

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC 01-301

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,

_____ /

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

AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT
GEORGE N. KOIKOS d/b/a Spartan Restaurant

RICHARD A. BARNETT ESQ.
RICHARD A. BARNETT, P.A.
on behalf of the
Academy of Florida Trial Lawyers
121 S. 61st Terr. Suite A
Hollywood, FL 33023
FL. Bar No. 257389

TABLE OF CONTENTS

Table of Contents.....i

Table of Citations.....ii

Argument.....1

Conclusion.....6

Certificate of Service.....7

Certificate of Font.....8

TABLE OF CITATIONS

Cases

American Red Cross v. Travelers Indemnity Co.,
816 F. Supp. 755, (D.D.C. 1993).....5

Home Indemnity Company v. City of Mobile v. City of Mobile,
749 F.2d 659, 662-663 (11th Cir.1984).....4

Pan American World Airways Inc. v. Aetna Casualty&Surety Co.
505 F.2d 989, 1006-1007 (1974).....1

Pincoffs Co., v. St.Paul Fire and Marine Insurance Co.
447 F2d 204 (5th Cir.1971).....4

Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.
263 U.S.487,492 44 S.Ct.175 68 L.Ed.402 (1924).....1

Travelers Insurance Co. v. C. J. Gayfer's & Co.
366 So.2d 1199, 1202 (Fla.1st DCA 1979).....3

Treatises

Ballantine's Law Dictionary,
Third Edition, Lawyers Coop 1969..... 2

ARGUMENT

"The common understanding is that in construing these (commercial) policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction and if it is understood, does not deserve much criticism, since theoretically, at least, the parties can shape their contract as they like."

J. Holmes, Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co., 263 U.S. 487, 492 44 S.Ct. 175 68 L.Ed. 402 (1924)

In considering the causation inquiry in the context of insurance cases, the Second Circuit Court of Appeals in Pan American World Airways Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1006-1007 (1974) stated":

These cases establish a mechanical test of proximate causation for insurance cases, a test that looks only to the "causes nearest to the loss" Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co., supra at 492, 44 S.Ct. 175 This rule is adumbrated by the maxim contra proferentum: if the insurer desires to have more remote causes determine the scope of exclusion he may draft language to effectuate that desire.

The operative portions of this insurance policy which bear on the issue under review, edited for ease of analysis are:

The (insuring company) will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury caused by an (occurrence defined as accident defined as) event that takes place without ones foresight or expectation (1) or an occurrence by chance or not expected (2) to which this insurance applies...

Therefore each "occurrence" means an event which takes place

without ones foresight or expectation or by chance.

The negligence of the insured is not an event which occurs without ones foresight. The insurance policy was purchased to protect the insured from claims arising out of his negligence.

Under "cause analysis" the negligence of the insured cannot be considered the occurrence as defined in the policy because it is an event that takes place without ones foresight or expectation.

(1) the term accident is not defined in the policy

(2) Ballantine's Law Dictionary, Third Edition, Lawyers Coop

The occurrences are the unexpected events that take place without foresight or expectation as a result of the foreseeable negligence of the insured. Therefore; depending on the circumstances, the insurance covers single or multiple occurrences which arise from the insureds' act or acts of negligence.

This notion, that the occurrence is the event by which the negligence manifests itself in bodily injury, was recognized in Travelers Insurance Co. v. C. J. Gayfer's & Co., 366 So.2d 1199, 1202 (Fla.1st DCA 1979). It is the manifestations of the breach of duty that are separate occurrences for purposes of coverage. The majority of courts considering this issue speak to the cause of the damage, the negligence, as opposed to the effect, the injuries. These courts overlook the fact that in every case the negligence makes possible but is separate from the immediate cause of the bodily injury.

The "cause theory" is not a helpful analytical tool

until there is a breakdown between the negligence and the subsequent causes of injuries.

From the standpoint of the policy definition, negligence could not be an unforeseen event. The negligence does not measure the number of occurrences in a particular case. The accidental events are those which result from the negligence and cause

3

bodily injury.

Amicus submits that the proper inquiry is not between the so-called "cause theory" and "effect theory" but rather whether

the negligence, as opposed to the events causing bodily injury resulting from the negligence, constitute an occurrence for the purpose of determine the number of occurrences in a particular case.

