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IN THE SUPREME COURT OF CALIFORNIA

STATE FARM FIRE AND CASUALTY CO. and STATE FARM GENERAL INSURANCE CO.,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

JOSHUA WRIGHT,
Real Party in Interest.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B202768

PETITION FOR REVIEW OR, IN THE ALTERNATIVE, REQUEST FOR A GRANT-AND-HOLD ORDER

HORVITZ & LEVY LLP
PETER ABRAHAMS (BAR NO. 44757)
MITCHELL C. TILNER (BAR NO. 93023)
KAREN M. BRAY (BAR NO. 175501)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
pabrahams@horvitzlevy.com
mtilner@horvitzlevy.com
kbray@horvitzlevy.com

CRANDALL, WADE & LOWE
WILLIAM R. LOWE (BAR NO. 54007)
CURTIS L. METZGAR (BAR NO. 125932)
9483 HAVEN AVENUE, SUITE 102
RANCHO CUCAMONGA, CALIFORNIA 91730
(909) 483-6700 • FAX: (909) 483-6701
metzgarc@cwlaw.com

ATTORNEYS FOR PETITIONERS
STATE FARM FIRE AND CASUALTY CO. and STATE FARM GENERAL INSURANCE CO.

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ISSUE PRESENTED

A liability insurance policy covers bodily injury damages caused by an "occurrence," and defines an "occurrence" to mean "an accident . . . which results in . . . bodily injury." If an insured commits a deliberate act of harm which results in more serious injury than intended, does the unintended injury constitute an "accident" giving rise to a duty to defend a third-party complaint against the insured?

Substantially the same issue is presented in *Delgado v. Interinsurance Exchange of the Automobile Club* (2007) 152 Cal.App.4th 671, review granted September 25, 2007, S155129 (*Delgado*).

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

While attending a party at a mutual friend's house, Jeffrey Lint and Joshua Wright had a heated and profane argument. Lint followed Wright from inside the house into the backyard, approached him from behind, locked his arms around Wright to pin him in a "bear hug," carried Wright several steps, and heaved him into the shallow end of a swimming pool. Wright landed on the top step of the pool and broke his collar bone. Lint was arrested and, based on his plea of nolo contendere, was convicted of battery.

Wright sued Lint. State Farm declined to defend Lint because the insuring agreement of Lint's State Farm policy limited State Farm's defense obligation to claims or suits for "bodily injury" caused by an "occurrence," which the policy defined as an "accident." Thus, under the policy, "accident" referred to the act that produced the injury, not to the injury itself. Lint acknowledged he deliberately threw Wright into the pool. State Farm therefore concluded that Wright's injuries did not result from an "accident" within the meaning of the policy.

In the first phase of a three-phase trial, the trial court concluded that State Farm had a duty to defend Lint. Though the court had no doubt that Lint intentionally grabbed Wright and threw him in the

water, the court nevertheless relied on evidence that Wright's injury was unexpected because Lint only intended to get Wright wet.

Following writ proceedings, the Court of Appeal issued a published decision agreeing with the trial court. The Court of Appeal inaccurately characterized the incident as friendly horseplay, rather than a violent altercation between strangers. The court held there was an "accident" because Lint did not intend to hurt Wright and because Lint mistakenly threw Wright "too softly" thereby failing to avoid the pool step on which Wright landed. The court concluded there was a potential for coverage and therefore State Farm owed Lint a defense.

The court's decision conflicts with numerous cases holding that "[a]n intentional act is not an 'accident' within the plain meaning of the word." (*Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537 (*Royal Globe*), fn. omitted.) Accordingly, where the insured acts intentionally, there is no accident, no potential for coverage, and thus no duty to defend. Whether the insured expected or intended his conduct to cause *injury* is beside the point because the intentional conduct itself forecloses the possibility of coverage: "The definition of 'accident' halts any argument that [the insured] intended his act but not the resulting harm." (*Commercial Union Ins. Co. v. Superior Court* (1987) 196 Cal.App.3d 1205, 1209 (*Commercial Union*); see *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 (*Merced Mutual*) ["We reject [the] argument that in construing the term 'accident,' chance or foreseeability should be applied to the resulting injury rather than to the acts causing the injury. . . . [W]here the insured intended all of the

acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury"].)

Instead, in what has become a common problem, the court extracted definitions of "accident" used in other cases and indiscriminately applied them here divorced from the policy context in which the term was used. The court then concluded that an "unintended bodily injury" qualifies as an "accident." However, inserting that definition in the policy in place of the term "accident" reveals the definition cannot be accurate, as it results in the policy's coverage illogically applying to "an unintended bodily injury . . . which results in . . . bodily injury" rather than an "unintended act . . . which results in . . . bodily injury."

Moreover, the decision is premised upon a misunderstanding of controlling cases, under which a deliberate act of harm does not qualify as an "accident" merely because an insured committed a "mistake" in carrying out that act or because it resulted in greater injury than intended. Here, Lint's deliberate act of hurling Wright into the pool to soak him in his street clothes following a heated and profane confrontation does not qualify as an "accident" merely because Lint claims he did not throw Wright hard enough and did not intend to break Wright's collar bone.

In reaching its decision, the court relied upon (1) inapposite cases defining "accident" in the context of different policy language, and (2) selective quotes from cases which did not decide the question

presented by this case, i.e., whether a deliberate act is transformed into an accidental one simply because the insured did not intend the particular harm that resulted. The quotes relied upon by the court reflect conflict and confusion among the courts concerning how the term "accident" should be interpreted in the context of occurrence-based policy language. Unless the issue is addressed by this Court, the trial and appellate courts will continue to issue conflicting decisions concerning policy coverage under commonly used policy language.

Review is also needed because the Court of Appeal's decision essentially nullifies frequently-used insurance policy coverage language regarding "occurrences" and "accidents" and allows insureds to manufacture a duty to defend (and coverage) based upon a post-incident characterization of their mental state. Indeed, the court's decision suggests that a duty to defend (and coverage) will always exist unless an insured admits that every act, every detail of the manner in which the act was carried out, and every aspect of the resulting injury occurred precisely as the insured intended. The decision therefore eliminates a disincentive to engage in dangerous acts, because insureds will often be able to conjure up something about an incident that did not go exactly as planned, and thereby evade the financial consequences of their irresponsibility.

Alternatively, State Farm requests that the Court grant review and defer briefing pending this Court's decision in *Delgado, supra,* 152 Cal.App.4th 671, review granted September 25, 2007, S155129. There, the Court will decide, under similar policy language, substantially the

same issue as that presented here, i.e., whether a deliberate act is transformed into an "accident" because of a mistake in the way the act is carried out.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. Following a heated and profane argument, Jeffrey Lint deliberately hurls Joshua Wright into a swimming pool, breaking Wright's clavicle.

On December 29, 2001, Joshua Wright (age 23) and Jeffrey Lint (age 21) were attending a party at a mutual friend's house. (Exh. H, pp. 118-119, 181.) Wright and Lint did not know each other. (Exh. H, pp. 165, 183.)

While Lint and Wright were both in the kitchen, Wright sat down with Lint's girlfriend (who also did not know Wright) and complained about having serious medical problems, including Hepatitis C. (Exh. H, pp. 163-164, 181, 183, 227-228, 230.) Lint thought Wright was a "loud mouth" and, upon overhearing Wright's "pathetic story," Lint told Wright he was a "fucking liar." (Exh. H, pp. 163-164, 181, 183-184, 230.) Wright responded "if you think I'm such a liar, then why don't you call my doctor" and handed Lint his hospital ID card. (Exh. H, p. 184; accord, exh. H, pp. 164, 181, 230.)

As Lint pretended to get on the phone, Wright got up to go outside. (Exh. H, pp. 164, 166, 230-231.) According to Lint, as Wright

was leaving, he told Lint, "'You're going to get your ass kicked, you pissed brain motherfucker.'" (Exh. H, pp. 164, 166-167, 231.)

