Case No. S236765

IN THE SUPREME COURT OF CALIFORNIA

LEDESMA AND MEYER CONSTRUCTION COMPANY, INC., et al.,

Petitioners,

v.

LIBERTY SURPLUS INSURANCE CORPORATION, et al.,

Respondents.

After Order Certifying Question by the
U.S. Court of Appeals for the Ninth Circuit

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR VICTIMS OF CRIME IN SUPPORT OF PETITIONERS LEDESMA AND MEYER CONSTRUCTION COMPANY, INC.; JOSEPH LEDESMA; AND KRIS MEYER

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CERTIFICATE OF INTERESTED ENTITES OR PERSONS

Amicus Curiae know of no entity or person that must be listed under (1) or (2) of Rule 8.208(d).

Case No. S236765

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR VICTIMS OF CRIME IN SUPPORT OF PETITIONERS, LEDESMA AND MEYER CONSTRUCTION COMPANY, INC.; JOSEPH LEDESMA; AND KRIS MEYER

The National Center for Victims of Crime (NCVC), formerly the National Victim Center, was founded in 1985, and is a nonprofit organization headquartered in Washington D.C. The NCVC respectfully applies for leave to file the accompanying amicus curiae brief in support of Petitioners, Ledesma and Meyer Construction Company, Inc.; Joseph Ledesma; and Kris Meyer pursuant to Rule 8.520(f) of the California Rules of Court. The NCVC is familiar with the content of the parties' briefs.

The NCVC is regarded as one of the nation's most effective resource and advocacy centers for victims of crime. The NCVC has an interest in this case due to its extensive work

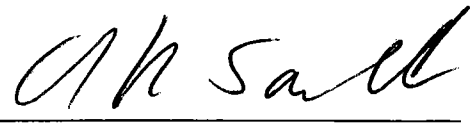
and dedication in representing the interests of crime victims, including those who have been victims of sexual abuse, incest, rape, and other violent crimes. The NCVC itself has no interest in or connection with any of the parties in this case.

The NCVC believes its views will assist the Court in resolving this case by addressing the certified question of the Ninth Circuit Court of Appeals

A party's counsel has not authored the brief in whole or in part, nor has a party's counsel contributed money in any way in support of this amicus brief.

Dated: May 9, 2017

Respectfully submitted,

By: 

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NATIONAL CENTER FOR VICTIMS OF CRIME

ARGUMENT

I. CLAIMS AGAINST AN EMPLOYER ARISING FROM ITS NEGLIGENT HIRING, RETENTION, AND SUPERVISION OF ITS EMPLOYEE CONSTITUTES AN "OCCURRENCE" UNDER THE RELEVANT COMMERCIAL GENERAL LIABILITY (CGL) POLICY

A. Liberty Acknowledges That Its Conduct In This Matter Constitutes an "Accident," and Thus an "Occurrence," Under The Terms of Its CGL Policy

This Honorable Court has accepted the certified question from the Ninth Circuit Court of Appeals, asking whether there is an "occurrence" under an employer's commercial general liability (CGL) policy when a third party brings claims against that employer for its negligent conduct in hiring, retaining, and supervising an employee who intentionally injures the third party. Conspicuously missing throughout Liberty's entire answering brief, though, is any analysis of this fundamental question. Instead, as it relates to this issue, the only indication of Liberty's position can be directly traced back to its correspondence in this matter, explicitly acknowledging that the negligence claims lodged against L&M related to conduct that was "accidental in nature." Accordingly, in answering this question, this Court need not look any further than Liberty's own concessions.

