S236765

SUPREME COURT OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, et al.,

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

9th Cir. No. 14-56120

REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

The question that the Ninth Circuit certified to this Court asks: Whether there is an 'occurrence' under an employer's commercial general liability [GGL] policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party." Because liability policies define *occurrence* as an *accident*, this question functionally asks whether the employer's negligent conduct in this context qualifies as an *accident*. That is the issue that L&M addressed in its opening brief.

Liberty has elected not to respond to this question in its answering brief. Instead, it reframes the issue, asking:

> 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"? (ABOM at 1.)

Neither Liberty's revised question nor its answering brief focus on whether an employer's negligent conduct qualifies as an "accident." But Liberty conceded in its correspondence with L&M that it did, and Liberty's brief makes no attempt to retract that concession. Instead, Liberty trains its analysis on the policy's requirement that the bodily injury at issue have been "caused by" the occurrence. Liberty contends that, because the employer's negligence was not the "independent cause" of the bodily

injury at issue in the claim, it does not satisfy the causation requirement established by the policy.

Liberty contends that coverage under a CGL policy is determined by looking at "the injury-causing act itself in order to determine whether there had been an 'occurrence' triggering coverage." (AOBM at 2.) In its view, "Doe's alleged 'bodily injury' was caused by Hecht's molestation and rape, not L&M's alleged negligent retention or supervision of Hecht." (*Id.*) Since L&M's negligence was not the "act directly responsible for the injury," Liberty claims that it cannot be considered to be the "cause" of the injury, and there is accordingly no coverage for Doe's claim under its policies. (*Id.* at 29.)

Liberty's position is at odds with the language in its policies, which require only that the bodily injury be "caused by" an occurrence. This Court's decision in *State v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, makes clear that when the policy says "caused by," this refers to tort-causation principles, *i.e.*, substantial-factor causation. (*Id.*, 45 Cal.4th at p. 1036.)

Liberty's attempt to defeat coverage by looking to the "injury-causing act itself" as opposed to the conduct of the insured cannot be squared with this Court's decision in *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 311. *Delgado* holds that, "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.*, second emphasis added.)

In sum, coverage exists under a liability policy when the *insured*'s conduct qualifies as an "occurrence" (an accident) that is a substantial factor in causing the harm that is the subject of the claim. Each of these requirements is met here.

Although Liberty's answering brief takes issue with many subsidiary aspects of L&M's arguments, it offers a notable lack of clash on L&M's principal contentions. Specifically, Liberty's brief offers no substantive disagreement with the following arguments advanced by L&M:

- This Court's first-party and third-party decisions dating to the 1860s consistently define *accident* in a way that includes the unintended consequences of the insured's intentional acts;
- L&M's negligent hiring, retention, and supervision of Hecht constituted an "accident;"
- The decision in *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 (*"Merced"*) uncritically relied on *accidental means* concepts to define *accident*; and
- There are no reasons grounded in public policy, or in the nature of CGL coverage, that suggest that claims against employers for negligent hiring, retention, or supervision of employees should fall outside the scope of CGL coverage.

Liberty likewise offers no defense of the prevailing view in the Court of Appeal that *accident* cannot include the unintended consequences of the insured's intentional acts.

In sum, Liberty has not provided this Court with any reason to answer the Ninth Circuit's certified question in any way other than "Yes."

ARGUMENT

A. Liberty's causation-based argument cannot be squared with the terms of its policies or with this Court's precedents

1. Liberty's policies promise coverage for bodily injury "caused by" an occurrence

Liberty's discussion of causation is curiously divorced from the language of its policies, which simply require that the bodily injury at issue in the claim against the insured be "caused by" an occurrence.

Specifically, the insuring clause in Liberty's primary policy promises that Liberty will "pay those sums that the insured becomes legally obligated to pay as damages *because of* 'bodily injury' ... to which this insurance applies. (ER 267–268, 289; ABOM at 9, emphasis added.) The insuring clause further explains that the policy applies to bodily injury "only if . . . [t]he 'bodily injury' . . . *is caused by* an 'occurrence' . . . ." (*Id.*, emphasis added.)

