

1993

LaSal Oil Company, INC v. Chicago Insurance Company : Brief of Appellee

Utah Court of Appeals

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J. Michael Hansen; Claudia F. Berry; Attorneys for Plaintiff/Appellant.

Mark J. Williams; Hanson, Epperson & Smith; Attorneys for Defendant/Appellee Omaha Indemnity; Carlton R. Ericson; Dunn & Dunn; Attorneys for Defendant/Appellee Utah Property.

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IN THE UTAH COURT OF APPEALS

LaSAL OIL COMPANY, INC.,

Plaintiff/Appellant

v.

CHICAGO INSURANCE COMPANY
(INTERSTATE INSURANCE GROUP);
OMAHA INDEMNITY (FRANK B.
HALL); ZURICH INSURANCE
COMPANY; and UTAH PROPERTY
AND CASUALTY INSURANCE
GUARANTY ASSOCIATION;

Defendants/Appellees

Case No. 930536-CA

Priority No. 15

BRIEF OF DEFENDANTS/APPELLEES

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
JUDGE JOHN A. ROKICH
Civil No. 88-0907028

UTAH COURT OF APPEALS

BRIEF

MARK J. WILLIAMS, Esq. (3494)
HANSON, EPPERSON & SMITH
Attorneys for Defendant/Appellee
Omaha Indemnity Company
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

J. Michael Hansen, Esq.
Claudia F. Berry, Esq.
SUITTER AXLAND & HANSON
175 South West Temple
Suite 700
Salt Lake City, Utah 84101
Attorneys for Plaintiff/
Appellant
LaSal Oil Company, Inc.

Carlton R. Ericson, Esq.
DUNN & DUNN
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102
Attorneys for Defendant/Appellee
Utah Property and Casualty
Insurance Guaranty Association

930536 CA

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Attorneys for Defendant/Appellee
Omaha Indemnity Company
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

J. Michael Hansen, Esq.
Claudia F. Berry, Esq.
SUITTER AXLAND & HANSON
175 South West Temple
Suite 700
Salt Lake City, Utah 84101
Attorneys for Plaintiff/
Appellant
LaSal Oil Company, Inc.

Carlton R. Ericson, Esq.
DUNN & DUNN
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102
Attorneys for Defendant/Appellee
Utah Property and Casualty
Insurance Guaranty Association

Robert G. Gilchrist
Barbara Berrett
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144
Attorneys for Defendant/Appellee
Chicago Insurance Company

Wallace R. Lauchnor, Esq.
PAULSEN, LAUCHNOR & MICKELSON
CSB Tower, Suite 500
50 South Main Street
Salt Lake City, Utah 84144
Attorneys for Defendant/Appellee
Chicago Insurance Company

Donald V. Jernberg, Esq.
Orest Dachniwsky, Esq.
OPPENHEIMER WOLFF & DONNELLY
Two Illinois Center
233 North Michigan Avenue, Ste. 2400
Chicago, Illinois 60601
Attorneys for Defendant/Appellee
Chicago Insurance Company

Allan T. Brinkerhoff, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Attorneys for Defendant/Appellee
Zurich Insurance Company

PARTIES

List of all parties to the proceedings in the Third District
Court:

- A. Plaintiff: LaSal Oil Company, Inc.
- B. Defendants: Allianz Insurance Company;
Carriers Insurance Company;
Chicago Insurance Company
(Interstate Insurance Group);
Midland Insurance Company;
Omaha Indemnity Company (Frank B. Hall);
Pacific Employers Insurance Company
(CIGNA);
Travelers Insurance Company;
Zurich Insurance Company; and
Utah Property and Casualty Insurance
Guaranty Association

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JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1993 Supp).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the trial court correct in ruling that the "sudden and accidental" exception to the pollution exclusion found in Omaha Indemnity's Comprehensive General Liability Policy is unambiguous and that "sudden" has a temporal aspect of abruptness?

Standard of Review

Since the trial court heard testimony on Omaha Indemnity Company's ("Omaha") Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment, it entered judgment in conformance with the evidence presented, and issued Findings of Facts and Conclusions of Law and Judgment in accordance with a Memorandum Decision. (R. 1891-1892.) An Order was entered granting judgment in favor of Chicago Insurance Company ("Chicago") that incorporated by reference the Findings of Facts and Conclusions of Law and the Entry of Judgment entered on behalf of Omaha (R. 1936-1937), while an order granting partial summary judgment was entered in favor of Utah Property and Casualty Insurance Guaranty Association (the "Guaranty Association") on behalf of Carriers Insurance Company ("Carriers") and summary judgment was entered in favor of Zurich Insurance Company ("Zurich"). (R. 1958-1960.) Therefore, the applicable standard of review for either situation is set forth below:

Whether the terms of the contract are ambiguous is a question of law; the Court therefore reviews a trial court's conclusion under a correctness standard. Anesthesiologists Associates of Ogden v. St. Benedict's Hospital, 852 P.2d 1031, 1035 (Utah App. 1993); Klas v. Van Wagoner, 829 P.2d 135, 138 (Utah App. 1992); Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985).

On a summary judgment, the appellate court gives no particular deference to the trial court's conclusions. Nevertheless, summary judgment is appropriate if, viewing the evidence in a light most favorable to the losing party, the prevailing party is still entitled to judgment as a matter of law. Warren v. Provo City Corp., 838 P.2d 1125, 1128 (Utah 1990); Daniels v. Deseret Federal Savings & Loan Assoc., 771 P.2d 1100, 1102 (Utah App. 1989).

2. Was the trial court correct in holding that the release of gasoline from LaSal's underground pipeline was not sudden?

Standard of Review

A conclusion of law is reviewed by the appellate court "under a correction of errors standard." Barnard v. Utah State Bar, 857 P.2d 917, 919 (Utah 1993); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

A summary judgment is reviewed to determine "whether there is any genuine issue as to any material fact, and if there is not, whether the prevailing party is entitled to judgment as a

matter of law." Gridley Associates Ltd. v. Transamerica Ins. Co., 828 P.2d 524, 526 (Utah App. 1992); Thornock v. Cook, 704 P.2d 934, 936 (Utah 1979).

STATEMENT OF CASE

Nature of Case, Course of Proceedings, and Disposition At Trial Court.

Omaha, the Guaranty Association, Chicago and Zurich (collectively referred to as the "insurers") hereby adopt and incorporate by reference the Statement of the Case set forth in Appellant's Brief, pages 3 through 9.

STATEMENT OF RELEVANT FACTS

For purposes of this appeal only, and for the sake of judicial economy, the insurers hereby adopt the Statement of Facts set forth in LaSal's Appellant's Brief at 9 through 21, subject to the corrections, clarifications, and additions to the following pertinent numbered paragraphs.

39. As a clarification of Dr. Pitt's testimony, insurers add the following:

Dr. Pitt testified at the evidentiary hearing that the particular piece of pipe (plaintiff's Exhibit 1-P) exhibited the characteristics of general corrosion as well as pitting corrosion. The basic deterioration and overall rusted appearance of the pipe was due to general corrosion. The localized area where corrosion had proceeded more rapidly than other areas was due to pitting corrosion. (R. 3245.) Further, Dr. Pitt

testified that a mill (the thickness of the corroded metal) is equal to 1,000th of an inch. (R. 3236.)

42. The following facts should be added to Appellant's paragraph 42 of Statement of Facts in order to clarify Dr. Pitt's testimony:

Dr. Pitt offered the following testimony concerning the cause of the leak in the section of pipe, Exhibit 1-P:

You see a pipe that's had extensive corrosion on the outside of the pipe. Could be designated as pitting type corrosion, but there is also considerable general corrosion on it.

. . .

Pitting corrosion is corrosion that occurs in a localized area, as contrasted to general corrosion over all the surface.

. . .

The process that I visualize that occurred . . . is that the corrosion likely occurred as a result of what we call straight current corrosion . . . and in this case, the corrosion occurred in a number of localized areas. The corrosion proceeded to continue until at some point in time the metal was thin enough to burst suddenly from the inside pressure of the pipe. And in my opinion that's what caused at least one of the holes present.

. . .

Simply the metal is not strong enough to hold the interior pressure.

R. 3234-3235.

43. As a clarification to Appellant's Statement of Facts paragraph 43, insurers add the following:

Dr. Pitt testified as follows:

If the pipe were not under pressure, I believe the leak would have also been sudden because at one instance it's there and then the next instance it's not there and then it's there.

R. 3238. In Dr. Pitt's opinion, whether due to a corrosion failure or a failure due to an accident such as a backhoe striking a pipe, every failure would be considered sudden. (R. 3254; 3297.)

44. In addition and in clarification to the limited facts set forth in Appellant's Statement of Facts paragraph 44, insurers add the following:

Following the exchange set forth in Appellant's Brief between Dr. Alex and LaSal's counsel, Dr. Alex testified that he did not consider the leak in this case sudden. He further opined that the first movement of two or three molecules did not encompass a sudden failure. (R. 3290.) Dr. Alex testified that the initial release of gasoline from inside a pipe that has failed due to corrosion would be "in the form of very minute amounts, a few atoms, osmotic, for all intents and purposes." (R. 3271.) After the first transgression of fluid in the form of atoms, "the first indication would be a slight wetting of the surface on the outside [of the pipe] in line with these thread roots." (Id.) In his opinion, this type of leak typically would progress from simply moisture on the outside to drops forming in a matter of days to weeks, and from a few drops to a gradual

trickle of gasoline over a matter of weeks to months. (R. 3271-3272.)

Additionally, Dr. Alex stated that there was no indication of an internally-caused stress fracture on the pipe because he would expect in the case of such stress fracture, to see a sharp line in the form of a crack, which was not present on Exhibit 1-P. (R. 3277.)

SUMMARY OF ARGUMENT

The pollution exclusion under the policies in question clearly and unambiguously precludes coverage for any discharge of pollutants into the environment, unless the discharge is "sudden and accidental." This Court has joined the other jurisdictions that have adopted the "more well-reasoned view" that the "sudden and accidental" exception to the pollution exclusion is unambiguous and has held that the word "sudden" "must have a temporal aspect to its meaning and not just a sense of something unexpected." Gridley Associates, Ltd. v. Transamerica Ins. Co., 828 P.2d 524, 527 (Utah App. 1992).

This Court reviewed the differing views of the pollution exclusion in Gridley and does not need to re-examine the issue whether "sudden" is unambiguous. "'Sudden' within the 'sudden and accidental' clause cannot be defined without reference to the temporal element, specifically immediacy, abruptness, and quickness." Id.

