

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 01-301

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

Appellant,

v.

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

Appellees.

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

REPLY BRIEF OF APPELLANT GEORGE N. KOIKOS

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ARGUMENT AND CITATIONS OF AUTHORITY

I. The Policy Language Supports Coverage for Two Occurrences

(Reply to Appellees' Subpoint A)

The policy defines “occurrence” as an “accident.” From the standpoint of the insured restaurant owner, each of the intruder’s gunshots is a separate “accident” causing bodily injury. Initial Brief, pp. 11-15. Because the policy covers “bodily injury ... caused by an occurrence,” an “occurrence” must mean an accidental or unexpected force or event that causes bodily injury.

The Insurers do not answer this argument. Instead, they ignore the words “accident, including” in paraphrasing the policy definition of “occurrence.” See Answer Brief, p. 9. Under the policy, the term “occurrence” means an “**accident**” (in the sense normally understood), “**including** continuous or repeated exposure to substantially the same general harmful condition.” The latter language broadens “accident” to include slow occurring injury resulting from continuous exposure to a harmful condition put out by the insured, such as pollutants or toxic materials. This language does not apply to the underlying facts of this case, where an intruder’s criminal acts caused injuries for which the insured is liable.

The word “accident” is the only relevant part of the policy definition here. If there is an “accident,” as that term is commonly understood, it is unnecessary to resort to the continuous exposure clause of the policy definition. While an “accident” may include bodily injury directly caused by continuous exposure to a physically injurious condition, in this case, gunshot injuries inflicted by an intruder were the “accidents.” The continuous exposure clause is simply inapplicable and inconsequential to this case. Initial Brief, pp. 28-30. See Metropolitan Life Ins Co. v. Aetna Casualty and Surety Co., 765 A. 2d 891, 900 (Conn. 2001):

The purpose of a continuous exposure clause is to combine claims that occur “when people or property are physically exposed to some injurious phenomenon such as heat, moisture, or radiation at one location.” Champion International Corp. v. Continental Casualty Co., 546 F. 2d 502, 507-08 (2nd Cir. 1976) (Newman, J., dissenting) cert. den. 434 U.S. 819 (1977). “The clause simply broadens ‘occurrence’ beyond the word ‘accident’ to include a situation where damage occurs (continuously or repeatedly) over a period of time rather than instantly, as the word ‘accident’ usually connotes.” Id. The continuous

exposure clause has doubtful application in a situation such as the present case where Metropolitan claims that the occurrence was its alleged failure to warn, rather than claimants' exposure to asbestos (A)n application of the continuous exposure clause to an allegation of negligent failure to warn places considerable strain on the words 'exposure' and 'conditions.' Id. at 508. Such as interpretation is inconsistent with the purpose of the clause.

The Insurers cite no policy language to support their contention that continuous exposure to a harmful condition means negligent inactivity that subjects the insured to liability for unexpected injury caused by another. See Answer Brief, pp. 12, 21. In urging the Court to focus on the reason why the insured may be liable, instead of the number of accidents or unexpected events from the insured's viewpoint, the Insurers are really urging this Court to adopt the "negligent act or omission test" rejected long ago. See Arthur A. Johnson Corp. v. Indemnity Co. of N. Am., 7 N.Y. 2d 222, 164 N.E. 2d 704, 708-09 (1959) (liability policy insures against accidents, not negligence; collapses of different protective walls on the same job site causing flooding injuries are separate accidents; while each collapse resulted from negligent construction hazard for

which the insured was liable, liability became complete only upon happening of accident causing liability to occur). See also Metropolitan Life Ins. Co. v. Aetna Cas. & Surety Co., *supra*, 765 A. 2d at 898, 901-03 and n. 21, and authorities discussed therein (negligent failure to warn was not single event or cause of injuries; courts look to event for which the insured is liable, *i.e.* the immediate event which caused injury, not some point further back in the causal chain, and have repeatedly rejected earlier causes in applying the event test).