B. Liberty Incorrectly Asserts That Darold Hecht's Conduct, Not L&M's Own Distinct Conduct, Is Most Germane To Whether Coverage Is Available To L&M Under The Terms of Its Own CGL Policy

While Liberty has already conceded that L&M's negligent conduct (Hiring, Retention, and Supervision) constitutes an "accident", it continues to make much ado

about the nature of Darold Hecht's conduct and how that somehow controls the analysis. This contention, however, patently ignores *Delgado v. Interinsurance Exchange of Automobile Club of Southern California*, (2009) 47 Cal. 4th 302, which instructs that the analysis of what constitutes an "accident", and therefore an "occurrence", must be inextricably linked to L&M's negligent conduct, not the conduct of Hecht, an individual who is not a party to the insurance contract. As stated in *Delgado*, "the word *accident* in the coverage clause of a liability policy refers to the *conduct of the insured* for which liability is sought to be imposed on the insured." (*Id.*, 47 Cal. 4th at p. 311, emphasis added). In apparent support of this flawed premise, Liberty surprisingly cites to *Dyer v. Northbrook Property & Casualty Ins. Co.*, (1989) 210 Cal. App. 3d 1540, a wrongful termination case. Frankly, *Dyer* is unpersuasive, at best. As a threshold matter, *Dyer* pre-dates *Delgado* by twenty (20) years and, thus, the analysis of *Dyer* lacks the guidance of existing law. Second, the nature of the employer-insured's conduct in *Dyer* is categorically distinct from the nature of L&M's conduct here. Whereas in *Dyer* the employer-insured's conduct was wholly derivative of its agent who intentionally terminated an employee with intended and foreseen consequences, L&M's conduct in negligently hiring, retaining, and supervising Hecht represents its own independent conduct involving unintended and unforeseen consequences to Doe. Third, the legal claims averred against the employer-insured in *Dyer* were exclusively derivative and vicarious in nature, whereas the claims averred against L&M were premised upon L&M's own independent, negligent conduct of hiring, retaining, and supervising Hecht. This, of course, is a clear byproduct of the distinctions in conduct between the employer-

insured in *Dyer* and L&M. Obviously, the nature of the *insured's* conduct is the primary variable to consider in this "accident"/"occurrence" analysis, rending *Dyer* an unworkable guide.

II. L&M'S NEGLIGENT HIRING, RETENTION, AND SUPERVISION OF ITS EMPLOYEE ARE NOT "TOO ATTENUATED" TO CONSTITUTE AN "OCCURRENCE", AND LIBERTY'S SUGGESTION TO THE CONTRARY IS UNSUPPORTED BY THE TEXT OF ITS CGL POLICY, CALIFORNIA LAW, AND ESTABLISHED PUBLIC POLICY CONSIDERATIONS

A. Pursuant to *State v. Allstate Ins. Co.*, The Only Reasonable Interpretation of Liberty's CGL Policy Is That L&M's Negligent Conduct of Hiring, Retaining, and Supervising Its Employee Are Not "Too Attenuated" To Establish Coverage

In California, it is well-settled that when seeking to determine the meaning of an insurance contract, the court should attempt to enforce the mutual intent of the parties at the time the contract was created. (*Minkler v. Safeco Ins. Co. of America*, (2010) 49 Cal. 4th 315 (internal citations omitted); Civ. Code, §1636). Where feasible, the Court should look only to the written terms of the insurance policy. (Civ. Code, §1639).

Here, the term Liberty utilized to trigger coverage for bodily injury under its CGL policy is when such bodily injury is "*caused by* an 'occurrence' . . . ." (OBOM at p. 7, emphasis added). Indeed, this Court has unequivocally held that when interpreting these words or similar causation-based language, traditional tort concepts govern. More specifically, in *State v. Allstate Ins. Co.*, this Court explained that "[i]n analyzing coverage under a liability policy, a *'tort approach'* . . . to causation of damages is *precisely* what is called for . . . ." (*State v. Allstate Ins. Co.*, (2009) 45 Cal. 4th 1008,

1035, emphasis added). This is not a novel concept, though. It is one that this Court already recognized and explained in *Garvey v. State Farm Fire & Casualty Co.*, stating that "the *right to coverage* in the third party liability insurance context draws on *traditional tort concepts* of fault, proximate cause and duty." (*Garvey v. State Farm Fire & Casualty Co.*, (1989) 48 Cal. 3d 395, 407, emphasis added).

