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**George N. Koikos v. Travelers Ins. Co.**

MR. CHIEF JUSTICE

NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS KOIKOS VERSUS TRAVELERS.

MEDITERRANEAN AGENDA THIS MORNING. THE ISSUE BEFORE THE COURT IS WHETHER AN INTRUDER'S GUNSHOT SERIOUSLY INJURING TWO RESTAURANT PATRONS, TWO OCCURRENCES UNDER THE RESTAURANT RESTAURANT'S LIABILITY POLICY, OR WHETHER THERE WAS A SINGLE OCCURRENCE, LIMITING COVERAGE TO \$500,000 PER COVERAGE AMOUNT. VICTIMS' COUNSEL ARE SITTING, ARE HERE, BUT THEY ARE AT THE BAR.

WAS THE ARGUMENT EVER MADE OR ADVANCED BY AN INSUROR THAT THE FACT THAT THESE WERE GUNSHOTS IN CLOSE PROXIMITY WAS THE OCCURRENCE, AS OPPOSED TO THIS IDEA THAT YOU JUST LOOK TO THE NEGLIGENT --

NO, MA'AM.

-- OMISSION.

IT WAS NOT MADE AND SHALL NOT BE HEARD BY THIS COURT IN MY OPINION. I AM HAPPY TO ADDRESS IT, HOWEVER, SINCE IT IS ON YOUR MIND. THEY DO NOT ATTACK THE McQUAIG RATIONALE, THE McQUAIG DECISION, AND THIS STATE, SINCE 1964 IN THE RECALLS DECISION, WHICH, WHEN A CAR MOVED FORWARD AND HIT A CAR AND THEN BACKED UP AND ANOTHER SEPARATE ACCIDENT, SO THIS CASE TIES INTO THE WILLFUL INTENT CRIMINAL LAW. DO YOU HAVE TWO SEPARATE WILLFUL ACTS THAT CAUSED SEPARATE INJURY?

WHAT IS THE STATE OF THE RECORD ON ONE SHOT, ONE SHOT, THAT INJURIES MORE THAN ONE PERSON, VERSUS MULTIPLE --

THERE HAS NEVER BEEN A -- THERE IS NO TESTIMONY, EVEN TO SUPPORT, THAT IT WAS ONE SHOT THAT INJURED TWO PEOPLE. THAT IS NOT -- IT IS APPARENTLY THAT THERE WERE TWO SEPARATE SHOTS, INJURING TWO SEPARATE PEOPLE.

RIGHT, BUT UNDER THE ANALYSIS OF WHAT IS AN OCCURRENCE, IS IT YOUR POSITION THAT IS A THE FACT THAT THE TRIGGER ON THE WEAPON WAS PULLED TWICE?

YES, SIR. JUST SAME RATIONALE THAT IT WOULD BE FOR --

IF THIS WAS AN UZIE AND IT JUST WAS PULLED ONE TIME AND IT SPRAYED OUT 50 BULLETS AND KILLED 50 PEOPLE, THAT WOULD JUST BE ONE OCCURRENCE.

YOUR HONOR, THAT IS POSSIBLE. THAT IS CERTAINLY A LOGICAL POSITION IN YOUR, THE WAY YOU ARE COMING AT, IT YES, SIR, BUT THERE IS NO SUCH -- THIS IS CLEARLY, THERE IS NOTHING HIKE TAKE IN THE RECORD TODAY. I THINK WHAT WE HAVE TO DO IS ANALYZE IT UNDER THE CRIMINAL LAW. WOULD IT BE TWO INJURIES. YOU KNOW, WE COULD COME UP --

WELL, BUT, THAT LEADS YOU TO WHAT ABOUT THE BOMBING OF THE WORLD TRADE CENTER, WHERE THERE WERE 5,000 PEOPLE OR JUST TAKE ONE BUILDING.

THAT IS ONE FORCE SET IN MOTION, YOUR HONOR. THAT IS NOT A PROBLEM.

BUT THERE WERE FIVE PEOPLE ON THE PLANE THAT WERE ALLEGEDLY HIJACKERS. NOW, IS THERE A SEPARATE OCCURRENCE FOR EACH HIJACKER?

I DON'T THINK THERE WAS ONE HIJACKING, IS MY UNDERSTANDING. I DON'T THINK THE NUMBER OF PEOPLE IS THE CASE. THAT IS THE EFFECT TEST, IF WE GET INTO THE NUMBER OF PEOPLE INJURED. THAT HAS BEEN REJECTED BY THE COURTS. THAT IS NOT THE LAW --

BUT THE THING THAT I WAS ASKING ABOUT IS HERE THERE WAS ONE SECURITY BREACH, JUST AS THERE WAS ONE SECURITY BREACH ON THE CLAIM.

YES, SIR, BUT BECAUSE THE LIABILITY -- BUT THE CAUSE OF THE LIABILITY IS NOT THE TEST. THE CAUSE OF THE DAMAGES IS THE TEST AND THAT IS THE CONFUSION. WE MUST LOOK TO THE CAUSE --

IN ALABAMA, APPARENTLY IT IS THE CAUSE OF THE LIABILITY, UNDER THE CASE CITED PIE JUDGE SWOFFORD.

NOWHERE -- CITED BY JUDGE SWOFFORD.

NOWHERE AM I AWARE THAT IT IS THE CAUSE OF THE DAMAGE. THE NEGLIGENT ACTOR OMISSION TEST HAS BEEN REJECTED SINCE 1959, BY THE NEW YORK COURT OF APPEALS AND NEVER RAISED SINCE. NOW, WHAT HAPPENS IN THE SALES CASES, IN THE DEFECTIVE PRODUCT OR SALES CASES, THE COURTS THERE IN COINCIDES. THE TEST COINCIDE, BECAUSE THE COURTS CONSIDER, WHEN YOU SELL A DEFECTIVE PRODUCT AND YOU PUT IT INTO THE STREAM OF COMMERCE, THEN THE USE IS A CONTINUOUS CAUSE, SO THAT IS WHERE THE DEFENSE, THE APPELLEES ARE CITING THOSE CASES, AND IT IS MISLEADING. THOSE COURTS STILL CITE THE CAUSE TEST.

BUT I THINK THAT WE ARE MISSING EACH OTHER, IN THAT WHAT I AM CONCERNED ABOUT IS THAT, AS I UNDERSTAND JUDGE STAFFORD'S ORDER AND HIS RELIANCE ON THE CASE OUT OF THE ELEVENTH CIRCUIT OUT OF, USING ALABAMA LAW THAT, THE FOCUS THERE IS ON WHAT GIVES RISE TO THE INSURED'S LIABILITY.

