[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
v.	:	2002, and 1181-1184 WDA 2002,
	:	affirming the Order of the Court of
RICHARD BAUMHAMMERS, ANDREJS	:	Common Pleas of Allegheny County
BAUMHAMMERS, INESE	:	entered June 6, 2002, at Nos. GD 01-
BAUMHAMMERS, MAY-LIN KUNG,	:	005671 and GD00-018199.
ADMINISTRATRIX OF THE ESTATE OF	:	
JI-YE SUN, AND MAY-LIN KUNG IN HER	:	
OWN RIGHT, SANFORD GORDON,	:	893 A.2d. 797 (Pa. Super. 2006)
ADMINISTRATOR OF THE ESTATE OF	:	
ANITA GORDAN, AND SANFORD	:	
GORDAN IN HIS OWN RIGHT, ZETTA	:	ARGUED: March 5, 2007
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. JUSTICE BAER **DECIDED: DECEMBER 27, 2007**

I join my colleagues in concluding that the Baumhammers' alleged negligence triggered Donegal Mutual Insurance Company's obligation to defend and potentially indemnify the insureds. In contrast to my fellow justices, I conclude that the horrific events in this case constitute neither one nor six "occurrences" under the terms of the insurance

policy.[1] Instead, I would hold that the four distinct events triggered four "occurrences:" the shooting and fire in Mt. Lebanon, the Scott Township shooting, the Robinson Township shooting, and finally the shooting in Center Township.

After considering my colleagues' well-reasoned expositions as well as numerous decisions across the nation interpreting similar clauses, I find the policy provision in question ambiguous as to what constitutes a single "occurrence." The pertinent provision in the Donegal policy fails to include language definitively indicating that multiple related events constitute a single occurrence. See Koikos v. Travelers Ins. Co., 849 So.2d 263, 272 (Fla. 2003) (referencing policies which include in the definition of occurrence "a series of related events"). Additionally, neither the policy's use of the word "accident" nor, as explained below, its reference to repeated exposure does anything to clarify the number of occurrences in the instant case. Accordingly, I conclude that the definition of "occurrence" in Donegal's policy is ambiguous. Under our long-standing case law, we must interpret ambiguous language in insurance policies in favor of the insured and against the insurance company as drafter of the provision. Standard Venetian Blind Co. v. Amer. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983).

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[1] The insurance policy at issue contained the following language:

> Limit of Liability. Our total liability . . . for all damages resulting from any one "occurrence" will not be more than the limit of liability . . . as shown in the Declarations. This limit is the same regardless of the number of "insureds," claims made or persons injured. All "bodily injury" and "property damage" resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions shall be considered to be the result of one "occurrence."

Reproduced Record (R.R.) at 97. "Occurrence," in turn, is defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury'; or b. 'Property damage.'" R.R. at 81.

To interpret the provision, the obvious starting point in the quantification of "occurrences" is the policy definition of the term as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . [b]odily injury or [p]roperty damage." R.R. at 81. In some cases, such as torts arising from exposure to toxic materials such as asbestos, the phrase "continuous exposure to substantially the same general harmful conditions" effectively limits the number of exposures found. The same language, however, has little utility in negligent supervision cases such as the one before us. In a case involving insurance coverage for negligent supervision of a priest, Judge Easterbrook of the Seventh Circuit opined on the application of a repeated exposure provision:

> It assumes a two-party perspective -- that an insured tortfeasor has harmed a victim. Its language is a mismatch for a case in which the tort is negligent supervision of an intentional wrongdoer. "[C]ontinuous or repeated exposure to conditions" sounds like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than with priests and choirboys. A priest is not a "condition" but a sentient being, and of course the victim was never "exposed" to the Diocese's negligent supervision.

Lee v. Interstate Fire & Cas. Co., 86 F.3d 101, 104 (7th Cir. 1996). In this case, Richard Baumhammers is not a condition and the victims were never exposed to his parents' negligent supervision. Accordingly, the repeated exposure clause should not control.

As ably presented by the Majority, one interpretation of the occurrence provision is that the number of "occurrences" in cases of negligent supervision is the number of negligent acts of the insured, in this case the parents' failure to supervise. Respectfully, I must reject this conclusion because it fails to account for the second half of the occurrence definition relating to the infliction of bodily injury or property damage, which is also a prerequisite to every action for negligence. The absence of either a negligent act or an injury results in no coverage, either because the policy coverage would not be triggered absent the negligence act of the parents, or because, pragmatically, there would be no

need for coverage if there were no injuries. If the Baumhammers had carelessly supervised their son and no one had been harmed as a result, there would be no actionable conduct to be covered by the insurance policy. Thus, the negligent act in and of itself cannot constitute an occurrence absent subsequent injury or property damage.

