EFiled: Jan 29 2015 09:22AM EST
Transaction ID 56683365

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: CARBON MONOXIDE EXPOSURE LITIGATION Civil Action No. 14-C-8000

THIS DOCUMENT APPLIES TO THE FOLLOWING CASES:

NAUTILUS INSURANCE COMPANY,
Intervening Plaintiff,

v.

PREMIER POOLS, LLC, et al.
Defendants.

ORDER

On December 18, 2014, the Presiding Judges assigned to the Carbon Monoxide Exposure Litigation heard oral argument on cross motions for summary judgment filed by Plaintiff Nautilus Insurance Company and also by Defendants Lori Burnside, Individually and as Mother and Next Friend of D.B., an infant; Danielle Mallow, Individually and Next Friend of L.M., an infant; Cory Epling, Amanda Epling and K.E., an infant; Edison Holeston and Karen Holeston.

Nautilus Insurance Company ("Nautilus") argues that the facts and circumstances in this case were that the Holiday Inn Express Hotel & Suites, located at 95 RHL Boulevard, South Charleston, West Virginia ("the Hotel") contacted Premier Pools to complete installation of a pool heater at the Hotel. According to Nautilus, Mr. Combs, co-owner of Premier Pools, completed the entire job in one day, left the Hotel, and did not return until after January 31, 2012, when the pool heater caused carbon monoxide (CO) to be disbursed throughout the Hotel causing one death and multiple injuries to the guests and, therefore, there is only one "occurrence" as that term is defined in the insurance policy at issue.

Defendants argue there were multiple negligent acts by Premier Pools and its members, Steve Combs and Karen Combs, which caused or contributed to the pool heater leaking CO into the Hotel rooms undetected thereby causing injuries and death and, therefore, there were

multiple "occurrences" as that term is defined in the insurance policy at issue. Defendants contend that Premier Pools was at the Hotel on two occasions, first to assess the situation, then to complete installation of the pool heater. Defendants also assert that there were separate days on which Hotel management turned the pool heater on and off which caused the heater to emit CO of sufficient levels that there were separate incidents where guests were injured as a result of CO exposure.

FINDINGS OF FACT

The Presiding Judges have reviewed and considered *Plaintiffs'(sic) Motion and Memorandum in Support of Summary Judgment* (Transaction ID 56430091) e-filed December 5, 2014[1], the *Motion for Summary Judgment of Nautilus Insurance Company* (Transaction ID 56438517) e-filed December 8, 2014, the responses to each of these motions, and the oral argument presented by the parties. Having conferred with one another to ensure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges unanimously **FIND:**

1. Premier Pools LLC ("Premier Pools") was contacted prior to December 27, 2011 by Manisha Patel, the manager of the Hotel, to see if they would finish the job of installing a swimming pool heater located inside the Hotel.

2. On December 27, 2011, Steve Combs, Premier Pools' member and manager, visited the Hotel, inspected the pool area and heater and made a proposal to complete installation of the heater, which was accepted by Ms. Patel. The following day, Steve Combs brought some workers to the Hotel and performed the work.

[1] With the exception of Premier Pools LLC, Steve Combs and Karen Combs, the Defendants in the Complaint for Declaratory Judgment are former guests at the Hotel who filed individual civil actions alleging personal injury as the result of alleged exposure to CO while staying at the Hotel.

3. Steve Combs testified that he started Premier Pools "[b]ecause I was actually putting in a pool a couple or three different times and the compliance officer went by ... and found that I did not have a license and shut the job down …. And after that happened two or three times, I mean, it's rather embarrassing and let's try to do something so that we won't have this problem anymore." (Deposition of Steve Combs, pp. 19-20.) [2]

4. Steve Combs attempted to get a license to install residential pools, but was unsuccessful. He decided to arrange for his wife, Karen Combs, to get the contractor's license. (*Id.* at 20-21.) Steve and Karen Combs came to Charleston to obtain the contractor's license and the required insurance, and to set up a limited liability company. Karen Combs studied for the contractor's license, took the test, and passed it. Steve Combs neither studied for nor took the test. (*Id.* at 21.)

