Case No. S236765

THE SUPREME COURT OF THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, *et al.*

Plaintiffs and Respondents,

v.

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

Defendants and Appellants.

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

RESPONDENTS' ANSWERING BRIEF ON THE MERITS

McCormick, Barstow, Sheppard,
Wayte & Carruth LLP
* Patrick Fredette, #207284
patrick.fredette@mccormickbarstow.com
Christopher Ryan, #294854
christopher.ryan@mccormickbarstow.com
7647 North Fresno Street
Fresno, California 93720
Telephone: (559) 433-1300
Facsimile: (559) 433-2300

Attorneys for Plaintiffs and Respondents Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters Inc.

Case No. S236765

THE SUPREME COURT OF THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, *et al.*

Plaintiffs and Respondents,

v.

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

Defendants and Appellants.

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

RESPONDENTS' ANSWERING BRIEF ON THE MERITS

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP
* Patrick Fredette, #207284
patrick.fredette@mccormickbarstow.com
Christopher Ryan, #294854
christopher.ryan@mccormickbarstow.com
7647 North Fresno Street
Fresno, California 93720
Telephone: (559) 433-1300
Facsimile: (559) 433-2300

Attorneys for Plaintiffs and Respondents Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

When the policy language restricts coverage to "'bodily injury' caused by an 'occurrence,'" does determination of whether there has been an "occurrence" required to trigger coverage focus on the molestation and rape that caused the alleged "bodily injury," or remote, antecedent events of alleged negligent hiring, retention and supervision that are purported to have made the injury-causing event possible, but are not an independent cause of the "bodily injury"?

Respondents Liberty Surplus Insurance Corporation ("LSIC") and Liberty Insurance Underwriters Inc. ("LIUI") (collectively, "Liberty") issued certain liability policies to Appellants Ledesma & Meyer Construction Co., Inc., Joseph Ledesma and Kris Meyer (collectively, "L&M"). The Liberty policies apply to covered "'bodily injury' caused by an 'occurrence.'" The Liberty policies define "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The plaintiff ("Doe") in the underlying action, *Jane JS Doe, et al. v. Ledesma & Meyer Constr. Co., Inc., et al.*, San Bernardino County Superior Court, Case No. CIVDS 1007001 ("*Doe* action"), alleged she was sexually abused and raped by Darold Hecht ("Hecht") in October and November of 2006 as a student at Cesar Chavez Middle School ("School"). Hecht was an employee of L&M and at the time worked on a project for L&M at the School. Hecht was so employed since approximately 2003. Among other claims, Doe

alleged Hecht was a registered sex offender when hired by L&M, and that L&M was negligent in hiring, retaining and supervising Hecht on the project at the School.

In its Opening Brief on the Merits, L&M mistakenly argues that California law requires that insurers look to the alleged source of liability as to its insured, such as alleged negligent hiring or supervision, and not to the injury-causing act itself in order to determine whether there has been an "occurrence" triggering coverage. The argument ignores that California courts, including this Court, have consistently focused on the actual cause of the "bodily injury" and whether that cause is accidental. If the cause of the "bodily injury" is not accidental, the "insuring agreement" is not satisfied and coverage is not implicated. This is true even if there are remote, antecedent events that are alleged to have invited the actual cause of the "bodily injury." Applied here, Doe's alleged "bodily injury" was caused by Hecht's molestation and rape, not L&M's alleged negligent retention or supervision of Hecht. Molestation and rape are inherently non-accidental, and thus Doe's alleged "bodily injury" was not caused by an "occurrence."

L&M also argues that the district court in the coverage action erred because it (according to L&M) found that alleged negligent hiring, retention and supervision were deliberate acts themselves and thus not "accidents." Respectfully, L&M does not portray the district court's holding accurately. Examination of the reasoning and law cited by the district court confirms that

the district court was not making the positive proclamation that L&M contends, but rather simply stating that the purportedly unintended consequences, from L&M's point of view, did not render the alleged antecedent negligence an "accident." Again, this is because the focus is on the injury-causing act itself. In attempting to argue the issue, L&M leads the Court through a discussion of the history and reasoning of one particular appellate case, *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41. However, L&M not only misapprehends *Merced*'s relevance to this action, but its reasoning more generally.

Finally, L&M urges the Court to rewrite California black-letter law that places on the insured the burden of establishing that the insuring agreement is implicated by a claim. L&M contends, incorrectly, that California law would support interpreting the requirement that "bodily injury" be caused by an "occurrence" as an exclusion, thus shifting the burden onto the insurer. However, this Court has clearly rejected such an approach.

STATEMENT OF THE CASE

I. Factual Background Relating to the *Doe* Action

A. The Cesar Chavez Middle School Project

In April 2002, L&M entered into a Construction Management Agreement with the San Bernardino County Unified School District ("SBCUSD") for a construction project ("Project") at the School. (Vol. 4, Appellants' Excerpts of Record ("4AER") 555.) L&M's work on the Project

began in early June of 2003, (4AER 556), and continued to the end of 2006. (4AER 557.)

B. Hecht's Background and Employment by L&M

In 1998 Hecht was arrested in Santa Clara County, California and convicted of one count under Cal. Penal Code § 261.5(d), "unlawful sexual intercourse with a minor" by "a person 21 years of age or older with a minor who is under 16 years of age." (2AER 194.) A news report of the arrest stated that Hecht was 26 years old at the time and the victim was 15 years old. (See 3AER 351.)

L&M hired Hecht on May 29, 2003, (see 4AER 556), and assigned him to the Project as an Assistant Superintendent. (*Id.*) Hecht was at the time Joseph Ledesma's brother-in-law. (See 2AER 181.)

On June 27, 2003, Hecht was arrested a second time, but on this occasion in San Bernardino County, California, and charged with one count under Cal. Penal Code § 647.6, "Annoying or Molesting Children." (2AER 196.) Hecht pled guilty to the charge and was sentenced to 36 months of probation and 45 days in jail. (*Id.*) The jail time was served on weekends. (*Id.*) Hecht's sentence also required him to attend counseling, register as a sex offender, and provide proof of registration. (*Id.*)

In or about August 2003, Hecht was sent for fingerprinting as part of a background check for purposes of his employment with L&M, (4AER 556), although Hecht had already been hired and working on the Project. (*Id.*)

Prior to receipt of the background check, Hecht informed Joseph Ledesma and Kris Meyer (the principals of the closely-held L&M) that he was a registered sex offender. (*Id.*)

Hecht's sex offender status was verified in a report received by L&M in early 2004 pursuant to Hecht's criminal background check. (See 2AER 207-08.) Further, a San Bernardino County Sheriff visited L&M on February 4, 2004, to confirm L&M received the report and was aware Hecht was a registered sex offender. (*Id.*)

Notwithstanding Hecht's status and L&M's knowledge of it, L&M employed Hecht on the Project through June 6, 2007. (See 2AER 177-78.) Hecht's employment with L&M ended when he resigned after Kris Meyer and Joseph Ledesma learned that Hecht had an extra-marital affair with an SBCUSD employee, an act entirely unrelated to his rape and molestation of Doe. (See 2AER 219.)

C. The Allegations of the *Doe* Action

Doe named L&M, SBCUSD, and others as defendants in the *Doe* action. (*See* 2AER 124.) The *Doe* action alleges that L&M was engaged in the Project during 2006, including when the school was in session. (2AER 130-31.) Doe further alleges that Hecht was an employee of L&M in 2006 and assigned to the Project prior to the beginning of the 2006-07 school year. (2AER 125-26.) According to the Second Amended Complaint in the *Doe*

action ("*Doe* SAC"), L&M either knew or had reason to know of Hecht's previous offenses. (2AER 125, 130, 147, 150.)

The *Doe* SAC alleges that Hecht first approached Jane Doe, a 13-year old student of Cesar Chavez Middle School, while she was on summer break from school in August 2006. (2AER 131.) After school resumed in August 2006, Hecht allegedly approached Doe at the school bus stop, provided his phone number and asked to drive her home from school, which Doe declined. (*Id.*) Thereafter, the *Doe* SAC alleges that Hecht began to follow Doe around campus and that Doe spoke with Hecht on the phone. (2AER 131-32.) According to the *Doe* SAC, in September 2006, Hecht "became more aggressive in his pursuit of Jane Doe" and in October 2006, Doe began to accept rides to and from school from Hecht. (2AER 132-33.) Doe alleges that beginning on or about October 12, 2006, Hecht began to use these rides as opportunities to isolate and sexually molest Doe. (2AER 133-34.) According to the *Doe* SAC, Hecht continued to sexually abuse Doe for "several weeks." (2AER 134-35, 138.)

The *Doe* SAC states multiple causes of action against L&M and other defendants. (See 2AER 127.) As to L&M and SBCUSD, Doe states causes of action for negligence, negligent hiring/retention and negligent supervision which allegedly allowed Doe to come into contact with Hecht, who in turn sexually abused Doe. (2AER 147, 149, 152.) However, Doe alleges her

injuries were the direct result of the sexual abuse by Hecht. (2AER 148, 151, 153.)