Liberty's umbrella policy is similarly worded. The insuring clause promises that Liberty will pay "those sums . . . that the 'Insured' becomes legally obligated to pay . . . *because of* 'bodily injury'. . . *caused by* an 'occurrence'. . . ." (ABOM at 10, 11, emphasis added.)

Liberty's coverage position concerning the causation standard that its policies impose was explained in a letter that Liberty sent to L&M, which Liberty quotes in its answering brief:

> [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, L&M's alleged negligent 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. (ABOM at 12, 13, emphasis added.)

"Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27.) The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the mutual intention of the parties at the time the contract was made. (*Id.*) This mutual intent "is to be inferred, if possible, solely from the written provisions of the contract." (*Id.*, citations and internal quotation marks omitted.) "If the policy language is clear and explicit, it governs." (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074, internal quotation marks omitted.)

In short, Liberty's obligations under its policies are defined by the terms of those policies. If Liberty had wanted to limit the scope of the policies' coverage to cases where the occurrence was the "direct," "immediate," or "actual" cause of the claimant's bodily injuries, it should have used that language. Having failed to do so, it cannot now urge this Court to construe the policies as though the "missing" language had been included. "We do not rewrite any provision of any contract, including an insurance policy, for any purpose."(*Rosen*, 30 Cal.4th at p. 1073, internal brackets omitted.)

To read those terms into the policy at this stage "would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted." (*Safeco Ins. Co.*

of America v. Robert S. (2001) 26 Cal.4th 758, 764 [declining to construe "illegal acts" exclusion as though it had been drafted as a "criminal acts" exclusion].)

2. The term "caused by" in Liberty's policies is defined by tort-causation principles — hence "substantial factor" causation

"[T]he 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.) "While coverage under both first and third party insurance is a matter of contract, the contractual scope of third party liability insurance coverage, as reflected in the policy language, depends on the tort law source of the insured's liability." (*State v. Allstate Ins. Co.*, 45 Cal.4th at p. 1031.)

L&M pointed out in its opening brief that *State v. Allstate* expressly recognizes that the substantial-factor test provides the relevant standard for tort-causation. (*Id.* at p. 1036.) "[T]he fact that 'substantial cause' may be sufficient to make a prima facie case in a tort action in order to support a joint and several judgment" . . . *does* imply that such tort law (substantial factor) causation is sufficient to create coverage *under a liability policy* when covered and excluded acts or events have concurred in causing injury or property damage." (*Id.*, internal quotation marks and citation omitted, emphasis in original.)

The fundamental point that the Court was making in *State v. Allstate* was that the internal causation standard within a liability policy (e.g., "because of" or "caused by") is defined by, and mirrors, the tort-causation standard that governs the insured's liability. Hence, when Liberty's policy refers to bodily injury "caused by" an occurrence, this means that the occurrence is a substantial factor in causing the bodily injury.

Liberty argues that L&M is attempting to read *State v. Allstate* to stand for the proposition that "coverage under a liability policy necessarily extends to the extent of an insured's potential liability." (ABOM at 33.) This is not L&M's argument at all. Obviously, there can be a wide gulf between an insured's exposure to tort liability and the extent of its insurance coverage for that liability. Were it otherwise, liability coverage would extend to *all* liability faced by an insured, and policy provisions that purported to limit the scope of coverage, such as exclusions, conditions, or even policy limits, would have no meaning.

L&M's argument, and the point that this Court made in *State v. Allstate*, is that to the extent that the insured can be held liable in tort for one of the risks covered by the policy, the *causation standard* that governs the insured's tort liability also governs the scope of its coverage for that tort. What *State v. Allstate* precludes is a result where the insured is held liable for a risk covered by its policy, but the policy's coverage is nevertheless not triggered because it is being governed by a causation standard that is stricter than the tort-causation standard.

