CASE NO.: SC 01-301

IN THE SUPREME COURT OF FLORIDA

GEORGE N. KOIKOS d/b/a
Spartan Restaurant,

Appellant,

v.

THE TRAVELERS INSURANCE COMPANY, a foreign corporation, and CHARTER OAK FIRE INSURANCE COMPANY, a foreign corporation,

Appellees.
_____/

On Certification from the United States Court of Appeals for the Eleventh Circuit
Case No: 00-11611

ANSWER BRIEF OF APPELLEES THE TRAVELERS INSURANCE COMPANY and CHARTER OAK FIRE INSURANCE COMPANY

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STATEMENT OF JURISDICTION

This court has discretionary jurisdiction pursuant to Fla. R. App. P. 9.030 (a) (2) (C).

STATEMENT OF THE CERTIFIED ISSUE

DID THE INJURIES SUSTAINED BY BRIAN ARMSTRONG AND D'JUAN HARRIS RESULT FROM A SINGLE OCCURRENCE OR MULTIPLE OCCURRENCES UNDER THE TERMS OF THE INSURANCE POLICY ISSUED TO KOIKOS BY DEFENDANTS?

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

The statement of the case and facts offered by Appellant KOIKOS in his brief does not set forth all of the matters of record which are pertinent to the subject appeal. Accordingly, Appellees hereinafter set forth their own statement.

Appellant KOIKOS brought a declaratory action in state court against THE TRAVELERS INSURANCE COMPANY. (R2-41-Exhibit "A"). TRAVELERS removed the case to the United States District Court, Northern District of Florida. (R1-1). Ultimately, THE CHARTER OAK FIRE INSURANCE COMPANY (the TRAVELERS affiliate that issued the insurance policy in suit), was joined as a defendant. (R1-17-1).[1]

[1] Based on fact that the subject policy was issued by Appellee CHARTER OAK FIRE INSURANCE COMPANY, Appellees will in this brief refer to the issuing entity and/or the Appellees jointly as "CHARTER OAK."

In his declaratory action, KOIKOS alleged that CHARTER OAK issued a commercial general liability policy which covered his restaurant operations. (R2-41-Exhibit "A"-1). KOIKOS further asserted that, in the early morning hours of April 26, 1997, his restaurant ("The Spartan") was being used by a local college fraternity for a graduation party. (R2-41-Exhibit "A"- 2). During the party, an altercation developed between members of the fraternity and two uninvited guests. As the altercation continued, one of the uninvited guests pulled out a gun and fired multiple shots. Several people were struck by the bullets. Two of the shooting victims, Appellants/Intervenors, BRIAN ARMSTRONG and D'JUAN HARRIS, filed suits against KOIKOS, alleging that they were injured on the evening in question as a result of the restaurant's failure to provide adequate security. (R2-41-Exhibit "A"- 2, 3).

The insurance policy issued by CHARTER OAK contained a $500,000 "Each Occurrence" limit of liability. (R2-41- Exhibit "F"- Form MP TO 01 05 95- 1 of 3). The term "occurrence" is defined in the policy as: "An accident, including continuous or repeated exposure to substantially the same general harmful conditions." (R2-41-Exhibit "F"-Form CG 00 01 10 93, page 11 of 12). The policy further provided that the $500,000 limit applied regardless of the number of claims made or suits brought; or, the number of persons making claims or bringing suits. (R2-41-Exhibit "F"-Form CG 00 01 10 93, page 7 of 12). The $500,000 limit was further stated to be the most

the company would pay "because of all bodily injury ... arising out of any one 'occurrence'." (R2-41-Exhibit "F"- form CG 00 01 10 93, page 7 of 12).

Based on the fact that multiple people had been shot, KOIKOS contended that the $1,000,000 General Aggregate limit applied, rather that the $500,000 Each Occurrence limit. In response, CHARTER OAK advised KOIKOS that under the terms of the policy the shooting incident was subject to the $500,000 limit. (R2-41, Exhibit "A"- 2, 3).

In the declaratory judgment proceedings, the parties filed cross-motions for summary judgment essentially asking the U. S. District Court to decide whether the underlying shooting incident was subject to a limit of $500,000 or $1,000,000. (R2-40, R2-39, R2-42, R2-43). After considering the parties' arguments, the District Court ruled that the underlying shooting incident constituted only one occurrence under CHARTER OAK's policy. (R2-61-8). Thus, the claims arising out of the shooting incident were subject to the $500,000 liability limit. (R2-61-8).

In the final summary judgment under review, the District Court further noted that, in determining the number of occurrences presented, Florida courts subscribe to the "cause theory" (as opposed to the "effect theory"). (R2-61-5). After reviewing the authorities from Florida, the Eleventh Circuit Court of Appeals and other jurisdictions, the District Court concluded that the proper inquiry under the "cause theory" was to determine whether the claims at issue arose out of one basic event or

series of events for which the insured was allegedly liable. (R2-61-8). Based on the fact that KOIKOS' liability arose out of his alleged negligence in failing to provide adequate security for the victims on the evening in question, the District Court concluded that only one occurrence was presented. (R2-61-8).

In issuing its ruling, the District Court also rejected KOIKOS' suggestion that the focus should be on the number of shots fired or victims injured. According to the District Court, KOIKOS' proffered analysis would constitute an impermissible focus on the "effect" - rather than the "cause"- of the events or incidents which resulted in the insured's exposure to liability. (R2-61-7).

The District Court further rejected KOIKOS' argument that the issue before it was controlled by American Indemnity Company v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983), *inter alia*, because the policy construed by the McQuaig court did not contain any definition of the term "occurrence," let alone the definition set forth in the CHARTER OAK policy. (R-2-61-6).