The *Doe* SAC also includes three causes of action specific to SBCUSD in relation to statutory duties applicable to public entities: negligence per se based on the failure to report sexual abuse pursuant to Government Code § 815.6 and Penal Code § 11164; negligent supervision based on Education Code §44807; and failure to fingerprint pursuant to Education Code §§ 45125.1 and 45125.2. (2AER 144, 154-56.)[1]

D. Hecht's Criminal Conviction

In October 2008, Hecht was arrested in relation to his abuse of Doe. In 2009 he was tried and convicted by a jury of five counts under Penal Code § 288(a), lewd and lascivious acts with a child under the age of 14; and one count under Penal Code § 288(b)(1), lewd and lascivious acts with a child under the age of 14 by use of force. (2AER 227). Hecht was sentenced to 24 years in prison. (2AER 230.)

E. Rulings and Termination of the *Doe* Action

The trial court in the *Doe* action ruled, in response to L&M's motion for summary judgment, that plaintiffs had produced evidence "that Hecht was convicted twice related to sexual misconduct with minors with one prior to his

[1] The *Doe* SAC also states intentional tort causes of action as to Hecht and an officer with the SBCUSD, Ionne Barnes-Joshua. (2AER 158, 160-62, 164, 166.)

employment and one while still employed with L&M." (2AER 45.) Further, according to the *Doe* court, evidence indicated that L&M "knew of the 1998 incident soon after they hired Hecht" and L&M "were further informed in February 2004 of the second conviction." (2AER 45.) Thus, evidence indicated that "with this knowledge [of Hecht's sex offender status] L&M allowed Hecht to work on the Cesar Chavez project while school children were present...." (2AER 45-46.) Further, the trial court found that "L&M's principals were aware ... that [Hecht] was a registered sex offender," and thus L&M could not establish that L&M "lacked knowledge of Hecht's unfitness to work at a school." (2AER 48.)

Pursuant to a stipulation of the parties in the *Doe* action, the parties proceeded to arbitrate the claims under Cal. Civ. Pro. § 638 rather than continue through the trial court, and the arbitrator produced a decision that contained only a "single statement of total damages." (2AER 53-54.) The February 10, 2014, arbitration decision found "defendants Ledesma & Meyer Construction Company, Inc., ... Joseph Ledesma and Kris Meyer individually, Ionne Barnes-Joshua individually and [SBCUSD] to be liable to the Plaintiff in the amount of three million, two hundred and fifty-thousand dollars ($3,250,000)." (2AER 54.)

II. The Liberty Policies

A. The LSIC Policy

Liberty issued to Ledesma & Meyer Development, Inc. a Commercial General Liability policy under number DGL-SF-184779-016, effective June 1, 2006 to June 1, 2007 ("LSIC policy"), which included Ledesma & Meyer Construction Company, Inc. as a named insured by endorsement. (See 3AER 262.) The LSIC policy states in relevant part:

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY ... LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" ... 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" ... to which this insurance does not apply. ...

b. This insurance applies to "bodily injury" ... only if:

(1) The "bodily injury" ... is caused by an "occurrence" ....

* * *

SECTION V – DEFINITIONS

...

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

...

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

* * *

B. The LIUI Policy

LIUI issued to Ledesma & Meyer Construction Company, Inc. a Commercial Umbrella policy under number LQ1-B71-185256-016, effective June 1, 2006 to June 1, 2007 ("LIUI policy"). (See 3AER 415.) The LIUI policy states in relevant part:

INSURING AGREEMENTS

I. COVERAGE

We will pay on behalf of the "Insured" those sums in excess of the "Retained Limit" that the "Insured" becomes legally obligated to pay by reason of liability imposed by law or assumed by the "Insured" under an "Insured contract" because

of "bodily injury," ... that takes place during the Policy Period and is caused by an "occurrence" happening anywhere. ...

* * *

V. DEFINITIONS

...

C. "Bodily injury" means physical injury, sickness, or disease, including death of a person. "Bodily injury" also means mental injury, mental anguish, humiliation, or shock if directly resulting from physical injury, sickness, or disease to that person.

...

J. "Occurrence" means:

1. as respects "bodily injury" or "property damage," an accident, including continuous or repeated exposure to substantially the same general harmful conditions;

* * *

III. Liberty's Reservation of Rights and Defense of L&M in the *Doe* Action

L&M tendered the *Doe* action to LSIC on June 11, 2010. LSIC agreed to defend L&M in the *Doe* action under a reservation of rights, through a letter dated July 2, 2010. (See 4AER 559.)

The LIUI policy is an excess policy that is only potentially applicable once underlying insurance is properly exhausted. LIUI issued a reservation of rights letter to L&M dated July 16, 2010, stating it had no indemnity obligation "to the extent that this matter did not arise from an 'occurrence,'" and reserved LIUI's "rights to disclaim coverage for this matter ...". (See 3AER 396.)

In further advising L&M of Liberty's position regarding its reservation of rights through correspondence dated August 22, 2011, Liberty noted that California law:

> support[s] the proposition that the "occurrence" determination focuses on the immediate injurious act, not any antecedent acts or omissions which purportedly allow the later act to take place. In context, the proposition results in the conclusion that there is no coverage for the *Doe* action, as while negligent supervision and retention are accidental in nature,[2] L&M's alleged negligent

[2] L&M selectively cites this portion of Liberty's letter out of context, to argue that "Liberty has directly admitted that L&M's negligence in hiring and supervising Hecht was 'accidental in nature'." (See Appellant's Opening Brief, ("Br."), at pp. 2, 14, and 16.) L&M appears to suggest that Liberty has not maintained a consistent position; that Liberty has concluded that, under the facts of the *Doe* action, L&M's intentional acts of retention and supervision were somehow accidental; or that, under the facts of the *Doe* action, Hecht's molestation and rape of *Doe* were somehow unexpected from the perspective of L&M. (See *id.*) L&M is wrong on all accounts. The letter, in context, reflects that Liberty has maintained a consistent position, and in fact referred to L&M's "alleged negligent acts and omissions." Further, here, L&M's

acts and omissions were not the actual and/or immediate cause of the claimed bodily injury. Rather the direct cause of the harm was Hecht's molestation of Doe.

(3AER 371.)

Despite that the injury alleged in the *Doe* action did not appear to implicate covered exposure, Liberty defended L&M in the *Doe* action under a reservation of rights. (See 3AER 371-72, 471.)

IV. Procedural History of This Coverage Action

A. In the District Court

While defending L&M under a reservation of rights, (*see* 4AER 559), Liberty filed this declaratory judgment action seeking a declaration that Liberty had no duty to defend L&M in the *Doe* action because that action did not allege an "occurrence" that could trigger coverage under the Liberty policies. (See 4AER 573.)

On December 3 & 4, 2012, L&M and Liberty filed cross-motions for summary judgment respectively. (See 2AER 115, 4AER 469.) The cross-

---

supposed "negligent management" was to hire, retain and place Hecht, whom L&M knew at the time was a registered sex offender, on the grounds of a middle school in a supervisory role. L&M ignores this reality in its attempt to in turn force a construct of California law which would support the misplaced theory that the "occurrence" analysis should be driven by the source of its liability, not the actual cause of Doe's "bodily injury." L&M also mistakenly characterizes the letter as "denying coverage," (see *id.*), despite that Liberty defended L&M in the *Doe* action pursuant to a reservation of rights, as noted in the letter itself, (see 3AER 371-72), and by L&M in the district court. (See 4AER 471.)

motions were ruled upon by the district court in its January 23, 2013, order which granted summary judgment to Liberty and denied L&M's motion for summary judgment. (1AER 12-16.) The district court reasoned:

> Here, L&M's alleged negligent hiring, retention and supervision were acts antecedent to the sexual molestation that caused injury to Doe. While they set in motion and created the potential for injury, they were too attenuated from the injury-causing conduct committed by Hecht. Moreover, even if one argued that L&M's conduct of supervision and retention were not antecedent, but rather simultaneous, to the molestation, that argument is unavailing. First, the supervision and retention are still not the injury-causing acts. Second, courts have rejected the argument that the insured's intentional acts of hiring, supervising, and retaining are accidents, simply because the insured did not intend for the injury to occur. *See Foremost Ins. Co. v. Eanes* (1982) 134 Cal.App.3d 566, 570-71; *Merced Mut. Ins. Co. v. Bobby Mendez* (1989) 213 Cal.App.3d 41, 50; *American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.* (N.D. Cal. 1991) 756 F.Supp. 1287, 1290; *see also Delgado v.*

Interinsurance Exchange of the Automobile Club of Southern California (2009) 47 Cal.4th 302, 315-316.[3]

(1AER 15, format of citations changed.) The Court concluded that "Doe's injuries giving rise to the claims in the Underlying Action were not caused by an 'occurrence,' as defined under the General Policy. Consequently, there is no possibility for coverage, and Liberty does not have a duty to defend and indemnify L&M." (1AER 15.) Further, because there was no injury caused by an "occurrence" and coverage did not apply to any entity, the district court did not need to specifically address any claim of coverage for SBCUSD. (See *id.*)

The district court granted Liberty's motion to enter final judgment on June 13, 2014. (1AER 6.) On June 26, 2014, L&M filed a motion for reconsideration of the district court's January 23, 2013, order based on a stipulated judgment entered into by the parties in the *Doe* action and related documents. (See 2AER 34, 53.) L&M also filed a notice of appeal of the June 13, 2014, judgment on July 10, 2014. (2AER 27.) The district court denied L&M's motion for reconsideration on August 6, 2014, noting that it had found that "L&M's alleged conduct was far too attenuated from the injury-causing conduct, namely, the assault of Jane Doe, and thus did not constitute an 'accident' or an 'occurrence'" that caused Doe's injury. (1AER 3.) Thus, a

[3] Contrary to L&M's characterization of the district court's opinion, (see Br. at p. 8), the district court did not single out *Merced* to support its reasoning but rather included *Merced* in a string cite with three other cases.

judgment of liability on those negligence claims against L&M was irrelevant to the district court's analysis and conclusion. (See 1AER 3.) L&M subsequently filed an amended notice of appeal on August 8, 2014. (See 2AER 17.)