Wright's comments "bothered" Lint and "got under [his] skin." (Exh. H, p. 231.) Lint followed Wright into the backyard. (Exh. H, pp. 164, 231.) Then Lint, who was 6 inches taller and 75 pounds heavier than Wright, approached Wright from behind, locked his arms around Wright's chest to pin him in a "bear hug," lifted Wright, carried him several feet, and heaved him into the shallow end of the cold swimming pool. (Exh. H, pp. 118, 119, 164, 166, 173, 181, 232, 234.) Wright was in his street clothes and shoes. (Exh. H, pp. 228, 234.) Lint stated that Wright had made no physical motion toward harming him and that he had no reason to fear for his safety at the time he threw Wright in the pool. (Exh. H, pp. 167, 231.) Lint characterized Wright as "a small guy"—in fact, he was only five foot four inches tall and weighed only 95 pounds. (Exh. H, pp. 119, 167, 228.)

When Wright landed in the pool, his shoulder hit the first step, and, as a result, Wright sustained a fractured right clavicle (collar bone). (Exh. H, pp. 119, 181, 187.) Upon seeing how seriously Wright had been injured, Lint apologized and said he did not mean to hurt him. (Exh. H, pp. 165, 168, 182, 185, 232, 234.)

During a subsequent deposition, Lint claimed he followed Wright outside "just to talk to him" and threw him in the pool "[j]ust to get him wet" as "horseplay." (Exh. H, pp. 231, 232; see also exh. D, p. 21; exh. H, p. 185 [Wright characterizes incident as horseplay].)

However, Lint's mother reported the incident to State Farm as "an altercation," not "horseplay." (Exh. H, p. 249.)

Lint was arrested and, based on a plea of nolo contendere, was convicted of one count of battery under Penal Code sections 242 and 243, subdivision (a). (Exh. H, pp. 170-171, 192.)

B. State Farm denies Lint a defense and indemnity because Wright's injuries were not the result of an "accident" and therefore were not covered by the policy.

At the time of the swimming pool incident, Lint qualified as an insured under his parents' State Farm homeowners policy. (Exh. H, pp. 118-119; see exh. H, p. 127.) The policy covered the insured's liability "for damages because of **bodily injury** . . . to which this coverage applies, caused by an **occurrence** . . . ." (Exh. H, p. 148.) The policy defined "occurrence" to mean: "an accident, including exposure to conditions, which results in: [¶] a. **bodily injury** . . . [¶] . . . [¶] during the policy period." (Exh. H, p. 134.)

After State Farm learned about the swimming pool incident, it obtained a copy of the docket in Lint's criminal case (showing his battery conviction), and took statements from Lint and Wright, both of whom described the circumstances under which Lint intentionally threw Wright into the pool. (Exh. H, pp. 119, 120, 161, 163-168, 179, 181-184, 191-194.)

State Farm thereafter informed Lint that it was denying a defense and indemnity on several grounds, including the fact that "[t]he claim against [him] does not meet the insuring agreement in the policy, as the actions do not arise out of an accident." (Exh. H, pp. 120, 196.)

Shortly thereafter, Wright filed a complaint against Lint, alleging negligence, assault, battery, and intentional infliction of emotional distress. (Exh. H, pp. 120, 198-203.) The complaint alleged that Lint "negligently, carelessly and recklessly touched plaintiff during horseplay while attempting to wrestle him," resulting in "severe and serious injury to plaintiff's person." (Exh. H, p. 200.)

Lint retained his own defense counsel but also tendered the action to State Farm. (Exh. H, p. 120.) State Farm re-examined all previously acquired information along with Wright's complaint and Lint's deposition transcript; however, its position remained unchanged. (Exh. H, pp. 120, 243.) State Farm again denied both a defense and indemnity because it was not aware "of facts giving rise to a potential for recovery of damages in the civil lawsuit that would fall within the scope of the insuring agreement" because "Wright's injuries and damages were not the result of an occurrence or accident." (Exh. H, p. 243.)

C. Lint sues State Farm, settles with Wright, and assigns Wright any claims against State Farm.

Lint sued State Farm seeking a declaration that State Farm owed him a defense in *Wright v. Lint* (Super. Ct. L.A. County, No. VC

040632). (Exh. A, pp. 2-4.) The court consolidated the two actions, and ordered trifurcation of the trial in the consolidated actions. (Exh. B, pp. 5-7.) Phase one would determine whether State Farm owed a duty to defend Lint in Wright's action. Phase two would address Lint's liability to Wright and Wright's damages; and phase three, if necessary, would address State Farm's duty to indemnify Lint. (Exh. B, p. 6.)

Shortly before phase one, Lint dismissed his declaratory relief action against State Farm and filed for bankruptcy. (Exh. C, p. 10.) Wright filed an adversary complaint in the bankruptcy proceeding to determine whether Lint's potential liability to Wright could be discharged. (Exh. C, p. 12.) Lint and Wright later stipulated to entry of judgment on the adversary complaint, under which Lint agreed to pay Wright and his attorneys $60,000. (*Ibid.*) As part of the settlement, Lint assigned his rights against State Farm to Wright. (Exh. C, p. 14.)

D. Wright files a second amended complaint, alleging breach of contract against State Farm.

Wright then filed a second amended complaint against Lint and State Farm. (Exh. D, p. 19.) Wright alleged a cause of action against Lint for "negligence." (*Ibid.*) As Lint's assignee, Wright also alleged causes of action against State Farm for "Declaratory Relief/Breach of Contract," seeking a judicial determination that State Farm had breached its contract by denying a defense and indemnity to Lint in Wright's action. (Exh. D, pp. 22-23.)

State Farm answered, generally denying Wright's allegations and asserting as an affirmative defense that State Farm had no obligation to defend or indemnify Lint because neither the pleadings nor any extrinsic facts known to State Farm at the time of tender "created any potential for the recovery of damages for bodily injury . . . arising out of an occurrence under any policy issued by defendants." (Exh. E, pp. 50, 52.)

E. The trial court rules State Farm owed Lint a defense because Wright's injuries were unintended and were therefore an "accident" covered by the policy.

For phase one of the trial, Wright and State Farm filed trial briefs (exhs. F, G), stipulated to certain facts, and stipulated to the admissibility of various documents for the trial court's consideration (exhs. H, I).

The court ruled that State Farm owed Lint a defense in Wright's action. (Exh. J, pp. 300-301; exh. L; exh. M, pp. 306-307.) The court explained: "When an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists. [Citation.] [¶] In the case at bar, Lint did not intend to cause any injury to Wright. He only wanted to get Wright wet. The resulting injury was neither expected nor intended." (Exh. J, p. 301.)

F. The Court of Appeal holds there was an "accident" because Lint did not intend the extent of Wright's injuries and miscalculated the force needed to throw Wright into the pool, and therefore State Farm owed Lint a defense.

State Farm filed a writ petition and the Court of Appeal issued an order to show cause and set a briefing schedule. (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, order to show cause issued Nov. 20, 2007.) Following briefing and oral argument, the Court of Appeal discharged the order to show cause and denied the petition. (Typed opn., 15.)

In its published decision, the Court of Appeal held there was an "accident" because Lint did not intend to hurt Wright and because Lint "miscalculated one aspect in the causal series of events leading to Wright's injury" by throwing Wright "too softly" and thereby failing to avoid the pool step on which Wright landed. (Typed opn., 12.) The court concluded there was a "potentially covered occurrence under State Farm's insurance policy" and therefore "State Farm owed a duty to defend Lint." (Typed opn., 14.)

State Farm petitioned for rehearing on the ground the court reached an erroneous decision as a matter of law. State Farm also noted numerous inaccuracies in the Court of Appeal's decision concerning the record and State Farm's position. The court denied the petition.

LEGAL DISCUSSION

I.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEAL CONCERNING WHAT CONSTITUTES AN "ACCIDENT" IN AN OCCURRENCE-BASED INSURANCE POLICY.

A. An insurer has no duty to defend an insured where there is no potential for coverage under the policy's insuring agreement.

"[A]n insurer has a duty to defend suits which potentially seek covered damages . . . ." (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 803 (*Collin*).) However, if there is no potential for the third party to recover on a covered claim, there is no duty to defend. (*Devin v. United Services Auto. Assn.* (1992) 6 Cal.App.4th 1149, 1157.)

To evaluate its duty to defend, the insurer must consider the facts alleged in the complaint against the insured as well as other available facts. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) If the pleaded and extrinsic facts conclusively foreclose the possibility of coverage, the insurer has no duty to defend. (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655.)

