

ORIGINAL

In the
Supreme Court of Ohio

SHARON A. SAUER, et al.,

Plaintiffs,

Case No. 2013-0283

v.

STINSON J. CREWS, et al.,

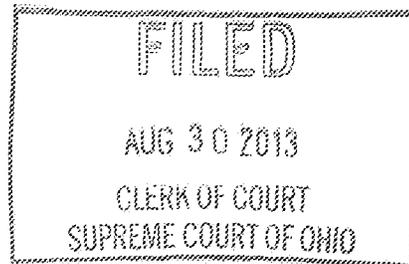
Defendants/Third-
Party Plaintiffs-Appellees,

*On Appeal from the Franklin County
Court of Appeals, Tenth Appellate District
(C.A. No. 12-AP-320)*

v.

CENTURY SURETY COMPANY,

Third-Party Defendant-
Appellant.



**MEMORANDUM OF AMICUS CURIAE OHIO INSURANCE INSTITUTE
IN SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST OF AMICUS CURIAE

This appeal comes before the Court on two specific assignments of error that are of particular importance to the parties, but it also raises broader issues that affect everyone in this State who purchases liability insurance. Amicus curiae Ohio Insurance Institute (“OII”) and its members submit this brief in support of appellant Century Surety Company and urge the Court to reverse the ruling by the Court of Appeals.

OII is the professional trade association for property and casualty insurance companies in the State of Ohio, and its members include dozens of domestic insurers as well as reinsurers and foreign insurance companies. OII provides a wide range of services to its members and to the public, media, and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely monitors judicial decisions that address important issues of insurance law, and it has selectively participated as an amicus curiae in several landmark insurance cases that have been decided by the Court. It is uniquely qualified to provide the Court with a broad perspective on the basic principles of insurance law that are relevant to this appeal, as well as practical insight into the consequences for insurers and insureds if the ruling below is not reversed.

Insurance makes modern life possible by spreading risks of loss that an individual or single business entity could not bear alone. Insurance companies calculate the premium rates needed to make this protection possible, based on the nature of the risks that they agree to indemnify under the provisions of an insurance policy. If a court expands the coverage of the insurance policy by interpreting its language to cover risks that the parties did not intend to indemnify -- as the Court of Appeals did in this case -- the amount of the premium that the policyholder paid for the insurance no longer corresponds to the risks that the insurer is required to indemnify, and the insurer must pay losses for which no premium was paid. This ultimately

increases the amount of the premiums that other policyholders must pay for the judicially expanded coverage, even if the expanded coverage duplicates coverage the policyholders already have under their other insurance policies.

The resulting uncertainty, inefficiency, and unnecessary costs for policyholders can be avoided if courts enforce the original intentions of the parties to the insurance policy. For example, appellee Stinson Crews Paving, Inc., separately purchased (1) coverage for liabilities arising from the use or ownership of its vehicles, under a commercial automobile insurance policy from Progressive Casualty Insurance Company, and (2) coverage for liabilities arising from other aspects of its business operations, under a commercial general liability (“CGL”) policy from appellant Century Surety Company. The CGL policy expressly excludes coverage for automobiles and trailers that are primarily used to transport people or cargo, consistent with established industry custom that CGL policies dovetail with automobile liability policies and do not provide duplicative coverage.

However, the Court of Appeals did not attempt to ascertain and implement the intentions of the parties to the CGL insurance policy in this case. Instead, it held that Crews’ trailer was insured under a provision of the CGL policy covering “mobile equipment” that is not used to transport people or cargo -- even though it is undisputed that Crews used the trailer to transport equipment and paving supplies. The Court of Appeals recognized that “cargo” refers generally to any goods that are transported and unloaded at a destination, but it noted that the word also has a narrower meaning that refers to goods that are transported and unloaded at a destination in the stream of commerce, *i.e.*, merchandise. On the basis of this “ambiguity” in the CGL policy, the Court of Appeals held that the equipment and supplies that Crews transports on the trailer are not “cargo,” in the narrower sense of merchandise transported in the stream of commerce, and

that this “ambiguity” must be construed to provide coverage for the trailer. The Court of Appeals thus expanded coverage under the CGL policy to include losses from risks that the parties had not intended to insure, increasing the risks on which the premium that was charged for the policy had been calculated and paid.

The Court of Appeals believed that Ohio courts should automatically extend coverage when a word in an insurance policy has more than one dictionary meaning, despite evidence that the expanded coverage was neither intended nor expected by the parties at the time the insured purchased the policy. In addition to creating coverage for losses for which no premium was paid, this would convert judicial proceedings from a process designed to ascertain and enforce the parties’ original intentions into a game of “gotcha” that awards payouts when policy language has more than one theoretically possible meaning.