The Gridley decision clearly distinguished between a discharge resulting from a "clean break" of a gasoline dispenser line that is "caused by an adjustment of the area in which it is in" and a break "caused by corrosion or deterioration which would have resulted in a gradual drip or trickle of gasoline from the line." Id. A clean break is deemed sudden, but a discharge of the type found in our case, namely a corrosively caused slow seepage leak, cannot be deemed sudden.

LaSal erroneously argues that any discharge, whether corrosively caused or caused by a classical break in the line, is sudden and, therefore, within the exception to the pollution exclusion. These insurers respectfully submit that such an interpretation would eviscerate the meaning of "sudden" in the pollution exclusion and render it mere surplusage. Gridley clearly rejects this approach. Therefore, because this corrosively caused discharge cannot be deemed "sudden", the judgments dismissing LaSal's action against these insurers should be affirmed.

ARGUMENT

POINT I

THE POLLUTION EXCLUSION IS UNAMBIGUOUS AND
PRECLUDES COVERAGE UNDER THE INSURERS'
POLICIES.

The pollution exclusion contained in the Omaha Policy¹ excludes coverage for:

bodily injury or property damage arising out of the discharge . . . of vapors . . . fumes . . . liquids or gases . . . or other irritants, contaminants or pollutants into or upon land . . . or other course or body of water; but this exclusion does not apply if the discharge . . . is sudden and accidental.

R. 1898 (emphasis added).

As acknowledged by LaSal in its Appellant's Brief, this Court has held in Gridley that "sudden" in the "sudden and accidental" exception to the pollution exclusion in a comprehensive general liability policy of insurance is unambiguous. Appellant's Brief at 23.

A. Well established rules of contract interpretation require the Court to give full effect to both "sudden and accidental."

Under Utah law the question of a contract's ambiguity is a question of law. Gridley, 828 P.2d at 526, (quoting Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989) (citing Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983))). Insurance contracts are construed according to general contract principles and are, therefore, subject to the same rules of construction. Village Inn Apts. v. State Farm, 790 P.2d 581 (Utah App. 1990).

¹The policies of the other insurers joining in this brief are either identical to or follow form of the Omaha Policy. Therefore, all references to Omaha's Policy apply to all other insurers' policies.

Utah law clearly states that an insurance policy is to be construed against an insurer only when the contract is ambiguous. Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225, 229 (Utah 1987) (citing Big Butte Ranch v. Holme, 570 P.2d 690 (Utah 1977)); Fire Ins. Exchange v. Allsop, 709 P.2d 389, 390 (Utah 1985).

Utah rules of contract interpretation establish that an objective and reasonable construction be applied to the contract in its entirety. Utah State Med. Assoc. v. Utah State Employee's Credit Union, 655 P.2d 643, 646 (Utah 1982). A policy is to be interpreted by Utah courts by giving its words "their plain, ordinary and popular sense, as an average or reasonable person with ordinary understanding would construe them." Draughon v. CUNA Mut. Ins. Society, 771 P.2d 1105, 1108 (Utah App. 1989) (quoting Clark v. Prudential Ins. Co., 204 Kan. 47, 464 P.2d 253, 257 (1970)). Extrinsic or parol evidence is generally inadmissible to determine the intent of the parties if the terms of a contract are clear and unambiguous. Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1319 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992).

A court may not add, ignore or discard words while interpreting contractual terms. Cornwall v. Willow Creek Country Club, 13 Utah 2d 160, 369 P.2d 928, 929 (1962). Finally, Utah rules of construction require the Court to harmonize contractual provisions in order to give all terms full effect. See Vance v.

Arnold, 114 Utah 463, 201 P.2d 475 (1949); G.G.A. Inc. v. Leventis, 773 P.2d 841 (Utah App. 1989).

Thus, Utah law clearly requires courts to determine the ordinary and plain meaning of "sudden" in the context of the insurance policy and in conjunction with "accidental," and not in the abstract. Any departure from these interpretative rules, as implied by LaSal's arguments, should not be countenanced.

B. Appellant's argument that the "sudden and accidental" exception to the pollution exclusion is ambiguous ignores clear policy language.

LaSal primarily argues that "sudden" is susceptible to more than one reasonable meaning. Appellant's Brief at 24. It argues that "sudden" can mean either "abrupt or immediate" or "unexpected." Id. LaSal urges the Court to follow the cases that have found the exception to the pollution exclusion to be ambiguous and therefore, interpreted in favor of coverage. See, e.g., Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980); Clausen v. Aetna Cas. & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (Ga. 1979). Because of such alleged ambiguity, LaSal argues that the Court must ignore the clear terms of the exception to the pollution exclusion which allow coverage for damages arising from polluting discharges only when they are both sudden and accidental. LaSal's approach, while ingenious, violates the basic rules of Utah law which prohibits a court from

adding, ignoring or discarding words in the course of contractual interpretation. See, Cornwall, 369 P.2d at 929.

The Tenth Circuit, in affirming the United States District Court for the District of Utah in Hartford Accident & Indemnity Co. v. United States Fidelity and Guaranty Co., 962 F.2d 1484 (10th Cir. 1992), cert. denied, El Paso Natural Gas Co. v. Hartford Acc & Indem. Corp., 113 S.Ct. 411, 121 L.Ed.2d 335 (1992) stated that "reading 'sudden' without a temporal component renders 'accidental' redundant." Id. at 1489. The court further explained that "[w]hile both conditions might include 'unexpected' or 'unintended,' 'sudden' cannot mean 'gradual,' 'routine' or 'continuous.'" Id. Acknowledging that dictionaries may indicate that "sudden" and "accidental" have several overlapping meanings, the Tenth Circuit panel stated that courts "cannot use only the redundant definitions, however." Id.

The Court recognized that Utah law requires each contract provision to be given effect and that the "conjunctive association of 'sudden' with 'accidental' requires both terms to be viewed as 'separate, conditional requirements for coverage.' This interpretive rule thus removes any ambiguity created by common usage." Id.

Hartford also quoted New Castle Country v. Hartford Accident & Indemnity Co., 933 F.2d 1162 (3rd Cir. 1991), (cited by LaSal in its brief in support of its argument) discounting the significance of dictionary definitions of "sudden":

By their very nature, dictionaries define words in the abstract, whereas here, we must ascertain whether the word "sudden" is ambiguous in the context of the specific insurance policy.

Hartford, 962 F.2d at 1489 (quoting New Castle Country, 933 F.2d at 1194).

Hartford further quoted New Castle Country which ruled that "conflicting precedent, while relevant, did not 'automatically mandate a finding of ambiguity'". Hartford, 962 F.2d at 1489 (quoting Newcastle Country at 1196).

Recent cases in other jurisdictions support this basic rule of policy interpretation. The Supreme Court of Florida in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., No. 78, 293, 1993 WL 241520 (Fla. July 1, 1993)² acknowledged that dictionaries may be helpful "insofar as they set forth the ordinary, usual meaning of words. However, as noted in New Castle Country v. Hartford Accident & Indemnity Co., dictionaries are 'imperfect yardsticks of ambiguity.'" Id. at 9 (quoting New Castle Country, 933 F.2d at 1193-94). The Florida Supreme Court stated that its duty was "to determine whether the word 'sudden' is ambiguous in the context of the specific insurance policy at issue." Id. (emphasis added).

The existence of multiple dictionary definitions of a word "is not the sine qua non of ambiguity. If it were, few words would be unambiguous." Fireman's Fund Ins. Co. v. Ex-Cell-O

²A copy is attached in Appendix.

Corp., 702 F.Supp. 1317, 1324 (E.D. Mich. 1988), quoted in Hartford, 962 F.2d at 1489 n.6.

Because the accepted rules of contractual interpretation require courts to harmonize policy provisions in order to give all terms of the contract full effect, LaSal's approach is artificial and strained. Even though the word "sudden" can connote a sense of the unexpected, it does not stand alone in the pollution exclusion exception, but is part of the conjunctive phrase "sudden and accidental." Hartford, 933 F.2d at 1489. Accidental means "unexpected or unintended." Hence, if sudden is reduced to mean only "unintended or unexpected," "sudden and accidental" would be rendered "entirely redundant." Dimmitt at 9 (citing E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause through the Looking Glass*, at 74 Geo.L.J. 1237, 1240 (1986)).

The meaning of "sudden" in the context of the policy in question, rather than in a vacuum, is clearly understood and could only be made ambiguous through "a lawyer's ingenuity." See Dimmitt at 11 (quoting United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988)).

This Court, in Gridley, reviewed the conflicting lines of cases from other jurisdictions, since it was a case of first impression in Utah. Despite such conflict, this Court ruled that the "sudden and accidental" exception to the pollution exclusion was clear and unambiguous, and that "sudden" always refers to a

temporal element. Id. at 527. That conclusion is consistent with the general rules of contractual interpretation set forth above.

This Court recognized the insightful analysis of the Supreme Court of Massachusetts by quoting Lumbermens Mut. Casualty Co. v. Belleville Industries, Inc., 407 Mass. 675, 555 NE.2d 568, 572 (1990) cert. denied, __ U.S. __, 112 S.Ct. 969 (1992):

For the word "sudden" to have any significant purpose, and not to be surplusage when used generally in conjunction with the word "accidental," it must have a temporal aspect to its meaning, and not just the sense of something unexpected. We hold, therefore, that when used in describing a release of pollutants, "sudden" in conjunction with "accidental" has a temporal element. The issue is whether the release was sudden. The alternative is that it was gradual. If the release was abrupt and also accidental, there is coverage for an occurrence arising out of the discharge of pollutants.

Gridley, 828 P.2d at 527.

Thus, this Court held that it has adopted the "more well-reasoned view of jurisdictions holding the pollution exclusion to be unambiguous and that sudden has a temporal element, 'specifically immediacy, abruptness, and quickness.'" Id. at 527. All other courts interpreting this exception to the pollution exclusion clause, applying Utah law, have reached the same conclusion.³

³See Anaconda Minerals Co. v. Stoller Chemical Co., 990 F.2d 1175 (10th Cir. 1993) (affirming United States District Court for the District of Utah decision finding pollution exclusion

Judge Rokich, in the case at hand, stated in his Memorandum Decision that the holding in Gridley best defines what constitutes a sudden and accidental discharge. He adopted the following language of Judge Russon from Gridley:

[T]he terms "sudden and accidental" are unambiguous. As commonly used, the meaning of sudden combines both elements of without notice or warning and quick or brief in time . . . sudden connotes a "temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity."