B. Before the Ninth Circuit

L&M appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. (See *Liberty Ins. Corp. v. Ledesma and Meyer Const. Co., Inc.* (9th Cir. 2016) 834 F.3d 998.) L&M and Liberty briefed the Ninth Circuit and appeared for oral argument. The Ninth Circuit subsequently requested that this Court determine the proper interpretation of the Liberty policies in this context. (See *id.* at 1001.) This Court granted review. (Order granting review, Oct. 21, 2016.)

ARGUMENT

I. L&M Cannot Meet its Burden to Establish Coverage

A. L&M Has the Burden to Establish Coverage in the First Instance, and L&M's Characterization of the "Occurrence" Requirement as Exclusionary Is Incorrect

As this Court has noted, "the burden is on the insured to bring the claim within the basic scope of coverage, and (unlike exclusions) courts will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage." (*Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 16, citing *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 803 .) "Accordingly, the insured has the burden of showing

that there has been an 'occurrence' within the terms of the policy." (*Waller, supra,* 11 Cal.4th at p. 16, citing *Collin, supra,* 21 Cal.App.4th at pp. 802-03.) L&M attempts to move the goalposts by mistakenly characterizing the "occurrence" requirement as exclusionary in nature. (*See* Br. at p. 42.)

L&M cites *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183 to argue that it is the function of the policy language, not its location in the policy that determines whether it should be construed an exclusion, thus shifting the burden of proof. (See Br. at p. 43.) However, *Aydin* expressly dealt with the "sudden and accidental" exception to the pollution exclusion and holds that when allocating the burden of proof an exception to an exclusion is properly construed as a coverage provision. (See *Aydin, supra,* 18 Cal.4th at p. 1191.) In response to the insured's concern that such a holding would permit insurers to "manipulate the allocation of the burden of proof by ... simple linguistic adjustments," the *Aydin* court stated: "The fact that different policy language might result in a different allocation of the burden of proof should hardly come as a shock. Rather, it arises from the parties' general freedom to contract as they deem fit. Simply put, our obligation is to give effect to the language the parties chose, not the language they might have chosen." (*Id.* at pp. 1192-93.)

In *Aerojet-General Corp. v. Transport Indemnity Co.* (1997)17 Cal.4th 38, this Court explained that the insurance policies "provide what they provide," and in agreeing to the policies the parties "established what was

'fair' and 'just' inter se. We may not rewrite what they themselves wrote.... We must certainly resist the temptation to do so.... As a general matter at least, we do not add to, take away from, or otherwise modify a contract for 'public policy considerations.'" (*Id.* at 75.)

Of course, if the "occurrence" requirement were conceptually removed from the insuring agreement, the insuring agreement would become a blanket provision of coverage for liability imposed under any circumstance. L&M may contemplate that such result would benefit it here, but it is fiction, as the terms of the policies are applied as written, (see *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264), and the rule of law in California is that the insured has the burden to establish, in the first instance, that the "occurrence" requirement is satisfied.

B. The Acts That Caused The "Bodily Injury" Are Inherently Non-Accidental

L&M does not dispute that the improper sexual contact with Doe was the deliberate, intended result of Hecht's conduct. Under California law, sexual abuse is by definition intentional and nonaccidental conduct. (See, e.g., *J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal. 3d 1009, 1025 ["child molestation is *always* intentional"], italics in original; *Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 811 ["rape is intentional conduct, stalking is intentional conduct..."]; *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596 [sexual assault "necessarily nonaccidental"].) Further,

under California law, intentional conduct does not constitute an "occurrence" defined as an "accident." (See, e.g., *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 806 ["It is fundamental that allegations of intentional wrongdoing do not allege an 'accident'"]; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537 ["An intentional act is not an 'accident' within the plain meaning of the word"]; *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 861 ["it is well settled that intentional or fraudulent acts are deemed purposeful rather than accidental and, therefore, are not covered under a CGL policy"].)

Without making the argument explicit, L&M suggests that an employer's vicarious liability for an employee's intentional tort should be considered the accident for the purposes of liability coverage. (See Br. at pp. 21-22.) However, where an intentional act is the immediate cause of the injury, the mere fact that the insured's liability is vicarious does not mean the injury is caused by an "occurrence." (See *Dyer v. Northbrook Prop. & Cas. Ins. Co.* (1989) 210 Cal.App.3d 1540, 1551-53.) In *Dyer*, an insured corporation sought coverage for a claim brought by a former employee for alleged wrongful termination. (See *id.* at 1543.) While the act of wrongful termination was not accidental, the insured argued that its *agents* "did the intentional acts, which made [the insured employer] liable vicariously, not because of its own intentional or willful conduct." (*Id.* at 1551.) Thus, reasoned the insured, its own "potential vicarious liability was accidental,

unforeseen, and a nonintentional event." (*Id.*) The *Dyer* court disagreed, noting "[i]n the case at bench, ... the issue was not who the policy insured, *but what harm it covered.*" (*Id.* at 1552, italics added.) Because "the policy expressed the intent not to include a termination of employment as an 'occurrence,'" there was no coverage for the insured employer's potential vicarious liability. (*Id.* at 1552-53; see also *Commercial Union Ins. Co. v. Superior Court* (1987) 196 Cal.App.3d 1205, 1209 [wrongful termination not an "occurrence"]; *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal. App. 3d 1199, 1202 [same].)

II. L&M's Argument that an "Occurrence" Analysis Should be Independent of the Immediate Cause of Harm is Not Supported by California Law

A. L&M's Forced Interpretation of This Court's Precedents Is Mistaken

L&M's argument turns on a forced and mistaken interpretation of this Court's precedents in *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.* (1959) 51 Cal. 2d 558; *Hogan v. Midland National Ins. Co.* (1970) 3 Cal. 3d 553; and *Delgado v. Interinsurance Exch. of Auto. Club of S. California*, 47 Cal. 4th 302 (2009). L&M also argues that this Court's decision in *Minkler v. Safeco Insurance Co. of America* (2010) 49 Cal. 4th 315, supports its argument and verifies its reading of this Court's precedent. An examination of this Court's decisions reveals otherwise.

1. *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*

In *Geddes*, *supra*, 51 Cal.2d 558, an insured sought coverage under an insurance policy for breach of warranty and negligence allegations arising out of the insured's delivery of purportedly defective aluminum doors, which were subsequently installed. (See *Geddes*, *supra*, 51 Cal.2d at pp. 560-61.) The insured's policy provided that the insured could not "recover under the policy unless the damages were damages 'because of injury to or destruction of property, including loss of use thereof, caused by accident...." (*Id.* at p. 563.) In determining that there had been an "accident," this Court did not focus on the point of view of the insured, or even the "actor." Rather, to the extent any point of view was considered, it was that of the injured party. This Court reasoned that the term "accident" had:

> been defined "as 'a casualty-something out of the usual course of events and which happens suddenly and unexpectedly and without design of the person injured.' [citations omitted]" (*Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 473.) It "'includes any event which takes place without the foresight or expectation of the person acted upon or affected by

the event.'" (*Richards v. Travelers Ins. Co.* (1891) 89 Cal. 170, 176 ....[4]

(*Geddes*, *supra*, at pp. 563-64, citations shortened.) This Court has subsequently rejected defining an accident from the point of view of the "person injured." (See *Delgado, supra*, 47 Cal. 4th at p. 306.)

In *Geddes* this Court also cited a Minnesota case in support of a more point-of-view neutral definition: "Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." (*Geddes* at p. 564, quoting *Hauenstein v. Saint Paul-Mercury Indem. Co.* (1954) 242 Minn. 354.)[5] Apparently quoting the *Hauenstein* formulation but without direct citation and without distinguishing it from the earlier California cases (and thus implying the cited case law in

---

[4] As discussed further below, both *Richards* and *Zuckerman* involved first-party life insurance policies that either used "accidental means" language or relied on cases interpreting that language.

[5] *Hauenstein* is a brief opinion in which the Supreme Court of Minnesota found that damage to a building caused by defective plaster was not excluded due to an exclusion for injury to "products manufactured, sold, handled or distributed by the Insured." (*Hauenstein*, *supra*, 242 Minn. at pp. 355-56.) The bulk of the opinion addressed whether the product exclusion applied. (See *id.*, passim.) The *Hauenstein* court only briefly noted that "[t]here is no doubt that the property damage to the building caused by the application of the defective plaster was 'caused by accident' within the meaning of the insurance contract, since the damage was a completely unexpected or unintended result." (*Id.* at p. 358.) Thus, to the extent the *Hauenstein* court considered the question, it focused on whether the *damage itself* was objectively "unexpected or unintended." (See *id.*)

general supported the rule), this Court concluded that "[t]he door failures were unexpected, undesigned, and unforeseen. They were not the result of normal deterioration, but occurred long before any properly constructed door might be expected to wear out or collapse." (*Geddes* at p. 564.)

