

**IN THE
SUPREME COURT OF CALIFORNIA**

LIBERTY SURPLUS INSURANCE
CORPORATION, et al.,

Plaintiffs and Respondents,

vs.

LEDESMA AND MEYER
CONSTRUCTION CO., et al.,

Defendants and Appellants.

No. S 236 765

[No. 14-56120]

(No. 12-cv-00900-RGK-SP)

SUPREME COURT
FILED

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Deputy

AFTER ORDER CERTIFYING QUESTION FROM THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF OF STEVEN W. MURRAY IN SUPPORT OF
PETITIONERS, AND AMICUS CURIAE BRIEF**

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**APPLICATION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF OF STEVEN W. MURRAY IN
SUPPORT OF PETITIONERS.**

TO THE HONORABLE CHIEF AND
ASSOCIATE JUSTICES:

Permission is respectfully requested to file the attached brief as Amicus Curiae in support of Petitioners, Defendants and Appellants Ledesma & Meyer Construction, Joseph Ledesma and Kris Meyer (L&M). This application is timely made within thirty days after the April 10, 2017, filing of L&M's Reply Brief.

Applicant's interest in this action is based on the nature

of his practice, which emphasizes insurance coverage on behalf of insureds. Applicant is presently representing insureds being sued for negligent hiring, retention and/or supervision of an agent/employee who allegedly engaged in tortious conduct. Such claim may permit the injured party to hold the principal/employer directly liable. Since liability policies do cover negligent conduct, this Court's construction and interpretation of California tort law — juxtaposed on the standard "caused by an occurrence" Commercial General Liability provision — will directly affect such matters. Clarification of the law regarding coverage for negligent supervision claims was the purpose of Applicant's September 9, 2016, letter urging Review be granted.

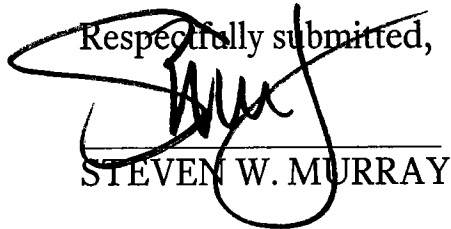
Liberty argues coverage exists only if "the actual cause" of harm is an insured risk. "Actual cause" is a variant of the term for causation in contract-based property insurance claims: "the efficient proximate cause." With property insurance, the insurance contract defines the covered and excluded risks. There is only one covered "efficient proximate cause" of a loss, other causes don't qualify.

Liability insurance is governed by completely different rules of causation —based on tort law, not contract law. Tort law recognizes multiple causes may result in an injury and that multiple tortfeasors may be involved. It does not recognize “actual cause” or any “remote, antecedent event,” there are only causative “substantial factors.” An alleged tortfeasor may be held liable for injury to a third party if its negligence is *a* — not *the* —cause thereof, and is a substantial factor in producing the injury. This is the risk insured under the “legally obligated to pay as damages because of ‘bodily injury’ . . .”provision of Liberty’s standard CGL policy.

This Court explained the different causation rules between property and liability insurance in *Garvey vs. State Farm* (1989) 48 Cal.3d 395, 405-407, then again in *Montrose Chemical Corp. vs. Admiral Ins.* (1995) 10 Cal.4th 645, 663-665. The confusion regarding this commonly occurring issue is apparent. An explanation of how and when those differences are to be applied, in this ordinary negligence action, will be welcomed by the bench and bar.

Applicant has reviewed the Order of the Ninth Circuit Court of Appeal (and the lower District Court Order), and the briefs of the parties, and is familiar with the issues in this case and the scope of their presentation. The proposed Amicus Curiae Brief was solely prepared and authored by Applicant, who solely funded the preparation and submission hereof. To properly inform the Court regarding these and other related matters, permission is respectfully requested to file the following Amicus Curiae Brief.

Dated: May 5, 2017

Respectfully submitted,

STEVEN W. MURRAY

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AMICUS CURIAE BRIEF OF STEVEN W. MURRAY

“Education is what you get when you read the fine print.

Experience is what you get if you don’t.” (Pete Seeger.)

SUMMARY OF ARGUMENT

The tort of negligent supervision — careless administrative conduct — is a well-established theory of liability against a principal/employer. It is a form of negligence, which is included in the definition of “accident.” Tort law, which creates civil liability for an insured, and which Liberty incorporated into its policy, governs causation for liability insurance coverage.

ARGUMENT

A. NEGLIGENT SUPERVISION IS AN “OCCURRENCE.”

California has long recognized the tort of negligence in hiring, retaining or supervising (negligent supervision.) (*Fernelius vs. Pierce* (1943) 22 Cal.2d 226, 233-234; 6 Witkin, Summary (10th ed. 2010) Torts, §1190, p. 561-565, 2016 Supp., p. 114-115; CACI No. 426.) It is a nationally recognized theory of liability. (Rest. Agency 2d, §213; Rest. Agency 3d, §7.05; Rest. Torts 3d, §19.)