R. 1890 (quoting Gridley, 828 P.2d at 527 (quoting U.S. Fidelity & Guaranty Co. v. Morrison Grain Co., 734 F.Supp. 437, 446 (D.Kan. 1990), affd. 999 F.2d 489 (10th Cir. 1993))).

Despite the fact that an ongoing controversy exists among different jurisdictions, the better-reasoned cases continue to find "sudden" in the exception to the pollution exclusion to be unambiguous and to require a temporal element.⁴ Hence, there is

unambiguous); Hartford Accident & Indemnity Co. v. United States Fidelity and Guaranty Co., 962 F.2d 1484 (10th Cir. 1992) (affirming United States District Court, District of Utah decision holding pollution exclusion unambiguous). Hartford cited the decision of Judge Winder of the District Court in Anaconda Minerals, 773 F.Supp. at 1505 n.9, noting that Judge Winder quoted Sharon Steel v. Aetna Casualty & Surety Co., no. C-87-2306 and C-87-2311 at 28 (3rd Dist. Utah, July 20, 1988) as follows: "[W]ithout referring to dictionaries, case law or parol evidence, a reasonably prudent person would interpret 'sudden' as including 'temporal condition of being instantaneous and abrupt'". Hartford Accident & Indemnity Co., 962 F.2d at 1490 n.7.

⁴See list of cases cited in ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773, 22 Cal.Rptr.2d 206, 209-211 (Cal.App. 4th Dist. 1993), petition for review denied ___ Cal.Rptr.2d ___ (Cal. 1993).

no reason for this Court to re-analyze this issue since that decision has already properly been made in Gridley in accordance with the principles of contractual interpretation firmly established by Utah case law. The trial court's judgments in our case on appeal were consistent with this Court's holding in Gridley and should, therefore, be affirmed.

POINT II

THE TRIAL COURT WAS CORRECT IN HOLDING THAT THE RELEASE OF THE GASOLINE FROM LASAL'S UNDERGROUND LINE WAS NOT SUDDEN.

In his Memorandum Decision, Judge Rokich concluded that Gridley, supra, "is the case that best defines what constitutes a sudden and accidental discharge." (R. 1890.) He adopted Gridley's language that "sudden connotes a `temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity.'" (R. 1980) (quoting Gridley, 828 P.2d at 527). The trial court also adopted Gridley's ruling that the "length of time that elapses before the leak is discovered or the amount of discharge does not render the fracture any less sudden," in situations where a discharge has a sudden inception rather than one which is gradual. (R. 1891.)

It should be noted for purposes of this appeal that LaSal is appealing that portion of the trial court's decision that ruled the pollution exclusion unambiguous, as well as its finding that the discharge was not sudden. Insurers understand that LaSal is not appealing that portion of the trial court's decision holding

that the elapsed time between the inception of the leak and its discovery does not render an otherwise sudden leak any less sudden. Therefore, the insurers will not specifically address this issue, except to the extent that it relates to the determination of the nature of the discharge, whether sudden or gradual.⁵

Most importantly for purposes of this appeal, the trial court distinguished the facts of the Gridley case from the case at hand. Based on the undisputed evidence established through extensive briefing by the parties as well as an evidentiary hearing involving qualified metallurgy experts, the trial court found that the failure of the pipe resulted from the process of corrosion. (R. 1899-1901.) In Gridley, the pipeline leak resulted from a "clean break" and was, therefore, deemed to be sudden. By contrast, the trial court in our case held "that a leak caused by corrosion is not sudden and accidental." (R. 1891.) Therefore, the pollution exclusion applies and precludes coverage for LaSal.

Despite LaSal's attempts to characterize Gridley's discussions concerning the difference between a "clean break" and one caused by corrosion as mere "dicta"⁶, such comparison of the

⁵This does not mean that the insurers necessarily agree with that premise, but rather, assert that even accepting it, they are nonetheless entitled to an affirmance of the trial court's judgment dismissing LaSal's complaint with prejudice.

⁶See Appellant's Brief at 30, 41-42.

differing causative processes is necessary for a full understanding of the holding of Gridley and should not be disregarded or reversed.

In Gridley, it was uncontroverted that the "break in the gasoline line was a 'clean break' that 'would have had to have been caused by an adjustment of the area in which it is in.'" Id. at 527. No evidence was presented to show that the leak was caused by corrosion or deterioration "which would have resulted in a gradual drip or trickle of gasoline from the line." Id. Thus, the court found that the "clean break certainly resulted in an unexpected as well as an immediate and abrupt flow of gasoline from the severed line" which qualified the discharge as "sudden." Id.

A. Gradual is the opposite of sudden.

This Court recognized in Gridley that for "sudden" to have any significance within the context of the pollution exclusion, it must refer to a temporal element "specifically immediacy, abruptness and quickness." Id.

LaSal has attempted to restrict the meaning of "sudden" to the isolated moment of "initial release" while ignoring both the causative process and the continuation of the leak. See Appellant's Brief at 38. LaSal argues that because the length of time to discover and the volume of the release are irrelevant, logic dictates that the Court should only look to the very moment

the gasoline left the confinement of the pipe into the environment. Such argument is both unrealistic and useless.

If the Court accepted LaSal's argument, the independent meaning of "sudden", which is the opposite of gradual, would be eviscerated. The Court would also be forced to disregard the long line of cases interpreting the pollution exclusion for both gasoline leaks, as well as general routine discharges. If every discharge were limited to a sterile analysis by characterizing the initial release from containment into the environment as sudden, every discrete release could arguably be found to be sudden. The only issue left to decide would be whether the discharge was unexpected or unintended.

The better-reasoned cases which have addressed this question (most of which have been relied upon by LaSal to construct its arguments), distinguish between differing causes of leaks as a means of deciding the true nature of the leaks. Just as this Court in Gridley distinguished between the nature of clean breaks and corrosively-caused leaks in underground lines, the courts in other jurisdictions have uniformly utilized these distinctions in analyzing the suddenness of leaks as well.

LaSal has cited Shell Oil v. Winterthur Swiss Ins. Co., 12 Cal.App. 4th 715, 15 Cal.Rptr.2d 815, 841-42 (1993) for the proposition that "sudden" refers to the commencement of a discharge but does not require the polluting event to terminate quickly. See Appellant's Brief at 33. LaSal failed, however, to

point out that the Shell court further stated "[i]f a sudden and accidental discharge continues for a long time, at some point it ceases to be sudden or accidental." Shell, 15 Cal.Rptr. 2d at 842 (citing Lumbermens Mutual Cas. v. Belleville, Ind., 407 Mass. 675, 555 N.E.2d 568, 572 n.6.)⁷

Furthermore, Shell stated:

We cannot reasonably call "sudden" a process that occurs slowly and incrementally over a relatively long time, no matter how unexpected or unintended the process. A "discharge, dispersal, release or escape" of pollutants that happens gradually and continuously for years is not "sudden" in the ordinary sense of the word. (American Motorists Ins. Co. v. General Host Corp. (D.Kan. 1987) 667 F.Supp. 1423, 1428-1429, affd. (10th Cir. 1991) 946 F.2d 1482, mod. on reh'g. (10th Cir. 1991) 946 F.2d 1489.) Thus, "sudden" necessarily contains a temporal element in addition to its connotation of the unexpected.

Shell, 15 Cal.Rptr. 2d at 841 (citations in original).

In a recent decision following Shell, ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773, 22 Cal.Rptr.2d 206 (Cal.App. 4th Dist. 1993), petition for review denied ___ Cal.Rptr.2d ___ (Cal. 1993), the California Court of Appeals held that the pollution exclusion precluded

⁷The Massachusetts's Supreme Court stated:

We decline to speculate on the proper construction of the exception, if a release or discharge, initially both accidental and sudden, continues for an extended period. As the discharge or release continues, at some point, presumably, it would likely cease to be accidental or sudden (even in the sense of unexpected).

coverage for damages incurred in clean-up of pollutants which leaked from rusted and corroded underground storage tanks. After performing a concise but thorough review of the issue surrounding the exception to the pollution exclusion, the court ruled that when applying the framework of rules of contract interpretation similar to those utilized by Utah courts,

there is no way that we could come to any other conclusion than that reached in the Shell Oil decision: that "sudden and accidental" language in the CGL [comprehensive general liability policy] pollution exclusion does not allow for coverage for gradual pollution.

Id. at 212.

Addressing the very issue before this Court, the court in ACL Technologies stated:

Giving sudden a meaning independent of accidental, therefore, requires giving it a meaning with a temporal aspect - immediacy, quickness or abruptness - that does not allow it to cover events, such as happened in this case - that occurred gradually. We therefore conclude, in the context of this case, that "sudden and accidental" unambiguously does not include gradual pollution.

Id. at 214 (emphasis added).

Even if the Court were to conclude that the phrase "sudden and accidental" is ambiguous, the trial court's judgments in our case, as in ACL Technologies, would have to be affirmed for this reason: "[W]hatever 'sudden' means, it does not mean gradual. The ordinary person would never think that something which happens gradually also happened suddenly. The words are

antonyms." Id. at 215. Because gradual is the opposite of sudden and because a reasonable and objective person with ordinary understanding would not expect sudden to cover gradual pollution, sudden can never mean both "unexpected and gradual." See, Id. at 215 n.40 & 216 n.42 for insightful and entertaining illustrations supporting this argument.

Even those cases cited by LaSal which seemingly support its position, in fact illustrate the insurers' analytical approach. One cannot determine the nature of the discharge by sterilely isolating the moment of initial release.

In order to understand the reasoning of the court in Wagner v. Milwaukee Mut. Ins. Co., 427 N.W.2d 854 (Wis.App. 1988), review denied, 436 N.W.2d 30 (Wis. 1988), relied upon heavily by LaSal, one must understand the facts. The parties agreed at oral argument that although the exact cause of the leak was unknown, the insurer, Milwaukee Mutual, conceded "that in all probability the leak resulted from a crack in a pipe damaged when cement footings for the canopy were poured on it, and that this crack occurred immediately." Id. at 855 n.2 (emphasis added).

The Wisconsin Appellate Court rejected the insurer's argument that the discharge was not sudden because the discharge accumulated over a period of three years. The court reasoned that the initial discharge of the gasoline was sudden. The gasoline leak began immediately after it was cracked in 1981 and continued leaking until it was discovered in 1984. Therefore,

according to the court, the length of time before the leak was discovered was irrelevant as it related to the issue of suddenness. Id. at 857.