In the *Geddes* opinion, this Court further explained, "[m]oreover [the door failures] occurred suddenly. *It bears emphasis* that we are concerned, not with a series of imperceptible events that finally culminated in a single tangible harm, but with a series of specific events ... *each of which caused identifiable harm at the time it occurred.*" (*Geddes* at p. 564, italics added.) Thus, the Court concluded, and chose to emphasize, that the damage was accidental in nature at the time each event occurred, i.e., throughout the causal chain. (See *Geddes* at p. 564.) As a result, *Geddes* provided the groundwork for the rule that eventually developed: an "accident" or "occurrence" is determined objectively based on the injury-causing event, and not remote events in the causal chain.

2. *Hogan v. Midland Nat'l Ins. Co.*

Hogan, supra, 3 Cal.3d 553, is particularly relevant and its close examination is helpful. In *Hogan*, this Court adopted the reasoning of the *Geddes* decision in determining whether two distinct injuries were covered under a policy that provided coverage for "injury to or destruction of property ... *caused by accident* ...." (*Id.* at p. 558, italics added by the Court.) In *Hogan*, the insured (Diehl) manufactured and sold wood processing

machinery, "insuring it against liability for property damage caused by accident." (*Id.* at p. 557.) The underlying claimant, Kaufman, purchased a saw manufactured by Diehl and began to use it in September 1961.[6] (*Id.*) The saw was allegedly defective causing lumber to be cut in widths that were too narrow. (*Id.* at p. 558.) After customers had rejected the lumber because it had been cut too narrow, "to avoid complaints in the future, Kaufman deliberately cut lumber wider than specified in orders," beginning after April 24, 1962. (*Id.* at p. 559.)

The insurer argued that damage to the boards resulting both from cutting the widths too narrow and too wide were not the result of "an accident." (See *Hogan* at p. 559.) The Court determined that there was "no merit" to the insurer's "assertion that damages resulting from undercutting were foreseeable under [*Geddes*]." (*Id.* at p. 560.) However, the Court determined that "[t]he circumstances, and the legal consequences, differ[ed] as to the boards cut too wide." (*Id.*) Even though, after April 24, 1962, Kaufman cut boards extra wide to compensate for the defective saw, the Court concluded that "[w]hatever the motivation, there is no question that these boards were *deliberately* cut wider than necessary; the conduct being

[6] Kaufman was the claimant in the liability action against Diehl in which Kaufman obtain a judgment. *See id.* at 557. Thereafter, Diehl assigned its cause of action against its insurer to Robert Hogan. *See id.* Neither the Supreme Court decision, nor the preceding Court of Appeal decision, discuss the relationship (if any) between Hogan and Kaufman.

calculated and deliberate, no *accident* occurred within the [*Geddes*] definition." (*Id.*, italics in original.)

It is important to note that the saw manufacturer, Diehl, and not Kaufman, was the insured. (See *id.* at p. 557.) The policy insured *Diehl* "against liability for property damage caused by an accident." *Id.* In *Hogan* this Court did not discuss in any way whether the under- or overcutting were expected or foreseeable by the insured, *Diehl.* (See *id.,* passim.) It was simply not relevant to the analysis. The only question was whether the injury-causing act itself was deliberate. (See *id.* at pp. 560-61.) This Court reasoned: "The deliberate nature of *Kaufman's act* (i.e., he contemplated the result of his act before he cut the boards) prevented the overcutting from constituting an accident...." (*Id.* at p. 560, italics added.)

Hogan is important in another respect. In *Hogan*, the plaintiff argued—much like L&M here—that an insured's precipitating negligence should be the focus of the analysis, rather than the actual cause of the harm. (See *id.* at 561.) In *Hogan*, the plaintiff argued that "Diehl's reasonable expectations were that the policy would cover claims for negligence, breach of warranty or strict liability in tort," and that the insurer's position would mean that "Diehl would have obtained nothing of value for its premium dollar." (*Id.*) In *Hogan*, this Court conceded that "[i]t was established in the prior action that, *due to*

Diehl's improper conduct[7] *in delivering a defective saw*, Kaufman deliberately cut boards too wide." (*Id.* at 560, italics added.) But, the Court did not view the term "accident" as coextensive with the insured's potential negligence (or strict) liability. Rather the Court found:

> There was no evidence in the record as to the expectations of the parties and no indication that Diehl anticipated coverage for liability not attributable to accident. The basic coverage for property damage liability due to accident is common in products liability policies.... One who purchases an insurance policy against liability for property damage due to accident cannot reasonably expect to obtain coverage for consequences clearly outside the scope of the definition of accident.

(*Hogan* at p. 561, citations omitted.)

Thus *Hogan*, which has not been overruled and remains California law, makes clear that the determination of an "accident" rests on the injury-causing conduct (i.e., the deliberate overcutting of the lumber) and not any antecedent act that precipitated the injury.

---

[7] Subsequently, the Court identified Diehl's "improper conduct" as "Diehl's negligence." (See *Hogan, supra,* 3 Cal.3d at p. 560.) Notwithstanding the Court's identification, it appears that Kaufman had sued under a breach of warranty cause of action. (See *Hogan v. Midland Nat. Ins. Co.* (1969) 2 Cal.App.3d 761, vacated (1970) 3 Cal.3d 553.)

3. *Delgado v. Interinsurance Exch. of Auto. Club of So. Calif.*

In *Delgado*, the underlying complaint alleged two causes of action against the insured: "[t]he first alleged an intentional tort in that [the insured] ... physically struck, battered and kicked [the claimant] Delgado. The second cause of action alleged that [the insured] negligently and unreasonably believed he was engaging in self-defense and unreasonably acted in self defense ...." (*Delgado*, *supra*, 47 Cal. 4th at p. 306.) Overruling the trial court, the Court of Appeal found that excessive force exercised in the course of self-defense was generally considered unintentional conduct under California law and thus "[t]he complaint showed potentially covered conduct because it alleged plainly that [the insured] acted in self-defense." (*Delgado v. Interinsurance Exch. of Auto. Club of S. California* (2007) 152 Cal.App.4th 671 [61 Cal.Rptr.3d 826, 837], revd. (2009) 47 Cal. 4th 302.)

On appeal to this Court, the claimant argued that "because [the insured's] assault and battery was motivated by an unreasonable belief in the need for self-defense, the act fell within the policy's definition of 'an accident,' because from the perspective of the injured party the assault was 'unexpected, unforeseen, and undesigned.'" (*Delgado*, *supra*, 47 Cal. 4th at pp. 308-09.) This Court disagreed, reasoning:

> Were we to accept Delgado's argument that any interpretation of the policy term "accident" should be based solely on whether

> the injury-causing event was expected, foreseen, or designed by the injured party, then intentional acts *that by no stretch could be considered accidental* nevertheless would fall within the policy's coverage of an "accident." Under Delgado's reasoning, even child molestation could be considered an "accident" within the policy's coverage, because presumably the child neither expected nor intended the molestation to occur.

(*Id.* at p. 310, citing *J.C. Penney Casualty Ins. Co.*, *supra*, 52 Cal. 3d at 1028, fn. 17, italics added.) Thus, in response to the claimant's argument that an "accident" can be construed from the perspective of the injured party, the Court refocused the inquiry onto the act itself that immediately caused the injury. (See *Delgado*, 47 Cal. 4th at p. 304.)

In *Delgado*, this Court continued to address an additional argument from the claimant: that the insured's mistaken understanding as to the need for self defense was "unforeseen and unexpected from the perspective of the insured, making the insured's responsive acts unplanned and therefore accidental." (*Id.* at p. 314.) The Court rejected this argument as well, explaining that "the law looks for purposes of causation analysis to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." (*Id.* at p. 315.) "In a case of assault and battery, it is the use of force on another that is closely connected to the resulting injury." (*Id.* at p. 315-16.) To "look to acts within the causal

chain that are antecedent to and more remote from the assaultive conduct would render legal responsibilities too uncertain." (*Id.*) To that end, the Court noted that "the term 'accident' unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury." (*Id.*, quoting *Maples v. Aetna Casualty & Surety Co.* (1978) 83 Cal.App.3d 641, 647-48.) The Court provided an illustrative example of its reasoning:

> When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury—hitting the other car—was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident.

(*Delgado*, *supra*, 47 Cal.4th at p. 316, quoting *Merced, supra*, 213 Cal.App.3d at p. 50.)

