

2006

Great American E&S Insurance Company v. Dallas W. Peters, Brandon Knuteson, and Mary Lynn Knuteson: Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

GREAT AMERICAN E&S)	
INSURANCE COMPANY,)	
)	
Plaintiffs/Appellee,)	
)	
v.)	Case No. 20060368-SC
)	
DALLAS W. PETERS and BRANDON)	Third District No. 030909411
KNUTESON, individually and on)	
behalf of MARY LYNN KNUTESON,)	
an incompetent adult,)	
)	
Defendants/Appellants.)	

**REPLY BRIEF OF APPELLANTS, DALLAS W. PETERS and BRANDON
KNUTESON, individually and on behalf of MARY LYNN KNUTESON, an
incompetent adult**

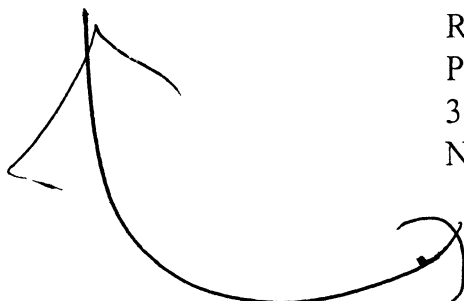
On appeal from the final judgment of the Third Judicial District Court
for Salt Lake County, Honorable L.A. Dever, District Judge

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ARGUMENT

I. RESPONSE TO GREAT AMERICAN'S STATEMENT OF FACTS.

One would expect the Appellee, Great American E&S Insurance Company ("Great American") to recite as the relevant "facts," those discrete undisputed material facts offered below in Great American's cross motion for summary judgment. Instead, Great American has offered a "new" statement of facts that includes "facts" without record citations; facts citing deposition testimony for which there is no foundation; facts that are correct in part and embellished in part; and in a few critical instances plain misstatements. Unfortunately, this approach is not new, since Great American has attempted to change the record regarding its summary judgment motion at every opportunity.¹

Great American's approach makes it difficult to determine what facts Great American actually considers to be **material** and **without dispute**. Nevertheless, Peters² must clarify that the record does not remotely support the claims: (1) that SOS Staffing,

¹The facts are dealt with below in the following briefs: Great American's original statement of facts (R 16-20) is responded to in Knutesons' opposition (R 841-845). Knutesons also offered a statement of undisputed facts (R 809-17) in opposition to Great American's motion and in support of its own motion. These are admitted by Great American. R 1039. Great American nevertheless sought to introduce new affidavits and a new statement of facts on reply. R 933-68. Knutesons responded, pointing out that these additional facts are irrelevant and far from undisputed. R 1066-71, 1076-80. Great American then offered a supplemental brief wherein it argued about what subsequent depositions and documentary evidence demonstrated (R 1712-35) and the trial court required simultaneous briefs so no direct response was allowed. Nevertheless, Knutesons offered a detailed statement of supported facts. R 1405-14.

²Peters and Knutesons have taken the same position throughout these proceedings and reference to Peters' position is that of Knutesons as well.

Inc. ("SOS") did not desire or obtain automobile liability insurance for any of its employees supervised by clients; (2) that Federal provided automobile coverage to SOS's clients on an individual basis based upon payment for such insurance rather than under the same policy language that applies to Vicars Trucking Company, Inc. ("Vicars") and to Peters; and (3) that SOS communicated and Federal agreed with SOS's claimed use of the words "staff" and "temporary employee." **The actual facts are to the contrary.**

A. SOS Sought Insurance for Some Employees Supervised by Clients.

Great American's principle premise is that SOS desired for all of its employees supervised by clients to be excluded for both primary and secondary automobile insurance regardless of whether the employee worked as a "temp" on short-term assignment or was a leased employee hired on a permanent basis. Great American takes this position because if a **single** employee supervised by clients is covered, then "staff" potentially embraces Peters because he was in no way a "temp." The facts easily disprove Great American's premise.

1. SOS Was Contractually Obligated to Provide Automobile Insurance.

As a starting point, SOS admittedly paid a premium for secondary non-owned automobile coverage based upon 10,000 employees, which includes all employees working for clients. *See* Appellants' Brief, Statement of Facts ("SOF") at 13 (¶¶ 35-36). The original affidavit of SOS's general counsel, John Morrison, concedes coverage was provided to "[e]mployees working for SOS clients" when requested. R 999 (Affidavit at

¶ 7). Morrison again confirmed in testimony that non-owned automobile liability coverage was extended to some employees supervised by clients and to those clients. R 1491 (Morrison Depo at 26). SOS was **contractually bound** in numerous contracts to provide such insurance. R 1514-15 (Invitrogen); R 1525 (Bergen Brunswick); R 1556 (Hewlett Packard); *see also* R 1570 (Invitrogen); R 1573 (Bergen Brunswick); R 1574 (Chimes and Hewlett-Packard); R 1575 (same); R 1579 (American Fence and Security); R 1580 (GE Capital); R 1581 (Questar); R 1606 (Alcoa); R 1585 (same); R 1606 (Burlington Resource); R 1633 (Questar). Clients also demanded that SOS's automobile insurer agree to waive its subrogation rights. *See* R 105 (Handley Depo at 105) ("**it's an ongoing issue as far back as I can remember**"); *see also* R 1457 (Marshall Depo at 40).