As it relates to these traditional tort concepts – and necessarily the right to coverage under this Court's holdings – it is the "substantial factor" test that has applied for decades. (*See, e.g., Mitchell v. Gonzales*, (1991) 54 Cal. 3d 1041, 1052). To the extent there was any lingering doubt about the applicability of the "substantial factor" test following *Mitchell*, this Court made its role in causation analysis abundantly clear in *Rutherford v. Owens-Illinois, Inc.*, when it held: "California has definitively adopted the *substantial factor test* of the Restatement Second of Torts . . . ." (*Rutherford v. Owens-Illinois, Inc.*, (1997) 16 Cal. 4th 953, 968, emphasis added).

To be clear, "[t]he substantial factor standard is a relatively *broad* one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (*Bockrath v. Aldrich Chemical Co.*, (1999) 21 Cal. 4th 71, 79, emphasis added). This Court even went on to emphasize that "[u]ndue evidence should not be placed on the word 'substantial'". (*Id.*, 16 Cal. 4th at p. 969). Moreover, for one's conduct to be deemed a "substantial factor," it is important to note that such conduct does not have to be the exclusive, or even the most direct, cause of the harm. (*Id.*, 16 Cal. 4th at p. 969; *Logacz v. Limanski*, (1999) 71 Cal. App. 4th 1149; *see also* California Civil Jury

Instruction, §§ 430 and 431). It merely has to be found that the harm caused would not have occurred without that conduct. (California Civil Jury Instruction, §430).

Here, L&M's negligent conduct surely constitutes a "substantial factor" of the harm caused to Doe. Without L&M's role in negligently hiring, retaining, and supervising Hecht, Hecht simply never would have had access or opportunity to abuse Doe, a victim who he only came upon because he was working for L&M at one of its middle school construction projects. In fact, in the underlying case leading to this declaratory judgment action, L&M was found – as a matter of law – to be liable for Doe's injuries. This was decided during a judicial reference,[1] which was presided over by the Honorable Judge Nuss, Ret. Importantly, the only type of claims Doe lodged against L&M were those sounding in negligence, specifically Negligent Hiring/Retention, Negligent Supervision, and Negligence. Judge Nuss's decision in favor of Doe, and thus adverse to L&M (and Joseph Ledesma/Kris Meyer, owners of the business), served as a direct acknowledgment that L&M's conduct was a substantial factor in causing Doe's injuries, thereby satisfying the causal link requirement under California law. Indeed, the former cannot be reached without proper satisfaction of the latter. It is, simply put, a necessary prerequisite.

[1] A Judicial reference is codified in California Code of Civil Procedure (CCP), § 638, which provides for the appointment of a referee to "hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision."

The judicial reference decision by Judge Nuss to hold L&M directly liable to Doe for its own negligent conduct (in contrast with vicariously liability concepts) is by no means an outlier. Courts throughout California, including this Court, have routinely recognized the viability of negligent hiring, retention, and supervision claims against employers for an employee's acts that are akin to those committed by Hecht. (*See Evan F. v. Hughson United Methodist Church*, (1992) 8 Cal. App. 4th 828 (holding that "in California, an employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him."); *see also Rahmel v. Lehndorff*, (1904) 142 Cal. 681). In this vein, California follows the rule and comment set forth in Restatement (Second) of Agency, § 213, providing – in relevant part – that:

> [t]he principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work . . . entrusted to him . . . An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity.

Significantly, in *Evan F. v. Hughson United Methodist Church*, the court not only made clear that direct negligent claims against an employer are viable for the precise types of circumstances that exist here, but also explained that the public policy component of causation/proximate cause, namely the appropriate scope for which liability extends, are not disturbed by these claims whatsoever. (*Evan F.*, 8 Cal. 4th at p. 841).[2] This is significant because, as stated above, these traditional tort causation principles apply with equal force to causation questions involved in the type of coverage disputes at issue in this appeal.

Here, the objective decision reached on causation by Judge Nuss during the judicial reference proceeding, as well as this Court's acknowledgement that these legal theories are both viable and predicated on sound public policy, collectively dictate that Liberty provide coverage to L&M. Indeed, for this Court to hold otherwise, such decision would supplant the findings of fact and law made by Judge Nuss and uproot sound jurisprudence that has already been firmly established by this Court.