KOIKOS appealed the District Court's ruling to the United States Court of Appeals, Eleventh Circuit.(R-2-66-1). Following its review, the Eleventh Circuit certified the case to this Court.

B. Statement of The Facts

From the pleadings, discovery and trial testimony taken in the underlying civil and criminal cases which arose out of the shooting incident, it is undisputed that on

April 26, 1997, a Kappa Alpha Psi Fraternity party was being held at The Spartan Restaurant. (R.2-41, Exhibit A, p.6; Exhibit D, p.492, lines 1-11). In the very early morning hours on that date (1:28a.m.), Charles Bell and Antonio Anderson parked their vehicle in downtown Tallahassee and walked on foot towards The Spartan. (R.2-41, Exhibit D, page 416-417). At The Spartan, a dispute erupted between Anderson and some of the members of the Kappa Alpha Psi Fraternity who were collecting an admission charge at the door of the restaurant. (R.2-41, Exhibit D, p. 6). After words were exchanged, Bell and Anderson left the restaurant at 1:35 a.m. (R.2-41, Exhibit D, p. 496-497; Exhibit D, p. 417, lines 7-25).[2]

Exactly four minutes and twenty-seven seconds after Bell and Anderson left the Spartan, they returned to the restaurant so that Anderson could get his admission fee back. (R.2-41, Exhibit D, p. 498, lines 1-25, p. 500, lines 5-10; Exhibit D, p. 417-418). At this time, an altercation broke out in the lobby area of the restaurant between Anderson and some of the members of the fraternity. (R.2-41, Exhibit C, para. 4(f)). Anderson was struck by Leslie "Trey" Miller and knocked to the ground. (R.2-41, Exhibit D, p. 501-503). Bell went to assist Anderson and pulled out his gun and began shooting. (R.2-41, Exhibit D, p. 504, lines 1-6). In the lobby area, Bell shot Miller and

[2]Many events which transpired on the evening in question were recorded by a video camera affixed to an Automatic Teller Machine near The Spartan. The footage from these recordings, which was introduced in evidence at Charles Bell's criminal trial, also contained the precise time at which the recorded events occurred.

Intervenors HARRIS and ARMSTRONG. (R.2-41, Exhibit D, pp. 57-58, 69-70, 212, and 285; Exhibit G, p. 28).[3]

Bell then got Anderson to his feet and, as they were proceeding out of the Spartan, a bottle was thrown at Anderson. (R. 2-41, Exhibit G, p. 539, lines 8-12). Bell fired several more shots outside the restaurant, and then he and Anderson left the premises (at 1:43 a.m.), fleeing in their vehicle. (R.2-41, Exhibit D, p. 418, p. 539, lines 8-17). [4]

Intervenors HARRIS and ARMSTRONG filed complaints against The Spartan Club & Grill. (R.2-41, Exhibits B and C.) These suits alleged that, as a result of negligence on the part of The Spartan in failing to keep its premises safe on the evening in question, HARRIS and ARMSTRONG were shot. More specifically, the complaints alleged, *inter alia*, that The Spartan negligently failed to employ trained

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[3] In his brief at page four, KOIKOS asserts that there was no evidence presented that any single shot injured more than one victim; and, that it is a "reasonable inference" that all victims were injured by separate shots. In response, CHARTER OAK notes that KOIKOS never offered any evidence to prove that the three persons injured in the first round of shots fired in the lobby (MILLER, HARRIS and ARMSTRONG) were in fact injured by separate shots.

[4]According to the witness testimony, the time which elapsed between the firing of the first shot inside the lobby area of The Spartan and the last shot outside the restaurant was less than 20 seconds. (R.2-41, Exhibit H, p. 44, lines 11-13). Further, based on the ATM video footage, a total of three minutes and 17 seconds elapsed from the time Bell and Anderson exited their vehicle the second time (with the gun) and when they returned to their vehicle to flee. (R.2-41, Exhibit D, p. 418, lines 1-25).

security guards who could have prevented the shooting incident by controlling the assailants or removing them from the premises prior to the incident. (R.2-41, Exhibits B and C). The complaints further alleged that prior criminal acts had occurred at the restaurant or in the vicinity thereof. (R.2-41, Exhibits B and C).

The CHARTER OAK policy (R.2-41, Exhibit "F") that was issued to the owner of The Spartan, Appellant GEORGE KOIKOS, contains the following relevant provisions:

> Coverage A. Bodily Injury and Property Damage Liability
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" .... to which this insurance applies...
>
> B. This insurance applies to "bodily injury"... only if:
>
> (1) The "bodily injury" ... is caused by an "occurrence"...

(R-2-41Exhibit F, Form CG 00 01 10/93, page 1 of 12).

Page eleven of the Commercial Coverage General Liability Coverage Form contains the following definition:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(R-2-41-Exhibit F, Form CG 00 01 10/93, page 11 of 12).

The Policy Declarations provide that the "General Aggregate" limit is $1,000,000. However, the "Each Occurrence limit" is $500,000.

(R-2-41-Exhibit F, Form MP TO 05/95, page 1 of 3).

The policy also contains the following provisions:

1. The Limits of Insurance shown in the Declaration and the Rules below fix the most we will pay regardless of the number of:

    a. insureds;

    b. Claims made or "suits" brought; or

    c. Persons or organizations making claims or bringing "suits"...

5. ... [T]he Each Occurrence Limit is the most we will pay for the sum of:

    a. Damages under Coverage A; and

    b. Medical expenses under Coverage C

    because of all "bodily injury" and "property damage" arising out of any one "occurrence."

(R-2-41-Exhibit F, Form CG 00 01 10/93, page 7 of 12).