The insurer's duty to defend "turns not on 'the technical legal cause of action pleaded by the third party' but on the '*facts* alleged in

the underlying complaint' or otherwise known to the insurer. [Citation.] A general boilerplate pleading of 'negligence' adds nothing to a complaint otherwise devoid of *facts* giving rise to a potential for covered liability." (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 8-9; accord, *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 595 (*Quan*) ["It is common to hear the argument that if the underlying complaint alleges negligence, there must be a duty to defend. This is not necessarily true"].)

Insurance policies have two parts: the insuring agreement which defines the risks that are covered, and the exclusions which remove from coverage risks that initially fall within the insuring clause. (*Collin, supra,* 21 Cal.App.4th at pp. 802-803.) When a loss does not fall within the risks covered by the insuring agreement, there is no coverage and no need to consider whether any policy exclusions apply. (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1048 (*Ray*); *Blue Ridge Ins. Co. v. Stanewich* (9th Cir. 1998) 142 F.3d 1145, 1150, fn. 5 (*Blue Ridge*).)

Where the relevant facts are undisputed and reveal no potential for coverage, the insurer is entitled to judgment. (See *Merced Mutual, supra,* 213 Cal.App.3d at pp. 45-46, 53.)

B. Under insuring agreements like State Farm's, an "accident" is an unexpected and unintended event or act that causes bodily injury. A deliberate act of harm is not an "accident."

California courts have held, in the face of policy language identical or similar to State Farm's, that an intentional act is not an "accident" within the meaning of the policy.

For example, Division Two of the same Court of Appeal as the one that issued the decision here recently addressed the same policy language and held that deliberate conduct is not an accident. In *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 883-884, 888 (*Lyons*), the insured was sued for assault and battery after he grabbed a woman's wrist, restrained her, and made an unwelcome sexual advance. The policy covered the insured's liability for bodily injury caused by an accident, and the insurer declined to defend on the grounds the complaint did not allege any liability potentially covered by the policy. (*Id.* at pp. 884, 886.) In the insured's action against the insurer, the trial court granted the insurer summary judgment, holding that "'grabbing a person's wrist is not an accident.'" (*Id.* at p. 885.)

The Court of Appeal affirmed, noting that an accident "'requires unintentional acts or conduct'" and the insured's act of grabbing the victim's wrist and restraining her "recount[ed] an intentional and deliberate course of conduct" which "simply could not be an accident." (*Lyons, supra,* 161 Cal.App.4th at pp. 887, 888.) In so doing, the court

stressed that the term "accident" "'refers to *the nature of the insured's conduct, not his state of mind.*'" (*Id.* at p. 889.) This Court denied review in that case. (Order, July 16, 2008, S163313.)

In many other cases involving deliberate misdeeds, the courts have held that intentional acts are not "accidents" and thus are not covered under policies similar to State Farm's—regardless whether the resulting injury was unintended. In other words, "[w]here the act giving rise to damages was intentional, the California courts have rejected the argument that while the act was intentional, the damages were not, and thus should be covered under the policy."[1/] (*American Guar. & Liability, supra,* 699 F.Supp. at p. 791.)

1/ See, e.g., *Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1505-1506; *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.App.4th 137, 155; *Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 811; *Ray, supra,* 77 Cal.App.4th at pp. 1045-1046; *Quan, supra,* 67 Cal.App.4th at pp. 592-593, 595-596, 600-601; *Blue Ridge, supra,* 142 F.3d at p. 1149; *Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1149-1152; *Collin, supra,* 21 Cal.App.4th at pp. 810-811; *Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 366-367, 369, fn. 1; *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 539; *Merced Mutual, supra,* 213 Cal.App.3d at pp. 44, 50; *American Guar. & Liability v. Vista Medical Supply* (N.D.Cal. 1988) 699 F.Supp. 787, 791 (*American Guar. & Liability*); *Commercial Union, supra,* 196 Cal.App.3d at p. 1209; *Royal Globe, supra,* 181 Cal.App.3d at p. 537.

C. The Court of Appeal's decision that "accident" includes an unintended injury conflicts with occurrence-based policy language and longstanding case law.

1. In the context of policies like State Farm's, "accident" must refer only to the nature of the act, not the nature of the injury.

Although this case involves the interpretation of the occurrence-based language in the State Farm policy and requires an analysis of the meaning of the term "accident" within the policy (see *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115), the Court of Appeal instead posed the pertinent issue as whether the swimming pool incident was "an 'accident' within the meaning of insurance law" generally. (Typed opn., 2; see also typed opn., 7 [referring to cases and characterizing them as "stand[ing] for the proposition that where the conduct is deliberate or volitional, the incident is not an 'accident' *for the purposes of insurance law*" (emphasis added)].) The court stated that "[t]he meaning of the term 'accident' in insurance law is not settled" (typed opn., 7) and canvassed case law positing varying definitions of "accident" but without considering how or whether those definitions make sense within the context of the coverage language like that in State Farm's policy (typed opn., 7-11).

After considering the potential meaning of the term "accident" in the abstract, the court concluded "accident" refers not only to the

injury-producing conduct, but also to unintended injury resulting from a deliberate act. (Typed opn., 7-12.) However, that definition does not work in the context of occurrence-based policies like State Farm's, where an "accident" in the coverage clause refers to the nature of the injury-producing act, not the nature of the injury. (By contrast, one of the coverage *exclusions* turns on the nature of the injury by excluding coverage for "bodily injury or property damage . . . which is either expected or intended by the insured." (Exh. D, p. 37, emphases omitted.))

The policy covers liability "for damages because of **bodily injury** . . . to which this coverage applies, caused by an **occurrence** . . . ." (Exh. H, p. 148.) The policy defines "occurrence" to mean: "an accident, including exposure to conditions, which results in: [¶] a. **bodily injury** . . . [¶] . . . [¶] during the policy period." (Exh. H, p. 134.) Under the court's interpretation of "accident," the coverage clause applies to "an unintended bodily injury . . . which results in . . . bodily injury." The court's interpretation is in direct conflict with other cases that have resoundingly rejected it as illogical: "In this context, an 'accident' cannot mean unintended damage because the causal event also would

be the result. Logically, a consequence cannot cause itself."[2/] (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 750.)

By focusing on Lint's intent in causing Wright's injuries, the Court of Appeal improperly conflated two separate provisions in the State Farm policy. The question whether an insured intended to cause the resulting injury is relevant to the issue whether a loss that falls within the scope of a coverage clause is excluded because the bodily injury was "expected or intended" by the insured. (Exh. H, p. 149.) The court's decision incorrectly treats the exclusion for "expected or intended" bodily injury as if it modifies the term "accident" in the insuring agreement. (Typed opn., 7-8, 9, fn. 2; see *Merced Mutual, supra,* 213 Cal.App.3d at p. 47 [threshold question is scope of coverage, not application of exclusion].) While such a modification may be present in policies such as the one in *Collin, supra,* 21 Cal.App.4th at pages 804, 805, relied upon by the Court of Appeal (typed opn., 9, fn. 2), the exclusion language in policies like State Farm's is in an entirely different section and cannot properly be invoked to define the scope of

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2/ The decision incorrectly asserts that State Farm agreed with the statement in *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661 (*Flores*) that "'[w]hen an injury is an unexpected *or* unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists[].'" (Typed opn., 9, fn. 2, quoting *Flores,* at p. 669.) Not so. State Farm acknowledged *only* that the statement might be true "as an abstract proposition" or "under certain policies," but explained that it was *not* true under the State Farm policy. (Reply to Opposition to Petition for Writ of Mandate 3-4, 9 (PWM Reply); see Petition for Rehearing 5 (Petn. for Rehg.) [noting inaccuracy in decision].)

a coverage provision. (See exh. H, pp. 148, 149.) The fact that a loss may not fall within an exclusion to the State Farm policy does *not* demonstrate there was coverage in the first place.

2. The decision conflicts with numerous longstanding cases.

The Court of Appeal dismissed the multitude of authorities cited above as distinguishable on the grounds they involved circumstances where the intent to commit the act coincided with the intent to harm or where the insured "intended all of the acts in the causal chain." (Typed opn., 13, emphasis omitted.) The court concluded this case is different because Lint's intent to throw Wright in the pool did not coincide with an intent to hurt Wright and because Lint mistakenly threw Wright "too softly" into the pool. (Typed opn., 12-13.)