The *Merced* court, from which *Delgado* draws the example, continued the illustration: "On the other hand, where the driver was speeding and deliberately hit the other car, the act directly responsible for the injury—hitting the other car—would be intentional and any resulting injury would be directly caused by the driver's intentional act." (*Merced*, *supra*, 213 Cal.App.3d at p. 50.) Thus confirming that under California law

determination of whether there has been an "occurrence" focuses on the "the act directly responsible for the injury" and not antecedent events.[8]

4. *Minkler v. Safeco Insurance Co.*

L&M's brief discussion of *Minkler v. Safeco Insurance Co. of America* (2010) 49 Cal.4th 315, reflects just how wide-off-the-mark L&M's reading of this Court's precedents is. According to L&M, *Minkler* illustrates that the law requires examination of antecedent acts of the insured (i.e., negligent hiring, supervision, etc.) to determine an "occurrence," defined as an accident, if those antecedent events provide a basis of liability. (See Br. at p. 15.) *Minkler* does no such thing. While this Court examined the question of coverage for a

---

[8] L&M contends that *Delgado* supports its position based on the Court's statement that an "accident" referred "to the conduct of the insured for which liability is sought to be imposed on the insured." (See Br. at p. 13, citing *Delgado*, *supra,* 47 Cal. 4th at p. 311.) However, L&M ignores context. In *Delgado*, the assailant and the insured were one and the same; the Court had no occasion to distinguish between the actor engaged in the assault and the insured. In support of the statement, the Court in *Delgado* cited *Quan*, *supra*, 67 Cal.App.4th at page 596, and *Collin, supra.*, 21 Cal.App.4th 787 . *Quan* held that sexual assault is necessarily non-accidental, even if encompassed by a purported negligence cause of action and the insured argued he may have mistaken consent. (See *Quan*, *supra*, 67 Cal. App. 4th at p. 596.) In *Collin*, the court held that a conversion could not be considered "accidental," even if there was no intent to permanently deprive the owner of property. (See *Collin*, *supra*, 21 Cal.App.4th at p. 804.) Like in *Quan*, the court found that the term accident referred to the conduct, not the insured's state of mind. (See *id.*) In both *Quan* and *Collins*, the court did not have occasion to distinguish between the insured and the actor performing the intentional act, as they were one in the same. However, the context of *Delgado*, *Quan*, and *Collin*, makes clear the focus is on the injury-causing act and not the subjective understanding of the insured.

claim of negligent supervision against one insured in relation to alleged child sexual abuse committed by another, the *Minkler* decision was based only on consideration of the policies' intentional acts exclusion, and not the "occurrence" requirement. (See *Minkler*, *supra*, 49 Cal.4th at p. 322.) The policies at issue contained a grant of coverage for liability for "damages because of bodily injury ... caused by an occurrence," but the court noted that the insurer "[did] not contend that the ... claims against [the insured] fell outside the scope of this basic coverage provision." (*Id.* at 322.) Pointing out the distinction, and suggesting the parties had focused on the wrong issue, the Court stated:

> The policies defined an "occurrence" as "*an accident*, including exposure to conditions which results, during the policy period, in bodily injury or property damage." (Italics added [by Court].) [The insurer] does not assert that [the claimant's] claims related to his alleged molestations by [an insured] are beyond the scope of this basic coverage because the molestations were not "accident[s]," and we have not been asked to address that issue. We therefore do not do so. (*But see Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal. 4th 302, 308-17, 97 Cal.Rptr.3d 298, 211 P.3d 1083; *Hogan v. Midland National*

Ins. Co. (1970) 3 Cal. 3d 553, 560, 91 Cal.Rptr. 153, 476 P.2d 825 .)

(*Minkler*, *supra*, 49 Cal.4th at p. 322, fn. 3.)

Minkler explicitly did not address the issue of whether there had been an "occurrence," as the Court was not asked to do so. However, in citing *Delgado* and *Hogan* on the issue, and no other cases, the Court appeared to directly suggest that it would not have found the alleged injury to be caused by an "occurrence," consistent with the cited cases, as the act that caused the bodily injury—the molestation—was not accidental.

B. The Liberty Policies Require that the Injury-Causing Act Itself Define if an "Occurrence" is Present

1. *Insurance Coverage is Not Coextensive With an Insured's Potential Tort Liability*

L&M mistakenly argues that a policyholder's coverage for tort liability should extend liability that may be imposed under tort-causation principles. (See Br. at p. 19.) The proposition is plainly an incorrect interpretation of California law. A "general liability" policy does not connote "unlimited coverage. ... It is invariably necessary to consult the language of any particular general liability policy to determine what coverages it affords." (*FMC Corp. v. Plaisted & Companies* (1998) 61 Cal. App. 4th 1132, 1146-47, disapproved of on other grounds by *State v. Cont'l Ins. Co.* (2012) 55 Cal.4th 186.) Liability policies generally provide coverage for certain types of risk and do not provide coverage that extends to the boundaries of all of the

insured's potential tort liability. (See, e.g., *Napa Cmty. Redevelopment Agency v. Cont'l Ins. Companies* (9th Cir. 1998) 156 F.3d 1238 ["'Accident' or 'occurrence'-based liability policies ... do not cover intentional or fraudulent behavior, only accidental or negligent [acts]"].) The contention was also plainly rejected by this Court in *Delgado*, which found no coverage even though the insured was subject to potential negligence-based liability. (See *Delgado, supra*, 47 Cal. 4th at pp. 306, 314-16.)

Utilizing an out-of-context quote, L&M mistakenly contends that this Court has ruled in *State v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, that coverage under a liability policy necessarily extends to the extent of an insured's potential liability. (See Br. at p. 19.) In *State*, this Court examined whether liability policies provided coverage to certain pollution events caused by the flooding of a waste containment facility. (See *State*, *supra*, 45 Cal.4th at p. 1014.) The passage quoted by L&M is in the context of whether the "concurrent cause" approach indicated there should be coverage. (See *id.* at pp. 1034-37.) The Court explained the rationale in employing the "concurrent cause" approach in the third-party liability context. (See *id.*) Applying the "concurrent cause" approach, the Court found that there was a triable issue of fact in relation to whether damage had been caused by an ostensibly covered "sudden accidental release" in addition to uncovered "subsurface leakage." (See *id.* at p. 1032.)

The Court did not decide or even opine on what might constitute an "occurrence" or "accident" under a third party liability policy. (See *id.*, passim.) Rather, *State*—and in particular the section quoted by L&M—stands for the principle that a covered, independent "concurrent cause" can implicate coverage under a third-party liability policy even when an excluded cause is also present. Unsurprisingly, L&M does not raise the argument that alleged negligent acts and/or omissions by L&M can constitute a covered independent "concurrent cause" of Doe's injury. (See Br., passim.)

The California "concurrent cause" doctrine also does not present an avenue for coverage here, and thus *State* has no substantive application. A concurrent cause exists when an indivisible harm occurs because of two distinct causes, each of which could independently cause injury, (see *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 102), which is not present here. (See also *Farmers Ins. Exch. v. Superior Court* (2013) 220 Cal.App.4th 1199, 1204-14 [discussing the concurrent cause doctrine].) Without the alleged intentional sexual assaults by Hecht, there is no injury, and thus no independent liability for L&M's alleged negligence. The "concurrent cause" analysis thus simply confirms that the "occurrence" inquiry does not focus on antecedent acts.

2. *The "Occurrence" Language Imposes an Objective Standard*

The language of the Liberty policies themselves indicate an objective focus on the injury-causing act to determine an "occurrence," with a focus on the act, not the actor. A brief discussion of the ISO CGL policy form is instructive. The 1966 ISO CGL policy form introduced the "occurrence" coverage trigger, which required that damage or injury be caused by an "occurrence." (See *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, *supra*, 17 Cal.4th at p. 49.) In the 1966 form, "occurrence" was defined as an "accident, including injurious exposure to conditions, which results during the policy period in [bodily injury or property damage] neither expected nor intended from the standpoint of the insured." (See *id.*) In 1973, the form was revised to define "occurrence" as an " accident, including continuous or repeated exposure to conditions, which results in in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (See *id.* at p. 49.) The form subsequently again changed the definition of "occurrence," but this time removed the clause relating to the point of the view of the insured, leaving an objective definition: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," as reflected in the Liberty policies. (See 3AER 289, 4AER 431.)

This background is helpful in consideration of another "concurrent cause" doctrine case on which L&M mistakenly relies, *Underwriters v. Purdie*

(1983) 145 Cal.App.3d 57, in support of its contention that liability coverage should always apply if liability is related to an employer's alleged negligent conduct. In *Purdie*, the policy at issue provided "occurrence" coverage, and occurrence was defined to mean "an accident ... which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured," mirroring the earlier, 1973 ISO form. (See *Purdie*, *supra*, 145 Cal.App.3d at p. 61.) In *Purdie*, a deliveryman was shot by a liquor store clerk with a gun kept on the premises with the permission of the insured store owner. (See *id.* at p. 62.) The deliveryman sued the insured, inter alia, for negligently hiring and supervising the clerk in addition to other claims. (See *id.*) While the *Purdie* case turned on application of the firearm exclusion, in discussing whether the shooting triggered coverage in the first instance, the *Purdie* court stated:

> Regardless of whether this shooting by Antoine was intentional or negligent, *it must first come within the policy's definition of an accident for liability to arise*. There could be no liability under the policy unless the occurrence is "neither expected nor intended from the standpoint of the insured."

(*Id.* at p. 67.) Thus, in relation to the "occurrence" determination, the *Purdie* court focused on whether the *shooting* came within the policy's definition of an accident. (See *id.*) Although it was not the focus of the *Purdie* court's analysis and not made explicit, it appears clear in context that because the

policy defined "accident" subjectively, from the standpoint of the insured, it could be considered accidental under the policy.[9] The *Purdie* court ultimately found that the policy provided coverage based on its reasoning that negligent hiring presented an independent, concurrent cause of injury and thus under *Partridge*, *supra*, 10 Cal.3d 94, coverage should apply.[10]

In contrast, in *Farmer v. Allstate Ins. Co.* (C.D. Cal. 2004) 311 F. Supp. 2d 884 , affd. (9th Cir. 2006) 171 Fed. App'x 111, the policy at issue provided

---

[9] The above quoted reasoning comes at the end of a section discussing that the firearm exclusion is not ambiguous, and therefore applicable. (See *Purdie*, 145 Cal.App.3d at pp. 66-67.) The insureds argued that the firearm exclusion was ambiguous because it could be construed as applying only to the negligent use of a firearm, and not its intentional use. (See *id.* at p. 66.) The *Purdie* court examined the exclusion and found that it did not contain such a limitation, and noted that the policy already contained a similar limitation in the "occurrence" definition, which was limited to the subjective standpoint of the insured. (See *id.* at pp. 66-67.)