Liberty seeks to distinguish *State v. Allstate* by arguing that it "did not decide or even opine on what might constitute an 'occurrence' or an 'accident' under a third-party liability policy." (AOBM at 34.) This is correct, but this observation does not assist Liberty here because Liberty's own argument neither defines, nor is dependent upon, what constitutes an occurrence or accident. Rather, Liberty *admits* that L&M's negligent conduct was "accidental in nature" and argues that this is irrelevant, because even if its negligent retention or supervision of Hecht qualified as an occurrence, there is no coverage because that conduct is "too attenuated" to trigger the policy's coverage.

Liberty also tries to distinguish *State v. Allstate* by arguing that it applies only to cases presenting a "concurrent cause" situation comparable to the one in *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 102, where each of the insured's distinct acts of negligence was independently capable of causing the injury. (ABOM at 34.) As Liberty puts it, "Without the alleged sexual assaults by Hecht, there is no injury, and this no independent liability for L&M's alleged negligence." (*Id.*)

Liberty's attempt to limit *State v. Allstate* in this fashion fails for two reasons. First, it overlooks the decision's holding that the causation standard for liability policies mirrors the tort-causation substantial-factor test. Second, Liberty misreads *Partridge*.

Neither *State v. Allstate* nor *Partridge* hold that insurance coverage for multiple risks is triggered only when the risks operate completely independently of each other. In fact, *Partridge* says precisely the opposite. Recall that the insured in *Partridge* had filed down the trigger of his pistol to create a "hair trigger," and then held the gun in his hand as he drove his car over a bumpy road, causing it to discharge and injure his passenger. (*Partridge*, 10 Cal.3d at p. 98.) The coverage issue in *Partridge* was whether the passenger's bodily-injury claim was covered by the insured's homeowner's policy, his auto policy, or both policies.

The Court held that the insured's negligent filing of the trigger mechanism was sufficient to hold him liable under the homeowner's policy, and the use of the gun while driving created coverage under the auto policy. (*Id.*, 10 Cal.3d at p. 106.) The fact that both acts were committed by the same insured to produce a single injury did not negate coverage under either policy. (*Id.*, 10 Cal.3d at p. 103.)

As relevant here, the Court did not condition coverage on a finding that the risks operated independently of each other. To the contrary, it explained

> Although there may be some question whether either of the two causes in the instant case can be properly characterized as The 'prime,' 'moving' or 'efficient' cause of the accident we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply A concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act." (*Id.*, 10 Cal.3d at pp. 104-105.)

In other words, *Partridge* held that the insured could establish coverage *without* having to prove that one negligent act was the efficient-proximate-cause of the other. It did not hold that coverage could exist *only* when the two acts were independent; rather, it held that there would be coverage *both* when the acts were dependent *and* when they were independent.

Hence, the context of this case, L&M's negligent hiring, retention, and supervision of Hecht was a cause of Doe's injuries, and Hecht's conduct was a cause of the same injuries. This concurrence "did not nullify any single contributory act" for the purposes of causation. Rather, both were substantial factors in causing Doe's harm. Because L&M's negligent conduct was a substantial factor in causing the harm, it was held liable to Doe. As a result, the "caused by" causation standard in Liberty's policies was also satisfied.

3. Causation within liability policies focuses on the insured's conduct, even if that conduct is not the direct or immediate cause of the victim's bodily injury

Liberty articulates its coverage argument this way: "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." (ABOM at 2.) Unfortunately, because this statement appears in the introduction to the brief and is not supported by citations, it is not clear which decisions Liberty has in mind.