Construing these policy provisions together, the policy states that a limit of $500,000 applies to all bodily injury arising out of a continuous or repeated exposure to substantially the same general harmful conditions, regardless of the number of

claims made or suits brought, and regardless of the number of persons or organizations making claims or bringing suits.

C. Standard of Review

The standard of review that is applicable to a District Court Order granting summary judgment is *de novo*. Elan Pharmaceutical Research Corp. v. Employers Insurance of Wausau, 144 F.3d 1372 (11th Cir. 1998). Issues involving the interpretation and application of the pertinent terms of an insurance policy are decided as a matter of law and therefore the reviewing court applies the same legal standards as those employed by the District Court. LaFarge Corporation v. Travelers Indemnity Co., 118 F.3d 1511, 1514-15 (11th Cir. 1997) (*per curiam)*.

Florida courts apply the same standard. Stuart Petroleum Co. v. Certain Underwriters at Lloyd, 696 So. 2d 376, 379 (Fla. 1st DCA 1997), *rev. dismissed*, 701 So. 2d 867 (Fla. 1997).

SUMMARY OF THE ARGUMENT

The District Court correctly construed the provisions of CHARTER OAK's policy and concluded that the underlying shooting incident constituted a single occurrence. The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." On the night in question, Intervenors HARRIS and ARMSTRONG sustained bodily injury

as a result of a "continuous or repeated exposure to substantially the same general harmful conditions." Thus, the $500,000 limit applied to the underlying shooting incident. This conclusion by the trial court was further supported by the terms of the policy which state that the $500,000 limit applied: A) regardless of the number of persons making injury claims; and, B) to all bodily injury arising out of any one "continuous or repeated exposure to substantially the same general harmful conditions". The trial court's conclusion that only one occurrence was presented was thus fully supported by the provisions of CHARTER OAK's policy.

In his brief KOIKOS asserts that the issue at bar should be controlled by American Indemnity Company v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983). The District Court correctly rejected this contention. There are three separate reasons why McQuaig is distinguishable. First, the insurance policy which the Fourth District Court of Appeal construed in McQuaig did not contain the language set forth in CHARTER OAK's policy, which defines "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Second, the policy at issue in McQuaig did not contain provisions which fixed the limits of insurance "regardless of the number of claims made or suits brought; or, the number of persons or organizations making claims or bringing suits." Finally, the insured in McQuaig was the actual shooter, rather than a party (like KOIKOS) who

was charged with negligently failing to prevent a shooter from injuring people on his premises.

McQuaig thus has no application to the insurance policy issued by CHARTER OAK and/or to the underlying claims against KOIKOS. Furthermore, there are other decisions (from other Florida District Courts of Appeal and other jurisdictions) which have construed language similar to that contained in CHARTER OAK's policy and found a single occurrence to exist under circumstances analogous to those at issue here. Based on this weight of authority, the District Court correctly concluded that the underlying shooting incident constituted one occurrence.

In his brief KOIKOS asserts that the number of occurrences presented should be determined by the number of shots which injured victims on the night in question. This analysis would require that this court either ignore or substantially re-write the terms of CHARTER OAK's policy. Further, as noted by the District Court, adoption of the "number of shooting victims" test proffered by KOIKOS would be tantamount to a ruling that Florida utilizes the "effect theory" to determine the number of occurrences under a liability policy. As admitted by KOIKOS, Florida subscribes to the "cause theory" in determining the number of occurrences presented.

The available authorities in Florida which have addressed analogous fact situations and similar policy language reveal that the number of occurrences present is determined by focusing on the act or series of related acts subjecting the insured to

liability. This analysis has also been employed in numerous other decisions. Under this test, it is clear that KOIKOS was subjected to liability because of his alleged negligent failure to keep patrons on his premises safe from criminal attack on the evening in question. The incident at issue in this case thus constituted a single occurrence under the CHARTER OAK policy. Obviously, multiple people were allegedly injured as a result of this conduct. However, under the clear language of CHARTER OAK's policy (and the "cause theory"), the number of people injured is not relevant in determining the number of occurrences presented.

The provisions of CHARTER OAK's policy are clear and unambiguous. Application of the policy terms to the underlying shooting incident compels a finding that only one occurrence was presented. Any other holding would lead to results which were clearly never intended by the parties to the contract based on the plain meaning of the words in the insurance policy.

Appellees request that this Court respond to the certified question by finding that the shooting incident in which ARMSTRONG and HARRIS were injured constituted a single occurrence under the terms of CHARTER OAK's policy.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE SHOOTING INCIDENT IN WHICH ARMSTRONG AND HARRIS WERE INJURED CONSTITUTED A SINGLE OCCURRENCE UNDER CHARTER OAK'S POLICY

A. The plain language of Charter Oak's policy controls

The first inquiry for a court in an insurance coverage action is to construe the terms of the insurance policy so as to give effect to the stated intent of the parties. See, Stuyvesant Ins. Co. v. Butler, 314 So. 2d 567 (Fla. 1975). Courts should construe policies as a whole in an attempt to ascertain the intent of the insuring agreement. South Carolina Ins. Co. v. Heuer, 402 So. 2d 480 (Fla. 4th DCA1981), rev. denied, 412 So. 2d 465 (Fla. 1982); see also, Sec. 627.419 (1) Fla. Stat. ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy..."). Further, a court should not rewrite a contract of insurance by extending the coverage afforded beyond that plainly set forth in the policy. U.S. Fire Ins. Co. v. Morejon, 338 So. 2d 223, 225 (Fla. 3d DCA 1976).

Applying these principles to the case under review, the policy states that a limit of $500,000 applies to each occurrence/accident. An accident includes "continuous or repeated exposure to substantially the same general harmful conditions.".