OII has chosen to participate as an amicus curiae in this case because the approach taken by the Court of Appeals harms insureds and insurers alike. It makes the scope of insurance coverage highly uncertain and bestows windfalls on a few policyholders who never expected or paid for the judicially expanded insurance coverage, which ultimately distorts the costs of insurance for all policyholders. OII respectfully requests that this Court reverse the ruling below and clarify that Ohio courts should enforce insurance policies consistent with the original intentions of the policyholder and the insurer.

STATEMENT OF THE CASE AND FACTS

There is no dispute as to any fact that is relevant to the legal question presented by this appeal. Amicus curiae Ohio Insurance Institute adopts and incorporates the Statement of Facts in appellant Century Surety’s merits brief.

ARGUMENT

Proposition of Law No. 1:

A registered commercial flatbed trailer, used to haul construction equipment to and from job sites, is not a vehicle maintained for purposes other than transportation of cargo within the meaning of a commercial general liability policy, and therefore claims arising out of the ownership or use of such a trailer are excluded from coverage under the terms of the policy.

In its first assignment of error, appellant Century Surety properly challenges the Court of Appeals' ruling that paving equipment and supplies that are loaded onto a flatbed trailer, transported to a work site, and then unloaded are not "cargo," and that injuries resulting from appellee Crews' use of the trailer are therefore covered by his Century Surety CGL insurance policy. The relevant provisions of the CGL policy are not disputed:

- the policy expressly excludes coverage for bodily injury or property damage "arising out of the...use...of any aircraft, 'auto' or watercraft owned or operated by [Crews];" and
- the policy expressly defines "auto" as, *inter alia*, a "trailer...designed for travel on public roads;" and
- the policy further provides that "auto" does not include "vehicles...maintained primarily for purposes other than the transportation of persons or cargo."

Century CGL Policy, Form CG-00-01-12-04, Exclusions, § g, and Definitions, § 2 and § 12(f), at 2, 12-13. In other words, Crews' trailer is excluded from coverage by the "auto" exclusion of the CGL policy if it is primarily used to transport cargo.

This case arose from a traffic accident on a public street. An automobile driven by plaintiff's decedent struck Crews' trailer, which he had parked adjacent to a job site after unloading paving equipment and supplies. Crews was subsequently found negligent for parking the trailer in a hazardous location and for violating several statutes and ordinances that prohibit obstructions of highways, parking in no-parking zones, and impeding traffic movement. *See*

Sauer v. Crews, 10th Dist. No. 10AP-834, 2011 Ohio 3310, at ¶ 12. Crews later learned that his insurance agent had failed to follow his instructions to insure the trailer under his Progressive Casualty automobile liability policy, and he sought coverage for the trailer under his Century Surety CGL policy.

The Court of Appeals held that the CGL policy provided coverage for the trailer, even though it expressly excludes trailers that are used to transport cargo. Courts in Ohio and other jurisdictions have uniformly reached the opposite conclusion, holding that vehicles used to move equipment and supplies to jobsites are transporting cargo and thus are not covered by CGL policies with identical exclusions. In *United Farm Family Mutual Insurance Co. v. Pearce*, 3d Dist. Auglaize No. 2-08-07, 2008 Ohio 5405, the Court held that a CGL insurance policy, which similarly excluded coverage for vehicles used to transport cargo, did not provide coverage for injuries caused by a dump truck that was used to transport paving equipment and supplies to jobsites:

[W]e cannot agree that the dump truck was “maintained primarily for purposes other than the transportation of persons or cargo”.... [The insured] used the dump truck primarily to haul asphalt and equipment to the job site.... Asphalt and equipment fall within the definition of...cargo.

2008 Ohio 5405, at ¶ 15. See also *Indiana Lumbermens Mutual Insurance Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 379 (8th Cir. 1999), where the Court held that a vehicle used to transport sawdust to a disposal site was not covered by a CGL insurance policy containing the same exclusion; the vehicle “was maintained primarily to move sawdust from one place to another...[and thus] was not ‘maintained primarily for purposes other than the transportation of persons or cargo’....”

These rulings reflect customary practices and expectations about CGL coverage in the insurance marketplace. CGL insurance policies are designed to dovetail with automobile

liability insurance policies so that policyholders do not have to pay premiums under both policies for unnecessary duplicative coverage. In *Pearce, supra*, the paving company had automobile liability insurance for the dump truck it used to transport paving equipment and materials to jobsites, and the Court held that this “certainly indicate[s] that it was the parties’ intention that the dump truck not be covered under the CGL policy.” 2008 Ohio 5405, at ¶ 16. In the present case, Crews admits that he intended to obtain insurance coverage for his trailer under his automobile liability policy from Progressive Casualty Insurance Company. In fact, he asserted claims against his agent for negligently failing to add the trailer as an insured vehicle under his Progressive policy.