While the Majority discusses the Superior Court's decisions in D'Auria v. Zurich Insurance Co., 507 A.2d 857 (Pa. Super. 1986), and General Accident Insurance Co. of America v. Allen, 708 A.2d 828 (Pa. Super. 1998), I find these cases inapt. In quantifying the number of occurrences, the point of conflict in both D'Auria and Allen relates to the first half of the definition of occurrence, because both cases involved numerous negligent acts. In D'Auria, the alleged negligent conduct involved a physician's repeated misdiagnosis of a patient's ailment, while in Allen, the negligent acts related to a woman's repeated failure to protect children entrusted to her care from her pedophilic spouse. In contrast, the parties in this case do not dispute the number of negligent acts,[2] but instead disagree regarding the application of the occurrence provision where there are numerous injuries.[3]

A second method of quantifying the ambiguous term "occurrence," as set forth in Chief Justice Cappy's dissent, derives from the total number of victims. I find this conclusion compelling because it acknowledges that a completed act of negligence requires both a breach of a duty of care and an injury. Moreover, it correlates to the

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[2] The negligent act in this case is the alleged negligent supervision of Richard Baumhammers by his parents, specifically the (1) failure to obtain adequate mental health treatment, (2) failure to secure his gun, and (3) failure to notify authorities of the danger he posed. The Baumhammers and the victims in this case have not argued for three occurrences based on the allegations of negligence but instead have asserted six occurrences based on the number of victims that resulted from the shooting spree.

[3] Additionally, the outcome in Allen does not support the Majority's conclusion that the number of occurrences is dependent on the number of negligent acts because while the court in Allen found that the repeated failures of the wife constituted a single continuous act of negligence, the court nonetheless found one "occurrence" for each of the three children.

potential number of tortious actions that could be brought against the insured. However, that interpretation results in the unenforceability of one sentence of the same limits of liability provision. The policy clearly provides, "This limit is the same regardless of the number of 'insureds,' claims made[,] or persons injured." If the number of occurrences is always determined by the number of victims, then this unambiguous limit can never be applied, a conclusion that cannot be consistent with the parties' intent. Accordingly, I am forced to reject this interpretation because I believe it conflicts with the language of the policy.

Instead, I would combine the two approaches, thus accounting for both the negligent act and the bodily injuries, while acknowledging that the number of injured per occurrence is irrelevant to the limit of liability. A finding of an occurrence would require a pairing of both a negligent act of an insured, in this case the parents' negligent supervision, and an injury, in this case the six shootings. However, to account for the unambiguous language rebuking the equation of number of occurrences with the number of victims, I employ the cause theory, as interpreted by other courts, to require consideration of whether there is "but one proximate, uninterrupted, and continuing cause which resulted in all the injuries and damage." See Allen, 708 A.2d at 833; D'Auria, 507 A.2d at 860; H.E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 150 F.3d 526, 534 (5th Cir. 1998); Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, (3d Cir. 1982). Under this interpretation, only one occurrence would result if multiple victims are injured in a single event, but separate occurrences result if there are separate events.[4] For example, one occurrence would result if the negligence of the insured resulted in a tortfeasor detonating a

[4] Additionally, equating occurrences with events does not conflict with the repeated exposure clause discussed above. Indeed, because that clause provides that exposure to one continuous cause triggers but one occurrence, logically, the absence of a single continuous cause should result in multiple occurrences.

single bomb, whether that bomb injured one or five hundred people because the injury or injuries resulted from one uninterrupted cause. In contrast, in considering the facts of the case at bar, each of the stops on Richard Baumhammers rampage constituted a separate event uniting of an allegedly negligent act and, crucially, an injury, triggering a completed act of negligence and therefore, a new occurrence under the terms of the policy. Accordingly, I would find one occurrence relating to the Mt. Lebanon death of Anita Gordon, a second occurrence consisting of the shooting of Anil Thakur and Sandip Patel in Scott Township, a third occurrence in Robinson Township where Ji-Ye Sun and Thao Pak Pam were killed, and a fourth occurrence in Center Township which caused the death of Gary Lee. Thus, I conclude that four occurrences resulted from the events.