5. Steve Combs had never installed a pool heater in a commercial establishment such as the Holiday Inn. His only experience was with residential pools. (*Id.* at 22, 36.*)*

6. Karen Combs testified that she worked as a clerk at St. Mary's Medical Center for about 15 years. (Deposition of Karen Combs at p. 7.)[3] It was her husband's idea for the two of them to start a business. (*Id.* at 8-9.) She testified that they were "getting licenses so he could legally run the business … his business." (*Id.* at 10, 12.) As Mrs. Combs stated, "he told me this is what we need to be legal, so I can legally install pools, this is what we need." "So I took a couple of days off work and we went here and here and here and here, and we got what we needed." (*Id.* at 13.) "That is the first step. You have to have the contractor's license first, and

2 See Exhibit A of "Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment of Defendants Steve Combs and Karen Combs on Claims Against Them in Their Individual Capacities (Transaction ID 556422339**).**
3 See Exhibit B of "Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment of Defendants Steve Combs and Karen Combs on Claims Against Them in Their Individual Capacities (Transaction ID 556422339**).**

then you get the business license. Then you get the insurance,…" They then "went to the place where they give the test and picked up a book." (*Id.* at 14.)

7. Karen Combs described the test she took as "some OSHA stuff" stating "I learned it for what I needed to pass the test, and then I really didn't think about it again, so I didn't retain it." She said Mr. Combs did not take the test for the license for operation of Premier Pools. (*Id.* at 15-16.)

8. After she obtained the license, Karen Combs did not do any of the work. She did not design the pool installation, she did not advise her husband with respect to installation and, in fact, she admitted that she knows nothing about pool heaters. (*Id.* at 16-17.) Essentially, Karen Combs did nothing more than participate in setting up Premier Pools by studying for a license that permitted Premier Pools and Steve Combs, her husband, to perform work on residential pools pursuant to a general contractor's license. (*Id.* at 17-20.) Mrs. Combs "knew … the general [contractor's license] did state for residential." (*Id.* at 28.)

9. Steve Combs stated during his deposition that he was told, "the room [where the pool heater was located] was very tight" and the previous contractor had quit for that reason. (Deposition of Steve Combs at p. 23.) He further stated that during the installation he "picked the [pool heater] vent [pipe] up and set it on top of it." "The vent [pipe] was hanging out of the ceiling, right there by the heater, and I picked up on it, reached over and set it down on there." (*Id.* at 28-29.) He said he "had to pick up on it [the vent] a few inches." (*Id.* at 31.) Later, he admitted he had stated it may have been three to four inches or six to twelve inches. (*Id.* at 43.)

10. Mr. Combs, who was acting as an HVAC contractor at a commercial establishment: a) never asked to see the installation manual for the heater; b) never asked to see where the venting went beyond the interior room he was working in where the vent went through

the room's ceiling; and c) admitted he had no idea where the pool heater vent pipe went and did not ask anyone about it. (*Id.* at 32-33.) Mr. Combs knew the significance of a vent for a gas-fired pool heater and that it had to be vented to the outside. (*Id.* at 33.)

11. Even though Mr. Combs admitted that he picked the pool heater vent pipe up, moved it over and then set it down on the new pool heater, he "did not do any checks of the continuity of the vent system." (*Id.* at 45-46.) He "assumed" the pipe went through the roof. (*Id.*) Mr. Combs stated that he was aware of the dangers of carbon monoxide. (*Id.* at 59.) He was aware that the pool heater installation required having venting which provided air flow from the outside to the bottom of the heater and from the top of the heater. The installation manual explained the dangers of CO and described exactly what was required to make it safe. (*Id.* at 46-60.)

12. Mr. Combs admitted he knew the dangers to guests and employees but did not check the venting even though he moved the vent. He neither asked nor confirmed anything about the vent, did not read the instruction manual, and did not comply with the instructions on the unit itself. (See Exhibits 30-48 to Mr. Combs' deposition.)