In Home Indemnity Company v. City of Mobile v. City of Mobile, 749 F. 2d 659, 662-663 (11th Cir. 1984), a case distinguishable on its facts, the Eleventh Circuit adopted the reasoning of the its predecessor Court, the Fifth Circuit, in the case of Pincoffs Co., v. St. Paul Fire and Marine Insurance Co., 447 F2d 204 (5th Cir. 1971) which determined that as between the negligent act of contaminating seed and the subsequent acts of distributing the seed, the latter were

the causes resulting from the negligence with each sale causing injury.

It was the sale that created the exposure to "a condition which resulted in property damage neither expected nor intended from the standpoint of the insured" ...And for each of the eight sales made by Pincoff there was a new exposure and another occurrence

4

At bar, it was the gunshots that created the exposure to a condition which, from the standpoint of the insured resulted in bodily injury neither expected nor intended, each such gunshot constituting a new exposure and another occurrence.

The identical result was reached in American Red Cross v. Travelers Indemnity Co., 816 F. Supp. 755, 761 n.8 (D.D.C. 1993) in which the insurer argued that the insured's general negligent practice in handling HIV-contaminated blood was the underlying cause of numerous blood claims and therefore constituted one occurrence.

The Court declined to resort to that level of generality in applying the cause test and held that each act of distributing the contaminated blood constituted an "occurrence" since the negligence could not result in injury

until a particular unit of contaminated blood was provided to an entity which would administer a transfusion.

5

CONCLUSION

Regardless of how denominated, the appropriate inquiry to determine the number of occurrences under these policy definitions is to discover the immediate cause of bodily injury that was made possible by the negligence of the insured.

Otherwise, unless there is more than one act of negligence, there will always be one occurrence based on one negligent act. If the insured's negligence resulted in more than one injury, the injured parties should not be limited to the coverage afforded under one occurrence, when, in fact, the insured's negligence caused more than one occurrence.

Finally, if the insurer desired to limit the definition

of occurrence to the negligence of its insured, it could have amended its policy to do so.

For these reasons, this Court should find that there were multiple occurrences for purposes of determining the amount of insurance coverage.

By: _____
RICHARD A. BARNETT ESQ.
RICHARD A. BARNETT, P.A.
on behalf of the
Academy of Florida Trial Lawyers
121 S. 61st Terr. Suite A
Hollywood, FL 33023
FL. Bar No. 257389

6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was faxed/mailed this 19th day of April, 2001 to:

ATTORNEYS FOR APPELLANT: David K. Miller P.A., Broad and Cassel, 215 S. Monroe St., Ste. 400, P.O. Drawer 11300, Tallahassee, FL 32302,

ATTORNEYS FOR APPELLEES: John P. Joy, Esq., Walton, Lantaff, Schroeder & Carson, 1119 Road A., Hampton NE 68843 and Jane Anderson, Esq. Walton, Lantaff, Schroeder & Carson, 1645 Palm Beach Lakes Blvd., Suite 800, West Palm Beach, FL. 33401 and **ATTORNEY FOR INTERVENOR ARMSTRONG;** Fred H. Flowers, Esq., 518 N. Calhoun Street, Tallahassee, FL. 32301; and **ATTORNEY FOR INTERVENOR HARRIS;** Robert S. Cox, Esq., Cox & Burns, P.A. 122 South Calhoun Street, Tallahassee, FL. 32301, **ATTORNEY AMICUS CURIAE FOR FLORIDA DEFENSE LAWYERS**

ASSOCIATION: Betsy E. Gallagher, Esq., Gallagher & Howard, P.A., P.O.
Box 2722, Tampa, FL 33601, ATTO

RICHARD A. BARNETT, P.A.
121 S. 61st Terr. Suite A
Hollywood, Florida 33023
Telephone: (954) 961-8550

By: _____

RICHARD A. BARNETT, ESQUIRE
Fla. Bar No. 257389

7

CERTIFICATE OF FONT

I hereby certify that the foregoing document was typed in
Courier New No. 12.

RICHARD A. BARNETT, P.A.
121 S. 61st Terr. Suite A
Hollywood, Florida 33023
Telephone: (954) 961-8550

By: _____

RICHARD A. BARNETT, ESQUIRE
Fla. Bar No. 257389