In State Farm Fire & Cas. v. CTC Dev. Corp., 720 So.2d 1072, 1075-76 (Fla. 1988), this Court necessarily rejected the negligent act or omission test advanced by the Insurers. The Court required “accident” to be determined from the standpoint of the insured, so that “accident” must be the event or immediate cause of injury causing liability to occur.

This point is critical because so many liability cases in Florida deal with the insured’s alleged responsibility for the “accidents” caused by another person. In such cases, the insured expects that if multiple events or accidents occur, there will be multiple occurrence coverage despite the singular reason for the insured’s liability. If an independent trucking firm has two vehicular crashes, the insured shipper who negligently retained the trucking firm expects coverage for both “accidents” as two

occurrences, not one. If two women are raped by an intruder in an apartment, the insured landlord who failed to provide adequate security or warning also expects coverage for two occurrences. Multiple causative events are multiple “accidents,” which are multiple “occurrences” insured under the policy. The Insurers simply urge a test for multiple occurrences that is unduly restrictive, judicially unaccepted, and not supported by policy language.

II. McQuaig and other Florida cases applying the general meaning of “occurrence” support coverage for two “occurrences.”

(Reply to Appellees’ Subpoint D)

American Indemnity Co. v. McQuaig, 435 So.2d 414 (Fla. 5th DCA 1983), held that an “occurrence” is the “proximate, uninterrupted and continuous cause which resulted in the injuries.” The Court properly distinguished Poly-Urethane Industries and its antecedents as cases involving a “single force.” Id. at 416.

The Insurers try to distinguish McQuaig by pointing out that the case applied the ordinary meaning of the word “occurrence,” whereas the instant policy defines “occurrence.” The issue is whether the policy definition changes the ordinary meaning of the term “occurrence” in the circumstances of this case. As discussed above, “accident” continues to have the same meaning as before, except it can also include

continuous or repeated exposure to a harmful condition. Koikos' inaction is not a physically injurious condition, and the gunshot wounds are not caused by a "continuous exposure" to any such "harmful condition," so the added language does not alter the ordinary meaning of "occurrence" for this case.

The Insurers also contend that McQuaig is distinguishable because there the insured rather than an intruder fired the gunshots. However, in both McQuaig and this case, the proximate and uninterrupted cause of the injuries is the actual gunshots, not some prior remote circumstance, such as the insured's mental state, that failed to prevent the gunshots. In fact, the intruder's separate criminal acts in this case present a much stronger interrupting cause than the insured's own acts in McQuaig.

Other Florida cases follow these principles. Phillips v. Ostrer, 481 So.2d 1241 (Fla. 3d DCA 1985), defined occurrence as the act which causes the damages, not the act which causes liability, citing McQuaig. Id. at 1247. Travelers Ins. Co. v. C.J. Gayfer's & Co., 366 So.2d 1199, 1202 (Fla. 1st DCA 1979), held the term occurrence is "commonly understood" to mean "the event in which negligence manifests itself in bodily injury." Trizec Properties, Inc. v. Biltmore Construction Co., Inc., 767 F.2d 810, 814 (11th Cir. 1985), cited 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 (citing Florida cases).” New Amsterdam Cas. Co. v. Addison, 169 So.2d 877, 886 (Fla. 2d DCA 1964), holds that “The time of the occurrence of an accident is the time when the complaining party is damaged, not the time when the wrongful act was committed.”

The Insurers’ argument that “occurrence” means one thing in the context of how many occurrences and another in the context of when an occurrence takes place has no textual or logical basis, and no support in Florida law. Cf. Champion Int’l Corp. v. Liberty Mut. Ins. Co., 701 F.Supp. 409, 413 (S.D.N.Y. 1988). It is clear from these cases that the word “occurrence” refers to the event that causes the injury, and not the failure to act or other reason that subjects the insured to liability. See also authorities discussed in Metropolitan Life Ins. Co. v. Aetna Cas. and Surety Co., supra, 765 A. 2d at 898, 901-02.