[10] The concurrent cause analysis by the *Purdie* court is mistaken. As L&M note, *Purdie* was criticized in *Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 128, fn. 6. In fact, the *Purdie* court's mistaken "concurrent cause" analysis was thoroughly addressed by the *Century Transit* court:

> As we read *Purdie*, the negligent hiring or retention theory asserted against the employer was not an independent cause of the injury but rather a theory for imposing liability on a third party for an excluded injury. Unless the employee fired the gun, the injury would not have occurred. Therefore, liability for negligent hiring was wholly dependent upon an injury caused by excluded event and was not a true "independent" cause of the plaintiff's injury. We agree with those cases which have criticized the concurrent cause analysis endorsed and applied by *Purdie*.

(*Century Transit*, 42 Cal.App.4th at p. 128, fn. 6, citations omitted.)

coverage to the insured for liability arising out of an "occurrence," which was defined objectively as "an accident ... resulting in bodily injury or property damage," reflecting the 1986 ISO form, and mirroring the language in the Liberty policies. (*Id.* at p. 887.) The district court examined coverage for an in-home day care operator (Mrs. Varela) in relation to an alleged molestation by her husband (Mr. Varela). (*Id.* at p. 886.) The district court first noted that the alleged molestation "was not an 'occurrence' because child molestation cannot be an 'accident.'" (*Id.* at p. 891.) Basing its reasoning on *Maples v. Aetna Casualty & Surety Co.* (1978) 83 Cal.App.3d 641, and its progeny (discussed *infra*), the court stated:

> The Court is inclined to find that Mrs. Varela's negligent supervision does not qualify as an "occurrence." ... In *Maples*, the court was faced with determining whether the negligent conduct that created the potential for the injury causing event should be deemed an "accident." The *Maples* court presumably could have found that both the negligent heater installation and the fire itself were "accidents" (and thus "occurrences"), but instead it found that only the event causing the injury was the "accident." In the instant case, the injury causing events were clearly Mr. Varela's molestations of Plaintiff—without such behavior, Plaintiff would not have brought the underlying action against the Varelas. In that Mrs. Varela's negligence enabled

Mr. Varela to molest Plaintiff, Mrs. Varela's conduct only created the potential for Plaintiff's injuries.

(*Id.* at 893.) While the *Farmer* court correctly applied an objective standard under California law in its discussion indicating that the alleged "bodily injury" was not caused by an "occurrence," the court ultimately based its finding of no coverage on other provisions in the policy. (*Id.*)[11]

C. L&M Incorrectly Contends that "Trigger of Coverage" Cases Have Improperly Influenced Decisions as to What Constitutes an "Occurrence"

L&M mistakenly contends that this Court should discount California law dictating that the "occurrence" analysis is driven by the injury-causing act, because it is rooted in part in cases that have dealt with "trigger of coverage" issues. (See Br. at p. 17.) L&M also ignores that a "seemingly unbroken line of authority" in California explains that "the term 'accident' unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury." (*Maples*, 83 Cal. App. 3d at pp. 647-648 [examining case

---

[11] As L&M notes, Liberty also cited in its Ninth Circuit brief an unpublished case from the Court of Appeals, *L.A. Checker Cab Co-op., Inc. v. First Specialty Ins. Co.* (2010) 186 Cal.App.4th 767 . (See Br. 16.) Liberty did not rely "heavily" on the decision, as L&M mistakenly claims, nor was it improper for Liberty to discuss the case "openly" before the Ninth Circuit. In particular, a federal circuit court may look for guidance in depublished or unpublished opinions from intermediate state courts. (See *Employers Ins. of Wausau v. Granite State Ins. Co.* (9th Cir. 2003) 330 F.3d 1214, 1220, fn. 8 [noting that a depublished California case lent support to appellant's reading of California law].) Consistent with the California Rules of Court, Liberty does not rely upon unpublished California case law in this Answering Brief.

law in relation to limitation of coverage to "injury to or destruction of property ... caused by accident"], citations omitted.)

Cases in the line of authority referenced in *Maples* deal with timing, i.e., a precipitating event that fell within a policy period, but a proximate, injury-causing event that occurred after the policy period. (See, e.g., *Maples*, *supra*, 83 Cal.App.3d 641; *Tijsseling v. Gen. Acc. etc. Assur. Corp.* (1976) 55 Cal.App.3d 623.) L&M mistakenly contends that such cases are inapposite and of no use in resolving the instant dispute. (See Br. at p. 17.) L&M is mistaken, and ignores the reality that this line of authority has been applied by this Court outside of the policy-period context, to confirm that remote events do not constitute an "occurrence" causing injury. (See *Delgado*, *supra*, 47 Cal.4th at p. 316.)

Indeed, this Court's citation of *Maples* in *Delgado* expresses its relevance to the determination of whether an "occurrence" has caused injury in the context of this action. (See *Delgado*, *supra*, 47 Cal.4th at p. 316.) L&M relies heavily on *Delgado*, but L&M cannot embrace *Delgado* as controlling and at the same time reject the authorities on which the *Delgado* opinion rests as "inapposite" because they purportedly arise in a different context.[12] In *Delgado,* this Court itself did not discount the authority of *Maples* as

[12] In doing so, L&M selectively picks and chooses "snippets" from *Delgado*—exactly what L&M incorrectly suggests Liberty has done. (See Br. at p. 18.)

inapposite, but rather embraced it to reflect the direct focus under California law on the injury-causing event, not earlier, antecedent events.

III. L&M's Argument in Relation to the "Unexpected Consequences" of Deliberate Acts is Misplaced

A. The Issue, As Framed by L&M, is Not Determinative for this Action

L&M takes pains to argue that there should always be coverage for the "unintended result" of "deliberate acts," (see Br. at p. 25), but even if that were true, it does not follow that coverage is otherwise afforded under the Liberty policies. The argument appears to be in response to L&M's incomplete characterization of the district court's opinion in finding (according to L&M) that L&M's purported negligence "did not qualify as an 'accident' under *Merced* because it was deliberate conduct." (Br. at 8.) While L&M points to *Merced* as the source of the district court's reasoning, in fact the district court did not single out *Merced*, but included it in a string cite with three other cases—*Foremost Ins.*, *Bay Area Cab Lease*, and *Delgado*—to support its conclusion that the alleged negligent hiring, retention and supervision was not an "accident." (See 1AER 15.) Thus, it is instructive to discuss the cases the district court cited[13] in addition to *Delgado*, already

[13] One of those cases, *Foremost Ins.*, predated *Merced*, and was thus plainly not guided by *Merced*. (See *Foremost Ins.*, *supra*, 134 Cal. App. 3d 566.) Another, *Bay Area Cab Lease*, did not rely on *Merced* to reach its conclusion, though it cited *Merced* exactly once in support of the statement: "The coverage under a written insurance policy is solely a matter for judicial

discussed above, as it provides context for the district court's reasoning, and in doing so explains that L&M's forced arguments are entirely mistaken.[14]

In *Foremost Ins.*, the owners of a motor home loaned it to others for a trip to Mexico. (See *Foremost Ins.*, *supra*, 134 Cal.App.3d at p. 569.) While in Mexico, the motor home was involved in an accident in which two occupants of the motor home were killed. (See *id.*) The owners were sued on a negligent entrustment theory, as well as under vehicle statutes. (See *id.*) The owners had an insurance policy with respect to the motor home that provided that "[t]his policy applies only to accidents ... while the automobile is within the United States of America." (*Id.*) Thus, the argument turned on defining the "accident." If the "accident" was the initial loaning of the motor home to others, i.e. the negligent entrustment, it would fall within the coverage territory of the United States. (See *id.* at 571.) In response to that argument, the *Foremost Ins.* court stated "[t]o argue that the loan of the vehicle constituted the 'accident' in this case strains credulity. 'Accident' suggests a negative unexpected occurrence. While a manufacturing defect or a negligent repair may conceivably fit within this rubric, the intentional loaning of a vehicle to friends does not." (See *id.*) Thus, the *Foremost Ins.* court clearly

---

interpretation." (See *Bay Area Cab Lease*, *supra*, 756 F. Supp. at p. 1289, citing *Merced*, *supra*, 213 Cal.App.3d at p. 45.)

[14] Because L&M focus particularly on *Merced*, it is discussed at greater length in the following sections.

delineated between the initial, allegedly negligent antecedent act of entrustment and the injury-causing event (the vehicle accident in Mexico). The court clearly understood that there had been an "accident," albeit one that occurred in Mexico and thus subject to the territorial limitation. As negligent entrustment can neatly be analogized to negligent hiring, it appears that the district court in this action cited *Foremost Ins.* in support of its conclusion that negligent hiring would not be considered an "accident" under California law. Other cases cited by the district court in turn support the same conclusion with respect to negligent retention and supervision.

