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IN THE
SUPREME COURT OF FLORIDA

LIBERTY MUTUAL
INSURANCE COMPANY,

Petitioner/Appellant

vs.

LONE STAR INDUSTRIES, INC.

Respondent/Appellee

CASE NO. 80,899

Initial Brief of Liberty Mutual Insurance Company

On Review To the Third District Court of Appeal of Florida

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ISSUE PRESENTED

Does this Court's July, 1993 decision in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp. ("Dimmitt II"), holding that the pollution exclusion has a temporal meaning and is not ambiguous, call for reversal of the decision of the Third District Court of Appeal in this case, which was based entirely on the decision reversed in Dimmitt II?

STATEMENT OF THE CASE

This is a discretionary review of an appeal from a non-final order granting respondent-appellee Lone Star Industries, Inc. ("Lone Star") partial summary judgment against petitioner-appellant Liberty Mutual Insurance Company ("Liberty Mutual"). In its order, which was affirmed by the Third District Court of Appeal ("Third DCA"), the trial court held that Liberty Mutual has a duty under certain comprehensive general liability (CGL) policies to defend Lone Star against actions brought by the Dade County Department of Environmental Resources Management ("DERM"), and others (collectively, the "Miami Wood Actions"). These actions allege that Lone Star caused environmental contamination by its regular release of pollutants in its operation of a wood treatment facility over a number of years. In the order appealed, the lower courts incorrectly ruled that Liberty Mutual must defend Lone Star in these actions despite the pollution exclusion in the policies, which precludes coverage of all pollution harm not caused by sudden and accidental releases. Because it conflicts directly with the decision of this Court, on

rehearing, in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1993 Fla. LEXIS 1128, 18 Fla. L. Weekly S400, _____ So. 2d _____ (Fla. 1993) ("Dimmitt II") and because no further proceedings are required, the decision below should be reversed.

PROCEEDINGS BELOW

The complaint in this action, filed on February 9, 1987, in Dade County Circuit Court, sought coverage of the Miami Wood Actions under its policies with Liberty Mutual. Liberty Mutual's answer denied any obligation to defend or indemnify Lone Star, citing, inter alia, the policies' pollution exclusion. On October 8, 1990, the Circuit Court entered Partial Summary Judgment on the issue of Liberty Mutual's duty to defend Lone Star in the DERM suit (the "Clemente Action").[1/] (App. 2). Liberty Mutual timely filed its notice of appeal on November 6, 1990. (R. 1-3)[2/]

[1/] A motion for partial summary judgment was filed by Lone Star on November 4, 1988 on the issue of Liberty Mutual's duty to defend the Clemente Action. On April 24, 1989, the Circuit Court entered an order granting Lone Star's "Motion for Partial Summary Judgment - Duty to Defend" without explanation. (App. 1). [The designation "App. __" refers to the page number of the Appendix to this brief.] Liberty Mutual's appeal of this order was dismissed as premature.

[2/]The designation "R" refers to the Record forwarded to this Court by the Third DCA.

On September 22, 1992, the Third DCA issued its brief opinion, stating:

> Based on the Florida Supreme Court's ruling in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., ____So. 2d__, (Fla. Case No. 78,293, opinion filed September 3, 1992) [17 FLW S579] that the term "sudden and accidental" as contained in the pollution exclusion clause is ambiguous as a matter of law, we hereby affirm.

(App. 4)

On October 6, 1992, Liberty Mutual moved the Third DCA for rehearing or reconsideration or to certify its decision to this Court (R. 309-313, 314-320). These motions were denied on November 10, 1992. (R. 339-340) On December 8, 1992, Liberty Mutual filed a notice to invoke the discretionary jurisdiction of this Court.[3/] (R. 341-343)

On July 1, 1993, this Court issued a new opinion, on rehearing, in Dimmitt ("Dimmitt II", 18 Fla. L. Weekly S400), reversing this Court's original decision in Dimmitt ("Dimmitt I") and expressly concluding that the pollution exclusion was not ambiguous. Dimmitt II held that pollution which "took place over a period of many years" was not "sudden and accidental". 18 Fla. L. Weekly S408

[3/]On December 10, 1992, Liberty Mutual filed an amended notice to invoke discretionary jurisdiction. Liberty Mutual's jurisdictional brief was filed with this Court on December 18, 1992. (R. 351-353) The ground for this notice, as for the motions for rehearing and certification in the Third DCA, were that the Third DCA had misapplied Dimmitt and that, even under that decision, Liberty Mutual did not owe a defense to Lone Star.

