

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Estate of Christopher Scott Weinheimer

Opinion No. 17-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Turtle Fur Company; CS Weinheimer CPA, P.C.;
Stockli USA, Inc.; and Four Seasons Realty, LLC
(n/k/a Four Seasons Sotheby's International Realty)

For: Michael A. Harrington
Commissioner

State File Nos. RR-15, RR-185,
RR-186 and RR-195

**RULING ON DEFENDANT CS WEINHEIMER CPA, P.C.'S MOTION
FOR SUMMARY JUDGMENT**

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Wesley M. Lawrence, Esq., for Defendant Turtle Fur Company
Eric G. Falkenham, Esq., for Defendant CS Weinheimer CPA, P.C.
Erin J. Gilmore, Esq., for Defendant Four Seasons Realty, LLC
Bonnie J. Badgewick, Esq., for Defendant Stockli USA, Inc.

ISSUE PRESENTED:

Is Defendant CS Weinheimer CPA, P.C. entitled to judgment in its favor and dismissal from this workers' compensation claim as a matter of law?

EXHIBITS:

CS Weinheimer CPA, P.C.'s Exhibit	Various documents (" <i>P.C. Exhibit</i> ")
CS Weinheimer CPA, P.C.'s Exhibit	Affidavit of Lisa Gardner of Travelers Insurance
Turtle Fur Company's Exhibit A:	Secretary of State listing for CS Weinheimer CPA, P.C.

BACKGROUND:

Considering the evidence in the light most favorable to the non-moving parties, *State v. Delaney*, 157 Vt. 247, 252 (1991), and taking judicial notice of all relevant forms in the Department's file, there is no genuine issue as to the following material facts:

1. The decedent, Christopher Scott Weinheimer, as the sole corporate officer of CS Weinheimer CPA, P.C. ("the P.C."), requested his exclusion from workers' compensation coverage. His exclusion was approved by the Vermont Department of Labor, issued by the insurer, and in effect at all relevant times, including on the date of his death. *The P.C.'s Statement of Undisputed Material Facts* ("*The P.C.'s*

Statement”), ¶ 1; Affidavit of Lisa Gardner, Travelers’ Regional Underwriting Officer, ¶¶ 2-8.

2. The decedent was self-employed as an accountant until his death on November 8, 2020. *Defendant Turtle Fur Company’s Statement of Undisputed Facts*, ¶ 1; *Turtle Fur Company’s Exhibit A*.

Approval of the Decedent’s Officer Exclusion

3. On or about January 29, 2016, the decedent submitted to the Vermont Department of Labor an application to exclude himself, the P.C.’s sole corporate officer, from workers’ compensation coverage. *The P.C.’s Statement*, ¶ 2; *P.C. Exhibit*, at 1-2.
4. On February 5, 2016, the Department approved the exclusion. *The P.C.’s Statement*, ¶ 3; *P.C. Exhibit*, at 1.
5. In February 2016, the P.C., through its insurance broker, asked its insurer to exclude the decedent from its workers’ compensation policy. *The P.C.’s Statement*, ¶ 4; *P.C. Exhibit*, at 3. In connection with that request, on or about March 9, 2016, the P.C. submitted information about its corporate ownership to the insurer. *The P.C.’s Statement*, ¶ 5; *P.C. Exhibit*, at 4-9.
6. On or about March 11, 2016, the insurer issued the requested corporate officer exclusion for the decedent with an effective date of February 5, 2016. *The P.C.’s Statement*, ¶ 6; *P.C. Exhibit*, at 10-12.

Issuance of Subsequent Policies and Verification of Corporate Information

7. Thereafter, the insurer issued a workers’ compensation and employer’s liability policy to the P.C. on an annual basis. Each policy included the officer exclusion endorsement for the decedent.
 - On or about October 13, 2016, the insurer issued such a policy for the period of December 7, 2016 through December 7, 2017. *The P.C.’s Statement*, ¶¶ 7-8; *P.C. Exhibit*, at 13-29.
 - On or about October 13, 2017, the insurer issued such a policy for the period of December 7, 2017 to December 7, 2018. *The P.C.’s Statement*, ¶¶ 11-12; *P.C. Exhibit*, at 35-57.
 - On or about October 17, 2018, the insurer issued such a policy for the period of December 7, 2018 to December 7, 2019. *The P.C.’s Statement*, ¶¶ 15-16; *P.C. Exhibit*, at 70-89.
 - On or about October 11, 2019, the insurer issued such a policy for the period of December 7, 2019 to December 7, 2020. *The P.C.’s Statement*, ¶¶ 19-20; *P.C. Exhibit*, at 101-120.