Crews and Century Surety expressly agreed to exclude the trailer from coverage under the CGL policy. The Court of Appeals erred in holding that the policy provided coverage for liabilities arising from the use of the trailer, and its decision should be reversed.

Proposition of Law No. 2:

When considering whether an insurance policy provision is ambiguous, a reviewing court must consider the context in which the policy provision is used -- particularly where that context pertains to a highly regulated commercial activity such as the use of commercial vehicles upon public roadways.

A. The intentions of the parties to an insurance policy control when words in the policy have more than one dictionary meaning.

The rules that Ohio courts use to determine the legal rights and obligations of parties under insurance policies have a single purpose: to effectuate the intent of the insured and the insurer at the time they entered into the insurance policy. *See, e.g., Hamilton Ins. Serv. Inc. v. Nationwide Ins. Co.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999); *Employers’ Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223 (1919), syllabus. The intent of the parties is presumed to be expressed by the language used in the insurance policy, *Kelly v. Med. Life Ins.*

Co., 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), syllabus paragraph one, and the plain and ordinary meaning of that language is generally controlling. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 597 N.E.2d 499 (1978), syllabus paragraph two. If the policy is ambiguous, in the sense that the intent of the parties cannot be ascertained from the words that it uses, a court must consider the policy as a whole and all other relevant evidence of their intent. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 634, 597 N.E.2d 499 (1992). Ambiguities that cannot be resolved by reference to the intent of the parties are construed against the insurer as a last resort. *See King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

Ohio courts routinely recite these legal principles, but they have sometimes failed to recognize the primacy of the parties' intentions when words used in an insurance policy have more than one dictionary meaning. Instead of using the intent of the parties as the touchstone of their analysis, some courts have automatically extended coverage in these circumstances based on the "ambiguous" policy language. The result is "two seemingly competing rules of law" in Ohio:

In ambiguous insurance policies, Ohio courts have established two methods of analysis. The first requires the court to construe the policy against the drafting party.... The second method of analysis requires the court to attempt to ascertain the intent of the parties to the insurance contract by looking at extrinsic evidence.... By resorting to extrinsic evidence, the court is still attempting to enforce the agreement the parties intended to enter.

Gottlieb & Sons, Inc. v. Hanover Ins. Co., 8th Dist. Cuyahoga No. 64559, 1994 Ohio App. Lexis 1682, at *11, *13 (Apr. 21, 1994).

It is more convenient for a court to apply a mechanical rule that automatically results in insurance coverage whenever words in a policy have more than one dictionary meaning, but that approach ignores the intentions of the parties that the court is supposed to enforce. *See Gottlieb*

& Sons, supra, at *13, *15 (“[w]ere this court to construe the ambiguous provision against [the insurer], we would, in effect, be subrogating our duty to decipher the parties’ intention”); *Cincinnati Gas & Electric Co. v. Hartford Steam Boiler Inspection and Insurance Co.*, S.D. Ohio No. 1:06-CV-331, 2008 U.S. Dist. Lexis 29569, at *20 (Apr. 10, 2008) (“Plaintiff misreads Ohio law in its argument that once an ambiguity is determined in an insurance exclusion, the Court must immediately construe the provision against the drafting insurance company”).

Most words in insurance policies and other contracts can be labeled “ambiguous” in the sense that they have more than one dictionary meaning. “By its very nature the English language contains a certain amount of ambiguity.... Still, the difficulties experienced in attempting to be precise when using the English language do not mean that the courts should automatically find contracts or statutes to be ambiguous.” *Winningham v. Sexton*, 820 F.Supp. 338, 341 (S.D. Ohio 1993), *affirmed*, 42 F.3d 981 (6th Cir. 1994). The intended meaning of a word depends upon its context, including the surrounding circumstances and the purpose for which it is used; “[p]arsing individual words is useful only within a context.” *State v. Porterfield*, 106 Ohio St.3d 7, 2005 Ohio 3095, 829 N.E.2d 690 at ¶ 11. Accordingly, words must be “construed in light of the subject matter with which the parties are dealing and purpose to be accomplished.” *Bobier v. National Cas. Co.*, 143 Ohio St. 215, 54 N.E.2d 798 (1944), syllabus paragraph one.

