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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

AUSTIN MUTUAL INSURANCE COMPANY, a foreign insurer, Plaintiff/Appellant, v. EDUARDO SOTO ALDECOA, JR. and EVA LETICIA DENOGEAN, husband and wife, and as personal representatives of the Estates of PAULINA and SEBASTIAN ALDECOA, Defendants/Appellees.	2 CA-CV 2011-0040 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20103701

Honorable Kenneth Lee, Judge

AFFIRMED

Kunz Plitt Hyland & Demlong, P.C.
By Steven Plitt, Joshua D. Rogers,
and Steven J. Gross

Phoenix
Attorneys for Plaintiff/Appellant

Van Amburg Law Firm, P.L.L.C.
By Noah J. Van Amburg

Tucson
Attorneys for Defendant/Appellee
Eduardo Aldecoa, Jr.

The Arrotta Law Firm Tucson
By Richard Arrotta

and

Law Offices of John L. Tully Tucson
By John L. Tully Attorneys for Defendant/Appellee
Eva Denogean

B R A M M E R, Judge.

¶1 Appellant Austin Mutual Insurance Company (Austin) appeals from the trial court's grant of summary judgment in favor of appellees Eduardo Aldecoa, Jr. and Eva Denogean, parents of two children who drowned in their grandparents' swimming pool. Austin argues the court erred in determining acts of the grandparents that had led to the deaths of the two children constituted two occurrences under the policy issued to the grandparents by Austin. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered. *See Ariz. Prop. & Cas. Ins. Fund v. Helme*, 153 Ariz. 129, 131, 735 P.2d 451, 453 (1987). In July 2009, two children drowned in their grandparents' swimming pool. On the day before the drowning, the children's grandmother left the gate to the pool unlatched and unlocked. On the day of the drowning, the grandmother was feeling ill and went to rest, leaving the children in their grandfather's care. The grandfather left the children in a room where Aldecoa was

sleeping and then went to his bedroom to watch television where he eventually fell asleep, leaving the bedroom's exterior sliding glass door open and the screen unlocked. The children then left the house through the bedroom door the grandfather had left open, entered the pool area through the unlocked gate, and drowned.

¶3 Aldecoa and Denogean brought an action for the children's wrongful death against the grandparents who, at the time of the accident, were named insureds under a homeowner's insurance policy issued by Austin that provided personal liability coverage up to $500,000 for each "occurrence." Austin retained counsel for the grandparents and agreed to pay the policy limit to settle the claim. However, Austin took the position that the policy limit was $500,000 because there was only one "occurrence" under the policy. The parents demanded a settlement of one million dollars, arguing there were two occurrences covered by the policy. The parents and Austin reached a settlement agreement whereby Austin paid the parents $500,000 and agreed to resolve the coverage dispute in a declaratory judgment action. The parties agreed that if the trial court determined there were two occurrences under the policy, Austin would pay an additional $500,000.

¶4 Austin filed a complaint for declaratory judgment against Aldecoa and Denogean asking the trial court to declare there was only one covered occurrence under the policy. All parties filed motions for summary judgment. After a hearing, the court granted summary judgment in favor of Aldecoa and Denogean, declaring the

grandmother's act of leaving the gate unlatched and the grandfather's act of failing to watch the children constituted two occurrences under the policy. This appeal followed.

Discussion

¶5 Austin argues the trial court erred in determining there were two occurrences under the policy. We review the interpretation of an insurance contract de novo. *Employers Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, ¶ 9, 183 P.3d 513, 515 (2008). In interpreting an insurance policy, we apply common sense and will find a policy ambiguous only if we are unable to determine how the policy applies to the specific facts of the case. *Id.*

¶6 Austin contracted to indemnify the grandparents, up to the policy limit of $500,000 per occurrence, for the amount an insured was liable by law because of "bodily injury" or "property damage" caused by an "occurrence" under the policy. The policy defines "occurrence" as "an accident, including repeated exposures to similar conditions, that results in 'bodily injury' or 'property damage' during the policy period."

¶7 In determining the meaning of "occurrence" under a policy such as Austin's, our inquiry centers on whether there was "'but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages.'" *Helme*, 153 Ariz. at 134, 735 P.2d at 456, *quoting Am. Indem. Co. v. McQuaig*, 435 So.2d 414, 415 (Fla. Dist. Ct. App. 1983). "[T]he number of causative acts is the key to interpreting 'per occurrence' clauses," and "the number of causative acts . . . determines the number of 'occurrences.'" *Id.* at 135, 735 P.2d at 457. Looking first to the Austin policy's

language, we find the definition of "occurrence" employs the causal test described in *Helme*.[1] *See id.* at 134, 735 P.2d at 456 (policy definition of "occurrence" as acts "resulting in injury" employed causal test).