8. Every year, the insurer sent a policyholder audit report to the P.C., seeking information about the P.C.'s business, company structure, employees, and nonemployee labor ("audit report"). In response each year, the P.C. provided an electronic policyholder report containing this information.¹ Each annual response reflected no change in the P.C.'s corporate structure nor any change in its officers.
- The insurer issued an audit report on or about December 7, 2017, for the policy period of December 7, 2016 to December 7, 2017. *The P.C.'s Statement*, ¶ 13; *P.C. Exhibit*, at 58-64. The P.C. provided its response on or about January 31, 2018. *The P.C.'s Statement*, ¶ 14; *P.C. Exhibit*, at 65-69.
 - The insurer issued an audit report on or about December 10, 2018, for the policy period of December 7, 2017 to December 7, 2018. *The P.C.'s Statement*, ¶ 17; *P.C. Exhibit*, at 90-95. The P.C. provided its response on or about January 26, 2019. *The P.C.'s Statement*, ¶ 18; *P.C. Exhibit*, at 96-100.
 - The insurer issued an audit report on or about December 9, 2019, for the policy period of December 7, 2018 to December 7, 2019. *The P.C.'s Statement*, ¶ 21; *P.C. Exhibit*, at 121-126. The P.C. provided its response on or about January 11, 2020. *The P.C.'s Statement*, ¶ 22; *P.C. Exhibit*, at 127-131.
9. The decedent suffered his fatality on November 8, 2020, during the policy period of December 7, 2019 to December 7, 2020. The policy in effect for that period included the decedent's officer exclusion; that exclusion was in effect on the date of the decedent's death and at all relevant times pertaining thereto. *The P.C.'s Statement*, ¶ 23.²

Procedural Background

10. On July 12, 2021, Claimant (the decedent's estate) filed a Notice of Injury and Claim for Compensation (Form 5) against the decedent's former employer, Defendant Turtle Fur Company ("Turtle Fur").
11. Claimant has never alleged that the decedent sustained an injury arising out of and in the course of his employment with any other employer, nor has it filed a claim against any other employer. *Claimant's Opposition to the P.C.'s Summary Judgment Motion* ("*Claimant's Opposition*"), at 2.

¹ The P.C. failed to respond to the audit report sent by its insurer on December 7, 2016, but provided no notice of any changes to its business, company structure, employees, and nonemployee labor at that time. *The P.C.'s Statement*, ¶¶ 9-10; *P.C. Exhibit*, at 30-34.

² Turtle Fur Company disputed the allegations set forth in the P.C.'s Statement ¶ 23, other than the decedent's date of death, on the sole grounds that the P.C. provided no evidence to support its allegations. I find that the P.C. provided the relevant insurance policy. *P.C. Exhibit*, at 100-120. Further, that policy contains the officer exclusion endorsement. *P.C. Exhibit*, at 117. Accordingly, I find that the material facts set forth in the P.C.'s Statement ¶ 23 are supported by admissible evidence.

12. In November 2021, Turtle Fur requested that the Department place three additional former employers on notice of potential liability for workers' compensation benefits for the decedent's fatal injury: CS Weinheimer CPA, P.C., Stockli USA, Inc., and Four Seasons Realty, LLC. These employers became additional defendants at Turtle Fur's behest, not at Claimant's behest, and specifically against Claimant's wishes. *Claimant's Opposition*, at 2.

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).
2. The P.C. seeks summary judgment dismissal from this matter on the grounds that the decedent was effectively excluded from coverage under the Workers' Compensation Act for his employment with the P.C.
3. Turtle Fur opposes the P.C.'s motion, as it prefers that all employers remain in the case in order to apportion any liability among them. Turtle Fur also contends that it has not been afforded an adequate time for discovery prior to responding to the motion.³
4. The other Defendants have not filed any opposition to the P.C.'s motion.

Adequate Time for Discovery

5. V.R.C.P. 56(b) provides that a party may move for summary judgment within 30 days after the close of discovery unless a different time is set by stipulation or court order. Defendant Turtle Fur contends that it has not had adequate time for discovery prior to responding to the P.C.'s motion. In support of its contention, Turtle Fur cites the Vermont Supreme Court case of *Al Baraka Bancorp (Chicago), Inc. v. Hilweh*, 163 Vt. 148, 156 (1994) (summary judgment premature if the opposing party has not had adequate time for discovery).
6. In *Bushey v. Allstate Ins. Co.*, 164 Vt. 399, 405 (1995), the Vermont Supreme Court expanded upon the rationale for permitting an adequate time for discovery in the summary judgment context as follows:

Rule 56 does not require that summary judgment motion decisions await completion of discovery, and to so require would defeat the purpose of the rule. *See Pizza Management, Inc. v. Pizza Hut, Inc.*, 737 F.Supp. 1154, 1169 (D.Kan.1990) (requiring that summary judgment

³ Turtle Fur's August 26, 2022 response to the P.C.'s motion included its own Motion for Summary Judgment. This ruling does not address Turtle Fur's motion. That motion will be the subject of a separate ruling after the other parties have had an opportunity to respond.

await completion of discovery frustrates its usefulness as tool to weed out claims that do not merit trial). The court need only permit an adequate time for discovery. *Poplaski v. Lamphere*, 152 Vt. 251, 254, 565 A.2d 1326, 1329 (1989).