Liberty’s standard policy requires the damages for which the insured is legally obligated to have been “caused by an occurrence [‘an accident, including continuous or repeated exposure to substantially the same general harmful conditions’].” (3 ER 289.)

Negligent supervision will always constitute an “accident, including continuous or repeated exposure to substantially the same general harmful conditions” because it involves non-intentional conduct, i.e., failure to use reasonable care in hiring,

retaining or supervising an agent/employee. For negligent hiring, retention, a plaintiff must prove the principal/employer “knew or had reason to believe [the agent/employee] was likely to engage in [tortious conduct.]” (*Lopez vs. Watchtower Society* (2016) 246 Cal.App.4th 566, 591.) Negligent supervision requires proof the principal/employer “knew or should have known of [the agent/employee’s] alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve [in the particular capacity.]” (*Ibid.*) It is a form of direct liability for a principal/employer arising out of negligence in hiring, supervising or retaining an incompetent or unfit person. (*John R. vs. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 451, and fn. 10.)¹

Negligent administrative conduct can create a risk of harm to third persons the principal/employer knows or should know

¹ Technically it is also a form of respondeat superior liability, since it is the negligence of a principal/employer’s administrative agent/employee which binds it. Ordinary respondeat superior liability arises from the conduct of an agent/employee engaged in the business or operations of the principal/employer. (*C.A. vs. Wm. S. Hart High School* (2012) 53 Cal.4th 861, 865.)

will come in contact with the agent/employee. (*Evan F. vs. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 842-843.) Any such risk of harm is always “an unexpected, unforeseen, or undesigned happening or consequence . . .” (*Delgado vs. Interinsurance Exchange* (2009) 47 Cal.4th 302, 308.) Like the average principal/employer, L&M never thought, let alone intended, that its carelessness would create a risk of harm to anyone.

This Court has previously determined a very similarly worded “occurrence” definition in a liability policy *includes* negligent conduct.

“But the homeowners policy that the insureds here bought from Safeco expressly provided that Safeco would defend and indemnify them for bodily injury caused by ‘an occurrence,’ which the policy defines as ‘an accident . . . which results, during the policy period, in bodily injury or property damage.’ Because the term ‘accident’ is more comprehensive than the term ‘negligence’ and thus includes negligence [citation], Safeco’s homeowners policy promised coverage for liability resulting from the insured’s negligent acts.” (*Safeco Ins. vs. Robert S.* (2001) 26 Cal.4th 758, 764-765.)

Negligent supervision is negligence, so Liberty’s policy likewise covers L&M’s negligent acts.

Moreover, whether an insured's conduct is an "occurrence" can be a factual issue, requiring an insurer to defend a potentially covered claim. This Court held whether Montrose Chemical's business practices in the manufacturing of toxic chemicals over a 35 year period could be an "occurrence" (defined essentially the same as in Liberty's policy) was a question of fact. (*Montrose Chemical Corp. vs. Superior Court* (1993) 6 Cal.4th 287, 292-293, 304-305.) This is because questions about the nature of the insured's conduct are usually not resolved as a matter of law.²

B. LIBERTY INCORPORATED TORT CAUSATION RULES.

Liberty's wish for an "actual cause" rule is found in property insurance, where there is only one covered cause of a loss: the efficient proximate cause. Property insurance is always a matter of *contract*: the causes of physical injury to the insured's property are

² L&M, which bought Liberty's policy, is the named insured and its conduct was *not* the same as Hecht's. The coverage grant is single, to "the insured." (3 ER 267.) This contractually shows in this policy insuring multiple parties, the term "the insured" is several, not joint, and only refers to the insured seeking coverage, here L&M. (*Arenson vs. National Auto & Casualty* (1955) 45 Cal.2d 81, 84.) This means L&M's coverage is independent of Hecht's.

always listed in a named peril policy, or in an all risk policy, the excluded causes are similarly listed. No references to any other source of causation is needed. (*Garvey vs. State Farm, supra*, 48 Cal.3d at 406-408; *Montrose Chemical Corp. vs. Admiral Ins., supra*, 10 Cal.4th at 663-664.) In contrast, a liability policy is based on losses a third party suffers caused by the insured's conduct. Tort law supplies the rule of decision, including causation, because it regulates the insured's conduct with the rest of the world.³

Since tort law is the source of an insured's civil liability, liability insurance must by definition follow and be based on it. Tort law contains its own rules of causation necessary to establish an insured's civil liability, so insurers must use and apply tort law causation to determine coverage for claims against insureds.

³ Chronology does not control causation. The most immediate cause of a loss is not automatically the legal cause, even with property insurance. See *Sabella vs. Wisler* (1963) 59 Cal.2d 21, 31-32: a builder's initial negligent construction of a sewer line (a covered risk) later ruptured, causing the house he had built on uncompacted fill to sink. Damage to the structure was covered although the immediate chronological cause was subsidence, an excluded risk.

“[W]e look to whether a covered act or event subjected the insured to liability for the disputed property damage or injury under the law of torts. We ask, in the standard insuring language used here, whether the disputed amounts are ‘sums which the Insured ... [became] obligated to pay ... for damages ... because of’ [bodily injury]” (*State of Calif. vs. Allstate Ins.* (2009) 45 Cal.4th 1008, 1031.)