However, this analysis is flawed. In the violent altercation which occurred here between strangers, Lint *did* intend to harm Wright; he just claims he did not mean to harm Wright as badly as he did through the serious injury he inflicted. Lint stated that he intended to throw Wright into the cold pool water, soaking him in his street clothes—thereby causing at the very least harm in the form of discomfort and inconvenience. (See exh. H, pp. 166, 228, 231.) Thus,

Lint's conduct in hurling Wright into the pool coincided with an intent to cause harm.[3/]

Moreover, the court's decision conflicts with other decisions which have rejected the notion that a "mistake" in carrying out a deliberate act is an independent act, happening, or event in the "causal series of events" which transforms the deliberate act into an accident. (Typed opn., 10-11.)

For example, in *Merced Mutual* (on which the court heavily relied and from which the court selectively quoted (typed opn., 10-11, 12, 13)), an insured claimed to have made a mistake in carrying out an intentional act which resulted in bodily injury. (*Merced Mutual, supra,* 213 Cal.App.3d at p. 51.) The court held that the mistake did not alter the character of the deliberate act, and therefore did not render it accidental. (*Ibid.;* see also *Lyons, supra,* 161 Cal.App.4th at p. 889 [insured's "mental miscalculation" concerning impact of his deliberate

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3/ As State Farm noted in its petition for rehearing (at page 9, footnote 2), the court's opinion erroneously characterizes all of the facts summarized in the decision as "stipulated" and "undisputed" by the parties. (Typed opn., 2, 12, 14.) To the contrary, the parties stipulated *only* to a limited set of facts, and stipulated to the *admissibility* of various documents reflecting information State Farm learned in connection with its decision to deny Lint a defense under the policy. (Exh. H, pp. 118-121.) State Farm did *not* stipulate to the accuracy of the information in those documents. (See *ibid.*) For example, State Farm did *not* stipulate that (a) "Lint intended only to talk to Wright" (typed opn., 3), (b) "Lint threw Wright in the pool '[j]ust to get him wet,' '[j]ust a party joke,' or 'horseplaying,' 'something to laugh about'" (typed opn., 3), or (c) "Lint did not intend to hurt Wright" (typed opn., 12).

act "simply cannot transform his intentional conduct . . . into an accident"].) In effect, the argument in *Merced Mutual*, like Wright's argument here, amounts to an assertion that *negligence* in carrying out an *intentional* act renders that intentional act an "accident." But, whether performed negligently or not, a deliberate act by its very nature is not an accident. (See *Quan, supra*, 67 Cal.App.4th at p. 596.) In other words, performing an intentional act imperfectly does not break the "causal series of events" leading to the injury. Thus, here, Lint intended each and every act leading up to an unexpectedly bad result (i.e., breaking Wright's clavicle rather than soaking and humiliating him). Any miscalculation in the physics of throwing Wright into the pool does not constitute a separate and discrete link in the causal chain.

The Court of Appeal also rejected State Farm's arguments (and its cited case law) on the grounds that they would result in "no coverage at all." (Typed opn., 14.) However, this statement and the paradigms on which it is based reflect that the court's decision arises from a misunderstanding concerning State Farm's position.

Indeed, the "paradigms" offered in the decision illustrate the flaw in the court's reasoning. The decision states that an "accident" occurs when a pick-up baseball game player breaks a nearby house window and a speeding driver hits and damages another vehicle because, although the player intended to hit the ball and the driver intended to speed, neither intended to cause property damage but

rather "miscalculated the physics involved" in their conduct. (Typed opn., 11.)

Contrary to the Court of Appeal's assumption (typed opn., 14), State Farm *agrees* that each of these incidents may qualify as an "accident," although the reason for this has nothing to do with a mistaken physics calculation. Rather, in each instance, there was no deliberate act of damage, i.e., neither the batter nor the driver intended to cause *any* kind of harm. The player did not deliberately hit the ball into the house and the driver did not deliberately hit the other vehicle. By contrast, the damage to the house and the vehicle would *not* constitute "accidents" if a player deliberately directed balls at a house wall to damage it but instead crashed a ball through a window, or a speeding driver deliberately bumped his car into another to scare the other driver but instead caused a serious collision and a wrecked car. In each of those circumstances, the injury-producing act of hitting the house and hitting the car are deliberate and therefore not accidental. The fact that neither actor "intended" the particular consequence of his act—i.e., the broken window and the wrecked car—could not convert their deliberate damage-producing acts into "accidents." Likewise, the fact that each actor committed some kind of a mistake in carrying out their deliberate actions—i.e., improperly aiming the ball or hitting the other car too hard—does not transform the deliberate underlying acts into accidental ones.

Here, the injury-producing act was hurling Wright into the cold pool, which Lint did deliberately with an intent to soak Wright in his

street clothes following their heated and profane exchange of words.[4/] (See exh. H., pp. 164, 166, 167, 173, 181, 183-184, 228, 231, 232.) It was not, for example, merely friendly horseplay between Lint and Wright, causing Wright to fall into the pool. Whether Lint intended to seriously hurt Wright or whether Lint "miscalculated the physics" in throwing him is irrelevant. Lint's injury-producing conduct was no accident and, under the State Farm policy and the authorities cited above, there was no potential insurance coverage for the losses resulting from that conduct.

4/ The court notes that Lint stated he intended "to talk to Wright" when he followed Wright outside. (Typed opn., 3.) This obviously is not true given Lint's admission that he instead deliberately grabbed Wright, pinned him in a bear hug, and flung him into the pool, despite the fact that Lint had heard Wright talking about his numerous health problems. (Exh. H, pp. 164, 230; see exh. H, p. 181.) The court also states that "Lint threw Wright in the pool . . . '[j]ust [as] a party joke.'" (Typed opn., 3.) However, the record shows that although Lint had in the *past* thrown people in the pool during parties as a "joke" (exh. H, p. 231), in this instance, it was as a result of a heated argument with Wright (exh. H, pp. 164, 166, 167, 173, 181, 183-184, 228, 231, 232; see Petn. for Rehg. 11, fn. 3 [flagging inaccuracy]).

3. The decision relies upon inapposite cases which reflect confusion among the courts concerning the meaning of the term "accident."

In reaching its decision, the Court of Appeal rejected numerous cases construing similar policy language and instead relied upon a few cases containing general comments that "accident" may refer to an unexpected consequence. (Typed opn., 7-11,13.) None of those cases dictate the result reached by the court, and the court's reliance upon them illustrates a recurring problem among the courts in taking a definition of "accident" from one case and applying it in another without considering the specific policy context in which the term is used.

Some of the cases relied upon by the court involved policy language in which"accident" referred to unexpected injury rather than, as in the State Farm policy, the *act* which causes the injury. For example, in *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 558 (*Hogan*), and *Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 324 (*Meyer*), the policies' insuring clauses covered injuries that were accidentally caused. Thus, the focus of the coverage clause was not on whether the *act* causing the injury was deliberate or accidental, but rather whether the *resulting injury* was neither expected nor intended by the insured. (See *Hogan*, at pp. 559-560; *Meyer*, at pp. 325-327.)

State Farm's policy, in contrast, covered bodily injury "caused by an occurrence" (exh. H, p. 148, emphasis omitted) and defined "occurrence" to mean "an accident . . . which results in" bodily injury (exh. H, p. 134). Neither *Hogan* nor *Meyer* involved this sort of insuring agreement, so neither court had occasion to interpret this language.

Other cases relied upon by the Court of Appeal did not decide the issue presented here, i.e., whether a deliberate act designed to cause harm qualifies as an "accident" simply because more serious harm resulted. For example, in *National American Ins. Co. v. Insurance Co. of North America* (1977) 74 Cal.App.3d 565, 571-572, 573 (*National American*), the Court of Appeal did not analyze or rule on the issue and instead had to resolve the question whether the insured's liability arose out of the use of a vehicle. In the process, the court noted only in passing that the trial court had found an accident under circumstances where a boy flipped an egg at a pedestrian, causing him to lose his eye.[5/] (*Id.* at pp. 569, 571.) The Court of Appeal affirmed the trial court's determination of the respective liability of two different insurers on other grounds. (*Id.* at pp. 574-577.)

