IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DENI ASSOCIATES OF FLORIDA, INC.,

Petitioner,

vs.

STATE FARM CAS. INS. CO.,

Respondent.
_____/

Supreme Ct. No. 89,115
4th DCA Case No. 94-2354

L.T. CASE NO. 93-23021-02

On appeal from the en banc decision of the Fourth District Court of Appeal

Petitioner's Reply Brief
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REPLY TO RESPONDENT'S JURISDICTIONAL CHALLENGE

Article V, section 3(b)(4) of the Florida Constitution provides that this Court:

> May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

STATE FARM asserts that this Court lacks jurisdiction because the Fourth District Court did not "pass" upon the question it certified:

> Where an ***ambiguity*** is *shown* in CGL a policy, is the court limited to resolving the ambiguity in favor of coverage, or may the court apply the doctrine of reasonable expectations of the insured to resolve ambiguities in CGL policies?

Deni at 404. (emphasis added)

STATE FARM cites only two cases, Gee v. Seidman & Seidman, 653 So. 2d 384 (Fla. 1995) and Revitz v. Baya, 355 So. 2d 1170 (Fla. 1977) in support of this proposition. Id. at 2-4.

STATE FARM's reliance on these two cases is somewhat misplaced. In Gee, this court noted that the district court had stated quite specifically, that it did not address the issue it was certifying. Gee, 653 So. 2d at 385 (emphasis added). Here, the Fourth District discussed and "passed" upon the issues of "ambiguity" and "reasonable expectations," concluding - in a split majority - that the clause in the CGL policy was "unambiguous" and that it was unable to apply the doctrine of "reasonable expectations" without express authorization of this court. Thus, unlike Gee, the District Court here specifically addressed

the issues contained in the certified question.'

Revitz similar to Gee, and is readily distinguishable. In Revitz, the District Court specifically found it unnecessary to pass on the certified question, Id. at 1171. In contrast, the Fourth District have actually noted that it had been necessary for it to pass upon the certified question. At page 403 of its opinion, the District Court states:

> "CGL policies are widely and generally used in Florida"... "it was necessary for this Court to answer the certified question to enable the supreme court itself to decide the issue of ambiguity and consider the doctrine of reasonable expectations,,."

State Farm v. Deni, 670 So.2d at 403.

Indeed, although the six-judge majority at the Fourth District found the exclusion "unambiguous," the court was sufficiently concerned with that determination (and with the opinion of the judges who dissented), that it sent the question - and the related issue of "reasonable expectations" - to this Court for its determination on those same issues.

In sum, because the Fourth District actually "passed" upon the certified question, this Court can exercise its plenary jurisdiction in accordance with Article V, section 3(b)(4) of the Florida Constitution.

It should also be pointed out that once this Court exercises discretionary jurisdiction over the question certified, it can then review all other issues raised in the case as well. Hillsborouah Association for Retarded Citizens Inc. v. City of Temple Terrace, 322 So.2d 610 (Fla., 1976) ; Rupp v. Jackson, 238 So.2d 86 (Fla. 1970). See also, In re Adoption of

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[1] State Farm Fire & Casualty Insurance v. Deni Associates of Florida. Inc., 678 So. 2d 397 at 403 (Fla. 4th DCA 1996).

Baby E.A.W., 658 So.2d 981, cert denied, G.W.B. v. J.S.W., 116 S.Ct. 719,133 Ld. 2d 672 (where this Court held that the Supreme Court is privileged to review the entire decision and record and that it is the certification of a question, rather than an opinion, which triggers this broad jurisdiction of the Supreme Court).

SUMMARY OF THE ARGUMENT

As the core of its substantive argument on appeal, STATE FARM maintains that the language contained in the "pollution" exclusion contained in its commercial insurance policy is "clear" and "unambiguous." See STATE FARM'S Answer Brief at 14. As such, STATE FARM argues, the trial court was wrong when it failed to apply the so-called "plain language" rule, and when it refused to find that the injuries caused by the office equipment accident were not covered because they resulted from "pollution" in the form of "chemicals." Id.. At 16. This argument is fundamentally flawed in several respects.