III. General insurance law looks to the “immediate cause” of the injury.

(Reply to Appellees’ Subpoints B, C, E and F)

The “immediate cause” or “uninterrupted cause” or “cause nearest the injury” all express the same insurance law principle. The Insurers argue that their policy does not expressly adopt this principle. Indeed, their policy does not mention “cause” at

all in defining “occurrence,” but rather, leaves this issue to be determined by general insurance law principles. The “immediate cause” or “uninterrupted cause” or “cause nearest the injury” is a nationally established principle of insurance law, see Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 492 (1924); 8A Appleman, Insurance Law and Practice § 4891.25 (“A single uninterrupted cause which results in a number of occurrences ... generally is only one accident or occurrence. And, conversely, if that cause is interrupted or replaced by another cause, the chain of causation is broken and more than one accident or occurrence has taken place ...”). The Court may presume, from the absence of express contrary policy language, that the parties intended this well-established principle to apply.

McQuaig, Gayfers, Phillips, Trizec, and Addison applied this principle in Florida. See also Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Co., supra, 765 A. 2d at 903, holding that Metropolitan’s argument for the court to “ignore the immediate event that caused the claimant’s injuries, and instead, look to an earlier event in the causal chain, has been rejected repeatedly by the courts applying the event test.”

The Insurers’ citations do not adopt any different principle, as they decide coverage for the insured’s sale of a defective or unsafe product as the single direct cause of the injuries, and are expressly limited to situations where there were no

interrupting causes. E.g., Chemstar, Inc. v. Liberty Mutual Ins. Co., 41 F.3d 429, 432 (9th Cir. 1994), held that the insured’s failure to warn purchasers of the defect in the plaster product was a single “occurrence,” because there was **no intervening cause** of the user’s injury:

We agree with the district court that there was no intervening, proximate cause after GLC’s failure to warn.

Accord, Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982):

The general rule is that an occurrence is determined by the cause or causes of the resulting injury.... Using this analysis, the court asks if “[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. (e.s.) (citations omitted).

Other cases cited by the Insurers do not discuss the issue of independent interrupting causes producing multiple events. In Traveler’s Indemnity Co. v. Olive’s Sporting Goods Inc., 764 S.W.2d 596 (Ark. 1989), an insured store owner was sued for negligently selling firearms to one Crossley, who then shot several victims. The

insured apparently argued for an “effect” theory based solely on the number of victims. There was no discussion of Crossley’s individual shots as a separate interrupting cause. The Court, citing a train derailment case and a defective product case, found that the completed sale of a dangerous product was a single “occurrence.” In this case, Koikos did not sell a dangerous product, but rather failed to prevent an intruder from using his own firearm on the premises, which is clearly an independent interrupting cause. Given this distinction, the Court need not determine whether the Arkansas case was correctly reasoned.

In Continental Ins. Co. v. Hancock, 507 S.W.2d 146 (Ky. 1973), the insured nightclub owner was liable when he called for employees under his supervision to assist him in fighting three patrons, who were then injured in the fight. The cause nearest the injury was the owner’s assault or instigation of the injuries. The employees’ authorized actions were not an independent interrupting cause of the injuries, and opinion does not explain its reasoning on the single occurrence issue.

In Southern Int’l Corp. v. Poly-Urethane Industries, Inc., 353 So.2d 646 (Fla. 3d DCA 1977), the insured seller of poly-urethane sealant entered a single contract with the owner of a condominium complex to apply the product to all buildings in the complex. The court held the transaction was a single occurrence, even though the

defective sealant product was applied to several buildings in the same transaction. Again, no interrupting cause issue was presented. This is the classic case where a condition produced by the insured itself is the sole and direct cause of the injuries.

In Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc., 660 So.2d 1136 (Fla. 4th DCA 1995), an employee dishonesty policy defined “occurrence” to mean “all loss caused by, or involving, one or more employees, whether the result of a single act or a series of acts.” An employee’s series of embezzlements from the employer over a four-year period was held to be a single “occurrence” under this policy definition. The case did not concern similar policy language, or independent interrupting causes, or injuries to multiple victims.

In Grissom v. Commercial Union Ins. Co., 610 So.2d 1299 (Fla. 1st DCA 1992), the Court held that the insured’s erection of a drainage control ditch was not an accident, but rather that the accident was the unintended flooding and damage to adjoining property resulting from inadequate drainage facilities. The Court confirmed that an accident is that which happens by chance, and is unexpected, unusual and unforeseen. See id. at 1302, n. 2. There was no discussion of intervening causes or of the number of occurrences, and there was no holding as suggested by the Insurers’ Answer Brief on page 15, n. 5.

Other cases cited by the Insurers dealt with ambiguous policies which the Court construed in favor of the insured, who contended for a single “occurrence” in order to limit its deductible. See Howard, Weil, et al. v. Insurance Co., 557 F.2d 1055, 1060 (5th Cir. 1977); Michaels v. Mutual Marine Office, Inc., 472 F.Supp. 26, 29-30 n. 11 (S.D.N.Y. 1979); Uniroyal, Inc. v. The Home Insurance Co., 707 F.Supp. 1368, 1382 (E.D.N.Y. 1988). See also Grissom v. Commercial Union Ins. Co., *supra*, 610 So.2d at 1304. These cases support that the meaning of “occurrence” as applied to the facts of this case is ambiguous, and must be construed in Koikos’ favor to find multiple occurrences. See Initial Brief, pp. 30-32.

In other cases cited by the Insurers, the policy defines “occurrence” to mean “exposure to conditions” or “exposure to general conditions,” but omit the adjective “harmful.” Cf. Appalachian Ins. Co., *above*, 676 F.2d at 59; Michigan Chem. Corp. v. American Home Assurance Co., 728 F.2d 374, 378 (6th Cir. 1984); Champion Int’l Corp. v. Continental Cas. Co., 546 F.2d 502, 505 (2d Cir. 1976). The difference is significant because “harmful condition” connotes intrinsic physical danger, such as toxins. Koikos’ alleged failure to provide greater security for the premises is not an intrinsically injurious physical condition, nor was the injury produced by continuous

exposure to any such harmful condition. Again, the policy language at minimum is ambiguous in these circumstances, and all doubt must be resolved in Koikos' favor.

The Insurers also cite civil rights cases in which an employer instigates an illegal practice or policy, carried out by individual employees on separate occasions. The illegal practice or policy can only be implemented by individual employees acting in the scope of their duties, and thus constitutes the proximate and uninterrupted cause of the injuries by the insured employer.¹

On the other hand, if an employer is liable merely by virtue of its inaction or failure to prevent harm by another, such as by negligent hiring, retention or supervision of an employee who acts without authority, the courts find separate occurrences for each victim. H.E. Butt Grocery Co. v. National Union Fire Ins. Co., 150 F.3d 526, 530-35 (5th Cir. 1998); Illinois Central R. Co. v. Accident & Cas. Co., 739 N.E.2d 1049, 1057-59 (Ill. 1st DCA 2000) (distinguishing the Insurers' citations). In State Farm Fire & Cas. Co. v. Elizabeth N., 12 Cal. Rptr 2d 327 (Cal. 1st DCA 1992), cited

¹ Florida courts have not followed these cases anyway. Compare Pierce v. Town of Hastings, 509 So.2d 1134 (Fla. 5th DCA 1987), rev. den., 519 So.2d 988 (Fla. 1988) (sovereign immunity waiver law imposing a \$50,000 limit for each "incident or occurrence," although construed in favor of the city, requires that repeated wrongful arrests are separate incidents or occurrences; trial court's finding of a single incident or occurrence was "patently incorrect").

by the Insurers, each child who was injured by a molester constituted a separate occurrence. Id. at 327-28.

