Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.
(2018) California Supreme Court
Duty to defend may be required of insurer in negligent hiring context, even where acts of hired employee causing harm were willful.

FACTS/PROCEDURE

Ledesma & Meyer Construction Co., Inc. (L&M) contracted with San Bernardino Unified School District to manage a construction project at a middle school. L&M had previously hired Darold Hecht as an assistant superintendent, and assigned him to the middle school project. In 2010, Jane Doe, a 13-year-old student from the school, sued in state court alleging that Hecht had sexually abused her. Doe's claims included a cause of action against L&M for negligent hiring, retention, and supervision.

L&M tendered the defense to their insurer, Liberty Surplus Insurance Corporation (Liberty), who was contracted with L&M to defend, inter alia, any "bodily injury" caused by "an occurrence" which was defined as "an accident." Liberty defended L&M, but under a reservation of rights, and meanwhile sought declaratory relief in federal court that it had no obligation to defend or indemnify L&M. The district court sided with Liberty, reasoning that Doe's injury was not caused by an "occurrence" because the "alleged negligent hiring, retention, and supervision were acts antecedent to the sexual molestation… While they set in motion and created the potential for injury, they were too attenuated from the injury-causing conduct committed by Hecht". L&M appealed, and the ninth circuit certified this question to the California Supreme Court.

HOLDING/DISCUSSION

Question Answered. Under California liability insurance law, an "accident" is an "unexpected, unforeseen, or undersigned happening or consequence from either a known or an unknown cause." The term is more comprehensive than just "negligence," and thus includes negligence. (Black's Law Dict. (5th Ed. 1979) at p. 14, col. 2.)

A cause of action for negligent hiring, retention, and supervision seeks to impose liability on an employer, not the employee. It's undisputed that Hecht's sexual misconduct was a willful act beyond the scope of insurance coverage. (*J.C. Penny Casualty Ins. Co. v. M. K.* (1991) 52 Cal. 3d 1009, 1025.) However, this willful conduct does not preclude potential coverage his employer.

In *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal. 4th 315, a plaintiff sued his Little League coach for sexual molestation and included a claim against the coach's mother for negligent supervision and failing to prevent molestations that occurred in her home. The coach was an additional insured on his mother's homeowner's insurance policy. The California Supreme Court held that an exclusion for injuries arising from the son's intentional acts did not apply to the mother's liability for negligence. The mother had objective grounds to assume she would be covered so longer as she herself had not acted in a manner in which a willful act barred coverage. (Id. at 325.) In *Minkler*, the court did not consider whether the claims involved were "accidents" under the insurance policies, as the issue was not raised.

In the instant case, the district court did not rely on the fact that Hecht's conduct was intentional, but instead on two different grounds: a causation analysis and the court's reading of case law.

a. Causation

For the purposes of California tort law, causation is established when the defendant's conduct is a "substantial factor" in bringing about the plaintiff's injury. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal. 4th 1008, 1035.) The district court held that L&M's actions set the chain in motion but were too attenuated from Hecht's acts of molestation and therefore did not legally cause Doe's injuries. The Supreme Court found this reasoning contrary to case law recognizing that negligent hiring, retention, or supervision may be a substantial factor in a sexual molestation perpetuated by an employee. (*C.A. v. William S. Hart Union H.S. Dist.* (2012) 52 Cal. 4th 861; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal. App. 4th 828.)

b. Case Law

The district court relied on case law to reject the idea that L&M's acts of hiring, retention, and supervision Hecht were accidents, simply because the insured did not intend for the injury to occur. One such case was *Delgado v. Interinsurance Exchange Automobile Club of Southern California* (2009) 47 Cal. 4th 302. In *Delgado* the insured was sued for assault and battery and assigned his claim against his homeowners insurer to the injured party as part of his settlement. Delgado claimed that the attack was an "accident" from his point of view since he did not expect or intend to be assaulted, but the Supreme Court rejected this argument. The word "accident" in the coverage clause of a liability policy refers to the conduct of the *insured* for which liability if sought to be imposed on the insured. In *Delgado*, the insured's intentional conduct was the immediate cause of the injury, and thus was beyond the scope of insurance coverage. In the instant case, L&M's negligence was an indirect cause, and was not an intentional tortious act.

The district court also cited *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal. App 3d 41. There the insured was sued for sexual assault, but claimed his conduct was an "accident" because he had mistakenly believed the victim had consented. While admitting that he intentionally engaged in sexual conduct, he nevertheless claimed he intended no injury. The court declined to recognize such a minimalist definition for "accident." *Merced* is distinguishable from the instant case. First, it did not involve a claim for negligent hiring, retention, or supervision. Section, the argument relied on in *Merced* is different from the current issue. There, the insured acknowledged that he had intentionally engaged in the acts that caused injury, while here L&M argues that the injury causing acts of Hecht were neither intended nor expected.

The district court also cited *American Empire Surplus Lines Ins. Co. v. Bay Area Cal Lease* (1991) 756 F. Supp. 1287, which relied on *State Farm Mut. Auto Ins. Co. v. Longden* (1987) 83 Cal. App. 3d 641 and *Maples v. Atena Cal. & Surety Co.* (1978) 83 Cal. App. 3d 641. Both of these cases were based on the "unremarkable proposition that an 'accident' does not occur until there is an injury." The Supreme Court found these cases distinguishable in that, when damage is inflicted during the policy period, those cases do not support a finding against coverage for the insured's negligent conduct.

In the instant case, Liberty's argument would leave employers without coverage for negligent hiring, retention, or supervision whenever the employee's conduct is deliberate. Such a result would be inconsistent with California law. "Absent an applicable exclusion, employers may legitimately expect coverage for such claims under comprehensive general liability insurance policies, just as they do for other claims of negligence."