NO. THAT CASE DEALT, WE DISTINGUISH THAT CASE IN OUR BRIEFS. THAT CASE WAS THE CASE, THE ALABAMA SUPREME COURT CLEARLY ADOPTED THE TEST, AS I AM SUGGESTING. THE ELEVENTH CIRCUIT SAID THAT THE RAIN OR THE DISASTER, WHATEVER THE NATURAL DISASTER WAS, WAS NOT AN INTERVENING FORCE, AND HELD THAT THE CAUSE WAS THE ORIGINAL DEFECTIVE CONDITION. WE DON'T HAVE ANY PROBLEM WITH THE DEFECTIVE SALES CASES. YOUR HONOR, WHAT I THINK I WOULD LIKE TO DO IS BE SURE THAT JUSTICE PARIENTE AND YOURSELF ARE NOT, UNDERSTAND OUR POSITION IN THE McQUAIG CASE WHICH HAS NOT BEEN BRIEFED WHICH, IN MY OPINION, SHOULD NOT BE ABLE TO BE RAISED IF IN THIS COURT. HOWEVER I EXPECTED THE QUESTION, SO I AM PREPARED FOR IT. I THINK THE ARBITRARY TIME LIMITS HERE CANNOT CONTROL. LET ME GIVE YOU TWO EXAMPLES THAT I CAN SEE. IF A COUPLE, IF A HOMEOWNER SHOOTS, ACCIDENTALLY, A COUPLE ENTERING HIS HOUSE, BY MISTAKE, THINKING THAT THEY WERE INTRUDERS, THAT IS TWO OCCURRENCES. HE SHOOTS ONE. HE SHOOTS THE OTHER ACCIDENTALLY TWO OCCURRENCES. LET ME GIVE YOU THE PRIME, THE EXAMPLE THAT I THOUGHT OF THAT IS ABSOLUTELY REVEALING. IF AN INTRUDER BREAKS INTO AN APT APARTMENT, FOR WHICH THERE IS ALLEGEDLY NEGLIGENT SECURITY OR A NEGLIGENT GUARD OR WHATEVER AND BEGINS TO RAPE ROOMMATE NUMBER ONE, AND WHILE HE IS RAPING ROOMMATE NUMBER ONE, SHOOTS ROOMMATE NUMBER TWO, THAT IS TWO OCCURRENCES, HE HAVE THEN IT IS HAPPENING SMAULTLY, AND THAT IS A CLEAR SIMULTANEOUS OCCURRENCE, IT IS TWO POINTS. NOW, IF THE INSURANCE COMPANY WANTS TO CHANGE THE RESULTS, WHICH HAS BEEN THE LAW IN FLORIDA SINCE, I THINK, THE RECALLS CASE, CITED BY McQUAIG AND IN TEXT

SAME APPELLATE CASE, SO IF THEY WANT TO CHANGE THAT, THE WAY THEY CHANGE THAT IS TO PROVIDE, IN THE DEFINITION OF THE POLICY, THAT ANY RELATED ACTS, ANY SERIES OF RELATED ACTS ANY CAUSALLY-RELATED ACTS WILL BE CONSIDERED ONE OCCURRENCE. THAT IS THE WAY POLICIES CHANGE. THAT OUR POLICIES THAT -- THERE ARE POLICIES THAT HAVE DONE THAT BUT THEY DIDN'T DO THAT HERE, AND THEY ARE TRYING TO BACK DOOR BY ADOPTING THE NEGLIGENT ACTOR OMISSION TEST, WHICH IS ACTUALLY PASSE IN THIS COUNTRY. MR. CHIEF JUSTICE

JUSTICE SHAW HAS A QUESTION.

LET ME ASK YOU THIS.

YES, SIR.

IF THERE WAS AN ALTERCATION, AND PARTY A SHOT B AND C AS A RESULT. THEY WERE ARGUING WITH THE TWO, A WAS ARGUING WITH B AND C, THERE WAS NO INTERVENING TIME LAPSE THERE, WOULD THAT BE ONE OR TWO?

SOMETHING IN THE POLICY THAT RESTRICTS THE EVENT, SUCH AS PROVIDING FOR A SERIES OF RELATED ACTS OR SOMETHING OF THAT NATURE, WHEN YOU HAVE AN ACCIDENT, WHICH HAD THIS WOULD BE A SUDDEN -- WHICH THIS WOULD BE A SUDDEN OCCURRENCE, THAT WOULD BE TWO EVENTS. THAT IS, IF YOU SHOT A AND YOU SHOT B THAT, IS TWO OCCURRENCES. YES, SIR. IN OTHER WORDS IT IS TWO ACCIDENTS. THE FOCUS IS, IF THE INSURED WANTS TO CHANGE THE WORD "ACCIDENT" TO MEAN SOMETHING MORE THAN A COMMON OCCURRENCE, AS THE LAW INTERPRETED IT --

WHAT ABOUT THEIR ARGUMENT? AS I UNDERSTAND IT, A PART OF THEIR ARGUMENT IS THAT "OCCURRENCE", AS IT IS DEFINED IN THE POLICY THAT WELL ARE LOOKING AT, CONTAINS SOME LANGUAGE THAT INCLUDES CONTINUES OR REPEATED EXPOSE YOURS TO SUBSTANTIALLY THE SAME GENERAL HARMFUL CONDITIONS.

YES, MA'AM.

AND SO THEIR ARGUMENT IS THAT THIS WS, THIS GUY WAS MAKING MULTIPLE, THIS WAS REPEATED OR CONTINUOUS EXPOSURE, BECAUSE IT WAS ALL TOOK PLACE AT THIS ONE TIME.

THAT IS JUST A TWISTING AND A CON TORTING OF LANGUAGE, TO MAKE IT SAY SOMETHING IT DOESN'T. THAT LANGUAGE WAS ADDED BY THE INSURANCE INDUSTRY, IN 1966, IN AN EFFORT, AS THE CASE LAW POINTS OUT, IN AN EFFORT TO BROADEN COVERAGE BEYOND SUDDEN OCCURRENCES, TO GRADUAL OR DELAYED HARM SITUATIONS.

WHAT DOES THAT LANGUAGE MEAN, IF IT DOES NOT MEAN WHAT --

IT MEANS THAT THE CASE LAW POINTS OUT, AND BY THE WAY THEY USE THE WORDS HARMFUL HERE. THEY EVEN GO BEYOND THE CASE -- THIS POLICY IS REALLY NOT APPLICABLE. THEY USE THE WORDS "HARMFUL CONDITIONS".

THEY CAN CONTRACT IN ANY FASHION THEY WANT TO, AS LONG AS IT IS A LEGAL CONTRACT, AND UNLESS THIS IS AGAINST INSURANCE LAW OR SOME OTHER LAW, YOU HAVE TO GIVE SIGNIFICANCE TO THE WORDING OF THAT POLICY, DON'T YOU?

YOU SURE DO. I ABSOLUTELY AGREE, AND THIS COVERAGE BROUGHT THAT. THE CASES SAY THIS IS NT A CONDITION. THIS IS NOT A CONDITION, YOUR HONOR, AND I POINT OUT, IN THE SUPPLEMENTAL AUTHORITY, I HAVE GIVEN YOU THE ONE RESTAURANT POLICY WE COULD FIND, WHERE THE COURT OF ILLINOIS SAID THE PREPARATION OF BAD FOOD IS SAUTED ONION CASE, IS

NOT THE CONDITION, IS NOT A CONDITION, FORGET THAT. IT IS THIS IS -- IT IS THE SERVICE OF THE FOOD IS THE HARMFUL ACT, AND EACH TIME YOU SERVE THAT BAD FOOD, IT IS A SEPARATE OCCURRENCE, AND THAT IS A GOOD CASE, PRETTY WELL-REASONED. I UNDERSTAND INSTINCTUALLY THAT THE COURT HAS THIS PROBLEM, AND COUNSEL FOR THE DEFENSE OR COUNSEL FOR THE INSURANCE COMPANY IS COUNTING ON YOU TO HAVE THAT REACTION, BECAUSE IT IS A UNUSUAL REACTION. YOU HAVE TO STUDY IT, UNDERSTAND THE CASE LAW, UNDERSTAND WHERE IT COMES FROM, AND YOU HAVE TO UNDERSTAND THAT WHAT HE IS TRYING TO DO, ARTFULLY SO, IS TO TAKE A -- I AM SORRY, YOUR HONOR HONOR.