As far as L&M is aware, only one California appellate decision has actually relied on this argument to deny coverage in the context of a claim against an employer for negligent hiring, retention, or supervision of an employee who committed an intentional tort. That decision was in *L.A. Checker Cab Co-op., Inc. v. First Specialty Ins. Co.* (2010) 112 Cal.Rptr.3d 335, 338, ordered depublished on October 27, 2010, a case that Liberty relied on in its briefing in the district court and in the Ninth Circuit.[1]

Liberty's coverage position improperly seeks to shift the focus of the coverage inquiry from the acts of the insured (L&M) to the acts of a third party (Hecht). *Delgado* precludes this approach, since it holds that "The

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[1] Liberty argues that it was proper for it to do so in the federal system, noting that "a federal circuit court may look for guidance in depublished or unpublished opinions from intermediate state courts. (ABOM at 39, n. 11, citing *Employers Ins. of Wausau v. Granite State Ins. Co.* (9th Cir. 2003) 330 F.3d 1214, 1220 fn. 8.) But unpublished and depublished appellate opinions do not provide equivalent guidance. Liberty argues that it did not rely "heavily" on *L.A. Checker* in its federal briefing, nor does it rely on it at all in this case. But this ignores the fact that the argument it advances is *precisely* the holding of *L.A. Checker*, and the flaws in that holding were what prompted the depublication requests that this Court granted in that case.

term 'accident' in the policy's coverage clause refers to the injury-producing acts of the insured . . . ."(*Id.*, 47 Cal.4th at p. 315.)

Delgado means that courts do not root through the causal chain leading to the claimant's bodily injury, determine its "actual cause," and withhold coverage if that cause is not accidental. Rather, the proper analysis considers the conduct of the insured. If that conduct qualifies as an accident (and hence as an "occurrence"), and it "causes" the bodily injury at issue under the substantial-factor test, the insured has satisfied its burden of bringing the claim within the scope of the policy's insuring clause.

Liberty realizes that *Delgado* poses a problem, which it addresses in a footnote that accuses L&M of "ignor[ing] context" concerning *Delgado*'s directive that the reference to an "occurrence" refers to the insured's conduct, and not the conduct of a third party. (ABOM at 30, n. 8.) Liberty points out that, in *Delgado*, "the assailant and the insured were one and the same." (*Id.*) Therefore, "the Court had no occasion to distinguish between the actor engaged in the assault and the insured." (*Id.*)

Liberty also notes that *Delgado* cited *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 596, and *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 804, in support of the statement that liability coverage looks to the conduct of the insured. *Quan* held that sexual assault is inherently non-accidental, and *Collin* similarly held that a conversion could not be considered accidental. (ABOM at 30, n. 8.)

Liberty concludes its discussion of the issue by explaining that, "the context of *Delgado*, *Quan*, and *Collin*, makes clear that the focus is on the injury-causing act and not the subjective understanding of the insured." (ABOM at 30, n. 8.) Liberty's argument is opaque, perhaps deliberately so. As in *Delagdo*, the wrongdoer was the insured in both *Quan* and in *Collin*.

So neither of those cases offers a template for a case where the "assailant and the insured were [not] one and the same."

But whatever Liberty means, it does not suggest that there is any justification stated in *Quan*, or *Collin*, or even in *Delgado*, for an exception to the rule that "The term 'accident' in the policy's coverage clause refers to the injury-producing acts of the insured . . . ." (*Delgado*, 47 Cal.4th at p. 315.)

By contrast, L&M's coverage position is wholly consistent with this statement in *Delgado*, and even with Liberty's assertion that "the focus is on the injury-causing act." What Liberty's argument incorrectly assumes is that L&M's negligent hiring, retention, and supervision of Hecht cannot be "the injury-producing act."

This argument fails to acknowledge that a claim against an employer for negligent management of an employee is a separate, independent tort; not a "parasitic" or "vicarious or derivative" claim arising from Hecht's deliberate acts. (*See Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 325 [distinguishing between the insured's "independent tort" of negligently failing to prevent acts of molestation and the molester's tortious acts].)

L&M discussed this issue at pages 20-22 of its opening brief on the merits. Since the insured employer's negligence forms the basis for an independent tort claim against it for negligent hiring, retention or supervision of an employee, it logically follows that the "wrongful act" that is analyzed to determine whether it qualifies as an occurrence is the insured's wrongful act.