13. Mr. Combs testified that he was contacted to "finish installing their pool heater." (*Id*. at 22.) When he first saw the heater room, the gas line was run to the heater, but the plumbing was not hooked up. Mr. Combs claimed that he told the Holiday Inn manager "you've got a huge filter in a little pool…we could make the filter smaller… ." And, on behalf of Premier Pools, he did that. (*Id*. at 25-26.) He took out the old pipes and replaced them with new pipes and a new smaller filter. (*Id*. at 26.) So they went one day and looked at the job and discussed it with the management as to what needed to be done. Then went back and worked on it later. (*Id*. at 24.)

14. The job was planned and agreed to on December 27, 2011. On that day, Defendants (Plaintiffs in the underlying personal injury cases) contend Steve Combs should have evaluated the pool heater, determined whether there were carbon monoxide detectors in the room, determined where the vent pipe was located in the Hotel, and determined what needed to be done to safely install a new gas fired pool heater in the Hotel.

15. Mr. Combs then returned to the hotel on December 28, 2011. "My brother and one of the gentlemen went and started tearing the old heater out and filter out while I went to get the new filter, and by the time I got there, they were almost done tearing the old one out. It was so big you couldn't carry it out… ." (*Id*. at 27.) "We took the old one out, we put the new one in, we did the plumbing. I believe I hooked up the electric line going…for the spark ignitor… ," and then I picked the vent up and set it on top of it." (*Id*. at 27-28.) "The vent was hanging out of the ceiling right there by the heater, and I picked up on it, reached it over and set it down on there – the exhaust fan." (*Id*. at 28.)

16. Management at the Hotel turned the pool heater on and off at different times. It is not clear at this point why, but it is clear that it occurred after the heater was installed by Premier Pools in December 2011.

17. Hotel guests, Danielle Mallow and Lori Burnside traveled to Charleston on January 21, 2012, to shop. They stayed at the Hotel with their teenage daughters. The evening, of January 21, 2012, they decided to swim. They went to the desk and asked the clerk about the pool. The clerk told them the pool was operational for the time being, but that "it keeps setting off the fire alarm and they may need to close it." (Affidavit of Lori Burnside.) The water in the pool was warm, but the air was cold in the room due to the exterior door being open. They were

told it was open to help ventilate the problem that was triggering the fire alarm. The pool was warm enough, given the temperature in the pool area, that the heater had to be on.

18. Hotel guest Amanda Epling testified that she checked into the hotel on January 28, 2012, and checked out on January 30, 2012. The temperature of the pool was cold on the 28th and they advised the desk clerk. (Deposition of Amanda Epling at 90-91.)

19. Hotel guest Danielle Sharot arrived at the Hotel on January 30, 2012, and was assigned Room 313. She decided to go to the pool to swim. When she arrived at the pool area she noticed the back door was propped wide open and there were no lights on in the room or in the pool. She went to the front desk and asked Hotel Manager Manisha Patel if the pool was closed. Ms. Patel told her the pool was not closed, but she had not had the time to turn things on yet. (Affidavit of Danielle Sharot).

20. Ms. Sharot followed Ms. Patel into the pool area and thought it odd that the door to the outside was propped so far open during winter months. She asked Ms. Patel if there was a reason why the door was open. Ms. Patel told Ms. Sharot there were construction workers who liked to park in the back of the hotel near the door to the pool area and, since the keypad did not work, the workers would prop the door open so they could come in that door. Ms. Patel turned the lights on and went into a small room where the heater was located to turn on the pool lights and blowers. Id.

21. The temperature in the pool was "freezing." The water was so cold that Ms. Sharot decided she would go to her room. At the elevator, Ms. Patel asked Ms. Sharot if she was finished swimming. When Ms. Sharot advised Ms. Patel the water was just too cold, Ms. Patel advised her she would turn the heat up in the pool. Ms. Sharot understood that Ms. Patel had turned the heater on but that she would turn it up higher. On January 31, 2012, the fire

department checked the water temperature and found that the temperature was 83 degrees, which was substantially higher than when Ms. Sharot was in the pool. Id.