This Court described the problem in *State v. Porterfield, supra*, 106 Ohio St.3d at 5, 7, 2005-Ohio-3095, 829 N.E.2d 690, at ¶ 11:

Some courts have reasoned that when multiple readings are possible, the provision is ambiguous.... The problem with this approach is that it results in courts reading ambiguities into provisions, which creates confusion and uncertainty. When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning.... Only when a definitive meaning proves elusive should

rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling....

See also Westfield Insurance Co. v. Galatis, 100 Ohio St.3d 216, 228, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 49 (holding that an earlier decision finding that the word “you” is ambiguous was wrongly decided because “the intention of the parties was ignored”).

Many Ohio appellate courts have heeded this Court’s directive that the actual intentions of the parties trump abstract linguistic semantics. However, the Court of Appeals in the present case found that the CGL insurance policy is “ambiguous” because dictionary definitions of “cargo” include goods that are transported in the stream of commerce as well as goods that are transported for other reasons. It then held that the flatbed trailer Crews used to transport equipment and supplies from place to place did not transport “cargo” under the narrowest definition of that word, that the policy must be construed against the insurer, and that the trailer was therefore covered by the CGL policy. 2012-Ohio-6257, at ¶ ¶ 16-27.

In *United Farm Family Mut. Ins. Co. v. Pearce*, 3rd Dist. Auglaize No. 2-08-07, 2008-Ohio-5405, the Third District Court of Appeals reached the opposite conclusion, on nearly identical facts and policy language, because it considered the intent of the parties. It, too, recognized that “cargo” can refer to goods that are transported in the stream of commerce and to goods that are transported for other reasons, but it found that the parties’ intent to adopt the broader meaning -- which encompasses the paving equipment and supplies the insured transported to job sites -- was evident from the surrounding circumstances: the insured had sought to obtain coverage under a separate automobile liability insurance policy, which “certainly indicate[s] that it was the party’s intention that the dump truck not be covered under the CGL policy.” *Id.*, at ¶ ¶ 15-16. The Court of Appeals in the present case distinguished *Pearce* on the ground that “[t]he issue here is not whether [appellee’s] paving equipment falls

within the meaning of the term ‘cargo’ under one of its definitions, but whether the policy is ambiguous as to that term.” 2012 Ohio 6257, at ¶ 27. The Court thus lost sight of its proper role of enforcing the intent of the parties.

Other courts have also recognized that an insured’s purchase of insurance coverage for specific types of liabilities is evidence that the insured did not intend to obtain duplicative coverage for the same risks under a separate CGL policy. In *Winningham, supra*, 820 F.Supp. at 344, NARC had purchased a wharfinger insurance policy (which covered business operations on water) as well as a CGL policy (which covered business operations on land), and the Court held that even if the scope of coverage specified in the wharfinger policy could be considered ambiguous, NARC’s purchase of both types of policies “confirms that the parties did not intend the wharfinger policy to cover injuries on land.”

This Court cannot conceive of, nor has the Plaintiff offered, any reason why NARC would purchase two insurance policies to cover the same claim. If NARC desired additional insurance protection for someone who hurt themselves on land, then NARC would have purchased a [CGL] policy from USF&G with a higher amount of coverage.

820 F.Supp. at 344, 346. The Sixth Circuit affirmed that ruling. *Supra*, 42 F.3d at 985 (“it is reasonable to conclude that Winningham’s injuries [on land] would be covered by the [CGL] policy” and “not by the [wharfinger] policy”).

Similarly, in *United States Fidelity & Guaranty Co. v. Employers Casualty Co.*, 672 F.Supp. 939, 941, 943 (E.D. La. 1987), *affirmed*, 857 F.2d 289 (5th Cir. 1988), the Court recognized “the general industry custom not to cover claims under both automobile and CGL policies; if a claim is covered under one type of policy, it is not covered under the other.” Duplicate coverage “would defeat the industry custom of having coverage under either a CGL policy or a general auto policy, but not under both.” (*Id.*) In *Michael Carbone, Inc. v. General*

Acc. Ins. Co., 937 F.Supp. 413, 424 (E.D. Pa. 1996) the Court also noted “the industry custom of not providing coverage for a risk that is instead typically insured under an automobile policy” and held that the parties did not intend to provide coverage under a CGL policy “that duplicates coverage provided by car insurance policies;” “when interpreting insurance contracts, courts often look to how the policy in question interacts with other types of available coverage.”

In the present case, the Court of Appeals improperly failed to consider the original intent of the parties in deciding whether the CGL insurance policy covered Crews’ trailer, and its decision should therefore be reversed.