4. The trigger-of-coverage cases do not support Liberty's causation argument or its coverage position

Liberty also suggests that the cases involving the issue of "trigger of coverage" support its view that "the 'occurrence' analysis is driven by the injury-causing act." (ABOM at 39.) What Liberty overlooks is that, in the trigger-of-coverage context, the issue being considered is not whether or not the insured's conduct qualifies as an occurrence; it is whether that occurrence falls within the period that a particular policy is effective. This point is clearly illustrated in the two trigger-of-coverage cases that Liberty cites in its discussion, *Maples v. Aetna Cas. & Surety Co.* (1978) 83 Cal.App.3d 641, and *Tijsseling v. Gen. Acc. etc. Assur. Corp.* (1976) 55 Cal.App.3d 623. (ABOM at 39, 40.)

In *Maples*, the insured was a plumber, who negligently installed a hot-water heater in a client's home, causing a fire. The installation occurred during the policy period, but the fire occurred after the policy had expired. The policy provided that it applied "only to accidents which occur during the policy period." (*Id.*, 83 Cal.App.3d at p. 641.) The court applied a rule drawn from earlier cases that posed similar timing issues, "the general rule [is that] the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed, but the time when the complaining party was actually damaged."(*Id.*, 83 Cal.App.3d at p. 647.)

Tijsseling is similar. There, the insured (Tijsseling) sold two real-estate parcels to two buyers. They sued him for negligent misrepresentation upon learning that a house that he had built on one parcel before the sales encroached on the other parcel. The issue in *Tijsseling* was whether the policy that Tijsseling had in force at the time the suit was filed against him would cover conduct occurring years before the policy was issued. The

policy in that case provided coverage for property damage "which occurs during the policy period." (*Id.*, 55 Cal.App.3d at p. 626.)

In the court's view, "The events constituting damage in the instant case occurred either when the encroaching dwelling was constructed or when negligent representations were made by Tijsseling or by subsequent sellers of the property. None of these events occurred during the period covered by the General policy." (*Id.*, 55 Cal.App.3d at p. 628.) Accordingly, there was no coverage under that policy.

Neither *Maples* nor *Tijsseling* held that the insured's conduct cannot qualify as an occurrence when it produces damage that occurs outside of the policy period. Indeed, this Court's decision in *Insurance Co. of North America v. Sam Harris Constr. Co.* (1978) 22 Cal.3d 409, 412, shows that it can. That case involved the insured's negligent maintenance of an aircraft during the policy period, which resulted in a crash after the policy expired. Based on the language of the policy at issue in that case, this Court held that there was coverage.

Here, both L&M's negligent acts and Hecht's molestation of Doe occurred during Liberty's policy period. Hence, Liberty has not raised any trigger-of-coverage defenses. Accordingly, the trigger-of-coverage cases shed little, if any, light on the issue the Court confronts here.

B. Liberty concedes the core premises of L&M's argument

The tone and heft of Liberty's answering brief convey the overall impression that Liberty takes issue with everything that L&M has argued in its opening brief. But that is something of a facade. Liberty's choice to re-frame the issue it would address necessarily limited the amount of clash between the parties' contentions, since each party was responding to a different issue.

But even when Liberty offered a response to L&M's arguments, that response was typically a glancing blow, either because Liberty misstated the argument and then responded to an argument that L&M did not make,[2] or because Liberty homed in tangential issues.[3] As explained below, when it comes to the most important propositions that underlie L&M's argument, Liberty's answering brief shows that Liberty and L&M are in full agreement.

1. Liberty concedes that an accident can include the unintended consequences of an intentional act, and that L&M's conduct here was accidental

The certified question before the Court asks whether an employer's negligent hiring, retention, or supervision of an employee can constitute an occurrence under a liability policy. Since those policies define *occurrence* as an *accident*, the critical issue in this case is whether L&M's negligence in managing Hecht qualifies as an accident. That is the issue that L&M's brief addressed.

L&M argued that its negligent hiring, retention, and supervision of Hecht qualified as an accident under this Court's precedents as well as under the definition of *accident* that this Court adopted in *Delgado*: "In the context of liability insurance, an accident is an unexpected, unforeseen, or

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[2] For example, Liberty devotes three pages of its brief to arguing that "insurance coverage is not co-extensive with an insured's potential tort liability. (ABOM at 32-34.) But L&M never argued that insurance coverage was co-extensive with tort liability.

