

**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

**INITIAL BRIEF OF APPELLANT GEORGE N. KOIKOS**

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## **STATEMENT OF JURISDICTION**

The Florida Supreme Court's jurisdiction arises upon certification from the United States Court 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?**

## **STATEMENT OF THE CASE**

Appellant Koikos is the owner-proprietor of the Spartan Restaurant in Tallahassee, Florida. He rented the restaurant to members of a college fraternity for a private party. Appellants Brian Armstrong and D’Juan Harris attended the party, and were seriously injured when an intruder fired gunshots into the restaurant. Armstrong and Harris filed separate actions in state court, alleging that Koikos was responsible for their injuries because Koikos failed to provide adequate security. (R1-1, Complaint Ex. B and C).

Appellees, Travelers Insurance Company and Charter Oak Fire Insurance Company (collectively the Insurers) provide general liability coverage under a policy issued to Koikos. (R1-1, Complaint Ex. A). They acknowledged policy coverage for the Armstrong and Harris suits, but limited coverage to \$500,000 pursuant to the policy’s single occurrence limitation.

Appellants contend that the intruder’s separate gunshots, which separately injured Armstrong and Harris and were the immediate cause of their injuries, should be separate “accidents” under the policy, subject only to the policy’s aggregate coverage limit of \$1 million.

The Insurers contend that Koikos’ alleged negligent security was a single harmful condition and therefore a single occurrence under the policy. (R1-1 Complaint Ex. D; R1-20, Charter Oak’s Answer ¶ 16 and Second Defense). In other words, in limiting

coverage to a single occurrence, the Insurers looked to the reason that Koikos allegedly incurred liability for the injuries (i.e., the alleged negligent security) rather the immediate cause of the injuries which resulted in potential liability to Koikos (i.e. the intruder's shootings that Koikos allegedly should have reasonably foreseen and prevented).

Koikos brought this declaratory action in state court to determine coverage under the liability insurance policy. The Insurers removed the case to the United States District Court. (R1-1). The District Court granted Armstrong and Harris permission to intervene in this coverage action on the side of Koikos. (R1-28, 29).

The parties filed cross motions for summary judgment. (Defendants' Motion R1-39; Intervenors' Motions R1-40, R2-41; Plaintiff's Motion R2-42). Pleadings and testimony in the underlying tort claims and related cases were submitted in support of these motions without objection. (R1-40, R2-41).

The District Court entered its order holding that the events constitute a single "occurrence" under the policy and granting summary judgment limiting coverage as requested by the Insurers. (Order, R2-61; Final Judgment, R2-62).

Koikos appealed to the Eleventh Circuit, which certified the issue to this Court.

## **STATEMENT OF THE FACTS**

On the night of April 25, 1997, Koikos rented the restaurant to Alpha Kappa Psi fraternity of Florida A&M University for a graduation party. (R2-61-2).

In the early morning hours of April 26, two intruders tried to enter the party but were turned away with words exchanged. Sometime later, the two intruders returned and renewed the argument. (R2-61-2). One of the guests, Leslie Miller, struck one of the intruders and knocked him down. (R1-40 D. Bell Test. 123; Lowery Test. 146; Miller Test. 158). The other intruder, Charles Bell, pulled out a handgun and began firing. (R2-61-2).

Bell fired shots into the restaurant, paused to assist his companion to his feet, then fired additional shots into the restaurant as both intruders exited the restaurant. A nearby off-duty police officer reported four or five gunshot noises, then another two shots. (R1-40 Batson Test. 65-66, 75). The police crime scene technician later 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 Transcript):

Brian Armstrong was shot in the temple (Id. Skaarhaug Test. 79-81).

D'Juan Harris was shot in the back (Id. Batson Test. 73).

Leslie Miller was shot in the midsection and leg (Id. Miller Test. 162).

Tracy Holton was shot in the leg (Id. Holton Test. 178).

Olutokunbo Akiode was shot in the hand and hip (Id. Akiode Test. 314).

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.

Brian Armstrong sued Koikos alleging that Koikos was responsible for his gunshot injuries inflicted by the assailant because Koikos failed to employ trained security guards who could have prevented the assailant from entering the premises or controlled and removed the assailant. (R1-1 Complaint Ex. B ¶ 9, R2-41 Ex. B ¶ 9).

D'Juan Harris also sued alleging that Koikos was liable for his gunshot injuries inflicted by the assailant, because Koikos provided negligent security and failed to warn patrons of possible dangers. (R1-1 Complaint Ex. C, ¶s 4, 6 and 9; R2-41 Ex. C ¶s 4, 6 and 9).