Obviously, the court focused on the nature of the initial discharge and reasoned that because the leak was caused by an immediate breaking of the pipe with a single event, as in Gridley, rather than by a slow, ongoing process of corrosion, it qualified as a sudden leak. The court also emphasized that the sudden status of the leak would only be maintained if the continuing discharge remained undiscovered. Id. at 857-858.

Likewise, LaSal has selectively cited Goodman v. Aetna Cas. & Sur. Co., 412 Mass. 807, 593 N.E.2d 233 (1992). Therein, the parties agreed that an underground gasoline storage tank had been leaking for 18 months prior to its discovery and removal. Summary judgment was granted when the trial court found that the release over 18 months was too lengthy to have been considered sudden. Id. at 235. The Massachusetts Supreme Court reversed and remanded for the reason that "the record in this case did not permit an informed resolution whether the leak in question was abrupt, and therefore, does not establish enough facts to warrant decision on the "suddenness" issue." Id. at 235-236. The court reaffirmed the holding in Lumbermens Mut. Cas. Co. v. Belleville Ind., 407 Mass. 675, 555 N.W.2d 568 (1990) cert. denied, ___ U.S. ___, 112 S.Ct. 969 (1992), which held that "the abruptness of the commencement of the release or discharge of the pollutant is the

crucial element in determining whether an event qualifies as 'sudden'." Goodman, 559 N.E.2d at 235 (quoting Lumbermens, 555 N.E.2d at 572). The Massachusetts court, however, did not exclusively restrict its analysis to the very moment of the liquid's discharge into the outside environment, as proposed by LaSal. In fact, the court demonstrated a more meaningful approach as follows:

While the cause of the release does not determine whether the exception to the pollution exclusion is applicable, it may well be informative in deciding whether the release was abrupt. For example, a sudden cause (like a pile driven into a gasoline tank), or the sudden development of a condition (like a ground shift that ruptures piping) might guide the decision whether a given release of pollutants was due to a momentary event, and therefore, was abrupt.

Id.

In concluding that insufficient evidence had been developed at trial to determine the cause of the leak, the Goodman court quoted from plaintiff's expert who opined that the discharge was not the result of a gradual leak of gasoline from the tank over an indeterminant period of time, but was an abrupt discharge. Id. at 236. Nevertheless, the court noted that the expert's observations provided no clear explanation of the source of the hole in the offending tank "or whether the release of pollutants came about as a result of a condition that developed so rapidly it could properly be described as a momentary event." Id. (citing Gridley). Furthermore, there was evidence that gasoline

also appeared to have been released from a siphon or riser pipe connecting the underground tank, and conflicting testimony existed concerning the extent of the hole in the defective tank. Id.

As a final illustration of the differing treatment accorded by courts to pipes that leak as a result of a "sudden event versus a slowly developing, gradual leak," the Goodman court stated:

The leak of gasoline from tank no. 2 may have begun slowly from a crack or small hole in the tank brought about by its aging, and then increased over time as the crack or hole widened. This type of release probably would not constitute a "sudden" event within the exception to the pollution clause. However, it is also possible that the discharge of pollutants occurred as the result of a sudden cause or rapidly developing condition . . . but, until all of the circumstances of the release in this case are fully developed, no adequate determination can be made as to whether the "sudden and accidental" exception is applicable.

Id. at 236 (emphasis added).

The Goodman decision is consistent with Wagner and Gridley in differentiating between a gradually developing leak through corrosion and one which is abrupt and immediate, arising from a sudden event causing a "clean break."

Another case cited by LaSal, Petr-all Petroleum Corp. v. Firemans Ins. Co., 593 N.Y.S.2d 693 (A.D. 4 Dept. 1993) ruled that an insurer had a duty to defend the owner of a gasoline station which had leaking underground gasoline pipes, based on

the broad duty to defend, since the complaint by a third-party adjacent homeowner could be interpreted "to allege an accidental and unexpected leak from a subsurface pipe or tank that continued undetected for a period of time, an event both sudden and accidental" Id. at 695. The papers submitted demonstrated that the cause of the leak may have been a break in the pipeline when a customer drove away from a dispenser before removing the nozzle from her car. Id. at 695.

The court stated that the insurer, by relying upon this specific event as a basis for dismissal, "implicitly conceded that the complaint" may be interpreted as alleging a sudden and accidental leak. Under these circumstances, rather than a leak resulting "from a repeated or continuous business operation," the court found a duty to defend. Id.

There is no evidence in our case to indicate a sudden and accidental break of the pipeline in question. Rather, the leak arose from the gradual corrosive process and continued its slow progression over time until its discovery. (R. 1899, ¶ 23; R. 1901, ¶ 10.)

Colonie Motors, Inc. v. Hartford Acc. & Indemnity Co., 538 N.Y.S.2d 630 (A.D. 3 Dept. 1989), cited by LaSal, also presents facts that are inapposite to our case on appeal. Colonie involved claims for coverage in the face of the pollution exclusion where a discharge of waste oil into the environment was caused when an underground pipe in a waste oil containment unit

"cracked." The court noted that the record was absent of any suggestion "that plaintiff was aware of either the crack or the discharge until waste oil was discovered in the ground water of adjacent property." The court also noted that routine maintenance or inspection would presumably not have revealed the leak (unlike a gasoline tank which is regularly inventoried). Again, because of the inconclusive nature of the type of discharge at its inception, the court ruled in favor of the insured.

The cases discussed above and cited by LaSal demonstrate the differentiation between a gradual leak resulting from corrosion and a sudden leak caused by an abrupt or immediate event. Sudden is the opposite of gradual. In order to give effect to the meaning of "sudden" in applying it to the facts of our case, the commencement of the leak at the LaSal Station must be analyzed in its context. Such analysis clearly demonstrates that it resulted from a gradual, on-going process of corrosion and continued as a slow, gradually developing leak thereafter. On that basis, the trial court correctly held it to be gradual and non-sudden. (See R. 1901.)

B. The evidence establishes that the inception of the leak resulted from corrosion and that its commencement was gradual and not sudden.

LaSal's expert, EarthFax Engineering, Inc., has concluded that the onset of the gasoline release occurred sometime between

February, 1983 and September, 1984. See Appellant's Brief at 17 (citing R. 1655-1656). The pipe was not uncovered and removed until approximately January 30, 1986, when the leak was located and repaired. (R. 3223.)

LaSal's metallurgy expert, Dr. Pitt, in his report drafted July 15, 1992, submitted as Exhibit 3-P at the evidentiary hearing (R. 1885), stated that "[v]isual observation of the coupling shows extensive pitting and corrosion present on its outside surface." (Emphasis added.) Further, Dr. Pitt stated that "[c]orrosion of the pipe wall produced a situation where the metal thickness at the thread roots was too small to hold the interior pressure." Id. Dr. Pitt roughly calculated that corrosion had gradually proceeded over time to the point where the pipe at the place of failure was "about 1.1 mills. at the time of failure." (R. 3236.) A millimeter is a thousandth of an inch. Dr. Pitt admitted that 1 millimeter would be in the magnitude of a sheet of paper or even thinner.⁸ (R. 3253.)

Dr. Franklin Alex, expert metallurgist presented on behalf of Omaha, agreed with Dr. Pitt that the pipe was thinned to the point of failure as a result of general and pitting corrosion. In fact, their only disagreement centered on their interpretation of whether the actual discharge of the product from the pipe resulting from corrosion was sudden or gradual.

⁸Dr. Alex stated that 1.1 millimeters is about "half the width" of a piece of paper. (R. 3278, 3287.)

It was Dr. Pitt's opinion that there could not be anything other than a sudden failure of a pipe due to corrosion because, in his mind, at one moment the pipe is not open, and at the next moment the product breaks through its containment. (See R. 3242, 3253-3254.) In fact, when questioned by Judge Rokich directly, Dr. Pitt stated that "the actual happening is where there's a hole that - at one instant there's a hole and before that there's no hole and that's my definition of sudden." (R. 3297.) In order to seek a clarification of his testimony, the following dialogue then took place between Judge Rokich and Dr. Pitt:

The Court: Let's go back over that so I can-

Witness Pitt: Kinetics means how fast something occurs, and that would be how fast fluid flows through the hole. I don't care how fast it flows through the hole.

The Court: So it's just the time that the penetration occurs?

The Witness: Yes.

The Court: As the suddenness of the break?

Witness Pitt: Yes.

The Court: Okay. And you're saying that's not the case.

R. 3297.

In short, Dr. Pitt utilized a metaphysical approach and found that the first molecular movement of liquid from inside of metal, regardless of how badly corroded it might be, to outside of metal, is always sudden.

Dr. Alex, in harmony with Dr. Pitt, also believed that the failure was caused by general and pitting corrosion (R. 3266), and that the pipe failed in at least five areas coincident with the thread roots. (R. 3266.) Dr. Alex opined as to the cause of the failures as follows:

They were caused by general and pitting corrosion. There are then the various indications. Here are the various degrees of penetration. You've got anywhere from just going through to the point where the corrosion products are still in the penetration, but you can see the inside surface to the point where you have the complete perforation in an elongated perforation.

R. 3269.

Dr. Alex explained corrosion to be a process that any metallic substance undergoes when exposed to the environment. The iron pipe starts corroding and forming oxides which are represented by the brown or rusting areas on the pipe. (R. 1885, Exhibit 1-P; see, also, Exhibits 4-D, the photograph of the pipe.) Corrosion gradually progresses at different rates in different areas. The faster corroding areas form pits, until finally the material is eaten away to the point where the metal is thinnest, which, in LaSal's case, was in the thread roots. (R. 3270.)

According to Dr. Alex, the areas of corroded perforation generally still have a coating of rust on the inside and outside and, where underground, are retained by soil and other material.

Therefore, "the first transgression of fluid would be in the form of very minute amounts, a few atoms, osmotic, for all intents and purposes." (R. 3271.) There would initially be a "slight wetting of the surface on the outside in line with these thread roots" that would progress at some point in the future to more perceptible liquid on the outside of the pipe. Id. As explained by Dr. Alex, the time frame involved from the first osmotic moisture on the outside, to the formation of drops outside the pipe could take from days to weeks. It would take from weeks to months for the few drops to slowly progress to a gradual trickle of product through the corroded openings. (R. 3272.)