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[2] For context, in *Evan F. v. Hughson United Methodist Church*, a young boy (Evan) was sexually abused by a minister of the Hughson United Methodist Church. (*Evan F.*, 8 Cal. 4th App. at p. 831). After being molested, Evan then began doing sexually inappropriate things to his sister (Eyrene) who was six years old. (*Id.*). An adolescent psychiatrist opined that Evan's inappropriate sexual contact with his sister was due to the abuse inflicted upon him by the Hughson United Methodist Church minister, as described above. (*Id.*). Accordingly, claims were brought by both Evan and Eyrene against Hughson United Methodist Church for, among other things, Negligent Hiring. (*Id.*, 8 Cal. 4th App. at p. 834). While the court held that Eyrene's claims against Hughson United Methodist Church ran afoul of causation's public policy considerations, the court held that Evan's claims for Negligent Hiring against Hughson United Methodist Church presented no such policy concerns. (*Id.*, 8 Cal. 4th App. at p. 841).

In its answering brief on the merits, Liberty seemingly rejects that tort-based concepts, and thus the substantial-factor test, are applicable in analyzing the scope of coverage issue here: whether L&M's conduct is, or is not, "too attenuated" to constitute an "occurrence" under its CGL policy. (ABOM at p. 34). In particular, Liberty attempts to argue that the approach laid out in *State v. Allstate Ins. Co.* is reserved only for cases involving a "concurrent cause". (*Id.*). This, however, merely represents yet another example of Liberty artificially inserting phantom limitations into text. This time, instead of Liberty manufacturing the limitation into its own CGL policy, it is imposing it on this Court's prior opinions. While this text of *State v. Allstate Ins. Co.* is already partially cited above, the broader quotation is worth highlighting here:

> In analyzing coverage under a liability policy, *a 'tort approach' . . . to causation of damages is precisely what is called for* . . . . When the insurer has promised to indemnify the insured for all 'sums which the Insured shall become obligated to pay . . . for damages . . . *because of*' nonexcluded property damage, *or similar language, coverage necessarily turns on* whether the damages for which the insured became liable resulted – *under tort law* – from covered causes.

(*State v. Allstate Ins. Co.*, 45 Cal. 4th at p. 1035, emphasis added). Clearly, the exact restrictions that Liberty wishes to introduce appear nowhere within the pertinent section of this Court's opinion in *State v. Allstate Ins. Co.*, or anywhere else, for that matter.

B. Even If It Is Assumed, *Arguendo*, That There Are Additional Reasonable Interpretations of "Caused By", As Used in Liberty's CGL Policy, California Law and Public Policy Still Dictate That There Must Be Coverage for L&M Under the Terms of Liberty's CGL Policy

As discussed above, the coverage-triggering words in Liberty's policy, "caused by", can only be properly construed to include L&M's negligent management of its employee, a "substantial factor" of the harm suffered by Doe. Said differently, such negligent management cannot be considered "too attenuated" under the terms of Liberty's CGL policy pursuant to California law. However, even if this Court were to find that this interpretation of "caused by" is not the only reasonable interpretation, and that it would somehow also be possible to reasonably interpret "caused by" to mean only conduct that is the absolute most direct and immediate cause of the harm, Liberty's argument still must fail.

First, in such scenarios, this Court has made unmistakably clear that "insurance coverage is 'interpreted *broadly so as to afford the greatest possible protection to the insured* . . . .'". (*MacKinnon v. Truck Ins. Exchange*, (2003) 31 Cal. 4th 635, 648 (internal citations omitted), emphasis added). In this case, to conform with this principle, the term "caused by" must be given meaning that reasonably expands coverage to L&M, not constricts it. Indeed, Liberty's proposed interpretation of "caused by" does exactly the opposite. More specifically, in narrowly seeking to define "caused by" to mean only the most direct and immediate cause – something which garners no support from the actual language of its CGL policy – Liberty advocates that we contravene the rules of

interpretation that have already been shaped so as to afford L&M, as the insured, the least possible protection.

Furthermore, in harmony with the above rationale, a broader interpretation of "caused by" that reasonably expands protections of the insured is in lockstep with this Court's holding in *State v. Allstate Ins. Co.*, applying tort principles of causation – specifically the "substantial factor" test – to these types of insurance coverage matters instead of a more limited, less-inclusive test. Nonetheless, nowhere in Liberty's answering brief did it once identify a different causation-based metric other than that which is governed by tort principles to measure these facts up against. Instead, Liberty only baldly insists that "caused by" should be as restrictive and exclusive as possible.