Liberty chose to write substantially the same provision, effectively incorporating tort rules of law into its policy. (3 ER 267.)

Liberty’s insuring provision supersedes its “actual cause” test. Indeed, this Court reversed *Golden Eagle Refining vs. Associated Int’l. Ins.* (2001) 85 Cal.App.4th 1300, 1316, because it improperly required the insured to prove contractual — instead of tort — causation to obtain indemnity damages against its liability insurer.

“The quoted passage reveals the fundamental flaw in *Golden Eagle*’s reasoning. In analyzing coverage under a liability policy, a ‘tort approach’ to causation of damages is precisely what is called for When the insurer has promised to indemnify the insured for all ‘sums which the Insured shall become obligated to pay ... for damages ... because of’ nonexcluded property damage, or similar language, coverage necessarily turns on whether the damages for which the insured became liable resulted — *under tort law* — from covered causes.” (*State of Calif., supra*, 45 Cal.4th at 1035, original italics.)

Tort law recognizes multiple parties (as here) can be responsible to any injured party, and that multiple causes (as here) can be involved. L&M's negligent supervision need only be *a* — not *the* — cause of Plaintiff's injuries. (*Viner vs. Sweet* (2003) 30 Cal.4th 1232, 1239-1240.) That other tortfeasors also caused the injuries is irrelevant, any one tortfeasor is liable for all damages it causes. (*Am. Motorcycle Assn. vs. Superior Court* (1978) 20 Cal.3d 578, 587.)

Tort law does not recognize Liberty's "actual cause" or any "remote, antecedent event" analysis. (Ans. Brief, p. 2.) In liability cases, there are only causative "substantial factors." (*Mitchell vs. Gonzales* (1991) 54 Cal.3d 1041, 1052; CACI No. 430.) Negligent supervision results in direct liability for harming a victim if it is a "substantial factor" in causing same, even if another person's conduct also was a substantial factor. (CACI No. 431.) With negligent supervision, the principal/employer's administrative negligence always chronologically precedes the agent/employee's tort. The latter cannot occur without the former; the essence of the tort is the

principal/employer's conduct which created the risk of harm which enabled the agent/employee to harm the victim. Negligent supervision is never a "remote, antecedent event."

CONCLUSION

Liberty's liability coverage is standard in almost every Commercial General Liability (CGL) policy issued in California, and is the single most important protection against catastrophic loss a business can have. Liability insurance is the safety valve to ensure continued commercial activity. Unfortunately, actively vetting and carefully selecting persons who act for an employer is no guarantee such person won't harm someone. Current events show even national security and political vettings are not an exact science, so how can ordinary companies be held to a higher standard?

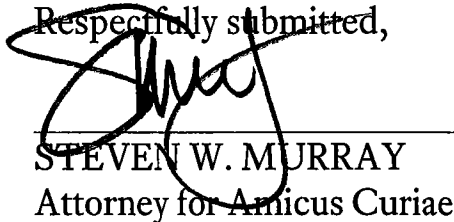
Liability insurance is the only form of affordable risk management to protect against the tortious conduct of such agents, while also protecting potential victims. Like many employers, L&M found itself saddled with a liability from a bad apple it had hired. At this

point there was nothing more L&M could do except to tender the claims to Liberty.

While insurers are free to insert exclusions from the coverage they prospectively sell, they are not free to renege on their existing binding promises. As long as California law allows direct negligence actions against insureds like L&M, insurers like Liberty must be ordered to provide the coverage they sold. This Court's answer to the Ninth Circuit should be "YES!"

Dated: May 5, 2017

Respectfully submitted,




STEVEN W. MURRAY
Attorney for Amicus Curiae

**CERTIFICATION OF LENGTH OF BRIEF
(Rule 8.204(c)(1))**

I HEREBY CERTIFY that this Application to File an Amicus Curiae Brief and Amicus Curiae Brief contains 2,214 words, which is less than the total words permitted by said Rule. This certification is based on the computer program used to prepare this Brief.

Dated: May 5, 2017



STEVEN W. MURRAY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and am not a party to the within action; my business address is 14930 Ventura Boulevard, Suite 205, Sherman Oaks, California 91436.

On the date hereinbelow specified, I served the foregoing document(s) described below on the interested parties in this action by placing true copies thereof enclosed in (a) sealed envelope(s) addressed as follows:

Date of Service : May 5, 2017

Document(s) Served : APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

Parties Served : See Attached Service List

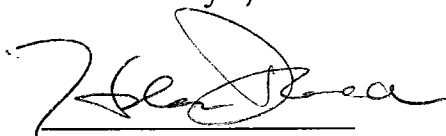
(BY U.S. MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Sherman Oaks, California in the ordinary course 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 day after date of deposit for mailing in affidavit.

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

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Sherman Oaks, California on May 5, 2017.


HELEN DUNCAN

Liberty Surplus Ins. vs. Ledesma & Meyer Construction, et al.
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