First, the "pollution" exclusion in STATE FARM's policy is anything but "clear" and "unambiguous." The trial court found that to be the case, as did a number of judges at the Fourth District Court of Appeal. Deni has consistently thought in line with these judges, as have numerous courts around the country which have interpreted similar language in pollution exclusion clauses. In fact, even the six judges at the Fourth District who found the provision to be "unambiguous" were sufficiently enough concerned about their decision that they certified this case, here, specifically so that this Court could determine the question of ambiguity, stating: "Therefore, to enable the Supreme Court *itself* to decide the issue of ambiguity..., we certify the following question to the court...." Deni I, 678 So.2d 397 at 403.

The determination of whether or not the language of the exclusion is sufficiently clear to make it enforceable requires this Court to analyze the specific language used, in its proper context, and determine whether the "plain meaning" of that language is in fact, "clear" and "unambiguous."

The question then becomes whose "plain meaning" to attach to the operative term. The insurance company's? The insured's? No, the "plain meaning" of the disputed terms are those which a "reasonable" person - in like circumstances - would attach to it.

Similarly, this Court must also determine to whom is the term supposed to be "clear." Must it be to the insurance companies themselves, who use (and often manufacture) these terms, and have an undeniably strong interest in defending their alleged "clarity?" Or must the language only be "clear" to those highly-educated members of the bar and judiciary who analyze the meaning of such terms at an admittedly elevated intellectual level?

No, the concepts of "clarity" and "ambiguity* in this analysis are' to be directed at the great common denominator - the "reasonable" person. As such, the "plain" or "common" meaning of these words - as well as the question of whether or not they are "clear" or "unambiguous" - is to be determined from the perspective of the "reasonable" person; by asking what a "reasonable" person could expect these terms to mean under the particular circumstances. In this way, the "recent development" of the "doctrine of reasonable expectations" is already well-rooted in traditional principles of contract construction. So too, the trial court's holding is compatible with this idea, and the principle in turn justifies the trial court's determination of "ambiguity," and its refusal to apply the all inclusive "plain meaning" of the word "pollutant" STATE FARM champions so strongly in this case.

The issue here, then, is not simply whether Florida recognizes the "reasonable expectations" doctrine. Instead, the issue is whether reasonable people, be they insured, or insurer, could construe this particular "pollution exclusion" to include - within its "plain meaning" - a minor spill of ammonia out of an office blueprint machine. In fact, under traditional rules of insurance policy construction (which themselves strongly favor the insured and coverage), the question is actually even more focused. The court need only ask: is the language susceptible to at least one other "reasonable" interpretation then the one proposed by the six-judge majority at the Fourth District?

If there is any other "reasonable" way of interpreting this exclusion, it becomes "ambiguous" as a matter of law, and the decision of the trial court in this case must be affirmed. Similarly, if it is in anyway "unclear" that this sort of office-machine accident is excluded from coverage - as "pollution" - the decision of the trial court must stand.

Petitioner suggests that the various interpretations of this provision which have been discussed and argued throughout this case - those put forth by the Petitioner, the trial judge and those offered by the dissenting Judges at the Fourth District Court of Appeals, all provide strong evidence of "reasonable" alternate interpretations which must result in the reversal of the District Court. Further, when the existence of these alternate interpretations are combined with those produced by courts in other jurisdictions reviewing similar pollution exclusion clauses, it is clear that the trial court was within its discretion in its acknowledgment of the possibility that the language could be susceptible to more than one interpretation. Thus, whether the trial judge applied purely traditional concepts of insurance policy construction, or "went out on a limb" when he recognized the "reasonable

expectations" of the parties - as well he should have - the District Court erred in reversing his decision. Any conclusion other than that reached by the trial judge means, in effect that every one of these other "alternate" judicial interpretations must be considered as "unreasonable."

ARGUMENT

I. THE LANGUAGE OF THE POLLUTION EXCLUSION CLAUSE IS AMBIGUOUS

Although STATE FARM claims that the language in its pollution exclusion clause is "clear and unambiguous," only one paragraph of its 50-page Answer Brief actually looks to that language. Instead, STATE FARM relies almost exclusively on judicial opinions drawn from other jurisdictions - many of which are distinguishable - and many of which do not even concern the exact language of the pollution exclusion clause involved here - all in support of its contention that the language in this policy is "clear and unambiguous."