These complaints clearly allege that the direct or immediate cause of the injuries was the separate gunshots fired by the intruder Charles Bell. The complaints also allege that Koikos was responsible for the resulting injuries because he negligently failed to protect or warn each victim against a foreseeable attack. (R2-41, Armstrong Complaint ¶s 5-10; Harris Complaint ¶s 9-10, 15).

The other three shooting victims, Miller, Holton and Akiode, have not brought any action against Koikos as of this date.

Koikos' general liability policy provided that Travelers would provide Business Owners Coverage through its affiliate, Charter Oak Fire Insurance Company, as set

forth in the Common Policy Declarations. (R2-41, Ex. F., Form IL T3 15 12 94 at 2, Form IL TO 25 04 90 at 1).

The applicable “Coverage Part” provided that:

- a. [The insuring company] will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies....
- b. This insurance applies to “bodily injury” and “property damage” only if:
  - (1) The “bodily injury” ... is caused by an “occurrence” that takes place in the “coverage territory.” (e.s.)

(R2-41, Ex. F, Form CG 00 01 10 93 at 1).

The policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (R2-41, Ex. F., Form CG 00 01 10 93 at 11). (e.s.) The term “accident” is not defined by the policy.

The limits of insurance were set out in the Business Owners Coverage Part Declarations. The Each Occurrence Limit in the Declarations was \$500,000 and the General Aggregate Limit in the Declarations was \$1,000,000. (R2-41, Ex. F., Form MP TO 01 05 95 at 1). The policy provided in Section III, Limits of Insurance, that the Each Occurrence Limit amount is the most that would be paid because of all bodily injury arising out of any one occurrence; and further the limits shown on the

Declarations were the most the insuring company would pay regardless of the number of claims made or persons making claims. (R2-41, Ex. F, Form CG 00 01 10 93 at 6-7).

On August 12, 1998, the Insurers notified Koikos through counsel that they considered all claims to be a single occurrence, and that they would apply the \$500,000 per occurrence limit to all claims. (R1-1, Complaint Ex. D).

The parties filed cross motions for summary judgment to determine Koikos' coverage if the victims prevailed or settled. All parties agreed there were no disputed issues of material fact. Federal District Judge William Stafford granted a final summary judgment in favor of the Insurers. (R2-61). Koikos and the Intervenors Armstrong and Harris appealed to the Eleventh Circuit, which certified the following issue to this Court:

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?

## **STANDARD OF REVIEW**

The certified question involves the interpretation of an insurance contract which is a pure issue of law. No deference is due the summary judgment ruling of the federal district court. In federal courts the interpretation of an insurance contract is a legal issue subject to de novo review. LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511, 1514, (11th Cir. 1997).

Florida courts apply the same standard. Steuart Petroleum Co. v. Certain Underwriters at Lloyds, 696 So. 2d 376, 379 (Fla. 1st DCA 1997), rev. disp., 701 So. 2d 867 (Fla. 1997) (appellate court is on equal footing with the trial court).

## **SUMMARY OF THE ARGUMENT**

There are many situations where an Insured may be liable for injuries caused by another's intentional or criminal acts. Among these situations are negligent hiring, retention, supervision, training, or failure to warn or provide security. This case will establish whether a liability Insurer can limit its policy obligation in such cases by claiming that the harm done by separate acts to separate persons is one accident or occurrence.<sup>1</sup>

Koikos believes that the number of "occurrences" for purposes of the single occurrence limitation in this case is determined by the direct or immediate cause of the injuries for which he is responsible, specifically the intruder's separate gunshots injuring separate victims. While there may be only one on-going negligent failure or inactivity whereby the Insured may become responsible for another's physical act, that does not mean there was only one accident causing the injuries. Just as the accidental shooting of two separate persons by the Insured would be two covered accidents, an intruder's shooting of two separate persons on the Insured's property for which the Insured is liable is likewise two covered accidents.

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<sup>1</sup>The terms occurrence and accident will be used interchangeably in the brief as the policy definition of "occurrence" is an "accident." An accident causing injury may be one that occurs quickly, such as a car wreck, or one that occurs slowly over a period of time, such as continuous or repeated exposure to a chemical.

The number of accidents should not be determined by the singularity of the reason or theory by which the Insured incurs liability, but rather by the direct or immediate cause of the injuries or the accidents for which the Insured is potentially liable. This position is consistent with the standard policy language in this case, Florida case law, and other reasoned authorities.

