

2006

Great American E&S Insurance Compnay v. Dallas W. Peters and Brandon Knuetson, Mary Lynn Knuteson : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Alan C. Bradshaw; Manning, Curtis, Bradshaw and Bednar; attorneys for appellants.

John R. Lund, Jill L. Dunyon; Snow, Christensen and Martineau; George B. Hall Jr., Rebecca Y. Cooper; attorneys for appellees.

Recommended Citation

Brief of Appellant, *Great American v. Peters*, No. 20060368 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6452

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

GREAT AMERICAN E&S
INSURANCE COMPANY,

V.

Defendants/Appellees.

Third District No. 030909411

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

Attorneys for Appellants

John R. Lund
Jill L. Dunyon
SNOW, CHRISTENSEN &
MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

George B. Hall, Jr.
Rebecca Y. Cooper
Phelps Dunbar, L.L.P.
365 Canal Street, Suite 2000
New Orleans, LA 70130-6534

FILED
UTAH APPELLATE COURTS

JUN 17 2006

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/Appellees.)	

**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

Alan C. Bradshaw
MANNING CURTIS BRADSHAW &
BEDNAR LLC
10 Exchange Place, 3rd Floor
Salt Lake City, Utah 84111

Attorneys for Appellants

John R. Lund
Jill L. Dunyon
SNOW, CHRISTENSEN &
MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

George B. Hall, Jr.
Rebecca Y. Cooper
Phelps Dunbar, L.L.P.
365 Canal Street, Suite 2000
New Orleans, LA 70130-6534

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
ISSUES FOR REVIEW	1
DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
I. <u>Nature of the Case and Course of the Proceedings</u>	3
II. <u>Statement of Facts</u>	5
SUMMARY OF ARGUMENT	13
ARGUMENT	18
I. THE GREAT AMERICAN POLICY COVERS ALL SOS'S EMPLOYEES.	18
II. COVERAGE EXISTS IF THE GREAT AMERICAN POLICY IS 'FOLLOW FORM' AND THE LANGUAGE OF ENDORSEMENT 16-02-33 IS INCORPORATED BY REFERENCE.	27
A. <u>Rules of Construction.</u>	28
III. PETERS IS AN SOS EMPLOYEE WHO IS NOT A "TEMPORARY EMPLOYEE FOR [SOS] CUSTOMERS."	30
A. <u>Great American's Interpretation of "Temporary" and "Staff" is Contrary to Ordinary Usage and Unreasonable.</u>	32
B. <u>SOS's Alleged Subjective Intent is Inconsistent With Actual Conduct and Such Intent is Legally Irrelevant.</u>	38
1. <u>SOS's Post-Claim Position of "Intent" is Contrary to its Conduct.</u>	39

2.	<u>SOS's Unique Understanding of the Words "Staff" and "Temporary" Was Never Communicated to or Agreed to by Federal</u>	41
C.	<u>The Actions of Federal, SOS and Great American Demonstrate Coverage.</u>	43
IV.	AMBIGUITY IN ENDORSEMENT 16-02-33 MANDATES A FINDING OF COVERAGE.	45
V.	GREAT AMERICAN IS BOUND BY FEDERAL'S PROVISION OF COVERAGE.	48
	CONCLUSION	50

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page #</u>
<i>Air Liquide Am. Corp. v. Continental Cas. Co.</i> , 217 F.3d 1272 (10th Cir. 2000)	30
<i>Allen v. Prudential Prop. and Cas. Ins. Co.</i> , 839 P.2d 798 (Utah 1992)	43
<i>Amway Dist. Benefits Assoc. v. Northfield Ins. Co.</i> , 323 F.3d 386 (6th Cir. 2003)	49
<i>Associated Indem. Corp. v. Dow Chemical Co.</i> , 814 F. Supp. 613 (E.D. Mich. 1993)	49
<i>Bernard Lumber Co. v. Louisiana Ins. Guaranty Ass'n</i> , 563 S.2d 261 (La. Ct. App. 1990)	24
<i>Bordelon v. Great Am. Indem. Co.</i> , 124 So.2d 634 (La. Ct. App. 1960)	45
<i>Capitol Reprod., Inc. v. Hartford Ins. Co.</i> , 800 F.2d 617 (6th Cir. 1985)	19, 20
<i>Carlson v. Doekson Gross Inc.</i> , 372 N.W.2d 902 (N.D. 1985)	24
<i>Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.</i> , 7 F.3d 1047 (1st Cir. 1993)	19, 23-24
<i>Cullum v. Farmers Ins. Exch.</i> , 857 P.2d 922 (Utah 1993)	14, 21, 26
<i>Dawson v. Dawson</i> , 841 P.2d 749 (Utah Ct. App. 1992)	16, 28, 34, 35
<i>Draughon v. CUNA Mut. Ins. Soc.</i> , 771 P.2d 1105 (Utah Ct. App. 1989)	35
<i>Farmers Ins. Exch. v. Call</i> , 712 P.2d 231 (Utah 1985)	15, 26
<i>Farmers Ins. Exch. v. Versaw</i> , 2004 UT 73, ¶ 24, 99 P.3d 796	28, 29, 46, 47
<i>Fid. & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.</i> , 189 F. Supp.2d 1212 (D. Kan. 2002)	19

<i>Gov't Empl. Ins. Co. v. Dennis</i> , 645 P.2d 672 (Utah 1982)	15, 28-29, 35, 36, 37, 46
<i>Great Atl. Ins. Co. v. Liberty Mut. Ins. Co.</i> , 773 F.2d 976 (8th Cir. 1985)	49
<i>Greer v. Northwestern Nat'l Ins. Co.</i> , 743 P.2d 1244 (Wash. 1987)	42
<i>Home Savings and Loan v. Aetna Cas. and Sur. Co.</i> , 817 P.2d 341 (Utah 1991)	29, 34
<i>Jenkins v. Percival</i> , 962 P.2d 796 (Utah 1998)	45
<i>King v. Employers Nat'l Ins. Co.</i> , 928 F.2d 1438 (5th Cir. 1991)	23-24, 25
<i>Klos v. Lotnicze</i> , 133 F.3d 164 (2nd Cir. 1997)	43
<i>L.E. Meyers Co. v. Harbour Ins. Co.</i> , 394 N.E.2d 1200 (Ill. 1979)	49
<i>LDS Hosp. v. Capitol Life Ins. Co.</i> , 765 P.2d 857 (Utah 1988)	17, 28, 32, 46
<i>Megonnell v. United Services Auto. Ass'n</i> , 796 A.2d 758 (Md. 2002)	19, 23
<i>Nichols v. Great Am. Ins. Co.</i> , 169 Cal. App.3d 766, 215 Cal. Rptr. 416 (1985)	35
<i>Over The Road Drivers, Inc. v. Transport Ins. Co.</i> , 637 F.2d 816 (1st Cir. 1980)	42-43
<i>Peterson v. The Sunrider Corp.</i> , 2002 UT 43, ¶ 13, 48 P.3d 918	18, 44
<i>Playtex FP, Inc. v. Columbia Cas. Co.</i> , 609 A.2d 1087 (Del. 1991)	48-49
<i>Price Dev. Co. v. Orem City</i> , 2000 UT 26, ¶ 9, 995 P.2d 1237 (Utah 2000)	3
<i>R.W. Beck & Assoc. v. City of Sitka</i> , 27 F.3d 1475 (9th Cir. 1994)	49
<i>Reyes-Lopez v. Misener Marine Constr. Co.</i> , 854 F.2d 529 (1st Cir. 1988)	24
<i>Rice v. Granite Sch. Dist.</i> , 456 P.2d 159 (Utah 1969)	45
<i>Schmidt v. Luchterhand</i> , 214 N.W.2d 393 (Wis. 1974)	45
<i>Scott-Pontzer v. Liberty Mut. Fire Ins. Co.</i> , 710 N.E.2d 1116 (Ohio 1999)	48

<i>St. Paul Fire & Marine Ins. v. Commercial Union Assurance</i> , 606 P.2d 1206 (Utah 1980)	33
<i>State Auto Ins. Ass'n. v. Anderson</i> , 528 A.2d 1374 (Pa. Ct. App. 1987)	43
<i>State Farm Mut. Auto Ins. Co. v. Potter</i> , 186 F.2d 834 (9th Cir. 1950)	45
<i>State v. Worthen</i> , 765 P.2d 839 (Utah 1988)	45
<i>Swaminathan v. Swiss Air Transport Co., Ltd.</i> , 962 F.2d 387 (5th Cir. 1992)	43
<i>United States Fid. & Guar. Co. v. Sandt</i> , 854 P.2d 519 (Utah 1993)	28, 35
<i>Universal Underwriters Ins. Co. v. State Farm Mut. Auto Ins.</i> , 925 P.2d 1270 (Utah 1996)	14-15, 21, 25- 26
<i>Valley Bank & Trust Co. v. U.S. Life Title Ins. Co.</i> , 776 P.2d 933 (Utah Ct. App. 1989)	34, 35
<i>WebBank v. American General Annuity Serv. Corp.</i> , 2002 UT 88, ¶ 19 P.3d 1139	29
<i>Wells Fargo Bank v. California Guar. Ass'n.</i> , 45 Cal. Rptr. 2d 537 (Cal. Ct. App. 1995)	24

Rules

	<u>Page #</u>
UTAH CODE ANN. § 31A-21-106	1, 3
UTAH CODE ANN. § 31A-21-106(1)	4, 14, 18, 25- 26
UTAH CODE ANN. § 31A-21-106(1)(a)	21, 22, 25
UTAH CODE ANN. § 31A-21-106(1)(c)	26
UTAH CODE ANN. § 31A-21-107(1)	27
UTAH CODE ANN. § 78-2-2(3)(j)	1
UTAH R. CIV. P. 7(c)(3)(A)	5

Other Authority

	<u>Page #</u>
1 Couch on Insurance 2d, Sec. 15:30	33
17A Am.Jur.2d Contracts § 347	16, 34- 35, 38, 42
17A Am.Jur.2d Contracts § 348	34, 38, 42
A. CORBIN, CORBIN ON CONTRACTS § 24.16 (2003)	41
Random House Webster's College Dictionary (2d ed. Revised 2000)	32
RESTATEMENT (SECOND) CONTRACTS § 204(4), cmt. g	41
Roget's Thesaurus, p. 581 (3rd ed. 1998) (R 941-42)	37
Utah Insurance Bulletin 94-1 (Revised 10/96)	25

JURISDICTIONAL STATEMENT

Jurisdiction of the Court is conferred by UTAH CODE ANN. § 78-2-2(3)(j).