This approach reveals the weaknesses inherent in STATE FARM'S arguments. Firstly, STATE FARM'S refusal to scrutinize the policy itself is telling. If the policy at issue is so "clear," the most convincing argument STATE FARM might make would surely be directed at the language of the policy itself, and would not be so concerned with outside precedent. In essence, STATE FARM has argued that the Florida Supreme Court should be guided only by a variety of outside sources, including, non-binding distinguishable cases, and blurbs pulled from classic works of children's fiction, and that these sources somehow make the language in the policy here is unambiguous.* Petitioner respectfully

*STATE FARM actually quotes Humpty Dumpty in their Answer Brief suggesting that this Court should be guided by Humpty in applying the plain language rule. See

submits that this court should simply review the language in question, and make its own determination of whether the policy in this case is ambiguous.

Secondly, as this Court is no doubt aware from the potpourri of cases cited in the briefs submitted by the parties and amici, courts from around the country have come down on both sides of the rather "generic" issue of whether "pollution exclusion" clauses are ambiguous. Indeed, as Petitioner pointed out in its Initial Brief (and throughout these proceedings), there are numerous decisions which have found the opposite position STATE FARM now champions, and some have specifically held language similar to that here unclear or ambiguous. In fact, this is exactly what the trial judge in this case found, as did 5 of the eleven judges at the Fourth District Court of Appeals. They all found the exclusion to be ambiguous.

Thus, while some of the cases submitted by STATE FARM are no doubt persuasive to its cause, there is also a substantial amount of contrary precedent which is equally as persuasive. The very existence of that contrary authority underscores an almost inevitable conclusion that the language of the policy is susceptible to more than one "reasonable" interpretation. In other words, the policy is ambiguous.

In light of all the foregoing, STATE FARM's critical reliance on the applicability of the cases it cites is telling. While Petitioner would agree that some of the opinions could supply helpful guidance to this Court, at the same time, Petitioner would urge this Court to first decide for itself whether the language is unclear, or perhaps more specifically, if its

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Answer Brief of Respondent at 18.

"plain meaning" is susceptible to any other possible interpretation than the one provided by the six judge majority panel at the Fourth District. If so, the Court need look no further.

To that end, it must first be pointed out that the provision in question specifically excludes only those injuries which are caused by "pollutants" and, there is no need to look to the "plain meaning" of that term (whatever that might be), because the term "pollutant" is explicitly defined within the policy. See. e.g.. Petty v. Petty, 548 So.2d 793 (Fla. 1st DCA 1993)(holding that a contract term should be given plain meaning only in the absence of evidence that the parties intended a term to denote a special meaning). In this case, STATE FARM saw fit to replace the "plain meaning" of the word "pollutant" with a defined meaning in the policy, on terms favorable to STATE FARM. Specifically, STATE FARM has defined "pollutant" to be "any liquid or **gaseous...irritant or contaminant,** including fumes, [and] chemicals." (Emphasis added)(R.46). Thus, the appropriate inquiry in this case is begins with inquiry into the "plain meaning" of the words **"irritant or contaminant."**

Thus, the Court must determine whether these two words - "irritant" and "contaminant"- are so clear that the pollution exclusion clause here can have *no other reasonable meaning* than that offered by STATE FARM. Stated differently, it is these two definitional terms - "irritant" and "contaminant" - that STATE FARM must show to be "clearly" and "unambiguously" applicable to this minor office accident.

The words "irritant" and "contaminant" are not defined in the policy, but rather, the policy includes a "grocery list" of items STATE FARM considers to be "irritants" or "contaminants." The list includes a number of rather mundane, everyday substances, and it does not indicate which one of the two critical categories each of these items falls under.

For example, although the list includes all "alkali" substances, it does not reveal whether "alkali" is considered an "irritant" or a "contaminant," or both.