The policy in this case provides coverage if bodily injury is caused by an accident. Injury caused by a third person for which the Insured is liable is a covered accident. Accordingly, the intruder's shooting of two individuals with two separate gunshots are separate accidents covered by the policy. The intruder commits two crimes when he or she shoots different victims, and there is no reason why these two separate torts should be treated any differently for liability insurance coverage.

American Indemnity Co. v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983), squarely holds that multiple gunshots, injuring multiple victims, constitute multiple occurrences under a liability policy. The Court held each gunshot was a "proximate, uninterrupted and continuous cause which resulted in the injuries." The insurance law maxim *causa proxima non remota spectatur* (the immediate not the remote cause is considered), likewise, is consistent with McQuaig.



The Insurers argue that the policy definition of “occurrence” is narrowed by the language that an “accident” includes continuous exposure to the same harmful conditions. However, this language broadens, rather than limits, coverage to include slow or continuous accidents such as exposure to chemical toxins, as well as more traditional accidents that occur rapidly. This language does not apply to this case dealing with “fast-happening” accidents, and should not be invoked to limit coverage as if only gradual harm were involved. Moreover, the failure to prevent harm caused by an outside force is not the same as a “harmful condition” that itself directly produces harm over time. At the very least, the policy language is ambiguous and must be construed in favor of Koikos by finding multiple “occurrences” in this case.

## **ARGUMENT AND CITATIONS OF AUTHORITY**

THE INJURIES SUSTAINED BY ARMSTRONG AND HARRIS RESULTED FROM THE INTRUDER'S SEPARATE GUNSHOTS WHICH ARE SEPARATE "OCCURRENCES" UNDER THE TERMS OF THE INSURANCE POLICY AND FLORIDA LIABILITY INSURANCE LAW.

- A. The policy terms substantiate that each accident causing injury to a person is a covered occurrence.

The policy states that the insurance applies if "bodily injury ... is caused by an occurrence."

"Bodily injury" is defined to mean injury sustained by a person.

"Occurrence" is defined to mean:

an accident, including continuous or repeated exposure to substantially the same general harmful conditions. (e.s.)

Construing these provisions together, it is apparent that an “occurrence” is determined with reference to an accident causing bodily injury to a person.

In the circumstances of this case involving injury by gunshot, an occurrence is the accident or unexpected happening causing bodily injury to each intervenor, not the inactivity of the insured making him potentially liable for their injuries. The bodily injury to each intervenor was clearly caused by the separate gunshots of the intruder. Coverage exists because Koikos is alleged to be responsible for these accidents (unexpected events from Koikos’ viewpoint).

The policy states that the Each Occurrence Limit shown on the Declarations is the most the insurer will pay “because of all bodily injury... arising out of any one occurrence.” This provision reinforces that a covered accident is that which causes bodily injury to a person. While the Limits of Insurance section limits the indemnity amount regardless of the number of claims made or the number of persons making claims, that does not change the policy coverage for each accident that causes bodily injury. For example, if one accident injured two persons, that would be a single

occurrence. But this provision does not change multiple accidents injuring separate persons into a single occurrence.

If the Court were to adopt the Insurers' position in this case, the effect would be that injuries caused by a third person for which the Insured is responsible would always be subject to the single occurrence limitation. The Insurers would always contend that the Insured was only negligent once in continually failing to do something, despite the fact the separate acts for which the Insured is allegedly responsible caused injury to different persons. This test would unfairly restrict coverage for serious injuries like those in this case.

B. A gunshot is an accident causing injury that is a covered occurrence under the policy.

The policy definition of "occurrence" means an "accident." The word "accident" encompasses "accidental events or injuries or damages neither expected nor intended from the standpoint of the insured," and should be construed liberally in favor of the insured. State Farm Fire & Casualty Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1075-76 (Fla. 1998). When an unexpected injury results from the insured's intentional act, an accident occurs for purposes of liability insurance. Id.

Hence, if the insured shoots or strikes another unintentionally or by mistake, there is an accident causing bodily injury that is a covered occurrence. See, e.g., Harvey v. St. Paul Western Ins. Cos., 166 So. 2d 822 (Fla. 3rd DCA 1964)(shooting while attempting to disarm person in fight); Grange Mutual Casualty Co. v. Thomas, 301 So. 2d 158 (Fla. 2nd DCA 1974)(bystander unintentionally shot during family quarrel); Spengler v. State Farm Fire and Casualty Co., 568 So. 2d 1293 (Fla. 1st DCA 1990), rev. denied, 577 So. 2d 1328 (Fla. 1991)(insured intended to shoot a supposed burglar but actually shot his girlfriend instead). See also American Indemnity Co. v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983)(insured's shooting of police officer while insane).

C. Gunshot injury inflicted by an intruder for which

the insured is liable is a covered accident.