Similarly, in *Flores*, the Court of Appeal held that a policy with a coverage clause like State Farm's did not cover injuries resulting from the insured driving a passenger to shoot someone because the insured

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5/ The "egg-flipping" would not constitute an "accident" under the State Farm policy because it was a deliberate act of harm. Although the "flipper" may have only intended to smash an egg on the victim, the fact that the victim instead lost an eye does not transform the "flipping" from a deliberate act to an accidental one.

committed a deliberate act to harm, which was not an accident. (*Flores, supra,* 45 Cal.App.4th at p. 671.) The court therefore was not faced with the question whether the coverage clause would encompass a circumstance where an insured commits a deliberate act that causes a particular injury the insured did not intend. (See *ibid.* [the insured "intended and expected injury to result from his acts"].) For this reason, the statement in *Flores* that an "accident" exists "[w]hen an injury is an unexpected or unintended consequence" is dicta.[6/] (*Flores,* at p. 669.) Nevertheless, the Court of Appeal in this case relied on that dicta. (Typed opn., 7-8.)

Moreover, to any extent *National American* and *Flores* suggest that an unintended injury may qualify as an "accident" under policies like State Farm's, they only further demonstrate the conflict and confusion among the courts concerning how to interpret the term "accident" in the context of occurrence-based policy language. (See *ante,* pp. 15-16 & fn. 1 [numerous cases hold "accident" refers to the cause of the injury, not the injury itself].) Absent this court's intervention, the

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6/ The court incorrectly attributes to State Farm the assertion that it was dicta for the *Flores* court to state that the insured "'therefore intended and expected injury to result from his acts.'" (Typed opn., 9 & fn. 2, emphasis omitted, quoting *Flores, supra,* 45 Cal.App.4th at p. 671.) State Farm did *not* characterize this statement as dicta, but rather the one quoted in the text above. (See Petition for Writ of Mandate 33; PWM Reply 9.) Indeed, the *Flores* court's reference to the fact that the insured intended and expected to cause injury demonstrates the insured's act was not accidental and was instead a deliberate act of harm. (See Petn. for Rehg. 14, fn. 5 [raising point to Court of Appeal].)

courts will continue to issue conflicting decisions on this issue—depending upon which definition of "accident" they extract from divergent lines of authority.

D. The Court of Appeal's decision writes the "occurrence" and "accident" language out of the policy and allows insureds to manufacture a duty to defend (and coverage) and evade responsibility for deliberate and dangerous acts.

As a result of the Court of Appeal's decision, bodily injury coverage in the State Farm policy and the many others like it will turn on the mental state of insureds vis-a-vis the consequences of their actions rather than the question whether their objective conduct was deliberate. The impact will be to effectively write the "occurrence" and "accident" language out of policies containing these terms because insureds can nearly always characterize post loss the purpose underlying their conduct in a manner so as to render the resulting bodily injury unintentional or render some aspect of their otherwise deliberate conduct "unforeseen" or "undesigned." (Typed opn., 12, emphases omitted.) For example, in this case, Lint could have *actually* intended to physically injure Wright but, upon seeing how serious the injury proved to be, claimed he never meant to physically harm Wright, that he mistakenly threw Wright "too softly," and therefore Wright's injury was an "accident" for which coverage exists.

In fact, the court's decision suggests that the only time a bodily injury will fall outside the scope of the coverage clause will be where the insured admits he intended the precise result that occurred. (See typed opn., 12 [event was an accident because not "all of the acts, the manner in which they were done, and the objective accomplished transpired exactly as Lint intended"].) Thus, under the decision, damages could fall within the coverage clause if Lint intended to get Wright wet and cause him to catch a cold but instead Wright caught pneumonia, or even if Lint intended to drown Wright but instead broke his clavicle. The decision therefore effectuates a vast expansion of what has previously been understood to qualify as an "accident."

The court's decision also eliminates a major disincentive to engaging in deliberate and dangerous conduct because it provides insureds with a sure-fire way to evade the financial consequences of that conduct. Insureds can behave deliberately and recklessly knowing that they can later claim things did not turn out precisely as they planned and thus their insurer must pay for any losses they caused. Unruly thugs will be able to convert all of their violent actions into "accidents" by, for example, claiming they took a swing at someone to "scare" them, but "mistakenly" connected with the victim's eye socket. Insulating insureds from taking personal responsibility for their deliberate misdeeds hardly promotes sound public policy.

II.

ALTERNATIVELY, THIS COURT SHOULD GRANT REVIEW AND HOLD THE CASE PENDING THE DECISION IN *DELGADO* CONCERNING THE MEANING OF "ACCIDENT" IN AN OCCURRENCE-BASED INSURANCE POLICY.

The legal issue presented here is substantially the same as that presented in *Delgado,* which involves substantially similar policy language and is currently pending oral argument in this Court. (*Delgado, supra,* 152 Cal.App.4th 671, review granted Sept. 25, 2007, S155129.)

In *Delgado,* the insured struck the victim in the nose and repeatedly kicked him. (*Delgado, supra,* 152 Cal.App.4th at pp. 676-677.) The victim sued, alleging the insured negligently and unreasonably believed he was acting in self defense when he battered the victim. (*Ibid.*) The insured tendered the defense to his insurer under a policy which covered "'[b]odily injury . . . caused by an occurrence'" and defined "occurrence" as "'an accident . . . which . . . results in bodily injury.'" (*Id.* at p. 682.) The insurer denied a defense because the insured's deliberate conduct in causing the injury did not constitute an "accident." (*Id.* at p. 677.) In a subsequent suit against the insurer seeking a declaration that the insurer owed a duty to defend, the trial court sustained the insurer's demurrer without leave to amend and dismissed the action. (*Id.* at pp. 678-679.)

On appeal, the court held that the negligence claim based on the mistaken belief of the need to act in self defense created a potential for coverage as an "accident" under the policy. (*Delgado, supra,* 152 Cal.App.4th at pp. 682, 684-685.) In its Petition for Review, the insurer posed the issue as whether the insurer had a duty to defend a third-party complaint alleging the insured was acting under an unreasonable belief he was acting in self defense. (Respondent's Petition for Review, p. 3 [filed Aug. 3, 2007].) The insurer argued that the insured's deliberate violent conduct did not qualify as an "accident" and the insured's alleged negligence or mistake in carrying out that conduct did not transform the purposeful acts into an "accident." (*Id.* at pp. 18-27.) This Court will accordingly determine whether a "mistake" in the manner in which a deliberate act is performed converts that act into an accidental one.[7]

Although this case does not involve self defense, it also presents the issue whether a deliberate act is transformed into an accidental one merely because there was a "mistake" in how the act was performed (specifically, whether Lint's deliberate act of hurling Wright into the pool became an "accident" by virtue of Lint's "mistake" in not throwing Wright hard enough so as to avoid the pool steps).

7/ *Jafari v .EMC Ins. Cos.* presents substantially the same issue for resolution, which is why this Court granted review and is holding that case pending resolution of *Delgado.* (*Jafari v. EMC Ins. Cos.* (2007) 155 Cal.App.4th. 885, review granted Dec. 12, 2007, S157924.)

Accordingly, this Court should grant review and either decide the case on the merits or defer briefing pending its decision in *Delgado*.

CONCLUSION

For the reasons stated above, this Court should grant review. Alternatively, this Court should grant review and defer briefing pending this Court's decision in *Delgado*.

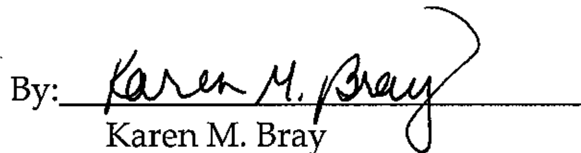
Concurrent with this petition, State Farm has filed a letter requesting that, in the event review is not granted, this Court issue an order that the Court of Appeal's decision not be published.

Dated: August 14, 2008

Respectfully submitted,

HORVITZ & LEVY LLP
PETER ABRAHAMS
MITCHELL C. TILNER
KAREN M. BRAY

CRANDALL, WADE & LOWE
WILLIAM R. LOWE
CURTIS L. METZGAR

By: 
Karen M. Bray
Attorneys for Petitioners
STATE FARM FIRE AND CASUALTY CO. and STATE FARM GENERAL INSURANCE CO.