The "list" also includes vague, generic, terms like "vapor" and "chemicals." Elementary science classes teach that virtually every man-made product - and most which appear in nature - are made up of different "chemicals." In fact, tap water is nothing more than a simple chemical compound - and tap water can take on a gaseous form and thus appear as "vapor." Does this make water a pollutant?[3] If a beaker of "di-hydrous oxide" (i.e., a glass of water!), accidentally "spills," and someone is injured after slipping in the puddle on the floor, could STATE FARM deny coverage because this injury resulted from the "spill of a chemical?" This would, of course, be an absolutely absurd result, a result justified only by the "unreasonably" over-broad connotation STATE FARM seeks to impose on this so-called "pollution" exclusion.

Similarly, "vapor" could certainly be considered an "irritant" depending, of course, on what the "vapor" is made up of - but does this mean that STATE FARM considers every kind of vapor - including even pure water vapor - to be an irritant? (And thus a "pollutant"?) Certainly not. Such a reading would directly conflict with the "plain meaning" of the definitional terms of the exclusion itself (and with its title and purpose). And, in situations where the definitional component of an exclusion conflict with the examples given - particularly when the examples are as over-broad as they are here - at least one thing is

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[3]Water can also be an "irritant" as anyone who has ever gotten water up their nose while swimming can attest. Does that make "water" a "pollutant" under the policy in question?

certain: there is a substantial lack of clarity to the exclusion - and particularly under these circumstances.

The grocery list also includes "waste" (but again, does not indicate whether it is considered an irritant or contaminant), but it goes even further here and specifically includes within the definition of "waste" any and all materials "... to be recycled, reconditioned, or reclaimed." This is perhaps the most obscure definition in the exclusion and certainly one of the broadest - for virtually anything can be "recycled or reconditioned," and anything can be "pollutant."

Indeed, the word "waste" - which is actually not defined anywhere in the policy - is itself ambiguous. See, e.g., Minerva Enterprises, Inc. V. Bituminous Casualty Corp.,312 Ark 128, 851 S.W. 2d 403 (1993) (the term "waste" in pollution exclusion is ambiguous). "One man's trash is another man's treasure, or so the saying goes, and the word "waste" can surely be said to have more than a solitary meaning. Deni, 678 So.2d at 405 (Stone, J. Dissenting), citing Minerva. Moreover, the "plain meaning" of the term "waste" - in the context of a so-called "pollution" exclusion - must be different from the "plain meaning" of the word "waste" in other contexts, and certainly in its "general" use of the term. For example, the "plain meaning" of the word 'waste" might very well include typical items everyday garbage - like a banana peel from an employee's lunch pail. If something like that is accidentally dropped on a busy hallway floor, and someone slips on it and is injured, could STATE FARM claim the injury was the result of "pollution," and is thus excluded from coverage?

An "irritant" could be just about anything. In fact, almost any dictionary will confirm

the fact that the word "irritant" (used as either a noun or adjective) is derived from the transitive verb "irritate." As such, an "irritant" is typically defined as something which tends to "irritate" or which "causes irritation." WEBSTER DICTIONARY 399 (concise ed. 1964). The term is thus defined by the person irritated.

If an insured cleans the floors with floor soap (or wax), either of the substances could be considered as "irritants". This would mean if a customer of the insured slips on some soapy water, the injury would not be covered (under STATE FARM's interpretation of the exclusion), because it was caused by "pollution".

The lesson to be learned from all of these examples is that the operative terms "irritant" and "contaminant" are so totally overbroad as to lack the requisite "clarity" necessary to satisfy the strict construction afforded an exclusionary provision in commercial insurance policy. As the trial judge (and many others) pointed out, these so-called simple terms can be interpreted to encompass all sorts of injuries the policy was otherwise obviously intended to cover. In other words, applying an all-encompassing "plain meaning" to these exclusionary terms could quite easily negate any coverage at all under the policy - an absurd result which certainly does not comport with the purpose for this type of insurance, or the intention of the consumer who purchases it. Reading these two exclusionary terms in their broadest sense would render the policy virtually useless to a commercial consumer, and would leave the insurance company - the one who drafted this provision - able to pick and choose which cases it wishes to settle, and which cases it wishes to contest. It is clear, then, that the language of the exclusion clause is unenforceable as written.