Liability coverage also exists when the insured is unexpectedly liable for physical harm inflicted on another by an employee, independent contractor or stranger who acts intentionally. The Insurers in this case did not deny coverage, but rather claimed that coverage was limited to the single occurrence limit.

When the insured's inactivity, such as lack of supervision, training, or security, makes the insured liable for foreseeable criminal or intentional acts of a third party, there is still an accident causing harm. There is a covered occurrence for which the insured is alleged to be liable.

In Sunshine Birds & Supplies, Inc. v. U.S. Fidelity & Guaranty Co., 696 So. 2d 907, 911 (Fla. 3rd DCA 1997), the Court found occurrence liability coverage when the insured did not have actual knowledge of its employee's proclivity to abuse children on the business premises, but with the exercise of care could have learned of the same and taken remedial steps to prevent victimization of two minor children.<sup>2</sup> The Court observed in footnote 7 that such allegations state classic negligence against insureds in Florida, citing numerous authorities where a limited duty is imposed to prevent foreseeable intentional or criminal acts of third parties.

Likewise, Nationwide Mut. Fire Ins. Co. v. Pipher, 140 F.3d 222 (3rd Cir. 1997), found that the alleged negligence of an apartment owner in not securing the premises and in hiring the assailant who murdered a tenant was a covered accident. The Court cited numerous authorities where bodily injury caused by an intentional act

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<sup>2</sup>The Court in Sunshine Birds found the insurer had a duty to defend the separate suits brought by each minor, but did not reach the occurrence limitation issue here because no such issue was raised by the insurer. See H. E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh, P.A., 150 F.3d 526 (5th Cir. 1998)(holding that the sexual assault against each separate minor was a separate occurrence).

of a third party was an accident and therefore a covered occurrence. Specifically, the Court stated:

“(I)t is well established that the test of whether the injury or damage is caused by an accident must be determined *from the perspective of the insured* and not from the viewpoint of the person who committed the injurious act. From (the Insured owner’s) standpoint, (the victim’s) assault and death was unexpected, entirely fortuitous, and therefore, an accident.\*\*\*

The rule seems to be well-settled in other jurisdictions that \*\*\* (a)lthough a third party may have intentionally injured or killed the plaintiff, the death or injury may still be an accident under the terms of the policy. (citations omitted).(emphasis in original).

Id. at 225-26.

It is precisely this circumstance that gives rise to the issue posed here. Because there is liability coverage for injuries intentionally inflicted by third persons, this Court must now decide whether multiple occurrences are determined in the same manner as if the insured acted physically to cause the injuries. Koikos submits that the number of accidents remains the same from the insured's perspective in either case. Regardless of whether the insured accidentally shoots two people thinking they are intruders, or whether the insured is responsible for two shootings by an intruder because of inadequate security, the policy provides coverage for each accident. The coverage is the same in either case.

D. Each gunshot causing injury to a separate person is a covered accident.

Two or more gunshots injuring two different persons are multiple accidents for purposes of liability insurance. To determine whether acts that give rise to multiple

injuries constitute one “occurrence” or multiple “occurrences,” Florida appellate courts have looked to the “cause” of the injuries. In the most analogous case, American Indemnity Co. v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983), the Court applied this “cause theory” to find that multiple gunshots constitute multiple occurrences.

In McQuaig, the insured suffered a mental breakdown to the point of insanity. Two police officers, Pope and McQuaig, tried to get him to surrender, but he resisted by firing three shotgun blasts within a short time. The first shot injured Pope; the second shot injured both Pope and McQuaig; and the third shot injured McQuaig. The insurer contended that the insured’s insanity, i.e., the condition that made the insurer responsible, was a single “occurrence” that caused all of the officers’ injuries. The two officers contended that each blast was a separate “occurrence” causing injury.

While the insured’s insanity caused liability as it caused him to fire the shotgun blasts, the blasts directly caused the officers’ injuries. The Court had to choose whether to focus its “cause” analysis on the remote and indirect cause (the insured’s insanity), or on the direct and immediate cause (the insured’s separate acts of firing multiple shotgun blasts).

The Court based its ruling on the ordinary meaning of the term “occurrence” as “one proximate, uninterrupted and continuing cause which resulted in all of the injuries

and damages.” Id. at 415. The Court specifically held this ruling was consistent with cases relied on by the insurer such as Southern International Corp. v. Poly-Urethane Industries, Inc., 353 So. 2d 646 (Fla. 3rd DCA 1977), in which other courts had ruled that multiple injuries were directly caused by a single act, omission or condition. The Court stated:

.... **In each of these cases, however there was a single force, that once set in motion caused multiple injuries.**

Analogous to this would be if a single shot had injured both McQuaig and Pope. This was not the case. A shot was fired and Pope was injured. There was a time interval of approximately two minutes before another shot was fired which inflicted most of McQuaig’s injuries.