2. *SOS Reduced its Primary Risk.*

SOS's approach was **not** to eliminate automobile coverage but to do three things to reduce its primary automobile insurance risk. First, SOS applied for and sought insurance. *See* SOF at 13 (¶¶ 35-36). Second, SOS apparently sought to reduce the number of claims by foregoing coverage for "temps" on short-term assignment. The words used are "temporary employees for the customers." R 682. Third, SOS sought to reduce the level of risk for the remaining covered employees supervised by clients by relying upon the clients' primary insurance. The broker suggested that because SOS's automobile insurance is secondary, SOS could require that the clients and the involved

employees maintain sufficiently high limits so that SOS's coverage would not generally respond. *See* R 1700-01; R 1435-36 (Handley Depo at 52-53).

3. *The Same Unmodified Policy Language Applies to All Clients.*

Most significantly, for purposes of this appeal, the record is undisputed that in providing automobile insurance for employees supervised by clients, the same policy language applies to **all** of SOS's clients and employees. Great American's statement that individual SOS clients "**pay[]**" for this insurance is patently false. *See* GA Brief at 7. Rather, Federal communicated to SOS that it would never issue an endorsement adding a **particular** SOS client as an "additional insured" for automobile coverage and that "[n]o such endorsement exists." R 1431 (Handley Depo at 24). The agent reported these facts to SOS. R 1431, 1435-36, 1451 (Handley Depo at 24, 51-54, 144); R 1697-1702 (e-mails); R 1462-67 (Marshall Depo at 61-62, 68, 72-74, 76, 80-81); R 1498-1500, 1502-03 (Morrison Depo at 72, 76-77, 86-89). Consequently, SOS's clients from Vicars to Hewlett Packard are treated the same because the Federal Policy is an integrated contract:

This policy's terms can be amended or waived only by endorsement issued by **us** and made a part of this policy.

R 667 (¶ B) (emphasis in original). The SOS witnesses concede that Federal issued no endorsements adding SOS's clients or the involved employees as "additional insureds."

R 1431, 1436, 1451 (Handley Depo at 24, 53-54, 144); R 1456-59, 1463, 1475 (Marshall Depo at 36-37, 41, 47, 67-68, 115); R 1492, 1500, 1502 (Morrison Depo at 30, 78, 87).

Nevertheless, Federal communicated to SOS the "opinion that [Federal] did not need to grant . . . to our clients additional insured status because they felt they were already included in the wording . . . in the policy." R 1462 (Marshall Depo at 62); *see also* R 1500 (Morrison Depo at 77); R 1432-33 (Handley Depo at 36-38). Federal's opinion is set forth in an e-mail from Federal's underwriter stating:

Under the Who is an insured section of the policy, paragraph C extends coverage to "Anyone else who is not otherwise excluded under paragraph b. above and is liable for the conduct of an "insured" but only to the extent of that liability".

R 1698. Under this language, the SOS client is an "insured" to the extent it is responsible for the conduct of another "insured," the covered SOS "staff" employees. *See* R 1465 (Marshall Depo at 73-74) (if the SOS employee is an "insured" then the client could be an insured for the employee's conduct); *see also* R 1503, 1510 (Morrison Depo at 91, 153-54) (SOS's client "likely . . . could be held vicariously liable for activities of an SOS employee"). Admittedly, this contract language "appl[ies] to **any** of SOS's clients." R 1451 (Handley Depo at 143) (emphasis added).

4. *SOS Confirmed Coverage for Employees Supervised by Clients.*

Without obtaining "additional insureds" endorsements, SOS issued "Certificates(s) of Liability Insurance" confirming coverage for automobile liability including excess liability coverage under the Great American Policy. *See* R 1569-81.³ With respect to

³Great American is sometimes referred to in these certificates by its prior name,
(continued...)

Hewlett Packard ("H.P."), for example, SOS supplied its client with **full-time** computer programmers. R 1496 (Morrison Depo at 49). Under the contract with H.P., non-owned automobile liability insurance was required for both H.P. **and for the individual employees.** R 1496 (Morrison Depo at 51). In meeting this contractual obligation, SOS represented to H.P. that coverage was provided under the Federal Policy "but only as respects to work performed by the named insured's employees." R 1574 (Certificate). In other words, H.P. was covered only because the SOS employee who did full-time work is an "insured." *See* R 1698 (underwriter's e-mail). In describing whether SOS relied upon the language quoted by Federal's underwriter to provide this assurance to clients, SOS's insurance broker testified: "Yes. We had to." R 1434 (Handley Depo at 42).

