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August 14, 2008

VIA FEDERAL EXPRESS

Honorable Ronald M. George, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 90013-1233

Re: Request for depublication: *State Farm Fire & Casualty Co. v. Superior Court (Wright)* (2008) 164 Cal.App.4th 317

Dear Chief Justice George and Associate Justices:

Petitioners State Farm Fire and Casualty Co. and State Farm General Insurance Co. (together, State Farm) filed a petition for review in the above case. Pursuant to California Rules of Court, rule 8.1125, State Farm requests that, if review is not granted, the Court of Appeal's opinion be depublished. It should not stand as precedent because it (a) conflicts with longstanding case law concerning what constitutes an "accident" in an occurrence-based insuring clause, (b) misrepresents State Farm's position, and (c) eliminates a disincentive for deliberate and dangerous acts by allowing insureds to manufacture a duty to defend (and coverage) for such acts, thereby evading financial responsibility.

I. The interests of State Farm

State Farm is the defendant in the underlying action and the petitioner before the Court of Appeal. As measured by A.M. Best Company, State Farm is ranked the number one California insurer with respect to homeowner direct written premium policies like the one at issue in this case, with 20.2 percent of the market. State Farm currently has in effect nearly 1.5 million liability policies adversely affected by the Court of Appeal's erroneous decision.

II. Why the Court of Appeal's decision should not be published.

A. Background: The Court of Appeal holds that the intentional act of heaving someone into a pool is an "accident" because the insured did not intend to cause the resulting injury.

Jeffrey Lint and Joshua Wright had a heated and profane argument at a party. Lint followed Wright from inside a house into the backyard, approached him from behind, locked his arms around Wright, carried Wright several steps, and heaved him into the shallow end of a pool. Wright landed on the top step of the pool and broke his collar bone.

Wright sued Lint. State Farm declined to defend Lint because the policy's insuring agreement limited State Farm's defense obligation to suits for bodily injury caused by an "occurrence," defined as "an accident" that results in bodily injury. 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 subsequent proceedings, the trial court stated it had no doubt that Lint intentionally grabbed Wright and threw him into the pool. Nevertheless, the court concluded State Farm owed a duty to defend on the ground that Wright's injury was unexpected because Lint only intended to get Wright wet. The Court of Appeal agreed, holding 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.

B. The decision conflicts with occurrence-based policy language and longstanding case law.

1. An insurer has no duty to defend an insured where there is no potential for coverage.

"[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.)

Insurance policies have two parts: the insuring agreement which defines the covered risks, 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 need to consider whether any 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 facts are undisputed and reveal no potential for coverage, the insurer is entitled to judgment. (See *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 45-46, 53 (*Merced Mutual*).)

2. 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 long 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—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.) The term "accident" """refers to *the nature of the insured's conduct, not his state of mind*.""" (*Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 886, 889 (*Lyons*).)

[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 v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 592-593, 595-596, 600-601 (*Quan*); *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 Ins. Co. v. Superior Court* (1987) 196 Cal.App.3d 1205, 1209; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537.

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

a. 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.

Rather than interpreting the term "accident" within the context of the State Farm policy, the Court of Appeal canvassed case law positing varying definitions of "accident" but without considering how or whether those definitions make sense within the context of the policy at issue. (Typed opn., 2, 7-11.) After considering the potential meaning of "accident" in the abstract, the court concluded "accident" refers not only to the injury-producing act, but also to unintended injury resulting from a deliberate act. (Typed opn., 7-12.) However, that definition does not work in occurrence-based policies like State Farm's, where an "accident" refers to the cause of the injury, not the injury itself. (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 conflicts 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." (*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 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.

b. The decision conflicts with longstanding caselaw.

The Court of Appeal dismissed the 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 into 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.)

This analysis is flawed. 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 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, arising out of a heated and profane confrontation, coincided with an intent to cause harm.

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,* 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 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 court's flawed 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.)

State Farm agrees that each of these incidents may qualify as "accidents," 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 those circumstances, the injury-producing acts of hitting the house and 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. (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 act 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.

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

The Court of Appeal rejected the 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.

Some of the cases 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, 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.[2] (*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 *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661, 671 (*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 committed a deliberate act to harm, which was not an accident. 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. (*Id.* at p. 669.) Nevertheless, the Court of Appeal in this case relied on that dicta. (Typed opn., 7-8.)

C. The decision misrepresents State Farm's position.

In the decision, the Court of Appeal asserts State Farm agreed with the statement in *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, supra,* 45 Cal.App.4th at p. 669.) That is inaccurate. 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. (PWM Reply 3-4, 9 [emphases added]; see Petition for Rehearing 5 [noting inaccuracy].)

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[2]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.

Nevertheless, if the decision remains published, insureds will undoubtedly cite this "concession" as proof that their intentional, injury-producing acts qualify as "accidents," so long as they contend the resulting injury was not expected.[3]

D. The decision allows insureds to manufacture a duty to defend (and coverage) post loss and evade responsibility for deliberate and dangerous acts.

If the Court of Appeal's decision remains published, bodily injury coverage in State Farm policies 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, Lint could have *actually* intended to 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 a covered "accident."

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, damages could fall within the coverage clause if Lint intended to get Wright (whom he knew to be physically impaired) wet and cause him to

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[3]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 PWM 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 Petition for Rehearing 14, fn. 5 [raising point to Court of Appeal].)

catch a cold but instead Wright caught pneumonia, or even if Lint intended to drown Wright but instead broke his clavicle. The decision therefore vastly expands 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.

III. Conclusion

For the reasons above, State Farm request that, in the event review is denied in this case, this Court order that the Court of Appeal's decision be depublished.

Respectfully submitted,

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KMB/aty
Enclosure (Court of Appeal decision)

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:

> Letter to Honorable Ronald M. George, Chief Justice and Honorable Associate Justices dated August 14, 2008 requesting depublication

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.

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Clerk, Court of Appeal Second Appellate District Division Three 300 S. Spring St. 2nd Floor, North Tower Los Angeles, CA 90013	Case No. B202768

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