22. The evidence indicates the pool heater was turned on and off by the staff at the Hotel at different times, and that the guests who are Defendants in this declaratory judgment action were in the Hotel during times when the Hotel pool heater was allegedly emitting sufficient CO to cause injury.

23. The Court **FINDS** there were several times when Premier Pools and the Combs could have done things at different times which were within their duty and responsibility to avert the injuries complained of in these cases.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

1. The Nautilus Insurance Policy provisions that Defendants (Plaintiffs in the underlying personal injury cases) rely upon for their position that they are entitled to summary judgment are as follows:

a. Nautilus Commercial General Liability Coverage Form, CG 00 01 (12/04) carrying bodily injury and property damage limits of $500,000 per occurrence and a $1,000,000 general aggregate, contains the following Coverage Grant:

> **1. Insuring Agreement**
>
> **a. We will pay those sums that the insured becomes legally obligated to pay because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:**

> **1. The amount we will pay for damages is limited as described in Section III – Limits of Insurance;**

Section III – Limits on Insurance of the Commercial General Liability Coverage Form, CG 00 01 (12/14) provides for the Limits of Coverage:

> **5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:**
>
> **a. Damages under Coverage A; and**
> **b. Medical expenses under Coverage C**
>
> **because of all "bodily injury" and "property damage" arising out of any one "occurrence".**

Section IV – Definitions of the Commercial General Liability Coverage Form, CG 00 01 (12/14) defines "occurrence" as follows:

> **13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

2. In support of its motion for summary judgment, Nautilus relies upon *Kosnoski v. Rogers*, No. 13-0494, 2014 WL 629343 (W. Va. Feb. 18, 2014) and *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985). Nautilus argues that courts continue to follow the holdings in *Shamblin, supra*, with regard to the meaning and legal interpretation of "occurrence" in a liability policy like the one at issue in this case.[4]

3. Nautilus claims the holdings in both *Shamblin* and *Kosnoski* control the outcome of this case because the definition of "occurrence" in the Nautilus policy and the policy in *Kosnoski* are identical, and the *Kosnoski* Court made clear in its memorandum opinion that its

4 Nautilus also relies upon *Canal Ins. Co. v. Blankenship*, 129 F.Supp.2d 950 (2001), in support of its argument that the definition of "occurrence" is not ambiguous. The *Canal* Court acknowledged that in *Shamblin* the court found a definition of "occurrence" identical to the *Canal* policy was unambiguous. However, the issue in *Canal* was whether the insured could stack insurance coverage where there were two separate policies on a tractor and on the trailer it was pulling. None of the parties in *Canal* disputed that the accident was a single occurrence. Id.

decision turned on the continuous or repeated nature of the exposure to the carbon monoxide leaking from a single source, the gas boiler furnace:

> It is clear from the record that there was a leak of carbon monoxide from a **single source**, the gas boiler furnace. While the gas undoubtedly traveled to different rooms within the single building at different times over several hours, **the injuries to petitioners and the decedent were from continuous or repeated exposure to substantially the same general harmful conditions.** As in *Shamblin*, we find that the definition of occurrence at issue in the instant case is not ambiguous, at least not in the sense meant by petitioners in this case. Therefore, we find that under the facts presented in the case, there was a single occurrence under the policy at issue.

citing Kosnoski at *3 (emphasis added).

4. However, Defendants in the Complaint for Declaratory Judgment, who are Plaintiffs in the underlying personal injury actions, argue there were multiple occurrences because the Combs and Premier Pools committed separate acts of negligence: a) failure to obtain a commercial license; b) undertaking a commercial job while only licensed for residential work; c) failure to inspect the pool heater room and pool heater; b) failure to read the pool heater instruction manual; c) failure to inspect the vent pipe from the pool heater all the way to the outside of the building; d) failure to properly install the pool heater; e) dislodging the pool heater vent pipe thereby causing CO to freely enter the rooms, hallways and other common areas in the Hotel; and f) failure to install CO detectors.