Following the issuance of Dimmitt II, Lone Star filed a motion seeking one of three alternatives: that this Court not exercise jurisdiction over the present case, or, if it did accept jurisdiction, that it allow full briefing of the merits, or, relinquish jurisdiction to the Third DCA [4/] On April 5, 1994, this Court denied Lone Star's motion in its entirety, thus exercising jurisdiction over this case but not permitting full briefing on the merits or oral argument. The proceedings before this Court therefore are limited solely to the question of whether the Third DCA's decision conflicts with Dimmitt II.

STATEMENT OF FACTS

Between 1972 and 1979 Liberty Mutual issued CGL insurance to Lone Star. This insurance specifically excluded coverage for harm arising out of the discharge, dispersal, release or escape of contaminants or pollutants unless the discharge was both "sudden and accidental" or resulted from underground seepage of which Lone Star was unaware. From 1972 until the early 1980's, Lone Star operated a wood treatment facility at 7000 Coral Way in Miami ("the Site"). The Miami Wood Actions alleged that, in the course of daily operations at the Site, pollutants were routinely allowed to drip onto the soil, causing extensive contamination of

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[4/] "Motion For The Entry of an Order Denying Review, or In the Alternative Accepting Jurisdiction, and Permitting a Full Briefing On The Merits and Oral Argument, Or In the Alternative, Accepting Jurisdiction and Relinquishing Jurisdiction to the Third District Court of Appeals With Directions."

the Site and leading DERM and others to file suit against Lone Star.

The Clemente complaint alleged that the releases of contamination at the Site were known, "wanton" and "willful" and "occurred . . . and continue to occur and exist until the present time unabated, unremedied and uncorrected . . . " (Clemente complaint p. 4-5, 8; App. 10, 13). The Clemente complaint did not allege, in form or substance, either sudden and accidental releases or unknown underground seepage. The other complaints against Lone Star contained allegations that the contamination was the result of ongoing operations between 1942 and 1981 (DER suit, ¶15-16, App. 19); that the site was "knowingly" used as a dump for dangerous chemicals (Futura suit ¶19, App. 28) and that the contamination was the "cumulative effort" of "dripping and spilling" since 1941 (Davidson suit ¶12-14, App. 34). Despite the allegations in these complaints of long term, intentional pollution, Liberty Mutual initially provided a defense to Lone Star pending an investigation of the actual circumstances of the pollution. When Liberty Mutual's investigation confirmed that the releases of pollution at the site were gradual and intentional, Liberty Mutual withdrew its defense of Lone Star.

SUMMARY OF ARGUMENT

The decision of the Third DCA was based exclusively on the holding of Dimmitt I that the "pollution exclusion" is ambiguous, which conclusion was reversed by this Court in Dimmitt II, which

holds that the pollution exclusion is not ambiguous and bars coverage for harm caused by releases of pollution which are not both "sudden" (rapid, abrupt) and "accidental". The duty to defend is determined by comparing the allegations of the complaint against the insured with the terms of the insurance policy. The complaints against Lone Star alleged that the contamination at the Site was the result of decades of operations, in which Lone Star knowingly discharged pollutants into the soil. Under Dimmitt II, there is no coverage for pollution which is ongoing and expected, and Liberty Mutual has no obligation to defend Lone Star from the Miami Wood Actions because these actions do not allege a "sudden and accidental" release of contamination. Thus, the decision of the Third DCA that Liberty Mutual must defend Lone Star conflicts with Dimmitt II and must be reversed.

Finally, Lone Star's assertions that the underground seepage exception applies conflicts with the plain meaning of the clause. Accordingly, the decision below should be reversed.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL MUST BE REVERSED BECAUSE IT CONFLICTS WITH DIMMITT II.