COULD THE INSURANCE COMPANY CONCEIVABLY DRAFT A POLICY THAT WOULD COVER -- ABSOLUTELY AND THEY SHOULD HAVE.

AND WHAT WOULD BE THE WORDING THERE, AS OPPOSED TO THE WORDING HERE?

I THINK I HAVE GIVEN IT TO YOU. I THINK THEY SHOULD SAY ANY ACT, ANY SERIES OF ACT, ANY RELATED ACTS, ANY CAUSELY-RELATED ACTS. THERE ARE WAYS TO DO THAT AND CASES THAT DO THAT AND THEY ARE TRYING TO WORK THIS UNDER A CONTINUOUS EXPOSURE ACT AND SAYING IT IS CONTINUOUS EXPOSURE CASE. IT IS AN ACCIDENT CASE.

IF YOU HAD, FOR EXAMPLE, IN THE SAME SITUATION, SOME NEGLIGENCE, AND THEN YOU HAD A FIRE THAT BROKE OUT, AND INJURED SEVERAL PEOPLE, DO YOU AGREE THAT THE FIRE, THEN, IS THE OCCURRENCE, AND THERE IS ONE OCCURRENCE, EVEN THOUGH THERE ARE MORE PEOPLE INJURED?

YES AND THAT WOULD BE THE LOGICAL CONCLUSION.

COULD YOU ADDRESS THIS ISSUE, AS FAR AS READING THIS WHOLE THING TOGETHER, WHAT IS THE SIGNIFICANCE OF THE AGGREGATE LIMIT PROVISION OF \$1 MILLION, IF WE EXCEPT THAT THE INSURANCE COMPANY'S POSITION THAT \$50 HOW IT IS THE LIMIT FOR THEIR NEGLIGENT ACTOR VICE VERSA? I GUESS WHAT I AM ASKING, DO YOU SEE THAT \$1 MILLION AGGREGATE AS --

NO MATTER HOW MANY OCCURRENCES, THEY WON'T PAY MORE THAN A MILLION DOLLARS. THAT IS NOT IN CONTEXT.

WITHIN A YEAR OF THE POLICY PERIOD?

THAT IS NOT IN CONTEST. WE ACKNOWLEDGE THAT THE DISPUTE HERE IS OVER \$500,000. THAT IS THE DISPUTE, WHETHER IT GOES TO THE VICTIMS OF THE CRIME OR NOT. I THINK, THOUGH, THAT, HOWEVER, YOUR EXAMPLE IS VERY INTERESTING BECAUSE INJUSTICE QUINCE, YOU COULD SEE THAT YOU COULD BE NEGLIGENT FOR A NUMBER OF REASONS. THE LAW DOESN'T TURN ON HOW MANY REASONS YOU ARE NEGLIGENT. YOU COULD FAIL TO PROVIDE A PROPER GUARD, AND YOU COULD HAVE THE DOORS THAT ARE LOCKED THAT SHOULD BE OPEN, AND YOU COULD HAVE A LOT OF DIFFERENT REASONS WHY THIS HARM MAY HAVE OCCURRED, BUT THE LAW LOOSE TO THE MOST IMMEDIATE CAUSE. THE TEST HAS BEEN EXPRESSED BY THE WAY, IN SEVERAL DIFFERENT WAYS IN FLORIDA, THE CASE LAW, WE HAVE TALKED ABOUT THE CAUSE NEAREST THE INJURY. WE HAVE TALKED ABOUT THE IMMEDIATE CAUSE. THE GAIFER'S CASE OUT OF THE FIFTH DISTRICT TALKS ABOUT THE WAY IN WHICH IT MANIFESTS IT SELF.

YOU AREN'T LOOKING AT THE UNDERLYING CAUSE OF LIABILITY. FOR EXAMPLE IF THE SECURITY GUARD HA HISTORY OF VIOLENT BEHAVIOR AND THEN THEY WERE, ALSO, INDEPENDENTLY NEGLIGENT IN NOT HAVING ENOUGH SECURITY GUARDS, IF IT GOES TO THE UNDERLYING CAUSE, IT WOULDN'T BE GIVEN THAT --

THAT IS EXACTLY RIGHT, AND YOU CAN BET YOUR BOOTS THEY WOULDN'T BE HERE ARGUING

THAT THE CAUSE OF THE INSURED'S LIABILITY IS THE REASON, IF THAT WERE THE CASE, IF WE HAD MULTIPLE THEORIES, WE WOULDN'T BE HERE ARGUING. THAT THE ELIZABETH INDE CASE AND THE CHILD MOLESTING CASES, IS A POSITION WHERE IT MIGHT COME INTO THE COURT, ALTHOUGH IT STRAINS THE CREDIBILITY OF THE COURT TO -- THE CREDULITY OF THE COURT, AND THAT IS A PHENOMENON WHERE WE ARE TALKING ABOUT STEAM, HEAT, RADIATION, WHERE THINGS, HARM IS CAUSED OVER TIME AND NOT CAUSED IMMEDIATELY.

THAT IS IN THE RIDER OR POLLUTION CASES --

THERE COULD BE AND SOME OTHER CASES THAT GO OFF ON THE CONDITION SITUATION AND FIND THAT, AND TO GET BACK TO THE ELIZABETH INDE CASE, WHICH I WANTED TO POINT OUT, BECAUSE THOSE CASES DEALING WITH CHILD MOLESTATIONS HOLD, THAT EVEN THOUGH YOU ARE, THE CHURCH, FOR EXAMPLE, WAS NEGLIGENT IN HIRING A, OR LETTING PEOPLE HAVE ACCESS TO CHILDREN THAT SHOULDN'T HAVE HAD ACCESS TO THE CHILD, AND THE HARM OCCURS OVER A PERIOD OF TIME, WHERE THE CHILDREN ARE MOLESTED OVER A PERIOD OF TIME AND SUFFER EMOTIONAL HARM, THE COURT SAYS THAT, THEY REASON THAT THE INJURY THERE, THE CAUSE IS THE, THE CAUSE SHOULD BE TO EACH PERSON INJURED.

COMING BACK TO JUDGE STAFFORD'S ORDER.

YES, SIR. OKAY. JUDGE STAFFORD.

HIS REASONING WAS THAT, WHILE THAT THE CAUSE OF AN OCCURRENCE IS AN ACTOR EVENT THAT RESULTS IN THE INSURED BECOMING LEGALLY OBLIGATED TO PAY DAMAGES FOR BODILY INJURY.

AN EVENT FOR WHICH THE INSURED IS RESPONSIBLE. I WILL CONCUR WITH YOU THERE, YOUR HONOR.

NOW, THE GIST OF THE CAUSE OF ACTION HERE WAS A BREACH OF SECURITY. CORRECT? A FAILURE BY SECURITY.

YOUR HONOR, IT DOESN'T MATTER WHY THE INSURED IS ALLEGED TO BE LIABLE. THAT IS THE KEY THING TO REMEMBER IN THIS CASE. IT DOESN'T MATTER. ANOTHER BASIS OF THE ALLEGATIONS OF THE CAUSE OF ACTION HERE WAS THE FAILURE TO PROVIDE SECURITY.

THAT'S CORRECT.