Id. Because the direct and proximate cause in McQuaig was the individual shots, the Court distinguished the cases on which the insurer relied and dismissed the insurer’s argument based on the insanity condition. The Court held:

American Indemnity’s argument that Croskey’s [the insured’s] insanity was the single cause of all the injuries is

likewise without merit. While it is true that but for his insanity, Croskey's act would have been intentional and hence excluded under the terms of the policy, it does not follow that his insanity was the proximate cause of McQuaig's injuries. **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. **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.**<sup>3</sup>

<sup>3</sup>Had Croskey shot Pope, then left, and hours or days later shot McQuaig, there would be little argument that this was more than one occurrence. The only difference is that here, the time interval was relatively short. (e.s).

McQuaig, 435 So. 2d at 415-16.

In this case, under the reasoning of McQuaig, each time the intruder pulled the trigger and shot a different victim there was a separate “occurrence.” A diagram helps in comparing McQuaig with the present case:

**McQuaig**

Remote Cause

Direct Cause

Insured’s insanity → Insured’s Separate shots → Separate injuries

**Koikos**

Remote Cause

Direct Cause

Insured’s alleged negligent security → Intruder’s separate gunshots → Separate injuries

It makes no difference that here an intruder rather than the insured fired the gunshots that caused the injuries. The single “proximate, uninterrupted cause” of the injuries remains the gunshots. Indeed, this action presents a much stronger case for multiple occurrences than McQuaig did, because the intruder, a more independent intervening cause, interrupted, interacted with patrons, and fired the shots which were the direct causes of the injuries.

There is no material distinction between the insured’s gunshots and an intruder’s gunshots as the proximate uninterrupted causes of injuries. There is no reason why, if the insured restaurant owner had gone berserk and injured two patrons with separate shots, there would be multiple occurrences; but if an intruder did the same thing, it constitutes only a single occurrence.

The Insurers may contend that the various gunshots were fired within a short time and this fact makes them a single “occurrence.” McQuaig expressly rejected this argument. 435 So.2d at 415. Each gunshot was a separate willful act and caused a separate injury, and thus a separate “occurrence.” See also Liberty Mut. Ins. Co. v. Rawls, 404 F.2d 880 (5th Cir. Fla. 1968) (insured motorist’s first and second collisions, only seconds apart, were two separate “occurrences” since the motorist had regained control and could have avoided the second collision). Here, the intruder maintained control of the handgun and each shot was voluntary and could have been

avoided. The courts should not invent some time interval to distinguish single and multiple occurrences. For example, would a ten second interval be enough for separate accidents? A minute? Ten minutes? An hour? If the insurer wants to provide for such restrictive time interval limitations, it must write them into its policy. See State Farm Fire and Casualty Co. v. CTC Dev. Corp., 720 So. 2d at 1072, 1075 (Fla. 1998).

Moreover, the intentional shooting of each victim is a separately punishable offense, as discussed in Vera v. Beto, 422 F.2d 1052, 1054 (5th Cir. 1970)(citations omitted):

He intended to shoot Humberto and did so. He intended to shoot Benny and did so. These were intentionally separate and distinct assaults upon two human beings. They constitute separate offenses. A similar or even a common motive could not blend them into one... If a single shot struck two people a different result might obtain... Any other rule would allow an assailant, once he shot down his first victim, to keep on shooting with impunity at anything that moved.

See also State v. Brandt, 460 So. 2d 444, 446 (Fla. 5th DCA 1984)(finding two separate crimes where batteries on two victims occurred at the same location in the same time period), rev. denied, 467 So. 2d 999 (Fla. 1985).

When the Insured is alleged liable for separate criminal acts of a third party, there are separate occurrences (unexpected events or accidents) from the Insured's perspective. The single occurrence limitation would not apply.

Under the Insurers' approach, the insured's inadequate security would be the single cause of injury and hence a single "occurrence." This completely overlooks that the injuries were caused by the shootings. If the covered accident is just a lack of action as the Insurers contend, then it has no temporal boundaries. Thus, even different intruders shooting different victims on different days could all be one "occurrence." This absurdity is the logical extension of the Insurers' approach.