The Third DCA based its decision in this case solely on the holding of this Court in Dimmitt I that the phrase "sudden and accidental" in the "pollution exclusion" is ambiguous.[5/] (App. 5) Since Dimmitt I has been reversed precisely on this point, so too must the Third DCA's ruling be reversed.

This Court decided Dimmitt II on July 1, 1993, reversing Dimmitt I and holding that the phrase "sudden and accidental" was not ambiguous and that "sudden" "includes a temporal aspect with a sense of immediacy or abruptness". 18 Fla. L. Weekly S401. On the facts before it, this Court found that the policyholder was not entitled to coverage because the pollution at issue "took place over a period of many years and most of it occurred gradually." 18 Fla. L. Weekly S402. The Court concluded that, because these releases occurred in the course of daily business, they were not, as a matter of law, "sudden and accidental". Id.[6/] On March 31, 1994, this Court denied Appellant's Motion

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[5/]Liberty Mutual's original petition to this Court was based upon the Third DCA's misapplication of Dimmitt I to the facts of this case. Because of the allegations of known and gradual releases of pollution against Lone Star in the underlying complaints, even under Dimmitt I, Liberty Mutual owed no defense to Lone Star. The Third DCA's decision was inconsistent with Dimmitt I because the complaints against Lone Star alleged that the releases of pollutants were intentional and, under Dimmitt I, this was sufficient to defeat Lone Star's claim for a defense.

[6/]On March 31, 1994, this Court denied Appellant's Motion for Rehearing and Clarification and the decision in Dimmitt II became final.

for Rehearing and Clarification and the decision in Dimmitt II became final.

In light of this Court's decision in Dimmitt II, the decision of the Third DCA in the present case must also be reversed. The entire basis of the decision of the Third DCA was the holding of Dimmitt I that the pollution exclusion was ambiguous. The Third DCA expressly held: "based on the Florida Supreme Court's ruling in [Dimmitt I] that the ... pollution exclusion clause is ambiguous as a matter of law, we hereby affirm" (App. 4) With the reversal of Dimmitt I, the rule of law upon which the Third DCA based its decision has been reversed; a corresponding reversal of the decision of the Third DCA in this case is necessary to avoid a conflict with Dimmitt II. Cf., Cantor v. Davis, 489 So. 2d 18 (Fla. 1986); Hendeles v. Sanford Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978) (Appellate court must apply law in effect at the time of decision).

This Court has exhaustively considered the meaning of the pollution exclusion in Dimmitt. There is no need for this Court to examine further the meaning of this clause. Rather, the present proceedings are confined solely to the question of whether the decision of the Third DCA in this case conflicts with this Court's decision in Dimmitt II, and the meaning of the pollution exclusion enunciated in that case.

There is no avoiding the conflict between the Third DCA's decision and Dimmitt II; they are entirely inconsistent. The complaints against Lone Star alleged willful contamination

and pollution over a span of decades. Under Dimmitt II, these actions do not allege a "sudden and accidental" release of contamination. The Third DCA's reliance on Dimmitt I, which has been definitively reversed, cannot stand and must itself be reversed.

II. LIBERTY MUTUAL HAS NO DUTY TO DEFEND LONE STAR BECAUSE THE COMPLAINTS AGAINST LONE STAR DID NOT ALLEGE A "SUDDEN AND ACCIDENTAL" RELEASE.

Under the rule of Dimmitt II, Liberty Mutual has no duty to defend Lone Star. As set out by this Court in Dimmitt II, "sudden" means "abrupt" or "rapid" and is the opposite of "gradual". Because it is clear on the face of the complaints that the Miami Wood Actions do not allege a "sudden and accidental" release (in fact, they allege exactly the opposite), Liberty Mutual has no duty to defend Lone Star from these actions. Thus, the decision of the Third DCA must be reversed and judgment entered for Liberty Mutual.

In order to obligate an insurance carrier to defend its insured, the allegations of the underlying suit against the insured must bring a claim within the scope of coverage provided by the policies. National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977); Tropical Park, Inc. v. United States Fidelity & Guar. Co., 357 So. 2d 253 (Fla. 3d DCA 1978); Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810, 814 (Fla. 1st DCA 1985). If the underlying complaint fails to allege facts which, if established, create coverage within the policy of insurance, the insurer has no duty to defend the action

or pay a judgment obtained therein. Florida Physicians Insurance Co., v. G. W. Lanzenby, 576 So.2d 794 (Fla. 2d DCA 1991); Caduceus Self Ins. Fund Inc. v. South Florida Emergency Physicians, 436 So.2d 1034 (Fla. 3d DCA 1983); Old Republic Ins. Co. v. West Flagler Associates Ltd., 419 So.2d 1174 (Fla. 3d DCA 1982); Commercial Union Ins. Co. v. R.H. Barto Co., 440 So.2d 383 (Fla. 4th DCA 1983), rev. den., 451 So.2d 850 (Fla. 1984).

Under Florida law, where there is an absence of an allegation of an essential element of coverage, a carrier has no duty to defend. In Consolidated Mutual Ins. Co. v. Ivy Liquors. Inc., 185 So.2d 187 (Fla. 3d DCA 1966), the insurance policy at issue provided coverage only for harm caused by "accident". The court in Ivy Liquors found that the carrier did not have a duty to defend its insured when the complaint against the insured did not allege an accident. See also, Ins. Co. of No. America v. Querns, 562 So. 2d 365 (Fla. 2d DCA 1990) (no duty to defend complaint which alleged "willful" acts where policy provided coverage only for "accidents"); Aetna Cas. & Sur. Co. v. Miller, 550 So. 2d 29 (3d DCA 1989) (no duty to defend complaint which alleged intentional and negligent acts where policy contained exclusion for intentional acts); Fed. Ins. Co. v. Applestein, 377 So. 2d 229 (Fla. 3d DCA 1979) (no duty to defend complaint which

alleged acts done "with malice" and which were "willful" where policy excluded coverage for intentional injury.)[7/]

The CGL policies at issue each contain a "pollution exclusion" which provides:

> It is agreed that the insurance does not apply to any liability arising out of pollution or contamination due to discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion shall not apply if such discharge, dispersal, release or escape is sudden and accidental or results from an underground seepage of which the insured is unaware.

[7/]Numerous cases have held that the pollution exclusion forecloses any duty of defense where the complaint against the insured does not allege discharges of contaminants which are "sudden and accidental." See, e.g., EAD Metalurigical, Inc. v. Aetna Cas. & Sur. Co., 905 F.2d 8 (2d Cir. 1990); Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 669 F. Supp. 798 (E.D. Mich. 1986); Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (App. Div. 2d Dept. 1988), aff'd, 74 N.Y. 2d 66, 544 N.Y.S.2d 531, 542 N.E. 2d 1048 (1989); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988), aff'd, 1989 U.S. App. LEXIS 4795, (6th Cir. Tenn. 1989); United States Fidelity & Guar. Co. v. Korman Corp., 693 F. Supp. 253 (E.D. Pa. 1988); Covenant Ins. Co. v. Friday Engineering Inc., 742 F. Supp. 708 (D. Mass. 1990); United States Fidelity & Guar. Co. v. Star Fire Coals Inc., 856 F.2d 31 (6th Cir. 1988); Great Lakes Container Corp. v. Nat'l Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E. 2d 374, 315 N.C. 688 (1986); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987); American Mut. Liab. Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929 (W.D. Pa. 1987).

In the present case, the Miami Wood Actions not only failed to allege a "sudden and accidental" release, they left no room for ambiguity by alleging the opposite, namely that the discharges took place gradually over many decades as part of Lone Star's regular wood treatment process.