In short, the record demonstrates **without dispute** that some SOS employees supervised by clients, including for example full-time programmers supplied to H.P., were covered "staff" and not excluded "temporary employees."

³(...continued)

"Agricultural Express & Surplus." The certificates are not endorsements and do not modify the policies. The certificates expressly state: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY. . . . [IT] **DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE.**" *Id.* (emphasis added). The broker concedes he did not have authority to bind, Federal R 1427 (Handley Depo at 6), the certificates have a stamp signature for SOS's agent (not Federal's signature), and they were not as a matter of routine practice provided to Federal. R 1445 (*Id.* at 117). Providing the certificate to Federal was a "judgment call" and Handley has no information that any of SOS's certificates were provided. R 1445 (*Id.* at 117-18).

B. SOS Never Communicated to Federal Any Special Meaning for the Words Used in Endorsement 16-02-33.

Faced with the **admitted** fact that SOS's post-claim reading of the words "staff" and "temporary employees for the customers" is contrary to the ordinary meaning of the words used (R 1478 (Marshall Depo at 126); R 1509 (Morrison Depo at 149-50)), Great American nevertheless argues that SOS communicated to Federal a unique understanding of these words. *See* GA Brief at 23. Afraid of the spotlight, Great American makes this factual claim in footnote at 23, n.5 with citations that are not remotely supportive.⁴

The testimony of the three SOS witnesses disproves Great American's factual claim. SOS's general counsel, John Morrison, was present for no discussions with Federal (R 1489, 1501 (Morrison Depo at 19, 83)), he did not draft any policy language (R 1490 (*id.* at 23)) and Morrison "can't give us a personal statement as to how that particular language [endorsement 16-02-33] made it onto this endorsement." R 1507 (*id.* at 133). Likewise, SOS's risk manager, Mark Marshall, recalls no discussions with Federal (R 1455, 1470 (Marshall Depo at 22, 93)), he does not know "what Steve Handley did or did not say to anyone at Federal with respect to [16-02-33]" (R 1470,

⁴**The cited testimony** reveals that the insurance broker can't recall when the involved endorsement came into existence, he can't recall "how it came into existence" and he doesn't know if he talked to SOS at the time of the Federal Policy. R 1440-41 (Handley Depo at 84-85). The absence of any communication with Federal on the key language is detailed below. Great American also cites deposition testimony of Mark Marshall that might be misleading. Great American quotes Marshall regarding what was communicated to "them," making it appear he communicated with Federal, without noting that Mr. Marshall has no idea what was stated to Federal as described below.

1486-87 (*id.* at 94, 219-20) and he is not aware of any communication where SOS told Federal "it meant for the word temporary to mean permanent." R 1486 (*id.* at 217).

With respect to SOS's broker, Steve Handley, his recollection is extremely limited. He does not recall who the underwriter at Federal was or when he may have spoken with him. *See* R 1109 (Affidavit at ¶ 13); *see also* R 1428, 1430, 1440-41, 1450 (Handley Depo at 11-12, 17, 84-85, 137). Handley only recalls asking for an endorsement that would make "the 'Employees As Insureds' endorsement (CA 989) apply to the staff employees of SOS and not temporary employees." R 1109 (Affidavit at ¶ 13). Handley has no recollection of any discussion "regarding the words 'staff employee' or 'temporary employee.'" *Id.*; *see also* R 1428-29 (Handley Depo at 12-13, 15-16). Moreover, when Great American's counsel asked Handley whether SOS intended for SOS's payrollers (including full-time employees like Peters) to be considered part of SOS's covered "staff," or part of the uncovered "temporary employees," he responded:

THE WITNESS: I would not know how to answer that question.

R 1453 (Handley Depo at 154) (emphasis added). In short, there is no evidence that SOS's alleged secret intent was communicated to Federal.

Lastly, the evidence from Federal is uniformly supportive of coverage. Federal told SOS that without making policy modifications SOS could satisfy certain client demands for automobile coverage by citing the policy language that the SOS employees working for the clients are "insureds" and therefore the clients are likewise covered for

the conduct of these employees. R 1698. Federal also recognized coverage **for Peters specifically** before coverage litigation was pursued. *See* R 744-45 (letter confirming coverage). Federal recognized coverage despite SOS's protests that such finding could impact its future rates (R 1504, 1506, 1508 (Morrison Depo at 94, 105, 146)); R 1439 (Handley Depo at 66-67)), and despite Great American's protests. *See* GA Brief at 32.⁵

II. THE GREAT AMERICAN POLICY COVERS ALL SOS'S EMPLOYEES.

With the above clarification of the factual record, Peters turns to the legal arguments presented regarding the Great American Policy. Great American has denied coverage by seeking to incorporate by reference two endorsements to the Federal Policy.

⁵Great American's citation to materials given to Vicars also requires a brief response because the offered statements lack context. Vicars signed two documents, R 85 ("Nonliability Statement") and R 439 ("Vehicle Statement"). The documents were signed in connection with SOS's **Ogden** office possibly providing **short-term temporaries** to Vicars. *See* R 786-93 (Alayne Vicars Depo at 7,12, 14-15, 18-20, 26-27, 32-33 and 46); R 795-96 (John Vicars Depo at 39-43). The **Logan** office of SOS was not involved and it is that office which provided employee leasing services for full-time employees like Peters. *Id.* In the end, no short-term temporaries were ever provided to Vicars. *Id.* The two SOS documents are also irreconcilably in conflict. The Nonliability Statement states "employees placed by SOS are not otherwise covered by employers liability and/or general liability insurance." *See* R 85. The Vehicle Statement states the opposite: "SOS employees are covered by Workers' Compensation, employers' liability and general liability policies. Certificates of Insurance will be furnished upon request." *See* R 439. The Federal Policy is a type of general liability policy. To the extent the Vehicle Statement explains that there is an exception for certain vehicles, that exception is a limited one: "[i]t is not practical for us to insure vehicles or machinery/equipment **only temporarily used** by our employees at your request." *See* R 439 (emphasis added). Most importantly, SOS's desire to secure secondary automobile insurance for employees in the field is undisputed. *See* Appellants' Brief at 13 (SOF ¶¶ 35-36); *see also* R 1700-01 (memo from broker to SOS).

Great American then attempts to ignore Utah Code Ann. § 31A-21-106(1) which prohibits incorporation by arguing that the statute is permissive and has been applied only "where an insured would need to have separate knowledge of the law in order to understand what its policy covers." GA Brief at 38-39. Great American then claims that if the statute is applied to excess or umbrella policies such policies "could not be written in Utah as a practical matter." *Id.* These arguments are irrelevant and wrong.

"It is . . . well established that '[t]he form of the verb used in a statute, i.e., something 'may,' 'shall' or 'must' be done, is the single most important textual consideration determining whether a statute is mandatory or directory.'" *State ex re. M.C. v. K.H.C.*, 940 P.2d 1229, 1236 (Utah Ct. App. 1997) (quoting 3 Norman J. Singer, Sutherland Statutory Construction § 57.03, at 7 (5th ed. 1992)). Here the Utah legislature has stated that an insurance policy "**may not**" incorporate by reference any term. Since the word "may" is permissive, it follows that the opposite, "may not," is mandatory. *Id.*; *see also* GA Brief at 38 (policy "cannot 'incorporate.'"). This Court has already rejected the argument that the statute is permissive and will not be enforced if its "purpose" is not violated, for example, when an insurance policy incorporates information presumably known through public statutes. *Cullum v. Farmers Ins. Exch.*, 857 P.2d 922, 925 (Utah 1993). This Court held "[t]he language of the statute does not lend itself to such an interpretation." *Id.*

Further, requiring an excess or umbrella carrier to attach those portions of an underlying policy intended to be included does not render such insurance "impractical," rather it presents an easy and statutorily mandated way to ensure that the policy reveals its precise language. The Great American Policy is a perfect example of how clarity could easily have been achieved but instead ambiguity was created.

The language Great American cites is unclear on whether incorporation is to take place at all and, if so, to what extent. Great American argues that paragraph "F.6" incorporates Federal endorsements CA 989 and 16-02-33 based upon the phrase "for no broader coverage" and alleged "context." *See* GA Brief at 33-36. In reality, the context of paragraph "F.6" refutes the claim that **any language dealing with "who is an insured"** is incorporated. The Great American Policy devotes nine separate subparagraphs and over 500 words to defining the covered "insured[s]." R 704 (¶ F). The Federal Policy deals with these same subjects on its own precise terms. *See* R 655 (¶ A.1).

Most importantly, the Great American Policy contains its own definition of the "employees" who are insureds. R 704 (¶ F.6). The Federal Policy likewise contains its own definition of the covered "employees." R 662 (¶¶ E and H), R 663 (¶ N), R 681 (CA 989) and R 682 (16-02-33). While Great American apparently does not argue that all 500 plus words defining the covered "insureds" are displaced by language from the Federal Policy, it implicitly argues that 68 words used to define the covered "employees" are

eliminated. GA Brief at 34 ("the analysis runs back into the clear language of the second endorsement of the Federal policy."). **In context**, this argument is absurd. Great American fails to explain how it can pick and choose language on the subject of "who are the insureds," while other similar language is not incorporated.

The structure of ¶ F.6 also contradicts Great American's interpretation. Paragraph F.6 contains subparagraphs that deal, in order, with three subjects: (1) that employees are insureds while acting within the scope of employment; (2) that automobile coverage must be provided in the underlying insurance; and (3) who are and are not the covered employees. R 704 (¶ F.6). In context, the reference to no broader "coverage" in the second subparagraph is not an attempt to define the covered "employees." If it were, Great American would not have provided its **own definition** of the covered "employees" in the **following subparagraph**. *Id.*

Incorporation "must be sufficiently clear for [the] court to conclude the parties intended the incorporation." *Schneider Nat'l Transport v. Ford Motor Co.*, 280 F.3d 532, 538 (5th Cir. 2002). Peters previously cited many cases which have held that a reference to "coverage" in umbrella policies does not embrace the list of insureds or other limiting language but instead merely requires that underlying insurance be provided. *See* Appellants' Brief at 23-25. Great American dismisses these cases without analysis, yet

Great American does not cite a single case supportive of its position that the reference to "no broader coverage" redefines the "insureds." See GA Brief at 34-35.⁶

Finally, Great American's claim that Peters relies upon incorporation by reference as a primary argument is incorrect. Paragraph F.6 imposes a condition that underlying automobile insurance be provided and that condition is admittedly met. R 756 (Great American's counsel); R 1855 at 5-6 (same). Further, once that condition is met, this Court can enforce the Great American Policy without imposing additional limitations contained in endorsements that violate Utah Code Ann. § 31A-21-106(1). See Appellants' Brief at 26-27 (citing this Court's prior case law and § 31A-21-107(1) to the effect that a non-complying policy may be enforced by the policyholder). Great American has not responded on this key point and its position that coverage fails entirely is clearly wrong under past cases and the Insurance Code. *Id.*

Alternatively, this Court can simply read the "no broader coverage" language and find that at most Federal's more limited insuring clause is incorporated and the Great American Policy can be enforced as written. See Utah Code Ann. § 31A-21-107(1).

⁶This Court's recent analysis in *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 35, 140 P.3d 1210, 1217, lends contextual support to the interpretation that Great American intended for the "no broader coverage" language to refer, at most, to the **scope of the insuring clause** for automobiles, not to redefine the "insureds." In *Benjamin*, this Court acknowledged that in general "[u]mbrella policies widen the scope of coverage." That is the case here under the insuring clauses. See Appellants' Brief at 25, n.7. Consequently, the "for no broader coverage" language serves to overcome the general rule of broader insurance for the limited purpose of the automobile insuring clause.

III. COVERAGE EXISTS IF THE GREAT AMERICAN POLICY IS "FOLLOW FORM" AND THE LANGUAGE OF ENDORSEMENT 16-02-33 IS INCORPORATED BY REFERENCE.

If this Court disagrees with the above analysis of the Great American Policy and finds it necessary to address endorsement 16-02-33, Peters is nevertheless covered by the Federal Policy. Great American's brief is revealing regarding a key issue it chooses not to address. Specifically, Great American does not analyze endorsement 16-02-33 under plain meaning. Instead, Great American sets up the false premise that SOS intended to obtain an exclusion for **every one of its employees supervised by clients** and Great American argues SOS communicated to Federal an intent to use the words in 16-02-33 according to a special meaning. As detailed in Peters' original Statement of Facts (Appellants' Brief at 9-13 ¶¶ 20-36) and *supra* Section I, these assertions are incorrect as a matter of undisputed fact. SOS never intended for **all** its employees supervised by clients to be excluded, particularly for secondary coverage above the clients' insurance. Tragically, it is undisputed that Mary Lynn Knuteson's injuries exceed the limits of all underlying insurance, including the Vicars and Federal policies.

More importantly, SOS's uncommunicated intent is irrelevant. *See* 17A Am.Jur.2d Contracts § 348 ("the intention of the parties must be gathered from that language, and from that language alone, no matter what the actual or secret intentions of the parties may have been); *see also* Appellants' Brief at 41-43 (additional authority). At one time, Great American conceded this point. R 1719 ("Great American does not . . . suggest that SOS's

understanding of the definitions of the terms 'staff' and 'temporary employee' is relevant to the construction of the insurance contract."). Unfortunately, Great American has not abided by this concession on appeal. *See* GA Brief at 17-32.

When the words used are given plain meaning, coverage is clearly provided. In trying to avoid reading the key language ("staff of the insured only and not temporary employees for the customers") according to plain meaning, Great American sets up a strawman. Great American argues that Peters has attempted to make endorsement 16-02-33 "useless[]" (GA Brief at 19), "ignored [it] altogether" (*id.*), "disregarded [it]" (*id.*), and that the interpretation offered by Peters "would cause every SOS employee to be" covered. *Id.* at 27-28. This parade of horrors is unfounded.