OKAY. NOW --

AND IT WOULDN'T MATTER IF IT WAS VICARIOUS LIABILITY. IT WOULDN'T MATTER IF HE HAD NEGLIGENTLY HIRED SOMEBODY. IT REALLY WOULDN'T MATTER, BECAUSE LIABILITY POLICIES ARE ACTS OF INSURANCE. THAT IS WHAT THEY ARE. THEY INSURED AGAINST ACCIDENTS.

YOU WOULD AGREE WITH ME THAT A LIABILITY INSURANCE POLICY IS A POLICY THAT IS TO PROVIDE INDEMNITY AGAINST THE LIABILITY OF THE INSURED.

FOR ACCIDENTS. THAT IS CORRECT. IT IS, THE CASE LAW, THE WONDERFUL CASEY CITED TO YOU, THE SUPREME COURT OF CONNECTICUT LAYING OUT THE LAW FOR GENERATIONS, IS DON'T GET CONFUSED. IT IS, A LIABILITY POLICY IS AN ACCIDENT POLICY. IT INSURES AGAINST SUDDEN AND UNEXPECTED EVENTS, AND THAT IS WHAT YOU ARE PROTECTING, REGARDLESS OF WHY YOU ARE OR WHETHER YOU ARE LIABLE. IT DOESN'T REALLY MATTER WHY YOU ARE LIABLE, AND THAT IS WHY THIS ACTS OR OMISSIONS TEST HAS NEVER BEEN GIVEN CREDENCE, SINCE 1959 IT HAS NEVER BEEN RAISED. I AM INTO MY REBUTTAL TIME. THANK YOU VERY MUCH. MR. CHIEF JUSTICE

MR. JOY. THANK YOU, MR. TURNER.

JOHN JOY IS WITH ME. ON BEHALF OF TRAVELERS INSURANCE THE APPELLEES. THERE IS NO QUESTION BUT THAT MR. HARRIS AND MR. HARM STRONG -- ARMSTRONG WERE INJURED AT THE SAME PLACE AT EXACTLY THE SAME POINT IN TIME, BY THE SAME SHOOT HEER, BY THE SAME GUN, AND ALSO -- BY THE SAME SHOOTER, BY THE SAME GUN, AND ALSO VERY IMPORTANTLY BY THE SAME NEGLIGENT ACT OF INSURANCE AS PROVIDED IN THIS CASE.

IF WE HAD A BOUNCER AT THE RESTAURANT WHO HAD BEEN NEGLIGENTLY RETAINED, THIS BOUNCER ON THE SAME EVENING, HAD INFLICTED VARY I SERIOUS INJURIES ON TWO -- VERY SERIOUS INJURIES ON TWO DIFFERENT INDIVIDUALS. CERTAINLY THE CAUSE IS THE NEGLIGENT BOUNCER, BUT WHY WOULD WE NOT HAVE TWO DIFFERENT OCCURRENCES FOR TWO INDIVIDUALS, BEING ATTACKED OR BEATEN BY THAT BOUNCER OR SECURITY PERSON?

I BELIEVE YOUR HONOR IS POSITIVE IS POSITING A HYPOTHETICAL -- IS POSITING A HYPOTHETICAL WHERE YOU HAVE TWO UNRELATED INCIDENTS. YOU HAVE ONE AT ONE POINT IN THE EVENING INVOLVING ONE PROBLEM AND ANOTHER AT ANOTHER POINT IN THE EVENING, INVOLVING A COMPLETELY UNRELATED PROBLEM. I BELIEVE THAT IS THE QUESTION. IT IS NOT LIKE THE BOUNCER WAS INJURING TWO PEOPLE IN THE SAME FRAY, IF YOU WILL.

LET'S SEPARATE THEM BY MOMENTS. IF YOU WANT TO SEPARATE THEM BY MOMENTS, IN LOOKING TO, WOULD THAT THEORY APPLY IN THAT SITUATION AS WELL? WE HAVE GUESTS STANDING AT THE DOOR TO COME INTO THE RESTAURANT AND ONE IS INJURED AND THEN WE INJURY ANOTHER ONE.

OUR POSITION, YOUR HONOR, IS THAT THE CAUSATION TEST CANNOT BE APPLIED IN A NONSENSICAL MANNER. YOU CANNOT TAKE AND HAVE AN UNREASONABLE APPLICATION OF THIS TEST. THE REVIEWING COURT, IN A SITUATION LIKE THAT, HAS TO LOOK AT THE FACTS PERTAIN TO GET OPERATIVE NEGLIGENCE OF THE INSURED, WHICH INFLICTED DAMAGE A, AND THEN IN YOUR HYPOTHETICAL YOUR HONOR, COMPARE THAT TO THE OPERATIVE NEGLIGENCE OF THE INSURED THAT INJURED DAMAGE B, AND UNDER THE CAUSATION TEST, CLEARLY THERE IS A BIG PLACE FOR THIS CONCEPT OF A BREAK IN THE CHAIN OF CAUSATION, AND INTERVENEING CAUSE, A STOP. INCIDENT ONE IS OVER. INCIDENT TWO BEGINS. THERE IS NO RELATIONSHIP BETWEEN THE TWO. I BELIEVE THE HYPOTHETICAL YOU HAVE POSED, YOUR HONOR, IS AFTERNOON MORE COMPELLING CASE TO FIND TWO SEPARATE OCCURRENCES IF THERE IS ABSOLUTELY NO RELATIONSHIP.

I GUESS, AND THAT IS WHAT MY FIRST QUESTION WAS, WITH STARTING OUT, WHICH IS TRYING TO UNDERSTAND, SO YOU ARE NOT SAYING THAT, IN THIS EVENING, THAT THE UNDERLYING ALLEGATION WAS THAT THE SECURITY WAS NEGLIGENT. PASSIVE NEGLIGENCE OMISSION.

RIGHT.

THAT, IF, AT EIGHT O'CLOCK, ONE INCIDENT OCCURS, AND AT TEN O'CLOCK ANOTHER INCIDENT OCCURS, BUT EVEN THOUGH THE INSURED IS BEING SUED FOR THE SAME IDENTICAL FAILURE, THAT THERE IS YOU ARE AGREEING THAT THAT IS TWO, WOULD BE TWO SEPARATE COINCIDENCES?

I BELIEVE IT IS, YOUR HONOR.

BUT THAT IS WHAT I, SO GOING BACK TO THIS, THEN, THE McQUAIG, WHICH REALLY TALKS ABOUT EACH SHOT BEING SEPARATE, ARE YOU SAYING THAT IS, McQUAIG IS WRONGLY DECIDED?

NO, YOUR HONOR. I BELIEVE McG. GUAIG WAS -- I BELIEVE MGUAIG WAS THE INSURED SHOOTER. THE INSURED SHOOTER FIRED SHOT ONE AND INJURED PLAINTIFF A AND THEN AFTER A PERIOD OF TIME THE INSURED SHOOTER SHOT PLAINTIFF B. PLAINTIFF B COULD NOT HAVE BEEN INSURED IN THE PLAINTIFF A CASE.

SO IF ONE OF THE VICTIMS HAD BEEN INJURED BY THE GUN SHOT BUT THE OTHER VICTIM HAD BEEN INJURED BY SOMEONE ELSE STRIKING A BLOW WITH HIS FIST, AND THOSE WERE TWO, THAT WOULD BE TWO SEPARATE OCCURRENCES?

I DON'T THINK SO. I BELIEVE IN YOUR HONOR'S HYPOTHETICAL YOU ARE TALKING ABOUT THE SAME ALTERCATION OR FRAY OR PROBLEM IN THE LOBBY. IT WAS THE SAME EVENT. IT WAS THE SAME INCIDENT.