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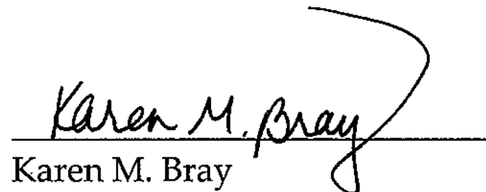

Karen M. Bray

Filed 6/26/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STATE FARM FIRE AND CASUALTY CO. et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; JOSHUA WRIGHT, Real Party in Interest.	B202768 (Los Angeles County Super. Ct. No. VC038921)

ORIGINAL PROCEEDINGS in mandate. Raul A. Sahagun, Judge. Petition denied.

Horvitz & Levy, Peter Abrahams and Mitchell C. Tilner; Crandall, Wade & Lowe, William R. Lowe and Curtis L. Metzgar for Petitioners.

No appearance for Respondent.

Blumberg Law Corporation and Ave Buchwald; Law Offices of Moss, Hovden & Lindsay and Del D. Hovden for Real Party in Interest.

INTRODUCTION

If an insured throws someone into a swimming pool intending to get the other person wet, but by mistake does not throw hard enough and so the latter lands on the pool's cement step and suffers injuries, is the incident an "accident" within the meaning of insurance law? We conclude it is.

In an action for damages for personal injuries and declaratory relief brought by real party in interest Joshua Wright against Jeffrey Lint and his insurer, State Farm Fire and Casualty Co. and State Farm General Insurance Co. (together State Farm), the trial court ruled that State Farm owed a duty to defend Lint. In so ruling, the trial court stated that "the evidence is pretty clear that [Lint] didn't intend to harm [Wright]." State Farm filed a petition for writ of mandate seeking an order directing the trial court to vacate its order and enter instead a judgment declaring that State Farm has no duty to defend Lint against Wright. State Farm reasons that Lint's conduct giving rise to Wright's lawsuit was deliberate and so it was not an accident, irrespective of whether Lint intended the injury. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are stipulated: Lint, then 21 years old, resided with his parents. Wright was 23 years old. Lint was bigger than Wright.

Both men attended a party. During the evening, the two began to argue. After an exchange of words, Wright went outside. Lint followed Wright, grabbed him, picked him up, and threw him into the shallow end of the swimming pool. Wright landed on the pool's concrete step, which was not covered by water. Wright sustained a fractured right clavicle and was hospitalized for approximately four days.

Lint apologized to Wright. Wright reported that, after the incident, Lint told him that Lint had not meant to hurt him. Wright characterized the incident as "horse-playing around."

Lint was arrested for the swimming pool incident and entered a nolo contendere plea to a charge of misdemeanor battery (Pen. Code, § 242).

Lint's parents had a valid homeowners insurance policy issued by State Farm (policy No. 71-NE-1108-6). Lint was an insured under this policy. The policy covered "damages because of bodily injury . . . caused by an occurrence . . . ." An "occurrence" was defined in the policy as "an accident, including exposure to conditions, which results in: [¶] a. bodily injury; or [¶] b. property damage . . . ." The policy excluded from coverage, "[B]odily injury . . . [¶] (1) which is either expected or intended by the insured; or [¶] (2) which is the result of willful and malicious acts of the insured[.]"[1]

Wright's counsel notified State Farm of a claim arising out of the incident. In a recorded statement obtained by State Farm, Lint said, "if I wanted to hurt this guy . . . I would have just hit him, but I didn't want to hurt him."

State Farm notified the Lints that it was reserving its right to deny a defense and indemnity. In November 2002, State Farm informed Lint that it was denying a defense and indemnity on several grounds, among which was that "The claim against you does not meet the insuring agreement in the policy, as the actions do not arise out of an accident. Also, the policy specifically excludes damages which are either expected or intended by the insured or the result of willful and malicious conduct."

Wright filed his complaint against Lint, alleging negligence among other things. In his deposition, Lint testified that when he followed Wright outside, he did not plan to "kick his ass" and did not intend to hurt Wright. Lint intended only to talk to Wright. Lint threw Wright in the pool "[j]ust to get him wet," "[j]ust a party joke," or "horseplaying," "something to laugh about."

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1 Compare Insurance Code section 533, which reads in relevant part: "[a]n insurer is not liable for a loss caused by the wilful act of the insured . . . ."

The Lints again tendered the defense to Wright's lawsuit to State Farm and included a copy of Lint's deposition transcript. State Farm again denied a defense and indemnity on the ground that Wright's injuries were not caused by an occurrence or an accident.

Lint filed a declaratory relief action against State Farm (Case No. VC 040 632, hereinafter the declaratory relief action). Therein, Lint sought a declaration that the State Farm policy covered his acts in that his acts "were either negligent, less than willful, or, if found to be willful, were not done with a pre-conceived design to inflict injury, or was not intended or expected to cause bodily harm, and/or that [he] did not know or believe that his conduct was substantially certain or highly likely to result in the kind of damage that occurred."

Lint and Wright stipulated to entry of judgment in Lint's declaratory relief action. Thereunder, Lint agreed to pay Wright and his attorneys $60,000 and assigned all of his rights against State Farm to Wright.

Wright then amended his complaint to delete all his causes of action against Lint except for one sounding in negligence, and to allege causes of action against State Farm for declaratory relief and breach of contract. In particular, Wright's complaint alleged that "On or about December 27, 2001, Defendants, and each of them, negligently, carelessly and recklessly touched plaintiff during horseplay while attempting to wrestle him . . . ."

The trial court consolidated Wright's action with the declaratory relief action and trifurcated the issues. First, the court would resolve the question of whether State Farm owed a duty to defend Lint. At the close of trial of phase one, the court ruled that State Farm owed a duty to defend. The court recited the rule that when an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists. (*Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661, 669 (*Flores*).) The court found that Lint did not intend to cause any injury to Wright; he only wanted to get Wright wet. Thus, the injury was neither expected nor intended.

After this ruling was reduced to a statement of decision and final order, State Farm brought this writ proceeding.

DISCUSSION

1. *Standard of review*

The facts are undisputed. Thus, the interpretation of the State Farm insurance policy is a question of law, which we review de novo. (*Bluehawk v. Continental Ins. Co.* (1996) 50 Cal.App.4th 1126, 1131.)

Under the rules of policy interpretation, we look to the language of the contract to ascertain its plain meaning "or the meaning a layperson would ordinarily attach to it. [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) We give effect to the mutual intent of the parties at the time the contract was formed, inferable if possible, from the written policy. (*Ibid.*, citing Civ. Code, §§ 1636 & 1639.) Our interpretation is controlled by " '[t]he "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citations] . . . .' " (*Waller v. Truck Ins. Exchange, Inc., supra,* at p. 18.)

"[C]overage clauses are broadly construed in favor of the insured and express exclusions are strictly construed against the insurer . . . ." (*Flores, supra,* 45 Cal.App.4th at p. 670.) In a declaratory relief action to determine the duty to defend, "the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot.*" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.)

2. *The duty to defend and the insurance policy at issue here*

"It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.] This duty . . . is separate from and broader than the insurer's duty to indemnify. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 19.)

“ ‘For an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. [Citation.] Hence, the duty “may exist even where coverage is in doubt and ultimately does not develop.” [Citation.]’ [Citation.]” (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 295.)

By contrast, “ ‘ “where there is no possibility of coverage, there is no duty to defend . . . .” ’ [Citation.] . . . [¶] . . . [W]here the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability. [Citations.] This is because the duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy. [Citations.]” (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 19.) Hence, “ ‘the insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.’ [Citation.]” (*Montrose Chemical Corp. v. Superior Court, supra,* 6 Cal.4th at p. 300, italics omitted.)

“[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [Citations.]” (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at p. 19.)

As observed, the policy here provides liability coverage for “damages because of bodily injury . . . caused by an occurrence . . . .” An “occurrence” is “an accident, including exposure to conditions, which results in: [¶] a. bodily injury . . . .” The policy thus provides coverage to Lint only if Wright’s injury was the result of an accident. The State Farm policy at issue here does not define the word “accident.”

3. *Because Lint did not intend all of the acts in the causal series of events leading to Wright's injury, the stipulated facts presented the potential for coverage under the policy and so State Farm had a duty to defend Lint.*

The meaning of the term "accident" in insurance law is not settled. Our Supreme Court has observed on more than one occasion that "No all-inclusive definition of the word 'accident' can be given . . . ." (*Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 559, quoting from *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 563-564; see also *Hyer v. Inter-Insurance Exchange, Etc.* (1926) 77 Cal.App. 343, 348.)