E. Other Florida cases are consistent with McQuaig.

The Eleventh Circuit's certification order stated that McQuaig might be inconsistent with other Florida appellate decisions, citing Southern International Corp. v. Poly-Urethane Industries, Inc., 353 So. 2d 647 (Fla. 3rd DCA 1977). That case involved the insured's improper application of roof sealant at a condominium complex causing direct damage to various tenants' property. McQuaig observed that in Poly-

Urethane Industries the defective sealant was “a single force, that once set in motion caused various injuries.” McQuaig, 435 So. 2d at 415. In other words, the Insured installed a defective product which itself caused harm over time. There was no other cause producing the harm for which the insured was liable. Here, each intervening gunshot was the “single force that once set in motion caused various injuries” for which Koikos was allegedly liable.

Moreover, in Phillips v. Ostrer, 481 So. 2d 1241, 1247 (Fla. 3rd DCA 1985), rev. denied, 492 So. 2d 1334 (Fla. 1986), the same Court that decided Poly-Urethane Industries expressly followed McQuaig, saying:

Florida applies the "cause theory" to determine which acts are occurrences triggering an insurance company's liability. American Indemnity Co. v. McQuaig, 435 So.2d 414 (Fla. 5th DCA 1983). **The act which causes the damage constitutes the occurrence. McQuaig.**

Accordingly, Florida courts recognize that the “act which causes the damage” is the covered accident. The Insured’s negligent inactivity, which may make Insured responsible for the accident, is not the accident or “act which causes the damage.”

Further, in Travelers Insurance Co. v. C. J. Gayfer's & Co., 366 So. 2d 1199, 1202 (Fla. 1st DCA 1979), the Court held a policy definition of “occurrence” does not change the common meaning of “occurrence,” which is “the event in which negligence manifests itself in property damage or bodily injury.” The issue in Gayfer's was not *how many* occurrences but *when* an occurrence takes place (i.e. whether it took place within the policy period). However, the meaning of occurrence does not vary depending on the issue presented in a case, but must have one consistent meaning for all issues under the policy.

Applying the Gayfer's reasoning here, the Insured's negligent inactivity (failure to prevent a third person from causing injuries) is different from the “event in which negligence manifests itself in injury” (the gunshots), which establishes “occurrence” for all purposes under the policy.

McQuaig is the most analogous decision, and other Florida District Courts of Appeal and the former Fifth Circuit in Rawls, similarly define “occurrence” as an accident or event that directly and proximately causes injury, consistent with McQuaig.

F. The immediate cause of an injury determines

whether there are multiple occurrences when the

Insured is responsible for another's intentional  
or criminal acts.

Under general principles of insurance law, courts look to the immediate physical cause rather than more remote causes. In Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1006-07 (2d Cir. 1974), the Court stated:

Remote causes of losses are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. ...Thus, in Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co., 263 U.S. 487, 492, 44 S. Ct. 175, 68 L. Ed. 402 (1924), Mr. Justice Holmes wrote:

“The common understanding is that in construing these 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.” (e.s.)

Id. at 1006. The Pan American Court continued:

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. Id., Feeney & Meyers v. Empire State Insurance Co., 228 F.2d 770, 771 (10th Cir. 1955).

505 F.2d at 1007. Accord, Bender Shipbuilding & Repair Co. v. Brasileiro, 874 F.2d 1551, 1559 (11th Cir. 1989) (citing the *causa proxima* maxim).

By recent comprehensive opinion, the Fifth Circuit Court of Appeals, applying Texas law, determined that the immediate cause of the injury determined multiple occurrences when the insured was alleged to be liable for the physical acts of a third party under theories of negligent security, supervision, hiring and retention. In H. E. Butt Grocery Co. v. National Union Fire Ins. Co., 150 F.3d 526, reh en banc den., 159 F.3d 1358 (5th Cir. 1998), the grocery was sued when its employee molested children at the store on different days. The insurer claimed multiple occurrences in order to benefit from the grocery's \$1 million "per occurrence" self-insured retention limit. The Court concluded that it should look to the immediate cause of each child's injuries, i.e., the separate sexual acts of abuse, and not to the indirect cause, the store's employment practice. Each sexual assault incident was a separate "occurrence" under the policy. The Court noted that "negligent supervision alone, whether on-going or not, would not trigger any obligation on the part of the insurers." 150 F.3d at 530-35.

This decision cites numerous cases from other jurisdictions that reach the same conclusion that an employee's molestation of different children constitute separate occurrences within the meaning of the employer's liability policy. Id. at 532-34. Judge

Benavides, in a separate concurring opinion, recognized that courts apply different “cause theories” in determining the number of “occurrences.” He distinguished between the “immediate cause” test adopted by the panel majority, which focuses on the immediate or direct cause of the injury, and the “liability-triggering event” test, which focuses on what event gives rise to the insured’s liability. Id. at 535. However, Judge Benavides concurred that the Court reached the right result even under this latter test because the employee’s molestation of each child were the separate events that gave rise to liability. Id. at 536.