¶8 "A 'proximate cause' is defined as 'that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred.'" *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 13, 231 P.3d 946, 950 (App. 2010), *quoting Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). Austin argues that, because neither one of the grandparents' acts was "independently . . . capable" of causing injury, the acts cannot "serve as an uninterrupted continuing cause" and thus there is only one occurrence. It interprets "occurrence" to include a "series of events that work together to cause harm" and to exclude actions that would not "in isolation" cause injury.[2] However, Arizona case law does not permit this interpretation of "one proximate, uninterrupted, and continuing cause." *See Helme*, 153 Ariz. at 134,

[1]Austin has conceded this causal test applies and that the number of occurrences is determined by the "number of causative acts."

[2]Austin asks us to define accident as the event causing damage rather than an earlier event creating the potential for damage, relying on *Century Mutual Insurance Co. v. Southern Arizona Aviation, Inc.*, 8 Ariz. App. 384, 446 P.2d 490 (1968), and *Outdoor World v. Continental Casualty Co.*, 122 Ariz. 292, 594 P.2d 546 (App. 1979). Those cases, however, define accident in the context of policy language limiting coverage to accidents during the policy period and thus do not inform the definition of occurrence apart from issues of timing; for that we rely on *Helme*. *See Century Mut.*, 8 Ariz. App. at 384, 386, 446 P.2d at 490, 492; *Outdoor World*, 122 Ariz. at 293, 295, 594 P.2d at 547, 549.

735 P.2d at 456. Multiple acts that cause a single injury constitute multiple occurrences. *Id.* at 135, 735 P.2d at 457. A cause need not be capable of independently causing harm; an accident may have more than one proximate cause "if each was an efficient cause without which the resulting injuries would not have occurred." *Brand v. J.H. Rose Trucking Co.*, 102 Ariz. 201, 205, 427 P.2d 519, 523 (1967); *see also Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983) ("[M]ore than one person may be liable for causing an injury and . . . a particular defendant may not avoid liability for his causative act by claiming that the conduct of some other person was also a contributing cause.").

¶9 Practical applications and policy reasons also support the conclusion that the concept of proximate cause, and thus "occurrence" under the policy language, is not limited only to causes independently responsible for causing an injury. *See Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 168, 709 P.2d 517, 525 (1985) ("Given the complexity of life, there is little that can be attributed to any single act, and the law does not relieve a defendant from liability simply because of the intervening act of a third person."). If an actor not covered by the policy is partly at fault, including a contributorily negligent victim, Austin's interpretation of "proximate cause" would preclude recovery for the victim if the insured was partly at fault but not the last "cause" in the chain of causation. And Austin does not avoid this practical implication by providing any reason to use a special definition of proximate cause in cases where an injury is caused by the cumulative acts of insureds covered by the same policy.

¶10 In this case, the actions of each grandparent—leaving the pool gate unlocked and failing to supervise the children properly—constituted two causative acts and, therefore, two "occurrences" under the policy. *See Helme*, 153 Ariz. at 135, 735 P.2d at 457. As conceded by Austin, each act was necessary to produce an injury that otherwise would not have occurred. *See Salica*, 224 Ariz. 414, ¶ 13, 231 P.3d at 950. The actions were taken by separate actors on separate days, each presumably acting without actual knowledge of the other's act. We cannot conclude that these separate acts constituted one uninterrupted "natural and continuous sequence." *Id.*

¶11 Nor was the grandmother's action of leaving the gate unlocked superseded by the grandfather's failure to supervise the children the following day. An intervening cause breaks the chain of proximate causation only if it is a superseding cause. *Petolicchio v. Santa Cruz Cnty. Fair and Rodeo Ass'n*, 177 Ariz. 256, 263, 866 P.2d 1342, 1349 (1994). A superseding cause is one that is not reasonably foreseeable and "when, looking backward, after the event, the intervening act appears extraordinary." *Ontiveros*, 136 Ariz. at 506, 667 P.2d at 206. An intervening cause cannot be considered a superseding cause when the defendant's conduct "increases the foreseeable risk of a particular harm occurring through the conduct of a second actor." *Id.* Proximate cause focuses on the foreseeability of the injury, not the defendant's degree of culpability. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047 (act or omission need not be large or abundant cause of injury).

¶12 One foreseeable risk of not locking the gate was that it granted unsecured access to the water, and the fact that the children entered the pool area was not, in hindsight, so extraordinary that it could not have been anticipated. *See Ontiveros*, 136 Ariz. at 506, 667 P.2d at 206. Moreover, leaving the gate unlocked "increase[d] the foreseeable risk" that the precise harm suffered in this case would occur, and so the grandfather's actions cannot be considered superseding.[3] *Id.* Where, as in this case, a reasonable fact-finder could not conclude the intervening act was unforeseeable, a court may determine it was not a superseding cause as a matter of law. *See, e.g.*, *State v. Slover*, 220 Ariz. 239, ¶ 14, 204 P.3d 1088, 1093 (App. 2009) (no superseding cause instruction necessary where car accident exposed intoxicated victim to drowning in creek). Therefore, the trial court did not err in concluding the grandfather's actions could not be a superseding cause to the grandmother's that would reduce the number of "occurrences" to his alone.