ISSUES FOR REVIEW

Did the trial court err in granting summary judgment in favor of Great American E&S Insurance Company ("Great American") and against Dallas W. Peters ("Peters") and Mary Lynn and Brandon Knuteson ("Knutesons"), including the following:

With Respect to the Great American Policy

A. Did the trial court commit legal error by ruling that "insured" status under the Great American Policy is defined by language in the Federal Policy rather than by the definition of "insureds" stated in the Great American Policy?

B. Did the trial court commit legal error by incorporating by reference endorsement 16-02-33 of the Federal Policy into the Great American Policy contrary to UTAH CODE ANN. § 31A-21-106?

With Respect to the Federal Policy

C. Did the trial court commit legal error by ruling that Great American can deny coverage to Peters based upon language in the Federal Policy despite Federal's agreement that "Peters is an insured person under the Federal Policy" and despite payment of its full \$1,000,000 policy limit?

D. Did the trial court commit legal error by ruling that Peters was a "temporary employee[]" excluded by endorsement 16-02-33 of the Federal Policy despite undisputed

evidence that Peters worked full-time, five days a week, including he regularly operated the dump truck he was operating at the time of the accident?

E. Did the trial court commit legal error by giving effect as a matter of "fact" (not law) to SOS's claimed subjective undisclosed intent concerning the words "staff" and "temporary," rather than the ordinary meaning of those words?

F. Did the trial court commit legal error by ruling that the word "staff" as used in the Federal Policy unambiguously does not refer to the individuals that "SOS Staffing" provides to its clients to complete the client's "staffing" needs?

G. Did the trial court commit legal error by failing to rule that one "reasonable" interpretation of the Federal Policy is that Peters (an admitted employee of SOS) is an "insured" for purposes of automobile liability coverage?

H. Did the trial court commit legal error by ruling that interpretation of the Federal Policy is to be determined based upon an alleged underwriting intention to not insure any SOS employee operating under the control of an SOS client when the record contains no evidence from Federal supporting this alleged intent and when the evidence from SOS is directly contrary including that SOS represented and warranted such coverage to clients?

I. Did the trial court commit legal error by failing to rule that Great American conceded ambiguity concerning who are the "insured" employees under the Federal and Great America Policies in response to requests for admissions?

J. Did the trial court commit legal error by failing to rule that the word "you" as used in the Federal Policy is ambiguous?

The trial court's grant of summary judgment is reviewed for correctness. *See Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237 (Utah 2000).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. UTAH CODE ANN. § 31A-21-106 (Addendum Ex. A):

[A]n insurance policy may not contain any agreement or 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.

STATEMENT OF THE CASE

I. Nature of the Case and Course of the Proceedings

This is an insurance coverage dispute between Peters, an "insured" under an umbrella liability insurance policy, and his insurer, Great American.¹ The primary insurer, Federal Insurance Company ("Federal") is no longer a party. Federal found Peters to be an "insured" and paid its full \$1,000,000 limit for the benefit of Mary Lynn Knuteson. Ms. Knuteson is an incompetent adult represented by her husband, Brandon Knuteson, who suffered traumatic brain injury when Peters failed to stop at a stop sign while driving a dump truck.

¹Peters and Knutesons have taken the same position throughout these proceedings and reference to Peters' position is that of Knutesons as well.

In proceedings below, the parties filed cross motions for summary judgment on the issue of whether Peters is an "insured" under the Great American Policy. Peters' position is that all "employees" of SOS Staffing, Inc. ("SOS") are "insureds" under the language of the Great American Policy. There is no dispute that Peters was an employee of SOS at the time of the accident. Peters also contends that although it is improper under UTAH CODE ANN. § 31A-21-106(1) to incorporate language from the Federal Policy, Federal correctly found Peters to be an insured under its policy language because he was not a "temporary" employee. Therefore, coverage exists even if terms of the Federal Policy are incorporated by reference.

Great American's position is that endorsement 16-02-33 to the underlying Federal Policy is made a part of the Great American Policy and that this endorsement removes coverage for a subset of SOS's employees, specifically "temporary employees for customers." Great American argues that although Peters was employed full-time with an expectation of continued employment and Federal found him to be an "insured," Peters is excluded because SOS allegedly "intended" for all employees working under the supervision of SOS's clients to be considered "temporary" employees.

The first issue presented on appeal is whether this case will be resolved under the language of the Great American Policy, the Federal Policy, or both. The trial court granted Great American's motion for summary judgment but did not address UTAH CODE ANN. § 31A-21-106(1) or three of the four independent grounds offered by Peters for

summary judgment. The trial court instead ruled based upon SOS's alleged subjective "intent" concerning the Federal Policy. R 1831-35 (Addendum Ex. B).

II. Statement of Facts

Peters' Full-Time Employment by SOS

1. On March 15, 2001 Peters was driving a dump truck and failed to stop at a stop sign, running into a vehicle driven by Mary Lynn Knuteson (hereinafter "the Accident"). As a result of the Accident, Mrs. Knuteson suffered traumatic brain injury and she requires constant care ("24/7") which she will likely need for the remainder of her life. Mrs. Knuteson is unable to work, cannot ambulate independently and she is unable to care for herself. *See* R 809, 962 (admitted); *see also* R 783-84, 797-800.²

2. At the time of the Accident, Peters was employed by SOS Staffing, Inc. ("SOS"). SOS became Peters' employer as a result of Vicars Trucking Company, Inc. ("Vicars") requesting that SOS provide payroll services for Peters and other full-time employees. At the time of the Accident, Peters was working full-time, five days a week. Mr. Peters regularly operated the dump truck he was driving at the time of the Accident.

²Great American affirmatively admitted the SOF offered by Knutesons in support of summary judgment. *See* R 962-66 (Great American's Reply at iii-vii). Great American did argue that certain paragraphs were "not relevant" but Great American failed to provide any "citation to relevant materials, such as affidavits or discovery materials" to dispute any of the offered paragraphs and therefore the offered facts have been "deemed admitted" for purposes of summary judgment. *See* UTAH R. CIV. P. 7(c)(3)(A). Paragraphs 1-15 herein are taken from the SOFs offered in support of Knutesons' motion for summary judgment. Paragraphs 16-36 herein are taken from Knutesons' supplemental brief requested by the trial court.

Peters was never screened by SOS and like all of Vicars' full-time workers, he was sent by Vicars to SOS (rather than being supplied by SOS from its list of screened temporary workers). R 809-10 (¶¶ 2-3), 962-63 (admitted); *see also* R 785-86, 789-93, 794-96.

The Federal and Great American Policies

3. Federal Insurance Company ("Federal") wrote a contract of insurance, Policy No. BAT (02) 7350-75-00 (the "Federal Policy"), that provides \$1,000,000 of liability coverage to SOS for the period from January 1, 2001 through January 1, 2002. R 811 (¶ 5), 963 (admitted); *see also* R 643-95 (relevant parts Addendum Ex. C).

4. Great American E&S Insurance Company ("Great American") wrote a contract of insurance, Policy No. UMG 00 41 44-04 (the "Great American Policy"), that provides \$5,000,000 of liability coverage to SOS for the period from January 1, 2001 through January 1, 2002 in excess of the "amounts stated as the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance. . . ." The Federal Policy is listed as the "Underlying Polic[y]" for "Automobile/Garage" coverage. R 811 (¶ 6), 963 (admitted); *see also* R 696-725 (Addendum Ex. D).

5. An endorsement (Form CA 989) to the Federal Policy 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 your personal affairs.

R 813 (¶ 17) (emphasis added), 963 (admitted); *see also* R 681.

6. Another endorsement (Form 16-02-33) to the Federal Policy states:

FORM CA989 (02/99) "EMPLOYEES AS INSURED" IS
AMENDED TO INCLUDE TO FOLLOWING WORDING:

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

R 813 (§ 18) (emphasis added), 964 (admitted); *see also* R 682.

7. The Great American Policy provides automobile coverage if "included under the policies listed in the Schedule of Underlying Insurance and for no broader coverage than is provided under such underlying policies." R 812 (§ 11), 963 (admitted); *see also* R 704.

8. The Great American Policy partially defines "Employees" as follows:

Employees include "leased workers" but not "temporary workers." "Leased workers" are leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform related duties to the conduct of your business. "Leased workers" are not "temporary workers." "Temporary workers" are persons furnished to you to substitute for permanent employees on leave or to meet seasonal or short-term workload conditions.

R 813 (§ 15), 963 (admitted); *see also* R 704.

9. The Federal Policy partially defines "Employee" as follows:

"Employee" includes a "leased worker." "Employee" does not include a "temporary worker."

R 812 (§ 12), 963 (admitted); *see also* R 662.

10. The Federal Policy defines a "Leased worker" as follows:

"Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to

perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."

R 812-13 (§ 13), 963 (admitted); *see also* R 662.

11. The Federal Policy defines "Temporary worker" as follows:

"Temporary worker" means a person who is furnished to you for a finite time period to support or supplement your work force in special work situations such as "employee" absences, temporary skill shortages and seasonal work loans.

R 813 (§ 14), 963 (admitted); *see also* R 663.

12. At the time of the Accident, Peters did not fall within the definitions for "Temporary worker" or "temporary workers" as defined in the Policies. R 813 (§ 16), 963 (admitted).

Federal's Payment of the Claim

13. The Dump Truck driven by Peters at the time of the Accident was a "covered auto" under the Federal Policy. R 812 (§ 10), 963 (admitted); *see also* R 635-42.

14. Federal provided full coverage of \$1,000,000 (the amount of its policy) to Peters for the benefit of the Knutesons. R 818 (§ 29), 965 (admitted); *see also* R 759-64.

15. In providing such coverage, Federal has stated that "Peters is an insured person under the Federal Policy." R 818 (§ 30), 966 (admitted); *see also* R 760-61.