SOS has two core businesses: supplying "temps" and "employee leasing." *See* R 1112 (insurance application). While Great American accuses Peters of "concocting" a third category of SOS employee (*see* GA Brief at 5), so-called "payrollers," it is SOS that has consistently characterized Peters as a "payroller" (*see* R 1010 (Marshall Affidavit at ¶ 5); R 1504 (Morrison Depo at 96); R 1086 (contemporaneous November 2001 letter). SOS also concedes payrollers are treated differently from both "temporary employees" who work for clients and other employees who work in SOS's offices.⁷

⁷As compared to "temporary employees," payrollers are paid on a different pay scale, payrollers do not receive a 401K company match and payrollers' vacation benefits differ. R 1504-05 (Morrison Depo at 96-97); R 1478-79 (Marshall Depo at 128-29).

Within this admitted context, Peters does not dispute that many, perhaps most, of SOS's employees are excluded because most are "temporary employees for the customers." However, some employees are not, including those who work in SOS's physical offices and others such as the full-time computer programmers assigned to H.P. *See supra* 5-6. Once the strawman is removed, the position of Peters is elementary.

Peters' position is simply that the words "and not temporary employees for the customers" cannot be magically transformed into the words "and not [all] employees who work directly for customers at their place of work" as Great American argues. *See* GA Brief at 19-20. In seeking reformation, Great American asks this Court to do six things it cannot do: (1) throw away dictionaries and existing rules for contract construction, including reading the word "temporary" out of the contract; (2) disregard Federal's definition of a "temporary worker" in the same policy as embracing a temporal component; (3) disregard SOS's public use of the word "staff" in favor of an undisclosed subjective meaning; (4) disregard Federal's finding of coverage and payment of the claim; (5) disregard SOS's representations and warranties to clients that some employees working at a customer's location are covered; and (6) disregard the admissions of Great American's coverage counsel and adjustor.

With respect to the critical rules of contract interpretation, it is apparent that Great American is seeking to have this Court apply a specialized, technical, subjective meaning. *See* GA Brief at 23-25. However, in Utah, the standards for construing insurance

contracts are well established and so long as the language is unambiguous (as Great American contends), "the parties' intentions are determined from the plain meaning of the contractual language." *Benjamin*, 2006 UT 37, ¶ 14. Words must be interpreted as "used in common, daily, non-technical speech," not a specialized vocabulary. *Government Employees Ins. Co. v. Dennis*, 645 P.2d 672, 675 (Utah 1982); *see also United States Fid. & Guar. v. Sandt*, 854 P.2d 519, 525 (Utah 1993) (refusing to read policy based upon insurance company's "plausible [meaning] when analyzed by one trained in technical construction"); *Dawson v. Dawson*, 841 P.2d 749, 751 (Utah 1992) (meaning must "be plain to a person of ordinary intelligence and understanding . . . in accordance with the usual and natural meaning of the words"). Moreover, "this court has a long history of relying on dictionary definitions to determine plain meaning." *State v. Redd*, 1999 UT 108, ¶ 11, 992 P.2d 986, 990. In particular, "standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries." *Dennis*, 645 P.2d at 675.

Great American throws this established law aside and argues that dictionaries and plain meaning should be ignored because no dictionary contains the entire phrase "temporary employee for the customer." GA Brief at 23. In reality, Great American's argument is, in essence, an attempt to violate the fundamental rule that all of the words used must be given effect. Great American simply reads the word "temporary" out of the

Federal Policy because supposedly "the essence" of the phrase "temporary employee for the customers" is that "he [is] working for a customer." *Id.*

This attempt to read the word "temporary" out of the Federal Policy is improper. *See Marriot v. Pacific Nat. Life Assur. Co.*, 467 P.2d 981, 983 (Utah 1970) ("we . . . assume that language included [in an insurance policy] was put there for a purpose"); *Vitagraph, Inc. v. American Theatre Co.*, 291 P. 303, 306 (Utah 1930) ("no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof"). In addition, Great American cannot argue that the word "temporary" is anything but plain and unambiguous. It means "lasting or effective for a time only." R 1073-75 (Random House Webster's College Dictionary (2nd ed. Revised 2000)). As applied to an employee, it means "an office worker hired . . . for a short period of time." *Id.* Nor does Great American explain how it can read the word "temporary" out of the Federal Policy, when that same policy **defines** the very similar phrase "temporary workers" in a temporal way and such definition makes a difference for coverage. *See* R 662-63 (§§ E, H, N).

Great American's reading of the word "staff" is equally unconvincing. Again, Great American asks this Court to ignore plain meaning and the dictionary definition of "staff" as "a group of people, especially employees, who carry out the work of an establishment or perform a specific function." R 1074. Instead, Great American mischaracterizes the position of Peters by claiming that he reads the Federal Policy so that all "temporary employees" are "staff" and all temporary employees are covered. *See* GA

Brief at 19, 23, 27-28. As noted above, many, if not most, "employees" of SOS are not "staff" because they are "temporary employees" who are "hired . . . for a short period of time." R 1073-75 (dictionary).