SO, OKAY, WE REALLY ARE, THEN ACTUALLY FOCUSING ON THE EVENT AND NOT THE UNDERLYING NEGLIGENCE OF THE INSURED.

RESPECTFULLY, UNS, WE ARE FOCUSING ON BOTH.

WELL, BUT I SEE YOU SAYING, BECAUSE THAT HAS BEEN MY COMMON SENSE UNDERSTANDING OF THE EVENT BEING THE INCIDENT, AND I DIDN'T REALLY UNDERSTAND THE INSURED AS TAKING THE POSITION THAT, BECAUSE THE GUN SHOTS WERE IN CLOSE PROXIMITY, THAT, REALLY, WAS IN THIS CASE, THE WAY, WHY THERE IS ONLY ONE OCCURRENCE, AND THAT IT WASN'T THE ISSUE OF FOCUSING ON THE UNDERLYING FORCE US --TORTIOUS ACT. THAT YOU HAVE TO LOOK AT BOTH. IS THAT WHAT YOU ARE REALLY SAYING HERE?

YOU HAVE TO LOOK, YOUR HONOR, AT WHAT HAPPENED IN THE RESTAURANT THAT NIGHT AND SEE IF THE OPERATIVE NUCLEUS OF LIABILITY-PRODUCING CHARGES AGAINST THE INSURED, THAT THEY WERE NEGLIGENT, THEY DID NOT PROVIDE SECURITY, THEY DID NOT PROTECT THEIR PATRONS, THAT WAS THE NEGLIGENCE, AND DID THAT NEGLIGENCE CONTINUE FORWARD TO PRODUCE, WITHOUT ANY BREAK IN THE CHAIN OF CAUSATION, DID THAT SAME NEGLIGENCE, DID THOSE, THE STATE'S IDENTICAL AND SPECIFIC ACTS OF NEGLIGENCE RESULT IN INJURIES TO MULTIPLE PEOPLE, WITHOUT A BREAK IN THE CHAIN OF CAUSATION. AND THAT IS WHAT WE ARE SAYING AND THAT IS WHAT HAPPENED IN THIS PARTICULAR CASE, AND THAT IS WHY THERE WAS ONLY ONE OCCURRENCE, REGARDLESS OF THE NUMBER OF PEOPLE THAT WERE INJURED.

IS THIS REALLY A WORKABLE CONCEPT THOUGH? IN OTHER WORDS --

ABSOLUTELY.

CAN YOU TAKE THIS CONCEPT, THEN, AND APPLY IT TO MULTIPLE SITUATIONS THAT MAY OCCUR OUT THERE, AND THAT IS JUST WHAT THE HYPOTHETICAL THAT YOU ARE WORKING WITH THAT YOU HAVE THE BREACH OF SECURITY AT THE DOOR, AND THAT IS GOING TO BE THE FOCUS WITH REFERENCE TO THE LIABILITY OF THE RESTAURANT OWNER OR WHATEVER, BUT THEN YOU HAVE THE PERSON THAT GOES INTO ONE PRIVATE ROOM AND IS INVOLVED IN AN ALTERCATION, AND INFLECTS DAMAGE ON A PATRON OF THE RESTAURANT THERE, AND THEN GOES ALL THE WAY ACROSS THE RESTAURANT, INTO ANOTHER PRIVATE ROOM, AND INFLECTS DAMAGE ON A PATRON IN ANOTHER PRIVATE ROOM, AND IF I AM LISTENING TO YOUR ANALYSIS CORRECTLY, YOU ARE SAYING, WELL, THAT WOULD BE TWO DIFFERENT OCCURRENCES THERE, BECAUSE THEY ARE SEPARATED IN TIME AND SPACE AND HAVE SOME DISTINCT IDENTIFICATION TO THEM. IS THAT CORRECT?

YOUR HONOR, I AM NOT SAYING THAT THERE WILL NOT BE MORE DIFFICULT CASES AND SETS OF FACTS, BUT I BELIEVE, IN YOUR HONOR'S HYPOTHETICAL, I BELIEVE YOU ARE POSITING A SITUATION WHERE THERE WAS -- YOU ARE POSITING A SITUATION IN WHICH -- YOU ARE POSITING A SITUATION IN WHICH THERE WAS ONE ATTACK ON VICTIM A AND ANOTHER

ATTACK ON VICTIM B IN A SEPARATE AREA OF THE RESTAURANT.

BUT THE OFFENDER IS THE SAME.

YES. I SUGGEST, YOUR HONOR, THAT THAT IS A SINGLE OCCURRENCE, ALL RELATED TO THE NEGLIGENT SECURITY, ALL TIED UP IN TIME AND SPACE AND CAUSAL RELATIONSHIP.

SO IF THE OFFENDER COMES IN AND SITS IN THE PRIVATE ROOM AND AND THERE IS SOME DISTURBANCE IN THERE, AND THIS IS A PERSON THAT NOT ONLY HAS A WEAPON, BUT AFTER THEY HAVE A DRINK OR TWO, THEY HAVE A TERRIBLE TEMPER, AND SO SOMETHING HAPPENS IN THAT PRIVATE ROOM, AND THEN FOR SOME REASON, THEY ARE NOT IDENTIFIED, AND THEY ARE NOW AN HOUR LATER, THEY ARE IN ANOTHER PRIVATE ROOM AND SOMETHING VERY SIMILAR HAPPENS, AND, AGAIN, THEY LOSE THEIR TEMPER AND FIRE, YOU WOULD SAY THAT THOSE ARE TREATED AS ONE OCCURRENCE?

THAT IS A HARDER HYPOTHETICAL FOR ME, YOUR HONOR. I BELIEVE THAT I WOULD HAVE A HARDER TIME CONVINCING YOU THAT THOSE WERE THE SAME, BECAUSE OF THE BREAK-IN TIME AND THE SEPARATION, AND SOMEONE WOULD CLAIM THAT THE INSURED WAS MORE NEGLIGENT FOR NOT DETECTING THE SECOND ONE, LET ALONE THE FIRST ONE.

HOW WOULD HAVE AN INSURED EVER KNOW, UNDER THAT CONCEPT OF OCCURRENCE, THEN, WHEN THEY WERE PROTECTED AND WHEN THEY WEREN'T PROTECTED AND WHAT IT WAS THAT THEY WERE PROTECTED AGAINST? I UNDERSTAND, NOW, THAT IF YOU WRITE A MORE EXPRESS POLICY, CLEARLY YOU CAN DEFINE OCCURRENCE ANY WAY THAT YOU WANT TO DO IT, BUT I AM JUST CONCERNED ABOUT THE CASE LAW, YOU KNOW, THAT IS OUT THERE, AND THE WAY, AND HOW DIFFICULT, AT LEAST SUPERFICIALLY, IT APPEARS TO ME, TO APPLY A CONCEPT LIKE THIS, TO A VARIETY OF INSTANCES, WHEREAS THE CASES THAT YOUR OPPONENT CITES, AT LEAST SEEM TO HAVE SIMPLICITY IN THEIR FAVOR, AS FAR AS THE WAY THAT THAT WORKS.