The Great American Policy Defines Covered "Employees" And No Provision Of The Great American Policy Was Negotiated Or Modified

16. The Great American Policy covers "[a]ny [SOS] employees . . . acting within the scope of their duties." R 1405 (¶ 1) (emphasis added); *see also* R 704.

17. The Great American Policy is an integrated agreement and can be modified only by an endorsement signed by Great American. R 1405 (¶ 2); *see also* R 708.

18. The Great American Policy has not been modified by subsequent endorsement and does not contain the language set forth in endorsement 16-02-33 to the Federal Policy. R 1405 (¶ 3); *see also* R 682, 696-725.

19. Stephen G. Handley ("Handley") the insurance broker for SOS Staffing, Inc. ("SOS"), John K. Morrison ("Morrison") SOS's general counsel and Mark C. Marshall ("Marshall") SOS's insurance risk manager, all testified that there were no discussions or negotiations related to any provision of the Great American Policy and the language of that policy was drafted entirely by Great American. R 1405-06 (¶ 4); *see also* R 1109, 1454, 1475-76, 1488, 1504.

With Respect to the Federal Policy SOS And Federal Never Agreed To Use The Word "Temporary" To Mean "Long Term"

20. SOS employees include so-called "payrollers." A payroller is an employee found by SOS's client. Payrollers can work full-time for the SOS client with the expectation that their employment will continue for a certain number of years or

indefinitely. The SOS client decides the length of the payroller's employment. R 1406 (¶ 5); *see also* R 1454, 1477-78, 1486, 1488, 1492-93.

21. Dallas Peters was a full-time payroller. R 1406 (¶ 6); *see also* R 1454, 1480, 1488, 1504. Despite the fact that payrollers can work full-time with the expectation of continuing employment, SOS's witnesses claim that SOS internally lumps "payrollers" with other "temporaries" and calls both categories of employees "temporary employees." SOS claims that it internally distinguishes these employees from employees who are under SOS's direct supervision—so-called "staff." R 1406-07 (¶ 7); *see also* 1454, 1478, 1486, 1488, 1491, 1493.

22. SOS's witnesses acknowledge that by using the words "temporary employee" to describe a full-time worker whose job is expected to continue, SOS uses the word "temporary" in a way that has no temporal meaning, contrary to the ordinary dictionary meaning of that word. R 1407 (¶ 8); *see also* 1454, 1478, 1488, 1509.

23. No witness has any recollection of explaining to Federal SOS's unique use of the words "staff" and "temporary employees." R 1407-08 (¶¶ 9-11); *see also*, R 1109-10, 1426, 1428-30, 1440-41, 1446, 1450, 1454-55, 1470, 1486-87, 1488-90, 1501, 1507.

24. Although Handley was the only SOS witness who talked to Federal during underwriting, he does not know whether SOS intended for payrollers to be considered part of the covered "staff" under endorsement 16-02-33. R 1408 (¶ 12); *see also* R 1453.

25. Federal wrote endorsement 16-02-33. R 1408 (¶ 13); *see also* R 1109, 1426, 1442.

26. After the Accident, SOS tried to convince Federal to change its position that Peters was a covered non-temporary "staff" employee within the meaning of 16-02-33 and to deny the claim. Federal's adjuster responded by telling SOS "that the wording [of endorsement 16-02-33 is] ambiguous." R 1408 (¶ 14); *see also* 1426, 1438-39, 1454, 1480-81, 1488, 1506, 1508.

27. At the time SOS tried to persuade Federal to change its position, SOS was concerned that the \$1,000,000 reserve set by Federal as well as any future payment by Great American would impact SOS's insurance rates and/or its ability to obtain coverage. R 1408 (¶ 15); *see also* 1426, 1436, 1449, 1452, 1454, 1476-77, 1488, 1504.

SOS Has Treated Full-Time Employees As "Insureds" In Order To Meet Contract Requirements With its Clients

28. SOS's clients sometimes insist that the client **and the SOS employees** who work at the direction of the client be added as "additional insureds" to SOS's automobile liability policy. SOS's clients also sometimes require that SOS's automobile liability carrier waive its right to seek subrogation against the client. R 1409 (¶ 16); *see also* R 1426, 1430, 1443, 1454, 1457, 1460, 1488, 1491.

29. For example, SOS signed several contracts requiring that the clients and the employees doing work at the clients' direction be added as "additional insureds" to the Federal policy for automobile coverage and that Federal waive its right of subrogation

against the clients. R 1409 (§§ 17-18); *see also* R 1454, 1470-71, 1473-75, 1488, 1494-97, 1511-1643 (relevant parts Addendum Ex. E) (R 1511-68, 1584-1643).

30. In order to meet the requirements of these contracts, SOS was required to either obtain an endorsement modifying the Federal Policy or locate existing language in the policy that provides such coverage. The Federal Policy is an integrated contract that can be modified only by endorsement. R 1410 (§ 19); *see also* R 667, 1426, 1431.

31. SOS knew Federal would not issue endorsements adding SOS's clients or the involved employees as "additional insureds" to the Federal Policy. R 1410 (§§ 20-21); *see also* 1426, 1431, 1436, 1451, 1454, 1456-59, 1463, 1475, 1488, 1492, 1500, 1502.

32. SOS nevertheless issued "Certificates(s) of Liability Insurance" confirming "additional insured" status for automobile liability coverage including excess liability coverage under the Great American Policy. R 1411-12 (§ 24); *see also* R 1569-81, 1644-87 (Addendum Ex. F).

33. SOS did so in reliance on existing language in the Federal Policy to the effect that because the "employee" working full-time for the SOS client is an "insured," the SOS client is also an "insured" for vicarious liability related to the employee's conduct. R 1411-12 (§§ 22-23); *see also* 1426, 1432-34, 1452, 1462, 1465, 1488, 1500, 1503, 1510, 1697-99 (Addendum Ex. G).

34. The certificates confirming "additional insured" status to SOS's clients parrot the language of an e-mail from Federal outlining policy language whereby SOS's

clients are additional insureds "to the extent" they are vicariously liable for the conduct of the involved SOS employees. R 1413 (§ 26); *see also* R 1575-80 (SOS's clients "are listed as additional insureds . . . on Auto Liability policy, but only as respects work performed by the named insureds' employees"); 1697-99 (coverage exists for "[a]nyone else who is . . . liable for the conduct of an 'insured' but only to the extent of that liability.").

SOS Paid a Premium for Non-Owned Auto Coverage

35. The declarations page of the Federal Policy confirms that SOS paid a premium for non-owned automobile coverage based upon 10,000 employees. R 647; *see also* R 1114 (application).

36. SOS's general counsel confirmed that this figure is the number of employees working at any given time including all "payrollers." R 1492.

SUMMARY OF ARGUMENT

The trial court's ruling that Peters is not an "insured" under the Great American Policy must be reversed and a judgment entered finding Peters to be an insured for four reasons. Each of these grounds serves as an independent basis for coverage. The trial court addressed only the second ground and failed to consider that each ground separately supports a finding of coverage.

1. *Peters is an Insured Under the Great American Policy Language.*

First, the Great American Policy defines all SOS's "employees" as insureds and Peters is admittedly an SOS employee. Great American's argument that endorsement 16-02-33 of the Federal Policy redefines the covered employees to exclude "temporary employees for the customers" fails as a matter of contract interpretation and under the Utah Insurance Code's prohibition against incorporation by reference. With respect to the contract, Great American concedes the requirement that automobile coverage be "included" in the Federal Policy is not an incorporation of specific language, but merely a pre-condition to coverage that has been met. *See* R 1855 at 5-6, 8. Further, the "for no broader coverage than is provided" language, at most, references the scope of the underlying automobile insuring clause, not the list of "insureds" separately defined in each policy. Cases uniformly hold that a reference to underlying "coverage" is to the type of risk covered, not specific limiting language.

In all events, Great American's argument is one of incorporation by reference prohibited by UTAH CODE ANN. § 31A-21-106(1). Great American's only response is that if this statute applies, no automobile coverage is provided at all. However, the pre-condition that automobile coverage be provided by underlying insurance has been met. Further, this Court has uniformly held that insurance policies will be enforced without limiting language that is improperly incorporated. *See Cullum v. Farmers Ins. Exch.*, 857 P.2d 922, 927 (Utah 1993); *Universal Underwriters Ins. Co. v. State Farm Mut. Auto Ins.*,

925 P.2d 1270, 1275 (Utah 1996); and *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 236-37 (Utah 1985). Any other outcome rewards Great American for issuing a non-complying policy.

2. *Peters is an Insured Under the Federal Policy Language.*

Second, if this Court evaluates endorsement 16-02-33 of the Federal Policy, coverage must be provided because it is clear Federal correctly interpreted that language by finding Peters to be an "insured" and by paying its \$1,000,000 limit. Great American's argument is that Peters must be considered a "temporary" employee of SOS even though it is undisputed that he was working full-time with an expectation of continuing permanent employment. Great American has attempted to turn the word "temporary" into its antonym, "permanent." However, a "temporary" worker is defined in dictionaries and in the policies as someone retained for a short period of time. Great American also gives the word "staff" an unwarranted meaning of not working "under the direction and control of customers." Dictionaries and other relevant sources define an organization's "staff" as its "employees." SOS itself uses the word "staff" to refer to the workers it employs to be supervised by clients. At best, the word "staff" is "flexible, elastic, slippery and somewhat ambiguous" and therefore it cannot serve to eliminate coverage. *Gov't Empl. Ins. Co. v. Dennis*, 645 P.2d 672, 674 (Utah 1982).

In trying to overcome straightforward definitions and common meaning, Great American argued to the trial court that "[t]his case is about whether SOS **intended** that its

employees driving customers' vehicles while doing customers' work be insureds under SOS auto liability policies." In essence, Great American persuaded the trial court that SOS subjectively intended for black ("temporary") to mean white ("permanent") or black ("temporary"). However, before the word "temporary" can be given the meaning of its antonym—"permanent"—Great American had to first show the word is ambiguous. The trial court found no such ambiguity (R 1831-34) and unambiguous terms are interpreted according to plain and ordinary meaning. *Dawson v. Dawson*, 841 P.2d 749, 750 (Utah Ct. App. 1992). Moreover, SOS's post-claim assertions of alleged intent are entirely irrelevant since "[a] party's subjective, undisclosed intent is immaterial to the interpretation of a contract, [and] the court will give force and effect to the words of the contract without regard to what the parties to the contract thought it meant or what they intended for it to mean." 17A Am.Jur.2d Contracts § 347. There is no evidence that SOS and Federal agreed to use the words "temporary" or "staff" in a unique way.

Therefore, this Court can read the words used and give them a common meaning. If the Court looks beyond the words, the only potentially admissible evidence relates to performance and such evidence uniformly supports coverage. Specifically, SOS was required to confirm automobile coverage for its clients and for the involved employees. SOS did so based upon Federal's written assurance that such coverage was provided. Great American persuaded the trial court to ignore this undisputed evidence with an apology that SOS "like all businesses . . . were under pressure to do certain things.

Nobody wanted to issue those certificates [showing insured status for customers and the involved employees]." This apology is irrelevant. Most importantly, key performance evidence comes directly from Federal. Federal drafted endorsement 16-02-33 and it has paid the claim precisely because Peters is an "insured."

3. *Alternatively, the Federal Policy Language is Ambiguous.*

Third, coverage for Peters should be recognized even if Great American has advanced a "reasonable" interpretation of 16-02-33 because the interpretation offered by Federal and Peters is clearly reasonable. It is settled that if language is subject to more than one reasonable interpretation, it is ambiguous and "any ambiguity or uncertainty in the language of and insurance policy must be resolved in favor of coverage." *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988). The interpretation offered by Peters and Federal is reasonable since the words used ("temporary" and "staff") have been given a common meaning, and the offered reading is consistent with the parties' performance, including Federal's payment of the claim and SOS's representations to clients.

4. *Coverage Has Been Provided Under the Federal Policy and Great American Must Follow.*

Fourth, coverage for Peters should be recognized because the Great American Policy offers coverage when insurance is "provided under" the Federal Policy. Since coverage has in fact been "provided under" the Federal Policy, Great American must follow Federal's lead under established law.

ARGUMENT

Because entitlement to summary judgment is a question of law, this Court accords no deference to the trial court's resolution. *Peterson v. The Sunrider Corp.*, 2002 UT 43, ¶ 13, 48 P.3d 918. Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* In reviewing summary judgment, this Court views "the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Id.*

Applying these standards, this Court must reverse and enter a judgment in favor of Peters and Knutesons for four **independent** reasons. The trial court failed to address three of these grounds, including the mandate in UTAH CODE ANN. § 31A-21-106(1) that all provisions of an insurance policy be stated in the policy and not incorporated by reference. *See* R 1831-35. As detailed below, it does not matter whether this Court disallows incorporation by reference or looks to the Federal Policy. In either case, Peters is an "insured." Peters will first address the language of the Great American Policy and UTAH CODE ANN. § 31A-21-106(1). Peters will then address the three independent reasons why Federal was correct in concluding that Peters is an "insured."

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

Great American agrees that before a provision of a primary policy will be read into an umbrella policy "there would, at the least, [have] had to be a conspicuous, clear and express clause that incorporated the exclusions of the primary policy into the [excess

coverage section of the] umbrella policy." R 980-81 (quoting *Megonnell v. United Services Ass'n*, 796 A.2d 758, 773 (Md. 2002)). Great American further concedes "[n]owhere in Great American's policy are the words 'follow form' found, let alone a 'conspicuous, clear and express clause' incorporating the provisions of the primary auto policy into the umbrella policy." R 981. Consequently, the Great American policy must stand on its own and, as an "umbrella" policy, its terms may be broader than the underlying insurance.³

Unlike the Federal Policy, the Great American Policy contains no endorsement purporting to limit the covered SOS employees. Instead, the Great American Policy provides insurance for any SOS employee with the only limitation being that they act "within the scope of their duties." See R 704, ¶ F.6. The relevant language reads:

F. "Insured" means each of the following to the extent set forth:

...

³See *Capitol Reprod., Inc. v. Hartford Ins. Co.*, 800 F.2d 617, 623-24 (6th Cir. 1986) (an umbrella "performs a further service of providing a broader range and a greater dollar-value of coverage in excess of the coverage afforded by the primary insurer [but] the costs of the excess insurance can be minimized [because] the premium is determined based upon the amount of the [primary] limits [and] also [is] influenced by the knowledge that most losses can be adjusted satisfactorily within the limits of the primary insurance policies."); *Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.*, 7 F.3d 1047, 1053 (1st Cir. 1993) ("the broader function served by umbrella policies [is to] extend [] coverage even to unanticipated 'gaps'" (cited by Great American); *Fid. & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 189 F. Supp.2d 1212, 1223 (D. Kan. 2002) ("an umbrella policy can provide broader coverage than the underlying policy, meaning that the umbrella policy will 'drop down' to provide primary coverage. Put another way, [a]n umbrella policy has been characterized as a 'hybrid policy, combining aspects of both a primary and a following form excess policy.'").

6. Any of your partners executive officers, directors or employees but only while acting within 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" . . . **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.

Employees include "leased workers" but not "temporary workers." "Leased workers" are leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform related duties to the conduct of your business. "Leased workers" are not "temporary workers." "Temporary workers" are persons furnished to you to substitute for permanent employees on leave or to meet seasonal or short-term workload conditions.

R 704, Section V, Definitions, ¶ F.6 (Exhibit F) (emphasis added).

Despite the above express definition of who the covered employees "include," Great American argues that the "no broader coverage" language serves to incorporate endorsement 16-02-33 of the Federal Policy thereby redefining the list of "insureds" to a subset of SOS's employees. R 1855 at 74. In doing so, Great American reads out of the policy an entire clause (68 words) defining which SOS "employees" are included, in favor of language not found in the policy. Obviously, if Great American intended for language to be included in the Great American Policy, "it certainly could have included such a provision in the umbrella policy." *See Capitol Reprod.*, 800 F.2d at 623.

Moreover, Great American's incorporation of endorsement 16-02-33 is contrary to the Utah Insurance Code. No insurance policy in Utah can "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 delivery, unless the policy, application, or agreement accurately reflects the terms of the incorporated agreement, provision or attached document." UTAH CODE ANN. § 31A-21-106(1)(a). Here the Great American Policy neither attaches nor incorporates by reference the terms of endorsement 16-02-33 as Great American concedes. *See* R 981 ("[n]owhere [is there] a 'conspicuous, clear and express clause' incorporating the provisions of the primary auto policy into the umbrella policy.").

This Court has enforced the provisions of § 31A-21-106(1)(a) without exception. For example, in *Cullum*, 857 P.2d at 925 the policy granted coverage for permissive users of an automobile and stated that the amount of such insurance would be the minimum under the applicable "Financial Responsibility Law." This Court held that the failure to state the actual amount of the statutory minimum precluded the minimum from being applied because the purpose of § 31A-21-106(1)(a) is "to ensure that the entire insurance contract is contained in one document so that the insured can determine from the policy exactly what coverage he or she has." *Id.*⁴

⁴Another analogous case is *Universal Underwriters Ins. Co. v. State Farm Mut. Auto Ins.*, 925 P.2d 1270 (Utah 1996). In *Universal* the policy did not define all of the insureds, other than to state that the policy covered the first named insured and "any other person or organization required by law to be an INSURED." This Court held that a policyholder could not determine who was precisely insured by reviewing the policy and
(continued...)

Great American tries to overcome the clear prohibition against incorporation by arguing that unless terms of the Federal Policy become part of the Great American Policy, no automobile coverage exists at all because the Great American Policy states automobile coverage is not provided "unless such coverage is included under the policies listed . . . and for no broader coverage than is provided under such underlying policies." *See* R 704; R 1855 at 6-7, 69 and 74. Great American's argument fails for several reasons.

First, Great American concedes that the requirement that automobile coverage be "included" in the underlying policy is not an incorporation of specific language but merely a pre-condition to coverage. R 1855 at 8 ("No it does not incorporate by reference. It required you to look at the underlying policies. . . ."). As such, a court can look to the Federal Policy for the limited purpose of determining **whether** automobile coverage exists (i.e., is this type of risk insured against) without incorporating by reference specific policy language, in particular limiting language. Great American concedes that this **condition** has been met because "there is an underlying policy providing auto coverage." R 1855 at 5-6 (Great American's counsel). Recognizing satisfaction of this condition does no violence to § 31A-21-106(1)(a) because no specific terms, and particularly no limitations, are incorporated.

⁴(...continued)

therefore § 31A-21-106(1)(a) was violated and the statutory minimums for permissive users could not be incorporated by reference.

Great American nevertheless argues that the reference to "for no broader coverage" imposes more than a condition. Great American argues this language results in the specific limitations of endorsement 16-02-33 becoming a part of the Great American Policy. *See* R 1855 at 8 ("you [must] look at the underlying policies to determine who is an insured under the underlying policy"); *id.* at 28 (same). However, many cases (including those cited by Great American) make clear that a reference to "coverage" in an umbrella policy is to **the type of risk** covered by the primary policy, not a specific definition of the "insureds," or any other limiting language.⁵ An instructive case is *King*

⁵For example, in *Megonnell* (relied upon by Great American at R 980-81) a wife obtained a verdict against her husband. The husband's primary insurer was not liable for the judgment in excess of a statutory minimum because the primary policy contained a so-called "household" exclusion. The husband's umbrella policy did not contain such an exclusion but did state: "We provide excess liability protection for occurrences covered by primary insurance." 796 A.2d at 764. The umbrella carrier argued, as Great American does here, that the reference to the primary's "coverage" served to incorporate by reference specific exclusionary language of the primary policy. The Court disagreed, holding that incorporation must be "conspicuous, clear and express." *Id.* at 773. The Court read the umbrella to require only that the primary policy cover the type of risk identified—an automobile accident—that meets the definition of an "occurrence" under the primary policy. *Id.* at 772.