Using Judge Benavides’ terminology, McQuaig adopts the “immediate cause” test for Florida (*causa proxima* rule). However, as Judge Benavides notes, it may be simpler to visualize the intruder’s shootings as liability triggering events (accidents), producing the same result in this case. Such approach is comparable to the “event by which the negligence manifests itself” test suggested in Gayfers, 366 So. 2d at 1202. Thus, the intruder’s gunshots were the events by which Koikos’ negligent security would have manifested itself in injuries to the intervenors. Injuries caused to different persons by separate gunshots are multiple occurrences under all of these approaches.

G. The cases cited by the federal trial judge

do not support the Insurers' position.

The federal district court relied on Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204 (5th Cir. 1971) (applying Texas law), and Home Indemnity Co. v. Mobile, 749 F.2d 659 (11th Cir. 1984) (applying Alabama law), but these decisions do not support a ruling for the Insurers here.

Maurice Pincoffs involved multiple claims for sales of contaminated birdseed. The insured had imported the birdseed from the manufacturer in Argentina, and sold it to dealers who resold it to customers. The diagram of causation was as follows:

Manufacturer's → Insured's purchase → Dealers' purchases → Consumption  
contamination and sales and resales and death of  
birds

The Court held that the claims against the insured were based on its sales of a defective product to dealers, and thus each dealer sale resulted in separate "occurrences" under the liability policy. This is not inconsistent with Koikos' position. Applying the same reasoning here, each guest's admission to the insecure premises would be comparable to a sale of a defective product to that patron, and hence a separate "occurrence."

However, even if Maurice Pincoffs could be read to support the Insurers' position, Texas courts have now construed the McQuaig rule, as shown by more recent rulings. See H. E. Butt Grocery, 150 F.3d at 530-31. In particular, see State Farm Lloyds v. Williams, 960 S.W.2d 781, 784-85 and n.5 (Tex. Ct. App. 1997)(a multiple gunshot case, holding that each gunshot is a separate "occurrence," and citing both Maurice Pincoffs and McQuaig for support).

Home Indemnity involved multiple claims for private property flood damage that resulted from city drainage system overflow following three rainfall incidents. The Eleventh Circuit quoted the controlling Alabama decision, United States Fire Insurance Co. v. Safeco Insurance Co., 444 So.2d 844 (Ala. 1983), as follows:

The court first set out the applicable standard - "[a]s long as the injuries stem from one proximate cause there is a single occurrence." 444 So.2d at 846. Thus, a single occurrence may result in multiple injuries to multiple parties over a period of time; but if one cause is interrupted and replaced by another intervening cause, the chain of causation is broken and more than one occurrence has taken place. Id. at 846-47. Based on the facts of the case, the court then determined that two separate occurrences had taken place, because the additional damage was caused by a "separate, intervening cause" (the negligence of the roofing crew) rather than the prior condition of the roof. Id. at 847.

Home Indemnity, 749 F.2d at 662.

The insurer argued that each rainfall incident was a separate "occurrence" within the meaning of its policy, and admitted coverage for three "occurrences." The City

and the flood victims argued that each flood victim's property damage was a separate "occurrence." Id. at 661. Either argument supports Koikos' position in this case.

However, the Eleventh Circuit, in an unusual ruling, rejected both parties' positions, and held that the City's defective drainage system was the single proximate cause of all the flooding injuries. The Court deemed the separate rainfall events to be "Acts of God" and not separate intervening causes that broke the chain of causation. Id. 663. In other words, the City itself was the only tortfeasor, not vicariously or derivatively liable for failure to prevent another active tortfeasor's intentional harm.

Once this unusual circumstance is understood, Home Indemnity is distinguished, and the underlying Alabama rule announced by the State's Supreme Court supports Koikos' position. Koikos' alleged negligent security was interrupted and replaced by the intruder's gunshots as the proximate cause, and consequently more than one occurrence took place.

H. Other policy language broadening accident coverage to include injury caused by gradual exposure to harmful conditions is inapplicable to this case.

Coverage exists in this case because there were fast-happening accidents, i.e. third party gunshots causing injuries for which the Insured may be liable. Coverage does not exist because the Insured commission of a slow tort, i.e. exposing the injured party to a harmful condition over time.

