IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CRYSTAL L. MADDOX,

Appellant,

v. Case No. 5D12-3577

FLORIDA FARM BUREAU GENERAL,
ETC., ET AL.,

Appellee.

________________________________/

Opinion filed September 13, 2013

Appeal from the Circuit Court
for Brevard County,
John M. Harris, Judge.

Robert J. Telfer, Jr., of Cianfrogna, Telfer,
Reda, Faherty & Anderson, P.A., Titusville,
for Appellant.

John D. Russell, of Burr & Forman LLP,
Tampa, for Appellee.

PALMER, J.

In this dog bite case, Crystal Maddox appeals the final judgment entered by the trial court granting declaratory relief to Florida Farm Bureau General Insurance Company. Determining that the trial court erred in concluding that only one "occurrence" under a homeowner's insurance policy took place, we reverse that portion of the final judgment.

At the time of the dog attack, Maddox, together with her two sons, Logan and Ivan, lived with her boyfriend, Robert Bullard, and his two dogs, Dixie and Sugar, in Bullard's home. As Maddox was dressing Logan, she heard Ivan screaming. Maddox and Bullard ran to the spare bedroom where they saw Dixie biting Ivan. They tried to get Dixie to release her grip on Ivan's face. After Dixie finally released Ivan's face from her mouth, she bit Maddox in the face. Both Ivan and Maddox sustained injuries from the dog bites.

Bullard's home was insured under a homeowner's policy issued by Florida Farm Bureau General Insurance Company. The policy declarations provided Bullard with personal liability coverage limited to $100,000 for each "occurrence." The policy provided, in pertinent part, the following conditions for personal liability:

> 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".

The policy contained the following relevant definition:

> "Occurrence" means 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."

Maddox filed a complaint against Bullard seeking damages for the injuries she sustained in the dog attack. Florida Farm Bureau thereafter filed a complaint for declaratory relief naming both Bullard and Maddox as defendants. The complaint alleged that Florida Farm Bureau was not liable to pay any damages to Maddox

because, under Bullard's policy, the damages claimed by Maddox for her bodily injuries were subject to the same occurrence limit applicable to the damages for injuries suffered by Ivan, and that the per occurrence limit had been exhausted because $100,000 had already been paid to Ivan. The complaint also requested the court to enter an order declaring that the entire dog attack constituted one occurrence under Bullard's policy. Bullard and Maddox filed separate answers asserting that the injuries to Ivan and Maddox were sustained in separate occurrences.

Florida Farm Bureau and Maddox filed competing motions for summary judgment. The trial court granted Florida Farm Bureau's motion, finding the dog bite injuries were subject to the one occurrence limit in Bullard's policy.

Maddox appeals, arguing that the trial court erred in granting summary judgment in favor of Florida Farm Bureau because the dog bites that she and Ivan sustained were separate occurrences. We agree.

In the absence of explicit policy language to the contrary, the Florida Supreme Court has adopted the "cause theory," which looks to the cause of a party's injuries for determining the number of "occurrences" under an insurance policy. See Koikos v. Travelers Ins. Co., 849 So. 2d 263, 269 (Fla. 2003). Here, the cause theory must be applied because Bullard's policy contains no explicit contrary language.

Whether the injuries that Maddox and Ivan sustained constitute one occurrence is controlled by American Indem. Co., v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983), and Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003).

In McQuaig, two deputy sheriffs responded to a residence where three shots were fired. The first shot struck one officer. The third shot struck another officer. The

second shot struck both officers. In issuing declaratory relief, as sought by the property owner and his insurer, American Indemnity, the trial court held that each shotgun blast was a separate occurrence. American Indemnity appealed arguing that there was only one occurrence for the following three reasons: (1) one instrumentality of danger-the shotgun-caused the injuries, (2) the injuries were caused in one specific location, and (3) the injuries occurred in a short time period of less than two minutes. In rejecting this argument, our court recognized that, under the cause theory, "the inquiry is whether 'there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages." McQuaig, 435 So. 2d at 415 (quoting Bartholomew v. Ins. Co. of N. America, 502 F. Supp. 246 (D.R.I. 1980)).