In considering the meaning of "staff," this Court should also consider Great American's discussion of SOS's website. *See* GA Brief at 30. Great American, with desperation, argues that SOS's website is not "part of the record" (*id.*), although that claim is untrue. *See* R 1081-85.⁸ The website shows that SOS publicly refers to the workers it provides to its customers as "staff" to meet the customers "staffing" needs. *Id.* Great American counters that "[t]he website speaks of placing a temporary employee with a customer." GA Brief at 30. In reality, the reference to "temporaries" is only to the fact that SOS **changed its name** from "SOS Temporary Services to SOS Staffing Services, Inc.--a name that would **better reflect their** changing name and **broader scope of services**." R 1084 (emphasis added). This broader scope of service includes "information technology and specialty niches" (R 1094) and "temporary, temp-to-hire and **permanent** placement" (R 1082 (emphasis added)). SOS undeniably does not limit its use of the word "staff" to refer to office personnel. In fact, it changed the company's name from "Temporary Services" to "Staffing Services" precisely because SOS supplies both short-term ("temporary") and long-term ("permanent") employees **to clients**. At a

⁸The website was presented to the trial court on December 15, 2003. *Id.* Despite several subsequent filings and oral argument, Great American has never taken issue with the genuineness of the website. *See* R 1294-1322, 1707-37, R 1855.

minimum, the word "staff" is "a 'slippery' word to mark out and designate those who are insured by the policy [and] . . . [a]ll who may, by any reasonable construction of the word, be included . . . should be given [the policy's] protection." *Dennis*, 645 P.2d at 675.

Great American also conspicuously fails to address this Court's guidance that contracts are to be read consistently with the "actions of the parties in proceeding under the contract." *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 23, 48 P.3d 918, 920; *see also* Restatement (Second) Contracts § 202(4), cmt g ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."). Great American instead attacks Federal, Peters and their lawyers by describing Federal's finding of coverage as "concocted and pointless." GA Brief at 40. In truth, Federal found coverage before coverage counsel was retained and despite Great American's attempts to interfere. As the drafter of endorsement 16-02-33 (*see* Appellants' Brief at 11, SOF ¶ 25), Federal's coverage finding is "the strongest evidence" of meaning. Restatement (Second) Contracts § 202(4), cmt g.

SOS's actions are likewise supportive of coverage. SOS's post-claim assertions of intent made in the context of concerns over future insurance rates are irrelevant and directly at odds with SOS's contemporaneous efforts to seek secondary automobile liability insurance for its employees supervised by clients including "payrollers." SOF at 13 (¶¶ 35-36). SOS also represented and warranted automobile coverage for clients and

involved employees under the **same** policy language relied upon here, including full-time programmers sent to work for H.P. *See supra* 5-6.

Great American's actions are also consistent with coverage. Great American tries to sweep aside the admissions of its adjustor and coverage counsel, citing cases outside of Utah. *See* GA Brief at 31. Great American fails to distinguish the cited Utah authority. *See* Appellants' Brief at 45, n.17. Great American simply does not own up to the fact that its adjustor and legal counsel concluded after studied review that the only issues under the Federal Policy were whether Peters was on a temporary short-term assignment and whether he was acting to benefit SOS. *See* R 635-42, 753-58. These agents did not contend, as Great American now argues, that the word "temporary" can be read out of the Federal Policy. *See* GA Brief at 19-20.

In short, the Federal Policy covers Peters because he was an SOS employee who was not a "temporary employee" for a customer.

IV. AMBIGUITY IN ENDORSEMENT 16-02-33 MANDATES A FINDING OF COVERAGE.

If this Court does not find that the Federal Policy unambiguously covers Peters, coverage is still available because in Utah, "ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage." *Sandt*, 854 P.2d at 522. At a minimum, the reading of 16-02-33 offered by Federal and Peters is one reasonable interpretation.

Great American seeks to override the established principle of construing ambiguity against the insurer by citing *Jaramillo v. Providence Washington Ins. Co.*, 871 P.2d 1343, 1347 (N.M. 1994) and arguing that Peters is a "third party" stranger to the Federal Policy. See GA Brief at 27-28. *Jaramillo* does not support Great American because the policy in that case covered only one class of insureds--"you"--defined as a corporate entity. Here, the Federal Policy defines the covered insureds to include SOS's "employees." See SOF at 6 (§§ 6-7). Where a class of insureds is identified, the plaintiff "need not be personally named in the contract" in order to recover just as any other insured. See *Tradesmen Int'l v. United States Postal Serv.*, 234 F. Supp. 2d 1191, 1202 (D. Kan. 2002); see also *United States v. United Services Auto. Ass'n*, 968 F.2d 1000, 1002-1003 (10th Cir. 1992) (ambiguous language covers persons other than named insured). The Federal Policy mandates this result: "the coverage afforded applies separately to each insured who is seeking coverage or against whom a . . . 'suit' is brought." R 662 (§ F).

In *Dennis*, 645 P.2d at 674, this Court dealt with a virtually identical issue and found that the rule requiring that ambiguities be construed against the insurer applies to an "insured" whose status arises by description rather than by name. *Id.* (finding the word "resident" to be ambiguous). Similarly, in *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857 (Utah 1988), the "insured" was the husband of the named insured and this Court did not hesitate to apply the "long subscribed to . . . view that any ambiguity or uncertainty in the language of an insurance policy must be resolved in favor of coverage." *Id.* at 858. In

light of these cases and the language of the Federal Policy, it is clear Peters is an "insured" equal to SOS.

In trying to avoid the impact of an ambiguity, Great American also cites *Pekin Ins. Co. v. Benson*, 714 N.E.2d 559, 563 (Ill. Ct. App. 1999) for the proposition that the phrase "and not temporary employees for the customers" merely illustrates who the "staff" does not include, rather than serving to define who is not covered. See GA Brief at 26, n.7. In *Pekin*, however, the illustration was in a separate sentence and the word used was "includes," which is far more illustrative than the words "and not." *Id.* at 565. Moreover, the holding in *Pekin* is that because the word "includes" could also be read to be a phrase of limitation (i.e., a definition), the policy had to be read to favor the broadest possible coverage. *Id.* Here, the phrase "staff of the insured only and not temporary employees for the customers" is most naturally read to define the excluded "non-staff" as the "temporary employees for the customers." Because this reading is supportive of coverage, it **must** be followed. *Sandt*, 854 P.2d at 522-23.

In addition, the word "staff" is not limiting. "Staff" is commonly defined as a synonym for "employee." R 941-42 (Addendum Ex. I); R 1074 (Addendum Ex. H). SOS itself refers to the people it sends to its clients as "staff" who solve "staffing" problems and provide "staffing solutions." R 1081-84. Even more importantly, Federal reasonably read the language of 16-02-33 to provide coverage and it paid its \$1,000,000 limit. As

detailed above, SOS's and Great American's actions likewise demonstrate that Peters has presented a "reasonable" reading of the Federal Policy.

Moreover, if Great American were correct that Federal and SOS agreed to exclude all "employees who were directly responsible for customers at their place of work" (GA Brief at 19-20), that intent could have been easily expressed. Instead, Federal and SOS chose the words "temporary employees" at a time when SOS knew it would continue to field demands from H.P. and other clients for "permanent" employee insurance. Great American now seeks to ignore the word "temporary," while Peters gives effect to the word and therefore his interpretation, joined by Federal, is clearly reasonable.

V. GREAT AMERICAN IS BOUND BY FEDERAL'S PROVISION OF COVERAGE.

Although Great American tries to avoid the words "follow form," it is undeniable that Great American's position is that its policy "follows" Federal endorsements CA 989 and 16-02-33. *See* GA Brief at 2, 34. In taking a coverage position contrary to Federal's, it is important to note that Great American had no involvement in drafting the Federal Policy and there were no communications with Great American. *See* SOF at 9 (¶ 19).

Consequently, the law is clear that as a follow form carrier, Great American must pay according to Federal's interpretation, especially where it had no involvement in drafting. *See Playtex FP, Inc. v. Columbia Cas. Co.*, 609 A.2d 1087, 1093 (Del. 1991) (follow form carriers are held to the interpretation of the primary insurer); *Associated Indem. Corp. v. Dow Chemical Co.*, 814 F. Supp. 613, 618 (E.D. Mich. 1993) (consistent

interpretation is necessary). Great American weakly attempts to distinguish these cases as not involving policy "construction." *See* GA Brief at 42. To the contrary, in *Playtex*, the court extensively analyzed the primary insurance and held that the excess carrier was bound by the construction of the primary insurer. 609 A.2d at 1092-98. Similarly, in *Associated Indem.*, 814 F. Supp. at 618, the court construed and applied the terms of the primary policy, precisely because the policies followed form. *See also* Appellants' Brief at 49 (*citing* additional cases).

Incredibly, Great American tries to avoid these cases by arguing that its policy does not follow form in all respects. *See* GA Brief at 41-42. However, Great American's own argument is "follow form" for 16-02-33. Consequently, Federal's interpretation of 16-02-33 controls. Great American fails to cite a single contrary authority.

CONCLUSION

The trial court's grant of summary judgment must be reversed and Peters declared an "insured" based upon the four independent grounds described in Sections II-IV.

DATED this 15th day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copies of the foregoing Appellants' Reply Brief to be served by placing the same in the U.S. Mail, postage prepaid, to the below named attorneys this 15th day of November, 2006:

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