YES. A COUPLE OF THINGS. YES. AS TO THE INSURED'S ABILITY TO UNDERSTAND OR KNOW EXACTLY HOW MUCH COVERAGE THEY ARE GOING TO HAVE TO ANY PARTICULAR CASUALTY THAT IS GOING TO INCUR WITH CRAZIER FACTS THAN THE NEXT ONE I CAN'T REALLY PROVIDE THAT, YOUR HONOR. ALL I CAN SAY IS THAT THE PARTIES TO A CONTRACT, WE HAVE TO LOOK AT THE OBJECT I HAVE MEANING OF THE WORDS THEY USE AND APPLY THEM. SECONDLY, AS TO WHETHER OR NOT THIS TEST IS WORKABLE AND PLIABLE -- AND APPLYABLE, I FEEL VERY STRONG THAT THIS TEST CAN BE APPLIED TO ANY PARTICULAR SITUATION THAT OCCURS, AND I AM NOT TELLING YOU THAT EACH ONE IS GOING TO BE EASY AS THE NEXT ONE BUT WHAT I AM SAYING, YOUR HONOR IS THAT, IF YOU WERE GOING TO DRAFT A LAW SCHOOL EXAM AND YOU WANTED TO STUMP YOUR CLASS, YOU WOULDN'T GIVE THEM THESE PARTICULAR FACTS, BECAUSE IT JUST A ALL CAME DOWN AND -- IT JUST ALL CAME DOWN AND ALL OCCURRED AND IT WAS ALL OVER VERY QUICKLY. IT WAS ALL RELATED. IT WAS THE SAME PEOPLE FIGHTING. IT WAS THE SAME ASSAILANT, IT WAS AT THE SAME PLACE, AND IT WAS JUST ALL RELATED. MR. CHIEF JUSTICE

JUSTICE QUINCE HAD A QUESTION.

I NEED YOU TO EXPLAIN TO ME, IN ANSWER TO JUSTICE PARIENTE'S QUESTION, YOU SAID THAT THE FOCUS HAD TO BE ON WHAT EXPOSED THE INSUROR TO LIABILITY.

THE INSURED, YOUR HONOR.

THE INSURED. THE POLICYHOLDER.

IF THAT IS THE CASE, I AM NOT SURE I UNDERSTAND HOW YOU EVER GET TWO OCCURRENCES ON THE SAME NIGHT, BECAUSE IF YOU ARE FOCUSING IN ON THE FACT THAT THE INSURED HAD NO

SECURITY.

YES.

THEN THAT IS A CONTINUOUS THING THAT HAPPENED ALL NIGHT, SO WOULD YOU ANSWER JUSTICE LEWIS'S QUESTION THAT YOU COULD HAVE TWO INCIDENTS? I AM, IT SEEMS TO ME THAT YOU ARE TAKING SOME INCONSISTENT POSITIONS HERE.

YOUR HONOR, WHAT WE ARE SAYING IS THAT THE WAY THAT THE CAUSATION THEORY OF DETERMINING THE NUMBER OF OCCURRENCES UNDER AN INSURANCE POLICY WORKS IS THAT THERE IS A PLACE IN THAT ANALYSIS FOR WHAT IS KNOWN AS THE INTERVENING CAUSE, WHERE THE CAUSATION BREAKS, AND THE EASIEST EXAMPTOLL EXPLAIN IT, YOUR HONOR, WOULD BE A SITUATION LET'S TAKE IT OUT OF NEGLIGENT SECURITY. LET'S TAKE IT TO DRIVING A CAR F A PERSON IS DRIVING A CAR DOWN THE STREET AND, YOU KNOW, LOOSE DOWN AT A NEWSPAPER ON HIS FEET AND THEN STRIKES VICTIM A, AND THEN AFTER THAT ACCIDENT, DOESN'T STOP, HAS A CALLOUS CONSCIOUS AND KEEPS GOING, GAINS CONTROL OF HIS CAR, AND LOOSE DOWN AT THE UP IN AGAIN AND STRIKES VICTIM B, YOU HAVE A TRUE BREAK IN CAUSATION. YOU HAVE A STOP IN THE EFFECT OF THE FIRST NEGLIGENCE. IT WAS A DIFFERENT NEGLIGENCE.

IF WE GO BACK TO THIS SITUATION, THEN WHAT YOU ARE SAYING, THEN, IS THAT WHILE YOU HAD A DUTY TO HAVE SECURITY AT THE BEGINNING OF THE NIGHT, AND SOMETHING, SOME INCIDENT TAKES PLACE, YOU, THEN, END UP WITH A DIFFERENT DUTY? AN ADDITIONAL DUTY?

WELL, I WOULD SURMISE, YOUR HONOR, THAT, IF THE PLAINTIFF'S LAWYER WHO HAD THE SECOND CASE WOULD PROBABLY BE CRITICAL OF THE FACT THAT THE DEFENDANT DID NOT REACT AND PROVIDE BETTER SECURITY, WHEN HE KNEW THAT THERE WAS TROUBLE THAT NIGHT. SO I AM SAYING, YOUR HONOR, IT WOULD JUST E DISCREET NEGLIGENCE AT DIFFERNT TYPES, CAUSING DIFFERENT DAMAGES. THAT IS THE VERY DIFFICULT CASE TO CONVINCE A COURT THAT YOU HAVE ONLY GOT ONE OCCURRENCE.

BECAUSE THE FOCUS IS ON WHAT EXPOSES THE INSURED TO LIABILITY SO WE GO BACK, NO MATTER HOW YOU SLICE IT, IT IS FOCUSING ON THE ACTUAL EVENT THAT CAUSES THE INJURY, SO FOR EXAMPLE, IF YOU HAD A SITUATION WHERE YOU HIRED SOMEBODY WHO IS A, DRANK ALCOHOL AND YOU WERE BEING SUED BECAUSE THAT GUY WENT OUT ON A PARTICULAR NIGHT AND HAD A SERIES OF ACCIDENTS, THE ONE THAT YOU WERE BEING SUED BECAUSE, IT FOR THE SAME EXACT THING THAT THE PERSON WAS, YOU NEGLIGENTLY FAILED TO CHECK THEIR BACKGROUND, AND THAT IS THE UNDERLYING TORTIOUS ACT, DOESN'T CHANGE THROUGHOUT THE NIGHT, BECAUSE YOU ARE IN SOME OTHER JURISDICTION. THERE IS FOUR ACCIDENTS. WE KNOW, IF WE JUST TAKE THAT COMMON EXAMPLE, THERE IS NOT ONE OCCURRENCE. THERE ARE FOUR OCCURRENCES. CORRECT?

THE CASES, IN SITUATIONS LIKE THAT, MY UNDERSTANDING OF HOW THE COURTS HAVE TREATED IT IS THAT, IF THE ACTOR WHO INFLECTS THE INJURY IS AN AGENT OF THE INSURED, AND THAT ACTOR IS GETTING INVOLVED IN SEPARATE ACCIDENTS, THEN YOU HAVE MULTIPLE OCCURRENCES, BUT THE OTHER SITUATION, WHICH IS CLOSER TO WHAT WE HAVE HERE, WOULD BE A SITUATION SUCH AS IN THE CONTINENTAL VERSUS, I AM SORRY, THE TRAVELERS VERSUS --

MY HYPOTHETICAL, THERE ARE FOUR SEPARATE ACCIDENTS.

