlene Brooks. Thus, the trial court properly granted summary judgment on the coverage issue as well.<sup>3</sup> In support of their motion for summary judgment, defendants averred that, although Charlene Brooks's post offer screening was supervised in the instant case by Perkins, an occupational therapist, that level of supervision, *i.e.*, that of an occupational therapist, was not required and that such screenings are normally performed by a technician with a high school degree.

In support of these contentions, defendants submitted the affidavit of Perkins, wherein he stated that he did supervise the dynamic-lifting test performed by Charlene Brooks on June 25, 2003. He explained that the dynamic lifting was part of Charlene Brooks's post offer, pre-employment screening in connection with her application for employment at St. Tammany Parish Hospital.

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<sup>3</sup>Pursuant to the Medical Malpractice Act, LSA-R.S. 40:1299.41, a "patient" is defined as a natural person "who receives or should have received health care from a licensed health care provider, under contract, expressed or implied." LSA-R.S. 40:1299.41(A)(15). Plaintiffs and defendants assert that at the time of the incident, Charlene Brooks was not a "patient" as defined in the Medical Malpractice Act and, thus, that the exclusions at issue should not apply. Nonetheless, we note that neither of the exclusions at issue contains language limiting the exclusions to claims based on the rendering of "health care" to a "patient" as defined in the Medical Malpractice Act.

With regard to the screening itself, Perkins explained that there are three components to the screening: static lifting, functional positioning, and dynamic lifting. The static lifting portion of the screening involves several different lifts, which are measured by a computer that prints out a report. For the functional positioning test, the job applicant stands in one location and places pegs in one of three peg boards. The test involves reaching and twisting and measures the job applicant's ability to turn and rotate from different positions. Finally, in the dynamic lifting portion of the screening, the job applicant places weights in a crate, carries the crate a certain distance, and then returns with the crate. According to Perkins, the weight in the crate is determined by the job description provided in the applicant's informational packet and the results of the static lifting portion of the screening.

With regard to supervision of the post offer screening, Perkins attested that supervising the screening does not require any formal education in a professional program, but, rather, is learned through on-the-job training. Perkins stated that all employees in the Department of Rehabilitation Services, which include physical therapists, physical therapy assistants, physical therapy technicians, occupational therapists, occupational therapy assistants, and speech therapists, are trained on the job to conduct and supervise post offer screenings, but that, more often than not, the screenings are performed by technicians. According to Perkins, the therapists have college degrees and are licensed by the State of Louisiana, the assistants have vocational training certificates, and the technicians have high school degrees and on-the-job training. Perkins further attested that, while he does not routinely perform these evaluations, he was available and offered to assist his staff with Charlene Brooks's evaluation.

We are mindful that, in determining whether or not a particular act falls within one of these exclusions, the court is required to examine the character of the act itself. Here, we note that no evidence was offered in opposition to defendants' motion and supporting affidavits to establish that Perkins was required to exercise any particular expertise or professional judgment in administering the test or that Charlene Brooks's screening required the exercise of any particular skill or discretion acquired by him in his special training. Moreover, no evidence was offered in opposition to defendants' motion to establish that Perkins offered any "medical advice" or "medical instruction" to Charlene Brooks. Thus, we agree with the trial court that the defendants established their entitlement, as a matter of law, to judgment in their favor declaring that the Scottsdale policy provided coverage herein.

#### **CONCLUSION**

For the above and foregoing reasons, we affirm the January 6, 2009 judgment finding that Scottsdale has a duty to defend its insureds under the CGL policy issued to St. Tammany Parish Hospital that coverage was afforded under the policy. This matter is remanded for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed to Scottsdale Insurance Company.

**AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS.**