In Koikos, George Koikos rented his restaurant to a fraternity for a graduation party. During the party, an intruder fired two separate, but nearly concurrent, rounds. Two guests of the fraternity party were struck by a single bullet. In addition, three other guests were injured. Koikos filed an action against its insurer, Travelers Insurance Company (Travelers) seeking declaratory relief. The case was removed to federal court. The federal district court granted summary judgment for Travelers, holding that the shooting incident amounted to one occurrence under the policy. Koikos appealed. The Eleventh Circuit certified the question to the Florida Supreme Court, and the Court concluded that each shooting of a separate victim constituted a separate occurrence. The Court held that "it is the act that causes the damage, which is neither expected nor intended, from the standpoint of the insured, that constitutes the 'occurrence." The Court also rejected Travelers' argument that all of the shots should be considered one

occurrence because of the close proximity in time and space of the individual shots fired, concluding:

> [U]sing the number of shots fired as the basis for the number of occurrences is appropriate because each individual shooting is distinguishable in time and space.

Id. at 272.

In this case, the immediate injury-producing acts were the dog bites, and the dog bite that inflicted the injuries to Maddox was not the same dog bite that inflicted the injuries to Ivan. Therefore, each dog bite was a separate occurrence.

While Florida Farm Bureau argues that the "dog attack" constituted one occurrence, the Koikos Court rejected a similar argument, concluding that there was no unambiguous language in the policy to put "Koikos on notice that 'a series of similar causes' would be considered one occurrence." 849 So. 2d at 273. The Court further stated that the policy's definition of occurrence was susceptible to two reasonable interpretations (specifically, that the "[o]ccurrence' can reasonably be stated to refer to the entire shooting spree or to each separate shot that resulted in a separate injury to a separate victim."). Therefore, the policy must be construed in favor of the insured. See State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998) (explaining that where policy language is subject to differing interpretations the language "should be construed liberally in favor of the insured and strictly against the insurer.").

Likewise, in this case, it is reasonable to construe the occurrence as the entire dog attack or as each separate dog bite. Because ambiguous provisions must be construed against the insurer, the occurrence language in the instant policy must be

construed as meaning each separate dog bite that resulted in a separate injury to a separate victim was a separate occurrence. For these reasons, the trial court erred in holding that the injuries which Maddox and Ivan sustained were not separate occurrences under Bullard's policy.

In closing, we hold that, with respect to paragraph two of the final judgment which relates to intentional infliction of emotional distress, the trial court properly granted declaratory relief for Florida Farm Bureau.

AFFIRMED in part; REVERSED in part; REMANDED.

ORFINGER, J., concurs specially, with opinion.
BERGER, J., concurs in part and dissents in part, with opinion.

I concur with the majority opinion. I write separately to address the argument made in Judge Berger's thoughtful dissent.

The facts of this case are not in dispute. Bullard's dog, Dixie, attacked Ivan, a young child. As Bullard and Maddox, Ivan's mother, tried to get Dixie to release her grip on Ivan's face, Dixie attacked Maddox. Both Ivan and Maddox sustained injuries from the dog bites. The dispute here centers on whether this constitutes one or two "occurrence(s)" under Florida Farm Bureau's policy. I agree that this case is controlled by the supreme court's decision in Koikos v. Travelers Insurance Co., 849 So. 2d 263 (Fla. 2003).

In Koikos, two people were shot by an assailant who fired multiple times in a restaurant. They filed separate lawsuits against Koikos, the restaurant's owner, claiming that he negligently failed to provide adequate security at his restaurant. Koikos, in turn, sued his insurer, Travelers, in a declaratory judgment action. Koikos argued in favor of finding multiple occurrences under the policy, contending that the determination of the number of occurrences should be based on the immediate cause of the injuries—the gunshots. In contrast, Travelers argued that the focus should be on Koikos's underlying negligence—his alleged failure to provide appropriate security. Koikos, 849 So. 2d at 265, 267. The supreme court held that the proper focus should be on "the act that causes the damage," the gunshots, not Koikos's failure to protect his patrons. "Focusing on the immediate cause-that is the act that causes the damage-rather than the underlying tort-that is the insured's negligence-is also consistent with the interpretation of other forms of insurance policies." Id. at 271. In its opinion, the supreme court agreed with this Court's

decision in American Indemnity Co. v. McQuaig, 435 So. 2d 414 (Fla. 5th DCA 1983), which held that consistent with the "cause theory," an "occurrence" is the *immediate injury-producing act and not the underlying tortious omission.* Id. Consequently, "[t]he act which causes the damage constitutes the occurrence." Phillips v. Ostrer, 481 So. 2d 1241, 1247 (Fla. 3d DCA 1985); see New Hampshire Ins. Co. v. RLI Ins. Co., 807 So. 2d 171 (Fla. 3d DCA 2002).