5. "[S]ummary judgment is mandated if the record, when reviewed most favorably to the nonmoving party, discloses 'that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Payne v. Weston*, 466 S.E.2d 161, 165 (W. Va. 1995) quoting *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 133 S.E.2d 770 (W. Va. 1963); *Painter v. Peavy*, 451 S.E.2d 755, 756 (W. Va. 1994).

6. Summary judgment "is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law." *Miller v. City Hospital, Inc.*, 475 S.E.2d 495 (W. Va. 1996) *quoting Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W. Va. 1995).

7. In order to successfully oppose a motion for summary judgment, the non-moving party "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in [the non-moving party's] favor." *See Precision Coil, Inc.*, (citations omitted); Syl. Pt. 5, *Jividen v. Law*, 461 S.E.2d 451 (W. Va. 1995). Summary judgment is not a remedy to be exercised at the Circuit Court's option; it must be granted when there is no genuine dispute over any material fact. See generally, *Precision Coil, Inc.*, 459 S.E.2d at 329.

8. The Court **FINDS** that the facts which occurred in the subject case are significantly different from the facts in *Kosnoski* and *Shamblin*. In both *Kosnoski and Shamblin*, the courts clarified that the "closeness in time" between the two events will determine whether there were one or two occurrences. Here, there is no "close connection" in time between the events of January 21, 2012, January 28, 2012, and January 31, 2012. Also, the definition of "occurrence" in the Nautilus policy defines it in the first instance as "an accident" – not "several accidents." There were different times when the Combs and Premier Pools could have prevented the alleged injuries. Additionally, there were changes in the circumstances including that the Hotel staff turned the pool heater on and off on different days.

9. The Court in *Kosnoski* found *Shamblin* to be the controlling case on this issue. In *Shamblin*, the defendant owned a mobile cleaning business and the defendant employees were driving three of the business vehicles during the scope of and in the course of their employment

when a collision occurred. The drivers had been radioing each other as to when it was clear to pass other vehicles. One driver radioed back to another driver that it was safe to pass other vehicles and, while attempting to pass a vehicle, a collision occurred. The driver and passenger of the car that was hit brought a civil action, and, while the civil action was pending, Nationwide informed the defendant that the insurance limits for each vehicle would not be available to the defendant even if it were determined that more than one of defendant's vehicles contributed to the accident. The defendant then brought a declaratory judgment action asking the court to construe the insurance policy and to declare that the liability limits for each vehicle were available since the employee defendants all contributed to the collision. The trial court held that there was one "occurrence" within the meaning of the insurance policy.

10. The West Virginia Supreme Court agreed and found the following language pertinent: '"[W]hen ordinary people speak of an 'accident' in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word 'accident' to describe the *event* [emphasis in original], no matter how many persons or things are involved.'" *Id.* at 341, 643, *citing Saint-Paul Mercury Indemnity Co. v. Rutland*, 225 F.2d 689, 691 (5th Cir. 1955).

11. The *Shamblin* Court also found pertinent the test suggested forth in § 3[c] of the annotation at 55 A.L.R. 1300 (1957), set forth in the footnote: "[T]he important point to be remembered when analyzing a factual situation to determine whether one, or more than one, 'occurrence' is involved is the relative closeness of the connection in time and space between the cause and result." Id.,at 341-342, 643. The Court explained that, "[t]he subject insurance policy's definition of 'one occurrence'-injury or damage 'arising out of continuous or repeated exposure

to substantially the same general conditions'-is consistent with this emphasis on closeness in time and space." Id., at 342, 643-44.