[3] *See, e.g.*, Liberty's exegesis on the distinction between a scrivener's error and judicial error. (ABOM at 52-55.) While that distinction may have significance where the issue is a court's ability to correct its own error; that issue is not implicated here. What is important is that even Liberty admits that there was an error.

undesigned happening or consequence from either a known or an unknown cause." (*Id.*, 47 Cal.4th at p. 308.)

One would scour Liberty's brief in vain to see any disagreement with either point. Liberty's brief only mentions this definition once, in its discussion of *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.* (1959) 51 Cal.2d 558, 564, which acknowledges that the Court borrowed this definition from *Hauenstein v. Saint Paul-Mercury Indem. Co.* (1954) 242 Minn. 354, and applied it as the relevant definition of *accident* in that case. (ABOM at 22.)[4]

Liberty never argues that L&M's conduct specifically, or an employer's negligent management of its employees generally, do nor or should not fit within this definition. Nor does Liberty take issue with L&M's contention that this Court's precedents dating to 1891, in both first-party and third-party cases, form an unbroken strand of authority supporting the proposition that the unintended consequences of an actor's intentional conduct can qualify as an accident. Liberty disagrees with some aspects of how L&M reads some of this Court's decisions in this area, but offers no resistance on this point.

In addition, Liberty acknowledges that "negligent supervision and retention are accidental in nature." (ABOM at 12.) This is what Liberty

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[4] Coincidentally, in both California and Minnesota the juridical application of the *Hauenstein* definition has followed the same arc. As in California, Minnesota's intermediate appellate courts gradually read the term "consequence" out of the definition of *accident*, so that it came to be viewed as excluding the unintended results of deliberate acts. (*American Family Ins. Co. v. Walser* (Minn. 2001) 628 N.W.2d 605, 610, 611 [explaining how the court of appeals "strayed from the *Hauenstein* definition"]. As explained *infra*, at pp. 20-22, the *Walser* Court corrected that error, and re-established that an *accident* can include the "consequences" of the insured's deliberate acts.

advised L&M in an August 22, 2011 reservation-of-rights letter, and to its credit Liberty has not changed position. Liberty never argues in its brief that L&M's conduct was not accidental. Its argument is that, irrespective of whether it was accidental, there is no coverage in light of Liberty's view of causation.

2. Liberty cannot dispute that *Merced* improperly imported *accidental means* principles into the definition of *accident*, and that this mistake has profoundly influenced California law

Having admitted that this Court's precedents demonstrate that an accident can include the unintended consequences of the insured's deliberate acts, Liberty makes no attempt to defend or rely on the contrary proposition, which currently forms the prevailing view in the Court of Appeal and in the courts of the Ninth Circuit when they apply California law. (*See, e.g., Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 ["the term 'accident' refers to the insured's intent to commit the act giving rise to liability, as opposed to his or her intent to cause the consequences of that act"].)

L&M explained in its opening brief that the most influential decision on this point is *Merced Mutual Ins. Co. v. Mendez*, 213 Cal.App.3d at p. 50, and that the *Merced* court inadvertently imported the test for *accidental means* into its analysis of what constitutes an *accident* by relying on *Unigard Mut. Ins. Co. v. Argonaut Insurance Co.* (1978) 20 Wash.App. 261, 579 P.2d 1015, 1018, which made the same error.