II. NONE OF THE CASES CITED BY STATE FARM OR VARIOUS AMICI RENDER THE PROVISION CLEAR OR UNAMBIGUOUS

STATE FARM and Amici cite to over 100 cases to support their contention that the pollution exclusion is "clear and unambiguous." See e.g., Answer Brief of Respondent STATE FARM at 16. Of course, Petitioner is also quite capable of citing to numerous cases which hold just the opposite, that the pollution exclusion is not clear and ambiguous. (See e.g.: Associated Wholesale Grocers, Inc. v. Americold Corp., __ P.2d __) . (Opinion appears at 1997 WL 97263)(Recently holding that the "release or escape of pollutants" language in the insurer's pollution exclusion is ambiguous). In fact, the trial judge in this very case - and five different Judges at the Fourth District- also found this particular exclusion ambiguous. Judge Stone (concurring in part and dissenting in part) in Deni at 404, noted the jurisdictional divergence of opinion:

> "I recognize that courts in some jurisdictions have found pollution exclusion clauses similar to that used here to be clear and unambiguous. However, courts in other jurisdictions have enforced coverage notwithstanding broad exclusionary terms where the court concludes that a reasonable insured ordinarily would not recognize the breadth of the exclusion because the policy is not sufficiently explicit. See, e.g., A-I Sandblasting & Steamcleanina Co. v. Baiden 53 Or. App. 890, 632 P.2d 1377 (1981), *aff'd,* 293 Or. 17,643 P.2d 1260 (1982)."

Regardless of these other courts and jurisdictions, this Court is the only court that must decide whether this particular pollution exclusion clause is ambiguous. The simple fact that STATE FARM cites to a "zillion" cases in other jurisdictions (and that Petitioner can too) is proof in itself that the language in these provisions can be susceptible of more than one meaning. The amount of litigation which has resulted over a simple paragraph shows how uncertain and unclear the courts in this country are about pollution exclusion

clauses. Thus, terms such as "pollutant," "irritant," and "'contaminant," can quite easily be found ambiguous by this Court.

Petitioner proposes that the Court ask the nearest 5 clerks or assistants what the words "pollutant," "irritant," and 'contaminant," mean - whether alone, or within the context of this policy. STATE FARM would have this Court believe that it would receive but one answer. Petitioner submits that these clerks or assistants will furnish 5 different responses; and remember, only one different interpretation need be found in order to rule in favor of Deni as a matter of law. this Court can easily find more than one interpretation of the pollution exclusion clause, as a matter of law, any ambiguity construes coverage in favor of the insured.[4]

III. THE TRIAL COURT'S REFERENCE TO THE PARTIES REASONABLE EXPECTATIONS DOES NOT CONSTITUTE REVERSIBLE ERROR

For all the aforementioned reasons, Petitioner believes this Court need not address the so-called "doctrine of reasonable expectations" in order to find in favor of Petitioner. However, to the extent this Court does address this doctrine, it would not alter that result.

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[4]Where the terms employed in an insurance policy are ambiguous, however, the courts are to strictly construe the language against the insurer and in favor of coverage. Sterling v. Citv of West Palm Beach, 595 So. 2d 284 (Fla. 4th DCA 1992). See also Florida Power & I iaht Co. v. Penn America Ins. Co,, 654 So. 2d 276, 277-78 (Fla. 4th DCA 1995). Also, an insurance policy is to be interpreted so as to provide coverage whenever possible. Infinity Yachts. Inc. v. St. Paul Fire & Manne Ins. Co,, 655 So. 2d 1259, 1261 (Fla. 4th DCA 1995); Sanz v. Reserve Ins. Co. of Chicago. Ill,, 172 So. 2d 912, 913 (Fla. 3d DCA 1965). This is especially true where the language of an insurance contract can be considered ambiguous, which then requires that the language be construed in favor of the insured. See State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245 (Fla. 1986); Harnett v. Southern Ins. Co., 181 So. 2d 524 (Fla. 1985); Sterling v. City of West Palm Reach, 595 So. 2d 284 (Fla. 4th DCA 1992).