State Farm points to numerous cases that stand for the proposition that where the conduct is deliberate or volitional, the incident is not an "accident" for the purposes of insurance law. (*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."]; *Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1045-1046 ["[C]ourts have consistently defined the term ['accident'] to require unintentional acts or conduct. [Citations.] The plain meaning of the word 'accident' is an event occurring unexpectedly or by chance. [Citation.]"].) State Farm asserts that where the term "accident" refers to the injury-producing act, it is irrelevant that the insured did not intend the injury that flowed from the act. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 599 ["[W]hether the insured intended the harm that resulted from his conduct is not determinative. The question is whether an accident gave rise to [the victim's] injuries."].) Therefore, State Farm argues, because Lint indisputably deliberately threw Wright into the pool, his conduct was *intentional* and not an accident, regardless of whether Lint intended the effect of his act to injure Wright.

However, the term "accident" has also been used to refer to the unintended or unexpected *consequence* of the act. "When an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists. When the injury suffered is *expected* or

intended, coverage is denied. When one expects or intends an injury to occur, there is no 'accident.' " (*Flores, supra*, 45 Cal.App.4th at p. 669, quoting from *Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 96.) "The fact that an act which causes an injury is intentional *does not take the consequence of that act outside the coverage of a policy* which excludes damage unless caused by accident for if the *consequence* that is the damage or injury *is not intentional and is unexpected it is accidental* in character. [Citation.]" (*Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 327, italics added.) In *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., supra*, 51 Cal.2d 558, the Supreme Court stated that "accident" "has been defined 'as "a casualty -- something out of the usual course of events and which *happens* suddenly and unexpectedly and without design of the person injured." [Citations.] It " 'includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event.' " [Citations.]' " (*Id.* at p. 563, italics added, original italics omitted.) These statements defining the term "accident" employ the words "consequence" and "happen," thereby indicating that an accident can exist when either the cause is unintended or the effect is unanticipated.

In *Flores,* relied on by the trial court, Sanders was the driver of an insured automobile in which Perez was the passenger with a gun. The two agreed to drive into Santa Barbara to seek retribution against Flores for an earlier assault on Sanders. As Sanders drove by, Perez intentionally shot at Flores, who was standing on the street, injuring him. (*Flores, supra,* 45 Cal.App.4th at p. 667.) The automobile policy at issue contained a provision similar to the State Farm policy here, in which an occurrence was defined to mean an accident. (*Id.* at p. 669.) *Flores* discussed cases in which the insured engaged in reckless conduct that caused covered injury: leaving a loaded hair trigger weapon on one's lap while driving over a bumpy road, flipping eggs out of a car at 40 miles per hour, and drunk driving. (*Id.* at pp. 669-670, citing *Peterson v. Superior Court* (1982) 31 Cal.3d 147; *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94,

101; & *National American Ins. Co. v. Insurance Co. of North America* (1977) 74 Cal.App.3d 565.) Those cases, *Flores* noted, "all constituted 'accidents' within the meaning of personal injury insurance policies *because the injuries are not intended or expected*." (*Flores, supra,* at p. 671, italics added.) *Flores* held, unlike the three cases above recited, that the shooting was not an accident because all of the conduct was planned and "Sanders therefore *intended and expected injury to result* from his acts." (*Ibid.*, italics added.)[2]

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[2] State Farm argues that this statement in *Flores, supra*, 45 Cal.App.4th 661 is dictum and should not be followed "in light of the many cases that conflict with it," and because the issue in *Flores* was whether the injury arose from the use of the insured's vehicle as required under the automobile policy. We disagree. *Flores,* an opinion from this District Court of Appeal, decided both that insured's conduct was not "accidental" within the meaning of the policy, and that the injury did not arise from the use of the insured's vehicle. (*Id.* at p. 671.) As noted, the automobile insurance policy at issue in *Flores* contained a provision covering "occurrences" that were defined as "accidents" virtually identical to the policy at issue here. (*Id.* at p. 669.) Thus, the conclusion in *Flores* that the injury was not accidental was part of the opinion's holding.

The dictum argument is also unpersuasive. State Farm acknowledges that the statement in *Flores*, to wit, "[w]hen an injury is an unexpected *or* unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists[]" is accurate. (*Flores, supra*, 45 Cal.App.4th at p. 669, italics added.) State Farm nonetheless argues that "[t]he trial court here, however, misunderstood *Flores* to support the converse proposition as well -- that the policy *does* apply when an insured who acts intentionally does *not* expect or intend his conduct to cause injury." *Flores* was not incorrect. Often policies that define occurrence as an " 'accident' " also include the language " 'which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*' " (See, e.g., *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 804, italics added; *Royal Globe Ins. Co. v. Whitaker, supra*, 181 Cal.App.3d at pp. 534-535; *Quan v. Truck Ins. Exchange, supra,* 67 Cal.App.4t at p. 592.) And, as *Collin* observed, the italicized language " 'merely explains that expected or intended injuries or damage are not "accidents" within the meaning of the policy.' [Citation.]" (*Collin v. American Empire Ins. Co., supra*, at p. 805.) Also, the focus is on whether the *result* or *consequence* of a deliberate act was unexpected or unintended. (*Flores, supra,* at p. 669; *Hogan v. Midland National Ins. Co., supra,* 3 Cal.3d at p. 559.)

Meyer v. Pacific Employers Ins. Co., *supra*, 233 Cal.App.2d 321 is analogous because the court focused on the consequence of a deliberate act. While drilling a well, the drilling company caused the ground to vibrate resulting in damage to the neighbor's property and buildings. Although the policy language was different, the issue in *Meyer* was whether the adjacent property's damage was *an accident*. (*Id.* at p. 325.) *Meyer* held that an accident existed because although the company intentionally drilled, there was no evidence that it "intended or expected the vibrations which their operation set in motion would cause damage to plaintiffs' property." (*Id.* at p. 327, fn. omitted.)

National American Ins. Co. v. Insurance Co. of North America, supra, 74 Cal.App.3d 565, is also instructive. There, four teenagers riding in a car indiscriminately "flipped" eggs at houses and other targets. While their automobile was moving at 40 miles per hour, one of the teens threw an egg at a pedestrian, causing the victim to lose sight in one eye. (*Id.* at p. 569.) In holding that the injuries arose out of the use of an automobile, the appellate court affirmed the trial court's finding that liability resulted from an " 'accident,' " under the policy, triggering coverage. (*Id.* at p. 571.)

Similarly, in *Hogan v. Midland National Ins. Co.*, *supra*, 3 Cal.3d 553, the insured sold a defective saw that cut lumber more narrowly than it should have. (*Id.* at pp. 557-559.) *Hogan* focused on the foreseeability of the damages, stating, " 'Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, *unforeseen, or undesigned happening or consequence* from either a known or unknown cause.' " (*Id.* at p. 559, italics added, quoting from *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.*, *supra*, 51 Cal.2d at pp. 563-564.)

As summarized by *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, at page 50, "coverage is not always precluded merely because the insured acted intentionally and the victim was injured. An accident, however, is never present when the insured performs a deliberate act unless some additional,

unexpected, independent, *and unforeseen happening* occurs that produces the damage. [Citation.] Clearly, where the insured acted deliberately *with the intent to cause injury*, the conduct would not be deemed an accident. Moreover, where the insured *intended all of the acts that resulted in the victim's injury*, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury." (*Ibid.*, italics added.) An injury is not accidental when "[a]ll of the acts, the manner in which they were done, and the objective accomplished occurred exactly as appellant intended." (*Merced Mutual, supra,* at p. 50.) "Conversely, *an 'accident' exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity.*" (*Ibid.*, italics added.)

The following paradigms are illustrative: During a pick-up baseball game, a batter hits the ball with the intention of sending it into deep right field for a homerun. But, because of the batter's stance and the angle of contact with the ball, the batter sends the baseball in a trajectory that breaks a window in foul territory. The batter deliberately hit the ball and intended that it move far and fast. It cannot be said that this batter intended to cause the property damage, i.e., to hit a foul ball and break the window. This was an accident because one aspect in the causal series of events -- too much force at an inadvertent angle leading to the broken window -- was unintended by the batter, and as such was fortuitous. In the second example, an intentionally speeding driver negligently hits another car. The speeding was an intentional act; but, "the act directly responsible for the injury -- hitting the other car -- was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident." (*Merced Mutual Ins. Co. v. Mendez, supra*, 213 Cal.App.3d at p. 50.) In these examples, the conduct resulting in harm was intended but the ultimate result was not because the actor mistakenly miscalculated the physics involved. (See *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 888.)