Of the cases cited by the district court, only *Bay Area Cab Lease* involved an underlying claim of negligent supervision. (See *Bay Area Cab Lease*, *supra*, 756 F. Supp. at p. 1289.) In *Bay Area Cab Lease*, the district court examined liability coverage for a cab company where it was alleged that an employee had molested a child and found that "negligent hiring/supervision is not an 'accident.'" (*Id.*) The *Bay Area Cab Lease* court reasoned that, "even if it [were] accepted that the act of 'negligent hiring' is the occurrence which gave rise" to the claimant's injuries, "this is not a risk that is covered by the policy since it is not an 'accident.'" (*Id.* at p. 1290.) The hiring and supervision of the employee "merely created the potential for injury to [the claimant] but was not itself the cause of the injury." (*Id.*) The *Bay Area Cab Lease* court did not focus on the "deliberate" nature of the purported negligent supervision in reasoning that there had been no "accident." Rather, there had

been no "accident" because the hiring and supervision were not the injury-causing events themselves. (See *id.* at p. 1290.) While the *Bay Area Cab Lease* court's finding of no coverage was also based on a limitation that the policy extended coverage only to injury arising from certain premises, (see *id.* at pp. 1290-91), the court's reasoning that no "accident" was alleged accurately reflects California law.

Thus, it appears that the district court collapsed into one sentence its reasoning as to why negligent hiring, retention and supervision do not constitute an "accident" under the facts of the *Doe* action. In some circumstances, like in *Foremost Ins.*, acts like alleged negligent entrustment or alleged negligent hiring are distinct because they represent discrete intentional acts. In others, as in *Bay Area Cab Lease*, there was no accident because the allegedly negligent acts were not themselves the direct cause of the injury, but rather merely created the opportunity for another actor to behave intentionally. The common thread is that the antecedent acts are distinct and separable from the events that actually caused the injury—whether temporally/geographically as in *Foremost, Ins.*, or because an inherently intentional act was the direct cause of injury, as in *Bay Area Cab Lease*. This Court, in *Delgado* (also cited by the district court here), confirmed the reasoning. (See *Delgado*, *supra*, 47 Cal. 4th at p. 310 [proper focus is on the injury-causing event].)

Examination of L&M's proffered hypothetical makes it clear that L&M's argument is unnatural and not responsive to this case. L&M present a

hypothetical wherein "Smith" attempts to throw a baseball to a child, but inadvertently "throws the ball over the child's head, and the ball breaks his neighbor's window." (Br. at p. 41.) According to L&M, acceptance of Liberty's argument and the judgment of the district court, particularly insofar as it reflects the reasoning of *Merced, supra,* 23 Cal.App.3d 41, would indicate there would be no coverage for Smith because he intended to throw the ball, just not through the window. (See Br. at p. 41.) One could hardly think of a scenario more disparate from the facts of this case and less enlightening.

Adopting L&M's hypothetical to the actual issue in controversy in this action would result in a scenario like this:

> *Smith intentionally threw a baseball through his neighbor's window. Despite knowing that Smith was prone to throwing baseballs through his neighbor's window, Jones gave Smith a baseball as they stood outside the neighbor's house.*

It becomes clear that the broken window is not the result of an "accident," and certainly is not an "unintended consequence" of intentional conduct. Rather, the result was a direct, intended result of the voluntary act. Further, Jones's antecedent act of entrusting the baseball to Smith does not change the result, independent from the fact that Jones can properly be viewed as expecting Smith to throw the ball through the window based on his knowledge of Smith's proclivity. The entrustment did not cause the broken window, but it

was rather Smith's act of throwing the baseball through the window that caused it to break.

L&M state that the majority of California appellate courts have not found than an "accident ... includes the unexpected consequences flowing from the insured's deliberate acts," (Br. at p. 25), but note that a handful of courts have followed what L&M contends is the correct rule. However, examination of those cases in context, makes it clear that they do not support the forced journey L&M invites the Court to undertake.

In *State Farm Fire and Cas. Co. v. Superior Court* (2008) 164 Cal.App.4th 317 ("*Wright*"),[15] the court examined an instance where an insured attempted to throw a boy into a pool simply to get him wet, but instead the boy landed on a cement step and was injured. The *Wright* court concluded that, because the injury itself was not intended, it could be deemed the result of an "accident." (See *id.* at p. 329.) The *Wright* court rejected the insurer's argument that the court "should apply 'fortuity' solely to the act causing the injury without reference to the injury...." (*Id.* at p. 330.) In concluding that a fortuitous injury resulting from an intentional act could implicate an "occurrence," the *Wright* court distinguished cases involving "sexual harassment or sexual assault," noting that "with respect to sexual molestation,

[15] Other courts, as well as L&M in its Opening Appellate Brief, refer to this case by the name of the claimant, Wright. We follow the convention.

no aspect in the causal series of events can be unintended." (*Id.*, citing *Merced, supra,* 213 Cal.App.3d at p. 50.) Thus, the *Wright* decision clearly does not embrace a circumstance where the harm itself is a necessary consequence of the injury-producing act, as in the case of sexual molestation.

Further, *Wright* predates *Delgado*; compare *Wright* with *State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, which follows this Court's decision in *Delgado*. In *Frake*, the court determined that an insured's intentional act of striking the claimant did not qualify as an "accident" simply because the insured did not intend to cause the resulting injury. (See *Frake*, *supra*, 197 Cal.App.4th at p. 584.) Although L&M mistakenly contends that *Frake*, among other cases, adopted *Merced*'s reasoning, (see Br. at p. 27), the *Frake* court relied most heavily on this Court's holding in *Delgado*, discussing it at length. (See *Frake*, *supra*, 197 Cal.App.4th at pp. 581-83, 584-85.) In following *Delgado*, the *Frake* court criticized *Wright*, stating:

> [T]o the extent *Wright* ruled that the term "accident" applies to deliberate acts that directly cause unintended harm, such a holding is contradictory to well-established California law. We are not aware of any California decision that has cited *Wright* approvingly or adopted its analysis.

(*Id.* at p. 585.) The *Frake* court reasoned that *Delgado* "reaffirm[ed] prior case law holding that the nature of the 'injury-causing event' determines whether an accident has occurred, not the nature of the resulting injury." (*Id.*

at p. 582.) As a result, the intentional act of striking the claimant, despite the purportedly unexpected consequences, could not be considered an "occurrence."

L&M also cites *Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, in which the court found that an intentional trespass could still result in an "accident" because while intent is an element of the tort of trespass, "[i]ntent to cause damage was not ... an element of the tort and, ... the trespasser was liable for such damage as he caused even though that damage was not intended or foreseen by him." (*Id.* at p. 326.) The *Meyer* court distinguished, at some length, circumstances where an injury was intended and where an intentional act inadvertently resulted in injury. (*See id.* at pp. 326-27.) In doing so, the *Meyer* court focused on whether the injury itself was "accidental in character." (See *id.* at p. 327.)[16] As with *State Farm*, the court's reasoning in *Meyer* does not indicate a finding of coverage for

[16] As this Court noted in *J.C. Penney Cas. Ins. Co., supra*, 52 Cal. 3d 1009, "*Meyer* does not support [the] view that coverage applies unless the insured acted with a subjective intent to injure. To the contrary, *Meyer* makes clear that coverage is excluded in this case [where the claimant was sexually molested]. ... *Meyer* does not support the argument ... that one can sexually abuse a young child but intend no harm." (*J.C. Penney Cas. Ins. Co., supra*, 52 Cal. 3d at pp. 1024-25, citing *Meyer, supra*, 233 Cal. App. 2d at p. 325.)

L&M in relation to Doe's sexual molestation—where the act and intent to injure are indivisible.[17]

B. *Merced* Was Correctly Decided and Reasoned, and Did Not Particularly Rely on *Unigard*

L&M's unusual focus on *Merced* cannot be a result simply of the district court's citation of the case. As discussed above, *Merced* is simply one of a number of cases cited by the district court. The focus appears to be based on a mistaken preconception that the particular reasoning of *Merced* contradicts California law, and thus improperly influenced the district court's determination. However, this is not the case, as a closer look at *Merced* reveals.

In *Merced, supra*, 213 Cal.App.3d 41, the insured, Mendez, was sued for liability due to alleged repeated instances of sexual assault. (See *Merced, supra*, 213 Cal.App.3d at 44.) The complaint alleged causes of action for both intentional and negligent assault and battery. (See *id.*) Mendez had a homeowner's policy that provided coverage for bodily injury "caused by an occurrence," a term defined to mean an "accident." (See *id.* at p. 46.) In seeking liability insurance coverage from his insurer, Mendez argued that he believed the sexual acts were consensual, and thus could be construed an

[17] The other case cited by L&M for the proposition, *Chu v. Canadian Indem. Co.* (1990) 224 Cal.App.3d 86, modified (Oct. 5, 1990), does not support L&M's contention for coverage here, and otherwise lacks instructional value in this context. *Chu* turned on whether there was known loss precluding coverage. *See Chu* at 97.

"accident" because, "even if the acts causing the alleged damage were intentional," "the resulting damage was not intended." (*Id.* at p. 48.)

In determining that Mendez's sexual assault was not covered as an "occurrence," the *Merced* court examined several California cases at length, including cases decided by this Court. (See *Merced, supra*, 213 Cal.App.3d at pp. 48-50.) Specifically, the *Merced* court closely examined this Court's decision in *Hogan*, characterizing the holding thusly:

> Focusing on the foreseeability of the damages, the insurance company argued damage to the boards resulting from cutting the widths too narrow was not the result of an accident because all of the damages "were not only foreseeable and expectable but in fact foreseen since Kaufman knew from the outset that the saw was defective...."