7. Turtle Fur contends that it did not have adequate time for discovery because it had only 30 days from receipt of Claimant's July 27, 2022 discovery responses in which to file its response to the P.C.'s summary judgment motion.
8. As background, Claimant asserted its claim against Turtle Fur in July 2021, and the other employers were put on notice of the claim in November 2021. The P.C. filed its summary judgment motion on May 26, 2022, and the Department granted Turtle Fur an extension of time to file its response to the motion until 30 days after Claimant provided its signed discovery responses. Claimant provided those responses on July 27, 2022. Accordingly, Turtle Fur had until August 26, 2022 in which to file its response to the motion. Based on this timeline, I conclude that Turtle Fur had adequate time in which to file a response to the motion.
9. Turtle Fur also contends that it is premature to respond to the P.C.'s motion because it does not have the decedent's 2020 tax returns. It contends that the tax returns are relevant to the volume of work that the decedent performed, the P.C.'s typical and unforeseen expenses, and the number of employees working for the P.C. *Turtle Fur's Response to the P.C.'s Summary Judgment Motion*, at 3.
10. Although the tax returns may be relevant to those issues, they are not relevant to the officer exclusion issue. In the *Al Baraka Bancorp* case, the Court rejected the plaintiff's claim of inadequate time for discovery because the plaintiff made no showing that additional discovery could help its position. Instead, the summary judgment decision in that case was rendered on the unambiguous transactional documents to which additional discovery would not have been relevant. *Al Baraka Bancorp, supra*, at 156. I reach the same conclusion here. Although the decedent's tax returns may be relevant to his employment, they are not relevant to the officer exclusion issue upon which this motion is based.
11. Accordingly, I conclude that Turtle Fur is not prejudiced in its response to this motion either by not having additional time for discovery, or by not having the decedent's 2020 tax returns.

Officer Exclusions under the Vermont Workers' Compensation Act

12. The Vermont Workers' Compensation Act permits business entities to exclude officers from workers' compensation coverage under the Act. Section 601 of the statute provides in relevant part as follows:

(14) "Worker" and "employee" means an individual who has entered into the employment of, or works under contract of service or

apprenticeship with, the employer. ... The term “worker” or “employee” does not include:

...

(H) With the approval of the Commissioner, a corporation or a limited liability company (L.L.C.) may elect to file exclusions from the provisions of this chapter. A corporation or an L.L.C. may elect to exclude up to four executive officers or managers or members from coverage requirements under this chapter. . . .

13. Accordingly, a properly excluded officer is not an “employee” or a “worker” under the Vermont Workers’ Compensation Act.
14. Workers’ Compensation Rule 25 sets forth the procedures for obtaining an exclusion. The rule provides that a corporation’s executive officer may be excluded from coverage under the Workers’ Compensation Act pursuant to 21 V.S.A. § 601(14)(H) by filing an Application for Exclusion (Form 29), accompanied by the required supporting documentation, and obtaining the Commissioner’s approval. *See Workers’ Compensation Rules 25.1200 through 25.1400.* Under Workers’ Compensation Rule 25.1600, a new exclusion application is required whenever there is a change of business entity or corporate officers.
15. The P.C. in this case followed the procedures for excluding the decedent from coverage under the Workers’ Compensation Act, *see* Background No. 3 *supra*, and the Commissioner approved his exclusion on or about February 5, 2016. *See* Background No. 4 *supra*. Thereafter, the P.C. made no changes to its business entity or corporate officers. *See* Background No. 8 *supra*. Therefore, the exclusion remained in place, and no new exclusion application was required under Rule 25.1600.
16. I therefore conclude that the decedent’s exclusion from coverage under the Vermont Workers’ Compensation Act was in effect from February 5, 2016 through and including the date of his death on November 8, 2020.

Exclusion from Coverage under the Travelers Policy

17. Based on the officer exclusion that the Department approved on February 5, 2016, Travelers Insurance issued a series of workers’ compensation insurance policies to the P.C. that specifically excluded the decedent from coverage. Successive policies with the exclusion were in effect from February 5, 2016 to December 7, 2020, including on the date of the decedent’s fatality. *See* Background Nos. 6-7 *supra*.
18. Insurance policies are construed according to their terms and the evident intent of the parties as expressed in the policy language. *See Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, Inc.*, 2015 VT 52, ¶ 16, citing *Sperling v. Allstate Indem. Co.*, 2007 VT 126, ¶ 8. Insurance policies that “specifically and unambiguously exclude coverage are effective to preclude the insurer’s liability.” *Sperling, supra*, 2007 VT 126, ¶ 14.