¶13 Austin contends that if each act constituting an occurrence need not be capable of independently resulting in harm, then "each discrete act or omission" of the grandparents could constitute a separate occurrence. Austin argues the policy includes the phrase "repeated exposures to similar conditions" in the definition of "occurrence" to avoid the circumstance where acts or omissions could be broken down into "an infinite number of 'occurrences.'" For example, Austin argues the grandfather leaving the

[3]The grandmother would not be relieved of liability even if she could not have foreseen the particular manner in which the accident occurred, including the grandfather's negligent supervision. *Rossell*, 147 Ariz. at 169, 709 P.2d at 526.

children with their sleeping father, then leaving both the back door open and the screen door unlocked, and then falling asleep, could all constitute separate occurrences. But this argument is inconsistent with the definition of occurrence from *Helme*. The individual acts of the grandfather constitute an uninterrupted and continuing cause—negligent supervision of the children. *See Helme*, 153 Ariz. at 134, 735 P.2d at 456. Moreover, those individual acts also constitute an uninterrupted natural and continuous sequence under the definition of proximate cause, and thus constitute a single cause. *See Salica*, 224 Ariz. 414, ¶ 13, 231 P.3d at 950.

¶14 Austin also argues the policy's inclusion of injuries resulting from "repeated exposures to similar conditions" in the definition of occurrence modifies the causal test from *Helme* and merges the acts of each grandparent into a single occurrence. There is no definition of "repeated exposures" or "similar conditions" in the policy. The trial court determined that, under these facts, the repeated exposure clause "ha[d] no bearing on the meaning of 'occurrence' as defined by the Policy because the injury in this matter was not an incremental injury caused by repeated exposures to harm; rather, the injury . . . was essentially instantaneous." We agree.

¶15 Clauses such as "repeated exposures to similar conditions" often are referred to as continuous exposure clauses and apply to injuries resulting from exposure to harmful conditions over a period of time. *See, e.g.*, 43 Am. Jur. 2d *Insurance* § 688 (2011) ("A continuous exposure clause broadens an 'occurrence' beyond the word 'accident' to include a situation where the damage occurs, continuously or repeatedly,

over a period of time, rather than instantly."); *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶¶ 122-23, 98 P.3d 572, 609 (App. 2004) (occurrence definition including "continuous or repeated exposure to conditions" applied where plaintiff exposed to contaminated water over time). As noted by the trial court, Arizona courts have not addressed the purpose of continuous exposure clauses, but other jurisdictions consistently have interpreted them to cover claims of incremental injury rather than instantaneous injury, particularly but not exclusively arising from exposure to environmental toxins. *See, e.g., Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 898 (Conn. 2001) (exposure clause merged claims arising from each insured's exposure to asbestos at same place and time); *Towns v. N. Sec. Ins. Co.*, 964 A.2d 1150, ¶ 30 (Vt. 2008) (repeated exposure clause applies where injury "not linked to a single event but rather to long-term and continuous exposure" to hazardous material).

¶16 Austin has offered inconsistent interpretations of the "repeated exposures" clause's application to these facts. On appeal, Austin contends the acts of each grandparent were part of an "exposure process," and that the acts are "related and repeated actions that work[ed] interdependently to expose the children to the pool." Below, Austin argued "the acts or omissions of both Grandparents resulted in one accidental exposure to the condition (the pool) and, therefore, constitute one 'occurrence.'" In its motion for summary judgment, Austin argued the grandparents' acts "resulted in a culmination of similar conditions" that "allowed the loss to occur."

¶17 For the clause to apply here to preclude a finding of two covered "occurrences" there must be "repeated exposures to similar conditions." Austin has argued both that the acts of the grandparents were "exposures" or were "similar conditions." Even if we were to strain the definition of "condition" to include the acts of the grandparents, Austin has failed to explain how the acts of each grandparent were similar.[4] The grandmother failed to secure the pool properly and the grandfather failed to supervise the children; such omissions are of a different nature and cannot reasonably constitute "similar conditions." To the extent one cohesive suggested interpretation can be gleaned from this assortment of attempts, Austin argues "repeated exposures to similar conditions" should be interpreted to mean a "series of events that work together to cause harm." But this interpretation would apply to any situation where multiple causes contribute to one injury and is inconsistent with a plain and common-sense reading of the clause. *See Employers Mut. Cas. Co.*, 218 Ariz. 262, ¶ 9, 183 P.3d at 515 (we apply common sense to determine how policy applies to facts of case).

¶18 Applying a common-sense reading to the policy, we determine, as did the trial court, that the repeated exposure clause does not apply to these facts and does not merge the acts of the grandparents into a single occurrence. In the absence of an applicable modifying clause, the causal test from *Helme* applies. Therefore, because the

[4]Nor does Austin explain how these conditions are the "same factor," although it argues *Montrose Chemical Corp. v. Admiral Insurance Co.*, 913 P.2d 878, 892 (Cal. 1995), stated that "occurrence" includes a "series of events attributable to the same factor."

acts of each grandparent constitute two separate causes of the deaths of the children, and because the policy language does not merge the two causes, the trial court did not err in determining there were two qualifying occurrences under the policy.

Disposition

¶19 For the foregoing reasons, we affirm the trial court's grant of declaratory judgment in favor of Aldecoa and Denogean.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge