

2006

# Great American E&S Insurance Company v. Dallas W. Peters, Brandon Knuteson, Mary Lynn Knuteson : Brief of Appellee

Utah Court of Appeals

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GREAT AMERICAN E&S  
INSURANCE COMPANY,

Plaintiff/appellee,

V.

DALLAS W. PETERS and BRANDON  
KNUTESON, individually and on  
Behalf of MARY LYNN KNUTESON,  
An incompetent adult,

Defendants/Appellants.

) Case No. 20060368-SC  
)  
) Third District No. 030909411

## BRIEF OF APPELLEE GREAT AMERICAN E&S INSURANCE COMPANY

On appeal from the final judgment of the Third Judicial District Court for Salt Lake County, Honorable L.A. Dever, District Judge

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GREAT AMERICAN E&S  
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## **I. STATEMENT OF JURISDICTION**

Appellee Great American E&S Insurance Company (“Great American”) agrees with the Jurisdictional Statement contained in Appellants’ Dallas Peters and Mary Lynn and Brandon Knutesons’ (collectively, “the Knutesons”) principal brief.

## **II. ISSUE FOR REVIEW, STANDARD OF REVIEW AND PRESERVATION BELOW**

Did the trial court err in determining that an employee of SOS Staffing Services, Inc. (“SOS”) working for an SOS customer in furtherance of the customer’s business was not insured under SOS’ primary or umbrella insurance policies because he was a temporary employee, and not a staff employee, of SOS?

This issue was preserved at R. 1831-36. The trial court granted summary judgment in Great American’s favor, and this Court reviews the trial court’s ruling for correctness. *Machock v. Fink*, 2006 UT 30 ¶ 8, 137 P.3d 779.

There are no statutes that are determinative of this issue. No addendum is necessary for this brief under Utah Rule of Appellate Procedure 24(a)(11).

## **III. INTRODUCTION**

Policy construction must, above all else, make sense. It can only make sense in context. The Knutesons’ arguments to overcome the clear and purposeful wording in the policies do not make sense and do not honor the context in which the policy was issued. The record unequivocally makes clear that neither the named insured, SOS, nor its

insurers ever wanted or needed such coverage, and, in fact, took steps to make certain it was not provided.

The Knutesons, who are strangers to the policies, now want to undo what SOS and its insurers arranged. There is no logical, much less legal, reason to ignore the clear intent reflected in the policy wording. The Knutesons argue that as long as their construction of the policies is “reasonable,” that construction must be enforced. However, since their construction is supported by a series of abstract and isolated microanalyses, their construction is inherently unreasonable.

Great American plainly declared in the umbrella policy that it would not insure any person operating an auto except to the extent that person is insured by an underlying auto policy. The Knutesons depend on a topsy-turvy argument about that declaration to suggest that Great American actually meant the opposite result.

Judge Dever reviewed all arguments the Knutesons raise here and rejected them. His reading of the Federal and Great American policies, including the parties’ intent as set forth in the policies, was correct. This Court should affirm summary judgment for Great American.

#### **IV. STATEMENT OF THE CASE AND PROCEDURAL DISPOSITION**

1. SOS is a company in Utah that provides businesses with whom it contracts (customers) with laborers or office personnel for use at the customer’s place of work or in the customer’s business. (R. 30).

2. SOS has two categories of individuals who it pays for work they perform.

While SOS calls individuals in both categories “employees,” they are markedly different types of employees. The first category is “staff employees.” Staff employees consist of SOS management personnel; those who process and recruit personnel who work for SOS clients; and secretaries, accountants, and bookkeepers. (R. 1010). Staff employees work at SOS offices, report to SOS supervisors, and carry out the work of SOS on behalf of SOS. (R. 967).

3. As SOS’ general counsel John Morrison summarized, “[S]taff employees work under the control and supervision on a daily basis of SOS. They are the employees who further the business interests of SOS.” (R. 1351). Staff employees are by no means permanent employees; they agree when hired that their employment is at-will. (R. 1333).

4. The second category of individuals are also paid by SOS, but for work they perform on behalf of an SOS customer. SOS calls this second category “temporary employees.” (R. 1010).

5. Although temporary employees receive their paychecks from SOS, SOS’ customers pay SOS to cover the individuals’ wages. Such an individual works at the will of the customer. He reports to work at the customer’s office and takes direction from the customer in carrying out his job duties for the customer. (R. 30). Even if a temporary employee works for an SOS customer full-time and long-term, SOS still considers the individual a temporary employee in deference to the fact that the employee is placed through SOS. (R. 1010). Temporary employees may either be interviewed and screened

by SOS and then placed with an SOS customer, or they may be screened by the SOS customer and then sent to SOS for payroll services. (R. 1010).

6. SOS screens potential staff employees by requiring them to authorize a thorough background check and fill out an application called “Staff Application for Employment.” (R. 1011). Temporary employees undergo a different background check and fill out a different application called “Application for Employment.” (R. 1011).

7. Staff employees receive a Summary Plan Description and Benefits Program Booklet that lists benefits available to “Staff Employees,” and a Substance Abuse Policy. Temporary employees do not receive these documents. (R. 1011). Staff employees enjoy medical, dental, vision and accidental death benefits paid for by SOS; temporary employees do not. Staff employees receive disability insurance. Temporary employees do not. (R. 1011).

8. SOS typically pays staff employees every two weeks from SOS’ corporate payroll account. By contrast, temporary employees are paid weekly, from the office nearest their site of employment with the customer. Some temporary employees are paid “on demand,” immediately after completing a particular work assignment for an SOS customer. (R. 1011).

9. Staff employees have specified paid vacation and sick leave days, and their SOS supervisor tracks their attendance. Temporary employees have no sick leave days and a different vacation package from staff employees. The SOS customer, not SOS, monitors their work hours and attendance. (R. 1011).

10. Mr. Peters was a temporary employee of SOS and met the above criteria of a temporary employee. (R. 1012-13). He was sent to SOS by Vicars, an SOS customer, for payroll services. Vicars would send its employees to SOS to sign up as temporary laborers, and Vicars then paid SOS for payroll services. (R. 223, 225). This is what happened with Mr. Peters. (R. 227).

11. Other personnel at Vicars are in the same situation. For example, Alayne Vicars, Vicars' corporate secretary, was partially paid through SOS. (R. 218-19).

12. SOS has consistently stated that it has, and has always had, two categories of employees: staff employees and temporary employees. Although Mr. Peters clearly falls into the category of temporary employees, the Knutesons claim that Mr. Peters, as a "payroller," is in some third category of SOS employees entirely of the Knutesons' concoction. (Appellants' Brief, p. 42). Nonetheless, Mr. Morrison noted that SOS "only ha[s] two classifications of employees," and that payrollers such as Mr. Peters are a subset of temporary employees. (R. 1350, 1472).

13. Mr. Peters was not a staff employee. He did not fill out a "Staff Application for Employment," but the SOS application given to temporary employees. (R. 1019). SOS did not screen Mr. Peters for employment, as it would one of its own staff employees. Rather, the expectation among SOS, Vicars and Mr. Peters was that Mr. Peters would work for Vicars, not SOS, carrying out the work of Vicars. (R. 228).

14. Mr. Peters was performing work in the course and scope of employment for Vicars when the subject accident occurred, driving to a job site as directed by his Vicars

supervisor. (R. 30-1, 93, 1012-13). He was driving a truck owned by Vicars and insured through Vicars. (R. 31, 86, 218). Shortly before the accident, Vicars made sure through its insurance agent that this truck was covered under its general liability policy with Farm Bureau. (R. 227-28).

15. Vicars owner John Vicars acknowledged Mr. Peters as “my employee.” (R. 103). Vicars told SOS how much to pay Mr. Peters for the work he was doing for Vicars, then SOS charged back to Vicars that amount plus an additional increment to compensate SOS for its payroll services to Vicars. (R. 99, 225). Mr. Peters reported to work and turned in his time cards at Vicars, not at SOS. (R. 97, 1012). His supervisor worked for Vicars, not SOS. (R. 97). He took directions from Vicars, not SOS. (R. 223, 228). He drove where Vicars told him to go, and SOS had no ability to do this. SOS could not tell him where, when or how to drive. (R. 31, 102).

16. In 2000 and 2001, SOS used an insurance broker to obtain automobile liability insurance. (R. 998, 1003). The broker worked with the underwriter for Federal Insurance Company (“Federal”) to obtain a quote for automobile liability insurance, and SOS ultimately purchased coverage with a limit of \$1 million in effect from January 1, 2001 to December 31, 2002 (“the Federal policy”). (R. 1003).

17. Federal sent SOS an automobile liability policy, which SOS’ broker and in-house risk manager reviewed. They determined that the policy as written offered broader non-owned automobile coverage than SOS desired in that it covered SOS’ temporary employees as well as its staff employees. (R. 999, 1004). As a matter of course, SOS

does not provide automobile liability insurance for temporary employees unless an SOS customer specifically requests and pays SOS for that coverage. (R. 999). Vicars never made such a request of SOS. (R. 1855, pp.53-54)

18. Specifically, the policy as originally written contained a form endorsement, Form CA989 (02-99), which is a printed standard form copyrighted and published by the Insurance Services Offices (“ISO”). ISO is in the business of preparing policy forms for insurance policies. (R. 1299). Form CA 989 is entitled “Employees as Insured,” and states:

The following is added to the **Section II–Liability Coverage**, paragraph **A.1.**

**Who is an Insured Provision:**

Any “employee” of yours is an “insured” while using a covered “auto” you don’t own, hire or borrow in your business or personal affairs.

(R. 1323). This endorsement did not meet the needs of SOS because SOS did not want its temporary employees to be covered while driving vehicles that SOS did not own, hire or borrow in its own business, as opposed to its customers’ business. (R. 999, 1004).

19. Upon realizing the error with endorsement Form CA 989, SOS asked its broker to ensure that the non-owned automobile coverage was for the benefit of SOS staff employees only and not for temporary employees for its customers. (R. 1004). SOS’ risk manager, Mark Marshall, noted that “[w]e did indicate to them that we did not want to extend that coverage to our temporary associates.” (R. 1341). Mr. Morrison explained that SOS could not, as a practical matter, control the driving activities of temporary

employees while they were working for customers, and therefore did not want to provide liability insurance for them:

[W]e were concerned about the risk that – All of our temporary employees working in the field in an unsupervised – unsupervised by us and driving vehicles maintained and insured by others, we were concerned that our coverage would be eroded if there were claims made on our policy. So we talked about ways that we could structure the policy or have the policy endorsed that would provide entity coverage as well as coverage to our staff employees but exclude coverage for the non-staff employees, the temporary employees.

(R. 1345).

20. Mr. Marshall emphasized that SOS did not want automobile coverage extended to temporary employees because “obviously the more people you extend it to, then the greater potential for loss is.” (R. 1341).

21. SOS’ broker, Steven Handley, testified that he told Federal that SOS:

wanted to add coverage for certain employees in this particular situation. Not the use of non-owned autos, but we wanted to limit it to staff employees.

We did not want to extend that coverage to all of the temporary employees out on working assignments for SOS’ customers.

(R. 1441-42).

22. As a result of this discussion, Federal added Endorsement Form 16-02-33 to the policy, which makes clear that non-owned automobile insurance coverage is for SOS staff employees and not for temporary employees. (R. 999, 1004). SOS read the endorsement and found that the endorsement accomplished its desire not to extend automobile coverage to temporary employees. (R. 1341).



23. Handley testified as to Endorsement Form 16-02-33:

[t]hat endorsement, in my opinion, reflected our request for this coverage extension to staff employees . . . .

(R. 1782).

24. Endorsement Form 16-02-33 is not an ISO form, but is an endorsement crafted at SOS' request. (R. 1299). The Endorsement states that it is an amendment to Form CA989, "EMPLOYEES AS INSURED:

THIS FORM APPLIES TO THE STAFF OF THE INSURED ONLY  
AND NOT TEMPORARY EMPLOYEES FOR THE CUSTOMERS."

(R. 477).

This Endorsement became a part of the Federal policy covering SOS for automobile liability insurance. (R. 440-91).

25. SOS did agree to have its broker issue certificates of insurance to four other customers indicating that they were additional insureds (R. 1462-63), but no certificate indicated that any employee of those customers was an additional insured. (R. 1774).

26. Vicars never asked that it be issued a certificate of insurance showing that it was an additional insured under SOS' insurance. (R. 1757).

27. Mr. Marshall testified that SOS agreed to comply with certain customers' requests to have SOS' broker issue certificates of insurance showing them as additional insureds because he believed SOS was honoring a contractual obligation to defend and indemnify those customers. (R. 1462-63).

28. Mr. Marshall did not believe that the issuance of these certificates of insurance reflected a belief that SOS' customers were insured under the Federal policy. (R. 1465). Marshall noted an e-mail from Federal's underwriter (Exh. G. to Appellants' Brief) to respond to customer's requests for certificates of insurance "would not be acceptable" and that SOS "still needed additional insured wording" to satisfy its customers' requests for additional insured status. (R. 1462).

29. It was understood, even by Federal, that Federal would have to charge an additional premium to endorse its policy to add customers as additional insureds "to provide some premium for the severity potential that is presented." (R. 1815).

30. SOS also purchased an umbrella liability policy from Great American. (R. 492-521). The Schedule of Underlying Insurance attached to the Great American policy identifies the Federal insurance policy as the underlying primary policy for automobile coverage. (R. 494).

31. The Great American policy's insuring agreement requires Great American to pay only those sums above the Federal policy on behalf of the "insured" that SOS "becomes legally obligated to pay by reason of liability imposed by law . . . ." (R. 496).

32. Addressing who is insured, the Great American policy initially states that SOS' "employees" are covered as insureds. (R. 500). However, the policy stipulates that this coverage does not apply to the use of automobiles "unless such coverage is included under the policies listed in the Schedule of Underlying Insurance and for no broader coverage than is provided under such underlying policies." (R. 500). Thus, if an

employee using an automobile would not be covered under the Federal policy, he would not be covered under the Great American policy. (R. 500).

33. The Great American policy also states that “temporary workers” are not covered by the policy. (R. 500).

34. Moreover, the Exclusions section of the Great American policy reiterates that it does not offer coverage for claims arising out of the use of any automobile, “except to the extent that such insurance is provided by a policy listed in the Schedule of Underlying Insurance, and for no broader coverage than is provided by such policy.” (R. 499).

35. Vicars became an SOS client in September 2000. (R. 85). SOS and Vicars entered into an agreement entitled “Policy of Nonliability for SOS Employees,” requiring Vicars to provide automobile insurance coverage to employees payrolled through SOS, such as Mr. Peters:

[Vicars] acknowledges that it has the necessary insurance coverage and that its insurance carrier is aware of the fact that the employees placed by SOS are not otherwise covered by employer’s liability and/or general liability insurance.

(R. 85).

36. Vicars signed another document with SOS entitled “Policy on Operation of Vehicles and Equipment,” that more specifically emphasized Vicars’ obligation to provide automobile liability insurance for temporary employees such as Mr. Peters:

It is not practical for us to insure vehicles/equipment only temporarily used by our employees at your request, but owned and maintained by you. Therefore, we do not provide insurance coverage or accept liability for claims or expenses that may result from the operation of your vehicles,

equipment, and/or machinery by our employees. In order to secure our services for these purposes, we ask that you acknowledge that SOS does not provide coverage in these areas . . . . Customer also acknowledges that it has necessary insurance coverage, and its insurance carrier(s) is aware of and has extended coverage to include these provisions.

(R. 439).

37. Shortly after signing these agreements, and consistent with these agreements, Vicars sent SOS a copy of its general liability insurance policy with Farm Bureau showing that employees like Mr. Peters would be covered by the Farm Bureau policy. (R. 221).<sup>1</sup>

38. After the subject accident, Brandon Knuteson, on his wife's behalf, sued Vicars, Mr. Peters and SOS for personal injury in *Knuteson v. Peters, et al.*, Civil No. 020900793, Judge Glenn Iwasaki. (R. 87). Vicars' general liability insurer, Farm Bureau, defended Mr. Peters in that lawsuit. (R. 17). The Knutesons received a policy limits settlement from Vicars' general liability insurer. This was because Mr. Peters was an insured "employee" under the Farm Bureau policy. Mr. Peters assigned any claim he has against Great American to the Knutesons. (R. 761).

39. SOS moved for summary judgment in the personal injury lawsuit, arguing that it could not be vicariously liable for Mr. Peters' actions because he worked for Vicars,

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<sup>1</sup> Vicars clearly was not one of the SOS customers to which Appellants refer in their brief who required of SOS that the customer's employees be added as additional insureds to SOS' general liability policy. Judge Dever noted during oral argument on the Motion for Summary Judgment that unless SOS gave Vicars a certificate of insurance covering all of Vicars' employees, which it did not, Appellants' argument was irrelevant. (R. 1855 p. 54). In any event, the Certificates of Insurance issued to customers other than Vicars indicated that just the company and sometimes its officers and directors were additional insureds, but never its employees. (R. 1569-1687).

not SOS. (R. 198-206). The Knutesons agreed and gave notice that they would not oppose SOS' motion, and SOS was dismissed from that lawsuit. (R. 214-15).

40. Great American initiated this lawsuit by filing a complaint for declaratory judgment against Mr. Peters and Mr. Knuteson in 2003, seeking a ruling that Mr. Peters was not an insured under the umbrella liability policy issued to SOS. (R. 1-7).

41. After discovery, the parties filed cross-motions for summary judgment on the issue of whether Mr. Peters was insured under the Great American policy. Judge Dever held oral argument on the motions on May 19, 2004, and on July 13, 2004, he issued a Memorandum Decision in Great American's favor. (R. 1832-36). Judge Dever acknowledged that it was necessary to look to the Federal policy to determine whether Mr. Peters was insured by SOS since the Great American policy states that it will not insure anyone driving an automobile unless that person is an insured under the Federal policy. (R. 1832-33). Noting that Mr. Peters clearly was not a staff employee of SOS based upon the undisputed facts, Judge Dever concluded:

Here, the Court interprets the plain language of the term ["staff"] to not include Peters as a staff employee of SOS. Otherwise, to consider Peters as "staff" would be to conclude that Great American and Federal agreed to underwrite all motoring risks operating under the supervision and control of any and all SOS clients. The position is untenable and not supported by the undisputed evidence. Here, Peters was under the operation and control of Vicars Trucking and not SOS Staffing. Consistent with this is the undisputed statement of SOS Risk Manager, Mark Marshall, stating that Peters was not part of the SOS staff.

(R. 1834).

42. On March 26, 2006, Judge Dever signed the Order granting summary judgment to Great American and denying summary judgment to the Knutesons.

(R. 1837-38). This appeal ensued. (R. 1839-40).

## **V. SUMMARY OF ARGUMENT**

It is the Knutesons' burden, as the parties arguing that Mr. Peters is insured under the Great American policy, to prove that there was coverage. *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.* 868 F. Supp. 1278, 1295-96 (D. Utah 1994), *affirmed*, 52 F.3d 1522 (10<sup>th</sup> Cir. 1995); *Morris v. Farmers Home Mut. Ins.*, 28 Utah 2d 206, 500 P.2d 505, 507 (Utah 1972). They cannot meet this burden because the plain language of the Great American policy, considered either in conjunction with the underlying Federal auto policy or standing alone, clearly states that temporary employees for SOS' customers such as Mr. Peters are not insureds for accidents arising from their use of an automobile not owned by SOS. Considering the uncontroverted fact that Mr. Peters was an SOS temporary employee and not part of SOS' staff, he cannot be an insured.

The Knutesons' arguments that the policy term "temporary employee" does not fit Mr. Peters fail because they do not address whether, much less establish that, he was "staff." The arguments are also improper because they focus solely on the word "temporary," not the phrase "temporary employee," and ignore completely the operative part of the phrase, "for the customers." Alternatively, they argue that the term "staff" is so broad it encompasses any employee, which simply renders the term meaningless.

None of the Knutesons' arguments changes the uncontroverted fact that Mr. Peters, was not SOS staff. He therefore cannot be an insured under any commonsense understanding of the terms of the policy. Nor do the Knutesons' various arguments that post-claim conduct by SOS, Federal and Great American overcome the conclusion that Mr. Peters is not insured. Federal's decision to settle the Knutesons' claim against it does not bind Great American nor change the fact that Mr. Peters is not an insured under the terms of the Federal policy.

Reference to the Federal policy is required in reading the Great American policy because that is what the policy says. The Knutesons' efforts to pick and choose parts of the Federal policy on which to rely is not supported by any rule of construction or established interpretation of Utah Code Ann. § 31A-21-106(1). However, if some of the Federal policy is not to be considered, then none of it can be considered. Even without reference to the Federal policy, the Great American policy does not insure Mr. Peters.

The Knutesons unnecessarily complicate a simple and rational situation. A straightforward analysis shows that Mr. Peters is not an insured. This Court should on that basis affirm summary judgment in Great American's favor.

## **VI. ARGUMENT**

### **A. MR. PETERS IS NOT AN INSURED UNDER THE FEDERAL POLICY**

The Great American policy standing alone does not make Mr. Peters an insured because it makes clear anyone operating an auto is not an insured unless such coverage is provided by underlying insurance. Thus, it is necessary to address the Federal policy.

1. **The Federal Policy Provides Automobile Coverage Only to SOS Staff Employees, Not Temporary Employees of Customers.**

The Federal policy sets forth “**WHO IS AN INSURED,**” and states that “insureds” include those who use a covered automobile that SOS owns, hires or borrows. (R. 44). Mr. Peters was driving a truck owned by Vicars at the time of the accident, and SOS did not hire or borrow the truck. (R. 31, 86, 218). Mr. Peters is thus not an insured under that provision.

There are two relevant endorsements. The first, entitled “**EMPLOYEES AS INSUREDS,**” states that “any employee” of SOS is insured while using a covered automobile that SOS does not own, hire or borrow. (R. 70). However, this endorsement is limited by a second endorsement, which was crafted to meet SOS’ explicit demand that its temporary employees for its customers not be insured while operating those customer’s vehicles. The second endorsement provides:

FORM CA989 (02/99) “EMPLOYEES AS INSUREDS” IS AMENDED  
TO INCLUDE THE FOLLOWING WORDING:

THIS FORM APPLIES TO THE STAFF OF THE INSURED ONLY AND  
NOT TEMPORARY EMPLOYEES FOR THE CUSTOMERS.

(R. 71).

Thus, Mr. Peters, as a temporary employee for an SOS customer, is not insured under the Federal policy. The only way the Federal policy would cover his liability for an automobile accident while driving a vehicle SOS did not own, hire or borrow is if he were a staff employee of SOS.



SOS specifically demanded that Federal issue the second endorsement after it realized that the Federal policy with only the “EMPLOYEES AS INSUREDS” endorsement attached was too broad. SOS notified its insurance broker that the “EMPLOYEES AS INSUREDS” endorsement would have to be changed because SOS wanted to provide “non-owned” automobile coverage only for its staff employees, those who work in SOS offices and whose driving activities can be supervised by SOS. SOS did not want to provide insurance to the thousands of temporary employees driving vehicles of SOS customers in furtherance of those customers’ businesses. As a result, Federal prepared the second endorsement, which expressly limits the group of insureds to staff employees and explicitly eliminates as insureds SOS’ temporary employees working for SOS customers. The endorsement was attached to the policy and accepted by SOS.

SOS’ desire that its responsibility be limited to those employees it directly monitored gives the context for the second endorsement. That context is entirely relevant in considering the meaning of the term “temporary employee for the customers.” In *Valentine v. Farmers Insurance Exchange*, 2006 UT App. 301, 556 Utah Adv. Rep. 30 (Utah Ct. App. 7/20/06), the Court of Appeals construed the term “regular use” of a non-owned vehicle. Concluding that an employer’s truck was available for an employee’s “regular use” (in order to find no underinsured motorists coverage under the employee’s personal auto policy), the court considered that the purpose of the term was not to expand coverage, but to restrict it, and declined to find that the term as used in the policy is ambiguous “in the context of the undisputed facts of record.” *Id.* at 301 at ¶ 13. By

taking into account the purpose behind the inclusion of this term in the policy, the court was acting consistently with the maxim that terms in insurance contracts be construed “in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, including the purpose of the policy.” *Id.* at ¶ 15, *quoting Neilsen v. O’Reilly*, 848 P.2d 664, 666 (Utah 1992).

The Knutesons would have the Court ignore the undisputed purpose of the second endorsement in the Federal policy. Doing so would violate the basic tenet of policy construction that policies are to be construed as a whole, with all provisions given effect. *Holmes Dev., LLC v. Cook*, 2002 UT 38 ¶24, 48 P.3d 895; *Utah Farm Bureau Ins. Co. v. Crook*, 1999 UT 47 ¶ 5, 980 P.2d 685. Courts are “obliged to assume that language included [in a policy] was put there for a purpose, and to give it effect where its meaning is clear and unambiguous.” *Marriot v. Pacific Nat’l. Life Assurance Co.*, 24 Utah 2d 182, 467 P.2d 981, 983 (Utah 1970).

The Knutesons also ignore the clear purpose reflected in the policy language. SOS intended that the Federal policy not insure its temporary employees, and the second endorsement as written reflects that intent. *See MIC Prop. & Cas. Ins. Corp. v. Int’l. Ins. Co.*, 990 F.2d 573, 575 (10<sup>th</sup> Cir. 1993) (stating that absent an ambiguity in the policy, the intent of the parties must be derived solely from the language of the insurance contract); *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1992 (Utah Ct. App. 1993), *cert. denied*, 860 P.2d 943 (Utah 1993) (stating that clear and unambiguous contract will be interpreted according to its plain and ordinary meaning). The Knutesons’ argument that

the intent of the endorsement be disregarded in the face of the uncontroverted facts asks this Court to do too much. The endorsement acts as a significant limitation which the Knutesons ask to be minimized to the point of uselessness, if not ignored altogether.

**2. Mr. Peters was not a Staff Employee but was a Temporary Employee Working for Vicars, an SOS Customer.**

SOS is in the business of providing workers to various companies or customers to further those customers' businesses. SOS cannot operate this business without another, separate set of employees to carry out the administrative and operational functions of SOS. SOS therefore has two categories of employees: temporary employees, those employees who work directly for customers at their place of business; and staff employees, those who carry out the business operations of SOS. The two categories are mutually exclusive, and SOS operates with clear distinctions between the two categories of employees, as set forth in ¶¶ 2-9 of the Statement of Facts.

Staff employees work at SOS offices and include bookkeepers, administrative personnel, management, and those who recruit temporary employees. Their supervisors are other SOS staff employees, and they work under the supervisors' direction and control. When being considered for employment, potential staff employees fill out a form called "Staff Application for Employment" and authorize SOS to perform a background check. When hired, they receive a handbook setting forth corporate policies and benefits. They receive disability, medical, dental and accidental death insurance.

They enjoy specified vacation time and sick leave days. SOS pays them once every two weeks.

By contrast, temporary employees work for SOS customers at the customers' will and direction. They carry out the business of the customer. Temporary employees work at the customers' work sites or places of business, and they are supervised by the customers, not SOS. The customer pays SOS for the wages of the temporary employees, and SOS in turn issues the temporary employees a pay check, once a week. Prospective temporary employees fill out an application with SOS simply called "Application for Employment," and the background check they undergo is less extensive than with staff employees. Temporary employees do not receive benefits paid for by SOS.

Mr. Peters was hired as a temporary employee to work for Vicars. Vicars sent Mr. Peters to SOS for payroll services.<sup>2</sup> Mr. Peters filled out the "Application for Employment" and underwent the less extensive background check. Vicars paid SOS for Mr. Peters' wages plus an additional amount to cover SOS' payroll services. Mr. Peters reported to work at Vicars each day, took direction from a Vicars supervisor, and turned in time cards at Vicars. Mr. Peters drove trucks owned and furnished by Vicars. He was reporting to a Vicars worksite on the morning of the accident as ordered by his Vicars supervisor. Vicars' owner considered Mr. Peters to be a Vicars employee. Mr. Peters

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<sup>2</sup> Mr. Peters was therefore a "payroller," which SOS testified is a subset of "temporary employee."

functioned just like other temporary employees SOS provided to its customers, and in no way was he ever treated as staff of SOS.

The context from which the wording of the second endorsement derives is inescapable. Vicars willingly agreed to, and did, provide Mr. Peters with insurance coverage for his actions while driving an automobile or truck for Vicars under its auto liability policy. This arrangement made sense because Vicars would monitor his driving and directed him where and when to drive, and Vicars would have the liability.

*Kunz v. Beneficial Temporaries*, 921 P.2d 456, 461-63 (Utah 1996).<sup>3</sup> SOS could not and did not tell Mr. Peters how to drive, and it did not give him any training on how to drive the Vicars trucks. Accordingly, Vicars signed two separate documents with SOS agreeing that it would be the entity to purchase automobile liability insurance for Mr. Peters. Vicars acknowledged that SOS would not provide any automobile liability insurance for him. Vicars did purchase automobile liability insurance covering Mr. Peters through Farm Bureau. When the Knutesons sued Mr. Peters for the automobile accident, Farm Bureau defended him. Farm Bureau paid its policy limits in settlement of the Knutesons' negligence claim against Mr. Peters.

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<sup>3</sup> In the underlying tort litigation against SOS and Vicars Tracking, SOS moved for dismissal on the basis that as a "special employer," it had no tort liability, and the Knutesons did not oppose that motion. (R. 214-15)

**B. ARGUMENTS THAT MR. PETERS WAS A COVERED STAFF EMPLOYEE OF SOS ARE UNAVAILING**

**1. Dictionary Definitions of “Temporary” and Thesaurus Synonyms for “Staff” do not Lend Meaning to the Industry Terms “Temporary Employee” and “Staff Employee.”**

All evidence is that Mr. Peters was by SOS custom and practice a temporary employee and not a staff employee of SOS. Recognizing this irrefutable fact, the Knutesons attempt to cast the issue as one of construction of the term “temporary employee.” They do so by improperly focusing solely on the word “temporary” and by ignoring the modifier “for the customers.”

The Knutesons note that since Mr. Peters “was working full-time, five days a week” (Appellants’ Brief, p. 5), he was not a “temporary” employee. The issue is not whether Mr. Peters is a “temporary” employee, but whether he is a “temporary employee.”<sup>4</sup> The Knutesons also claim Mr. Peters had “an expectation of continuing employment,” although they do not have a citation to the record on appeal for this. Again, any expectation of continuing employment Mr. Peters may have had was with Vicars, not for SOS. In any event, the amount of hours or length of time he worked does not affect whether or not he was a “temporary employee for the customers” and certainly does not bear on whether he was “staff.”

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<sup>4</sup> The Knutesons also conveniently interchange the terms “temporary employee” and “temporary worker,” then point to the fact that Great American admits that Mr. Peters was not a “temporary worker” as that term is defined in its policy. That definition, of course, addresses those workers supplied to SOS for its seasonal needs not by SOS to others. (R. 813). The fact that Mr. Peters is not a “temporary worker” under either the Great American policy or the Federal policy is therefore irrelevant.

By ignoring the phrase “for the customers,” the Knutesons ignore the very essence of the term “temporary employee.” What makes Mr. Peters a “temporary employee for the customers” is that he was working for a customer. The operative term is not “temporary” employee; it is not even a “temporary employee.” It is “temporary employee for the customers.” Any reasonable construction must account for the entire phrase.

The Knutesons also dismiss SOS’ ability and right to categorize its own employees. They claim that although SOS has consistently distinguished its employees as either “temporary employees” or “staff employees,” this distinction is “unreasonable” because dictionaries and thesauruses do not explicitly acknowledge this distinction. (Appellants’ Brief, pp. 32, 37). This is not surprising, since there is no definition in a dictionary and no synonym in a thesaurus for either term. Yet the terms exist in the business world and are used by SOS and other similar businesses to categorize their employees.<sup>5</sup>

Great American does not take the position that courts should never look to dictionaries to define certain words in insurance policies; rather, its position is that reference to this source is not useful and not reliable when the dictionary does not contain

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<sup>5</sup> Appellants suggest that Federal did not have SOS’ understanding of “staff” and “temporary employee” and thus SOS’ “subjective and unilateral intent has no bearing.” (Appellants Brief, p. 42). The facts simply do not support the premise. SOS’ broker communicated SOS’ concerns to Federal (R. 1441-42), and SOS found that the resulting manuscript endorsement reflected precisely its intent. (R.1341.) The endorsement itself is evidence of a bilateral understanding.

a definition for a term and that term has a commonly-understood meaning in the insured's line of business. *See Berger v. Ideal Nat'l. Life Ins. Co.*, 524 P.2d 599, 601 (Utah 1974) (terms in insurance contracts should be construed to reflect the "ordinarily accepted meaning" of the term). Reliance on this source here is actually counterproductive because it produces outlandish results.<sup>6</sup> The Knutesons suggest that a "temporary employee" must mean anyone who works "part-time" for SOS without expectation of continued employment; but there are staff employees who work part-time, and all staff employees agree by signing their Staff Application for Employment that they can be fired at-will. (R. 1333). They claim that since a synonym for "staff" is "employee," that must mean that all SOS employees are staff employees and that there is no such thing as a temporary employee. This is simply not the case in the business of SOS. The two terms are commonly used and mean different things.

Utah law recognizes that the labor supply industry presents a unique employment situation that cannot practically be captured by a dictionary or thesaurus. Utah courts have dealt with the question of whether a temp agency or the customer should be considered the employer for workers' compensation purposes. Using terminology specific to this context, courts have held that a "loaned employee" is a "special

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<sup>6</sup> To illustrate that reliance upon a dictionary definition is not always useful, there is not a dictionary definition for the term "law clerk." The dictionary definitions of "clerk" (man ordained to the ministry, members of the five 'minor orders,' scholar, officer in charge of records, shop assistant) do not help in explaining what a "law clerk" is as that term is commonly used in the legal practice, i.e., a law student working at a law firm who cannot engage in the practice of law but who still can work on substantive legal matters such as drafting letters or pleadings. *The Compact Oxford English Dictionary* (2d Ed. revised 1998).



employee” of the customer, and the “special employer” is the one who is supposed to provide workers’ compensation insurance for the employee. *Hardman v. Specialty Services*, 177 F.3d 921 (10<sup>th</sup> Cir. 1999); *Kunz v. Beneficial Temporaries*, 921 P.2d 456 (Utah 1996); *Gheri v. Salazar*, 883 P.2d 1352 (Utah 1994). Not only do Utah courts acknowledge this special terminology, they understand that the special employer, the customer, has the responsibility to provide insurance coverage for the loaned employee.

The ordinary, plain, and commonly used meaning of “staff” cannot be overlooked in this context. The Knutesons contend that any and every employee who works full-time, even if for another company under that company’s direction and control, is part of SOS’ “staff.” Under the Knutesons’ reasoning, even Vicars’ corporate secretary would be SOS’ staff because she, like Mr. Peters and other Vicars employees, was partially paid through SOS. (R.218-19.) That would be an absurd and inherently unreasonable result in this context.

## **2. The Terms are not Ambiguous.**

The Knutesons next argue that if this Court does not automatically embrace their unsupported assertion that Mr. Peters was a staff employee, it must conclude that the terms “staff” and “temporary employee” are ambiguous and determine that Mr. Peters was insured under the Federal policy. A contract term or provision is ambiguous only “if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms or other facial deficiencies.” *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88 ¶ 20, 54 P.3d 1139; *see also Peterson v. The Sunrider Corp.*, 2002

UT 43 ¶19, 48 P.3d 918. If an alternative construction offered by a party is not plausible or reasonable, it does not create an ambiguity. *S.W. Energy Corp. v. Continental Ins. Co.*, 1999 UT 23 ¶ 14, 974 P.2d 1239. A policy term is not ambiguous “merely because one party assigns a different meaning to it in accordance with his or her own interests.” *Village Inn Apartments v. State Farm Fire & Cas. Co.*, 790 P.2d 581, 583 (Utah Ct. App. 1990).<sup>7</sup>

This Court recently expounded on ambiguities in insurance contracts, noting that “words and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests.” *Saleh v. Farmers Ins. Exchange*, 2006 UT 20 ¶ 17, 133 P.3d 428, *rehearing denied* (2006). A party claiming an ambiguity must offer a “plausible” alternate interpretation of the word or term:

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<sup>7</sup> The Federal policy does not define the term “staff,” but that fact does not make the term ambiguous or “slippery.” A term is not ambiguous just because it is not defined. *Musmeci v. Schwegmann Giant Super Markets, Inc.*, 332 F.3d 339, 354 (5<sup>th</sup> Cir. 2003), *rehearing denied* (2003), *rehearing and rehearing en banc denied*, 82 Fed.Appx. 144 (5<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004); *Winter v. Minnesota Mutual Life Ins. Co.*, 199 F.3d 399, 408 (7<sup>th</sup> Cir. 1999); *Smith v. So. Farm Bureau Cas. Ins. Co.*, 114 S.W.3d 205, 207 (Ark. 2003); *Heath v. State Farm Mut. Automobile Ins. Co.*, 659 N.W.2d 698, 699 (Mich. App. 2002). It must still be construed as one would ordinarily understand it. *Winter*, 199 F.3d at 408; *LDS Hospital v. Capitol Life Ins. Co.*, 765 P.2d 857, 858-59 (Utah 1988); *Valley Bank and Trust Co. v. U.S. Life Title Ins. Co. of Dallas*, 776 P.2d 933, 936 (Utah Ct. App. 1989). Nor does the second endorsement define “staff” (as Appellants’ inconsistently argue at p. 36) by the phrase “and not temporary employees for the customers.” *Pekin Ins. Co. v. Benson*, 714 N.E.2d 559, 563 (Ill. Ct. App. 1999), *appeal denied*, 720 N.E.2d 1095 (Ill. 1999) (holding that final sentence of policy provision is not a limitation, but an application or illustration of the general definition).

In other words, to earn the designation of plausible, a notion, explanation, or interpretation must impart confidence in its credibility sufficient to merit our applause. A standing ovation is not required, a discreet collision of the palms will do, but there must be reason to applaud.

*Id.* at ¶ 17.

The Knutesons' alternative definitions for the terms "temporary employee" and "staff" are not credible. They effectively nullify any distinction whatsoever between the two terms and would cause every SOS employee to be considered "staff." There would be no reason for the second endorsement in the Federal policy if every SOS employee were a staff employee.

The Knutesons nonetheless persist by insisting that these terms must be construed against the insurer. This rule of construction does not apply here for two reasons. First, the wording of the second endorsement of the Federal policy is not a contract of adhesion; to the contrary, the insured specifically requested this endorsement. It is not a form endorsement but was drafted because SOS told Federal who it wanted to be insured and who it did not want to be covered, and Federal crafted the endorsement accordingly. Second, this rule does not apply to a third party. *See Jaramillo v. Providence Washington Ins. Co.*, 871 P.2d 1343, 1347 (N.M. 1994) (stating that the rule is inapplicable in situations where a third party who is not expressly named as an insured seeks coverage under a policy that was not purchased by the third party). The insured who pays the policy premium is protected by this rule because that is the party that has the expectation

of benefits of the contract. As a third party, Mr. Peters merely seeks the benefits of a contract that SOS, the named insured, especially did not want Mr. Peters to have.

Citing to a Utah case discussing the meaning of the word “resident” in an insurance contract, the Knutesons maintain that “staff” is a “slippery word” that must be construed to extend to every SOS employee. (Appellant’s Brief, pp. 28-9). The opinion is simply unpersuasive. Not only does the opinion in *Government Employees Ins. Co. v. Dennis*, 645 P.2d 672 (Utah 1982) not address the word “staff,” it recognizes that words in insurance contracts should be used in their “common, daily, non-technical speech . . . .” *Government Employees Ins. Co.*, 645 P.2d at 675. Here, there is unassailable evidence that SOS intended that temporary employees not be insured under the Federal policy while operating its customers’ autos under those customers’ direction and supervision in the customers’ business, and this intent is set forth in the second endorsement of the policy. “Staff” means “a body of assistants carrying out the will of a superior.” *Beta Nu Chapter, Delta Sigma Theta Sorority v. Smith*, 89 N.E.2d 722, 724 (Ind. App. 1950). This concept is consistent with the named insured’s evidence – an employee working at the direction and control of another company cannot be SOS’ “staff.” Again, Mr. Peters is no more part of SOS’ staff than is Vicars’ corporate secretary.

3. **SOS' Issuance of Certificates of Insurance to Customers other than Vicars is of no Import.**

Digging deeply into extrinsic evidence that is inadmissible because the second endorsement is not ambiguous,<sup>8</sup> the Knutesons decry the fact that SOS arranged for its broker to issue certificates of insurance to some of its customers (not Vicars) indicating those customers were additional insureds under the Federal policy. They claim these certificates indicate that SOS understood that the Federal policy (even as endorsed) made temporary employees working for customers insureds. However, none of the certificates of insurance include the customers' employees as additional insureds and only four of the certificates in Addendum F to Appellants' brief pertain to automobile policies. (R. 1569-1687). SOS never provided a certificate of insurance to Vicars, and as Judge Dever noted, the certificates of insurance therefore have no import as to whether Mr. Peters was a temporary employee working for Vicars. If anything, the absence of a certificate of insurance issued to Vicars strengthens SOS' position that temporary employees working for Vicars were not insured under the Federal policy. SOS did not accept "Federal's written opinion" that there is a subset of employees working for customers who are insureds (Appellants' Brief, pp. 39-40).<sup>9</sup> (R. 1462). SOS was issuing certificates of insurance to comply with contractual defense and indemnity obligations (R. 1462-63) and did not believe that the issuance of these certificates reflected a belief that its customers were insured under the Federal policy. (R. 1465).

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<sup>8</sup>Only if a court determines that the terms of a policy are ambiguous is extrinsic

**4. SOS' Website Does Not Contradict Great American's Arguments.**

The Knutesons claim that SOS' current website loosely uses the words "temporary" and "staffing" and that these words or derivations thereof can therefore mean whatever the Knutesons want them to mean. (Appellants' Brief, p. 37). This website is not part of the record, and to the contrary, the appearance of these words in the website supports the notion that staff employees are those who are under the direction and control of their employer. SOS proposes to help prospective customers with "staffing challenges," an obvious reference to the fact that it can be difficult for a customer to find the right employees, but these employees will be working for the customer under the customer's control and supervision. (R. 1081). The website speaks of placing a temporary employee with a customer. (R. 1084). There is nothing in the website that arms the Knutesons with a compelling argument that all SOS employees are staff employees.

**5. Appellants' Resort to Other Extrinsic Evidence After Policy Inception Underscores the Weakness of their Position.**

The Knutesons point to a host of innocuous statements made by Great American's claims adjuster and former counsel well after policy inception to the effect that Mr. Peters

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evidence admissible to determine the parties' intent at the time the policy was issued. *Ward v. Intermountain Farmers Ass'n.*, 907 P.2d 264, 268 (Utah 1995). The Knutesons overstate the holding in *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88 ¶ 19. It does not overrule the line of cases that limits consideration of facts to allow the court to place itself in the position of the parties at the time of contracting.

<sup>9</sup> That so-called "written opinion" was in fact erroneous because it did not consider the effect of the second endorsement in the Federal policy.

was an SOS employee. They illogically leap to the conclusion that Great American thereby has “admitted” that Mr. Peters was an SOS staff employee. (Appellant’s Brief, pp. 5-6, 30-2). These statements also are inadmissible to construe Great American’s or Federal’s policy terms. *See Prudential Ins. Co. of Amer., Inc. v. Superior Court*, 98 Cal.App. 4<sup>th</sup> 585, 599 (2002) (stating that opinions of claims adjusters or other agents or employees of an insurer are inadmissible to interpret an insurance contract); *Chatton v. Nat’l. Union Fire Ins. Co. of Pittsburgh, PA*, 10 Cal. App.4<sup>th</sup> 846, 865 (1992), *rehearing denied* (1992) (emphasizing that because the interpretation of an insurance policy is a legal and not a factual determination, opinions of an insurer’s employees are irrelevant to that interpretation).

The conclusion that Mr. Peters was an SOS employee is a concession of nothing as it does not bear on the issue of whether he was a temporary employee or a staff employee. The two endorsements in the Federal policy regarding who is insured state that an insured (1) must be an SOS employee; (2) must use a covered auto that SOS does not own, hire or borrow in its business; and (3) must be a staff employee of SOS. “Admitting” that Mr. Peters is an SOS employee satisfies only one of three criteria required for him to be insured under the policies.

The Knutesons also refer to letters written by Great American’s former counsel to Federal stating that “Peters was an employee using a covered auto,” as if that constitutes an admission that Mr. Peters was covered under the insurance policies. (Appellants’ Brief, pp. 30-2). The Knutesons fail to quote the entire passage, which reads as follows:

However, it is our preliminary assessment that Mr. Peters was not operating the dump truck in the business of SOS. Rather, Mr. Peters was operating the dump truck in the business of Vicars Trucking.

(R. 636).

Great American's former counsel was discussing the second criterion of insured status, whether Mr. Peters was operating the Vicars truck in SOS' business, and concluded that Mr. Peters did not meet this criterion. Great American did not admit that Mr. Peters was covered by the policies; it instead concluded that he was not covered.

Even if this evidence did contain statements that Mr. Peters was an insured, an insurance company is not estopped from denying coverage due to its agents' representations that a policy covered losses at issue. *United Pac. Ins. Co. v. Northwestern Nat'l. Ins. Co.*, 185 F.2d 443, 447 (10<sup>th</sup> Cir. 1950). The doctrines of waiver and estoppel cannot be used to create coverage that is not in the policies. *Hennes Erecting Co. v. Nat'l. Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 813 F.2d 1074, 1078 (10<sup>th</sup> Cir. 1987); *United Pac. Ins. Co. v. Northwestern Nat'l. Ins. Co.*, 185 F.2d at 447; *Lone Star Steakhouse and Saloon, Inc. v. Liberty Mut. Ins. Group*, 2003 WL 21659663 (D. Kan. 2003).

The Knutesons berate Great American for trying for over a year to persuade Federal to change its position. (Appellants' Brief, p. 44.) To the extent Federal actually believed Mr. Peters was an insured, it was mistaken. Great American's attempt to get Federal to change its mind means that Great American cannot have been convinced that Mr. Peters was an insured, as the Knutesons argue.



**C. BECAUSE MR. PETERS IS NOT AN INSURED UNDER THE FEDERAL POLICY, COVERAGE IS NOT TRIGGERED UNDER THE GREAT AMERICAN POLICY**

**1. Due to the Inherent Nature of Umbrella Liability Policies and the Great American Policy Language Itself, the Question of Who is Insured under the Great American Policy Cannot Be Answered without the Federal Policy.**

The Great American policy is not a primary policy; it is an umbrella policy. It sits atop the Federal policy, which is the primary auto policy. The triggering of coverage by the Great American policy is dependent upon the Federal policy.

The Great American policy begins with a Schedule of Underlying Policies, emphasizing that it lies on top of, and is dependent upon, certain underlying policies. The Schedule lists the Federal policy by name and policy number. (R. 698). The Insuring Agreement in the Great American policy stipulates that Great American will pay on behalf of SOS “those sums in excess of the “retained limit” that the “insured” becomes legally obligated to pay by reason of liability imposed by law . . . because of bodily injury . . . .” (R. 700). The “retained limit” is the dollar amount of coverage in the applicable underlying policies, including the Federal policy. (R. 701). Importantly, benefits under the Great American policy are provided only if (1) Great American is legally obligated to pay on behalf of an insured; and (2) the applicable underlying policies have been exhausted. (R. 700).

When the Great American policy discusses who is insured, the Federal policy comes into play again. The Great American policy states in Section V, Subsection F.6.,

that SOS' employees "acting within the scope of their duties" are insureds. (R. 704).

However, this provision goes on to state that these employees are not insureds for any use of autos unless the underlying policies also provide that coverage:

However, the coverage granted by this Provision 6 does not apply to the ownership, maintenance, use, "loading" or "unloading" of any "autos," . . . unless such coverage is included under the policies listed in the Schedule of Underlying Insurance and for no broader coverage than is provided under such underlying policies.

(R. 704).

Hence, the analysis runs right back into the clear language of the second endorsement of the Federal policy. Great American's coverage cannot be broader than the coverage in that underlying policy. Judge Dever appropriately acknowledged that "for this reason it is necessary for the Court to determine Peters' coverage, if any, under the Federal policy since Peters is insured under Great American only to the extent that he is insured under the coverage provided by Federal." (R. 1833).

While this reasoning is simple enough, the Knutesons contend that the words "and for no broader coverage" in Subsection F.6. of the Great American policy somehow only pertain to the "type of risk covered" and not "who is covered." They claim that there is an abstract universal concept of the term "coverage," regardless of the context in which it is used. The legal support they offer for this argument is no support at all. The one case the Knutesons single out for discussion in the text of their argument (*King*) limited "coverage" to the nature of the risks insured, but as it was used in a particular part of a policy, and not as used here. (Appellant's Brief, pp. 23-4). The other cases cited show

only that the term “coverage” can refer to the type of risk covered, but it does not follow that it cannot refer to who is covered under the policy, particularly where the policy wording so suggests.

The Knutesons’ failure to acknowledge context undermines their position because if, as in *King*, this Court were to look to how the term is used in the Great American policy, it would see that Subsection F.6. makes clear that the term “coverage” refers to insureds; the subsection deals solely with the identity of insureds and says “. . . the coverage granted by this Provision 6 . . . .” The term “coverage” in this context cannot refer simply to the class of auto insurance without disregarding this context. If as the Knutesons argue, the phrase “. . . and for no broader coverage than is provided under [the Federal policy]” is designed merely to limit the coverage to auto coverage, that limitation is already in place with the Federal policy itself - - it is, after all, an auto policy. The phrase as the Knutesons construe it is therefore a useless appendage, and no contract or policy should be construed so as to render any provision a mere surplusage. *Marriot v. Pacific Nat’l. Assurance Co.*, 467 P.2d at 983.

Finally, the Knutesons’ argument is itself inconsistent with the proposition advanced because the mere reference to a class of coverage is not sufficient to establish coverage. The Knutesons themselves rely on a specific policy provision, and not merely a class of coverage, to support their argument of coverage under the Great American policy. (Appellants Brief, p. 25). Further undermining their argument, it is clear that

they must also refer to the definition in the Federal policy of the term “auto;” otherwise, a truck would not qualify and there would be no coverage for anything.

It is clear from the use of the word “coverage” in Section V, Subsection F.6. that the Great American policy does not make employees insureds while using non-owned automobiles unless the Federal policy does. The Federal policy unambiguously restricts that coverage to staff employees of SOS.

Of course, if this Court accepted the Knutesons’ assertion that reference to the Federal policy must be ignored, Mr. Peters still could not be covered under the Great American policy. The Knutesons’ position that the Great American policy must be read as if the Federal policy does not exist is actually self-defeating. If mention of the underlying policy were deleted from Section V, Subsection F.6. of the Great American policy, the provision would read as follows:

Any of your partners, executive officers, directors or employees [are insured] but only while acting in the scope of their duties.

However, the coverage granted by this Provision 6 does not apply to the ownership, maintenance, use, “loading” or “unloading” of any “autos,” aircraft or watercraft.

Mr. Peters was using an automobile when the accident occurred, so he would not be considered an insured under such a reading of the Great American policy. Even looking at the Great American policy standing alone, there is no coverage for Mr. Peters.

2. **Reading the Umbrella Policy in Conjunction with the Underlying Policy does not Violate the Utah Statute against Incorporation by Reference.**

The Knutesons recognize that application of the entirety of Section V, Subsection F.6. of the Great American policy means that Mr. Peters is not an insured under that policy. They also recognize that consideration of the Great American policy without reference to the underlying Federal policy leads to the same result. The Knutesons attempt to overcome this dilemma by invoking Utah statute and maintaining that Subsection F.6. is void because it requires the reader of the Great American policy to refer to the Federal policy to see the Federal policy's limitation of coverage. With no precedent involving umbrella and excess policies, the Knutesons contend this is impermissible incorporation under Utah Code Ann. § 31A-21-106(1).

However, they depend on a piecemeal application of the statute to cobble together coverage. They would have the Court open the door just enough to let in the fact that the Federal policy offers auto coverage but then slam it shut before the terms of that policy can be read. The Knutesons attempt to draw some distinction between a "condition" and an "incorporation." Subsection F.6.'s reference to the Federal policy cannot be both, and it certainly cannot be part one thing and part another. If it is a "condition," it controls to preclude coverage. If it is an impermissible incorporation, then all reference to the Federal policy is out, and the Great American policy standing alone precludes coverage. (See Point C.1. above).

The Knutesons take Utah Code Ann. § 31A-21-106(1) out of context. This statute provides that an insurance policy cannot “incorporate any provision not fully set forth in the policy or in an application or other document attached to and made a part of the policy at the time of its delivery . . . .” The Schedule of Underlying Insurance in the Great American policy lists the Federal policy that SOS purchased, reviewed and had changed to include the limitation that the Knutesons now want held impermissibly incorporated.

This Court has held only that this statute deals with situations where an insured would need to have separate knowledge of the law in order to understand what its policy covers in order to understand the terms of coverage. *See Universal Underwriters Ins. Co. v. Sate Farm Mut. Ins. Co.*, 925 P.2d 1270 (Utah 1996) (holding that primary insurance policy covering those individuals listed in a particular statute violated Utah Code Ann. § 31A-21-106 because the insured could not be expected to know what that statute said or where to find the statute); *Cullum v. Farmer Ins. Exchange*, 857 P.2d 922 (Utah 1993) (concluding that primary insurance policy limiting coverage to the “statutory minimum” would require insured to locate the statute and therefore violated § 31A-21-106). It has gone no farther.

In contrast, Section V, Subsection F.6. of the Great American policy did not require SOS to locate a statute or have specialized knowledge of the law. In order to understand this provision, SOS need only look at the Federal policy, which it had. SOS was not only aware of the extent of automobile liability coverage for SOS employees in

the Federal policy, it is the one who demanded that the second endorsement be written to limit coverage to staff employees. Section 31A-21-106 cannot, as this Court has interpreted it, eliminate language that the insured fully understood and arranged to be in place for its own purposes. The Knutesons ask this Court to extend the scope of the statute, yet they offer no compelling reason why other than their contention that it will help them achieve a result in this case that makes absolutely no sense. Such a result would not be consistent with the purpose of the limitation of coverage.

Acceptance of the Knutesons' reading of the statute would mean that umbrella and excess liability policies could not be written in Utah as a practical matter. Umbrella and excess liability policies exist only when there is an underlying policy, and if it is forbidden for these policies to refer to an underlying policy, the policies cannot operate as the parties intend them to operate. Excess policies that do little more than follow form to underlying policies would be useless (and, one would think, unenforceable by either the insured or insurer). To the extent umbrella policies provide coverage on the same terms as provided by underlying policies, those policies would be equally useless. Other parts of umbrella policies would become nonsensical. For example, it would be entirely unclear when coverage under these policies would attach. Umbrella policies (like the Great American policy) and excess policies state that their limits are not available until the amounts provided by underlying insurance are exhausted.

3. **Federal's Payment of its Policy Limits to the Knutesons does not Make Mr. Peters an Insured under the Federal Policy or the Great American Policy.**

Completely ignoring that the Federal policy does not provide coverage for Mr. Peters, and that the Great American policy has limiting language of its own, the Knutesons contend Great American is bound by Federal's settlement with the Knutesons in which Federal paid policy limits. Federal's mistake does not mean Great American must pay for it.

Faced with the Knutesons' bad faith action, Federal opted to settle, paying only its policy limits, but obtaining a release for extra contractual claims as well: "to resolve all claims and third-party claims against it in the declaratory judgment/bad faith lawsuit." (R. 759-64). The release contains a concocted and pointless statement that Mr. Peters was an insured under the Federal policy. What the Knutesons do not say is that Federal answered the Knutesons' third-party complaint for a declaration of coverage and for bad faith by denying that Mr. Peters was an insured under its policy. (R.331). It takes no imagination to see why Federal agreed to make the gratuitous statement it made in the agreement, and it is not because Federal believed it. SOS certainly would not accede to this statement, since it successfully urged Federal to prepare the second endorsement precluding temporary employees like Mr. Peters from being insureds. Great American was not a party to the agreement, nor was SOS. Federal was free to cut a deal with the Knutesons and escape the risk of the bad faith claim against it. Great American is not bound by that deal or the statement in the agreement.



In any event, there is nothing in the Great American policy that calls for Great American to pay just because Federal paid. The Great American policy states that coverage is “for no broader coverage than is provided under [the Federal policy].” It does not say “and for no broader coverage than what Federal decides in settlement of claims against it.”<sup>10</sup>

The Knutesons nevertheless argue that Great American is bound as a “follow form” excess insurer, which it is not. A pure “follow form” excess policy serves simply to increase the limits of the primary policy and does not contain its own limiting language. *Rhone-Poulenc, Inc. v. Int’l. Ins. Co.*, 71 F.3d 1299, 1303-04 (7<sup>th</sup> Cir. 1995), *rehearing denied* (1996), *on remand* 2006 WL 328011 (N.D. Ill 1996), *on remand* 1996 WL 435180 (N.D. Ill. 1996). A “follow form” excess policy incorporates and adopts every condition of the underlying policy. *Rummel v. St. Paul Surplus Lines Ins. Co.*, 945 P.2d 985, 989 (N.M. 1997). In order for an excess policy to “follow form” to a primary policy there must, at the least, be a “conspicuous, clear and express clause” incorporating the provisions of the primary policy into the excess coverage section of the umbrella policy. *Megonnell v. United Serv. Automobile Ass’n.*, 796 A.2d 758, 773 (Md. 2002). Great American’s policy is an umbrella policy, not an excess policy. Nowhere in Great

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<sup>10</sup> Great American’s policy does not contain a “follow the fortunes” clause. Reinsurance policies that bind the reinsurer to accept a ceding insurer’s good faith decision on all things concerning the ceding insurer’s policy terms and claims against it contain a “follow the fortunes” clause. It means that a reinsurer may not “second guess” the coverage decisions of the ceding insurer. 1A Couch on Insurance §9:16, 9:17 (3d ed. 2006).

American's policy are the words "follow form" found, much less a "conspicuous, clear and express clause" incorporating the entire primary policy into the umbrella policy. Great American's policy contains its own insuring agreement, as well as its own definitions, conditions and exclusions.

But even if none of that were true, the cases the Knutesons cite to support their argument do not involve the situation here. None involves an issue of policy construction. In *Playtex FP, Inc. v. Columbia Cas. Co.*, 609 A.2d 1087, 1093 (Del. 1991), the court considered whether an excess insurer could challenge whether its policy's attachment point was reached based on the excess insurer's understanding of how the primary policy was exhausted. *Id.* The court found as a matter of law that the primary policy was exhausted in a manner contrary to the excess insurer's understanding; however, it held that once the primary policy limits were held to be exhausted, they were exhausted, and since the excess policy attached upon exhaustion of the underlying policy limits, the excess policy did attach. *Id.* There was no finding that the excess insurer was bound by a term construed in the primary policy.

The Knutesons offer the case of *Associated Indem. Corp. v. Dow Chem. Co.*, 814 F. Supp. 613, 618 (E.D. Mich. 1993), for the proposition that it is unnecessary to examine the "occurrence" definition in an excess policy because the definition of the term in the primary policy controls with respect to all parties under all other policies. Again, the issue was not one of policy construction (the primary and excess policies did not even

have the same definitions of the term “occurrence”), but of determining as a matter of fact how many occurrences there were.

In *Amway Distrib. Benefits Ass’n. v. Northfield Ins. Co.*, 323 F.3d 386 (6<sup>th</sup> Cir. 2003), a primary carrier failed to advise its insured at renewal of a reduction in coverage, and the court held as a result that the reduction in coverage would not retroactively be recognized. The excess insurer was held to the broader original scope of coverage. *Id.* However, there was no disagreement as to the meaning of terms in either policy, merely a holding that the primary insurer was not able to impose retroactively a restriction in coverage it had intended because it failed to notify the insured that it was doing that. The fact that the excess carrier was held to the same result does not mean that there was a construction of a policy term in a primary policy that was “binding” as to the same term in the excess policy. There was no construction at all.<sup>11</sup>

Acceptance of the Knutesons’ position would create a rule of law that a primary insurer can settle a claim and unilaterally declare a person to be an insured for any reason and bind the umbrella insurer to that declaration. This would deprive the umbrella insurer of its day in court and invite untold mischief, if not collusion.

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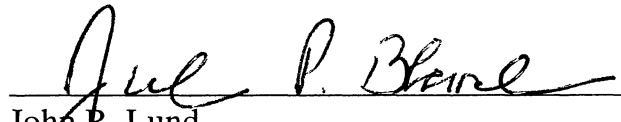
<sup>11</sup> Appellants also rely on three cases, *R.W. Beck & Assoc. v. City and Borough of Sitka*, 27 F.3d 1475, 1483 (9<sup>th</sup> Cir. 1994); *Great Atlantic Ins. Co. v. Liberty Mut. Ins. Co.*, 773 F.2d 976, 980 (8<sup>th</sup> Cir. 1985); and *L.E. Myers Co. v. The Harbour Ins. Co.*, 394 N.E.2d 1200, 1202-03 (Ill. 1979), for the proposition that a “follow form” excess carrier is obligated to provide coverage even in a situation where the primary policy is reformed post-claim. (Appellant’s Brief, p. 49). These cases are also irrelevant because they deal with the reformation of a primary policy due to a mutual mistake of the parties in the original placement.

## **VII. CONCLUSION AND RELIEF REQUESTED**

It is the burden of a person claiming that he is insured under a policy to prove that he is in fact insured. It is not the burden of the insurance company or the named insured to show the absence of coverage. The Knutesons have not met their burden of demonstrating that Mr. Peters, who clearly was not a staff employee of SOS, is somehow covered by a primary policy and umbrella policy that expressly limit coverage for claims arising from accidents involving non-owned autos to staff employees. Great American respectfully requests that this Court affirm the grant of summary judgment in its favor.

DATED this 13<sup>th</sup> day of September, 2006.

SNOW, CHRISTENSEN & MARTINEAU

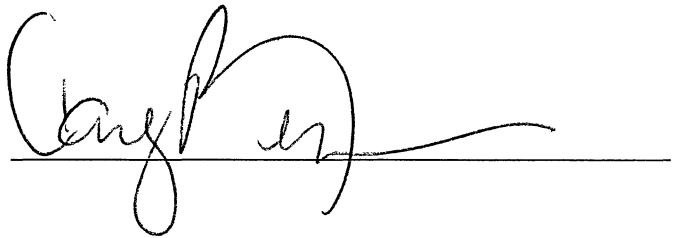
  
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## CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellee to be served by placing the same in the U.S. Mail, postage prepaid, to the below named attorney this 13<sup>th</sup> day of September, 2006.

Alan C. Bradshaw  
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A handwritten signature in black ink, appearing to read "Alan C. Bradshaw", is written over a horizontal line.