19. I therefore conclude that the decedent was also effectively excluded from the P.C.'s workers' compensation insurance policy at all relevant times, including on the date of his November 8, 2020 fatality.

Consequences of Exclusion

20. Section 601(14)(H) of the Workers' Compensation Act defines the term "employee" as not including an officer who was properly excluded from coverage under the Act. See Discussion Nos. 12-13 *supra*. Further, the Department's Application to Exclude Corporate Officers from Workers' Compensation Coverage (Form 29) states in part as follows: "Vermont law permits corporate officers . . . to exclude up to four (4) officers . . . from **protection** under the Vermont Workers' Compensation Act." Above the signature line, the form states:

The undersigned, an officer of the above-named corporation . . . elects to be excluded from coverage under the corporation's/LLC's workers' compensation policy, **and not be entitled to the protections provided by Vermont Workers' Compensation Act** from the date this application is approved by the Commissioner.

See P.C. Exhibit, at 1 (emphasis added).

21. In *Koski v. Black Rock Construction, LLC*, Opinion No. 25-15WC (November 16, 2015), the Department considered the effect of an officer exclusion on a claim for workers' compensation benefits. The Commissioner held that a corporate officer who is lawfully excluded from coverage under 21 V.S.A. § 601(14)(H) forfeits his or her right to claim workers' compensation benefits under the statute, but may pursue a tort action for personal injuries, subject to the employer's having all of the defenses available in a personal injury claim. *Koski*, Conclusion of Law No. 35.
22. The same result follows here. Not only was the decedent excluded from the P.C.'s workers' compensation insurance policy, but he was also excluded from the protections that the Vermont Workers' Compensation Act affords to "employees." Accordingly, under the statute, the decedent is prevented from recovering workers' compensation benefits, and the P.C. shall have all the defenses available in a personal injury claim should the decedent's estate bring such an action. See 21 V.S.A. § 601(14)(H).

Defendant Turtle Fur's Request for Apportionment

23. Finally, Turtle Fur contends that, if the decedent is not covered by the Workers' Compensation Act for his employment with the P.C., the P.C. should nonetheless remain a party to this matter to determine its liability in full or on the basis of apportionment among all the defendants. More broadly, Turtle Fur contends that dismissing the P.C. from this action would provide Claimant with free rein to select

defendants of its own choosing and would preclude Turtle Fur from asserting any claims or defenses it might otherwise have with respect to the P.C.

24. In response, the P.C. characterizes Turtle Fur's position as a "concern untethered to any legal principle," and contends that the workers' compensation statute does not require the retention of parties "to insure a robust availability of alternative defendants." *See The P.C.'s Reply to Turtle Fur's Opposition*, at 5-6. In any event, the exclusion of the decedent from coverage under the workers' compensation statute leaves his estate with only a tort remedy for any injuries he may have sustained arising out of and in the course of his employment with the P.C. *See Discussion No. 22 supra*. Accordingly, if the Department is ever in a position to apportion liability for workers' compensation benefits among the decedent's former employers, the P.C. is excluded from that pool of former employers who may be subject to liability for workers' compensation benefits.

Claimant's Opposition to the Motion

25. Claimant opposes this summary judgment motion on the grounds that it was not the party who asserted a claim against the P.C. As set forth in Claimant's opposition, it does not want the "taint" or "stench" of having asserted a claim against the P.C. to be attributed to it. *Claimant's Opposition*, at 2. In the alternative, if the motion is granted, Claimant requests that the Department clearly state that Turtle Fur initiated the claim against the P.C. and that Claimant did not initiate a claim against the P.C. or any other defendant.
26. The purpose of summary judgment is to avoid a useless trial. *See, e.g., Sykas v. Kearns*, 135 Vt. 610, 612 (1978), citing 6 J. Moore, *Federal Practice P 56.15*, at 56-391 (2d edition 1976). Thus, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).
27. In this case, there is no genuine issue of material fact concerning the exclusion of the decedent from workers' compensation coverage, and the P.C. is entitled to judgment as a matter of law. Granting this motion fulfills the purpose of conserving judicial resources and avoiding an unnecessary hearing regardless of which party named the P.C. as a defendant.
28. As Claimant has requested, the fact that Turtle Fur is the party who asserted a claim against the P.C. is stated in this ruling. *See Background Nos. 10-12 supra*.

ORDER:

Defendant CS Weinheimer CPA, P.C.'s Motion for Summary Judgment is hereby **GRANTED**, and the claim for workers' compensation benefits against Defendant CS Weinheimer CPA, P.C. is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont, this 5th day of October 2022.

Michael A. Harrington
Commissioner