THE ACTOR WAS AN AGENT OF THE INSURED. I BELIEVE THAT WOULD BE A BETTER CASE FOR FOUR SEPARATE ACCIDENTS BUT THE CLOSE SITUATION THAT IS A DIFFERENT SITUATION, YOUR HONOR, IS THE SITUATION, IN OLIVE SPORTING GOODS, WHICH IS TRAVELERS INDEMNITY VERSUS OLIVE SPORTING GOODS FROM KENTUCKY, AND I CAN'T REMEMBER THE YEAR, BUT THAT WAS A SITUATION WHERE AN INSURED STORE NEGLIGENTLY SOLD A FIREARM TO A CUSTOMER, AND THAT CUSTOMER WENT OUT AND SHOT MULTIPLE PEOPLE. IT WAS THE SAME NEGLIGENCE, AND IT

WAS JUST PLAIN OUT AGAINST MULTIPLE VICTIMS, AND THE COURT, THERE, FOUND THAT THERE WAS ONLY ONE OCCURRENCE, SO WHAT WE ARE SAYING HERE, IS THAT IN THIS PARTICULAR CASE, THERE WAS NO DOUBT WHAT HAPPENED IN THAT LOBBY THAT NIGHT.

LET ME STOP YOU FOR A MINUTE THOUGH, BECAUSE THE DIFFICULTY WE ARE HAVING, I GUESS, IS THAT YOU GIVE THE ILLUSTRATION OF THE KENTUCKY CASE, AND MY UNDERSTANDING OF YOUR ANALYSIS HERE IS THAT IT WOULD BE CONTRARY TO THE HOLDING OF THE KENTUCKY CASE, THAT YOU WOULD AGREE THAT, IF THERE WERE FOUR SEPARATE OCCURRENCES, WATCH OUT WITH THE USE OF THE WORD OCCURRENCE, THAT THERE WOULD BE SEPARATE LIABILITY FOR EACH OF THOSE. IN OTHER WORDS, THAT YOUR VIEW THAT YOU HAVE EXPRESSED TO US HERE, AND AS YOU HAVE EXPLAINED IT, WOULD BE CONTRARY TO THE HOLDING OF THE KENTUCKY CASE, BECAUSE YOU WOULD NOT SIMPLY FOCUS ON THE LETTING THEM SLIP BY THE DOOR, YOU KNOW, WITHOUT PROPER IDENTIFICATION OR SECURITY OR WHATEVER. THAT WOULDN'T BE, WHEREAS THE KENTUCKY COURT DID FOCUS ON THAT YOU KNOW, OPERATIVE ACT, AND LIMITED, THEN, RESPONSIBILITY. AFTER THAT, NO MATTER HOW MANY TIMES THERE WAS A CONSEQUENCE OF THAT. I MEAN, SO YOU ARE CONFUSING ME, IN THE WAY THAT YOU ARE PRESENTING THAT. YOU ARE NOT ADVOCATING THE POSITION OF THE KENTUCKY COURT, AS I UNDERSTAND IT. IS THAT CORRECT?

THAT'S NOT CORRECT, YOUR HONOR.

YOU ARE ADVOCATING IT.

I AVE CITED --

SO WE ARE ALL THE WAY BACK TO IT IS SIMPLY THE ONE BREACH SECURITY, OKAY, NO MATTER HOW MANY PROBLEMS OCCUR AS A CONSEQUENCE OF THAT.

HERE IS WHAT I AM SAYING, YOUR HONOR. I AM SAYING THAT CONTINENTAL VERSUS HANCOCK, THE KENTUCKY CASE INVOLVING STORE THAT ALLEGEDLY NEGLIGENTLY SOLD A FIREARM TO ONE PERSON, WHO TOOK THAT FIREARM AND SHOT MULTIPLE PEOPLE, THAT CASE DIRECTLY AND SPECIFICALLY SUPPORTS OUR POSITION IN THIS CASE, BECAUSE IN THAT SITUATION, YOU HAVE TE ESSENTIAL NEGLIGENCE, WHICH WAS THE NEGLIGENT SALE OF THE WEAPON AND THAT FROM THAT NEGLIGENCE, THERE WAS NO MORE NEGLIGENCE ON THE PART OF THE INSURED, IN BETWEEN ITS SALE OF THAT WEAPON TO THAT OFFENDER, AND THEN THE NUMBER OF PEOPLE THAT WERE HURT BY THAT GUN ON THAT EVENING. AND THAT IS THE SAME SITUATION WE HAVE HERE, AND SO, YOUR HONOR I AM SAYING THAT THAT CASE SUPPORTS US. IN RESPONSE TO JUSTICE PARIENTE, I WAS RESPONDING TO A SITUATION WHERE YOU MIGHT HAVE AN AGENT OF AN INSURED WHO COMMITS, AN AGENT OF THE INSURED, NOT A THIRD PARTY, LIKE OUR ASSAILANT OR THE KENTUCKY ASSAILANT, BUT YOU ARE TALKING ACCOMPANY ONLY BEING ABLE TO ACT THROUGH ITS AGENTS, AND THAT PERSON HAS FOUR SEPARATE ACCIDENTS, SO IT IS DIFFERENT.

I UNDERSTAND.

SO IN, SAY IT IS AN APARTMENT SECURITY ISSUE, THAT IS THEY FAIL TO PROVIDE PROPER SECURITY, AND IN ONE NIGHT, TWO WOMEN AND TWO DIFFERENT APARTMENTS ARE RAPED, IS THAT ONE OCCURRENCE UNDER YOUR DEFINITION OF, UNDER YOUR POICY, OR TWO OCCURRENCES?

I BELIEVE, YOUR HONOR, AND WE HAVE TO HAVE A FAIR AND SENSIBLE APPLICATION OF THE CAUSE ANALYSIS. WE HAVE TO LOOK ATWHAT HAPPENED AND WHEN DID IT HAPPEN, WHERE DID IT HAPPEN AND WHAT THE FACTS WERE PERTAINING TO THAT, ALL THOSE PEOPLE WHO WERE INJURED THAT NIGHT, AND WAS IT A CONTAINED EVENT OR WAS IT SOMETHING WHERE IT WAS JUST COMPLETELY UNRELATED AS TO TIME AND SPACE AND DISTANCE.

SO IF WE HAVE TO DO THAT, DOES THAT MEAN THAT THE DEFINITION OF "OCCURRENCE" IN THIS POLICY IS ACTUALLY AMBIGUOUS?

ABSOLUTELY NOT, YOUR HONOR, PARTICULARLY IN THIS CASE. THIS DEFINITION IS SPECIFIC, IN TERMS OF WHAT IT SAYS AN ACCIDENT, INCLUDING CONTINUOUS OR REPEATED EXPOSURE TO THE SAME GENERAL HARMFUL CONDITIONS. WE ARE GOING TO LAY ONTO THAT THE CAUSATION THEORY WHICH FLORIDA HAS EMPLOYED, AND A REVIEWING COURT IS GOING TO LOOK AT ANY GIVEN SET OF FACTS AND MAKE A DETERMINATION WHETHER OR NOT THERE WAS A BREAK IN THE CHAIN OF CAUSATION, AND THAT CAN BE DONE. COURTS ARE COMPLETELY CAPABLE OF DOING THAT IT IS DONE EVERYDAY, AND IT IS JUST GOING TO DEPEND ON THE FACTS, YOUR HONOR, OF APPLYING THE POLICY LANGUAGE TO A PARTICULAR SET OF FACTS. AND IN THE CASE BEFORE THE COURT IT IS NOT A DIFFICULT CASE, AND YOU KNOW, WITH REGARD TO EXACTLY HOW THIS INCIDENT OCCURRED.

