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

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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-

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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,