Despite LaSal's interpretation that the final push through the corrosively-thinned membrane was the result of a "sudden impulse of internal pressure," Dr. Alex stated that the discharge was not due to a sudden failure of the pipe. He pointed out that the holes in the pipe were "eaten away on both sides" and showed signs of gradually enlarging pitting areas that over time would continue to form a larger hole in surrounding areas. (R. 3283.) Furthermore, the photograph of the pipe (Exhibit 4-P) portrays an area that is covered over with corrosive products that demonstrates "various degrees of penetration . . . and you still have . . . some areas where you can see the corroding products, but the area is not penetrated yet." (R. 3283.)

In summary, Dr. Alex agreed if you narrowly define sudden as "the first time one molecule of water moves through that wall

section" then the leak would be considered sudden. However, he stated that he didn't "think that one molecule or two molecules or three molecules encompasses a sudden failure from a practical standpoint." (R. 3290.)

The approach proffered by LaSal through its expert, Dr. Pitt, takes an unnecessarily restrictive and unrealistic point of view in determining "sudden" for purposes of the pollution exclusion. Under this analysis, all discharges will be subjected to this microscopic analysis and found to be sudden. Whether caused by an abrupt breaking of the line by a backhoe, or arising from a gradual corrosive process, all leaks, and for that matter, all discharges would be considered sudden. This analysis would have the same effect as defining sudden to mean "unexpected and unintended." The United States Court of Appeals for the Sixth Circuit rejected this approach:

We are not convinced that the discharges in this case were brief or momentary. Ray has argued that each release was sudden, when viewed in isolation. But under this theory, all releases would be sudden; one cannot always isolate a specific moment at which pollution actually enters the environment. Rather than pursuing such metaphysical concepts, we choose to recognize the reality of Sea Ray's actions in this case.

Ray Industries, Inc. v. Liberty Mutual Ins. Co., 974 F.2d 754, 768-769 (6th Cir. 1992).

There is no dispute between either of the experts, nor in the record, with the fact that the leak in question resulted from

a long-term process of corrosion. The only disagreement between the experts is the legal conclusion each draws from such evidence. To accept LaSal's premise that all leaks are sudden eviscerates the meaning of sudden, in violation of the general rules of contractual interpretation firmly established in Utah law. For this reason, insurers urge this Court to affirm the trial court's judgment.

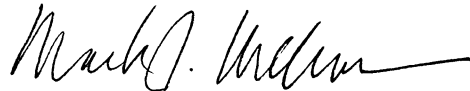
CONCLUSION

The trial court was correct in applying the well-reasoned decision of Gridley to the facts of this case in finding that the pollution exclusion in the Omaha policy precluded coverage for any of the underlying claims against LaSal. The "sudden and accidental" exception to the pollution exclusion is unambiguous. This Court does not need to re-examine the issue of whether sudden is unambiguous. "Sudden" cannot be defined, within the exception to the pollution exclusion, without referring to "the temporal element, specifically immediacy, abruptness, and quickness." Gridley, 828 P.2d at 527.

The record clearly establishes, without dispute, that the leak in question was formed as a result of an ongoing, gradual process of corrosion. Under such facts, Gridley requires that this leak be found to be gradual, not sudden, in its inception. In order to find this leak sudden, this Court would have to abandon all logic and accept an unworkable and unrealistic analytical framework.

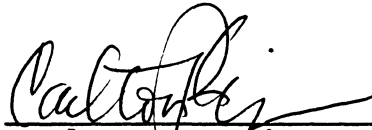
Clearly, this leak developed gradually, and its commencement was gradual. Thus, the pollution exclusion requires this Court to affirm the trial court's dismissal of LaSal's complaint against all the insurers.

DATED this 22nd day of December, 1993.



Mark J. Williams, Esq.
of and for
HANSON, EPPERSON & SMITH
Attorneys for Defendant/Appellee
Omaha Indemnity

DATED this 21st day of December, 1993.




Carlton R. Ericson, Esq.
of and for
DUNN & DUNN
Attorneys for Defendant/Appellee
Utah Property and Casualty
Insurance Guaranty Association

DATED this 21st day of December, 1993.



Robert G. Gilchrist, Esq.
Barbara Berrett, Esq.
of and for
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant/Appellee
Chicago Insurance Company

DATED this 22nd day of December, 1993.



Allan T. Brinkerhoff, Esq.
of and for
RAY, QUINNEY & NEBEKER
Attorneys for Defendant/Appellee
Zurich Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two (2) true and correct copies of the above and foregoing Brief of Defendant/Appellee to be mailed, U.S. mail, postage pre-paid thereon, this 28th day of December, 1993, to the following:

J. Michael Hansen, Esq.
Claudia F. Berry, Esq.
SUITTER AXLAND & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Attorneys for LaSal Oil Company, Inc.

Tim Dalton Dunn, Esq.
Carlton R. Ericson, Esq.
DUNN & DUNN
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102
Attorneys for Utah Property and Casualty
Insurance Guaranty Association

Robert G. Gilchrist
Barbara Berrett
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144
Attorneys for Chicago Insurance Company

Wallace R. Lauchnor, Esq.
PAULSEN, LAUCHNOR & MICKELSON
CSB Tower, Suite 500
50 South Main Street
Salt Lake City, Utah 84144
Attorneys for Chicago Insurance Company

Donald V. Jernberg, Esq.
Orest Dachniwsky, Esq.
OPPENHEIMER WOLFF & DONNELLY
Two Illinois Center
233 North Michigan Avenue, Suite 2400
Chicago, Illinois 60601
Attorneys for Chicago Insurance Company

Allan T. Brinkerhoff, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Attorneys for Zurich Insurance Company

A handwritten signature in cursive script, appearing to read "Allan T. Brinkerhoff", is written over a horizontal line.

APPENDIX

DIMMITT

Supreme Court of Florida

DIMMITT CHEVROLET, INC., ET AL.
CASE NO. 78,293
PAGE TWO

THURSDAY, JULY 1, 1993

DIMMITT CHEVROLET, INC., et al.,
Appellants,

vs.

CASE NO. 78,293

SOUTHEASTERN FIDELITY INSURANCE
CORPORATION, Appellee.

Mr. Thomas K. Bick
Mr. Joseph W. Dorn
Mr. Jeff G. Peters
Mr. Jeffrey S. Kurtz
Mr. Steven R. Berger
Mr. Bradley H. Trushin
Mr. Jeffrey A. Tew
Mr. Daniel A. Casey
Mr. George K. Rahdert
Mr. Luther T. Munford
Mr. Richard N. Dicharry
Ms. Pamela G. Michiels

The Motion for Rehearing is granted. The opinion filed in
this case on September 3, 1992, is withdrawn and the following
opinion dated July 1, 1993, is substituted in lieu thereof.

MCDONALD, SHAW, GRIMES and KOGAN, JJ., concur.
BARKETT, C.J., and OVERTON and HARDING, JJ., dissent.

A True Copy

JB

TEST:

cc: Miguel J. Cortez, Jr., Clerk
Mr. Ronald L. Kammer
Mr. Thomas W. Brunner
Mr. James M. Johnstone
Ms. Lainie J. Simon
Ms. Carol Barthel
Mr. Dennis A. Tosh
Ms. Laura A. Foggan
Mr. Robert E. Austin, Jr.
Mr. Hal K. Litchford
Ms. Kristyn D. Elliott
Mr. Alan C. Sundberg

Sid J. White
Clerk Supreme Court.

INSURANCE

Supreme Court of Florida

No. 78,293

DIMMITT CHEVROLET, INC., et al.,
Appellants,

vs.

SOUTHEASTERN FIDELITY INSURANCE
CORPORATION, Appellee.

ON MOTION FOR REHEARING GRANTED

[July 1, 1993]

PER CURIAM.

This cause is before the Court on the following certified question of law from the United States Court of Appeals in Industrial Indemnity Insurance Co. v. Crown Auto Dealerships, Inc., 935 F.2d 240 (11th Cir. 1991):

WHETHER, AS A MATTER OF LAW, THE POLLUTION EXCLUSION CLAUSE CONTAINED IN THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY PRECLUDES COVERAGE TO ITS INSURED FOR LIABILITY FOR THE ENVIRONMENTAL CONTAMINATION THAT OCCURRED IN THIS CASE.

We have jurisdiction. Art. V, § 3(b)(6), Fla. Const. See also § 25.031, Fla. Stat. (1991); Fla. R. App. P. 9.150.

The court of appeals set forth the following statement of facts and procedural history of this case for our consideration.

The following facts, taken from the district court's opinion, Industrial Indem. Ins. Co. v. Crown Auto Dealerships, 731 F. Supp. 1517, 1518-19 (M.D. Fla. 1990), are undisputed. Appellants Dimmitt Chevrolet, Inc. and Larry Dimmitt Cadillac, Inc. ("Dimmitt") operated two automobile dealerships. From 1974 through 1979, Dimmitt sold the used crankcase oil generated by its business to Peak Oil Company ("Peak"). From 1954 to 1979, Peak recycled the oil at its plant in Hillsborough County, Florida for sale as used oil.

In 1983, the Environmental Protection Agency ("EPA") determined that Peak's oil operations had resulted in extensive soil and groundwater pollution at and around the plant site. Much of this pollution resulted from Peak's placement of waste oil sludge in unlined storage ponds. Chemicals from the sludge then leached into the soil and groundwater. Some of the pollution also derived from oil spills and leaks at the site, including a 1978 incident in which a dike collapsed and allowed oily wastewater to be released from a holding pond, and the occasional runoff of contaminated rainwater.

In July 1987, the EPA notified appellants that a release of hazardous substances had occurred at the Peak site and that appellants were potentially responsible parties ("PRP") for the costs of investigating and cleaning up the pollution. This liability is imposed, pursuant

MEALEY'S LITIGATION REFURIO
INSURANCE

to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607 et seq., on anyone who generates, transports, or disposes of hazardous substances. In February 1989, Dimmitt and other PRPs entered into two administrative orders with EPA. Without conceding liability, appellants agreed to undertake remedial measures at the Peak site.

Appellee Southeastern Fidelity Insurance Corporation ("Southeastern") provided comprehensive general liability ("CGL") insurance coverage to Dimmitt from 1972 through 1980. The policy covered Dimmitt

for all sums which the INSURED shall become legally obligated to pay as DAMAGES because of A. BODILY INJURY or B. PROPERTY DAMAGE to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the INSURED seeking DAMAGES on account of such BODILY INJURY or PROPERTY DAMAGE, even if any of the allegations of the suit are groundless. . . .

An "occurrence" is defined by the policy as

an accident including continuous or repeated exposure to conditions, which result in BODILY INJURY or PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED. . . .