MR. JOY, GOING BACK TO YOUR CONDITION SITUATION, YOU DO AGREE THAT THOSE, THAT KIND OF CLAUSE WAS PLACED ON A LIGHT POLICY, TO EXPAND RATHER THAN REDUCE COVERAGE. DO YOU NOT? AND THEN THE FOLLOW-UP TO THAT IS THAT THAT HAS BEEN APPLIED IN THE TOXIC TORTS AND POLLUTION CASES, WHERE YOU HAVE DRY CLEANING COMPANIES. YOU DON'T HAVE A BRILLIANT EVENT. YOU HAVE GOT THE EXPOSURE. THOSE ARE REALLY TWO QUESTIONS. NUMBER ONE IS TO BROADEN AND NUMBER TWO IS NOT REALLY DESIGNED FOR THIS KIND OF INCIDENT, IS IT?

I BELIEVE, YOUR HONOR, THAT THE CONTINUING EXPOSURE CLAUSE WAS INITIALLY OR ORIGINALLY INSERTED FOR REASONS PERTAINING TO, YOU KNOW, SLOW TORTS AND THINGS LIKE THAT, BUT, YOUR HONOR, WE HAVE TO TAKE THE WORDS AS THEY ARE WRITTEN IN THE INSURANCE POLICY, AND WHAT THE WORDS TALK ABOUT IS EXPOSURE TO HARMFUL CONDITIONS. IT DOESN'T SAY WHAT TYPE OF EXPOSURE OR WHAT TYPE OF HARMFUL CONDITIONS, AND WHAT WE ARE SAYING, YOUR HONOR, IS THAT, WHEN THIS ISSUE COMES TO THE COURT, THE COURT HAS TO TAKE THE FACTS OF THE CLAIM AND THE LANGUAGE OF THE INSURANCE POLICY AND SAY WAS IT OR WASN'T IT, AND WHAT WE ARE SAYING IS THAT, IF AN ASSAILANT IN A LOBBY -- MR. CHIEF JUSTICE

MR. JOY, YOU ARE OUT OF TIME. THANK YOU VERY MUCH. MR. TURNER, REBUTTAL.

QUICKLY --

LET ME ASK YOU THIS QUESTION.

OKAY, SIR.

TAKE A SITUATION. IF A CLUB BOUNCER, LET'S SAY, HAD, IN AN ATTEMPT TO CONTROL THE CROWD, PUSHED ONE PERSON, AND IN A DOMINO EFFECT THAT PERSON HAD BOUNCED INTO THREE OR FOUR PEOPLE, WHAT WOULD YOU HAVE?

I THINK THAT IS A CONTINUOUS FORCE SET IN MOTION. I THINK THAT IS ANSWERED BY MCGUAIG.

THE THE SAME BOUNCER, THEN, PUSHES ONE PERSON AND MOVES FROM THAT PERSON AND GOES AND PUSHES SOMEBODY ELSE AND INJURIES BOTH OF THEM.

TWO OCCURRENCES.

THAT IS A DIFFERENT SITUATION.

YES, SIR.

YOU HAVE TWO OCCURRENCES THERE.

YES, SIR. I THINK THE COURT BROUGHT OUT A LOT OF QUESTIONS THAT I THINK ARE EXCELLENT, BECAUSE THE WORD "INCIDENT" WAS USED. THE WORD "INCIDENT" WAS USED. IT DOESN'T DEFINE OCCURRENCES. INCIDENT. AND IT DOESN'T PRETEND TO SAY. WHAT HAPPENS IN THIS POLICY, YOU GOT NO AGOGATION CLAUSE IN THIS POLICY. AND ALL THE GOOD ADVOCATES IN THE WORLD CAN'T MAKE UP FOR THAT FACT AND THE COURT SAID, EVEN IN CONTINUOUS EXPOSURE CASES, JUDGE LEWIS, THAT THE NOTION THAT YOU CAN AGGREGATE THESE MERELY BY THE EXPOSURE LANGUAGE, YOU MUST HAVE AN AGOGATION CLAUSE. THEY NEED TO HAVE AN AGOGATION CLAUSE FOR THE CONTINUOUS EXPOSURE ISSUES OR INJURIES, OR FOR THE ACCIDENTS. THEY DON'T HAVE IT IN THE POLICY THAT IS THE PROBLEM, IF THEY COULD GET ONE, GET IT THROUGH THE INSURANCE COMMISSIONER, SO I THINK ONE OF THE CRITICAL THINGS THAT I HEARD IN ORAL ARGUMENT WAS A CONCESSION THAT McGQUAIG WAS CORRECTLY DECIDED. BECAUSE IF MR. FRANKIS, THE EMPLOYER, HAD SHOT TWO PEOPLE, HE WOULD BE -- IF MR. FRIAKIS, THE OWNER, HAD SHOT TWO PEOPLE, HE WOULD BE LIABLE. BUT YOU HAVE GOT AN INTRUDER AS AN INTERVENING CAUSE THAT BREAKS THE CHAIN. YOU DON'T HAVE MERE HARM WITH NEGLIGENT SECURITY. YOU HAVE GOT TO HAVE SOMETHING THAT ACTUALIZES IT. YOU HAVE GOT TO HAVE SOMETHING THAT AFFECTS IT, AND THE OYSTER CASE SAYS THE EVENT THAT MANIFEST THES THE NEGLIGENCE, WHICH IS A WAY TO LOOK AT IT. THAT IS WHAT TRIGGERED THE LIABILITY. HE CONCEDES THE TWO OF THOSE EVENTS. HE CONCEDES McQUAIG, AND HE DOESN'T HAVE A CASE, DESPITE WHAT IT MIGHT LOOK TO BE AT THE FIRST LOOK THROUGH IT. THAT IS THE PURPOSE OF HAVING AN INSURANCE POLICY AND THE REASON FOR THIS CASE FORM THE INSURANCE COMPANY HAS THE RIGHT TO PUT AN AGOGATION CLAUSE IN THERE, PUT GOODLANGUAGE IN THERE, IF EY ARE TALKING ABOUT A SERIES OF INTERRELATED EVENTS OR SERIES OF INCIDENTS OR ANYTHING OF TAT NATURE.

YOU DON'T CONCEDE THAT THE POLICY CAN BE CONSTRUED TO MAKE IT DIFFERENT, IF THE PERSON THAT DID THE SHOOTING HERE WAS AN INSANE EMPLOYEE OF SOMEBODY THAT HAD GONE, MOMENTARILY CRAZY, AND JUST DID THE SAME THING THAT IS THE INTRUDERS DID.

I STILL THINK IT WOULD BE TWO OCCURRENCES, IF THEEMOYEE SHOT TWICE. I THINK THAT IS THE POINT. THERE IS TWO OCCURRENCES THERE. I THINK THAT, THE ISSUE OF WHETHER IT CAN BE CONSTRUED EITHER WAY, SOMEONE, ONE OF THE JUDGES RAISED AMBIGUITY ISSUE, IS A GAIN, THE INSURANCE COMPANY A GAIN, BECAUSE THE CONSTRUCTION OF THE INCIDENTS, IF THE LOWER COURTS HAD A QUESTION, YOU CAN REST ASSURED THAT MR. CROWS-COULDN'T CONSTRUE IT. THE WAY THEY ARE CONSTRUING IT AS IN OYSTER, SO YOU HAVE THE INSURANCE KICK N THE INSURED GETS THE BENEFIT OF THE DOUBT. HE HAS PAID HIS PREMIUMS AND HE IS ENTITLED TO COVERAGE AND THE VICTIMS ARE ENTITLED TO COVERAGE. MR. CHIEF JUSTICE

THANK YOU, MR. TURNER, AND THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.