Intervenors ARMSTRONG and HARRIS alleged (and the facts proved) that on the evening in question they were both injured by "substantially the same general harmful condition" on KOIKOS' premises. The fact that two of them were injured in the incident does not change the result. The policy expressly states that the $500,000 limit applies regardless of the number of people injured in the accident. See, Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 32 n. 3 (Fla. 2000)(wherein this Court compared a "per person/per accident" limit with a "per occurrence" limit and noted that a per occurrence limit applies "regardless of the number of people involved in the accident...".).

The operative language of CHARTER OAK's policy is easily applied to the facts of the underlying claim. KOIKOS was charged with negligently failing to keep his premises safe on the night in question. As a result of this alleged breach of duty, ARMSTRONG and HARRIS were gunned down in the lobby of the Spartan Restaurant within seconds of each other. A very serious incident occurred that night. From KOIKOS' perspective, the occurrence on his premises was accidental (i.e. unexpected). See, Initial Brief at pp. 11-15. The number of people injured in the incident was only dependent on the direction(s) the gun was fired and the location of particular bystanders/participants. Adopting the test proffered by KOIKOS, i.e. "one occurrence for each claimant shot in the lobby," would require this Court to ignore the

plain language of CHARTER OAK's policy, and thereby violate firmly established principles of policy construction.[5]

B. Courts in other jurisdictions have found one occurrence under similar facts and policy language.

In Travelers Indemnity Co. v. Olive's Sporting Goods, Inc., 764 S.W. 2d 596 (Ark. 1989), Olive's Sporting Goods (Travelers' insured) was sued for negligent sale of guns to an individual who later shot a policeman, killed and wounded several other persons, and then committed suicide. The insurance policy in question contained a definition of occurrence which included the repeated exposure to conditions language, and limited liability regardless of the number of persons injured or claims made. The Olive's Sporting Goods court found that the policy was not ambiguous and held that there was only one occurrence under the insurance policy - the insured's alleged negligent sale of weapons to the assailant. Id. at 599.

[5] On pages 28-32 of his brief, Koikos essentially requests that this Court ignore the complete definition of "occurrence" in Charter Oaks' policy when the underlying case involves a "fast-happening" accident rather than a "slow tort." The plain language used in the definition of occurrence precludes such an interpretation. Further, this proposed construction goes against established, well-reasoned Florida caselaw. See Grissom v. Commercial Union Ins. Co. , 610 So. 2d 1299 (Fla. 1st DCA 1992)(the term "accident,"as used in the definintion of "occurrence," includes not only a single, sudden, unexpected event that causes damage, but also includes injury or damage that results from a created or preexisting condition for which the insured is legally responsible, even though it may have occurred or persisted over an extended period of time).

Similarly, in Continental Ins. Co. v. Hancock, 507 S.W. 2nd 146 (Ky. App. 1973) the insured operated a nightclub. An altercation inside the nightclub ultimately led to a fighting incident in the parking lot. In the affray, three patrons were injured. The nightclub was sued for negligence in allowing the incident to occur on its premises. Continental had issued a liability policy to the nightclub which contained a definition of "occurrence" (and a limitation regardless of number of persons injured, etc.) which was similar to the one before this Court. Applying the policy language to the facts before it, the Hancock court held that only one occurrence was presented by the fighting incident, even though multiple people were injured. Id. at 152.[6]

CHARTER OAK respectfully suggests that this Court should apply the same analysis as that employed in Olive's Sporting Goods and Hancock, supra, and reach the same result. Based on the plain language used, the intent of CHARTER OAK's insuring agreement is clear: a given accident (or occurrence) includes continuous or

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[6] Appellees urge this Court to consider the results in Olive's Sporting Goods and Hancock (finding a single occurrence for multiple shootings where the policy language was similar to CHARTER OAK's policy) in contradistinction to the holdings in State Farm Lloyds v. Williams, 960 S.W. 2nd 781 (Tx. 1997) and American Indemnity Company v. McQuaig, 435 So. 2nd 414 (Fla. 5th DCA 1983) (finding more than one occurrence for multiple shootings where the policy did not contain language similar to CHARTER OAK's). See, KOIKOS' Initial Brief at pp. 16-19 and 26-27. Although the court in Williams cited McQuaig in support of its holding, other courts have expressly refused to apply McQuaig because the policy at issue in McQuaig did not contain the "continuous or repeated exposure to...conditions" language. See, State Farm Fire & Cas. Co. v. Elizabeth N., 9 Cal. App. 4th 1232, 1238, n.2 (Cal. 1st DCA 1992); Foust v. Ranger Ins. Co., 975 S.W. 2nd 329 (Tx. 4th DCA 1998).

repeated exposures to substantially the same general harmful conditions - and, the limit of liability ($500,000) applies to all bodily injury arising out of the incident, regardless of how many people present injury claims.[7]

C. Florida Courts have construed similar policy language to find one occurrence.

In Southern International Corp. v. Poly-Urethane Industries, Inc., 353 So. 2d 647 (Fla. 3d. DCA 1977), the Third District Court of Appeal construed the same policy language as that contained in the CHARTER OAK policy. In Poly-Urethane Industries, the insured roofing contractor entered into a contract to apply sealant to the roofs of each of the different buildings at a condominium complex. Several months after the sealant was applied, various tenants of the buildings which had been treated began experiencing leaks in the roofs. Like CHARTER OAK's policy, the insuring agreement at issue in Poly-Urethane Industries contained both an "Each Occurrence" limit and an "Aggregate" limit, and further provided that all injury arising out of "continuous or repeated exposure to substantially the same general conditions" would be considered as arising out of one occurrence. Id. at 647.