However, the policy excluded coverage for

BODILY INJURY or PROPERTY DAMAGE arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials . . . into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. . . .

In October 1988, Southeastern filed a declaratory judgment action against Dimmitt, seeking a declaration by the district court that

Southeastern owed no duty to defend or indemnify Dimmitt under the CGL policy. Dimmitt filed a counterclaim seeking a contrary declaration. Both parties subsequently filed motions for summary judgment. The district court granted summary judgment in favor of Southeastern, reasoning that the pollution exclusion was not ambiguous and that the word "sudden" should be given a temporal meaning. Industrial Indem. Ins. Co. v. Crown Auto Dealerships, 731 F. Supp. 1517 (M.D. Fla. 1990). Accordingly, the district court ruled that the pollution at the Peak site occurred over a period of years and therefore could not be considered "sudden." The district court subsequently denied without opinion Dimmitt's motion to alter or amend the judgment.

Crown Auto, 935 F.2d at 241-42 (footnotes omitted).

As noted by the court of appeals, Dimmitt Chevrolet, Inc. (Dimmitt) was not the actual cause of the pollution damage at issue. Its liability, however, is not in dispute in this case. The issue before us is whether Dimmitt's comprehensive liability insurance policy was intended to cover hazardous waste pollution under the circumstances set forth in the court of appeals' opinion. The question turns on the meaning of the term "sudden and accidental" within the pollution exclusion clause of Dimmitt's policy.

Dimmitt asserts that the term "sudden and accidental" is ambiguous because it is subject to multiple definitions. Thus, because ambiguous terms within an insurance policy should be construed in favor of the insured, the policy should be construed in Dimmitt's favor. Dimmitt argues that the word "sudden" does not have a temporal meaning and that the term was intentionally

written so as to provide coverage for unexpected and unintended pollution discharge.

Southeastern Fidelity Insurance Corporation (Southeastern) contends that the clause excludes coverage for all pollution except when the discharge or dispersal of the pollutant occurs abruptly and accidentally. As such, Southeastern asserts that it had no duty to defend or indemnify Dimmitt because the pollution by the actual polluter, Peak Oil Company (Peak), was gradual and occurred over a period of several years.

Both sides also argue that the drafting history of pollution exclusion clauses favors their respective positions. In this regard, it should be noted that comprehensive general liability (CGL) policies are standard insurance policies developed by insurance industry trade associations, and these policies are the primary form of commercial insurance coverage obtained by businesses throughout the country. Before 1966, the standard CGL policy covered only property and personal injury damage that was caused by "accident." Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 84 (N.J. Super. Ct. 1987). In 1966 the insurance industry switched to "occurrence-based" policies in which the term "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Broadwell, 528 A.2d at 84 (quoting 3 Rowland H. Long, The Law of Liability Insurance App-53 (1966)). Beginning in

1970, the pollution exclusion clause at issue in this case was added to the standard policy. Finally, the policy was again changed in 1984 by the addition of what has been called an "absolute exclusion clause," which totally excludes coverage for pollution clean-up costs that arise from governmental directives. Kenneth S. Abraham, Environmental Liability Insurance Law 161 (1991).

Dimmitt argues that because many state insurance commissioners approved the 1970 addition of the pollution exclusion clause without ordering a reduction in premiums, this indicates that the clause did little more than clarify coverage. Southeastern counters by saying that the reason there was no premium reduction in 1970 was because there had been no premium increase when the coverage was expanded in 1966 to cover occurrences. Both parties also rely on conflicting statements made by insurance representatives who had appeared before state insurance commissions, as well as statements made by other insurance experts.

The policy language at issue here has been the subject of extensive litigation throughout the United States. There is substantial support for both parties' positions. On the one hand, the supreme courts of Colorado, Georgia, West Virginia, and Wisconsin have found the pollution exclusion clause to be

ambiguous.¹ In reaching their conclusions, these courts refer to the varying dictionary definitions of the word "sudden." They are also persuaded by the drafting history that the words "sudden and accidental" were intended to mean "unexpected and unintended."

On the other hand, the supreme courts of Massachusetts, Michigan, North Carolina, and Ohio have held that the word "sudden" has a temporal context.² Therefore, when the word "sudden" is combined with the word "accidental," the clause means abrupt and unintended. A majority of federal courts of appeal appear to have adopted this view in construing policies in states in which the supreme court of that state has not yet set forth its position.³

¹ Hecia Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1003 (Colo. 1991); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Just v. Land Reclamation Ltd., 456 N.W.2d 370 (Wis. 1990).

² Lumbermens Mut. Casualty v. Belleville Indus., Inc., 555 N.E.2d 568 (Mass. 1990); Upjohn v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Waste Management of the Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986); Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992).

³ E.g., Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 957 F.2d 1153 (4th Cir.) (construing New Jersey law), cert. denied, 113 S. Ct. 78, 121 L. Ed. 2d 42 (1992); Aetna Casualty & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) (construing Missouri law); Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484 (10th Cir.) (construing Utah law), cert. denied, 113 S. Ct. 411, 121 L. Ed. 2d 335 (1992); Northern Ins. Co. v. Aardvark Assocs., 942 F.2d 189 (3d Cir. 1991) (construing Pennsylvania law); A. Johnson & Co. v. Aetna Casualty & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (construing Maine

We are persuaded that the federal district judge properly construed Southeastern's pollution exclusion clause. The ordinary and common usage of the term "sudden" includes a temporal aspect with a sense of immediacy or abruptness. As stated by the court in Hybud Equipment Corp. v. Sphere Drake Insurance Co., 597 N.E.2d 1096, 1102 (Ohio 1992):

As it is most commonly used, "sudden" means happening quickly, abruptly, or without prior notice. This is the plain and ordinary meaning of the word, and the context in which it is employed does not indicate that it should be given any other meaning.

See Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368 (Minn. App. 1992) (sudden means the incident at issue occurred relatively quickly rather than gradually over a long period of time).

law); New York v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 1991) (construing New York law); PL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir.) (construing Michigan law), cert. denied, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 875 F.2d 868 (6th Cir. 1989) (construing Tennessee law by affirming without opinion 693 F. Supp. 617 (M.D. Tenn. 1988)); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) (construing Kentucky law); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (construing New Hampshire law). Contra CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 962 F.2d 77 (1st Cir. 1992) (also construing New Jersey law); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) (construing Delaware law).

Dimmitt points to dictionary definitions of "sudden" which also include the meaning of "happening or coming unexpectedly." Dictionaries are helpful insofar as they set forth the ordinary, usual meaning of words. However, as noted in New Castle County v. Hartford Accident & Indemnity Co., dictionaries are "imperfect yardsticks of ambiguity." 933 F.2d at 1193-94. Our duty is to determine whether the word "sudden" is ambiguous in the context of the specific insurance policy at issue.

The use of the word "sudden" can connote a sense of the unexpected. However, rather than standing alone in the pollution exclusion clause, it is an integral part of the conjunctive phrase "sudden and accidental." The term accidental is generally understood to mean unexpected or unintended. Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484 (10th Cir.), cert. denied, 113 S. Ct. 411, 121 L. Ed. 2d 335 (1992). Therefore, to construe sudden also to mean unintended and unexpected would render the words sudden and accidental entirely redundant.⁴ This analysis is well stated in Northern Ins. Co. v. Aardvark Assocs., Inc.

⁴ See E. Joshua Rosenkranz, Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237, 1240 (1986), in which the author laments that some courts have "ignored the insurers' intent and distorted the phrase 'sudden and accidental' beyond recognition." He states that "courts have extended the coverage of policies containing the pollution exclusion 'to mean just what they choose it to mean.'" Id.

"To read 'sudden and accidental' to mean only unexpected and unintended is to rewrite the policy by excluding one important pollution coverage requirement--abruptness of the pollution discharge. The very use of the words 'sudden and accidental' reveal (sic) a clear intent to define the words differently, stating two separate requirements. Reading 'sudden' in its context, i.e. joined by the word 'and' to the word 'accidental', the inescapable conclusion is that 'sudden', even if including the concept of unexpectedness, also adds an additional element because 'unexpectedness' is already expressed by 'accident.' This additional element is the temporal meaning of sudden, i.e. abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage."

942 F.2d 189, 192 (3d Cir. 1991) (quoting Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393, 402 (Pa. Super. 1989)). As expressed in the pollution exclusion clause, the word sudden means abrupt and unexpected.⁵

We reject Dimmitt's suggestion that the policy is ambiguous because the term accident is included both within the definition of occurrence and in the pollution exclusion provision.⁶ We concur with the response to this argument, stated

⁵ Our conclusion that sudden has a temporal dimension when used in conjunction with the term accidental is consistent with this Court's precedent in construing the statutory definition of sudden accident in workers' compensation cases. Spivey v. Battaglia Fruit Co., 138 So. 2d 308 (Fla. 1962); Meehan v. Crowder, 158 Fla. 361, 28 So. 2d 435 (1946).

⁶ Likewise, we also reject the dissenters' argument that the term "sudden and accidental" in the pollution exclusion clause should be given the same interpretation as certain courts have construed

In. United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988):

We do not find the pollution clause to be riddled with ambiguities despite the best efforts of Star Fire to create them. Specifically, we believe the district court erred when it treated the pollution exclusion and the "occurrence" definition provisions as interchangeable. Though the district court recognized that the issue before it was "whether Star Fire's release of coal dust falls within the policy exclusion provision," the court failed to explicate the language of the exclusion and ruled in favor of Star Fire on the basis of the "occurrence" definition. We have no difficulty reconciling the two provisions. We believe the "occurrence" definition results in a policy that provides coverage for continuous or repeated exposure to conditions causing damages in all cases except those involving pollution, where coverage is limited to those situations where the discharge was "sudden and accidental." We fully agree with the conclusion that this language is clear and plain, something only a lawyer's ingenuity could make ambiguous." American Motorists Insurance Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987). "It's strange logic to perceive

the term in boiler and machinery policies. The most obvious flaw in this argument is that it ascribes universal meaning to the phrase "sudden and accidental" regardless of the context of its use. Significantly, boiler and machinery policies provide coverage for damage that is sudden and accidental; Southeastern's pollution exclusion applies the phrase to the causative agent--the discharge. Further, we note that the Massachusetts Supreme Court specifically rejected its own prior decision in New England Gas & Electric Ass'n v. Ocean Accident & Guarantee Corp., 116 N.E.2d 671 (Mass. 1953), the lead case relied upon by the dissenters, as authority for compelling the sudden and accidental language in pollution exclusion clauses to be construed in the same manner as in boiler and machinery policies. Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 555 N.E.2d 568 (Mass. 1990).

ambiguity" in this clause. Waste Management of Carolinas, Inc. v. Peerless Insurance Co., 315 N.C. 688, 340 S.E.2d 374 (1986).