Thus, unless the complaints against Lone Star alleged releases which were "sudden and accidental" or resulted from underground seepage of which Lone Star was unaware, the pollution exclusion relieves Liberty Mutual of any duty to defend Lone Star.[8/]

None of the allegations of the Miami Wood Actions bring these claims within the scope of the coverage provided by Liberty Mutual. The allegations against Lone Star of property damage caused by the discharge or release of contaminants are outside the scope of coverage defined by Liberty Mutual's policies. While the actual words "sudden and accidental" need not necessarily be alleged in the complaint, the complaint must allege facts which can be reasonably construed as stating a sudden and accidental discharge. There are no such facts alleged in the complaints in the Miami Wood Actions. Indeed, these complaints allege exactly the opposite -- ongoing, continuous and intentional releases of contamination over the course of decades. As a result, under Dimmitt II, Liberty Mutual has no duty to defend Lone Star and the decision of the Third DCA must be reversed.

[8/]By its express terms, the exclusion applies to releases of pollution and not to the effects of the releases. See, e.g., Lumbermen's Mut. Cas. Co. v. Belleville Indus., Inc., 407 Mass. 675, 679 (1990) ("The sudden event to which the exception in the pollution exclusion applies concerns neither the cause of the release or the damage caused by the release. It is the release itself that must have occurred suddenly, if the exception [to the exclusion] is to apply so as to provide coverage").

A. The Miami Wood Actions Do Not Allege A Sudden and Accidental Release

To be entitled to a defense, Lone Star must show that the complaints against it alleged both sudden and accidental releases. In fact, none of the Miami Wood actions alleged either a sudden or an accidental release. For example, the Clemente complaint alleged, inter alia:

a. That the pollution was caused by Lone Star's "throwing, draining, running" pollutants into the waters of Dade County (Clemente complaint, ¶11; App. 8);

b. That Lone Star allowed contaminants "to seep" into the waters of Dade County (¶11; App. 8);

c. That the discharges of pollution "occurred ... and continued to occur and exist until the present time" (¶16 at p. 4-5; App. 9-10);

d. That the discharges of contaminants were committed by Lone Star "wantonly" and "willfully" (¶6 at p. 8; App. 13); and

e. That the defendants, including Lone Star, "knew" of the discharges of contaminants (¶6 at page 8; App. 13).

The other complaints against Lone Star also allege that the contamination was "knowingly" caused by Lone Star over the course of decades. All of these allegations are entirely inconsistent with releases or discharges which are "sudden and accidental" and, as such, are excluded from coverage.

1. There Are No Allegations of A "Sudden" Release

Dimmitt II clearly holds that "sudden" has a temporal meaning of speed, rapidity and abruptness. 18 Fla. L. Weekly S402. The Clemente complaint alleged that Lone Star allowed contamination to "seep" into the waters of Dade County. To "seep" is to "percolate slowly." Websters New International Dictionary (2d Ed.) at 2266. Under Dimmitt II, allegations of contamination caused by "seeping" do not allege a "sudden" "abrupt" or "rapid" release. Likewise, "draining" is an ongoing, gradual process which is not sudden. By alleging that the discharges "occurred . . . and continued to occur to the present time unabated, unremedied and uncorrected," the Clemente complaint further confirms the allegations of an ongoing, gradual process of pollution. Such a continuing course of pollution is inconsistent with the meaning of "sudden" as articulated in Dimmitt II, which found that there was no coverage because "the pollution took place over a period of many years and most of it occurred gradually." 18 Fla. L. Weekly S402.

Similarly, the "Davidson Action" alleges that Lone Star dripped dangerous chemicals onto the ground since 1941 (¶ 13, App. 34), and that the "cumulative effect" of this dripping over the course of 40 years resulted in contamination (¶ 9-13, App. 33-34). Under Dimmitt II, allegations that hazardous chemicals were dripped over the course of 40 years do not constitute a "sudden and accidental" release.

Finally, the DER suit against Lone Star alleges that, as a result of ongoing operations between 1942 and 1981, the Site became contaminated. (¶¶ 15-16, App. 19). As with the other underlying complaints, the DER suit alleges that the contamination was the result of Lone Star's ordinary business operations over the course of decades. Again, rather than affirmatively alleging a "sudden and accidental" release, the DER complaint alleges precisely the contrary.