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[7] On pages 30-32 of his brief, Koikos asserts that the lack of uniformity of interpretation of the term "occurrence" is a basis to extend additional coverage. In reply, CHARTER OAK states that the case authorities involving similar policy language and claims against insureds for negligently permitting multiple shootings to occur have consistently found one occurrence. See Hancock and Olive's Sporting Goods supra.

Based on these facts and policy language, the Poly-Urethane Industries court ruled that all injuries were subject to the Each Occurrence limit rather than the Aggregate limit. Id. at 648. This ruling is significant for two reasons. First, in determining the number of occurrences presented, the Poly-Urethane Industries court focused on the continuous and related actions of the insured which created the liability, i.e. improperly applying sealant. Id. ; see also State Farm Fire & Cas. Co. v. CTC Development Corp. , 720 So. 2d 1071, 1076 (Fla. 1998)(the term "accident" should be viewed from the perspective of the insured). Second, notwithstanding the fact that: A) the insured had applied the sealant to multiple buildings at the condominium complex; and, B) "various tenants of these buildings" sustained water leaks, the Poly-Urethane Industries court still ruled that the incident was subject to the "Each Occurrence" limit.

Similarly, in Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc., 660 So.2d 1136 (Fla. 4th DCA 1995), the Fourth District Court of Appeal considered policy language which defined an occurrence as: "all loss caused by, or involving, one or more 'employees' whether the result of a single act or series of acts." The Court held that an employee's series of embezzlements which occurred over a four-year period constituted a single occurrence. Reliance, 660 So.2d at 1137.

CHARTER OAK thus submits that Florida courts have followed the rule, adopted by the majority of jurisdictions, that where the policy contains a definition of

the term "occurrence" (which specifies that an occurrence is intended to include continuous or repeated exposure to substantially the same general conditions, or similar language), a single occurrence will be found where the injuries at issue are attributable to substantially the same acts or omisions (causative negligence of the insured), regardless of the number of persons injured or the labels given to the allegedly negligent acts which resulted in those same injuries. The majority of jurisdictions have agreed that this is the better view because to decide otherwise would result in a no-limits policy. Travelers Indem. Co. v. Olive's Sporting Goods, Inc., 764 S.W. 2d 596 (Ark. 1989)("To decide that each of the injuries required separate coverage under the policy would in effect put a no-limits policy into effect").[8]

D. American Indemnity v. McQuaig does not support a finding of multiple occurrences

In his brief at pp. 16-19, KOIKOS maintains that this Court should find multiple occurrences on the basis of American Indemnity Company v. McQuaig, 435 So.2d 414 (Fla. 5th DCA 1983). In response, CHARTER OAK asserts that McQuaig is entirely distinguishable because the liability policy involved in that case did not contain the same policy language as that contained in the CHARTER OAK policy; and also

[8] In his brief at p. 8-9, Intervenor ARMSTRONG has cited Consolidated Ins. Co. v. Henderson, 542 So. 2nd 1032 (Fla. 3rd DCA 1989) for the proposition that multiple occurrences should be found. However, as this decision was a *per curiam* affirmance, under Florida law it has no precedential value. See, The Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So. 2nd 310 (Fla. 1983).

because in McQuaig the insured was the actual shooter, rather than one who was charged with negligence in failing to prevent a shooting incident.

In analyzing the number of occurrences presented, the Fifth District Court of Appeal in McQuaig noted that the policy before it did not define the term "occurrence." Id. at 415. The court therefore applied the test of whether "there was but one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damages." Id. at 415. The Fifth District Court of Appeal cannot be faulted for looking elsewhere to find an appropriate definition of the term occurrence, since that term was not defined in the policy. However, in this case the CHARTER OAK policy does define the term "occurrence":

> "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

This definition of occurrence was not considered by the McQuaig court. Thus, it is impossible to know how it would have ruled had the policy in that case contained this definition of occurrence (and/or the language in CHARTER OAK's policy which limits liability regardless of the number of claims made, persons injured or suits brought). See also, authorities cited at note 6, supra, which refused to extend the McQuaig holding to policies which contained a definition of "occurrence" similar to CHARTER OAK's.

On pages 18-19 of his brief, KOIKOS also suggests, based on McQuaig, that the proper focus for determining the number of occurrences should be on the "direct" or "immediate" cause of the injury. Appellees respectfully disagree with KOIKOS' hypothesis and conclusion. A careful review of McQuaig reveals that the court there focused on the actions of the insured to which liability attached. As noted by the McQuaig court, "liability attached when [the insured] Croskey fired the shots..." Id. at 415-16. Appellees thus submit to this court that, even assuming McQuaig had any application to the policy issued by CHARTER OAK, the analysis employed there was more consistent with the test utilized by the other Florida courts cited herein who have addressed the issue, to wit: focusing on the acts or related acts of the insured which subjected the insured to liability.

In the case now before this court, KOIKOS was not sued by HARRIS and ARMSTRONG for shooting them. Rather, KOIKOS was sued for his alleged negligence in failing to provide adequate security at his restaurant on the evening in question. If this alleged negligence on KOIKOS's part was not, in the view of the McQuaig court, the "proximate, uninterrupted and continuing cause which resulted in all of the injuries and damages" sustained by HARRIS and ARMSTRONG on the night in question, KOIKOS would have no liability to the injured parties, and CHARTER OAK would have no responsibility under its policy.

Thus, contrary to KOIKOS' suggestion on pages 18 and 19 of his brief, liability did not attach to KOIKOS each time Bell pulled the trigger. In fact, no liability would attach for any of the shots, unless it was proved that KOIKOS was negligent in failing to keep his premises safe, and that this negligence was the proximate cause of the injuries sustained.

KOIKOS relies upon three other Florida decisions which are allegedly consistent with McQuaig. CHARTER OAK's response to each case follows.

On page 19 of his brief, KOIKOS cites Liberty Mut. Ins. Co. v. Rawls, 404 F. 2nd 880 (5th Cir. 1968) for the proposition that a first and second automobile collisions constituted separate occurrences. Again, there is no indication that the insurance policy at issue in Rawls contained the definition of "occurrence" which is in CHARTER OAK's policy. Thus, this decision has no application to the issue before this Court.

KOIKOS next relies upon Phillips v. Ostrer, 481 So. 2nd 1241 (Fla. 3rd DCA 1985) for the proposition that "the act which causes the damage constitutes the occurrence." Initial Brief at pp. 21-22. This isolated statement by the Phillips court does not aid KOIKOS' cause. In Phillips, INA had issued a dishonesty bond which provided coverage for losses arising from dishonest or fraudulent acts committed during the term of the bond. As noted by the Phillips court: "By the clear terms of the policy, the honesty bond was an occurrence bond, protecting the policyholder for acts

done while the policy was in effect, rather than for losses suffered or claims made during that time." Id. at 1247. The allegedly dishonest acts committed by the trustee/insureds in Phillips were the purchases of three separate groups of insurance policies. Although payment of the premiums for all three groups of policies was made during the term of the bond, only the third group of policies was actually purchased during the term of the bond. The party seeking coverage in Phillips argued that the payments of the premiums (on all three groups of policies) were the occurrence giving rise to INA's liability on the bond; and, therefore INA was obligated to provide coverage under the bond for all losses arising from the trustee's procurement of three sets of policies. Id.

The Phillips court rejected this contention and found that, under the "cause theory" and INA's policy, the occurrence was the insured's act during the policy period which caused the damage (i.e. procurement of the third group of policies), and not the ministerial act of paying the premiums for all three groups of policies during the term of the bond. The Phillips court thus affirmed the trial court's ruling which reduced the amount of damages chargeable against INA on the bond. Id.

CHARTER OAK thus submits that, not only is Phillips not supportive of KOIKOS' position, it actually supports the finding of the District Court in the summary judgment under review, that the proper focus to determine the number of occurrences was on the insured's action or actions which subjected him to liability (i.e.

KOIKOS' negligent failure, on the evening in question, to keep his premises safe for patrons such as ARMSTRONG and HARRIS).

The last case cited by KOIKOS which is allegedly consistent with McQuaig is Travelers Ins. Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199 (Fla. 1st DCA 1979). Initial Brief at p. 22. KOIKOS asserts, based on Gayfers, that Florida courts define the common meaning of "occurrence" as "the event in which negligence manifests itself in property damage or bodily injury." Appellees have several responses to this argument.

First, the issue in Gayfer's was not the number of occurrences presented under a liability insurance policy. Gayfer's addressed the question of how a court is to determine the timing of an occurrence for purposes of determining whether it occurred during the policy period. Further, it is clear that the test discussed in Gayfer's for determining **when** an occurrence takes place is the so-called "effect" test. As noted by another court:

> While the 'cause' test is appropriate for determining whether there is a single occurrence or multiple occurrences, it is not applicable in determining when an occurrence takes place. We hold that the determination of when an occurrence happens must be made by reference to the time when an injurious effects of the occurrence took place.

Appalachian Ins. Co. v. Liberty Mutual Insurance Company, 676 F.2d 56 (3rd Cir. 1982); see also, Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F. 2nd 810, 812 (11th Cir. 1985)("Both parties acknowledge the applicability of the general rule that the

event which triggers potential coverage under an occurrence-type policy is the sustaining of actual damage by the complaining party and not the date of the negligent act or omission which caused the damage").

Gayfer's thus offers no support for KOIKOS' position.

In summary on this point, Florida courts do not subscribe to the "effect theory" to determine the number of occurrences presented under a liability insurance policy. See, American Indemnity Company v. McQuaig, supra. KOIKOS' request that this Court focus on the number of gunshots causing injury to determine the number of occurrences would result in the adoption of the "effects theory" in Florida. Based on the clear language of CHARTER OAK's policy, it would be unjust to base the number of occurrences on the number of people who presented injury claims as a result of the shooting incident in this case. Further, under KOIKOS' proffered test based on the number of bullets fired, if one individual was hit by multiple shots this would result in there being separate occurrences for each bullet. The analysis which KOIKOS requests this court to adopt is both unworkable and contrary to the express terms of CHARTER OAK's policy.

E. There is no basis in CHARTER OAK's policy or applicable law to determine the number of occurrences in this case by employing the "immediate cause" of injury test proferred by Appellant.

KOIKOS continues his argument by asserting that this Court should focus on the "immediate cause" of the injuries (the bullets fired) to decide whether or not there

is a single rather than multiple occurrences. Initial Brief at pp. 23-25. However, with the exception of H.E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh, PA, 150 F. 3d 526 (5th Cir. 1998)(discussed infra), none of the cases cited by KOIKOS in support of this proposed test even discuss the issue of single versus multiple occurrences. See, Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir.1974) (in construing whether coverage was excluded from an all-risk policy, the court looks to the proximate cause of the loss); Queen Ins. Co. v. Globe & Rutgers Fire Insurance Co., 44 S. Ct. 175 (1924) (in determining whether the loss was excepted by "all..consequences ***of hostilities or warlike operations" the cause nearest to the loss is considered); and Bender Shipbuilding & Repair Co. v. Brasileiro, 874 F.2d 1551 (11th Cir. 1989) (marine insurance interpretation strictly applies the doctrine of the "immediate not the remote cause is considered"). These cases all involved the applicability of policy exclusions in first party property damage cases, not the number of occurrences presented under a liability insurance policy

The sole case that Koikos cites for his contention that the immediate cause test should be adopted by this court, and which does involve the single v. multiple occurrence issue, is H.E. Butt Grocery . There, the Fifth Circuit was faced with a situation where a store employee sexually assaulted two different children at the store on different days. The two sexual assaults took place approximately one week apart.

The parents of each child filed separate suits against the store. Id. at 528. Although the H.E. Butt Grocery court found that two occurrences were presented by these facts, it further opined: "We express no opinion as to the number of occurrences that would arise if an employee molested two children at the same time in the same incident. That question is not before us and remains for another day." Id. at p. 535, n.6.

Thus, H.E. Butt Grocery did not address the situation presented in this case where all of the injuries were sustained in the same incident. Again, both ARMSTRONG and HARRIS were injured at the same place (the restaurant lobby); at or about the same moment in time; in the same altercation; by the same shooter and gun; and, by the same alleged negligence of KOIKOS at said time and place. Further, the policy at issue in H.E. Butt Grocery did not contain the language limiting the company's liability to one occurrence even if multiple people brought suits for their injuries.

The case of Washoe County v. Transcontinental Ins. Co., 878 P.2d 306 (Nev. 1994), a sexual molestation case, contains a particularly instructive discussion of KOIKOS' "direct cause" test:

> Similarly, the County was not accused of direct or vicarious responsibility for the actual molestations by Boatwright, but was accused of inaction or inadequate action in the process and attendant duties of licencing the day-care center. Accordingly, even though the actions of the individual wrongdoers are the most direct causes of harm for the victims in both Mead Reinsurance and the instant case, the actions of the individual wrongdoers taken alone are not the basis of liability for the city of Richmond or the County in the instant case.

> Instead, liability for both entities is premised on the entities' negligence in performing a duty, which permitted the intervening conduct of those who actively caused the victims' harm.
>
> Id. at 310.

Similarly, in the case before this Court, the focus should be on KOIKOS' negligence on the evening in question, and not on the acts of the assailant.

F. Cases From Other Jurisdictions That Employ The "Cause Theory"Have Found A Single Occurrence Under Facts Similar To This Case

The overwhelming majority of jurisdictions, (including Florida), apply the "cause theory" to determine whether a single "occurrence" has taken place for purposes of liability insurance. American Indemnity Co. v. McQuaig, 435 So.2d 414, 415 (Fla. 5th DCA 1983) and cases cited therein. The cause of an occurrence is that which exposed the insured to liability for the injury. Michigan Chem. Corp. v. American Home Assur. Co., 728 F.2d 374, 379 (6th Cir. 1984). The focus is on the underlying circumstances which resulted in the claim for damages and not on the number of persons injured or claims made. International Surplus Lines Ins. Co. v. Certain Underwriters in Underwriting Syndicates, 868 F.Supp 917 (S.D. Ohio 1994); Champion Int'l. Corp. v. Continental Casualty Co., 546 F.2d 502, 506 (2d Cir. 1976). In other words, it is "the circumstances creating harm which both the policy and the parties contemplated as an 'occurrence'." Champion Int'l. Corp. v. Liberty Mut. Ins. Co., 701 F.Supp 409, 412 (S.D.N.Y. 1988). The reasoning behind this is that a liability policy is

intended to protect an individual or a business from liability from its tortuous conduct, and therefore it is reasonable to look to the underlying conduct or the cause of that liability in construing the term "occurrence." Newmont Mines, Ltd. v. Hanover Ins. Co., 784 F.2d 127, 136 (2d Cir. 1986); see also Washoe County v. Transcontinental Ins. Co., 878 P.2d 306, 310 (Nev. 1994)("occurrence" should be defined in such a way as to give meaning to the entity's [insured's] connection to liability). Therefore, it is the liability of the insured that the court must focus on when determining the number of occurrences, not the liability or acts of another tortfeasor. Id. at 308, ("...it is the County's liability, not Boatwright's liability, which is at issue").

In cases where the policy contains a definition of occurrence as including continuous or repeated exposure to substantially the same general conditions, the critical inquiry is whether or not the damage-causing process was continuous and repetitive. Uniguard Ins. Co. v. U.S. Fidelity & Guaranty Co., 728 P.2d 780, 782 (Idaho Ct. App. 1986).

These cases are in accord with the decisions from other jurisdictions which have reached similar conclusions when faced with a series of related acts which can be attributed to a single basic cause. Chemstar, Inc. v. Liberty Mut. Ins. Co., 41 F.3d 429, 433 (9th Cir. 1994) (Twenty-eight incidents of pitting involving twenty-eight different homes and multiple claimants, but caused by the failure of a lime plaster manufacturer to warn of limited application requirement, thus triggering only one