Second, in such scenarios, this Court has long-recognized and applied the doctrine of *contra proferentem*, which necessarily cuts directly against Liberty's proposed, narrow interpretation of its CGL policy. The doctrine of *contra proferetem* provides that if there is any ambiguity in the contract, it must be construed strongly against the drafting party. (*Blythe v. Gately*, (1876) 51 Cal. 236; *see also* Civil Code, § 1654). This Court has said, "[t]hey who choose the words, frame the language, draft the instrument, and execute it, ought rather to be held to a strict interpretation of the paper than he who merely accepts it." (*Hooper v. Wells, Fargo & Co.*, (1864) 27 Cal. 11). This maxim is especially apt in the insurance coverage context, where the insurer, as drafter, must be held accountable for the ambiguities in which they themselves create. (*See La Jolla Beach & Tennis Club v. Industrial Indemnity Co.*, (1994) 9 Cal. 4th 27, 37-38; *see also Minkler*, 49 Cal. 4th 315,

321 (stating that this rule of construction against the insurer "stems from the recognition that the insurer generally drafted the policy and received premiums to provide the agreed protection."))

While Liberty seeks to impute narrow meaning to the term "caused by" so that it only includes coverage for occurrences that were the most direct and immediate of the injury, it cannot be ignored that it was Liberty who had sole discretion over the language choice in its CGL policy. Surely, if Liberty truly intended such restrictive meaning at the time of drafting, it simply would not have issued a policy devoid of the very language that would have unequivocally accomplished its desired result. For one, Liberty could have just inserted any number of words immediately in front of "caused by" to narrowly modify its meaning, such as the words "directly" or "immediately". Similarly, and with equal ease, Liberty could have crafted an exclusion to ensure its policy was given the effect it now conveniently purports was intended (*i.e.*, to deny coverage for the negligent hiring, retention, and supervision of an employee). In sum, Liberty, as drafter, must bear the consequences of its own poor drafting choices.

CONCLUSION

In light of the foregoing, the Court should answer the certified question in the affirmative, holding that claims against an employer arising from its negligent hiring, retention, and supervision of its employee constitute an "occurrence" under a CGL policy.

Dated: May 9, 2017

Respectfully submitted,

By: _____
Antonio R. Sarabia II (SBN 90109)

Attorney for Amicus Curiae
NATIONAL CENTER FOR VICTIMS OF CRIME

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that, according to the word count feature of Microsoft Word, this *amicus curiae* brief contains approximately 3,432 words, not including the Tables of Contents and Authorities, proof of service, signature blocks or this certification page.

Antonio R. Sarabia II (SBN 90109)

Liberty Surplus Insurance Corporation, et al.v. Ledesma and Meyer Construction, et al.
Supreme Court No. S236765
9th Circuit No. 14-56120
D.C. No. 2:12-cv-00900-RGK-SP

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3463 Tanglewood Lane, Rolling Hills Estates, California 90274-4131.

On **May 9, 2017**, I served the foregoing documents as **Application to File Amicus Curiae Brief and Brief of Amicus Curiae** on the interested parties in this action as follows:

[] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Rolling Hills Estates, CA, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) after date of deposit for mailing in affidavit.

[XX] ELECTRONIC Pursuant to CRC Rule 8.212(c)(2) and/or the Court's Local Rules, a copy was submitted electronically via the Court's website as indicated on the service list.

[] BY OVERNIGHT MAIL/COURIER To expedite service, copies were sent via FEDERAL EXPRESS

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **May 9, 2017**, at Rolling Hills Estates, California.

Antonio R. Sarabia II (SBN 90109)

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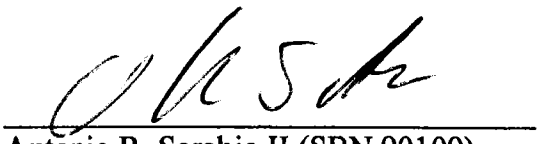

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