2. There Are No Allegations of An "Accidental" Release

In order to be entitled to a defense, the complaint against Lone Star must allege both a "sudden and accidental" release. The Miami Wood Actions, however, allege neither a sudden nor an accidental release. Thus, Lone Star's claim for a defense is doubly defective. In Florida, an "accident" for the purposes of insurance coverage is an unexpected, unusual or unforeseen event, something which happens by chance and without design, an event from an unknown cause. Dimmitt II, 18 Fla. L. Weekly S401 ("accidental" means unexpected or unintended); Roberson v. United Services Auto. Ass'n, 330 So. 2d 745 (Fla. 1st DCA 1976); Aetna Ins. Co. v. Webb, 251 So. 2d 321 (Fla. 1st DCA 1971). See also Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69, 70 (Fla. 1953) ("An effect which is the natural and probable consequence of an act or cause of action is not an accident") (emphasis in original); Bituminous Casualty Corp. v. Burns, 200 So. 2d 612, 613 (Fla. 3d DCA), cert. denied, 204 So. 2d 326 (Fla. 1967) ("a

result which would naturally be expected to follow from other condition is not an accident.").

The Clemente complaint alleges that the releases of contaminants at the Site were "known," "wanton" and "willful." "Willful" means "intentional." Websters, supra at 2928. There is simply no allegation of an "accidental" discharge; indeed, the opposite is true. See Stevens v. Horne, 325 So. 2d 459 (Fla. 4th DCA 1975) (no duty to defend where policy contained exclusion for willful acts and underlying complaint alleged willful acts). Clearly, such allegations are inconsistent with an "accident." The "Futura" suit against Lone Star specifically alleges that Lone Star "knowingly" allowed the site "to be used as a dump or repository for dangerous chemical waste" (¶ 19, App. 28) over the course of its operations. These allegations foreclose any possibility that the releases of pollution were "unexpected" or accidental. Thus, the Miami Wood allegations show that the pollution exclusion applies and that Liberty Mutual has no duty to defend Lone Star.

As in Dimmitt, the pollution in this case resulted from the regular course of the insured's business. Because, the discharges of contaminants at the Site were not "accidental",

coverage for the harm they caused is barred by the pollution exclusion.[9/]

B. There is No Coverage Under the Underground Seepage Exception.

Lone Star has claimed that regardless of the construction given to the "sudden and accidental" language of the pollution exclusion, it is entitled to coverage under the "underground seepage" exception to its pollution exclusion. This argument is no more than thinly-veiled attempt to avoid the clear language of the exclusion. The so-called "underground seepage exception" specifies that the "discharge, dispersal, release or escape" must "result from" an underground seepage of which the insured is unaware. A release resulting from underground seepage cannot be the same as a spill onto the ground that then seeps into the ground. For the exception to apply, the initial discharge causing the damage must begin under the ground and the insured must be unaware of it. Neither of these criteria is met here.

There are no allegations of underground seepage of which Lone Star was unaware in any of the Miami Wood Actions. Rather the complaints allege "willful" and "known" "dripping and

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[9/]See Great Lakes Container Corp., v. National Union Fire Ins. Co., 727 F. 2d 30 (1st Cir. 1984) (no coverage where contamination was result of insureds ordinary operations); American States Ins. Co. v. Maryland Casualty Co. 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (exclusion intended to eliminate coverage for "the emissions of pollutants as a regular or continuous part of the insured's business"); Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E. 2d 201 (Ind. App. 1981) (emissions insured knew would continue as part of its business operations not sudden and accidental); Star Fire Coals, supra, (same).

spilling" of contaminants from Lone Star's operations. The complaints against Lone Star establish (1) that the release of contaminants resulted from an above ground dripping rather than any underground seepage and; (2) that Lone Star was well aware of these releases. The fact that the Clemente Complaint alleges that, after the initial release, the contaminants later "seeped" into and below the surface does not entitle Lone Star to coverage where the initial release did not "result from" an underground seepage. Indeed, such a construction would allow the "underground seepage" exception to completely swallow the pollution exclusion.

CONCLUSION

For the reasons set forth above, Liberty Mutual respectfully requests this Honorable Court to reverse the judgment of the Third DCA and remand this matter with directions to enter judgment in favor of Liberty Mutual.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished in the manner indicated to all parties on the attached list this 20th day of June, 1994.

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