The circumstances here, based on the complaint and the undisputed facts discovered by State Farm, parallel the baseball batter, the egging in *National American Ins. Co.*, the speeding driver in posited by *Merced Mutual Ins. Co.*, and the drilling company in *Meyer*. Although he deliberately picked Wright up and threw him at the pool, Lint did not intend or expect the consequence, namely, that Wright would land on a step. Lint miscalculated one aspect in the causal series of events leading to Wright's injury, namely, the force necessary to throw Wright far enough out into the pool so that he would land in the water. It is undisputed that Lint did not intend to hurt Wright; he merely intended that Wright land farther out into the water and "get . . . wet." No doubt Lint acted recklessly. But, just as the teenagers irresponsibly flipping eggs did not intend to cause the victim to lose an eye, or the intentional speeder did not plan to hit another car, Lint rashly threw Wright at the pool without expecting that Wright would land on the cement step. Stated otherwise, the act directly responsible for Wright's injury, throwing too softly so as to miss the water, was an *unforeseen or undesigned happening or consequence* and was thus fortuitous. (*Hogan v. Midland National Ins. Co., supra*, 3 Cal.3d at p. 559.) The event here was an accident because *not* all of the acts, the manner in which they were done, and the objective accomplished transpired exactly as Lint intended. (*Flores, supra,* 45 Cal.App.4th at p. 669; *Merced Mutual Ins. Co. v. Mendez, supra*, 213 Cal.App.3d at p. 50.)

Alternatively, the policy here excluded from coverage, "[B]odily injury . . . [¶] (1) which is either expected or intended by the insured; or [¶] (2) which is the result of willful *and* malicious acts of the insured[.]"[3] (Italics added.) Based on the complaint and the undisputed facts discovered by State Farm, Wright's injury was (1) neither expected nor intended by Lint; nor was it (2) the result of a malicious act of the insured.

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[3] See footnote 1, *supra*.

The cases on which State Farm relies are distinguished. Many involve sexual harassment or sexual assault. (*Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 811; *Quan v. Truck Ins. Exchange, supra*, 67 Cal.App.4th at pp. 592-596; *Merced Mutual Ins. Co. v. Mendez, supra*, 213 Cal.App.3d at p. 52.) Our Supreme Court stated "[t]here is no such thing as negligent or even reckless sexual molestation." (*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1021.) "Some acts are so inherently harmful that the *intent to commit the act and the intent to harm are one and the same*. The act is the harm." (*Id.* at p. 1026, italics added.) Stated otherwise, with respect to sexual molestation, no aspect in the causal series of events can be unintended. (See *Merced Mutual Ins. Co. v. Mendez, supra*, at p. 50.)

In other cases relied on by State Farm the insured intended *all of the acts in the causal chain, including the injury*. (*Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1506 [no accident where insured willfully and intentionally intended to defame]; *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.App.4th 137, 155 [no accident where insured who sent offending fax transmissions intended that faxes be received]; *Ray v. Valley Forge Ins. Co., supra*, 77 Cal.App.4th at p. 1046 [no accident where insured roofing consultant intended homeowners' association use of the materials he selected]; *Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1150 [no accident because insured's negligent misrepresentation involved " '*intent to induce reliance*' "]; *Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 366 [same]; *Collin v. American Empire Ins.* Co., *supra,* 21 Cal.App.4th 787 [insured admitted conversion of property was intentional and willful]; *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 539 [no accident where insured conspired to engage in fraudulent billing scheme because "none of the damages asserted arose from an accidental 'occurrence' "]; *Commercial Union Ins. Co. v. Superior Court* (1987) 196 Cal.App.3d 1205, 1209 [no accident where firing employee was intentional].)

Taken to its logical conclusion, State Farm's argument that we should apply "fortuity" solely to the act causing the injury without reference to the injury, would result in no coverage at all. State Farm proffers an accident as one where Lint inadvertently bumps into Wright, knocking him into the pool. Yet, in State Farm's analysis, there could never be a covered event because all batters deliberately seek to hit baseballs and therefore engage in intentional acts, regardless of whether the property damage, namely, breaking windows, was intended. Likewise, there would never be a covered occurrence when an injury is occasioned by a negligent driver, who obeys the laws of the road, nevertheless miscalculates a lane change and hits another car. (Cf. *Meyer v. Pacific Employers Ins. Co., supra,* 233 Cal.App.2d at p. 327 ["Certainly no one would contend that an injury occasioned by negligent or even reckless driving was not accidental within the meaning of a policy of accident insurance"].) Under State Farm's analysis all accident-based automobile insurance policies would be illusory.

Finally, the parties disagree about the effect of Lint's nolo contendere plea to misdemeanor battery. Lint stipulated that he intended to pick Wright up in a bear hug, the elements of misdemeanor battery. (Pen. Code, § 242.) Regardless of whether this plea may be considered by State Farm. (Cf. *Flores, supra,* 45 Cal.App.4th at pp. 673-674), the result remains the same because intent to commit bodily injury is not an element of misdemeanor battery. (Pen. Code, § 242; *Allstate Ins. Co. v. Overton* (1984) 160 Cal.App.3d 843, 848; but see *Fire Ins. Exchange v. Altieri* (1991) 235 Cal.App.3d 1352, 1360, fn. 7.) Therefore, the potential for coverage exists notwithstanding Lint's plea to misdemeanor battery.

Based on the above analysis, the allegations of the instant complaint along with the stipulated facts asserted a claim that was a potentially covered occurrence under State Farm's insurance policy. Therefore, the trial court properly ruled that State Farm owed a duty to defend Lint.

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is denied. Petitioner is to bear the costs of this writ proceeding.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.

Filed 7/9/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STATE FARM FIRE AND CASUALTY CO. et al., Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; JOSHUA WRIGHT, Real Party in Interest.	B202768 (Los Angeles County Super. Ct. No. VC038921) ORDER MODIFYING OPINION; CHANGE IN THE JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on June 26, 2008, be modified as follows:

1. On page 15, third sentence of the first full paragraph, the words "Petitioner is" are changed to "Petitioners are" so the sentence reads:

Petitioners are to bear the costs of this writ proceeding.

[This modification changes the judgment.]

PROOF OF SERVICE
[Code Civ. Proc., § 1013a]

I, Inez Martinez, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436.

On **August 14, 2008**, I served the foregoing document entitled:

PETITION FOR REVIEW OR, IN THE ALTERNATIVE, REQUEST FOR A GRANT-AND-HOLD ORDER

on the interested parties in this action as follows:

[✓] (BY MAIL) by placing a true copy thereof in an envelope addressed as follows [as indicated on the attached service list]. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing.

Parties Served:

Counsel Name/Address/Telephone	Party(ies) Represented
Del D. Hovden (SBN 01943) Moss, Hovden & Lindsay 13215 East Penn Street, Suite 100 Whittier, CA 90602 (562) 698-7963 Fax: (562) 698-2155 e-mail: not available	Attorney for Plaintiff Joshua Wright

Ave Buchwald (SBN 70305) Blumberg Law Corporation 100 Oceangate, Suite 1100 Long Beach, CA 90802-4330 (562) 437-0403 Fax: (562) 432-0107 e-mail: not available	Attorney for Plaintiff Joshua Wright
William R. Lowe (SBN 54007) Curtis L. Metzgar (SBN 125932) Crandall, Wade & Lowe 9483 Haven Avenue, Suite 102 Rancho Cucamonga, CA 91730 email: metzgarc@cwlaw.com	Attorney for Defendants State Farm Fire and Casualty Co. and State Farm General Insurance Co.
Clerk, Court of Appeal Second Appellate District Division Three 300 S. Spring St. 2nd Floor, North Tower Los Angeles, CA 90013	Case No. B202768
Hon. Raul A. Sahagun Los Angeles Superior Court Southeast District, Dept. C 12720 Norwalk Blvd. Norwalk, CA 90650-3188	Case No. VC038921

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **August 14, 2008**, at Encino, California.

Inez Martinez