Similarly, in *Walbrook* (another case relied upon by Great American at R 981), an umbrella policy stated: "this policy is extended to include Engineers Professional Liability [EPL] as more fully described in the underlying General liability policy/ies." *Id.* at 1052. The umbrella carrier argued that this language served to limit the EPL coverage to "claims made" rather than "occurrence" coverage since "claims made" was the only type of coverage "described in the underlying" policy. *Id.* The Court disagreed based upon the purpose of umbrella policies (to fill gaps) and the actual language of the umbrella policy read as a whole. The Court held that this type of risk—EPL—was "covered" by the primary and that incorporation of the "claims made" language from the

(continued...)

v. Employers Nat'l Ins. Co., 928 F.2d 1438 (5th Cir. 1991). In *King*, as here, the umbrella carrier tried to equate a reference to "coverage" to the specific list of "insureds" defined in the underlying policy. The excess carrier argued that language requiring prior notice of "any change in **coverage** of the underlying insurance" applies to the adding of "additional insureds" to the policy. The Fifth Circuit disagreed:

The policy also states that it shall only apply to certain "**coverages**" which are set out in the declarations page of the policy. . . . In the declarations page, "coverage" includes general risks such as bodily injury and property damage for which Interstate provides indemnity. . . . **Thus the word "coverage" as used in this policy refers to the nature of the risks insured against and not to the parties insured.**

Id. at 1445 (emphasis added).⁶

⁵(...continued)

primary into the umbrella would render the umbrella's actual language "meaningless." *Id.*; see also *Reyes-Lopez v. Misener Marine Constr. Co.*, 854 F.2d 529, 530 n.2 (1st Cir. 1988) ("'Coverage' refers to whether losses arising from a particular risk (an activity or event) are within the scope of the insurance"); *Bernard Lumber Co. v. Louisiana Ins. Guaranty Ass'n*, 563 S.2d 261, 266 (La. Ct. App. 1990) (the word "coverage" as used in an umbrella policy "refers to being insured against a specified risk or loss" under the primary policy and therefore the absence of an ability to collect against the primary carrier is not a requirement of "coverage"); *Wells Fargo Bank v. California Guar. Ass'n.*, 45 Cal. Rptr. 2d 537, 545 (Cal. Ct. App. 1995) ("a layperson would have understood the phrases 'covered by said underlying insurance' and 'not covered by said underlying insurance' as referring to the *scope* of the underlying insurance" not whether payment is actually made) (emphasis in original); *Carlson v. Doekson Gross Inc.*, 372 N.W.2d 902, 906 (N.D. 1985) ("limitation on coverage should be accomplished by specific exclusions or endorsements to the policy, not by a limiting designation of the named insured.").

⁶Although the Court in *King* found that the same insureds were covered by both policies, it did so because the excess policy was a true "following form" policy that expressly incorporated all "provisions of the immediate underlying policy" and the excess policy did not contain its own definition of "insureds." *Id.* at 1444.

As in *King*, there is no way to equate Great American's reference to "coverage" to the specific list of "insureds" separately defined in the two policies. At most, the "no broader coverage" language refers to the scope of the insuring provision for automobiles, not the list of "insureds." The Federal Policy insures against "'bodily injury' or 'property damage' . . . caused by an 'accident.'" R 655. There is no question that this insuring language is triggered by the tragic injuries suffered by Mary Lynn Knuteson.⁷

In addition, if Great American's reading of the "no broader coverage" language were correct as a matter of contract interpretation, its interpretation nevertheless runs squarely into UTAH CODE ANN. § 31A-21-106(1)(a). The Utah Insurance Commissioner has specifically advised that "[n]either should definitions of terms be incorporated by reference." *See* Bulletin 94-1 (Revised 10/96) (discussing UTAH CODE ANN. § 31A-21-106(1)). In *Universal Underwriters*, this Court held that a policy violated § 31A-21-

⁷The insuring language of the Great American umbrella policy is even broader, since it covers all "sums . . . the 'Insured' becomes legally obligated to pay by reason of liability imposed by law." R 700. The fact that the "no broader coverage" language at most refers to the scope of the insuring language for automobiles, not the list of "insureds," is reinforced by exclusion O. That exclusion states there is no coverage for "liability arising out of . . . any 'auto' 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 703. In context, it is clear that this is a reference to the "risk" insured against, specifically automobile accidents, not the list of "insureds." Even if the for "no broader coverage" language could be read to refer to the list of "insureds," Great American's interpretation is nonetheless not the only "reasonable" interpretation. For the reasons described below (*infra* Sections II.A and IV), coverage must still be found based upon an ambiguity, especially because there were no discussions or negotiations related to any provision of the Great American Policy. *See* SOF ¶ 19.

106(1) because it could not be "determine[d], simply by reading [the policy], who was insured under the policies." 925 P.2d at 1274-75. Thus, it is clear that a definition of "insureds" cannot be incorporated by reference.

The issue then becomes whether Great American will be rewarded for issuing a non-complying policy in a situation where Great American concedes the pre-condition to coverage (underlying automobile coverage) has been met. *See* R 756; R 1855 at 5-6. The clear answer is that the Utah Insurance Code prohibits Great American from using the no incorporation statute as a shield. Under this Court's prior decisions, a policy will be enforced without limiting language sought to be incorporated. In *Cullum*, for example, the remedy for defining policy limits by incorporation was not to render the policy without coverage, but to provide coverage without such limitation. 857 P.2d at 927. Similarly, in *Universal Underwriters*, this Court held that the result of the failure to define permissive users was not to eliminate coverage or to limit coverage to permissive drivers listed in a statute, but to insure all permissive drivers as "insureds." 925 P.2d at 1275. In *Call*, 712 P.2d at 236-37, this Court similarly stated that "especially exclusionary language" will not be incorporated by reference and a policy must be enforced without the "invalid" limiting language.⁸

⁸The Insurance Code requires this result. While incorporation by reference is prohibited (UTAH CODE ANN. § 31A-21-106(1)(c)), the next provision of the Code addresses "[c]ontract rights under noncomplying policies" and states a "policy is enforceable **against the insurer** according to its terms, even if it exceeds the authority of

(continued...)

In this case, the Great American Policy must be enforced because it fully defines the covered "insureds." *See* R 704. This language can be enforced without resort to incorporation by reference as argued for by Great American under a different name. *See* R 1855 at 29; *see also id.* at 8-9 (same). Under the Great American Policy, the list of covered "employees" is all SOS employees, including Peters.

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

As set forth above, incorporation by reference is improper and this Court may never reach the language of endorsement 16-02-33 to the Federal Policy. Nevertheless, if this Court decides to evaluate 16-02-33, it is clear that Federal correctly interpreted this language, finding Peters to be an "insured" for three independent reasons. First, as set forth in Section III below, Peters is not an excluded "temporary" employee. Second, as set forth in Section IV below, even if Great American's reading of endorsement 16-02-33 is one "reasonable" interpretation, the endorsement is ambiguous and therefore coverage must be provided. Third, as set forth in Section V, Great American agreed to follow Federal's provision of coverage.

The rules of construction that apply to each of these distinct issues are described in subpart A below.

⁸(...continued)
the insurer." UTAH CODE ANN. § 31A-21-107(1) (emphasis added).

A. Rules of Construction.

In evaluating the Federal Policy, this Court must consider several critical rules of contract interpretation, including the particular rules applied to insurance contracts. This Court should also note how the relevant burdens are allocated between Great American and Peters for purposes of applying these rules.

First, insurance contracts are "construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance." *Farmers Ins. Exch. v. Versaw*, 2004 UT 73, ¶ 24, 99 P.3d 796 (quoting *United States Fid. & Guar. Co. v. Sandt*, 854 P.2d 519, 521 (Utah 1953)). Consequently, "[i]t should also be kept in mind that 'the purpose of insurance is to insure,' and clauses excluding activities from coverage are to be strictly construed against the insurer." *Dawson*, 841 P.2d at 750. Anything that "is not clearly excluded from the operation of [an insurance] contract is included in the operation thereof." *LDS Hosp.*, 765 P.2d at 859. Language which purports to cut back coverage (even if not designated as an "exclusion") will be "strictly construed" and only "explicit language" will serve to limit coverage. *See Sandt*, 854 P.2d at 524.

Second, if the language functions as a limitation, exception or condition to coverage, then it "must be made and established by the insurer to escape liability thereunder." *LDS Hosp.*, 765 P.2d at 859.

Third, when an insurance company "uses a 'slippery' word to mark out and designate **those who are insured by the policy, it is not the function of the court to**

sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction . . . the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words [used]." *Dennis*, 645 P.2d at 675 (emphasis added).

Fourth, the words in an insurance contract, "even more than in the construction of statutes, words . . . should be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning." *Id.*

Fifth, "the parties' actions and performance [are] evidence of the parties' true intention." *WebBank v. American General Annuity Serv. Corp.*, 2002 UT 88, ¶ 19, 54 P.3d 1139, 1145.

Sixth, if the language in an insurance contract has two or more reasonable interpretations, i.e. is ambiguous, then such "provisions are usually construed against the insurer without resort to extrinsic evidence, because insurance contracts are ordinarily standard forms, whose language is not negotiated by the parties." *Home Savings and Loan v. Aetna Cas. and Sur. Co.*, 817 P.2d 341, 347 (Utah 1991); *see also Versaw*, 2004 UT 73 at ¶ 25 ("uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage.").

III. PETERS IS AN SOS EMPLOYEE WHO IS NOT A "TEMPORARY EMPLOYEE FOR [SOS] CUSTOMERS."

Applying the above principles, Peters is an "insured" under the Federal Policy.

The Federal Policy states in endorsement CA 989 that "Any 'employee' of yours is an 'insured' while using a covered auto you don't own, hire or borrow in your business or your personal affairs." *See* SOF ¶ 5. Great American concedes that Peters was an "employee" of SOS driving a covered vehicle (i.e., any vehicle) at the time of the Accident. *See* SOF ¶ 2.⁹

Despite this straightforward coverage analysis, on April 22, 2003 (R 755-58) Great American denied the claim. Great American did so by making an incorrect **factual claim** that Peters was "one of many" temporary workers "assigned by SOS to its customers for specific jobs or temporary assignments." *See* R 757 (emphasis added). In making this

⁹*See also* R 635-36 ("Dallas Peters, an employee of your insured SOS . . . was operating a dump truck. . . . We believe that Mr. Peters was an employee using a covered auto."); R 637-38 ("Mr. Peters was an employee at the time of loss. . . . We believe that Mr. Peters was an employee using a covered auto, because the policy provides coverage for 'any auto.'"); R 642 ("There is no question that Peters was an employee of SOS and was using a vehicle that was neither owned, hired or borrowed at the time of the accident."). At the time of these admissions, Great American nevertheless questioned whether Peters acted "in [SOS's] business." Great American abandoned this argument before sending its denial letter because it is clear Peters furthered the interests of SOS and he was undeniably SOS's "employee." SOS's witnesses have confirmed that leasing employees like Peters furthers SOS's business. Morrison Depo at 148 (R 1508); *see also* Marshall Depo at 180 (R 1485) ("our business is placing people on assignment."). The Tenth Circuit has rejected the argument that a leased employee does not act in the business of the leasing employer. *See Air Liquide Am. Corp. v. Continental Cas. Co.*, 217 F.3d 1272, 1277-78 (10th Cir. 2000).

factual claim, Great American acknowledged that Peters was "an employee of SOS" and that its **only** avenue to a denial was to argue that under endorsement 16-02-33 Peters was not an insured because he was a "TEMPORARY EMPLOYEE FOR THE CUSTOMERS." R 756-57. In the words of the denial letter, Peters was "one of many" SOS temporaries who worked on "temporary assignments" and on March 15, 2001 Peters was supposedly "performing temporary work for Vicars Trucking." *Id.*

However, Great American knew better. Great American had received discovery in the underlying action showing that Peters was **never** a temporary employee for SOS assigned to temporary assignments. SOF ¶ 2.¹⁰ Great American has subsequently conceded these facts, including that Peters was an existing full-time employee for whom SOS became his legal employer. SOF at ¶ 2. In short, the one and only basis for Great American's original denial is directly contrary to admitted facts.

As a result, Great American's lawyers constructed a new basis for denial—one that is nowhere stated in the denial letter and one that has nothing to do with policy language.

¹⁰SOS has distinct businesses of employee leasing (similar to many other PEO's) and its more well known role as a supplier of "temps." *See* R 1112 (application). Given these distinct businesses, Great American was asked to "[a]dmit that Dallas W. Peters was never on SOS's list of temporary associates" and that he was "working full-time in his employment at the time of the accident." *See* Great American's Admissions, Request Nos. 5 and 11 (R 630-32). Great American responded by stating "[t]he information presently known or readily obtained by Great American is insufficient to enable it to admit or deny this Request." *Id.* In other words, Great American admits that at the time of its coverage denial it did not have factual support for the claim that Peters acted as one of SOS's temporary workers assigned temporarily to clients.

Great American evolved its arguments to the bold claim that "[t]his case is about whether SOS **intended** that its employees driving customers' vehicles while doing those customers' work be insureds under SOS's auto liability policies." R 1710. This argument is legally irrelevant and factually wrong for the reasons detailed below. As Great American's first coverage counsel concluded, once Peters is shown to have acted "in your [SOS's] business," Peters "is clearly insured under the [Federal] policy." *See* R 635-38.

A. Great American's Interpretation of "Temporary" and "Staff" is Contrary to Ordinary Usage and Unreasonable.

Great American's position is that Peters must be considered a "temporary" employee of SOS regardless of the full-time nature and permanency of his employment. However, in Utah, all limitations to coverage are strictly construed and Great American bears the burden of proving that a limitation applies. *See LDS Hosp.*, 765 P.2d at 859.

By claiming that Peters is a "temporary" employee, regardless of whether his position is full-time or permanent, Great American has **turned the word temporary into its antonym**. According to Great American, it "is **not important . . . how long [employees] will [work].**" R 974 (emphasis added). However, the word "temporary" is defined as follows:

1. Lasting or effective **for a time only; not permanent**.
2. an office **worker hired**, usu. through an agency on a per diem basis, **for a short period of time**.

RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. Revised 2000) (emphasis added) R 1073-75 (Addendum Ex. H).

This common sense definition of "temporary" is used in both policies to define "temporary workers." See Federal Policy (R 663), Section V, Definitions, ¶ N ("Temporary worker' means a person who is furnished to you for a finite time period . . . in special work situations such as employee absences, temporary skill shortages and seasonal workloads."); Great American Policy (R 704), Section V, Definitions, ¶ F ("Temporary workers' are persons furnished to you to substitute for permanent employees on leave or to meet seasonal or short-term workload conditions."). The Policies also expressly state that the temporal nature of employment makes a difference for coverage purposes because "temporary workers" are not insureds but full-time employees, including "leased" workers, are insureds. See SOF ¶¶ 8 and 11.

The key endorsements (CA 989 and 16-02-33) draw this same distinction—temporary workers assigned to customers are not covered but all other full-time employees are "insureds." SOF at ¶¶ 5-6. The policy must be read as a whole and the endorsements harmonized with these main policy definitions. *St. Paul Fire & Marine Ins. v. Commercial Union Assurance*, 606 P.2d 1206, 1208 (Utah 1980) ("As a general rule: endorsements . . . are to be read and construed with the policy proper") (*quoting* 1 Couch on Insurance 2d, Sec. 15:30).

In trying to overcome these straightforward definitions and common meaning, Great American argues in essence that SOS subjectively intended for black ("temporary") to mean white ("permanent") or black ("temporary"). However, before Great American

can give the word "temporary" the meaning of its antonym—"permanent"—Great American must first show that the word "temporary" is ambiguous. *See Dawson*, 841 P.2d at 750 ("If the policy terms . . . are unambiguous, then 'we interpret those terms in accordance with their plain and ordinary meaning'") (quoting *Valley Bank & Trust Co. v. U.S. Life Title Ins. Co.*, 776 P.2d 933, 936 (Utah Ct. App. 1989)); *see also* 17A Am.Jur.2d Contracts § 348 ("the intention of the parties must be gathered from that language, and that language alone, no matter what the actual or secret intentions of the parties may have been"). Great American fails to cite a dictionary or other source to justify its position that "temporary" can mean "permanent."

Instead, Great American argues that this Court cannot interpret the words black ("temporary") or white ("permanent") because supposedly all "knowledge of [SOS's] employment and personnel practices" resides with SOS. *See R 962*, 975-76. It is a Court's job, however, to read and interpret the Federal Policy and to give the policy a plain meaning. *Home Savings*, 817 P.2d at 347 ("[t]he interpretation of a contract normally presents a question of law"). The law is settled that "[a] party's subjective, undisclosed intent is immaterial to the interpretation of a contract, [and] the court will give force and effect to the words of the contract without regard to what the parties to the contract thought it meant or what they intended for it to mean." 17A Am.Jur.2d Contracts § 347. Courts simply are not in the business of "attempt[ing] to ascertain the actual

mental processes of the parties in entering into a contract; rather the law presumes that the parties understood the import of their contract." *Id.*

While most parties are not so bold as to argue that a word should be read as its antonym, the argument that a word should be given an undisclosed **subjective** meaning attributed to it by the policyholder is hardly new. Great American, as a sophisticated insurer, is aware of and has advocated in favor of the overwhelming body of law rejecting subjective interpretation. *See Nichols v. Great Am. Ins. Co.*, 169 Cal. App.3d 766, 215 Cal. Rptr. 416, 421 (1985) ("words in an insurance policy are to be read in their plain and ordinary sense").

This Court has likewise rejected subjective interpretation of insurance policies. In Utah, words must be interpreted as "used in common, daily, non-technical speech," not based on specialized industry vocabulary. *See Dennis*, 645 P.2d at 675; *Dawson*, 841 P.2d at 751 (contract interpreted "in accordance with the usual and natural meaning of the words."); *Valley Bank*, 776 P.2d at 936 (policy terms are given "plain meaning"). The test is objective and looks at the language "as an ordinary purchaser of insurance would understand it." *Sandt*, 854 P.2d at 523; *Draughon v. CUNA Mut. Ins. Soc.*, 771 P.2d 1105, 1108 (Utah Ct. App. 1989) (same).

Stripping the words "temporary employees" of specialized or technical meaning, the phrase clearly does not describe the opposite—full-time permanent employees. Under

straightforward contract interpretation, Peters is covered because he was not a "temporary" worker.

Great American's reading of the word "staff" is equally unconvincing. As an initial matter, it is important to note that the word "STAFF" is not separately defined in the Federal Policy outside of its use in endorsement 16-02-33. *See* Great American Admissions, No. 14 (R 632). Under the language of that endorsement, the potential "cutback" in coverage is for those employees who are "TEMPORARY EMPLOYEES FOR THE CUSTOMERS." *See* R 682. In other words, the Federal Policy defines "STAFF" in the very provision Great American cites. The allegedly "excluded" non-"STAFF" are the "TEMPORARY EMPLOYEES FOR THE CUSTOMERS."

Nevertheless, Great American argues the excluded non-"staff" does not refer to just "temporary employees" as stated, but instead to any employee who is not working "under the direction and control of customers" whether permanent or temporary. R 974. Great American never attempts to explain how this extraordinary limitation can be gleaned from the word "STAFF." At best, the word is multidimensional. *See Dennis*, 645 P.2d at 674. In *Dennis*, this Court observed that the word "resident" (similar to the word "staff") has "different shades of meaning" and while frequently used, it "has no precise, technical, and fixed definition applicable to all contexts and to all cases" and therefore the word is "flexible, elastic, slippery and somewhat ambiguous." *Id.* at 674.

As recognized in a common thesaurus, "staff" and "employee" can be used as synonyms. *See* Roget's Thesaurus, p. 581 (3rd ed. 1998) (R 941-42) (stating that the synonyms for "staff" include "crew, personnel, help, **employees**"); *id.* at 191 (stating that one synonym for "employee" is "staff member") (Addendum Ex. I.). SOS itself uses the word "staff" to refer to the people it sends to clients to be supervised by those clients. *See* R 1081-84 (SOS's website) (Addendum Ex. J).¹¹

Consequently, it is clear that Peters, as an admitted SOS employee, "may by reasonable construction of the word"—STAFF—be included within the coverage afforded by the policy. *Dennis*, 645 P.2d at 675.¹²

¹¹SOS refers to the services it provides to its customers through its employees as "staffing." *See* R 1081-84. Obviously, the people who provide this "staffing service" can reasonably be considered SOS's "staff." For example, SOS discloses on its website that it changed its name from "SOS **Temporary** Services to SOS **Staffing** Services, Inc. —a name that would better reflect [SOS]'s changing scope and broader range of services." R 1084. A part of this change is the suppling of "permanent" employees, not just "temporaries." *See* R 1082 ("SOS Staffing services . . . **provides** temporary, temp-to-hire and **permanent** placements"); *see also* R 1081 (SOS meets the **needs of "employer[s]** looking for **staffing solutions**"); R 1083 ("We are dedicated to providing quality **staffing services**").

¹²It is worth noting that while Great American criticized the Knutesons for citing a thesaurus rather than a dictionary in looking at the common meaning of the word "staff," the dictionary definition for "staff" is essentially the same as the cited thesaurus:

1. a group of people, **esp. employees**, who carry out the work of an establishment or perform a specific function.

Id. R 1074 (emphasis added) (Addendum Ex. H). As noted in the Webster's College Dictionary, the "most common senses [of the term defined are] listed first." Great American ignores both the dictionary and the thesaurus by arguing that such definitions

(continued...)

B. SOS's Alleged Subjective Intent is Inconsistent With Actual Conduct and Such Intent is Legally Irrelevant.

Pushed to justify its bizarre interpretation of "temporary" and "staff," Great American ascended to 30,000 feet and argued to the trial court that "[t]his case is about whether SOS **intended** that its employees driving customers' vehicles . . . be insureds." *See* R 1710 (emphasis added).

Unfortunately, Great American's tactic worked and the trial court disregarded its role to interpret policy language according to objective evidence. *See* 17A Am.Jur.2d Contracts §§ 347-48 (quoted *supra* Section III.A). Instead, the trial court gave complete deference to SOS's post-claim assertion of subjective "intent." *See* R 1834. In doing so, the trial court set up the strawman that SOS did not intend for **all** its workers to be covered because such a position is "untenable." R 1834. However, the trial court's all or nothing approach is legally and factually irrelevant. The issue is not whether SOS intended for **all** its employees supervised by clients to be "insureds" (a position never advocated by Peters), but rather what subset of employees supervised by clients are excluded as "temporary" employees.

¹²(...continued)

"are problematic" because "the first dictionary definition of 'staff' is typically 'rod' or 'stick' [and] [b]y this measure no one would be 'staff.'" *See* R 973 at 5 n.6. In Webster's College Dictionary, "stick" is the fourth definition and the fact that the word "staff" has a different meaning when the reference is to an inanimate object does not mean that the word "staff" cannot be given its "most common sense[]" meaning when the reference is to a person, i.e. "employees, who carry out the work."

Indeed, it is **undisputed** that SOS intended for **some** employees supervised by clients (the non-"temporary" employees) to be "insureds" since it represented and warranted such coverage to clients. The facts (detailed below) prove SOS confirmed automobile coverage for its full-time employees leased to customers. Even more importantly, SOS's alleged subjective "intent" is irrelevant. These two points are addressed below.

1. SOS's Post-Claim Position of "Intent" is Contrary to its Conduct.

SOS clients oftentimes contractually demanded affirmation of automobile insurance for the client and for the SOS employees doing work. SOF ¶¶ 28-34. To meet these requirements, SOS was required to either obtain an endorsement modifying the Federal Policy or locate existing language in the policy that provides such coverage. SOF ¶ 30. Federal, however, issued no such endorsements and SOS knew Federal would never do so. SOF ¶ 31. SOS nevertheless issued "Certificate(s) of Liability Insurance" through its agent representing to SOS's clients that those clients have "additional insured" status for automobile liability coverage including excess liability coverage under the Great American Policy. SOF ¶ 32 (Addendum Ex. F).

Because these certificates do not modify the policies, the **only** basis for confirming "additional insured" status to clients is the language of the Federal Policy. In making these representations, SOS obtained Federal's written opinion that there is a subset of employees sent to work under the supervision of the clients who are covered "insureds"

under the Federal Policy and, consequently, SOS clients are also covered "insureds" to the extent of vicarious liability. SOF ¶ 33 (Addendum Ex. G). This interpretation applies equally to Peters since it is based upon the language of the Federal Policy, not an endorsement addressed to a particular client.¹³

SOS relied on and took advantage of Federal's interpretation in order to satisfy client's contractual demands, SOF ¶¶ 28-34, and SOS's post-claim statements of intent are inconsistent with its prior conduct.¹⁴ SOS is admittedly motivated post-claim by an interest in avoiding increased premiums. *Id.* at ¶ 27. In reality, the record reveals that SOS paid for non-owned automobile coverage for an estimated 10,000 employees, including payrollers. *See* SOF ¶¶ 35-36; *see also* R 1414 (¶¶ 28-30); R 647; R 1492; R 1700-06; and R 1501. While SOS hoped that clients would carry their own insurance and that such insurance would first respond to claims, SOS was required by contract to have additional automobile insurance. *Id.* Great American's after-the-fact "parade of

¹³The trial court clearly did not understand and/or did not consider the undisputed facts on this point. *See* R 1855 at 25, 49-57.

¹⁴The trial court's statement that it is factually undisputed "that Peters was not part of the SOS staff" is flatly wrong because the issue of what "staff" means is a legal issue not an issue of unilateral intent and **undisputed admissible evidence** uniformly refutes this conclusion. SOS's factual claim is that **no** employee supervised by a client was part of its "staff." However, the actual evidence is that SOS represented and warranted insurance coverage for employees supervised by clients when coverage was available only for SOS's "staff." *See* SOF ¶¶ 6, 28-34. Second, SOS publicly markets these same employees supervised by clients as staff who provide "staffing solutions." *See supra* note 11. The most that can be said is that SOS **argues** it internally refers to employees supervised by others as non-staff, but SOS's internal conduct is irrelevant (*infra* Section II.B.2), and the objective evidence is uniformly contrary to the trial court's conclusion.

horribles" that SOS would never pursue insurance even on a secondary basis is simply refuted by undeniable evidence. SOF at ¶¶ 28-34.

Because the facts related to SOS's conduct are undisputed and support a finding of coverage, Great American had to convince the trial court to somehow ignore these facts. Remarkably, Great American convinced the trial court to accept a mere apology. Great American explained SOS's conduct by saying that SOS "like all businesses . . . were under pressure to do certain things. Nobody wanted to issue these certificates [showing insured status for customers and the involved employees]." R 1855 at 24; *see also* R 1729-30 ("business pressures forced" SOS to confirm automobile insurance coverage for employees). Great American's apology, however, does not pass legal scrutiny. It is black letter law that actions speak louder than words and SOS's conduct conclusively rebuts Great American's position of a contrary intent that was never communicated as described below. *See* A. CORBIN, CORBIN ON CONTRACTS § 24.16 (2003); RESTATEMENT (SECOND) CONTRACTS § 204(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.").

2. *SOS's Unique Understanding of the Words "Staff" and "Temporary" Was Never Communicated to or Agreed to by Federal.*

Even if SOS's conduct were consistent with its post-claim assertions of "intent," the law is clear that subjective intent is irrelevant. SOS's witnesses themselves concede that SOS's internal use of "temporary" to describe a full-time permanently leased employee is contrary to the ordinary dictionary meaning of the word. SOF ¶ 22; *see also*

SOF ¶¶ 20-21. More importantly, SOS representatives admit never communicating SOS's "unique" understanding of the words "temporary" or "staff" to Federal. SOF ¶ 23 (neither the risk manager nor in-house counsel communicated with Federal). SOS's insurance agent is the only individual to interact with Federal on SOS's behalf. He does not recall explaining SOS's unique use of "staff" or "temporary" to Federal and there is no evidence that Federal agreed with or knew of SOS's alleged special use of these words. *Id.* Indeed, **the agent could not have explained SOS's alleged intent if he had been asked because he does not know whether a payroller such as Peters was intended by SOS to be considered part of the "staff" or a "temporary."** *Id.*¹⁵

Consequently, SOS's alleged internal use of words is irrelevant. Evidence of an alleged subjective and unilateral intent of one party has no bearing on interpretation. 17A Am.Jur.2d Contracts §§ 347-48.¹⁶ Even if SOS's internal use of words were considered

¹⁵Great American's counsel elicited the following testimony:

Q: (BY MR. LUND) Are you familiar enough with what SOS sought to accomplish with its coverage to tell whether or not they sought to have coverage limited to staff that would or would not include payrollers.

...

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

R 1453.

¹⁶*See also Greer v. Northwestern Nat'l Ins. Co.*, 743 P.2d 1244, 1249 (Wash. 1987) (parties had contrary understandings and so extrinsic evidence including what the broker told the policyholder is irrelevant); *Over the Road Drivers, Inc. v. Transport Ins. Co.*, 637 (continued...)

"reasonable," this Court has squarely held that a policyholder's "reasonable expectation" that a policy will be read in a certain way is irrelevant to the way it is construed. *See Allen v. Prudential Prop. and Cas. Ins. Co.*, 839 P.2d 798, 807 (Utah 1992).

In short, there is no evidence of an agreement between SOS and Federal to read the words "staff" or "temporary" in a special way. Consequently, SOS's post-claim proffers of alleged intent are a red-herring.

C. The Actions of Federal, SOS and Great American Demonstrate Coverage.

While Peters believes this Court can simply read endorsement 16-02-33 and find coverage, it is clear that if this Court considers evidence beyond the contract, the admissible evidence is not SOS's secret undisclosed intent (contrary to its actions), but rather performance evidence from SOS (described above), Federal and even Great American.

Specifically, Great American is faced with the reality that Federal, the party that wrote endorsement 16-02-33 (SOF ¶ 25), performed by paying the entire \$1,000,000

¹⁶(...continued)
F.2d 816, 819 (1st Cir. 1980) (statements by an underwriter concerning meaning of a policy are irrelevant because "they prove nothing; it is the parties mutual understanding of what the contract meant that is important here."); *State Auto Ins. Ass'n. v. Anderson*, 528 A.2d 1374, 1376 (Pa. Ct. App. 1987) (even if intent is established "our law has never indicated that one party's subjective intent or understanding of a contractual obligation controls that obligation."); *Klos v. Lotnicze*, 133 F.3d 164, 168 (2nd Cir. 1997) (objective not subjective intent controls); *Swaminathan v. Swiss Air Transport Co., Ltd.*, 962 F.2d 387, 389 (5th Cir. 1992) (same).

claim under language Great American now argues eliminates coverage. Recognizing the significance of this fact, Great American went on the offensive below, first arguing that Federal's payment was a "mistake," a "staged event" and a "confected . . . settlement." *See* R 979-80. Nothing could be further from the truth as Great American knows. The trial judge dismissed Great American's arguments as "all speculation." *See* R 1855 at 21. In reality, the record shows that Great American tried to convince Federal to change its finding of coverage for more than a year prior to Federal's payment. *See* SOF ¶ 26; *see also* R 814-18 (¶¶ 19-28). Federal's finding of coverage was made long before any settlement was reached and before the finding of coverage was even communicated to counsel for Peters and the Knutesons. R 816. Great American's efforts to portray these facts as staged by lawyers (who were not yet retained) smacks of desperation. Great American also tries to dismiss Federal's payment of the claim by arguing that only evidence of events at the time of contracting are relevant. However, this Court has clearly held that performance evidence is persuasive regarding intent. *See Peterson v. The Sunrider Corp.*, 2002 UT 43, ¶ 23, 48 P.3d 918 (contract will be read consistently with "actions of the parties in proceeding under the contract.").

Great American is equally defensive in responding to other performance evidence, including statements by Great America's own expert coverage counsel, Tim Dunn, and by its adjuster, Guy Blaire, both of whom read the Federal Policy consistently with Peters' interpretation for substantial periods of time. Great American argues that the written

statements of these individuals are not "admissions." Great American goes so far as to argue that Mr. Dunn, who wrote at least three coverage letters (R 635-41, 754-54) over three months, may not have read the entire Federal Policy. *See* R 983-87. These arguments are nonsense. Courts frequently bind insurance companies to the admissions of their counsel or the insurance company's agent adjustors.¹⁷

In short, the reading of endorsement 16-02-33 offered by Peters is correct and consistent with the only potentially relevant evidence of "intent." Peters is not an excluded "temporary" and therefore this Court must order that he is a covered "insured."

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

Alternatively, even if this Court finds that Great American has advanced a "reasonable" interpretation of 16-02-33, the interpretation offered by Federal and Peters is

¹⁷*See e.g. State v. Worthen*, 765 P.2d 839, 847 (Utah 1988) ("The general rule is that statements made by an attorney concerning any matter within the scope of his authority are admissible [and the attorney's authority is] measure[d] . . . by the same tests of express or implied authority as would be applied to other agents"); *Rice v. Granite Sch. Dist.*, 456 P.2d 159, 163 (Utah 1969) (adjustor's statements that "insurance company admitted liability" would prevent carrier from relying on limitations period if proven to be true); *Jenkins v. Percival*, 962 P.2d 796, 799 n.1 (Utah 1998) (an insurance "adjuster . . . is an employee of [the carrier] which has the express, contractual obligation to settle and otherwise adjust a claim" and therefore the adjustor has the authority to agree to arbitration.); *see also State Farm Mut. Auto Ins. Co. v. Potter*, 186 F.2d 834, 839 (9th Cir. 1950) (statements by adjustor and insurance company's counsel are admissible against insurance company); *Schmidt v. Luchterhand*, 214 N.W.2d 393, 400 (Wis. 1974) (counsel's admission of coverage is binding); *Bordelon v. Great Am. Indem. Co.*, 124 So.2d 634, 637 (La. Ct. App. 1960) (same).

also reasonable. Consequently, on this ground alone the trial court's ruling must be reversed.

Great American's argument boils down to a claim that Federal's interpretation of its own policy is **unreasonable as a matter of law** even though Federal drafted endorsement 16-02-33 and it was confident enough in its interpretation to pay \$1,000,000. Great American is forced to take this awkward position because it is settled that "any ambiguity or uncertainty in the language of an insurance policy must be resolved in favor of coverage." *LDS Hosp.*, 765 P.2d at 858; *Versaw*, 2004 UT 73 at ¶ 25; *see also Dennis*, 645 P.2d at 675 (if due to use of an ambiguous term, "the company [defined the insureds] more extensive[ly] than it contemplated, the fault lies in its own selection of the words . . . it chose.").

Federal's interpretation is reasonable for all the reasons described above. Federal's interpretation is consistent with SOS's statements to clients confirming automobile coverage for clients and for the full-time employees assigned to clients. *See supra* Section III.B.1. Federal's interpretation is also consistent with the interpretation of Great American's original coverage counsel and adjustor. *See supra* Section III.C.

Great American also recognized in litigation that the Federal Policy is subject to more than one interpretation. Specifically, Great American was asked a straightforward question: "[a]dmit that Dallas W. Peters falls within the definition of 'Employee' as defined in Section V. DEFINITIONS ¶ E of the Federal Policy." *See* Great American

Admissions, Request No. 6 (R 630). Great American's reply implicitly (if not explicitly) concedes ambiguity:

The Request as written asks for an admission regarding the employment status of Dallas W. Peters, but does not specify by whom or what entity Dallas W. Peters was employed. **Great American is therefore unable to admit or deny this Request without the necessary clarification as to the employer.**

Id. (emphasis added). If Great American cannot answer this most basic of questions, it is clear a lay person could not conclude with certainty that Peters is an uncovered "temporary employee."

Most importantly, the reading offered by Federal and by Peters is reasonable based upon the words used. As detailed above (*see supra* Section III.A), Great American is attempting to turn the word "temporary" into its antonym, "permanent." Great American does this even though defined terms in the Federal Policy make it clear that "temporary" means short term and that the expected duration of employment is an important coverage distinction. *Id.* Also, the word "staff" is flexible and uncertain, and it can refer to an organization's employees. At a minimum, "staff" does not have the precise meaning Great American attributes of not working "under the supervision of clients" no matter whether such arrangement is "temporary" or "permanent."

Because the reading offered by Federal and Peters is reasonable, coverage must be provided based upon an ambiguity. *See Versaw*, 2004 UT 73 at ¶ 25. Federal concedes

ambiguity. SOF ¶ 26. On this independent basis alone, the trial court's granting of summary judgment must be reversed.¹⁸

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

Great American argues its coverage is "no broader . . . **than is provided under such underlying polic[y]**," (R 704) (emphasis added). Federal has undeniably provided coverage (SOF at ¶¶ 14-15). Consequently, Great American must follow suit under the terms of its policy and the arguments it presents.

Courts frequently state that a primary carrier's reading of its policy, as the drafter and party with whom the policyholder interacts, must take precedent over an excess carrier's uninvolved second guessing. Where the primary carrier has a different intent from that of the following form carrier, courts consistently read the primary and following form policies in harmony to find coverage. *See Playtex FP, Inc. v. Columbia Cas. Co.*, 609 A.2d 1087, 1093 (Del. 1991) ("excess insurers who follow form are generally held to

¹⁸Knutesons have offered another alternative basis to find coverage under the Federal Policy. Under Section II-Liability Coverage, ¶ A.1.a, the Federal Policy states that "[t]he following are 'insureds:' You for any covered 'auto.'" *See* R 655. Great American first argued that this language applies only to corporate entities (*see* R 20), but later conceded this language may also be read to apply to individuals, including an "SOS Staffing staff member" but not Peters. R 22 (n.3). In *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 1116, 1119 (Ohio 1999) the Ohio Supreme Court held that the word "You" in an automobile liability policy issued to a corporation is ambiguous and subject to more than one reasonable interpretation in determining whether "you" refers to the individuals who act on behalf of the corporation. The Court reached this conclusion although the policy stated (as does the Federal Policy) that "throughout this policy the words you and your refer to the named insured shown in the declarations." *Id.* at 1118.

the intent of the primary insurer."); *Associated Indem. Corp. v. Dow Chemical Co.*, 814 F. Supp. 613, 618, n.5 (E.D. Mich. 1993) (language in primary and excess policies should be read consistently "if possible" because otherwise the expectation of a meaningful and coordinated insurance program is frustrated).

Similarly, in *Amway Dist. Benefits Assoc. v. Northfield Ins. Co.*, 323 F.3d 386 (6th Cir. 2003) a primary insurer failed to notify the policyholder at renewal of an endorsement that cut back the scope of coverage. The following form carrier relied upon the endorsement to deny the claim. The Court held that "because of the 'follow form' linkage between an excess insurer and the primary insurer" the excess carrier is bound by the primary carriers "procedural as well as substantive obligations to their common insured." *Id.* at 393. The excess carriers' remedy if the primary carrier makes a mistake is through "an indemnity action against the primary." *Id.* Other courts have likewise held that a follow form excess carrier is obligated to provide coverage even in situations where the primary policy is reformed post-claim. *See R.W. Beck & Assoc. v. City of Sitka*, 27 F.3d 1475, 1483 (9th Cir. 1994); *Great Atl. Ins. Co. v. Liberty Mut. Ins. Co.*, 773 F.2d 976, 980 (8th Cir. 1985); *L.E. Meyers Co. v. Harbour Ins. Co.*, 394 N.E.2d 1200, 1202-03 (Ill. 1979).

This case presents an even more compelling set of facts to read the policies in harmony because there is no need to reform the Federal Policy. Great American has expressly agreed to provide excess insurance for coverage "provided under such

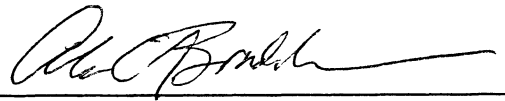
underlying [Federal] polic[y]." *See* R 704. Since Federal has provided coverage of \$1,000,000, the Great American Policy is therefore triggered under the language of the Great American Policy. SOF at ¶¶ 14-15.

CONCLUSION

The trial court's grant of summary judgment must be reversed. This Court must rule that Peters is an "insured" under the Great American Policy for one of the four independent reasons described above. Alternatively, this Court should find that there are unresolved questions of fact surrounding "intent" based upon, among other things, SOS's conduct inconsistent with its claimed subjective intent.

DATED this 14th day of July, 2006.

MANNING CURTIS BRADSHAW &
BEDNAR LLC

A handwritten signature in cursive script, appearing to read 'Alan C. Bradshaw', written over a horizontal line.

Alan C. Bradshaw
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copies of the foregoing Appellants' Brief to be served by placing the same in the U.S. Mail, postage prepaid, to the below named attorneys this 14th day of July, 2006:

John R. Lund
Jill L. Dunyon
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

George B. Hall, Jr.
Rebecca Y. Cooper
Phelps Dunbar, L.L.P.
365 Canal Street, Suite 2000
New Orleans, LA 70130-6534