THE SUPREME COURT
STATE OF FLORIDA

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

Appellant,

vs.

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

Appellees.
_____/

CASE NO.: SC01-301

BRIEF OF INTERVENOR BRIAN ARMSTRONG

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
U.S. COURT OF APPEALS CASE NO.: 00-11611

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF JURISDICTION

The Florida Supreme Court’s jurisdiction arises upon certification from the United States of Appeals for the Eleventh Circuit under Rules 9.030(a)(3) and 9.150, Fla. R. App. P.

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?

PRELIMINARY STATEMENT

This case is before this Court on certification from the United States Court of Appeal for the Eleventh Circuit of a question of what constitutes an “occurrence” for the purpose of determining the limits of liability insurance coverage.

The Appellant is George N. Koikos, d/b/a Sparta Restaurant, the insured party and the Defendant in the action for damages. The Appellant will be referred as Appellant of Koikos.

The Appellees are the Travelers Company and Charter Oaks Fire Insurance Company which are the insurers of Koikos in this matter and will be referred as Appellees.

The Intervenors are Brian Armstrong and D’Juan Harris, the plaintiffs in the claims filed in the Circuit Court. The Intervenors will be referred to as Intervenor Armstrong or Intervenor Harris.

The record on appeal will be referenced herein as R followed by the page number.

STATEMENT OF THE CASE

The Intervenor Armstrong adopts the Statement of the Case as set out in the Initial Brief of Appellant Koikos.

STATEMENT OF THE FACTS

The Intervenor Armstrong adopts the Statement of Facts as contained in the Brief of Appellant Koikos. Intervenor Armstrong does emphasize for its limited arguments, the following facts:

In this case, grounded in negligent or inadequate security, Intervenor Armstrong emphasizes that the police crime scene technician recovered six projectiles and six .45 caliber ammunition casings from the scene. (R1-40 Korngay Test.329). Five guests at the party suffered gunshot injuries. (R1-40).

There is no evidence that any single shot injured more than one victim. It is a reasonable inference that each of the victims was injured by a separate shot.

SUMMARY OF ARGUMENT

The intervenor Armstrong agrees with and adopts the arguments advanced by the Appellant Koikos. In addition, the intervenor also argues that each gunshot by the intruder involved herein, represents a separate case of inadequate or negligent security and is a separate occurrence as that term is defined in the Appellee's insurance policy.

The policy issued to Koikos by the Appellees limits its liability to five hundred thousand dollars ($500,000)for each occurrence with an aggregate limit of one million dollars ($1,000,000). ® 2-4). And the policy describes an occurrence for single liability purposes as "continuous or repeated exposure to substantially the same harmful condition."

The leading case in Florida on the issues of single occurrences versus multiple occurrences is American Indemnity Co. v. McQuaig, 435 So. 2d 414 (Fla 5th DCA, 1983), which an involves a series of gunshots. In the McQuaig case, as in this case, each gunshot is deemed the "cause" of the damages and therefore separate occurrences.

Similarly, Koikos owed intervenor Armstrong a duty to provide him with adequate security. Each firing of a gunshot is a breach of duty and a separate occurrence.

ARGUMENT

POINT ON APPEAL

DID THE SEPARATE GUNSHOTS OF AN INTRUDER AT A FRATERNITY PARTY CONSTITUTE SEPARATE OCCURRENCES FOR THE PURPOSE OF DETERMINING THE LIMITS OF LIABILITY INSURANCE.

Intervenor Brian Armstrong asserts that each shot fired by the intruder in this case is equal to a separate occurrence of negligent security by the insured Koikos.

American Indemnity Co. v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA, 1983), held that where the insured, while insane, fired three shots at law enforcement officers, each separate shot constituted a separate "occurrence", even thought the shots occurred in close temporal proximity to one another. The court stated:

"The majority of jurisdictions employ the 'cause theory' to determine whether more than one 'occurrence has taken place for purposes of liability insurance." (Citing a long list of authorities.)