deductible); Associated Indemnity Corp. v. Dow Chemical Co. (E.D. Mich. 1993) 814 F. Supp. 613, 623 (damage to different buildings caused by same defect in building material constituted one "occurrence"); Transport Ins. Co. v. Lee Way Motor Freight, 487 F. Supp. 1325, 1329 (N.D. Tex 1980) (insured's discriminatory policies constituted one "occurrence" despite insured operating from four separate trucking terminals); Michaels v. Mutual Marine Office, Inc., 472 F.Supp. 26, 29 (S.D.N.Y. 1979) (two hundred dents and holes caused by "grab buckets" dropped over nine-day period constituted one "occurrence"); Champion Intern. Corp. v. Continental Casualty Co., 546 F.2d 502, 506, (2d Cir. 1976) (continuous and repeated sale of defective paneling–used in one thousand four hundred vehicles–constituted one "occurrence" even though it resulted in damages to a large number of individual consumers); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1382-1383 (E.D.N.Y. 1988) (one hundred and ten deliveries of Agent Orange herbicides by insured to military constituted one continuous "occurrence"); Howard, Weil, Labouisse, Friedrichs v. Ins. Co., 557 F.2d 1055, 1059-1060 (5th Cir. 1977) (a series of trades and bad checks constituted "a single ongoing episode resulting in a single loss" with respect to a broker's blanket bond); Fireman's Fund Ins. Co. v. Scottsdale Ins. Co., 968 F.Supp 444 (E. D. Ark. 1997) (multiple sales of contaminated food at a restaurant were one occurrence as long as they were not wholly independent events); Foust v. Ranger Ins. Co., 975 S.W. 2d 329 (Tex. 4th Dist. 1998) (multiple applications of a herbicide was

one occurrence because it resulted from repeated exposure to the same general conditions, distinguishing American Indemnity Co. v. McQuaig and State Farm Lloyds v. Williams because the insurance policies in those cases did not define the term occurrence).

The analysis relied upon by the courts in the above-cited cases was summarized in the Texas Fourth District Court of Appeal in Foust v. Ranger Ins. Co., 975 S.W. 2d 329 (Tex. 4th DCA 1998). There, the court explained that the cases considering the single/multiple occurrence issue distinguish cases based upon whether the policy contains language providing that all damages arising out of exposure to substantially the same general conditions are considered to arise out of one occurrence. Foust 975 S.W. 2d 335. The reasoning is that, "...[Where a policy contains a provision that all injury or damage resulting from the same general conditions shall be considered to be caused by one occurrence, the terms of such provision should be strictly construed. As the court in Lee Way noted, 'These words must be given their plain meaning and not construed in a technical or limited sense.'" citing Transport Ins. Co. v. Lee Way Motor Freight, Inc., 487 F.Supp 1325 (N.D. Tex. 1980).

Koikos next argues that pursuant to Maurice Pincoff's Company v. St. Paul Fire & Marine Insurance Company, 447 F.2d 204 (5th Cir. 1971), that The Spartan Restaurant's admission of each guest on the night of the shooting incident constitutes a separate "occurrence" and therefore since five guests were injured, there were five

separate occurrences. Initial Brief at p. 26. Based upon Appellees' review of the record, it does not appear that this argument was made by Koikos in the trial court. However, even assuming this argument had been made in the trial court, Appellees assert that the Maurice Pincoff's case supports their position.

In Maurice Pincoff's, the Fifth Circuit Court of Appeals held that "We think that the occurrence to which the policy must refer is the occurrence of the events or incidents for which Pincoff's is liable." Id. at 206. Consequently, since it was the act of selling contaminated seed which subjected Pincoff's, the insured, to liability, it was this act that created the exposure to "a condition which resulted in property damage neither expected nor intended from the standpoint of the insured." Since Pincoff's was negligent in receiving and reselling contaminated seed to eight different dealers in different states over a ten-day period, the court held that there were eight occurrences under the policy. In the case at bar, however, there was only one negligent act for which The Spartan Restaurant incurred liability, and that was its act of negligently failing to keep the restaurant premises safe for patrons on the evening of the shooting incident.

Further, the Maurice Pincoff's case could never support Koikos' position because it did not contain the same language as Charter Oak's policy, i.e., the "continuous or repeated exposure to substantially the same general harmful

conditions", and/or the language limiting the carrier's exposure to one occurrence regardless of the number of injury claims made.

As their final response to KOIKOS' arguments, Appellees directs this Court's attention to Home Indemnity Co. v. City of Mobile, 749 F.2d 659 (11th Cir. 1984) [cited by the District Court in the final summary judgment under review (R-2-62-)]. There, the Court had before it the question of whether flood damage that occurred after major rainstorms in 1980 and 1981 constituted a single occurrence. The City of Mobile had been sued for its negligence in the planning, construction, operation and maintenance of its surface water drainage system. Its insurer argued that each separate rainfall and consequent flooding was one occurrence, and since there were three separate rainfalls, there were three separate occurrences. The Court disagreed with this argument and held that under Alabama law, the "occurrence" to which the policy refers is the "events or incidents for which the City is liable." The City of Mobile court further explained that the rainfall and flooding itself were not the "occurrences," since those were acts for which the City was not liable. Rather, it was the negligence of the City in maintaining its water drainage system which created the City's liability, and so each discrete act or omission on the part of the City of Mobile that occurred at a particular location which caused damage was a single occurrence, regardless of whether one or one hundred houses were damaged.

The Home Indemnity reasoning should be applied to affirm the decision under review because Alabama, like Florida, has adopted the "cause" theory of analyzing the meaning of an "occurrence." Alabama also follows the rule in Florida that courts must give to the terms of the policy the meaning intended by the parties to the policy. Home Indemnity, 749 F.2d at 662.

The operative language of CHARTER OAK's policy is easily applied to the shooting incident at issue in this case. Whether the focus is on the negligence of KOIKOS or on the actual shots fired, the people injured at the restaurant on April 26th, 1997 were clearly exposed to substantially the same general harmful conditions on KOIKOS' premises, which said conditions were both continuous and repeated. Further, the $500,000 limit applies regardless of the number of people who brought claims for their injuries.

CONCLUSION

The District Court correctly applied Florida law and determined that the shooting incident that occurred at the Spartan Restaurant constitutes a single occurrence pursuant to the unambiguous terms of CHARTER OAK's policy. Appellees respectfully request that this Court answer the certified question in the same manner.

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 pt. In compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by _____ this day of May, 2001 to all counsel on the attached mailing list.

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