[J-3-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DONEGAL MUTUAL INSURANCE COMPANY,	:	Nos. 18-33 WAP 2006
	:	Appeal from the Order of the Superior
Appellant	:	Court entered February 17, 2006, at Nos.
	:	1130-1136 WDA 2002, 1148-1152 WDA
	:	2002, and 1181-1184 WDA 2002,
v.	:	affirming the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered June 6, 2002, at Nos. GD 01-
RICHARD BAUMHAMMERS, ANDREJS	:	005671 and GD00-018199.
BAUMHAMMERS, INESE	:	
BAUMHAMMERS, MAY-LIN KUNG,	:	
ADMINISTRATRIX OF THE ESTATE OF	:	893 A.2d. 797 (Pa. Super. 2006)
JI-YE SUN, AND MAY-LIN KUNG IN HER	:	
OWN RIGHT, SANFORD GORDON,	:	ARGUED: March 5, 2007
ADMINISTRATOR OF THE ESTATE OF	:	
ANITA GORDAN, AND SANFORD	:	
GORDAN IN HIS OWN RIGHT, ZETTA	:	
RENEE LEE, ADMINISTRATRIX OF THE	:	
ESTATE OF GARRY LEE, JANE/JOHN	:	
DOE, ADMINISTRATOR OF THE	:	
ESTATE OF ANIL THAKUR, BANG	:	
NGOC NGO, ADMINISTRATOR OF THE	:	
ESTATE OF THAO Q. PHAM, SANDIP	:	
PATEL, AND UNITED SERVICES	:	
AUTOMOBILE ASSOCIATION,	:	
	:	
Appellees	:	

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: DECEMBER 27, 2007**

I join the majority conclusion on the issue of coverage, agreeing that under the insurance policy ("Policy") issued by Donegal Mutual Insurance Company ("Donegal"), the claims made against Adrejs and Inese Baumhammers (the "Baumhammers") are for

damages resulting from bodily injuries caused by an "occurrence." I dissent, however, as to the majority's conclusion that there was a single occurrence for which coverage is provided.

First, I write to re-emphasize that at this point in time, we address whether Donegal must provide a defense to the Baumhammers, not whether the Baumhammers are legally liable for the claims made against them and Donegal must pay. The liability, if any, of the Baumhammers for the actions of their adult child implicates several issues, which include whether the Baumhammers owed a duty of care to the plaintiffs. The question of legal duty will involve a weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution. Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000). But this, along with the other elements of the claims made against the Baumhammers, are questions for another day.

My dissent as to the number of covered occurrences is premised on my view that the majority incorrectly shifts perspective when it counts how many occurrences there were once it concludes that the events at issue did indeed constitute an occurrence for which there is coverage. As to coverage, the majority examines the definition of an "occurrence" in the Policy, focuses on Richard Baumhammers' violent acts, and determines that an accident, which qualifies as a covered occurrence under the Policy, took place because those acts were unexpected by the insureds. But then, to count the number of occurrences, the majority shifts its focus to the omissions of the Baumhammers that are alleged to be negligent, and states that "[b]ecause coverage is predicated on the Baumhammers' inaction, and the resulting injuries to the several victims stem from that one cause, we hold that Parents' alleged single act of negligence constitutes one accident and one occurrence." (Majority opinion at 13.). This is inconsistent.

I would hold that the question of the number of occurrences, like the question of whether there was an occurrence, is to be determined with a focus on Richard Baumhammers' acts. That is to say, I would count the number events that were unexpected by the Baumhammers. In this regard, I would adopt the analysis set forth in the well-reasoned opinion of the Florida Supreme Court in Koikos v. Travelers Ins. Co., 849 So.2d 263 (Fla. 2003). In Koikos, the Court adopted the "cause" test, focusing on the immediate acts that caused bodily injury, and counted the number of occurrences, *i.e.*, accidents, from the standpoint of the insured. Id. at 271. With this approach in mind, in the present case, I would conclude that there were six occurrences for which the Policy provides coverage.[1]

For these reasons, I concur with the majority that the Policy provides coverage, but respectfully dissent from the majority's conclusion that there was only one occurrence. I would conclude that there were six covered occurrences and thus, would affirm the Superior Court's decision in its entirety.

[1] I also point out that Koikos aptly emphasizes the numerous ways in which insurance companies can limit liability in this area when they draft insurance contracts by using clear language, and highlights the well-settled principle of strictly construing insurance contracts against the drafter, which has long been followed in Pennsylvania. Id. at 272. See Miller v. Boston Ins. Co. 218 A.2d 275, 277 (Pa. 1966).