B. “Cargo” includes all goods that are transported to a destination and unloaded, with only a temporary connection to the transporting vehicle.

The Court of Appeals began and ended its legal analysis with its finding that the word “cargo” is ambiguous. It quoted two dictionaries that define “cargo” as “goods transported by a vessel, airplane, or vehicle,” *Black’s Law Dictionary*, 226 (8th ed. 2004), and as “goods or merchandise conveyed in a ship, airplane, or vehicle, *Merriam-Webster’s Online Dictionary*, <http://www.merriam-webster.com/dictionary/cargo>, and it pointed out that one of those dictionaries defines “goods” to include:

- (a) “something that has economic utility or satisfies an economic want;”
- (b) “personal property having intrinsic value but usually excluding money, securities, and negotiable instruments;” and
- (c) “something manufactured or produced for sale.”

2012 Ohio 6257 at ¶¶ 18, 20, *citing* <http://www.merriam-webster.com/dictionary/goods>.

The Court of Appeals found that “two of the usages [of ‘goods’] refer to cargo in the stream of commerce,” and it concluded that “cargo” is therefore ambiguous because it can refer to goods that are transported and unloaded in the stream of commerce and to goods that are

transported and unloaded for other purposes. 2012 Ohio 6251, at ¶ 20. But a noun is not ambiguous merely because it includes more than one category of things. For example, an insurance policy that indemnifies liability for “damages” is not ambiguous even though damages may refer to medical bills and may refer to lost wages; it indemnifies the insured for all damages, including medical bills and lost wages.

The Court of Appeals concluded that “many” courts in other jurisdictions “have seen an ambiguity in the term [cargo],” 2012 Ohio 6257, at ¶ 21, but the four cases it cited did not hold that the word “cargo” is ambiguous under the circumstances presented here or even that it should be construed against an insurer. In *American Home Assurance Co. v. Fore River Dock & Dredge, Inc.*, 321 F.Supp.2d 209 (D. Mass. 2004), the insured argued that its maritime insurance policy, which insured “cargo” on vessels, covered a crane that had been mounted on the deck of a barge for over ten years. The Court noted that “cargo...may have a varying meaning,” in the sense that it can refer to “passengers as well as freight,” but held that it was not ambiguous with respect to the crane, and that, “absent ambiguity, this Court should give the term ‘cargo’ its plain and ordinary meaning,” which is “1) any item, 2) transported on a vessel from one point to another, 3) with only a temporary connection to the vessel.” 321 F.Supp.2d at 222-23. Because the crane was mounted to the deck of the barge and was not unloaded, it had “more than a temporary connection to the barge” and thus was not “cargo.” 321 F.Supp.2d at 223.

The other three cases cited by the Court of Appeals also provide no support for its ruling. In *State Farm Fire and Casualty Co. v. Pearce*, 984 F.2d 610, 613 (4th Cir. 1993), the Court held that a boat was “in use,” and thus was within the coverage of an insurance policy, while it was being towed behind the insured’s vehicle, and therefore rejected the argument that the boat could not be “in use” while it was being transported as cargo; the policy did not exclude -- or

even mention -- "cargo." In *Edward J. Gerrits, Inc. v. Royal Marine Service Co.*, 456 So.2d 1316, 1317 (Fla. App. 1984), the Court held that a maritime policy insuring "cargo" did not cover a crane that "was used to load cargo onto a barge, which travelled on the barge for the sole purpose of off-loading the cargo, and which itself was not to be delivered or off-loaded;" the term "cargo" did not "unambiguously include the crane," which had more than a temporary connection to the barge. Finally, in *The Manila Prize Cases*, 188 U.S. 254, 269-270 (1902), the Court similarly held that appurtenances of a ship are not "cargo" because they are not "intended to be disposed of" at the destination; "cargo" has "a merely transitory connection" to a ship.

In short, the dictionaries and case law cited by the Court of Appeals do not support its ruling that the word "cargo" is ambiguous in this case and must be construed against the insurer without regard to the intentions of the parties. On the contrary, they confirm the common understanding that personal property transported on a trailer and unloaded at a destination, with only a temporary connection to the trailer itself, is "cargo." Accordingly, the parties' CGL insurance policy does not cover the trailer, and the ruling below should be reversed.

CONCLUSION

For the reasons set forth above, amicus curiae Ohio Insurance Institute supports appellant Century Surety Company in this appeal and urges the Court to reverse the decision by the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Amicus Curiae Ohio Insurance Institute in Support of Appellant was served via regular United States mail on this 30th day of August, 2013, on the following:

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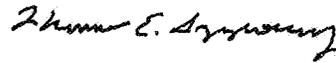
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