While an accident under the policy can include “continuous or repeated exposure to substantially the same general harmful conditions,” such accident contemplates situations in which the insured itself releases a harmful product or force. A “harmful condition” means the condition that causes the harm or injury. This is not the same as the insured’s status or inactivity that renders the insured responsible for compensating an injury caused by another person’s intentional or criminal acts.<sup>3</sup> See H. E. Butt Grocery, 150 F.3d 526 (finding multiple occurrences where the Insured was responsible for sexual abuse of various persons because of negligent security and supervision, even where the “exposure to conditions” policy language, quoted at p. 529, was more definitive than here).

The history of this policy language substantiates that it was intended to broaden coverage in favor of insureds, not to limit coverage as the insurers attempt to do here. As explained in Broadwell Realty Service, Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 84 (N. J. Super. Ct. 1987), cited with approval in Dimmitt Chevrolet v. Southeastern Fidelity, 636 So.2d 700, 703 (Fla. 1993)(citations omitted):

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<sup>3</sup> A restaurant owner’s inaction is not a “harmful” condition, i.e., is not “full of harm,” but rather, is a passive omission that does not cause any injury unless the intruder intervenes. The failure to prevent harm from intervening is different from a harmful condition whereby the insured causes harm.

In the 1966 revision, the insurance industry switched universally to “occurrence-based coverage...” This change was “in response to consumer demands for broader liability protection and in acquiescence to the judicial trend toward a more expansive reading of the term accident...” This definition was designed to “make it clear that occurrence embraces not only the usual accident, but also exposure to conditions which may continue for an unmeasured period of time...” (e.s.)

Thus this language broadened the coverage in favor of the insured, and did not eliminate the coverage that extends from use of the term “accident” alone.

Since the present case involved the traditional, fast-happening “accident,” policy coverage was not dependent on the added language for “repeated exposure to harmful conditions.” This language is unrelated to coverage in this case, and cannot serve to limit coverage. The Insurers cannot extend coverage to fast-happening accidents in this case, and then invoke the single occurrence limit as if coverage were based on a gradual tort.

I. Ambiguity as to the applicability of the definition of “occurrence” must be resolved in favor of greater coverage.

Any ambiguity is resolved in the insured’s favor. E.g., see CTC Dev. Corp., 720 So.2d at 1075-76 (finding ambiguity in the term “accident,” which is used to define “occurrence” in the instant policy); see also 30A Fla. Jur. 2d Insurance § 1692. If “occurrence” coverage in this case can mean accident or unexpected happening or event that causes bodily injury, so that each separate shooting causing bodily injury to different persons is a separate “occurrence,” then the Court should adopt that construction. “(W)here policy language is subject to differing

interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer.” CTC Dev. Corp., 720 So.2d at 1076.

Decisions around the country vary in their interpretation of the policy definition of “occurrence.” Judge Benavides in H. E. Butt Grocery noted that the term “occurrence” has been held ambiguous and difficult to apply:

I would conclude that the panel in the *Catholic Church* case [26 F.3d 1359] did in fact believe that the definition of occurrence was subject to more than one interpretation. The court noted that the meaning of the phrases “a continuous or repeated exposure to conditions” and “substantially the same general conditions” is “malleable” and that the meaning of “occurrence” can be perplexing in application.

150 F.3d at 1364; see also S. F. v. West American Ins. Co., 463 S.E.2d 450, 451-52 (Va. 1995) (holding that the term “occurrence” is ambiguous and susceptible to numerous interpretations, and that each incident of molestation by the insured’s employee is a separate “occurrence” even if all are traceable to one negligent hiring action).

The lack of uniformity as to the application of the policy language in these circumstances suggests that it is ambiguous, see Security Ins. Co. v. Investor Diversified, Ltd., 407 So. 2d 314, 316 (Fla. 4th DCA 1981); Annot., 4 A.L.R. 4th

1253 (1981), and is another reason to construe the policy in favor of providing greater coverage for the Insured.<sup>4</sup>

### 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.

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<sup>4</sup> If the Insurers had wanted to exclude or limit the occurrence-based coverage where the insured restaurant owner is liable to a patron for assault or battery by another patron or intruder, then the Insurer could have explicitly modified the definition of “occurrence” to do so. See and compare Council v. Paradigm Ins. Co., 2001 U.S. Dist. Lexis 2842 (M.D. Fla. Mar. 7, 2001), in which the court gave effect to a modified definition of “occurrence” excluding coverage for assault or battery of any person. Lacking such an explicit exclusion or limitation, the instant policy must fully cover each battery as an occurrence. The Insurers cannot reduce their coverage exposure in half by misapplying the policy definition of occurrence as if it explicitly limited coverage with respect to assault or battery.

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**CERTIFICATE OF SERVICE**

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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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