Liberty's answering brief does not dispute that the test for *accident* adopted in *Unigard* was drawn solely from cases that involved *accidental means* policies and therefore did not accurately describe the test for what constitutes an *accident*. Nor does it dispute that the portion of the *Unigard* opinion that the *Merced* court cited in its description of what constitutes an

accident is actually the definition of *accidental means.* Liberty makes no attempt to argue that it would be appropriate to use the test for *accidental means* in cases involving insurance policies that promise coverage for an *accident.*

Instead, it argues that *Merced* was correctly decided and did not "particularly rely on *Unigard.*" (ABOM at 49.) But L&M has not argued that *Merced* or any of the cases that have relied on it have been wrongly decided. *Merced* involved allegations of forcible sexual assault. Even before this Court decided *J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1021, which recognized that sexual assault and child abuse were inherently uninsurable, the law has been that when the insured engages in deliberate conduct from which harm would "naturally be expected," there is no accident if that harm occurs. (*Price v. Occidental Life Ins. Co.* (1915) 169 Cal. 800, 803.)

L&M's argument is that even though the *Merced* court reached the right result, in doing so it adopted an erroneous test for what constitutes an *accident*, inadvertently drawn from *accidental means* cases. Liberty's assertion that the *Merced* court did not "particularly rely" on *Unigard* is unfounded. While it is true that the *Merced* opinion did discuss many California cases concerning the meaning of *accident*, its *ratio decidendi* was drawn directly from *Unigard.* (*Merced*, 213 Cal.App.3d at p. 50.)

That specific portion of the *Merced* opinion was divided by the West editors into six headnotes when they typeset the opinion into the California and Pacific Reporters. Headnote 8 says, "**Insurance** 'Accident,' within meaning of insurance policy, is never present when insured performs deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces damage." This language is

drawn directly from *Unigard* and misstates the law concerning what constitutes an *accident*. (See OBOM at 32-34.) Liberty does not contend otherwise.

According to West's Keycite feature, this specific headnote has been followed in 60 later decisions, including 27 California appellate opinions, 9 Ninth Circuit decisions, and 22 decisions by district courts in California.

Liberty cannot dispute that *Merced* erroneously seeded *accidental means* concepts into California law concerning the meaning of *accident*, nor can it credibly minimize the significance of that error.

3. Liberty offers no reason why the risks posed by an employer's negligent management of its employees should fall outside of the coverage provided by CGL policies

In its opening brief L&M argued that claims against an employer for its negligence in hiring, retaining, or supervising its employees fall squarely within the nature of risks that CGL coverage was designed to cover. (OBOM at 20-25.) Liberty does not take issue with this contention, except to the extent that it would be inconsistent with its argument that liability coverage must be determined based on the "direct" or "immediate" cause of the harm.

C. Allowing insurers to treat the *occurrence* requirement as a multi-purpose exclusion makes the terms of liability policies unclear

L&M argued in its opening brief that because the *occurrence* requirement in Liberty's policy was worded exactly like an exclusion, and was treated like an exclusion by Liberty, it should be subject to the same rules of construction that apply to exclusionary language in insurance policies. (OBOM at 42-46.)

Liberty responds by quoting this Court's recognition that insurers have the general freedom to contract as they see fit, and that courts should

not take it upon themselves to re-write insurance policies. (ABOM at 16, 17.) Liberty once again fails to respond to L&M's argument.

L&M is not asking this Court to re-write Liberty's policy (or any other liability policy). It merely asks the Court to apply the rules that govern the interpretation of exclusionary policy language to all exclusionary provisions in the policy, even if the insurer has inserted them into the policy's insuring clause.

This case illustrates the need for clarity. There is no exclusion in L&M's policy that would inform it that its policy would not cover claims arising from its negligent hiring, retention, or supervision of its employees. But Liberty has cast the *occurrence* limitation in the policy's insuring clause as just such an exclusion. The vice in this approach is twofold: It not only misconstrues the *occurrence* requirement, for the reasons explained above, but it also failed to put L&M on notice about what its policy would actually cover at the time that L&M was purchasing coverage.

The Minnesota Supreme Court's decision in *American Family Ins. Co. v. Walser*, 628 N.W.2d at p. 611, is instructive. The insured in *Walser* (Walser) was a tenth-grader, who was playing basketball with two friends. When one of the boys (Jewison) jumped up and hung from the rim, the two others grabbed his ankles and tugged, causing him to lose his grip. Jewison lost his balance upon landing, put out his hand, and injured his thumb. He sued for the injury. Walser's insurer denied coverage, arguing that there had been no accident because the boys had purposely tugged on Jewison's ankles.