First, it must be pointed out that some jurisdictions apply the "reasonable expectations" doctrine only after a finding of ambiguity. See Deni, 678 So.2d at 402. However, since established Florida law always construes ambiguities against the insurer, a finding of ambiguity would actually serve to negate any application of the doctrine under these facts. As such, if this Court finds the exclusion ambiguous, it need not go any further to affirm the trial court's ruling, because the Petitioner would be entitled to coverage under Florida law. Thus, in such a case, there would be no need to consider the "reasonable expectations" doctrine, as established Florida jurisprudence would neatly resolves the issue in favor of the Petitioner.

If - and only if-this Court does find the exclusion to be unambiguous, then the Court should apply the "reasonable expectations" doctrine. Bromfeld v. Harleysville Insurance Co., 688 A. 2d 1114 (N.J. Super. 1997). The doctrine is underpinned by the fact that insurance policies are basically contracts of "adhesion." Deni 678 So.2d at 402 (Citing 2 Couch on Insurance 3d § 22:11). To apply the so-called "doctrine," courts simply look to the "reasonable expectations" of the parties to determine their intent when they made the contract. In other words, in applying this supposedly "new" doctrine, the courts are just looking to the "objective" intention of the parties.

As discussed, the issue in this case is really whether a reasonable person could have construed this particular exclusion to include - under its "plain meaning" - a minor ammonia spill out of a blueprint machine. Simply put, it is Petitioner's position that no one could have reasonably expected this - a simple office mishap - to be excluded from coverage.

As explained in Petitioner's Initial Brief at 34, the reasonable expectations doctrine applies in construing the terms of an insurance policy even if the policy is found to be unambiguous.[5] In fact, Judge Stone noted that the reasonable expectations concept is not entirely foreign to Florida. Deni, 678 So.2d at 397. Accord also Chacon v. American Family Mut. Ins. Co., 788 P.2d 748 (Colo. 1990) (interpreting unambiguous insurance policy in light of what a reasonable insured would have understood contract to mean).

Respondent contends that even if this Court were to apply the "reasonable expectation" doctrine, coverage to Deni would still be improper because "Petitioner sued for coverage for what it characterized as claims arising from a chemical spill." See Answer Brief at 50. As such, Respondent asserts on behalf of Deni that there was "no misunderstanding." The contention evidences STATE FARM's misunderstanding of the "reasonable expectation" doctrine. The fact that Deni sought coverage under their policy with STATE FARM thereby evidences that there indeed was a "misunderstanding." It matters not whether STATE FARM did not think that there should have been a misunderstanding; rather, it is the reasonable expectation of the parties. Thus, at least one of the parties to this cause (Deni) believed - as any reasonable person would - that this

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[5] Robert Keaton, professor at Harvard Law School and later a federal judge, explained the reasonable expectations doctrine as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored **even though painstaking study of the policy provisions would have negated those expectations.**

Robert Keaton, Insurance Law 350,351 (1971) (emphasis added).

minor ammonia spill from their blue-print machine was covered by their insurance policy. (i.e., that it was not "excluded by the pollution exclusion clause). Therefore, this Court should look at the intentions of the parties - objectively - and determine whether both STATE FARM and DENI intended that the minor ammonia spill would be excluded from coverage under the pollution exclusion clause.

After all, the words used in a contract are supposed to be given the meaning most commonly understood in relation to the subject matter and the circumstances, and a "reasonable" construction is always favored over an unreasonable one. See, e.g., Royal Inv. And Dev. Corp. v. Monte's Air Conditioning Serv., Inc., 511 So.2d 419 (Fla. 4th DCA 1987); Thompson v. C.H.B., Inc., 454 So.2d 55 (Fla. 4th DCA 1984); Herian v. Southeast Bank, N.A., 564 So.2d 213 (Fla. 4th DCA 1990) (interpretation of contract which gives reasonable and effective meanings to all terms is preferred to interpretation which leaves a part unreasonable); Premier Ins. Co. v. Adams, 632 So.2d 1054 (Fla. 5th DCA 1994) (interpretation which gives reasonable meaning to all contract provision is always preferred over interpretation which leaves part of contract useless or inexplicable).