Under the collective reasoning of all these cases, where the insured's intrinsically harmful operation or unlawful policy causes injury to multiple victims, there may be just one "occurrence,"² but where the insured is liable for independent intervening acts of another resulting in separate injuries, there are multiple accidents or occurrences as in the present case.

² In the continuous exposure cases cited by the Insurers, the policy also contains a clause stating "all bodily injury or property damage resulting from the same general conditions will be considered to be caused by one occurrence." See e.g. Foust v. Ranger Ins. Co., 975 S.W. 2d 329, 333 (Tex. 4th DCA 1998). There is no such clause in the present policy. The policy here provides only that the number of claims or injuries does not determine the number of occurrences. This provision simply advances the well-recognized rule that the number of causative events, not the number of persons injured, determines the number of occurrences. It does not serve to aggregate separate accident events.

*IV. The two separate gunshots cannot be aggregated
into a single occurrence.*

The Insurers do not present any argument or authority that the intruder's firing of shots within a short time transforms all the shots into a single "occurrence." In this regard, however, Koikos reiterates that each shot was a separate willful and wrongful act, and thus a separate "accident" from his standpoint. Initial Brief pp. 19-20. Shootings are separate accidents or occurrences because they are possibly distinguishable in time and space, and the first shot did not cause the second. See 8A Appleman, Insurance Law and Practice § 4891.25, pp. 17-19. Here each gunshot was physically distinct from the other gunshots in time and space, and was caused by the intruder's conscious decision to shoot again, not by the other gunshots. The Eleventh Circuit found, and it was uncontested, that the intruder fired one shot hitting Armstrong (in the temple) and a different shot hitting Harris (in the back). See Certification Order, 240 F.3d at 1331. Each resulting injury is therefore a separate "occurrence."

Because separate "accidents" occur in a short time, that does not transform or aggregate them into a single occurrence. If there were separate, willful acts, resulting in different injuries, there are multiple occurrences. McQuaig and Liberty Mut. Ins.

Co. v. Rawls, 404 F.2d 880 (5th Cir. 1968), clearly decided this issue. Accord: State Farm Lloyds, Inc. v. Williams, 960 S.W. 2d 781 (Tex. App. Dallas 1997) (shooting of wife and daughter before insured shot herself were multiple occurrences). See also Michigan Chem. Corp. v. American Home Assurance Co., 728 F.2d 374, 380 (6th Cir. 1984), observing that the length of time in which the injuries occur is irrelevant to determine the number of occurrences, and citing other cases on which the Insurers rely. This has long been the law, and McQuaig has been part of Florida insurance law incorporated into policies issued in this State for almost 20 years. If the Insurers had wanted a different result than McQuaig required, they should have written some time limit into the policy definition of “occurrence,” so that all events within a particular time or all related events would constitute one occurrence. They cannot ask the Court to rewrite the policy to impose some invented and arbitrary time limit or condition.³

³ See Initial Brief, p. 32, n. 4. Even in harmful condition cases, the continuous exposure clause relied on by the Insurers is not sufficient to permit aggregation of accidents based on similar conduct. See Metropolitan Life Ins. Co. v. Aetna Cas. and Surety Co., supra, 765 A. 2d at 900: “The policy is silent as to aggregation of claims based solely on similar conduct. Indeed, several courts have rejected the theory that a continuous exposure clause permits aggregation of claims based on similar conduct.”

CONCLUSION

The Court should answer the certified question by ruling that the gunshot injuries to Harris and Armstrong were separate accidents and therefore separate occurrences under the insurance policy in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font used in this brief is Times New Roman 14 point in compliance with Rule 9.210(a)(2), Fla. R. App. P.

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