The trial court ruled in favor of the insured, and the Court of Appeal reversed, finding that there was no accident because the injury resulted from "an act that was both intentional and wrongful." (*Id.*, 628 N.W. at

p. 609.) The Minnesota Supreme Court reversed, finding that there was an accident under the *Hauenstein* definition because the boys acted without any intent to cause injury, and therefore Jewison's bodily injury was an unintended consequence of their deliberate act. (*Id.* at pp. 612-613.)

Walser illustrates the need for symmetry between the breadth of the *occurrence* requirement in liability policies and the standard exclusion in such policies withdrawing coverage for damage that the insured expects or intends.[5] *Walser* rightly notes that it would be illogical to construe the *occurrence* requirement more broadly than the intentional-acts exclusion. (*Id.*) Rather, "It would be preferable—at least in terms of common sense expectations of the meaning of contractual provisions — that a general coverage provision provide a broad scope of coverage that is then limited by a specific exclusion. (*Id.*)

Accordingly, in construing the definition of *accident*, the Court consulted its cases construing the intentional-acts exclusion, noting that, "accidental conduct and intentional conduct are opposite sides of the same coin. The scope of one in many respects defines the scope of the other." (*Id.* at pp. 611, 612.) Hence, under the *Hauenstein* definition, "where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional." (*Id.* at p. 612.)

Although six of the justices in *Walser* viewed the conduct at issue as an accident, one justice dissented. In his view, "Under the language of the insurance policy, it makes no difference whether the insured intended injury

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[5] In California, the scope of that exclusion is held to parallel the scope of the statutory exclusion in Insurance Code section 533, prohibiting indemnity for the insured's willful acts. (*Delgado,* 47 Cal.4th at pp. 313–314.)

or not—the only concern is whether the act causing the injury was accidental or intentional." (*Id.* at p. 615, dissenting opn. of Stringer, J.)

Justice Stringer's analysis is based upon the same rationale that the various Court of Appeal decisions in California have relied on to reach the conclusion that *accident* cannot include the unintended consequences of deliberate acts. His dissent illustrates that, when it comes to determining what qualifies as an "accident," fair-minded people and judges often fail to see the same incident in the same way.

This variability demonstrates both the need for clarity in the definition of *accident*, as well as the uncertainty that flows from allowing insurers to rely on the terms *occurrence* or *accident* as catch-all exclusions to avoid coverage for a broad range of undefined conduct.

If this Court were to acknowledge that the *occurrence* requirement in Liberty's policy served an exclusionary function, and should therefore be evaluated as an exclusion, it would not pass muster unless the Court viewed it as communicating its scope to the insured in terms that were "clear and unmistakable." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

It is doubtful that the Court would find that a statement that the policy covers only bodily injury caused by an occurrence "clearly and unmistakably" informed L&M that claims against it for negligently hiring, retaining, or supervising an employee would be excluded.

Accordingly, this Court's recognition that the *occurrence* requirement in liability policies is a term of limitation and is therefore subject to the rules of construction that apply to such terms would provide insurers with considerable incentive to clarify their policies. That, in turn, would lead to fewer "disillusioned insured[s]; protesting insurer[s], and

anguished court[s]." (*Bareno v. Employers Life Ins. Co.* (1972) 7 Cal.3d 875, 878.)

CONCLUSION

The Court should answer the certified question in the affirmative, holding that an *accident* can include the unintended consequences of the insured's intentional acts, and that claims against an employer arising from its negligent hiring, retention, and supervision of its employee qualify as an *occurrence* under a CGL policy.

Dated: April 10, 2017

Respectfully submitted,

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Dated: April 10, 2017.

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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

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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: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **April 10, 2017,** I served the foregoing documents described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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[XX] 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 Claremont, California, 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) day after date of deposit for mailing in affidavit.

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[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 **April 10, 2017,** at Claremont, California.

Debbie Hunter

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