In the final analysis, we construe this policy to mean that (1) basic coverage arises from the occurrence of unintended damages, but (2) such damages as arise from the discharge of various pollutants are excluded from the basic coverage, except that (3) damages arising from the discharge of these pollutants will fall within the coverage of the policy where such discharge is sudden and accidental. See Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 957 F.2d 1153 (4th Cir.), cert. denied, 113 S. Ct. 78, 121 L. Ed. 2d 42 (1992).

Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause.

Applying the policy language to the facts of this case, we hold that the pollution damage was not within the scope of Southeastern's policy. The pollution took place over a period of many years and most of it occurred gradually. With respect to the pollution which resulted from oil spills and leaks at the site as well as from occasional runoff of contaminated rain water, we agree with the analysis of the federal district judge in this case when he said:

These spills and leaks appear to be common place events which occurred in the course of daily business, and therefore cannot, as a

matter of law, be classified as "sudden and accidental." That is, these "occasional accidental spills" are recurring events that took place in the usual course of recycling the oil. As one court observed: "contamination . . . by disposing of chemicals in the lagoon, or by annual careless spillage onto the ground surface cannot be sudden; or unexpected and accidental . . ." American Mutual Liability Ins. v. Neville Chemical, 650 F. Supp. 929, 933 (W.D. Pa. 1987); Grant-Southern Iron & Metal Co. v. CNA Insurance Co., 669 F. Supp. 798 (E.D. Mich. 1986) (polluting air emissions caused by the sporadic or continuous break down of pollution equipment were not sudden and accidental).

GRIMES, J., concurring.

I originally concurred with the position of the dissenters in this case. I have now become convinced that I relied too much on what was said to be the drafting history of the pollution exclusion clause and perhaps subconsciously upon the social premise that I would rather have insurance companies cover these losses rather than parties such as Dimmitt who did not actually cause the pollution damage. In so doing, I departed from the basic rule of interpretation that language should be given its plain and ordinary meaning. Try as I will, I cannot wrench the words "sudden and accidental" to mean "gradual and accidental," which must be done in order to provide coverage in this case.

Industrial Indem. Ins. v. Crown Auto Dealerships, 731 F. Supp. 1517, 1521 (M.D. Fla. 1990). See also Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 555 N.E.2d 568 (Mass. 1990).

We answer the certified question in the affirmative and return the record to the Eleventh Circuit.

It is so ordered.

McDONALD, SHAW and KOGAN, JJ., concur.

GRIMES, J., concurs with an opinion.

OVERTON, J., dissents with an opinion, in which BARKETT, C.J. and HARDING, J., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Overton, J., dissenting.

I dissent. In my view, the majority: (1) ignores key factors in determining that the term "sudden and accidental," as used in comprehensive liability insurance policies, is not ambiguous; (2) fails to consider the facts in this record concerning the intent of the insurance industry in using that term and, consequently, is wrong on the merits; and (3) allows the insurance industry to grossly abuse the rehearing process in the presentation of its rehearing petition in this cause.

The Definition of "Sudden and Accidental"

The majority's reasoning blatantly ignores evidence before this Court reflecting that the term "sudden and accidental" is ambiguous. The term "sudden and accidental" has been in use by the insurance industry in standard form insurance policies since before 1970. In those policies, "sudden and accidental" has been defined differently from the definition asserted in this case by Southeastern. For instance, in policies involving boilers and machinery, courts have uniformly found the term "sudden and accidental" to be defined as "unforeseen or unexpected" (the definition asserted by Dimmitt), as opposed to "instantaneous or abrupt" (the definition asserted by Southeastern). The law is clear and unrefuted on this point.⁷ In explaining the meaning of

⁷ See, e.g., New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 116 N.E.2d 671, 680 (Mass. 1953) (defining the word "sudden" within the term "sudden and accidental" in a boiler and

"sudden and accidental" in boiler and machinery policies, one treatise states the following:

In order for the insured to recover under a boiler and machinery policy it must demonstrate that the occurrence was "sudden and accidental." Although the terms "sudden" and "accidental" seem to imply that the immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the "common meaning" doctrine, the courts have uniformly held that the dictionary definition of the terms as "unforeseen, unexpected and unintentional" is controlling.

Stephen A. Cozen, Insuring Real Property, § 5.03(2)(b) (1989) (footnotes omitted). Similarly, Professor Couch in his treatise states the following:

When coverage is limited to a sudden "breaking" of machinery the word "sudden" should be given its primary meaning as a happening without

machinery policy as "a happening without previous notice or with very brief notice, or as something coming or occurring unexpectedly, unforeseen, or unprepared for"); Anderson & Middleton Lumber Co. v. Lumbermens Mut. Casualty Co., 333 P.2d 938, 941 (Wash. 1959) (the word "sudden" within the term "sudden and accidental" in boiler and machinery policy construed to mean "unforeseen and unexpected," not instantaneous). See also Sutton Drilling Co. v. Universal Ins. Co., 335 F.2d 820, 824 (5th Cir. 1964) (finding it was undisputed that the word "sudden," as used in oil well insurance policy, means "happening without previous notice or with very brief notice; unforeseen; rapid. It does not mean instantaneously."). After 1970, courts continued to similarly construe the term "sudden and accidental" in boiler and machinery policies. See, e.g., Community Fed. Sav. & Loan Ass'n v. Hartford Steam Boiler Inspection & Ins. Co., 580 F. Supp. 1170, 1173 (E.D. Mo. 1984) (three separate motor failures of one motor over a seven-month period found to be "sudden and accidental"); Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 934 (W.D. Pa. 1973) (relying on dictionary definition, court determined that "sudden" means "happening or coming unexpectedly").

previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is, "sudden" is not to be construed as synonymous with instantaneous.

George J. Couch, 10A Couch on Ins. Law 2d § 42:396 (rev. ed. 1982) (footnotes omitted) (emphasis added). In fact, in one case three separate failures of one motor over a seven-month period were found to be "sudden and accidental." Community Fed. Sav. & Loan Ass'n v. Hartford Steam Boiler Inspection & Ins. Co., 580 F. Supp. 1170 (E.D. Mo. 1984). The simple fact that the term "sudden and accidental" has been defined differently in other insurance policies is sufficient to support a finding of ambiguity as to the term's definition here. For the majority to assert otherwise, in my view, defies logic and common sense and is legally unjustified. A majority of other state supreme courts that have considered this issue agree with my position. See Hacia Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990).

In determining whether the term was ambiguous, the Wisconsin Supreme Court recognized that even dictionaries differ on the meaning of the term "sudden." That court noted that Webster's Third New International Dictionary (1986) gives the primary meaning of "sudden" as "occurring unexpectedly . . . not

foreseen," and a secondary meaning as "prompt," whereas the Random House Dictionary gives the primary meaning as "happening, coming, made, or done quickly." 456 N.W.2d at 573. Random House gives "sudden" the secondary meaning of "an unexpected occasion or occurrence." The Random House Dictionary of the English Language (2d ed. 1987).

The Georgia Supreme Court likewise noted the differences in the definition of that term and the variances of its primary and secondary meanings in the dictionaries, stating: "But, on reflection one realizes that even in its popular usage, 'sudden' does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death." Claussen, 380 S.E.2d at 688. The court explained that "[e]ven when used to describe the onset of the event, the word has an elastic temporal connotation that varies with expectations." Id.

In my view, the term "sudden and accidental" must be found to be ambiguous given that the term is, in fact, subject to more than one interpretation. Although the insurance industry asks that we find the term to be unambiguous, it is clear that the term can mean "unexpected and unintended," a definition not limited as to time of occurrence, in addition to Southeastern's asserted definition of "instantaneous or abrupt." This is especially true when considering the extreme divergence among the numerous jurisdictions considering this issue. As noted, even dictionaries cannot agree as to the primary and secondary

meanings of the word "sudden." Notably, however, perhaps the most important illustration of this ambiguity is the definition that the insurance industry itself embraced in regulatory presentations. An examination of the pollution exclusion clause drafting history set forth below unquestionably supports the conclusion that the clause was included only to preclude coverage for intentionally caused pollution damage, not to preclude damage that was "unexpected and unintended."

The Drafting History of Comprehensive General Liability Policies and the Pollution Exclusion Clause

Comprehensive general liability (CGL) policies are standard insurance policies developed by insurance industry trade associations, and these policies are the primary form of commercial insurance coverage obtained by businesses throughout the country. CGL policies have been revised in pertinent part on three separate occasions: first in 1966, then again in the early 1970s and mid-1980s.⁸ Just, 456 N.W.2d at 573-74; Brooke Jackson, Liability Insurance for Pollution Claims: Avoiding a Litigation Wasteland, 26 Tulsa L.J. 209, 224 (1990). The pollution exclusion clause, the clause at issue in this proceeding, was included as a standard clause in CGL policies in

⁸ In 1984 the industry proposed what has been called an "absolute pollution exclusion clause." The new clause completely eliminates the term "sudden and accidental" and totally excludes coverage for pollution clean-up costs that arise from governmental directives. Kenneth S. Abraham, Environmental Liability Insurance Law 161 (1991).

the 1970s revision. Id.; Stephen L. Liebo, 7A Appleman's Insurance Law and Practice § 4499.05 (Supp. 1991).

Before 1966, the standard comprehensive general liability policy covered only property and personal injury damage that was caused by "accident." Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of New York, 528 A.2d 76, 84 (N.J. Super. Ct. 1987); Just, 456 N.W.2d at 574. The term "accident" was undefined in policies, and courts reached differing conclusions as to exactly what type of damage was covered. In defining the term "accident," most courts agreed that the term referred to damage caused by an unintentional or unexpected event. But some found that damage caused by gradual pollution was covered, while others did not. Just, 456 N.W.2d at 574.

To clarify this confusion, in 1966 the insurance industry switched from "accident-based" comprehensive general liability policies to "occurrence-based" policies. Kenneth S. Abraham, Environmental Liability Insurance Law 155 (1991). In the occurrence-based comprehensive general liability policy, the term "occurrence" was defined as "'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.'" Broadwell, 528 A.2d at 84 (emphasis added)(quoting 3 Rowland H. Long, The Law of Liability Insurance App-53 (1966)).