12. The *Shamblin* Court explained:

> In the case before this Court there may or may not have been two antecedent negligent acts but there was only one resulting "occurrence," the event from which liability arises, namely, the collision. The subject matter of the insurance is not "cause[s]" but "liability" and the basis for liability is an event (the collision) resulting in bodily injury or property damage. "[A]n occurrence means one event, not several events, and the question here is which event is contemplated by the policy definition. **The cases have consistently construed 'occurrence' or 'accident' in liability policies to mean the event for which the insured becomes liable, and not some antecedent cause of the injury."**

Id., at 342, 644 (emphasis added).

13. The *Shamblin* Court adopted the event triggering liability test for determining "occurrences," and found that the two negligent acts were not separate "occurrences" but rather separate 'acts' that lead to one 'resulting event.' *Id* at 343, 644. In doing so, the Court considered *Hartford Accident & Indemnity Co. v. Wesolowski*, 305 N.E.2d 907 (1973). In that case, the court held that there was only one "occurrence," not two occurrences, within the meaning of an automobile liability insurance policy, when an insured vehicle struck one oncoming vehicle and then ricocheted off and struck a second vehicle more than 130 feet away. The court recognized three approaches to determining whether there was one or more than one "occurrence" for liability insurance purposes: (1) looking to the proximate cause of the injuries or damages, (2) looking to the number of persons suffering a loss, and (3) looking to that one event of an unfortunate character that takes place without one's foresight or expectation and which is objectively descriptive of what happened. The court concluded that the third approach was the most practical of the three approaches. In applying this event test the court examined the closeness in time of the two impacts (only instants apart) and found that there was a single,

inseparable three-car accident. *Id.* at 910. Ultimately, the Court in *Shamblin*, like the court in *Wesolowski,* found that there was only one event or occurrence from which liability arose due to the closeness in time, because the two acts, (1) signaling to pass and (2) passing, happened at or about the time of the accident. *Shamblin*, at 343, 644.

15. Other jurisdictions have used the "liability-triggering event" test outside the context of the automobile accidents. Courts applying the "liability-triggering event" test determine the number of occurrences by looking to the event or incident that creates liability on the part of insured. 64 A.L.R.4th 668 (1988); *Allocation of Losses in Complex Insurance Coverage Claims,* §7:2. In non-automobile accident cases, courts which have adopted the "liability-triggering event" have found multiple occurrences under policy provisions and definitions very similar to those at issue. *Michigan Chem. Corp. v. Am. Home Assur. Co.*, 728 F.2d 374, 383 (6th Cir. 1984) (where a chemical company mistakenly filled an order for livestock feed supplement with flame retardant); *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co*., 447 F.2d 204, 206 (5th Cir. 1971) (where a batch of contaminated bird seed was sold and shipped to multiple customers); *Mason v. Home Ins. Co. of Illinois*, 177 Ill. App. 3d 454, 460, 532 N.E.2d 526, 529 (1988) (where tainted onions were served over a three-day period injuring multiple restaurant customers). Although the facts of these cases are not precisely the same as the facts of the present case, the analysis utilized in each is applicable. Unlike automobile accident scenarios, in which alleged "occurrences" happen within a short, often instantaneous, window of time, cases like the one at bar may occur over extended periods. As the Court in *Mason* explained:

> "The Insured could not be subject to liability until it served a portion of the contaminated food, which constituted the act from which liability arose. Service of numerous portions to individual patrons over the three day period involved here constituted multiple distinct acts or occurrences. There was not an

> uninterrupted and continuing cause from which all of the injuries resulted, as is the case when guests' property is damaged in a hotel fire (*Denham v. LaSalle-Madison Hotel Co.* (7th Cir.1948), 168 F.2d 576, cert. den. 335 U.S. 871, 69 S.Ct. 167, 93 L.Ed. 415) or when an open faucet on an upper floor of a building causes water damage to property on lower floors."

Mason v. Home Ins. Co. of Illinois, 177 Ill. App. 3d 454, 461, 532 N.E.2d 526, 530 (1988).