In Koikos, the gunshots, not the negligent security, directly caused the injury to the plaintiffs. Likewise, in McQuaig, the immediate cause of the plaintiffs' injuries were the gunshots, not the shooter's insanity. Similarly here, the "immediate cause" of the injuries to Ivan and Maddox was Dixie's attacks, not Bullard's underlying negligence of failing to control his dog, although that was, no doubt, a factor.

The dissent points to two authorities from other jurisdictions that might, if controlling, lead us to conclude that only one occurrence occurred here. Indeed, the state and federal courts have struggled with this issue and reached varying conclusions on the seemingly straightforward question of what constitutes a single "occurrence" within the meaning of an insurance policy. See generally Michael P. Sullivan, Annotation, What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence, 64 A.L.R.4th 668 (1988). Nonetheless, unless our supreme court recedes from Koikos, I believe the majority opinion is correct.

I agree with the majority that the trial court properly granted declaratory relief for Florida Farm Bureau on Crystal Maddox's claim for emotional distress. However, I do not agree that the injuries sustained by Maddox and her son, during a single dog attack, constituted two occurrences under Bullard's homeowners insurance policy. In my view, the dog attack was the sole "proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages" to both Maddox and her son and, thus, constituted only one occurrence under the policy. See Am. Indem. Co. v. McQuaig, 435 So. 2d 414, 415 (Fla. 5th DCA 1983).

The Florida Supreme Court has adopted the cause theory when analyzing whether more than one occurrence has taken place under an insurance policy. See Koikos v. Travelers Ins. Co., 849 So. 2d 263, 271 (Fla. 2003). Under this theory, "[i]t is the act that causes the damage, which is neither expected nor intended from the standpoint of the insured, that constitutes the 'occurrence.'" Id.

While the majority is correct that the cause theory must be applied in this case, I am not convinced that Koikos, or McQuaig upon which it relies, requires reversal.

Both Koikos and McQuaig involved individual tortfeasors firing multiple gunshots resulting in injury. In McQuaig, the insured, who claimed insanity, fired several shotgun blasts within a two-minute period that injured two people. 435 So. 2d at 415. Utilizing the cause theory, this court held that each shotgun blast was a separate occurrence. Id. at 416. However, we noted that the result would have been different if "there was a single force, [such as one shot striking multiple people] that once set in motion caused multiple injuries." Id. at 415.

In Koikos, the shooter was not the insured, but rather a third-party tortfeasor. 849 So. 2d at 265. Relying on the McQuaig approach, the Florida Supreme Court concluded:

> [C]onsistent with the "cause theory" that in the absence of clear language to the contrary, when the insured is being sued for negligent failure to provide security, "occurrence" is defined by the immediate injury-producing act and not by the underlying tortious omission. Thus, in this case, the immediate causes of the injuries were the intervening intentional acts of the third party - the intruder's gunshots.

Id. at 271-72.

Had the injuries to Maddox and her son been caused by the intentional acts of Bullard or some other individual, I would agree with the majority that, based on Koikos, each act resulting in injury would constitute a separate occurrence. However, those are not the facts in this case. Maddox and her son were not injured by another person, they were injured by a dog, the insured's property, during a single, uncontrollable attack. See Helmy v. Swigert, 662 So. 2d 395 (Fla. 5th DCA 1995) ("Under Florida law, a dog is considered to be personal property."). Indeed, the record reflects the dog in this case was out of control from the time it first bit Maddox's son, through the time it bit Maddox in her effort to stop the attack, until the time Maddox and her son were able to flee to safety. Accordingly, much like the cases involving out of control motor vehicles, the dog attack in this case was the single force, that once set in motion caused the injury to Maddox and her son. See McQuaig, 435 So. 2d at 415; see also Truck Ins. Exch. v. Rohde, 303 P.2d 659 (Wash. 1956) (injuries to three motorcyclists from motorist who veered into echelon constituted one occurrence); St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955) (truck colliding with train, damaging sixteen cars belonging to fourteen owners, is one occurrence).

This view is consistent with the cause theory outlined in Koikos and McQuaig. Here, the cause of the injury was the dog attack, the effect of the attack was the injury to Maddox and her son. Since Florida does not follow the "effect theory,"[1] I believe the trial court was correct in determining the injuries to Maddox and her son were the result of one occurrence.[2]

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[1] "Under the minority view, or 'effect' theory, the courts have held that the 'per accident' clause in insurance policies is to be construed as referring to the result or effect of the accident on the persons injured or damaged and not as referring to the cause of the accident." McQuaig, 435 So. 2d at 415 n.1.

[2] Based on the specific facts of this case, I find no ambiguity in the insurance contract.