Indeed, it is the duty of the trial court in contract cases to prevent an "absurd" interpretation of the contract. American Medical Intern, Inc. v. Scheller, 462 So.2d 1 (Fla. 4th DCA 1994), review denied, 471 So.2d 44, cert. denied, 106 S.Ct. 345,474 U.S. 947, 88 LED. 2d 292 (1994); In re F i n e -, 159 B.R. 972 (M.D. Fla. 1993) (under Florida law, courts should reconcile conflicting terms in ambiguous contract; if a particular interpretation would lead to an absurd conclusion, then that interpretation should be abandoned in favor of one which is reasonable, logical and rational); Jhompson v. C.H.B.,

Inc., 454 So.2d 55 (Fla. 4th DCA 1984) (courts should interpret contracts to be as consistent with reason, probability and practical aspect of transaction between parties); Hussman Corp. v. UPS Leasing, Inc., 549 So.2d 215 (Fla. 5th DCA 1989) (words used in business documents should be interpreted as reasonable persons, knowledgeable about the business or industry would interpret them - not some strained interpretation put forth by the drafter).

STATE FARM contends that courts around the country which have found coverage - despite similarly overbroad pollution exclusions like the one here are:

> doing nothing more or less than sidestepping the plain language rule because of subjective discontent with a result that would be produced by using the plain language.

Id. t 17. In this way, STATE FARM mistakenly believes (as did the majority at the Fourth District), that the trial court applied Deni's subjective intent to the meaning of the "pollution" exclusion. However, a review of the trial court's order clearly shows that the judge was focusing on the meaning which a reasonable person would place on an exclusion in a comprehensive liability policy - not on what Deni expected at all. In fact, Deni's "subjective" expectations as to the meaning of the critical terms "pollutant," "irritant," and "contaminant" have never been an issue in this case.

After all, what is the "plain" meaning of a contract term? Is it not the meaning which a "reasonable" person would place on the term in light of the circumstances reflected in the four comers of the contract? Contrary to the statement of the majority in Deni - and STATE FARM here - Deni's "subjective" interpretation of these terms never came into play in this

case. As the majority at the fourth District itself pointed out, the trial judge simply found that STATE FARM's overly-broad "definition" of "pollutant" was "beyond what a reasonable person placed in the position of the insured would have understood the word to mean." 678 So.2d at 399.[6] Faced with such lack of clarity (i.e., just what&the words "irritant' and "contaminant" mean to the reasonable man if not every substance on this planet?), the court had no choice but rule in favor of coverage.

In fact, that is precisely what this case comes down to. Are the definitional terms "irritant" and "contaminant" - as contained within in this "pollution" exclusion of this an otherwise comprehensive (and expensive!) insurance policy sufficiently clear in meaning - and particularly so in light of the fact that the terms appear to include within their scope all "vapors," "chemicals," and "wastes" of any kind as "pollutants"?

Applying this doctrine to the facts of this case, it is not fair to conclude that Deni reasonably expected that the pollution exclusion clause would exclude coverage under the type of spill involved in this case, notwithstanding the "ambiguity" of the clause itself. See ambiguity argument above, supra.

CONCLUSION

In light of the foregoing, and on the strength of the authorities cited, Appellant Deni Associates of Florida, Inc. respectfully suggest that this Court answer the certified question

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[6]What the trial judge did not say (but what he certainly could have formally concluded in light of the record evidence), no "reasonable person" - whether in the position of the insured or the *insurer* - could have believed the word "pollutant" was intended to exclude from coverage everything which might arguably fit within STATE FARM's unreasonably expansive interpretation of the word.

in the affirmative, or determine - as the language of the Policy is applied to the facts of this particular case - that coverage be afforded to Deni, or otherwise find that Deni is entitled to coverage, that this Court reverse the decision of the Fourth District Court of Appeals, and that it direct that the trial court decision be reinstated, or grant such similar relief as is available or proper, as well as granting Deni's Motion for Attorney Fees and Costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via regular United States Mail to the following individuals on the attached service list this 3rd day of April, 1997.

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