16. As in *Mason*, here there was not an uninterrupted and continuing cause from which all of the injuries here resulted. And, in accord with *Shamblin* and *Kosnoski*, the amount of time separating the alleged "occurrences" is relevant in determining the number of "occurrences" here. *Id.* at 342, 343; *Kosnoski* at *1. "[T]he important point to be remembered when analyzing a factual situation to determine whether one, or more than one, "occurrence" is involved is the relative closeness of the connection in time and space between cause and result."[5] *Shamblin*, at 342, 643.

17. Unlike *Kosnoski* and *Shamblin*, the underlying Plaintiffs were injured at different times – January 21, 2012, January 28, 2012, and January 31, 2012. Thus, the closeness in time and space of the proposed "occurrences," – are not present.

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5 The accompanying footnote 6 of *Shamblin* states:

> If, on the basis of the present cases, an attempt is made to reconcile the decisions regardless of the rationes decidendi advanced in the respective opinions-simply on the facts presented-such a reconciliation can be achieved on the basis of the closeness of connection in time and space between the individual items of injury or damage. **If cause and result are simultaneous or so closely linked in time and space as to be considered by the average person as one event, the courts have invariably found that a single accident within the meaning of the accident clause of the policy has occurred, while if enough time has elapsed between the injuries or damages to the various items involved or if the latter are widely separated in space, the courts have been inclined to allow separate claims even though they sprang from the same cause.** Generally speaking, it may therefore be stated that the aggregate of events resulting from insured's negligent act, such as several collisions, constitutes one accident, provided there is a close connection in time and place and a single sequence of cause and effect embracing the entire aggregate of events. **If, on the other hand, the times or places and detailed causes of each instance of injury or damage are different, there are separate accidents although each contains a common causal factor**. This test, by necessity, does not suggest a fixed and arbitrary rule of a certain permissible time interval or difference in location. It does not attempt to answer in the abstract how much time must elapse or how far apart the items must be in space before the courts will recognize the existence of separate accidents. All this test can do is to point out the relevant factors which in the past seem to have influenced the courts, at least unconsciously, in reaching their decisions. (emphasis added)

17. Although *Kosnoski* and the present case both involve carbon monoxide poisoning, the two cases differ with respect to key facts, which determine whether the events constituted a single "occurrence" or multiple "occurrences." The carbon monoxide poisoning in *Kosnoski* took place over the course of one 'night'. The injured persons in *Kosnoski* were harmed "…during the night of September 4th, 2011, and the early morning hours of September 5th, 2011…" *Kosnoski* at *2. Unlike *Kosnoski*, where a faulty furnace continuously emitting carbon monoxide over a single night harmed the injured parties, here, the harm to the underlying plaintiffs was not continuous. They were periodically poisoned as the result of a faulty pool heater being turned on and off over a 10 day period--there was not an uninterrupted and continuing cause.

18. In *Kosnoski*, there was no intervening period of time that could have stopped the process. There was no time period to have stopped or taken some action that could have stopped the damage. The same is true for *Shamblin*.

19. The Court **FINDS** there were a number of events for which the insureds of Nautilus may be liable to the guests of the Hotel. These independent, discrete activities undertaken by Premier Pools and/or Mr. and Mrs. Combs at different times created different occurrences for which the insureds may become liable.

20. The Court further **FINDS** that there were separate acts of negligence before and during December 27, 2011 and December 28, 2011 for which the Combs and Premier Pools may be liable to the Defendants (Plaintiffs in the underlying personal injury actions).

21. Accordingly, the Court **FINDS** that there was more than one "occurrence" in this as that term is defined in the Nautilus insurance policy at issue.

Accordingly, the Court hereby **FINDS** that there is no genuine issue of material fact as to these issues and, as a matter of law, Defendants' motion for summary judgment is **GRANTED** and Nautilus Insurance Company's motion for summary judgment is **DENIED**.

The objections and exceptions of Nautilus Insurance Company are noted and preserved.

ENTERED: January 29, 2015

/s/ John A. Hutchison
Lead Presiding Judge
Carbon Monoxide Exposure Litigation