Statements by the insurance industry at that time indicate that the shift to an occurrence-based CGL policy was to "clarify

the coverage provided by liability policies, and to avoid the confusion resulting from courts attempting to distinguish between accidental means and accidental results." Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360, 364 (Ohio Ct. App. 1972). Additionally, the shift was to clearly indicate that the term "occurrence" included damages caused by "exposure to conditions which may [have] continue[d] for an unmeasured period of time." Broadwell, 528 A.2d at 84 (quoting 3 Rowland H. Long, The Law of Liability Insurance App-53 (1966)). For instance, Lyman Baldwin, Secretary-Underwriting, Insurance Company of North America, made this statement regarding coverage:

"Let us consider how this would apply in a fairly commonplace situation where we have a chemical manufacturing plant, which, during the course of its operations, emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new [occurrence-based] policy, there is coverage until such time as the insured becomes aware that the damage was being done."

Just, 456 N.W.2d at 574 (quoting George Pandygraft, et al., Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 141 (1988)).

On March 17, 1970, the industry again proposed to amend CGL policies to include the pollution exclusion clause at issue in Dimmitt. When the pollution exclusion clause was proposed, representatives of the industry indicated that the new clause was not designed to reduce coverage; instead, it was to ensure that insureds who recklessly and intentionally polluted or who failed

to take reasonable precautions to prevent pollution would not be afforded coverage. For example, the Insurance Rating Board stated:

"Coverage for pollution or contamination is not provided in most cases under present policies because damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident"

Just, 456 N.W.2d at 575 (emphasis added) (quoting James T. Price, Evidence Supporting Policyholders in Insurance Coverage Disputes, Nat. Resources & Env't, Spring 1988, at 17, 48). Emphasizing the view that it was not intended to reduce coverage, The Fire, Casualty & Surety Bulletin, a bulletin used by insurance agents and brokers in interpreting policy provisions, stated:

"In one important respect, the exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the 'damage was expected or intended' by the insured and the exclusion states, in effect, that the policy will cover incidents which are sudden and accidental--unexpected and not intended."

Just, 456 N.W.2d at 575 (emphasis added) (quoting Sheldon Hurwitz & Dan D. Kohane, The Love Canal--Insurance Coverage for Environmental Accidents, 50 Ins. Couns. J. 378, 379 (1983)).

In determining whether to approve the new clause, the West Virginia insurance commissioner held a hearing to determine the meaning of the term "sudden and accidental." The commissioner's concern was that the clause would reduce coverage but not reduce

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In re Pollution and Contamination Exclusion Findings, W. Va. Dept. of Ins. Order 70-4 (August 19, 1970). The Supreme Court of West Virginia recently addressed the issue and stated the insurance industry had engaged "in studied, affirmative and official communications with a regulatory authority of the State of West Virginia." Joy Technologies, 421 S.E.2d at 497. In those communications,

Id. at 499-50 (emphasis added).

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Likewise, the State of Florida, as an amicus curiae in this cause, has asserted that representations similar to those made to West Virginia's insurance commissioner were made to it at the time the industry sought approval of the clause in Florida. The State additionally noted that, had insurers submitted the clause as one limiting coverage, Florida and other states would likely not have approved the clause without a simultaneous rate reduction.

Four state supreme courts have construed the term "sudden and accidental" to be clear and unambiguous, holding that the common, everyday understanding of the term "sudden" is a happening done quickly, without warning, unexpectedly, or abruptly. Lumbermens Mut. Casualty Co. v. Belleville Indus.,

Inc., 555 N.E.2d 568 (Mass. 1990); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Waste Management, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986); Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992). None of these courts, however, have addressed representations by the industry regarding its intentions in including the term "sudden and accidental" in the pollution exclusion clause and none have acknowledged that the industry itself has construed and applied this term differently in other insurance policies. In my view, the failure to consider these representations in determining the meaning of "sudden and accidental" is unjustified. I would hold that the insurance industry contemplated no change in coverage except in those instances where damage was caused by intentionally committed acts of pollution, and, consequently, that "unexpected and unintentional" damage is covered under the term "sudden and accidental."

Interestingly, even though the Massachusetts Supreme Court in Lumbermens held that "sudden and accidental" had a temporal meaning, its consideration of that term in a later case would still require that the summary judgment in the instant case be reversed and remanded. In Goodman v. Aetna Casualty & Surety Co., 593 N.E.2d 233 (Mass. 1992), the Massachusetts Supreme Court reviewed a case in which the damage at issue under the pollution exclusion clause was caused by a gradual leak. Damage caused as a result of the leak occurred over an eighteen-month period of time. The trial court, based on Lumbermens, had issued summary

judgment in favor of the insurer, finding that an eighteen-month leak was not "sudden and accidental." The Supreme Court reversed and remanded that determination, stating that the issue of whether the damage was sudden and accidental turned on how the accident itself occurred rather than whether the damage caused by the accident was sudden and accidental. For instance, if the leak was caused by a sudden and accidental puncture, then the damage resulting from that leak was covered under the policy even if the damage itself occurred over a long period of time. Under this rationale, it would still be necessary to remand the instant case for a determination of whether the damage at issue was sudden and accidental.⁹

Improper Grounds for Granting Rehearing

Finally, I believe that the majority's opinion allows Southeastern to grossly abuse the rehearing process because the contents of the petition for rehearing in this case are improper. Under Florida Rule of Appellate Procedure 9.330, a motion for rehearing shall not be used to re-argue the merits of a court's decision. In this case not only does Southeastern totally reargue legal issues previously considered by this Court, it also seeks to improperly present "newly discovered evidence."

⁹ See, for example, the Circuit Court of Appeals' notation that at least some of the damage at issue was caused by a 1978 incident in which a dike collapsed and allowed oily wastewater to be released from a holding pond. Crown Auto, 935 F.2d at 241.

Southeastern contends that its "new" evidence is admissible to rebut extrinsic evidence submitted by Dimmitt.

I would strike Southeastern's "new evidence" for two reasons. First, the evidence submitted by Dimmitt was properly made part of the record in this proceeding. The Circuit Court for the Eleventh Circuit specifically noted that the record in this case properly included extrinsic evidence submitted by Dimmitt Chevrolet regarding the drafting history of the pollution exclusion clause and the intent of the insurance companies. It further noted that Southeastern had an opportunity to respond to the evidence submitted by Dimmitt. It stated:

We conclude that the record properly includes the extrinsic evidence submitted by Dimmitt regarding the drafting history of the pollution exclusion clause and the intent of the insurance companies. Appellee argues that such extrinsic evidence is not properly a part of the record on appeal because much of it was proffered with the post-trial motion to alter or amend and was thus untimely. Under the circumstances of this case, it was appropriate for Dimmitt to proffer the evidence in connection with the motion to alter or amend. The district court ruled that the evidence was discoverable in a February 8, 1990 order. The parties' pretrial stipulation contemplated that the issue of admissibility of the evidence would be decided at a motion in limine. However, the district court granted summary judgment prior to the date set for trial. Dimmitt reasonably planned to argue for admissibility of the evidence at a motion in limine, rather than in a supplemental brief in connection with the pending summary judgment motions, because the district court's February 8, 1990 order denied motions by certain other auto dealerships to file supplemental briefs in support of their cross-motions for summary judgment. Furthermore, Southeastern had an opportunity to respond to

the extrinsic evidence, and in fact did respond, in their Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment. Finally, at least some of the evidence was discussed in opinions cited by the district court in its order granting summary judgment. See, e.g., Claussen v. Aetna Cas. & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989).

Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., 935 F.2d 240, 243 n.3. (11th Cir. 1991) (references to record omitted). Consequently, the extrinsic evidence submitted by Dimmitt may properly be considered by this Court.

Second, the evidence Southeastern now asks this Court to consider is not new--it is a drafting and regulatory history of the policy at issue as compiled by Transamerica Insurance Company. Transamerica sought to file this history in an amicus brief in this proceeding. However, the brief was late-filed and was rejected by this Court. Southeastern now seeks to admit Transamerica's compilation by incorporating that compilation into its rehearing petition, claiming it is "new evidence." This history was readily available to Southeastern during the course of this proceeding, and it is improper to allow them to circumvent procedural rules of this Court by permitting submission of that evidence at this time.

Given that the evidence being submitted by Southeastern is now inadmissible and given that a significant portion of Southeastern's argument in the petition makes reference to that evidence, I believe that the rehearing petition is improper under the rules and should be stricken. Consideration of the rehearing

petition in its present form makes a mockery of the rehearing rule and effectively signals the bar that "anything goes." Apparently, the insurance industry has sought a proverbial second bite at the apple and won.

BARKETT, C.J. and HARDING, J., concur.

Jeffrey A. Tew and Daniel A. Casey of Kirkpatrick and Lockhart, Miami, Florida,

Amici Curiae for The American Fiber Manufacturers Association, The American Petroleum Institute, The Chemical Manufacturers Association, International Business Machines Corporation and Olin Corporation

Certified Question of Law from the United States Court of Appeals for the Eleventh Circuit - Case No. 90-3359

George K. Rahdert of Rahdert & Anderson, St. Petersburg, Florida; Luther T. Munford of Phelps Dunbar, Jackson, Mississippi; and Richard N. Dicharry and Pamela G. Michiels of Phelps Dunbar, New Orleans, Louisiana,

Alan C. Sundberg and William F. McGowan, Jr. of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, Tallahassee, Florida; and Thomas K. Bick and Joseph W. Dorn of Kilpatrick and Cody, Washington, D.C.,

Amicus Curiae for John Richard Ludbrooke Youell on behalf of Underwriters at Lloyd's, London

for Appellants

Ronald L. Kammer of Hinshaw and Culbertson, Miami, Florida; and Thomas W. Brunner, James M. Johnstone and Lainie J. Simon of Wiley, Rein and Fielding, Washington, D.C.,

Robert E. Austin, Jr., Leesburg, Florida; and Hal K. Litchford and Kristyn D. Elliott, Orlando, Florida,

Amici Curiae for Insurance Environmental Litigation Association, Servite Insurance Company, Florida Farm Bureau Insurance Company, and American Surety & Casualty Company

for Appellee

Robert A. Butterworth, Attorney General and Jeff G. Peters, Assistant Attorney General, Tallahassee, Florida,

Amicus Curiae for State of Florida

Jeffrey S. Kurtz, City Attorney, Delray Beach, Florida; and Steven R. Berger and Bradley H. Trushin of Wolpe, Leibowitz, Berger & Brotman, Miami, Florida,

Amicus Curiae for City of Delray Beach