(*Id.* at p. 49, quoting *Hogan, supra*, 3 Cal.3d at p. 559.) The *Merced* court then examined why the *Hogan* court rejected that assertion. (See *Merced, supra,* 213 Cal.App.3d at p. 49.) Transitioning directly from its discussion of *Hogan*, the *Merced* court concluded "[w]e reject appellants' argument that in construing the term 'accident,' chance or foreseeability should be applied to the resulting injury rather than to the acts causing the injury." (*Id.* at p. 50.) This conclusion is clearly a correct application of this Court's precedent in *Hogan*, and presented as such. The intentional sexual acts were deliberate and thus not an "accident." (*See id.* at p. 50.)

After announcing the above-quoted conclusion, the *Merced* court offered three paragraphs of further explanation. In the first paragraph, the *Merced* court briefly quoted *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.* (1978) 20 Wash.App. 261, to note that "[i]n terms of fortuity and/or foreseeability, both "the means as well as the result must be unforeseen, involuntary, unexpected and unusual." (*Merced, supra,* 213 Cal.App.3d at p. 50, citing *Unigard, supra,* 20 Wash.App. at p. 264.) The *Merced* court then cited *Unigard* for the proposition that "[a]n accident, however is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." (*Merced, supra,* 213 Cal.App.3d at p. 50, citing *Unigard, supra,* 20 Wash.App. 261.) The *Merced* court did not discuss the facts or reasoning of *Unigard*, as it did with *Hogan*, as well as other California cases. In fact, the *Merced* court did not otherwise discuss or cite *Unigard* in any way. While L&M, in its brief, quotes the *Merced* court at length, including a theoretical presented by the *Merced* court that L&M agrees is correctly reasoned, (see Br. at p. 36), L&M omits the final explanatory paragraph of the *Merced* court's ruling on the issue, which applies the law to the facts and concludes in part:

> All of the acts, the manner in which they were done, and the objective accomplished occurred exactly as appellant intended. No additional, unexpected, independent or unforeseen act occurred. "Whatever the motivation," because Mendez's

> conduct was "calculated and deliberate" (*Hogan, supra*, 3 Cal.3d at p. 560), it was not an "accident" and thus not an "occurrence" within the meaning of the policy provision.

(*Merced, supra,* 213 Cal.App.3d at p. 50.) In concluding its discussion of the issue, the *Merced* court again rooted its decision in this Court's decision in *Hogan*. Despite that the *Merced* court correctly applied California law and this Court's precedent, L&M claims, without any justification, that "the cornerstone of *Merced*'s distinction between what qualifies as an 'accident,'" was the two brief citations to *Unigard*. However, neither the reasoning nor the context of the *Merced* opinion supports L&M's forced contention.

C. The *Merced* Opinion is Not the Result of a "Scrivener's Error"

L&M exaggerates the role of the *Unigard* citations in the *Merced* opinion in order to create the illusion of flawed reasoning by the Court of Appeals. By arguing (incorrectly) that the "cornerstone" of the *Merced* court's reasoning was a couple of brief cites to *Unigard*, L&M creates the false impression that the *Unigard* case is the source of a supposed "error" in California law. It must do so because it cannot directly dispute that *Merced* was correctly reasoned and decided under California law, or indeed that any of the subsequent cases citing *Merced* (including this Court's decision in *Delgado*) were correctly reasoned and decided under California law.

L&M incorrectly contends that the opinion of the appellate court in *Merced, supra*, 233 Cal.App.3d 41, is the product of a "scrivener's error." (See Br. at p. 32.) A "scrivener's error," or "clerical error," is defined as "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and *not from judicial reasoning or determination*." (Black's Law Dict. (9th ed. 2009) p. 622, col. 1, italics added.)[18] Under California law, a clerical error is distinguished from judicial discretion (or error) and is dependent on "whether it was the deliberate result of judicial reasoning and determination." (*Gill v. Epstein* (1965) 62 Cal.2d 611, 615, citing *Estate of Doane* (1964) 62 Cal.2d 68, 71; *see also Aspen Internat. Capital Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1204 ["A correctable clerical error includes one made by the court which cannot reasonably be attributed to the exercise of judicial consideration or discretion"].) Washington, where L&M supposes the "scrivener's error" originated, is in accord. (See, e.g., *Marchel v. Bunger* (1975) 13 Wash.App. 81, 84 ["A judicial error involves an issue of substance; whereas, a clerical error involves a mere mechanical mistake. The test for distinguishing between

[18] In the Ninth Edition of Black's Law Dictionary, the entry for "scrivener's error" refers one to the entry for "clerical error." (See Black's Law Dict. (9th ed. 2009) p. 1466, col. 1.) The above definition is found under the entry for "clerical error," which states that it is "[a]lso termed *scrivener's error*." (*Id.* at p. 622, col. 1, italics in original.)

'judicial' and 'clerical' error is whether, based on the record, the judgment embodies the trial court's intention"].)

There is no indication that the court in *Unigard* made any such error. In order to resolve the issue, the *Unigard* court examined analogous law from other cases. (See *Unigard*, *supra*, 20 Wash. App. at p. 264, fn. 2.) Courts do so routinely. (See, e.g., *Do v. Superior Court* (2003) 109 Cal.App.4th 1210, 1214 .)

L&M contends that the *Unigard* court's use of case law relating to first-person "accidental means" policies somehow invalidates or poisons that court's reasoning, and in turn the *Merced* court's brief citation of *Unigard* as persuasive authority. But this Court did exactly the same thing in *Geddes*, *supra*, 51 Cal.2d 558, when it turned to *Richards v. Travelers' Ins. Co.* (1891) 89 Cal. 170, and *Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, in order to define "accident" in a third-person liability policy. (See *Geddes*, *supra*, 51 Cal.2d at p. 563.) In *Richards*, the Court examined a life insurance policy wherein "the death must have been caused by accidental means.... The insurance is not against accidental injuries, but against injuries occurring through accidental means." (*Richards*, *supra*, 89 Cal. at p. 171.) In *Zuckerman*, the Court had examined a first-person life insurance policy that provided coverage for "accidental bodily injury ... caused by ... Accident." (*Zuckerman*, *supra*, 42 Cal.2d at p. 466.) While the first-person life insurance policy before the Court in *Zuckerman* did not use the term "accidental means,"

the Court noted that the provision was "substantially similar" to a provision insuring injury "caused directly and independently of all other causes by violent and accidental means." (*Id.*, quoting *Brooks v. Metropolitan Life Ins. Co.* (1945) 27 Cal.2d 305, 306.) The Court in *Zuckerman* court also looked at "accidental means" policies in *Richards, supra*, and *Rock v. Travelers' Ins. Co.* (1916) 172 Cal. 462 , in discussing the term "accident."

Further, L&M's characterization (incorrect, as it is) has no legal significance here. Under California law, a "clerical error" can be corrected by the trial court through a simple amendment. (See, e.g., *In re Candelario* (1970) 3 Cal. 3d 702, 705 .) However, "[a]ny attempt by a court, under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted." (*Id.*, quoting *In re Wimbs* (1966) 65 Cal.2d 490, 498.) No issue relating to any attempt to "correct" or alter any lower court record has ever been raised in this action by either party. Rather, L&M use the term loosely to incorrectly impugn the reasoning of the *Merced* court. However, as discussed above, the *Merced* court's reasoning is sound and accurately reflects California law as established by this Court.

CONCLUSION

For the foregoing reasons, Liberty respectfully submits that the Court should answer the certified question in the negative in the context of the undisputed facts of this action, and find that the *Doe* action does not allege an "occurrence" within the meaning of the Liberty policies.

Dated: February 16, 2017

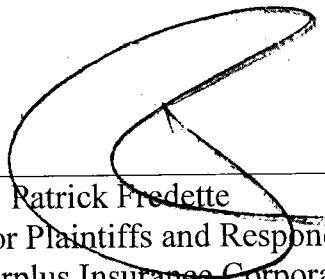
McCORMICK, BARSTOW,
SHEPPARD,
WAYTE & CARRUTH LLP

By: _____
Patrick Fredette
Christopher Ryan
Attorneys for Plaintiffs and
Respondents Liberty Surplus Insurance
Corporation and Liberty Insurance
Underwriters Inc.

CERTIFICATE OF WORD COUNT

The text of this Answering Brief contains 13,295 words, according to the word count generated by the word-processing program used to prepare the brief.

Dated: February 16, 2017



By: _____
Patrick Fredette
Attorney for Plaintiffs and Respondents
Liberty Surplus Insurance Corporation
and Liberty Insurance Underwriters Inc.

4294621.1

PROOF OF SERVICE

STATE OF OHIO, COUNTY OF HAMILTON

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Hamilton, State of Ohio. My business address is 312 Walnut Street, Suite 1050, Cincinnati, Ohio, 45202.

On February 16, 2017, I served true copies of the following document(s) described as **RESPONDENTS' ANSWERING BRIEF ON THE MERITS** on the interested parties in this action as follows:

Ricardo Echeverria
SHERNOFF BIDART
ECHEVERRIA LLP
600 South Indian Hill Boulevard
Claremont, California 91711

Attorney for Appellants:
Ledesma & Meyer Construction Company, Inc.; Joseph Ledesma; and Kris Meyer

Jeffrey I. Ehrlich
THE EHRLICH LAW FIRM
16130 Venture Boulevard,
Suite 610
Encino, CA 91436

Attorney for Appellants:
Ledesma & Meyer Construction Company, Inc.; Joseph Ledesma; and Kris Meyer

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 the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit

I declare under penalty of perjury under the laws of the State of Ohio that the foregoing is true and correct.

Executed on February 16, 2017, at Cincinnati, Ohio.

Christopher Ryan