The Court in McQuaig goes on to say:

"American Indemnity did not incur any liability because of Croskey's insanity but rather liability attached when Croskey fired the shots which resulted in injury to the two deputies. While Croskey's insanity may have been a factor, it is clear that the proximate cause of Pope's injuries was the

shotgun blasts which struck him and the proximate cause of McQuaig's injuries was the shotgun blasts which struck him. *Under the cause theory, there was not "one proximate, uninterrupted, and continuous cause which resulted in the injuries and damages" but rather three separate causes.* Thus, the court correctly determined that there were three separate occurrences for which American Indemnity is liable." (Emphasis added.) 435 So. 2d at 415-16 (footnotes omitted).

Admittedly, unlike in McQuaig, the Appellees herein in the policy issued to Appellant Koikos, sought to define "occurrence" for purposes of liability coverage. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. (R 2-4, Ex. F, Form CG00-01 10-93 at 11).

However, nothing in this definition contradicts the findings in McQuaig. As a matter of fact, this definition of "occurrence" as being continuous, repeated, exposure to harmful conditions would be more applicable to a fire or an explosion or asbestos poisoning rather than a series of gunshots. See Lee v. Interstate Fire and Casualty Co., 86 F. 2d 101 (7th Cir. 1996).

Others Florida cases using reasoning similar to that in McQuaig have addressed the question of whether there was

single or multiple “occurrence” for purposes of liability insurance limits. In Consolidated American Insurance Co. v. Henderson, 542 So. 2d 1032 (Fla. 3rd DCA, 1989), the court held that where the insured had sexually molested several children over a period of time, each separate act of sexual abuse constituted a separate occurrence. And in Liberty Mutual Insurance Co. v. Rawls, 404 F. 2d 880 (5th Cir. 1968), the court, applying Florida law, held that multiple “occurrences” were involved in a situation where the insured, while driving at a very high rate of speed, collided with the rear end of a vehicle traveling in the same direction, knocking the other vehicle off the road, and then collided head-on with another vehicle coming in the other direction.

The possibility of multiple occurrences giving rise to liability is at least tacitly recognized by the Appellee’s policy herein. The company policy recognized multiple occurrence by providing an aggregate limit of a million dollars ($1,000,000). The intervenor asks, What are multiple occurrences that would invoke the aggregate amount if not the occurrences in this case? In this case, there are separate causes, separate victims, separate gunshots resulting in separate injuries. Intervenor Armstrong asserts that under these circumstances, the aggregate policy limit is applicable.

CONCLUSION

There were several manifestations of negligent security on the night and at the activity involved in this matter.

The first manifestation was when Bell and Anderson came. Bell paid and Anderson tried to slip in without paying. Tempers flared, argument ensued between Sims and Anderson and they left. But this breach of security was not the proximate cause of Brian Armstrong's injuries.

The second occurrence of negligent security was when Anderson and Bell were allowed to re-enter the premises. Anderson demanded a refund of his money, tempers flared, argument between Anderson and Miller. But this breach of security was not the proximate cause of Brian Armstrong's injuries.

And a third case of negligent security was when Miller knocked Anderson down. But this was not the proximate cause of Brian Armstrong's injuries.

The proximate cause of Brian Armstrong's injuries was the bullet through his head fired by the intruder in a distinct, conscious, and separate act. But for this bullet, he would not have been injured.

And based upon McQuaig, the bullet that caused injury was a separate breach of security and separate occurrence for

insurance liability purposes.

WHEREFORE, it is requested that the court find that each separate gunshot was a separate cause of injury, and that each gunshot constitutes a separate occurrence under the terms of the policy as a matter of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Jane Anderson, Esquire**, 1645 Palm Beach Lakes Boulevard, Suite 800, West Palm Beach, Florida 33401, **Richard A. Barnett, Esquire,** 121 S. 61st Terrace, Suite A, Hollywood, Florida 33023, **Robert Cox, Esquire**, 122-A South Calhoun Street, Tallahassee, Florida 32301, **Benjamin Crump, Esquire,** 521 E. Tennessee Street, Suite B, Tallahassee, Florida 32308, **Betsy Gallagher, Esquire,** P.O. Box 2722, Tampa, Florida 33601, **John P. Joy, Esquire**, 1119 Road A, Hampton, Nebraska 68843 and **David Miller, Esquire**, P.O. Drawer 11300, Tallahassee, Florida 32302 this 23rd day of March, 2001.

_Fred H. Flowers, Attorney for Intervenor Brian Armstrong

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is Courier

New 12-point font.

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